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Understanding Forestry Law

BY SCOTT HORNGREN

This issue of the *Western Forester* is devoted to the law. Just as the practice of “forestry” covers a wide range of skills and issues, so does the practice of law. The following articles span the legal field including anti-trust, immigration, endangered species, easements and timber trespass law. But what is the law? It is primarily statutes enacted by state legislatures or the U.S. Congress. However, it also includes regulations adopted by administrative agencies. While it is easy to turn to the text of statutes and regulations to read the law, the more difficult task is to understand the “common law” that is not found in the text of statutes or regulations. Instead, the common law is created by judges through their precedential written opinion. Timber trespass and immigration disputes are largely governed by statutory law. In contrast, personal injury and contract disputes are largely governed by the common law.



Many foresters wonder how the “legal system” works. The vast majority of legal disputes never go to trial and are settled sometimes with the assistance of a paid mediator. State professional attorney publications are packed with advertisements for attorneys willing to serve as mediators to resolve a case. In some counties, like Multnomah County, Ore., any lawsuit must be resolved by mandatory arbitration if the amount in dispute is under \$50,000.

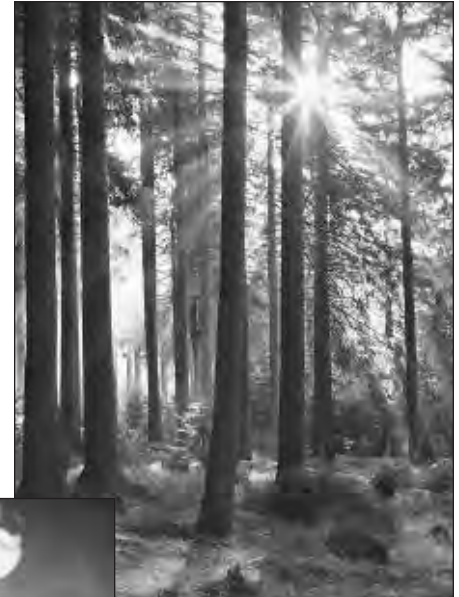
Although no mediator was involved, the article about the spotted owl litigation in Washington explains how the case was settled before trial.

The resolution of a legal dispute is ultimately through either the state or federal court system depending on whether state or federal law is involved, whether the dispute is between citizens of different states and the amount in controversy. A federal court can hear a dispute between



citizens of different states if the amount in controversy exceeds \$75,000. If these conditions are not met, generally the matter is resolved in state court. Lawsuits about anti-trust or the management of federal lands are resolved in federal court such as the dispute over National Forest management described in the Mission Brush article.

Courts are not established to resolve all legal disputes and may only resolve those matters that they are authorized by statute or the constitution to resolve. Disputes between citizens and government agencies sometimes are resolved through administrative tribunals such as Washington's



Forest Practices Appeals Board or the Oregon Department of Forestry.

Finally, an ounce of prevention can go a long way in keeping a legal dispute from developing in the first place. Attorneys are in a much better position to

provide helpful legal services before you sign a contract or cut that tree near the fence line. Consulting an attorney early could save thousands of dollars later if it avoids litigation.

Whether your interest is in deeds, easements, trespass or federal laws, hopefully this issue of the *Western Forester* has something of interest to you and provides a better understanding of how the law applies to the diverse practice of forestry. ♦

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Securing Access to Forestlands

BY HEATH A. CURTISS AND
KIRK B. MAAG

To access forestlands, foresters must frequently cross property owned by other parties, including forestland owners and neighboring landowners. While informal agreements with landowners may provide quick and easy access, these agreements are tenuous and often terminable at will. Failure to obtain enforceable access rights can increase the cost of accessing forestlands, lead to litigation, or worse, make these lands inaccessible. This can be particularly problematic in the context of



Heath Curtiss



Kirk Maag

harvesting timber, which may require road improvements and lead to increased traffic. Easements provide a mechanism for securing clear, enforceable rights.

An easement is a nonpossessory interest in the land of another party that entitles the owner of the easement to limited use of the other party's land without interference. For example, an easement could provide a forester with access to timber located on another's property via a private access road. Alternatively, an easement could grant a forester the right to construct a road across another's property to access timber. Because easements are generally irrevocable within their term of existence, whether that term is perpetual or limited, they are an effective mechanism for securing access.

In contrast to the limited use allowed under an easement, fee simple ownership represents full ownership of land. That is, once a grantor conveys fee simple ownership with-

out reservation, the grantor no longer owns any interest in the land conveyed. This distinction is important because one of the attributes of fee simple ownership is the right to exclude. For example, a grantor who inadvertently conveys fee simple ownership to a road across the grantor's property could thereafter be excluded from using the road.

Drafting an Easement

Given that easements are often long-term agreements involving limited use of valuable land, parties should take particular care when creating them. An easement should be in writing and should include precise language. The easement should identify the party granting an easement (the grantor), the party receiving the easement (the grantee), and any other parties who are giving or receiving benefits under the easement. The grantor must be the current owner or owners of the land to be burdened by the easement. Because land is frequently held in a corporation, limited liability company or other entity, the landowner's identity is not always obvious. Nevertheless, anyone entering an easement must ensure that the grantor is correctly identified in the easement.

To avoid disputes about whether a grantee obtained easement rights or fee simple ownership, the granting language should use the term "easement" rather than "right of way," and "grant" rather than "convey." An easement should also contain a section entitled "Recitals" or "Purpose" in which the parties describe the reason for the easement. This section can be helpful in determining the scope of the easement if unforeseen circumstances arise.

Finally, an easement should specify with clarity certain terms, such as those described below.

Type of Easement. Easements can benefit a specific parcel of land (appurtenant easements) or can be unrelated to any particular parcel of property (easements in gross). An appurtenant easement is inseparable from the benefited parcel of land. For example, an access easement that is appurtenant to forestlands remains appurtenant to those lands even if the



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Next Issue: Forestry Professionals Today and Tomorrow

forestlands are sold to another party. On the other hand, an easement in gross cannot typically be assigned. For example, if a timber company obtained an easement in gross to access certain timber it purchased, the timber company might be unable to sell the easement to another party.

Use of Easement. When drafting an easement, the parties should consider current and future access needs and identify the limits on the rights of use, including use by the grantor, the grantee and third parties. Unless the granting instrument states that the easement is exclusive, the grantor may continue to use the land underlying the easement in any manner that is consistent with and does not unreasonably interfere with the grantee's rights. The parties can also specify whether the grantee's access rights are limited to personal use or whether they extend to commercial use. An easement that does not extend to commercial use would limit the grantee's ability to sell timber or charge for recreation or hunting access.

Location. An easement should contain a full legal description of the underlying property. The parties should identify the location of the easement on a map, plat or scale drawing and attach the identifying document to the easement. For an access easement, the parties should identify the center line of the easement and specify its width. If the easement requires the grantee to construct a road, the width of the easement should be sufficient to accommodate construction.

Payment. The easement should state whether the grantor received any cash (or other valuable benefit) for granting the easement. If there is a dispute between the parties regarding the scope of the easement, a court may use this to help ascertain the parties' original understanding.

Duration. The parties should identify whether the easement is permanent or for a limited duration. Unless otherwise specified, the easement continues in perpetuity or until abandoned. Thus, the parties should define what constitutes abandonment. If the easement is for a limited duration and for the purpose of harvesting timber, the grantee should ensure that the easement

extends long enough to accommodate delays in logging activity.

Maintenance, Repairs and Damages. The easement should identify the party who is responsible for maintenance, repairs and damages. For example, if the easement allows the grantee to use an existing road on the grantor's property, the easement should specify which party is responsible for maintenance and repairs. Because it is possible that the grantee's use of an existing road or construction of a new road could damage the grantor's property, the easement should identify the party who bears the burden of such damages.

Taxes. Because easements are not taxed separately, the parties should determine whether the grantee will pay the grantor for a portion of the taxes. This is particularly important if the easement increases the value of the grantor's property.

Remedies. Unless otherwise stated, failure to abide by the terms of an easement will not result in termination of the easement. Instead, courts will award damages or order a party to stop certain offending activity. The parties can, for example, require that disputes be resolved through arbitration or that the losing party pay the attorneys fees of the prevailing party.

Recording an Easement

Parties should generally record all easements with the county, making the easement part of the public record. As between the grantor and grantee, an easement need not be recorded to be enforced, but its enforceability as against assignees or third parties increases upon recordation. If an easement is not recorded, the purchaser of property burdened by an easement may challenge the easement for lack of notice. However,

if an easement is recorded, courts will assume that the purchaser knew of the easement, making the easement enforceable against the purchaser.

The parties can record an easement at the county recorder's office. To record an easement, certain conditions must be met: the signature of the grantor of the easement must be acknowledged by a notary public; the document must conform to certain formal requirements, including the required statement "After recording, return to: [name and address]"; and payment of the proper fee. A person should call the county recorder to determine the statutory format and fee requirements before attempting to record an easement.

