EMERGING LEGAL CONSTRAINTS ON EVEN AGED MANAGEMENT
OF SOUTHERN PINE

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Litigation based on a number of federal environmental statutes is impacting even-age management of the southern pine resource. Although most of the litigation to date has involved Texas forests, the implications are region-wide. This paper discusses the legal issues involved, traces the history of the conflicts, and predicts possible future impacts.

INTRODUCTION

One of the summary conclusions of the Fifth American Forest Congress in 1963 reads, in part, "There is no question but that on thebulk of American forest land today, timber is carrying the economic load in supporting other forest uses -- but this provides us with little or no right to conclude that this will continue to be true in the future. The pressures of urbanization impose new burdens on the forests and in some sections of the country, as population pressures continue, these other demands may supplant timber as the dominant forest resource demand" (Goddard and Widner 1963). By the 1970's, this forecast had become reality and the trend has continued through the 1980's. Increasingly, those "other demands" have been asserted in the courts -- and to a lesser extent before administrative bodies and in legislative halls -- by citizen groups seeking environmental protection and enhancement. The constitutional, judicial, legislative, and administrative powers inherent in our American system of government are now being interpreted more broadly than ever before to serve the public interest in matters relating to our forest resources.

The nonmaterialistic nature of many of the arguments currently being heard in our courts was articulated 20 years ago by one of the top authorities in environmental law, Professor Joseph Sax of the University of Michigan Law School. In a 1970 article in Fortune, Professor Sax states "We are beginning to see value in maintaining resources rather than merely exploiting them. The law is going to have to respond to this new perspective" (Siegel 1973). And, the law is responding.

Without law, disputes may well result in violence; yet law is not synonymous with order. Disappointments are likely to be in store for those who believe that properly enacted laws will insure wise resource management.

Is the developing environmental law as directed to our forest resources assuring wise use and management of our forests? The answers to this question, of course, are many and varied. Differing opinions abound, even among professional foresters. Nevertheless, some trends and implications are apparent. To date, the emerging law as it impacts forest management practices has been directed largely toward public forest resources -- and, to a certain extent, private forest resources -- in the west. However, during the last few years, there have also been significant legal developments with respect to public forest management in the south. And that which involves public forests can easily be extended to private forests, as we have seen happen in some parts of the west. The law which touches lightly in the south today could fall with a heavy hand tomorrow.

Why has there been a flurry of litigation involving public forest lands? The primary reason lies with the concept of "standing to sue" in the federal courts (Siegel 1973). Standing arises most frequently as an issue when a person or organized group complains of injuries inflicted either by statute or by an administrative agency acting pursuant to statute. Essentially, there can be no case unless the plaintiff has a personal stake in the outcome. Traditionally, this concept had to meet two major criteria. First, the complaining party had to


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show a private legal interest which was affected by the alleged governmental misconduct. And second, the harm must have been economic in nature. During the last three decades the U.S. Supreme Court has greatly liberalized the law of standing by reducing the traditional concept of economic value to a triviality. The National Environmental Policy Act of 1970 further shattered the barriers (Siegel 1973). After its enactment, many federal district court decisions granted standing to both conservation groups and to individuals without requiring them to show a private legal interest. The result is that today the problem of standing to sue is practically non-existent for environmental organizations.

BACKGROUND

For nearly a day and a half now you’ve heard various aspects of the subject of all-aged versus even-aged management of southern pine discussed -- management considerations, silvicultural considerations; economic analyses and implications.

This morning I’m going to address the emerging legal constraints on even-age management of southern pine -- a particular aspect of the legal issues affecting forest resource management that has direct implications for the southern forest economy. The term even-age management includes three components -- clearcutting, seed-tree cutting, and shelterwood harvests. Uneven-aged or selection management, in contrast, consists of selecting individual trees for cutting. In layman’s terms, as one court has said, “selection management techniques may be analogized to thinning the forest for timber harvest, rather than cutting all or most of it down”.

Ironically, most of the litigation relating to forest resource management, including that directed to southern pine management, can be attributed directly to government policy expressed in legislation. The law relating to citizen resource rights has evolved not out of governmental indifference but rather from an abundance of legislative concern.

The stage was set in the landmark 1973 case of Izark Walton League versus Butz, which directly addressed even-aged management as governed by the Organic Act of 1897. In this decision, the United States District Court for the Northern Division of West Virginia permanently enjoined clearcutting of hardwoods on the Monongahela National Forest. The Court, in rendering the decision, applied -- in its words - the "plain meaning of the Organic Act". The judge concluded that the "clear and unmistakable language of the Act limited timber sales to dead, mature or large growth of trees; required that each individual tree to be cut be marked or otherwise designated; and that all sold timber be cut and removed." In this instance, the Court relied on the plain meaning doctrine of statutory construction. The plain meaning of isolated words, however, is rarely determinative of Congressional intent. That is why Congress subsequently overturned the Monongahela decision as part of the 1976 National Forest Management Act.

