COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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April 16, 1982

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The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Commerce
Committee on Energy and Commerce
House of Representatives

Dear Mr. Dingell:

This responds to your request for our views on certain legal issues involved in the proposed disposal of the Government-owned tract of land on Matagorda Island. In the preparation of this response, we have had the benefit of the views of both the Department of the Interior (Interior) and the General Services Administration (GSA).

Your request presents three major issues. First, is the 1971 Memorandum of Understanding (1971 MOU) between the Department of the Interior and the Air Force a "cooperative agreement" within the contemplation of the National Wildlife Refuge System Administration Act, as amended by the Game Range Act, Public Law 94-223, 90 Stat. 199 (1976) (hereafter collectively referred to as Public Law 94-223)? Second, if it is a "cooperative agreement" within the contemplation of Public Law 94-223, can Interior remove the Matagorda Island property from the National Wildlife Refuge System (NWRS or System) by terminating the 1971 MOU? Based on our review of Public Law 94-223 and its legislative history, we conclude that the 1971 MOU is a "cooperative agreement" under Public Law 94-223 and that Interior may remove the property subject to the 1971 MOU from the System by terminating its use pursuant to the terms of the 1971 MOU.

The third major issue involves the scope of GSA's authority to dispose of Interior's interest in Matagorda Island. By enacting Public Law 94-223, Congress clearly directed that areas of the NWRS are to continue to be a part of the System unless removed pursuant to the terms of Public Law 94-223. Hence, until Interior terminates its use of the Island pursuant to the terms of the 1971 MOU or an act of Congress removes such lands from the System, GSA has no authority to dispose of Interior's interest in Matagorda Island. Conversely, until and unless either of the two actions noted above occurs, any disposal action by GSA with regard to the excess Air Force interest in Matagorda Island will be subject to Interior's interest.

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I.

Matagorda Island is a barrier island located in the Gulf of Mexico approximately 35 miles north of Corpus Christi, Texas. The Government's fee interest in Matagorda Island was originally acquired in a condemnation action in the early 1940's for use by the Army Air Corps. 1/ From 1943 to 1945 and again from 1949 to 1975 when the Air Force announced the closure of the Island base, the Island was operated as a weapons range.

On November 20, 1971, the Department of the Interior and the Department of the Air Force executed a memorandum of understanding permitting Interior to administer Air Force lands on Matagorda Island as a part of the Aransas National Wildlife Refuge, subject to certain specified conditions. Subsequently in January 1973, the Assistant Secretary of the Interior notified the Acting Administrator, GSA, that "the Matagorda Island Air Force Base in Texas * * * has been incorporated into the Aransas National Wildlife Refuge by an agreement with the Air Force." Interior has advised that they continue to manage the Island property as part of the Refuge System. 2/

On or about September 25, 1975, the Air Force reported the Matagorda Island Air Force Base to GSA as excess to its needs. Shortly thereafter, Interior formally requested that the excess property be transferred to it under the authority of Public Law 80-537, 16 U.S.C. §§667b-667d (1976). 3/ The State of Texas

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1/ The Government acquired 18,992 acres of land on Matagorda Island in fee and leased an additional 16,500 acres, more or less, of marshlands on the bay side of the Island from the State of Texas. The Government's leasehold estate reverted to the State of Texas in March of 1976.

2/ Interior's authority to administer and manage the Matagorda Island property is derived from two sources. First and foremost, of course, is the 1971 MOU. The second source is the annual permit granted by the Corps of Engineers on behalf of the Air Force to Interior's Fish and Wildlife Service to use, manage and maintain the Matagorda Island tract on a nonreimbursable basis for the Air Force.

3/ Public Law 80-537, 16 U.S.C. §§667b-667d, is set out in pertinent parts hereafter.

followed suit in January 1976, filing a "Notice of Desire to Acquire Surplus Property" pursuant to section 203(e)(3)(H) of the Federal Property and Administrative Services Act of 1949 (hereafter Property Act of 1949), 40 U.S.C. §484(e)(3)(H) (1976).

In April 1976, GSA informed the Regional Director, Fish and Wildlife Service (FWS), of its decision to transfer the southwest portion of the Island to FWS. Three days later GSA reassured the FWS Regional Director that since the disposal action could not be consummated until receipt of the Air Force decontamination statement, 4/ GSA would consider any further FWS justification to support the transfer of the remaining northern two-thirds of the Government property to FWS pursuant to Public Law 80-537's criteria. FWS supplied additional justification on May 26, 1976.

