



Washington, DC Update

As its traditional August recess wraps up, Congress will return in September to unfinished legislative business, including negotiations over the next COVID-19 relief measure. Democrats and Republicans appear far apart on the cost of potential COVID legislation and key issues like the potential inclusion of state and local aid. President Trump's August 8 order to use disaster funding to temporarily provide an additional \$400 in monthly unemployment payments relieved some of the political pressure to reach an agreement, but there will be renewed calls for legislative action as the country continues to suffer the economic fallout from the pandemic.



Congress will also have to reach an agreement on annual appropriations before Fiscal Year (FY) 2020 ends on September 30. To gain additional leverage, Democrats in Congress have suggested coupling COVID legislation with an appropriations agreement to keep the government funded – a concept that has been dismissed by the White House and Republicans in Congress. With the November election just two months away and early voting in some states coming in a matter of weeks, Congress will likely adopt a Continuing Resolution to avoid another government shutdown.

House and Senate negotiators will also begin working to reach agreement on the National Defense Authorization Act (NDAA), the annual legislation establishing defense spending and programs. As reported in the [July Newsletter](#), one potential sticking point could be the House's attempt to attach 1.5 million acres of new Wilderness designations to the NDAA bill – including Rep. Derek Kilmer's (D-WA) "Wild Olympics" legislation and Rep. Jared Huffman's (D-CA) Northwest California wilderness proposal.

Feinstein-Daines Legislation. Senator Steve Daines (R-MT) has [requested](#) a committee hearing for bipartisan forestry legislation he recently introduced with Senator Diane Feinstein (D-CA). The [Emergency Wildfire & Public Safety Act of 2020](#) includes modest, reasonable reforms to encourage forest health treatments. Among other provisions outlined in a [section-by-section](#), the legislation includes a limited 3,000 acre Categorical Exclusion for fuel and fire breaks near roads and transmission lines and would require the Forest Service to conduct three new "landscape-level, collaborative wildfire risk reduction projects" proposed by a Governor.

The Feinstein-Daines legislation also includes a fix to the "new information" hook of the *Cottonwood* litigation precedent that falls short of the full fix offered by legislation introduced by Senators Daines, Jim Risch (R-ID), and Mike Crapo (R-ID) earlier this summer. A companion bill was recently introduced in the House by Reps. Doug LaMalfa (R-CA) and Jimmy Panetta (C-CA). Given the extreme polarization

in Congress, AFRC has applauded the introduction of bipartisan legislation that can serve as a first step towards providing the Forest Service with additional tools to do more forest management work. AFRC President Travis Joseph provided the following statement in support of the legislation:

“We thank Sen. Steve Daines and Sen. Dianne Feinstein for introducing bipartisan legislation to accelerate management activities on our national forests. Members of both parties agree on the urgent need to reduce the risks of wildfires and toxic smoke that are threatening our public lands, wildlife habitat and water resources, as well as our health and safety of our citizens. This legislation, including provisions to address one aspect of the disastrous ‘Cottonwood’ decision, will remove barriers to making our forests healthier and more resilient for all Americans. We urge Congress to pass this bipartisan solution without delay.”

Forest Service Reports Timber Accomplishments through Third Quarter. The Forest Service recently released its [“Cut and Sold” report](#) through the third quarter of FY 2020. The nationwide 1.19 billion board feet of timber output is down by over 26% compared to the same period in FY 2019. Here in the West, the numbers are mixed: Region Six is down by 32%, Region One is down by 14%, and Region Five is up by almost 18%. The Forest Service sold 3.3 billion board feet of timber in Fiscal Year 2019.

