Since passage of several environmental laws in the late 1960s and 1970s, management of national forests in the United States has been increasingly challenged in the courtroom. The four national forests in the East Texas "piney woods" region (the Angelina, Davy Crockett, Sabine, and Sam Houston National Forests) collectively total over 600,000 acres. Conflicts over management and use on the four national forests began in the mid-1970s, highlighting the difficulties of managing in a litigious atmosphere.

HISTORY OF LITIGATION ON THE NATIONAL FORESTS IN TEXAS

By the 1930s, East Texas was a "has-been" forest area. The big lumbermills of the early century had left thousands of acres of cutover land, little of which had been or was being reforested. Much of this land provided no income to the owners or benefits to the local economy. Taxes on the land made land ownership a liability. In 1933, the Texas Legislature passed legislation that authorized the United States to acquire land for the establishment of four national forests. Land purchase began under the authority of the Weeks Law of 1911, specifically for the protection of watersheds and the production of timber. The purchase consisted of tracts both large and small from hundreds of individual landowners and timber companies.

Many tracts were completely denuded, but some had existing timber stands of varying ages and conditions. The first priorities after the purchase were to establish forest cover, improve the quality of existing stands, and to protect the area from fire. Through such programs as the Civilian Conservation Corps, millions of trees were planted, stand improvement measures carried out, and administrative facilities (such as roads, buildings, and recreation areas) were built. The national forests in Texas began to take shape. Under good management, they were soon able to provide modest amounts of harvestable timber. As the forests grew and prospered, harvests increased to the point that in the late 1960s the

BY BETTY JONES

USDA FOREST SERVICE PHOTO #372305.

A view of the entrance to Ratcliff Lake Recreation Area on the Davy Crockett National Forest from 1938 shows evidence of the cutover landscape the Forest Service purchased a few years before.

USDA FOREST SERVICE PHOTO #406540.

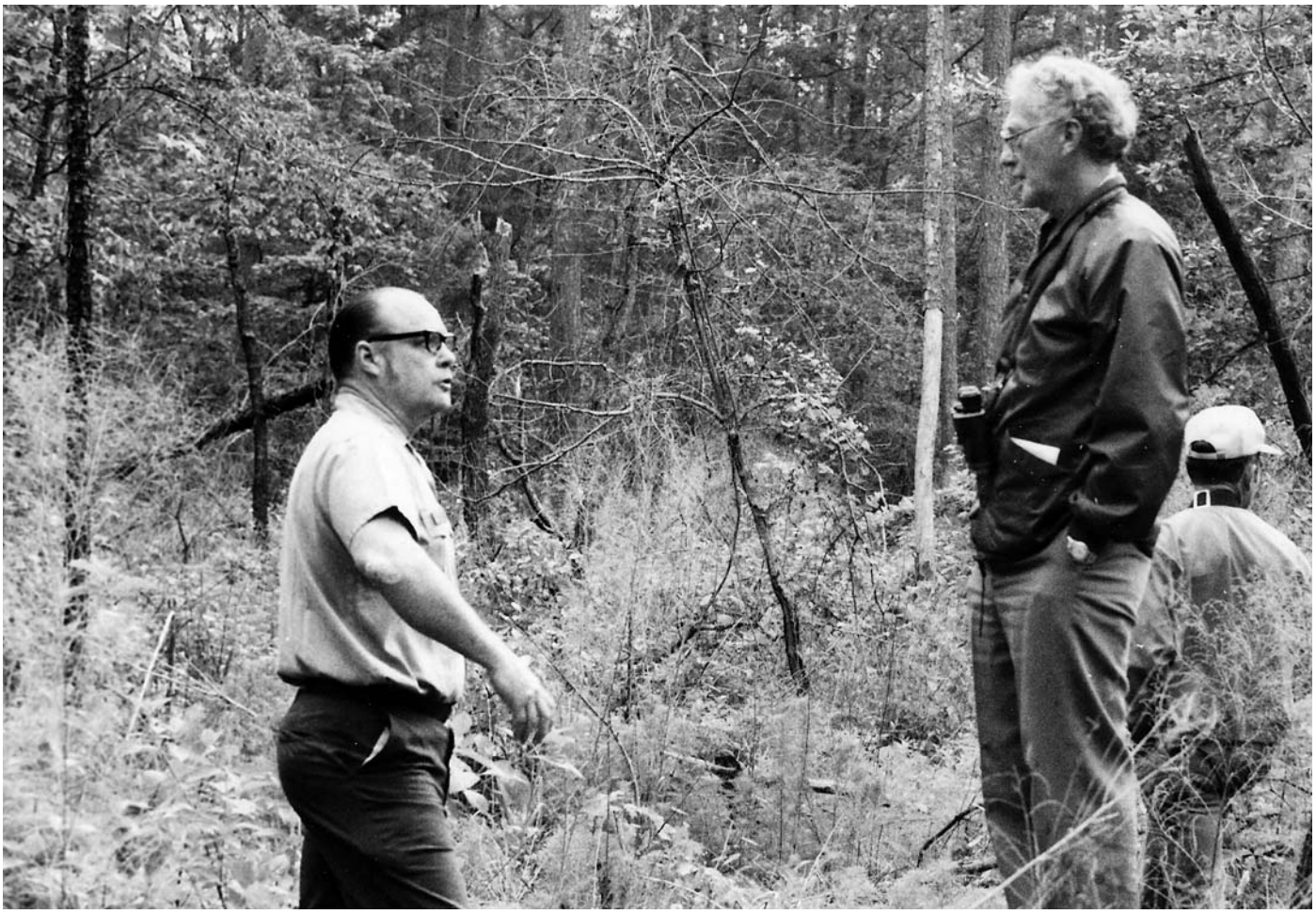
A Civilian Conservation Corps worker plants pines in the Angelina National Forest in the 1930s.

