

June 23, 1999

John A. Johnson
Department of Fish and Wildlife
Marine Resources Program
2040 SE Marine Science Drive
Newport, OR 97365

Dear Mr. Johnson:

This letter is in response to your correspondence dated June 2, 1999, concerning the marketing of an aerial photograph that you took of the New Carissa.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION 99S-018

STATED FACTS: An employee for the Oregon Department of Fish and Wildlife (ODFW) was on the job as an ODFW representative in a helicopter flying over the ship New Carissa which was grounded on the beach near Waldport, Oregon. The helicopter was privately owned and the flight was being paid for by the owner of the New Carissa. While flying over the ship, the employee used his personal camera and film to take a photograph of the New Carissa.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to
John A. Johnson

June 23, 1999
Page Two

obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

QUESTION #1: Do the Oregon Government Standards and Practices laws prohibit the ODFW employee from selling the photograph for personal profit?

OPINION: Yes. ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, their official position or office to obtain a financial gain or the avoidance of a financial detriment that would not otherwise be available but for the public official's holding of the official position or office other than official salary, honoraria, the reimbursement of expenses or an unsolicited award for professional achievement for the public official.

The Supreme Court, in Davidson v Oregon Government Ethics Commission, 300 OR 414, 712 p. 2d 87 (1985), identified the broad policy of Oregon's ethics laws as ensuring, "...that government employees do not gain personal financial advantage through their access to the assets and other attributes of government. In that case, the Supreme Court held that a public official could not use his official position to obtain financial gain for himself where, through access to his governmental body's buying power, he purchased an automobile at a discount price. The court emphasized that the term "use" in ORS 244.040(1) includes availing oneself of a benefit not available to the general public. The Court applied a but for test, i.e., but for his position, the public official would have been unable to purchase the car at the discount price and, thus, obtain a personal gain. 712 p 2d 92.

The stated facts indicate the employee was on the job when he took the photograph of the New Carissa. The but for test of Davidson is applicable to the stated facts. But for the fact that the employee was working in his capacity as a public employee, the employee would not have been in the position to take the photograph. Therefore, ORS 244.040(1)(a) prohibits the employee from selling his photograph for a personal profit.

The fact that the employee used personally owned film and camera to take the photograph is not relevant.

John A. Johnson

June 23, 1999
Page Three

QUESTION #2: Is the photograph the employee s property since it was produced with the employee s camera and film?

OPINION: The GSPC staff cannot make this determination. The employee and officials of ODFW should resolve this question, however, if the photograph is deemed to be the employee s property, the employee would still be prohibited from realizing financial gain from the photograph.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Sincerely,

L. Patrick Hearn
Executive Director

LPH:aip/newcarissa.so