



Department of Energy

Washington, DC 20585

GC GUIDANCE ON BARTER TRANSACTIONS INVOLVING DOE-OWNED URANIUM

The Department of Energy has on a variety of occasions engaged in transactions under which it bartered uranium to which it has title for goods or services. This guidance memorializes the results of analyses previously directed to individual proposed transactions. For the reasons discussed below, we conclude that the Atomic Energy Act of 1954¹, as amended, (AEA), authorizes such barter transactions.

Background: DOE Barter Transactions

In a number of instances, DOE has engaged in transactions involving the barter of DOE-owned uranium² in exchange for various products or services. For example, DOE entered into a transaction with the United States Enrichment Corporation (USEC), under which USEC would decontaminate uranium for the Department in exchange for an amount of marketable uranium equivalent in value to the costs of the USEC processing. The Department benefited from this barter arrangement by avoiding costs that would have been incurred to clean and/or replace the contaminated uranium and the costs of disposing of the contaminated uranium as waste.

In a different context, in 2007 and 2009, the Department's National Nuclear Security Administration (NNSA) awarded contracts to downblend surplus DOE highly enriched uranium (HEU) into low enriched uranium (LEU). Those contracts provide that NNSA would acquire the selected contractors' downblending services in exchange for a portion of the resulting LEU. Put differently, the contractors bartered their downblending services for a portion of LEU.

Similarly, in 2008, the Department transferred 1.05 metric tons (MTs) of LEU as payment for services Westinghouse performed as part of the Ukraine Nuclear Fuel Qualification Project. That barter permitted completion of a project that supported the commitment of the United States Government to provide nuclear fuel diversification options to the Government of Ukraine.

The Department and the Executive Branch have been transparent with both Congress and the public regarding these transactions. For example, the Administration's Fiscal Year (FY) 2005 Congressional Budget Request for the Department of Energy included the following statement:

¹ Pub. L. No. 83-703, 68 Stat. 919, 42 U.S.C. §2011 et seq.

² In all cases, the uranium that was the subject of DOE barter transactions satisfied the AEA definition of either "special nuclear material" or "source material." Enriched uranium is "special nuclear material," as defined in section 11aa. of the AEA. See AEA §11aa., 42 U.S.C. §2014(aa) ("The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2701 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material."). Natural and depleted uranium are "source material," as defined in section 11z. of the AEA. See AEA §11z., 42 U.S.C. §2014(z) ("The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.").



In FY 2005, the Government intends to continue operating the shipping and transfer facility to remove technetium-99 from contaminated uranium, contingent upon reaching a barter arrangement with the United States Enrichment Corporation The Department is evaluating the need for authorization to pursue such a barter arrangement to carry out this work.

Id. Vol. 5 at 410. The Department subsequently conducted such an evaluation and determined that additional authority was not needed.³ Accordingly, the similar statements regarding DOE's intention to barter with USEC for decontamination services in the FY 2006 and FY 2007 Congressional Budget Request documents do not contain that caveat. *See* FY 2006, Vol. 5 at 360; FY 2007, Vol. 5 at 210.⁴ The Administration's FY 2009 budget request likewise refers to the barter relating to the NNSA HEU downblending program. More specifically, the budget request notes DOE's intent to "pay for commercial downblending services by transferring title to a portion of the resulting [LEU] to the contractor." FY 2009, Vol. 1, at 518.

Additionally, in March 2008, Secretary of Energy Bodman released to the public⁵ his *Policy Statement on Management of the Department's Excess Uranium Inventory (Policy Statement)*. The *Policy Statement* makes clear both (1) the Department's view that the Atomic Energy Act authorized it to engage in barter transactions in uranium and (2) that the Department had engaged in such transactions and would do so in the future in appropriate instances:

[T]he Department does have authority under the AEA to engage in barter transactions, where it transfers uranium and receives services or another form of uranium as compensation. Under this statutory authority, the Department has structured several arrangements so that some uranium can be used to offset the costs of certain services that have been provided to the Department such as downblending, enrichment, decontamination or storage. The Department will consider using this approach in the future where it determines such an approach is reasonable, furthers the interests of the Department and results in the receipt of reasonable value for the material exchanged for services.⁶

³ *See* Memorandum from Paul M. Golan, Acting Assistant Secretary for Environmental Management to David K. Garman, Acting Under Secretary for Energy, Science and Environment (September 30, 2004).

