

**December 20, 2013**

## **ENR Markup of Key Forestry Titles**

On December 19, the Senate Energy and Natural Resources Committee met and marked up several bills dealing with land management and preservation. Three of those bills included key forestry titles impacting management in western states:

- S.1301, the “Oregon Eastside Forest Restoration, Old Growth Protection, and Jobs Act of 2013,” Senator Ron Wyden’s (D-OR) eastside bill.
- S.37, the “Forest Jobs and Recreation Act,” Senator John Tester’s (D-MT) legislation to mandate increased forest management and new Wilderness areas on certain National Forests in Montana.
- S.1300, the “Stewardship Contracting Reauthorization and Improvement Act,” legislation from Senator Jeff Flake (R-AZ) to reauthorize stewardship end result contracting authority for ten years. However, it is likely that stewardship contracting will be reauthorized as a part of broader legislation, such as the Farm Bill or an omnibus appropriations bill.

A substitute amendment to the eastside legislation was proposed by Senator Wyden and adopted by the Committee. The substitute resulted from negotiations between Chairman Wyden, Ranking Member Lisa Murkowski (R-AK), and the Administration, and is being promoted as a pilot project for Eastern Oregon. The substitute makes minor improvements to the bill, such as the removal of the 21” diameter limits to harvest and limiting the effect of the legislation to 15 years. The substitute also removes a provision that sought to disadvantage certain National Forests, mills and communities in northeast Oregon by making the forests already receiving CFLRP projects a priority for the acreage targets and funding in the eastside bill. The Wallowa-Whitman, Ochoco, and Umatilla National Forests do not have CFLRP projects.

Unfortunately, many other troubling provisions remain, including a 150 year age limit on trees to be harvested, complex layers of restrictions, prescriptions, external review, and new opportunities for litigation. Other new provisions, including those billed as environmental streamlining, will not effectively address today’s analysis paralysis and litigation threats.

We are disappointed that Senator Wyden has chosen to move this eastside forest legislation forward in spite of the concerns and opposition expressed by an overwhelming majority of Eastern Oregon’s forest products industry and county commissions.

With all of the good efforts currently underway in Eastern Oregon including three CFLRP projects located on the Fremont-Winema, Deschutes, and Malheur National Forests, two 10-year stewardship projects (one on the Malheur and one on the Fremont-Winema), the new Blue Mountain Strategy on the Wallowa-Whitman, Umatilla, Malheur and Ochoco National Forests, and the newly announced East Face of the Elk Horn Mountain project proposed by the Western Governors Association, AFRC feels that the additional overlay of the eastside bill will be counterproductive.

While Senator Murkowski offered words of support for Senator Wyden and the eastside legislation, the Ranking member criticized the Tester bill because it sets vast acreages aside for new Wilderness without providing certainty for timber harvests, which several other Committee members did not support. Despite no votes from six Republicans, S. 1300 did pass out of Committee.

Also in Wyden's opening remarks, he stated that "he and Murkowski would be developing and passing national forestry legislation working with both sides of the aisle." With national legislation possibly moving in the next few months, one has to wonder the value of these state based pieces of legislation when overarching and broader solutions may be forthcoming. */Tom Partin*

## **No O&C Data Yet**

On November 26, Senator Ron Wyden introduced the "Oregon and California Grant Land Act of 2013." Ever since the rollout, AFRC, Oregon Congressional Delegation members, and the O&C Counties, along with many other groups and people have expressed doubts about how the bill can achieve the predicted harvest level of 300-350 mmbf. Questions have also been raised about the level of county timber payments likely under the legislation, whether harvest volumes will be distributed throughout Western Oregon, and if the legislation provides actual legal certainty for timber projects.

Based on these and other unanswered questions, AFRC sent a letter to Senator Wyden's office on November 27 asking that they release the data sets outlining the amount of land that would be available for timber harvest and the ecological overlays across the landscape that would reduce the manageable land base and timber harvest levels under his proposal. Only with this information is it possible to perform a detailed analysis to determine the likely sustained yield, regional breakouts of harvests by BLM district, and projected timber harvest revenues. Oregon Governor John Kitzhaber's O&C Task Force performed this type of extensive analysis for seven different options as outlined in the O&C Lands Report. AFRC has also filed a Freedom of Information Act (FOIA) for this information with the BLM since the agency generated the maps, modeling information, and harvest calculations used in Wyden's O&C bill.

Further, on December 18, Oregon Congressmen Peter DeFazio (D), Kurt Schrader (D), and Greg Walden (R) sent a letter to Governor Kitzhaber asking that he update his O&C Lands Report by providing an updated analysis of the House passed O&C Trust, Conservation and Jobs Act and initiate an analysis of Senator Wyden's O&C Grant Lands Act of 2013 (one of the seven options modeled by the O&C Task Force closely resembled the House bill).

