United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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M-36974

Memorandum

To: Secretary

From: Solicitor

Subject: Inspector General's Report on Land Acquisitions

By memorandum dated June 8, 1992, you have requested that I review the Inspector General's ("I.G.") Audit Report: "Department of the Interior Land Acquisitions Conducted with the Assistance of Nonprofit Organizations," Report No. 92-I-833 ("I.G. Report"), and prepare an opinion reviewing the practices which the I.G. believes may not be in accordance with the law.

As noted by the Inspector General, nonprofit conservation organizations ("nonprofits") have made significant contributions to meeting Departmental acquisition priorities. Furthermore, these nonprofit organizations operate with the assistance of bureaus to identify and acquire lands of high priority to the Department. The notion of private sector assistance to the Department in meeting identified priority acquisitions does not seem to raise any considerable legal or policy problems. Rather, the implementation of these nonprofit-bureau relationships raised questions in the context of the Inspector General's report.

This memorandum devotes considerable attention to the way in which nonprofit organizations and Departmental entities interact. It attempts to analyze the legal nature of the relationships, and whether any current practices raise issues that need to be addressed by management of the Department. While the immediate question raised in the report of the Inspector General involves the authority of the Department to exceed fair market value in purchasing land previously acquired by a nonprofit organization, I believe this question is best answered in a comprehensive review of the way in which these acquisition transactions occur.

THE INSPECTOR GENERAL'S REPORT

The purpose of the I.G. Report was to audit land acquisitions made by the Fish and Wildlife Service ("FWS"), the National Park Service ("NPS") and the Bureau of Land Management ("BLM"), through appropriations from the Land and Water Conservation Fund ("LWCF"), 16 U.S.C. §4601-4-11, and, in the case of FWS, also from the

Migratory Bird Conservation Fund ("MBCF"), 16 U.S.C. §715 et seq., with the assistance of nonprofits. Specifically, the Report states that the overall objective of the audit was to review the propriety of such land acquisitions to determine whether:

> ...(1) the Department was buying land at excessive prices, (2) nonprofit organizations were benefiting unduly from their participation in the Department's land acquisition process, and (3) lands acquired with the assistance of nonprofit organizations were actually needed by the acquiring bureau.

I.G. Report at 2. During the period covered by the audit, October 1, 1985, to September 30, 1991, Congress provided about $992 million for land acquisitions by FWS, NPS and BLM. These three agencies identified a total of 317 transactions during the audit period, with a combined value of about $222.6 million, in which acquisitions were made with the assistance of nonprofits. Of this total funding, $546 million was made available to the FWS for land acquisitions, of which $367 million was appropriated from the LWCF and $179 million deposited in the MBCF. Nonprofit organizations were involved in 159 land acquisitions, in which the FWS paid the nonprofits a total of $135.6 million, or 25 percent of the total FWS land acquisition funds available. Congress appropriated almost $388 million to the NPS for land acquisitions under the LWCF during the same period, of which 89 transactions, totalling $47 million, or 12 percent of total funding, involved nonprofit organizations. Total funding for BLM under the LWCF was approximately $58 million, of which 69 transactions, valued at almost $40 million, or 70 percent of total funding, involved nonprofit organizations.

While nonprofit organizations have been involved with Federal agency land acquisitions for more than a quarter-century[1], the growing financial resources of the Nation's major conservation organizations, combined with a dramatic increase in funding available under the LWCF[2], has significantly expanded the overall financial involvement nonprofit organizations currently have with Federal land acquisition transactions.

Of the transactions involving nonprofit organizations during the 1986-1991 period, the I.G. selected 130 acquisitions totalling about

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[1]A 1981 report by the General Accounting Office, noted that 4.5 percent of land acquired by NPS, FWS, and the Forest Service during the period 1965-1979 was acquired through the use of nonprofit conservation organizations. ("Overview of Federal Land Acquisition and Management Practices," CED 81-135.)

[2]Funding under the LWCF for the FWS, NPS and BLM increased 141 percent between 1986 and 1991, from $91.4 million to 219.8 million per year.

$134 million on which to base his report. As a result of his audit of these land acquisition transactions the I.G. states:

> We identified a total of $7.1 million from the Land and Water Conservation Fund and the Migratory Bird Conservation Fund that we considered excessive that was paid to tax exempt nonprofit organizations for financing and arranging sales of property to the Department.

I.G. Report at 5. This figure is broken down into two segments. The first, totalling $5.2 million, represents the amount which the Report claims FWS paid in excess of Fair Market Value. It appears that within the context of this Report "Fair Market Value" is used interchangeably with the term "Appraised Fair Market Value."[3]

The I.G. was able to specifically document these costs, because as is stated in the Report:

> The U.S. Fish and Wildlife Service issued instructions that authorized and sanctioned the practice of purchasing property from nonprofit organizations for amounts greater than the property's fair market value. Specifically, the Service's land acquisition program managers were instructed to use letters of intent, which provide that the Service will purchase property from cooperating nonprofit organizations for the prices paid by the nonprofit organization, plus any interest, overhead, and direct costs incurred by the nonprofit organization, even when reimbursement of these costs causes the sales price to exceed the appraised fair market value. (emphasis added).

