GAO

United States
General Accounting Office
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Office of the General Counsel

B-281637

May 14, 1999

The Honorable Don Young
Chairman, Committee on Resources
House of Representatives

Subject: Forest Service Violations of Section 303 of the 1998 Interior Department Appropriations Act

Dear Mr. Chairman:

In your letter dated November 24, 1998 written jointly with the Honorable Frank H. Murkowski, you requested our opinion on whether the United States Forest Service engaged in lobbying in violation of federal law. In particular, you asked whether actions taken by employees of the Forest Service to implement a Communication Plan for the Forest Service Natural Resource Agenda violated section 303 of the 1998 Interior Department Appropriations Act, which prohibited the expenditure of funds for certain lobbying activities undertaken by covered federal officials.[1] In addition to your letter, you provided us with approximately 1500 documents you had received from the Forest Service in response to your request for documents concerning the Agenda and the Communication Plan.

We have completed our review of those documents and have determined that activities described in them constitute violations of section 303. Specifically, these activities included (1) urging members of the public during a meeting to contact Congress in support of road funding initiatives in legislation and in the budget, and (2) a campaign to promote public support for a budget proposal seeking to change the way certain payments to states from Forest Service revenues are calculated.

Because the documents themselves establish at least two violations, and in view of the time and resources that would be required to examine each action of every

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[1] Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 303, 111 Stat. 1543, 1589 (1997). The Forest Service is funded by the Department of Interior Appropriations Act. Your letter also requested an opinion as to whether other relevant statutes had been violated, but we agreed with your staff to limit our analysis to violations of section 303.

employee pursuant to the Communication Plan, we have limited our opinion to these violations. As discussed below, we are recommending that the Secretary develop guidelines on lobbying under section 303 and educate his employees concerning them.

SECTION 303 OF THE 1998 INTERIOR DEPARTMENT APPROPRIATIONS ACT

Section 303 of the 1998 Interior Department Appropriations Act is one of a long line of restrictions on the use of appropriated funds by federal officials for lobbying, or attempting to influence legislators.[2] These restrictions began with the enactment of a criminal prohibition in 1919[3] and continued with various appropriations restrictions imposed from time to time from the 1950's to the present on individual federal agencies and on the government as a whole.[4] Generally speaking, these laws have been interpreted not to prohibit direct contact with legislators by executive branch officials, but instead to prohibit a variety of other federal agency lobbying activities.[5]

Section 303 of the 1998 Interior Department Appropriations Act provided:

> No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete.

A nearly identical version of this restriction was first enacted in 1977[6] and has been in every Interior Department appropriations law since.

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[2] See generally United States General Accounting Office, Principles of Federal Appropriations Law, 4-156 to 4-179 (2d ed. 1991).

[3] Third Deficiency Appropriation Act, fiscal year 1919, ch. 6, § 6, 41 Stat. 68 (1919) (codified on June 25, 1948 at 18 U.S.C. § 1913).

[4] United States General Accounting Office, supra note 2, at 4-156 to 4-179.

[5] Id.

[6] Department of the Interior and Related Agencies Appropriations Act, 1978, Pub. L. No. 95-74, § 304, 91 Stat. 285, 307 (1977). This provision appended at the end of the phrase, "in accordance with the Act of June 25, 1948 (18 U.S.C. 1913) [the criminal anti-lobbying statute]." Without explanation, Congress eliminated the reference to the criminal provision in 1982 and years thereafter; we have previously held that this deletion did not change the reach of the statute. B-262234, December 21, 1995.

The Senate Appropriations Committee that authored what is now section 303 described the concerns that motivated its inclusion:

> The Committee is disturbed to learn of certain public information activities being conducted by the National Park Service, Fish and Wildlife Service, and Forest Service that tend to promote pending legislative proposals to set aside certain areas in Alaska for national parks, wildlife refuges, national forest and other withdrawals. Colorful brochures printed and actively distributed by these agencies extol the benefits of such proposals and as a result, tend to promote certain legislative goals of these agencies….[7]

However, the Committee also noted that the provision "should not be construed as an impediment on the agencies' ability to respond to public information inquiries."[8]

At the time that what is now section 303 was enacted, two other anti-lobbying restrictions applied to actions of federal agency employees covered by the Interior Department Appropriations Act. These were (1) the criminal prohibition on the use of appropriated funds to influence members of Congress to favor or oppose legislation (18 U.S.C. § 1913 (1994)), and (2) a government-wide restriction prohibiting the use of appropriated funds for publicity or propaganda purposes designed to support or defeat pending legislation.[9] These restrictions had been interpreted by the Department of Justice and GAO to prevent government officials from explicitly asking members of the public to contact their elected representatives in support of or opposition to pending legislation (so-called "grassroots lobbying").[10]

Given the existence of these two prohibitions on grassroots lobbying at the time that what is now section 303 was enacted, and given the clarity of the Senate Committee's purpose to prohibit certain public information activities like the brochures promoting agency legislative goals, we concluded in our first opinion interpreting the provision that it was meant to cover actions not reached by these other two restrictions.[11] Thus

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[7] S. Rep. No. 95-276, at 4-5 (1977).

[8] Id. at 5.

