

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-208583

DATE: September 27, 1982

MATTER OF: Bureau of Indian Affairs: Procedures for
collection of administrative fees from sales of
Indian timber

DIGEST: Under 25 U.S.C. § 413, the Secretary of the Interior has broad discretion as to the deduction of administrative fees from the proceeds of commercial sales of timber from Indian lands. Contrary to the opinion of the Solicitor of the Interior Department, there is no requirement that administrative fees be deducted in every instance in which public funds are expended. Consequently, Bureau of Indian Affairs procedures reducing administrative fees otherwise collectible by any amount the tribe involved agrees to expend for timber management are not unlawful.

The Chairman of the Subcommittee on Interior and Related Agencies, House Committee on Appropriations, has requested our opinion as to whether the Bureau of Indian Affairs has been acting in an unauthorized manner by depositing administrative fees collected from sales of timber from tribal and allotted lands into Bureau accounts, and making such funds directly available for payment of expenses relating to tribal forest management activities. This request follows a recent legal opinion by the Solicitor of the Department of the Interior, concluding that the Bureau's current procedures for handling administrative fees are inconsistent with 25 U.S.C. § 413 (1976). That provision authorizes the Secretary of the Interior to collect and dispose of administrative fees for work done for Indian tribes or individuals. The Solicitor has concluded that BIA's procedures amount to a "diversion" from the United States Treasury of funds collected to cover costs paid for with public funds.

We have examined the Bureau's procedures for collection and disposition of administrative fees in light of 25 U.S.C. § 413 and its legislative history, and conclude that those procedures do not violate the applicable statutory requirements. A detailed discussion of the reasons for our conclusion follows.

BACKGROUND

In exercising its trust responsibilities for Indian lands, the Bureau of Indian Affairs manages (normally on a joint basis with the tribe or individual concerned) the development and commercial sale of timber from both allotted (individual) and unallotted (tribal) Indian lands. 25 U.S.C. §§ 406-407, 466. Under 25 U.S.C. §§ 406-407, the legislative authority for commercial sale of Indian

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timber, the Secretary of the Interior is permitted to deduct administrative costs from timber sale proceeds pursuant to 25 U.S.C. § 413. The latter provision states:

"The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: Provided, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds."

Whenever the Federal Government sells Indian timber, 25 U.S.C. § 413 permits the Secretary of the Interior to retain, in his discretion, a reasonable portion of the proceeds to reimburse either (or both) the Federal Government or Indian tribes for the expenses of timber management (including the cost of timber sale administration). When reimbursement is made for expenses incurred by the Federal Government, amounts collected are to be credited to the Treasury as miscellaneous receipts; when reimbursement is made for expenses incurred by Indian tribes, amounts collected are to be credited to the appropriate tribal funds.

By regulation, the Secretary of the Interior has exercised the discretion given to him under section 413. Current regulations, in effect since 1961, provide:

"In sales of timber from either allotted or unallotted lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands, including the cost of timber sale administration, but not including the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction, or the manner in which it is to be made, there shall be deducted 10 percent of the gross amount received for timber sold under regular supervision, and 5 percent when the timber is sold in such a manner that little administrative expense by the

Indian Bureau is required. Service fees in lieu of administrative deductions shall be determined in a similar manner." 25 C.F.R. § 141.18 (1981) (emphasis supplied).¹

According to the Department of the Interior, the practice of the Bureau until the early 1960's was to deduct administrative costs from the proceeds of sales (generally 10 percent, or 5 percent for sales involving little administrative cost), and to deposit such amounts into the Treasury as miscellaneous receipts. By 1962, however, the Bureau's practice was to reduce the amount deducted by an amount equal to the pro rata share of administrative expenses borne by the tribe.²

In 1972, through special instructions issued by the Assistant Secretary for Public Land Management, the Bureau's procedures were revised to reduce the administrative fee deduction by an amount equivalent to any tribal contribution to timber management expenses. According to the Assistant Secretary's instructions:

"When Indian tribes contribute toward paying the cost of the forestry program on their respective reservations by authorizing expenditures from their

¹ Regulations prior to 1961 provided for a similar 10 percent deduction, subject to special instructions of the Commissioner of Indian Affairs, but only were to cover costs directly related to timber sale administration. See 25 C.F.R. § 141.25 (1958). At the time, this Office advocated a more liberal construction of the types of expenses covered, which view is now reflected in the current regulations. See "Administration of Forest Management Activities by the Bureau of Indian Affairs, Portland, Oregon, Area Office," November 9, 1956, at 12.

