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Supreme Court Takes Forest Roads Case

On June 25, the U.S. Supreme Court announced it will review *NEDC v. Brown*, the Ninth Circuit ruling that logging roads are “industrial facilities” subject to the National Pollutant Discharge Elimination System (NPDES) requirements of the Clean Water Act (CWA). That [decision](#) invalidated Environmental Protection Agency (EPA) regulations that have been in place since 1976. Those rules regulate forest roads as non-point sources under a Best Management Practices (BMP) system.

There are two separate appeals that will be consolidated for argument, the State of Oregon’s (*Decker v. Northwest Environmental Defense Fund*) and industry’s (*Georgia-Pacific West v. NEDC*). The questions the Supreme Court has asked the appellants to address in their briefing focus on whether runoff from logging roads should be regulated as *industrial* stormwater and whether the Ninth Circuit should have deferred to EPA.

Initial briefs are due August 21. A number of amicus briefs, including one by AFRC, will be filed by August 28. Oral argument is likely to be scheduled in late November or early December. The Court’s ruling is likely to be announced next spring.

On the Congressional front, a one year moratorium on forest road permitting by EPA, designed to give the Court time to decide whether to review the case, was included in the FY12 Appropriations Bill, which expires on September 30. The FY13 Interior Appropriations Bill includes another one year extension of that exemption, but to date the bill has only passed in the House. A more permanent solution would be passage of the Silviculture Regulatory Consistency Act. The House version of the bill ([HR 2541](#)), sponsored by Representatives Jaime Herrera Beutler (R-WA) and Kurt Schrader (D-OR), now has over 60 co-sponsors. A Senate companion bill ([S 1369](#)), sponsored by Senator Mike Crapo (R-ID) has 27 co-sponsors and is pending in the Senate. The act would amend the CWA to regulate silvicultural activities as non-point sources of pollution, effectively leaving forest roads under the BMP schemes of the various states.

It is unclear how the Court’s grant of review will affect EPA’s approach to the issue. On May 23, prior to the grant of certiorari, EPA issued a [Notice of Intent](#) for rulemaking. The agency’s approach is two-fold: First, to revise Phase I stormwater rules to specify that stormwater discharges from logging roads are not “associated with industrial activity.” Second, the agency is seeking input on how it should address water quality impacts from forest road discharges. EPA is clearly trying to distinguish “logging roads” from the broader category of “forest roads,” despite the fact that the same road has a variety of functions over time and for different owners and users. At a public listening session in Seattle on June 27, EPA representatives were unable to say how the Supreme Court’s grant of review would affect their process, but predicted it would be on-going pending the Court’s final decision.

AFRC is hopeful EPA will defer further work on rulemaking because how the Supreme Court rules will determine what rules are needed. A permanent fix will only come if Congress amends the CWA to prevent continued efforts by environmental groups to hamstring forest management through the courts.

/Ann Forest Burns

SPI Settles Fire Damage Case

Sierra Pacific Industries (SPI) decided not to risk the company when it [agreed to settle](#) a nearly billion dollar fire damage claim for \$47 million in cash and 22,500 acres of “undeveloped wildland” in California. The Forest Service will select the forestland from a list of 200,000 acres designated by SPI, and codefendants have to come up with another \$8 million making the total cash settlement \$55 million.

The claim by the United States arose from the 65,000 acre Moonlight Fire which originated on private land and burned 47,000 acres of national forest land. While pleased with the small settlement relative to the large sum of money at stake, SPI vigorously maintains it is not liable for the fire and will defend several cases scheduled for trial in state Superior Court in 2013.

