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ARE DEFENDANTS GETTING BURNED?

FEDERAL WILDFIRE LITIGATION POLICY

By

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Wildfire in California and throughout the West is an inevitable occurrence in fire-prone ecosystems that have evolved over the millennia. It is as predictable as death and taxes but recent federal policy, aided and abetted by several decisions, has made the damages potentially recoverable by the United States and other public agencies wildly unpredictable and wildly in excess of traditional measures of damage to real property. The purpose of this article is to explore the reasons for such a dramatic shift in governmental wildfire damages recovery actions, the economic consequences and unfairness that flows from this policy shift, and to advocate the need for legislative and/or judicial reform to return a measure of rationality to this area of litigation.

The ecosystem in California has been influenced by fire for millennia. Long before any evidence of human presence, lightning provided a natural ignition source for seasonally dry fuels. These annual fires shaped the land and created fire-adapted (or fire-dependent) ecosystems. Indeed, lightning continues to be a significant ignition source for wildfires in California and throughout the Western U.S. A recent reminder of the role of lightning occurred during the summer of 2008. Between June 22, 2008 and August 11, 2008, a series of dry lightning storms swept over California. Thousands of lightning strikes were recorded and by the time the event was over, more than 1,157,000 acres had burned.[1] Although the press has typically viewed such events as "natural disasters" or "catastrophic," the fact that they regularly occur suggests they are normal events that routinely occurred prior to human intervention. For the past 100 years or so, wildfire has been treated as an enemy that must be stopped at all costs and the federal view was that

[1] CALIFORNIA WILDFIRES FEMA EM- 3287-CA Total Incidents from 6/22/08 – 8/11/08.

all fire is bad. There are two important aspects to this policy: 1) All wildfire must be stopped and 2) All wildfire must be viewed as some form of catastrophe.

When the U.S. Forest Service was established in 1905, fire suppression became the only policy for dealing with wildfire – whether natural or human caused. One observer, Ted Williams, wrote a provocative article in 2001 for the Audubon publication *Incite* entitled, "*Burning Money.*"

> In the 1930s – before Congress started writing federal agencies blank checks for firefighting – an average of almost 40 million acres burned per year. From 1920 to 1950, when forest fires were more or less doing their thing, the average area burned each year was eight times what it was from 1970 – 1999. In the past 30 years the federal firefighting budget has increased by a factor of 10, to roughly $ 1 billion a year
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> What America got for the $1 billion it spent to fight the fires in 2000 was essentially nothing. Andy Stahl, executive director of Forest Service Employees for Environmental Ethics, put it this way: "It may make sense to put out small fires that have just started in places we don't want burned – say the grasslands around suburban Los Angeles or the back yards of Santa Fe. But the notion that we should continue to fight fires when they're 10,000 acres or 100,000 acres is ludicrous. We never put out fire of that size. Nature does. But we always fight them. We might as well drop dollar bills on them." The General Accounting Office agrees, observing in a 1999 report that "large wildfires are generally impossible for firefighters to stop and are generally extinguished by rainfall or when there is no more material to burn."

The view expressed by Mr. Williams in this Audubon Society publication likely is shocking to many. While wildfires that are more frequently occurring in or threatening the Wildland-Urban Interface (WUI) must logically be suppressed, the same is perhaps not true for fires burning deep in the wilderness where lightning caused fires have burned for millennia.

More recently, Chad Hanson Ph.D. authored "The Myth of 'Catastrophic' Wildfire - A new Ecological Paradigm of Forest Health.[2] In the article, Dr. Hanson attempts to de-bunk what he describes as various "myths" associated with the effects of wildfire. The following appears in the Preface:

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[2] John Muir Project Technical Report 1• Winter 2010 • www.johnmuirproject.org.

> Recently, however, a new paradigm has begun to emerge, informed by the latest ecological science. Over the past decade, a surge of scientific discovery has led researchers to fundamentally re-think previous assumptions about fire and forest health. In this new "forest ecology" paradigm, scientists have come to understand that high-intensity fires, or "stand-transforming fires", occurred naturally in most western U.S. conifer forests historically, and we have far less fire now than we did prior to fire suppression policies. Scientists have also come to understand that dead trees, especially large dead trees, or "snags", are not only the most ecologically valuable habitat features in the forest, but are also far too scarce, due to fire suppression and logging conducted under the guise of fuels reduction and forest health.
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> Most strikingly, recent scientific evidence has revealed that, contrary to previous assumptions, most current fires are predominantly low-intensity and moderate-intensity, and the relatively scarce high-intensity areas support the highest levels of native plant and wildlife biodiversity of any forest type in the western United States. Scientists now understand that, far from being "destroyed", these high-intensity patches are actually natural ecological treasures. High-intensity, or stand-transforming, fire creates ecologically-vital "snag forest habitat", which is rich with large snags, large downed logs, dense pockets of natural conifer regeneration, patches of native shrub habitat, or "montane chaparral", and large live trees. [P 2]

For a defendant attempting to fend off a multi-million dollar environmental damages claim premised upon a wildfire affecting USFS land, the views expressed above are shocking. High intensity, or stand-transforming, fires actually create ecologically vital forest habitat? If anything, these unique ecological treasures created by high-intensity fires (or fires of any intensity for that matter) must be considered in assessing the environmental harm resulting from a forest fire. Historically, Plaintiffs have litigated these forest fire damage cases as if the fire *only* caused damage and have failed to recognize or offset damages due to these meaningful gains in environmental value. The fact that such fires naturally occur with regularity only adds to the misery. No one, to this author's knowledge, has described a giant oil spill such as creating an "ecological treasure."

Over time, various branches of the federal government have changed fire suppression policy to reflect a growing recognition that fire is an ecological process and that the artificial suppression of fire has created veritable "tinder box" conditions in our forests. The National Park Service led the way in the late 1960's – with the USFS

following suit in 1974 – to change from complete fire suppression to fire management, allowing lightning fires to burn in wilderness areas. The trend of allowing fires to burn will likely continue as there is an increasing awareness that fire suppression practices have increased the frequency of larger wildfires throughout the West because of a huge increase in fuel loading that naturally was suppressed by periodic fires that have been prevented from burning over the past 50 – 100 years.[3] As of 2007, various federal land management agencies presided over 6,000 fires that burned over 3,500,000 acres annually.[4]

One of the fires that occurred in 2007 was the *Moonlight Fire* that burned in the Plumas and Lassen National Forests. The *Moonlight Fire* ignited on Labor Day, September 3, 2007, and was allegedly caused by a bulldozer track striking a rock while installing a water bar to control erosion on a select-cut logging operation. The fire burned more than 65,000 acres, eventually burning into the *Antelope Wheeler Lightning Complex* fires that burned nearly 23,000 acres the prior month before it was extinguished. In July of 2009 (nearly two years after the fire), the USFS filed suit claiming fire suppression costs and natural resource damages. Continuing a trend established in the *Storrie Fire* case that settled in 2008, the USFS sought an unprecedented amount of natural resource damages. In an initial Federal Rule 26 Disclosure, the U.S. claimed damages of $791,367,247. Accruing interest potentially took the damages over $1 billion making it, effectively, an "economic death penalty" case for the defendants accused of responsibility for the fire.