I.G. Report at 5. The second component, consisting of $1.9 million, represents financial gains realized by the nonprofits on property sold to the Department, even though the price was at or below fair market value. The Report states that:

> In these transactions the nonprofit organizations arranged to purchase property for less than fair market value and to sell the property to a Departmental bureau for the property's appraised value in accordance with the Relocation Assistance Act. However, the nonprofit organizations in most cases just held an option until the Departmental bureau had funds available to buy the property.

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[3]Although the sub-heading of the report which discusses this issue is entitled "Purchase Prices Exceeded Fair Market Value," in citing specific examples of acquisitions, the report refers to FWS payments to nonprofits exceeding the appraised fair market value.

I.G. Report at 8.

The second part of the Report focuses on appraisal and property valuations, in which the I.G. finds considerable procedural problems. Although no fixed dollar amount is assigned as a loss to the Government, the Report states:

> We found, however, that certain land purchases were made before the appraisal process had been completed or were made in excess of the appraisal value with no documentary evidence to justify the increased price. In addition, the value of the land acquired was based on appraisals that were an average of 400 days old at the time of acquisition, with the age of 71 of the 93 appraisals reviewed exceeding 180 days. As a result, the Department currently has little assurance that the fair market value estimates used by its bureaus are timely, complete, and accurate and that prices paid to nonprofit organizations are reasonable and well supported.

I.G. Report at 16. The I.G. Report concludes that, "because of the breakdowns observed in valuing properties," the Government's interests are not adequately protected in dealing with nonprofits.

One recommendation in the I.G. Report is that the Assistant Secretary for Fish and Wildlife and Parks obtain:

> [A] Solicitor's opinion on (a) the allowability of paying interest costs and (b) the Department's authority to exceed the appraised fair market value by paying added nonprofit charges such as interest and overhead.[4]

I.G. Report at 10. As noted in the introduction, this opinion will analyze the components involved in a nonprofit acquiring land for the Service to identify potential legal issues.

BACKGROUND

Although the practice of nonprofits purchasing and holding properties for later conveyance to Federal land acquisition bureaus has been utilized for several decades, the statutes and regulations governing Federal land acquisitions do not deal directly with this relationship.

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[4]Note that by memorandum of February 19, 1992, the Director of the FWS requested a Solicitor's opinion on these issues. That request has been merged into this Opinion.

In 1983[5], as the result of a joint effort between NPS, FWS, BLM and the Forest Service, guidelines were drafted to better define the relationship between nonprofits and these land acquisition bureaus. Following an opportunity for public review and comment, pursuant to notice in the Federal Register, final guidelines were published, also in the Federal Register (30 Fed. Reg. 36342, 1983), setting down basic principles to be followed in these transactions. The introduction to these guidelines stated both the purposes of these relationships and the broad array of partners which might assist the land acquisition agencies in achieving those purposes:

> Because of the lengthy time requirement in the budgeting and appropriations process, Federal Agencies are frequently unable to acquire land in response to imminent threats to critical resources or to buy needed resources under favorable terms. With the ability to act quickly in the private market and maintain flexible working relationships with landowners, nonprofit conservation organizations or other corporations, individuals, or entities (hereinafter "other entities") can assist and support the Federal Land Acquisition program.

The guidelines outline basic principles that should govern the role of nonprofits and other entities in acquiring land or interests in land for ultimate Federal acquisition. In summary those basic principles are:

1. Nonprofit conservation organizations and other entities are not agents of the Federal Government, unless specifically designated by mutual consent.

2. The nonprofits and other entities are typically independent groups who freely negotiate real estate actions anywhere and anytime they desire and at their own risk.

3. Because of statutory, budgetary and policy considerations, the objectives of the Federal agencies must be paramount to those of the nonprofit conservation organizations and other entities.

4. Lands or interests in land proposed for acquisition through a nonprofit or other entity should be in accord with priorities outlined by the agency and must be within the boundaries of authorized areas, consistent with existing authorities, and limited to tracts that the agency has determined need to be acquired.

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[5]The 1983 guidelines were adopted at the urging of the Office of Management and Budget and the General Accounting Office in order to establish a policy for determining what the working relationship between the agencies and nonprofits should be in acquiring lands.

5. In each case where a nonprofit organization or other entity seeks prior assurance from an agency or an agency requests the assistance of a nonprofit organization the proposal of the agency should be outlined in a letter of intent to the nonprofit organization or other entity.

