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HANFORD LAND TRANSFER

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A Report Prepared by the

WASHINGTON DEPARTMENT OF ECOLOGY

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March 1993





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HANFORD LAND TRANSFER

INTRODUCTION

Purpose

The prospect that the U.S. Department of Energy may relinquish control over significant areas of the Hanford site raises important policy issues for the State of Washington. The purpose of this report is to help frame these issues for consideration by the Governor and the Legislature. To this end, the report provides background information and attempts to identify and discuss key policy considerations, however it does not make specific policy recommendations.

Overview

The U.S. Department of Energy (USDOE) Hanford site in Southeast Washington is in transition. From the 1940's until the late 1980's, Hanford's principal mission was the production of plutonium and uranium for the Nation's nuclear weapons program. Today, Hanford's chief mission is the cleanup of the extensive quantities of hazardous and radioactive wastes accumulated over the past forty years.

With this change of mission comes the prospect that USDOE will, over the next several decades, relinquish control over large areas of the Hanford site. Hanford Site Manager John Wagoner has stated that USDOE has an "affirmative obligation" to identify lands no longer needed to support the agency's mission and to make such lands available for transfer to other entities.

USDOE has already advised the State that it is willing to discuss the possible transfer of 1000 acres of the Hanford site to the State. This land, currently under lease to the State, hosts the commercial low level waste disposal facility operated by US Ecology and is the site proposed by Chemical Waste Management, Inc. for the hazardous waste and mixed waste incinerators. It is also located adjacent to areas extensively contaminated by past weapons material production activities.

USDOE has also indicated that the Arid Lands Ecology Reserve (ALE) comprised of nearly 120 square miles on the western edge of the site and another 140 square miles located north and east of the Columbia River may be other near-term candidates for transfer from USDOE control. These lands were used to provide a safety buffer and security for the site's weapon material production activities and were not significantly contaminated by those activities.

Over the next several decades, it is likely that additional lands will also be made available for transfer as cleanup efforts progress.

Under current laws and procedures, lands declared as surplus to USDOE's needs could be transferred to other federal agencies, to State and local governmental entities, Indian tribes, or private parties. Moreover, given the diverse physical characteristics of the Hanford site, it is likely that the lands transferred would collectively be capable of accommodating a wide range of land uses.

The prospect that USDOE will transfer large areas of the Hanford site has generated considerable interest.

- o Benton, Grant, and Franklin Counties and the City of Richland have voiced a strong desire to see surplus Hanford lands transferred to private ownership or otherwise made available for economic development purposes.
- o Residents of southern Grant County have proposed that areas of the Hanford site north of the Columbia River be made available for agriculture. The Hanford Reach Draft Environmental Impact Statement (DEIS) proposes that the north slope area become a national wildlife refuge.
- o Environmental interests and other parties have urged that the Arid Lands Ecology Reserve (ALE) and the area north of the Columbia River continue to be managed as wildlife and ecological reserves.
- o The Yakima Indian Nation, the Nez Perce Tribe, and the Confederated Tribes of the Umatilla Indian Reservation have expressed a strong interest in once again exercising off-reservation reserved treaty rights which were suspended in the 1940's as the result of the nuclear weapons program.

Key State Policy Questions

Hanford land transfers pose significant long-term policy questions for the State. These transfers could generate substantial future benefits for the citizens of the State. The future benefits, however, are dependent on how the transferred lands are used.

In this regard, key policy questions facing the State include:

- o **Who should coordinate planning for land transfers?**

Given the number of governmental jurisdictions and other parties interested in land transfers, there exists a high potential for conflict which could threaten, delay, or impede land transfers. Should the State attempt to put in

place a process to facilitate discussions among interested parties to help resolve conflicts and coordinate transfer activities? How should land transfers be integrated with local land use planning?

- o **What role should the State play as a land owner or manager on the Hanford site?**

In addition to the 1000 acres leased from USDOE, the State also owns a 640 acre parcel on the Hanford site expressly for the purpose of treatment and disposal of extremely hazardous waste. Moreover, the Washington State Department of Wildlife manages, under permit from USDOE, the Wahluke Slope Recreation Area located on the Hanford site north of the Columbia River. Should the State continue its current landlord role? Are there public purposes which could be furthered by additional State land acquisition? Would continued federal ownership achieve the same results?

- o **What action should the State take to ensure that land transfers do not impede cleanup efforts or jeopardize public health and safety?**

USDOE can legally transfer lands adjacent to or near extensively contaminated sites. In some cases, it can also transfer land parcels before actions to remove contamination are complete. USDOE may also be able to enter into long-term lease arrangements with private parties for contaminated sites. Transfer of land under such circumstances could interfere with cleanup efforts and jeopardize public health and safety. Discovery of contamination on transferred lands previously thought to be uncontaminated or fully remediated, also raises questions as to who would be liable for any additional cleanup efforts needed.

In its role as a regulator, what action should the State take to ensure that land transfers do not knowingly risk public health and safety? What action should the State take to ensure that land transfers do not relieve USDOE in any way from its obligation to fully cleanup the Site?

Report Structure

This report consists of six chapters. First, there is a brief background on the formation, operations, and recent changes in the Hanford reservation. Those familiar with Hanford site history may wish to skim over this chapter.

Hanford Land Transfer

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Second, there is a review of potential future land uses, by area. Based on the work of the Hanford Future Site Uses Working Group, this chapter will indicate where one might--and might not--expect land transfer for other uses in the near future.

The third chapter discusses the legal and procedural framework within which transfer from USDOE to some other entity would take place. These procedures set priorities among potential uses and potential recipients of lands that are transferred. The desirability and practicality of any particular proposal must be evaluated in light of these laws and procedures.

The fourth chapter describes the environmental clean-up requirements and issues of liability for contamination that would affect any Hanford land transfers. Parallel experiences with transfer of closed military bases will be examined.

The fifth chapter discusses other legal constraints that may affect future Hanford landowners. These constraints include water rights, Indian treaty rights, other pre-existing claims, and cultural and historic preservation.

The sixth and final chapter returns to specific policy issues that will face State government. These include the different kinds of proposed uses, protection of the State, the public, and other entities from long-term harm or liability for harm resulting from previous contamination. The chapter also identifies such basic planning issues as economic development, protection of natural resources, cultural and recreational values, and involvement of the public and Indian tribes in land transfer and land use decisions.

Chapter 1

HANFORD BACKGROUND

Formation of the Hanford Reservation

Hanford was selected as the site for the nation's first large-scale plutonium production facilities at the beginning of 1943. It was selected by the leaders of the "Manhattan Project" due to its remoteness from large population centers, its access to clean water and electricity, and its geologic ability to bear large facilities.¹

Land for the reservation was quickly assembled. Some land was withdrawn from the public domain under the Second War Powers Act. Other parcels were acquired in fee from the State, railroad land grant holders, and private citizens by purchase and/or condemnation. Farming was the principal activity on the site; altogether about 1,500 people lived in the three farming communities of Hanford, White Bluffs, and Richland.²

The civilian population was quickly cleared from the site. Native Americans were denied access to the site to exercise treaty-reserved rights to fish, hunt, gather foods and medicines, and pursue other activities. Construction work began in March 1943, for the first nuclear reactors and chemical separations plants. By September 1944, B Reactor was running. By December 1944, B Reactor fuel was chemically separated at T Plant to retrieve Plutonium 239.³ By August 1945, when World War II ended, three reactors and three processing plants were operational.⁴

After the war's end, activity slowed for nearly two years. Then, under pressure of the Cold War, Hanford activities were expanded. In 1947, operation of the site passed to the Atomic Energy Commission (AEC). In 1948, the AEC authorized acquisition

¹This very brief account is based on M. S. Gerber, Legend and Legacy: Fifty Years of Defense Production at the Hanford Site (Richland, Washington: Westinghouse Hanford Company, March 1992). A partial list of references may be found at the end of this report.

²ibid., p. 3.

³M. Y. Ballinger and R. B. Hall, A History of Major Hanford Facilities and Processes Involving Radioactive Materials (Richland, Pacific Northwest Laboratory, 1991).

⁴Gerber, op. cit., p.6.

of lands on the north slope, through purchase of previously leased land, or transfer of control from the Bureau of Land Management and the Bureau of Reclamation by memorandum of agreement. AEC also leased an additional 173,000 acres as secondary zones. These secondary zones were released in 1953 and 1958.⁵

Beginning in 1959, the City of Richland and some surrounding areas were released. Perhaps some 4,500 acres were released from 1959 to 1965. Approximately 13,000 additional acres have been released since 1965.⁶

The Hanford site currently contains approximately 359,680 acres or 562 square miles.

Hanford Defense Production Mission

Hanford's principal mission from 1943 until 1989 was production of fissionable materials for nuclear weapons. Uranium fuels were fabricated in the "300" Area (see Map 1.1), irradiated in one of nine reactors, located in the "100" Areas near the Columbia River, and then chemically separated to extract uranium and plutonium isotopes in the "200" Areas in the center of Hanford.

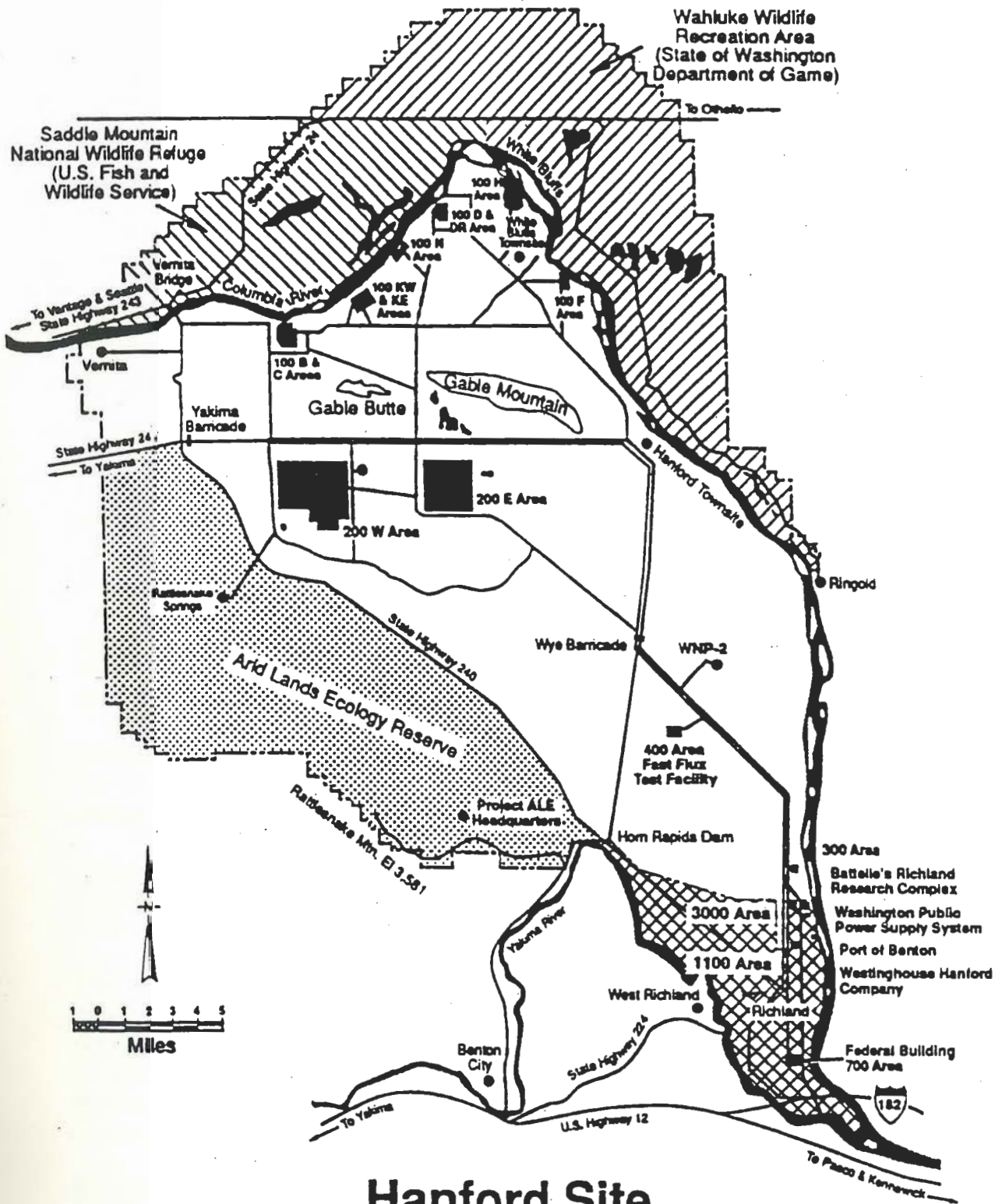
Due to the secrecy required and the hazards posed by these operations, access to Hanford site was tightly controlled. Even where public thoroughfares traversed the site, a vigilant security force discouraged dallying or straying from the authorized path. For the most part, health, safety, and environmental regulation were self-administered by the AEC and its successor agencies. State, local, and other federal officials did not oversee operations.

The first eight "single pass" reactors took cooling water from the Columbia River. The water passed through the highly radioactive reactor cores. It then was discharged back to the river after being held some time for radioactive decay. The last of these reactors ceased operation in 1970.

The ninth reactor, "N", operated from 1965 to 1986. Larger than its predecessors, it used "closed loop" cooling, so radioactive water was not routinely discharged back to the river. N Reactor was shut down in 1986 for safety upgrades recommended after the Chernobyl incident in the Soviet Union. N Reactor had certain design

⁵C. Pasternak, "Hanford Real Estate Fact Sheet: Reconstruction Recap", presented to Hanford Future Site Uses Working Group, Kennewick, Washington, May 14, 1992.

⁶ibid.



Hanford Site Department of Energy

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MAP 1.1

similarities to the Chernobyl reactors. Safety upgrades were discontinued in 1988 when N Reactor was placed in "standby" status. By 1991, the Department of Energy decided to close N Reactor permanently.

