UNITED STATES DEPARTMENT OF AGRICULTURE

OFFICE OF INSPECTOR GENERAL

Washington D.C. 20250

DATE: August 26, 1998

REPLY TO
ATTN OF: 08003-4-SF

SUBJECT: Title to Physical Improvements on the Zephyr Cove Land Exchange

TO: Mike Dombeck
Chief
Forest Service

ATTN: Andrea Fowler
Audit Liaison

This evaluation report is a part of our ongoing regionwide audit of the Pacific Southwest Regional Office Land Adjustment Program (Audit No. 08002-1-SF). This report deals with the ownership of the physical improvements on the Zephyr Cove land exchange, which the Forest Service needs to immediately address.

In accordance with Departmental Regulation 1720-1, please furnish a reply within 60 days describing the corrective action taken or planned and the timeframes for implementation. Please note that the regulation requires a management decision to be reached on all findings and recommendations within a maximum of 6 months from date of report issuance.

The Office of the Chief Financial Officer (OCFO), U.S. Department of Agriculture, has responsibility for monitoring and tracking final action for the findings and recommendations. Please note that final action on the findings and recommendations should be completed within 1 year to preclude listing in the semiannual report to Congress. Please follow your agency's internal procedures for forwarding final action correspondence to OCFO.

ROGER C. VIADERO
Inspector General

# FOREST SERVICE
# PACIFIC SOUTHWEST REGION
# TITLE TO PHYSICAL IMPROVEMENTS ON THE ZEPHYR COVE LAND EXCHANGE
# LAKE TAHOE BASIN MANAGEMENT UNIT
# SOUTH LAKE TAHOE, CA
# EVALUATION REPORT NO. 08003-4-SF

**AUGUST 1998**

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**UNITED STATES DEPARTMENT OF AGRICULTURE**
**OFFICE OF INSPECTOR GENERAL - AUDIT**
**WESTERN REGION**
**600 HARRISON STREET, SUITE 225**
**SAN FRANCISCO, CA 94107**

# EXECUTIVE SUMMARY

## FOREST SERVICE
## PACIFIC SOUTHWEST REGION
## TITLE TO PHYSICAL IMPROVEMENTS ON THE ZEPHYR COVE LAND EXCHANGE
## LAKE TAHOE BASIN MANAGEMENT UNIT
## SOUTH LAKE TAHOE, CA
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### PURPOSE

This evaluation report presents the results of the U.S. Department of Agriculture, Office of Inspector General's (OIG) ongoing review of the Zephyr Cove land exchange transaction at Lake Tahoe. The review is part of our audit of the Pacific Southwest Regional Land Adjustment Program. As a result of recent events, this evaluation report, which focuses only on the ownership of the physical improvements on Zephyr Cove, is being issued before the regionwide audit is completed so the Forest Service (FS) can immediately address the reported concerns. During our audit, we became aware of matters that require the assistance of OIG Investigations. On July 14, 1998, OIG Investigations opened an investigation on the issues surrounding the Zephyr Cove land exchange and its improvements.

### RESULTS IN BRIEF

The FS regional office is in serious jeopardy of losing management control over the Zephyr Cove lands it has recently acquired in a land exchange valued at $38 million. Our evaluation found that this was due in part to the questionable actions of the land exchange proponent relating to the alleged sale and transfer of publicly-owned improvements to a private party. Upon taking possession of the improvements, the private party informed the FS of its intention to fully commercialize and develop the FS lands contrary to the FS' original purpose of acquiring the environmentally sensitive property for conservation and general public access.

The Office of the General Counsel (OGC) issued an opinion which stated that the FS is the legal owner of the improvements and that the proponent had no authority to sell and transfer the Government-owned improvements to the private party. Despite the OGC opinion, the FS is continuing to accommodate the private party by agreeing to another land exchange giving the private party a portion of the lands for its private commercial use in return for other private lakefront lands. We seriously question the rationale of this exchange since it not only violates the land conservation objective of the FS but also increases FS boundaries and administrative costs.

To preclude further deterioration of the FS' control of the Zephyr Cove lands, it is imperative that the FS immediately

take aggressive action to assert its ownership of the property and all its improvements.

## KEY RECOMMENDATIONS

We recommend that the regional office consult with OGC and the Department of Justice (DOJ) to determine the legal actions necessary to assert ownership rights to the Zephyr Cove improvements. Also the regional office needs to determine the compensation due the FS for the adverse occupancy of the publicly-owned improvements and, with OGC's and DOJ's approval, bill the private party for the amount due. Finally, the FS must cease all actions, including the contemplated land exchange, with the private party, the proponent, and other concerned parties until the ownership issues relating to the improvements are resolved in consultation with OGC and DOJ.

We informally discussed these issues and recommendations with the regional lands staff and regional OGC attorneys. On July 30, 1998, the regional forester wrote to the regional OGC attorney to refer the matter relating to the Zephyr Cove improvements to DOJ for the appropriate actions.

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# INTRODUCTION

## BACKGROUND

In the fall of 1995 the proponent proposed a land exchange with the Bureau of Land Management (BLM) to acquire Federal lands in the Las Vegas valley in exchange for non-Federal lands throughout Nevada. The non-Federal lands offered for exchange included a 46-acre parcel in the Lake Tahoe Basin known as Zephyr Cove. This property is located on the shore of Lake Tahoe, with approximately 3,000 feet of sandy beach, a small wetland area, meadow, creek, and a 10,000-square-foot mansion and other buildings. The property supports a variety of sensitive plant and wildlife species, as well as four distinctive micro-ecosystems. Zephyr Cove's appraised value of about $38 million made this the most expensive land exchange in FS' history.


**VIEW OF ZEPHYR COVE'S BEACHFRONT TO LAKE TAHOE**

Because the property was located within the boundaries of the Forest Service (FS) Lake Tahoe Basin Management Unit (LTBMU), the proponent contacted the FS to obtain their concurrence on the proposed exchange. The regional forester said that acquiring the Zephyr Cove property was a "once in a lifetime opportunity." The LTBMU's lands officer said that the Zephyr Cove property offered extraordinary opportunities for the public and the protection and management of Lake Tahoe. The LTBMU forest supervisor considered the acquisition of the quarter mile of sandy beach to be a great public benefit because public beach access to Lake Tahoe was extremely limited.

FS lands staff wished to acquire the Zephyr Cove property in an unimproved, natural state. They acquired 35 unimproved acres, valued at about $24.3 million, in the first phase of the proponent's exchange with BLM. Title to this portion of the property was transferred to the FS in the fall of 1996. The FS then agreed to acquire the remaining 11 acres in the second phase of the proponent's land exchange with BLM. The 11-acre parcel was appraised for $13.5 million under the assumption that the improvements would be removed and that no encumbrances existed on the property. This parcel was transferred to the FS on April 25, 1997.

## OBJECTIVES

Our objective for this phase of the audit of the Zephyr Cove land exchange was limited to determining if the FS had taken the necessary actions to protect its ownership rights to the Zephyr Cove improvements.

