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FOREST FIRE PROTECTION ON PUBLIC AND PRIVATE LANDS IN NEW MEXICO

FIRE STILL BURNS ON W. S. RANCH

[Albuquerque (AP)]—An extensive forest fire on the W. S. Ranch in Colfax County appeared today to be burning uncontrolled through the fourth day.

State Forester Ray Bell, who flew over the fire area yesterday, estimated today that the fire had covered from 10-12 sections, or a minimum of 6,400 acres. . . .

The big fire and two other smaller ones on the W.S. Ranch are not being fought by the land owner. The state has no fire protection agreement with the W. S. Ranch and at this point has no authority to enter on the land to fight the blaze.

But the Forestry Department has been keeping a close watch on the fires, preparing to move if they should threaten timber on adjoining land on which the state does have a fire protection agreement.

Bell explained today that in case of fire on private land not covered by a fire protection agreement with the state, the state forces cannot enter the area unless the fire is endangering timber on land covered by an agreement. . . .

Bell, obviously irritated that the W. S. Ranch fires are being allowed to burn uncontrolled, said today that there are many other people besides the land owner with a stake in a forest fire.

"Timber is a natural resource and our watersheds are important and everyone who takes a drink of water has an interest," Bell said today.

"The farmers and the people interested in water recreation are vitally interested just as much as the land owner an [*sic*] the man who owns the timber."

Bell said the big fire is located at the head of the watershed for the Canadian River. The aftermath of a forest fire is sterile soil and erosion, he said.¹

Although our timber, public and private, is subject to depredations from wasteful cutting practices, disease, blight, and general neglect of sound conservation practices, the destruction of timber by forest fires is still the chief problem of forest conservation. New

1. Albuquerque Tribune, July 3, 1963, § A, p. 1, col. 6.

Mexico has lost an average of 1,250 acres of forest through fire each year for the past ten years.² The loss of usable timber is only a part of the damage. The destruction of forests by fire has its effects on soil, wildlife, and watershed as well.

New Mexico's commercial timber forests are held under several forms of ownership: 67 per cent are federally owned; 3 per cent are state owned; and 30 per cent are privately owned.³ Because of this diversity of ownership, it is difficult to determine who, or what agency, if any, is responsible for fire protection upon these lands. This Note will (1) examine the many federal and state constitutional and statutory provisions for the protection of public and private forested lands, and (2) discuss fire protection on private lands in New Mexico and suggest a possible legislative solution to the problem of providing the state with sufficient authority and funds for a program of fire prevention and suppression applicable to all private forested lands.

I

FIRE PROTECTION ON PUBLIC LANDS

A. Protection on Federal Lands

Unquestionably, the United States Government has the power to provide for the protection of its forests. The United States Constitution provides:

The Congress shall have Power to dispose of and make all need-
ful Rules and Regulations respecting the Territory or other Prop-
erty belonging to the United States. . . .⁴

Under this provision, the power of the United States to enact rules and regulations reasonably calculated to preserve federal forest lands is exclusive and supersedes all power of the states to act in a manner inconsistent with the purpose expressed.⁵ In the exercise of this rule-making power, Congress may delegate the power to execu-

2. U.S. Forest Service Statistical Report, *State and Private Forestry—Region 3*, at 3 (unpublished report on file at Regional Office, United States Forest Service, Albuquerque, N.M.) [hereinafter cited as *Statistical Report*].

3. *Statistical Report*, *op. cit. supra* note 2, at 3.

4. U.S. Const. art. IV, § 3, cl. 2.

5. *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *United States v. Gurley*, 279 Fed. 874 (D. Ga. 1922); see also Annot., 13 A.L.R.2d 1098 (1950).

tive officers to administer and to make rules and regulations for the promotion of reforestation and forest conservation projects and for the protection of public forest lands.⁶ The Secretary of Agriculture has the duty of protecting the national forests from fire and other depredations. To carry out this duty, he is given broad authority to make rules and regulations.⁷ The Secretary of the Interior is authorized to protect and preserve from fire timber owned by the United States which is located upon the public lands, national parks, national monuments, Indian reservations, or other lands under his jurisdiction.⁸

The administrative power given these executive officers is broad enough (1) to encompass private interests within the public forest, *e.g.*, private lessees of cabin sites and mineral lessees;⁹ and (2) to reach private interests near the public lands administered by the officer. Examples of (2) are: (a) the authority of the Secretary of the Interior to render emergency fire-fighting assistance to nearby fire protection agencies for fires outside of the national park system;¹⁰ (b) the authority given federal "agency heads"¹¹ charged with the duty of providing fire protection for United States property to enter into reciprocal fire protection agreements with neighboring public or private fire protection organizations;¹² and (c) if no reciprocal agreement exists, each agency head has the authority to render emergency fire-fighting assistance within the vicinity of the place where his agency maintains fire protection facilities, if he deems such assistance to be in the best interests of the United States.¹³

6. *United States v. Grimaud*, 220 U.S. 506 (1911); *Dent v. United States*, 8 Ariz. 413, 76 Pac. 455 (1904); *Chambers v. McCollum*, 47 Idaho 74, 272 Pac. 707 (1928).

7. 30 Stat. 35 (1897), as amended, 16 U.S.C. § 551 (Supp. IV, 1963).

8. 42 Stat. 857 (1922), 16 U.S.C. § 594 (1958).

9. See *United States v. Reeves*, 39 F. Supp. 580 (D. Ark. 1941), where the court upheld the constitutionality of a regulation promulgated by the Secretary of Agriculture regarding unleashed dogs in a national forest. Answering a charge that such authority was an unconstitutional delegation of legislative power, the court said that in the very nature of things Congress cannot by general statute regulate the various details of the management of the national forests. The delegation of power could not be considered as unlawful so long as the Secretary's rules and regulations tended to protect the public lands and faithfully preserve the interests of the people at large.

10. 67 Stat. 495 (1953), 16 U.S.C. § 1b(1) (1958).

11. "Agency heads" are defined as the head of any executive agency, or independent establishment in the executive branch of the federal government. 69 Stat. 66 (1955), 42 U.S.C. § 1856 (1958).

12. 69 Stat. 66 (1955), 42 U.S.C. § 1856(a) (1958).

13. 69 Stat. 67 (1955), 42 U.S.C. § 1856(b) (1958).

Criminal sanctions are provided for persons who wilfully and without authority set on fire any timber, underbrush, or grass or other inflammable material upon the public domain,¹⁴ and for the person who, having set the fire upon public domain, leaves such fire without extinguishing it or permits it to spread beyond his control.¹⁵

B. Protection on State Lands

The New Mexico Legislature has expressly stated that the protection of the state's forest resources from loss by fire is in the public interest. The preamble to the New Mexico Logging Operations Laws provides:

The protection of growing timber and young growth from fire hazard and the prevention of logging practices which will increase fire hazard and prevent the favorable conditions of water flows are hereby declared to be a public policy of the state of New Mexico.¹⁶

This is but another expression of New Mexico's general interest in conserving its natural resources.¹⁷

Four areas of New Mexico's laws provide for fire protection on state lands.

