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Real Property Disposal Under the Federal Property and Administrative Services Act of 1949--Request of the Chairman of the Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce (B-101646)

In connection with the above audit, you requested an analysis of the legislative history of the Federal Property and Administrative Services Act of 1949. The purpose of the analysis is to assist in determining what limits if any the Act places on the discretion of the Administrator of the General Services Administration to dispose of excess and surplus real property.

The legislative history confirms that the Administrator does not have discretion to dispose of excess real property outside the Federal Government if it is clear a Federal agency needs it and would be required to purchase on the market more expensive property in lieu of the less valuable excess property. He is required to survey Federal agency needs for the property. Economic advantage to the Government justifies disposal to a private party, State or local government.

With two exceptions, there appears to be no specific limitation on the Administrator's discretion to reject a proposed use of surplus property in favor of another use outside the Federal Government. The two exceptions are the priority surplus property uses for power transmission lines and public airports.

The attached Legal Analysis discusses the Administrator's discretion to dispose of excess and surplus real property insofar as the legislative history adds to the understanding of the subject beyond what can be learned from reading the text of the Act.

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It also discusses legislative history that aids in showing that the Secretary of the Interior's request under 16 U.S.C. 667b for excess property to be used as a migratory bird refuge is not subject to the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(g)).

In reading this Legal Analysis it should be kept in mind that the legal requirements of the statute may be different than the intention of individual Congressmen as expressed in the legislative history. For this reason, any application of specific facts to the general comments made in this Analysis should be discussed with someone in the Special Studies and Analysis Section, Office of General Counsel.

Attachment

cc: Mr. Shafer, LCD
Mr. Hill, LCD
Mr. Kriethe, LCD
Mr. Shnitzer, OGC
Mr. Pierson, OGC
Mr. Kirkpatrick, OGC
Index and Files
Index Digest

LEGAL ANALYSIS

DIGEST: The legislative history of the Federal Property and Administrative Services Act of 1949 confirms that the Administrator of the General Services Administration does not have discretion to declare excess Federal property surplus and dispose of it outside the Government unless after a survey of agency needs, he reasonably determines that no Federal agency requires the excess property as an alternative to purchasing other property at a cost higher than the value of the excess property. 40 U.S.C. 472(g) and 483.

With two exceptions (priority surplus property uses for power transmission lines and public airports), the Federal Property and Administrative Services Act of 1949 does not indicate any limit on the GSA Administrator's discretion to reject a proposed use of surplus property in favor of another use outside the Federal Government.

The GSA Administrator has broad discretion to negotiate a sale of surplus real property whenever special circumstances warrant, and he may limit competition for a negotiated sale to the extent he has any rational basis for doing so. 40 U.S.C. 484(e)(3)(G).

The GSA Administrator in order to declare property surplus has discretion to reject a Fish and Wildlife Service request under 16 U.S.C. 667b for real property to be used as a migratory bird refuge, since such request is not subject to 40 U.S.C. 472(g), requiring him to determine that the Government doesn't need excess property before declaring it surplus.

I. PERTINENT PROVISIONS OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

In order to minimize expenditures for property (both real and personal), the Administrator of GSA is required under 40 U.S.C. 483 to prescribe policies and methods to promote the

maximum utilization of "excess property" by executive agencies and to provide for the transfer of "excess property" among Federal agencies. The term "excess property" is defined in 40 U.S.C. 472(e):

"(e) The term 'excess property' means 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."

Thus, the Administrator has authority to promote, and provide for the transfer of, "excess property," but under the above definition it does not become excess until the head of the agency holding the property determines the agency no longer needs it.

The Administrator has under 40 U.S.C. 484 supervision and control over the disposition of "surplus property" to parties outside of the Federal Government, including State and local public agencies for the various purposes enumerated in 40 U.S.C. 484 and other statutory provisions. The term "surplus property" is defined in 40 U.S.C. 472(g):

"(g) The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator."

The effect of the above provisions is that "excess property" no longer needed by one Federal agency is to be available for the needs of other Federal agencies. It becomes "surplus property" for disposal outside the Government only when it is "not required for the needs and the discharge of the responsibilities of all Federal agencies as determined by the Administrator."

The following discussion emphasizes the legislative history of the Federal Property and Administrative Services Act of 1949 as it relates to the discretionary authority of the Administrator to have "excess property" transferred between Federal agencies and "surplus property" sold or donated to State and local government agencies, as well as private parties.

