

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
OREGON DEPARTMENT OF FORESTRY  
PRIVATE FORESTS**

IN THE MATTER OF: ) **PROPOSED ORDER**  
 )  
**JOHN WEST** ) OAH Case No. 2017-ABC-00192  
 ) Agency Case No. 16-SW046 and 16-SW047  
 )  
 )

**HISTORY OF THE CASE**

On September 30, 2016, the Oregon Department of Forestry, Private Forests (ODF, or the Department) issued two notices of violation and two repair orders to John West.<sup>1</sup> On November 10, 2016, Attorney James Dole requested a hearing on West’s behalf.

On December 7, 2016, ODF referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Rick Barber to preside at hearing. Senior ALJ Monica Whitaker convened a prehearing conference on ALJ Barber’s behalf, setting the hearing for March 29-30, 2017, and further setting a schedule for the Motion for Summary Determination West intended to file.

On January 31, 2017, Mr. Dole filed a Motion for Summary Determination on West’s behalf. Assistant Attorney General Matt DeVore filed ODF’s Response on February 14, 2017, and Mr. Dole filed West’s Reply on February 21, 2017. On March 7, 2017, ALJ Barber denied the motion.

Hearing was held as scheduled on March 29 and 30, 2017, in Grants Pass, Oregon. Mr. Dole represented West, who appeared and testified. Mr. DeVore represented ODF. The following witnesses testified at ODF’s request: West; ODF Operations Forester Stephen Wetmore; Oregon Department of Fish & Wildlife (ODFW) Assistant District Fish Biologist Peter Samarin; ODF Stewardship Forester Douglas Thackery; and ODF Geotechnical Specialist John Seward. The following witnesses testified at West’s request: Dean Schwerdt; Robert Webb;<sup>2</sup> Robert Stumbo; Civil Engineer Ralph Dunham; and West.

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<sup>1</sup> The repair orders were amended on December 23, 2016.

<sup>2</sup> Also referred to in the record as “Dick” Webb (witness list) and “Ed” Webb in West’s testimony.

The evidentiary record closed on March 30, 2017, and the hearing record was held open for written closing arguments. Both parties submitted initial written arguments on April 18, 2017, and response arguments on April 25, 2017. The record closed and the matter was taken under advisement after receiving the last argument.

### **ISSUES**

1. Whether the 2014 crossing replacement over Brimstone Gulch was an “operation” under the Forest Practices Act (FPA), as defined in ORS 527.620(12).
2. Whether, if it was an operation under the FPA, West was an “operator” as defined in ORS 527.620(13).
3. Whether West violated the FPA in the following particulars:
  - a. Failing to notify ODF of the 2014 crossing replacement.
  - b. Failing to provide a written plan to ODF for the crossing replacement.
  - c. Installing a culvert crossing that did not meet FPA requirements for flooding and fish passage.
4. Whether, if West violated the FPA, he must correct the violations as required by ODF.

### **EVIDENTIARY RULING**

Exhibits A1 through A32, offered by ODF, were identified and offered into evidence. All but Exhibit A22 were admitted into evidence. Exhibits R1 through R7, offered by Respondent, were admitted into evidence. Exhibits A18, A23, R1 and R2 were admitted over objection.

### **CREDIBILITY DETERMINATION**

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness’ credibility can be based on a number of factors other than the

manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically credible. *Tew v. DMV*, 179 Or App 443 (2002).

In this case, there is a dispute in the testimony between West and the employees of Grayback Logging, the primary timber harvester on West's 2014-15 logging operation. The dispute is important because of West's claim that the culvert crossing he installed in 2014 was only used for mining equipment and not for logging equipment.

West testified that the culvert was installed in July 2014, but that the old railroad bridge remained intact for use by the logging company. The culvert, he claimed, was solely to be used for mining. Logging trucks were not allowed to use the culvert crossing. West testified that he was present in mid-to-late 2015 when the bridge was removed, leaving only the culvert crossing.