## SCOPE

This evaluation report covers only the issue of the ownership of the improvements on the Zephyr Cove land exchange. Our audit of other aspects of the Zephyr Cove land exchange and other land transactions at the LTBMU is continuing and any additional issues identified in the audit will be included in our audit report of the FS Pacific Southwest Region Land Adjustment Program. Due to the critical nature and timing of the Office of Inspector General's (OIG) recommendations on this issue, it was imperative that this evaluation report be issued before the regionwide audit report so the FS can immediately address the concerns noted herein. The evaluation was performed in accordance with the Quality Standards for Inspections issued in March 1993 by the President's Council on Integrity and Efficiency.

During our audit, we became aware of matters requiring the assistance of OIG Investigations. On July 14, 1998, OIG Investigations opened an investigation on the matters relating to the Zephyr Cove land exchange and its improvements.

## METHODOLOGY

To accomplish our review concerning the improvements on the Zephyr Cove land exchange, we performed the following steps and procedures.

- At the FS Washington Office, we interviewed staff in the lands section to determine their concerns about the Zephyr Cove land exchange.

- At the FS regional office, we interviewed lands staff members to discuss the procedures being taken to take ownership of the Zephyr Cove improvements. In addition, we reviewed the exchange case files, discussed the exchange with lands staff, and obtained copies of the appraisals and other relevant documents.

- At the LTBMU, we met with forest staff to discuss the improvements on the Zephyr Cove land exchange. We also reviewed the exchange case files and discussed the exchange with lands staff.

- We met with regional staff attorneys at the Office of the General Counsel (OGC) to discuss legal issues identified during the evaluation and the legal opinion that had been provided to the FS.

- We interviewed management and lands staff individuals at BLM in the Nevada State office and Las Vegas district office concerning their involvement in the Zephyr Cove exchange.

- We interviewed an auditor at the Office of Inspector General, Department of the Interior, concerning their prior work involving the Zephyr Cove land exchange.

# FINDINGS AND RECOMMENDATIONS

## I. THE FOREST SERVICE IS IN JEOPARDY OF LOSING MANAGEMENT CONTROL OVER ZEPHYR COVE LANDS IT HAS RECENTLY ACQUIRED FOR $38 MILLION

The FS is in jeopardy of losing management control over the Zephyr Cove lands that it recently acquired in a land exchange valued at about $38 million. Our evaluation found that this was due in part to questionable actions by the proponent relating to the alleged sale and transfer of publicly-owned improvements to a private party. The private party has taken possession, occupied, and restricted FS and public access to the improvements and the surrounding public lands and has informed the FS that it either wants to fully commercialize and develop the surrounding public lands into an exclusive resort establishment or to use the improvements as a private estate home, contrary to the FS' original purpose of conservation and general public access.

In an April 8, 1998, legal opinion, OGC stated that title to the Zephyr Cove land and improvements was transferred to the FS on April 25, 1997. Instead of asserting the FS' ownership of the improvements, FS officials accommodated the private party and have begun negotiations with the private party for exchanging a portion of the Zephyr Cove lands with the improvements to the private party. The contemplated exchange ignores the FS' pre-existing ownership rights to the improvements and is in direct conflict with the land ownership objectives and conservation mission of the FS.

To preclude further deterioration of the FS' control of the Zephyr Cove lands, it is imperative that the FS consult with OGC and the Department of Justice (DOJ) on taking immediate and aggressive action to assert its ownership of the improvements located on the Zephyr Cove property, and cease all negotiations with the private party and other related parties concerning the Zephyr Cove lands and improvements.

### FINDING NO. 1

### THE FS HAS NOT ASSERTED OWNERSHIP OF PUBLICLY-OWNED IMPROVEMENTS AT ZEPHYR COVE

An exchange proponent improperly sold publicly-owned improvements located on FS lands to a private party. This occurred because the proponent apparently misrepresented information to LTBMU personnel and a private party as to the proponent's rights and interest in the improvements. As a result, the proponent allegedly received approximately $3 million from the sale of publicly-owned improvements. In addition, the private party has taken possession and occupied the publicly-owned improvements, restricted FS and public access to the property, posted "private property" signs on the beach and perimeter of the estate home, and proposed

its own development plans using the Zephyr Cove lands recently acquired by the FS.

The proponent offered the remaining 11 acres of the Zephyr Cove property to the United States of America (USA) in the second phase of its land exchange with BLM. The property was appraised for $13.5 million under the assumption that the improvements located on the property, including a 10,000-square-foot mansion, would be completely removed and that no encumbrances existed on the property. Sometime during the exchange process a decision was made to leave the improvements on the property.

On April 25, 1997, the first warranty deed from the proponent was recorded. It contained no reservations for improvements and title to the land and improvements passed to the FS. On June 25, 1997, a second warranty deed was recorded to include additional statutory authority. This deed also contained no reservations for the improvements. On July 11, 1997 the proponent recorded a third warranty deed. This deed included a reservation for the improvements.

During our audit of the land adjustment program on the Humboldt-Toiyabe National Forest in Nevada (Audit Report No. 08003-02-SF), we became aware of title problems on the Zephyr Cove land exchange. We reported our concerns to the Chief of the FS on June 30, 1997. OIG recommended that the FS take immediate action to resolve issues regarding the property transferred to the Government, including obtaining a legal opinion from OGC concerning the improvements on the Zephyr Cove lands.

The FS requested a legal opinion from OGC on March 24, 1998, approximately 9 months after we notified the FS of our concerns. The full text of the OGC opinion is shown as exhibit A. In essence, OGC responded to the FS request on April 8, 1998, with the following conclusions:

- Title to the Zephyr Cove land was conveyed to the USA on April 25, 1997, with no exception or reservation for the improvements located on the property. Title to the improvements clearly passed to the USA (and the FS) on that date.

- The proponent did not retain title to the Zephyr Cove improvements when it conveyed title to the USA. Furthermore, the proponent never acquired title to the improvements **after** it conveyed the property to the USA.

- Pursuant to the Federal Land Policy and Management Act (FLPMA), title to lands located within a national forest passes to the FS when the deed to the USA is recorded.

- After the title to the property and improvements passed to the USA, FS lands staff at the LTBMU had no authority to authorize the proponent to convey title of the publicly-owned improvements to a private party.

- OGC did not think that equitable estoppel would be applied to the USA in this case.

- If equitable estoppel is not applicable, the proponent’s conveyance of the Zephyr Cove improvements to a private

party on July 2, 1997, is invalid and the third party is not a bona fide purchaser.

