U.S. Senate Committee on Energy and Natural Resources
October 21, 2021 Hearing: *Pending Legislation*
Questions for the Record Submitted to Mr. Christopher French

Questions from Senator Steve Daines

Question 1: Mr. French, would S. 2561 have any impact on the Forest Service's obligation to consult or re-consult on forest projects?

Response: No, S. 2561 would not affect the Forest Service's obligation to consult on individual management activities when necessary.

Question 2: Mr. French, if S. 2561 were to become law, would the Forest Service still consult on completed Forest Plans when the data and science supported doing so?

Response: The Forest Service would consult when amending or revising Forest Plans and would maintain the discretion to engage in plan-level consultations to provide for efficiency at the project scale for activities occurring on units with completed Forest Plans.

Question 3: Mr. French, does the Forest Service typically have to revise Forest Plans as a result of re-consultation triggered by *Cottonwood*-related lawsuits or challenges?

Response: To date, re-consultations triggered by *Cottonwood*-related challenges have not resulted in a determination that amendments to affected Land Management Plans are necessary.

Question 4: Mr. French, I've continued to hear that the *Cottonwood* case law would not pose a challenge to the agency if Forest Plans were routinely updated and revised. Do you believe that to be true?

Response: The *Cottonwood* ruling applies to Land Management Plans regardless of age. Only the 2018 Consolidated Appropriations Act makes the age of a Land Management Plan relevant to the question of when reinitiation of a plan-level consultation may be required. The Act eliminated any requirement to reinitiate plan-level consultations based on new species listings and critical habitat designations altogether until March 2023. After that date, the relief against reinitiation of plan-level consultations is limited to those cases where the Plan is less than 15 years old and no more than 5 years have passed since the new species listing or new critical habitat designation. In addition, within the Ninth Circuit a litigant can bring a challenge based on the availability of new information that reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered at any time regardless of the age of a Land Management Plan.

Question 5: Mr. French, during the hearing you mentioned the 2018 omnibus language that partially addressed challenges stemming from the *Cottonwood* decision. Please elaborate on the shortcomings of that language, particularly as it relates to the "new information" trigger for consultation and the 2023 sunset.

Response: The 2018 Consolidated Appropriations Act only provided temporary relief (through March 23, 2023) from consultation requirements for new species listings or new critical habitat designations. It did not speak to the new information trigger.

The Forest Service has analyzed various approaches to address the upcoming potential consultation workload after March 23, 2023. Our initial analysis estimates that the workload may take 5-10 years to accomplish and

will require multiple millions of dollars per year. For example, for forests just in the Ninth Circuit, the initial required consultation would occur on 187 taxa across 36 national forests. This will divert resources from ongoing and future land management plan revisions, and from project-level consultations to implement needed national forest management activities such as hazardous fuels reduction, ecological restoration, and infrastructure projects. Further, plan-level consultations have the potential to delay decisions for on-the-ground activities until such plan-level consultations are completed.

Question 6: Mr. French, during the hearing you stated that after 2023 almost 100 plans will have to go through re-consultation which will take several years and millions of dollars to complete. Please elaborate on how Forest Service planning, resources, and restoration projects will be impacted.

Response: Please see the response to Question 5.

Question 7: Mr. French, during the hearing you stated that forest management had not yet been crippled by the *Cottonwood* decision. Please provide the number of lawsuits and the number of NOIs filed since 2016 including the amount of projects impacted and the amount of resources spent to respond to litigation and re-consult.

Response: In response to the *Cottonwood* ruling, the Forest Service reconsulted on critical habitat for the Canada Lynx. Forest Service personnel spent an estimated 400 person days valued at approximately $250,000 over 12 months to complete this reconsultation. Since January 2016, there have been at least 27 lawsuits, in twelve states, and 49 notices of intent (NOIs) to sue involving Endangered Species Act new information claims, challenging both plan-level and project-level decisions. Of the 49 NOIs received with new information claims, 26 are project specific, 11 challenge plan-level decisions, and 12 have both project specific and plan-level claims. Three plan-level actions were enjoined or vacated due to litigation associated with NOIs with new information claims. Two project specific actions were enjoined due to litigation associated with NOIs with new information claims.

