



Decision

Matter of: Department of Agriculture—Application of Statutory Notification Requirement

File: B-334306

Date: August 15, 2023

DIGEST

After announcing that it would relocate most of the employees of both the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS), the United States Department of Agriculture (USDA) transferred amounts appropriated to each of these agencies to satisfy an obligation to a contractor for relocation planning assistance.

By notifying the Appropriations Committees before transferring the amount appropriated to NIFA under a fiscal year 2018 appropriations act, USDA complied with a notification requirement in the same act. Although USDA made the notification during the fiscal year preceding that in which it made the transfer, the amount transferred from NIFA's appropriation was available without fiscal year limitation and, therefore, the notification for this amount remained operative during the succeeding fiscal year.

In contrast, the amounts USDA transferred from ERS were appropriated under a fiscal year 2019 continuing resolution. Although these amounts were subject to the same notification requirement, USDA did not submit a notification to the Appropriations Committees for this amount. The notification that USDA submitted to the Appropriations Committees pertained only to amounts appropriated in the fiscal year 2018 appropriations act and not to amounts appropriated under the fiscal year 2019 continuing resolution. Therefore, USDA violated both the notification requirement and the Antideficiency Act.

DECISION

This responds to a request for our decision concerning whether USDA complied with a statutory notification requirement when it transferred amounts to satisfy an

obligation to a contractor for relocation planning assistance.¹ In accordance with our regular practice, we contacted USDA to seek factual information and its legal views on this matter.² USDA provided information and its legal views in its response and follow-up communications.³

BACKGROUND

On August 9, 2018, USDA announced its plan to move most employees of two research agencies—the Economic Research Service (ERS) and the National Institute of Food and Agriculture (NIFA)—out of the Washington, D.C. area.⁴ The same day, USDA sent letters informing the House and Senate Agriculture appropriations subcommittees of its proposal.⁵ USDA wrote that NIFA and ERS “will engage private sector assistance in our search” for potential headquarters sites

¹ Letter from Representative Jennifer Wexton, Representative Gerald E. Connolly, and Representative Donald S. Beyer, Jr., to Comptroller General (May 6, 2022).

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 Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (June 29, 2022); Email from Assistant General Counsel for Appropriations Law, GAO, to Associate General Counsel, General Law and Research Division, USDA (Feb. 14, 2023); Telephone Conversation with Associate General Counsel and Senior Counsel, General Law and Research Division, USDA, with Assistant General Counsel for Appropriations Law and Senior Attorney, GAO (Apr. 25, 2023) (Telephone Conversation).

³ Letter from Associate General Counsel, General Law and Research Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Nov. 4, 2022) (USDA Response); Letter from Associate General Counsel, General Law and Research Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Mar. 27, 2023) (USDA Supplemental Response); Telephone Conversation.

⁴ USDA, *USDA to Realign ERS with Chief Economist, Relocate ERS & NIFA Outside DC*, Release No. 0162.18 (Aug. 9, 2018) (Release No. 0162.18), *available at* <https://www.usda.gov/media/press-releases/2018/08/09/usda-realign-ers-chief-economist-relocate-ers-nifa-outside-dc> (last visited Aug. 10, 2023).

⁵ USDA Response, Attachment D.

using funds “appropriated in the 2018 Omnibus Appropriations Act, including the funding provided specifically to NIFA for relocation and renovation costs.”⁶

On October 22, 2018, USDA obligated \$339,310.60 of its Office of the Secretary appropriation on a contract with a private vendor for relocation planning assistance.⁷ ERS and NIFA each transferred half that cost (\$169,655.30) to the Office of the Secretary appropriation.⁸ On June 13, 2019, USDA announced ERS and NIFA would relocate to the Kansas City region.⁹

DISCUSSION

At issue here is (1) whether USDA was required by law to notify the Appropriations Committees before it transferred amounts to the Office of the Secretary appropriation to satisfy the obligation for a contract for relocation planning assistance; and (2) if so, whether USDA made the required notification. We first consider these issues for amounts appropriated to NIFA and then for amounts appropriated to ERS.

