



## Washington DC Update

With another government shutdown deadline quickly approaching on March 2, discussions are underway between the Biden Administration and Congressional leadership to reach agreement on another stopgap funding bill. Little progress has been made to reach agreement on a long-term agreement or pending supplemental spending requests, including additional military aid for Ukraine.

House Speaker Mike Johnson (R-LA) announced that he is only willing to consider another Continuing Resolution (CR) to keep the government open if there is an agreement on a schedule for finalizing appropriations bills. Under Johnson's proposal, six appropriations bills, including the Interior and Related Agencies bill, would need to be finalized by March 8. Without such an agreement, Johnson has indicated that a March 2 shutdown for some agencies may be inevitable. The Forest Service is currently operating under a CR that runs to March 8.

In a recent [memo](#), Forest Service Chief Randy Moore signaled that the agency should be prepared for less funding due to potential reductions (or flat) Fiscal Year 2024 appropriations and a 5.2 percent cost of living increase for federal employees. Of course, the agency is still struggling to spend the billions it received under the Inflation Reduction Act and the Bipartisan Infrastructure Legislation. Despite receiving record funding and direction from the White House and Congress to address the wildfire and forest health crisis, Forest Service timber outputs remain flat or are decreasing.

*Farm Bill prospects look dim.* Senator Debbie Stabenow (D-MI), who chairs the Senate Agriculture Committee, recently signaled that she would prefer to extend the current farm bill rather than reaching agreement with House Republicans on their demands for limits to climate funding and food stamp programs. Stabenow is retiring at the end of this Congress and is unlikely to accept any partisan policy demands from the House, particularly as Democrats believe they have a good chance of regaining the House majority this November.

House Agriculture Committee Chairman GT Thompson (R-PA) and Forestry Subcommittee Chairman Rep. Doug LaMalfa (R-CA) are eager to include some additional forestry reforms, which may have bipartisan support from some House Democrats on the Committee. However, deep divisions within the Republican caucus make it challenging to advance a farm bill that doesn't include provisions that would render it dead on arrival with Senate Democrats.

*Vilsack appears before House Agriculture Committee.* On February 14, the House Agriculture Committee convened a hearing to hear [testimony](#) from Agriculture Secretary Tom Vilsack on "the state of rural America," which covered a wide range of topics. A broad range of committee members,

Republicans and Democrats, pressed the Secretary about forestry issues, including management of the National Forest System.

Reps. Doug LaMalfa, Jim Costa (D-CA), and Dusty Baker (R-SD) expressed continued frustration with the lack of progress by the Forest Service to increase fuels reduction and forest thinning efforts on tens of millions of acres of at-risk forests. Rep. Lori Chavez-DeRemer (R-OR) inquired about the status of the Northwest Forest Plan Federal Advisory Committee and Rep. Marie Gluesenkamp-Perez (D-WA) expressed concern about the impact of proposed EPA particulate matter regulations on the forest products sector and prescribed fire.

Vilsack's responses largely included familiar talking points about the agency's efforts to create new markets, including cross-laminated timber, and the agency's efforts to implement recent record funds and new authorities provided by Congress. /Heath Heikkila

<h2>The AFRC Podcast</h2>  <p><b>Episode 30: Rep. Cliff Bentz on the U.S. Supreme Court, Antiquities Act and O&amp;C Timberlands</b></p> 	<p>The <a href="#">AFRC Podcast</a> is a monthly discussion examining key issues and news relating to forestry, forest products and public lands management.</p> <p>In December, Congressman Cliff Bentz of Oregon led a coalition of U.S. Representatives and Senators in filing an amicus brief with the Supreme Court, urging the Court to hear two important and critical cases challenging the President's misuse of the Antiquities Act. These cases, <i>American Forest Resource Council v. United States of America</i> and <i>Murphy Company v. Biden</i>, present a clear opportunity for the Court to establish limits on presidential authority and uphold the Constitution's separation of powers doctrine. Congressman Bentz joins The AFRC Podcast to discuss the Antiquities Act and the importance of curbing executive overreach.</p> <p><a href="#">Click here to listen</a> to Episode 30. Our podcast is available on Spotify! Also now available on Apple Podcasts!</p>
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### Rep. Marie Gluesenkamp Perez Added to AFRC Annual Meeting Agenda



Final preparations are underway for the 2024 AFRC Annual Meeting, April 2-4 at Skamania Lodge in Stevenson, Washington. Registration is open until March 29. Please visit our website to [register](#) and [book your room](#) – our room block has been extended to March 8. Our [meeting agenda](#) continues to be updated with engaging speakers and informative panels. Here are some new highlights:

- On the morning of Wednesday, April 3, U.S. Representative Marie Gluesenkamp Perez (D-Washington) will welcome you to her district and present a new vision for federal forest management in Congress.