The O&C Counties have also been pressing for the release of the data so Wyden's proposal can be modeled and the public can better understand what is being proposed. Douglas County Commissioner and Association of O&C Counties President Doug Robertson was recently quoted in the Bend Bulletin "*Until Senator Wyden directs the Bureau of Land Management (which oversees the lands) to release the*

*information that was used as the foundation for his bill, nobody really knows what revenue predictions are accurate or what land base is going to be available (for harvest),” he said. “At this point, everyone is flying blind.”*

As of publication of this newsletter, no response has been received from the Wyden office. The BLM has just posted a GIS file to their [website](#) but it is not yet clear if it includes all of the map layers necessary to analyze the proposal. We hope to know more soon. Also posted to the website is a document outlining the volume calculations for the Wyden proposal done by Dr. Norm Johnson. The charts lack information about key assumptions that underpin the projections, but our initial review confirms our suspicion that the volumes associated with the bill are short-term volumes not what can be sustained through time in the form of long-term sustained yield projections. On the other hand, the House bill and the other alternatives modeled by the Governor’s Task Force were all based on a long-term sustained yield. This discrepancy reinforces the need to obtain all of the data and assumptions necessary to determine the long-term sustained yield harvest numbers, payments back to counties, District by District volume calculations, and a myriad of other outcomes for the Wyden proposal.

To have an open and honest discussion of both the House and Senate versions of the O&C bill, all pertinent data needs to be available for review. The House version has been extensively studied and analyzed for the likely harvest numbers, payments back to counties, and other important outputs, including endangered species habitat. Until this type of analysis is performed on the Wyden legislation we have no idea if the claims made during its rollout are backed by facts or mere estimates. */Tom Partin & Rob Molinelli*

## **Baucus to China**

The other big news involving the Senate Natural Resources Committee was the announcement that Senator Max Baucus, who now chairs the Finance Committee, is likely to be nominated as the next Ambassador to China. He will likely be confirmed and assume that position early in 2014. That will open up the Finance Committee Chairmanship which Senator Ron Wyden is in line to receive. With that change, Mary Landrieu (D-LA) will most likely become the new Chair of the Energy and Natural Resources Committee. It will be interesting to follow the moving chairs early next year. */Tom Partin*

## **AFRC Files Amicus Brief**

On November 27, AFRC filed an amicus brief in the case of *Salix v. USFS* currently before the Ninth Circuit Court of Appeals. The *Salix* case, which originated in the Federal District Court for the District of Montana, involves an environmental group's challenge to the Forest Service's failure to re-initiate consultation regarding the Northern Rockies Lynx Amendment and the associated forest plans in light of the designation of new critical habitat for Canada lynx.

AFRC addressed two important issues in its amicus brief. First, the Forest Service appealed the district court's determination that the Forest Service must re-initiate consultation on the Lynx Amendment and forest plans in light of the designation of Canada lynx critical habitat. Importantly, both AFRC and the Forest Service argued that the Ninth Circuit's longstanding interpretation that forest plans are agency "action" subject to reinitiation of ESA consultation has been effectively overruled by the Supreme Court. The Tenth Circuit recently concluded as much, and AFRC hopes the Ninth Circuit will change course on this interpretation in order to conform with current case law, provide consistency between the circuits, eliminate a claim requiring consultation on forest plans, and reduce administrative delay of future timber

projects. This issue is especially important to AFRC because the Forest Service and BLM often use Forest Plans or regional amendments to plans such as the Western Oregon Plan Revisions and the Sierra Nevada Framework to make programmatic changes to plans and environmentalists' challenges to the regional efforts can stop timber harvest over a wide geographic area.

The second issue AFRC addressed is the scope of injunctions issued by federal courts in response to alleged ESA violations. The district court correctly denied injunctive relief to the plaintiffs because they did not provide sufficient evidence of harm to justify shutting down timber sales across the entire area covered by the Northern Rockies Lynx Amendment. Plaintiffs are appealing this aspect of the judge's decision and AFRC supported the district court's denial of blanket injunctive relief under the ESA. AFRC argued that the court reached the right result, and emphasized that any time an injunction is issued, it must be narrowly tailored and must not apply in cases where a plaintiff has not made a specific showing of harm.

The case is still being briefed, therefore a decision on these issues will not come until sometime next year. /Rob Molinelli

## **Temporary Flooding Ruled a Taking**

On December 3, the Federal Circuit Court of Appeals ruled that the destruction of trees by temporary flooding caused by government action was an unconstitutional taking of property.

The Circuit Court affirmed the 2009 ruling of the Court of Federal Claims which found the Army Corps of Engineers regulation of a dam upstream of the Arkansas Fish and Game Commission's Wildlife Management Area destroyed timber worth \$5.6 million. The Commission harvests and reforests the area to maintain a healthy forest. When the case first came to the Circuit in 2011, the Court ruled that because the flooding was periodic, rather than permanent, resulting property damage did not qualify as a taking.