On April 6, 1977, GSA notified the Regional Director, FWS, that 6,716 acres on the southwest portion of the Island would be transferred to FWS and the remaining 12,276 acres would be conveyed to the State of Texas following preparation of an environmental impact statement. Shortly thereafter, Interior challenged the legality of GSA's proposed disposal action. By letter of June 7, 1977, Secretary Andrus reaffirmed the FWS application for transfer of the entire Matagorda Island tract to FWS. Not to transfer the entire tract, according to Secretary Andrus' letter, would run counter to the overriding policy of the Federal Property and Administrative Services Act of 1949 and GSA implementing regulations to achieve maximum utilization of Federal properties by executive agencies. Absent GSA's specific finding that the entire Matagorda Island tract is "not required for the needs and the discharge of the responsibilities of [the Department of the Interior]," the Secretary questioned the legality of GSA's decision under the Property Act of 1949. The Secretary

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4/ In accordance with 41 C.F.R. 101-47.401-4, holding agencies are responsible for the expense and supervision of decontamination including the complete removal or destruction by flashing of explosives of property that has been subjected to contamination with any sort of hazardous materials. Any report of excess property covering contaminated property shall state the extent of such contamination, the plans for decontamination, and the extent to which the property may be used without further decontamination. 41 C.F.R. 101-47.202-7.

also pointed out GSA's failure to consult with Interior to assure that disposal of the property would not jeopardize the whooping cranes or their critical habitat, as required by Section 7 of the Endangered Species Act.

It was not until July 6, 1977, that Interior brought Public Law 94-223 to GSA's attention. Since, in Interior's opinion, the 1971 MOU constituted a "cooperative agreement," as that phrase is used in Public Law 94-223, "any land covered by the Memorandum of Understanding must continue to be included within the Refuge System and may not be disposed of except by Act of Congress." Secretary Andrus concluded his letter to Administrator Sampson by "again urg[ing] that the property be conveyed to the Fish and Wildlife Service."

By letter dated November 3, 1977, Administrator Sampson responded to Secretary Andrus' June and July 1977 letters, rejecting Interior's interpretation of the 1971 MOU. As pertinent here, the Administrator commented that

> "Public Law 94-223 has been in existence since February 27, 1976. We are concerned that after the many discussions and efforts by DOI to have this property transferred under Public Law 537, 80th Congress, at such a late date other authority is quoted as a basis for transfer. Further, we are concerned that DOI's interpretation of Public Law 94-223 would appear to negate the intent and purpose of authority given to GSA to dispose of property under Public Law 537, 80th Congress, and section 202(a) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 483(a)), for wildlife purposes. Additionally, we question whether it was the intent of Congress in enacting Public Law 94-223 that it serve as a basis for the permanent tranfer of property for wildlife use, such as in the case of Matagorda Island."

A comparison of Administrator Sampson's November 1977 letter to Secretary Andrus, quoted in part above, with the Deputy Administrator's September 28, 1981 response to you indicates that GSA continues to maintain that the 1971 MOU did not place the Matagorda Island property in question in the System, and hence, that all of such property is available for disposal.

As you know, subsequent to the 1977 exchange between Interior and GSA, protracted but ultimately fruitless negotiations ensued among Interior, GSA, and the State of Texas looking toward some final disposition of the property. It was not until the spring of 1981 that the Matagorda Island impasse surfaced again in full public view. Since your letters of July 13, 1981, and August 26, 1981, to the Secretary of the Interior and the Assistant Secretary for Fish and Wildlife and Parks fully explain these events, we proceed now to consider the legal issues presented. 5/

II.

The Game Range Act, Public Law 94-223, 90 Stat. 190 (1976), amended the National Wildlife System Administration Act of 1966, to provide in part that

> "(3) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is--
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> * * * * *

5/ Interior and GSA recently published notice of their intent to prepare an environmental impact statement on the disposition of the Matagorda Island property. 47 Fed. Reg. 5048 (February 3, 1982). The notice describes the proposed three-step Federal action driving the impact statement as (1) the express termination of the 1971 MOU, (2) withdrawal by Fish and Wildlife Service of its November 1975 request for transfer of the Island to it, and (3) GSA's conveyance of title to the State of Texas. Id.

> "(B) so included * * * pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,
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> shall continue to be a part of the System until otherwise specified by Act of Congress, except that nothing in this paragraph shall be construed as precluding--
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> * * * * *
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> "(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement referred to in subparagraph (B) of this paragraph." 16 U.S.C. 668dd (a)(3).

We agree with the Department of Interior that the 1971 MOU is a "cooperative agreement" as that term is used in Public Law 94-223.