- Molly Pitts of The National Wild Turkey Federation, and Marcus Selig of the National Forest Foundation will speak on a panel about mobilizing the private sector to get more work done on our forests.
- Tim Bishop of Mayer Brown, and Mike Haglund of Haglund Kelley LLP will discuss the O&C Act, the Antiquities Act and the Supreme Court, followed by former Reagan speechwriter Clark Judge, who will also discuss his experience working with AFRC in support of our joint O&C Lands case before the U.S. Supreme Court.
- The popular "Bill & Heath Show" returns. Bill Imbergamo, Executive Director of the Federal Forest Resource Coalition and Heath Heikkila, AFRC Director of Government Affairs, will discuss federal forest management in a presidential election year.

Stay tuned for more exciting announcements. Any questions about our annual meeting can be directed to Cindi Kaneshige at [ckaneshige@amforest.org](mailto:ckaneshige@amforest.org). We look forward to seeing you in the beautiful Columbia River Gorge in Stevenson, WA. /*Nick Smith*

### **New Lawsuit Challenges Forest Service Timber Targets**

In January, environmental groups filed a lawsuit challenging the Forest Service's practice of developing annual timber targets. The complaint argues that the Forest Service fails to properly study environmental and climate impacts of establishing targets and the logging projects that are designed to fulfill the targets.

Targets are measured in units of hundred cubic feet (CCF) and assigned by Region and by Forest following finalization of each fiscal year's budget. These levels of planned harvest are also a function of multiple vegetation management projects that are analyzed through the lengthy and exhaustive NEPA process. This process includes the analysis of environmental impacts of conducting planned vegetation management, including the harvest of timber and other products.

Since the Forest Service manages its land primarily for forest health and fire resiliency objectives, timber outputs are generally characterized as a 'byproduct' or 'tool' of attaining these other goals. As such, the annual output of these products is driven more by locally-desired forest health conditions than it is by top-down assigned CCFs. In fact, not all timber outputs actually come in the form of timber. For example, in fiscal year 2023, only 46% of Region 5's "timber" outputs were actually in the form of timber products. The remaining 54% were firewood and biomass. These percentages were a function of the Region's desire to meet its forest health conditions by removing small trees and brush that could only be utilized as firewood and biomass.

Ultimately, the use of timber and non-timber targets serves as more of a customer and partner relationship device than a quota. Wood product manufacturing facilities rely on raw material from multiple sources, including timber and non-timber products from Forest Service lands. Estimations of the projected level of this supply for any given year are critical for planning and resource allocation. The same concept applies to loggers and other contractors who depend on accurate projections of workloads to plan their annual operations.

Even these estimations and projections in the form of targets are often unreliable. In fiscal year 2023, Region 1 only attained 80% of its assigned timber target, and over a quarter of that total was in non-timber products such as firewood. In fiscal year 2021, Region 6's target was reduced by 23% midway through the year to account for wildfire impacts. Despite these hiccups, purchasers and operators appreciate the Forest Service's attempts to provide reliable annual work plans, even if they are occasionally unfulfilled. It's discouraging to see special interest groups attempting to disrupt the agency's ability to provide this critical piece of customer and partner service. /Andy Geissler

## **AFRC Argues Before the Ninth Circuit Defending the Tecuya Project**

On February 8, the Ninth Circuit held oral argument regarding the challenge to the Tecuya Ridge Shaded Fuelbreak Project (Tecuya Project) on the Los Padres National Forest. The panel included Judges Kim McLane Wardlaw (Clinton appointee), Michelle Friedland (Obama appointee), and Jennifer Sung (Biden appointee). AFRC, California Forestry Association, and Associated California Loggers are participating as Defendant-Intervenors in this second appeal before the Ninth Circuit in support of the Project and the Roadless Rule exception. *See Los Padres ForestWatch v. U.S. Forest Serv.*, No. 23-55054 (9th Cir. Aug. 14, 2023). Video of the hearing is [available here](#).

