



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

SOLICITOR'S MEMORANDUM 4/17/81

APR 17 1981

MEMORANDUM

TO: Director, Bureau of Land Management (720)
THROUGH: ^{Deputy} Assistant Secretary, Land and Water Resources
FROM: Assistant Solicitor, Realty
Division of Energy and Resources
SUBJECT: Authority to expend funds appropriated to the Bureau of Land Management for the completion of cadastral surveys requested by another agency. BLM Ref. 9641.21 (420).

Shuell
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You have requested our opinion concerning whether or not the cadastral survey account of the Bureau of Land Management (BLM) may be charged, on a non-reimbursable basis, for the cost of correcting erroneous survey work performed with respect to two boundary line survey projects of the BLM Denver Service Center, Division of Cadastral Survey.

The two projects presented for our consideration are:

- (1) National Park Service (NPS) Fossil Butte National Monument, Wyoming, Group No. 341; and
- (2) U.S. Army, Corps of Engineers (COE), Lake Sharpe Reservoir, South Dakota, Group No. 50.

In our opinion, the cost of the correctional work for the Fossil Butte Project could be lawfully charged, on a non-reimbursable basis, to the FY 1978 cadastral survey account of BLM, provided sufficient unobligated funds were available at the time for that purpose. On the other hand, the cost of the correctional work for the Lake Sharpe Project could not be charged, on a non-reimbursable basis, to the cadastral survey account of BLM, or any other account of BLM that was funded by a recurring annual appropriation.

FACTS

The relevant facts pertaining to the Fossil Butte and Lake Sharpe Projects are separately set forth below.

A. Fossil Butte Project.

In May of 1975, NPS requisitioned the Fossil Butte Project. The NPS purchase order submitted to BLM listed the cost of the work at "\$22,000.00 Est." Payment was to be made by "lump sum upon completion of the job". The work to be performed was described as follows: "survey and monument the approximately 20 mile exterior boundary of Fossil Butte National Monument, including all

necessary services, supplies and equipment." The purchase order contained a numerically coded description of the NPS account to be charged but did not reference specifically the appropriation being obligated for the cost of the work. No authority was cited in the purchase order for proceeding with the project on the basis set out in the order. In the absence of additional information in the documents submitted for our review, it is assumed that NPS obligated a FY 1974 NPS appropriation for the cost of the work, since funds for NPS, like BLM, are for the most part appropriated on only a fiscal year basis.

Special surveying instructions for the Fossil Butte Project were issued by the Denver Service Center, BLM, at the end of May, 1975. Presumably field operations for the project were initiated in the following month or shortly thereafter. Basically, the requested work involved a dependent resurvey of section and subdivision lines previously established on the ground by General Land Office surveys, and subsequent resurveys in some cases, as part of the net of the Public Land Survey System. The exterior boundary of the national monument served simply to mark the reserved monument lands, consisting primarily of public lands set aside by Act of Congress, ^{1/} from the adjoining unreserved public lands; although at one or two points along the southwesterly reach of the national monument, small segments of the exterior boundary of the monument marked the limits of reserved acquired land within the monument and, at one point, the limits of a small, wedge-shaped parcel of privately owned land located outside of, but abutting, the monument boundary. On its southern extremities, the reservation bordered on roadway or railroad rights-of-way traversing public lands adjoining the monument boundary.

Apparently, the lump sum payment provision was not strictly adhered to, as a departmental audit disclosed that by the end of FY 1977 only \$2,077 remained obligated for the costs of the project. Due to BLM's inadvertence, this remaining balance was not carried over as being obligated at the beginning of FY 1978, and thus it was lost to BLM for reimbursement purposes. Because of field work that was not performed correctly when it was undertaken initially, BLM was obliged to perform additional field work during FY 1978 in order to properly complete the Fossil Butte Project. The cost of the correctional work, and the cost of BLM office work required to complete the project in FY 1978, was charged to the BLM cadastral survey account during that fiscal year on a non-reimbursable basis. These costs totalled \$10,400. NPS was not asked to reimburse BLM for all or any part of the FY 1978 costs incurred by BLM.

