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Parker
G.K.M.

DECISION

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

FILE: B-66927 DATE: February 28, 1978

MATTER OF: Strategic Petroleum Reserve Program

DIGEST:

1. Energy Policy and Conservation Act establishes Strategic Petroleum Reserve (SPR) Program. All authority under any provision relating to SPR Program expires June 30, 1985. Department of Energy may enter into leases for storage space which extend beyond June 30, 1985, if such leases are found to be necessary for Program and in best interests of United States.

2. 40 U.S.C. § 278a (1970)(section 322, Economy Act of 1932), prohibits paying more than 25 percent of first year's rent for improvements to leased premises or more than 15 percent of value of premises for annual rent. However, Energy Policy and Conservation Act provides authority, for purposes of Strategic Petroleum Reserve Program, to locate and construct storage facilities on leased property. GAO will not object to expenditures for rent and improvements incurred in creation of Strategic Petroleum Reserve which may exceed Economy Act fiscal limits if disclosed to Congress in Strategic Petroleum Reserve Plan and not disapproved.

This decision is in response to a letter from the Administrator, Federal Energy Administration (FEA), requesting our opinion on several questions of importance to the Strategic Petroleum Reserve Program. (Since submission of these questions, the functions of the Administrator which gave rise to these questions, have been transferred to the Secretary of Energy (section 301, Pub. L. No. 95-91, 91 Stat. 577). References hereafter to the Department of Energy are in recognition of that transfer.)

The first question is whether the FEA (now the Department), prior to July 1, 1985, may enter into lease or other contractual arrangements, the terms of which extend beyond June 30, 1985. The question arises because of section 531 of the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 965, 42 U.S.C. § 6401 (Supp. V 1975), which provides, with exceptions not relevant, that:

> "* * * all authority under any provision of title I * * * of this chapter [which includes the Strategic Petroleum Reserve Program] * * * shall expire at midnight, June 30, 1985 * * *."

Section 159(f) of the Energy Policy and Conservation Act, 42 U.S.C. § 6239 (Supp. V 1975), provides in pertinent part that, in order to implement the Strategic Petroleum Reserve Plan, and for certain other purposes, the Administrator may:

> "(B) acquire by purchase, condemnation, or otherwise, land or interests in land for the location of storage and related facilities;
>
> "(C) construct, purchase, lease, or otherwise acquire storage and related facilities;
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> "(D) use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired pursuant to this part;
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> * * * * *
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> "(F) store petroleum products in storage facilities owned and controlled by the United States or in storage facilities owned by others if such facilities are subject to audit by the United States;
>
> "(G) execute any contracts necessary to carry out the provisions of such Strategic Petroleum Reserve Plan, Early Storage Reserve Plan, proposal or amendment * * *."

According to the Administrator--

> "No-year funds have been appropriated and are available for these purposes [i.e. for the Strategic Petroleum Reserve Program]. See Public Law 94-303, 90 Stat. 607 (1976); Public Law 94-373, 90 Stat. 1059 (1976).

"It is anticipated that a substantial portion of the petroleum to be purchased for the Strategic Petroleum Reserve will be stored underground, in salt-leached caverns and in mines. The FEA has commenced the acquisition of sites, some of which are now in use by owners or lessees, for such storage.

"It may be concluded by the FEA, in certain instances, that it would be in the interest of the Government, for financial and other reasons, to lease, or contract for storage at sites, rather than purchase or condemn a fee simple title thereto. However, discussions with owners and lessees of some candidate sites indicate a reluctance on their part to lease or sublease their property to the FEA, or contract for storage services, on terms of less than ten to twenty years, and from the Government's standpoint it might be disadvantageous to store oil under a more costly contract of short duration. Consequently, the FEA deems it important, in order to accomplish the objectives of the Strategic Petroleum Reserve program at a minimum cost to the Federal Government, that the FEA have the ability to enter into agreements with site owners or lessees, entailing lease or other contractual obligations of not less than ten to twenty years."