annual cut was about 100 million board feet. This was a conservative use of the resource as annual growth exceeded 150 million board feet. The forests also provided over one million man-days of recreation use annually, habitat for hundreds of wildlife species, forage for several thousand cattle, and protection of watershed quality.

One tract acquired in the 1930s had by the 1970s a stand of Southern yellow pines more than sixty years old. Referred to as the Four Notch Area of the Sam Houston National Forest, it was used for many years as a testing area for varied management techniques such as intensity of thinning and timber stand improvements. By the mid 1970s, because of the age of the timber, tree vigor was declining, the area was experiencing insect attacks, and was ripe for wildfire or other catastrophic events. It was in need of at least a thinning, or in many spots, a removal cut and regeneration. The practical management of the Southern yellow pine traditionally held that foresters emulate nature by using regeneration methods that result in even-aged stands. These methods include seed tree and shelterwood cutting, which result in natural regeneration, or clearcutting, which is followed by planting. The Forest Service made plans for these activities and proposed commercial sales to accomplish it.

Learning of these proposed actions, Edward C. "Ned" Fritz, a Dallas-based attorney and chairman of the Texas Committee on Natural Resources (TCONR) objected. Fritz founded TCONR in 1968 to work for the establishment, preservation, and proper management of wilderness areas and wildlife habitat in Texas. A meeting was arranged for Fritz, outdoors writer Mike Frome, and Forest Supervisor John Courtenay to examine the area and to discuss the situation on April 27, 1976. Acting on behalf of TCONR, Fritz requested a halt to the proposed timber sales because he was adamantly opposed to any use of clearcutting, a timber management technique widely used by the Forest Service throughout the country at that time. In addition, he had hopes that the Four Notch area would be designated as wilderness, and wanted it left as it was. His request was denied on the basis of the need for forest health and the commitment to industry to sell its timber on the market.

On July 2, 1976, TCONR brought suit, charging violations of the Wilderness Act, Multiple Use-Sustained Yield Act, National Environmental Policy Act (NEPA), and Endangered Species Act (ESA). In *Texas Committee on Natural Resources v. Earl L. Butz, Secretary of Agriculture*, TCONR argued that timber cutting, site preparation, and regeneration (replanting) would cause unnecessary damage to the natural environment, and argued that even-age management (clearcutting, shelterwood cutting, and seed tree cutting) violated provisions of NEPA. The case was assigned



USDA FOREST SERVICE PHOTO.

Forest Supervisor John Courtenay, left, discussed management issues with Ned Fritz of the Texas Committee on Natural Resources (TCONR) during a tour on the national forests in 1976, around the time TCONR filed its first suit. Courtenay was the first of four forest supervisors for the U.S. Forest Service involved in litigation from TCONR.

to Federal District Judge William Wayne Justice in the Eastern District of Texas in Tyler. At a pre-trial hearing five days later, Judge Justice stated that he was strongly opposed to even-age management and clearcutting. The judge's statement gave an indication of how he might rule on the case, and set the tone for the next three decades of trials and hearings in district court.

By the time the suit came to trial in December 1976, the Sierra Club and the Wilderness Society had joined TCONR as plaintiffs. The original complaint had been amended to include violations of the National Forest Management Act (NFMA) soon after it was signed into law in October 1976, and before the Forest Service had a chance to implement specific provisions of the act. NFMA is the primary statue governing the administration of national forests. NFMA's goal is to enable multiple use and sustained timber yield. It requires the secretary of agriculture to assess forest lands, develop a management program based on multiple-use, sustained-yield principles, and implement a resource management plan for each unit of the National Forest System. The plans are reviewed and revised as needed on a ten-year basis. The act was deemed necessary after several debates over the legality of clearcutting forests. The National Environmental Policy Act was enacted in 1969 to encourage productive and enjoyable harmony between man and his environment, and to promote efforts that will prevent or eliminate damage to the environment and biosphere. TCONR repeatedly cited these acts in their challenges to national forest activities, believing that the planned projects themselves, or the way they were being carried out on the ground, were in violation of the provisions of NFMA and NEPA.

