

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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MARILYN KEEPSEAGLE, et al.,		)
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Plaintiffs,		)
		)
v.	)	Civil Action No. 99-3119 (EGS)
	)	
TOM VILSACK, Secretary, U.S.		)
Department of Agriculture,		)
		)
USDA.		)
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MEMORANDUM OPINION

Pending before the Court are Class Counsel’s recommendations for the initial distribution of *cy pres* funds pursuant to the Addendum to the Settlement Agreement (“Addendum”). On April 20, 2016, this Court granted the plaintiffs’ motion to modify the Settlement Agreement, thereby approving the proposed Addendum. *Keepseagle, et al., v. Vilsack*, 2016 WL 9455764, Civil Action No. 99-3119 (D.D.C. Apr. 20, 2016), *aff’d*, 856 F.3d 1039 (D.C.Cir. 2017), *cert. denied*, 138 S.Ct. 1345 (2018)(No. 17-807). Among other things, the Addendum provides for awards to Initial *Cy Pres* Beneficiaries in the aggregate of \$38,000,000.00 upon recommendation by Class Counsel and approval by this Court. Addendum, ECF No. 824-2 at 5.

“Initial *Cy Pres* Beneficiaries” are defined as:

Any non-profit organization that (i) has provided business assistance, agricultural

education, technical support, or advocacy services to Native American farmers or ranchers between January 1, 1981 and November 1, 2020 to support and promote their continued engagement in agriculture, (ii) is either a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code ("Code"); educational organization described in Section 170(b)(1)(A)(ii) of the Code; or an instrumentality of a state or federally recognized tribe, including a non-profit organization chartered under the tribal law of a state or federally recognized tribe, that furnishes assistance designed to further Native American farming or ranching activities, provided, however, that the use of any grant funds by such grant recipient shall be restricted exclusively to charitable and educational purposes described in Section 170(c)(2)(B) of the Code; and (iii) is proposed by Class Counsel and approved by the Court.

*Id.* The Addendum further provides that the awards shall be: (1) "for the benefit of Native American farmers and ranchers"; and (2) "may not be used for litigation, lobbying, or political activity as those terms are defined by the Internal Revenue Code." *Id.*

Class Counsel recommends initial *cy pres* awards to thirty-four (34) beneficiaries in amounts ranging from \$145,637.00 to \$9,031,000.00. Class Counsel's Recommendations Regarding *Cy Pres* Distribution, ECF No. 883; Notice of Filing, ECF No. 907-1. The defendant United States Department of Agriculture ("USDA") objects to Class Counsel's recommendations only as to two proposed beneficiaries. Upon consideration of the parties'

submissions, the applicable law, and pursuant to the Addendum, the Court **APPROVES**, with one modification, Class Counsel's recommendations for the reasons set forth below.

The Court unsealed Class Counsel's recommendations on April 17, 2018 following the Supreme Court's denial of the petitions for certiorari and the USDA moved to file a response to the recommendations. Class Counsel stated that although the Addendum did not provide for a role for the USDA in the recommendation and approval process, they did not object to the USDA's request to brief the issue. Status Report, ECF No. 898. Thereafter, the Court granted the USDA's motion to have the benefit of its scrutiny of the recommendations.

The USDA objects to two of the proposed recipients, and to one use of the award by one of those recipients.<sup>1</sup> First, the USDA objects to the recommended award of \$692,213.00 to Farmer's Legal Action Group (FLAG) because: (1) Sarah Vogel, Class Co-Council, has served on the FLAG Board, and because class counsel played a role in determining which entities would be recommended

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<sup>1</sup>The USDA also notes that if this settlement were proposed to the Department of Justice (DOJ) today it would not be approved pursuant to new departmental policy regarding *cy pres* provisions and discusses the policy concerns that lead to this new policy. Response to Class Counsel's Recommendations, ECF No. 901 at 2-3, 6-9. However, and as class counsel point out, the USDA entered into the settlement agreement willingly. Furthermore, a DOJ policy change pursuant to which the agreement would not be entered into today does not provide grounds for rejecting Class Counsel's recommendations.

to the Court for an award of the funds, this creates "the appearance of a potential conflict of interest;" (2) the person nominated to be the Executive Director of the Trust<sup>2</sup>, Janie Hipp, served on the board of FLAG at the time the recommendation was made and so the recommended award to FLAG "could appear to be an effort by the Advisory Committee Members to curry favor with" the Executive Director of the Trust; and (3) since FLAG intends to use the award to fund the drafting of legislation, this raises the concern that FLAG may intend to use funds for lobbying purposes in violation of the Addendum. Response to Class Counsel's Recommendations, ECF No. 901 at 9-11; Defendant's Response to Class Counsel's Revised Recommendation, ECF No. 905 at 2.<sup>3</sup>

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<sup>2</sup>The Addendum also created a Trust to be endowed by the remaining funds - about \$265 million or 70% of the *cy pres* funds available - which would distribute the funds over a period not to exceed 20 years. On May 1, 2018, the Court appointed Ms. Hipp to serve as the Executive Director of the Trust.

