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B-151087, October 20, 1976, 56 Comp.Gen. 31

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B-151087, OCTOBER 20, 1976, 56 COMP.GEN. 31

STATES - FEDERAL AID, GRANTS, ETC. - PAYMENTS - PRIOR TO AVAILABILITY OF APPROPRIATIONS GRANTS FROM APPROPRIATIONS UNDER THE LAND AND WATER CONSERVATION FUND ACT (ACT), 16 U.S.C. 4601-4 TO 4601-11 MAY BE APPLIED TO COSTS INCURRED BY STATES AFTER SEPT. 3, 1964 (DATE OF ENACTMENT), BUT PRIOR TO AVAILABILITY OF THE APPROPRIATION CHARGED, IF IT IS DETERMINED THAT SUCH PAYMENTS WOULD AID IN ACHIEVING THE PURPOSES OF THE ACT, SINCE NOTHING IN THE ACT PROHIBITS SUCH PAYMENTS AND THERE IS NO POSSIBILITY THAT FEDERAL DOLLARS WILL BE USED MERELY TO REPLACE STATE DOLLARS EXPENDED FOR NON-FEDERAL PURPOSES. FURTHERMORE, THERE IS NO ANTI DEFICIENCY ACT OBJECTION SINCE THE GRANT ITSELF WOULD NOT BE MADE UNTIL THE APPROPRIATION CHARGED BECOMES AVAILABLE. STATES - FEDERAL AID, GRANTS, ETC. - AVAILABILITY - IN ADVANCE OF APPROPRIATION AVAILABILITY CONCERNING USE OF GRANT FUNDS TO PAY FOR COSTS INCURRED BY GRANTEE PRIOR TO AVAILABILITY OF APPROPRIATION TO BE CHARGED. GENERAL ACCOUNTING OFFICE (GAO) WILL NO LONGER APPLY "GENERAL RULE" THAT, IN CONNECTION WITH GRANTS, FEDERAL GOVERNMENT MAY NOT PARTICIPATE IN COSTS WHERE THE GRANTEE'S OBLIGATION AROSE BEFORE AVAILABILITY OF APPROPRIATION TO BE CHARGED UNLESS THE LEGISLATION OR ITS HISTORY INDICATES A CONTRARY INTENT, SINCE SUCH RULE DID NOT REFLECT ACTUAL BASIS ON WHICH DECISIONS CITED IN SUPPORT THEREOF WERE DECIDED AND, IN ANY EVENT, HAS NO LEGAL BASIS. 45 COMP.GEN. 515, 40 ID. 615, 31 ID. 308 AND A-71315, FEBRUARY 28, 1936, MODIFIED. STATUTORY CONSTRUCTION - COURT INTERPRETATION - EFFECT RULE OF STATUTORY CONSTRUCTION DEVELOPED BY COURTS WHICH DISFAVORS RETROACTIVE APPLICATION OF STATUTE IS RELEVANT PRIMARILY WHERE RETROACTIVE APPLICATION OF A STATUTE WOULD ABROGATE PRE-EXISTING RIGHTS OR OTHERWISE CAUSE RESULT WHICH MIGHT SEEM UNFAIR. HOWEVER, THESE CONSIDERATIONS, AND THUS CITED RULE OF STATUTORY CONSTRUCTION, DO NOT APPEAR RELEVANT TO ALLOWANCE OF GRANT PAYMENTS FOR COSTS INCURRED BY GRANTEE PRIOR TO AVAILABILITY OF APPROPRIATION TO BE CHARGED. FURTHERMORE, IT IS DOUBTFUL THAT SUCH USE OF GRANT FUNDS EVEN INVOLVES RETROACTIVE APPLICATION OF A STATUTE IN CUSTOMARY SENSE SINCE DETERMINATION OF WHETHER TO ALLOW PAYMENT, AS WELL AS PAYMENT ITSELF, WILL BE MADE AFTER THE APPROPRIATION BECOMES AVAILABLE.

