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July 12, 2006

The Honorable Pete V. Domenici
Chairman, Committee on Energy
and Natural Resources
United States Senate

Subject: *Department of Energy—December 2004 Agreement with the United States Enrichment Corporation*

Dear Mr. Chairman:

This responds to the Committee's request for a legal opinion regarding what has been referred to as a "barter arrangement" between the Department of Energy (DOE) and the United States Enrichment Corporation (USEC) under a December 10, 2004 Agreement.¹ As agreed with your staff, this letter addresses two principal legal issues: (1) whether DOE had authority to enter into the December 2004 Agreement; and (2) whether DOE had authority to use proceeds from USEC's sale of DOE uranium under the Agreement.

As discussed below, on the first issue, we conclude that DOE was authorized to enter into the December 2004 Agreement by section 3112(b)(2)(D) of the USEC Privatization Act of 1996, 42 U.S.C. § 2297h-10(b)(2)(D). As required by that provision, DOE sold and received payment for Russian-origin uranium to be consumed by domestic end users, and DOE's failure to act within statutory deadlines did not terminate its authority. On the second issue, we conclude that DOE's actions violated the requirements of 31 U.S.C. § 3302(b), the miscellaneous receipts statute. When DOE directed USEC to receive, retain, and use proceeds from the sale of government-owned uranium to compensate USEC for expenses it incurred on behalf

¹ On June 16, 2006, GAO reported to the Committee concerning our review of certain management issues regarding this Agreement in *U.S. Enrichment Corporation Privatization: USEC's Delays in Providing Data Hinder DOE's Oversight of the Uranium Decontamination Agreement*, GAO-06-723 (Washington, D.C.: June 16, 2006).

of the department, DOE improperly augmented its appropriations by \$62 million. To resolve its improper use of sales proceeds, DOE should either seek and obtain congressional ratification of its use of the proceeds or adjust its accounts by transferring \$62 million from its appropriation to the miscellaneous receipts of the Treasury. If DOE lacks sufficient budget authority to cover the adjustment, it should report a violation of the Antideficiency Act² in accordance with 31 U.S.C. § 1351.³

BACKGROUND

The Energy Policy Act of 1992 created USEC as a wholly owned government corporation to perform all uranium enrichment services for commercial purposes in the United States, services that DOE had previously provided.⁴ Between 1993 and 1998, in preparation for USEC's eventual conversion to a private corporation, DOE transferred a total of approximately 45,000 metric tons of uranium (MTU) to USEC to help sustain it as a viable private enterprise. *See* 42 U.S.C. § 2297h-2(b); GAO, *Nuclear Nonproliferation: Implications of the U.S. Purchase of Russian Highly Enriched Uranium*, GAO-01-148 (Washington, D.C.: Dec. 15, 2000), at 34. The USEC Privatization Act of 1996 provided for sale of USEC to the private sector, and this process was completed in July 1998.⁵

² The Antideficiency Act prohibits making or authorizing expenditures or obligations that exceed available budget authority. 31 U.S.C. § 1341.

³ Consistent with our regular practice, we requested DOE's legal views on these issues. Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to David R. Hill, General Counsel, DOE, Feb. 9, 2006. On May 2, 2006, the Department replied. Letter from Eric J. Fygi, Deputy General Counsel, DOE, to Susan A. Poling, Managing Associate General Counsel, GAO, May 2, 2006 (2006 DOE Letter). We obtained further information, clarification, and documents in telephone conversations, e-mail, and fax communications with DOE staff between May 5 and June 6, in addition to documents DOE provided to GAO in connection with the 2006 GAO report (GAO-06-723).

⁴ *See* Energy Policy Act of 1992, Pub. L. No. 102-486, title IX, § 901, 106 Stat. 2776, 2924 (Oct. 24, 1992), 42 U.S.C. §§ 2297a, 2297b-2; GAO-06-723, at 1-2.

⁵ *See* USEC Privatization Act of 1996, Pub. L. No. 104-134, §§ 3103-3106, 110 Stat. 1321-335, 1321-336 to -338, 42 U.S.C. §§ 2297h-1 to 2297h-4; GAO-06-723, at 2.

In early 2001, USEC notified DOE that up to 9,550 MTU that DOE had transferred to it was potentially contaminated with technetium⁶ and claimed that DOE was liable for damages arising from this transfer.⁷ To resolve its claim, USEC asked DOE to replace USEC's contaminated uranium with uncontaminated, or "clean," uranium. *Id.* DOE did not admit liability but for a variety of reasons entered into a series of agreements with USEC starting in June 2002.⁸ The agreements provided that DOE would either replace the contaminated uranium with clean uranium or compensate USEC in some way for decontaminating the uranium; in return, USEC would "release the United States from any and all liability and claims" with respect to a *pro rata* portion of the contaminated uranium.⁹ The agreements also contained provisions helping to ensure continuation of a U.S. domestic uranium enrichment capability and deployment of an advanced uranium enrichment technology.¹⁰

In the June 2002 Agreement, DOE compensated USEC for decontaminating some of the uranium by taking title to and assuming responsibility for some of USEC's stockpile of depleted uranium waste, which would reduce USEC's eventual disposal costs.¹¹ In a 2004 Work Authorization, DOE compensated USEC for decontaminating additional transferred uranium by paying an estimated \$31 million from DOE's appropriations.¹² In an October 2004 Agreement, DOE agreed to exchange clean DOE-owned uranium for contaminated USEC uranium.¹³

⁶ Technetium is a radioactive metal created as a by-product of nuclear fission. Commercial specifications for nuclear fuel severely limit the amount of technetium that may be contained in uranium fuel, and the contamination discovered by USEC exceeded those limits. GAO-06-723, at 9.

