LEGAL ISSUES

Timber Trespass in a Nutshell

Spotted Owl Returns to the Spotlight

Contracts

Securing Access to Your Forestland

The Importance of Property Boundaries

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Silviculture 101

This magazine is a benefit of membership in your family forestry association
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Photos courtesy of www.istockphoto.com

Staff:
Lori D. Rasor, Editor
Michele Docy, Assistant
4033 S.W. Canyon Rd.
Portland, OR 97221
503-488-2104
FAX 503-226-2515
rasor@safnwo.org

Minten Graphics, Graphic Design

Northwest Woodlands Advisory Committee Members:
Mike Barnes
Bob Brink
Rick Dunning
Mike Gaudern
John Poppino
Lori Rasor
Ed Styskel


Other than general editing, the articles appearing in this publication have not been peer reviewed for technical accuracy. The individual authors are primarily responsible for the content and opinions expressed herein.
When I found out that the theme for this issue was to be legal issues, I thought to myself, “Oh great. I don’t know anything about legal issues. What the heck am I going to write about?” We’re in the process of trying to find an attorney that can do myriad jobs including revising our out-of-date wills, some estate planning, and maybe setting up trusts. But so far I can’t say that I have learned anything worth passing on to you all. That would be y’all if you’re from the South! So, anyway, I asked my wife what she thought, but when I said “legal issues” she thought I said “Eagle issues” since she is a little hard of hearing, and said something about writing about my Boy Scout experiences since I made Eagle Scout. I said, “No, LEGAL issues,” to which she replied, “Oh, beagle issues. Well, we have always had labs, so I don’t know much about beagles.”

Well, I decided to call my good friend Bill, who is a retired attorney, since I wasn’t making any progress with my wife. I told Bill that I needed help on putting together a short article about legal issues and forestry. Bill thought about it a while and said that he thought that if you have seen one tree you’ve seen them all. Well, there was that big redwood down in California that he drove right through, but other than that, not much difference. That didn’t help me much, so I called my friend, Tim, who is a practicing attorney. I always hate that word “practicing” when it comes to lawyers and doctors and such. It reminds me of when I was a kid and my sister would “practice” her saxophone. That was just awful, so I sort of think bad thoughts about some attorney “practicing” on me on my dime (or dollar!). Anyway, Tim said that I gotta look for a lawyer who lives in the woods, has a log cabin, owns three chain saws, cuts his own firewood and loves beagles! I told him that I thought that would be a pretty short list. He replied, “Yeah, in fact I’m the only one I know of that fits the bill.” Well, that sort of raised a red flag to me, so I told him I would get back with him sometime. I had to save up a little more cash.

Well, after all that time I still didn’t have anything worth writing about, so I decided that this would be about the shortest column that I ever wrote, for which you might be most grateful! I think that I shall just encourage you to read on and you should learn a lot more than you learned from me. Oh, yeah. If you find a lawyer that knows the difference between a fir and a pine, let me know! ■

Beagles and Eagles

Timber Tax Specialist
PAUL JAMESON, EA
Licensed to practice before the IRS
(208) 664-5767 Coeur d’Alene, ID
email: pjameson@icehouse.net

Weyerhaeuser is now purchasing timberland throughout Washington and Oregon. For more information, please call Jim Bunker at:
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This is my first message in Northwest Woodlands as president of the Oregon Small Woodlands Association. By way of introduction, I’ll tell you a bit about myself.

I was born and raised in western Washington and graduated from Franklin Pierce High School, south of Tacoma, in 1958 (that’s right, I’ve just attended the big 50th class reunion). A few years back, on a trip to Washington to visit relatives, I decided to show my wife, Karin, where I had spent two summers during high school working on a Washington State DNR fire crew near Kapowsin. The school is gone, the tavern is gone and the old fire camp with its bunkhouse and equipment shed exist only in my memory. Oh well, wasn’t it Satchel Paige who said “never look back?”

After doing a five-year stint in the Air Force, I returned home to Washington and got a job in a plywood mill. Then one dark night, my TR-3 and I headed south on I-5. We got as far as Eugene, Ore., where I stopped and contacted an old Air Force buddy whose mom temporarily adopted me. I got another mill job, enrolled in college and met and married Karin, all within a year of arriving in Eugene. We soon moved to Corvallis, where I enrolled in OSU’s School of Forestry and earned both bachelors and masters degrees in forest management.

I worked as a forester in private industry, for government and for myself for 30 years. Karin and I purchased our first very small piece of forestland about 1980 and have been purchasing more land over the years as funds allow. My retirement in 1999 has allowed me to spend a good deal of time doing what I love most—managing our forestlands.

After 45 years in Oregon, I consider myself an Oregonian. But my two summers on the Washington DNR fire crew introduced me to the forest. There is no doubt in my mind that the experience sowed the seeds of my love for the forest and influenced me to become a forester and a woodland owner.

I couldn’t come up with a good segue into the theme of this issue (law and forest management), but I’ll offer a few comments anyway. The body of law (federal, state and even local) that tells you how you can or can’t manage your forestland grows constantly. Laws relating to property rights, forest practices, land use, general liability, fire liability, endangered species and many other topics vie for your attention as a manager of forestland.

I have been a volunteer for eight years on OSWA’s governmental advisory committee. The purpose of the committee is to monitor proposed legislation that could be adverse to woodland owners, testify pro or con on proposed legislation and advise OSWA members of what laws may be on the horizon. It seems that at each legislative session some special interest group has a “better idea” about how we should conduct our forest management activities. If you are concerned by the increasing legal constraints on forest management, I urge you to commit time and/or resources to your individual state association’s activities monitoring and advocating on its members’ behalf.
New President Takes the Helm

Greetings from the new president! I manage our family’s 677-acre tree farm near Yacolt in northern Clark County, Wash. I am also the executive director of the Pomeroy Living History Farm, a nonprofit entity that our family established to provide educational programs for school children and the general public about 1920s pre-electrical farm life. About 4,000 school children a year visit our farm to participate in various programs from timber production to a pumpkin patch.

