Testimony to The House Committee on Oversight & Investigations
Subcommittee on the Interior, Energy, and Environment
Hearing on "Restoring Balance to Environmental Litigation"
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Thank you for the opportunity to address the Subcommittee regarding imbalances in environmental litigation and potential solutions to increase fairness, transparency, and efficiency in management of public lands. There are many common-sense reforms available both through rulemaking and legislation and this hearing is a timely effort to make progress. Progress is needed because of the ways in which litigation tools are being used to impede reasonable land management efforts.

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

Our federal forests, managed by the Forest Service and Bureau of Land Management (BLM), urgently need active management to reduce the risk of severe wildfire. Over 80 million acres of the federal forest landscape – over 40% of our federal forests – have been identified as at high risk from insects, disease and wildfire. The last two summers have seen extensive wildfires across the West, with records being set each year, and athletic and cultural events cancelled. In Oregon alone, hundreds of thousands of acres burned and state fire suppression costs exceeded $100 million, while California saw its largest fire on record, the 420,000-acre Mendocino Fire.

Litigation delays are an important piece of this puzzle. In both 2017 and 2018, project areas burned while they were delayed in litigation. Another forestry project was finally approved this year after *13 years* of administrative and litigation delays. There has to be a better way to resolve disputes fairly and equitably without piling delay on delay. There also has to be a better way to handle attorney fees in these cases, where the amounts awarded are completely out of proportion to the market or to results achieved, and money paid is taken straight from the budget of the agency that needs it. Some reforms were enacted through the 2018 Consolidated Appropriations Act, which is an important first step and shows that bipartisan progress is possible.

Agency procedures are susceptible to abuse

Although much attention focuses on litigation in the federal courts, administrative proceedings are a substantial source of delay and abuse. The applicable procedures can be changed by federal agencies through rulemaking without Congressional intervention.

The Bureau of Land Management's (BLM) protest and appeals process badly needs reform. BLM regulations permit any party to file a protest within 15 days of the announcement of a timber sale. 43 C.F.R. § 5003.3. There is no deadline for the response to the protest and BLM routinely delays award of a timber sale pending protest resolution. Although BLM has a policy to respond to any such protest within 45 days, in recent years that policy has been completely ignored. It has been common for protest decisions to take 18 months or longer. Fringe opponents of BLM action have developed a strategy of protesting every sale in order to obtain a delay. They file extremely voluminous protests, regardless of the size of the sale, with the goal of forcing the agency to respond in excruciating detail to "litigation-proof" the document. Often such protests are just a rehash of the comments these groups have already submitted.

The burning of the Pickett Hog sale shows where this process is out of balance. The sale covered 318 acres in southwest Oregon and was aimed at reducing hazardous fuels and providing timber to support public services and jobs in the area. Despite the small size, this sale would support or retain forty forest-sector jobs (equivalent to a shift at a mill). After a year of planning, Pickett Hog was sold to a timber company in Oregon. Sale opponents submitted a 200-page protest with over 100 protest points. When the Taylor Creek fire approached in August 2018 – nearly a year later – BLM had still not responded to the protest. The sale burned not because of any flaw, but simply because of delay.

Despite causing these significant delays, protests rarely lead to changes to the original decision. When BLM denies a protest, the protestor still has the opportunity to appeal this decision to the Board of Land Appeals (IBLA). 43 C.F.R. § 4.410. In contrast to the indefinite delay inherent in the protest process, unless a stay is granted by the IBLA, once 45 days have passed projects may be implemented (go "full force and effect") even if the IBLA hasn't rendered a final decision. 43 C.F.R. §§ 4.21(b)(3), (b)(4), (c). The IBLA has rigorous standards as to whether a stay can be issued instead of the automatic delay in the current protest period. To obtain a stay in front of IBLA, a party must show "sufficient justification" based on four factors of likely success on the merits, irreparable harm, balance of harms, and the public interest. 43 C.F.R. § 4.21(b)(1). The appellant requesting a stay "bears the burden of proof to demonstrate that a stay should be granted." 43 CFR § 4.21(b)(2). Additionally, IBLA regulations treat a stay as denied once 45 days have passed.

At this point, the protester can still file a lawsuit in federal court to continue their opposition to the project. Thus, the current process gives project opponents three bites at the apple to delay or stop a BLM-administered timber sale – protest, administrative appeal to IBLA, and litigation in federal court. This isn't balance and it is not improving the quality of decisions. It should be reformed.