⁷ Memorandum from Dennis J. Scott, Assistant General Counsel, USEC, to Matt Urie, Attorney-Advisor, DOE, *Contaminated Uranium Inventory*, Jan. 3, 2001.

⁸ *See, e.g., Agreement between the U.S. Department of Energy and USEC, Inc.*, June 17, 2002 (June 2002 Agreement), pt. B, at 12 ("Without any admission of liability, [DOE] agrees to replace any out-of-specification uranium . . . transferred by [DOE] to USEC.").

⁹ *See, e.g.,* June 2002 Agreement pt. A, ¶ (a), at 12; *Letter Work Authorization*, Apr. 7, 2004 (2004 Work Authorization), § 1.3.2, at 3; *Memorandum of Understanding Effectuating the Transfer of Natural Uranium Hexafluoride for Affected Inventory*, Oct. 22, 2004 (October 2004 Agreement), at 1.

¹⁰ *See, e.g.,* June 2002 Agreement art. 2, at 1, and art. 3, at 7.

¹¹ June 2002 Agreement pt. B, at 12.

¹² 2004 Work Authorization, § 4.1, at 5.

¹³ October 2004 Agreement, §§ 1.3, 1.4, at 3.

Finally, in December 2004, DOE and USEC entered into the agreement at issue here, *Memorandum of Agreement for the Continued Operation of the Portsmouth S&T Facilities for the Processing of Affected Inventory in Fiscal Year 2005 and Thereafter*, Dec. 10, 2004 (December 2004 Agreement). Like most of the previous agreements, the December 2004 Agreement specified that USEC would decontaminate the contaminated uranium transferred to it by DOE and that USEC would release DOE from liability for the previous contaminated transfers. *Id.*, § 1.2(c), at 4. Unlike the other agreements, the December 2004 Agreement provided that USEC also would decontaminate DOE-owned uranium. DOE agreed to compensate USEC for these services by transferring to it “marketable assets [clean uranium] that are not necessary for national security needs from DOE’s former uranium program.” *Id.*, at 1. USEC was required to sell the uranium on the commercial market, deposit the proceeds into private investment accounts, and use the proceeds to cover “allowable costs” that it incurred in decontaminating the uranium. *Id.*, at 3; § 2.1, at 6; § 6.2, at 8. If the initial uranium sales did not yield enough proceeds to cover USEC’s allowable costs, DOE agreed to transfer more clean uranium for USEC to sell. *Id.*, § 7.2(c), at 9. If any uranium sale proceeds remained unspent at the end of the agreement, after USEC’s allowable costs were reimbursed, those were required to be “returned” to DOE within 30 days. *Id.*, § 6.2, at 8.

The clean uranium that DOE agreed to transfer to USEC was deemed Russian-origin uranium under section 3112(b)(1) of the USEC Privatization Act. December 2004 Agreement, § 4.2, at 7. The Agreement also acknowledged that if the transferred uranium were sold for consumption by domestic end users, it would be subject the use restrictions in section 3112(b)(2)(D) of the act. *Id.*

Twelve days after DOE signed the December 2004 Agreement, it approved USEC’s marketing strategy for sale of 900 MTU of DOE clean uranium. In its approval memorandum, DOE stated that the December 2004 Agreement “has in effect made USEC the department’s sales agent for” the uranium.¹⁴ From December 2004 to November 2005, DOE transferred about 900 MTU to USEC under the Agreement, and USEC sold this uranium to four buyers for a total of \$62 million for eventual consumption by domestic end users. GAO-06-723, at 18.

In November 2005, in section 314 of DOE’s appropriations act for fiscal year 2006, Congress expressly authorized DOE, notwithstanding any other provision of law, including section 3112 of the USEC Privatization Act and the miscellaneous receipts statute, 31 U.S.C. § 3302(b), “to barter, transfer or sell uranium . . . and to use any

¹⁴ Memorandum from Linda L. Gunter, Associate Director, Office of Nuclear Fuel Supply Security, DOE, to William E. Murphy, Manager, Portsmouth Paducah Project Office, DOE, *Approval of USEC’s Marketing Strategy For the Sale of 900 Metric Tons of Uranium (MTU) in Response to Article 4 of the Memorandum of Agreement for Continued Operation of the Shipping and Transfer facilities in FY 2005 and beyond*, Dec. 22, 2004 (Gunter Memorandum).

proceeds . . . to remediate uranium inventories” held by DOE. Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 314, 119 Stat. 2247, 2281 (Nov. 19, 2005). In view of the terms of section 314, this opinion considers only DOE’s authority to enter into and implement the December 2004 Agreement prior to enactment of section 314 (November 19, 2005).