Attempts to Sever Improvements from Zephyr Cove Lands Was Not Pursuant to Federal Law

In February 1997, the proponent and LTBMU lands staff worked on developing a mechanism that would allow the proponent to "sever" the improvements from the Zephyr Cove land being exchanged to the FS. An agreement was created that gave the proponent the opportunity to quit claim the improvements to a private party to operate as a concessionaire, or transfer them to the FS. The LTBMU lands officer stated that the FS did not draft the agreement. It was presented to the LTBMU by the proponent with some input from the lands officer. The lands officer thought that the proponent's attorneys had drafted the agreement. The agreement directed that:

> 1) **On or about July 1, 1997**, the proponent shall convey via quit claim instrument all of the proponent's right title and interest in and to all improvements on the Zephyr Cove land (main residence, caretaker's cottage/garage, main entry gate and driveway) to certain individuals and/or entities whose purpose shall be to utilize the Improvements for the purpose of operating a concession. The improvement conveyance shall not convey any interest in the offered lands but shall sever the improvements therefrom and convey only the improvements to the concessionaires.
>
> 2) **On or before July 1, 1997**, and only in the event that Alternative 1 above does not apply, the proponent shall be obligated to convey via quit claim instrument all of the proponent's right title and interest in the improvements (cited above) to the USA. The actual date of conveyance shall not be sooner than July 1, 1997, or later then September 1, 1997 (Alternative 2 Conveyance Date). Within ten (10) business days prior to the Alternative 2 conveyance date, the proponent shall tender to the USA the sum of $42,500 as and for the expected operation and maintenance costs related to the Improvements for a period of three (3) years.

Section 1.3.2 of the agreement specified that the USA (FS) would notify the proponent in writing on or before June 30, 1997, regarding whether the proponent should elect Alternative 1. If the FS did not notify the proponent as of that date, the proponent would elect Alternative 2 (quit claim to the FS).

The LTBMU forest supervisor and a representative from the proponent signed the agreement on March 5, 1997, **without** consulting OGC to ensure that the agreement met Federal law and that the Government's rights and interests were protected. More than a year passed before OGC had an opportunity to review the agreement. In an opinion dated April 8, 1998, OGC said that the LTBMU did not have the authority to execute this document. Pursuant to the FLPMA, title to lands within a national forest passes to the FS when the deed to the USA is recorded. When this agreement was executed, the USA had no title to the subject land. After title passed to the USA, the LTBMU had no authority to agree that the Government-owned improvements could be severed from the land, and no authority

to authorize or direct the proponent to convey title of the Government-owned improvements to a private party.

OGC stated that disposal of publicly-owned property must be pursuant to Federal law and that there was no Federal law supporting this agreement with the proponent. They said that the attempted "severance" may have been an effort to say that the improvements were being used but not the land. OGC concluded that such an argument had no legal merit because the improvements were in place on the land and used the land.

The legal opinion stated that any reservation of the right to use land to be conveyed to the FS had to comply with Title 36 Code of Federal Regulation 251.17, effective on January 6, 1971. This regulation specifies that owners of a property, like the proponent, can reserve the right to occupy and use the land for various purposes, but any reservations must be stated in the warranty deed when title is conveyed to the USA, and must specify the area to be encumbered by the improvements, the intended use, and the duration of the reservation. Any reservation for such use would require that the appraisal be redone to reflect the effect on the value of the lands being conveyed to the USA.

The Warranty Deed Transferred the Title of Zephyr Cove Lands and Improvements to the FS

An Interagency Agreement between BLM and the LTBMU, dated July 23, 1996, specified that the proponent was responsible for preparing and recording the warranty deeds and other legal documents needed to transfer ownership of the Zephyr Cove property to the USA. The proponent recorded the first warranty deed for phase 2 of the land exchange on April 25, 1997. **The deed contained no exceptions or reservations for the improvements on the property.** Consequently, title to both the land and the improvements passed to the FS at that time. On June 17, 1997, the BLM Nevada State office formally accepted the warranty deed conveying title to the land and the improvements to the USA.

The Proponent Quit Claims Zephyr Cove Improvements to a Private Party

The proponent did not have ownership to the Zephyr Cove improvements and it also did **not** have the right to choose the options pertaining to the disposition of the improvements. However, on June 30, 1997, the proponent wrote to the acting LTBMU forest supervisor and improperly advised him that pursuant to the terms of its agreement with the LTBMU, the proponent had reached an agreement to convey the improvements to a private party. The letter also stated that unless the proponent was informed to the contrary, the matters set forth in the letter would be deemed approved by the USA and in full compliance with the agreement. The selection by the proponent was not in compliance with the agreement, which gave the FS the sole right to decide on the disposition of the improvements.

We interviewed the acting forest supervisor who received the letter. He stated that he arrived at the LTBMU in April 1997 and was not familiar with the agreement between the proponent and the LTBMU. He said that he met with the proponent during the last week of June 1997 and that the proponent claimed that

its agreement with the LTBMU gave it the right to convey the improvements to a private party to operate as a concessionaire. He said that the proponent **never** discussed the other alternative that was available (quit claim to the FS) nor did it tell him that only the FS had the right to choose how to dispose of the improvements.

At the time of the June 1997 meetings, the proponent knew that there were questions over the legal ownership of the Zephyr Cove improvements. The LTBMU lands officer also knew about the title problems. The acting forest supervisor stated that, at the time of the June meetings, he had not heard of any title problems related to the Zephyr Cove land exchange. He told us that neither the proponent nor the lands officer communicated any such information to him.

The acting forest supervisor told us that in the final week of June 1997, he received frequent calls from the proponent, local county commissioners, and the private party who intended to purchase the improvements from the proponent. The acting forest supervisor said that each of these parties wanted him to agree to the proponent's choice of a concessionaire and to promise that the FS would allow the private party to operate as an FS concessionaire after it bought the improvements from the proponent. The acting forest supervisor said that he would not promise to issue a special use permit.

The acting forest supervisor told us that as a result of the pressure from the proponent, county commissioners, and the private party, he sent a letter to the proponent on June 30, 1997, acknowledging the proponent's choice to sell the improvements to the private party. In this letter the supervisor told the proponent that "as agreed, the buyer must be approved by the FS to ultimately operate the improvements on National Forest System lands." He also told the proponent that the third party "must understand **there is no guarantee** of being able to operate." When we discussed the contents of the June 30, 1997, letter with the acting forest supervisor, he stated that had he known that the FS could have directed the proponent to transfer the improvements to the FS, he would not have agreed to let the proponent transfer and sell the improvements to the private party.

On July 2, 1997, the acting forest supervisor sent another letter to the proponent stating that "the FS has decided to select Alternative #1 regarding the Zephyr Cove property." This letter gave the impression that the acting LTBMU forest supervisor had selected the concessionaire option as specified in the agreement when he had not. He told us that the July 2, 1997, letter was prepared by the LTBMU lands officer, and that he signed it because he thought it was a necessary part of completing the agreement with the proponent. He reiterated that the proponent had selected the concessionaire option, not the LTBMU, and that he did not know that the agreement gave him the option to transfer the improvements to the FS. In addition, the letter was dated July 2, 1997, two days after the concessionaire option terminated.

During our meeting with OGC attorneys and FS regional lands staff on August 3, 1998, the FS regional lands director stated that the FS' official position regarding the July 2, 1997, letter signed by the acting forest supervisor was that it was issued in error. The acting forest supervisor was not

authorized to sign the letter, nor did he have the delegated responsibility to make the decision regarding the Zephyr Cove improvements.

The Proponent Improperly Recorded Third Deed to Transfer Publicly-Owned Improvements Back to the Proponent

Soon after the recording of the first warranty deed, the proponent was informed by BLM lands officials that title to the Zephyr Cove land and improvements had passed to the FS on April 25, 1997. The proponent then prepared another warranty deed that contained language reserving the improvements to the proponent. However, significant terms of the reservation, such as the area encumbered by the improvements, purpose of use, and duration of the reservation were not spelled out.

