

Wildfire Liability

Heath Curtiss, OFIC General Counsel

U.S. v. Union Pacific Railroad

- Storrie Fire in 2000 on Plumas and Lassen National Forests
- California statute allowed for “**any damages** to the property caused by the fire.”
- Court held that “any damages” includes “resource damages, including timber damages, rehabilitation and restoration costs, and **environmental and habitat damages.**”
- \$102MM settlement, of which \$22MM attributed to suppression costs.

U.S. v. Sierra Pacific Industries

- 2007 Moonlight Fire on Plumas and Lassen National Forests.
- California statute allowed for triple damages and double damages for timber trespass.
- \$330MM: \$120MM property, \$22MM fire suppression, \$87MM interest, **\$100MM environmental damages**. Multiplied by two.
- SPI's summary judgment largely rejected.
- Settlement: \$55MM cash, 22,500 acres of land. Total value approximately \$122.5MM.

U.S. v. CB&I Constructors, Inc.

- Copper fire in 2002 on Angeles National Forest
- US pursued \$7.6MM in fire suppression costs, plus an unspecified amount for “intangible environmental damages.”
- 2009 Jury awarded the \$7.6MM, plus **\$28.8MM for intangible environmental damages** (\$1,600/acre)
- Ninth Circuit affirmed. California “embraces **broad theories of tort liability** that enable plaintiffs to recover full compensation for all the harms they suffer.”



Image State of Oregon

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Google earth

Imagery Date: 6/28/2005 43°13'31.25" N 123°57'10.60" W elev 1187 ft eye alt 16247 ft