The Tecuya Project is a strategic shaded fuelbreak along the Tecuya Ridgeline to protect the nearby Wildland Urban Interface communities. The project area has become overgrown, weakened by drought and bark beetle infestation, and is highly vulnerable to wildfire. The project area was identified in both the Mt. Pinos Community Wildfire Protection Plan and the Los Padres National Forest Strategic Fuelbreak Assessment as a priority fuelbreak. The Tecuya Project authorizes thinning on 1,626 acres, including approximately 1,075 acres that overlap with the Antimony Inventoried Roadless Area (IRA). Under the 2001 Roadless Area Conservation Rule (Roadless Rule), the Forest Service can only approve commercial thinning in IRAs of "generally small diameter timber." 36 C.F.R. § 294.13(b)(1).

In 2022, the Ninth Circuit [remanded](#) the Tecuya Project back to the Forest Service to substantiate its determination that trees 21-inches at diameter at breast height (dbh) are "generally small diameter timber" within the project area. The court expressly did not require that the Forest Service undertake any particular method but found that the administrative record at that time was inadequate. [See February 2022 Newsletter](#).

The Forest Service then issued a Revised Decision Memo explaining the agency's use of a growth potential methodology to determine what constitutes "generally small diameter timber" in the project area; specifically, Jeffrey Pine have a growth potential of 60 to 90 inches dbh and, therefore, the removal of trees up to 21-inches dbh are small in comparison to the Jeffrey Pine's growth potential. Overall, 98.5 percent of the thinning activities in the project area involve trees that are less than 14-inches dbh, and only 1.5 percent of the trees are between 14 and 21 inches dbh. District Court Judge Phillips [ruled](#) in favor of the Forest Service, upholding the project and finding that the agency complied with the Ninth Circuit remand order by explaining how the trees to be thinned are "generally small" based on the tree species' growth potential. [See December 2022 Newsletter](#).

The sole issue before the Ninth Circuit in this second appeal is whether the Forest Service, on remand, adequately substantiated its determination that trees to be thinned for the shaded fuelbreak meet the "generally small diameter timber" requirement under the Roadless Rule's exception for thinning in an IRA. Instead of discussing the Roadless Rule's "generally small diameter timber" requirement, Los Padres ForestWatch et al.'s argument focused on whether the project area was overgrown and whether the



Forest Service determined that thinning trees in the 14- to 21-inch dbh size class would reduce wildfire risk. The panel was very active with questions and were critical of Los Padres ForestWatch et al.'s arguments because counsel offered no evidence that could show that the Forest Service's use of the growth potential methodology and its supporting analysis was in clear error, or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," which is the standard Los Padres ForestWatch et al. must meet for the court to vacate and remand the agency's Revised Decision Memo.

The Government responded well to questions from the panel, demonstrating that the Forest Service had sufficiently substantiated its use of the growth potential methodology. The panel also asked the Government whether the agency's use of growth potential was a novel approach or a post-hoc rationalization, though overall the panel seemed to defer to the Government's analysis and reasoning.

AFRC on behalf of Defendant-Intervenors was able to highlight to the Court the importance of the Project--to protect the nearby communities in the Wildland Urban Interface. AFRC also provided clarity on the site-specific analysis in the Forest Service's Revised Decision Memo, providing citations in the administrative record that the agency was not making general assertions about the Jeffrey Pine's growth potential but had looked at the on-the-ground, site-specific conditions, such as soil and climate, in reaching that determination. Judge Friedland, who was the most active judge during questioning, appreciated AFRC's reference to the site-specific analysis because she thought the Forest Service had not completed or provided any site-specific analysis.

AFRC was also able to affirmatively answer a question from Judge Sung about whether the Forest Service's use of the growth potential methodology is permissible within the Roadless Rule. Finally, AFRC also responded to questions from the panel about deference because there are two types of agency deference at play in this case: (1) the *Auer/Kisor* deference, which applies if there is ambiguity in an agency regulation; and (2) the *McNair* deference, for matters that fall within the agency's technical expertise. We expect a ruling from the Ninth Circuit within the next six months. /Sarah Melton

## **Lolo Plan Revision Team Releases Proposed Action**

On January 31, the Lolo National Forest released the Proposed Action for its Land Management Plan revision, beginning a 60-day comment period that ends on April 1. The Proposed Action effectively serves as a preliminary draft land management plan and outlines desired conditions, objectives, and standards and guidelines.

The Lolo, which covers slightly over 2 million acres in western Montana, began the revision process in the winter of 2022 and anticipates completion of a final plan by the end of 2026. AFRC and several of its members and partners have formed a coalition to facilitate a line of communication with the planning team and to establish a concerted voice in favor of active forest management on public lands. Members of the coalition engaged with the planning team at several public meetings in February to learn about the Proposed Action and provide initial feedback. Among other issues, the coalition has emphasized the importance of the Lolo National Forest to the regional wood basket for most of the sawmills remaining in Montana as well as some of the mills in northern Idaho. The jobs created by active forest management are critical to the communities and counties that have lands in or near the Lolo National Forest.

