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## Wilderness, Luck & Love: A Memoir and a Tribute

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*WildEarth Guardians*

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# WILDERNESS, LUCK & LOVE

## A MEMOIR AND A TRIBUTE

*Neil Kagan\**

In 1983, I brought two lawsuits, my first in federal court. Together, these lawsuits were the catalyst responsible for breaking a years-long impasse over the fate of pristine wildlands under the supervision of the U.S. Forest Service. The lawsuits also pushed Congress to preserve more wildlands as wilderness than it would have otherwise. Congress preserved more than 8.2 million acres of land in eighteen states in 1984 all told.

Many forces and people were responsible for protecting wildlands in the United States as wilderness. I tell this story to recognize the one person who has never received any public acknowledgment—the person who made the lawsuits possible: Elizabeth Kay Reed. I cannot bear the thought of her being unknown or forgotten.

I deserve no more recognition for my work than I do for breathing. I simply had no alternative.

### THE NATIONAL SCENE

I will begin by briefly reviewing the origin, meaning, and significance of the legal term, “wilderness.”

In 1964, Congress enacted the Wilderness Act.<sup>1</sup> Congress said, “A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”<sup>2</sup> Congress directed that “ ‘wilderness areas’ . . . be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.”<sup>3</sup> Upon

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\* Legal Director of WildEarth Guardians; formerly Adjunct Clinical Assistant Professor of Law at the University of Michigan Law School; J.D. University of Oregon School of Law, 1981; M.Sc. in Entomology Michigan State University, 1978; B.Sc. in Biology Pennsylvania State University, 1975. This is for Kei-chan, who made my dreams come true, and for Hannah, who is one of them. I thank Professors Nancy Wang, John Bonine, and Paul Reingold for encouraging me to get this in writing. I also thank the editors of this journal for accepting an unconventional article for publication, for graciously tolerating a cascade of edits, and for enabling a fellow to know a measure of relief.

1. Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890, 890 (1964).
2. 16 U.S.C. § 1131(c) (2012).
3. 16 U.S.C. § 1131(a) (2012).

enactment, Congress designated 9.1 million acres of federal land in thirteen states as wilderness.<sup>4</sup> This only whetted the nation's appetite for wilderness.

Six years later, in 1970, Congress enacted the National Environmental Policy Act (NEPA).<sup>5</sup> NEPA requires every federal agency to prepare a detailed environmental impact statement (EIS) before taking a major action significantly affecting the quality of the environment.<sup>6</sup> To inform decision-makers and the public, an EIS must describe the environment that would be affected by an action, as well as the consequences of a range of alternative actions on the environment.<sup>7</sup>

In 1972, the Forest Service completed what it called a "Roadless Area Review and Evaluation" (RARE).<sup>8</sup> The RARE assessed the suitability of fifty-six million acres of roadless areas (*de facto* wilderness) larger than 5,000 acres.<sup>9</sup> The Forest Service recommended twelve million acres as wilderness, eleven million acres for further review, and thirty-three million acres for release to non-wilderness uses, such as logging and road-building.<sup>10</sup>

Immediately, the Sierra Club sued Earl Butz, the Secretary of the U.S. Department of Agriculture, which oversees the Forest Service.<sup>11</sup> The Sierra Club convinced the court that NEPA "required the Forest Service to prepare an [EIS] prior to authorizing timber sales in roadless areas that the RARE study inventoried but designated as nonwilderness."<sup>12</sup>

In 1974, representatives of the Sierra Club and the Wilderness Society created the Oregon Wilderness Coalition (OWC) to protect a substantial number of roadless areas in Oregon.<sup>13</sup> Their reasons for creating OWC were threefold. *First*, the Forest Service was developing EISs for large "planning units" in Oregon quickly because it "wanted to resolve the roadless issue in its most productive National Forests."<sup>14</sup> *Second*, the national conservation groups had an image problem. They were perceived as

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4. Michael C. Blumm & Lorena M. Wisehart, *The Underappreciated Role of the National Environmental Policy Act in Wilderness Designation and Management*, 44 ENVTL. L. 323, 334 (2014).

5. National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852, 852 (1970).

6. 42 U.S.C. § 4332(C) (2012).

7. *Id.*; 40 C.F.R. §§ 1502.1, 1502.10, 1502.15, 1502.16 (2003).

8. Blumm & Wisehart, *supra* note 4, at 337.

9. *Id.* at 336-37.

10. *Id.* at 337.

11. *See* *Sierra Club v. Butz*, 349 F. Supp. 934, (N.D. Cal. 1972); *see also* *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973), *overruled on other grounds by* *Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

12. Blumm & Wisehart, *supra* note 4, at 339.

13. DENNIS M. ROTH, U.S. DEP'T OF AGRIC., FOREST SERV. FS-410, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1980-1984 24 (1988) [hereinafter ROTH II] (Roth was the Chief Historian of the U.S. Forest Service).

14. *Id.* at 24.

too radical by conservative Oregonians east of the Cascade Mountains, where the bulk of Oregon's roadless areas were located; a state organization would not have this problem.<sup>15</sup> And *third*, representatives of a state organization could more effectively create an individual constituency for each roadless area, teaching techniques to protect wilderness and take political action.<sup>16</sup>

OWC's representatives included James Monteith, a wildlife biologist who started at a salary of \$100 per month, as well as Andy Kerr and Tim Lillebo, who each started at a salary of \$50 per month.<sup>17</sup> Only their intense commitment to protecting wilderness made it possible for them "to go into the often hostile environment of small mill towns of southern and eastern Oregon to organize for wilderness protection."<sup>18</sup>

In 1977, under the direction of Rupert Cutler, the Assistant Secretary of Agriculture for Conservation, Research, and Education in the Carter Administration, the Forest Service initiated a new RARE (RARE II), to correct the deficiencies with what then became known as "RARE I."<sup>19</sup> The intent was to "speed the process of wilderness designation, and open other roadless areas to nonwilderness uses."<sup>20</sup>

By 1977, James Monteith believed "only a national wilderness lawsuit could save Oregon[']s roadless areas."<sup>21</sup> In a letter to OWC's Executive Committee, he wrote, "Without a nationwide suit which legally challenges the process being used to destroy wilderness, conservationists stand to lose most roadless areas to development."<sup>22</sup> The Sierra Club, however, feared a national lawsuit "would provoke a timber industry and congressional backlash."<sup>23</sup>

In 1979, the Forest Service issued RARE II and an associated EIS. Intended to provide recommendations to Congress for national legislation,<sup>24</sup> RARE II assessed the suitability of sixty-two million acres of roadless areas, one-third of the National Forest System.<sup>25</sup> The Forest Ser-

15. *Id.*

16. *Id.*

17. *Id.* at 25; SUSAN ZAKIN, COYOTES AND TOWN DOGS, EARTH FIRST! AND THE ENVIRONMENTAL MOVEMENT 235 (1993).

18. ROTH II, *supra* note 13, at 25.

19. DENNIS M. ROTH, U.S. DEP'T OF AGRIC., FOREST SERV. FS-410, THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1964-1980 55 (1988) [hereinafter ROTH I].

20. Blumm & Wisheart, *supra* note 4, at 340.

21. ROTH II, *supra* note 13, at 25; *see also* ZAKIN, *supra* note 17, at 236.

22. ROTH II, *supra* note 13, at 26 (quoting Letter from Jim Monteith to OWC Exec. Comm. (Feb. 15, 1977)).

23. *Id.*; *see also* ZAKIN, *supra* note 17, at 236.

24. GERALD W. WILLIAMS, THE FOREST SERVICE: FIGHTING FOR PUBLIC LANDS 182 (2007).

25. ROTH II, *supra* note 13, at 1; Blumm & Wisheart, *supra* note 4, at 340.

vice recommended fifteen million acres for wilderness, roughly eleven million acres for further review, and thirty-six million acres for release to non-wilderness uses.<sup>26</sup>

In Oregon, the Forest Service recommended allocating three million acres of roadless areas as follows: 368,000 acres for wilderness, 400,000 acres for further study, and 2.2 million acres for non-wilderness uses.<sup>27</sup> Oregon activists immediately proposed to challenge the allocations in court, but the Sierra Club opposed the use of litigation, fearing it would lead to “strong, widespread political backlash against wilderness.”<sup>28</sup>

Instead of enacting national legislation, Congress took a state-by-state approach.<sup>29</sup> The result was a logjam of state wilderness bills.<sup>30</sup> In 1979, Senator Mark O. Hatfield, an Oregon Republican, introduced a 600,000-acre Oregon Wilderness bill.<sup>31</sup> Hatfield’s bill would have released approximately 2.4 million acres of roadless areas for logging and road-building.

Hatfield was known and respected by many for his early opposition to the Vietnam War, among other things. However, he was not a willing friend of the environment. In fact, he “drew the scorn of preservationists for defending the logging industry during the bitter timber wars of the 1980s and ’90s.”<sup>32</sup>

Hatfield’s bill became deadlocked. One reason was that Congressman Jim Weaver wanted more acres of wilderness.<sup>33</sup> Weaver was a Democrat who represented Oregon’s 4th Congressional District, located in mid and southern Oregon west of the Cascade Crest.<sup>34</sup> His was the “top-ranked congressional district for timber production” in the country.<sup>35</sup> Weaver “believe[d] in the value of wilderness as a genetic preserve.”<sup>36</sup> In addition to Weaver’s opposition, the Sierra Club and The Wilderness Society opposed

26. Blumm & Wisheart, *supra* note 4, at 341; WILLIAMS, *supra* note 24, at 182.

27. KEVIN R. MARSH, *DRAWING LINES IN THE FOREST: CREATING WILDERNESS AREAS IN THE PACIFIC NORTHWEST* 127 (Univ. of Wash. Press 2009).

28. *Id.* at 127-28.

29. WILLIAMS, *supra* note 24, at 182.

30. *Id.*

31. *Oregon Wilderness Act of 1979: Hearing on S. 812 and S. 1369 Before the Subcomm. on Parks, Recreation, & Renewable Res. of the Comm. on Energy & Nat. Res. U.S. S., 96th Cong.* 1 (1979); ROTH II, *supra* note 13, at 27; WILLIAMS, *supra* note 24, at 182.

32. Emma Brown, *Mark Hatfield Dies: Former Oregon Senator Was 89*, WASH. POST (Aug. 8, 2011), [https://www.washingtonpost.com/local/obituaries/former-senator-mark-hatfield-of-oregon-dies-at-89/2011/06/14/gIQAj9ic1I\\_story.html?utm\\_term=.dcf586fb5851](https://www.washingtonpost.com/local/obituaries/former-senator-mark-hatfield-of-oregon-dies-at-89/2011/06/14/gIQAj9ic1I_story.html?utm_term=.dcf586fb5851).

33. ROTH II, *supra* note 13, at 27; WILLIAMS, *supra* note 24, at 182.

34. ANDY KERR, *OREGON WILD: ENDANGERED FOREST WILDERNESS* 57-58 (2004), <http://www.andykerr.net/oregon-wild-the-book/> (click “Chapter 3: A Brief Political History of Oregon’s Wilderness Protections”); see also ROTH II, *supra* note 13, at 29.

