

Designated Ethics Supervisor

Redated for printing 01/01/94  
October 20, 1993

661-93-0540

465-3600

Board member's conflict  
of interest arising from  
permits and membership  
in organizations -  
Executive Branch Ethics  
Act (AS 39.52)

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Pursuant to AS 39.52, the Alaska Executive Branch Ethics Act (hereafter the "Ethics Act" or the "Act"), you have requested advice concerning possible conflicts of interest posed by Board member A's ownership of two permits in Area B; his membership in a Corporation, a Council, and an Association; and his position as Mayor of a Borough. You request advice regarding whether it would be a violation of the Ethics Act for A to participate as a board member on matters pertaining to issues in Area B, other issues concerning other groups in Area B, and other issues in other administrative areas in Alaska that compete with Area B.

## **I. BACKGROUND**

The following is our understanding of the facts based on information provided by you in a letter dated February 8, 1993, and upon information obtained from public records concerning the various organizations and entities in which A is either a shareholder, member, or employee.

### **A. A's, his wife's, and his daughter's interests in Area B**

Presently, A owns two permits in Area B. His wife, also owns a permit in Area B. You state that one of the Area B permits has not been used by A since 1974 and that he will transfer this permit to his wife. A uses his other Area B permit. You also state that A's daughter, possesses an Area B permit.

### **B. A's membership in and association with organizations and entities that have interests in the activities in Area B.**

A is a member of an Association, a nonprofit, nonstock, cooperative corporation and association that represents the

interests of permit holders in Area B. There are approximately 150 to 200 members, all of whom own Area B permits.

A is a shareholder of a Corporation, a Native corporation formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA"). The Corporation has approximately 400 shareholders, the majority of whom reside in a Community. A large number of the shareholders derive their livelihood from Area B, either directly or indirectly.

A is a member of a Council, a federally recognized Alaska Native tribe in a Community. There are approximately 665 members, all of whom live in a Community, and many of whom own or hold Area B permits. In court proceedings, the Council has stated that the activities in Area B are "essential to the economic and cultural survival of the Tribe."<sup>1</sup>

A also is the Mayor of a Borough, an incorporated borough under the laws of Alaska that serves a number of communities. The Borough provides educational, social, health, and other governmental services and facilities to these remote communities. In court proceedings, the Borough has stated that it relies almost entirely on taxes on sales within its jurisdictional boundaries and therefore economically depends on the activities in Area B.<sup>2</sup>

Based on a review of court documents from suits before the U.S. District Court in Alaska,<sup>3</sup> the Superior Court for the

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<sup>1</sup> Memorandum In Support of Motion To Intervene at 4, submitted in support of a Council's motion to intervene in a suit brought in the U.S. District Court for Alaska, discussed infra on page 3, n.3.

<sup>2</sup> Memorandum in Support of Motion to Intervene, at 4, submitted in support of the Borough's motion to intervene in a suit before the U.S. District Court for Alaska.

<sup>3</sup> In this suit, a coalition of people from two regions challenge the state's operation of activities in Area B and seek an order from the court requiring the United States Secretary of Commerce or Interior to take over the management of the activities in Area B and in the two regions. The Association, Borough, Corporation, and Council together moved to intervene as a matter of right in order to protect their interests in the activities. This case is still pending.

State of Alaska, Third Judicial District,<sup>4</sup> and the Superior Court for the State of Alaska, Second Judicial District,<sup>5</sup> it is apparent that the Association, Borough, Corporation, and Council have demonstrated their respective interests in the board's management of the activities in Area B. The activities have been the subject of tremendous contention and litigation among groups in Alaska. The activities take place along an area that affects other regions in Alaska.

## II. ISSUES

Based on the foregoing facts, you have asked six questions:

1. Whether A's ownership of permits in Area B gives rise to a conflict of interest with regard to proposals and other matters before the board concerning issues in Area B or other areas of Alaska.

2. Whether A's interests in the permits for Area B will create a conflict of interest with regard to proposals and other matters concerning activities in Area B or other areas of Alaska.

3. Whether A's ownership of an Area B permit creates a conflict of interest, as described in number (1) and (2) above, even though he has not used with the permit since 1974, and it is being transferred to his wife.

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<sup>4</sup> In this suit, the Association, Borough, and Corporation brought a lawsuit against the board seeking an injunction to invalidate the board's limit for activities set forth in the Alaska Administrative Code. The superior court granted the state's motion for summary judgment, declaring the limit valid. The case is now over.

<sup>5</sup> In this suit, Native groups from another part of Alaska brought this lawsuit seeking an injunction to close down activities in Area B. The plaintiffs claim that the activities violate the statutes and provisions of the Alaska Constitution because it interferes with activities in other regions. The Association, Borough, Corporation, and Council moved to intervene as a matter of right to continue the activities. This lawsuit is still pending.

4. Whether A's wife's ownership of an Area B permit creates a conflict of interest for A.

5. Whether A's membership in the Association, Corporation, or Council, all of which are involved in litigation as plaintiff against the state, or as co-defendants with the state, or both, creates a conflict of interest with regard to proposals and matters uses in Area B or other parts of Alaska.

6. Whether A's position as Mayor of a Borough and the Borough's involvement in litigation against and with the state creates a conflict.

### III. ANALYSIS

#### A. A's ownership of Area B permits.

The Ethics Act provides that "a public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person." AS 39.52.120(a). Furthermore, the Act prohibits a public officer from using his official position to "take or withhold official action, in order to affect a matter in which the public officer has a personal or financial interest." AS 39.52.120(b)(4).

The Ethics Act defines "personal interest" to mean an interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership, in any organization, whether fraternal, nonprofit, for profit, charitable, or political, from which, or as a result of which, a person or organization receives a benefit.<sup>6</sup>

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<sup>6</sup> The Act defines "benefit" to mean

anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or

AS 39.52.960(18).