I am a past president of the Clark County Chapter of WFFA, a graduate of class XIX of the Washington County Chapter of WFFA, a graduate timber production to a pumpkin patch. parcelize in various programs from school children to participate in various programs from timber production to a pumpkin patch.

Let me first say how impressed I am by the WFFA office in Chehalis. Led by Rick Dunning as executive director and Sherry Fox as TFW liaison, Erica Norquist as communications officer, a great group on the SLO Advisory Committee and an active and committed executive board, WFFA has become a first class, professionally run organization that has developed significant influence with decision makers in Olympia and beyond. The dues restructure last year has aided greatly in this pursuit. Thank you for supporting it!

One of issues that I plan to be intimately involved in during my term is the challenge of preparing the next generation to manage the family tree farm. Notice, I didn’t say estate planning. The challenge of preparing the next generation to manage the family tree farm is only one of the tools that may be necessary to keep the tree farm a tree farm.

What is really important is for families to come together and share a common dream for the land and the trees.

This fall we will introduce, at a number of sites throughout the state, a program developed at Oregon State University called “Ties to the Land.” It is a six-hour seminar that walks family members through discussions and activities that help create the dialogue so important to developing that common dream. I urge you and your families to participate.

There are probably dozens of other legal issues facing Washington state tree farmers that I could or should share with you. But I’m the new kid on the block and need to get up to speed on all of that first. But I will say that we in WFFA leadership are not satisfied with Forests and Fish Law and the way it is treating small forest landowners. We are bringing that dissatisfaction loud and clear to folks in Olympia and they are finally responding. I hope to bring you good news about all of this as the year unfolds.

In the meantime, our cool spring has been great for tree growth and seedling survival. And I hear that the markets may return as early as spring of ’09. So go take a stroll through your tree farm and be proud of all that you have accomplished!
WHAT TO DO IN . . .

AUGUST

► Things to Do on a Hot Day During Fire Season:
  ❑ Not Much.
  ❑ Rain Dance if you have a good one and can still shake it…or just think Rain.
  ❑ Water this year’s planting if you think they are at risk. Don’t wait until the needles start to look and feel dry. They have already kicked the bucket and you are too late. Maybe one gallon per seedling. My recommendation for the west slope of the Cascades is water on August 1 if you have not had measurable rain in the previous 45 days. The second week of August is too late.
  ❑ Order tree seedlings for Winter 2008/2009 planting. You will need to know acres, species and seedlings per acre. 43,560 square feet = one acre. 10 ft x 10 ft spacing = 100 square feet per seedling and 435 seedlings per acre. 9 ft x 9 ft spacing = 81 square feet per seedling and 538 seedlings per acre. Measuring the size of your planting area is a good job for your handheld GPS receiver.
  ❑ Call your herbicide guy and plan your Site Preparation or Release spray.
  ❑ Change the oil in something.

SEPTEMBER

► Invasive Weed in the Spotlight: Himalayan Blackberry, Rubus armeniacus
  ❑ Himalayan blackberry was brought here by Luther Burbank for crossing with other cultivars as it has such a vigorous cane. And as they say, the rest is history. Burbank is better known for his work with potatoes.
  ❑ You can expect canes to grow 12 feet per year (can grow up to 23 feet per OSU Extension Bulletin EM 8894) and root when the tip touches ground. They have ravaged our riparian areas, hidden our tired iron and buried your seedlings. They have also pulled your seedlings over with the help of wet snow like this last winter.
  ❑ The bigger the patch the bigger the problem. If your conifer timber gets crown closure, Himalayan blackberry will lose vigor and mostly die off from lack of sunlight. You can wear Mr. Blackberry out through mowing and mowing and probably more mowing. Livestock will graze the newly sprouted canes. You may get control, but not eradication through mowing and grazing. Oregon State Extension Service Bulletin EM 8894 dated September 2006, Managing Himalayan Blackberries in Western Oregon Riparian Areas, is an excellent source of information on this invasive species. Their recommendation is to mow in the spring and spray in the fall.
  ❑ For those of you who prefer herbicides, and/or don’t have a site that lends itself to mowing, you need to be patient and wait for the berries to ripen. This should be late August to early September. Until now, Mr. Blackberry has been busy growing and reproducing. He now needs to store food in his roots so he can repeat the cycle next spring. And you want your herbicide to get down to his roots. I like a directed spray with a fan style nozzle and I add a dye so I can see where I have sprayed. Dye reinforces the need to wear rubber gloves and boots when applying herbicides. My cheat sheet on herbicides lists Accord Concentrate (Glyphosate) to be good, and Garlon 3A, Garlon 4 and Escort XP to be excellent for control of Himalayan blackberry. Consult your herbicide expert for choice of herbicide and mixing instructions.

► SLASH TREATMENT and SITE PREPARATION AFTER LOGGING: To Pile or not to Pile?

Reasons to pile:
  ❑ Heavy slash is difficult to plant through and will cost you more for planting and you may not get the planting job you were hoping for.
  ❑ Ips bark beetles like pine slash, so if you have pine slash you need to pile and burn to avoid a beetle outbreak and possible damage to your green trees.
  ❑ You want a clean site around your dwelling for cosmetics or for a fire break.
  ❑ You want a fire-safe area along a public access route through or adjacent to your forest property.
  ❑ You like straight rows of seedlings and/or have a management plan for managing rows of trees.
Reasons not to pile:

- Piling can be expensive.
- Slash breaks down over time and improves your forest soil.
- Deer and elk are opportunistic feeders, and tend to browse at which is easiest to reach. Slash may help hide your seedlings and make your unit less desirable for deer and elk.
- You may want to create fire breaks along public access routes through your forest and around your buildings.

Other options and considerations:

- Pile just enough slash to make planting successful and leave the rest.
- Chip the slash in your firebreak areas and broadcast your chips.
- Don’t pile next to snags, which can become torches when piles are burned.
- Pile when soils are dry to minimize compaction and make them dirt free for a clean burn. An excavator with a brush grapple works best and a dozer with a brush blade next best. A good operator improves the quality of the work done with any tool.
- Or you can hand pile. Hard work builds good character and you want your children and their children to be of good character, so you know who to call.

