

**California Department of Forestry and Fire v. Howell, et al. - Case No. CV09-00205**

**Ruling: Denied.** The alternative motions for summary adjudication by Plaintiff, California Department of Forestry and Fire (“CDF”), are denied.

The CDF seeks to recover its suppression and related costs arising from the Moonlight Fire, which originated on September 3, 2007 in the area of the Cooks Creek timber sale. Second Amended Complaint, filed 2/10/2010 (“SAC”), para. 1. The Defendants include, *inter alia*, the property owners, their property manager, the timber operator, two of the operator’s employees and the purchaser of the timber involved in that sale (collectively “Defendants”). SAC, paras. 3-30.

A public agency has no common law right to recover costs incurred in the exercise of its police powers. *County of San Luis Obispo v. The Abalone Alliance* (1986) 178 Cal.App.3d 848, 859. Instead, the right to recover fire suppression costs is a creature of statute, which must expressly authorize the recovery of public expenditures. *See, People v. Wilson* (1966) 240 Cal.App.2d 574, 576-577 (right to recover fire suppression costs is “creature of statute”); *People v. Southern California Edison Company* (1976) 56 Cal.App.3d 593, 603 (same); *see, also, City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1018 (“*Shpegel-Dimsey*”) (statute must expressly authorize recovery). More specifically, “. . . the right to recover *all* fire suppression costs resulting from negligence in allowing a fire to spread is now strictly limited to that provided in Health and Safety Code section 13009. [Citation].” *Id.*, at 1020. (Italics in original.)<sup>1</sup>

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<sup>1</sup> Under both *Health and Safety Code sections 13009* and *13009.1*, liability for fire suppression and related costs is imposed on “[a]ny person (1) who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled . . . to escape onto any public or private property.”

To recover its suppression costs under *Health and Safety Code section 13009*, the CDF must establish that the Defendants were “. . . responsible for setting or kindling the fire.” *People v. Southern Pacific Company* (1983) 139 Cal.App.3d 627, 638; *see, Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1019-1020 (suppression costs not recoverable where Defendant did not cause fire); 78 Ops.Cal.Atty.Gen. 310, Richard A. Wilson (1995), fns. 3, 4 (suppression costs not recoverable from a Defendant in the “. . . absence of responsibility for the existence of the fire.”).

The CDF does not posit, as a material fact in its separate statement, that any Defendant caused or kindled the Moonlight Fire. This is to be compared with the CDF’s pleading, which specifically alleges that the fire was started by one of the Defendants’ bulldozing activities. *See, SAC*, paras. 94-96. The CDF has thus failed to establish an element necessary to recover its suppression costs under its second cause of action.

By seeking summary adjudication that *14 C.C.R. section 938.8* (“*section 938.8*”) creates a legal duty, however, the CDF appears to be contending that, in addition to recovery under *Health and Safety Code sections 13009* and *13009.1*, and without proving up all elements required by those statutes, the CDF may recover its suppression costs under a negligence theory. As noted above, the right to recover fire suppression costs does not arise under the common law. *Shpegel-Dimsey, supra*, 198 Cal.App.3d at 1020. Thus, *section 938.8* can create no legal duty, for purposes of a negligence cause of action, to recover suppression costs under the common law. *See, People v. Southern Pacific Company, supra*, 139 Cal.App.3d at 636-638 (suppression costs not recoverable solely on basis of negligence in failing to extinguish fire).<sup>2</sup>

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<sup>2</sup> The Court has reviewed the Order in the federal action, rendered by Judge Kimberly Mueller on July 2, 2012, in which she ruled that *section 938.8* creates a legal duty of care. There is nothing in that order to

At most, *section 938.8* may establish a standard of care under *Evidence Code section 669*, with proof of its violation shifting the burden of proof onto the Defendants on the issue of their alleged negligence in allowing the fire to escape onto other property. See, *California Service Station and Automotive Repair Association v. American Home Assurance Company* (1998) 62 Cal.App.4th 1166, 1177 (“*California Service Station*”) (regulation may establish standard of care).<sup>3</sup>

Insofar as the CDF motions fail as a matter of law, the parties’ evidentiary objections are moot.

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suggest that Judge Mueller was apprised of, or considered, the authorities which establish, under California law, that the right to suppression costs is a creature of statute, not the common law.

<sup>3</sup> If, on the other hand, the CDF is contending that *section 938.8* creates a right to recover suppression costs, an administrative agency cannot “. . . ‘by its own regulations create a remedy which the Legislature has withheld.’[Citations.]” *California Service Station, supra*, 62 Cal.App.4th at 1176. (Citation omitted.) Such remedy, if it exists, must be created by *Public Resources Code sections 4551, 4551.5 and 4553*, from which *section 938.8* derives its authority. See, *California Service Station, supra*, at 1176-1177 (court looks to statute authorizing regulation to determine whether remedy created). Comparing the language of these statutes with that of *Health and Safety Code sections 13009 and 13009.1*, it becomes apparent that the *Public Resources Code* does not expressly create any right to recover fire suppression costs.