B. Lake Sharpe Project

In February of 1971, COE submitted to BLM an order, based on estimates previously furnished by BLM, for the survey of the East and West boundary lines of the Lake Sharpe Reservoir. The reservoir area is comprised entirely of lands acquired by the United States from non-federal owners, in contrast to federally owned public lands; and none of the lands bordering the reservoir are federally owned public lands under the jurisdiction of BLM. The work covered by the order involved surveying, or resurveying for control purposes, over 350 miles of new

^{1/} Act of October 23, 1972, Pub. L. 92-537, 86 Stat. 1069.

or previously established boundary lines in thirteen townships. In two of the townships, certain section lines, that also served as part of the exterior boundary line of an Indian reservation, were scheduled for resurvey in connection with the project. The Bureau of Indian Affairs previously had requested a dependent resurvey of those particular reservation lines.

The amount stated in the 1971 order for the cost of the project was "Est. \$90,125.00." The order provided for reimbursement of BLM on the basis of periodic billings as the work progressed. The order did not refer to any authority allowing BLM to proceed with the work as ordered. In March of 1972 a change order was issued by COE increasing the authorized amount by \$90,000 to "Revised Amount \$180,125.00." Again, in April of 1973 a second COE change order allowed an increase of \$45,000 and thus specified a "Revised Amount \$225,125.00." Both of the change orders contained a provision, as did the original order, that required COE's approval for any additional increase in the authorized cost of the work. Each of the three orders specified that it would expire at the end of the fiscal year next following the fiscal year in which the order was made. Each order also stated that the services to be performed were properly chargeable to the appropriations or accounts referred to in the order; but except for a numerically coded reference, the relevant COE appropriation or account was not identified.

In April of 1973, BLM informed COE by letter that BIA had made available \$25,000 for execution of the project work within the Lower Brule Indian Reservation. Presumably this sum was applied by BLM to the dependent resurvey of the Indian reservation boundary lines previously alluded to.

By May of 1977, all or virtually all, of the funds obligated by COE for the cost of the Lake Sharpe Project had been transferred to BLM. ^{2/} Initially, it was thought that the field work for the project had been completed in August of 1973. However, a BLM office review conducted in 1975 disclosed serious flaws in the execution of the field work for sizeable portions of the project. In 1975 and 1976, BLM expended approximately \$60,000 or \$65,000 to correct some of this work. These costs were charged to BLM's cadastral survey account on a non-reimbursable basis, presumably in FYs 1975 and 1976. Additional corrective field work was performed in FY 1977 on a non-reimbursable basis. Nevertheless, the bulk of the correctional work had not been completed by the close of FY 1977.

In 1977, the Denver Service Center, BLM, estimated the cost of completing the correctional work as amounting to \$301,600, without any adjustment for inflationary factors. In October of 1977, COE advised BLM that it would not accept any further billings for costs incurred by BLM in connection with the Lake Sharpe Project.

^{2/} A COE memorandum stated that \$223,062 had been expended. A BLM draft memorandum, prepared in April of 1977 stated that all of the obligated funds had been applied to the costs of the project.

DISCUSSION

A. BLM Appropriation Acts

The revenue for BLM cadastral survey work is made available by annual appropriations, each of which is intended to fund the cadastral survey program of BLM for but one fiscal year. See, Memorandum Opinion, dated January 10, 1969, from Assistant Solicitor, Branch of Lands, to Director, Bureau of Land Management, re Cadastral Survey Authority. ^{3/} During each of the fiscal years in which the BLM cadastral survey account was charged for correctional survey or resurvey work in connection with the Fossil Butte or Lake Sharpe Projects, the operative appropriation acts provided in relevant part, under the captions of, respectively, "Department of the Interior" and "Bureau of Land Management":

"Management of Lands and Resources

"For expenses necessary for protection, use, improvement, development, disposal, cadastral surveying, classification, and performance of other functions as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management...

"Administrative Provisions

"Appropriations for the Bureau of Land Management shall be available for purchase...Provided...Provided further, That appropriations herein made may be expended on a reimbursable basis for (1) surveys of lands other than those under the jurisdiction of the Bureau of Land Management..." ^{4/}

The above quoted reimbursement proviso first appeared, albeit couched in somewhat different language, in the Interior Department's appropriation Act for FY 1928, with the endorsement of the Bureau of the Budget and the

^{3/} Limited revolving fund authority, for only supplies and equipment services, in support of BLM management programs for the public lands administered by the Secretary of the Interior through BLM, was established by the Act of October 21, 1976, Pub. L. 94-579, § 306, 43 U.S.C. § 1736. Special deposits for certain cadastral surveys also have been authorized from time to time and the funds deposited are made available through the appropriation process. E.g., 43 U.S.C. § 1737 (c); Interior appropriation Act of July 26, 1977 for F.Y. 1978, 91 Stat. 285, 286.

