

Testimony of Susan Jane M. Brown, Western Environmental Law Center

**U.S. House of Representatives Natural Resources Committee,
Subcommittee on Federal Lands**

**Legislative Hearing on
H.R. 200, H.R. 1473, H.R. 1567, and H.R. 1586**

March 23, 2023

Chairman Tiffany, Ranking Member Neguse, and members of the subcommittee, thank you for the opportunity to join you today to discuss H.R. 200, the *Forest Information Reform Act*, and H.R. 1567, the *Accurately Counting Risk Elimination Solutions Act*.

My name is Susan Jane M. Brown, and I am a Senior Staff Attorney with the Western Environmental Law Center (WELC). We are based in Eugene, Oregon, with offices in Portland, Bend, and Lostine, Oregon; Seattle, Washington; Taos and Santa Fe, New Mexico; Buena Vista, Colorado; and Helena, Montana. WELC uses the power of the law to defend and protect the West's treasured landscapes, iconic wildlife, and rural communities. We combine our legal skills with sound conservation biology and environmental science to address major environmental issues in the West in the most strategic and effective manner. WELC works at the national, regional, state, and local levels and in all three branches of government. We integrate national policies and regional perspective with the local knowledge of our 150+ partner groups to implement smart and appropriate place-based solutions.

WELC is also deeply engaged in collaborative forest conservation in Oregon, working closely with the Blue Mountains Forest Partners and Harney County Forest Restoration Collaborative on the Malheur National Forest, the Deschutes Collaborative Forest Project on the Deschutes National Forest, and the Northern Blues Forest Collaborative on the Umatilla and Wallowa-Whitman National Forests, all located in eastern and central Oregon.

I am a proud environmental litigator. My primary focus of litigation is federal public lands forest management, and my practice includes cases involving the Endangered Species Act, National Environmental Policy Act, National Forest Management Act, Oregon and California Lands Act, and other land management statutes. I am an Adjunct Professor of Law at Lewis and Clark Law School, where I have taught Forest Law & Policy to upper division law students for the past 14 years. Both my litigation and pedagogy have been heavily influenced by not only my collaborative experience, but also my tenure as Natural Resources Counsel for Congressman DeFazio, a former Member of this Committee.

Today I am testifying on H.R. 200, the *Forest Information Reform Act*, and H.R. 1567, the *Accurately Counting Risk Elimination Solutions Act*.

H.R. 200, the *Forest Information Reform Act*

H.R. 200, the *Forest Information Reform Act*, would exempt the Forest Service and Bureau of Land Management (BLM) from reinitiating consultation on applicable land management plans (forest plans) in three circumstances: 1) when a new species is listed under the Endangered Species Act (ESA); 2) when new critical habitat is designed under the ESA; or 3) when new information about a listed species or its critical habitat becomes available. The legislation is a false solution in search of a nonexistent “problem” and should not advance out of the Subcommittee.

Intentionally ignoring the dangers of climate change is reckless and myopic at best, and yet disregarding new information about climate change effects on listed species and their critical habitat is exactly what H.R. 200 does. Climate change is dramatically affecting our forests, whether manifested as increased droughts, insects, disease, floods, wildfire, species range shifts, or other effects.¹ Most forest plans are woefully out of date² and do not address how climate change could affect national forest resources and provide direction to lessen the impacts to wildlife and human communities. Ignoring these obvious ecological changes by failing to reinitiate consultation on forest plans to ensure that native biodiversity is conserved for future generations is akin to burying one’s head in the sand and hoping for the best. But this is not what the National Forest Management Act (or the Federal Land Policy and Management Act) require of our federal land managers: instead, the Forest Service and BLM must use the best available science to inform land management,³ and sometimes that best available science indicates that land management plans require reevaluation.

Additionally, H.R. 200’s purported reliance on project-level consultation rather than plan-level consultation will not create efficiencies or conduct sufficient analysis as required by the ESA in two ways.

One, many types of forest management do not require or do not receive project-level authorization and therefore will not be subject to project-level consultation. For example, both winter and summer recreational off-road vehicle use is not subject to project-level authorization and yet often has significant adverse effects on listed species and their critical habitat. Likewise, domestic livestock grazing authorization, while subject to project-level (or, allotment-level) analysis and consultation, is woefully behind schedule and many western allotments either have no environmental analysis at all, or analysis that is decades-old. This use of the national forests also can have substantial adverse effects on listed species and critical habitats, and yet would generally escape ESA review under H.R. 200.

