

BETHA McCONKEY
ROBERT L. COOK

IBLA 83-270, 83-413

Decided June 21, 1983

Appeals from decisions of the Nevada State Office, Bureau of Land Management, rejecting applications filed pursuant to the Small Tract Act, and offering direct sales of the tracts for the current fair market value. N 030435 and N 031075.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Repealers -- Small Tract Act

The Small Tract Act, 43 U.S.C. § 682a (1976), was repealed by sec. 702 of the Federal Land Policy and Management Act of 1976, Oct. 21, 1976.

2. Applications and Entries: Vested Rights -- Appraisals -- Evidence: Burden of Proof -- Small Tract Act: Appraisals

The mere filing of a small tract application does not create in the applicant any right or interest in the land. An applicant for land under the Small Tract Act, 43 U.S.C. § 682a (1976), cannot acquire any right or interest in the land by virtue of administrative delay in processing the application. When the current fair market value of the land has been determined in accordance with accepted procedures, the appraisal will not be disturbed in the absence of positive, substantial evidence that it is in error.

APPEARANCES: Betha McConkey and Robert L. Cook, pro sese.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

In 1954 and 1955, Betha McConkey and Robert L. Cook were among many individuals who filed applications in the Reno, Nevada, land office, pursuant

to the Small Tract Act of June 1, 1938, as amended, 52 Stat. 609, 43 U.S.C. § 682a (1976), for 5-acre tracts in sec. 32, T. 22 S., R. 61 E., Mount Diablo meridian in Clark County, Nevada, near Las Vegas. Because of the similarities in the situations and issues involved, we consolidated these cases for consideration on appeal.

By decision dated May 10, 1962, the Bureau of Land Management (BLM), rejected these two applications, among others, stating that conflicts with unpatented mining claims had delayed adjudication of the small tract applications and that BLM could not predict when ongoing contest proceedings would conclude. Therefore, BLM offered each applicant an alternate site nearby at a specific purchase price and allowed the applicants 60 days to either tender the purchase price or to appeal. Robert L. Cook opted to appeal, but withdrew his appeal after BLM modified its decision on June 8, 1962, to allow the original applications to remain pending at the applicants' option. On May 1, 1964, BLM again allowed the applicants the chance to obtain an alternate tract, this time using a drawing procedure. On both occasions, these applicants chose to leave their applications on file for the original tracts they had selected.

By letters dated August 20, 1981, and December 11, 1981, BLM informed these applicants that recent judicial decisions 1/ had resolved the unpatented mining claim conflicts which had impeded the processing of their applications. The letters stated that since the Small Tract Act had been repealed in 1976, its provisions no longer applied and the land would be offered under noncompetitive sale procedures, i.e., upon payment of current fair market value. The letters also stated that the specific price would not be known until appraisals were completed. Appellant Cook requested and received a copy of the eventual appraisal report which valued these applicants' tracts and seven other 5-acre tracts in the same section at \$50,000 each. Appellant Cook objected to these values in letters to BLM dated September 15 and November 1, 1982.

By letter decisions dated November 23, 1982, BLM rejected the original small tract applications, stating that the Small Tract Act was repealed on October 21, 1976 (by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2789). In accompanying letters, BLM informed

1/ The Aug. 20, 1981, letter to Ms. McConkey stated that the litigation which had delayed processing of her claim finally ended on Mar. 23, 1981, when the U.S. Supreme Court let stand a circuit court opinion which affirmed a Board decision invalidating unpatented mining claims. See McCall v. Watt, 450 U.S. 996 (1981). The U.S. Court of Appeals for the Ninth Circuit had affirmed summary judgment against plaintiffs seeking review of the Board's decision in United States v. McCall, 7 IBLA 21 (1972). See McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980). See also note 2, infra. The Dec. 11, 1981, letter to Mr. Cook referred to the judgment in Bradford Mining Corp. v. Andrus, Civ. No. LV 77-218 (D. Nev. Mar. 14, 1979), upholding the Board's decision in United States v. Osborne, 28 IBLA 13 (1976). The McConkey case record also contains a copy of the Bradford judgment.

the applicants that they could opt to purchase the tracts under other statutory authority. The stated price for each parcel was the same appraised value, \$50,000. From these letter decisions, the applicants appeal.