[9] Treasury, Postal Service and General Government Appropriations Act, 1979, Pub. L. No. 95-429, § 607(a), 92 Stat. 1001, 1016 (1978).

[10] See B-262234, December 21, 1995; 59 Comp. Gen. 115, 117-18 (1979). The Department of Justice continues to maintain this view of 18 U.S.C. § 1913. Memorandum for the Attorney General and Deputy Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, April 14, 1995.

[11] 59 Comp. Gen. 115, 118-19 (1979).

we held that the statute was designed "to cover particularly egregious examples of 'lobbying' by Federal agencies," even though the material stops short of actually soliciting the reader to contact his congressperson in support of or opposition to pending legislation.[12]

In this first GAO opinion on what is now section 303, we considered a National Endowment of the Arts (NEA) mass mailing of an information packet concerning the NEA's "Living Cities Program." The packet did not directly exhort the public to contact Congress. However, among other things, the cover letter to the information packet was highly supportive of the program, describing it as a "unique piece of legislation" and highlighting the fact that the only obstacle that remained in the way of program implementation was a favorable house vote on program funding. Moreover, the NEA timed its mailing to coincide with reconsideration of the program's appropriations after the conference committee failed to agree on funding. We concluded that the mailing was designed to promote public support for the funding, thereby violating the Interior Appropriations Act anti-lobbying provision.[13]

More recently, in a 1995 decision, we held that remarks made by a Fish and Wildlife Service employee at a press conference called to generate opposition to a pending amendment to the Clean Water Act tended to promote public opposition to the legislative proposal and hence violated the Department of Interior Appropriations Act restriction.[14] The Fish and Wildlife Service employee did not urge members of the public to contact their congressional representatives. Instead, he stated that "we cannot afford to rollback protection" for wetlands, which he believed the legislation would do. In analyzing the case, we pointed out that the press conference had been called to coincide with the legislation's active consideration in committee; attract public attention; criticize the legislation; and link in the public mind the legislation and its sponsor, who was the chairman of the committee considering the legislation and represented the district where the press conference was held. Under these circumstances, we concluded that the Fish and Wildlife Service employee's allegation of negative consequences that would result from enactment of the legislation at issue violated the Interior Department Appropriations Act restriction by tending to promote public opposition to the legislative proposal.[15]

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[12] Id. at 120.

[13] Id. at 120-21.

[14] B-262234, December 21, 1995.

[15] Id. In our 1995 opinion, we noted that the Department of Justice has historically expressed the view that the President's constitutional role in the legislative process includes the duty to communicate with the citizens of the United States on matters that relate to legislation. E.g., Memorandum from William P. Barr, Assistant Attorney

On the other hand, in another NEA case, we did not find a violation where an NEA official met with an arts lobbying organization at the arts group's request during an arts management conference, and gave a presentation concerning the agency's budget for the following year.[16] We concluded that agency officials may meet with groups sharing the agency's interest in legislation to exchange information and viewpoints without violating the Interior Department Appropriations Act restriction. In our view, the meeting was essentially a vehicle for the lobbying group to brief its membership, the NEA and others on its activities and lobbying efforts, and to hear about NEA's general policies and plans.

In the same NEA case, we also did not find a violation where an NEA official responded to a question from the audience concerning what the audience could do to support the NEA.[17] The official, who had just finished making a presentation at the arts management conference on the NEA's structure, its function, and the status of its reauthorization, stated that the audience could contact their elected representatives. Because the answer was informational and more in the nature of a civics lesson than an exhortation to take action, we did not view it as tending to promote public support or opposition to pending legislation. Instead, we held that the official's statement constituted a good faith response to a question from a member of the public, a type of communication not proscribed by the Interior Department Appropriations Act restriction.[18] As long as such statements are strictly factual and devoid of positive or negative sentiments about the pending legislation, they are permissible.[19]

General, Office of Legal Counsel, to Attorney General Dick Thornburg, September 28, 1989 ("Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts"). Most recently, "Anti-Lobbying Act Guidelines" issued on April 17, 1995, by the Office of Legal Counsel Department of Justice, stated that lobbying activities may not be limited when: ". . . personally undertaken by the President, his aides and assistants within the Executive Office of the President, the Vice President, cabinet members within their areas of responsibility, and other Senate-confirmed officials appointed by the President within their areas of responsibility." In this connection, we note that none of the Forest Service employees involved in the activities complained of here are in the categories of executive branch employees whose lobbying activities are constitutionally protected under the Justice Department's view.

[16] B-239856, April 29, 1991.

[17] Id.

[18] Id.

[19] 59 Comp. Gen. at 119.

In testimony concerning government-wide legislation modeled on section 303 of the Interior Appropriations Act, we recently summarized the principles we have utilized in analyzing section 303 cases.[20] We pointed out that while section 303 prohibits the use of appropriated funds for explicit appeals to the public to contact their elected representatives, "it also reaches more broadly to restrict appeals to the public that implicitly tend to promote support for or opposition to legislative measures." In each case under section 303, we have had to reach a judgment whether under all the facts and circumstances present, the activity tended to promote public support or opposition to a pending legislative proposal. Among the factors we have considered in analyzing whether a violation has occurred are the timing, setting, audience, content, the reasonably anticipated effect of the questioned activity, and whether the communication was intended to promote support or opposition to a legislative proposal. For example, with respect to the intent factor, in the NEA "Living Cities Program" case, we concluded that the NEA mass mailing "was designed to promote public support for funding the Program."[21] In the case of the NEA official who responded to an audience inquiry concerning what actions members of the audience could take to support the NEA, we found that intent was lacking and that her response was "incidental to her presentation and was not part of any plan to generate action on the part of her audience."[22]

With these principles in mind, we turn to the facts presented in this case.

