Washington DC Update

Appropriations. On July 20, the House of Representatives passed the Fiscal Year 2023 Interior, Environment, and Related Agencies Appropriations Bill as part of a six-bill funding package of government operations. The Interior bill outlines funding levels for the Forest Service and the U.S. Department of the Interior, including the Bureau of Land Management (BLM) and U.S. Fish and Wildlife Service.

Overall, the legislation provides the Forest Service $3.95 billion for agency programs not related to fire – $256 million more than the current fiscal year. Unfortunately, the House bill does not direct these increases towards programs that are likely to increase timber outputs. The Forest Products line item, which most directly supports the Forest Service timber program, would essentially be level funded at $38 million. This is significantly less the Biden Administration request level of $44 million in Fiscal Year 2022, although the Congress ultimately trimmed this back to $37.6 million in Fiscal Year 2022.

The legislation would provide $6.43 billion for federal Wildland Fire Management efforts, including $2.55 billion in off-budget funding for suppression through the fire borrowing fix. This is $762.2 million more than Fiscal Year 2022. The committee report directs the Forest Service to *"provide information to the Committee within 90 days of enactment of this Act detailing the resources necessary to increase the Agency's timber target to four billion board feet, annually."*

Must Read: Why timber is essential to the Biden Administration's wildfire strategy

AFRC President Travis Joseph explains why the Forest Service and BLM timber sale programs are essential to preserving and growing the physical and human forest infrastructure that is not only critical to providing carbon-friendly wood products to meet society's needs but is essential to helping the Forest Service and BLM accomplish their respective federal forest management goals.

Click here to read the article.

Forest Service hazardous fuels reduction efforts and the Collaborative Forest Landscape Restoration Act (CFLRA) program would also be level funded, but these programs received massive infusions of funding through the Bipartisan Infrastructure and Jobs Act. The Committee report includes an expectation that additional

resources provided through the Bipartisan Infrastructure Act *"to support forest restoration activities will enhance rather than reduce timber sale outputs."*

The Committee report also includes language directing the Forest Service and Department of the Interior to continue utilizing prescribed burns, including requiring a report *"detailing the barriers to implementing prescribed burns in the western United States, possible solutions, and an estimate of fire damage in 2021 that could have potentially been avoided had the agencies implemented a more robust prescribed burn regime."*

We hope to work with House and Senate budget writers to direct additional funding towards programs that could help reduce the escalating costs of fire suppression through commercial thinning and active management as Congress negotiates a final funding bill..

The BLM would receive $12.2 million for the Public Domain Lands forest management program, which is less than the BLM's $14.8 million request for Fiscal Year 2023. The proposed funding level is $1.9 million more than the FY 2022 funding level, but the report directs $1 million *"for conserving and restoring lands including identifying and managing for carbon sinks."* The report also *"supports the Bureau of Land Management's collaboration with the Forest Service to define, identify, and complete an inventory of old-growth and mature forests on Federal lands."*

The BLM would receive $125.1 million for the management of the Oregon and California Grant Lands - a $7.8 million increase over the Fiscal Year 2022 enacted level but $3.6 million less than the Administration's FY 2023 budget request. Within this amount, $1.9 million is to "support partnerships with Tribes, States, and local governments," $2.3 million is for "conserving and restoring lands to combat climate change," and $11 million is for "Species Conservation."

It is unclear how these allocations will support the BLM's primary duty to manage the O&C lands for sustained yield timber harvests. It is also unclear whether funds are provided for the BLM to comply with a federal court order to revise the 2016 Western Oregon Resource Management Plans, which DC District Court Judge Richard Leon ruled did not comply with the O&C Act of 1937.

The committee report includes language directing the BLM *"to refrain from any actions that would withdraw the Bureau from its fire protection agreement with the State of Oregon"* and *"to regularly report its timber sale accomplishments for sales that have been sold and awarded rather the merely offered for sale. The Bureau is expected to report these activities in a manner consistent with the U.S. Forest Service and only count awarded volume."* Similar language has appeared in Interior Appropriations measures adopted by the House and Senate.

The Senate Appropriations Committee has not released its Fiscal Year 2023 Interior Appropriations bill. While the House has now passed six of the 12 annual Appropriations bills, we expect Congress to adopt a Continuing Resolution to fund the government until after the November election.

U.S. Senate ENR Committee Mark-Up. On July 21, the U.S. Senate Energy and Natural Resources Committee held a markup to consider a pending nomination and 45 public lands bills. The agenda included several bills related to federal forests, including AFRC priority legislation to address the Ninth Circuit *Cottonwood* decision.

Cottonwood. By a 16-4 vote, the Committee adopted a bipartisan amendment to legislation (S. 2561) from Senator Steve Daines (R-MT) intended to close a loophole employed by anti-forestry activists to block forest health projects while the Forest Service is required to reinitiate Endangered Species Act consultation on previously adopted forest plans. The legislation adopted by the Committee is consistent with the position of the Obama Administration when it sought cert review of the *Cottonwood* decision by the U.S. Supreme Court based on forest management plans not being ongoing actions and the reality that consultations are taking place at the project level. Most recently, serial anti-forestry litigants have used claims of "new information" to delay and block critical forest health projects.

