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DIGEST

The Honorable Charles Wilson House of Representatives

Dear Mr. Wilson:

In your letter of May 13, 1994, you asked whether the National Tree Trust (Trust), the grantee designated by the President under the America the Beautiful Act of 1990, as amended (Act), must grant $2.5 million to the Texas Reforestation Foundation (TRe) to comply with language contained in the Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1399 (1993). You also asked whether the Trust, in expending money for legal and other professional fees, was complying with the terms of the Act.

As discussed below, the appropriation act provision is ambiguous. Although it is clear that the Congress intends that TRe receive $2.5 million, the appropriation act does not make clear who is to grant these funds to TRe. Further, as suggested in the April 5, 1994, Department of Agriculture legal opinion, recapturing funds from the Trust or requiring the Trust to grant its current funds to TRe would raise difficult constitutional issues. We believe that the intention of the Congress would be best met by the Forest Service, Department of Agriculture, rather than the Trust, granting $2.5 million to TRe. With respect to your second question, we conclude that Trust expenditures for legal and other professional services do not violate the terms of the Act.

BACKGROUND

In the America the Beautiful Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359, 3553, as amended, the Congress authorized the President to designate a private nonprofit organization (denoted by the Act as the "Foundation") to receive a grant from the Department of Agriculture to carry out the purposes of the Act. The purposes set forth in the Act were to make grants to qualifying nonprofit organizations and local governments for programs in support of tree planting, maintenance, management, protection and cultivation in rural areas, communities, and urban areas; and to solicit, accept and administer public and private sector contributions thus increasing the number of trees planted, maintained, managed, and protected. Section 1263, 104 Stat. 3554.

The Act authorized the Secretary of Agriculture to make a one-time grant to the Foundation in fiscal year 1991 of not more than $25 million to carry out the

purposes of the Act. Sections 1263, 1264(d), 104 Stat. 3554, 3555. The Act authorized the Foundation to hold the grant funds in interest-bearing accounts and to use grant principal and interest only for projects and activities consistent with the purposes of the Act. Sections 1264(f), (g), 104 Stat. 3555.[1] The Act specifically prohibited the use of grant funds for programs that harvest and sell Christmas trees. Section 1264(o), 104 Stat. 3557. The Act also authorized an appropriation of $25 million to be granted by the Secretary of Agriculture to the Foundation, and provided that funds appropriated under this authority may remain available until expended. Section 1264(p), 104 Stat. 3557.

The Act became law on November 28, 1990. The President designated the Trust as the entity to receive the grant under the Act. On December 7, 1990, the Trust applied to the Forest Service for a grant in the amount of $19,985,200.[2] On December 14, 1990, using funds from its fiscal year 1991 lump-sum appropriation for State and Private Forestry, enacted on November 5, 1990, the Forest Service, Department of Agriculture, granted the Trust $19,895,200 to carry out the purposes of the Act. (Grant Award 90-G-016.)

The grant agreement mirrors the terms of the Act. It provides for payment of the funds in advance in one lump sum and authorizes the Trust to hold the grant funds (and any interest earned) in interest-bearing accounts to carry out the Act's purposes. The agreement limits the use of grant funds to making grants to qualified organizations (as defined in the Act) and local governments for projects and activities consistent with the purposes of the grant. It specifically requires the Trust to ensure that trees planted under a program receiving funds under the grant are not commercially harvested and sold for Christmas trees.

Upon receipt of the grant, the Trust deposited the funds into interest-bearing accounts. It also received contributions. During 1991, the first year of its operation, the Trust received approximately $1.4 million in interest and contributions. During that same year, it made grant distributions of about $114 thousand. During 1992, the Trust had revenues of slightly under $1 million, and made grant distributions of about $380 thousand. In 1993, the Trust received interest and contributions of about $1.1 million, and made grant distributions of over $550 thousand.