Absence of a Written Easement

Absence of a written easement does not necessarily mean that a forester lacks access rights. A party may, in some cases, establish a prescriptive easement through use. The party must show use over a 10-year period that is open, notorious and adverse to the rights of the owner of the underlying property, and that is continuous and uninterrupted. Because this is a difficult test to meet, owners of forestlands should not rely on their belief that they have acquired such an easement.

A properly drafted and recorded easement will secure long-term, stable access to forestlands. ♦

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The Spotted Owl Returns to the Spotlight

BY ELAINE SPENCER

The late 1980s and early 1990s was all about the northern spotted owl in Northwest timber country. A series of injunctions brought under the National Forest Management Act and the Federal Land Policy and Management Act effectively shut down logging in federal forests. As supplies for mills dependent upon the federal forests evaporated, rural communities in timber-dependent areas saw unemployment rates skyrocket. The 1990 listing of the owl as threatened under the Endangered Species Act (ESA) threw nonfederal lands into turmoil as well.

But, President Clinton's Northwest Forest Summit brought the beginning of a path that looked like it would lead to a "new normal." The 1994 adoption of the Northwest Forest Plan was supposed to provide a foundation for not just the preservation of the northern spotted owl, but for other old-growth and late-seral dependent creatures of the Northwest forest. Oregon adopted a 70-acre rule protecting the 70 acres of



best habitat around a northern spotted owl nest site in non-federal land. In 1996, Washington adopted a more protective forest practice rule, creating spotted owl special emphasis areas (SOSEAs) in areas of non-federal land where some scientists and commentators believed an additional contribution to recovery of the owl was needed to make up for deficits on federal land.

The premise of all the injunctions of the 1980s and the plans and regulations of the 1990s was that the key to conservation and recovery of the spotted owl was preservation of late-seral and old-growth forests. The reason the spotted owl was believed to be at risk was the rapid harvest of the remaining old growth, which was almost entirely on federal land. The assumption was that by preserving the remaining old-growth and late-seral forests and setting aside large federal reserves to regrow late-seral forests, over time the spotted owl population would stabilize and rebuild.

The barred owl is the northern spotted owl's eastern cousin. At some point during the middle of the 20th Century it made its way across the northern plains, and in the 1970s began invading Washington from

British Columbia. At the time that the spotted owl was listed as threatened under the ESA, scientists identified the barred owl as a potential threat of unknown significance. The barred owl merited at most passing mention, however, along with West Nile virus, great horned owls and miscellaneous other potential threats.

Unfortunately, the last 15 years has brought an explosion of the barred owl population in the Northwest. The barred owl has proven to be a better competitor than the northern spotted owl. The barred owl is slightly larger and is more aggressive than the spotted owl. The northern spotted owl has a relatively narrow diet. In the northern part of its range, the northern flying squirrel, itself rare, accounts for well over half of the northern spotted owl's diet. The rarity of northern flying squirrels probably explains the very large home ranges of spotted owls. In other areas, northern spotted owls also rely on wood rats. Even there, however, the spotted owl's diet is narrow and their home range is large. The barred owl, by contrast, eats not only northern flying squirrels and wood rats, but a variety of other small mammals, other birds, insects, frogs and fish. As a result, the barred owl can meet its dietary needs in a smaller area, has a much smaller home range, has a larger clutch size, and fledges more young annually than the northern spotted owl. The result is that as many as 7-10 pairs of barred owls sometimes now occupy what was a single home range of a northern spotted owl. The impact of the invasion of that many new predators competing for the same food supply has been that northern spotted owl populations have decreased sharply where the barred owl invasion is strongest. Across the spotted owl's range, when a barred owl has invaded within a half mile of the spotted owl site center, the spotted owl has typically abandoned the territory.

Predictably perhaps, this turn of events has spawned two different reactions—litigation by the Seattle and Kittitas Audubon Societies, and the final completion of a Recovery Plan for the northern spotted owl by



One serious threat to the spotted owl (right) is the invasion of barred owls (left). Barred owls have been expanding into the range of the northern spotted owl since the 1960s and by 2000 they colonized and their numbers increased. Barred owls' adaptability and aggressive nature may make them more successful in competing for the northern spotted owl's ecological niches.

the U.S. Fish and Wildlife Service. The ultimate utility of either remains to be determined.

In late 2006, the Seattle Audubon Society and the Kittitas Audubon Society, represented by the Washington Forest Law Center, sued Weyerhaeuser Company, Washington Commissioner of Public Lands Doug Sutherland, Vicki Christiansen, head of regulatory programs for Washington's Department of Natural Resources and alternate chair of the Washington Forest Practices Board, the Washington Department of Natural Resources, and the members of the Washington Forest Practices Board. The claims against Weyerhaeuser were that Weyerhaeuser's on-going forest practices in southwest Washington, including harvest of stands that may be used by spotted owls, were going to take spotted owls inside four spotted owl regulatory home range circles. The claims against the state officials were that state forest practices permits that allow the harvest of what is suitable spotted owl habitat anywhere in the state within spotted owl regulatory cir-

cles results in take of northern spotted owls.

The unusual thing about the suit against Weyerhaeuser was that the Weyerhaeuser property in southwest Washington has no old growth and essentially no late-seral forests. The few late-seral acres that exist are precluded from harvest by marbled murrelet protections. The area of the circles involved in the lawsuit was all harvested in the early decades of the 20th Century and was the site of the first tree farm in North America. It had been intensively managed since the 1940s. Nor did the older second-growth stands within the circles contain many of the legacy features sometimes found in second-growth stands. After the initial harvest, the Weyerhaeuser lands had been subject to repeated wildfires, spread by snags left during the initial harvest. As a result, in the 1940s, Weyerhaeuser sent workers onto the land to fell the snags. The land is, however, some of the most productive forestland in North America, and it is perhaps that innate productivity, com-

bined with a propitious dominance by Douglas-fir with only limited hemlock, lower elevations and rolling terrain that resulted in a few spotted owls locating on the Weyerhaeuser land in spite of the fact that the land did not have the characteristics usually thought to be essential to spotted owls. Weyerhaeuser was also alone among private landowners in continuing a regular survey program on its lands and in reporting the results of those surveys to the state. Thus when the plaintiffs were seeking "poster children" for their proposed lawsuit against the state, Weyerhaeuser's owls were among the rare regulatory owl circles outside of SOSEAs where there was actual evidence of spotted owls being present.

The plaintiffs' real target was the state of Washington, which they hoped to force to adopt significantly more stringent forest practices rules protecting spotted owl habitat. Plaintiffs' theory was that the old federal "no-take" guidelines, which had been adopted in the 1990s by the U.S. Fish and Wildlife Service and quickly



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rescinded, set the standard for what owls required in order to prevent "take" under the ESA. Those guidelines required that 70 acres of high-quality habitat exist around the nest site, that 50 percent of the area within a half mile of the nest be suitable spotted owl habitat, and that 40 percent of the area across the entire home range of the owl be suitable habitat. Owls don't live in circles, but for regulatory purposes the home range is described as a circle, with the radius of the circle varying from province to province. In southwest Washington, the radius of the regulatory circles is 2.7 miles, making the circles nearly 23 square miles in size.

The claims against the state officials raised serious constitutional questions. Basic concepts of federalism do not allow the federal government to dictate to state officials how the state may carry out its regulatory decisions. The federal government has broad power to enact its own regulations, but not to tell the state how to regulate. The federal district court dismissed the Department of Natural Resources based on sovereign immunity, and dismissed the Forest Practices Board members based on their legislative immunity. The Court refused to dismiss Doug Sutherland and Vicki Christiansen, however, in their capacity as the officials responsible for carrying out the Washington Forest Practices Rules and issuing forest practices permits, holding that there was an issue of fact for trial as to whether Sutherland and Christiansen were the cause in fact of harm to any owls.

The case proceeded to a four-day hearing on a preliminary injunction in June of 2007. The trial court entered a preliminary injunction against Weyerhaeuser, precluding it prior to trial of

the case from harvesting stands over age 50 within the four regulatory owl circles without first conducting a comprehensive survey to determine that the harvest area did not contain "suitable spotted owl habitat" as defined by Washington's forest practices rules.

The actual impact of the injunction on Weyerhaeuser's forestry is relatively minor, however, as the injunction left substantial acreage available for harvest. The preliminary injunction might be of more concern to small landowners, because it raises the possibility that if a northern spotted owl were located within 2.7 miles of a property, the landowner might be precluded from harvesting forests over age 50.

The trial court denied any preliminary injunction against the state. The Court found that except for the Weyerhaeuser circles, the plaintiffs had failed to prove that there were actually spotted owls present in most of the regulatory circles for which they had sought relief, and that for the few regulatory circles where there was some evidence of owl presence, there was no proof that the circle had less than 40 percent suitable habitat—which plaintiffs claimed was the amount needed to avoid take of spotted owls. In fact, most of the non-Weyerhaeuser circles for which the plaintiffs had some evidence of spotted owls being present were adjacent to federal land and may very well have had 40 percent suitable habitat.