However, evidence from Grayback Logging disputes West's testimony. Milt Coyle, the general manager at Grayback, told Stephen Wetmore that the logging crews crossed Brimstone Gulch at the culvert crossing because there was no longer a bridge during the logging operation in late 2014 and early 2015. (Test. of Wetmore). Coyle sent an email to Doug Thackery with the same information. (Ex. A18). Robert Webb, another Grayback employee, also noted that the crews crossed the culvert. He testified that the bridge was still nearby, but was not crossing the stream any longer. (Test. of Webb).

There is a clear dispute in the testimony as to whether the bridge was still spanning the stream in late 2014 and early 2015. West testified it was there and in use for logging purposes. The loggers testified and otherwise indicated the bridge was no longer there. Credibility is an issue.

Grayback Logging, Webb and Coyle are not parties to this matter and have no reason to fabricate their testimony. The time of their logging operation is clear—it ran from December 2014 and was continued into early 2015. (Ex. A17). Webb's sworn testimony, and the repeated comments of Coyle, establishes that the railroad bridge had been removed *before* the Grayback logging operation—that is, sometime in 2014. The logging crews used the culvert crossing to reach the harvest area, as did Fisher Trucking, the company Grayback used to haul the logs, because there was no bridge.

West is a party to this proceeding. He testified that the bridge was still there until mid-to-late 2015, a time clearly after Grayback's logging operation was completed. That timetable fits his position at hearing that log trucks used the bridge and only mining equipment used the culvert crossing. However, in light of the credible evidence from Coyle and Webb, West's testimony about the bridge removal cannot be true.

West testified that he was present when the railroad bridge was removed later in 2015. If he was present at the time the bridge was removed, then he knows that the bridge was removed

earlier, in 2014. He knows the mid-to-late 2015 date is not true but has testified to its truth anyway. West's testimony that the bridge was removed later in 2015 is not credible.

West's lack of truthfulness in this one instance does not indicate that every part of his testimony is untrue. However, it does mean that I view the rest of his testimony with suspicion. At points where I do not accept his testimony as accurate, I will so indicate. As an example, West testified that he told Wetmore—during Wetmore's site inspection for the 2013 *logging* operation—that the culvert crossing he intended to install was for mining purposes only. This self-serving testimony is not supported by Wetmore's testimony or by the context of a logging operation site visit.

## **FINDINGS OF FACT**

1. On April 26, 2013, Brimstone Natural Resource Co. (BNR) purchased a parcel of property in Josephine County. (Ex. A13 at 5). John West is the president of BNR. Robert Stumbo is also an officer of BNR, but does not recall what his role is because West does most of the paperwork for the corporation. (Test. of Stumbo). BNR later conveyed the property to Westlands Contracting, Inc. John West is the president of Westlands. (Test. of West).

2. Brimstone Gulch is a medium Type F (fish-bearing) stream that runs through the property. (Ex. A13 at 11). At the time West's company purchased the property, there was a road with an old bridge made of railroad planks crossing the stream that was used for logging operations and other purposes. (Test. of West).

3. On March 28, 2013, ODF received notification of a logging operation filed by West on behalf of BNR. The harvest was to begin May 15, 2013 and end on December 31, 2013. (Ex. A13 at 11). Operations always ended at the end of the calendar year. If the operation was not finished, the operator could file a continuation notice at the beginning of the following year. In this case, the logging operation ended in 2013 and no continuation was needed. (Test. of Wetmore). The notification form that West filled out in March 2013 referenced the fish-bearing aspects of Brimstone Gulch and the nearby Dog Creek, and included the following language:

Notification comments: NO OPERATIONS WITHIN 100' OF STREAM, INCLUDING CROSSINGS AND LANDINGS, WITHOUT A REVIEWED WRITTEN PLAN ON FILE WITH ODF; MAY REQUIRE REFORESTATION[.]

(Ex. A13 at 11; emphasis in original).

4. Stephen Wetmore was the ODF Stewardship Forester in 2013, and in that capacity he performed a site visit of the property on June 18, 2013. Wetmore noted that the operation included crossings of Brimstone Gulch at a nearby ford, and he gave West a Written

Statement of Unsatisfactory Condition as a result, because there was no written plan for the crossing provided to ODF. (Ex. A13 at 13). At the time of his visit, West told Wetmore that he was planning to replace the railroad bridge with a six-foot (72 inch) culvert crossing. Wetmore told him he did not think six feet was big enough, and Wetmore said he would calculate the correct size and provide the information to West. (Test. of Wetmore, West).