⁴ For instance, the FY2006 budget request states:

USEC has agreed to process contaminated uranium for the Department in exchange for an amount of marketable uranium equivalent in value to the costs of their operation. This self-funded arrangement (barter) capitalizes the value of surplus uranium in exchange for services restoring the market value of an asset that if left untreated would be dispositioned as waste. The Department began this arrangement in December of FY 2005. The technetium-99 barter arrangement does not affect the request for FY 2006 funding because it is budget neutral, thereby allowing the available resources to focus on other cleanup activities.

FY 2006, Vol. 5, at 360.

⁵ The *Policy Statement* is available at <http://www.ne.doe.gov/newsroom/2008PRs/nePR031208.html>.

⁶ *Policy Statement* at 1.

Finally, the Department has also made its understanding of its authority to engage in barter transactions clear in correspondence with offices within the Legislative Branch.⁷

On at least three occasions, congressional appropriators have also acknowledged the Department's policy of engaging in barter transactions in appropriate instances and urged its continuance in specific contexts. First, with reference to the USEC barter for decontamination services, the conference report accompanying the Energy and Water Development Appropriations Act, 2004, stated, "[t]he conferees encourage the Department to continue the existing barter arrangement for part of fiscal year 2004 to resolve the problem of uranium contaminated with technetium-99, and direct the Department to budget funds for this activity in fiscal year 2005." H.R. Conf. Rep. No. 108-357, at 147 (2003). A similar statement of support for the USEC decontamination barter appears in the conference report accompanying the Consolidated Appropriations Act, 2005. *See* H.R. Conf. Rep. No. 108-792, at 944 (2004). Finally, for fiscal year 2006, Congress enacted appropriations legislation that explicitly enabled DOE to retain proceeds from a barter, transfer, or sale of uranium. In particular, section 314 of the Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, 119 Stat. 2247, provides as follows:

SALES OF URANIUM- (a) IN GENERAL- Notwithstanding any other provision of Federal law, including section 3112 of the USEC Privatization Act (42 U.S.C. 2297h-2) and section 3302 of title 31, United States Code, the Secretary of Energy is authorized to barter, transfer or sell uranium (including natural uranium concentrates, natural uranium hexafluoride, or in any form or assay) and to use any proceeds, without fiscal year limitation, to remediate uranium inventories held by the Secretary.

(b) ADDITIONAL REQUIREMENTS- Any barter, transfer or sale of uranium under subsection (a) shall to the extent possible, be competitive and comply with all applicable Federal procurement laws (including regulations); and shall not exceed 10 percent of the total annual fuel requirements of all licensed nuclear power plants located in the United States for uranium concentrates, uranium conversion, or uranium enrichment.⁸

Legal Analysis

The Department's long-standing and publicly stated understanding of its authority to engage in barter transactions comports with the text of the AEA. Indeed, as discussed below, the AEA

⁷ *See e.g.*, Letter from DOE Deputy General Counsel, Eric J. Fygi, in response to questions from Susan A. Poling, Managing Associate General Counsel, U.S. Government Accountability Office, (May 2, 2006), regarding the Department's legal authorities in connection with a December 2004 transfer of DOE-owned uranium to USEC (discusses, among other laws, sections 3d., 63, 66, and 161g. of the AEA)

⁸ As is demonstrated below, DOE had in fiscal year 2006, and continues to have, authority to sell, transfer, and barter uranium under the AEA, making the authorization of those activities in section 314 a recitation of the potential uses of existing authorities in uranium transactions that gives context and meaning to the new elements it contains, the Department's ability to retain revenues otherwise forbidden by the Miscellaneous Receipts Act, and the Department's ability to structure transactions without regard to section 3112 of the USEC Privatization Act. Accordingly, section 314(a) is best understood as a funds retention provision, a view borne out by the placement of this section in an appropriations act.

contains both general provisions that are naturally read to authorize barter transactions, as well as specific provisions that buttress that authority as to the specific types of transactions in which the Department has in fact engaged.

