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Issues Associated with the Conveyance and Transfer of DOE Lands under Public Law 105-119


Introduction and Background

Public Law 105-119 (Law) was enacted in November 1997 as part of the Defense Authorization Act of 1998 (Act). The Law specifically requires the US Department of Energy (DOE) to identify lands that are suitable for conveyance or transfer at Los Alamos National Laboratory (LANL) within 90 days after enactment of the Act. In general, suitable lands include those parcels that are not required to meet the national security missions assigned to DOE at LANL within a ten year period beginning on the date of enactment of the Act. Additional suitability criteria are addressed below and include the need to establish clear title to the land and to restore areas contaminated with hazardous wastes. This proposed change in future land ownership is intended to serve as the final settlement of DOE community assistance obligations with respect to LANL and Los Alamos County and to stimulate economic development.

Public Law 105-119 includes several significant stipulations. The land conveyed or transferred shall be used for historic, cultural, or environmental preservation purposes, economic diversification purposes or community self-sufficiency purposes. Under the Law, only two government entities are eligible to acquire lands: Los Alamos County (County) and the US Department of Interior (DOI) in trust for the Pueblo of San Ildefonso (Pueblo). Neither of the two traditional federal agencies responsible for the
conveyance or transfer of public lands, Bureau of Land Management (BLM) or Government Services Agency (GSA), are required to manage this process. However, the US Army Corps of Engineers (COE) is assisting in the title review process.

No later than one year after enactment of the Act, DOE must submit to Congress the results of a title review showing that there are no claims or impairments to the lands proposed for conveyance or transfer. If any claims or impairments are identified from the title review, DOE must take appropriate actions to resolve them. As soon as practical after issuance of the title review, both the County and DOI must reach a formal agreement proposing how they would allocate future ownership of these lands and provide this agreement to DOE. Future ownership of any lands that can not be mutually agreed to by both parties would be withdrawn from the process.

Hazardous and/or radioactive waste contaminated and/or disposal areas located on these lands must undergo appropriate environmental restoration within ten years of enactment of the Law. Land that can not be restored or released for the uses identified under the Act within 10 years following enactment of the Act will be removed from further consideration. No later than 21 months (August 1999) after enactment of the Act, DOE must identify and report on any environmental restoration issues that must be considered prior to transferring the land. In addition, a National Environmental Policy Act (NEPA), Environmental Impact Statement (EIS) must also be completed and issued by August 1999 and followed by a Record of Decision (ROD). DOE must then summarize the results of both the environmental restoration report and the EIS to Congress.

No later than 90 days following the issuance of the formal agreement between the County and DOI concerning the allocation of future ownership, DOE must submit to Congress a plan for implementing the conveyance or transfer process. Implementation of this plan must begin no later than nine months (November 2000) following the submittal of the
plan. In accordance with the times specified in the Act, the conveyance or transfer process is to be implemented within three years and completed within ten years of enactment of the Act.

**Major Issues**

The initial most significant issue was the identification of lands considered suitable for conveyance or transfer. Currently, only two selection criteria (i.e. lands not required to support DOE national security missions at LANL and lands with clear title) have been applied. The former criterion was not based on a rigorous process or well-defined set of standards. The later criterion however, is subject to established real property law. Based on these two criteria, ten land parcels totaling approximately 4800 acres are currently being evaluated for conveyance or transfer. The selection criterion concerning environmental restoration has not been completely evaluated.

Regarding national security missions at LANL, generally, lands that were not in active use did not serve an essential support purpose (e.g. buffer area, outdoor test area, or security zone) or were not contiguous with the core LANL facility were identified as not being vital to the DOE mission. DOE and LANL worked jointly on the preliminary identification of suitable lands. DOE then made the final identification of these lands to Congress in February 1998 in accordance with the Act. A significant facilitating factor was that DOE and LANL were aware of the pending requirements of the Act well in advance of it being enacted.

