DECISION

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

FILE: B-210361 DATE: August 30, 1983

MATTER OF: Forest Service--Availability of appropriated funds for payment of Tahoe Keys Property Owners' Association Assessments

DIGEST:

1. Forest Service, Department of Agriculture appropriated funds are available to pay assessments levied by private homeowners' association against lot Service acquired by donation under authority of Public Law 96-586. Assessments are enforcible against the United States as covenants running with the land where assumption of obligation to pay is necessary condition for acquisition of lot.

2. Doctrine based on the Supremacy Clause of the United States Constitution, Article IV clause 2, that Federal agencies are exempt from paying assessments levied by state and local governmental authorities does not preclude the Forest Service, Department of Agriculture from paying private homeowners' association assessments on lot acquired through donation.

3. Forest Service, Department of Agriculture did not violate Antideficiency act provision, 31 U.S.C. § 1341(a)(1)(B) by accepting title to property subject to future homeowner association assessments. Provision prohibits obligations in advance of appropriations. No violation occurred because Service's appropriation, to be derived from the Land and Water Conservation Fund, Public Law 97-100, 97th Cong., 1st Sess., 95 Stat. 1391, 1406 (1981) was made available for assessment payments, and its appropriation for land acquisition was enacted before Service took title to property.

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4. 31 U.S.C. § 3324(b) (formerly 31 U.S.C. § 529 (1976)) (advance payment prohibition) prohibits Forest Service Department of Agriculture from paying in one lump sum the capitalized value of homeowners' association assessments against a lot the service acquired by donation. Assessments are used to maintain and improve lot holders' (including United States) commonly held property and are assessed annually in amounts determined to be necessary. By paying assessments in lump sum, Forest Service would be paying for services before payment is due and in an amount not yet determined to be necessary. Advance payment prohibition does not, however, preclude the Service from paying the annual assessments when due since, like all other owners, the Forest Service could not have acquired the lot without assuming this obligation.

This responds to a request from a certifying officer of the Forest Service, Department of Agriculture for our answers to questions concerning the payment of annual assessments levied against a Government owned lot by the Tahoe Keys Property Owners Association. The issue is whether appropriated funds are available to pay the assessments, or alternatively, whether the Service could pay the capitalized value of the assessments in one lump sum.

For the reasons discussed below, we conclude that appropriated funds are available to pay the assessments but that the Forest Service should pay them when due rather than paying their capitalized value to the Association.

Background

On December 23, 1980, Congress enacted the so-called Burton-Santini Act, (Act) Public Law 96-586, 94 Stat. 3381, in part to provide for the acquisition of certain environmentally sensitive lands in the Lake Tahoe Basin, California, to prevent the environmental quality of the Basin from being seriously jeopardized by overdevelopment. Pub. L. No. 96-586 § 1(a)(4), (b); 3(a)(1) provides:

> "The Secretary of Agriculture is authorized to acquire by donation, purchase with donated or appropriated funds, or otherwise, lands and interests in lands which are unimproved as of the date of enactment of the Act * * * and which are environmentally sensitive lands * * *." 94 Stat. 3383 (1980).

Pursuant to this authority, the United States through the Forest Service acquired title to an unimproved lot in the Mt. Tallac Village Unit 3 in El Dorado County, California ,by donation in December 1981. The lots in the Village are subject to the provisions of a declaration of protective restrictions which was recorded in the El Dorado County Recorders office at the time the Forest Service acquired lot 37. The declaration provides that certain charges and assessments may be levied against all lot owners and that every person who acquires title to a lot within the Village, "* * * shall by such act be conclusively deemed to have consented and agreed to pay all charges and assessments. "It further provides that, "all of said limitations, covenants, restrictions and conditions [which includes the duty to pay assessments] shall run with the real property and shall be binding upon and be for the benefit of all parties having or acquiring any right, title or interest in the subdivision or any part thereof." The Association uses the assessments to improve and maintain the Village's commonly held areas and facilities, pay taxes and generally further the lot owners' collective interests.

The Tahoe Keys Home Owners Association, a California nonprofit corporation made up of all lot owners, levies the assessments annually which constitute liens against the lots subject to the restrictions. The declaration empowers the Association to enforce the liens either by a collection action or by a foreclosure suit.

Attorneys for the Association have formally demanded that the Forest Service pay a delinquent annual assessment. The Forest Service is withholding payment pending our decision.