I. General Provisions of the AEA

A. Section 161g.

Pursuant to section 161g. of the AEA, the Secretary of Energy is authorized to:

acquire, purchase, lease and hold real and personal property, including patents, as agent of and on behalf of the United States . . . and to sell, lease, grant and *dispose* of such real and personal property as provided in this Act.

AEA §161g., 42 U.S.C. §2201(g) (emphasis added). For purposes of this analysis, the key term is “dispose.” That term is not defined in the AEA, and thus should be given its ordinary meaning. *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”). In ordinary language, the authority to “dispose” of property includes the power to barter that property in exchange for needed goods or services.

Our understanding is informed by the Supreme Court’s holding— in a decision that predates the AEA – that the phrase “dispose of” includes the power to barter, exchange, or sell. *Phelps v. Harris*, 101 U.S. 370, 381 (1879). In *Phelps*, the Court was concerned with the authorization in a will to “dispose of” all or a portion of the property devised by the will. In discussing the ultimate disposition of the property, the Court expressly relied on the ordinary meaning of the word “dispose” to conclude that it included barter:

The expression ‘to dispose of’ is very broad, and signifies more than ‘to sell.’ Selling is but one mode of disposing of property. It is argued, however that the subsequent direction to invest the proceeds indicates that a sale was meant. But this does not necessarily follow. Proceeds are not necessarily money. This is also a word of great generality. *Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands.*

Id. at 380 (emphasis added).

The Court further explained:

Now, whilst it may be true that when the words ‘disposed of’ are used in connection with the word ‘sell,’ in the phrase ‘to sell and dispose of,’ they may often be construed to mean a disposal by sale; it does not necessarily follow that when power is given generally, and without qualification by associated words, to dispose of property, leaving the mode of disposition to the discretion of the agent, that the power should not extend to a disposal by barter or exchange, as well as to a disposal by sale. The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical

signification. Taking the whole clause in the codicil together, it is equivalent to an authority to dispose of the property as the trustee should deem most for the interest of his children; and *this would include the power to barter or exchange as well as the power to sell.*

Id. at 381 (emphasis added). The Supreme Court’s precedent thus fortifies the conclusion that Congress’s use of the term “dispose” in section 161g. provides authority for the Department to engage in barter transactions.

That understanding of the Department’s authority to dispose of property through barter is further bolstered by the Department’s treatment under the Federal Property and Administrative Services Act (“Federal Property Act”),⁹ a provision that Congress enacted in 1949, after the passage of the Atomic Energy Act of 1946, which included what is now section 161g.¹⁰ The Federal Property Act provides a comprehensive scheme for the disposal of Federal property.¹¹ To reinforce its broad scope, Congress expressly preempted any inconsistent Federal law that might otherwise govern surplus Federal property. *See* 40 U.S.C. §113(a). However, the “nonimpairment” clause of the Federal Property Act specifically exempts certain agencies and types of transactions from the Act’s requirements. *See* 40 U.S.C. §113(e). DOE’s activities with regard to atomic energy are among these specific statutory exemptions:

(a) In General.— Except as otherwise provided in this section, the authority conferred by this subtitle is in addition to any other authority conferred by law and is not subject to any inconsistent provision of law. . . .

(e) Other Limitations.— Nothing in this subtitle impairs or affects the authority of— . . .

(12) *the Secretary of Energy with respect to atomic energy;. . . .*

40 U.S.C. §113 (emphasis added). Accordingly, all the property activities of the Atomic Energy Commission, and now all the property activities of the Department that are within the scope of the AEA, are excepted from Federal Property Act requirements and restrictions.¹² The

⁹ Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, ch. 288, 63 Stat. 377.

¹⁰ *See* Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755, §12(a)(7). The Atomic Energy Act of 1946 was the predecessor of the Atomic Energy Act of 1954, which was enacted as an amendment to the 1946 Act.

