

January 4, 2013

Mark Tillemans, Supervisor Elect  
Inyo County - District 4  
P.O. Box 612  
Big Pine, CA 93513

Re: Your Request for Advice  
**Our File No. A-12-179**

Dear Mr. Tillemans:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Because the Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this advice is based solely on the facts presented.

Please note that the Commission does not provide advice on legal requirements imposed outside the confines of the Act. Thus, we offer no opinion on the application of other conflict-of-interest laws that may apply, such as common law conflict of interest and Government Code Section 1090.

### QUESTION

Does the Act prohibit you from making, participating in making, or influencing the outcome of a governmental decision before the Board of Supervisors concerning an encroachment permit sought by your employer, Big Pine Paiute Tribe of the Owens Valley (the "Tribe")?

### CONCLUSION

Yes. Because you have economic interests in the Tribe that are directly involved in the upcoming governmental decision, you may not make, participate in making, or influence the

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

decision unless you determine that there will be no reasonably foreseeable material financial effects on any economic interests you may have.

### **FACTS**

You were recently elected to the Inyo County Board of Supervisors and will be sworn in on January 7, 2013. Prior to the election, you worked for the Tribe in two capacities: for the first three years, you ran the Education Department and for the last two years you were the General Manager for the Tribe's Economic Development Corporation. You have been responsible for such things as running a job training program for both youth and adults, managing a fitness center, leasing buildings in the Tribe's commercial park, providing entrepreneurship training and the development of a full service travel plaza.

You plan to continue working in your current position as General Manager while serving as a member of the Inyo County Board of Supervisors.<sup>2</sup> As General Manager, you will continue to assist in the development of the travel plaza project. With respect to that project, the Tribe intends to seek an encroachment permit from the County in the near future, which will require a decision by the Board of Supervisors. You will not receive any bonuses for successful completion of that project, nor will you be involved in any of the contract negotiations.

### **ANALYSIS**

The Act's conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.) Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official's economic interests.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

As a member of the Inyo County Board of Supervisors who would be called upon to vote on an encroachment permit for the Tribe, you are a public official who would be making a

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<sup>2</sup> Because the conflict-of-interest provisions of the Act are "decision" based, the mere fact that you, in your private capacity, continue to work as General Manager for the Tribe is not prohibited by the Act (although other laws outside the Act may apply).

governmental decision.<sup>3</sup> You would therefore meet steps one and two, and the remaining steps are analyzed below.

### **Step Three: What are your economic interests?**

As mentioned, a public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.) The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).)
- An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$440 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule. (Section 87103, Regulation 18703.5.)

According to your letter, you are currently the General Manager for the Tribe's Economic Development Corporation. As a result, you have an economic interest in Tribe as a business entity as well as a source of income.<sup>4</sup>

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<sup>3</sup> Please note, if public officials specified in Section 87200 (including county supervisors) have a conflict of interest in an agenda item noticed at a public meeting, then he or she must: (1) publicly identify the financial interest immediately prior to discussion of the item, as detailed in Regulation 18702.5(b); (2) recuse himself or herself from discussing, voting on, or otherwise influencing the matter; and (3) leave the room until after the discussion, vote, or conclusion of any other disposition of the matter. (Section 87105.) Special rules for closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests are discussed in Regulation 18702.5(c) and (d).

<sup>4</sup> This assumes that you have received income totaling \$500.00 or more from the Tribe in the prior 12 months.

In addition, a public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.) You have provided no facts suggesting the personal financial effects rule would apply to your circumstances<sup>5</sup> and we will not discuss it further.

**Step Four: Are your economic interests directly or indirectly involved in the decision?**

*Business Interests and Sources of Income* – Regulation 18704.1(a) states that a person, including business entities and sources of income, is directly involved in a decision before the official's agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Based on the facts provided, your economic interests in the tribe as a business entity and source of income would be *directly* involved in the decision because the Tribe would be the subject of the governmental decision involving an encroachment permit.

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interests?**

1. *Materiality*

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is “material.” (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Any financial effect on a business entity that is directly involved in a governmental decision is presumed to be “material.” (See Regulation 18705.1(b)(1).) In addition, any financial effect on a source of income that is directly involved in a governmental decision is deemed “material.” (Regulation 18705.3(a).) The size of a financial effect on a directly

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<sup>5</sup> This is especially true given your statement that you will not receive any type of bonus from the Tribe based on a successful outcome concerning the permit.

involved business entity or source of income does not matter. If there is any financial effect at all, even “one-penny,” that effect is presumed to be material.

In addition to the materiality standard for a source of income as described above, there is a special rule for materiality that applies in cases where there is a “nexus” between duties owed to a source of income and to the official’s public agency. When a public official is paid by another entity to accomplish some action that is within the official’s public decision-making authority, any financial effect on the source of income is presumed material, *regardless of whether the source of income is directly involved or indirectly involved*. The “nexus test” is set out at Regulation 18705.3(c):

“(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the private employer is benefiting from the actions of the employee in his or her official capacity. (*Yarnell* Advice Letter, No. A-00-161.) Typically, a “nexus” is found in situations where the official is also a high-level employee with direct influence and control over his or her employer’s management or policy decisions. (*Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-305.) It stands to reason that your position as General Manager of the Tribe’s Economic Development Corporation provides you with influence and control over management or policy decisions. Assuming this is the case, *any* financial effect on the Tribe resulting from the permit decision of the Board of Supervisors would require you to disqualify yourself from that decision.<sup>6</sup>

## 2. Foreseeability

As noted above, the Commission does not act as a finder of fact in its advice letters. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (See *In re Thorner* (1975) 1 FPPC Ops. 198.) Because determination of the foreseeability of material financial effects is an unavoidably factual question, we must leave this ultimate determination to the public official and his or her counsel. A material financial effect on an economic interest

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<sup>6</sup> Please note that Regulation 18705(c) provides the following exception:

“Special Rules. Notwithstanding 2 Cal. Code Regs. sections 18705.1 through 18705.5, inclusive, an official does not have to disqualify himself or herself from a governmental decision if: Although a conflict of interest would otherwise exist under 2 Cal. Code Regs. sections 18705.1 through 18705.5, inclusive, and 18706, the decision will have no financial effect on the person or business entity who appears before the official . . . .”

need not be certain or even substantially likely to be “reasonably foreseeable,” but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.) It does appear, however, that, except for purely ministerial acts, any decisions by the Board of Supervisors on the Tribe’s encroachment permit application for the travel plaza project would foreseeably have some financial impact on the Tribe.

### **Steps Seven and Eight: Public Generally & Legally Required Participation**

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official’s economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be unable to take any action due to the absence of a voting quorum. (Section 87101; Regulation 18708.)

You have not provided any facts to suggest that either of these exceptions would apply to your particular situation. Thus, we will not address these issues further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Jack Woodside  
Senior Counsel, Legal Division

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