There was no finding in the case or as part of the settlement that SPI was liable for the fire. SPI did not own the land on which the fire allegedly originated and an independent contractor was hired by SPI to deliver logs to the mill. What started the fire and where it began are disputed facts. The [government claimed](#) a bull dozer striking a rock sparked the fire that remained in an incipient state for about 1.5 hours (therefore no one saw it happen). SPI maintains there are other much more probable causes than a bull dozer driving over a rock at typical bull dozer speeds. A reputable U.C. Davis University scientist said that the bulldozer could not have ignited a fire by striking the two rocks identified by the government or any other rock in the area. Aerial photographs taken at 3:00 pm perhaps an hour after the fire erupted into open flame (according to government estimates) show that the government’s alleged points of origin were outside the smoke and had not yet burned. However, the judge held just before trial that Sierra Pacific may be liable for the fire even if its independent contractor did not start the fire. Sierra Pacific believed that the automatic (or “strict” liability) decision was wrong, but had no opportunity to appeal the ruling just days before trial. In addition, just weeks before trial, a [Ninth Circuit case](#) interpreted California law to allow a jury to find unlimited “intangible environmental damages” in a case involving a fire on the Angeles National Forest. In the Moonlight case, the pre-fire fair market value of the government’s land and timber affected by this fire was about \$115 million dollars. After the fire, the government’s land had a market value of about \$96 million, meaning that the fire reduced the value of the property by about \$19 million. The government claimed damages of about \$800 million, nearly 40 times the diminution in value of its land and nearly 8 times the pre-fire market value.

There are several significant and far reaching implications of the settlement and pre-trial rulings. First the case should be an eye-opener for forest product companies and their contractors about the elevated risk of working on or near national forest or BLM timberlands. Second, the case highlights [the need for changes to California state law](#). According to the Secretary of the California Natural Resources Agency, “existing law is ambiguous with respect to total damage recovery,” (allowing aggressive prosecutors to exploit ambiguities in California law to seek excessive damages from private landowners when a fire occurs). One irony is that in the reverse situation where a fire starts on fuel-choked national forest land and burns onto private land, the private landowner faces an uphill battle recovering damages from the Forest Service because its forest management and firefighting decisions are usually insulated by the

“discretionary function” exception that eliminates the government’s liability under the Federal Tort Claims Act.

Finally, the case creates a new risk on landowners that allow the public to recreate on their lands. If the law is that landowners are liable for fires they did not cause, it is almost certain to cause landowners to lock up those private lands that the public currently can access. To that end, [SPI spokesperson Mark Pawlicki warned](#) that “The lethal combination of biased investigations, mission-driven prosecutors, and an unprecedented ruling creates an intolerable condition that will result in landowners sealing off their lands to the public.” /*Scott Horngren*

Farm Bill Forestry Provisions

On July 12, the House Agriculture Committee completed its work on legislation reauthorizing the Farm Bill, which includes several important forestry provisions that apply to federal lands. The markup contained several forest related amendments, including a successful amendment from Representative Kristi Noem (R-SD) that would allow the Forest Service to categorically exclude forest health treatments on lands identified as “critical areas” for projects up to 10,000 acres. The underlying legislation originally limited that categorical exclusion to 1,000 acres. Other significant provisions in the bill include:

- Stewardship contracting, which is due to expire in 2013, would be extended to 2017.
- Expansion of the Good Neighbor Authority, which is currently a pilot in Colorado, will expand to include all National Forest System lands. This would allow for the Forest Service to contract with states to do hazardous fuels reduction and other projects on the National Forests.
- Authorizes expedited treatments for “critical areas” designated as suffering from “insect infestation, drought, disease, or storm damage,” or at “future risk of insect infestations or disease outbreaks.” The Noem amendment brought this authority to 10,000 acres.
- Authorizes the Forest Service to hire back retirees to “provide technical services for conservation-related programs and authorities on National Forest System lands.

Also of significance was an attempt by Representative Kurt Schrader (D-OR) to amend a modified version of the O&C Trust, Conservation, and Jobs Act to the Farm Bill. The O&C proposal would put approximately 1.5 million acres of the BLM’s 2.6 million acres in western Oregon into a trust to generate needed revenues back to the counties and provide a consistent harvest level for the forest products industry. It would also transfer management of older O&C forests to the Forest Service. Although the amendment appeared to have strong bipartisan support, Representative Bob Goodlatte (R-VA) raised a point of order against the amendment based on jurisdictional issues related to the BLM lands and the Natural Resources Committee. The amendment was then ruled out of order and failed a procedural vote related to the point of order. Schrader will continue to work with the other co-sponsors Peter DeFazio (D-OR) and Greg Walden (R-OR) to advance the bill in the House of Representatives. Schrader’s Farm Bill amendment attempt was a clear sign of growing frustration with the House Natural Resources Committee, which to date has not taken any action on the legislation.

