DOCUMENT RESUME

06242 - [B1606655]

[President's Eighth Special Message to the Congress concerning Impoundments]. OGC-78-10; B-115398. June 6, 1978. 1 pp. + 3 enclosures (12 pp.).

Report to the Congress; by Robert F. Keller, Acting Comptroller General.

Contact: Office of the General Counsel.
Budget Function: Miscellaneous: Impoundment Control Act of 1974 (1005).
Organization Concerned: Department of Energy; Department of the Interior; Department of Agriculture; Department of the Army: Corps of Engineers; Department of Commerce; Economic Development Administration; International Communications Agency; Executive Office of the President.
Congressional Relevance: Congress.
Authority: Impoundment Control Act of 1974. H. Rept. 95-379. S. Rept. 95-301.

The President's eighth special message for fiscal year 1978 pursuant to the Impoundment Control Act of 1974 proposed a rescission of budget authority for $30 million, four new deferrals totaling $55.1 million, and revisions to two previously transmitted deferrals. The rescissions involved the Department of Energy's atomic energy defense activities and the Department of Agriculture's agricultural conservation program. The 45-day period of continuous session during which these funds may be withheld pending congressional consideration will end July 15, 1978. The proposed deferrals involve construction and rehabilitation projects of the Department of the Interior, the Alaska Hydroelectric Power Development Fund of the Corps of Engineers, the Department of Energy, financial and technical assistance of the Economic Development Administration, and salaries and expenses of the International Communications Agency. (RRS)

6655

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

IN REPLY REFER TO: B-115398

June 5, 1978

To the President of the Senate and the
Speaker of the House of Representatives

On May 12, 1978, we received copies of the President's eighth special message for fiscal year 1978 that was transmitted to the Congress pursuant to the Impoundment Control Act of 1974.

The special message proposed a rescission of budget authority for $30 million, four new deferrals totaling $55.1 million, and revisions to two previously transmitted deferrals.

Enclosed are our comments on this special message.

R.F. Keller

ACTING Comptroller General
of the United States

Enclosures

OGC-78-10

GAO COMMENTS ON THE PRESIDENT'S EIGHTH SPECIAL MESSAGE FOR FISCAL YEAR 1978

DEPARTMENT OF ENERGY

D78-61 Atomic Energy Defense Activities (Full Fuzing Option Bomb Production Facilities, various locations, Project No. 78-16-b) 89X0201

Our review establishes that this withholding of funds has been in effect since December 20, 1977, without having been reported to the Congress. Furthermore, we have determined that the cognizant congressional committees were not informed of the President's decision to go forward with modification of the B-43 bomb rather than the B-77 bomb until two months after steps had been taken to implement that decision.

Because we recently reviewed the facts surrounding production of the B-77 bomb for Senator Strom Thurmond, a copy of our letter of May 23, 1977, to the Senator is enclosed (Enclosure II) for the information of the Congress.

DEPARTMENT OF THE INTERIOR

D78-63 Bureau of Reclamation Construction and Rehabilitation 14X5061

We have confirmed that funds in the amount of $17.7 million are being deferred pending the completion and evaluation of those project studies mentioned in the Justification.

With respect to the second paragraph of the Justification, a representative of the Solicitor's Office of the

Department of the Interior (DOI), told us that the Department of State has made one general commitment and one specific commitment to the Canadian Government. The general commitment prohibits construction on any project features that might potentially affect Canadian waters until it is clear that the United States will meet its obligations under the Boundary Water Treaty of 1909. The specific commitment is not to let any contracts on the Lonetree Dam until the two Governments have consulted on the International Joint Commission Report on the project. The Bureau of Reclamation had planned to spend about $8.4 million in fiscal year 1978 on Lonetree construction. However, because of the specific commitment, $6.8 million cannot be obligated.

Certain other project features are not being constructed because of the Department of State's general commitment. For example, a Bureau of Reclamation representative said fish screens costing about $875,000 are not being constructed on McClusky Canal because of a question over whether the currently designed screens will effectively stop biota from going into Canadian waters. The official added, however, that construction of the current design would not have an impact until water is made available several years from now.

