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Office of the General Counsel

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Mr. James R. Turner
Authorized Certifying Officer
Forest Service
U.S. Department of Agriculture
P.O. Box 96090
Washington, D.C. 20090-6090

Dear Mr. Turner:

This responds to your inquiry concerning whether the Forest Service may transfer funds to the Office of General Counsel (OGC), Department of Agriculture (USDA) to cover the salaries and expenses of OGC attorneys dedicated to work on Forest Service issues.¹ For the reasons discussed below, we do not object to past transfers made by the Forest Service to OGC; however, the Forest Service and OGC should not engage in such transfers in the future in the absence of clear intention expressed by the Congress permitting such transfer.

Both the Forest Service and OGC receive lump sum appropriations to finance their operations. See, e.g., Pub. L. No. 104-208, 110 Stat. 3009, 3009 - 205 (1996) ("For necessary expenses of the Forest Service . . ."); Pub. L. No. 104-180, 110 Stat. 1569, 1572 (1996) ("For necessary expenses of the Office of the General Counsel . . ."). The Department's Inspector General questions whether the Forest Service appropriation is available for transfer to OGC to finance legal services provided the Forest Service. The Inspector General suggests that the OGC appropriation is

¹The letter variously describes these issues as "complex legal issues", "emerging issues", issues requiring "immediate actions", "substantially different from normally provided legal services for which the OGC receives appropriation funding". The letter, however, does not otherwise identify any particular issues addressed or legal services provided by OGC.

specifically available for the purpose of providing legal services to all of the Department's offices and agencies, including the Forest Service. As a general rule, if an expense falls specifically within the scope of one appropriation, even though it may be reasonably related to the purpose of a second appropriation, the expense is properly payable only from the first appropriation. See 63 Comp. Gen. 422, 427-28 (1984); 20 Comp. Gen. 102 (1940). Consistent with this rule, we generally would view OGC's appropriation as the only one available to cover the cost of providing legal services to the Forest Service, irrespective of the Forest Service appropriation for necessary operating expenses.

The Agriculture Department's OGC has long viewed its appropriation as available to cover the cost of providing only those services delineated in its annual budget request. Consequently, when the Forest Service is confronted with complex or emerging legal issues that require immediate attention, OGC has asked the Forest Service to reimburse it for the costs of addressing those issues. OGC believes this is appropriate since it does not develop its budget in contemplation of such issues. See, e.g., Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriation for 1994: Hearings before a Subcomm. of the House Comm. on Appropriations, 103d Cong., 1st Sess. 707 (1993) ("We receive an appropriation which delineates the kinds of services we can provide for the purposes the Congress has in mind when it provides that appropriation. So only where there is a function that the agency has--or a need that agency has--which is distinguishable from the kinds of services that we have told this committee--that we have told the Congress--we intend to provide with our appropriated monies, do we think that we can proceed on this kind of reimbursable basis."). Programmatically, this affords flexibility to deal with emerging issues. As the emerging issues become part of the Forest Service's ongoing, routine operations, OGC will assume funding responsibility for attorneys dedicated to these issues.

Over the years, OGC has advised the appropriations committees of its reimbursable arrangements with the Forest Service and other departmental agencies. The response has been somewhat mixed. In 1994, for example, the House Appropriations Committee, Agriculture Subcommittee, stated, "The Committee does not expect the Office of General Counsel to seek reimbursement from other agencies' appropriations in this bill . . . to supplement its appropriation." H.R. Rep. No. 103-542, at 14 (1994). The Senate Appropriations Committee, however, cautioned OGC to seek reimbursement "only when absolutely necessary." S. Rep. No. 103-290, at 13 (1994). The conferees on the fiscal year 1995 appropriations bill stated that they "do not expect the Office of the General Counsel to seek reimbursement from other agencies in this Act to supplement its appropriation." H.R. Rep. No. 103-734, at 7 (1994). The conferees further offered that "[i]f funds are transferred from appropriations in this Act to the Office of the General Counsel, they must have the approval of the agency administrator." Id., at 7-8.

