



United States Department of the Interior

OFFICE OF THE SOLICITOR

MAR 14 2003

Memorandum

To: Chief, National Wildlife Refuge System

From: Hugo Teufel III, Associate Solicitor
Division of General Law

Subject: Draft Director's Order on FY 2003 National Wildlife Refuge System Centennial Expenditures

This memorandum is in response to your memorandum received on February 7, 2003 raising concerns about some proposed expenditures of Fish and Wildlife Service (FWS) funds to promote the centennial celebration for the National Wildlife Refuge System. For guidance to its employees, the FWS has prepared a draft Director's Order regarding these expenditures. The FWS appended to the draft order a list of possible expenditures with comments about their propriety. You have asked for our views concerning these proposed expenditures.

A provision of the recent Omnibus Appropriations Act for Fiscal Year (FY) 2003 (the Department of the Interior's FY 2003 appropriations act) provides additional expenditure authority for FWS to carry out its responsibilities under the Centennial Act of 2000 (Centennial Act), 16 U.S.C. § 668dd. The new statutory language states: "*Notwithstanding any other provision of law, the United States Fish and Wildlife Service may use funds appropriated in this Act for incidental expenses related to promoting and celebrating the Centennial of the National Wildlife Refuge System.*" Pub. L. No. 108-7 (2003), Division F, Title I, sec. 129 (Section 129). Considering this supplemental language and general principles of appropriations law, most of the proposed expenditures on the list would be valid uses of appropriated funds. However, some of the expenditures on the list are potentially problematic, and in these areas the FWS should make expenditures only with serious consideration and caution. These expenditures are addressed in detail later in this memorandum.

Even with the enactment of section 129 and the "notwithstanding any other provision" language, the general rule remains that expenditures of appropriations must have a logical relationship to the appropriation sought to be charged. 31 U.S.C. § 1301(a). In determining whether an expenditure is permissible an agency must ask to what extent the expenditure will contribute to accomplishing the purposes of the appropriation, and whether the expenditure falls within the agency's legitimate range of discretion. *Principles of Federal Appropriations Law* (July 1991), vol. I, ch. 4, subsec. B. Here, we believe that because Congress used the term "incidental" the general rule remains in effect in the determination whether the proposed

expenditures are meet that requirement. In other words, Congress “expects” the expenditures to relate in some way to the purpose of the Centennial celebration.

Therefore, in order to determine whether these proposed expenditures are permitted, FWS must analyze the Centennial Act and the Department’s current appropriations act (Pub. L. 108-7), including section 129, to determine whether the purpose is authorized, and, second, evaluate the adequacy of the administrative justification to decide whether it has properly exercised or exceeded its discretion. *Principles of Federal Appropriations Law* (July 1991), vol. I, ch. 4, subsec. B. We recommend that FWS, in order to evaluate these factors, select a person, preferably someone in its office who certifies expenditures as permissible, who will be able to properly evaluate proposed expenditures under these standards and answer any questions that FWS staff may ask about such proposals. The Division of General Law will be available to provide further guidance for any remaining issues and concerns.

As mentioned above, we believe that most of the proposed expenditures on the list do not present legal obstacles. However, we advise caution in several areas.

In general, expending funds for publicity experts (item number six (6)) may be an acceptable expenditure of appropriation funds if the purpose of hiring the publicity expert is to effectuate an agency’s legitimate informational function or legitimate promotional function where authorized by law. *Principles of Federal Appropriations Law* (July 1991) vol. I, ch. 4, subchap. C. 11. g. (3). In this case section 129 authorizes the promotion and celebration of the Centennial. Thus, hiring a publicity expert to promote and inform the public about the Centennial should be acceptable.

Item number eight (8) on the proposed list, for the acceptance of advertisements in FWS’s publications, appears to deal with receipt of funds rather than expenditures. We believe there would be serious augmentation of appropriations issues if FWS were to pursue this policy. On the other hand, we see no obstacles to FWS acknowledging contributions or cooperation from outside entities by printing acknowledgments in its publications. In our analysis we considered whether the payment from the advertiser might be considered a gift, which the FWS could accept under its gift authority. We concluded, however, that because the advertisement is being published as consideration for the “donation”, it loses the essential “gratuitous” aspect of a gift. *Principles of Federal Appropriations Law* (July 1991) vol. II, chap. 6, subchap. E. 3. a. Hence, there is no gift but rather the advertisement is bought by the advertiser under a contract.