The 1976 statute, however, has itself become heavily entwined in litigation involving southern forest resource management during the last few years -- together with the Endangered Species Act, the National Environmental Policy Act and the Wilderness Act. Let’s briefly look at each law.

Wilderness Act

The 1964 Wilderness Act was passed by Congress, in the words of the Act, to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness by establishing a national wilderness preservation system to be composed of federally owned areas designated by Congress as wilderness areas”.

Environmental Policy Act

The purpose of the 1969 National Environmental Policy Act, known as NEPA, is a broad one -- to declare a national policy which will encourage productive and enjoyable harmony between man and his environment, and to promote efforts which will prevent or eliminate damage to the environment. In furtherance of this goal, all federal agencies must develop an environmental impact statement for any proposed action which will significantly affect the quality of the human environment.

Endangered Species Act

The purposes of the 1973 Endangered Species Act are to provide a means of preserving the ecosystems upon which endangered and threatened

species may be conserved, and to provide a program for the conservation of such species. All federal agencies are directed by the Act to use their authorities in furtherance of the Act's purposes.

National Forest Management Act

The 1976 National Forest Management Act is a program to incorporate in plans to be developed for management of the national forest system. The Act further requires that there be public participation in the development, review and revision of the plans -- and that the plans shall provide for multiple use and sustained yield in accordance with the 1960 Multiple Use and Sustained Yield Act. The legislation also stipulates that even-aged silvicultural systems are to be used only where they are the optimum method as determined by interdisciplinary teams of resource professionals.

THE TEXAS LITIGATION

Let's now take a look at how these statutes and others are impacting even-age management of our southern pine resource. The bulk of the action has clearly been in Texas, but the implications are region-wide.

Litigation began in 1976 when the Texas Committee on Natural Resources filed suit in federal district court to stop clearcutting, seed tree cutting, and shelterwood harvesting on the Texas National Forests. Judge Justice, in ruling for the plaintiffs, issued an injunction prohibiting even-age management of the Forest's pine resource. He held that the environmental impact statement prepared by the Forest Service relating to the practice of even-age management in Texas was insufficient and in violation of NEPA. The 5th Circuit Court of Appeals ultimately ruled that it was improper for the District Court to enjoin Forest Service management practices under NEPA until such time as the agency implemented a forest plan under the National Forest Management Act. That Act had been passed in 1976 and at the time the Appeals Court ruled it was anticipated that a forest plan would be in place within several years and would then be subject to judicial scrutiny.

Nine years passed and in 1985 the Texas Committee on Natural Resources -- this time joined by the Sierra Club and the Wilderness Society -- filed suit once again against the Forest Service. The thrust of the plaintiffs' claim this time also related to violations of NEPA -- but the focus of the challenge was the Forest Service's southern pine beetle control program in the proposed Four Notch Wilderness Area of the Sam Houston National Forest, and the accompanying beetle control environmental impact statement, rather than on the overall forest management plan. The Court ruled that it was unwilling to grant the plaintiffs the full relief requested under their NEPA claim, but did rule that certain Forest Service practices warranted court imposed restrictions to prevent harm to the endangered red cockaded woodpecker until the time of trial. The Court then imposed six restrictions on the beetle control program, none of which specifically prohibited even-aged management per se.

In response, the Sierra Club and the Wilderness Society two months later filed a new suit on the same grounds in the Federal District Court for the District of Columbia -- but this time directed to even-aged management components of pine beetle control measures on wilderness areas of the national forests in Louisiana, Arkansas and Mississippi. The plaintiffs argued that the control measures were capricious, arbitrary and without scientifically proven effectiveness. The Court held for the Forest Service, ruling that its actions were not a violation of the Wilderness Act.

In October 1987 the plaintiffs went to court once again, contending that all even-aged management practices on the Texas National Forests should be halted because they violated the Wilderness Act and the Endangered Species Act, as well as the National Environmental Policy Act. The Court ruled that the broad based relief sought by the plaintiffs to suspend all even-aged management in all of the national forests in Texas was unwarranted. The Court also refused to lift the six restrictions on beetle control imposed in 1985 but ordered that all cutting within 100 yards of woodpecker colonies be prohibited until a trial on the issue was held.

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9Texas Committee on Natural Resources v. Bergland, 573 F.2d 201 (5th Cir. 1978), cert. denied, 439 U.S. 966 (1978).