Plutonium and uranium were extracted from irradiated fuel in the 200 East and 200 West areas. Separation activities took place at one time or another in five different plants. The last to be used was the Plutonium and Uranium Extraction Plant, or "PUREX". Liquid wastes from chemical separation processes went to underground storage tanks.

Other contaminated liquids were routinely discharged to the ground in the 200 Areas, at the reactor sites, including N Reactor, and in the 300 Area near the city of Richland.

Late in 1988, PUREX operations were halted due to a violation of internal safety standards. While the problem was under review, a new Federal administration, facing a rapidly changing world situation, decided that additional plutonium production at Hanford was no longer needed. In 1992, Energy Secretary James Watkins suspended all USDOE reprocessing of reactor fuel for plutonium production. This decision was followed by the announcement of the permanent closure of PUREX in November 1992, effectively bringing an end to Hanford's defense production activities.

While USDOE is studying how to reconfigure the Nation's nuclear weapon production complex, it appears unlikely at this time that Hanford will be selected as a site for new production facilities.

The legacy of Hanford's defense operations is immense. In the 200 Areas, there are 28 "double-shell" and 149 "single-shell" tanks containing 60 million gallons of radioactive and hazardous liquid wastes and sludges. At least 66 of these tanks are known or suspected of leaking. Over 440 billion gallons of liquid waste were discharged to the ground during Hanford operations.⁷ Soil contamination is extensive.

Storage basins at K Reactor hold 2,100 tons of irradiated N Reactor fuel, much of which is damaged. Leakage of cooling water from the basins is suspected. PUREX and the other former separation facilities will require cleanup and decommissioning

⁷Don W. Wodrich, "Historical Perspective of Radioactively Contaminated Liquid and Solid Wastes Discharged or Buried in the Ground at Hanford," Westinghouse Hanford Company, April, 1991.

along with hundreds of other contaminated structures, tanks, and piping systems. The eight single-pass reactors and N Reactor must be decontaminated and their cores disposed of.

There are nearly 550 acres devoted to shallow burial of contaminated solid wastes. Contaminated groundwater plumes extend over more than 170 square miles.

Cleanup of the Hanford Site

In May, 1989, the State of Washington, the U.S. Environmental Protection Agency and USDOE signed the **Hanford Federal Facility Agreement and Consent Order**, known as the "Tri-Party Agreement". The Agreement calls for a series of measures to clean up the Hanford site over thirty years. It covers both active waste management and remediation and restoration of areas contaminated in the past.

The Agreement was reached after extensive negotiations. The cleanup and waste management activities covered by the Agreement are based on those included in the Hanford Defense Waste Environmental Impact Statement and Record of Decision issued in 1987.⁸ The Agreement calls for separating Hanford double-shell tank wastes into "high level" and "low level" fractions. The high level fraction will be processed into glass in a vitrification plant; the low level fraction will be disposed of in a concrete-like grout below ground. Vitrification, pretreatment, and grout facilities will be located in or adjacent to the 200 East area. These activities occur primarily under **Resource Conservation Recovery Act (RCRA) authority.**⁹

The Agreement prescribed a separate schedule for research and evaluations leading to a decision on disposal of single shell tank waste. USDOE is now studying the possibility of retrieving and treating single-shell tank wastes along with double-shell tank wastes.

Cleanup of contaminated soils, ground water and biota are primarily covered by "past practice" portions of the Agreement. Contaminated sites have been organized into 78 "operable units". For each operable unit, the Agreement requires characterization of contamination, evaluation, and implementation of the cleanup action. These activities occur primarily under **Comprehensive Environmental Response**

⁸U.S. Department of Energy, "Final Hanford Defense Waste Environmental Impact Statement," December 18, 1987.

⁹42 U.S.C. § 6901 et seq. Resource Conservation Recovery Act.

Compensation Liability Act (CERCLA) authority.¹⁰

Several cleanup activities are outside the current Tri-Party Agreement. Decommissioning and decontamination of surplus reactors and production facilities have been dealt with separately. USDOE also proposes to issue a separate environmental impact statement on disposal of the irradiated fuel stored in the K-Reactor basins.

USDOE proposes to dispose of the first eight production reactors by hauling the eight core blocks to the 200 Areas for burial. The removal will be completed by 2019, and will be coordinated with cleanup actions under the Tri-Party Agreement. Decommissioning and cleanup of N Reactor, as well as most of the separations plants, including PUREX, have yet to be scheduled for evaluation.

Other Hanford Missions

While Hanford's principal mission has been production of nuclear weapons material, the site has, over its history, had a number of lesser missions. Most of these missions were or are nuclear-related. In recent years, Hanford has played a role in the development of nuclear power sources for space applications. The Fast Flux Test Facility (FFTF) completed in 1980, has supported research associated with liquid metal reactors, fusion, reactor operations and safety, and medical isotopes.

Hanford is also the site of USDOE's Pacific Northwest Laboratory. The laboratory, operated by the Battelle Memorial Institute, conducts work in the areas of energy technology development, environmental and life sciences, nuclear waste management, and nuclear safety. Hanford will also be the site of the \$200 million Environmental and Molecular Sciences Laboratory (EMSL).

USDOE invested considerable effort and resources in exploring Hanford's potential as the site of a deep geologic repository for spent nuclear fuel from commercial power reactors. That work ended with the passage of the Nuclear Waste Policy Amendments Act of 1987.

USDOE has also encouraged the development of commercial nuclear activities on the Hanford site. The AEC leased a 1,000-acre tract to the State of Washington to promote nuclear-related development. A commercial low-level radioactive waste

¹⁰42 U.S.C. § 9620(H), Comprehensive Environmental Response Compensation Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act.

disposal facility has operated on 100 acres of the leasehold since 1965. In the 1970's, land was leased to the Washington Public Power Supply System (WPPSS) to construct three commercial power reactors. One plant, Washington Nuclear Plant No. 2, was completed and is operating.

USDOE has recently made the Hanford site available for non-nuclear activities. An area northeast of 200 East, near the south slope of Gable Mountain, has been designated as a potential site for the Superconducting Magnetic Energy Storage (SMES) project. This project is a joint public/electric power utility venture. An area near FFTF has been selected as the site for the National Science Foundation's Laser Interferometer Gravitational-Wave Observatory (LIGO).

Hanford's Economic Impacts

The economy of the Tri-Cities region is, and has been, heavily dependent on activities at Hanford. Employment, incomes, population, vacancy rates, housing starts and other economic indicators in Benton and Franklin Counties have reflected the expansions and contractions of Hanford activities since 1943.¹¹

Currently, USDOE, its contractors, Siemens Nuclear Power Corporation, and WPPSS directly employ about 16,500 workers. This constitutes about one-fourth of the two-county employment, but 42 percent of payroll dollars--an annual average of \$645 million.¹²

The other major employment sector in the Tri-Cities is agriculture. Farming, agricultural services, food processing, and related industries currently employ about 12,900 workers at an annual average payroll of \$160 million.¹³

Discontinuance of the Basalt Waste Isolation Project and shutdown of N Reactor in 1988 caused a significant downturn in the regional economy. However, USDOE and contractor employment related to waste management and cleanup has increased.

¹¹42 U.S.C. Michelle S. Gerber, "Economic Impacts of Hanford Operations on Tri-Cities, Washington: 1943-1972," presented to Future Site Uses Working Group, May 14, 1992, Kennewick, Washington.

¹²Dean Schau, "The Tri-Cities Economy," presentation to Future Site Uses Working Group, May 14, 1992, Kennewick, Washington.

¹³ibid.

USDOE and contractor employment grew 25 percent from March 1989, to March 1992.¹⁴

Hanford jobs are relatively high-paying; they also attract specialized skills. Benton and Franklin Counties have about three percent of the State's workforce, but eight percent of the State's engineers and nine percent of its scientists.

Local leaders are concerned that cleanup may not sustain the high-value employment for the specialized workforce. In any case, cleanup will be over at some point. There are several initiatives underway to "spin off" or otherwise capture new high-value employment at Hanford.

¹⁴ibid.

Chapter 2

LANDS POTENTIALLY AVAILABLE FOR TRANSFER

Report of the Future Site Uses Working Group

In its December 1992 report, the Hanford Future Site Uses Working Group identified a range of potential future uses for six geographic areas of the Hanford site. The group's work provides a good starting point to identify those areas that may, in the reasonably near term, be available for other uses and those that may not.¹⁵

The Future Site Uses Working Group represented the USDOE and the Department of Interior, the Environmental Protection Agency, the States of Washington and Oregon, Indian Tribes, local governments, agricultural, economic development, and environmental interests, and Hanford "watchdog" organizations. The group was asked to project possible future site use scenarios in order to provide a basis for planning and assessing cleanup strategies. The Site Uses group did not explore issues of land ownership, land transfer, and implementation actions required to bring about the projected uses.

The Future Site Uses report divides Hanford into six geographic areas (see Map 2.1): North of the River; Arid Lands Ecology Reserve; the Columbia River corridor; the "Central Plateau", the reactor (or "100") areas above the south bank of the River; and "all other areas". The report anticipates non-USDOE uses in the first three areas mentioned in the relatively near term. It also contemplates non-USDOE uses for parts of the "all other areas" category.

The following discussion of areas and potential land uses closely follows the Future Site Uses report.

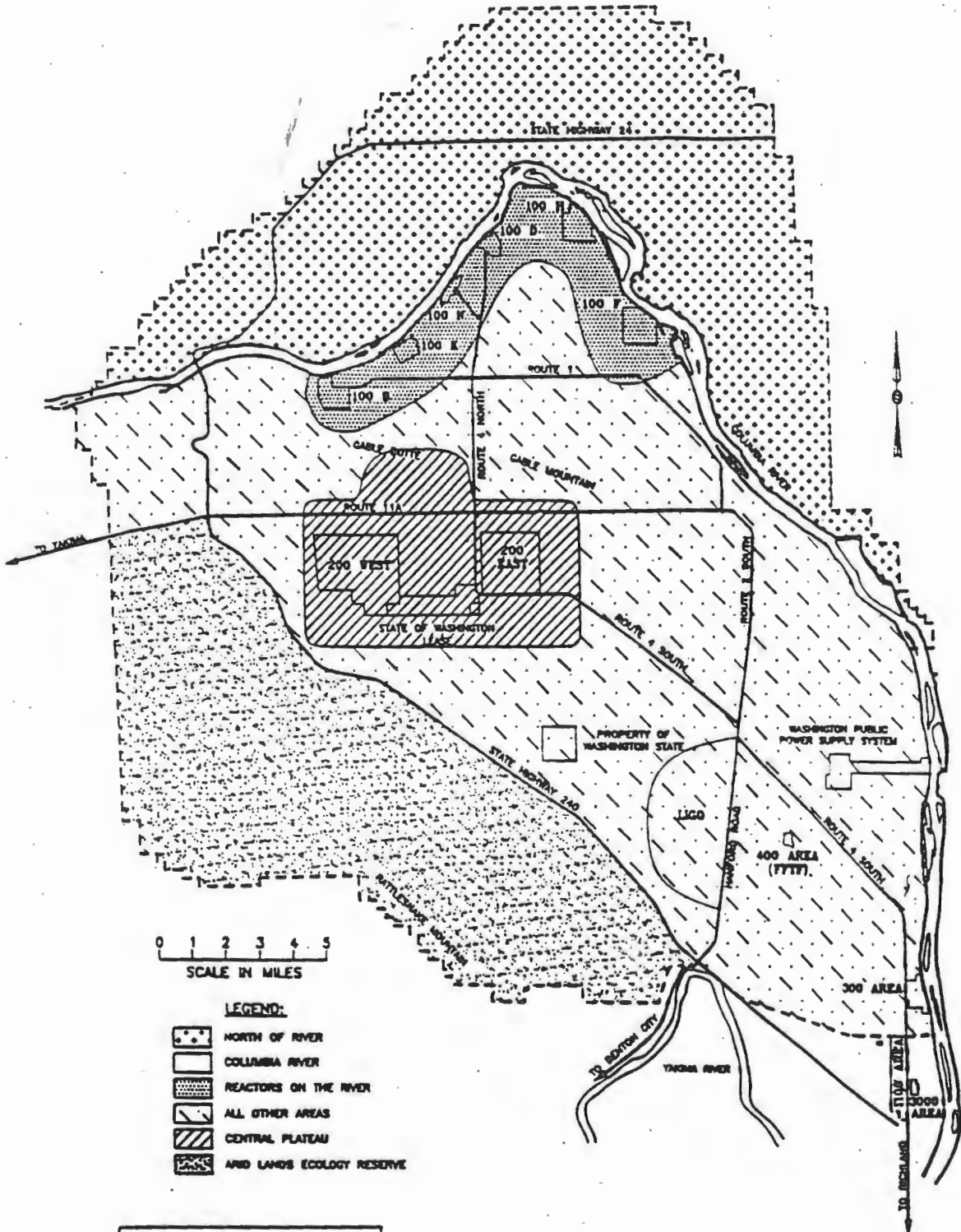
Lands That May Be Considered For Transfer in the Near Term

Arid Lands Ecology Reserve. The area between State Route 240 and the Rattlesnake Ridge was designated an Arid Lands Ecology Reserve in 1967. Acquired as a buffer area, the ALE was "upwind" and relatively unaffected by nuclear operations. It was used to provide "control" or "baseline" studies on plants and animals to compare with those contaminated in other parts of the site. The ALE

¹⁵"Report of the Hanford Future Site Uses Working Group," Richland, December, 1992.

SIX GEOGRAPHIC STUDY AREAS MAP

HANFORD FUTURE SITE USES WORKING GROUP



THIS MAP IS TO BE USED AS A CONCEPTUAL TOOL PROVIDING GENERAL INFORMATION FOR THE HANFORD FUTURE SITE USES WORKING GROUP.

ACR/PLD/RS/08-08-80 10/28/78 AM

MAP 2.1

contains approximately 120 square miles, or 77,000 acres.

