



Washington, D.C. Update

The House and Senate remain at odds on additional stimulus measures in response to COVID-19. Earlier this month the Democratic House passed the HEROES Act, a \$3 trillion measure that includes a second round of stimulus checks to most Americans, an extension of federal unemployment support and \$1 trillion in aid for state and local governments. Senate Republicans immediately dismissed the legislation as dead on arrival and President Trump has indicated he might veto it.



Senate Majority Leader Mitch McConnell (R-KY) has conceded that additional COVID-19 stimulus measures are likely, but he and other Senate Republicans support a pause in additional stimulus spending to see how the economy recovers as many states begin reopening. Negotiations are likely to continue into June. In the meantime, the House is expected to take up major legislation soon, including a reauthorization of federal transportation programs. AFRC and our allies have been working to secure additional funding for Forest Service roads.

Great American Outdoors Act. Senate Majority Leader Mitch McConnell recently reiterated a commitment to passing the Great American Outdoors Act, legislation that would mandate full funding of the Land and Water Conservation Fund (LWCF) at its \$900 million annual authorized level, and direct \$9.5 billion to address the maintenance backlog on national parks and other public lands over the next five years. LWCF is currently receiving about \$400 million through the annual appropriations process.

Under the Great American Outdoors Act, the National Park Service would receive 70% of the available maintenance backlog funding while the Forest Service would receive just 10%, or about \$190 million annually. The Forest Service has a maintenance backlog of about \$5 billion, with a large majority of that being for roads. However, under the legislation the Forest Service would be required to spend 65% of the funding on non-transportation projects. If this provision remains in the bill the Forest Service could annually direct about \$66 million towards its extensive road system, which is important to sustaining the agency's timber management program.

The Great American Outdoors Act gained momentum after President Trump promoted the bill via Twitter to boost the tough re-election campaigns of Senators Steve Daines (R-MT), Cory Gardner (R-CO), and Rob Portman (R-OH). Trump is expected to sign the legislation if passed by the House (also expected). While the recreation-focused bill does *not* include specific investments and policies aimed at increasing timber harvest from public lands, it also does *not* include controversial wilderness bills that had previously been tied to the LWCF and public land omnibus packages.

Cottonwood. In 2015, the Ninth Circuit Court established a dangerous legal precedent in a case known as “Cottonwood.” The legal decision has proven to be a potent and effective litigation tool for anti-forestry groups. [For more Cottonwood background, read AFRC’s one-pager here.](#)

Fixing Cottonwood has been one of AFRC’s top legal and policy priorities. With the help of our national partners, we helped secure a *partial legislative* fix in 2018. Yet, the Cottonwood precedent continues to lead to injunctions and timber program disruptions across the country. There are three options to fully fix the harmful Cottonwood precedent: 1) legislation; 2) regulation; or 3) legal action. AFRC and its partners are pursuing all three.

Bipartisan legislation is our preference, but this is likely the most difficult path in today’s political environment. Democrats and Republicans have been “negotiating” a full Cottonwood fix for years. The Obama Administration supported a fix, but Democratic leaders in the Senate and House have blocked passage.

Senator Daines has been a Cottonwood champion. His advocacy led to [a recent letter from Forest Service Chief Vickie Christiansen and Fish and Wildlife Director Aurelia Skipwith](#) explaining the Administration’s view on the Cottonwood issue and responding to proposed legislative language. This is an important development and will hopefully help break the legislative logjam. Senator Daines also continues working with Senator Diane Feinstein (D-CA) in the hopes of introducing legislation that includes a Cottonwood fix and other reasonable reforms to streamline federal forest management activities.

The Administration could also use the regulatory process to address the Cottonwood precedent, and the recent joint agency letter to Senator Daines elevated the issue with the agencies and the White House. Regulatory action does have its challenges given the timing (close to a presidential election) and expected litigation. The Administration is also focused on finalizing other pending regulation changes, as the time available before January 2021 is quickly narrowing. AFRC continues to explore ways to resolve the issue in the courts, as the Obama DOJ asked the Supreme Court to do in 2016.