35. KERR, *supra* note 34, at 58.

36. ROTH II, *supra* note 13, at 29.

the “hard” release language in Hatfield’s bill.<sup>37</sup> (“Hard” release would permanently release roadless areas not designated as wilderness to non-wilderness uses; “soft” release would allow roadless areas not designated as wilderness to be reconsidered as wilderness in the future.<sup>38</sup>) Stymied, Hatfield effectively removed himself from the wilderness issue for the next four years.<sup>39</sup>

But the issue itself would not go away. In 1980, the State of California sued Secretary of Agriculture Bob Bergland, challenging the legal sufficiency of the RARE II EIS with respect to forty-seven roadless areas in California.<sup>40</sup> Judge Lawrence Karlton of the Eastern District of California held the EIS deficient on several grounds, including its failure to adequately describe roadless areas and discuss the effect of release on wilderness characteristics and values.<sup>41</sup> Judge Karlton pilloried the Forest Service for reducing “[m]ajor features of an area . . . to highly generalized descriptions such as ‘mountain’ or ‘river.’ One can hypothesize how the Grand Canyon might be rated: ‘Canyon with river, little vegetation.’”<sup>42</sup>

Congress began searching for compromise language to include in wilderness bills that would ensure “sufficiency” (protection against RARE II lawsuits) and the release of roadless areas not designated as wilderness for non-wilderness uses.<sup>43</sup> A compromise was reached on soft release, specifically, the release of roadless areas for one cycle of the planning process required by the National Forest Management Act, or ten to fifteen years.<sup>44</sup> However, upon the election of Ronald Reagan as President and the flip of the Senate to Republican control in 1981, for the first time since 1955,<sup>45</sup> the timber industry reneged on its support for the compromise.<sup>46</sup>

## THE OREGON SCENE

Meanwhile, the Forest Service was attempting to log individual roadless areas allocated to non-wilderness by RARE II. One such attempt involved the North Kalmiopsis roadless area in the Siskiyou National Forest

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37. *Id.* at 27; WILLIAMS, *supra* note 24, at 182.

38. See Blumm & Wisehart, *supra* note 4, at 345; see also ROTH II, *supra* note 13, at 3; WILLIAMS, *supra* note 24, at 182.

39. ROTH II, *supra* note 13, at 27.

40. *California v. Bergland*, 483 F. Supp. 465, 470 (E.D. Cal. 1980).

41. *Id.* at 470, 484.

42. *Id.* at 486 n.22.

43. ROTH II, *supra* note 13, at 3.

44. *Id.*

45. *Senate Chronology, 1970-Present*, U.S. SENATE, <https://www.senate.gov/history/chronology.htm> (last visited Nov. 4, 2017) (click on tab “1970-Present”).

46. ROTH II, *supra* note 13, at 4.

in southwest Oregon. In the summer of 1982, the Sierra Club sued the Forest Service to stop the construction of a road into the area and the access it would provide to virgin forest for logging.<sup>47</sup>

The background of this lawsuit is lengthy. “The Kalmiopsis is a rugged jumble of steep mountains, long ridges, and deep river canyons.”<sup>48</sup> “Magnificent old-growth forests contrast with serpentine prairies and open Jeffrey pine savannas to provide for an ever-changing landscape.”<sup>49</sup> The “diversity of plant life includes regional endemics found no place else.”<sup>50</sup> “Wildlife is equally as rich, with more vertebrate species recorded . . . than in any other subregion of Oregon.”<sup>51</sup>

In 1946, the Forest Service established the Kalmiopsis Wild Area, a 76,900-acre administrative classification to protect an area abundant with *Kalmiopsis leachiana*, a rare type of heath.<sup>52</sup> The 1964 Wilderness Act then designated the Kalmiopsis Wild Area as a wilderness.<sup>53</sup>

In 1978, Congress expanded the Kalmiopsis Wilderness to a total of 180,000 acres.<sup>54</sup> Jim Weaver and his colleagues in the House wanted to include more acres to the north and south, but Hatfield and his Senate colleagues refused.<sup>55</sup> The area in hottest dispute was to the north.<sup>56</sup>

The North Kalmiopsis,<sup>57</sup> 113,000 acres in size,<sup>58</sup> is watershed to several important wild fisheries, as well as the Wild Section of the Wild and Scenic Illinois River.<sup>59</sup> Three tributaries of the Wild Illinois also flow through the North Kalmiopsis roadless area: the Silver, Indigo, and Lawson Creeks.<sup>60</sup> The wild fish populations of these tributaries “are an essential part of the

47. *Sierra Club v. Block*, No. 82-1006 FR, 1982 U.S. Dist. LEXIS 18154, (D. Or. Aug. 30, 1982); see also *Earth First! v. Block*, 569 F. Supp. 415, 420 (D. Or. 1983).

48. GEORGE WUERTHNER, OREGON’S WILDERNESS AREAS: THE COMPLETE GUIDE 54 (2003); Lee Webb, *Kalmiopsis Wilderness*, WILDERNESS CONNECT, <http://www.wilderness.net/NWPS/enlargeAndDetails?id=2626> (last visited Feb. 24, 2018).

49. WUERTHNER, *supra* note 48, at 54.

50. *Id.*

51. *Id.* at 54-55.

52. *Id.* at 53-55.

53. *Id.* at 55.

54. *Id.*

55. KERR, *supra* note 34, at 56-57; ZAKIN, *supra* note 17, at 238.

56. KERR, *supra* note 34, at 57; ZAKIN, *supra* note 17, at 238.

57. Aaron Moffatt, *North Kalmiopsis Roadless Area*, GEOVIEW.INFO, [http://us.geoview.info/north\\_kalmiopsis\\_roadless\\_area,74696384p](http://us.geoview.info/north_kalmiopsis_roadless_area,74696384p) (last visited Nov. 4, 2017).

58. Paul Fattig, *Earth First! Founder Looks to Bring Back the Wild*, ASHLAND DAILY TIDINGS (Oct. 21, 2013), [http://www.dailytidings.com/article/20131021/NEWS02/310210305;20\\_Years\\_Later,\\_Oregon\\_Protests\\_Have\\_Echo](http://www.dailytidings.com/article/20131021/NEWS02/310210305;20_Years_Later,_Oregon_Protests_Have_Echo), SEATTLE TIMES, Apr. 28, 2003, at B2 [hereinafter *20 Years*].

59. *North Kalmiopsis Roadless Area*, KALMIOPSISWILD.ORG, <http://kalmiopsiswild.org/north-kalmiopsis/> (last visited Nov. 4, 2017).

60. *Id.*

world class fishery of the lower Wild and Scenic Rogue River.”<sup>61</sup> The Rogue was one of the eight “instant” rivers designated as a Wild and Scenic River upon enactment of the Wild and Scenic Rivers Act in 1968.<sup>62</sup>

In 1979, the Forest Service approved logging in the North Kalmiopsis, and the construction of a road to reach the logging sites, relying on the RARE II EIS for the allocation of the roadless area to non-wilderness uses and on the Rogue-Illinois Planning Unit EIS for the analysis of alternative non-wilderness uses.<sup>63</sup>

The road was designed to traverse a line immediately north of the boundary between the Kalmiopsis Wilderness and the North Kalmiopsis roadless area. It would pass just below a 3,811-foot peak named Bald Mountain,<sup>64</sup> so it was called the “Bald Mountain Road.” On December 23, 1981, Congress expressly made a line item appropriation of \$1,485,000 for the construction of the road.<sup>65</sup> If completed, the Bald Mountain Road would foreclose the expansion of the Kalmiopsis Wilderness.

On July 13, 1982, the Forest Service awarded a contract to Plumley, Inc., for construction of the first seven miles of the Bald Mountain Road.<sup>66</sup> Plumley began work on the road that August.<sup>67</sup>

In the lawsuit that followed, *Sierra Club v. Block* (John Block was the latest Secretary of Agriculture), the Sierra Club called the shots because it had hired the lawyer handling the case.<sup>68</sup> Still concerned about an industry and congressional backlash, and a wholesale release of roadless areas to development as a consequence, the Sierra Club refused to challenge the sufficiency of the RARE II EIS, even though it was well aware of the outcome of *California v. Bergland*.<sup>69</sup>

61. *Id.*

62. 16 U.S.C. § 1274(a)(5) (1970).

63. *See Earth First! v. Block*, 569 F. Supp. 415, 418-19 (D. Or. 1983); *see also Sierra Club v. Block*, 13 Env'tl. L. Rep. 20177-78 (D. Or. 1982) (order denying preliminary injunction).

64. *See* Dennis Poulin, *Bald Mountain (Oregon)*, SUMMIT POST, <http://www.summitpost.org/bald-mountain-oregon/357347/c-357308> (last visited Nov. 4, 2017); ZAKIN, *supra* note 17, at 230.

65. Land and Water Resources Act of 1981, Pub. L. No. 97-100, 95 Stat. 1391, 1405 (1981) (“\$1,485,000 shall be available for construction of the Bald Mountain Road in the Siskiyou National Forest.”).

66. *Earth First!*, 569 F. Supp. at 420; *Sierra Club v. Block*, 13 Env'tl. L. Rep. at 20178.

67. *Sierra Club v. Block*, 13 Env'tl. L. Rep. at 20178.

68. Email from Andy Kerr to Neil Kagan (Apr. 10, 2017) (on file with author); *see also ZAKIN, supra* note 17, at 238-40.

69. *See ZAKIN, supra* note 17, at 238-40; KERR, *supra* note 34, at 58.



The Sierra Club's Bald Mountain Road lawsuit failed. Judge Helen Frye of the District of Oregon denied the plaintiffs' application for a preliminary injunction on August 30, 1982.<sup>70</sup>

Later that year, the U.S. Court of Appeals for the 9th Circuit upheld Judge Karlton's decision in the case that was then titled *California v. Block*, after John Block's ascension to the office of Secretary. The Ninth Circuit enjoined activities that would impair the wilderness character of the forty-seven roadless areas that were the subject of the lawsuit until the Forest Service prepared an EIS that complied with NEPA.

### MY PATH

I will leave things there while I travel back in time to explain how I arrived on the scene in Oregon.

My remarkable luck in life began with the unearned privilege of being born white and male. My parents and large, extended family lived in New York City, in the Borough of Queens.

I will quickly jump ahead to 1970, when I was sixteen and a sophomore in high school. On April 22nd, I woke up.

April 22, 1970, was the very first Earth Day. A day devoted to the environment was the brainstorm of Gaylord Nelson, U.S. Senator from Wisconsin, prompted by his observation of the devastation caused by the huge 1969 Santa Barbara oil spill. On Earth Day 1970, "20 million Americans took to the streets, parks, and auditoriums to demonstrate for a healthy, sustainable environment in massive coast-to-coast rallies."<sup>71</sup>

My high school in Woodbridge, New Jersey, held an assembly to mark the occasion. I looked upon the whole thing merely as a diversion from class, and I do not remember precisely what was said. But the assembly turned out to be my road-to-Damascus moment. I was seized by the irresistible conviction that my duty was to spend my life protecting the natural environment against the destructiveness of civilization—because the environment is essential for life and because life is a thing of beauty.

In my senior year of high school, in Berwyn, Pennsylvania, I took a course in advanced biology that focused on ecology and included ecosystem field studies. I vividly remember the sense of amazement I experienced when my teacher, Dr. Ralph Heister, waded into a stream, picked up a rock,

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70. *Sierra Club v. Block*, 13 Env'tl. L. Rep. at 20178; see also *Earth First!*, 569 F. Supp. at 420. On January 13, 1983, all parties agreed to a dismissal of *Sierra Club v. Block* "with prejudice," without a final determination of the plaintiffs' claim that the Forest Service failed to comply with NEPA. *Earth First!*, 569 F. Supp. at 420.

71. *The History of Earth Day*, EARTHDAY NETWORK, <https://earthday.org/about/the-history-of-earth-day/> (last visited Nov. 5, 2017).

turned it over, and showed it to me. It was covered with immature mayflies, stoneflies, and caddisflies. Here was a whole world that I had not known to exist. I was captivated, convinced my destiny was to become an aquatic entomologist.

As luck would have it, Dr. Heister was a protégé of Dr. Robert Butler, then a professor of fish biology at the Pennsylvania State University. Through Dr. Heister's intercession, Dr. Butler became my advisor when I arrived at Penn State in the fall of 1972 to major in biology. In our very first conversation, Dr. Butler, one of the wisest, kindest men I have ever known, suggested I should consider a double major, just in case the market for biologists was weak when I graduated.

Earlier that year, I happened to read an op-ed in *The New York Times* written by Anthony Lewis. He noted that laws were being passed to address the grave ecological crisis facing society.<sup>72</sup> Recalling this, I proposed to make law my double major.