1. Public Land Laws

Section 7-12-1, New Mexico Statutes Annotated,¹⁸ imposes upon the Commissioner of Public Lands the duty to care for the timber and timber products upon state lands. It also gives him authority to promulgate such rules and regulations as may be necessary to protect the state's timber and watersheds. Section 7-12-2¹⁹

14. 62 Stat. 788 (1948), 18 U.S.C. § 1855 (1958), provides for a maximum fine of \$5,000 or five years imprisonment, or both.

15. 62 Stat. 788 (1948), 18 U.S.C. § 1856 (1958), provides for a maximum fine of \$500 or six months imprisonment, or both.

16. N.M. Stat. Ann. § 62-1-1 (1953).

17. For example, the Legislature has said that lessees of state lands shall protect the leased lands from waste. N.M. Stat. Ann. § 7-7-5 (1953). With regard to petroleum resources, the New Mexico Supreme Court has said:

[T]he two fundamental powers and duties of the [Oil Conservation] [C]ommission are prevention of waste and protection of correlative rights. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 323, 373 P.2d 809, 817 (1962). "Prevention of waste is of paramount interest." *Id* at 324, 373 P.2d at 818.

18. N.M. Stat. Ann. § 7-12-1 (1953).

19. N.M. Stat. Ann. § 7-12-2 (1953).

gives the Commissioner authority to enter into cooperative agreements with federal or private agencies in order to carry out the provisions of section 7-12-1.

2. Logging Operations Laws

Section 62-1-2²⁰ requires that any person, firm, association, or corporation cutting saw timber from lands within the state must (1) take all reasonable precaution to prevent the starting of fires, (2) promptly suppress all fires that may occur on timberland before, during, or after cutting, and (3) construct fire lines by piling and burning slash on a strip on each side of main hauling roads.

3. Forest Conservation Act

Section 62-3-3²¹ establishes a State Forestry Department and Forest Conservation Commission. Section 62-3-11²² gives the Commission power to make rules and regulations it deems necessary for the prevention and suppression of forest or brush fires. Section 62-3-9²³ authorizes the Commission to enforce all laws relating to the following acts upon all forested, cut-over, or brush lands within New Mexico: (a) prevention and suppression of fires; (b) logging and timber operations and practices; (c) trespass, waste, and littering; and (d) conservation of forest lands and products. This section also authorizes the State Forester and all persons designated by the Commission to go upon these lands for investigative purposes and to arrest anyone violating these laws. These officers are not liable in any civil actions for acts done while discharging their duties.

4. Criminal Provisions

All three of the foregoing groups of laws carry criminal penalties. Section 7-7-2²⁴ provides that it shall be a misdemeanor punishable by fine or imprisonment for any person to build a fire in or near any forest, timber, or other inflammable materials upon state lands and leave before it is totally extinguished. Section 7-7-1²⁵ makes it a felony to wilfully and maliciously set on fire any timber, underbrush, or grass upon state lands, or to leave a fire burning unattended near

20. N.M. Stat. Ann. § 62-1-2 (Supp. 1963).

21. N.M. Stat. Ann. § 62-3-3 (1953).

22. N.M. Stat. Ann. § 62-3-11 (Supp. 1963).

23. N.M. Stat. Ann. § 62-3-9 (1953).

24. N.M. Stat. Ann. § 7-7-2 (1953).

25. N.M. Stat. Ann. § 7-7-1 (1953).

any timber or other inflammable material. The penalty may be a fine, imprisonment, or both.²⁶

Section 40A-17-1²⁷ of New Mexico's criminal code defines the improper handling of fire and provides that whoever commits such handling is guilty of a petty misdemeanor.²⁸

Section 62-1-3²⁹ provides that the violation of any of the provisions of the Logging Operations Laws³⁰ shall be a misdemeanor punishable by fine, imprisonment, or both.

Finally, section 62-3-12³¹ provides that any person convicted of violating any of the rules and regulations promulgated by the Forest Conservation Commission shall be guilty of a misdemeanor and subject to fine, imprisonment, or both.

C. Co-operative Fire Protection Agreements

In addition to the provisions of the federal and state governments for fire protection on their own lands, there has been a great deal of legislation providing for co-operation among the various federal, state, and private agencies responsible for the conservation and protection of timbered lands.

The Weeks Act of 1911³² set the stage for regular federal-state co-operative forestry efforts. Under this Act, the Secretary of Agriculture is authorized to enter into co-operative agreements with the states for the organization and maintenance of a fire protection system on any state or private forest land located upon the watershed of a navigable river. In order for a state to take advantage of the Act, it must first provide, by law, for a fire protection system.³³

26. In comparing §§ 7-7-1 and 7-7-2, one wonders what penalty would apply to the camper who carelessly leaves his campfire burning. He is not "wilful or malicious" in so doing, but neither does he make any attempt to extinguish the fire. If § 7-7-2 is interpreted as requiring a showing of at least *some* attempt to extinguish, but failure to *totally* extinguish, then our camper might have committed a felony under § 7-7-1 by "suffering the fire to burn unattended near any timber."

27. N.M. Stat. Ann. § 40A-17-1 (1953).

28. Subsection D of this new criminal provision states that "leaving any campfire burning and unattended upon the lands of another person" shall be an improper handling. N.M. Stat. Ann. § 40A-17-1D (1953). Perhaps our hypothetical camper who might have been found guilty of a felony under § 7-7-1 (see note 26 *supra*) will be treated under this subsection as a petty misdemeanant, since the subsection specifically provides for campers who leave their campfires burning.

29. N.M. Stat. Ann. § 62-1-3 (1953).

30. N.M. Stat. Ann. §§ 62-1-1 to -5 (1953, Supp. 1963).

31. N.M. Stat. Ann. § 62-3-12 (1953).

32. 36 Stat. 961 (1911), 16 U.S.C. § 563 (1958).

33. *Ibid.*

The Clarke-McNary Act of 1921³⁴ considerably broadened the Weeks Act. It is under the Clarke-McNary Act, and its subsequent amendments, that the present federal-state co-operative programs are being established. The first section of the Act is similar to the Weeks Act, in that it directs the establishment of co-operative agreements with states and other private agencies to provide fire protection. However, the Clarke-McNary Act is much broader. The protection systems authorized are not limited to watershed areas of navigable rivers; they extend to all timberlands in each state.³⁵ New Mexico has expressly accepted the provisions of the Clarke-McNary act.³⁶

There are several other federal statutes that provide for co-operative action between the federal government and state and private agencies. Section 594, title 16, United States Code³⁷ is important, as it authorizes the Secretary of the Interior to act directly or in co-operation with other departments of the federal government, states, or private owners to protect the federally owned timber in national parks, national monuments, and other lands under his jurisdiction from fire, disease, or insects.