6. In cases where a nonprofit organization or other entity or a Federal agency has requested and received a letter of intent and the nonprofit conservation organization or other entity has secured an option to buy and does not or will not own title prior to a binding Federal commitment to purchase, the option price, the sale price to the Federal agency and the appraisal data must be disclosed before a decision to purchase is made by the Federal agency.

The letter of intent is the document establishing the pre-acquisition relationship between the Federal agency and the nonprofit or other entity. As stated in the Federal Register notice, this letter should provide the nonprofit or other entity with a minimum of:

1. Land or interest in land needed;

2. the estimated value;

3. the projected time frame as to when the agency intends to acquire the property from the nonprofit organization or other entity; and

4. a statement indicating that should the agency be unable or decline for policy reasons to purchase the land within the projected time frame, disposition of the land or interests in land by the nonprofit organization or other entity is without liability to the government.

Although BLM is involved with a limited number of direct acquisitions involving nonprofit organizations, the vast number of transactions between nonprofits and BLM involve land exchanges, which are covered by provisions of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §1716. The FWS and NPS have been involved in the majority of direct acquisitions involving nonprofit organizations. Consequently, the balance of this discussion will focus primarily on FWS and NPS transactions.

While both the FWS and the NPS were parties to the 1983 "Guidelines for Transactions Between Nonprofit Conservation Organizations and Federal Agencies," our research indicates that the two bureaus have taken differing approaches in implementing acquisitions involving nonprofits.

Both bureaus utilize a letter of intent to reduce to writing in a formalized manner the understanding between the parties. It is apparent in talking with those involved with the acquisition process within the bureaus that discussions between bureau and nonprofit

personnel involving land acquisitions are routine. However, it is clear that the vast majority of properties subject to such letters are parcels high on the bureau acquisition priority system. The bureau seeks the assistance of the nonprofit to ensure that a specific parcel will be available from a willing seller at the time when funding for the property is appropriated.

The major difference in utilizing nonprofit organizations in the acquisition procedures between the FWS and the NPS is that in signing a letter of intent, the Director of the FWS specifically indicates that the nonprofit will be paid its purchase price for the property plus reimbursement for direct expenses, overhead, and foregone interest. All such expenses claimed by the nonprofit must be verified to the satisfaction of the Service before they are paid.

The NPS, on the other hand, does not agree to pay any such expenses. However, as the result of a meeting with NPS acquisition officials, it is apparent that at the time NPS acquires a property from a nonprofit, it routinely pays a price above the appraised value of the property which would appear to approximate a value which would equal the costs paid to the nonprofit by the FWS in similar transactions.

Reprogramming guidelines found at pp.4-6 of the House Report accompanying the FY 1992 Interior and Related Agencies Appropriations Act instruct the Department to present over-appraisal acquisitions to the Appropriations Subcommittees for review. When the NPS agrees to pay a nonprofit an amount greater than the appraised value for a property, it routinely sends a letter notifying the Appropriations Subcommittees of its intent to proceed with the transaction in 30 days, unless otherwise notified. We are unaware of instances in which the Subcommittees have advised the NPS not to proceed with such a transaction.

The FWS, on the other hand, precludes the notification process by paying a nonprofit no more than the appraised value for a property. The administrative and overhead costs paid to the nonprofit are not viewed by the FWS as a component of the purchase price, and thus the Service does not consider such acquisitions as "over-appraisal transactions," requiring Subcommittee notification.

LEGAL ISSUES

I. The Legal Relationship between Agencies and Nonprofit organizations involved in Land Acquisition Transactions

In addressing the legal issues raised in the I.G. Report, we begin with the basic, but essential threshold questions that define the legal relationships between the land acquisition agencies and the nonprofit organizations that sell properties to the Federal government. The "letters of intent" delineate the general arrangement between the agencies and nonprofits before the nonprofits first acquire properties from third party sellers.

The first question presented by these transactions is whether the nonprofit is the agent of the Government for purposes of these acquisition. The nonprofit is not an agent of the Government when it acquires the real property, as set forth in the letters of intent, because the law of agency recognizes that a principal may not employ an agent to do that which the principal cannot himself do. 3 C.J.S. §§291-294; California Sand and Gravel, Inc. v. United States, 22 Ct. Cl. 19 (1990).

The facts briefly restated are that at the request of the NPS or the FWS in a letter of intent, the nonprofit acquires property in its own name. This is done because at the time of the request the Government does not have the funds available to purchase the property. After appropriated funds become available, the Government subsequently purchases the land from the nonprofit and pays interest and all direct overhead expenses incurred.

The Antideficiency Act is the linchpin of the legislative machinery established to protect and preserve the congressional power of the purse. It provides:

> "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law." 31 U.S.C. §665(a).

This section prohibits the FWS and the NPS from purchasing goods, services and land without funds appropriated for that purpose. Since an agent cannot be given any authority greater than that possessed by the principal, the nonprofit clearly cannot be considered an agent of the Government since the Government has no authority to purchase the land until Congress authorizes and appropriates funds for the purchase.