Now that the Farm Bill has been passed out of the House Agriculture Committee there is uncertainty as to when the full House will take it up. Several conservative House members don’t believe cuts to some of the subsidy programs went far enough and may not support the overall bill, while other members may face a tough vote due to the cuts that are included. / *Tom Partin*

Spotted Owl Critical Habitat Comments

On July 6, AFRC submitted extensive [comments](#) on the US Fish & Wildlife Service's (FWS) Northern Spotted Owl Draft Critical Habitat and Environmental Impact Statement and Economic Assessment to expand designation of spotted owl critical habitat from 5,312,300 acres to 13,962,449 acres. Our conclusion is that the proposal fails to meet the requirements of section 3(5)(A) of the ESA and accompanying regulations.

The Draft Environmental Assessment fails to disclose the true environmental consequences of the proposal and is based on the faulty processes of the previous two documents. The Draft Economic Analysis fails to meet the requirements of section 4(b)(2) of the ESA and accompanying regulations and misrepresents the current situation (baseline) therefore grossly underestimating the economic consequences of the proposal.

AFRC employed the services of independent scientists from [WEST, Inc.](#) to conduct an [analysis](#) of the first of three computer simulation models the FWS used in designing their proposal. They concluded:

“Based on the results in the Royle et al. (2012) and Torres et al. (2012) papers and the differences that we find between MaxEnt and maximum likelihood estimation applied to the U.S. Fish and Wildlife Service data from the Southern Western Cascades and Klamath East we believe that the results obtained from a MaxEnt analysis may be misleading for habitat modeling in general, and are unreliable with habitat modeling for northern spotted owls in particular. Also, as the U.S. Fish and Wildlife Service analysis used the output from MaxEnt for further analyses using the Zonation and Hexsim programs we believe that the results from these further analyses are also not reliable.”

Dr. Larry Irwin of the [National Council for Air and Stream Improvement](#) also conducted a [review](#) based on his extensive research on spotted owl demography and habitat use. He concluded:

“[T]here is a high degree of uncertainty that the combined models that underlie the proposed CH Rule accurately and reliably identified habitat that is essential for conservation throughout the range of the Northern Spotted Owl.”

We believe the process used is incapable of determining what areas were “*occupied at the time of listing*” and/or are “*essential for the conservation of the species*” and should be completely redone using processes that will meet the requirements of sections 3(5)(A) and 4(b)(2) of the ESA.

The final critical habitat designation is expected to be completed by November 15. /Ross Mickey

Counties Granted Extension

On July 17, the FWS agreed to allow the counties additional time to comment on the Northern Spotted Owl Draft Critical Habitat Designation and Environmental Impact Statement and Economic Assessment. Skamania County, Washington; Douglas County, Oregon; and Siskiyou County, California, filed papers on July 3 seeking to intervene in AFRC's Federal District of Columbia District Court case challenging the 2008 critical habitat designation. They hoped the judge would order the agency to provide them adequate time to submit their own economic analysis. The government agreed to give the counties until August 20 to comment, provided they withdraw their request to intervene.

Earlier requests by the counties to be granted cooperating agency status in this rulemaking process were rejected by FWS. /*Ann Forest Burns*

Suit Filed on Murrelet Take

The Cascadia Wildlands Center has sued Oregon Governor John Kitzhaber, members of the Land Board and the Board of Forestry for violation of the ESA arguing that management of state forest lands results in a take of marbled murrelets. Plaintiffs asked the court to declare “that defendants’ management of, decision-making regarding, and timber sale programs for the Tillamook, Clatsop, and Elliott State Forests violate the Endangered Species Act.” In particular, plaintiffs want the court to rule that defendants are taking marbled murrelets by approving logging of habitat occupied by marbled murrelets; fragmenting occupied and suitable marbled murrelet habitat; creating Marbled Murrelet Management Areas that are insufficient to protect the birds and their habitat and are leading to habitat fragmentation; adopting and applying a “take avoidance” policy that fails to prevent take of marbled murrelets; and establishing logging levels and otherwise authorizing logging on the Tillamook, Clatsop, and Elliott State Forests that will result in take of marbled murrelets.