Dr. Butler immediately endorsed this idea. He named some of the new laws to protect the environment that had just been passed or were on the verge of passing (for instance, NEPA, the Clean Air Act, and the Clean Water Act), and said lawyers would soon be needed to enforce them. My course was set.

Fortunately, my college career was not interrupted by the Vietnam War. I had duly registered for the draft upon my eighteenth birthday. In the lottery drawing held for my age cohort on March 8, 1973, my number was seventy-five.<sup>73</sup> This number almost certainly would have been low enough for me to be drafted.<sup>74</sup> But the last draft call was on December 7, 1972, and the Selective Service's authority to induct draftees expired on June 30, 1973.<sup>75</sup> Luckily for me, I was spared the ordeal of Vietnam.

I graduated from Penn State in the Summer of 1975, but I did not go directly to law school. Instead, that fall I went to graduate school to get a better grounding in science, particularly in ecology, because I believed the knowledge I would acquire would make me a better lawyer for the environment. I enrolled in a Master's degree program at Michigan State University. I was awarded a graduate assistantship with Dr. Rich Merritt, a new professor in the Department of Entomology. I was one of Dr. Merritt's first graduate students. The field work for my Master's thesis was grueling, so it took

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72. Anthony Lewis, *Life and Politics*, N.Y. TIMES, Jan. 16, 1972, at 31.

73. *The Vietnam Lotteries*, SELECTIVE SERV. SYS., <https://www.sss.gov/About/History-And-Records/lotter1> (last visited Nov. 5, 2017).

74. *See id.*

75. *Id.*

me three years instead of the usual two to earn my degree. By then, I was more than ready for law school.

I had applied to a handful of law schools, and I was accepted by most of them, including my first choice: the University of Oregon, in Eugene. Oregon's law school was my first choice because it had the best environmental law curriculum. That meshed perfectly with my attraction both to the West and to Oregon, in particular.

Not only had I been drawn to the West's vast open spaces and beauty from childhood, but Oregon had a reputation for environmental protection. While he was Oregon's governor, Tom McCall had given a notorious speech in 1971, saying, "We want you to visit our State of Excitement often. Come again and again. But, for heaven's sake, don't move here to live."<sup>76</sup> "McCall hoped to ward off environmental degradation associated with post World War II development."<sup>77</sup> He presided over the enactment of a comprehensive pollution prevention program in 1969; the "bottle bill," to reduce litter, in 1971; and a comprehensive land use planning program to protect natural resources and prevent urban sprawl in 1973.<sup>78</sup>

I drove from East Lansing, Michigan, to Eugene, Oregon, in May 1978, as soon as I was finished with my Master's degree. I left before the graduation ceremony because I could not get to Oregon and law school soon enough.

Upon my arrival, I lost no time in introducing myself to Professor John Bonine, who had himself arrived at the law school earlier in 1978 and established the first environmental law clinic in the United States. John had come to Oregon from the U.S. Environmental Protection Agency, where he was Associate General Counsel. Previously, he had worked on the first Senate campaign of none other than Mark Hatfield.

To my good fortune, John was to become my teacher, employer, mentor, loyal friend, and confidant. That summer, before I even started law school, he allowed me to sit in on his clinic, where I applied my scientific background to a project to stop the spraying of the toxic herbicide 2,4-D in state and privately-owned forests. I helped a professor in the Biology Department at the University of Oregon, Dr. George Streisinger, draft testimony for presentation at a hearing before the Oregon Board of Forestry.

At the end of the summer, on August 24, 1978, the time came to register for law school. That day is the luckiest day of my life because that is the

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76. *Tom McCall Biography*, HIST. PROJECT, <https://oregonhistoryproject.org/articles/biographies/tom-mccall-biography/> (last updated May 1, 2014).

77. *Id.*

78. *Id.*

day I met the love of my life. Her name was Elizabeth and she called herself Betty. But I knew her as Keiko.

Betty was a woman filled with *joie de vivre*. No one loved life more. She was described as “composed and serene,”<sup>79</sup> yet “full of joy,”<sup>80</sup> “vibrant,”<sup>81</sup> and “cheerful,”<sup>82</sup> possessed both of a “quick wit”<sup>83</sup> and a “smile [that] could light up a room.”<sup>84</sup> People were drawn to her. Swept up in her daring, they shed caution, ventured to join her, and discovered the thrill of rafting whitewater rivers and parachuting out of airplanes. *Carpe diem*. That was her motto.

Betty was also registering for her first year of law school when I arrived at the registration room. I paused on the threshold. Then I saw her. In that instant, I turned to stone. I literally could not move for several heartbeats. My feet felt rooted to the ground. Coming to my senses, I gathered the forms I had to fill out. With uncharacteristic boldness, I took the seat next to hers, leaned toward her, and spoke those immortal words: “Do we use pen or pencil on these forms?”

Giving me barely a glance, Betty said, “I don’t know, but I’m using pen.” She did not give me a second look.

I did not fall in love with Betty Reed. I plunged in, and I never surfaced. That she chose me is a perpetual source of delight and wonder, a mystery I have still to solve. Just lucky, I guess. We became best friends, and we shared a charmed and blissful life for seventeen years.

I was not the most successful student in law school. In fact, my grades were downright disappointing, not even close to my expectations. I seriously questioned whether I belonged in law school or had a future as a lawyer. Betty would have none of it. She had faith in me. Only with her encouragement, I stayed with it. I graduated all right, at the top of the *bottom* half of my class. But my Trial Practice professor told me I would do fine.

Betty and I married almost two years to the day we met, just before our third and last year of law school began. In Spring 1981, we drove around Oregon, stopping seemingly in every small town with a lawyer, looking for jobs, handing out resumes. This was not a good time to find a job, though.

79. Letter from Melinda Eden to Neil Kagan (Mar. 19, 1996) (on file with author).

80. Letter from Mary Lawrence to Neil Kagan (Mar. 1996) (on file with author).

81. Letter from Margaret Reeves to Neil Kagan (Apr. 12, 1996) (on file with author); Letter from Mary Lawrence to Neil Kagan, *supra* note 80.

82. Letter from Janet Schroer to Neil Kagan (Apr. 1, 1996) (on file with author).

83. Letter from Barbara Haslinger to Neil Kagan (Mar. 1996) (on file with author).

84. Letter from Melinda Eden to Neil Kagan, *supra* note 79.

The country had just emerged from a brief recession and was hovering on the brink of a longer one that lasted from July 1981 to November 1982.<sup>85</sup>

By the time Betty and I graduated from law school in May 1981, only one of us had a job—her. Bill Laswell, then the District Attorney for Douglas County, in Southwest Oregon, hired her as a Deputy District Attorney.

As the center of the heart of the western timber industry, Douglas County was dominated by that industry. In those days, the timber industry was as critical to the economy of Douglas County as it was to the rest of Oregon, if not more so. The timber industry was a major source of employment. The county budget depended heavily on its substantial share of the receipts from federal timber sales, including those in the nearby Umpqua National Forest.

Betty and I moved to the small town of Roseburg, the county seat of Douglas County. Roseburg is a very conservative, small town. Its population in 1980 was 16,644 inhabitants.<sup>86</sup> Roseburg was proud of its identity with the timber industry. So proud, it proclaimed itself the “Timber Capital of the Nation.”<sup>87</sup>

No law firm in Roseburg would hire me, probably as much because of the recession as because of my outspoken commitment to environmental protection. Bill Laswell generously gave me a brief internship. I traveled around Douglas County, prosecuting misdemeanors in its four Justice Courts. Later, I contracted myself out, doing legal research and drafting pleadings, motions, and briefs for other lawyers. This is not what I went to law school for, obviously, but it did give me trial and practical experience.

In September 1982, in the midst of the recession, with an unsecured loan from a local bank—the “Timber Community Bank,” of all banks—I opened my own law office as a solo practitioner. I was ready for business. My first six cases were all . . . divorces.

Divorce was something I knew absolutely nothing about. I had at least taken classes in criminal law and procedure in law school. I spent a lot of time in the law library, educating myself on family law, and I pestered the friendly lawyers in town for advice. The not-so-friendly lawyers referred people to me they did not want to represent, people who had little money or whose legal affairs were so tangled that no one else would take them on.

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85. Richard C. Auxier, *Reagan's Recession*, PEW RES. CTR. (Dec. 14, 2010), <http://www.pewresearch.org/2010/12/14/reagans-recession/>.

86. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, PC80-1-A39, NUMBER OF INHABITANTS (OREGON) 9, (1980).

87. See THE CITY OF ROSEBURG, <http://www.cityofroseburg.org/> (last visited Nov. 5, 2017).

Meanwhile, I bided my time, waiting for my chance to start working for the environment.

## 1983

In 1983, preserving wilderness became my *raison d'être*.

In April, the U.S. House of Representatives passed a 1.2 million-acre Oregon Wilderness bill, which had been introduced by Oregon's Congressional Democrats: Jim Weaver, Les AuCoin, and Ron Wyden.<sup>88</sup> Hatfield planned to proceed with a Senate bill, holding field hearings and talking with all the major interests in the summer, but he never introduced a bill in 1983.<sup>89</sup> The House bill died.

### THE BALD MOUNTAIN ROAD LAWSUIT

Back in Oregon, also in April, construction of the Bald Mountain Road resumed. The onset of winter in 1982 had shut down the road-building before it got very far.

Neither the Sierra Club lawsuit nor anything else had succeeded in stopping the road. So, Earth First!—"the self-proclaimed anarchist 'non-organization'"<sup>90</sup>—began a series of blockades and delaying actions to prevent the bulldozers and chainsaws from wreaking their havoc.

The name "Earth First!" was coined by Dave Foreman in 1980 while he and his band of true believers started talking about forming a radical environmental group.<sup>91</sup> Inspired by Edward Abbey's book, "The Monkey Wrench Gang," Earth First!'s symbol was a fist in a circle; its logo: "No Compromise in Defense of Mother Earth!"<sup>92</sup> Earth First!'s goal was to "preserve one major wilderness area in every ecosystem in the United States."<sup>93</sup>

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88. ROTH II, *supra* note 13, at 31.

89. *Id.* at 31, 34.

90. ZAKIN, *supra* note 17, at 8.

91. *Id.* at 132-33.

92. *Id.* at 133.

93. *Id.* at 144.



*From left, Steve Marsden, Mike Roselle,  
Kevin Everhart, and Pedro Tama*<sup>94</sup>

In late April, on Bald Mountain, four men stepped in front of a Caterpillar bulldozer and refused to move out of the way. “Nothing like this had ever happened in Oregon’s timber country.”<sup>95</sup> The driver, Les Moore, “shouted at the blockaders, who stood there silently, in good civil-disobedience fashion.”<sup>96</sup> When Moore ran out of words, he charged the blockaders with his bulldozer while they stood firm.

He backed down the road scar about fifty feet, lowered the blade and prepared to charge. The big Cat moved forward, its thirteen-foot blade scraping a wall of dirt up against the protesters’ feet. . . . Nobody moved. Visibly frustrated, Moore backed up the bulldozer

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94. Paul Fattig, *The Birth of a Movement*, MEDFORD MAIL TRIB., Apr. 27, 2003 (featuring a photo of the protesters in front of the bulldozer at Bald Mountain).

