



California Fair Political Practices Commission

April 15, 1994

Raymond J. Nutting
El Dorado County
Board of Supervisors
330 Fair Lane
Placerville, CA 95667

Re: Your Request for Informal Assistance
Our File No. I-94-070

Dear Supervisor Nutting:

This is in response to your request for advice under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Since your request does not pertain to specific governmental decisions, we are treating your request as one for informal assistance.²

Please note that nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

As a member of the El Dorado County Board of Supervisors, may you attempt to influence federal policies regarding the sale of timber within the county?

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Sections 18000 - 18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

CONCLUSION

You may not make, participate in making, or attempt to use your official position to influence any governmental decision if the decision will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on you, or on a member of your immediate family, or on any of your economic interests.

FACTS

You were elected to the El Dorado County Board of Supervisors in November 1992. According to our conversation of March 7, 1994, you currently hold a 40-percent interest in a family ranch, which consists of 637 acres of land. Part of the ranch land is timber land. Your land has marketable green timber that you can sell on the open market or to a lumber company. You are currently selling the dead and dying trees through your family business, Tom and Ray Nutting, to a local sawmill.

According to your letter dated February 22, 1994, the El Dorado National Forest spreads over half the land in El Dorado County. The U.S. Forest Service has a program known as the "25 percent" fund under which El Dorado County receives specified funds from the timber sale program on the national forest. For example, in 1992, El Dorado County received \$3,815,367. The use of such funds are restricted for schools and roads pursuant to federal policies.

You state in your letter that you want to encourage the U.S. Forest Service at the local level to maintain a viable timber sale program within the county that will directly benefit the economic well-being of the county. U.S. Forest Service policies are set at the local, state, and national levels.

Also according to our conversation of March 7, 1994, you would like to influence the U.S. Forest Service policies, as a public official, to increase the U.S. Forest Service sales. Recently, the U.S. Forest Service has made large reductions in the timber sale program. At the same time, there have been increases in the selling price of lumber and logs that sawmills buy from private landowners, such as your family.

ANALYSIS

Conflicts of Interests, Generally

Section 87100 prohibits public officials from making, participating in, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. As a member of the El Dorado County Board of Supervisors, you are a "public official" as defined in the Act. (Section 82048.)

For purposes of Section 87100, a public official:

1. Makes a governmental decision whenever the public official votes on a matter, commits the agency to a course of action, or enters into any contractual agreement on behalf of the agency. (Regulation 18700(b).)

2. Participates in a governmental decision when, acting within the authority of his or her position, the public official negotiates, without significant substantive review, with a governmental entity or private person regarding the decision or advises or makes recommendations to the decisionmaker, either directly or without significant intervening substantive review. (Regulation 18700(c).)

3. Attempts to influence a decision where the official:

(a) Contacts or appears before any member, officer, employee of the official's agency or any agency under the appointive or budgetary control of the official's agency (Regulation 18700.1(a), copy of Regulation 18700.1 enclosed); or

(b) Attempts to use his or her official position to influence a governmental decision of an agency,³ other than that the official's own agency, where the official acts or purports to act on behalf of, or as the representative of, his or her own agency to any member, officer, employee or consultant of the agency making the decision (Regulation 18700.1(c)).

You stated in our telephone conversation of March 7, 1994, that you desire to gather information and seek public support in order to ultimately influence the decisions of the U.S. Federal Service regarding its timber land policies. You wish to undertake these activities in your capacity as a member of the board of supervisors.

The question you pose is whether these actions would be considered attempts to influence a governmental decision which would require your disqualification as a member of the board of supervisors. We have advised that attempts to influence include preliminary discussions, negotiations, compromises, reasoning, and planning. (Feinstein Advice Letter, A-84-057.) Therefore, the actions you have described would be considered attempts to influence your agency, the board of supervisors. Moreover, this would include attempts to influence the board of supervisors so that the board may ultimately make recommendations to the U.S. Federal Service regarding its timber land policies. (Regulation 18700.1(a); Cauble Advice Letter, No. I-90-427.)

³ "Agency" means any state agency or local government agency. (Section 82003.)

However, pursuant to Regulation 18700.1(b), you would not be attempting to use your official position to influence a governmental decision of your agency if you communicate with the general public or the press, or if you appear, as any other member of the general public before your agency in the course of your agency's prescribed governmental functions, solely to represent your personal interests. (Regulation 18700.1(b).)

Economic Interests

An official is financially interested in a governmental decision within the meaning of Section 87100 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, or on a member of the official's immediate family, or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) 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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

* * * *

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(a) - (d).

You have various economic interests which may be affected by governmental decisions concerning the sale of timber in El Dorado County. Your economic interests under Section 87103 are as follows:

1. **Investment Interest:** Presumably, you have an investment of more than \$1,000 in a business entity,⁴ Tom and Ray Nutting. Therefore, your business interest constitutes an investment interest as described in Section 87103(a) and is a potentially disqualifying economic interest of yours.⁵

2. **Interest in Real Property:** You own approximately 255 acres (40-percent of the ranch property). Therefore, you also have an interest in real property worth more than \$1,000 within the meaning of Section 87103(b).⁶

3. **Sources of Income:** Your family business currently sells dead and dying timber to a local sawmill. Any person or business that has made any payment to you in the past 12 months is a source of income to you for the purposes of Section 87103(c).⁷ Therefore, the business, and clients of the business, are sources of income of yours. (Section 87103(c).)

4. **Officer of a Business Entity:** As part owner of a family business, you are the officer of a business entity within the meaning of Section 87103(d).

Accordingly, you may not make, participate in making, or attempt to use your official position to influence any governmental decision if the decision will have a reasonably foreseeable and material financial effect, distinguishable from

⁴ A "business entity" means 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.)