<sup>3</sup>In a footnote, the USDA suggests that the Court also scrutinize for possible violations of the Addendum's prohibition on lobbying the awards to Farm Aid for "advocacy training" and to the National Congress of American Indians to "ensure that the design of federal programs permits Native farmers and ranchers to reap the full benefits." *Id.* at 11 n.3. The USDA provides no argument in support of why these uses of the funds would violate the prohibition on lobbying. The award to Farm Aid will be used to, among other things, provide advocacy training to Native American farmers and ranchers to ensure that their "voices . . . are heard when farm policy is being made." Class Counsel's Recommendations Regarding *Cy Pres* Distribution, ECF No. 883 at 30. The Court finds that since the funds are not being used for direct advocacy in support of particular legislation, but for advocacy training, there is no violation on the prohibition on

Second, the USDA objects to the recommended award of \$317,545.00 to the Shoshone-Bannock Tribes because Mark Wadsworth, a member of the Advisory Committee that helped class counsel devise recommendations for the initial *cy pres* beneficiaries, works there as a Range Manager. Response to Class Counsel's Recommendations, ECF No. 901 at 11. The USDA acknowledges that Class Counsel state that Mr. Wadsworth played no role in the review of this request, but nonetheless objects because "it is not unreasonable to believe that other Committee Members could have approved an award to Shoshone-Bannock Tribes in an effort to please the Advisory Committee member affiliated with them and thereby secure his vote for an entity that they favored." *Id.* at 11-12.

Class Counsel respond that, as an initial matter, they adopted a careful process to select beneficiaries that included the following steps:

- (1) outreach efforts to invite organizations to submit proposals for funding;
- (2) recruitment of an Advisory Committee, identified to the Court in briefs well in advance of the process, which included individuals with relevant expertise in philanthropy, Native American non-profit

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influencing legislation. See *infra* at 9. Similarly, the Court finds that the award to the National Congress of American Indians to produce reports designed to help "ensure that the design of federal programs permits Native farmers and ranchers to reap the full benefits," Class Counsel's Recommendations, ECF No. 883 at 24, does not amount to influencing legislation. See *infra* at 9.

organizations, and the needs of Native Americans involved in agriculture; (3) adoption of a conflict of interest policy; (4) review of every initial letter of inquiry by three different raters (one class counsel, one Native American farmer or rancher, one person with philanthropic expertise); (5) review of every full application by the entire Advisory Committee and three members of the class counsel team; and (6) a two-day in person meeting to make the final determinations.

Response to USDA's Comments, ECF No. 902 at 2 (citing Class Counsel's Recommendations Regarding *Cy Pres* Distribution, ECF No. 883 at 2-7). Class Counsel concludes that this process "bears no resemblance . . . to *cy pres* distributions in other cases in which class counsel simply recommended distribution of funds to their favorite personal charities." *Id.*

The Advisory Committee consisted of the following individuals: (1) Claryca Mandan; (2) Porter Holder; (3) Mark Wadsworth; (4) Carly Hare; and (5) Gary Cunningham. Class Counsel's Recommendations Regarding *Cy Pres* Distribution, ECF No. 883 at 3 n.1. Each member of the Advisory Committee as well as other individuals involved in selecting the beneficiaries - Class Counsel and Class Counsel's consultant - agreed to be bound by a conflict of interest policy, which: (1) prohibited them from accepting gifts or favors from any entity seeking to be an initial *cy pres* beneficiary; (2) prohibited them from providing assistance, including writing or other services, to

assist a specific beneficiary obtain funds; (3) required disclosures regarding affiliations that would cause a conflict of interest; (4) required recusal from considering an application where a conflict exists; and (5) required them to agree to not seek to influence other Advisory Committee Member's votes on applications for which a member is recused. *Id.*, Ex. 4. Class Counsel state that "[g]iven the relatively small number of individuals who have the relevant expertise" in deciding who to recommend as beneficiaries, it adopted the conflict of interest policy at the outset and followed it scrupulously. Response to USDA's Comments, ECF No. 902 at 2-3.