Two, project-level consultation intentionally looks only at the project decision under consultation and often fails to consider the cumulative effects on listed species and critical habitat of many

¹ United Nations Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report, Summary for Policymakers*, available at https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_-_SYR_SPM.pdf (March 20, 2023).

² Erin H. Ward, Katie Hoover, and Pervaze A. Sheikh, Congressional Research Service, *Legal and Practical Implications of the Ninth Circuit’s Cottonwood Environmental Law Center v. U.S. Forest Service Decision Under the Endangered Species Act*, CRS Report R47201 (Aug. 2, 2022) (hereinafter “CRS”), 3.

³ See, 16 U.S.C. § 1604; 43 U.S.C. § 1712(b)(2).

different uses of a national forest on either that project's geography or across the entire national forest: this broadscale look only happens at the forest plan level. Consequently, a project-level consultation on a timber sale (for example) only looks at how that timber sale affects the listed species and critical habitat within that timber sale area, and not how climate change, increased wildfire occurrence and severity, and reduced water flows affect that species and its habitat that exists across the national forest. This piecemeal approach fails to capture important ecological effects at the appropriate scale.⁴ While project-level consultation is essential, it is not, alone, sufficient.

In addition to being bad policy, the justification for H.R. 200 rests on false premise. As the Subcommittee well knows, responding to the Ninth Circuit Court of Appeals' affirmation of *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (*Pacific Rivers*) in *Cottonwood Law Center v. United States Forest Service*, 789 F.3d 1075 (9th Cir. 2015) (*Cottonwood*) has been of high interest to those in Congress who believe that *Cottonwood* hinders forest management within the jurisdiction of the Ninth Circuit (i.e., Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands). In response to this interest, the Congressional Research Service (CRS) released a report in August 2022 that sought to bring clarity to these claims, *Legal and Practical Implications of the Ninth Circuit's Cottonwood Environmental Law Center v. U.S. Forest Service Decision Under the Endangered Species Act*. Two important facts emerged from CRS' review.

First, CRS concluded that "Estimating or analyzing the effects of the *Cottonwood* decision (and the subsequent omnibus legislative fix) on [Forest Service, FS] operations and resources is challenging, primarily due to data constraints."⁵ Although the Forest Service has alleged in congressional testimony and elsewhere that *Cottonwood* precludes expeditious implementation of forest management activities and that "reinitiating consultation ""takes numerous resources away from getting work done on the ground,""⁶ CRS found that in fact

The FS has provided limited data to support or refute these claims. Similar to many other federal agencies, the FS does not routinely track or report the cost or personnel time associated with the development of forest plans or project-level decisions, engaging in consultation, or responding to administrative or judicial challenges to those decisions. For project-level planning, the FS does not routinely track the time between the publication of a decision document and the on-the-ground implementation of that project. Because of these limitations, there is insufficient baseline data with which to authoritatively identify and compare the effect specific factors may have on staffing or project development and implementation timelines. These data constraints also limit resource allocation

⁴ Indeed, this approach essentially asks each project-level consultation to do the work of plan-level consultation. Because under H.R. 200 there would be no requirement to reinitiate consultation on a forest plan in most cases, each project-level consultation would require more analysis in the first instance, rather than personnel being able to incorporate the more comprehensive and current forest plan-level analysis into project-level consultation, and would require personnel to reanalyze plan-level effects in each project-level analysis. This is not an efficient process.

⁵ CRS, 16.

