



**DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION**

May 20, 2005

David Hartwig, Administrator
Department of Administrative Services
State Services Division
155 Cottage Street NE
Salem, OR 97310

Re: Opinion Request OP-2005-3

Dear Mr. Hartwig:

You ask whether the Risk Management Division (Risk), on behalf of the Department of Administrative Services (DAS), has authority under ORS 278.405 to provide liability insurance coverage to the Columbia River Gorge Commission (Commission) and its members.

For the reasons discussed below, we conclude that Risk may provide insurance coverage to the Commission and its members pursuant to its authority under ORS 278.405 if Risk determines that doing so promotes the efficient operation of state government.

Discussion

ORS 278.405(1) provides in pertinent part:

The Oregon Department of Administrative Services shall direct and manage all risk management and insurance programs of state government * * *. Authority granted the department in this section includes but is not limited to the following authority:

(1) To provide all insurance coverages * * * which the department determines *necessary or desirable for the efficient operation of state government* * * *. (Emphasis added.)

This statute does not provide DAS with unlimited discretion to provide insurance. Instead, it specifies that, as determined by DAS, the provision of insurance must be necessary or desirable for “the efficient operation of state government.”

Under the method of statutory interpretation prescribed by the Oregon Supreme Court, we interpret statutory terms of common usage to have their “plain, natural and ordinary meaning.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). As

used in ORS 278.405(1), an “efficient” operation is one “marked by qualities, characteristics, or equipment that facilitate the serving of a purpose or the performance of a task in the best possible manner.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 725.

The Oregon Court of Appeals has stated that the provision of indemnity to public servants effectuates two fundamental public policies: it encourages both qualified persons to accept public employment and the zealous execution of public functions, duties, and responsibilities. *Welker v. TSPC*, 152 Or App 190, 198, 953 P2d 403 (1998), *vacated and rem’ d on other grounds* 332 Or 306, 27 P3d 1038 (2001); *see also Gill v. SAIF*, 314 Or 719, 724-25, 842 P2d 402 (1992); *Stevenson v. State of Oregon*, 290 Or 3, 12-13, 619 P2d 247 (1980). As public servants, it is reasonable to assume that Commission members and staff carry at least some concern about whether the good faith discharge of their duties will expose them to litigation and potential personal liability. It follows that the provision of insurance coverage for tort claims would likely have the effect of encouraging qualified persons to accept an appointment as a Commission member or employee, and encourage them to execute their responsibilities zealously.^{1/} At the very least, providing insurance coverage should prevent qualified persons from rejecting appointment to, or employment with, the Commission due to concerns about liability. By helping to attract qualified personnel, providing insurance coverage would undoubtedly contribute to the efficient operation of the Commission.

However, the question that must be answered under ORS 278.405(1) is whether attracting qualified commissioners and staff would promote “the efficient operation of state government.” Without addressing whether the Commission is part of Oregon state government, the determination that must be made is whether attracting qualified commissioners and staff through providing insurance coverage will promote state government’s efficient operation, even if the Commission is not part of that government. This is a factual determination for Risk to make. We offer the following observations for your consideration.

The Commission acts with regard to the preservation and development of land in the Columbia River Gorge National Scenic Area, as delineated in 16 USC § 544b (scenic area).^{2/} Because the scenic area extends into both Washington and Oregon, it appears reasonable to assume that their joint creation and support of a “regional agency” (16 USC § 544c(a)(1)(A)) represents one of the most efficient and effective methods by which to assure consistent management of land use issues across state boundaries. Therefore, in determining whether providing insurance coverage to the Commission and its members is “necessary or desirable for the efficient operation of state government,” Risk may consider the likely effect on state government if the governor were unable to attract qualified members and the Commission were unable to attract qualified staff because of exposure to potential liability. In other words, would providing insurance coverage to the Commission and its members contribute to the efficient operation of state government by helping to sustain the Commission as a viable method for addressing land management issues within the scenic area?

Under this approach to the criteria for providing insurance coverage, Risk could consider whether coverage to the Commission and all of its members, as opposed to only Oregon based members and staff, would be necessary or desirable. In addressing issues about the scope of

possible coverage, Risk may want to consider the authority provided by ORS 190.420 as a means by which Risk and its counterpart in Washington state government could cooperate in providing insurance.^{3/}

Another way to approach the “efficiency” criteria in ORS 278.405(1) would be to consider the fact that Oregon would be responsible for half of the funding necessary to provide the Commission and its members with insurance coverage if it chose to seek such coverage from private insurance carriers, and also for half of the funding needed to cover the costs incurred by the Commission both in defending against claims of wrongdoing and in satisfying any judgments imposed against it.^{4/} Risk may want to consider whether providing insurance coverage under ORS 278.405 represents the most efficient means for Oregon to participate in addressing the needs of the Commission that financially affect the state.

This office is available to address questions that Risk may have about exercising its authority under ORS 278.405(1) in relation to the Commission, including questions that pertain to pursuing a joint effort with Washington under ORS 190.420.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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^{1/} Under the compact described in endnote 2, the governor of each state appoints three of the Commission’s voting members, and the governing body of each of the six affected counties appoints one of the remaining six commissioners. ORS 196.150 (Compact, Art. II). Members appointed by Oregon’s Governor are subject to Senate confirmation and serve a four-year term. ORS 196.160; 16 USC § 544c(a)(3).

^{2/} The Columbia River Gorge National Scenic Area Act establishes a National Scenic Area in three Oregon and three Washington counties and consents to an interstate compact between the two states to carry out its purposes. Pub L 99-663, 100 Stat 4274, *codified at* 16 USC § 544 (1986). Both states adopted the compact, which incorporates the federal act and authorizes the creation of the Commission. ORS 196.150; RCW 43.97.015.

^{3/} ORS 190.420(1) states: “Any power or powers, privileges or authority exercised or capable of exercise by a public agency in this state may be exercised and enjoyed jointly with any public agency in another state to the extent that the laws of the other state permit such joint exercise or enjoyment.”

^{4/} The Commission is wholly funded by appropriations by the Oregon and Washington legislatures. ORS 196.150 (Compact Art. IV). Oregon would be responsible for funding the purchase of insurance so long as the expenditure was “necessary” to enable the Commission to “fulfill the powers and duties imposed upon [it].” ORS 196.150 (Compact Art. IV).