During the trial, the Forest Service defended its position of employing proven scientific forestry techniques in managing the national forests for multiple uses. Government attorneys argued that the court's role was to ensure that an agency followed NEPA procedural requirements and that it was not the court's function to settle disputes between scientific communities. But, when Judge Justice issued his ruling on May 24, 1977, he enjoined even-age management, which effectively shut down the commercial sale of timber from the Texas national forests. The government appealed to the Fifth Circuit Court of Appeals. Nearly a year later, it reversed the district court and dissolved the injunction, which had held that the practices of even-age management (specifically clear cutting, shelterwood cutting, and seed-tree cutting) were in violation of NEPA. The Fifth Circuit held it was improper for the district court to enjoin the Forest Service management practices under NEPA until such time as the agency implemented a forest plan in accordance with NFMA. The ruling did not satisfy TCONR, nor did the forest plan because of its provision for even-aged management.

After the injunction was lifted, forest operations resumed on

USDA FOREST SERVICE PHOTO.

An aerial view of the Four Notch area of the Sam Houston National Forest shows the devastation beetles caused in the absence of control activities. The lightest areas, which comprise the majority of the area shown, are those affected by the beetle. Control activities had been suspended as a result of TCONR's challenges in federal court.

the national forests in Texas until 1985, when TCONR filed a request for preliminary injunction to halt the agency's Southern Pine Beetle (SPB) control activities in five newly designated wilderness areas. Ned Fritz had been deeply involved in the creation of all five areas, helping to draft the legislation to have them established in 1984. The Forest Service began cutting trees that harbored the beetles along with a narrow buffer strip around them to stop the spread of the beetles onto adjoining private land, and to protect colonies of the endangered Red-cockaded Woodpecker (RCW). TCONR filed for preliminary injunction to halt the control activities, charging that the control measures were ineffective, unnecessary, and violated the Wilderness Act, ESA, and NEPA. TCONR sought declaratory and injunctive relief and asked the court to set aside the agency's pest control program.

In a hearing before Federal District Judge William Steger of the Eastern District of Texas, the Forest Service maintained that exhaustive research had established the usefulness of the control techniques, and cited existing legal authority that allowed the use of adequate measures to control the beetles in wildernesses while still protecting wilderness values. The small Texas wilderness areas presented unique challenges because intermingled private lands made control of infested spots while they were small all the more crucial. TCONR argued that only minimally sufficient steps should be taken to control SPBs in the wildernesses, and suggested that since beetles are a part of nature, the best approach would be to leave them alone entirely.

During the beetle debates, a second issue began to emerge—that of the endangered Red-cockaded Woodpecker (RCW). The plaintiffs invoked the Endangered Species Act of 1973 to protect the bird's habitat of live pine trees from logging activities. Environmental groups had quickly turned ESA into an effective legal tool for challenging forestry practices. TCONR cited ESA in its attack on clearcutting because of its impact on the woodpecker's habitat. On June 4, 1985, when the court ruled on the plaintiff's motion for a preliminary injunction, the full relief requested under NEPA was not granted, but the court did rule that certain practices of the agency warranted court-imposed restrictions to prevent harm to the RCW. The court found that the Forest Service had violated its own regulations to protect the RCW while combating the SPB. The Forest Service was required to supervise cutting activities in the wilderness areas to ensure those who implemented the control measures properly followed agency guidelines.

In 1987, Forest Service scientists Dr. Richard Conner and Dr. Craig Rudolph of the Southern Forest Experiment Station in Nacogdoches, Texas, issued a report on their research and monitoring of RCW populations on the national forests in Texas. The report indicated a decline in the numbers of active woodpecker colonies over the previous five years on the Angelina, Davy Crockett, and Sabine National Forests. The primary reason stated for the decline was that colonies that had gone inactive were typically located in high basal areas, whereas the species typically forages in open, park-like stands of pine trees. Their recommendation was to control the hardwood midstory and institute a program of thinning to reduce the basal area in the entire colony area.

On July 11, 1987, TCONR filed its *First Amended Complaint for Declaratory Judgment and Injunctive Relief* and asked the court to set aside the agency's beetle control program of "cutting and poisoning" within the wilderness areas in Texas. Three months later, TCONR filed a second complaint that challenged the first forest land and resource management plan issued by the National Forests in Texas under the guidelines of the National Forest Management Act. In seeking injunctive relief, TCONR and the Sierra Club objected to the even-age management practices the