95. ZAKIN, *supra* note 17, at 250.

96. *Id.*

about ten yards. The protesters . . . hustled up to where Moore was, and faced off against the blade again.<sup>97</sup>

Moore was defeated, but ran off to call the authorities. “When the cops finally got there, they duly arrested the blockaders.”<sup>98</sup> The *Earth First! Journal* proclaimed, “The blockade of the Bald Mountain Road had begun, after months of planning and preparations; so too, began the nonviolent struggle to save all wilderness.”<sup>99</sup> “It was the first significant use of a nonviolent civil-disobedience protest in the battle over ancient forests.”<sup>100</sup>

The human blockades on Bald Mountain continued. By the beginning of July, seven blockades had been mounted, leading to the arrests of forty-four people.<sup>101</sup> One group of blockaders was nearly buried alive by an out-of-control bulldozer driver.<sup>102</sup> The blockades were big news, and not just in Oregon. “The Bald Mountain fight is widely regarded as the ‘shot heard round the world’ in what became known as the spotted owl wars.”<sup>103</sup> It was “a turning point in the long-running battle over the future of the Northwest’s old-growth forest”<sup>104</sup> and “became a rallying cry for direct-action campaigns throughout the U.S.”<sup>105</sup>

By this time, the Oregon Wilderness Coalition had re-named itself the Oregon Natural Resources Council (ONRC). While it was still named OWC, ONRC had been a plaintiff in the unsuccessful Sierra Club lawsuit in 1982. The high visibility of the Earth First! blockades enabled ONRC to raise funds to cover the costs of a new lawsuit to stop the road.<sup>106</sup> ONRC could not raise enough money to hire a lawyer, though. Consequently, Andy Kerr, then ONRC’s Conservation Director, began looking for someone to handle the case for free.

One morning in mid-May, John Bonine was bicycling from West Eugene to his office at the law school when by happenstance his path crossed

97. *Id.* at 250-51.

98. *Id.* at 251.

99. *Id.*

100. *20 Years*, *supra* note 58 (quoting Andy Kerr, senior counselor for ONRC).

101. ZAKIN, *supra* note 17, at 253; John E. Bonine, *Private Public Interest Environmental Law: History, Hard Work, and Hope*, 26 PACE ENVTL. L. REV. 465, 486 (2009); Fattig, *supra* note 94; *20 Years*, *supra* note 58; *Protesters Remain in Jail*, UNITED PRESS INT’L, July 1, 1993.

102. ZAKIN, *supra* note 17, at 254.

103. *Noted Environmentalist Leaves Headwaters Post*, SEATTLE POST-INTELLIGENCER, Mar. 31, 1998, at B3.

104. *20 years*, *supra* note 58.

105. *Id.*; see also Fattig, *supra* note 94; Andy Kerr, *Civil Disobedience for the Forest: The Time for Direct Action has Come Again*, WILD FOREST REV. (Apr. 1995), <http://www.andykerr.net/civil-disobedience/>.

106. ZAKIN, *supra* note 17, at 258.



Andy's.<sup>107</sup> Andy mentioned the blockades to John. As John remembers it, Andy said, "We haven't been able to find anybody to file a lawsuit against the construction of this road in Southern Oregon."<sup>108</sup> John suggested Andy call me. "Why don't you call my friend and former student, Neil Kagan, in Roseburg . . . . He is a public interest environmental lawyer, trying to make it on his own."<sup>109</sup> Andy did call, and he asked me to file a lawsuit to stop the Bald Mountain Road. As Andy later explained, "Competent, and *pro bono*, legal counsel was hard to find back then."<sup>110</sup>

Of course, I leaped at the chance. The vision of bringing a case such as this was my reason for going to law school rather than pursuing a career as a biologist. I had been preparing myself for this case for eleven years.

But as I began evaluating the case, it seemed to have three strikes against it. *Strike One*: Congress had expressly appropriated money to fund the Bald Mountain Road. That might mean Congress intended to override NEPA and the necessity of an EIS. *Strike Two*: ONRC had been a party to the 1982 lawsuit to stop the Bald Mountain Road, *Sierra Club v. Block*. The Sierra Club and the then-OWC had not raised a legal theory available to them in that lawsuit—that the RARE II EIS was inadequate. This failure would give rise to the defense of claim preclusion, a doctrine that requires a party to raise all the available legal theories when it sues, or be precluded from raising them in a later lawsuit. *Strike Three*: The previous lawsuit had failed. This suggested a new case might well fail on the merits, too.

As I dug deeper, the prospects began to look better. First, I found precedents indicating that Congress's appropriation did not override NEPA. Next, although ONRC had been a party to the 1982 lawsuit, the addition of new parties to a new lawsuit could defeat a defense of claim preclusion. Finally, the EIS for the Rogue-Illinois Planning Unit relied on the general analysis of the RARE II EIS to support the allocation of the North Kalmiopsis to non-wilderness uses. *California v. Block* established that the RARE II EIS did not disclose the specific effects of the allocation on the wilderness characteristics of the North Kalmiopsis.

Now I had a case. I feverishly got to work, because the road was under construction, two blockades had already occurred, and more were coming. First, to head off a claim preclusion defense, I had ONRC invite Earth First! to join the lawsuit. In a nod to Earth First!'s role in raising the profile of the case, ONRC agreed to allow Earth First! to be named as the lead plaintiff. However, I was concerned that Earth First! would not be able to

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107. Email from John Bonine to Neil Kagan (Mar. 30, 2017) (on file with author).

108. *Id.*

109. *Id.*; Bonine, *supra* note 101, at 486.

110. Email from Andy Kerr to Neil Kagan (Apr. 10, 2017) (on file with author).

establish standing—the right to bring a lawsuit. So, I also had ONRC invite a number of individuals to be named as plaintiffs. Some of them, like Steve Marsden and Pedro Tama, had been members of OWC or were members of Earth First!. One of them, Claudia Beausoleil, was not a member of either group.

I still had a bit of a “Catch-22”<sup>111</sup> problem: I could only file a lawsuit in federal court if I was admitted to federal court; the only way I could be admitted to federal court was if I had conducted a trial in federal court; but I could not conduct a trial in federal court because I was not admitted to federal court. To escape this paradoxical situation, I had to find a sponsor—a lawyer already admitted to federal court. However, I could find no attorney in Oregon willing to sponsor me, including attorneys sympathetic to the environment. Maybe they were discouraged by the fallout that might come from representing an environmental group as radical as Earth First!, whose members openly broke the law.

Whatever the reason, I was desperate. I finally called on Jim Arneson, a criminal defense attorney in Roseburg who was a member of the Umpqua Valley Audubon Society. Soon after arriving in Roseburg, I had helped this Audubon chapter by successfully challenging Douglas County’s failure to comply with Oregon Statewide Planning Goal 5. The purpose of Goal 5 is to “protect natural resources and conserve scenic and historic areas and open

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111. In *Catch-22*, Joseph Heller captured the absurdity of war as experienced by the members of a World War II bomber squadron stationed in Italy.

“Is Orr crazy?”

“He sure is,” Doc Daneeka said.

“Can you ground him?”

“I sure can. But first he has to ask me to. That’s part of the rule.”

“Then why doesn’t he ask you to?”

“Because he’s crazy,” Doc Daneeka said. “He has to be crazy to keep flying combat missions after all the close calls he’s had. Sure, I can ground Orr. But first he has to ask me to.”

“That’s all he has to do to be grounded?”

“That’s all. Let him ask me.”

“And then you can ground him?” Yossarian asked.

“No. Then I can’t ground him.”

“You mean there’s a catch?”

“Sure there’s a catch,” Doc Daneeka replied. “Catch-22. Anyone who wants to get out of combat duty isn’t really crazy. . . .”

JOSEPH HELLER, *CATCH-22* 45 (Simon & Schuster 1992).

spaces.”<sup>112</sup> (Convincing the Oregon Land Conservation and Development Commission to reject their land use plan hardly endeared me to the County Commissioners, who invited me into their office for a little chat. We exchanged views. We agreed to disagree.)

Jim knew little about environmental law. Nevertheless, he agreed to serve as my co-counsel. Then, I was off to the races!

As quickly as I could, I drafted a complaint; prepared affidavits for the plaintiffs, detailing the harm they would suffer if the road were built; wrote a motion asking for a temporary restraining order (TRO) and a preliminary injunction stopping the construction of the road and the related timber harvesting; and wrote a brief explaining how the Forest Service had violated the law. I typed it all up on the latest technological marvel: an IBM Correcting “Selectric” III typewriter. One of its novel features was a “Lift-off Tape” system, which allowed me to lift incorrectly typed characters off the page. If that failed, I had white-out.

I drove the seventy miles from Roseburg to Eugene to file the papers in *Earth First! v. Block* in the U.S. District Court for the District of Oregon on Thursday, June 30th. Then, following the rules of civil procedure, I called the U.S. Attorney’s office. I told an Assistant U.S. Attorney that I was going to ask a judge for a TRO to stop the Bald Mountain Road. He had handled the Sierra Club lawsuit the year before. He told me my lawsuit was precluded. No surprise. I said I thought otherwise, and we would see.

The case was assigned to Judge James Redden,<sup>113</sup> who was based in Portland. I called his clerk to schedule an immediate hearing on my request for a TRO.

### *EARTH FIRST! v. BLOCK*—ROUND 1 JULY 1, 1983

Judge Redden received the case at about 11 a.m. on Friday, July 1st, just before the start of a long Fourth of July weekend.<sup>114</sup> At 1:33 p.m., after reading the briefs, the opinion in *Sierra Club v. Block* (the 1982 Bald Mountain Road lawsuit), and the opinion in *California v. Block*, the judge convened

112. OR. DEP’T OF LAND CONSERVATION & DEV., OAR 660-015-0000(5), GOAL 5: NATURAL RESOURCES, SCENIC AND HISTORIC AREAS, AND OPEN SPACES (1996), <http://www.oregon.gov/LCD/docs/goals/goal5.pdf>.

113. Judge Redden was nominated by President Jimmy Carter on December 3, 1979, to a new seat on the United States District Court for the District of Oregon. *Redden, James Anthony*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/redden-james-anthony> (last visited Nov. 5, 2017). He was confirmed by the United States Senate and received his commission on February 20, 1980. *Id.*

114. Transcript of Hearing on Motion for Temporary Restraining Order at 1, *Earth First! v. Block*, 569 F. Supp. 415 (D. Or. July 1, 1983) (No. 83-6298ME).

a conference call.<sup>115</sup> I was in Roseburg. The judge and two attorneys representing the Forest Service were in Portland.

The judge's first question was for me: Why was my case not precluded by *Sierra Club v. Block*?<sup>116</sup> I answered that Judge Frye was not asked to evaluate whether the Forest Service complied with NEPA in allocating the North Kalmiopsis to non-wilderness uses. Rather, she was only asked to evaluate whether the Forest Service complied with NEPA in choosing among different plans for non-wilderness use.<sup>117</sup> In other words, so far as Judge Frye was concerned, the non-wilderness allocation was a given, not something she needed to concern herself with.<sup>118</sup>

I also argued that Judge Frye's decision should not bar Earth First! or the nine individuals I had named as plaintiffs because they were not parties to *Sierra Club v. Block*. Therefore, they had not had a full and fair opportunity to litigate the issues.<sup>119</sup>

The attorneys for the Forest Service argued that the issue in my case was the same as the issue in *Sierra Club v. Block*, namely, compliance with NEPA, and that the Rogue-Illinois Planning Unit EIS provided the site-specific analysis missing in the RARE II EIS.<sup>120</sup>

I came right back, reading excerpts from the Rogue-Illinois Planning Unit EIS. These excerpts showed that the planning unit EIS did not analyze the environmental impact that non-wilderness designation would have on the wilderness characteristics of the North Kalmiopsis roadless area.<sup>121</sup>

Next, the judge wanted to know how much of the road had already been built.<sup>122</sup> About five miles of the total 8-mile road had been substantially completed.<sup>123</sup> In that case, the judge asked me, had not irreparable harm to the environment already occurred?<sup>124</sup> No, I said, not when one balances the road against an untouched, *de facto* wilderness 113,000 acres in size.<sup>125</sup> Especially not where, if the road were completed, the area would be opened up for logging.<sup>126</sup>

At this point, the time was approximately 4:30 p.m. The hearing had gone on for three hours. The judge said, "[B]oth sides have made very

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115. *Id.*

116. *Id.* at 1-2.

117. *Id.* at 5-6.

118. *Id.* at 20.

119. *Id.* at 4-5, 20-23.

120. *Id.* at 7-8, 13.

121. *Id.* at 15-20.