ANALYSIS

I. DOE’s Authority to Transfer the Uranium to USEC under the December 2004 Agreement

DOE relies on section 3112(b)(2)(D) of the USEC Privatization Act as authority for the December 2004 Agreement. In support of its position, DOE provided us with a draft memorandum entitled *Sales of Uranium Hexafluoride Pursuant to Section 3112(b) of the United States Enrichment Corporation Privatization Act, 42 U.S.C. 2297h-10*, dated “4/18/03 + 4/24/03” (2003 DOE Memo), addressing DOE’s authority under section 3112(b)(2)(D). DOE told us that this 2003 memorandum represents the department’s current legal position on its authority for the December 2004 Agreement. Telephone Conference Call with Mary H. Egger, Deputy General Counsel, and Susan F. Beard, Assistant General Counsel, DOE, and Susan D. Sawtelle, Associate General Counsel, GAO, and others, May 5, 2006. *See also* 2006 DOE Letter, Attachment at 2–3.¹⁵

Section 3112(b)(2) authorizes DOE sales of Russian-origin uranium and provides that DOE “shall sell, and receive payment for” this category of uranium within 7 years of enactment, that is, no later than April 26, 2003. In addition, for sales of such uranium for consumption by “end users in the United States,” section 3112(b)(2)(D) provides that DOE “shall” sell the uranium even earlier—“in calendar year 2001”—and once the uranium is sold, its consumption is restricted both by date (not before January 1, 2002) and amount (no more than 3 million pounds per year). *Id.* DOE acknowledges that its transactions under the December 2004 Agreement did not meet the 2001 or 2003 deadlines in section 3112(b)(2).

¹⁵ DOE also asserts that certain general authorities under the Atomic Energy Act are “in harmony with the results achieved from” the December 2004 Agreement or “likely also would have” or “might well” have authorized the Agreement. *See* 2006 DOE Letter, Attachment at 1–3, *citing* Atomic Energy Act §§ 3(d), 63, 66, 161(g), 42 U.S.C. §§ 2013(d), 2093, 2096, 2201(g). *See also* Memorandum for David K. Garman, DOE Acting Under Secretary for Energy, Science and Environment, from Paul M. Golan, DOE Acting Assistant Secretary for Environmental Management, *Action: Approve the transfer of programmatic responsibility to the Office of Environmental Management for implementation of a barter agreement with USEC for Continued Operation of the Portsmouth Shipping and Transfer (S&T) Facilities to Process USEC* (continued...)

A. DOE's Sale and Receipt of Payment for Its Uranium

DOE maintains that its transfer of uranium to USEC under the December 2004 Agreement constituted the requisite "sale" under section 3112(b)(2)(D), and that USEC's release of its liability claims against DOE, together with its decontamination of DOE's uranium, constituted the requisite "payment." 2006 DOE Letter, Attachment at 6; 2003 DOE Memo, at 7–9.

We agree that DOE ultimately sold and received payment for the uranium, but not that it was a sale to USEC. Instead, the December 2004 Agreement established USEC as DOE's sales agent for sales of the uranium to other entities. The extent of control that DOE retained over the uranium it transferred to USEC under the Agreement does not support DOE's characterization of the transfer as a sale to USEC.

While the Agreement provided that DOE would "transfer to USEC title to and possession of" clean uranium belonging to the United States, December 2004 Agreement, § 2.2, at 7, USEC had no discretion over use of the uranium. The Agreement required that USEC sell the uranium on terms and conditions detailed in a DOE-approved marketing strategy using "its good faith efforts to obtain the best possible price given market conditions at the time of the sale." *Id.*, § 4.1, at 7. The Agreement required USEC to "notify [DOE] as each contract for sale . . . is executed and the agreed contract price." *Id.*, § 6.3, at 8. It also required USEC to "report the proceeds from sales . . . to [DOE] within 10 days of the date on which USEC receives payment." *Id.*, § 6.5, at 8. DOE received copies of all of USEC's sales contracts with the commercial buyers and copies of wire transfers, so that the department could verify USEC's receipt of funds from the buyers. *See* GAO-06-723, at 20. Under a separate security agreement required by the December 2004 Agreement, USEC was required to segregate sales proceeds in an account separate from USEC's other funds, and USEC could not apply those proceeds to cover expenses without first obtaining DOE's approval. *Security Agreement between U.S. Department of Energy and USEC*, Feb. 2, 2005, § 4.6, at 4. DOE retained a security interest in the uranium, USEC's contracts for sale of the uranium, USEC's accounts receivable for the uranium, and the proceeds from USEC's sale of the uranium. *Id.*, § 2.1, at 2–3.

The December 2004 Agreement also restricted the uses to which USEC could apply the sale proceeds—they could be used only to compensate USEC for allowable costs. December 2004 Agreement, § 6.2, at 8. "Allowable costs" were defined as the "direct, indirect, and plant overhead costs" that USEC incurred in operating its facilities for processing "Affected Inventory," which included both USEC-owned and DOE-owned contaminated uranium. *Id.*, at 1; § 2.1, at 6. DOE officials explained that USEC was

(...continued)

and DOE contaminated inventories of uranium hexafluoride (UF6) (Sept. 30, 2004) (citing same authorities). Because we find that the December 2004 Agreement was authorized by section 3112(b)(2)(D) of the USEC Privatization Act, we do not address whether these or other statutes may have provided additional authority.

required to apply the sale proceeds first to the costs of decontaminating USEC-owned uranium and then to the costs of decontaminating DOE-owned uranium.¹⁶ Telephone Conference Calls with Mary H. Egger, Deputy General Counsel, and Susan F. Beard, Assistant General Counsel, DOE, and Susan A. Poling, Managing Associate General Counsel, and Susan D. Sawtelle, Associate General Counsel, GAO, and others, May 8 and 9, 2006 (Conference Calls of May 8 and 9). Any equipment and materials purchased with the sale proceeds would become the property of DOE. *Id.*, art. 12, at 15. Finally, the December 2004 Agreement provided that if excess sales proceeds remained after all activities were completed, the remaining proceeds “shall be returned to DOE within 30 days.” *Id.*, § 6.2, at 8.

