

From: Gersovitz, Jeremy (LEG)  
Sent: Tuesday, July 21, 2009 3:13 PM  
To: Bob Hawks; Cheryl Steenson; Elsie Arntzen; Edie McClafferty; Gary Branae; Jim Peterson; Kelly Gebhardt; Kim Gillan; Lake (Rep.), Bob; McGee, Dan (Senator); Russell Bean; Wanda Grinde  
Subject: Putting out fires: Montana's ability to enter onto federal lands to mitigate hazards and fight wildfires

Members of the Committee:

I was asked to report to you on the county and the state's ability to enter onto federal lands in order to mitigate hazards and fight fires.

First, let's look at some relevant Montana statutes.

The legislature has declared, in Section 76-13-115(2), that it is the state's fire policy that "it is a priority to minimize property and resource loss resulting from wildfire and to minimize expense to Montana taxpayers, which is generally accomplished through an aggressive and rapid initial attack effort". As this committee may have seen from the results of The Price of Flame, the Final Report of the Fire Suppression Interim Committee, (published January of 2009), this policy can bump up against federal fire suppression strategies when the two entities share common borders. Under Section 76-13-104(1)(a), MCA, the department's duty is "to ensure the protection of land under state and private ownership and to suppress wildfires on land under state and private ownership." Note, as we will see later for a good reason, the clear absence of any mention of "federal" lands. However, note too, that during this last legislative session, Senate Bill 111 inserted subsection (1)(b) to allow the department to "engage in wildfire initial attack **on all lands** if the fire threatens to move onto state or private land." (Emphasis supplied.)

Next, a small taste of constitutional law.

The U.S. Constitution provides that Congress has the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Article IV, Section 3, Clause 2). Pretty well without exception, the Supreme Court has recognized the expansive nature of this power. In the bedrock case of *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Court wrote that "absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." In that case, the New Mexico Livestock Board entered upon public lands of the United States and removed wild burros which were then auctioned off. *Kleppe* was cited extensively by the federal court that decided *U.S. v. Nye County*, 920 F.Supp. 1108 (D. Nev. 1996). In that case, Nevada argued the U.S. lacked jurisdiction to regulate that state's public lands and thus could not legally restrain a Nye county commissioner who was reopening a road by riding a county bulldozer through national forest lands. The court disagreed, holding that title to the public lands within

Nevada's boundaries rests in the United States.

Here's how New Mexico took a run at the issue with N.M. Stat. Ann. § 4-36-11.

Findings; declaration of disaster; powers of county commissions

A. The legislature finds that:

(1) numerous citizens and government officials in the state of New Mexico have repeatedly petitioned the United States forest service both collectively and individually at public meetings, by correspondence and by telephone to request that the forest service take appropriate action to remove or eliminate the conditions that have created a state of emergency caused by a present risk to the lives and property of citizens in and adjacent to national forests within New Mexico;

(2) all the petitions have for all practical purposes been either ignored or discounted by the United States forest service resulting only in what can be reasonably characterized as inaction on the part of the forest service to appropriately reduce, if not remove, the risk to the lives and property of the citizens of New Mexico;

(3) because the United States forest service has failed to exercise its responsibilities as a sovereign to protect the lives and property of the citizens of New Mexico and because it is a fundamental principle under the laws of any just society that the persistent failure of a sovereign to fulfill such obligations constitutes grounds for the forfeiture of jurisdictional supremacy, such a forfeiture must hereby be recognized and declared; and

(4) because of recognition and declaration of this forfeiture of jurisdictional supremacy, a jurisdictional vacuum has been created that requires the state of New Mexico to acknowledge its obligations as a sovereign power to protect the lives and property of its citizens and consequently to authorize any action it presently deems necessary to fill the vacuum created by the federal government by assuming jurisdiction to reduce to acceptable levels, if not remove, the threat of catastrophic fires posed by present conditions in national forests within its borders.

B. The legislature declares a disaster within those areas of the national forests of New Mexico that suffered severe fire damage, as determined by the local board of county commissioners, where large amounts of forest undergrowth have created the potential for damaging fires in the future. The legislature also declares that the disaster is of such magnitude that the police power of the state should be exercised to the extent necessary to provide the resources and services that will end the disaster and mitigate its effects.

C. After consulting with the state forester and the regional United States forester, taking surveys, holding those public hearings as may be necessary and developing a plan to mitigate the effects of the disaster, a board of county commissioners for a county in which a disaster has been declared pursuant to Subsection A of this section may take such actions as are necessary to clear and thin undergrowth and to remove or log fire-damaged trees within the area of the disaster. A county may enter into an agreement with a contractor, licensee or other agent to carry out the purposes of this subsection.

The bill was signed into law in 2001 despite warnings from that state's attorney general as to its constitutionality.

On June 11, 1993, Montana Attorney General Joseph Mazurek wrote an informal unpublished letter of advice to two county attorneys by which he concluded "Congress's power over Article IV federal public lands is paramount." He cited Kleppe's language that "[a] different rule would place the public domain of the United States completely at the mercy of state legislation." He went on to write that "[s]tate legislation cannot prevail on federal public lands when it conflicts with federal legislation, and likewise a county ordinance or land use plan applicable to federal public lands will not be allowed to stand when it conflicts with federal law. Whether a specific ordinance will have legal effect will require an analysis of the particular ordinance with the foregoing principles in mind." The attorney general had been asked to pass upon whether a board of county commissioners had the authority to : (1) regulate land uses upon federal or state lands; and (2) prevent the acquisition of land by the federal or state governments. More specifically, the county ordinances would have established: that federal agencies must notify the county a set number of days prior to issuing land management decisions; limitations upon the federal government's ability to designate additional wilderness areas and wild and scenic rivers; that the amount of federal or state land within the county may not be increased; that all federal natural resource decisions shall be dictated by principles protecting private property rights, protecting local custom and culture, and opening new economic opportunities through reliance on free-markets; and a county "threatened and endangered species committee" for overseeing protection and recovery of all state and federal listed species.

You should also be aware that when Montana's Code Commissioner & Director of Legal Services Greg Petesch examined this issue when he was drafting SB 34/LC 0496 (to allow counties to reduce forest fuels on federal lands) he prepared a memorandum to the Fire Suppression Committee dated October 30, 2008, in which he stated his opinion that the proposed legislation violated the Supremacy Clause of the U.S. Constitution. This bill died in standing committee. Similarly, attorney Todd Everts, who drafted SB 111/LC0485 (referenced above) for the 61st Legislature, noted his concerns that the legislation "may be unconstitutional as applied." This bill was signed by the governor on April 6, 2009.

I trust this tracks your directive. Please contact me should you have further questions.

Respectfully,

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