

National Forest Law Newsletter

by Ryan Woody

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This monthly electronic newsletter is a service provided by Attorney Ryan L. Woody for the benefit of clients and forest stakeholders. The vagaries and complexity of the laws and current issues in National Forest Management have, for many lawyers, and professionals alike, made keeping current laws an arduous and laborious task. It is the goal of this electronic newsletter to assist in the dissemination of new legal developments as they occur within the National Forests. If anyone has co-workers, associates or other individuals who wish to be placed on this e-mail mailing list, please provide their e-mail addresses to Ryan Woody at rwoody@mwl-law.com. I appreciate your friendship and your business. Please visit and bookmark my new daily blog www.nationalforestlawblog.com

Below: Chugach National Forest, Alaska

IN THIS ISSUE



<u>Summers v. Earth Island: Supreme Court Update.</u>	2
<u>National Forest Death Penalty Case: U.S. v. Gabrion (6th Cir. 2008)</u>	6
<u>Book Review: Forty Years a Forester: 1903-1943</u>	3

Supreme Court: Summers v. Earth

THE CASE

Environmental plaintiffs challenged Forest Service regulations that exempted certain decisions from notice and comment review. The plaintiffs alleged that these regulations violated the Appeals Reform Act, 16 U.S.C. 1612. The plaintiffs brought suit on the basis of an affidavit from Jim Bensman, who claimed to have suffered from his loss of appeal on the affected projects.

On June 5, 2003 the Forest Service published its final implementing procedures for a new category of projects, fire rehabilitation activities on less than 4,200 acres. These Fire CE projects would be categorically exempted from NEPA review and can be implemented immediately. Similarly, salvage timber sales of 250 acres or less were also exempted from NEPA review.

After the 2002 McNally fire in Sequoia National Forest, the Forest Service prepared a 238 acre post-fire salvage timber sale called the "Burnt Ridge Project". Immediately following the approval of this project Earth Island and the environmental plaintiffs filed suit alleging that the categorical exclusion violated the ARA and NEPA. The trial court agreed and applied a nationwide injunction against the regulations. The Ninth Circuit Court of Appeals affirmed the trial court's decision in part and reversed it in part. *See Earth Island Institute v. Ruthenback*, 490 F.3d 687 (9th Cir. 2007).

THE ISSUES

Standing. Standing refers to a requirement that the plaintiff prove that he or she has suffered an injury as a result of a defendant's conduct. In this case, the plaintiffs alleged that Mr. Bensman suffered a procedural injury from his inability to review and challenge the proposed project. In addition, Bensman alleged that he would suffer an aesthetic injury and loss of recreational opportunities. The trial court found that Bensman had alleged a procedural injury under the ARA and that he properly alleged an aesthetic injury. The Ninth Circuit Court of Appeals agreed with the trial court.

Ripeness. Ripeness is the concept that a legal challenge is premature if an action is not final or the record is incomplete. In this case the Forest Service argued that the regulations were not ripe for the court's review because they have not yet been applied. As it turned out the timber sale was actually withdrawn by the Forest Service. The



court was not persuaded by the withdrawal of the sale and felt that the record was complete enough for review. The court of appeals agreed in part and reversed the trial court holding that the plaintiffs could only challenge the two regulations that were actually applied to the Burnt Ridge Sale.

Facial Challenge. This refers to the challenge of certain statutes or regulations in their entirety as opposed to a specific application. Part of the plaintiffs' argument was that these projects occur too quickly and without notice so that they needed to facially challenge the regulations. They claimed that the individual facts of each project is not what is important because each case involves the same legal question - whether the regulations violate the ARA.

Remedy. Remedy refers to the mode or form of the relief that the court orders for the prevailing party. In this case, the court issued a nationwide injunction against the regulations. The Forest Service had argued that the injunction may only apply against the regulations within the Eastern District of California, where the case originated.

THE SUPREME COURT

The Supreme Court likely took the case on appeal to address and clarify the prudential doctrines of standing and ripeness. These are always important issues for the Court. The Court does not want the federal courts to entertain lawsuit where there is no actual injury to the plaintiff. This case presents a good example for the Court because the plaintiffs' have presented a very marginal case on both standing and ripeness.

