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Oregon Forest Industries Council

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March 21, 2013

Senator Floyd Prozanski, Chair  
Senate Committee on Judiciary  
State Capitol  
Salem, OR 97310

**RE: SB 709 – Relating to civil actions regarding forest fires.**

Dear Chair Prozanski and Members of the Committee:

The Oregon Forest Industries Council supports SB 709. The bill establishes a fair methodology, applicable to all landowners, for valuing property damages resultant from forest fires, and clarifies the limited circumstances under which those damages may be multiplied. Without better defining the legal exposure for wildfire damages, Oregon's landowners could face legal claims of such massive scale that they are forced to choose between gambling the company and settling for outrageous sums.

The catalyst for the legislation is a series of federal lawsuits in California, culminating in the "Moonlight Fire" litigation. In 2007, the Moonlight Fire started on private lands in Lassen County, California and spread to public lands managed by the United States Forest Service. Two years later, the United States Department of Justice pursued claims against (a) an operator harvesting trees on the land from which the fire originated, (b) the owner of that land, and (c) the owner of the standing timber. Using novel readings of ambiguous California law, USDOJ claimed property damages far in excess of market values, and argued to double that amount for alleged negligence. Though the reduction in market value of federal lands due to the fire totaled approximately \$20 million, the USDOJ pursued a recovery of \$791 million, plus interest. Sierra Pacific, the owner of the trees, and the only company with substantial assets in the litigation, was forced to settle. It could not continue operating with a persistent and well-funded federal plaintiff pursuing a nearly \$1 billion claim that threatened to bankrupt the company. In the end, though no liability was established, Sierra Pacific paid the federal government \$55 million and deceded to the Forest Service approximately 22,500 acres of land.

SB 709 is designed to give the parties to litigation in wildfire cases more certainty regarding the legal exposure surrounding forest fire damages. It does so by further fleshing out language found in ORS 477.090 with the following:

- SB 709 provides explicitly that a plaintiff in a forest fire case can recover (i) the lesser of the reduction in fair market value of the property, or the cost to restore the property to its original condition, as determined by a State certified appraiser, and (ii) all other objectively verifiable monetary losses.
- Likewise, it specifies that the foregoing damages may only be doubled if the plaintiff can show willful, reckless, malicious, or grossly negligent behavior on the part of the defendant.

- Finally, it makes SB 709 the exclusive remedy for damages to property in forest fire cases. This would preclude creative lawyers from arguing that other statutes allowing larger multipliers, such as Oregon's timber trespass law, should apply to wildfire damages.

With these improvements to ORS 477.090, we believe that defendants such as Sierra Pacific would see their day in court should they face claims similar to those brought in the Moonlight Fire litigation.

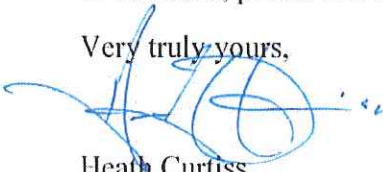
It is also important to highlight what the bill does not do:

- It does not diminish or alter any cause of action for which a person may bring a civil action due to forest fire. Negligence is still negligence.
- It does not prevent a party from recovering economic losses. Should a forest fire prevent a landowner from delivering logs under contract, penalties for failure to deliver would be recoverable damages.
- And, importantly, it does not cap damages. Intangible values, such as aesthetics or recreation resources, are cognizable, provided that such values can be evidenced by prior market transactions.

Finally, please know that our members are just as likely to be plaintiffs as defendants in wildfire liability cases. The language is, we believe, a careful balance of interests that results in a fair outcome for all parties to wildfire litigation.

OFIC asks for your support of SB 709, including the -1 amendments. Should you have any questions or concerns, please feel free to reach me at the number and address above.

Very truly yours,



Heath Curtiss  
General Counsel, Director of Government Affairs  
Oregon Forest Industries Council



## **SB 709 SECTION-BY-SECTION SUMMARY (-1 Amendments, Replaces Bill)**

**SECTION 2. Subsection (1):** This subsection includes the relevant definitions. While most of these definitions are discussed substantively where they appear below, it is worth noting here that there are two primary components to damages: property damages and economic damages. Property damages are calculated as the lesser of (i) the reduction in fair market value as determined by a state certified appraiser, or (ii) the cost to restore the property to its original condition. Economic damages would include other monetary losses, such as contract damages resultant from the fire.

**Subsection (2):** Building on language in ORS 477.090, this subsection provides that double damages are available if the fire started as a result of gross negligence, willfulness, maliciousness, or recklessness. In all other circumstances, only single damages are available.

**Subsection (3):** Preserving language in ORS 477.090, this subsection provides that persons liable for wildfire damages are also liable for fire suppression costs.

**Subsection (4):** This subsection provides that the damages available under Subsection (1) are the exclusive remedy for damage *to property* due to a forest fire. Note that this would not preclude bodily injury claims. The draft language is explicit that it does not (i) prohibit cross-claims, counterclaims, or joinder of third parties, or (ii) affect application of contributory or comparative negligence as spelled out in ORS 31.600.

**Subsection (5):** This subsection states explicitly that the bill does not create a new cause of action or alter any existing cause of action.

**SECTION 3. Subsection (1):** This subsection provides that the doctrine of *res ipsa loquitur* does not apply in the context of wildfires. *Res ipsa loquitur* is latin for “the thing speaks for itself,” and is an evidentiary standard that, in certain circumstances, allows a plaintiff to maintain a negligence claim without proving that the defendant breached a duty of care to the plaintiff. *Res ipsa* is applicable only to those types of injuries that do not occur unless someone is negligent (e.g., an anvil falling out of a window). We do not believe there is any circumstance under which this should apply to forest fires.

**Subsection (2):** This subsection provides that a person is not liable for forest fires occurring by act of God (e.g., a lightning strike) unless such person causes or contributes to the spread of the fire.

**SECTION 9:** This subsection provides that the bill is prospective only.