It is important to note that the agency frequently offers much of its annual timber volumes during the fourth quarter and could still close the current deficit. However, we also know that COVID-19 has had a significant impact on staff travel and field work. No bids are also up in areas where chip and pulpwood markets have been impacted by the COVID related downturn in the paper industry. /Heath Heikkila

U.S. Fish & Wildlife Service Issues Two Proposed Rules for Critical Habitat

The U.S. Fish & Wildlife Service (FWS) issued two proposed rules in August concerning habitat for endangered species. On August 5, it [proposed](#) a regulatory definition of “habitat” that serves as a starting point for any determination of critical habitat. In the 2018 *Weyerhaeuser case*, the Supreme Court unanimously ruled that “According to the ordinary understanding of how adjectives work, ‘critical habitat’ must also be ‘habitat.’” Thus “‘critical habitat’ is the subset of ‘habitat’ that is ‘critical’ to the conservation of an endangered species.” This decision clarified that an area is not “habitat” if it cannot *currently* be used by the species. Comments on the rulemaking are due September 4 and can be [submitted here](#).

On August 11, the Service issued a [proposal](#) to revise critical habitat for the Northern Spotted Owl. Comments are due October 13 and can be [submitted here](#). This proposal identifies 204,653 acres in western Oregon that FWS believes should be excluded under section 4(b)(2) of the Endangered Species Act. Section 4(b)(2) provides that an area may be excluded if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” The acres identified are all either in the Harvest Land Base under the BLM management plan or have been transferred to tribal management. As such, FWS stated “fish, wildlife, and other natural resources on tribal lands may be more appropriately managed under tribal authorities, policies, and programs than through federal regulation where tribal management addresses the conservation needs of listed species.”

It also found exclusion of HLB lands “reduces the burden of additional section 7 consultation for these lands that serve primarily to meet BLM’s timber sale volume objectives.” Therefore, excluding these HLB lands from the critical habitat designation would provide some incremental benefit by clarifying the primary role of these lands relating to northern spotted owl conservation, and by eliminating any

unnecessary regulatory oversight. These benefits of exclusion outweigh the relatively minimal benefit of retaining these lands as critical habitat.

This small proposal is only the start of the process. The Service specifically requested description of “[a]ny additional areas, including Federal lands, that should be considered for exclusion under section 4(b)(2),” plus “any National Forest System lands ... that should be considered for exclusion under section 4(b)(2) of the Act.” The proposal gives notice that the final rule “may exclude additional areas if we find that the benefits of exclusion outweigh the benefits of inclusion or may remove areas if we find that the area does not meet the definition of ‘critical habitat.’”

Pursuant to the stipulated settlement agreement in *Carpenters Industrial Council v. Bernhardt*, a final determination must be submitted to the Federal Register by December 23. (See [April Newsletter](#)). AFRC is working closely with our partners and members to provide substantive comments by the October 13 deadline. /Lawson Fite

Forest Service Publishes Eastside Screens Amendment EA



The Forest Service has published a [Preliminary Environmental Assessment](#) that considers plan amendments to the current standard prohibiting the removal of trees over 21-inches diameter at breast height (DBH). The existing standard, commonly referred to as the 21-inch rule, was established as an interim standard in 1994 as a component of a larger set of standards known as the Eastside Screens.

This rule is embedded in a section of the Screens that focuses on the maintenance and development of late and old forest structure. In 1994, the Forest Service believed that the rule was a useful vehicle to attaining this focus and its incorporation as a standard was integral to “manipulating vegetative structure that does not meet late and old structural conditions, in a manner that moves it toward these conditions.”

Since its inception, new science, shifting agency priorities, and empirical evidence from 25 years of active management have proven that those prior assumptions were flawed and that an amendment to the rule is necessary to adapt to current social and ecological values. According to the EA, the goal of the proposed amendment is to “maintain the abundance and distribution of old forest structure.” The EA

also identifies the project’s “purpose” as developing a “durable, science-based alternative to the 21-inch rule.” Three alternatives are considered and their effectiveness at attaining a variety of desired outcomes are analyzed in detail.

The Proposed Alternative replaces the 21-inch standard with a guideline that emphasizes recruitment of old and large trees. This alternative defines old trees as over 150 years of age and large trees as over 21 inches or 30 inches depending on the species. The Old Tree Standard Alternative replaces the size prohibition with an age prohibition of 150 years. The Adaptive Management Alternative removes the 21-

inch standard and instead relies on existing standards in the Eastside Screens to attain late and old forest structure objectives.