^{4/} The operative Interior Department appropriation Acts were: Act of August 31, 1974 for FY 1975, 88 Stat. 803, 804; Act of December 23, 1975 for FY 1976 and the period from June 30, 1976 through September 30, 1976, 89 Stat. 977, 979; Act of July 31, 1976 for FY 1977, 90 Stat. 1043, 1044; Act of July 26, 1977 for FY 1978, 91 Stat. 285, 287.

General Accounting Office. 5/ In so far as the proviso authorized periodic accounting adjustments, it presaged the General Reimbursement Between Appropriations Act of June 29, 1966, § 1, 31 U.S.C. § 628a, pertaining to transfers, on a reimbursable basis, between Intra-department, or Intra-bureau or office, appropriations during or by the close of a given fiscal year. 6/

B. Fossil Butte Project

In 1975, the public lands (and the small amount of acquired lands) reserved for administration by NPS within the Fossil Butte National Monument were virtually surrounded by unreserved public lands under the administration of BLM.

5/ Act of January 12, 1927 for FY 1928, 44 Stat. 934, 938. See, Hearing before Subcommittee of House Committee on Appropriations, Interior Department Appropriation Bill, 1928 at p. 517 (H.R. 14827, 69th Cong. 2nd Sess.). In its original version, the proviso read:

"Provided further, That this appropriation may be expended for surveys made under the supervision of the Commissioner of the General Land Office, but when expended for surveys that would not otherwise be chargeable hereto it shall be reimbursed from the applicable appropriation, fund, or special deposit."

The term "this appropriation" referred to the appropriation head, "Surveying public lands: For surveys and resurveys of public lands..." The present wording of the proviso was introduced in the general appropriation Act of September 6, 1950 for FY 1951, 64 Stat. 595, 682. That Act also, for the first time, employed the term "cadastral surveys" in the appropriation language under the head of "Management of Land and Resources". The proviso has never specifically referred to resurveys. See, 1 Comp. Dec. 514 (1895); 1 Comp. Dec. 515 (1895); 5 Comp. Dec. 431 (1899). Starting with the Interior appropriation Act of May 13, 1960 for FY 1961, 74 Stat. 104, 105-106, the appropriations subject to the proviso were expanded from the appropriation head, "Management of Land and Resources" to embrace all of the appropriations that are made available under the caption of "Bureau of Land Management" in each Interior annual appropriation act.

6/ Notwithstanding the passage in 1966 of the General Reimbursement Between Appropriations Act, Congress has repeatedly and consistently enacted the BLM survey reimbursement proviso in each subsequent annual appropriation act for the Interior Department. The consistent reenactment of the proviso negates any argument favoring a partial repeal of the special proviso by the more general statute. It is, of course, axiomatic that in the absence of a clear legislative expression of intent to the contrary, a specific statute will not be nullified by a general one, regardless of the priority of enactment. Morton v. Mancari, 417 U.S. 535, 550-551 (1974); See, also, 73 Am Jur. 2d, Statutes § 417.

Thus, the Fossil Butte Project could have been executed, virtually in its entirety, as a dependent resurvey of the exterior boundaries of the remaining BLM administered public lands, pursuant to the authorizing acts providing for such resurveys that are restated at 43 U.S.C. §§ 772 and 1711(b). If this approach had been taken, clearly the bulk of the project would have been performed, in the words of the relevant appropriation acts, with regard to "lands... under the jurisdiction of the Bureau of Land Management." ^{7/} In that case, substantially all of the cost of the work would have been absorbed, on a non-reimbursable basis, by the BLM appropriation-allocation for "cadastral surveys" under the appropriation head, "Management of Lands and Resources".

However, it was decided initially to view the project as an exterior boundary survey of the reserved lands, comprising the monument, under the administration of NPS. Accordingly, as provided in the aforementioned appropriation act proviso, any available BLM appropriation could be expended, on a reimbursable basis, for the cost of the Fossil Butte Project, because the survey was being conducted in relation to "lands other than those under the jurisdiction of the Bureau of Land Management." In making this election, the last quoted phrase of necessity was construed to include public land reservations administered by other Interior bureaus or offices, although the public lands in the reservations remained subject to the survey and resurvey functions that historically have been performed by, or under the supervision of, BLM or its predecessor, the General Land Office. ^{8/} This construction of the statute appears to be reasonable enough,

^{7/} See, n.5, *supra*. The amount of privately owned land bordering the exterior boundary of the monument was trifling and does not warrant extended consideration in relation to BLM's resurvey authority. Suffice it to say sufficient authority existed. See, n.8, *infra*.