⁵ The term "investment" as used in Section 87103(a) above includes a financial interest in a business entity, including but not limited to any partnership or other ownership interest owned directly, indirectly or beneficially by the public official, or his or her immediate family, if the business entity owns real property within the jurisdiction. (Section 82034.)

⁶ An individual's interest in real property includes a pro-rata share of interests in real property of any business entity in which the individual or immediate family owns a 10 percent or greater interest. (Section 82033.)

⁷ Section 82030 provides that the income of an individual also includes a pro-rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater.

the effect on the public generally, on you, or on a member of your immediate family, or on any of your economic interests specified in Section 87103 above.

Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case.⁸ An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

Materiality

The Commission has adopted guidelines to determine whether a financial effect on an economic interest is material, depending on the specific circumstances of the decision. The applicable standard differs depending on whether an economic interest is directly or indirectly affected by a decision.

Where an economic interest in which a public official has an economic interest is directly involved in the decision before the public official's agency, the effect of a decision is deemed to be material. (Regulation 18702.1, copy attached.) You should consult Regulation 18702.1 to determine whether an economic interest of yours is directly involved in a decision before your agency.

Where an official's economic interests are indirectly involved, the material financial effect on an official is determined based on the standards set out in Regulation 18702.2 - 18702.6.

a. Business Entities

Regulation 18702.2 (copy enclosed) should be applied to determine whether a governmental decision would affect a business owned by you, or a source of income which is a business, such as the sawmill. This applies regardless of whether a decision has a positive or negative financial effect on your economic interests.

Whether the indirect effect on a business entity is material depends on the financial size of the business entity. For example, Regulation 18702.2(g) provides that for a relatively

⁸ Generally, each governmental decision must be analyzed independently to determine if there will be a foreseeable material financial effect on an official's economic interests. (In re Owen (1976) 2 FPPC Ops. 77.)

small business entity, the indirect effect of a decision is material where:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The 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 \$2,500 or more; or

(3) The decision will result in the increase or decrease in the value of assets or liabilities of \$10,000 or more.

Consequently, if subdivision (g) of Regulation 18702.2 were the appropriate standard, and a county decision concerned a program that will affect the gross revenues of your business, or a business client, by \$10,000 or more for a fiscal year, or the value of assets or liabilities by \$10,000 or more, you may not participate. Moreover, if the decision will result in the business in question incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more, you may not participate.

b. Real Property

You own a large amount of land which includes timber land. Obviously, you have an interest in real property worth more than \$1,000. We are given no facts to establish the magnitude of the effect of any of your decisions to determine if a decision would materially affect your real property interests. However, the appropriate standard for you to apply in making this determination is set out in Regulation 18702.3(c).

Regulation 18702.3(c) provides that for decisions which may affect an interest in real property but which do not involve a subject property from which distances can be determined, the effect of a decision is material if the decision will have a reasonably foreseeable financial effect of \$10,000 or more on the fair market value of the real property in which the official has an interest or the decision will affect the rental value of the property by \$1,000 or more per 12-month period.

"Public Generally" Exception

However, public officials with financial interests that will be materially affected by a decision may participate in the decision if the effect on their interests is not distinguishable from the effect on the public generally. This exception is factually based and takes several different forms depending on the specific facts involved.

The most common application of the "public generally" exception is to decisions that affect the official's interests in substantially the same manner as it would affect a significant segment of the public. (Regulation 18703.) Regulation 18703 provides in pertinent part:

(a) General Rule: Except as provided in Government Code Sections 87102.6 and 87103.5, and California Code of Regulations, Title 2, Sections 18703.1, 18703.3, and 18703.5, the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if both subdivisions (a)(1) and (a)(2) of this regulation apply:

(1) Significant Segment: The governmental decision will affect a "significant segment" of the public generally as set forth below:

(A) The decision will affect:

(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents, or

(ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(iii) Fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; or,

(B) The decision will affect 5,000 individuals who are residents of the jurisdiction; or,

(C) The decision will affect the segment of persons identified in California Code of Regulations, Title 2, Sections 18703.2;

Thus, you could participate in decisions where the effect on your economic interests is substantially the same as the effect on

a significant segment of the population of El Dorado County or the population of a district.

Regulation 18703.2(b) provides an alternative exception. Regulation 18703.2(b) provides that for purposes of Regulation 18703(a)(1)(C), where a decision will affect an industry, trade, or profession in substantially the same manner as the decision will affect an official's economic interest, the industry, trade, or profession constitutes a "significant segment" of the jurisdiction, in the case of any other elected official, if that industry, trade, or profession is a predominant industry, trade, or profession in the official's jurisdiction or in the district represented by the official.

We do not have sufficient facts to determine if the timber industry is a predominant industry in your jurisdiction or in your district. This provision was originally adopted to deal with situations where a local economy is based on one industry so that virtually anyone who would serve in office would be drawn from that industry, trade, or profession. (Blegen Advice Letter, A-85-176.) For purposes of determining what is a predominant industry, for example, we have advised that where virtually everyone is employed by the same company or in the same industry, an industry is a predominant industry. (Holmer Advice Letter, A-86-051).

Furthermore, even where the industry is a significant segment as defined in Regulation 18703.2, you would fall within the scope of the exception in the regulation only if it affected your economic interests in the same manner as the industry. On the basis of your facts, it would appear that the decisions will have an unusual effect on you because of your ownership interests in real property. Therefore, disqualification would still be required. (In re Overstreet (1981) 6 FPPC Ops. 12.)

I trust this letter has addressed your concerns. Should you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Steven G. Churchwell
General Counsel



By: Luisa Menchaca
Counsel, Legal Division

Enclosures