TO THE HONORABLE ROBERT MCCLORY, HOUSE OF REPRESENTATIVES, OCTOBER 20, 1976:

THIS RESPONDS TO YOUR REQUEST FOR OUR OPINION CONCERNING THE USE OF LAND AND WATER CONSERVATION ASSISTANCE FUNDS TO REIMBURSE COSTS INCURRED BY STATES PRIOR TO THE AVAILABILITY OF AN APPROPRIATION FOR SUCH PURPOSES.

THE LAND AND WATER CONSERVATION FUND ACT OF 1965 (ACT), PUBLIC LAW 88-578 (SEPTEMBER 3, 1964), 78 STAT. 897, AS AMENDED, 16 U.S.C. SECS. 4601-4 TO 4601-11 (1970 AND SUPP. V, 1975), ESTABLISHED A FUND IN THE TREASURY FROM WHICH THE CONGRESS COULD MAKE APPROPRIATIONS, 60 PERCENT OF WHICH WOULD BE ALLOCATED FOR GRANT ASSISTANCE TO STATES AND 40 PERCENT WOULD BE USED FOR OTHER FEDERAL

PURPOSES, 16 U.S.C. SEC. 4601 7(A). FUNDS ALLOCATED FOR STATE PURPOSES AND APPORTIONED PURSUANT TO STATUTORY DIRECTION AMONG THE SEVERAL STATES ARE THEREAFTER AVAILABLE TO PROVIDE MATCHING ASSISTANCE OF UP TO 50 PERCENT OF EACH STATE'S COSTS IN PLANNING, ACQUIRING, AND DEVELOPING NEEDED LAND AND WATER AREAS AND FACILITIES TO BE USED FOR OUTDOOR RECREATION PURPOSES. 16 U.S.C. SECS. 4601-4, 4601-8(A) AND (C).

THE SECRETARY MAY CONSIDER PROVIDING FINANCIAL ASSISTANCE TO A STATE FOR ACQUISITION AND DEVELOPMENT PROJECTS ONLY AFTER THE STATE HAS PREPARED AND SUBMITTED A COMPREHENSIVE STATEWIDE OUTDOOR RECREATION PLAN. THE SECRETARY MAY PROVIDE STATES ASSISTANCE TO PREPARE A PLAN WHEN SUCH PLAN IS NOT OTHERWISE AVAILABLE, 16 U.S.C. SEC. 4601-8(D). THE SECRETARY MAY THEN PROVIDE FINANCIAL ASSISTANCE FOR PROJECTS FOR LAND AND WATER ACQUISITION AND DEVELOPMENT WHICH ARE IN IN ACCORDANCE WITH THE APPROVED COMPREHENSIVE STATEWIDE OUTDOOR PLAN. 16 U.S.C. SEC. 4601-8(E).

YOUR QUESTION IS WHETHER MATCHING FUNDS PROVIDED TO STATES UNDER THE ACT MAY BE APPLIED TO REIMBURSE STATES FOR COSTS INCURRED AFTER THE DATE OF APPROVAL OF THE ACT, BUT PRIOR TO THE TIME THAT THE PARTICULAR APPROPRIATION TO BE CHARGED BECAME AVAILABLE.

IT IS NOTED THAT THE INTERIOR DEPARTMENT'S BUREAU OF OUTDOOR RECREATION, WHICH ADMINISTERS THE ACT, CURRENTLY PERMITS PAYMENTS FOR COSTS INCURRED PRIOR TO PROJECT APPROVAL UNDER CERTAIN CIRCUMSTANCES. THE BUREAU OF OUTDOOR RECREATION MANUAL, PART 670, PROVIDES IN PERTINENT PART AS FOLLOWS:

3. RETROACTIVITY. IT IS THE INTENT OF THE BUREAU THAT FUND GRANTS BE AWARDED TO ASSIST WORK NOT YET UNDERTAKEN, RATHER THAN TO HELP PAY FOR WORK ALREADY BEGUN OR COMPLETED. THIS APPLIES TO ENTIRE PROJECTS AND TO EACH STAGE OF A MULTI-STAGE PROJECT.