Over about one year, the COE conducted a rigorous property title search including the establishment of a temporary local office and telephone line to review local property records and Hispanic homesteader property claims. Because of the manner in which LANL was created during World War II, by withdrawing certain federal lands and
condemning or purchasing private lands, special emphasis was placed on homesteader claims that had been identified by the Hispanic Homesteaders Association during the drafting of the Law.

In February 1999 the COE issued their official report that concluded there were no substantiated claims or impairments to the titles for the ten land parcels being considered for conveyance or transfer. Lands previously owned by Hispanic homesteaders and included in the ten parcels had been purchased legally with no commitment to return the lands following their use by the federal government. The COE recognized that the Hispanic Homesteaders Association had attempted to substantiate claims to the lands by alluding to atypical documentation (e.g. personal documents, interviews, church records etc.) but had failed to demonstrate that any lands had outstanding claims or should be returned to the previous owners. Based upon the findings of the COE, DOE is not required to consider Hispanic homesteader claims on any of the ten parcels. A spokesperson for the Hispanic Homesteaders Association has stated that the association intends to file suit to intervene in the process.

In accordance with the Act, the potential future ownership allocation and allowable land uses of the parcels are being evaluated in an EIS. A draft EIS (DOE/EIS-0293) for the proposed conveyance and transfer of certain lands at LANL was issued for public review and comment in February 1999. The draft EIS did not attempt to speculate as to who the new owner might be for any individual parcels. Based on inputs from both the County and the Pueblo, the EIS evaluated the environmental impacts of potential land uses identified for each of the ten parcels. Future land uses identified by either the County or the Pueblo for each parcel were consistent with those allowed under the Act. However, no detailed definition or description of what comprises acceptable land uses exists in the Law or was provided by either the County or the Pueblo. In addition, there is nothing in the Act that requires a future landowner to abide by the identified land use. In the draft
EIS, DOE took the position that once the parcels are conveyed or transferred they will pass beyond their administrative control and all subsequent use of the land will be independent of DOE. This approach raises issues pertaining to future compliance with the land uses stipulated under the Act and the potential for non-compatible land uses to occur next to a federal nuclear research and weapons facility.

In order to facilitate the NEPA process and to comply with the legally mandated schedule in the Act, both the County and the Pueblo as well as the US Forest Service (USFS), National Park Service (NPS), BLM and Bureau of Indian Affairs were identified as Cooperating Agencies. The USFS and the NPS were invited to be cooperating agencies since lands that they administer border or are close to some of the ten parcels. The BLM was invited to participate based upon their federal land conveyance and transfer experience, especially in New Mexico.

Because of the clear intent of the Act, the EIS only considered the preferred alternative (i.e. convey or transfer the land), the no action alternative and no other alternatives. The preferred alternative is structured so that each individual parcel is evaluated and could be conveyed or transferred independently of the other parcels. In addition, the EIS made extensive use of a recently completed DOE EIS (DOE/EIS-0238) known as the LANL Site-Wide EIS (SWEIS) for evaluating the extent of potential impacts on the ten parcels and LANL. Another critical assumption was that the preferred alternative would have a minimal effect on LANL activities and operations since the ten parcels supported no essential missions. Impacts from 200 environmental restoration potential release sites (PRSs) and 152 building scheduled for demolition were considered at a general level of detail in the EIS since the details of potential remediation actions are not known at this time. Also, the EIS did not address in detail a previously identified utility concern relating to the supply of electric power to both LANL and the County during projected peak use periods.
Impacts to threatened or endangered species and cultural resources are a major issue on many parcels. Future ownership can have a significant effect on potential impacts. For example, the County is not subject to federal consultation requirements for threatened or endangered species and cultural resources but the Pueblo (i.e. DOI) is subject to these requirements. Because of the uncertainty in future ownership, DOE has decided to delay the consultation process for both endangered or threatened species and cultural resources until the NEPA process is completed and the future owners are identified for each parcel. An additional complicating factor in terms of protecting environmental resources is that some of the parcels are located in another county, Santa Fe County. It is assumed that any lands acquired by Los Alamos County or the Pueblo that are located in Santa Fe County would be subject to Santa Fe County ordinances that do require a certain level of protection for biological and cultural resources.