Tour Guide 1994

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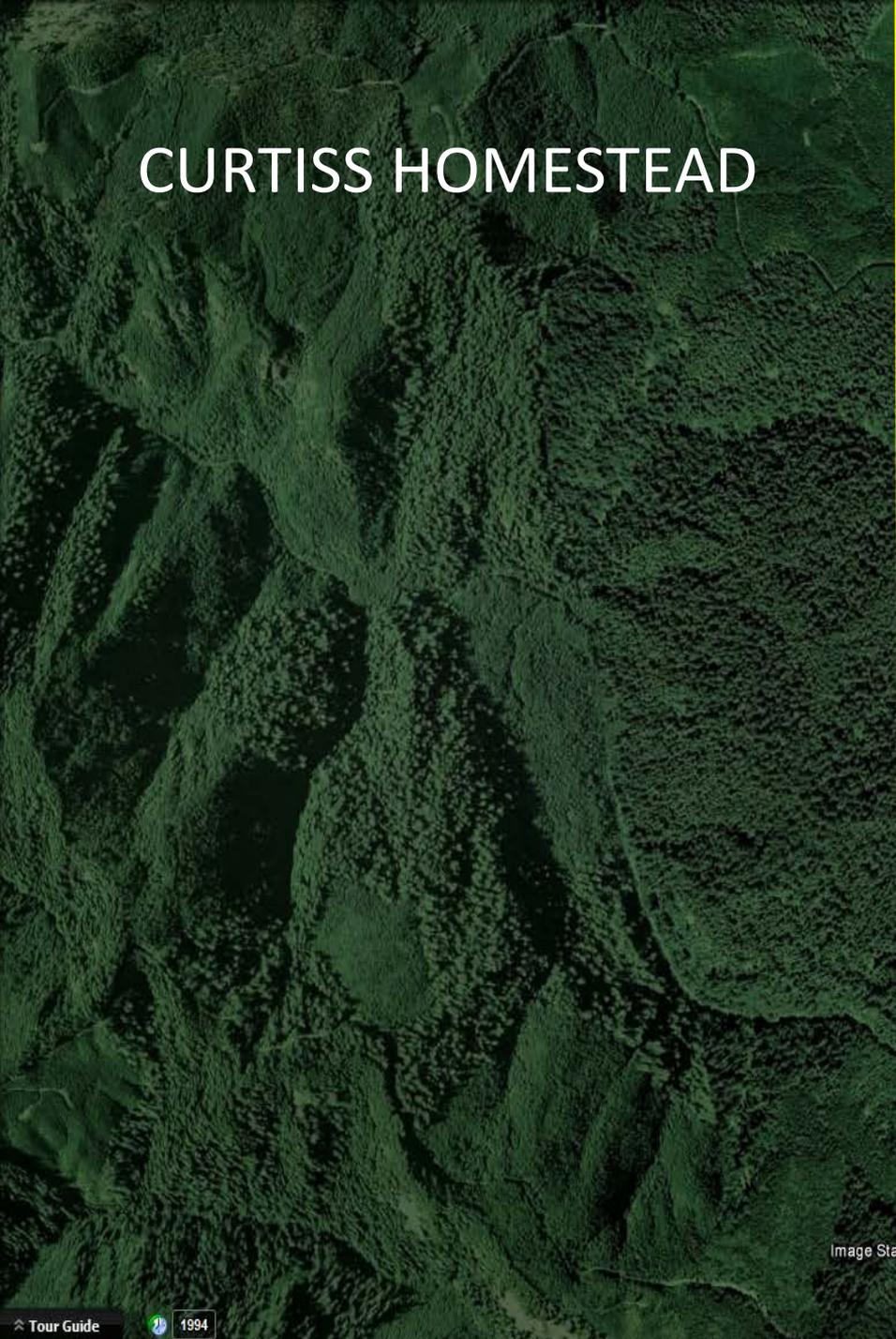
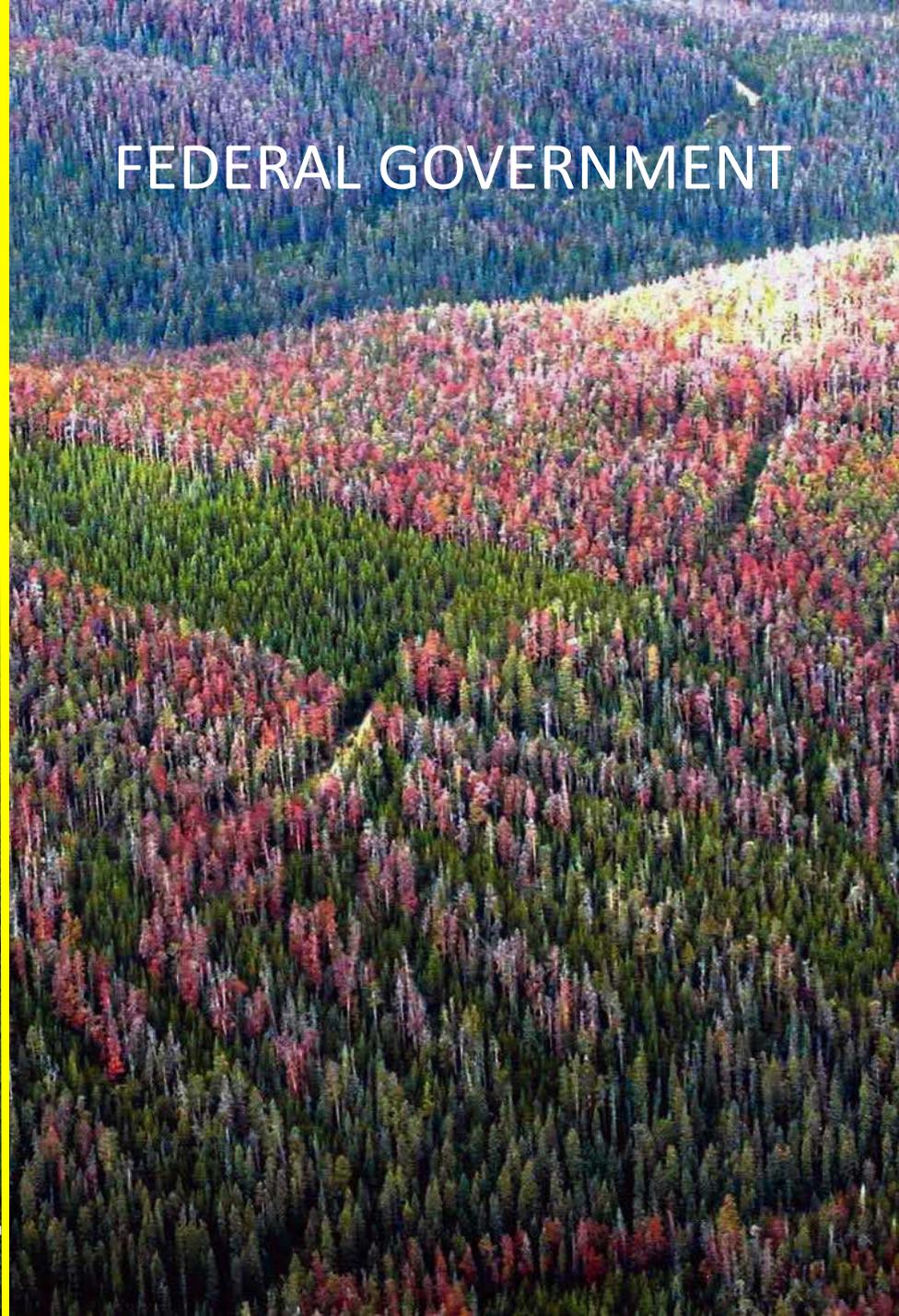


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Property can't be worth more than FMV

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Public has an interest exceeding FMV

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We're working on that . . .