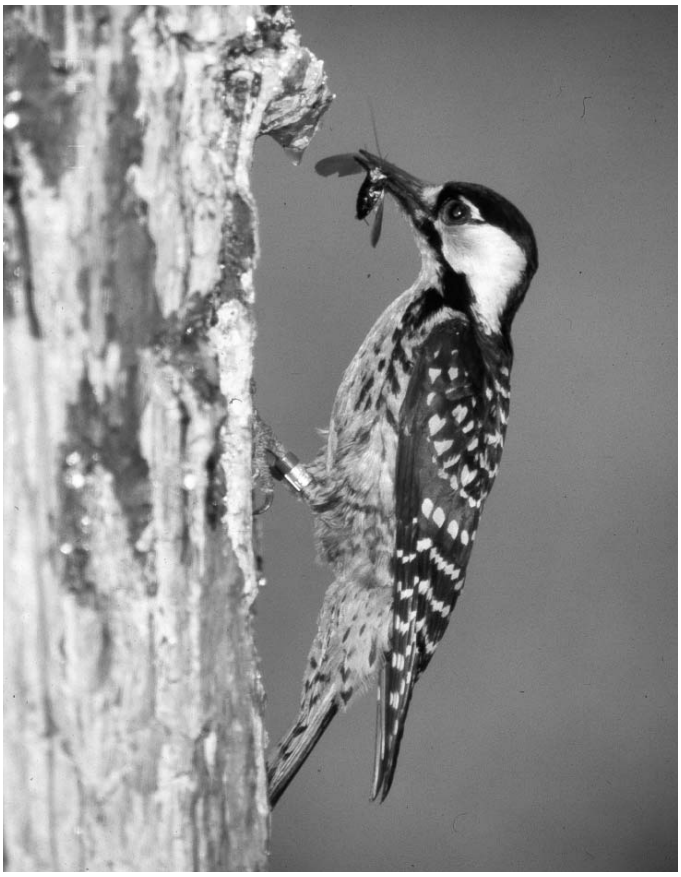
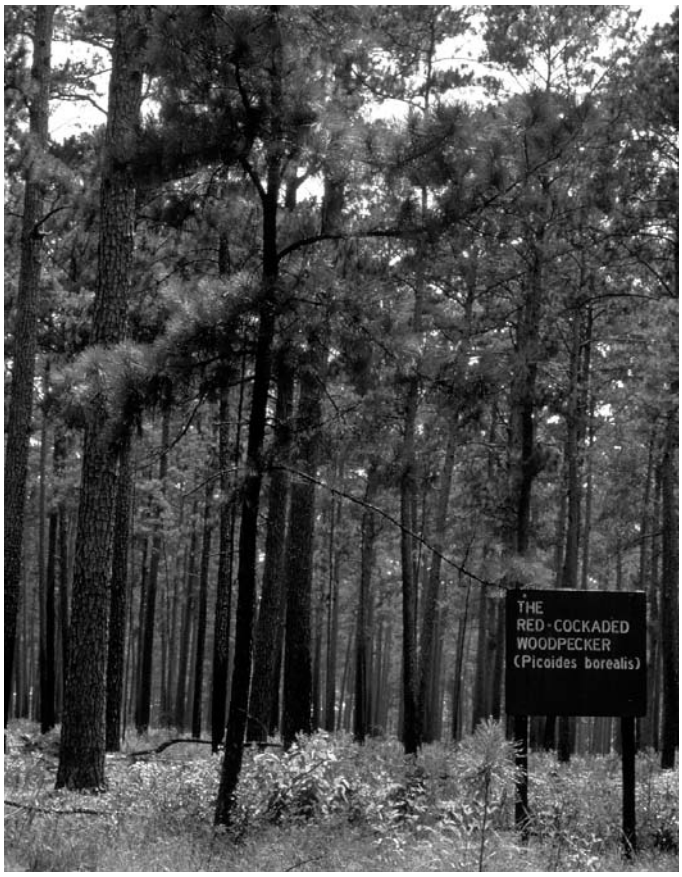


PHOTO COURTESY OF J. HANUJA, USDA FOREST SERVICE.

The red-cockaded woodpecker became a rallying point for TCONR. The bird is a federally listed endangered species found throughout the four national forests in Texas. TCONR invoked the Endangered Species Act to halt logging and preserve the bird's habitat.



USDA FOREST SERVICE PHOTO.

Open, park-like stands of pine trees like these provide forage for the red-cockaded woodpecker. In 1987, Forest Service scientists recommended controlling the hardwood midstory and instituting a program of thinning to restore the stands.

Forest Service had contemplated in the forest plan as violations of NFMA and NEPA.

With no provision in NFMA to challenge an agency's action in court, the case was filed under the Administrative Procedures Act (APA). They argued that the court should waive the APA's exhaustion of administrative remedies requirement because of the irreparable harm that would occur between then and the time the administrative appeal they had filed on the forest plan could be decided. The Forest Service assured the court that the appeal would most likely be decided in 8 months, but no longer than 15 months, and that only 5,000 acres out of the approximate 460,000 acres of the Texas national forests would be subject to even-age management by the time the appeal was expected to be decided. The court concluded that the anticipated delay was not so unreasonable as to warrant its intervention at that point in the administrative proceedings and refused to waive the administrative exhaustion requirements. The temporary restraining order was denied, but the court refused to lift restrictions imposed earlier. Furthermore, it prohibited cutting within 100 yards of the RCW colonies until a full evidentiary hearing and trial could be held.

