KEN SALAZAR
Attorney General

CHRISTINE M. ARGUELLO
Chief Deputy Attorney General

ALAN J. GILBERT
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 5th Floor
Denver, Colorado 80203
Phone (303) 866-4500
FAX (303) 866-5691

April 10, 2002

M E M O R A N D U M

TO: Ken Salazar
Attorney General

FROM: Daniel S. Miller
First Assistant Attorney General
Natural Resources and Environment Section

RE: Legal analysis of the federal government's obligation to comply with Colorado's environmental covenant law

1. Introduction

On July 1, 2001, Senate Bill 01-145 ("SB 145") took effect. This bill creates a statutory "environmental covenant" as a mechanism for enforcing use restrictions imposed in connection with remediation of contaminated sites. During the drafting of SB 145, the Attorney General's Office and the Colorado Department of Public Health and Environment solicited input from a variety of interested parties on the scope, content, and wording of the proposed bill. Representatives from a number of federal agencies participated in discussions on various drafts of the legislation. In the course of these discussions, the federal agency representatives argued that the state does not have the authority to require a federal agency to grant an environmental covenant, at least in cases where the federal agency is not otherwise transferring the land out of federal ownership. I think the federal agencies are mistaken. Below, I set forth the federal agencies' various arguments and my responses.

1.1 Summary of federal agencies' arguments

a) The waiver of federal sovereign immunity in § 6001 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (RCRA) does not encompass state laws that mandate disposal of federal property rights. It appears that this argument rests on alternate theories. The first theory, as I understand it, is that the requirement to grant an environmental covenant (which they characterize as a property interest) is not a "requirement respecting control and abatement of . . . solid waste or hazardous waste disposal and management." The second

theory is based on the fact that RCRA waives the federal government's immunity from state law only to the extent that the state law treats federal agencies the same as private parties. The federal agencies contend that Colorado's law discriminates against federal agencies. Colorado's law requires environmental covenants for cleanups that do not allow unrestricted use, or that do incorporate engineered structures, such as a cap. Typically, such cleanups are less expensive than those that allow unrestricted use of the property, at least in the short run. Because federal agencies believe that they cannot grant covenants due to the Property Act (see (c)), they argue that the statute essentially precludes them from taking advantage of these less-expensive cleanup options.

b) Under the Property Clauses of the U.S. Constitution, Article I, section 8, clause 17 and Article IV, section 3, clause 2, state law may not affect the title of lands held by the United States or interfere with its right of disposal of such lands.

c) The environmental covenant required under Colorado's law is an interest in property, and under the Federal Property Act, 40 U.S.C. § 471 et seq., federal agencies may not dispose of real property -- only the General Services Administration has that authority, and it is not inclined to use it.

d) Section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9620(h) (CERCLA) preempts state laws that "amount to disposal of federal property prior to the United States' determination that such property is excess."

A copy of the federal agencies' memo setting forth their arguments in full is attached.

1.2 Summary of responses to federal arguments

a) Under Colorado's statute, environmental covenants contain such use restrictions and associated requirements as were imposed or relied upon in an environmental remedial decision to protect human health and the environment. These restrictions are commonly referred to as "institutional controls," and the federal government has long recognized that they are integral to the "abatement of . . . solid waste or hazardous waste." Regardless of whether Colorado's environmental covenant is an interest in property, it is thus within the scope of the RCRA waiver of immunity, and Congress has directed federal agencies to comply with such requirements. Because the Property Act does not preclude federal agencies from complying with the requirement to grant a covenant, Colorado's environmental covenant statute treats federal agencies exactly the same as private parties, and thus is within the scope of the RCRA waiver.

b) The Property Clauses do not prohibit state regulation of activities on federal lands. Absent cession or consent, a state is free to enforce its laws on federal land so long as those laws do not conflict with federal law. Thus, the real question is whether the state has the authority to require a federal agency to comply with state institutional control laws, even if that means the agency must convey a property interest to create an institutional control. This question is answered by looking to see if the federal government has waived its immunity from state

regulation. Because Congress has waived the federal government's immunity in this area, the Property Act does not shield federal agencies from state laws such as SB 145.

c) Under Colorado law, a covenant is not an interest in property, so the Property Act does not affect the application of SB 145. Even if an environmental covenant were an interest in property, the scope of this interest is, by definition, "surplus" under the Property Act. The General Services Administration (GSA) has authority (if not the responsibility) to dispose of surplus property. GSA's reluctance to comply with state institutional control laws is not a legal impediment, but simply a policy decision to violate such laws, because RCRA's waiver of immunity applies to GSA just as it does to any other federal agency. Moreover, within certain limits, GSA may delegate the authority to dispose of surplus property to other agencies. If GSA declines to delegate its authority to dispose of surplus property to other federal agencies, then GSA and the other federal agencies will simply have to coordinate their efforts to ensure compliance with Colorado's SB 145. This is an administrative process, not a legal barrier.

d) Three separate express savings provisions in CERCLA make clear that § 120(h) does not preempt state law. 42 U.S.C. §§ 9614(a), 9620(i), 9652(d). Even aside from these express provisions, it is clear that by its terms, § 120(h) does not limit state requirements respecting contaminated federal property prior to or during transfer.

2. Background

Understanding the issues that the federal agencies raised in their memorandum requires first, an understanding of what institutional controls are and how they are used in remediating contaminated sites, and second, an understanding of how the Colorado environmental covenant law operates.

2.1 Institutional controls: what they are and how they work

Other things being equal, the preferred goal of cleanups conducted under CERCLA, RCRA, and other environmental laws is to return the contaminated site to a condition where it can be used safely for any purpose. This can be accomplished by removing the contamination and disposing of it elsewhere, or by treating the contamination to render it harmless. However, "other things" are seldom equal. Technological limitations and fiscal constraints often preclude cleaning up contaminated sites completely. In some cleanups, we remove or treat only the most heavily contaminated materials. In other cases, we create physical barriers to isolate the remaining contamination from people and the surrounding environment. In still other cases, we combine both treatment/removal and containment strategies.

One of the most vexing and controversial problems in cleaning up contaminated sites is determining "how clean is clean?" Cleanup levels are usually established through a risk assessment process in which the nature and amount of exposure to contamination is a key factor. In turn, future land use determines who will be exposed to contamination, by what routes they will be exposed, and how much they will be exposed. For example, contaminated soil covered

by an asphalt parking lot offers little chance for human exposure, and poses correspondingly little risk. If the same soil were used for a garden, people could be exposed to the residual contamination through inhalation, ingestion and dermal contact. Therefore, in setting cleanup levels for a particular site, it is important to know how the property will be used. As the example above suggests, residential use requires more stringent cleanup standards than, say, industrial use, and is correspondingly more expensive. And because residual contamination may remain harmful for long periods of time, it is important to ensure that future land uses are compatible with the cleanup levels.

In the early years of implementing CERCLA, parties responsible for cleanup often criticized the Environmental Protection Agency (EPA) for requiring cleanups to meet levels that would be safe for residential use, even if the property in question had long been an industrial site, and was likely to remain so. In response to this criticism, EPA amended the CERCLA regulations in 1990 to require consideration of likely future land uses in setting cleanup standards.[1] EPA subsequently published guidance that clarified how EPA staff should determine and consider the reasonably anticipated future land use in selecting remedies under CERCLA.[2]

When a chosen remedy leaves contamination on a site (for whatever reason), land and water use restrictions must be used to supplement treatment and containment actions to ensure that the remedy protects human health and the environment. Because contamination is frequently long-lived, these restrictions generally must be enforceable against both current and subsequent owners and users of the affected land. These land and water use restrictions are known as "institutional controls." As discussed below, EPA has recognized the need for institutional controls in its CERCLA regulations and in numerous CERCLA and RCRA guidance documents.