FACTUAL BACKGROUND

The Natural Resource Agenda

On October 7, 1997, during testimony before the House Committee on Agriculture, Secretary of Agriculture Dan Glickman announced that he had asked Forest Service Chief Mike Dombeck to develop, by the beginning of 1998, a natural resource agenda for the Forest Service.[23] The Forest Service developed its Natural Resource Agenda in

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[20] H.R. 3078, The Federal Agency Anti-Lobbying Act (GAO/T-OGC-96-18, May 15, 1996).

[21] 59 Comp. Gen. at 121.

[22] B-239856, April 29, 1991.

[23] OC-DJ-1. This and similar citations refer to numbers assigned by the Forest Service to the documents it provided to you in response to your request. Some of the Forest Service documents consist of several unrelated attached pages with a document number on the first page. When referring to material within such documents, we have

January 1998.[24] The purpose of the Agenda was to set the future direction of the Agency for the twenty-first century.[25]

The Agenda contained three legislative goals that were the subjects of the lobbying alleged here. The first two legislative goals dealt with funding for Forest Service roads. The third legislative goal was to change the way payments to states were made from revenue collections.

With respect to road funding, the Agenda stated, "Road budgets will emphasize road reconstruction, relocation, maintenance and decommissioning to protect and restore watersheds while improving standards to more safely serve increased recreation use." It further stated, "We will explore with other agencies increased funding from the Highway Trust Fund for roads providing the primary recreation access to federal lands…." The two legislative goals the Agenda was referring to were: (1) enactment of the fiscal year 1999 Forest Service budget proposal, which included funds for maintenance and reconstruction of Forest Service roads;[26] and (2) additional funding for its heavily-traveled arterial and collector roads from the Highway Trust Fund[27] through amendment of reauthorization legislation for the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), which was then pending in Congress.[28]

This attempt to obtain additional funding from the Highway Trust Fund through ISTEA was also referred to by Forest Service employees as the "Access America" initiative.[29] The Access America effort was aimed at obtaining funds from the

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cited the number assigned to the first page of the multi-page document in which the material appears.

[24] NRE-BP-122.

[25] OC-DC-4.

[26] USDA Forest Service FY 1999 Budget Explanatory Notes for the Committee on Appropriations, 2-3, 150-54, 202-08, reprinted in Department of Interior and Related Agencies Appropriations for 1999 : Hearings Before the Subcomm. on Department of the Interior and Related Agencies of the House Comm. on Appropriations, 105th Cong. 6-7, 154-58, 206-12 (1998) [hereinafter Hearings].

[27] The Highway Trust Fund finances most federal highway programs from taxes on motor fuels and tires, among other things. See 26 U.S.C. § 9503 (1994).

[28] The ISTEA reauthorization bill, H.R. 2400, was introduced on September 4, 1997. 143 Cong. Rec. H6917 (daily ed. Sept. 4, 1997). It was enacted on June 9, 1998. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998).

[29] Forest Service "Access America" Briefing Book, § 1.

Highway Trust Fund to finance road construction, reconstruction and maintenance on roads that accessed federal lands. According to Forest Service documents, the addition of amounts from the Highway Trust Fund would allow the Forest Service to focus its appropriated dollars on the maintenance and repair of its local road system, and to the decommissioning of unneeded roads.[30] The Trust Fund would then be used to repair the backbone arterial and collector road system.[31]

The third legislative goal set by the Agenda was to "[d]ecouple payments to states from revenue collections to provide a stable, predictable level of funding for county roads and schools."[32] This statement referred to a change the Forest Service sought in current law.[33] Under existing law, 25 percent of most Forest Service receipts is paid to the states for distribution to the counties in which National Forest System lands are located for financing public roads and schools. Because receipts from sales of timber have declined in recent years, these payments to states have also declined. Therefore the Administration proposed in its fiscal year 1999 budget to decouple payments from revenue collections and instead provide a set level of payments in order to give these counties a predictable source of income.[34] The figure estimated in the budget for these payments was $270 million.[35] The budget proposal stated that the Administration would transmit proposed legislation to Congress later in 1998 intended to stabilize the payments,[36] which it in fact did on April 2, 1998.[37]

The Communication Plan for the Natural Resource Agenda

During the first week of January 1998, the Forest Service Office of Communications began developing a Communication Plan for the rollout and subsequent communication of the Natural Resource Agenda over the ensuing months.[38] The final

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[30] See, e.g., id.

[31] Id.

[32] NRE-BP-122.

[33] 16 U.S.C. § 500.

[34] USDA Forest Service FY 1999 Budget Explanatory Notes, supra note 26 at 247-48; Hearings, at 251-52.