Access to the ALE has been restricted since 1943. Relatively little development or use has occurred within its boundaries. There is contamination at a former Nike Missile site and from septic tanks. There is no projected role for the ALE in USDOE's cleanup or other continuing or projected missions at Hanford. It appears likely that USDOE will find it is "excess to its mission."

As will be noted in Chapter 6, wildlife officials and interested citizens are eager to preserve the large, relatively undisturbed area of native shrub steppe habitat that ALE represents. Other uses have been suggested for portions of the area: agriculture in the flat, previously grazed portion along the southwesterly side of Highway 240, and wind power generators on Rattlesnake Ridge. Native Americans have expressed a desire to reserve use of Rattlesnake Ridge for cultural and religious purposes.

North Slope. The 140 square miles of Hanford north of the Columbia River, the "North Slope" area, is also buffer. It contains large areas of undisturbed or returning shrub steppe habitat. The area is currently divided in two parts, managed by the Washington Department of Wildlife as the Wahluke Slope Recreation Area and the U.S. Fish and Wildlife Service as the Saddle Mountain Wildlife Refuge.

Some parts of the north slope were in agricultural use prior to 1943. Much of the area is within the Columbia Basin Irrigation Project area. Irrigation is prohibited in the "red zone", a portion of the area in which saturation of the soils causes sloughing of the White Bluffs. There are two identified areas of contamination: a former Nike Missile site and an area where agricultural pesticides were dumped. There is no known radioactive contamination.

The U.S. Department of Energy projects no future mission for the north slope. The preferred alternative in the Draft Environmental Impact Statement for the Hanford Reach¹⁶ calls for making the north slope area a permanent wildlife refuge managed by the U.S. Fish and Wildlife Service. A group of citizens in the Mattawa area, supported by the Board of Grant County Commissioners, supports the "Wahluke 2000" plan, under which parts of the north slope area would be made available for irrigated agriculture.

¹⁶U.S. National Park Service. "The Hanford Reach of the Columbia River: Draft River Conservation Study and Environmental Impact Statement", June, 1992.

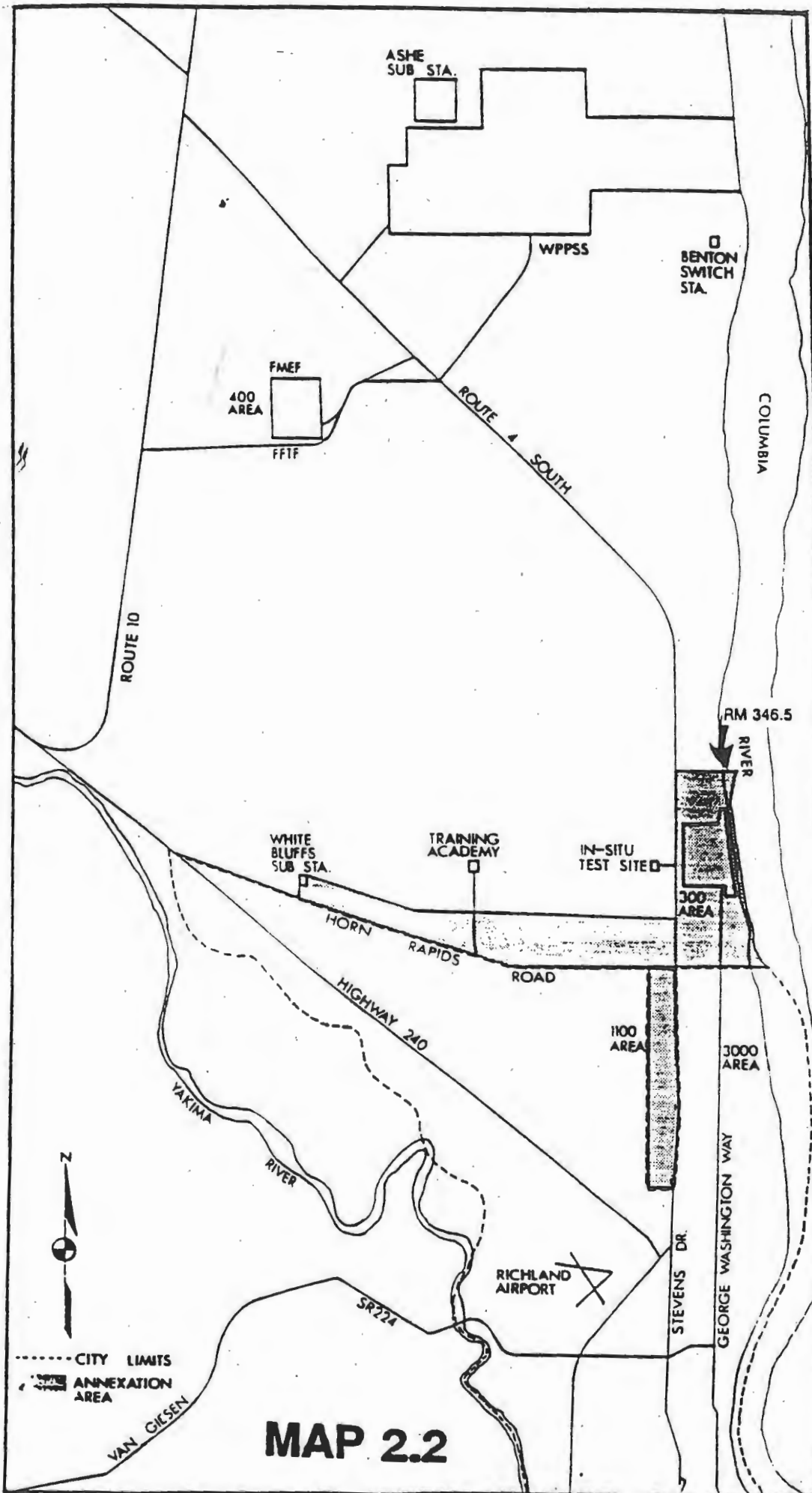
Columbia River Corridor. The Draft Hanford Reach Environmental Impact Statement has as its preferred alternative the management of the Reach as a Wild and Scenic River, virtually from Hanford's northwestern boundary to the 300 area. The proposal, which will require Congressional action to implement, envisions public ownership of the River, including a corridor one-quarter mile wide along either shore. A final Environmental Impact Statement is expected in mid-1993. Its recommendations may lead Congress to transfer all or parts of the River corridor to another Federal agency.

Areas Adjacent to the City of Richland. For many reasons, there may be interest in the transfer of some parcels in the southeastern corner of the Hanford site for other uses. When the Federal government released the area that became the city of Richland, it retained the 1100 Area, a long narrow finger of land now bounded by other private uses on three sides. The location of the Washington State University Tri-Cities campus near the site boundary and the development of the Tri-Cities Science and Technology Park, indicate strong interest in expanding economic activity in the vicinity of the 300 Area. Location of the Environmental and Molecular Sciences Laboratory in the 300 Area is expected to stimulate educational and private-sector "spin-offs".

The City of Richland has proposed annexing nearly four square miles (about 2,500 acres) (see Map 2.2), including the 1100 and 300 Areas and adjacent lands. The city wants to be able to provide municipal services to new development, whoever owns the land. Benton County has also expressed an interest in maintaining its jurisdiction and overseeing development in this area. These planning issues will be worked out within the context of the Washington Growth Management Act.

The 1100 Area has non-radioactive contamination resulting from its use as a motor pool and staging area. The 300 Area, used for reactor fuel fabrication and nuclear-related laboratory work, has extensive radioactive and non-radioactive contamination. Contamination extends outside 300 Area boundaries to the north, south, and west. The land west of the 300 Area and north of Horn Rapids Road (the present City of Richland boundary) is generally "clean", except for a sanitary landfill and a small chemical groundwater plume. Cleanup of contaminated sites within the 300 and 1100 Area is now being addressed under the Tri-Party Agreement.

The Future Site Uses Working Group generally acknowledged that the area adjacent to Richland and to the 1100 and 300 Areas would be used for economic development. Preservation of wildlife habitat will also be a consideration in this part of the site.



MAP 2.2

Unlike transfers relating to the ALE Reserve or the North Slope, actions in the areas adjacent to Richland are likely to be sequential and to involve relatively small parcels. USDOE sees continuing missions in the 1100 and 300 areas, but may also see positive reasons (e.g. "privatization") for facilitating transfer and development of nearby lands.

State 1,000-Acre Leasehold. In 1964, the State of Washington leased a 1,000 acre tract between the southwestern corner of the 200 East area and the southeastern corner of 200 West. The land, leased for 99 years at nominal cost, is available to sublet for nuclear-related activities compatible with the requirements of the Federal nuclear materials production mission of Hanford. Subsequently, the State sublet 100 acres to California Nuclear (now US Ecology, Inc.) to operate a shallow land disposal site for commercial low level radioactive wastes. There are no subleases for the remaining 900 acres.

In 1991, Chemical Waste Management, Inc., proposed to develop an incinerator to dispose of hazardous and mixed hazardous and radioactive wastes on a portion of the State leasehold. The Director of Ecology (the landlord agency), asked an external panel to review whether this would be an appropriate use of leased land. The panel's work was terminated when USDOE advised the State that the proposed use was not compatible with the terms of the State's lease. However, Mr. John Wagoner, Manager of the Richland Field Office of USDOE, wrote the Director of Ecology, suggesting that USDOE might consider transferring the land to the State so that the lease's restrictions would no longer apply.

The leasehold falls within the area designated "Central Plateau" by the Future Site Uses group. It is envisioned to be restricted to waste management and, perhaps, compatible industrial uses in the foreseeable future. The leasehold's proximity to the highly-contaminated 200 areas, the potential long-term liability associated with the commercial low-level waste disposal site, and other issues are likely to make transfer of this tract a complex question.¹⁷

¹⁷USDOE has suggested another possible alternative use for the 900 acres of the 1,000 acre leasehold tract which are presently not utilized. USDOE suggests that the "non-utilized" acreage could be returned to USDOE for use by that Agency's waste management and disposal activities. As part of this alternative, USDOE has also suggested that other lands could be made available for State sponsored activities. Robert M. Rosselli. Letter to Jeff Breckel, Washington Department of Ecology. Draft Hanford Land Transfer Report. February 10, 1993.

The foregoing appear to be the Hanford site tracts where there is active interest in and some possibility of relatively near-term land transfer. There are other portions in the "all other areas" that are not particularly contaminated nor necessary to present or projected USDOE missions. The "McGee Ranch" area, west of Highway 24 and north of the ALE Reserve, is valued by wildlife interests as additional shrub steppe habitat. It is also regarded as a source of clean fill dirt for USDOE cleanup operations in Hanford's contaminated areas.

The formerly irrigated farming areas near the White Bluffs and Hanford townsites have attracted some interest from county officials and others as a farming area. Questions about underlying groundwater contamination and concerns about market perception of Hanford-grown products are likely to deter near-term efforts to transfer lands in this area for agricultural development.

State-Owned Section for Hazardous Waste Disposal

In 1980, the Federal government sold the State of Washington a 640-acre section south of the 200 East area, near SR 240, for the purpose of extremely hazardous waste disposal. This parcel is uncontaminated and undeveloped. No action has been taken to develop a waste disposal facility.

The section lies within that part of the "all other areas" designated by the Future Site Uses Group for some mix of economic development and habitat preservation. The group also recommended that waste management activities be concentrated in the Central Plateau, and that presently uncontaminated areas not be used in a way likely to cause contamination.

The State paid \$237,000 for the parcel. Under the deed, if it is used for any purpose other than hazardous waste disposal, ownership could revert to the Federal government. Some people have proposed that the State exchange this parcel for other land, to support purposes ranging from habitat preservation to economic development to hazardous waste disposal.

Areas NOT Likely to be Transferred in the Foreseeable Future

There are several areas at Hanford that will continue under USDOE ownership for the foreseeable future. These include former operations areas where cleanup and waste management will continue for some time, and areas where continuing site support activities and new missions are anticipated.

100 Areas. There are six areas along the south shore of the Columbia River that contained Hanford's nine plutonium production reactors. The area covered by the "Superfund" designation that includes the reactor sites is about 17,000 acres, or 26.6 square miles. A Draft Environmental Impact Statement on decommissioning and decontamination of eight of the reactors was published in March 1989. USDOE has now issued a final EIS and proposes to remove the reactor cores and buildings from the 100 area by 2019. No assessment has yet been published for decommissioning and decontamination of the ninth reactor--the N Reactor, officially closed in 1992.

The decontamination and decommissioning work on the reactors--and actions to clean up contaminated soil and groundwater associated with the reactors--may take as long as 75 years. USDOE currently anticipates no other mission for this area, so it may be released once cleanup is complete.

Adoption of the preferred alternative in the Hanford Reach Draft Environmental Impact Statement would include a quarter-mile-wide strip along the river in a wild and scenic river corridor. The parts of the wild and scenic river corridor in the current 100 areas would be managed as a national wildlife refuge. There is also considerable support for retaining "B" Reactor as a historic monument and establishing a museum/interpretive center complex adjacent to it.

200 Areas. The 200 Areas, where irradiated fuel was separated to extract plutonium and uranium, is now at the core of USDOE's active waste management and processing activities. The bulk of Hanford's "high level" radioactive wastes are held in tanks in these areas. The wastes will be retrieved, separated into different components, and treated for disposal. Large volumes of the "low level" fraction of tanks wastes may be disposed of in sub-surface "grout vaults" adjacent to the 200 East Area. Solid low level radioactive wastes have been disposed of in shallow land burial sites in the 200 Areas as well. This includes disposal of nuclear submarine reactor compartments.

The 200 Areas also contain many contaminated facilities that await decommissioning and significant areas of soil and groundwater contamination. For the foreseeable future, this part of the site is likely to be at the heart of USDOE cleanup and long-term waste management activities.

The Future Site Uses Working Group anticipated contaminated materials from other areas of Hanford being brought to the Central Plateau for treatment, storage, and, in some cases, disposal. The group felt this ought not to lead to spreading contamination over a larger area than covered by the present 200 Areas and the land between them. The group recognized that there may be a need for a buffer area

around the core waste management area for health and safety reasons.

