

Are We Putting the Forest to Sleep? An update: Coho Lawsuit and a Minor Correction

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Tyler Ernst: It's unequivocally true that this lawsuit has been a motivating factor for the Department and the Board of Forestry to work on this habitat conservation plan and to continue to move forward with it.

Chris Edwards: Welcome to Forestry Smart Policy, a podcast produced by the Oregon Forest Industries Council for policymakers and other thought leaders influencing decisions in Oregon. I'm Chris Edwards, your host and president of OFIC. In this episode, I again sit down with Tyler Ernst, Policy Counsel for Manufacturing and Resources at OFIC for a quick update on state lands policy. You'll recall that Tyler joined OFIC three years ago as a natural resource attorney with more than 10 years of experience in natural resource policy and government relations. In his role as Policy Counsel, Tyler represents OFIC's members in policy discussions before the state legislature and various natural resource agencies and commissions. His portfolio includes forest carbon and climate change, state forest management, air and water permitting, and labor and employment. In this short follow-up episode, Tyler provides a small correction to the timeline of events discussed in our first State Lands episode and discusses what the state agreed to in its settlement of the Coho lawsuit, a lawsuit that by many accounts appeared to be a motivating factor behind the urgency for securing a federally approved habitat conservation plan. Without further delay, my discussion with Tyler Ernst.

All right, today's episode of the Forestry Smart Policy podcast is a little different than most. It's probably going to be a bit briefer, but we have a couple of quick things to cover. First, an update on the Coho lawsuit, and of course, in the last episode of the podcast, we talked about that at great length and the intersection between the Coho lawsuit against the state and the habitat conservation plan that is working its way through and could impact a state forest here in Oregon. But before we get into that, we have a brief correction for the record. We always endeavor to bring you accurate and dependable information regarding forest policy in the state of Oregon. And after the last episode, we discovered a slight misstatement. And while it probably doesn't really materially impact the historic record of what's happened on state forest policy here in Oregon over the last couple decades, we did nonetheless want to set that record straight. So Tyler, in the last conversation we had, when you were talking about the historic record on state forest and the development of goals, you had talked about twin goals and Governor Kitzhaber's role in that at the time. How have we come to understand that history since that episode?

Tyler Ernst: Yeah, well, it's great to be back here in the saddle doing the podcast with you, Chris. And like you said, we are always open to feedback. And so I hope that anyone who listens to this podcast is willing to give us feedback, not only on the content, but also just if you find the subject matter interesting or helpful. We love to hear that too. But we did have someone actually reach out who had firsthand experience during the period of history that we talked about at the Department of Forestry. And this individual reached out, expressed their appreciation for the podcast episode and said, no, there was one little minor thing that I caught though that I don't quite remember happening the way you guys indicated.

And so we listened to the feedback there and then went and tracked down a few more primary sources to check what we had said there. And what we found was that conversation that I had indicated that Governor Kitzhaber had with the Department of Forestry and with the Board of Forestry in 2007 actually didn't happen in 2007, which makes sense if anyone is doing the calculation in their head about when Kitzhaber was Governor of Oregon, it couldn't have happened in 2007. That actually happened after the department had already been working for some amount of time on the land allocation plan that we had talked about, which was this new management paradigm was to be a new management paradigm for state forests. And so Governor Kitzhaber actually came to the department, the Board of Forestry, after the department had been working on that plan and had been dealing with a lot of conflict around the details of that plan.

And he gave that charge at that time to the department, to the board, to try to figure out how to increase revenues and increase conservation on state forests. And so that was more in the 2011, 2012 type timeframe, as we understand it. Well, I'm still looking around through old board minutes to try to figure out exactly what meeting it was that the governor came in and made that charge to the board. If we have a record of that, we might not. But if there is hope to find that, we will have a more accurate date. But minor issue, but definitely as we talk about the different changes that have happened with the way that the state approaches management of these state forests, a lot of what we talk about when we trace history and a lot of the reason why we trace history is we're trying to figure out motivating causes for changes that are made. And so to attribute a motivating cause for the department to look at its management paradigm being a charge by the governor, well, that's not quite accurate if the dates don't line up there. And so whatever the motivating causes, we talked about some other ones, obviously, during our last podcast for that change were, it was not the governor coming to them directly when they first set out to hammer out that land allocation plan.

Chris Edwards: Yeah. Thanks for that correction, Tyler. And speaking of motivating causes, we talked at length in the last episode that it appears as though the pursuit of the current

habitat conservation plan on state forests is somewhat driven, if not largely driven, it's at least been somewhat driven by this Coho lawsuit. And I think different folks, depending on who you talk with, would attribute more motivation to that or less motivation to that. But we certainly talked about it as a factor. And we've had some developments in that lawsuit since the last episode. So Tyler, what can you tell us about the Coho lawsuit?

Tyler Ernst: Yeah, well, I mean, first off, I think it's unequivocally true that this lawsuit has been a motivating factor for the Department and the Board of Forestry to work on this habitat conservation plan and to continue to move forward with it. Even as we talked about in the last podcast episode, some of these kind of unintended or unknown negative impacts of this plan and what it will do in particular to harvest volumes have come to light. And the record is replete with examples of Board of Forestry members expressing concern that if they slow down this HCP process, that there's this active lawsuit out there. And so what are the implications of that for the potential liability for the state, for legal liability?

