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DECISION

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

FILE: B-194861 DATE: April 22, 1981

MATTER OF: Interdepartmental Waiver Doctrine - Withdrawn Lands

DIGEST: Department of Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. §§ 1701 et seq. (1976)) and on proposed amendment to the public land regulations (43 C.F.R. § 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) distinguished.

An executive department, using real property of another executive department, cannot pay either for the use of the property or, upon returning it, for its restoration to its original condition, unless authorized by statute. This is the so-called interdepartmental waiver doctrine. 59 Comp. Gen. 93 (1979); 44 Comp. Gen. 693 (1965); 32 Comp. Gen. 179 (1952); 31 Comp. Gen. 329 (1952); see 10 Comp. Gen. 288 (1930). We conclude that the doctrine does not prohibit payment for restoration when a department uses lands withdrawn from the public domain by the Department of the Interior under the provisions of the Federal Land Policy and Management Act of 1976, Public Law No. 94-579, 90 Stat. 2743 (1976) (classified to 43 U.S.C. §§ 1701 et seq. (1976)).

The Department of the Interior, which submitted this question, does not believe that the doctrine should apply when an agency uses withdrawn public lands, builds improvements, and then, when its need for the land ends, gives notice of its intention to relinquish it. Citing the 1976 Act (43 U.S.C. §§ 1701, 1712(c), and 1732(a)), the Deputy Assistant Secretary for Land and Water Resources says that United States policy favors retention of public lands for multiple use management. The doctrine, in Interior's view, can sometimes result in the property being disposed of contrary to Congressional intent, and the Department would like to issue regulations which would prevent that.

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The Deputy Assistant Secretary cites the case of the Lewistown Air Force Station as an example of how the doctrine can prevent multiple land use and seemingly frustrate Congressional policy favoring retention of public lands. Between 1958 and 1961, public domain land was withdrawn for use by the Air Force as an air station near Lewistown, Montana. The Air Force built 67 buildings and used the Station for about 10 years. In 1971, the Air Force notified the Bureau of Land Management that it intended to relinquish the land. The improvements had to be removed for the land to be suitable for retention by the United States for multiple use management, and a dispute arose over which agency should provide the funds for removal. The Station was situated within a block of Bureau-managed land classified for retention and multiple use management in public ownership. The Air Force maintained that the doctrine precluded it from paying for the removal, and requested the Bureau either to accept the property for return to the public domain with the improvements, or acknowledge that it was not acceptable so that it could be reported to the General Services Administration for disposal.

The doctrine frustrates the Congressional policy favoring retention of public lands because, in Interior's view, if the Air Force was not prevented by the doctrine from removing the improvements, the property could be made suitable for multiple use, and therefore, would not have to be disposed of. Interior believes that it would be more equitable for the withdrawing agency, and not the Department, to be responsible for removing improvements constructed on public lands. Requiring the Department to remove improvements from withdrawn public lands at the time of relinquishment may place a severe and unpredictable strain on its resources.

We understand that the Lewistown matter has been resolved. (A private individual interested in acquiring the boilers in the buildings at Lewistown agreed to remove all of the improvements at the Air Station as part of his bargain with the Government.) However, because similar situations are likely to occur, the Department plans to propose amendments to the public land regulations which would require an agency, at the time a parcel of public land is withdrawn, to assure the Department that it will remove any improvements it may add if, at the time the agency relinquishes the property, land use planning indicates that removal is desired. Interior suggests that the proposed amendment would provide a means of avoiding the operation of the interdepartmental waiver doctrine. Further, by providing advance notice to the agencies of their duty to remove improvements, the regulation would give them an opportunity to obtain an appropriation specifically for removal of improvements. Thus, the doctrine would not apply, because, in Interior's view, the appropriation obtained by the agency using the withdrawn land

would provide the statutory authority necessary to overcome the doctrine's application.

We agree that, where an agency has an appropriation specifically for the purpose of removing improvements on land withdrawn for its use, this constitutes the statutory authority, required by the interdepartmental waiver doctrine, which permits the using department to pay for restoration of the property. Cf. 59 Comp. Gen. 93 (1979).