In early July the parties settled the litigation. The Washington Forest Practices Board has established a Policy Working Group on Northern Spotted Owl Conservation to recommend measures that result in strategic contributions from non-federal lands in Washington to the broader goal of conservation of a viable population of the northern spotted owl. The Policy

Working Group will include the state Department of Natural Resources, Audubon, WFPA and Weyerhaeuser, as well as representatives of the Washington Department of Fish and Wildlife and others, and it is intended to result in a collaborative process. The parties to the litigation concluded that continuing the "take" litigation under the federal ESA would not be productive and would prevent a truly collaborative process, which they are hopeful will lead to conservation benefits for the spotted owl on non-federal lands.

The more significant event for the spotted owl may be that on May 13, 2008, the U.S. Fish and Wildlife Service released its final recovery plan for the northern spotted owl. The plan continues much of the approach of the Northwest Forest Plan on the westside of the Cascades in Washington and Oregon. On the eastside of the Cascades, the plan recognizes that stopping all harvest is a recipe for catastrophic wildfire. Since adoption of the Northwest Forest Plan, catastrophic wildfire has become a major source of loss of spotted owl habitat. On the eastside of the Cascades, and in the Klamath basin in southern Oregon and northern California, the plan calls for adaptive management to harvest as needed to prevent fuel buildup while still preserving owl habitat. Most importantly—and perhaps most controversially—the plan calls for immediate pilot programs for lethal removal of barred owls, to be followed by widespread lethal removal of barred owls if the pilot programs demonstrate that spotted owls can return to late seral reserves when the barred owls are removed. As for southwest Washington, which was the focus of the Audubon suit, the plan concludes that there are too few spotted owls within the region to make any recovery efforts there appropriate. ♦

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Landmark Ninth Circuit Mission Brush Decision Supports Forest Management

BY SCOTT HORNGREN

The Ninth Circuit, in a landmark unanimous decision in *The Lands Council v. McNair*, No. 07-35000, has given hope to those who want to end the judicial gridlock over implementation of forest health and fuel reduction projects on western national forests. This case was considered by an “*en banc*” panel of 11 judges, which reversed a three-judge panel decision that stopped the Mission Brush Project on the Idaho Panhandle National Forests. Only about 15-20 of the Ninth Circuit’s 13,000 appeals in a year are reviewed *en banc*. The full court was

concerned that its three-judge panel was misapplying the law to the Forest Service. Only a full court *en banc* panel can overrule the legal interpretations of three-judge panels. The full court explained, “We took this case *en banc* to clarify some of our environmental jurisprudence with respect to our review of the actions of the United States Forest Service.” The courts conceded that its prior three-judge panel decisions had made several errors because “we created a [on-the-ground data collection and scientific proof] requirement(s) not found in any relevant statute and regulation...and...we defied well-established law concerning the deference we owe to agencies and

their methodological choices. Today we correct those errors.”

The Mission Brush Project involved selective harvest of 3,829 acres of forest with the objective of reducing fire hazard and improving conditions for the flamulated owl that forages in open forest stands. Intervenor were Boundary County, City of Moyie Springs, City of Bonners Ferry, Everhart Logging and Regehr Logging.

The court reversed several of its earlier opinions that second guessed the Forest Service and imposed project-specific research requirements and data collection burdens not found in any law or regulation. The court also made clear that an injunction is not automatic in an environmental case. The court held that the economic impact to intervenor Boundary County and the family logging businesses, along with the long-term benefits of reducing the risks of wildfire, should be considered by a court in balancing the harm and considering the public interest in evaluating whether to grant an injunction.

Highlights and a brief analysis of the opinion are provided below.

- The court emphasized that the standard of review of Forest Service decisions under the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA) is narrow and is governed by the Administrative Procedure Act (APA) deferential arbitrary and capricious standard.

- The court held that judges should not act as a panel of scientists that choose among scientific studies and order the Forest Service to explain every possible scientific uncertainty. This will help defend against the lawsuits that attack every facet of a decision as involving scientific uncertainty. The court recognizes that there is always uncertainty, and just because the Forest Service does not discuss every uncertainty under the rainbow does not mean the decision is legally deficient. The appellants argued that it was uncertain and there was no proof that thinning the dense under-

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story of the forest would improve flammulated owl foraging. The court held: "To require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose."

- The court held that the Forest Service adequately addressed scientific uncertainty regarding whether the Mission Brush project will maintain wildlife viability.

- The court emphasized that the national forests are to be managed for multiple uses, not just for wildlife and are not to be "set aside for non-use."

- The court concluded that the Forest Service has flexibility in providing for wildlife viability and it is not the court's role to second guess how the Forest Service chooses to provide for wildlife viability. The court concluded, "Thus, as non-scientists, we decline to impose bright-line rules on the Forest Service regarding particular means that it must take in every case to show us that it has met the NFMA's requirements."

- The court endorsed the use of a habitat analysis to assess wildlife viability and does not require a population-based analysis to maintain viability as the three-judge panel demanded. So long as the analysis uses the best available information and confirms the type of habitat a species uses, a discussion of habitat changes should suffice to meet the viability requirement as it did in the favorable Inland Empire Public Lands Council v. Forest Service case from 1996, which most judges in the Ninth Circuit seemed to have forgotten was still binding precedent.

- The court overruled the Ecology Center v. Austin case that had required on-the-ground research to prove timber harvest would benefit wildlife before any tree could be cut. The court also overruled Idaho Sporting Congress v. Thomas to the extent the opinion precluded the Forest Service from using change in wildlife habitat as a proxy for change in wildlife populations where there is appreciable habitat disturbance. The Land Council v. Powell case that required detailed on-the-ground data collection was also limited to its facts.

- The court upheld the Forest Service technical conclusion that the Idaho Panhandle National Forest has more than 10 percent old growth as required by the Forest Plan.

- Significantly, the court held that the district court judge properly considered the loss to intervenors of jobs and harm to the local economy and the risks from no action including catastrophic fire, insect infestation and disease. The court clearly states that an injunction is not "automatic" in an environmental case and a court must conduct equitable balancing of harms even in environmental cases.

Overall, this is a great precedential opinion that overrules some bad cases and clearly sets forth the law in a way that defers to professional resource managers. The decision will hopefully get judges on a new course that will make it easier for the Forest Service to implement forest health and fuel reduction projects to benefit watersheds, wildlife and the economy. ♦

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Rediscover Oregon's Forests

Understanding and Preventing Timber Trespass

BY DAVID A. HEPLER AND
JANNA A. AGINSKY

All foresters at one time or another during the terms of their careers find themselves dealing with timber trespass. Often they are the first to notice that timber trespass occurred. In many instances, they are also charged with the task of preventing such trespass or, if the trespass has already taken place, with estimating the monetary value of the missing timber. This article is intended to provide foresters with some basic information on the timber trespass laws in Oregon and Washington to help them in these tasks.

What are timber trespass laws and why do we need them?

Forestland owners and city dwellers alike know that the trees on their properties have great value—sometimes economic value, sometimes aesthetic or emotional value, and sometimes all of the above. The term “timber trespass” generally refers to unpermitted cutting of trees and other vegetation on someone else’s property. Timber trespass laws in effect throughout the United States are geared toward helping property owners protect the value of their trees in two critical ways: first, by establishing stiff penalties (in some cases, as much as triple the amount of actual losses) that strongly discourage loggers or neighbors from cutting trees without the true property owner’s permission; and second, by compensating property owners for damage to or loss of their trees as a result of unpermitted cutting. The same pot of money thus represents both a stick that punishes the wrongdoer, and a carrot to compensate the damaged property owner for his or her loss.



David Hepler



Janna Aginsky

What is necessary to establish a timber trespass claim?

The plaintiff in a timber trespass case must establish certain facts or circumstances in order to receive the benefit of the law. Like most property laws, timber trespass is a creature of state law. This means that the exact requirements for establishing a timber trespass claim vary from state to state. In order to determine the exact elements for a timber trespass claim in your state, you should consult with a qualified property lawyer licensed in your state. However, there are some general principles and concepts that recur in most states, particularly in the Northwest.

1. The plaintiff must own the real property. To recover damages for timber trespass, a plaintiff must establish that he or she is the owner of the land from which the trees were removed, including the true boundary line between the parties. The property owner need not have a present possessory interest in the property in order to bring a successful claim; this means that holders of contingent remainders (for example, what’s left after a life estate) and lenders may be able to collect damages for wrongfully cut trees.

2. The defendant must have entered onto plaintiff’s real property. As for any trespass action, the plaintiff must show that the defendant entered onto plaintiff’s property. If the defendant merely hauled logs away from a neutral location, the plaintiff is unlikely to recover damages.

3. The defendant must have some level of mental culpability. In some circumstances a defendant will be liable for timber trespass even if the defendant thought he was on property that he was entitled to log. Most states “shift the burden of proof” with regard to this requirement for intent, such that a plaintiff need not show that the defendant intended to cut trees on plaintiff’s property; rather, it is up to the defendant to show that he had some reason to think he was within his right to cut the trees in question.

