

SIESTA INVESTMENTS, INC.

IBLA 76-774

Decided November 15, 1976

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting appellant's application for a private land exchange N-7716.

1. Private Exchanges: Generally

Prior to issuance of a patent an exchange application is nothing more than a proposal under which no contract right arises and no equitable title vests. The Bureau of Land Management has discretion to reject an exchange application where it is determined that the public interest would not be served by the proposed exchange.

2. Administrative Procedure: Generally--Estoppel--Federal Employees and Officers: Authority to Bind Government

An applicant for a private land exchange cannot benefit from the doctrine of equitable estoppel where no agent of the Government who was authorized to consummate the exchange falsely and materially misrepresented to or concealed material facts from appellant concerning the Government's position with respect to the proposed exchange.

APPEARANCES: George V. Albright, Esq., Albright & McGimsey, Las Vegas, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On February 7, 1972, Siesta Investments, Inc., a Nevada corporation (appellant), by its attorneys, Albright and McGimsey,

contacted the United States Air Force regarding an offer to exchange land. Appellant is the owner of a tract which adjoins Nellis Air Force Base in Clark County, Nevada, and which is presently zoned for residential use only. Appellant maintains that this residential classification renders its land virtually useless due to the high noise level produced by jet aircraft traffic from the base. Appellant further asserts that the residential zoning restriction is maintained through an agreement between the Air Force and the Clark County Planning Department. On July 5, 1973, the District Manager, Bureau of Land Management, responded to the appellant's inquiries with a statement that the exchange "proposal appears to be feasible at this stage in time, but will be subject to future review of lands reports, environmental analysis, and appraisal." The response was accompanied by the forms for filing a formal exchange application.

Appellant on July 18, 1973, filed a private exchange application with the Nevada State Office (BLM), and the Corps of Engineers thereafter initiated the necessary appraisals of the proposed exchange parcels. In March of 1975, appellant, having received no further correspondence concerning its application, initiated inquiries as to the status of the proposal. On August 9, 1976, the Air Force responded with a notice of a proposed cancellation of the exchange project. This notice was followed on August 5, 1976, by a decision of BLM rejecting the exchange offer. A letter of August 6, 1976, from the Army Corps of Engineers to appellant's counsel stated that several local agencies had objected to the exchange because the BLM land offered is in the path of the proposed expansion of McCarran International Airport and also stated that " \* \* \* the Air Force no longer has a military requirement for the Siesta Investments, Inc., property \* \* \*."

Appellant contends that the BLM's local and State officers have been aware of the efforts of the Air Force to restrict the permissible zoning of the subject property. Appellant asserts further that the Air Force initiated an exchange program to acquire properties with use restrictions contiguous to Nellis Air Force Base and that pursuant to this program, BLM has "processed this particular exchange offer and a number of similar offers \* \* \*." Appellant does not, however, make any reference to the final status of the "similar offers" or make any claims of discrimination.

Appellant argues, finally, that it has "relied upon representations of the Air Force and the favorable feasibility statement of the BLM," in limiting its efforts in seeking rezoning of the property. It states that "this alternative (the private exchange) was favorable to and originally made available by these Government agencies," and, accordingly, it requests that this Board reverse the decision of BLM and order "a continuation of the above entitled land exchange project."

[1] At the outset it is evident from a straightforward reading of the applicable regulations that the Bureau of Land Management has a considerable degree of discretion in the area of private land exchanges. 43 CFR 2204.2-1 provides that:

An application may be rejected at any time prior to the issuance of patent or other instrument of transfer. Exchanges will not be consummated, in the discretion of the authorized officer where for example, after public notice

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(b) Information is received which establishes that the exchange is not in the public interest.

The decision below commences with a statement that the Department of the Air Force is no longer interested in acquiring the land which appellant offered in its exchange proposal. Since the Air Force's desire for the parcel was a major public interest factor bearing upon the exchange, BLM's subsequent rejection of the application falls squarely within the scope of the Bureau's discretion not to consummate an exchange where "information is received which establishes that the exchange is not in the public interest."

In Jack H. Stockstill and Vernon C. Mager, 1 IBLA 278 (1971), the Board upheld the rejection of an exchange application even though a land office had determined that a private exchange under the Point Reyes National Seashore Act was in the public interest and the applicants had submitted a deed to the offered land in favor of the United States. As we noted in that case, Lewis v. Hickel, 427 F.2d 673 (9th Cir. 1970), cert. denied, 400 U.S. 922 (1970) held that the Secretary of the Interior has the power under 43 U.S.C. § 315g to reject applications at any time prior to the issuance of a patent on the selected land, even though the applicants have complied with all the necessary conditions regarding transfer of base lands to the United States. Referring to this Ninth Circuit holding, the opinion in Stockstill, *supra* at page 282 points out that:

\*\*\* 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. Hicke, 427 F.2d 673 (9th Cir. 1970).