[35] Id.

[36] Id.

[37] NRE-BP-116.

[38] See OC-CH-20.

version of the Communication Plan stated that the goal of the Plan was "to have key audiences receive and understand the Forest Service Natural Resource Agenda, resulting in general support for the principles and future direction of Forest Service resource management."[39] (Emphasis in original.) The audiences named in the Communication Plan included employees, Congress, the media and external groups. The multiple vehicles to be used to communicate the Agenda included internet and intranet sites, speeches to interest groups at their functions, roundtables, feature articles, op-ed pieces, one-on-one briefings, posters, brochures, electronic newsletters, and press conferences, "to name a few."

According to the Plan, the rollout was to begin with the Chief's speech to Forest Service employees on March 2, 1998. Over the ensuing months, agency leadership would "communicate with targeted audiences, aimed at development of support for the management principles engendered in the Agenda." With respect to employees, the Plan was to involve an extensive effort to educate employees concerning the Agenda so that they could disseminate it in the field. With respect to Congress, an objective of the Plan was that "key elements of the [Natural Resource Agenda] receive support in Congress." With respect to the media, among other activities, the Chief was to "meet with editorial boards on every trip to the field" and "push the Agenda." The strategy was "to gain internal and constituent support" by providing information to the media "resulting in balanced or favorable articles, feature pieces, and editorials." With respect to the external groups, the Chief was to make "key speeches in influential settings to explain and expand upon the Agenda…." The goal of these communications with external groups was to have them "receive, understand, and support" the Agenda.

ANALYSIS

As previously stated, section 303 of the 1998 Interior Department Appropriations Act provides that, "No part of any appropriation contained in this Act shall be available for [the prohibited activities]." (Emphasis supplied.) The Forest Service, although part of the Department of Agriculture, receives its appropriations from the Department of Interior and Related Agencies Appropriations Acts. Therefore Forest Service employees were covered by section 303 during fiscal year 1998.

Under section 303, appropriated funds may not be used for activities promoting public support or opposition "to any legislative proposal on which congressional action is not complete." (Emphasis supplied.) We look first to the Forest Service's legislative goals in the Natural Resource Agenda to determine whether they are "legislative proposals" under section 303. As previously noted, these goals included:

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[39] NRE-BP-123.

funding for Forest Service roads through an amendment to ISTEA, funding for Forest Service roads through the fiscal year 1999 budget request, and funding to stabilize payments to states through the fiscal year 1999 budget request. The bill to reauthorize ISTEA was substantive legislation and therefore clearly constitutes a "legislative proposal" within the meaning of section 303, as our previous section 303 opinions have held.[40] Appropriations legislation is also covered by this language.[41] We have not previously had the opportunity to consider whether section 303 applies to proposed presidential budgets.

While neither the language nor the legislative history of section 303 defines the meaning of the phrase "legislative proposal on which congressional action is not complete," the committee that authored the provision expressed its concern that activities of certain federal agencies extolling the benefits of pending legislative proposals tended "to promote certain legislative goals of these agencies."[42] Thus it was the promotion of the executive departments' legislative goals contained in "legislative proposals" under consideration by Congress that motivated enactment of section 303. Legislative goals of the executive branch are set forth for the consideration of Congress not only in bills drafted or otherwise supported by the executive branch, but also in the President's budget, which is his proposal for how money should be spent in the next fiscal year.

Indeed, presidential legislative proposals to Congress in general and the budget in particular have a special status in our constitutional and legislative scheme. The Constitution provides that the President shall from time to time "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient."[43] The President is required by statute to submit one such measure, the budget, to Congress by the first Monday of February each year.[44] Under the statute, the President must propose appropriations for the next fiscal year and identify any proposed appropriations attributable to newly-established or expanded government activities. Moreover, according to a provision of the Congressional Budget Act of 1974,[45] the President's submission of the budget—the blueprint for government

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[40] See, e.g., B-262234, December 21, 1995.

[41] See, e.g., 59 Comp. Gen. 115, 119 (1979).

[42] S. Rep. No. 95-276, at 4-5 (1977).

[43] U.S. Const. Art. II, § 3.

[44] 31 U.S.C. § 1105 (Supp. III 1997).

[45] 2 U.S.C. § 631 (1994).

spending for the following fiscal year—initiates the process for enactment of the annual appropriations laws, just as congressional bills do for authorizing legislation.

The Rules of the House of Representatives also reflect the role of proposed Presidential budgets in initiating the legislative process for annual appropriations laws. Under the Rules, "estimates of appropriations" from the executive departments are to be addressed to the Speaker and referred by him to the appropriate committees,[46] just as bills are referred to standing committees of jurisdiction.[47] One of these committees, the Appropriations Committee, is required by the Rules within thirty days of transmittal of the budget by the President to Congress to hold hearings on the budget, with particular reference to, among other things, "the basic recommendations and budgetary policies of the President in the presentation of the Budget."[48] Similarly, the Budget Committee has the duty under the Rules to hold hearings on the budget in order to develop the concurrent resolution on the budget for each fiscal year.[49]

We have also held that another appropriations restriction prohibiting lobbying activities with respect to "legislation pending before Congress" applied not just to actual appropriations legislation, but to proposed presidential budgets as well.[50] Because the phrase "legislative proposal" is at least as broad if not broader than the phrase "legislation pending before Congress," and because proposed Presidential budgets have a special constitutional, statutory and procedural role of setting forth for consideration by Congress the President's legislative goals for how money should be spent in the next fiscal year, we conclude that presidential budgets are also "legislative proposals" within the meaning of section 303.