Institutional controls are usually required in one of two circumstances. One is to ensure the integrity of engineered structures, such as caps or barrier walls, that were used as part of the cleanup remedy. Such structures are often used to prevent human access to residual contamination, prevent precipitation or groundwater from infiltrating and mobilizing the contaminants in the underground environment, or both. In either case, land use restrictions such as prohibitions on drilling, excavating, and irrigating are necessary to prevent damage to the cap while the residual contamination remains hazardous. Periodic maintenance of the cap or other structure may be required to ensure it continues to function properly.

The second circumstance where institutional controls are required is when cleanup levels are set based on land use restrictions being in place. This typically occurs when the party responsible for the cleanup wants to reduce its cleanup costs. As discussed above, it costs more to clean up contamination to levels that are safe for residential use than it does to clean up to levels that are safe for industrial uses. If cleanup levels are based on an assumption that the

---

[1] 55 Fed. Reg. 8666, 8710-11 (March 8, 1990). These amendments were part of a broad overhaul of the CERCLA regulations following passage of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499.
[2] "Land Use in the CERCLA Remedy Selection Process," OSWER Directive No. 9355.7-04.

future land use will be a parking lot, and the land use changes to residential, the old cleanup levels likely will not be protective for the new use.

As a result of pressure from Congress and the responsible parties, including federal agencies, there is a trend toward allowing less-expensive CERCLA remedies where cleanup levels are based on assumptions of restricted future use. This trend is mirrored in cleanups conducted under RCRA and state laws that are analogs to RCRA and CERCLA, as well as state brownfields and voluntary cleanup laws. Federal agencies stand to reap substantial savings from basing cleanup levels at their sites on assumed restrictions of future uses. In 1996, the Department of Energy (DOE) estimated that it would cost an additional $124 billion dollars to clean up its sites to unrestricted use scenarios, rather than merely to levels that would support the anticipated future uses at each of its sites.[3] The Department of Defense (DOD) likewise stands to save billions of dollars by cleaning up only to levels that support limited uses.

Although institutional controls have been a common feature of cleanup decisions for over a decade, only recently has serious thought been given to potential problems in their implementation. For example, EPA seldom analyzed the feasibility, short and long-term effectiveness or implementability of institutional controls as part of its feasibility studies under CERCLA, even though the NCP regulations require such analysis.[4] Few people paid much attention to whether the mechanisms used to implement institutional controls were legally sufficient. Even when CERCLA Records of Decision required institutional controls, the requirements were often ignored.

In the past three years or so, however, several commentators have documented the many difficulties of implementing effective institutional controls.[5] DOE funded several studies that have identified various legal and "institutional" shortcomings with existing approaches to creating and implementing institutional controls. DOD and DOE are currently funding the National Conference of Commissioners on Uniform State Laws to draft a model "environmental covenant" law to address such shortcomings. EPA is hosting a series of workshops on institutional controls, and has developed specific guidance on managing their inherent weaknesses.

Environmental regulators have used several mechanisms to implement institutional controls. The main ones are covenants, easements, and zoning ordinances. Each of these mechanisms has weaknesses that limit it usefulness. Zoning decisions are not within the control of state and federal environmental regulators, nor are zoning decisions enforceable by those environmental regulators. Covenants and easements, of course, are property law concepts developed through the common law. Because courts have historically favored the free alienation

---

[3] The 1996 Baseline Environmental Management Report, U.S. Department of Energy, DOE-EM-0290, page 6-9.
[4] 40 CFR § 300.430(e)(9).
[5] For some excellent discussions of the legal and practical difficulties of implementing institutional controls, see, e.g., Long-Term Stewardship and the Nuclear Weapons Complex: The Challenge Ahead, K. Probst and M. McGovern, Resources for the Future, June 1998; Protecting Public Health at Superfund Sites: Can Institutional Controls Meet the Challenge?, Environmental Law Institute, 2000; Long-Term Institutional Management of U.S. Department of Energy Legacy Waste Sites, National Research Council, National Academy Press, August 2000.

of land, they have been correspondingly reluctant to allow individuals to restrict the use of their land beyond their lifetimes. Consequently, the courts have often refused to enforce easements and covenants against subsequent owners of the land, unless the easement or covenant meets certain conditions. Environmental regulators seeking to use easements and covenants as institutional controls may not be able to meet these common law conditions. For example, some courts have refused to enforce easements that restrict the use of the servient estate.[6] Obviously, easements would not make very good institutional controls in states that follow this rule. Similarly, courts have often required that "privity" (e.g., a landlord-tenant relationship, or a grantor-grantee relationship) exist between parties to a covenant before enforcing the restrictions in a covenant against subsequent owners of the affected parcel.[7] Again, environmental regulators may not be able to establish the requisite privity.

Several states have created statutory mechanisms to implement institutional controls because of concerns that common law covenants and easements may not be enforceable. By creating statutory controls, these laws eliminate the sometimes arcane legal impediments posed by common law doctrines that may apply to common law easements and covenants. Colorado's environmental covenant law is one such statute.

2.2 Summary of Colorado's SB 145, the "environmental covenant" law

SB 145 creates a statutory "environmental covenant" that is enforceable by the Department of Public Health and Environment ("the Department"). The environmental covenant contains use restrictions that have been imposed or relied on in a cleanup decision under a state or federal cleanup law.[8] These use restrictions are enforceable against subsequent owners of the affected land.[9] Environmental covenants run with the land and are binding on the landowner, the owner's successors and assigns, and any person using the land, notwithstanding any other provision of law, including common law requirements for creating covenants that run with the land.[10]

SB 145 does not create new environmental obligations. Rather, it creates a mechanism for implementing and enforcing institutional controls that were relied on in another environmental regulatory decision. SB 145 specifies that environmental covenants are required for any "environmental remediation project"[11] in which the "relevant regulatory authority"[12] makes a "remedial decision"[13] on or after July 1, 2001, that would result in either or both of the following:

---

[6] 7 Thompson on Real Property § 60.02(e)(1) (David A. Thomas, ed.) (1994).
[7] See, e.g., Taylor v. Melton, 274 P.2d 977 (Colo. 1954).
[8] §§ 25-15-319(1)(b) and 25-15-101(4.7), C.R.S.
[9] §§ 25-15-321 and 25-15-322, C.R.S.
[10] §§ 25-15-318(2) and 25-15-322(6), C.R.S.
[11] The phrase "environmental remediation project" includes cleanups conducted under CERCLA; RCRA; the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7901; the Colorado Hazardous Waste Act, § 25-15-101, C.R.S.; the Colorado Radiation Control Act, § 25-11-101, C.R.S.; and the Colorado Solid Wastes Disposal Sites and Facilities Act, § 30-20-101, C.R.S.
[12] The term "relevant regulatory authority" means the agency that made the remedial decision under any of the preceding laws. This will often be the Department or the U.S. Environmental Protection Agency. However, for

(a) Residual contamination at levels that have been determined to be safe for one or more specific uses, but not all uses; or
(b) Incorporation of an engineered feature or structure that requires monitoring, maintenance, or operation or that will not function as intended if it is disturbed.[14]

Environmental covenants created under SB 145 contain "environmental use restrictions" that are relied on in the remedial decision to protect human health or the environment.[15] The statute defines "environmental use restriction" as

> a prohibition of one or more uses of or activities on specified real property, including drilling for or pumping groundwater; a requirement to perform certain acts, including requirements for maintenance, operation, or monitoring necessary to preserve such prohibition of uses or activities; or both, *where such prohibitions or requirements are relied upon in the remedial decision for an environmental remediation project for the purpose of protecting human health or the environment*.[16]

For example, if a remedial decision incorporates an engineered cap that must remain intact to prevent precipitation from infiltrating and mobilizing buried contamination, the covenant would contain an environmental use restriction prohibiting activities that would damage the cap, such as excavation, drilling or grading. Similarly, the covenant would include an environmental use restriction requiring periodic inspection and maintenance of the cap.