The Department of the Interior and Related Agencies Appropriations Act, 1994, in the appropriation account for Department of Agriculture, Forest Service, State and Private Forestry, provides

"That of the funds previously appropriated under this head as a grant to the National Tree Trust Foundation, $2,500,000 shall be provided as a grant to the Texas Reforestation Foundation."

107 Stat. 1379, 1399.

On January 3, 1994, the President of TRe wrote to the Chairman of the Board of Directors of the Trust requesting the use of $2.5 million, as provided in the fiscal year 1994 appropriations act. On January 5, 1994, the Trust Chairman wrote back to TRe refusing to transfer any funds.

On January 13, 1994, the Chief of the Washington Office, Forest Service, Department of Agriculture, wrote to Representative Sidney Yates, Chairman of the

Subcommittee on Interior, House Committee on Appropriations, concerning the proviso in the fiscal year 1994 appropriations act. The Chief indicated that the "funds previously appropriated under this head" were contained in the fiscal year 1991 appropriations act in the amount of $19,895,200. He stated that the full amount of the appropriation was granted and paid to the National Tree Trust on December 14, 1990; the Forest Service did not retain any part of the amount appropriated. He said that the National Tree Trust was in full compliance with the terms of the grant. Further he stated that it was the view of the Department of Agriculture that so long as the Trust complied with the grant agreement there was no basis for withdrawing any portion of the amount granted. Nor could the Forest Service compel the Trust to make a subgrant to the Texas Reforestation Foundation. He concluded that the Forest Service "has no available funds to grant to the Texas Reforestation Foundation."

On April 5, 1994, pursuant to your request, the Associate General Counsel of the Department of Agriculture provided you with a legal opinion on the effect of the fiscal year 1994 appropriation proviso. The opinion concluded that notwithstanding the proviso, so long as the Trust complied with the terms of the Act and the grant agreement, Agriculture had no authority to reclaim any portion of the amount granted. Further, the opinion concluded that the appropriation language did not compel the Trust, a private organization, to transfer funds to TRe.

Subsequently, on April 25, 1994, you obtained an opinion from the Congressional Research Service (CRS), concluding that the Trust must comply with the appropriations act provision and grant $2.5 million to TRe.

DISCUSSION

Authority to Grant funds to TRe

In your letter you asked whether the language in the fiscal year 1994 appropriations act requires the Trust, a private, nongovernment entity, to "grant" $2.5 million to TRe. In our view the language of the appropriations proviso is ambiguous. It does not identify who is to make the grant. If the appropriation proviso is read as requiring the Trust to transfer its funds to TRe significant constitutional issues are raised. In this regard, we share the conclusion of the Agriculture Associate General Counsel in his opinion to you that the Trust has a property right in the grant funds that is protected by the Constitution's Fifth Amendment. See generally Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Madera Irrigation Dist. v. Hancock, 985 F.2d 1397, 1401 (9th Cir. 1993). As the Agriculture Associate General Counsel states, it is quite likely that the courts would conclude that Congress has no power to compel the transfer of part of those funds from the Trust to TRe.[3]

However, we believe these constitutional issues can be avoided and the clear intent of the statute that TRe receive a grant of $2.5 million effecuated.

While the language of the appropriation proviso reflects a clear congressional desire that $2,500,000 be provided as a grant to TRe, the proviso does not specify who shall make the grant nor does it identify with precision whose funds shall be used. The proviso specifies that "of the funds previously appropriated under this head as a grant to the National Tree Trust Foundation," a grant shall be made to TRe.

We see nothing in the proviso that compels any action by the Trust. It does not direct that the Trust transfer $2.5 million to TRe from the moneys it received as a grant in 1990. Nor have we found any language in previous State and Private Forestry appropriations that specifically appropriated any funds as a grant to the Trust. Rather, the language "funds previously appropriated under this head" is a clear reference to funds previously appropriated for State and Private Forestry, that is, funds appropriated to, and administered by, the Forest Service.

