

Subcommittee on Federal Lands

Tom McClintock, Chairman

Hearing Memo

June 5, 2017

To: All Committee on Natural Resources Members

From: Majority Committee Staff – Chris Marklund
Subcommittee on Federal Lands (x6-7736)

Hearing: Oversight hearing on “*Burdensome Litigation and Federal Bureaucratic Roadblocks to Manage our Nation’s Overgrown, Fire-Prone National Forests*”
June 8, 2017 at 2:00 PM; 1324 Longworth HOB.

The Subcommittee on Federal Lands will hold an oversight hearing on “*Burdensome Litigation and Federal Bureaucratic Roadblocks to Manage our Nation’s Overgrown, Fire-Prone National Forests,*” on **Thursday, June 8, 2017 at 2:00 p.m.** in 1324 Longworth House Office Building. The hearing will focus on the adverse impact of litigation to national forests; added requirements and compliance challenges posed by internal Forest Service processes and by other agencies; and, the tragic impacts of these policies on America’s overgrown and fire-prone federal forests.

Policy Overview

- The U.S. Forest Service is entrusted with managing 193 million acres¹ of mostly forested areas in 43 states and Puerto Rico.² Currently, **Fifty-eight million acres** of national forest are at high or very high risk of severe wildfire³ due in large part to a lack of active management of the landscape.
- When District Rangers, Forest Supervisors and their staffs attempt to advance forest thinning and other active management projects, their efforts can be significantly delayed or derailed due in large part to ever increasing environmental analysis requirements resulting in longer, more costly planning timelines and significantly increased regulatory complexity.
- Ever-increasing analyses are a direct result of attempts by the Forest Service to make environmental analysis documents “bullet-proof” in an increasingly litigious landscape.
- As reported in the Helena Independent Record, “the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and National Forest Management Act (NFMA)

¹ USDA Forest Service, By the Numbers, <https://www.fs.fed.us/about-agency/newsroom/by-the-numbers>

² USDA Forest Service, About the Agency, <https://www.fs.fed.us/about-agency>

³ Chief Tom Tidwell, Testimony before the Senate Committee on Energy and Natural Resources, May 5, 2015

are most often cited as the basis for litigation.”⁴ Vegetative management activities account for **more than 40 percent** of all lawsuits brought against the Forest Service.⁵

- According to a Government Accountability Office (GAO) analysis of data provided by the National Association of Environmental Professionals, the Forest Service produced 572 Environmental Impact Statements (EIS) between 2008 and 2012,⁶ nearly 25 percent of all draft and final EIS produced during that time period.⁷

Invited Witnesses

Mr. Lyle Laverty
President
The Laverty Group
Denver, Colorado

Mr. Lawson Fite
General Counsel
American Forest Resource Council
Portland, Oregon

Mr. Bruce Hallin
Director, Water Supply
Salt River Project
Phoenix, Arizona

Ms. Susan Jane M. Brown
Staff Attorney
Western Environmental Law Center
Eugene, Oregon

Background

America’s 154 national forests⁸ are increasingly becoming overgrown, insect and disease infested, fire-prone thickets due in part to a lack of active management, such as thinning forests, to promote resiliency and enhance forest health.

The Forest Service manages mostly forested areas in 43 states and Puerto Rico,⁹ an area equivalent to approximately ten percent of the continental U.S. land base (193 million acres).¹⁰ In 2015 written testimony before the Senate Energy and Natural Resources Committee, Forest

⁴ Tom Kuglin, Law of the land: How litigation has shaped the Forest Service, Helena Independent Record, November 9, 2014

⁵ Robert W. Malmshemer, PhD, JD, Testimony before the House Natural Resources Subcommittee on Federal Lands, May 14, 2015

⁶ U.S. Government Accountability Office, National Environmental Policy Act Little Information Exists on NEPA Analyses (GAO-14-369), April 2014

⁷ Ibid.

⁸ USDA Forest Service, About the Agency, <https://www.fs.fed.us/about-agency>

⁹ Ibid.