If land transfers do occur in this part of Hanford, they are likely to be small parcels for very limited purposes related to waste management. The State's 1000-acre leasehold is located within the waste management area.

300 Area. The much smaller 300 Area, located just north of the City of Richland, is likely to continue in USDOE ownership. The area is home to activities of the Pacific Northwest Laboratory, including the proposed Environmental Molecular Sciences Laboratory. The 300 Area also has some complex contamination and decommissioning problems.

Activities in the 300 Area may stimulate interest in transfer of adjacent lands for "privatized" technology-development. (See above discussion of "Areas Adjacent to the City of Richland.")

400 Area - Fast Flux Test Facility. While the Fast Flux Test Facility, an experimental liquid metal cooled reactor, is currently on standby status, there is a possibility that it will have future missions. These may be in production of isotopes for medical, industrial, and research purposes. They may also relate to development of fast liquid metal reactors--FFTF's original purpose.

Other Energy and Scientific Missions. An area northeast of 200 East, near the south slope of Gable Mountain, has been designated as the site for the Superconducting Magnetic Energy Storage (SMES) project. This is a joint public/electric power utility venture. An area west and north of the FFTF site has been designated for a National Science Foundation project: the Laser Interferometer Gravitational-Wave Observatory (LIGO). Both these facilities require a considerable amount of land and some isolation from other activities.

USDOE and local emergency response agencies have also proposed a Hazardous Materials Management and Emergency Response (HAMMER) training center. USDOE has also proposed an Environmental Safety and Health research complex on lands west of the 300 Area. These would likely continue as USDOE-owned facilities.

WPPSS Site. The Washington Public Power Supply System holds a 99-year lease for the area containing Washington Nuclear Plant #2, unfinished plant #1, and abandoned plant #4.

Chapter 3

LEGAL AND PROCEDURAL FRAMEWORK FOR TRANSFER

Transfer Procedures Under Existing Federal Laws

The transfer of land from Federal ownership is controlled by Federal statutes and regulations. The legal status of the land when it was originally taken by a Federal agency for a specific use can also influence how it is transferred when no longer needed by the controlling Federal agency.

The process by which Federal land is transferred to State, tribal, or local government, or to private control, is often complicated and time consuming.

Five key statutes will govern the transfer of most land at Hanford. They are: the **Federal Property and Administrative Services Act of 1949**, the **Federal Land Policy and Management Act of 1976**, the **Atomic Energy Act (AEA)**, the **Atomic Energy Communities Act (AECA)**, and the **Columbia Basin Irrigation Act**.

How and from whom each land parcel was acquired to form the Hanford site will determine the applicable statute and procedures under which the parcel will be transferred. Parcel-by-parcel title histories will identify any recorded reserved rights and easements that could impact land transfer. In addition, Indian treaty reserved rights to fish, hunt, or pursue other activities may affect particular parcels. Given the large number of parcels comprising the Hanford reservation, this title research will be complex and time-consuming.

Federal Property and Administrative Services Act of 1949¹⁸

The **Federal Property and Administrative Services Act of 1949 (FPASA)** provides Federal agencies the statutory means to dispose of property that they no longer require. Most Federal property is disposed of under the authority of this statute, and the implementing procedures specified in the **Federal Property Management Regulations (FPMR)**.¹⁹ Under this Act, excess land is reported to the General Services Administration (GSA) for; (1) utilization by other executive agencies having

¹⁸40 U.S.C. § 483

¹⁹41 C.F.R. Part 101-47, Utilization and Disposal of Real Property

a requirement for such property, or (2) disposal as surplus property.²⁰

Key steps leading to transfer under FPASA are:²¹

(1) Reports of "excess" property are forwarded by Federal agencies to GSA at least annually. Excess property is defined as: "...any property under the control of any Federal agency which the head of the agency determines is not required for the needs and the discharge of the responsibilities of the agency."²²

(2) GSA notifies other Federal agencies having functions that require the use of real property, of the availability of specific excess properties. These Federal agencies are encouraged to inspect these excess properties if, from the descriptive data provided by GSA, they may be suitable to satisfy agency needs which, if not satisfied by excess property, would require expenditure of Federal funds for acquisition or construction of the required property/facilities.²³

(3) Federal agencies have 30 days to identify a firm requirement for excess property. If no Federal agency responds, the property is declared as "surplus". Surplus property is defined as: "...any excess property which the Administrator of General Services determines is not required for the needs and the discharge of the responsibilities of all Federal agencies."²⁴

(4) Prior to disposal of the property by public sale, GSA provides notices to State

²⁰United States General Services Administration, Disposal of Surplus Real Property, April 1988, p. 1.

²¹At any time in the process, under-utilized, excess or surplus property can be declared as suitable for use in support of a homeless assistance activity by the Department of Housing and Urban Development (HUD). In accordance with Title V of the McKinney Act (42 U.S.C. § 11411), GSA will then give priority to any "representative of the homeless", including State, local governments or any private organization which provides assistance to the homeless. Requests for property transfer under the authority of the McKinney Act could pre-empt other requests by State or local governments.

²²United States General Services Administration, op. cit., p. 2.

²³ibid.

²⁴ibid.

and local governments and public institutions of the availability of such property to those agencies, in accordance with special statutory authority.²⁵ The definition of "State and local governments and public institutions" includes State government agencies, political subdivisions, and instrumentalities thereof or municipalities.²⁶

5) Depending on the proposed use, public agencies and institutions may be able to acquire surplus property by special statutory provisions without consideration, without monetary consideration, or with a "discount price preference" of up to 100 percent. Examples of special statutory preferred uses include: public park or public recreational area, public health or education, wildlife conservation, and public airport.²⁷ The FPMR provides a complete listing of special statutory authority disposal categories.²⁸ Property transferred under such special statutory provisions can only be used for the purposes identified in the transfer documents.

(6) Surplus property can be obtained by public agencies and institutions without use restrictions through negotiated sales. Fair market value is the measurement standard in such transactions.²⁹

(7) If there is no interest from public agencies or institutions, GSA will sell surplus property to the general public through the following methods: sealed bid, public auction, broker or negotiation.³⁰ Publicly solicited sealed bids and public auction are the preferred means for disposal. Negotiated procurements or brokers can be used, depending upon specific factors outlined in the FPMR. These factors include considerations such as nature or condition of the property to be transferred, estimated dollar value of the sale, or complexity of the disposal action, etc.³¹

GSA does not have the authority under the FPASA and the FPMR to dispose of: (1)

²⁵ibid, p. 6.

²⁶ibid, p. 13-16.

²⁷ibid, p. 8.

²⁸41 C.F.R. § 101-47.308, Special Disposal Provisions.

²⁹United States General Services Administration, op. cit., p. 8.

³⁰ibid, p. 10.

³¹41 C.F.R. § 101-47.304, Advertised and negotiated disposals.

public domain lands, (2) national forest lands and (3) national park lands.³² At Hanford, a significant part of the identified excess lands would be transferred according to the requirements and procedures outlined in the FPASA and the FPMR. However, the Hanford reservation also includes lands that were originally public domain.

Transfers of public domain lands would be governed by different authorities and procedures as explained in the following section. This intermingling of different types of Federal property may complicate any scenario to transfer large blocks of land.

Federal Land Policy and Management Act of 1976³³

The **Federal Land Policy and Management Act of 1976** is the key statute in a collective body of laws commonly known as the **Public Land Laws**. These laws outline policy and management of public lands, including those lands within the public domain. Implementing procedures and regulations are contained in the **Federal Land Regulations**.³⁴ The controlling management agency is the United States Bureau of Land Management (BLM).

The Hanford reservation includes lands that were "withdrawn" from the public domain to support the nuclear-related activities at Hanford.³⁵ These public domain lands appear as sections interspersed in a checkerboard pattern among lands that are owned in fee by USDOE or the Bureau of Reclamation (Reclamation) (See Map 3.1).

Generally, lands that were withdrawn from the public domain for use by a Federal agency (holding agency), will return to the public domain when such lands are no longer needed or utilized by that agency. Return to the public domain would be accomplished through a revocation of the original "withdrawal."

Upon completing an investigation of the proposed revocation, BLM may determine that such lands are "substantially changed in character by improvements or

³²ibid.

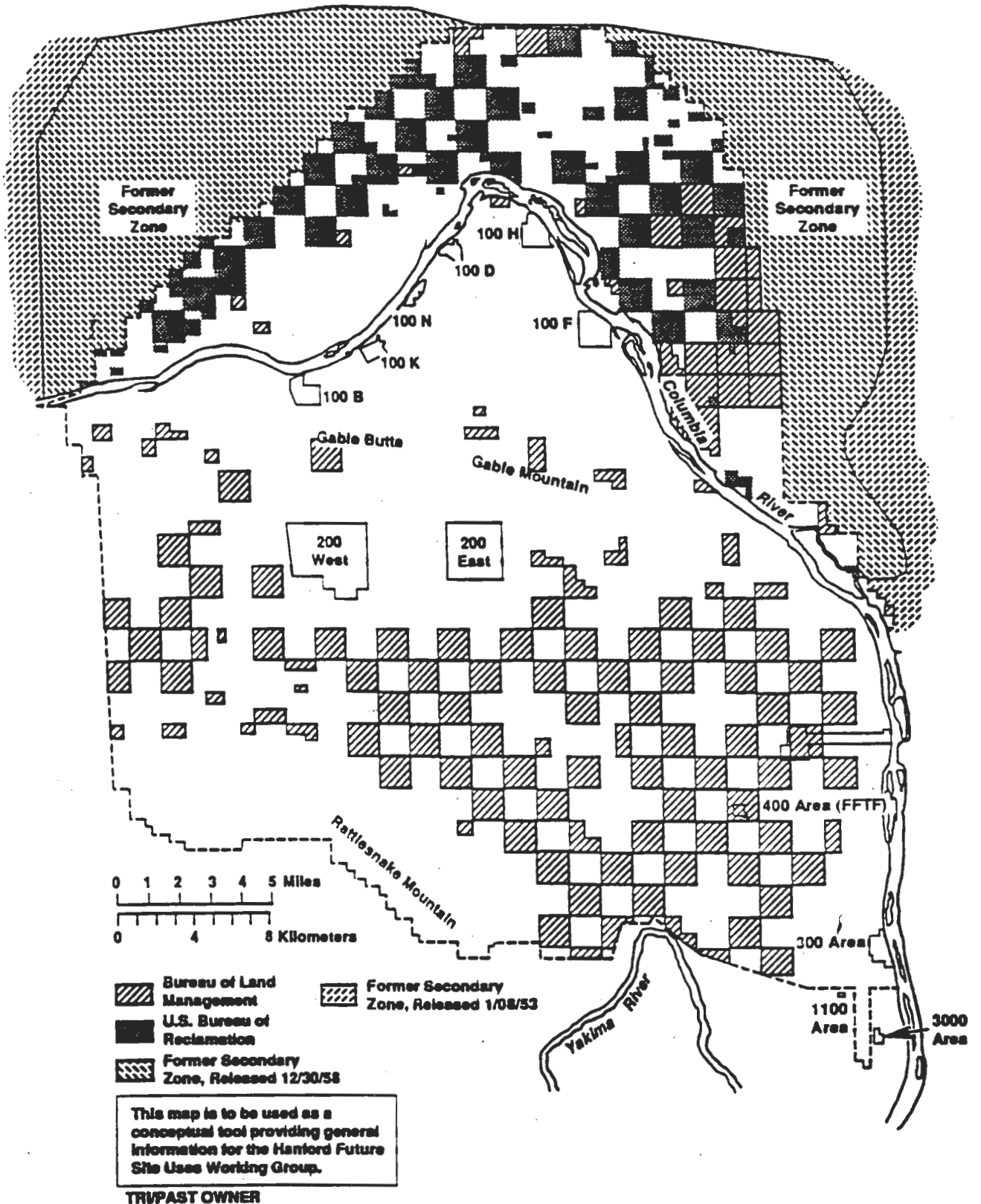
³³43 U.S.C. § 1713, Federal Land Policy and Management Act of 1976.

³⁴43 C.F.R. Chapter II, Bureau of Land Management, Interior.

³⁵C. Pasternak, op. cit.

Land Uses: Past Ownership Map

Hanford Future Site Uses Working Group



MAP 3.1

otherwise".³⁶ In such cases, the land will be referred to GSA for disposal as excess property, in accordance with the FPASA and the FPMR's. A large part of the Hanford reservation did not contain nuclear weapon production facilities. These areas may be considered by BLM to be unchanged or undisturbed, and therefore could be returned to the public domain under BLM control. Contaminated or polluted areas might be considered by BLM to be "substantially changed in character"; however, BLM has not clearly stated the factors it would consider in making such a decision.

If the land is considered by BLM to be suitable for return to the public domain, management and control will revert to BLM which can then retain the land in public domain status, or dispose of the property in accordance with the public land laws and the Federal land regulations³⁷.

Revocation of a land withdrawal is officially accomplished through the issuance of a Public Land Order (PLO) by the Secretary of the Interior. PLO's are published in the Federal Register. PLO copies are also sent to GSA, Congress and other designated parties.

BLM can transfer land that has been returned to the public domain through the following methods:

(1) It can transfer the land to a different Federal agency through the withdrawal process. As indicated earlier, this is also accomplished through issuance of a Public Land Order.³⁸ The Bureau of Indian Affairs (BIA) has primary responsibility for carrying out the fiduciary obligations the federal government owes Indian tribes. BLM could act on behalf of a tribe to receive land under a Public Land Order.

(2) The land can be transferred to Federal agencies and to States through the exchange of land. Typical transactions of this type include: national forest exchanges, national park system exchanges, wildlife refuge exchanges, national wild and scenic rivers system exchanges, and State exchanges.³⁹ According to BLM officials, most

³⁶43 C.F.R. Chapter II, Subpart 2374, Acceptance of Jurisdiction by BLM.

³⁷43 C.F.R. Chapter II, § 2374(c)

³⁸43 C.F.R. Chapter II, Part 2300, Land Withdrawals.