And so this lawsuit has provided some of at least some of the impetus for the department to work on this plan and move forward on the time frame that they have. And as you just indicated, there was a fairly big development in the case. So on March 21st, the plaintiffs in the case, so number of environmental organizations and the state finalized a settlement agreement in exchange for an agreement by the plaintiffs to drop all of their claims against the state. The state gave a number of concessions to the plaintiffs indicating how they would move forward on habitat protections for the Coho. So again, if you remember, the habitat conservation plan that the department is working on does not just cover Coho salmon. It covers a number of salmonid species, a few terrestrial species as well, some salamanders, a couple birds, a couple mammals.

But this lawsuit was particularly targeted at Coho and what impact management activities on state forests were having on the Coho in particular. And so what this settlement agreement spells out as far as the state's duties or responsibilities are concerned is that the state has agreed per this settlement to implement the riparian protections in the habitat conservation plan. So again, because this covers both aquatic species and terrestrial species, there are protections for different types of habitat. And so the protections that are for habitat surrounding streams, surrounding water bodies, those riparian protections, those elements of the draft habitat conservation plan would have to be put in place by the department in this coming fiscal year, and then would have to remain in place from fiscal year 2025 through fiscal year 2028, or until the fiscal year, until the department has an incidental take permit in hand from the services in response to an approved habitat conservation plan. So what the department has agreed to do, what the state has agreed to do is pretty much start implementing the habitat conservation plan

early, even before it has final sign off from the services, but only those portions that are relevant to aquatic species.

Chris Edwards: Okay, so by early, are we talking 2024?

Tyler Ernst: Yeah, that's right. So 2024, fiscal year 2024 operating plan of the department would have to include these riparian protections.

Chris Edwards: Okay. And so again, circling back to what we shared regarding our opinion of the Coho lawsuit and the lack of necessity of the lawsuit, and we frankly, we don't think that the state should have settled. We think that they had a strong case, and Coho have shown strong recovery under the old Forest Practices Act. That's prior to the Private Forest Accord and the new increased habitat protections under the new regulatory regime. In the face of that, the state settled, frankly, we're moving on. You know, so now really what's left of the habitat conservation plan debate are really those areas outside of those riparian prescriptions, riparian conservation areas.

Tyler Ernst: Yeah, that's right. And I think it's important what you said there, and I'll just repeat it for the sake of emphasis that Coho numbers have shown a strong rebound to the point that many would speculate, and of course, you know, we'll have to see what happens in the coming years. Many would speculate that the Coho will be removed from the threatened list the next time that comes up for a decision by the services. And so, you know, that's like you said, that all happened. And the recovery of Coho happened under the Old Forest Practices Act, and under the current and by current, I mean up to today, management paradigm of the state on state forests.

The state has always managed their forests differently than private landowners manage theirs. And when you talk about in particular, in this case, since we're talking about Coho and Coho habitat, when you talk about riparian buffers, the state has buffered their buffered streams to a greater extent than private landowners had to under the Forest Practices Act. And so they've been doing that. So where the state is currently managing to and where private landowners have been managing to, that in and of itself seems to be sufficient for the Coho to have recovered.

Well now all of those private acres, which if you remember just the relative scope of private land acres to state land acres, I mean state forest lands are a very small piece of the pie. So when you talk about all those private lands that are now going to have much larger stream buffers as a result of the private forest accords and the updated Forest Practices Act, it definitely leaves you wondering, well, why would the state need to go even further than they currently are to protect the species that's already recovering and seems to be possibly already fully recovered.

Chris Edwards: So Tyler, for those that aren't following this, these developments super closely, or might not be really familiar with the Habitat Conservation Plan process. Now that the state has settled on the Coho lawsuit, is the whole debate about the Habitat Conservation Plan done and over?

Tyler Ernst: No, not at all. In fact, one of the particularly frustrating aspects to this whole debate about the prudence of the Habitat Conservation Plan that the department is pursuing is that, to the extent that this Habitat Conservation Plan was being driven by this act of lawsuit, and again, that's probably not the only cause, the only reason, but if that was one of the motivating reasons, the harvest volume reductions that we are seeing right now as this draft Habitat Conservation Plan begins to go through the implementation process at the district level, those harvest reductions are not owing to the increased stream buffers or these riparian management areas.

These harvest reductions are all being driven or almost entirely being driven by these HCA's, these habitat conservation areas, which are the upland areas away from the stream. And so these are the areas that are being set aside to provide protections for terrestrial species. But the lawsuit isn't dealing with a terrestrial species, it's dealing with an aquatic species. When you consider that, it does make you wonder why the Board of Forestry wasn't willing to at least separate out the two pieces of this conservation plan, this habitat conservation plan, and say, look, let's address the most pressing issue, the Coho issue, that is, because we have active litigation.

Let's address that first, and then we can address the terrestrial species piece, which obviously needs more work. Well, we would say obviously, because the harvest projections that we were originally seeing, now we see were entirely illusory. So that piece needs more work. Let's separate that out, and let's go back to the drawing board and really figure out how can we land that piece, that piece that's meant for the protection of these terrestrial species. How can we land that in a place where we're providing the benefit to those species that we want to provide, but we're also not completely undercutting these local communities and the industry that relies on a flow of fiber from those lands?

Chris Edwards: All right. Well, I think that that's a pretty good update as to where we are today, post-Coho lawsuit settlement. There's more to come on the state's pursuit of a habitat conservation plan for state forest here in Oregon. And I'm sure that we will have you back, Tyler, to talk more about that in the coming months.

Tyler Ernst: Look forward to it, Chris. Thanks.

Chris Edwards: And until then, thanks for joining us, and we'll catch you on the next episode. That's it for now on state forest policy, although I'm confident we'll return to this

topic in future episodes. Be sure to check back for new content coming your way soon on the forestry smart policy podcast. And as always, if you have a question about this episode or something else, drop us a note at podcast@ofic.com, and in a future episode, we may just address it.