122. *Id.* at 14.

123. *Id.*

124. *Id.* at 28.

125. *Id.*

126. *Id.* 28-29.

strong arguments on who should prevail."<sup>127</sup> He said he would think things over and let us know his decision in a little while.<sup>128</sup> I camped by the phone, sitting on pins and needles. (This was long before cell phones.)

The judge called us back at 5:02 p.m. His first words were, "Okay. My inclination is to grant the Temporary Restraining Order."<sup>129</sup> "My thing [sic] is, there is [a] strong enough likelihood of success in this case on the plaintiffs' part, based upon what I know now, that I should enter a TRO."<sup>130</sup> But he immediately expressed concern that I had not included Plumley as a necessary party, and wondered whether he could order Plumley to do anything.<sup>131</sup> Ultimately, the judge reasoned that Plumley would not be seriously affected by a TRO that would expire at 5:00 p.m. on the following Wednesday, July 6th.<sup>132</sup> He entered a TRO to that effect, scheduling another TRO hearing on the 6th, and a hearing on my motion for a preliminary injunction on the 13th.<sup>133</sup>

As soon as we hung up, I called Andy Kerr to give him the good news. Earth First! had received a special permit close to the road construction area for the July 4th weekend. More than 300 people showed up for the third annual "Round River Rendezvous," planning to stage a protest and more blockades.<sup>134</sup> But when the news of the TRO arrived, "the giant protest [that had been planned] against the Bald Mountain Road . . . became instead a giant celebration."<sup>135</sup> "The Rendezvous, which Earth First!ers had expected to be a war, turned into a victory party. . . . There were speeches, dancing, and music."<sup>136</sup>

### *EARTH FIRST! v. BLOCK—ROUND 2* JULY 6, 1983

Five days later, Judge Redden convened a second conference call. Once again, I was in Roseburg. Everyone else, including Plumley's lawyer, was in the judge's chambers in Portland.

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127. *Id.* at 32.

128. *Id.* at 33, 36-37.

129. *Id.* at 38.

130. *Id.* at 41.

131. *Id.* at 38, 41.

132. *Id.* at 42.

133. *Id.* at 44 (ordering the grant of the TRO).

134. MARTHA FRANCES LEE, *EARTH FIRST!: ENVIRONMENTAL APOCALYPSE* 73-74 (1995) (" . . . with over three hundred Earth First!ers in attendance."); ZAKIN, *supra* note 17, at 258. The first of these rendezvous was held on July 4, 1980 and Earth First!er Bart Koehler "came up with the name Round River Rendezvous after Aldo Leopold's metaphor for an ecological world-view." ZAKIN, *supra* note 17, at 141-42.

135. LEE, *supra* note 134, at 73.

136. ZAKIN, *supra* note 17, at 258.

The judge said that, contrary to the government's position, he thought *California v. Block* supported my arguments.<sup>137</sup> Then, he asked to hear from Plumley's lawyer.<sup>138</sup> Plumley's lawyer argued that it would suffer irreparable harm if the TRO were kept in place because: (1) the company was small; (2) the company's focus was on building the Bald Mountain Road; (3) the company had spent \$488,000 on new equipment for the job; (4) the company had spent \$2,105.58 a day on wages and \$5,598 a day on equipment; (5) the job was half-completed; and (6) completing it would take until the end of September.<sup>139</sup>

The judge then asked me to respond to Plumley's claim that it would be irreparably harmed if it were kept from completing the road. I argued that Plumley's losses were economic, quantifiable, and compensable. Ours, on the other hand, were incalculable because the wilderness, once invaded and destroyed, could never be recovered or, at least, not for many, many lifetimes.<sup>140</sup>

I also argued that the Forest Service was responsible for Plumley's economic losses because it misled him by allowing the construction of the road, despite *California v. Block*.<sup>141</sup> I added that the Forest Service had betrayed the public trust for the same reason.<sup>142</sup> The Forest Service's lawyer "object[ed] most strenuously" to this accusation.<sup>143</sup> I suppose I went too far, but perhaps I can be forgiven for letting my passion get the better of me in light of my youth. The judge, at least, was forgiving. "I think there is usually quite a bit of rhetoric in cases like this," he said dryly.<sup>144</sup>

Then the judge asked for the government's views.<sup>145</sup> The Forest Service's lawyers said the road would give access to very valuable timber, creating jobs and receipts both for the federal government, the state, and the county.<sup>146</sup>

After hearing all sides, the judge decided to keep the TRO in effect until the hearing on my motion for a preliminary injunction on July 13th.<sup>147</sup>

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137. Transcript of Proceedings at 2-3, *Earth First! v. Block*, 569 F. Supp. 415 (D. Or. July 6, 1983) (No. 83-6298ME-RE).

138. *Id.* at 3.

139. *Id.* at 4-5, 7, 9-10, 12, 22.

140. *Id.* at 24-26.

141. *Id.* at 25.

142. *Id.*

143. *Id.* at 26, 28.

144. *Id.* at 28.

145. *Id.*

146. *Id.* at 27.

147. *Earth First! v. Block*, 569 F. Supp. 415, 417 (D. Or. 1983) (noting that J. Redden made an order extending TRO).

*EARTH FIRST! v. BLOCK*—ROUND 3  
JULY 13, 1983

Over the next seven days, I briefed various issues that had come up during the TRO hearings while pulling all of my evidence and arguments together. The hearing was held at the federal courthouse in Eugene. There was intense interest in the case, and the media was following it closely. The courtroom was packed. I was wearing my one and only suit.

At the outset, Judge Redden outlined the several issues of concern to him. These included: (1) the Forest Service's failure to inform Judge Frye of *California v. Bergland* in the Sierra Club's 1982 Bald Mountain lawsuit, *Sierra Club v. Block*; (2) the Forest Service's apparent failure to inform Plumley that *California v. Bergland* might interfere with the road-building; (3) the preclusive effect, if any, of *Sierra Club v. Block* on the current lawsuit; (4) the plaintiffs' failure to file their lawsuit before the construction of the road resumed in 1983, at least some of them choosing instead to use "illegal means," "which has been noted from the press;" and (5) whether the substantial completion of the road meant that irreparable harm had already been done.<sup>148</sup> This last point seemed particularly bothersome to the judge. He said:

[T]he harm may have virtually been done by now and perhaps the best course of action would be to finish this road and not use it or stop right where it is. I just don't know. It would have been an easy decision to make it if it hadn't been started. But the delay in [sic] filing of this lawsuit makes the decision much more difficult.<sup>149</sup>

Then the judge gave me the go-ahead to proceed.

Diving in, I called my first witness in my first trial before a federal judge. I proceeded through my witnesses, most of them plaintiffs in the case. Jim Arneson conducted some of the questioning on direct and, later, on cross-examination.

One very important witness for the plaintiffs was a Forest Service geologist. To protect him as best I could from repercussions for testifying against his employer, I had subpoenaed him, and I established that I had compelled him to testify in our very first exchange.<sup>150</sup> Through his testimony, I established that Plumley would be using explosives to blow up part of the mountain to build the road.<sup>151</sup> This was a very important point be-

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148. Transcript of Proceedings at 2-8, *Earth First! v. Block*, 569 F. Supp. 415 (D. Or. July 13, 1983) (No. 83-6298-ME-RE).

149. *Id.* at 7.

150. *Id.* at 38.

151. *Id.* at 39-40.

cause it underscored the irreparable harm that I needed to show to get the injunction. One cannot put a blown-up mountain back together. Judge Redden took note.

The Ninth Circuit's *California v. Block* decision was controlling precedent in Oregon. Yet, I had to prove that the EIS for the Rogue-Illinois Planning Unit depended on the invalidated RARE II EIS.

For its part, the Forest Service did not roll over. Through their cross-examination of the individual plaintiffs who testified, the Forest Service's lawyers attempted to establish that the plaintiffs had been represented in the Sierra Club's Bald Mountain Road lawsuit because they were members either of the Sierra Club or OWC.<sup>152</sup>

The Forest Service's lawyers also elicited testimony from some of the plaintiffs that they came to the court with "dirty hands," because they had participated in the non-violent, but still criminal blockades.<sup>153</sup> One of these was young Claudia Beausoleil. On cross-examination, she testified that she had been arrested for a blockade on May 5th and fined \$100.<sup>154</sup> Following up, the government lawyer asked her, "I understand from the record . . . this had to do with your attaching yourself to some road building equipment?"<sup>155</sup> Claudia guilelessly answered, "Yes, I chained myself to the bulldozer; I felt it was the right thing to do."<sup>156</sup> I got the impression that Claudia's forthrightness and idealism impressed the judge.

At the end of a very long day, after a short recess, the judge reconvened the hearing to announce his decision. He indicated that he was troubled by the failure of the government to disclose the *California v. Bergland* case in the 1982 lawsuit to stop the Bald Mountain Road:

There has been a lot of talk about dirty hands. I don't know whose are the dirtiest, plaintiffs' [for acts of civil disobedience] or defendants' [for not advising Judge Frye of *California v. Bergland*].<sup>157</sup> Both plaintiffs and defendants in *Sierra Club v. Block* apparently thought it would be the best course not to bring *California v. Bergland* to the attention of the Court. . . . The Forest Service . . . for . . . obvious reasons.<sup>158</sup>

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152. *Id.* at 68-69, 96, 105-07, 120-22.

153. *Id.* at 70-71, 89-90, 96-98.

154. *Id.* at 97.

155. *Id.*

156. *Id.*

157. *Earth First! v. Block*, 569 F. Supp. 415, 420 (D. Or. 1983) ("The government did not raise the RARE II issue, or advise the court of existing case law on point.").

158. Transcript of Proceedings at 190-91, *Earth First! v. Block*, 569 F. Supp. 415 (D. Or. July 13, 1983) (No. 83-6298ME).



Judge Redden rejected the Forest Service's call to dismiss the case for lack of standing. He said that even though ONRC had been a plaintiff in *Sierra Club v. Block*, and even though some of the individual plaintiffs had been represented in that lawsuit by virtue of their membership either in the Sierra Club or ONRC, one plaintiff had not: Claudia.<sup>159</sup>

Then the judge announced his decision on the merits: Based on *California v. Block*, the Forest Service had violated NEPA.<sup>160</sup> The Rogue-Illinois Planning Unit EIS was inadequate because it lacked the site-specific analysis required to designate a roadless area as non-wilderness, relying instead upon the invalid RARE II EIS.<sup>161</sup> He would grant a preliminary injunction stopping the construction of the road. But he would not enjoin logging in the North Kalmiopsis roadless area, saying:

It seems to me the course of action I should take is to grant the preliminary injunction. . . . [This] does not reach the issue of logging. . . . *You have some 17 other contracts which involve[ ] roads and logging which apparently the course of action will be to litigate one by one.*<sup>162</sup>

I had been on an adrenaline-high all day. By this time, I was exhausted. But I had to get the judge to extend the injunction to the logging. In my motion, I had asked not only for an injunction stopping the road, but also for an injunction stopping every single one of the planned timber sales in the North Kalmiopsis.

But who was I, a mere novice in federal court, just two years out of law school, to correct a federal judge in front of a courtroom full of people hanging on every word and gesture?

Shakily, I got to my feet. This is what I said and how the judge responded:

MR. KAGAN: Your Honor . . . I would like to clarify that plaintiffs in this action are not merely attacking the construction of *this* road. We are saying that *any activity . . . including all of the timber sales that are planned in this area . . . should be enjoined.*

THE COURT: . . . . It seems to me in retrospect that is true, *this is a preliminary injunction enjoining everything.*<sup>163</sup>

159. *Id.* at 190.

160. *See id.* at 191.

161. *Earth First! v. Block*, 569 F. Supp. 415, 419-20 (D. Or. 1983).

162. Transcript of Proceedings at 191-92, *Earth First! v. Block*, 569 F. Supp. 415 (D. Or. July 13, 1983) (No. 83-6298ME) (emphasis added).

163. *Id.* at 198.