In this case, as previously noted, the President's fiscal year 1999 budget contained two relevant initiatives. First, the budget included funds for maintenance and reconstruction of Forest Service roads.[51] Second, the budget included funds for the

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[46] Rules of the House of Representatives, Rule XL, § 936; Rule XXIV, cl. 2, § 882 (1997).

[47] Id., Rule X, cl. 5 (a), § 700; Rule X, cl. 1, § 669.

[48] Id., Rule X, cl. 4(a)(1)(A), § 694a.

[49] Id., Rule X, cl. 4(b), § 695.

[50] See, e.g., B-178648, September 21, 1973 (government news broadcasts exhorting people to contact Congress in support of the President's budget violated appropriations provision prohibiting publicity or propaganda designed to support or defeat legislation pending before Congress).

[51] See supra note 26.

payments to states proposal.[52] While the actual legislation required to implement the proposal regarding payments to states was not submitted to Congress along with the proposed budget, the Forest Service Fiscal Year 1999 Budget Explanatory Notes contained a description of the need for the legislation it planned to submit later in the year and a description of the formula the law would use to determine the payments.

Thus, the Natural Resource Agenda made reference to at least three "legislative proposals" under section 303: the ISTEA reauthorization legislation; the fiscal year 1999 budget request for Forest Service road funding; and the fiscal year 1999 budget request for funding to stabilize payments to states. Congressional consideration was not complete on these legislative proposals during the time period in which the lobbying activities alleged here took place, approximately February through April, 1998. As previously noted, the ISTEA reauthorization bill was introduced as H.R. 2400 on September 4, 1997 and was not enacted until June 9, 1998.[53] The President transmitted the budget to Congress on February 2, 1998[54] and it was still pending at this time as well. Therefore the only remaining question is whether Forest Service employees engaged in "any activity or the publication or distribution of literature that in any way tend[ed] to promote public support or opposition to" any of these three legislative proposals during fiscal year 1998.

Efforts to Promote Road Funding

As previously noted, the official "rollout" of the Forest Service Natural Resource Agenda came with a speech to Forest Service employees by Forest Service Chief Mike Dombeck on March 2, 1998.[55] Among other things, Chief Dombeck discussed the need to obtain the road funding proposed in the Administration's fiscal year 1999 budget, the possibility of obtaining Highway Trust Funds for the Forest Service's heavily-traveled roads, and the legislative proposal to stabilize payments to states.[56] In a letter the same day to all employees, the Chief urged employees to "discuss the agenda with your colleagues, your friends and your neighbors."[57]

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[52] See supra note 34.

[53] See supra note 28.

[54] Budget of the United States Government, Fiscal Year 1999, Feb. 2, 1998.

[55] NRE-BP-123; see also PSW-02.

[56] PSW-02.

[57] RMS-DB-03.

In another letter the same day to regional management officials, the Chief asked officials to "communicate this speech and the ideas presented by the agenda to as wide an audience as possible both inside and outside the agency."[58] He further stated that he was forwarding to them for their review the Communication Plan for the Natural Resource Agenda. He urged them to "look for opportunities to implement actions called for in the plan," and not to wait "for specific requests from Washington before taking action." Instead, he said they should "use the national plan as a guide for developing your own Regional, or Station communication effort around the agenda." According to an electronic mail report on a conference call between the Chief and regional officials concerning the rollout of the Natural Resource Agenda, the Chief told the officials "that he wants each of us to be proactive with the agenda. That includes working aggressively with employees, interest groups and congressionals to move the full agenda forward."[59]

Apparently, at least some regional officials took this message to heart. On March 20, 1998, the Huron-Manistee National Forest held a public "Friends of the Forest" meeting.[60] In attendance at this meeting were individuals from the Sierra Club, Georgia Pacific Corporation, and other groups, and members of the general public. The agenda, printed on Huron-Manistee National Forests letterhead, indicates that the meeting ran from 9:00 am to 3:30 pm and consisted of presentations by Forest Service personnel. From 1:30 to 2:00, a Forest Planner for the Forest Service discussed the "New Roads Policy." The detailed minutes of the meeting indicate that the new roads policy he discussed was the "Access America" ISTEA reauthorization initiative to fund maintenance of arterial and collector roads through the Highway Trust Fund. According to the minutes, the Forest Planner stated, in part:

> There are 86,000 miles of Forest Development arterial and collector roads that are…major access [sic] to the National Forests but don't make sense to be under State or County jurisdiction. Historically, these roads were constructed, reconstructed and maintained through a combination of roads appropriations and commodity production (timber sales, oil and gas mining, etc.).
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> An estimated 80% of the traffic on these arterial/collector roads is recreation oriented; the demand for recreation opportunities and the associate access is increasing dramatically and has been steadily since the 1950's. It is time to consider the Forest Service becoming a public road authority on the

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[58] PSW-02.

