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B-143536, Aug. 15, 1960

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B-143536, AUG. 15, 1960

TO THE ADMINISTRATOR, FEDERAL AVIATION AGENCY:

YOUR LETTER OF JULY 18, 1960, CONCERNS A PROBLEM WHICH HAS ARISEN IN CONNECTION WITH SITES CHOSEN FOR AIR NAVIGATION "REPEATER-FACILITIES" OF THE FEDERAL AVIATION AGENCY.

YOU STATE THAT THREE OF THE SITES CHOSEN (AND WITH WHICH YOUR LETTER IS SPECIFICALLY CONCERNED) ARE IN THE COUNTIES OF SEDGWICK, WASHINGTON, AND ADAMS, IN THE NORTHEAST SECTION OF COLORADO. YOU ADVISE THAT SUCH PLACEMENT OF THESE FACILITIES NECESSITATES ACCESS BY MEANS OF LOCAL COUNTY RIGHTS-OF-WAY IN THE COUNTIES MENTIONED. YOU STATE THAT THE CONDITIONS OF THESE RIGHTS-OF-WAY ARE SUCH THAT THEY ARE NEGOTIABLE ONLY BY FOUR-WHEEL DRIVE VEHICLES; THAT IN THESE COUNTIES THERE ARE VERY FEW ROADS OF IMPROVED QUALITY DUE TO LACK OF POPULATION IN THE AREA; THAT THE RIGHTS-OF -WAY ARE UNEVEN, UNPAVED, AND VERY DIFFICULT TO USE EVEN IN GOOD WEATHER, AND THAT UNDER ADVERSE WEATHER CONDITIONS, THESE ROADS ARE COMPLETELY IMPASSABLE.

THE COUNTIES CONCERNED HAVE ADVISED YOU THAT THEY CANNOT, UNDER PRESENT CONDITIONS, IMPROVE THESE ROADS TO MEET YOUR NEEDS DUE TO THE FACT THAT THEY ARE USED ONLY SLIGHTLY BY A FEW RANCHERS IN THE AREA. YOU STATE THAT THESE COUNTIES ARE NOT OBLIGATED TO IMPROVE THE ROADS FOR THE USE OF THE UNITED STATES,"SINCE THIS GOVERNMENT IS NOT A TAXPAYER IN THE COUNTY.' YOU ALSO STATE THAT THE COUNTIES HAVE, HOWEVER, OFFERED TO IMPROVE THESE ROADS IF THE UNITED STATES WILL CONTRIBUTE A SHARE, DUE TO THE FACT THAT THESE ROADS WILL BE USED ALMOST EXCLUSIVELY FOR THE PURPOSES OF YOUR AGENCY. YOU ADVISE THAT THESE COUNTIES CLAIM TO HAVE DONE THIS BEFORE FOR VARIOUS BRANCHES OF THE DEPARTMENT OF DEFENSE.

YOU STATE THAT UNDER SECTION 303 (C) OF THE FEDERAL AVIATION ACT OF

1958, AS AMENDED, 49 U.S.C. 1344 (C), YOUR AGENCY IS EMPOWERED TO ACQUIRE REAL ESTATE BY THE USUAL MEANS AND THAT SECTION 302 (K) OF THE ACT (49 U.S.C. 1343 (I) (FURTHER AUTHORIZES THE ADMINISTRATOR TO---

"* * * CONFER WITH AND AVAIL HIMSELF OF THE COOPERATION, SERVICES, RECORDS, AND FACILITIES OF STATE, TERRITORIAL, MUNICIPAL OR OTHER LOCAL AGENCIES.'

YOU REFER ALSO TO THE FOLLOWING PROVISIONS OF SECTION 313 (A) (49 U.S.C. 1354 (A) (OF THE ABOVE-CITED ACT:

"THE ADMINISTRATOR IS EMPOWERED TO PERFORM SUCH ACTS, TO CONDUCT SUCH

INVESTIGATIONS, TO ISSUE AND AMEND SUCH ORDERS, AND TO MAKE AND AMEND SUCH GENERAL OR SPECIAL RULES, REGULATIONS, AND PROCEDURES, PURSUANT TO AND CONSISTENT WITH THE PROVISIONS OF THIS CHAPTER, AS HE SHALL DEEM NECESSARY TO CARRY OUT THE PROVISIONS OF, AND TO EXERCISE AND PERFORM HIS POWERS AND DUTIES UNDER, THIS CHAPTER.'