The Proposed Action designates 851,201 acres as suitable for timber production, 1,033,730 acres as unsuitable for timber production but where timber harvest can occur to meet other desired conditions, and 378,314 acres where timber harvest is excluded entirely. The Sustained Yield Limit (SYL), which

represents the maximum harvest level (aside from salvage) from the suitable timber base was calculated to be 144 million board feet (mmbf). However, the Projected Timber Sale Quantity (PTSQ) is tentatively set at 44 mmbf and the Projected Wood Sale Quantity (PWSQ) at 50 mmbf. The PTSQ is the sawlog component of the PWSQ, which also includes non-saw material, biomass, and firewood.

AFRC and other coalition members are particularly concerned with the significant gap between the PTSQ/PWSQ and the SYL. If the SYL is accurate and the PWSQ reflects the Lolo's future annual harvest program, there would be nearly 100 mmbf of annual net forest growth on a Forest that currently appears to be overstocked. However, neither the PTSQ nor the PWSQ are a function of attaining desired

future conditions or aligning with the local industry's raw material needs. According to the Proposed Action, the PTSQ is neither a ceiling nor a target, but rather represents the planning team's best estimation of how much timber can realistically be offered for sale each year given its anticipated budget and staffing constraints. However, the recent success of the shared stewardship concept and Good Neighbor Authority should provide opportunities for the Lolo to overcome its own budget and staffing constraints by leveraging the private sector to expand its timber program beyond what is estimated in the Proposed Action.



*Forest Service staff outlining the Proposed Action to a group of interested citizens in St. Regis.*

The Proposed Action also outlines desired future conditions but provides limited information on existing conditions. This information gap is also

concerning as its inclusion could provide useful insight on the need for active management as well as informing vegetation management planning in the future. Ideally, the revised plan would include objectives and direction designed to shift existing conditions toward the natural range of variation over the 15–20-year life of the plan. This need is particularly relevant in the Wildland Urban Interface (WUI), which covers 45% of the National Forest. Treatments needed to mitigate fire risk in the WUI should be a priority that is reflected in the revised plan's direction.

While AFRC and the coalition are discouraged with some components of the Proposed Action, we believe our input could inform the ensuing Environmental Impact Statement and ultimately improve the Draft Forest Plan. Information on the Proposed Action can be found [here](#). /*Andy Geissler and Tom Partin*

### **Case Study Illustrates Climate Benefits of Harvesting DNR State Trust Lands**

Over the last couple of years, there have been a small number of individuals calling for the Washington State Department of Natural Resources (DNR) to stop harvesting legally available timber over 80 years of age on DNR-managed state trust lands. The timber stands in question are primarily those made available for harvest under the 2019 adoption of the Marbled Murrelet Long Term Conservation Strategy (MMLTCS).

Those calling for preserving these trees are unhappy with the MMLTCS making these trees available for harvest. The argument they are now making is that these trees need to be preserved due to the “climate crisis” and the need to sequester and store carbon.

To determine what the actual carbon accounting is at the timber sale level, AFRC asked the Consortium for Research on Renewable Industrial Materials (CORRIM) to conduct a full carbon accounting of DNR timber sale using life cycle assessment (LCA) data on forestry, forest operations, and manufacturing of products that were produced from that sale.

The Penny Alderwood Timber Sale was selected for this [case study](#) (summary of findings also [available here](#)). The 235.1-acre sale is located in east Jefferson County and contained a mix of second- and third-growth stands. Some of the second-growth units contained stands 80 years or older, which were identified by anti-forestry activists in their opposition to the logging operation.

In addition to the LCA assessment for the timber sale, a comparison with a ‘no-harvest’ scenario was also conducted. This was requested partly due to ongoing claims by the activists that not harvesting these stands is better for carbon sequestration and storage.

The Penny Alderwood sale was purchased by an AFRC member and most of the logs removed from the sale were processed by the purchaser or other AFRC members. This provided a unique opportunity to use extensive data provided by the timber purchaser related to harvest operations, transportation distances, and the different types of wood products produced.