To burn or not to burn:

- Wildlife like piles.
- You need to protect your seedlings next to piles you leave for wildlife.
- Piles take up planting space. Make small piles if you plan to leave them.
- Landing areas tend to accumulate slash, which may be marketable as biofuel or hog fuel.
- Leave limbs in the woods if your landing clean-up plan is to pile and burn.
- Need a permit to burn.

When to burn:

- Burn only when rains arrive. Make sure it is really wet so the fire doesn’t spread from your piles. Fall is normally the best time to burn as the fall and winter rains extinguish your fire. In spring you need to make sure your fire is out.
- Cover your piles if you think they will be tough to light after you wait for the surrounding area to be fire safe. You do not need to cover the whole pile, just an area large enough to get hot when lit. Good portions of your pile to cover would be the downhill side, the side into the prevailing wind and where you have suitable fuel to light your pile.

October

► ARE YOU READY FOR THE WINTER?

- How long has it been since you and your gutters have seen eye-to-eye?
- Maybe it’s time to check the gutters and drainage for the barn and shop.
- Check your water bars and drainage ditches to ensure they’re ready when the rains fall.
- Are your culverts clean and ready to carry the anticipated flow?

Down on the Tree Farm is edited by David Bateman, with help from several Linn County Small Woodlands members. This column is a project of the Linn County Small Woodlands Association and OSU Extension Master Woodland Managers. Suggestions are always welcome, send them to Dave Bateman at knothead@smt-net.com.

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Understanding Forestry Law

By SCOTT HORNGREN

This issue of Northwest Woodlands is devoted to the 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 opinions. Timber trespass and Oregon Measure 37/49 disputes are largely governed by statutory law. In contrast, personal injury and contract disputes are largely governed by the common law.

Many landowners 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.

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.

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 Practice 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 you 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 contracts or easements, hopefully this issue of Northwest Woodlands provides you with a better understanding of how the law works and how it might affect your particular situation.

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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Timber Trespass in a Nutshell
Understanding, Preventing and Obtaining Compensation for Wrongful Tree Cutting

By DAVID A. HEPLER AND JANNA AGINSKY

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 esthetic 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), which 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.

How does a property owner 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 statute of limitations 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.

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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.

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’s exception caps a commercial logger’s liability at actual damages (that is, no treble or double damages) if the logger was operating under a signed contract with someone the logger reasonably believed owned the subject property, if the contract included a metes and bounds legal description of the subject property, and if the property boundaries were flagged or staked by the owner.

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.
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 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?**

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.

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 your property and left some of the felled timber lying on the property, you 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:

1. **Be familiar with your property.** Visit your 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 your property personally, ask your contractors, neighbors or other locals for periodic updates about what is going on in the area.
2. **Pay close attention to logging operations.** 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.
3. **Mark your property boundaries.** 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.

**David A. Hepler and Janna Aginsky** are attorneys for Schwabe, Williamson & Wyatt in Portland, Ore. David can be reached at 503-796-2885 or dhepler@schwabe.com. Janna can be reached at 503-796-2459 or jaginsky@schwabe.com.

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By SEAN MUNGER AND ALI SEALS

Clients often ask: “Do I really need a contract?” The question is a valid one and usually the answer is “yes.” Although many view contracts as cumbersome and time consuming to negotiate, they don’t have to be, and they usually save time in the long run in preventing or clarifying disputes about what parties have agreed to.

Contracts are basically promises that the law is willing to enforce. In business or personal life, we constantly make promises; often without even realizing it. Accordingly, it is important to record promises in writing that have legal consequences with precision and have them enforced, if need be. Agreeing in writing to the terms of an agreement allows us to describe our exact understanding of our commitments. As many have learned the hard way, oral agreements are often incomplete and when problems arise, one side may well be at a distinct advantage when trying to realize the benefits of the agreement. Also, oral agreements lend themselves to misunderstandings and different recollections about the applicable agreement.

When many of us think of contracts, we think of long, detailed documents incorporating words like hereby, therefore and hereinafter. Realistically, contracts are just as enforceable when they are written in normal, clear English as when they feature complex legalese. In order to form a contract, it is vital that certain elements are present.

First, the parties to the contract must comprehend that they are entering into a contract. This simply means that all parties to a contract must realize that they are committing to do something. Next, there must be mutual “consideration.” Consideration, in this context, is simply the idea that each side needs to give something in order to get something in return. For example, a promise to mow my neighbor’s lawn for nothing in return is not a contract. Here, there is no consideration on my neighbor’s part; he is not giving me anything in return. However, if I agree to mow my neighbor’s lawn for $20, we have made a contract as there is mutual consideration—each side receives some benefit from the transaction.

Finally, there must be “offer and acceptance.” Offer and acceptance means just what one might suspect. In the lawn-mowing example, the offer would be me offering to mow my neighbor’s lawn for $20. Acceptance would be my neighbor accepting the deal as proposed. If he indicates that he would enter into the agreement for $10 and nothing more, this would be considered a counteroffer, and we would not have a contract. Instead, I would need to accept the counteroffer in order for our agreement to be considered a binding contract.

Sometimes, many counteroffers can go back and forth between the parties before one is finally accepted and a valid contract is formed.

There are certain key provisions to be included in any contract that will be enforceable under the law. The most basic provisions are:

**Parties.** The parties that will be bound by the contract must be specifically identified. All parties will need to receive some benefit from the contract and their rights and obligations must be clearly set out.

**Term.** The term or duration of the agreement. It is important to specify in precise terms how long the agreement will last and under what circumstances it ends.

**Price, Quantity and Purpose.** The price and quantity of the goods or services should always be clearly indicated in the contract. Similarly, the purpose of a contract (i.e. duties of the parties to be performed) should be carefully set forth.

**Default and Remedies.** The contract should carefully explain what constitutes a party’s failure to perform as well as what happens once this failure has become evident.

**Attorney’s Fees.** Attorneys are expensive. Typically, contracts will indicate that the prevailing party in a lawsuit concerning the terms of a contract will be entitled to reimbursement of the fees incurred to resolve the mat-
ter by the opposing side. Unless this is clearly indicated in the contract or provided for by statute, the legal fees will be paid by each side individually.

