

**REVIEW RECENT LITIGATION ON FOR-  
EST SERVICE FIREFIGHTING AND  
FOREST HEALTH EFFORTS**

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**HEARING**

BEFORE THE

**COMMITTEE ON AGRICULTURE  
HOUSE OF REPRESENTATIVES**

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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# REVIEW RECENT LITIGATION ON FOREST SERVICE FIREFIGHTING AND FOREST HEALTH EFFORTS

TUESDAY, NOVEMBER 15, 2005

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON AGRICULTURE,  
*Washington, DC.*

The committee met, pursuant to call, at 2:00 p.m., in room 1300 of the Longworth House Office Building, Hon. Bob Goodlatte (chairman of the committee) presiding.

Members present: Representatives Gutknecht, Osborne, Neugebauer, Boustany, Schwarz, Foxx, Conaway, Peterson, Herseth, Salazar, and Barrow.

Staff present: Bill Imbergamo, Ben Anderson, Brian Knipling, Callista Gingrich, clerk; Lindsey Correa, and Christy Birdsong.

## OPENING STATEMENT OF HON. BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA

The CHAIRMAN. This hearing of the House Committee on Agriculture to review recent litigation on Forest Service firefighting and forest health efforts will come to order.

Good afternoon. We are here to discuss several instances where litigation over the complex web of laws that govern our National Forest System has created havoc for our professional land managers, with potentially devastating delays to needed forest management activities. The issues before us today stem primarily from the district court case *Earth Island Institute v. Ruthenbeck*. This case was filed against a forest-restoration project proposed by the Forest Service after a wildfire in California in 2002. The legal issues this case exposed, however, have roots that date back to the passage of the Appeals Reform Act in 1992, and they have raged inconclusively since that year.

I want to make clear that I support public involvement in the management of our National Forests. This committee has supported making the public involvement process simpler, shorter, and more transparent through such things as the Healthy Forests Restoration Act. But what we are dealing with today is the result of overlapping and conflicting mandates that, if the court in the *Earth Island Institute* case is correct, require the following: public notice and comment on the development of forest plans, which set broad parameters for land management; public notice, comment, and appeal of significant projects, such as timber sales; public notice, com-

ment, and appeals of insignificant projects which are severely restricted in terms of where they can be proposed on the National Forests, and lest we forget, litigation over both forest plans and projects, whether significant or insignificant.

The Forest Service is the only Federal land management agency with a statutorily required administrative appeals process. It also prepares more National Environmental Policy Act documentation than any other Federal agency. Even after extensive documentation and public involvement, the Forest Service is still routinely sued by environmental advocacy groups. The result in my mind is, at what point have we lost sight of environmental results because of our excessive attention to bureaucratic process?

The ruling in the *Earth Island* case initially threatened to halt over 1,500 forest health projects, as well as numerous other minor activities such as outfitter and guide permits and permits for well-established ski areas. It is my understanding that the judge's recent order reduced the impact of the initial ruling on projects unrelated to resource use and development, but the damage to many projects has already been done as several of our witnesses will tell us today.

Even more telling, however, was the initial reaction from certain environmental advocacy groups. Within days of the judge's ruling, environmentalists around the country demanded a halt to everything from minor thinning projects to a proposed bicycle race through forestland. The Forest Service is clearly a favorite target of dilatory litigation, and even the proposal to drastically reduce timber sales has done nothing to abate the problem.

Even with the narrowed ruling, the Forest Service believes that almost 600,000 acres of fuels treatments will be delayed at least through the winter, including almost 33,000 acres on the George Washington-Thomas Jefferson National Forest in Virginia. In all likelihood, these projects won't be undertaken until the spring. Twenty-two salvage logging projects will also be delayed, reducing the value of the already dead timber by at least 50 percent and denying badly needed economic activity to rural areas. All told, over 800 projects affecting more than 1.2 million projects, 1.2 million acres will be delayed.

I will note that although today's hearing is an oversight hearing, we have introduced a bill, H.R. 4091, that addresses the issue at hand in this case. The bill clarifies that projects conducted under the categorical exclusions are not subject to the Appeals Reform Act.

Under Secretary Rey will also touch briefly on a case filed by an advocacy group to force the Forest Service to conduct NEPA and Endangered Species Act consultation on its use of fire retardant. This case, I believe, illustrates the mindset that regardless of commonsense steps taken to protect the environment, they are not satisfied unless extensive process is undertaken. It is worth nothing that once the Forest Service engages in the NEPA and ESA consultation processes, there will be numerous chances for opportunistic litigators to file additional motions and even new cases. While the litigants have thus far not sought an injunction against the use of fire retardant, that possibility still exists.

It is my understanding that both the Sierra Club and the Western Environmental Law Center will submit testimony for the record. Representatives of these groups were unable to attend today's hearing. I recommend committee members to avail themselves of their views as soon as they become available.

At this time, it is my pleasure to recognize the ranking member of the committee, the gentleman from Minnesota, Mr. Peterson.

**OPENING STATEMENT OF HON. COLLIN C. PETERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA**

Mr. PETERSON. Thank you, Mr. Chairman, and thank you for calling this hearing today. I also want to thank our witnesses for sharing their perspectives on the impact of litigation on forest health and management. I would like to extend a special welcome to Tim O'Hara, the vice president of Minnesota Forest Industries. Many of my constituents are employees of the companies represented by Tim, and their lives and jobs depend on responsible forest management practices, and the continuing health of Minnesota National Forests.

In 2003, the GAO published a report that looked at the number of Forest Service decisions to implement forest fuels reduction activities and how many of those decisions were appealed or litigated in fiscal years 2001 and 2002. Out of 762 decisions involving forest-fuel-reduction activities, 485 of those decisions were appealed, and 23, or 3 percent of the decisions were litigated. Although the GAO report suggested that only a small fraction of the cases resulted in litigation, the number of appeals is disconcerting. We need to find a way to address concerns raised in the appeals and litigation process during the development of fuel reduction plans, rather than letting those issues come up after the plan is complete. Delaying forest health projects for too long because of appeals will only make the problem worse.

*Earth Island v. Ruthenbeck* is just one example of how a complicated case can drag on through several court decisions over 6 years and still yield nothing but confusing edicts for the public and the Forest Service alike. Between appeals and litigation, the Forest Service is stretched for resources and distracted from pursuing its main mission, which is to sustain the health, diversity, and productivity of the Nation's forest and grasslands to meet the needs of present and future generations. We must also continue to keep our domestic forest products industry viable. The industry faces increasing global challenges from countries that have lower environmental standards than we do, and we need to work with the industry to address the growing forest health crisis.

I look to hearing from today's witnesses regarding the specific impacts of recent litigation, and suggestions about how we can fix this system. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. Are there other members of the committee who would like to make an opening statement? The gentleman from Colorado, Mr. Salazar.

**OPENING STATEMENT OF HON. JOHN T. SALAZAR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO**

Mr. SALAZAR. Thank you, Mr. Chairman and Ranking Member Peterson for holding this important hearing today. I would like to recognize Brad Robinson from the Gunnison Energy Corporation, who will testify on today's second panel. Thank you for being here all the way from Colorado.

Colorado currently has 37,975 acres that are affected by the *Earth Island* decision. Categorical exclusions are important to my district and the individuals that rely upon them. I know that people have different views of the National Energy Policy Act and any possible changes to it, including categorical exclusions, but I am concerned with how the *Earth Island* decision will impact Colorado's forest health initiatives. Many residents of Colorado, as well as myself, are worried that this court decision will stifle community forest health projects. Over the past couple of years, Colorado has been plagued with pine beetle infestation that has wreaked havoc in Colorado's forests. Many communities are evaluating the best way to treat these dead trees to limit the fire hazard, and they are very concerned about what impacts the court decision will have on the ability to do that.

I know that this issue has become quite contentious, and I am hoping that it can be resolved along with any other issues that exist at today's hearing, and I look forward to hearing the testimony of today's witnesses. I want to thank the panel participants, Chairman Goodlatte, and Ranking Member Peterson for bringing this issue to the committee. Thank you.

The CHAIRMAN. Are there other Members who wish to make an opening statement?

[The prepared statement of Mr. Pombo follows:]

PREPARED STATEMENT OF HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Good afternoon. I'd like to start by thanking Chairman Goodlatte for holding this hearing. This issue is so important, that the chairman and I introduced H.R. 4091, which would address the categorical exclusion decision. Our bill may not be the ultimate solution for resolving this issue, but it serves to open up the issue for discussions so we can better determine what needs to be done.

The recent court rulings on categorical exclusions and fire retardants are obvious and unfortunate examples of judicial activism. This type of environmental litigation clearly shows the intent of the environmental litigants: to stop any meaningful work from being done on national forests. Rather than being part of the solution, these groups would rather appeal and litigate to get the results they desire. Make no mistake, they are not interested in the sensible management of our public lands—they are interested in stalling management on our public lands and limiting public access.

Contrary to some claims, I am not opposed to appeals or litigation by anyone or any group—including environmental groups. It is vital that Americans have the opportunity to sue. But, as it will be clearly demonstrated in today's hearing, these decisions have gone too far. Land managers need to get back to what they are trained so well to do: manage land. Instead Government resources are tied up for months and even years, fighting frivolous lawsuits—not to mention the millions of taxpayer dollars that are wasted in the process. Meanwhile, we still have 190 million acres of public land at high risk to catastrophic wildfire. Wouldn't this time and money be better spent on projects to actually protect and restore our public lands?

I'd like to thank Under Secretary Rey for being here today and giving us a glimpse as to what the Forest Service is dealing with. Congress is sometimes too quick to blame the agencies for inaction. Today, we can hopefully shed some light

on what Congress can do to help the land management agencies actually start managing land again.

The CHAIRMAN. We will welcome our first panelist, the Honorable Mark Rey, Under Secretary of Natural Resources and Environment of the U.S. Department of Agriculture. Mr. Secretary, we are always delighted to have you with us and you are welcome again today.

**STATEMENT OF MARK REY, UNDER SECRETARY, NATURAL RESOURCES AND ENVIRONMENT, U.S. DEPARTMENT OF AGRICULTURE**

Mr. REY. Thank you very much. And thank you for the opportunity to appear before you today to provide the Department's assessment of the impacts of recent court rulings on the Forest Service use of categorical exclusions and fire retardants.

The recent court ruling on the Forest Service use of categorical exclusions has a significant impact on a range of management activities throughout the country. Thousands of projects that we had found to have insignificant environmental impacts will now be subject to formal notice, comment, and appeal, lengthening the time to conduct such activities, increasing their costs, and potentially greatly increasing the amount of information that will be needed to document decisions.

Furthermore, the court order is inconsistent with congressional intent for two categories of projects which Congress specifically legislated in order to expedite agency work, applied silvicultural research projects under the Health Forest Restoration Act, and oil and gas development under the Energy Policy Act.

Of foremost concern is the effect of the court ruling on the hazardous fuel reduction work that is accomplished with multiple methods and often with multiple partners. For fiscal year 2006, we estimate that about half of the annual hazardous fuels treatment target will be accomplished using categorical exclusions. This means that all of those projects are now subject to another 32 to 135 days of administrative process prior to implementation on the ground.

The acreage affected includes about 900,000 acres of hazardous fuel reduction projects, as part of our National target of 1.8 million acres for hazardous fuel reduction treatments. This 900,000-acre estimate includes almost 600,000 acres of prescribed burning in the southern region. One effect of the increased timeframes is missing prospective windows of air quality limitations for prescribed burning. Delayed prescribed burning activities increases fuel loading, leading to higher fire risks and potentially higher smoke emissions. Moreover, increased fuel loads add to the complexity of the burns, with the potential for fire escapes and the need for more people and equipment, thus increasing costs.

An additional potential impact in the regions, that the regions report, is to neighboring communities. Over 230 neighboring communities would potentially benefit from these hazardous fuel reduction projects if they were not delayed, as they now will be.

We have submitted for the record of the hearing those 230 communities that are now going to be placed at increase risk. My statement for the record also includes a brief description of the evo-

lution of this litigation, and a detailed description of all of the type of projects that would be affected.

The recent ruling on project appeal procedures for categorically excluded activities will have, in short, a far-reaching impact on the Forest Service's ability to quickly respond to resource management needs and partner requests for work of a routine nature with insignificant environmental effects. We know that recent court orders impact not just our activities, but also our neighboring communities and landowners, permittees, contractors, and other Government agencies. Additionally, this court ruling will apply to any new categorical exclusions developed in the future for the actions listed in the October 19 order, thereby potentially expanding the future impacts of the court ruling.

In the second decision filed on October 24, 2005, the Federal District Court of the District of Montana held that the Forest Service's failure to conduct an environmental analysis on the use of long-term chemical fire retardant on National Forest System land violated the National Environmental Policy Act and the Endangered Species Act. The court left to the Forest Service's discretion whether to conduct an environmental assessment or a more comprehensive environmental impact statement to comply with NEPA. Preliminary estimates by agency staff indicate that a programmatic EIS, should we decide to go that route, might take up to 2 years to complete, at a roughly estimated cost of between \$1.5 million and \$2 million. Even prior to this case, the Forest Service worked with the Fish and Wildlife Service and the National Marine Fisheries Service for some time on the subject of how we might conduct Endangered Species Act section 7 consultation for firefighting activities. This consultation did not reach a conclusion, and therefore we are not able to estimate what amount of additional activity or what additional cost would be required by the court's order. At this point, we have not verified that the Fish and Wildlife Service or the National Marine Fisheries Service will accept a programmatic consultation of this nature. If they would not, then we face the prospect of additional difficulty in complying with this order, potentially site-specific consultations each time we elect to use fire retardant.

While the court in this case did not enjoin the use of retardant while the required NEPA and EIS activities are conducted, there is still the possibility of an injunction in the future. The judge did make a decision on the merits of NEPA and EIS claims, so it is possible that another plaintiff in this or another venue could cite this finding and seek an injunction. So we will be in a state of uncertainty as to the availability of retardant as we begin compliance with this order and start into the next firefighting season.

In sum, those are the impacts, as we see them today, of both court decisions. I would be happy to respond to any questions that the committee has.

[The prepared statement of Mr. Rey appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Mr. Rey. What safeguards does the agency have in place governing the use the long-term fire retardant?

Mr. REY. Today, our use of long-term fire retardant is predicated on a number of safety evaluations of the retardants that we use. The testing that we do includes a human health risk assessment, which is completed through a contract with Labatt-Anderson Laboratories, and specifications for that research are reviewed in conjunction with the Environmental Protection Agency and EPA's known carcinogen list, and we continually monitor for compliance with those EPA requirements.

In addition, 4 years ago, the Forest Service developed guidelines for aerial delivery of retardants and foams, which requires that aerial drops not be made within 300 feet of a waterway. So both on our own initiative as a result of research done by contractors, and in consultation with EPA, we have done as much as possible to make sure that the use retardants and foams is as safe as we can make it.

The CHAIRMAN. So in other words, don't let me put words in your mouth, but your opinion is that the processes that you have engaged in over a significant period of time in evaluating the use of these retardants satisfies you that you are preventing direct exposure to firefighters of any kind of hazard, and you are taking measures to prevent the retardant from getting into watercourses, is that correct?

Mr. REY. That is correct. In addition to that, we also evaluate the impacts of the individual retardants on the environment to decide whether to continue to use them, and we have safety protocols in those instances where a firefighter is exposed to a retardant drop, that minimizes the long-term impacts of that exposure.

The CHAIRMAN. Did the judge in this case indicate specific things that the Department had not investigated, or was it simply a you haven't a complied with what I think the procedure is supposed to be under NEPA and ESA?

Mr. REY. I think it is by and large the latter. I mean, both of the holdings in this case were procedural holdings associated with the standard processes that you use under the National Environmental Policy Act or under the Endangered Species Act.

The CHAIRMAN. There wasn't a gapping area of concern that you left uncovered that the judge was brining attention to. He was simply requiring the maximum bureaucratic process to be undertaken here.

Mr. REY. Well, I don't know that I would express it quite that way, but he was assuring that we were—

The CHAIRMAN. I don't have to appear before him.

Mr. REY. I might and I have before. He was chastising us for not following the procedural requirements of those two statutes, in his judgment.

The CHAIRMAN. Can you describe in more detail the extraordinary circumstances that prohibit the use of categorical exclusions?

Mr. REY. When we write a categorical exclusion, we define certain circumstances where that exclusion isn't properly used, and where the project in question should be accompanied by a more detailed environmental assessment. By and large, when we look extraordinary circumstances, we are looking at the landscape and looking for the presence of things like threatened or endangered

species, floodplain or wetland areas or municipal watersheds, wilderness or wilderness study areas, or other areas of a sensitive environmental nature. And if we make a determination that the project is likely to have an effect on those values, then the extraordinary circumstances exclusion, or the extraordinary circumstances requirement kicks in and the categorical exclusion isn't used.

The CHAIRMAN. Now that is with the Forest Service. What about a private citizen? If a Forest Service official attempted to use a categorical exclusion, in spite of the presence of one or more of those circumstances that you just described, what recourse would that citizen have?

Mr. REY. In virtually all cases, during the scoping process associated with the particular project, the citizen would have the opportunity to tender comments to the agency, saying essentially that there is an extraordinary circumstance here and the categorical exclusion should not be used. Then, after having brought that to the agency's attention, if the agency proceeds anyway, the citizen still has all their rights before a court to bring the agency to court. In that case, what the private citizen would be alleging is that the agency violated the categorical exclusion by using it for a project for which it wasn't appropriate.

The CHAIRMAN. So even if at the end of this process, this court decision is clarified or overturned and you are back to using categorical exclusions as you had been using them, that same individual or group that expressed those concerns would still have their rights to express those concerns in a process that would still allow them to take action if they felt the Forest Service was ignoring their extraordinary circumstance concern?

Mr. REY. That is correct.

The CHAIRMAN. Can you comment on the communications the agency received from environmental groups after Judge Singleton's September 18 ruling? Is it true that concerns were raised on a wide variety of forest management projects and special use permits?

Mr. REY. The nature of the communications between parties is probably something I shouldn't go into too much detail on, given that the litigation is still pending. Suffice it to say that the sequence of events from our perspective sort of went like this: the judge issued an order; we interpreted it in a fairly standard way, as applying within his jurisdictional reach; the plaintiffs objected to that, filing a motion of contempt with the court, asserting that the order should be applied nationwide and to all activities; the court, the Government filed a motion for clarification; the court then issued a second order, saying it did mean to apply it nationwide and it would not hold the Government in contempt at that time; the plaintiffs then subsequently communicated with us, saying, we now expect you to apply the order nationwide for all activities, which is what we subsequently did. That had a broader reach than, I think, the plaintiffs envisioned it would, even though, in our judgment, that is what the order said in fairly straightforward terms. So the plaintiffs filed a second motion for clarification to limit the number of kinds of activities that were affected. At the same time, the Government filed a motion to stay the decision. The judge issued the motion for clarification, thereby reducing the number of activities that were covered, and we are still waiting for a

response to the motion to stay. All the briefing on that motion has been completed. So I guess, without disclosing any of the protected or privileged communications, that is the essential who-shot-John's of what has transpired to date.

The CHAIRMAN. Thank you. The gentleman from Minnesota.

Mr. PETERSON. Thank you, Mr. Chairman.

There seemed to be a lot of confusion about the nature of public involvement under these various Forest Service decision-making processes. Now, how many are there of these decision-making processes for fuel reduction activities, like the regular fuel reduction, like Health Forest Restoration Act reductions and others? How many are there of this nature, do you know?

Mr. REY. Not that many. I think I can summarize them for you. Any time we make a decision, we have obligations under the National Environmental Policy Act to evaluate the environmental impacts of the decision. For certain kinds of projects, where we have determined after doing the project over and over again and seeing that there is no significant environmental impact, the environmental documentation is taken care of through the categorical exclusion. For more complicated projects, where there may or may not be a significant environmental impact, we do an environmental assessment, and if the end of that analysis finds that there is no significant impact, proceed. For even larger projects of greater geographic scope or complexity or environmental sensitivity, we do an environmental impact statement.

Each of those has a somewhat different public participation requirement associated with it. A categorical exclusion, prior to the *Earth Island* decision, did not involve formal notice and comment or a right to administrative appeal, even though there was a comment opportunity, as I indicated to the Chairman, during the scoping process for projects covered under a categorical exclusion. For projects covered under the environmental assessment or an environmental impact statement, it has been the Forest Service practice to allow formal public notice and comment. Even though not all agencies do that for environmental assessments, we do. And then we do have an appeals process that applies to projects that are covered by an environmental assessment or an environmental impact statement.

In all three categories, there is a right of judicial review. The Healthy Forest Restoration Act modified some of those procedures for a certain category of fuels reduction projects, not to exceed 28 million acres in total over the life of the authorization of the bill. But essentially, notwithstanding the changes to the Healthy Forest Restoration Act, all the fuels reduction projects fit into one of those three categories.

Mr. PETERSON. Apparently, some of these activities are exempt from the Appeals Reform Act, am I right?

Mr. REY. It was our judgment, prior to the *Earth Island* decision, that projects covered under a categorical exclusion were not subject to the Appeals Reform Act. That in essence was the central question at issue in the *Earth Island* decision. Since the enactment of the Appeals Reform Act in 1992, the Forest Service has consistently maintained that where they cover, where they perform individual projects under the authority of a categorical exclusion, be-

cause there is no notice and comment and subsequent documentation, administrative appeal is unnecessary and inappropriate. Where there is an opportunity for appeal is when we formulate the categorical exclusion itself.

