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[Comments on FEMA Authority To Withold Oregon's Emergency Planning Funds]

Number: B-226544

Date: 1987-03-24

B-226544, MAR 24, 1987, OFFICE OF GENERAL COUNSEL

APPROPRIATIONS/FINANCIAL MANAGEMENT - FEDERAL ASSISTANCE - CIVIL DEFENSE - EMERGENCY PREPAREDNESS - FUNDS - WITHHOLDING DIGEST: FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) IS AUTHORIZED TO WITHHOLD CIVIL DEFENSE ACT FUNDS FROM THE STATE OF OREGON BASED ON THE STATE'S NONPARTICIPATION IN A COMMUNICATIONS EXERCISE DESIGNED TO TEST CIVILIAN PREPAREDNESS FOR IMMINENT NUCLEAR WAR. OREGON'S PRIOR GOVERNOR AGREED TO THE EXERCISE IN THE STATE'S COOPERATIVE AGREEMENT WITH FEMA. IF FEMA ATTEMPTS WITHHOLDING, IT MUST FOLLOW PROCEDURAL DUE PROCESS CALLED FOR IN ITS STATUTE AND IMPLEMENTING REGULATIONS, AND IT CAN ONLY WITHHOLD THE FUNDS PROVIDED UNDER THE CIVIL DEFENSE ACT, NOT ALL EMERGENCY PLANNING FUNDS. ADDITIONALLY, FEMA COULD EXERCISE ITS DISCRETION TO ACCOMMODATE OREGON'S WISH TO PARTICIPATE IN A DRILL PREMISED ON A LESS POLITICALLY SENSITIVE SCENARIO THAN A NUCLEAR WAR WITH THE SOVIET UNION.

THE HONORABLE RON WYDEN:

YOUR LETTER OF MARCH 10, 1987 REQUESTED OUR VIEWS ON WHETHER THE FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) IS EMPOWERED TO WITHHOLD ALL OR PART OF OREGON'S 1987 EMERGENCY PLANNING FUNDS BASED ON THE STATE'S NONPARTICIPATION IN AN EMERGENCY COMMUNICATIONS EXERCISE PREMISED ON THE SCENARIO OF A MAJOR NUCLEAR WAR WITH THE SOVIET UNION. BASED ON THE STATUTE, REGULATIONS AND THE FEMA/STATE COMPREHENSIVE COOPERATIVE AGREEMENT WE FIND THAT, AS A MATTER OF LAW, FEMA HAS BOTH THE AUTHORITY AND DISCRETION TO UNDERTAKE TO WITHHOLD FUNDS. BY THE SAME TOKEN, HOWEVER, FEMA IS NOT STATUTORILY REQUIRED TO WITHHOLD FEDERAL GRANT FUNDS FROM OREGON BECAUSE OF NONPARTICIPATION. MOREOVER, IF FEMA ELECTS TO ATTEMPT WITHHOLDING OF FUNDS, IT MUST FOLLOW ITS OWN REGULATIONS ON THIS MATTER. THE REGULATIONS REQUIRE OBSERVING FULL PROCEDURAL DUE PROCESS.

BACKGROUND

WHEN FEMA WAS CREATED IN 1978, IT WAS TASKED WITH COORDINATING ALL THE EMERGENCY PLANNING AND RESPONSE ACTIVITIES AT THE FEDERAL LEVEL. AMONG THE SEVERAL STATUTES WHICH IT IS RESPONSIBLE FOR ADMINISTERING IS THE FEDERAL CIVIL DEFENSE ACT OF 1950. THAT ACT SET UP FEDERAL GRANTS (100% MATCHED BY THE STATES) FOR CIVIL DEFENSE FACILITIES AND PERSONNEL, TO BE USED FOR ATTACK PREPAREDNESS AND FOR NATURAL DISASTERS. 50 U.S.C. APP. SECS. 2281, 2286 (1982). THE TERMS "CIVIL DEFENSE" AND "ATTACK" ARE DEFINED IN THE ACT AS FOLLOWS:

"(C) THE TERM 'CIVIL DEFENSE' MEANS ALL THOSE ACTIVITIES AND MEASURES DESIGNED OR UNDERTAKEN (1) TO MINIMIZE THE EFFECTS UPON THE CIVILIAN POPULATION *** WHICH WOULD BE CAUSED BY AN ATTACK UPON THE UNITED STATES OR BY A NATURAL DISASTER ***."