Committee Chair Joe Manchin (D-WV) partnered with Daines in offering the bipartisan amendment. Senator Ron Wyden (D-OR) was vocal in his criticism of the legislation claiming that it would create chaos and be a "prescription for a lawyer's full employment program." While Wyden was joined by Senators Bernie Sanders (I-VT), Maria Cantwell (D-WA), and Mazie Hirono (D-HI) in voting no, Wyden was the only Senator to speak against the legislation. AFRC President Travis Joseph provided a statement thanking Senator Daines for leading efforts to advance the Cottonwood fix:

"We're encouraged by the bipartisan work to advance meaningful legislation addressing a significant roadblock to science-based, active forest management. If signed into law, this bill will help accelerate the pace and scale of management to address the serious threats to our national forests, including catastrophic wildfires. This work demonstrates there is strong support among Republicans and Democrats to break the gridlock that is too often preventing good forest management on federal lands. We thank Senator Daines for his tireless work to fix the disastrous Cottonwood decision, and for his leadership on behalf of communities in Montana and throughout the West. We hope lawmakers can build on this success to provide federal agencies the tools and clear direction they need to implement the forest health treatments needed to address our nation's growing forest health and wildfire crisis."

River Democracy Act. Senator Ron Wyden's so-called River Democracy Act (S. 192) to designate 4,700 miles of Oregon rivers, creeks, gulches and draws as "Wild and Scenic" and place additional restrictions on the management of three million acres of federal lands was on the agenda, but the bill was withdrawn from consideration. Senator Wyden's office is believed to be drafting a revised version of the legislation, but we are unaware of any effort to engage with interested stakeholders in Oregon to address the widespread concerns that have been raised.

Root and Stem Project Authorization Act. Senator Steve Daines also secured committee passage of an amendment to his legislation (S. 3046) to provide the Forest Service the authority to allow third-parties to fund project planning costs within the existing stewardship contracting authority. The legislation seeks to build on the successful "A-Z Project" on the Colville National Forest.

Other legislation. Legislation (S. 1538) from Senator Jeff Merkley (D-OR) to expand the existing Smith River National Recreation Area and designate additional southwest Oregon rivers as Wild and Scenic passed narrowly, 11-9.

The Committee deadlocked 10-10 on several other bills and the nomination of Laura Daniel-Davis to serve as Assistant Secretary of Land and Minerals Management at the U.S. Department of the Interior, a

position that oversees the BLM. Daniel-Davis served in senior roles in the Department of the Interior during the Obama Administration.

DeFazio Rogue Wilderness, National Recreation Area Legislation. On June 23, the House Natural Resources' National Parks, Forests, and Public Lands Subcommittee held a hearing on five public lands bills, including Congressman Peter DeFazio's (D-OR) *Wild Rogue Conservation and Recreation Enhancement Act* (H.R. 7509) to expand the existing Wild Rogue Wilderness area by nearly 60,000 acres and create a new 98,150-acre BLM National Recreation Area in southwest Oregon. The legislation is similar to Senator Wyden's Oregon Recreation Enhancement (ORE) Act (S. 1589). AFRC President Travis Joseph sent a letter to the Natural Resources Subcommittee outlying AFRC's concerns, including those previously shared with Congress regarding Wyden's ORE Act. /*Heath Heikkila*

The AFRC Podcast

Episode 11: Kent Duysen, Saving Our Sequoias and Southern Sierra Forests

Click here to listen to Episode 11. Our podcast is available on Spotify! Also now available on Apple Podcasts!

The AFRC Podcast is a monthly discussion examining key issues and news relating to forestry, forest products and public lands management.

In recent years severe wildfires have killed up to a fifth of the world's Giant Sequoia trees. Those who live and work near the famed Sequoia groves in California have warned for years that overstocked conditions and high tree mortality on federal forests would someday threaten these iconic trees. As 2022 brings more severe wildfires to the region, the federal government is taking action to implement forest management treatments in Yosemite National Park and surrounding national forests. Kent Duysen of Sierra Forest Products is a longtime advocate for forest health in Southern Sierra Nevada and recently testified to Congress in support of the Saving Our Sequoias legislation, which would expedite management activities including thinning and prescribed fire.

Forest Service, BLM Respond to Recent Executive Order

President Biden issued an Executive Order (EO) on Earth Day titled: Strengthening the Nation's Forests, Communities, and Local Economies. This EO established the Administration's policy to, among other things, "pursue science based, sustainable forest and land management; conserve America's mature and old-growth forests on Federal lands; and invest in forest health and restoration." Since its release, the focal point of the EO has been its reference to "mature" and "old growth" forests managed by the Forest Service and BLM. The action item associated with this focal point is direction to define, identify, and

complete an inventory of old-growth and mature forests on federal lands within one year of the date of the order.

