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Land Transfer Options for Property on Closing Military Bases

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PART I. OVERVIEW

This report discusses the options for the use, transfer and control of real property on Department of Defense bases that are to be closed or realigned[1] under the Defense Authorization Amendments and Base Closure and Realignment Act (1988 Base Closure Act)[2] and the Defense Base Closure and Realignment Act of 1990 (1990 Base Closure Act)[3]. The analysis of options in this report takes into consideration the findings and recommendations of the Defense Environmental Response Task Force (Task Force),[4] as set forth in its Report to Congress submitted by the Secretary of Defense to Congress on November 12, 1991. The Task Force was charged with identifying ways to improve federal and state agency coordination of environmental response actions and to consolidate and streamline practices, policies, and procedures for cleanup of U.S. military bases slated for closing under the 1988 Base Closure Act.[5]

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[1]Such real property is referred to throughout this report as "base closure property".

[2]Pub. L. 100-526.

[3]Pub. L. 101-510, tit. XXIX, part A. See also Pub. L. 101-510 §2909 (prescribing the scope of the 1990 Base Closure Act and preserving the authority of the Secretary of Defense to carry out base closures and realignments under the 1988 Base Closure Act, Pub. L. 100-526, and closures and realignments to which 10 U.S.C. § 2687 is not applicable).

[4]The Secretary of Defense chartered the Task Force on April 17, 1991, in accordance with Section 2923 of the Fiscal Year 1991 National Defense Authorization Act, Pub. L. 101-510, which mandated creation of the Task Force.

[5]Pub. L. 101-510 § 2923(c).

Part II of this report discusses certain federal statutory and regulatory mandates affecting the use or disposition of base closure property. Part III describes the general rules and priorities governing transfers of base closure property. Part IV discusses various options with respect to uncontaminated property, contaminated property, and cleaned-up contaminated property on bases. With respect to each of these general categories of real property, the report: (i) describes the potentially viable options; (ii) discusses legal and procedural issues relating to the use of these options; (iii) considers the comparative effectiveness of the various options; and (iv) notes the potential impediments to implementation of the various options. Part V of the report describes mechanisms that may be used to conserve and protect areas with important natural or cultural features. Part VI provides a summary of the transfer options and related issues.

PART II. FEDERAL LAWS AND REGULATIONS GOVERNING PROPERTY TRANSFERS

A. Authority for Disposition of Base Closure Property

The Department of Defense (DoD) may dispose of property or rights of the United States only as expressly or implicitly authorized by Congress.[6] Through the Federal Property and Administrative Services Act of 1949 (FPASA),[7] Congress has delegated its

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[6]U.S. Const., art. IV, § 3, cl. 2(placing power to dispose of property of the U.S, and to prescribe related rules and regulations, in Congress, subject to Congressional delegation); Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941). A transfer to another federal department or bureau, however, is not a sale and is not subject to the Constitutional restriction prohibiting disposition of public property without Congressional authorization. 32 Op. U.S. Att. Gen. 511 (1921).

[7]40 U.S.C. §§ 471-544.

power to control utilization of "excess" property and to dispose of "surplus" property of the United States to the General Services Administration (GSA).[8]

Any proposal for sale, lease, or other transfer of interests in real property on bases must satisfy the requirements of the FPASA, as modified by Congress with respect to transactions associated with base closures. The 1988 and 1990 Base Closure Acts require that, with respect to base closure property, the Administrator of GSA delegate his authority under the FPASA to utilize excess property and to dispose of surplus property to the Secretary of Defense.[9] The Base Closure Acts also require delegation to the Secretary of Defense of GSA's authority to determine that surplus base closure property shall be transferred for use as a public airport[10] and to determine the availability of excess or surplus base closure property for wildlife conservation purposes.[11] The Secretary of Defense must exercise the authority delegated to him in accordance with the Federal

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[8]40 U.S.C. §§ 483, 484.

[9]Pub. L. 100-526 § 204(b)(1); Pub. L. 101-510 § 2905(b)(1). The Administrator of GSA issued Delegations of Authority pursuant to these provisions, on March 1, 1989, and September 13, 1991, respectively. The cover letters transmitting these Delegations note the understanding that the Department of Defense will be operationally responsible for the disposition of the military installations and the GSA's role is "strictly one of oversight to insure consistency with the Federal Property and Administrative Services Act of 1949, as amended, and other applicable laws and regulation, including the Stewart B. McKinney Homeless Assistance Act." Letter from Richard G. Austin, Acting Administrator of GSA, to William Howard Taft IV, Acting Secretary of Defense (Mar. 10, 1989); Letter from Richard G. Austin, Administrator of GSA, to Richard B. Cheney, Secretary of Defense (Sept. 13, 1991).

[10]See 50 U.S.C.A. App. § 1622(g).

[11]See 16 U.S.C. § 667b. Only the 1990 Base Closure Act expressly requires the delegation of the Administrator's authority to determine the availability of excess or surplus real property for wildlife conservation purposes. Compare Pub. L. 101-510 § 2905(b)(1) with Pub. L. 100-526 § 204(b)(1).

Property Management Regulations,[12] which govern the utilization of excess property and the disposal of surplus property under the FPASA.[13] The Secretary's delegated authority does not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property.[14]

The 1988 and 1990 Base Closure Acts authorize the Secretary of Defense to issue regulations that are necessary to carry out the authority delegated to him with respect to excess and surplus property, after consulting with the Administrator of GSA.[15] No such regulations have been promulgated. DoD should consider issuing regulations pursuant to the authority provided under the Base Closure Acts to resolve statutory ambiguities and to promote consistency in cleanup and property disposal activities with respect to base closure property.

B. CERCLA Restrictions on Transfer

Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA)[16] imposes certain requirements and restrictions on

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[12]Pub. L. 101-510 § 2905(b)(2)(A)(referring to regulations in effect on the date of enactment of the 1990 Base Closure Act, November 5, 1990); Pub.L 100-526 § 204(b)(2)(A)(comparable provision in 1988 Base Closure Act). The Secretary also must comply with regulations governing the conveyance and disposal of property for use as a public airport under 50 U.S.C. App. § 1622(g). See id. Regulations issued by the various military departments within DoD also may affect the utilization or disposition or other transfer of base closure property. This report does not consider or address the potential effects of regulations specifically governing the deposition of U.S. property for use as a public airport or regulations issued by the military departments.

[13]See 41 C.F.R. Part 101-47.

[14]Pub. L. 101-510 § 2905(b)(2)(C); Pub. L. 100-526 § 204(b)(2)(C).

[15]Pub. L. 100-526 § 204(b)(2)(B); Pub. L. 101-510 § 2905(b)(2)(B).

[16]42 U.S.C. § 9620(h).

transfers of real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of. Section 120(h)(1) specifies that any federal agency entering into a contract to sell or transfer such real property must include in the contract notice of the type and quantity of the hazardous substance and when the storage, release and disposal occurred.[17] Under Section 120(h)(3) of CERCLA, any federal agency transferring such real property by deed must provide a covenant in the deed warranting that all remedial action necessary to protect human health and the environment with respect to any hazardous substance remaining on the property has been taken before the date of the transfer and that the United States will take any additional remedial action found to be necessary after the date of transfer.[18]

The Task Force concluded that Section 120(h)(3) of CERCLA only prohibits the transfer of ownership by deed of DoD property meeting the conditions of Section 120(h)(3) on which all necessary remedial action has not yet been taken in accordance with established criteria.[19] The provision does not appear to prohibit contractual arrangements such as leases, options, licenses and installment sales contracts that would permit the beneficial use of contaminated base property prior to the taking of all necessary remedial action where such use would not endanger human health or the environment. Non-federal use of property might be allowed, for example, where action to remediate soil contamination has been taken in accordance with applicable standards and remaining groundwater contamination poses no significant increased threat to human health or the

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[17]42 U.S.C. § 9620(h)(1).

[18]42 U.S.C. § 9620(h)(3).

[19]Task Force Report at vii; see also Task Force Report at 5-7, 12-16.

environment.[20]

The Task Force recognized the need for a definitive interpretation to establish when "all remedial action . . . has been taken" for purposes of Section 120(h)(3) of CERCLA.[21] If remedial action must be completed before all remedial action is considered taken, Section 120(h)(3) would delay transfer of some contaminated base closure property for decades.[22] Remedial action is completed when the final cleanup standards applicable to the contaminated property have been satisfied.[23]

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[20]The Task Force determined that criteria for use during cleanup should include, at a minimum:

> (1) the transfer and subsequent use will not significantly increase the risk of harm to human health and the environment;
> (2) the use will not impede the cleanup process;
> (3) site conditions and cleanup activities will not present a significant risk of harm to users of the facility;
> (4) the cleanup process will be completed expeditiously and in accordance with all applicable standards; and
> (5) DoD retains responsibility for any long-term operation and maintenance of the remedial action and for any necessary removal or remedial action identified in the future, to the extent that DoD is responsible for any contamination which may have given rise to the required removal or remedial action.

Task Force Report at vii-viii, 10-11, 16 (also noting that state and local governments and the public must be adequately notified).

[21]Task Force Report at 13.

[22]See id.