United States Forest Service officials are directed to aid the enforcement of state laws with regard to the prevention and suppression of forest fires. With respect to national forests, they must aid other federal bureaus and departments upon request.³⁸

The United States Forest Service has the authority to rent or sell fire control equipment to state, county, private, or other non-federal agencies who are co-operating with the Forest Service in fire control under the terms of written co-operative agreements.³⁹

Not only does New Mexico accept the Clarke-McNary Act and the other principal federal conservation acts,⁴⁰ but its laws provide for cross-agency agreements between the State Land Commission

34. 43 Stat. 653 (1924), as amended, 16 U.S.C. §§ 471, 505, 515, 564-68a, 569, 570 (1958).

35. 43 Stat. 653 (1924), as amended, 16 U.S.C. § 564 (1958).

36. N.M. Stat. Ann. § 62-3-2 (1953), a provision of the New Mexico Forest Conservation Act [N.M. Stat. Ann. §§ 62-3-1 to -15 (1953, Supp. 1963)] accepts the Clarke-McNary Act, along with the Co-operative Forest Management Act [64 Stat. 473 (1950), 16 U.S.C. §§ 568(c), 568(d) (1958), as amended, 16 U.S.C. § 568(d) (Supp. IV, 1963)] and the Forest Pest Control Act [61 Stat. 177 (1947), 16 U.S.C. §§ 594-1 to -5 (1958)]. The latter two acts are not pertinent to this discussion of fire protection.

37. 42 Stat. 857 (1922), 16 U.S.C. § 594 (1958).

38. 35 Stat. 259 (1908), 16 U.S.C. § 553 (1958).

39. 58 Stat. 736 (1944), 16 U.S.C. §§ 580, 580a (1958).

40. N.M. Stat. Ann. § 62-3-2 (1953).

and the Forest Conservation Commission⁴¹ and for state co-operation with federal or private agencies.⁴² To carry out the provisions of the Clarke-McNary Act and other federal forest conservation acts, the New Mexico Forest Conservation Act designates the Forest Conservation Commission an agent of the State of New Mexico with authority to enter into fire protection contracts with the Secretary of Agriculture, the New Mexico Commissioner of Public Lands, and other state, federal or private agencies or organizations, corporations, individuals, and private landowners.⁴³

II

FIRE PROTECTION ON PRIVATE LANDS

The foregoing federal and state statutory provisions afford fire protection over private lands in only two instances: (1) when the private lands are so close to public lands that it is in the best interest of the agency responsible for the protection of the public lands to protect the nearby private lands,⁴⁴ and (2) when the private lands are covered under a co-operative agreement or fire-fighting contract with a federal or state agency.

However, we are still faced with the problem of providing fire protection for a considerable portion of the private timberlands in New Mexico which do not come within either of the above categories. Approximately one million acres of private commercial timberlands in New Mexico are unprotected.⁴⁵ As in the case of the

41. N.M. Stat. Ann. § 62-3-6 (Supp. 1963).

42. N.M. Stat. Ann. §§ 7-12-2, 62-1-4 (1953); N.M. Stat. Ann. § 62-3-6 (Supp. 1963).

43. N.M. Stat. Ann. § 62-3-6 (Supp. 1963).

44. In *United States v. Chesapeake & O. Ry.*, 130 F.2d 308 (4th Cir. 1942), defendant railroad's locomotive threw out sparks along its right of way which was near to, but not adjoining, a national forest. A fire started by the sparks spread from the right of way to private land adjoining the national forest. On its own volition and at an expense of \$2,000, the United States went on the private land and fought the fire to keep it from spreading to the national forest. The court held that although the local, Virginia, statute provided a method only for the *state* to put out the fire and recover the expenses therefor, the provision that the negligent party should be liable for the amount of expenses incurred in fighting the fire was not nullified. The statute was interpreted to mean that the negligent party would be liable for all expenses incurred by *anyone* who was justified in fighting the fire. Here, the steps the United States took to fight the fire were justifiable. The court stated that when valuable property is being endangered by the approach of a rapidly spreading fire, the owner is not a volunteer when he takes proper steps to prevent destruction of the property.

45. This figure is based upon an interpretation of information from the Statistical Report, *op. cit. supra* note 2, at 1, 3. New Mexico has approximately 1,800,000 acres

W. S. Ranch fire reported at the beginning of this Note, the owner fights the fire as best he can or simply lets it burn out. The result is that timber which is valuable to both public and private interests is needlessly lost.

Unquestionably, the public has an interest in the use of private timberlands. In *State v. Dexter*,⁴⁶ the United States Supreme Court affirmed the decision of the Washington Supreme Court which upheld the constitutionality of a Washington statute requiring owners and proprietors of land used for commercial logging to provide for its reforestation. The court stated that private enterprise must utilize its property in ways that are not inconsistent with the public welfare.⁴⁷ The court noted that the record of the private owner's unrestricted use of his timberland had been one of "cut and get out," leaving the logged-off lands (having no economic value) to revert to the county for unpaid taxes. The denuded hillsides had made possible the rapid run-off of surface waters, thereby increasing the danger from floods and contributing to costly soil erosion.⁴⁸

It is the public policy of New Mexico to protect growing timber from fire hazards.⁴⁹ With increasing use of New Mexico's forested areas for hunting, fishing and recreational purposes, it will be more important than ever to devise some means of controlling fires on all private lands with the least inconvenience and expense to the state and private owners.

Two problems must be solved before any effective fire control over private timberland may be achieved: (1) whether the state may legally enter upon private lands to fight fires, with or without the owner's consent; and (2) how the expense of fighting the fire may be allocated; who pays—the state, the federal government, the private owner, or do all three contribute?

A. The State's Right to Enter upon Private Lands to Fight Fires

This problem is now well settled in the state's favor. In the 1795 case of *Vanhorne's Lessee v. Dorrance*,⁵⁰ the United States Supreme Court said:

of private commercial timberlands. The assumption was made that the 917,000 acres New Mexico now protects includes *no* federal lands, *all* of the state's 200,000 acres, and the balance (slightly over 700,000 acres) in private lands—leaving a little more than 1 million private acres unprotected.

46. 32 Wash. 2d 551, 202 P.2d 906, *aff'd without opinion*, 338 U.S. 863 (1949).

47. *State v. Dexter*, 32 Wash. 2d 551, 202 P.2d 906, 907 (1949).

48. 202 P.2d at 908.

