DECISION

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

FILE: B-217821 **DATE:** April 8, 1986

MATTER OF: Reimbursement by Navy to Federal Aviation Administration for damage to Instrument Landing System.

DIGEST:

1. The Federal Aviation Administration may not be reimbursed by the Navy for replacement cost of an Instrument Landing System owned by the Government at the El Paso, Texas International Airport which was destroyed by the crash of a Navy aircraft, since property of Government agencies is not the property of the separate entities but rather of the Government as a single entity and there can be no reimbursement by the Government to itself for damage to or loss of its own property.

2. Although the Federal Aviation Administration (FAA) charged the cost of replacement of Instrument Landing System (ILS) to its "Facilities and Equipment (Airport and Airway Trust Fund)" appropriation account which consists of appropriations made to the FAA from the Airport and Airway Trust Fund for the purpose of funding the acquisition, establishment and improvement of air navigation facilities, this does not bring activity within exception to interdepartmental waiver rule recognized by this Office for damage caused to property held in trust by the Government on behalf of particular identifiable beneficiaries in order to protect beneficiaries equitable interest in property. FAA is using Federal funds to repair damage to Government-owned property and is not acting as trustee on behalf of particular group of identifiable beneficiaries in repairing ILS.

This decision is in response to a request from J.E. Murdock, III, Chief Counsel, Federal Aviation Administration (FAA), Department of Transportation, dated March 5, 1985, asking whether it may be reimbursed by the Navy for the replacement cost of an Instrument Landing System (ILS) owned by the Government at the El Paso, Texas International Airport which was destroyed by the crash of a Navy aircraft. The FAA replaced the ILS at a cost of $33,000.00 and then sought reimbursement from the Navy. However, this request was denied in a letter dated December 2, 1983, from the Assistant Counsel for

the Office of the Navy Comptroller, Office of General Counsel, Department of the Navy, on the grounds that the decisions of this Office preclude inter-agency payment of claims for damages caused by employees of one agency to property owned by the Government and under custody and control of another agency. While the Navy recognized that certain limited exceptions to the rule exist, it is its view that this case does not fall within any of these exceptions. This position was affirmed in a letter submitted at our request by the Counsel for the Office of the Navy Comptroller.

On the other hand, the FAA contends that since the funds it used to replace the ILS came from the Airport and Airway Trust Fund, this case falls within the exception recognized by this Office in 41 Comp. Gen. 235 (1961).

For the reasons stated below we find that the reimbursement by Navy to the FAA for destruction of the ILS owned by the Government under the custody and control of the FAA is not authorized.

BACKGROUND

We have held that:

> "Generally, Federal inter-agency claims for damages to property are not reimbursed * * * on the theory that all property of agencies and instrumentalities of the Federal Government is not the property of separate entities but rather of the Government as a single entity. Thus there can be no reimbursement by the Government to itself for damage to or loss of its own property." 60 Comp. Gen. 710, 714 (1981).

Like most rules (this one is commonly referred to as the interdepartmental waiver rule), this one is not without its exceptions, express or implied. Thus, where the Congress has by statute required an inter-agency activity to operate on a self-sustaining basis by the recovery of all capital equipment and operating costs from other agency users on a reimbursable basis, a statutory exception to the rule is created. See 59 Comp. Gen. 515 (1980).

The FAA points out however that even in the absence of express statutory authority, we held in 41 Comp. Gen. 235 (1961) that a claim against the Air Force submitted by the

Bureau of Indian Affairs on behalf of the users of the San Carlos Irrigation Project, Coolidge, Arizona (characterized as a Government instrumentality), for damages to the project's power lines was not precluded under the interdepartmental waiver rule.[1] We held that:

> "* * * while title to and control of the San Carlos project remains vested in the United States and the project is a Government instrumentality it is clear that the only funds available for repair of the damage caused to the project are funds of the project beneficiaries held in trust for them by the Government. And, as stated by the Assistant Secretary, it is they rather than the Government who are bearing the instant loss." 41 Comp. Gen. 237-238 (1961) (emphasis supplied).

Relying upon the reference to the trustee status of the Government which resulted in the claim not being on behalf of another Government agency, but instead, on behalf of the third party beneficiaries, the FAA feels it enjoys a similar status because repairs to the ILS are funded from the Airport and Airway Trust Fund. We disagree.

DISCUSSION

The Airport and Airway Trust Fund (Trust Fund) is currently authorized and established under 26 U.S.C. § 9502 (1982). Under subsection 9502(b) amounts equivalent to taxes received in the Treasury under various aviation excise tax provisions are appropriated to the Trust Fund. In addition, there is authorized to be appropriated to the Trust Fund such amounts as are required to make any authorized expenditures. 26 U.S.C. § 9502(c). Interest on Trust Fund investments, as well as the proceeds from the sale of any Trust Fund investment asset, are to be credited to the Trust Fund. 26 U.S.C. § 9602(b)(3).