At this point, you may be wondering what happens if you don’t put your agreement in writing. Chances are your oral contract is still enforceable. However, there are certain circumstances that generally require a written contract. The circumstances under which contracts are required to be in writing in order to be binding are set forth in the applicable Statute of Frauds, which requires certain contracts to be in writing and signed by all parties to the deal in order to be binding. Every U.S. state has some variation of the Statute of Frauds, and they usually differ very little between states. Below are several examples of agreements that fall under a traditional Statute of Frauds.

**Agreements that cannot be performed within one year.** Agreements that, according to their terms, are impossible to perform within one year must be in writing. For instance, a contract for a five-year supply of natural gas would need to be in writing per the Statute of Frauds.

**Sales of goods of $500 or more.** Some transactions involving the sale of goods with a value of $500 or more require a written agreement. For instance, a $400 contract modified to $650 must be in writing and falls under the Statute of Frauds. However, a $650 contract that is modified down to $400 can be modified orally.

**Buying, selling or other transfer of land.** The purchase, sale or transfer of real property should always be in writing. An important fact to note is that leases for real property do not qualify as a transfer of real property. However, if the duration of the lease is for more than one year, it will likely qualify as an agreement that cannot be performed within one year.

The Statute of Frauds does not mean that an agreement that should have been reduced to writing is automatically void or fraudulent. Instead, it makes the contract “cancellable” or “voidable” by one of the parties. If both parties agree that a contract exists, absent a written agreement, the contract will be considered valid in court and it can be enforced.

Essentially, it is always a safe bet to put your agreements down in writing and sometimes it is imperative. In most cases, putting agreements in writing will save time and energy in the long run and will likely provide a better business atmosphere for everyone involved.

**Sean Munger** is an attorney for Schwabe Williamson & Wyatt in Portland, Ore. He can be reached at 503-796-2904 or smunger@schwabe.com. **Ali Seals** is a third-year law student at the University of Oregon School of Law, clerking in the firm’s Portland office. He can be reached at 503-796-7448 or aseals@schwabe.com.
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 non-federal 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 commentors 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 re-grow 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 seven to ten pairs of barred owls can 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 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 ongoing 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 practice permits that allow the harvest of what is suitable spotted owl habitat anywhere in the state within spotted owl regulatory circles 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 had 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, combined with a propitious dominance by Douglas-fir with only limited hemlock, lower elevations and rolling terrain that had 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 practice 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 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 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 forest over age 50.

Weyerhaeuser also entered into a Research and Management Agreement with the U.S. Fish and Wildlife Service, under which it is conducting a telemetry study of the owls in the circles, including two spotted owls and six barred owls. The telemetry study means that if the case comes to trial, now set for June 2009, Weyerhaeuser will have considerably more information about the actual status of the spotted owls than it had at the preliminary injunction stage.

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.

At press time, the parties are in the midst of settlement negotiations for dismissal of the lawsuit. It is not clear that anyone believes that take litigation will result in the preservation of more spotted owl habitat. The proposed settlement will work toward establishing a more collaborative approach, using incentives to encourage landowners to develop older stands on at least portions of their property and reducing the economic threat of having the presence
of a spotted owl settle on or near a landowner’s property.

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.

ELAINE SPENCER is a shareholder with Graham & Dunn PC in Seattle, Wash. She can be reached at 206-340-9638 or ESpencer@GrahamDunn.com. She most recently represented Weyerhaeuser in the spotted owl “take” case described in this article.
Securing Access to Forestlands

By HEATH A. CURTISS AND KIRK B. MAAG

To access forestlands, owners must frequently cross property owned by another party. While informal agreements with neighbors 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 harvesting timber, which may require improvements to roads and increased traffic. Further, a lack of clear, enforceable access rights reduces the value of forestlands. Easements provide a mechanism for securing such 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 the owners of forestlands with access to their property via a neighboring landowner’s private road.

Alternatively, an easement could grant the owners of forestlands the right to construct an access road across a neighboring landowner’s property. 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 without 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.

To avoid the dispute between easement rights and fee simple ownership illustrated above, 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 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 against assignees or third parties increases upon recording. 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: (1) the signature of the grantor of the easement must be acknowledged by a notary public; (2) the document must conform to certain formal requirements, including the required statement, “After recording, return to: [name and address]”; and (3) 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 the owner of forestlands 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 thereby increasing the value of those lands.

**Heath A. Curtiss** is an associate at Stoel Rives LLP in Portland, Ore. He can be reached at 503-294-9810 or hcurtiss@stoel.com. **Kirk B. Maag** is a third-year student at Georgetown University Law Center and a summer associate at Stoel Rives, also in Portland. He can be reached at kbmaag@stoel.com.

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Chief Forester

P.O. Box 99788
Lakewood, WA 98496-0788
(253) 581-3022
Fax (253) 581-3023
E-mail: wlc.don@comcast.net
and surveying, as related to ownership boundaries, has been a key component of civilizations for thousands of years. Surveying is steeped in history whether it’s the common law we inherited from the British, the code of Napoleon, which Louisiana was developed under, or Spanish law that impacts parts of California, Texas, New Mexico and Arizona even today. King Kamehameha of Hawaii used ties to the volcano peaks to describe property conveyed to others. And of course, the most famous land surveyor was our first President, George Washington.

Measuring America by Andro Linklater is a fascinating review of the history of land surveying and recommended reading.

Timber Cutting Line Agreements should only be used as a last resort, for several reasons. First, some use this method to avoid surveying costs. Since we know that the agreement line is not likely to be on the true boundary, someone is losing timber value. Second, these agreements usually are not perpetual in most cases, so a few years down the road the owners are facing the same boundary problem again. The boundary location becomes a nagging, persistent problem. Thirdly, the cost of surveying and marking an agreement line, preparing legal agreements, negotiations and so forth often approach the costs of a standard boundary survey. Cutting line agreements can involve more than two ownerships thereby complicating negotiations: two or three owners might agree while one doesn’t. Fourth, if the properties are subject to, say, a mortgage or other lien, ownership or legal issues, the line agreement would require a release from a mortgage company, for example, adding more time and expense. And lastly, it is likely that someone will mistakenly think the agreed “cutting line” is a property boundary, which can cause future disputes. Landowners should consult with their attorneys on this issue. My recommendation: Do a boundary survey and life will be lots easier!