The Questions

Q. 1. a. "Did the Forest Service have the authority to accept title to the property, since Exception 5 of Schedule B of the Policy of Title Insurance creates a binding obligation against the Government for the payment of monies in advance of appropriations? This appears to be a violation of 31 U.S.C. § 665 [now 31 U.S.C. § 1341(a)(1)(B)] and we find no authority in [Public Law 96-586] that would permit such acceptance.

A. 1(a). The statute which the Forest Service's question refers to, a provision of the so-called "Antideficiency Act," provides that an officer or employee of the United States Government may not involve the Government in a contract or obligation for the payment of money before an appropriation is made for that purpose unless otherwise authorized by law. The provision is directed toward preventing agency officials who do not have funds on hand for a particular purpose from committing the United States to make payments at some future time for that purpose and thereby, in effect, coercing the Congress into making an appropriation to cover the commitment. Thus, the provision generally prohibits an official from committing the Government to make payments before Congress has enacted an appropriation which is available for them.

The Service questions whether it violated the Act by accepting title to lot 37 because the acceptance made the Government responsible to pay the Homeowners' Association's annual assessments. Under California law, the Association's right to receive assessment payments is enforceable as a covenant running with the land or as an equitable servitude. Cal. Civil Code §§ 1460-68 (Deering 1971), Anthony et al. v. Brea Glenbrook Club, 130 Cal. Rptr. 32 (1976). The United States becomes obligated to perform a covenant running with the land just as any other owner does when it accepts a deed with notice of the covenant. See Mississippi State Highway Commission v. Cohn, 217 So. 2d 528 (1969). Thus, the Forest Service became bound to pay the assessments when it became the lot's owner.

The Service did not violate the Antideficiency act because it acquired lot 37 after Congress enacted the appropriation which is available for the assessment payments. The Service acquired the lot on December 29, 1981, as noted above. The Service's appropriation which is available for the assessment payments--that is, its appropriation for land acquisition to be derived from the Land and Water Conservation Fund--was made on December 23, 1981. Public Law 97-100, 97th Cong., 1st Sess., 95 Stat 1391, 1406 (1981). (See our answer to question 3 for a discussion of the basis of this appropriation's availability.) Accordingly, the Service did not violate 31 U.S.C. § 1341(a)(1)(B) by taking title to lot 37 subject to homeowners' association assessments.

Q. 1(b). Would the Forest Service have authority to pay in one lump sum the capitalized value of the annual assessment as if it were acquiring the subdivision land by condemnation?

A. 1(b). No. The Service may not pay the capitalized value of the annual assessments in one lump sum.

Unlike the duty to pay the assessments annually, the law does not require the Service to make a lump sum payment. As explained in our answer to question 1, the Service is bound by the provisions of the Association's Declaration of Covenants and Restrictions because they are enforcible as covenants running with the land. The Declaration requires that lot owners pay the assessments as the Association levies them. Since the Association levies the assessments annually,the Service is required to pay them annually in performance of covenant running with the land. However, since the Association does not require a lump sum payment, the Service is not bound by law to make one.

It should not extinguish its assessment liability with a lump sum payment because that might result in its expending more than it would ultimately have to pay if it had waited for the determination of the amount needed by the Association to be made in the course of its annual budget setting and assessment procedures. The lump sum payment amount would be based upon the assumption that future assessments would be approximately the same as the current amount. It is possible that the Association will reduce future annual assessments as the Tahoe Keys development becomes established. Thus, a lump sum payment based upon a constant assessment rate could result in the Service's making too great an expenditure. In any case, we believe a lump sum payment is inadvisable because determining a figure which accurately reflects the capitalized value of annual assessments is virtually impossible in view of the fact that the amount of assessments the Association will make in future years is uncertain.

Moreover, we think the Service might be violating 31 U.S.C. § 3324 (formerly 31 U.S.C. § 529 (1976)) if it paid the capitalized value of the assessments in one lump sum since it has no legal obligation to pay anything in advance of the due date of each assessment.

31 U.S.C. § 3324(b) generally prohibits agencies from paying for goods or services in advance of receiving them. While it is true that even a payment of the annual assessment might be strictly construed as a violation of the advance payment prohibition since the maintenance, improvement, and other services provided by the Association are generally rendered after the assessment is collected, we do not think it is necessary to look behind the assessment to the specific uses to which the Government's share of the assessment funds will be put. As discussed before, payment of the assessment when

due represents liquidation of a fully mature obligation. The Government is required to pay on the due date of each assessment.