The Act defines "financial interest" to include

(A) an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, including property ownership, or a professional or private relationship that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit;

AS 39.52.960(9)(A).

Where there is a conflict, the Ethics Act requires that a determination be made as to whether the conflict is minor and inconsequential ("conflicts that are unavoidable in a free society") or substantial and material. AS 39.52.110(a)(3). The Act provides that there is no violation where

(1) the personal or financial interest in the matter is insignificant or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or,

(2) [the] action or influence would have insignificant or conjectural effect on the matter.

AS 39.52.110(b)(1) and (2).

A actively uses one permit but has not used his other permit since 1974. Based on his ownership and active use of one of his Area B permits, we believe A has a financial interest in proposals affecting Area B permit holders. With respect to the Area B permit (which he does not use), the question arises whether his ownership of this permit alone would give him a financial interest in proposals affecting similar Area B permit

(..continued)

loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value.

AS 39.52.960(3).

holders. We believe it does.

Although A does not use one of his Area B permits, he possesses a financial interest in the value of the permit, which will fluctuate depending on board regulations that direct when the permit may be used or activities by these permit holders. Accordingly, we believe that A's ownership of the Area B permit gives him a financial interest in proposals affecting Area B permit holders.

If A transfers his Area B permit to his wife, this would not eliminate his financial interest in proposals affecting the interests of Area B permit holders. For purposes of determining a board member's financial interests in a particular matter, the Act defines "financial interest" to include those interests held by an "immediate family member." AS 39.52.960(9)(A). The Act defines "immediate family member" as

a public officer's spouse, a relation by blood with and including the second degree of kindred, and a regular member of the officer's household.

AS 39.52.960(11). Whether A or his wife owns the permit, there still is a conflict. Similarly, his daughter's ownership of an Area B permit would also give A a financial interest in proposals affecting the Area B permit holders.

There are approximately 129 Area B permit holders of one type and 120 Area B permit holders of another type. As a member of these user groups in Area B, A's financial interest in proposals affecting these user groups is not "of a type that is possessed generally by the public or a large class of persons to which the public officer belongs." AS 39.52.110(b)(2). We believe that it would be a violation of the Act for A to vote on a proposal that significantly affects his financial interests as a member of these user groups. Id.; see 1991 Inf. Op. Att'y Gen. (Nov. 25; 663-91-0180) (in considering whether a board member's interest in a matter could give rise to a conflict under the Act, we concluded that a significant factor was whether the action would have regional as opposed to statewide effect); see, 1989 Inf. Op. Att'y Gen. (August 30; 663-90-0073) (we advised a department that it would be a violation of the Act if one of its biologists held a limited entry permit for and possessed the management authority to influence and direct the economics of the same fishery); see, e.g., Carney v. State, 785 P.2d 544, 548 (Alaska 1990) (holding under common law conflict of interest rules that because of their active fishing interests in the commercial salmon drift net fishery in the Nushagak district,

four members of the board of fisheries possessed conflicts of interests with respect to proposals that could benefit their user groups at the expense of competing user groups in the district).

If a proposal has an insignificant effect on A's financial interests as a member of the Area B permit holders, then he should be allowed to participate.

With respect to proposals pertaining to allocations to competing user groups in Area B or in other regions of Alaska, a similar analysis applies. We advise that if a proposal to a competing user group significantly affects A's financial interests as a member of the Area B permit holders, then A should recuse himself from voting on that proposal. If a particular proposal concerning a competing user group has an insignificant effect on A's financial interests as a member of the Area B permit holders, then we advise that A should be allowed to vote on the proposal.

We believe the foregoing answers question numbers 1, 2, 3, and 4.

**B. A's membership in the Association, Corporation, and Council.**

A is not an officer or director of the Association, Corporation, or Council. A is a member of the Association and Council and a shareholder of the Corporation. In accordance with the Ethics Act's definition of "personal interest," membership in these organizations gives him a "personal interest" in proposals before the board that would confer a "benefit" to these organizations.<sup>7</sup>

From a review of the lawsuits in which these organizations are parties either as co-defendants with the state or as plaintiffs against the state, the interests of these organizations appear to be concentrated on the board's management of Area B. Given A's independent financial interests in the Area B activities, it is unnecessary to analyze further what A's conflicts are based on these organizations' interests in the activities in Area B. We cannot conceive of a proposal that would specifically and significantly affect these organizations' interests in the Area B activities that would not also specifically and significantly affect A's financial interests in these activities. If a situation arises where a proposal might

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<sup>7</sup> See supra, page 4, n.6.

affect these organizations' interests in the Area B activities but not A's financial interests in these activities, we will address the issue at that time.

We believe that the foregoing answers question number 5.

**C. A's position as Mayor of a Borough.**

A is the Mayor of a Borough, which is an incorporated borough under the laws of Alaska that serves several communities. The Borough provides educational, social, health, and other governmental services and facilities to these remote communities. As discussed earlier in the opinion, the Borough has stated that it depends on the activities in Area B for its primary source of revenue.

Based on A's position as mayor, we believe that A has a personal interest in proposals that would confer a "benefit" to the Borough. However, similar to our discussion above, it is unnecessary to analyze further what A's conflicts are based on whether a particular proposal confers a significant "benefit" to the Borough. We cannot conceive of a proposal that would directly and specifically affect the Borough's interests in the Area B activities that would not also directly and specifically affect A's financial interests in these activities. If a situation arises where a proposal may "benefit" the Borough but not A, we will address the issue at that time.

We believe the foregoing answers question number 6.

If you have further questions, please do not hesitate to contact me.

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