

Editor's note: Reconsideration denied -- Order dated Dec. 20, 1984: Appealed -- settled, decision vacated as part of settlement but all action stayed until BLM issued new decision; Civ.No. S-82-595-LKK (ED Calif.)

WARREN J. CONRAD

IBLA 83-362

Decided March 27, 1984

Appeal from decision of the California State Office, Bureau of Land Management, rejecting application for an Indian allotment, CA 13321.

Affirmed as modified.

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

When an application is made for an allotment under the provisions of 25 U.S.C. § 337 (1976), governing allotments to Indians within national forests, the application is referred to the Secretary of Agriculture for a determination whether the lands are more valuable for agricultural or grazing purposes than for the timber found thereon. The Department of the Interior is bound by the determination of the Secretary of Agriculture and is constrained to follow that decision.

2. Indian Allotments on Public Domain: Generally -- Indian Allotments on Public Domain: Lands Subject to

Where the Secretary of Agriculture has made a determination pursuant to sec. 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1976), that lands within a national forest are of no value for the timber found thereon and are of negligible value for agricultural or grazing purposes, the Secretary of the Interior may properly reject the allotment where the record shows that the land in question is not a viable economic agricultural unit.

APPEARANCES: Marilyn B. Miles, Esq., Eureka, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought from a decision of the California State Office, Bureau of Land Management (BLM), dated January 21, 1983, rejecting Indian allotment application CA 13321. The application was made for 5 acres of land

within the Klamath National Forest in California. ^{1/} The application was filed pursuant to section 4 of the General Allotment Act of 1887, 25 U.S.C. § 334 (1976). However, since it involves land within a national forest, it was considered under section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1976).

The BLM decision noted that appellant based his allotment claim on the assertion that his ancestors had lived in the Somes Bar area since 1885 until their deaths, and that appellant had lived on the applied for land "off and on" during his childhood and adult years. The decision goes on to state that BLM records indicate that appellant's brother, Willis Conrad, filed an earlier application for an allotment of 20 acres of land which tract also included the same lands applied for by appellant. The decision stated that on December 29, 1977, patent 04-78-0010 issued to Willis Conrad for 2.02 acres of land upon which the family residence and orchard were located. BLM concluded therefore that appellant's date of settlement on the land applied for must be considered as the date of his application, November 2, 1981. The BLM decision also stated:

Section 4 of the General Allotment Act permits Indian allotments only on unappropriated public lands outside of reservations. The records of this office show that on October 25, 1920, the land applied for, among other lands, was reserved from entry, location, or other disposal under the laws of the United States in accordance with the provisions of Sec. 24 of the Act of June 10, 1920 (41 Stat. 1063). [^{2/}] Thus, from before the time you were born in 1940 through the date on which your application was filed, the land was closed to settlement.

The applied for land is also within the boundaries of the Klamath River which was designated as an addition to the national Wild and Scenic Rivers System on January 19, 1981, pursuant to the [Wild and Scenic Rivers] Act of October 2, 1968 (82 Stat. 906).

Accordingly, BLM held the application must be rejected because the lands were withdrawn from entry.

BLM further based its decision on the report from the Forest Service, United States Department of Agriculture, regarding the land within the application, which stated in pertinent part:

Parcel 'A' contains approximately 4.4 acres characterized by a Phillite soil type. This is a rocky, [shaley] metasedimentary soil which is a moderately good timber producing soil. The current vegetation consists of Douglas fir, ponderosa pine, and a variety of hardwoods. This parcel is more valuable for the timber than for agricultural [uses].

^{1/} Although appellant's application was purportedly made for 5 acres, Forest Service considered the application to embrace 12 acres. See discussion, infra, at note 3.

^{2/} 16 U.S.C. § 818 (1982).

Parcel 'B' contains approximately 5.6 acres characterized by a serpentine soil type. The current vegetation consists of brush species, grasses, hardwood trees and a few commercial conifers. This serpentine site is a poor timber producer, but very poor agriculture soil type. Coupled with side slopes of 25%+ makes this area non-agricultural in nature. Although limited in its commercial timber production the site does produce adequate hardwood trees and brush. This vegetative cover maintains good wildlife habitat and soil erosion protection. This area is more valuable for its timber and existing vegetative cover than for agriculture.