Before the trial, TCONR supplemented their initial amended complaint because the Forest Service denied their request for a stay of even-age management practices pending a decision on the merits of the plaintiffs' administrative appeals. TCONR claimed the Forest Service had been practicing even-age management since 1964, which had reduced the ecosystems to "marginal survivability," and that a continuation of these practices for the time contemplated would jeopardize the potential for recovery to the diversity directed in NFMA on all four national forests. TCONR claimed that NFMA required the stands on the national forest be maintained with appropriate forest cover of diverse tree species and other related considerations on all parts of the national forest—issues that NFMA addresses. However, the Forest Service's position was that the *overall* landscape of the forest provided for this diversity, and that, unlike what TCONR argued, the laws do not require that every single site, or acre, on a national forest contain the specified diversity. This represented a substantial difference in philosophy, a difference that lay at the heart of the legal battle between TCONR and the Forest Service.

TCONR continued to strongly object to the thinning and midstory removal of trees within the boundaries of the RCW colonies, citing the agency's failure to analyze resulting damages to the RCW and environment, including a greater susceptibility to windthrow, denser compaction of the soil from logging operations, and the reduction of habitat of other species. They asked the court to restrain the Forest Service from expanding the thinning and midstory removal, and to declare the agency's buffer cutting of un-infested trees around and near infestations, and subsequent site preparation and re-planting of trees, in violation

of diversity provisions of NFMA.

The four-day trial held in Eastern District Court in Tyler in March 1988 was presided over by Federal District Judge Robert Parker. Judge Parker limited all evidence to that which related to the RCW and its habitat. In its ruling on June 17, 1988, the court declared that the Forest Service's SPB control program was efficacious to some degree, and not arbitrary or capricious. Judge Parker ruled in favor of the plaintiffs on the RCW issues, finding that the conduct of the Forest Service had detrimentally affected the RCW in violation of the ESA and its applicable regulations, and thereby constituted a "taking" of the species within the meaning of Section 9 of the ESA. ("Taking" is defined in the ESA as killing or causing to die.) The court further found that actions of the Forest Service jeopardized the woodpecker within the meaning of Section 7 of the ESA, and entered a permanent injunction enjoining the Forest Service "from failing to implement" specific practices and procedures within 1200 meters (approximately ¾ mile) of identified active and inactive RCW colony sites on the national forests in Texas. The specific requirements were:

- Conversion of forest harvesting techniques from even-age management to a program of selection or uneven-age management that preserves old growth pines from cutting within 1200 meters of any active colony
- Establishment of a basal area of 60 square feet per acre within 1200 meters of any colony site
- Establishment of a program of mid-story removal of hardwoods in and adjacent to colony sites
- Discontinue the use of existing logging roads or other non-paved roads within colony sites and restrict the use of such roadways to the essential minimum within 1200 meters of any colony site

In addition, the court ordered the agency to compile a plan to address all aspects of future management techniques consistent with the findings and conclusions of the court "designed to maximize the probability of survival of the red-cockaded woodpecker in the national forests in Texas."

The Forest Service prepared a plan and submitted it to the court, but it did not comply with all the technical requirements ordered in that it still contained some provisions for even-age management. Analysis by Forest Service biologists and silviculturists demonstrated that the court's requirements of conversion to uneven age management would not produce the ideal conditions for the RCW that the court expected. However, the court rejected that plan and ordered the Forest Service to modify the plan so that the original requirements were met. The revised Comprehensive Plan was filed in December 1988 and contained the specific requirements outlined by the court. Meanwhile, the Forest Service entered into consultation with the U. S. Fish and Wildlife Service, the agency charged with overall responsibility for endangered species. They also appealed the court's decision to order specific measures to the Fifth Circuit. The Fish and Wildlife Service issued a jeopardy opinion on the court-ordered plan, finding that implementing an unproven system of forest management was likely to jeopardize the continued existence of the species on the national forests in Texas, and that the court's plan required a level of forest administration and intensive management that would be unattainable.

The Texas Forestry Association and Southern Timber Council, which traditionally supported Forest Service management, filed an amicus curiae, or "friend of the court" brief, to join the case on appeal. They believed the decision as rendered would have catastrophic effects on timber and wildlife resources if not reversed, and argued that the national forests should be managed professionally by federal agencies carrying out plans formulated under existing laws rather than by a judge with no training in biological sciences.

After a review of the plaintiff's administrative appeal of the Final Land and Resource Management Plan and Environmental Impact Statement (EIS), Forest Service Chief Dale Robertson announced that there would be no decision rendered on the appeal because a new plan and EIS were required in view of the constraints imposed by the court's ESA decision and the resulting constraints on 200,000 acres to be managed for the RCW. Regional Forester John Alcock then decided to amend all forest plans in the Southern Region with RCW populations to incorporate additional standards and guidelines for RCW habitat management. Legal challenges to current plans, information from the updated RCW recovery plan, and coordinating SPB control strategies with RCW management necessitated forest plan amendments.