As stated in OGC's April 8, 1998 opinion, any reservation of the improvements would require a revaluation of the Zephyr Cove land being offered by the proponent. This statement was confirmed by the FSWO Chief Appraiser. The **unencumbered** Zephyr Cove property had an appraised value of $13.5 million. A reservation for improvements operated as a concessionaire and encumbering about 6 acres, would reduce the land's value by as much as $10 million. However, the appraised value was not reduced to reflect the improvement reservation. In addition, the FSWO Chief Appraiser stated that the $13.5 million appraisal became void when the decision was made to leave the improvements on the land because the estate that had been appraised was not the same estate being conveyed to the public. Leaving the appraisal unchanged would result in the public paying more than fair market value for the property.

The revised warranty deed was recorded for the proponent on July 11, 1997, almost 3 months after the USA had accepted title to the Zephyr Cove land and the improvements. Also recorded was the official BLM acceptance of the original warranty deed, dated June 17, 1997. Rerecording the BLM acceptance signature document with the revised warranty deed created the false impression that BLM had accepted the new warranty deed when, in fact, it had not. According to FS lands staff, the proponent recorded the replacement warranty deed without BLM or FS knowledge or review.

OGC did not have an opportunity to review this revised warranty deed until the spring of 1998. In their April 8, 1998, opinion, OGC said that the proponent's attempt to add reservation language to a third warranty deed was void due to its vagueness. Consequently, the proponent had not reserved any right to use the Zephyr Cove improvements, and they continued to remain in FS ownership.

The Proponent Reportedly Received Benefits Estimated at $3 Million From the Sale of Publicly-Owned Improvements

Although the proponent knew title to the improvements passed to FS ownership on April 25, 1997, the proponent sold and transferred the publicly-owned improvements to the private party on July 2, 1997. The private party reportedly paid the proponent $300,000 plus additional consideration. This consideration included giving the proponent and its executives the exclusive use, including all amenities and services, of the Zephyr Cove luxury estate home and guest cottage for a total of 7 weeks during the months of February, March, July,

August, and September of each year, and 2 golf memberships at a well-known and prestigious golf course (owned by the private party) in Lake Tahoe for a period of 20 years. Use of the improvements and the golf memberships would be provided as long as the private party was able to operate the improvements as an FS concessionaire. The private party estimated the total compensation to the proponent for the Zephyr Cove improvements at approximately $3 million. The entire agreement between the proponent and the private party was not released for our review. Consequently we could not determine if additional conditions apply to the private party's purchase of the improvements and/or if other forms of compensation have been granted to the proponent.

A Private Party Took Possession of the Publicly-Owned Improvements, Restricted FS and Public Access, and Planned for the Development of the Public Lands

After the private party allegedly purchased the improvements from the proponent, the private party locked the gates leading into the Zephyr Cove property and the entire 43 acres acquired by the FS at a cost of $38 million. Since the property was completely fenced, the locked gates made the property inaccessible to FS personnel and the general public. The entire 43-acre parcel was posted with "private property" signs. The private party also maintained a caretaker to watch the grounds and keep the public away from the improvements.

**LOCKED GATE ENTRANCE TO ZEPHYR COVE PROPERTY**

The Zephyr Cove property was closed off to the FS until April 30, 1998, over one year after the FS acquired title to the Zephyr Cove property. At that time, under the direction of the FS regional office, the LTBMU lands staff removed small portions of the chain link fencing surrounding the Zephyr Cove property and some of the private property signs erected by the private party.

On January 21, 1998, the private party submitted a special use application to the LTBMU for use of the FS lands surrounding the estate house. The private party wanted FS approval to use the estate house for group meetings and conferences. In addition to the original improvements, the private party stated that additional structures might be placed on the FS property including, but not limited to, gazebos, tennis courts, swimming pools, picnic areas, guest and employee parking, and driveways. The application proposed using all 46 acres recently acquired by the FS at a cost of $38 million, plus an additional 33 acres of FS land adjacent to the Zephyr Cove property for an exclusive bed and breakfast and conference center.

The private party's application anticipated using the FS land to accommodate the needs of various groups using the estate home (for 50 to 100 people) and did not include any provisions for general public access to the quarter mile of Lake Tahoe shoreline or provide for any general public use of the 80 acres of FS land that the private party wished to utilize for its own customers. In effect, the special use application proposed using 80 acres of prime FS lakefront land, including the newly acquired Zephyr Cove property, for the sole benefit of the private party's clientele residing at the estate house or participating in conferences held there.


**"PRIVATE" SIGN POSTED BY PRIVATE PARTY ON PUBLIC LANDS OWNED BY THE FS AT ZEPHYR COVE**

Within a few months of its acquisition, FS management control over public lands at Zephyr Cove, for which it paid about

$38 million, is now seriously in jeopardy, subject to the dictates of the private party occupying and asserting ownership of the improvements.

The FS Has Not Asserted Ownership of Zephyr Cove Improvements

In their April 8, 1998, opinion, OGC told FS officials that title to the Zephyr Cove improvements passed to the FS on April 25, 1997, and that the proponent's conveyance of the Zephyr Cove improvements to a private party on July 2, 1997, was invalid. OGC did not think the USA (FS) could be equitably estopped from asserting its ownership rights because it would not be a serious injustice if the sale to the private party was invalidated and because the public interest would be harmed if the transaction was allowed to stand.

After receiving the OGC opinion, the FS regional office lands staff became actively involved in resolving the Zephyr Cove situation at the LTBMU. Even though the OGC opinion stated that the FS had title to the improvements, by May 1998 the regional office had begun negotiations with the private party to do another land exchange (see Finding No. 2).

We concur with the OGC opinion (see exhibit A) dated April 8, 1998, that the FS is the legal owner of the Zephyr Cove land and all the improvements upon it. The FS has fully paid the proponent about $38 million for the complete, unencumbered use of the Zephyr Cove property for the enjoyment of the general public. The proponent neither had the right to retake ownership of the improvements nor to sell the publicly-owned improvements at a profit to a private party. The private party has no legal basis to occupy or use the facilities and to restrict the FS' and the public's access to the public lands at Zephyr Cove. In consultation with OGC and DOJ, the FS should take legal action to assert its rightful ownership of the improvements, take possession of the improvements, and remove all unauthorized private parties from the public lands at Zephyr Cove. In addition, the FS should determine the amount of compensation due from the private party during the period of their adverse occupancy of the publicly-owned improvements and land, and with OGC's and DOJ's approval, bill the private party for the amount due.

## RECOMMENDATION NO. 1a

In consultation with OGC and DOJ, take legal action to immediately assert rightful ownership of the Zephyr Cove improvements and take possession of them. Remove all unauthorized private parties from the FS property.

## RECOMMENDATION NO. 1b

Determine the compensation due from the private party for the period of their adverse occupancy of the FS land and improvements, and with OGC's and DOJ's approval, bill the private party for the amounts due.