One of the challenges in implementing institutional controls is maintaining knowledge of the use restrictions over long time periods. In some cases, these use restrictions will need to be maintained for decades, centuries, or even in perpetuity, because the contamination either degrades slowly or, as in the case of metals, not at all. The difficulty of maintaining knowledge of institutional controls over long time periods is further increased because the environmental regulator charged with oversight of the covenant typically has no involvement in the land use development process. Conversely, the local entities involved in land use development seldom have any role in the oversight of environmental cleanups. Of course, successive owners and users of the land must also be made aware of the institutional controls.

SB 145 addresses this challenge in several ways. To ensure that subsequent owners and users of the property will have knowledge of the existence of the covenant, the law makes

---

CERCLA cleanups on federal land, it will usually be the federal agency with authority, jurisdiction, or control over the land. See Executive Order 12580, § 2(d) and (e), 3 CFR, 1987 Comp. p. 193.

[13] The term "remedial decision" means the administrative determination by the relevant regulatory authority that establishes the remediation requirements for the remediation project. § 25-15-101(4.5) and (13.5), C.R.S.

[14] § 25-15-320, C.R.S.

[15] § 25-15-319(1)(b), C.R.S.

[16] § 25-15-301(4.7), C.R.S. (emphasis added).

documents creating, modifying or terminating an environmental covenant subject to the same recording requirements that apply to other instruments affecting real property. The first page of each covenant must contain the following notice in bold-face fifteen-point type: "This property is subject to an environmental covenant held by the Colorado Department of Public Health and Environment pursuant to section 25-15-321, C.R.S."[17] Each covenant also must contain an agreement to incorporate the covenant in any leases or licenses granting a right to use the property.[18] Finally, the covenant also requires the owner to notify the Department at least 15 days in advance of any transfer of ownership of some or all of the property subject to the environmental covenant.[19] This allows the Department to notify the new owner of the land of the existence of the covenant.

SB 145 also uses multiple mechanisms intended to alert the Department to any proposed changes in the use of land subject to an environmental covenant. The covenant must contain a requirement that the owner notify the Department simultaneously with submitting any application to a local government for a building permit or change in land use.[20] And the statute requires local governments to notify the Department when they receive an application affecting land use or development of land that is subject to an environmental covenant.[21] The Department then reviews the proposed application to determine whether it is consistent with the restrictions of the covenant and notifies the local government of its conclusions.

To ensure that the local land use decision makers have appropriate notice of the land use restrictions in an environmental covenant, SB 145 requires the Department to notify local governments of the creation, modification and termination of any environmental covenants in their jurisdictions.[22] The Department must create and maintain a registry of all environmental covenants, including any modification and termination thereof.[23]

In the event of an actual or threatened violation of an environmental covenant, the Department may issue an administrative order requiring compliance with the terms of the covenant, or may ask the attorney general to file suit for appropriate injunctive relief.[24] SB 145 also allows other entities that have an interest in ensuring the covenant is not violated to sue for appropriate injunctive relief. These entities include the grantor of the covenant, the affected local government, and any third party named in the covenant.[25]

3. Analysis

---

[17] § 25-15-319(1)(f), C.R.S.
[18] § 25-15-319(1)(g), C.R.S.
[19] § 25-15-319(1)(c), C.R.S.
[20] § 25-15-319(1)(d), C.R.S.
[21] § 25-15-324(2), C.R.S.
[22] § 25-15-324(1), C.R.S.
[23] § 25-15-323, C.R.S.
[24] § 25-15-322(2), C.R.S.
[25] § 25-15-322(4) and (5), C.R.S.

3.1. Federal agencies must comply with the requirement to grant an environmental covenant because that requirement is within the scope of the waiver of immunity in RCRA.

RCRA waives the federal government's sovereign immunity from state requirements "respecting control and abatement of solid waste or hazardous waste disposal and management."[26] The federal agencies assert, without explanation, that an environmental covenant is not a requirement respecting the abatement and control of hazardous or solid waste, and therefore is not within the scope of the waiver. This argument flies in the face of the plain language of SB 145, common sense, federal law, and a plethora of federal agency regulations, actions and guidance.

3.1.1. Colorado's environmental covenant requirement falls within the plain meaning of the RCRA waiver of immunity.

As described above, SB 145 requires an environmental covenant when "environmental remediation projects" result in residual contamination that is not safe for all uses, or employ engineered structures that require monitoring, maintenance or operation, or will not function as intended if disturbed. Environmental remediation projects include closures of hazardous waste management units and solid waste disposal sites, and remediation of environmental contamination involving solid or hazardous waste pursuant to RCRA, the Colorado Hazardous Waste Act, and the Colorado Solid Wastes Disposal Sites and Facilities Act.[27] Virtually by definition, environmental remediation projects under these laws involve the "control and abatement of solid waste or hazardous waste disposal and management," and thus each falls within the scope of the RCRA waiver of federal sovereign immunity.[28] Furthermore, SB 145 is codified as part

---

[26] RCRA's waiver of sovereign immunity is contained in section 6001 of the statute, 42 U.S.C. § 6961. This section provides, in relevant part

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements . . . .

[27] See § 25-15-101(4.5)(I),(II),(VII) and (VIII).

[28] Similarly, SB 145 applies to remedial decisions made under CERCLA. §25-15-101(4.5)(III). CERCLA § 120(a)(4) waives the federal government's sovereign immunity from state laws concerning removal and remedial action at federal facilities that are not on the National Priorities List (NPL). 42 U.S.C. § 9620(a)(4). Additionally, state hazardous waste laws apply at federal facilities that are on the NPL. U.S. v. Colorado, 990 F.2d 1565 (10th Cir. 1993); CERCLA §§ 114(a), 120(i), and 302(d) (42 U.S.C. §§ 9614(a), 9620(i), and 9652(d). Therefore, CERCLA remediation decisions involving solid or hazardous wastes fall within the scope of RCRA's waiver of sovereign immunity, regardless of whether the facilities affected by such decisions are on the NPL. And because SB145 is

of the Colorado Hazardous Waste Act, and also explicitly provides that the "requirements and restrictions of an environmental covenant are requirements under this part 3 [i.e., the Colorado Hazardous Waste Act]."[29]

3.1.2 EPA's own regulations, guidance, and actions in implementing RCRA and CERCLA clarify that institutional controls are requirements regarding the control and abatement of solid and hazardous waste.