³⁹43 C.F.R. Chapter II, Part 2200, Exchanges: General Procedures, and Part 2310, State Exchanges.

public domain land transactions involve exchanges.

(3) Public domain lands can be conveyed to State and local governments under the authority of the **Recreation and Public Purposes Act**.⁴⁰ Land transferred under the authority of this Act would involve use restrictions. For example, land conveyed to State or local government for use as a park would be limited in its use to that purpose.

(4) Land can be transferred through a public land sale. Such land is identified for disposal if the land meets the following criteria listed in the **Federal Land Policy and Management Act**:⁴¹

- o Because of its location or other characteristics, the land is difficult or uneconomical to manage, and is not suitable for management by another Federal agency.

- o The land was originally acquired for a specific purpose but is now no longer required for that or any other purpose.

- o Disposal of the land will serve important public objectives such as the expansion of communities and economic development "...which cannot be achieved prudently or feasibly on land other than public land, and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values."

Generally, the public sale of land is accomplished by competitive bidding. However, in order to ensure equitable distribution of land, the Secretary of the Interior can determine to sell the land on the basis of modified bidding or without competitive bidding.

In making such a determination, the Secretary "...shall consider the following potential purchasers:

- (1) the State in which the land is located;
- (2) the local government entities in such State which are in the vicinity of the land;

⁴⁰43 U.S.C. § 869, et seq.

⁴¹43 U.S.C. § 1713, Federal Land Policy and Management.

- (3) adjoining landowners;
- (4) individuals; and
- (5) any other person."⁴²

Atomic Energy Act of 1954⁴³

The Atomic Energy Act of 1954 (AEA) gives the U.S. Department of Energy the authority to "...acquire, purchase, lease, and hold real and personal property, including patents, as agent of and on behalf of the United States....and to sell, lease, grant, and dispose of such real and personal property as provided..."⁴⁴

USDOE believes that its authority to dispose of property under the **Atomic Energy Act** is limited to situations in which the transfer directly serves the purposes of the Act, i.e., nuclear-related activities. Property transfers to accommodate the siting of nuclear power plants or radioactive/mixed waste disposal sites would appear, under USDOE's interpretation, to satisfy the intent of the Act. USDOE has stated that transfers to accommodate siting of hazardous waste and mixed waste facilities would not be eligible under the terms and condition of the lease established pursuant to the authority of the AEA.⁴⁵ Land to be used for purposes unrelated to nuclear activities would have to be transferred in accordance with the FPASA, the Public Land Laws, or through long-term lease under the authority of the AECA.

It should be noted that transfers under the AEA are limited to lands USDOE holds in fee. Further, in exercising its AEA authority to dispose of real property, USDOE would not be subject to the property transfer procedures in the **Federal Property and Administrative Services Act of 1949 (FPASA)**, and the **Federal Property Management Regulations (FPMR)**.

⁴²43 U.S.C. § 1713, Sales of public land tracts.

⁴³42 U.S.C.

⁴⁴42 U.S.C. § 2201(g), Acquisition of real and personal property.

⁴⁵J.D. Wagoner, letter to Chuck Clarke, Director, State of Washington Department of Ecology, Subject: Chem-Nuclear Environmental Services Inc. (Chem-Nuclear) Sublease, August 28, 1992.

The Atomic Energy Communities Act of 1955⁴⁶

USDOE also has limited authority to dispose of real property under the **Atomic Energy Communities Act of 1955 (AECA)** without adherence to the property transfer provisions of the FPASA and the Federal FPMR.

The intent of the AECA is to facilitate the termination of ownership and management of communities by the Atomic Energy Commission (forerunner of the U.S. Department of Energy). The Act provided for establishment of local self-government, the transfer of municipal functions, installations and utilities, and the "...orderly sale to private purchasers of property within those communities with a minimum of dislocation."⁴⁷ With respect to Hanford, the term "community" as defined in the Act, refers to Richland, Washington.⁴⁸ The City of Richland (approximately 2,054 acres) was transferred from Federal to private control in 1959 under the authority of this statute.

USDOE officials have stated their belief that all of the property available for disposal under the authority of this statute has already been transferred. Additional authority to transfer land under this Act may require congressional approval.

The Act does, however, grant USDOE the authority to lease any real property "in or near the City of Richland", provided that such property is directly related to the Hanford project, and provided that a determination is made by USDOE that the disposition of such real property would "prevent or reduce the adverse economic impact of actual or anticipated reductions in Commission programs in that area."⁴⁹ Additional lease transfers may be possible under this "economic impact" provision.

The Columbia Basin Irrigation Act⁵⁰

The **Columbia Basin Irrigation Act** provides the Secretary of the Interior the authority to sell, exchange or lease public lands (and other lands acquired under the

⁴⁶24 U.S.C. § 2301.

⁴⁷42 U.S.C. § 2401, Congressional Declaration of Policy

⁴⁸ibid.

⁴⁹42 U.S.C. § 2349, Hanford project; disposal of property.

⁵⁰12D U.S.C. § 835.

authority of the statute)"...for the purposes of assisting in the permanent settlement of farm families, protecting project land, and facilitating project development."⁵¹ The Bureau of Reclamation (Reclamation) is the governing Federal agency.

The Hanford site includes sections of land that were transferred to Atomic Energy Commission (USDOE) control from Reclamation. The Reclamation land represents a mixture of public domain and other lands purchased by Reclamation. All Reclamation lands, over 26,000 acres, are located within Hanford's North Slope (Wahluke) area.

If the North Slope is declared excess by USDOE, the 26,000 acres would return to Reclamation for direct management and control. Reclamation could retain complete management and control or it could enter into an agreement with another Federal agency or State/local government to carry out these functions. In such cases, Reclamation would retain ownership. Reclamation could also lease the land, or transfer it by sale or land exchange. Most land transfer transactions in the Columbia Basin Settlement area are accomplished through land exchanges.

Both public domain and other lands under Reclamation control would be disposed of and/or sold pursuant to the provisions of the **Columbia Basin Irrigation Act**. A sale must be compatible with the purposes of the Act as specified above: i.e., to assist the permanent settlement of farm families, to protect project land, and to facilitate project development. Historically, Reclamation has applied a broad interpretation of land transactions that "facilitate project development."

For "settlement" lands covered by the **Columbia Basin Irrigation Act**, Reclamation is not strictly bound by the FPMR.⁵² Reclamation is not required to dispose of such public lands under the authority of the Public Land Laws. However, the agency attempts to follow, to the extent deemed practical, the policies and procedures outlined in the FPMR.

⁵¹16 U.S.C. § 835c, Duties of Secretary of Interior.

⁵²Lands identified as "settlement" were acquired by the U.S. Bureau of Reclamation for establishment of "farm units" under the authority of the **Columbia Basin Irrigation Act**.

Legislative Transfer

Notwithstanding the provisions of the above statutes, Congress can authorize specific land transfers by legislative action.

Congress could direct the transfer of specific sections or categories of land for specific purposes. Transfer authority can be provided by enacting new laws or amending existing laws or statutes. For example, AECA amended the AEA to allow the City of Richland to be transferred from Federal to private control.

Congress could also conceivably grant a specific exemption to existing laws to effect a land transfer or to ease the transfer process. An example of this can be seen in the **Base Realignment and Closure Acts (BRACA)**, which facilitated Department of Defense closure of certain military installations, and their transfer to civilian control.

History of Hanford Land Acquisitions and Transfers

The appendix to this Chapter contains a USDOE summary of major land acquisitions and disposal actions since the Hanford reservation was assembled in 1943. The acquisition of the Hanford site involved thousands of individual title transactions and land withdrawals. Initial acquisition took place under authority of the **Second War Powers Act of 1943**. Most subsequent acquisitions and disposal actions took place under the key legislative Acts listed above.

APPENDIX

ACQUISITION AND DISPOSAL OF HANFORD REAL ESTATE

**(BASED ON MATERIALS PRESENTED TO
FUTURE SITE USES WORKING GROUP)⁵³**

- 5/41 Government issues Proclamation #2487 (55 Stat. 1647) placing country on an unlimited national emergency (approx. 6.5 months before Pearl Harbor).
- 2/43 Under the unlimited national emergency, War Department establishes Gable Project, Pasco, Washington, authorizing the acquisition of approx. 447,870 acres (approx. 700 sq. miles) of land for a "military necessity". Most land was to be purchased. Unimproved lands in the Yakima Horn, the Wahluke Slopes, and the Franklin County side of the Columbia was to be leased. Slightly over 50 percent of the site was not on the tax roles, being owned by either the Federal, State, or county governments.
- 9/43 Public Land Order (PLO) 1654 is issued which withdrew 12,033 acres of land in the Public Domain for the use of the War Department for military purposes related to the unlimited national emergency. This PLO was subsequently followed by PLO's 191, 202, 204, and 261.
- 4/48 City of Richland officially dissolved by court order.
- 12/48 Approximately 88,000 acres on the Wahluke Slope, about half of which had been leased, is obtained and declared a central control zone. The previous leasehold portion was purchased outright. The remaining portion consisted of public domain and fee title lands, the control of which was provided to AEC by memorandum of agreement with Reclamation. An additional 173,000 acres, located on either side of the central zone, are

⁵³C. Pasternak, op. cit., as amended.

leased as a secondary zone.

Prior to the above action, during this same year, lands previously leased in area "C" were either purchased or released. Lands in the Horn Rapids Triangle were included in this release and land use restrictions were also removed on the Franklin County side of the river. However, land previously leased east of the Yakima River, in the twin bridges area, was purchased. These lands were already in the original Hanford boundaries.

1/53 The east and west portions of the Wahluke Slope secondary zones acquired in 1948 were released, reducing the size of the Hanford Site by approximately 80,000 acres.

PLO's are also revised and re-issued converting lands from military control to the Atomic Energy Commission (AEC).

1/53-1/58 A small number of land parcels located around the perimeter of the site were released to GSA to be excessed.

12/58 The balance of the secondary Wahluke Slope zone acquired in 1948 was released reducing the northern site boundaries to approximately where they are today.

1959 The City of Richland is released from AEC control and 2,054 acres of land are transferred under PL 221.

10/62 280 acres, excessed through GSA, were acquired by the FAA and subsequently transferred to the Port of Benton for the Richland airport.

8/64 10,000 acres of Public Domain lands within the boundary of the Hanford Site were transferred by the Interior Department to AEC in exchange for 7,000 acres of fee lands. These 7,000 acres were then transferred to BLM as Public Domain lands and were reserved for use by the AEC. (PL 88-557)

In this same year, 394 acres in North Richland were excedded through GSA; 276 acres to Battelle and 118 acres to Douglas Aircraft. An additional 291 acres were disposed of to the Corps of Engineers (COE).

1965 840 acres were excedded to the State of Washington on the south slope of Rattlesnake Mountain in exchange for State's mineral rights on approximately 39,000 acres of land. In addition, 5,361 housing units along with walks, fences, recreational facilities, utilities, etc. were sold.

In addition, 152 acres of land were released through GSA.

1966-1971 11,331 acres were released around the perimeter of site to GSA for sale and to BLM.

11/30/71 Permit issued to what is now Washington State Department of Wildlife and U.S. Fish & Wildlife for Wahluke Slope area.

1971-pres. 1,671 acres released through GSA at various times.

Site currently consists of approximately 359,680 acres (562 sq. miles) approximately 18%, or 64,743 acres (101 sq. miles), of which are public domain lands.

Chapter 4

RESPONSIBILITY FOR CLEAN-UP AND LIABILITY PROTECTION

This Chapter will examine two cleanup related questions that must be addressed in any scenario to transfer land at the Hanford reservation:

- (1) What environmental regulations could affect the transfer of real property at Hanford?
- (2) How would the transfer of Hanford real property affect the liability of USDOE or subsequent owners for remediation of contamination and liability for third party damage or injury, i.e., tort liability?

Environmental Regulatory Framework

The following environmental regulations will affect Federal real property transactions at Hanford:

A. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 120(h) Restrictions: Transfers of Federal property which have been exposed to hazardous substances may be restricted by Section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).⁵⁴ These restrictions could affect or even block specific proposed Hanford property transfers.

CERCLA Section 120(h) affects transfers of real property on which a hazardous substance has been stored for one year or more, or is known to have been released or disposed of. The Act states that any contract entered into by the United States for transfer of such property to "another person" must include: (1) notice of the type and quantity of hazardous substances; (2) notice of the time at which such storage, release, or disposal took place; and (3) a description of the remedial action taken.⁵⁵

⁵⁴42 U.S.C. § 9620(h), *op.cit.*

⁵⁵R.T. Swenson, D.V. Fivehouse, and W. Wisniewski, "Resolving the Environmental Complications of Base Closure", Federal Facilities Environmental Journal, Autumn 1992, p. 279.

CERCLA Section 120(h) also states that any deed transferring such property must contain a covenant warranting that "all remedial action necessary to protect human health and the environment...has been taken before the date of such transfer, and any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States."⁵⁶

Real property that fits the hazardous substance storage, release, or disposal criteria mentioned above cannot be transferred without the completion of remediation, a complex and lengthy process. The restriction applies both to "Superfund" sites included in the National Priorities List (NPL), and non-NPL sites meeting the storage/release/disposal criteria.

Recent efforts by DOD to close military installations illustrates the potential impact of CERCLA Section 120(h) upon real property transfers. Closure of these installations represents a significant adverse economic impact upon surrounding communities. The military installations are also often seen as the "best prospect for future economic development".⁵⁷ State and local governmental jurisdictions as well as private interests may encourage quick transition of these installations to civilian use.

However, in attempting to transfer lands, DOD found it difficult to meet the requirements of CERCLA. Specifically, DOD found: (1) contamination of soil and groundwater at most bases is not fully known but is clearly widespread, and (2) the statute does not define when a remedial action has been taken.⁵⁸

Upon closing Pease Air Force Base (AFB), New Hampshire, a Superfund site, DOD leased real property to the State of New Hampshire for use as an airport. In leasing the real property to New Hampshire, DOD contended that CERCLA Section 120(h) did not apply. The rapid transition of Pease AFB to civilian use was considered essential to offset the economic degradation of the surrounding communities.

