

June 27, 2002

ATTORNEY GENERAL SALAZAR: CITIZENS MUST COMPLY WITH EVACUATION ORDERS OR FACE CRIMINAL CHARGES

Denver-- Attorney General Ken Salazar issued a legal opinion to government and law enforcement officials regarding the authority of state and local officials to order and enforce disaster evacuations in Colorado.

Salazar advised Governor Bill Owens, Colorado's sheriffs, district attorneys, and county and municipal officials that they do have the authority under emergency situations to order the evacuation of citizens and enforce the order should they choose to do so. A person disobeying these orders can be charged with the crime of obstructing government operations or obstructing a police officer or firefighter. The crimes are punishable with jail of up to one year and fines up to \$1,000. The authority to enforce these laws is found in Colorado statutes and the power of the government to protect the safety and welfare of the community in disaster emergency circumstances.

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Gentlemen:

I want to confirm the legal authority of state and local officials and sheriffs to order disaster evacuations in Colorado. The wildfires burning partially out of control in several areas of the state have prompted evacuation orders, and anyone questioning an evacuation imperils the safety of firefighters and other citizens.

Orders to evacuate areas in danger from wildfires are lawful and criminally enforceable in Colorado. For the safety of everyone, citizens and visitors to this state are obligated to evacuate when required.

The government's ability to require evacuations in the face of wildfires and other grave perils is rooted in the most fundamental reason for the existence of government, the protection of the safety of the public. In re Interrogatories of the Governor on Chapter 118, Sess. Laws 1935, 52 P.2d 663, 667 (Colo. 1935) (constitution of Colorado presupposes the power of government to protect people as an inherent attribute of sovereignty) (citations omitted). The varied actions taken by state and local governments in Colorado to fight ongoing wildfires are examples of government protecting our communities from natural and man-induced threats.

Evacuations are ordered in the face of approaching wildfires for compelling reasons. The personal safety of the evacuees is at risk. Evacuations protect law enforcement and rescue personnel who otherwise would confront an out-of-control fire, in circumstances not of their choosing, to aid endangered citizens. Evacuations enable authorities to remove residents from a dangerous area in an orderly and timely way, before a rapidly approaching fire creates panic and the traffic and other problems that hysteria can cause. Evacuations also remove citizens from areas in which they endanger or hamper fire fighting efforts. Finally, evacuation orders avoid the need to divert emergency response and relief personnel from other duties when a fire approaches.

The legal basis for government to control individual behavior in this way cannot seriously be questioned in this emergency circumstance. The government acts to protect the safety and welfare of the community through the exercise of its "police powers." E.g., *In re Interrogatories of the Governor on Chapter 118, Sess Laws 1935*, supra, 52 P.2d 663; *Sligh v. Kirkwood*, 237 U.S. 52 (1915) (police power "is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of the public interest. . . It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health.") (citations omitted); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (citing "long line" of cases sustaining the use of state police powers against challenges under the Due Process and Takings Clauses of the federal Constitution); *Kelley v. Johnson*, 425 U.S. 238 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power . . .")

Protection of the common good justifies actions of government that range from disaster response for public safety to the regulation of commerce and other economic activity for the public welfare. *Zeigler v. People*, 124 P.2d 593, 598 (Colo. 1942). The more clear and dangerous the threat to the community, the more obvious is the government's legal power to act.

Ordinarily, a citizen or visitor to Colorado is at liberty to stay at a place of his or her choosing. This liberty interest gives way to the paramount government interest of protecting public safety when the community faces a disaster. The law provides several varied examples of this principle, three of which are described below.