^{8/} It would be a novel proposition, indeed, to hold that the officers of the government who historically have been charged with the responsibility for surveying the public lands now lack the authority to survey or resurvey the common boundary between reserved public land and unreserved public or privately owned land, so that the reserved land may be identified with precision to ensure its proper use and freedom from disposal or trespass. Compare, *Stoneroad v. Stoneroad*, 158 U.S. 240, 247, 250 (1895); *Couts v. Stickler*, 34 Land Dec. 188, 190 (1905). See, *United States v. Doyle*, 468 F. 2d 683 (9th Cir. 1972); *United States v. Reimann*, 504 F. 2d 135 (10th Cir. 1974); *French v. United States*, 49 Ct. Cl. 337 (1914); Memorandum Opinion, dated August 11, 1978, *infra*. In order to properly perform its duties, the land office must consider and determine what lands are public lands and what portions thereof are available for disposal or have been reserved from disposition, *Kirwan v. Murphy*, 189 U.S. 35, 53 (1903). From the earliest days, this concern, involving as it does the execution of original surveys of the public lands as well as corrective and dependent resurveys, devolved exclusively on the Land Office, *Craig v. Powell*, 128 U.S. 691, 697-698 (1888); *Lane v. Darlington*, 249 U.S. 331, 333 (1919), subject only to the supervision of the Secretary of the Interior. *Knight v. U.S. Land Association*, 142 U.S. 161, 176-177 (1891). See, also, *Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.C. 1979). Congress has enacted statutes on this subject as well. Act of April 8, 1864, § 6, R.S. § 2115, 43 U.S.C. § 176; Act of March 3, 1899, § 1, 16 U.S.C. § 488. As to the former of those two statutes, see, particularly, 1 Comp. Dec. 179, 180 (1895). The General Resurvey Act of March 3, 1909, as amended, 43 U.S.C.

especially if the current phrasing is considered in relation to the original phrasing of the proviso, which would not have permitted the same construction. 9/

(Footnote 8, continued)

§ 772, likewise is pertinent, since it has been liberally construed by the courts to authorize reservation boundary line resurveys. E.g. Doyle, supra, and Pueblo of Taos, supra. There is, in addition, a long established administrative practice with respect to the resurvey of public land reservation boundaries by BLM or its predecessor, the General Land Office. See, also, n. 9, infra.

With regard to the relatively small amount of acquired land within the national monument, the exterior boundary of which was included in the survey work, adequate implied authority for the work was delegable to BLM. See, the Act of October 23, 1972, supra, n. 1; Memorandum Opinion, dated August 11, 1978, from Associate Solicitor, Division of Energy and Resources, to Assistant Secretary, Land and Water Resources, re Survey of National Park Boundaries; Memorandum Opinion, dated January 21, 1981, from Assistant Solicitor, Realty, Division of Energy and Resources, to Director, BLM, re BLM's Survey Authority with respect to Acquired Lands.

9/ See, n. 5, supra. The original wording referred to "surveys that would not otherwise be chargeable" to the appropriation for surveys and resurveys of the public lands, in contrast to surveys conducted with respect to "lands other than those under the jurisdiction of the Bureau of Land Management". Commencing with the sundry civil expenses appropriation Act of October 2, 1888, for FY 1889, 25 Stat. 505 and continuing through the Interior appropriation Act of May 24, 1922 for FY 1923, 42 Stat. 552, each annual appropriation for surveys and resurveys of the public lands contained a specific reference to "lines of reservations" as a proper object of the appropriation. The reference was in the context of an exception to a clause generally limiting the availability of the appropriation. It follows, therefore, that when the phrasing of the survey appropriation was shortened in the appropriation Act for FY 1924, 42 Stat. 1174, 1180, by elimination of the limitation clause in its entirety and other long standing language, see, Hearing before Subcommittee of House Committee on Appropriations, Interior Department Appropriation Bill, 1924 at p. 122 (H.R. 13559, 67th Cong. 4th Sess.), such deletion was not intended to nullify surveys and resurveys of public land reservation boundary lines as a proper object of the survey appropriation in the FY 1924 Act or in any of the survey appropriations that followed it. Thus, under the original wording of the proviso, surveys and resurveys of the lines of public land reservations clearly were "chargeable" to the public land survey appropriation. As a result, most of those surveys or resurveys were not subject to the reimbursement proviso. The survey of Indian reservations for allotment purposes could involve exterior boundary resurvey work. The cost of that work was treated as being reimbursable from separate appropriations made to the Bureau of Indian Affairs for surveying allotments in the reservations. This special work did not fall within the ambit of the land office's general surveying authority in relation to the Indian reservations pursuant to 25 U.S.C. § 176. See, 7 Comp. Dec. 591 (1901).