¹¹ Section 203(a), codified as amended at 40 U.S.C. §541, of the Federal Property Act provides that “(e)xcept as otherwise provided in this subchapter, the Administrator of General Services shall supervise and direct the disposition of surplus property.” Section 203(c), codified as amended at 40 U.S.C. §543, provides that an executive agency designated or authorized by GSA may dispose of surplus property by sale, exchange, lease, permit or transfer, for cash, credit, or other property, on terms and conditions that the Administrator considers proper. Also, section 203(e) provided exception to the standard advertising requirements. As amended, this section is expanded and provides the GSA procedure for disposal, including requirements such as public advertising for bids, negotiated disposal, and congressional notification. *See* 40 U.S.C. §545.

¹² When the Federal Property Act was originally enacted, the predecessor to 40 U.S.C. §113, provided that the Federal Property Act did not impair or affect the authority of the “Atomic Energy Commission.” *See* Pub. L. No. 81-152, ch. 288, 63 Stat. 377, §502(d)(18) (1949), 40 U.S.C. §474 (Supp. V vol. 2 1946). Title 40 was enacted into positive law by Pub. L. No. 107-217, 116 Stat. 1062 (2002), “Codifying Title 40, United States Code – Public Buildings, Property, and Works.” Congress, when revising and re-enacting Title 40 in 2002,

Department's exemption from the limitations on disposal otherwise imposed under the Federal Property Act is distinctive. Only two other agencies, the Departments of Defense and Agriculture, have "dispose of" authority that is not constrained by the Federal Property Act by virtue of the nonimpairment clause, and, in both those instances, the exemption is significantly narrower than that provided for DOE.¹³ The fact that Congress recognized and exempted the general authority of the Department's predecessor to dispose of property notwithstanding the strictures of the Federal Property Act supports the conclusion that Congress intended to preserve the authority of the Department to dispose of Atomic Energy Act-related property in a variety of ways, including barter.

None of this should be understood to mean that there are no statutory constraints on the Department's authority to dispose of property through barter. Rather, by its terms, any disposal of property under section 161g. (through barter or otherwise) must be "as provided in this [the Atomic Energy] Act." As the Department has long understood,¹⁴ the phrase "as provided in this Act" is reasonably interpreted to require that any disposition under section 161g. must relate to property that the Department has acquired in connection with carrying out functions under the AEA¹⁵ or property that will be used to carry out the objectives of the AEA.¹⁶ If property to be disposed of has been, or will be, used in order to carry out a function or pursue an objective of

recognized that the Atomic Energy Commission no longer existed and that the former section 474 had not been amended to reflect that fact. H.R. Rep. No. 107-479, Revision of Title 40, United States Code, "Public Buildings, Property, and Works," provides that the 2002 Amendments to the Federal Property Act are "without substantive change." *Id.* at 2 (2002).

¹³ DOD's disposal authority is exempt from Federal Property Act coverage pursuant to subsection (e)(4) of the nonimpairment clause only with respect to "property required for or located in occupied territories." 40 U.S.C. § 113(e)(4). The Department of Agriculture is likewise exempt from the Federal Property Act only for a limited purpose -- "with respect to any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation[.]" 40 U.S.C. § 113(e)(2). Moreover, section (e)(2) goes on to provide that the agency "shall, to the maximum extent practicable" follow the "requirements of [the Federal Property Act]."

¹⁴ *See, e.g.*, Memorandum from Eric J. Fygi, Acting General Counsel, DOE, to Jennifer J. Fowler, Chief Counsel, Oak Ridge Operations Office, at 7 & n.4 (March 27, 1998).

¹⁵ *E.g.*, Letter from Robert R. Nordhaus, General Counsel, Department of Energy, to Colonel Joseph G. Graf, U.S. Army Engineer District, Fort Worth (August 9, 1994) (realty acquired to construct subsequently canceled nuclear research complex might be conveyed by DOE under section 161g. because property had been acquired for nuclear research under the Atomic Energy Act.).