The North Kalmiopsis was saved.

### THE OREGON RARE II LAWSUIT

After the success of its Bald Mountain Road lawsuit, ONRC turned its attention to bringing a lawsuit challenging the non-wilderness allocations in all the roadless areas in all eleven of the National Forests in Oregon.<sup>164</sup> As I have already noted, together these roadless areas contained more than three million acres.

An Oregon lawsuit was necessary for two reasons. First, the threat of a lawsuit alone would leave the roadless areas exposed to development. This was the official policy of the Department of Agriculture, as the Assistant Secretary for Natural Resources and Environment reminded the Chief of the Forest Service in a memo dated September 9, 1983. Displaying overt contempt for the rule of law, he wrote, "I would . . . restate the Department's policy that timber sales and other activities not be held up or withdrawn merely because of the threat of appeal or lawsuit relying on the Ninth Circuit [*California v. Block*] decision. *It is important that the Forest Service put those who wish to halt development activities in the position of actually having taken the necessary steps to do so.*"<sup>165</sup>

The second reason for bringing an Oregon lawsuit was to pressure Congress to legislatively protect the roadless areas. James Monteith, now ONRC's Executive Director, laid out the strategy to the group's members as follows:

A RARE II suit may provide the necessary incentive, since the "locking up" of three million acres will be anathema to them [the timber industry], and the only way to "unlock" those lands is to pass legislation. . . . *The lawsuit is the best catalyst we can provide, short of total capitulation on the acreage. If it's not an adequate incentive for the industry, so be it.*<sup>166</sup>

One roadless area Betty and I often visited was Boulder Creek, almost 20,000 acres in size, located in the Umpqua National Forest in Douglas

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164. See, e.g., SIERRA CLUB, *Oregon National Forests*, <http://oregon2.sierraclub.org/sites/or.sierraclub.org/files/juniper-group/images/Oregon-NF.png> (last visited Feb. 24, 2018); *Pacific Northwest Forest Areas*, U.S. DEP'T AGRIC., [https://www.fs.usda.gov/detail/r6/home/?cid=fsbdev2\\_026675#oregon](https://www.fs.usda.gov/detail/r6/home/?cid=fsbdev2_026675#oregon) (last visited Nov. 5, 2017).

165. Complaint at 40, *Or. Nat. Res. Council v. Block*, No. 83-1902 (D. Or. Dec. 13, 1983) (emphasis added) (quoting from Exhibit 8: Memorandum from John B. Crowell, Jr., Assistant Sec'y for Nat. Res. & Env't, Dep't of Agric., to R. Max Peterson, Chief, Forest Serv. (Sept. 9, 1983)).

166. ROTH II, *supra* note 13, at 35 (emphasis added) (quoting James Monteith, Executive Director, ONRC, Dec. 2, 1983).

County, fifty miles east of Roseburg.<sup>167</sup> “Small waterfalls and rapids connect the series of quiet pools that make up Boulder Creek, a tributary of the North Umpqua River,” famous worldwide for its steelhead runs.<sup>168</sup> Ponderosa pines flourish on Pine Bench, near the southern end of the area, and are thought to be the largest such stand of this kind this far northwest of the crest of the Cascade Mountains.<sup>169</sup>

ONRC approached me to bring an Oregon lawsuit. Andy Kerr later wrote, “I think you were our first and only ask. Bonine [recommended] you to us. You’d work *pro bono*, even though you were living in the logging capital of the world at the time . . . . Though history prove[d] our choice right, we were desperate. If you had said no, no Plan B was in mind.”<sup>170</sup>

Needless to say, ONRC did not have to ask me twice. On December 13th, I filed *Oregon Natural Resources Council v. Block* in the U.S. District Court for the District of Oregon.<sup>171</sup> The lawsuit covered all three million acres of roadless areas in all the National Forests in Oregon. It sought an injunction on logging, road-building, and other development in all roadless areas, including 202 existing timber sales and 183 planned timber sales.<sup>172</sup> Because the lawsuit might halt activities in the roadless areas, opined one of Oregon’s leading newspapers, “When Congress convenes next month, Mark Hatfield will be virtually compelled to push an Oregon wilderness bill through the Senate.”<sup>173</sup>

I meanwhile had no illusions that the case would be an easy one to win. *California v. Block* notwithstanding, proving that the EIS for each planning unit in each National Forest depended on the invalid RARE II EIS would be a major challenge. Just finding and gathering the print versions of all these EISs would be a daunting prospect. The Internet? Still in its infancy.

167. *Boulder Creek Wilderness*, U.S. FOREST SERV., <https://www.fs.usda.gov/recarea/umpqua/recarea/?recid=63374> (last visited Nov. 5, 2017) [hereinafter *Boulder Creek*].

168. *Id.*; S. COMM. ON ENERGY AND NATURAL RESOURCES ON OREGON WILDERNESS ACT OF 1984, S. REP. NO. 465, at 14, 98th Cong., 2d Sess. (1984).

169. *Boulder Creek*, *supra* note 167.

170. Email from Andy Kerr to Neil Kagan (Apr. 10, 2017) (on file with author); *see also* Bonine, *supra* note 101, at 486.

171. Complaint at 1, Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Dec. 13, 1983); *see also* Richard Green, *Suit Seeks to Prevent Timber Cut*, SALEM STATESMAN J., Dec. 14, 1983, at 1A; WILLIAMS, *supra* note 24, 184; *Suit Filed to Stop Logging on RARE 2 Land*, GRANT PASS DAILY COURIER, Dec. 13, 1983, at 1A; Dan Wyant, *Suit Seeks Timber-Sales Halt*, EUGENE REG.-GUARD, Dec. 14, 1983, at 1A.

172. Complaint at 14 ¶ 2, Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Dec. 13, 1983); Green, *supra* note 171, at 1A; *Suit Filed to Stop Logging on RARE 2 Land*, *supra* note 171, at 1A; Wyant, *supra* note 171, at 1A.

173. *RARE II Pressures Mount*, EUGENE REG.-GUARD, Dec. 18, 1983, at 22A.

As in the case of ONRC's Bald Mountain Road lawsuit, the Sierra Club and The Wilderness Society opposed the statewide lawsuit, still fearful of a legislative backlash that might result in hard release.<sup>174</sup> However, the National Audubon Society and six Oregon Audubon chapters became my clients, joining the lawsuit as plaintiffs.<sup>175</sup>

The government was the defendant, of course, but not the only one. I was mindful of Judge Redden's admonition that I should have included Plumley in the Bald Mountain Road lawsuit because it had a financial stake in the outcome of the case.

Having learned my lesson, I named in addition to the government a defendant class made up of representatives of the timber industry. Class actions are used almost exclusively to form plaintiff classes, not defendant classes. The reason I used the vehicle of a class action was that I did not know the identity of the scores of companies, large and small, that had contracted with the Forest Service to build roads or log timber in all the planning units of each of the eleven National Forests in Oregon. What is more, even if I could discover their identity, serving each one of them with legal papers would be a logistical nightmare.

So, whom did I choose as representatives of the defendant class? Two were timber industry trade associations, the Industrial Forestry Association and the Northwest Pine Association.<sup>176</sup> Two others were timber companies that were amongst the largest purchasers of timber on National Forest lands in Oregon.<sup>177</sup> One was a national company, Louisiana-Pacific, the single largest purchaser.<sup>178</sup> The other was an Oregon company, close to home. In fact, its headquarters were in the place Betty and I called home: Douglas County. The name of the company? Roseburg's namesake: Roseburg Lumber Company,<sup>179</sup> a major employer in Douglas County.

174. ROTH II, *supra* note 17, at 35 ("The Sierra Club and The Wilderness Society attempted to dissociate themselves completely from ONRC's suit.")

175. *Id.*; *Audobon [sic] Society Joins Lawsuit to Halt Forest Land Development*, EUGENE REG.-GUARD, Feb. 2, 1984, at 1B; *Audubon Chapters Join Forest Wilderness Suit*, GRANTS PASS DAILY COURIER, Feb. 10, 1984, at 8. The six chapters were the Central Oregon Audubon Society, Lane County Audubon Society, Portland Audubon Society, Rogue Valley Audubon Society, Salem Audubon Society, and Umpqua Valley Audubon Society. First Amended Complaint, Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. May 4, 1984); *Audubon Chapters Join Forest Wilderness Suit*, *supra* note 175, at 8.

176. Complaint at 3-4 ¶¶ 9, 12, Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Dec. 13, 1983); Green, *supra* note 171, at 1A.

177. Wyant, *supra* note 171, at 1A, 4A.

178. Complaint at 3-4 ¶¶ 9, 13, Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Dec. 13, 1983); Green, *supra* note 171, at 1A; Wyant, *supra* note 171, at 1A.

179. Complaint at 3-4 ¶¶ 9, 13, Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Dec. 13, 1983); Green, *supra* note 171, at 1A.

I was warned to expect death threats by a friend in the know. None materialized. I might have been elected “most hated man in Douglas County” had an election been held. But, enveloped in Betty’s love, I was safe.

## 1984

On January 25th, Jeff Sirmon, the Regional Forester of the Pacific Northwest Region of the Forest Service, announced that all National Forests in Oregon, except the Willamette,<sup>180</sup> had stopped selling timber from the roadless areas studied in RARE II.<sup>181</sup> “The halt . . . [came] in response to a lawsuit filed last month in federal court . . . by the Oregon Natural Resources Council.”<sup>182</sup> The stoppage would reduce the logging of Oregon’s National Forests in Fiscal Year 1984 by 14%, or 500 million board feet.<sup>183</sup> “‘Until this lawsuit gets resolved, we won’t be selling any of this timber,’ . . . [Sirmon] said.”<sup>184</sup>

Sirmon’s announcement came right out of the government’s playbook. Earlier, the Assistant Secretary for Natural Resources and Environment had “strongly suggest[ed]” that the Forest Service issue press announcements whenever it was compelled to “acquiesce” to the deferral of development activities because of the Ninth Circuit decision in *California v. Block*.<sup>185</sup>

Meanwhile, *California v. Bergland* had “generated intense political pressures from logging interests and other development interests” to relieve the Forest Service of the necessity of conducting the detailed analysis required by NEPA before it could allocate roadless areas to non-wilderness uses.<sup>186</sup> The threat of injunctions in states other than California drove these interests to “put their political clout behind bills to designate some of these

180. The Forest Service claimed that the Willamette had prepared an EIS that evaluated the wilderness potential of its roadless areas. *Willamette Sees Slight Reduction*, EUGENE REG.-GUARD, Feb. 2, 1984, at 1B.

181. *Suit Could Cut Timber Sales, Foresters Say*, SALEM STATESMAN J., Jan. 26, 1984, at 7B; *Suit Halts Harvesting of Timber*, EUGENE REG.-GUARD, Jan. 26, 1984, at 3B; *Suit May Slash Timber Harvest 14%*, GRANTS PASS DAILY COURIER, Jan. 26, 1984, at 5C.

182. *Suit Could Cut Timber Sales, Foresters Say*, *supra* note 181, at 7B; *Suit Halts Harvesting of Timber*, *supra* note 181, at 3B; *accord WILLIAMS*, *supra* note 24, at 184; Bonine, *supra* note 101, at 486.

183. *Suit Could Cut Timber Sales, Foresters Say*, *supra* note 181, at 7B; *Suit Halts Harvesting of Timber*, *supra* note 181, at 3B; *Suit May Slash Timber Harvest 14%*, *supra* note 181, at 5C.

184. *Suit Halts Harvesting of Timber*, *supra* note 181, at 3B.

185. Complaint at 40, *Or. Nat. Res. Council v. Block*, No. 83-1902 (D. Or. Dec. 13, 1983) (quoting from Exhibit 8: Memorandum from John B. Crowell, Jr., Assistant Sec’y for Nat. Res. & Env’t, Dep’t of Agric., to R. Max Peterson, Chief, Forest Serv. (Sept. 9, 1983)).