5. Under the Forest Practices Act (FPA), there are specific requirements for the size of a river or stream crossing (bridges, fords, or culverts). In addition to providing notification and a written plan to ODF, the crossing must be able to withstand a 50-year return interval—that is, the amount of water that the creek would hold in the case of a 50-year flooding event. The operator must also meet all requirements for fish passage. (Ex. A10, A11; Test. of Wetmore).

6. Recognizing that most of its foresters were not engineers and that the determination of 50-year return flows under the rule would be a common problem they would encounter when addressing the size of crossings, ODF prepared and informally adopted Technical Note 5 (Tech Note 5) as a means to calculate the 50-year return flow. (Ex. A10). The equation includes calculating the area of drainage that would go through the streambed and the peak flow of the 50-year event, to determine the cubic feet per second (cfs) of water that would need to go through the culvert crossing. Most who made the calculations in this case used a program called StreamStats to estimate the drainage area and the other factors. Tech Note 5 also has a chart to help determine the minimum size of a culvert to meet FPA standards. (Test. of Wetmore, Thackery, Seward).

7. The crossing must allow for the passage of adult and juvenile fish, and the crossing should be as wide as the active channel of the stream. Technical Note 4 is designed to help determine the appropriate method to allow passage for the adult and juvenile fish when creating or replacing a stream crossing. There are six different strategies for addressing the replacement of a crossing: 1) abandon and remove the crossing; 2) build a channel-spanning structure (bridge); 3) use a ford; 4) prepare a streambed simulation in a modified culvert; 5) use a culvert at zero grade; 6) or other hydraulic design. (Ex. A9; Test. of Wetmore).

8. On June 19, 2013, as he had promised, Wetmore calculated the size of the culvert that would be needed and conveyed that information to West. He recommended a 96-inch culvert, and specifically noted:

**The 6' pipe has been planned and WILL NOT MEET THE FPA.**

(Ex. A13 at 14; emphasis in original). Wetmore's calculations were incorrect because he failed to also take into account the fish passage criteria and failed to take into account the loss of volume when a culvert is appropriately countersunk. A bigger culvert than 96 inches was needed but, because it was Wetmore's error, ODF would not have cited West had he taken Wetmore's advice on the correct size of the culvert. (Test. of Wetmore).

9. West received Wetmore's calculation of 96 inches and was aware that ODF's analysis had concluded a six-foot culvert was not large enough. West did not agree with Wetmore. West did not do any calculations to determine the appropriate size of the culvert, and did not consult an engineer or any other agency with the expertise to determine the correct culvert size. (Test. of West).

10. Others examining this stream crossing have used Tech Note 5 and StreamStats to calculate the correct culvert size for the property where West installed the 72-inch culvert. Forester Doug Thackery determined that the 50-year return flow would be 492 cfs, and that a culvert of 108 inches was needed for the return flow. It would probably be larger for fish passage. (Test. of Thackery). Geotechnical Specialist John Seward's calculations were within five percent of Thackery's, again just looking at peak flows and not fish passage. (Test. of Seward). Ralph Dunham, an expert reviewing the case for West, initially calculated a higher return flow than the others (535 cfs), but analyzed the data using several techniques, to arrive at a conservative belief that the return flow would be 430 cfs. Dunham concluded that West's 72 inch pipe would not meet a 50-year return flow, although Dunham believed that ponding above the culvert would control most of the additional water. (Test. of Dunham).

11. In April 2014, West had Stumbo purchase a six-foot round culvert pipe, thirty feet long, to use for the culvert crossing at Brimstone Gulch. (Ex. R7). In early July 2014, West had the culvert installed at the same location where the railroad bridge was or had been. The culvert pipe was laid on top of the bedrock of the stream, with no countersinking, and was covered with gravel. (Test. of West). West did not file a notification of the operation with ODF, nor did he file a written plan for the crossing. (Test. of Wetmore).