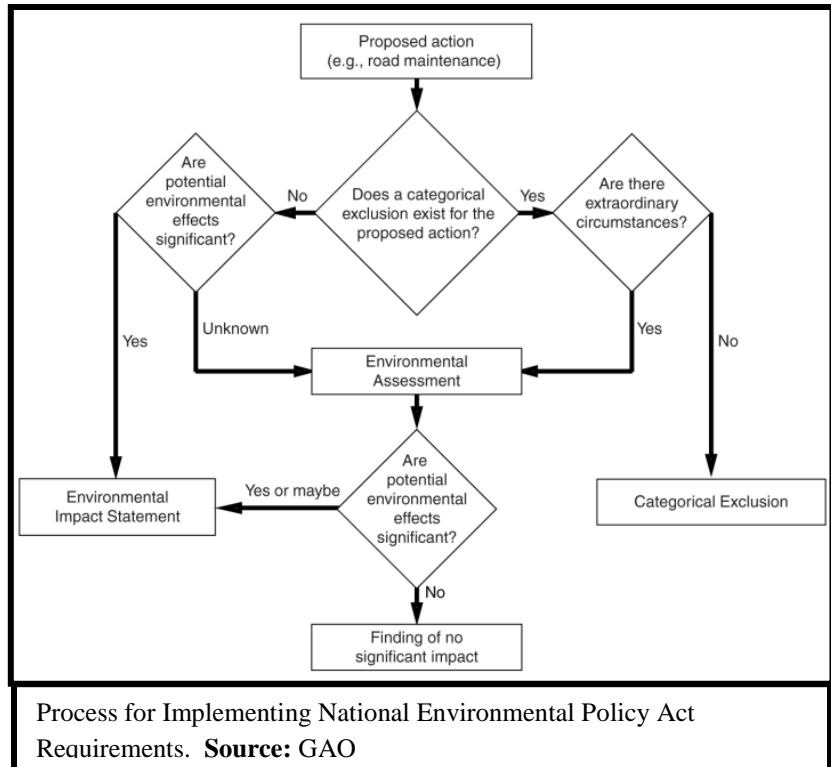
¹⁰ Ibid. By the Numbers

Service Chief Tom Tidwell indicated, “58 million acres of national forest are at high or very high risk of severe wildfire”¹¹ – or nearly one third of all of the Forest Service’s acreage and an area roughly the size of Pennsylvania and New York combined.

The Forest Service’s anemic forest management efforts, both in terms of administrative obstacles (e.g., cumbersome planning processes, high costs and analysis paralysis); and legal obstacles in approving forest management projects, exacerbate the ongoing forest health crisis.

National Environmental Policy Act Process and “Analysis Paralysis”

Timelines for analysis have increased from several months to several years for a typical forest management project. In March of 1981, the Council on Environmental Quality (CEQ) published guidance to federal agencies noting that the preparation of an Environmental Impact Statement (EIS) for “even large and complex energy projects would require only about 12 months”¹² and went on to note that completion of an Environmental Assessment (EA) “should take no more than 3 months.”¹³ However, a 2014 report by the Government Accountability Office (GAO) noted that the average EIS now



takes more than **4.5 years** (1,675 days)¹⁴ to complete and that time to complete is increasing at a rate of more than 34 days per year.¹⁵ The timeframe for completing NEPA analysis under an EA or Categorical Exclusion (CE) has not fared much better over time, with the Forest Service reporting to GAO it takes more than 18 months (565 days) to complete an EA and nearly 6 months (177 days) to complete a CE.¹⁶

Today, increasing NEPA analyses requires the Forest Service to expend significantly more time and resources to complete what CEQ once referred to as “concise public

¹¹ Ibid. Chief Tom Tidwell Testimony

¹² CEQ, Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations. 46 Fed. Reg. 18026 (Mar. 23, 1981) as amended.

¹³ Ibid.

¹⁴ U.S. Government Accountability Office (GAO), National Environmental Policy Act Little Information Exists on NEPA Analyses (GAO-14-369), April 2014

¹⁵ Ibid.

¹⁶ Ibid.

documents.”¹⁷ As more and more Forest Service resources are consumed by regulatory analysis, scarce agency resources are expended, fewer acres of forest are treated and fewer products harvested from our forests. As the flow of forest products has declined, lumber mills that once supported local economies have closed, forest jobs have disappeared, our forests have become over-grown and fire prone and catastrophic wildfires have increased in size and severity.

In 2002, then-Forest Service Chief Dale Bosworth, requested a study be conducted to assess the agency’s “analysis paralysis.” The report, “*The Process Predicament, How Statutory, Regulatory, and Administrative Factors Affect National Forest Management*,” describes an agency in which “excessive analysis” contributes to delays, confusion and increased costs and where staff spends nearly half of their working hours conducting environmental analysis to “bullet-proof” projects against litigation.¹⁸ Sadly, the points made by the report are just as salient today as they were the day the report was published.

