

**STATEMENT OF
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**BEFORE THE
HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON FEDERAL LANDS
MAY 14, 2015**

**CONCERNING
Litigation and Increased Planning's Impact on
Our Nation's Overgrown, Fire-Prone National Forests**

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify today on the impact of litigation and planning on the management of our National Forests. I served as Chief of the United States Forest Service from 2001 until I retired in 2007. My career spanned 41 years and included positions throughout the organization at all levels including some of the Agency's most remote field stations, and in leadership positions at the national forest, regional office and in the Washington Office. I appreciate being asked to testify today about a subject that is very important to me. That is, how do we minimize what is often excessive process barriers that prevent the accomplishment of critical on-the-ground work. The health of the National Forests, primarily west of the Mississippi, is generally poor and in serious need of an increased active on-the-ground management. The attention of this Subcommittee to finding solutions is very necessary.

Here's how I see the current situation: If you have spent any time on our National Forests and Grasslands it is likely that you have experienced the dedication of Forest Service employees. These people truly care about being good stewards of the land. Few things are more frustrating to them than to spend years working with communities and developing restoration projects only to see that work tied up in endless objections, appeals and litigation. Even worse, these dedicated employees often become the scapegoat and get blamed for not doing enough; "If only they would just try harder." Congress and the courts have designed and defined the legal landscape that these employees must navigate to get work done on the ground. While many environmental laws were originally passed for good reason at a time when more checks and balances were needed, the situation has dramatically changed. Now communities are coming together at unprecedented levels to find common ground and to address the increasing threats of insects, disease, invasive species and wildfire. Unfortunately, the sheer multitude of laws, and their expansion by the courts have led to processes almost unintelligible to reasonable people. I would challenge anyone to work under the laws, regulations and litigation that constitute the processes that now exist. We need to concentrate on fixing this problem; not assigning blame. All of us understand that significantly more restoration needs to occur through aggressive active management. We need to reevaluate and reduce excessive process requirements. This can be done without reducing environmental safeguards. In fact if we don't address these problems, much more environmental damage will occur.

Although I could easily devote much of my testimony to the need for increased budgets for the Forest Service to address the poor forest health conditions, I appreciate the reality that budgetary increases are not likely in the near future. Unfortunately, too much of the agency's funds are spent on "bullet proofing" projects against potential objections, appeals and litigation. Although much of the focus and discussion today occurs in the context of preventing catastrophic wildfire, the reality is that the Forest Service has a severe land management problem that prevents accomplishing on-the-ground work that not only serves to prevent wildfire, but also provides clean water, improves habitat, delivers forest products, and promotes quality recreation. The current rate of forest health treatments is unacceptable and primary impediments include overburdening process requirements as well as the impacts caused by the process of paying for wildfire suppression.

Eliminating process barriers that prevent on-the-ground accomplishment is critically important, and my testimony will primarily address this. As Chief, I often referred to these barriers as a "process predicament" that was costly, unnecessary, and often caused delays of multiple years.

Process Predicament – How We Got to This Point

In the period of roughly 1960 to 1980 the Forest Service did large projects with very little analysis and documentation of potential environmental effects. For the most part, these projects involved timber harvest over large areas of the United States. With the rise of the environmental movement, laws such as the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) were enacted covering multiple federal agencies, and the National Forest Management Act (NFMA) was enacted specific to the Forest Service. These laws resulted in more public participation, greater analysis and documentation, and the use of interdisciplinary skills in preparing alternatives. Generally, this resulted in better quality work being performed at the ground level. However, these laws also provided a vehicle for some interests to use appeals procedures to excessively lengthen the amount of time necessary to execute a project. These same parties also extensively pursued litigation that resulted in further curtailing the timely accomplishment of on-the-ground work. In many cases, projects curtailed due to objections, appeals and litigation would have prevented catastrophic wildfires that destroyed the productivity of forests and degraded watersheds that communities depend on.

The current situation is unacceptable. I recall during my tenure as Chief, I appeared at a Senate hearing where I discussed this process predicament issue. I brought to the hearing one copy-paper sized box that represented the total analysis file for a proposed timber sale in Montana. This project was then appealed under NEPA procedures. In contrast to the single box containing the total analysis file, the appeals file associated with this proposed timber sale totaled around 30 such boxes, and delayed the project several years.