"(A) THE TERM 'ATTACK' MEANS ANY ATTACK OR SERIES OF ATTACKS BY AN ENEMY OF THE UNITED STATES *** WHICH MAY CAUSE, SUBSTANTIAL DAMAGE OR INJURY TO CIVILIAN PROPERTY OR PERSONS IN THE UNITED STATES IN ANY MANNER BY SABOTAGE OR BY THE USE OF BOMBS, SHELLFIRE, OR ATOMIC, RADIOLOGICAL, CHEMICAL, BACTERIOLOGICAL, OR BIOLOGICAL MEANS OR OTHER WEAPONS OR PROCESSES. ***"

50 U.S.C. APP. SEC. 2252(A), (C) (1982).

TO HARMONIZE THE COMPETING INTERESTS OF PLANNING FOR NATURAL DISASTER AND ATTACK PREPAREDNESS, CONGRESS STATED THAT--

"FUNDS MADE AVAILABLE TO THE STATES UNDER THIS ACT MAY BE USED BY THE STATES *** TO PREPARE FOR, AND *** PROVIDE EMERGENCY ASSISTANCE IN RESPONSE TO, NATURAL DISASTERS TO THE EXTENT THAT THE USE OF SUCH FUNDS FOR SUCH PURPOSES IS CONSISTENT WITH, CONTRIBUTES TO, AND DOES NOT DETRACT FOR ATTACK-RELATED CIVIL DEFENSE PREPAREDNESS.

50 U.S.C. APP. SEC. 2289 (1982).

TO IMPLEMENT THIS "DUAL USE" PROVISION, FEMA CREATED THE CONCEPT OF THE INTEGRATED EMERGENCY MANAGEMENT SYSTEM. THE INTEGRATED SYSTEM ATTEMPTS TO COORDINATE THOSE ELEMENTS OF EMERGENCY PLANNING AND RESPONSE THAT ARE COMMON TO ALL CIVIL DEFENSE ACTIVITIES, AS WELL AS TO ENSURE SUFFICIENT EMPHASIS ON ATTACK PREPAREDNESS.

THE FEMA/OREGON COMPREHENSIVE COOPERATIVE AGREEMENT REFERENCES THE INTEGRATED SYSTEM IN ARTICLE X, ENTITLED "NONPERFORMANCE," WHERE IT PROVIDES:

"A. IN KEEPING WITH THE CONCEPT OF INTEGRATED EMERGENCY MANAGEMENT AND CIVIL DEFENSE, A STATE IS EXPECTED TO PARTICIPATE IN ALL PROGRAMS FOR WHICH FUNDING IS OFFERED, UNLESS EXTENUATING CIRCUMSTANCES WARRANT EXCLUSION OF A PROGRAM OR PROGRAMS. REFUSAL OF A STATE TO PARTICIPATE IN NUCLEAR ATTACK PREPAREDNESS PROGRAMS AND ACTIVITIES OR LACK OF ACCOMPLISHMENT OF OBJECTIVES SUPPORTING THESE ACTIVITIES WILL CONSTITUTE REASON FOR WITHHOLDING OR WITHDRAWAL OF CIVIL DEFENSE FUNDING, AS DETERMINED BY THE REGIONAL DIRECTOR."

OTHER PARAGRAPHS OF ARTICLE X PROVIDE:

"B. FAILURE OF THE STATE TO ACCOMPLISH THE OBJECTIVES SET FORTH IN AGREED UPON STATEMENTS OF WORK *** MAY SUBJECT THE STATE TO THE WITHHOLDING OF FUNDS *** OR TO COLLECTION OF SUCH FUNDS ALREADY EXPENDED, NOT TO EXCEED THE ESTIMATED COST OF WORK NOT PERFORMED ***.