As we indicated above, the Forest Service made the grant to the Trust out of the lump-sum fiscal year 1991 State and Private Forestry appropriation. That appropriation did not specifically appropriate, or earmark, any funds "as" a grant to the Trust. The appropriation reads:

"For necessary expenses of cooperating with, and providing technical assistance to States, Territories, possessions, and others; and for forest pest management activities, $183,377,000, to remain available until expended, as authorized by law . . . ."

Pub. L. No. 101-512, 104 Stat. 1915, 1938 (1990).

The legislative history of the fiscal year 1991 appropriations act suggests that the Congress envisioned $20,000,000 for a grant to a tree planting foundation (without specific reference to the Trust) within the total lump sum appropriated for State and Private Forestry.[4] The fiscal year 1991 appropriation act in the "State and Private Forestry" account appropriated $183,377,000 (less 0.524 percent) to the Forest Service for necessary expenses of cooperating with and providing assistance to States, Territories, possessions, and others, "as authorized by law." 104 Stat. 1938. This language required the Forest Service to use the funds appropriated in accordance with authorities contained in other statutes. See B-220682, February 21, 1986; 36 Comp. Gen. 240, 242 (1956). Although it is not clear that there was existing statutory authority allowing the Forest Service to make a grant to the Trust on November 4, 1990, when the appropriation was passed, the enactment of the Act on November 28, 1990, clearly authorized such a grant (which the Forest Service, in fact, made on December 14, 1990). Section 1264(d) of the Act stated that "(f)or fiscal year 1991, the Secretary is authorized to make a grant of not to exceed $25,000,000 to the Foundation." Further, section 1264(p) of the Act authorized an appropriation of $25,000,000 for the grant. In our opinion, when the 1991 State and Private Forestry appropriation is read together with the authorizations in the Act, we think it made available an amount not to exceed $25,000,000 for a grant to the Foundation.

The amount we conclude was available from the 1991 appropriations differs from the amount suggested in the House Appropriation Committee report for the 1991 appropriations act. We have long taken the position, however, that

"when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies."

55 Comp.Gen. 307, 319 (1955); see also 64 Comp.Gen. 282 (1985). As stated by the Supreme Court, "[e]xpressions of committees dealing with requests for

appropriations cannot be equated with statutes enacted by Congress . . . ." Tennessee Valley Authority v. Hill, 437 U.S. 153, 191 (1978). The Congress could have limited appropriations for an America the Beautiful grant to $20,000,000 by stating so in the statute.[5]

In administering the fiscal year 1991 State and Private Forestry appropriation, the Forest Service used only $19,895,200 of the $25,000,000 available for a grant to the Foundation.

Funds contained in the State and Private Forestry appropriation remain "available until expended," that is, they are no-year funds. Therefore, funds available but not obligated in one fiscal year remain available for obligation in the subsequent fiscal year. We understand that in its accounting system the Forest Service does not identify the year of enactment of no-year funds. Thus, to the extent that there is an unobligated balance in the no-year State and Private Forestry account, the Forest Service cannot determine in which year those funds may have been appropriated.

The annual Budget of the United States Government, submitted by the President for fiscal years 1993 through 1995, shows that the following amounts remained unobligated in the State and Private Forestry account at the end of the indicated fiscal years:

FY 1991.....$43,066,000. (FY 1993 Budget, Appendix-360) FY 1992.....$33,448,000. (FY 1994 Budget, Appendix-393) FY 1993.....$35,169,000. (FY 1995 Budget, Appendix, 227)

It appears, therefore, that an amount equal to the unused portion of the fiscal year 1991 appropriation remained available for a grant under the Act through fiscal years 1991, 1992, and 1993, and was available at the time the fiscal year 1994 appropriations proviso was enacted. Thus, funds are available which the Forest Service can use to fulfill the proviso by making a $2,500,000 grant to TRe from the unobligated balance in the State and Private Forestry account.