ORAL ARGUMENT

The parties argued before the Supreme Court on October 8, 2008. Based on the tenor of questions, the Court is deeply concerned with the issue of standing. Ed Kneedler argued for the Forest Service while Matt Kenna argued for the environmental groups. I've highlighted some key exchanges from the oral argument transcript below:

JUSTICE SCALIA: Suppose the statute says anybody in the country can sue to stop a violation of the due - due process clause. Would that statute be valid?

MR. KNEEDLER (F.S.): No. You - you would have to - you would have to show a particular injury and -

JUSTICE SCALIA: The Article III requirements cannot be eliminated by Congress?

MR. KNEEDLER: That is - that is correct. And - and there is no indication at all that in this statute, which was just intended to modify the Forest Service's intent to change its internal decision-making processes - and Congress wanted to restrict what - what the Forest Service was going to do - that it thereby meant to change the

fundamental nature of the agency's own internal regulations which would not -

.....

CHIEF JUSTICE ROBERTS: Counsel, to read just one sentence to you from the National Wildlife Federation case, because I think it's the biggest hurdle you fact. It's on page 15 of the government's brief. It says: "A regulation is not ordinarily consider[ed] the type of agency action ripe for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions and it's factual components flushed out by some concrete action applying the regulation to the claimant's situation."

It seems like a high hurdle for you to surmount.

MR. KENNA: Mr. Chief Justice, I think that needs to be read in combination with the footnote 2 to that decision, which says of course if you have a regulation applying a particular measure across the board -

CHIEF JUSTICE ROBERTS: That's the Abbott Labs exception, isn't it? I don't think anybody suggests that that is applicable here.

...

MR. KENNA: Yes. But I think where as here the regulation has been applied to the plaintiffs on an ongoing basis, it's conceded that it was applied thousands of times nationwide.

CHIEF JUSTICE ROBERTS: But you have not pointed to a particular fact under any of these affidavits when it was applied to any of the plaintiffs. In what the National Wildlife Federation case said, "Some concrete action applying the regulation to the claimant's situation."

MR. KENNA: We have the Burnt Ridge Project itself. And then once we have shown standing, it becomes a matter of mootness.

CHIEF JUSTICE ROBERTS: You haven't shown any standing with respect to the Burnt Ridge Project on an ongoing basis because that has been settled. It's outweighed - it's out the door.

There was, of course some lighthearted moments when Mr. Kenna broached the topic of Christmas tree permits when making a point about how the Forest Service appeals process worked:

MR. KENNA: ...Now, that's the way it worked under the Forest Service before the Appeals Reform Act was passed and what Congress meant to keep in place

substantively with a different procedure through the ARA. So a Christmas tree permit, for instance, an original Christmas tree permit is exempt, not because it's insignificant. We've never conceded, and that's what the whole merits were about, that it's -

JUSTICE SCALIA: You need a permit to have a Christmas tree? Where is this?

(Laughter.)

MR. KENNA: I'm sorry, Your Honor. So if you want to go and cut your own Christmas tree -

JUSTICE SCALIA: I know what you're talking about.

MR. KENNA: You know, I get one every year. I just go down to the local Kreger's hardware store; I pay my \$7 to the clerk. There's no exercise of discretion, and you can go and cut your own tree. Now, that is exempt, not because it's environmentally insignificant, which, you know, it probably is in most cases, but because there is no decision approving it. And that's the way it has always worked, and that's where we think the line needs to be drawn, although, of course, the merits were not raised by the government here.

CHIEF JUSTICE ROBERTS: You cut down a tree in the national forest without approval?

(Laughter.)

MR. KENNA: I did get the permit, Your Honor.

CHIEF JUSTICE ROBERTS: Oh.

(Laughter.)

CONCLUSION

I strongly suspect that the Court will reverse the Ninth Circuit's decision. I think the Court will find not only that the dispute was not ripe for adjudication after the site-specific action was withdrawn, but also that the plaintiff's lacked standing to challenge the action. In light that conclusion, I suspect the Court will avoid addressing whether the nationwide injunction was proper.