49. N.M. Stat. Ann. § 62-1-1 (1953).

50. 2 U.S. (2 Dall.) 303, 309 (1795).

[T]he right of acquiring and possessing property and having it protected, is one of the natural, inherent and inalienable rights of man. . . . The preservation of property, then, is a primary object of the social compact. . . . [N]o one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community.

However, since *Dorrance* there has been an almost complete reversal of the philosophy that a man may do as he pleases with his property. The first important case recognizing this reversal was *Commonwealth v. Alger*,⁵¹ where the Massachusetts Supreme Court said:

Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

The *Alger* decision provided the basis for the present view that statutes designed to protect and conserve a state's natural resources are constitutional as an exercise of the state's police power. The best expression of the present position of the state courts, and of the United States Supreme Court, may be found in *State v. Dexter*,⁵² where the Washington Supreme Court said:

[T]he protection and conservation of the natural resources is in the general welfare and serve[s] a public purpose, and so constitute[s] a reasonable exercise of the police power.

51. 61 Mass. (7 Cush.) 53, 85 (1851).

52. 32 Wash. 2d 551, 202 P.2d 906, 909 (1949), *aff'd without opinion*, 338 U.S. 863 (1949). The Washington Supreme Court held constitutional a reforestation statute which would require those engaged in commercial logging operations to make provisions for reforesting the area logged by either leaving a certain number of trees for reseeding purposes or by restocking. The statute was held to be a lawful exercise of the state's police power; it did not authorize the taking of private property without compensation or due process of law.

For additional information on the constitutionality of conservation statutes and statutes dealing particularly with forest fire protection, see generally *United States v. Alford*, 274 U.S. 264 (1927); *Chambers v. McCollum*, 47 Idaho 74, 272 Pac. 707 (1928); *Stacer, The Oregon Forest Conservation Act*, 2 Willamette L. J. 268, 282 (1963); *Note, The Constitution and State Control of Natural Resources*, 64 Harv. L. Rev. 642 (1951); *Note, Constitutional Aspects of Timber Conservation Legislation*, 25 Notre Dame Law. 673 (1950); *Note*, 1952 Wis. L. Rev. 186; *Annot.*, 13 A.L.R.2d 1095 (1950).

New Mexico early adopted the rule of the *Alger* case⁵³ and has followed it ever since. For example, conservancy acts have been held constitutional as not denying due process or equal protection of the law,⁵⁴ and statutes providing for the establishment of irrigation districts in New Mexico are constitutional.⁵⁵ The New Mexico Supreme Court has stated that the police power extends to all great public needs and may be exercised in aid of what is held by preponderant opinion to be greatly and immediately necessary to public welfare;⁵⁶ that the Legislature has wide latitude in determining the necessity for protecting the peace, health, safety, morals, and general welfare of the public;⁵⁷ and that it is not essential that an "immediate" necessity exist before the Legislature can move under the police power—it may act to prevent apprehended dangers as well as to control those already existing.⁵⁸

The people of New Mexico have also expressed themselves on the subject of forest fires. The New Mexico Constitution states:

The police power of the state shall extend to such control of private forest lands as shall be necessary for the prevention and suppression of forest fires.⁵⁹

Thus, the state has authority to enter upon private lands to prevent or suppress forest fires.

B. Distribution and Recovery of Fire-fighting Expenses

Once the problem of getting the state onto private land to fight fires has been solved, the more difficult questions must be answered:

53. *State v. Brooken*, 19 N.M. 404, 143 Pac. 479 (1914).

54. *In re Proposed Middle Rio Grande Conservancy Dist.*, 31 N.M. 188, 242 Pac. 683 (1925).

55. *Davy v. McNeil*, 31 N.M. 7, 240 Pac. 482 (1925).

56. *State v. Prince*, 52 N.M. 15, 189 P.2d 993 (1948). In a concurring opinion in *Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist.*, 57 N.M. 287, 311, 258 P.2d 391, 406 (1953), Chief Justice Sadler stated:

If a huge conflagration were sweeping Albuquerque . . . none would question the power of the city government . . . to destroy by blasting or otherwise [establish] a sufficient "fire break" to stop the spread of the flames and save the lives and property of those living beyond.

By analogy, no one could deny the state the right to act similarly in the prevention of forest fires.

57. *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779 (1941).

58. *State ex rel. Hughes v. Cleveland*, 47 N.M. 230, 141 P.2d 192 (1943).

59. N.M. Const. art. 15, § 2.

who pays—if the private owner must contribute a portion of the cost of state-furnished fire protection on his land, how may the state assess and collect that portion?

Because of the public's interest in protecting forest and watershed resources, public funds may, and should, be used for the protection of both public and private forestlands,⁶⁰ so long as the use of public funds is in reality for a public purpose and does not constitute a private benefit.⁶¹

On the other hand, it is within the constitutional power of the state to recover reasonable sums from private owners of forest lands to defray the expenses incident to a coherent plan for forest protection and conservation.⁶² The exercise of this power is advisable for at least two reasons: (1) it will help spread the burden of forest fire protection on private land more equitably between the public and the private owner, and (2) it will involve the private owner more directly and make him more conscious of the necessity of providing fire protection for his lands.

60. *Chambers v. McCollum*, 47 Idaho 74, 272 Pac. 707 (1928); *Opinion of Justices*, 84 N.H. 559, 149 Atl. 321 (1930).

61. *Deal v. Mississippi County*, 107 Mo. 464, 18 S.W. 24 (1891); *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331 (1915). The New Mexico Supreme Court discussed this "public purpose v. private benefit" question in *State v. Lavender*, 69 N.M. 220, 365 P.2d 652 (1961). In that case the court was construing a utilities relocation act, N.M. Stat. Ann. §§ 55-7-23 to -29 (1953), which required the state to pay, in certain cases, the non-betterment costs of utility relocation expenses necessitated by highway improvements. The question was whether the City of Albuquerque (being treated as a private utility because of its proprietary function as a supplier of water and sewer services) should have to pay the expenses of relocating service lines caused by the construction of a federal-aid highway through the city, or whether the New Mexico State Highway Commission could be ordered to reimburse the city from state funds. The court ordered the Highway Commission to reimburse the city and held that the statute did not violate the constitutional prohibition against state aid to private enterprise (N.M. Const. art. 9, § 14). Although the court recognized that the burden of relocating would thus be spread upon the taxpayers of the state as a whole, it felt that to cause the City of Albuquerque (in its capacity as a private utility) to pay the relocation expenses would mean that the expense would be passed along to the users in the form of increased rates. Thus, a small segment of the population of the state would have to bear the burden while the benefit of the new highway would be enjoyed by persons from all over the state.