The good news is that the Cottonwood issue is now on the radar screens of the highest levels of USDA and the Department of the Interior. Both Departments now fully understand the urgency for a full Cottonwood fix and its importance to the long-term viability of Forest Service and BLM timber programs. The Administration’s support for legislation in this [letter](#), and their efforts to address it through regulation, are positive developments. We will continue to underscore the urgent need for a solution.

NEPA Reforms. Last week the President issued another [Executive Order](#) that directed all Federal agencies to waive regulations where they can adopt new or use existing emergency procedures to reduce regulation and stimulate the economy in the wake of the COVID-19 outbreak.

We’re in discussions with the Forest Service to ascertain what steps they may take to follow this order. The most useful step the agency could take would be to rapidly finalize their NEPA Regulations, which they have been working on since January 2018. [You can read AFRC’s comments on the Forest Service Regulations here.](#)

We are concerned, however, that the White House may instead push to finalize the more general Council on Environmental Quality (CEQ) NEPA Regulations proposed in January of *this* year. If the CEQ Regulations are finalized first, the Forest Service may have to delay and revise some components of their proposed rules to be consistent with the CEQ rules. This delay would likely require another round of

public notice and comment. However, the Forest Service may be able to move forward with components of their proposal that aren't impacted by the CEQ regulations, including proposed Categorical Exclusions. We are determining how we can best engage in support of the Forest Service NEPA reforms, which represent an important step forward. /Heath Heikkila

BLM Seeks to 'Modernize' Rules Relating to Admin. Protests; Proposes expanded Salvage CE

For years AFRC members and staff have urged the Bureau of Land Management to address the abuse of the administrative protest process by anti-forestry groups. On May 28, the Department of the Interior and BLM responded, [announcing](#) they were proposing updates to regulations “governing administration of timber sales and protest of forest management decisions.” In a separate [news release](#), the BLM said they were also proposing to establish a new 5,000-acre categorical exclusion for routine timber salvage projects.

Once the rules are published in the federal register, the BLM will open a public comment period for 60 days on the forest management rules, and 30 days on the new timber salvage CE. AFRC is prepared to engage in the process to help ensure the final rules provide real relief for our members, our communities and the land managers seeking to do more work on the ground. In the meantime, we think the announcement is an important step towards addressing the paralysis that administrative protests have caused in some BLM districts.

Abuse of the administrative protest process has been most egregious in Southwest Oregon, where a handful of activists have exploited a loophole in the agency's public engagement process to stop or significantly delay projects. This obstruction has impacted the Medford District's timber program, which has struggled responding to protests containing hundreds of pages of redundant and irrelevant protest points. This paralysis has created uncertainty for timber purchasers and contractors in the region. The abuse has also had a devastating impact on communities that have endured years of catastrophic wildfire and smoke due to the lack of active forest management.

In fact, the BLM's press release specifically cites the Pickett Hog timber sale that received 29 protests before auction in September 2017, delaying the sale for more than a year. Before the BLM could complete protest reviews and responses, a wildfire destroyed a number of sale units in July 2018. Under its proposed regulations, the BLM says public comments could have been addressed before the auction was held, allowing the BLM to award the sale and the purchaser to begin thinning operations before the fire took place.

The Chamber of Medford & Jackson County has recognized and [expressed concerns](#) about how the abuse of the administrative and appeals process has impacted Southern Oregon's economy and livability as fires and smoke have led to the cancellation of events and have impacted local businesses, including those in the tourism and forest sectors.

In DOI's press release, Chamber President and CEO Brad Hicks applauded the proposed rules, saying they will improve forest management on BLM lands, save lives as well as benefit local jobs and businesses in their community. “This is quite an achievement and the effort will go a long way toward protecting our quality of life, providing relief from wildfires and smoke, and ensuring that our region remains a destination for tourism far into the future,” Hicks said.

John Murphy, President & CEO of Murphy Company also commented that his company “strongly supports common sense changes to end the blatant abuse of this system to restore greater fairness and certainty for the rural communities where we operate, forestry experts, and companies like ours that rely on BLM timber to continue putting Oregonians to work producing the renewable, carbon-friendly wood products we use every day.”