A short time later, the plaintiffs filed a second amended complaint alleging that the even-aged management practices of the Forest Service as set forth in the recently completed forest plan for the Texas National Forests were in violation of the National Forest Management Act and that the forest plan's accompanying environmental impact statement was in violation of NEPA. The Forest Service moved for dismissal of the claims since the plaintiffs had not exhausted their administrative remedies. The Court ruled for the Forest Service on that particular point, but moved to trial on the plaintiffs' previous claims under the Endangered Species Act and the Wilderness Act. By this time the southern pine beetle had been relegated to a minor role -- the red-cockaded woodpecker was now the focal point. In reality, however, the woodpecker was only a surrogate issue in an attempt to eliminate even-aged management on the Texas National Forests.

What is this bird that has caused such consternation? As the Court said, "this woodpecker makes no great or even necessary contribution to ecological balance, his song is unremarkable, and his plumage causes no heads to turn. However, these apparent shortcomings do not enter into the equation of the task assigned to this Court. The red-cockaded woodpecker's chief claim to fame is the fact that it succeeded in having its name inscribed on the endangered species list. The red-cockaded woodpecker has joined the ranks of other interestingly named flora and fauna, including the Santa Cruz long-toed salamander, the Dismal Swamp Southeastern shrew, the purple-spined hedgehog cactus, and the Appalachian monkeyface pearly mussel. Of course, the listing of an animal or plant on the endangered species list is a distinction without cause for celebration." 14

To make a long story short, the Court ordered that only selection harvesting would be allowed within 1,200 meters of cavity trees, and that all-aged management would be practiced within this area. 15 The order applies to nearly 40 percent of the Texas National Forests -- some 200,000 acres.

AFTERMATH OF THE TEXAS LITIGATION

In response to the Court's direction that the Forest Service submit a plan to carry out the management program that had been ordered, the agency proposed a modified shelterwood system. The judge rejected the plan and insisted that only selection cutting be used. In so doing, he stated "The Forest Service contention that at rotation age there is little difference economically between clear-cutting and selection management is not persuasive to the Court. The Court is persuaded that selection management does have economic advantages resulting from the avoidance of the high cost of regenerating clear-cut areas and the costs associated with the care required by highly vulnerable young stands. Selection management provides a good return during the entire lifetime of the period in question. Taking into consideration the value of money coupled with the high initial expense of even-aged management, economic factors mitigate in favor of selection management. Uneven-aged or selection management produces more wood per dollar spent and is more economically efficient over the productive life of a tract of timber. In addition to excellent economic returns, a well managed selection forest is pleasing to the eye of even city dwellers." 16 The judge went on to say "the sole reason for the Forest Service's adoption of even-age or clear-cutting as the management method of choice is the fact that it is preferred by the timber companies. The Forest Service is an agency that has experienced a high degree of the 'revolving door' phenomenon between governmental and private interests. That is to say that the greatest market for government employees in private industry is with the large timber companies. This fact provides an incentive for agency personnel to accommodate industry desires -- thus, that explains the high level of influence the timber companies have over policies and practices of the Forest Service." 17

Violation of the taking clause of Section 9 of the Endangered Species Act was the primary issue before the Court. This clause reads as follows: "With respect to any endangered species of fish or wildlife listed pursuant to Section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to take any such species within the United States or the territorial sea of the United States". The plaintiffs had finally found the issue needed to stop even-age management on the national forests. In short, the plaintiffs successfully argued that the Forest Service's silvicultural practices and methods of managing the Texas National Forest resulted in a taking of the red cockaded woodpecker within the meaning of Section 9 of the Endangered Species Act.

The District Court decision is currently on appeal. Pending the hearing of the appeal, the Forest Service's Region 8 established an administrative policy in June of last year that prohibits clearcutting within 3/4 of a mile of woodpecker colonies on the 13 national forests in the south. In response, the Region 8 Forest Service Timber Purchasers Council, based in Atlanta, filed suit on December 7 seeking to

15 Id.
16 Id.
17 Id.
overturn the policy (Forest Industries 1990b). The
plaintiffs allege that the policy violates the Endangered Species Act, the National
Environmental Policy Act and the National Forest
Management Act. Evidently they were able to
learn some lessons from the Sierra Club. With
respect to the National Forest Management Act, the
Council charged that the restrictions constitute an amendment to all 15 southern
national forest land and resource management
plans -- an amendment that was adopted without
public participation and environmental
examination, as required by law. The case has
not yet been heard.

WHERE ARE WE HEADED?