[23]CERCLA Section 121(d)(2), 42 U.S.C. § 9621(d)(2), incorporates cleanup standards from other applicable federal environmental laws and state environmental laws that are more stringent than federal law. Such standards are known as "ARARs". The federal and other laws applicable to the cleanup of base closure property also will affect the short-term and long-term uses of the property. Whether, and to what extent, clean-up standards may vary based on the long-term use is not fully resolved, and may not be resolved prior to interpretation of Section 120(h) by the courts or clarification by Congress. The Task Force report states that "(i)n order to ensure compliance with applicable law, maintain public confidence, and avoid the potential for future liability, DoD should plan on full compliance with all ARARs." To follow this recommendation, DoD will need to determine the ARARs

The United States Environmental Protection Agency (EPA) recently issued a memorandum setting forth the Agency's view that "all remedial action necessary to protect human health and the environment" may be considered to have been "taken" at an NPL site for purposes of Section 120(h)(3) of CERCLA "when construction of the remedy is complete."[24] This would include "a demonstration that the remedy is operating properly according to design specifications contained in the [CERCLA] record of decision and remedial design."[25] According to EPA, "achieving the cleanup levels in the record of decision is not required."[26] EPA's interpretation of Section 120(h)(3), if upheld, thus would permit transfer by deed of contaminated base closure property after the remedy designed to "protect human health and the environment" is put in place and becomes operational, even though the remedial action necessary to meet applicable cleanup standards will not be completed for many years.

Section 120(h)(3) of CERCLA does not prohibit transfers of property by deed where no remedial action is necessary because the property was not contaminated[27] or because

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applicable to each base, establish interim and final cleanup standards, and establish criteria for determining when contaminated property may be transferred for non-federal use or disposed of.

[24]Memorandum from Don R. Clay, Asst. Administrator, EPA Office of Solid Waste and Emergency Response, and Herbert H. Tate, Jr., Asst. Administrator, Office of Enforcement, to EPA Waste Management Division Directors and Regional Counsels, Regions I-X (Feb. 18, 1992).

[25]Id.

[26]Id.

[27]The Task Force report suggests that DoD, EPA and the states consider requiring a separate document, called a "Clean Parcel Assessment Document" for establishing that land is uncontaminated. See Task Force Report at 8 n.9.

all remedial action necessary to protect public health and the environment has been taken. Thus, such parcels of land or facilities may be sold, leased, or otherwise transferred to non-military users without violation of Section 120(h)(3) of CERCLA, even though all remedial action has not been taken with respect to other base property.[28]

Section 120(h)(3) of CERCLA applies only to transfers by the United States to other persons or entities.[29] DoD thus may transfer ownership of contaminated base real property, or interests therein, to another federal agency or department as long as the arrangement does not interfere with the remedial action on the property. The transfer of property to another federal agency would not affect DoD's obligation under CERCLA to ensure that remedial action is taken.

C. Other Federal Laws

In addition to the FPASA and CERCLA, a number of other federal laws may limit the alternatives with respect to non-federal use or disposition of base closure property. These provisions include Sections 2667 and 2692 of Title 10, U.S.C. Section 2667 sets forth certain requirements with respect to the leasing of non-excess and excess DoD property. Section 2692 also may affect leasing of base closure property, since the provision generally prohibits the use of DoD installations for the storage or disposal of hazardous materials not

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[28]Such transfers, of course, are only permitted to the extent authorized by the FPASA and other applicable federal laws. DoD, EPA and appropriate state regulatory agencies need to develop criteria for determining when property on a base may be leased or otherwise made available for non-DoD use before cleanup activities on the property or on other base property have been taken. Generally applicable criteria, and procedures for establishing base-specific criteria, might be set forth in regulations promulgated by DoD pursuant to the Base Closure Acts or in other DoD guidance.

[29]See also 42 U.S.C. § 9601(21)(defining "person" to include the United States government).

owned by DoD. The potential effects of Sections 2667 and 2692 on the leasing of base closure property are discussed in greater detail below.

Other federal statutes that may be relevant to the disposition or other transfer of use of base closure property are discussed under "Public Benefit Transfers" and "PROTECTION OF NATURAL AND HISTORIC AREAS" below.

PART III. GENERAL RULES GOVERNING TRANSFERS OF BASE CLOSURE PROPERTY

The alternatives for disposition or other non-federal use of base closure property will depend to a significant extent upon the classification of the property as "excess", "surplus" or neither excess nor surplus pursuant to the FPASA and the Federal Property Management Regulations.[30] The FPASA defines "excess property" as "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof."[31] As head of DoD, the Secretary of Defense has the authority to determine, pursuant to the guidelines set forth in the Federal Property Management Regulations, whether base closure property satisfies the statutory definition of "excess property".[32]

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[30]40 U.S.C. §§ 471-544; 41 C.F.R. Part 101.

[31]40 U.S.C. § 472(e). "Property" is defined by the FPASA as "any interest in property," with the exception of the public domain, national park and forest lands and certain other specified property. 40 U.S.C. § 472(d).

[32]DoD, like other executive agencies, is required by the Federal Property Management Regulations to make an annual review of its property holdings to identify property that is not utilized, is underutilized or is not being put to its optimum use. See 41 C.F.R. §§ 101-47.201-2, -47.202, -47.802. As a result of the annual review, each agency must determine whether the property should be released as excess property or held for "a foreseeable future program use". If property being held for future use can be made available for temporary

"Surplus property" is defined under the FPASA as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of the GSA]."[33] Under the 1988 and 1990 Base Closure Acts, the Secretary of DoD has the delegated authority to determine whether excess base closure property meets the statutory definition of "surplus property".[34]

As discussed further below, DoD must consider the requirements of Section 120(h) of CERCLA in addition to the needs of other federal departments and agencies in classifying base closure property under the FPASA and the Federal Property Management Regulations.

A. Transfers Within DoD

Prior to any determination that real property at a base to be closed or realigned is "excess" and therefore subject to transfer or disposal outside DoD, other military services and agencies of DoD must be given the opportunity to acquire the property.[35] Since

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use by others, GSA normally must be notified so that it can determine whether the property should be permitted to another federal agency for temporary use. No "outlease" (lease outside the U.S. government) of such property can be made prior to such GSA determination. See 41 C.F.R. § 101-47.802. See generally 41 C.F.R. Subpart 101-47.8 (identification of unneeded federal real property). See also 10 U.S.C. § 2667(a), discussed below, which authorizes military departments to lease non-excess property to third parties on a short-term basis if certain requirements are met.

[33]40 U.S.C. § 472(g).

[34]Although the 1988 and 1990 Base Closure Acts do not specifically address the classification of excess real property as "surplus" to the United States, the broad delegation of authority to the Secretary of Defense under these Acts appears to include this authority.

[35]1988 Base Closure Act § 204(b)(3). This provision also provides that the Secretary of Defense shall give priority to DoD departments or instrumentalities that agree to pay fair market value for the property. Section 2905(b)(2)(D) of the 1990 Base Closure Act, however, merely states that the Secretary of Defense may transfer real property or facilities located at a base to be closed or realigned to a military department or other entity within

Section 120(h)(3) of CERCLA only prohibits the transfer by deed of contaminated parcels "by the United States to any other person or entity"[36] before all necessary remedial action has been taken, it would not apply to intra-DoD transfers.

B. Transfers to Another Federal Agency

DoD property that is determined to be "excess" must be made available to other federal agencies before it can be offered for sale or other disposition to third parties as surplus property.[37] Under the Federal Property Management Regulations, a federal agency that obtains real property from another federal agency generally must reimburse the transferor agency in an amount equal to the estimated fair market value of the transferred property.[38]

As discussed previously, any property that the Secretary of Defense determines is not

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the Department of Defense or the Coast Guard, with or without reimbursement. See also 10 U.S.C. § 483; 41 C.F.R. § 101-47.203-1(stating that "(e)ach executive agency shall, as far as practicable..., make reassignments of real property and related personal property under its control and jurisdiction among activities within the agency in lieu of acquiring such property from other sources"); 41 C.F.R. § 101-47.203-5 (screening of excess property for utilization by federal real property holding agencies).

[36]42 U.S.C. § 9620(h)(3).

[37]See 40 U.S.C. § 483; 41 C.F.R. § 101-47.203-2.

[38]41 C.F.R. § 101-47.203-7(prescribing reimbursement requirements applicable to transfers of property between federal agencies). This general rule is not applicable if Congress has specifically authorized such transfers without reimbursement or if the Director of OMB and the Administrator of GSA (or, presumably, in the case of base closure property, the Director of OMB and the Secretary of Defense) approve a request for exception from the 100 percent reimbursement requirement. As previously noted, the 1988 Base Closure Act, Pub. L. 100-526 § 204(b)(2), and the 1990 Base Closure Act, Pub. L. § 2905(b)(2), both delegate the authority of the Administrator of GSA to utilize excess property under the FPASA, 40 U.S.C. § 483, to the Secretary of Defense and require that the Secretary comply with the Federal Property Management Regulations, 41 CFR § 101-47.

required for the discharge of DoD's responsibilities or otherwise needed to meet DoD's mission is "excess".[39] If contaminated property can be transferred for use by another federal agency while permitting DoD to fulfill its responsibilities under CERCLA to take remedial action, such property probably can be classified as "excess" to DoD and can be transferred to another Federal agency for fair market value reimbursement or as otherwise authorized.[40] As with intra-DoD transfers, Section 120(h)(3) of CERCLA does not prohibit transfers of real property interests between federal agencies or departments.