The law makes a substantial distinction between defendants who

knowingly go onto another’s property to cut trees, and defendants who inadvertently cross the line. In Oregon, for example, anyone who removes a tree knowing (or if he should have known) that it belongs to someone else is liable for treble damages, whereas a trespasser who only casually or mistakenly cuts another’s tree or shrub is liable only for double damages; in Washington, intentional timber trespass renders a defendant liable for triple damages while unintentional timber trespass only generates actual damages liability. Damages are discussed further below.

Innocent logger defense

Some states, including Oregon, provide partial protection for loggers who have committed timber trespass in good faith. These limitations of liability are intended to shield commercial loggers from being overly penalized for taking a few trees from the wrong side of a property line.

Oregon law sets forth specific requirements that the contract logger must meet in order to claim the exemption: the contract logger must be working under a signed written contract with the person that the contract logger reasonably believes to be the owner of the timber in the operations area. The law even describes exactly what the contract logger must do to take advantage of this defense:

1. Ensure the contract includes a metes and bounds or other legal description;
2. Ensure the owner locates, marks and protects from damage all survey monuments in the operation area;
3. Ensure the owner flags, stakes or otherwise clearly marks the boundaries of the operation area;
4. Obtain from the owner a copy of a deed or other legal indicia or title to the trees to be cut;
5. Compare the deed with the contract legal description; and
6. Retain a copy of the deed for three years.

If all these requirements are met, a commercial logger’s liability is capped at actual damages (that is, no treble or double damages). While

Washington does not have similar statutory provisions, the Oregon requirements are a good road map to Washington landowners and foresters as to what kind of due diligence they should undertake to avoid inadvertent trespass.

How long does a property owner have to file a claim?

The statute of limitations for a timber trespass article varies from state to state, but is typically two or three years from the time of discovery of the unpermitted cutting. In Washington, for example, a timber trespass plaintiff has three years from the time that he discovered (or could have reasonably discovered) the damage to bring suit. In Oregon, on the other hand, a plaintiff has six years from the date of the damage to file a claim.

What damages can a timber trespass plaintiff recover?

As foresters are often charged with computing the value of the timber taken as a result of timber trespass, they should be familiar with the rules of calculating such damages.

The core concept underlying timber trespass damages is usually derived from the value of the land before versus after the damage. If a trespasser severs mature, merchantable trees, the practical method of determining damages is by examining the "stumpage" value of the standing timber, which means the market value of the timber before it is cut.

In instances of residential timber trespass or cutting of ornamental plants, including shrubs, other factors may be considered in determining the actual damages. For example, the value of the damaged vegetation in providing shade, privacy, wind screen and beauty may enter into the analysis.

Many states allow timber trespass plaintiffs to recover double or triple the amount of actual damages suffered. As mentioned above, this multiplier concept is intended to create a real disincentive for loggers and other cutters to be sloppy in their determination of what they're allowed to cut.

Foresters must remind their landowner clients that a property owner may be obligated to mitigate his damages following a timber trespass.

For example, if a timber trespasser has logged a portion of the property and left some of the felled timber lying on the property, the landowner may be obligated to try to salvage the value of the cut timber. Additionally, a timber trespass plaintiff may experience a reduction in his damages award to the extent that the timber trespasser improved the plaintiff's property with roads or other improvements.

The mitigation and deduction of improvement value concepts may factor into the multiple damages calculation. As an example: I own 100 acres of timberland, and you knowingly log five acres of my property. The value of the wrongfully cut timber is \$25,000. You leave \$10,000 worth of logs lying conveniently next to a road that you constructed at a cost of \$5,000, and I decide to let those logs rot as they lie rather than having them hauled off. My damages (if this took place in Oregon) would likely be determined to be (\$25,000 minus \$10,000 minus \$5,000) x 3, or \$30,000. If, on the other hand, the facts from the above example were all the same except you did not build a road or leave any logs lying on my land, my damages would be \$25,000 x 3, or \$75,000.

Most states allow a timber trespass plaintiff to recover its attorney fees as well as the reasonable cost of reforesting the property. In some states, including California and Washington, a timber trespass plaintiff may also recover damages for emotional distress suffered by the property owner.

Prevention

Common sense provides the best approaches toward preventing timber trespass. Good practices include:

- **Recognize easy targets for timber trespass.** Sites with easy access, harvest and transport, out-of-view sites, sites with specialty species or market premium sorts, sites adjacent to current harvest operations and sites with questionable boundary lines are all

attractive targets for timber trespassers and require extra attention.

- **Be familiar with the property.**

Visit the property frequently, or at least periodically, so that you remain aware of what is happening on and around it. If you are unable to visit the property personally, ask contractors, neighbors or other locals for periodic updates about what is going on in the area. Be alert to logging trucks in the area.

- **Pay close attention to logging operations.** Mark the logging area carefully and inspect the logging job regularly (preferably weekly) to ensure that contractors stay within harvest boundaries, comply with water quality laws, and protect physical structures such as roads and fences. If a neighbor is logging, find out who the logging contractor is and make sure the contractor knows that you are watching and that you care.

- **Mark your property boundaries.**

Even if there is no logging activity planned on the property, paint markings and signage on and between trees can greatly reduce unintentional timber trespasses.

Conclusion

A monetary award cannot bring back mature trees that have been cut illegally. But the specter of treble damages makes people think twice about what they are cutting, and also provides compensation for property owners whose trees or shrubs have been illegally cut. Common sense behavior, vigilance and legal advice, when necessary, can decrease the likelihood of loss and increase the probability of compensation after a timber trespass has occurred. ♦

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The Aftermath of the Weyerhaeuser Case: Important Lessons for the Timber Industry

BY MICHAEL E. HAGLUND

The antitrust laws of the United States are designed to preserve and protect competition in goods and services. These laws prohibit agreements among companies that fix prices, divide markets, limit production or otherwise impede or destroy market forces. In 2007, the U.S. Supreme Court for the first time decided an antitrust case involving a log market in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*

The Weyerhaeuser case involved the market for alder sawlogs in the Pacific Northwest. A federal jury in Portland found that Weyerhaeuser had monopolized the alder sawlog market through a variety of anti-competitive tactics. These included acquisitions of competitors (four of the seven Weyerhaeuser alder sawmills were purchased from competitors), oral and written exclusive log supply agreements, manipulative and preclusive bidding practices, and false representations to state governments to obtain access to public timber.

The case was tried over two weeks in April 2003 and resulted in a verdict for Ross-Simmons of \$26.2 million, which was automatically trebled under antitrust law to \$78.6 million. Weyerhaeuser's appeals made their way



through the Ninth Circuit Court of Appeals, which affirmed the verdict, and eventually to the Supreme Court. The only issue before the Supreme Court involved the legal test for illegal bidding behavior incorporated into just two sentences in the jury instructions.

At trial, the federal judge had told the jury that Weyerhaeuser engaged in an illegal log bidding practice if it purchased more logs than necessary or paid a higher price than necessary in order to prevent competitors from obtaining logs they needed at a fair price. Weyerhaeuser argued that this test was far too vague and urged the court to adopt an objective test providing a clear definition of illegal or predatory bidding for logs or other raw materials.

The Supreme Court agreed, reversed the verdict and declared that bidding was predatory only where the bid price was so high that the bidder would lose money on the products generated from the high-priced logs. In other words, so long as a company would remain profitable on the lumber and byproduct sales derived from the logs for which it was bidding high prices, there was no basis for an antitrust claim by a less efficient competitor who was unable to earn a profit on the same logs.

Was the Supreme Court decision the end of the Weyerhaeuser case? No. By handing down a new legal test for predatory bidding, the case went back to the district court for a new trial with the correct jury instruction. Rather than

try the case a second time, it was settled for \$17 million in the fall of 2007.

Ross-Simmons was not the only alder sawmill to sue Weyerhaeuser for monopolization of the alder sawlog market. All told, 14 sawmills in Oregon, Washington and British Columbia sued and collected over \$80 million in settlements. According to trial testimony, Weyerhaeuser also spent \$100 million on experts (antitrust and forest economists, forensic accountants, etc.). And that doesn't count the legal fees incurred in defending five cases.

A conservative estimate of Weyerhaeuser's total cost for this antitrust episode exceeds \$300 million, a figure that represents approximately 56 percent of the timber giant's average annual company-wide profit in each of the last 10 years. It should be no surprise then that antitrust exposure strikes fear in the hearts of large corporations throughout the United States. And it's not just the potential cost of treble damage awards. Antitrust violations can also result in felony criminal charges, exposing the guilty company to substantial fines, and the involved individuals to fines and imprisonment.

How can a forest products company, its executives and its personnel involved in raw material procurement and sales avoid running afoul of antitrust? The best practices include adoption of antitrust compliance procedures and a training program designed to ensure that all company executives and key personnel in both log procurement and sales have a basic understanding of U.S. antitrust laws and what types of activities are absolutely prohibited.

Some of the most important steps that will significantly reduce the possibility of antitrust violations include the following:

1. Do not communicate with competitors about sensitive competitive topics, including: prices, terms of sale, pricing plans, marketing strategies or plans, expansion plans, facility closures, contraction or downtime plans, and specific costs.



