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United States Government Accountability Office
Washington, DC 20548

B-322791

April 3, 2012

The Honorable Don Young
House of Representatives

The Honorable Lisa A. Murkowski
United States Senate

Subject: *Department of Transportation—Homer-Halibut Cove-Jakolof Bay-Seldovia Ferry*

This responds to your request for our legal opinion regarding amounts enacted for the Homer-Halibut Cove-Jakolof Bay-Seldovia Ferry. Letter from Congressman Don Young and Senator Lisa A. Murkowski to General Counsel, GAO (Jan. 31, 2012) (Request Letter). For each of fiscal years 2004, 2005, and 2006, Congress enacted appropriations requiring that the Secretary of Transportation make amounts from the Highway Trust Fund available for a project identified as the “Homer-Halibut Cove-Jakolof Bay-Seldovia Ferry, Alaska” (Ferry). The amounts were made available to the Seldovia Village Tribe (Tribe), a federally-recognized Indian tribe,¹ who used the amounts for expenses related to a ferry. You asked us (1) which agencies other than the Department of Transportation (Transportation) were involved in the conveyance of funds to the Tribe; (2) whether Transportation’s conveyances of funds to other agencies were consistent with the laws making funds available for the Ferry; and (3) whether the conveyances to the Tribe were consistent with the appropriations acts that made amounts available for the Ferry.

In response to your first question, we found that Transportation involved one other agency, the Department of the Interior (Interior), in the conveyance of funds to the Tribe. For each of the fiscal years 2004, 2005, and 2006, Transportation allocated²

¹ 75 Fed. Reg. 60810 (Oct. 1, 2010).

² An allocation is a delegation, authorized in law, by one agency of its authority to obligate budget authority and outlay funds to another agency. GAO, *A Glossary of Terms Used in the Federal Budget Process*, [GAO-05-734SP](#) (Washington, D.C.: Sept. 2005), at 9.

funds for the Ferry to Interior, which then conveyed the amounts to the Tribe through its annual funding agreements pursuant to the Indian Self-Determination and Education Assistance Act.³

In response to your second question, we conclude that Transportation's actions with respect to the fiscal years 2004 and 2005 amounts were consistent with specific provisions in the appropriations acts granting Transportation authority to transfer the amounts to another federal agency. Transportation did not identify, nor did we locate, specific statutory authority to transfer the fiscal year 2006 amounts to Interior. Given the facts and circumstances, if Transportation lacks specific authority, we would not object if the fiscal year 2006 transfer were made pursuant to the Economy Act, 31 U.S.C. § 1535.

In response to your third question, we conclude that both Transportation's allocation documents and Interior's annual funding agreements with the Tribe are consistent with the language of the appropriations. Their documents required that the Tribe use the funds for a ferry, the purpose stated in the appropriations acts.

Our practice when issuing opinions is to obtain the views of the relevant agencies to develop a factual record and to establish their legal positions on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, [GAO-06-1064SP](#) (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. In this regard, we requested the views of Transportation and Interior. Letter from Managing Associate General Counsel, GAO, to Solicitor, Interior (Dec. 16, 2011); Letter from Assistant General Counsel for Appropriations and Budget, GAO, to General Counsel, Transportation (Jan. 23, 2012). Transportation provided additional information and its legal position. Letter from Deputy Assistant General Counsel for General Law, Transportation, to Assistant General Counsel for Appropriations and Budget, GAO (Feb. 23, 2012) (Transportation Letter). Interior did not respond to our letter.

BACKGROUND

For fiscal year 2004, the Transportation, Treasury, and Independent Agencies Appropriations Act, 2004, required that the Secretary of Transportation make specified amounts from the Highway Trust Fund⁴ available for necessary expenses

³ 25 U.S.C. §§ 450–458ddd-2.

⁴ Congress authorizes Transportation, through the Federal Highway Administration and its other agencies, to incur obligations (using contract authority) on behalf of the federal government. See B-275490, Dec. 5, 1996; see also Federal Highway Administration, *Financing Federal-Aid Highways*, FHWA Publication No. FHWA-PL-07-017 (Mar. 2007), available at www.fhwa.dot.gov/reports/financingfederalaid/ (last visited Mar. 19, 2012). Contract authority is a form of budget authority that permits an agency to incur obligations in advance of appropriations. See 2 U.S.C.

to carry out projects “identified under this section in the statement of managers accompanying this Act.” Pub. L. No. 108-199, § 115, 118 Stat. 3, 279, 294–95 (Jan. 23, 2004). The explanatory statement listed several “surface transportation projects”; one of these projects is designated “Seldovia-Homer-Jakolof Bay Halibut Cove Ferry Planning and Design, Alaska,” with a corresponding amount of \$2 million. H.R. Rep. No. 108-401, at 960 (Nov. 25, 2003). The act also provided that “funds made available under this section may, at the request of a State, be transferred by the Secretary to another Federal agency to carry out a project funded under this section.” Pub. L. No. 108-199, § 115, 118 Stat. at 294–95.

