



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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July 1, 2015

Graham St. Michel  
Staff Counsel  
Department of Conservation  
801 K Street  
Sacramento, CA 95814

Re: Your Request for Informal Assistance  
**Our File No. I-15-098**

Dear Mr. St. Michel:

This letter responds to your request for advice on behalf of Brandon Badeker and Paul Fry, Engineering Geologists with Office of Mine Reclamation in the Department of Conservation (“OMR”), regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup>

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest, Section 1090 or your agency’s incompatible activities statement. Because your questions are general in nature and not about specific decisions, we are treating your request as one for informal assistance.<sup>2</sup>

### FACTS

Mr. Badeker and Mr. Fry (the “officials”) have both reported an interest in the same 120-acre federal mining claim. After learning of their interests, OMR prepared a May 27, 2015 legal memorandum analyzing the officials’ interest in their federal mining claim and possible impacts on their performance of their duties at OMR. You have asked for the FPPC’s review and feedback regarding the analysis and conclusions set forth in the memorandum.

The officials are both Engineering Geologists with OMR. Mr. Fry began working for OMR in September 2013, while Mr. Badeker was hired on June 9, 2014. Their duties and responsibilities as Engineering Geologists are similar. Both evaluate local lead agency (county, city and other local entities) and mining operator compliance with California’s Surface Mining and Reclamation Act (SMARA). Under SMARA, local governments have primary permitting and direct regulatory

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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.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

authority over mining operations, while OMR provides technical assistance and serves as a backstop for mining oversight and enforcement.

As Engineering Geologists, the officials are assigned to specific geographical areas. Mr. Badeker's work is generally confined to Colusa, San Joaquin, Sonoma, Tehama, Humboldt, Madera, Mendocino, and San Luis Obispo counties and Mr. Fry's work is generally confined to Imperial, Inyo and San Bernardino counties. Neither of the officials has within their assigned areas the site on which their mining claim exists.

Within their respective assignments, the officials review lead agency reports and documents submitted to lead agencies, review annual mining operator reports, perform site inspections, assist lead agencies in maintaining compliance, recommend enforcement and assessment of penalties, take compliance action when necessary (issuing violation notices and/or orders to comply), and appear before the State Mining and Geology Board when necessary.

Additionally, the officials review county-approved reclamation plans to ensure compliance with SMARA. This includes performing field inspections to observe engineering conditions (e.g., slope stability, erosion and draining conditions), as well as evaluating the adequacy of financial holdings to achieve reclamation of the mine sites. To a lesser extent, the officials may be involved in researching and developing policy recommendations.

*Personal Interests:* The officials each report having a one-third interest in the same 120-acre federal placer mining claim (CAMC#0295377)<sup>3</sup> on U.S. Forest Service-managed land in Placer and El Dorado counties, California. The officials report the claim as an interest in real property with a fair market value of \$2,000 to \$10,000. They have reported this interest on several Form 700s (with the earliest disclosure made on Mr. Fry's October 2013 assuming office statement). The officials stated they do not know with any certainty the fair market value of their mining claim. Given the current lack of development and use as a recreational mining site, the officials expressed doubt that the total value of their respective interests would be valued at \$2,000.

At this time, the mining claim is not subject to OMR regulation under SMARA.<sup>4</sup> Moreover, neither official has stated an interest in developing the claim to any degree that would trigger a

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<sup>3</sup> A federal mining claim is associated with a parcel of land for which the claimant has asserted a right of possession and the right to develop and extract mineral resources. A placer claim covers the right to extract mineral deposits not located in veins or rock-in place. Mining claims are unpatented, meaning that the claimant has only the right to conduct those activities necessary for mining. The claim does not represent ownership of the land, nor exclusive surface rights. The claimant has exclusive rights to the minerals, and may bring trespass actions against anyone found extracting minerals. Interests in federal mining claims are transferable.

<sup>4</sup> California's SMARA applies to mining operations, including those on federally-managed lands, which disturb more than one acre or remove more than 1,000 cubic yards of material. (Public Resources Code Section 2714(d).) Additionally, SMARA contains an exception for "surface mining operations that are required by federal law in order to protect a mining claim, if those operations are conducted solely for that purpose." (Public Resources Code Section 2714(e).) When SMARA applies, the mining operator must submit a reclamation plan and financial assurances to, and obtain a permit from, the local lead agency (after consultation and review by OMR). If the mine is located on federal land, the local lead agency also works with the relevant federal agency to ensure that all local, state and federal requirements are satisfied.

federal Notice of Intent/Plan of Operations<sup>5</sup> and/or application of SMARA. Nor do they currently believe the financial incentives exist to justify the process of obtaining permits needed for larger-scale operations.

