

Note: There are reams of legal arguments about the state and federal cases involved. The procedural issues are not the interesting stuff, but the issues of 5th Amendment “take” versus habitat “take” are. Because the lawyers all found so much to argue about, so can we.

**Case Study:
Boise Cascade Walker Creek Site**

Walker Creek site is in the North Coast Range of Oregon. This area is primarily 2nd growth timber, with about 1/3 of the property in the area owned by the state, the rest privately owned. There is no federal ownership within 40 miles. The resident population of owls was small but reproductive to 2003.

1986: Spotted owls seen on Walker Crk Site.

1988: Boise Cascade buys property:

1988: State of Oregon lists owl as threatened species.

1991: Boise sells all commercial timberland (1770 acres) except the 70-acre parcel around center of activity.

1990: Nest documented

1992: Northern spotted owl federally listed.

1992: Boise plan to harvest timber rejected by State because 70 acres of suitable habitat around nest not protected.

1993: Boise sues Oregon Board of Forestry on the grounds that “refusal to permit it to log the Walker Creek site constituted a taking under Article I, section 18, of the Oregon Constitution, as well as under the Fifth Amendment, as applied to the states through the Fourteenth Amendment, of the United States Constitution. Boise further alleged that the restriction on logging the other acres during the owl nesting season was a temporary taking under both constitutions.” (Boise Cascade v. State of Oregon 1994)

1997: Boise Cascade V. State of Oregon Board of Forestry: The trial court granted Boise partial summary judgment, ruling as a matter of law that a regulatory taking had occurred. The jury returned a verdict for Boise, and the trial court entered judgment for Boise in the amount of \$2,279,223 in damages for the temporary restriction on its logging of the Walker Creek site.

Subsequent appeals in 1999, 2003, 2005 kept reversing decisions. In 2005, a trial court entered judgment for Boise Cascade for a temporary taking of the timber, in the amount of \$25, plus costs. This amount was the difference between the value of the property at the beginning of the temporary taking in 1993, and the end of the temporary taking in 1997. Reversed on cross-appeal.

Jan 1997: Female spotted owl died. (Radiotagged)

Summer 1997: Male moved 11 miles away, new mate. No response during annual surveys at Walker Creek site.

1998: Boise requests from USFWS an advisory opinion: Can they log Walker Creek now?

1998: Subadult spotted owl wandering around the landscape (radiotagged); UFWS informed petitioner that the Walker Creek Unit “contain[ed] nesting habitat as well as foraging or dispersal habitat for spotted owls” and that logging would “create a risk of harm to the northern spotted owls which would use this site.”(Boise Cascade v. United States of America, 2002).

USFWS suggests that Boise prepare an incidental take permit (and associated HCP) to apply for permit to log, or consider land exchange.

Boise Cascade files suit against the FWS in federal district court, seeking a declaration that logging on the Walker Creek Unit would not “take” spotted owls within the meaning of the ESA, and an injunction prohibiting the FWS from taking any action to prevent the logging.

USFWS countersuit, resulting in a federal injunction against logging the site, and the court orders USFWS conduct surveys for spotted owls at that site (and within 1.5m of the site), then report back in fall. No response during surveys.

Late 1998: District court permanently enjoined petitioner from logging without a permit issued pursuant to Section 10 of the ESA. Boise did not appeal.

1999: HCP prepared by Boise. 5-year plan for harvesting the timber, follows state forest practices. USFWS assessment: “This alternative would eliminate spotted owl habitat for an unknown and indefinite period of time. This alternative would likely result in incidental take in the form of harm by impairing essential breeding, feeding, and sheltering behaviors of spotted owls.” Radiotagged subadult was found dead in May.

1999: USFWS conducts surveys for spotted owls; no response. USFWS says ITP permit no longer needed; injunction lifted in July 1999.

2000-2003: Suits, counter suits, appeals. Federal position was that Boise pursued a suit before trying to go through permit procedure (HCP) so the case was “unripe.” If the permit had been denied, then a claim of take would have been appropriate.

Boise’s position was the restriction of logging violated 5th Amendment take prohibition, plus the surveys by USFWS on Boise property were a “temporary taking.” In addition, Boise argued that had it applied for an incidental take permit in 1992 it would have been denied.

Background on the official surveying and management guidelines.

Oregon forest practices (1994): Operations must leave a minimum 70-acre “core area” which encompasses the nest site. The core area must consist of the best available suitable habitat in the vicinity of the site. Forest practices that do not maintain the core area’s habitat suitability are not allowed. This means, in most cases, timber harvesting within the core area will not be allowed.

According to “Procedures leading to Endangered Species Act compliance for the northern spotted owl” (USFWS 1990), the median home range size (based on 95% minimum convex polygon) for spotted owl pairs in the Oregon Coast Range is 4,766 acres, or the approximate equivalent of the area encompassed by a circle with a radius of 1.5 miles.

The USFWS protocols of 1990 that were what most State Forest Practices guidelines were based on were rescinded. Some of the arguments in this case had to do with whether an Incidental Take Permit was likely to have been granted back in 1992 if Boise had taken that route instead of going to court first. Because Boise was arguing that the guidelines didn’t make that likely, the defense took the position that the guidelines were not official and weren’t necessarily what the decision would have been based on.

USFWS Protocols for surveying proposed management activities that may impact Northern Spotted Owls.
Oregon Coast Ranges:

- Habitat w/in 1.5 mile radius should be surveyed.
- If no responses have been obtained from an historical site after 3 years of survey (using the guidelines established in this document), the site may be considered unoccupied, barring other evidence to the contrary

(Rescinded) Federal Incidental Take Guidelines (U.S. Fish & Wildlife Service 1990) recommended that to avoid incidental take of northern spotted owls, managers avoid any harvest activity that results in less than 500 acres of suitable habitat within a 0.7-mile radius of a spotted owl activity center. The guidelines also recommended that within the Oregon Coast Range province, managers avoid any harvest activity that results in less than 1906 acres of suitable habitat within a 1.5-mile radius of the activity center.

QUESTIONS:

A couple of conservation questions: How can habitat protection in low-grade habitat be specified? If the median home range is around 4766 acres, why are they arguing about a 70-acre core?

Legal questions: Did the government legally “take” the property, as prohibited by the 5th Amendment?
(Pages 132-134 in vol II)

When the organisms die and/or leave, should the landowner still be responsible for the habitat?

What would have changed if the owls had stayed?

References:

U.S. Department of the Interior, Fish and Wildlife Service. 1992b. Protocol for surveying proposed management activities that may impact northern spotted owls. Endorsed by the U.S. Fish and Wildlife Service, 7 March 1991, Revised March 17, 1992. Portland, OR. 17 p

Boise Cascade Corporation v. State of Oregon, (Oregon State Board of Forestry) (93-2018; CA A100855) 1999. Link: <http://www.publications.ojd.state.or.us/A100855.htm>

Boise Cascade Corp. v. Board of Forestry, 93-2018; A115966 (2003).

Boise Cascade Corp. v. Board of Forestry, 325 Or 185, 935 P2d 411 (1997).

Boise Cascade v. United States of America 2002. **No. 02-862**

Link: <http://www.usdoj.gov/osg/briefs/2002/Oresponses/2002-0862.resp.pdf>

Availability of a Habitat Conservation Plan and Receipt of an Application for an Incidental Take Permit for Boise Cascade Timber Company, Clatsop County, Oregon [Federal Register: December 23, 1998 (Volume 63, Number 246)][Notices][Page 71148-71150] www.fws.gov/policy/library/99fr10717.html