NIFA amounts

On October 22, 2018, USDA transferred about \$170,000 from an appropriation for NIFA’s relocation expenses to the appropriation for the USDA Office of the

⁶ USDA Response, Attachment D, at 1, 3, 5, and 7.

⁷ See USDA Office of Inspector General, *USDA’s Proposal to Reorganize and Relocate the Economic Research Service and National Institute of Food and Agriculture*, Inspection Report No. 91801-0001-23, at 1 n.8 (Aug. 2019) (USDA OIG Report). According to the documentation provided, ERS and NIFA transferred funds to Departmental Administration (DA) for it to award a contract on their behalf. USDA Response, at 4. DA is part of the Office of the Secretary and has a line-item appropriation in the “Processing, Research, and Marketing, Office of the Secretary” account in the President’s Budget. *Appendix, Budget of the United States Government for Fiscal Year 2024*, at 61, 63, available at <https://www.govinfo.gov/content/pkg/BUDGET-2024-APP/pdf/BUDGET-2024-APP.pdf> (President’s Budget) (last visited Aug. 10, 2023).

⁸ USDA Response, at 4 and Attachment C, at 4, 8, 13, 17; USDA Supplemental Response, Attachment 2, at 5–7, 10–11; USDA OIG Report, at 1 n.8.

⁹ USDA, *Secretary Perdue Announces Kansas City Region as Location for ERS and NIFA*, Release No. 0091.19 (June 13, 2019), available at <https://www.usda.gov/media/press-releases/2019/06/13/secretary-perdue-announces-kansas-city-region-location-ers-and-nifa> (last visited Aug. 10, 2023).

Secretary, which used the amount to satisfy an obligation to a contractor for relocation planning assistance.¹⁰ We first consider whether USDA was required by law to notify the Appropriations Committees before it made this transfer.

The amount USDA transferred from NIFA was appropriated in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2018, Pub. L. No. 115-141, div. A, title VII, 132 Stat. 351, 394 (Mar. 23, 2018) (2018 Agriculture Appropriations Act). Section 753 of the 2018 Agriculture Appropriations Act provided \$6 million specifically to NIFA for relocation and renovation costs.¹¹ All amounts appropriated under the 2018 Agriculture Appropriations Act, including the amount for NIFA’s relocation and renovation costs, were subject to Section 717(a) of the Act. Pub. L. No. 115-141, 132 Stat. at 385. It states:

None of the funds provided by this Act . . . shall be available for obligation or expenditure through a reprogramming, transfer of funds, or reimbursements as authorized by the Economy Act, or in the case of the Department of Agriculture, through use of the authority provided by section 702(b) of the Department of Agriculture Organic Act of 1944 (7 U.S.C. 2257) or section 8 of Public Law 89-106 (7 U.S.C. 2263), that—

. . . (4) relocates an office or employees; . . .

unless the Secretary of Agriculture . . . notifies in writing and receives approval from the Committees on Appropriations of both Houses of Congress at least 30 days in advance of the reprogramming of such funds or the use of such authority.

Pub. L. No. 115-141, 132 Stat. at 385. Section 717(a) thus provides, in relevant part, that an agency must notify the Senate and House Appropriations Committees if it (1) uses transferred amounts (2) to relocate an office or employees. *Id.*

USDA’s action here met both of these elements. Pursuant to 7 U.S.C. § 2263, which permits USDA to transfer amounts between appropriations available to it,

¹⁰ See USDA Supplemental Response, Attachment 2, at 6, 11; USDA OIG Report, at 1. NIFA’s interagency agreement was signed on October 22, 2018, but lists October 1, 2018, as the start of the performance period. USDA Supplemental Response, Attachment 2, at 4, 5, 8–9.

¹¹ Pub. L. No. 115–141, § 753, 132 Stat. at 394. This “General Provisions” section appropriated these funds for the “National Institute of Food and Agriculture—Research and Education Activities” account, *id.*, in addition to the \$887,171,000 this account received under the Act. *Id.*, 132 Stat. at 355.