Prior to the *Storrie Fire* settlement in 2008[5], federal resource damages claims in the tens of millions were virtually unheard of, let alone claims of multiple hundreds of millions. What happened? How could the United States claim damages far in excess of any conceivable pre-fire fair market value? What happened to the traditional measure of damages to real property – the "lesser of" rule?[6] Were the damages claimed based upon a fiction that USFS land has no fair market value and were, therefore, verging on "priceless"? Was the claim based upon simple governmental greed? Was it based upon impending federal insolvency? Was it an unannounced federal policy designed to slowly but surely take over all privately owned land and timber-related businesses in the Western United States? Was it the product of federal career/empire building within the U.S. Attorney's Office? Was it wise to turn the Affirmative Civil Enforcement Unit of the U.S. Attorney's Office into one of the largest plaintiff firms in California - or anywhere? In this brave, new, and enlightened world, the saying "It's good to be King" has a new, invigorated meaning. Damage claims of this order of magnitude, for an

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[3] Miller, R.F. and R.J. Tausch. *The Role of Fire in Juniper and Pinion Woodlands: A Descriptive Analysis, Proceedings. The First National Congress on Fire, Ecology and Daily, Scott, et. al. Fire Behavior and Effects in Fuel treatments and Protected Habitat on the Moonlight Fire.* USDS Forest Service. June 2008.

[4] Van Wagtendonk, Jan. 2007. *The History and Evolution of Wildland Fire Use.* Fire Ecology Special Issue, Vol. 3. No.2, 2007

[5] The *Storrie Fire* case settled for $102 million following a ruling that paved the way for even greater damages, as will be discussed below.

[6] The measure of damages to real property is the lesser of the diminution in fair market value or the cost to repair. See (9th Circuit Model Jury Instructions 5.2 Measure of Damages and California Civil Jury Instructions [CACI] 3903F)

event that occurs naturally as part of a fire-dependent ecosystem and that has a variety of benefits to lands set aside in perpetuity, were unheard of only several years ago. Moreover, a more recent Ninth Circuit Opinion has essentially created a new class of "non-economic" damages to real property akin to "pain and suffering" for which no economic valuation or expert testimony is required. Furthermore, the anointing of punitive damages-type multipliers takes present and future defendants deeper into the economic swamp of uncertainty, uninsurability and potential financial doom. The new federal wildfire damages recovery policy would make Thomas Jefferson's head spin and King George III blush. The policy raises a number of constitutional issues – including "takings," "due process," "excessive fines" and "unjust punishment."

The Recent Federal Cases

The roots of the current federal policy can be traced to the *Big Creek* and *Storrie Fires*. Steven S. Kimball, in a 2009 article entitled *Forest Fire Damages in Transition,*[7] traced the history of the expansion of federal wildfire damages claim to the *Big Creek Fire,* a 1994 fire that burned 1,950 acres and cost $7.7 million to extinguish.[8] This fire appears to be the first wildfire where the United States sought HEA-based natural resource damages, which are unavailable to private plaintiffs.[9] In that case, Robert Unsworth, one of the developers of the HEA mathematical model was retained by the United States and presented HEA damages in addition to lost commercial timber and reforestation costs. The case settled for $14 million in 2006. It appears that the U.S. Attorney for the Eastern District fully recognized the potential economic windfall of seeking "intangible environmental damages" and took full advantage of this newly developed theory in the next major fire case – the *Storrie Fire.*

The *Storrie Fire* was ignited on August 17, 2000 in the Feather River Canyon on the Union Pacific Railroad right-of-way within the Plumas National Forest. By the time it was extinguished, 52,000 acres within the Plumas and Lassen National Forests were burned. The United States contended the Union Pacific track maintenance workers failed to clear the area of flammable material and failed to use appropriate spark shields in connection with high-speed rail saws and grinders, allowing the escape of small, hot pieces of metal that ultimately started the fire. Litigation was commenced in the Eastern District of California. The United States sought a then-unprecedented amount of damages: $121 million for commercial timber loss, $24 – $33 million for reforestation

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[7] *The Federal Lawyer*, August 2009, Page 38.

[8] The alleged cause of the *Big Creek Fire* was an explosive short circuit in a 12,000-volt electrical substation caused by a squirrel.

[9] Habitat Equivalency Analysis (HEA) is a methodology used to determine compensation for resource injuries. The principal concept underlying the method is that the public can be compensated for past losses of habitat resources through habitat replacement projects providing additional resources of the same type. Natural resource trustees have employed HEA for groundings, spills and hazardous waste sites. The model was initially utilized by NOAA to address injury to sea grasses, coral reefs, tidal wetlands, salmon streams, and estuarine soft-bottom sediments. See *"Habitat Equivalency Analysis: An Overview"* Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration, Department of Commerce, March 21, 1995, (Revised October 4, 2000 and May 23, 2006) Robert Unsworth, applied the concept to the Big Creek Fire- the first known instance that HEA was used in a wildfire case.

and $13 million for loss of habitat and other environmental "services" calculated using HEA methodology.

During the course of litigation, three motions relating to damages were filed by Union Pacific. The court, applying California law, ruled against Union Pacific on all motions and issued an opinion that has been embraced by the U.S. Attorney's Office and that has haunted defendants.[10] First, Union Pacific argued that the proper measure of damages under long-standing California law is the difference in value of the land before and after the injury. Judge Frank Damrell (Ret.) rejected the argument and the cases cited by Union Pacific, finding that the general measure of tort damages under California law is broadly defined. California Civil Code section 3333 states: "[T]he measure of damages ... is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." The Opinion also referenced a quotation from an earlier federal decision: "[N]atural resources have values that are not fully captured by the market system."[11] Perhaps the key to understanding how the current federal wildfire damages scheme was formed is the following language at page 1143 of the Opinion:

> UP cited to a number of cases addressing property damages to residential or commercial real property with an available market value and stating that a plaintiff is generally allowed to recover either the cost of repair or the diminution of market value. [Citations omitted] *These cases, however, have little or no relevance to the present case, in which UP burned thousands of acres of protected government forest lands for which no real estate market exists.* [Emphasis added]

As it turns out, the premise that "no real estate market exists" is a false premise with regard to federal land, including United States National Forest and Bureau of Land Management timberland, as will be discussed below.