The first case involves Hurricane Andrew, which struck Dade County, Florida in August, 1992 with overwhelming force. The hurricane devastated buildings, homes, roads, power facilities and other services. As disaster control measures, Dade County officials imposed curfews that lasted until mid-November, 1992. During curfew hours, citizens were not free to leave their homes, a very significant restriction on individual liberty. The United States Court of Appeals for the Eleventh Circuit upheld these curfews in *Smith v. Avino*, 91 F.3d 105 (11th Cir 1996), abrogated on unrelated grounds, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). It noted the courts have "consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction. . . . In such circumstance, governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency. 91 F.3d at 109. The Court concluded, "[i]n an emergency situation, fundamental rights such as the right to travel and free speech may be temporarily limited or suspended. *Id.*

In the second case, facing the threat of a smallpox epidemic in the early 1900s, Cambridge, Massachusetts enacted a law requiring everyone to receive smallpox vaccinations. Henning Jacobson refused to be vaccinated. He was convicted for his refusal and fined five dollars, to be paid in lieu of going to jail. Justice Harlan wrote for the United States Supreme Court that upheld Jacobson's criminal conviction. He observed, "the liberty secured by the Constitution . . . to every person . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. . . . Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. . . . Even liberty, the greatest of all rights, is not unrestricted license to act according to one's own will. . . ." *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905) (internal quotes and citations omitted).

The final example arose when county officials in Wyoming confronted a different type of emergency, and ordered the evacuation of a community near Rawhide, Wyoming in the late 1980s. The evacuation was prompted by lethal gas pollution seeping underground beneath a subdivision built near a coal mine. A resident named Miller challenged the power of the county to evacuate the subdivision. He lost, first in the federal district court in Wyoming and then in the United States Court of Appeals for the Tenth Circuit in Denver. *Miller v. Campbell County*, 722 F.Supp 687 (D.Wyo. 1989); *Miller v. Campbell County*, 945 F.2d 348 (10th Cir. 1991). The district court rejected Miller's argument that the county improperly interfered with his liberty to live in the subdivision, and cited the police powers of the county granted by a state civil defense statute. It affirmed that the government's powers "clearly include the power to order an evacuation of an area within the county stricken by a disaster of natural causes such as the seepage of lethal gases." 722 F.Supp. at 693.

The power of the government to act quickly and decisively in the face of a looming disaster increases with the proximity and size of the public danger. See, e.g., *Yakus v. United States*, 321 U.S. 414, 422-23, 431-49 (1944) (emergency caused by World War II justifies price controls and significant administrative restrictions on commerce); *Miller v. Campbell County*, supra, 722 F.Supp. at 690-93 (discussing emergency takings of property). An approaching wildfire is an example of a pressing and substantial danger that empowers government to act with particular speed and certainty to protect the public good.

The legislature codifies the state's police powers as needed to protect the public safety and welfare. *Bland v. People*, 76 P. 359 (Colo. 1904); *Missouri Pac. R. Co. v. City of Omaha*, 235 U.S. 121, 127 (1914). In Colorado, the General Assembly has enacted statutes that allow state and local officials to order and to enforce evacuations.

When an emergency is declared, the General Assembly has bestowed upon the Governor and local authorities broad and enumerated powers to respond appropriately. The Colorado Disaster Emergency Act of 1992, located at § 24-32-2101, C.R.S., describes these powers. Its purpose, among others, is to "[c]larify and strengthen the roles of the governor, state agencies, and local governments in prevention of, preparation for, response to, and recovery from disasters." § 24-32-2102(d), C.R.S.

When the Governor responds to a wildfire or other disaster by declaring a "disaster emergency" in an executive order or proclamation, he triggers his powers under this statute. § 24-32-2103(1.5), C.R.S. ("disaster" includes "fire" and many other enumerated dangers). Among his other powers, the Governor can "[d]irect and compel the evacuation of all or part of the population from any stricken or threatened part of the state [if necessary for public safety or disaster response.]" § 24-32-2104(7)(e), C.R.S. Governor Owens issued an executive order declaring a statewide disaster emergency due to wildfires on June 10, 2002. Executive Order No. D01402.

Local governments are also empowered by the General Assembly under this statute. § 24-32-2109, C.R.S. A "local disaster" can be declared by the principal executive officer of a political subdivision of the state. § 24-32-2109(1), C.R.S. Upon that declaration, the response and recovery aspects of any and all local and interjurisdictional disaster emergency plans are activated. § 24-32-2109(2). A plan that authorizes evacuations furnishes the legal power to the local jurisdiction to issue evacuation orders. In addition, the General Assembly has elsewhere noted that management of local fires is the responsibility of local authorities in appropriate areas. § 24-30-304, C.R.S.

