

JAMES R. HENSHER ET AL.

IBLA 84-386, 84-387,  
84-397

Decided March 22, 1985

Appeals from various decisions of the California State Office, Bureau of Land Management, rejecting Indian allotment applications CA-14478, CA-14479, and CA-15252.

Appeals dismissed.

1. Indians: Lands: Allotments on Public Domain: Generally -- Indians: Lands: Allotments on Public Domain: Classification -- Rules of Practice: Appeals: Dismissal  
Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

Lorinda L. Hulsman, 32 IBLA 280 (1977), and Curtis D. Peters, 13 IBLA 4, 80 I.D. 595 (1973), are overruled.

APPEARANCES: James R. Hensher, pro se; Lucille G. Hibpshman, pro se; Marilyn B. Miles, Esq., Eureka, California, for appellant Wilverna S. Reece.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

James R. Hensher, Wilverna S. Reece, and Lucille G. Hibpshman have appealed from separate decisions of the California State Office, Bureau of Land Management (BLM), rejecting their Indian allotment applications. For reasons explicated below, we dismiss these appeals.

On March 22, 1976, Hensher filed an Indian allotment application with the Forest Service, U.S. Department of Agriculture, pursuant to section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982). Hensher sought 40 acres of land situated in the SW 1/4 SE 1/4 sec. 30 and the NW 1/4 NE 1/4 sec. 31, T. 39 N., R. 12 W., Mount Diablo Meridian, California, along the south fork of the Salmon River within the Klamath National Forest. In late 1979, Hensher amended his application to increase the acreage sought to approximately 160 acres, including the land described in the original application.

On January 15, 1982, Reece filed an Indian allotment application for 20 acres of land situated in the SE 1/4 sec. 30, T. 39 N., R. 12 W., Mount Diablo Meridian, California. This tract sought by Reece was also described in Hensher's application. On June 16, 1983, the Forest Service prepared a report regarding the eligibility of appellants Hensher and Reece to receive Indian allotments, which was approved by the Regional Forester, California Region, Forest Service, on August 10, 1983.

By decision of February 21, 1984, BLM "rejected" Hensher's application, relying on the Forest Service report, because the land had either been appropriated for other uses or was more valuable for timber purposes than

for agricultural or grazing purposes. By decision of that same date, BLM "rejected" Reece's application, also relying on the Forest Service report, concluding that the land was not available for disposal and was more valuable for timber than for agricultural or grazing purposes. Both Hensher and Reece have appealed these determinations.

On September 14, 1982, appellant Hibpshman filed an Indian allotment application with the Forest Service, U.S. Department of Agriculture, for 160 acres of land situated in the SE 1/4 sec. 25, T. 7 S., R. 21 E., Mount Diablo Meridian, California, within the Sierra National Forest, pursuant to section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982). By decision dated March 1, 1984, BLM "rejected" appellant Hibpshman's application, based on an October 31, 1983, Forest Service report, because the Forest Service had determined that the land was chiefly valuable for timber, and thus not available for allotment. Appellant Hibpshman has also appealed to this Board.

All three appellants present various arguments which relate to the substantive conclusions of both the Forest Service reports and BLM's decisions. But, for reasons which we will explore in some detail, we are obliged to dismiss all three appeals. Our action is occasioned not by any specific deficiency in any of appellants' submissions but rather is necessitated by the application of the regulatory provisions relating to Indian allotment applications within units of the national forest system. Since we recognize that our action herein may be seen as inconsistent with numerous prior BLM decisions, <sup>1/</sup> we will explain the reasons therefor.

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<sup>1/</sup> Among such decisions are Lorinda L. Hulsman, 32 IBLA 280 (1977), and Curtis D. Peters, 13 IBLA 4, 80 I.D. 595 (1973). Indeed, because such

As an initial matter, it is necessary to set out the statutory and regulatory framework which the Department has established for adjudications of Indian allotment applications in the national forests.

Section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982), provides as follows:

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 who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. 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.

The applicable regulations are now found at Subpart 2533 of Title 43. Initially, it should be noted that application is not made to BLM, but rather to the Forest Service. Thus, 43 CFR 2533.1 states:

An Indian who desires to apply for an allotment within a national forest under this act must submit the application to the supervisor of the particular forest affected, by whom it will be forwarded with appropriate report, through the district forester and Chief, Forest Service, to the Secretary of Agriculture, in order that he may determine whether the land applied for is more valuable for agriculture or grazing than for the timber found thereon.