In 2012, the Supreme Court reversed the Circuit Court's conclusion, [ruling](#) that the duration of the flooding was not the determinative factor of whether a taking had occurred. Instead, courts must examine whether the injury was caused by authorized government action, whether the injury was the foreseeable result of that action, and whether the injury constituted a sufficiently severe invasion that interfered with the landowner's reasonable expectations of use for the land.

The Supreme Court did not rule directly on whether what happened in Arkansas was a temporary taking, but remanded the case to the circuit court to make that determination.

AFRC participated as an amicus before the Supreme Court. (See [AFRC Newsletter December 9, 2011](#).) It is our hope that a body of law is developing which will allow forest landowners to claim compensation for Endangered Species use of their property. /Ann Forest Burns

## **N. California FY13 Target Accomplishments**

The FY13 target accomplishments for the four northern California forests, Klamath, Six Rivers, Shasta Trinity, and Mendocino followed the trend of past years. The positive aspect is that three forests actually exceeded their assigned target, but one forest brought the others down in terms of not meeting the overall Province target.

The target for the Northern Province was 100.4 mmbf and the final accomplishment was approximately 72 mmbf (72% of the assigned target). The Mendocino accomplished 137% of its target, the Six Rivers 121%, the Klamath 116%, and the Shasta Trinity 29%. Sawlog volume accounted for 73%, biomass 6%, and firewood 21% of the total target accomplishment. The Shasta Trinity continued its streak of not meeting its target. This was the 19<sup>th</sup> year out of the last 20 that it has not met its target. /Rick Svilich

## **House Looks at ESA Again**

On December 12, the House Natural Resources Committee chaired by Doc Hastings (R-WA) held a full Committee oversight hearing titled “ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies.” This was the fifth hearing the Committee has held on the Endangered Species Act, and Chairman Hastings has said that he plans to introduce a bill next year that will improve the ESA for both the species and people impacted.

Witnesses at the hearing included Jeff Sikes, Legislative Director for the Association of Arkansas Counties; Carl Albrecht, CEO of Garkane Energy Cooperative; Greg Foley, Executive Director for the Kansas Department of Agriculture’s Division of Conservation; and Megan Maxwell, Consulting Biologist from Broomfield, Colorado. All four witnesses testified about the serious impacts which are occurring because some species (many of them obscure) are being listed and tying up large acreages from any use.

Jeff Sikes pointed out how two species, the Neosho Mucket (a fresh water mussel) and the Rabbitsfoot Mussel could possibly put 42% of Arkansas’ watersheds into critical habitat. Both Albrecht and Maxwell discussed the flaws in the data collection and lack of transparency that has taken place for the potential listing of the Sage Grouse which will have a major impact on much of the federal lands in the west that could be used for grazing, oil and gas production, and other important natural resource uses. Finally, Greg Foley testified that in Kansas they have been very successful with local conservation efforts by private landowners working individually to assist in species protection, and listing the Lesser Prairie Chicken in that state would hinder their ability to conserve the species rather than protect it.

Look for a bill from Hastings, early in 2014. More to come on ESA reform next year. /Tom Partin

## **Committee Considers Nominations**

On December 17, the Senate Energy and Natural Resources Committee held a hearing to consider the following nominations.

- Janice Schneider, Assistant Secretary of the Interior (Land and Minerals Management) Department of the Interior
- Neil Kornze, Director of the Bureau of Land Management, Department of the Interior
- Dr. Marc Kastner, Director of the Office of Science, Department of Energy
- Dr. Ellen Williams, Director of the Advanced Research Projects Agency-Energy, Department of Energy

The Interior nominees have the following background. Kornze has been the Acting Director of the BLM since March, and has worked on many western resource issues when he was public lands aid for Senate Majority Leader Harry Reid (D-NV). Schneider is currently an environmental attorney at Latham & Watkins LLP in Washington D.C. She also worked as an attorney for Interior during the

Clinton administration. All nominees will likely be voted on in January when the Committee reconvenes.

The most negative comments regarding any of the nominees came from Senator John Barrasso (R-WY) who questioned the qualifications of 35 year old Kornze to head the BLM by outlining a federal law that requires a director to have “broad background and substantial experience in natural resource management and the BLM director is not a position for on-the-job training.”

Also on December 17, the Senate Environment and Public Works Committee held a hearing to consider other nominations for key positions including Rhea Suh, nominee for Interior assistant secretary for fish and wildlife. If confirmed she would oversee the National Park Service and the Fish and Wildlife Service. This is a position that deals with the contentious ESA issues and new listings along with balancing the need for development on federal lands. Suh was blasted by several Republican Senators including John Barrasso, David Vitter (LA) and James Inhofe (R-OK) for a 2007 statement critical of the environmental impacts of oil and gas. Those Senators took that earlier statement as a reflection of how she might view oil and gas development, as well as grazing on public lands. Suh is currently assistant secretary at Interior for policy, management and budget. A final vote on Suh’s nomination will occur in January as well. */Tom Partin*