The Boundary Survey is the basic tool of property rights. You can’t defend your ownership and manage property without knowing where the boundaries are. Both Oregon and Washington have state laws and rules regulating county surveyors, professional land surveyors and the practice of surveying. County surveyor records generally go back to the mid 1800s. Oregon passed legislation in 1947 requiring all boundary surveys be recorded in the county surveyor’s office. Washington passed similar legislation sometime later. In general, Oregon and Washington both require licensing of surveyors, the recording of surveying documents, plats and notes as public information with the county surveyor or auditor, and practice standards. Most county survey offices are staffed, allowing you to check there to see what surveys on or near your property have been recorded.

Surveyors often get client comments such as, “You have my deed, why can’t you just set up your instrument and survey my boundary?” If it were only that easy! When a surveyor shows up on your property he or she has already spent preparation time reviewing your deed, the neighbor’s deeds, county survey records and so forth. The following are elements required to determine boundaries:

1. **Deed research at the county or title company records.** Deeds can go back 150 years. The surveyor will be looking at the chain-of-title to determine if there are gaps or overlaps in the written legal descriptions. If the...
surveyor finds a legal description overlap, they must then research which parcel has senior rights. The first parcel partitioned from a larger parcel gets priority over junior right parcels when there are boundary conflicts.

2. Survey research. Previous surveys are normally clear indications of where property lines were intended to be. They also can contain information on the location of controlling corners that may have been destroyed. They also can demonstrate the amount of reliance on a corner by other surveyors in the past.

A thorough research of prior surveys is critical to accomplish prior to establishing or reestablishing property corners. The surveyor:

• may research property surveys recorded at the county surveyor’s office;
• may also need highway, road or utility surveys to help determine boundaries;
• may need to research Forest Service, BLM or timber company records of corner restoration or perpetuation. These records may not be recorded in the county surveyor records; and
• should talk with “old timers” in the area. They have lots of knowledge of what was done in the past.

It’s not uncommon during this process that the surveyor will find a recorded survey monumenting all or part of the ownership boundaries, making boundary location easier.

3. Field Survey. The surveyor now commences fieldwork, locating past survey monuments and collecting data with survey instruments. The data is then analyzed by computer. Now let’s suppose what the surveyor finds on the ground doesn’t match the legal description: distance to a road is different or one of the bearings doesn’t match the found bearing between two original monuments. Where do we put the boundary? Fortunately we have guidance in statute and common law: If the deed has errors in it or does not clearly describe a piece of land, then the surveyor should try to determine the intent of the deeds. If this cannot be determined then certain calls (if any) in the deeds are held to resolve the conflict. The deed calls have a hierarchy of importance: (1) calls to visible boundaries such as streams and roads held over; (2) calls to monuments such as stones, posts, iron pipes or trees held over; (3) calls of distance held over (4) calls of angles or bearings held over; and (5) calls of area or acres.

4. Final survey. When the boundary is resolved and monumented, the surveyor records the plat with the county surveyor or auditor where it will be indexed and preserved for future public use.

Adverse Possession

Suppose during the field survey the surveyor discovers the neighbor built a fence and shop on your property. The surveyor will collect occupation data, notify you and show the occupation on the plat. There are multiple outcomes of this scenario ranging from a court trial to a lot line adjustment to an easement. Whether a trial or a negotiated agreement, your attorney and surveyor will form a team to deal with the adverse possession.

In Oregon, statute says to acquire title by adverse possession one must have “…actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years.” The possession time in Washington is also 10 years, except under certain circumstances it could be seven years. Public land and railroads are not subject to adverse possession claims.

I have testified in numerous adverse possession cases over the years. The adverse possession cases are expensive and time consuming to defend, with costs sometimes exceeding the subject property values. They also cause hard feelings between neighbors. Many of these cases go to jury trials and the court decisions are unpredictable and risky. I testified in a case where an old fence meandered into a 40-acre parcel, including about 10 acres of timber (500 mbf +/-). Even though none of the statute requirements to acquire title by adverse possession were met, the jury awarded the land and timber to the claimant. I’ve seen adverse claim court cases costing tens of thousands of dollars dealing with insignificant issues such as a foot or two of a rural driveway. The best protection against an expensive adverse possession claim is a boundary survey and watching and maintaining the survey boundary in the future.

RONALD E. STUNTZNER is the managing member of Stuntzner Engineering & Forestry, LLC, and is a consulting forester, licensed engineer and professional land surveyor with more than 40 years experience. He has served on the Oregon State Board of Examiners for Engineering and Land Surveying for the last eight years as well as other numerous industry related committees. Stuntzner Engineering & Forestry, LLC has four office locations: Coos Bay, Forest Grove, Brookings and Dallas, Ore. Ron can be reached at 541-267-2872 or ronstuntzner@stuntzner.com.
Measure 49: More Than a “Modification” of Measure 37

By WALTER (RANDY) MILLER JR.

Since 1973, Oregon has been leading the nation in its approach to statewide land use planning. Most recently, this planning demonstrates an ongoing debate in the state concerning entitlements to monetary and other relief when new government regulations effectively diminish the fair market value of real property. This debate is borne out in the text of Oregon’s Measures 37 and 49. Touted by its advocates as a “fix” to Measure 37 (2004), Measure 49 passed by referendum on November 6, 2007, and is current law.

Measure 37 was approved by 62 percent of voters and became law on December 2, 2004. Measure 37 provided that if a land use regulation restricted an owner’s use of his or her property and reduced the fair market value of the property, the owner could make written demand for compensation to the regulating body. Measure 37 did not distinguish between large or small, or commercial or residential properties. In turn, the regulating body could either compensate the owner for the reduction in fair market value or waive the regulation to that owner. If the governing body failed to take either of those actions within 180 days of the owner’s written demand for compensation, the owner could sue the regulating body in circuit court for just compensation, attorney fees, expenses and costs.