A. POLICY. RETROACTIVE COSTS ARE THOSE COSTS INCURRED PRIOR TO PROJECT OR STAGE APPROVAL BY THE BUREAU. THEY INCLUDE COSTS INCURRED FOR SUBSEQUENT STAGES BEFORE THE STAGES ARE APPROVED. WITH THE SPECIFIC EXCEPTIONS STATED BELOW, RETROACTIVE COSTS ARE NOT ELIGIBLE FOR MATCHING FUNDS.

B. EXCEPTIONS.

(1) RETROACTIVE PROJECTS. RETROACTIVE COSTS WILL NOT BE MATCHED UNDER ORDINARY CIRCUMSTANCES. EXCEPTIONS WILL BE MADE ONLY WHEN IMMEDIATE ACTION IS NECESSARY AND THE TIME NECESSARY TO PROCESS AN APPLICATION WOULD RESULT IN A SIGNIFICANT OPPORTUNITY BEING LOST. THE STATE WILL NOTIFY THE BUREAU IN WRITING OF THE NECESSITY FOR IT TO ACT PRIOR TO DOING SO AND GIVE JUSTIFICATION FOR THE PROPOSED ACTION. SUCH NOTIFICATION MUST INCLUDE AN ENVIRONMENTAL ASSESSMENT AS OUTLINED IN SECTION 650.1.3. FINDING BY THE BUREAU THAT AN ENVIRONMENTAL IMPACT STATEMENT MIGHT BE REQUIRED WILL PRECLUDE THE GRANTING OF A WAIVER. FUNDS MUST BE AVAILABLE TO THE STATE'S APPORTIONMENT, AND A PROJECT AGREEMENT MUST BE SUBMITTED AS SOON AS POSSIBLE. IF THE BUREAU GRANTS AN EXCEPTION, THE RETROACTIVE COSTS WILL BE ELIGIBLE FOR ASSISTANCE IF THE AGREEMENT IS LATER APPROVED IN THE NORMAL COURSE. GRANTING AN EXCEPTION IS ONLY AN ACKNOWLEDGEMENT OF THE NEED FOR IMMEDIATE ACTION; IT DOES NOT IMPLY A QUALITATIVE APPROVAL OF THE PROJECT. THE COSTS ARE INCURRED AT THE APPLICANT'S RISK AND GRANTING OF THE EXCEPTION DOES NOT IN ANY WAY INSURE APPROVAL OF THE PROJECT. UNDER NO CONDITIONS WILL AN EXCEPTION BE GRANTED DURING A PERIOD OF STATE INELIGIBILITY OR WHEN THE AMOUNT REMAINING UNOBLIGATED IN THE STATE'S APPORTIONMENT IS

INADEQUATE TO COVER THE PROPOSED RETROACTIVE PROJECT.

THESE PROVISIONS INDICATE, AND AN OFFICIAL OF THE BUREAU HAS CONFIRMED, THAT PRESENTLY A WAIVER IS GRANTED ONLY WHEN THERE ARE SUFFICIENT FUNDS IN THE STATE'S APPORTIONMENT TO COVER THE PROSPECTIVE PROJECT COSTS AND THOSE FUNDS ARE SET ASIDE AT THAT TIME. THEREAFTER, IF THE PROJECT IS APPROVED AND THE FUNDS SET ASIDE ARE STILL AVAILABLE, THE PREVIOUSLY INCURRED COSTS MAY BE REIMBURSED. HOWEVER, THE SAME BUREAU OFFICIAL HAS INFORMALLY ADVISED THAT THE BUREAU IS CONSIDERING A LIBERALIZATION OF ITS CURRENT POLICIES SO AS TO ALLOW RETROACTIVE COSTS (1) WITHOUT REQUIRING THAT FUNDS AVAILABLE UNDER A STATE'S APPORTIONMENT BE SET ASIDE AT THE TIME OF WAIVER, OR (2) EVEN IN CASES WHERE A STATE'S APPORTIONMENT HAS BEEN EXHAUSTED AT THE TIME OF WAIVER.