In a 1996 hearing on its appropriations request, an OGC witness advised the House Appropriations Subcommittee on Agriculture that OGC's budget request for fiscal year 1997 included amounts to cover legal services for the Forest Service that the Forest Service had previously reimbursed OGC. Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations for 1997: Hearings before a Subcomm. of the House Comm. on Appropriations, 104th Cong., 2d Sess. 582 (1996). The OGC witness explained, "For fiscal year 1997, the Forest Service may not be in the position to provide the estimated level of funding for services provided by OGC attorneys because of fiscal constraints." Id. Consistent with OGC's longstanding interpretation of its appropriation, the OGC witness noted that "[s]ince the work being performed in the Forest Service area has proven to be permanent in nature, vital to the client agency and necessary to the Department, OGC is proposing to absorb the cost . . . into our direct appropriation in fiscal year 1997" Id.

We ordinarily accord some deference to an agency's interpretation of the availability of its appropriation. B-252467, June 3, 1994; B-247563.2, May 12, 1993. Given that OGC currently accepts no reimbursements from the Forest Service, and that it had clearly, and annually, advised the Congress of its interpretation of the availability of its appropriation and of its reimbursement arrangements, we will not object to past reimbursements. In the future, however, OGC should not accept reimbursements from the Forest Service in the absence of clear intention expressed by the Congress permitting such reimbursements.

Federal law clearly requires specific legislative authority to transfer amounts between appropriations accounts. "An amount available under law may be withdrawn from one appropriation account and credited to another . . . only when authorized by law." 31 U.S.C. § 1532. Thus, when the Forest Service uses its appropriation to reimburse OGC, there must be some authority to support the transfer in order to avoid augmenting or supplementing OGC's appropriation. In a 1993 appropriation hearing, OGC cited 7 U.S.C. § 2263 and the Economy Act, 31 U.S.C. §§ 1534, 1535, as authority for the transfer of funds under its reimbursable agreements.

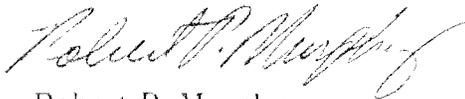
We do not think that 7 U.S.C. § 2263 provides the needed authority to transfer funds. This statute addresses a situation entirely different from that present here. Section 2263 provides that "each appropriation available to the Department of Agriculture may be charged . . . for the benefit of any other appropriation available to the Department, for the purpose of . . . financing activities . . . for which funds are available both in the financing appropriation so charged and in the appropriation so benefited" The legislative history of section 2263 indicates that the statute was designed for situations where several USDA agencies, involved in the same activity, incur joint costs that cannot practically be allocated among the appropriation accounts at the time of payment. S. Rep. No. 89-506, at 9 (1965).

Section 2263 permits payment to be made initially from one account, with the proper amounts to be allocated later from the financing account to other accounts. Thus, section 2263 applies where both the transferring and receiving accounts are available to cover the cost of the activity being jointly financed. Here, however, both appropriations are not available to finance these costs. Therefore, section 2263 does not authorize the transfers.

The Economy Act authorizes an agency to obtain goods or services from another agency or unit within the same agency that the agency or unit is able to provide or get by contract, and to transfer funds to cover the actual costs of such goods or services if, among other things, "amounts are available." 31 U.S.C. § 1535(a)(1). The Economy Act does not authorize the transfer of funds to cover an agency's cost of doing what it is otherwise required to do out of its own appropriation. 40 Comp. Gen. 369 (1960); 16 Comp. Gen. 333 (1936). Accordingly, because the Forest Service's appropriation is not available to cover the legal expenses, the Economy Act does not provide transfer authority here.

I trust the foregoing is responsive to your request.

Sincerely yours,



Robert P. Murphy
General Counsel