LEGAL LIMITS OF PROFESSIONAL SOCIETIES AND RESOURCE POLITICS

ROBIN L. RIVETT, Pacific Legal Foundation, 555 Capitol Mall, Suite 350, Sacramento, CA 95814

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It is with great pleasure that I join you today for a discussion of the legal limits to which The Wildlife Society and the Society for Range Management can embark upon in pursuing resource lobbying activities. Jim Clawson requested me to make this presentation today probably because I am an attorney and I work for a nonprofit organization, Pacific Legal Foundation. PLF is a public interest, tax-exempt, nonprofit corporation incorporated under the laws of California. We are a Section 501(c) (3) nonprofit corporation under the Internal Revenue Code (IRC). This means, we like your societies, can receive tax-deductible contributions and our income is also tax-exempt. But there is one thing that my nonprofit organization does not do - any substantial lobbying. The reason is that our tax-exempt status could be jeopardized otherwise. This too will be your major concern should your organization decide to engage in such activities.

Accordingly, the principal purpose of this presentation today will be to make some general observations on what kind of legislative advocacy activities you can now engage in under your current organizational structures and what activities you could engage in if you were to amend your organizational structure.

It is my understanding that both The Wildlife Society and the Society for Range Management are Internal Revenue Code 501(c) (3) tax-exempt organizations. Section 501(c)(3) dictates that to qualify under this section as a tax-exempt organization the organization must have no substantial part of its activities which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office. Therefore, your societies may, under this section, engage in lobbying but that lobbying cannot be a substantial part of your activities. It should be noted that IRC Regulation No. 1.501(c)(3)-1(c) (3) (ii) and IRC 491 define attempting to influence legislation in such a way to encompass both grassroots organizing and actual lobbying of legislators.

The important term in Section 501(c)(3) is "substantial." A "substantial" part of your activities must not be considered to be carrying on propaganda or otherwise attempting to influence legislation. Substantial is not defined in the code or in the regulations or in revenue rulings. Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974), cert. denied , 419 U.S. 1107 (1975), does shed some light on this vagueness. In Haswell the Court said that in determining whether political activities of an organization are substantial the organization's political affairs must be balanced in the content of objectives and circumstances of the organization. But in order to determine whether substantial part of its activities is to influence or an attempt to influence legislation a percentage list is not appropriate. Though we are not provided with an easy percentage determination, there are examples we can point to. For example, the percentages of expenditures on political activities in Haswell were 19.27% and 20.5% and both of these percentages were determined to be substantial.

It is important to note, however, that there are certain political activities which are completely prohibited and may not even be considered within the insubstantial segment of money to be spent on political activity. Treasury Regulation 1.501(c)-(1) (c) (3) provides that prohibited activities include contacting or urging the public to contact legislators in support of or in opposition to legislation, advocating the adoption or rejection of legislation, or making statements written or oral for or against a candidate for public office. There is an alternative, however, which would avoid running the risk of your organization losing its tax-exempt status. If an organization expects a substantial amount of its activities to be spent on political activities and it does want to engage in lobbying activities, the organization can make what is known as a Section 501(h) election. Under Section 501(h) a Section 501(c)(3) organization can replace the amorphous "substantial part of its activities" test with a limit defined in terms of expenditures for influencing legislation. The formula for such expenditures is as follows: the lobbying non-taxable amount for a year is 20% of the first $500,000 of the organization's exempt purpose expenditures for the year, plus 15%

of the second $500,000, plus 10% of the third $500,000, plus 5% of any additional expenditures, but with an overall limit of $1 million per year.

There is also another provision. The grassroots nontaxable limit is 25% of the lobbying nontaxable income. Grassroots lobbying is defined as attempting to influence the general public on legislative matters. If the amount of lobbying expenditures exceeds these limits, that amount is subject to an excise tax of 25% of its excess lobbying expenditure. Also if the electing organization's lobbying expenditures over a four-year period normally exceed 150% of the limitations described the organization will lose its tax-exempt status.

In summary, what this Section 501(h) election does is to provide a fixed numerical amount which the tax-exempt organization may permissibly devote to lobbying without endangering its exempt status.

Another option would be for the society to form another organization under the society's control. The new organization would pursue the organization's lobbying goal. There are a number of problems with this option. First affiliated organizations are treated as one organization with its parent for purposes of Section 501(h). This means the nonsubstantiality requirement on lobbying applies to the affiliated organization in exactly the same way as to the parent society. See IRC 4911(f). The society would gain no advantage from forming another organization under its control to conduct its lobbying. Moreover, a tax-exempt organization is responsible for taking reasonable steps to ensure that the funds donated by it to other organizations are not used for political purposes. Treasury Regulation 1.527-6(b)(5z). If new organizations engage in political activities and the society contributes to the organization the society could possibly lose its tax-exempt status entirely.