In a March 1991 ruling, the court of appeals affirmed in part the district court's finding of "taking" under Section 9 of the ESA, and "jeopardizing" the RCW in violation of Section 7 of the ESA. The appeals court granted in part the Forest Service's appeal regarding the court-ordered plan for RCW management, holding that the district court should not have dictated specific measures for future management of RCW habitat. Instead, it should review the plan under the APA's arbitrary and capricious standard, which acknowledges the agency's discretion to develop the content of its management plan so long as it meets the requirement of the law in taking a thorough look at all alternatives.

The Forest Service then filed a motion to approve their new management plan that would apply the standards being implemented in all other Southern Region national forests to the national forests in Texas as well. The district court denied the motion, and the Forest Service again appealed to the Fifth Circuit. The Fifth Circuit vacated the district court's order and remanded it to the district court to review under the arbitrary and capricious standard of review. However, no formal ruling was ever issued from the district court, which subsequently kept the court-ordered plan in effect.

> The provisions meant that the Forest Service must proceed cautiously in implementing an even-age management alternative.

Returning to district court in 1992, TCONR filed a *Fourth Amended Complaint* that contained what the court interpreted as a "series of motions": a preliminary injunction, a declaratory judgment, and a permanent injunction to prohibit a number of

USDA FOREST SERVICE PHOTO BY GAY IPPOLITO.

TCONR member Larry Shelton (left) and TCONR Chairman Ned Fritz (center) discuss questions about a timber sale project on the Sabine National Forest with Forest Supervisor Ronnie Raum (right) during a tour for plaintiffs in 1997. TCONR filed its first lawsuit against the Forest Service more than thirty years before.

imminent timber sales, as well as all future sales authorizing even-age timber management. Stating it was convinced the plaintiffs were substantially likely to succeed on their NFMA and NEPA claims against defendant's even-age logging agenda, the district court granted a preliminary injunction on the Forest Service's even-age management practices, halting nine scheduled timber sales. The court cited violations under NEPA and NFMA, stating that NFMA mandates that the Forest Service use even-age management practices in the national forests only when consistent with the protection of soil, water, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource. Furthermore, it concluded that, according to NFMA, even-age management techniques be used only in exceptional circumstances.

The ruling was appealed to the Fifth Circuit, which reversed the decision, finding that NFMA does not limit even-age management to exceptional circumstances and that the "exceptional circumstance" standard was too high. The circuit court concluded that even-age management must be the "optimum" or appropriate method to accomplish the objectives and requirements set forth in a land resource management plan, and that it does not mean that even-age management is the exception to a rule that purportedly favors selection management. Similarly, the requirement that even-age logging protect forest resources does not in itself limit its use; rather, these provisions meant that the Forest Service must proceed cautiously in implementing an even-age management alternative and only then after a close examination of the effects that such management will have on other forest resources.

The circuit court's opinion also addressed the issue of species diversity, and the district court's ruling that even-age management planned in the Environmental Assessments (EAs) would fail to protect forest diversity and resources, which was based on the agency's acknowledgment that even-age management would adversely affect inner forest species. The circuit court's analysis found that the directive meant that national forests were subject to multiple uses, including timber harvesting, and this suggested that the mix of forest resources would change according to a given use. The court cited the requirement in the Code of Federal Regulations (CFR) directives that provides for reduction of diversity where needed to meet overall multiple use objectives, and the requirement that there be no substantial and permanent impairment of land productivity, i.e., that timber harvests must not irreversibly damage soil, slope, or other watershed conditions. The court concluded that the provisions indicate that some adverse effect to resources is allowed, though up to a point, which is for the Forest Service to determine.

Regarding the NEPA issue, the circuit court pointed out that NEPA is merely a procedural statute requiring only that the agency not act before it thoroughly studies the environmental consequences; it does not require an agency to choose the "environmentally preferable course of action." The case was then remanded to the district court to consider on the merits based on the government's motion for summary judgment. The nine timber sales

held up by the preliminary injunction were allowed to proceed.

In 1995, Judge Robert Parker of the Eastern District in Texas was appointed to the Fifth Circuit Court of Appeals and the case was transferred to Federal District Judge Richard Schell in Beaumont. Judge Schell became the fourth federal judge to handle this case, which had been going on for ten years at that time. Meanwhile, needed silvicultural practices such as thinning, salvage, and stand improvement were not being carried out. The potential for more SPB attacks were increasing. SPB attacks are cyclic in nature, and always present at low levels, rising to epidemic proportions on a seven-to-ten year cycle. During this particular period, attacks were low but were building toward the next blowup.

During this period, beetle attacks were low but were building toward the next blowup.

Soon thereafter, TCONR filed an emergency request for trial, alleging that the Forest Service had failed to carry out on-the-ground protection of resources. The Forest Service filed a motion for summary judgment as to TCONR's even-age claims. Government lawyers objected to conducting an evidentiary hearing, contending that the even-age management claims had been addressed in previous rulings, and that any further ruling should be decided on review of the lengthy record already before the court. However, Judge Schell denied the government's motion and granted TCONR's request for trial, ruling that there were triable issues of fact as to whether the Forest Service had kept current and adequate inventories and monitoring data for key resources in the national forests in Texas; protected key resources in its application of even-age management techniques; and provided for diversity of plant and animal communities in its application of even-age management techniques.