The House and Senate Committees on Appropriations had recommended that $18,660,000 be allocated to the project for fiscal year 1978 and indicated that none of these funds are intended to be spent on project features affecting Canadian waters. Specifically, House Report No. 95-379 states "none of the funds provided for the project will affect Canadian waters." Similarly, Senate Report No. 95-301 states "the recommended amount does not include or provide for work on project features that are disputed or alleged to have the potential to adversely affect waters flowing into Canada." The Senate committee report also states that the fiscal year 1978 funds are to be used "to continue and complete construction on the McClusky Canal* * *."

With respect to the third paragraph of the Justification, the legal effects of the Stipulation and Order are currently being litigated in the United States District Court for the District of North Dakota in the case of State of North Dakota and Garrison Diversion Conservancy v. Cecil Andrus, et al., Civ. Act. No. A77-1048.

The Senate Committee on Appropriations was aware of the Stipulation and Order and believed construction of the project features should continue. The Committee report states "the project should proceed as authorized, and that the work for which the funds are provided should be undertaken in fiscal year 1978 notwithstanding the stipulation or agreement entered in by the Secretary of the Interior."

We recently had occasion to consider several of the issues relating to the Garrison Diversion Unit in response to a request by Senator Milton Young. A copy of our letter of May 25, 1978, to Senator Young is enclosed (Enclosure III).

In connection with the Garrison Diversion Unit, we recognize that while the Stipulation and Order which precipitated the present impoundment was entered on May 11, 1977, the deferral message was not sent to the Congress until May 12, 1978. However, we do not think that for all the time involved, almost one year, the impoundment existed but went unreported. This is because the Stipulation and Order did not have an immediate budgetary impact. Our analysis is that the impoundment did not result until some time after the May 11, 1977, Stipulation and Order. Specifically, documentation we have obtained from the Department of Interior suggests that it was not until December 1977 or January 1978 that cognizant department officials became aware of the impoundment situation.

Our discussions with departmental representatives on this point establishes that a deferral was not sent to the Congress due to the belief that the non-expenditure was due to action by the court and not the result of an executive branch decision not to obligate funds for the project. While we agree that the matter raised difficult issues, we nevertheless point out that we have had repeated contacts with departmental representatives since as early as the beginning of April 1978 regarding the possible impoundment of Garrison Diversion Unit funds. However, it was not until May 12, 1978, that the withholding was finally reported. In our view, the department has taken more than an acceptable period of time to consider the matter and to process the necessary paperwork to the the Office of Management and Budget for resolution.

- - - - - - - - - - -

We conclude that the information provided in the following rescission and deferral proposals is correct and that the actions being proposed have been clearly and accurately stated.

DEPARTMENT OF AGRICULTURE

R78-5 Agricultural Stabilization and Conservation Service
Agricultural Conservation Program
(Drought and Flood Assistance)
1283315

Based on the current legislative calendar, the 45-day period of continuous session during which the funds may be withheld pending congressional consideration of a rescission bill will end July 15, 1978.

DEPARTMENT OF DEFENSE - Civil

D78-60 Corps of Engineers
Alaska Hydroelectric Power
Development Fund
96X4203

DEPARTMENT OF ENERGY

D78-62 Energy
89X0203

DEPARTMENT OF COMMERCE

D78-6A Economic Development Administration
Financial and Technical Assistance
13X1210

INTERNATIONAL COMMUNICATIONS AGENCY

D78-41B Salaries and Expenses
Special Foreign Currency Program
67X0205

ENCLOSURE II

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

IN REPLY REFER TO: B-115398

May 23, 1978

The Honorable Strom Thurmond
United States Senate

Dear Senator Thurmond:

This replies to your letter of May 1, 1978, in which you raised certain questions about the Executive branch's actions regarding production of the B-77 gravity bomb. Specifically, you ask whether there has been an impoundment of budget authority in regard to B-77 bomb production activities and if the Executive branch has acted in compliance with prior opinions of this Office expressed in connection with the termination of Minuteman III Intercontinental Ballistic Missile production activities. Detailed answers to your questions follow.