YOUR LETTER NOTES THAT DECISIONS OF THIS OFFICE HAVE PRONOUNCED AS A GENERAL RULE THAT, IN CONNECTION WITH GRANTS, THE FEDERAL GOVERNMENT MAY NOT PARTICIPATE IN COSTS WHERE THE GRANTEE'S OBLIGATION AROSE BEFORE AN APPROPRIATION UNDER THE ENABLING LEGISLATION BECAME AVAILABLE, UNLESS THE LEGISLATION OR ITS HISTORY INDICATES A CONTRARY INTENT. 45 COMP.GEN. 515 (1966); 40 ID. 615 (1961); 31 ID. 308 (1952); AND A-71315, FEBRUARY 28, 1936.

THE FIRST DECISION OF OUR OFFICE IN THIS AREA APPEARS TO BE A-71315, FEBRUARY 28, 1936. IN THAT DECISION WE HELD THAT THE SOCIAL SECURITY BOARD COULD NOT REIMBURSE STATES FOR ADMINISTRATIVE EXPENSES INCURRED BY THEM IN CONNECTION WITH UNEMPLOYMENT COMPENSATION PROGRAMS DURING FISCAL YEAR 1936 BUT PRIOR TO THE DATE OF ENACTMENT OF THE SUPPLEMENTAL APPROPRIATION ACT, 1936, WHICH FIRST MADE FUNDS AVAILABLE FOR PAYMENTS TO STATES. WE BASED OUR HOLDING IN LARGE PART ON THE FACT THAT THE CONGRESS, IN MAKING APPROPRIATIONS FOR STATE PAYMENTS, HAD REDUCED THE AMOUNT AUTHORIZED FOR THE ENTIRE YEAR IN PROPORTION TO THE TIME THAT HAD ELAPSED BETWEEN THE BEGINNING OF THE FISCAL YEAR AND ENACTMENT OF THE APPROPRIATION, THEREBY CLEARLY INDICATING AN INTENT THAT THE APPROPRIATION BE USED PROSPECTIVELY.

IN B-11393, JULY 25, 1940, WE CONSIDERED THE SECOND DEFICIENCY APPROPRIATION ACT, 1940, APPROVED JUNE 27, 1940, WHICH PROVIDED FOR PAYMENTS BY THE COMMISSIONER OF EDUCATION TO STATE AND OTHER PUBLIC AGENCIES FOR THE COST OF CERTAIN VOCATIONAL EDUCATION COURSES OFFERED BY THEM TO DEFENSE WORKERS. WE CONCLUDED THAT THE COMMISSIONER COULD ONLY MAKE PAYMENTS FOR COSTS INCURRED ON OR AFTER JULY 1, 1940. IT IS TO BE NOTED, HOWEVER, THAT THE DEFICIENCY APPROPRIATION ACT APPARENTLY CONSTITUTED THE AUTHORIZATION FOR THE PROGRAM, AS WELL AS THE SOURCE OF THE FUNDS THEREFOR. THUS COSTS INCURRED PRIOR TO JULY 1, 1940 WOULD HAVE PREDATED THE AUTHORIZATION FOR PAYMENT.

IN 31 COMP.GEN. 308 (1952), WE HELD THAT THE ACTING ADMINISTRATOR ON THE FEDERAL CIVIL DEFENSE ADMINISTRATION COULD NOT MAKE CONTRIBUTIONS TO THE STATES, UNDER THE PROVISIONS OF THE FEDERAL CIVIL DEFENSE ACT OF 1950, FOR ITEMS PURCHASED PRIOR TO THE DATE ON WHICH THE FEDERAL APPROPRIATION TO BE CHARGED BECAME AVAILABLE. WE OBSERVED:

IN VIEW OF THE * * * LEGISLATIVE HISTORY, IT APPEARS THAT THE CONGRESS DID NOT INTEND OR CONTEMPLATE THAT RETROACTIVE PAYMENTS WOULD BE MADE FOR OBLIGATIONS INCURRED OR EXPENDITURES MADE BY THE STATES PRIOR TO AN APPROPRIATION BECOMING AVAILABLE. ACCORDINGLY, THE HOLDING IN A-71315 DATED FEBRUARY 28, 1936, THAT, IN THE ABSENCE OF A CONTRARY INDICATION, SUMS APPROPRIATED FOR GRANTS ARE AVAILABLE FOR USE ONLY PROSPECTIVELY FROM THE DATE OF THE APPROPRIATION AND NOT FOR REIMBURSING STATES FOR EXPENDITURES THERETOFORE MADE OR FOR LIQUIDATING

