

E – OUTLOOK

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Editor's Note: Any opinions expressed herein are those of the author alone.

County of Linn v. State of Oregon ***Oregon State Forests May be Managed for Drinking Water, Wildlife, Fisheries, Not Just Timber Production***

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Go Alliance

The Oregon Supreme Court has declined to hear an appeal in *County of Linn v. State of Oregon*. This class action lawsuit dealt with the management of state forests and was brought by 14 Oregon counties on the theory that the state had a duty to maximize logging revenues in order to achieve the “greatest permanent value” as required by state law. On September 16th, the Supreme Court denied the counties’ appeal without issuing a written opinion, cementing the Oregon Court of Appeals April ruling and formally concluding litigation that spanned six years, involved a \$1 billion dollar judgment, and had far reaching implications for state forest management.

On April 27, 2022, the Oregon Court of Appeals issued [an opinion](#) reversing a Linn County court decision that had awarded certain Oregon counties over \$1 billion dollars. The Court of Appeals found that the lower court’s decision erred in its interpretation of state law. At issue in the case was whether Oregon had to prioritize timber production over other values, such as drinking water, wildlife and fisheries, in its management of Oregon State forests, which amount to about 3% of Oregon’s forestland.

In the wake of excessive cut-and-run harvesting and the Tillamook fires in the 1920s and 1930s, Oregon counties obtained hundreds of thousands of acres of land that private timber companies had abandoned. The counties initially approached the Forest Service about taking on these lands, but the Federal government refused. The burden ultimately fell to the state as the counties were unable to take on the expensive rehabilitation effort. However, as a condition of the transfer, the state agreed to care for the land and share a

portion of timber revenues with the counties when the land became productive again. Today we know these lands as the Tillamook, Clatsop, Elliot and Santiam State Forests. The Forest Acquisition Act of 1941 required that management secure the “greatest permanent value of such lands to the state.”



Tillamook Forest Post-fire Logging
(Source: USDA)

Because there was great economic value in the burned old growth forests, the forests were extensively logged. This logging added even more impact to the fire disturbed landscape.

Tillamook Forest Post-fire Logging
(Source: USDA)

An extensive road network was constructed to remove the burned timber.



In 2016, several Oregon counties, with the support of various timber interests, sued the State of Oregon. The counties argued that the definition of “greatest permanent value” meant the state had to maximize the potential revenue from the lands by promoting logging over protecting water supplies, wildlife, and other forest values. The counties claimed the state had breached a contractual obligation to maximize the potential revenue and that it had not been logging enough.

The State moved to dismiss the case, arguing there was no contractual term requiring that logging be promoted over other values. The trial court denied the motion to dismiss and based on the challenged legal ruling submitted the case to a jury. The jury awarded the counties over \$1 billion. The State of Oregon appealed the award.

On behalf a host of fishing and conservations groups, Crag Law Center filed intervention papers in the trial court and filed an amicus curiae brief supporting the State's position on appeal. Oregon Forest Industries Council filed a brief in support of the counties' position. The fishing and conservation amici asserted that there is an ongoing and significant dispute over the past and current management of Oregon's state forests between the federal agencies entrusted with the management of threatened and endangered fish and wildlife on these lands and the waters that flow through them, the State of Oregon's Department of Forestry, fish and wildlife conservation interests, the counties, and industry.

In particular the fishing and conservation amici argued that whether the state has been and currently is in compliance with the federal Endangered Species Act and the Clean Water Act with respect to its forest practices on state land is a significant contested issue. They noted that it "is not possible for Linn County to demonstrate compliance across hundreds of thousands of acres of forest land, thousands of sub-watersheds and for multiple species while asserting that the State could have and should have logged more. Nor is it possible for Linn County to support a claim that the state could log more into the future given the potential for wildfire, species decline, drought, climate change and more."

In their briefing, the timber industry amici countered that: "[i]n an effort to persuade the Court that the jury should not have been tasked with deciding damages associated with the breach of contract theory presented by the Counties, Amici seek to cast doubt on the State's existing compliance with the ESA and CWA." The industry contended that the fishing and conservation group amici "miss the mark—both because they mischaracterize the requirements of those laws and because they misstate the issues presented to the jury and on appeal. The jury was correctly tasked with evaluating and weighing the evidence presented at trial to determine the damages caused by the State's breach of contract, and evidence in the record supported the jury's verdict."

The case was argued in February 2022, and two months later the Court of Appeals reversed the trial court as a matter of law. The Court of Appeals held that there is no obligation to secure the "greatest permanent value of such lands to the state" because the statutory language does not provide the clear intent necessary to conclude that an obligation to maximize revenue was vaunted above all other values state forests provide.

First, the Court of Appeals held that earlier cases had not held that the term “greatest permanent value” is a statutory contract between the counties and state of Oregon. The Court of Appeals noted that the Oregon Supreme Court had not previously described the land exchange under ORS chapter 530 as creating a contract, stating it is “unnecessary to describe the agreement between the state and counties in contract or trust terms.” Instead, in the earlier case, the Oregon Supreme Court instructed courts to look “to the statutes to determine what flows from them.”

Following that instruction, the Court of Appeals held that the “greatest permanent value” statute’s text, context, and legislative history did not reflect a clear and unmistakable intent to create a contract with the counties requiring maximizing logging and economic value for the counties. As a result, the jury’s verdict and the \$1 billion award were set aside. In other words, logging is not the prime directive. The state has discretion to determine how it secures the “greatest permanent value of such lands to the state” and the State of Oregon may balance the protection of water supplies, wildlife, and timber production.

Following the decision by the Court of Appeals the counties sought review by the Oregon Supreme Court. Now that the Supreme Court has declined to hear the case, the Court of Appeals opinion stands as the final word on this matter. As a result, the state will continue to have discretion in managing Oregon’s forests to achieve the “greatest permanent value” —the state will not have to prioritize timber extraction to realize the greatest economic return regardless of the impact on other values.



Santiam State Forest

(Source: R. Bloemers)

The Santiam State Forest provides many recreational opportunities.

Tillamook State Forest

(Source: Tee Sam)

The intact forests owned by the State of Oregon provide drinking water to many communities and habitat for wildlife.



SELECTED ADDITIONAL NEWS COVERAGE

Mateusz Perkowski, *Oregon Supreme Court Won't Consider Reinstating \$1 Billion Timber Verdict*, CAPITAL PRESS, Sept. 16, 2022, www.capitalpress.com/ag_sectors/timber/oregon-supreme-court-wont-consider-reinstating-1-billion-timber-verdict/article_2b6ab020-361a-11ed-9b9d-4fd4e48eff20.html.

Bradley W. Parks, *Oregon Supreme Court Won't Hear Appeal of \$1B Timber Verdict*, OREGON PUBLIC BROADCASTING, Sept. 16, 2022, www.opb.org/article/2022/09/16/linn-county-timber-oregon-supreme-court/.

Ted Sickinger, *Oregon Court of Appeals Hears Arguments Over \$1.1 Billion Verdict Against State for 'Underharvesting' Forests*, THE OREGONIAN, Feb. 23, 2022, www.oregonlive.com/politics/2022/02/oregon-court-of-appeals-hears-arguments-over-11-billion-verdict-against-state-for-underharvesting-forests.html.

Ted Sickinger, *Failing forestry: With \$1 Billion Timber Lawsuit, Not All 14 Counties are Big Winners*, THE OREGONIAN, Nov. 26, 2019, www.oregonlive.com/politics/2019/11/failing-forestry-with-1-billion-timber-lawsuit-not-all-14-counties-are-big-winners.html.