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fn. 1 (continued)

decisions are so numerous, no attempt will be made to list all cases effectively overruled by our instant decision.

Assuming that the Secretary of Agriculture determines that the land is more valuable for agriculture or grazing, the regulation then provides that "the Secretary of Agriculture will note that fact on the application and forward it to the Commissioner of Indian Affairs." 43 CFR 2533.2(b) (emphasis supplied). The regulations then provide that "[i]f the Commissioner of Indian Affairs approves the application, he will transmit it to the Bureau of Land Management for issuance of a trust patent." 43 CFR 2533.2(c).

On the other hand, should the Secretary of Agriculture determine that the land is not more valuable for agriculture or grazing than the timber found thereon, "he will transmit the application to the Secretary of the Interior and inform him of his decision in the matter. The Secretary of the Interior will cause the applicant to be informed of the action of the Secretary of Agriculture." 43 CFR 2533.2(a) (emphasis supplied).

As can be seen, under this regulatory scheme, BLM has no adjudicatory functions relating to Indian allotments within national forests. To the extent that the Secretary of Agriculture has determined the land is more valuable for agriculture, any adjudicatory functions of the Department seem clearly to be vested in the Bureau of Indian Affairs (BIA), with BLM having the mere ministerial function of issuing a trust patent in the event that BIA approves the allotment. And, where the Secretary of Agriculture has determined that the land is more valuable for the timber found thereon, the Department merely informs the applicant of the decision of the Secretary of Agriculture. Thus, on the one hand, the actions of BLM are purely ministerial, while, on the other hand, they are simply informational.

This Board has recognized part of the informational nature of BLM's role in informing an applicant of a decision of the Secretary of Agriculture that the land is not valuable for agriculture by constantly reiterating its view that such a decision of the Secretary of Agriculture is immune from review within the Department of the Interior. See, e.g., Benjamin F. Sanderson, Sr., 16 IBLA 229, 230-31 (1974); Junior Walter Daugherty, 7 IBLA 291, 294-95 (1972). To this extent, the Board has given determinations of the Secretary of Agriculture, that the land is not more valuable for agricultural or grazing purposes than for the timber found thereon, the same controlling weight which it accords similar recommendations concerning leasing on acquired lands under Forest Service jurisdiction.

In this regard, however, it seems relatively clear that this Board and its predecessors have been lulled into error by treating the determination of the Secretary of Agriculture under Subpart 2533 in the same manner as they have treated the refusal of the surface managing agency to assent to issuance of an oil and gas lease for acquired lands. The one critical distinction, which has never been properly considered, is that an application for an acquired lands lease is properly filed in BLM. Thus, the adjudication of the application (even where BLM must follow another agency's recommendation) is properly a function of BLM. In contradistinction, insofar as Indian allotments within national forests are concerned, the application is filed not with BLM but with the Forest Service. There is, thus, no BLM adjudicatory function comparable to that which attends acquired lands leasing applications.

In retrospect, it can also be seen that the error of the Board in purporting to adjudicate such appeals was also occasioned by the prior development of similar case law involving Indian allotments on the public domain. Since we recognize that our instant decision may appear to represent a sharp break with our precedents, an examination of the historical genesis of our error seems warranted.

It is helpful to recall the background of the Indian Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 (1982). Passed in a period of time during which the thrust of governmental Indian policy was to break up the Indian reservations, the Indian Allotment Act was, in effect, an Indian homestead act. See generally Opinion 31 L.D. 417 (1902). The Indian Allotment Act therefore allowed Indians to settle on the public domain, where it was "not otherwise appropriated," and initiate a claim for an Indian allotment. 25 U.S.C. §§ 334, 336 (1982). In this regard, the Indian Allotment Act paralleled the Homestead Act, which also permitted the initiation of an entry by settlement.