"C. FAILURE OF THE STATE TO ACCOMPLISH THE OBJECTIVES *** FOR THE PREVIOUS FISCAL YEAR MAY SUBJECT THE STATE TO A DIMINISHED OR WITHHELD AWARD OF FUNDS. ***"

THE WITHHOLDING PROVISIONS IN THE COOPERATIVE AGREEMENT ARE BASED ON THE STATUTE WHICH PROVIDES THAT--

"WHEN, AFTER REASONABLE NOTICE AND OPPORTUNITY FOR HEARING TO THE STATE *** THE DIRECTOR, FEMA FINDS THAT THERE IS A FAILURE TO EXPEND FUNDS IN ACCORDANCE WITH THE REGULATIONS, TERMS, AND CONDITIONS ESTABLISHED UNDER THIS ACT FOR APPROVED CIVIL DEFENSE PLANS, PROGRAMS OR PROJECTS, *** THE DIRECTOR IS AUTHORIZED TO NOTIFY SUCH STATE *** THAT FURTHER PAYMENTS WILL NOT BE MADE TO THE STATE ***

FROM APPROPRIATIONS UNDER THIS ACT (OR FROM FUNDS OTHERWISE AVAILABLE FOR THE PURPOSES OF THIS ACT FOR ANY APPROVED PLAN, PROGRAM OR PROJECT WITH RESPECT TO WHICH THERE IS SUCH FAILURE TO COMPLY) UNTIL THE *** DIRECTOR IS SATISFIED THERE WILL NO LONGER BE SUCH FAILURE. UNTIL HE IS SO SATISFIED, THE *** DIRECTOR SHALL EITHER WITHHOLD THE PAYMENT OF ANY FINANCIAL CONTRIBUTION TO SUCH STATE *** OR LIMIT PAYMENTS TO THOSE PROGRAMS OR PROJECTS WITH RESPECT TO WHICH THERE IS SUBSTANTIAL COMPLIANCE WITH THE REGULATIONS, ETC. ***."

50 U.S.C. APP. SEC. 2253(H) (1982). 44 C.F.R. PART 303 (1984, AS AMENDED) SUBSTANTIALLY REPEATS THE STATUTORY LANGUAGE, AND DETAILS THE NOTICE AND HEARING REQUIREMENTS.

THE OREGON EXERCISE

AMONG 13 MAJOR OBJECTIVES IN THE STATEMENT OF WORK UNDER THE CATEGORY OF EMERGENCY MANAGEMENT ASSISTANCE, OREGON'S FISCAL YEAR 1987 COMPREHENSIVE COOPERATIVE AGREEMENT WITH FEMA CALLS FOR THE STATE TO "PARTICIPATE IN A LOCAL TO STATE TO REGION NATIONAL SECURITY SYSTEM EXERCISE PER CPG 2-10." CPG (CIVIL PREPAREDNESS GUIDANCE) 2-10 IS A SERIES OF EIGHT BOOKLETS PREPARED IN 1978, OUTLINING PROCEDURES TO BE FOLLOWED DURING PERIODS OF HEIGHTENED INTERNATIONAL TENSION AND IMPENDING CRISIS LEADING UP TO AND THROUGH THE PERIOD OF A NUCLEAR ATTACK ON THE UNITED STATES.

FEMA SCHEDULED ITS EXERCISE FOR MARCH 3-5, 1987. THE SCENARIO FOR THE EXERCISE WAS BASED ON A BEST-SELLING NOVEL ABOUT A SUPERPOWER CONFRONTATION ENDING IN NUCLEAR WAR, AND IT INCLUDED THE SEVERAL DAYS OF INCIPIENT PANIC PRECEDING THE OUTBREAK OF WAR.