USDA transferred amounts from an appropriation for NIFA's relocation and renovation costs to an appropriation for the Office of the Secretary.¹² USDA also transferred the amounts to relocate an office or employees within the meaning of Section 717(a). USDA had already announced its intention to relocate NIFA and ERS and solicited expressions of interest from potential sites at the time of this transfer.¹³ Additionally, it made the transfer to satisfy an obligation under the contract, which was for consulting services to advise USDA on where to relocate the agencies.¹⁴ Thus, this planning contract was part of a relocation process that was already underway and, therefore, USDA was required to notify the Appropriations Committees of the transfer.

We next consider whether USDA made the required notification. We conclude that it did. As noted, in an August 9, 2018, letter to the House and Senate Agriculture appropriations subcommittees, USDA stated that it would “engage private sector assistance in our search” for potential headquarters sites using funds “appropriated in the 2018 Omnibus Appropriations Act, including the funding provided specifically to NIFA for relocation and renovation costs.”¹⁵ Consistent with its letters to the Appropriations Committees, USDA transferred from the NIFA appropriation to the appropriation for the Office of the Secretary \$169,655.30 to satisfy an obligation to a contractor that provided relocation planning assistance.¹⁶

¹² More specifically, USDA transferred \$169,655.30 of the \$6,000,000 appropriated for NIFA's relocation and renovation costs to the heading “Agricultural Programs, Processing, Research and Marketing, Office of the Secretary.” Pub. L. No. 115-141, 132 Stat. at 351, 394. See USDA Supplemental Response, Attachment 3, at 1; USDA Supplemental Response, Attachment 2, at 6, 11 (reflecting the transfer of \$169,655.30 and servicing agency funding information corresponding to the “Processing, Research and Marketing, Office of the Secretary, Agriculture” Treasury account); *Department of the Treasury, Federal Account Symbols and Titles, Part II* (Apr. 2023), at row 320, available at <https://fiscal.treasury.gov/files/fast-book/fastbook-Apr-2023-part2.xlsx> (last visited Aug. 10, 2023).

¹³ USDA, Release No. 0162.18; USDA Response, Attachment D, at 1, 3, 5, 7, and Attachment E.

¹⁴ USDA Response, at 4, Attachment C, at 4, 8, 13, 17, and Attachment D, at 1, 3, 5, 7.

¹⁵ USDA Response, Attachment D, at 1, 3, 5, and 7.

¹⁶ USDA Supplemental Response, Attachment 2, at 5–7, 10–11, and see Attachment 3, at 1.

USDA notified the Appropriations Committees during fiscal year 2018 yet it did not transfer the funds until fiscal year 2019.¹⁷ However, the amounts USDA transferred were available without fiscal year limitation and, therefore, remained available for obligation when USDA made the transfer. Accordingly, the notification that USDA made in fiscal year 2018 permitted it to transfer in fiscal year 2019 the no-year amounts appropriated to NIFA.

ERS amounts

On or around October 22, 2018, USDA transferred about \$170,000 from an appropriation for ERS to the appropriation for the USDA Office of the Secretary which, as it did for the amounts it received from NIFA, used the funds to satisfy an obligation to a contractor for relocation planning assistance.¹⁸ We next consider whether USDA was required by law to notify the Appropriations Committees before it made this transfer.

At the close of fiscal year 2018, Congress enacted a continuing resolution appropriating funds to USDA for fiscal year 2019. Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. C, §§ 101(1), 105(3), 132 Stat. 2981, 3123–24 (Sept. 28, 2018) (2019 Continuing Resolution). Accordingly, this measure appropriated amounts to ERS available under the same terms and conditions as in fiscal year 2018. See *id.*, 132 Stat. at 3123 (appropriating “[s]uch amounts as may be necessary . . . under the authority and conditions provided” in fiscal year 2018 appropriations acts). This amount was available for obligation in fiscal year 2019 for the needs of that year, and hence the 2019 Continuing Resolution provided the amount that ERS transferred.

The purpose of the 2019 Continuing Resolution, as with any continuing resolution, was “to maintain the previous year’s *status quo* with regard to government funding and operations.” B-328325, Sept. 12, 2016. See Pub. L. No. 115-245, 132 Stat. at 3123 (appropriating amounts at a “rate for operations” as provided in fiscal year

¹⁷ USDA Supplemental Response, Attachment 2, at 4, 8–9.

