



B-328323

February 28, 2017

The Honorable Lisa Murkowski
Chairman
The Honorable Tom Udall
Ranking Member
Subcommittee on the Interior, Environment, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable Ken Calvert
Chairman
The Honorable Betty McCollum
Ranking Member
Subcommittee on the Interior, Environment, and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *U.S. Forest Service—Line-Item Appropriation for Acquiring Aircraft for the Next-Generation Airtanker Fleet*

This responds to your request for an opinion regarding the U.S. Forest Service's use of \$65 million appropriated to the Forest Service “for the purpose of acquiring aircraft for the next-generation airtanker fleet” in the Consolidated and Further Continuing Appropriations Act, 2015. See Pub. L. No. 113-235, div. F, title III, 128 Stat. 2130, 2430 (Dec. 16, 2014). The \$65 million is a line-item amount in the Forest Service's fiscal year (FY) 2015 Wildland Fire Management appropriation. You ask whether the Forest Service's actions with regard to the Wildland Fire Management appropriation and, specifically, the funds earmarked in that appropriation for acquiring aircraft for the next-generation airtanker fleet, were in compliance with the purpose statute, 31 U.S.C. § 1301, and the Antideficiency Act, 31 U.S.C. § 1341(a).¹

¹ Letter from Chairman and Ranking Member of the Subcommittee on the Interior, Environment and Related Agencies, Committee on Appropriations, House of Representatives, and Chairman and Ranking Member of the Subcommittee on the Interior, Environment and Related Agencies, Committee on Appropriations, United States Senate, to the Comptroller General, GAO (July 14, 2016). You asked a

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The purpose statute provides that appropriated funds may be used only for authorized purposes. B-327922, May 12, 2016, at 2. The Antideficiency Act, among other things, prohibits federal agencies from incurring obligations exceeding an amount available in an appropriation. B-327432, June 30, 2016, at 3.

As explained below, we conclude that the Forest Service failed to comply with the purpose statute because it obligated some amount of the \$65 million designated for acquiring aircraft for the next-generation airtanker fleet for other purposes, such as salaries, training, and equipment maintenance. The Forest Service may be able to adjust its accounts to correct its purpose statute violation. If the Forest Service, after adjusting its accounts, has sufficient budget authority to cover all obligations incurred, then the Forest Service would not have violated the Antideficiency Act.

Consistent with our practice for legal opinions, our office requested and received the views of the Department of Agriculture's (USDA) Office of the General Counsel regarding the factual circumstances of the matter, as well as its legal views regarding whether the Forest Service's actions were in compliance with the purpose statute and Antideficiency Act.² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Associate General Counsel for General Law and Research, USDA, to Assistant General Counsel for Appropriations Law, GAO (Dec. 8, 2016) (Response Letter); Email from Associate General Counsel for General Law and Research, USDA, to Assistant General Counsel for Appropriations Law, GAO (Jan. 20, 2017).

BACKGROUND

Under the Consolidated and Further Continuing Appropriations Act, 2015, the Forest Service received an appropriation of \$2,333,298,000, to remain available until expended, for wildland fire management. Pub. L. No. 113-235, 128 Stat. at 2430. The appropriation provided funds for a number of wildland fire management activities, including emergency fire suppression on or adjacent to National Forest System lands, fire presuppression activities on such lands, and emergency rehabilitation of burned over National Forest System lands. The appropriation specified that of the \$2,333,298,000 provided for wildland fire management, "\$65,000,000 shall be available for the purpose of acquiring aircraft for the next-generation airtanker fleet to enhance firefighting mobility, effectiveness, efficiency, and safety." *Id.*

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number of questions in the letter. This opinion only addresses the Forest Service's actions with regard to the \$65 million appropriated to the Forest Service for acquiring aircraft for the next generation airtanker fleet. GAO is conducting an audit engagement to address your other questions.

² The Forest Service is a component of USDA.

USDA explains that the \$2,333,298,000 appropriated for wildland fire management was recorded in the Forest Service's Wildland Fire Management account. Response Letter, at 2. USDA adds that the Forest Service separates the Wildland Fire Management account into two subaccounts--the Wildland Fire Preparedness subaccount and the Wildland Fire Suppression subaccount. *Id.* USDA states that although the appropriation included a line-item specifically earmarking \$65 million for the acquisition of aircraft for the next-generation airtanker fleet, "no budget line-item was created for the Next-Gen airtanker by the Forest Service, the [USDA], or the Office of Management and Budget (OMB)." *Id.*, at 1. USDA also notes that OMB "did not separately apportion any funds for the Next-Gen airtanker acquisition in FY 2015." *Id.* USDA concludes that "this lack of any separate apportionment or account for the Next-Gen airtanker was due to the fact that it was a new item, not included in the agency's budget request, and added late in the appropriations process." *Id.* USDA adds that because of this, the Forest Service "tracked the funds in question together with all of its other funds for wildland fire preparedness (referred to as the 'WFPR' subaccount), rather than setting aside \$65 million in a separate budget line-item account." *Id.*, at 2.

