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GETTING BACK THE LAND: HOW NATIVE AMERICANS CAN ACQUIRE EXCESS AND SURPLUS FEDERAL PROPERTY

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One of the more infamous aspects of the history of American ingenuity was the development of an untold number of schemes to wrest land from Native Americans. Today, the consequences of this endeavor are self-evident. American Indians have lost almost all the land they owned when the Europeans "discovered" the American continent. The restoration of Indian lands in this day and age may perhaps best be described as an impossible dream. However the acquisition of unused federal property represents a viable method for Native Americans to restore at least part of that lost land — land which they still need.

This article outlines two methods for obtaining unused federal property. Both procedures give substantial discretion to government officials, and it is therefore incumbent upon those seeking land to present an adequate and firm description of their needs in order for their efforts to be successful. Nevertheless, Native Americans can secure unused federal land in the ways outlined. Many have already done so.

TWO WAYS TO OBTAIN FEDERAL LAND

The federal government reviews all its property annually in order to determine whether or not any of it may be disposed of. If an agency no longer requires a piece of property, that property (including the buildings on it) is classified as "excess."¹

When property is designated as an excess to one agency, the General Services Administration (GSA) asks other federal agencies whether they can use it. For example, an excess post office could become a social security center.

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1. 40 U.S.C. § 484 (1970).

Excess property is not directly available to Native American groups. It can only be transferred to an agency of the United States Government. Federal agencies may, however, obtain excess property for Indian use. When excess property is not requested by any *federal* agency, GSA will classify the property as "surplus."²

States and local governments may acquire surplus property for education, health, housing, park, highway, airport, wildlife conservation, and power project uses.³ Private groups, such as Indian organizations, may be given surplus property to utilize in education, public health, and housing projects.⁴ If neither governments nor private groups qualify for a parcel of surplus property, that land is sold to the highest bidder.

Excess and surplus property thus provide two ways for Native Americans to obtain unused government land.

EXCESS PROPERTY

GSA may transfer excess real property without charge to any federal agency whose programs require land and buildings. When more than one agency seeks a particular parcel, GSA chooses between the applicants on the basis of the uses each agency proposes. Further, the Office of Management and the Budget must concur in any transfer of property worth more than \$100,000.

An agency may secure excess property for one of its grantees or for an organization under contract to carry out agency programs. GSA transfers the property to the agency which then gives a use permit to the grantee or contractor. The United States remains the owner of the property, but the grantee or contractor has full control of the property.

A permit to use an agency's property would probably be for the same term as the contract with or grant from the agency, but the permit should be renewed along with the contract or grant. Most importantly, the agency need not and should not charge for use of the land and buildings, since the agency paid nothing for them.

Indian organizations should be able to obtain excess land through almost any federal agency. The Bureau of Indian Affairs and the Indian Health Service can legally make grants to and contracts with any Native American group (although the BIA sometimes refuses to help urban Indians) for almost any purpose. Other agencies — especially the Office of Economic Opportunity, the Department of Health, Education and Welfare, and the Department of

2. 40 U.S.C. § 484 (j) (1), (2), (3) (1970).

3. 40 U.S.C. § 484 (k) (1), (2) (1970).

4. 40 U.S.C. § 484 (k) (2) (1970).

Labor — should not be ignored. For instance, it might be possible to plan a job training project and get the Labor Department to both supply the funds and obtain the needed land and buildings. At the same time, direction of the project and administration of the land would remain in local hands.

A Native American organization interested in operating a government supported project on excess property should be aware of the latest *Catalogue of Federal Domestic Assistance* in order to ascertain possible funding agencies for their prospective projects. Inquiries should be made at each possible agency in order to determine which have grant or contract money available. Negative responses should not discourage the fund raiser. Check with each agency's office in Washington, D.C., and, if necessary, obtain the assistance of a local Congressman to speed up the process.

The next step is drafting a proposal for each agency that has money. Often the same proposal may be used for several agencies, a point that the draftsman should bear in mind. Also, most agencies will provide assistance in the draftsmanship of proposals when requested to do so.

While the format of the proposal is being created, GSA should be immediately consulted as to presently available excess property. The regional GSA office should be consulted in order to obtain a list of all presently excess property in your area. If requested, the GSA will also send a notice whenever land in your state is declared excess. It is important to maintain current familiarity with locally desirable excess property that meets the needs of each requested project.

As soon as possible after the proposal is funded, make arrangements with the funding agency to apply for the excess property desired. Delay can be costly; although property may remain excess for a long time, the law allows GSA to change excess property into surplus after only 30 days.

Crucial to this process is the realization that no agency is legally required to apply for excess land. Each agency must be consulted separately as to the disposition of a particular piece of land within its control. Nevertheless, a Native American organization should succeed in securing excess property if its proposal is funded and the group has Indian and non-Indian political support.

SURPLUS PROPERTY FOR EDUCATION AND HEALTH USES

The Department of Health, Education and Welfare (HEW), with GSA's approval, may dispose of real property that is surplus to the federal government but needed by others for use in education

or the protection of public health.⁴ Disposals for educational purposes may be made to state and local governments, to tax-supported schools, and to nonprofit educational institutions which the Internal Revenue Service has declared exempt from federal taxes. Disposals of surplus property for public health purposes may be made to tax-supported medical institutions and to hospitals and to non-profit health related organizations which IRS has ruled tax exempt.