Trust Compliance with the Act

In your letter you suggest that the Trust's expenditure of $146,563 for legal fees and $707,502 for other professional fees over the first three years of its existence may have been inconsistent with the requirements of the Act. In this regard, section 1264(g)(1) of the Act provides:

"The Foundation may use funds provided by this section only for making grants to qualified organizations, municipalities, counties, towns and townships for the implementation of projects and activities that are consistent with the purposes [of the Act]."

104 Stat. 3555.[6] This language is susceptible to at least two interpretations. First, it could mean that the Trust may only use grant funds for making subgrants, and thus could not use them for administrative or other expenses. Alternatively, it could mean that the subgrants that the Trust makes with grant funds may only be to eligible entities and for projects consistent with the Act. The latter interpretation would not preclude the Trust from using grant funds for administrative expenses.

We need not decide which of these interpretations was intended by the Congress.

Our examination of the Trust's annual reports for the first three years of its operation shows that the Trust invested the full amount of the grant in interest-bearing accounts, and that the amount of earned interest or donated funds received by the Trust covered all of its administrative expenses. Thus, we have no basis to conclude that the Trust has used any of the grant funds to pay for legal or other professional services. Therefore, even under a more restrictive reading of the restriction, Trust expenditures for professional services have not violated section 1264(g)(1) of the Act. We do not think that these expenditures were otherwise inconsistent with the Act.

We trust that this opinion adequately addresses the questions raised in your letter. As agreed with Peyton Walters of your staff, unless you release it sooner, this opinion shall be available to the public 3 days from today.

1. The Foundation may only grant funds to local governments and "qualified organizations." The Act defined "qualified organizations" as those that meet the requirements of section 501(c)(3) of the Internal Revenue Code and have demonstrated an ability to implement the project for which funds will be used. Section 1264(g)(2), 104 Stat. 3555.

2. The amount requested by the Trust and granted by the Forest Service was calculated by applying the 0.524 percent reduction required by section 325 of the fiscal year 1991 appropriation act, 104 Stat. 1978, to the $20,000,000 that the Forest Service believed was appropriated for a grant to the designated Foundation based upon committee reports accompanying the act.

3. In his legal opinion to you, the Agriculture Associate General Counsel suggests (1) that the Congress has no constitutional power to appropriate funds that have already been disbursed from the Treasury to a private, nongovernment entity; and (2) that forcing the Trust to transfer funds to TRe would constitute a taking of Trust property without due process of law.

4. The House Appropriations Committee stated that it was including $20,000,000 (under special projects) "for a private foundation whose function it will be to mobilize the corporate and civic sectors to donate funds and labor to plant and care for trees to be planted as part of [the America the Beautiful] effort." H.R. Rep. No. 789, 101st Cong., 2d Sess. 92 (1990). The Senate Appropriations Committee removed the $20,000,000, stating its view that the objectives of the America the Beautiful program could best be met by using "existing delivery mechanisms" of the State and private forestry network. S. Rep. No. 534, 101st. Cong., 2d Sess. 87 (1990). The Committee of Conference recommended a lump-sum appropriation for State and Private Forestry between the amounts provided by the House and Senate bills. The Joint Explanatory Statement of the Committee of Conference indicated that the increase over the amount proposed by the House consisted of several increases and decreases in specific programs, but did not mention the $20,000,000 special projects amount for the tree planting foundation. See H.R. Rep. No. 971, 101st. Cong., 2d Sess. 50 (1990). However, a careful examination of the amounts added and subtracted for specific programs, projects, and activities, suggests that the conferees did include the $20,000,000 in calculating the lump-sum appropriation they agreed on.

5. For example, in the same fiscal year 1991 appropriation for "State and Private Forestry" the Congress did specifically earmark $4.5 million for a grant to Mercer County, West Virginia. 104 Stat. 1938.

6. This requirement was also included in the grant agreement at paragraph 7.