¹⁶ *E.g.*, Memorandum from Ralph D. Goldenberg, Assistant General Counsel for General Law, Department of Energy, to James M. Cayce, Office of Project and Fixed Assets Management, Department of Energy (September 23, 1996) (sale of surplus realty and personalty at the Department's Mound Plant might be done under section 161g. because purchaser's users would further the public health and military objectives of the Atomic Energy Act); Memorandum from Ralph D. Goldenberg to Agnes P. Dover, Deputy General Counsel for Technology Transfer and Procurement, Department of Energy (June 5, 1996) (realty and personalty originally acquired to carry out non-nuclear research activities of the Western Energy Technology Center might be conveyed under section 161g. in order to have recipient conduct nuclear waste research relating to historical production activities under the Atomic Energy Act).

the AEA, then section 161g. may be utilized as disposal authority.¹⁷ The AEA's objectives are generally laid out in section 3 of the statute. The purposes enumerated there include "mak[ing] the maximum contribution to the common defense and security and the national welfare," AEA §3c, 42 U.S.C. §2013(c), "encourage[ing] widespread participation in the development and utilization of atomic energy for peaceful purposes," AEA §3d, 42 U.S.C. §2013(d), and creating "a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit," AEA §3e, 42 U.S.C. §2013(e).

The DOE barter arrangements described above are consistent with these enumerated purposes. The uranium-decontamination barter with USEC both promoted the national welfare and resulted in uranium that could be used to create atomic energy for peaceful purposes. NNSA's program of downblending HEU contributed to the common defense and security. Finally, the Department's barter for Westinghouse services supported a program that enhanced nuclear fuel options for the Ukraine and thus involved international cooperation to promote peaceful use of atomic energy.

B. Section 161j.

Section 161g. is not the only general provision of the AEA that supports the Department's authority to engage in barter transactions in appropriate instances. As to any transactions involving national security, section 161j. of the AEA also provides authority to engage in barter. Section 161j. authorizes DOE to "make such disposition as it may deem desirable" of "radioactive materials" and "any other property, the special disposition of which is . . . in the interest of national security." AEA §161j., 42 U.S.C. 2201(j). Thus, for example, although 161j. was not cited as a basis for the transfer, the NNSA barter involving the exchange of LEU for downblending services furthers the U.S. nonproliferation objective of limiting the spread of proliferation-sensitive nuclear material and technologies, and thus is conducted "in the interest of national security." Such barter transactions are thus authorized by section 161j.¹⁸

II. Specific Provisions of the AEA

In addition to these general authorities to dispose of property provided in section 161, the AEA also contains provisions that pertain specifically to the control, use, and distribution of special nuclear and source material. In appropriate instances, those specific authorizations also support

¹⁷ See Memorandum from Eric J. Fygi, Acting General Counsel, Department of Energy, to Jennifer J. Fowler, Oak Ridge Operations Office, on Leasing of Department of Energy Property (March 27, 1998).

¹⁸ Section 161j.'s reference to the Department's authority under that provision being "without regard to the Federal Property and Administrative Services Act of 1949, as amended, except section 207 of that Act" does not indicate that *other* grants of authority under the AEA are subject to the Federal Property Act. Congress apparently added that provision to ensure that section 207 (which deals with notice to the Attorney General in certain circumstances to ensure compliance with antitrust law) of the Federal Property Act was to apply, which of course it would not have otherwise given the reach of the non-impairment provision of the Property Act. For the reasons discussed above in the text of this memorandum, reading section 161j.'s language to imply that the Federal Property Act applies to other AEA provisions would be directly contrary to the explicit text of the Federal Property Act itself, which expressly exempts "the Secretary of Energy with respect to atomic energy" from impairment by the relevant parts of that statute.

DOE's barter authority. Where the specific provisions apply, however, DOE must of course ensure that it complies with any specific limitations in their terms to the extent that those provisions are applicable to a given transaction.

A. Section 53

Section 53 of the AEA provides DOE with authority to "distribute special nuclear material" domestically for various research and development activities, for use under a commercial license for a utilization or production facility, or "for such other uses as [DOE] determines to be appropriate to carry out the purposes of [the AEA]." AEA §53a.(iii), 42 U.S.C. §2073(a)(iii). Section 53 further specifies that the Department may distribute special nuclear material "by sale, lease, lease with option to buy, or grant." AEA §53c.(1), 42 U.S.C. §2073(c)(1).¹⁹

