



UNDER SECRETARY OF THE ARMY
WASHINGTON

24 April 2003

Re: CHALLENGE Number 2003-0002

Mr. Michael Arendt
U.S. Army Corps of Engineers
Lock and Dam Operator
Howell Heflin Lock and Dam
RR1 Box 122
Gainesville, Alabama 35464-9801

Dear Mr. Arendt:

This responds to your appeal of the March 27, 2003, decision of the Assistant Secretary of the Army (Manpower and Reserve Affairs), denying your challenge to the Army's 2001 Federal Activities Inventory Reform (FAIR) inventory. I received your appeal on April 11, 2003.

Activity Challenged. You are appealing the decision that Function Codes Q520, Operation and Maintenance of Locks and Bridges, and Q540, Operation and Maintenance of Dams, were properly included on the list as non-inherently Governmental activities.

Decision. In light of your appeal, I have reviewed the Assistant Secretary's decision, which is incorporated herein by reference. Based upon this review, I have determined that the activities challenged under Function Codes Q520 and Q540 are not inherently Governmental. Therefore, I am affirming the challenged decision to properly include these Function Codes on the FAIR Act list.

Rationale. The Appeal makes a reference to Title 50, United States Code, Section 100, paragraphs (a) and (e) as a basis for appeal. This referenced statute, addressing nitrate plants, is not relevant to the determination of whether the activities described by a Function Code are inherently Governmental. Section 100, paragraph (e) requires that the plant or plants described in paragraph (a) be constructed and operated solely by the Government. Accordingly, ownership and control must rest with the Government. It has already been recognized that certain positions (Lockmasters) in these codes are inherently Governmental sufficient to maintain ultimate control. Therefore, Title 50, United States Code, Section 100 is not a basis for exclusion of Function Codes 520 and 540 from the FAIR Act list.

Additionally, your appeal states that deciding how much water is released in order to maintain pools or headwater for safe marine and commercial navigation significantly impacts the life, liberty, or property of private persons and is therefore

inherently Governmental. The significance of the impact of an action alone on private individuals is not the sole basis for an inherently Governmental determination. The action must involve the interpretation and execution of the laws of the United States. As such, the decision-making you describe does not rise to the level of the exercise of substantial discretion or decision-making necessary to properly characterize positions in these Function Codes, other than Lockmasters, as inherently Governmental.

Your appeal seems to suggest that the requirement for a Government organization to remain operational on a 24 hour, 7 day a week, basis, requires a characterization of the function as inherently Governmental. This fact is irrelevant to an inherently Governmental determination.

Your appeal further suggests that Lock and Dam Operators are inherently Governmental because they are indistinguishable from Lockmasters. In Title 33, United States Code, Sections 1 and 413, Congress assigned to the Secretary of the Army the duty to prescribe regulations for the use, administration, and navigation of the navigable waters of the United States that, in his judgment, the public necessity may require for the protection of life and property, or of the operations of the United States in channel improvement. Officials who approve the procedures for the operations of the interstate navigable waters are the only officials who are executing the laws of the United States so as to significantly impact the life, liberty, and property of private persons. This authority does not extend to every person involved in the operation of locks and dams.

Finally, your appeal raises an issue for the first time that was not raised in your initial challenge pertaining to personal services contracts. The question of personal services contracts is a separate issue from whether or not a specific Function Code is inherently Governmental. Inherently Governmental determinations are the sole subject of FAIR Act challenges and appeals and other issues are not under consideration.

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 its larger, ongoing review of all functions for possible re-engineering, privatization, consolidation or other related 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 human resources management concerns.

Sincerely,



R. L. Brownlee