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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** U.S. Park Police Indemnification Agreement

**File:** B-242146

**Date:** August 16, 1991

### DIGEST

U.S. Park Police may not include an indemnification clause in mutual assistance memoranda of understanding with state and local police unless liability is limited to available appropriated funds and Congress approves such an arrangement.

### DECISION

A Deputy Solicitor at the United States Department of the Interior asks whether the Antideficiency Act prohibits the United States Park Police from including indemnification clauses in mutual assistance memoranda of understanding with local law enforcement agencies. In our opinion these agreements fall within the general rule against indemnities which subject the United States to indefinite or potentially unlimited contingent liabilities. The proposed indemnification clause contravenes the Antideficiency Act and should not be entered into unless authorized by Congress.

### BACKGROUND

The Secretary of the Interior is authorized to designate state and local law enforcement personnel as special police in the National Park System, 16 U.S.C. § 1a-6(c) (1) (1988). The Secretary is also authorized to cooperate in enforcing state or local laws within national parks located in those jurisdictions. 16 U.S.C. § 1a-6(c) (2). Accordingly, the Park Police maintain memoranda of understanding with local law enforcement agencies in Virginia and Maryland which provide that upon request of the Park Police, local law enforcement personnel may enter areas of the National Park System to act as special police. The memoranda delineate when and how assistance may be provided.

The memoranda also state that the costs of furnishing services are borne by the agency furnishing services and that no claims for reimbursement shall be made by one jurisdiction against another. However, the memoranda do not presently protect local jurisdictions against claims by third parties injured by police action, although the Deputy Solicitor states that he is "aware of no case where a claim has been made against either the United States or a local law enforcement agency when its

employees assisted the Park Police under a memorandum of understanding." Proposed revisions of the memoranda of understanding invoke Virginia and Maryland laws requiring indemnification clauses in law enforcement reciprocal agreements. The laws are identical, requiring that any reciprocal agreement include indemnification clauses which:

"waive any and all claims against the other parties thereto which may arise out of their activities outside their respective jurisdictions under such agreement; and indemnify and save harmless the other parties for property damage or personal injury which may arise out of the activities of the other parties to such agreement outside their respective jurisdictions under such agreement." (Emphasis added.)

Va. Code Ann. § 15.1-131 (1989); Md. Crim. Law Code Ann. Art. 27, § 602B(d) (1987).

The submission states that the Maryland and Virginia jurisdictions will not execute any reciprocal aid agreement without such indemnification clauses and that these jurisdictions seek to include the clauses in any future proposed memoranda of understanding with the Park Police. The Deputy Solicitor notes that state and local law enforcement officers serving as special federal officers under memoranda of understanding with the Park Police are federal employees for purposes of the Federal Tort Claims Act and the Federal Employees Compensation Act. See 16 U.S.C. § 1a-6(d). However, the submission notes that this protection is apparently insufficient to meet the statutory requirements of Maryland and Virginia. While protecting the individual police officers, 16 U.S.C. § 1a-6(d) "may not provide complete protection for the two states," and local and state governments would remain subject to liability.

#### OPINION

This Office has long held that absent specific statutory authority, indemnity provisions which subject the United States to indefinite or potentially unlimited contingent liability contravene the Antideficiency Act, 31 U.S.C. § 1341(a) (1988), since it can never be said that sufficient funds have been appropriated to cover the contingency.<sup>1/</sup>

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<sup>1/</sup> See 62 Comp. Gen. 361, 364-365 (1983) and cases cited therein. The Antideficiency Act proscribes expenditures or obligations beyond available appropriations, and prohibits "a contract or obligation for the payment of money before an

(continued...)

Here, the potential liability of the Park Police is unknown because the clause in question provides an indemnity for property damage and personal injury. There is no possible way to know at the time the memoranda are signed whether there are sufficient funds in the appropriation to cover a liability if or when it arises under the indemnification clause because no one knows in advance how much the liability may be.