⁶ CRS, 16 FN 111 (quoting former Forest Service Chief Vicki Christensen).

comparisons between those national forests bound by the different circuit court decisions.⁷

It is alarming that – *based on no objective data whatsoever* – the Forest Service would allege that an appellate court decision that merely affirms what has been black letter law in the largest Court of Appeals for more than thirty years precludes mission critical work. As an agency that is statutorily bound to make land management decisions based on interdisciplinary scientific information,⁸ the Forest Service’s policy position is disappointing to say the least.⁹

Second, “CRS examined FS timber harvest data from FY2015 (the year *Cottonwood* was decided) through FY2021 and was unable to identify any noticeable difference in the overall volume of timber sold or harvested across the entire NFS and between the NFS units covered by the Ninth Circuit relative to other NFS units.”¹⁰ The lack of a causal relationship between *Cottonwood* and timber sold or harvested between the Ninth and Tenth Circuits further indicates that *Cottonwood* is not the demon its detractors suggest.¹¹

Information received from a Freedom of Information Act (FOIA) request to the Forest Service seeking data on the instances when the agency was compelled to reinitiate consultation between 2017-2020 shows that reinitiation of consultation happens rarely and can be concluded quickly. Across the 154 national forests and 20 national grasslands that comprise the National Forest System, the agency reinitiated consultation on only 7 plans per year on average,¹² most frequently (12 instances) due to the Forest Service voluntarily amending or modifying its forest plan, a situation that does not implicate *Cottonwood* or its fixes including H.R. 200.¹³ Four plans in the southwest required amendment due to a court order finding that the Forest Service failed to address the recovery of Mexican spotted owls, another situation not implicated by *Cottonwood*.

Four plans required reinitiation based on changed conditions, and two plans required reinitiation based on new information, situations where H.R. 200 would apply. In three situations new critical habitat designations compelled reinitiation and only in one situation was reinitiation required due to the listing of a new species under the ESA. Thus, less than half of the forest plan reinitiations (i.e., 10 instances) were due to situations implicated by *Cottonwood*. In addition, the

⁷ CRS, 16; *see also id.* at FN 112 (explaining that time and expense data that *was* verifiable lacked context to evaluate its significance).

⁸ 16 U.S.C. § 1604.

⁹ That the agency has steadfastly held this position in the Biden Administration is perplexing, given the Administration’s purported emphasis on the use of science in decisionmaking and the need to address the biodiversity and climate crises by conserving important landscapes. *See, Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking*, 86 Fed. Reg. 8,845 (Jan. 27, 2021); Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7,619 (Feb. 1, 2021).

¹⁰ CRS, 17.

¹¹ Indeed, since *Cottonwood* merely affirms what has been the law in the Ninth Circuit since 1994 when *Pacific Rivers* was decided, and yet the national forests within the Ninth Circuit have consistently been the highest timber volume producing forests since 1994, it is a truism that neither *Cottonwood* nor *Pacific Rivers* have had any meaningfully adverse effect on timber production. *See, United States Forest Service, Forest Products Cut and Sold from the National Forests and Grasslands*, available at <https://www.fs.usda.gov/forestmanagement/products/cut-sold/index.shtml> (last visited March 18, 2023).

¹² The FOIA request and responsive documents are available upon request.

¹³ CRS, 3, 13.

FOIA response indicated that in many of these situations the agency was able to initiate and complete consultation in days or weeks without lengthy environmental documentation. The “problem” allegedly posed by *Cottonwood* is, in fact, much ado about very little and does not warrant congressional intervention involving the nation’s premier wildlife conservation law.

Although the need for H.R. 200 is neither supported by the facts nor is good policy, there are two solutions that should enjoy bipartisan support.

First, Congress should eliminate the annual Interior Department appropriations rider that exempts the Forest Service from the National Forest Management Act requirement to revise its forest plans not more than every 15 years.¹⁴ Although the Forest Service’s 2012 National Forest Management Act planning rule envisions revising plans within 3-4 years, it is questionable at best whether the agency is in fact making diligent progress towards revising the more than 100 forest plans that require updating.¹⁵ Eliminating this exemption could increase the urgency and rate at which the Forest Service revises its plans.

Second, Congress recently invested more than \$8 billion in new money in Forest Service land management through the Infrastructure Investment and Jobs Act and the Inflation Reduction Act, including for forest planning and ESA consultation. The agency now has a substantial influx of funding to accomplish foundational land management planning and species consultation, which should make the need for H.R. 200 obsolete. Congress should wait and see how the Forest Service utilizes this new investment before intervening in the reinitiation process.

