

## Opinion No. 70-97

December 14, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Mr. Ray L. Bell State Forester New Mexico Department of State Forestry P.O. Box 2167 Santa Fe, New Mexico 87501

### QUESTIONS

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Are rules 5 through 8 of the "Rules and Regulations Relating To The Prevention and Suppression of Forest Fires" a legitimate exercise of the rule-making power granted to the Forest Conservation Commission by Section 62-3-11, N.M.S.A., 1953 Comp. (1969 Supp.).

#### CONCLUSION

Yes.

### OPINION

#### {\*170} ANALYSIS

The rules in question are the following:

**Rule 5. Existence, use, and treatment of timber roads (and spurs leading thereto) regarding suppression and fighting of forest fires.** All timber and log-hauling roads, including spurs leading thereto, in a timber-cutting {\*171} operation on lands subject to forest fire shall be by the landowner, owner of the timber, or timber-cutting operator:

(a). used, treated, and left in a sufficiently passable condition to allow for the driving over and thereon of motor vehicles, tractors, pumper trailers, or other fire-fighting equipment used for the purpose of suppressing or fighting forest fires.

(b). drained in such a proper manner consistent with good conservation practices as to forestall water erosion and prevent the denuding of a timber-cutting area, and,

(c). reseeded with grass seed (and this includes skid trains) compatible to the area being reseeded. Reseeding work is restricted to the months of June or March and must be completed within twelve (12) months after the initial reseeded work is commenced.

**Rule 6. Water bars.** Water bars shall be constructed and placed by the landowner, owner of the timber, or timber-cutting operator upon timber-hauling roads (or spurs

leading thereto) in areas or locations designated by the State Forester or his agents. The type and number of water bars required shall be determined by the State Forester or his agents.

**Rule 7. Disposal of slash, snags, and tops.** During a timber-cutting operation and prior to the termination thereof, each landowner, owner of the timber, or timber-cutting operator for the purpose of preventing forest fires shall:

- (a). scatter all concentration of slash,
- (b). fell all standing and uncut dead or diseased snags, and,
- (c). trim all tops down to four (4) inches.

**Rule 8. Skidding of logs.** The skidding of logs must be done on an up or down slope in such a manner that the least amount of land erosion will occur.

These rules were issued by the Forest Conservation Commission pursuant to the following grant of legislative power:

Rules and regulations of commission. -- The commission is authorized to make and enforce rules and regulations not in conflict with any law now in force as it deems necessary for the prevention and suppression of forest or brush fires and for the control of forest pests within the state. Section 62-3-11, N.M.S.A., 1953 Comp. (1969 Supp.)

To be valid these rules must be within the authorized purposes of the statute. They are within these purposes if they bear some reasonable relationship to fire prevention and suppression or forest pest control. **City of Santa Fe v. Gamble-Skogmo, Inc.**, 73 N.M. 410, 389 P.2d 13 (1964).

In determining whether these rules bear a reasonable relationship to the purposes of the statute, the courts will give great deference to administrative expertise. This is especially true of rules which, like those in question, are legislative rules. Davis, *Treatise on Administrative Law*, § 5.01. The New Mexico Court of Appeals has recognized that its scope of review of legislative rules is more limited than it is for adjudicative orders. When an agency is acting like a law-making body passing broad rules for future application, the court will interfere only if the agency acts "arbitrarily, capriciously or in clear abuse of its discretion." **Wylie Bros. Contracting Co. v. Albuquerque Bernalillo County Air Quality Control Bd.**, 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

The rules in question pass these judicial tests. Lumber roads are the only roads cut through vast areas of New Mexico's wilderness. If the Forestry Department is to be able to transport fire-fighting equipment and men to fires quickly, these roads must be properly maintained and protected from erosion. Improper skidding of logs can also create risks of erosion which will threaten these roads. Similarly, slash and standing

snags must be cut to reduce breeding grounds for pests and to reduce the possibilities of those fires which spread rapidly through the tops of dead trees. It is clear that these rules {\*172} bear a reasonable relationship to prevention and suppression of forest pests and fires.

This rationale for these rules, or similar ones, will be accepted by the court unless so totally unsupported by evidence as to be capricious and arbitrary. It is important to note, however, that our courts do not require that regulations be supported by substantial evidence. That requirement applies only to agencies adjudicating individual rights and liabilities, which is not the case here. **Wylie Bros. Contracting Co. v. Albuquerque Bernalillo County Air Quality Control Bd., supra.**

It makes no difference that the rules relating to erosion might also be classified as conservation measures. All fire prevention and suppression might easily be classified as forest conservation practice; in fact the enabling statute here, Section 62-3-11, is part of the act entitled "Forest Conservation Act." Section 62-3-1, N.M.S.A., 1953 Comp. The important issue is whether the Commission abused its discretion in passing these rules. In light of the foregoing considerations, we conclude that it did not.

There is one further test which these rules must pass: they must be reasonable. Davis, Treatise on Administrative Law § 5.03. The reasonableness requirement is closely related to the due process clauses of our state and federal constitutions. N.M. Const. art. 2, § 18; U.S. Const. amend XIV. A rule would be unreasonable if it caused such expense and hardship that it amounted to a taking of property without due process of law. The reasonableness of a rule must be judged by the results of its application in particular situations. We can only conclude here that there is nothing unreasonable about the rules on their face and that, therefore, they are a legitimate exercise of the Commission's rule-making power.

By: Gary O'Dowd

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