

PRESIDENT'S MESSAGE

This January, longtime Idaho Legal History Society president Ernest A. Hoidal passed the mantle of leadership on to me. Not only is Ernie's on-the-spot knowledge of Idaho legal history encyclopedic and thorough, his passion for ILHS and his stamina in advancing its mission are exemplary. Thankfully, he will continue to be integrally involved in the Society's work and mission. With the transition of the presidency, Kristina Running, a clinic professor at the University of Idaho College of Law, joined ILHS leadership as Secretary. William Fletcher, attorney at Hawley Troxell, continues on as Treasurer. Ernie, Kristi, and Will are the backbone of our all-volunteer Society. Your continued support helps us preserve Idaho's legal history. We can always use your time, your ideas, and your participation. — Ritchie Eppink

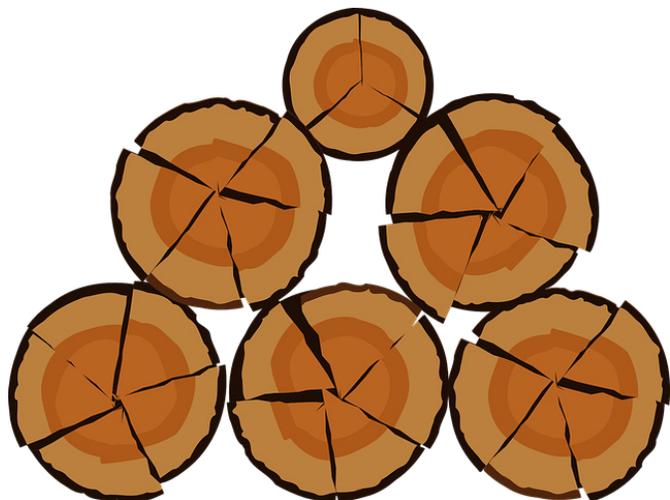
SPRING 2018

REGULATION HURDLES AFFECTING THE NORTHWEST'S TIMBER INDUSTRY IN THE 1990s

By Alexis Poul

The Northwest, especially Idaho, is widely known for its vast forests, vivid landscapes, and vibrant wildlife. It is also known for its timber industry. The Idaho Land Board predicts that it will sell 252 million board feet of timber in 2018—estimated to raise \$65 million to \$85 million for the state's endowment, which benefits public schools.¹ Though the timber industry is still active in Idaho, it has significantly decreased from production in the early to mid-20th century. *Continued on page 2*

TIMBER INDUSTRY, CONTINUED



The change is largely because of environmental regulations that were enacted in the 1970s and one U.S. Supreme Court case—*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. The *Sweet Home* case, a 6-3 decision, held that the Endangered Species Act of 1973 (ESA)'s definition of “harm” included habitat modification. This decision led to greater protection for endangered species but also led to government regulation of logging on private land.

History of the Endangered Species Act of 1973

After several environmental crises in the 1960s, such as the Santa Barbara oil spill and the Cuyahoga River catching on fire, Congress enacted multiple laws that began environmental regulation—including the Clean Air Act of 1970, the Clean Water Act of 1972, and the Endangered Species Act of 1973.² These laws targeted pollution and other environmentally destructive activities that threatened human health and the environment.³ The Endangered Species Act of 1973 (ESA)'s purpose is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.”⁴ Section 9 of the ESA prohibited anyone from “taking” any endangered species of fish or wildlife within the United States or the territorial seas of the United States.⁵ “Take” is further defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁶ In 1975, the word “harm” in the definition of “take” was further defined to mean “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or shelter.”⁷ In 1982, Congress further amended the ESA to authorize the Secretary of the Interior to issue permits for takings that would otherwise be prohibited by Section 9(a)(1)(B).⁸ This

permit process requires the permittee to prepare a conservation plan that outlines how that individual or corporation will “minimize and mitigate” the impact of its activities on threatened and endangered species.⁹