Public Law 94-223's legislative history clearly indicates that one of the Act's main purposes was to sanction legislatively the prior designation of all refuge areas by the various means employed. 6/ One of the means employed to establish a refuge was,

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6/ As introduced, Section 2 of H.R. 5512 would have amended section 4(a) of Public Law 89-669, the National Wildlife Refuge System Administration Act of 1966 (NWRSAA of 1966), 16 U.S.C. §668dd(a) (1976), to provide as follows:

> "Each area designated by law, Executive order, or secretarial order as an area of the National Wildlife Refuge System and included in the System on January 1, 1975, or thereafter shall continue to be a part of the System until otherwise specified by Act of Congress * * *." See H.R. 5512, 94th Cong.,

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1st Sess. (1975) contained in Wildlife Refuge and Organic Act: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries, House of Representatives on H.R. 5512 and others, 94th Cong., 1st Sess. at 18-19, Ser. No. 94-12 (May 15, 1975) (hereafter House Subcommittee Hearings).

During hearings before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment as well as in the formal Department of the Interior letter report to the full House Committee, see H.R. Rep. No. 94-334 at 12, Interior advised that certain changes would be necessary to section 2 of H.R. 5512 as introduced in order "to legislatively sanction the previous designation of refuge areas by the various methods employed." House Subcommittee Hearings at 41. Interior's representative at the Hearings explained the reason as follows:

> "Establishment of units of the National Wildlife Refuge System can be accomplished in a variety of ways, including public land withdrawals, cooperative agreement with another land owning agency such as NASA, AEC, and the Department of Defense, specific act of Congress, donation, exchange, and purchase in fee or easement.
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> "If the intent of H.R. 5512 is to cover all of the National Wildlife Refuge System, we suggest section 2 of the bill be rewritten by deleting reference to areas established by 'law, Executive order, or secretarial order.'
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> "We also suggest that an exception be made for lands administered as part

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and still is, by cooperative agreement between the Department of the Interior and any land-holding Federal department or agency. According to the Department of the Interior representative testifying at the House Subcommittee Hearings, under these "cooperative agreements," while the lands subject thereto are administered as part of the System, this is only a "secondary use" with "primary jurisdiction" remaining in the land-holding agency.

Turning to the 1971 MOU between the Departments of the Air Force and the Interior, we believe it contains all the attributes of a "cooperative agreement," as suggested by Public Law 94-223's express language and its legislative history. The MOU's "cooperative" purpose is evidenced by a sequential reading of the agreement's "whereas" clauses. To provide for their mutual desire to protect the habitat of the endangered whooping crane, the Air Force granted Interior a permit to "use said lands as a part of the Aransas National Wildlife Refuge" "under such conditions as will not interfere with the primary mission and use by Air Force of the property." In other words, Interior obtained a secondary use of Matagorda Island as a wildlife refuge for an endangered species, subject to the primary jurisdiction of the land-holding agency. Clearly this is the type of agreement Congress had in mind when it enacted Public Law 94-223.

6/ CONTINUED

> of the system but under the primary jurisdiction of another land-owning agency.
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> "A number of refuges in the system, such as Seal Beach Refuge in California and Merritt Island Refuge in Florida, are operated under cooperative agreements with another land-owning agency as a secondary use. Termination of such refuges should continue to be based upon the terms of the cooperative agreement." House Subcommittee Hearings at 41-42 (emphasis added).

When ordering H.R. 5512 reported to the House, the Committee on Merchant Marine and Fisheries adopted an amendment incorporating Interior's suggestion. H.R. Rep. No. 94-334 at 3, 4.

We have examined GSA's arguments to the contrary, but do not find them persuasive. In its September 28, 1981, letter to you, GSA questions whether the Endangered Species Act of 1966, Public Law 89-669, 80 Stat. 926 (1966), recited in the 1971 MOU's third "whereas" clause, as amended prior to the execution of the 1971 MOU, "provide[s] for any express authority for cooperative agreements between Federal agencies * * *." Since, in our view, Public Law 94-223 legislatively ratified all prior designations of refuge areas by cooperative agreements such as the 1971 MOU, we see no merit in questioning at this late date Interior's and Air Force's authority under the Endangered Species Act of 1966 to execute the the 1971 MOU. 7/

GSA next contends that the 1971 MOU was for a permit for a restricted secondary use and was "not intended by both parties as a document which would transfer the Federal lands into the National Wildlife Refuge System." Our prior discussion of Public Law 94-223 and its legislative history addresses the first part of this point. To reiterate, clearly Congress was aware that Interior might hold only a secondary interest in properties subject to cooperative agreements, yet Congress included these areas within the System. And the express terms of the 1971 MOU indicate the clear understanding of both the Air Force and Interior that the secondary use granted to Interior was to "use said lands as a part of the Aransas National Wildlife Refuge." Although not a "transfer" of Air Force's primary jurisdiction to Interior, the 1971 MOU clearly granted a secondary use for wildlife refuge purposes.