EPA's regulations, guidance and actions implementing RCRA and CERCLA also demonstrate that the federal government has waived its immunity from state institutional control laws. Most cleanup of environmental contamination at RCRA sites is conducted under RCRA's "corrective action" authorities that were added to the statute in 1984.[30] EPA proposed comprehensive corrective action regulations in 1990, but most of these were never promulgated.[31] Because EPA's approach to corrective action was modeled after its regulations implementing CERCLA, and because the CERCLA regulations treat institutional controls explicitly, it is best to begin a review of the federal approach to institutional controls with the CERCLA regulations.

The National Contingency Plan (NCP)[32] is the set of regulations EPA promulgated to implement CERCLA. The NCP explicitly recognizes that CERCLA cleanups may include use of legal mechanisms to restrict land or water use. The NCP provides:

> EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls as appropriate for short- and long-term management to prevent or limit exposure to hazardous substances, pollutants, or contaminants. Institutional controls may be used during the conduct of the remedial investigation/feasibility study (RI/FS) and implementation of the remedial action and, where necessary, as a component of the completed remedy. The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are

---

clearly a state law "concerning removal or remedial action," it falls within the scope of the CERCLA waiver of sovereign immunity for remedial (or removal) decisions at non-NPL sites, even if such decisions involve materials that are not hazardous or solid wastes. Finally, CERCLA § 120(a) provides that federal agencies "shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . . ." Thus, whenever a CERCLA remedial or removal action requires an institutional control, federal agencies may be required to comply with state institutional control laws.

SB 145 also applies to remedial decisions made under the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7901, and the Colorado Radiation Control Act, § 25-11-101, C.R.S. However, neither of these laws regulates federal agencies, so remedial decisions under them would not implicate federal agencies.

[29] § 25-15-318(3), C.R.S.

[30] See 42 U.S.C. §§ 6924(u) and (v), and 6928(h).

[31] 55 Fed. Reg. 30798 (July 27, 1990). Nevertheless, EPA and states authorized to implement the corrective action program frequently use the 1990 proposed regulations as guidance in implementing the corrective action program.

[32] 40 CFR Part 300.

> determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of remedy.[33]

The preamble to the NCP discusses the use of institutional controls in CERCLA cleanups in some detail.[34] This discussion recognizes that EPA may not have the authority to implement institutional controls at a site, and that such controls will generally be implemented under state law.[35] Consequently, for fund-lead CERCLA sites, the NCP requires states to "assure that any institutional controls implemented as part of the remedial action at a site are in place, reliable, and will remain in place . . . ."[36] Subsequent EPA guidance also explicitly recognizes that implementation of institutional controls frequently depends on state law.[37] This EPA guidance specifically endorses the use of "proprietary" institutional controls such as easements or covenants because of their ability (in some states) to bind subsequent owners of the land, but recognizes their legal limitations.

EPA also considers institutional controls an integral part of cleanups under RCRA. EPA has long stated that cleanups under the two programs should result in comparable remedies -- that is, any procedural differences that may exist between the two programs should not substantively affect the outcome of remediation.[38] Consistent with this "parity principle," EPA has issued guidance for RCRA corrective action that incorporates the same expectations regarding use of institutional controls as exist in the NCP.[39]

Given the NCP regulations governing institutional controls and the practical limitations that sometimes prohibit cleaning up sites to unrestricted use levels, it is not surprising that hundreds of CERCLA Records of Decision and consent decrees require use of institutional controls.[40] In some cases, EPA and the Department of Justice have specifically required

---

[33] 40 CFR §300.430(a)(1)(iii)(D).
[34] 55 Fed. Reg. 8706-8707 (March 8, 1990).
[35] Id. at 8706.
[36] 40 CFR § 300.510(c)(1).
[37] "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups," OSWER 9355.0-74FS-P, EPA 540-F-00-005, September, 2000 (hereafter, "Institutional Controls: A Site Manager's Guide").
[38] See, e.g., 54 Fed. Reg. 41006-41009 (October 4, 1989); 54 Fed. Reg. 10520 (March 13, 1989); 55 Fed. Reg. 30853-30853 (July 27, 1990); "Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities," memo from Steven A. Herman, Assistant Administrator for Office of Enforcement and Compliance Assurance and Elliott P. Laws, Assistant Administrator for Office of Solid Waste and Emergency Response, September 24, 1996.
[39] See "Corrective Action for Releases From Solid Waste Management Units at Hazardous Waste Management Facilities; Proposed Rule" 61 Fed. Reg. 19431, 19448 (May 1, 1996).
[40] For example, virtually all of the CERCLA sites in Colorado rely in part on institutional controls. See, e.g., "Decision Summary for Record of Decision Broderick Wood Products Adams County, Colorado, Operable Unit 2 -- Final Site Remedy, March 1992, at pp. 49 and 51; "Superfund Record of Decision, Denver Radium Site Streets, Operable Unit 7," March 1986, at pp. 11-12; "Record of Decision, Lowry Landfill Superfund Site," March 1994, at page 1-3 and pp. 11-1 to 11-2; "Superfund Record of Decision: Sand Creek Industrial (Operable Units 3 and 6), CO," at pp. 25, 32, 35, A2; "Soil Cleanup of Smuggler Mountain Site, Aspen--Pitkin County, Colorado, Explanation of Significant Differences," May 16, 1990.

responsible parties to grant easements or covenants restricting land or groundwater use.[41] This brings to mind the old adage "what's sauce for the goose is sauce for the gander." If institutional controls in the form of easements and covenants are not requirements related to the remediation of hazardous or solid wastes or hazardous substances, as the federal agencies argue, then EPA has no authority to impose institutional controls in its RCRA and CERCLA decisions. EPA's (and DOJ's) many decisions requiring private entities to grant easements or covenants demonstrate that this hypothesis is untenable. Contrary to the federal agencies' position, covenants and easements used as institutional controls are legitimate -- indeed, often necessary -- components of remedial decisions under both CERCLA and RCRA.[42]

3.1.3 Colorado's SB 145 treats federal agencies in exactly the same manner as private entities, so its requirements for environmental covenants fall within the RCRA sovereign immunity waiver.

The federal agencies' alternative rationale supporting their argument that Colorado's environmental covenant law does not fall within the scope of the RCRA waiver of sovereign immunity merits little discussion. The argument is that by its terms, the RCRA waiver only covers state laws that are applied to the federal government in the same manner and to the same extent as they are to private entities. The agencies then argue that because the Property Act does not give federal agencies the authority to grant the covenants required by Colorado's law, the law does not apply to them in the same fashion as it does to similarly situated private individuals, and thus is not covered by the RCRA waiver.

As described below, the Property Act does not preclude federal agencies from granting covenants as required by Colorado's law. Further, SB 145 treats federal agencies in exactly the same fashion as it treats other entities. Like other entities, federal agencies can choose to clean

---

[41] See, e.g., consent decrees filed in U.S. v. Beazer East, Inc., Civil Action No. 00-CV-561 (filed June 2, 2000) at page 26 (requiring execution and recording of a restrictive covenant) and in U.S. v. Phelps Dodge, et al., Civil Action No. 01-M-0080 (filed January 16, 2001) at page 21 (same).