We cannot reconcile these contract terms and practices with DOE’s assertion that it sold the uranium to USEC. USEC had no choice in whether to sell the uranium, or in how to go about it. The agreement required sale and required DOE to approve the marketing plan. The relationship between the two parties was more like a principal-agent relationship. The principal instructed the agent, USEC, in the sale, the placement of proceeds in a separate account, the allowable uses of proceeds, and allowable costs. We find it far more reasonable to conclude that the December 2004 Agreement accomplished not the sale of uranium to USEC, but rather the designation of USEC as DOE’s sales and marketing agent. DOE itself, 12 days after signing the December 2004 Agreement, identified USEC as DOE’s sales agent for the uranium transferred pursuant to the Agreement, not the purchaser of the uranium. *See* Gunter Memorandum.

As the United States Customs Court has observed, “the decisive consideration which distinguishes a principal-agent relationship from a buyer-seller relationship is the right of the principal to control the conduct of the agent with respect to the matters entrusted to him.” *Dorf International v. United States*, 291 F. Supp. 690, 694 (Cust. Ct. 1968) (importer had little discretion in sale of machine; because importer’s province was to find customers for exporter, importer was exporter’s selling agent). In *Dorf*, the court advised that “[w]hich of these relationships exists is to be determined by the substance of the transaction,” and that “[n]o single factor is determinative; rather the relationship is to be ascertained by an overall view of the entire situation. . . .” *Id.* *See also* *Pier 1 Imports, Inc. v. United States*, 708 F. Supp. 351, 356 (Ct. of Intl Trade 1989); *G.J. Parkhill v. United States*, 385 F. Supp. 204, 207 (N.D. Tex. 1974); *Lorraine T. Fink v. Commissioner of Internal Revenue*, T.C. Memo 1982-284 (May 24, 1982); 1 Williston on Sales, § 2:1, at 19–21 (5th ed. 2005); 1 Mechem on the Law of Agency, §§ 44–48, at 28–32 (2nd ed. 1914) (“The essence of agency to sell is the delivery of the goods to a person who is to sell them . . . as the property of the principal, who remains the owner of the goods and who therefore has the right to

¹⁶ USEC agreed to “waive any claim for fees” for these decontamination services. December 2004 Agreement, at 2. Instead, USEC was entitled to credit the “allowable direct, indirect, and plant overhead costs incurred” in decontaminating the uranium against the revenues derived from the uranium sales. *Id.* at 3; § 2.1, at 6.

control the sale, to fix the price and terms, to recall the goods, and to demand and receive their *proceeds* when sold, less the agent's commission.”) (Emphasis in original.).

While the December 2004 Agreement obligated DOE to transfer “title to and possession of” the uranium to USEC, the terms of the Agreement together with its collateral security agreement demonstrate that the purpose of the transfer actually was to facilitate the sale of the uranium to other commercial entities by USEC on behalf of DOE. It is common for selling agents to be given title and possession to property in order to effect a sale on behalf of the principal. Restatement (Second) of Agency § 14N (1958) (independent contractor agents “also fall within the category of trustees, as in the case of a selling agent who has been given title to the subject matter . . . [and] there is an agency [relationship] if in the transaction which they undertake they act for the benefit of another and subject to his control”). The terms of the December 2004 Agreement and the security agreement show that DOE retained control over the use and disposition of both the uranium and the proceeds from its sale. Despite the recitation in the December 2004 Agreement transferring title and possession to USEC, the security interests that DOE retained in its security agreement served to protect DOE's title to the uranium and the sales proceeds. DOE actually parted with no incidents of ownership.

Between December 2004 and November 2005 (when Congress passed section 314), USEC sold the uranium to four different buyers for a total of \$62 million. GAO-06-723, at 18. USEC, acting as DOE's sales agent, received payment from the four buyers on behalf of DOE. While we disagree with DOE's assertion that it sold the uranium to USEC, we conclude that DOE, using USEC as its agent, sold the uranium and received payment, satisfying the requirements of section 3112(b)(2)(D).

B. DOE's Failure to Meet Statutory Deadlines

As noted above, section 3112(b)(2) provided that DOE “shall” sell and receive payment for its Russian-origin uranium no later than April 26, 2003, and section 3112(b)(2)(D) provided that sale of this uranium for consumption by domestic end users “shall” occur in calendar year 2001. Thus, the next issue is whether DOE's authority under section 3112(b) had expired before it entered into the December 2004 Agreement. Although arguably the word “shall” in these provisions could be construed as a mandatory command that terminated DOE's authority when it missed the deadlines, rendering the December 2004 Agreement unauthorized under that section,¹⁷ DOE asserts that the deadlines were only hortatory and did not affect its authority. Conference Calls of May 8 and 9.

¹⁷ Perhaps the most fundamental principle of statutory construction is that words in a statute must be given their ordinary or natural meaning whenever possible. *See Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997).

DOE relies on *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), and related cases. See 2003 DOE Memo, at 5–6. *Barnhart* involved a requirement under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) that the Social Security Administration (SSA) “shall, before October 1, 1993,” make an assignment of every coal industry retiree to a particular coal industry operator when that was possible. Assignment required the operator to pay annual premiums to fund retiree health benefits. When identification of an operator was not possible, the Coal Act contained a fallback provision under which benefits for “unassigned” retirees would be paid primarily by publicly funded plans. SSA failed to make thousands of assignments by the deadline, in many cases missing the date by several years, and coal industry operators who received late assignments sued SSA, arguing that its assignment authority had expired.