## FINDING NO. 2

## CONTEMPLATED LAND EXCHANGE WITH PRIVATE PARTY DOES NOT COMPLY WITH FS OBJECTIVES AND IS NOT IN THE PUBLIC'S INTEREST

In order to resolve the dispute over the management of the Zephyr Cove lands, the FS regional office has begun negotiations with the private party for a portion of the recently-acquired Zephyr Cove lakefront property in exchange for other lands of equal value. However, the proposed exchange will mean the transfer of recently acquired, environmentally sensitive shoreline property to private interests for future development and the creation of an "inholding" (or private lands surrounded by FS lands), increasing FS boundaries and administrative costs. We seriously question the rationale and legality of such an exchange, since it ignores the FS pre-existing ownership of the improvements on the Zephyr Cove property (See Finding No. 1) and is in total conflict with the mission and objectives of the LTBMU. The exchange not only results in a fragmented ownership of FS lands but also disposes of environmentally sensitive and highly desirable recreation lands for private development.

The FLPMA of 1976, Section 102 requires that public lands be retained in Federal ownership unless it is determined that the disposal of a particular parcel will serve the national interest. It specifies that public lands be managed in a manner that will protect the quality of...scenic, ecological, environmental, and water resources and that, where appropriate, will preserve and protect certain public lands in their natural condition, that will provide food and habitat for fish and wildlife and domestic animals, and that will provide for outdoor recreation and use. Section 102 (10) states that the exchange of such lands be established by statute, requiring that each disposal, acquisition, and exchange be consistent with the prescribed mission of the department or agency involved.

The primary purpose of the LTBMU's Land Ownership Adjustment Plan is to acquire land that will enhance public recreation opportunities and obtain an optimum land base for resource management. Priority for acquisitions is as follows:

a. Lands with lake and stream frontage for public access and use.

b. Lands suitable for campground, picnic, and other recreational development, or which enhance adjacent lands with similar values.

c. Lands, the development of which is imminent, which would adversely affect national forest lands or other public values.

d. Lands in the backcountry and in shoreline areas needed to protect scenic, wildlife habitat, and watershed values.

FS Negotiated to Give Portion of Zephyr Cove Land to the Private Party

The FS acquired the Zephyr Cove property in a two-phased land exchange. The first phase was completed in the fall of 1996 and involved 35 unimproved acres of the 46-acre tract. The second phase, appraised at $13.5 million, included the remaining 11 acres. Title to that property, and the improvements located upon it, was transferred to the FS on April 25, 1997. However, a dispute soon arose over the legal ownership of the Zephyr Cove improvements (see Finding No. 1). Even though an OGC opinion stated that the FS had legal title to the improvements, the FS regional office has begun negotiations with the private party for approximately one-half (6 acres) of the Zephyr Cove property for other lands located in the Lake Tahoe Basin.

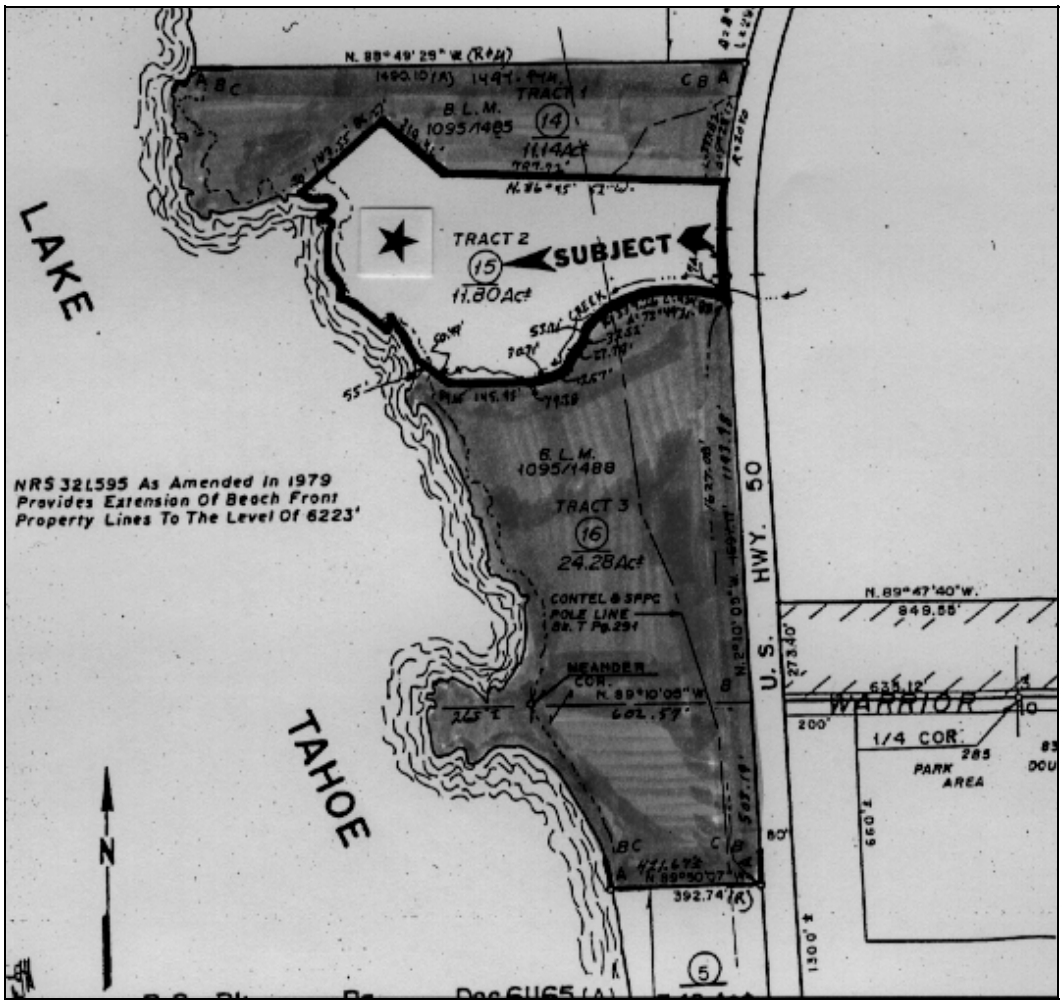
The Zephyr Cove Property Identified for Disposal to the Private Party Provides Significant Benefits to the Public

The Zephyr Cove property is a 46-acre parcel located on the shore of Lake Tahoe. With an appraised value of about $38 million, the Zephyr Cove property is the most expensive land exchange in FS history. FS lands management staff argued that the high price was justified because the property offered a long expanse of sandy beach (approximately a quarter mile) for public access and use, provided sensitive species habitat, and opportunities for watershed enhancement and fisheries improvement, and has a meadow habitat for wildlife. The regional forester said that acquiring the Zephyr Cove property was a "once in a lifetime opportunity." Acquiring the Zephyr Cove property and its rare shorefront and beach access was the LTBMU’s highest priority.

The Proposed Land Exchange Ignores FS Ownership of Improvements, Does Not Comply With Land Management Objectives, and Is Not in the Public’s Interest

The FS has begun negotiations with the private party for 5 to 7 acres of the Zephyr Cove property including the improvements and the majority of valuable shoreline and sandy beach access fronting the estate. The total acreage to be given up by the FS is still being discussed, but it must provide the private party with enough land to operate a private commercial venture on the property. In exchange, the private party would be required to locate an alternative piece of land in the Lake Tahoe Basin, preferably with lakeshore frontage.

