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BRAC 2005 and the Transformation
of America's Military

By Randall S. Beach

The first base realignment and closure (BRAC) round in a decade is occurring this year and promises to be the largest divestment ever of military base property. Despite four previous BRAC rounds in the 1980s and 1990s, the Department of Defense (DoD) remains one of the largest landowners in the world. The DoD infrastructure inventory includes approximately 586,000 buildings at more than 5,500 locations comprising more than 30 million acres. Dep't of Defense, Base Structure Report (2004), available at www.defenselink.mil/pubs/20040910_2004BaseStructureReport.pdf. The DoD has sought this latest BRAC round to further reduce costs and transform the American military from a Cold War fighting force into a force designed to address modern threats. This article reviews the ongoing 2005 BRAC process.

Transformation

Secretary of Defense Donald Rumsfeld announced his desire to transform America's military soon after taking office in 2001. To Rumsfeld and his supporters, transformation of the military entails changing a Cold War fighting force into a force comprised of lighter, more mobile, and more lethal combat units. DoD describes transformation as:

[a] process that shapes the changing nature of military competition and cooperation through new combinations of concepts, capabilities, people and organizations that exploit our nation's advantages and protect against our asymmetric vulnerabilities to sustain our strategic position, which helps underpin peace and stability in the world. . . . U.S. defense strategy requires agile, network-centric forces capable of taking action from a forward position, rapidly reinforced from other areas, and defeating adversaries swiftly and decisively while conducting an active defense of U.S. territory.

Military Transformation: A Strategic Approach 2 (Fall 2003), available at www.oft.osd.mil/library/library_files/

document_297_MT_StrategyDoc1.pdf. Meeting these objectives requires the transformation of the infrastructure that will support this new force. Another round of base closures is, therefore, viewed as a critical component of the transformation of America's military. As Secretary Rumsfeld stated in 2002, "BRAC 2005 should be the means by which we reconfigure our current infrastructure into one in which operational capacity maximizes both warfighting capability and efficiency." Memorandum from the Secretary of Defense to the Secretaries of the Military Departments (Nov. 15, 2002), available at www.defenselink.mil/brac/index.html.

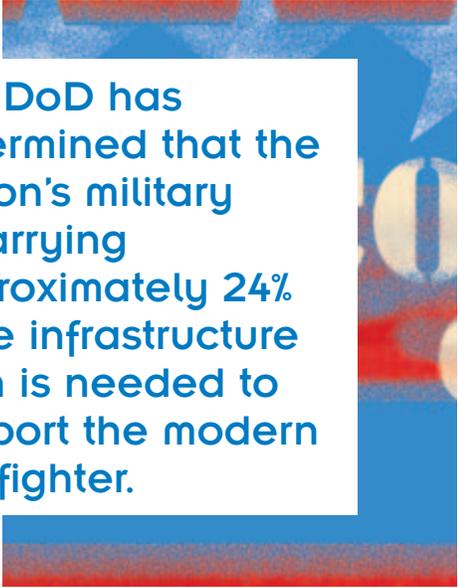
The "Mother of All BRACs"

Before the publication of the Secretary's closure and realignment recommendations on May 13, 2005, the DoD determined that the nation's military was carrying approximately 24% more infrastructure than is needed to support the modern war fighter. *Report Required by Section 2912 of the Defense Base Closure and Realignment Act of 1990, as amended through the National Defense Authorization Act for Fiscal Year 2003* (Mar. 2004), available at www.defenselink.mil/brac/docs/04_0_body032403.pdf. This perceived excess infrastructure is the target of BRAC 2005. On May 13, 2005, the Secretary published his recommendations, including the closure of 33 major installations. This number of closures makes BRAC 2005 the largest base closure round to date. The last four base closure rounds combined resulted in the closure of 97 major installations. For this reason, BRAC 2005 is being referred to as the "mother of all BRACs." Leigh Dethman, *Bush's Budget May Mean Hill Is Safe for Now*, *Deseret Morning News*, Feb. 25, 2005, available at <http://deseretnews.com/dn/view/0,1249,600114624,00.html>.