A Native American group qualifies if it is a non-profit corporation organized to operate a school, library, educational museum, hospital, clinic, nursing home or rehabilitation facility or some combination thereof and has obtained a federal income tax exemption.⁵

A tax-exempt corporation that can use surplus property for a health or education project should inform HEW. HEW will then provide notification whenever property is available. Each notice will specify a period of approximately 15 days for telling HEW whether the organization is interested in that parcel. Noncompliance with the 15 day notice period may result in disposition of the land by HEW for some other purpose or priority.

If it is determined that the property should be acquired, a letter should be written (called an "interest letter") to HEW's Regional Office of Surplus Property Utilization. The letter should state the location of the property, the educational or public health project for which the property would be used, and the name of the non-profit organization desiring it.

Upon receipt of this letter, HEW will answer and specify an amount of time — usually about 20 days — for submission of a detailed application. This time can be extended with GSA's permission; however GSA has demonstrated reluctance to such requests and timely application is advisable.

HEW's reply to the interest letter will also provide a guide specifying what must be included in the application. The requirements for the application are different depending on whether an organization plans to use the land for education projects or for public health projects. If a group plans to have both types of projects, it must meet both sets of requirements. All applications must be complete and detailed, stating precisely what education or health programs will be carried out and how those programs will be funded.

While preparing the application your organization should coordinate its plans with city, county, and state authorities. An attempt should be made to gain their support and to meet any criticisms

5. 40 U.S.C. § 484b (1970).

they might have. For example, the proposed project must not conflict with state or local zoning and building codes.

As soon as you complete the application (and not later than HEW's deadline), submit four copies to HEW. If HEW is convinced that your program is viable, and that other projects do not deserve priority, HEW will recommend that GSA assign the property to HEW for transfer to your group. GSA then has 30 days to accept or reject HEW's recommendation.

In some cases, GSA will have to make a study of the environmental impact of a proposed transfer before assigning the property to HEW. In any event, once GSA accepts HEW's recommendation, the property is assigned to HEW who then has 60 days to transfer title to your organization.

During those 60 days HEW will work with your organization on the exact terms of the deeds and other papers needed to effect the transfer. The terms vary with each property but always allow HEW to take back the property if your organization does not carry out the program specified in its application. (However, it is very unusual for HEW to actually take back the property.)⁶

A recipient of surplus land and buildings must also agree to pay for them. Where the property is to be used for education or health purposes, the price varies from 50 per cent of fair market value to nothing depending on a "public benefit allowance." This allowance (set forth in federal regulations)⁷ depends on such factors as accreditation, public service training, hardship, research programs, and the inadequacy of existing facilities. HEW will negotiate as to the use of the property that will qualify for the 100 per cent allowance. The allowance may be earned by using the property according to the program approved in your application.

An accredited Indian educational institution will usually receive a 100 per cent allowance and therefore owe nothing for the land and buildings it obtains so long as its activities conform to those described in its application. When the allowance is less than 100 per cent and payments must actually be made, they are spaced out over thirty years.

Over and above the agreement to pay for land and buildings, any organization receiving surplus property for education and health purposes must reimburse the government for an appraisal and if necessary, a survey of that property. The appraisal and the survey may cost as much as several thousand dollars, and that amount

6. Conversations with Mr. Melvin Summers, Region 9, Director of Surplus Property Utilization, Health Education and Welfare Department, San Francisco, California.

7. See 41 C.F.R. §§ 101.47.308-4 *et seq.* (1972 Supp.).

is not reduced by the public benefit allowance. However, it is possible to arrange for installment payments.

It may readily be seen that the procedure requires a great deal of effort and planning. Generally the most important matter, and the one which deserves the greatest attention is obtaining funding for the proposed project. HEW and GSA require an applicant for surplus property to demonstrate "fiscal responsibility" before surplus property is turned over.⁸ In other words, your organization must have the funds necessary to carry out your proposal or at least a promise of those funds. It is advisable to make every effort to prepare a funding proposal and submit it to all potential financing sources (government agencies and private foundations) long before you have a particular parcel of land picked out. In this manner it will then be possible to make a successful application to HEW whenever you learn of the existence of surplus land and buildings in your area. If financing is not obtained prior to requesting the land, subsequent negotiations with various agencies may prove to be fruitless and their discretion is less likely to be exercised in favor of your organization.

SURPLUS PROPERTY FOR HOUSING

With GSA's permission, the Department of Housing and Urban Development (HUD) may sell or lease surplus land to a public or tribal housing authority or to a private non-profit housing development organization. All private buyers or lessees must agree to use the land for at least forty years for low and moderate income housing and to develop that housing under a HUD housing program. (A HUD community development office may be consulted for the details of these programs.)

With HUD's approval, related public, commercial, and industrial facilities may be built on the property. This means that your organization could build a community center, library, and stores. With HUD's approval, it may even be possible to develop a business to employ people residing on the surplus site.