GSA also argues that the permit conditions were "automatically terminated when the unconditional report of excess property was received, accepted, and processed by GSA pursuant to 41 C.F.R. 101-47.202-10." As we noted earlier, GSA received Air Force's report of excess property at the end of September 1975. However, GSA apparently did not consider Air Force's report final until

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7/ Although GSA questions whether the Endangered Species Act of 1966, as amended prior to execution of the 1971 MOU, provides for any express authority, section 1(b) of the Endangered Species Act, as recited in the 1971 MOU, may reasonably be said to impliedly authorize such agreements. See also section 2(b) of the Endangered Species Act of 1966, 80 Stat. 927, October 15, 1966.

the required decontamination report was received in September 1976. Although Public Law 94-223 was signed into law on February 27, 1976, it was by its terms applicable to "[e]ach area * * * included within the System on January 1, 1975." Thus even if we were to agree with GSA on this point, the area would still be a part of the System and still subject to the terms of Public Law 94-223, since any "automatic termination" of the 1971 MOU would have occurred after January 1, 1975. Finally, if the permit was automatically terminated when GSA received the report of excess property in September 1975, we fail to understand why on July 22, 1977, GSA requested the Air Force to transfer its "rights" under the 1971 MOU to GSA. 8/ Accordingly, we reject GSA's argument of an implied termination.

III.

The second major issue is whether Interior can remove the subject Matagorda Island property from the System by terminating the 1971 MOU. In this regard, Public Law 94-223 provides that areas included within the System on January 1, 1975, shall continue to be a part of the System until otherwise specified by act of Congress, except that this provision of the Act shall not be construed as precluding

> "(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement * * *." 16 U.S.C. 668dd(a)(3)(iii).

The 1971 MOU does not mention or provide for the "disposal" of the Matagorda Island property. However, it does provide that it may be terminated in whole or in part by mutual agreement of the Secretary of the Interior and the Secretary of the Air Force. The Air Force also could terminate the permit unilaterally if,

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8/ GSA's recognition of the 1971 MOU's continued legal vitality is also suggested by its consent to the Corps' grant of annual permits to FWS to use, manage and maintain the Matagorda Island tract on a nonreimbursable basis for the Air Force. Moreover, GSA has apparently acquiesced to Interior's management of the Island since the Air Force originally reported the Matagorda Island base as excess to its needs in September 1975.

after notification of noncompliance, Interior "fails to use the said premises in accordance with the terms and conditions of this permit."

Interior maintains that any areas included within the System by cooperative agreement "may be removed from the System either by an Act of Congress or pursuant to the terms of the cooperative agreement." Letter to The Honorable John D. Dingell from Assistant Secretary for Fish and Wildlife and Parks, G. Ray Arnett, dated August 4, 1981. You subsequently advised the Assistant Secretary of your disagreement with this construction of Public Law 94-223, emphasizing that Public Law 94-223 used the term "disposal," not "termination," and that the 1971 MOU speaks only of the latter.

Nonetheless, in your recent letter of January 27, 1982, to Assistant Secretary of the Interior Arnett, you appear to concede that Interior may, but need not, terminate the 1971 MOU:

> "I agree that the 1971 agreement does not provide for disposal of the Refuge area. I also do not contend that because the agreement is silent on disposal, that the agreement requires this area 'must forever be a part of the Refuge System.' The 1976 Game Range Act requires the area be 'forever' a part of the 'Refuge System' except where the agreement provides for termination and such termination occurs as provided by the agreement. However, the Air Force is not seeking termination, rather the GSA and Texas are. They are not parties to the agreement. I know of no legal basis for GSA to seek such termination, particularly where the Surplus Property laws are inapplicable by reason of the Game Range Act.
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> "As I have already pointed out, the 'mutual agreement' provision in the termination clause does, in fact, enable either party to prevent termination. That was the obvious purpose of the clause and probably was requested by the Interior Department in 1971. Interior need not terminate."

