Prepared Statement of

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U.S. House Natural Resources Committee
Forum on "Confronting America's Out-of-Control Wildfire and Forest Health Crisis"

July 21, 2022

Main Points

- The wildfire crisis is getting worse. Increasing active forest restoration efforts will improve forest health and reduce the risk of catastrophic wildfires.
- Regulatory red tape creates conflict, rather than encouraging collaboration, over conducting active management activities, including mechanical thinning and prescribed burning.
- Partnerships with the private sector, states, counties, and tribal nations can help overcome federal capacity challenges to administering more forest restoration projects.

Introduction

Ranking Member Westerman, members of the committee, thank you for the opportunity to appear before you to discuss America's wildfire and forest health crisis. My name is Hannah Downey, and I am the policy director of the Property and Environment Research Center (PERC), a conservation research institute based in Bozeman, Montana.[1] For more than 40 years, PERC has explored market-based solutions to conservation challenges, including the importance of restoring national forests to tackle the wildfire crisis.

I have, unfortunately, experienced the wildfire crisis firsthand. In 2008, when I was in high school, my family and I had to evacuate from the Cascade Fire during a backpacking trip in Montana's Beartooth

[1] PERC—the Property and Environment Research Center—is a nonprofit research institute located in Bozeman, Montana, dedicated to improving environmental quality through markets and property rights. PERC's staff and associated scholars conduct original research that applies market principles to resolving environmental problems.

Mountains. Since then I have watched flames burn the mountains around Bozeman from my front porch, worried about family and friends serving as wildland firefighters, and witnessed utter destruction in the wake of a wildfire. I have also observed the benefits that active forest management delivers in reducing wildfire risk.

Large and destructive wildfires are becoming more common across the West, with new records of destruction set almost every year. Although several factors contribute to this trend, the declining health of our nation's forest is a primary cause. In this forum, I will aim to highlight multiple policy solutions that can overcome the regulatory barriers and capacity challenges that hinder active forest restoration.[2]

The Worsening Wildfire Crisis and the Need for Increased Forest Restoration

Wildfires are burning record numbers of acres in the western United States each year. More than 10 million acres burned nationwide in three of the past seven years, most of them in the West. This year, wildfires have already burned more than 5 million acres, putting the country well on track for another devastating fire year.[3] These fires cost human lives, destroy homes and infrastructure, pollute waterways, burn wildlife habitat, and endanger outdoor recreation opportunities.

Some factors that contribute to declining forest health and increasing fire risk, such as climate, will require long-term policy changes with benefits that will be realized only gradually. Forest restoration—notably mechanical thinning and prescribed burns—offer a way to mitigate these risks in the short term. One study led by U.S. Forest Service scientists estimated that of four factors driving fire severity in the western United States, live fuel "was the most important," accounting for more than 50 percent of average relative influence, while climate accounted for 14 percent.[4] Whatever the future course of climate policy, the fact remains that many national forests have already accumulated decades worth of underbrush and fuels, escalating present fire risk. Forest restoration can help reduce these risks in the short run by creating and maintaining healthy, resilient forests and maximizing the ecological, environmental, and economic benefits people derive from them.

The effectiveness of mechanical treatments and prescribed burns was demonstrated in 2021 during Oregon's Bootleg Fire, which ultimately burned more than 400,000 acres. Firefighters reported that

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[2] *See* Holly Fretwell and Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC Public Lands Report (April 2021).

[3] "Incident Management Situation Report," National Interagency Coordination Center (July 17, 2022).

[4] Among the four factors driving fire severity in the western United States, live fuel accounted for an estimated 53.1 percent of average relative influence, fire weather accounted for 22.9 percent, climate accounted for 13.7 percent, and topography accounted for 10.3 percent. *See* Sean A. Parks et al., *High-Severity Fire: Evaluating Its Key Drivers and Mapping Its Probability Across Western US Forests*, Environmental Research Letters (2018).

where both treatments had been applied, fire intensity was reduced, the crowns of trees were left intact, and the blaze became a more manageable ground fire. Reports suggested that an area where scheduled prescribed burns had been delayed suffered more damage than areas where treatments had been completed.