To guide this analysis, the Forest Service considered 186 individual scientific documents that ranged in focus from socioeconomics to forest ecology to inform numerous issues of concern. Among other issues, the EA analyzed how each alternative would improve late and old forest structure (which is the goal of the proposed amendment) and concluded that the Adaptive Management Alternative would permit the “development of more open late old structure than all other alternatives.”

While the conclusions that considered current science related to late and old forest structure are straightforward, how each alternative impacts the “durability” component of the project’s stated purpose is less so. Although the EA is not explicit on how durability is defined, it does allude to the context of the term by citing “social, political, and ecological” durability. The scientific review discussed above should make the determination of ecological durability clear and simple. How the Forest Service plans to gauge social and political durability, on the other hand, is a bit nebulous. Written comments on the EA can be submitted [here](#) and are due by September 10. /*Andy Geissler*

Washington State Update – Board of Natural Resources “Retreat”

The Washington State Board of Natural Resources meets the first Tuesday of every month, except in August, when the Board traditionally holds a retreat, often including field trips, to “dig deeper” into topics the Board will be considering. Past retreats have been held in southwest Washington to look at issues related to the marbled murrelet long term conservation strategy and silviculture needs. Last year’s retreat was in eastern Washington to look at state land issues related to agriculture, land development, recreation impacts, and forest health issues. Unfortunately, due to COVID-19 restrictions, an in-person retreat was not possible. Instead, the Board held a virtual retreat on August 13.

The retreat covered several topics of current and future interest to the Board. These included “Working Forests and Recreation,” the Middle May timber sale, and issues related to trust land management of commercial properties. DNR produced a series of presentations on these topics that included video and still images of some of the sites, which the Board would have visited in person.

In Washington State there has been a growing narrative by a vocal minority that working forests and recreation are incompatible uses. The [Working Forests and Recreation presentation](#) helped to inform the Board that this narrative presents a false choice, especially on DNR managed trust lands. The first part of the presentation explored the current interaction of active forest management and recreation on DNR managed trust lands, with existing examples of how these two activities coexist on the same ground across the state.

The remainder of the presentation was set in the Reiter Foothills and provided some history of this landscape as well as highlighting how the timber sale program interacts with, and in some cases supports and directly benefits the recreation program financially. For example, DNR timber sales and active forest management often help reduce costs associated with the building and maintenance of recreation infrastructure, while not increasing costs to the beneficiaries. While not discussed in the presentation, the recreation program also occasionally benefits from the opportunity to pay for some State Lands engineering time on projects, versus incurring the associated costs of contracting that work out. The presentation showed the Board how the timber sale program actually creates the ability to provide quality recreation. This set the stage for the next topic, the Middle May timber sale.

The Middle May timber sale is located in the Reiter Foothills in Snohomish County, near the towns of Gold Bar and Sultan, and was developed by DNR to replace the vacated Singletary timber sale ([May 2017](#), [July 2017](#), [September 2017](#) Newsletters). Despite significant public engagement, and efforts to mitigate concerns of sale opponents in the non-motorized recreation community, DNR has been receiving pressure to not move forward with the sale. The [Middle May presentation](#) and associated [Fact Sheet](#), outline the efforts DNR has undertaken to address concerns of a finite group of stakeholders, while meeting DNR's legal fiduciary obligations to the trust beneficiaries and DNR's obligations under the State Lands Habitat Conservation Plan (HCP), all while working to provide quality non-motorized recreation opportunities.

AFRC sent a [letter to the Board of Natural Resources](#), providing additional perspective on the Middle May timber sale process and the now associated reconveyance effort in Snohomish County (see next article). Active forest management in this landscape is an integral part of DNR's efforts to build fiscally sound recreation projects. Unfortunately, the false choice between recreation or forest management being espoused by the opponents of Middle May is not a constructive message to expand recreation on DNR managed trust lands. Working forests and recreation can, and do exist, on the same footprint of land in many parts of Washington, including DNR managed trust lands.