Although a clause limiting the government's liability to appropriations available at the time a loss arises, with no implication that Congress will be required to appropriate funds to make up any deficiency, would prevent an overt Antideficiency Act violation, we have viewed such a provision in the past as less than ideal because it may have potentially disastrous fiscal consequences for the agency.<sup>2/</sup> See 62 Comp. Gen. at 366-367. Payment of an especially large indemnity obligation could wipe out the entire unobligated balance of the agency's appropriation for the rest of the fiscal year, forcing the agency to seek a supplemental appropriation. 62 Comp. Gen. at 367, citing B-202518, Jan. 8, 1982. Conversely, if a liability arises toward the end of the fiscal year it is quite possible that no unobligated balance would be available for an indemnity payment.

Our current view is that open-ended indemnification agreements should not be entered into regardless of the existence of language of limitation except with express congressional acquiescence. 63 Comp. Gen. 145, 147 (1984), citing 62 Comp. Gen. at 368. Thus we recommend that the Park Police obtain congressional approval for this type of arrangement.

We note that the Deputy Solicitor points to 59 Comp. Gen. 705 (1980) as supporting the proposed indemnification agreement. In that case we carved out a limited exception to the general

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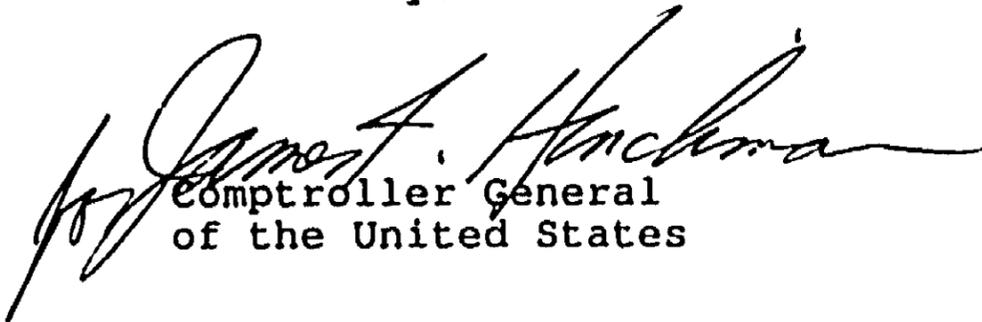
<sup>1/</sup> (...continued)

appropriation is made unless authorized by law." 31 U.S.C. § 1341(a). The Adequacy of Appropriations Act, 41 U.S.C. § 11 (1988), is also violated by contractual indemnity provisions which subject the United States to indefinite and uncertain liabilities. B-201072, May 3, 1982.

<sup>2/</sup> The Park Police recently provided us with a copy of a memorandum of understanding that provides that nothing contained in the agreement shall be construed as binding the Park Police and other signatories "to expend in any one fiscal year any sum in excess of funds appropriated for purposes of this Agreement for that fiscal year, or as involving either party in any contract or other obligation for the further expenditure of money in excess of such appropriations."

rule prohibiting contingent indemnities of uncertain and undeterminable amounts,<sup>3/</sup> There we held that the General Services Administration could procure electric power for government agencies under a contract requiring the customer (the government) to indemnify the utility against liability arising from delivery of the power,<sup>4/</sup> But we were careful to point out in 62 Comp. Gen. at 364, however, that 59 Comp. Gen. 705 should not serve as precedent. Indeed, except for 59 Comp. Gen. 705, "the accounting officers of the Government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary." 62 Comp. Gen. at 364-365.

Because mutual assistance memoranda of understanding between the Park Police and local authorities are important for effective law enforcement, we will not object to the Park Police temporarily entering into revised agreements with the required indemnification clauses while congressional approval is being sought. These agreements should include provisions limiting the government's liability to appropriations available at the time a loss arises with no implication that Congress be required to appropriate funds to make up for any deficiency.

  
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<sup>3/</sup> We have not objected in the past to indemnification clauses where the maximum amount of liability is fixed or readily ascertainable, and where the agency had sufficient funds in its appropriation which could be obligated or administratively reserved to cover the maximum liability. Likewise, indemnity contracts that have received statutory approval are also permissible. 62 Comp. Gen. at 365.

<sup>4/</sup> The utility would not provide services without the indemnity provisions, which were required by tariff, and no other source existed. We found that the indemnity requirement did not discriminate against the government and that the risk of loss was remote. Because the possibility existed, however remote, that future liability could arise in excess of available appropriations, we advised that GSA inform Congress of the situation.