More than half of the land in the 11 contiguous western states is federally owned and managed, and the largest wildfire burden falls on the Forest Service. The agency manages 193 million acres of land, and wildland fire management is its top budget item—including $3.7 billion of suppression costs in 2021.[5] The Forest Service reports a backlog of 80 million acres in need of restoration, yet the agency has treated an average of just 2 million acres in the West annually in recent decades.[6] The Biden administration aims to carry out fuel treatments on an additional 50 million acres over the next 10 years to reduce extreme wildfire risks, including an additional 20 million acres of national forest land.[7]

It's encouraging that bipartisan agreement on conducting more forest restoration work is emerging. The challenge now, however, is overcoming barriers and leveraging partnerships to get that work completed on the ground.

Overcoming Red Tape

Before any chainsaws or drip torches can touch a federal forest, a restoration project must be approved. The approval process requires navigating costly red tape and litigation obstacles that stand in the way of forest restoration. These barriers must be reduced in order to increase the pace and scale of forest restoration work.

National Environmental Policy Act

Forest restoration projects must navigate significant bureaucratic obstacles, including review under the National Environmental Policy Act (NEPA). Depending on the extent of anticipated impacts, NEPA may require the Forest Service to analyze a project through, in order of increasing complexity and expense, a categorical exclusion, environmental assessment, or environmental impact statement. The agency may also need to develop a range of alternatives to the project and analyze their impacts.

While well-intentioned, these extensive NEPA reviews can significantly increase project costs and inject substantial delays. New research from PERC compiled and analyzed a novel NEPA dataset and found

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[5] "Suppression Costs - Federal Firefighting Costs," National Interagency Fire Center.

[6] *Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America's Forests*, U.S. Forest Service, FS-1187a (January 2022).

[7] *Ibid.*

that the average time to conduct an environmental impact statement is 2.6 years for a mechanical treatment and 2.7 years for a prescribed burn.[8] Even a categorical exclusion, which is designed to exempt a project from stringent environmental review, takes an average of nine months for both mechanical treatments and prescribed burns.[9]

NEPA delays contribute substantially to an overall approval and implementation process that hold up projects for many years. Once the Forest Service initiates the environmental review process, it takes an average of 3.6 years to actually begin a mechanical treatment on the ground and 4.7 years to begin a prescribed burn—and those numbers increase to 5.3 years and 7.2 years, respectively, if an environmental impact statement is required.[10] Given the time it takes to conduct environmental reviews and implement fuel treatments, it is unlikely that the Forest Service will be able to achieve its goal of treating an additional 20 million acres over the next 10 years.

Not only does the NEPA process delay Forest Service actions, the resulting uncertainties also make it difficult for states, tribes, conservation groups, and other stakeholders to partner with the agency on forest management projects. Acreage limits on categorical exclusions under NEPA for forest restoration projects should be increased, and categorical exclusions for wildfire resilience projects should be made easier to apply by clarifying or eliminating vague standards that invite conflict.

This committee is currently considering legislation such as the Resilient Federal Forests Act (H.R.4614) and the Save Our Sequoias Act (H.R.8168) that could make a meaningful difference. Additionally, Congress should encourage the Secretary of Agriculture and the Forest Service to fully use the authority put forward by Senator Steve Daines (R-Mont.) in the Bipartisan Infrastructure Law to streamline the NEPA process for projects that address a high wildfire risk "emergency situation." These sorts of approaches could reduce the burden of the NEPA process and facilitate more work being conducted more quickly on the ground.

Endangered Species Act

In many western forests, the Endangered Species Act presents an additional complexity to getting forest restoration work done. If a project funded or implemented by a federal agency may jeopardize a species or adversely modify critical habitat, the agency must consult with the U.S. Fish and Wildlife Service to identify ways that impacts to the species can be avoided or mitigated.

