



6. **FORESTS: 9th Circuit weighs in on NW logging and salvage projects**

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The 9th U.S. Circuit Court of Appeals issued two rulings last week against federal agencies' planned logging and fire salvage operations in the Pacific Northwest. While the two unrelated cases presented a mixed bag of legal findings, their net effect was to at least temporarily halt two controversial timber harvests.

In the first ruling, issued Feb. 12, the court held that while a lower court did not abuse its discretion under the National Environmental Policy Act by declining to issue an injunction against post-fire salvage operations in the Umatilla National Forest in Washington state last year, the district court should have issued the injunction under terms of the National Forest Management Act [*Lands Council, et al. v. Martin and U.S. Forest Service*; No. 06-35781]. The controversial part of the case turns on the court's determination that the salvage operations would result in taking of "live" trees in violation of agency rules.

The case involved salvage logging following the 2005 School Fire, which burned over 51,000 acres in southeastern Washington, including about 28,000 acres in the Umatilla National Forest. The Forest Service had prepared an environmental impact statement for various salvage alternatives, selecting a plan that would permit salvage logging on 9,423 acres, including portions of two tracts of uninventoried roadless areas, said the court.

To prevent loss of value estimated at about \$1.5 million, logging under three sales arrangements was permitted on an emergency basis for 3,647 acres of the most severely burned areas of the forest. Immediately, a collection of environmental groups, including the Lands Council, the Oregon Natural Resources Council, the Hells Canyon Preservation Council and a local chapter of the Sierra Club, sued the agency and asked a federal district court to issue a temporary restraining order and preliminary injunction against the operation. Their motion was denied, as was an attempt to seek an emergency injunction from the 9th Circuit in September.

Salvage logging began last autumn, but it will not be completed until this coming summer, said the 9th Circuit, meaning the case is not moot, as the Forest Service had argued.

In weighing claims by the environmentalist groups under the two federal laws, the court did not find any "clear legal error" by the district court with regard to NEPA, in part because the Forest Service had prepared a sufficiently thorough EIS, but also because prior rulings had determined that "logging in a roadless area -- even an uninventoried roadless area or a roadless area greater than 5,000 acres -- does not categorically require an EIS."

However, with regard to claims under the Forest Management Act, the court cited legal prohibitions against the harvesting of living trees as part of a salvage operation, even though the Forest Service argued that the trees in question were dying as a result of fire damage. Neither the National Forest Management Act nor the applicable forest plan defined "living trees" so the court said it used the common meaning of the term, declaring, "The common understanding of the terms 'live' is, quite simply, 'not dead.'"

The agency had used the "Scott Mortality Guidelines" as the method for marking trees for harvest, which according to the court, resulted in "marking of both dead trees and dying trees, that is, trees that are likely to die in the near future but have not yet died." But the agency's forest plan for the region also called for use of the "Eastside Screen" in the cases of old-growth forests, which the court held does not allow the harvesting of live trees with a diameter greater than 21 inches "that currently exist."

"Applying this definition, 'live trees' will be harvested, which is expressly prohibited by the Eastside Screens," the court ruled.

The decision remanded the case to the district court, which was directed to issue an immediate injunction against the taking of any still-living trees with trunk diameter of 21 inches or greater. In other words, "no tree of the requisite size with green needles shall be harvested," ruled the opinion authored by Judge Susan Graber.

Mismatch of authorizations found

In the second decision, written by Judge Wallace Tashima, the 9th Circuit on Feb. 16 declared as invalid an "incidental take statement" that would authorize killing of northern spotted owls in conjunction with the logging of some 22,000 acres in southern Oregon [*Oregon Natural Resources Council, et al., v. Allen and U.S. Fish and Wildlife Service*; No. 05-35830].

According to the court, in response to a 2004 decision in a separate case, FWS had voluntarily withdrawn a biological opinion (BiOp) and reinstated agency consultations related to a planned timber harvest that would likely result in adversely affecting habitat for the endangered spotted owl. It subsequently withdrew over 5,383 acres from the logging plan.

But the agency did not withdraw a related "incidental take statement," for the original proposal, which the court said "would authorize the taking of 'all' northern spotted owls associated with the full timber harvest."

In its 2001 BiOp on the project, the agency had determined that the timber harvest would remove 22,227 acres of the critical habitat used by the owls for nesting, roosting and foraging. However, the opinion also claimed that the logging was not likely to jeopardize the owls' existence or destroy critical habitat, even though it might result in incidental takings of the birds. The related incidental takings statement provides the agency with an exemption from penalties for takings of protected species, as specified by its terms. The court explained that "a no-jeopardy finding effectively green-lights the proposed action" under the Endangered Species Act.

In siding with the environmental plaintiffs, the 9th Circuit determined that the take statement was invalid because the associated BiOp had been changed. "As it stands, the incidental take statement is now broader than the project and allows for the take of more spotted owls than are affected by the remaining portions" under the revised BiOp, said the court. "Because there is no rational connection between the authorization of take and the scope of the proposed action, we conclude that the incidental take statement is arbitrary and capricious," the court ruled.

The order will result in a revised take statement process, which, according to the American Forest Council, could delay timber sales on about 75 tracts by as much as two years.