The development of a categorical exclusion is a rulemaking exercise. And the way it proceeds is we look at, over the course of time, categories of activities where we have been doing environmental assessments, that medium level of analysis, but where we have been consistently finding no significant environmental impact. And when we identify a category of activities that fits that nature, what we then do is say this is a category of activities where we have enough experience to know that the outcome is going to be, A, the same most every time, and B, of an insignificant environmental impact each time. And so therefore it is not doing the environment or the taxpayer any good to continue to spend the money and time to do environmental assessments every time we do one of those activities.

So we gather together all of that data, put together a proposed categorical exclusion for that category of activities, put that out for public notice and comment, go through a formal notice and comment period and an administrative appeals period on that category, on that particular categorical exclusion, and then, if at the end of the day, we still think it is justified, we go forward with it. In the past, when people, when private citizens or interest groups have taken an issue with either the development of a categorical exclusion or a specific project operated under the authority of a categorical exclusion, what they have done is challenged either the project as not fitting the categorical exclusion, or challenged the categorical exclusion itself as involving the kinds of projects that are likely, in some cases at least, to have significant environmental impacts and therefore should be subject to a greater degree of environmental analysis. In *Earth Island*, for the first time, the plaintiffs took a different path in bringing their challenge, and that was to say that all projects covered under categorical exclusions are subject to notice and comment and appeal.

Mr. PETERSON. It doesn't sound very simple to me, but how does—

Mr. REY. Well, it is as simple as we could make it, given the circumstances.

Mr. PETERSON. You are in big trouble, I guess we all know that, but how does, I just wanted to follow up.

The CHAIRMAN. Go right ahead.

Mr. PETERSON. How does somebody, an average person, find out about these categorical exclusions? Is there some way to?

Mr. REY. When we are developing a categorical exclusion to cover a category of projects, people find out the same way they do any of our other decisions, because it is a rulemaking action. We publish a notice in the Federal Register. We accept comments on the way we have written the category.

Mr. PETERSON. Is there a website they go on to find out or what?

Mr. REY. Sure, it would be on our website, the Forest Service website.

Mr. PETERSON. That lists these exclusions?

Mr. REY. Yes.

Mr. PETERSON. How many are there?

Mr. REY. Thirty-some. At the present time, about 20.

Mr. PETERSON. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. The gentleman from Minnesota, the chairman of the Forestry Subcommittee, is recognized.

Mr. GUTKNECHT. Thank you, Mr. Chairman. I don't have so much a question about the issue of forests, but I do have a comment and I am going to use my opportunity to make it; and that is that there is a growing feeling, at least in my State of Minnesota, that we are just not, we have the health forest initiative, but we are still not utilizing the forest resources the way we should be. And I just want you to know that, from my perspective, I will to continue not only to monitor the situation, but I do believe that the squeaky wheel gets the grease and I am going to continue to squeak. With that I yield back my time. And if you want to respond, you can.

Mr. REY. I understand the concern and I think what I have been trying to do here today is squeak a little myself.

The CHAIRMAN. I thank the gentleman. The gentlewoman from South Dakota is recognized.

Ms. HERSETH. Thank you, Mr. Chairman for having this hearing today. Thank you, Mr. Rey, for your testimony.

I want to just explore with you some hypothetical situations and how they might be affected by the district court ruling. If we don't take a legislative action to respond to it, or if it is not overturned on appeal, because even though we had the initial decision July 2, and then in response to the confusion it caused, there was the clarification order that you discussed with us today and that we are familiar with. There seems to still be some confusion, and I am not entirely clear on what is covered and what is not now, in terms of the categorical exclusion regulations. So in your opinion, can electric distribution companies and cooperatives get access to their right-of-ways in National Forests to do power line maintenance for fire mitigation purposes?

Mr. REY. I would say that if the maintenance work they need to do involves any amount of ground disturbing activity, it is questionable whether we have a categorical exclusion that will apply. If, on the other hand, it is just brush maintenance, then it probably still is allowed without notice and comment and appeal. Remember, the judge didn't disallow categorical exclusions, he simply said that projects conducted under many of our categorical exclusions require notice, comment, and appeal right, which will tack on 135 days, as much as 135 days. So in the question you asked, if there is not substantial ground disturbance, it is just brush maintenance, I think that the categorical exclusion, to the extent one exists on a particular forest, probably is still able to proceed, projects are still able to proceed. To the extent that there is a significant amount of ground-disturbing activity, if they are actually blading or maintaining a road right-of-way along the power line, that probably isn't going to make it without notice, comment, and a right of appeal.

Ms. HERSETH. How about a smaller post-fire salvage, to the degree that it includes any kind of timber sale?

Mr. REY. That will require notice, comment, and appeal.

Ms. HERSETH. Regardless of the size of the post-fire salvage activity?

Mr. REY. Regardless of the size.

Ms. HERSETH. How about using categorical exclusions to deal with a bug or a disease infestation problems?

Mr. REY. There again, you can use a categorical exclusion, but if what you are going to deal with the bug or disease infestation involves either harvesting timber or prescribed fire, that categorical exclusion is going to require notice and comment and appeal.

Ms. HERSETH. And as you described the process by which the Forest Service develops the categorical exclusion for certain types of activity, as you described in terms of being subject to that intermediate level of analysis with the EA and that over time there is just no environmental impact, so you create the categorical exclusion, and then that is subject to the notice and comment period and the administrative appeal, can you tell me, other than the reference to the 1993 rule in the district court ruling, what was the basis for the district court identifying these 11 activities?

Mr. REY. I am at a loss to give you a rationale for the judge's final clarification. I know of no basis in current law that allowed him to distinguish some activities covered under the categorical exclusions which would not require notice, comment, and appeal, and other activities covered by categorical exclusions which would require notice, comment, and appeal. The basis of his holding was essentially a bare-language interpretation of what the 1992 appeals law required, and there is nothing in that law which would give the judge any insight to say, require it here, but not here. So I think, while we appreciate that the clarification reduced the impact of the decision, I can't sit here today and tell you how the judge decided to go that way.

Ms. HERSETH. One final question. I think you responded fairly extensively to Chairman Goodlatte, but if you could just, again, address it again. After the initial ruling and the Forest Service decision to suspend all categorical exclusions, why did the Forest Service choose to issue such a blanket order, when a less sweeping one may have sufficed?

Mr. REY. At the point that we issued that order, we did not have the benefit of the judge's final clarification. And as I told you a moment ago, I don't have any idea of how he came up with that distinction. So it didn't appear to us that there was a basis for making such a distinction. What we were faced with was the judge who said, apply this order broadly; a plaintiff who said, apply it to all projects and said if you don't, we are going to file a second contempt motion, knowing that in the order that the judge just issued, he said, I won't hold you in contempt at this time. The three words, at this time, suggested to us that if we didn't apply his order as broadly as it seemed to be written, that we would likely face a subsequent contempt motion, and maybe a successful one at that. And in as much as spending time behind bars is not high on my list of things to do, nor is it the chief's, we decided to do exactly and expressly what the court order seemed to tell us to do and what the plaintiffs seemed to be insisting on.

Ms. HERSETH. Thank you. And just one final comment. I would, for the record, want to express my being at a loss myself in trying

to figure out the basis for the district court's clarification and dismissing the careful system that we have set up through the agency, through the Forest Service, in developing the categorical exclusions. And a number of the areas that are listed in the clarification order seem to me as well to trample on some of the work that we have done since the passage of the Healthy Forest Restoration Act and the involvement of local communities serving on these advisory boards, and to be able to dismiss this so out of hand, really, I think that the district court's clarification order was simply to push back on the Forest Service in a way, after you did issue an order, that you had to do to avoid some of the other litigation. So I appreciate your testimony and your responses to the questions today, Mr. Rey. Thank you.

Mr. REY. Thank you.

The CHAIRMAN. I thank the gentlewoman and join her in her puzzlement. The gentleman from Texas is recognized.

Mr. CONAWAY. Thank you, Mr. Chairman. Dr. Rey, thank you for being here today.

Along the lines that Stephanie was talking about, in applying the new paradigm to oil and gas exploration and drilling, natural gas drilling in all likelihood, if I had a five-well project that I wanted to drill, under these new rules, I would come to you and we would go through all of this exercise to get the right clearances. And then, after when I started drilling, I needed to run a flow line that was not anticipated originally, would that open me up to another 135-day appeal process, that I would have to stop drilling at that point in time?

Mr. REY. Yes.

Mr. CONAWAY. And wait on that?

Mr. REY. Yes.

Mr. CONAWAY. So let us go—

Mr. REY. If the flow line wasn't originally contemplated in the first decision, yes, that would require a second decision.

Mr. CONAWAY. So we would have to stop the drilling, or figure out another way to do it?

Mr. REY. Yes.

Mr. CONAWAY. OK. I could see that it would be a real chilling effect on the exploration for natural gas on Federal lands, or forestlands, I guess.

Mr. REY. It will delay things, there is no question about that.

Mr. CONAWAY. Yes. In misfit youth, I rode motorcycles, dirt bikes, and as always, there is tension between folks about whether or not to use forestlands for off-vehicle, off-highway vehicle use. I noticed in your testimony that you had an enduro race that got canceled, I guess, because of this rule. I am maybe one of the few guys in Congress who has actually raced enduro racing. Is this a circumstance where they can never do that or they would go through, or lengthen the time of which to get permission to hold those races on Forest Service? Which would it be?

Mr. REY. Right. The issue here in this particular race was that the order applied the notice, comment, and appeal requirements to the categorical exclusion that was used to justify that race. And the race was scheduled to begin before the 30-day comment period ended, so there was no choice but to postpone the race. That is not

to say they can't have a race in the future, they just have to, assuming that the court order stood, we would still use a categorical exclusion, most likely, for this race and then we would just add the amount of time necessary. And the people who want to sponsor the race would have to plan accordingly.

Mr. CONAWAY. Sure. Back on geophysical testing. If you lay out a grid of how you want to do that test and that grid would then get approved, and once you then got on the ground, though, and began to lay out your equipment and everything, and you want to deviate somewhat from that, would you then have to start over with the process? And I may be being a little bit redundant, but I want to be redundant for the record, because if the impact this is going to have, particularly at a time when people are complaining about high natural gas prices, and one of our problems with high natural gas prices is a supply, and we have a supply on Federal lands that we are having a very difficult time getting at. So can you give me some sort of a sense of is there a de minimus amount of change you can have from your original plan before you have to go back to the appeals process, or is it just any change whatsoever?

Mr. REY. Is the change likely to change the environmental effect of the project as originally designed? And if it is, or is possible, then you have to go back and reevaluate those changes.

Mr. CONAWAY. OK. The phrase, is possible, is troubling. That is pretty open-ended.

Mr. REY. Yes, I agree.

Mr. CONAWAY. Mr. Chairman, I yield back. Thank you for this opportunity to testify, or to question the witness.

The CHAIRMAN. I thank the gentleman. The gentleman from Colorado is recognized.

Mr. SALAZAR. Thank you, Mr. Chairman.

Mr. Under Secretary, in October 18, 2005, Senators Bingaman and Harkin actually sent a letter to President Bush, asserting that the agency took an unnecessary and inappropriate response by suspending noncontroversial activities such as firewood cutting permits and simple little things like that. Have you relaxed your position on that, not yet?

Mr. REY. That position changed after the last court order clarifying what the judge believed could go forward and what couldn't go forward without notice, comment, and appeal. Remember, in this case, we have had three different court orders. The middle order, which was where the judge seemed to suggest that everything should stop, was the order that we responded to, basically directing our people to comply with the order. After that order, then Senator Harkin and Senator Bingaman, who were not in danger of being held in contempt of court if they missed a judgment on what this judge wanted, wrote to us and told us we were being way too conservative. Subsequently, the plaintiffs filed a motion for clarification and the judge came up with that third order, where he said these things can go forward without notice, comment, and appeal, and these other things can't. And that is the third order that Congresswoman Herseth and I were talking about earlier. So the short answer to your question is yes, the issues that Senator Harkin and Senator Bingaman were concerned about are now going forward

without notice and comment and appeal, but they are going forward in that fashion because the judge clarified that he didn't mean to sweep them into his holding.

Mr. SALAZAR. Thank you. I yield back.

The CHAIRMAN. I thank the gentleman. The gentleman from Louisiana, Mr. Boustany.

Mr. BOUSTANY. Thank you, Mr. Chairman.

I know we are all interested in sound scientific data to support the regulatory framework that exists and that we build, and given that there are many different kinds of chemical compositions of fire retardants, were there any specific scientific studies that were cited in regard to fire retardants in that Montana court case that would back or justify the court decision, and specifically that would have led the court to deny the use of categorical exclusion for fire retardants?

Mr. REY. In the case in Montana, it didn't have anything to do with a categorical exclusion. The issue there was, we had been using fire retardant on the basis that we were responding to emergency circumstances, and that therefore the formal NEPA analysis that normally would attach to that wasn't appropriate. And my recollection is, in the Montana case, the plaintiffs did provide evidence of instances where retardant did escape and get into water bodies and result in environmental impacts. And that is a known factor. We do have protocols to try to use the retardant as safely as possible to keep it out of water bodies, knowing that if it is directly applied to a water body, there will be some environmental implications that would be undesirable.

Mr. BOUSTANY. So you do have pretty good scientific studies to support the use of categorical exclusion for fire retardants. Is that a fair statement?

Mr. REY. We don't use fire retardant under a categorical exclusion. There are different circumstances under the National Environmental Policy Act, which allow you to respond to emergency situations, when human life and property is at risk. And we were using our fire retardant without an environmental impact statement under that standard. So categorical exclusions didn't have anything to do with it.

But the other part of your question is, do we have sound scientific evidence to make us comfortable that using retardant with the proper protects and in the right way will have a minimal environmental impact? We do and I described for the Chairman some of the studies that we have done, relative to retardant use. That having been said, if it is used properly or in circumstances where the guidelines aren't followed, we know that there can be some environmental implications associated with that, and those we have to minimize, given the reality that we are in firefighting environment whenever we are using retardant.

Mr. BOUSTANY. I thank you for the clarification and I yield back.

The CHAIRMAN. I thank the gentleman. The gentleman from Michigan, Mr. Schwarz, is recognized.

Mr. SCHWARZ. I want to be clear that I understand precisely what is going on here, and let me preface my remarks with saying I will reference property that I own in the State that I don't represent, and I own property in the Flathead Valley of Montana. The

fire on the north fork of the Flathead 2 years ago was clearly visible from my home, and we wondered how far down the valley it would come. And the Bitterroot fire also was one that I was very aware of because, for days on end, we could not see across Flathead Lake because of the fire there. So and I have relatives by marriage who are in the timber industry. So in the spirit of full disclosure, I wanted to preface my remark with that.

Is it a fair statement to just say, if categorical exclusions are disallowed by a Federal court anywhere, it could be in the northern part of the State of Michigan, where we have lots of National Forest land, that unequivocally it inhibits the Forest Service and its initiatives for prudent forest maintenance and management, period, is that clear and unequivocal statement that I could take back home to the folks and say that is why I am thinking that it is pretty important that H.R. 4091 be moved along, because you are really being inhibited by this court decision? Is that a fair statement?

Mr. REY. Yes.

Mr. SCHWARZ. I yield back, Mr. Chairman.

Mr. REY. See, I am capable of a brief answer every once in a while, I guess.

The CHAIRMAN. Mr. Secretary, I have one last question. Would you summarize the current status of the litigation for us and where you see it going from here?

Mr. REY. Well, where I see it going from here is anybody's guess, but the current status is that the court, at the district court level, has before it the Government's motion to stay the impact of decision pending appeal to the circuit court. And we hope that now all the briefing on that motion is completed, that we should hear from the judge shortly. What he will do is anybody's guess. He could stay the decision, allowing the status quo prior to his decision to stand, or he may decline to do that. The Government has filed a notice of appeal to the Ninth Circuit Court of Appeals, and I dare say that is where the next action will take place, before the Ninth Circuit. There is no briefing schedule set yet for the Ninth Circuit. As you probably know, the Ninth Circuit has a very heavy case load relative to the other circuits, and I would guess that we are unlikely to get a decision on the merits for some considerable amount of time; certainly, not less than 8 months to a year. So depending on what the district court judge does with respect to the motion to stay, we could make it into the next season with these circumstances still pending before us.

The CHAIRMAN. Is there any litigation going on in any other circuit that is related to this same issue that could conflict with the decision of this judge?

Mr. REY. No, and I would expect we won't see that litigation occur. In this case, and I am speculating now, the plaintiffs have a pretty good decision in the Ninth Circuit. Why not wait and see what the Ninth Circuit does with that, rather than set up the prospects for a conflict in a different circuit. Certainly, there is other litigation on fuel reduction projects around the country. There is no shortage of that. In fact, half of the projects that were initiated under the Healthy Forest Restoration Act are under appeal today, so that GAO percentage that was mentioned earlier seems to be holding true. But if I were to speculate, I would speculate that

these identical issues won't be raised in another circuit, because that would seem to be strategically not advantageous.

The CHAIRMAN. Well, certainly not by the same type of proponent of the legislation that we are talking about today, but perhaps by a community or by another organization or individual or business that is impacted by the stay that is on one of the projects in another part of the country.

Mr. REY. That is possible. They could challenge the basis for the delay and try to get a different ruling out of the court. The problem there, of course, is that by the time they got a ruling, we might be through the 135-day period, in which case, we would proceed with the project and the court would probably dismiss their challenge, as there no longer being a case in conflict.

The CHAIRMAN. I understand. And there is also a question of whether they would have standing as opposed to the Forest Service.

Mr. REY. That is correct.

The CHAIRMAN. The Forest Service, has the Government looked at the possibility of bringing action to other places to allow that local jurisdiction to allow them to go forward with an action?

Mr. REY. I don't know how we would organize to do that. In the case, in this instance, we are the decisionmakers, so somebody has to sue us. Now, if somebody sued us using the *Earth Island* case as precedent, then we would argue against that in that other jurisdiction, and perhaps another judge might take a different view of it.

The CHAIRMAN. Very good. Thank you very much. We appreciate your contribution today.

Mr. REY. I have been informed by staff that I need to clarify two points here, so let me do that. In response to the question of how many CEs we have, I was closer to being right with my first guess. The total number is 32. And in response to Congresswoman Herseth's question about maintenance activities along utility lines, I was generally correct. If there is ground-disturbing activity associated with it, notice, comment, and an opportunity for appeal would be required. But if it was just routine maintenance that didn't involve disturbing the soil, then probably that would fit under one of our existing categorical exclusions. And under the judge's clarification, notice, comment, and appeal wouldn't be required.

One other thing that I would like to clarify is what I think the long-term impact of this kind of decision will be. As I said earlier, this decision didn't disallow categorical exclusions, it simply said that for many categories of activities covered there under, notice, comment, and an opportunity for appeal are required. And that adds, at the bottom line, 135 days to the project. But more broadly and over time, I think the effect of this decision, if it is left standing, will be that more and more of our line managers will look at their vulnerability in the face of likely appeal and decide that instead of using a categorical exclusion in the first instance, they might as well go ahead and do an environmental assessment so they have got a more robust record that is easier to defend during the appeals process. Certainly, over the years, we have found our environmental assessments growing longer and longer and longer

as a consequence of the reality and the fear of administrative appeals and litigation; continued to lengthen those documents, because line officers wanted to make sure that they had thought of everything possible to put in the record to be able withstand an administrative appeal. I think, over time, that same dynamic is going to occur here, and what you will see is less and less use of categorical exclusion, more and more environmental assessments, as line managers to try to bulletproof their records. And the cost impacts of those are going to be to increase the cost of conducting these activities anywhere from 3- to 5-fold, as well as, of course, increasing the time beyond the mere 135-day limit. That is something I didn't mention but I wanted to elaborate on before I leave. Thank you.

The CHAIRMAN. Thank you, Mr. Secretary, and we will stay in touch with you about this litigation. It concerns us greatly and we are interested of what contribution we may make to a solution to. Obviously, that will depend upon the outcome of the court case, but as was noted earlier, we have also legislation that will help to clarify some of these questions.

Mr. REY. Let us know if there is anything you need from us.

The CHAIRMAN. Thank you.

I would now like to invite our second panel to the table; Dr. Michael Mortimer, professor of forest law and policy of Virginia Tech from Blacksburg, Virginia, and on behalf of the Society of American Foresters; Mr. John Hofmann, director of natural resources with the Regional Council of Rural Counties from Sacramento, California; Mr. Time O'Hara, vice president of Minnesota Forest Industries from Duluth, Minnesota, on behalf of the American Forest and Paper Association; and Mr. M. Brad Robinson, president of Gunnison Energy Corporation from Denver, Colorado.

Dr. Mortimer, welcome. You are from my neck of the woods, and we are delighted to have you with us today.

**STATEMENT OF MICHAEL MORTIMER, PROFESSOR, FOREST LAW AND POLICY, VIRGINIA TECH UNIVERSITY, BLACKSBURG, VA**

Mr. MORTIMER. Thank you, Mr. Chairman. Members of the committee, I am pleased to have the opportunity to appear before you today to discuss a pressing National Forest management issue. I wish to make my comments today on behalf of the Society of American Foresters and its 15,000 forestry professionals.

The National Environmental Policy Act, or the NEPA, has been in effect for nearly 40 years. Its dual requirement to involve the public and to analyze the potential environmental impacts of major Federal actions have provided safeguards against careless development and unforeseen consequences.

In enacting NEPA, Congress provided a useful mechanism for categorically excluding from repeated environmental analysis smaller projects that afford very little risk in the way of environmental impacts and those projects that are also considered emergency actions. These types of actions, or these categories of actions, should be expeditiously implemented and warrant exemption from administrative appeals. The SAF supports the recently introduced legislation, H.R. 4091, which would respond to a recent court deci-

sion hindering timely implementation of actions that have insignificant environmental impact.