USDA acknowledges that in mid-September 2015, the unobligated balance of the Wildland Fire Management account (which included the Wildland Fire Preparedness and the Wildland Fire Suppression subaccounts) was less than the "\$65 million amount appropriated for Next-Gen airtanker acquisition." *Id.* As such, there was not, as of mid-September 2015, "\$65,000,000 . . . available for the purpose of acquiring aircraft for the next-generation airtanker fleet to enhance firefighting mobility, effectiveness, efficiency, and safety," as directed in the Consolidated and Further Continuing Appropriations Act, 2015. See Pub. L. No. 113-235, 128 Stat. at 2430.

DISCUSSION

The purpose statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law." 31 U.S.C. § 1301(a). The fact that an appropriation for a specific purpose is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated. B 278121, Nov. 7, 1997, at 2.

Here, the language regarding the acquisition of aircraft is straightforward and does not contain any qualifying terms. It provides simply that "of the funds provided, \$65,000,000 shall be available for the purpose of acquiring aircraft for the next-generation airtanker fleet to enhance firefighting mobility, effectiveness, efficiency, and safety." Pub. L. No. 113-235, 128 Stat. at 2430. Accordingly, the Wildland Fire Management appropriation makes the entire amount of \$65,000,000 available only for the acquisition of aircraft for the next-generation airtanker fleet.

Nevertheless, USDA contends that the Forest Service's actions here did not constitute a violation of the purpose statute. USDA first acknowledges that the Forest Service, as explained above, did not separately account for or manage the \$65 million that Congress had expressly appropriated for the acquisition of aircraft for the next generation airtanker fleet. Rather, it recorded obligations in mid-September 2015 in the Wildland Fire Management appropriation that caused the amounts available for the acquisition of aircraft for the next-generation airtanker fleet to drop below the \$65 million that Congress had expressly appropriated for that purpose.

USDA notes that the Forest Service's prior fiscal year wildland fire management appropriations had also been made available until expended in their respective appropriations acts. Funds that are "available until expended," commonly known as "no-year funds," are not subject to the bona fide needs rule, and remain available for obligation for an indefinite period of time. B-326945, Sept. 28, 2015, at 3. USDA refers to these no-year funds here as "fungible as to time," presumably because of their no-year characteristic. Response Letter, at 2–3. USDA next notes because these amounts were "fungible as to time," and there were sufficient unobligated amounts remaining in prior fiscal year appropriations, these amounts were available for the acquisition of aircraft for the next-generation airtanker fleet. *Id.* USDA concludes that because these "alternative sources of funding" were available in September 2015, and could have been used, the Forest Service's actions did not violate the purpose statute.

We disagree. USDA's position, that there were other unobligated funds available at the time that could have been used, does not nullify the express language of the line-item appropriation or the purpose statute. The purpose statute requires that appropriations be applied only to the objects for which the appropriations were made, and prohibits charging authorized activities to the wrong appropriation. 31 U.S.C. § 1301(a); B-327432, June 30, 2016, at 3. The fact remains that in mid-September 2015, the Forest Service used amounts expressly appropriated for the acquisition of aircraft for the next-generation airtanker fleet for other purposes. By doing so, the Forest Service violated the purpose statute.

The fact that there were unobligated wildland fire management funds from prior fiscal years available in September 2015 does, however, have a direct bearing on whether the Forest Service's purpose statute violation also resulted in a violation of the Antideficiency Act. Indeed, USDA states, without further explanation, that it has "identified in its accounts a combination of . . . funding sources to create a reserve of \$65 million for Next-Gen airtanker acquisition." Response Letter, at 2–3.

Given these potential funding sources, the Forest Service should, if otherwise able, adjust its accounts to correct its purpose statute violation. Specifically, the Forest Service should deobligate those amounts charged to the FY 2015 Wildland Fire Management appropriation that caused the amount available to drop below the \$65 million that was to remain available for acquiring aircraft for the next-generation

airtanker fleet. The Forest Service should then obligate those amounts to the unobligated balances of another appropriation available as to purpose, amount, and time. If the Forest Service, after adjusting its accounts, does not have sufficient budget authority to cover all obligations incurred, then the Forest Service violated the Antideficiency Act. 31 U.S.C. § 1341; B-302973, Oct. 6, 2004, at 9. The Forest Service should then report an Antideficiency Act violation as required by law.³

CONCLUSION

The Forest Service violated the purpose statute when it used amounts expressly appropriated for the acquisition of aircraft for the next-generation airtanker fleet for other purposes. To correct that violation, the Forest Service, if otherwise able, should adjust its accounts as described above. If, after adjusting its accounts, the Forest Service does not have sufficient budget authority to cover all obligations incurred, then the Forest Service violated the Antideficiency Act and should report accordingly.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853 or Julia C. Matta, Assistant General Counsel for Appropriations Law, at (202) 512-4023.

Sincerely yours,



Susan A. Poling
General Counsel

³ See 31 U.S.C. § 1351 (requiring the head of an agency to report all relevant facts and a statement of actions taken to the President and Congress, and to send a copy of the report to the Comptroller General).