Testimony for The Senate Committee on Environment and Public Works
Hearing on Forest Management to Mitigate Wildfires: Legislative Solutions

September 27, 2017

Lawson Fite, General Counsel
American Forest Resource Council

Thank you for the opportunity to address the Committee on Environment and Public Works regarding urgently needed reforms to allow for effective management of our federal forests. Speedy action by Congress to enable active forest management is the best defense against a future of catastrophic wildfire.

The American Forest Resource Council (AFRC) is a non-profit trade association that represents manufacturers, mill workers, loggers, and private forest landowners in five Western States: Montana, Idaho, Washington, Oregon, and California. Our members care deeply about the health and sustainability of public forestlands, on which their businesses and communities depend. The forest products industry is the lifeblood of many rural communities throughout the West. In many of these areas, logging or milling is the only plentiful source of family-wage jobs, particularly for workers without college degrees. These blue-collar middle-class jobs bring the American dream to rural communities throughout the Nation.

My remarks will focus on the need to conduct more robust active management of federal forests to address the wildfire crisis and ensure stability of rural communities. The forest products industry strongly supports efforts by Senators from both sides of the aisle to streamline the planning process and alleviate litigation roadblocks. The legislation discussed at this hearing is a vital component of these efforts. The Litigation Relief for Forest Management Projects Act, S. 605, sponsored by Senators Daines (R-MT) and Tester (D-MT), would enact the Obama Administration's position to fix a misguided and disastrous court decision that is holding up management activities in nearly a dozen National Forests. Senator Thune's (R-SD) Forest Management Improvement Act of 2017, S. 1731, would give the Forest Service the tools it needs to address forest management where it is most needed, while also providing innovative litigation solutions. Senators Hatch (R-UT) and Heinrich (D-NM) have teamed together to sponsor the Sage-Grouse and Mule Deer Habitat Conservation and Restoration Act, S. 1417, which enables a broad-based restoration strategy in key wildlife habitat.

I. *Federal Forests Urgently Need Active Management*

In the West, this year's wildfire season has been one of the worst on record. It started earlier and fire activity is far above average. Nearly nine million acres have already burned. Portland and Seattle have both been covered in smoke for days on end, with ash falling in the streets, schools cancelled, children huddled inside, and health-sensitive individuals suffering distress. Across the country, nearly 4.5 million homes are at risk from wildfire.

The Eagle Creek Fire burned over 40,000 acres just east of Portland, including some very popular and scenic hiking spots in the Columbia River Gorge. Over one hundred hikers were

trapped behind the fire and had to be rescued. The fire started in a Scenic Area where active management is prohibited, and spread to a Wilderness Area where no mechanical work, including active timber management, is allowed. Driven by Gorge winds, the fire expanded rapidly in its first few days, even jumping the Columbia River into Washington. Many local schools cancelled classes, and Portland Public Schools cancelled the first day of kindergarten. Outdoor activities were curtailed across the region, from football games to track meets. When the fire flared up again on September 17, Portland recorded the worst air quality *in the country*. And the worst five locations in air quality were all in Oregon.

This fire opened city residents' eyes to the experiences of rural residents. Over the past several years, catastrophic fires have burned repeatedly in the rural west, unleashing devastation over hundreds of square miles. Near Brookings, Oregon, the Chetco Bar Fire burned nearly 190,000 acres – an area four times the size of the District of Columbia. This fire started in a Wilderness Area where active management is prohibited, so the Forest Service did not immediately move to suppress it. The fire grew and spread to nearby federal lands. After burning for over two months, it was only 53% contained as of mid-September, at a cost to taxpayers of over $57 million. This fire caused the ash clouds and haze to cover the coastal town of Brookings.

Catastrophic fires are the result of decades of fire suppression, coupled with unprecedented fuel buildups due to a lack of forest management activity. These catastrophic fires destroy valuable timber resources but also degrade many of the other uses of healthy forests. In one 2014 fire, nearly 20,000 acres of high-quality northern spotted owl habitat burned. In fact, over the past two decades, wildfire has become the greatest source of habitat loss for the northern spotted owl. Between 1995 and 2015, according to the Forest Service, habitat impact attributed to wildfire was *ten times* the impact from timber harvest. Since 2015, wildfire impacts have only worsened.

There is scientific consensus that active management decreases forest fire extent, severity, and impacts. An actively-managed forest will exhibit fire behavior more consistent with the historic role of fire in forested ecosystems. Owing to this scientific consensus, many groups—including environmental organizations—have changed their positions on active management, at least in the roaded "front-country." At AFRC, we are deeply involved in collaborative efforts with such groups, and our attorneys are representing collaborative groups in litigation throughout the West. Following the science, projects developed in collaboration between industry, environmental groups, recreational users, local government, and others have made significant strides in forest restoration. But more is needed.

Some deny the fire science because it conflicts with their ideology. They deny that these fires are actually catastrophic, or they point to climate change to deny that fuel buildup plays any role in fire intensification. Climate change is certainly a factor, but it is not working alone. It is not an either/or question. Warmer climate combines with overstocked, stressed, kindling-like forests to create firestorms that outpace anything the country has seen in living memory. It is no coincidence that over 90% of the burned acres in Oregon this year were on Forest Service lands which comprise just over 50% of Oregon's forestland and where active management is nearly at a standstill. The state and federal government have about equal amounts of land in Oregon, and experience equal numbers of fire starts. But burned areas are overwhelmingly concentrated on

Forest Service lands. Active management will make these federal forests more resilient to these extreme events.

Attached to this testimony are two photographs demonstrating how active management can work. The photographs were taken in the same spot, facing different directions, by AFRC's field forester. Both areas were affected by the National Fire on the Umpqua and Rogue-Siskiyou National Forests in southern Oregon. The first photograph shows where thinning occurred in the "D-Bug" project. There, the fire crept on the ground and left the overstory intact. The fire crews were able to hold the fire south of Oregon Highway 230 in these thinning units. The second photograph, taken from the same spot in the other direction, is 100% black in the overstory and understory—this is where thinning did not occur. This is a stark demonstration of how active management can restore the historic role of fire.

Unfortunately, there are too many bureaucratic and legislative roadblocks tying land managers' hands. Because of these roadblocks, forests have been burning before they have been treated. At least three major projects have been planned in recent years which burned before implementation. The 2014 Johnson Bar Fire in Idaho burned the area of an in-progress collaborative restoration project; when the Forest Service attempted to build on that work to conduct post-fire work. Yet a fringe group sued and obtained an injunction- resulting in the closure of a sawmill in Orofino, Idaho. In 2016, the Pioneer Fire destroyed the area of the Becker Project on the Boise National Forest, putting a whole year's timber volume for southern Idaho at risk and resulting in severe environmental and recreational impacts. To its credit, the Forest Service used all available tools and put two post-fire projects together in only nine months. However, those projects are the subject of threatened litigation under the Ninth Circuit's mistaken *Cottonwood* decision. The Stonewall project on the Helena-Lewis & Clark National Forest is a true cautionary tale. After a fringe group sued, the district court, acting under the *Cottonwood* decision, issued an injunction. The court noted that an injunction would be a "wise course" because "the risk of fire is not imminent." Mere months later, the project began burning in the 18,000-acre Park Creek Fire, which was contained only after expenditures of over $10 million in suppression costs.

We need common-sense reforms to lighten the burden of redundant administrative process and continuous litigation. Forestry is traditionally an area of bipartisan progress, and it still can be. There are a number of measures with support from Republicans and Democrats, environmentalists and industry. The Committee should take quick action to advance forestry reform legislation to give us the best chance to mitigate future wildfire seasons.

II. *S. 605 (Daines/Tester) Would Fix the Disastrous* Cottonwood *Decision*

The Litigation Relief for Forest Management Projects Act (S.605) is a bipartisan, bicameral measure that merely seeks to enact the Obama Administration's position on procedures under the Endangered Species Act (ESA). S. 605 would eliminate a judicially-imposed paperwork requirement that is at odds with the ESA, a requirement that offers no conservation benefit. The Committee should move quickly to advance S. 605 and report it favorably to the Senate floor. A companion bill is pending in the House, with bipartisan sponsors including Reps. Mike Simpson (R-ID) and Collin Peterson (D-MN). It is no surprise that this common-sense legislation has

attracted the support of lawmakers from both parties, from state and local governments, and prominent environmental groups including Trout Unlimited and the National Wildlife Federation. AFRC offers the strongest possible support, as do many industry groups including Intermountain Forestry Association, Montana Wood Products Association, California Forestry Association, and Federal Forest Resource Coalition.

In brief, S. 605 will allow projects to move forward under existing forest plans if an appropriate plan-level ESA consultation is completed. It will eliminate any requirement for the Forest Service or Bureau of Land Management to *reinitiate* consultation due to new ESA listings or critical habitat at the plan level—and only at the plan level. The bill does not change existing law regarding applicable requirements to consult on individual projects, new forest plans or plan revisions. The Ninth Circuit requires consultation on new plans, while the Tenth Circuit does not. S. 605 leaves this circuit split in place.

ESA consultation issues play a significant role in federal forest management. AFRC supports the goal of the ESA, which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. …" 16 U.S.C. § 1531(b). The ESA requires an agency to avoid undertaking any action that would be "likely to jeopardize the continued existence" of a listed species. 16 U.S.C. § 1536(a)(2). Agencies must also avoid "adverse modification" of critical habitat. These requirements allow negative effects on species or critical habitat, so long as those negative effects do not appreciably reduce the likelihood of survival or recovery of the species. If an action is deemed "not likely to adversely affect" species, a full consultation is not required. Consultation usually culminates in a biological opinion from the Fish & Wildlife Service.

The Ninth Circuit requires a land management agency to consult on its management plans (forest plans) and obtain a plan-level biological opinion. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, (9th Cir. 1994). The Tenth Circuit doesn't require any plan-level consultation. *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007). We believe the Tenth Circuit has the better argument (and the Obama Administration agreed, as it asked the Supreme Court to review the issue). Forest plans do not authorize or implement any ground-disturbing activity. Instead, they set a series of land classifications, management standards and guidelines, and management goals. For that reason, the Tenth Circuit concluded that a forest plan is not concrete enough to constitute agency "action" subject to the ESA. This "circuit split" regarding initial forest plan consultation is left in place by S. 605.

Unfortunately, the Ninth Circuit has gone even farther. In *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), the Ninth Circuit ruled that the Forest Service had to re-do consultation at the *Forest Plan level* for 11 National Forests after designation of critical habitat for lynx throughout the region. It says that a completed forest plan is still an action in progress, so the Forest Service has to re-do its ESA compliance on an entire region when a new species is listed or new critical habitat is designated. Following *Cottonwood*, district courts are beginning to hold up projects, such as Stonewall, to wait for the full plan-level consultation.

In Forest Service Region 1, where most of the affected forests are, projects involving over 291 million board feet (MMBF) of timber are in litigation, the vast majority *Cottonwood*-related. And 151 MMBF is under an injunction, including 50 MMBF under contract. These projects also have substantial conservation benefits, such as fish passage improvement and habitat restoration, many of which are financed through timber revenues. *Cottonwood* is holding communities and ecosystems hostage. Although impacts are currently focused on Montana, there is significant danger that *Cottonwood* will expand like fire. Cases are currently pending regarding forests in Idaho and Ohio, and one was recently dismissed regarding the Superior National Forest in Minnesota.

The Obama Administration, including Secretary Vilsack, asked the Supreme Court to review *Cottonwood* in 2016, but was denied. That fall, the Forest Service began the arduous process of consulting on 11 National Forests and more than 35,000 square miles of lynx habitat. This July, the Forest Service completed its biological assessment—the first piece of the consultation process. It is unclear when a biological opinion will be complete at the plan level. Then, project-level analyses will have to be reviewed against the plan-level opinion. This process will not be completed in 2017 and will likely stretch well into the 2018 forest management operating season. Of course, each step will be subject to multiplying lawsuits and injunctions.

Since nearly every forestry project already undergoes ESA consultation, this plan-level exercise has no real conservation benefit. A plan-level analysis generally assesses an amount of species-wide impact that is sustainable. Projects can proceed as long as their impacts fall within the plan-level approved impacts. When a project is evaluated without plan-level clearance, there is no such buffer for the agency to rely on. Therefore, ESA consultation at the project-specific level is likely to be more conservative.

S. 605 simply and directly fixes *Cottonwood*. It provides that re-initiation of plan-level consultation is not required due to a new species listing or critical habitat designation. It does not affect any *applicable* requirement to consult on a new plan or a significant plan revision. The bill applies to both the Forest Service and the BLM, which each manage significant forestlands.

The extreme effect of *Cottonwood* is illustrated by the East Reservoir Project on the Kootenai National Forest. This project has strong support of the Kootenai Forest Stakeholders Coalition, a collaborative group including timber companies, local government, and several environmental groups. I am representing the Coalition and Lincoln County in the case. The Coalition put a lot of work into the project, including pushing for changes that reduced impacts on lynx habitat. Still, a fringe group sued. The district court found that even under *Cottonwood* the project could move forward. But in September of last year, the Ninth Circuit halted all commercial harvest in the project, and it remains stalled pending a further decision. It has now been seven months since the case was argued, and over a year since the injunction was issued. If a collaboratively-supported restorative project that is not likely to affect species cannot make it through the process without an injunction, the process needs to be changed.

III. *S. 1417 (Hatch/Heinrich) and S. 1731 (Sen. Thune) Would Streamline Processes that Are Holding Back Active Management*

S. 1417 and S. 1731 both contain important ideas for forestry reform and deserve strong consideration. Both bills establish a set of categorical exclusions which streamline compliance with the National Environmental Policy Act (NEPA). A categorical exclusion (CE) allows the agency to implement a project without producing an Environmental Assessment (EA) or Environmental Impact Statement (EIS). This results in significant efficiencies in planning resources. While implementing a CE rarely takes more than six months, a typical EA takes three times as long, according to a 2014 report from the Government Accountability Office. The same report found an EIS can take nearly five years on average. It is no wonder that the Forest Service spends an estimated $350 million annually satisfying environmental analysis and paperwork requirements.

S. 1417 is focused on specific habitat needs for mule deer and sage grouse. This habitat restoration work could produce significant improvements in forest health, and wildfire resistance, while also producing some positive economic impact, chiefly in the Four Corners States.

S. 1731 would establish a series of CEs from various forest health perspectives and tools, including early seral habitat, thinning projects, wildlife habitat improvement, and salvage of dead trees after a fire, wind or other event. This gives the Forest Service (and BLM) a full suite of tools to deploy in an expedited fashion in the manner they deem wisest. Although the agencies aren't perfect, Congress created them for the purpose of deploying forestry expertise across the landscape. S. 1731 actually gives them the ability to do what Congress has directed them to do.

S. 1731 builds on past successes from the 2014 Farm Bill. It amends the Good Neighbor Authority (GNA) to remove the prohibition on road maintenance and reconstruction activities associated with forest restoration projects – a critical correction. GNA allows states to deploy resources and expertise to help the Forest Service or BLM expand its forest restoration activities, but the road prohibition has limited the effectiveness of this tool. Many states, particularly Idaho and Wisconsin, are establishing innovative and self-funding programs that expand the forest management footprint without requiring additional federal tax dollars. S. 1731 also expands the scope of the Farm Bill CE from 3,000 to 10,000 acres. This CE has become an extremely valuable tool for addressing the forest health crisis nationwide. AFRC is involved with one of the first legal challenges to a project using the Farm Bill CE. We prevailed in the district court and are hopeful that success continues.

S. 1731 has two other very important provisions. In section 4, it streamlines the number of alternatives to be considered in EAs or EISs for forest management projects. This would greatly improve efficiency of forest management. Alternative development is a significant draw of agency time and resources. The extent of "reasonable" alternatives is frequent ground for litigation. By placing limits on the number of alternatives, the bill streamlines the process and creates certainty about what NEPA requires. Too often, agencies will do *more* than they sincerely believe is required, simply to "litigation-proof" a project. We cannot afford to be wasting taxpayer dollars and agency resources like this.

The Forest Management Improvement Act also establishes a pilot arbitration program for forestry projects. This could greatly reduce the litigation burden on forest management. The bill gives the Forest Service discretion to develop the pilot program. Arbitration is a much quicker way to allow for review of projects. It would be easy to design a program whereby a final, binding decision is issued on a project within 90 days. Contrast this with ordinary litigation, where the time from project issuance to final litigation decision is measured in years.

Many states have adopted mandatory arbitration systems for cases such as car accidents, and contracts often provide for required arbitration. The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (FAA), establishes a federal policy in favor of arbitration. The FAA does not establish specific requirements for arbitration, but provides that private arbitration agreements will be enforced. States and arbitration bodies usually provide that arbitrators must be neutral and must make disclosures to avoid any conflict of interest. They often also rely on senior attorneys or retired judges. Thus, any arbitration program should ensure neutrality and provide guidance on the selection of arbitrators (such as approving retired federal or state court judges). It should also deal with cost allocation, since arbitration can be significantly more expensive for the parties. Ideally, the government would compensate the arbitrators. Arbitrators' fees could also be subject to prevailing-party status. Arbitration should be established with required timelines, such as a final decision within 90 days that is not appealable. A well-designed program allows for effective review and certainty without the great delays and expense that are now so widespread.

IV. *Conclusion*

The legislative solutions before you can mitigate the horrific effects of catastrophic fire and restore the health of forests and rural communities. As Senator Daines eloquently said, either we will manage our forests, or they will manage us. Now is the time for Congress to make effective active management a reality.

Lawson Fite is the general counsel of the American Forest Resource Council (AFRC). He directs AFRC's legal program in supporting the goal of sustainable timber harvest from public lands throughout the five Western states where AFRC's members operate. The legal program works to build precedent that supports active management and sustained timber harvest. Particularly in this era of climate change and unprecedented fires, active management is key to maintaining forest health as well as the stability of rural communities.

Mr. Fite began his career as a Trial Attorney in the Wildlife and Marine Resources Section of the United States Department of Justice, focusing on litigation under the Endangered Species Act (ESA) and other environmental statutes. He successfully represented the Coast Guard in an ESA challenge to efforts to respond to the Deepwater Horizon spill. He also prevailed in a case regarding the effects of timber salvage on bat species in Kentucky's Daniel Boone National Forest, receiving a Special Achievement Award from the Attorney General.

Immediately prior to joining AFRC, Mr. Fite was in private practice in Portland, Oregon. He successfully represented the Port of Vancouver USA in environmental litigation regarding the Vancouver Energy terminal proposal, arguing the case before the Washington Court of Appeals.

Fite holds a law degree from Harvard Law School and an undergraduate degree in environmental science and public policy from Harvard University. He clerked for Justice Walter L. Carpeneti of the Alaska Supreme Court.