After three years from the date Measure 37 became law, thousands of claims had been filed encompassing approximately 792,327 acres, or only 1.3 percent of Oregon’s land. These claims also sought monetary just compensation reaching into the billions of dollars—applicable only if the governing body chose not to waive the regulation(s), or did not act within the prescribed 180-day period. The latter statistic caught the attention of Oregon’s legislators and, in a closed legislative session wrought with controversy, a committee of state representatives drafted the text of what would become Measure 49, which was unanimously approved by Democrats and opposed by Republicans.

Measure 49 passed by referendum on November 6, 2007, with 61 percent of voters in favor, almost the same percentage as Measure 37 a few years prior. According to Oregon’s Department of Land Conservation and Development, Measure 49 simply modifies Measure 37 “to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon’s protections for farm and forest uses and the state’s water resources.” It would be more accurate to say that Measure 49 practically eviscerates the relief afforded under Measure 37 to ensure those protections.

Measure 49 allows “claim” applicants to seek relief from land use regulations passed after January 1, 2007, that restricts the applicant’s desired residential, farm or forest use of real property in a way that lowers the property’s value, and when the highest and best use of the property at the time the regulation was enacted was residential use. (A “claim” here is not a “claim” in circuit court or cause of action for monetary just compensation as was previously directed under Measure 37.) Measure 49 claim applications for commercial and industrial uses will be denied. In response, the local government or state must either compensate the claimant for the reduction in fair market value or authorize the claimant to use the property without application of the regulation.

You might ask: “What about those whose property was subject to a land use regulation enacted after they acquired the property, but prior...
to January 1, 2007?” Under Measure 49, if the owner did not previously file a Measure 37 claim he or she may not seek relief now. For those who did file Measure 37 “claims” for monetary just compensation, Measure 49 provides a different type of “just compensation,” which it defines as: relief under Measure 49. That relief, more specifically, does not include any monetary compensation, but provides one to three homesites on a parcel outside the Urban Growth Boundary for an applicant who can show that those sites would have been allowed when he or she acquired the property. There is no requirement that the claimant show that the regulation diminished the property value. This is commonly called the “Measure 49 Express Lane” and is contrasted with the “Conditional Path.”

Under Measure 49’s Conditional Path, an applicant outside the Urban Growth Boundary can apply for four to 10 homesites. Any applicant within an Urban Growth Boundary must follow the Conditional Path for anywhere from one to 10 homesites. Again, commercial and industrial uses are prohibited. Development on high-value farmland and forestland, and groundwater restricted areas is also prohibited.

The Conditional Path has already been criticized as overly burdensome and even called impossible. To achieve the Conditional Path standard an applicant must prove the value of his or her property in the year prior to application of the prohibitive regulation and also in the year after the regulation went into effect. The difference between these values, in present-day dollars, divided by the local value of a present-day vacant housing site equals the number of housing sites the claimant is permitted under Measure 49’s Conditional Path.

Under Measure 49, the actual and reasonable cost in preparing the “claim,” including the cost of the appraisal, not to exceed $5,000, may be added to the calculation of the reduction in fair market value of the property. Anecdotal evidence from counsel and appraisers indicates, however, that an applicant on the Conditional Path will likely incur substantial out-of-pocket expenses, far in excess of the $5,000 limit, for the wizardry required for an appraiser to establish an accurate valuation today for the property in say, the early 1970s. In contrast with Measure 37, however, Measure 49 does not permit recovery of attorney fees and other costs if a lawsuit should become necessary to enforce the new provisions.

Battles are being fought in courtrooms across Oregon to resolve whether Measure 49 also requires dismissal of pending legal actions for compensation, along with any hope of recovering attorney fees that accrued and were filed under Measure 37 because regulating governments failed to pay or waive within the 180-day period. The state’s position is that it makes no difference whether such claims were valid under Measure 37, that Measure 49 renders such claims moot and therefore the governing body is not required to pay just compensation, attorneys fees, expenses and costs under Measure 37. If correct, valid Measure 37 claimants who have spent hundreds of thousands of dollars in attorney fees to justifiably litigate their claims against a governing body in circuit court may receive no more than the Measure 49 Express Lane provides, or nothing if the property is commercial, industrial or otherwise excluded under Measure 49.

Measure 49’s main solace for the landowner is the improvement of Measure 37’s ambiguous scheme of transferability of rights and the “widow” problem. The transferability of a so-called “waiver” under Measure 37 was the subject of much debate during Measure 37’s existence. Measure 49 addresses the issue and explains that if a property owner is granted permission to develop homesites under the new scheme, those rights run with the land and have the...
If I Charge a Fee to Use My Private Land, Am I Liable if Someone Gets Hurt?

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

Most state laws allow the forest landowner to retain the liability protection of the recreational use statute if the only fee charged is for firewood gathering. For example, 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?

A landowner may wonder whether it is 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. However,
even if a fee is charged to a recreational user, that does not automatically mean a landowner will be liable if the person using the property is injured. Once a fee is charged, the statutory liability protection no longer applies and the courts will apply a judge-made law or what is also known as the “common law.”

Under common law, there are generally 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 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 likely be considered an invitee. Generally, a landowner 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. 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, but the landowner can take steps to minimize the liability risk.

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 can also have a different business entity own the land, obtain insurance, and use liability waivers.

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, liability releases are strictly construed 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.
Mason County Tree Farmer Named Tree Farmer of the Year

The Hama Hama Tree Farm, managed by David Robbins and his family, has been named the 2008 Washington State Tree Farmer of the Year, recognizing his exceptional commitment to enhance his forestland. The award was announced on April 25 in Mt. Vernon at the annual meeting of the Washington Farm Forestry Association, which is a co-sponsor of the Washington Tree Farm Program.

David Robbins’ grandfather, H.M. Robbins, started the Hama Hama Logging Company in 1922. In 1972, David became involved in the management of the property, which lies on the west side of Hood Canal and includes the Hamma Hamma River, Johns Creek and 400 acres of estuary and tide flats. The

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tree farm is mostly composed of Douglas-fir with scattered stands of alder, hemlock and cedar, and supports a sustainable harvest of 1.4 million board feet per year. Their careful stewardship of the water, soil and timber resources directly benefits another portion of the family business—the Hama Hama Seafood Company, which supplies oysters and clams to the area.