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[8] Eric Edwards and Sara Sutherland, *Does Environmental Review Worsen the Wildfire Crisis? How environmental analysis delays fuel treatment projects*, PERC Policy Brief (June 2022).
[9] *Ibid.*
[10] *Ibid.*

Though the law is well-intended to protect wildlife, it can have the opposite effect. In 2011 the Forest Service initiated the Pumice Project to reduce wildfire risks on nearly 10,000 acres in the Klamath National Forest. Local environmental organizations objected, alleging that the project would harm the federally protected northern spotted owl, and delayed the project for a decade. Ultimately, the 2021 Antelope Fire burned through the site before any restoration work was conducted, destroying the owl habitat that the environmental groups claimed to be protecting.[11]

Additionally, if a new species is listed or critical habitat is designated during the period between an environmental review and project completion, the agency can be penalized for failing to anticipate and hit a moving target. Under the Ninth Circuit's 2015 *Cottonwood* decision, such regulatory changes require the Forest Service to restart consultation with the Fish and Wildlife Service at the forest plan level, then to restart consultation for individual projects, all before proceeding.[12] A forest project to protect Bozeman's water supply from catastrophic wildfire, for example, was the subject of the *Cottonwood* decision and was enjoined for seven years for review of lynx habitat.

Fixing *Cottonwood* is necessary to advance forest restoration goals. The Obama administration even urged the Supreme Court to reverse *Cottonwood*, explaining in a petition that the ruling "has the potential to cripple the Forest Service."[13] An initial legislative partial fix to *Cottonwood* expires in March of 2023. Congress should act now to pass a full fix to limit Endangered Species Act consultations to specific forest restoration projects, rather than broader planning documents. Without a fix, the Forest Service estimates that consultation will be required on 187 projects across 36 national forests, diverting resources from other needed national forest management activities.[14] One potential solution is to overturn *Cottonwood* and adopt the Tenth Circuit's approach nationwide, under which consultation is not required for a forest plan nor for similar decisions. Individual projects would still be subject to consultation requirements, while the major cause of controversy and delays would be alleviated.

Litigation

Litigation is another obstacle that compounds the others. While litigation plays an important role in holding the government accountable, it can also be disruptive and warp incentives. It can encourage

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[11] Ryan Sabalow and Dale Kasler, "'Self-serving garbage': Wildfire experts escalate fight over saving California forests," The Sacramento Bee (October 25, 2021).

[12] *See* Holly Fretwell and Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC Public Lands Report (April 2021).

[13] *See* Pet. for Cert., *U.S. Forest Serv. v. Cottonwood*, No. 15-1387 (filed June 10, 2016).

[14] Questions for the Record submitted by Forest Service Deputy Chief Christopher French to Senator Steve Daines following an October 21, 2021 hearing before the U.S. Senate Committee on Energy and Natural Resources on S. 2561.

conflict rather than collaboration, especially where the government pays its opponents' attorney fees. Ultimately, litigation has tied the Forest Service in what former chief Jack Ward Thomas described as a "Gordian knot" by limiting the agency's ability to actively manage national forests.[15]

A legal challenge that enjoins an approved NEPA decision, for instance, delays the time to implementation. And while a small number of overall projects may be litigated, the threat of legal challenge can cripple progress in slashing fire risk.[16] The Forest Service admits that it often engages in overly lengthy and extensive regulatory analysis to reduce the chances of a challenge or lessen the odds that proposed actions will be overturned, in essence trying to construct a "litigation-proof" NEPA.[17] More agency time and resources spent bulletproofing NEPA analyses means fewer spent improving conditions in forests.

Roughly two-thirds of the lawsuits challenging Forest Service projects from 2005 to 2019 targeted forest restoration projects.[18] Litigation adds additional costs and delays to implementing treatments. PERC research has found that projects that require an environmental impact statement and are litigated take an additional 1.5 years for mechanical treatments and 2.1 years for prescribed burns, on average, between initiation and implementation compared to those that are not challenged in court.[19] The consequences of litigation, however, have not been evenly distributed. Eighty-five percent of cases over this period were filed in courts within the Ninth Circuit, and nearly half were filed in only two district courts: the District of Montana and the Eastern District of California.[20]

Litigation and its threats significantly delay forest restoration work and unnecessarily cost taxpayers. Congress should make litigation less disruptive by requiring lawsuits to be filed quickly and clarifying how fire risks and forest health should affect injunction decisions. For example, Congress should require lawsuits challenging forest restoration projects to be filed soon after a project is approved and expedite cases concerning such projects by limiting how long preliminary injunctions can remain in

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[15] *See* Jack Ward Thomas, *The Future of the National Forests: Who Will Answer an Uncertain Trumpet?* (2011)

[16] Less than 1 percent of Forest Service forest restoration projects with a categorical exclusion approval are litigated, while nearly 18 percent of environmental impact statement projects are. *See* Eric Edwards and Sara Sutherland, *Does Environmental Review Worsen the Wildfire Crisis? How environmental analysis delays fuel treatment projects*, PERC Policy Brief (June 2022).

