

State plans to appeal timber lawsuit

By **TED SICKINGER**
The Oregonian

When a jury in Linn County determined last week that the state had breached its contract with 13 rural counties by failing to maximize logging revenues on state land, the damage award was breathtaking. \$1,065,919,400.

The state plans to appeal — to the Supreme Court if necessary. In fact, Department of Justice lawyers spent a good deal of the trial building a record for that appeal, which could start with a variety of motions in Linn County before Judge Thomas McHill enters a final judgement.

But the clock is ticking on the largest-ever legal award against the state of Oregon. The judgement, when filed, will accrue interest at 9% annually, adding an additional \$96 million a year to the tab while its out on appeal.

And if the state loses its appeal? “It’s going to cost a lot of money and I don’t know where it would come from,” said Sen. Betsy Johnson, D-Scappoose, a legislative budget chief whose district includes two of the three counties that stand to reap the biggest windfalls.

“The ramifications to the state’s budget could conceivably be catastrophic.”

The fallout would reverberate far and wide, including in many counties that filed the lawsuit. Indeed, the damages, if upheld, would be a bonanza for a handful of counties and special taxing districts. But if you consider the portion of the award that would be borne by taxpayers in each county, paying the bill would effectively create a net loss for more than half of the counties who signed on to sue the state, according to an analysis by The Oregonian.

“Basically, you’re suing yourself, or your own family, and it comes out of the family budget,” said Joe Cortright, a Portland economist. “If they believe that pound of flesh is going to be extracted from someone else, it’s hard to see how that would work.”

What follows is a discussion of some of the major questions raised by the jury award and its consequences.

What was the basis of the damage award?

Oregon’s state forests are mostly made up of lands that were originally logged over or burned by wildfire. Without the resources to rehabilitate the lands, 15 so-called “forest trust land counties” subsequently deeded the forests to the state. In exchange, the state agreed to replant the forests, protect them from fire and share a portion of the timber harvest proceeds when they returned to productivity.

According to the Forest Acquisition Act of 1941, the state is supposed to manage the forests for the “greatest permanent value of such lands to the state.”

The jury found that the greatest permanent value was synonymous with maximizing timber production. It found the state had breached a contract with the counties by failing to maximize resulting timber payments since 2001. It awarded the plaintiffs \$674 million in past damages and \$392 million in future damages, which assumes the state will continue to fail to maximize timber revenues for the next 50 years.

Who are the big winners?

The plaintiffs included Benton, Clackamas, Columbia, Coos, Douglas, Josephine, Lane, Lincoln, Linn, Marion, Polk, Tillamook and Washington counties, plus local taxing districts within those counties. Clatsop County opted out of the lawsuit, but local taxing districts within the county were part of the suit.

The damage award was based on expert witnesses’ analysis, which the jury adopted. It was heavily lopsided. Three-quarters of the money would flow to three counties and be disbursed among local taxing districts, which include schools, ports, libraries and fire districts.

Tillamook County would see \$332 million; local districts in Clatsop County stand to get \$243 million and Washington County, which is home to 47,000 acres of the Tillamook Forest, would get \$94 million. A few other counties — Linn, Lane and Coos would also see fairly sizable infusions. By comparison, Josephine County would walk away with \$1.2 million.

Who pays for it?

Bottom line, if the verdict is upheld, the obligation falls to Oregon taxpayers.

Personal income taxes are the largest source of state revenues, making up nearly 90 percent of the state general fund in the last budget cycle. So, on a per-capita basis, the damage award would effectively transfer money from Oregon’s populous urban counties to their rural counterparts.

No one is contemplating a special tax to cover the verdict, so individual taxpayers won’t be directly responsible. Rather, the money would come out of the income taxes we already pay. (Business taxes complicate the math a bit, but the general story wouldn’t change much.)

In other words, nearly \$240 million paid by Multnomah County taxpayers that would ordinarily go to schools and other state-funded services will go instead to cover the timber judgement.

Effectively, that makes it a transfer from Oregon’s urban counties to its tim-



Albany Democrat-Herald

Attorney John McGrory speaks during the closing arguments in the \$1.4 billion class action lawsuit in Linn County Circuit Court.

‘WHEN YOU ADD IT ALL UP, IT’S A BIG HOLE YOU’D BE PUNCHING IN THE STATE BUDGET. IT’S A STATE OBLIGATION TO PAY. THEY’RE GOING TO MAKE CUTS ELSEWHERE, SO IT FURTHER DISTORTS THE WHOLE BUDGETING PROCESS.’

Dick Schouten | Washington County Commissioner
who opposed the lawsuit and testified at the trial

ber-dependent communities.