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2. When bidding on a timber sale or private timber, make certain that your bid is not so high that your company will lose money on the wood products generated from those logs. If your purpose is to bid the logs to a level to keep them away from your competitor despite the loss to your company, you're engaged in illegal predatory bidding.

3. Be careful how you communicate in memos, studies, reports, email and voice mail because poorly worded documents or messages can give the impression that improper activity took place when in fact it did not.

4. In all your business dealings, remember the following: compete vigorously and equitably; treat all customers and suppliers objectively; never discuss pricing at conventions, trade shows or elsewhere with a competitor; and avoid any practice that could be characterized as unfair or deceptive.

The Weyerhaeuser case presents some important lessons for anyone involved in log procurement. As a case study, it's worth examining how both Weyerhaeuser's behavior and the alder sawlog market have changed since the Portland jury issued its huge verdict in 2003, which at the time was the largest antitrust verdict in the history of the Pacific Northwest.

Based on evidence generated in all five cases over the years 2003-2007, industry interviews and market share data, the alder industry in the Pacific Northwest has changed fairly dramatically since the 2003 verdict. Weyerhaeuser has abandoned multiple practices challenged on antitrust grounds. These include entering into exclusive log supply contracts with major landowners and last-look bidding where a log buyer makes a bid, but also asks the supplier for the chance to meet or beat any higher bid from a competitor.

Weyerhaeuser's share of the alder market has also dropped from approximately 75 percent in 2003 to just below 50 percent in 2007 as a result of a mill closure, reduced production levels and the growth of competitors. A market share below 50 percent is generally viewed as within a safety zone that is below a level where a company has enough market share to monopolize prices.

Finally, it is worth noting that woodland owners also have a big stake in free and competitive log markets. Where a single company gains a significant competitive advantage and becomes the sole market for a log species, there is a danger that it will use its market power over time to force log prices down. In the case of alder, log prices have enjoyed a solid period of generally increasing prices while softwood logs have been on the decline. This is one of the key benefits of a competitively healthy log market.

In any area where one dominant sawmill appears to be emerging and is doing so by paying high log prices, consulting foresters representing landowners should be careful not to

play into a strategy that facilitates the exit of a competing sawmill. Once that competition is gone, log prices will fall and the forest manager will rue the day that the landowner accepted the short-term high price from the monopolist rather than spread supplies around to keep multiple sawmills in operation. ♦

Michael E. Haglund is a founding partner of the Portland law firm of Haglund, Kelley, Horngren, Jones & Wilder and served as lead counsel for Ross-Simmons Hardwood Lumber Co. and 12 other plaintiffs in alder antitrust litigation against Weyerhaeuser. He can be reached at 503-225-0777 or haglund@hk-law.com.



We Remember

Albert Stage 1929-2008

Albert R. Stage, 79, died on Saturday, July 12, at home near Moscow, Idaho.

Al was one of the giants in forest biometrics research and forest growth dynamics modeling in the world. His broad breadth of knowledge, analytical skills, creativity and curiosity, and his sheer love of science, made him a consummate forest scientist. It is noteworthy that his most productive year measured in refereed journal papers was 2007, many years after becoming an emeritus scientist. He had more work to do and many more papers planned than his lifetime permitted.

Al was best known for the creation of the Prognosis Model for Stand Development, first published in 1973. This model is the core of what is currently known as the Forest Vegetation Simulator (FVS), the most widely used forest growth model in the world. Al's vision, his quiet but persuasive prodding, and his firm grasp of biophysical, mathematical and statistical concepts are at the foundation of FVS. Many who had the pleasure of working closely with him stand in awe of his achievements; the fervor and pace with which Al attacked forestry research was exhausting!

Al's Forest Service career started in 1950 with a summer job at the Fort Valley Experimental Forest in Arizona. In 1951 he was hired by the Northern Rocky Mountain Forest and Range Experiment Station and when not on military or educational leave, he supervised the Priest River Experimental Forest in northern Idaho until 1956. He received an M.S. in Mathematical Statistics and a Ph.D. in Forest Mensuration, both from the University of Michigan. Al was one of the original inhabitants of the Moscow Forestry Sciences Laboratory when it opened in 1963. It was there that he was appointed to his dream job as a project leader, a position he maintained until retirement in 1995.

Al received several awards and honors during his career, including the Society of American Foresters Award in Forest Science. He was elected a Fellow of SAF in 2000.

In lieu of flowers, the Stage family suggests that memorial gifts be made in Al's name to the American Cancer Society (920 North Washington St., Suite 200, Spokane, WA 99201), White Pine Chapter of the Idaho Native Plant Society (P.O. Box 8481, Moscow, ID 83843) or the Palouse Land Trust (P.O. Box 8506, Moscow, ID 83843). ♦

Employers Beware: Don't Get ICE'd by Your I-9 Practices

BY BRADLEY MAIER

For the past 20 years employers have been required to verify the identity and employment authorization and complete a Form I-9 for all new hires.



Because "employer" is broadly defined by the statute and implementing regulations as "any individual or entity who engages the services or labor of an employee for wage or other remuneration" (but not including independent contractors), employers of all sizes including landowners, logging companies, mills, and reforestation contractors, for example, are required to comply with Immigration Reform and Control Act's (IRCA) I-9 requirements.

The law has not changed much since Congress enacted IRCA in 1986. However, employers should be aware that the agency responsible for its enforcement and the methods it uses has changed significantly. Established in 2003 as a separate agency under the newly created Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) traces its

roots to the former Immigration and Naturalization Service (INS). Unlike legacy INS, which was primarily an administrative agency responsible for *both* conferring benefits (like green cards and U.S. citizenship) as well as enforcement, ICE is singularly focused on investigation and enforcement, a mission that it pursues with great zeal. In stark contrast to its predecessor, ICE increasingly relies on traditional criminal law enforcement tactics including electronic surveillance, paid informants, large-scale multi-agency investigations, search warrants, criminal prosecutions, asset seizures and major fines to investigate and penalize offending employers.

For much of the last decade, workplace enforcement was put on the backburner while ICE retooled and the agencies instead focused on apprehending foreign terrorists, human traffickers and other high priority targets following 9/11. With only minimal enforcement activities between 2001 and 2006 and little media attention to the subject until recently, many employers have become lax about I-9 compliance. At the same time, unprecedented numbers of undocumented workers moved to the Pacific Northwest and joined the workforce, many using valid-looking fraudulent documents.

With the issue of workplace enforcement and I-9 compliance at the fore, employers are now looking for ways to ensure that their workforce is "legal."

Unfortunately, there are no perfect solutions. Not even DHS's much-touted electronic verification system (which all federal contractors will soon be required to use), can fully shield employers from liability. Because employers can be held liable for both "actual" as well as "constructive" knowledge of an employee's unauthorized status, at the very least employers should take appropriate steps to ensure that their I-9s are prepared correctly and completely.

By regulation, an employer is presumed to have constructive knowledge of a worker's unauthorized status if there is no I-9 on record or if it is incomplete. In other words, even if an employer has reviewed an employee's documents and believes they are valid, the employer could still be held liable if ICE discovers that the worker is in fact unauthorized to work and there is no I-9 on file or it is incomplete. On the other hand, good faith compliance creates a rebuttable affirmative defense.

Practical steps you can take to reduce risk

- Have all I-9s completed and managed by a small designated group of people who are well trained in I-9 requirements and acceptable documents. Review and audit on a regular basis starting now. Initial, date and document all corrections (never back-date). If a new I-9 is necessary, retain the old one.

- Use only the most current version of the I-9 form for new hires (Rev. 06/05/07). Also carefully review the new DHS *Handbook for Employers* (M-274). The latest versions of both documents can be downloaded at <http://www.uscis.gov/i-9>.

- Develop and implement an effective system for completing, storing, reverifying and destroying I-9s and copies of supporting documents (if any) in a timely manner. Keep I-9 files separate from personnel files and implement the policy consistently and uniformly. Maintain I-9 documentation throughout the period of employment, but you may destroy three years after hire or one year after termina-

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tion, whichever occurs last.

- Always examine *original* documents. Never accept photocopies. Receipt notices for pending applications may be accepted under certain circumstances. The list of acceptable I-9 documents changed with the new I-9 form. Be certain to accept only listed documents.

- If you use contract labor, rely only on reputable staffing agencies. Require contract language explicitly stating that: a) the contracting agency will be solely responsible for completing I-9s and verifying employment authorization; and b) the contracting agency will never knowingly refer a worker who does not possess employment authorization. Also, include an indemnity clause that includes appropriate language to protect you as the employer in the event there are issues later with the I-9s prepared by the contracting agency or the employment of authorization of the employees referred to you. Note that although employers are not required to complete I-9s and verify employment authorization of independent contractors, if the employer knows that a contractor does not possess valid employment authorization, it can be held liable as the employer in fact.

- Develop and implement a plan for responding to "no-match" letters issued by the Social Security Administration *in a timely manner*. Make the policy transparent, employ it consistently and uniformly, and document each step. Check employer records within 30 days of receipt of a no-match letter. If the error cannot be corrected, check with the employee within 90 days and ask him/her to resolve the discrepancy with the Social Security Administration (SSA). At present, DHS's new no-match regulation is still held up in litigation. Therefore, do *not* complete a new I-9, reverify employment authorization or take adverse action based upon the SSA letter alone.