H.R. 1567, the *Accurately Counting Risk Elimination Solutions Act*

As a policy matter, although WELC understands the utility and ease of “counting acres,” we instead believe that land managers, the public, and decision makers should be focused on measuring the *outcomes* of land management. Until Congress directs the agencies to measure and report on outcome-based indicators of performance rather than outputs, however, WELC generally supports the premise of H.R. 1567 with two small alterations based on our direct experience with the purpose of the legislation in the context of collaborative forest management.

By way of background, as my opening statement notes, WELC is a member of several forest restoration collaborative groups in eastern Oregon. I am a founding member of the Blue Mountains Forest Partners (BMFP), which works with diverse stakeholders on the Malheur National Forest to restore large landscapes to reduce wildfire risk, conserve wildlife habitat, and contribute to economic development of rural communities dependent on national forest management. In 2012, the Malheur was designated as a Collaborative Forest Landscape Restoration Act (CFLRA) project, which brought 10 years of additional funding to the Forest

¹⁴ See, Pub. L. 117–103, div. G, title IV, § 407, Mar. 15, 2022, 136 Stat. 410.

¹⁵ The 21-member Federal Advisory Committee chartered to advise the Forest Service on implementation of the 2012 planning rule, on which I served for 6 years including 2 years as co-chair, provided 66 consensus recommendations to Secretary Vilsack in 2018 regarding how the Forest Service might improve and expedite its forest planning and amendment process. United States Forest Service, *Planning Rule FACA Committee, FACA Committee Recommendations* (available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd-575909.pdf) (Feb. 3, 2018). Few of those consensus recommendations have been implemented.

Service for the collaborative implementation and monitoring of large landscape restoration projects on the Forest.¹⁶

BMFP takes our applied science, monitoring, and adaptive management very seriously. Based on the experience and knowledge of our restoration contractors and forest products industry partners, BMFP became concerned that we were not “finishing treatments,” meaning that while the commercial timber harvest always occurred, other restoration actions – prescribed burning, meadow restoration, precommercial thinning, etc. – often lagged far behind or did not occur at all: when multiple restoration actions were proposed for the same acres (i.e., precommercial thin + commercial thin + fuels treatment + wildlife enhancement + prescribed fire on the same acre), only some of the actions were actually timely completed. And yet, the Forest Service always reported substantial “acres treated” in annual budgetary and congressional reports, which did not square with BMFP’s on-the-ground experience.

With a few years of implementation of our Collaborative Forest Landscape Restoration Program (CFLRP) project under our belts, in 2018 we asked our partners at The Nature Conservancy (TNC) to provide BMFP with an overview of the extent of our restoration work across the Forest and whether we were treating sufficient acres to reduce wildfire risk and restore ecological integrity across the landscape. Dr. Kerry Kemp, a forest ecologist with TNC and now with the Forest Service, spent months working with the Forest Service and agency databases to get a complete picture of what acres we had touched with what restoration action(s) and what action(s) remained in order to “finish” the necessary restoration BMFP and our partners believed needed to occur.

Unfortunately, we were unable to complete our review. However, we did learn that it was clear that the Forest Service’s understanding of what restoration actions had and had not occurred was completely different than the experience of contractors who were doing the actual work on the ground (and being paid by the federal government to complete that work). Whether an issue of the lack of standardized training of agency staff who use the database (employees have different ways of viewing the data based on their area of expertise), agency turnover and the lack of new staff familiarity with the Forest’s program of work, lack of a standardized definition of “complete,” or political pressure to show “acres treated” and “board feet harvested,” it was apparent that the Forest Service was double- and triple-counting acres and yet still not finishing the job in the woods.

This is not an issue of sloppy or misleading contractors either. BMFP’s restoration contractors and logger partners keep detailed records of their work in the woods and know exactly what work should occur on what acres because they are under contract to complete that work; but they also know when they aren’t able to operate on those acres due to weather, timing, or other constraints.¹⁷ Consequently, our restoration contractors and logger partners have long lists of

¹⁶ The Collaborative Forest Landscape Restoration Program (CFLRP) is incredibly successful in building social license around forest restoration and enjoys rare bipartisan support. WELC strongly supports this program and urges Congress to support its reauthorization and an expanded funding appropriation.

¹⁷ Another issue that BMFP has identified is that the acres analyzed for restoration activities in approved National Environmental Policy Act (NEPA) documents are often much greater than the acres that the Forest Service advertises to contractors for either commercial or noncommercial treatment. Thus, acres are “left on the table” that could and should receive restoration.

acres that still require restoration activities, some of which have been outstanding for years if not decades.