In a recent meeting with FS officials, the private party indicated that they expected to pay less than the $1.14 million per acre recently paid by the FS if they acquire the Zephyr Cove lands. The private party claims that the value of the Zephyr Cove lands has been significantly reduced due to the FS ownership of adjacent lands. To further accommodate the private party, the FS even agreed to pay for half of the appraisal expenses of the contemplated land




**FS ZEPHYR COVE LANDS (SHADED AND OUTLINED). ★ INDICATES THE PORTION BEING CONTEMPLATED FOR DIVISION AND EXCHANGE.**

exchange with the private party.

One of the private parcels being discussed for FS acquisition is the Mandell Estate, an 8-acre parcel located on Lake Tahoe. This parcel contains four lakefront homes and has been on the market for a year and a half at $27 million. It is located in the prestigious Incline Village district and is surrounded by a private subdivision of multimillion-dollar homes. In a recent Lake Tahoe news article, the potential acquisition of the Mandell Estate by the FS is already being actively protested by local residents.

Exchanging a crucial portion of the Zephyr Cove lands to the private party allows private development and restricts access to public lands that have been identified as having sensitive plant and wildlife species, distinctive micro-ecosystems, opportunities for watershed enhancement, fisheries improvement, meadow habitat, and an unprecedented stretch of unbroken sandy beach for open public use and recreation. Disposal of environmentally sensitive lands for commercial

development directly violates the essence of the Santini-Burton Act, which provides for the conservation and environmental protection of Lake Tahoe, the overall objective of the LTBMU.

The disposal of the Zephyr Cove lands will create a private enclave within FS boundaries and fragment FS land ownership, thereby increasing FS administrative costs. Acquisition of the Mandell estate would further exacerbate the problem. The Mandell estate already contains four lakefront homes that must be demolished and sits on developable acreage in the Lake Tahoe Basin, where developable land is scarce. In addition, acquiring the Mandell estate would create an isolated FS parcel in the midst of a developed subdivision, further increasing FS boundaries and administrative costs.

We concur with the OGC opinion that the FS is the legal owner of the Zephyr Cove land and the improvements upon it. The private party has no legal right to occupy or use the improvements (see Finding No. 1), nor does it have any legal basis to negotiate for the use of the Zephyr Cove lands. The FS must cease all actions with the private party and other related parties concerning the future use of Zephyr Cove lands and improvements until the ownership issues relating to the improvements are resolved in consultation with OGC and DOJ.

## RECOMMENDATION NO. 2

Cease all actions with the private party, the proponent, and other related parties concerning the Zephyr Cove lands, including the contemplated land exchange, until the ownership issues relating to the physical improvements are resolved in consultation with OGC and DOJ.

# *EXHIBIT A - OPINION OF THE OFFICE OF THE GENERAL COUNSEL ON THE ZEPHYR COVE IMPROVEMENTS*

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April 8, 1998

ES RECEIVED R-5
APR 10 1998
NATURAL RESOURCES MANAGEMENT

TO: Philip H. Bayles
Director
Lands and Minerals

RE: Zephyr Cove Exchange--Phase 2

This letter is in response to your letter dated March 24, 1998. In Phase 2 of the subject Zephyr Cove exchange, Tract 2 (consisting of approximately 11.8 acres) was acquired in exchange for $13,500,000.00 of Department of Interior, Bureau of Land Management (BLM) lands in Clark County, Nevada. In Phase 1, Tracts 1 and 3 (consisting of 35.4 acres) were acquired in exchange for $24,500,000.00 of BLM lands in Clark County, Nevada.

The pertinent documents which have been provided to this office are listed below as documents 1 through 17. The first fourteen are the same documents which have been given to all parties as attached to the Chronology prepared by your office, and are numbered as they are in the Chronology. Documents 15, 16 and 17 have been added.

1. The August 21, 1996 BLM Preliminary Title Opinion issued by John Payne, Assistant Regional Solicitor, Pacific Southwest Region. This opinion only relates to Phase 1. We have not seen any title opinion relating to Phase 2. Any title opinion relating to Phase 2 should reference Policy of Title Insurance # 200594MTV, which is attached as document 17.

2. The September 5, 1997, Exchange Agreement between BLM and the Olympic Group, a Limited Liability Corporation (Olympic).

3. The March 3, 1997, BLM letter to the Lake Tahoe Basin Management Unit, Forest Service, United States Department of Agriculture (the Unit is referred to as the LTBMU; the Forest Service is referred to as the FS), regarding appraisal of Phase 2 as if the improvements were not there. In this letter, Saundra L. Allen, the Deputy State Director, BLM, Reno, Nevada, states that Olympic intends to convey possession of the improvements to a concessionaire who would obtain a lease from the FS. After closing, the letter states that the FS will have to determine the economic rental value of the site needed to support the improvements.

4. The March 5, 1997, LTBMU-Olympic Agreement giving the United States of America the option to have the improvements conveyed to the USA for no consideration or the option to have Olympic convey the severed improvements to a concessionaire.

5. The March 19, 1997, FS appraisal review. The land is appraised as if the improvements were not there. Document 3 is discussed in the appraisal review. On page 5, the document states that the appraisers concluded that the change in appraisal instructions regarding the disposition of the improvements had no effect on the value of the land as originally appraised.

6. On April 25, 1997, the first deed from Olympic to the USA was recorded. There was no reservation of improvements in the deed.

7. On June 17, 1997, the deed from Olympic to the USA was notarized. This deed contained a reservation that was subject to 36 CFR 251.17. This is the deed which was later recorded on July 11, 1997 as the third deed to the USA. See document 14 below.

8. On June 25, 1997, the second deed from Olympic to the USA was recorded. There were no reservations in this deed. It is the same deed as document 6, except that what was recorded included acceptance by BLM and the citation of an additional statutory authority for the transaction.

9. On June 25, 1997, Olympic recorded a Memorandum of Interest reserving the improvements as per the March 5, 1997, document, number 4 above. Number 9 was recorded immediately after document number 8 was recorded.

10. The June 30, 1997, letter from Olympic to the LTBMU recommending conveyance of the improvements to Park Cattle Co. (Park).

11. The June 30, 1997, letter from the LTBMU to Olympic in response to document number 10. The letter states Park has no guarantee of being able to operate.

12. The July 2, 1997, letter from the LTBMU to Olympic selecting alternative 1 of the March 5, 1997, agreement, which is to have Olympic convey the severed improvements to a concessionaire.

13. On July 2, 1997, the quitclaim deed of the improvements from Olympic to Park was recorded. This deed included a reservation by Olympic. See document 16 for the extent of the reservation.

14. On July 11, 1997, Olympic recorded its third deed to the USA which included a reservation that quoted 36 CFR 251.17. This deed stated that it replaced the first recorded deed to the USA, document 6 above. The acceptance of title by BLM attached is the acceptance attached to the second recorded deed to the USA, document 8 above. There is no new acceptance of title for this third recorded deed to the USA.