Next, UP argued that the majority of the land that burned in the *Storrie Fire* was designated "Wilderness" (no logging) or "deferred"/"off base" (no current logging).[12] Therefore, recovery of commercial timber value should not be available. Further, that if it was recoverable, defendants were entitled to an offset for salvage logging and the costs of reforestation associated with timber harvest. Judge Damrell, however, determined that the United States was entitled to recover damages for the *commercial value* of timber that could not be harvested and, further, ruled that Union Pacific was not entitled to an offset for the expenses associated with logging, the salvage value of the logs, or for

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[10] *United States v. Union Pacific Railroad*, 565 F. Supp. 2d. 1136, 1138 (2008).

[11] *Ohio v. United States DOI,* 880 F. 2d 432, 463 (D.C. Cir. 1989).

[12] The Herger-Feinstein Quincy Library Group Forest Recovery Act of 1998 prohibited the USFS from selling timber before the fire and prevented salvage logging after the fire. Had the fire not occurred, however, the trees could have eventually been harvested after expiration of the act. Buck's Lake Wilderness was likely wise off limits to logging and reforestation so long as it retained designation as "Wilderness."

reforestation costs – all of which are normal commercial timber harvest expenses. Finally, Judge Damrell determined that HEA damages were recoverable. The court rejected Union Pacific's arguments that these damages were duplicative, overlapping, unauthorized and that a plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done."[13] It does not appear that an argument was made that the claimed damages exceeded the pre-fire Fair Market Value – which is almost certainly the case. Union Pacific, facing a case of undisputed liability and the rejection of all of its damages arguments by the Court, settled the case for the unprecedented sum of $102 million in order to avoid a potentially greater verdict.

The United States Attorney's Office rejoiced over the settlement and issued a press release.[14] Department of Agriculture Undersecretary Mark Rey stated "We are pleased with this settlement. The money will be quickly applied toward restoring the landscape and the ecological balance on National Forest lands damaged in the fire so that the public can once again enjoy these pristine forest regions;"[15] Yet, years after the settlement, more than $90 million remained in a Department of Treasury account while various agencies engaged in bureaucratic rumination about what to do with the money. The press release further announced the formation of "Fire Recovery Litigations Teams" that have been staffed with attorneys who have now fanned out throughout the West gunning for more justice for the inevitable seasonal fires that occur. A new federal legal industry that never before existed has formed and damages never before contemplated prior to the *Storrie Fire*, are now viewed as indispensible "compensation." Few have questioned the wisdom of this titanic shift in federal policy and the magnitude of damages that is uniquely available to the "King."

To state that the U.S. Attorney embraced the damages concepts set forth in the *Storrie Fire* decision would be a gross understatement. With the ability to recover full value for commercial timber without any worry of duplicative damages or offset for normal costs associated with harvesting timber a *fait accompli,* the new frontier has been expanding the recovery of double damages under California's Timber Trespass statute, Civil Code §3346,[16] and pushing the envelope of "intangible environmental damages."

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[13] *Valdez v. Taylor Auto Co.*, 129 Cal. App. 2d. 810, 822-823 (1955).

[14] LARGEST SETTLEMENT EVER IN A FOREST FIRE CASE: UNION PACIFIC RAILROAD COMPANY PAYS $102 MILLION TO SETTLE THE UNITED STATES' CLAIMS ARISING OUT OF THE 2000 STORRIE FOREST FIRE. United States Attorney McGregor W. Scott, Eastern District of California, Tuesday, July 22, 2008

[15] The most recent accounting is set forth in the *Storrie Fire FY 2010 Annual Report*, available on the internet. The Report states "The Forest Service (LNF and PNF) implemented over $4 million in projects during the first year (FY09) of restoration and approximately $3 million during the second year (FY10) of restoration." While a number of studies and surveys have been done, picnic tables purchased, partnerships with school districts formed, etc., it does not appear that any significant reforestation has been completed.

[16] CC §3346 (a) provides: "For wrongful injury to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual of involuntary…the measure of damages shall be twice the sum as would compensate for the actual detriment…"

The U.S. Attorney has had the assistance of both state and federal courts in this new endeavor.

In June of 2002, workers erecting a municipal water tank ignited a fire as a result of grinding operations. Named the *Copper Fire*, it eventually consumed over 20,000 acres and damaged both private property and portions of the Angeles National Forest in Southern California. Litigation commenced by private plaintiffs in state court resulted in an appellate decision that created a split of authority in California regarding the recovery of double damages for wildfires. Prior to the *Copper Fire*, the settled law in California was that the recovery of wildfire damages was part of a separate, comprehensive statutory scheme and that CC §3346 does not apply to wildfires. In 2009, the Second District Court of Appeal, in *Kelly v. CB&I Constructors, Inc.*, determined that a 1970 decision by the Third District Court of Appeal[17] was erroneously decided and that CC §3346, indeed, applied to wildfire cases.[18] The *Kelly* court embraced a "modern" view of trespass, finding that the "plain language" of CC §3346 triggered application in wildfire cases and that nothing in the legislative history indicated otherwise.[19] Subsequent to *Storrie*, the U.S. Attorney began pleading entitlement to double damages while the *Copper Fire* appeals were percolating. When the *Kelly* decision came down, the U.S. Attorney enthusiastically embraced double damages for "casual or involuntary" trespass. Indeed, the U.S. Attorney began to claim that the doubling applied *not just to timber loss damages but to all damages, including fire suppression.* In the *Sims Fire*, for example, the United States claimed that it was entitled to a doubling of *all* damages, escalating the claim from $37.71 million to approximately $75.42 million.