The [Commercial Real Estate and Transition Lands presentation](#) built on some of the topics discussed at the August 2019 Board Retreat in the Tri-Cities area (Pasco, Kennewick, Richland). The transition lands/commercial real estate conversations in last year primarily focused on agricultural trust lands that had become surrounded by development within one or more of the cities listed above. This year's presentation was more focused on the history of transition lands and those in western Washington that tend to be forested and have development opportunities or pressure encroaching on them. DNR presented additional information about existing developed commercial properties and how those contribute to trust revenues. These parcels are nearly all entirely Common School trust lands. Revenue from these lands, commercial, managed forests, or agriculture, benefit the State's K-12 construction funding. Some of DNR's legislative work this coming session will aim to improve challenges DNR faces when working to sell or lease these lands. /*Matt Comisky*

DNR Lands in Snohomish County's Reiter Foothills

Anti-forestry activists are ramping up their campaign to stop forest management activities on DNR state trust lands in the Reiter Foothills area in eastern Snohomish County, including the Middle May timber sale. The area has a history of extensive timber harvest as many of these lands were once privately owned before reverting to county and then state ownership.

Environmental groups and local anti-forestry activists are now lobbying the Snohomish County Council to request a reconveyance of approximately 5,300 acres of DNR trust lands in the Reiter Foothills to create a "Wild Wallace County Park." Under state law ([RCW.79.22.300](#)) a county can file an application with the Board of Natural Resources to return state forestlands (often referred to as county transfer lands) back to the county for use as a public park if certain conditions are met. Proponents of "Wild Wallace" are making the usual claims about the benefits of a new park to the local community, but have made no attempt to address serious questions about the loss of timber revenues to local beneficiaries, private sector job losses due to a reduction in timber volume, and potential new restrictions on recreational and subsistence activities.

During a Snohomish County Council meeting on August 19, proponents of the reconveyance provided extensive testimony in favor of the reconveyance and urged the Council to request a six-month delay to

the Middle May timber sale. Many of the public commenters referenced the importance of honoring tribal treaty rights and consulting with local tribes in support of their requests. Ironically, several tribal leaders from the Tulalip Tribes spoke out in strong opposition to the reconveyance and in favor of Middle May and the importance of working forests. Ryan Miller, Environmental Liaison and Tribal Member, on behalf of the Tulalip Tribes Board of Directors, included the following statement in his [remarks](#) (starts at 50:59):

“Tulalip is here today to oppose the reconveyance of the 5,300 acres and the reconveyance of the Middle May timber sale. It would create a fractionated landscape that would damage treaty reserved resources and have an associated impact on the wildlife corridor in this area. Breaking up this wildlife corridor while expanding the trail system would significantly impact wildlife range and movements in the localized area.

The Tulalip Tribes support working forests in Washington and understand the vital role that they play in keeping our landscape healthy and promoting local economies. Working forests also help encourage plant and animal diversity that is important to the overall landscape and the protection of Tribal treaty rights.

We ask that any process include considerable tribal consultation and that does not mean delaying this process in order to provide that. These conversations should have happened years ago.”

On August 21, anti-forestry activists [wrote](#) Commissioner Hilary Franz and the Board of Natural Resources urging the Board not to approve the Middle May timber sale and requested a six-month delay for other timber sales in the Reiter Foothills claiming that “the Snohomish County Council is seeking a reconveyance for 5300 acres of the Reiter Foothills Forest, which includes the Middle May sale.” AFRC sent a [letter](#) to the Board on August 26 clarifying that there is no reconveyance being considered by the Council and reminded the Board about the extensive efforts DNR has made to address the concerns of the anti-forestry activists within its fiduciary obligations to beneficiaries that continue to be harmed by the delays.