The BLM says its new timber salvage CE would affect only routine timber salvage projects smaller than 5,000 acres that normally do not require more extensive environmental analysis. While wildfire affects hundreds of thousands of acres of BLM-managed lands each year, current BLM regulations only allow for the use of a salvage harvest CE that may not exceed 250 acres. The additional CE will increase the agency’s flexibility to respond to disturbances across larger areas. */Nick Smith*

Eastside Screens Plan Amendment

The Forest Service has initiated a process to consider amendments to the land management plans of six eastern Oregon and Washington national forests (Deschutes, Fremont-Winema, Malheur, Ochoco, Umatilla, and Wallowa Whitman) to revise a provision that limits harvesting trees larger than 21 inches in diameter.

This provision, often referred to as the 21” rule, is one component of a unique portion of those eastside land management plans commonly referred to as the Eastside Screens. They are unique in that they were established as interim direction in 1994 in response to a petition by the Natural Resource Defense Council demanding that the Forest Service halt certain timber sales in eastern Oregon and Washington. The interim nature of their genesis resulted in a set of guidelines that were not a product of a robust scientific review or public engagement process. These shortcomings were likely deemed acceptable at the time since they were producing a product that was not intended to be permanent. However, a year later, the Regional Forester signed those guidelines, including the 21” rule, into permanent plan direction for all eastern National Forests.



After 25 years of managing under these interim guidelines the Forest Service is finally considering amending one small piece. This time however, the assessment of the 21” rule will be accompanied by an extensive scientific review and public engagement process. The public engagement process began with a series of workshops intended to allow the public to share their perspective on the proposal—a proposal which has not yet even started to take form. The Forest Service timed these workshops prior to development of a clear proposed action to hear from interested stakeholders as early as possible. They specifically wanted to hear ideas on what standard could viably replace the 21” rule as their intent is not to remove the interim standard but adapt it to current science and management needs.

Overshadowed by what *may* be modified is what is *not* being modified. The overarching objective in the Eastside Screens of developing and maintaining late old forest structure is not being proposed for modification. Standards and guidelines for managing for this forest type will continue to be a driving objective for the eastside Forests. This amendment process will simply analyze whether a one-size-fits-all diameter limitation is the appropriate vehicle to attain that objective. Literature from Oregon-based scientists who presented on the science workshop suggests it is not. James Johnston with Oregon State University coauthored a 2018 paper* that considered restoration of historical forest conditions in diverse inland forests. Among other findings, that paper concluded that:

“Retaining all trees >21” dbh may handicap restoration of historical forest conditions for two reasons: First, many stands, particularly moister and more productive stands, currently have more trees >21” dbh than were historically present. Second, many trees >21” in contemporary stands are a different species than was present historically and retaining these trees will exacerbate compositional shifts from shade-intolerant to shade-tolerant species.” *Johnston, J. D., C. J. Dunn, M. J. Vernon, J. D. Bailey, B. A.

Morrisette, and K. E. Morici. 2018. Restoring historical forest conditions in a diverse inland Pacific Northwest landscape. *Ecosphere* 9(8):e02400. 10.1002/ecs2.2400

During these workshops, the Forest Service emphasized its desire to establish a standard that is “socially, politically, and scientifically durable.” The notion of “social durability” regarding a controversial limitation like the 21” rule was questioned during the science workshop. The scientist panel’s response included recognition that the amendment will not likely be “socially acceptable to everyone.” Navigating this reality will likely be a challenge for the agency. AFRC hopes to express its support for the development of a science-based standard that is adaptable to the diverse array of forest ecosystems across eastern Oregon and Washington and will encourage other stakeholders to express their support as well.

If you are interested in learning more about the process, you can visit the website developed specifically for the plan amendment [here](#). /Andy Geissler

Ninth Circuit Speedily Rejects Challenge to BLM’s Resource Management Plan

Only 10 days after hearing [oral argument](#) (via Zoom), a three-judge panel of the Ninth Circuit [rejected](#) several environmental groups’ challenge to the 2016 RMP for the O&C Lands. The groups challenged the RMP’s alleged “secession” from the Northwest Forest Plan, in that the RMP changed riparian buffers from two tree heights to one. The Eugene District Court (Judges McShane and Russo) rejected those claims in 2019 ([March 2019 Newsletter](#)) and the Ninth Circuit affirmed. The case was heard by Judges Hurwitz, Schroeder, and Owens, appointed respectively by Presidents Clinton, Carter, and Obama. The Roseburg Area Chamber of Commerce, Zuber & Sons Logging and Turner Logging intervened in the case and were represented by Julie Weis of Haglund Kelley LLP.