Similarly, groups have undertaken practices of blanket objection to Forest Service projects, resulting in delay under the applicable regulations. 36 C.F.R. Part 218. It is not uncommon to see

a "copy and paste" error where an objection gets sent to the wrong forest or refers to the wrong project. As with BLM projects, these objections seldom offer anything new, but simply rehash the comments submitted during planning. Fortunately, Forest Service regulations have timelines ordinarily requiring completion of the objection within 45-75 days. 36 C.F.R. § 218.26(b). There are objections for emergency situations. 36 C.F.R. § 218.21.

The Forest Service regulations do need reform, particularly in that the emergency situation determination (ESD) regulations offer a narrow window to streamline the planning process in situations where time is of the essence such as post-fire harvest. The regulation allows for an ESD where necessary to "avoid[] a loss of commodity value sufficient to jeopardize the agency's ability to accomplish project objectives directly related to resource protection or restoration." 36 C.F.R. § 218.21(b). This restrictive structure forces bundling of efforts that might be better addressed in separate workstreams, and it leads to its own litigation, further delays, and further wood deterioration. The Forest Service's reluctance to use an ESD led to significant setbacks in Idaho's Nez Perce-Clearwater National Forest. There, the Johnson Bar Fire destroyed an area that had been planned for collaborative restoration. The failure to use an ESD delayed the project by six months, resulting in the loss of an entire working season when the project was held up in court.

For both agencies, fear of litigation can result in refusing to implement the project while litigation is in progress—even if no injunction is ever issued. Armed with this knowledge, project opponents may file suit even if their chances of success are limited.

The burdens of litigation

Litigation in the federal courts is not balanced either. A party opposing a forestry project or timber sale has multiple arenas. Once it gets to court it has multiple chances to stop a project: (1) temporary restraining order; (2) preliminary injunction; (3) injunction pending appeal (district court); (4) injunction pending appeal (appeals court); (5) appeal of the preliminary injunction; (6) summary judgment; (7) injunction pending appeal of summary judgment (district court); (8) injunction pending appeal of summary judgment (district court); and (9) appeal of summary judgment. For a project to be implemented, it has to keep winning and winning, whereas opponents have to win only once. Project opponents keep trying, and even if they are not successful, they succeed in diverting agency and public time and resources needed to respond to repeated injunction requests.

The results of this litigation burden can be dramatic. For example, on May 18, 2018, only three days after oral argument, the Ninth Circuit issued a one-paragraph order affirming the district court and approving the Frog Project on the Sequoia National Forest. This lightning-quick resolution marked the end of one of the lengthiest administrative and court processes anywhere.

Frog was first proposed in 1999 and the first Environmental Assessment (EA) issued in 2000. The Forest Service proposed to improve forest stand health on 1,630 acres in the Sequoia National Forest by thinning small understory trees to reduce stand density. The contract was awarded in in 2001. Operations commenced in 2004 but were halted by the McNally Fire and by a 2005 injunction. The initial injunction remained in place for seven years. In 2013, the Forest Service completed a revised Environmental Assessment and the court dissolved the injunction.

Operations resumed in 2015, but shortly before the 2016 operating season, a lawsuit was filed, claiming that the 2013 revised EA needed to be supplemented because of effects on fisher habitat arising from the recent mortality epidemic in the southern Sierras. The Forest Service voluntarily suspended operations for a year to engage in extensive data collection. Once that was finished, it decided no supplemental EA was necessary. And in September of 2017, the district court upheld the project, and it was affirmed.

Litigation impacts have been particularly egregious on collaborative projects. Congress authorized the Collaborative Forest Landscape Restoration Program (CFLRP) in 2009, 16 U.S.C §§ 7301-7304, recognizing a growing consensus among groups, from loggers to environmentalists, that active management can decreases forest fire extent, severity, and impacts. At AFRC, we are deeply involved in collaborative efforts with such groups, and our attorneys are representing collaborative groups in litigation throughout the West. Following the science, projects developed in collaboration between industry, environmental groups, recreational users, local government, and others have made significant strides in forest restoration.

The courts have not caught up. In two recent cases, the Ninth Circuit halted or overturned collaborative projects without recognizing the years of work that went into building consensus or the public interest in supporting collaborative work. Instead, the court bought into dubious arguments made by fringe groups who reject even the idea of forest collaboration and oppose removal of so much as a single tree from the forest.