Another option would be for a society to set up a social welfare organization under IRC 501(C)(4). Such an organization can be dedicated exclusively to lobbying and still maintain its tax-exempt status. However, contributions to social welfare organizations are not automatically deductible. However, if the contributions are necessary as a business expense the donor can deduct them under IRC 162(e). The society also would not be able to control a section 501(c)(4) social welfare organization or otherwise it would violate the affiliation rules of Section 4911(f) discussed above. There is little doubt that it is possible for the society as presently constituted to set up a social welfare organization under Section 501(c)(4) and avoid the affiliation rules of Section 4911(f). Nevertheless, setting up such an organization would not enable either society to donate anymore than its allocated amount for lobbying under the section 501(h) election option. At a minimum, however, the society would have a sympathetic tax-exempt organization to vote and lobby in the area of its expertise and interest.

Another option, option 5, would be for the society to set up a political action committee under Section 527 of the Internal Revenue Code. However, this organization would be useful only for the specific purpose of lobbying for a particular candidate. Another option would be for the Society to hire a professional to lobby for a particular candidate. Another option would be for the society to pay a professional lobbying organization directly. However, again the limitations of Section 501(h) and Section 4911 would still apply. As another option members of the society could contribute to a lobbying organization directly. Member funding and nonorganizational funding would obviate all the problems discussed above but would not enable the society to control the lobbying activities in any way. There would not be any kind of coordinated, strategic methodology for engaging in legislative advocacy work under this option.

It appears that the three best options for conducting lobbying activities would be to maintain your Section 501(c)(3), take the 501(h) election, or create a new social welfare organization. It is important to remember, however, that no matter what option you select, you still have a limitation on the amount of expenditures which can be allocated towards a legislative advocacy program.

Let me mention some caveats which are related to your societies' desires to become more involved with resource politics. Generally speaking the right to engage in politics is a privilege of citizenship which should not be denied to state employees in the absence of express or necessarily implied statutory prohibition, or unless the particular activity is harmful to the state government, but no political activity should be engaged in on state time. 19 Ops. Att'y Gen. 150 (1952).

This opinion of the California Attorney General is quite broad, but is limited by several statutes, both state and federal,

More specifically, agencies basically have two powers. They have legislative powers and they have adjudicatory powers. Legislative powers entail the making of rules of general application whereas adjudicative powers entail the application of regulatory and statutory law to the particular individual in a particular case. Federal statutes provide a couple of modes of promulgating regulations. The first mode is formal on the record rulemaking which is tantamount to a trial where witnesses are interrogated and cross-examined. The second mode is informal or "notice and comment" rulemaking. Most state regulations are developed this way. In informal rulemaking, interested persons are notified of proposed actions to provide them an opportunity to participate through written comments and, in the agency's discretion, through oral comments. After the hearing process, the agency decision is then made which is either to adopt or reject or modify the proposed regulations. You should be aware, however, that other less formal methods are also used. These methods do not actually produce regulations but they do produce in many instances virtually the same impact. The methods include such devices as opinion letters, directives, interpretations of law, agency policy statements, and agency manuals. Generally, these modes permit no public input, yet they could greatly impact your interests.

Consequently, the question we should ask is how can we have an impact in this regulatory jungle? First we need to recognize that the agency staff's advice to the agency leader or decision maker carries great weight and in many, many circumstances is determinative. I point to the State Water Resources Control Board, to the Department of Food and Agriculture, Environmental Protection Agency, and to the Department of Health Services as examples. Obviously, you must know how the agency system works and you must get to know the key agency staff members. The key is that you've got to have the opportunity to educate the staff, which many times provides the basis for a decision or a rule adoption. I am talking about administrative agency lobbying which is the ideal and appropriate job for professional societies such as The Wildlife Society or the Society for Range Management.

Let me emphasize that one needs to get involved early in the rulemaking process and involvement should not be limited to agency actions with only direct impact on your particular interest. You must monitor agencies for precedent setting trends which may not directly impact your interests now, but may in the future. What should you do to ensure your viewpoint is heard? First, before the rules or action are even in formal draft, you should make a record and point out information which has been overlooked or misinterpreted and then you must provide a reasonable, rational alternative to the regulations being proposed. Once the regulations are in draft you must actively provide professional advice on those regulations which you believe are inappropriate or unreasonable. Your inquiry must be searching. On the federal level you can use the Freedom of Information Act and on the California state level you can use the Public Records Act to try to obtain all the records relating to the regulation or issue, good or bad. You must evaluate the data as experts and in so doing you may find that there is no relation between the data and the specific regulations which have been promulgated. You must file written comments in informal rulemaking proceedings focusing on incorrect data and the impact the regulations will have on the public as a whole. If the regulations are adopted anyway and you have been able to develop the proper administrative record there is still a chance to overturn them administratively.

Regulations in the State of California must be approved by the Office of Administrative Law (OAL) under statutorily prescribed standards. If the record does not support their necessity or authority, etc., they will be overturned.

Let me suggest, though, that if you have not done your homework, OAL review will not help you. The regulations will become law and you will have to live with them. Your next step will be to turn you lobbying activities to the Legislature which is the appropriate body to lend interpretive assistance to administrative bodies by passing clarifying legislation. But remember, whether your advocacy activities occur before administrative agencies or legislatures if you lobby as a Section 501(c)(3) organization - as The Wildlife Society or the Society for Range Management - there are limitations to what you can do. Be alert to these limitations or otherwise you may lose what is the lifeblood of nonprofit corporations - your tax-exempt status.