It is important to emphasize that an agent of the Government must act within his delegated authority. See St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1300 n.7. (8th Cir. 1980). It is well established that apparent authority does not apply to Government agents. California Sand .

Formation of a principal-agent relationship does not require a written document. An agency relationship may be created by an overt act of the parties, or by ratification. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800,808 (C.A.N.Y. 1971). See e.g., 48 C.F.R. 1.602.3. The letter of intent expressly states that no obligation is imposed on either party. Therefore, it cannot be argued that this

letter establishes an agency relationship.

Second, the letter of intent does not establish a contract between the Department and the nonprofit. There is no stated consideration nor are there included any mutual promises. See National By-Products, Inc. v. United States, 186 Ct.Cl. 546, 560; 405 F.2d 1256, 1264 (1969). Neither party is given any remedy in the event there is failure to perform. What this letter of intent appears to be is a statement of possible future intent on the part of the Government to take some action, if it so chooses. This, in our opinion, is nonbinding and does not create a contract of any type. Tilley v. Cook County, 103 U.S. 155 (1880). Appeal of Andonian Associates, Inc., IBCA 482-2-65, 65-2 BCA ¶4951 (1965). It is, nevertheless, important that the bureaus reiterate this view to potential nonprofit purchasers. The 1983 policy contains an explicit statement that should be included in letters of intent. This language should be included in each letter.

The third inquiry associated with assessing the appropriateness of these expenditures, is whether they involve the purchase of supplies or services for which the procurement process is applicable under the Federal Acquisition Regulations.

The federal procurement laws and regulations are not applicable to the purchase of real property or services associated with such purchases.

The Office of Federal Procurement Policy Act of 1974 (Procurement Act) was passed by Congress to establish policies, procedures, and practices which will provide the government with property and services of the requisite quality, within the time needed, at the lowest cost. 41 U.S.C. §401 et seq., (Pub. L. 93-400), as amended by (Pub. L. 96-83, and OFPP Policy Letter 85-1, Federal Acquisition Regulations System, dated August 19, 1985). Under the Procurement Act, the term "procurement" is defined to include, "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout...." The statute specifically excludes real property from the procurement regulations. 41 U.S.C. §403, and 41 U.S.C. §405(a).

Under the Procurement Act, the Office of Federal Procurement Policy promulgated what is now the Federal Acquisition Regulations (FAR). The FAR is the major government-wide regulation governing federal procurement. The FAR was established for the codification and publication of uniform policies and procedures for "acquisitions" by all executive agencies. (48 C.F.R. 1.101). The FAR applies to all acquisitions except where expressly precluded. 48 C.F.R. 1.103. The term "acquisition" is defined in the FAR as:

> the acquiring by contract with appropriated funds of supplies and services (including construction) by and for the use of the

> Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated...

(48 C.F.R. 2.101.) The term "supplies" is defined in the FAR as, "all property except land or interest in land." (emphasis added.) (48 C.F.R. 2.101).

Thus, land acquisitions have been excluded from the procurement process. The result is the same whether the land acquisition is made by the Government or a third party on its behalf. Land acquisition activities of third parties would not be subject to the FAR, since the FAR only applies to acquisitions by the Government and because land acquisitions, in any case, are excluded from the FAR. Consequently, the purchase of land from a nonprofit would still not constitute a procurement contract.

In the usual circumstance where the Government purchases the land directly from the seller without the involvement of a third party, the services related to that purchase (e.g. appraisal services, title searches) would be available for competition under the procurement regulations. While this is the common practice of the Department, there is no legal obligation to use the procurement process in acquiring these services so long as they are considered to "relate to the acquisition of land." 48 C.F.R. 2.101. As a legal matter, the Government is free to use the appraisal of the seller.

In a traditional acquisition of privately owned land the NPS procures title evidence, surveys and appraisals in order to determine the landowner, the tracts to be acquired, and the Government's estimate of market value. These services and reports are acquired by competitive bidding.

The NPS recognizes that nonprofits, before offering land to the Government for purchase or entering an option agreement, have incurred appraisal, survey and title costs just as any prudent private purchaser would do. Further, the nonprofit reflects these costs, in whole or in part, in the price at which it will offer the land for purchase by NPS. These nonprofit transactional costs are not itemized or reviewed by NPS.

In dealing with nonprofit organizations, NPS expends its own funds for title evidence. NPS seldom needs to do survey work, but here the practice is mixed. NPS may spend funds for a survey under FAR, if needed, or accept what might be characterized as a "donation" of a survey from a nonprofit. On appraisals it is the NPS policy to purchase its own appraisals under the FAR. Only with the personal approval of the Director will the NPS accept for review an appraisal done by a nonprofit and then only before the nonprofit initiates negotiations with the landowner. NPS then reviews in-house the appraisal to see whether it will approve the appraiser's estimate of just compensation. The latter course is the exception.

