

Editor's note: 77 LD. 174.

ESTATE OF LYLE K. GROSS

IBLA 70-38 Decided October 23, 1970

Small Tract Act: Generally

The mere filing of a small tract application does not create in the applicant any right or interest in the land, and the Secretary in his discretion may refuse to consummate a sale at any time prior to issuance of patent.

Small Tract Act: Classification

Public lands classified as disposable under the Act may be reclassified by the Secretary for retention by the Government.

IBLA 70-38: Nevada 050534

ESTATE OF LYLE K. GROSS : Small Tract Act
: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This appeal to the Secretary of the Interior was perfected by the Estate of Lyle K. Gross, deceased. The appeal is from a decision rendered by the Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated February 17, 1969, which dismissed an appeal from the Bureau of Land Management's Nevada land office. The Nevada land office had rejected an application filed by Lyle K. Gross on December 22, 1958, to lease or purchase 5 acres under the Small Tract Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. §§ 682a-e (1964).

After the application for lease or purchase was filed, the Bureau of Land Management made a small tract classification. In March of 1964 the district manager for the Bureau of Land Management classified the land for direct sale to the applicant at the appraised fair market value of \$500.00. However, the applicant had died in December 1963. Upon learning this the Nevada land office contacted his heirs and apprised them of its action.

Complications regarding the probate of the Estate of Lyle K. Gross and concerning claims to minerals underlying the subject 5-acre tract delayed the consummation of the sale for several years. During these delays, which were not occasioned by either party, the Nevada land office vacated its decision approving the small tract application and rejected the application in October 1968. The reason for the rejection of the application was the discovery of the only subspecies of a rare fish population in a spring known as School Spring located on the 5 acres. The species of fish is identified as Cyprinodon nevadensis, more commonly known as "pupfish." The subspecies, pectoralis, is listed among the rare and endangered fish of the United States by the U.S. Bureau of Sports Fisheries and Wildlife.

In September 1967 the Nevada Fish and Game Commission requested a protective withdrawal of the tract because it surrounded School Spring. The Nevada land office, in its October 1968 decision rejecting the application, found that it would be in the public interest to reclassify the tract for retention under the provisions of the Classification and Multiple Use Act, 78 Stat. 986, 43 U.S.C. §§ 1411-18 (1964).

The decisions of the Department are clear that the mere filing of an application pursuant to the Small Tract Act, *supra*, does not create in the applicant any right or interest in the land covered by the application. *Betty L. Sherman*, A-29901 (February 19, 1964). The Act authorizes the Secretary of the Interior, in his discretion, to sell or lease tracts of land not exceeding 5 acres which he may classify as chiefly valuable for certain purposes, under such rules and regulations as he may prescribe, at a price to be determined by him. The rules and regulations applicable in the instant case are found at 43 CFR 2233.0-2 (1970 ed.), now 43 CFR 2730, 35 F.R. 9618 (1970). The "Objectives" section of said rules and regulations provides in substance that small tract activity shall promote the beneficial utilization of the public lands, safeguard the public interest in the lands and coordinate with interested local governmental agencies toward conservation of natural resources.

The discretion vested in the Secretary by the Small Tract Act, *supra*, is essentially the same as is vested in the Secretary by the Isolated Tracts Act, 43 U.S.C. § 1171 (1958). Decisions under the Isolated Tracts Act, *supra*, hold that the Secretary, in exercising the discretionary power granted him by Congress, may refuse to consummate a sale at any time prior to issuance of patent whenever he determines such action would be in the public interest. *Willcoxson v. United States*, 313 F. 2d 884 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 932 (1963); *Ferry v. Udall*, 336 F. 2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965). In these cases the purchase price had already been deposited, while in the present case it was never tendered.

The classification of land as suitable for disposition under the Small Tract Act does not preclude a subsequent cancellation of that classification when a different classification is found to be in the public interest. *Cecil W. Hinshaw*, A-30006 (July 23, 1964). As was stated in the land office decision of October 21, 1968, rejection of the application was predicated upon the finding that the public interest required such action in order to protect and preserve the rare species of fish discovered in the spring located within the 5-acre tract. We find this to be well within the delegated authority of the land office manager.

Having determined that the land office action was proper, thereby making the subject tract no longer available for disposition under the Small Tract Act, supra, it becomes unnecessary to discuss the other reasons for appeal as set forth by the appellant.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed.

Francis E. Mayhue, Member

I concur.

I concur.

Newton Frishberg, Chairman

Anne P. Lewis, Member

