

TOWNSITE OF LIBERTY

IBLA 77-427

Decided April 30, 1979

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting application for townsite patent, OR 16300 (Wash.).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally—Federal Land Policy and Management Act of 1976: Repealers—Townsites

R.S. 2387, 2388 and 2389, 43 U.S.C. §§ 718-720 (1976), were repealed by sec. 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790, and any transfer of land for a townsite within a National Forest after the effective date of FLPMA, Oct. 21, 1976, must be made under authority of sec. 213 of that Act. The filing of an application under other statutes prior to the enactment of FLPMA does not constitute a valid existing right which would survive FLPMA.

APPEARANCES: Jack McSherry, Esq., McSherry and Ellis, Cle Elum, Washington.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Townsite of Liberty (Liberty) appeals from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated May 27, 1977, rejecting its application for townsite patent OR 16300 (Wash) because the provisions of Revised Statutes 2387, 2388, and 2389, 43 U.S.C. §§ 718-720 (1976), under which the application was filed, were repealed by section 703 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790.

On July 23, 1976, Judge W. R. Cole of the Superior Court of Kittitas County, Washington (Trustee), and petitioners for Liberty

filed an application for 174 acres of land described by metes and bounds and located in surveyed secs. 1 and 2, T. 20 N., R. 17 E., Willamette meridian, Washington, in the Wenatchee National Forest. The application included the Declaratory Statement of Judge W. R. Cole, with certified copies of the Superior Court Petition, Endorsement of Trustee as to Estimate of Cost, map of proposed Townsite of Liberty, and Acceptance of Trust by Judge Cole. In the application, the Trustee and petitioners alleged that the townsite had been in existence since 1883. The land in issue was first withdrawn for national forest purposes on February 22, 1897, by Presidential Proclamation (29 Stat. 903).

In its decision rejecting the townsite application, the State Office cited Gibbonsville Townsite, 30 IBLA 74 (1977), for the proposition that a townsite application is not a valid existing right within the ambit of FLPMA. The State Office explained that FLPMA repealed the authority under which the application was made and that the application is not a prior existing right under section 701 of the Act. The State Office also added that the rejection of the application would not be prejudicial to consideration by the Forest Service of an application under section 213, the new provision for townsite National Forest System lands under FLPMA which reads:

The Act of July 31, 1958 (72 Stat. 438, 7 U.S.C. 1012a, 16 U.S.C. 478a), is amended to read as follows: "When the Secretary of Agriculture determines that a tract of National Forest System land in Alaska or in the eleven contiguous Western States is located adjacent to or contiguous to an established community, and that transfer of such land would serve indigenous community objectives that outweigh the public objectives and values which would be served by maintaining such tract in Federal ownership, he may, upon application, set aside and designate as a townsite an area of not to exceed six hundred and forty acres of National Forest System land for any one application. After public notice, and satisfactory showing of need therefor by any county, city, or other local governmental subdivision, the Secretary may offer such area for sale to a governmental subdivision at a price not less than the fair market value thereof: Provided, however, That the Secretary may condition conveyances of townsites upon the enactment, maintenance, and enforcement of a valid ordinance which assures any land so conveyed will be controlled by the governmental subdivision so that use of the area will not interfere with the protection, management, and development of adjacent or contiguous National Forest System lands."

In its statement of reasons, appellant stresses the early existence of Liberty, well before the establishment of the National Forest, and its continuous existence as a townsite to present. It also points out these factual distinctions between Gibbonsville, supra, and the case in issue: The application filed by Liberty concerns the original unpatented townsite, whereas the application filed by Gibbonsville deals with an addition to the original townsite patented in 1900 which did not qualify for inclusion in the original patent; Liberty rights were established well before the National Forest came into existence, whereas the Gibbonsville tract apparently had no townsite rights; Liberty has a valid existing right to make a townsite entry which was preserved by the filing of its Declaratory Statement prior to the passage of FLPMA in 1976, and Gibbonsville does not; the land involved in Gibbonsville was "adjacent to or contiguous to an established community," as provided by section 213 of FLPMA, but the land in Liberty is not; Liberty had the approval of the Forest Service, but Gibbonsville did not.

[1] Although the facts in this case differ from those in Gibbonsville Townsite, supra, the legal issue is identical. The question to be resolved is whether or not appellant has a valid existing right under section 701 of FLPMA which would survive the passage of FLPMA. We find that it does not. Section 701 of FLPMA provides that nothing in that Act shall be construed as terminating any patent, or other land use right or authorization existing on the date of approval of the Act (October 21, 1976). Appellant had only an application for a patent on this critical date. Therefore, it had no valid existing right which would survive FLPMA. See William J. Colman, 40 IBLA 180 (1979).

Since the statutes under which the application was filed have been repealed, the Department no longer has authority to issue patents under such statutes. Any townsite patent issued after October 21, 1976, the effective date of FLPMA, must be issued pursuant to that Act. Gibbonsville Townsite, supra.

We note, however, that appellant is correct in its contention that section 213 of FLPMA does not apply to Liberty because the lands in issue are not "adjacent to or contiguous to an established community." On June 30, 1978, S. 2033 was enacted into P.L. 95-310, 92 Stat. 362, which dispensed with these limitations for Liberty as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any requirement or limitation therein with respect to the location of lands that may be conveyed, the Secretary of Agriculture is authorized to convey as a townsite lands in the Wenatchee National

Forest, Washington, known as the Liberty Townsite, pursuant to and in accordance with the provisions of the Act of July 31, 1958 (72 Stat. 438; 7 U.S.C. 1012a) as amended by section 213 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2743, 3760). [Emphasis in original.]

Since section 213 of FLPMA and P.L. 95-310 specifically authorize the Secretary of Agriculture to designate lands as townsites, the Secretary of the Interior has no jurisdiction in this case. Applications for townsites within the National Forest System must be filed with the Secretary of Agriculture as directed by FLPMA. Dismissal of this appeal will not be prejudicial to consideration of such application.

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.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

