



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply, Refer to:
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SEP 13 2007

Memorandum

To: Chief, Division of Federal Assistance, Region 3

From: Chief, Division of Policy and Programs, Wildlife and Sport Fish
Restoration, Washington Office *M. J. [Signature]*

Subject: Preagreement Costs

The purpose of this memorandum is to address your concerns about a possible inconsistency between the Service Manual chapter on Preagreement Costs (522 FW 16) and a Comptroller General's decision, dated May 5, 1961 (B-145085), which could be interpreted as disallowing preagreement costs of the nature permitted under 522 FW 16.

In December 2006, your staff brought this decision to the attention of the Washington Office (WO) Division of Federal Assistance (FA) in response to a recently issued amendment to Service Manual Chapter 522 FW 6 on Land Acquisition. The WO-FA had initiated the amendment to eliminate an inconsistency with 522 FW 16. Since the Joint Federal/State Task Force on Federal Assistance Policy (JTF) had recommended this chapter to the Director, the WO-FA made the JTF aware of the issue.

The JTF reexamined 522 FW 16 in light of the 1961 Comptroller General's decision, and a subsequent October 20, 1976, decision of the Comptroller General (B-151087) during its April 4-6, 2007 meeting. Assisting the JTF in its review of the policy was Solicitor's Office attorney Larry Mellinger, who regularly provides counsel to the FWS on JTF matters. During this review, it was determined that 522 FW 16 was not inconsistent with the Comptroller General's most recent decision regarding this issue. Provided below is a brief summary of the analysis supporting this position.

The Comptroller General wrote its 1961 decision in response to a proposal to permit a State to pay for land under the Pittman-Robertson and Dingell-Johnson Acts in advance of its apportionment, which was prior to when Federal funds become available for such purposes. The Comptroller General based its decision in part on provisions in each Act that read:

...[T]he Secretary of the Interior shall approve only such projects as may be substantial in character and design and the expenditure of funds hereby authorized shall be applied only to such approved projects....

The Comptroller General explained that Congress intended that Federal Assistance funds only be applied to projects initiated by the States with the approval of the Secretary of the Interior under an apportionment for use prospectively. Congress did not intend for a State to discharge retroactively an obligation incurred by the State prior to the availability and obligation of Federal funds.

However, 15 years later, as reflected in its 1976 decision (B-151087), The Comptroller General came to a somewhat different conclusion, stating that:

While the courts have developed a rule of construction which disfavors retroactivity, this rule is relevant primarily where retroactive application of a statute would abrogate pre-existing rights or otherwise cause results which might seem unfair. ... Indeed it is at best doubtful that such a use of appropriations for grant payments even involves the "retroactive" application of a statute in the customary sense, since the determination of whether to allow payment itself, will be made after the appropriation becomes available. ... However there is no basis to create a rigid legal barrier in this regard, so as to limit consideration of all factors relevant to deciding how the purposes of a particular grant program can best be accomplished. ... We would prefer to base each decision from now on on the statutory language, legislative history, *and* [emphasis added] particular factors operative in the particular case in question, rather than on a general rule.

The Comptroller General in its 1976 decision clarified and, in effect, modified its 1961 decision.

We note that the preagreement costs allowed for under the existing policy (522 FW 16) must be approved on a case-by-case basis, must be for costs that were necessary and reasonable for accomplishing the overall grant objective, and are such that they would have otherwise been approved within the grant period. Further, the Manual states that it is the general policy of the Service to fund eligible projects prospectively, and thus preagreement costs are to be treated as the exception, not the norm.

Based on the language of the 1976 Comptroller General's decision, and the qualifications in the FWS's current preagreement cost policy, we find that Service Manual Chapter 522 FW 16 is legally sound in its current form.

If you have any questions on this subject, please do not hesitate to contact me at 202-208-2231.