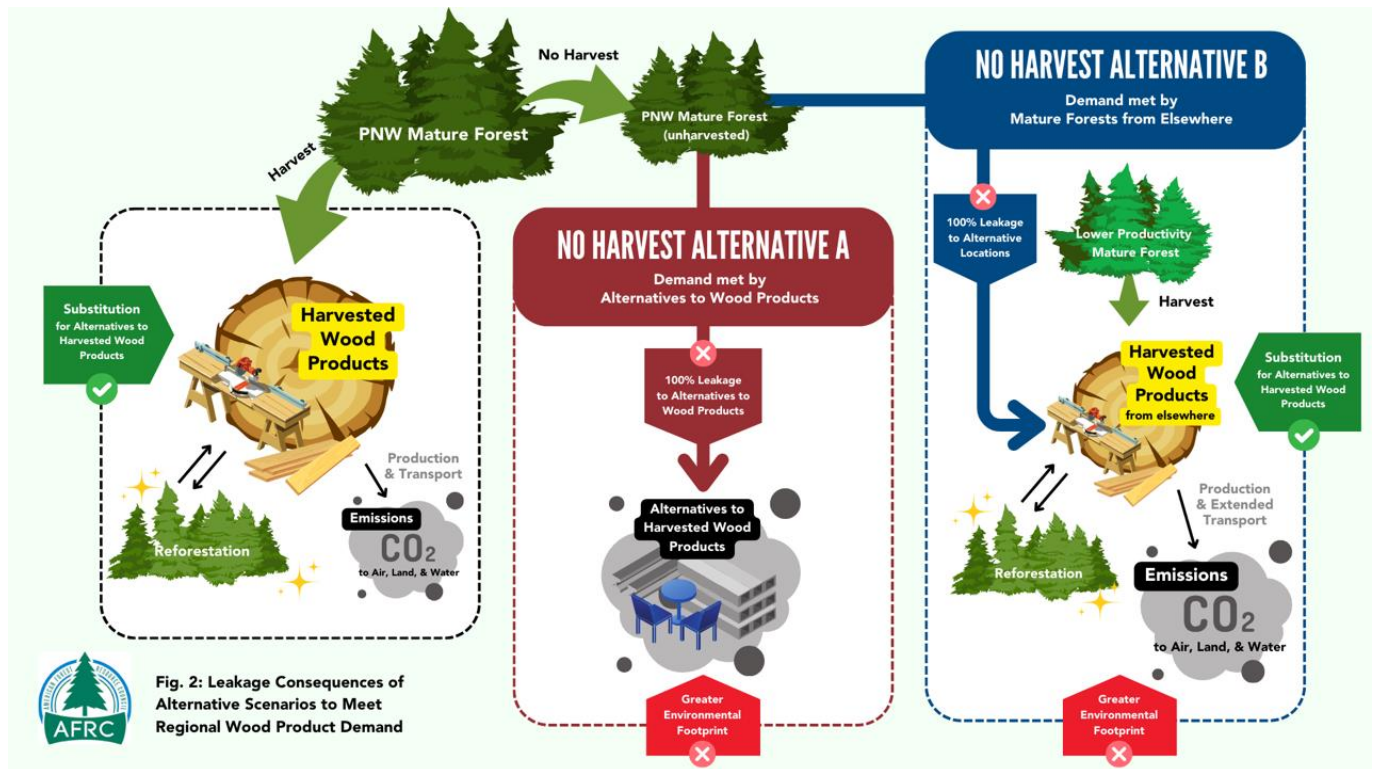


Fig. 2: Leakage Consequences of Alternative Scenarios to Meet Regional Wood Product Demand

Western Washington state trust lands managed by DNR are currently harvested around age 65 on average. This leads to a substantial portion of the harvested wood ending up in long-lived wood products, such as