OBLIGATIONS THERETOFORE INCURRED APPEARS FOR APPLICATION AND YOUR SECOND AND THIRD QUESTIONS ARE ANSWERED IN THE NEGATIVE. * * * . ID. AT 310.

THIS DECISION MISSTATED THE HOLDING IN A-71315, WHICH, AS NOTED PREVIOUSLY, CONCLUDED THAT CONGRESS HAD INTENDED THE FUNDS THERE INVOLVED BE USED PROSPECTIVELY ONLY. HOWEVER, THE RESULT REACHED IN 31 COMP.GEN. 308 WAS CORRECT AND IN ACCORD WITH A-71315, SINCE IT ALSO SPECIFICALLY FOUND THAT THE LEGISLATIVE HISTORY OF THE ACT INVOLVED INDICATED AN INTENT THAT THE FUNDS INVOLVED BE USED PROSPECTIVELY ONLY. SEE DISCUSSION AT 31 COMP.GEN. 309-310.

IN 40 COMP.GEN. 615 (1961), WE HELD THAT FEDERAL AID FUNDS PROVIDED UNDER THE PITTMAN-ROBINSON AND DINGELL-JOHNSON ACTS COULD NOT BE USED TO SHARE IN THE COSTS OF PROJECT LANDS ACQUIRED BY THE STATES PRIOR TO THE AVAILABILITY OF THE FUNDS FOR THAT PURPOSE. HOWEVER, IN THAT DECISION WE AGAIN FOUND THAT THE PROVISIONS OF THE ACTS THEMSELVES INDICATED THAT THE CONGRESS INTENDED THAT THE FEDERAL AID FUNDS WOULD BE APPLIED TO RESTORATION PROJECTS ONLY PROSPECTIVELY. 40 COMP.GEN. AT 618.

THUS IN THE FOREGOING THREE DECISIONS, THE TOUCHSTONE OF OUR RATIONALE WAS THAT THE CONGRESS HAD MANIFESTED AN AFFIRMATIVE INTENT, EITHER IN THE LANGUAGE OF THE LAWS INVOLVED OR THEIR LEGISLATIVE HISTORIES, THAT FEDERAL ASSISTANCE BE USED ONLY IN CONNECTION WITH COSTS INCURRED SUBSEQUENT TO AN APPROPRIATION. WE DID NOT BASE OUR RESULT ON THE ABSENCE OF A CONGRESSIONAL EXPRESSION OF INTENT THAT COSTS INCURRED PRIOR TO THE APPROPRIATION BE INCLUDED, ALTHOUGH WE CONCEDE THAT A "GENERAL RULE" TO THIS EFFECT WAS INCLUDED IN EACH OF THE DECISIONS AFTER A-71315, SUPRA. BECAUSE THIS "GENERAL RULE" DOES NOT REFLECT THE ACTUAL BASIS FOR EACH OF THE ABOVE MENTIONED DECISIONS, WE WILL NO LONGER CITE AND APPLY SUCH A RULE WHEN CONSIDERING THE LEGALITY OF USING GRANT FUNDS TO PAY FOR COSTS INCURRED PRIOR TO AVAILABILITY OF THE APPLICABLE APPROPRIATION.

