

M. LAWRENCE BERK

IBLA 83-432

Decided June 27, 1984

Appeal from decision of the Nevada State Office, Bureau of Land Management, rejecting small tract application and offering direct sale of an alternate tract for the current fair market value. N 028671.

Affirmed.

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

The Small Tract Act, 43 U.S.C. § 682a (1970), was repealed by sec. 702 of the Federal Land Policy and Management Act of 1976, Oct. 21, 1976.

2. Applications and Entries: Vested Rights -- Small Tract Act: Applications

The mere filing of a small tract application did not create in the applicant any right or interest in the land sought. An applicant for land under the Small Tract Act, 43 U.S.C. § 682a (1970), did not acquire any right or interest in the land embraced in his application by virtue of administrative delay in processing the application.

APPEARANCES: M. Lawrence Berk, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

In 1954, M. Lawrence Berk filed application N 028671 pursuant to the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. § 682a (1970). The land embraced in his application to lease aggregated 5 acres and consisted of the E 1/2 SW 1/4 NE 1/4 SE 1/4 sec. 28, T. 20 S., R. 60 E., Mount Diablo meridian. It was accompanied by payment of \$25. 1/ Soon after the filing of appellant's application, it was discovered that the application, along with a number of others, embraced land within placer mining claims located by one William A. McCall, Sr. Pursuant to a Government mineral examiner's

1/ The regulations in effect in 1954 provided that each application to lease must be accompanied by a \$10 filing fee together with the 3-year rental fee of \$15. See 43 CFR 257.10 (1954).

report, a contest against these mining claims was initiated on March 18, 1960, charging that no discovery of a valuable mineral deposit had been made within the limits of the claims. An answer was duly filed denying the allegations.

Cognizant of the amount of time that resolution of the contest might consume, the Nevada Land Office, by letter of June 8, 1962, offered appellant a choice to either await ultimate adjudication of the validity of the mining claims or to accept an alternate tract. On June 11, 1962, appellant elected to await adjudication. In 1964, the Land Office afforded appellant another opportunity to accept an alternate tract, which was also declined.

Meanwhile, the contest came on for hearing in 1965. By decision dated August 15, 1968, the Hearing Examiner held the various claims null and void. On appeal from this decision, the findings of the Hearing Examiner were affirmed in a decision styled United States v. McCall, 2 IBLA 64, 78 I.D. 71 (1971). A suit for judicial review was thereafter filed, styled McCall v. Boyles, Civil LV 74-68 RDF (D. Nev. filed May 8, 1974). The district court ultimately granted the Government's motion for summary judgment, and this action was affirmed by the Court of Appeals for the Ninth Circuit on July 10, 1980. A petition seeking a writ of certiorari was denied by the United States Supreme Court on March 23, 1981.

While the court suit was progressing, however, Congress enacted the Federal Land Policy and Management Act of 1976 (FLPMA), Act of October 21, 1976, 43 U.S.C. §§ 1701-1784 (1982). As we have noted many times, FLPMA effected major changes in the Bureau of Land Management's (BLM's) statutory mandate, necessarily resulting in the repeal of a great number of prior statutory provisions. Included therewith was the repeal of the Small Tract Act. See section 702 of FLPMA, 90 Stat. 2789.

By letter of August 18, 1981, the State Director, Nevada, informed appellant of the completion of the McCall litigation, and also advised him of the repeal of the Small Tract Act. He noted, however, that the land would be offered to appellant under the noncompetitive sale provisions of FLPMA (43 U.S.C. § 1713(f) (1982)) at its fair market value. ^{2/} The State Director pointed out, however, that in light of the number of parcels to be appraised, the process of appraisal might take a full year.

On July 14, 1982, the Nevada State Office published a Notice of Realty Action which announced that various parcels of land had been determined to be suitable for disposal and advised interested parties that they could submit comments relating thereto. Included in this list was the land sought by appellant, designated as parcel 82-132. On August 5, 1982, BLM received a copy of a resolution adopted by the Las Vegas Board of County Commissioners objecting to the sale of a number of parcels, including parcel 82-132, because of a conflict with a proposed expressway.

^{2/} As the State Director noted, the requirement that the land be sold at fair market value was also part of the Small Tract Act regulations. See 43 CFR 257.13(a) (1954). Under the procedures applicable in 1954, however, the purchase price would be the fair market value when the land was initially leased rather than when it was actually purchased.