Recently, a lawsuit challenged the lease of real property for civilian use and questioned the Federal government's circumvention of CERCLA Section 120(h). The suit holds that a lease represents a transfer, thus requiring adherence to CERCLA

⁵⁶ibid.

⁵⁷House of Representatives Report 102-814, Community Environmental Response Facilitation Act, p. 5.

⁵⁸Swenson; Fivehouse and Wisniewski, op. cit., p. 282.

Section 120(h). This lawsuit has not as yet been resolved.

B. The Community Environmental Response Facilitation Act: Because of the ongoing concerns that CERCLA Section 120(h) would pose an obstacle to the transfer of surplus property at military installations, thereby impacting local community economic development, Congress passed the **Community Environmental Response Facilitation Act (CERFA)**. In November 1992, President Bush signed CERFA into law.

CERFA amends CERCLA Section 120(h) to facilitate the transfer of all or portions of Federal installations to civilian use. Under certain conditions, the law allows more rapid transfer of real property impacted by hazardous substance activities. The law was written to apply to all Federal installations.

CERFA requires that, for real property on which "Federal Government operations are to be terminated", the releasing agency must identify "uncontaminated" parcels. These are defined as parcels free from hazardous substances, petroleum and its derivatives that have been stored on the property for one year or more, or that were known to have been released or disposed of.⁵⁹

Once identified, these clean parcels, including those located on NPL sites, can be transferred. The Administrator of the EPA must first concur in the identification of those clean parcels within an NPL facility. For non-NPL listed facilities, the "appropriate State official" has 90 days to concur, or not concur with the identification. If State officials do not take action within 90 days, concurrence is deemed to have been given. The transferring agency must covenant that any remedial action "discovered to be necessary" after the date of transfer shall be the responsibility of the Federal government.⁶⁰

Another key provision of the Act clarifies when remedial action is considered as complete. Specifically, the Act states that "...all remedial action necessary to protect human health and the environment is deemed to have been taken once an approved remedy is demonstrated to EPA to be installed and operating properly." For example, property requiring long term treatment for groundwater contamination may be transferred once the remedy for such contamination is in place and operating. Prior to CERFA's enactment, pumping and treating to reach acceptable levels, a possible 20 to 30 year process, would be required before property could be

⁵⁹ibid, p. 2.

⁶⁰House of Representatives Report 102-814, op. cit., p. 14.

transferred.⁶¹

C. Resource Conservation and Recovery Act (RCRA) Regulations⁶² and the State of Washington Dangerous Waste Regulations.⁶³ The generation, transportation, and management (i.e., treatment, storage, and disposal) of most hazardous and mixed radioactive waste at Hanford is regulated under the Federal **Resource Conservation Recovery Act (RCRA)** and the State **Dangerous Waste Regulations**. The State of Washington exercises both independent State authority⁶⁴ and delegated authority from the Federal government to regulate such activity. In doing this, it applies the **Dangerous Waste Regulations** which satisfy the basic requirements of RCRA.

Facilities undergoing cleanup or remediation at Hanford have been classified as either RCRA corrective action or CERCLA past practice units under the **Hanford Federal Facility Agreement and Consent Order**, more commonly known as the **Tri-Party Agreement (TPA)**. Notwithstanding this division, the transfer of land that is subject to remediation will, under either law, be subject to the requirements of CERCLA Section 120(h).

The following aspects of RCRA and the Dangerous Waste Regulations could apply in a Hanford land transfer scenario:

(1) It is highly unlikely that ownership, operation or control of an active RCRA-managed treatment, storage, or disposal (TSD) facility would be transferred. However, if such a case should occur, a class 1 modification to the facility permit would be required.⁶⁵ The draft Hanford site-wide permit (currently in the review process) specifies that the permit "...may be transferred to a new owner or operator only if it is modified or revoked and reissued pursuant to WAC 173-303-830(3)(b).⁶⁶

⁶¹ibid.

⁶²42 U.S.C. § 6901.

⁶³WAC 173-303-610(b).

⁶⁴RCW Chapter 70.105.

⁶⁵WAC 173-303-830, Appendix I, para. 7.

⁶⁶Department of Ecology Nuclear and Mixed Waste Management Program, Final Permit for the Treatment, Storage and Disposal of Dangerous Waste, Revised Draft, December 30, 1992.

Furthermore, the new owner or operator would have to manage the TSD facility in accordance with the requirements of RCRA and the Dangerous Waste regulations.

(2) The State Dangerous Waste regulations specify that when a TSD facility is certified for closure, the deed to the facility property, "...or some other instrument which is normally examined during title search" must reflect: (a) that the land has been used to manage dangerous waste, and (b) that its use is restricted.⁶⁷

(3) The "restriction" referenced in the foregoing paragraph refers to the "postclosure" period. Postclosure use of property "on or in which dangerous wastes remain after partial or final closure" must not disturb the "...integrity of the final liner cover, liner(s), or any other components of any containment system, or the function of the facility's monitoring systems", unless it is found that the disturbance is: (a) "necessary to the proposed use of the property and will not increase the potential hazard to human health or the environment", or (b) necessary to reduce a threat to human health and the environment.⁶⁸ The new owner(s) or operator(s) would be responsible for the postclosure management and monitoring requirements specified by RCRA and the Dangerous Waste Regulations.

Liability Issues

The transfer of real property upon which hazardous substances have been stored, treated, and disposed generates significant concern about the possible transfer of liability to subsequent owners. Two liability concepts must be considered: (1) the responsibility to complete required cleanup actions, and to bear the costs thereof, and (2) liabilities for third party injury or damage caused by the existence of hazardous substances or contamination, i.e., tort liability.

CERCLA provides for "strict" as well as "joint and several" liability for all costs of investigation and remediation as a result of hazardous substance releases. Those persons or parties that, according to CERCLA, owned, operated, or by their actions caused such contamination, are considered to be "strictly" liable or "liable without regard to fault". They are also "jointly and severally liable" in that each liable person or party is responsible for all of the costs of investigation and remediation.

Due to its ownership of contaminated sites and its responsibility for contaminated conditions, the Federal government can be held strictly, jointly and severally liable

⁶⁷WAC 173-303-610(b).

⁶⁸WAC 173-303-610(7)(d).

for the completion of remediation on a Superfund or other hazardous waste site, such as found at Hanford.⁶⁹

Subsequent owners of lands subject to CERCLA Section 120(h) cannot be held liable for the remediation of contamination that existed prior to, or at the time of land transfer. However, they will be held liable for the remediation of contamination that was caused by their operations after transfer of the land.

Determining who is responsible for contamination can be a difficult issue to resolve. Any prospective owner may be concerned about potential legal actions to determine responsibility and liability for the completion of remedial response actions.

While CERCLA does not hold subsequent owners of Federal installations liable for the cleanup of contamination that existed at the time of transfer, the Act is largely silent on tort liability associated with personal injury and property damage resulting from pre-existing contamination. Conceivably, subsequent property owners could be held solely liable for such damage.

Indemnification

Concerns that CERCLA does not adequately indemnify future owners has motivated some state and local governments to seek congressional action. In the Pease AFB case, the Department of Defense argued that the joint and several provisions of CERCLA provided adequate indemnification.

The State of New Hampshire was not convinced that it was adequately protected from all liabilities associated with the lease of Pease AFB for use as an airport. Officials of the Pease Development Authority, an agency of the State, were particularly concerned with the lack of third party liability indemnification coverage. They feared lack of such coverage would discourage contractors from submitting bids to do work on the site.

State officials asked Congress for more expansive indemnification for the state of New Hampshire. A provision in the **Fiscal Year 1991 Defense Authorization Bill** provided the desired indemnification. This broader indemnification was extended to all States with military installation closures through two subsequent Congressional Acts.

⁶⁹Washington State Department of Ecology, Legal Module Workbook, September, 1992, p. 15.

Section 330 of the FY 1993 Defense Authorization bill stated that the "...Secretary of Defense shall hold harmless, defend, and indemnify in full the persons and entities described....from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance or pollutant or contaminant as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law."⁷⁰

Similar language was enacted in the **Fiscal Year 1993 Defense Appropriations Bill**. Faced with this new statute, DOD issued a policy memorandum which required that the Deputy Secretary of Defense "...must review planned transfers or leases or real property to a state or a political subdivision of a state..."⁷¹ The resulting administrative review requirements offset efforts to accelerate the property transfer process.

These two congressional acts pertain only to the transfer of military installations being disposed of under the authority of congressional base closure statutes. They do not apply to Department of Energy installations.

Conclusions

Having explored the regulatory and liability framework within which Hanford land transfers must be considered, the two questions outlined at the beginning of this section can be addressed.

- (1) **What environmental regulations could affect the transfer of real property at Hanford?**

CERCLA Section 120(h) prohibits the transfer of any NPL-listed or other hazardous waste site at Hanford prior to the completion of remedial action. This process could take 20 to 30 years. CERFA could however, speed the process of land transfer.

⁷⁰House Resolution 5006 text report; Section 330, Indemnification of Transferees of Closing Defense Property.

⁷¹Deputy Secretary of Defense memorandum; Subject: Transfer or Lease of Department of Defense Real Property to States or Political Subdivisions of States, October 6, 1992.

First, CERFA would allow the near-term transfer of uncontaminated parcels even within a designated operable unit boundary. Second, CERFA would allow the transfer of contaminated parcels after the installation and demonstration of remedial measures, but before contamination is reduced to prescribed final levels.

While CERFA could expedite the transfer of Hanford parcels that are known to be uncontaminated or on which remedial action is successfully being taken, the transfer of parcels where the nature and extent of contamination is not fully known or understood could still take years.

(2) How would the transfer of Hanford real property affect the liability of USDOE or subsequent owners for remediation of contamination or third damage or injury, i.e., tort liability?

It is clear that the provisions of CERCLA hold USDOE responsible for completion of actions to remediate contamination that is shown to have existed at the time of transfer. Subsequent owners would be held liable for the cleanup of any contamination that they caused.

If land were transferred without full or complete knowledge of residual contamination, or if land were transferred and subsequently used for activities dealing with hazardous materials, it may be difficult to define the extent of contamination caused by any party. In such cases, both USDOE and subsequent owners may share liability for additional remedial actions.

Having more than one responsible party may make it harder to enforce expeditious completion of cleanup actions. This underscores the need to fully baseline the nature and extent of the contamination existing at the time of transfer. Finally, the potential for exposure to legal action to determine responsibility for remedial actions may deter prospective owners from acquiring Hanford property.

CERCLA does not clearly protect subsequent owners from liability for damage or injury to third parties resulting from contamination existing at the time of transfer. As a result of this uncertainty over liability, Congress incorporated broad indemnification language into both the fiscal year 1993 Defense Authorization and Defense Appropriations bills. The bills provide tort liability indemnification for anyone acquiring ownership or control of any portion of a closed military facility. This language may also help reinforce Federal responsibility for subsequent remedial actions.

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It should be stressed that the indemnification language of these two bills provides protection only for land transfers involving military installations that are in the closure process.

Chapter 5

OTHER LEGAL CONSTRAINTS ON FUTURE LAND TRANSFER AND USE

Other laws and regulations may also constrain future transfers of Hanford lands. Some may limit how or for what purposes transferred lands can be used.

Water Rights

The right to use of water on or adjoining the Hanford reservation is an important consideration in any proposed land transfer. Without adequate water, the ability to effectively use the land for the purposes intended may well be limited.

Sources of water used to support activities or operations on the Hanford reservation lands include the Columbia River, Yakima River, and various groundwater aquifers.

Water rights issues at Hanford are complicated by a number of factors. There are a large number of land parcels at Hanford, each having potentially different attached water rights. USDOE's past and present water withdrawals are based on a legal doctrine that may not support future withdrawals by other parties. There is competition for limited appropriative rights to available surface water.

Three key questions must be addressed in assessing the impacts of water rights issues upon Hanford land transfers:

- (1) What were the nature and extent of water rights that existed at the time the Hanford reservation was established in 1943? Who owned those rights?;
- (2) When the Hanford reservation was created, under what authority did the Federal government appropriate water?; and
- (3) As Hanford lands are returned to non-Federal control, what water rights, if any, are transferred to the subsequent owners?

These questions are answered in the following paragraphs.

- (1) **The nature and extent of water rights existing at the time the Hanford reservation was created.**

Prior to the establishment of the Hanford reservation in 1943, rights to the water on or adjacent to reservation lands were generally determined by State water resource laws, which are predominantly based on the "prior appropriations" doctrine.

The prior appropriations doctrine is essentially a "first in time...first in right" approach to water use. It "...grants priority rights to use of the water to those who first put it to some beneficial use."⁷² Once a right to use water under the prior appropriations doctrine is established, the water rights holder must use the water to preserve the right. The right can be lost after a five year lapse in water use.⁷³ If a water source becomes "over-appropriated", the junior rights would be curtailed or limited in order to satisfy more senior rights.

Pre-Hanford land owners based their rights to certain amounts of water upon their proven usage, i.e. appropriative rights. Each landholder might differ in usage, and therefore their appropriative right. To determine the exact nature of all pre-Hanford water rights would require a title search of thousands of deed transfer documents.

Chapter 3 states that "Parcel by parcel, title history characterization will also identify any existing reserved rights and easements that could impact the land transfer process and the rights of the involved parties." This would probably include a review of potential pre-existing or reserved water rights.

It is generally assumed that, when the Hanford reservation was created, individual land parcels were "transferred in fee" to the Federal government along with accompanying water rights. However, water rights may have been reserved by previous land owners or there may have been provision for return of those rights when the Federal government subsequently returns the property to non-Federal control. Such reserved rights, if they exist, may be in conflict with State law which requires the water rights owner to use the water in order to retain the rights.

⁷²Joint Select Committee on Water Resource Policy, Report to the Legislature, January 1989, p. 5.

⁷³ibid.