IN ANY EVENT, THERE SEEMS TO BE NO LEGAL REQUIREMENT FOR A "GENERAL RULE" PROHIBITING SUCH GRANT PAYMENTS EXCEPT UNDER EXCEPTIONAL CIRCUMSTANCES. WHETHER A STATUTE OPERATES RETROACTIVELY OR PROSPECTIVELY IS, OF COURSE, A QUESTION OF STATUTORY CONSTRUCTION WHICH DEPENDS UPON THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY IN ANY GIVEN CASE. WHILE THE COURTS HAVE DEVELOPED A RULE OF CONSTRUCTION WHICH DISFAVORS RETROACTIVITY, THIS RULE IS RELEVANT PRIMARILY WHERE RETROACTIVE APPLICATION OF A STATUTE WOULD ABROGATE PRE-EXISTING RIGHTS OR OTHERWISE CAUSE RESULTS WHICH MIGHT SEEM UNFAIR. 73 AM.JUR. 2D, STATUTES, SEC. 350; 2 SUTHERLAND STATUTORY CONSTRUCTION, SECS. 41.02, 41.04 (4TH ED., 1973). THESE CONSIDERATIONS DO NOT APPEAR RELEVANT TO THE ALLOWANCE OF GRANT PAYMENTS FOR COSTS INCURRED PRIOR TO AVAILABILITY OF THE APPROPRIATION CHARGED. INDEED, IT IS AT BEST DOUBTFUL THAT SUCH A USE OF APPROPRIATIONS FOR GRANT PAYMENTS EVER INVOLVES THE "RETROACTIVE" APPLICATION OF A STATUTE IN THE CUSTOMARY SENSE, SINCE THE DETERMINATION OF WHETHER TO ALLOW PAYMENT, AS WELL AS PAYMENT ITSELF, WILL BE MADE AFTER THE APPROPRIATION BECOMES AVAILABLE. CF., 2 SUTHERLAND STATUTORY CONSTRUCTION, SUPRA, SEC. 41.01. IT MAY CERTAINLY BE OBSERVED THAT MOST FEDERAL GRANT PROGRAMS ARE DESIGNED TO INDUCE ACTIONS OR RESULTS WHICH WOULD NOT OTHERWISE OCCUR, RATHER THAN TO REWARD THOSE WHICH WOULD TAKE PLACE IN ANY EVENT OR TO SUBSTITUTE FEDERAL DOLLARS FOR STATE OR LOCAL CONTRIBUTIONS. HOWEVER, THERE IS NO BASIS TO CREATE A RIGID LEGAL BARRIER IN THIS REGARD, SO AS TO LIMIT CONSIDERATION OF ALL FACTORS RELEVANT TO DECIDING HOW THE PURPOSES OF A PARTICULAR GRANT PROGRAM CAN BEST BE ACCOMPLISHED. FOR EXAMPLE, IT COULD NOT ORDINARILY CARRY OUT CONGRESSIONAL INTENT TO REIMBURSE A STATE FOR THE COSTS OF PROPERTY ACQUIRED MANY YEARS PRIOR TO ITS APPLICATION FOR THE PARTICULAR GRANT IN QUESTION, AT A TIME WHEN NO FEDERAL PURPOSE WAS EVEN CONTEMPLATED.

CONCEIVABLY, HOWEVER, THERE MIGHT BE SPECIAL CIRCUMSTANCES THAT WOULD JUSTIFY EVEN THAT USE OF GRANT FUNDS. WE WOULD PREFER TO BASE EACH DECISION FROM NOW ON ON THE STATUTORY LANGUAGE, LEGISLATIVE HISTORY, AND PARTICULAR FACTORS OPERATIVE IN THE PARTICULAR CASE IN QUESTION, RATHER THAN ON A GENERAL RULE.

TURNING TO THE INSTANT CASE, WE NOTE THAT SECTION 6(C) OF THE LAND AND WATER CONSERVATION FUND ACT, SUPRA, 16 U.S.C. 4061-8(C), PROVIDES IN PART:

* * * NO PAYMENT MAY BE MADE TO ANY STATE FOR OR ON ACCOUNT OF ANY COST OR OBLIGATION INCURRED OR ANY SERVICE RENDERED PRIOR TO THE DATE OF APPROVAL OF THIS ACT.

THE ACT WAS APPROVED ON SEPTEMBER 3, 1964, ALTHOUGH IT DID NOT BECOME EFFECTIVE UNTIL JANUARY 1, 1965. SEE PUBLIC LAW 88-578, SEC. 1(A), 78 STAT. 897.