[42] EPA is not the only federal agency that has issued guidance endorsing the use of institutional controls, recognizing that such controls will frequently rely on state laws, and encouraging the use of mechanisms that will bind subsequent owners of the remediated land. For example, last year the Office of the Under Secretary of Defense issued a memorandum titled "Policy on Land Use Controls Associated with Environmental Restoration Activities" (January 17, 2001), along with related guidance documents for property planned for transfer out of federal control and for active installations. The guidance for property planned for transfer out of federal control states:

> Implementing LUCs through established real estate and land use management mechanisms provides the best assurance that LUCs will be effective. Beyond establishing the appropriate implementation mechanisms before transfer, DoD may have only limited authority to control the use of property it no longer owns. Because state and local laws govern property transfer and land use, actions to implement and manage LUCs will be governed largely by state and local requirements.

Department of Defense Guidance on Land Use Controls Associated with Environmental Restoration Activities for Property Planned for Transfer Out of Federal Control, at 1.

up their contamination to unrestricted use levels, and thus avoid SB 145's requirements entirely. If they choose to implement a cheaper cleanup and rely on land use restrictions to make the cleanup protective, they must grant the covenant just like any other entity.

3.2. The Property Clauses of the Constitution do not prohibit states from requiring federal agencies to grant easements or covenants for use as institutional controls in the context of environmental remedial programs.

The Federal agencies cite Surplus Trading Co. v. Cook [43] as authority for the proposition that the Property Clauses of the Constitution[44] prohibit state laws that "affect the title of the United States or interfere with its right of disposal." Surplus Trading involved land over which the United States had acquired exclusive legislative jurisdiction through purchase with the consent of the Arkansas legislature.[45] Consequently, the state simply had no legislative jurisdiction in that case. Here, the federal government does not have exclusive jurisdiction over facilities that are subject to RCRA or state laws regarding removal or remedial action, because the waivers of sovereign immunity in RCRA and CERCLA act as partial retrocessions of jurisdiction.[46] Surplus Trading is inapposite to the question whether a state may require a federal agency to comply with state institutional control laws.

The Property Clauses do not, of themselves, bar the exercise of state jurisdiction on federal lands. "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory . . . ."[47] Thus, the real question is whether the state has the authority to require a federal agency to comply with state institutional control laws, even if that means the agency must convey a property interest. If Congress has waived the government's immunity from such regulation, the waiver overrides any limitations imposed by the Property Clauses.[48] As detailed above, the federal government has waived its immunity from state institutional control laws. Thus, the Property Clauses do not prohibit Colorado from requiring a federal agency to grant an environmental covenant.

---

[43] 281 U.S. 647 (1930).

[44] U.S. Const. Art. I, § 8, cl. 17 and Art. IV, § 3, cl. 2.

[45] In Surplus Trading, the sheriff and tax collector of Pulaski County, Arkansas, filed suit to enforce payment of taxes assessed against personal property situated within the boundaries of Camp Pike, a U.S. Army mobilization, training and supply center. The Supreme Court held that the state's tax laws did not apply to property located on Camp Pike, because the United States had acquired the land for the purpose of establishing Camp Pike with the consent of the Arkansas legislature. Consequently, pursuant to the express language of Art. I, § 8, cl. 17, the United States acquired the authority to "exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings." "It has long been settled that, where lands for such a purpose are purchased by the United States with the consent of the state Legislature, the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction." 281 U.S. at 652.

[46] Hancock v. Train, 426 U.S. 167, 178, 96 S.Ct. 2006, 2012-13 (1976). See also, Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 108 S.Ct. 1704 (1988) (reading statute partially retroceding exclusive federal jurisdiction also as a waiver of federal sovereign immunity).

[47] Kleppe v. New Mexico, 426 U.S. 529, 543, 96 S.Ct. 2285, 2293 (1976).

[48] Hancock, 427 U.S. 178, 96 S.Ct. 2012-13, supra.

3.3. The Property Act does not impair federal agencies' ability or obligation to comply with Colorado's environmental covenant law because the covenant is not an interest in property, and even if it were, it would be surplus, such that it should be disposed under the Property Act.

The federal agencies have argued that, with limited exceptions, only the General Services Administration (GSA) has the authority to convey federal property interests.[49] They also note that GSA is unwilling to facilitate the use of institutional controls. GSA has issued a memorandum describing its policy on covenants or other mechanisms to restrict land use in connection with environmental cleanups.[50] In summary, the memorandum states GSA's view that such covenants constitute "interests in property" under the Property Act; that GSA "is doubtful as to the necessity, desirability, or legal enforceability of placing restrictions on property that will remain in the Government's inventory;" that "it would be difficult, if not impossible, for GSA to accurately determine the impact such restrictions may have on the future disposal of the property;" and that "[t]herefore, GSA will deny all requests for land use restrictions on fully utilized property unless the requesting agency can demonstrate the unique and extreme circumstances which would overcome GSA's objections to the placing of such restrictions on the property."

The response to this argument is two-fold. First, SB 145's environmental covenant is not an interest in property, so the Property Act does not apply. Second, even if an environmental covenant were an interest in property, nothing in the Property Act prohibits a federal agency from granting an environmental covenant. In fact, the Property Act may actually *require* a federal agency to grant such covenants. This is because under the Property Act, federal agencies are *supposed* to dispose of surplus property, and the "property interest" comprising the environmental covenant is, by definition, surplus. Even if GSA has discretion under the Property Act not to dispose of property rendered surplus by environmental remediation decisions, GSA is still subject to the waivers of immunity in RCRA and CERCLA, and therefore may not simply refuse to comply with SB 145 and other state institutional control laws. The most that can be said for the federal agencies' argument is that the Property Act may create some administrative burdens for federal agencies if GSA refuses to delegate its surplus property disposition authority.

3.3.1. An environmental covenant created under SB 145 is not an interest in property subject to the Property Act.

The federal agencies' assertion that SB 145 creates an interest in property is mistaken. The Property Act defines "property" to mean "any interest in property," with certain exclusions not relevant here, but does not define "interest in property."[51] The interpretation of the term "interest in property" is a federal question, but a federal court will generally look to state law when federal interests in property are involved, so long as the state law "do[es] not effect a discrimination against the government, or patently run counter to the terms of [the pertinent

---

[49] One such exception affects the Department of Energy. Under the Atomic Energy Act, the Department has the authority to dispose of real property. 42 U.S.C. § 2201(g).

[50] Memorandum from John Q. Martin to Regional Directors, regarding Restrictive Covenants on Non-excess Property, dated October 16, 1998 (hereinafter, GSA memo).

[51] See 40 U.S.C. § 472(d).

federal statute]."[52] Colorado's law passes these tests, and under Colorado law, the environmental covenant is not an interest in property. Therefore, the Property Act does not apply.

3.3.1.1. Under Colorado law, neither a common law covenant nor the environmental covenant is an interest in property

In Thornton v. Schobe,[53] the Colorado Supreme Court held that a common law covenant restricting the use of land is not an "interest in property." In Thornton, plaintiffs purchased land from the defendant in reliance on defendant's oral promise that he would not erect buildings used for business or store purposes on an adjacent, retained parcel. Plaintiffs subsequently sued to enjoin the defendant from constructing a store on the retained parcel. The defendant argued that the oral promise was void under the statute of frauds. The court agreed with plaintiffs' argument that "an agreement restricting the use of land is not within the statute of frauds, because it does not relate to an interest in land, but merely to its use."[54] The court stated "[j]ust as profits on the purchase and sale of land are not an 'estate or interest' in the land [citation omitted], so the method or use of land is not such an estate or interest."[55]

Of course, the environmental covenant in SB 145 is a statutory covenant, not a common law covenant. The state adopted SB 145 because of a lack of case law in Colorado clearly indicating that the state would be able to enforce a common law covenant used as an institutional control.[56] Like common law covenants, the environmental covenant involves the use of property, and is subject to the state's recordation laws. Unlike common law covenants, no privity of estate is required to create an environmental covenant.[57] Section 25-15-318 describes some other ways in which the environmental covenant differs from a common law covenant.