[59] RO9-A-04.

[60] R9-HM-2.

> arterial collector forest development roads that are, for all practical purposes, public roads. These roads should then be reconstructed with highway trust dollars.
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> The Forest Service estimates a deferred reconstruction backlog of $10.5 billion on existing arterial/collector forest development roads. It would take $375 million annually to begin working toward eliminating that backlog and move toward a safe, comfortable transportation system for the National Forest user.
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> This initiative is not maintenance needs assessment [sic]; it is a reconstruction needs issue. Maintenance needs are being addressed through annual appropriations. The FY 99 President's budget requests a 26% increase in road maintenance appropriations.

Also according to the minutes, a Forest Supervisor delivered the closing remarks. He stated, in part, "We need to communicate these issues not only locally but included [sic] Detroit, Grand Rapids and other downstate cities and keep the dialogue open…Let Congress know what our problems and solutions are. They need to know what is important to you. We will try to have more public forums." (Emphasis supplied.) The road funding initiatives were the only legislative proposals that were discussed in the meeting, according to the minutes, and therefore this exhortation to contact Congress must have referred to them.

This "Friends of the Forest" meeting was clearly an activity that would tend to promote public support for these road funding legislative proposals, as proscribed by section 303. Forest Service employees used appropriated funds, at the very least in terms of their salaries, to urge members of the public to inform Congress of Forest Service problems concerning road funding and the solutions proposed by the Forest Service--enactment of the Forest Service budget and amendment of the ISTEA reauthorization legislation to provide Highway Trust Funds for Forest Service roads.

Unlike the NEA case in which the NEA met with an interest group and discussed its general plans and policies,[61] the Forest Service went beyond merely providing information to encouraging participants to let "Congress know what our problems and solutions are." Also unlike the same NEA case in which an NEA official, as an incidental part of her presentation, responded in good faith to a question about what people could do to support the NEA,[62] the Friends of the Forest meeting was part of the overall effort set forth in the Communication Plan to gain support for the Forest

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[61] B-239856, April 29, 1991.

[62] Id.

Service Natural Resource Agenda, which included the road funding legislative proposals. As we have recently pointed out in testimony, section 303 not only prohibits grassroots lobbying of the sort engaged in here, but it reaches more broadly to restrict even implicit appeals.[63] Therefore, this explicit appeal to the public is certainly encompassed within the ambit of section 303 and therefore is a violation of that provision.

Efforts to Promote Payments to States Proposal

In addition to the Communication Plan prepared for the overall Natural Resource Agenda, a "Communication Plan for Reforming Forest Service Payments to States" was also prepared by the Forest Service Office of Communications on March 6, 1998.[64] This communication effort was to be part of and consistent with the overall Communication Plan. The goal of the Payments to States Communication Plan was to "have key audiences receive and understand the Forest Services' payment to states proposal, resulting in general support for the proposal." (Emphasis in original.) Objectives of the Plan included, among others:

1. Have each Forest Supervisor visit with their Commissioners/Supervisors and explain the effects this proposal will have upon that county.
2. Have interested Members of Congress, and their staffs, briefed and kept abreast of the status of the proposal.
3. Have key media outlets support the proposal, as indicated by supportive editorials.
4. Have key groups support the proposal.

With respect to its general approach, the Plan stated, "Although we will provide informational material for all interested parties, we will take extra steps to inform and involve key groups such as industry, elected county/state officials, and environmental groups." In this regard, the Plan stated that appropriate professional associations and interest groups such as the National Governors Association and the International Association of Fish and Wildlife Agencies would be identified and provided information on the proposal. Personal contacts, rather than fax or electronic mail, were to be used by Forest Service leaders who had relationships with the identified groups. Forest Service leaders were to "take every opportunity to meet with media,

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[63] H.R. 3078, The Federal Agency Anti-Lobbying Act , supra note 20; see also B-239856, April 29, 1991.

[64] WO-PA-KE-05.

local elected officials, employees, and interest groups to explain [the Natural Resource Agenda]. As appropriate, the payments proposal will be emphasized."

Finally, specifically with respect to the involvement of field personnel, the Plan noted that the Natural Resource Agenda contained a legislative proposal concerning stabilizing payments to states and that all employees had received a copy of the Chief's speech, which referenced the proposal. The Plan stated that regional leaders would also receive a briefing packet containing information on the payments to states proposal and a directive from Chief Dombeck detailing his expectations concerning sharing information on the proposal. Regional leaders, according to the Plan, would be expected to share payments to states information from the packet with their County Supervisors and then report to the Washington office on their contacts as well as concerns and support for the proposal. A Washington office employee would be designated "to continually assess support for the proposal."

On March 13, 1998, Chief Mike Dombeck sent the directive to regional leaders referred to in the Communication Plan concerning stabilizing payments to states.[65] It stated,

> On March 2, in the Forest Service Natural Resource Agenda, I stressed the need to work with Congress and local communities to provide stable and predictable payments to States…As many of you know, the Administration is proposing legislation to stabilize payments to States. I support this proposal and request you and your employees to assist me in sharing information with your internal and external customers.