Should you have any specific questions, feel free to contact me at rwoody@mwllaw.com

Huron-Manistee National Forest

“Curious Issue of Jurisdiction” - Murder in a National Forest Leads to Death Penalty for Michigan Man

U.S. v. Gabrion, 517 F.3d 839 (6th Cir. 2008)

The Sixth Circuit Court of Appeals recently denied a request for a rehearing en banc by a Michigan man convicted of federal first-degree murder. The case presented an interesting jurisdictional question.



Marvin Gabrion picked the wrong lake when he decided to kill Rachel Timmerman. At some point between June 3, 1997 and July 5, 1997 Mr. Gabrion drowned Ms. Timmerman in Oxford Lake, which lies within the Huron-Manistee National Forest. Contrary to Michigan law, federal first-degree murder carries the death penalty.

After the initial briefing was completed, the Court of Appeals requested the parties to provide supplemental briefs about whether the court had jurisdiction over the crime. The “curious issue of jurisdiction” was whether the federal government ever provided notice and accepted jurisdiction over the southern portion of Oxford Lake back in 1940. Without federal jurisdiction, Mr. Gabrion’s conviction would be overturned and he would be free subject to prosecution by the State of Michigan. More importantly for Gabrion, the death penalty would be off the table. Instead of deciding the issues, the case was remanded to the trial court on the issue of jurisdiction. As it turned out the federal government never provided notice back in 1940 pursuant to 40 U.S. C. § 255. Accordingly, the trial court later concluded that concurrent jurisdiction existed to prosecute crimes on Oxford Lake - meaning that either Michigan or the federal government was free to prosecute Gabrion. The conviction stood and the defendant appealed contending that the U.S. never had jurisdiction, concurrent or otherwise.

As explained by the Court of Appeals the issue on appeal was whether the Congress has legislative jurisdiction over the Oxford Lake parcel on the Huron-Manistee National Forest so that its federal murder statute applied. Essentially, did Congress have authority over the Oxford Lake parcel under which the federal prosecutor could utilize

the federal murder statute.

The answer came down to the history surrounding the original conveyance. The conveyance was exceedingly complex, so I will merely summarize. In 1923 Michigan consented to the cession of forest lands to the federal government, but the State was to retain concurrent criminal jurisdiction over those lands. Specifically, the Oxford Lake parcel was deeded to the federal government on July 11, 1939. The federal government did not formally acknowledge the conveyance. Later, in 1940 Congress amended 40 U.S.C. § 255 to require that the government specifically “accept” jurisdiction over the lands to be acquired otherwise no such federal jurisdiction was accepted. But the court found that the 1940 amendment did not apply here because it not retroactive. As such, no express acceptance was necessary when the government acquired the Oxford Lake parcel. In the end, the court found that the court had concurrent jurisdiction over crimes committed in National Forests. The main opinion upheld the jurisdiction under the Enclave Clause, while a concurring opinion would also have upheld the jurisdiction under the Property Clause and the Commerce Clause.

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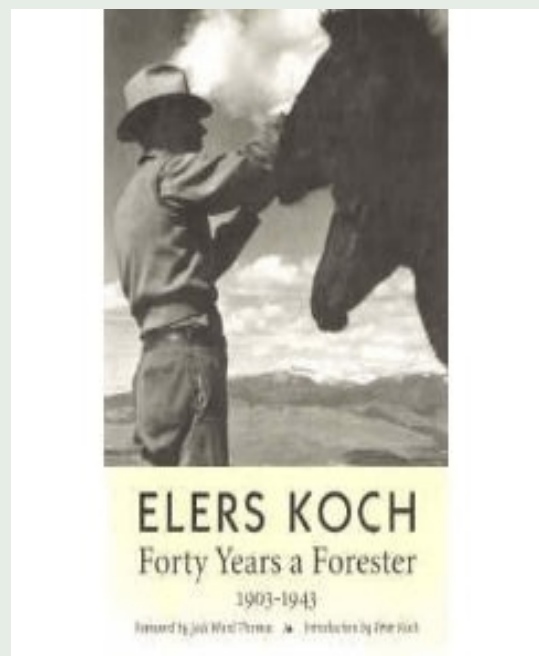
Forty Years a Forester: 1903-1943, Elers Koch