“The Robbins family deserves to be recognized for their many years of excellent forest management and their commitment to forest stewardship,” Washington Tree Farm Program Chair Bryon Loucks said.

The Washington Tree Farmer of the Year contest recognizes private landowners for the exceptional job they do to enhance their forestland as well as the promotion of sustainable forestry practices. The state, regional and national Tree Farmer of the Year contests are sponsored by the American Tree Farm System (ATFS), a national program that promotes sustainable management of forests through education and outreach to private landowners. To be a certified Tree Farmer, a landowner must manage his or her forestland in an environmentally sound manner in accordance with the American Forest Foundation’s standards and guidelines.
mall forest landowners around the state of Washington are beginning to submit Long-Term Forest Practices Applications that may permit forest management practices for up to 15 years. In October 2007, the Washington State Department of Natural Resources began offering small forest landowners a long-term option in addition to standard forest practices applications. A long-term application (LTA) can be approved for three to 15 years. A standard application is typically valid for two years.

Jeff Galleher, the Long Term Application Program manager, has met with many of the small forest landowners who are working on these applications. Galleher remarks, “Many of the small forest landowners who have begun the LTA process are attracted to the potential flexibility that they see in this option. Many landowners want to selectively harvest their ground and remove a couple loads a year over the next decade. A long-term application lets them do that pretty easily.” Forest disturbance or changing markets can also steer people to an LTA. In the event of storm or fire damage to timber, landowners prefer to harvest timber quickly, and would like to already have a valid application for their land. Timber markets change frequently and many landowners want to be able to harvest when prices are good. In all of these cases, the flexibility in having a valid LTA comes in handy.

In 2005, DNR’s Small Forest Landowner Office Advisory Committee, which includes members of the Washington Farm Forestry Association, began to develop an LTA process. From the start, the LTA was intended to reduce paperwork for small forest landowners over the long term. The LTA also allows landowners more management flexibility and will encourage them to plan for the future as they ponder what they’ll be doing on the land for the next 15 years.

The process for getting an LTA is different from the process of getting a standard forest practices application. For an LTA, the landowner submits the application form in two separate steps. To complete step one, the landowner must supply a map that shows the application area and document all sensitive sites within that boundary. Sensitive sites may include streams, wetlands, unstable slopes, seeps, cultural resources and several other features. The landowner also needs to inventory forest roads on the property and assess the condition of each road as part of step one. When the field work and paperwork is complete, step one is submitted to DNR’s region office for review. Within 45 days of receiving the paperwork, step one will either be validated or returned to the landowner with an explanation of why it could not be validated.

When step one is validated, the landowner prepares step two. At step two the landowner actually describes the forest practices that they wish to perform over the duration of their long-term application. The landowner will map out different areas of timber on the property then document the management practices that may take place in each area. In each area, the landowner might list all of the potential activities that could occur during the next 15 years such as even-aged, uneven-aged or salvage harvesting. The harvest method will also be listed. A landowner must also record the roads and landings that he or she wishes to build, and mark the management zone boundaries around streams, wetlands and other sensitive
sites. When step two is submitted to the region office, the landowner will be notified within 45 days as to whether the application will be approved.

When step two is approved, the landowner has a valid forest practices application for the application area. From then on, the landowner just needs to submit a five-day Notice of Operation form before conducting the approved forest practices. This notice must be submitted at least five business days before the activity begins.

A landowner typically does more upfront work when submitting a long-term application, but the landowner will save time and paperwork over the long term by not having to submit additional applications or renew a standard application throughout a 15-year period.

Writing an LTA requires thinking up to 15 years into the future. This can be challenging as many family forest landowners may not know what their timber will look like throughout that period. However, it is very valuable to look into the future in forest management and put some ideas together for what management will be necessary. Many interested parties in Washington hope that a long-term outlook will help people to better plan, and that planning may help keep these family owned forestlands in forestry. DNR Stewardship foresters can assist landowners in crafting longer-term plans and can be quite helpful in guiding people through the LTA submission process. Galleher points out, “In the early stages of looking at long-term applications coming in, landowners who have worked closely with DNR staff throughout the process are much more successful than those who have tried to complete the applications alone. We have a lot of resources for folks to tap into if they give us a call.”

The Small Forest Landowner Office (SFLO) serves as a focal point for small forest landowner concerns and policies, and as a resource for the tools and information they need to keep their land in forestry use. The SFLO provides expertise in managing small forest holdings and recommends incentives to improve management through several programs in addition to the LTA. The Forestry Riparian Easement Program pays landowners for timber that is required to be left, by law, in the Riparian Management Zone when harvesting near a stream. The Family Forest Fish Passage Program offers cost-share money to help landowners repair undersized culverts and other fish barriers on private forest roads that cross streams. The Forest Stewardship Program provides on-site forest management advice and assistance on development of Forest Stewardship Plans. You can contact Michael Ahr at the SFLO at 360-902-1849 or sflo@dnr.wa.gov with questions about long-term applications or other SFLO programs.

MICHAEL AHR is an outreach specialist for the Small Forest Landowner Office, Washington State Department of Natural Resources, in Olympia. He can be reached at 360-902-1849 or michael.ahr@dnr.wa.gov. JEFF GALLEHER manages the long-term application process and contributed to this article. He can be reached at 360-902-1635 or jeff.galleher@dnr.wa.gov.
DEAR TREEMAN, I was traveling on Highway 99 north of Eugene, Ore., and saw an osprey in a nest on top of one of the utility poles. I had a spotted owl within the restricted usage nesting area a couple years ago. They wouldn't let me use the road that was within a quarter mile of the site. So why doesn't the Department of Transportation reroute traffic during the osprey nesting season? —Jack

DEAR JACk, Your osprey is considered a “vulnerable” species. Basically, there are no restrictions in terms of area around a nesting site. The Endangered Species Preservation Act of 1966 covered only native species. So in 1969 the Endangered Species Conservation Act was passed to prevent extinction of certain species. Then in 1973, the act most of us woodland owners have come to know and love, the Endangered Species Act defined threatened and endangered species, placed certain species under protection and required federal agencies to conserve habitats.

