

September 17, 2013

Sarah Carrillo
Tuolumne County Counsel
2 South Green Street
Sonora, CA 95370

Re: Your Request for Advice
Our File No. A-13-125

Dear Ms. Carrillo:

This letter responds to your request for advice on behalf of Tuolumne County Supervisor Sherri Brennan regarding her responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ In addition, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Section 1090.

QUESTION

Will Supervisor Brennan have a conflict of interest if she participates in discussions, deliberations, and possible actions by the Board of Supervisors regarding the county's position on the U.S. Fish and Wildlife Service's proposal to list the Sierra Nevada yellow-legged frog, as well as the northern distinct population segment of the mountain yellow-legged frog as endangered and to list the Yosemite Toad as threatened under the Endangered Species Act?

CONCLUSION

With regard to the supervisor's livestock business, it does not appear that the decision in question will have a foreseeable and material financial effect on the supervisor's livestock business. With regard to her interest in the grazing permit, this might be considered an interest in real property. However, since the supervisor's payments for the permit are not \$2,000 or more annually, she does not have a potentially disqualifying leasehold interest in real property as

¹ 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.

contemplated by the Act. Therefore, the supervisor does not have a conflict of interest within the meaning of the Act based on a real property interest.

FACTS

Supervisor Brennan is a member of the Tuolumne County Board of Supervisors. In her personal capacity, Supervisor Brennan and her family own livestock. Supervisor Brennan and her family hold three livestock grazing permits with the United States Forest Service (“Forest Service”) on lands within Tuolumne County. These allotments are all located in the Stanislaus National Forest. The allotment permits held by are 10-year rolling permits and each has a defined geographic area with a maximum number of cow/calf pairs allowed. Supervisor Brennan pays the Forest Service on an annual basis for the permits based on the number of animals entering each allotment.

The U.S. Department of Fish and Wildlife (“Fish and Wildlife”) is considering a proposed rule to list the Sierra Nevada yellow-legged frog, as well as the northern distinct population segment of the mountain yellow-legged frog as endangered and to list the Yosemite Toad as threatened under the Endangered Species Act. According to the Fish and Wildlife website, when Fish and Wildlife proposes a listing under the Endangered Species Act, they are required to consider “whether there are geographic areas that are essential to conserve the species,” or critical habitats.

“Critical habitat is the specific areas within the geographic area, occupied by the species at the time it was listed, that contain the physical or biological features that are essential to the conservation of endangered and threatened species and that may need special management or protection. Critical habitat may also include areas that were not occupied by the species at the time of listing but are essential to its conservation.” (*Critical Habitat. What is it?* (September 2011) Fish & Wildlife Service Endangered Species Program.) The document goes on to say:

- “Critical habitat designations affect only Federal agency actions or federally funded or permitted activities. Critical habitat designations do not affect activities by private landowners if there is no Federal ‘nexus’—that is, no Federal funding or authorization. Federal agencies are required to avoid ‘destruction’ or ‘adverse modification’ of designated critical habitat.”
- **“What provisions of the Endangered Species Act relate to critical habitat?** To protect endangered and threatened species, the Endangered Species Act makes unlawful a range of activities involving such species without a permit for purposes consistent with conservation goals of the Act. These activities include take, import, export, and interstate or foreign commerce. ‘Take’ includes kill, harm, harass, pursue, hunt, capture, or collect or to attempt to engage in any such conduct.”
- **“What is the purpose of designating critical habitat?** Designating areas as critical habitat does not establish a refuge or sanctuary for a species. Critical habitat is a tool to guide Federal agencies in fulfilling their conservation responsibilities by requiring them to consult

with the Fish and Wildlife Service if their actions may ‘destroy or adversely modify’ critical habitat for listed species.”

- **“Does a critical habitat designation affect all activities that occur within the designated area?** No. Only activities that involve a Federal permit, license, or funding, and are likely to destroy or adversely modify critical habitat will be affected. If this is the case, [Fish and Wildlife] will work with the Federal agency and landowners—including private landowners—to amend their project to enable it to proceed without adversely affecting critical habitat.”