The escalation was even more flagrant against defendants in the *Moonlight Fire* litigation. Secure in the belief that traditional notions of fair market value and objective standards likely would not be applied, the U.S. Attorney did not even retain an expert to determine pre-fire fair market value or diminution in value as a result of the fire. The defense, on the other hand, retained an expert who utilizes a well-established method of valuing timberland—discounted cash flow. Using this methodology, the expert offered an unchallenged pre-fire fair market value of the burned land of approximately $115.7 million. The expert also found that had the trees been quickly salvaged and not allowed to rot, the net change in marked value would have only been $19.7 million. But the U.S. Attorney was confident that fair market value was irrelevant. After all, the *Storrie Fire* decision stated "*UP burned thousands of acres of protected government forest lands for which no real estate market exists.*" But was it really true that "no real estate market existed" – particularly for National Forest timberland designated "General Forest" and previously logged?

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[17] *Gould v. Madonna*, 5 Cal. App. 3d. 404 (1970).

[18] *Kelly v. CB&I Constructors, Inc.*, 179 Cal. App. 4th 442 (2009).

[19] For a thorough review of the legislative history that supports the view that it was never intended that CC§ 3346 be applied to wildfire cases, please see Sierra Pacific Industries Motion for Summary Judgment/Summary Adjudication in the Moonlight Fire case. [*United States v. Sierra Pacific Industries, et. al.*, United States District Court, Eastern District, California, Case No. 2:09-CV-02445-KJM-EFB]

Components of the $791,367,247 total damages set forth in the *Moonlight* Initial Rule 26 Disclosure were the "doubling" of the alleged $86,441,296 timber loss under CC §3346 and the "doubling" of all alleged economic damages to yield an "intangible environmental damages" claim of $469,950,634. The net effect was to inject a form of what might be viewed reverse "mega-millions" casino-style, "economic death penalty" risk into the case. The use of a "multiplier" of economic damages was akin to the U.S. Attorney "betting on the come" that the Ninth Circuit would support that measure of "intangible environmental damages" in the companion federal case arising out of the *Copper Fire*. Conveniently for the United States, the Ninth Circuit decision came down literally days before the *Moonlight Fire* case was headed to trial.

On Friday, June 29, 2012 the Ninth Circuit Court of Appeal filed its Opinion in the *Copper Fire* case (*USA v. CB&I Constructors, Inc., No. 10-55371, DC No. 2:08-cv-03609-PA-AGR*). As feared by defendants, the Ninth Circuit upheld the verdict of $28.8 million for "intangible environmental damages" in a case where the "economic damages" for fire suppression costs ($6.6 million) and various immediate resource protection costs totaled $7.6 million. The U.S. did not provide any testimony, expert or otherwise, to quantify environmental harm. Instead, the U.S. Attorney suggested two possible ways the jury could calculate an award for "intangible environmental damages:" either a "multiplier" applied to economic damages, or by determining a "price per acre" for the 18,000 acres of National Forest land burned in the fire.

The Ninth Circuit Opinion is troubling for current and future defendants in a number of ways. First and foremost, in characterizing "intangible environmental damages" as "non-economic damages" the opinion appears to open the door for a qualitative "pain and suffering" type argument, previously unavailable in real or property damage cases. The approval of a "multiplier" without any expert environmental economic impact testimony paves the way for an award of "intangible environmental damages" that can result in a verdict wildly in excess of pre-fire fair market value, again unprecedented in real or personal property damages case law. The alternative "price per acre" is no more attractive when applied to thousands of acres of fire damage without any real expert or scientific guidance. To use the *Moonlight Fire* case for perspective, the United States disclosed its long-standing "go-to" HEA expert, Robert Unsworth. He opined that intangible environmental damages under the HEA model in the *Moonlight Fire* were $43 million, which highlights yet again the greed in the previous demand of $469,950,634 for the same category of damages. Further, defense HEA experts, using Mr. Unsworth's own methodology and applying an offset for future fire suppression costs that he utilized in all prior cases, came up with a *net* HEA award in the $2 to $3 million range. Finally, it is very troubling that fire suppression costs were part of a multiplier for "intangible environmental damages" as the two do not appear to be related. Once this opinion was published, it became very clear to the Moonlight Fire defendants that the U.S. Attorney would opt for the *Copper Fire* "intangible environmental damages" multiplier – an argument that would greatly expand the potential verdict range.

The New Federal Policy Applied to the *Moonlight Fire*

The *Moonlight Fire* was allegedly ignited as a result of contact between the metal tracks of a CAT bulldozer on andesite rock that occurred during the course of creating a "water bar" to control erosion on a logging skid trail. The theory promoted in the Joint Federal/State Origin and Cause Investigation report was that the fire smoldered for more than an hour and a half before it became an open flame fire. It was alleged that the bulldozer operators should have discovered the fire before leaving the work site. The bulldozer operators were employees of Howell's Forest Products, a Licensed Timber Operator and independent contractor hired by Sierra Pacific Industries, the purchaser of standing timber sold by a group of individuals (collectively referred to as "Landowners") who owned the timberland that was approved for harvest by the California Department of Forestry and Fire Protection pursuant to a Timber Harvest Plan. The Landowners owned the property as, essentially, tenants in common and were therefore vulnerable to personal judgments. The Landowners were all descendants of patriarch T.B. Walker, a self-made Minnesota lumberman who moved to California in the late 1800's. In one of the many ironies in the case, Walker was a firm believer in the role of fire in the forest ecosystem-long before there was such a thing as an "ecosystem." Henry Graves, an early successor to Gifford Pinchot as Chief of the fledgling United States Forest Service, was reportedly appalled by thoughts that fire could be viewed as beneficial but authorized a fire study of Walker's property in Westwood, California.[20] Although Graves managed to convince Walker to endow a Chair at the Yale School of Forestry, he never embraced Walker's views regarding the role of fire. At the time of the *Moonlight Fire* that ignited on Walker property near Westwood, a century of suppressing all fires created a veritable tinder box out of Plumas Nation Forest and virtually all Western forests. The USFS has begrudgingly been forced to acknowledge that the policy of suppressing all fires has had very negative consequences and now is forced to attempt to deal with the huge fuel loads that have been allowed to build. Present and future defendants will be forced to pay the price of the misguided fire suppression policy that has created a "tinder box" of unhealthy forests throughout the Western United States, with potentially no viable comparative fault defenses for the Forest Service's longstanding mismanagement. Fuels reduction treatments are being slowly implemented but it may well be "too little, too late." It was most certainly too late for the *Moonlight Fire* defendants.

