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United States Government Accountability Office
Washington, DC 20548

B-323699

December 5, 2012

The Honorable Heath Shuler
House of Representatives

Subject: *Department of the Interior—Availability of Funds for Payment to Swain County, North Carolina*

Dear Representative Shuler:

This responds to your June 25, 2012 request for our opinion concerning whether the National Park Service (Park Service), a bureau of the Department of the Interior (DOI), may use fiscal year 2012 appropriated funds to make additional payments to Swain County, North Carolina under the Memorandum of Agreement Relating to Non-Construction of North Shore Road entered into in February 2010 (2010 Agreement). Letter from Hon. Heath Shuler to Comptroller General, June 25, 2012 (Request Letter). As explained below, we conclude that the Park Service has no contractual obligation under the 2010 Agreement to make additional settlement payments in fiscal year 2012 because the Consolidated Appropriations Act, 2012 did not designate any amount expressly for that purpose.¹ However, the limitation of contractual liability under the 2010 Agreement does not render a lump sum appropriation unavailable to the Park Service for the payment of a properly settled claim. If the Park Service determines that its lump sum appropriation is available to pay properly settled claims, the Park Service may, in its discretion, elect to make a payment to Swain County under the 2010 Agreement.

Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies in order to develop a factual record and to establish the agencies' legal positions on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/lawresources/resources.html. In this case, DOI provided its legal views and additional information. Letter from Associate Solicitor for Parks and Wildlife, DOI, to Assistant General Counsel for Appropriations and Budget, GAO, Aug. 15, 2012 (Response Letter).

¹ See Consolidated Appropriation Act, 2012, Pub. L. No. 112-74, div. E, title I, 125 Stat. 786, 991–92 (Dec. 23, 2011).

BACKGROUND

In 1942, Congress authorized the Tennessee Valley Authority (TVA) to construct the Fontana Dam on the Little Tennessee River in North Carolina. See *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 548 (1946) (citation omitted). When the dam was built, the reservoir it created flooded most of North Carolina Highway 288, rendering it useless for travel. *Id.* As a result, the area lying between the reservoir and the Great Smoky Mountains National Park (Park) remained practically isolated. *Id.*

This situation created a number of issues for various parties.² Accordingly, in 1943, TVA, DOI, the State of North Carolina, and Swain County entered into an agreement (1943 Agreement) to settle the disputes among the parties. The 1943 Agreement provided, among other things, that DOI would construct a road through the Park, commonly referred to as the “North Shore Road,” that would connect with a state road outside of the Park in order to provide access to certain areas rendered inaccessible as a result of the flooding of Highway 288. *Vance v. Tennessee Valley Authority*, 738 F.2d 1418, 1420 (4th Cir. 1984) (providing a historical background on the construction of the North Shore Road). However, DOI’s obligation to construct, through the Park Service, the North Shore Road was expressly contingent upon the appropriation by Congress of all funds necessary for such construction. *Id.*

In the 1960s, the Park Service constructed approximately 7 miles of the North Shore Road before abandoning the effort due to difficulties encountered in constructing the road. *Id.*; see also *Welch*, 327 U.S. at 549-50. The Park Service eventually determined that it was not environmentally or economically feasible to continue construction of the road, and no major work on the road has occurred since 1972. *Id.* The Park Service ultimately decided to cease any further efforts to construct the North Shore Road and recommended that the 1943 Agreement be resolved through a monetary settlement with Swain County.³ See National Park Service, Briefing Statement (Oct. 2, 2007), available at <http://home.nps.gov/grsm/parkmgmt/index.htm> (last visited Nov. 30, 2012).

In the Department of Defense Appropriations Act, 2010 (2010 Defense Appropriations Act), Congress provided that DOI “may make a payment to Swain County, North Carolina, in an amount of \$12,800,000, in connection with the non-

² The various disputes are not relevant here, but are discussed in *Welch*, 327 U.S. at 548–51.