It is still important, however, to determine whether the doctrine applies in a case involving relinquishment of withdrawn public lands when considering the efficacy of the proposed regulation. As stated above, under the doctrine a borrowing agency cannot pay for property restoration even if it has agreed with the lending agency to do so. Accordingly, if the doctrine applies, and a withdrawing agency does not seek a removal appropriation, or does not receive one, an agreement made pursuant to the suggested regulation would not be binding.

In our opinion, the Department may promulgate an enforceable regulation which would require an agency to agree to remove improvements it makes on withdrawn public land if the removal is necessary to make the property suitable for retention because we do not view the interdepartmental waiver doctrine as applying to the Lewistown-type situation.

The doctrine is based upon the premise that, since any repair or replacement of the borrowed property would be for the future use and benefit of the loaning department, the appropriation of the borrowing agency may not be charged with the cost. 59 Comp. Gen. 93 (1979), B-159559; August 12, 1968. Early statements of the doctrine involved personal property where the repair clearly benefited the lending agency. For example the Quarantine Service could not pay for a mule to replace one, borrowed from the Quartermaster Department of the Army, which accidentally drowned. 10 Comp. Dec. 222 (1903). Similarly, the Engineer Department could not pay for a lantern, borrowed from the Lighthouse Service of the Department of Commerce, which washed away during a heavy squall and could not be recovered. 22 Comp. Dec. 379 (1916). The Census Bureau, in another case, could not pay to recondition furniture borrowed from the Marine Corps. 10 Comp. Gen. 288 (1903). In such cases, restoration of the borrowed property clearly benefited the lending agency since it would use the property upon its return to carry out agency functions.

The Bureau of Land Management does not benefit, in the sense referred to in the cases, from restoration by another agency of withdrawn public lands. The public lands managed by the Bureau are simply

those lands belonging to the United States which remain from all of the Nation's original lands. A parcel of public land is not dedicated to a specific purpose unless the Congress or the Bureau acts. (At the time of the Federal Land Policy and Management Act's passage, the Congress estimated that the public lands totaled more than 450 million acres, about one-fifth of the Nation's original total of about 1,800 million acres. H.R. Rep. No. 1163, 94th Cong. 2d Sess. 2 (1976)).

The Bureau, when performing its withdrawal oversight duties, is acting as the Executive branch delegate of the Congress, in furtherance of the purposes of the Federal Land Policy and Management Act of 1976. At the time of the Act's passage, over 3,000 public land laws were in effect, presenting an incoherent expression of Congressional policies concerning the Nation's public lands. H.R. Rep. No. 1163, 94th Cong., 2d Sess. 1 (1976). Moreover, Congress believed that the Executive Branch "has tended to fill in missing gaps in the law, not always in a manner consistent with a system balanced in the best interests of all the people." Id. Therefore, the Act gave qualified withdrawal responsibilities to the Bureau, to be exercised in accordance with the Act's purposes in order to make the Nation's land use policy and practice stable and uniform. Id.

Furthermore, under the Act, Congress retained authority over certain important withdrawals. 43 U.S.C. § 1714(j) (1976). Thus, the Congress and the Bureau share the responsibility for withdrawals from the public domain. It is possible that a parcel of land may be withdrawn under the Bureau's authority, relinquished by the using agency, and then withdrawn by an Act of Congress to another agency for an altogether different purpose.

This situation is distinguishable from 59 Comp. Gen. 93 (1976), which involved land in the De Soto National Forest. De Soto was established from designated United States lands and from lands specifically acquired for the purpose of having the Forest Service permanently administer them as a National Forest. 1 Fed. Reg. 609; 49 Stat. 3524 (1936). Therefore, in contrast to the Bureau's situation involving public lands, restoration of property within the Forest's boundaries clearly benefits the Forest Service.

Moreover, charging removal expenses to the withdrawing agencies would not impair Congressional fiscal oversight. In fact, it would seem that the pertinent oversight committee could better determine an activity's true cost if the removal expense were charged against the appropriation available for the conduct of the activity than if the expense were charged against the Bureau's appropriation. Accordingly, we agree that the proposed regulation, requiring withdrawing agencies to agree to

bear the cost of restoring the land to its former condition returning it to the public domain, is proper.

Milton J. Socolar

Acting Comptroller General
of the United States