In an attempt to make modest strides toward addressing the “analysis paralysis” challenge, the Forest Service has promoted stewardship contracting as a means of conducting necessary forest thinning projects, and is investing time and resources to support locally based forest collaboratives, which seek to bring diverse groups of stakeholders, such as industry, environmental groups and local governments, together to develop forest health projects and find solutions to complex natural resource management challenges.

Unfortunately, litigation persists. As Madison County, Montana Commissioner Dave Schulz noted before the Federal Lands Subcommittee in May of 2015, due to the threat of litigation from outside groups refusing to meet or collaborate with the community, what started as a consensus proposal for 100,000 acres of fire salvage and reforestation was reduced to less than 2,000 acres of salvage.¹⁹ “Fear of litigation prevents the Forest Service from thinking big”²⁰ and is a “significant factor in preventing responsible management of our Nation’s forests.”²¹

Litigation’s Paralyzing Impacts on Federal Forest Management

Litigation is paralyzing one of the core missions of the Forest Service. Between 1989 and 2008, **1,125 lawsuits** were filed against the Forest Service.²² Hundreds more have been filed since. Although more than 80 laws govern the management of the national forests, NEPA, the ESA and NFMA are the laws most frequently cited in litigation against the Forest Service with NEPA cited in more than 71 percent of cases.²³

¹⁷ CEQ, Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations.

¹⁸ USDA Forest Service Report, *The Process Predicament, How Statutory, Regulatory, and Administrative Factors Affect National Forest Management*, June 2002

¹⁹ House Committee on Natural Resources Subcommittee on Federal Lands, Transcript Oversight Hearing On Litigation And Increased Planning’s Impact On Our Nation’s Overgrown, Fire-Prone National Forests, May 14, 2015

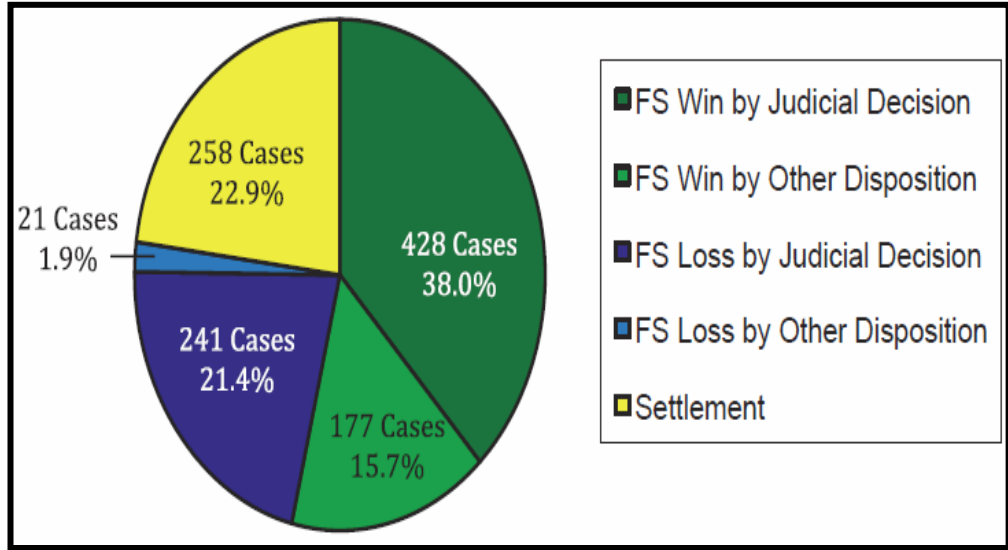
²⁰ Ibid.

²¹ Ibid.

²² Robert W. Malmshemer, Testimony before the House Natural Resources Subcommittee on Federal Lands

²³ Ibid.

Litigation is among the most often cited reasons for NEPA related project delays²⁴ and both litigation and the threat of litigation can cause significant delays. An agency official seeking to prepare a “bullet-proof” EA or EIS must be mindful of not only federal rules and regulations but also previous judicial interpretations.