186. DOUG SCOTT, *THE ENDURING WILDERNESS* 82-83 (2004); *see also* MARSH, *supra* note 27, at 133-34.

roadless areas as wilderness, if only to get as much of the other roadless land as they could released and made available for possible roading [sic] and timber sales.”<sup>187</sup>

The Bald Mountain Road lawsuit transformed the looming threat of an injunction in a state other than California into a reality. As its sole successor, the Oregon lawsuit precipitated a statewide *de facto* injunction and posed the only actual threat of a court-ordered injunction in the country.<sup>188</sup>

Andy Kerr told me that Jim Weaver called the Oregon lawsuit a “jewel.” Weaver and other champions of wilderness in Congress used the industry pressure generated by the fear of yet another judicial injunction as leverage.<sup>189</sup> They demanded the designation of a substantial portion of roadless areas as wilderness in exchange for the release of other roadless areas for non-wilderness uses.<sup>190</sup> “Although Senator Hatfield intensely disliked being coerced in this way, he recognized the renewed urgency of passing an Oregon wilderness bill. He made it known that he was willing to negotiate with Weaver and include additional acreage in exchange for some form of temporary release language.”<sup>191</sup>

In court, I was keeping the pressure on, keeping the Oregon lawsuit alive, keeping the defendants at bay. The timber companies had filed motions to strike or dismiss.<sup>192</sup> I filed memos in opposition.<sup>193</sup> On January 30th, the judge denied the motions, keeping the timber companies in the case.<sup>194</sup> He also scheduled my motion to certify a defendant class to be heard on April 16th.<sup>195</sup>

187. SCOTT, *supra* note 186, at 82-83.

188. The Bald Mountain Road and Oregon lawsuits were the only RARE II lawsuits brought after *California v. Bergland*.

189. *Id.* at 83.

190. *Id.*

191. MARSH, *supra* note 27, at 137; see KERR, *supra* note 34, at 59 (The lawsuit “forced Hatfield to finally act on Wilderness legislation.”).

192. Docket Sheet at nos. 21, 23, Or. Nat. Res. Council v. Block, No. 83-1902.

193. *Id.* at nos. 27, 28.

194. *Id.* at no. 31.

195. *Id.* On April 16th, the judge denied the motion to certify a defendant class, but essentially gave me what I wanted by limiting my obligation to that of serving only lead counsel for the private defendants – counsel the defendants would have to select or that the judge would appoint. Hearing on Motion to Certify a Class at 2-3, 6-8, Or. Nat. Res. Council v. Block, No. 83-1902 (D. Or. Apr. 16, 1984). So, I proceeded to file an amended complaint naming another ninety individual timber and construction companies as defendants. Docket Sheet at nos. 57-146, 148, Or. Nat. Res. Council v. Block, No. 83-1902. The lawyer for one of the defendants amusedly called the case “Neil Kagan against the world.”

In February, Senator Hatfield met with representatives of the Sierra Club.<sup>196</sup> To their surprise, he promised to support soft release.<sup>197</sup> Hatfield supported soft release because he knew the Senate did not have the votes for hard release.<sup>198</sup> Because he was running for re-election in 1984, he also wanted credit for resolving the impasse over release language.<sup>199</sup> And then there was that pesky lawsuit that just happened to be jeopardizing the stability of Oregon's timber industry and, thus, the state's economy.<sup>200</sup>

"By March, wilderness bills for New Hampshire, Vermont, Wisconsin, and North Carolina [all containing soft release language] had been prepared and were ready for action by the Senate Agriculture Committee."<sup>201</sup> The "moment of truth" on release language arrived later, on April 11th.<sup>202</sup> Senator James McClure (Republican from Idaho) was presiding as chairman at a business meeting of the Energy and Natural Resources Committee, when he and Hatfield had a "dramatic showdown."<sup>203</sup> McClure was "insist[ing] that all wilderness bills contain permanent-release language."<sup>204</sup>

Hatfield not so subtly reminded members of the committee that he was the chairman of the Appropriations Committee. The Appropriations Committee is one of the most powerful in the Senate because it oversees discretionary spending. The chair of the committee has enormous influence over requests by other Senators to appropriate the money they covet for their states and constituents. Hatfield's mention of his chairmanship served notice on his colleagues of how much they depended on his goodwill. He expressed his impatience over the delay in the passage of the Oregon Wilderness bill, citing the urgency created by the Oregon lawsuit, and he demanded action as follows:

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196. ROTH II, *supra* note 13, at 17.

197. *See id.*

198. *See* Email from Andy Kerr to Neil Kagan (Mar. 31, 2017) (on file with author). An event in March confirmed the lack of votes for hard release. Senator Jesse Helms (R-NC) requested that the North Carolina wilderness bill pass out of the Senate Agriculture Committee, even though it contained soft release language instead of the hard release language he favored. *See* ROTH II, *supra* note 13, at 17-18. "The Sierra Club's Tim Mahoney . . . saw [this] as an important event and a signal to Senator [James] McClure that he did not have enough support in the Senate to pass long-term release." *Id.* at 18 (emphasis added).

199. Email from Andy Kerr to Neil Kagan (Mar. 31, 2017) (on file with author).

200. *Id.*

201. ROTH II, *supra* note 13, at 17.

202. *Id.* at 18.

203. *Id.*

204. MARSH, *supra* note 27, at 137; accord WILLIAMS, *supra* note 24, at 182; *Millions of Acres Win Wilderness Protection*, CQ ALMANAC 313-17 (40th ed. 1984), <https://library.cqpress.com/cqalmanac/document.php?id=cqal84-1152976>.

I think unlike any of the other western states at this moment, we are in a very unique situation in Oregon in that we have had suits<sup>205</sup> filed that are now being litigated . . . And considering the basic economics of Oregon is related to the timber industry, we are in a very urgent situation . . .

Now, as Chairman of the Appropriations Committee, I have tried to accommodate the members of the Senate in literally hundreds of amendments . . . And I have tried to perform that same help and assistance with senators on this committee.

Now, Mr. Chairman, I am a little bit impatient today because I've been ready to move on this bill for quite some time.<sup>206</sup>

Hatfield's ultimatum broke the logjam caused by the debate over release language.<sup>207</sup> House and Senate negotiators got serious.<sup>208</sup> On May 2nd, they announced a compromise on soft release that would be added to all wilderness legislation.<sup>209</sup> Under this compromise, the Forest Service would reconsider roadless areas allocated to non-wilderness uses at least every fifteen years for possible inclusion in the Wilderness Preservation System.<sup>210</sup> In the interim, the Forest Service could allow logging and other development on those lands.<sup>211</sup> "Most important to Hatfield and the Oregon timber industry, the [Oregon] bill included sufficiency language that nullified the ONRC's lawsuit."<sup>212</sup>

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205. Although Hatfield referred to "suits," plural, ONRC's statewide RARE II lawsuit was the only one then being litigated in Oregon. It was also the only statewide RARE II lawsuit ever brought anywhere in the country.

206. ROTH II, *supra* note 13, at 18-19 (quoting from U.S Senate Energy Committee Business Meeting, Apr. 11, 1984) (emphasis added). Senator Dan Evans (R-WA) too "expressed his extreme readiness" for passage of the Washington Wilderness bill, which also had soft release language. *Id.* at 18-19.

207. MARSH, *supra* note 27, at 138.

208. See ROTH II, *supra* note 13, at 19.

209. *Millions of Acres Win Wilderness Protection*, *supra* note 204.

210. See *id.*; SCOTT, *supra* note 186, at 83.

211. *Millions of Acres Win Wilderness Protection*, *supra* note 204.

212. MARSH, *supra* note 27, at 138; see also Oregon Wilderness Act of 1984, Pub. L. 98-328, § 7, 98 Stat. 272, 277-79 (1984). After the enactment of the Oregon Wilderness Act of 1984, the U.S. District Court entered a final judgment dismissing the Oregon lawsuit as moot. Final Judgment, *Or. Nat. Res. Council v. Block*, No. 83-1902 (D. Or. Aug. 6, 1984).



Ultimately, driven by the desire to resolve the RARE II dilemma, Congress enacted bills designating 8,265,647 acres as wilderness in eighteen states.<sup>213</sup> The bills were enacted in the following order:<sup>214</sup>

- Wisconsin (24,339 acres)<sup>215</sup>
- Vermont (41,265 acres)<sup>216</sup>
- New Hampshire (77,000 acres)<sup>217</sup>
- North Carolina (68,750 acres)<sup>218</sup>
- Oregon (859,500 acres = 854,000 acres Forest Service + 5,500 acres Bureau of Land Management)<sup>219</sup>
- Washington (1,005,930 acres = 998,790 acres Forest Service + 7,140 acres Interior)<sup>220</sup>
- Arizona (1,062,510 acres = 699,140 acres Forest Service + 363,370 acres Interior / Bureau of Land Management)<sup>221</sup>
- California (3,207,510 acres = 1,792,930 acres Forest Service + 1,414,580 acres National Park Service)<sup>222</sup>
- Utah (749,550 acres)<sup>223</sup>
- Florida (49,150 acres)<sup>224</sup>
- Arkansas (91,103 acres)<sup>225</sup>
- Georgia (14,439 acres)<sup>226</sup>

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213. SCOTT, *supra* note 186, at 83. Congress actually enacted twenty state Wilderness bills in 1984. However, Congress's designation of Wilderness in Missouri and New Mexico was not prompted by RARE II. See San Juan Basin Wilderness Protection Act of 1984, Pub. L. 98-603, 98 Stat. 3155, (1984); see also Irish Wilderness Act of 1984, Pub. L. 98-289, 98 Stat. 199, (1984).

214. Acreage is land under the jurisdiction of the Forest Service, except where noted.

215. Wisconsin Wilderness Act of 1984, Pub. L. 98-321, § 2, 98 Stat. 250, 250 (1984).

216. Vermont Wilderness Act of 1984, Pub. L. 98-322, § 102, 98 Stat. 253, 254 (1984).

217. New Hampshire Wilderness Act of 1984, Pub. L. 98-323, § 101, 98 Stat. 259, 259 (1984).

218. North Carolina Wilderness Act of 1984, Pub. L. 98-324, § 2, 98 Stat. 263, 263-64 (1984).

219. Oregon Wilderness Act of 1984, Pub. L. 98-328, §§ 3, 4(f), 98 Stat. 272, 272-75, 277 (1984).

220. Washington State Wilderness Act of 1984, Pub. L. 98-339, § 3, 98 Stat. 299, 299-302 (1984).

221. Arizona Wilderness Act of 1984, Pub. L. 98-406, §§ 101, 202, 203, 301, 98 Stat. 1485, 1485-89, 1491-93 (1984).

222. California Wilderness Act of 1984, Pub. L. 98-425, §§ 101, 106, 98 Stat. 1619, 1619-24, 1626-27 (1984).

223. Utah Wilderness Act of 1984, Pub. L. 98-428, § 102, 98 Stat. 1657, 1657-59 (1984).

224. Florida Wilderness Act of 1984, Pub. L. 98-430, § 1, 98 Stat. 1665, 1665-66 (1984).

225. Arkansas Wilderness Act of 1984, Pub. L. 98-508, § 3, 98 Stat. 2349, 2349-50 (1984).

226. Georgia Wilderness Act of 1984, Pub. L. 98-514, § 2, 98 Stat. 2416, 2416 (1984).

- Mississippi (5,500 acres)<sup>227</sup>
- Wyoming (884,129 acres)<sup>228</sup>
- Texas (34,346 acres)<sup>229</sup>
- Tennessee (24,942 acres)<sup>230</sup>
- Pennsylvania (9,705 acres)<sup>231</sup>
- Virginia (55,984 acres)<sup>232</sup>

“Most of these laws designated substantially more Wilderness than [the Forest Service had recommended].”<sup>233</sup>

The Oregon Wilderness Act of 1984 alone protected more than one million acres from development, forever.<sup>234</sup> It set aside as components of the National Wilderness Preservation System 859,500 acres:

in order to promote, perpetuate, and preserve the wilderness character of the lands, protect watersheds and wildlife habitat, preserve scenic and historic resources, and promote scientific research, primitive recreation, solitude, physical and mental challenge, and inspiration for the benefit of all the American people, to a greater extent than is possible in the absence of wilderness designation.<sup>235</sup>

(In RARE II, the Forest Service had recommended only 368,000 acres for wilderness.<sup>236</sup>) The Oregon Wilderness Act set aside another 156,900 acres “[i]n order to conserve, protect, and manage, in a substantially undeveloped condition, certain National Forest System lands in the State of Oregon having unique geographic, topographic, biological, ecological features and pos-

227. Mississippi National Forest Wilderness Act of 1984, Pub. L. 98-515, § 2, 98 Stat. 2420, 2420 (1984).

228. Wyoming Wilderness Act of 1984, Pub. L. 98-550, § 201, 98 Stat. 2807, 2808-09 (1984).

229. Texas Wilderness Act of 1984, Pub. L. 98-574, § 2, 98 Stat. 3051, 3051 (1984).

230. Tennessee Wilderness Act of 1984, Pub. L. 98-578, § 2, 98 Stat. 3088, 3088 (1984).

231. Pennsylvania Wilderness Act of 1984, Pub. L. 98-585, § 4, 98 Stat. 3100, 3100-01 (1984).

232. Virginia Wilderness Act of 1984, Pub. L. 98-586, § 2, 98 Stat. 3105, 3105-06 (1984).

233. SCOTT, *supra* note 186, at 83.

234. None were more responsible for the passage of the Oregon Wilderness Act of 1984 than James Monteith, Andy Kerr, and Tim Lillebo. They have deservedly received credit for their vision, savvy, and courage, but not enough.