YOUR LETTER CONTINUES, IN PART, AS FOLLOWS:

"THIS AGENCY THEREFORE HAS THE POWER TO CONSTRUCT ITS OWN ACCESS ROADS ON LAND IT HAS ACQUIRED BY CONDEMNATION, LEASE OR OTHERWISE, FOR PURPOSES OF SERVICING THESE REPEATER FACILITIES. WE HAVE ANNUALLY BUDGETED FOR AND RECEIVED FUNDS FOR THIS PURPOSE (SEE ATTACHMENTS FROM THE FEDERAL AVIATION AGENCY BUDGET FOR FISCAL YEAR 1961). IN ORDER FOR THIS AGENCY TO CONSTRUCT AND IMPROVE THE 9.35 MILES OF ROAD WHICH IS NECESSARY TO SERVICE AND OPERATE THESE FACILITIES AND TO PROVIDE FOR MAINTENANCE OF SUCH ROADS, COSTS OF APPROXIMATELY $118,976 WILL BE INCURRED. THE COUNTIES INVOLVED HAVE OFFERED TO PERFORM THE NECESSARY CONSTRUCTION AND MAINTENANCE OF THESE ROADS IN AN IMPROVED ALL-WEATHER CONDITION IF THIS AGENCY WILL CONTRIBUTE ONLY $4700, IN ALL. THIS AGENCY'S PARTICIPATION IN SUCH AN AGREEMENT WOULD AMOUNT TO A SAVINGS TO THE UNITED STATES OF APPROXIMATELY $114,276. TO RELOCATE THE SITES SO THAT ROADS WHICH ARE PRESENTLY IN AN ACCESSIBLE STATE FOR USE IN THE COUNTIES NAMED WOULD COST THE UNITED STATES APPROXIMATELY $250,000.

"THE PROBLEMS, AS YOU CAN SEE, ARE OF PRIME IMPORTANCE TO THIS AGENCY, SINCE LARGE SAVINGS WOULD ENSUE IF SUCH AN AGREEMENT WITH THE COUNTY WERE CONCLUDED. WHILE THE ROADS IN QUESTION WOULD REMAIN OWNED AND OPERATED BY THE LOCAL COUNTIES INVOLVED, THE ONLY PURPOSE THAT THESE ROADS WOULD PRESENTLY SERVE WOULD BE THOSE OF THE UNITED STATES GOVERNMENT. THE SAVINGS INVOLVED RANGE FROM AN EIGHTH TO A QUARTER OF A MILLION DOLLARS. AVOIDANCE OF ADMINISTRATIVE AND MAINTENANCE PROBLEMS WOULD ALSO BE EFFECTED. IT IS BELIEVED THAT SINCE THIS AGENCY HAS THE AUTHORITY UNDER SECTION 302 (K) OF ITS ACT TO USE STATE FACILITIES AND THAT SINCE THE ADMINISTRATOR IS EMPOWERED TO PERFORM SUCH ACTS AS HE SHALL DEEM NECESSARY TO CARRY OUT THE PROVISIONS OF SUCH ACT, THIS AGENCY IS EMPOWERED TO ENTER INTO THE VARIOUS AGREEMENTS NECESSARY.'

WHILE, IN EFFECT, YOU INDICATE THAT IT IS YOUR VIEW THAT YOUR AGENCY'S APPROPRIATION IS AVAILABLE TO CONTRIBUTE TO THE COST OF THE WORK IN QUESTION, YOU SAY THAT DUE TO THE SERIOUSNESS OF THE PROBLEM, IT IS DEEMED DESIRABLE TO OBTAIN OUR VIEWS IN THE MATTER.

IT IS WELL ESTABLISHED THAT APPROPRIATED FUNDS ARE NOT AVAILABLE FOR THE REPAIR, IMPROVEMENT, OR RECONSTRUCTION OF STATE-CONTROLLED OR COUNTY- CONTROLLED PUBLIC ROADS, UNLESS SPECIFICALLY AUTHORIZED BY SUBSTANTIVE LAW OR THE APPROPRIATION CONCERNED. 2 COMP. GEN. 308; 6 ID. 97; ID. 353. THE USE OF APPROPRIATED FUNDS THEREFOR IN THE ABSENCE OF SPECIFIC STATUTORY AUTHORITY WOULD RESULT IN THE VIOLATION OF SECTIONS 3678, 3679, AS AMENDED, AND 3733, REVISED STATUTES.

SECTION 3678, REVISED STATUTES, 31 U.S.C. 628, STATES:

"EXCEPT AS OTHERWISE PROVIDED BY LAW, SUMS APPROPRIATED FOR THE VARIOUS BRANCHES OF EXPENDITURE IN THE PUBLIC SERVICE SHALL BE APPLIED SOLELY TO THE OBJECTS FOR WHICH THEY ARE RESPECTIVELY MADE, AND FOR NO OTHERS.'

SECTION 3679, REVISED STATUTES, 31 U.S.C. 665, PROVIDES THAT:

"NO OFFICER OR EMPLOYEE OF THE UNITED STATES SHALL MAKE OR AUTHORIZE AN EXPENDITURE FROM OR CREATE OR AUTHORIZE AN OBLIGATION UNDER ANY APPROPRIATION OR FUND IN EXCESS OF THE AMOUNT AVAILABLE THEREIN; NOR SHALL ANY SUCH OFFICER OR EMPLOYEE INVOLVE THE GOVERNMENT IN ANY CONTRACT OR OTHER OBLIGATION, FOR THE PAYMENT OF MONEY FOR ANY PURPOSE, IN ADVANCE OF APPROPRIATIONS MADE FOR SUCH PURPOSE, UNLESS SUCH CONTRACT OR OBLIGATION IS AUTHORIZED BY LAW.'