Forest Service Land Management Cases by Final Case Outcome.
Source: Testimony of Robert W. Malmshiemer

Even so, outside observers note that the sheer number of federal rules and regulations governing a federal project make it almost certain a judge will find some part of the process as deficient.²⁵ This causes over-correction, additional regulation and leads to “an increase in the cost and time needed to complete NEPA documentation, but not necessarily an improvement in the quality of the documents ultimately produced.”²⁶

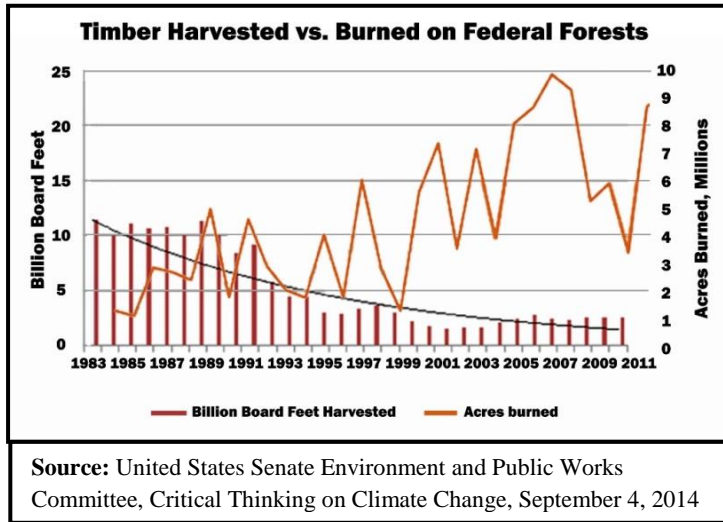
What’s more, obstructionist litigants know that a successful case is not required in order to delay or halt a forest management project for months, years or indefinitely. Of cases brought against the Forest Service between 1989 and 2008, the Forest Service prevailed in 53.8 percent of all cases and nearly two-thirds of cases in which a judge ruled on the merits of the case.²⁷ In fact, the Forest Service only lost 29.8 percent of cases brought against it. These relatively low chances for success led Dr. Robert Malmshiemer to conclude before the Federal Lands Subcommittee that “the indirect benefits of litigation, such as publicity and delay of Forest Service action, may be as important to litigants as the direct benefits of winning a case.”²⁸

Devastating Impacts on our Federal Forests

Today, lawsuits intended to halt active management of federal forests account for more than 40 percent of all lawsuits brought against the Forest Service.²⁹

²⁴ CRS Report RL33152, The National Environmental Policy Act (NEPA): Background and Implementation, January 10, 2011
²⁵ Tom Kuglin, Law of the land: How litigation has shaped the Forest Service
²⁶ CRS Report RL33152
²⁷ Robert W. Malmshiemer, Testimony before the House Natural Resources Subcommittee on Federal Lands
²⁸ Ibid.
²⁹ Ibid.

From the mid 1950's through the mid 1990's, the amount of timber harvested from the



national forests averaged 10 to 12 billion board feet. In FY 2015, the Forest Service harvested less than 2.9 billion board feet of timber across 204,763 acres, a small fraction of the acreage in need of treatment. Beginning in 1996, the average amount of timber harvested from federal forests fell to between 1.5 and 3.3 billion board feet. Conversely, since 1996, the average annual amount of acres burned due to catastrophic wildfire totaled over 6.2 million acres per year.

Today, while Forest Service employees at the national forest level spend more than 40 percent of their time conducting planning and analysis³⁰ instead of actively managing our federal forests, more than fifty percent of the Forest Service budget is spent fighting catastrophic wildfire.³¹ In 2015, wildfires burned 10.1 million acres of forests, including 7.4 million acres of federal lands.³²

Agency staff rate catastrophic wildfire as one the biggest threats to endangered species habitat and as wildfires continue to increase in size, number and intensity, their adverse impacts to wildlife habitat grow as well. Hot, long burning fires burn nutrients out of the soils and reduce water retention, both of which are critical to the reestablishment of vegetation after a fire. Mudslides, flooding and erosion, which often occur on the heels of a severe wildfire, threaten water availability and water quality for forest wildlife and human populations alike.

The direct costs to the Forest Service for responding to the impacts of catastrophic wildfire, including landslides, flooding and other threats to life, property, water quality and ecosystems have topped \$166 million from FY 2011 to FY 2016. This figure does not include costs to private lands owners, counties, municipalities and water districts.

The impact of wildfires devastates homes, businesses and communities as well. Between 2006 and 2016, the Forest Service reported that wildfires destroyed 36,827 structures. In the last two years alone, wildfires burned nearly 9,000 structures. Tragically, there have also been 349 wildfire-related fatalities over the past twenty years.

This hearing seeks to further explore the plethora of problems facing the Forest Service and our nation's federal forests.

³⁰ USDA Forest Service, The Process Predicament, How Statutory, Regulatory, and Administrative Factors Affect National Forest Management

³¹ USDA Forest Service, The Rising Cost of Fire Operations: Effects on the Forest Service's NonFire Work, August 4, 2015

³² CRS Report R43077, Wildfire Management Appropriations: Data, Trends, and Issues, August 2016