Commencing near the turn of the century, various forest reserves (predecessors of the national forests) were established in the Western States. 2/ By their nature, they embraced large amounts of acreage and included various parcels of land which were more suitable for agriculture activities than preservation of timber. Since, however, the withdrawal of

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2/ Thus, section 24 of the General Revision Act of Mar. 3, 1891, 26 Stat. 1103, authorized the President to set aside public lands for forest reservations. By 1905, a total of 85,627,472 acres of land had been included in the forest reserves. See P. Gates, History of Public Land Law Development at 579.

lands for forest reserves expressly removed the land from appropriation under the public land laws, there was no mechanism by which agricultural entry could be made on such lands.

To rectify this lacuna, Congress adopted the Forest Homestead Act in 1906, 34 Stat. 233, which permitted the Secretary of Agriculture to classify lands as "chiefly valuable for agriculture" and so notify the Secretary of the Interior, who would declare such lands open to homestead settlement. A similar intent animated the adoption of section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982), which authorized the allotment of land within the national forests "in conformity with the general allotment laws" upon a determination of the Secretary of Agriculture that the lands applied for "are more valuable for agricultural or grazing purposes than for the timber found thereon."

As might be expected, given a finite amount of land and a great number of individuals willing to lay claim thereto, over a period of time the land remaining in Federal ownership was less and less amenable to productive use for agriculture purposes. Indeed, the entire emphasis of the Department of the Interior began to shift from land disposal to land management, a shift which was effectively codified in the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, 43 U.S.C. § 1701 (1982).

Prior to FLPMA, the first significant legislation aiming towards management of Federal lands rather than their disposal was the Taylor Grazing

Act of 1934, 43 U.S.C. § 315 (1982). Pursuant to section 7 of the Act, 43 U.S.C. § 315f (1982), all of the land under the jurisdiction of the Department of the Interior in the contiguous United States was withdrawn for classification. Since that time, as a number of court decisions have affirmed, no Indian settlement on the public lands, leading to the acquisition of an Indian allotment, has been allowable unless the land has first been classified as available for such disposition. See, e.g., Pallin v. United States, 496 F.2d 27 (9th Cir. 1974).

Because the availability of any public domain land for entry under the general land laws, including Indian allotments, was dependent upon a classification that the land was suitable for such use <sup>3/</sup> a considerable body of case law developed concerning classification criteria. While this case law was initially generated in homestead adjudications, the standards developed were carried over to Indian allotment adjudication. Thus, in John E. Balmer, 71 I.D. 66 (1964), the Assistant Secretary held that, where it was determined that 160 acres of grazing land were incapable of supporting a family, an Indian allotment for such land was properly rejected.

Departmental adjudication of classification appeals virtually ceased after 1964, however, as a result of a regulatory revision (28 FR 6079

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<sup>3/</sup> Inasmuch as the Taylor Grazing Act, supra, was not applicable to Alaska, the land in Alaska continued to be open to settlement without prior favorable classification. See generally United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). Thus, Native allotments in Alaska were never dependent upon prior classification of the land as suitable therefor.

(June 14, 1963)), which removed all classification appeals from the general appellate procedure and instituted in its place a modified certiorari system direct to the Secretary. See 43 CFR 4.410(a)(1), 2450.5. What is important for our purpose is that when the Board began to adjudicate rejections of Indian allotment applications on national forest lands, a body of law already existed which delineated various considerations in ascertaining whether the land sought was amenable to the grant of an Indian allotment. Thus, it is understandable, if regrettable, that these later Board decisions applied adjudicatory concepts developed in cases involving public domain Indian allotments to Indian allotments in national forests. The real error lay not in the principles utilized but in the implicit assumption that it was within the purview of the Board's adjudicatory authority to examine the application of these principles.

We now hold, therefore, that where an Indian allotment application for land in the national forest is rejected based on a finding that the land was more valuable for timber than for agriculture or grazing, the prospective allottee has no administrative recourse within the Department of the Interior, but rather must seek review of such a determination through the appropriate channels of the Forest Service, Department of Agriculture. On the other hand, where the Forest Service has determined that the land is more valuable for agricultural or grazing purposes, further adjudication of the acceptability of the allotment application is, by regulation, committed to BIA, not to BLM. It follows, therefore, that since the instant appeals involve a determination by the Forest Service that the land is more valuable for timber

purposes, this Board has no jurisdiction over the subject matter of these appeals.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

James L. Burski  
Administrative Judge

We concur:

R. W. Mullen  
Administrative Judge

Wm. Philip Horton  
Chief Administrative Judge