Colorado's sheriffs occupy a unique position with regard to evacuation orders. They are elected, constitutional officers. Colo. Const., Art. XIV, § 8. They exercise powers described in the constitution and in statute, but they also possess residual common law powers. *Newman v. People*, 47 P. 278, 282 (Colo. 1896); *People ex rel. State Bd. Of Equalization v. Pitcher*, 138 P. 509, 512-14 (Colo. 1914) (discussing powers of the county assessor and citing at length a description of the powers of sheriffs); *McMillan v. Monroe County*, 520 U.S. 781 (1941) (sheriff represents the sovereignty of the state in his or her county). The sheriffs also exercise those powers necessarily implied by the existence of their office. *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993) (in addition to express powers, sheriffs implied powers "which are reasonably necessary to execute those express powers"); *Skidmore v. O'Rourke*, 383 P.2d 473, 475 (Colo. 1963) (implied powers accompany the constitutional office of county treasurer).

These powers are embodied in the common shorthand description of Colorado's sheriffs as the chief law enforcement officials in Colorado's counties. They are reflected in the sheriffs' very broad statutory authority to keep the peace. § 30-10-516, C.R.S.; e.g., *Morris v. Faulkner*, 46 Ill. App.3d 625, 361 N.E.2d 112, 115-116 (sheriff acts lawfully to keep the peace when he directs occupants to leave a tavern after reports of potential trouble). In the face of a dire emergency, the powers of the sheriffs broadly allow them to use their best judgment, so they may act effectively to protect overall public safety. See *Smith v. Avino*, supra, 91 F.3d at 109; Walter H. Anderson, 1 A Treatise on the Law of Sheriffs, Coroners and Constables § 6 (1941) (to protect the peace "it becomes the sheriff's right, and it is his duty, to determine what the public safety and tranquility demand, and to act accordingly").

Colorado's sheriffs have particularly broad and important legal powers and duties to fight fires. See, generally, Colorado Attorney General Opinion 01-2 (July 23, 2001) (fire fighting duties of sheriffs and fire protection districts). The sheriffs are the fire wardens of the counties in Colorado in the case of prairie or forest fires. § 30-10-512, C.R.S. Sheriffs are required to assume "charge" of prairie or forest fires or to assist other governmental authorities to control and extinguish such

fires. § 30-10-513, C.R.S. Sheriffs seek aid to fight fires on private property in unincorporated areas of counties. § 30-10-513.5, C.R.S. They enforce all state forest fire laws. § 23-30-306, C.R.S.

For the important public safety reasons described in detail at the outset of this letter, a necessary adjunct to fighting fires, in this instance, is the power to order people to remove themselves from areas of danger in appropriate circumstances. Therefore, sheriffs have the legal ability to order an evacuation.

Evacuation orders of the Governor, local authorities, and sheriffs are enforced by criminal sanctions, and a person disobeys an evacuation order at his or her peril. A person commits the crime of obstructing government operations if, by using or threatening to use violence, force, or physical interference or obstacle, he or she intentionally obstructs, impairs, or hinders the performance of the governmental function by a public servant. § 18-8-102(1), C.R.S. A person commits the crime of obstructing a police officer or fire fighter or other rescuer if the person uses or threatens violence, force, physical interference, or an obstacle and knowingly obstructs, impairs, or hinders the enforcement of a penal law or the preservation of the peace by a peace officer or the prevention, control, or abatement of fire by a fire-fighter. § 18-8-104(1)(a), C.R.S.

These crimes are misdemeanors. They are punishable by imprisonment of up to six months and a year, respectively, and fine of up to \$750 and \$1000. § 18-1-106(1), C.R.S. An order for restitution also caused can be imposed. § 16-18.5-103, C.R.S.

I hope this review is helpful to government officials and Colorado citizens as Colorado confronts these unprecedented wildfire conditions.

Sincerely,

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