The three additional documents not shown in the FS Chronology are as follows:

15. A warranty deed from Olympic to the USA dated October 3, 1996, recorded October 9, 1996, as document 398321, in Book 1096 at page 1485. This document conveyed tract 1. The

deed contained a reservation of a 40 foot exclusive easement for ingress, egress, landscaping, gates, fences, utilities and other incidental uses.

16. Six pages from an Agreement dated July 1, 1997, between Olympic and Park which sets forth the seven week reservation in the improvements to Olympic and attached the March 5, 1997, document (number 4 above) as an exhibit. It states the purpose of Park is to seek a concession arrangement and special use authorization. This Agreement has the same paragraph numbering system as the attachment to document 2 and as document 4. This may indicate who prepared document 4.

17. Policy of Title Insurance # 200594MTO, which was issued on April 25, 1997.

For purposes of analysis, I have broken this transaction into two parts. The first is the BLM-Olympic transaction and the second is the Forest Service-Olympic transaction.

BLM-Olympic Transaction

In the initial stages of this acquisition, Olympic was willing to tear down the improvements. Apparently, the Nevada BLM State Director made, or concurred in, a decision that the improvements would remain. When and why this decision was made, and how this decision relates to document 4, is unclear. However, it is clear that the USA did not include the value of the improvements in its appraisal of the 11.8 acres. See documents 3 and 5. Because of this appraisal condition, removal of the improvements would not change the fact that the USA got equal value for the Clark County lands. If the improvements were authorized under a special use authorization, it would appear that the annual fee for the use of the area encumbered would have to be based on a percentage of a land value figure of approximately $1,140,400 per acre, which is the price paid by the USA for the lands.

By documents 6 and 8, title to the subject land was conveyed to the USA with no exception or reservation of the improvements. Looking at only these documents, title to the improvements clearly passed to the USA.

In other words, from a title point of view, Olympic never retained title to the improvements when it conveyed title to the USA by documents 6 and 8. Furthermore, Olympic never acquired title to the improvements after the two conveyances to the USA. Document 4 is not a transfer from the USA to Olympic. It does not purport to be a document of conveyance and the Forest Service did not initiate appropriate action under any authority it does have to convey either real or personal property owned by the government. Document 9 can not create a reserved title to the improvements in Olympic. The Memorandum of Interest does not constitute a conveyance to Olympic.

# EXHIBIT A - OPINION OF THE OFFICE OF THE GENERAL COUNSEL ON THE ZEPHYR COVE IMPROVEMENTS



This is referred to as Part II of the transaction. The next question is what is the effect of the rest of the documents in the file. Documents 3, 4, 9, 10, 11, 12, and 13 are the pertinent documents for this analysis. Document 4 sets up a process whereby the LTBMU is to elect whether title to the improvements will pass to the USA, without further consideration, or whether title to the improvements will be conveyed by Olympic to a concessionaire. This election option states that such conveyance shall convey no interest in the land but shall sever the improvements therefrom.

The FS had no authority to execute Document 4. This document is dated before the first two deeds to the USA. Pursuant to FLPMA, title to lands within a National Forest passes to the FS when the deed to the USA is recorded. When document 4 was executed, the USA had no title to the subject lands. After title had passed to the USA, the LTBMU had no authority to agree that the government-owned improvements could be severed from the land, and no authority to authorize or direct Olympic to convey title to the government-owned improvements to a third party. Disposal of publicly-owned property must be pursuant to federal law. There is no federal law supporting this document. While there are procedures for the disposal of personal property and procedures for contracting for a concessionaire, the Forest Service did not follow those procedures in this case.

There is another problem with the documentation. Any reservation of the right to use land to be conveyed to the FS should have been pursuant to 36 CFR 251.17. The attempted severance of the improvements may have been an effort to say 36 CFR 251.17 did not apply because the severed improvements were being used, not the land. This argument has no legal merit. Even if title to the improvements could be severed from the land, the improvements are in place on the land and use the land.

Document 14 may have been an attempt to comply with 36 CFR 251.17 and reserve the improvements. Since significant terms of the reservation, such as the area encumbered by the improvements, purpose of use, and duration are not spelled out, this document is void for vagueness. In addition, the reservation of such use would require that the appraisal be redone to reflect the effect on the value of the lands being conveyed to the USA. For example, if Park thought it could use the entire 11.8 acres pursuant to the reservation, without paying a fee to the USA, the exchange value received by the USA would be less than that received by Olympic.

Document 9 was recorded immediately after the second deed to the USA. As noted above, it is an ineffective attempt to put of record a chain of title to the improvements based on document 4. Documents 11 and 12 are the letters whereby the LTBMU selects alternative l and tells Olympic that there is no guarantee that Park would be able to operate. By document 13, Olympic quit claims title to Park with a reservation to Olympic. The consideration for this transaction was, according to Park, a "multiple" of $300,000. In January of 1998, Park submitted an application for a Special Use Authorization (SUA) covering all of the lands acquired in Phase 1 and Phase 2 (a total of 47.2 acres), to operate an "upscale" Bed and Breakfast and Conference Center. This application has been withdrawn for refinement.

May the United States be Estopped from Arguing the Second Part of the Exchange is Invalid?

**The only argument I can see that either Park or Olympic could possibly raise is that the United States is equitably estopped by virtue of its conduct from contending that the documents identified in Part II are ineffective to transfer title to the improvements to Olympic and Park.**

The seminal case in this area of law is FCIC v. Merrill, 332 U.S. 380 (1947), which held that traditional estoppel principles do not apply against the federal government. While this principle remains generally valid, the courts have recognized some exceptions. In Spears v. FCIC, 579 F. Supp. 1022 (E.D. Tenn, 1 984), the district court gave some history on the issue of equitable estoppel against the USA. The court stated that the doctrine of equitable estoppel as applied against the government has undergone considerable development since FCIC v. Merrill.

In USA v. Ruby Company, 588 F.2d 697 (Ninth Cir. 1 978), cert denied, 442 US 917(1979), the Ninth Circuit concludes that the Supreme Court has rejected the contention that there are no circumstances in which estoppel may apply to the government. In USA v. Harvey, 661 F.2d 767 (Ninth Cir. 1 980), which was an ejectment action, the USA claimed that equitable estoppel could not be asserted against the government because public lands are held in trust for the people. The court stated that, in a proper case, equitable estoppel could be applied against a government claim to title in real property, citing several cases including US v. Ruby, supra. The case states that more than the technical elements of equitable estoppel have to be proved. The litigant must establish equities that, on balance, outweigh the "inherent equitable considerations which the government asserts as the constitutional trustee on behalf of all the people". The five elements set forth are:

- whether the party to be estopped knew the facts;
- whether the party to be estopped intended or could justifiably be perceived as intending its conduct to induce reliance;
- whether the party asserting the estoppel was ignorant of the facts;
- whether the party asserting estoppel relied upon the government's conduct; and
- whether the government engaged in affirmative misconduct.