Thinking of it that way raises an interesting point. Taxpayers in counties receiving damages from the lawsuit would also be covering a share of it. And when you set those potential liabilities against the damages awarded, eight of the 14 counties who opted into the suit are actually worse off.

Washington County’s taxpayers, for example, are second only to Multnomah in terms of the percentage of personal income taxes they contribute to the state. It’s also the third largest recipient of damages. But counting taxpayers’ liability, Washington County ends up \$90 million in the hole. Taxpayers in Benton, Clackamas, Douglas, Josephine, Lane, Marion and Polk counties would also be contributing more to the judgement than the county would receive in damages.

“It feels unfair,” said Bob Van Dyk, policy director for the Oregon Wild Salmon Center. “The biggest beneficiaries are Tillamook County and John DiLorenzo (the lead plaintiffs’ lawyer). And the losers are taxpayers as a whole, people who care about fish and wildlife, and people who care about balance and collaborative management of natural resources.”

To be sure, the forest trust land counties rely heavily on timber receipts to fund local services, and contend they’ve been getting shorted for two decades.

Linn County commissioner Roger Nyquist said the award would provide a much-needed boost for counties to tackle some of the social problems that came with the decline of the wood products industry in rural counties.

“We’re grateful for the jury decision and feel pretty good about things,” he said. “There are 151 class members and I have a lot of work to do in the next week because I intend to talk with every one of them about how we proceed from here.”

How would the state cover the bill?

That’s the billion-dollar question. The state maintains a risk fund to cover legal settlements and other payouts. But it’s too small to cover this award, and because this claim is for a breach of contract, it wouldn’t be covered by that fund.

The state could structure a settlement to pay it down over time. It could issue bonds, effectively borrowing the money and paying it back over time with interest.

Alternatively, it could cut services that taxpayers would otherwise get.

“When you add it all up, it’s a big hole you’d be punching in the state budget,” said Washington County Commissioner Dick Schouten, who opposed the lawsuit and testified at the trial. “It’s a state obligation to pay. They’re going to make cuts elsewhere, so it further distorts the whole budgeting process.”

For one biennium at least, any damage award distributed to school districts

might reduce or eliminate the money they receive from the state school fund. And some suggest the legislature could simply reduce other payments to the counties to recoup the settlement.

“Budgetarily, money is pretty fungible,” said Cortright. “I’m sure someone in the governor’s office and the legislature is thinking about how they’d move the walnut shells around to pay for this.”

Could the state still settle with the counties?

It could, and the plaintiffs are eager to talk, perhaps sensing the risk that the award could be lost on appeal.

The state has not budged so far though, and its lawyers worked to build an extensive record during the trial to aid an appeal.

Meanwhile, the Department of Forestry is working to create a new Forest Management Plan. That plan could be structured to deliver larger harvests, but the agency has already said that’s not part of its draft. It is already being sued by environmentalists to block 68 timbers sales, and it expects obligations under the Endangered Species Act to increase, not decline.

DiLorenzo, the counties’ lawyer, says there are an infinite number of ways to settle the predicament. But, he said, the state has to be willing to negotiate with the counties like partners.

“How can the governor afford not to roll up her sleeves and work something out

with the counties,” he said. “This judgement will earn interest...If they take five years to appeal this and discover they’re wrong again, that will add another half billion in interest.

“Instead of kicking the can down the road, how about getting in a room with us and working this out.”

What’s the state’s appeal based on?

The state signaled a number of its main objections before and during the trial.

It will make the case that the 1941 Forest Acquisition Act did not establish a contract between the state and the counties. The state argued that it only needed to share revenue when it did harvest. Harvest targets are established by the state forester, who has no statutory obligation to maximize revenues, it says.

It will argue that the counties, as political subdivisions of the state, can’t sue the state for money and that the lawsuit never should have been a damages case.

The state also maintains that the case, which involves the interpretation of statute and the context around it, should have been decided by a judge, not a jury. There were numerous Forest Acquisition Acts, and the state argues they all contemplated managing the forests to achieve a variety of benefits.

The state will argue that the award for past damages was based on an outdated harvest model that did not ensure compliance with the Endangered Species Act. Future damages, it maintains, were based on a 2018 model that was never intended for the purpose it was used. “The state’s attorneys challenged the trial court for making legal errors that put blinders on the jury and infected its verdict,” stated Ralph Bloemers, senior staff attorney with the Crag Law Center, a non-profit law firm in Portland.

Bloemers said the Oregon Supreme Court previously declined to describe the 1941 act as “creating a contract” and ruled that the counties gave up control of the land in exchange for a share of the revenues. Yet the trial judge barred the state from telling the jury about it.

“Why are the counties’ attorneys so eager to talk settlement?” he asked. “I think it is because the verdict is incredibly vulnerable on appeal.”



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