

JACK H. STOCKSTILL ET UX. AND
VERNON C. MAGER ET UX.

IBLA 70-118

Decided February 22, 1971

Private Exchanges: Generally

Even though a land office determined that a private exchange under the Point Reyes National Seashore Act was in the public interest and the applicants submitted a deed to the offered land in favor of the United States, if a change in circumstances warrants, the exchange application can be rejected as not in the public interest by the Director, Bureau of Land Management. Prior to issuance of a patent on the selected land an exchange application is nothing more than a proposal under which no contract right arose and no equitable title vested.

Private Exchanges: Protests

Where the notice of publication of a private exchange states that the purpose of the notice is to give persons objecting to the exchange an opportunity to file their objections within 30 days after first publication of the notice, a protest filed after the end of the 30-day period can be considered.

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Sacramento 078951

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: Point Reyes National
: Seashore exchange
: application rejected

: Affirmed

DECISION

Jack H. Stockstill and Vernon C. Mager and their wives have appealed to the Secretary of the Interior from a decision of December 15, 1969, by Office of Appeals and Hearings, Bureau of Land Management, acting for the Director, which set aside the Sacramento land office decision of July 7, 1966, allowing them 30 days from receipt within which to remit the amount of \$ 1,800 to equalize the values of the offered and selected lands involved, and rejected their proposed exchange application filed under the Point Reyes National Seashore Act of September 13, 1962, 76 Stat. 538, 16 U.S.C. 459c et seq. (1964).

In June 1964 the applicants proposed to exchange privately subdivided Lot 58 (offered land) they owned on Point Reyes for 160 acres of public domain land (selected land) in nearby Sonoma County, California. Shortly after the exchange was proposed the selected land was classified as suitable for that purpose. In September 1964 the Realty Officer, Point Reyes National Seashore, National Park Service, advised the applicants that the exchange appeared feasible and the United States would pay them \$ 1,520 to equalize the values. In February 1965 the equalization amount was increased to \$ 2,020. In March 1965 a Sacramento land office decision approved the proposed exchange and payment of \$ 2,020 to the applicants, authorized publication of the required notice, and requested the applicants to tender their deed and title information. The notice was published; the deed was executed and submitted, and a title report was obtained.

1/ In the decision below the protests of the City of Sonoma, the County of Sonoma, Mrs. Inez P. Ettelson, and Harold and Fred Fletcher were dismissed. As they have not appealed to the Secretary, their names are not included in the heading.

In August 1965 a new appraisal was ordered to determine the effect of an interim decision to impose a mineral reservation on the selected land. As a result of that appraisal, the applicants were informed that instead of receiving \$ 2,020 from the United States, they would have to pay the United States \$ 2,300 to equalize the values because of an increase in the value of the selected land. In March 1966 the National Park Service indicated that the value of the offered land increased to \$ 7,000 reducing the difference in values from \$ 2,300 to \$ 1,800. On July 7, 1966, the Sacramento land office sent a decision to the applicants advising them of the disparity in values as of March 31, 1965, the date of first publication, and called upon them to remit \$ 1,800 within 30 days of receipt of the decision or the case would "be closed without further notice." That action was the subject of the applicants' appeal to the Director, Bureau of Land Management. It was alleged on appeal to the Director that the Government has a mandatory duty to issue a patent to the selected land, and to transmit the sum of \$ 2,020 to them, as both parties to the transaction in the proposed exchange have fully complied with all the requirements of the law and regulations in the matter.

On May 1, 1968, the Associate Solicitor, Public Lands, stated that a new appraisal was needed for both the offered and selected lands. The new appraisal, completed in May 1969, valued the offered land at \$ 9,000 and the selected land at \$ 24,500. On that basis the applicants would be required to pay \$ 15,500 to the United States to equalize the values.

The decision appealed from quotes that portion of the Point Reyes National Seashore Act, supra, which authorizes the Secretary of the Interior to acquire property by exchange, provided that "The properties so exchanged shall be approximately equal in fair market value, except that the Secretary may accept cash from or pay cash to the grantor in such an exchange in order to equalize the values of the properties exchanged." The decision pointed out that unless a statute or regulation provides otherwise, the general rule is that until a patent issues the Department may at any time determine that the sale or exchange should not be consummated. The Department, according to the decision, made its legal position regarding exchanges clear in 43 CFR 2204.2-3, 35 F.R. 9548-9549 (formerly 2244.1-4(b)(c)) "prior to issuance of patent, no action taken shall establish any contractual or other rights against the United States, or create any contractual

or other obligation of the United States." Under its express policy to receive a fair return for its property, 43 CFR 1725.2-1, the decision observed, the Department in sales and exchange cases has consistently adhered to the position that the question of whether to consummate the transaction remains open to reexamination for factors affecting the public interest until patent issues.