In this same letter of January 27, 1982, you also suggest that "absent a request by the Air Force for termination to meet

its defense needs, Interior is [not] authorized under the laws applicable to Interior, such as the Game Range Act, the National Wildlife Refuge System Administration Act [collectively referred to herein as Public Law 94-223], the Endangered Species Act, the Migratory Bird Treaty Act and NEPA, to exercise the termination clause." Here, however, the Air Force as the landholding agency disavowed any interest in the property for defense purposes when it declared Matagorda Island as excess to its needs. Hence, the only object of the termination is to allow GSA to dispose of the area to Texas, which object is, in your opinion, inconsistent with the overall purpose of the statutes cited in your recent letter as well as the purpose of Public Law 94-223's "disposal" provision.

Although Public Law 94-223 speaks only of "disposal," we believe Congress' use of this term embraced the act of termination as well. As reported out of the House Committee on Merchant Marine and Fisheries, H.R. 5512 provided, in language identical to Public Law 94-223, for "the disposal of any lands within any such area pursuant to the terms of any cooperative agreement * * *." H.R. Rep. No. 94-334 at 2 (1975). The House Report's discussion of H.R. 5512's legislative background suggests that the above language was added by voice vote of the full Committee at the urging of the Department of the Interior. Id. at 3,4,10, 13. The Committee's section-by-section analysis explained that under this language,

> "* * * lands included within the System pursuant to a cooperative agreement could likewise be disposed of or the use of such lands terminated pursuant to the terms of a cooperative agreement." Id. at 10 (emphasis added); see also S. Rep. No. 94-593 at 7 (1976) (identical statement).

This exception from congressional approval was suggested by the Department of the Interior:

> "* * * If the intent of H.R. 5512 is to cover all of the National Wildlife Refuge System, we suggest the amendment proposed in section 2 of the bill be clarified and an exception be made for lands administered as part of the System but

> under the primary jurisdiction of another landowning agency. As previously stated, many refuges in the System are operated under cooperative agreement with another landowning agency. Termination of such refuges should continue to be based upon the terms of the agreement. * * *." Letter to Leonor K. Sullivan, Chairman of the House Committee on Merchant Marine and Fisheries, from the Assistant Secretary of the Interior, Royston G. Hughes, dated May 14, 1975, reprinted in H.R. Rep. No. 94-334 at 13 (1975). See also House Subcommittee Hearings at 42 (to the same effect).

Interior recommended that H.R. 5512 be amended to provide that "those lands within the System pursuant to an agreement with any Federal * * * governmental entity may be removed from the System in accordance with the terms of such agreement." Id.

Although H.R. 5512 as reported to the House used the word "disposed" rather than "removed," the House Report's explanation quoted above clearly indicates that "disposal" encompasses termination of the use of lands pursuant to the terms of a cooperative agreement. We have found nothing in Public Law 94-223 or in its legislative history that refutes both the House and the Senate's clear explanation of the intended meaning of this provision.

Your second contention raises the issue whether Interior may seek to terminate the 1971 MOU pursuant to its "mutual termination" provision absent an Air Force request to terminate in order to meet its defense needs. We believe Interior and the Air Force may so agree to terminate the 1971 MOU, subject, of course, to compliance with the applicable requirements of NEPA and ESA.

As you know, prior to the Game Range Act amendments to the NWRSAA of 1966, Interior used cooperative agreements to establish units of the System, and Congress was so aware. See House Subcommittee Hearings at 41-42 quoted in footnote 6 above. There were apparently no restrictions under the NWRSAA of 1966 limiting the authority of the parties to such agreements to agree to terminate the cooperative agreements.

Although you argue that it was the general purpose of the Game Range Act amendments, Public Law 94-223, and the specific purpose of the Act's "disposal" provision to so restrict the Secretary's authority, we do not agree. Clearly, one of the general purposes of Public Law 94-223 was to limit the Secretary's previously unfettered authority to remove areas from the System without congressional approval. However, the purpose of the explicit exception in favor of cooperative agreements was not to limit the Secretary's authority to remove areas from the System, but rather to preserve the rights of the parties to cooperative agreements to remove areas from the System without congressional approval. Or, in the words of the Department of Interior, "Termination of such refuges should continue to be based upon the terms of the agreement." H.R. Rep. No. 94-334 at 13; and see House Subcommittee Hearings at 41-42 quoted in part above.

Both the House and the Senate Reports' explanation of the change to be made by the proposed amendments support this view. The House Report's section-by-section analysis explains that areas included within the System on January 1, 1975, pursuant to law, executive or secretarial order, public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any Federal or State agency, "would continue to be a part of the System until otherwise specified by an Act of Congress." H.R. Rep. 94-334 at 10. The Report continued:

> "However, Congressional approval would not be required in three situations. First, transfers or disposals of acquired lands could still be made provided the Secretary--with the approval of the Commission--determined that such lands were no longer needed and the appropriate price for such lands is collected pursuant to the requirements of paragraph (2) of this subsection. Second, lands could still be exchanged for lands of equal value pursuand to the requirements of subsection (b) (3) of this section of the Act. And third, lands included within the System pursuant to a cooperative agreement could likewise be disposed of or the use of such lands terminated pursuant to the terms of a cooperative agreement.