II. TRANSFER OF EXCESS LAND TO FEDERAL AGENCIES

QUESTION:

How much discretion does the Federal Property and Administrative Services Act of 1949 give the Administrator to decide under 40 U.S.C. 472(g) that excess real property is not required for the needs and the discharge of the responsibilities of all Federal agencies and is, therefore, "surplus property" available to parties outside the Federal Government?

The Administrator's discretion to declare excess property surplus and distribute it outside the Federal Government is limited in order to prevent new acquisition of more expensive property by a Federal agency whose needs would adequately be served by less valuable excess property.

In connection with section 472(g), House Report No. 670, 81st. Cong., 1st Sess., May 24, 1949, states at page 8:

"'Surplus property' means any property which has been declared excess by a particular Federal agency and which, after a survey of the needs of other Federal agencies, is determined by the Administrator of General Services no longer required by the Federal Government as a whole." (Underscoring provided.)

This statement refers to subsection 3(g) of S. 2020, 81st Cong., 1st Sess., the definition subsequently enacted. Consequently, before determining that Federal agencies do not require excess property, the Administrator must conduct a "survey" of Federal agency need for the property.

Senate Report No. 475, 81st Cong., 1st Sess., at page 8, makes this same statement concerning the need for a survey of Federal agency needs before property is determined to be surplus. Further, this report at page 4 states:

"[G]reat losses have been suffered by the Government through purchasing of new articles by one agency when serviceable articles of the same type are available in the inventories of other agencies and excess to their needs. The bill is expected to stop these losses. It

provides a uniform system for the identification and classification of property, and for the standardization of contract forms, specifications, and procedures. It requires executive agencies to maintain reasonable inventory levels and to establish adequate inventory controls. The Comptroller General is authorized to prescribe principles and standards for property accounting. The bill requires continuing surveillance by every executive agency of the property under its control and it authorizes the Administrator to make surveys of such property and of property-management practices. Through these measures, the committee believes that there can be, and, if efficiently administered, that there will be maximum utilization of property already owned by the Government and minimum purchasing of new property. (Underscoring provided.)

This statement refers to sections 201-202, 205 and 206 of S. 2020, which in pertinent part are identical to these sections of the present Act.

Maximum utilization of Government-owned property and the various provisions in the Act to implement this policy were, then, enacted with the objective of preventing losses to the Government when agencies purchased new property in lieu of receiving property excess to the needs of other agencies.

A similar explanation appears in Hearings on the Federal Property Act of 1949, S. 990 and S. 859, 81st Cong., 1st Sess., before the Senate Committee on Expenditures in the Executive Departments, April 14, 1949. This colloquy between the Committee Chairman and the Acting General Counsel of the Federal Works Agency (Maxwell H. Elliot) appears on page 26 of the Hearings:

"MR. ELLIOT.

* * * * *

"I think the biggest thing that this bill is designed to do is to get maximum utilization by the Government of its own property.

The purpose--and it is a purpose that will have to be carried out not only by this clear legislation but by intelligent and exhaustive administration--is to avoid the situation where today one agency is buying things at new prices, where another agency is selling the same things off at junk dealer's prices because the agency which is selling doesn't know that the agency which is buying has need for that material.

"THE CHAIRMAN. Does this bill require that an agency, when it ascertains that it has property excess to its needs, must certify that property to the Federal Works Agency,*/ and that the FWA, after taking jurisdiction, may dispose of it either to another Government agency or as surplus property under the terms of the bill?

"MR. ELLIOT. That is correct, sir. The bill defines excess and surplus property and defines excess property as property under the control of any agency which the head of that agency has determined he no longer needs in his operations.

"THE CHAIRMAN. In so determining, it may then become surplus property if it is in excess to the needs of other agencies of the Government?

"MR. ELLIOT. That is correct, sir.

"THE CHAIRMAN. The Federal Works Agency, under this law would determine, after that property was certified as no longer needed by a specific agency, whether it is excess property to that agency and to the Government needs. If it is in excess of Government needs, it then actually is surplus property? It would be placed in one category or the other by your agency and disposed of accordingly.

*/ The bill under discussion, S. 990, 81st Cong., 1st Sess., would have given property disposal functions to this existing agency rather than creating GSA.