This is not an isolated incident. BMFP participates in numerous coalitions of forest collaborative groups across the west, and nearly all of them report similar issues and frustrations. Investigative journalists have also identified this problem.¹⁸ H.R. 1567, the *Accurately Counting Risk Elimination Solutions Act*, would address a substantial portion of this problem by bringing transparency to the “counting acres” issue. WELC suggests two modest alterations to the legislative proposal.

First, Section 2(d)(1)(B)(i) defines “hazardous fuels reduction activity” to exclude “a wildland fire managed for resource benefits,” but this exclusion should be reconsidered before the bill advances out of the Subcommittee. The use of beneficial fire (whether prescribed or a natural ignition) for resource benefit is a significant tool in the forest restoration toolbox¹⁹ and must be encouraged if we are to successfully address the Wildfire Crisis.²⁰ The Forest Service should be able to “count” these beneficial fire acres, provided the fire in fact had positive resource benefits as most wildland fires do.²¹

Second, after consultation with Tribes and cultural fire practitioners, the Subcommittee should consider including “cultural burning” within the scope of the legislation and consider including the following definitions in Section 2:²²

‘Cultural burn’ means the intentional application of fire to land by an Indian tribe or cultural fire practitioner to achieve cultural goals or objectives identified by a tribal ordinance, traditional tribal custom or law of an Indian tribe, such as subsistence, ceremonial activities, biodiversity or other benefits.

‘Cultural fire practitioner’ means a person associated with an Indian tribe with experience in burning to meet cultural goals or objectives, including subsistence, ceremonial activities, biodiversity or other benefits.

‘Indian tribe’ means a federally recognized Indian tribe.

¹⁸ Adiel Kaplan and Monica Hersher, NBC News, *The Forest Service is overstating its wildfire prevention progress to Congress despite decades of warnings not to* (available at <https://www.nbcnews.com/news/investigations/forest-service-overstating-wildfire-prevention-progress-congress-decad-rcna41576>) (Aug. 9, 2022).

¹⁹ Hessburg et al., *Climate, Environment, and Disturbance History Govern Resilience of Western North American Forests*, 7 FRONT. ECOL. EVOL. 239 (2019). doi: 10.3389/fevo.2019.00239

²⁰ United States Forest Service, *Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America’s Forests* (available at <https://www.fs.usda.gov/managing-land/wildfire-crisis>) (Jan. 2022).

²¹ Merschel et al., *An ecological perspective on living with fire in ponderosa pine forests of Oregon and Washington: Resistance, gone but not forgotten*, TREES, FORESTS AND PEOPLE 4 (2021) available at <https://www.sciencedirect.com/science/article/pii/S2666719321000133?via%3Dihub>.

²² Oregon State Legislature Representative Pam Marsh has proposed these definitions as an [amendment to Oregon House Bill 2985](#), which would create a Prescribed Fire Liability Pilot Program in the State. In turn, these definitions were borrowed from California’s [Senate Bill 926](#), enacted into law in 2022, that created a Prescribed Fire Liability Pilot Program in that state.

Although it no longer occurs at the rate or extent as it did prior to European colonialization, cultural burning is an important tool to restore forest ecological integrity, as well as a manifestation of Indigenous sovereignty. Indigenous burning played a critical role in establishing forest ecosystems and continues to play a necessary stewardship role today. Tribes and Indigenous people across the country have used fire for thousands of years, and cultural burning practices are essential to the stewardship of plants and animals for food, fiber, and sustenance, the provision of community safety, and Tribal ceremonial, spiritual and religious practices. Thus, cultural burning should be “counted” by the Forest Service as a legitimate forest restoration action.

WELC would be pleased to work with the Subcommittee to make these alterations to H.R. 1567.

Conclusion

I look forward to discussing H.R. 200 and H.R. 1567 with the Subcommittee and answering any questions that the Subcommittee may have. Thank you for the opportunity to share my thoughts and experiences with you.

Sincerely,

A handwritten signature in black ink that reads "Susan Jane M. Brown". The signature is written in a cursive, flowing style.

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