In fiscal year 2005, Congress enacted the Transportation, Treasury, Independent Agencies, and General Government Appropriations Act, 2005, as part of the Consolidated Appropriations Act, 2005. Pub. L. No. 108-447, div. H, 118 Stat. 2809, 3199 (Dec. 8, 2004). This act required that the Secretary of Transportation make available a specified amount “for surface transportation projects as identified under this section in the statement of the managers accompanying this Act.” *Id.* at § 117, 118 Stat. at 3212–13. The explanatory statement lists many projects; one of these is the “Homer-Halibut Cove-Jakolof Bay-Seldovia Ferry, Alaska,” with a corresponding amount of \$6 million. H.R. Rep. No. 108-792, at 1403 (Nov. 20, 2004). As with the fiscal year 2004 act, this act also included a provision for transfers: “funds made available under this section, at the request of a State, shall be transferred by the Secretary to another Federal agency.” Pub. L. No. 108-447, 118 Stat. at 3213.

In fiscal year 2006, Congress enacted the Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006. Pub. L. No. 109-115, 119 Stat. 2396 (Nov. 30, 2005). This act specified that projects and activities described under the “Federal-Aid Highways” heading in the statement of managers accompanying the Act “shall be eligible for fiscal year 2006 funds.” *Id.* at § 113, 119 Stat. at 2407. Among the several subheadings listed under the “Federal-Aid Highways” heading in the explanatory statement is “Ferry Boats and Ferry Terminal Facilities”; under this subheading a line appears for the project designated “Homer-Halibut Cove-Jakolof Bay-Seldovia Ferry, AK,” for the amount of \$1 million. H.R. Rep. No. 109-307, at 158 (Nov. 18, 2005). Unlike the acts for fiscal years 2004 and 2005, the fiscal year 2006 act includes no provision regarding transfer of amounts to other federal agencies.

In both fiscal years 2004 and 2005, an official from the state of Alaska requested that Transportation transfer funds for the Ferry to the Bureau of Indian Affairs, which is an agency of Interior. Transportation Letter, enclosures. To accomplish this,

§ 622(2)(A)(iii); *see also* GAO, *A Glossary of Terms Used in the Federal Budget Process*, [GAO-05-734SP](#) (Sept. 2005) (Budget Glossary), at 21. Congress subsequently enacts an appropriation from the Highway Trust Fund to liquidate the obligations. Budget Glossary, at 21; *see also* *Financing Federal Aid Highways*, at 34.

Transportation established an allocation account in the U.S. Treasury, which permitted Interior to obligate and administer the funds for the Ferry. Transportation Letter, at 2; see also B-321823, Dec. 6, 2011; 1 TFM 2-1500, § 1520.65. Transportation followed the same procedure in fiscal year 2006. *Id.* Interior provided the funds to the Tribe each fiscal year through an annual funding agreement between Interior and the Tribe pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458ddd-2. *E.g.*, *Kachemak Bay Ferry Construction Addendum to the FY 2006 Annual Funding Agreement (2006 Funding Agreement)*.

DISCUSSION

To respond to your first question, we asked Transportation what other agencies were involved in the conveyance to the Tribe. Letter from Assistant General Counsel for Appropriations and Budget, GAO, to General Counsel, Transportation (Jan. 23, 2012). Transportation told us that for each of the fiscal years 2004, 2005, and 2006, it allocated funds for the Ferry to Interior, which then conveyed the amounts to the Tribe through annual funding agreements pursuant to the Indian Self-Determination and Education Assistance Act.⁵ Transportation Letter; see also 2006 Funding Agreement.

To respond to your second question, we reviewed the appropriations acts provisions permitting Transportation to transfer to another agency amounts enacted for the Ferry. In fiscal year 2004, the appropriations act provided that “funds made available under this section may, at the request of a State, be transferred by the Secretary [of Transportation] to another Federal agency to carry out a project funded under this section.” Pub. L. No. 108-199, 118 Stat. at 294–95. In fiscal year 2005, the appropriations act provided that “funds made available under this section, at the request of a State, shall be transferred by the Secretary [of Transportation] to another Federal agency.” Pub. L. No. 108-447, 118 Stat. at 3213. For both of these years Alaska made a request of Transportation. Transportation Letter, enclosures. Thus, Transportation had authority to allocate the fiscal years 2004 and 2005 amounts to Interior.