³ The Park Service reached this conclusion after conducting an environmental impact statement and related administrative proceedings pursuant to the National Environmental Policy Act of 1969. See 42 U.S.C. §§ 4321–4370h.

construction of the North Shore Road.”⁴ Of the \$12.8 million, \$4 million was available for obligation upon enactment, with the remaining \$8.8 million available for obligation “120 days following signature of an agreement between the Secretary of the Interior, Swain County, the State of North Carolina, and the Tennessee Valley Authority that supersedes the [1943 Agreement].”⁵

In February 2010, the parties to the 1943 Agreement entered into the 2010 Agreement, which superseded the 1943 Agreement. The 2010 Agreement provided for the payment of a monetary settlement to Swain County of up to \$52 million. As per the 2010 Defense Appropriations Act, \$12.8 million of that amount was paid to Swain County in fiscal year 2010. Request Letter, at 2. DOI agreed to pay the remaining amount of the settlement over ten years, as appropriated by Congress for that express purpose. Specifically, the 2010 Agreement provided that DOI would pay

“[s]uch additional sums, not to exceed [\$39.2 million], as are hereafter appropriated by Act of Congress *for the express purpose of effectuating the 2010 Agreement* relating to the non-construction of the North Shore Road on or before December 31, 2020.”

2010 Agreement, at 3-4 (emphasis added).

The Consolidated Appropriations Act, 2012 enacted a lump sum appropriation to the Park Service “[f]or construction, improvements, repair, or replacement of physical facilities.” Pub. L. No. 112-74, div. E, title I, 125 Stat. 786, 991 (Dec. 23, 2011). The act made no reference to the 2010 Agreement. The conference report accompanying the bill ultimately enacted as the Consolidated Appropriations Act, 2012, however, references a prioritized project list for the Park Service that includes the North Shore Road monetary settlement as an itemized project. See H.R. Conf. Rep. No. 112-331, at 1057 (2011); H.R. 2055, 112th Cong., 1st sess. Specifically, the conference report provides that amounts appropriated for construction “will fully fund NPS construction projects as prioritized by the [National Park] Service pursuant to the Administration’s revised request list provided to the Committees on June 24, 2011.” H.R. Rep. No. 112-331, at 1057 (2011). The prioritized project list contains a \$4 million item for “North Shore Road Monetary Settlement.” *FY 2012 President’s Budget Recast for Construction*, at 2.

DISCUSSION

At issue here is whether funds appropriated to the Park Service under the Consolidated Appropriations Act, 2012 are available to make a payment to Swain County under the 2010 Agreement. First, we consider whether the 2010 Agreement

⁴ Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 1007, 123 Stat. 3409, 3470 (Dec. 19, 2009).

⁵ *Id.*

requires the Park Service to make such a payment. Next, we consider whether the Park Service may make such a payment in the absence of a contractual obligation to do so.

It is clear from the terms of the 2010 Agreement that DOI's obligation to make additional payments arises only when such amounts "are hereafter appropriated by Act of Congress for the express purpose of effectuating the 2010 Agreement." 2010 Agreement, at 3-4. Fiscal year 2012 appropriations to the Park Service, including the appropriation for construction, make no mention of Swain County, the North Shore Road, or the 2010 Agreement. See Pub. L. No. 112-74, 125 Stat. at 991-92. Therefore, DOI has no obligation to use fiscal year 2012 appropriated funds to make a payment to Swain County.

This conclusion is consistent with the view of the Fourth Circuit Court of Appeals in *Vance*. See generally 738 F.2d 1418. *Vance* involved a breach of contract claim by heirs of deceased persons buried in cemeteries located in Swain County. *Id.* at 1419. The flooding of Highway 288 during construction of the Fontana Dam obstructed the only road access to these cemeteries. *Id.* The plaintiffs, claiming to be third-party beneficiaries to the 1943 Agreement, filed suit against DOI and the other parties to the agreement seeking to compel construction of the North Shore Road.

The 1943 Agreement stated that construction of the North Shore Road

"shall be subject to and contingent in all respects upon the appropriation by Congress of all funds necessary for such construction, and failure on the part of Congress for any reason to make such appropriations shall not constitute a breach or violation of this agreement by [DOI] or any other party hereto."⁶

1943 Agreement, at 11. In affirming the trial court's dismissal of the claim, the *Vance* court concluded that plaintiffs would not be able to establish a breach of the 1943 Agreement where construction of the North Shore Road was contingent upon an appropriation by Congress, and no such appropriation had been enacted. *Id.* at 1422.