SECTION 3733, REVISED STATUTES, 41 U.S.C. 12 STATES:

"NO CONTRACT SHALL BE ENTERED INTO FOR THE ERECTION, REPAIR, OR FURNISHING OF ANY PUBLIC BUILDING, OR FOR ANY PUBLIC IMPROVEMENT WHICH SHALL BIND THE GOVERNMENT TO PAY A LARGER SUM OF MONEY THAN THE AMOUNT IN THE TREASURY APPROPRIATED FOR THE SPECIFIC PURPOSE.'

THIS LATTER PROVISION OF LAW PROHIBITS THE EXECUTION OF A CONTRACT FOR "ANY PUBLIC IMPROVEMENT" ON FEDERAL PROPERTY UNLESS FUNDS ARE SPECIFICALLY APPROPRIATED THEREFOR.

THUS, AS INDICATED IN 39 COMP. GEN. 388, IF SPECIFIC ACTION IS REQUIRED BY THE CONGRESS WITH RESPECT TO PUBLIC IMPROVEMENTS ON FEDERAL PROPERTY, A FORTIORI, SPECIFIC AUTHORITY WOULD BE REQUIRED FOR THE FINANCING FROM FEDERAL FUNDS OF PUBLIC IMPROVEMENTS ON STATE OR COUNTY PROPERTY.

SECTIONS 302 (K) AND 313 (A) OF THE FEDERAL AVIATION ACT OF 1958, AS AMENDED, 49 U.S.C. 1443 (I) AND 1354 (A), VAST AUTHORITY IN THE ADMINISTRATOR TO USE STATE OR LOCAL FACILITIES AND TO PERFORM SUCH ACTS AS HE DEEMS NECESSARY TO CARRY OUT THE ACT AND THE INDEPENDENT OFFICES APPROPRIATION ACT, 1961, 74 STAT. 425, UNDER THE HEADING "FEDERAL AVIATION AGENCY," SUBHEADING ,ESTABLISHMENT OF AIR NAVIGATION FACILITIES" (74 STAT. 428), PROVIDES, IN PART, AS FOLLOWS:

"FOR AN ADDITIONAL AMOUNT FOR THE ACQUISITION, ESTABLISHMENT, AND IMPROVEMENT BY CONTRACT OR PURCHASE AND HIRE OF AIR NAVIGATION FACILITIES, INCLUDING THE INITIAL ACQUISITION OF NECESSARY SITES BY LEASE OR GRANT; *

WE AGREE THAT UNDER THE ABOVE-QUOTED APPROPRIATION AND CITED PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958 YOUR AGENCY HAS AUTHORITY TO CONSTRUCT ACCESS ROADS ON LAND IT ACQUIRES TITLE TO BY CONDEMNATION OR OTHERWISE, AND ON LEASED LANDS, PROVIDED IN THE LATTER CASE THE RIGHTS OF THE GOVERNMENT ARE FULLY PROTECTED.

HOWEVER, WE FOUND NOTHING IN YOUR BASIC LEGISLATION OR THE ABOVE APPROPRIATION ACT OR ITS LEGISLATIVE HISTORY WHICH AUTHORIZES THE USE OF APPROPRIATED MONEYS TO REPAIR, IMPROVE, OR RECONSTRUCT COUNTY OWNED AND CONTROLLED PUBLIC ROADS. IN A DECISION DATED DECEMBER 23, 1952, 32 COMP. GEN. 296, WE CONCLUDED THAT CONSTRUCTION OF A DECELERATION LANE ON U.S. HIGHWAY 6, ADJOINING THE ENTRANCE TO A VETERANS ADMINISTRATION HOSPITAL, BUT NOT ON THE PREMISES, WAS NOT AUTHORIZED, STATING IN PART:

"CONSIDERING ALL OF THE FACTORS INVOLVED, INCLUDING THE BELIEF THAT NUMEROUS OTHER REQUESTS WOULD BE MADE IF FEDERAL PARTICIPATION IN THE CONSTRUCTION OF THESE PROPOSED LANES WERE PERMITTED, THE CONCLUSION SEEMS INESCAPABLE THAT THE USE OF FEDERAL FUNDS TO IMPROVE PUBLIC ROADS NEAR FEDERAL FACILITIES IS A MATTER FOR THE CONSIDERATION OF THE OF THE CONGRESS. * * *"

WHAT WAS SAID THERE IS FOR APPLICATION TO THE SITUATION HERE PRESENTED. ALTHOUGH IT WOULD BE TO THE FINANCIAL ADVANTAGE OF THE GOVERNMENT TO DO WHAT IS PROPOSED,

WE ARE REQUIRED TO HOLD THAT SPECIFIC STATUTORY AUTHORITY SHOULD BE OBTAINED FOR EXPENDITURES OF THIS TYPE.