The differences between common law covenants and the environmental covenant reinforce the conclusion that the environmental covenant is not an interest in land. Essentially, the environmental covenant is a hybrid between a property law concept (a covenant that runs with the land) and an exercise of the state's police power (which may also run with the land, as in the case of zoning regulations). A valid exercise of the police power does not confer a property right in the government. Under SB 145, environmental covenants only contain restrictions or requirements that were relied upon in another regulatory decision made under an environmental statute to protect human health or the environment.[58] These restrictions are themselves exercises of the police power, and they may be challenged under the respective statute governing the environmental remediation project.[59] All the environmental covenant does

---

[52] Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 210, 66 S.Ct. 992, 995 (1946); United States v. Yazell, 382 U.S. 341; 86 S.Ct. 500 (1966); cf. United States v. Little Lake Misere Land Co., 412 U.S. 580, 93 S. Ct. 2389 (1973) (Louisiana statute which retroactively provided that mineral rights reserved in land conveyances to the United States were imprescriptable held repugnant to United States' interest and therefore not applicable).
[53] 79 Colo. 25, 243 P. 617 (1925).
[54] 79 Colo. at 27, 243 P. at 618.
[55] 79 Colo. at 28, 243 P. at 618.
[56] See § 25-15-317, C.R.S.
[57] Cf. 25-15-318, C.R.S. and Taylor v. Melton, 130 Colo. 280, 274 P.2d 977 (1954).
[58] See sections 25-15-319(b) and 25-15-101(4.7) C.R.S.
[59] See, e.g., §§ 25-15-305 and 308(3)(a), C.R.S.; 42 U.S.C. §§ 6976, 9613(j).

is insert the regulatory restriction in an instrument that is defined, by the statute, to be enforceable against subsequent owners of the remediated land.

Consistent with its regulatory nature, and unlike a common law covenant, an environmental covenant may be modified or removed by the owner of land burdened by the covenant, even over the Department's objections.[60] For example, the owner may propose to conduct additional remediation, or may be able to demonstrate that residual contamination at the site has degraded below levels of concern. So long as the modification or termination would still protect human health and the environment, the owner has the right to terminate or modify the environmental covenant. While the Department must approve proposals to modify or terminate covenants, the owner has the right to appeal the Department's determination in the same manner as other regulatory determinations the Department makes.[61] If the owner convinces the court that it has met the statutory standards for modifying or terminating the covenant, then the Department must act accordingly. The landowner's ability to modify or terminate the covenant over the Department's objections is wholly incompatible with the notion that the Department possesses a property interest in the covenant. In essence, the environmental covenant is simply a mechanism for notifying subsequent landowners that they are bound by continuing regulatory requirements applicable to their land.

3.3.1.2 To determine whether an environmental covenant is an interest in property for purposes of the Property Act, a Federal court will adopt Colorado law because it neither discriminates against the federal government nor runs counter to the terms of a federal statute.

As to the first prong of the Reconstruction Finance test, I have already shown that Colorado's environmental covenant law does not discriminate against the federal government.[62] No provision of SB 145 singles out the federal government for disparate treatment in any way.

The second prong of the Reconstruction Finance test asks whether the state law would "run patently counter" to the terms of the pertinent federal statute. Here, the Property Act is obviously pertinent. But there are other relevant federal statutes that should be considered as well: RCRA and CERCLA.[63] As discussed below, SB 145 does not impair federal interests in implementing the Property Act, and actually furthers federal interests in implementing RCRA and CERCLA.

One of the primary purposes of the Property Act, and the only one relevant here, was to provide an "economical and efficient system" for "disposal of surplus property."[64] "Surplus" property is property that is not required for the needs or discharge of responsibilities of any

---

[60] § 25-15-319(h), C.R.S.
[61] § 25-15-321(7), C.R.S.
[62] See text supra, at 12.
[63] See U.S. v. Little Lake Misere Land Co., 412 U.S. at 594-97, 93 S.Ct. at 2398-99 (considering impact of applying Louisiana law on federal land acquisition programs not at issue in the case).
[64] 40 U.S.C. § 471.

federal agency.[65] The Property Act specifically grants GSA the authority to dispose of surplus government property, and also allows GSA to delegate this authority within limits.[66] Even if an environmental covenant were considered an interest in property, by definition the scope of this interest would be "surplus," such that the GSA or an authorized federal agency may dispose of it.

Why would an environmental covenant be a surplus interest? Because the only right granted in the environmental covenant is the right to monitor and enforce use restrictions that were relied on as part of an environmental remediation decision, the extent of the "property interest" in the covenant is co-extensive with the interest *that the federal agency has already determined to be surplus* in proposing or selecting a particular cleanup remedy. This is best illustrated with a hypothetical.

Suppose that a federal agency owns land that is contaminated with metals such as arsenic and lead. To clean up the contamination to levels that are safe for all uses would require excavation and offsite disposal of 10,000 cubic yards of contaminated soil. Alternatively, cleaning up to levels that are safe for industrial (but not residential) use would only require excavation and offsite disposal of 3,000 cubic yards of contaminated soil, at a correspondingly lower cost.[67] To save the difference in the cost of the two remedies, the federal agency decides to clean up only to the extent that is safe for industrial use, and to prohibit residential land use to prevent unsafe exposure to the residual contamination.[68] That decision is equivalent to a determination that the government's "residential use property interest" in the affected land is surplus.[69]

Because the only right granted in the environmental covenant is the right to monitor and enforce use restrictions that were relied on as part of an environmental remediation decision, the extent of the "property interest" in the covenant is co-extensive with the interest that the federal agency has already determined to be surplus. As explained above, the requirement for an SB 145 environmental covenant is a consequence that follows from an environmental remediation decision which results in a "less than unrestricted use" cleanup. If anything in this sequence

---

[65] To be "surplus" under the Property Act, the property must first be "excess." Excess property is property under the control of a federal agency which that agency has determined is not required for its needs and the discharge of its responsibilities. "Surplus" property is excess property that is not required for the needs or discharge of responsibilities of any federal agency, as determined by the GSA. See 40 U.S.C. § 472(e) and (g) for the definitions of surplus and excess property.

[66] Section 484(c) of the Property Act authorizes the GSA Administrator to designate or authorize other federal agencies to dispose of surplus property in accordance with the Act and such terms as the GSA Administrator deems proper.

[67] As discussed above at pp. 3-4, residential land use generally requires more stringent cleanup levels than industrial or commercial uses.

[68] "Decides" here refers both to cleanups of federal facilities conducted under CERCLA, where the federal agency is both polluter and regulator (i.e., it both *proposes* and *approves* the cleanup decision), and cleanups conducted with an independent regulator, where the federal agency *proposes* a cleanup plan that the regulator must then *approve*.