Roots of the Sweet Home decision

On June 26, 1990, the Northern Spotted Owl was listed as a threatened species under the ESA. This “medium-sized, chocolate brown owl” lives in dense canopied forests abundant with old-growth trees, snags, and trees with broken tops.¹⁰ Because of timber harvesting and land conversions, the owl's habitat was in decline, as was the number of owls.¹¹ Shortly after the owl's listing, the United States Fish & Wildlife Service (FWS) implemented guidelines for timber harvesting in and near spotted-owl sites.¹² These implementations included leaving 70 acres of the best available suitable owl habitat encompassing the owl activity center, 500 acres of suitable habitat within a 0.7 mile radius of a nest site or activity center, and 40 percent coverage with suitable owl habitat of the entire radius of a nest site or activity center.¹³ If affected parties did not follow these guidelines, they would be subject to criminal investigations for violating the takings provision of the ESA.¹⁴ In order to further protect the owl and its habitat, in 1994 President Bill Clinton imposed a plan that prohibited timber harvest and related activities on the owl's habitat on both federally and privately owned land throughout the Northwest.¹⁵

This new set of Northern Spotted Owl guidelines from the FWS struck fear in private landowners who relied on the timber industry for income. An example of this fear was evident in Norman Hutson, Jr., a tree farmer near Fort Lewis, Washington, who was interviewed by the *Seattle Post* in 1993.¹⁶ His 170-acre tree farm had been in his family for decades.¹⁷ He feared that the new restrictions “might shut down all harvesting on the site and deprive his family of an income and timber's value.”¹⁸ That same year, the *Seattle Post* reported that the Washington Forest Protection Association, which represented a majority of the state's timber companies, claimed that the “owl-circles” regulated by the guidelines covered more than 600,000 acres of its members'

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COVERED WAGON COFFEEHOUSE BRINGS LEGAL CONTROVERSY AND NATIONAL SPOTLIGHT TO MOUNTAIN HOME

By Ritchie Eppink



The 1960s finally reached Idaho in 1971—via Mountain Home. A famous civil rights lawyer, Mark Lane, ushered them here, carrying sparks from the burgeoning GI Movement—a wide-scale revolt against the Vietnam War inside all branches of the US military. On June 14, 1971, the day after the *New York Times* published the first excerpts of the Pentagon Papers, the Covered Wagon GI coffeehouse held its grand opening at 150 N. Main Street in Mountain Home, kicking off with a talk about “Your Military Rights.” Over the next six months, the Covered Wagon would rattle its conservative military community while drawing big-name celebrities to Idaho and prompting legal battles that embarrassed both military and civilian authorities in court.

Formed by Air Force servicemembers who met Lane after a Boise anti-war rally in April 1971, the Covered Wagon joined a network of GI coffeehouses outside military bases in the US and overseas. The coffeehouses nurtured the GI movement, providing a physical focal point to unite servicemembers’ anti-war resistance. The Covered Wagon in Mountain Home was the first GI coffeehouse near an Air Force base, born just as the Vietnam War was becoming primarily an air war.

The Covered Wagon immediately met with government suppression. The day of the coffeehouse’s grand opening, the *Idaho Statesman* reported that 247th Tactical Fighter Wing Commander Henry Warren had forbidden the Wagon from distributing its newspaper, the *Helping Hand*, on base. By the end of 1971, the Air Force had discharged twenty Covered

Wagon members. That August, the Air Force asked Wagon member Captain Larrie Knudsen for his resignation after he marched with 35 Air Force personnel across the desert from Mountain Home to the Morrison-Knudsen headquarters in Boise to protest the construction company’s war-related contracts in Vietnam. When Knudsen, adopted great-grandson of Morrison-Knudsen co-founder Morris Knudsen, refused to resign, Warren withdrew the security access Knudsen needed to do his work.

While the Covered Wagon’s “March Against Genocide” to protest Morrison-Knudsen was garnering national press coverage, Knudsen worked with judge advocate Captain Gary Aker to challenge Warren’s actions. Aker began helping Knudsen prepare claims under Article 138 of the Uniform Code of Military Justice, which allows servicemembers to seek redress for wrongs committed by their commanding officers. But Captain Neil Shepherd, the chief judge advocate at MHAFB, directly ordered Aker not to represent Knudsen. Upon getting that order Aker tendered his own resignation, telling the *Statesman* that the order conflicted with his ethical obligations as a lawyer. The national attention that the Covered Wagon was drawing attracted celebrity support from across the country and brought Jane Fonda, Dr. Benjamin Spock, Dick Gregory, Donald Sutherland, Howard Zinn, and others to Mountain Home and Boise.