If a water right is not exercised within the five year window, the right continues to exist until the Department of Ecology takes formal action to "extinguish" the right. It is not certain that Ecology has ever accomplished this for "lapsed" rights at Hanford. It is assumed that the Department of Ecology could easily extinguish "lapsed" rights that have not been exercised since the formation of the Hanford reservation.

(2) Under what authority did the Federal government appropriate water for Hanford?

The Federal government's rights to appropriate water on the Hanford reservation is governed by a legal doctrine that originated in a Supreme Court decision known as Winters v. United States.⁷⁴ The Winters' rights doctrine states that "...there is an implied reservation of water to fulfill the purposes of Indian reservations." Under this doctrine, Indian tribes can reserve water rights for "...all of the purposes for which an Indian reservation is established." The extent to which an Indian tribe can exercise those rights is bound by the extent of "unappropriated water" existing either at the time their lands were established by treaty, or to "time immemorial."⁷⁵

The Winters' rights doctrine has evolved into a general "implied reservation doctrine" that applies to non-Indian Federally established reservations. At Hanford, the Federal government's priority date for establishing its reserved water right under the implied reservation doctrine is the date that the reservation was established in 1943. Therefore, the extent of the Federal government's appropriative rights under the implied reservation doctrine would be the extent of "unappropriated water" existing at the time the Hanford reservation was established.⁷⁶ In some cases, the

⁷⁴Joint Select Committee on Water Resource Policy, State Briefing Paper #10,, Reserved Water Rights, p. 2.

⁷⁵ibid.

⁷⁶While this section addresses the "implied reservation" rights exercised by the Federal government under the Winter's doctrine, it is important to note that the tribes have a concern regarding the Winters reserved water rights that they may hold with regard to rivers bordering or running through the Hanford reservation (primarily the Columbia and Yakima). The tribes maintain that their Winters rights include reserved water rights on all rivers where that tribe possesses "usual and accustomed fishing stations". Tribes have stated a position that "usual and accustomed fishing stations" exist on the Columbia and Yakima rivers, and that their Winters water rights exist even if they are as yet unquantified. D.W. Hester, CTUIR Tribal Attorney, Memorandum to

Winter's doctrine may apply to ground as well as surface water.

The Federal government has not established its own water resource regulations. In establishing the extent of its appropriative claim under the Winter's doctrine at Hanford, it appears that the Federal government has followed regulatory procedures outlined in State water resource laws to document the extent of its appropriative rights under the Winter's doctrine. As an example, the State of Washington established a permit requirement for the appropriation of groundwater in 1950. Since then, the Federal government has filed a number of State permit applications at Hanford, in accordance with State regulations, for appropriation of the available ground water.

USDOE could have used water rights established under State water resources law when the Hanford reservation was created. However, USDOE believes that it has used only those water rights afforded to it under the implied reservation doctrine.

(3) As Hanford lands are returned to non-Federal control, do the corresponding Federal water rights transfer to the subsequent owners?

It is not clear whether the implied reservation water rights held by the Federal government may be transferred when Federal lands are transferred to non-Federal control. Some courts have ruled that Winters' doctrine rights held by Indians may be transferred to non-Indian control. Whether the courts will apply the same rule to non-Indian Federal reservations, or whether they will decide that implied reservation water rights exist only as long as the reservation serves the purpose for which it was established, remains to be seen.

If the Federal government is able to transfer its implied reservation water-right, then the transferee probably would receive a pro-rata share of the total right established for the Hanford reservation. The protections of the implied reservation doctrine likely would no longer apply to the non-Federal ownership. Instead, the transferee presumably would have to use these rights, as specified under State water resource laws, or lose them.

Apparently, the Federal government did not exercise any "pre-existing" or "pre-reserved" rights that existed at the time the land was acquired to support Hanford activities. These rights have not been exercised within the statutory five year period.

The rights continue to exist until the Department of Ecology takes formal action to extinguish them. If a dispute should arise, the Department of Ecology would have to determine if the rights had been exercised as required by State law. Conceivably, a dispute of this kind could delay a land transfer.

Assuming that implied reservation water rights may be transferred at Hanford, the transferee's ability to expand his Winter's rights for new uses may be somewhat limited. For example, claims for appropriative rights to Yakima River water have been established in current litigation. The date for filing a water right claim for the Hanford sub-basin has expired. The USDOE did not establish a claim under the Yakima River litigation. New appropriations for Columbia River water have been closed since 1992.⁷⁷ Therefore, the pro-rata transfer of Columbia River water rights established under the implied reservation doctrine could be indefinitely limited to the Federal government's existing claim. Likewise, new claims to ground water sources may also be limited indefinitely to existing Federal claims which may be defined by State permit. The extent of ground water contamination could further limit the ability for future appropriation.

Pre-existing Ownership Claims

As discussed in Chapter 2, **public domain lands** that were withdrawn to form the Hanford site, once excessed, will return to the Department of the Interior, Bureau of Land Management (BLM). (See map 3.1) BLM then follows its own process to determine whether the lands' "essential character" has changed before any further action is taken.

About 26,000 acres of land in the North Slope area were acquired by the Bureau of Reclamation, Department of the Interior, under the Columbia Basin Project Act. These lands were transferred to the Atomic Energy Commission (AEC) in 1957 by Memorandum of Agreement.⁷⁸ That memorandum says that if the lands are determined to be excess to the AEC's (now USDOE's) mission, they will revert to the Bureau of Reclamation.

Some area residents assert, as a moral principle, that private citizens hurriedly displaced from their homes and farms in 1943--44 should have rights to reclaim their lost lands. According to the USDOE, the lands were acquired in fee, and there are

⁷⁷WAC Chapter 173-563.

⁷⁸Memorandum of Agreement between the Bureau of Reclamation and the Atomic Energy Commission, February 27, 1957.

no reversionary claims. To date, USDOE's individual title searches have not revealed any written commitments to return parcels to former owners, or to provide them preference should the land become available. As land is "excessed", title searches will be performed for each parcel.

The terms of existing leases, permits, and easements will be honored. The leases to the State of Washington and the Washington Public Power Supply System were mentioned in Chapter 1. These leases run past the middle of the next century. Bonneville Power Administration has power transmission corridors across the Hanford site. There are two state highway rights of way. When USDOE excesses portions of the land, it may retain easements for roads, railroads, or communications facilities that it regards still supportive of its missions at Hanford.

Indian Treaty Rights

In the Treaties of 1855, the Confederated Tribes and Bands of the Yakima Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and the Nez Perce Tribe ceded large tracts of land to the United States. All of the present Hanford reservation is on land ceded primarily by the Yakima and also by the CTUIR. All three tribes/nations reserved rights to take fish "at all . . . usual and accustomed stations" in common with citizens of the United States. The treaties also provided to the tribes ceding land "the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens"

The Army suspended exercise of these rights on the Hanford site in 1943. The tribes maintain that there are a number of "usual and accustomed" fishing stations along the Hanford Reach of the Columbia River. Moreover, there is evidence that the tribes engaged in hunting, gathering, and grazing activities on public lands prior to their inclusion in the site. The return of these lands to the public domain would presumably allow tribal members to resume their exercise of off-reservation treaty rights.

Therefore, certain Indian tribes possess rights reserved by their treaties with the United States government. These rights can be exercised on Hanford lands. Generally speaking, members of the Yakima Indian Nation, the CTUIR, and the Nez Perce Tribe have the right to access their usual and accustomed fishing stations, even if these stations are located on private lands. The tribal members also have the right to access "open and unclaimed" or publicly owned lands that are managed in a manner consistent with their off-reservation hunting, razing, and gathering treaty rights. Any transfer of Hanford lands, whether from one federal agency to another, to State or local government, or to private ownership, should take these treaty right

into consideration.

Native Americans are also very concerned about protection of archeological and religious sites within Hanford's boundaries. Federal law requires varying degrees of acknowledgement and protection of these sites.

Archaeological, Cultural and Historic Preservation

A number of Federal laws and regulations require Federal agencies to protect archaeological, cultural and historic values in actions affecting real property. These requirements could affect Hanford land transfer actions in at least two ways:

- (1) Mandated review, consultation, and approval procedures may require expenditures of time and resources prior to completing a transfer.
- (2) Perhaps more significantly, the laws may provide a basis for the Secretary of Interior or other responsible official to withhold approval of a transfer for a use that will fail to protect historic, cultural, and other values. In some cases, regulations require extensive efforts to work with potentially affected parties to prevent or mitigate loss of these values. Deed restrictions or other limiting measures may result.

A large number of sites located within the Hanford reservation have been identified as having archaeological, cultural or historic significance. For example, the Gable Mountain and Butte area has been nominated as a national historic site. According to the USDOE, 50 sites have been included in the National Register for Historic Places. An additional 75 sites have also been identified by USDOE as having potential archeological, cultural or historic significance.

The **National Historic Preservation Act of 1966 (NHPA)**, and the **American Indian Religious Freedom Act (AIRFA)** are among the laws that have particular significance for Hanford. The purpose of the NHPA is to "...protect properties of historical architectural significance at Federal, State, and local levels from Federal actions affecting properties included in or eligible for inclusion in the National Register of Historic Places."⁷⁹ Specifically with regard to land transfers, Section 110 of the NHPA states that the Secretary of Interior "...shall review and approve the plans of transferees of surplus Federally owned historic properties not later than ninety days

⁷⁹W.A. Appel, R.J. Cole, H. Edelhertz, W.H. Ostenson, Fundamental Legal Issues Surrounding A Potential Nuclear Waste Repository in Washington State, p. 93.

after his receipt of such plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced".⁸⁰

Procedures developed under the NHPA are to be used "to the extent feasible" in dealing with other Federal laws relating to the protection of archaeological, cultural, and historic values.⁸¹

The AIRFA has been used by Indian tribes to challenge, in court, Federal actions that could impact sites that have cultural significance for Native Americans. The Act states that "...it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions...". This includes "access to sites."⁸² The law itself consists of one paragraph. However, the broad implications of the Act may provide a legal means for Native Americans to protect sites with significant cultural and religious values in any proposed Hanford land transfer.

A final point regarding Native American rights must be mentioned. The various Federal archaeological, historical and cultural laws primarily impact the actions of Federal agencies and departments. Protection of significant archaeological, historical and cultural values may be diminished by the transfer of Hanford lands to non-Federal parties.

Land Use Authority

Lands transferred to non-Federal ownership will be subject to State and local land use laws and ordinances. Local zoning codes and other measures that implement local policies and comprehensive plans will apply.

⁸⁰16 U.S.C. 470h-2, § 110.

⁸¹36 CFR Chapter 800.14.

⁸²42 U.S.C., § 1996, Protection and Preservation of Traditional Religions of Native America.

Chapter 6

KEY POLICY ISSUES

The State of Washington must face important policy questions in a number of issue areas as it forges a comprehensive position on Hanford land transfers. The issue areas are:

- o Economic Development
- o Protection of Natural, Cultural, and Recreation Values
- o Agriculture
- o Hazardous Waste Management
- o Native American Treaty Rights and Interests
- o Liabilities Associated with Contamination
- o Public Involvement

This chapter attempts to characterize and briefly discuss these policy issues.

Economic Development

- o Should the State support the transfer of Hanford lands for the purpose of economic development and diversification in the Benton/Franklin/Grant County area?
- o Are there actions the State should take to encourage and facilitate such transfers? Should the State take title to Hanford lands for economic development or is this role better left to local governmental and economic development interests?
- o Should the State provide assistance in preparing or promoting transferred lands for economic development?

With 16,500 employees and a 1992 budget of \$1.75 billion, Hanford makes a significant contribution to both the local and State economies. However, while Hanford's budget and workforce will increase in the near-term, they will decline in the long-term as site cleanup efforts conclude. And, although USDOE will probably maintain a presence at Hanford following the completion of cleanup work, the budget and workforce will be at dramatically reduced levels.

Economic diversification will be required to offset the anticipated significant decline in USDOE operations. The Hanford cleanup program offers an opportunity for such economic diversification. The size and complexities of Hanford's waste management and cleanup problems create significant opportunities for businesses involved with environmental restoration activities, the development and marketing of advanced cleanup technologies, and the design, fabrication, and operation of waste treatment equipment and facilities. Moreover, the availability of a large, highly skilled and technically adept workforce may also attract technology-based businesses and manufacturers not directly related to the cleanup program.

Efforts have been initiated to capitalize on the opportunities afforded by the cleanup program. USDOE and its contractors are working with local and State economic development interests to launch the Hanford Economic Transition Initiative. Westinghouse Hanford Company has taken the lead in establishing the Hanford International Environmental Institute. Work is under way to develop the Tri-Cities Science and Technology Park. WSU has established a Tri-Cities Campus which offers a strong technical program. USDOE has committed to build the Environmental and Molecular Sciences Laboratory (EMSL) valued at nearly \$200 million.

The State of Washington has played an active role in economic development activities at Hanford. The legislature has directed the Department of Trade and Economic Development (DTED) to emphasize the highly skilled work force and world-class research facilities in the Tri-Cities when implementing "programs to attract or maintain industrial or high-technology investment in the State."⁸³ The legislature further found that "the new emphasis on waste cleanup at Hanford and the new technologies needed for environmental restoration warrant a renewed effort to promote the development..." of the 1,000 acres of State leased land at Hanford.⁸⁴ DTED was directed to work with "associate development organizations" in the Tri-

⁸³RCW 43.31.215.

⁸⁴Laws of 1990, § 1, Chapter 281.

Cities to promote such development and a special account in the State treasury was established to fund the work.⁸⁵

The transfer of Hanford lands to Benton County, the City of Richland, other public agencies or private parties adjacent to the City of Richland could contribute significantly to these economic transition and development efforts by providing attractive locations for new businesses. These lands are or could easily be served by urban services. They offer convenient access to the Hanford Site to the north and to urban and residential areas to the south. They are in close proximity to other businesses and to such key facilities as USDOE's Pacific Northwest Laboratory, the WSU branch campus and the proposed EMSL. Moreover, such transfer would be consistent with the City of Richland's proposed annexation of approximately 2,500 acres of the Hanford Site around and including the 300 and 1100 Areas, and with the recommendations of the Hanford Future Site Uses Working Group.