The Origin and Cause Opinions set forth in the Joint State/Federal Origin and Cause Investigation Report were hotly contested in the federal case and remain contested in the pending state cases filed by Cal Fire (suppression costs) and a number of private plaintiffs. Because of the pending state litigation, further commentary on the criticisms of the government investigation and the conclusions reached must be deferred. In federal pre-trial motions, the court ruled that a jury could find Howell's (the LTO), SPI (the buyer of standing timber), the Walker Family Landowners and their forest manager, W.M. Beaty liable for the fire *even if the fire was started by a third party – including an arsonist.* In addition to the pre-trial ruling that limited the defenses available to SPI and that opened the door for liability even if SPI's independent contractor did not cause the

[20] Harold K. Steen, *The U.S. Forest Service A History (Centennial Edition) Forest History Society*, 2004; Pages 135-136.

fire, SPI's position was further compromised by the *Copper Fire* decision noted above. Trial of the case became such a high risk, "bet the company" case that SPI felt compelled to settle. Liability for a fire started by anyone coupled with an ability to argue a multiplier of all "economic" damages – claimed to be in the multiple hundred million dollar range – compelled SPI to re-evaluate the risks. As trial was scheduled to commence, a number of settlement negotiations were conducted by a federal magistrate and the case settled. When it was over, the case settled for an estimated $122,500,000 that took the form of $55 million in cash and 22,500 acres of SPI land.[21]

The Fiction of "No Fair Market Value" for USFS Timberland

Investigation and discovery conducted during the *Moonlight Fire* confirmed that there is, indeed, a national timberland market where properties are bought, sold and exchanged in tremendous volumes. The USFS is an active participant and is frequently involved in litigation related to these transactions.[22] Indeed, the USFS website publishes "success stories" regarding the expansion of the National Forest System.[23] Between 2000 and 2010, the USFS acquired roughly 229,746 acres and averaged about 115 exchanges per year for fiscal years 1989-1999.[24] Indeed, the USFS is about to acquire 22,500 additional acres from Sierra Pacific Industries (valued at $3,000 per acre) pursuant to the recent settlement.

Of further, exquisite irony is the fact that Sierra Pacific Industries, the Walker Family and their forest manager, W.M. Beaty (also a defendant) exchanged thousands of acres with the USFS prior to the *Moonlight Fire*.[25]

So how is forest land valued in transactions between private landowners and the USFS?

The answer is both straightforward and simple. The land is valued pursuant to the Uniform Appraisal Standards for Federal Land Acquisitions (USFLA). [26] The standards

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[21] Codefendants paid a total of $8 million and SPI's and its insurers made up the balance of the cash payment that included periodic payments for $30 million over the course of 5 years. The 22,500 acres will be selected by the USFS from SPI's inventory of forest land.

[22] *See, e.g.*, the following: *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d. 800 (9th Cir. 1999) (discussing multiple land exchanges between the USFS consisting of old growth forest lands); *National Forest Preservation Group v. Butz*, 343 F.Supp. 696, 699. (1972) (discussing the attempted USFS exchange of 10,243 acres of the Gallatin National Forest for lands owned by Burlington Northern adjacent to the Beaverhead National Forest and within Yellowstone National Park (remanded on appeal); *City of Williams v. Dombeck*, 151 F.Supp. 2d 9, 11 (2001) (discussing a land exchange between USFS land a private owner of property located on the outskirts of the Grand Canyon National Park); *Western Land Exchange Project v. Dombeck*, 47 F. Supp. 2d 1196, 1198 (1999) (discussing a land exchange between the USFS and other entities involving 31,256 of land owned by the National Forest System for 34,319 acres of land owned by a private party.)

[23] *See* http:/www.fs.fed.us/land/staff/LWCF/accomplishments.shtml .

[24] Mark Rasmussen Declaration/Expert Report; Uniform Appraisal Standards for Federal Land Acquisitions (USFLA) at L-94.

[25] The USFS exchanged 3,846.58 acres of National Forest land in close proximity to the *Moonlight Fire* origin with 4,496.7 acres of W.M. Beaty managed land. More recently, the USFS exchanged land located in Tahoe National Forest and El Dorado National Forest with land owned by Sierra Pacific Industries

are often referred to as the "Yellow Book" and have specific language with regard to consideration of highest and best use.

> *Non-economic highest and best use is not a proper basis for the estimate of market value [thus] a highest and best use of conservation, preservation, or other use that requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value.* (UASFLA, p. 36).

The USFS recognizes this in Forest Service Manual 5400 which directs the agency to consider only economic uses when establishing market value. The market value of the property must be based on its highest and best *economic* use. Consideration of "non-economic" values, such as habitat conservation values, cannot be included. To do so would be a violation of the federal appraisal standards.

In summary, when the United States is buying, selling or exchanging land – including National Forest land – the "fair market value" is the standard. If that is true, then how can the USFS claim that burned National Forest is worth an exponentially greater sum than its pre-fire fair market value? Why can't the traditional measure of damages used for more than a hundred years by federal and state courts – the "lesser of" standard – be used if, indeed, the USFS utilizes fair market value in non-litigation transactions?

Through the Wildfire Litigation Damages *Looking Glass*

Here is where Lewis Carol meets "It's good to be King" in an Olympic-caliber feat of judicially-condoned intellectual gymnastics. The United States contended that, once land becomes part of a National Forest, it immediately sheds any vestige of the fair market value the land possessed only moments before escrow closed and becomes, for all intents and purposes, "priceless." This fantastic bit of arguable confiscatory alchemy is best explained through the testimony presented by one of the experts retained by the United States in the *Moonlight Fire* case. The real estate appraisal expert was presented with a series of hypothetical questions, beginning with an exchange of private timber land for USFS land. The expert was asked to assume that the respective exchange properties were appraised and determined to be equal value. The witness was then asked:

> Q: The day after the exchange takes place, what is the value of the land acquired from the private landowner by the Forest Service [Objection]
>
> A: It has no market value[27]

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[26] Forest Service Manual 5410.7 known as "USFLA" or "The Yellow Book."
[27] Deposition of Steven Roach 2/28/12; 71:7-15

The expert was further asked to assume that the newly-acquired USFS land was totally consumed by a negligently set fire the day after the transaction. Again, the expert claimed that fair market value had no relevance in determining the damages caused when the land burned the day after the exchange: "I don't see a connection between the concept of market value and fire damages."[28] A further hypothetical was presented involving the destruction of a Forest Service structure in a wildfire. Again, the expert testified that it did not have a market value and would have to be valued pursuant to the concepts set forth in the *Storrie Fire* decision.[29] Finally, the expert testified that the *Storrie Fire* concepts would have to be applied to a pick-up truck that was purchased for $35,000 and then burned in a wildfire. The expert testified that, conceptually, he could envision the Forest Service sustaining damages in excess of the fair market value of the pick-up.[30] At that point, the cross-examining attorney (this author) did not go any further with hypotheticals along the lines of: "Assume a USFS employee flies to Salt Lake City and rents a vehicle from Hertz..." The premise is that once *anything* becomes USFS property, it takes on attributes of "priceless" unavailable to any of the King's subjects.