State Law Controls . . . Probably

- Ninth Circuit has held that “[s]tate law governs the federal government’s recovery of damages for harm caused by fire in National Forests.”
- Exception if state law is “aberrational” or “hostile” to federal interests, in which case “federal common law” applies

Res ipsa loquitur

- Latin for “the thing speaks for itself”
- Evidentiary standard that, in certain circumstances, allows jury to infer negligence and causation.
- Wildfires are **CATEGORICALLY NOT** the type of injury that occurs **ONLY** if someone was negligent.



Sovereign Immunity

- The King can do no wrong.
- In the US, federal government may not be sued unless it has waived its immunity or consented to suit.
- Only waivers are the Federal Tort Claims Act (tortious conduct) and the Tucker Act (contract violations).
- Waivers not very broad, and only applicable to wildfire in very particular circumstances.
- Creates perverse incentives.



Goals of State Legislation

- Define a fair metric for valuing wildfire damages.
- Make it the exclusive remedy.
- Limit application of multipliers.
- Make it broadly applicable (don't single out the feds)
- Preclude application of *res ipsa* to wildfires.

California Legislation: AB 1492

- The result of a great deal of compromise.
- If a public agency is seeking damages, they must be “quantifiable and not unreasonable in relation to the pre-fire market value of the property, taking into consideration the ecological and environmental value of the property to the public.”
- In addition to short-term costs (e.g., fire suppression and remediation), the public agency “may also recover ecological and environmental damages caused by the fire, if those damages are quantifiable . . . taking into consideration the ecological and environmental value of the property to the public.” Those values include “lost recreational value,” “lost interim use,” “lost historical and archeological value,” “damage to wildlife, wildlife habitat, water or soil quality, or plants,” “damage to any rare natural features of the property,” and “lost aesthetic value.”

OFIC Legislation

- Wildfire damages equals:
 - Property damages, calculated as the lesser of:
 - The loss in fair market value, as determined by a state certified appraiser, or
 - The cost to restore the property to its original condition.
 - PLUS economic damages, styled in the statute as objectively verifiable monetary losses.
- Foregoing is the exclusive remedy for damages *to property*. Would not preclude personal injury claim. Does not affect any party's ability to recover fire suppression costs.

OFIC Legislation (cont.)

- Foregoing remedy may only be doubled if the wildfire resulted from recklessness, gross negligence, willfulness or malice.
- *Res ipsa loquitor* may not be used to infer negligence in wildfire cases.

The Session

- SB 709 and HB 3201 introduced simultaneously.
- SB 709 immediately took the lead.
- Introduced with 18 sponsors due to efforts of Senator Betsy Johnson.
- HB 3201 passed out of the House Agriculture Committee unanimously, but stalled in the House Judiciary Committee.
- SB 709 began to languish in Senate Judiciary under pressure for amendments.



Other States Move

- Idaho HB 132 passed March 12
 - Suppression costs, PLUS, economic damages, PLUS diminution in FMV OR restoration costs.
- Montana SB 345 passed April 24
 - Nearly identical language



Resolution: Res Ipsa

- Some concern re precedent.
- Different language, same place.
- (2) A person is not liable in a civil action for injury to or destruction of property arising out of a wildfire, except to the extent evidence demonstrates that:
 - (a) An action or inaction of the person constituted negligence or a higher degree of fault; and
 - (b) The action or inaction caused or contributed to the cause of the wildfire or caused or contributed to the spreading of the wildfire.

Resolution: Wildlife Values

- Some concern regarding lost wildlife.
- Representatives of the Deschutes Land Trust and The Nature Conservancy weighed in supporting legislation.
- Settled on language explicitly preserving ability of State to recover damages for the unlawful taking of wildlife under ORS 496.705 (poaching)

Bill Passed

- Passed unanimously out of the Senate on April 17.
- Passed unanimously out of the House on May 22.
- Signed by the Governor on June 4.

US v. Southern California Edison

- 2007 James Fire in Kern County that spread to Sequoia National Forest.
- Claims that AB 1492 “violates the Supremacy Clause of the United States Constitution, frustrates and is hostile to federal policy, and will not apply to the measure of damages in this case.”
- Settled quickly. Issue remains outstanding.

Federal Legislation Better

- The federal government should observe state property law, and should not be able to recover more than private landowners in an action for wildfire damages.
- Likewise, the federal government should not be immune to lawsuits when wildfires spread from federal lands to private lands.
- New law should be enacted that incentivizes the Forest Service to aggressively fight forest fires.

Questions?