[69] Similarly, when a federal agency decides to build a cap to limit exposure to buried contamination, that agency has implicitly determined that land uses inconsistent with maintaining the integrity of the cap are also surplus. Or again, when a federal agency decides to rely on prohibiting consumption of a contaminated drinking water aquifer instead of cleaning up the aquifer to safe drinking water standards, it has implicitly determined that any property interest it has in the groundwater is surplus.

triggers the Property Act's requirements, it is the first step -- the federal agency's decision to propose a cleanup that (whether explicitly or implicitly) requires use restrictions.[70]

The federal agencies have acknowledged that Colorado can use other regulatory authorities (such as a corrective action order issued under the state's hazardous waste law) to prohibit land uses that would be unsafe in light of residual contamination levels or that would impair the effective functioning of an engineered component of a remedy.[71] Implicit in this acknowledgement is the recognition that remedies they have chosen to implement result in a de facto determination that the foregone land uses are "surplus." The federal agencies' only objection to the use restrictions that SB 145 would impose is that they take the form of a covenant. However, the covenant is necessary because it is not clear that a corrective action order or other administrative mechanism under an environmental law would bind subsequent owners of the contaminated land.[72]

---

[70] In fact, one might legitimately argue that while granting an environmental covenant does not violate the Property Act, the decision not to clean up to unrestricted use does. As described in the text, a cleanup decision that results in less than unrestricted use is an implicit decision that the prohibited uses are surplus to the government's needs. The Property Act requires each agency to determine, first, that the property at issue is excess to that agency's needs. Then, if it has not been delegated the authority to determine that property is surplus, it must refer the matter to the GSA for a determination of whether the property is surplus to the government's needs. But federal agencies are not following these procedures, and are instead routinely making decisions that will limit the future use of the remediated land without evaluating whether they or other federal agencies might have need for the restricted use. If, as the federal agencies argue, these use limitations are "interests in property," then many federal agencies are in widespread violation of the Property Act.

[71] These acknowledgements were made orally in meetings with attorneys for the federal agencies during the drafting of SB 145. However, this position is also reflected in the following statement on page 6 of the federal agencies' memorandum: "For property that remains in the federal inventory, the federal government retains full responsibility for the effectiveness of any land use controls. Moreover, through its enforcement authority, the State has various tools to require the landholding agency to address any threat posed by problems associated with land use controls."

[72] The federal agencies have, on occasion, said that their particular objection is that the state would require the covenant to be created even if the property were to remain in federal ownership for the foreseeable future. They have suggested they would be willing to grant the environmental covenant at such time as the underlying fee interest in the property is transferred out of federal ownership. This is not an acceptable solution for three reasons. First, the federal agencies' legal arguments apply with equal force to federal property that is proposed for transfer as for that which is proposed to be retained, so there is no assurance that a federal agency would be willing to grant the environmental covenant at the time of a future transfer. Second, in the time between remedy implementation and property transfer, the federal agency might transfer property rights (such as an easement) that would be inconsistent with, and possibly superior to, the use restrictions included in a subsequently created covenant. Third, and most important, failing to grant the covenant at the time of the remedial decision undercuts many of SB 145's safeguards for maintaining knowledge of the environmental use restrictions. Maintaining track of institutional controls over time is likely to be a major challenge for environmental regulators. See, e.g., "Long-Term Institutional Management of U.S. Department of Energy Legacy Waste Sites," National Research Council, August 2000 ("there is no convincing evidence that institutional controls and other stewardship measures are effective over the long term"). One of the purposes of Colorado's environmental covenant law is to create multiple mechanisms for tracking and retaining knowledge of land use restrictions associated with cleanups. Under the statute, the environmental covenant is recorded in the property records, and the state regulatory agency must both maintain a registry of the covenants and notify affected local governments of their existence. Failing to create the covenant until some unspecified point in the future -- potentially decades away -- wholly undercuts these protective measures.

Turning to the other pertinent statutes for purposes of the Reconstruction Finance test, SB 145 serves a vital link in implementing RCRA and CERCLA cleanups. As previously discussed, cleanups under CERCLA, RCRA and analogous state laws frequently rely on institutional controls to meet the statutory requirement to protect human health and the environment. However, in most situations, neither CERCLA, RCRA, nor other federal laws provide any mechanism by which to implement institutional controls that will bind subsequent owners of the remediated property.[73] Consequently, the Environmental Protection Agency, the federal agency charged with implementing CERCLA and RCRA, often looks to state laws to provide enforceable mechanisms for implementing institutional controls.[74]

In fact, as noted above, the need for laws such as Colorado's SB 145 is so great that the Department of Defense and the Department of Energy are funding the National Conference of Commissioners on Uniform State Laws to draft a model state institutional control statute.

To recapitulate, a federal court should look to Colorado law in interpreting the term "interest in property" under the Property Act, because Colorado law does not discriminate against the government, or patently run counter to the terms of federal statute. Under Colorado law, the environmental covenant is not an interest in property, so the Property Act does not apply to SB 145.

3.3.2. Even if an environmental covenant were an interest in property, the Property Act would not prohibit a federal agency from granting an environmental covenant.

Even assuming that the environmental covenant were an interest in property, no federal law prohibits federal agencies from disposing of such interests. As shown above, the "property interest" encompassed by an environmental covenant is clearly surplus, and thus may (or must) be disposed under the Property Act. To the extent that disposition of surplus property may be discretionary under the Act, neither GSA nor other federal agencies may rely on such discretion to avoid compliance with SB 145. That is because RCRA is both a waiver of the government's immunity from state law *and* an affirmative direction to federal agencies to comply with state laws: "Each department, agency, and instrumentality of the . . . Federal Government . . . *shall* be subject to, and *comply with*, all . . . State . . . requirements, both substantive and procedural . . . . The United States hereby *expressly waives any immunity* otherwise applicable to the United States with respect to any such . . . requirement . . . ." (Emphasis added.)[75]

GSA is an "agency or instrumentality" of the executive branch, and thus is subject to the waiver of sovereign immunity in RCRA.[76] As shown above, the requirement to grant an environmental covenant falls within the waivers of federal sovereign immunity in RCRA and CERCLA. GSA's reluctance to comply with state laws regarding institutional controls is not a

---

[73] In very limited cases, the subsequent owners of remediated land could be subjected to the requirement to obtain a RCRA permit for a disposal facility.

[74] See, e.g., 40 CFR §§ 300.430(a)(1)(iii) and 300.510(c)(1); "Institutional Controls: A Site Manager's Guide," supra note 37.

[75] RCRA § 6001(a), 42 U.S.C. § 6961(a).

[76] GSA is also subject to CERCLA's waiver of immunity. See 42 U.S.C. § 9620(a)(4).

legal impediment, but simply a policy determination to violate the law. GSA's policy cannot override federal statutes that direct it to comply with state laws regarding hazardous or solid wastes or removal and remedial actions.

GSA and the other federal agencies will simply have to coordinate their efforts to ensure compliance with Colorado's SB 145. This is an administrative task, not a legal barrier. And even that administrative inconvenience can be avoided simply. Under the Property Act, GSA has the primary responsibility for supervision and disposition of surplus property.[77] However, the Act also authorizes GSA to delegate this authority to other federal agencies:

> Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.[78]

Pursuant to this authority, the GSA has promulgated regulations delegating its authority to dispose of certain categories of surplus property to various agencies. For example, GSA has delegated to the Department of Defense ("DOD") the authority to determine that excess real and related personal property valued at less than $15,000 is no longer required for the needs and responsibilities of Federal agencies, and to dispose of such property.[79] This regulation is particularly interesting because the environmental covenant itself has no monetary value, and creation of an environmental covenant does not diminish the value of the "retained" property at all.[80] Consequently, this regulation already provides DOD all the authority it needs to grant an environmental covenant. Even if GSA declines to read this regulation as authorizing DOD to grant environmental covenants, GSA still has the authority to promulgate a rule that clearly does authorize DOD (and other federal agencies) to grant environmental covenants and other similar devices in other states.