The beauty and magic of this fantastic concept is further revealed by learning that *it is reversible*. If the USFS decides to part with land, it is, once again, capable of being appraised at fair market value. During settlement negotiations in the *Moonlight Fire* when difficulty was encountered closing a gap between the United States and Sierra Pacific, I made the (not so) tongue-in-cheek suggestion that the gap could be readily closed if Sierra Pacific simply torched several thousand acres of pristine timberland that had a stated value of $3,000/acre shortly after it was transferred to the United States, thereby rendering it "priceless" to the point of closing any conceivable gap in settlement negotiations.

The Pre-Legislation Federal Policy was Bad Public Policy

At the time *Moonlight* settled, defendants were living in a world where traditional notions of compensation for real and personal property damage were out the window and the recent *Copper Fire* decision fully opened the door to "pain and suffering" damages in property damage cases. Defendants and their counsel strongly felt that federal wildfire damages un-tethered to pre-fire fair market value was terrible policy unless the goal is for the federal government to eventually take back all privately owned timber land in the West. In an already devastated and struggling economy, timber related businesses will be dealt a crippling blow. Insurers were understandably concerned that the cost and, indeed, availability of insurance could well make many individuals and businesses unable to afford or even obtain any meaningful insurance. Underwriters were historically able to evaluate risk in some rational manner. In the new world that had metastasized since 2008, the exposure for property damage was largely dependent upon the mood of the U.S. Attorney and the ability to whip a jury into a sympathetic frenzy. By being able to claim damages wildly in excess of fair market value, the U.S. attorney could readily turn wildfire cases into "bet the ranch," "do or die" scenarios akin to plea bargaining when

[28] Deposition of Steven Roach 2/28/12; 72:11-13
[29] Deposition of Steven Roach 2/28/12; 73:1-12
[30] Deposition of Steven Roach 2/28/12; 75:1-76: 1

faced with a capital crime. From the perspective of Sierra Pacific Industries, Landowners and W.M. Beaty, the scenario in Moonlight was akin to a building owner being charged with the death penalty because a tenant (or trespasser) committed a murder in one of the apartments.

A number of questions arose as a result of the current policy. Should the United States be able to extract vast sums of money from private citizens and businesses using a complete fiction that "*protected government forest lands for which no real estate market exists*" burned? Was the *Moonlight Fire* really catastrophic? If so, was the *Antelope Complex* Fire – a lightning-caused fire that burned 22,000 acres of Plumas National Forest a month before *Moonlight* – also catastrophic? What, if anything is going to be done regarding the land "damaged" by the *Antelope Complex* Fire? Why has *the Storrie Fire* $102 million settlement fund essentially rotted without any meaningful reforestation? How can California's timber industry compete if the cost of doing business includes exposure to fantastic damages claims?

The "Monkey See, Monkey Do" Problem

The success of the United States did not go un-noticed by other governmental entities and, in all likelihood, the private plaintiff bar. At lease one local government entity has jumped on the damages band wagon, claiming outlandish damages in a wildfire case.[31] As state and local entities in California sink further and further into the bankruptcy abyss, it is likely that any manner of revenue grabbing will take place. It is also anticipated that plaintiff's counsel will seek to utilize the "logic" set forth in the *Copper Fire* opinion and try to expand damages available to private parties. At lease one of the state litigants in the *Moonlight Fire* has suggested that HEA damages will be pursued even though there is no precedent and, indeed, no logic for a private party claiming "public benefit" damages. In light of *Copper Fire,* some multiplier may be pursued. So, defendants may face doubling under §3346 and than a multiplier under *Copper Fire* in litigation with a private plaintiff.

Unless the course was changed and rational damage assessment used for hundreds of years re-introduced, defendants in governmental wildfire – and perhaps all other types of property damage – cases faced more economic misery and uncertainty.

The Legislative Effort

During the pendancy of the federal *Moonlight Fire* case, it became apparent to a number of people, including this author, that the U.S. was relying heavily on California statutory and case law to support the evolving "intangible environmental damages"

[31] In the *Geysers Fire,* the Sonoma County Agricultural Preservation and Open Space District filed a claim for damages to various conservation easements after the case had been in litigation for years. The District claimed more than $34 million for damages to conservation easements that a District expert, Robert Unsworth, claimed could have been replaced for $1.72 million. The case settled for more than it was arguably worth because of the "downside risk" potential. (*Sonoma County Agricultural Preservation and Open Space District v. Calpine Corporation, et. al.*, Sonoma County Superior Court Case: SCV- 24562]

claims being made in the post-*Storrie* world of wildfire litigation. It therefore, appeared that relief from excessive and ruinous damages claims might best come from legislation that specifically addressed the issue of wildfire damages recoverable by a governmental entity. Because the federal government was (and remains) the largest owner of wildland in California and because of the tremendous fuel load buildup in virtually all sectors, exposure in post - *Copper Fire* Opinion federal claims was viewed as unlimited. The fears were many. The cost and availability of insurance and the ability of the California forest products industry to remain competitive in an already struggling economy were concerns at the top of the list. There was also increasing concern about a perceived trend toward *de facto* strict liability instead of negligence.

Beginning in early 2011, this author and others began drafting proposed legislation designed to "cap" governmental wildfire damages at pre-fire Fair Market Value and to clarify liability exposure that was becoming blurred through aggressive prosecution. A final concern was resolution of the split of authority in California discussed above regarding whether double and treble damages pursuant to Civil Code §3346 are avaialble in wildland fire cases. This author's initial attempt at drafting legislation began in March of 2011 and was as follows:

Health & Safety Code §13007

Any person who personally or through another ***for whom such person is legally responsible*** willfully, negligently or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire.