Parcel 'C' contains approximately 2 acres characterized by rock fill. This area has been and is now utilized by Cal Trans as a waste disposal site for landslide material. Current vegetation includes grasses planted by Cal Trans for erosion control purposes and some conifer trees planted by the Forest Service to accelerate the reclamation process. Most of the conifers have been destroyed by Mr. Conrad's livestock. This is rockfill, not agricultural ground.

On the basis of the report, BLM concluded that the land in parcels A and B do not qualify for forest allotment since they are more valuable for timber than for agriculture or grazing. Although parcel C was not found more valuable for timber, BLM held that it was neither chiefly valuable for agriculture or grazing as required by 43 CFR 2533.2 nor possessed of sufficient agricultural potential to support this use on an economic basis.

Appellant contends in his statement of reasons for appeal that the asserted withdrawals of the land for power project 74 and under the Wild and Scenic Rivers Act should not bar his application. The historical use of this land by the Conrad family which served as the basis of granting an allotment to appellant's brother on adjacent land predated these withdrawals. Further, appellant asserts that his application qualifies for an Indian allotment within the national forest. Appellant notes that the timber assessment appearing within the Forest Service report describes a tract of 4.8 acres within the allotment application which is "best suited for the growth of grasses." Appellant argues that the inference may be drawn that these lands are suitable for grazing. In addition, appellant notes in his brief that there is apparent confusion regarding the lands applied for since the allotment application sought 5 acres and the Forest Service report analyzed 12 acres.

The record in this case is deficient in certain critical respects. Appellant's allotment application is deficient in that it fails to identify the land applied for. Application is made for 5 acres in the State of California, but appellant fails to describe the land applied for either by legal subdivision, section, township, and range or by metes and bounds description tied to a corner of the public land surveys. His only description is, "I have lived on this land since birth." The Forest Service report submitted to BLM contains two diagrams, one by Gene Graber and one by David J. Kirste, which purport to describe the lands in the allotment application. These two diagrams describe the acreage as approximately 12 acres. Although

the land applied for is identified by one of the diagrams as being within sec. 33, T. 12 N., R. 6 E., Humboldt meridian, the tract has not been platted to show its location within the section. ^{3/}

As noted by BLM, section 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), provides that public lands included in any proposed power project are thereupon reserved from entry, location, or other disposal under the public land laws. Shirley A. Clark, 77 IBLA 51 (1983). The records in the case file including the master title plat and the notice of withdrawal for power project 74, effective October 25, 1920, disclose that the W 1/2 W 1/2 of sec. 33 is omitted from the withdrawal. The lands for which application is made were neither identified by appellant nor platted by Forest Service in a manner to reveal the legal subdivision involved. However, it appears from the Forest Service report that appellant's application embraces a tract adjacent to and lying to the south of the allotment patented to appellant's brother. This latter tract is clearly shown on the master title plat as being located in the W 1/2 W 1/2 outside the withdrawal. Accordingly, it appears that at least some of the land sought by appellant may be outside the withdrawal. Hence, the record does not support that part of the BLM decision rejecting the application on this basis.

Further, the record does not support a finding that the land has been withdrawn pursuant to the Wild and Scenic Rivers Act. It does appear that the land is in close proximity to the Klamath River, although the distance is uncertain in light of the failure of the record to define the location of the tract. Section 8 of the Wild and Scenic Rivers Act, as amended, does provide that all public land within the authorized boundary of any component of the wild and scenic river system designated pursuant to 16 U.S.C. § 1274 (1982) is withdrawn from entry, sale, or other disposition under the public land laws. 16 U.S.C. § 1279 (1982). However, reference to the relevant statute fails to disclose that the Klamath River is designated as a wild and scenic river. 16 U.S.C. § 1274 (1982). Accordingly, we are unable to affirm rejection of appellant's application on this basis.

[1] Section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1976), provides in relevant part:

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

^{3/} Despite the obvious discrepancy between the 5 acres in appellant's application and the 12 acres analyzed by Forest Service personnel, there is no indication that the land appellant is seeking does not lie within the 12-acre tract.

purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

This statute provides for the discretionary allotment by the Secretary of the Interior of those lands within the national forests which the Secretary of Agriculture has determined "are more valuable for agriculture or grazing purposes than for timber found thereon." Applications filed for allotments in national forests are referred to the Secretary of Agriculture for a determination as to whether the lands are more valuable for agricultural or grazing purposes than for the timber found thereon. The Department of the Interior is bound by this determination of the Secretary of Agriculture and is constrained to follow it. Lorinda L. Hulsman, 32 IBLA 280, 283 (1977); Junior Walter Daugherty, 7 IBLA 291, 296 (1972). Regarding the 4.4 acre tract designated by Forest Service as parcel A, a determination by Forest Service has been made that the land is more valuable for timber than for agricultural or grazing purposes. Similarly, with respect to parcel B containing approximately 5.6 acres, the Forest Service recommendation concludes that the area is "more valuable for its timber and existing vegetative cover than for agriculture." The recommendation notes that the site has a very poor soil type which, coupled with the grade of the land, makes it nonagricultural in nature. ^{4/} Thus, the Interior Department is without authority to grant appellant's application for such land.