As explained in our answers to question 1, the requirement that lot owners pay assessments as levied is a covenant running with the land. Thus, the Service could not acquire lot 37 without becoming subject to the assessment payment requirement. Taking title to the lot furthers the purpose of Public Law 96-586 of acquiring environmentally sensitive lands in the Lake Tahoe Basin. Accordingly, since the only way the Service could carry out its congressional acquisition mandate with respect to the lot at issue is to pay the assessments when due, we do not consider them to be advance payments in violation of 31 U.S.C. § 3324.

Q. 2. "If acceptance of title is proper, would the Forest Service be prohibited from the payment of such fees and assessments under the general rule of sovereignty of the United States against payment of fees, assessments and taxes?"

A. 2. No. The constitutional doctrine that the Federal Government is immune from State and local taxes applies only to assessments levied by State and local governmental authorities. It is inapplicable to assessments made by private associations, such as Tahoe Keys. The basis of the doctrine that the United States has sovereign immunity from State taxation is the Supremacy clause of the constitution. (Art. IV, cl. 2). See McCulloch v. Maryland, 17 U.S. 316 (1819). The Supremacy clause precludes the States from interfering with the Federal Government's exercise of the powers which the Constitution gives it. State taxation of Federal property constitutes such unconstitutional interference. United States v. Allegheny County, 322 U.S. 174 (1944). The doctrine that the Federal Government is immune from state taxation generally includes direct assessments by state authorities on the United States for local improvements because such assessments are involuntary exactions. They amount to taxes which the United States is not required to pay. 27 Comp. Gen. 20 (1947), B-184146, August 20, 1975.

The sovereign immunity doctrine, based on the Supremacy Clause, does not apply to the Tahoe Keys assessments, however, because a private entity--not a state--levies them. They are not involuntary taxes arising from the statutory exercise of

State power, but contract obligations which run with the land acquired by the Government.

Q. 3. "If the Forest Service is not immune from the fees and assessments, what appropriation is available to us to make payment?"

A. 3. The payment of assessments to the Association is a necessary expense of carrying out the purposes of subparagraph 3(a)(1) of Public Law 96-586, i.e., the acquisition of environmentally sensitive lands. They are therefore, payable from appropriations from the Land and Water Conservation Fund which section 3, quoted supra, authorizes.

When Congress authorizes a particular activity and appropriates funds therefor, by implication it confers authority to incur expenses which are necessary or incident to the proper conduct of the activity. 6 Comp. Gen. 619, 621 (1927). To be considered a necessary or incidental expense, an expenditure must contribute to, or directly result from, the execution of an authorized agency function.

The Forest Service's assessment liability results directly from carrying out its congressional mandate to acquire environmentally sensitive land in the Lake Tahoe Basin. The duty to pay assessments arose "automatically" upon the Service's acceptance of the donation of lot 37, pursuant to its section 3(a)(1) authority. Accordingly, the assessment payments are expenses necessarily incurred as an incidence of acquiring the property in question, pursuant to the authority of section 3(a)(1) of Public Law 96-586. Funds appropriated for such acquisitions, therefore, are available to pay the Association.

Funds for section 3(a)(1) acquisitions are appropriated annually from the Land and Water Conservation Fund. Section 3(a)(1) provides that, "[t]he funds used for acquisition of such lands and interest in lands shall be the funds to be appropriated pursuant to this Act * * *." Section 3(g) authorizes funds to be appropriated from the Land and Water Conservation Fund for the act's purposes. For fiscal year 1982, Public Law 97-100 appropriates funds " * * * for acquisition of and or waters, or interest therein, in accordance with statutory authority applicable to the United States Forest Service * * * to be derived from the Land and Water Conservation Fund, to remain available until expended." 95 Stat. 1391, at 1406 (December 23, 1981). It is clear from the language of the 2 quoted provisions read together that this appropriation is the one which is available for section

3(a)(1) acquisitions. Accordingly, since the assessment liability in question arose incident to an acquisition, the Service should use appropriated funds derived from the Land and Water Conservation Fund which were provided by Public Law 97-100 without fiscal year limitation to make payments to the Association.

for Milton J. Socolar
Comptroller General
of the United States