The Forest Service and BLM issued a Request for Information (RFI) from the public to inform how to proceed with meeting this direction. Rather than seeking opinions from the public on their philosophies on how old forests should or should not be managed, the agencies are simply looking for input on how to create a single definition for two forest types that vary significantly across the country. The RFI acknowledged that "most scientists agree that old-growth forests differ widely in character with age, geographic location, climate, site productivity, and characteristic disturbance regime."

Since it would be scientifically unsound to define a single measurable attribute for mature and old-growth forests across the entire country, such as age or tree size (consider a giant sequoia grove in California compared to a hardwood forest in the Appalachian Mountains), complying with the EO direction will be a challenge.

As a useful example, in 2004 the Washington State Legislature directed the Department of Natural Resources (DNR) to conduct an inventory of old-growth forest stands on state lands as defined by a panel of scientists. In response, DNR contracted with regional scientists to create a guide that would inform local land managers as they worked to comply with this direction. Those scientists concluded that "the great diversity and ages of forests found in western Washington makes the task of creating a comprehensive guide difficult" and were compelled to develop their guidance based on seven distinct vegetation zones (Van Pelt, R. 2007). This guide ultimately ascribed measurable attributes for identifying old growth, but only specific to each of the seven zones. If a region as small as western Washington warranted seven distinct sets of criteria for old growth, the entire nation would warrant hundreds more.

Agency leadership seemed mindful of this challenge during a public informational webinar on July 21, as they often characterized their request for input around creating a "framework" for mature and old-growth forests, rather than a universal definition. The webinar, which was attended by nearly 200 individuals, can be found here. During the webinar, agency leadership also welcomed input on how they should proceed with conducting an inventory of mature and old-growth forests once a definition has been created. Some participants highlighted the time-intensive nature of conducting a forest inventory across roughly 250 million acres of forest land in a manner that reflects a definition based on qualitative rather than quantitative forest conditions that is adaptable to forests from Florida to Oregon. Such an inventory, if done effectively, could warrant on-the-ground field visits to align the inventory with the definitions. Those participants also questioned whether such an effort would be a wise use of limited agency staff considering the Forest Service's goal of treating an additional 20 million acres of forest land to address the Wildfire Crisis.

Other participants on the webinar called for immediate action to place a "moratorium" on certain timber harvest activities while the inventory is being conducted. Forest Service leadership clarified that the EO does not, by itself, change any current forest management policies or practices, and instead directed the participant's attention to subsequent sections of the EO that direct the agencies to coordinate conservation and wildfire risk reduction activities, including consideration of climate-smart stewardship of mature and old-growth forests. An additional public engagement process will be forthcoming that will likely seek input on what "climate smart stewardship" looks like on federal forest land. Those interested in submitting formal comments must do so by August 15. /*Andy Geissler*

Washington Supreme Court Unanimously Holds that State Trust Lands Must be Managed for Beneficiaries

On July 21, in a unanimous opinion authored by Justice Whitener, the Washington Supreme Court held that the Enabling Act of 1889 created a trust that requires the State, through DNR, to manage state trust lands for the benefit of the enumerated state beneficiaries, including counties, public schools, universities, fire districts, libraries, hospitals, and other community services. DNR currently manages over 2 million acres of state trust lands—granted through the Enabling Act and by Washington counties—to produce sustainable timber supplies and generate long-term revenue for the defined state beneficiaries. AFRC, along with five Washington counties, three school districts, two fire districts, the Port of Port Angeles, and the City of Forks participated in the case as defendant-intervenors (Beneficiary Intervenors).

Conservation Northwest et al. brought a challenge to two of DNR's land management decisions—the Sustainable Harvest Calculation and the Long-Term Marbled Murrelet Conservation Strategy—on the basis that DNR violated its trust mandate under the Washington Constitution article XVI, section 1 that "[a]ll public lands granted to the state are held in trust for all the people." Conservation Northwest et al. argued that DNR inappropriately prioritized generating revenue from timber harvests instead of broader public interests when managing its state trust lands, such as preserving salmon and other wildlife, providing recreation opportunities, enhancing carbon storage, and maintaining open space, which would benefit "all the people."

The Thurston County Superior Court dismissed Conservation Northwest et al.'s action on the merits based on the seminal *County of Skamania v. State* decision, which provides that DNR has a duty of undivided loyalty to the state trust beneficiaries. Conservation Northwest et al. sought direct review to the Supreme Court, arguing that *Skamania*'s holding did not apply to DNR's management of granted lands and that DNR did not owe a "private" trust duty for the benefit of the state institutions enumerated in the Enabling Act or to the county beneficiaries that granted their lands to the State under RCW 79.22.040. Rather, Conservation Northwest et al. argued that DNR's trust obligation is owed to "all the people" based on article XVI, section 1 of the Constitution.