"MR. ELLIOT. That is correct, sir. It is up to each agency to say what property is excess to it, but having so determined that, it has the responsibility and the duty to report to the Administrator. He in turn has the responsibility and duty of surveying the needs of the entire Government and of making a continuous survey and of seeing what other agencies may or may not need what property.

"THE CHAIRMAN. Are the terms of the bill sufficient to make it mandatory that each agency submit systematic and periodic reports to the Federal Works Agency with respect to excess property it may have on hand? Or is that to be controlled by rules or orders promulgated by the Administrator of the Federal Works Agency?

"MR. ELLIOT. I might say that both the President and the Administrator under the terms of this bill have power to prescribe general regulations, but in answer to your specific question, section 103 (b), which appears on page 10, I believe, lines 15 through 20, requires that--

"Each executive agency shall (i) maintain adequate inventory controls and accountability systems for the property under its control, (ii) continuously survey property under its control to determine which is excess property, and (iii) perform the care and handling of such excess property.'

"THE CHAIRMAN. That particular subsection does not have any specific provision requiring that as they make these surveys and inventories, they shall submit such report to your agency.

"MR. ELLIOT. No, sir; but section 107 (a), on page 20, lines 7 through 9, authorizes the administrator to make surveys of Government property and management practices with respect thereto and to obtain reports thereon from executive agencies.

"THE CHAIRMAN. Then the bill does provide a system of permitting the Administrator of the Federal Works Agency to issue regulations to the other agencies with respect to reporting excess property.

"MR. ELLIOT. That is right, sir.

"THE CHAIRMAN. But it does not prescribe any periodic report. They will be made, as contemplated by this bill, only subject to requests or regulations that may be promulgated by the Administrator of the Federal Works Agency. In other words, there is considerable latitude left in the law to the Administrator of the Federal Works Agency with respect to setting up a system whereby your agency can be kept informed with respect to inventories of property in the possession of various Government agencies and when those inventories reach the point that they do have property in excess of their needs.

* * * * *

"THE CHAIRMAN. Now let me get one other point straight. We have developed that each agency under the regulations that may be promulgated by the Federal Works Agency, will be required to keep inventories and make reports as called for. It is contemplated that the Federal Works Agency will have knowledge at all times of any excess property in any particular agency of the Government, the nature of that property, and so forth; and your Agency therefore becomes a source of central information with respect to property.

"MR. ELLIOT. That is true, sir. The other side of that picture is that under that same section it is contemplated that we would be a source of information as to the needs of agencies for property." (Under-scoring provided.)

Under discussion in this colloquy are the definitions of "excess" and "surplus" property in S. 990, 81st Cong., 1st Sess., enacted in pertinent part as the Federal Property and Administrative Services Act of 1949. Section 103 of this bill, referred to in the colloquy, was subsequently enacted (with minor changes) as Section 202 of the Act (40 U.S.C. 483) providing for maximum utilization of Federal property in order to minimize expenditures for property. Section 107 became section 206 of the Act (40 U.S.C. 487), authorizing the Administrator to make surveys of Government property and obtain agency reports on property holdings.

The above legislative history makes clear that in two respects the definition of "surplus property," together with 40 U.S.C. 483 and 487, limits the Administrator's discretion to dispose of Federal excess property outside the Federal Government. First, he may not do so if he definitely knows that one or more Federal agencies can use the excess property to adequately meet their needs at less expense than a new acquisition of Federal property. Second, his discretion is checked because he must survey agency needs for the excess property before determining it is surplus. The survey involves using the information system for identifying the excess property possessed by holding agencies and matching it with the property needs of other agencies who would be required to purchase property on the market unless they received the excess property. The Administrator's discretion is checked in this manner in order to minimize Government expenditures as required by 40 U.S.C. 483. For this purpose, the legislative history makes no distinction between real and personal property.

The overriding concern of minimizing costs in connection with the Administrator's determination that excess property is not needed by Federal agencies is illustrated in a letter from the Comptroller General to the Chairman of the House Subcommittee on General Government Activities, Government Operations Committee, B-132099, July 22, 1957. The Chairman asked the questions: May a Federal agency declare a property "excess" to its needs and the GSA Administrator declare that property "surplus" when the sales arrangement provides that the private purchaser will lease back the property to the agency which uses the property for the same purpose before and after the sale? The letter recognized the logical difficulty of the Administrator determining that the property was "not required for the needs and the

discharge of the responsibilities of all Federal agencies, as determined by the Administrator," when the same need and use were served for the same Federal agency before and after the surplus property declaration and sale:

"Question No. 5 presents a situation which, in our opinion, raises serious doubts as to whether there is any basis for determining that the property is 'excess' or 'surplus' property. The fact that the property was immediately leased back after sale certainly indicates that there is a continuing need for the use of the property. Such fact also would constitute prima facie evidence that there is a continuing need for holding title to the property. We feel that, in order to rebut such prima facie evidence, an agency would have to make a very clear showing that the transfer of title to and leasing back of the property were economically in the best interest of the Government. This showing possibly could be made in a few instances where the Government's costs of operation and maintenance were unusually high when compared with similar costs of the proposed vendor who specializes in that particular type of work. We believe that any doubtful case of this nature should be presented to the Attorney General for his determination as to whether the property was lawfully disposed of under the provisions of the Property Act since he is the only one who might possibly recover the property. There is no final action which the accounting officers could take in the matter."

Significantly, this case represents an example of "prima facie evidence," or a presumption, that an agency requires the property. The presumption could be overcome by showing that the sale is economically in the best interest of the Government.

Most importantly, the decision states:

"The above definition of 'excess property' [40 U.S.C. 472(f)] clearly vests in the head of each Federal agency discretionary authority

to determine whether any property under its control is required for its needs and the discharge of its responsibilities. The above definition of 'surplus property' [40 U.S.C. 472(g)] likewise vests in the Administrator of General Services discretionary authority to determine whether any property declared by a Federal agency to be excess property is required for the needs and the discharge of the responsibilities of all Federal agencies. In view of such discretionary authority, the legality of any determination by a head of a Federal agency or by the Administrator of General Services that property is excess property or surplus property, respectively, could not be questioned by the accounting officers unless such determinations were clearly arbitrary or capricious and even then the only action the accounting officers could take would be to report the matter to the Congress or to the Attorney General for any possible legal proceeding to recover the property.

"Whether such determinations are arbitrary or capricious requires consideration of the meaning of the clauses 'required for its needs and the discharge of its responsibilities' and 'required for the needs and the discharge of the responsibilities of all Federal agencies' contained in the above definitions. We have found nothing in the legislative history of the Property Act to explain the specific intent of these clauses. Such clauses have to be construed, therefore, in the light of their common ordinary meaning when considered in the context of the entire Property Act.

"Section 2 of the Property Act provides that it 'is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for * * * (b) the utilization of available

property; (c) the disposal of surplus property.' One of the primary purposes of the legislation was to obtain more economical use of the property through maximum utilization of the property by all agencies of the Government and the minimum purchasing of new property. Senate Report No. 475, 81st Congress, states that the proposed legislation [enacted as the 'Property Act'] would prevent great losses which had been 'suffered by the Government through purchasing of new articles by one agency when serviceable articles of the same type are available in the inventories of other agencies and excess to their needs.' The Property Act did not attempt to force an agency to continue to use property under its control which it had determined to be excess to its needs, but merely required that any property declared by the owning agency to be excess to its needs be offered to other Government agencies prior to its disposition to private concerns.

'Whether an agency needs to use certain property to carry out an authorized program depends primarily upon the manner in which the program is to be carried out and great weight must be given the determination of the agency head vested with the responsibility of carrying out the program. It is a question which cannot be answered categorically in the affirmative or the negative as a general proposition, but must be determined on the basis of the facts in each case considering the manner in which the program is being conducted. There may be instances where certain property, such as communication facilities, could be sold and the purpose for which it was being used accomplished through private contracts at a cost less than the Government's costs of operation and maintenance of the property. In such cases, it could be argued that the Government's need was for the availability of communication services

rather than for a property right in the facilities. If this be a fact and the agency head determined that the property is no longer needed for such purpose or for any other activity within the agency and declares the property to be 'excess property,' we do not believe that such a determination could be said to be arbitrary or capricious. If such property is in fact not needed by any other Government agency and the Administrator of General Services declares the property as 'surplus property,' his determination likewise would not be arbitrary or capricious and the sale of the property to private interests might be legally proper.

"The fact that the property is continued to be used by the owning agency pending its disposition either to another Government agency or as surplus property would not necessarily affect the legality of the determinations that the property was 'excess' or 'surplus' property. The continued use of the property does not, in itself, necessarily mean that the agency has a continuing need for either the use of, or title to, the property. As indicated above, the agency might be able to carry out the same program more economically after the property is sold. * * * (Emphasis added.)