C. Disposals of Surplus Property

Excess DoD property determined to be surplus must be disposed of in accordance with the requirements of the FPASA and the Federal Property Management Regulations, as modified by the 1988 and 1990 Base Closure Acts. As previously noted, the authority to dispose of surplus property under the FPASA and the Federal Property Management Regulations has been delegated to the Secretary of Defense.

The Federal Property Management Regulations prescribe the specific rules governing competitive public sales, negotiated disposals, and public benefit transfers of surplus real

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[39]See 40 U.S.C. § 472(e).

[40]The Secretary's delegated authority does not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property. Thus, DoD must determine whether property is excess in accordance with the guidelines set forth in the Federal Property Management Regulations. See 41 U.S.C. §§ 101-47.201-2, -47-202, and Subpart 101-47.8. Because these guidelines do not specifically address the treatment of property that must be retained by the United States pursuant to Section 120(h)(3) of CERCLA pending the taking of remedial action, DoD may wish to obtain additional guidance from GSA regarding the application of the Federal Property Management Regulations to base closure property.

property.[41] States and local governments generally are given priority over private individuals in acquiring surplus federal property.[42] The Federal Property Management Regulations provide for notice to be given to eligible public agencies prior to any public advertising, negotiation or other activities with respect to disposal of property that DoD, under its delegated authority, determines is available for disposal pursuant to certain federal statutory authorities.[43] Public benefit transfers are discussed further below.

Under the FPASA and the Federal Property Management Regulations, the local governmental units having jurisdiction over zoning and land use regulations must be afforded the opportunity to zone base closure property in accordance with local comprehensive land use planning.[44] Also, the 1988 and 1990 Base Closure Acts specifically

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[41]See generally 41 C.F.R. 101-47.3(prescribing the policies and methods for disposing of surplus real property and related personal property). The FPASA requires, with certain significant exceptions, that disposals of surplus real property be made after public advertising for bids, to the bidder whose "bid ... will be most advantageous to the Government, price and other factors considered," unless not in the public interest to do so. 40 U.S.C. § 484(e)(1),(2). Disposals may be negotiated, rather than competitively bid, in certain circumstances in accordance with the Federal Property Management Regulations and "subject to obtaining such competition as is feasible under the circumstances." 40 U.S.C. § 484(e)(3). Such circumstances include disposals to states, U.S. territories or possessions, or political subdivisions thereof. In addition to competitively bid public sales and negotiated disposals, the FPASA authorizes certain public benefit transfers, which typically involve use restrictions and in some cases may be made without monetary consideration to the U.S. government or at a price below market value. See 40 U.S.C. § 484(k),(p).

[42]See generally 41 C.F.R. 101-47.3. See also 40 U.S.C. 484(e)(3)(negotiated sales to public agencies without use restrictions).

[43]See 41 C.F.R. 101-47.3.

[44]40 U.S.C. § 532; 41 C.F.R. §§ 101-47.303-2(b), -47.303-2a, -4906a&b (implementing § 803 of the FPASA, 40 U.S.C. § 532). The FPASA also requires that, to the greatest practicable extent, all prospective purchasers of such real property be furnished full and complete information concerning (1) current zoning regulations, or, if the property is unzoned, prospective zoning requirements and objectives for the property, and (2) current availability of streets, sidewalks, sewers, water, street lights, and other service facilities and

require that, prior to taking any action with respect to the disposal of surplus property at a base to be closed or realigned, the Governor of the State and the heads of local governments concerned must be consulted in considering any plan for the use of the property by the local community.[45] Although zoning is solely within the purview of the local government, DoD may make suggestions as to zoning of surplus base real property as part of the required state and local consultation.[46]

The U.S. Attorney General must be given notice and opportunity to review any transfer to a private party of surplus property with an estimated fair market value of $3 million or more to ensure that the transfer will not result in antitrust law violations.[47]

To satisfy the requirements of Section 120(h)(3) of CERCLA, the U.S. Government must retain ownership of contaminated property until all remedial action necessary to protect human health and the environment has been taken. Thus, contaminated excess base closure property does not appear to satisfy the definition of "surplus property" under the FPASA and the Federal Property Management Regulations unless all necessary remedial action have been taken with respect to such property.[48]

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prospective availability of such services if such property is included in local comprehensive planning. 40 U.S.C. § 532(b).

[45]Pub. L. 100-526 § 204(b)(2)(D); Pub. L. § 2905(b)(2)(E).

[46]See id.

[47]40 U.S.C. § 488; 41 C.F.R. § 101-47.301-2.

[48]As previously noted, "surplus property" is "any excess property" that is determined to be "not required for the needs and the discharge of the responsibilities of all federal agencies ..." 40 U.S.C. § 472(g). Since fee simple ownership of contaminated property must be retained by the United States to satisfy the responsibilities imposed by CERCLA Section 120(h)(3), such property does not appear to satisfy the definition of surplus property prior to the taking of all remedial action necessary to protect human health and the environment. See also Memorandum from Don R. Clay, EPA Office of Solid Waste and Emergency

D. Public Benefit Transfers

The 1988 and 1990 Base Closure Acts, the FPASA, the Federal Property Management Regulations, and other federal statutes authorize the conveyance or lease of DoD real property for various prescribed public purposes to state and local governmental units and eligible non-profit institutions where federal requirements have been satisfied. These public purposes include education, public health (including homelessness), public parks and recreation, historic monuments, correctional facilities, wildlife conservation, public airports, and federal aid and other highways.[49] The provisions governing these public benefit transfers in some cases authorize transfers of real property without monetary consideration or at discounted prices. The deeds making such transfers may need to provide that the property be used and maintained in perpetuity for the authorized public purpose, and that the ownership of the property shall, at the option of the United States,

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Response, and Henry H. Tate, Jr., EPA Office of Enforcement, to EPA Waste Management Division Directors and Regional Counsels (Feb. 18, 1992) (indicating that, in EPA's view all necessary remedial action has been "taken" for purposes of Section 120(h)(3) of CERCLA when the remedy has been constructed and is operating.)

For rules governing utilization of excess property by federal agencies, see 41 C.F.R. 101-47.2. Compare 41 C.F.R. 101-47.3 (governing disposition of surplus property).

[49]See Pub. L. 100-526 § 204(b); Pub. L.101-510 § 101-510; 40 U.S.C. § 484(k),(p)(authorizing the disposition of surplus real property for various public purposes); 16 U.S.C. 667b-d(transfer of excess or surplus real property for wildlife conservation purposes); 23 U.S.C. 107, 317(transfers for highway purposes); 50 U.S.C. app. §§ 1622(g), 1622a-c(transfer of surplus property for use as a public airport); 41 C.F.R. §§ 101-47.203-5, -47.203-7, -47.301-3, -47.303-2, -47.308, -47.4905, -47-4906. Section 2693 of title 10 (U.S.C.) authorizes the transfer of four excess DoD properties each year to public agencies without reimbursement for use in proposed correctional options programs, but expressly exempts properties and facilities to which the 1988 Base Closure Act, Pub. L. 100-526, is applicable, since such properties are needed to finance the consolidated program under that Act. See H.Rep. No. 681(I), 101st Cong. 2d Sess. 82 (Sept. 5, 1990), reprinted in 1990 U.S.Code Cong. & Ad. News 6472, 6486 (discussing 10 U.S.C § 2693, which was enacted as § 1802 of the Comprehensive Crime Control Act of 1990).

revert to the United States in the event the property ceases to be used or maintained for that purpose.[50] Transfers of real property for wildlife conservation purposes and transfers of real property for use as a public airport are discussed in more detail below.

The Secretary of Defense has been delegated the authority to determine whether excess real property on bases being closed is to be transferred for wildlife conservation purposes to state wildlife agencies or to the Secretary of the Interior pursuant to Section 667b of Title 16, U.S.C. This provision authorizes such transfers without compensation if the property is valuable for wildlife conservation or for purposes of the national bird migratory program.[51] Any such transfers, unless to the U.S., must be made subject to (1) the reservation by the U.S. of all oil, gas, and mineral rights and (2) the condition that the property shall continue to be used for wildlife conservation, and that title shall revert to the U.S. in the event it is no longer needed for such purposes or is needed for the national defense.

The Secretary of Defense has been delegated the authority to transfer to a state, political subdivision, municipality, or tax-supported institution without monetary or other consideration any surplus real property that the Administrator of the Federal Aviation Administration determines is essential, suitable, or desirable for the development, improvement, operation, or maintenance of a public airport subject to certain conditions,

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[50]40 U.S.C. 484(k),(p); 16 U.S.C. 667b-d; 23 U.S.C. 107, 317; 50 U.S.C. app. §§ 1622(g), 1622a-c; 41 C.F.R. §§ 101-47.203-5, -47.203-7, -47.301-3, -47.303-2, -47.308, -47.4905, -47-4906. See also 41 C.F.R. § 101-47.307(conveyances).