The Supreme Court ruled in *Barnhart* that SSA’s authority to make assignments did not expire on October 1, 1993. The Court noted that SSA’s task to make thousands of assignments by the deadline was a “substantial” one subject to factors beyond SSA’s control, and it was “reluctan[t] to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.” *Barnhart*, 537 U.S. at 158, quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). “We have summed it up this way,” the *Barnhart* Court stated: “if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose [a] coercive sanction” of terminating the agency’s authority to act. *Id.* at 159, quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). “[A] statute directing official action needs more than a mandatory ‘shall’ before the grant of power can sensibly be read to expire when the job is supposed to be done,” the *Barnhart* Court ruled, with the “more” to be found in the statute’s structure, purpose, or legislative history. *Barnhart*, 537 U.S. at 161.

Based on the absence of an explicit statutory consequence for noncompliance with the deadlines and the lack of intent to terminate SSA’s authority in the structure, purpose, or legislative history of the Coal Act, the Court held that SSA’s authority was not time-limited. The fact that the deadline was located within the same subsection as the Commissioner’s authority to act did not indicate the agency’s authority was co-terminous with the deadline. The Court rejected this as a formalistic rule that would “thwart the statute’s object” of having private companies pay for most of the retiree benefits, because under the fallback provision that allegedly applied if SSA’s authority were read as time-limited, benefits would largely be paid by the public. *Barnhart*, 537 U.S. at 159. The Court also observed that because the Coal Act was passed 6 years after its holding in *Brock v. Pierce County*, above, Congress was presumed to have known in drafting the statute that “we do not readily infer congressional intent to limit an agency’s power to get a mandatory job done merely from a specification to act by a certain time. See *United States v. Wells*, 519 U.S. 482, 495 . . . (1997).” *Id.* at 160. In sum, the Court declared that to ensure fulfillment of Congress’s objective to hold private employers, not the public fisc, responsible for retiree benefits, the deadline should be read “as a spur to prompt action, not as a bar to tardy completion” of SSA’s duties. *Id.* at 172.

As in *Barnhart*, section 3112(b)(2) of the USEC Privatization Act provided that DOE “shall” sell its Russian-origin uranium by 2001 or 2003, but specified no consequence for failure to do so. As DOE notes, the statute did not condition the department’s authority by use of terms such as “unless” or “until.” 2003 DOE Memo at 6. Thus under *Barnhart*, the deadlines in section 3112(b) are to be read as targets rather than jurisdictional mandates unless the Privatization Act’s structure, purpose, or history reveals a contrary legislative intent.

We find no such contrary intent. Section 3112 contains a *non*-time-limited provision authorizing DOE sale and transfer of uranium at any time—section 3112(d)—which arguably indicates that DOE’s section 3112(b) authority was time-limited. Under this argument, even if DOE missed the deadlines in section 3112(b), it could still sell its Russian-origin uranium under the fallback provision of section 3112(d). However, we agree with DOE that as in *Barnhart*, there is no indication that Congress intended section 3112(d) as a fallback to section 3112(b).¹⁸

Section 3112, entitled “Uranium transfers and sales,” directs DOE how to carry out virtually every step of the disposition of both Russian-origin and other uranium in DOE’s inventory—from the allowable timing of sales and transfers, to the permissible recipients and uses, to the maximum volumes, and even to end user consumption rates—with different sections governing different categories of uranium. Section 3112(b) specifically authorizes DOE to sell Russian-origin uranium, setting detailed timetables and quantity limits on the sale of this category of uranium. Section 3112(d), by comparison, authorizes DOE’s sale and transfer of uranium from its “stockpile” (an undefined term) at any time subject to certain conditions. Under the basic tenet of statutory construction that the more specific statute takes precedence, *see, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 489–90 (1973), this structure suggests that sales of Russian-origin uranium are governed solely by section 3112(b). The text of section 3112(d) also supports this interpretation. Section 3112(d)(1) authorizes DOE sales “in addition to the transfers and sales authorized under subsections (c) and (e)” —omitting reference to Russian-origin uranium sales authorized under subsection (b)—and section 3112(d)(2) specifically excludes section 3112(b) sales from the conditions of section 3112(d).

The legislative history of the USEC Privatization Act lends further support to the interpretation that section 3112(d) was not intended as a fallback to section 3112(b). Congress believed that one of the biggest impediments to privatizing USEC was investor concern about the potential adverse impacts of an agreement known as the

¹⁸ An interpretation that section 3112(d) applied as a fallback where DOE missed the section 3112(b)(2) deadlines would render the December 2004 Agreement unauthorized. DOE staff told us that because the Department did not believe section 3112(d) applied, it took no action to meet the section 3112(d) sale conditions.

Russian HEU Agreement.¹⁹ The concern was that under this agreement, inexpensive Russian-origin uranium would flood the U.S. market, depressing prices for domestic uranium producers, threatening job security for domestic uranium enrichment industry workers, and making USEC's enrichment and marketing services less competitive.²⁰ Congress therefore carved out section 3112(b) as a separate, specific authority for sale of Russian-origin uranium, imposing restrictions on its sale to minimize adverse impacts on the domestic market, while still meeting U.S. obligations under the HEU Agreement to buy the material from Russia.

