

ALERT

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SUBROGATION AND RECOVERY

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EVALUATING SUBROGATION CLAIMS ARISING FROM THE LOWER NORTH FORK WILDFIRE IN JEFFERSON COUNTY, COLORADO

Brad W. Breslau • 720.479.3920 • bbreslau@cozen.com

I. Introduction and Background

On Monday, March 19, 2012, the Colorado State Forest Service initiated a controlled burn on property owned by the Denver Water Board located in Jefferson County, Colo. This 50 acre prescribed burn was part of an ongoing fuel management program in the Lower North Fork area as part of a service agreement between the Colorado State Forest Service and the Denver Water Board. On Monday, March 19, crews completed a containment line around the prescribed fire area. The actual prescribed fire was carried out and completed on Thursday, March 22, with mop-up operations beginning on Friday, March 23.

On Monday afternoon, March 26, the fourth day after the burn, a Colorado State Forest Service crew reported windy conditions but no smoke or fire activity along the fire perimeter as they circled the burned area several times. The crew then reported a sudden, significant increase in wind and then reported seeing blowing embers carried across the containment line, over a road and into unburned fuels. The crew immediately requested additional resources and began fighting the fire. The Colorado State Forest Service claims to have followed all procedures and safety protocols in conducting the prescribed burn. News media reports indicate that prior to beginning the prescribed burn, the paperwork completed by the Colorado State Forest Service indicated that the risk in proceeding with the prescribed burn was "moderate."

II. Lower North Fork Wildfire

At present, the Lower North Fork Wildfire is 90 percent contained. It destroyed 27 homes and structures, burned 4,140 acres and caused the deaths of three people. Countless pets and livestock also perished in the fire.

Colorado Deputy State Forester Joe Duda issued the following apology on behalf of the state of Colorado on March 28, 2012:

"One of the primary roles of the Colorado State Forest Service is to help keep forests healthy and reduce the threat of catastrophic wildfires through fuel reduction. Prescribed fires are a well-established tool in this effort, with many measures in place to make this tool as safe as possible. This is heartbreaking, and we are sorry; despite the best efforts of the Colorado State Forest Service to prevent this very kind of tragic wildfire, we now join Colorado in hoping for the safety of those fighting a large fire, and mourning the loss life and property."

Duda went on to indicate that an independent panel was conducting a review of the prescribed burn and a Colorado Bureau of Investigation was looking into circumstances involving the origin of the fire.

III. Potential Claims Resulting from Lower North Fork Wildfire

Both the Colorado State Forest Service and the Denver Water Board will likely avail themselves of the defense of sovereign immunity. C.R.S. § 24-10-108 provides that "[e]xcept as provided in sections 24-10-104 to 24-10-106, sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by claimant." C.R.S. § 24-10-104 indicates that the governing body of a public entity, by resolution, may waive the immunity granted in C.R.S. § 24-10-106.

C.R.S. § 24-10-106(1) provides that “[a] public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided in this section. Sovereign immunity is waived by a public entity in an action for injuries developing from:

(f) The operation and maintenance of any public water facility ... by such public entity;”

Accordingly, an argument could be made that the prescribed burn on the Denver Water Board property was in furtherance of the operation and maintenance of that public water facility.

It should be noted that, as a jurisdictional prerequisite to any claim against either the Denver Water Board or the Colorado State Forest Service, statutory notice will need to be submitted to the Colorado State Forest Service and the Denver Water Board as required by C.R.S. § 24-10-109. It is also important to note that the maximum recovery, should sovereign immunity be determined to have been partially waived by statute, would be \$150,000 for injury to any one person with a maximum of \$600,000 for any single occurrence.

Cozen O’Connor is currently researching the law to determine whether a violation of due process can be successfully asserted against the Denver Water Board or the Colorado State Forest Service pursuant to 42 U.S.C. § 1983. If such an argument can successfully be made, then there would be no “cap” on damages as a result of the Lower North Fork Wildfire.

IV. Conclusion

Cozen O’Connor remains prepared to assist you in the continued evaluation and pursuit of subrogation claims arising out of the Lower North Fork Wildfire.

To discuss the Lower North Fork Wildfire or any questions you may have regarding wildfires, please contact Brad W. Breslau at bbreslau@cozen.com or 720.479.3920.