I. WHETHER B-77 PRODUCTION FUNDS HAVE BEEN IMPOUNDED:

There has been an impoundment of those funds that would be used for production of the B-77 gravity bomb. In his eighth special message for fiscal year 1978 dated May 12, 1978, the President proposed to the Congress a deferral of $23,497,322 in budget authority that was appropriated for the use of the Department of Energy. The special message states in part:

> "It has been determined that a modernized B-43 bomb, together with other weapons in the stockpile, may be able to fulfill requirements previously identified for the B-77 bomb, but at significantly lower costs. As a result, it may not be necessary to modify current weapon production facilities for the B-77 bomb. Therefore, the funds associated with B-77 bomb production facilities modification [$23,497,322] are being deferred. In addition, it has been requested that in FY 1979 funding be redirected to B-43 bomb production and to other

> purposes. The amount deferred, totalling $23.5 million, will be applied to reduce the appropriation request for these activities in FY 1979."

A copy of the deferral message is enclosed.

II. WHETHER EXECUTIVE BRANCH ACTIONS REGARDING PRODUCTION OF THE B-77 BOMB ARE IN ACCORD WITH PRIOR OPINIONS OF THIS OFFICE:

In the course of our analysis of this question, we contacted representatives of the Office of Management and Budget and the Department of Energy concerning the status of the B-77 and B-43 bomb programs. Based upon these discussions, we understand that, at present, there is no work of any nature being undertaken within the Department of Energy weapons complex for the B-43 bomb modification program. Shortly after the President's decision to modernize the B-43 bomb rather than produce the B-77 bomb, the Department of Energy began preliminary design work at one of its laboratories. This work was terminated, however, when the Chairman of the House Committee on Armed Services, Representative Melvin Price, formally notified the Department by letter dated February 24, 1978, that he did not concur in the decision to use fiscal year 1978 funds to develop a modified B-43 bomb design. We understand that as a result of Chairman Price's letter, B-43 bomb design work ceased and that, in toto, such activities were minimal --lasting just a matter of weeks.

We further understand that Department of Energy efforts on the research, development, and testing of the B-77 bomb are continuing and will continue until completed. When this phase of the program is completed, all designs and B-77 bomb technology will be "shelved." We also understand that presently there are no actions being taken with regard to the production of the B-77 bomb. All B-77 bomb production-related work was discontinued on December 20, 1977, when the Department of Energy's Division of Military Applications advised the Manager of the Albuquerque Operations Office to cease such efforts.

Representatives of the Office of Management and Budget and the Department of Energy have also informed us that there

is, at this time, no intention to use the $23.5 million that has been proposed for deferral to the Congress for either the B-77 or B-43 bombs in this fiscal year.

As indicated in your letter of May 1, 1978, we have previously had occasion to consider the Executive branch's actions regarding termination of Minuteman III production. As you know, a similar situation existed with regard to termination of production activities on the B-1 bomber. In both of those cases we found that actions had been taken to curtail the programs prior to the time the Congress had an opportunity to review the matter under the procedures of the Impoundment Control Act. As a result we notified the Executive branch that when a decision is made to terminate or curtail a program, it is more in keeping with the spirit of the Impoundment Control Act that such decisions be made jointly by the Congress and the Executive branch.

In the case of the B-77 bomb we are once again troubled that orders were issued as early as December 20, 1977, to terminate all B-77 bomb production-related activities. Yet, it was not until February 21, 1978, that the cognizant committees of the Congress were notified of this major decision. On that date, the Department of Energy formally advised those committees of the decision to devote funds to B-43 bomb modification at the expense of B-77 bomb production efforts. As noted, Chairman Price promptly communicated to the Department his disagreement with this plan on February 24, 1978. Nevertheless, it appears that the Executive branch had implemented its revised plans regarding B-77 bomb production over two months before the congressional committees were advised.

Another result of the December 20, 1977, production termination orders was that the funds only recently proposed for deferral -- $23.5 million -- were effectively impounded since that date. This analysis of the matter is not disputed by representatives of the Office of Management and Budget.

The Executive branch has taken an excessive amount of time to report this deferral to the Congress under the Impoundment Control Act. Also, as noted above, the Executive branch has acted to implement a major decision -- one

affecting the production of an important nuclear bomb -- without notifying the Congress in a timely manner. Based upon the information currently available, we cannot say at this time whether the Executive branch's actions have had, or will have, an adverse effect on the cost to produce B-77 bombs in the event Congress decides that such bombs should be produced rather than approve use of the budgetary resources for modification of the B-43 bombs.

We hope the foregoing will be of assistance to you.