The East Reservoir Project on the Kootenai National Forest has the strong support of the Kootenai Forest Stakeholders Coalition, a collaborative group including timber companies, local government, and several environmental groups. I am representing the Coalition and Lincoln County in the case. The Coalition put a lot of work into the project, including pushing for changes that reduced impacts on lynx habitat. Still, a fringe group sued. The district court found that the project could move forward. But in September 2016, the Ninth Circuit halted all commercial harvest in the project, and it remained stalled for two years pending a further decision. When that decision, *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025 (9th Cir. 2018), finally came down this July, it approved 80% of the project. Still the whole project was halted for two years while the Ninth Circuit made a decision.

Another Ninth Circuit ruling from this August strikes another blow against collaborative landscape management. The court rejected, on dubious grounds, the Lost Creek-Boulder Creek collaborative project. *Alliance for the Wild Rockies v. U.S. Forest Service*, 899 F.3d 970 (9th Cir. 2018). The project reflects a common understanding that doing nothing is not an option. Without prescribed burns and noncommercial thinning at least 40,000 acres remain at risk of mortality from insect, disease and fire; 25 culverts will not be replaced (to the detriment of bull trout); and 55 million board feet of logs will not be manufactured into wood products while maintaining the approximately 1100 associated jobs.

The Ninth Circuit ignored all these factors, and its opinion does not mention the collaborative process at all. Instead, it assumes that the restoration emphasis of the project is a binding forest plan amendment and compares that to the existing forest plan, rather than analyzing whether the project is consistent with the forest plan. This upside-down ruling shows that litigation reform is

a necessary element to any meaningful change on our forests. Indeed, the court's decision is so flawed that the government has already taken the unusual step of filing a petition for rehearing. The Payette Forest Coalition also filed a petition for hearing with unanimous support from its membership of conservation groups, recreation interests, local governments, and timber representatives.

Substantive litigation reform

Litigation reform could take many shapes. Since there are so many opportunities to halt a project, some limits on the type of injunction available may be appropriate. The Healthy Forest Restoration Act (HFRA), for example, limits injunctions against projects to 60 days, but it allows indefinite renewals. 16 U.S.C. §§ 6516(c)(1)-(2). HFRA also alters the balancing test to be applied in considering an injunction 16 U.S.C. § 6516(c)(3). Meaning litigation reform would impose limits on what types of injunctions could be sought, particularly for collaborative projects.

East Reservoir also highlights the impact of Ninth Circuit's disastrous *Cottonwood* decision. *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), ruled that the Forest Service had to re-do consultation at the *Forest Plan level* for 11 National Forests after designation of critical habitat for lynx throughout the region. It says that a completed forest plan is still an action in progress, so the Forest Service has to re-do its ESA compliance on an entire region when a new species is listed or new critical habitat is designated. Following *Cottonwood*, courts started to hold up projects to wait for the full plan-level consultation. This appeared to be the basis for the injunction against East Reservoir, even though the project was not likely to adversely affect any listed species. Another project, called Stonewall, was subject to an injunction and burned only a few weeks later. Fortunately, Congress instituted a partial *Cottonwood* fix in the 2018 Omnibus. This was a good first step, but a full fix would remove an important litigation-generated barrier.

Another avenue is arbitration. Many states have adopted mandatory arbitration systems for cases such as car accidents, and contracts often provide for required arbitration. The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (FAA), establishes a federal policy in favor of arbitration. The FAA does not establish specific requirements for arbitration, but provides that private arbitration agreements will be enforced. States and arbitration bodies usually provide that arbitrators must be neutral and must make disclosures to avoid any conflict of interest. They often also rely on senior attorneys or retired judges. Thus, any arbitration provision should ensure neutrality and provide guidance on the selection of arbitrators (such as approving retired federal or state court judges). It should also deal with cost allocation. Arbitration should be established with required timelines, such as a final decision within 90 days that is not appealable. Such a structure would give project opponents the opportunity to be in front of a neutral decisionmaker but would provide a speedy decision. In that situation, any errors could be quickly identified and fixed, avoiding situations where projects are halted simply for procedural reasons.

Senator Daines has introduced a bill, the "Protect Collaboration for Healthier Forests Act," S.2160, which establishes a reasonable structure for a pilot arbitration program. A pilot program would allow time to assess whether arbitration is effective at improving outcomes.