Protection of Natural, Cultural and Recreational Values

- o Should the State support and promote land transfers for the purpose of protecting natural, cultural, and recreation values?
- o Should the State acquire and manage Hanford lands for the protection and public enjoyment of these values or should such actions be left to Federal agencies?

Of the 560 square miles that comprise the Hanford site, only a small portion was developed or utilized for the production of nuclear weapons materials or for other energy missions. The remainder of the site was left undeveloped to provide a safety buffer and access was restricted for security purposes. As a result, wildlife has flourished and Hanford today contains one of the largest remaining areas of undisturbed shrub-steppe habitat.

The shrub-steppe community is a complex ecosystem based on a mosaic of grasses and shrubs, each suited to a particular soil condition, elevation, and moisture regime. In the 1880's, Washington contained nearly 10.4 million acres of shrub-steppe. Today, much of this habitat type has been lost to development and agricultural practices. Most of the remaining shrub-steppe has been degraded by invasions of non-native noxious weeds and is fragmented. Less than 10 percent of the remaining habitat truly supports native plant communities.

⁸⁵RCW 43.31.205 and RCW 43.31.207.

Given the degraded nature of this habitat type in general, Hanford's large, undisturbed expanses of shrub-steppe are unique. In all, 90 species of birds, 16 species of mammals, numerous reptilian species, and an abundance of insects depend on this dwindling habitat type. Of these species, 47 are rare, including 6 species which are already listed as rare or endangered and 15 that are candidates for this status.

In addition to the shrub-steppe habitat, the Hanford site also hosts the Hanford Reach which often is characterized as the last free flowing stretch of the Columbia River. This portion of the river is known for its scenic, natural, cultural, and recreational values as well as being an important salmon spawning area.

USDOE has managed large portions of the Hanford site specifically for wildlife protection and ecological research. The ALE Reserve encompasses 77,000 acres of the Hanford Site west of Highway 240. The U.S. Fish and Wildlife Service and the Washington Department of Wildlife, under contract with USDOE, manage the 140 square mile portion of the Hanford site north of the Columbia River for wildlife purposes.

In 1988, Congress passed Public Law 100-605 directing the Secretary of Interior in consultation with USDOE; State, local, and tribal governments; and "other interested entities" to:

1. Conduct an evaluation of the Hanford Reach's outstanding fish and wildlife, geologic, scenic, recreational, natural, historical, and cultural values;
2. Develop and analyze preservation alternatives; and
3. Develop a preferred alternative.

In June 1992, the National Park Service issued a Draft Environmental Impact Statement (DEIS) analyzing preservation alternatives for the Hanford Reach. The proposed alternative recommends legislative action by Congress to establish a new National Wildlife Refuge with a Wild and Scenic River overlay. The proposed refuge would include the river, all islands, all lands within a quarter mile of the river and that portion of the Hanford site north of the river. The Wild and Scenic River designation would cover the river and lands within a quarter mile of the river.

Under the proposed designation:

1. "The focus of management would be on the protection of all nationally

significant resources, with particular emphasis on the enhancement of fish and wildlife habitat";

2. "Some recreational access points would be improved but not expanded";
3. Some additional visitor facilities and interpretive programs would be provided;
4. "Damming and major dredging would be prohibited"; and
5. New industrial facilities within the designated river corridor would be prohibited.

The State Departments of Ecology, Wildlife, and Fisheries have voiced general support for the preferred alternative as have environmental and wildlife groups. The proposed action conflicts, however, with a proposal put forth by Grant County residents and endorsed by the Grant County Board of Commissioners to re-establish agricultural uses on Hanford lands north of the river. Moreover, Benton County Commissioners have also voiced strong opposition to the preferred alternative.

In addition to the preservation alternative proposed in the Hanford Reach DEIS, environmental and conservation interests participating in the Hanford Future Site Uses Working Group have also urged the preservation of undisturbed habitat across the entire Hanford Site. With the prospect that the ALE reserve could be an early transfer candidate, these interests have particularly stressed a desire that this area continue to be managed as an ecological reserve. While wildlife and ecological preserves generally received significant support within Hanford Future Site Use Working Group discussions, such set-asides could conflict with suggestions that portions of ALE be made available for agricultural use and that other undeveloped areas of the Hanford site be made available for commercial or industrial activities.

The Indian tribes also have a great interest in the protection of fish, wildlife, and vegetation resources, in order to resume exercise of reserved treaty rights. Preservation and protection of cultural, archeological, and religious sites is also a priority for the tribes.

Agriculture

- o Should the State support and promote the transfer of Hanford lands for the purpose of re-establishing agricultural uses?

- o What areas of the Hanford site, if any, should be made available for agricultural uses?

Prior to the creation of the Hanford reservation, a sizable portion of the site was used for agricultural practices, principally irrigated farms and orchards. During the discussions of the Hanford Future Site Uses Group several proposals to reestablish agricultural uses on Hanford lands were aired. One proposal was to allow agricultural practices to occur on the flatter, eastern and northern portions of the ALE reserve. Agricultural uses in this area could be limited due to its close proximity to contaminated groundwater.

The second proposal was to open a portion of the area north of the river for agricultural practices. Under the Wahluke 2000 Plan, drafted by residents in the Mattawa area of Grant County and endorsed by the Grant County Commissioners, the Hanford site north of the Columbia River would be used for a combination of agricultural, wildlife and recreational uses. To accomplish this, the plan proposes the transfer of all USDOE lands north of the river to the Bureau of Reclamation (Reclamation). Reclamation in consultation with governmental entities and interested citizens would prepare a study designating lands for agricultural, wildlife and recreational uses. Reclamation would then sell lands designated for agricultural use and use the proceeds to develop the necessary irrigation water distribution infrastructure. Lands for wildlife and recreational uses would be managed by State or local government agencies under contract with Reclamation.

Unresolved issues regarding possible agricultural use of the Hanford site include:

1. The availability of sufficient quantities of water through the Columbia Basin Project and adequacy of delivery infrastructure to allow irrigated agriculture on the Wahluke Slope.
2. The limits on use of groundwater south of the river due to contamination.
3. The possible stigma that could be associated with agricultural products produced in proximity to contaminated lands.
4. The potential for conflict between agricultural practices, habitat preservation, and Native American interests in some locations.

Hazardous Waste Management

- o Should areas of the Hanford reservation be set aside as a possible site for commercial hazardous waste facilities? Should the State support and promote land transfers for this purpose?
- o Are there areas of the Hanford site which would be appropriate or potentially suitable locations for commercial hazardous waste facilities?
- o Should the State seek to acquire Hanford lands and develop such facilities or should these functions be solely the responsibility of private interests?

The Hanford reservation has in the past been considered as a possible site for commercial hazardous waste facilities. This is likely due to the fact that the Reservation's large size would allow such facilities to be isolated from adjacent and possibly incompatible uses.

RCW 70.105.040 authorized the Department of Ecology to acquire land on the Hanford reservation for the sole purpose of developing and operating a disposal facility for extremely hazardous waste. In 1980, the State acquired 640 acres on the Hanford site for this purpose. If the site is used for some purpose other than a hazardous waste disposal facility, it could revert to USDOE ownership under the terms of the deed. To date, no facility has been constructed. Further, the Hanford Future Site Uses Working Group recommended that no waste facility be constructed at this site since it has not been contaminated by prior Hanford operations.

In 1991, Chemical Waste Management, Inc. proposed the construction of a commercial hazardous waste incinerator on land the State leases from USDOE near the 200 area in the central portion of the Hanford site. Consideration of the proposal has been suspended since USDOE has determined such a use would be inconsistent with the terms of the State's lease with USDOE.⁸⁶

Interest in the Hanford reservation as a site for commercial hazardous waste facilities will likely continue, particularly given USDOE's growing waste management mission and its interest in transferring excess lands. The diverse interests represented on the Hanford Future Site Uses Group were divided on whether commercial waste facilities should be allowed. Some argued that efforts should focus solely on cleaning

⁸⁶J.D. Wagoner, op.cit.

up Hanford's waste and others saw commercial waste facilities as compatible with USDOE's waste operations.

The Hanford Future Site Uses Group has recommended that USDOE concentrate its waste treatment facilities in the Central Plateau area to minimize the amount of land devoted to, or contaminated by, waste management activities. Concern has been voiced that the siting of commercial facilities in a manner consistent with this concept may not be possible without interfering with USDOE cleanup efforts or exposing workers at commercial facilities to unacceptable levels of risk posed by nearby USDOE operations or contamination.

The State's hazardous waste law contains two policies on the responsibility for hazardous waste facilities in Washington. RCW 70.105.040 authorizes a State-sited waste disposal facility at Hanford, and allows disposal of extremely hazardous waste at this site only. RCW 70.105(9) declares that it is the intent of the legislature that the private sector be encouraged to assume the lead role in providing hazardous waste facilities in the State.

The Washington State Hazardous Waste Plan recommends that the legislature "reconsider the issues associated with its policy of solely relying on the private market for hazardous waste facility development." The Plan, a cooperative effort of the Department of Ecology and the State Solid Waste Advisory Subcommittee on Hazardous Waste Planning, suggests that the goal of this policy review should be "to clarify inconsistencies in the current law, and to determine whether a different strategy would better meet the goal of providing for the in-state management of wastes".⁸⁷

Overall, the Plan recommends a "Close to Home" policy with regard to the management of hazardous waste. The suggested goal is self-sufficiency on the part of "individual generators and TSD's, the State as a whole, and the Pacific Northwest as a region."⁸⁸ The report notes in-state capacity to treat selected waste streams is insufficient. Other plan recommendations relating to hazardous waste facilities address:

1. The listing of additional wastes requiring management;

⁸⁷Washington Department of Ecology, Washington State Hazardous Waste Plan, Chapter 2, January 1992.

⁸⁸ibid, p. 25.

2. On-site or local management of wastes;
3. Sizing of facilities based on need;
4. In-region management of wastes; and
5. Interstate equity of Waste Management.

Native American Interests

- o How should the interests and rights of Native Americans be addressed in State policy relating to Hanford land transfers?

The Yakima Indian Nation, the CTUIR Reservation, and the Nez Perce Tribe will be key parties in any land transfer program at Hanford and should be consulted in the formulation of State policy on such transfers.

As noted in chapter 5, the Hanford reservation contains many cultural and religious sites of great significance to the tribes. Moreover, the tribes as part of the Treaties of 1855 reserved rights related to hunting, fishing, gathering foods and medicines and pasturing livestock on the open and unclaimed portions of ceded lands, in common with citizens.

Due largely to security measures, the tribes have had limited access to cultural and religious sites on the Hanford Reservation since 1943. They have also been largely prevented from exercising their reserved treaty rights.

The tribes have strongly supported the cleanup of USDOE wastes on the Hanford reservation. This support stems largely from their desire to regain access to the site and to again exercise their treaty rights. It is uncertain what specific actions with regard to land transfers the tribes might take to protect their rights. Continued Federal ownership in some form may afford the tribes the greatest level of protection for their cultural and religious sites, and the best opportunity for the access needed to exercise their treaty rights.

Liabilities Associated with Contamination

- o Should the State promote or support land transfers which could potentially interfere with cleanup efforts, diminish USDOE's responsibility for cleanup actions or threaten public health and safety?

- o Should the State seek indemnification to protect subsequent property owners from liability resulting from USDOE contamination?

As noted in chapter 4, Section 120(h) of CERCLA prohibits the transfer of contaminated land until cleanup or remedial action is complete. The Community Environmental Response Facilitation Act amends CERCLA to specify that a remedial action is deemed to be complete once a remedy is demonstrated to be installed and operating properly. In short, contaminated land can be transferred in some instances before contamination has been reduced to acceptable levels or fully contained.

Chapter 4 also noted that, while USDOE will remain liable for additional response or cleanup actions needed after the transfer of land, the subsequent owners will share in that liability to the extent that they are responsible for the contamination requiring response or cleanup. It is not clear, however, under CERCLA whether USDOE would remain liable for natural resource damages, personal injury, or property damages resulting from any contamination remaining after transfer of the land. Subsequent land owners may be held totally responsible for these damages. In any event, subsequent owners would, at a minimum be subject to suit and legal action and, even if they were not held liable, they would bear the cost and inconvenience of being involved in such proceedings. Finally, legal proceeding to determine the liability could significantly delay the implementation of any additional cleanup action needed.

Section 330 of the FY 1993 Defense Authorization Act grants broad indemnification to subsequent owners of lands transferred as the result of military base closures. The State may wish to pursue similar indemnification provisions for USDOE land transfers, given the vulnerability of subsequent property owners under CERCLA and the potential for protracted delay of needed response actions until liability is determined.

Stakeholder Participation in Land Transfer Decisions

- o Should the State play a role in coordinating land transfer activities with local governments and other stakeholders?

Hanford is a large and diverse site capable of supporting a wide range of uses. The prospect that USDOE may at some time in the future relinquish control of significant portions of the site has already generated considerable interest. Competing and sometimes conflicting proposals for land ownership and use of portions of the site have already emerged. Given the number of governmental jurisdictions and other

parties that are keenly interested in the future of Hanford lands, the likelihood of further conflict is high. Such conflicts could threaten or seriously delay land transfers.

The comprehensive planning and land use authority of Benton, Franklin, and Grant Counties and the City of Richland will be the key driver in shaping future use of Hanford lands transferred from Federal control. The City of Richland is already considering an annexation of Hanford site lands. The Counties are evaluating Hanford lands within their jurisdiction as part of their planning efforts required under the Growth Management Act. Cooperation among affected State and local governmental entities in these planning processes could serve as the basis for forging a regional land transfer strategy.

The Hanford Future Site Uses Working Group demonstrated that divergent interests can come together to productively discuss future site uses. Participants in the working group urged continued discussions among affected stakeholders on issues involving land transfer and ownership. A coordinated regional approach for land transfers could help garner critical political support and speed the transfer process.