¹⁸ USDA Response, at 4. It is unclear from the documentation provided precisely when USDA transferred the ERS amounts. For example, the interagency agreement USDA provided was unsigned and undated. USDA Response, Attachment C at 3, 6, 10–11, 12, 15, 16, 19–20. However, the documents indicate that the transfer likely occurred on or around the October 22, 2018, contract award date. The interagency agreement USDA provided listed “2019” as the period of availability for ERS’s funds, and said ERS “will reimburse” DA for its share of a “contract generated by” DA. USDA Response, Attachment C at 4, 8, 13, 17. USDA said ERS obligated funds to DA “for it to award” a contract, USDA Response, at 4, but the USDA OIG Report said ERS “reimbursed” USDA for its share. USDA OIG Report, at 1 n.8.

2018 appropriations acts, and “under the authority and conditions” in those acts, to continue projects or activities “conducted in fiscal year 2018”); *id.* (stating no funds provided under the 2019 Continuing Resolution shall be used “to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2018”); *id.* (making appropriations available to the “extent” and “manner” provided by the pertinent fiscal year 2018 appropriations act); *id.*, 132 Stat. at 3124 (providing that “only the most limited funding action” authorized by the 2019 Continuing Resolution “shall be taken in order to provide for continuation of projects and activities”); *id.* (continuing entitlements and other mandatory payments whose budget authority was provided in fiscal year 2018 appropriations acts “at the rate to maintain program levels” under current law).

To this end, the 2019 Continuing Resolution carried forward the terms and conditions of the prior full-year appropriation. See, e.g., B-325350, Apr. 30, 2014 (observing that a continuing resolution carried forward a proviso from the previous year); B-324481, Mar. 21, 2013 (concluding that the fiscal year 2013 continuing resolution extended all of the authorities and conditions provided in a fiscal year 2012 appropriations act, and finding no language to indicate Congress did not expect a certain directive to apply during the continuing resolution).

Therefore, the 2019 Continuing Resolution carried forward Section 717(a), making its amounts subject to the notification provision. See Pub. L. No. 115-245, 132 Stat. at 3123. Just as Section 717(a) required USDA to notify the Appropriations Committees for particular transfers of the no-year amounts appropriated to NIFA for fiscal year 2018, so too did Section 717(a) require USDA to notify the Appropriations Committees for particular transfers of the fiscal year amounts appropriated under the 2019 Continuing Resolution.

And just as USDA’s transfer of the amount appropriated to NIFA under the 2018 Agriculture Appropriations Act triggered the Section 717(a) requirement to notify the Appropriations Committees, so too did USDA’s transfer of the amount appropriated to ERS under the 2019 Continuing Resolution trigger the notification requirement. In particular, using its authority under the Economy Act, 31 U.S.C. § 1535, USDA transferred amounts from an appropriation for ERS to an appropriation for the Office of the Secretary.¹⁹ Additionally, USDA used the amount transferred to relocate an

¹⁹ More specifically, USDA transferred \$169,655.30 of the \$86,757,000 appropriated to ERS under the “Economic Research Service” heading in the 2018 Agriculture Appropriations Act, Pub. L. No. 115-141, 132 Stat. at 354, to the heading “Agricultural Programs, Processing, Research and Marketing, Office of the Secretary.” *Id.*, 132 Stat. at 351. See USDA Response, Attachment C, at 4, 8, 13, 17 (reflecting the transfer of \$169,655.30 and servicing agency funding information corresponding to the “Processing, Research and Marketing, Office of the Secretary, Agriculture” Treasury account); *Department of the Treasury, Federal Account Symbols and Titles*, Part II (Apr. 2023), at row 320, *available at* (continued)

office or employees.²⁰ As explained above regarding NIFA, at the time of this transfer, USDA had already announced it would move the two agencies, and the planning assistance contract was to help USDA find their new headquarters sites.²¹ This contract was thus part of an already-underway relocation process and, therefore, USDA had to notify the Appropriations Committees of the transfer.