In fiscal year 2006, the appropriations act did not include the same transfer authority as in fiscal years 2004 and 2005. See Pub. L. No. 109-115, 119 Stat. at 2407. Generally, agencies may transfer appropriations only as specifically authorized by law. 31 U.S.C. § 1532. In its letter to us, Transportation did not acknowledge that the fiscal year 2006 act did not provide transfer authority. Transportation did advise that it had allocated the fiscal year 2006 amounts to Interior in the same manner as it did the fiscal years 2004 and 2005 amounts. Transportation Letter. If Transportation lacks specific transfer authority, we would not object if the transfer were made pursuant to the Economy Act, 31 U.S.C. § 1535. The Economy Act

⁵ 25 U.S.C. §§ 450–458ddd-2.

allows an agency to transfer appropriations to another agency in return for a service rendered. In that regard, the Economy Act would authorize Transportation to acquire Interior's services to convey the amounts to the Tribe, and permit Transportation to transfer the amounts to Interior to effect that purpose, just as Transportation did in fiscal years 2004 and 2005 with its allocation documents.⁶ However, Transportation has not provided us with an Economy Act agreement.

To respond to your third question, we reviewed the appropriations acts provisions for fiscal years 2004, 2005, and 2006 that enacted amounts for the Ferry. The appropriations act for each fiscal year incorporated by reference⁷ provisions from the statements of managers providing that amounts would be made available for a ferry.⁸ For fiscal year 2004, the statement of managers provided \$2 million for the "Seldovia-Homer-Jakolof Bay Halibut Cove Ferry." H.R. Rep. No. 108-401, at 960. For fiscal year 2005, the statement of managers provided \$6 million for the "Homer-Halibut Cove—Jakolof Bay—Seldovia Ferry, Alaska." H.R. Rep. No. 108-792, at 1403. For fiscal year 2006, the statement of managers provided \$1 million for the "Homer-Halibut Cove-Jakolof Bay-Seldovia Ferry, AK." H.R. Rep. No. 109-307, at 158.

The documents in which Transportation allocated amounts to Interior stated that the amounts were allocated for a ferry. See, e.g., Letter from Director, Office of Program Development, Federal Highway Administration, Transportation, to Deputy Director, Office of Tribal Services, Bureau of Indian Affairs, Interior (allocating fiscal year 2004 amount). Similarly, the annual funding agreements required that the Tribe use the funds for expenses related to a ferry. See, e.g., 2006 Funding Agreement. Therefore, we conclude that both the documents Transportation prepared to allocate funding to Interior and the annual funding agreements between Interior and the Tribe are consistent with the language of the appropriations acts; the documents required that the Tribe use the funds for a ferry, the purpose stated in the appropriations.

CONCLUSION

Transportation allocated funds that Congress made available for the "Homer-Halibut Cove-Jakolof Bay-Seldovia Ferry, Alaska" to Interior, which conveyed the amounts

⁶ The Economy Act would authorize Transportation, also, to transfer an amount to pay Interior costs Interior may incur in handling the transaction for Transportation.

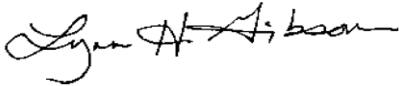
⁷ For a discussion of the legislative practice of incorporation by reference, see B-316010, Feb. 25, 2008.

⁸ See Pub. L. No. 108-199, 118 Stat. at 294; Pub. L. No. 108-447, 118 Stat. at 3213; Pub. L. No. 109-115, 119 Stat. at 2407. Aside from the provisions from the statements of managers that the appropriations acts incorporated by reference, there is no additional legislative history concerning the appropriations for the Ferry for any of the three fiscal years 2004, 2005, or 2006.

to the Tribe. Both Transportation's allocation documents and Interior's annual funding agreements with the Tribe are consistent with the language of the appropriations. The documents required that the Tribe use the funds for a ferry, the purpose stated in the appropriations acts. While the appropriations acts for fiscal years 2004 and 2005 specifically authorized Transportation to transfer the amounts to another federal agency, Transportation did not identify, nor did we locate, similar authority for fiscal year 2006. If Transportation has no such specific authority, we would not object, as explained above, to Transportation's use of the Economy Act to justify the transfer.

If you have any questions, please contact Thomas H. Armstrong, Managing Associate General Counsel, at (202) 512-8257, or Julia C. Matta, Assistant General Counsel for Appropriations and Budget, at (202) 512-4023.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn H. Gibson". The signature is fluid and cursive, with the first name "Lynn" being the most prominent.

Lynn H. Gibson
General Counsel