ON FEBRUARY 23, 1987, THE GOVERNOR OF OREGON OFFICIALLY REFUSED TO PARTICIPATE IN THE EXERCISE, CITING THE "UNACCEPTABLE" SCENARIO AS THE REASON, BUT INDICATING THE STATE'S WILLINGNESS TO PARTICIPATE IN OTHER COMMUNICATIONS EXERCISES WHICH THE STATE ARGUED WOULD FULFILL FEMA'S CIVIL DEFENSE ROLE. EARLIER, THE GOVERNOR'S LEGAL COUNSEL HAD OFFERED THE FULL CREATIVE RESOURCES OF THE STATE TO DEVELOP A MUTUALLY ACCEPTABLE ALTERNATIVE NUCLEAR DETONATION SCENARIO WHICH WOULD COME WITHIN THE BROAD STATUTORY DEFINITION OF "ATTACK." FEMA INSISTED ON ITS SET SCENARIO, WHICH IT STATED WAS DEVELOPED IN CONSULTATION WITH AND AGREED TO BY THE PREVIOUS STATE ADMINISTRATION.

IN THE ENSUING IMPASSE BETWEEN STATE AND FEMA REGIONAL OFFICIALS, THE FEMA REGIONAL DIRECTOR HAS THREATENED UNILATERALLY TO WITHHOLD ALL OF OREGON'S EMERGENCY PLANNING FUNDS AS SPECIFIED IN ARTICLE X OF THE COOPERATIVE AGREEMENT.

ANALYSIS

OUR INDEPENDENT ANALYSIS OF THE STATUTE, THE REGULATIONS, AND THE COOPERATIVE AGREEMENT HAS CONVINCED US THAT FEMA IS ACTING WITHIN THE SCOPE OF ITS DISCRETION IN SCHEDULING THE EXERCISE, INSISTING ON ITS SCENARIO, AND, PROVIDED IT OBSERVES DUE PROCESS, IN WITHHOLDING AT LEAST SOME FUNDS FROM THE STATE BASED ON NONPARTICIPATION. WE MUST ALSO POINT OUT THAT NONE OF THESE ACTIONS IS REQUIRED BY LAW.

A. EXERCISE IS NOT MANDATORY

THE CIVIL DEFENSE ACT DOES NOT REQUIRE FEMA TO CONDUCT THE PARTICULAR DRILL THAT OREGON SO STRONGLY OBJECTS TO. "ATTACK" IS DEFINED IN THE STATUTE TO INCLUDE

MULTIPLE ENEMY THREATS AND SABOTAGE. THERE IS NO STATUTORY NUCLEAR ATTACK-RELATED CONDITION ON THE USE OF THE FEDERAL CONTRIBUTIONS TO THE STATES. THE STATUTE DECREES ONLY THAT STATE EMERGENCY PLANNING EXPENDITURES BE COMPATIBLE WITH ATTACK PREPAREDNESS, NOT THAT ATTACK PREPAREDNESS IS PRIMARY. AS WE SEE IT, THE SAME DISCRETION THAT FEMA EXERCISED TO SELECT THE SCENARIO IN THE FIRST PLACE COULD ALSO SUPPORT A DECISION TO ACCEPT ONE OF THE STATE'S ALTERNATIVES. AS A MATTER OF CONTRACT, HOWEVER, FEMA IS ENTITLED TO HOLD THE STATE TO ITS AGREEMENT TO PARTICIPATE IN A COMMUNICATIONS EXERCISE, "PER CPG 2-10," AND TO INSIST ON A SCENARIO FOR THAT EXERCISE THAT INCLUDES FULL SCALE NUCLEAR WAR.