Legislation

In December 2001, Congress enacted the National Defense Authorization Act of Fiscal Year 2002, which contained the legislative enabling provisions for a new round of base clo-

sures. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001), 10 U.S.C. § 2687 note. Technically, the BRAC 2005 legislation consists of amendments to the Defense Base Closure and Realignment Act of 1990. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2901, 104 Stat. 1485 (1990). These amendments use the framework established by the



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previous legislation to enable a new closure round in 2005.

Although in large part the 2005 round of base closures will closely follow the process established in previous rounds, the BRAC 2005 enabling legislation does allow for important differences in its implementation. Perhaps the most notable difference between the BRAC 2005 legislation and that of previous rounds will prove to be the elimination of the No-Cost Economic Development Conveyance. The Economic Development Conveyance (EDC) is a property disposal authority for BRAC property dating back to 1993 when Senator David Pryor (D-Ark.) proposed an amendment to the 1990 BRAC Act that allowed for the conveyance of real and personal

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property to local reuse authorities (LRAs) to be used for economic development and job generation purposes. National Defense Authorization Act of 1994, Pub. L. No. 103-160, § 2903, 107 Stat. 1547 (1993). Specifically, the Pryor Amendment, as it became known, allowed the Secretary to “transfer real property and personal property located at a military installation to be closed . . . to the redevelopment authority . . . for consideration at or below the estimated fair market value of the property transferred or without consideration.” Id. § 2903(a).

The advent of the EDC was a reaction to closure communities’ frustration with the then-available property disposal methods. The most well-known disposal methods at that time were the Public Benefit Conveyance (PBC) and public sale. The PBC could be used to transfer property at no cost, but only for limited purposes such as education, airports, prisons, historical monuments, and parks and recreation. Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 541 et seq., § 550, § 553, § 554. Public sale entailed the transfer of the property via either a negotiated sale or public auction process. Id. § 545. Neither the PBC nor the public sale method of property disposal allowed the LRA to gain property with sufficient flexibility to allow it to successfully reuse the property for economic development purposes. In contrast, the EDC allowed the military departments to convey former base property to the LRA for fair market value consideration and with fewer restrictions.

As originally configured, the EDC proved a useful tool in theory, but it presented practical difficulties for communities struggling to revitalize their economies. Communities that had just had their economic life blood stripped away by BRAC found the appraisal process that came hand-in-hand with the EDC drawn out and frustratingly closed to local access and input. Further, at the end of the process, these communities

faced paying the military departments millions of dollars to regain property the communities had, in many cases, given to the DoD for installation use. That, coupled with the increasingly common, and often accurate, belief on the part of LRAs that they did not have a true understanding of the condition of the base properties, or of what it would take to make such property conducive to modern development, meant that successful EDC conveyances were few and far between and much BRAC property remained static.

The failure of the EDC tool to move property off the federal books resulted in another amendment to the BRAC Act in 1999. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 2821, 113 Stat. 512 (1999). This time, members of Congress heard what closure communities had been trying to tell



them all along: the property had to be delivered in a manner that allowed the LRA the most flexibility in reuse (EDC-like), but it had to be conveyed at no cost to the LRA (PBC-like). Thus, the No-Cost EDC was born. The No-Cost EDC allowed for the conveyance of property for economic development and job generation at no cost to the LRA. The communities’ cries for help were answered and BRAC property began, finally, to be successfully conveyed and redeveloped.

The BRAC 2005 legislation has now turned back the clock on the

EDC. The EDC conveyance mechanism remains, but only in its pre-1999 configuration. The EDC provisions within the latest base closure act now provide that “the Secretary shall seek to obtain consideration in connection with any transfer . . . of property located at the installation in an amount equal to the fair market value of the property as determined by the Secretary.” Pub. L. No. 107-107, § 3006, 115 Stat. 1012, 1350 (2001) (amending Pub. L. No. 101-510, § 2905(b)(4)(B)). The Secretary has the discretion, but is not obligated, to transfer property for less than fair market value or no consideration. Id.