The Forest Service currently has several categorical exclusions as allowed under the NEPA, including those that are components of the Health Forest Initiative and the Healthy Forest Restoration Act. The exclusions aid in reducing hazardous fuels, addressing insect and disease outbreaks, and rehabilitating forests after catastrophic events. It is important to note that these forest health-related categorical exclusions require full compliance with applicable environmental laws. Additionally, projects implemented under these exclusions must still be consistent with the forest management plans required under the National Forest Management Act, and those plans are developed with significant public involvement and environmental analysis.

The categorical exclusions that we have spoken about today can provide the Forest Service with the means to accelerate accomplishment of urgent projects on the ground. However, the agency cannot take full advantage of the efficiencies offered by these exclusions without relief from the current statutory appeals process. Judge Singleton's recent ruling in the *Earth Island Institute* case has unfortunately clouded the relationship between categorical exclusions and the appeals process. While the court clearly recognized that the Appeals Reform Act "certainly permits exclusion of environmentally insignificant projects from the appeals process," the court does not seem to understand that what it is describing are in fact categorically excluded projects.

The court then compounds this problem by creating an artificial distinction where none exists. The court held that while the Forest Service is clearly not required to make every minor project it undertakes subject to the appeals process, it is required to delineate between major and minor projects. The court's apparent logic here is that minor insignificant projects do not require an appeals process, whereas major insignificant projects do.

There is no such distinction between major and minor in the definition of categorical exclusion. The critical question in NEPA is instead whether actions will significantly impact the human environment. The size or scope of the project is largely irrelevant. Only the environmental impacts are of concern. What Judge Singleton has done is create a new test to determine whether a categorical exclusion is appealable based on whether it is a major or minor action. Since this major versus minor distinction is not currently defined, only another judge, on a case-by-case basis, can decide that question conclusively, unless Congress acts to remedy the situation. The *Earth Island Institute* case has inappropriately blended the NEPA process with the appeals process. The consequence is uncertainty for the agency and undoubtedly additional lawsuits challenging the use of categorical exclusions in the future.

Recent research on Virginia's National Forests has shown that the appeals process inevitably slows down implementation of categorically excluded projects. In the cases we examined, the public comment and appeals process added an average of 4 months, essentially doubling the implementation time for what should have been quickly completed, low impact projects.

It is worthwhile noting that in none of the appealed categorical exclusion projects we studied, did the information raised on appeal lead to the reversal of the original Forest Service decision. It was in fact troubling that so many concerns were raised during the post-decisional period that could have been raised prior to the land manager's decision, had the appellants wanted to contribute to improving the projects and the agency decisions.

In closing, as I was helping to coordinate the State of Montana's post-fire efforts on its forestlands in the Bitterroot Valley following the catastrophic fire season in the year 2000. It was indeed painful to watch the NEPA and appeals processes grind down the Forest Service's ability to respond promptly to the crisis. Categorical exclusions can restore commonsense to how the NEPA is applied. Mr. Chairman, it is undeniably important that efforts with H.R. 4091 move forward. The recent decision by Judge Singleton in the California district court is unfortunate, and demands that Congress clarify how categorical exclusions and the Forest Service appeals process fit together. The Society of American Foresters supports your initiative and supports efforts to restore the ability of the Forest Service to act in a timely fashion to address forest health and other land and resource management needs. Thank you.

[The prepared statement of Mr. Mortimer appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Dr. Mortimer. Mr. Hofmann, welcome.

**STATEMENT OF JOHN B. HOFMANN, DIRECTOR, NATURAL RESOURCES, REGIONAL COUNCIL OF RURAL COUNTIES**

Mr. HOFMANN. Thank you, Mr. Chairman and members of the committee for the invitation to address the impacts of the application of the Appeals Reform Act on projects agreed to within Community Wildfire Protection Plans. At this time, we are aware of 57 Community Wildfire Protection Plans within 29 California counties, 15 of which include all or most of the at-risk communities within the county.

At the cornerstone of a Community Wildfire Protection Plan are four basic requirements: first, it must identify and prioritize areas for hazardous fuel reduction treatments with recommendations for the type and method of treatment; second, it must recommend the measures that reduce structural ignitability; third, it must accomplish those criteria within the context of collaborative agreements; and four, it must be agreed to by the local Government, local fire department, and State forest management agency, in consultation with Federal agencies and interested parties.

The areas and treatments recommended by the plans are developed collaboratively with all interested parties. This collaborative process invites debate, science, emotion, and eventually compromise, balance, and acceptance. The debate continues until the community participants satisfy locally elected Government leaders that the plan is socially acceptable, and that local and State fire experts, that the plan will protect the at-risk communities. Categorical exclusions provide communities an incentive to collaboratively meet standards proven to not have a significant effect on the environment and be noncontroversial

The application of the Appeals Reform Act to categorical exclusions impacts the implementation of a Community Wildfire Protection Plan in a number of ways. First, the scoping required under the Appeals Reform Act would duplicate hazardous fuel reduction requirements. The categorical exclusion most likely to be used to implement, excuse me, a Community Wildfire Protection Plan is the hazardous fuels reduction categorical exclusion that was spoken of earlier. The rule specifies that fuels reduction activity shall be identified through the same collaborative framework required for the development of the treatments in a Community Wildfire Protection Plan. The three-tier collaborative framework invites participation at the local, State, and national level. The Federal Register notice for the hazardous fuel reduction category adds, this collaboration will, where appropriate, seek to address conflicts concerning alternative uses of resources. A second scoping period would be duplicative of the required collaborative process.

Second, scoping and appeals would jeopardize community collaboration and support. Application of the Appeals Reform Act would require scoping after a community had already collaboratively developed a recommendation, or in essence, open a second scoping period. This second scoping provides opportunities for those not satisfied with a Community Wildfire Protection Plan process to modify projects or even override the community collaboration to the extent that the community might no longer support the project. The second scoping period has the power to override the required community collaboration. Scoping and appeals for a categorical exemption thereby reduces the incentive for a community to collaboratively develop a Community Wildfire Protection Plan, only to subsequently modify and delay by those outside the Community Wildfire Protection Plan planning process.

Third, scoping and appeals will reduce the incentive for environmentally simplified treatments. For projects that require environmental assessment or an environmental impact statement, Federal agencies must evaluate, at a minimum, the community-recommended treatments. If, during the scoping or agency review, a different alternative is recommended, the agency must still evaluate the community recommendation along with the scoping or the agency recommendation. However, Federal agencies are not obligated to evaluate community recommendations, in addition to their own, for projects that meet the categorical exclusion standards. Therefore, communities that want to ensure their recommendations are evaluated, would be discouraged from meeting the environmentally benign categorical exclusion standards.

Fourth, the scoping and appeals will increase the projected implementation costs. Communities must stretch existing funds to implement wildfire protection plans. Last year, California communities requested \$33.5 million in grant assistance to implement 366 projects agreed to in Community Wildfire Protection Plans. The combination of State and Federal funding totaled only \$8.7 million, which funded 127 community projects. Where Federal funds are used to reduce fuels on private lands, the private projects must also be NEPA compliant. Conducting a second scoping period with its accompanying analysis will further aggravate the funding scarcity on both Federal and private lands.

The fifth, scoping and appeals will jeopardize the Community Wildfire Protection Plan strategy. A Community Wildfire Protection Plan is a strategy, not a project. The effectiveness of the strategy is dependent on the collective integration of all projects. With significant modifications to individual projects, the strategic plan may no longer be effective in protecting communities. The hope of a Community Wildfire Protection Plan was to bring peace to the forest wars through collaboratively resolving differences in communities. Adding a second scoping and appeals requirement to collaboratively develop environmental insignificant projects undermines the cornerstones of a Community Wildfire Protection Plan.

Thank you, Mr. Chairman and members of the committee. I will be happy to answer questions that you may have.

[The prepared statement of Mr. Hofmann appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Mr. Hofmann. Mr. O'Hara, welcome.

**STATEMENT OF TIM O'HARA, VICE PRESIDENT, MINNESOTA FOREST INDUSTRIES**

Mr. O'HARA. Good afternoon, Mr. Chairman and committee members. My name is Tim O'Hara and I am vice president of forest policy with Minnesota Forest Industries. My testimony today is also on behalf of the American Forest and Paper Association. AF and PA is a National trade association I represent. It is forest landowners, manufacturers of forest products, and producers of pulp and paper products. In 2004, the U.S. forest products industry had sales of over \$230 billion and employed 1.1 million people and accounted for 7 percent of U.S. manufacturing.

We are interested in this issue, because many forest products companies and their 1.1 million employees have a direct interest in the management of U.S. forestlands, both public and private. Insect and disease outbreaks and wildfires do not respect property boundaries. It is important that Federal agencies recognize significant threats that Federal non-action poses to adjacent communities and non-Federal forestland owners.

The forestlands administered by the Forest Service are facing a forest health crisis. 72 million acres of forestlands are at high risk of catastrophic wildfire, and an additional 26 million acres are at risk from insects and disease epidemics. Categorical exclusions were developed to address these issues. The Forest Service desperately needs these types of tools to simplify the excessively complicated documentation process, and to move forward with the critical on-the-ground activities in a timely manner.

There are several examples of forest health problems from all over the country which highlight the urgent need for these categorical exclusions. The southern pine beetle outbreak in the Ocala National Forest in Florida in 2001 is an example of this. According to Forest Service documents, the outbreak was approximately 150 acres. The agency prepared environmental assessment and proposed harvest of the infected trees. By the time the agency completed the public review and appeal process, 9 months had passed. Over this 9-month period, the infestation had grown from 150 to 1,500 acres, 10 times the size of the original infestation. In California, forestlands within the Angeles, Cleveland, and San Bernardino

National Forests are suffering from the largest bark beetle infestation in the last 50 years. Categorical exclusions are being used to remove diseased trees that are threatening to fall on homes, power lines, and the emergency evacuation routes. In Colorado and North Dakota, categorical exclusions have been used to control the spread pine beetle and to salvage infested trees and salvage prior to them losing their value as lumber.

We now face a situation where professional land managers within the Forest Service are not able to undertake needed activities in a timely fashion. A U.S. district court's recent decision has removed a much-needed tool from the forest manager's toolbox, a tool that was created to address serious forest health issues, where time unfortunately is not an asset. But not only will critical forest management actions not take place on the ground in a time frame needed to control insects, disease, or reduce the risk of fire, the Forest Service's good faith and credibility may also be held at question. An example of this is in Minnesota on the Superior National Forest, where Community Wildfire Protection Plans were completed for Cook and Lake Counties. These plans were developed from a community collaborative-based process that involved local Governments and the Federal Government. Without the use of the categorical exclusions, the ability of the Forest Service to implement their portion of the projects will be significantly delayed. Let us hope these communities are patient enough to continue with this very worthwhile effort.

Congress has provided the Forest Service the wide range of tools to manage the forest health crises facing our National Forests. The Healthy Forest Restoration Act of 2003 is an example of this. These tools allow Forest Service professional managers to move forward with certainty on activities that will help restore the health of our National Forests. And similar action is now needed from Congress to allow categorically excluded projects to move forward in a timely manner.

AF and PA looks forward to working with this committee and others to help develop solutions to address the burdensome process requirements that delay needed action on our National Forests. Thank you for the opportunity to testify. Mr. Chairman, I would be happy to answer questions from the committee.

[The prepared statement of Mr. O'Hara appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Mr. O'Hara. Mr. Robinson, we are pleased to have you with us today.

**STATEMENT OF M. BRAD ROBINSON, PRESIDENT, GUNNISON ENERGY CORPORATION**

Mr. ROBINSON. Thank you. Gunnison Energy Corporation has been exploring for natural gas in and around the Grand Mesa, Uncompahgre, and Gunnison National Forests on the western slope of Colorado for the last 4 years. What I wanted to talk about today was the direct impact on our company of this recent court ruling out of the Eastern District Court in California.

Gunnison Energy and a partner, SG Interests, acquired a natural gas pipeline system and a natural gas field that have been in existence for about 20 years. We did that at the first of the sum-

mer. This gas field is located in western Colorado between 8,000 and 10,000 feet of elevation. Because of that, we can only do work in the summer and fall months. The wells, most of the wells in the field are owned by Gunnison Energy and its partners, but there are also third-party producers who own wells in the area. We were in communication with the Forest Service for months prior to this acquisition, to be sure we understood the types of permits that would be required to operate the pipeline system, as well as to do certain modifications to the system, which were done for safety purposes and operational efficiencies. Some of this work involved moving a pipe that was exposed in a creek and is in danger of rupturing during the next spring runoff, snow runoff. Some of it involved merely moving some equipment around on the pipeline, and also changing some piping at a compressor station so that it would meet current operating codes. So basically, we are talking about safety work and just minor modifications.

The Forest Service approved this work via categorical exclusion because we weren't building any new roads or disturbing any new ground. But before we could complete the work, the Forest Service was forced to rescind both our operating permit for the pipeline, as well as the permits that were issued to do these improvements. In addition to that, our partner, SG Interests, was trying to build a line down to some wells they had just drilled, trying to get their gas to the market this winter. They were forced to terminate their work as were other third-party producers. The Forest Service has now come back and reauthorized that work, but the problem is, is that the contractors who were doing it have now moved on to other projects and can't immediately restart our work. And again, since this pipeline system is at elevation in the mountains, it is virtually assured we won't be able to do this work before the snow stops us this winter. And normally, you cannot recommence that work until June or July of the following year.

So at this point, we have at least three and as many as five gas producers who are unable to get their gas to the market this winter at significant cost to them. We also have three companies that went ahead and started work and invested significant funds of money to get gas to the market only to have that work stopped in spite of our efforts and the Forest Service's efforts.

We also have a court ruling that, in my opinion, in spite of the two clarifications, is far from clear. I believe it is item No. 10 of the clarification that presumably says that if you are clearing vegetation for the purpose of doing seismic exploration work, you need notice and a comment period. But it also talks to minerals and energy work and facilities, so it is really not clear what it is talking about, and I can promise you that there will be environmental groups that will go back to court to stop other work being done under categorical exclusions. And again, in a company like our case, those sorts of delays, waiting for the appeal periods and stuff to lapse, can mean 6 to 12 months delay in our work because of the winter conditions. So I also urge this committee to try to adopt H.R. 4091, which would exempt categorical exclusions from the Appeals Reform Act.

And I also just wanted to add two other comments. I believe Mr. Rey talked about the difference between a categorical exclusion, an

environmental assessment, and an environmental impact statement. We were just completing an environmental assessment to drill only 18 gas wells in an area where we already have existing production. And the document that we produced to do that is about this thick. We have been working on it for 18 months. It has probably 6 months to go before it will be final. We have expended in excess of \$250,000 on that study. So the distinction between allowing minor work for a via categorical exclusion and pushing something into an EA can mean 2 years and hundreds of thousands of dollars. And I guess the final thing, I would like to agree with a couple of the other panel people that, by and large, the Forest Service has excellent line managers. They need discretion to do their jobs. So anything you can do to facilitate that, I think is good. Thank you.

[The prepared statement of Mr. Robinson appears at the conclusion of the hearing.]

The CHAIRMAN. Thank you, Mr. Robinson.

Dr. Mortimer, would exempting categorically excluded projects from administrative appeals take away public participation in the decisionmaking?

Mr. MORTIMER. No, there is still a number of entry points for the public to participate in the process. Of course the categorical exclusions themselves, when they are developed, as Under Secretary Rey mentioned, they are already part of the NEPA process, which entails public participation. They are also part of an administrative rulemaking process which has its own variation on public participation. They are also integrated into the forest management plans that each National Forest has in place and is required to have in place, and so there is public participation that occurs throughout that process. And final, for better or for worse, there is also the remedy of litigation which, in a very strict sense, could be considered a form of public participation and decision making.

The CHAIRMAN. You mentioned that the precipitous decline in Forest Service timber sales in the last 15 years has not been accompanied by a decline in formal challenges to Forest Service proposals. Am I to take this to mean that environmental groups are challenging fuel reduction and forest restoration projects?

Mr. MORTIMER. It would be difficult to break that out without taking a look at the data more closely, but the trend that is appearing is that even though the volume of timber that is being sold and harvested from the National Forest is in decline and has been in decline for the last 15 years or so, litigation has not followed that trend. The number of lawsuits has remained steady and shows some increase actually, so it is becoming more intense for National Forest managers to face litigation, even though they are not cutting nearly the amount of timber that they once were.

The CHAIRMAN. Mr. Hofmann, how do you see the function of the Community Wildfire Protection Plan changing with the application of scoping and appeals to categorically excluded projects?

Mr. HOFMANN. The main advantage of a Community Wildfire Protection Plan is that the community comes together that involves all of the same individuals that would typically be involved in a scoping process. But instead of and responding to the Forest Service with their comments individually, they respond to each other and

they work those things out. That is sometimes a painful process, to negotiate across the table and then go to the Forest Service and say here is what we all want, we as a public, pretty unanimously would like you to do. I see that under this appeals process or under the scoping process would go forward and apply to the categorical exclusions, that would be not an incentive for the communities to come together under that aspect, because you can always go around the community and come into the second scoping process. So why be engaged in the first scoping process and that heart wrenching giving up things that you would rather not give up in order to have a community compromise? So I think that is one area that you would see the community compromises disappear.

I think that you would also see the community, to the extent that they would continue on that process, they would not want to do a categorical exclusion; therefore they would want to make sure that their recommendations were not so environmentally friendly, if you will, not so many environmentally benign, that they would require an EA. That way the Forest Service would have to assess their recommendation, and not modify it later on down the process. So I see that you would have more significant projects involved with that.

And then, of course, with the combination of those two, then you would have to start asking, is it really worth it for us to sit down at the table? Many of these projects, the Community Wildfire Protection Plans, have been in the process now for 2 years developing, and the incentive to sit down for that 2-year period would disappear, if all can be changed later on down the road. So I see that Community Wildfire Protection Plans may not solve the problem that we had originally hoped that they would.

The CHAIRMAN. Mr. O'Hara, can you describe for me the impact of delays on projects, such as the Devil's Track fuel reduction project and the Kawishiwi timber sale, on local communities in Minnesota?

Mr. O'HARA. Mr. Chairman, the Kawishiwi timber sale and the Devil Track fuel reduction projects are projects that plan to use the categorical exclusions under the Healthy Forest Restoration Act. And what I see the problem is, kind of a rippling effect. The Forest Service has limited staff budget dollars to spend, so the opportunity costs of going back and looking at those projects a second time, providing the public review, comment, appeal process will delay actions that the Forest Service kind of had in the pipeline to prepare for meeting their forest plans' objectives. And what happens there is to the communities, the timber sales or timber or volume coming out of those projects, and the economic activity associated with those projects, just won't take place. And to exacerbate the problem, the projects that were going to take place the following year or the year after will also be delayed.

The CHAIRMAN. In your estimation, is the quality of forest habitats improved by these kind of delays?

Mr. O'HARA. No. If you look at our State and much of the Lake States, the Forest Service land is intermingled with other ownerships. So you have State land, county land, private land, intermixed with Forest Service lands. And the projects or forest management activities on either one of these ownerships, if you were to walk across them and look at what is happening in the for-

est, you won't be able to say I am on county land, I am on Forest Service land, I am on private land. So the activities that take place in forest management do not change, but the delays could be catastrophic by not sanitizing areas that have insects or disease outbreaks.

The CHAIRMAN. Thank you. Mr. Robinson, on projects where the agency was not using categorical exclusions, what portion of the delays that you have experienced are attributable to the development of NEPA documentation and resolution of administrative appeal?

Mr. ROBINSON. In the area of oil and gas, virtually every single environmental assessment or environmental impact study is appealed by some environmental group. At minimum, with an environmental assessment, you have got 105-plus days of notice, comment, and appeal built in. And I think I would agree with, I think it was Mr. Rey that commented that because the forests, the people in the forests doing these things believe they are going to be appealed, they tend to have an extremely onerous review process and a reticence to issue them before they have double-checked every word on every page. And so I think that the chance to have to appeal everything adds a significant delay to almost any project.

The CHAIRMAN. How much gas will be shut in this winter as a result of the delays and confusion caused by Judge Singleton's ruling?

Mr. ROBINSON. Well, I can't say precisely, but somewhere between 2,500 and 5,000 MCF per day, which is enough gas to heat hundreds of, if not a thousand, homes.

The CHAIRMAN. All right, thank you very much. The gentleman from Colorado is recognized.

Mr. SALAZAR. Thank you, Mr. Chairman.

I just wanted to clarify something that you had in your statement that I don't think you talked about, Mr. Robinson, but you talked about a pipeline that was basically in jeopardy of being damaged with the spring runoff. Not being able to fix that because winter has set in, and if it does get damaged early in the spring, what is the process? Do you have to go through the appeals process? Do you have to go through hearings, or can you actually go in there and repair that immediately?

Mr. ROBINSON. Well, the fortunate thing that happened was when the Forest Service re-approved some of our work. As you may know, I don't know if you were lucky enough to be home recently, but we had about a week and a half of really pretty weather out there and we were able to get that pipe repaired, so it has been buried. But it was being hit by boulders, by boulders that were coming down the creek this spring before we acquired it. Had that pipeline ruptured, you obviously have a safety issue, but more importantly, there would have been natural gas liquids that would have gone into the creek and polluted the creek. So had we not had the clarification to the judge's ruling, and had the Forest Service not immediately approved our work, we would have been in danger for that happening next year. Now, we have not been able to complete all of the other work to the pipeline, and it snowed last night. There was a significant amount of snow in western Colorado last night. I do not know if we will be able to complete the other work.