Just weeks after the March Against Genocide, the Covered Wagon met even more violent suppression, this time from the Ada County Sheriff. On August 20, 1971, two dozen Covered Wagon members and supporters rallied in the lobby of the Rodeway Inn on the river in Garden City, where General William Westmoreland, US Army Chief of Staff, was the guest of honor at a Chamber of Commerce dinner. Despite the fact that Wagon protesters’ chanting and singing could not be heard inside the banquet, Ada County’s cowboy sheriff Paul Bright showed up out of uniform and, with Garden City police officers, assaulted and arrested nine Covered Wagon protesters including attorney Mark Lane and his wife, Carolyn Mugar. Even eyewitnesses hostile to the protesters were shocked by the violent police response. Lane told the Associated Press: “I have been arrested in Jackson, Miss., and with Martin

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COFFEE HOUSE, CONTINUED

Luther King in Baltimore. I covered police riots in Chicago and wrote a book about it. But for unprovoked, insane attacks upon peaceful men and women, I've never seen anything worse than Sheriff Paul Bright and his men in Boise." Boise attorney John Runft represented the arrested protesters and, after Attorney General Tony Park launched an investigation into police misconduct and KTVB footage disproved the official police reports, Ada County Prosecutor Jim Risch dropped all charges to avoid disgrace at trial.

Three months later the Covered Wagon prevailed in legal proceedings again, this time in two special Air Force court-martials. Airmen Jim Shaffer and Tom Spaulding faced six months hard labor, forfeiture of pay, and bad-conduct discharges for being in the car with a civilian who was on base handing out invitations to a Covered Wagon dinner. Represented by Lane and Aker, they raised First Amendment defenses to their charges for distributing unapproved printed materials—presenting legal issues that remain unsettled within military law. Though judge Lieutenant Colonel Allan Smith denied the defense's motion to dismiss on constitutional grounds, Shaffer and Spaulding never got to appeal the decision. The prosecution's case collapsed after its only eyewitness, an air security policeman, picked out the wrong man when asked to identify the accused at trial. Judge Smith found Shaffer not guilty, and the Air Force dropped charges against Spaulding hours later. The acquittal made the *New York Times* the next day.

The Covered Wagon itself had been burned to the ground by arson two weeks before. Mountain Home residents gathered on Main Street to watch it burn, many cheering. National celebrities led a national campaign to rebuild, and the Covered Wagon continued on until 1974, after the war's official end. The legacy of the Covered Wagon echoes in the national press still today, nearly fifty years later. A January 2018 *New York Times* op-ed recalled the Covered Wagon and the fire that burned it to the ground, lamenting that "despite the extraordinary political and cultural impact that dissenting soldiers made throughout the Vietnam era, their voices have been nearly erased from history."

Jeff Richard Schutts, "We Say No to Your War! The Story of the Covered Wagon GI Coffeehouse," master's thesis, August 1994.

Mark Lane, *Citizen Lane: Defending Our Rights in the Courts, the Capitol, and the Streets* (2012).

David L. Parsons, "How Coffeehouses Fueled the Vietnam Peace Movement," *New York Times*, Jan. 9, 2018, <https://www.nytimes.com/2018/01/09/opinion/coffee-cafes-vietnam-war.html>.

Anthony Ripley, "2 Airmen Cleared of Distributing Peace Leaflets at Idaho Base," *New York Times*, Dec. 10, 1971, at 49.

Ken Matthews, "Right to Dissent in Uniform Keynotes Legal Battle," *Idaho Statesman*, Dec. 5, 1971, at 11-C.

Ken Matthews, "Military Lawyer Says Dissenters Fear Reprisal," *Idaho Statesman*, Dec. 5, 1971, at 11-C.

Ken Matthews, "Author Mark Lane Matches Wits for GI Rights at Mountain Home," *Idaho Statesman*, July 18, 1971, at 19-B.

1892: MARTIAL LAW AND THE MINERS' UNION

By Kayla Griffin

Idaho is the 43rd state, admitted to the Union during a flurry of activity in 1889 and 1890 that saw the nation add five states in just seven months' time. As a frontier state with a small population and few businesses, Idaho was still struggling to establish itself when a nationwide depression hit in 1893. Businesses and industries alike began shutting down as unemployment skyrocketed. However, this was not the first time economic woes troubled Idaho: one of its predominant employers, the mining industry, began dealing with economic and legal issues as early as 1887.