Middle May is included in the timber sale package scheduled for approval by the Board of Natural Resources at its September 1 meeting. AFRC has prepared a [background document](#) on the importance of maintaining DNR trust lands in the Reiter Foothills as working forests. HFHC has also launched a [grassroots campaign](#) to support this effort with the Board of Natural Resources and Snohomish County Council. /Heath Heikkila

Forest Service Region 1 Reaches Timber Targets Despite Obstacles

Region 1 plans to sell 385 million board feet (MMBF) of their FY 2020 target of 420 MMBF. The target includes a component of post and pole and firewood, however due to COVID-19 restrictions, the Region has not been selling firewood, and thus cannot take credit for the volume. In addition, the Region has almost 300 MMBF of timber tied up in some form of litigation, the majority being in Montana.

The Idaho Panhandle National Forest expects to reach their 60 MMBF target, however, about 25 MMBF will be sold in late August and September. The Nez Perce-Clearwater National Forest has either sold or advertised 98% of their 89 MMBF timber target.



The western Montana Pod had to juggle several timber sales to be able to meet their target. The Kootenai National Forest learned in early FY 2020 they had to do reconsultation on their Forest Plan due to grizzly bears. This meant they had to pull back some of their proposed sales and reduce their sale volume by about 25 MMBF.

To make up that shortfall the Lolo and Bitterroot National Forests were each asked to bring an additional timber sale forward. In early August, the Bitterroot learned that their NEPA work on the Gold Butterfly project needed some bolstering, and two large sales on that Forest had to be set back. To

juggle that new shortfall in volume, the Flathead National Forest was asked to move one of their FY 2021 sales forward. With these changes it appears the western Montana Pod will hit their timber target. This is truly an example of how the Pod concept can work (and is working) in Region 1.

The Region's FY 2021 target will increase to 460 MMBF., The increase in volume will come from the North Idaho Pod and 50% of the Region's FY 2021 timber sale program has signed NEPA documents. AFRC would like to give a big thank you to the Region for their efforts in meeting their FY 2020 timber target despite the unique circumstances and setbacks. / *Tom Partin*

District Court Upholds the Tecuya Ridge Project on the Los Padres National Forest



On August 20, U.S. Magistrate Judge Patrick Walsh ruled in favor of the Forest Service, upholding the Tecuya Ridge Shaded Fuelbreak Project above Frazier Park, California. AFRC was joined by the California Forestry Association (CalForests) and Associated California Loggers (ACL) in intervening in the case to defend the project.

The project was developed to thin forests along Tecuya Mountain within the national forest that have become unnaturally overgrown, weakened by drought and beetle attacks, and highly vulnerable to wildfire. For more on why this project is critically important to protecting communities near the project area, see [AFRC's press release](#) from October 2019.

Last year, AFRC organized a field tour to educate local residents and the media on the importance of active forest management and the need for the shaded Fuelbreak. Attending the tour were representatives of the Kern County Fire Department, who explained how a fuel break would give firefighters a better opportunity to attack a fire and potentially save nearby homes. ([November 2019 Newsletter](#)).

The plaintiffs, including Los Padres ForestWatch, Earth Island Institute, and Center for Biological Diversity brought four claims challenging the project. First, they asserted that the Forest Service violated NEPA because the project does not fall within the scope of the "timber stand improvement" categorical exclusion, and extraordinary circumstances warranted the preparation of an Environmental Assessment or

Environmental Impact Statement. Second, plaintiffs argued that the proposed activities do not fall within the 2001 Roadless Rule's exception that authorizes limited types of timber removal activities. Third, plaintiffs alleged that the Forest Service and FWS violated the ESA by allegedly ignoring data related to California condor roosting sites. Finally, plaintiffs alleged that the Forest Service violated the National Forest Management Act by not complying the Forest Plan's protection of condor roosting sites.

Judge Walsh rejected all of plaintiffs' claims. The court concluded that the project falls within the scope of the timber stand improvement categorical exclusion because "the project will result in the thinning of the forest for brush control, to improve growth, and to reduce fire hazard." This is the second district court decision upholding the use of commercial thinning activities for the purpose of improving growth and reducing fire hazards.