Trial began on April 1, 1996, and concluded ten days later. Testimony centered on what the plaintiffs presented as evidence of irreversible damage to soil, water, and other forest resources (fish, wildlife, and diversity) in the way even-age timber sales were being carried out on the ground. The Forest Service argued that they had conducted sales as the laws required and in accordance with its Forest Land and Resource Management Plan. During the proceedings, the Forest Service provided the court advance copies of its Revised Land and Resource Management Plan.

On August 17, 1997, Judge Schell issued an order stating that the agency's actions, or failure to act, had been arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. He found that the Forest Service had neither protected the key resources of soil and watershed, nor adequately inventoried and monitored for wildlife and diversity, and questioned whether the Forest Service was meeting objectives and adhering to standards and guidelines. He enjoined the Forest Service and its interveners (Texas Forestry Association and Southern Timber Council) from engaging in timber harvesting on the national forests in Texas under any method, unless such harvesting was for insect or disease control, fire protection, or for any other reason necessary to maintain the health of the forest land. In his accompanying memorandum, Judge Schell directed parties to file briefs as to the scope of the injunction and the appointment of a master or expert, noting the court anticipated the need for a master or expert once federal defendants moved to demonstrate compliance with the law and to lift the injunction.

Schell's injunction suspended sixty-seven timber sales valued at $15.8 million. Negotiations between the parties resulted in fourteen timber sales being released from the injunction, those being non-salvage sales that were actively operating when the injunction was issued. Additional thinning sales that the Forest Service determined to be in compliance with Judge Parker's 1988 order also proceeded. The Forest Service appealed Judge Schell's order and injunction to the Fifth Circuit Court of Appeals.

Before resolution of the case on appeal, TCONR filed a new motion to hold the defendants in contempt, and a motion to amend the 1988 injunction regarding RCW management by limiting prescribe burns and midstory removal. The Forest Service issued a "Decision Memo" announcing plans to implement the thinning of RCW 1200-meter zones in a compartment of the Angelina National Forest in order to comply with measures outlined in Judge Parker's 1988 order to improve the habitat. On July 8, 1999, TCONR filed another *Motion to Order Compliance With Laws Before Impairing Angelina National Forest*. TCONR then issued four supplements to their motion, the second one seeking to prevent thinning, burning, and midstory removal in this compartment, and subsequently expanded their challenge to ten other actions planned on all four national forests. The court granted a temporary restraining order on July 14 to include all the challenged actions until the court ruled on the Forest Service's forthcoming motion to lift the 1988 injunction. On October 14, 1999, the government filed to have the 1988 and 1999 injunctions regarding RCW management vacated and to approve their new RCW management plan.

Meanwhile, on August 14, 1999, a three-judge panel of the Fifth Circuit upheld Judge Schell's 1997 injunction on timber harvesting that had suspended sixty-seven timber sales. The defendants then requested an *en banc* hearing whereby all the judges on the Fifth Circuit Court of Appeals would hear the case. Judge Parker, having been extensively involved in the case in the district court, recused himself from participating. The Fifth Circuit agreed to rehear the case, and on May 23, 2000, thirteen of the fifteen judges heard presentations by both parties as to whether the district court had jurisdiction to review the environmental groups' broad challenge to the agency's management of Texas' national forests, and whether there was indeed a final agency action to review. (A final agency action is the consummation of the agency's decision-making process, and the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.) On September 20, 2000, the Fifth Circuit issued an 8-to-5 decision reversing the panel's August 14 ruling and held that the district court did not have jurisdiction to review and enjoin the agency's timber management program on the national forests in Texas. It stated that only "final agency actions," such as individual timber sales, could be challenged in district court. The injunction was vacated and the case remanded to the district court.

TCONR filed for a stay of the official mandate and petitioned the Fifth Circuit to rehear the case en banc. The circuit court

USDA FOREST SERVICE PHOTO BY GAY IPPOLITO.

Pine logs are loaded during a thinning operation on the Sam Houston National Forest in 2002.

refused to rehear the case and ordered the mandate be issued. In the final judicial route left to them, TCONR petitioned the U. S. Supreme Court to hear the case. The Supreme Court refused, which effectively upheld the Fifth Circuit's decision. Final disposition of the case was returned to the Eastern District Court.

Maintaining that the Fifth Circuit Court's decision did not vacate the entire 1997 injunction, TCONR requested that the district court re-issue certain portions of the injunction. The Forest Service, along with the Texas Forestry Association and Southern Timber Council, filed motions asking the district court to dismiss the NFMA claims and bring an end to the long-running litigation. The court directed the parties to file reports addressing NFMA issues as to which, if any, issues remained ripe for judicial review. The Forest Service outlined the status of all sales challenged by the plaintiffs and asked the court to rule on the administrative record on those sales. TCONR again asked the court to modify its injunction to permanently enjoin the sales for timber not yet cut. TCONR moved for preliminary injunction to halt or preclude the harvest of timber on six active timber sales.