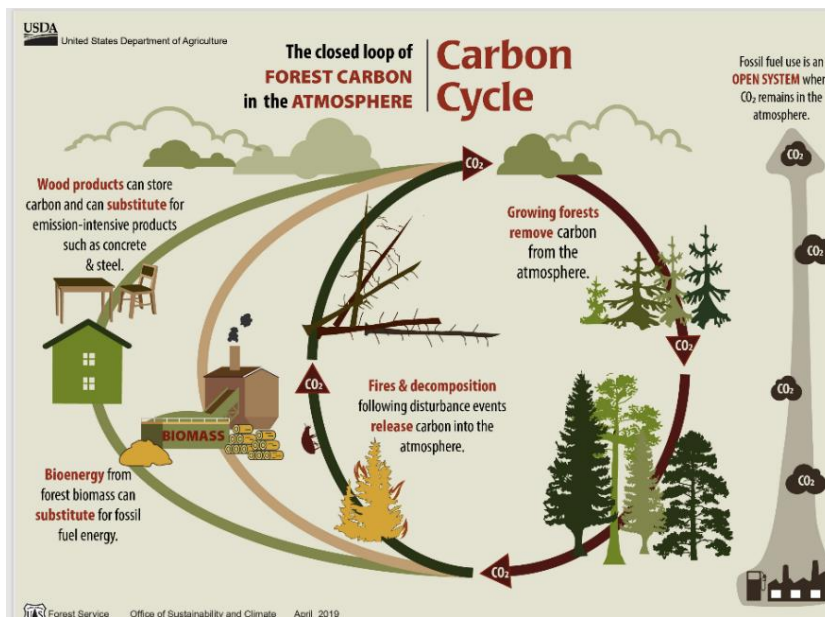
homes. Logging opponents claim these stands over age 80 (they have termed them “legacy” forests) experience continued, and substantial, forest growth and carbon sequestration and storage past year 80, but these assumptions are not supported by FIA data. The FIA data indicates that net carbon sequestration rates in these DNR forests, which are managed for longer rotations, effectively go to zero after the stands reach 70-80 years old.

The case study brought to light some interesting takeaways. First, for every acre of the 80-year DNR-managed stand harvested, there is a net of 11.71 metric tons more of carbon stored or offset over the non-harvest alternative.

Additionally, because Washington state law requires reforestation after harvest, over the next 40 years the new trees provide a climate benefit of as much as 72 metric tons per acre over the non-harvest alternative. The full carbon calculation indicates there is no carbon “debt” after harvest when accounting for substitution and leakage.

While these results are from an analysis at the forest scale or timber harvest scale, these findings are important as Dr. Elaine Oneil, Director of Science and Sustainability, CORRIM, and lead researcher for the study pointed out:

*“Examining outcomes at the forest scale misses most of the impacts and benefits that can accrue from a managed forest and wood product system. Real climate benefits can only be determined by looking at a scale that measures the likely atmospheric impacts of our activities. At that system-wide scale, carbon debt doesn’t exist, especially when the wood products can serve as substitutes for products with a higher carbon footprint.”*



An ongoing continuous sustainable cycle of forest management; harvesting, re-planting, growing, and harvesting, combined with the use of long-lived wood products provides superior carbon sequestration and storage benefits when compared to unmanaged forests and more carbon-intensive substitute materials. The Intergovernmental Panel on Climate Change (IPCC) recommends:

*“Sustainable forest management can*

*maintain or enhance forest carbon stocks, and can maintain forest carbon sinks, including by transferring carbon to wood products, thus addressing the issue of sink saturation. Where wood carbon is transferred to harvested wood products, these can store carbon over the long-term and can substitute for emissions-intensive materials reducing emissions in other sectors.”- [IPCC Special Report, 2019](#)*



Timber harvested from DNR-managed forested state trust lands is not only an economic benefit for the defined beneficiaries and the communities they serve. But also, a substantial climate solution through the ongoing sustainable harvest of timber and the long-lived wood products that are manufactured from that timber. You can read the [case study here](#). /Matt Comisky

## **Washington Legislative Update**

The Washington Legislature is nearing the end of its 60-day “short session,” which is set to end on March 7. Most of the bills relating to DNR state trust lands are no longer active, but we are closely monitoring budget provisos that were included in proposals from the House and Senate.

### **Budget Negotiations.**

The House and Senate are considering supplemental operating, capital, and transportation budgets that build on the two-year budgets passed last session. The Senate budgets would add around \$725 million and the House budgets over \$1.1 billion.

Lawmakers remain flush with revenue from Washington’s Climate Commitment Act (CCA), a cap-and-trade scheme that generated \$1.6 billion in its first year – far exceeding projections. The state is also receiving significant new revenues from Washington’s new tax on certain capital gains. Both programs were major achievements for Democrats and face repeal votes in November as part of six initiatives heading to the November ballot.

Last year, lawmakers directed \$70 million in CCA funds to permanently set aside 2,000 acres of DNR state trust lands. AFRC worked for months to educate legislators why these set asides don’t benefit our climate and also hurt working families and the beneficiaries of state trust lands.

Unfortunately, anti-forestry activists and their allies in some county courthouses, are advocating for more CCA-funded set asides. Below is an outline of the key provisions in the various budgets which are all funded through the CCA.