Appellants both argue that the passage of FLPMA did not repeal the Small Tract Act and that the terms of FLPMA should not now be imposed upon their preexisting applications. Appellant Cook particularly objects to BLM's 6-year wait before applying this law to his application. Appellant McConkey maintains that the Federal courts recognize a "vested interest" in small tracts, noting Civ. LV74-68RDF. ^{2/} She maintains that "[t]he 'pink slips' issued by BLM in receipt of our small tract applications represent a contract." She also contends that the current appraisal does not represent fair market value, and is highly inflated as evidenced by the lack of bidding at two recent small tract sales in the Las Vegas area.

[1] Contrary to appellants' belief, the Small Tract Act was effectively repealed on October 21, 1976, by FLPMA. Section 702 of FLPMA, "Repeal of laws relating to homesteading and small tracts," states: "Effective on and after the date of approval of this Act, the following statutes or parts of statutes are repealed * * *," among them the original Small Tract Act; the Act of June 1, 1938, 52 Stat. 609, and amendments to the Small Tract Act; the Act of July 14, 1945, 59 Stat. 467; and the Act of June 8, 1954, 68 Stat. 239. Section 701(a) of FLPMA, 90 Stat. 2786, did preserve contractual rights to small tracts that had already vested at the time of its passage, as in Chester F. Dawson, 73 IBLA 27 (1983), where a small tract applicant accepted a BLM "offer to purchase" and paid the purchase price to BLM in 1954. Pending applications, however, are now governed by section 203 of FLPMA, 90 Stat. 2750, 43 U.S.C. § 1713 (1976): "Sales of public lands shall be made at a price not less than their fair market value as determined by the Secretary."

[2] Appellant McConkey argues that the "pink slip" represents a binding contract. It does not. The Department has long held that an applicant for land under the Small Tract Act cannot acquire a right or interest in land by the filing of an application, nor may a right or interest be acquired because of a delay in processing the application. Filing an application only entitles an applicant to have the application considered. After fair market value has been determined in accordance with accepted procedures, the appraisal will not be disturbed in the absence of positive substantial evidence that it is in error. Leon H. Rockwell, 72 IBLA 373 (1983), and cases cited.

These two small tracts were appraised by a qualified appraiser, using a market approach. The appraiser's results are supported by eight recent sales

^{2/} The reference is to McCall v. Boyles in which the U.S. District Court for the District of Nevada, on Aug. 17, 1977, let stand its summary dismissal of plaintiffs' action for review of the Board's decision in United States v. McCall, 2 IBLA 64, 78 I.D. 71 (1971). The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal on July 10, 1980. 624 F.2d 192 (9th Cir. 1980). Certiorari was denied Mar. 23, 1981. 450 U.S. 997 (1981).

of similar parcels nearby in secs. 29, 30, 31, and 32, T. 22 S., R. 61 E., and sec. 5, T. 23 S., R. 61 E., Mount Diablo meridian. Appellants have not submitted positive substantial evidence that the appraisals are in error. Therefore, the appraisals will not be disturbed.

In response to the complaint that BLM delayed the processing of these claims, we must point out that BLM was engaged in time-consuming litigation arising from the contesting of conflicting unpatented mining claims. Only when the mining claimants' administrative appeals and judicial review thereof were complete were the unpatented mining claims truly declared null and void, thus removing the impediment to the sale of the tracts. See Leon H. Rockwell, supra at 376.

In 1962, BLM offered alternate tracts to appellants and other small tract applicants in an attempt to alleviate the difficulties caused by the protracted delay. Appellants declined the offers. FLPMA repealed the Small Tract Act in 1976, during the protracted litigation. Sales of public land are now governed by section 203 of FLPMA, 43 U.S.C. § 1713 (1976) and for land in Clark County, Nevada, by P.L. 96-586, Act of Dec. 23, 1980, 94 Stat. 3381. These statutes require sale of public lands for not less than current fair market value. See 43 U.S.C. § 1713(d) (1976).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Nevada State Office are affirmed.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Gail M. Frazier
Administrative Judge