Mr. SALAZAR. Thank you. And, Mr. O'Hara, how much time does it take to actually render lumber or timber useless after it has been devastated by pine beetle or by other things such as fire?

Mr. O'HARA. Of course, that is going to differ by regions. The southern region probably would be—I am guessing—3 months. Up where I am from, Minnesota, after the blow-down that we had, blue stain sets in rather quickly, probably 3 to 6 months, depending if the roots are still in tact or not. For pulp wood production, you get a little longer window, maybe another 2 or 3 months before the window deteriorates to such a point that you cannot make pulp.

Mr. SALAZAR. Thank you, Mr. Chairman. I have nothing further.

The CHAIRMAN. I thank the gentleman. The gentleman from Minnesota.

Mr. GUTKNECHT. Thank you, Mr. Chairman.

Mr. O'Hara, I suspect you are more familiar than even I am with the blow-down, but could you share with the committee what potentially could happen in northern Minnesota with all the trees that are on the ground?

Mr. O'HARA. The blow-down Congressman Gutknecht is referencing occurred July 4, 1999. Most of the blow-down was in the boundary waters wilderness area, in the wilderness area. We had about half million acres inside there blow down, and outside, I think, 110,000 acres blew down. So what we have is a lot of trees still today that are kind of like piled up upon each other. So they are getting very dry. There is some greening up, of course, a natural regeneration. The risk of fire there is still real. They had one back in August, the Alpine Lake fire, which burned, I believe, upwards of around 2,000 acres, but cost \$7 million to contain. And they were very fortunate on that fire, that the containment was 75-percent lake, so three-quarters of the fire was already surrounded by lakes. But the threat of fire is still there, and to clean it up, it is virtually impossible within the boundary lines.

Mr. GUTKNECHT. Well, not just in terms of cleaning up, but if that did get out of control, how much fuel have we got on the ground up there, and what kind of a fire would we have?

Mr. O'HARA. I can't remember the exact tonnage, but it would be a large conflagration. The fire, depending which way the winds are blowing, could blow. Typically, we get a northwest wind, is our typical wind. So if you have a fire starting up in that area, you have Tofte, Grand Marais, Lutsen, those cities and towns and communities that would be in the path of that fire.

Mr. GUTKNECHT. But it could literally burn all the way to Lake Superior.

Mr. O'HARA. It literally could, yes.

Mr. GUTKNECHT. Thank you.

Mr. O'HARA. Yes.

The CHAIRMAN. The gentleman from Louisiana.

Mr. BOUSTANY. I have nothing.

The CHAIRMAN. I thank the gentleman. The gentleman from Michigan is recognized.

Mr. SCHWARZ. One brief observation, if I could. Mr. Robinson, there is a good deal of natural gas in western Colorado, where Gunnison Energy is located, and also in the State of Wyoming. Is

the holdup, the environmental assessment problem, localized to forestlands in Colorado, or would you say that this is a problem in the entire gas producing, natural gas producing area? And do you think western Colorado, actually, western Colorado, parts of western South Dakota and North Dakota, eastern Montana, Wyoming, is it generalized or is it Colorado-specific?

Mr. ROBINSON. It is definitely a generalized problem. Anywhere in the country that you are trying to do work on the forestlands, the permitting process is arduously slow. Even being allowed past standards that they apply that are different and more expeditious than the Forest Service and that is another area. But if we could ever get the Forest Service timelines and rules to coincide, we would be a lot better off.

Mr. SCHWARZ. Would moving this legislation through and getting the president's signature on it ameliorate your situation to a greater or lesser degree?

Mr. ROBINSON. It would, yes. Yes, it would, to a greater degree.

Mr. SCHWARZ. OK, thank you very much. And just an observation to Dr. Mortimer, again, about there in Montana where you obviously spent some time down in the Bitterroots, which is 90 miles south of, or it is directly west of where my place is. That was a horrendous fire, and Montanans are still, and my relatives in Montana are still shaking their head and hoping and praying that something like that doesn't happen again. And to slow up steps that need to be taken, cleanups especially in that area, which haven't been done, as you know, in years and years and years and years, to me is unconscionable. So I thank you very much for your comments today, and I will bring them back to the folks out in western Montana and tell them that at least there is some folks back in the eastern part of the United States, as you know, that are looking out for their interest. Thank you very much. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. I thank the gentleman, and I thank all of the panelists for their contribution today. Today's hearing has cast the spotlight once again on the complexity of the maze of laws governing the Forest Service. While I do not question for a moment the good intentions behind them, the fact is, they are open to novel construction by the courts in ways that work the will of Congress, and we are seeing that very plainly right now. Public involvement, including the right to challenge forest management decisions, is intended to improve forest management decisions, not to stymie them until they are meaningless. At this point, the courts will continue to hear this case, even though the fire that led to the present dispute burned out almost 6 years ago. But we as a committee will continue to evaluate this set of overlapping and conflicting laws with an eye towards simplification and efficiency. And I want to thank all of our participants today.

Without objection, the record of today's hearing will remain open for 10 days to receive additional material and supplementary written responses from witnesses to any questions posed by a member of the panel, and we may submit several additional questions to the members of this panel. This hearing of the House Committee on Agriculture is adjourned.

[Whereupon, at 3:45 p.m., the committee was adjourned.]

[Material submitted for inclusion in the record follows:]

#### STATEMENT OF MARK REY

Mr. Chairman: Thank you for the opportunity to appear before you today to provide the Department's assessment of the impacts of recent court rulings on the Forest Service use of categorical exclusions and fire retardants. For the litigation involving the use of categorical exclusions both parties have filed notices of appeal of the ruling, and the Government has filed a motion for stay pending appeal. Due to the on-going litigation in these cases, I am obliged to limit my testimony to the impacts of these court rulings on the Forest Service, and not the merits of the cases.

#### USE OF CATEGORICAL EXCLUSIONS

The recent court ruling on the Forest Service use of categorical exclusions has a significant impact on a range of management activities throughout the country. Thousands of projects that we had found to have insignificant environmental impacts will now be subject to formal notice, comment and appeal, lengthening the time to conduct such activities, increasing their costs, and potentially increasing the amount of information that will be needed to document decisions.

Furthermore, the ruling is inconsistent with congressional intent as we understand it for two categories of projects which Congress specifically legislated in order to expedite agency work—applied silvicultural treatment projects under the Healthy Forest Restoration Act and oil and gas development in the Energy Policy Act. In both instances, Congress legislated categorical exclusions with the expectation that the effects would be reduced process, cost and time to complete the high-priority work. That expectation will be largely nullified by this ruling.

Of foremost concern is the effect of the court ruling on the hazardous fuels reduction work that is accomplished with multiple methods and often with multiple partners. For fiscal year 2006, we estimate that about half of the annual hazardous fuels treatment target will be accomplished using categorical exclusions. This means that all those projects are now subject to another 30 to 135 days of administrative process prior to implementation on the ground.

Categorical exclusions, as defined by the NEPA regulations of the Council on Environmental Quality (40 CFR 1508.4), are categories of actions that do not have a significant effect on the human environment (individually or cumulatively) and have been found to have no such effect by a Federal agency in the agency NEPA procedures. These categories of actions were established through public notice and comment for actions that were found to be minor in nature and to have individually and cumulatively insignificant environmental effects. We have developed categories of excluded activities through a public process supported by a record of analysis of documented environmental effects of over 2,400 projects. The Forest Service used this NEPA category—categorical exclusions—to identify projects and activities that are excluded from the notice, comment, and appeal provisions of the Appeals Reform Act. The Forest Service project appeal regulations (36 CFR 215), issued in 2003, provide that projects and activities which are categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA) are not subject to notice, comment and appeal.

The *Earth Island Institute v. Ruthenbeck* case (formerly *Earth Island Institute v. Pengilly*) was filed in October 2003 by five non-profit groups alleging that the Forest Service's authorization of the Burnt Ridge Restoration Project, on the Sequoia National Forest violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Appeals Reform Act (ARA) and the Administrative Procedures Act (APA). The original project analysis was categorically excluded from additional documentation. A decision was made and documented in a Decision Memo. This decision was withdrawn in March 2004 after the district court for the Eastern District of California issued a preliminary injunction against the project in December 2003.

The court nevertheless ruled on the plaintiffs' facial challenge to the validity of the appeal regulations (36 CFR 215) including the exemption of categorically excluded projects and activities projects from the notice, comment and appeal regulations. The court has since issued three decisions regarding the Forest Service project appeal regulations at 36 CFR 215. First, on July 7, 2005, Judge Singleton filed a ruling invalidating certain provisions of the project appeal regulations (36 CFR 215), including the provision of the appeal regulation that exempted categorically excluded projects and activities from notice, comment and appeal. The judge stated,

The ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as maintaining Forest Service

buildings or mowing ranger station lawns need not be subject to the notice, comment and appeal procedures. Actions that concern “land and resource management plans,” however, “shall” be subject to notice, comment and appeal procedures.

On July 22, 2005, an attorney for the plaintiffs sent a letter to the Department of Justice stating that he would move for contempt if he did not receive a letter by July 26 stating the agency was immediately suspending all categorically excluded actions implementing forest plans which have not been made subject to comment and appeal. On July 28, 2005, plaintiffs filed a motion to hold the Forest Service and Chief Dale Bosworth in contempt of court.

The Department of Justice, in its response, refuted the contempt claim and asked the court to clarify that its ruling was effective only in the Eastern District of California and should apply only to decisions issues after July 7th.

The second order, on September 20, 2005, made by Judge Singleton clarified that his July order applies nationally and prospectively from July 7, 2005. The Judge denied the plaintiffs’ motion for contempt, but warned that ‘the Court fully intends to enforce its orders.

On September 21, 2005, plaintiffs wrote another letter to Department of Justice threatening a second motion to hold the Forest Service in contempt if the Forest Service refused to immediately comply with the order.

In response to the judge’s order and faced with an aggressive plaintiff sending letters threatening contempt motions, the Chief of the Forest Service issued direction to the field to immediately suspend all categorically excluded proposed actions and ensure that all such projects are subject to the notice, comment and appeal provisions.

On October 19, 2005, the court issued a third order in response to the plaintiff’s motion to clarify. Judge Singleton clarified what categorically excluded decisions are not subject to notice, comment and appeal under the court’s order.

Based on the court’s order, the following actions are now expressly subject to notice, comment and appeal.

- timber sales;
- prescribed burning;
- cutting trees for thinning or wildlife purposes over 5 contiguous acres; (Thinning is a critical activity for ecosystem restoration. Timber sales, prescribed burning, and thinning are conducted to reduce hazardous fuels.)
- creating or maintaining wildlife openings; (This activity is a key wildlife habitat improvement for creating habitat diversity, edges and hiding cover.)
- designating Off Highway Vehicles (OHV) routes;
- constructing new OHV routes and facilities;
- upgrading, widening, or modifying OHV routes;
- special use permits for OHV activities;
- gathering geophysical data using certain techniques;
- trenching for data gathering on mineralization; and,
- clearing vegetation for sight paths for minerals, energy, or geophysical investigation or support facilities. (Inclusion of these last 3 activities imposes new procedural delays for virtually all oil and gas exploration activities.)

#### IMPACTS OF ORDERS ON FOREST SERVICE ACTIONS

For the kinds of projects that include actions not exempted by the October 19 order, the Forest Service will now have to provide notice and opportunity to comment and appeal. The notice, comment and appeal process could add up to 135 days to the timeline before a project can be approved and implemented. The level of public interest and comment on a project determines if an appeal period, with a potential 105 day period for filing and reviewing appeals, is required for a project decision. Additionally, this court ruling would apply to any new categorical exclusions developed in the future for the actions listed in the October 19 order, thereby potentially expanding future impacts of this court ruling.

I have some data to share with the Committee on the impacts of these court orders on Forest Service activities. We asked each of the nine Forest Service Regions to provide estimates of categorically excluded projects with activities listed in the October 19 order that are now subject to notice, comment and appeal. All of these projects would have been prepared with our previous public involvement and environmental analysis procedures, but would have been exempt from notice, comment and appeal.

The Regions report that as a result of the October 19 clarifying order, over 800 projects are now subject to notice, comment and appeal. This figure includes projects in fiscal years 2005 and 2006. The Regions report the following number of projects for each of the activities listed in the October order:

- about 260 small timber sales, each of which may include up to 1,000 acres of hazardous fuels treatments by thinning, up to 70 acres of live tree harvesting, salvaging of dead or dying trees up to 250 acres, or sanitation harvest to control insects or disease of up to 250 acres;
- about 210 prescribed burning projects for hazardous fuels reduction treatments on up to 4,500 acres;
- over 30 wildlife opening projects;
- about 7 OHV route designations;
- over 9 new OHV route and facility construction;
- about 14 OHV route modifications;
- over 6 special use permits for OHV activities or events;
- over 215 projects for cutting trees for thinning or wildlife habitat improvement in an area greater than 5 acres;
- over 20 geophysical data gathering projects;
- about 7 trenching projects for mineralization evidence; and
- about 20 projects for clearing vegetation for sight paths for minerals, energy, or geophysical investigation or support facilities.

The Regions estimated the acreage of these projects now subject to notice, comment and appeal to be over 1.2 million acres. This acreage figure includes about 900,000 acres of hazardous fuels reduction projects as part of the national FY 2006 target of 1.8 million acres for hazardous fuels reduction treatments. This 900,000 acre estimate includes almost 600,000 acres of prescribed burning in the Southern Region. One effect of the increased timeframes is missing prescriptive windows of air quality limitations for prescribed burning. Delaying prescribed burning activities increases fuel loading, creating higher risks and potentially higher smoke emissions. Moreover, increased fuel loads add to the complexity of the burns with the potential for fire escapes and need for more people and equipment, thus increasing costs. Higher fuel loads increase fire intensities and behavior putting project crews at risk. An additional potential impact the Regions report is to neighboring communities. Over 230 neighboring communities would potentially benefit from these hazardous fuels reduction projects if they were not delayed.

As was previously stated, the categories of excluded activities were developed through a public rulemaking process supported by a record of documented environmental effects which concluded that these activities have insignificant environmental effects.

The procedural changes brought on by rulings in the Earth Island Institute case will have an important consequence on our ability to conduct routine operations where there are no adverse effects on extraordinary circumstances. Being able to move swiftly to accomplish project work is essential to people whose livelihood is dependent upon time-sensitive decision making. In fact, the risk of not taking action may often exceed the environmental effects of project implementation.

Our inability to promptly handle routine matters has an effect on the public, our customers and partners. Hazardous fuel treatment operations that are coordinated across land ownerships will become more complicated, time consuming and potentially less effective due to procedural delays that affect National Forest System lands that adjoin other Federal, state and private lands to be treated in the same proposal. An overarching goal in the President's Healthy Forest Initiative (HFI) and the Congressionally-enacted Hazardous Fuels Reduction Act (HFRA) was to reduce the amount of time and cost associated with the forest restoration and hazardous fuels reduction treatments where the scope of effects was well understood and the Forest Service's experience had concluded there were no significant environmental effects. Achieving this goal is now that much more challenging.

But the impacts of the ruling go beyond fuels reduction projects. In the recently enacted Energy Policy Act, (P.L. 109-58) Congress directed Federal agencies to respond to energy-related activities more quickly. Many of the routine and minor proposals we deal with involve coordination of those proposals and activities on BLM lands. The difference of time in terms of our ability to respond to proposals versus those of the BLM creates unnecessary procedural challenges when responding to energy-related proposals.

Our off-highway vehicle program provides enjoyment for thousands of motorcycle, ATV, jeep and snowmobile enthusiasts. Special events on National Forest System lands are a popular activity for many clubs, an activity that requires a special use permit. Because clubs often do short-term event planning, in the past we have been able to respond within a few weeks to meet their schedule. Now, we will need up to 7-months lead time for notice, comment, analysis, and appeal opportunity to issue a special use permit for an OHV activity. For example, a motorcycle club had planned an enduro ride on the Eldorado National Forest in California. The event

had to be cancelled because the Forest Service couldn't comply with the court order and issue the special use permit in time.

The recent ruling on project appeal procedures for categorically excluded activities will have a far-reaching impact on the Forest Service's ability to quickly respond to resource management needs and partner requests for work of a routine nature with insignificant environmental effects. We know the recent court orders impact not just our activities, but also our neighboring communities and land owners, permittees, contractors, and other government agencies. Moreover, the court's ruling has resulted in some loss of efficiency gained and we have, therefore, lost some of the efficiencies gained in the last few years with the President's Healthy Forest Initiative and your Healthy Forest Restoration Act for ecosystem restoration and hazardous fuels reduction.

#### USE OF FIRE RETARDANT

In a decision filed on October 24, 2005, the Federal district court for the District of Montana held that the Forest Service's failure to conduct an environmental analysis on the use of long-term chemical fire retardant on National Forest System land violated the National Environmental Policy Act (NEPA), and that the agency's failure to engage in formal consultation on this activity similarly violated the Endangered Species Act (ESA).

Regarding NEPA, the court concluded, "The USFS decision to allow the use of chemical fire retardant on national forests has a direct immediate effect on the environment." Additionally, the court stated, "...the USFS decision not to consult NEPA in the annual dumping of millions of gallons of chemical fire retardant on the national forests is unreasonable."

Regarding ESA, the Court held that the Forest Service's reliance on emergency consultations for long-term retardant dropped in waters inhabited by listed species did not excuse the lack of formal consultation with the Fish and Wildlife Service and the National Marine Fisheries Service. The Court ruled that "The use of long-term fire retardant is not unexpected but guaranteed; the only question is when and where it will be used. There is no reason why the USFS cannot conduct formal consultation with FWS and no reason to find that the ESA requires anything else."

In its order, the court stated that while Plaintiffs had requested "additional injunctive relief", they had not specifically requested that the court enjoin the Forest Service from using the fire retardants, and so no injunction was issued. The court ordered the Forest Service to comply with NEPA and to begin formal consultation with the Fish and Wildlife Service under ESA.

The court left to the Forest Service's discretion whether to conduct an environmental assessment (EA) or a more comprehensive environmental impact statement (EIS) to comply with NEPA. Preliminary estimates by agency staff indicate that a programmatic EIS, should we decide to go that route, might take up to 2 years to complete.

Even prior to this case, the Forest Service worked with FWS and NMFS for some time on the subject of how we might conduct ESA section 7 consultations for fire-fighting activities, and did not reach a conclusion. Therefore we are not able to estimate what amount of additional activity, or what additional cost, would be required by the court's order. At this point, we have not verified that FWS and NMFS will accept a programmatic consultation of this nature. If they would not, then we face the prospect of additional difficulty in complying with this order.

We note that, while the court in this case did not enjoin the use of the retardant while the required NEPA and ESA activities are conducted, there is still the possibility of an injunction in the future. The judge did make a decision on the merits of the NEPA and ESA claims, so it is possible that another plaintiff, in this or another venue, could cite this finding and seek an injunction, which a court could grant. So we will be in a state of uncertainty as to the availability of this firefighting tool even as we begin compliance with this order.

This concludes my statement, I would be happy to answer any questions that you may have.

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#### STATEMENT OF BRAD ROBINSON

I am Brad Robinson, president of Gunnison Energy Corporation. Gunnison Energy has been exploring for natural gas in and around the Grand Mesa, Uncompahgre and Gunnison National Forests on the Western Slope of Colorado for 4 years. Gunnison Energy has invested ten of millions of dollars in these exploration efforts but has yet to earn any income from these investments. One of the reasons for this is

the high cost and time delays associated with exploring for and developing minerals on Forest Service and BLM lands.

I would like to relate to you today how the recent court ruling relating to Categorical Exclusions (CEs) out of the Ninth Circuit Court and the resulting confusion with regard to the Forest Service's ability to issue Categorical Exclusions has impacted our company. Before I start, let me emphasize two things: First, Gunnison Energy strongly supports reasonable protections to the environment. Secondly, Gunnison Energy has an excellent working relationship with the Forest Service and in no way blames them for these recent problems.

Gunnison Energy and a partner, SG Interests, recently purchased a natural gas pipeline system and a natural gas field which have been in existence for nearly 20 years. Some of the gas wells are owned by Gunnison Energy and its partner, some are owned by third parties. Gunnison Energy was in communication with the Forest Service months prior to this acquisition to determine what permits would be required to operate the pipeline and to do certain minor modifications to the pipeline system to improve its safety and operational efficiency. The Forest Service advised us that this work could be approved via a CE since no new roads were being built nor was any new surface disturbance taking place. And, in fact, the Forest Service approved our work via a CE once acquisition of the pipeline system was finalized. However, before our work could be completed, the Forest Service was forced to rescind its approval because of the Ninth Circuit Court ruling. Our partners, SG Interest were also forced to halt work on an extension of the pipeline system to wells they own which they had hoped to produce over this winter. Other gas well operators have also terminated their work.

The Forest Service has now re-approved some of this work. However, the contractors who were to do this work have moved on to other projects and cannot immediately restart this work. In addition, our pipeline system and gas field is between 8,000 and 10,000 feet of elevation. Therefore, it is nearly assured that this work will not be done this year and cannot be recommenced until June or July 2006 when the snow melts.

So, at this point, we have at least three, and perhaps five, companies whose gas will most certainly be shut in for the winter at a significant cost to these companies. We have three companies who, in good faith, invested significant sums to get this gas to market this winter. And, in spite of our and the Forest Service's efforts, we are shut in. This not only hurts us, but also hurts gas consumers.

