

Background

In order to ensure that the operations of the Sierra Nevada Conservancy (SNC) are fully compliant with all applicable laws, rules and regulations and that activities are conducted in compliance with its own governing statutes, SNC Staff seeks advice from legal counsel on a variety of issues through several means. SNC Staff obtains legal counsel from the Attorney General's office and the Department of General Services Office of Legal Services on issues specific to their relative expertise. SNC also obtains legal advice and guidance through employment of a retired annuitant with expertise on grant-related issues and the organizational development of the SNC. SNC has taken this approach in order to ensure that legal expertise and knowledge specific to its operations remain available as needed. SNC Staff is now recommending that legal expertise on administrative issues be made available on a more consistent basis. These issues may include but are not limited to miscellaneous personnel topics such as equal employment opportunity, sexual harassment, adverse actions, state workers' compensation, return to work; state contracting topics including contracting requirements, amendments, awards, vendor eligibility, conflict of interest; and review of SNC policies and procedures. The State Coastal Conservancy (SCC) has been identified as having the capacity and needed expertise, and the SCC's Executive Officer has agreed and asked its legal staff to provide these services.

The staffs of the SCC and the SNC are now negotiating an agreement for legal services that the SCC's attorneys would provide. Under an interagency agreement to provide legal services, the SCC's attorneys would establish an attorney-client relationship with the SNC. SCC has informed SNC that attorneys with multiple clients must avoid representing adverse interests, potential and actual. An exception applies where the attorney makes full disclosure to the affected clients and obtains their informed consent. The Board of the SCC recently authorized their staff to enter into this agreement, acknowledging and waiving the potential conflicts of interest. The SCC Board further delegated to its Executive Officer the authority to waive future actual attorney conflicts of interest in connection with legal advice provided to the SNC and others. The SNC Board is now being asked for their informed consent to enter into this agreement as well.

Current Status

Several statutes and the Rules of Professional Conduct of the State Bar of California, including Rule 3-310(C), govern attorneys in the representation of potentially and actually adverse interests, and collectively require informed consent of both clients. Lawyers must also strictly maintain the confidences of their clients (Business & Professions Code § 6068(e) (1)). The interests of the SCC and the SNC in a matter could conflict, at least in theory. For example, the two agencies may have differing interests in their common contract, might both seek the same limited funds, or might have differing positions on pending legislation or litigation.

Under Rule 3-310(C), an attorney may not, without the written consent of both clients, 1) accept representation of more than one client in a matter in which the interests of the

clients potentially conflict; or 2) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or 3) represent an entity in a matter and at the same time accept as a client in a separate matter an entity that has an adverse interest in the first matter. The third type of adversity could arise (in the absence of consent), for example, if legal staff advised the SCC about obtaining grant funds from a limited source, the SNC then asked for legal representation regarding a personnel matter, and also sought grant funds from the same limited source (without asking for legal representation on the funding issue).

The chances of an actual legal conflict of interest are likely to be small, especially within the limited legal services that SNC would be seeking through SCC. However, under Rule 3-310(C), a problem could arise if the two agencies were in competition for funds, or took different positions on legislation or litigation. Even if legal staff were not asked by both entities to represent them on that adverse matter, they would possibly have a collective conflict in representing one of the entities on another matter, absent both clients' consent. By making full disclosure of potential conflicts to the SCC and to the SNC, and by obtaining the formal, informed written consent of both Boards, SCC attorneys can provide services to the SNC while complying with the Rules that require avoidance of representing adverse interests.

In the event of an actual conflict between the two agencies, the agencies would need to consult their assigned deputies in the Attorney General's Office, rather than staff attorneys, for legal advice on that matter, unless the agencies both waived the actual conflict of interest. Actual conflicts under the subject agreement will be referred to the SCC Executive Officer, as directed by their Board. The SNC Board would need to act on actual conflicts of interest unless that action is delegated to the SNC Executive Officer as well.

Recommendation

Staff recommends that the Sierra Nevada Conservancy adopt the following resolution pursuant to Division 23.3 of the Public Resources Code:

The Board of the Sierra Nevada Conservancy has been fully informed in writing about the potential for conflicts of interests with regard to the State Coastal Conservancy's provision of legal services for SNC as described, and hereby authorizes entry into an agreement between SCC and SNC for these services. The Board further authorizes the Executive Officer of SNC to act on its behalf in resolving any actual conflicts of interest that may arise as a result of providing these services.