

Released

B-173240-D.M., Jan. 23, 1973

The Comptroller General

NOV 23 1972

Charles D. Hylander
Director, ID *for*

Request for legal determinations

We are considering issuing a letter report to the Administrator of the Agency for International Development (AID) on the propriety of a \$10 million transaction recorded in August 1972 in AID's prior-year and current-year population assistance accounts.

We need to resolve certain legal questions, however, before we can proceed with the report. These questions are: (1) does AID's August 10, 1972, transaction which freed prior year supporting assistance funds by substituting current year funds meet the legal requirements for a deobligation and for an obligation, and (2) can AID legally use deobligated funds earmarked for population purposes for supporting assistance?

The facts surrounding our questions follow. For 4 fiscal years—1968 through 1971—AID's population assistance programs were funded under the provisions of title I of the Foreign Assistance Act of 1961, as amended. The specific provision of the Foreign Assistance Act relating to 1970 and 1971 funds follows.

"Sec. 292. Authorization.—Of the funds provided to carry out the provisions of part I of this Act for the fiscal year 1970, \$75,000,000, and for the fiscal year 1971 \$100,000,000, shall be available only to carry out the purposes of this title and, notwithstanding any other provision of this Act, funds used for such purposes may be used on a loan or grant basis." (Underlining provided.)

The system of using other appropriation line items such as Development Loans, Technical Assistance, and Supporting Assistance, to fund population assistance was commonly referred to as congressional earmarking. We understand that if the earmarked accounts were not used for population purposes, they did not become available for any other purpose.

For fiscal year 1972 the Congress for the first time made a specific population line item appropriation and in the absence of congressional

agreement on the foreign assistance authorization and appropriation bills for fiscal year 1973, a Continuing Resolution provided AID funding authority through February 28, 1973.

During the 4 years of 1968 through 1971, AID initiated many population assistance projects, with funding from the several appropriations available for Development Loans, Technical Assistance, Supporting Assistance, and Contingency Fund. The amounts earmarked and the corresponding obligations were as follows.

<u>Year</u>	<u>Earmarked</u> <u>(million)</u>	<u>Obligations</u>
1968	\$ 35	\$34.7
1969	50	45.4
1970	75	74.6
1971	100	75.9

Over the 4 years, a large pipeline of unexpended funds accumulated for population projects. In early fiscal year 1973 many millions of dollars remained unspent (unliquidated obligations) for these population projects.

Because of an apparent desire to increase the supporting assistance funds available to it in fiscal year 1973, AID on August 10, 1972, deobligated \$10 million prior-year supporting assistance funds from the population projects, and simultaneously replaced funds for the same projects by recording an obligation of \$10 million of fiscal year 1973 population funds. The stated reason for this transaction, which is explained in more detail in attachment A, was as follows:

"Because of immediate high priority need for SA [Supporting Assistance] funds please deobligate \$10,000,000 of prior year SA funds from population projects managed by AID/W offices. This will not affect program implementation in the short run as these projects have adequate pipelines. As needed, funds should be restored to these projects by using FY 1973 ECA from the population account."

To support its use for other purposes of the deobligated population funds, AID obtained its General Counsel's opinion on June 12, 1972. AID's General Counsel concluded that population grants using fiscal year 1971 and earlier funds may be deobligated and would, thereafter, be available for reobligation for either population purposes or for the purpose for which the funds were originally appropriated such as development loans or supporting assistance. The General Counsel's opinion is contained in attachment C.

This opinion was based on the "deob-reob" authority of the annual Foreign Assistance Appropriation Act. The authority in the Foreign Assistance and Related Programs Appropriation Act, 1972, under the Economic Assistance subsection of title I, is as follows.

"Unobligated balances as of June 30, 1971, of funds heretofore made available under the authority of the Foreign Assistance Act of 1961, as amended, except as otherwise provided by law, are hereby continued available for the fiscal year 1972, for the same general purposes for which appropriated and accounts certified pursuant to section 1311 of the Supplemental Appropriation Act, 1971, as having been obligated against appropriations heretofore made under the authority of the Foreign Assistance Act of 1961, as amended, for the same general purpose as any of the subparagraphs under 'Economic Assistance' and 'Security Supporting Assistance', are hereby continued available for the same period as the respective appropriations in such subparagraphs for the same general purpose: Provided, That such purpose relates to a project or program previously justified to Congress and the Committees on Appropriations of the House of Representatives and the Senate are notified prior to the reobligation of funds for such projects or programs."