One member of Congress has already attempted to restore the No-Cost EDC. In 2003, Rep. Sam Farr (D-Cal.) introduced a bill that would have made the No-Cost EDC mandatory for bases closed under BRAC 2005 and would have expanded the scope of the No-Cost EDC to include housing initiatives. H.R. 1903, 108th Cong. (2003). That bill was referred to the House Armed Services Committee and has not since emerged. At least for now, the No-Cost EDC will not be available to BRAC 2005 closure communities.

The Commission

The 2005 BRAC Commission will consist of nine members nominated by the President of the United States and confirmed by the Senate. Pub. L. No. 107-107, § 3001, 115 Stat. 1012, 1342 (2001) (adding a new Section 2912 to Pub. L. No. 101-510). The legislation requires the President to nominate the full Commission no later than March 15, 2005. Id. § 2912(d)(1). The BRAC legislation allows the Speaker of the House and the Senate majority leader to each suggest two members for the President’s consideration. Pub. L. No. 101-510, § 2902(c)(2). In the spirit of bi-partisanship, the legislation also allows the minority leaders of the Senate and House to suggest one member each to the President. Id. The remaining three members of the Commission are chosen by the

President in his discretion. The President also selects the Commission's chair from among the nominated members and the chair hires the Commission staff members. *Id.* § 2902(c)(3).

Essentially, the BRAC Commission acts as an appellate body charged with reviewing the closure and realignment decisions made by the Secretary. The Commission received the Secretary's recommendations on May 13, 2005, and will spend the next four months reviewing the DoD's closure decisions and the data supporting those decisions. Pub. L. No. 107-107, § 3003 (adding a new Section 2914 to Pub. L. No. 101-510). The Commission will first hold public hearings in Washington, D.C., receiving testimony from DoD officials, and then hold regional hearings across the country. *Id.*; Pub. L. No. 101-510, § 2903(d). These regional hearings are designed to allow each community with an installation selected by the Secretary for closure or realignment to appear before the Commission to present its case against base closure.

Unlike the President and Congress, the Commission is empowered to make changes to the list proffered by the Secretary. Pub. L. No. 101-510, § 2903(d)(2)(B). The BRAC 2005 legislation has, however, made the exercise of that power by the Commission more difficult. Under amendments included in the Defense Authorization Act for Fiscal Year 2005, adding an installation to the Secretary's list requires an affirmative vote of seven of the nine Commission members. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 2834, 118 Stat. 1811 (2004). In addition, two members must visit the installation proposed to be added. *Id.* These requirements will likely make it difficult for the Commission to add bases to the Secretary's list.

Although its legislative authority expires on April 15, 2006, the BRAC Commission's role will essentially end on or before September 8, 2005,

when the Commission must submit its final closure and realignment recommendations to the President. If the President accepts the list in its entirety, he must transmit the list to Congress no later than November 7, 2005. Pub. L. No. 107-107, § 3003 (adding a new Section 2914 to Pub. L. No. 101-510). On receipt of the list from the President, Congress has 45 days to reject the list en masse. Pub. L. No. 101-510, § 2903(e). If Congress does not act to reject the closure and



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realignment list, the list is deemed accepted and final. Pub. L. No. 107-107, § 3003. The requirement that the President and Congress accept or reject the closure list en masse is an attempt by the drafters of the BRAC legislation to remove politics from the BRAC process.

Going . . . Going . . . Gone?

Although, as discussed above, the military departments have many different mechanisms under which they may dispose of BRAC real and personal property, DoD and the individual military departments have seemingly rediscovered one of the older property transfer mechanisms on the books, the public auction. The Navy has had two successful experiences with using public auctions to dispose of former installation property, and these successes are prompting the other military departments to re-

examine the way that they dispose of BRAC property.