The underscored portions of this quote suggest at least three questions the Administrator must generally answer in the negative before he is authorized to reject a Federal agency's assertion of need and declares property surplus:

1. Will the requesting agency be required to purchase other property at greater cost to the Government than the value of the excess property available to satisfy the agency's need?
2. Does the requesting agency need the property to carry out its program by the method it is primarily responsible for choosing when there is no cheaper or adequate alternative property available on the market?
3. Considering all facts and circumstances of the particular case would the Government receive any economic advantage by using the property itself rather than selling or donating the property?

Compare B-152223, November 6, 1963, which held that there was no rational basis for an "excess" and "surplus" property determination when the purchaser acted only as a landlord for the agency which had owned and used the property before the sale.

III. DISPOSAL OF SURPLUS PROPERTY

QUESTIONS:

A. Does the legislative history of the Federal Property and Administrative Services Act of 1949 indicate any priority of need for surplus real property which serves as a check on the GSA Administrator's discretion to reject a proposed use of the property outside the Federal Government in favor of another use?

Section 602 of the Federal Property and Administrative Services Act of 1949 (formerly §502, 63 Stat. 399) states:

"SEC. 602. (a) There are hereby repealed--
 "(1) the Surplus Property Act of 1944, as amended (except sections 13 (d), 13 (g), 13 (h), 28, and 32 (b) (2), and sections 501 and 502 of Reorganization Plan Numbered 1 of 1947; Provided, That, with respect to the disposal under this Act of any surplus real estate, all priorities and preferences provided for in said Act, as amended, shall continue in effect until 12 o'clock noon (eastern standard time), December 31, 1949;
 * * * * (Underscoring supplied.)

In connection with this provision, House Report No. 670, 81st Cong., 1st Sess., May 24, 1949, states at pages 5-6:

"Surplus real property is in a different situation. That relating to municipal airports, public parks, historic monuments, and for recreational purposes is set up as permanent legislation. As to all other surplus real property the committee has retained existing priorities and preferences with respect to the disposition of such surplus real property only until 12 o'clock noon (eastern standard time) December 31, 1949."

Consequently, priorities for surplus real property terminated on December 31, 1949, with the exception of any priority in the Surplus Property Act of 1944 not repealed by section 602. Two real property priorities appear to have been carried over from the Surplus Property Act of 1944. One is evidently surplus power transmission lines. The other is surplus property for public airports. See 50 Appendix U.S.C. 1622(d) and (g)(6), respectively. Any question concerning these priorities should be checked with GSA. The GSA Property Management and Disposal Service Handbook (4000.1), Excess and Surplus Real Property, Chapter 3, paragraphs 31 and 32, does not explain how GSA recognizes and deals with these priorities.

Other than these two priorities, there appears to be no specific limitation on the Administrator's discretion to reject a proposed use of surplus property in favor of another use.*/

B. What circumstances justify the Administrator of GSA's negotiated sale of real property under 40 U.S.C. 484(e)(3)(G)?

40 U.S.C. 484(e) requires publicly advertised sales except for the express reasons set forth in section 484(e) permitting sales by negotiation. A common but troublesome justification is that contained in section 484(e)(3)(G):

"(3) Disposals and contracts for disposal may be negotiated, under regulations prescribed by the Administrator * * * subject to obtaining such competition as is feasible under the circumstances, if--

* * * * *

"(G) with respect to real property only, the character or condition of the property or unusual circumstances make it impractical to

*/ While not having a priority of right to surplus property for public parks, recreational areas and historic-monument sites, State and local governments receive any such property at a price of only 50 percent of fair market value for park and recreational uses and without monetary consideration for historic-monument sites.

advertise publicly for competitive bids and the fair market value of the property and other satisfactory terms of disposal can be obtained by negotiation; * * * *

Concerning this provision, Senate Report No. 1284, 85th Cong., 2d Sess., at pages 14-15, contains these comments of the Comptroller General:

"Subparagraph (G) would authorize negotiated disposals, subject to obtaining such competition as is feasible, with respect to real property only, if 'the character or condition of such property or unusual circumstances make it impractical to advertise publicly for competitive bids, and the fair market value of the property and other satisfactory terms of disposal can be obtained by negotiation.' In the administrative comments concerning this provision it is stated that the public interest is substantially safeguarded by the requirement that in the exercise of the negotiating authority, there must be obtained the fair market value of the property and other satisfactory terms of disposal. It is stated further that the subparagraph strengthens the Government's position in making disposals of surplus real property where competitors may [not] be on an equal footing, as in the case of scrambled industrial facilities or in place Government property on leased property. It is stated that this provision will permit the Government to reconvey property to former owners where the equities justify such action. As indicated in the above report of July 26, 1955, we do not question the purposes of the subparagraph as proposed but we believe that under the language used the authority to negotiate would be unnecessarily broad and could be the subject of abuse. Further, as indicated in our prior report we believe that this subparagraph should, therefore, be restricted by its terms to the cases to which it was intended to apply, as referred to in the explanatory letter: We are still of this opinion."

However, this provision was not restricted to situations where competitors are not on an equal footing or to reconveyance of property to former owners, but retained authority to negotiate expressed in the most general of terms. Consequently, it gives the Administrator broad discretion to negotiate whenever the circumstances warrant. To the extent that he has a rational basis for doing so, the Administrator may limit competition when a negotiated sale is justified. If, for example, one proposed use of the surplus property has been selected and one party is in the best position to adopt that use, negotiations may be restricted to that party. See B-165868, June 30, 1971.

IV . RELATIONSHIP BETWEEN 16 U.S.C. 667b (FEDERAL LANDS FOR WILDLIFE CONSERVATION) AND 40 U.S.C. 472(g)†(SURPLUS PROPERTY UNDER THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949)

Summarizing the above discussion, under the Federal Property and Administrative Service Act of 1949, the Administrator of GSA has authority to sell Federal property to a private party only after it is declared "surplus." 40 U.S.C. 484(a) and (c). The term "surplus property" means property "excess" to the needs of the Federal agency holding it and "not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of GSA]." 40 U.S.C. 472(g). The term "excess property" means property under the control of any Federal agency which is not required for its needs, as determined by the head of the agency. 40 U.S.C. 472(e). Until the Administrator makes a valid determination under section 472(g) that the "excess property" is not required by any Federal agency requesting the property, it cannot be declared "surplus" and sold to a private party or otherwise disposed of as "surplus property" to a State or local government agency. Thus, Federal agencies have a priority to "excess property." But the priority is a severely qualified one, because the Administrator has broad discretion to determine that Federal agencies do not need the property. There are no priorities for "surplus property" under the Federal Property and Administrative Services Act of 1949.*/

*/ As discussed in III.A., above, under the Surplus Property Act of 1944, there are apparently still priorities for power transmission lines and public airports.

But the Administrator of GSA is authorized by 16 U.S.C. 667b¹ to determine whether excess property is available without reimbursement for wildlife conservation purposes to the States or, if particularly suited for migratory birds, to the Secretary of the Interior. Upon GSA's determination that it is so available, the land may be transferred to either a State or the Secretary of the Interior for such purposes without reimbursement.

16 U.S.C. 667b provides in pertinent part:

"§667b. Transfer of certain real property for wildlife conservation purposes; reservation of rights

"Upon request, real property which is under the jurisdiction or control of a Federal agency and no longer required by such agency, (1) can be utilized for wildlife conservation purposes by the agency of the State exercising administration over the wildlife resources of the State wherein the real property lies or by the Secretary of the Interior; and (2) is [chiefly] valuable for use for any such purpose, and which, in the determination of the Administrator of General Services, is available for such use may, notwithstanding any other provisions of law, be transferred without reimbursement or transfer of funds (with or without improvements as determined by said Administrator) by the Federal agency having jurisdiction or control of the property to (a) such State agency if the management thereof for the conservation of wildlife relates to other than migratory birds, or (b) to the Secretary of the Interior if the real property has particular value in carrying out the national migratory bird management program.
* * * * (Underscoring and brackets supplied.)

The Secretary of the Interior has authorized the Fish and Wildlife Service (FWS) to request property under this provision.

The word "chiefly" was deleted by the Act of September 26, 1972, Pub. L. No. 92-432, 86 Stat. 723. Until this amendment,

the Administrator of GSA could not transfer Federal property to either a State or the Secretary of the Interior for wildlife conservation unless under the original enactment of May 19, 1948, c. 310, §1, 62 Stat. 240, he found the property to be "chiefly valuable" for such purpose. He had to compare the value of the property for wildlife conservation and for other purposes. If the value was higher for a private use such as ranching or farming, the property could not be transferred to a State or the Secretary of the Interior for wildlife conservation. See the statement of Chairman Dingell in the Congressional Record, April 17, 1972, pp. H.3105-06; also House Report No. 92-990 and Senate Report No. 92-1108.