Sincerely yours,

R.F. KELLER

Acting Comptroller General
of the United States

Enclosure

ENCLOSURE III

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

IN REPLY REFER TO: B-164844

May 25, 1978

The Honorable Milton R. Young
United States Senate

Dear Senator Young:

Your staff recently requested that the General Accounting Office answer several questions relating to the Garrison Diversion Unit Project. The project has been the subject of litigation since May, 1976, when the National Audubon Society sued to enjoin the Secretary of the Interior from proceeding with project work. Most major project activities ceased on May 11, 1977, when a Stipulation and Order was entered by the United States District Court for the District of Columbia which stayed the legal proceeding pending certain action by the Federal government. It was the entry of the Stipulation and Order that apparently motivated the following questions.

1. What legal impact does the Stipulation and Order have on:

--the master repayment contract between the Department of the Interior and the irrigation district (Garrison Diversion Conservancy District), and

--the contract under which the Department of the Interior would provide municipal and industrial water to the City of Minot, North Dakota.

2. What authority does the Secretary of the Interior have to enter into Stipulation and Order agreements?

3. Does the court action (Stipulation and Order) constitute an order or a stipulation?

4. What is the status of the deferral request that was to be made as a result of the Stipulation and Order?

After the Stipulation and Order was entered, the State of North Dakota, which was an intervenor defendant in the original action but had not consented to the Stipulation and Order, brought suit to compel the Secretary of the Interior to proceed with the project in accordance with its agreement with the State as expressed in the master contract. That suit is presently before the United States District Court for the District of North Dakota. State of North Dakota and Garrison Diversion Conservancy v. Cecil Andrus, et al., Civ. Act. No. A77-1048. In answering the State's complaint, the Government raised the May 11, Stipulation and Order as a defense for its actions. This defense put the effect of the Stipulation and Order directly into issue. The effect of the Stipulation and Order on the contract involving the City of Minot and the Department of the Interior also depends upon the court's determination of the effect of that document on the master contract since the Minot contract is part of the Garrison Diversion Unit.

With regard to the Stipulation and Order, we point out that a Memorandum Opinion bearing on the issue of the effect of this document was rendered by Judge Richey of the United States District Court for the District of Columbia on December 9, 1977. See National Audubon Society v. Andrus, 442 F. Supp. 42 (D.D.C. 1977). In his opinion, Judge Richey noted:

> "The Stipulation did not resolve or settle any of the issues raised by the plaintiff; it only stayed the litigation until a new EIS is prepared." (Emphasis added.)

From this it might be inferred that the Stipulation and Order had the effect of staying the judicial proceedings while the parties implemented the specifics agreed upon in the Stipulation.

In our view, the Secretary of the Interior's authority to enter into stipulation and order agreements and the nature and legal effects of the subject Stipulation and Order are matters encompassed by, and part of, the larger question already before the United States District Court for the District of North Dakota; a question dealing with the effect

of the Stipulation and Order as it relates to the master agreement.

Therefore, since the issues raised by questions 1 through 3, as outlined above, are presently before the court, I must confirm my staff's April 13, 1978, advice to your staff that, consistent with our long standing policy, we will not collaterally intrude on the pending litigation by answering these questions. This policy recognizes both the primacy of the judiciary to provide a meaningful resolution to the matters being litigated and our concern that our opinions on these same matters may interfere with or prejudice the interests of a party.

With regard to the status of the deferral resulting from implementation of the Stipulation and Order, the deferral was reported to the Congress by the President in his eighth special message for Fiscal Year 1978 dated May 12, 1978. A copy of the proposed deferral (No. D78-63) is enclosed. In connection with this impoundment, we note that in their Prayer For Relief, the plaintiffs in the North Dakota lawsuit asked the court to issue an Order--

> "Enjoining the defendants from impounding all currently appropriated construction funds for construction in Fiscal Year 1978, and further enjoining defendants from impounding currently appropriated construction funds for construction in Fiscal Year 1978, unless and until the defendants shall comply with the provisions of 31 U.S.C. 1301 et seq." (Emphasis added.)

It would appear the President's proposed deferral of May 12, 1978, has satisfied this aspect of the plaintiff's request.

In light of your interest in the Garrison Diversion Unit Project, we will send to you a copy of our report on the President's proposed deferral as soon as our review of the matter pursuant to the Impoundment Control Act is completed.

We hope the foregoing will be of assistance to you.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

Enclosure