The term "sale" is not defined in the AEA, but in common usage the term "sale" means the "exchange of goods or services for an amount of money or its equivalent." *Webster's II New College Dictionary* (1999) (emphasis added). Multiple sources confirm this definition. One standard dictionary defines "sale" as "the transfer of ownership of and title to property from one person to another for a price." *Webster's Ninth New Collegiate Dictionary* (1991). Definitions of the term "sale" at the time the term was added to the AEA include "a contract whereby property is transferred from one person to another for a consideration of value," *Black's Law Dictionary* (4th ed. 1961) ((citing *Arnold v. North American Chemical Co.*, 122 N.E. 283, 284 (Mass. 1919) and *Faulkner v. Town of South Boston*, 127 S.E. 380, 381 (Va. 1925)), and "a contract whereby the ownership of property is transferred from one person to another for a sum of money or, loosely, for any consideration." *Webster's New Collegiate Dictionary* (1961). The term "price" means "[t]he amount of money or other consideration asked for or given in exchange for something else." *Black's Law Dictionary* (8th ed. 2004). "Consideration" includes "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee." *Black's* (2004). "Price" and "consideration" are not generally understood to be limited to cash and are reasonably construed to include the types of consideration that DOE has received in exchange for bartered uranium, including disposition of material for which the Department otherwise would have been liable for disposal as waste, services and the products resulting from bargained-for services.

The U.S. Supreme Court, moreover, has construed the term "sale" to include transfers of property in exchange for "valuable consideration," not just cash. *See Culver v. Uthe*, 133 U.S. 655, 660 (1890). In *Culver*, the Court noted that "in a technical sense," the term sale "may mean a transfer of the title of property for a money consideration," but also noted that the term "has other meanings which would include the present transaction," *Id.* at 659, a transaction which in that case involved the delivering up and cancellation of a land-warrant received in recognition of federal service as payment for land. *Id.* at 658. The Court in *Culver* distinguished an earlier case, *State v. McFarland*, 110 U.S. 471, 478 (1884), in which the Court held that the term sale,

¹⁹ For distributions by sale under section 53, the AEA provides that DOE must establish sales prices on a nondiscriminatory basis such that the prices will, "in the opinion of the [Department], ... provide reasonable compensation to the Government." AEA §53c.(2), 42 U.S.C. §2073(c)(2). By the terms of the statute, it is within DOE's discretion to determine what is "reasonable compensation" for the special nuclear material it distributes by sale. There is nothing in the statute or its legislative history that would preclude the Department from exercising that discretion to allow for the exchange of something other than cash, provided that the "something" received is of sufficient value to provide reasonable compensation to the Government.

as used in the statutes at issue in that case “was limited to sales for cash” because the statutes in that case spoke of “net proceeds” from the property to be sold that would be “disbursed” or “appropriated.” *Culver v. Uthe*, at 659-660 (quoting *MacFarland*, 110 U.S. at 482). The Court noted that use of the term “sale” in the statute at issue in *Culver* did not “contemplate the receipt of any money into the treasury.” *Id.* at 660. In the absence of such statutory language addressing disposition of “proceeds” and their “appropriate[ion]”, the Court in *Culver* broadly construed the term sale to include transfers of property in exchange for non-monetary “valuable consideration.” *Id.*

The conclusion that section 53 authorizes barter does not depend exclusively on the understanding of the word “sale.” There is also significant supporting evidence in the legislative history of the AEA that the Department’s authority to “distribute” special nuclear material was understood in 1964 to include the authority to engage in barter transactions. Specifically, in the report accompanying the bill that became the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (1964), the Joint Committee on Atomic Energy noted that DOE’s predecessor agency “possesse[d] the authority under the existing language of the [AEA]” to “barter special nuclear material, *distributed* pursuant to section 54, and to accept as partial payment source material to be delivered to the Commission pursuant to section 66.” S. Rep. No. 88-1325, at 26 (1964). Notably, the Joint Committee made that statement in the context of amending section 54 of the AEA to expand the authority of the Department’s predecessor and to explain how the new reported legislation would work in light of the existing authority to “distribute” materials through barter. *See* Private Ownership of Special Nuclear Materials Act §9. Given the fact that, as discussed above, section 53 also uses the term “distribute,” Congress’s acknowledgement that “distribution” encompasses barter with regard to section 54 while legislating on that section is significant evidence of the meaning of that term in section 53 as well. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in statutory text is generally read the same way each time it appears.”).