[51]Property may be transferred to the Secretary of the Interior if the property has particular value in carrying out the national migratory bird management program. 16 U.S.C. § 667b.

restrictions, and reservations of rights in the U.S. Government.[52]

E. State and Local Laws

In addition to compliance with federal requirements governing disposition of base property, a base-by-base analysis of state and local real property and land use laws will be necessary to determine the potential applicability and effect of such laws on the various property use or disposition alternatives.

PART IV. TRANSFER OPTIONS

A. Uncontaminated Property

Uncontaminated parcels of land or facilities[53] may be sold, leased, or otherwise transferred to non-military users before all necessary remedial action on contaminated portions of the base has been taken, without violation of Section 120(h)(3) of CERCLA. DoD thus should take action as soon as practicable to define the boundaries of areas of

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[52]See 50 U.S.C. app. § 1622(g); Pub. L. § 204(b)(1); Pub. L. § 2905(b)(1).

[53]Property is considered "uncontaminated" for purposes of this report if the property is not subject to Section 120(h)(3) of CERCLA because no hazardous substance was stored for one year or more, known to have been released, or disposed of there. The Task Force concluded that uncontaminated areas should be narrowly defined and, in its deliberations, limited the use of the term "uncontaminated parcels" to areas with neither contamination nor likelihood of contamination of the surface or the subsurface, including the groundwater. Task Force Report at 7.

It should be noted that there may be areas subject to the Section 120(h)(3) contract notice and covenant requirements because hazardous substances were present on the property for a year or more, even though no hazardous substances were released or remain in that area and no remedial action was or is necessary. Since such property is analogous to cleaned up contaminated property, it may be disposed of in the same manner as cleaned-up contaminated property.

contamination or likely contamination by "metes and bounds"[54] descriptions to facilitate the transfer of uncontaminated areas to other uses as quickly as possible.[55] The Task Force found that transferring uncontaminated parcels of a closing base, with appropriate safeguards to prevent interference with clean-up of contaminated parcels, will speed the process of establishing non-military uses of the land.

1. Disposition of Fee Simple Interest

Uncontaminated base closure property that is surplus normally will have to be sold or otherwise disposed of pursuant to the FPASA and the Federal Property Management Regulations.[56]

2. Leases

Unless uncontaminated base closure property is to be retained by the U.S. to facilitate cleanup of contaminated portions of a base or for other reasons,[57] such property will be considered surplus. The Federal Real Property Management Regulations authorize the non-federal interim use of surplus property, by lease or permit, only if (1) the lease or permit term does not exceed one year; (2) the lease or permit is revocable by the disposal agency on 30 days or less notice; and (3) the use and occupancy of the property will not

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[54]Metes and bounds are the legal boundary lines and marks used to describe a parcel of land in a deed.

[55]State and local laws in many instances will require the subdivision of property into designated lots prior to the sale or other transfer of uncontaminated portions of base property.

[56]See "Disposals of Surplus Property" in Part III of this report.

[57]As previously discussed, DoD must make excess property available for use by other federal agencies prior to designation of the property as "surplus". See "Transfers to Another Federal Agency" in Part III.

interfere with, delay, or retard the disposal of the property.[58] These limitations appear to be generally applicable to leasing of surplus base closure property.[59]

In some situations, disposition of uncontaminated property may not advisable before remedial action has been taken on contaminated base property. Leasing rather than fee simple transfer of uncontaminated property may be advisable when frequent or continuous access to the uncontaminated area will be necessary for a period of time to complete remedial action on adjacent or nearby contaminated areas. If DoD sold or otherwise disposed of the fee simple interest in such uncontaminated areas, easements probably could be retained in the deeds of transfer for the uncontaminated areas permitting access for purposes of remedial action on adjacent parcels. A lease of the uncontaminated property, however, would provide DoD with the right of access, would not convey the same degree of rights in the property as transfer of fee simple ownership (thereby retaining greater control in DoD), could be written for a definite term or be terminable at will, and would place less risk on the third party using the property than fee simple ownership.

Leasing of an uncontaminated area also may be a better alternative than a transfer of fee simple ownership where the nature and location of contamination in one area might

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[58]41 C.F.R. § 101-47.312(a)(requiring compliance with 41 C.F.R. §§ 101-47.304-9, -47.304-12, with one modification). Since no similar limitations with respect to interim non-federal use of excess property are expressly set forth in the Federal Real Property Management Regulations, the regulations appear on their face to permit DoD to enter into whatever lease terms it deems advisable with respect to excess base closure property that is not determined to be surplus. See 41 C.F.R. § 101-47.203-8, -9. DoD probably should seek guidance from GSA or, perhaps, from Congress to confirm this point, however, particularly since Section 2667(f) of Title 10, U.S.C., generally limits the leasing of DoD property determined to be excess as a result of base closures.

[59]This rule may not be applicable to leases for various public purposes authorized by 40 U.S.C. §§ 484(k), (p).

make subdivision or other delineation of the surrounding land into contaminated and uncontaminated lots imprudent or impractical. In such cases leasing the entire parcel, with appropriate restrictions to prevent any use of the contaminated portion that would endanger human health or the environment, may be the preferable course.

Uncontaminated property would not be surplus where its retention by DoD or the U.S. is determined to be necessary to satisfy the requirements of CERCLA Section 120(h)(3). Such property thus would be classified as excess, or neither excess nor surplus.[60] Like its authority to lease surplus property, DoD's authority to lease non-excess or excess base closure property is limited.

Section 2667 of Title 10, U.S.C. authorizes U.S. military departments to lease to third parties property that is not "excess".[61] Property may be leased under Section 2667(a) if the Secretary of a military department determines that the leasing would promote the national defense or be in the public interest, and the property is: (1) under the control of the

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[60]Excess property is surplus if it is determined to be "not required for the needs and the discharge of the responsibilities of all Federal agencies..." 40 U.S.C. § 472(g). A question exists as to whether uncontaminated property is "required" if the cleanup of adjacent or nearby could proceed without the retention of the uncontaminated parcel by the United States, even though it would be much more difficult. The FPASA and Federal Property Management Regulations do not provide specific guidance in situations where retention of ownership of otherwise unutilized property is needed or desired to facilitate compliance with Section 120(h)(3) of CERCLA. DoD may wish to seek guidance from GSA, and perhaps, from Congress, regarding the proper classification and treatment of such property under the FPASA and the Federal Property Management Regulations.

[61]Under the Federal Property Management Regulations, each federal agency annually must determine whether its underutilized or unutilized property should be released as excess property or held for "a foreseeable future program use." If property being held for future program use can be made available for temporary use by others, GSA normally must be notified so that it can determine whether the property should be permitted to another federal agency for temporary use. No "outlease" (lease outside the U.S. government) of such property can be made prior to such GSA determination. See 41 C.F.R. § 101-47.802. See generally 41 C.F.R. Subpart 101-47.8 (identification of unneeded federal real property).

military department; (2) not presently needed for public use; and (3) not excess property. Such leases may not exceed 5 years and must provide DoD with a right to revoke the lease at will, unless a longer term or omission of the right to revoke promotes the national defense or is in the public interest. The lease may provide the lessee with a right of first refusal in the event the lease is revoked to permit the sale of the property.[62] The 1988 and 1990 Base Closure Acts do not appear to affect the applicability of the provisions of Section 2667(a) to leases of non-excess base closure property.

Leasing of excess property is authorized if the lease meets the requirements applicable to interim use of excess property under the Federal Property Management Regulations or the requirements of Section 2667(f) of title 10, U.S.C.[63] The Federal

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[62]10 U.S.C. §§ 2667(a), (b). See also 21 Op. U.S. Att. Gen. 537 (1897). Leases of U.S. property generally may be for money consideration only. 40 U.S.C. § 303b. But see 10 U.S.C. § 2667(b)(4).

[63]Some uncertainty exists as to whether 10 U.S.C. § 2667(f) should be read to limit the authority of the Secretary of Defense to lease excess base closure property under the FPASA, pursuant to the delegation of GSA authority in the 1988 and 1990 Base Closure Acts. Section 2806 of Pub. L. 101-510 amended section 2667(d) of title 10 (U.S. Code), which deals with revenue from the leasing out of DoD assets pursuant to Section 2667. Although the 1990 Base Closure Act was enacted in a separate title of the same legislation, neither the amendments to Section 2667 in Pub. L. 101-510 nor the provisions of the 1990 Base Closure Act, Pub. L. 101-510, tit. XXIX, Part A, help to clarify the relationship between the 1988 and 1990 Base Closure Acts and Section 2667 of Title 10, U.S.C. See also Pub. L. 101-510 § 2909 (providing that the 1990 Base Closure Act is "the exclusive authority for ... carrying out any closure or realignment of a military installation inside the United States" except for closures and realignments under the 1988 Base Closure Act and closures and realignments to which 10 U.S.C. § 2687 is not applicable). DoD may wish to obtain clarification from Congress to establish whether Section 2667 applies to base closure property covered by the 1988 and 1990 Base Closure Acts. In addition, neither the 1988 nor the 1990 Base Closure Acts require that the Administrator of GSA delegate his authority to concur in leases of excess property pursuant to 10 U.S.C. § 2667(f) to the Secretary of Defense. Thus, if DoD is authorized to lease excess property only to the extent that the lease satisfies the requirements of Section 2667(f), the concurrence of the Administrator of GSA may be required.