## ANALYSIS

Section 87100 provides:

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

Section 87103 provides that an official has a “financial interest” in a 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 following:

- Any business entity in which the public official has a direct or indirect<sup>6</sup> investment worth \$2,000 or more. Section 82005 defines a “business entity” 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.
- Any real property in which the public official has a direct or indirect interest worth \$2,000 or more. Section 82033 defines an “interest in real property” to include any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family.
- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

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<sup>5</sup> Under U.S. Forest Service regulations, a Notice of Intent/Plan of Operations is required from any person proposing to conduct mining operations which might cause a significant disturbance of surface resources. (36 C.F.R. § 228.4.) A Notice of Intent/Plan of Operations is not required for prospecting and sampling activities such as gold panning, non-motorized hand sluicing, battery-operated dry washers, and collecting mineral specimens using hand tools. (*Ibid.*) The Notice of Intent prompts the District Ranger to determine whether a Plan of Operations is required. When a Plan of Operations is required, the claimant must describe various aspects of the mining activities, including environmental protection and reclamation measures. The Plan of Operations triggers environmental review under the National Environmental Policy Act and must be approved by the Forest Service before significant disturbances are allowed.

<sup>6</sup> “For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.” (Section 87103.)

- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$460 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.<sup>7</sup>

*Real Property:* Under your facts, the interest in question qualifies as an interest in real property. The courts have held that mining claims and mineral rights are vested possessory rights which are recognized as interests in real property; they are not merely assertions of rights. (*United States v. Shumway*, 199 F.3d 1093, 1099-1102, 1105 (9th Cir. 1999); See also *Oneto* Advice Letter, No. I-08-044a; *Duncan* Advice Letter, No. A-95-289; *Cosgrove* Advice Letter, No. I-92-536.)

You raise the question as to whether the real property interests of the respective officials would be valued at \$2,000 or more. While the limited nature of the interest suggests it has a small value, we note that the property right (albeit only to minerals) is over 120-acres. While the Commission cannot ascertain the value of the officials' respective property interests, in valuing the interest, the officials should compare the claim to the sale price of other similar claims, as well as consider the original cost for their specific claim. For purposes of this letter, we assume that the value is more than to \$2,000 for each official.

*Business Investment/Business positions:* The Act's definition of "business entity" also includes a "joint ventures. We considered the term "joint venture" in the *Tutt* Advice Letter, No. A-02-341:

"We have previously advised that when two or more individuals own a piece of real property for the purpose of making a profit, this is a joint venture<sup>8</sup> recognized as a 'business entity' under the Act. (*Daniel* Advice Letter, No. A-00-134; *Whitson* Advice Letter, No. A-98-148.) Dr. Eiskamp, together with 5 other members of the Eiskamp family, jointly own the Monterey County real estate, portions of which are leased to others and provide income. For the reasons stated above, this joint ownership is a joint venture and business entity within the meaning of the Act. Assuming that Dr. Eiskamp's direct or indirect investment in this business entity has a value of \$2,000 or more, or that he exercises a position of management with respect to the rental or other business activity on this parcel, this business entity is an economic interest to him."

In contrast to the example used in the *Tutt* Advice letter, the officials here are not using their interest in property to produce income and are not leasing portions of their interest to other persons. As you noted, the officials use the mining claim to engage in recreational, or "hobby," gold mining

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<sup>7</sup> The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the Commission to equal the same amount determined by the Commission pursuant to Section 89503(f).

<sup>8</sup> [Footnote 4 from original] "The common definition of a 'joint venture' is a 'special combination of two or more persons, where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation, or as an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge.'" (*Sadugor v. Holstein* (1962) 199 Cal.App.2d 477, 483.)

(panning and non-motorized hand sluicing), and camping with their families. They stated they have engaged in such activities since 2009, but have not located more than “little amounts” of gold. There appears to be no reportable income or profit from their activities. Under these facts, the jointly owned property is not being operated for profit and therefore would not be considered a business entity under the Act.

*Foreseeability and Materiality*

Assuming for purposes of the remainder of this letter that the real property interests of the respective officials is greater than \$2,000, Regulation 18701 and 18702.2 provided situations that would be conclusively presumed to be a conflict of interest.

For purposes of foreseeability, Regulation 18701(b)<sup>9</sup> provides that generally:

“A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

You stated:

- The officials’ use of the property interest is not currently subject to the agency’s regulation and you stated that the officials have no plans in the foreseeable future to increase their mining activities to a level that would require state permits.
- You also noted that the officials were not assigned to the jurisdictions in which their mining claim is located (Placer and El Dorado Counties). Therefore, even if their mining claim were to become involved in matters pending before OMR, it is unlikely they would be involved in the decisions.
- With respect to general policy decisions, you stated that certain decisions could drive up the value of gold or lead to an increase or decrease in the amount of competition in the gold mining field and thus could impact even nonregulated claims. However, these effects would be speculative.
- Finally, as you note, even if a conflict of interest were to exist, the officials’ obligations would be to disqualify from making, participating in making, or influencing decisions. You note that such decisions are not so integral to the officials’ job duties to make disqualification problematic.

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<sup>9</sup> In some cases, the foreseeability of the financial effect is presumed. For example, a “financial effect ... is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1) - (6).”

Based on your facts, it appears unlikely that any decision that the officials make in performing their duties will trigger a conflict of interest.

As noted above, informal assistance does not provide the immunity that formal written advice provides. This is because formal advice is necessarily dependent on the specific facts concerning a specific decision. Consequently, when these facts develop, you should seek additional formal advice.

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

Sincerely,

Hyla P. Wagner  
General Counsel

/s/

By: John W. Wallace  
Assistant General Counsel,  
Legal Division

JWW:jgl