Even if one were to understand section 53’s reference to “distribut[ion]” and “sale” of special nuclear material as not, by itself, embracing *all* aspects of a barter transaction, that authority unquestionably authorizes the “put” part of the transaction, and other Departmental authority sustains the other side of the transaction. More specifically, the authority to “distribute” special nuclear material authorizes the part of a barter transaction that involves the Department releasing uranium to an external entity. The plain meaning of the word “distribute” encompasses such releases of material. At the same time, the other side of the transaction – the receipt of goods or services by the Department – is supported, as described below, by the Department’s general authority under its organic act to make contracts to acquire goods and services necessary to carry out its missions.

In particular, although the AEA does not contain an explicit general provision authorizing the Department to enter into such contractual arrangements, the Supreme Court has long understood that the federal government has an inherent right to enter into contracts through Executive Branch departments to carry out the various functions place in them. *See United States v. Tingey*, 30 U.S. 115, 128 (1831) (“It is in our opinion an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.”). The Government Accountability Office has similarly noted

that “[i]t has long been established that a government agency has the inherent authority to enter into binding contracts in the execution of its duties.” Office of the General Counsel, U.S. Government Accountability Office, 1 Principles of Federal Appropriations Law, at 2-6 (3d ed. 2004); *see also* 2 Principles of Federal Appropriations Law, at 6-89 to 6-91 (3d ed. 2006). Let there be any doubt, Congress expressly granted the Secretary authority to “enter into and perform such contracts, leases, cooperative agreements, or other similar transactions... as he may deem to be necessary or appropriate to carry out functions now or hereafter vested in the Secretary,” in the Department of Energy Organization Act. Pub. L. No. 95-91, 91 Stat. 599, §646(a) (1977), 42 U.S.C. §7256(a). Thus section 53, even if read parsimoniously, in combination with the Departmental express contracting and substantive mission authorities, amply supports both sides of appropriately tailored uranium barter transactions.

B. Section 63

Section 63 of the AEA provides another source of authority to barter material in appropriate instances. Section 63 authorizes the Department to “distribute source material”²⁰ domestically for various research and development activities, for use under a commercial license for a utilization or production facility, or “for any other use approved by [DOE] as an aid to science or industry.” AEA §63a., 42 U.S.C. §2093(a). Section 63 does not define the term “distribute.” As described above, it is reasonable, therefore, consistent with the understanding of section 53, to construe the term “distribute” as used in section 63 as also sufficiently broad to include barter. *See Ratzlaf*, 510 U.S. at 144 (“A term appearing in several places in statutory text is generally read the same way each time it appears.”). If anything, section 63 is broader than section 53, because section 63 does not specify the types of transactions by which the Department may distribute source material.

Section 63 should also be read in conjunction with the general authority under section 161m., which specifies that the Department may “sell, lease, or otherwise make available” source material as necessary for the conduct of certain licensed activities. AEA §161m., 42 U.S.C. §2201(m). As noted above, the Department has concluded, after consulting case law and other aids to construction, that the authority to sell as used in the AEA is broad enough to include barter. Even if “sale” were not understood to include barter, despite the case law and analysis described above, the authority under section 161m. to “otherwise make available” source material would certainly include it.

For certain distributions under section 63, the AEA requires that the Department “make a reasonable charge” that the Secretary determines pursuant to section 161m. of the AEA. AEA §63c., 42 U.S.C. §2093(c). Section 161m. provides that DOE must establish prices to be paid for material furnished by the Department on a nondiscriminatory basis such that the prices will, “in the opinion of the [Department], ... provide reasonable compensation to the Government.” Here again, as is the case with section 53, by the terms of section 161m., it is within DOE’s discretion to determine what is “reasonable compensation” for the source material it distributes. There is

²⁰ *See* AEA §11z., 42 U.S.C. §2014(z) (“The term “source material” means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.”). As noted in footnote 1, source material includes natural and depleted uranium.

nothing in the statute or legislative history that confines the term “compensation” to cash on the barrelhead, or would preclude the Department from exercising that discretion to allow for the exchange of something other than cash, provided that the “something” received is of sufficient value to provide, “in the opinion of the [Department],” reasonable compensation to the Government.