Among plaintiffs’ request for relief is a court order requiring the state to obtain an incidental take permit through the adoption of the Habitat Conservation Plan (HCP). For the Elliott State Forest, the Land Board decided not to extend its existing HCP and instead adopted a take avoidance policy for management of forest lands. Under the Elliot’s revised 2011 forest management plan and take avoidance policy, the sustained timber production increased from about 25 to 40 million board feet per year and the acreage of conservation areas also increased.

The state essentially agreed to a preliminary injunction by withdrawing many scheduled timber sales and suspending several existing contracts. The litigation is in its early stages but a trial is likely to be scheduled later this year or early next year. The Oregon Forest Industries Council, Douglas Timber Operators, Scott Timber, Seneca Sawmill Company, and Hampton Tree Farms are intervenors in the case. AFRC’s staff attorney is co-counsel for intervenors. We will continue to report on future developments. /*Scott Horngren*

Beaverslide Victory

Judge Samuel Conti of the Northern District of California has upheld the Beaverslide Project on the Six Rivers National Forest. *Conservation Congress v. Finley*. Conservation Congress attacked the spotted owl analysis under the ESA and the National Environmental Policy Act. The court rejected all of Conservation Congress’ claims which relied heavily on declaration testimony of Dominic DellaSala.

The project involved 13 owl home ranges, seven of which were occupied and many were below the spotted owl “take” guideline of 40% habitat within the home range and 500 acres of habitat within 0.7 miles of the site center. However, no harvest would occur in the 70 acre core and no high quality owl habitat would be harvested. The Beaverslide victory is significant because the judge upheld the use of informal consultation based on both the Forest Service and FWS conclusion that harvest would not adversely affect the spotted owls and thus formal consultation was not required. The judge also rejected Conservation Congress’ argument that reinitiation of consultation was required.

The ESA regulations require reinitiation of consultation when “new information reveals the effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” In particular, Conservation Congress argued that the new information included the spotted owl recovery plan, studies about barred owl displacement of spotted owls, and a report by Eric Forsman of the Forest Service that a more expansive definition of high quality owl habitat was needed that extended beyond just old-growth stands. The court concluded that there was nothing new or significant that had not been previously considered by the Forest Service or FWS. The court found that the recovery plan was adequately considered by the agencies in a supplemental report prepared after the Record of Decision was signed, that found competition from barred owls was already addressed by maintaining all high quality spotted owl habitat, and that although the Forsman Report suggested a new definition of “high quality” spotted owl habitat, it did not include a new definition. The court also concluded that the Forest Service adequately considered and disclosed that harvest and burning might result in some short short-term effect on spotted owl prey. The plaintiffs are evaluating whether to appeal. /*Scott Horngren*

DNR Timber Program Report

Below is DNR’s timber sale program through FY12 which ended June 30.

Sales offered	152
Sales sold	145
Sales no-bid	7
Volume offered	578.0 mmbf
Volume sold	552.8
Volume no-bid	25.2
% Volume sold	96%
Sold sale value	\$163.7 million
Price/MBF	\$296
Overbid ratio	27%
Average bidders per sale	2.6

DNR expects to sell approximately 614 mmbf in FY13, of which approximately 554 mmbf will come from the westside and 60 mmbf from the eastside. /*Jacob Groves*

Western Governors Letter to Congress

On July 11, four Governors from the Western Governors’ Association including Chairman Gary Herbert (R-Utah), Vice-Chairman John Hickenlooper (D-Colorado), and Forest Health Lead Governors C.L. “Butch” Otter (R-Idaho) and John Kitzhaber (D-Oregon) sent a letter to the Majority and Minority leaders in both the U.S. Senate and House of Representatives requesting that Congress provide supplemental funding needed to aid federal, state, and local firefighters battling wildfires this season. The Governors pointed out in the letter that without supplemental funding, management agencies could be forced to redirect resources from other program budgets such as proactive fire risk reduction work to fund the suppression.

In the letter the Governors also request that Congress act to:

- Fully fund the Federal Land Assistance, Management and Enhancement Act's (Flame Act Funds) to ensure emergency suppression costs do not impact federal non-fire budgets and programs.
- Ensure completion and implementation of the National Cohesive Wildland Fire Management Strategy.
- Take action necessary to address deficiencies in the nation's aerial firefighting resources.
- Reform federal land management policies so they encourage and expedite active forest and land management to improve forest function and landscape resiliency.
- Provide funding and direction to federal agencies to coordinate with state agencies on required reviews under environmental laws to ensure timely review and approval of salvage and restoration work necessary to sustain both the built and natural environments.