The Court remarked that the groups claimed “the 2016 RMPs weakened protections by halving the two site-potential-tree-height (‘SPTH’) under the ACS to one SPTH.” It acknowledged “even the 1994 Northwest Forest Plan recognized that its choice of two SPTH was subject to reconsideration.” The Court also found the Plan EIS did not need to “assess how the 2016 RMPs might affect future unspecified conduct by private landowners in the Western Oregon checkerboard.” It concluded BLM provided a “reasoned explanation” for changes from the NWFP to the RMP.

Although the groups had brought a claim contending that the RMP violated the O&C Act (because of the groups’ belief that the Act is a “multiple” rather than dominant-use statute), that claim was decisively rejected by the district court and wasn’t appealed. The district court ruled that “the plain language of the statute, as well as its legislative history, clearly reflect that the O&C Act is not a ‘multiple use mandate

for public federal forestland management.’ Rather, courts have repeatedly held the O&C Act is a ‘primary’ or ‘dominant’ use statute for sustained-yield timber production.” Further, “managing O&C lands pursuant to sustained-yield principles by definition protects watersheds, regulates stream flows, and contributes to the economic stability of surrounding communities.”

While this challenge to the RMP was rejected, the suits brought by AFRC and AOCC in Washington, D.C. continue to await rulings on remedy ([January 2020 Newsletter](#)). The Ninth Circuit ruling means the D.C. court will drive the next steps on O&C lands. /*Lawson Fite*

Split Populations Create Split Listing Determinations for Pacific Fisher



On May 15, the U.S. Fish & Wildlife Service (FWS) [published](#) its [Final Rule](#) listing the Southern Sierra Nevada (SSN) population of the Pacific fisher as endangered, but at the same time determining the Northern California-Southern Oregon (NCSO) population of fisher does not warrant Endangered Species Act (ESA) listing.

FWS’s final rule not to list the NCSO population represents a shift in the agency towards active forest management being a tool in species conservation, rather than a threat. The Pacific fisher is a medium sized mammal in the same family as weasels, mink, martens, and otters. Fishers live in low- to mid-elevation coniferous forests, or mixed conifer and hardwood.

The fisher was first brought to the attention of the FWS in 2004 and was a “candidate” species for a number of years. In 2014 the agency proposed listing the species. However, in 2016, the proposal was withdrawn as the FWS found that the potential threats to the species were no longer “of sufficient imminence, intensity, or magnitude” necessary to qualify the fisher for listing when considering the entire west coast population. Environmental groups successfully challenged the listing in federal court. ([October 2016](#), [November 2019 Newsletters](#)).

In 2019, FWS published the Revised Proposed Rule suggesting that the Pacific fisher would be listed as threatened ([November 2019 Newsletter](#)). During the comment review period, FWS made the critical decision to split the west coast fisher DPS into two smaller Distinct Population Segments: The Southern Sierra Nevada DPS and the Northern California-Southern Oregon (NCSO) DPS. It was known even in 2014 that the fishers were easily categorized into four subpopulations, each with their own genetic differences. In soliciting comments on this issue in particular, FWS determined that three of the subpopulations could be classified together as the NCSO DPS, consisting of roughly 3,000 fishers. These three groups share the same general territory, and their genetic variability from each other was diminished from easy crossover, making the strategy for mitigating the threats to the NCSO DPS the same throughout that region.

The Southern Sierra Nevada subpopulation, however, was found to be completely isolated from the other groups by approximately 130 miles. The SSN fisher are genetically distinct, and have suffered more acute impacts from drought, fire, and habitat fragmentation in the last five years. With a population of ranging from 100 to 500, FWS determined that the SSN fisher are more susceptible to population-wide impacts from individual losses. Thus, FWS determined that NCSO and SSN groups each warranted individual consideration under the ESA.