Most notably, the court held that the Forest Service and FWS did not violate the ESA. The court determined that the agencies adequately analyzed the telemetry data showing roosting sites and that "the telemetry data shows that 46 of those roosting sites occurred in or near the project area" and out of 142,428 total nights of roosting this amounts to .032 percent of the roost activity. Thus, the project would not negatively impact the condor because this is a relatively small percentage and is consistent with the Forest Service's finding that this roosting was infrequent. In addition, the Forest Service imposed several mitigating measures and stop-work requirements to further protect the condor.

Despite plaintiffs concerns of the project's impacts, the Tecuya Project seeks to benefit the California condor by making the area more resilient to wildfire that could destroy important roosting habitat. This is particularly relevant as fires are burning throughout California and have [destroyed an 80-acre condor sanctuary](#) on the Los Padres National Forest.

Plaintiffs appealed the ruling to the Ninth Circuit. A similar project located on the Los Padres, the Cuddy Valley Forest Health/Fuels Reduction Project, is also pending before the Ninth Circuit, with briefing to occur this Fall. AFRC, along with CalForests and ACL, will continue efforts to defend this much-needed fuelbreak. /Sara Ghafouri

Ninth Circuit Refuses to Rehear CCR Appeal While the Mt. Hood National Forest Burns

As reported in the [July Newsletter](#), AFRC on behalf of High Cascade, petitioned the Ninth Circuit to rehear the Crystal Clear Restoration (CCR) Project appeal either by the original panel or the full court (*en banc*). The Federal Government also took the unusual step of petitioning for a rehearing *en banc*, which required approval from the Solicitor General. Douglas County, Oregon; Kootenai Tribe of Idaho; and Public Lands Council and Oregon Cattlemen's Association submitted separate *amicus curiae* (friend of the court) briefs in support of the petitions for hearing.

On August 26, the Ninth Circuit declined to rehear the case either by panel or *en banc*, leaving the published opinion to remain in place. The Forest Service must now prepare an EIS for the project to move forward, delaying project implementation for at least another year. The panel's decision also has troubling implications for the use of forest management activities, in this case variable density thinning, that are based in real science and are proven to protect public lands and communities from wildfire and provide true conservation benefits.

The Ninth Circuit held that the Forest Service's decision not to prepare an Environmental

Impact Statement was arbitrary and capricious because the agency’s use of variable density thinning for the purpose of reducing large-scale fire risk was “highly controversial and uncertain.” The panel determined that the agency did not consider contrary scientific evidence submitted by the appellants, which consisted of a generalized 2008 paper that did not cover the project area and was partly funded by an environmental advocacy group. The appellants also submitted a newspaper opinion piece and other material whose author has been criticized for “agenda-driven science.” (See [April 2020 Newsletter](#).)



The CCR Project aims to restore over 11,000 acres of the Mt. Hood National Forest in Wasco County by thinning overstocked stands at risk of wildfire and abuts two Wildland Urban Interface areas—Warm Springs WUI and the Juniper Flats WUI. Approximately 97 percent of this project is in lands designated as Matrix under the Northwest Forest Plan, which are specifically designated for timber harvest, and the sales associated with the project would generate approximately 60 MMBF.

The Mt. Hood’s concerns about potential wildfires and firefighter safety in the area was not unfounded, especially as the White River Fire comes dangerously close the CCR Project area. See [White River Fire Map](#). And tragically, a firefighter recently died in a helicopter accident while conducting bucket drops on the fire to help battle the blaze in the rough terrain. AFRC will continue its efforts to support fuels reduction projects like CCR. /Sara Ghafouri

Forest Products Industry Steps Up to Defend CEQ Rules Against Flood of Litigation

Last month, the Council on Environmental Quality (CEQ) issued [new rules](#) implementing NEPA with the aim of streamlining the bureaucracy and paperwork that is stifling new infrastructure and smothering our forests. This is particularly important to the forest products industry because federal agencies that manage timber projects issue about *one-third* of all the NEPA documents in the country.