Our holding in Stockstill, supra, controls the case at bar. Appellant has by virtue of the exchange application no rights whatever in the selected lands since the decision of BLM is well within its discretionary authority.

Appellant's allegation that the Air Force has obtained the cooperation of Clark County, Nevada, in limiting permissible zoning of the base land in such a manner as to work an unlawful taking of property without just compensation or due process is in no way germane to the resolution of this appeal. Appellant, if it feels wronged by existing zoning restrictions, has its remedy in the appropriate tribunals. The allegation that "the BLM's local and State officers have been aware of the efforts of the Air Force to restrict the permissible zoning of the subject property \* \* \*," does not state any claim upon which relief can be based in this appeal. Whatever the propriety of the Air Force's alleged action, that action concerns the BLM only insofar as the BLM, in its sole discretion, may consider it a relevant factor in determining whether the public interest will be served by the exchange. "The determination of 'public interest' is one committed by law to agency discretion and therefore unreviewable." Lewis, supra at 673.

[2] Appellant additionally pleads reliance as a ground for appeal alleging that the BLM and the Army Corps of Engineers "are responsible for the lengthy delay since 1973 in processing the exchange order" and that, accordingly "The Corporation \* \* \* has limited its efforts in seeking rezoning by the County and judicial redress for the taking of property without due process." Even assuming that estoppel 1/ could lie against the United States in a

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1/ In United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973), the court stated:

"It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress.

"As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public interest \* \* \*. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it." Utah Power & Light Co. v. United States, 248 U.S. 389, 409 (1917)."

land exchange case, the facts here do not warrant its application. In United States v. A. B. Fleming, 20 IBLA 83, 97 (1975), this Board dealt with a similar claim of reliance in the form of the equitable estoppel defense of a lode mining claimant. We held in that case that:

\* \* \* The elements of equitable estoppel require in this instance that some agent of the Government who was authorized to declare the claims valid should have falsely misrepresented to or concealed material facts from the appellants concerning the validity of these claims with the intention that the appellants should act upon it, with the result that appellants were thereby induced to do so to their ultimate damage. See Utah v. United States, 284 U.S. 534, 545 (1932); Cramer v. United States, 261 U.S. 219, 234 (1923); Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960); Fogle v. Hal B. Hayes & Associates, Inc., 211 F.Supp. 260, 264 (D. Calif. N.D. 1963); cf. United States v. Georgia-Pacific Co., 421 F.2d 92, 95-97 (9th Cir. 1970); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973).

Appellant states that it "relied upon representations of the Air Force and the favorable feasibility statement of the BLM \* \* \*." The record, however, fails to disclose any unequivocal statements by either the BLM or the Air Force with respect to the ultimate outcome of the exchange proposal. We note furthermore that under the test of Fleming, *supra*, no representations made by the Air Force concerning public land controlled by BLM could qualify as representations "made by a person who was authorized" to do so. Thus appellant can rest its reliance claim only on the BLM "feasibility" statement, a document (appellant's Exhibit "C") which expressly qualifies its potentially favorable projection by stating "the proposal appears to be feasible at this stage in time, but will be subject to future review of lands reports, environmental analysis, and appraisal \* \* \*" (Emphasis added).

Even in retrospect, the foregoing can hardly be described as a misrepresentation of the facts surrounding the land exchange proposal. The BLM potential feasibility statement is a guarded, cautious assessment of the sort which would not induce a reasonable man to consider the exchange a certainty. Appellant, moreover, has not demonstrated any irreparable damage proceeding from its alleged confidence that the exchange would take place. If it limited its efforts in seeking rezoning, it is free to make those efforts at the present time. Similarly, it may seek "judicial redress for the unlawful taking of property" which, it contends, the zoning ordinance visits upon it.

The facts of this appeal present no case for the assertion of an equitable estoppel claim which would restrict the discretion of BLM. Since the denial of appellant's exchange proposal is otherwise within the scope of that discretion, there is no reversible error in the decision below.

We note also that section 8 of the Taylor Grazing Act, 43 U.S.C. § 315g (1970) under which the application was filed, was repealed by The Federal Land Policy and Management Act of 1976, P.L. 94-579 on October 21, 1976.

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.

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Frederick Fishman  
Administrative Judge

We concur:

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Martin Rivto  
Administrative Judge

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Newton Frishberg  
Chief Administrative Judge