First, the Navy auctioned 240 acres of land at the former Tustin Marine Corps Air Station near the cities of Tustin, Irvine, and Santa Ana, California. The winning bidder for that property paid the Navy \$208 million. George Stewart, *Helicopter Base Auction Nets \$208 Million*, Irvine World News, Oct. 3, 2002. More recently, Lennar Corp., the nation's third largest home builder, was the winning bidder for approximately 3,700 acres of the former El Toro Marine Corps Air Station in Orange County, California. Jean O. Pasco, *One Bidder Wins It All at El Toro*, L.A. Times, Feb. 17, 2005, at B1. Lennar will reportedly pay the Navy \$649.5 million in exchange for that property. Many at the DoD and among individual military departments view these auctions as model disposal initiatives.

Although few base properties in the United States have the unquestionable value that 3,700 acres in Orange County, California, do, disposal by public auction will be sought by the military departments at many, if not all, of the BRAC 2005 closure sites. The days of acquiring an entire base by a PBC or EDC transfer are most probably gone. More likely, the military department involved will seek to employ many disposal methods, including public auction, at a single site.

Closure communities should be wary of the public auction. In communities such as Orange County, the public auction combined with diligent local planning initiatives may indeed be successful. Most bases, though, are not located in places such as Orange County. For bases located in areas where property values are more typical, the public auction may be less feasible and much less desirable. Those LRAs that have spent the last decade or so attempting to redevelop former base property in rural areas, for example, will be the first ones to profess that, in those areas in which there is not an immediate market, LRAs must create the market.

Further, an attempt to submit even a portion of former base property to public auction may be equally disastrous. It should be understood that the military departments will be charged with disposing of the BRAC property as quickly as possible and for as much consideration as possible. It follows, therefore, that the military departments will likely seek to dispose of the property and recover their costs, or any portion thereof, via public auctions. It is logical that the military departments will seek to auction off the most valuable (which is to say, readily developable) portion

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of the base. LRAs charged with redeveloping base property and revitalizing the surrounding community's economy may find they need the income from that readily developable portion of the base to support the development of the remaining, less desirable, property. If the military department has auctioned the most valuable portion off to the highest bidder, the LRA will have lost a valuable tool in its efforts to redevelop the remaining property.

Conclusion

For those veterans of the base closure efforts of the last 20 years, this year's BRAC round will be familiar territory. For BRAC neophytes, the ensuing

12 months will be stressful and frustratingly confusing. Unfortunately, feelings of frustration and confusion are unlikely to be abated anytime soon for those communities that find their local bases on the final closure list transmitted to Congress by the President this fall. Although that act will represent the culmination of the BRAC closure determination, it marks the mere beginning of the often long and trying base redevelopment process that most closure communities will find consumes their economic and political resources for the foreseeable future and beyond.

In January of this year, the Government Accountability Office released a report updating the status of prior base closure rounds. *Military Base Closures: Updated Status of Prior Base Realignments and Closures*, GAO-05-138 (Jan. 2005), available at <http://www.gao.gov/new.items/d05138.pdf>. This report found that, as of September 30, 2004, the DoD had transferred about 72% of 504,000 acres that were subject to the 1988, 1991, 1993, and 1994 BRAC rounds. Id. at 10. The report cited environmental remediation as the reason why the remaining 28% of the unneeded property had not been transferred. Id. Although the DoD had reported estimated savings of \$28.9 billion through fiscal year 2003, it had incurred an estimated \$8.3 bil-

lion for environmental cleanup costs and, together with other federal agencies, an estimated \$1.9 billion for redevelopment assistance for closure communities. Id. at 21, 24. Offering hope for the next closure communities, the GAO report also found that, of the 62 communities studied, 69% had unemployment rates equal to or lower than the national average and 48% had income growth rates higher than the national average. Id. at 28-29 nn.30-31. Despite this hope, the fact that 10 years have passed since the last BRAC round and a substantial portion of BRAC property from the 1988 closure round forward has not yet been disposed of is indication that the BRAC process is a long and difficult journey for all involved parties.

Fortunately, the new group of base closure communities will not be alone. They can draw on the collective experience of the communities that have lost their treasured military installations during the previous four BRAC rounds. The new closure communities also will have the resources offered by an entire base closure industry that has grown exponentially since the first BRAC round in 1988. Members of this niche industry include financial consulting firms, environmental consulting firms, planning firms, economic development consultants, private developers, and, of course, the legal profession. ■



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