Finally, they asked that Congress act on the several legislative proposals that have been introduced that would improve the health of our forests, reduce the number and severity of wildfires, and build capacity of our firefighting resources.

AFRC appreciates the proactive positions put forth in this letter and thank the Governors for their work on these very important issues. / *Tom Partin*

New Planning Process on Willamette

The Willamette National Forest has begun a new planning process for a watershed on the Sweet Home Ranger District that is billed as the "Cool Soda All-Lands Approach Project." The Sweet Home Ranger District, Cascade Timber Consultants, and the South Santiam Watershed Council make up the interdisciplinary team that will consider input from various stakeholders and ultimately make management recommendations to be implemented through a NEPA process. The intent is to develop investment incentives to accomplish more landscape scale outcomes on the ground.

The planning area is located on a watershed that contains a checkerboard ownership pattern of both public and privately owned lands. The Forest Service ownership in question is primarily allocated as Matrix land by the Northwest Forest Plan. AFRC had the chance to present a summary of the current and potential status of the sustainability of the timber resources on these lands to the ID team to be incorporated into their planning process. This presentation was followed by a meeting where stakeholders were invited to give input on various "key benefits from nature" identified by the ID team, ultimately voting on the top three "benefits" they would like to see represented in the planning area.

At this point it is unclear what the actual management implications of this project will be. However, AFRC has expressed its concern to the Forest Service that the goals and objectives identified for Matrix land could be sacrificed and negotiated due to this process. We also expressed our disapproval of the apparent voting process the Forest Service implemented as a way to rank those "key benefits" identified. With one representative from forest products associations and three representatives from environmental conservation groups at the table, the values that got the most "votes" were not surprising. / *Andy Geissler*

Snow Basin Project

On March 30, the Record of Decision (ROD) was issued for the long awaited Snow Basin project, a landscape scale vegetation management project on the Wallowa Whitman National Forest. The preferred alternative in the Draft EIS would have provided 62 mmbf of volume along with various other restoration activities. As a result of public comments and some acreage errors, the selected alternative in the Final EIS reduced the volume to 48 mmbf. The ROD generated 10 appeals from a variety of stakeholders including Baker County landowners and citizens, Baker County Small Woodlands Association, Baker and Union Counties, two environmental groups and two forest industry groups, including AFRC. Nine of the appeals had standing.

During May and June a series of meetings was conducted by the Forest Supervisor in an attempt to informally dispose of the various appeals. As a result of agreements made in those meetings, five of the appellants withdrew portions of their appeals. The notable agreements achieved in the informal resolution were:

- Retained all maintenance treatments in the warm dry multi-story late structure stands.
- Retained the option to remove grand fir >21" dbh when in competition with more desirable seral species.
- Retained the option to remove all species of trees severely infected with dwarf mistletoe, including those >21" dbh, when mistletoe infections exceeded defined parameters.
- Retained 39 acres of treatment in Riparian Habitat Conservation Areas.
- Added 130 acres of group selection as restoration treatments.

Especially significant was a commitment received from the Forest Service to more aggressively treat fuel loads and insect and disease problems within 1/2 mile of private lands. The first timber sale from the project will be advertised this month. */Irene Jerome*

National Forest System Rework

Last week, a two-day conference was convened in Sacramento, California to discuss possible legislative and administrative actions to restore sustainable forest management to the National Forest System. The conference, organized by the National Institute for the Elimination of Catastrophic Wildfire, brought together county elected officials, rural school administrators, local law enforcement, forest products industry representatives and a large number of Forest Service retirees.

Former Forest Service Chief Jack Ward Thomas and Oregon State University College of Forestry Dean Hal Salwasser were among the speakers who stressed the need to institute reforms to improve the ability of the Forest Service to implement forest management activities or explore alternative approaches for managing the land, including some of the legislative proposals being proposed in Congress that are focused on trust-based management. Douglas County, Oregon County Commissioner Joe Laurance spoke about the worsening social and economic ills his county grapples with due to a lack of sustainable management on the National Forests and the BLM O&C Lands. Local law enforcement, school administrators and community members shared similar stories that have now become evident due to ever-declining and uncertain Secure Rural School payments.