² The following example is given by the Department of the Interior: In a timber sale with total proceeds of \$10,000,000, 10 percent (\$1,000,000) would normally be deducted for administrative costs. If actual administrative expenses had been \$1,000,000 by the Bureau and an additional \$500,000 by the tribe, the 10 percent deduction would be reduced by one third, i.e. the percentage of total costs borne by the tribe. Consequently, \$666,666 would be deducted as administrative fees and be deposited in the Treasury as miscellaneous receipts.

existing tribal accounts, the amount of the administrative fee deduction* * * shall be determined by reducing the administrative fee deduction that would otherwise be collectible under these instructions in the absence of any tribal contribution, by the actual amount of the tribal contribution." Memorandum from Assistant Secretary Loesch to the Commissioner of Indian Affairs, dated June 15, 1972.

Under new accounting procedures adopted in 1975, a portion of the proceeds of each timber sale was set aside in a separate holding account. Funds deposited in this account were to be made available to reimburse Indian tribes for expenses relating to approved forest management activities.³ At the end of each fiscal year, the tribes would submit invoices detailing their actual costs for the forestry program. The Bureau would then make appropriate reimbursements from that portion of sale proceeds held in the holding account. Any funds remaining in that account at the end of the fiscal year would be deposited in the Treasury as miscellaneous receipts.

In 1979, the Assistant Secretary for Indian Affairs issued an amendment to the special instructions for timber sale deductions, permitting timber sale proceeds deposited in the special holding account to be made available for immediate expenditure for activities supportive of the timber program. See Memorandum from Assistant Secretary Gerard to Area Directors, dated May 25, 1979. Funds remain available for this purpose through the fiscal year following the one in which the proceeds accrued, after which time any amount unused is to be deposited in the Treasury as miscellaneous receipts.⁴ This amendment was intended to benefit tribes that did not have sufficient funds of their own to expend in anticipation of reimbursement.

³ This procedure initially applied only to the sale of timber from unallotted lands, but was later extended to cover allotted lands as well.

⁴ In 1980 the period of availability of the funds in the special holding account was extended to 2 years following the year in which they were received.

DISCUSSION

The Solicitor of the Department of the Interior, in his opinion of May 5, 1982, concludes that the above-described procedures of the Bureau of Indian Affairs constitute an illegal diversion of funds that should properly have been deposited into the Treasury as miscellaneous receipts. That conclusion is premised on an initial determination that 25 U.S.C. § 413 affords the Secretary no discretion to refrain from collecting administrative fees when public monies have been used in the management of Indian timber sales. Because we disagree with this initial determination, we view the Bureau's procedures, as modified by special instruction of the Assistant Secretary, to be proper.

According to the opinion of the Solicitor, 25 U.S.C. § 413 contains a "statutory directive" that imposes a "duty" on the Secretary to collect reasonable fees to cover the costs of work performed for Indians. Solicitor's opinion, pp. 11-13. A reasonable fee, according to the Solicitor, "means a fee which approximately equals the amount of public funds expended." *Id.*, p. 12. Consequently, procedures that reduce the amount of fees collected to a level below that of public funds expended are considered to be in violation of 25 U.S.C. § 413.

Unlike the Solicitor, however, we can find nothing in the present language of section 413 that supports such a restrictive view of the Secretary's discretion in this area. Contrary to the Solicitor's statement that section 413 contains a "statutory directive" to charge administrative fees, the actual language of the statute provides that the Secretary is "authorized, in his discretion, and under such rules and regulations as he may prescribe" to collect reasonable fees for the cost of work performed for Indians. 25 U.S.C. § 413 (1976) (emphasis added). We have previously characterized language almost identical to that underscored as placing the matter within the sound discretion of the agency involved. See 58 Comp. Gen. 108, 111 (1978); 53 Comp. Gen. 143, 144 (1973); accord, Sherman R. Smoot, Co. v. United States Dept. of Transportation, 516 F. Supp. 260, 264n.1 (D.C.D.C. 1981). Where such broad discretion exists, the agency's action will not be considered improper so long as it is consistent with the underlying statutory purposes and so long as any procedural requirements are followed. See National Federation of Federal Employees v. Devine, 679 F. 2d 907, 912 (D.C. Cir. 1981).

The Solicitor's restrictive view of 25 U.S.C. § 413 appears to be based principally upon an analysis of the purpose and legislative

history of that provision, with particular emphasis given to its predecessor, enacted in 1920. As a preliminary matter, we note that the earlier version of the statute expressly "directed" the Secretary to charge reasonable fees for work incident to sale or lease of Indian lands or the timber thereon. Act of February 14, 1920, ch. 75, 41 Stat. 408, 415. Because the statute was amended in 1933 to delete this mandatory language and replace it with the present discretionary language, we question the Solicitor's reliance on the legislative history of the first version. Act of March 1, 1933, ch. 158, 47 Stat. 1417.