Legislation such as NEPA, ESA, and NFMA, was used primarily to address Forest Service activities involving large scale timber harvest throughout the nation. In these circumstances, after conducting project analysis, the Agency would, on occasion, determine that the alternative with the least impact to the environment, was the "no action" alternative. In contrast, today, after weighing alternatives for project execution, the "no action" alternative is often highly impactful for the environment and one of the least desirable choices. The foundational laws enacted several decades ago need to be modernized to recognize the current situation. Doing so

will allow project level planning to occur in the context of today's need to focus on improving forest health that results from active management on larger areas; including maximizing the output of forest products. In the current situation, Forest Service managers know that while not all projects will face objections, appeals and litigation; all projects are affected by the potential. Therefore Forest Service decision makers routinely react by over-performing analysis and generally attempting to "bullet-proof" projects excessively, thus adding no value to the quality of the final decision. Even with a notable improvement through the use of collaboratives that have brought opposing viewpoints into consensus for project execution, the existing authorities continue to empower interests with extreme viewpoints to bring projects to a halt for years or even permanently. Congress itself needs to look at its own gridlocked situation when it comes to moving reasonably moderate and bipartisan legislation that can improve project execution.

Legislation and Other Actions that can Improve On-the-Ground Accomplishment

There are several examples of recently enacted legislation that will reduce process predicament. These include actions in the 2014 Farm Bill that make Stewardship Contracting and Good Neighbor Authority permanent. The provision in the Farm Bill to treat insect and disease infestations through the categorical exclusion process (for 3,000 acres or less), is another example.

There are examples where outstanding on-the-ground accomplishment is occurring primarily because coalitions of people who work and live among our National Forests and Grasslands have "left their bias at the door" and come together to make a difference. In some of these cases, special legislation enabled successful project execution. Examples include:

- The Longleaf Pine Restoration in the Southern States
- The Colorado Beetle Consortium
- The Yosemite-Stanislaus Solutions in California
- The Four Forest Restoration Initiative in Arizona
- The Black Hills long term (10 year) Environmental Impact Statement

Any legislative reforms need to be based on the premise that the vast majority of projects being planned by the Forest Service should be executed promptly with a minimum of analysis. Interest groups should not be excessively empowered to stop such projects. The vast majority of planned projects have these attributes:

- They are based on sound foundational science.
- They are based on tried and true practice that has previously been shown to be successful.
- They can be executed with readily available skills and expertise.

Only a small number of large scale projects involve major innovations, new applications of science, and/or require skills and expertise that are not readily available. It is only these types of projects that should receive the majority of analysis and be thoroughly vetted with interested parties.

Let me note one example of an existing authority where projects can be promptly and efficiently executed. Emergency on-the-ground rehabilitation activities immediately following a wildfire; referred to as Burned Area Emergency Rehabilitation (BAER), can be performed (within specific criteria) without following procedures of NEPA. In response to the wildfires of 2000 on the

Bitterroot National Forest, approximately \$1 million was spent on specific BAER work after a short work planning effort conducted by an interdisciplinary team of specialists. After reviewing this work on the ground shortly after its execution, members of my leadership team remarked that they spent all day reviewing the work performed with only this \$1 million. They noted that if similar work had been performed without this emergency authority, the total cost would be several million dollars due to analysis requirements. BAER is an excellent example of a current authority that can be considered for replication to other types of work.

I urge the Committee to focus on making changes to existing laws that recognize current conditions. Some changes that should be considered include:

- Use of categorical exclusions to accomplish broader objectives over larger areas of the landscape and which encourage maximizing forest product outputs.
- Provide incentives specifying that when collaboratives have been used, streamlined processes would be available, including:
 - Recognition that the collaboration process itself constitutes the analysis of alternatives, and thus simplifies the decision making process.
 - Use of arbitration to resolve objections and appeals.
 - Allow for project execution to continue during litigation.
 - Require litigants to post bonds when initiating legislation.
- Expanded use of emergency rehabilitation treatments modeled on a BAER model.
- Passage of legislation such as S.326 proposed by Senator Flake, that would modify cancellation ceiling procedure and thus further incentivize use of longer term stewardship contracts.
- Reform “equal access to justice” procedures that reduce potential financial incentives for pursuing litigation.

I also want to specifically encourage the Subcommittee to support passage of the Wildfire Disaster Funding Act (WDFA – H.R.167) or other legislation that would once and for all end the process of fund transfers from other programs to cover the costs of wildfire suppression. No federal agency should be expected to deliver its mission under the process now used by the Forest Service to pay the cost of suppressing wildfires. While the primary focus of this hearing is on the “process predicament” associated with lawsuits, appeals, and planning delays, I want to emphasize that the current process of paying for wildfire suppression is every bit as significant of a barrier to on-the-ground accomplishment. Many of the projects being delayed in the final hours before execution due to wildfire funding needs are also projects that successfully navigated the costly and complex objections, appeals, and litigation processes, only to get to the point of cancellation or delay caused by wildfire funding needs. To be blunt, this is a true “double whammy” that needs to be addressed concurrently.

Mr. Chairman, Let me thank you again for inviting me to testify today. I, along with other Forest Service retirees would look forward to providing any assistance your staff may need as you contemplate how to maximize the accomplishment of work to improve the condition of our National Forests and Grasslands.