- Consider enrolling in DHS's "E-Verify" electronic employment authorization verification system. The heavily promoted program is currently voluntary for private employers. However, in June 2008 the President issued an Executive Order requiring participation in the program as a condition for all new federal contracts. Comments to a proposed rule were due in August 2008.

The new requirement will go into effect 60 days after a final rule is published and is expected to cover: 1) all new employees hired by the contractor or subcontractor during the life of a new contract; 2) all existing employees who are directly engaged in the performance of work under the covered contract; and 3) all existing indefinite-delivery/indefinite quantity-contracts for future orders if the remaining contract period extends at least six months beyond the effective date of the final rule and there remains a substantial amount of work or number of orders. Before signing up, seek counsel and carefully review the terms and conditions of DHS's Memorandum of Understanding.

- Consider utilizing the H-2B guest-worker program to bring temporary or seasonal guest workers from abroad. In

its current form the H-2B program is complex and cumbersome. In May 2008, Department of Labor issued a proposed rule that, when finally implemented, should significantly streamline and expedite the process, thus making it easier to employ temporary and seasonal workers from abroad.

- Finally, Benjamin Franklin had it right about an ounce of prevention. Get counsel and invest the time and resources necessary to get your I-9s in order *before ICE comes knocking*. ♦

Bradley Maier is an immigration attorney at the Northwest law firm of Schwabe, Williamson & Wyatt and chair-elect of the Oregon Chapter of the American Immigration Lawyers Association (AILA). He can be reached at Schwabe's office in Portland at 503-796-2440 or bmaier@schwabe.com.



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Real Estate Deeds in the Pacific Northwest: What Form to Use and Why

BY GREGORY FULLEM AND
DALE FUJIMOTO

Although various states in the Pacific Northwest utilize different deed forms to effectuate similar types of real estate conveyancing transactions, the goals for respective grantors and grantees of real property are generally the same regardless of the jurisdiction. Grantors (sellers of real property) want to limit the warranties they provide in a deed, and grantees (purchasers of real property) seek as many deed warranties as possible regarding the state of title to the property as possible.

On one end of the spectrum are warranty deeds that provide ultimate protection to grantees and more exposure to grantors; on the other end are quitclaim deeds, where the grantor generally has no liability for title defects and the



Gregory Fullem



Dale Fujimoto

grantee has no recourse against a grantor for the same. The specific language that creates warranty deeds, special warranty deeds, quitclaim deeds, and bargain and sale deeds originated from common law. Today, most states have statutorily codified at least some of the common law deeding language. The following discusses the effect that statutory or other granting language used in Oregon, Washington, Alaska and Idaho has upon particular conveyances and addresses the strategy behind each deed type in these jurisdictions.

Warranty Deeds

Warranty deeds are the most common type of deed. They furnish grantees with a number of covenants, the most important of which is that grantors will forever warrant and defend the title to the property against myriad adverse claims. The warranty deed is the best possible deed for a grantee/purchaser to obtain, and the least favorable for a grantor/seller to deliver at closing.

In Oregon, a deed providing that a grantor "conveys and warrants" a property "free of encumbrances" creates a warranty deed, regardless of the

actual title to the instrument (i.e., if this granting language is used, but the parties called the instrument a special warranty deed, it's likely courts would construe the instrument as a warranty deed). Warranty deeds in Oregon:

1. Convey the property's entire interest.
2. Prevent grantors from asserting that they had an interest in the property less than that provided in the deed.
3. Warrant that the deed passes after-acquired title to the grantee.
4. Warrant that the grantors legally own the property and have the right to convey it.
5. Warrant that the property is free from encumbrances (except as may otherwise be set forth in the deed itself).

6. Warrant that the grantors will defend the property's title.

7. Require the grantors to disclose encumbrances for which they will not be liable.

In Washington, the phrase "conveys and warrants" contained in a conveyance instrument also acts to create a warranty deed. Washington's statutory warranty deeds provide the same covenants as in Oregon, except they: (a) do not explicitly prevent grantors from asserting that they had an interest less than that provided in the deed; and (b) they warrant quiet and peaceable possession of the property.

Alaska's statutory warranty deed form follows Washington's form verbatim. Furthermore, Alaska courts have adopted the Supreme Court of Washington's interpretation of the Washington warranty deed statute.

Unlike the jurisdictions above, Idaho has yet to codify any of its deed forms. Idaho courts, however, have stated that conveyancing instruments using the operative language "grant, bargain, sell and convey" create warranty deeds. Such grants in Idaho:

1. Imply that: (1) grantors have not conveyed any right, title or interest in the property to any other person; and (2) the property is free from encumbrances that the grantors made or from which they suffered.



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2. Presume that the grantors are passing a fee simple title.

3. If they involve fee simple property, pass a grantor's after-acquired interest to grantees.

Grantees should always request a warranty deed when purchasing property so that they obtain the various protective covenants and warranties regarding title described above.

Typically, grantors seek to use one of the alternative deed forms described below in order to limit grantor's warranty exposure for title defects. When grantees balk at receiving a deed containing less comprehensive warranties than the warranty deed, typically grantors can successfully persuade grantees to accept the special warranty deed or its equivalent in the place of a warranty deeds and rely for further protection against title defects upon the title insurance policy to be provided by grantee at closing.

Special warranty deeds

Special warranty deeds are favored by grantors, because grantors warrant only those defects that occurred after the grantor obtained the property. Accordingly, if a prior titleholder caused a title defect, then a grantee will have to look to the covenants in the prior titleholder's deed and title insurance for recourse, not to the immediate grantor's deed.

In Oregon, special warranty deeds are created when a grantor "conveys and specially warrants" a property "free of encumbrances created or suffered by the grantor."

Special warranty deeds in Oregon:

1. Require grantors to warrant and defend the property's title.

2. Require grantors to disclose encumbrances for which the grantor will not be liable.

Washington, Alaska and Idaho do not have statutory special warranty deeds. However, Washington's statutory bargain and sale deed has the same legal effect as an Oregon special warranty deed. In Washington, the phrase "bargains, sells and conveys" creates a bargain and sale deed pursuant to which the grantors warrant that: (1) they own an indefeasible fee simple estate in the property; and (2) the property has no encumbrances that the grantors created or from which

they suffered.

Special warranty deeds or their equivalent are commonly used in jurisdictions in which they exist as available deed forms. They provide a middle ground for grantors and grantees, giving grantees warranties upon which they can rely and shielding grantors from claims arising during periods in which the grantor did not own the property.

Quitclaim deeds

Under quitclaim deeds, grantors make no warranties whatsoever and transfer to the applicable grantee only the interest that they have in a property, if any. The quitclaim basically releases grantor from later asserting that they have any interest in the property. Under quitclaim deeds, grantors make no assurance that they have good title to, or even any interest

at all in, the property. Therefore, when grantors use quitclaim deeds, grantees should be on notice that there may be outstanding encumbrances against the property, precluding grantees from having bona fide purchaser status.

In Oregon, the phrase "releases and quitclaims...all right, title and interest in and to" the property creates a quitclaim deed. Quitclaim deeds in Oregon:

1. Convey a grantor's legal and equitable title and interest in a property.

2. Do not convey after-acquired title to grantees or prevent grantors from asserting that they had a lesser estate than that provided in the deed.

3. Give grantees the status of good faith purchasers.

By comparison, Washington and Alaska use the language "conveys and quitclaims...all interest." Alaska

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courts have concluded that the words "grant" and "convey" are also sufficient to create quitclaim deeds. Statutory quitclaim deeds in Washington and Alaska have the same effect as Oregon, except they do not expressly give grantees the status of good faith purchasers and do not estop grantors from asserting that they had a lesser estate than that provided in the deed.

In Idaho, the phrase "convey, release, remise and forever quitclaim" creates a quitclaim. Unlike the jurisdictions above, Idaho common law,

rather than statutes, establishes the language that creates quitclaim deeds.

Quitclaim deeds are typically used to remove lingering encumbrances as potential clouds on title and are not advisable for the grantee, since they provide no warranties of title.

Bargain and sale deeds

Bargain and sale deeds generally imply that grantors have the right to convey title, but offer no warranties regarding the title to property. In Oregon, a deed using the word "conveys" creates a statutory bargain and sale deed. Such deeds in Oregon:

1. Convey the property's entire interest.
2. Prevent grantors from asserting that they had an interest less than that provided in the deed.
3. Pass after-acquired title to the grantee.
4. Do not provide any covenants of title.

Notably, Alaska and Idaho do not have statutory bargain and sale deeds. As noted above, the bargain and sale deed in Washington is the equivalent of an Oregon special warranty deed.

Parties should pay special attention to the deed form suggested for a particular deal. The name of the chosen deed form is important, but the specific granting language used will ultimately determine the interests actually conveyed. Grantees should always seek as many warranties regarding title as possible and grantors should always seek to limit the warranties of title contained in the deed. When a grantor refuses to provide a full warranty deed at closing and the grantee is forced to accept the equivalent of a special warranty deed, generally title insurance can be obtained by a grantee to provide adequate protection against title defects.