The same argument might be applied to the expense of forest fire protection on private lands. First, the expense of protection is a "non-betterment" expense; it does not *improve* the private land. Second, the public at large will benefit from the protection of a valuable natural resource.

62. *Chambers v. McCollum*, 47 Idaho 74, 272 Pac. 707 (1928); *Starker v. Scott*, 183 Ore. 10, 190 P.2d 532 (1948); *State ex rel. Sherman v. Pape*, 103 Wash. 319, 174 Pac. 468 (1918).

New Mexico follows the "share the burden" philosophy by providing for co-operative fire protection agreements with private individuals or organizations⁶³ and for fire protection contracts whereby the state agrees to furnish all the fire protection for the contracted land at a rate of three cents per acre.⁶⁴ For the period 1960-1962, the total cost of fire protection for all non-federal forested and watershed lands in New Mexico (*i.e.*, private, state, and county lands) was \$276,678.⁶⁵ The cost sharing among private, state and county, and federal was: 20 per cent private; 41 per cent state and county; and 39 per cent federal.⁶⁶ Private landowners in New Mexico are providing a higher percentage of the total fire funds than in any other state.⁶⁷ But even at that, New Mexico has been unable to bring all the private timberlands under adequate fire protection. There are approximately 2 million acres of non-federal commercial timberlands in New Mexico—1,800,000 private and 200,000 state-owned.⁶⁸ More than 50 per cent of the private timberland is still unprotected.⁶⁹

Not only does the state have unprotected private timberlands, but those private owners who are participating in co-operative fire protection agreements or contracts with the state are contributing more than their fair share. The New Mexico State Forestry Department has stated that (1) most other states do not ask the landowner to contribute at all but, rather, obtain fire protection funds from other sources; (2) no other state is requiring every private landowner to sign co-operative agreements or contracts; and (3) the system of co-operative fire protection agreements or contracts in New Mexico results in a "crazy-quilt" pattern of protected lands because (a) many landowners will not agree to pay their share of the costs (averaging about three cents per acre at the present time),

63. N.M. Stat. Ann. §§ 7-12-2, 62-1-4, 62-3-2, 62-3-6, -7 (1953, Supp. 1963).

64. N.M. Stat. Ann. § 62-3-6 (Supp. 1963); Joint Report, *infra* note 65, at 7.

65. United States Forest Service and the New Mexico Department of State Forestry Joint Report, A Study of Cooperative Forest Fire Control Problems in New Mexico 3-4 (1963) [hereinafter cited as Joint Report].

66. Joint Report, *op. cit. supra* note 65, at 4.

67. New Mexico private landowners actually provide about 24 to 30% of the total fire funds as compared to the 16% recommended in the *Batelle Report*, a study of the co-operative forest fire control problem on state and private lands on a nationwide basis. Joint Report, *op. cit. supra* note 65, at 3-4.

68. United States Forest Service Statistical Report, State and Private Forestry—Region 3, at 3 (unpublished report on file at Regional Office, United States Forest Service, Albuquerque, N.M.) [hereinafter cited as Statistical Report].

69. Statistical Report, *op. cit. supra* note 68, at 1, 3. See note 45 *supra* for the basis of this estimate.

or (b) those that do agree one year may drop out the next year, depending upon how hard pressed they are for cash.⁷⁰

Yet no one would deny that the state is the logical source for uniform fire protection over all lands, and that all private landowners should contribute their portion of the expense for protection on their lands. But how may the state provide universal fire protection and recover the private owner's portion of the expenses therefor? Should the state merely attempt to *recover* expenses as they occur, or should there be a permanent fund available for fire suppression costs?⁷¹

There are four possible solutions to the expense-recovery problem: (1) the negligence approach; (2) recovery by action for debt; (3) co-operative agreements and fire protection contracts; and (4) the taxation-insurance approach.

1. The Negligence Approach

No attempt will be made in this Note to discuss the common law and statutory expressions of negligence liability for the recovery of fire-fighting expenses. Suffice it to say that several jurisdictions, not including New Mexico, have set up statutes which impose liability upon the owner or occupant for expenses resulting from fighting a fire started on his land.⁷² Liability may be predicated on the creation of a fire hazard or upon some element of negligence, such as failure to comply with statutory regulations relating to the prevention and control of fires.⁷³

70. Joint Report, *op. cit. supra* note 65, at 7.

71. When the New Mexico Forest Conservation Act was passed, one section provided that \$100,000 be appropriated to the state forestry department as an emergency fire suppression fund for each of the years 1960 and 1961. N.M. Stat. Ann. § 62-3-13 (1953). But similar appropriations have not been made for subsequent years. Even if there were annual appropriations for such purpose, there could be no permanent "continuing" fire suppression fund; another section of the Act provides that all funds in either the general forest conservation fund or the emergency fire suppression fund are to revert to the state's general fund on July 1st of each year. N.M. Stat. Ann. § 62-3-15 (1953).

72. However, New Mexico does have a statute which provides that any person setting on fire any woods, marshes, or prairies, whether his own or not, will be liable in a civil action to the injured party for double damages. N.M. Stat. Ann. § 40-18-7 (1953). The problem with such a statute is that in many cases much legal fictionalizing would have to be done to show that the state was such an "injured party" that it could recover its fire-fighting expenses.

73. For a more detailed treatment of this area see generally Falk, *Timber and Forest Products Law* 113 (1958); Note, *Forest Fires: Responsibilities and Liabilities*, 2 *Willamette L. J.* 309, 321 (1963); Annot., 90 *A.L.R.2d* 874 (1963); Annot., 24 *A.L.R.2d* 241 (1952); Annot., 18 *A.L.R.2d* 1081 (1951); Annot., 104 *A.L.R.* 412 (1936); 22 *Am. Jur. Fires* §§ 3, 4 (1939).

It may be argued that these negligence-based statutes are the best solution to the expense-recovery problem because there is an established body of common law upon which they may be interpreted, without raising any constitutional questions, and no cumbersome administrative machinery need be set up for their application. However, the disadvantages outweigh the advantages. Recovery is available only through the slow judicial process, and it may be only a partial recovery, depending upon the solvency of the defendant. No permanent fire suppression fund will be available to the state forestry department. The statutes provide only for the recovery of expenses—they do not encourage fire *prevention* through participation in any sort of co-operative program. Finally, they do not entirely solve the problem of expense recovery for accidentally or naturally caused fires.