12. Sometime between July 2014 and the beginning of the Grayback Logging operation beginning in December 2014, West had the railroad bridge removed from crossing the stream and placed, relatively intact, near the stream on the property. From that point on, the culvert crossing was used by the loggers. (Test. of Webb; Ex. A18).

13. In November 2014, West provided a notification to ODF of a logging operation to begin in early December 2014. The operation continued into early 2015. (Ex. A17). Grayback Logging harvested a stand of timber high on the ridge of the property during the operation. It was necessary to use the crossing of Brimstone Gulch to access the timber. Milt Coyle is the general manager of Grayback, and Robert Webb worked on the crew. When Grayback crossed Brimstone Gulch, it was over the culvert because the railroad bridge was no longer spanning the stream. (Test. of Webb). Fisher Trucking used the culvert crossing to haul the logs for Grayback, and another logger, Carlos Short, came in and logged a different area around the same time, also crossing at the culvert. (Ex. A18).

14. The road that crosses Brimstone Gulch on BNR/Westlands property is an active forest road. It was used during the harvest phase of the 2013 operation, during the Grayback operation in 2014-15, and by Carlos Short early in 2015. The 2013 harvest area was replanted in

2015, and the area logged by Short and possibly by Grayback was replanted in early 2017. (Test. of West). Continued access to the harvested and replanted areas remains necessary because it takes at least four years for new trees to reach the “free to grow” stage, where active monitoring is no longer needed. (Test. of Wetmore).

15. In late 2015 and early 2016, a number of neighbors near the property contacted ODF to report increased activity on the property and to report the new crossing of Brimstone Gulch. (Ex. A13 at 15-22). Having received these reports, Douglas Thackery, the new Stewardship Forester, contacted West to ask permission to enter the property and see the crossing. West told Thackery that he did not want ODF to enter his property until he could confer with his attorney, who was scheduled to return from a trip in late August. When Thackery recontacted West on August 29, West told him he had installed the six-foot culvert but refused to allow ODF access to the property. He told Thackery that there were no fish in the area and that he believed ODF was on a “witch hunt.” (Ex. A12; Test. of Thackery).

16. Because West denied ODF access to the area to inspect the crossing, ODF sought and obtained an Administrative Inspection Warrant from the Josephine County Circuit Court and executed the warrant on September 30, 2016. Present for the inspection were Wetmore and Thackery, a third Stewardship Forester, ODFW fish biologist Peter Samarin, and a deputy sheriff from Josephine County. ODF measured the culvert, investigated its alignment with the stream, and took photographs of the culvert. The inspection showed that the round culvert was placed on top of bedrock with no countersinking or other design change; that its alignment with the stream was off by 16 degrees (causing some scour of the stream bed below); and that there was a drop from the culvert to the water on the downstream side that would make fish passage upstream impractical. (Ex. A14).

### **CONCLUSIONS OF LAW**

1. The 2014 crossing replacement over Brimstone Gulch was an “operation” under the Forest Practices Act (FPA), as defined in ORS 527.620(12).
2. West was an “operator” as defined in ORS 527.620(13).
3. West violated the FPA in the following particulars:
  - a. Failing to notify ODF of the 2014 crossing replacement.
  - b. Failing to provide a written plan to ODF for the crossing replacement.
  - c. Installing a culvert crossing that did not meet FPA requirements for flooding and fish passage.
4. West must correct the violations as required by ODF.

## OPINION

The Department contends that Respondent, in his individual capacity, was an “operator” for purposes of the Forest Practices Act (FPA), and that his “operation” to place a culvert at a stream crossing was subject to the FPA. The Department has the burden of proof in this matter. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). The burden of proof encompasses two burdens, the burden of production of evidence in support of an assertion, and the burden to persuade the fact-finder that the facts asserted are true. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000).

There is little dispute in this case about the facts pertaining to the 2014 culvert crossing that West installed in 2014. It is undisputed, for instance, that West failed to notify ODF of the installation, and that no written plan for the installation was ever provided to ODF. Furthermore, despite West’s protestations to the contrary, there is little question that the 72-inch round culvert that West installed in 2014 failed to meet the ODF standards for a stream crossing set forth in the administrative rules.

