



UNDER SECRETARY OF THE ARMY
WASHINGTON

07 APR 2000



CHALLENGE Number 2000-0019



Dear [REDACTED]

This responds to your appeal of the February 23, 2000, decision of the Assistant Secretary of the Army (Manpower and Reserve Affairs), denying your challenge to the 1999 FAIR Act inventory. I received your appeal on March 13, 2000.

Function Code S700, Natural Resource Services

Activity Challenged. You are appealing the decision that the "Natural Resource Services," Function Code S700, was properly included on the list.

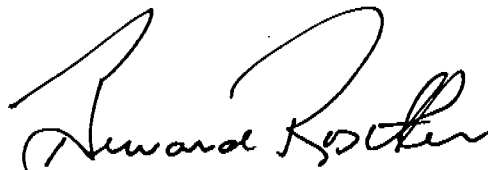
Decision. I have reviewed the Assistant Secretary's decision, which is incorporated herein by reference, in light of your appeal. Based upon this review, I have determined that the selected activities included under Function Code S700 pertaining to "Natural Resource Services" are not inherently Governmental. Therefore, I am affirming the challenge decision that they are properly included in the Army's FAIR Act list.

Rationale. Your appeal suggests that the Sikes Act exclusion of natural resources implementation and enforcement services from Office of Management and Budget Circular A-76 indicates a congressional intent that these services be characterized as inherently Governmental. However, neither the legislative history nor the plain language of the Sikes Act compels such a characterization. Rather, the limited legislative history of this provision demonstrates intent not necessarily to restrict DoD's authority to enter into contracts for implementation and enforcement of cooperative agreements, but to obviate the need for review and contracting under this Circular. The provisions of the DoD and Army regulations and the legal opinion that you cited must be construed consistent with this view. In this connection, responsible DoD personnel have advised me that DoDI 4715.3 relating to the environmental conservation program likely will be revised soon. As part of this effort, DoD intends to clarify the wording in paragraph 4.1.13. to reflect the fact that while not all natural resources management functions may be fairly characterized as inherently Governmental, some may be, particularly to the degree substantial discretion is exercised in approval of integrated natural resources management plans. In addition, the January 1999 message from the Assistant Chief of Staff for Installation Management that you also

referenced is inconsistent with the view that the inherently Governmental portion of the natural resource services function includes primarily only policy-related activities. I expect that this message will be revised in the near future. In light of these actions, the natural resources services function will be reconsidered in connection with the Year 2000 FAIR Act Inventory. It is possible both that some natural resources functions may be determined to be inherently Governmental and that other non-inherently Governmental natural resources functions may be exempted from private sector performance. In the mean time, I am affirming the Assistant Secretary's decision under the 1999 FAIR Act inventory.

Your appeal contends the Assistant Secretary's presumption that substantial discretion in developing natural resources management plans is exercised by personnel who are assigned to positions at grades GS-13 and above within a management headquarters is incorrect because very few installations have natural resource professionals as high as the GS-13 level. But that is the very point of the presumption, which is limited by its terms to senior personnel within a management headquarters. No installation functions, by definition, are included in a management headquarters, in part, because current Army policy requires approval of these plans at the major command (MACOM) level. The Assistant Secretary's decision recognizes that the range of discretion available in the natural resources function appears to be substantially circumscribed by law, regulation and guidance from Army headquarters and MACOM levels.

Please note that the Army's FAIR Act determinations are only one step in pursuing a larger objective. The larger objective is to ensure that Army functions and activities are performed in a manner that is both cost-effective and in the best interests of the taxpayers. In this connection, the Army FAIR Act inventory will be reviewed in conjunction with Army's larger, ongoing review of all functions for possible reengineering, privatization, consolidation or other reinvention efforts. As the Assistant Secretary indicated, these reviews may lead to decisions to keep performance of some activities in-house based on risk assessment, national security considerations, responsible land stewardship, or enlightened human resources management. In reaching these decisions, I can assure you that recognition will be given to the important contributions natural resource managers at every Army installation make towards meeting the Army's responsibilities for acting in the public interest in the management of its lands and natural resources.

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Bernard Rostker



UNDER SECRETARY OF THE ARMY
WASHINGTON

07 APR 2000



CHALLENGE Number 2000-0022



Dear [REDACTED]

This responds to your appeal of the February 23, 2000, decision of the Assistant Secretary of the Army (Manpower and Reserve Affairs), denying your challenge to the 1999 FAIR Act inventory. I received your appeal on March 9, 2000.

Function Code S700, Natural Resource Services

Activity Challenged. You are appealing the decision that the "Natural Resource Services," Function Code S700, was properly included on the list.

Decision. I have reviewed the Assistant Secretary's decision, which is incorporated herein by reference, in light of your appeal. Based upon this review, I have determined that the selected activities included under Function Code S700 pertaining to "Natural Resource Services" are not inherently Governmental. Therefore, I am affirming the challenge decision that they are properly included in the Army's FAIR Act list.

Rationale. Your appeal suggests that the Assistant Secretary's decision (that the function of Natural Resource Services is not inherently Governmental) should be overturned because he did not specifically address every issue raised in your challenge. The FAIR Act requires a rationale for a determination of whether a function is or is not inherently Governmental. In making this determination, the Assistant Secretary considered every comment and contention which he believed to be germane. However, he did not think it necessary to comment in his decision on every issue raised in your challenge letter. The Army framework for FAIR Act challenges is based on rendering functional determinations on an Army-wide basis on what functions are or are not inherently Governmental. Having a consistent rationale for such an Army-wide functional determination may have resulted in what your appeal characterizes as a "form letter," but assures that each challenge or appeal within the same functional area is dealt with in a consistent manner based on the same rationale.

Your appeal contends the Assistant Secretary's presumption that substantial discretion in developing natural resources management plans is exercised by personnel who are assigned to positions at grades GS-13 and above within a management headquarters is incorrect because very few installations have natural resource professionals as high as the GS-13 level. But that is the very point of the presumption, which is limited by its terms to senior personnel within a management headquarters. No installation functions, by definition, are included in a management headquarters. The Assistant Secretary's decision recognizes that the range of discretion available in the natural resources function is relatively limited at the installation level, a determination that is fully compatible with an Army-wide functional determination that natural resources functions at the installation level are not inherently Governmental. Interfacing with Federal, state and local regulators concerning compliance with environmental laws is not unique to the Federal Government. Private sector entities also must comply with environmental laws and meet and negotiate with Government regulators on their compliance. Your appeal's contention that a National Environmental Policy Act (NEPA) analysis would be required by virtue of the Assistant Secretary's FAIR Act determination is incorrect and not relevant to FAIR Act determinations.

Please note that the Army's FAIR Act determinations are only one step in pursuing a larger objective. The larger objective is to ensure that Army functions and activities are performed in a manner that is both cost-effective and in the best interests of the taxpayers. In this connection, the Army FAIR Act inventory will be reviewed in conjunction with Army's larger, ongoing review of all functions for possible reengineering, privatization, consolidation or other reinvention efforts. As the Assistant Secretary indicated, these reviews may lead to decisions to keep performance of some activities in-house based on risk assessment, national security considerations, or enlightened human resources management.

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Bernard Rostker