2. Recovery by Action for Debt

Some states have statutes which provide that the state may recover its fire-fighting expenses in an action for debt. These statutes declare that the setting or maintenance of a fire under certain conditions is a "public nuisance," and the state therefore has the right, in the exercise of its police power, to come in and abate the nuisance. New Mexico has such a statute, and its language is typical:

Any fire on any forested . . . lands in the state of New Mexico burning uncontrolled and without proper precaution being taken to prevent its spread is hereby declared a public nuisance by reason of its menace to life or property. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to make a reasonable effort to control or extinguish it immediately, and if said responsible person, firm or corporation shall refuse, neglect or fail to do so, voluntary forest fire wardens or peace officers of the state . . . may summarily abate the nuisance thus constituted . . . and the cost thereof may be recovered from said responsible person, firm or corporation by action for debt.⁷⁴

The creation of the "nuisance" contemplated by this type of statute is not based on a negligence theory. A "nuisance" may arise from (1) the creation or maintenance of a condition having a natural tendency to cause danger and inflict injury; or (2) from the use of

74. N.M. Stat. Ann. § 40-18-4 (1953).

an intrinsically dangerous agency, the necessary and obvious effect of which is to cause harm.⁷⁵

The wording of the New Mexico "nuisance" statute,

Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to make a reasonable effort to control or extinguish it immediately,⁷⁶

makes it clear that any person—owner, lessee, or logging contractor—may be liable for his inaction, if he was the "responsible" person. Query whether the legal owner may avoid liability under the statute if he has leased the premises to a commercial logger and no longer is in possession? Is he then "responsible"? An Oregon case⁷⁷ held that owners of forestland, by merely entering into a contract with a logging company, cannot divest themselves of their statutory duty to make every reasonable effort to control and extinguish a fire immediately after its existence comes to their knowledge; nor may they divest themselves of liability for a breach of that duty.⁷⁸

If the state acts under its "nuisance-debt" statute, the landowner should be afforded notice and opportunity for a hearing at some stage of the proceedings in order to establish the validity of the amount determined by the state as the "debt" owed.⁷⁹ The land-

75. In *Arneil v. Schnitzer*, 173 Ore. 179, 144 P.2d 707 (1944), the court held that one could maintain a public nuisance on his land by permitting the accumulation of inflammable material thereon. For this he would be liable in damages for the destruction of his neighbor's property by fire originating in such material, though neither the owner nor any of his employees negligently or intentionally set the fire. See also, *Richardson v. Murphy*, 198 Ore. 640, 259 P.2d 116 (1953).

76. N.M. Stat. Ann. § 40-18-4 (1953).

77. *State v. Gourley*, 209 Ore. 363, 305 P.2d 396 (1956), *rehearing denied*, 306 P.2d 1117 (1957).

78. *Ibid.*

79. *Starker v. Scott*, 183 Ore. 10, 190 P.2d 532 (1948); *First State Bank v. Kendall Lumber Corp.*, 107 Ore. 1, 213 Pac. 142 (1923). Nor does it seem equitable to hold the landowner who violates the conditions of the statute liable for the full amount of suppression expense incurred by the state if such amount would exceed the full value of the land and timber as it existed immediately before the fire. The final phrase of N.M. Stat. Ann. § 40-18-4 (1953) now reads:

and the cost thereof may be recovered from said responsible person, firm or corporation by action for debt.

Perhaps the following words could be added at the end:

but in no case shall such cost exceed the fair market value of the timber remaining on the land of said person, firm or corporation after the fire has been abated.

This additional wording would prevent the state from bankrupting the private landowner. If he has to reimburse the state for the fire-fighting expenses, he would at least

owner should have the opportunity to show that he made a reasonable, though unsuccessful, effort to extinguish the fire. If so, he should not be held liable to the state in any amount.

Although the "nuisance-debt" statute suffers from the same disadvantages as the negligence-based statutes, in that recovery must be through the slow judicial process and it does not provide any sort of fire suppression fund for the state forestry department, it does avoid the question of whether or not the fire was negligent in its origin. All fires are covered, regardless of their origin.

3. Co-operative Agreements and Fire Protection Contracts

New Mexico is presently attempting to recover fire-fighting expenses through a program of co-operative agreements and fire protection contracts between the state and the private landowner. The Forest Conservation Act sets up the basic plan:

[T]he [Forest Conservation] commission is designated as the agent of the state of New Mexico and is authorized to enter into contracts and co-operative agreements with . . . private landowners . . . individuals, corporations . . . and private agencies or organizations to prevent and suppress forest or brush fires. . . .⁸⁰

The statute contemplates two types of fire protection agreements: (1) a co-operative agreement with an independent fire protection organization or district composed of a group of private landowners, or a large landowner who has set up his own fire protection program;⁸¹ and (2) contract agreements with individual landowners whereby the landowner and the state agree that the state shall provide all the fire protection and the landowner shall reimburse the state for his fair share of the expenses. As of August, 1963, New Mexico had signed fire contracts with approximately 150 out of a total of 2,037 owners of private commercial forest.⁸²

The argument in favor of co-operative agreements and fire protection contracts is that such a program directly involves the private owner in the cost of protecting his land. Not only does this make

be able to break even by selling off the remaining timber. The private owner should not be unjustly enriched by the value of the timber the state was able to save (which would have otherwise been lost), but neither should the state be able to bankrupt the private owner by obtaining a judgment that he could not satisfy.

80. N.M. Stat. Ann. § 62-3-6 (Supp. 1963).

81. No information is available as to whether New Mexico has entered into any such co-operative agreements.

82. Joint Report, *op. cit. supra* note 65, at 7, 8.

him more conscious of the importance of fire protection but, in theory at least, the state can depend upon being reimbursed for the landowner's share of any fire-fighting expenses.

However, the program has several serious drawbacks. *First*, there is no permanent fire suppression fund available to the state forestry department;⁸³ the state may even have to sue for the amount due, in an action for breach of contract.

Second, the program is not compulsory. The Forest Conservation Act provides:

No provision of this Forest Conservation Act . . . shall be construed to require the commission to conduct fire prevention or suppression activities upon any land unless the same be covered by a standard fire co-operative agreement; Provided, however, should a fire be burning upon land not covered by an agreement, the commission may contract with the owner of said land, or with owners of adjacent lands which are being threatened by such fire, to suppress such a fire for a consideration of not less than the actual cost of suppression.⁸⁴

As was dramatically pointed out by the W. S. Ranch fire, the owner may refuse to contract and the state's hands are tied. Of the total acres of private commercial timber in New Mexico, 55.6 per cent is owned by only 2.3 per cent of the total number of private owners.⁸⁵ Because of this peculiar distribution of private ownership, the co-operative fire protection program will fail if these few owners refuse to cooperate.

Third, even assuming that most private owners were willing to contract, difficult problems of administration arise. There may be contract lands next to non-contract lands, resulting in a "crazy-quilt" pattern of protected lands. A fire may spread from non-contract to contract lands and be more costly to suppress after spreading to the contract lands. This will increase the financial burden on the state and the contract owner. There will be a constant problem of bookkeeping to keep up with the expiration and renewal of the contracts. Some owners will deliberately let their contracts expire without an intent to renew. Thus, the pattern of protected lands will shift from year to year.