The key questions in the case are more basic. The first question is whether the 2014 installation was an “operation” under the FPA standards. If West is correct that it is not an operation under the FPA’s authority, then there is no basis for ODF to require West to replace or repair the crossing. If the installation was an operation under the FPA, then the second question arises: whether West was an “operator” under the same standards. If he was not an operator, then ODF has no basis to pursue this action against him.

### Operation and Operator Analysis

Therefore, my analysis begins with the question of whether the 2014 culvert crossing installation was an operation under the FPA.

**The culvert installation was subject to the FPA.** An “operation” under the FPA is defined by statute. ORS 527.620(12) states in part:

(12) “Operation” means *any commercial activity relating to the establishment, management or harvest of forest tree species* except as provided by the following:

\* \* \* \* \*

(g) The development of an approved land use change after timber harvest

activities have been completed and land use conversion activities have commenced.

(Emphasis added).<sup>3</sup> Under this statute, the question is whether the culvert installation involved the “establishment, management, or harvest” of forest tree species.

ODF contends that the road crossing the stream over the culvert (and previously over the bridge) is an “active” road under the FPA, and that it continues to be actively in use for forest purposes, even up to just before the hearing. The evidence shows that the road was—and will be—used in the following forest-related activities:

- The 2013 timber harvest (for which BNR filed a notification but not a written plan);
- The 2014-15 timber harvest performed by Grayback Logging, including the log hauling efforts of Fisher Trucking;
- The timber harvest by Carlos Short in early 2015;
- The 2015 replanting of the areas harvested in 2013;
- The 2017 replanting of the area harvested in 2014-15;
- Repeated monitoring to assure that the replanted trees reach the “free to grow” stage (a period of approximately four years from planting).

The road in question, and therefore the crossing of Brimstone Gulch, has been clearly involved in all three aspects noted by the statute: the establishment, management and harvest of forest tree species.

Respondent argues that the installation was not subject to the FPA because, at the time the culvert was installed, there were no active logging operations on the property. His argument is based on timing. He argues that when he installed the culvert in July 2014, the 2013 logging operation was over and the Grayback operation had not yet begun. Because there was not an active logging operation happening at the time, he argues, the FPA cannot apply.

ODF argues that Respondent’s interpretation of the FPA on this point is too narrow and too simplistic.

John West seems to suggest that he should be able to turn the Forest Practices Act (“FPA”) on-and-off at his own discretion; to decide that the road is a logging road while log trucks are on it, but a mining road when the logging trucks pass. However, in enacting the [FPA], the Legislature did not create a system that could

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<sup>3</sup> Subsection (12)(g) was included in the quotation because of West’s claim that his activities on the property were focused solely on mining. Even if that were true—and the record shows it was not—there is no evidence that an approved land use change has ever been accomplished for the property. Therefore, subsection (12)(g) does not serve as an exception in this case.

be so narrowly applied. By its express terms, the FPA provides the Board of Forestry with exclusive authority to develop and enforce rules, and to coordinate with other state agencies and local governments which are concerned with the forest environment. ORS 527.630(3). The goal is to provide the public with a stable regulatory environment, not one that shifts from day to day. ORS 527.630(6).

(ODF Reply at 1-2). I agree with ODF.

The goal of the FPA is to “encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and maintenance of forestland[.]” ORS 527.630(1). If allowed, Respondent’s argument would allow persons to disregard the requirements of the FPA simply by ceasing logging operations for the period of time they did not want the FPA to apply. In fact, there is no clearer example of that than the decision in this case. West installed a culvert that ODF had already told him was too small, and he did so without any other input because, he decided, the FPA did not apply.

West’s argument notwithstanding, the preponderance of the evidence shows that the road in question was an active forest road under the FPA, and that the operation to replace the crossing of Brimstone Gulch was subject to FPA jurisdiction. There had been earlier FPA operations using the road, and would be future ones. The FPA requirements still applies, and the culvert installation was an operation under ORS 527.620(12).

**Respondent was an “operator” under the FPA.** Having concluded that the culvert crossing installation in 2014 was an operation under the FPA, the question left to be decided is whether West personally was an “operator” under the same definitions statute:

(13) “Operator” means any person, including a landowner or timber owner, who conducts an operation.