"Also, it should be pointed out that in rewriting section 4(a) of the Act, the second sentence of the subsection was eliminated. Under present law, the Secretary could modify or revoke public land withdrawals affecting lands in the System whenever he determined it was in the public interest to do so. By eliminating this sentence from the subsection as rewritten by this legislation, it makes it clear that public land withdrawals which are or become a part of the System shall continue to be a part of the System and such public land withdrawals could not be modified or revoked except by an Act of Congress. The Committee considers this change to be technical in nature only and necessary to conform to the legislation. This change will in no way change the Secretary's authority to issue a public land withdrawal to put lands in the System but it will make sure any disposals of such land will be by an Act of Congress.

"However, Congressional approval would not be required for such lands to be exchanged for other lands pursuant to the requirements of subsection (b)(3) of this section of the Act, nor would Congressional approval be required for such lands to be disposed of pursuant to a cooperative agreement if such lands were included in the System pursuant to a cooperative agreement." Id. at 10-11 (emphasis added); see also S. Rep. No. 94-593 at 7-8 (identical statement).

9/ At the end of the House Report's discussion concerning the requirements to remove areas from the System, the report notes as follows:

"The Committee would like to point out that it strongly supports plans and programs in wildlife refuges designed to

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Turning to the 1971 MOU, it simply provides that the Secretary of the Interior and the Secretary of the Air Force may mutually agree to terminate. 10/ Nor does Public Law

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9/ CONTINUED

> mutually benefit both Federal and State fish and wildlife management programs, such as cooperative hunting and fishing, law enforcement, habitat improvement, etc., in which public benefits are shared; however, the Committee feels that to transfer total management responsibilities over an area to another Federal or State agency is tantamount to a transfer of jurisdiction and control over the land and is the type of transfer that would be covered by this legislation, which requires an Act of Congress before such transfer could take place. The Committee, in carrying out its oversight responsibilities in this regard, expects the United States Fish and Wildlife Service to keep the Committee fully informed of any plans it has that may border on transfers of this nature."

This observation is ambiguous at best since the report had already recognized that transfers under the Act did not in all cases require an Act of Congress. Indeed, it would appear anomalous to assume that Congress did not realize that the termination of a use pursuant to the terms of a cooperative agreement, explicitly discussed and recognized three and four paragraphs earlier, would permit the transfer of jurisdiction and control of the land without an act of Congress.

10/ Interior takes the position that GSA has succeeded to the Air Force's interest in the 1971 MOU. Hence, only the agreement of GSA and Interior is needed to terminate the 1971 MOU. In our view, Air Force's agreement is required. Although Air Force declared the property excess to its needs in September 1975, Air Force continues to be the land-holding agency. See 41 C.F.R. 101-47.103-7, 101-47.202-9, 101-47-402. GSA apparently acts only as disposal agent for the Air Force, 41 C.F.R. 101-47.103-6. As we observed earlier, GSA requested that the Air Force transfer its "rights" under the 1971 MOU to it. The record before us discloses no such transfer.

94-223 11/ or its legislative history indicate that Congress intended to limit Interior's discretion to terminate beyond the terms contained in the cooperative agreement.

Similarly, we do not agree that, absent an Air Force request to terminate the 1971 MOU, Interior is precluded from seeking termination of the 1971 MOU because of Public Law 94-223, the Endangered Species Act (ESA), 16 U.S.C. §1531 et seq., the National Environmental Protection Act (NEPA), 42 U.S.C. §4321 et seq., and the Migratory Bird Treaty Act, 16 U.S.C. §703 et seq. 12/ Our examination of these statutes discloses no limitation on the Secretary's authority to initiate the termination of cooperative agreements under the provisions of Public Law 94-223. Nor do we think it is appropriate for us to imply such a limitation simply from the goals and purposes of these statutes, particularly in

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11/ Public Law 94-223 authorizes the Secretary of the Interior to transfer, dispose or exchange System lands without congressional approval in two other limited situations. However, in these two situations, Congress limited the Secretary's authority to exchange System lands or to transfer or dispose of acquired lands subject to his finding that the lands are "suitable for disposition" or "are no longer needed for the purposes for which the System was established," respectively. 16 U.S.C. §668dd(a)(3)(i and ii). Public Law 94-223 does not limit the Secretary's authority to remove lands from the System by terminating cooperative agreements even to this extent.