### **Senate Capital Budget:**

- \$10 million for reforestation of burned DNR-owned lands, with a focus in state trust lands.
- \$2.5 million for a grant program for private and tribal landowners to assist with reforestation of burned lands.
- \$8 million to fund the purchase of replacement lands for five Trust Land Transfer [parcels](#).
- \$25 million for the Quinault Indian Nation to purchase inholdings owned by the Anderson & Middleton Company. The lands would remain working forests.
- \$5.8 million for community forest grants, for [two proposed forests](#).

### **House Capital Budget:**

- \$10 million for wildfire restoration on DNR-managed lands.
- \$8.3 million to fund the purchase of replacement lands for six Trust Land Transfer [parcels](#), some of which differ from the Senate’s proposed project list.
- \$5.8 million for community forest grants, for the same [two proposed forests](#).

- \$25 million for “encumbered lands – acquisition,” but it is believed that this proviso could include direction to set aside up to 655 more acres of DNR state trust lands and purchase more of the Deep River Woods parcel in Wahkiakum County.

### **House Operating Budget.**

Ten million for DNR “forest treatments in areas where they have the greatest potential to prevent wildfire and protect air quality.” While AFRC supports this funding, its insertion in Committee seemed focused more on the November vote to repeal the CCA.

### **Legislation.**

**HB 2243** – **Creating the children’s social equity land trust (Rep. Kristine Reeves, D-30).** This bill would have created a new land trust at DNR to generate revenue for childcare grants for underserved communities. An amended version of the bill that addressed many of AFRC’s concerns passed out of the House Natural Resources Committee with bipartisan support, but it failed to advance out of the Capital Budget Committee before the cutoff.

**HB 2333** – **Assessing the carbon sequestration potential of state-owned lands for the purpose of generating offset credits under the climate commitment act (Rep. Reeves, D-30).** Rep. Reeves’ intent with this legislation was for DNR and other agencies to do a broad analysis of potential carbon offsets on state lands and buildings before authorizing the entry into these complex, controversial carbon offset markets. AFRC testified with questions about how the bill would reflect two related work group processes funded in last year’s budget. The bill did not advance out of the House Environment and Energy Committee before the cutoff.

**SB 6281/HB 2446** – **Investing in reforestation efforts following landscape-scale forest disturbances (Sen. Kevin Van De Wege, D-24; Rep. Dave Paul, D-10).** WFPA helped draft this legislation to create a \$10 million grant program funded under the CCA for private landowners to reforest lands following catastrophic wildfires and other large disturbances. The bill would also direct an additional \$10 million of CCA funds to DNR for reforestation on state lands. Neither of the bills remain alive, although funding for reforestation is included in the Senate Supplemental Capital Budget. /*Heath Heikkila*

### **AFRC Files an *Amicus Curiae* Brief In Support of Three Projects on the Fremont-Winema National Forest**

On February 26, AFRC filed an [amicus curiae brief](#) in the Ninth Circuit supporting the Forest Service’s use of the timber stand and wildlife habitat improvement categorical exclusion (CE-6) to approve the Baby Bear Timber Stand and Wildlife Habitat Improvement Project (Baby Bear), the Bear Wallow Timber Stand and Wildlife Habitat Improvement Project (Bear Wallow), and the South Warner Habitat Restoration Project (South Warner) on the Fremont Winema National Forest. *See Oregon Wild, et al. v. U.S. Forest Serv., et al., No. 23-35579 (9th Cir. Dec. 6, 2023).*

Plaintiff-Appellants Oregon Wild and WildEarth Guardians appealed Oregon District Court Judge Michael McShane’s August 2023 summary judgment order that upheld the three projects. AFRC participated as [amicus curiae](#) in the District Court case, and Judge McShane granted AFRC time during oral argument. *See Oregon Wild et al. v. U.S. Forest Service, No. 1:22-cv-01007-MC (D. Or. Aug. 4, 2023);* [see July 2023 Newsletter](#) and [August 2023 Newsletter](#).

The Forest Service’s categorical exclusions allow for the authorization of certain activities without the need to prepare an Environmental Assessment or Environmental Impact Statement under NEPA. At issue on appeal is CE-6, which applies to “timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction” and “include, but are not limited to ... (ii) Thinning or brush control to improve growth or to reduce fire hazard including the opening of an existing road to a dense timber stand [and] ... (iv) Prescribed burning to reduce natural fuel build-up and improve plant vigor.” 36 C.F.R. § 220.6(e)(6).