ODF argues that a typical operation may involve more than one operator. It considered West the operator in this case because of his involvement in the decisions leading to the improper installation of the culvert crossing in 2014.

There are several reasons why I conclude that West was an operator in the culvert crossing operation. First, there is no written evidence to establish that West was operating in a corporate capacity (much less, which corporation) when he installed the culvert. He did not file a notification with ODF, and did not file a written plan. The only known involvement (other than West’s later self-serving testimony that he was representing the corporation) is that of West personally.

Second, the evidence shows that West was personally involved in every decision that led up to the installation of the culvert crossing. In June 2013, West personally told Wetmore that he

intended to install a six-foot culvert to replace the bridge. West received Wetmore's notice that the six-foot culvert was too small, and West decided to disregard that notice. West made the decision to forego getting a professional opinion concerning the correct size for the culvert, and made the decision that the FPA did not apply. In 2016, after having installed the too-small culvert, West made the decision to deny access to ODF when the agency wanted to review the crossing. West was personally involved in all aspects of the operation.

Third, as ODF notes, West's involvement in this case is very similar to the operator in *Gambee v. Dept. of Forestry*, 191 Or App 241 (2003).

In *Gambee*, the petitioner (like West) was the principal of several companies: Alpine Logging, Inc, Alpine Management, Inc., and Alpine Investors, Inc. In 1995, Alpine (the court did not distinguish between the three corporations), purchased property in Klamath County and notified ODF that it intended to harvest timber on the property. ODF informed Alpine that there were bald eagle nest sites on the property, and required a written plan to protect the nesting trees during the harvest.

When Alpine submitted a written plan in 1996, ODF rejected the plan because it did not adequately protect the nest trees. Alpine asked for more information on the requirements for an acceptable plan, but did not resubmit a written plan.

In 1997, Gambee hired a logger to harvest the timber. The logger filed a notification that listed his company (Kanna Logging) as the operator and Alpine as the landowner. No written plan was submitted and, in early December 1997, a local resident reported to ODF that there was a logging operation taking place on the property. Kanna's operation cut down one of the nest trees and rendered the other nest tree unusable by the eagles.

ODF issued notices of violation to Gambee, and Gambee argued that he was not the operator in the case. In its extended explanation concerning why it held Gambee to be the operator in the case, the court stated:

Gambee argues that the board erred in concluding that he was an "operator" of a timber harvest operation. *According to Gambee, he was at most an "absentee landowner" and cannot be regarded as an "operator" because he did not "conduct" the "operation" on the Algoma property, as provided in the definition of "operator" in ORS 527.620(13).* Gambee argues that Kanna conducted the logging operation and that he— Gambee—neither exercised nor had the right to exercise control over Kanna's operation.

The department responds that the relevant statutes do not define the terms "operator" and "operation" so narrowly. The department argues that an operator is a person, including a landowner or timber owner, who conducts any commercial activity relating to the growing or harvesting of forest tree species. *Given the*

*board's undisputed findings that Gambee conducted such activities, the department argues, he was, therefore, an operator who was subject to civil penalties for violation of the relevant rules.*

Gambee's assignment presents an issue of statutory construction. When the issue involves an administrative agency's construction of the relevant statute, the weight that we give to the agency's construction depends on the nature of the statutory terms. If the terms are "delegative" in nature, then judicial review of the agency's construction is highly deferential. *Meltebeke v. Bureau of Labor and Industries*, 322 Or. 132, 142 n. 12, 903 P.2d 351 (1995). When the terms are "inexact," judicial review is governed by the interpretive analysis described in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-12, 859 P.2d 1143 (1993), that is, we attempt to determine the intended meaning of the statute by reference to its text in context and, if necessary, its legislative history and other aids to construction. *Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or. 348, 353-54, 15 P.3d 29 (2000). In this case, the terms involved are inexact in nature. We therefore interpret the statute in accordance with the usual rules of statutory construction.

ORS 527.680(1) provides, in part, that the State Forester may cite an "operator" for violating various provisions of the Oregon Forest Practices Act. An "operator" is defined as "any person, including a landowner or timber owner, who conducts an operation." ORS 527.620(13). An "operation," in turn, is defined—subject to exceptions not applicable to this case—as "any commercial activity relating to the establishment, management or harvest of forest tree species." ORS 527.620(12).