Reforming attorney fees litigation to avoid skewed incentives

The Equal Access to Justice Act (EAJA) is the primary fee-shifting statute applicable to federal forest litigation. It provides for an award of attorney fees to a qualified prevailing party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2812(d)(1)(A). EAJA continues to result in significant outlays of funds to environmental groups. A report from Strata Policy indicated up to $5.8 million in such payments in a twelve-month period. Along with other fee-shifting statutes, EAJA is a means for anti-management groups to financially support their litigation efforts.

EAJA was first enacted in 1981 for a three-year period, then permanently reauthorized in 1985. It was originally titled the "Small Business Equal Access to Justice Act" and was "intended to respond to a chronic problem *small business owners* have had contesting or challenging the unreasonable exercise of Government authority." When signing the bill, President Carter touted the bill's "direct benefit to millions of small business men and women."

The Small Business Committee cautioned, "It must be noted that the real aim of this legislation is not to spend great sums to pay the costs of fighting unwarranted Federal action." The Supreme Court has relied on Congressional statements that found appropriate fee decisions "have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984) (quoting S. Rept. No. 94–1011 at 6 (1976)).

The courts are not following through on these directives. Instead, they are issuing fee awards disproportionate to the market rate for services performed, thus incentivizing environmental litigation. For example, the Oregon district court recently awarded over $180,000 for a case that involved a single motion for preliminary injunction and only one hearing. *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Turner*, 305 F. Supp. 3d 1156 (D. Or. 2018). This is likely at least twice the amount a private client would pay for the work. In another case, the same court awarded over $800,000 for a case that went to the merits but did not involve discovery, unusual motion practice or a trial. *Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, No. 3:12-CV-00431-HA, 2014 WL 7331039 (D. Or. Dec. 19, 2014). Again, this is vastly in excess of what a private client would willingly pay. And these are both cases where I served as a fee expert and the court made some reduction in its award.

In the past decade, private law practice has experienced significant disruption from the advent of aggressive billing management, alternative fee arrangements, and outsourcing. Since fee awards are supposed to be based on the market, it makes little sense to insulate them from these facts. But courts have generally persisted in simply adding up the hours spent and multiplying them by a private-practice rate. They do very little to police whether hours were reasonably necessary to the case. As a result, there is little incentive for plaintiffs to accept a reasonable settlement offer on fees; instead, they drive up the ultimate amount either through negotiation or litigation.

Reforms are needed to better align fee awards with the market, through mechanisms such as fee arbitration, fixed fees for certain actions, or hour caps on certain tasks.

Rate reform should be pursued

Unless special expertise is required, EAJA fee awards are supposed to be limited to an inflation-adjusted maximum, currently about $193 per hour. In the D.C. Circuit, environmental APA cases are not considered to require special expertise. *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005). In the Ninth Circuit, however, the cap is routinely lifted and groups compensated at the high rates equivalent to those in private practice. *See*, *e.g.*, *NRDC v. Winter*, 543 F.3d 1152 (9th Cir. 2008). The EAJA cap, currently $193/hour, is a reasonable rate that is in line with private practice rates outside elite law firms in large cities. Eliminating the "specialty" exception would disincentivize litigation but still provide claimants with a fair return.

Similarly, the circuits are split as to what locality's rates should apply. The D.C. Circuit is careful to avoid a "windfall" to attorneys just because the case is in an expensive location, *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755 (D.C. Cir. 1999), but the Ninth Circuit has no such rule. Sticking with a uniform cap would eliminate these problems and rationalize EAJA's effects. Although EAJA was born out of a desire to help small business, it is not implementing that vision today. Common-sense reforms to EAJA's standards and rates would provide fair compensation without creating incentives for obstructionist litigation.

Reforms needed in payments and reporting

EAJA also undercuts forest management in that it directs fees be paid directly out of the agency budget. 28 U.S.C. § 2412(d)(4). This is in contrast to environmental statutes such as the ESA and Clean Water Act, where fees are paid out of the Judgment Fund. 28 U.S.C. § 2414. The current situation punishes the agency twice, reducing active management capacity even further.

As a cost saving move, in 1995 the government stopped keeping track of payouts under EAJA and there is no accountability for how much agencies are spending and environmental groups are reaping from EAJA related cases. Originally, EAJA provided for government wide reporting on its use and cost. For judicial proceedings, EAJA required the Director of the Administrative Office of the U.S. Courts to report annually to Congress on EAJA court activity, including the number, nature, and amounts of awards; claims involved; and any other relevant information deemed necessary to aid Congress in evaluating the scope and effect of awards under the Act. Recent legislation is required the agencies to renew the EAJA fees reporting requirements.