Hearing on "Restoring Balance to Environmental Litigation"
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Questions from Chairman Greg Gianforte (MT-AL)

1. In your experience, have you seen many of the same plaintiffs appear in actions challenging forest management activities and timber projects? If so, to what extent do you think general objection to active forest management or timber production on federal land contributes to these parties' frequent appearances in court to challenge Forest Service actions?

   Response:

   Yes, many of the same plaintiffs repeatedly appear in actions challenging forest management activities and timber projects. In fact, a small group of less than 10 organizations is responsible for most anti-management litigation. Often, objections or filings from these groups will be copied and pasted from one another, mistakenly identifying the project at issue or even the National Forest.

   *These fringe groups are indeed driven by ideological opposition to forest management and timber production. It is rare for projects to be challenged in court unless those projects have a commercial timber component. In some cases, parties seeking an injunction will clarify that their request for relief is aimed *only* at the commercial element of the project. This reveals positions based not on evidence, including new science, or on what's best for the forest, but on fixed beliefs.*

   The ideological aversion to forest management leads to extreme positions and actions. Some of these groups have claimed, against all evidence, that active forest management does not actually reduce fuels. Others attack forest management by stating that "nothing can prevent fires." Of course, this has nothing to do with how a resilient landscape responds to fires.

   Further hardening their anti-active management position, a coalition of fringe groups published a statement in 2015 rejecting the Forest Service's (and Congress') moves toward collaborative solutions. This statement was issued one year after the 2014 Farm Bill established the Collaborative Forest Landscape Restoration Program (CFLRP), which has made great strides in Montana, Idaho and elsewhere toward management solutions that are ecologically, socially, and economically responsible. These groups

complain that collaborative groups are not sufficiently attentive to "biocentric" positions and have pledged to refrain from collaboration.

In one case in Montana, 29 fringe groups submitted an amicus *brief to the district court where they urged the court to reject the collaboratively-developed East Reservoir project. Using charged terms like "collaborator," the groups asked the court to disregard "local interests" and suggested that collaborative support for a balanced and carefully-designed project was "[o]n the same spectrum" as the "contingent of the population" associated with the Malheur NWR standoff. Fortunately, the district court gave appropriate weight to the local collaborative group, which included representatives of several strong conservation organizations as well as local government and industry.*

Our current system greatly empowers those with the most extreme positions. Further exploration of alternative dispute resolution mechanisms such as arbitration, as well as reforms to fee-shifting statues that incentivize serial litigants, is greatly needed.

2. In some cases, federal agencies such as the Forest Service are working collaboratively with stakeholders, only to have courts intervene when a fringe organization sues. How can we better support these collaborative efforts and insulate consensus decision-making from fringe group attacks?

Response:

*Productive collaboration is very hard work. It requires stakeholders to switch from advocacy for positions to advocacy for interests. And effective collaboration requires participants to advocate for *others'* interests. For the most part, participants find collaboration worth the effort. It can result in projects that produce watershed and habitat improvements, reduce fuels and fire risk, and produce predictable timber volume. Often collaboration improves the overall quality of a project by subjecting it to hard questions and honest scrutiny.*

When a fringe group—one that rejects even the idea of collaboration—files suit on a project, that is highly demoralizing to collaborative group members. If a project is halted or delayed, participants start to question the value of the time and energy put into these processes. AFRC has worked with collaborative groups to become involved in this litigation and to educate courts about these projects. While courts often look favorably on such projects, particularly in light of growing consensus on the need for active management in our federal forests, they still have imposed significant delays at times. The ability of a fringe group, with little stake in the outcome, to hamstring these projects, is a threat to the sustainability of collaborative efforts.

Congress can help. There are a number of thoughtful proposals to streamline resolution of disputes relating to collaborative projects. Two are arbitration and injunction reform. A meaningful arbitration system would allow for quick resolution of any challenges to collaborative projects, while still preserving the right to seek review—a right that is important to many collaborative group members. Arbitration programs have reduced costs/impacts and delays of litigation in other areas such as resolution of car accident

cases. One of the worst outcomes in our current system is delay while a project is evaluated (as opposed to delay resulting in a finding of a legal violation). Arbitration could make a difference.

Targeted injunction reform could also make a difference. In the Healthy Forests Restoration Act (HFRA), there are 60-day limits on preliminary injunctions or injunctions pending appeal. However, these limits are subject to renewal so they are not effective. In other contexts, Congress has exempted certain actions entirely from injunctive relief. For collaborative projects, a good step forward would be to limit injunctions pending appeal, either entirely or with a firm time limit. Injunctions pending appeal are only issued after the district court has denied preliminary injunctive relief, or has issued summary judgment in favor of a project. At that point, the agency should be allowed to move forward because at least one court has given its blessing.

Injunction reform could also look at the standard for an injunction. Under current interpretations of the Endangered Species Act (ESA), a plaintiff can usually get an injunction merely by showing that it has demonstrated "serious questions" on the merits. Requiring plaintiffs to meet the traditional "likelihood of success" standard would still protect sensitive species, but would also give some protection to the collaborative process.

3. Are plaintiffs able to file suit and delay the implementation of forest management and timber projects while the case plays out in court? If so, what are some of the harms that can result from these delays?

Yes, plaintiffs are able to file suit and delay projects while a case is pending. A fringe plaintiff has five separate opportunities to stop a project before the case is decided on the merits. In addition, because of the easy availability of these injunctions, the responsible federal agencies have become overly cautious about proceeding even without the filing of an injunction. Such "self-enjoining" is counterproductive as it rewards and encourages filing of litigation. Even worse, agencies such as BLM will hold off a project indefinitely while reviewing administrative filings from project opponents.

Significant and widespread harms can result from these delays. Because there is so much land in need of forest restoration – over 80 million acres—each day of delay increases the risk of declines in forest health and catastrophic wildfire. The delays also stymie needed watershed restoration efforts that are often funded through timber sale receipts. Delayed receipts affect local counties, schools, and roads, which have to look to other sources of funding or cut services when promised revenues do not materialize.

Timber supply also suffers, as the agencies are unable to keep to a predictable and sustained output of timber. If the flow to a mill is interrupted, loggers, mill workers, and others may be laid off. This has ripple effects throughout rural communities where the forest products industry is one of the few sources of family wage jobs.

This predictability is essential for industry to justify the capital costs of constructing and maintaining mills. We have seen some regions, such as Utah, where lack of consistent

timber supply led to mill closures. In those areas, the government does not have the infrastructure it needs to responsibly manage the landscape.

Delays are particularly acute problems in the context of post-fire treatments. Wood begins to rot as soon as the tree dies and most timber is no longer merchantable within 18-24 months. If that happens, the agency would have to use appropriated funds both to remove the timber and to replant, rather than having industry pay for the timber and using receipts to fund replanting and other work. Because of the lengthy administrative process, a project can take 12 months to develop, leaving a very short window for implementation. Thus, any delay to a post-fire could essentially kill the project.

There are substantial opportunities to reduce litigation impacts on forest management and the Committee's attention to these issues is timely and important.