We also have a court ruling that in spite of two clarifications is still not clear. Item number 10 of the judge's clarification presumably speaks to the need for notice and comment for CEs related to clearing vegetation for the purpose of doing seismic exploration work or the like. However, I can assure you that others will argue that this provision means that any minerals or energy work requires that CE's be noticed, commented upon and be subject to appeal. Again, in our case, the delay this entails can mean an extra six to twelve month delay in our work.

The logic behind Categorical Exclusions was to "categorically exclude" from further analysis under the National Environmental Protection Act those activities which are so minor or so routine that local Forest Service officials can evaluate and approve them on a site specific, project by project basis without the delay of months of comment and appeals. Examples include the transfer of permits related to existing uses of the forest and modification to existing equipment and facilities or other activities which do not impact the forest land. The court ruling and resulting uncertainty guts the Forest Service's ability to carry out their most basic work. I strongly urge you to again provide the local Forest Service the tools and discretion they need to do their jobs, so that ranchers, grazers and people like me can do our jobs.

Attached to this statement is suggested language which can be added to the Appeals Reform Act to clarify that CE's are not subject to notice, comment or appeal provisions. Gunnison Energy urges you to adopt this or similar language to remedy the burdensome delays which are stopping routine work and stopping the delivery of much needed natural gas to the market.

Thank you.

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#### STATEMENT OF TIM O'HARA

Good morning, Mr. Chairman. My name is Tim O'Hara, and I am the vice president of Minnesota Forest Industries. My testimony today is also on behalf of the American Forest and Paper Association (AF&PA), which is the national trade association representing forestland owners, manufacturers of solid wood products, and producers of pulp and paper products. The U.S. forest products industry had sales

of over \$230 billion in 2004 and employed 1.1 million people. The industry accounts for about 7 percent of U.S. manufacturing.

We are interested in the issue being explored at this hearing because many forest products companies and their employees have a direct interest in the management of the U.S. forest lands, both public and private. Since insect and disease outbreaks and wildfires do not respect property boundaries, addressing the growing forest health crisis on our Federal lands is integral to reducing risks to adjacent communities and state and private forestlands. Our industry is very concerned that the Federal agencies recognize the significant threats that Federal non-action poses to non-Federal forestlands. In addition, many of these companies are partially or wholly dependent on timber resources of the National Forest System.

#### THE NEED FOR TIMELY ACTION

The administration announced the Healthy Forests Initiative in 2002 to address the growing forest health crisis on our Federal forestlands. The Forest Service estimates that over 72 million acres are at high risk of catastrophic wildfires and another 26 million acres are at risk from insect and disease epidemics. Further exacerbating the problem is the fact that, according to the Forest Service, the agency spends more than 40 percent of its budget and staff time managing paperwork, rather than managing the forests.

In 2003, the Forest Service developed several new Categorical Exclusions (CEs) to cover activities that would not have a significant impact on the environment and therefore would not require an environmental assessment or environmental impact statement. These new CEs applied to limited acreage projects and were designed to reduce hazardous fuels, remove trees to prevent the spread of insects and disease, and restore forests following a wildfire. These activities could be accomplished directly after the local manager's decision without lengthy delays, just like the numerous categorical exclusions already in place.

In developing these categorical exclusions, the agency conducted an extensive review of hundreds of projects that provided clear justification for the categorical exclusions, and demonstrated that the use of the categorical exclusions will not have a significant impact on the environment.

The Forest Service desperately needs these tools to simplify the excessively complicated documentation processes currently in place and to move forward with critical on-the-ground activities. There are several examples of forest health problems from all over the country, which highlight the urgent need for these categorical exclusions:

- An outbreak of Southern Pine Beetle was detected on the Ocala National Forest in Florida in April of 2001. According to Forest Service documents, 60–70 spots of beetle attacks were detected, covering approximately 150 acres. Agency analyses were initiated that determined the appropriate action would be for the Forest Service to cut and remove the infested trees. The agency prepared an environmental assessment, which was followed by months of public comments, appeals, and waiting periods. Ultimately, the needed harvest and removal of the infested trees did not begin until nine months after the outbreaks were detected, by which time the outbreak had spread to almost 1,500 acres, ten times the original impact. This delay cost the Forest Service 2.3 million board feet with a value of \$158,000. More importantly, the remaining infested trees posed a significant forest health and fire threat.

- The Daniel Boone National Forest in Kentucky experienced Southern Pine Beetle outbreaks starting in 1999 and continuing through 2001. Two types of treatment methods—cut and leave and cut and remove—were attempted, but efforts to control the spread of the beetle were delayed by excessive paperwork and appeals, allowing the devastation to quickly spread. More than 100,000 acres of pine forest were lost to beetle damage on the Daniel Boone, an estimated 80 percent of pine acres previously existing. Because these pine forests had provided habitat to the federally endangered red cockaded woodpecker, 15 of these rare birds had to be captured and relocated to other States where pine habitat was unaffected by the beetle. The forest is now faced with thousands of dead pine trees across the landscape, creating hazards for recreation and devastation to the landscape.

- In California, forest lands within the Angeles, Cleveland, and San Bernardino National Forests are suffering from the largest bark beetle infestation in the last 50 years. The effects of overstocking, drought, and lack of active forest management have severely damaged these forests. As a result, several hundred thousand dead pine trees are decaying fast and threatening to fall on homes, power lines, and emergency evacuation routes. These forests contain recreation areas used by millions of people from the nearby metropolitan areas and surround residences with

millions of dollars of property value. The categorical exclusions introduced in 2003 have helped in expediting removal of the diseased and infected trees.

- In the Rocky Mountain Region, many national forests have utilized categorical exclusions to handle small mountain pine beetle salvage projects, such as the Custer Bugs project on the Black Hills National Forest in South Dakota and the Beecher project on the White River National Forest in Colorado. Both of these national forests have active mountain pine beetle epidemics covering tens of thousands of acres. The use of categorical exclusions has allowed the Forest Service to move quickly to salvage trees that have been attacked by mountain pine beetle to prevent the spread of beetles to additional trees and to salvage the dead trees before they lose their value for lumber.

#### CONSEQUENCES OF LITIGATION

In today's society, litigation seems to be the common reaction whenever someone or some group is offended or does not get their way. This is not to suggest that legitimate grievances never occur or that the Forest Service always gets it right. However, we can all agree that a Federal judge lacks the training to be a qualified forest manager and that a courtroom is the wrong place to create forest policy.

I offer the litigation directed at the Texas National Forests to demonstrate why litigation can hurt the ability of the agency to take care of serious forest health problems and cost unnecessary time and money. Environmental groups filed a case in the Texas Federal courts in 1985, originally hoping to stop the Forest Service from addressing a pine beetle outbreak in designated wilderness areas. After a few years, the court allowed the agency to cut the infested trees to prevent it from spreading outside the wilderness, which of course it already had. The lawsuit then expanded into numerous other issues and lasted for eighteen years. Finally, in 2003, the court dismissed the case primarily because the courts had rejected every claim argued by the environmental groups since 1991.

Obviously, not every lawsuit reaches this extreme. However, I put it forth as an example to illustrate why Congress should make every effort to provide the Forest Service with as much clarity as possible so that the opportunities for litigation are minimized.

#### THE NEED FOR CONGRESS TO ACT

We now face a situation where professional land managers within the Forest Service are not able to undertake needed activities in a timely fashion. Activities that have been documented to not significantly impact the environment are nonetheless held up through a burdensome process of public comment and appeal. AF&PA and its member companies support the concepts of comment and appeal, but do not believe that these processes are appropriate to actions that have been determined to have no significant environmental impacts and where the need for action is critical.

In a recent decision, U.S. District Court Judge Singleton (Earth Island Institute vs. Pengilly, now Ruthenbeck) determined that categorical exclusions were subject to the 1992 Appeals Reform Act and therefore the Forest Service must allow for public comment and appeals on covered activities. But in a later clarification, he then drew a baseless distinction between "minor" and "major" categorical exclusions and included the forest health activities in the "major" category subject to notice, comment and appeal. There is no legal basis for this distinction, since the rules of the Council on Environmental Quality define categorical exclusion as any activity with no significant environmental impacts. Whatever the merits of Judge Singleton's underlying decision, it has caused and will continue to cause significant delays for critical forest health projects. Hundreds of projects have been suspended all across the country until the public comment and appeals process can occur. It is worth noting that any party who is truly affected by one of these projects may always file a lawsuit, an action which is obviously available to many given the number of cases where the Forest Service is a defendant.

The extra time needed for notice, comment, and appeal procedures is potentially in excess of 135 days and can often delay seasonal projects even longer. The Forest Service anticipates that approximately 148,000 acres of hazardous fuels treatments to reduce the risk of catastrophic wildfire will not be completed in FY 2006 as was originally planned. Over 82,000 of the 148,000 acres are located in the wildland-urban interface. In some locations, there are only certain times of year where conditions exist to accomplish prescribed burning safely and without undesirable resource damage; delays caused by this ruling may result in these activities being postponed into FY 2007.

One current example of the problems associated with delays comes from the Hash Rock fire on the Ochocco National Forest in eastern Oregon. This fire occurred five years ago and burned most of a wilderness area. The Forest Service proposed salvaging outside the wilderness on the fringes. The project was appealed and no sale went forward. The pine beetle then moved from the burned area into adjacent large, old growth ponderosa pines, which the forest plan was trying to preserve as old growth. This fall, the Forest Service proposed a project to contain the beetle infestation and a CE was going to be used, but now cannot because of Judge Singleton's ruling. So, because of continued appeals and litigation, an insect infestation has spread and will continue to spread from a large burned area and has attacked healthy, large, old-growth pines which were designed for protection.

The impacts of Judge Singleton's ruling are also being felt in Minnesota's Superior National Forest, where Community Wildfire Protection Plans were recently completed for Cook and Lake Counties. These plans were developed from a community-based collaborative process, through which desired outcomes were identified. The planned activities would incorporate the use of CEs to promptly address the dangerous hazardous fuels situation. Without the use of CEs as intended, the ability of the Forest Service to implement their portion of the projects will be significantly delayed and the entire effort will be compromised for those communities.

Another recent decision that has been in the news is Judge Molloy's ruling in the Montana Federal court that the Forest Service failed to properly analyze its use of chemical fire retardant to control wildfire from the air. While the judge has not stopped use of this critical tool in the fight against wildfire as the agency prepares the necessary analyses, this presents yet another example of the myriad ways the Forest Service becomes entangled in process while trying to address and manage the very real and very dangerous conditions on the national forests.

These decisions and others suggest that we cannot and should not let these issues get decided piecemeal through our judicial system. Action is needed by Congress now to assist the Forest Service in moving forward expeditiously on appropriate activities.

Congress has provided the Forest Service with a wide range of tools to address the forest health crisis facing our national forests. Recent and pending legislation, including the Healthy Forests Restoration Act of 2003 and the recently introduced Forest Emergency Recovery and Research Act, specify the appropriate processes and timeframes for various activities. These laws allow the Forest Service's professional forestland managers to move forward with certainty on activities that will help restore the health of our national forests. Similar action is now needed from Congress to allow categorically excluded projects to move forward in a timely manner.

AF&PA looks forward to working with this Committee and others to help develop solutions to address the burdensome process requirements that delay needed action on our national forests. Thank you for the opportunity to testify, Mr. Chairman. I would be happy to answer questions from the Committee.

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#### STATEMENT OF JOHN B. HOFMANN

Thank you, Mr. Chairman and members of the committee for the invitation to address the impacts of the application of the Appeals Reform Act on projects agreed to within Community Wildfire Protection Plans (Plans). At this time, we are aware of fifty-seven Community Wildfire Protection Plans in various stages of development within 29 California counties, 15 of which include all or most of the at-risk communities in that county. Through the efforts of California's Fire Safe Councils, which predate the Healthy Forest Restoration Act, many of these Plans have been in development for over 2 years.

A Community Wildfire Protection Plan must meet four basic requirements: (1) it must identify and prioritize areas for hazardous fuel reduction treatments with recommendations for the type and method of treatment; (2) it must recommend measures that reduce structural ignitability; (3) it must accomplish those criteria within the context of collaborative agreements; and, (4) it must be agreed to by the local government, local fire department, and the state forest management agency in consultation with Federal agencies and interested parties. We appreciate the wisdom of Congress in including the combination of these elements, for they are the cornerstones to successful implementation of Community Wildfire Protection Plans.

The areas and treatments recommended by the Plans are developed collaboratively according to the Implementation Plan for the Comprehensive Strategy for a Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment. Under the three-tiered structure, all interested parties have the opportunity to participate. This collaborative process invites debate, science, emotion,

and eventually compromise, balance, and acceptance. The debate continues until the community participants satisfy locally elected government leaders that the Plan is socially acceptable, and the local and state fire experts that the plan will protect the at-risk communities.

In addition to expedited NEPA procedures, the Healthy Forest Restoration Act retained the authorized use of categorical exclusions. Categorical exclusions provide a standard and an incentive for communities to collaboratively simplify treatment recommendations and minimize environmental impacts. Categorical exclusions are created after evaluating hundreds of similar completed projects and finding none of the projects, individually or cumulatively, have had a significant effect on the environment. By reducing the time and cost associated with a more formal environmental analysis, categorical exclusions provide communities an incentive to meet standards known to not have a significant effect on the environment and be non-controversial.

Application of the Appeals Reform Act to categorical exclusions impacts the implementation of a Community Wildfire Protection Plan in a number of ways:

- The scoping required under the Appeals Reform Act will duplicate hazardous fuels reduction requirements.

The categorical exclusion most likely to be used to implement a Community Wildfire Protection Plan is the hazardous fuels reduction category exclusion. The rule specifies that the fuels reduction activity "shall be identified through a collaborative framework as described in A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy Implementation Plan". This is the same collaborative framework required by the Healthy Forest Restoration Act for developing treatments in a Community Wildfire Protection Plan. The three-tiered collaborative framework invites participation at the local, state and national level. The June 5, 2003 Federal Register notice for the hazardous fuel reduction category exclusion adds, "This collaboration will, where appropriate, seek to address conflicts concerning alternative uses of resources and be used by the Federal agencies to consider, as appropriate, reasonable alternatives to recommend courses of action."

The process of community collaboration has proven effective under the Secure Rural Schools and Community Self-determination Act of 2000. Not one project developed by the collaborative Resource Advisory Committees has been appealed. However, if collaborative plans are significantly modified by a second scoping period, the community collaborative compromise may be breached and the process reverts back to the non-collaborative process that has spurned appeals and litigation. Following up a collaborative effort with a scoping outreach and appeals would be duplicative, time consuming and risky for environmentally insignificant treatments.

- Scoping and appeals will jeopardize community collaboration and support.

The Healthy Forest Restoration Act of 2003 requires communities to recommend treatments in a Community Wildfire Protection Plan by collaboration "in order to encourage meaningful public participation during preparation of authorized hazardous fuel reduction projects". Application of the Appeals Reform Act would require scoping after a community had already collaboratively developed a recommendation, or in essence, open a second scoping period. A second scoping period would diminish rather than encourage meaningful public participation in the project development through a Community Wildfire Protection Plan. A second scoping period provides an opportunity for those not satisfied with the Community Wildfire Protection Plan process to modify projects even to the extent that the community might no longer support the project. The second scoping period has the power to override the required community collaboration. Scoping and appeals for a categorical-exemption thereby reduces the incentive for a community to collaboratively develop a community wildfire protection plan, only to be subsequently modified and delayed by those outside the Community Wildfire Protection Plan planning process.

- Scoping and appeals will reduce the incentives for environmentally simplified treatments

For projects that require an environmental assessment (EA) or an environmental impact statement (EIS), Federal agencies must evaluate, at a minimum, the community recommended treatments. If, during scoping or agency review, a different alternative is recommended, the agency must still evaluate the community recommendation along with the scoping or agency recommendation. However, Federal agencies are not obligated to evaluate community recommendations in addition to their own for projects that meet the categorical exclusion standards. Therefore, communities that want to ensure its recommendations are evaluated, would be discouraged from meeting the categorical exclusion standards.

- Scoping and appeals will increase project implementation costs

Scoping and appeals will needlessly add to the cost of community recommended fuels treatments that qualify for a categorical exclusion. Communities must stretch existing funds to implement wildfire protection plans. Last year, California communities requested \$33.5 million in grant assistance to implement 366 projects agreed to in Community Wildfire Protection Plans. The combination of state and Federal funding totaled only \$8.7 million dollars, which funded 127 community projects. Where Federal funds are used to reduce fuels on private lands, the private projects must also be NEPA compliant. Conducting a second scoping period with its accompanying analysis will further aggravate the funding scarcity on both Federal and private lands.

- Scoping and appeals will delay community project implementation

Time is of the essence for many communities surrounded by hazardous fuels conditions. For Southern California, the passage of the Healthy Forest Restoration Act was too late. In California, we were fortunate this past season. Heavy winter rains fueled fear in many firefighters as wildland fuels grew. While we can breathe a sigh of relief for a mild fire fighting season, unless the excessive fuels are removed, the resultant growth in fuels will combine with next year's growth and the following year's growth to exponentially contribute to explosive fire conditions next year, and the year after, and the year after that. It is not a question of if, but when the wildfires will ignite. Delays of any extent, extends the time period communities are vulnerable to wildfire.

- Scoping and appeals will jeopardize the Community Wildfire Protection Plan strategy

A Community Wildfire Protection Plan is a strategy, not a project. The effectiveness of the strategy is dependent on the collective integration of all the projects. The challenge with past fuels reduction plans has been the piece-meal approach with individual projects. Fuels reduction treatments have proven effective when the fire starts in alignment with the project. Far too often, the fire burned through or missed the treatment area and burned with catastrophic results for want of a strategically placed sequel. With significant modifications to individual projects, the strategic plan may no longer be effective in protecting communities.

The hope of Community Wildfire Protection Plans was to bring peace to the forest wars through collaboratively resolving differences in communities. Adding a second scoping and appeals requirement to collaboratively developed, environmentally insignificant projects undermines the cornerstones of a Community Wildfire Protection Plan.

Thank you Mr. Chairman and Members of the Committee. I will be happy to answer any questions you may have.

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#### STATEMENT OF MICHAEL MORTIMER

Mr. Chairman, members of the committee, I am pleased to have the opportunity to appear before you today to discuss a pressing national forest management issue. While I am a member of the forestry faculty at Virginia Tech, I wish to make my comments today on behalf of the Society of American Foresters and its 15,000 forestry professionals.

The National Environmental Policy Act or the NEPA has been in effect for nearly 40 years. Its dual requirements to involve the public and to analyze the potential environmental impacts of major Federal actions have provided safeguards against careless development and unforeseen consequences.

In enacting NEPA, Congress provided a useful mechanism for categorically excluding from environmental analysis smaller projects that afford very little risk in the way of environmental impacts and those projects considered emergency actions. These actions should be expeditiously implemented and warrant exemption from administrative appeals. SAF supports the recently introduced legislation, HR 4091, which would respond to a recent court decision hindering timely implementation of actions that have insignificant environmental impact.

The Forest Service currently has several categorical exclusions as allowed under the NEPA including those that are components of the Healthy Forests Initiative (HFI) and the Healthy Forests Restoration Act (HFRA) (P.L. 108-148). These exclusions aide in reducing hazardous fuels, addressing insect and disease outbreaks, and rehabilitating forests after events. Each of the HFI/HFRA categorical exclusions include specific limitations on the size of the projects, which vary from 70 acres for limited harvesting to 4,500 acres for prescribed burning; road building; silviculture applications; and herbicide and pesticide use. These categorical exclusions cannot be used in wilderness or wilderness study areas. Additionally, each includes provisions for how the public will be involved in the process. The wildfire risk reduction cat-

egorical exclusion in particular mandates that projects be developed through the collaborative process of the 10 Year Comprehensive Strategy for Implementing the National Fire Plan.

Because of the insignificant environmental impacts of these projects and the public involvement afforded through regulatory mandates in the exclusions, the forest planning process, project scoping, and litigation, these projects do not need to be further subjected to the administrative appeals process. It is important to note that these forest health-related categorical exclusions require full compliance with environmental laws. Additionally, projects implemented using these exclusions must still be consistent with the forest management plans required under the National Forest Management Act that are developed with significant public involvement and environmental analysis. Use of categorical exclusions relies upon the science and experiential knowledge of forest managers who have implemented these forest management practices for decades.

An agency is not free to develop categorical exclusions in any manner it sees fit. Categorical exclusions cannot be applied arbitrarily or haphazardly as the Forest Service discovered in the 1999 Heartwood decision.<sup>1</sup>

In contrast, when developing the HFI categorical exclusions, the Forest Service conducted extensive analysis of these types of projects and came to the conclusion that these actions result in insignificant environmental effect. In addition, forest managers need these exclusions to quickly respond to emergencies and reduce the threats to the Nation's forests.

SAF strongly believes that by their nature and with the limitations outlined in the regulations, the forest health projects allowed under the HFI and HFRA categorical exclusions should be excluded from further environmental analysis. These categorical exclusions can provide the Forest Service with a means to accelerate accomplishment of urgent projects on the ground. However, the agency cannot take full advantage of the efficiencies offered by these categorical exclusions without relief from the current statutory appeals process.

Judge Singleton's recent ruling in the Earth Island Institute case <sup>2</sup>

The court then compounds this problem by creating an artificial distinction where none exists. The court held that "While the Forest Service is clearly not required to make every minor project it undertakes subject to the appeals process, it is required to delineate between major and minor projects" The court's apparent logic being that minor projects do not require an appeals process, whereas major projects do.