The Final Rule validates some hotly contested principles of forest management. Timber production has been historically viewed as a threat to the species. However, this final ruling ultimately agrees that active forest management can benefit the fisher, and that NCSO fishers have been observed moving into and thriving in areas currently being managed for timber production. Active management principles are designed to facilitate long term care of the forests, which includes retaining the structural elements necessary to fisher habitat. Fuels reduction projects help mitigate the severity of wildfire, and FWS determined that whatever short-term harms come to the species are outweighed by the benefits of reducing the threat of wildfire.

While the greatest threats to the SSN population are wildfire and tree mortality from drought, there are so few members of this population that the short term losses of active forest management cannot be sustained. FWS determined that ESA protections are more warranted in this group because the loss of each individual fisher creates a proportionally greater risk to the entire population. A designation of critical habitat is expected in the near future. Despite the SSN DPS listing, all of the currently scheduled timber projects in the southern Sierra's are expected to continue as planned. This is largely due to the many conservation procedures that have already been implemented by the Forest Service and the agency's proactive measures to prepare for a possible listing.

Conservation groups, of course, are disappointed that a majority of the fisher was not given protection under the ESA. Conservation groups will most likely try to challenge the final ruling and seek ESA protections for the NCSO DPS. Any such case would likely go before the same judge that gave the order to reconsider FWS's fisher listing. Given that the rule very thoroughly addresses the reasons for creating two distinct population segments, as well as assesses the threats to each group in exacting detail, it seems unlikely that the final rule will be tossed out as arbitrary and capricious. The AFRC Legal Team is currently monitoring the potential of any litigation. */Stephanie Keys*

Industry Coalition Submits Comments on Oregon Coast Coho 5-Year Status Review

On May 26, AFRC, the Oregon Forest & Industries Council and Douglas Timber Operators [submitted comments](#) on the National Marine Fisheries Service's (NMFS) 5-year status review for the threatened Oregon Coast Coho, which was published in the Federal Register on October 4, 2019. Out of 28 salmonids listed under the ESA on the west coast, the Oregon Coast Coho is the only species that NOAA has jurisdiction over in western Oregon. The species was first listed in 1998 and has been addressed in multiple rounds of litigation and administrative review.

The Coalition's comments provided three important reasons as to why NFMS should delist the species. First, a study published in 2019 shows that recent Coho abundance levels (2001-2018) are comparable to historical abundance levels, which NMFS has previously deemed to constitute a benchmark for recovery ([Cramer & Caldwell 2019](#)). NMFS's previous conclusion that Coho populations are greatly reduced from the early 20th century, which now has shown to be incorrect, is the cornerstone of its recent determinations on the status of the species.

Second, studies published from 2015-2018, which were not considered as part of NMFS's 2016 Status Review or 2016 Recovery Plan, have shown that habitat conditions, fish densities, and fish productivity are similar between private forestlands managed under the Oregon Forest Practices Act and public lands managed under the Northwest Forest Plan. These studies demonstrate that habitat on both private and public lands are in much better condition than assumed in the environmental baseline for the species.

Third, the improved habitat conditions on private forestlands and agricultural lands reflect the significant investments the State of Oregon, federal government, private landowners, local businesses, and tribes have made in stream enhancement projects under the Oregon Plan over the past 20 years. For those reasons, the Coalition suggested current regulatory mechanisms are more than adequate to ensure that ESA protections are no longer necessary. AFRC thanks Dominic M. Carollo from Yockim Carollo LLP for his assistance with these comments. /Sara Ghafouri

Washington State DNR Update

The last week of May was auction week for the Department of Natural Resources. The Department holds auctions on Tuesday, Wednesday, and Thursday during auction week with typically two auctions on each day. The auctions were once again held remotely from each Region and were relatively well attended.

In May, DNR's auction featured 19 sales, including a few sorts that did not sell at the April auction. Despite the current market conditions, early results appear that DNR was able to sell all but one traditional (non-sort) sale. Total sold volume was 55,997 MBF. At the writing of this article, DNR was finalizing a few of the sort auction results and a total sold value was not available. As of the April 2020 auction, DNR sold 97 of 108 offered sales for a sold volume of 435,367 MBF. This has resulted in generating a gross sale of \$133,207,607.56, which will benefit a variety of beneficiaries, including counties, schools, fire districts, and libraries.