In view of the broad authority given him to acquire land in fee, which would include a fee simple, an interest without limitation or condition, the Administrator contends that it would be incongruous to conclude that he may not enter into a lease extending beyond the expiration date of the program. He contends further that:

"* * * it also would be illogical to hold that the expiration of a statutory authority to acquire storage facilities by lease or other contract has the effect, ipso facto, of terminating contracts of the Federal Government, in the absence of any express statutory limitation on the lease and contract authority granted by Congress. Indeed, § 531 of the Energy Policy and Conservation Act itself provides that the expiration of authority under Title I thereof 'shall not affect * * * any action * * * based upon any act committed prior to midnight, June 30, 1985.' And it also seems pertinent that, pursuant to 1 U.S.C. § 109:

"'The expiration of a temporary statute shall not have the effect to release any * * * liability incurred under such statute, unless

> the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action * * * for the enforcement of such * * * liability.'
>
> "As execution of an agreement extending beyond June 30, 1985, would be an 'act committed' before the expiration of authority under Title I, and since such an act would give rise to an obligation under a temporary statute extending beyond expiration of that statute, the Congress must have intended, in passing the Energy Policy and Conservation Act, that the FEA would have the authority to enter into valid lease or other contractual agreements extending beyond June 30, 1985."

The Administrator clearly has independent authority to enter into rental agreements, pursuant to section 159(f) of the Act and the terms of such agreements are not limited by fiscal year, since "no year" funds have been appropriated.

We agree that a lease for a term of years, which is otherwise proper, does not terminate, ipso facto, because of the expiration of the statutory authority for the program under which the lease is entered into. However, the question is not whether a lease extending beyond June 30, 1985, would terminate by operation of law on that date, but whether a lease of that duration may be entered into at all.

A basis for entering into long-term leases is suggested in general terms by the Administrator. He says that:

> "It may be concluded by the FEA, in certain instances, that it would be in the interest of the Government, for financial and other reasons, to lease, or contract for storage at sites, rather than purchase or condemn a fee simple title therein. However, discussions with owners and lessees of some candidate sites indicate a reluctance on their part to lease or sublease their property to the FEA, or contract for storage services, on terms of less than ten to twenty years * * *."

If the Department concludes that there are financial or other reasons why a long-term lease would be in the best interests of the United States and would be necessary to carry out the SPR Program, then in our view the Department may enter into a lease extending beyond the termination date of the program. The fact that the leases would not expire until after the Program authority ceases is not dispositive. The Government would also be left,

after June 30, 1985, with property interests not needed for the Program if storage sites were purchased or condemned.

Of course the agency cannot enter into an agreement having the effect of obligating funds beyond their period of availability. However, as the Administrator points out, no-year funds have been appropriated for acquisition of storage space for the SPR program.

The next questions pertain to the application of section 322 of the Economy Act of 1932, 40 U.S.C. § 278a (1970), to the leasing of sites for oil storage in the Strategic Petroleum Reserve and, more generally, to the restriction on expenditure of appropriated funds for permanent improvements to private property. Section 322 provides in pertinent part:

> "* * * [N]o appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government nor for alterations, improvements, and repairs of the rented premises in excess of 25 per centum of the amount of the rent for the first year of the rental term * * *."

The Administrator asks whether the 15 percent limitation is applicable to the leasing of sites for oil storage in the Program, and if so, how it is to be applied. He points out that land would be acquired, not for the incidental buildings or structures which may be on the land, but for subsurface formations suitable for petroleum storage. He suggests that, under the circumstances, the 15 percent limitation should not be applied:

> "The fair market value of the rented premises is determinable by appraisal. But it is unclear what portion of this amount properly is attributable to the 'building' component of the rented premises. * * * Indeed, application of the statute to this situation is so awkward that one must wonder whether it was intended to apply in circumstances such as are pertinent here."