The same legislative history indicates that Congress intended the section 3112(b) deadlines "as a spur to . . . action, not as a bar to tardy completion" of DOE's obligation to sell Russian-origin uranium. *Barnhart*, 537 U.S. at 172. The fact that Congress's overarching objective was to minimize the impact of large amounts of Russian-origin uranium coming into the U.S. market suggests Congress wanted to provide DOE with flexibility to sell at the optimum time for U.S. interests.²¹ This

¹⁹ See *Agreement Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, U.S.-R.F.*, Feb. 18, 1993. The United States signed the Russian HEU Agreement after breakup of the Soviet Union in order to provide financial aid to Russia and to keep weapons-grade uranium off the world market. The Agreement required highly enriched uranium (HEU) from Russian nuclear weapons to be "blended down," or diluted, into low-enriched uranium (LEU), and committed the United States, through its executive agent USEC, to purchase large amounts of the LEU over a 20-year period for sale to utilities as nuclear reactor fuel. See generally GAO-01-148; *In re Uranium from Kazakhstan*, USITC Inv. No. 731-TA-539-A (U.S.I.T.C. July 1999).

²⁰ See, e.g., S. Rep. No. 104-173, at 14 (1995) ("[T]he unrestricted entry into the market of new, low cost feed materials could significantly disrupt uranium markets and depress market prices."); *USEC Privatization Act, Hearing on S. 755 Before the Senate Committee on Energy and Natural Resources*, S. Hrg. No. 104-105, at 2 (June 13, 1995) (remarks of Chairman Murkowski) ("[W]e must . . . balance the interests of a very important national nonproliferation initiative, the U.S.-Russian Highly Enriched Uranium agreement. We must maintain the chance of a free market for uranium enrichment. We must maintain the health of the uranium mining industry, and we must ensure fairness to the workers of the enrichment plants in Kentucky and Ohio."); *id.* at 8 (statement of Sen. Ford) ("The biggest challenge . . . will be to find a solution to the Russian uranium problem. We want USEC to continue to buy uranium from Russia, but we must find a way for USEC to sell it into the market without putting Americans out of work.").

²¹ It was precisely because DOE was concerned about an already weak domestic market that it had not sold all of its Russian-origin uranium by the April 2003 statutory deadline. See 2003 DOE Memo, at 1-2. The same concern had prompted DOE to recommend to Congress, in 2000 and 2002, that it remove or modify this deadline. See DOE, *Report to Congress on Maintenance of Viable Domestic Uranium*, (continued...)

likely would mean that the section 3112(b)(2) deadlines were intended as targets, not as jurisdictional mandates. The legislative history suggests another reason why Congress would provide deadline flexibility—because, as in *Barnhart*, the tasks DOE had been assigned were substantial, complex, and subject to factors beyond DOE’s control.²² Although the legislative history is silent about why Congress imposed deadlines at all under these circumstances, we, like the *Barnhart* Court, are reluctant to “infer congressional intent to limit an agency’s power to get a mandatory job done merely from a specification to act by a certain time.” *Id.* at 160. In sum, we conclude that DOE’s authority to sell uranium under the December 2004 Agreement was not time-limited by its failure to meet the deadlines in section 3112(b)(2). DOE therefore was authorized to enter into the December 2004 Agreement.²³

II. DOE’s Authority to Use Proceeds from USEC’s Sales of the Uranium

The second issue is whether DOE had authority to use the proceeds of USEC’s sale of DOE uranium pursuant to the December 2004 Agreement. Under the miscellaneous receipts statute, 31 U.S.C. § 3302(b), “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). *See, e.g.*, B-302825, Dec. 22, 2004 (Office of Federal Housing Enterprise Oversight (OFHEO) may not retain money collected from third party litigants for

(...continued)

Conversion and Enrichment Industries (December 2000), at 22; DOE, *Report on the Effect [that LEU] delivered under the Russian HEU Agreement has on the Domestic Uranium Mining, Conversion, and Enrichment Industries, and the Operation of the Gaseous Diffusion Plant* (Dec. 31, 2002), at 8.

²² *See, e.g.*, S. Hrg. No. 104-105, at 17 (statement of USEC President William H. Timbers) (“[S]ome have asked, ‘. . . [W]hy is this taking so long?’ . . . [T]his is a difficult, complex, technically challenging program to implement. This is not just a commodity. We are not talking about orange juice futures . . . This has never been done before . . . We do not want to just [d]o it quickly, we want to do it right.”).

²³ Because DOE’s position on its legal authority for the December 2004 Agreement has been developed informally rather than through a formal rulemaking, adjudication, or other rigorous process, it is not entitled to substantial deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842–45 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 227–39 (2001). We nevertheless find DOE’s position regarding the significance of the section 3112(b) deadlines to have the “power to persuade,” and thus entitled to “respect” under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), because of the validity of its reasoning. As with the regulatory framework considered in *Mead*, DOE’s interpretations of the USEC Privatization Act pertain to a “highly detailed” statutory framework and it “can bring the benefit of specialized experience to bear on the subtle questions in this case.” *Mead*, 533 U.S. at 235.

copying costs). To retain and use money without statutory authority would improperly augment the amount of an agency's appropriations and would permit the agency to extend its reach beyond the operating level that it could achieve otherwise. *See, e.g.*, B-306860, Feb. 28, 2006; 23 Comp. Gen. 694 (1944); 9 Comp. Dec. 174 (1902). *See also, e.g.*, 13 Op. Off. Legal Counsel 188, 189 (1989); 12 Op. Off. Legal Counsel 233, 233–34 (1988).

As noted above, DOE asserts that with the December 2004 Agreement, the Department sold uranium to USEC but not for cash. Conference Calls of May 8 and 9; 2006 DOE Letter, Attachment at 1. DOE officials conceded that at the time of the Agreement, the department had no authority to retain proceeds from its sales of uranium, and that if USEC had paid cash for the uranium, DOE would have been required to deposit the proceeds into the miscellaneous receipts of the Treasury. Conference Calls of May 8 and 9. According to DOE officials, USEC, instead of paying cash in consideration for DOE's sale of uranium, agreed to (1) release any claims of liability for the decontaminated uranium that DOE had transferred to USEC under previous agreements, and (2) decontaminate DOE-owned uranium. *Id.* DOE argues that because it received no money in this transaction, it did not violate the miscellaneous receipts statute. 2006 DOE Letter, Attachment at 6. We disagree.