In Footnote 10, the court of appeals states that the Supreme Court recently observed that it has never decided what type of conduct by a government official would estop the government, or "whether even 'affirmative misconduct' would estop the government." Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 1470-71, 67 L.Ed.2d 685(1981).

An alternative formulation is provided in Schoonover v. USA, 1993 WL 151146 (N.D. Cal.), where the court states that equitable estoppel will not lie against the Government as it lies against private litigants. (Because this is an unreported district court decision, it will not be cited in any dispute. I found its discussion of the differences between estoppel applied to a private party and estoppel applied to the government to be helpful in this analysis). The four requirements where private litigants are involved are:

1. knowledge of the true facts by the party to be estopped;

2. intent to induce reliance or actions giving rise to a belief in that intent;
3. ignorance of the true facts by the relying party; and
4. detrimental reliance.

When the USA is to be estopped the additional elements are:

5. a party must prove affirmative misconduct going beyond mere negligence;
6. that the government's act will cause a serious injustice; and
7. that the public's interest will not suffer undue damage by imposition of the liability.

It appears that the LTBMU knew the facts as set forth in documents 3, 4, 9, 10, 11, 12 and 13, and that the LTBMU could be perceived as intending its conduct to induce reliance. Olympic and Park have stated they were unaware of any lack of authority on the part of the LTBMU. If the actions of the LTBMU in entering into document 4 and in sending documents 11 and 12 were found to constitute affirmative misconduct, and if the actions of Olympic and Park as set forth in documents 4, 9, 10, and 13 were found to constitute detrimental reliance on the actions of the LTBMU, then it is possible a court could conclude that the USA should be equitably estopped to deny the validity of the conveyance from Olympic to Park.

More specifically, as to item 1, I believe that the United States would be held to have known that it did not have the authority to engage in Part II of this transaction. As to item 2, I have no evidence on the intent of the Forest Service. However, the actions undertaken in Part II of this transaction are inexplicable and indefensible from a legal or title standpoint based on our present knowledge of the events. As to item 3, Park and Olympic have stated that they did not know that the LTBMU did not have the authority to enter into the transaction. However, given that both are very sophisticated in lands transactions, this position is hard to accept at face value. Moreover, since the lack of authority is a matter of federal law, both are on constructive notice that there was no authority for Part II. As to item 4, I believe there is some detrimental reliance, but there is no information as to the extent of it. Moreover, it might be limited to the costs incurred in pursuing this unauthorized transaction.

Finally, while Park and Olympic might be able to establish the first four elements for estoppel, and possibly the fifth, I am not convinced that the evidence would establish that there will be a serious injustice if the transaction is invalidated. Further, I understand that the Forest Service position is that the public interest would surely be harmed if this transaction were allowed to stand.

There are a few additional factors to consider. First, Olympic was initially willing to remove the improvements at no cost to the USA, but it ultimately conveyed the improvements to Park at the direction of the LTBMU. Second, there is some possibility of litigation between Park and Olympic, which would likely also affect the USA. Similarly, while I believe it is unlikely, a court could possibly find that the USA should be estopped to deny the validity of Part II of the transaction. Third, regardless of the result of the above, Olympic's purported reservation of a seven week period of use of the improvements (see document 16), which are supposed to be open to the public through a concessionaire, is clearly invalid under any analysis. Document 4 never

mentioned such a reservation and there is no basis for this reservation. Finally, Park acknowledges that it knew about document 11, which stated that there was no guarantee of a permit, which means that this agreement was illusory. Thus, even if estoppel were applied against the United States, I believe it would only result in a conclusion that Park was allowed to submit an application for a special use application for a concession, and that it had no entitlement to a permit. Under this analysis, if the Forest Service determined that there was no need for such a concession, the improvements would have to be removed from National Forest System lands by Park.

If equitable estoppel is not applicable against the USA, the Olympic to Park conveyance is invalid and Park is not a bona fide purchaser. The USA might have to file an action against Olympic and Park to rescind the Olympic to Park conveyance, an ejectment action to remove the improvements, and probably a quiet title action to clear title.

ANSWER TO QUESTIONS IN FS LETTER

Question 1: Was the BLM/Zephyr Cove land exchange a legal transaction?

The BLM-Olympic transaction was legal. The FS-Olympic transaction involving the purported transfer of the improvements severed from the real property was not a legal transaction when document 4 was executed on March 5, 1997.

Question 2: What property rights did the United States actually acquire following the completion of the exchange?

After the recordation of the first two deeds to the USA, the title to the land and improvements was transferred to the US.

At this point Document 15 comes into play. This document was the deed which transferred title to tract 1 in Phase 1, which is the parcel to the north of the subject 11.8 acres. This document was recorded October 9, 1996, at which time Olympic still owned the subject 11.8 acre parcel. Olympic reserved a 40 foot wide exclusive and perpetual easement for ingress, egress, landscaping, gates, fences, utilities and other incidental uses for the purpose of access to the 11.8 acre parcel.

When the USA got title to the 11.8 acre parcel, it then owned in fee the parcel on which the severed improvements are located and the parcel over which the road easement passed. The general rule is that an appurtenant easement is extinguished by merger of title when the same person owns both parcels.

Question 3: Is the transaction or any portion thereof, rescindable?

The first two deeds to the US are not rescindable. The only unusual occurrence would be the conveyance of the improvements without consideration. However, this would not be a basis for

rescission by the US. The deed to Park from Olympic is not rescindable if the US is equitably estopped to deny this deed.

Question 4: Is there a way to say we cannot accept title with the improvements in place?

The title acceptance in this case would be by the BLM. The second deed to the US, document 8, was accepted by the BLM. There was no reservation of improvements in the first two deeds. The effort to create a reservation occurred with documents 4, 9, 10, 11, 12 and 13. Since the FS had title when document 13 was executed there was no authority to authorize the Olympic to Park conveyance. If this was considered part of the BLM-Olympic transaction one could argue that 36 CFR 251.17 should apply. Document 14 tried to do this.

Question 5: Has there been an effective conveyance of any rights to Park and/or Olympic? If so, what has been conveyed?

If the United States is estopped from contending that Part II of the transaction is invalid, Park owns the severed improvements together with the right to apply for a SUA. As part of the documents which create the equitable estoppel, it is clear that there is no guarantee to Park that a SUP will be issued. See document 11. There interest may well be illusory. If the FS determines on the basis of a needs assessment that no SUP should be issued, Park would have the obligation to remove its improvements from NFS lands. Because of the conclusions rendered above, it is clear that the purported seven week reservation by Olympic is invalid.

Under the circumstances, while I do not believe that equitable estoppel would be applied to the United States in this case, resolution of this issue would necessarily involve protracted litigation, and ongoing disputes over use, management and protection of the property during the litigation. Thus, I believe the best result would be to negotiate a resolution of the matter through a three-party agreement by which Park and Olympic quit-claim any interest they may have to the United States. If you are not able to effect such a resolution within a very short period of time, you should complete the needs assessment we have discussed.

I am willing to provide further assistance in this process. Please contact this office if you have any questions about this opinion.

Richard T. Flynn

Richard T. Flynn, Attorney

cc
Juan Palma, Forest Supervisor, LTBMU
Jim Snow, OGC, WO

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