We next consider whether USDA made the required notification when it transferred to the Office of the Secretary the amounts appropriated to ERS under the 2019 Continuing Resolution. We conclude that it did not. USDA did not notify the Appropriations Committees that it would transfer amounts appropriated under the 2019 Continuing Resolution. The only written notification that USDA provided was in its August 9, 2018, letter to the Appropriations Committees, approximately 50 days prior to the enactment of the 2019 Continuing Resolution.²² This notification referred only to amounts appropriated in the 2018 Agriculture Appropriations Act and made no mention of the 2019 Continuing Resolution.

USDA, however, asserts that its August 9, 2018, letter sufficiently notified the Appropriations Committees. We disagree. On September 28, Congress enacted a continuing resolution for fiscal year 2019. Two days later, on September 30, USDA's fiscal year 2018 appropriations expired, making them unavailable to incur new obligations. 31 U.S.C. §§ 1502(a), 1551(a)(3), 1553. And the next day, fiscal year 2019 began. These events—the enactment of the continuing resolution, expiration of budget authority, and change in fiscal years—rendered USDA's August 9, 2018, letter insufficient for the purpose of notifying the Appropriations Committees of a transfer of amounts appropriated under the 2019 Continuing Resolution. Instead, USDA's notice concerned since-expired funding appropriated under a prior law: the 2018 Agriculture Appropriations Act.

USDA asserts that because Congress has enacted Section 717 in some form for 23 years, it relies “on the assumption that at a minimum it will be included every year in the form it was in the prior year” and, therefore, that if it notifies the Appropriations Committees during the prior fiscal year, then the enactment of a continuing resolution requires no further notification.²³ We disagree. A “blanket” notification

(continued) <https://fiscal.treasury.gov/files/fast-book/fastbook-Apr-2023-part2.xlsx>
(last visited Aug. 10, 2023).

²⁰ USDA Response, Attachment C, at 4, 13.

²¹ USDA, Release No. 0162.18; USDA Response, Attachment D, at 1, 3, 5, 7, and Attachment E.

²² USDA Response, Attachment D, at 1, 3, 5, 7.

²³ USDA Response, at 1, 3.

that remains valid under subsequent appropriations would not only be inconsistent with the simple fact that a subsequent appropriation stands apart from a prior one, but would also frustrate Congress’s ability to oversee how agencies spend the funds it appropriates.

One of the ways that Congress exercises its power of the purse is by placing time limits on agency funding, such as through one-year appropriations, and requiring agencies to give advance notice before taking some actions. See GAO, *Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations*, GAO-19-372T (Washington, D.C.: Feb. 6, 2019) (“Advance notification requirements . . . provide a mechanism by which Congress may exercise its constitutional power of the purse”); B-327432, June 30, 2016 (“Congress has the right to predicate the availability of appropriations on compliance with specified notification requirements.”). As the holder of the purse strings, Congress has a clear interest in being informed of how agencies will obligate the amounts Congress appropriates. Congress furthered that interest when it required USDA to make particular notifications to the Appropriations Committees. Changed circumstances—such as the expiration of the budget authority for which an agency provided notification, and a subsequent appropriation of funds for a new fiscal year like the continuing resolution—require agencies to provide an updated notification consistent with the changed circumstances.

Requirement for approval from the Appropriations Committees

Section 717(a) requires USDA not only to notify the Appropriations Committees before taking particular actions but also to receive their “approval . . . at least 30 days in advance” of taking the action. Pub. L. No. 115-141, 132 Stat. at 385. This provision reserves within the Appropriations Committees the power to approve executive action made pursuant to authority Congress has already delegated to the executive branch—in this case, the authority to transfer amounts when authorized by law. The Supreme Court held in *Immigration & Naturalization Service v. Chadha* that such provisions are inconsistent with the Constitution’s procedures of bicameralism and presentment of legislation. 462 U.S. 919, 951–959 (1983).