Oregon Wild et al.’s appeal comes on the heels of a 2022 decision in the Ninth Circuit, which held that CE-6 “unambiguously” permits commercial thinning. *Mountain Cmty. for Fire Safety v. Elliott*, 25 F.4th 667, 675 (9th Cir. 2022). [See February 2022 Newsletter](#). Because of that ruling, Oregon Wild et al. could not challenge these Projects based solely on their inclusion of commercial thinning activities and, instead, are challenging the Projects based on their size, arguing that no reasonable interpretation of CE-6 would permit this “type and scale” of commercial thinning.

Oregon Wild et al. challenge both the size of the commercial thinning authorized for each project and the validity of CE-6 as applied to projects that involve larger-scale commercial thinning. Unlike some other Forest Service CEs, CE-6 does not include an acreage limitation for commercial or non-commercial treatments. For the Baby Bear Project, commercial thinning is authorized for up to 3,000 acres of the 4,774-acre project area; South Warner authorizes up to 16,000 acres of the 69,567-acre project area; and Bear Wallow authorizes up to 10,000 acres of the 17,200-acre project area. These three projects also include prescribed burning and non-commercial thinning, which Oregon Wild et al. did not challenge.

Oregon Wild et al.’s first argument is that the acreage of commercial thinning activities is a necessary element of CE-6 and that CE-6 cannot encompass projects that involve larger-scale thinning activities. Oregon Wild et al. attempt to portray these three separate projects as a single 29,000-acre project, asking the Ninth Circuit to read into the plain text of CE-6 a theoretical but undefined acreage limit. The District Court [granted](#) summary judgment in favor of the Forest Service, holding that “the plain language of CE-6 is clear on [size]. It contains no acreage limit. Plaintiffs point to nothing in CE-6’s text that would suggest activities under this exclusion are limited by number of acres.” Judge McShane further explained that “it is apparent that the activities involved in the projects here fall squarely within those permitted by CE-6. Each of the projects aim to improve timber stand and/or wildlife habitat by means of thinning and prescribed burning.”

Second, Oregon Wild et al. assert that if CE-6 permits commercial thinning at these larger scales, then CE-6 itself is a violation of NEPA because commercial thinning “can have significant environmental impacts,” arguing that when the Forest Service promulgated CE-6, the agency never made a required finding that commercial thinning under CE-6 would not have individually or cumulatively significant impacts. Judge McShane determined that Oregon Wild et al.’s “facial” challenge to CE-6 fails for two clear reasons. First, Judge McShane held that their facial challenge is time-barred because the applicable statute of limitations is six years and CE-6 was promulgated in 1992. Second, Judge McShane concluded that Oregon Wild et al.’s challenge rests on a procedural claim under NEPA, not a substantive one, and therefore no exception to the statute of limitations applies.

In our *amicus curiae* brief before the Ninth Circuit, we emphasize how important it is for the Forest Service to be able to rely on CE-6 as the agency intended, and expedite much-needed projects, without any imposed acreage limitation. Our brief focuses on three main points: (1) the activities authorized for

the Baby Bear, Bear Wallow, and South Warner Projects—commercial and non-commercial thinning and prescribed burning to improve timber stand health and improve wildlife habitat—clearly fall within the scope of CE-6; (2) unlike other CEs, the plain language of CE-6’s regulatory text does not contain an acreage limitation and the court should not impose one; and (3) for over three decades, the Forest Service has had a history of relying on CE-6 to approve projects that involve commercial thinning.

Further, we explain that the Forest Service analyzed a number of resource conditions in the project areas and found that no extraordinary circumstances were present that would warrant further NEPA analysis—which Oregon Wild et al. do not challenge. Accordingly, we argue that the agency’s determinations that CE-6 applies to these three projects is entitled to deference from the court and should be upheld.

Overall, Oregon Wild et al. patently objects to any aspect of commercial timber harvest involved in a project approved under CE-6, which is vital to improving forest health, supporting non-commercial forest health treatments, and the local communities and the forest products industry upon which they rely. The Forest Service filed their Answering brief on February 22, and Oregon Wild et al.’s Reply brief is due April 11. We expect oral argument to be scheduled later this summer or early fall. /Sarah Melton

### ***AFRC in the News***

- Nick Smith published an opinion in the [Billings Gazette](#) and other Montana newspapers on the implications of federal old growth policy.
- Nick Smith is quoted in a [Statesman Journal/Register-Guard](#) story regarding mill curtailments in Oregon.
- Heath Heikkila appeared on [Undivided with Brandi Kruse](#) to discuss the use of CCA money to shut down management of DNR state trust lands.
- Nick Smith is quoted in an [E&E/Greenwire](#) article regarding a lawsuit filed by anti-forestry groups targeting Forest Service “timber targets.”