EL DORADO COUNTY

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August 8th, 2007

El Dorado County Board of Supervisors
330 Fair Lane
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SUBJECT: County Counsel and Risk Management assessment of the proposed Angora Fire Burn Area Hazardous Tree Identification and Removal Initiative.

Honorable Board Members:

❒ Background

On July 31, 2007 (item #7) the Board approved the transfer of $1.5 million from contingency to fund emergency tree debris removal in the Angora Fire burn area and requested that an informational item be brought to the Board on August 14, 2007 showing the risk of liability from the removal of hazardous trees from the properties affected by the Angora Fire. The following report is submitted pursuant to that direction after consultation with County Counsel and Risk Management.

❒ County Counsel Information Provided:

County liability during the operation of the tree removal program

The work is to be performed by an independent contractor. That contractor will employ a forester and a licensed timber operator. The forester will decide which trees are hazardous and are to be removed. The LTO will remove the trees. The contract with the contractor will provide that the contractor defend and indemnify the County from and against any and all claims arising from the activities engaged in by the forester and the LTO. The contractor employing the forester and the LTO will be required to carry liability insurance of one million dollars with an umbrella/excess policy which we would recommend in the amount of five million dollars. That can be determined by the Risk Department.

During the course of the work, County employees will not be engaged in the selection of trees to be removed nor will the County employees be involved in the actual removal of the trees. This is important because a public employee can be held liable for their negligence to the same extent as a private person subject to various immunities. The County is then obligated to defend and indemnify the employee for acts or omissions occurring within the scope of the employees' employment. Given that County employees will not be performing the selection or removal activities the exposure here is minimal.

The liability of the County could be premised upon the following theories:

1. Failure to hire a competent contractor
2. Vicarious liability for the negligence of the contractor

1. So long as the contractor hired has the appropriate licenses to perform the work we should have little exposure on this front. Also, a series of cases would protect the County from any claims by the employee of the contractor hired to do the work.

2. Vicarious liability for the negligence of the contractor. The County is liable for the acts of an independent contractor to the same extent as a private person. Generally the hirer of an independent contractor is not liable for the negligence of an independent contractor. An exception to this general rule is the peculiar risk doctrine. This doctrine states that where the hirer of an independent contractor knows that the work exposes persons to a risk of harm inherent in the work itself, the hirer of the independent contractor can be held liable for injuries occasioned by that risk of harm. Under one scenario, if the hirer makes no provision in the contract for safety precautions to protect from the inherent danger, then the hirer can be liable. (Restatement of Torts2d section 413). A simple way to protect from that liability is to be sure the contract with the contractor has provisions requiring safety measures to protect from falling trees. The second scenario is where the contract calls for the safety precautions, but those are not taken by the contractor. In such a case, the County could be liable but would be entitled to indemnity from the contractor. This is supported not only by the contractual indemnity but also by the Restatement of Torts section 416.

Generally the peculiar risk doctrine will not make the County liable to an employee of the contractor. (Privette v. Superior Court (1993) 5 Cal.4th 689). The County may be liable to the employee of an independent contractor if the injury is related to County exercise of retained control over the work site and the county affirmatively contributed to the occurrence of the injury e.g. supplied defective equipment (McKown v. Walmart (2002) 27 Cal.4th 219). To limit our exposure in

this regard we simply will not control the work of the contractor or supply equipment to the contractor.

All possible exposure to the County during the course of the work can be adequately protected against by requiring a strong indemnity provision in favor of the County and adequate insurance limits by the contractor. Additionally, under the Right of Entry Permit, the homeowner has agreed to hold harmless and indemnify the County for any injuries arising as a result of the debris removal work which includes tree removal.

County liability after the tree removal is complete

This scenario occurs when subsequent to the completion of the tree removal program a person is injured by a falling tree. The claim is the tree should have been removed.

First, the County is under no mandatory duty to remove the damaged trees. Therefore, no cause of action could be made under such a theory. One might argue that the County has assumed a duty to remove all damaged trees by virtue of agreeing to have any trees removed. Generally, the courts have required the plaintiff to specify the enactment which imposes the mandatory duty on the County. There is no mandatory duty to remove damaged trees. The County could adequately protect itself from any claims by virtue of a strong indemnity provision in its favor in the contract with the Contractor and adequate insurance requirements. It should be remembered that the County is not deciding which trees are to be removed nor is it engaged in the physical work of removing the trees. Therefore, any liability of the County would have to be vicarious through the contractor.

Second, the County would not be liable for a dangerous condition of public property as the tree is on private property. The exception to this would be if the hazardous tree left standing creates a dangerous condition on public property, e.g. the sidewalk or street and the County has the authority to order remediation of the situation. (Carson v. Facilities Development Co. (1984) 36 Cal.3d 830). If a tree remaining on the private property were subsequently determined to be hazardous, the County could require the owner of the property to take such measures as are necessary to remedy the situation. Alternatively, if the remaining tree were an imminent hazard, the County could remove the tree. If the County were not aware of the dangerous condition caused by the tree then no liability would likely attach. If the County were aware of the danger posed by the hazardous tree left in place, took no action and an injury occurred, then the County may well have liability but could be protected from that liability by virtue of a strong indemnity language in the contract with our tree removal contractor.

❒ **Risk Management Information Provided:**

Risk Management Recommends the following insurance requirements:

- $1,000,000 Commercial General Liability Insurance combined single limit per occurrence for bodily injury and property damage, and $5,000,000 in the form of excess/umbrella coverage which must follows the form of the primary CGL coverage.
- For purposes of this project, Professional Liability is not required.

Respectively,

Gerri Silva M.S., R.E.H.S.
Director
Environmental Management Department