Property Management Regulations authorize the grant of rights for non-federal "interim use" of excess property when it is determined that such interim use is not required for the needs of any Federal agency.[64] No specific limitations on such use is specified in the regulations, although approval of GSA generally is required. As a result of the delegation of GSA's authority to the Secretary of Defense pursuant to the 1988 and 1990 Base Closure Acts, however, GSA approval does not appear to be required with respect to non-federal interim use of excess base closure property pursuant to the Federal Property Management Regulations.[65]

Under Section 2667(f), military departments may lease real property that has been determined to be excess as a result of a defense installation realignment or closure to State or local governments pending final disposition if: (1) the Secretary of the military department controlling the property determines that such action would facilitate State or local economic adjustment efforts, and (2) the Administrator of General Services concurs.[66] Although these requirements usually limit the authority of DoD to lease excess property, the 1988 and 1990 Base Closure Acts provides the Secretary of Defense with the authority normally held by GSA under the Federal Property Management Regulations to permit the

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[64]See 41 C.F.R. 101.203-9.

[65]The obligation of GSA under the FPASA and the Federal Property Management Regulations to determine whether such interim use of excess property is needed by another federal agency also has been delegated to the Secretary of Defense with respect to base closure property. See also 41 C.F.R. § 101-47.203-8 (governing temporary utilization of excess property by federal agencies).

[66]10 U.S.C. § 2667(f). GSA's internal handbook on disposition of real property, which is not available to the general public, may set forth criteria used for the review and approval of Department of Defense outleases of excess military real property for economic adjustment purposes under 10 U.S.C. § 2667(f).

non-federal interim use of excess base closure property that is not needed by another federal agency.[67]

In addition, excess or surplus base closure property may not be leased for other purposes if it is determined to be needed for housing the homeless under the Stewart B. McKinney Homeless Assistance Act.[68]

Despite the above limitations, leasing may be the best available means in many instances for allowing the interim non-federal use of uncontaminated base closure property where immediate sale or other disposition of the property is not practical or possible due to ongoing cleanup activities on adjacent or nearby land.

B. Contaminated Property

Section 120(h)(3) of CERCLA requires DoD to include in any deed transferring land contaminated by hazardous substances a covenant warranting that "all remedial action necessary to protect human health and the environment has been taken before the date of transfer" and that the U.S. government will take any additional remedial action found to be necessary after the date of the transfer. The Task Force found that where remedial action that renders the land safe for, and compatible with, a particular industrial or other approved land has been taken, the transfer of use of the land to a new non-military user prior to completion of all remedial action may be in the public interest. The Task Force recognized that a definitive interpretation of "all remedial action ..." required under Section 120(h)(3) of CERCLA prior to transfer of contaminated property by deed may not be

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[67]As previously noted, however, the effect of Section 2667(f) of Title 10, U.S.C., if any, on leases of excess base closure property on bases closed pursuant to the 1988 or 1990 Base Closure Acts is not clear.

[68]See 42 U.S.C. § 11411; 40 U.S.C. § 484(k).

possible unless the courts or Congress resolve the issue.[69] The Task Force concluded that having the remedial action in place may protect human health and the environment provided that the transfer documents ensure that the responsible agency will complete the cleanup process expeditiously and in accordance with agency standards.[70] If "taken" means having the remedial action in place, transfer by deed may be permitted, for example, where surface remediation is completed but groundwater remediation through pump and treat methods will not be completed for many decades.

Set forth below are several options that would permit, without violation of the provisions of Section 120(h)(3) of CERCLA, the transfer of use of DoD property that has been cleaned to standards that make the area compatible with and safe for the approved land use.[71] As concluded by the Task Force, DoD will need to restrict changes from the approved land use prior to completion of all remedial action through appropriate covenants in leases and other agreements.

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[69]Task Force Report at 13.

[70]As previously discussed, EPA issued a memorandum on February 18, 1992 stating its view that all necessary remedial action has been "taken" when the remedy has been constructed and is operating. See Memorandum from Don R. Clay, Asst. Administrator, Office of Solid Waste and Emergency Response, and Henry H. Tate, Jr., Office of Enforcement, to Division Directors and Regional Counsels, Regions I-X.

[71]In addition to the mandates of Section 120(h)(3) of CERCLA, in the case of property formerly used by DoD at which there are unsafe buildings or debris of DoD, all actions necessary to comply with regulations of the GSA on the transfer of property in a safe condition must be completed before the property is released from federal control, except in the case of property to be conveyed to an entity of State or local government or to a native corporation. 10 U.S.C. § 2701(g). (Section 2701 of title 10, U.S.C., deals with environmental restoration at DoD facilities.) The Federal Property Management Regulations address the treatment of property that is dangerous to public health or safety, requiring that it be rendered innocuous or that appropriate safeguards be taken. See 41 C.F.R. 101-47.401-1(c), -47.401-4, -47.501-3.

1. Leasing

Assuming that contaminated property has been determined to be safe for certain uses, DoD could lease the property to non-federal lessees subject to appropriate restrictions.[72]

As discussed in greater detail above with respect to uncontaminated property, the leasing of DoD property is subject to limitations. If contaminated base closure property is determined to be "excess property",[73] leasing is authorized if the lease meets the requirements applicable to interim use of excess property under the Federal Property Management Regulations[74] or the requirements of Section 2667(f) of title 10, U.S.C.[75] Leasing of "non-excess" base closure property by military departments appears to be authorized if the lease meets the requirements set forth in Section 2667(a) and (b) of Title 10, U.S.C. and the Federal Property Management Regulations.[76]

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[72]As previously discussed, leasing of excess property to non-federal lessees generally would be possible only after the property has been made available for use by other federal agencies pursuant to the Federal Property Management Regulations.

[73]See 40 U.S.C. § 472(e) (defining "excess property" as "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof").

[74]41 C.F.R. § 101-47.203-9.

[75]As previously noted, the relationship between Section 2667(f) and the delegated authority of DoD under Federal Property Management Regulations for purposes of leases of excess base closure property is not completely clear.

[76]DoD needs to establish criteria for determining when contaminated property is "excess," rather than non-excess. As noted above, contaminated property does not appear to satisfy the definition of "surplus" property prior to the taking of all necessary remedial action required by CERCLA Section 120(h)(3). See 40 U.S.C. § 472(g).

Section 2692 of title 10, U.S.C., is particularly relevant to the leasing of contaminated property. This provision prohibits the use of DoD installations for the storage or disposal of hazardous or toxic materials not owned by DoD. This limitation, assuming that it is applicable to DoD installations after they have been targeted for closure,[77] will make contaminated property less attractive to potential industrial lessees. In some cases, contaminated property might be safely used for industrial but not for other purposes prior to the taking of all necessary remedial action. DoD may wish to request Congress to amend Section 2692 to except such property, with appropriate provisions to protect public health and the environment, to facilitate the conversion of base closure property to non-federal uses.

In additional to the legal restrictions noted above, other factors will limit the utility of leases with respect to contaminated property. Unless the leases are for a significant period of time, perhaps 20 years or more, few third parties may want to enter into ground leases for base land because they would not be able to recover or sufficiently benefit from the costs they incur for new buildings and other improvements to the property. This concern would also arise with respect to leases of improved real property unless the lessee does not wish to make any significant building improvements or additions on the property. Providing lessees with options to purchase the property after all necessary remedial action has been taken might alleviate their concerns with respect to this issue. The feasibility of

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[77]Section 2692 provides no exceptions for bases targeted for closure. Thus, it appears to apply to any base that still may be considered a DoD installation because DoD owns or controls a portion of the property. If all property at a particular installation is determined to be "excess" to DoD, DoD might take the position that Section 2692 is not applicable because the base is no longer a DoD installation. The merits of this position are questionable, however, since the base would still be under DoD's jurisdiction.

this alternative is discussed further below under "Purchase Options".

Although leasing of contaminated property is subject to numerous limitations, it will in many cases be the best available means for allowing non-military use of contaminated base closure property prior to the time that all necessary remedial action has been taken.

2. Executory Sales Contracts

In certain circumstances, an installment or other executory contract for the sale of base closure property might prove to be a useful device for transferring the right to use contaminated DoD property prior to completion of remedial action. Upon execution of a contract for the sale of land, the purchaser generally is considered the beneficial or equitable owner of the property. The seller retains legal title which is transferred at the time of closing.[78] Although the seller generally retains the right of possession of the property, the contract may provide the purchaser with the right to occupy the property prior to closing.[79] Installment contracts, which contemplate a long period of time between execution of the contract and conveyance of legal title by deed at closing, usually provide

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[78]See D. Flynn, Introduction to Real Estate Law at 98 (West 2d ed. 1986); M. Friedman, Contracts and Conveyances of Real Property at 541 (1975).

[79]Prior to entering into such a contract, however, DoD should consider the possible consequences of the purchaser's default. A vendee in possession generally may be evicted only in "an action of ejectment", a lengthy, expensive proceeding. To avoid this potential problem, the contract, or a separate lease agreement, could expressly create a landlord and tenant relationship which would permit DoD to evict the purchaser in summary proceeds. See M. Friedman, Contracts and Conveyances of Real Estate 544-45 (1975)(also noting exceptions to recognition of landlord-tenant relationships in contracts of sale). Creation of a lease under these circumstances, however, would be subject to the same limitations as leases of federal property generally, discussed elsewhere in this report.