The Bunker Hill and Sullivan Mining and Concentrating Company, a major mining company in north Idaho's Coeur d'Alene Mining District, reduced its miners' wages by 50 cents per day and their Car-men (transporters of the ore) employees' pay by a dollar per day—a huge reduction, in some cases a third of their income! Miners went on strike because of the wage gap, and the Car-men insisted they were miners and deserved the same pay. The company decided to restore the miners' wages but only increased the Car-men's pay by 50 cents. That action drove the miners to create the Wardner Miners' Union in 1887. This union was the first of its kind in the district and was organized in hopes of preventing future wage reductions.

Though everything seemed calm for a few years, by 1890 and 1891 trouble erupted again when mine owners introduced compressed-air drills. The introduction of that technology forced skilled miners to become shovel men and Car-men, which meant a reduction in their pay of 50 cents per day. Union members urged each mining company to adopt a uniform pay wage of \$3.50 a day, and most agreed. Bunker Hill



and Sullivan, however, did not.

For six months after the uniform wage was adopted, everything seemed peaceful. In January of 1892, however, most mines were forced to close because of increased railroad freight rates on ore shipped from the district. After railroads returned their rates to their previous lower prices, many mines reopened but decided to pay Car-men less than the uniform wage.

The Miners' Union refused to accept the wage reduction. Tensions increased dramatically between mine owners and union members, and Bunker Hill and Sullivan refused to hire any union men.

Mine owners imported non-union men, known as scabs, and also hired armed guards and detectives to protect them—in violation of Idaho's constitution and laws, which did not allow anyone to bring an armed force into the state. At first, union members tried to convince the scabs to join the union or leave the state. They were not successful, and by July of 1892 fighting broke out between the scabs and union members. During the battles one building, the Frisco Mill, was dynamited and several men were killed. Eventually the scabs surrendered.

Realizing that they were losing the war, mine owners asked Idaho governor Norman Willey for help. Willey proclaimed martial law in Shoshone County, called out the Idaho National Guard, and in turn asked President Benjamin Harrison to send federal troops. As the troops arrived, the scabs returned to the district under armed guard and continued to work for the wages that mine owners offered. Nearly six hundred members of the Miners' Union and sympathizers were arrested, with as many as 350 people locked up in warehouses and storehouses, dubbed "bull pens."

Thirteen union members were sentenced to time in the Ada County Jail in Boise, and four were sent to the Detroit House of Correction. By 1893 all prisoners were free; many returned to the Coeur d'Alenes, where they were welcomed as heroes. And six years later, another mine-labor war broke out in the mining district.

"Trouble Expected," *Salt Lake Herald*, May 22, 1892, <https://chroniclingamerica.loc.gov/lccn/sn85058130/1892-05-22/ed-1/seq-1/#words=dAlene+Coeur+D+EXPECT+expected+TROUBLE+trouble+d>

Gaboury, William J. "From Statehouse to Bull Pen: Idaho Populism and the Coeur d'Alene Troubles of the 1890's," *Pacific Northwest Quarterly* (1967), http://www.jstor.org/stable/40488223?seq=2#page_scan_tab_contents

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dcromwell@cableone.net

Chris Cuneo
ccuneo@parsonsbehle.com

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eahoidal@hoidallaw.com

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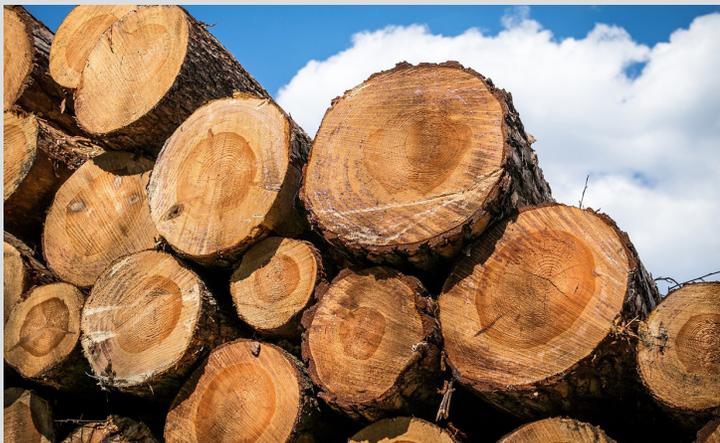
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TIMBER INDUSTRY, CONTINUED



lands.¹⁹ Further, in the same article, the *Post* reported that the Department of Natural Resources stated that these circles were “largely responsible for a thirty-percent drop in timber harvest on the lands it manages.”²⁰