235. Oregon Wilderness Act of 1984, Pub. L. 98-328, § 2(b)(1), 3, 98 Stat. 272, 272-75 (1984).

236. MARSH, *supra* note 27, at 127.

sessing significant scenic, wildlife, dispersed recreation, and watershed values."<sup>237</sup>

In explaining the pressing need for the Oregon Wilderness bill on the Senate floor on May 24, 1984, Senator Hatfield again gave the Oregon lawsuit as the reason, as follows:

[T]his legislation includes provisions which are essential to the stabilization of Oregon's timber base. It resolves the issue raised in . . . a . . . [law]suit which has been filed in Oregon pertaining to the adequacy of the RARE II study. This bill declares that the environmental impact statement is sufficient. Without such action, some 700 million board feet of timber which already has been sold is in jeopardy, and another 1.7 billion board feet of timber contained in planned timber sales will not be sold and harvested, assuming the likely success of the litigation. Resolution of the issue itself is a major step forward for Oregon's uncertain lumber economy.<sup>238</sup>

At the time, Oregon had an annual sales program of about 3.5 billion board feet.<sup>239</sup> The lawsuit might have cut that program in half.

Summing up, the Chief Historian of the Forest Service wrote as follows:

The fight over release had come to a welcome end for all involved. The path had been cleared to designate 6.6 million acres of National Forest System land [in six Western and twelve Eastern States] as wilderness, the largest designated acreage in a single session of Congress since the Wilderness Act of 1964.

. . . .

*Senator Hatfield's role in resolving the release question made the Oregon Wilderness bill [a catalyst, and therefore] one of the most important of those passed in 1984.*<sup>240</sup>

ONRC's strategy had played out just as it hoped. The success of its Bald Mountain Road lawsuit showed that a statewide lawsuit relying on *California v. Block* could succeed. For that reason, Regional Forester Sirmon ordered a halt to timber sales in roadless areas a little more than a month after I filed the Oregon lawsuit. The effects of that stoppage and the law-

237. Oregon Wilderness Act of 1984, Pub. L. 98-328, § 4(a)-(b), 98 Stat. 272, 275-76 (1984).

238. 130 CONG. REC. 14,058-59 (1984) (emphasis added) (statement of Sen. Hatfield).

239. *Id.*

240. ROTH II, *supra* note 13, at 19, 23.

suit's existential threat to Oregon's timber economy were the impetus that forced Hatfield to break the logjam blocking wilderness legislation in Oregon and, incidentally, in the other states, too.

As Andy Kerr put it to me, "Your litigation was a catalyst for the Oregon bill, which was a catalyst for all those others."<sup>241</sup>

### NOT THE END

The litigation was not mine, though. The truth is that the lawsuits were ours, mine and Betty's. My work was only possible because of her.

While I was pouring my time *pro bono* into the two lawsuits, alienating the populace in the process, my income was minimal. Adjusted for inflation, my annual income in 1983 was \$13,752.<sup>242</sup> As low as it was in 1983, it dropped by nearly half to \$7,539 in 1984.<sup>243</sup> My recollection is that my paying work came mostly from court appointments to represent indigent criminal defendants.

I was only able to bring the lawsuits because Betty supported us on her modest income, first as a Deputy District Attorney, then as a contract attorney for the City of Roseburg, and finally as the Roseburg City Attorney. She was a gifted and successful trial lawyer.

Betty never complained, but then, she did not regard the simple lifestyle we had as a sacrifice. Sure, she wanted wilderness, but there was another reason for her support, the real reason. She loved me.

Her support eventually may have cost Betty her job. In August 1985, she had re-joined the District Attorney's office. She was laid off in June 1986, after I had brought a lawsuit for ONRC to stop Mark Hatfield's pet project: the Elk Creek Dam, an Army Corps of Engineers boondoggle that would have destroyed a salmon-bearing tributary to the Wild and Scenic Rogue River had the dam been completed.<sup>244</sup> The reason given for Betty's layoff was budget cuts. I was later told by a friend who claimed to know that this was just a pretext for ridding Roseburg, Douglas County, and Southern Oregon of me. We relocated to Gresham, which borders Portland on the east.

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241. Email from Andy Kerr to Neil Kagan (Apr. 10, 2017) (on file with author).

242. This represents the adjustment of my 1983 annual income of \$5,691 to reflect its buying power in July 2017, using the CPI Inflation Calculator. *CPI Inflation Calculator*, U.S. DEP'T LABOR, <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5691&year1=198312&year2=201707> (last visited Nov. 6, 2017).

243. This represents the adjustment of my 1984 annual income of \$3,243 to reflect its buying power in July 2017, using the CPI Inflation Calculator. U.S. DEP'T LABOR, *supra* note 242.

244. Neil Kagan, *The Elk Creek Dam Story*, 26 PACE ENVIL. L. REV. 493 (2009).

A year later, Betty saved my life. Cancer, originating in my thyroid, painlessly and unobtrusively grew and metastasized to my lymph nodes. One morning, Betty noticed a lump on the side of my neck, prompting me to seek a diagnosis, which rapidly led to a biopsy, then surgery to remove as much of the cancerous tissue as possible. According to the surgeons, Betty's discovery of one of the tumors came in the nick of time. Without the treatment I received, I would have died in a few months.

Then, in 1994, cancer struck again. Only this time, Betty was the target. She was diagnosed in October, a month after our daughter Hannah's first birthday. During the next ten months, she endured multiple painful surgeries, debilitating rounds of chemotherapy, tiring sessions of radiation, and reconstructive surgery. At last, the cancer seemed to be in remission.

Then, in September, she started coughing, constantly, day and night. We went to the doctor, who took X-rays. When they were developed, he called us into his office. Showing the X-rays to us, he said, "This is bad." He explained that the cancer had recurred and spread from her breast to her lungs. We were stunned.

When we returned home from that devastating trip to the doctor, Betty got in bed, propped up against the headboard by pillows. Then this brave woman, who was quick to laughter, who rarely shed a tear, let loose a river of tears. Tears poured from her eyes and coursed down her cheeks in a continuous stream, like twin waterfalls. "I don't want to leave Hannah," she said. "I don't want to leave you." That is when my heart first began to break.

To stay with us, she tried everything over the next three months. She willingly subjected herself to experimental, physically punishing chemotherapy. She could tolerate this only by taking higher and higher doses of morphine, but the drug gave her less and less relief.

She lost her hair. Again. She lost weight. Night after night she lost sleep. She became gaunt and frail.

I gave her all the love, support, and care in my power to give. However, although she had saved my life, I was powerless to save hers. Rational or not, I felt guilty about this for years. In time, with counseling, I came to forgive myself: for failing her, for being the one who lived, for being alive. Mostly.

On December 22, 1995, I was home taking care of Hannah when Betty called me from her hospital bed. The cancer had spread to her liver. She said the doctor had told her that her condition was hopeless. She wanted to be home until she could be transferred to a hospice. "Then, you've decided you're ready to die? Is that what you *want*?" "Yes. Is that what *you* want?"

Never have I been faced with a more troubling question. I certainly did not want her to die, but I could tell from her imploring tone that she

needed me to say “yes.” After a moment’s anguish, I understood that what she meant was: Do I have your support? To that question, there was only one answer, which I gave unreservedly: “For your sake, yes.”

The doctor had called me earlier that day. She told me she thought Betty might have two weeks of life left. An ambulance brought her home early on the 23rd.

So, I thought we would have time to talk—not enough time, of course, but time enough to express our love for one another and to say farewell. Shortly after we got her settled in bed, though, while I was in the living room attending to the nurse’s instructions for her home care, Betty slipped into unconsciousness. One of the friends by her side urgently called me into the bedroom. Rushing there, I found her breathing with difficulty—deep, drawn out breaths, punctuated by long pauses. Distressed, I called her name. She did not answer. She did not wake up.

She was on the brink of death. But she was not dead yet. I realized then I still had a chance, a possibility of communing with my beloved one last time. I know not how, but suddenly I was calm.

I sat by her side, took her hand, held it in mine. Without any clear idea of what I would say, I began to speak to her. I spoke of our magical life together, of my appreciation for her gift of love, of Hannah’s future. I promised to make Hannah laugh every day. Every moment, I expected her to stop breathing, but she struggled on.

I recited the Shema, the Jewish prayer affirming that God is one. I knew she would have done it herself if she could. Still, she continued her tortured breathing.

I paused. She was suffering. I wanted her suffering to stop. I did not know what I should do, what I could do. I asked myself, can she be holding on for *me*? Is she waiting for my assurance that I am able to release her?

All I know for certain is this: Keeping my voice steady, I gently told her, “You can stop struggling now.” She took two more breaths. Then she was gone.

I did not want to go on without her. I could not imagine how I would.

But I had to go on. Our little girl needed me. I could not abandon Hannah. I love her, too.

Besides, I had a promise to keep. Keeping my promise was my saving grace, because Hannah’s laughter proved to be balm for my grieving soul. Turned out *I* needed *her*. Was I lucky Betty gave me a daughter or what?

Nine months after Betty died, I started a new chapter. Reluctantly, I left my law practice, our home, Oregon, and her body behind. Her memory stayed with me.

I will always be conscious of everything I owe Betty—my profession, my career, my daughter, my life.

We *all* are indebted to her.

So, if you find yourself in the Porcupine Lake Wilderness<sup>245</sup> in Wisconsin, the Bald River Gorge Wilderness<sup>246</sup> in Tennessee, the Paria Canyon Wilderness<sup>247</sup> in Arizona, or in Boulder Creek, the wilderness nearest and dearest to our hearts, please . . .

Remember Betty Reed.

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245. Brain Walton, *Porcupine Lake Wilderness*, WILDERNESS CONNECT, <http://www.wilderness.net/NWPS/enlargeAndDetails?id=563> (last visited Nov. 3, 2017).

246. *Bald River Gorge Wilderness*, WILDERNESS CONNECT, <http://www.wilderness.net/NWPS/enlargeAndDetails?id=4364> (last visited Nov. 3, 2017).

247. Mike Salamacha, *Paria Canyon-Vermilion Cliffs Wilderness*, WILDERNESS CONNECT, <http://www.wilderness.net/NWPS/enlargeAndDetails?id=2015> (last visited Nov. 3, 2017).