12/ A similar argument was made and rejected in Sierra Club v. Hickel, 467 F.2d 1048, 1051 (6th Cir. 1972), cert. den. 411 U.S. 920 (1973). There, the Sierra Club challenged the Secretary of the Interior's authority to exchange System lands with two utilities pursuant to the NWRSAA of 1966. The court held in part that since the Secretary may exchange lands "under his jurisdiction which he finds suitable for disposition," the NWRSAA of 1966 bestowed unreviewable administrative discretion on the Secretary to exchange lands. The dissent argued that the Secretary's action was reviewable to determine whether the exchange was compatible with the general duties imposed on the Secretary by the Migratory Bird Acts, the Endangered Species Act of 1966, and NEPA. See 467 F.2d at 1057-1059.

light of the unequivocal grant of authority to terminate "pursuant to the terms of any cooperative agreement."

This is not to say, however, that the Secretary of the Interior does not have legally enforceable duties under NEPA and ESA. With respect to NEPA, Interior has begun preparation of an environmental impact statement on the proposed removal of the Matagorda Island property from the System. 47 Fed. Reg. 5048 (February 3, 1982). Moreover, under section 7(a)(2) of the ESA, the involved Federal agencies must insure that any agency action is "not likely to jeopardize the continued existence of any endangered species * * * or result in the destruction or adverse modification of [critical] habitat of such species," unless the agency obtains a statutory exemption to undertake the proposed action. 13/ 16 U.S.C. §1536(a)(2),(h)(Supp. III, 1979). And, under section 7(a)(1) of the ESA, the Secretary has an affirmative duty to utilize other programs administered by him in furtherance of the goals of the ESA--the conservation of endangered species and their habitats. 16 U.S.C. §1536(a)(1), 1531(b). 14/ The record supporting any action to terminate the 1971 MOU should be sufficient to demonstrate compliance with these requirements. Connors v. Andrus, 453 F. Supp. 1037 (W.D. Tex. 1978); Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977). The ESA "citizen suit" provision, 16 U.S.C. §1540(g), provides a vehicle to obtain judicial review of the Secretary's compliance with the ESA.

Accordingly, we conclude that Matagorda Island can be removed from the System pursuant to the termination provisions of the 1971 MOU subject, of course, to compliance with the

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13/ One of the express purposes of the 1971 MOU was "to administer an area on Matagorda Island as a national wildlife refuge to meet its responsibilities for the whooping crane." The whooping crane was first listed as an endangered species in February 1967. 32 Fed. Reg. 4001 (1967). See also 50 C.F.R. §17.95(b) (1980), designating a portion of Matagorda Island as critical habitat for the whooping crane.

14/ Interior apparently acknowledges its responsibilities to comply with the ESA. Letter of the Assistant Secretary of the Interior for Fish and Wildlife and Parks to The Honorable John D. Dingell dated August 4, 1981.

applicable requirements of NEPA and ESA. We offer no opinion concerning the adequacy of Interior's efforts to comply with the requirements of NEPA or ESA.

IV.

The third major issue you raise involves the scope of GSA's authority to make some final disposal of Matagorda Island. GSA maintains that the 1971 MOU is not a "cooperative agreement" within the contemplation of Public Law 94-223, so Matagorda Island is available for transfer or disposal pursuant to the terms of the Federal Property and Administrative Services Act of 1949. Interior's position is that GSA succeeded to the Air Force's interest in the cooperative agreement although Interior continues to administer the Island as part of the NWRS. According to Interior, "[r]egardless of what disposition [by GSA] is to be made, the cooperative agreement would have to be terminated."

Your August 26, 1981, letter to the Assistant Secretary for Fish and Wildlife and Parks disputes Interior's explanation of GSA's interest in the Matagorda property. Instead, you contend that since enactment of Public Law 94-223, GSA has had no interest in or authority over the Matagorda Island property:

> "If the object of the termination is to allow GSA after termination to dispose of the area to the FWS, such an action would appear to be a costly and useless exercise. The FWS now has the area as a result of the 1971 agreement and the 1976 statute. It does not need a new action to confirm the obvious.
>
> "If the object is to allow GSA after termination to dispose of the area to Texas, I stress that the NWRS Administration Act precludes GSA's role * * *."

Accordingly, you asked for our opinion on GSA's authority over the property.