What does the litigation that I've briefly
discussed portend for even-aged management of our
southern pine resource? What are the emerging
legal trends and constraints? A critical first
question is whether management of our public
forest resources should be left strictly to
resource professionals without judicial review of
their actions. My answer is no, it should not be
-- as long as the complaint is not a frivolous
one and the court action is one of last resort
after appropriate and expeditious administrative
remedies have been exhausted. And even if I
thought otherwise, my opinion obviously would not
prevail. The courts give no indication of
retreat from accepting such cases for review.

As a practical matter, there are few
protections of consequence against this type of
litigation. Sometimes the simple filing of a
complaint has been the equivalent of an
injunction. Both the federal government and
private interests are spending vast amounts of
time, effort and money in the defense of such
actions. And when technical forestry
determinations made by professionals are
superseded by judicial opinion, the situation is
further confused.

In the litigation to date that has
addressed even-aged management, the district
courts have typically followed the premise that
the general purpose of a legislative act should not
dominate the specific requirements of
isolated sections. The weight of judicial
opinion tells us that this is the wrong rule. It
is well established that the general purpose of a
statute is the most important component and that
the act as a whole dominates isolated language.
The court should construe legislative details in
conformity with the dominating general purpose.
Fortunately, the federal courts of appeal have
shown a tendency to temper the lower court
decisions in this respect. Perhaps that will
again occur when the appeal of the current
litigation is heard.

Another possibility is the passage of
federal legislation to place limits on litigation
in specific resource situations -- such as was
recently done with respect to the northern
spotted owl controversy in the Pacific Northwest.
This so-called "timber compromise" legislation
was passed by Congress as part of the Interior
Department fiscal 1990 appropriations bill. The
bill established, for the areas in question,
specified timber sale levels for both Bureau of
Land Management and Forest Service lands. The
areas to be harvested are to be designated by the
complaining preservationist groups after which
further litigation on the matter is prohibited.
The constitutionality of the compromise
legislation was recently upheld by both the
Oregon and Washington federal district courts.

The judicial decisions to date clearly
indicate that even-aged management of southern
pine on Forest Service lands is permitted within
limits under both the National Forest Management
Act and the National Environmental Policy Act.
However, they also clearly indicate that the
Forest Service will be under increasing scrutiny
to strictly comply with the provisions of the two
statutes in establishing and conducting even-aged
management programs. The result is very likely
to be much less clearcutting limited to smaller
acreages.

The decisions further indicate that the
Endangered Species Act, on the other hand, is
broad and sweeping enough to prohibit even-age
management of publicly owned southern pine
altogether when an endangered species, whether
plant or animal, is perceived to be impacted.
The implications here are enormous. For example,
the red cockaded woodpecker inhabits southern
pine forests from Maryland to East Texas. And
other creatures, such as the gopher tortoise, are
waiting in the wings.

The restrictions that can be imposed by
existing legislation may well pale in comparison
with what very likely lies ahead. The trend
toward enhanced multiple use management on our
public forests may be reinforced and accelerated
by additional legislation. It seems likely that
the next law that could have a dramatic bearing
on even-aged management of southern pine will
address the preservation of diversity of plant
and animal life, plant communities and
ecosystems. The issue and concept are poorly
defined today, but are being increasingly
discussed. There is much public concern over
diversity in our managed public forests.

What about controls on even-aged southern
pine management on private lands? The National
Forest Management Act, the Wilderness Act and the
National Environmental Policy Act obviously do
not apply to privately owned forests. The
Endangered Species Act, however, is another
story. Section 9 of the Act, the crux of the
current woodpecker litigation, clearly applies to
all persons who commit an act harmful to
endangered species. The current litigation thus
has extremely important implications for private
southern forest owners.

\[16\] P.L. 101-121.
Even-aged management of private forest resources is subject to strict regulatory control under state forest practice statutes in some parts of the United States, particularly on the west coast. To date there are no indications that such state controls are imminent in the south. The constitutionality of such laws, however, has been upheld numerous times as being a legitimate function of a state’s police power. If 600,000 California voters sign the petition to put the issue on the ballot, Californians will vote in November on a proposed law which would ban clearcutting altogether on the state’s forests -- both public and private (Forest Industries 1990a). The impact of such a law on the southern pine industry would be disastrous.

CONCLUSION

Some 17 years ago then Secretary of Agriculture Earl Butz summed up what must be done. He stated "As Natural Resources Counsellor, my philosophy will be that all of us must search ceaselessly for the solid ground between economic interests and environmental concern. We must forge a practical, commonsense, working partnership between man's technology and the ecology of nature". 19

If this approach is ignored, environmental extremists will continue to flourish and the courts will be burdened with capricious lawsuits instead of serving what should be their real


function as a last-resort molder of environmental law. Both public and private forest administrators can be expected to make whatever adjustments are necessary for a better environment, but they must not be asked to guess what the rules are and the rules must be fair to all.

LITERATURE CITED