---

[77] 40 U.S.C. § 484(a).
[78] 40 U.S.C. § 484(c).
[79] 41 CFR § 101-47.601.
[80] GSA believes that when an environmental covenant or similar institutional control is placed on the land, it impairs the Government's ability to dispose of that land. See GSA memo, supra note 50. This is outmoded thinking. Mechanisms for implementing land use restrictions to protect human health or the environment don't impair re-use of contaminated land. Environmental contamination and uncertainty regarding proposed future uses do. An environmental covenant increases the value of the affected land by creating certainty about allowable uses and by minimizing the transaction costs for future landowners who may desire to change the use of the land affected by the covenant. It defines the permitted and prohibited uses, and establishes a clear process for seeking to modify or terminate the use restrictions. By spelling out the rules of the game that apply to a particular parcel of remediated land, the environmental covenant reduces uncertainty and increases the marketability and value of the land. Conversely, the environmental covenant does not confer any "valuable" right on the state. It is a regulatory action to protect human health and the environment, not a right to develop land.

3.4. CERCLA § 120(h) does not preempt state institutional control laws.

The federal agencies argue that the CERCLA § 120(h), which imposes certain requirements for transfer of federal property, preempts state institutional control laws. The short answer to this argument is that CERCLA expressly states that it does not preempt state laws.[81] "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation."[82] Further, "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."[83]

Because Congress has explicitly stated that nothing in CERCLA shall "be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances,"[84] and because institutional control requirements are exercises of the state's police power, the federal agencies' argument that CERCLA § 120's requirements for transfer of federal property preempt state institutional control laws must fail.

Even absent Congress' express rejection of the notion that CERCLA preempts state laws, nothing in CERCLA § 120(h) supports the federal agencies' argument that the statute implicitly preempts state institutional control laws. The federal agencies argue that CERCLA § 120(h)(3)(A)(ii)[85] demonstrates Congressional intent to "occupy the field" of institutional controls. To the contrary, this provision requires the United States to warrant that it has complied with state institutional control laws in cases where a cleanup remedy relies on such controls.

CERCLA § 120(h)(3)(A)(ii) applies when a federal agency proposes to transfer land on which hazardous substances were known to have been stored for a year or more, or known to have been released or disposed of. It requires the federal agency to include in the deed transferring the property a covenant warranting that "*all remedial action* necessary to protect human health and the environment with respect to any such substance remaining on the property *has been taken* before the date of such transfer" and warranting that "*any additional remedial action* found to be necessary after the date of such transfer *shall be conducted* by the United States" (emphasis added).

---

[81] 42 U.S.C. § 9614(a) provides: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9652(d) provides: "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances of other pollutants or contaminants." These sections are in the same chapter as CERCLA § 120, 42 U.S.C. § 9620.

[82] Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2618 (1992) (internal citations omitted).

[83] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947).

[84] 42 U.S.C. § 9614(a).

[85] 42 U.S.C. § 9620(h)(3)(A)(ii).

On their face, these covenants are wholly distinct from an institutional control. As described above, institutional controls are a type of remedial action that helps protect human health and the environment by restricting the uses of property with residual contamination. In most cases, to be effective, institutional controls must be enforceable by the environmental regulator against subsequent owners and uses of the remediated land. Nothing in CERCLA § 120(h)(3)(A)(ii) (or any other provision of CERCLA, for that matter) creates a covenant or other mechanism for imposing such use restrictions.[86] CERCLA § 120(h)(3)(A)(ii) simply requires the United States to warrant that it *has imposed institutional controls* whenever a CERCLA cleanup relies on such controls, because institutional controls are a type of remedial action.

Federal law generally does not provide a mechanism for imposing an institutional control.[87] Consequently, for sites that rely on institutional controls, the United States will generally only be able to comply with the CERCLA covenant provision by relying on state law mechanisms. In many states, uncertainty over the legal enforceability of common law covenants and easements means they are not effective mechanisms for implementing institutional controls. That is the case in Colorado, and that is why SB 145 was adopted. So for federal cleanup sites in Colorado that rely on institutional controls, the only way the United States could warrant that "all remedial action necessary to protect human health and the environment . . . has been taken before the date of such transfer" is for it to comply with SB 145.

4. Conclusion

The federal agencies have raised several constitutional and statutory objections to complying with Colorado's SB 145. Upon examination, these objections do not have merit. RCRA waives the federal government's sovereign immunity from state institutional control laws such as SB 145, and directs them to comply with such laws. Consequently, the Property Clauses do not shield federal agencies from such state laws. The Property Act does not prohibit federal agencies from complying with SB 145, because the environmental covenant is not an interest in property. Even if it were, it would in all cases be surplus, such that it may -- or must -- be disposed under the Property Act. In any event, RCRA's directive to federal agencies to comply with state institutional control laws would override any discretion they may have under the Property Act to refrain from disposing of this surplus interest. Finally, CERCLA § 120(h) does

---

[86] CERCLA's "early transfer" provisions remove any remaining doubt on this point. § 120(h)(3)(C)(i) allows the EPA Administrator (with the concurrence of the Governor of the affected state, in the case of NPL sites) or the Governor of the affected state (in the case of non-NPL sites) to defer the CERCLA § 120(h)(3)(A)(ii)(I) requirement for the covenant that "all remedial action . . . has been taken before the date of such transfer" under certain conditions. Among those conditions is the requirement that the "deed or other agreement proposed to govern the transfer . . . contain assurances that . . . provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment." In other words, the deed or other agreement must contain assurances that provide for institutional controls. This requirement would scarcely be necessary if the purpose of the CERCLA § 120(h)(3)(A)(ii) covenant were to serve as an institutional control.

[87] In some cases, an administrative order will suffice for implementing an institutional control because the institutional control may only be necessary for a short time. In such cases, there is no concern as to whether the institutional control is enforceable against subsequent owners. In most cases, however, including all cases where the cleanup levels are based on restricted use assumptions, the use restrictions must be enforceable against subsequent owners and users to be effective. See "Institutional Controls: A Site Manager's Guide," supra note 37

not pre-empt state requirements for creating institutional controls; rather, it requires federal agencies to warrant that they have complied with such state laws in appropriate circumstances.

The one lingering question regarding the federal agencies' reluctance to comply with state institutional controls laws is "Why?" Enforceable, reliable institutional controls such as SB 145's environmental covenant benefit those who are responsible for cleaning up contaminated sites. Without such reliable controls, the responsible parties would have to spend far more money to implement protective remedies. Without such controls, land with residual contamination will sit unused and idle. Without such controls, these contaminated lands will pose a threat to human health and the environment. The cost of creating an environmental covenant is minimal, especially compared to the costs of cleaning up to unrestricted use. Federal agencies have been among those leading the charge for creating and relying on institutional controls as part of a cleanup strategy. Now that the states are developing mechanisms to help achieve this goal, the federal agencies want no part of it. Why?