FWS follows a slightly different procedure. All FWS and Departmental requirements remain applicable to the appraisal, title and survey work that is acquired by the nonprofit. With an agreed upon letter of intent, a nonprofit will ask the FWS to identify acceptable appraisers. The completed appraisal will then be reviewed by a FWS reviewer and must meet all Service requirements for a Federal appraisal. Nonprofits will also utilize title companies and title attorneys that are preferred by FWS. Once again, all title work must meet all governmental requirements and is subject to independent FWS review and approval.

As a business matter, it makes good sense for the Government to perform an independent appraisal whether through a contractor or in-house to ensure that the Government receives the best price for the service.

II. Costs paid by agencies to nonprofits organization

We now turn to questions raised in the I. G. Report regarding the costs land acquisition agencies pay nonprofits in connection with transactions which are subject to letters of intent.

A. Authority for a bureau to pay more than the appraised market value to acquire a property

With regard to the FWS's policy of paying a nonprofit's administrative costs, overhead and interest, in addition to the purchase price of a property, the I.G. Report states that: "In our opinion, the Service's policy and practice are not consistent with provisions of the Relocation Assistance Act, which requires Federal agencies to purchase property at its fair market value." [6]

I.G. Report at 5.

Section 301(3) of the Relocation Assistance Act states that:

> Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event, shall such amount be less than the agency's approved appraisal of the fair market value of such property.

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[6] Here, again, it should be pointed out that the I.G. report uses the terms "fair market value" and "appraised fair market value" inter-changeably. Two sentences prior to this one, the Report refers to the Service's payment of nonprofit costs, "even when reimbursement of these costs causes the sales price to exceed the appraised fair market value."

42 U.S.C. §4651(3). Beyond the plain meaning of the words of this section, the legislative history of the Act reveals that one of the specific purposes of this section was to depart from past practices where sellers are made an offer by the government on a "take it or leave it basis." (H.R. Rep. No. 91-1656, 91st Cong., 2nd. Sess. (1970)). The House Report goes on to state that:

> ...[T]he proposed policy recognizes that individual appraisers and appraisals are not infallible, and for that reason places the responsibility on the acquiring agency to determine, in advance of negotiations, an amount which it regards as the fair market value of such property, and to make an offer to the property owner for the full amount so determined.

Id. The regulations to implement this Act, as it applies to all Federal agencies, were promulgated by the Department of Transportation, and appear at 49 C.F.R. 24. Section 24.102 of those regulations states that: "The initial offer to the property owner may not be less than the amount of the Agency's approved appraisal, but may exceed that amount if the Agency determines that a greater amount reflects just compensation for the property." (emphasis added.) See United States v. Fuller, 409 U.S. 488, 490 (1972).

A Bureau in seeking to acquire property may indeed offer a seller an amount greater than the appraised market value.

B. Authority for a bureau to pay administrative and overhead costs

The Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1992 appropriates monies for FWS land acquisition, as follows: "[f]or expenses necessary to carry out the provisions of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. §460l-4-11), including administrative expenses, and for acquisition of land or waters, or interest therein, in accordance with statutory authority applicable to the United States Fish and Wildlife Service...." (emphasis added). 105 Stat. 994 (1992) (hereafter "appropriations act"). The appropriations act appropriates monies for the NPS land acquisition as follows: "[f]or expenses necessary to carry out the provisions of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. §460l-4-11), including administrative expenses, and for acquisition of land or waters, or interest therein, in accordance with statutory authority applicable to the National Park Service...." (emphasis added). 105 Stat. 998.

The appropriations act states that administrative expenses are included in the land acquisition appropriations for NPS and FWS. NPS and FWS may pay their own administrative expenses related to land acquisitions from these appropriations.

The appropriations language does not make specific reference to the

indirect costs that may be linked to the purchase of land, e.g., appraisal and title search fees and title insurance. Because the act does not specifically address the issue, the question arises as to the legal authority of an agency's use of appropriated funds for these indirect costs. The basic rule of law applicable to this issue is found at 31 U.S.C. §1301(a): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." It is important to recognize, however, that this section does not require that every item of expenditure be specified in detail by the appropriations act.

The concept that an agency has reasonable discretion in determining how to carry out the objectives of the appropriation is known as the "necessary expense doctrine."

> It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by this express authority.

6 Comp. Gen. 619, 621 (1927). Thus, an appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.

An expenditure is justified under the necessary expense doctrine if it meets three tests:

1. The expenditure bears a logical relationship to the appropriation sought to be charged;

2. The expenditure is not prohibited by law;

3. The expenditure is not otherwise provided for because it falls within the scope of some other appropriation or statutory scheme.

See, e.g., 63 Comp. Gen. 422, 427-28 (1984).