There is no such distinction between major and minor in the Council on Environmental Quality's definition of categorical exclusion. The critical question in NEPA is instead whether actions will significantly impact the human environment. The size or scope of the project is irrelevant, only the environmental impacts are of concern. What Judge Singleton has done is create a new test to determine whether a categorical exclusion is appealable based on whether it is a major or minor action. Since this major vs. minor distinction is not currently defined, only another judge, on a case by case basis, can decide that question conclusively unless Congress acts to remedy this situation. The Earth Island Institute case has inappropriately blended the NEPA process with the appeals process. The consequence is uncertainty for the agency and undoubtedly additional lawsuits challenging the use of categorical exclusions.

Recent research on Virginia's national forests <sup>3</sup>

- One of the projects, designed to address a southern pine bark beetle infestation, would have harvested only 40 acres, prescriptively burned 70 acres, and constructed only one-third of a mile of road. Appeals added 7 months to the project, only to have litigation delay it another 13 months.

<sup>1</sup> *Heartwood v. U.S. Forest Service*, 73 F. Supp. 2d 962 (S.D. Ill 1999) aff'd 230 F.3d 947 (7th Cir.(Ill.)2000).

<sup>2</sup> *Earth Island Institute v. Pengilly*, Case No. CIV F-03-6386 JKS (E.D. CA 2005). has unfortunately clouded the relationship between categorical exclusions and the appeals process. While the court clearly recognized that the Appeals Reform Act certainly permits exclusion of environmentally insignificant projects from the appeals process, the court does not seem to understand that what it is describing are in fact categorically excluded projects.

<sup>3</sup> Scardina, A. 2003, Public involvement in USDA Forest Service project-level decision making: A qualitative analysis of public comments, administrative appeals, and legal arguments from case studies on the George Washington & Jefferson National Forests. Master of Science Thesis, Virginia Polytechnic Institute and State University. Blacksburg, VA. has shown that the appeals process inevitably slows down implementation of categorically excluded projects—in the cases we examined, the public comment and appeal processes added an average of 4 months, essentially doubling the implementation time for what should have been quickly completed, low impact projects:

- Two categorically excluded timber salvage sales, totaling a mere 150 acres of restoration work, were nonetheless appealed, again doubling the amount of time needed to implement the projects.

- Most discouragingly, a research project designed to test the efficacy of various gypsy moth pheromone treatments did not in fact qualify for a categorical exclusion. That project, designed to treat less than 1,000 acres not only failed to qualify for a categorical exclusion, but was subsequently appealed and litigated. While the Forest Service prevailed, the time elapsed was nearly two years. Two years to implement a small-scale forest health research project is unacceptable.

It is also worthwhile noting that in none of the appealed categorical exclusion projects we studied did the information raised on appeal lead to the reversal of the original Forest Service decision. It was in fact troubling that so many concerns were raised during the post-decisional period that could have been raised prior to the land manager's decision had the appellants truly wanted to contribute to improving the projects and the agency decisions.

In closing, as I was helping to coordinate the State of Montana's post-fire efforts on its forest lands in the Bitterroot Valley following the catastrophic fire season in the year 2000, it was painful to watch the NEPA and appeals processes grind down the Forest Service's ability to respond promptly to the crisis on its national forest lands. Categorical exclusions can restore common sense to how the NEPA is applied. Mr. Chairman, it is undeniably important that efforts with H.R. 4091, to codify the exemption of categorical exclusions from the appeals requirements of the Appeals Reform Act, move forward. The recent decision by Judge Singleton in the California District court is unfortunate, and demands that Congress clarify how categorical exclusions and the Forest Service appeals process fit together. The Society of American Foresters supports your initiative, and supports efforts to restore the ability of the Forest Service to act in a timely fashion to address forest health and other land and resource management needs on the national forests.

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TESTIMONY OF MATT KENNA ON BEHALF OF THE WESTERN  
ENVIRONMENTAL LAW CENTER, SIERRA CLUB, HEARTWOOD,  
AND CENTER FOR BIOLOGICAL DIVERSITY

TO THE UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON AGRICULTURE

NOVEMBER 15, 2005

CONCERNING

Review of Recent Litigation Regarding Forest Service  
Public Comment and Administrative Appeal Regulations

Thank you for the opportunity to provide these written comments on the pending case of Earth Island Institute v. Ruthenbeck, its effect on the public comment and administrative appeal regulations of the Forest Service, and the Forest Service's conduct in response to this litigation.

Effect of the Court's Orders

Contrary to views expressed in written testimony by the U.S. Department of Agriculture, the effect of Judge Singleton's<sup>1</sup> orders in this case has been nothing more than to reinstate the status quo regarding the affected regulations as they existed in 2003, before the challenged regulations were promulgated, and do not require the Forest Service to depart from the way it has conducted business for the vast majority of its history.

The Forest Service has had an appeals process in place since 1907, and timber sales had always been subject to appeal, until the regulations in question were promulgated in 2003. As the Forest Service stated in 1993 when it promulgated the first rules implementing the Forest Service Decision Making and Appeals Reform Act ("ARA"), in keeping categorically-excluded timber sales subject to appeal as they had also been prior to passage of the ARA: "These

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<sup>1</sup>. Judge Singleton sits on the U.S. District Court for the District of Alaska, but sits on this Eastern District of California case "by designation." Judge Singleton was appointed by President George H. W. Bush in 1990.

decisions, because they involve timber management, are sometimes subject to more complex analyses than the other actions. Much of the discussion in Congress about the Forest Service appeals process was directed towards timber harvesting, and the Agency feels that it is important to preserve the opportunity to appeal such decisions.” 58 Fed. Reg. 19,369, 19,373 (Apr. 14, 1993). Accordingly, it was the 2003 regulations that marked a radical change from past practice, and the Court’s order merely reinstated the rules for timber sales which had been in place for the vast majority of the Forest Service’s history.

Regarding non-timber decisions, it is true that the ten categorically-excluded activities other than timber harvest contained in the 2000 regulations (such as approval of new motorized trail routes) and reinstated by Judge Singleton were not subject to public comment and appeal under the 1993 rules. However, these activities, plus many more, were subject to public comment and appeal for decades prior to the 1993 regulations, which is why Heartwood challenged those regulations and why the Forest Service agreed in the 2000 settlement agreement to make those additional ten categories of actions subject to public comment and appeal. Accordingly, like timber sales these projects were also subject to appeal for the vast majority of the history of the Forest Service. During these many years the agency demonstrated that it was more than able to plan and implement projects in a timely manner while respecting the rights of citizens to provide comment and use administrative appeals.

#### The Forest Service Currently Has the Authority to Move Ahead with Emergency Actions

USDA’s written testimony fails to acknowledge that the Forest Service retains its authority to exempt emergency projects (such as urgent prescribed burning projects) from the stay provision of the ARA, allowing the projects to go forward immediately while any appeal proceeds. See 36 C.F.R. §§ 215.2, 215.9, 215.10. Accordingly, the Forest Service has all the

flexibility it needs to carry out urgent projects in an expedited manner, and accordingly it does not make sense to change the law to exempt all categorically-excluded projects from public comment and appeal.

Forest Service Malfeasance in Response to Court Orders

The Forest Service's failure to explain why it is not exercising its emergency authority where necessary, and its decision instead to seek relief in Congress which would exempt its many non-emergency actions from public review, is troubling. The reason for this approach appears to be the same reason that the agency misapplied the Court's order to apply it to truly minor actions such as firewood cutting, hunting outfitter permits, and even the cutting of the Capitol Christmas tree, in late September and early October before the court stepped in at plaintiffs' request: it represents an attempt to manufacture a political crisis intended to help the Forest Service in "overruling the judge legislatively," which "should lead to more questions about the real motives of the agency that allegedly protects the nation's forests." See "Forest Service Sulk," Washington Post Editorial October 24, 2005, Attachment #1; see also Attachments #2 thru #8 (Congressional letters and editorials expressing concern over USFS actions).

This effort to misapply the Court's ruling created serious impacts on citizens' lives. Outfitter permits were suspended right at the beginning of the big game season in Colorado, New Mexico and elsewhere, costing outfitters precious income during their peak season, and depriving some big game hunters of their chance to harvest game for the season. An Oregon resident "Pat Mooney lost half his wreath and Christmas tree-cutting season during the shutdown. He estimates the permit ban cost him \$15,000 and, in turn, hurt the eight commercial wreath makers he supplies with greenery." Attachment #9 ("Fuming in the Forest," Eugene

Register-Guard Editorial October 24, 2005). We see the decision by U.S. Forest Service leaders that created these significant disruptions of citizens' lives and livelihoods as a serious one. Efforts to place blame for the Forest Service's actions on "advice of its lawyers" or on "threatening letters of plaintiffs" are not supported by the facts. First, unequivocal binding case law made clear that once the Court set the 2003 rules aside, the old rules came back into effect, which did not make such minor actions subject to comment and appeal. Attachment #10 (October 19, 2005 Order, citing Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005)). Despite plaintiffs' citation of that case to the Court, the Forest Service never addressed it nor attempted to explain why it might not apply. It seems clear that only direction from the Forest Service leadership could have dictated this litigation strategy, rather than any legal advice of an attorney.

Second, the plaintiffs sent a letter to the Forest Service explaining that the order clearly did not apply to these minor actions, citing Paulsen v. Daniels. Attachment #11. It was plaintiffs, not the Forest Service, who sought and received an expedited order clarifying that the old rules were in place and that the Court's orders did not apply to these minor activities. Far from being "aggressive," the plaintiffs have expressed in letters to the Forest Service their willingness to discuss settlement with the agency to exempt any matters of urgency if the Forest Service honestly believed that existing emergency authority was not sufficient to exempt them from the appeal stay provision. Attachments #11, #12. The Forest Service did not accept any of these invitations to discuss settlement and failed to even respond.

#### Reasons Why Comment and Appeal are Necessary

There is a reason Congress passed the ARA in the first place: because Members and Senators of both parties agreed that better government was the result when the public had the

rights to provide input on Forest Service decisions. Congress also noted that the rights of public comment and appeal reduces the need to bring disagreements on specific projects to federal court.

The Forest Service states that categorically-excluded activities do not have significant effects, and therefore need no public comment and appeal. We agree that some activities such as firewood cutting have always been exempt from appeal and should remain so. However, we also believe that some projects can be planned with categorical exclusions but still have important aspects that require that the rights of comments and appeals be retained. This has become even more true under other Bush administration categorical exclusion rules which have expanded the use of categorical exclusions to include logging projects on hundreds of acres each, which each sometimes contain hundreds of log trucks' worth of timber. See 68 Fed. Reg. 44,598 (July 29, 2003).

As stated by one of the plaintiffs in a declaration submitted in the Ruthenbeck litigation, "the Center for Biological Diversity believes that the ability to categorically exclude certain projects is valuable; we only ask for notice, comment, and appeal opportunities for the kinds of projects that are on the margins of certainty, such as commercial timber sales and oil and gas drilling plans." Even for prescribed burn projects, absent some true emergency to carry them out immediately, public comment and potential appeal is a good idea. The rights of citizens to comment on projects and to have rights of administrative appeal are part of the social contract between Americans and the federal managers who have stewardship responsibilities over the public's lands. Efforts to short change the public's involvement strikes at the heart of this social contract. When is it appropriate for federal land managers to ignore the public in an attempt to meet their own desires? In order to reach timber volume goals? In order to augment some budget

shortfalls? In order to seek favor from a political ally? We believe that turning to the public rather than turning away will result in better outcomes for the management agencies, the public trust, the public's natural resources and the Congressional requirements for appropriating and overseeing these responsibilities.

**THE WASHINGTON POST****EDITORIAL**

<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/23/AR2005102300897.html>

**Forest Service Sulk**

Monday, October 24, 2005; A18

THE FOREST Service's decision to suspend more than 1,500 permits for activities in national forests -- including weddings, mushroom-picking and hunting expeditions for the disabled -- should lead to more questions about the real motives of the agency that allegedly protects the nation's forests. The extraordinarily petty decision appears to have been an overly literal response to a judicial decision in the summer, which found that the Forest Service had illegally rewritten its rules and dispensed with required public consultations before harvesting timber in Sequoia National Forest. The judge ordered the Forest Service to return to previous rules, which required public consultation for major forest activities, such as commercial timber sales, oil drilling or mining.

Instead of abiding by the law, the Forest Service, whose lawyers say they were interpreting a judge's broad and vague orders, decided to create chaos and put everything up for public consultation and a 30-day comment period. Proof that this was a political ploy -- deliberately designed to wreak havoc and feed the opposition to public consultation -- lies in the fact that a pro-development group announced it would like to see a "full public discussion" of the harvesting of the Capitol Christmas tree and initiated procedures that would delay the tree's arrival in Washington. On Capitol Hill there has also been talk of overruling the judge legislatively, possibly through an upcoming appropriations bill.

Now the same judge has clarified his earlier ruling and stated that public consultation is required for major activities that affect trees and wildlife, not for routine use of the forests. Forest Service lawyers say they will abide by the decision. Maybe the agency, and its Agriculture Department overseer, former timber industry lobbyist Mark Rey, should also think harder about whether it wants to preserve whatever smidgen of neutrality is left of the nation's forest policy, too.

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# Forest Service tries to teach greens a lesson

Agency attempts to bend court order to halt minor projects, but is knocked back

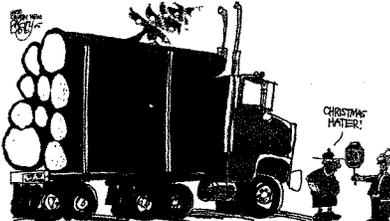
A recent court case temporarily prevented the public from cutting Christmas trees, picking mushrooms, or gathering firewood in national forests — or so the U.S. Forest Service wanted you to believe. This fall, the agency suspended nearly 1,600 routine activities, saying that a recent court ruling forced it to allow time for the public to comment on — and appeal — just about any action. The ruling resulted from a lawsuit brought by Earth Island Institute and other conservation groups, which charged that the Forest Service had been illegally permitting projects without opportunity for public input.

But suspending minor activities was not the point of the lawsuit, according to the plaintiffs' lead attorney, Matt Kenna of the Western Environmental Law Center. He says that the Forest Service went far beyond the intent of the court order in applying it to activities like bike races and the cutting of the Capitol holiday tree.

Andy Stahl, executive director of Forest Service Employees for Environmental Ethics, says that the agency was trying to stage a train wreck to get Congress to clean up the mess. In this case, "the mess" is the 1992 Forest Service Decision Making and Appeals Reform Act, which requires the agency to complete an appeals process (public notice and opportunity for comment and appeal) for projects implemented under national forest management plans.

When the Forest Service began implementing the appeals act, it used "categorical exclusions" to exempt environmentally benign projects from public input. However, over time, the agency added activities with larger impacts to the exclusion list. "The Forest Service was violating the 1992 appeals law," Stahl says.

A settlement in 2000 put the exclusion list in check. But in 2003, the Bush administration modified the appeals process to implement the Healthy Forest Initiative. One new regulation allowed all categorically excluded activities to sail through without the appeals process; other rules expanded the size of projects that can be excluded.



Since that time, the agency has inappropriately exempted thousands of projects from the appeals process, says Kenna. Examples include the Shaw Lake salvage timber sale in Colorado, which could produce up to 400 truckloads of timber, plus oil and gas development and the construction of off-highway vehicle routes, Kenna says.

On July 7, U.S. District Judge James K. Singleton Jr. agreed with Kenna and Earth Island, and struck down the 2003 rule circumventing the appeals process. The Forest Service first applied the order to forests in eastern California, where the court case began, but on Sept. 20, the judge clarified that his order was meant to apply nationwide.

The agency then suspended a broad array of activities pending the appeals process, which can take up to 135 days. According to Forest Service documents, projects put on hold or cancelled included the following: 169 recreation projects; 98 watershed and wildlife habitat projects; about 110 outfitter and guide permits for hunting, fishing, and horseback riding; National Guard training; Boy and Girl Scout meetings; family reunions; and over 175 permits for road easements.

The court order had stated that "environmentally insignificant projects" were still exempt from the appeals process; it provided the examples of maintaining Forest Service buildings and mowing ranger station lawns. However, the Forest Service took the order literally, exempting nothing beyond those two examples. "The judge did

not give the Forest Service latitude to choose what sort of categorical exclusion will be suspended," said Dan Jiron, an agency spokesman.

Mark Rey, the former timber lobbyist who now oversees the Forest Service, took every opportunity to drive home one of his favorite points: environmental lawsuits are throwing a wrench into daily operations on the national forests. "Probably the lesson here is that when you use litigation, you have to use it selectively — if you want to avoid those kinds of broader consequences," said Rey, undersecretary of the U.S. Department of Agriculture.

On Oct. 12, the Department of Justice, which represents the Forest Service in the case, filed a motion to allow the agency to return to its previous workings while it appeals the ruling. The environmentalist plaintiffs responded with an emergency motion, asking the court to clarify that the order was not intended to affect minor activities.

On Oct. 19, the judge confirmed that the Forest Service had blown the order out of proportion and that minor projects are not subject to the appeals process.

"We are relieved that Judge Singleton provided a necessary clarification to his earlier orders," Rey stated in a response. Nonetheless, the Forest Service plans to appeal the rulings so that all categorical exclusions may slide through without public involvement.

BY MICHELLE BURKHART  
mich@hcn.org

The author is an HCN intern.

High Country News, 10/31/05

## Home Box

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## Western Environmental Law Center

October 3, 2005

Ben Longstreth  
U.S. Dept. of Justice  
ben.longstreth@justice.usdoj.gov

RE: Implementation of Earth Island Institute v. Pengilly

Dear Ben,

I am sending this letter which is a corrected version of what I sent earlier today- I had mistakenly referred to the promulgation date of the voided rules as July 3, 2003, when the proper date is June 4, 2003.

As I have indicated in briefing on the merits, it is our position that once the rules were set aside by Judge Singleton, the old rules in effect prior to June 4, 2003, came back into effect, which did not require that outfitter permits, Christmas tree cutting etc. be subject to notice, comment and appeal. "The effect of invalidating an agency rule is to reinstate the rule previously in force." Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005), citing Action on Smoking & Health v. Civil Aeronautics Board, 713 F.2d 795, 797 (D.C. Cir. 1983).

These old rules include the 1993 rules which mandated that categorically-excluded timber sales be subject to public notice, comment and appeal, as amended by the 2000 rules resulting from the Heartwood settlement. Thus, in addition to categorically-excluded timber sales, the following activities are the only other categorically-excluded activities which need to be subjected to public notice, comment and appeal:

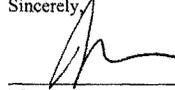
- (1) Projects involving the use of prescribed burning;
- (2) Projects involving the creation or maintenance of wildlife openings;
- (3) The designation of travel routes for off-highway vehicle (OHV) (use which is not conducted through the travel management planning process as part of the forest planning process; [sic])
- (4) The construction of new OHV routes and facilities intended to support OHV use;

- (5) The upgrading, widening, or modification of OHV routes to increase either the levels or types of use by OHVs (but not projects performed for the maintenance of existing routes);
- (6) The issuance or reissuance of special use permits for OHV activities conducted on areas, trails, or roads that are not designated for such activities;
- (7) Projects in which the cutting of trees for thinning or wildlife purposes occurs over an area greater than 5 contiguous acres;
- (8) Gathering geophysical data using shorthole, vibroseis, or surface charge;
- (9) Trenching to obtain evidence of mineralization;
- (10) Clearing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities.

65 Fed. Reg. 61,302, (Oct. 17, 2000).

Accordingly, I do not believe that any further order from the Court is necessary to allow minor activities which are not timber sales and which are not in this list from going forward.

Sincerely,



\_\_\_\_\_  
Matt Kenna  
Attorney for Heartwood et al.

**Casper Star-Tribune**

**EDITORIAL**

10/20/2005

**If a train wrecks in the forest ...**

The Forest Service needs to take a more reasonable approach to deciding which projects should be excluded from a formal review process.

Some forest activities should require a thorough review process, and some shouldn't.

Cutting down a Christmas tree should require a permit, not an environmental impact statement. Surface mining for coal in a campground might be another matter.

One forest activity that should be prohibited entirely is crisis manufacturing -- the deliberate creation of a needless problem to generate a political response.

Unfortunately, that appears to be the silly tactic being used by some of the higher-ups in the U.S. Forest Service.

In the years since the Bush administration took office, it has greatly expanded the number of projects that qualify for "categorical exclusions" -- those activities involving federal land that do not require a formal review process.

An example: In the 1980s, the Forest Service categorically excluded timber sales of 10 acres or less from the formal review process. Since the Bush administration's "Healthy Forests Initiative" was announced in 2003, up to 70 acres of green trees, 250 acres of salvage logging, or 1,000 acres of fuel reduction can be excluded. The construction of a temporary road of up to half a mile also would be excluded.

The new energy bill authorized by Congress and signed by the president also includes an expansion of categorical exclusions, allowing some oil, gas and geothermal wells to be drilled without environmental study or public comment.

In July, U.S. District Judge James Singleton Jr. of the Eastern District of California ruled that the use of categorical exclusion provisions in Forest Service rules violates the Forest Service Decision Making and Appeals Reform Act. And on Sept. 16, Singleton ruled that his decision would apply to other Forest Service lands outside the Ninth District, too.

The Forest Service reacted to the ruling by halting more than 1,500 permitted projects nationwide, including activities as seemingly innocuous as campground repairs, firewood cutting or cutting the family Christmas tree.

Responses by forest officials in Wyoming have been varied.

In some places, anyone who wants to cut a tree for the holidays now faces a possible appeals process that could stretch well beyond the holidays. That shouldn't happen. Anyone who would object to such a low-impact use of forest resources could fairly be branded an extremist.