If the "vendee in possession" (the future purchaser) was permitted to make improvements to the property, DoD would want to ensure that any mechanics's liens placed on the property by building contractors would not attach to DoD's interest in the property. See id. at 546.

the purchaser with the right to occupy the property prior to closing.[80]

DoD might execute a contract conditioned on the taking of all necessary remedial action with respect to the property, perhaps by a certain date. Such contracts would have to be carefully drafted to ensure that the condition is not considered a condition precedent to the existence of the contract, so that no agreement exists until the condition is satisfied. If performance is deemed to be optional on the part of the buyer or seller, a court might conclude that the contract lacks the requisite mutuality and recharacterize the contract as merely a purchase option or a right of first refusal.[81] It may be possible to avoid the issues raised by conditional contracts by specifying that the parties merely contemplate a postponement of the time for closing in the event that all necessary remedial action is not taken by a certain date.[82]

Assuming that no deed is executed and legal title may not be transferred until the final payment is made, conditioned upon the taking of all necessary remedial action, a contract for sale of DoD property would not violate the mandates of Section 120(h)(3) of

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[80]Installment contracts are both executory contracts and financing devices. Such arrangements permit the purchaser to spread the payments for the purchased property over a term of years and the seller retains legal title as security for such payments. Transfer of legal title usually occurs after the last scheduled payment has been made. Such contracts do not typically require the seller to take a certain action as a condition to transfer of title. Thus, a standard installment contract would require significant modifications to be useful in transferring beneficial use of contaminated DoD property prior to the taking of all necessary remedial action.

[81]See generally Friedman, Contracts and Conveyances of Real Property at 94-117 (1975). A contract provision requiring DoD to diligently pursue the taking of all necessary remedial action might minimize the likelihood of such a recharacterization.

[82]Id. at 98. The purchasers, however, are likely to want some assurance that they can terminate their obligations under the contract at some specific date if all necessary remedial action has not been taken.

CERCLA. Use of an executory contract, however, raises a number of practical and legal concerns in addition to those discussed above, particularly where any significant length of time is expected to pass between execution of the contract and the taking of all necessary remedial action. These include concerns regarding the ability of such contracts to satisfy the requirements of the FPASA and the Federal Property Management Regulations and other federal laws, including the McKinney Homeless Assistance Act; potentially adverse tax consequences for the purchaser; the proper means for determining compensation for use of the property or the money owed if all necessary remedial action is not taken on time and the closing is delayed; potential liability of DoD for damages or reimbursement of the cost of improvements if remedial action is not taken by the date projected or within a reasonable period thereafter, or if the taking of all necessary remedial action to satisfy applicable standards proves to be infeasible; and federal budgetary and accounting complications.

Despite these potential issues and concerns, an executory contract might be a useful device in circumstances where almost all necessary remedial action has been taken, or all necessary remedial action is soon to be taken, but the potential purchaser needs to occupy the premises immediately and merely entering into an interim lease of the property was not possible or desirable. Any such contract would have to ensure that the beneficial use of the property by the future potential purchaser prior to transfer of legal title by deed would not endanger public health and safety.

3. Purchase Options

To make the leasing of DoD real property more attractive to potential lessees who wish to make improvements on the property, DoD might wish to provide lessees with

options to purchase the leased property. Options to purchase contaminated property could not become exercisable prior to the time that all necessary remedial action has been taken, to avoid violation of Section 120(h)(3) of CERCLA by a transfer of a deed upon exercise of the option. DoD also might wish to consider selling purchase options on contaminated property which is not leased prior to or during remedial action. The availability of such options might make an adjacent uncontaminated parcel more attractive to potential purchasers who want a larger tract of land. The sale of options on contaminated parcels also would provide an additional funding source to DoD and would expedite the disposition of the property when all necessary remedial action is taken.

Although purchase options could be a useful tool in transferring base closure property to non-military use as quickly as possible, the grant of such options on excess base closure property, as part of leasing arrangements or otherwise, does not appear to be authorized under the FPASA.[83] If it becomes evident that granting options as part of lease arrangements would improve the utilization of base closure property by non-federal users, DoD may wish to seek legislative authorization for such arrangements from Congress.

Although options to purchase are not authorized under the FPASA, a lease of contaminated property that satisfies the requirements of Section 2667 of title 10 (U.S.C.) may provide the lessee with the first right to buy the property if the lease is revoked to

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[83]The United States Attorney General has issued an opinion concluding that the FPASA does not confer authority upon the Administrator of GSA to include options to purchase in leases executed pursuant to the Act. The reasoning of the opinion and the underlying authority also support the conclusion that the FPASA also does not authorize options to purchase outside the leasing context. See 41 Op. U.S. Att. Gen. 294 (1957). But see 10 U.S.C. § 2667(b)(authorizing the inclusion of rights of first refusal in leases authorized under 10 U.S.C. § 2667(a)).

allow the United States to sell the property under any other provision of law.[84]

In addition, prior to disposition or transfer of use of any unutilized and underutilized properties, DoD must consider the need for the property by other federal agencies for general use or for public purposes specified by statute, such as assisting the homeless pursuant to the requirements of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11411. If these determinations must be made at the time remedial action is completed, any option granted prior to such time might have to be made subject to rights of first and second refusal held by other federal agencies.

Although purchase options in leases generally are not considered subject to the Rule Against Perpetuities[85] or statutory variations thereof, applicable state law may be less favorable where the options are subject to a condition precedent pending the taking of all necessary remedial action. Thus, it might be advisable to fix a maximum term for any purchase options.[86]

4. Licenses

In certain circumstances, DoD may issue a license, in exchange for appropriate consideration, to permit the limited use of base closure property for a specific purpose.

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[84]See 10 U.S.C. § 2667(b).

[85]The Rule Against Perpetuities is a common law rule which generally prohibits the creation of future interests which might not vest within a time period equal to the duration of a life, or lives, in being plus 21 years.

[86]See Simes and Smith, The Law of Future Interests §§ 1244, 1245 (West 1956 and 1986 Supp.). The majority of courts apply the Rule Against Perpetuities where an option to purchase is not in a lease. Id.

Unlike a lease or an easement, a license does not transfer an interest in real property.[87] The Federal Property Management Regulations authorize permits allowing the interim use of excess or surplus property, if specified requirements are met.[88]

C. Contaminated Property After Remedial Action Is Taken

1. Sale of Fee Simple Interest

After all necessary remedial action with respect to contaminated real property on bases to be closed or realigned has been taken, in accordance with criteria established under CERCLA and other applicable state laws,[89] DoD must dispose of property determined to be surplus pursuant to the Federal Property Management Regulations, including in the deeds of transfer the covenant required under Section 120(h)(3) of CERCLA.

2. Leasing.

As in the case of uncontaminated property, the sale or other disposition of base closure property on which remedial action has been taken sometimes may be impractical or imprudent prior to completion of remedial action for the property[90] or other contaminated

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[87]See, e.g., Smith, Tschappat and Racster, Real Estate and Urban Development (1977).

[88]See 41 C.F.R. 101-47.203-9(non-federal interim use of excess property); 41 C.F.R. 101-47.312(non-federal interim use of surplus property).

[89]See Memorandum from Don R. Clay, Asst. Administrator, EPA Office of Solid Waste and Emergency Response, and Herbert H. Tate, Jr., Asst. Administrator, EPA Office of Enforcement, to EPA Division Directors and Regional Counsel, Regions I-X (Feb. 18, 1992) (stating EPA's view that all remedial action has been "taken" for purposes of Section 120(h)(3) of CERCLA when construction of the remedy is complete, and the remedy is operational).

[90]As previously discussed, EPA has expressed the view that Section 120(h)(3) permits the transfer by deed of contaminated property after the remedy is in place and operating.

base property. In such cases leasing may be the preferable course. Leasing of such property would be subject to the legal and practical limitations similar to those discussed above with respect to uncontaminated property.

D. Easements and Restrictions to Facilitate CERCLA Compliance

1. Easements

DoD will need to reserve easements in the deeds conveying ownership of certain uncontaminated property to give DoD and other appropriate federal and state agencies future access. Such an easement should be reserved where access to the conveyed property will be necessary to complete remedial action on other base property or where such access is likely to be necessary if additional contamination on cleaned-up base property is found in the future.

DoD also will need to reserve easements in the deeds of transfer for contaminated parcels to ensure that it will have the right to access to the property for purposes of investigation and to ensure the completion of remedial action, including any remedial action determined to be necessary in the future if additional contamination is found or suspected. Such easements must be broad enough in scope to permit DoD to fully comply with its obligations contained in the deed covenants required by Section 120(h)(3) of CERCLA.

The nature of the easements to be reserved by the United States in deeds of conveyance for base closure property will depend in large part upon the circumstances and the state law applicable to easements, which varies from jurisdiction to jurisdiction. Such easements will constitute "easements in gross"[91] and, to be enforceable against subsequent

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[91]Easements may either be "appurtenant" to adjacent land or stand alone "in gross". "Easements appurtenant" are attached to and for the benefit of adjacent land, which is the dominant estate. Unlike an easement appurtenant, an "easement in gross" is independent of other real property and may be held by an organization or other party as a separate

purchasers, must be considered to "run with the land" under applicable state law.[92] In some states, such easements may need to be re-recorded after a period of years to avoid their extinguishment under marketable title statutes.