83. See note 71 *supra*.

84. N.M. Stat. Ann. § 62-3-10 (1953).

85. Joint Report, *op. cit. supra* note 65, at 8. 84.5% of the total acreage is held by only 11.9% of the total owners.

In New Mexico, 88 per cent of the total number of private timber owners hold timber in parcels of less than 500 acres.⁸⁶ Such parcels would include the many small private cabin tracts where there is a high fire risk. In order to reduce the heavy burden of administering fire protection contracts on these small tracts, the New Mexico Forest Conservation Commission has considered eliminating all fire contract agreements covering ownerships below 500 acres.⁸⁷ Instead, the approach for the tracts under 500 acres would be to provide blanket fire protection at the state's expense, but still encourage the small tract owners to sign *co-operative* agreements (rather than *contract* agreements) whereby the private owner agrees to make a reasonable effort to cooperate with the state in providing fire protection for his land. Thus, there would be fewer collection and annual renewal problems because there would be fewer contracts to administer.

The constitutionality of this approach is questionable. Even "non-co-operative" private owners of small forested tracts would receive fire protection without contributing their share of the expenses. True, the burden of administering the contract fire protection agreements would be lessened, but two constitutional questions arise: (1) whether the interest of the general public in the conservation of the forest resources of the state is great enough to cause it to bear the entire burden of protecting that resource from destruction by fire, and (2) whether the owners of forest tracts over 500 acres should have to contribute to the costs of fire protection while the small tract holders do not.⁸⁸

4. The Taxation-Insurance Approach

One way to retain the benefits of uniformity of administration and universality of fire protection, and at the same time avoid the

86. Joint Report, *op. cit. supra* note 65, at 7.

87. Minutes of a meeting of the Forest Conservation Comm'n, New Mexico State Department of Forestry, Santa Fe, N.M. (August 23, 1963).

88. See *Durand v. Middle Rio Grande Conservancy Dist.*, 46 N.M. 138, 123 P.2d 389 (1941), where the New Mexico Supreme Court passed on the constitutionality of a special "relief act" of the New Mexico Legislature (N.M. Laws Spec. Sess. 1940, ch. 1). The act was designed to relieve the owners of non-cultivated lands within a conservancy district of the burden of paying their share of assessments for improvements. Payment of such assessments was to be deferred for fifteen years without interest. The burden of paying the deferred interest was thrown upon the owners of the cultivated lands in addition to their own annual assessments, plus any additional assessments for deficiencies caused by the deferred assessments on the non-cultivated lands. The court held that the special relief act was unconstitutional, as being in violation of the due process clause of the United States and New Mexico Constitutions.

constitutional questions raised in the preceding paragraph, is the taxation-insurance approach. Under it the state levies a uniform assessment of "X" cents per acre⁸⁹ on private forestland for fire prevention and suppression. In this manner, not only is uniformity retained, but the state forestry department will be able to build up a permanent fire suppression fund.⁹⁰ This avoids the difficulty of the state's having to go through the judicial process in actions for debt, or upon contract, to collect moneys due it.

Three arguments may be put forth in support of the validity of such assessments: (1) they are a valid exercise of the state's taxing power; (2) they are, in a sense, assessments for a "conservancy" district; and (3) they are a valid exercise of the state's police power. The following discussion will develop these points.

Since the protection and promotion of forests and water resources are within the ambit of the public welfare, the taxing power may be used to aid that public purpose.⁹¹ Such taxes may resemble double taxes, but in New Mexico there is no constitutional inhibition against double taxation.⁹² In a Maine case, *Inhabitants of Sandy River Plantation v. Lewis*,⁹³ the court construed a forestry district tax and held it constitutional against the argument that it placed a burden on real estate in addition to all other property taxes assessed throughout the state. The court reasoned that the land within the district was specially benefited by the tax. However, in a subsequent case, *In re Opinion of the Justices*,⁹⁴ the Maine court expressed the view that taxation, directly or indirectly, which would increase the value of privately owned resources was beyond the power of the legislature to authorize. A reply to this view would be that a fire protection tax would not *increase* the value of private timberlands; it would merely help *preserve the present value* of such lands.

The New Mexico Constitution states that taxes levied upon tangible property should be in proportion to the value thereof and

89. New Mexico's rate under the present system of fire protection contracts is three cents per acre. Joint Report, *op. cit. supra* note 65, at 7.

90. The New Mexico Forestry Department has said that only with a permanent fire suppression fund will there be a realistic financial plan which will enable the department to carry out a year-to-year plan for fire prevention and suppression. Joint Report, *op. cit. supra* note 65, at 9.

91. *In re Opinion of the Justices*, 99 N.H. 532, 114 A.2d 327 (1955); *Rector v. Town of Eastchester*, 197 Misc. 943, 99 N.Y.S.2d 991, 1003 (Sup. Ct. 1950); see also N.M. Stat. Ann. § 62-1-1 (1953).

92. N.M. Const. art. 8, § 1; see also *State Board of Pub. Accountancy v. Grant*, 61 N.M. 287, 299 P.2d 464 (1956).

93. 109 Me. 472, 84 Atl. 995 (1912).

94. 118 Me. 503, 106 Atl. 865 (1919).

should be equal and uniform upon all subjects of taxation of the same class.⁹⁵ This seems to prevent the assessment of a tax against private timberlands on a "per acre" basis, rather than an *ad valorem* basis. But the New Mexico Supreme Court has adopted the proposition that it is within the power of the Legislature, and also constitutional, to create special taxing districts and to assess the cost of a local improvement upon the property within each district according to the valuation, *the superficial area*, or the frontage of the property.⁹⁶ This "area" rule also has been expressed statutorily. The Grasshopper Control Act⁹⁷ provides that the Control Committee may levy and collect a special assessment against landowners within a control district whose lands have benefited from the extermination program, and the assessment may be based upon the acreage sprayed or baited.⁹⁸

Although the foregoing authorities are largely concerned with a special tax levy for the cost of a local *improvement*, there is no reason why the same argument may not be used to support a special tax levy for the conservation of a valuable natural resource such as our forests. There is perhaps an even stronger public interest in the conservation of natural resources than there is in their improvement.

Secondly, it may be argued that the fire protection assessment is not even a true tax and is therefore immune to the "unconstitutional tax" argument. Assessments for conservancy district purposes are not taxes within the meaning of the New Mexico Constitution.⁹⁹ The purposes behind an irrigation conservancy district and a forest fire protection district are sufficiently analogous that the same argument may be used in defense of a fire protection assessment.¹⁰⁰

The third argument in support of a per acre fire protection assessment is that it is a valid exercise of the state's police power. There is adequate authority to support such an argument. The New Mexico Constitution states:

95. N.M. Const. art 8, § 1.

96. *Fowler v. City of Santa Fe*, 72 N.M. 60, 380 P.2d 511 (1963); *Davy v. McNeil*, 31 N.M. 7, 240 Pac. 482 (1925); *City of Roswell v. Bateman*, 20 N.M. 77, 146 Pac. 950 (1915).