Health & Safety Code §13007.1

For purposes of establishing liability pursuant to Health & Safety Code § 13007, an owner, lessor, lessee, licensee or other possessor of land is not "legally responsible" for damages arising out of the following activities:

(1)All recreational activities, including, but not limited to, hiking, camping, hunting and fishing.
(2)Use of motor vehicles or other vehicles as defined in California Vehicle Code §§111,242-245,400-415,471, 585, 655,670 - including All Terrain Vehicles (ATV's), motorized bicycles and motorcycles
(3)The cutting of firewood for personal, non-commercial use
(4)Trespassers
(5)Operations and activities regulated by the Z'BERG-NEJEDLY FOREST PRACTICE ACT of 1973 [Public Resource Code §4511 et seq) conducted by a Licensed Timber Operator holding a valid license issued by the California Department of Forestry and Fire Protection.

Health & Safety Code §13007.2

Damages to real or personal property under this section shall be limited to the lesser of dimunition in fair market value or cost to repair. In no event shall total damages awarded under this section, including lost profits, loss of use, Habitat Equivalency Analysis (HEA) Damages, exceed the fair market value of the property at the time of the fire.

Health & Safety Code §13007.3

Notwithstanding the provisions of Civil Code § 3346, Code of Civil Procedure § 733 or any similar statute, no double, treble or other multiplier of damages shall be awarded under this section. Punitive or exemplary damages may be awarded upon a proper showing pursuant to Civil Code § 3294 et seq.

The process continued into 2012 and involved numerous meetings with the staff of Governor Jerry Brown, the Consumer Attorneys of California and others. The proposals regarding defining "legal responsibility" were unsuccessful and defendants remain in a world that also includes the potential for liability for a fire caused by a third part – such as a fire wood cutter or recreational user. The *Moonlight Fire* case has caused landowners to re-think the long-standing practice of permitting the cutting of firewood in the spring and fall as California's fire season is sometimes a 12 month season. Excessive damages claims are also testing the historic willingness of private landowners to permit all forms of recreational users to come onto their land. The effort to preclude double and treble damages unavailable for 29 years – the period between *Gould* (1970) and *Kelly* (2009) – was unsuccessful. The suggestion to "cap" damages at the pre-fire fair market value of the land affected by wildfire was also rejected – even thought is would have given governmental entities the potential of recovering greater damages that are available to private citizens.

At the last possible moment during the 2012 session, legislation was passed that provides defendants with some potential relief. The new statute, Health and Safety Code § 13009.2 is set forth, in full, below. The key features are:

- Damages claimed by a public agency "must be quantifiable and not unreasonable in relation to the pre-fire fair market value of the property, taking into consideration the ecological and environmental value of the roperty to the public."

- In addition, ecological and environmental damages are recoverable if they are "quantifiable" and not already addressed in the above section.

- In assessing reasonableness, prefire fair market value is relevant and one factor to be considered along with six specific categories of "ecological and environmental" damages

- If a public agency claims environment damages, it cannot enhance damages under CC §3346 or CCP §733

- "Public agency" = U.S., State of California, any city, county, district or subdivision

- The statute is prospective and only apples to cases filed on or after the effective date.

New Health and Safety Code §13009.2

13009.2. (a) In a civil action by a public agency seeking damages caused by a fire, pecuniary damages must be quantifiable and not unreasonable in relation to the prefire fair market value of the property, taking into consideration the ecological and environmental value of the property to the public. The only recoverable pecuniary damages shall be:

(1) Either the restoration and rehabilitation costs associated with bringing the damaged property back to its preinjured state or replacement or acquisition costs of equivalent value, or diminution in value of property as a result of the fire, including lost timber value, or some combination thereof.

(2) Short-term costs related to immediate damages suffered as a result of the fire, such as burned area emergency response costs, costs associated with discrete restoration activities related to repair and replacement of real property improvements, and remediation and eradication costs relative to invasive species and any other nonnative infestation caused by or exacerbated by sudden burn area conditions.

(b) In addition to the damages authorized by subdivision (a), a public agency may also recover ecological and environmental damages caused by the fire, if those damages are quantifiable, and are not redressed by the damages set forth in subdivision (a), taking into consideration the ecological and environmental value of the property to the public. Ecological and environmental damages may include:

(1) Lost recreational value.

(2) Lost interim use.

(3) Lost historical and archeological value.

(4) Damage to wildlife, wildlife habitat, water or soil quality, or plants.

(5) Damage to any rare natural features of the property.

(6) Lost aesthetic value.

(c) In assessing the reasonableness of damages under subdivision (b), the prefire fair market value of the property is relevant and one factor to be considered, in addition to the other factors listed in subdivision (b).

(d) A public agency plaintiff who claims environmental damages of any kind under subdivision (a) or (b) shall not seek to enhance any pecuniary or environmental damages recovered under this section. This section is not intended to alter the law regarding whether Section 3346 of the Civil Code or Section 733 of the Code of Civil Procedure can be used to enhance fire damages, but this section does confirm that if a public agency claims environmental damages under subdivision (a) or (b), it shall not seek to enhance any damages

recovered under this section for any reason, and shall not use Section 3346 of the Civil Code or Section 733 of the Code of Civil Procedure to do so, regardless of whether those sections might otherwise apply. This section is not intended to limit or change the ability of a public agency to recover costs arising from a fire as provided in Sections 13009 and 13009.1.

(e) For purposes of this section, the term "public agency" means the United States of America or any political subdivision thereof, the State of California, any city, county, district, public agency, or any other public subdivision of the state.

(f) This section shall apply only to a civil action filed on or after the effective date of the act adding this section.

Health and Safety Code section 13009.2 was part of Assemble Bill 1492. Passage of the Bill was described as an early morning "nail-biter." The package included, *inter alia*, a 1 percent sales tax on lumber sold in California that anticipated raising $30 million annually that would allegedly pay for regulatory oversight, relief from regulatory fees, and modification of the Timber Harvest Plan process/requirements. The legislation, to the surprise and concern of some, was vigorously opposed by the federal government. Both Interior Secretary Ken Salazar and U.S. Attorney for the Eastern District, Ben Wagner, actively lobbied against the state legislation.[32] Again, damages that were unheard of prior to the *Storrie Fire* settlement were apparently viewed by the federal government as essential to ongoing American life. Was the concern really for the environment? Or was it the money? If the concern was for the environment, then why was the titanic *Storrie* settlement fund allowed to rot when the premise for recovery was the restoration of land. Indeed, the situation became even more embarrassing (if indeed the federal government can be embarrassed) when the 75,000 acre *Chips Fire* erupted and spread rapidly on the dead fuel left because nothing was done to remediate *Storrie.* Larry Ames of the U.S. Forest Service was quoted as follows:

> "Heavy brush and dead trees are burning in the footprint of the Storrie Fire in 2000. The steep terrain and dry fuel and wind causing spot fires more than a mile away make the fire dangerous to fight from the ground."[33]

In the same article, USFS spokesperson, Brigitte Foster, is quoted as stating, "When a dead tree lights on fire and hits the ground or a rock, it can sound like an explosion." Because of the failure to use the settlement money for any meaningful remediation, there were many thousands of dead trees left standing and new brush accumulation left untreated when the *Chips Fire* started and spread within the *Storrie Fire* footprint.

