

Opinion No. 42-4119

July 16, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. H. R. Rodgers Commissioner of Public Lands Santa Fe, New Mexico. Attention: George Graham

{*219} By your letter of July 14, 1942 you have requested an opinion of this office with regard to certain problems which have arisen in connection with the payment of certain fire fighters who helped in the extinguishment of a forest fire upon state lands in Colfax county. The lands involved are certain lands included in Timber Contract No. 4099, and the fire fighters desiring payment are the employees of a contractor of the original purchaser, Gross, Kelly & Company.

The purchaser, by its agreement with the Commissioner of Public Lands, agreed in part as follows:

"During the time that this agreement remains in force, the Purchaser shall independently do all in its power to prevent and suppress forest fires on the sale area and in its vicinity, and shall require its employees, contractors and employees of contractors to do likewise. Unless prevented by circumstances over which it has no control, the purchaser shall place its employees, contractors and employees of contractors at the disposal of any authorized agent of the Commissioner for the purpose of fighting forest fires, with the understanding that unless fire fighting services are rendered on the area embraced in this agreement or on adjacent areas within two miles of the exterior boundaries of this sale area, payment for such services shall be made at rates to be determined by the Agent of the Commissioner in charge, which rates shall not be less than the current rates of pay prevailing in the said region for services of a similar character: Provided, That the maximum expenditure for fire fighting without remuneration in any one calendar year, at rates of pay determined as above, shall not exceed Five Hundred (\$ 500.00) Dollars:" (Contract No. 4099).

There can be one interpretation placed upon the foregoing provision. It is our opinion that this agreement compels the purchaser to make its contractor or employees of its contractor do all fire fighting necessary in the sale area and in an area within two miles of the exterior boundaries of the sale area. For the fire fighting work the purchaser is to be paid by whom it is immaterial but payment undoubtedly is to be made. However, the purchaser may be required by the Commissioner to do this work without remuneration for, up to and including \$ 500.00 worth of work. It is our opinion that the amount which will not be remunerated is left to the sound discretion of the Commissioner.

At this point another phase of the workings of the agreement must be considered, and that is as to how payment for the work done is to be made. Inasmuch as the Commissioner has entered into a separate agreement with the Forest Service of the

Department of Agriculture, whereby the latter has agreed, in consideration of \$ 5157.17 paid it by the state, to pay all expenses incurred in the suppression of fires upon certain state forest lands, should the Forest Service deduct the amount fixed by the Commissioner as not being payable to the purchaser for the work done, or should the Forest Service pay the total costs of the fire suppression without regard or consideration for the agreement between the Commissioner and the purchaser as to remuneration?

I have made a careful study of the agreement between the Commissioner and the Forest Service, {220} and find that for the service rendered by the Forest Service, it is entitled to receive from the state no more than \$ 5157.17, with one immaterial exception noted in Section 5 of the agreement. It is therefore clear that the amount found by the Commissioner not to be payable to the purchaser may not be credited to the Forest Service, else the Forest Service might be allowed to receive in excess of the amount agreed.

It is, therefore, our opinion that the Forest Service should pay the entire amount of the costs incurred in the suppression of the fire, and the separate negotiations should be carried on between the Commissioner and the purchaser by which, at some future time, the Commissioner may determine the amount, not to exceed \$ 500.00, which is not remunerable to the purchaser, and to charge and collect this amount from the purchaser, if necessary, by action upon bond deposited with the Commissioner by the purchaser.

I return herewith the contracts submitted to us.

Trusting that the foregoing sufficiently answers your inquiries, I am,

By GEO. H. HUNKER, Jr.

Asst. Atty. General