Comparison of alternative uses was the approach suggested in House Report No. 972, 80th Cong., 2d Sess., and Senate Report No. 1220, 80th Cong., 2d Sess., reporting favorably on the House version of the May 19, 1948, Act:

"This bill [H.R. 4018, 80th Cong., 1st Sess.] does not alter any of the provisions of the Surplus Property Act except to provide that the transfer of these properties may be made without reimbursement or transfer of funds. Other than that, the bill merely authorizes the War Assets Administrator to determine the best possible use that may be made of certain surplus property."

This statement refers to the Surplus Property Act of 1944, c. 469, 58 Stat. 765, which was left unaltered by the Act of May 19, 1948, except that property could be transferred without reimbursement for wildlife conservation and most importantly, the War Assets Administrator (one of the predecessors of the Administrator of GSA) could "determine the best possible use of the property." The reference to "surplus property" under the Surplus Property Act of 1944 was defined in section 3(e) of that Act to mean surplus to the needs and responsibilities of the owning agency. Government agencies were given priority to such surplus property under section 12 of the Act. Thus, "surplus property," with Federal agencies having a priority to it, was under the Surplus Property Act of 1944 essentially the same as "excess property" under the Federal Property and Administrative Services Act of 1949. But the Act of May 19, 1948, gave the Administrator the duty to "determine the best

possible use" of the surplus property. Consequently, the Federal-agency priority in section 12^d did not apply when the chief and best use was a private use.

The legislative history of the 1972 amendment shows the effect of eliminating the word chiefly. The following statement appears in House Report No. 92-990, 92d Cong., 2d Sess., p. 5:

"WHAT THE BILL DOES

"As previously explained in this report, under the Act of May 19, 1948, real property under the jurisdiction and control of a Federal agency no longer required by such agency may be transferred without reimbursement to the appropriate State agency or to the Secretary of the Interior for utilization for wildlife conservation, provided the property is 'chiefly valuable' for such use, and if GSA determines it is available for such use.

"H.R. 13025 would eliminate the word 'chiefly' from present law, thereby placing wildlife conservation on an equal footing with alternative public uses for the property.

"Your Committee feels that enactment of H.R. 13025 would facilitate such transfers and enable increased public ownership of lands important to wildlife and wildlife oriented recreation use."

Thus, with the elimination of "chiefly" wildlife conservation would be on an equal footing with alternative public uses of the property. A substantially identical statement appears in Senate Report No. 92-1108, 92d Cong., 2d Sess., p. 4. There is no suggestion in this legislative history of an intent to treat the needs of FWS for its migratory bird program any differently than other possible State or local government uses for the property.

QUESTIONS:

A. Is an FWS 16 U.S.C. 667b request for real property without reimbursement subject to the 40 U.S.C. 472(g) requirement

that the GSA Administrator must find no Federal agency, including FWS, needs the property before he is authorized to declare it "surplus property"?

If FWS requests property under the Federal Property and Administrative Services Act of 1949, GSA can't declare it surplus and dispose of it outside the Federal Government unless under 40 U.S.C. 472(g) the Administrator of GSA first determines it is not required by FWS or any other Federal agency. But when FWS requests property under 16 U.S.C. 667b, the question arises whether the Federal agency priority in 40 U.S.C. 472(g) applies to the FWS request.

Although the answer is not entirely free from doubt, it does not appear that an FWS request for property under 16 U.S.C. 667b is subject to 40 U.S.C. 472(g). If it were, FWS together with other Federal agencies would have priority over State and local governments requesting the property. But the 1972 amendment to 16 U.S.C. 667b placed wildlife conservation "on equal footing with alternative public uses," as stated in House Report No. 92-990 and Senate Report No. 92-1108, 92d Cong., 2d Sess., discussed above. The intent to give wildlife conservation equal consideration is inconsistent with the notion that FWS under 40 U.S.C. 472(g) is to have priority (more than equal) access to Federal property which it requests for migratory birds. Also, the 1972 amendment's deletion of the word "chiefly" does not evidence an intent to take away GSA's authority "to determine the best possible use" of the property, as indicated in House Report No. 972 and Senate Report No. 1220, 80th Cong., 2d Sess., under the original Act of May 19, 1948. The 1972 amendment eliminated the requirement that the property have the highest value for wildlife conservation before it could be used for that purpose. But elimination of that standard did not necessarily diminish the Administrator's authority "to determine the best possible use" of the property.