We have previously considered the effect of approval requirements in the context of appropriations provisions. *Id.*; see B-332704, June 30, 2022 (though it is not GAO’s role or practice to opine on the constitutionality of duly enacted statutes, we must consider and apply relevant Supreme Court precedent). In B-332704, we discussed the value and purpose of the notification and approval process with respect to congressional oversight. We cautioned that agencies ignore such expressions of intent at the peril of strained congressional relations. Recognizing Congress’ appropriations and oversight authority, we also noted agencies may abide by informal limitations, and some even incorporate them into regulations or internal guidance. Additionally, we observed that agencies have developed mechanisms for engaging with congressional committees on these types of actions. The Executive

Branch, for example, has concluded that approval provisions will be construed as requiring agencies to provide notice. B-332704, June 30, 2022.

Here Section 717(a) is such a provision and, consistent with precedent, we conclude that its requirement for the approval of the Appropriations Committees is not legally binding and without effect; however, its requirement that the Appropriations Committees be notified of such transfers remains in effect.²⁴ As we explained in B-332704, where Congress enacted an impermissible requirement for committee approval of executive action, the remaining provisions were “fully operative laws that employ workable Congressional oversight mechanisms within Congress’ power.” B-332704, June 30, 2022, at 8 n.38.

We reach the same result here. After excising the approval proviso from Section 717(a), its remaining provisions are fully operative laws. And their restrictions and conditions, such as the requirement for advance written notice from the Secretary of Agriculture, are oversight mechanisms that are well within Congress’s power to employ. Section 717(a)’s notification requirement, then, is a valid oversight provision that is fully operative and binding on USDA. Therefore, USDA was required to notify the Appropriations Committees before making the transfers at issue, but not to obtain their approval.

Antideficiency Act’s application

Having determined USDA violated the notification provision as to ERS, we lastly consider the consequence of this violation. The Antideficiency Act prohibits making or authorizing an expenditure or obligation that exceeds or is in advance of an appropriation. 31 U.S.C. § 1341. It extends to all provisions of law implicating the availability of agency appropriations, and agencies must consider the effect of all laws addressing the availability of appropriations. B-319009, Apr. 27, 2010 (citation and quotations omitted). Additionally, “[w]here Congress conditions the availability of funding on advance notice to the appropriate congressional committees, such funding is not available until the agency provides the required notification.” GAO, *Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations*, GAO-19-372T (Washington, D.C.: Feb. 6, 2019).

For example, the Department of Homeland Security (DHS) violated the Antideficiency Act when the United States Secret Service reprogrammed funds before DHS had given statutorily required advance notice to the Appropriations

²⁴ If the removal of an inoperative provision leaves other provisions that remain fully operative, the inoperative provision is said to be “severable,” and the other legally permissible provisions remain in effect while the inoperative provision is stricken. See *Chadha*, 462 U.S. at 931–935.

Committees. B-319009, Apr. 27, 2010. Absent this notice, the funds were not legally available for reprogramming. *Id.* This violation of the notice requirement constituted a violation of the Antideficiency Act. *Id.*; see also B-329603, Apr. 16, 2018; B-327432, June 30, 2016; B-326013, Aug. 21, 2014.

This case is analogous. USDA transferred amounts from ERS without providing the statutorily required advance notice to the Appropriations Committees. Section 717(a) conditions the availability of funds for relocations in part on USDA's compliance with its notification requirement. But because USDA did not satisfy this provision, the amounts appropriated to ERS in the 2019 Continuing Resolution were not legally available at the time of transfer. Therefore, by violating the notice requirement, transferring funds that were unavailable for obligation or expenditure, and using those amounts to satisfy an obligation to a contractor, USDA violated the Antideficiency Act. It should report its violation as 31 U.S.C. § 1351 requires.

CONCLUSION

USDA complied with a notification requirement in Section 717(a) when it transferred to the Office of the Secretary amounts appropriated to NIFA. USDA never made the requisite notification under Section 717(a) when it transferred amounts appropriated to ERS. USDA thus violated the notification provision and, as a result, the Antideficiency Act, and it should report its violation as required by 31 U.S.C. § 1351.



Edda Emmanuelli Perez
General Counsel