Concerned about an apparent decline in RCW group size since the 1999 preliminary injunction prohibiting prescribed fire and other habitat improvement measures in RCW habitat management areas in the Angelina and Sabine National Forests, the defendants approached the court in February 2003 and filed a motion to dissolve the 1988 RCW injunction and the 1999 preliminary injunction. A hearing was scheduled before Judge Schell on July 25, 2003. Prior to the hearing, the court granted permission for a group of thirteen independent scientists to file an *amicus curiae* brief concerning the Forest Service's motion to dissolve the two injunctions. The scientists agreed with the Forest Service's position that prescribed fire and some midstory control are essential to maintain RCW populations and the longleaf ecosystem generally in east Texas. They asked the court to immediately lift the 1999 preliminary injunction prohibiting these activities before there were significant further declines in RCW populations and fire dependent plant communities.

After hearing arguments from counsel for TCONR and the Forest Service, and applying the arbitrary and capricious standard specified in the Fifth Circuit remand, Judge Schell ruled from the bench and lifted both injunctions, and approved the Forest Service's RCW Management Plan. This cleared the way for the National Forests in Texas to fully implement the 1996 Revised Forest Land and Resource Management Plan, applying the standards and guidelines for managing RCW habitat already being used in other Southern Region forests.

The ruling brought an end to the ESA side of the case. The court stated its intent to clean up the case and instructed parties to file status reports on any remaining NFMA issues. The Forest Service filed its status report on September 26, 2003, addressing the current status of each sale questioned by the plaintiffs, and submitted proposed final orders to close the case. The plaintiffs filed a separate status report on September 29, 2003. It claimed that all sales that contained some even-age regeneration had not been overturned by the Fifth Circuit remand, and re-urged their motion to have the injunction reduced to specific sales. They also asked that if the court dismissed the injunctions, it do so without prejudice on the issue of mootness and not dismiss it on the merits. Instead, on September 30, 2003, Judge Schell signed a final

order, approving the management plans as submitted the Forest Service, and brought the decades-old case to a close.

The legal proceedings that began in 1976 shortly after Ned Fritz visited the proposed timber sale continued for the next twenty-seven years. Managing under judicial scrutiny spanned the tenure of four Forest Supervisors. At least three parties were involved on both sides, and dozens of witnesses testified for both sides. Issues involved in the lawsuit went before four federal district judges and at least two U. S. magistrates, before panels of the Fifth Circuit Court of Appeals six times, and before the entire Fifth Circuit Court once. There were at least two attempts by the plaintiffs to take the case to the U.S. Supreme Court. The case record contains over six hundred filings.

During this period, litigation became a way of life on the National Forests in Texas. From the outset of the litigation, various district judges ruled in favor of TCONR's challenges to the large federal agency's practices, which encouraged TCONR to take additional legal action. At first glance, it appeared that David might defeat Goliath by burying him in legal paperwork. By challenging seemingly every management decision that involved timber cutting, the Forest Service was forced to alter, restrict, or suspend many of its forest management activities while waiting for a decision. On appeal, however, the decisions against the agency were reversed—allowing the Forest Service to carry out its forest plans until the next action from TCONR.

As a consequence of TCONR's actions, as forest management plans were developed, it became routine to anticipate legal challenges to every decision. Though the lengths the Forest Service went to in order to make their forest plans withstand legal scrutiny helped push the agency to fully implement ecosystem management on the Texas national forests, litigating the issues of forest management took a large toll on the Forest Service in terms of dollars being diverted from on-the-ground projects, as well as manpower being devoted to trial preparations. From a professional forester's viewpoint, the impact of the litigation can be seen in the forests today—a noticeable decline in the vigor and physical condition of the timber stands which poses a greater susceptibility for Southern Pine Beetle attacks, and the degradation of wildlife habitat because of the removal of fire from the landscape. In short, the health of the forest is deteriorating from a lack of active management.

Debate on the various issues has provided insight as to the differing views of managing public lands, and the subsequent rulings have now established case law that will prove helpful as the U. S. Forest Service carries out its congressional mandates in managing public national forests. The differing philosophies and beliefs held by each side may not change any time soon, but the lessons learned from the struggles in the atmosphere of constant litigation are evidence to persuade the parties to openly communicate more effectively, work together to achieve common goals, and to help avoid litigation that is costly to not only the litigants, but also to the health of national forests. □

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SOURCES

This article is based on the case files located at the Supervisor's Office of the National Forests and Grasslands in Texas, and the U. S. District Clerk's office for the Eastern District of Texas in Lufkin, Texas, and on interviews with participants for the U.S. Forest Service. Readers may also wish to consult Edward C. Fritz's version of some of these events in his books *Clearcutting: A Crime Against Nature* (Austin, TX: Eakin Press, 1989); and *Sterile Forest: The Case Against Clearcutting* (Austin, TX: Eakin Press, 1983).