The fact that the 1933 amendment changed mandatory language in the 1920 provision to the present version is in itself a strong indication that the Congress intended to broaden the Secretary's discretion in this area. See Sutherland, Statutes and Statutory Construction, § 57.05 at 419 (4th ed. 1973). The legislative history of the 1933 amendment, however, specifically states that "[t]his bill will make the collection of fees optional in the discretion of the Secretary of the Interior * * *." H.R. Rep. No. 879, 72d Cong. 1st Sess. 1 (1932) (emphasis added). The Solicitor's opinion does recognize that the Secretary was given discretion under the 1933 amendment to collect no fee. However, it considers this discretion to be limited only to situations in which public monies were not expended. Solicitor's opinion, at 7-8. In our opinion, however, there is nothing in either the statutory language or in the legislative history of the 1933 amendment to justify such a conclusion.⁵

⁵ The Solicitor appears to base this view on the fact that the 1933 amendment was motivated by a desire to give the Secretary flexibility not to charge administrative fees to cover tribal funds expended. This had been in response to the Comptroller General's decision that the previous version of the statute required all fees collected, even those for expenses paid from tribal funds, to be paid to the Treasury as miscellaneous receipts. A-10174, September 22, 1925. While we are well aware of the circumstances surrounding the 1933 amendment, it appears from the broad grant of discretionary authority in the actual statutory language that the Congress intended to give the Secretary the flexibility to decline to collect administrative fees in any situation where collection was considered to be unwarranted, rather than just to permit the Secretary to forego collection of costs paid from tribal funds.

Having stated our opinion that 25 U.S.C. § 413 gives the Secretary of the Interior the discretion to reduce or decline the collection of administrative fees, even where such collections would be used to offset expenditures from public funds, two questions still remain: First, whether the present Bureau practice is consistent with rules and regulations prescribed by the Secretary; and second, whether such procedures constitute an abuse of the discretion granted to the Secretary.

In our view, the present Bureau practice is consistent with regulations properly promulgated by the Secretary. As described above, the present regulation provides for deduction of 10 percent (or 5 percent for low-cost timber sales) "[u]nless special instructions have been given by the Secretary * * *." 25 C.F.R. § 141.18 (1981). Special instructions, under which the present fee-reduction practice is followed, have in fact been issued. See Memorandum from Assistant Secretary Loesch to the Commissioner of Indian Affairs, dated June 15, 1972, as amended by Memorandum from Assistant Secretary Gerard to Area Directors, dated May 25, 1979. We therefore consider the present practice to be "under such rules and regulations as [the Secretary] may prescribe." 25 U.S.C. § 413 (1976).⁶

Finally, we do not find the decision to forego collection of fees to the extent that Indian tribes agree to use such funds for approved timber management activities to be an abuse of Secretarial discretion.⁷ While 25 U.S.C. § 413 obviously indicates an intention on the part of the Congress that services performed for individual Indians or tribes be reimbursed where possible from tribal

⁶ The Secretary, should he desire, may of course amend the procedures to achieve the result that the Solicitor's opinion advocates. Such an amendment, however, may only operate prospectively. See B-119574, November 3, 1954, in which we held that the Secretary's decision to permit waiver of section 413 fees for tribally-owned enterprises could not be made retroactive to a period before the applicable regulation or instruction was amended.

⁷ As we indicated in a 1975 report, however, proper controls over the manner in which the fee reduction is accomplished are necessary to ensure that the purposes behind that fee reduction are fulfilled. See "Indian Natural Resources--Opportunities for Improved Management and Increased Productivity. Part I: Forest Land, Rangeland, and Cropland." RED-76-8, August 18, 1975, at 17-19.

revenues, the 1933 enactment reflects a recognition that counter-vailing policies might warrant foregoing such collections in certain instances. In fact, as discussed above, the 1933 amendment was itself motivated in part by a desire to facilitate payment of forest management expenses from tribal funds without placing an unfair financial burden on the tribes. Later enactments of the Congress indicate a strong support of the policy of Indian self-management. See, e.g., Indian Self-Determination Act of 1976, 25 U.S.C. §§ 450-450n. Reduction of administrative fees under the present Bureau procedures encourages tribes to take on a larger share of forest management responsibilities, a fact that we believe may properly have been considered by the Secretary in exercising the broad discretion granted to him under section 413.

CONCLUSION

For the reasons described above, it is our opinion that the Secretary of the Interior has the discretion to reduce the amount of administrative fees that would otherwise be collectible under 25 U.S.C. § 413 by an amount equal to tribal contributions to forest management activities. We believe that, while section 413 authorized the collection of administrative costs from tribal revenues, it did not mandate that such costs be collected in every instance in which public funds had been expended. Such an interpretation of section 413, we believe, is inconsistent with the broad discretionary language of that provision, and is unsupported by its legislative history.

Because of the foregoing, it is also our conclusion that the procedures of the Bureau of Indian Affairs, based upon special instructions issued under authority of the Secretary's regulations, and consistent with his discretion under section 413, were lawful.

Henry R. Van Cleave
Comptroller General
of the United States