In response to the USDA's specific objections regarding conflicts of interest, Class Counsel state that Class Co-Counsel Sarah Vogel served on FLAG's Board of Directors twice, with the most recent service ending in June 2014 and so "there was no conflict to disclose by the time the cy pres proposal process took place in 2016." *Id.* at 3. In her Declaration, Ms. Vogel states that she served as a voluntary board member from September 9, 1997 through October 8, 2008, and from October 2011 to June 25, 2014. *Id.*, Ex. 1. The USDA does not contend that Ms. Vogel violated the conflict of interest policy, nor could it because the policy required the disclosure, among other things, of a current position as a director for an entity that could apply for funds. Class Counsel's Recommendations Regarding Cy

*Pres* Distribution, ECF No. 883, Ex. 4. Furthermore, the USDA does not object to the terms of the conflict of interest policy itself. See generally Response to Class Counsel's Recommendations, ECF No. 901. Accordingly, the Court finds USDA's objection to the award to FLAG on this ground to be without merit.

Second, with regard to the USDA's objection to the award to FLAG because Janie Hipp, the Executive Director of the Trust, served on FLAG's board, Class Counsel point out that Executive Director Hipp was not involved in "the review or selection of the organizations recommended for *cy pres* funding." *Id.* at 3. In response to the USDA's theory that the recommended award to FLAG "could appear to be an effort . . . to curry favor with" the Executive Director, Class Counsel point out that two Advisory Committee members are also Trustees for the Trust, therefore, Ms. Hipp works for them, and of the remaining Advisory Committee members, only one is associated with an entity that could apply for funding from the Trust. *Id.* at 4-5. The Court finds that since Ms. Hipp was not a member of the Advisory Committee nor was she otherwise involved in deciding which initial *cy pres* beneficiaries to recommend to the Court, the USDA's objection to the award to FLAG on the ground that Ms. Hipp served as a board member is without merit. The Court also rejects the USDA's

tortured theory that the recommended award to FLAG could result in favoritism in the future.

Finally, with regard to the USDA's objection to the recommended award to the Shoshone-Bannock Tribes because Mark Wadsworth, a member of the Advisory Committee, works there as a Range Manager, Class Counsel respond that this conflict was disclosed and Mr. Wadsworth was recused from considering the application. *Id.* at 5. Class Counsel further respond that: (1) there is no foundation to the USDA's speculation that the conflict of interest policy was violated by vote trading; (2) the USDA itself has three times selected Mr. Wadsworth to serve on its Council for Native American Farming and Ranching, thereby demonstrating its confidence in him; and (3) the USDA does not object to the merits of the award, noting that if the award had been improperly approved, there should be something unworthy about the proposal. *Id.* at 4-5. The Court finds that the USDA's pure speculation that there could have been a violation of the conflict of interest policy agreed to by Mr. Wadsworth to be without merit. Accordingly, its objection to the recommended award to FLAG on this ground is without merit.

In response to the USDA's objection to the award to FLAG on the ground that FLAG may use the award for lobbying because the uses of the award includes "drafting legislation," Class Counsel respond that drafting legislation does not amount to lobbying

because it does not have to include "influencing legislation." *Id.* at 6. Class Counsel further state that it is their "understanding" that FLAG would "apply its expertise to drafting legislation," but would not communicate with members of the public to seek their support, nor would it "communicate with any member of a legislative body or government official or employee involved in formulating legislation." *Id.* at 6-7. Class Counsel proposes that, if the Court disagrees, the award to FLAG bar the use of the funds for drafting legislation. *Id.* at 7.

The Court finds that the USDA's objections to the use of the funds for drafting legislation to have merit. The Addendum prohibits the use of award funds "for litigation, lobbying, or political activity as those terms are defined by the Internal Revenue Code." Addendum, ECF No. 824-2 at 5. The Internal Revenue Code defines lobbying as "influencing legislation," which in turn means: (1) "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and;" (2) "any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation." 26 U.S.C. § 501(h)(2)(A), 26 U.S.C. § 4911(d). In view of the broad reach of this language, the very drafting of legislation by an entity

with the requisite expertise could amount to an attempt to influence legislation by affecting the opinions of the persons who would advocate for its adoption. Therefore, the Court will accept Class Counsel's proposal and order that the grant to FLAG not be used for drafting legislation.

In sum, Class Counsel used a comprehensive process to ensure that the recommended Initial *Cy Pres* Beneficiaries are free from conflicts of interest and that the recommendations are consistent with the terms of the Addendum. The Court has considered and addressed the USDA's objections arising out of its scrutiny of the recommended recipients and the merits of each grant. Accordingly, the Court **APPROVES**, with one modification, Class Counsel's Recommendations Regarding *Cy Pres* Distribution Pursuant to the Addendum to the Settlement Agreement. An appropriate order accompanies this Memorandum Opinion.

**SO ORDERED.**

**Signed: Emmet G. Sullivan**  
**United States District Judge**  
**July 19, 2018**