2. Contractual covenants.

Leases or other contractual agreements permitting non-federal use of contaminated property must include covenants that would expressly prohibit uses that would endanger human health and the environment. Such agreements would need to provide DoD and other appropriate federal and state agencies and their designees with the right to enter the property for the purposes of inspection and completion of the remedial action to ensure compliance with Section 120(h).

Where access to the leased property is, or is likely to be, necessary to engage in remedial activities with respect to adjacent or nearby contaminated property, leases or other agreements permitting the non-federal use of the uncontaminated or cleaned-up property also must include appropriate covenants permitting the necessary access.

E. Liability Issues

This report does not address DoD's potential liability to non-federal users of contaminated base closure property prior to, during, or following, remedial action. Liability issues must be addressed, however, prior to selection of any alternatives providing for the use or transfer of contaminated property. Moreover, purchasers or lessees of DoD property are likely to request indemnification from DoD for liability attributable to DoD releases.

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interest in the subject property.

[92]See generally Powell §§ 401 et. seq. Cf. North Dakota v. United States, 460 U.S. 300 (1983)(dealing with impact of state law on an easement in gross acquired by the United States Secretary of the Interior).

DoD may want to obtain authorization from Congress to provide such indemnification.

In addition, DoD should consider its potential future liability for the polluting activities of lessees, purchasers or other users of base closure property and appropriate ways of protecting itself from such liability. It may be desirable for DoD to establish preferences for or against certain types of lessees or purchasers.[93]

PART V. PROTECTION OF NATURAL AND HISTORIC AREAS

Federal law authorizes, and in some cases requires, the imposition of restrictions on uses of federal property that are incompatible with the property's natural or historic features. The following executive orders and statutes may provide a basis for protection of special natural or historic features of base closure property:

1. Wetlands. Executive Order 11990, as amended[94] requires in part, with respect to the lease, grant of easement or right-of-way, or disposal of any federally-owned property, that the federal agency responsible for these activities: (1) refer in the conveyance to "those uses which are restricted under identified Federal, State, or local wetlands regulations;" (2) "attach other appropriate restrictions to the uses of the property by the grantee or purchaser or any successor, except where prohibited by law;" or (3) "withhold such properties from disposal." The Executive Order also requires each federal agency to take action to minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural and beneficial

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[93]As previously noted, 10 U.S.C. § 2692 prohibits the non-DoD use of DoD installations for the storage of toxic or hazardous materials.

[94]3 C.F.R. 121 (1978), as amended, E.O. 12608, 52 Fed Reg. 34617 (Sept. 14, 1987).

values of wetlands in carrying out its responsibilities" for, among other activities, the disposal of federal lands and facilities.

2. Floodplains. Executive Order (E.O) 11988, as amended,[95] imposes obligations and limitations similar to those imposed with respect to wetlands by E.O. 11990 on federal agencies involved in financial transactions relating to areas located in floodplains.

3. Endangered Species/Critical Habitats. The Endangered Species Act of 1973, as amended,[96] prohibits any DoD action that would jeopardize endangered species or critical habitats as determined by the Secretary of Interior and requires that DoD "further the Purposes of the Act by carrying out programs for the conservation of" these species and habitats.

4. Designated/Proposed Wilderness Areas. The Wilderness Act of 1964, as amended,[97] requires that DoD "be responsible for preserving the wilderness character" of any areas on that are within the boundaries of wilderness areas designated by Congress [or proposed for such designation] pursuant to the Act.

5. Designated/Proposed Wild and Scenic Rivers. The Wild and Scenic Rivers Act of 1968, as amended,[98] authorizes the protection of designated rivers and adjacent property and requires DoD to take action necessary to further the purposes of the Act with respect to properties, if any, under its jurisdiction "which include, border

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[95]3 C.F.R. 117 (1978), as amended, E.O. 12148, 3 C.F.R. 412 (1980).

[96]16 U.S.C. §§ 1531-1543.

[97]16 U.S.C. §§ 1131-1136.

[98]16 U.S.C. §§ 1271-1287.

upon, or are adjacent to, any river included" within a designated river system.

6. Coastal Barriers. The Coastal Barrier Resources Act of 1982,[99] places strict requirements on any DoD program that would affect the coastal barrier system.

7. Natural Landmarks. Various federal acts indicate that DoD should protect natural landmarks, including the National Environmental Policy Act of 1969 and the National Historic Preservation Act.[100]

8. Aquifer Recharge Areas. The Safe Drinking Water Act forbids the use of federal financial assistance for any project endangering a designated sole source aquifer recharge area.[101]

The discussion below presents an analysis of options that may be useful in protecting areas on bases to be closed that have special ecological, scenic, or other natural or historic value. These options would protect such areas after the land is transferred to non-DoD users.

A. Conservation Easements

A conservation easement is a nonpossessory interest in real property, normally created by the conveyance of a deed by the owner of the fee simple interest in the property to another party, usually a governmental entity or a nonprofit conservation organization.

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[99]16 U.S.C. §§ 3501-3510.

[100]See National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (requiring that "irretrievable" resources be protected); National Historic Preservation Act, 16 U.S.C. § 470-470w (requiring federal agencies to minimize possible harm to any landmark attributable to their undertakings); see also P.L. 94-58 (directing the Secretary of Interior to investigate property that exhibits "qualities of national significance" for possible inclusion in the National Park System or on the Registry of National Landmarks).

[101]42 U.S.C. § 300h-3(c).

The deed conveying the conservation easement contains restrictive covenants, and the grantee assumes responsibility for enforcement of the restrictions. Conservation easements usually include, in addition to negative restrictions, the right to enter the servient property to inspect for compliance with the restrictions. They also may provide for a right of public access for recreation.[102]

DoD may grant conservation easements on portions of base real property that have special ecological, scenic or recreational value.[103] The grant of a conservation easement on base real property would not affect DoD's ownership of the land and improvements thereon, which could be retained by DoD or transferred to third parties independent of the conservation easement. Such easements could be granted to another Federal department or agency, such as the U.S. Fish and Wildlife Service, to State or local governments or agencies, or to non-profit conservation organizations. DoD could grant conservation easements in exchange for fair market value[104] consideration or, where authorized, DoD could donate the easements or grant them for a price less than fair market value.

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[102]See generally Bruce & Ely, The Law of Easements and Licenses in Land (West 1988 & Cum. Supp.); Diehl & Barrett, The Conservation Easement Handbook (The Land Trust Exchange & The Trust for Public Land 1988).

[103]Section 120(h)(3) of CERCLA could be read to prohibit the grant of a conservation easement by deed on contaminated property to non-federal grantees prior to the taking of all remedial action necessary to protect human health and the environment. The prohibition is inapplicable to grants of easements to another federal agency or department, such as the U.S. Fish and Wildlife Service, or to creation of easements by written contract. See Smith, Tschappat and Racster, Real Estate and Urban Development 181-82 (Richard D. Irwin, Inc. 1977)(discussing easements created by written contract).

[104]The fair market value of an easement is generally considered to be the amount by which grant of the easement decreases the value of the land burdened by the easement.

The permitted scope, term, holders, enforcement and termination of conservation easements are typically determined under state statutes, which vary considerably from state to state.[105] Restrictions in conservation easements, however, normally can be tailored to fit the ecological and physical features of particular parcels of real property and to accommodate the needs and desires of DoD and the grantee agency or organization. For example, conservation restrictions can prohibit all activities altering the natural condition of the land or they can permit agricultural or forestry enterprises and/or limited development.

Conservation easements can be limited or unlimited in duration, although marketable title statutes in a significant number of states provide for the automatic extinguishment of all restrictions on real property after a specified number of years. Special statutory exemptions for qualifying conservation easements, however, often permit them to be enforceable in perpetuity.[106]

Section 319 of Title 40, U.S.C., may provide the necessary authorization in many situations to the Secretary of Defense to grant easements on base real property to State or local governments or agencies, or to non-profit organizations, or to other federal agencies, even without a determination that such interests are excess or surplus property.[107] The

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[105]Conservation easements typically are easements in gross, since they are not attached to adjacent land. Under common law principles such easements in gross would not usually be considered to "run with the land" so as to be valid against subsequent purchasers of the burdened land. By 1986, 45 states had enacted special enabling legislation to permit the creation of conservation easements that would avoid the enforcement issues raised by the common law. Powell on Real Property 430.2.

[106]See Diehl & Barrett, supra, at 132.