THE NATURE OF THE COOPERATIVE AGREEMENT PROCESS REQUIRES GOOD FAITH NEGOTIATION AS TO THE CONTENT OF THE AGREEMENT, AND DOES NOT PERMIT THE FEDERAL GRANTOR TO DICTATE TO THE STATE GRANTEE. FEMA'S REGIONAL MANAGER HAS STATED THAT THE AGREEMENT WAS FREELY NEGOTIATED WITH THE CURRENT GOVERNOR'S PREDECESSOR, AND THERE IS NO EVIDENCE TO SUGGEST THAT WAS NOT THE CASE. EVEN AT THIS LATE DATE, HOWEVER, FEMA COULD STILL FULFILL ITS MISSION OF ASSURING ATTACK PREPAREDNESS BY ACCEPTING ONE OF OREGON'S PROPOSED ALTERNATIVE SCENARIOS, ALTHOUGH IT IS NOT COMPELLED TO DO SO.

B. WITHHOLDING OF FUNDS IS NOT MANDATORY

THE PERTINENT STATUTORY LANGUAGE ON WITHHOLDING IS QUOTED AT PAGES 2 3. IT IS OBVIOUS FROM THAT LANGUAGE THAT ALTHOUGH WITHHOLDING IS AUTHORIZED, IT IS NOT REQUIRED. THE STATUTE DOES NOT SPECIFY ANY STATE ACTIONS THAT WOULD TRIGGER A WITHHOLDING ACTION. RATHER IT LEAVES TO THE DIRECTOR THE RESPONSIBILITY OF SATISFYING HIMSELF THAT FEDERAL CONTRIBUTIONS TO STATE CIVIL DEFENSE ORGANIZATIONS ARE BEING PROPERLY UTILIZED. IN A PROPER EXERCISE OF THIS DISCRETION, THE DIRECTOR HAS STATED HIS INTENTION, IN ARTICLE X OF THE COOPERATIVE AGREEMENT, TO WITHHOLD FUNDS BASED ON NONPARTICIPATION IN NUCLEAR ATTACK PREPAREDNESS PROGRAMS. HOWEVER, THAT DECISION WAS DISCRETIONARY ON HIS PART.

IN ADDITION, WE NOTE THAT THE COOPERATIVE AGREEMENT ALSO EXPRESSLY ALLOWED FOR CONSIDERATION OF "EXTENUATING CIRCUMSTANCES" WHICH WOULD WARRANT A STATE'S DECISION TO EXCLUDE CERTAIN PROGRAMS FOR WHICH FEDERAL FUNDING IS AVAILABLE. SO FAR AS WE KNOW, FEMA'S REGIONAL DIRECTOR HAS NOT WEIGHED OREGON'S EXTENUATING CIRCUMSTANCES-- THE UNWILLINGNESS OF LOCAL JURISDICTIONS WITHIN THE STATE TO ENGAGE IN NUCLEAR ATTACK EXERCISES AND THE OFFER TO DEVISE A SCENARIO THAT WOULD SATISFY ALL PARTIES-- IN ARRIVING AT HIS ANNOUNCED DECISION TO CUT OFF CIVIL DEFENSE FUNDS FROM THE STATE. AT A MINIMUM, WE THINK THIS MUST BE GIVEN DUE CONSIDERATION BEFORE MAKING A DECISION TO GO FORWARD ON WITHHOLDING.

C. OREGON IS ENTITLED TO A HEARING

THE COOPERATIVE AGREEMENT APPARENTLY GIVES THE FEMA REGIONAL DIRECTOR AUTHORITY TO CUT OFF CIVIL DEFENSE FUNDS BECAUSE OF NON PARTICIPATION IN NUCLEAR ATTACK PREPAREDNESS PROGRAMS. HOWEVER, THE STATUTE ON WHICH THE COOPERATIVE AGREEMENT IS BASED EXPRESSLY STIPULATES THAT WITHHOLDING MAY BE ENFORCED ONLY AFTER REASONABLE NOTICE AND A HEARING. IMPLEMENTING REGULATIONS AT 44 C.F.R. 303 (1984, AS AMENDED) PROVIDE FOR 15 DAYS WRITTEN NOTICE AND A FORMAL HEARING BEFORE THE DIRECTOR OR A DULY APPOINTED HEARING OFFICER WITH A WRITTEN AND ORAL RECORD AS THE BASIS FOR THE DIRECTOR'S DECISION ON WITHHOLDING.

