



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON DC 20310-0111

February 23, 2000

CHALLENGE Number 2000-0019

Dear

This responds to your challenge to the Army's 1999 FAIR Act inventory. Your challenge concerns one activity.

Standing. As an employee within the meaning of 5 U.S.C. 2105 performing natural resource management functions included under Function Code S700, "Natural Resource Services," you are an "interested party" who is qualified to submit challenges of inclusion or exclusion to the Army list. Other issues raised in your challenge are not relevant to FAIR Act determinations.

Date of Receipt. I received your Challenge on January 28, 2000.

Function Code S700, Natural Resource Services

Activity Challenged. You have challenged the inclusion on the list of work performed under the Function Code S700, "Natural Resource Services." This work includes natural resource management and implementation of the integrated natural resources management plan at an installation within Function Code S700 for "Natural Resource Services," as defined in the functional definition at the Army web site, <http://www.asamra.army.pentagon.mil/fair>, which is hyperlinked to the DOD FAIRNET website at <http://gravity.lmi.org/DODFAIR>.

Decision. I have determined that the activities included under Function Code S700 pertaining to Natural Resource Services are, for the most part, not inherently Governmental. Therefore, they are properly included in the Army's FAIR Act list.

Rationale. The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. The purpose of the challenged functions and activities listed above is to develop and implement the integrated natural resources management plan at the installation level, provide advice to installation

commanders with respect to compliance with Federal, State and local environmental laws and regulations, request funds, sign off on funding documents, accompany regulators on inspections, represent the government in negotiations with regulators, determine corrective actions to achieve compliance, and enforce community right-to-know and wildlife protection laws.

Your challenge contends that these functions should be considered inherently Governmental because of the Sikes Act, 16 U.S.C. 670a, and Department of Defense Directives, Instructions and regulations restricting competition of natural resources functions. The Sikes Act merely mandates the preparation and implementation of natural resources management plans. It also provides that Office of Management and Budget Circular Number A-76 does not apply to the procurement of implementation and enforcement services. The Sikes Act does not characterize such functions as inherently Governmental. DoD Instruction 4715.3 pre-dates the FAIR Act. Accordingly, the Army FAIR Act list presumes 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. However, most of the work involved in performing these functions are performed by personnel at lower grades. This presumption is based in part on the degree to which the exercise of discretion within this function is substantially circumscribed by law, rule and regulation. Another consideration is that the natural resource management functions under challenge are included in current A-76 studies.

Significance. The significance of a non-inherently Governmental designation for an activity is discussed at the Army web site hyperlinked to the DOD FAIRNET at <http://www.asamra.army.pentagon.mil/fair>. In some cases there may be legal impediments to contracting activities designated as non-inherently Governmental, as reflected in statutes, international agreements, and restrictions on contracting for personal services. In other cases, the Army may consider it imprudent to contract activities designated as non-inherently Governmental based on risk assessment and national security considerations, or enlightened human resources management. Such a determination has not been made at the present time in the case of the activities included within this challenge.

Scope. The Army's functions are defined by its unique roles and missions. Therefore, the Army's FAIR Act decisions may not be extended to other agencies with different missions based solely on function code titles. The Army FAIR Act Inventory included civilian positions performing functions within the Army infrastructure and within Civil Works. The FAIR Act Inventory excluded all contractor positions and all military positions, as well as all personnel performing functions in the following mission areas within the Army: Major Theater of War, Smaller Scale Contingency, Base Engagement Force, Strategic Reserve, Domestic Support, or Homeland Defense.

Appeal Rights. You have the right to appeal my decision since it is adverse to your Challenge. The specific procedures for submitting an appeal are set forth at the enclosure to this decision.



Patrick T. Henry
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosure

Appeal Rights

Appeals must be in writing and transmitted by United States mail, express mail delivery or other similar service, or facsimile transmission, or may be delivered in person only if the person making the delivery is authorized access to the Pentagon. (To assist in processing, appellants may mark "FAIR Appeal" on the envelope.) Appeals must be submitted to the office listed below within 10 working days of the date on which the challenger received the decision denying or rejecting the challenge:

Department of the Army
Office of the Assistant Secretary
Manpower and Reserve Affairs
ATTN: SAMR-FMMR-FAIR
111 Army Pentagon
Washington, D.C. 20310-0111
Fax: 703-614-6833