97. N.M. Stat. Ann. §§ 45-8-13 to -21 (Supp. 1963).

98. N.M. Stat. Ann. § 45-8-19 (Supp. 1963).

99. N.M. Const. art. 8, § 1; see *Gutierrez v. Middle Rio Grande Conservancy Dist.*, 34 N.M. 346, 282 Pac. 1 (1929), *cert. denied*, 280 U.S. 610 (1930).

100. And there seems to be no reason why the fire protection "district" could not be statewide if the state did not choose to divide its forested areas into smaller geographical districts.

The police power of the state shall extend to such control of private forest lands as shall be necessary for the prevention and suppression of forest fires.¹⁰¹

The New Mexico Legislature has declared:

The protection of growing timber and young growth from fire hazard . . . [is] hereby declared to be a public policy of the state of New Mexico.¹⁰²

Other timber jurisdictions have held it to be within the state's police power to impose the cost of protection of private forestlands upon the affected owners where protection against fires in such areas appears to be imperative.¹⁰³ These statutes do not deny due process of law.¹⁰⁴ For example, a Washington statute requiring private owners to participate in reforestation programs has been held to be a valid exercise of the state's police power, not violative of due process.¹⁰⁵

The argument may be made that fire protection assessments are discriminatory since they apply only to private timber owners, while the whole state enjoys the benefit thereof in the form of protection of timber and watershed resources. This argument was answered by the New Mexico Supreme Court in *Airco Supply Co. v. Albuquerque National Bank*.¹⁰⁶ The court held that the Legislature may enact statutes applying only to limited subjects (*e.g.*, prevention and suppression of forest fires) or persons (*e.g.*, all private owners of timberlands) so long as the classification is reasonable, the statute is general to the class it embraces, and it operates uniformly on all members of the class.

Oregon has enacted a statute which levies an assessment of one cent per acre on those lands in eastern Oregon which the Legislature found present a special fire hazard.¹⁰⁷ In a recent case, *Sproul v. State Tax Comm'n*,¹⁰⁸ this statute was held invalid by the trial court

101. N.M. Const. art. 15, § 2.

102. N.M. Stat. Ann. § 62-1-1 (1953).

103. *Starker v. Scott*, 183 Ore. 10, 190 P.2d 532 (1948); *First State Bank v. Kendall Lumber Corp.*, 107 Ore. 1, 213 Pac. 142 (1923); *State ex rel. Sherman v. Pape*, 103 Wash. 319, 174 Pac. 468 (1918); see also Annot., 13 A.L.R.2d 1095, 1109 (1950).

104. *State v. Canyon Lumber Corp.*, 46 Wash. 2d 701, 284 P.2d 316 (1955).

105. *State v. Dexter*, 32 Wash. 2d 551, 202 P.2d 906 (1949), *aff'd without opinion*, 338 U.S. 863 (1949).

106. 68 N.M. 195, 360 P.2d 386 (1961).

107. Ore. Rev. Stat. § 477.930 (1963).

108. 383 P.2d 754 (Ore. 1963).

on the ground that it attempted to levy a property tax upon a basis other than *ad valorem*. In reversing, the Oregon Supreme Court held that the levy was not an exercise of the state's taxing power; it was an exercise of the state's police power. And when the costs of the exercise of the state's police power are assessed against that class of persons or property causing the state to exercise its power, the collection of such costs is not subject to the constitutional limitations which apply to the exercise of the taxation power.¹⁰⁹

The foregoing discussion shows that New Mexico could adopt a per acre assessment method of providing fire protection for private timberlands similar to the Oregon program. In a sense, the result would be a state-managed forest-fire insurance program. A fire prevention and suppression fund would be available at all times, and it could be maintained at a proper level through experience rating based on the fire-fighting expenses of prior years.¹¹⁰

Two objections might be raised by private landowners against such a program: (1) it is an unnecessary interference with private enterprise, and (2) it creates an undue tax burden. As has already been shown,¹¹¹ the private landowner has no constitutional basis for these objections. However, in order to make the program more attractive to the private interests, two additional provisions might be considered.

First, the few owners who control large tracts of commercial timberland and the independent fire protection districts comprised of several private owners should be exempted from the program if they can satisfy the state forestry department that they have adequately "self-insured" by providing their own fire protection. Second, the undue tax burden objection may be met by keeping the annual assessment exactly in line with fire costs. If the fire suppression fund has a surplus at the end of a year, either reduce the rate for the following year or eliminate that year's assessment altogether. If there is a deficit at the end of a year, increase the assessment for the following year.

109. 383 P.2d at 760.

110. New Mexico should consider establishing different rates for different classifications of forested lands, such as "commercial" and "non-commercial" timberland, or "commercial timber" and "scrub or brush," to distinguish between the heavily timbered areas of the state and those which have a predominantly piñon or juniper pine cover. It is submitted that if classifications are established, they should be set up on a basis of inflammability rather than whether or not the area contains commercial timber.

111. See notes 91 to 99 *supra* and accompanying text.

CONCLUSION

The present program of voluntary co-operative agreements and fire protection contracts between New Mexico and its private timber owners is inadequate. Large areas of private timberland are unprotected because their owners refuse to contract with the state. The private owners who do participate in the state's fire protection program are presently contributing more than their fair share of fire-fighting expenses.

New Mexico has the power to enter upon private lands to prevent or suppress forest fires and may recover all, or a portion, of the expenses incurred therefor.¹¹² In order to avoid having to recover these expenses through judicial process, thereby imposing a possibly ruinous judgment upon the private timber owner, the state should impose a per acre fire protection assessment upon all private timberlands. Such a plan will (1) provide the state forestry department with a source of funds with which it may implement a uniform program of fire prevention and protection over all private timberlands, (2) provide for uniform administration of such a plan, and (3) spread the risk of fire protection evenly among all private timber owners.

FORREST S. SMITH†

112. Note that even at the time of the W. S. Ranch fire, the state could have entered upon the private lands, suppressed the fire, and brought action against the owners to recover its expenses. N.M. Stat. Ann. §§ 40-18-4 and 62-3-9 (1953), both give the state the right of entry, and § 40-18-4 gives the state the power to suppress the fire and recover the expenses in an action for debt. But the fact that the state forestry department no longer had an emergency fire suppression fund and would have had to resort to time-consuming and costly litigation to recover even a portion of its expenses were probably sufficient to discourage the state from taking any such action to suppress the fire.

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