Item number nine (9), for use of the FWS name and logo, is acceptable. FWS appears to have an established policy on the use of its logo, and thus, issues about use of the name and logo will not involve appropriations law. It also appears not to involve the expenditure of funds, but seems to deal with granting outside entities the right to use the FWS logo.

Expenditure number thirteen (13) for travel and transport of non-Government people will be acceptable within limits. Title 31 U.S.C. § 1345 prohibits, without specific statutory

authority, the payment of travel, transportation, or subsistence expenses of private parties (non-governmental) at meetings. It does not, however, prohibit FWS from paying such expenses for persons asked to travel to perform a direct service for the government. This situation is usually called "invitational travel." Therefore, considering this doctrine and section 129 we believe it is permissible to pay for travel for non-governmental persons who contribute to the purposes of the Centennial Act and section 129's purpose of promotion and celebration of the Centennial. On the other hand, payment of travel expenses for people simply to attend the Centennial's programs and/or ceremonies is stretching the meaning of "incidental" expenditures to a level not within Congress' intent. So, for example, while payment for travel for a person(s) to visit area schools in order to enhance public understanding of the National Wildlife Refuge system or payment of travel for a speaker at a Centennial event is acceptable, payments made for bussing area schoolchildren simply so that they may attend Centennial programs, even though educational, will not be.

Expenditure number fourteen (14) for lobbying will be acceptable under limited circumstances. Title 18 U.S.C. § 1913 prohibits the expenditure of appropriated funds "to influence in any manner a Member of Congress, a jurisdiction, or an official of any government to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation." This version of section 1913 is the result of a recent amendment contained in Pub. L. No. 107-273, Div. A., Title II, § 205(b) (2002). The Department of Justice interpreted the predecessor to this provision¹ to apply to indirect or "grass roots" lobbying and not to direct communications between executive branch officials and covered entities. *Principles of Federal Appropriations Law* (July 1991), vol. I, ch. 4, subsec. C.11.b. Thus, section 1913 prohibits expenditures where the FWS encourages third parties, either members of special interests groups or the general public, to communicate with their legislators (Congress, State or local) to support or oppose any legislation, law, ratification, policy or appropriation. Pub. L. No. 107-273, Div. A., Title II, § 205(b). We do not believe that lobbying, as proscribed by section 1913, can fairly be interpreted as "incidental" to promoting or celebrating the Centennial.² Thus, any use of Centennial funds for lobbying should

¹ Under the previous version of section 1913, using appropriated monies "to influence in any manner a Member of Congress to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress" was prohibited.

² Employees of the Department must comply with two other similar anti-lobbying provisions: a provision in the Treasury and General Government Appropriations Act that in FY 2002 appeared at section 623 (Pub. L. 107-67), and a provision in the Department's appropriations acts, appearing in FY 2003 at section 302. In general these provisions have been interpreted like section 1913 in terms of their application to "grass roots" lobbying. We do not discuss them specifically because, as we have stated in the text, we do not believe such lobbying can fairly be characterized as "incidental."

be **closely** coordinated with the designated person who will evaluate Centennial expenditures and with the Solicitor's Office.

Finally, we do not believe expenditure number eighteen (18) for button-making machines, unless a *de minimis* expense, is an acceptable use of appropriated funds. Section 129 permits "incidental" expenditures for the promotion and celebration of the Centennial, and it is our opinion that use of appropriated funds to purchase a machine that presumably can be used for purposes other than the celebration of the Centennial does not comprise an "incidental" expense. While the output of a button-making machine may assist the public in participating in the National Wildlife Refuge System's legitimate purpose of promoting awareness of the System and the celebration of its centennial anniversary, the purchase of the machine itself goes far beyond what we believe Congress meant by "incidental." Using funds to obtain the buttons themselves could properly be regarded as an incidental expense, but actually buying the machine unreasonably expands the definition of an "incidental" expense.

All other expenditures listed on the chart will be acceptable, within reasonable limits, but should be subject to review by the person assigned to evaluate the validity of the expenditures.

As to your question about whether expenditures made using FY 2002 funds or FY 2003 Continuing Resolution funds can be evaluated based on section 129, the answer is that expenditures made with FY 2002 funds must be evaluated on the basis of the law at the time the funds were obligated. Thus, because section 129 was enacted in FY 2003, after the previous FY 2003 continuing resolutions, the FWS may not use the authority of section 129 to justify expenditures for the Centennial that occurred in FY 2002 or in FY 2003 prior to the enactment of the Department's appropriations act.

We hope we have clarified your questions regarding the Centennial's ability to purchase certain items or services. Let us know if you have additional questions.