The memorandum then listed a number of expectations the Chief had for the regional leaders, including:

1. Hold informational sessions with all employees by March 30.
2. Forest Supervisors or District Rangers must meet with and brief county commissioners or supervisors and school administrators to explain the proposal and get their concerns and key items of support by March 30.
3. Field units should seek opportunities to brief the media on the proposal.
4. Whoever you determine is the most effective contact should meet with and brief the governors' offices, State education associations, and State associations of counties by March 30.
5. Report back to Kevin Elliott (kelliott/wo) using the enclosure for summarizing your briefings by March 30.

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[65] WO-P+L-RS-13.

The enclosure referred to in the Chief's directive consisted of a form for regional personnel to list individuals contacted and whether they were supportive or opposed to the payments to states legislative proposal.

On the same day that Dombeck sent his directive to regional leaders concerning the payments to states proposal, the Washington official designated as the contact for the regional managers on the issue gave a speech in which he explained the reason regional officials were being urged to have this "dialogue" with county officials: "[without] the support of the local communities this proposal has limited success on Capital [sic] Hill."[66]

The documents produced by the Forest Service demonstrate that the Chief's directive was thoroughly implemented by field personnel. Literally hundreds of contacts were made by field staff and reported on the contact forms supplied to the field along with the Chief's directive, or otherwise documented.[67] Among the individuals and groups contacted were county commissioners and other county officials, school board officials, mayors and other city officials, governors, state legislators and other state officials, judges, Chambers of Commerce, education associations, the National Association of Counties and the Western Governors Association.[68]

The briefing packet sent to regional officials along with the Chief's directive listed the benefits of reforming Forest Service payments to states.[69] According to the briefing packet, these benefits included an overall funding increase for the payments and a stabilization of the funding levels so that payments used for public schools and roads would not be reduced as a result of declining revenue collections. The packet also pointed out that under the proposal counties would receive at least what they received in 1997 and that many counties would receive higher amounts.

The documents demonstrate that regional officials used this packet extensively to brief individuals contacted.[70] At least one region used this material to prepare individualized briefing information to show the benefits to that region of the reform the Forest Service was advocating.[71] The region-specific briefing material and

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[66] WO-PA-KE-86.

[67] See, e.g., WO-PA-KE-2--WO-PA-KE-81; WO-PA-KE-84.

[68] Id.

[69] See WO-PA-KE-13; WO-PA-KE-14.

[70] See, e.g., R4-8.

[71] R10-20.

material listing the overall benefits of the proposal were used by the regional officials in their contacts with eleven mayors in the region.[72]

In at least some cases, this effort appears to have had its intended effect of promoting support for the payments to states proposal. Regional staff for a Forest Service region encompassing several western states reported, among other things, that "many" of the individuals contacted "indicated they may contact their congressional delegation with their comments."[73] Similarly, a superintendent of the Baker County Schools in Florida who was contacted was reported to be "very excited; will make calls to local members of Congress to support."[74] In addition, a school superintendent in Mullan, Idaho wrote a letter to a Forest Supervisor in Idaho stating that he was very pleased to see the proposed legislation to stabilize payments to states and asking the Forest Supervisor to let him know if he could be of assistance "in promoting this legislation."[75] Further, an electronic mail message authored by a Department of Agriculture Assistant to the Under Secretary for Natural Resources and the Environment stated that the Alpine County Board of Supervisors in California had adopted a resolution supporting the payments to states proposal.[76] Another electronic mail message authored by the same individual concerning the payments to states issue noted that, "The field has been meeting with school boards and county officials to explain the provisions. Grassroots people are starting to get this issue into the media."[77]

We believe that this campaign to promote the payments to states legislative proposal violated section 303 of the Interior Department Appropriations Act.[78] The briefing packet used in the contacts was highly supportive of the payments to states proposal,

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[72] See R10-01; R10-10; R10-20.

[73] WO-PA-KE-54.

[74] WO-PA-KE-71.

[75] WO-PA-KE-81.

[76] NRE-BP-99

[77] NRE-BP-104.

[78] The campaign not only tended to promote public support for a legislative proposal, but it in fact did so, as demonstrated by the responses to the campaign noted above. While the fact that members of the public stated that they planned to contact Congress does not itself prove that violations occurred, it does demonstrate that the Forest Service was successful in its campaign.

as was the case in the NEA mass mailing decision.[79] The audience selected—public officials likely to be concerned about funds for schools—was one that would be particularly responsive to such a proposal. Moreover, as articulated repeatedly in the Communication Plan for the payments to states proposal, the goal of the campaign was to promote public support for the proposal, thus satisfying the intent factor we have often found significant in these cases. Indeed, this Forest Service effort was comprised of just the sort of "particularly egregious instances of agency lobbying through public information campaigns" that we have held violate the Interior Department Appropriations restriction.[80]

It is impossible to tell from the documents produced by the Forest Service how fully the overall Communication Plan for the Natural Resource Agenda was implemented. Concerns expressed by members of Congress about possible illegal lobbying activities by Forest Service employees may have discouraged some further planned activities. Handwritten notes of conference calls between the Washington office and the regions during the time period after members of Congress began expressing these concerns, on and after March 13, 1998,[81] indicate that the regions were being cautioned about lobbying.[82]

We believe that further implementation of the Communication Plan would likely have resulted in a number of violations of section 303 of the 1998 Interior Appropriations Act. As repeatedly stated in the Communication Plan, the wide range of activities planned to communicate the Agenda had the objective of obtaining public support for the Agenda, which of course included the three legislative proposals discussed above. Moreover, these three legislative proposals were not minor aspects of the Agenda; the majority of the documents produced by the Forest Service concerning implementation of the Agenda focused on one or all of these proposals.[83] Given the

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[79] 59 Comp. Gen. at 120.