Until Interior terminates its use of the Island pursuant to the terms of the 1971 MOU or an act of Congress removes the Island property from the System, GSA has no authority to dispose

of Interior's interest in Matagorda Island. This proposition flows directly from Public Law 94-223's requirement that each area of the System continue to be a part of the System until disposed of pursuant to the terms of that Act. GSA's disposal authority relates solely to the Air Force's retained interest in Matagorda Island that was reported to GSA as excess in September 1975. Of course, any GSA disposal of the excess Air Force interest is subject to Interior's interest unless Interior terminates its interest under the 1971 MOU or Congress removes these lands from the System.

In our view, the basic complicating factor is that by operation of the 1971 MOU and Public Law 94-223, the jurisdiction over Matagorda Island was divided between two Government agencies--the Air Force and Interior. The division occurred in 1971 when the Air Force granted Interior a secondary use of the Island as a refuge for the whooping crane while retaining its primary jurisdiction over the Island. As our earlier discussion of the legislative history of Public Law 94-223 shows, Congress was fully aware that for certain areas of the System, Interior had only a limited interest, a secondary use, in certain lands administered as part of the System but otherwise under the primary jurisdiction of another agency or governmental entity. Congress' solution was not to transfer total jurisdiction from the land-holding agencies to Interior, but to confirm the prior designations and impose restrictions on the removal from the System of the lands subject to Interior's secondary use. Public Law 94-223 was not designed to restrict the transfer or disposal of the land-holding agencies' primary interests and, therefore, we see no reason why the disposal of the excess primary interest cannot be effected under otherwise applicable statutes (such as Public Law 80-537 and the Federal Property and Administrative Services Act of 1949) subject, of course, to Interior's interest and the constraints of Public Law 94-223.

Interior formally requested transfer of the Air Force's excess interest in the Matagorda Island property pursuant to Public Law 80-537, 16 U.S.C. §667b. Public Law 80-537 provides as follows:

> "Upon request, real property which is under the jurisdiction or control of a Federal agency and no longer required by such agency, (1) can be utilized for wildlife conservation

> purposes by the agency of the State exercising administration over the wildlife resources of the State wherein the real property lies or by the Secretary of the Interior; and (2) is valuable for use for any such purpose, and which, in the determination of the Administrator of General Services, is available for such use may, notwithstanding any other provisions of law, be transferred without reimbursement or transfer of funds (with or without improvements as determined by said Administrator) by the Federal agency having jurisdiction or control of the property to (a) such State agency if the management thereof for the conservation of wildlife relates to other than migratory birds, or (b) to the Secretary of the Interior if the real property has particular value in carrying out the national migratory bird management program. * * *"

GSA apparently considers an Interior request under Public Law 80-537 to be essentially the same as a State agency request for "surplus property" under the Property Act of 1949. See 15 Fed. Reg. 1350 (March 14, 1950); GSA Property Management and Disposal Service Handbook 4000.1, Excess and Surplus Real Property, ch. 3, para. 41 (April 19, 1977); cf. 41 C.F.R. 101-47.4905 (1980). Accordingly, an Interior request for real property under Public Law 80-537 is given equal consideration with State and local government requests for the same property. As we noted earlier, GSA has taken the position in the past that only approximately 6,716 acres of the Island qualify for transfer to Interior under Public Law 80-537.

However, under the Property Act, GSA cannot declare excess real property "surplus" and dispose of it outside the Federal Government unless the Administrator, GSA, specifically determines that the excess property is "not required for the needs and the discharge of the responsibilities of all Federal agencies." 40 U.S.C. §472(g) (1976). Were Interior to proceed under the Property Act of 1949, we do not think the Administrator could

determine that the excess Matagorda Island property is "not required for the needs and the discharge of [Interior's] responsibilities," in view of Public Law 94-223. By enacting Public Law 94-223, Congress legislatively sanctioned Interior's prior designation of properties included in the National Wildlife Refuge System pursuant to cooperative agreements. In other words, Congress has in our view limited the Administrator's discretion to determine that the excess Air Force interest is "surplus" to Interior's needs so long as Interior continues to retain its interest in the subject property. Accordingly, should Interior wish to avail itself of the Federal Property and Administrative Services Act's clear priority of Federal agencies to "excess" property, Interior should amend its request to conform to GSA's policies and procedures under the Property Act of 1949. 15/

Sincerely yours,

Shelton J. Dooley

for Comptroller General
of the United States

15/ Transfers under Public Law 80-537 are without reimbursement or transfer of funds. 16 U.S.C. §667b. On the other hand, under the Property Act, GSA may require reimbursement from Interior for transfers of excess real property in an amount equal to 50 percent of the appraised fair market value of the property requested unless Interior avails itself of one or more of the five exceptions to GSA's reimbursement requirement. 41 C.F.R. §101-47.203-7 (f)(2)(i, ii).