The Congress has authorized use of the Trust Fund for the purpose of meeting obligations of the United States. 26 U.S.C. § 9502(d). For example, the Congress has authorized

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[1] While we held that the interdepartmental waiver rule did not apply to the claim in this case, we indicated that other factors may have served to preclude the claim. 41 Comp. Gen. 238 (1961). Even if a claim may be presented, some basis of attributing liability to the agency alleged to have caused the damage in question must be found to exist.

the Trust Fund to obligate up to certain specified amounts for each fiscal year from 1982 through 1987 for making project grants to sponsors for airport planning or development.

The law also authorizes the making of appropriations to the Secretary of Transportation from tne Trust Fund for the purpose of funding the acquisition, establishment and improvement of air navigation facilities, 49 U.S.C. App. §§ 1348(b), 2205(a) (1982); the direct cost of operating and maintaining air navigation facilities, 49 U.S.C. App §§ 2205(c) (1982); and for research, engineering, development, and demonstration projects relating to improved facilities and to meet the needs of safe and efficient navigation, 49 U.S.C. App. §§ 1353 2205(b) (1982). The ILS falls within the definition of an air navigation facility.2/

Appropriations for capital improvements for air navigation facilities are included in the annual "Facilities and Equipment [F&E] (Airport and Airway Trust Fund)" appropriation account for the FAA. Appropriations for operation and maintenance expenses (including repairs) are included in the annual "Operations" appropriation to the FAA. This includes operations, maintenance and repairs to air navigation facilities. Each year some portion of this appropriation is derived from the general fund in the Treasury and the remainder from the Trust Fund. The FAA charged the $33,000.00 cost of replacing the ILS to its F&E account, as opposed to its Operations account, apparently on the ground that the ILS could not be repaired but had to be replaced.

In our opinion, the situation described in 41 Comp. Gen. 235 (1961) is clearly distinguishable from the situation presented here. The San Carlos Irrigation project was undertaken in consequence of the special trust relationship the Government exercises with regard to Indians. No such special relationship exists with regard to air carriers or air passengers. The San Carlos Irrigation project was characterized as a Government instrumentality operating in furtherance of this

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2/ 49 U.S. Sec. 1301(8) defines air navigation facility to mean:

> "* * * any facility used in, available for use in, or designed for use in, aid or air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft."

special trust relationship. Here, a Government agency--the FAA--is serving the Government's interest on behalf of the public generally.

Although the San Carlos Irrigation project (which includes both irrigation and electrification activities) was initially constructed using appropriated funds, the construction cost was required to be repaid by the project's users. Additionally, users were required to pay the cost of operating and maintaining the project. Presumably this liability included the cost of repairing the damaged power lines. The beneficiaries of the San Carlos Irrigation project entered into a debtor-creditor relationship with the Government to pay the project's costs either by virtue of statutory lien's being placed upon Indian lands to assure payment of their proportionate share of costs or by contracts executed with public or private landowners agreeing to pay the assessed charges. Here, funds are raised by excise taxes which remain constant unless adjusted by legislation. Furthermore, the legal liability is limited to the tax assessed and ends when payment for the particular item or service subject to the tax is made. No additional liability accrues by virtue of use of purchase of the item or service.

The assessments paid by the beneficiaries of the San Carlos Irrigation project were deposited directly to a trust fund account which a permanent appropriation made available for the purpose of operating and maintaining the San Carlos Irrigation project, 25 U.S.C. § 385a (formerly 31 U.S.C. § 725S-1) and were not viewed as Federal funds. Here, the excise taxes are deposited to the general fund of the Treasury and amounts equal to receipts are transferred to the credit of the Trust Fund. However, no expenditures for construction, operation and maintenance of air navigation facilities may take place unless the Congress appropriate funds for that purpose. Once appropriated they remain Federal funds. Furthermore, should they choose to do so, there is nothing to preclude the Congress from appropriating the funds for some other purpose unrelated to construction, operation or maintenance of air navigation facilities. While the Trust Fund serves to identify a source of funding for these purposes, the Congress has not limited itself to amounts in the Trust Fund for purposes of funding these activities and appropriations from the general fund are available and used to supplement the Trust Fund.

Nothing in the FAA's submission warrants our concluding (or even contends) that the ILS was not property owned by the United States in its sovereign capacity on behalf of the public generally, but instead as trustee exercising fiduciary duties in relationship to the property on behalf of specific identifiable beneficiaries. Merely appropriating amounts equivalent

to aviation excise taxes collected to the Trust Fund is insufficient to create an equitable interest in the Trust Fund or the property purchased with funds appropriated from the Trust Fund on behalf of the various excise taxpayers. In such a situation we cannot distinguish between the interests represented by the Government on behalf of some particular beneficiary with regard to the ILS purchased with funds appropriated from the Trust Fund that would warrant not applying the interdepartmental waiver rule, and the interest normally represented by the Government on behalf of taxpayers generally with regard to property purchase with funds appropriated from the general fund of the Treasury which in the past has not served to preclude application of the interdepartmental waiver rule.

Therefore we find no basis for holding that the interdepartmental waiver rule is inapplicable in this situation.

Milton J. Socolar

Acting Comptroller General
of the United States