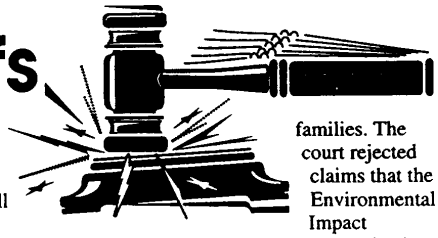
Legal Briefs



Doug Baur
AFBCA Chief Counsel

To date, the Air Force has fared very well in the arena of legal challenges to its base conversion procedures. Despite several threats of litigation by various parties, there have actually been very few lawsuits brought involving the Air Force base conversion process, and only two have gone so far as to have a court render a final decision.

In the *Conservation Law Foundation* case involving Pease AFB, N.H., the U.S. District Court recently rejected most claims of the plaintiff. However, the court did order a Supplemental DIS on certain air analysis and wetlands utilization deficiencies. The court also held that the 55-year lease at Pease AFB amounted to a deed under CERCLA Section 120(h)(3). This Pease AFB decision is of little "precedential" concern because of the unique facts as considered by the judge and because this issue is under appeal by both sides. It will be many months before that court's decision is rendered.

The only other decision came recently in the George Washington Home Owners Association case at Lowry AFB, Colo. There, the U.S. District Court rejected various environmental claims of a small minority, who were opposed to AFBCA and community plans involving the leasing of most of the base housing, as well as other property. The plaintiffs were especially opposed to plans for occupancy of the housing by homeless families. The court rejected claims that the Environmental Impact Statement had to include full characterization of hazardous waste sites and remedial actions planned for parts of the base. To have ruled otherwise would have postponed effective reuse for many years of housing and property which had been shown to be environmental safe to use. Since then, this case has been fully dismissed by the court, with the consent of both parties.

We find that occasional initial legal doubts or objections are expressed by counsel for communities, environmental regulators, and others who are new to this complex base conversion process. In most cases we have been able to explain and convince them of the legality and necessity of the processes and requirements we have to live with. Or, in strong cases, we have been able to find compromises or alternative means to meet their legitimate needs under their own applicable laws and procedures.

A good part of AFBCA's success in these and other legal challenges, which have been raised but later dropped or settled, has been the close involvement of the attorneys of AFBCA/LD as "team" players with the AFBCA real estate and environmental specialist staffs in the early and intermediate stages of all aspects of each base's cleanup, conversion and disposal program. ❐

RAB member liability

Members of a RAB should have little or no likelihood of personal legal or financial liability for opinions they express, votes they make, or actions they take in carrying out their duties on the RAB. Any actions effecting the environment that would be taken by the Air Force after receiving the advice of the RAB would expose only the U.S. Government to any such liability -- not advisory committee members who might have influenced the Air Force to take action.

If a member were to be sued for his/her RAB actions or votes, the Air Force would ask the U.S. Department of Justice to intervene and seek to have the U.S. made the sole defendant. If a judgement or penalty were ordered, the Air Force would be the party to pay it -- not the RAB member. ❐

Keeping it Legal . . .

The scope and complexity of the base closure and disposal enterprise which the Air Force is engaged in under Rounds 1 through 4 of the BCRA/DBCRA process are unprecedented in modern times. From the standpoint of complying with this myriad of existing and ever-growing body of statutes, regulations, case law, and binding policy directives which apply to this process (many of which involve legal requirements little known or understood by private-sector legal practitioners), AFBCA is heavily challenged on a daily basis.

The services of AFBCA's Legal Division (LD) should be engaged whenever legal aspects of any AFBCA activity could be at issue, especially if parties the Agency is dealing with are represented by or purport to be acting on the advice of their own legal counsel.

LD consists of eight experienced attorneys and support staff whose job includes:

- Interpret and apply the law to AFBCA activities;
- Advise all levels of AFBCA on legal and policy requirements;
- Conduct negotiations on environmental compliance, caretaking, and property disposal transactions;
- Draft or review and advise on legal sufficiency of transaction documents.

LD counsel are also the point of contact to obtain the additional services of a network of other Air Force and Government attorneys who support AFBCA programs as needed, including attorneys from AFCEE/JA, the Air Force Regional Counsel, and the Office of General Counsel, as well as litigation specialists of AFLSA/JACE, the U.S. Attorney's offices and the Department of Justice. ❐