Categories in order of severity include vulnerable, threatened, endangered and extinction. Your spotted owl is an endangered species requiring substantial restrictions on activities that may impact the bird. Your other friend, the osprey, is only a vulnerable bird, basically meaning we need to be concerned about their future welfare…leave them alone, they’ll leave us alone. So the Oregon Department of Transportation (ODOT) need not worry about ospreys compromising traffic flow on our public highways.

Our lights might be short circuited, possibly resulting in roast osprey, but that’s another issue for another day. —Treeman

DEAR TREEMAN, I have an easement across property owned by the Forest Service. The easement says that we are supposed to share in the maintenance of the road. There hasn’t been any harvesting going on for several years now and I have been the one doing all of the work. Since I own the land in front of and behind the Forest Service, can I file an adverse possession claim for the road since I’ve had the easement over 10 years? Then it would be mine and I could forget about the feds. —Tired of doing all the work

DEAR TIRED, Good idea…bad adversary. A private citizen cannot file adverse possession on any public lands, road or otherwise. Sort of resembles the old saying in a bad personal relationship: What’s mine is mine, what’s yours is ours. If adverse possession was an option for private citizens, think of the possibilities: squatters in the national forests, wait out the required time, and then file for ownership. One could make the argument they are managing the land and improving its value both from an economic and a social context, but alas, a specious contention in the eyes of the Feds.

An option that is available to you is to seek legal action on the grounds they are not living up to the contractual agreements as stated in the easement. The document needs to have been notarized and filed with the county. We are assuming you refer to a legal, written document, not a “Gentlemen’s Agreement” (verbal contract). Any attempt to get a favorable judgment in a court of law via an oral agreement against the Forest Service…well, you’re whistling in the wind there, my friend. —Treeman

DEAR TREEMAN, I notice you like impressing your readers with all of those big words. I assume you have a dictionary at your side while doing this work? Or is a Thesaurus your secret? —Steve

DEAR STEVE, Like the name. Well my friend, you are wrong on both counts. I have been an avid reader of classic literature for a number of years. My philosophy on reading: We have a limited amount of time for the “finer” things in life, thus if one is going to allot a portion of their time in this endeavor, it best be put to good use. What better one than classic literature? And as we’re on the subject, I thought I’d take the liberty to give you my “Top 10” all-time, favorite words. There are many others that are a close #11, but my time and your interest are at risk here. And as a possible homework assignment, we’ll use them in a phrase. Thus, anyone seeking clarification will need to consult Mr. Webster. Furthermore, if you have a bit of the sesquipedalian in you, please send me your favorites. So here you go:

Ubiquitous. My all-time favorite anywhere and everywhere.

Matutinal. When I’m at my best (“best” as a relative term).

Sycophant. We all know ’em and should despise ’em.

Gesticulate: One way to draw attention to what you say.

Falderal. Some of Treeman’s writings, but in good spirit.

Ingratiate. It all depends on how you do it.

Nefarious. Whoa, watch out!

Ingenuouus. As we should all be.

Lucubrations: Tough if you’re matutinal.

Perspicacity. My Grandma possessed it.

So many words…so little time.

—Treeman
Measure 49
continued from page 23

status of a permitted use. Measure 37’s so-called widow problem also often precluded surviving spouses whose names were absent from original property deeds from prosecuting claims successfully. Measure 49 allows these “widows” as proper applicants. The acquisition date of a surviving spouse of an owner in fee title is the date of marriage or the date the spouse acquired the property, whichever is later.

In summary, it is estimated that Measure 49 will provide some limited relief for hundreds or even thousands of property owners whose property has succumbed to qualifying land use regulations passed after January 1, 2007. There is no question, however, that Measure 49 eliminates the relief previously available under Measure 37, and for some, any prospect of relief whatsoever from qualifying government regulations. For owners in the latter category, the Department of Land Conservation and Development explains that your burdens are not “unfair” and are presumably necessary to retain “protections for farm and forest uses and the state’s water resources.”

WALTER (RANDY) MILLER, JR. is an attorney with Schwabe, Williamson, and Wyatt (SWW), a law firm serving the needs of clients throughout the Pacific Northwest. He practices in SWW’s condemnation and land use groups together with Joe Willis, Jill Gelineau and Tim Crippen. Mr. Crippen assisted in preparing this article. Randy Miller can be reached at 541-749-4042 or rmiller@schwabe.com.

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CALENDAR

Landscaping for Fire Prevention, Sessions of this program can be scheduled for interested groups of 10 or more. Please contact Chris Schnepl (Idaho Panhandle) at 208-446-1680 or Randy Brooks (North-Central Idaho) at 208-476-4434 to make arrangements.

Howdy Neighbor! Tour, July 26, Astoria, OR. Contact: Mike Gaudern, oswa@oswa.org, 503-588-1813.

Western Washington Forest Owners’ Field Day, Aug. 30, Wahkiakum County, WA. Contact: Andy Perleberg, 509-667-6658, andyp@wsu.edu.

Who Will Own the Forest?, Sept. 8-10, Portland, OR. Contact: Sara Wu, 503-488-2130, swu@worldforestry.org.

Howdy Neighbor! Tour, Sept. 6, Monroe, OR. Contact: Mike Gaudern, oswa@oswa.org, 503-588-1813.

Timberland and Neighbors: Sooner or Later There will be Issues, Sept. 23, Cottage Grove, OR. Contact: Western Forestry and Conservation Assoc., richard@westernforestry.org, www.westernforestry.org, 503-226-4562.

Howdy Neighbor! Tour, Sept. 27, Prineville, OR. Contact: Mike Gaudern, oswa@oswa.org, 503-588-1813.


National Tree Farmer Convention, Oct. 16-18, Portland, OR. Contact: American Tree Farm System, info@treefarmsystem.org, 202-463-2462.

SAF National Convention, Nov. 5-9, Reno, NV. Contact: Carlton Gleed, 866-897-8720 x111, gleedc@safnet.org, www.safnet.org.

Send calendar items to the editor at rasor@safnwo.org by mid-August 2008 for the fall issue.
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