"Because the [1943 Agreement] so clearly provided that [the Department of the] Interior's obligation to construct a road was in *all respects* contingent upon the appropriation of *all necessary funds*, plaintiffs would never be able to demonstrate a breach of agreement. Nor was there any obligation for Interior to seek further

⁶ This language from the 1943 Agreement is similar to the language in the 2010 Agreement, which requires DOI to make a payment to Swain County only when Congress appropriates amounts with the "express purpose of effectuating the 2010 Agreement." 2010 Agreement, at 3-4.

appropriations. The [1943 Agreement] specifically provided that ‘failure on the part of Congress *for any reason* to make such appropriations shall not constitute a breach or violation of this agreement by the Department or any other party hereto.’”

Id. at 1422 (emphasis in original).

The Fourth Circuit’s reasoning in *Vance* also applies to the case before us. The 2010 Agreement, like the 1943 Agreement, obligates DOI to make additional payments only if amounts are appropriated by Congress for the express purpose of making payments for the 2010 Agreement. Congress has not done so. Therefore, under these circumstances, the 2010 Agreement does not obligate DOI to make any payments to Swain County.

Absent an express appropriation to make a payment to Swain County under the 2010 Agreement, DOI is not required to do so. With respect to the reference to the Park Service’s prioritized project list in the conference report, we note that legislative history is legally binding only where a statute incorporates statements from the legislative history into the law by reference. B-316010, Feb. 25, 2008. In this case, the Consolidated Appropriations Act, 2012, does not incorporate by reference the language in the conference report or the prioritized project list. See Pub. L. No. 112-74.

However, we make an important distinction between the limitation of contractual liability in the 2010 Agreement and the availability of an appropriation to make an otherwise proper payment. The allocation of funds from a lump sum appropriation, such as the Park Service’s construction appropriation, is traditionally regarded as committed to agency discretion. See *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citations omitted). Such an appropriation gives an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way. *Id.* In our view, the language of the 2010 Agreement, limiting the government’s liability to Swain County to sums appropriated “for the express purpose of effectuating the 2010 Agreement,” serves the government’s interest in limiting the amount of its liability and the timing of payments to the county. In this regard, we believe that the Park Service, absent a specific statutory prohibition, may elect to waive application of this clause and use appropriated funds that are otherwise legally available to settle claims to make a payment to Swain County. The determination of whether its appropriation is available to make a settlement payment in the event of such a waiver is a matter committed to the Park Service’s reasonable administrative discretion.⁷ See B-223608, Dec. 19, 1988 (considerable weight is given to an agency’s determination

⁷ Here, in addition to the lump sum appropriation for construction, the Consolidated Appropriations Act, 2012 appropriated to the Park Service a lump sum for the operation and maintenance of the national park system. Pub. L. No. 112-74, div. E, title I, 125 Stat. at 991-92.

of whether expenditure bears a reasonable relationship to fulfilling an authorized purpose of an appropriation).

CONCLUSION

The obligation of the Park Service under the 2010 Agreement to make additional settlement payments to Swain County, North Carolina, arises when Congress appropriates funds “for the express purpose of effectuating the 2010 Agreement.” Such an appropriation does not appear in the Consolidated Appropriations Act, 2012. However, the limitation of contractual liability under the 2010 Agreement does not render a lump sum appropriation unavailable to the Park Service for the payment of a properly settled claim. If the Park Service determines that its lump sum appropriation is available for such purpose, the Park Service may, in its discretion, elect to make a payment to Swain County under the 2010 Agreement.

If you have any questions, please contact Edda Emmanuelli-Perez, Managing Associate General Counsel, at (202) 512-2853 or Omyra M. Ramsingh, Assistant General Counsel for Appropriations Law, at (202) 512-6152.

Sincerely yours,

A handwritten signature in black ink, appearing to read "S. Poling".

Susan A. Poling
General Counsel