THE COOPERATIVE AGREEMENT CANNOT SUPERSEDE THE STATUTE AND REGULATIONS ON WHICH

IT IS BASED, AND THEREFORE IT IS CLEAR THAT IF FEMA DOES ATTEMPT WITHHOLDING, IT MUST BE IN ACCORDANCE WITH ITS REGULATIONS AND THE AGENCY MUST OBSERVE FULL PROCEDURAL DUE PROCESS.

D. ALL FUNDS MAY NOT BE SUBJECT TO WITHHOLDING

WITH REGARD TO WITHHOLDING, THE STATUTE SPECIFICALLY MENTIONS THE DIRECTOR'S OPTION OF LIMITING A STATE'S PAYMENTS TO PROGRAMS OR PROJECTS IN WHICH THERE IS SUBSTANTIAL COMPLIANCE. THE COOPERATIVE AGREEMENT ALSO PROVIDES FOR PARTIAL WITHHOLDING IN PARAGRAPHS B AND C OR ARTICLE X.

IN ITS PUBLIC ANNOUNCEMENTS THUS FAR, FEMA HAS THREATENED TO WITHHOLD "ALL CIVIL DEFENSE FUNDS" PROVIDED TO THE STATE OF OREGON. FEMA HAS CITED $1.15 MILLION AS THE AMOUNT SUBJECT TO WITHHOLDING. THIS IS THE TOTAL AMOUNT OF EMERGENCY PLANNING FUNDS PROVIDED TO THE STATE. THE ONLY FUNDS FEMA IS AUTHORIZED BY THIS STATUTE TO WITHHOLD ARE THOSE FUNDS PROVIDED UNDER THE CIVIL DEFENSE ACT. BECAUSE OF TIME CONSTRAINTS IN RESPONDING TO THIS REQUEST, WE HAVE NOT TRACED THE $1.15 MILLION BACK TO ITS SOURCE, BUT IT IS NOT CLEAR THAT THE WHOLE STATE GRANT HAS ITS ORIGIN IN THE CIVIL DEFENSE ACT. CIVIL DEFENSE ACT FUNDS ARE NOT COEXTENSIVE WITH THE EMERGENCY FUNDS APPROPRIATED TO FEMA'S EMERGENCY MANAGEMENT PLANNING ASSISTANCE (EMPA) ACCOUNT. FUNDS IN THE EMPA ACCOUNT COVER GRANTS UNDER THE SEVERAL EMERGENCY PLANNING AND RESPONSE STATUTES THAT FEMA IS RESPONSIBLE FOR ADMINISTERING.

MOREOVER, WITHHOLDING ALL FUNDS FROM THE STATE IS NOT NECESSARILY IN ACCORD WITH FEMA'S INTEGRATED EMERGENCY MANAGEMENT SYSTEM CONCEPT. THE INTEGRATED SYSTEM LINKS ATTACK-RELATED CIVIL DEFENSE TO OTHER CIVIL DEFENSE ACTIVITIES, AND RECOGNIZES THE EXISTENCE OF GENERIC EMERGENCY PLANNING WORK COMMON TO ALL POTENTIAL EMERGENCY SITUATIONS. WITHHOLDING ALL FUNDS BASED ON NONPARTICIPATION IN THE SPECIFIC COMMUNICATIONS EXERCISE DOES NOT PROMOTE ATTACK PREPAREDNESS, BUT RATHER IMPAIRS IT BY UNDERCUTTING OTHER CIVIL PREPAREDNESS ACTIVITIES. THE FEMA/OREGON COOPERATIVE AGREEMENT OUTLINED 12 OTHER EMERGENCY MANAGEMENT ASSISTANCE OBJECTIVES FOR FISCAL YEAR 1987, AT LEAST SOME OF WHICH PROMOTE ATTACK PREPAREDNESS. WE TRUST THE FOREGOING IS HELPFUL TO YOU.