The Washington Supreme Court found that although *Skamania* correctly concluded that DNR is "obligated as a trustee to manage state lands for the beneficiaries," its holding was not determinative based on the issues before the court. The Supreme Court analyzed the Enabling Act of 1889, which was the mechanism that brought Washington, Montana, North Dakota, and South Dakota into the Union. The Supreme Court held that the Enabling Act was what created a trust "whereby the State accepted control of the granted lands with the express understanding that the lands were not its absolute property but, instead, were to be held and used exclusively for the enumerated purposes." The Enabling Act's trust mandate became binding once the state accepted its terms and adopted its state constitution, and the President then issued a proclamation that the terms of the Enabling Act had been complied with, making Washington a state. The Supreme Court expressly rejected Conservation Northwest et al.'s argument that the Constitution created a trust for "all the people."

The Court then went on to define the obligations that were imposed on the State as a trustee. It held that the same principles that govern private trusts also apply to these trusts. First among those principles is that the trustee owes a duty of undivided loyalty to the trust beneficiaries designated by the settlor of the

trust – here, the United States and the counties. "The trustee owes a duty of reasonable care and skill to make the trust property productive through leasing or managing it to generate income." The trustee has discretion in that management, but "the trustee's exercise of discretion is subject to the court's control only when necessary to prevent an abuse of that discretion."

The Supreme Court then went on to decide whether Conservation Northwest et al.'s allegations in their complaint could withstand a motion to dismiss. The Supreme Court held that they could not. The Supreme Court rejected Conservation Northwest et al.'s argument that the Enabling Act applies only to DNR's activities that involve selling or disposing of granted lands, and not to its day-to-day management.

Conservation Northwest et al. urged the Supreme Court to find that DNR's decision to generate revenue from timber harvests is detrimental to the broader public interest because it undermines conservation efforts. The Supreme Court did not agree and determined that DNR's decision to "generate revenue from timber harvests does not undercut its obligations under the Enabling Act or article XVI, section 1." The Court went on to explain that "[w]hile there is nothing in the Enabling Act that requires DNR to generate revenue specifically from timber harvests on state lands, DNR *may* elect do so . . . ." Generating revenue for the beneficiaries is advantageous to "all the people" "because they stand to benefit from having stable and financially viable public systems of education and governance."

Thus, the Supreme Court affirmed DNR's discretion to manage state trust lands as it had done in the two decisions Conservation Northwest et al. challenged – even if those decisions were less than optimal for the values Conservation Northwest et al. espoused.

Interestingly, even though DNR and the Beneficiary Intervenors prevailed before the Supreme Court, Conservation Northwest et al. has tried to tout their decisive loss as a "win." But their entire case centered around requesting a declaration from the Supreme Court that the constitutional trust was a "trust for all the people" and that DNR had to give equal weight to the competing environmental interests they raise and was only obligated to pay any net revenues to the trust beneficiaries. The Supreme Court expressly rejected those arguments. And to the extent that Conservation Northwest et al. contended that DNR's decisions were to maximize revenue at the expense of all other values, that has never been either the law or DNR's approach to management.

While the Washington Supreme Court has noted that DNR as a trustee has discretion in its management of state trust lands, that does not mean that there are no boundaries to that discretion. The Supreme Court reaffirmed one way that the trustee would abuse its discretion – by acting with divided loyalty. The Supreme Court has previously held that a trustee abuses its discretion when it sells a major asset for less than fair market value or without determining what is the fair market value of the asset.

Overall, this recent decision from the Supreme Court is a huge victory for the trust beneficiaries. It reaffirms that the State's duty is one of undivided loyalty to them. AFRC thanks Elaine Spencer and David Bechtold from Northwest Resource Law for their representation of the coalition in this matter.
/*Sara Ghafouri*

AFRC in the News

- AFRC released a press statement celebrating the Washington State Supreme Court's affirmation of the DNR's duty to manage state trust lands.
- Nick Smith was quoted in a Bend Bulletin story, sharing AFRC's concerns with the proposed River Democracy Act.
- Nick Smith was quoted in a Capital Press story regarding salvage litigation on the Willamette National Forest.

Barred Owl Removal Experiment and Strategy Update

The U.S. Fish & Wildlife Service (FWS) recently wrapped up an experimental project to test the effectiveness and feasibility of barred owl removal on northern spotted owl (NSO) populations. The experiment was authorized in 2013 in response to FWS findings that "competition with barred owls, a species not native to the Pacific Northwest, has been identified as the primary factor associated with the observed population declines of the NSO." That year, FWS initiated work on the experiment on the Hoopa study area in California and added three additional study areas in Oregon and Washington in 2015 and 2016.

Following completion of the experiment, FWS made the following conclusions, which can be found on the project's website [emphasis ours].

