

JOHN PAUL HINDS
RUTH M. HINDS

IBLA 75-202

Decided January 31, 1975

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing appellants' protest of the denial of their application for relief under the Mining Claims Occupancy Act, 30 U.S.C. § 701 et seq. (1970), or for alternative relief under the Small Tract Act, 43 U.S.C. § 682a (1970).

Affirmed.

1. Mining Occupancy Act

An application for relief under the Mining Claims Occupancy Act, 30 U.S.C. § 701 et seq. (1970), which is filed more than three years after the filing deadline of June 30, 1971, is fatally defective and cannot be considered under the Act.

2. Small Tract Act: Lands Subject To

Land along the Lower Colorado River which has been designated in a land use plan approved by the Secretary of the Interior as a public recreation area is not subject to disposal under the Small Tract Act of June 1, 1938, 43 U.S.C. § 682a (1970).

APPEARANCES: M. William Tilden, Esq., Lonergan, Jordan, Gresham & Varner, San Bernardino, California, for appellants. Robert D. Conover, Esq., Office of the Solicitor, United States Department of the Interior, Riverside, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

Appellants located the Copper Basin Canyon Mill Site claim in section 19, T. 2 N., R. 27 E., S.B.M., California, on June 26, 1954. On July 13, 1961, the Bureau of Land Management (BLM) declared such

claim null and void because it was located on lands withdrawn under a reclamation withdrawal in the first form on September 8, 1903, made pursuant to section 3 of the Reclamation Act of June 17, 1902, 43 U.S.C. § 416 (1970). On appeal to the Secretary of the Interior, the decision was affirmed. J. P. Hinds, A-29239 (March 8, 1962).

On a number of occasions following the final decision invalidating the claim appellants were afforded the opportunity to apply for a residential permit under the Department's Lower Colorado River Land Use Plan, to legalize their occupancy. They apparently decided to forego such procedure and to seek instead to have the subject land restored to mineral entry. The issuance of new occupancy permits under that program has long since been discontinued.

On March 26, 1964, appellants filed an application with the BLM seeking to have the land restored to mineral entry. On April 29, 1964, the Bureau of Reclamation recommended that the application be denied because the land was required for public use and recreational development. The recommendation stated that the land occupied by appellants was part of an area designated for county and city park and recreation development, as set forth in the "Land Use Plan" approved by the Secretary of the Interior in January 1964. On May 6, 1964, appellants were notified by BLM that their application was denied based on the recommendation of the Bureau of Reclamation.

On May 30, 1973, BLM issued a Notice of Trespass to appellants requiring them to remove their possessions and improvements from the subject land within 60 days of receipt of the notice. Appellants failed to comply with the notice. On April 3, 1974, a complaint for ejectment and damages was filed against appellants, United States v. J. P. Hinds et ux., Civil No. 74-977-R (U.S.D.C. C.D. Calif.). Action on such suit has been stayed pending the outcome of the present appeal.

This appeal arose as a result of actions taken by the California State Office on an application filed by appellants on August 9, 1974. Appellants were seeking fee title or a life estate in a certain portion of lot 5, section 19, T. 2 N., R. 27 E., S.B.M., pursuant to the Mining Claims Occupancy Act of October 23, 1962, 30 U.S.C. § 701 et seq. (1970). They also requested alternative relief pursuant to the Small Tract Act of June 1, 1938, 43 U.S.C. § 682a(1970). The land sought was located by appellants as a millsite in 1954.

By letter dated September 18, 1974, appellants were informed by the State Office that their application pursuant to the Mining Claims Occupancy Act, supra, was denied because it was not filed prior to June 30, 1971, as required by 43 CFR 2550.0-3(a). The State Office also found that, in accordance with 43 CFR 2731.3-1(d)(4), the application was not acceptable under the Small Tract Act, supra,

because the land was not open to application. For those reasons appellants' application was returned to them.

Appellants resubmitted their application on September 23, 1974, along with a formal protest of the action taken by the State Office. The State Office decision of September 25, 1974, dismissing the protest, is the subject of this appeal. That decision reiterated the reasons for denial set forth in the State Office letter of September 18. The decision also dealt with appellants' contention that the State Office failed to address itself to appellants' request for consideration of their application under either land category 1 or land category 2 as defined in section 2233.1 of the BLM Manual. The State Office found that the land sought by appellants had been classified so as to foreclose disposal or lease.

Appellants' application for relief under the Mining Claims Occupancy Act, supra, was properly returned without consideration because it had not been filed prior to June 30, 1971, the deadline provided for in 30 U.S.C. § 701 (1970).