Question 8: Mr. French, during the hearing you spoke about the split in the courts between the 9th Circuit and the 10th Circuit. You also mentioned the SCOTUS decision in 2004 which created a different standard for BLM Plans than Forest Plans. Please elaborate on why the 9th Circuit *Cottonwood* decision established a new standard for the Forest Service in these states.

Response: The *Petition for Certiorari* filed by the United States in 2016 identifies that the Ninth Circuit's *Cottonwood Environmental Law Center v. USFS*, 789 F.3d 1075 (9th Cir. 2015) ruling is in conflict with the Tenth Circuit's ruling in *Forest Guardians* v. *Forsgren*, 478 F.3d 1149 (10th Cir. 2007).

In 2004, the Supreme Court decided *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*) addressing the nature of Forest Service and BLM land management plans. The *Petition for Certiorari* identifies that the Supreme Court's holding in *SUWA* was relied upon by the *Forsgren* ruling in 2007 and that the Ninth Circuit's holdings in the *Pacific Rivers Council* v. *Thomas*, 30 F.3d 1050 (1994) (PRC) and *Cottonwood* cases are inconsistent with the *SUWA* ruling.

The Petition also identifies that Tenth Circuit's *Forsgren* decision expressly rejects the Ninth Circuit's approach in *Pacific Rivers Council* v. *Thomas*, 30 F.3d 1050 (1994) (PRC). Absent the relief provided in the 2018 Consolidated Appropriations Act, the *Forsgren* and *Cottonwood* decisions create a split in the circuits and established different standards for land management.

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Question 9: Mr. French, during the hearing you spoke about this litigation rate against forest projects in Region One. How might an arbitration program expedite resolution of these challenges to allow projects to move forward?

Response: The Forest Service estimates that over the past 22 years, approximately 13.6 percent of the 446 vegetation management projects in Region 1 have been litigated. The proposed pilot arbitration effort would be limited to 2 projects per year over a 5-year period. USDA is open to future discussions regarding the proposal for an arbitration pilot program to explore the potential for expediting resolution of legal challenges.

Question 10: Mr. French, S. 2836 directs the Forest Service to collaborate with the National Forest Foundation to create a methodology whereby non-federal entities may claim carbon credits in voluntary carbon markets in exchange for funds to be used by the Forest Service to implement projects to increase carbon sequestration. If enacted, how will the Forest Service determine the baseline "business as usual" scenario in which to assess and value the carbon credit and what resources will be required to develop a formula that accounts for the carbon benefits of active forest management across hundreds of tree species and different geographies and climates?

Response: The Forest Service supports collaboration with a variety of non-Federal entities to develop methodology, process, and procedures for leveraging private investments in land management projects that generate carbon reduction and sequestration outcomes on National Forest System lands. Collaborating with a variety of non-federal partners ensures the agency is positioned to leverage external funding, capacity, and expertise at a scale commensurate with both the need and opportunity, and to implement projects across a range of geographies and land management activities.

For several decades, carbon markets and voluntary trading have relied on forest carbon benefits estimates. These have often used tools are based on the Forest Service Forest Inventory and Analysis (FIA) program data that includes nationwide surveys across private and public forests, as well as the Forest Vegetation Simulator (FVS), a suite of growth and yield simulators supported by the Forest Service. It is anticipated that a suite of methodologies and estimates will be needed to account for the carbon benefits of active forest management across hundreds of tree species, different geographies and climates, and ownerships, with FIA data and the FVS models as a foundation. It is highly unlikely that one formula alone could produce credible estimates.

Question 11: Mr. French, could delayed harvest projects qualify as carbon sequestration projects under S. 2836 and, if so, what impact could that have on timber demand and supply?

Response: Forest Service timber management activities produce a wide range of outcomes: production of durable wood products, creation of habitat, restoration of forest ecosystems, mitigation of wildfire risk, sequestration of carbon, and many others. Delays in timber management activities affect when those outcomes occur and increase the risk that those benefits could be lost due to fire, insect and disease outbreaks, and other disturbances. To reduce that risk, the Forest Service must substantially increase the pace and scale of forest management using all available tools, including timber harvesting. We expect that this will result in the increased availability of Forest Service wood products, benefiting rural economies, forest industry, and forest health.