On October 15, 2013, the Tuolumne County Board of Supervisors is planning to consider a comment to the Fish and Wildlife concerning the effect of the federal decision to list the Sierra Nevada Yellow-Legged Frog, the Mountain Yellow-Legged Frog as endangered and to list the Yosemite Toad as threatened under the Endangered Species Act on the county. Additionally, the county will comment on the proposed rule to designate critical habitat to protect the aforementioned species. The deadline for submission of comments is November 18, 2013. Supervisor Brennan would like to know if she might participate in this item despite holding a livestock-grazing permit on land wherein the Yosemite Toad is located.

Eagle Meadows is one of Supervisor Brennan’s allotments and has the critical toad habitat on it, but pursuant to the existing allotment permit conditions, Supervisor Brennan’s cattle are not allowed to graze in the habitat area. The habitat area is approximately 10 acres out of 16,000 acres of the total allotment size. The 10-acre habitat area is required to be fenced so that the cattle cannot access it. You noted that in regards to Supervisor Brennan’s allotment, at this time, there is no indication she would be impacted by the proposed rule given the conditions of her allotment permits.

The Board of Supervisor’s is expected to comment on how the proposed rule would impact the county and its residents in relation to timber harvesting, recreational use, tourism, and livestock grazing. The county is concerned that some (unknown at this time) conservation measures may negatively impact the county’s economy and its residents. However, such conservation measures have not been set forth by Fish and Wildlife at this time.

On September 11, 2013, you provided the following additional facts:

- The allotment permit for Eagle Meadow is a ten-year rolling permit, but each year the Brennan’s and the Forest Service meet and develop an annual operating plan. At that time, a bill for the permit is created.
- For 2013, the amount the Brennan’s paid to the Forest Service for the use of Eagle Meadow was \$619.65. This amount was calculated using a formula based on animal unit month (AUM), which is one cow and one calf less than six months of age. They are allowed up to 150 AUM during the three-month season. They are also assessed possessory property interest and pay taxes on it.

- The allotment is seasonal and applies three months out of the year. During off-season, the Brennan's only have access to the area by permission of the Forest Service.
- A management area exists which includes a corral, cabin and barn. The permittee's are required to maintain the cabin, barn, fencing and other areas as set forth in the permit.
- The allotment permit has terms and conditions, which can be modified each year at the Forest Service's discretion. The permit is not allowed to be transferred or sold. Only the Forest Service can issue permits. Additionally, if the Brennan or any other permittee violates the terms and conditions of the permit, the Forest Service can be revoked.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using her or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step analysis for determining whether an official has a disqualifying conflict of interest. (Regulation 18700(b).)

Steps 1 and 2: Is the Supervisor a public official who will be making, participating in making, or influencing a governmental decision?

Section 82048 of the Act defines a public official as "every member, officer, employee or consultant of a state or local government agency." As a member of the Tuolumne County Board of Supervisors, Supervisor Brennan is a public official. Consequently, she may not make, participate in making, or otherwise use her official position to influence any governmental decision that will have a reasonably foreseeable material financial effect on any economic interest she may have.

A public official "participates in making" a governmental decision when the official advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision. (Section 18702.2.)

As a member of the Board of Supervisors, Supervisor Brennan will be participating in discussions regarding whether the U.S. Fish and Wildlife Service should list the Sierra Nevada yellow-legged frog, as well as the northern distinct population segment of the mountain yellow-legged frog as endangered and to list the Yosemite Toad as threatened under the Endangered Species Act. Supervisor Brennan will be called upon to consider whether the County should

support or oppose such a designation. Supervisor Brennan would therefore be making, participating in making, or using her official position to influence a governmental decision.²

Step 3: The Supervisor's relevant interests.

The Act's conflict-of-interest provisions apply to an official's interests as set forth in Section 87103. (Regulations 18703 - 18703.5.) The interests relevant to your question are:

1. An investment interest in, and position with, a business entity in which the public official has a direct or indirect investment worth \$2,000 or more. (Section 87103(b); Regulation 18703.1(a).)