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By FY 1978, the portion of the appropriation obligated in FY 1975 by NPS for the Fossil Butte Project had been exhausted--the unexpended sum remaining at the end of FY 1977 having been deobligated and presumably returned to the Treasury of the United States. Consequently, in the absence of further funding from NPS, BLM in effect elected, in FY 1978, to treat the corrective survey work as pertaining to "...lands under the jurisdiction of the Bureau of Land Management...", when it charged the cost of that work, on a non-reimbursable basis, to the FY 1978 BLM allocation for "cadastral surveys". While, from an accounting standpoint this handling of the matter might be criticized, because of a lack of consistency in the treatment of the costs of the project as a whole, nevertheless, the BLM cadastral survey account could be properly charged for the cost of the correctional work, provided of course that sufficient unobligated funds were available and programmed at the time for that purpose.

C. Lake Sharpe Project

The lands comprising the Lake Sharpe Reservoir are acquired lands of the United States; and BLM does not exercise administrative jurisdiction over any of them or over any of the adjoining lands. Since the reservoir lands are not public lands of the United States, BLM normally would have been without authority in 1971 to conduct a survey of their exterior boundaries, except to the limited extent, required for control purposes, of resurveying portions of the exterior boundary of the Lower Brule Indian Reservation. See, French v. United States, and Pueblo of Taos v. Andrus, *supra*, n.8. McKee v. United States, 1 Ct. Cl. 336, 341 (1865); United States v. Mackey, 214 F. 137, 138 (E.D. Okla. 1913), appeal dismissed 216 F. 29, reversed on other grounds 218 F. 128; 1 Comp. Dec. 514.

Under these circumstances, the only source of authority for BLM's execution of the Lake Sharpe Reservoir boundary survey was the Economy Act of June 30, 1932, § 601, as amended, 31 U.S.C. § 686. Subsection (a) of the Economy Act provides in relevant part:

"(a) Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon the furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau or office as may be requisitioned; but proper adjustments on the basis of the actual cost of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned: Provided... Provided further, That if such work or services can be as conveniently or more cheaply performed by private agencies such

work shall be let by competitive bids to such private agencies..."

Subsection (c) of the same Act states, in part, that:

"Orders placed as provided in subsection (a) of this section shall be considered as obligations upon appropriations in the same manner as orders or contracts placed with private contractors..."

The order originally placed in 1971 by COE with BLM, and each of the two COE change orders subsequently placed with BLM, expressly limited the amount by which the relevant COE appropriations could be obligated for the costs of the Lake Sharpe Project. The cost of the corrective work performed by BLM in FYs 1975, 1976 and 1977 far exceeds the last cost limit set by COE, and needless to say, any future costs incurred by BLM in correcting the defective field work will likewise exceed COE's final cost limit. Additionally, in 1977 COE expressly refused to accept any further BLM billings for the cost of the corrective work. Given these facts, BLM's cost overruns for the corrective work could not have been accepted by COE or properly charged to the available COE appropriations, just as the cost of survey work performed by a private contract surveyor that is in excess of a cost limit agreed to by the United States must be disallowed as being in excess of the Government's liability. 5 Comp. Dec. 431 (1899); 31 U.S.C. § 686 (c).

In view of the foregoing, all or virtually all of the corrective work costs incurred by BLM to date on the Lake Sharpe Project were expended on a non-reimbursable basis and thus, under the terms of the BLM appropriation act proviso, could not be absorbed by any BLM appropriation made available on an annual fiscal year basis. Moreover, to the extent that any such expenditure was charged to an annual fiscal year appropriation of BLM, the act of doing so violated the provisions of the Act of March 3, 1809, § 1, as amended, R.S. § 3678, 31 U.S.C. § 628, which provides that, except as otherwise provided by law, appropriated sums shall be applied solely to the objects for which they are made, and no others.

Should you have any questions in connection with this matter, please feel free to contact either the undersigned or Mr. Richard Woodcock of this office.



John J. McHale
Assistant Solicitor, Realty
Division of Energy & Resources

cc: Deputy Director
For Services, BLM (700)