The Forest Service even suspended the permit for cutting the tree selected as the "People's Holiday Tree" -- an 80-foot Engelmann spruce from New Mexico that was to decorate the Capitol in Washington, D.C.

Environmental groups have accused the Forest Service of fabricating a crisis for political purposes, hoping to foment a backlash against the environmental groups that successfully challenged the use of categorical exclusions for more significant projects. Forest Service officials deny that they're overreacting. They insist that they're just trying to comply with the ruling.

But in pulling the plug on minor activities that have been allowed longer than there's been a Forest Service, it's pretty hard to imagine there's no political motivation to their interpretation of the ruling.

Two things need to happen now: Judge Singleton needs to clarify his ruling, and the Forest Service needs to be a little more reasonable about letting traditional, low-impact uses go forward.

## Durango Herald Forest politics

Friday, October 21st 2005

Imagine Karl Rove as Smokey the Bear. Any question as to how politicized government has become were effectively answered by the Forest Service's response to a court ruling that went against the Bush administration. It was a public embarrassment for an honorable agency.

A federal District Court in California ruled July 2 that the Forest Service had to allow public comment on all projects. Representing the Western Environmental Law Center, Durango attorney Matt Kenna had argued that the Bush administration was in violation of federal law for not taking public comment on major projects such as large-scale logging operations or hazardous-fuel reduction efforts. The ruling was widely seen as a setback for the Bush administration's Healthy Forests Initiative.

In response, the Forest Service resorted to an old political trick. City governments seeking more money sometimes demonstrate their purported poverty by shutting down prominent fire stations or laying off the crossing guards that patrol the busiest schools. The point is not to conserve, but to make a splash by targeting something that everyone sees.

So, rather than simply complying with the judge's order, the Forest Service reduced it to the absurd and announced that it would henceforth require public input on everything from permission to cut a Christmas tree to allowing a wedding on forest land. According to the Corvallis (Ore.) Gazette-Times, the Forest Service suspended almost 1,500 projects nationwide, including mushroom gathering in Oregon, the transfer of a ski area's operating permit outside of Los Angeles and cutting a Christmas tree in New Mexico for the U.S. Capitol.

On Oct. 1, the Forest Service shut down a mountain bike race near Salida. And, in a news release, the agency said that permits to allow individuals to harvest firewood would now require a 30-day wait, which could be extended to 4½ months if appealed. Outfitter tours would not be allowed on national forest land without the same sort of public process as is being applied to the proposed Village at Wolf Creek. Several members of Congress – including our congressman, Rep. John Salazar, D-Manassa – responded by writing to Secretary of Agriculture Mike Johanns saying that, "Our constituents have told us they believe the agency is deliberately overreacting."

Kenna described the Forest Service reaction as "retaliatory." He says the judge was clear that his ruling did not apply to "categorical exclusions" – non-controversial uses that do not require a lengthy review process. The national spokesman for the Forest Service disagreed. He said, "The court did not give us the latitude to make a distinction between different types of categorical exclusions." But on Thursday the judge in the case issued a clarification of his ruling saying that the Forest Service had gone too far and specifically listing those projects that are "subject to notice, comment and appeal." Cutting firewood and Christmas trees are not among them.

Indeed, the list consists entirely of major projects such as prescribed burns, creation or expansion of off-highway vehicle routes, or cutting trees over an area of 5 or more contiguous acres. What the ruling did do was to undo regulations enacted in 2003 that would have allowed such projects – and in particular gas and oil drilling – to go forward with limited public comment. That would appear to be the real reason for what certainly seems to be a cheap attempt to marshal political pressure.

To most Americans the Forest Service is represented by thousands of hard-working and conscientious people who care deeply about our forests and the land. They did not deserve to be associated with this charade.

**United States Senate**

WASHINGTON, D.C. 20510

October 18, 2005

The President  
The White House  
Washington, D.C. 20500

Dear Mr. President:

The USDA Forest Service recently ordered the suspension of over fifteen hundred permits, projects, and contracts across the National Forest System. This will prevent thousands of people from accessing their public lands. It will cause substantial economic losses to many small businesses that depend on the National Forests to guide hunters, gather food and fuel, access private property, and other activities. This action was an unnecessary and inappropriate response to a recent court ruling (*Earth Island Institute v. Ruthenbeck*), and appears to be an attempt to make a political statement, rather than manage our National Forests rationally. The current debacle on the ground in states like New Mexico seems to be the result of misguided political appointees in the Department of Agriculture who have the authority to prevent the hardship being visited on the public and local economies, but who are failing to use it. We urge you to bring accountability within your Administration to this situation and to use the authority already in law to allow non-controversial forest activities to resume immediately.

This situation began when the Forest Service drafted illegal regulations in 2003 aimed at limiting the opportunities for the public to participate in National Forest decision making. The Forest Service was clearly on notice that its proposal was illegal. One of the disputed regulations codified a practice that a court had already struck down as defying common sense and the plain language of governing law. The public record of comments on that rulemaking is replete with numerous official comments pointing out the illegal and inappropriate nature of the regulations. Senior decision makers in the Department of Agriculture exercised poor judgment when they allowed this flawed rulemaking to proceed to conclusion without addressing these issues. It should have been no surprise to anyone when a court recently invalidated those portions of the new regulations on the basis that they were arbitrary, capricious, or manifestly contrary to governing law.

Instead of having a reasonable plan to manage the aftermath of this predictable outcome, the Department of Agriculture then precipitated the current crisis on the ground.

- Through the Forest Service and the Department of Justice, it could have asked the court to reinstate the previous set of regulations, which would have permitted at least the vast majority of the activities to go forward as planned. But it refused to do so. In fact, the Department did the opposite, by specifically asking the court to sever the invalidated portions of the regulations.

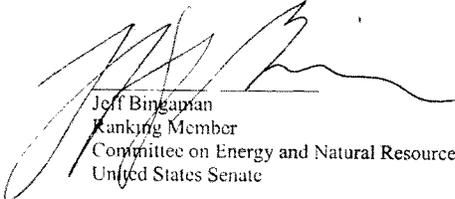
- The Department could have used the emergency exemption authority that was explicitly upheld by the court to allow many of the activities to go forward. It failed to do that.
- The Department of Agriculture could have issued an interim rule allowing the vast majority of activities to go forward. It failed to do that, too.

In fact, the Department of Agriculture has made matters considerably worse on the ground by being extraordinarily slow in dealing with the problems created by its flawed legal strategy. It has been three months since the Forest Service and the responsible managers in the Department of Agriculture knew of the potential problems on the ground around the country. Yet, the Department waited a month to request a stay of the court's ruling. In that time, not only could the courts already have granted a stay or clarification, but the Forest Service could have allowed a host of non-controversial projects to go forward even under the most stringent reading of the court's decision.

Career employees of the Forest Service are frustrated that they cannot get authorization from their superiors to proceed with these non-controversial activities in a normal fashion. Even the opposing litigants in the court case have offered to permit non-controversial projects to go forward. Ironically, it would appear that the only parties opposing these normal, non-controversial activities are the persons whom you have appointed to oversee the Department and the Forest Service. One is left with the impression that they think their political objectives would be advanced by causing maximum disruption to persons and local economies that rely on access to the National Forests for non-controversial activities such as hunting.

Excluding important segments of the public from entering the National Forests is not good agency management. Nor is trying to exclude the public from the decision making processes governing the National Forests. The Department has ample authority to allow many, if not all, of the non-controversial projects currently being held up to go forward. We urge you to put an end to what is in effect a lock-out of important users of the National Forests, by directing your appointees in the Department and the Forest Service to use their existing authorities to fix the serious problems they have created.

Sincerely,



Jeff Bingaman  
Ranking Member  
Committee on Energy and Natural Resources  
United States Senate



Tom Harkin  
Ranking Member  
Committee on Agriculture  
United States Senate

**Congress of the United States**

Washington, DC 20515

October 18, 2005

The Honorable Dale Bosworth  
 Chief of the Forest Service  
 U.S. Department of Agriculture  
 201 14<sup>th</sup> Street SW  
 Washington, D.C. 20250

Dear Chief Bosworth:

We write to express our concern with your September 23rd directive to Regional Foresters regarding the suspension of all categorically excluded projects decided after July 7, and ask that it be immediately withdrawn.

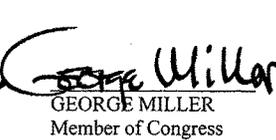
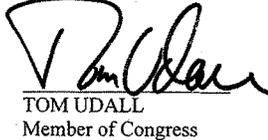
As we understand the district court decision in *Earth Island Institute v. Ruthenbeck*, your directive applies to categorically excluded actions far beyond those intended by the court. Prior to the adoption of the new categorical exclusion regulations in June 2003, minor activities such as Christmas tree harvest, mushroom picking, firewood gathering, and issuing guide permits were not subject to administrative appeals. Nothing in the district court's ruling should change this fact. As the Ninth Circuit noted earlier this year, "The effect of invalidating an agency rule is to reinstate the rule previously in force."

Therefore, the court order only requires that you halt—until proper public notice, comment, and appeals can be completed—projects related to timber sales, motorized vehicle use, etc. But it is unreasonable that you hold other uses of the forest that do not implement a forest plan hostage, as your directive does.

Your directive has caused unnecessary confusion and placed a significant burden on many who rely on the national forests for income, recreation, and general use. We ask that you immediately rescind your September 23 directive so that people can once again pick mushrooms, gather firewood, raft and fish, or cut a Christmas tree for the upcoming holiday.

Thank you for your consideration of this matter.

Sincerely,

 PETER DeFAZIO Member of Congress	 GEORGE MILLER Member of Congress	 TOM UDALL Member of Congress
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Letter to Chief Bosworth re: categorical exclusions  
October 18, 2005

  
EARL BLUMENAUER  
Member of Congress

  
LOIS CAPPS  
Member of Congress

  
RAUL GRIJALVA  
Member of Congress

CC: Undersecretary Rey

Congress of the United States  
Washington, DC 20515

October 20, 2005

The Honorable Mike Johanns  
Secretary  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, DC 20250

Re: *Earth Island Institute v. Ruthenbeck*

Dear Mr. Secretary:

We expect you have received by now a copy of Judge Singleton's October 19, 2005 order clarifying his earlier rulings in *Earth Island Institute v. Ruthenbeck*. The court unequivocally states that, "the Forest Service need not suspend actions not contemplated in the old rules, such as '[a]pproval, modification, or continuation of minor, short term (one year or less) special uses of National Forest System lands, such as for state-licensed outfitters or guides, or approving gathering forest products for personal use.'"

Judge Singleton's latest ruling removes any doubt about the intended scope of his July 2, 2005 decision. It makes clear that Forest Chief Dale Bosworth was mistaken when he wrote in a September 23 directive that "all categorically excluded projects must be immediately suspended and subjected to notice, comment and appeal." Mr. Bosworth's interpretation of the judge's July 2 decision was plainly overbroad.

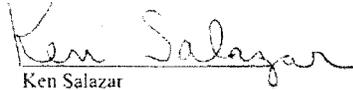
In light of the court's October 19 order, we once again request that you rescind immediately Chief Bosworth's September 23 directive before it causes additional unnecessary harm to the constituents of our state, who hold already-approved permits that are not subject to appeal under the court's rulings. We urge you to take immediate steps to ensure that permitted uses of the National Forests are allowed to go forward without unnecessary delay.

Please advise us in writing of your plans to align your agency's activities with the district court's opinion and to allow minor activities to continue in the Nation's forests.

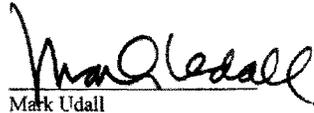
10/20/2005 – The Honorable Mike Johanns - U.S. Department of Agriculture

Thank you for your prompt attention to this matter.

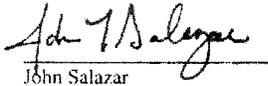
Sincerely,



Ken Salazar  
United States Senator



Mark Udall  
Member of Congress



John Salazar  
Member of Congress

**Congress of the United States**  
Washington, DC 20515

October 17, 2005

The Honorable Mike Johanns  
Secretary  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, DC 20250

Dear Mr. Secretary:

We write concerning a directive issued by Dale Bosworth, Chief of the Forest Service, in response to *Earth Island Institute v. Ruthenbeck*, a July 7, 2005 decision by the United States District Court for the Eastern District of California, and a September 16, 2005 order from the court clarifying that decision. The court's orders invalidated portions of the 2003 regulations promulgated by the Forest Service implementing the Forest Service Decision Making and Appeals Reform Act ("ARA") on the ground that those regulations were arbitrary, capricious, or manifestly contrary to governing law. The district court ruling requires that projects and activities implementing forest plans approved with categorical exclusions after July 7, 2005, be suspended until proper public notice, comment, and appeals are completed under ARA.

Chief Bosworth's directive has caused unnecessary confusion and placed a significant burden on many of our constituents, including the ski industry and other affected industries, who rely on the national forests for income, recreation, and general use. Hundreds of non-controversial construction permits and other already-approved projects that might have been completed during this year's construction season have been halted unnecessarily because of the agency's approach. It is unsurprising that our constituents have told us that they believe the agency is deliberately overreacting to the court's decision in order to gain political support in Congress for an equally overreaching legislative solution. We prefer to believe that the overbroad directive reflects only an overabundance of caution. But we would be gravely concerned to learn that the Forest Service is deliberately jeopardizing small businesses and citizens' livelihoods for political ends.

For the reasons set forth below, we ask you to reverse the Forest Service directive, to align your agency's activities with the district court's opinion, and to allow minor activities to continue in the Nation's forests.

The court's rulings apply by their terms to timber sales, motorized vehicle use, road construction, mining, and the like. They do not affect already-approved activities in the National Forests, including such minor activities as harvesting Christmas trees, picking mushrooms, or issuing guide permits. This was made plain when the district court wrote: "*While the Forest Service is clearly not required to make every minor project it undertakes subject to the appeals process, it is required to delineate between*

10/17/2005 – The Honorable Mike Johanns - U.S. Department of Agriculture

*major and minor projects in a way that gives permissible effect to the language of the ARA.*

Despite this clear language, Chief Bosworth's September 23 directive to Regional Foresters orders the suspension of *all* projects with categorical exclusions approved after July 7. This suspension is substantially overbroad and needlessly harmful to activities in the National Forests.

The overbroad nature of the September 23 directive is underscored by the legal effect of the *Earth Island Institute* decision. Prior to the Forest Service's regulations implementing the APA in June, 2003, minor actions such as repair and maintenance of recreation sites and facilities, short-term special uses of National Forest Service System lands for state-licensed outfitters and guides, and gathering forest products for personal use, were not subject to administrative appeals. These are the rules that legally are now in effect, following the invalidation of the 2003 rules. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9<sup>th</sup> Cir. 2005) ("[t]he effect of invalidating an agency rule is to reinstate the rule previously in force.").

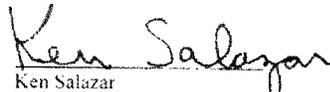
As a result, only certain categorically-excluded activities are now subject to the requirements of public notice, comment and appeal under the ARA. Consequently, we do not understand why the Forest Service chooses to suspend minor activities such as Christmas tree cutting, mushroom picking, and issuing guide permits. For the same reasons, small-scale forest-thinning projects and minor ski-area maintenance activities should be unaffected by the court's orders.

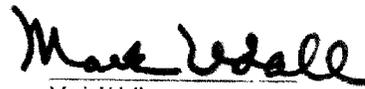
The agency has compounded the problem by waiting more than three months to file an appeal of the district court's orders and to ask for a suspension of those orders pending appeal. And we are advised that the Forest Service has refused to meet with the plaintiffs' attorneys, despite offers to negotiate a common-sense solution to these problems.

We request that you rescind Chief Bosworth's September 23 directive immediately. We also respectfully ask for an explanation of the Forest Service's actions following the district court's July 7 and September 16 orders and that you specifically respond to the claims set forth in the plaintiffs' response to the government's motion for stay (copy enclosed). Please furnish that written response as soon as possible and in any event not later than October 24, 2005.

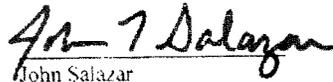
Thank you for your careful consideration of this matter

Sincerely,

  
Ken Salazar  
United States Senator

  
Mark Udall  
Member of Congress

10/17/2005 - The Honorable Mike Johanns - U.S. Department of Agriculture

A handwritten signature in black ink that reads "John Salazar". The signature is written in a cursive style with a prominent initial "J".

John Salazar  
Member of Congress



<b>Northwest</b>	<b>Southwest</b>	<b>Rocky Mountains</b>
1216 Lincoln Street	P.O. Box 1507	629 E. 1st Avenue, Suite 118
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## Western Environmental Law Center

Defending the West: Wildlife, Water, and Western Communities

September 30, 2005

Clay Samford  
U.S. Dept. Of Justice  
[clay.samford@usdoj.gov](mailto:clay.samford@usdoj.gov)

RE: Appeal Reform Act Case

Clay-

It appears from press accounts that the Forest Service is portraying the Court orders as producing an extreme result as applied to categorically-excluded projects other than timber sales, oil & gas exploration etc. Some of these activities, such as truly minor ones, all sides have acknowledged throughout the litigation do not need to be made subject to public notice, comment and appeal under the ARA because they do not "implement forest plans," such as occurred prior to 1992 under the pre-ARA Forest Service rules. To the extent that there are other activities which are subject to the Court's orders but which are non-controversial and regarding which the timing of the Court's orders have created a problem, I would like to reiterate, as we have always said, that we are more than willing to talk with the Forest Service about coming to an agreement on permitting such actions to move forward without comment and appeal. I would hope that the Forest Service would agree to such a common-sense approach, rather than try to create a train wreck in order to attack the Court's decisions.

Please contact me at any time to discuss these matters.

Sincerely,

\_\_\_\_\_/s/ Matt Kenna\_\_\_\_\_  
Matt Kenna  
Attorney for Heartwood et al.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE, a  
California non-profit corporation;  
SEQUOIA FORESTKEEPER, a  
California non-profit corporation;  
HEARTWOOD, an Indiana non-profit  
corporation; CENTER FOR  
BIOLOGICAL DIVERSITY, a New  
Mexico non-profit corporation, and  
SIERRA CLUB, a California non-profit  
corporation,

Plaintiffs,

vs.

NANCY RUTHENBECK, in her capacity  
as District Ranger, Hot Springs Ranger  
District, Sequoia National Forest;  
UNITED STATES FOREST SERVICE,  
an agency of the U.S. Department of  
Agriculture; ANN VENEMAN, in her  
official capacity as Secretary of  
Agriculture; DALE BOSWORTH, in his  
official capacity as Chief of the U.S.  
Forest Service,

Defendants.

Case No. CIV F-03-6386 JKS

ORDER

Two motions are before the Court at this time. First, Defendants have moved for stay pending appeal. Docket No. 94. Plaintiffs oppose the motion for stay and move for clarification. Docket No. 95. The motion for clarification will be addressed first.

## DISCUSSION

### I. Plaintiffs' Motion for Clarification

Plaintiffs' seek to clarify what Forest Service decisions are categorically excluded decisions subject to notice, comment, and appeal. The Court offers the following clarification. "The effect of invalidating an agency rule is to reinstate the rule previously in force." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983)). This is true where, as here, invalidated regulations are severed, while other valid regulations remain in place.

Here the Court severed certain regulations from the 2003 regulations. The Court intended that the regulations replaced by the now-severed 2003 regulations be reinstated. The relevant rules previously in force are the 1993 rule, and the 2000 supplemental rules. Under the 1993 rule, categorically excluded timber sales are subject to notice, comment, and appeal. 58 Fed. Reg. 58,904 (Nov. 4, 1993). The other categorically excluded activities subject to notice, comment, and appeal under these rules are:

- (1) Projects involving the use of prescribed burning;
- (2) Projects involving the creation or maintenance of wildlife openings;
- (3) The designation of travel routes for off-highway vehicle (OHV) use which is not conducted through the travel management planning process as part of the forest planning process;
- (4) The construction of new OHV routes and facilities intended to support OHV use;
- (5) The upgrading, widening, or modification of OHV routes to increase either the levels or types of use by OHVs (but not projects performed for the maintenance of existing routes);
- (6) The issuance or reissuance of special use permits for OHV activities conducted on areas, trails, or roads that are not designated for such activities;
- (7) Projects in which the cutting of trees for thinning or wildlife purposes occurs over an area greater than 5 contiguous acres;
- (8) Gathering geophysical data using shorthole, vibroseis, or surface charge;
- (9) Trenching to obtain evidence of mineralization;
- (10) Clearing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities.

65 Fed. Reg. 61,302 (Oct. 17, 2000). Thus, the Forest Service need not suspend actions not contemplated in the old rules, such as "[a]pproval, modification, or continuation of minor, short-term (one year or less) special uses of National Forest System lands, such as for state-licensed outfitters or guides, or approving gathering forest products for personal use." Docket No. 94 (Second Decl. of Manning at 6).

ORDER

**II. Defendants' Motion for Stay**

The Forest Service moves for stay pending appeal. The standard for a stay pending appeal is similar to the test for the issuance of preliminary injunctions. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The test is a continuum, requiring the movant to show at one end, "both a probability of success on the merits and the possibility of irreparable injury," and at the other end, "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* (citations omitted).

While the Forest Service has not shown a probability of success on the merits, it has raised significant issues, albeit in part due to misunderstanding the impact of the Court's orders. Much of the Forest Service's argument in favor of stay is based on irreparable harm flowing from proceeding without any rule framework in place. Given the above clarification, the majority of the harms identified will likely abate. In order to assist the Court in carefully balancing the hardships involved in light of the clarification, further briefing is necessary.