With regard to the 25 percent limitation of section 322, the Administrator says that it would--

> "* * * if applicable, constitute a serious obstacle to the leasing and subsequent Government alteration or improvement of storage facilities for the Strategic Petroleum Reserve program, and would tend to confine the lease option to a lease or sublease of property on which the necessary alterations or improvements are made by the owner or lessee. While some of the caverns and mines which the FEA presently contemplates utilizing for storage purposes are in existence, they have not yet been rendered suitable to receive oil for the Reserve, and substantial alterations may be necessary in order to make them suitable; other caverns and mines might have to be created. All storage facilities will require development of crude oil injection and withdrawal systems, including pumps, pipelines and dock facilities."

The Administrator cites our decision, 38 Comp. Gen. 143 (1958), as standing for the proposition that the 25 percent limitation does not apply to "unimproved lands." He asks in this regard whether real property consisting mainly of mines or "leached" caverns is unimproved, for purposes of section 322. As a corollary to this question, he asks, if the property is considered to be unimproved--

> "* * * does it become 'improved' simply because of the incidental presence thereon of buildings or other structures which generally are unrelated functionally to the use for which the property is to be leased?"

More generally, the Administrator refers to the rule that appropriated funds ordinarily may not be used for improvements to private property unless specifically authorized by law. 38 Comp. Gen. 143, 145 (1858). He asks:

> "If § 322 is inapplicable to the leasing of caverns and mines for the Strategic Petroleum Reserve program, is the FEA's authority * * * to lease real property and 'construct' thereon storage and related facilities, and to 'execute any contracts necessary to carry out' the program, authority to do this without regard to limitations on the use of available appropriations for rental payments or construction costs?"

As a general rule, appropriated funds may not be used to make permanent improvements to private property without specific statutory authority. Section 322 of the Economy Act represents a limited exception to that rule; agencies without other statutory authority to make permanent improvements to leased private property may do so to a limited extent by virtue of section 322.

However, the Department's authority in this regard differs significantly from the leasing authority, given many other Federal agencies, which we have held insufficient, without more, to exempt them from the section 322 requirements. The statutory leasing authority granted to the Department is for the sole purpose of creating and maintaining a Strategic Petroleum Reserve, of the size and within the time stipulated by law. In contrast, the kind of leasing authority which we have considered subject to the Economy Act limitations is to carry out the general purposes of the agency, rather than, as in this case, to accomplish a specific goal mandated by statute.

More specifically, the Department has authority, under the Act, in order to implement the Strategic Petroleum Reserve Plan which it must submit to the Congress, to acquire land or interests in land, including leaseholds, for the location of storage facilities, and to construct storage facilities. Sections 159(f)(4)(B) and (C), quoted supra. Taken together, these authorities allow the Department to construct storage facilities on leased property as well as property owned by the Government itself.

In addition, some degree of congressional control over expenditures by the Department to carry out the SPR Program is present in that the Strategic Petroleum Reserve Plan required to be submitted to the Congress and to contain information concerning contemplated costs, may be disapproved by the Congress. If the Congress takes no action, the SPR Plan may go into effect after 45 calendar days of continuous session have passed. Sections 159(a), (b); 551. The Plan must include estimates of the cost of storage facilities. Section 154(e)(7).

Under these circumstances, the agency having been given specific authority to construct storage facilities on leased property and the Congress having provided a mechanism for reviewing the plans for meeting the goals of the Program, we would not be required to object to expenditures either for alterations, improvements, or repairs, necessary to adapt leased properties to the accomplishment of the SPR Plan which exceed 25 percent of the first year's rent or for payments of rent exceeding 15 percent of the fair market value of the property (assuming

funds are otherwise available), provided that the sites to be acquired by lease and the associated costs are identified in congressionally approved amendments to the SPR Plan.

With regard to the additional question raised by the Administrator, whether real property consisting mainly of leached caverns or mines is "unimproved," and therefore not subject to the section 322 limitations, no general principle can be set forth. We would have to consider each rented site on a case by case basis. However, since we have concluded that expenditures for construction on leased property which have been, in effect, approved by the Congress as an element of the SPR Plan are not subject to the limitations of section 322, it is not now necessary to pursue this question.

Comptroller General
of the United States