The environmental effects from the development of certain parcels as well as the effects of LANL on human health are also considered in the EIS. Future land uses are considered to result in low levels of environmental impacts. Human health impacts from LANL operations are not expected to be significant based on bounding analyses contained in the LANL SWEIS. Chemical and radiological accidents were also evaluated but were not found to pose significant health risks to persons residing on any of the ten parcels in the future.

In order to facilitate the DOE strategy for environmental restoration, a draft report was published ahead of the schedule required under the Law at the same time that the draft EIS was issued. This draft report identifies several factors that will be considered for remediating the PRSSs and buildings scheduled for demolition that are located on the ten parcels. The draft report emphasizes the uncertainties involved in environmental restoration as well as the ecological and human health risk-based approach to cleanup.
used by DOE at LANL. The report does not identify any parcels that should be withdrawn from the process at this time.

Remaining Actions and Potential Concerns

At the time this paper was prepared, several key actions required to implement Public Law 105-119 had occurred but several others had not yet been completed. These remaining actions include issuance by DOE of a final EIS and a ROD required for compliance with NEPA. In addition, DOE must finish the final environmental restoration report. Both of these documents are on schedule to be completed by August 1999 but will require the agency to make some difficult decisions affecting LANL. Significant issues raised in relation to any one of these documents, including the assumptions they are based upon, could have a major effect on lands available for conveyance or transfer.

Compliance with other requirements of the Act, including the allotment of lands to future land owners and the DOE plan for implementing the transfer still need to be prepared. The allotment of lands between the County and the Pueblo will be a challenge for both parties but incentives for acquiring new lands should motivate this effort. The loss of unrestricted access and use of these ten parcels may affect DOE’s ability to maintain or modify future operations on adjoining LANL lands. The need to perform environmental restoration activities for up to ten years may necessitate a period of joint occupancy for certain parcels. In addition, DOE may consider retaining some utility and other access easements on certain parcels. The loss of DOE administrative control of these parcels could also affect existing Clean Air Act and Clean Water Act permits at LANL.

Compliance with the Endangered Species Act and various cultural resource laws could also affect the timing and scope of this process. If major new issues are identified after
the EIS is completed, additional NEPA reviews may be required or certain parcels may be withdrawn from the process. Unanticipated changes in DOE’s national security mission at LANL or a successful legal challenge from the Hispanic Homesteaders Association could also have a dramatic effect on land conveyances or transfers at LANL.

Finally, there is no defined measure to determine if the Law has accomplished what it was intended to do which was to end DOE community assistance obligations and to stimulate economic development. Because of the proximity of LANL to the Los Alamos townsite (they share a common border), LANL and the County must work closely to assist each other in terms of use of utilities, roads, and other infrastructure and services. Maintaining this close relationship will continue to require a significant level of DOE funding. Since the Los Alamos townsite has been both physically (located on a remote mesa top) and politically (a closed city) isolated for so many years and is highly dependant on one industry (i.e. LANL), it is very difficult to stimulate economic development. Industries interested in locating in the area will require more incentives than just the availability of developable land. It is uncertain that such incentives exist in or can be provided by the local community, the Pueblo or the surrounding area.

In summary, Public Law 105-119 set a clear, concise and schedule driven mandate to convey or transfer certain DOE lands at LANL. To date, DOE has met all required milestones. However, the most difficult milestones are yet to come with some being beyond DOE’s direct control. Even when all the milestones and deliverables required under the Law are met, it is uncertain if the Law will actually accomplish what it was intended to achieve.