Thus, an "operation" includes not just the activity of harvesting forest tree species but also "*any commercial activity relating to*" such activity. ORS 527.620(12) (emphasis added). The term "relating to" ordinarily refers broadly to activities that are logically or causally connected. *See Webster's Third New Int'l Dictionary* 1916 (unabridged ed. 1993) (defining the transitive verb "relate" in part as "to show or establish a logical *or* causal connection between") (emphasis added). Thus, an "operator" is one who conducts any commercial activity that is logically or causally connected to the establishment, management, or harvest of forest tree species.

*Moreover, in ordinary parlance, one "conducts" something when he or she leads, directs, runs, or manages it. See Webster's at 474 (defining the transitive verb "conduct" as, among other things, "to bring by or as if by leading: LEAD, GUIDE, ESCORT \* \* \* to lead as a commander \* \* \* to have the direction of: RUN, MANAGE, DIRECT"). Nothing in the phrasing of the statute or anything in its context suggests that the legislature intended a meaning different from the ordinary meaning of the term. Thus, once again, it is clear from the wording of the*

statute that, to be considered an "operator," an individual need not personally harvest the trees.

*In this case, the board found that, although Gambee did not personally log the property, nevertheless he was "intimately involved with the property and the operation." He knew that bald eagle nest sites existed on the property before the harvest began. Indeed, he hired a wildlife ecologist to assist in planning the harvest in light of the existence of those bald eagle nest sites. He then contracted with Kanna to log the property after meeting with Kanna to discuss the existence of the bald eagle nest sites. In other words, Gambee managed a number of commercial activities that related to the harvest of trees at the Algoma property. Accordingly, the board did not err in concluding that Gambee was an "operator" within the meaning of ORS 527.620(13).*

191 Or App at 251 (emphasis added).

Gambee was personally found to be an operator under the FPA, even though "Alpine" was the landowner and Kanna was the logger who harmed the bald eagle nests. Like Gambee in the 2003 case, West has been "intimately involved with the property and the operation" to replace the crossing at Brimstone Gulch. West was an operator as defined in ORS 527.620(13).

## **The Violations**

Having determined that the culvert crossing was an operation under the FPA and that West was an operator, I return to the violations alleged by ODF. As noted above, there is little question about those violations having occurred.

OAR 629-625-0000 states the purpose of and importance of logging roads:

### **Purpose**

- (1) Forest roads are essential to forest management and contribute to providing jobs, products, tax base and other social and economic benefits.
- (2) OAR 629-625-0000 through 629-625-0700 shall be known as the road construction and maintenance rules.
- (3) The purpose of the road construction and maintenance rules is to establish standards for locating, designing, constructing and maintaining efficient and beneficial forest roads; locating and operating rock pits and quarries; and vacating roads, rock pits, and quarries that are no longer needed in manners that provide the maximum practical protection to maintain forest productivity, water quality, and fish and wildlife habitat.

(4) The road construction and maintenance rules shall apply to all forest practices regions unless otherwise indicated.

OAR 629-625-0320 addresses stream crossings:

### **Stream Crossing Structures**

\* \* \* \* \*

(2) Operators shall design and construct stream crossings (culverts, bridges, and fords) to:

(a) *Pass a peak flow that at least corresponds to the 50-year return interval.* When determining the size of culvert needed to pass a peak flow corresponding to the 50-year return interval, operators shall select a size that is adequate to preclude ponding of water higher than the top of the culvert; and

(b) *Allow migration of adult and juvenile fish upstream and downstream during conditions when fish movement in that stream normally occurs.*

(Emphasis added).

In addition to failing to file a notification and a written plan with ODF for the culvert crossing installation, ODF contends that the culvert size selected would not allow passage of a 50-year return interval, and would not allow migration of adult and juvenile fish upstream and downstream.