Since the rules were issued on July 16, lawsuits have continued to be filed. (See [July Newsletter](#)) The suit filed in the Western District of Virginia (Charlottesville) took center stage on August 18 when the 17 plaintiff groups filed a motion for preliminary injunction, trying to stop the rules from going into effect on September 14. AFRC and the Federal Forest Resource Coalition joined with a number of business associations to seek intervention. Our partners in this effort include American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Road & Transportation Builders Association, Chamber of Commerce of the United States of America, Interstate Natural Gas Association of America, and National Cattlemen’s Beef Association. The coalition is represented by Michael Kimberly and Matthew Waring of McDermott, Will & Emery LLP.

The court will hold a hearing on the motion for preliminary injunction on September 4 and we expect a ruling before September 14. Our coalition and the government have also filed motions to dismiss for lack of standing.

In addition to the Virginia case, suits were previously filed in the Northern District of California (San Francisco) and Southern District of New York (Manhattan). This was followed by filing of [another suit](#) in San Francisco led by the State of California and including Washington and Oregon. /Lawson Fite

Ninth Circuit Halts the Ranch Fire Project on the Mendocino National Forest

The 2018 Ranch Fire burned over 410,000 acres, with over half the acres burning on the Mendocino National Forest. The fire also affected 770 miles of National Forest System roads, making it unsafe for public access. In response, the Mendocino authorized a series of commercial timber sales to remove dead, dying or structurally unsound trees that were within striking distance of the road in order to protect public safety.

The Ranch Fire Projects were authorized under the Forest Service’s “repair and maintenance of roads” categorical exclusion, 36 C.F.R. § 220.6(d)(4) (road maintenance CE), which allows for expedited environmental analysis under NEPA. The Ranch Fire Projects would treat less than 4,000 acres along the roadway, meaning that the vast majority of the area impacted by the Ranch Fire would remain untreated.

The Forest Service was careful in authorizing the removal of only trees that were a hazard to the public and established three criteria: (1) trees that exhibit a 50 percent probability of mortality, (2) trees within a 200-foot treatment area boundary, and (3) trees that were one and a half tree-height distance from the road because it captures those trees that have the potential to reach the roadway.



EPIC challenged the project and sought an injunction to halt ongoing timber operations. Judge Chen from the Northern District of California denied the request for a preliminary injunction, and EPIC appealed that adverse ruling to the Ninth Circuit. AFRC member Sierra Pacific Industries moved to intervene on appeal because they were the purchaser of the one of the sales associated with the Ranch Fire Projects.

On August 3, with a 2-1 decision, the Ninth Circuit reversed the district court’s denial of the preliminary injunction, holding that EPIC was likely to succeed on the merits of its claim that the Forest Service erred in relying on the repair and maintenance CE. The panel held that, “We have no doubt that felling a dangerous dead or dying tree right next to the road comes within the scope of the ‘repair and maintenance’ CE. But the Project allows the felling of many more trees than that.” The panel concluded that under the criteria for the Ranch Fire Project, some of the trees selected for removal “pose no imminent hazard” because they could not possibly strike the road, noting that if a 111-foot tree located 165 feet from the road were to fall, the tip of the tree would come to the ground 54 feet from the road.

Judge Lee dissented and found that that the “Project’s criteria [were] sufficiently strict, requiring operators to remove only what is reasonably necessary to further road safety and maintenance.” Unlike the majority opinion, Judge Lee acknowledged that the court’s review is limited “by a double dosage of deference”—the district court’s denial of a preliminary injunction is reviewed for abuse of discretion and a challenge to the agency action is reviewed under the arbitrary and capricious standard. Judge Lee found

that the Forest Service provided a reasonable and plausible conclusion as to why the “one and a half tree-height distance from the road” criteria was used. The Forest Service’s Hazard Tree Guidelines acknowledged that “[w]hen a tree or tree part fails, it may strike other trees or debris on the ground and fling material a considerable distance” and conditions like “wind, breakage, forces, and slope” may cause the fallen tree to travel to the road.