AID indicates that this authority is available to it under the Continuing Resolution for 1973, but it is of interest to note that the Senate deleted the foregoing provision from its version of the appropriation bill for 1973 (S.R. 16705, September 28, 1972).

In view of the congressional earmarking in the Foreign Assistance Act quoted above which indicates that earmarked funds can be used only for population purposes, we question the validity of the AID General Counsel's opinion that deobligated population funds are authorized for supporting assistance or for other purposes as originally appropriated.

AID informed us on November 1, 1972, that the \$10 million deobligated from population projects on August 10, 1972, will be reobligated shortly as part of the next tranche of supporting assistance for Jordan. (See attachment B.)

The "deob-reob" transaction on August 10, 1972, appeared to have been motivated by AID's belief that the Congress would not appropriate supporting assistance funds for fiscal year 1973 to the extent that AID felt that it needed. AID requested \$844 million in supporting assistance for 1973 but the Senate authorization bill provides only \$683 million. The Continuing Resolution provides supporting assistance funds February 28, 1973, at the annual rate of \$600 million.

Thus, it appears that AID is attempting to realign the foreign assistance priorities established by the Congress.

In summary, we request your opinion on the legality of:

- (1) AID's August 10, 1972, transaction freeing prior year supporting assistance funds (deobligation) by substituting current year funds (obligation); and
- (2) the use of deobligated earmarked funds from population projects for supporting assistance or other purposes originally appropriated as AID has stated that it intends to do.

We discussed this transaction with Messrs. J. M. Moore, J. J. Higgins and W. K. Schuler on October 6, 1972.

Attachments: A, B, & C

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Indorsement

JAN 23 1973

Director, International Division

Returned. Title X of the Foreign Assistance Act of 1961, was added to that act by section 109 of the Foreign Assistance Act of 1967, Public Law 90-137, approved November 14, 1967, 81 Stat. 448. House Report No. 90-551 accompanying H.R. 12048, the bill which subsequently was enacted as the Foreign Assistance Act of 1967 explained on pages 30 and 31 the provisions of section 292 of Title X, as follows:

"Section 109 adds to the act a new title X -- 'Voluntary Family Planning Programs' -- and earmarks \$50 million of the funds made available for economic assistance to be used only for the purposes of this title and authorizes the appropriation of excess foreign currencies for this purpose.

* * * In order to counteract any possible tendency for the Agency for International Development to continue business as usual and to regard

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family planning programs as a fringe operation, \$50 million of economic assistance funds have been set aside to be used only for this purpose. This amendment will enable them to reorganize their operations in order to deal more effectively with the food-population problem." (Underscoring supplied.)

In view of such legislative history and the express wording of section 292, we think it clear that amounts authorized to carry out Title I purposes may not be expended for any other purposes.

The deob-reob authority, set out on page 3 of your memorandum, contemplates that funds become deobligated only when the original obligation ceases to exist. Those funds then become available to finance new obligations entered into for the same general purposes. As we understand the instant transaction, there has been no cancellation of agreements under which the funds were originally obligated. Rather, only the source of funding those obligations has been changed. In other words, fiscal year 1973 funds are here being used to fund obligations incurred in prior years. This clearly is improper in that fiscal year funds are available only to cover obligations incurred during the fiscal year for which appropriated.

While in proper cases the funding of these population obligations may be shifted between funds appropriated for the various subparagraphs under Economic Assistance, the deob-reob authority even if otherwise applicable may not be used as a device to nullify the mandate of section 292 that the amount authorized therein for population purposes for each fiscal year shall be available only for such purposes. AID's General Counsel gives no consideration to this provision of section 292 in his opinion of June 12, 1972.

In view of the foregoing and in specific answer to your questions, it is our view that AID's substitution of current year funds is not authorized, and the use of funds authorized for population purposes during the fiscal years 1968 through 1971 for other than population purposes, as now proposed by AID, likewise is not authorized.