ODF presented testimony from Wetmore, Thackery and Seward concerning the size of culvert (or other crossing) needed to meet the requirements of the rule. Wetmore's calculations were incorrect, on the low side, because he failed to address fish passage and the need to countersink the culvert (an action which reduces the volume that can pass through the culvert). Thackery's and Seward's calculations were similar, suggesting the need for a culvert approximately 108 inches. Even Dunham, West's expert, admitted that the six-foot culvert was too small.

Additionally, the different strategies in Tech Note 4 indicated that something other than a round culvert set on top of bedrock would be needed for fish passage in that location.

The evidence overwhelmingly establishes that the culvert West installed was too small, and further establishes that he knew it was too small when he installed it. West must repair the

crossing in the manner that ODF approves.<sup>4</sup>

## **ORDER**

I propose the Oregon Department of Forestry, Private Forests issue the following order:

John West has violated the Forest Practices Act in the installation of the culvert crossing over Brimstone Gulch, and must repair or replace the crossing in a manner to be approved by ODF.

**Rick Barber**

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Administrative Law Judge  
Office of Administrative Hearings

## **EXCEPTIONS TO PROPOSED ORDER**

If this proposed order is adverse to you or to the agency, you or the agency may file exceptions within seven days after the date of the filing of the proposed order with the board if no other time is specified. Exceptions must be filed with the agency.

Please send any exceptions to:

Angie Johnson, Civil Penalties Administrator  
Department of Forestry, Private Forests Division  
2600 State Street  
Salem, OR 97310

The exceptions shall be confined to factual and legal issues that are essential to the ultimate and just determination of the proceeding, and shall be based only on grounds that:

1. A necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence on the record;
2. A necessary legal conclusion is omitted or is contrary to law or the board's policy; or
3. Prejudicial procedural error occurred.

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<sup>4</sup> Much of Dunham's testimony appeared to concede that the current culvert was too small and presented options for resolving the problems (using a second culvert, or other options) rather than replacing the crossing with the correct size culvert. The evidence does not establish what the correct method of repair or replacement should be, so that matter is left for ODF to determine.

The exceptions shall be numbered and shall specify the disputed finding, opinions or conclusions. The nature of the suggested error shall be specified and the alternative or corrective language provided.

After the board has received and reviewed the proposed order and the exceptions, if any, the board may:

1. Entertain written and/or oral argument if the board determines it is necessary or appropriate to assist the board in the proper disposition of the case. If allowed, oral argument will be limited to matters raised in written exceptions and shall be presented under time limits determined by the board chair;

2. Remand the matter to the ALJ for further proceedings on any issues the board specifies, and to prepare a revised proposed order as appropriate, under OAR 137-003-0655(2);

3. Enter a final order adopting the recommendations of the ALJ; or

4. Enter an amended proposed order or final order that modifies or rejects the recommendations of the ALJ. If the board decides to modify or reject the proposed order, the board must comply with OAR 137-003-0655 and 137-003-0665.

### **RECONSIDERATION AND REHEARING**

Under the provisions of OAR 137-003-0675, you may file a petition for reconsideration or rehearing of the final order with the board within 60 calendar days after this order is served. Any such petition shall set forth the specific grounds for reconsideration or rehearing and the remedy sought. The petition may be supported by a written argument. Under OAR 629-001-0050, you must file a petition for reconsideration as a condition for further appeal.

### **APPEAL**

You may appeal by filing a petition for judicial review with the Oregon Court of Appeals within 60 days following the date the final order on reconsideration or rehearing is issued, or within 60 days following denial of the request for reconsideration or rehearing. *See Oregon Revised Statutes 183.480 et seq.*

**CERTIFICATE OF MAILING**

On June 19, 2017 I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2017-ABC-00192.

By: First Class Mail

John West  
PO Box 1249  
Merlin OR 97532

James R Dole  
Watkinson Laird Rubenstein  
1246 NE 7th St. Ste B  
Grants Pass OR 97526

By: Electronic Mail

Greg Wagenblast, Agency Representative  
Department Of Forestry, Private Forests  
2600 State St Bldg D  
Salem OR 97310

Matthew B Devore, Assistant Attorney General  
Department Of Justice  
1162 Court St NE  
Salem OR 97301

Alesia Vella for Lucy M Garcia  
Hearing Coordinator