III. Effect of Other Sources of Law

A. Attorney General Opinions

In examining this question, our attention has been directed to an opinion rendered by Attorney General Taney that included the statement: “There is no power under any law of Congress to make contracts of barter, but all articles directed to be purchased are intended to be paid for in money[.]” 2 Op. Att’y Gen. 580, 581 (1833). The transaction involved was one where the War Department’s Chief of Ordnance authorized the scrapping of a number of obsolete iron cannon in exchange for the manufacture and delivery of a “quantity of gun skiddings.” Attorney General Taney’s declaratory statement doubtless was correct as a general proposition in 1833, but the holding itself turned on the absence of authority in that officer to determine that the cannon should be “brok[en] up and selling them.” *Id.* So the officer himself had no statutory authority to dispose of the obsolete cannon.

This case stands for the unremarkable proposition that statutory property sale or disposal authority is an essential factor to support a barter transaction absent generic explicit government barter authority. That proposition is entirely consistent with the analysis the Department has directed to uranium transactions, where there exists explicit statutory sale, distribution, and disposal authority under the AEA.

More instructive is the opinion rendered by Attorney General Jackson in 40 Op. Att’y Gen. 484 (1940). There, the Attorney General was called upon to opine on the lawfulness of a barter transaction in which the United States would provide Britain, before the United States was in a state of war, with an inventory of obsolete U.S. destroyers in exchange for leases for basing rights in British possessions. The Attorney General found that a statute authorizing “exchange” of excess material authorized the trading of obsolete destroyers for base rights in certain British territories.

The subsequent analysis of Attorney General Brownell’s 1957 opinion affirmatively supports the Department’s understanding of the guiding Supreme Court case law. That opinion addresses whether “options” to purchase were included under a statutory formula authorizing the disposal of excess property “by sale, exchange, lease, permit, or transfer, for cash, credit or other property.” 41 Op. Att’y Gen. 294 (1957). Attorney General Brownell found that options were not included within that statutory sale definition, but, in so doing, quoted approvingly the 1879 Supreme Court case discussed above in which the Court found that the phrase “dispose of” included the power to barter, exchange, or sell. *Id.* at 298 (citing *Phelps v. Harris*, 101 U.S. 370, 381 (1879)).

B. USEC Privatization Act

We have also considered the effect of the USEC Privatization Act, Pub. L. No. 104–134, title III,

110 Stat. 1321 (1996), 42 U.S.C. §2297h *et seq.*, and concluded that it likewise has no impact on the analysis laid out above. Somewhat oversimplified, that statute directed the Government to sell its interest in the Government-run USEC to the newly created private corporation bearing the same name. In shifting that previously governmental function to USEC, Congress also placed constraints on the Department's ability to enrich or transfer uranium. For instance, section 3112(d) specifies that the following three conditions must be satisfied prior to a sale or transfer of natural or low-enriched uranium from the Department's stockpile: 1) the President must determine that the uranium is not necessary for national security needs; 2) the Secretary of Energy must determine that the sale will not have an adverse material impact on the domestic uranium market; and 3) the Department must receive fair market value for the uranium. *See* USEC Privatization Act §3112(d), 42 U.S.C. §2297h-10(d).

Nothing in this statute purports to amend or repeal the Department's authorities under the provisions of the AEA discussed above. Moreover, there is no incompatibility between that pre-existing authority and complying with the conditions contained in the USEC Privatization Act. Accordingly, both statutes can – and, under controlling precedent, should – be given full effect without in any way depriving the Department of the authority to engage in barter transactions. *See Morton v. Mancari*, 417 U.S. 535, 550 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”).

Conclusion

The Department is authorized by law to barter nuclear material. That conclusion is supported by the explicit text of the AEA, as well as the broadly explicit provisions of the Federal Property Act. It is also supported by Supreme Court precedent interpreting key terms later used in the AEA, and, in the case of some AEA provisions, by directly relevant contemporaneous legislative history. Finally, none of the other legal authorities that have been brought to our attention suggests propositions that undercut the analysis of the Department's authority under the AEA.

A handwritten signature in black ink that reads "Scott Harris". The signature is stylized, with a large, sweeping initial "S" and a small circle above the "i" in "Harris".

Scott Blake Harris
General Counsel

June 16, 2010