SECTION 6(C) BY ITS TERMS PRECLUDES GRANT PAYMENTS FOR COSTS INCURRED BEFORE SEPTEMBER 3, 1964. HOWEVER, IT DOES NOT - NOR DOES ANY OTHER SPECIFIC PROVISIONS OF THE ACT - PREVENT THE SECRETARY OF THE INTERIOR FROM MAKING GRANT PAYMENTS FOR STATE COSTS INCURRED AFTER SEPTEMBER 3, 1964, BUT BEFORE THE AVAILABILITY OF THE APPROPRIATION TO BE CHARGED. MOREOVER, SECTION 6(C) HAS BEEN INTERPRETED BY THE INTERIOR DEPARTMENT, WITH THE KNOWLEDGE AND APPARENT ACQUIESCENCE OF CONGRESSIONAL COMMITTEES, AS IMPLICITLY SUPPORTING THE VIEW THAT THE LATTER COSTS MAY BE PAID. SEE, E.Q., HEARINGS BEFORE SUBCOMMITTEES OF THE HOUSE APPROPRIATIONS COMMITTEE ON THE SECOND SUPPLEMENTAL APPROPRIATION BILL, 1965, 89TH CONG., 1ST SESS., PT. 1, AT 580-81 (1965); HEARINGS BEFORE THE SENATE APPROPRIATIONS COMMITTEE ON THE SECOND SUPPLEMENTAL APPROPRIATION BILL, 1965, 89TH CONG., 1ST SESS., AT 323-24 (1965); CONG. REC., MAY 5, 1976 (DAILY ED.), H3924 (COLLOQUY BETWEEN REPRESENTATIVES MCCLORY AND TAYLOR, OF NORTH CAROLINA). WE NOTE THAT THE DEPARTMENT PROPOSES TO REIMBURSE "RETROACTIVE" COSTS ONLY IN LIMITED CIRCUMSTANCES. PART 670 OF THE BUREAU OF OUTDOOR RECREATION MANUAL, QUOTED IN FULL, SUPRA, REFERS TO CIRCUMSTANCES "WHEN IMMEDIATE ACTION IS NECESSARY" TO PREVENT A "SIGNIFICANT OPPORTUNITY" FROM BEING LOST. MOREOVER, THE STATE WOULD BE REQUIRED TO OBTAIN FEDERAL PERMISSION TO INCUR THE COST IN QUESTION PRIOR TO TAKING THE ACTION. THUS THERE APPEARS TO BE NO POSSIBILITY THAT FEDERAL DOLLARS WILL BE USED MERELY TO REPLACE STATE DOLLARS EXPENDED FOR NON-FEDERAL PURPOSES.

FINALLY, THE DEPARTMENT REGULATIONS MAKE IT CLEAR THAT NO OBLIGATION ARISES BY VIRTUE OF ITS APPROVAL OF COSTS INCURRED PRIOR TO PROJECT APPROVAL AND PRIOR TO THE AVAILABILITY OF AN APPROPRIATION FOR SUCH COSTS. THUS THERE IS NO ANTI-DEFICIENCY ACT OBJECTION TO THE REGULATORY CHANGE UNDER CONSIDERATION. THE GRANT ITSELF WOULD NOT BE MADE UNTIL THE APPROPRIATION CHARGED BECOMES AVAILABLE.

IN VIEW OF THE FOREGOING, IT IS OUR OPINION THAT GRANTS FROM APPROPRIATIONS UNDER THE LAND AND WATER CONSERVATION FUND ACT MAY BE APPLIED TO COSTS INCURRED BY STATES AFTER SEPTEMBER 3, 1964 (THE DATE OF ENACTMENT) BUT PRIOR TO AVAILABILITY OF THE APPROPRIATION CHARGED IF IT IS DETERMINED THAT SUCH PAYMENTS WOULD AID IN ACHIEVING THE PURPOSES OF THE ACT. ACCORDINGLY, WE HAVE NO OBJECTION TO A REVISION OF THE GRANT REGULATIONS ALONG THE LINES PREVIOUSLY DISCUSSED.