For purchasers and sellers of timberland, the strategies regarding negotiations of deeds are the same as generally described above: sellers should attempt to limit the warranties they are making in a deed, and buyers should seek to obtain as many warranties as possible. If a preliminary title report and resulting title policy indicate to a purchaser of real proper-


ty that the title to the timberlands being purchased is clean, the purchaser often acquiesces during deed negotiations, accepts the equivalent of a special warranty deed and relies solely on recourse against the title insurer in the event of title defect not arising during the seller's period of ownership.

In the event that timber is the only portion of real property being transferred by the deed in question, the same principles described above would apply to the negotiations regarding the granting language to be inserted in the timber deed. Parties to a timber deed transaction typically modify one of the statutory or common law forms of deed described above, after choosing the deed form containing warranties mutually acceptable to the parties. The parties then add various provisions regarding peculiar aspects of the transaction in question.

Regardless of the warranties crafted into the timber deed, the parties should also address, among various other matters, the following issues when utilizing a timber deed: (a) the length of time granted to the purchaser in which it may cut the timber; (b) the insurance requirements with respect to the purchaser's timber harvesting and other activities on the seller's lands; (c) who is responsible for compliance with the applicable Forest Practices Act and applicable environmental laws; (d) indemnity obligations of the parties with respect to their various activities; and (e) the requirement of execution of a quitclaim deed from purchaser back to seller upon completion of the timber harvest.


As a result of these many issues to be addressed, some timber deeds become much more elaborate than the statutory or common law deeds from which they evolve. ♦

Gregory Fullem is an attorney specializing in real estate, timber and forest products transactions for Schwabe, Williamson & Wyatt in Portland, Ore. He can be reached at 503-796-3736 or gfullem@schwabe.com. Dale Fujimoto was a summer associate at the firm in 2008.



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Calendar of Events

Silvicultural Treatments for Major Insects and Diseases on Indian Lands, Sept. 30-Oct. 1, Spokane, WA. Contact: WFCa.

Carbon Management in Forests: Principles, Policies and Practices, Sept. 30-Oct. 2, Blue River, OR. Contact: OSU Conference Services, 800-678-6311.

Professional's Night, South Puget Sound Chapter meeting, Oct. 2, Green River Community College, Auburn, WA. Contact: Tom Hanson, tom@infoforestry.com, 425-820-3420.

OFIC Annual Meeting, Oct. 12-14, Sunriver, OR. Contact: OFIC, ofic@ofic.com, 503-371-2942.

Professional Timber Cruising Seminar, Oct. 15-16, Beaverton, OR. Contact: Atterbury Consultants.

National Tree Farmer Convention, Oct. 17-19, Portland, OR. Contact: American Tree Farm System, info@tree-farmsystem.org, 202-463-2462.

Practical Application of New Technology for Foresters Seminar, Oct. 22-23, Beaverton, OR. Contact: Atterbury Consultants.

Timber Measurement Society, Oct. 28-29, Reno, NV. Contact: Matt Fonseca, matthew.fonseca@unece.org.

Pacific Logging Conference, Nov. 3-5, Las Vegas, NV. Contact: rikki@pacific-loggingcongress.com.

Oregon Watershed Enhancement Board Conference, Nov. 5-7, Eugene,

OR. Contact: Monte Turner, monte.turner@state.or.us, 503-986-0178.

SAF National Conference, Nov. 5-9, Reno, NV. Contact: Carlton Glead, 866-897-8720 ext. 111, gleedc@safnet.org, www.safnet.org.

Statewide Safety Conference, Nov. 8, Hood River, OR. Contact: Associated Oregon Loggers, 503-364-1330.

PNW Integrated Vegetation Management annual meeting, Nov. 18-19, Portland, OR. Contact: WFCa.

Advanced Variable Probability Sampling, Nov. 12-14, Corvallis, OR. Contact: Donna Williams, conferences@oregonstate.edu, 800-737-9300.

18th Annual Conference of the Environmental Education Association of Washington, Nov. 13-15, Wenatchee, WA. Contact: Washington State University, email@wsu.edu, 509-335-3557.

Forest Sector Modeling, Nov. 17, Seattle, WA. Contact: John Perez-Garcia, perjohn@u.washington.edu, 206-685-2315.

Managing Climate Change Risk in Forests, Nov. 20, Portland, OR. Contact: WFCa.

Wreath Making, South Puget Sound Chapter Meeting, Dec. 4, Green River Community College, Auburn, WA. Contact: Tom Hanson, tom@infoforestry.com, 425-820-3420.

2009 ORSAF/WSSAF Joint Leadership Conference, Jan. 16-17, Silverton, OR. Contact: Mark Buckbee, Mark_Buckbee@blm.gov.

Oregon Logging Conference, Feb. 19-21, Eugene, OR. Contact: www.oregonloggingconference.com, 541-686-9191.

Variable Probability Sampling Workshop, Spring 2009, Corvallis, OR. Contact: Donna Williams, conferences@oregonstate.edu, 800-737-9300.

Contact Information

Atterbury: Atterbury Consultants, 3800 SW Cedar Hills Blvd., #145, Beaverton, OR 97005, 503-646-5393, jaschenbach@atterbury.com, www.atterbury.com.

WFCa: Western Forestry and Conservation Association, 4033 SW Canyon Rd., Portland, OR 97221, 503-226-4562, richard@westernforestry.org, www.westernforestry.org.

Send calendar items to the editor, *Western Forester*, 4033 SW Canyon Rd., Portland, OR 97221; fax 503-226-2515; rasor@safnwo.org. The deadline for the Nov./Dec. 2008 issue is October 13.



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Liability Implications of Fees to Use Forestland

BY SCOTT HORNGREN

Forest landowners are increasingly looking for ways to generate revenue from their forestlands. One option is to charge a fee for recreational use of forestland. Each western state has its own "recreational use" law that provides landowners who open their property to free use by the public an exemption from liability if someone is hurt. The theory behind the law is simple—the landowner gets protection

against lawsuits from the public, and in exchange, the public gets free use of a forest landowner's property. If the landowner begins charging a fee for recreational use, then the landowner loses the liability protection of the law.

The fee for firewood exception

Oregon and Washington allow the forest landowner to retain the liability protection of the recreational use statute if the only fee charged related to use of the land is for firewood gath-

ering. In Oregon, a landowner can charge up to \$75/cord to use the forestland for firewood cutting, and in Washington, a landowner can charge a flat fee up to \$25 to use the land for firewood cutting and the landowner would still have the liability protection of the recreational use law.

Liability protection associated with injury from trees

Most states also protect landowners from liability for people who are injured by trees on the property. The purpose of this liability protection is to encourage landowners to retain trees on the land. For example, in Washington, a landowner is not liable to anyone who gets hurt from a tree in any location on the land. In contrast, in Oregon, the landowner gets liability protection only for injury associated with those trees and slash left after logging. To minimize liability then, in Oregon, a forest landowner would want to log all the property so that any remaining trees would be considered trees "left after logging."

What happens if I start charging a fee for recreational use of the forestland?

Is it worth it to charge a fee for hunting, hiking, mountain biking or other recreational activity if it means the landowner will lose the statutory liability protection of the recreation use statute? If the fee will produce only minimal income, then it is probably not worth the increased liability risk. However, even if a fee is charged to a recreational user, that does not automatically mean a landowner will have a much greater liability risk or be liable if the person using the property is injured. Once a fee is charged, the statutory liability protection no longer applies, but the courts will apply the liability rules of judge-made law or what is also known as the "common law."



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The common law generally recognizes three types of users of the land: the trespasser, the licensee and the invitee. The general rule is that a landowner owes no duty to a trespasser to

make the land safe, to warn of dangers, to avoid dangerous activities on the land, or to protect trespassers. So even if a fee is charged to use the land, if a trespasser is injured on the land, then the landowner will not be liable for the trespasser's injuries. The one exception to the general rule of no liability to trespassers is when the landowner knows that trespassers regularly intrude in a specific part of the property and the landowner knows or should know that the area contains a dangerous condition that could cause serious injury or death to a trespasser, and that the condition is not likely to be discovered.

An example would be a sink hole the landowner knows about near a trophy steelhead stream where trespass is common. If the landowner knows of this hazard, then she will be liable to even the trespasser unless the landowner warns trespassers of the dangerous condition, typically by posting warning signs of the danger.

While the trespasser represents one extreme of the spectrum where the landowner is generally not liable for any injury, the other end of the spectrum is the invitee to whom the landowner owes the highest duty of care under the common law. A recreational user who is charged a fee to come on the land would be considered an invitee. Generally, a landowner

Recreational Use Statutes

State	Statute	Year First Enacted	Immunity from liability lost if fee charged to use property?	Can immunity from liability be maintained if fee charged to cut firewood?
Alaska	AS 09.65.200	1980	Yes	No
Idaho	IC 36-1604	1976	Yes	No
Washington	RCW 4.24.200	1967	Yes	Yes — \$25/day
Oregon	ORS 105.672	1971	Yes	Yes — Up to \$75/cord

must inspect and repair known hazards or warn of those hazards if they cannot be repaired. If the landowner has provided clear warning of a hazard, and a recreational user is injured by the hazard despite the warning, it is unlikely that the landowner would be held liable even if the landowner charges a fee to use the land.