As discussed above, the terms of the December 2004 Agreement, as well as DOE's actions in implementing the Agreement, do not support the department's characterization of the transfer of uranium as a sale to USEC. DOE itself characterized USEC as its sales agent, not its buyer. Gunter Memorandum. By transferring uranium to USEC for sale and permitting USEC to use sales proceeds to defray its costs of decontaminating the uranium that DOE had transferred to it pursuant to earlier agreements, DOE received from USEC a release from any claims of liability that USEC might have against the department for transferring contaminated uranium. We, of course, have no objection to DOE transferring clean uranium to resolve its dispute with USEC. Public policy dictates in favor of the government addressing its disputes. 71 Comp. Gen. 340, 341 (1992). *See also Cannon Construction Co., Inc. v. United States*, 319 F.2d 173, 178–79 (Ct. Cl. 1963); B-306860, Feb. 28, 2006 (OFHEO could use an enforcement settlement agreement to require regulated entity to format electronic documents to enable OFHEO to pursue charges against the entity's former officers); B-237742, Mar. 14, 1990 (Army may use settlement agreements to resolve claims by contractors). A transfer of uranium in these circumstances and for this purpose would relate back to the original transfers (between 1993 and 1998) and, like those transfers, is authorized by the Privatization Act. *See* 42 U.S.C. § 2297h-2(b).

That, however, is not what happened here. With the December 2004 Agreement, DOE initiated a stream of revenue (the sales proceeds) that DOE used to cover the costs of decontaminating both the USEC-owned and DOE-owned contaminated uranium. This is problematic. It is well understood that in the absence of statutory authority, "what cannot be done directly cannot be done indirectly." *E.g.*, B-303927, June 7, 2005. An agency that lacks the authority to retain and use amounts that it receives directly cannot circumvent its lack of authority by engaging a contractor or, as here, a sales agent, to indirectly receive, retain, and use the funds. B-306663, Jan. 4, 2006.

In similar circumstances both GAO and the courts have recognized that a contractor constructively receiving money for an agency is not free of the requirement of the miscellaneous receipts statute that funds received for the use of the United States be deposited in the Treasury just as if they had been received directly by the agency. *See, e.g., Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361–63 (D.C. Cir. 1996) (Defense Department cannot require payment to morale fund of a portion of concession fees derived from unofficial travel); *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 968 (4th Cir. 1984) (Federal Aviation Administration (FAA) cannot hold in a trust fund amounts paid by airlines to defray FAA’s cost of acquiring new shuttle buses for Dulles Airport); B-300826, Mar. 3, 2005 (National Institutes of Health (NIH) could not authorize its contractor to charge a fee to cover the costs of a formal conference that NIH hosted); B-265727, July 19, 1996 (Securities and Exchange Commission may not reduce its obligation of appropriated funds resulting from a lease, and correspondingly increase its available appropriations, by subleasing space and arranging for the sublessee to make its payments directly to the landlord).

DOE clearly had authority to decontaminate its own contaminated uranium using funds appropriated for that purpose. At the time of the December 2004 Agreement, if DOE itself had sold its clean uranium, rather than transferring the uranium to USEC to carry out the same task, the department admits that it could not have legally retained the sales proceeds and applied them to pay its decontamination costs. Instead, DOE would have been required to deposit the sales proceeds into the miscellaneous receipts of the Treasury and to use DOE’s appropriations to acquire decontamination services. With the December 2004 Agreement, DOE circumvented the miscellaneous receipts statute by its use of USEC as its sales agent and its direct control of the disposition of the sales proceeds. *See* B-287738, May 16, 2002 (because Maritime Administration had effective control of the disposition of amounts held in an escrow account, it had constructively received those amounts within the plain meaning of the miscellaneous receipts statute).

DOE’s acquisition of decontamination services for its own uranium is conceptually indistinguishable from a Small Business Administration (SBA) contract that we addressed in 2004, B-300248, Jan. 15, 2004. In that case, SBA retained a contractor to help it perform regulatory reviews of lenders participating in its Preferred Lenders Program (PLP). SBA arranged to compensate its contractor by imposing fees on the PLP lenders and requiring the lenders to pay those fees directly to the contractor. SBA had no authority to retain and use those fees itself, nor could it allow its agent to do so. 31 U.S.C. § 3302(a) and (b) (“an official or agent of the United States Government . . . shall keep the money safe without . . . using it [and] shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim”). We observed that an agency receives money under the miscellaneous receipts statute if the receipts are to cover the expenses of the government or pay government obligations, B-300248, *citing* B-205901, May 19, 1982, and concluded that SBA could not compensate its contractor by requiring regulated lenders to pay the contractor’s fees.

Here, as in the SBA case, DOE arranged for an independent revenue stream not appropriated to it by Congress; had no authority to retain the proceeds of that revenue stream if received directly; and arranged for its agent, USEC, to receive the proceeds of the unauthorized revenue stream and to use those amounts to pay for expenses incurred on behalf of DOE. In our view, DOE's agent received "money for the government" but failed to deposit the money in the Treasury, and therefore, DOE violated the miscellaneous receipts statute and augmented its appropriations.