[107]But see S. Rep. No. 1364, 87th Cong., 2d Sess., reprinted in 1962 U.S.Code Cong. & Ad. News 3870(providing no indication that Congress specifically contemplated that the provision would be applicable to easements for conservation purposes); see also Letter from

provision authorizes DoD, upon application by "a State or political subdivision or agency thereof or any person" to grant an easement in DoD land, subject to whatever "reservations, exceptions, limitations, benefits, burdens, terms, or conditions, including those provided in section 319a of [title 10]," as he "deems necessary to protect the interests of the United States."[108]

Section 319 authorizes grants of easements "without consideration, or with monetary or other consideration, including any interest in real property." The Federal Property Management Regulations require, however, that DoD obtain consideration equal to the amount by which an easement decreases the value of the property.[109] Since these regulations require fair market value consideration for easements, it is not clear that conservation easements to ensure compliance with the above provisions can be granted to non-federal agencies or to non-governmental entities without consideration.[110] If transfers of real property without consideration for a particular purpose are authorized, however, such authorization may apply to grants of conservation easements, since such easements are

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Administrator of GSA to the Speaker of the House (June 12, 1961, reprinted in 1962 U.S.Code Cong. & Ad. News 3873-74 (recommending the enactment of Section 319, partially to avoid the FPASA requirement that easements in real property be excess and surplus property in order to be granted, and noting that, in the opinion of GSA, such enactment would not affect the budgetary requirements of GSA or any other executive agency).

[108]Cf. 10 U.S.C. §§ 2668, 2669. Section 2668 authorizes the Secretary of a military department to grant easements for rights-of-way for certain specified purposes and "for any other purpose" that he considers advisable.

[109]41 C.F.R. § 101-47.313-2.

[110]41 C.F.R. § 101-47.313-2.

interests in real property.[111]

Rather than creating a conservation or historic preservation easement on base property through a separate deed conveyed to another agency or entity to protect its special natural or historic attributes, DoD might reserve or except a conservation easement in a deed of conveyance to the purchaser of the fee simple interest in the property or otherwise attempt to restrict the future use of the property in the deed for the conveyance of the fee simple interest in such property. Also, mutual covenants might be imposed by DoD as the original owner of a subdivided parcel to control features of adjoining lots pursuant to a common development or subdivision plan. DoD might use such covenants where a parcel of land is to be sold for subdivision and development.

The enforceability of restrictive covenants which do not meet the statutory requirements under state law for conservation easements may be limited by state marketable title statutes or other law and such restrictions may need to be re-recorded to remain enforceable, although exceptions for restrictions for public or charitable purposes may be applicable. Dependent on local law, such deed covenants may not be considered to "run with the land" and thus may be enforceable only against the purchaser of the property from DoD and not subsequent transferees.

In addition, conservation easements or restrictive covenants, included in a deed of conveyance of the fee simple interest in property, even if enforceable against subsequent purchasers, may only be enforceable by DoD, thus placing an unwanted burden on DoD

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[111]For example, Section 667b of title 16, U.S.C., authorizes transfers of real property for wildlife conservation purposes to a state wildlife agency without compensation, and thus might be considered to authorize the grant of a conservation easement that meets the requirements of the provision.

to monitor compliance with the terms of the restrictions and covenants.

For these reasons, the grant of a conservation easement by separate deed to a federal or state agency or to a non-profit conservation or historic preservation organization may be preferable to the mere retention by DoD of conservation easements, or the inclusion of restrictive covenants, in deeds conveying fee simple ownership of the property.

B. Historic Preservation Easements.

DoD may grant an historic preservation easement to protect any building or other structure of historical importance on a base to be closed or realigned. Following the grant of an historical easement, DoD or a successor landowner could continue to use the burdened real property for any purpose and in any manner not inconsistent with the restrictions included in the deed granting the easement. Historic preservation easements, although different in purpose, are similar in nature to conservation easements and the federal, state and local legal requirements and limitations noted above with respect to the authority of DoD to grant conservation easements and the enforceability of such easements may also affect the ability to grant and enforce historic preservation easements.

The Archaeological Resources Protection Act of 1979[112] and the National Historic Preservation Act of 1966[113] place certain requirements on DoD to the extent that its undertakings may have an impact on archaeologically or historically significant property.

C. Transfer of Fee Simple Ownership.

In some circumstances, the ecological or other natural features of DoD property may be so significant that the only viable way to protect the ecological, scenic, recreational or

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[112]16 U.S.C. §§ 470aa-470ll.

[113]16 U.S.C. §§ 470-470w.

other special value of the property is to impose restrictions on the property preventing any change from its natural state. In such cases, it may be advisable to transfer ownership of the land over to the USFWS, to an appropriate state agency, or to a non-profit conservation organization for management, perhaps after imposition of restrictive deed covenants or easements to ensure that the property will remain in its natural state following any future sale.

D. Transferable Development Rights

Transferable development rights (TDRs) may be useful tools in some cases to channel development away from environmentally sensitive areas and toward areas designated for growth. TDR programs typically involve designation by zoning laws of some land in a particular region as preservation areas, where only minimal development, if any, is allowed, and designation of other land as growth areas, where high density residential or commercial development may be allowed. The zoning structure for designated growth areas usually is two-tiered, including both a base zoning density and a higher density level permitted only if owners of property obtain TDRs.[114]

TDR programs typically provide for the transfer of TDRs in one of two ways. In one type of program, a local land use authority grants TDRs to owners of property in the preservation areas, which they can sell or transfer for use with respect to other lots in the growth areas. Alternatively, the owner of an undeveloped or underdeveloped property in an area of natural or historic significance sells his development rights directly to the owner of another site where higher density development is being encouraged.

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[114]See Institutional Guidelines for Designing Successful Transferable Rights Programs, 6 Yale L. J. on Reg. 369, 372-73 (1989).

DoD might participate in a TDR program by reserving TDRs on certain environmentally sensitive land that it owns and selling these TDRs to purchasers of base property that was earmarked for higher density growth. The feasibility of such a program and its prospects for success as a mechanism to protect environmentally sensitive land in some parts of a base and to promote growth in other areas would depend upon development of a comprehensive land use plan for the base that was integrated with the land use plans and zoning ordinances of the local municipalities that will have jurisdiction over the base closure property. It also would require the cooperation of local authorities to manage the program. The required state and local consultation regarding local land use plans and zoning would be the appropriate forum for development of a TDR program. The potential limitations imposed by the Federal Property Management Regulations would have to be considered prior to the design of program providing for the creation and sale of TDRs in base property, particularly if the value of the transferred development rights might be greater than the compensation received for such rights by DoD.

E. Leases for Recreational Purposes.

Property that becomes excess as a result of base closure may be leased to State or local governments for use as parkland or other recreational purposes pending its ultimate disposition if the lease arrangement can satisfy the applicable requirements under the Federal Property Management Regulations governing the interim use of excess federal property or Section 2667(f) of title 10, U.S.C.[115]

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[115]See also 41 C.F.R. 100-47.308-7 (disposal of surplus property for a use as a public park or recreation area).

PART VI. SUMMARY

A variety of options exist for converting base closure property to non-federal use prior to the taking of all remedial action necessary to protect human health and the environment with respect to contaminated property on the base. The alternatives for transferring the use or ownership of a particular parcel depend to a significant extent upon the condition of the parcel and surrounding land and the classification of the property as excess, surplus or non-excess property under the FPASA and the Federal Property Management Regulations.

DoD generally will be required to dispose of its fee simple interest in base closure property that is not needed within DoD or other federal agencies after all necessary remedial action has been taken with respect to the property. The Federal Property Management Regulations specify procedures for making such dispositions of surplus property. These regulations generally require that priority be given to transfers to State or local governments or for public purposes. Leases of base closure property after all remedial action has been taken may be appropriate in certain instances, although such leases generally will have to be short-term.

Section 120(h)(3) of CERCLA prohibits the transfer of fee simple ownership of contaminated base closure property before all remedial action necessary to protect human health and the environment has been taken. In some cases, however, the property may be safe for certain uses even though all necessary remedial action has not been taken. Leasing often will be the best alternative for transferring the use of such property to non-DoD users. Executory contracts providing for possession by the purchaser prior to closing may be an appropriate alternative in some instances, particularly when almost all necessary

remedial action has been taken or all necessary remedial action soon will be taken.

DoD must ensure that it obtains easements as part of the conveyance of base closure property to preserve its right to access to the property to take or oversee the completion of remedial action. Easements on uncontaminated property also will be necessary if access to the property is, or is likely to be, necessary to take or complete remedial action on adjacent or nearby property. In addition, appropriate covenants must be included in leases and other agreements to protect public health and the environment and to ensure access to the property for purposes of remedial action.

Section 120(h) of CERCLA and the 1988 and 1990 Base Closure Acts have created numerous issues relevant to the transfer of use of base closure property prior to that of all remedial action necessary to protect human health and the environment has been taken. This report has discussed a number of such issues, including the following: (1) the proper classification under the FPASA and the Federal Property Management Regulations of base closure property that must or should be retained by the United States until all remedial action required by Section 120(h)(3) is taken; (2) the impact of the delegation of GSA authority to DoD pursuant to the 1988 and 1990 Base Closure Acts on Section 2667 of title 10, U.S.C., which applies to leasing of non-excess and excess DoD property; (3) the effect of the prohibition of Section 2692 of title 10, U.S.C., on the leasing of property by industrial users; (4) the scope of DoD's authority to grant conservation easements on base closure property to preserve special natural or historic features of base closure property and (5) whether DoD is authorized to sell purchase options on base closure property. Other significant issues, noted but not discussed in this report, are: (1) whether long-term use of property may affect the final clean-up standards for contaminated property; and (2) potential liability issues arising from non-federal use or ownership of base closure property.