[80] B-239856, April 29, 1991 (citing 59 Comp. Gen. 115 (1979)).

[81] See infra note 85 and accompanying text.

[82] See, e.g., E-VS-247 ("Appearance of Lobbying /Don't/Provide information"); E-VS-245 ("Field Don't initiate any more contacts @ this time/Respond to inquiries & requests"). (Emphasis in original.)

[83] In one of the documents, the Deputy Chief of Programs and Legislation was quoted as saying that "stabilizing payments is a key building block of the Chief's agenda." RO9-S+C-18. Moreover, an indication of the significance of these legislative proposals to the Forest Service is that draft legislation was submitted to Congress by it or by the USDA on both the road funding and payments to states proposals. As previously noted, the Department of Agriculture submitted draft legislation to Congress to stabilize payments to states on April 2, 1998. See supra note 37. The Forest Service

magnitude of the effort that was to be undertaken to satisfy the Communication Plan, it is highly likely that in addition to the violations described above, some of these other planned activities would have in fact tended to garner such support, in violation of section 303.

Indeed, in light of the large number of activities planned to implement the Agenda and the time and resources that would be required to investigate each action of every Forest Service employee pursuant to this plan, we have limited our analysis to the documents provided.[84] We believe that the documents themselves establish at least the two specific violations discussed above.

NEED FOR LOBBYING GUIDELINES

We have found no evidence that Forest Service employees were aware that they were violating the law and continued to take actions that they knew were wrong. Indeed, the evidence appears to us to be to the contrary. As far as we can determine, the topic of lobbying is not mentioned in any of the documents dated prior to the time that members of Congress first raised concerns regarding Forest Service communication plans or lobbying by Forest Service employees.[85] However, documents subsequent to that time suggest that employees should be careful not to lobby.[86] Unfortunately, several of these documents indicate a misunderstanding of what was (and still is) prohibited by the Interior Department Appropriations Act restriction.[87]

We have contacted USDA's Office of General Counsel, which has informed us that it had no guidelines concerning lobbying under section 303 during the events at issue here. Moreover, despite an April 9, 1998 letter from Chief Dombeck to Chairwoman

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also drafted and sent to Representative Peter DeFazio, in response to his March 11, 1998 request, an amendment to the ISTEA reauthorization legislation to achieve its goal with respect to that legislation. See E-VS-205; E-VS-376; E-VS-377.

[84] Thus, for example, we did not go beyond the documents to inquire into whether the Forest Service in fact engaged in planned activities that violated section 303 with respect to the media and interest groups.

[85] A March 13, 1998 letter from Chairman Don Young and Chairwoman Helen Chenoweth to Chief Dombeck appears to be the first letter to the Forest Service raising concerns about communication plans or lobbying. See E-VS-51.

[86] See supra note 82.

[87] See, e.g., RO9-30 (handwritten notes on March 20, 1998 conference call with regions concerning payments to states "in Pres. Budget therefore we aren't really lobbying").

Helen Chenoweth stating that the Forest Service was working with USDA's Office of General Counsel to develop such guidelines,[88] the Office of General Counsel informed us that it still has none.

CONCLUSION AND RECOMMENDATION

We have concluded that the expenditure of funds by the Forest Service for certain activities undertaken to implement a Communication Plan for the Forest Service Natural Resource Agenda violated section 303 of the 1998 Interior Department Appropriations Act. Specifically, these activities included (1) urging members of the public during a meeting to contact Congress in support of road funding initiatives in legislation and in the budget, and (2) a campaign to promote public support for a budget proposal seeking to change the way certain payments to states from Forest Service revenues are calculated.

We are sending a copy of our opinion to the Secretary of the Department of Agriculture, and we recommend that the Secretary develop guidelines on lobbying under section 303 and educate his employees concerning them so that future violations do not occur. We shared a draft of this opinion with the USDA's Office of General Counsel and made some changes to the opinion in response to their comments. An official from the USDA Office of General Counsel stated that the Office of General Counsel intended to follow our recommendation concerning the development and dissemination of guidelines.

Sincerely yours,

Robert P. Murphy
General Counsel

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[88] WO-PA-KE-82.

DIGEST

Expenditure of funds by the Forest Service for certain activities undertaken to implement a Forest Service Natural Resource Agenda Communication Plan violated section 303 of the 1998 Interior Department Appropriations Act. Activities included (1) urging members of the public during a meeting to contact Congress in support of road funding initiatives in legislation and in the budget, and (2) a campaign to promote public support for a budget proposal seeking to change the way certain payments to states from Forest Service revenues are calculated.