Parcel C is used as a waste disposal site for landslide material. Vegetation is described as including "grasses planted * * * for erosion control" and some conifers planted by Forest Service to accelerate reclamation. The Forest Service recommendation notes that this land is "rockfill, not agricultural ground." In Curtis D. Peters, 13 IBLA 4, 80 I.D. 595 (1973), aff'd, Peters v. Morton, Civ. No. 75-0201 RFP (N.D. Cal. Nov. 5, 1975), we stated:

This Department is not required to grant an Indian allotment within a national forest merely because the statutory criteria have been satisfied. The 1910 Act is crystal clear that, "[t]he Secretary of the Interior is authorized, in his discretion" to make such a grant. The proper exercise of discretionary authority by this Department has received judicial sanction. See Udall v. Tallman, 380 U.S. 1 (1965), rehearing denied, 380 U.S. 989 (1965); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); Peace v. Udall, 332 F.2d 62 (9th Cir. 1964); Thor-Westcliffe Development, Inc. v.

^{4/} Appellant challenges this finding as inconsistent with the characterization of the tract by Gene Graber, prescription forester, as "non-timbered" with low timber growth potential. The difficulty stems from the fact that the land is relatively poorly suited for either commercial timber production or agricultural uses. The relevant regulation requires that the land be chiefly valuable for agricultural or grazing uses. 43 CFR 2533.2. We find it unnecessary to debate which of two unsuitable uses the land is more valuable for where the record indicates that the land has negligible value for agricultural purposes. See Samuel C. George, 39 IBLA 399 (1979).

Udall, 314 F.2d 257 (D.C. Cir. 1963), cert. denied, 373 U.S. 951 (1963); Haley v. Seaton, 281 F.2d 620 (D.C. Cir. 1960).

Approval of an Indian allotment never was and is not now a mere ministerial duty of this Department. Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). The exercise of discretionary authority must be predicated upon rational grounds. United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972). See Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Daniels v. United States, 247 F. Supp. 193 (W.D. Okla. 1965).

The information of record indicates that the land could not support reasonably an Indian family. See Hopkins v. United States, supra * * *. Although it is true that Indian allotment applications for lands in national forests are not subject to the classification authority of the Secretary of the Interior, Bobby Lee Moore, 72 I.D. 505, 513 (1965), the issue of the economic viability of the allotment sought is a matter to be considered by the Department in exercising its discretion. See John E. Balmer, 71 I.D. 66 (1964).

In Balmer, at p. 67, the Department stated:

Since the intent of the Indian Allotment Act is to provide, in effect, a homestead which will constitute the source of a livelihood for an Indian family * * * it is within the authority of the Secretary of the Interior to determine that 160 acres of grazing land that is incapable of supporting a ranch family is not proper for acquisition in satisfaction of rights acquired by Indians under the Indian Allotment Act. [Footnotes omitted.]

[2] In Peters, as in the present case, the record indicated that the agricultural potential of the land was minimal, at best. The regulation at 43 CFR 2533.2 requires that "the land * * * [be] found to be chiefly valuable for agriculture or grazing." (Emphasis added.) This Board has previously held that even though the Secretary of Agriculture has found that certain lands within a national forest are of no value for the timber thereon, the application is properly rejected by the Secretary of the Interior where it appears from the record that the lands are of negligible agricultural value and lack sufficient potential to support such use on an economic basis. Samuel C. George, supra. The decision appealed from is properly sustained on this basis.

Appellant has requested a hearing pursuant to 43 CFR 4.415 to present evidence on issues of fact. The allowance of a request for hearing under 43 CFR 4.415 is discretionary. A hearing will not ordinarily be granted in the absence of an allegation of material facts which would affect the outcome of the decisions and, accordingly, the request is denied.

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 as modified.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Franklin D. Arness
Administrative Judge