A "business entity" under the Act is broadly defined as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association." (Section 82005.)

2. An interest in real property in which the public official has a direct or indirect investment worth \$2,000 or more in fair market value. (Section 87103(b); Regulation 18703.2(a).)

Under some circumstances, a leasehold is considered an "interest in real property" for purposes of the Act. (Section 82033.) Section 82033 defines an "interest in real property" to include any leasehold interest owned directly, indirectly or beneficially by the public official, if the fair market value of the interest is \$2,000 or more. Regulation 18729(b) provides that the value of a leasehold interest is the amount of rent owed during a 12-month period.

According to your facts, Supervisor Brennan's total annual cost of the lease in 2013 was \$619.65. While based on the formula used to determine the cost of the permit, this amount may change, it does not currently meet the \$2,000 threshold necessary to qualify as an interest in real property under the Act, and therefore cannot be the basis for a conflict of interest.

Step 4: Will the Supervisor's business interest be directly or indirectly involved in the governmental decision?

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly or indirectly involved in the governmental decision. (Regulation 18704(a).) For governmental decisions that affect business entities, the standards set forth in regulation 18704.1 apply. Regulations 18704.1 states:

² In addition, county supervisors must comply with Section 87105 and Regulation 18702.5. These sections require that immediately prior to the discussion of the item, the officials: (1) orally identify each type of interest involved in the decision as well as details of the interest, as discussed in regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

“(a) A person, including business entities, sources of income . . . is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the proceeding 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.”

Since Supervisor Brennan’s livestock business did not initiate the proceedings in question at the county or by the Fish and Wildlife, nor is it the subject of the proceedings, her business is indirectly involved.

Steps 5 and 6: What materiality standard applies and is it reasonably foreseeable that the materiality standard will be met?

Once the degree of involvement is determined, Step 5 of the conflict of interest analysis addresses the applicable materiality standard. Under Regulation 18705.1(c)(4), the financial effect of a governmental decision on a business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the value of the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

For a material financial effect on an official’s interest to be foreseeable, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Eagle Meadows, one of Supervisor Brennan’s allotments, has the critical toad habitat on it. You note that currently the toads are contained on 10 acres out on the 16,000 acres of the Eagle Meadow’s allotment. Pursuant to the existing allotment permit conditions, Supervisor Brennan’s cattle are not allowed to graze in the habitat area. In fact, the 10-acre habitat area is required to be fenced so that the cattle cannot access it.

Thus, at this time, it appears a decision to list or not to list the Yosemite Toad as threatened under the Endangered Species Act would not have a financial effect on the supervisor's livestock business. Since, it is not reasonably foreseeable that the decision will affect the supervisor's livestock business in a material manner, the business will not be the basis for a conflict of interest.

We note that a recent University of California study found no direct correlation between the intensity of cattle use and toad occupancy of meadows during any portion of the grazing season (early, mid, late). The report found that the toad presence is driven by meadow wetness (hydrology), rather than cattle utilization. (*Final Report -- Determining the Effects of Livestock Grazing on Yosemite Toads (Bufo canorus) and Their Habitat* by the University of California Berkeley: Barbara Allen-Diaz, Susan McIlroy; University of California Davis: Kenneth Tate, Leslie Roche; USFS Pacific Southwest Research Station: Amy Lind.) Based on these results, it would appear that impacts on the supervisor's business are even more unlikely.

The analysis may change in the future. For example, the decision to list the Yosemite Toad as threatened under the Endangered Species Act may result in modification or limitations on grazing on Forest Service properties. You should contact us for further advice if new facts arise.³

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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³ Your facts do not suggest that analysis of the final two steps of the standard analysis is necessary. Steps 7 and 8 provide exceptions to the conflict-of-interest rules. Under step 7, even if an official has a conflict of interest, disqualification will not be required if the governmental decision affects the public official's interests in a manner that is indistinguishable from the decision's effect on 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. (Section 87101; Regulation 18708.)