At present, the surplus property law permits no "public benefit allowance" to a government or corporation that buys or leases surplus property from HUD. However, a somewhat similar result is obtained since the purchaser or lessee does not pay full fair market value. Instead, he pays "fair value of use." Full fair market value is the property's price based on its most valuable possible use (and consequently the highest price that would be paid for it) while fair value for use is the property's price based on the use

8. *Id.*

to which it will actually be put. If property were worth \$20,000 for low-income housing and your organization was going to use it solely for that purpose, HUD would require only \$20,000 for the land even though, for example, a shopping center developer might pay \$100,000 for it. Moreover, unlike HEW, HUD normally does not charge for appraisals and surveys.⁹

One other significant feature distinguishes HUD and HEW surplus land procedures. The local government may veto any HUD (but not HEW) proposal to transfer surplus land to a private group. Indian organizations should therefore seek to rally public support for their proposed project and anticipate possible community objections.

Those Native American organizations interested in developing low or moderate-income housing projects should contact the nearest HUD community development office as soon as possible. HUD's notice, application, and title transfer practices are similar to HEW's. Upon request HUD will inform your organization when surplus property is available for housing; and HUD can help your group qualify for the HUD financed housing that must be secured in order to obtain surplus land through HUD.

WHICH IS BETTER, EXCESS OR SURPLUS PROPERTY?

Excess and surplus property each have advantages and disadvantages as sources of land for Native Americans. The principal virtue of surplus property is that little is obtained along with possession. The government cannot take surplus land away unless there is a failure to carry out the program described in your application. By contrast, an Indian organization could retain possession of excess property only as long as it had a government contract or grant, and the government is not obligated to renew most contracts and grants.

The main drawback to surplus property is its availability for only limited purposes: education, health, and housing. Excess property may be put to almost any use. For example, excess property could become a child care center, a conference center, an experimental farm, or a park.

It might be argued that excess property should always be free to Native American organizations. Although the law does not require this, free use is legal and no agency would have to pay GSA to secure excess property for Indian use.

Surplus property may or may not be free. If acquired from

9. *Id.*

HUD for housing, the "fair value for use" must be paid. That will never be zero, although it may be considerably less than fair market value. HEW's charge for surplus property could be as high as 50 per cent of fair market value. However, Native Americans should normally receive a 100 per cent public benefit allowance on purchases of surplus property for health and education uses.

Taxes should be the same on Indian owned surplus property and Indian controlled excess property. Property taxes would depend on state and local laws, which often exempt property used for educational and charitable purposes.

Building and zoning codes would apply to surplus property as soon as title passed from the United States. Excess property, which is owned by the government and must be used for a federally funded project, may be exempt from building codes and zoning restrictions.

If a choice is presented between excess and surplus property, the above considerations should be carefully weighed.

RECOMMENDATIONS

There are a variety of approaches to acquiring excess and surplus land. Listed below are several recommendations offered as suggestive guides through the bureaucratic process.

As a first step, it is necessary to acquire notices of excess and surplus property. Request GSA to inform your organization whenever land is declared excess in your area. Correspond with the regional HEW office of surplus property utilization and with the HUD area community development office and have your organization put on their mailing lists for surplus property notices. Monthly inquiries may also be made to check whether any unreported excess or surplus property has become available in your locale.

Secondly, a special committee for funding should be formed. To acquire land, your group must show an ability to utilize the property desired. In order to administer such projects as alcoholism clinics and training centers and to maintain buildings, financial resources are necessary. They are also required for the acquisition of surplus land for housing. The need to secure funding cannot be over emphasized. Surplus or excess land cannot be obtained without at least a promise of funds.

Specific individuals in your organization should be appointed to public relations positions. Good community relations are often necessary and always helpful. There are many valuable resources which civic clubs, churches, and social organizations can provide. Many of these associations can help your organization obtain public

and official support for its particular project. Further, some community organizations can provide technical skills, such as assistance indrafting the crucial "proposal" letters. These groups may also be willing to provide temporary funding or other assistance (of course, control of the project should remain in Indian hands).

Public officials—local, state and federal—should be contacted and requested to support the project. Their letters and phone calls to GSA, HEW, HUD, BIA, OEO, or whatever agency you are working with are very valuable. Politicians may also offer useful advice on what agencies or institutions to contact for funding, and they may even help secure funding themselves.

CONCLUSION

Securing excess and surplus government property is one way for Indian groups to re-establish a land base from which to determine their own destiny. It also affords Native Americans the opportunity to establish projects that will preserve their cultural heritage and increase their chance to survive in an alien culture.

Obtaining unused federal property depends to a large extent on the thoroughness and seriousness with which a project is undertaken. A living example of a successful quest is D-Q University near Davis, California. There, Indians and Chicanos have started an educational institution with two million dollars worth of surplus land and buildings which they acquired for only a few thousand dollars. Success requires a combination of persistence and patience. Hopefully this short summary of the procedures required to initiate surplus and excess land acquisitions will aid those Native American groups with prospective projects to follow a course of activity capable of beneficial and realistic results.

