

# IRISEYES

## Litigation Technology News

An ePublication of Iris Data Services

JUNE 2009

Volume 2, Number 2

### **Spoliation is All a Matter of Timing**

***Court finds plaintiff has the burden to prove the existence of data at the time duty of preservation arose, failure to do so extinguishes any potential sanctions for spoliation.***

**By Marco S. Nasca, Esq., Regional Director, Iris Data Services**

In the matter of United States of America v. Maxxam, Inc. et al., 2009 WL 817264 (N.D. Cal. Mar. 27, 2009), the court ruled that a party bringing a spoliation claim must meet the burden of establishing the existence of evidence at the time the duty to preserve arose; if this burden cannot be overcome, the accused party cannot be held liable for evidence that was lost or destroyed before an obligation to preserve was in existence.

This matter arises under the False Claims Act, alleging that defendants made false statements to the California Department of Forestry (CDF) and Fire Protection in a sustained yield plan (SYP), the approval of which caused the United States to contribute \$250-million towards the purchase of a large parcel of land known as Headwaters Forest, previously owned by Pacific Lumber Company, but later sold to defendant Maxxam in the mid-1980's.

According to plaintiffs, Pacific Lumber had carefully managed its redwood forests before the takeover by Maxxam, however post-takeover defendants' priority was short-term profits, not long-term sustainability, escalating Pacific Lumber's logging activities to pay off its debt. In the 1990s, Pacific Lumber was enjoined from harvesting old-growth timber that served as a habitat for an endangered species of bird. Pacific Lumber responded by suing both the state and federal governments, arguing that the enforcement of the Endangered Species Act constituted an unlawful taking of its property. To resolve this dispute, and quell the controversy over Pacific Lumber's aggressive forestry practices, Maxxam, Pacific Lumber, the State of California, and the United States entered into a complex agreement under which Pacific Lumber agreed to dismiss its pending lawsuits and to sell its old-growth forest and certain other land to the U.S.

Government and the State of California, with the Headwaters Forest becoming a public wildlife reserve.

As a condition of the purchase, Pacific Lumber agreed to develop and to implement an SYP for its retained properties. An SYP is a master plan for the operational, environmental, economic and other issues related to timber harvesting over a large area. It is based on a computer simulation that estimates projected timber growth and stocking requirements in relation to a proposed harvest.

Pacific Lumber's SYP was approved by the EPA, but later it was learned that the SYP did not comply with California environmental standards. Plaintiffs filed suit alleging that the SYP was actually fraudulent in multiple respects, and was designed specifically to facilitate payment of Maxxam's substantial debt. Plaintiffs alleged that it was this debt, and not legitimate

principles of long-term sustainability, that drove the models used to create the SYP. Plaintiffs estimated that by intentionally manipulating the SYP Pacific Lumber erroneously increased its harvest forecasts by 30%.

At issue before the court is the data preservation of the computer modeling program that originally created the SYP submitted by Pacific Lumber to the CDF. The specialized program functions by processing the inputs of various computer files, and then creates a simulation of growth and harvesting according to the prescriptions described in the SYP. During discovery it was learned that some of this data used to create the SYP was missing.

Eric Johnson, the project lead for VESTRA, a consulting firm hired by Pacific Lumber to create the SYP stated that hundreds of modeling simulations had been created between the years 1996-1999, and the inputs for these modeling simulations were “typically not saved, and no standard practice for saving old versions of files was in place.” Johnson further explained that VESTRA’s “general practice was to discard material that no longer had a business value.” Further, Johnson stated that any potential recoverable data was stored in a file cabinet in a disorganized fashion which was discarded in 2007 when VESTRA moved its office because there was no business reason to keep them, and was done in the normal course of business for the company.

Plaintiffs claimed that information related to the SYP was destroyed sometime in August 2007, after the court’s Case Management Order reminding parties of their duty to preserve relevant evidence. Plaintiff also claims that defendants failed to instruct its employees to preserve evidence relevant to the creation of the SYP prior to the VESTRA’s move.