On appeal appellants argue that "the millsite claim upon which appellants have been residing since 1954 falls within Land Category 1 or Land Category 2 of section 2233 of the BLM Manual * * *." Such section provides that persons whose occupancies occurred prior to October 23, 1962, the date of enactment of the Mining Claims Occupancy Act, and who cannot be considered under such Act, may be granted relief to continue their occupancy of public lands which were illegally or improperly entered. The granting of such relief, which is discretionary with the Secretary, is based on a land classification system.

Manual section 2233 outlined procedures whereby an individual claiming that his residence on his mining claim was for him a principal place of residence, as defined in 43 CFR 2550.0-5(d), could be afforded relief when, for some reason, he was found not to be qualified under the Act. The following are examples where the Department has found that an individual did not qualify under the Act: failure to occupy valuable improvements, Leslie and Lucy Neilson, 8 IBLA 404 (1972), Christian E. Wicks, 74 I.D. 166 (1966); failure to use the claim as a principal place of residence during the qualifying period, True E. Wess, 14 IBLA 38 (1973); Earl M. Hyde, A-31080 (January 20, 1970); Joseph W. Hinton, A-30374 (November 17, 1965).

[1] In each of those cases the individual or individuals involved had made a timely filing for relief under the Act and had relinquished their mining claim or had had it invalidated. Herein, appellants attempted to file an application for relief under the Act over three years after the filing deadline had expired. For that reason alone appellants' application could not be considered under the Mining Claims Occupancy Act.

Furthermore, the section of the BLM Manual relied upon by appellants does not create any rights in them. The BLM Manual is utilized internally for the instruction of Bureau personnel, and as an aid in the and interpretation and application of relevant statutes and administrative regulations. It does not have the force and effect of statutes or regulations. Barbara Rubenstein, A-28508 (Dec. 28, 1960). Moreover, section 2233.1 states that any relief to be granted is within the discretion of the Secretary.

The Small Tract Act leaves no doubt that a sale or lease under the Act is within the discretion of the Secretary of the Interior. On December 10, 1960, the Director of the Bureau of Land Management issued a decision, 1/ approved by the then Assistant Secretary, Lands and Minerals, rejecting numerous applications for lands along the Lower Colorado River filed pursuant to the Small Tract Act of June 1, 1938, 43 U.S.C. § 682a (1970). In a press release on December 22, 1960, the Assistant Secretary announced that the decision represented the Department's determination not to lease or sell under the Small Tract Act any of the land withdrawn for reclamation purposes along the Lower Colorado River area between Hoover Dam and the Mexican border. He also stated that the Department of the Interior would prepare the outline of a proposed land use plan for the Lower Colorado River. The completed plan, as referred to in the State Office decision, was approved by the Secretary of the Interior in January 1964.

Appellants claim that a recent decision by an Ad Hoc Board of the Office of Hearings and Appeals, Parker Area Residents Defense Committee, September 6, 1974, determined that a plan did not exist for the area claimed by appellants. Appellants cited the following language from such decision:

However, such Plan [Lower Colorado River Land Use Plan] apparently envisaged the development of an "over-all Recreational Land Use Plan." (Memorandum dated November 3, 1961, to Under Secretary Carr from Graham Hollister, Assistant to the Secretary, p. 2, attached to BLM's Opening Brief of May 29, 1974.) From the arguments and briefs it does not appear that such a Plan has yet been formulated.

The cited language means only that an overall recreational land use plan has not been finally developed for the area. It does not mean that there is not a Lower Colorado River Land Use Plan in existence. Such plan is the one approved by the Secretary in 1964.

1/ George B. Gibbons, Los Angeles 0119488, December 16, 1960. Cited with approval in Norman Gilbert Reid, A-27454 (January 19, 1961).

The lack of a final over-all recreational land use plan does not mean that the area is open to lease or disposal under the Small Tract Act, nor does it mean that the area was not designated generally as a recreational area in the Lower Colorado River Land Use Plan. Implementation of the Land Use Plan is continuing, with positive management of the federal lands for recreation an accomplished fact.

[2] The land sought by appellants is located along the Lower Colorado River near Parker Dam. It is part of the area designated in the Lower Colorado River Land Use Plan for use as a public recreational area. As such, it is not subject to disposal under the Small Tract Act. The Secretary has acted in his discretion in determining that the public interest is best served by preserving the land for public recreational purposes rather than by allowing private acquisitions in the area.

For the above stated reasons appellants' protest was properly dismissed.

Accordingly, 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.

Newton Frishberg
Chief Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge