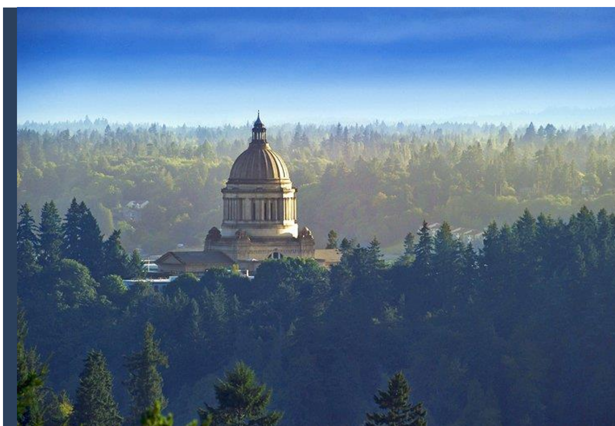
The experiment has demonstrated success in the removal of barred owls, resulting in reduced and declining barred owl populations in the removal areas. In areas where no removal occurs, barred owls continue to increase. Across all study areas, removal of barred owls had a strong, positive effect on survival of spotted owls and a weaker, but positive effect on spotted owl dispersal and recruitment. ***Spotted owl populations stabilized in the areas with removals but continued to decline at a rate of 12% in the areas without removals.***

These stark conclusions reveal the effectiveness of removing barred owls from NSO territories and validate the earlier findings that indicated that barred owls represent the primary threat to the recovery of the NSO. However, the feasibility of replicating this experiment across the entire range of the NSO is less clear. FWS noted that experimental barred owl removal occurred on less than one twentieth of one percent of the range of the barred owl. Determining the appropriate scale at which to expand this experiment will be a critical component of a removal strategy that is implementable and effective.

Development of that strategy is underway as FWS recently published their intentions to prepare an Environmental Impact Statement (EIS) to analyze the effects of a broader scale removal project. This EIS

will also consider alternative methods to achieving their ultimate objectives. FWS states that "it is critical that we manage invasive barred owl populations to reduce their negative effect on spotted owls before northern spotted owls are extirpated from large portions of their native range. Therefore, action alternatives need to provide for rapid implementation and result in swift reduction in barred owl competition." Solicitation for public input is underway through August 22. The solicitation is vague on the scale that this project will be implemented at; however, the website does note that a focus will be placed on "selected treatment areas."

The outcome of this strategy will impact the BLM's timber program in a direct way. Currently, BLM timber management is directed by the 2016 RMPs. Although the RMPs designated 80% of O&C lands for NSO habitat needs, they also placed harvest restrictions on the remaining 20% where sustainable timber management is required. Those restrictions can be lifted only when implementation of a barred owl management program has begun. However, that implementation must occur within eight years of the authorization of the RMPs. That gives FWS just under two years to complete the EIS, issue a final Decision, and implement the Decision. If this timeline is not met, the BLM must reinitiate formal consultation with FWS on the RMPs. The solicitation for public input indicates that a Draft EIS will be published this fall. /*Andy Geissler*



For more information, contact Nick Smith at 503-515-4206 or nsmith@amforest.org

4th AFRC Emerging Leaders Program
September 22-23, 2022
Hilton Garden Inn in Olympia, WA

Now accepting nominations from AFRC members and partners!

The Emerging Leaders Program is intended to promote the leadership skills of those who are on a path to lead our industry in the future. This year's agenda features AFRC experts and leaders in industry and government. Together, they will share important information and insights into the many issues surrounding the forest sector.

AFRC's Challenge to Delay Rules for NSO Critical Habitat Designation Dismissed As Moot

On June 24, Judge Richard J. Leon with the U.S. District Court for the District of Columbia issued an unfavorable ruling dismissing as moot AFRC's challenge to the FWS's illegal delays implementing its 2021 critical habitat designation (the January 2021 Rule) for the Northern Spotted Owl (NSO).

Joined by the Association of O&C Counties, and counties in Washington, Oregon, and California, AFRC challenged FWS's unlawful delays of the effective date of its January 2021 Rule, which was issued as the result of a settlement agreement AFRC and a coalition representing counties, businesses, and labor reached in April 2020 with FWS over its illegal 2012 NSO critical habitat designation of 9.5 million acres that included millions of acres of forests not occupied by the NSO. *See* September 2021 Newsletter.

The 2020 settlement agreement initiated a public rulemaking process that resulted in the January 2021 Rule, which rightfully excluded 3.4 million acres of non-habitat from the NSO critical habitat designation and other federal lands that are required to be set aside and managed for timber production under the O&C Act. The January 2021 Rule had an effective date of March 16, 2021, but FWS delayed its effective date twice: first to April 30, and then to December 15 (the Delay Rules).

In March 2021, AFRC sued FWS for these delays, challenging the validity of FWS's actions under the Administrative Procedure Act—meaning the FWS failed to provide any lawful justification for its delays—and that the public was not provided notice nor afforded meaningful opportunity to comment. These delays also effectively extended the 2012 NSO designation that restricted active forest management on federal lands that are not actually NSO habitat and restricts management on BLM's O&C timberlands, which are required to be managed on a sustained-yield basis. *See* AFRC's March 5, 2021 Press Release.

While the Delay Rules were in effect, FWS issued a proposed rule to withdraw its January 2021 Rule (the Withdrawal Rule) and to revise its illegal 2012 NSO critical habitat designation by excluding only 204,797 acres in Oregon—which would have added approximately 3.2 million acres to the 2012 NSO critical habitat. FWS formally withdrew the January 2021 Rule in November 2021, and the Withdrawal Rule took effect in December 2021. After the Withdrawal Rule went into effect, the Government moved to dismiss AFRC's action as moot.

In his decision, Judge Leon held that the court could not provide plaintiffs with any relief on our claims, thus rendering those claims as moot. The mootness doctrine limits federal courts to deciding actual, ongoing controversies. Judge Leon reasoned that because the Delay Rules had expired under their own terms—referring to the effective date of each Delay Rule—they no longer had any ongoing effect. Next, the Withdrawal Rule expressly withdrew and superseded the January 2021 Rule. Therefore, Judge Leon reasoned, the court could neither vacate the Delay Rules nor reinstate the January 2021 Rule, and thus the live controversy at issue now is only the validity of the Withdrawal Rule—which was not part of this particular suit: "the Court has no power to effectuate injunctive relief sought by plaintiffs, and any opinion on the lawfulness of the expired rules would be improperly advisory."

By dismissing our suit as moot, Judge Leon did not have to make a determination on the merits or whether the validity of the Withdraw Rule is predicated on the lawfulness of the Delay Rules. We respectfully disagree with the Judge's reasoning because declaring the Delay Rules unlawful would also undermine the lawfulness of FWS's promulgation of the Withdrawal Rule. AFRC and our coalition partners have 60 days from the date Judge Leon's order to file an appeal. /*Sarah Melton*

Judge Vacates Trump-ERA ESA Rules

In August 2019, environmental groups challenged the Trump-era ESA Rules (2019 ESA Rules) in the U.S. District Court for the Northern District of California in three related cases. The 2019 ESA Rules included (1) a "listing rule" that modified how the FWS and National Marine Fisheries Service (collectively, the Services) listed, removed from listing, or reclassified endangered or threatened species the criteria for designating habitat; (2) a "blanket repeal rule" of the policy that automatically extended the take prohibition to threatened species listed by the FWS; and (3) an "interagency consultation rule" that changed how the Services worked with federal agencies and revised, defined, and redefined terms to reduce the number of actions that would be considered to jeopardize listed species or result in the

destruction or adverse modification of critical habitat. AFRC supported this regulation reform and joined an industry coalition to participate in the litigation as defendant-intervenors.

While the challenge to the 2019 ESA Rules was pending due to many stay requests, on January 20, 2021 President Biden issued Executive Order 13990 directing agencies to review regulations that were issued during the Trump Administration. In June 2021, the Services announced their intent to revise the 2019 ESA Rules. *See* Press Release. In light of these proposed revisions, the government moved for voluntary remand *without vacatur*, in lieu of filing a response to the environmental groups' motion for summary judgment on the merits.

On July 5, Judge Tigar issued an order that vacated the 2019 ESA Rules, without issuing a decision on the merits, and went beyond the government's request to have the regulations remain in effect during the revision process. Instead, the effect of the district court's decision is that the pre-Trump-era regulations have been reinstated until the Services finalize new regulations. Of particular note, the "listing rule" and "interagency consultation rule" will revert to the Obama-era versions, which were challenged by several states and an industry coalition in federal court in late 2016 and 2017. A settlement agreement was reached in 2018, which required the Services to reconsider those Obama-era rules.

In considering whether to vacate the 2019 ESA Rules, Judge Tigar explained how the Services have conceded that they "have substantial concerns with the 2019 ESA Rules, both with respect to certain substantive provisions as well as certain procedures that were utilized in promulgating these regulatory revisions," and have announced that they are in the process of proposing new ESA rules. The court analyzed whether vacating the 2019 ESA Rules would be "disruptive" and concluded it would not cause confusion among the public, other agencies, and stakeholders, or impede the efficiency of ESA implementation.

The State Intervenors have filed a notice of appeal to the Ninth Circuit. The State Intervenors, Private Landowner Intervenors, and Industry Intervenors (including AFRC) filed a joint motion for stay pending appeal in the district court. The joint motion expressed concerns with Judge Tigar's failure to address the merits, relying on a recent decision from the U.S. Supreme Court. On April 6, the U.S. Supreme Court, without providing an opinion, granted a request for a stay in a case where a district court vacated the Trump-era Section 401 Rule without a decision on the merits. In doing so, the Court necessarily determined that the defendant-intervenors were likely to succeed on the merits of their appeal and that irreparable harm would likely result without a stay. This Supreme Court order demonstrates a disfavor for vacating rules without addressing the merits. /*Sara Ghafouri*

Biden Administration Rescinds two Trump-era ESA Rules—Habitat Definition and Critical Habitat Designation

President Biden's Executive Order 13990 included two Trump-era rules—the first defining "habitat" and the second pertaining to section 4(b)(2) exclusions from critical habitat designations under the ESA. *See* February 2021 Newsletter. Both ESA rules are now rescinded.

Habitat Definition Rule. On June 24, the FWS and the National Marine Fisheries Service (collectively, the Services) rescinded the regulatory definition of "habitat" without providing a new definition of habitat. Going forward, determining which areas qualify as "habitat" for a particular species will be done

on a case-by-case basis using the best scientific data available for that species. *See* Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 87 Fed. Reg. 37757, 37758 (June 24, 2022).

The Trump-era habitat rule effectively only applied in the context of designating "critical habitat": "For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." *See* Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81411, 81412 (Dec. 16, 2020). This definition was developed after the U.S. Supreme Court held that an area must logically be "habitat" in order for that area to meet the narrower category of "critical habitat" as defined under the ESA. *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361, 369 (2018). *See* November 2018 Newsletter.

The Administration's proposal received more than 13,000 comments. In the Final Rule, the Services concluded that the previous definition of habitat was "unhelpful, unnecessary, and improperly and excessively" constraining, and that "codifying a single definition [of habitat] in regulation could impede the Services' ability to fulfill their obligations to designate critical habitat based on the best scientific data available."

Instead, the Services concluded it would be more appropriate to evaluate and determine what areas qualify as "habitat" by considering the best available science for the particular species. The Services believe the previous habitat definition inappropriately constrained their ability to designate areas that meet the definition of "critical habitat," including areas essential to the recovery of listed species. The Services explained the 2020 habitat definition rule "eliminated from possible designation as critical habitat any area that does not 'currently or periodically' contain something deemed a necessary 'resource or condition' even though it would do so as a result of natural transition following a disturbance (*e.g.,* fire or flood), in response to climate change, or after reasonable restoration."

However, the Services recognize the importance of the Supreme Court's *Weyerhaeuser* decision and assert that they intend to designate areas as critical habitat only if those areas are habitat for the listed species and will ensure the administrative record for critical habitat designations includes an explanation of why any unoccupied areas are considered or determined as habitat for that species.

The Services' rescission of the 2020 habitat definition without replacement reverts the Services' designation of critical habitat to a pre-*Weyerhaeuser* approach, asserting broad discretion and flexibility in designating areas for critical habitat. This leads to a return to uncertainty, inconsistency, and lack of transparency in critical habitat designations, particularly for the designation of unoccupied critical habitat. The Final Rule rescinding the habitat definition states "[t]hat a specific unoccupied area may remain inaccessible to the listed species, or may require some form of natural recovery or reasonable restoration in order to support the listed species over the long term, does not preclude a finding that the area is presently habitat or that the area is 'essential for the conservation' of that species if the record of evidence regarding that species' needs and the resources available to it, such as limited availability of other habitat, supports such a conclusion at the time of designation." Stakeholders are now left with some uncertainty about what constitutes "reasonable restoration" that is necessary for an area to be designated critical habitat.

ESA Section 4(b)(2) Exclusion Rule. On July 21, FWS rescinded the Trump-era rule that revised FWS's process for implementing ESA section 4(b)(2). Specifically how FWS excludes areas from critical habitat designations, factors it may consider for exclusion from designation, and how and when FWS undertakes an exclusion analysis. *See* Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat. 87 Fed. Reg. 43433, 43433 (July 21, 2022). FWS's exclusion analyses and determinations will now revert to, and be guided by, the Obama-era 2016 Policy Regarding Implementation of Section 4(b)(2) of the ESA referred to as the "2013 Rule." However, the language in the preambles of the 2016 Policy and 2013 rule indicating that decisions not to exclude areas under section 4(b)(2) are committed to agency discretion and are judicially unreviewable will no longer be applicable in light of the *Weyerhaeuser* decision.

The ESA authorizes FWS to exclude particular areas from a critical habitat designation if the benefits of exclusion outweigh inclusion. The 2016 Policy describes the factors FWS may consider when evaluating the impacts of a critical habitat designation, including requirements for considering economic, national security and other impacts of critical habitat designations. The Trump-era rule provided a broader "non-exhaustive list of categories of potential impacts" that FWS could consider when evaluating whether to exclude an area from critical habitat designation—including public health and safety, community interests, and the environment, such as increased risk of wildfire. *See* Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82376, 82376 (Dec. 18, 2020).

The Administration's proposal received more than 29,000 comments, with about 28,000 in support of recission of the rule. In its Final Rule, FWS acknowledges this is a reversal of its previous position, but determined the previous critical habitat designation exclusion rule unduly constrained FWS's discretion in administering the ESA and problematic for three primary reasons. First, it limited or undermined FWS's role as the expert agency. Second, it constrained FWS's discretion in designating critical habitat, thus decreasing the agency's ability to further conservation of listed species through designation. Third, it created confusion and did not further FWS's goals of providing clarity and transparency; for example, it only applied to FWS, but NMFS continued to follow the 2016 Policy. As a result of this recission, stakeholders and proponents of critical habitat exclusion will not have the same opportunity to provide input on whether and how the Secretary should conduct its exclusion analyses. /*Sarah Melton*

AFRC Meets with North Idaho National Forests

On July 19 and 20, AFRC staff and members met with the Idaho Panhandle and Nez Perce-Clearwater National Forests. These two Forests make up what is called the North Idaho POD for Region 1. The POD concept has become one of the strengths of the Region 1 timber sale program due to the fact that if one Forest in the POD misses its target, the other Forests can help make up the shortfall.

The Idaho Panhandle meeting was the first in person meeting in over two years and had a good turnout of over 30 people. It was also the first time most attendees met Forest Supervisor Carl Petrick in person.

Like all Forests, the Panhandle is having a difficult time of staffing up to meet the challenges of increasing the pace and scale of management but have done an excellent job of getting NEPA projects approved and ready for implementation. In fact, the Forest has about 5-years of NEPA ready projects and are looking at an annual timber target of 85-90 mmbf in the coming years. Last fiscal year the Forest sold 81 mmbf of timber which ranked sixth in the nation—very well done!

Dense, decadent stand

Tethered logging system capable of operating on 70% slopes

Following an indoor meeting the group travelled to the Log Cabin timber sale owned by Idaho Forest Group. They are using a tethered logging system that is capable of operating on up to 70% slopes. (*photo, left*)

Much of the Panhandle that needs treatment is very heavily timbered with deteriorating stands on slopes over 35%. Tethered logging is showing that it can both be safer and have less impact that conventional skyline systems.

The following day we met with the Nez Perce-Clearwater Forest and went over their current timber sale program and plan of work. Much like the Panhandle, the Nez-Clear is striving to put out an annual timber target or 85-90 mmbf and have been big timber producers in the past. The current year program includes two large salvage sales from last years' fires—Sand Mountain (*photo, below*) and Johnson Creek. Both projects have completed Draft EA's and the Forest has requested an Emergency Situation Determination for both projects. The Forest is optimistic that the ESD's will be granted.

The Forest was recently dealt a setback when both the End of the World and Hungry Ridge Projects were remanded back to the Forest Service by the District Court. The Forest Service is working on providing the supplemental old growth analysis for the projects. *See* June Newsletter..

Sand Mountain Fire showing heavy mortality in the dense stands.

AFRC would like to thank the Forest Service and our members for making these meetings very successful. We especially appreciate the staff from both Forests for their continued hard work to get restoration work done on their Forests and much needed sawlog volume put in the marketplace for our members. */Tom Partin*

Corey Bingaman Joins AFRC as Western Oregon Field Coordinator

Team AFRC is excited to welcome Corey Bingaman as our Western Oregon Field Coordinator. Corey started at AFRC in July and is based out of the Eugene office.

Corey grew up in Portland, and his family has been in Western Oregon for over a century. He graduated from Oregon State University with a B.S. in Forest Operations Management in 2010. Upon graduating, Corey worked as a consulting forester for several companies throughout Oregon, California, and Montana. As a consultant, Corey worked with small and large private landowners, as well as state and federal agencies to accomplish various forest management activities. This included timber sale administration, GIS and cartography, timber inventory planning and implementation, and prescribed burning. Notably, consulting gave Corey the opportunity to learn and work in every major timber type across the Western United States.

Eventually, Corey's career led him to the University of Montana (UM) where he received his Master of Business Administration with a focus on forest management in 2018. While at UM, he worked as a graduate research assistant for the Bureau of Business and Economic Research in their Forest Industry department.

Most recently, Corey worked as a staff forester for Collins Pine Company in Chester, California. Working at Collins in particular, and throughout the Western United States in general, he witnessed first-hand the importance of actively managing Western forests for resilience to disturbance, especially in an age of unprecedented climate change and catastrophic wildfires. Corey is also a California Registered Professional Forester. In his free time, Corey enjoys playing Irish hurling, hiking, and spending time outside with his wife and two sons. /*Travis Joseph*

Forest Sector Leader, Advocate Larry Giustina Passes

AFRC was saddened to learn of the passing of Larry Giustina on July 19 due to complications of Alzheimer's Disease. He was 73. Larry led an incredibly full life, dedicated to his family and passions, which included timber, golf, and Oregon State University (OSU).

Larry was prominently involved in the timber industry. The Governor appointed him to serve three terms on the State Board of Forestry, and he was the past chair of the Oregon Forest Industries Council and the Northwest Forestry Association (predecessor to AFRC). Larry was also active with Keep Oregon Green and had a significant and lasting impact on OSU, the College of Forestry, and the communities that surrounded him. He was a friend, mentor, and inspiration to many.

An obituary published in the Register Guard, noted: “At the end of the day, for Larry Giustina, it was always about doing the right thing. This was the reason you always wanted him on your side. For his quiet diplomacy, and friendly demeaner, and for his ability to find what was best for everyone involved.” A Celebration of Life will be held on Wednesday, August 10 at 1:00 pm at The Shedd and a reception will follow at the Eugene Country Club. /*Travis Joseph*