Paul G. Deabling

Paul G. Deabling
General Counsel

INTERIM SUMMARY OF \$10 MILLION TRANSACTION
IN AID'S POPULATION ACCOUNTS

This interim summary highlights a \$10 million transaction in AID's prior-year and current-year population accounts. The transaction is designed to augment the Agency's Security Supporting Assistance capability in fiscal year 1973. It appears to be inconsistent with the spirit, if not the letter, of the law regarding the obligation and deobligation of funds, and the directives of the Congress specifying the use of certain funds for population assistance only.

During fiscal years 1968 through 1971, no separate appropriations were made for AID's population programs, but such programs were authorized to be funded from any appropriation category. During those years, many population projects were funded from the Security Supporting Assistance appropriations. In fact, over the years, a large pipeline of these earmarked funds built up and remained unspent (unliquidated) for specific population projects in early fiscal year 1973.

AID apparently believes that its population program is overfunded, and that its Security Supporting Assistance capability is and will remain underfunded. The \$10 million transaction demonstrates that AID is acting to realign these priorities, as AID sees them, by taking funds away from the population program and attempting to augment the Security Supporting Assistance capability in fiscal year 1973.

On June 12, 1972, the Bureau for Program and Policy Coordination (PPC) obtained an AID legal ruling that fiscal year 1971 and earlier Security Supporting Assistance funds could be deobligated for population purposes, and reobligated for Security Supporting Assistance purposes.

We are not sure the AID legal ruling will support the subsequent \$10 million transaction for several reasons. First, the "reob" authority of the annual appropriation act discussed in the ruling expired on June 30, 1972. As of early October, it was uncertain whether "reob" authority will be available for fiscal year 1973.

Second, the ruling nullifies the fact that the funds ^{were} earmarked by the Congress for population assistance only. The ruling that the funds may be deobligated and used for other purposes would seem to be inconsistent with the specific legislative mandate that they be used for population assistance only.

Finally we question whether there should be a deobligation of funds without a corresponding reduction or termination of the project or activity which gave rise to the original obligation.

The legal ruling is the only indicated authority we have found for the transaction. After obtaining the legal ruling, but extending into fiscal year 1973, PPC arranged for the AID Controller's Office to deobligate \$10 million of prior-year Security Supporting Assistance funds from continuing population projects, and to replace the funds to the same projects by obligating fiscal year 1973 new obligation authority (NOA) from the population appropriation.

By early August 1972, the AID Controller's Office had identified more than 20 ongoing population projects with unspent prior-year Security Supporting Assistance funds totaling about \$10 million. An official in the Controller's Office told us they insisted on getting something in writing from PPC-before completing the transaction.

We obtained a copy of a memorandum dated August 9, 1972, from PPC to the AID Controller. It is quoted below.

"Subject: SA deobligations"

"Because of immediate high priority need for SA funds please deobligate \$10,000,000 of prior-year SA funds from population projects managed by AID/W offices. This will not affect program implementation in the short run as these projects have adequate pipelines. As needed, funds should be restored to these projects by using FY 1973 NOA from the population account."

The PPC memorandum arrived at the AID Controller's Office on August 10, 1972. On the same day, the Controller's Office recorded the transaction deobligating the prior-year funds from the population projects and simultaneously obligating fiscal year 1973 population funds for the same projects under Continuing Resolution authority.

We tried unsuccessfully to identify and confirm the "immediate high priority need for SA funds" which prompted PPC to initiate this transaction to augment Security Supporting Assistance capability in fiscal year 1973. Based on discussions with several AID officials, however, it seems that AID's concern is for Security Supporting Assistance this fiscal year to a Middle Eastern country.

The \$10 million transaction described above appears to be questionable. There was no valid reason provided for the deobligation, and the basis for a reduction of this year's population assistance capability is not evidenced. Moreover, the Agency's indicated intention to use the funds congressionally earmarked for only population assistance as an augmentation of this year's Security Supporting Assistance capability would render meaningless that earmarking requirement.

We shall appreciate being advised of AID's views on the transaction as described in this summary. We would also appreciate being advised of any other pertinent facts or data relative to the transaction, or any other information deemed appropriate for a fuller understanding of the transaction.

DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D. C. 20523

ASSISTANT
ADMINISTRATOR

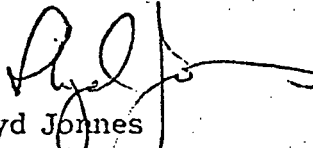
November 1, 1972

MEMORANDUM FOR: Mr. Clarence A. Siegler
Supervisory Auditor
General Accounting Office

SUBJECT: Interim Summary of Population Transaction

At the conclusion of our discussion yesterday morning, you asked me to comment on the subject summary. I would make three basic points.

1. It is my understanding that the funds deobligated in August have in point of fact not been reobligated but will be shortly as part of the next tranche of supporting assistance for Jordan.
2. You argue that the reobligation authority of the annual Appropriations Act expired on June 30, 1972. My understanding from the office of AID's General Counsel is that the Joint Resolution of July 1 continued the Agency's authority to deobligate and reobligate. In view of the fact that there has not been any reobligation in this instance, it seems to me that the matter is moot.
3. It is our intention to insure that the Congressional earmarking for fiscal 1970, as concerns population funding, shall remain intact. What funds will be used to replace the \$10 million of SA is, for the moment, uncertain.


Lloyd Jones
Deputy Assistant Administrator
for Program and Policy

DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT

October 5, 1972

GAO, Mr. Francis K. Buige -

You inquired about the legal advice on the deobligation of certain SA funds. I told you that I thought there had not been a written view. I was wrong, and here is the opinion we received from the General Counsel's office last June.


Lloyd Jones
DAA/PPC

Attachment: Memo Hoskins to S. Brown
of June 12, 1972 -
"Application of Deob/Reob
Authority to Population
Grants"

UNITED STATES GOVERNMENT

Memorandum

TO : PPC/RS, Mr. Sidney Brown

DATE: June 12, 1972

FROM : GC/LPC, John A. Hoskins



SUBJECT: Application of Deob/Reob Authority to Population Grants

You have inquired whether population grants utilizing funds appropriated prior to this fiscal year may be deobligated and reobligated for the purpose for which initially appropriated instead of for population programs. We have concluded that population grants using FY 1971 and earlier funds may be deobligated and would, thereafter, be available for reobligation for either population purposes or for the purpose for which the funds were originally appropriated. Prior to this year section 292 read as follows:

"Sec. 292. Authorization. Of the funds provided to carry out the provisions of part I of this Act for the fiscal year 1970, \$75,000,000, and for the fiscal year 1971 \$100,000,000, shall be available only to carry out the purposes of this title and, notwithstanding any other provision of this Act, funds used for such purposes may be used on a loan or grant basis."

Prior to FY 1972 no specific appropriation was made for population programs, but such programs were authorized to be funded from any appropriation category. The authority to reobligate such population grant funds, once obligated for a population purpose, is governed by the "deob-reob" authority of the annual appropriation act. The current authority reads, in part, as follows:

"Amounts certified pursuant to section 1311...as having been obligated against appropriations heretofore made...for the same general purpose as any of the subparagraphs under "economic assistance" and "security supporting assistance" are hereby continued available for the same period as the respective appropriations in such subparagraphs for the same general purpose...."

Applying this language to prior year population grants, such grants are obligations certified pursuant to section 1311 and are therefore continued available for the same period and for the same general purpose as the appropriations against which the obligation was originally made. This means, for example, that funds originally appropriated under development loans or supporting assistance line items and subsequently obligated for

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population purposes pursuant to FAA section 292 may now be deobligated and reobligated for the development loan or supporting assistance purpose for which they were originally appropriated. At the same time, however, section 292 authorizes population grants to be obligated from any of the funds provided to carry out part I of the FAA. The "funds provided" includes the annual availability of bridge items, one of which is estimated to be available during the current fiscal year. For this reason population grants may be deobligated and reobligated also for population purposes.

The above analysis does not apply, however, to FY 1972 funds, since the FY 1972 appropriation act includes a population line item appropriation. It follows that such funds appropriated and obligated for population purposes may, upon deobligation, be used only for population purposes.

c: A.Z. Gardiner, GC
A.W. Henshaw, GC/PHA