How do I minimize my liability risk if I charge a fee for recreational use?

A landowner can minimize the risk of liability even if a fee is charged for use of the land by inspecting the land for hazards, repairing the hazards if possible and, if not, posting signs warning of the hazards. The landowner also can have a different business entity own the land, obtain insurance and use liability waivers. The bottom line is that if the landowner charges a fee for use of the land, the liability protection of the recreational use law will no longer apply. However, the landowner can take steps to minimize liability risk, such as inspecting and warning of hazards, when a fee is charged. Therefore, the landowners' liability risk may not be much greater than when use of the land was free and the liability protections of the recreational use statute applied. In addition, if a fee is charged, but it is not a recreational fee for "use of the land,"

the liability protection of the recreational use statute may still apply. Court cases suggest that a parking fee at a trailhead is not a fee for recreational use of the land, and the recreational use statute would prevent a hiker injured on the trail from recovering damages from the landowner.

Now that I am charging a fee to use my property, can I limit my liability by requiring the recreational user to sign a liability release?

The law permits the use of liability releases and the most effective way to obtain a liability release would be to have each fee-based recreational user sign a liability release at the time the fee is collected. However, the liability release is enforceable only if the language is clear that the person is releasing the landowner from liability and the release is conspicuous. Generally, courts interpret liability releases narrowly against the landowner so that if it is not carefully written, any confusion in the terms of the release will be resolved in favor of the injured party. ♦

Scott Horngren is an attorney with Haglund Kelley Horngren Jones & Wilder in Portland, Ore. He can be reached at 503-225-0777 or Horngren@hk-law.com.

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OFRI Names Barnum New Executive Director

The Oregon Forest Resources Institute (OFRI) has named Paul Barnum as its new executive director. OFRI is a semi-independent state organization dedicated to forestry education.



Barnum replaces Leslie Lehmann, who retired in August after serving nearly 16 years as OFRI's founding executive director.

Barnum joins OFRI after a career in both private and public sectors. He is a former chair of OFRI's board and also served as president of SOLV, a state-wide conservation organization.

In accepting the position, Barnum noted his strong commitment to working with Oregon's diverse popu-

lation to increase understanding of natural resources management. "I am passionate about managing our forest resources responsibly for the benefit of all citizens and welcome the opportunity to further that ideal as OFRI's executive director," he said.

Most recently Barnum was a senior writer with Russell Investments in Tacoma and before that held a series of public affairs and communications jobs with Weyerhaeuser Company. He has worked as an account executive for a Eugene public affairs firm, project manager for University of Oregon Public Affairs and Development, adjunct instructor of public relations for the University of Oregon School of Journalism, director of public information with Clatsop Community College, and editor and writer for weekly newspapers. He holds a B.A. in English and



an M.A. in Journalism from the University of Oregon.

The Oregon State Legislature created the Oregon Forest Resources Institute (OFRI) in 1991 to improve public understanding of forestry and the state's forest resources and to help landowners achieve environmentally sound forest management. ♦

SAF Member Honored by Washington State DNR

Rod Pfeifle, Washington State Department of Natural Resources unit forester in the Alpine District, was the recipient of an Extra Mile Award for 2008. This award recognizes state employees who "surpass expecta-

tations for exemplary public service." Only 10 to 15 individuals are selected for this award each year in all of state government. Doug Sutherland presented the award at DNR's 50th Anniversary Celebration in Ellensburg in May.

Rod was honored for his work in getting the new Forest Improvement Treatment (FIT) program up and running in the region and then for his strong leadership in expanding its scope and effectiveness. The FIT program has become an important tool in addressing eastside forest health issues. It allows DNR to thin or treat susceptible forest stands that are overstocked and prone to insect attack, disease and fire. The depart-

ment is able to market the usually low-value wood products as long as the operation at least breaks even financially.

Over 3,000 acres have been completed to date and are now in a healthy, sustainable condition. This fiscal year will add another 2,500 acres. Another benefit is the money generated for the local economy by the contracts with logging and other contractors: over \$6.6 million to date.

Rod's work is making critical improvements to eastside forest health, bringing a variety of benefits to the citizens of the state.

Rod is the chair of the Mid-Columbia SAF chapter and a co-chair of the 2009 WSSAF annual meeting. ♦

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Policy Scoreboard

Editor's Note: To keep SAF members informed of state society policy activities, Policy Scoreboard is a regular feature in the Western Forester. The intent is to provide a brief explanation of the policy activity—you are encouraged to follow up with the listed contact person for detailed information.

OSAF Adopts Revised Position Statements, Other Updates Underway

The 2008 expiration of several OSAF position statements prompted some reviews and revisions by the Policy Committee. In May, the OSAF Executive Committee approved updated positions on "Salvage Harvesting" and "Using Pesticides on Forest Lands," and a revised statement on "Clearcutting" was adopted in August. The position on "Active Management to Achieve and Maintain Healthy Forests" was revised and may be approved by this printing. Although the older position statements remain of generally good quality, the review and revision process allows for some fine-tuning and integration of newer issues such as invasive species and biomass energy.

A one-year extension of the position statement on "Landslides on Forest Lands" was approved earlier this year, partly in response to some well-publicized landslides that raised questions about possible links to forestry activities. The Policy Committee plans to draft a new position that will address both landslides and other steep-land or wildland-urban interface issues, but the landslide position will remain useful until this new position is adopted. All OSAF position statements are online at www.forestry.org and draft revisions are posted in the "members only" section. Contact: Paul Adams, OSAF Policy chair, 541-737-2946; paul.adams@oregon-state.edu.

OSAF Provides Input on Federal Forest Management Legislative Proposals

Oregon legislators remain concerned about forest health and wildfire hazards, as well as old-growth forests on federal lands. Early this year, Rep. Peter DeFazio (D-OR) released a draft bill (see www.defazio.house.gov) on the management of USFS and BLM forest lands in the region. Sen. Ron Wyden (D-OR) co-sponsored the Forest Landscape Restoration Act (S. 2593) introduced in Congress, and OSAF members Marvin Brown and John Tappeiner both testified on Capitol Hill at a related committee

hearing. In July, Wyden released his own draft bill (see <http://wyden.senate.gov/>), the Oregon Forest Restoration and Old-growth Protection Act.

The scope and potential effects of these proposals are substantial, and OSAF and national SAF leaders conducted initial reviews and are tracking their further development. The national SAF office, with input from the OSAF Policy Committee, sent a letter to Rep. DeFazio with some pointed concerns about his proposal. A joint letter from OSAF and the national office to Sen. Wyden also raised many issues about the Senator's proposal, including its ambiguities, narrow focus and conflicts with existing legal mandates. The letter further emphasized that "legislation that would substantially limit the available tools, future management options or the discretion of experienced, local managers raises serious concerns for the forestry profession as it endeavors to serve society." Contact: Paul Adams, OSAF Policy chair, 541-737-2946; paul.adams@oregonstate.edu.

Idaho Forests Identified as GHG Source

The nation's forests are a greenhouse gas sink. Idaho's forests are a source, according to the recently released greenhouse gas (GHG) inventory produced by the Center for Climate Solutions (CCS) for the Idaho Department of Environmental Quality. Of the 20 state inventories of GHG emissions that CCS has performed, Idaho

is the only one where forests are a GHG source rather than a sink. The implications for forestry in the state are compelling. A good place to start is reducing wildfire emissions by actively managing hazardous fuels in the national forests that dominate Idaho's forested landscapes. Contact: Jay O'Laughlin, IESAF Policy chair, 208-885-5776, jayo@uidaho.edu.

Idaho Strategic Energy Alliance names Forestry Task Force

Stemming from the national 25x'25 initiative (25 percent of the nation's energy from renewable sources by 2025) Idaho Governor C.L. "Butch" Otter created a Renewable Energy Council in 2007 comprised of state agency heads and led by the administrator of the Idaho Office of Energy Resources, also created by the governor last year. The council is the first of three tiers in the Idaho Strategic Energy Alliance and will rely on information flowing up from the third tier of 10 task forces, including forestry, which will identify opportunities and challenges to develop energy resources in the state. A board of directors forms the middle tier and is responsible for turning the information on opportunities and challenges into recommendations for programs and policies. Your correspondent was honored by the invitation to serve as leader of the Forestry Task Force. Contact: Jay O'Laughlin, IESAF policy chair, 208-885-5776, jayo@uidaho.edu. ♦



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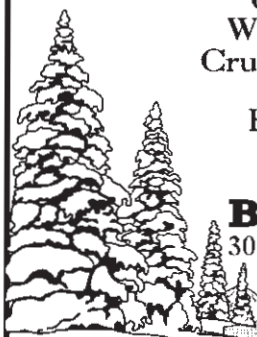
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