Last month we reported that the City Skidder and Middle May timber sale Forest Practice Applications (FPA) were appealed to the Pollution Control Hearing Board (PCHB). City Skidder was sold at the May auction, and shortly after the auction we learned that the PCHB granted DNR's request for Summary Judgment and dismissed the appeal. No litigation was filed within the time for challenging the Board's approval of the sale. The PCHB ruling can be appealed to Superior Court, but it appears likely the sale will move forward as permitted.

The appeal for the Middle May sale was withdrawn and the sale continues to be in a holding pattern awaiting an opportunity for DNR to facilitate a field trip with three members of the Board of Natural Resources and sale opponent representatives.

AFRC and trust beneficiaries continue to press their legal challenges to the 2019 Long-Term Conservation Strategy and Sustainable Harvest Calculation. The Skagit County Superior Court held telephonic hearings on April 29 and May 27, ultimately deciding on a compromise on the State's motion to transfer venue to Thurston County. The "writ" of review claims, which proceed on a closed record and a deferential review standard, will move forward in Thurston County, while breach of fiduciary duty claims will stay in Skagit County. /Matt Comisky

Colville National Forest Awards Second A-Z Project

On May 6, the Colville National Forest awarded the Chewelah A-Z Project (Chewelah) to Vaagen Brothers Lumber. The project area is approximately 80,000 acres and is the second project of its kind where the Colville would require the completion of an Environmental Analysis and presale activities at industry expense (not as service items). The timber from the project area would be sold at advertised rates (without further competition).

The first A-Z Project (Mill Creek) was awarded in 2013 to Vaagen Brothers and covered a 54,000-acre landscape. Vaagen Brothers contracted the NEPA review to a third-party private company. The Forest's belief was that by contracting NEPA and sale preparation activities to a perspective purchaser, it would

provide the Forest with increased capacity to implement restoration at a faster pace than with its current resources. Vaagen Brothers are currently operating on Mill Creek with timber task orders remaining for this year and FY 2021. The Mill Creek contract has a 10-year termination date.



Implementation of Chewelah will result in multiple-award blanket purchase agreements (also known as a BPA with subsequent Call Orders), over a period of approximately 15 years. The intent of these blanket purchase agreements is to reduce the potential of high intensity wildfire by removing and/or rearranging the existing fuel loading on selected project areas. The Forest has a need to treat thousands of acres in order to preclude large scale catastrophic fire and/or restore forest woodlands to meet other resource objectives. While Forest personnel are at capacity with other priority work, the community also wants to increase the number of acres treated and examine recreational opportunities. The Forest Service will make multiple

awards with no minimum guarantees. The resultant contracts will be IRTC, IRSC or service call orders with provisions for timber removal.

The work Vaagen Brothers will undertake may include, but is not limited to, preparing the NEPA document, unit layout, cruising, marking, road and trail maintenance; work to improve soil productivity, habitat for wildlife or fisheries, or other resource values; prescribed fire support; removing vegetation to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives; restore and maintain wildlife and fish habitat; and control noxious and exotic weeds and reestablish native plant species. The Forest Service will retain all decisional authority, but the risk for performing NEPA and pre-treatment services lies with the contractor.

There are a couple of major differences between the Chewelah Project and the Mill Creek Project. A Blanket Purchase Agreement will be used for Chewelah instead of issuing Task Orders for timber removal work. Using BPAs will allow local Colville Forest personnel to oversee the contract rather than the Acquisition Division. Second, because the BPA requires clear and documented decision points showing that the agency is clearly managing all decision points, Vaagen Brothers will be allowed to have more direct engagement with the planning work than in the first A-Z contract. However, the company is bringing in a third party NEPA team to conduct the project development and analysis.

AFRC congratulates both Vaagen Brothers Lumber and the Colville for entering into these unique stewardship agreements with the intent to increase the pace and scale of management on the Forest in hopes of preventing large scale wildfires. On October 26, 2018 AFRC, member companies, and Forest Service personnel visited the Chewelah Project during early planning. The photo (above, left) shows Rodney Smoldon (Forest Supervisor) outlining his thoughts for the Project. Also pictured are AFRC members Duane Vaagen, David Brummer (Stimson), Josh Anderson (Vaagen Brothers), and Bill Waterfield (Boise Cascade), and Forest Silviculturist Jonathan Day. */Tom Partin*