In applying these tests to the legality of the Interior bureaus funding their administrative expenses and costs related to land acquisition from the land acquisition appropriations, we note at the outset that the determination that a given item is reasonably necessary in accomplishing an authorized purpose is generally within

the discretion of the applicable agency. "When [GAO] review[s] an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range." In the Matter of Implementation of Army Safety Program, (unpublished GAO Decision, B-223608, December 19, 1988); see also 65 Comp. Gen. 738 (1986) (whether appropriated funds are available for a particular purpose must be evaluated in light of the specific circumstances and statutory authorities involved). Clearly there is adequate administrative justification for the bureaus to conclude that payment of costs related to the purchase of lands, as appraisal costs, title insurance, and overhead are necessary to accomplish the purpose of the appropriation, which is to fund the acquisition of land. Obviously, there are limits as to what would be considered a necessary expenditure. Overly broad "overhead" costs may raise a factual issue as to whether or not a cost is necessary.

Accordingly, the bureaus may conclude that it is appropriate to pay for costs directly relating to land acquisition under authority of the Department's annual appropriations for land acquisition.

Among the authorities given the FWS in the Land and Water Conservation Act for which the appropriations act authorizes administrative expenses is the "...Federal acquisition and development of lands." There is no law that precludes the FWS from making payment to an outside nonprofit organization for administrative acts in furtherance of the purposes of the Land and Water Conservation Act when funds have been appropriated for administrative purposes.

Note that 16 U.S.C. §460l-8 provides that grant payments may be made to states to carry out the purposes of 16 U.S.C. §460l-4-11 for planning, acquisition or development, and that §460l-8(e) provides that the acquisition money provided to states does not include "incidental costs relating to acquisition." The fact that Congress found it necessary to exempt "incidental costs" from purposes for which funds may be provided to states implies that payments for "incidental costs" are contemplated by the remainder of the conservation provisions within 16 U.S.C. §460l-4-11.

Furthermore, the FWS in transmitting its reprogramming requests has routinely informed the Congress as to the nature of the administrative expenditures that had been approved in association with land acquisitions from nonprofit organizations.[7] The fact there

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[7]As an example of such notification, in a December 3, 1990 letter to Congressman Sidney Yates, Chairman of the House Appropriations Subcommittee on Interior and Related Agencies, regarding an acquisition involving the Nature Conservancy, the Assistant Secretary

has been no objection voiced or attempt to reverse this practice adds weight to the position that Congress concurs in this expenditure of administrative funds under the Appropriations Act.

C. Authority for a bureau to pay interest charges to nonprofits

In reviewing the bureaus' payment practices to nonprofits in these transactions, the payment of interest is of particular concern. We note that the Federal government is not authorized to pay interest unless it is expressly provided for by statute or by contract. See, e.g., United States ex. rel. Angarica v. Bayard, 127 U.S. 251 (1888); United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947). There is no statutory authority that directs the FWS to reimburse the seller for interest payment. Therefore, the reimbursement of interest to a seller could only be permitted if specifically provided for in a contract. Even if it were conceded that the letter of intent between the agency and the nonprofit which provides for the reimbursement of interest was a contract, and we believe it is not, OMB Circular No. A-122, "Cost Principles for Nonprofit Organizations" (46 Fed. Reg. 17185, 1980), which sets forth principles for determining costs of grants, contracts and other agreements with nonprofit organizations, states at Attachment B(19)(a) that, "Costs incurred for interest on borrowed capital or temporary use of endowment funds, however represented, are unallowable." (This OMB circular was adopted in the FAR at 48 C.F.R. 31.702, under Subpart 31.7 -"Contracts with Nonprofit Organizations.") Therefore, since we are not aware of any express statutory authority for the agencies to pay interest to nonprofit organizations, and A-122 specifically prohibits the payment of interest in contracts and other arrangements with nonprofit organizations, there is no basis to support an agency's reimbursement of interest expenses.

III. Propriety of the relationship between land acquisition agencies and nonprofit organizations

Beyond the basic issues involved in analyzing the legal relationship between the Department's land acquisition agencies and the nonprofit organizations, and reviewing the costs allowed in such transactions, there are certain aspects of these relationships raised by the I.G. Report and our own research which raise substantial questions.

A. Overpayment Issue

The I.G.'s report outlines specific NPS, BLM and FWS transactions in which nonprofit organizations realized proceeds in excess of identified costs. This issue is distinguished from the cost issues

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- Policy Management and Budget stated, "In accordance with the terms and conditions of the Service's agreement with TNC the purchase price for this property will include interest, overhead and other administrative costs, as summarized in the enclosed analysis."

discussed above, in that it focuses not on costs related to the purchase of the property or with prices paid above appraised value. Rather, this question deals with transactions in which the nonprofit purchases property under complicated technical arrangements which result in prices paid to the nonprofit from the agency in excess of what the nonprofit paid the original third party owner. Often these transactions involve options in which the nonprofit had very little capital invested and almost no risk involved.