The issue of "Legislative Intent" will, undoubtedly, be much discussed by members of the bench and bar regarding the meaning of §13009.2 and potential "gray areas." Unfortunately, the "packaging" of AB 1492 makes the issue of "intent" perhaps

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[32] *See, e.g.,* the LA Times article at: http://latimesblogs.latimes.com/california-politics/2012/07/california-jerry-brown-wildfire.html

[33] *See,* http://www.chicoer.com/news/ci_21226048/expanding-chips-fire-sends-smoke-into-butte-county

more elusive. It appears from Assembly Floor Analysis from September 1, 2012 that the *Moonlight Fire* and *Copper Fire* damages claims played some part in demonstrating the need for new legislation. The comments section stated in part:

> With regard to wildfire liability damages, California law allows for the doubling or tripling of damages for "wrongful injuries to timber, trees, or underwood upon the land of another." Only recently has the federal government used this law to enhance damages related to wildfires. In one case, the federal government claimed $662,480,066 in damages, $331,240,033 of which comprised of "double damages." In addition, the federal government has sought intangible environmental damages in a manner analogous to emotional distress damages. *Such damages are determined in the absence of a formula dictating the proper amount of an award.*

Additionally, the other, main "intent" was simply to raise more money through a new tax that will, hopefully, provide some measure of relief for the struggling California timber industry trying to compete in a national and international market.

Where do we go from here?

The impact of §13009.2 on federal wildfire litigation remains to be seen. Reportedly, cases were filed earlier than they otherwise would have been filed in order to avoid the new law.[34] Perhaps the first issue is whether the U.S. will attempt to avoid §13009.2 altogether by asserting an alternative federal damages basis that trumps state law with regard to damages to federal land. If so, then defendants will have to take the battle to Washington D.C.

Here are some potential issue areas:

1) What is meant by "pecuniary damages must be '*quantifiable*,'" and by whose standards?

The term "quantifiable" is not defined in the statute. Merriam Webster defines the adjective "quantifiable" as follows: "To determine, express or measure the quantity of." The term appears to contemplate some form of quantitative measurement. Perhaps the most important issue is "Quantifiable by whom?" Will expert testimony be required? If so, what expert qualifications will be required in order to express an admissible opinion on pecuniary damages? Will HEA methodology continue to be asserted as a means of "quanitifying" environmental damages?

2) "*Pecuniary damages*" are defined as restoration, rehabilitation or replacement costs or diminution of value, including lost timber value or some combination."

[34] The federal government enjoys a luxurious 6 year statute of limitations – 28 USC § 2415.

What standards or limitations will be applied to the "mixing and matching" of historical damages alternatives under the "Lesser Of" Rule. Can these damages – historically considered "economic" damages – exceed prefire fair market value? Will appropriate measures be taken to avoid duplicative damages categories? Historically, plaintiffs have attempted to recover both timber damages and reforestation. Will the language of subsection (a)(1) be sufficient to prevent duplicative damages?

3) What is meant by "*Not unreasonable in relation to the prefire fair market value, taking into consideration the ecological and environmental value of the property to the public?*"

This meaning of this language will, undoubtedly, be vigorously debated. Presumably "reasonableness" will be a question of fact for the jury and subject to some form of judicial review. Again, can the aggregate of the various authorized pecuniary damages exceed fair market value? Nothing in the new legislation precludes the possibility that a "reasonable" award could be found to be greater than the pre-injury fair market value of the land.

4) Recovery of additional "*ecological and environmental damages....if those damages are quantifiable, and not redressed in subdivision a)*"

Who will determine whether theses damages have been redressed under the pecuniary damages provisions of subdivision a)? Judge or jury? How will defendants avoid double recovery – particularly when "pecuniary" award is in excess of the pre-fire fair market value of the property?

5) How are the six identified potential loss categories or factors to be evaluated?

Subdivision (b) lists lost recreational value, lost interim use, lost historical and archeological value, damages to wildlife habitat water or soil quality or plants, damage to rare natural resource features, and lost aesthetic value. What are the standards for evaluation? Is expert testimony required?

6) "*In assessing the reasonableness of damages under subdivision (b), the pre-fire fair market value of the property is relevant and one factor to be considered in addition to the other (six) factors*"

What does this mean? Is this a jury issue? Does the trier of fact have to first determine pre-fire fair market value before assessing both pecuniary and "ecological and environmental damages"?

7) If the U.S. believes that doubling and trebling is recoverable under CC 3346 and CCP 733, will the U.S. seek "environmental damages" of any kind under subdivision (a) or (b)? If pecuniary damages can exceed pre-fire fair market value and doubling for "incidental or involuntary trespass" is available in

wildland fire cases, does the passage of §13009.2 provide any meaningful relief for those accused by a governmental agency of wildfire damages?

8) Will this legislation provide and degree of certainty for insurance underwriters and risk managers?

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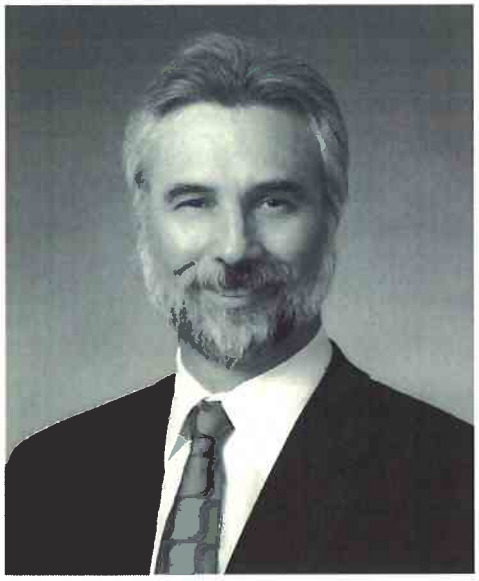

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