A further question arises as to whether 40 U.S.C. 472(g) attaches to a 16 U.S.C. 667b FWS request because the Federal Property and Administrative Services Act of 1949 at 40 U.S.C. 474 says it is paramount and prevails over inconsistent provisions of other laws:

"The authority conferred by this Act shall be in addition and paramount to any authority

conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith * * *."

But the supremacy of that Act pertains only to the circumstances within its scope. One of those circumstances is that in accordance with 40 U.S.C. 483(a)(1), the GSA Administrator, with the approval of the Director of the Office of Management and Budget (OMB), is to prescribe the reimbursement for transfers of excess property to most Federal agencies. As provided in 41 Code of Federal Regulations (C.F.R.) section 101-47.203-7, GSA and OMB have agreed to permit transfers without reimbursement in five cases. Of these, the exemption from reimbursement most relevant to FWS would seem to be section 101-47.203-7(f)(2)(ii)(a). The provision says the transferee agency may receive excess property without making payment if "it clearly demonstrates that it cannot furnish the required reimbursement without obtaining an additional appropriation for that specific purpose." But apart from exemptions allowed by GSA and OMB, reimbursement is required.

An FWS property request under 16 U.S.C. 667b is not strictly within the scope of the Federal Property and Administrative Services Act of 1949, since section 667b provides that in no case is the Secretary of the Interior or a State required to pay for property received. Because the two acts do not cover the same circumstances, there is no conflict between them. Sands Sutherland Statutory Construction, Volume 1A, §§20.26, 23.08-23.10. And since the acts are not coterminous, the supremacy of the Federal Property and Administrative Services Act of 1949 is not violated even though the GSA Administrator before he denies an FWS property request under 16 U.S.C. 667b fails to determine that the property is not required to meet the needs and responsibilities of FWS.

Also, it is significant that GSA has always considered an FWS request under 16 U.S.C. 667b to be essentially the same as a State agency request for "surplus property" under the Federal Property and Administrative Services Act of 1949. See 13 Federal Register 1350, March 14, 1950, and GSA Property Management and Disposal Service Handbook 4000.1, Excess and Surplus Real Property, chapter 3, paragraph 41.

B. Does the GSA Administrator have complete discretion to decline an FWS request for real property under 16 U.S.C. 667b?

There is no legal standard in 16 U.S.C. 667b limiting the GSA Administrator's discretion to deny an FWS request for Federal excess property, since this provision merely provides that he is to determine whether the property "is available" for wildlife conservation, including migratory birds. Because the provision only says the property "may * * * be transferred" to a State or the Secretary of the Interior, there is no requirement that a request for it must be satisfied, even though it is "valuable" for wildlife conservation or of "particular value in carrying out the national migratory bird management program."

C. Can FWS bypass 16 U.S.C. 667b and receive migratory bird property under the Federal Property and Administrative Services Act of 1949?

FWS can request excess property for migratory birds under the Federal Property and Administrative Services Act of 1949. But to come within that Act rather than 16 U.S.C. 667b FWS must either offer to pay for the property or demonstrate to GSA that reimbursement is not required because one of the five exceptions to reimbursement in 41 C.F.R. §101-47.203-7 applies.

As discussed above, the exception most pertinent to FWS appears to be 41 C.F.R. 101-47.203-7(2)(ii)(a), which would require FWS to demonstrate its inability to furnish the required reimbursement without an additional appropriation for the specific purpose of purchasing property for migratory birds. House Hearings on the Department of the Interior and Related Agencies Appropriations for 1977, Part 4, February 27, 1976, indicate the possibility that FWS has insufficient appropriations for the purchase of land for migratory birds. The Director of FWS, Mr. Lynn A. Greenwalt, testified at page 455 of the Hearings that FWS had only about half the funds it needed to maintain its 7-year schedule for property acquisitions to be used for migratory bird habitat. Also, Mr. Russell Fielding, Chief of FWS Legislative Services, told us the FWS Real Property Division has records of FWS "pleading poverty" and receiving from GSA without reimbursement excess Federal property under the Federal Property and Administrative Services Act of 1949 rather than 16 U.S.C. 667b.

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