Typically, an option is a contract between a prospective buyer and prospective seller, giving the buyer the right to purchase property (in this case) at a given price before the option expires. Usually, an option is purchased in the hopes that another buyer will be willing to pay a higher price for the property than the price in the contract, before the option expires. For example, a nonprofit could negotiate and purchase an option from a private landowner for $10,000, giving it the right to buy a given parcel for $1 million, within one year. If, in turn, a Federal Agency seeks to acquire that property during the term of the option, it must deal with the option-holder. Thus, the nonprofit could ask considerably more than $1 million for the property, and if the agency agreed to pay that price, the nonprofit would exercise its option and the land would pass from the third party owner to the Federal Agency. The nonprofit would then collect the difference between the price paid by the agency and the $1 million price for which the nonprofit has the option of purchasing the property.

As an example cited in the I.G. Report (p.9), The Trust for Public Land invested $1,000 to buy an option to purchase a 217-acre parcel of land for $2 million for a Wildlife Management Area. As a result, the Trust for Public Land realized a gain of about $200,000 when the FWS purchased the property nine months later for $2.2 million.

We recognize the public policy considerations and the perceptions created in the public mind by these transactions. In order to avoid these types of outcomes in the future, the I.G. Report recommends that the acquiring agencies limit prices paid to the nonprofit organizations when their assistance is requested by a Departmental bureau to either the nonprofit organization's purchase price plus allowable expenses per the Relocation Assistance Act or to the approved appraisal value, whichever is less." I.G. Report at 10. It should be recognized that the "profits" realized by the nonprofits in these transactions are typically not the result of overpayments by the Federal government, but rather, more likely have resulted from an underpayment by the nonprofit to the third party. A potential solution is that nonprofits be encouraged or required to fully disclose that they hold a letter of intent from a Federal agency in negotiating transactions with third parties and that they are seeking to purchase their land in contemplation of a future sale to the Federal government. The current guidelines only require that the nonprofit make full disclosure to the land acquisition agency of the terms of its transaction with the third party seller.

B. The nonprofit organizations are not, in this instance, advisory committees

Section 3(2) of Federal Advisory Committee Act (FACA) defines "advisory committee" as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof... which is ...established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal government. . ." 5 U.S.C. App.§3(2). The nonprofit organizations that sell land to the Department were not established by the Federal government.

The leading case on determination of whether an outside group is an advisory committee is Public Citizen v. Department of Justice, 491 U.S. 440 (1989). In Public Citizen, the Court discussed several factors to be considered in deciding if an agency is using an organization as an advisory committee under the Act. The factors include: (1) whether the government prompted formation of the group, (2) whether the organization is funded by the government, and (3) whether the organization is amenable to management under FACA by the agency.

Other cases have looked at the regularity of meetings, purposes of the meetings, formality of the agency's relationship to the organization, and the types and nature of communication between the organization and the agency.

We understand each bureau internally studies land areas within its jurisdiction and identifies areas that should be protected. Each bureau then develops a priority list for land acquisition, which ranks the areas in priority order based on the bureau's mission. The bureau lists are reviewed annually by the Department as part of the Department's budget formulation process. The lists are then merged according to established administration criteria. A list of Departmental priorities covering FWS and NPS is the final result.[8]

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[8]The development of land acquisition priorities by the National Park Service involves both a public participation and a budget prioritization process. At the local level the various areas of the National Park System develop land protection plans. These plans identify the tracts of land that will be acquired, the interest in lands (i.e., easement, fee, etc.) to be acquired, and priority of acquisition. Members of the public are invited to participate in this process and comment on the draft land protection plans. NPS, after considering the public comment, finalizes the plan.

The prioritization regarding which tracts will be acquired then goes into a budget competition with other tracts in other areas of the National Park System. The result is an NPS land acquisition plan, nationwide. The NPS program then competes with the Departmental acquisitions for appropriations from the Land and Water Conservation

The Department's priority list is released to the public at the same time it is made available to the Congress. Until release to the Congress, each year's list is an internal document, and is not available to any outside source (including the nonprofit organizations).

We are informed that, because the priority lists for each bureau and the Department are revised each year, the above-described procedures are an on-going process subject to continuing revisions. At any time, any party, including states, nonprofit organizations and private landowners may (and do) suggest to a bureau that a specific tract of land should be acquired. No suggestion for acquisitions is accepted until the bureau studies the situation itself and reaches an independent conclusion. No entity is relied on as a preferred, or regular source for suggesting potential land acquisition projects.

Under the holding in Public Citizen, receipt, and even ultimate acceptance, of an unsolicited suggestion from an outside organization does not transform the entity into a FACA committee. Where the bureaus have responsibility for initiating their own land acquisition priority lists and independently considering suggestions for inclusion, they cannot be said to be "utilizing" the nonprofit organization as a source of advice within the meaning of the Act.