In defense of this aspect of the December 2004 Agreement, DOE points to a 1988 decision of this Office, 67 Comp. Gen. 510 (1988). See 2006 DOE Letter, Attachment at 6. The 1988 decision and other decisions in that line address in-kind replacement or repair of damaged government property, in lieu of a cash payment, by a tortfeasor. In the 1988 case, the Bureau of Alcohol, Tobacco and Firearms (ATF) asked if it could accept a replacement vehicle from a negligent third party, who had damaged an ATF vehicle beyond repair, without violating the miscellaneous receipts statute. We concluded that ATF could accept the replacement vehicle, "despite the fact that, had the tortfeasor paid the government . . . , the money would have to be deposited as miscellaneous receipts." 67 Comp. Gen. at 511.

The 1988 decision and related decisions have no application here. These decisions address damage to government property resulting from tortious acts, clearly not the factual situation present here. The purpose of the ATF and related decisions is to facilitate the government, which has suffered damage, being made whole. To require an agency to insist on cash payable to the miscellaneous receipts account of the Treasury rather than replacement or repair would not serve the public interest. Again, that is not the situation here. The purpose of the December 2004 Agreement was not to remedy a tortious act against government property, but to settle claims, to acquire decontamination of DOE-owned uranium, and to identify a source of funds to pay for that service.²⁴

As noted above, in November 2005, Congress enacted in DOE's appropriations for fiscal year 2006 a provision that expressly authorizes the department to "barter, transfer or sell uranium . . . and to use any proceeds, without fiscal year limitation, to remediate uranium inventories" held by DOE, notwithstanding any other provision of

²⁴ We also distinguish our recent decision, B-306860, Feb. 28, 2006. In that case, OFHEO, prosecuting the Federal Home Loan Mortgage Corporation (Freddie Mac), agreed to settle charges against Freddie Mac if Freddie Mac agreed to produce specified documents electronically formatted for OFHEO's use. Because the costs of formatting the documents were Freddie Mac's costs, not OFHEO's costs, Freddie Mac's payment of the costs did not constitute a *de facto* augmentation of OFHEO's appropriations. In the case at hand, the costs of decontaminating DOE-owned uranium are an obligation of the department (not USEC), and DOE's use of a source of funds not appropriated to it to defray those costs constitutes an augmentation of the department's appropriations.

federal law, including section 3112 of the USEC Privatization Act and the miscellaneous receipts statute. Pub. L. No. 109-103, § 314. Thus, at least for fiscal year 2006, section 314 permits DOE, through an agent like USEC, to sell government-owned uranium and to use the proceeds to compensate USEC for decontaminating DOE's uranium.

We are aware that USEC is the only American vendor currently offering domestic commercial uranium enrichment services, and that all of the agreements DOE negotiated to address USEC's claims have included language reflecting the department's desire that USEC continue as a viable entity. Our objection here is with DOE's improper augmentation of its appropriations.

Because DOE's fiscal year 2005 "Departmental Administration" appropriation was available for the purpose of decontaminating its uranium,²⁵ to remedy its violation of the miscellaneous receipts statute, DOE should adjust its accounts by transferring \$62 million from this appropriation to the miscellaneous receipts of the Treasury.²⁶ If DOE finds that it lacks sufficient budget authority to cover the adjustment, it should report a violation of the Antideficiency Act in accordance with 31 U.S.C. § 1351. In the alternative, DOE may wish to seek and obtain congressional ratification of its use of the \$62 million.

CONCLUSION

DOE was authorized under section 3112(b)(2)(D) of the USEC Privatization Act to transfer uranium to USEC under the December 2004 Agreement, as an interim step in USEC's sale of such uranium, on the department's behalf, for consumption by domestic end users. However, prior to the enactment of section 314 of DOE's fiscal year 2006 appropriations act, the department used uranium sales proceeds (and earnings on those proceeds) in violation of the miscellaneous receipts statute, 31 U.S.C. § 3302(b), which resulted in DOE unlawfully augmenting its appropriations. To resolve its improper use of the sales proceeds, DOE should either seek and obtain congressional ratification of its use of the proceeds or adjust its accounts.


If there are questions concerning these matters, please contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667, or Susan D. Sawtelle,

²⁵ Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2952 (Dec. 8, 2004) ("For salaries and expenses of the Department of Energy necessary for departmental administration in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*)").

²⁶ Between December 2004 and November 2005, USEC sold DOE's uranium for a total of \$62 million and used the proceeds to cover the costs of decontaminating USEC-owned and DOE-owned uranium. GAO-06-723, at 18.

Associate General Counsel, at (202) 512-6417. Assistant General Counsels Thomas H. Armstrong and Doreen S. Feldman, Senior Attorney Neill Martin-Rolsky, Senior Staff Attorney Omari Norman, and Senior Analyst Ryan T. Coles also made key contributions to this opinion.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel

DIGESTS

1. Section 3112(b) of the USEC Privatization Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-335, 1321-344 (Apr. 26, 1996), 42 U.S.C. § 2297h-10(b), authorized the Department of Energy (DOE) to transfer to the United States Enrichment Corporation (USEC) Russian-origin uranium so that USEC could sell the uranium on DOE's behalf for consumption by domestic end users, as provided for in a December 2004 agreement between DOE and USEC.

2. DOE violated 31 U.S.C. § 3302(b), the miscellaneous receipts statute, and augmented its appropriations when it authorized USEC to hold, invest, and use the proceeds from public sales of government-owned uranium to compensate USEC for costs it incurred in decontaminating uranium on behalf of DOE, prior to enactment in November 2005 of specific statutory authority exempting the proceeds of those uranium sales from the miscellaneous receipts statute.