



To: Members of the Conservancy

From: Glenn Alex, Chief Counsel

Date: April 18, 2013

Re: Agenda item 3.E: Providing legal services to the Sierra Nevada Conservancy;
consent

Summary and proposed Coastal Conservancy resolution

The Sierra Nevada Conservancy, a relatively new agency, has requested a few hours per month of Coastal Conservancy legal services, since the Sierra Nevada Conservancy lacks its own legal staff. The Coastal Conservancy's Executive Officer has asked our legal staff to provide these services. The request is consistent with the Coastal Conservancy's 2013 Strategic Plan, which calls for obtaining new funds to help pay for the agency's projects and on-going operation.

In providing legal services to another agency, the Conservancy's attorneys would establish an attorney-client relationship with an additional client. 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 formal consent.

The staffs of the Coastal Conservancy and the Sierra Nevada Conservancy are now negotiating an agreement for legal services that the Coastal Conservancy's attorneys would provide. Both agencies are being asked for their informed consent to potential legal conflicts of interest.

Staff recommends that the State Coastal Conservancy adopt the following resolution pursuant to Division 21 of the Public Resources Code:

The State Coastal Conservancy hereby authorizes entry into an agreement with the Sierra Nevada Conservancy under which the Coastal Conservancy's attorneys will provide legal services to that agency. The Coastal Conservancy has been fully informed in writing about its attorneys' responsibilities in avoiding the representation of adverse interests without the consent of their clients, understands the potential for

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adverse legal and practical interests as described, and consents to the potential conflicts of interest. The Coastal Conservancy also delegates to the Executive Officer the authority to waive future attorney conflicts of interest in connection with the Sierra Nevada Conservancy or another state agency to which the Coastal Conservancy's attorneys are asked to provide legal advice.

Staff further recommends that the Conservancy adopt the following findings:

The State Coastal Conservancy hereby finds that:

1. The proposed authorization is consistent with Government Code § 11256, which authorizes state agencies to furnish services, materials and equipment to, and to perform work for, other state agencies upon agreed terms and conditions.
2. The proposed authorization is consistent with Division 21 of the Public Resources Code, including § 31104, which authorizes the Coastal Conservancy to receive financial support from public and private sources.
3. The proposed authorization is consistent with the Conservancy's current Project Selection Criteria and Guidelines and 2013 Strategic Plan insofar as it will help support the Coastal Conservancy's statutory programs and purposes.

Discussion

Several statutes and the Rules of Professional Conduct of the State Bar of California, including Rule 3-310(C),¹ 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. Bus. & Professions Code § 6068(e)(1).

The interests of the Coastal Conservancy and the Sierra Nevada Conservancy 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 Coastal Conservancy about obtaining grant funds from a limited source, the Sierra Nevada Conservancy 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).

¹ Referred to below as "Rule ____."

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In the event of an actual conflict between the two agencies, the Coastal Conservancy would need to consult 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.

In addition, practical conflicts could result from a Coastal Conservancy attorney's work for more than one client—for example, differences in the clients' expectations, schedules, and deadlines. In working for another entity, Coastal Conservancy attorneys would also need to segregate physical and electronic files and other materials in a manner that would preserve the attorney-client confidences of the Sierra Nevada Conservancy.

Government Code § 11256 authorizes state agencies to furnish services, materials and equipment to, and to perform work for, other state agencies upon agreed terms and conditions.

The proposed authorization does not have the potential to result in a physical change in the environment, and so under 14 Cal. Code of Regs. § 11378, is not a project subject to the California Environmental Quality Act.

Conclusion

The Coastal Conservancy's attorneys are not aware of any actual adverse interests between the two agencies to which they would provide the requested legal services, and think that the chances of an actual legal conflict of interest are likely to be small. 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 likely 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 Coastal Conservancy and to the Sierra Nevada Conservancy, and by obtaining the formal, informed written consent of both, Conservancy attorneys can provide services to the Sierra Nevada Conservancy while complying with the Rules that require avoidance of representing adverse interests.

Delegating authority to the Executive Officer to waive future conflicts of interest will expedite the Conservancy's ability to address an actual conflict of interest that might arise in the future as well as confirm that the Executive Officer can authorize the Coastal Conservancy's attorneys to provide legal advice to additional state agencies in the future.