Even if receipt of such unsolicited input from the nonprofit organizations were to be considered as the receipt of advice, none of the usual factors is present to begin to bring the entities within the ambit of the FACA. In Public Citizen, the Supreme Court concluded, based on an analysis of the legislative history behind FACA, that the FACA is essentially limited to "groups organized by or closely tied to the Federal Government and thus enjoying quasi-public status." This analysis leads us to the same result the

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Fund. The Department makes a recommendation to OMB and the President's budget establishes the priorities for acquisition of land for the Department. This latter process does not involve the nonprofits, and their advice is not sought on how the Administration's acquisition program should be implemented.

The Fish and Wildlife Service identifies lands appropriate for acquisition pursuant to the Land Protection Plan (LPP) process. Prior to the start of a new refuge or the expansion of an existing refuge, FWS completes an LPP. This is done through public notice and often individual mailings to known land owners. Public meetings are held and important natural resources are identified. The LPP priorities are listed, tract by tract, as high medium or low priority. Threats to individual tracts are also reviewed. Following budget prioritization with OMB, acquisition is then accomplished on a case by case basis.

Court found in Public Citizen.[9] There is no advisory committee relationship in this instance.

C. Ethical considerations

In staff discussions with acquisition personnel of the FWS and the NPS, it was clear that there existed no policy to favor certain nonprofit groups over others in assisting with land acquisitions. Certain organizations over time have been utilized more frequently, based on a variety of factors.[10] Nevertheless, staff indicated a willingness to work with any group or individuals on acquisition priorities.

Such willingness to work with all sources is significant. It is important to avoid the substance or appearance of favoring certain groups or individuals over others, absent clear, objective criteria. The 1965 Executive Order on Prescribing Standards of Ethical Conduct for Government Officers and Employees (hereinafter cited as E.O. 11222), directs that employees "avoid any action... which might result in, or create the appearance of -

(1) using public office for private gain;
(2) giving preferential treatment to any organization or person;
(3) impeding government efficiency or economy;
(4) losing complete independence or partiality of action;
(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

E.O. 11222, section 201(c).

Again, the facts we have produced lead to no policy of favoritism of particular groups, or of attempting to limit sources of assistance in the acquisition program.

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[9]In Public Citizen, the Appellant contended the American Bar Association (ABA) views on judicial nominations brought the ABA under FACA. The Court rejected this argument.

[10]Three nonprofit organizations -- The Nature Conservancy, The Trust for Public Lands and The Conservation Fund -- accounted for 239, or 75 percent, of the 317 land acquisition transactions with FWS, NPS and BLM, involving nonprofits during the 1986 to 1991 period covered by the I.G. Report. Bureau personnel cite these organizations' superior financial and staff resources, on a national level, as a primary reason for their ability to assist in the majority of land transactions involving nonprofits.

CONCLUSIONS AND RECOMMENDATIONS

In this review of the Departmental-nonprofit transfers, I have concluded:

1. The relationship between Departmental bureaus and nonprofit organizations are neither contractual nor agency relationships giving rise to inappropriate obligations prior to the commitment of resources for acquisition. (Page 7).

2. The land acquisitions in question are not subject to the requirements of so-called procurement laws. (Page 8). However, specific actions related to land acquisition may provide bureaus with an opportunity to contract certain functions.

3. Generally, the bureaus have the authority to pay in excess of appraisal values for property acquired. (Page 10).

4. Authority exists to pay overhead and administration costs of the nonprofit organizations. (Page 11).

5. No authority exists for bureaus to pay interest for income foregone as a result of the acquisition by nonprofits. (Page 13).

6. While option costs are utilized by nonprofits and have resulted in payments in excess of costs from bureaus to the nonprofits, the arrangements are legal. (Page 14).

7. The interaction of nonprofits and Departmental bureaus does not give rise to a federal advisory committee relationship. (Page 15).

In light of our review of the law and facts, the following recommendations are offered for management consideration.

1. Differing procedures are utilized for the reimbursement of costs between the FWS and NPS. No clear criteria exists for paying over appraised value. We recommend that policymakers consider whether a unified approach would be appropriate.

2. There is a disparity between the bureaus with regard to appraisals prior to the acquisition of lands from nonprofit organizations. Generally, the FWS accepts the appraisal commissioned by the nonprofit as the basis of its acquisition. Generally, the NPS relies on an independent appraisal. The merits of the approaches should be considered and reviewed.

3. The payment of foregone interest is inappropriate and should not form the basis for bureau reimbursement in transactions with the nonprofits.

4. With respect to option contracts held by nonprofits, a potential solution would be to require disclosure by the nonprofits of a letter of intent between the nonprofit and the bureau.

5. The relationship between the bureaus and the nonprofits disclose no factual basis for a conflict of interest situation. However, care ought to be given to avoiding even the appearance of impropriety or special relationships. Perhaps reiteration of the 1983 policy would re-emphasize the open nature of the process.

6. The Department should review bureau compliance with the 1983 policy.

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