The decision below found:

Regulation 43 CFR 2244.1-4(b)(2) [now 43 CFR 2204.2-2, 35 F.R. 9548] provides that "changes in values, after publication of the notice . . . will ordinarily not be a basis for rejection of an application, all other factors being equal." It may be argued that this regulation is intended to fix the values as of the time of publication. However, such construction is neither required by the language of the regulation nor consistent with the statute, regulations or precedents cited above. Construed consistently with the statute and regulations, this section simply means that changes in market value, although they must be recognized, will not ordinarily require rejection of an application.

In order to equalize the values presently established for the offered and selected lands, appellants would now be required to remit to the United States \$ 15,000. It is reasonable to assume that they will refuse to do so in view of their unwillingness heretofore to remit \$ 1,800 to equalize values. Moreover, in light of the vast disparity in values reflected by the May 1969 appraisal, we question whether consummation of the proposed exchange would be in accord with the statutory and regulatory requirement that the properties to be exchanged shall be approximately equal in value. While the statute and regulation provide that cash may be used to equalize values, we doubt whether Congress thus intended to entirely dispense with the requirement that there be some similarity in the values of the lands to be exchanged. Finally, it is obvious that both the offered and selected lands are located in areas of such fluctuating prices and speculative activity that the values set by appraisal do not necessarily reflect the fair market value of such land as of the date when the exchange might be completed.

Accordingly, we believe that the best interests of the public would be served by vacating the proposed exchange. In this way the present classification of the selected lands may be reexamined in order that it may be determined exactly what their proper disposition should be.

On appeal to the Secretary, the appellants incorporate by reference or by repetition their reasons for appeal to the Director, Bureau of Land Management. They request that the decision of December 15, 1969, be vacated and that the transaction in the proposed exchange be completed. They contend that everything required to be done by them and the Secretary had been completed and that no objections had been received and/or were made within the time nor in the manner required by law and therefore the Secretary has no discretion to fail to accept title to the property offered and to issue a deed or other instrument of transfer for the property selected by appellants.

We have carefully reviewed the record and the decision below and conclude that the findings are correct and should be affirmed. In a recent case involving an exchange, in considering the issue whether the appellants therein were entitled to compel issuance of a patent on the selected land because they complied with the necessary conditions regarding transfer of the base lands to the United States, the United States Court of Appeals for the Ninth Circuit held that the Secretary of the Interior has the power to reject applications prior to issuance of patents. The court found additional support for this conclusion in section 6 of the act of April 28, 1930, as amended, 43 U.S.C. § 872 (1964), which grants authority to the Secretary to return base land deeded to the United States in an exchange transaction when the exchange is "thereafter withdrawn or rejected." The court further found that no rights could accrue to either party to an exchange before issuance of patent on the selected land, and until that time the exchange application is nothing more than a proposal under which no contractual right arose and no equitable title vested. Lewis v. Hickel, 427 F.2d 673 (9th Cir. 1970).

This is identical in principle with cases upholding the discretionary authority of the Secretary to reject, prior to the issuance of a cash certificate, offers to purchase public land

under the Isolated Tracts Act, as amended. 43 U.S.C. § 1171 *et seq.* (1964). Lewis v. Udall, 374 F.2d 180 (9th Cir. 1967); Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964); Willcoxson v. United States, 313 F.2d 884 (D.C. Cir. 1963).

The determination of whether or not the exchange is in the "public interest" is within the discretion of the Department. Lewis v. Hickel, *supra*. In the circumstances of this case, we concur with the Bureau that "the best interests of the public would be served by vacating the proposed exchange."

We turn to the matter of the objection to the protests, which was not discussed below, although the protests were dismissed in the decision appealed from for another reason. Appellants oppose consideration of the protests against the exchange on the grounds that no protest was filed within the 30 days after first publication or was served on the appellants. The notice of exchange provided in pertinent part:

The purpose of this notice is to allow all persons asserting a claim to the selected land or having a bona fide objection to the exchange to file their protests or objections in this office. Any claims or objections must be filed, with evidence that a copy thereof has been served on the applicants, within 30 days from the date of first publication.

This language is not mandatory in the sense that no protest can be filed after the expiration of the 30-day period and that any late filing cannot be considered by the Department. Neither the Point Reyes National Seashore Act, *supra*, nor the Department's regulations on exchanges, 43 CFR 2203.6, 35 F.R. 9548 (formerly 43 CFR 2244.1-3), prescribe a mandatory time limit on the filing of protests. The time limit in the notice is properly to be construed as setting the time limit beyond which the Department will act on the exchange. Willis N. Farlow et al., 62 I.D. 206 (1955).

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 appealed from is affirmed,

and the case is remanded to the Bureau of Land Management to return evidence of title to the offered land to the appellants in accordance with section 6 of the act of April 28, 1930, as amended, supra; restated in 43 CFR 2204.3.

Anne Poindexter Lewis, Member

We concur:

Martin Ritvo, Member

Francis E. Mayhue, Member