Unfortunately, the majority opinion ignores how the Forest Service relied on regional guidance—both the 2011 Marking Guidelines for Fire-Injured Trees and the 2012 Hazard Tree Guidelines for Forest Service Facilities and Roads—to determine which dead, dying or structurally trees should be deemed hazardous to the public. The decision also fails to account for the strong public interest in having these trees removed in an expeditious manner. We are now approaching two years after the fire, making it unsafe for third-party contractors to conduct the commercial hazard tree removal work. If the Forest Service is unable to move forward with the Ranch Fire Projects in a timely manner, the agency will be forced to close miles of road and recreation areas on a long-term basis, to the detriment of the public.

Petitions for panel rehearing or rehearing *en banc* (full Ninth Circuit) are due on September 17. If a request is made, the Ninth Circuit has 21 days to determine whether to hear the matter *en banc*. /Sara Ghafouri

AFRC and Partners Push Supreme Court for Transparency in Endangered Species Consultation

[Section 7](#) of the ESA requires federal agencies to consult with the FWS and/or National Marine Fisheries Service to ensure that agency actions do not “jeopardize the continued existence” of a listed species or “adversely modify” or destroy designated critical habitat. Even under the best of circumstances, the consultation is somewhat of a “black box” for action agencies like the Forest Service or BLM, and even more so for timber purchasers, permittees, and others who rely on the consultation process.

On August 3, AFRC and industry partners National Association of Home Builders, American Farm Bureau Federation, and NFIB Small Business Legal Center filed an [amicus brief](#) with the Supreme Court urging the Court to rule in favor of transparency in the consultation process. The case, called [U.S. Fish & Wildlife Service v. Sierra Club](#), addresses what parts of consultation are part of the “deliberative process” so that documents are privileged from release under the Freedom of Information Act.

The case involves a consultation by EPA where the Services prepared jeopardy biological opinions on a proposed rule for cooling water intake structures. Once EPA learned it was going to get jeopardy opinions, it stopped consultation on the initial version of the rule, rewrote the rule, and re-submitted to consultation, eventually getting no-jeopardy [opinions](#). The Services refused to release the jeopardy BiOps, claiming they were “drafts” and therefore “deliberative.” The Ninth Circuit ruled against the Services, but the Supreme Court took the case in March.

Our brief describes how the Services’ actions can impose significant economic consequences without having to explain the scientific rationale. This case highlights a factual scenario that we have encountered where an agency will assert that it cannot select a particular alternative in planning or a project because it would not pass muster in consultation. Understanding the line between jeopardy and no-jeopardy is important for the regulated community to obtain the best outcomes when working with agencies on the ground.

Although AFRC and our partners are not often on the same side of a case as the Sierra Club, the ACLU, and The New York Times, this is an instance where a wide variety of stakeholders agree that transparency will be beneficial to the public interest. Other briefs along the same lines were filed by [environmental organizations](#), [former agency officials](#), and an array of [media](#) and [civil liberties groups](#). The Court has set the case for argument on November 2, and will likely issue a decision by next June. AFRC appreciates the support of our partners in this effort. */Lawson Fite*

Heidi Logan Joins AFRC as Legal Extern



Heidi Logan is a third-year law student at Lewis & Clark Law School, where she focuses on studying environmental law. She takes special interest in natural resources management and is thrilled to join AFRC as the legal team's extern this Fall.

This summer, Heidi externed with the U.S. Department of Justice, Environment and Natural Resources Division, where she worked on matters involving Fifth Amendment takings, oil and gas leases, water rights, and forest management plans. While studying at Lewis & Clark, Heidi has also externed with the U.S. Army Corps of Engineers in

Portland, Oregon. For the last two years, she has volunteered her time towards improving state water quality protections in Oregon.

Heidi fell in love with the Pacific Northwest and its iconic forests while studying environmental resources engineering at Humboldt State in Northern California. There, she became fascinated by the timber industry's history and often visited the Samoa Cookhouse, the last operating lumberjack cookhouse, which showcases the region's logging roots. Seeing the importance of timber resources has had a lasting impact on Heidi. She looks forward to learning how AFRC advocates for sustained yield timber harvests on public lands and supports timber-reliant communities that exist throughout the Pacific Northwest. */ Heidi Logan*