The conference attendees resolved to work with other organizations and individuals who share a stake in the health of rural communities and forests to build a grassroots lobbying effort to convince Congress to take action. The recommendations of the attendees are being compiled by conference organizers and will be available in a couple of weeks. /*Ann Forest Burns*

Betsy McGreer Honored

Elizabeth L. McGreer, President of McGreer and Company, Inc., has been named a Worldwide Who's Who Professional of the Year in Forestry. While inclusion in Worldwide Who's Who is an honor, only a small selection of members in each discipline are chosen for this distinction. These special honorees are distinguished based on their professional accomplishments, academic achievements, leadership abilities, years of service, and the credentials they have provided in association with their Worldwide Who's Who membership.

A graduate forester, Ms. McGreer parlays 28 years of experience into her business, McGreer and Company. She established her company 24 years ago, and utilizes her knowledge of logging and forest product companies to deliver high-quality services. Throughout her career, she has done public speaking on timber bonding, taught numerous underwriting seminars and has written four books, including "FIRE! Up River," "Up River, Reflections of Hells Canyon", "Wildflowers, Up River," and "Up River Again: Postcards from the Canyon." She is recognized as the only surety agent in the United States who specializes in bond programs for the forest product industry.

Ms. McGreer received a Bachelor of Science in Forestry from the University of Washington. A standout amongst her peers, she is a recipient of an Excellence in Craft honor. She remains active in her field when she is not working as a member of the Federal Forest Resource Coalition, American Forest Resource Council, Montana Wood Products, Federal Timber Purchasers Committee and Northwest Outdoor Writers Association. (*reprinted from Worldwide Who's Who*)

Congratulations Betsy!

Maness and DeLuca Named

Both Oregon State University and the University of Washington have announced new leaders for their respective Forestry and Environmental and Forest Science schools.

Thomas Maness

Dr. Thomas Maness has been chosen as the Cheryl Ramberg and Allyn C. Ford Dean of Forestry and Director of the Oregon Forest Research Laboratory at OSU's College of Forestry. He is currently Head of the Department of Forest Engineering, Resource Management. In his current position he is responsible for the professional forest management and engineering degree programs. Since joining OSU in 2009, he has spearheaded the development of the College's new Professional School and Conservation Management Program.

Dr. Maness earned his Bachelor's degree in Forest Management from West Virginia University where he graduated magna cum laude in 1979. He earned his MS in Forest Operations at Virginia Tech in 1981, and afterwards worked for Weyerhaeuser Company where he served as a forest engineer in the Klamath Falls region and developed strategic forest planning models. In 1989 he earned his doctorate in Forest Economics from the University of Washington and joined the Faculty at the University of British

Columbia. In addition to leading the College of Forestry, Dr. Maness will work in collaboration with the Deans of Agricultural Sciences and Earth, Ocean and Atmospheric Sciences to advance the science of sustainable Earth ecosystems as part of the college's Division of Earth Systems Science.

Maness begins his new role at Oregon State on August 1.

Thomas DeLuca

Thomas H. DeLuca has been chosen to lead the University of Washington's 105-year-old school of Natural Resources Programs and the school's 45 faculty and 100 staff members which oversee research, teaching and public engagement interests across the spectrum of natural resources, including ecological, social and economic.

He is currently professor of natural resources and geography at Bangor University, Wales, where he holds the chair in environmental science. DeLuca conducts research in forest ecosystem sciences and is the environmental theme leader for the University's research innovation program called Pontio, chair of the forestry group and academic advocate for the Treborth Botanic Garden, and teaching garden that is open to the public.

DeLuca holds a bachelor's degree from the University of Wisconsin-Madison and a master's degree from Montana State University, both in soil science and a doctorate in soil microbiology and biochemistry from Iowa State University. DeLuca authored more than 80 publications with a focus on the key role soils play in the ecological functioning of forest and grasslands, and has contributed to our understanding of how land management affects nutrient and carbon cycling.

DeLuca will also oversee the University's Pack Experimental Forest, the Olympic Natural Resources Center, and the University of Washington Botanic Gardens. DeLuca will take begin his new duties on September 1 pending approval by the UW board of regents. /Tom Partin