The Decision and its Effects

Because of the threat that the Northern Spotted Owl regulations posed to the timber industry, the American Forest and Paper Association, a Washington-based trade association, organized a plaintiffs’ group in Sweet Home, Oregon.²¹ This group, composed of small landowners, logging companies, and families dependent on the timber industry, brought action against Secretary of the Interior Bruce Babbitt, claiming that the word “take” in the ESA should not be broadly interpreted to include habitat modification, as the definition of “harm” provides.²² They argued that if Congress had actually intended “take” to include habitat modification, it would have defined “take” to include “destruction, modification, or curtailment of [the] habitat or range of fish and wildlife.”²³ When the case reached the U.S. Supreme Court in 1995, the Court rejected this argument. It held that the interpretation of “harm” was sensible for three reasons. First, an ordinary understanding of the word “harm” would encompass habitat modification, as the dictionary definition of “harm” is “to cause hurt or damage to: injure” and habitat modification could lead to the injury or death of an endangered species.²⁴ Second, the inclusion of habitat modification in the definition of harm furthers the purpose of the ESA, which is to protect threatened and endangered species and their environment.²⁵ Finally, the Court concluded that Congress’s 1982 amendment, which established the permitting process for activities that would otherwise be prohibited by Section 9(a)(1)(B), suggests that both indirect takings, such as habitat modification, and deliberate takings are prohibited by the ESA.²⁶ The Court reasoned that this interpretation was sensible, as the permit procedure would “have little more than

[an] absurd purpose” if Section 9(a)(1)(B) only applied to deliberate takings.²⁷

After the Supreme Court released its decision, environmentalists had reason to celebrate. However, shortly afterward, the *New York Times* released an article reporting that conservatives in Congress were moving to amend the law in such a way as to overrule the Court’s decision.²⁸ Despite Congress’ disapproval, Interior Secretary Babbitt stated that “the agency welcomed the Court’s decision because protecting habitat was the best way to prevent extinctions,” and he encouraged private landowners to negotiate habitat conservation plans with the agency on their property.²⁹

Conclusion

Though the timber industry is still active in the Northwest, especially in Idaho, there is a long history of the industry’s differences with environmentalists, politics, and the court system. Despite these differences, many families and companies rely on the industry, and consumers can be satisfied that paper products will still be available in grocery stores and the Northern Spotted Owl and many other endangered species are still protected from extinction.

1. Betsy Z. Russell, “Land Board Approves Timber Sale Plan for Next Year, Draws Praise from N. Idaho Timber Firms,” *Spokesman-Review Blog*, Apr. 18, 2017.
2. Todd Aagaard et al., *Practicing Environmental Law* 28-29 (2017).
3. *Id.* at 27.
4. The Endangered Species Act of 1973, 16 U.S.C.A. §1531(b).
5. *Id.*, §1538(a)(1)(B).
6. *Id.*, §1532(19).
7. 50 C.F.R. §17.3, 40 F.R. 44415 (1975).
8. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407, 2414 (1995).
9. *Id.*
10. “Northern Spotted Owl,” U.S. Fish & Wildlife Service - Oregon Fish and Wildlife Office, 2017.
11. *Id.*
12. Albert Gidari, “The Endangered Species Act: Impact of Section 9 on Private Landowners,” 24 *Envtl. L.* 419, 426 (1994).
13. *Id.* at 426-27.
14. *Id.* at 426.
15. John H. Cushman, Jr., “The Supreme Court: Endangered Species; Environmentalists Win a Victory, but Action by Congress May Interrupt the Celebration,” *New York Times*, June 30, 1995.
16. Gidari at 438-39.
17. *Id.*
18. *Id.*
19. *Id.* at 440.
20. *Id.*
21. Keith Schneider, “Power to Protect Species May Hang on a Word,” *New York Times*, Jan. 6, 1995.
22. *Sweet Home*, 115 S.Ct. at 2410-11.
23. *Id.* at 2411.
24. *Id.* at 2412-13.
25. *Id.* at 2413.
26. *Id.* at 2414.
27. *Id.*
28. Cushman, Jr., *supra*.
29. *Id.*

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