According to Johnson, the SYP model no longer existed at VESTRA in June 2006 when Mr. Johnson recalls having looked for it without success before leaving employment with VESTRA. The only specific information provided by plaintiffs regarding the circumstances of the alleged destruction relates to Johnson’s use of the software in August 2007, where Johnson stated that he returned to VESTRA to use the modeling software in connection with an on-going interactive process with various governmental agencies, not related to the SYP in question.

Based upon the information provided in discovery, plaintiffs’ experts detailed the information produced, opining that there was substantial documentation that the defendants supplied desired yields to Johnson and VESTRA and that Johnson manipulated the modeling software to reach those yields. Nevertheless, plaintiffs’ experts argued that they cannot conclusively state for certain their opinions without reviewing additional information that was not produced. Plaintiffs asked the court to impose the most extreme sanction available — terminating sanctions.

Plaintiffs argue that the absence of the materials at issue makes a fair resolution of this case impossible, and that the prejudice is so great that no lesser sanction will suffice.

Beginning its decision, the court first established its power to provide sanctions, stating that it is within their inherent power to “sanction litigants for the destruction of evidence where they knew or should have known that the documents were relevant to litigation or potential litigation. The duty to preserve relevant evidence can arise even before the commencement of litigation, and sanctions may be imposed if defendants knew or should have known that the evidence destroyed was potentially relevant. Further, a party’s destruction of evidence need not be done in bad faith to warrant imposition of sanctions, so long as there is a finding of fault.”

The court first concluded that the defendants could be held vicariously liable, and thus responsible for any alleged spoliation of evidence because the SYP inputs were in the possession of VESTRA, an agent of Pacific Lumber. The court strengthen this bond by showing that both VESTRA and Pacific Lumber were being represented by the same law firm in the Headwaters purchase, holding that it was entirely reasonable to hold defendants responsible for the preservation of evidence in the hands of its agent law firm, and therefore in the hands of the consultants retained by the firm.

The court next sought to determine whether there was in fact spoliation, and if so, whether it was destroyed at a time when there was a duty to preserve it. The court found that the plaintiffs have met their burden of demonstrating that certain evidence was not preserved, citing plaintiffs' motion which states generally that the SYP Model was destroyed after the filing and service of the Complaint. However, the court found that there was no evidence of intentional spoliation, finding that VESTRA destroyed many back-up tapes and files during a move to smaller offices and that other files were simply destroyed in the ordinary course of business. The court reasoned that in the creation of the SYP outputs, it was customary that inputs to the software would be changed without saving the prior values since throughout the process there would be numerous changes made as part of the process. The court found that there was no actual evidence to support plaintiffs' assertion of intentional spoliation other than plaintiffs' expert's declaration.

The court next addressed when a duty to preserve the missing evidence arose, examining three events that occurred before this action was served, which plaintiffs claim triggered a duty to preserve evidence: (1) the proceeding lawsuit in 1999; (2) communications with defendants Realtor in 2002 regarding another parcel of land acquired after the closure of the Headwaters deal; and (3) Pacific Lumber's claim against the State of California for breach of the Headwaters

Purchase Agreement in 2006. The court concluded that only the latter gave rise to a duty to preserve the inputs of the software that are at issue here. In that claim, Pacific Lumber alleged that the State of California breached the Headwaters Agreement in a variety of ways. The court concluded that this claim gave rise to a duty to preserve all evidence related to the Headwaters Agreement—including all SYP inputs.

The court then turned to the question as to whether the missing evidence existed in January 2006. Although the court concluded that evidence was not preserved, and that defendants had a duty to preserve the SYP inputs beginning in 2006, defendants could not be found liable for spoliation unless such evidence existed in January 2006 and was destroyed or lost after that date. The court found that plaintiffs did not satisfy their burden of establishing that evidence was destroyed or lost after the duty to preserve it arose. The court found that there was little evidence regarding the date and circumstances under which the inputs to the SYP model were lost or destroyed. As it is plaintiffs' burden to demonstrate that the SYP inputs existed at a time when a duty to preserve evidence existed, the absence of evidence demonstrating this fact required the court to deny plaintiff's motion.

**About The Author:**  
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