Following receipt of this objection, another Notice of Realty Action was published on September 20, 1982, eliminating parcel 82-132 from further consideration for public sale because of the objection. On December 1, 1982, notices were sent to various applicants informing them that it had been determined that the land which they sought would not be suitable for disposal and granting them an opportunity to select alternate tracts from a list provided. Appellant Berk, who had moved in the interim, apparently did not receive this notification, but, on December 30, 1982, inquired of the State Office as to the status of his Small Tract Act application. By letter decision dated January 31, 1983, BLM rejected the application stating that since the Small Tract Act had been repealed with the passage of section 702 of FLPMA, 90 Stat. 2789, on October 21, 1976, the provisions of the Small Tract Act no longer applied. A letter accompanied this decision advising appellant of the right to select an alternate parcel. Berk filed an appeal both from the rejection of the application and the offer of an alternate parcel contingent upon payment of current fair market value of the land.

In his statement of reasons for appeal, Berk contends that FLPMA did not repeal the Small Tract Act, but only foreclosed the further filing of applications for small tracts. Thus, he argues that the repeal does not apply to applications on file with BLM for 20 years. He further asserts that the Federal courts have recognized his "vested interest" as a small tract applicant. He argues that the "pink slip" (receipt for filing fee and advance rental) issued to him by BLM constitutes a binding contract. Finally, with reference to the alternate parcels, he contends that the current appraisals do not reflect a true fair market value because they are too high.

[1] With reference to whether FLPMA repealed the Small Tract Act insofar as appellant is concerned, we note that section 702 of FLPMA, styled "Repeal of laws relating to homesteading and small tracts," reads as follows: "Effective on and after the date of approval of this Act, the following statutes or parts of statutes are repealed * * *." Included among the laws repealed by this section are the Act of June 1, 1938, 52 Stat. 609 (the original Small Tract Act); the Act of July 14, 1945, 59 Stat. 467; and the Act of June 8, 1954, 68 Stat. 239 (both amendatory Acts to the original Small Tract Act). It is clear that the Small Tract Act was effectively repealed October 21, 1976, by FLPMA. Russell R. Gilson, 76 IBLA 20, 21 (1983); John R. Dillingham, 73 IBLA 156, 158 (1983). The question remains, however, whether appellant had any valid existing rights which could survive the repeal of that Act. The answer is clearly in the negative.

[2] It must be pointed out that, under the regulations in effect when appellant filed his Small Tract Act application, no direct sales were authorized. See 43 CFR 257.3(b) (1954). Rather, the regulations specifically noted that "[u]se and improvement of the land under lease will be required before it may be purchased." Id. Any lease so issued contained an express option noting that "if the land is classified for lease and sale lessee may purchase it after the expiration of 1 year from the date of the lease, provided he has made the improvements herein required." Form 4-776 (Jan. 1954) (emphasis in original).

It might well be that, where the land had been classified for lease and sale, and a lease had issued and improvements were placed thereon before the Small Tract Act was repealed, the rights in the applicant to purchase under

the Small Tract Act would survive the repeal of the Act. See generally Abraham Epstein, 24 IBLA 195 (1976). But, the fact of the matter is that appellant could not avail himself of such a ruling for the simple reason that no lease ever issued to him.

Appellant was "vested" with only such rights as properly incurred to any applicant. While no lease could properly issue to a later applicant, and thus Berk was "vested" with a certain priority of consideration, he was possessed of only a hope or expectation that any lease would issue at all. Indeed, the applicable regulations clearly delineated a number of considerations which would guide the Department in deciding whether to lease or not. See 43 CFR 257.3(a) (1954). The "pink slip" which appellant received was no more than a receipt for the filing and prepaid rental charges. Insofar as the rental payments were concerned, the regulations expressly provided that "if, for any reason, a lease is not issued, the rental payment will be returned." 43 CFR 257.10(a) (1954). ^{3/} Clearly, no contract arose upon receipt of appellant's offer to lease as this offer was never accepted. See generally Leon H. Rockwell, 72 IBLA 373 (1983), and cases cited.

As we noted, the January 31, 1983, decision was accompanied by a letter offering appellant an opportunity to purchase, noncompetitively, an alternate tract which was to be selected from a list of available lands. The letter advised appellant that he had 60 days in which to select his alternate parcel. Appellant elected to appeal, contending generally that the small tracts were not being offered at fair market value. Appellant, however, has submitted nothing beyond his naked assertion that all of the parcels were overvalued. In the absence of an identification of a specific parcel in which he is interested, together with a showing as to why he believes that parcel is overvalued, appellant's general allegations cannot be considered.

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.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

^{3/} Indeed, the regulations actually provided that if no lease ever issued the filing fee, itself, would be returned to the applicant. See 43 CFR 257.9 (1954).