**IT IS THEREFORE ORDERED:**

Plaintiffs' motion for clarification at **Docket No. 95** is **GRANTED**. The Court will defer ruling on the Forest Service's motion for stay pending appeal until both parties have an opportunity to file further briefing regarding the relative hardships involved in light of the Court's clarification. The Forest Service's brief shall be filed **on or before November 10, 2005**. Plaintiffs may reply **on or before November 23, 2005**.

Dated at Anchorage, Alaska, this 19 day of October 2005.

/s/ James K. Singleton  
**JAMES K. SINGLETON, JR.**  
United States District Judge

ORDER



P.O. Box 11615, Eugene, OR 97440    Tel: (541) 484-2692    Fax: (541) 484-3004    Email: forrest@fseee.org

November 21, 2005

Chairman Goodlatte  
House Committee on Agriculture  
1301 Longworth House Office Building  
Washington, DC 20515

RE: Submitted for the record regarding hearing on "Recent Litigation on Forest Service Firefighting and Forest Health Efforts," November 15, 2005

Dear Mr. Chairman,

FSEEE counts among its members numerous current and former Forest Service firefighters and fire planners, and we are committed to helping you understand the very real human dimension of forest fires and fire fighting. To that end, I am sending you the testimony of Ken Weaver, whose son Devin was killed fighting the Thirtymile Fire in central Washington in 2001. As we work to build a safe and cost-effective Forest Service wildland fire management program, we need to listen to the voices of people like Ken, whose life has been radically altered by our fire suppression policies.

I would also like to take advantage of this opportunity to clarify statements made by Undersecretary of Agriculture Mark Rey in front of your committee regarding recent litigation, notably *FSEEE v. USFS*, requiring the Forest Service comply with the National Environmental Policy Act (NEPA) with regards to fire retardant use, and *Earth Island v. Ruitenbeek*, requiring the Forest Service comply with the Forest Service Decision-making and Appeals Reform Act (ARA) with regards to notice and comment on projects implementing land and resource management plans. In his testimony, Rey obscured his own role in creating the current situation regarding fire retardant, exaggerated the potential threat of an injunction against fire retardant use, and misrepresented the Forest Service's past interpretation of the ARA.

**1. Undersecretary Rey's role in the fire retardant case.**

Undersecretary Rey's comments on the recent court order requiring legal compliance for the use of fire retardant conceal Rey's own role in creating the government's legal infirmities. At the committee's hearing, Rey testified that

The Forest Service worked with FWS and NMFS for some time on the subject of how we might conduct ESA section 7 consultations for firefighting activities, and did not reach a conclusion. Therefore we are

not able to estimate what amount of additional activity, or what additional cost, would be required by the court's order. At this point, we have not verified that FWS and NMFS will accept a programmatic consultation of this nature. If they would not, then we face the prospect of additional difficulty in complying with this order.

If Mr. Rey does not know whether FWS and NMFS will accept programmatic consultation on fire retardant, it is because he has not asked them. Both Fish and Wildlife and the National Marine Fisheries Service have been demanding that the Forest Service consult with them regarding fire retardant use since at least 2002. Rey does not reveal that in 2003 the Forest Service nearly completed the necessary environmental analysis, but ceased work, against the advice of USDA Office of General Counsel attorneys, as a direct result of Mr. Rey's decision to avoid revealing to the public the dangers of toxic fire retardant. We are attaching to our letter two exhibits from the court record in *FSEEE v. USFS* that demonstrate that Mr. Rey was directly responsible for this decision, and that he made the decision against the advice of his attorneys.

*Exhibit A:* An email from Tom Harbour, deputy director of fire and aviation for the Forest Service, to James Gladden, the Forest Service's director for Watershed, Fish, Wildlife, Air, and Rare Plants, regarding national guidelines for fire retardant use then in preparation, in which Mr. Harbour explains that, "Dave Tenny told me that he and Mark Rey and the appropriate Undersecretary from DOI (Ann??) had met and decided there would NOT be formal consultation on retardant use."

*Exhibit B:* A working paper from the summer of 2003 which reveals that USDA OGC attorney Allen Groesbeck advised the Forest Service to pursue formal consultation (See pg. 3).

We may never know how much money Rey wasted by ignoring his attorneys and postponing this NEPA process by three years while pushing it into the courts. FSEEE believes that the court-ordered NEPA process will give the Forest Service a chance to improve not only its firefighting effectiveness, and its protection of fish and wildlife that are sensitive to toxic fire retardant dumps, but also firefighter safety. Aviation accidents related to fire retardant use have emerged in recent years as one of the leading causes of firefighter death. As Ken Weaver explains, the consequences of these unnecessary firefighter deaths are deep and long lasting.

## **2. The improbability of an injunction against the use of fire retardant.**

In his testimony, Rey suggests that while there is currently no injunction against fire retardant use, another party may be able to walk in off the street and obtain an injunction against retardant use based on the court's holdings in *FSEEE v. USFS*. Rey exaggerates this threat by ignoring the high standards necessary to obtain an injunction. Another party would first have to establish standing on the issue of fire retardant use by demonstrating its interests are directly affected by retardant use. The party would then have to convince a judge both that there was a danger of irreparable harm from the use of

fire retardant, and that such harm outweighed the dangers to the public from not using retardant. Finally, the party would have to demonstrate that an injunction was in the public interest. These are high and exacting standards unlikely to be met by any casual litigant.

### **3. Clarification of the Forest Service's interpretation of the ARA**

In his testimony before the committee, Rey stated that the Forest Service has consistently maintained, since the passage of the ARA in 1993, that projects categorically excluded from NEPA analysis are also exempt from the notice, comment, and appeal requirements of the ARA. This is not true. For ten years following the passage of the ARA in 1992, the Forest Service followed regulations that contained a list of types of projects, notably including *all* logging projects, that "implemented land and resource management plans," and therefore were required, under the ARA, to be subject to notice, comment, and appeal, and specifically included certain types of projects categorically excluded from NEPA but still subject to the ARA. These rules were rewritten in 2003.

Rey complained that he did not understand the rationale for the distinction the court made between projects that were and were not subject to the ARA. The court found that the 2003 regulations, written by the Forest Service under Rey's supervision, violated the law. Following standard legal practice, the court reinstated the regulations that existed prior to 2003. Given that Rey seems unaware of these previous rules, it is not surprising that he did not understand the court's decision. It is a little disturbing, however, that Rey is unaware of laws he was responsible for administering during the first two years of his tenure as Undersecretary.

Thank you for the opportunity to submit this testimony. I am available to answer any questions you or your staff may have regarding these issues.

Forrest Fleischman  
Policy Advocate



**Exhibit B:**

**USDA Forest Service and US DOI  
Fire and Aviation Management  
Briefing**

Pre-decisional document – Working Paper

Date: June 26, 2003

**ISSUE:** FWS and NMFS are advising the FS that formal consultation, including NEPA, is required for the use of fire retardants, and possibly for all fire suppression activities, under ESA Section 7

**SITUATION:** Annually an average of over 11,000 loads of retardant is dropped during suppression actions, covering approximately 6500 acres. During the past 2 years, 8 instances of retardant reaching waterways have been documented; with 3 of those resulting in documented fish kills. Of these, 1 used the guideline exemption that allows for use of retardant within the 300-foot buffer if life or property were threatened (this was not a federal action), 1 was a transportation spill, and 6 were the result of accidental application within the buffer area and waterway. This resulted in an accident rate of 0.036 percent of the total drops. In every one of these instances an emergency consultation was undertaken with the appropriate regulatory agency.

The Forest Service maintains that this level of overflight, spills and fish kill would not jeopardize the continued existence of any listed species. Additional guidance will not increase protection of fish where life or property are threatened, or reduce the risk of an accidental spill.

**BACKGROUND.** Prior to calendar year 2000, the Endangered Species Act compliance was implemented under 50 CFR 402.05 Emergency Consultation Procedures while conducting emergency response activities related to wildland fire fighting. When the situation developed with Sodium ferrocyanide (April, 2000), it was determined that Guidelines for Aerial Application of Retardants and Foams in Waterways (Guidelines) were needed to appropriately protect aquatic species that are listed as threatened or endangered.

An interagency request for interim approval of the Guidelines was made of the FWS and NMFS in April, 2000 and both these agencies concurred with the Guidelines. An interagency request for interim concurrence was again made in 2001, based on a biological assessment/evaluation of the effects of using the Guidelines. FWS and NMFS again concurred that the Guidelines provided appropriate measures to protect aquatic species during aerial application of retardants and foams.

This approval was effective through December 31, 2002. The wildland firefighting agencies are now in the process of doing an updated consultation, if necessary. There are six options open to the wildland fire agencies. The regulatory agencies are of the opinion that, based on the eight incidents previously mentioned, formal consultation and NEPA will be required even though none of the emergency consultations resulted in a jeopardy opinion. The USDA FS does not share the opinion of the regulatory agencies in regard to the effects of aerial delivery of retardants and foams.

TALKING POINTS

- Prior to 2000, USDA FS and DOI consulted with FWS and NMFS under Emergency Consultation Procedures, after fire suppression activities had occurred and a USDA FS biologist determined that the suppression action had had an adverse effect on species
- In 2000, due to increased concern about chemicals in retardants, the FWS and NMFS along with the USDA FS and DOI land management agencies, crafted aerial retardant application guidelines. During this process the wildland fire agencies requested concurrence from FWS and NMFS on these same guidelines.
- This concurrence ran through December 2002.
- A NOI was filed by FSEEE alleging that consultation with FWS and NMFS is required nationally for retardant use.
- The FWS and NMFS have advised USDA FS that the expenditure of moneys for award of contracts and pre-suppression planning constitute an 'action' and formal consultation must be completed.
- The scope has expanded to the regulating agencies' suggestion that consultation should include all fire suppression activities on a forest (or BLM district) basis.
- Whether the simple expenditure of funds is sufficient to trigger the need for consultation has been a source of contention for several years, with the FS holding that planning is not an 'action.'
- Not only is this precedence setting, none of the affected agencies have the personnel or funds to complete consultation on this level

Option	Pro	Con
No consultation is necessary, rather agency-to-agency interaction on use of guidelines without concurrence should be sought	<ul style="list-style-type: none"> <li>• Process done rapidly with low cost, includes FWS and NMFS input to protect species</li> <li>• Reg agencies will not agree with this option</li> </ul>	<ul style="list-style-type: none"> <li>• Allan Groesbeck advises that because we set a precedent because we consulted once this may not hold in court</li> <li>• Legal vulnerability is high</li> </ul>
Informal consultation that continues to focus on development and use of aerial guidelines	<ul style="list-style-type: none"> <li>• Narrows scope to only aerial application of retardant guidelines</li> </ul>	<ul style="list-style-type: none"> <li>• Still has potential to produce a likely to adversely affect call;</li> <li>• May lead to formal consultation.</li> <li>• Reg agencies may not agree to this level of consultation</li> </ul>
National level formal consultation on all fire chemicals used (ground and air)	<ul style="list-style-type: none"> <li>• Potential to provide incidental take coverage</li> </ul>	<ul style="list-style-type: none"> <li>• Potential to impact suppression capability;</li> <li>• adds to process gridlock;</li> <li>• High cost in dollars, personnel commitment</li> </ul>
National level formal consultation on all suppression activities	<ul style="list-style-type: none"> <li>• Potential to provide incidental take coverage</li> </ul>	<ul style="list-style-type: none"> <li>• Potential to impact suppression capability;</li> <li>• adds to process gridlock;</li> <li>• High cost in dollars, personnel commitment</li> <li>• Far reaching implications that could affect on-going litigation</li> </ul>
Forest level formal consultation on all fire chemicals used (ground and air)	<ul style="list-style-type: none"> <li>• LMP based on specific mgmt areas suppression responses. Site specific/Species specific</li> </ul>	<ul style="list-style-type: none"> <li>• Highly impactful to LMP process as Forests update, in terms of dollars and personnel needs;</li> <li>• Highly impactful in consultation time and documentation;</li> <li>• May lead to non-discretionary requirements developed by non-fire reg agency personnel and loss of suppression capability</li> </ul>
Forest level formal consultation on all suppression activities	<ul style="list-style-type: none"> <li>• LMP based on specific mgmt areas suppression responses. Site specific/Species specific</li> </ul>	<ul style="list-style-type: none"> <li>• Highly impactful to LMP process as Forests update, in terms of dollars and personnel needs</li> <li>• Highly impactful in consultation time and documentation;</li> <li>• May lead to non-discretionary requirements developed by non-fire reg agency personnel and loss of suppression capability</li> </ul>

*Weaver Flower Company*

PO Box 200, 103 Prospect, Moxee, WA 98926

Ken Weaver  
PO Box 200  
Moxee, WA 98926

(509) 452-9079

November 21, 2005

Chairman Goodlatte  
House Committee on Agriculture  
1301 Longworth House Office Building  
Washington, DC 20515

RE: Submitted for the record regarding hearing on "Recent Litigation on Forest Service Firefighting and Forest Health Efforts," November 15, 2005

Dear Mr. Chairman,

Thank you for the opportunity to share my experience with Forest Service firefighting. The problems the Forest Service has in fighting wildland fires, and in insuring the safety of firefighters and accountability of decision makers may be an abstract subject from the perspective of a lawmaker in Washington D.C., but I have to live everyday with the costs of these problems. Let me explain.

On July 11<sup>th</sup>, 2001 I was awakened at 1:07 a.m. by my wife screaming, "Ken, there's a man on the phone. He says Devin is dead." Barbara was shaking and bent over as though she had been hit in the stomach. I instantly knew those words were true. The pain in her voice was too large, too intense. "He says Devin died in a fire."

I forced myself to take the phone and braced for the words that were to come next. "Hello, Mr. Weaver. My name is Randy. I am with the Forest Service. Devin's crew was overrun by a fire at about 5:30 yesterday afternoon and Devin didn't make it."

"What do you mean he didn't make it?" I said. "My son could outrun any fire. It's not possible for a fire to overtake Devin; he is in too good of shape."

"I'm very sorry, Mr. Weaver, but the ID is positive. We know for sure that Devin was one of the casualties."

"One of the casualties? Are there more?"

"Yes, there were three more. We are trying to reach their families now."

Barbara held me from my back, her arms around my shoulders, the way I used to hug Devin. She was sobbing. "He's not dead. Devin's not dead. The man was wrong," she said. "Call somebody else. Devin's not dead."

"Yes he is, sweetheart," I said. "Devin is dead." I had said it for the very first time. The words came crashing out of my mouth like boulders crashing in a rockslide. They took

physical form and hurt as they violated the air. Devin is dead. My golf, bow hunting, bowling, camping partner, soul mate and best boy friend was dead.

For the next eight hours, Barbara and I sat together on the couch. Barbara had her feet pulled under her with arms around shins in the fetal position. I just held her as tight as I could. We grieved a deep, visceral grief and cried. Words were infrequent and choked with pain. Time was suspended. Yesterday's bright promise looked today like a threat. Our family would never be together again; our circle was broken. Unlike any other problem I had faced in my life, I couldn't solve this one. I knew that this was not like any book or movie where the tragic hero always gains closure in the end.

As the first wave of pain began to pass, one thought burned in my mind. How could they do this? How could they possibly get Devin with twenty-one days of experience into that level of harm's way? This kid was twenty-one. He was a fitness buff at six feet and 170 pounds. He ran seven miles a night with a thirty-pound pack on his back to prepare for this job. He was an experienced woodsman. How could they possibly get him into a situation he could not escape from? The next afternoon, three members of the Forest Service came to our home with the first details of the tragedy. They described an out-of-control wildfire that blew up quickly, trapping and burning my son to death. They said it was no one's fault, an act of God.

Over the next days and weeks, more details became available, and the picture that emerged was something quite different from an act of any God I know. The fire was indeed out of control, but had been for more than four hours. This crew was led down a dead-end road in a steep box canyon with a plan of attack that was later determined to have had no chance of success. In all, the people who were supposed to be protecting Devin's life violated every single rule of safety on the books. They ignored every single warning sign present, abandoned all common sense and could not exercise even minimal command authority after they were entrapped. All the training Devin had just received stressed safety first. Everything he was told stressed safety as the top priority. Nothing was more important than the health of the firefighters. We talked about his training after it was completed and he said these people really know what they are doing. They were so safety-minded he wasn't sure they would ever let him close to a real fire. He, like the others in his crew, went down that dead-end road in that steep box canyon in front of that out-of-control wildfire, knowing that safety was the top priority in the minds of his supervisors.

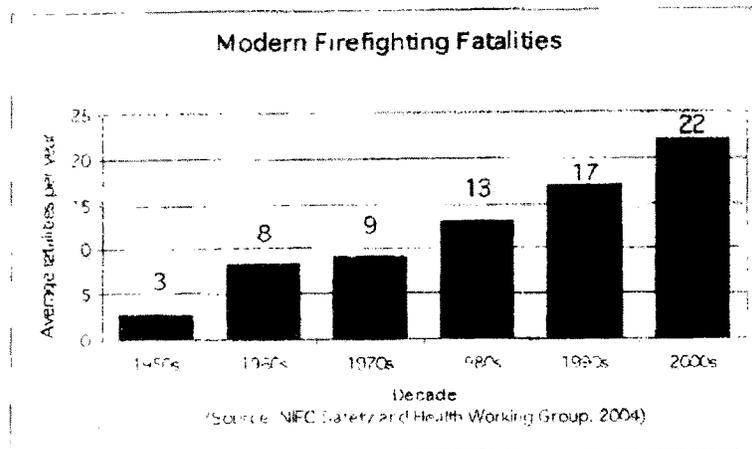
As it turned out, it was all a fraud. No one considered Devin's safety. No one considered the rules to actually be rules. As the investigative report would later quote a firefighter, "Everyone knows those [ten standing safety rules] are just guidelines and can't always be followed." Devin's squad was completely betrayed when they were led down that road. His squad did not give their lives; they had their lives taken. They did not die because of what they were doing, rather whom they were doing it for. We now know that the United States Forest Service does not have to follow any safety rules. The information Devin and others received in training was little more than a cruel hoax. It served only to make them let their guard down. They never had any more than a random chance. No one ever told

the new lies what any veteran could tell you about safety. "They aren't really rules. They're just guidelines, so we don't have to follow them. It doesn't matter if your boss gets you killed. This is the Forest Service. We don't answer to anyone.

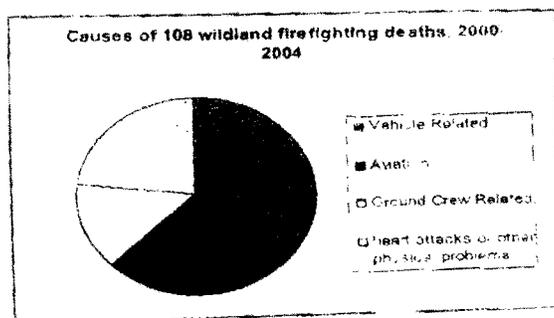
And so it is that an incident commander can abandon his responsibility to his crew, break every rule, ignore every watch-out point, suspend his common sense, exercise no leadership, cause the death of his crew members and simply be reassigned. No fines, no loss of wages or rank, just reassignment. Yesterday I got an overtime parking ticket and had to pay a \$10 fine. It occurred to me that parking thirty minutes overtime was a more heinous crime with a larger penalty than what happened at Thirtymile. How is this possible? How can a department in our government operate by a different set of rules than the rest of the population? Why do we make brave young men and women fighting wildland forest fires each summer suffer greater workplace risk than we allow in the private sector? Aside from the legal question, how is this morally possible?

The single issue here is accountability. Abraham Lincoln said it best, "Government of the people, for the people, by the people." Our government was divided into three branches to ensure accountability. Without accountability, the Forest Service is neither for the people nor by the people.

In the four years since my son's death, little progress has been made to make the Forest Service more accountable in its firefighting operations. Every year, more firefighters are unnecessarily killed in the line of duty. As you can see in the chart below, the number of firefighting deaths has risen dramatically in the last fifty years. In the 1950s, an average of three firefighters were killed per year. As recently as the 1970s, only nine were killed per year – but in the first five years of the current decade, an average of twenty-two were killed per year – 107 deaths in addition to Devin's.



Firefighters in the line of duty die from many causes. Historically, burnovers such as what occurred to my son were a major cause of death among firefighters. While the Forest Service has made little progress in decreasing the number of burnover deaths, the large increase in firefighting deaths has been caused primarily by increased use of heavy equipment and aircraft in firefighting. **Aircraft, primarily used for aerial fire retardant delivery, account for one quarter of the 108 deaths between 2000 and 2004.**



My son died at the end of a dead end road in the middle of a vast wilderness area. The fire he was killed fighting threatened no one, and the plan of attack was ruled to have no chance of success. Until the agency holds decision makers personally responsible for the effects of their decisions on firefighters, they will continue to make mistakes like those that cost me my son. Until the agency examines the environmental and worker safety issues associated with its use of fire retardant chemicals, aviation deaths will continue to be a major problem.

People ask me how I have managed to deal with Devin's death. I never answer that question. The fact is I haven't managed, is there anyone in the world that could? Devin's loss continues to be an unbearable source of pain in my life. I am told that time will make it less so, that's hard to imagine. After four years I still don't understand how this could happen. It seems like a bad dream, but it's not. It's a nightmare from which I will never awake. I will spend the rest of my life marking time until I see my best friend again. A lifetime before I can hug him. A lifetime before I can laugh at his dry humor, before I see his broad smile. A lifetime before the circle will be unbroken.

Sincerely yours,

*Ken Weaver*  
Ken Weaver