Forty Years a Forester: 1903-1943

by Elers Koch, Peter Koch (Introduction), Jack Ward Thomas (Forward)

On my recent trip to Montana, I found an interesting memoir by Elers Koch. The memoir begins: “I think I was born to be a forester - the profession of forestry in the United States opened up just in time to offer me the kind of life and work that fit my desires and upbringing.”

Mr. Koch was a Forest Service forester in northwest Montana after the turn of the century. His memoir is written simply but provides a intriguing look at life as a forest ranger before the car culture, cell phones and the internet. Despite the generational gap, Koch’s frustrations will sound familiar, including, disconnect with Washington and critiques of the Forest Service’s fire management policies.



Koch was a Montana native but received his education at the Yale School of Forestry under Gifford Pinchot. As to "G.P." Koch recalled:

He was a man of the most impressive appearance and magnetic personality. It was his almost religious devotion to the cause of forestry and conservation that inspired a loyalty and interest in the job for its own sake that was probably never equaled in any government bureau. In some ways his character resembled that of Franklin D. Roosevelt. Both men professed, and I think sincerely, the greatest solicitude for the small man - the underdog. At the same time, both were aristocrats by birth, training and environment, and inherited wealth. While G.P could be very affable and free and easy with woodsmen and mountain men and small ranchers, he never could make himself one of them; similar to Roosevelt, he was always the aristocrat, and his affability contained something of patronage. One never forgot that he was Gifford Pinchot, the chief, and no one ever dreamed of taking any liberties with him. I recall one young man in the office routing a document to his desk marked simply "Pinchot." He was given a severe reprimand for leaving off the "Mr."

Although not opposed at all to logging, of the business, he wrote:

I have spent many days in logging camps, necessary in the course of my work, but I never did like them. Logging, at best, is a ruthless and violent business. The camps are temporary and purely utilitarian, and always a scar in the midst of the forest, leaving apparent destruction behind them.

He wrote of a particularly enlightening exchange with a Washington politician that shows that not much has changed. After explaining to the Senator that the agency had already spent over \$200,000.00 yet it could scientifically do nothing to fight against a local infestation of bark beetle, the Senator replied:

"I will be glad to help with this project, and I am sure I can get the necessary appropriations through the congressional committees," he said.

I repeated my argument.

"But, Senator," I said, "I think you don't understand. On the basis of our best judgment and our technical advice, it is not desirable to continue the work, and we don't want the money."

Senator Wheeler looked at me in amazement.

"Well," he said, "you are the first government man I ever talked to that didn't want an appropriation when he could get it."

While Koch is clearly not a trained writer, his memoir holds the reader's interest. His writing style can be compared to the old stories that a grandfather tells at family gatherings. But that should not overlook his ability to describe the joys of working on

the forests in Montana. In a chapter where he discusses the science of growing trees, he drifts into a beautiful yet systematic description of the forest that he so loved.

There is no more beautiful forest than a mature white pine stand with the noble gray-ridged clear column of the white pine rising above the vivid green crowns of the associated hemlock and cedar and white fir. The ground cover in such a virgin forest is particularly fascinating and beautiful; along the watercourses and in moister places are fringes of delicate maidenhair fern and great clumps of the tropical-looking sword fern. There is the Clintonia or queen's cup with its single turquoise blue berry, one of the purest blues in nature, wild ginger with its broad green leaves and aromatic root, gold thread whose roots stripped of bark are of a clear golden yellow, the pale saprophytic dutchman's pipe, and masses of stringers of club moss. The fallen half-rotten logs are often covered with trailing mats of the lovely little Linnes or twin flower.

Koch's book is certainly worth the read. I recommend it for a long weekend, especially those that lay ahead this winter. To find the book, try Alibris or Amazon. Used copies can be found as low as \$1.99 for the paperback version.

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