[17] *See* Linda Luther, *The National Environmental Policy Act: Streamlining NEPA*, Congressional Research Service RL33267 (December 2007).

[18] *See* Jonathan Wood, "Fix America's Forests," The Environmental Forum (March/April 2022).

[19] Eric Edwards and Sara Sutherland, *Does Environmental Review Worsen the Wildfire Crisis? How environmental analysis delays fuel treatment projects*, PERC Policy Brief (June 2022).

[20] The Ninth Circuit covers Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington. *See also* Jonathan Wood, "Fix America's Forests," The Environmental Forum (March/April 2022).

place before a court ultimately decides a case.[21] Additionally, Congress should build on improvements in the Bipartisan Infrastructure Law that tightened the standard for injunctions in "emergency situations" and impose a heavier burden to justify blocking a forest restoration project in areas of high fire risk that border populated areas. One such approach would be limiting injunctions to cases where moving forward would be objectively reasonable.

Increasing Capacity Through Partnerships

Once a forest management project makes it through the approval process, another barrier exists that prevents some projects from being implemented: having the physical resources and funds to get the work done on the ground. The Forest Service should increase work with outside partners to address its capacity challenges.

Good Neighbor Authority

Good Neighbor Authority is a mechanism that allows states, counties, and tribes to enter 10-year contracts to conduct forest restoration on federal lands. Partners' roles can include planning and preparation as well as the restoration work itself. In return for their efforts, state partners can receive a share of revenues that result from selling materials harvested or compensation directly from the federal government. In its current form, counties and tribes are prohibited from retaining timber revenues.

States across the West have proven themselves capable forest management partners, and many consider Good Neighbor Authority to be an important—and at times, crucial—tool for accomplishing their forest action plans. The Forest Service, for example, recognizes that expanding Good Neighbor Authority agreements will be crucial to meeting its 10-year wildfire crisis strategy.[22]

Much has been achieved since Good Neighbor Authority was expanded nationally less than a decade ago. Twelve western states have signed Good Neighbor agreements with federal agencies, and seven states have agreements in place on every national forest within their boundaries. Alaska, Colorado, Idaho, Montana, Oregon, Washington, and Wyoming have generated or expect to soon generate enough revenue from timber sales to fund subsequent restoration activities.[23]

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[21] Currently, lawsuits can be filed up to six years after project approval. A shorter deadline would let the Forest Service, private partners, and investors know early on whether a project will likely be tied up in litigation, enabling them to better allocate their resources. *See* Holly Fretwell and Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC Public Lands Report (April 2021).

[22] *Confronting the Wildfire Crisis: A 10-Year Implementation Plan*, U.S. Forest Service, FS-1187b (January 2022).

[23] *Use of Good Neighbor Authority Across the West*, Rural Voices for Conservation Coalition (August 2021).

While Good Neighbor Authority has become a successful tool for empowering state partners in forest management, reforms could make it even more inclusive and effective for landscape-scale wildfire risk reduction.[24] Giving counties and tribes the legal authority to keep timber revenues, for instance, would not only treat those partners as "full" neighbors but also make it easier to harness their expertise in conducting forest treatments.

Restrictions also specify that program funding can only be spent on the federal lands within a Good Neighbor project boundary, even if state or other lands are interspersed in the project area. Letting revenues from Good Neighbor Authority agreements be spent across the landscape, including on state and private lands, would help improve the effectiveness of forest restoration treatments at a wider scale.

Contract Lengths for Private Partners

Private partners are essential in contributing resources to forest restoration projects. Conservation organizations, the timber industry, and other businesses have all been leaders in helping get work done in federal forests.[25] The challenge is that federal contracts and cooperative agreements with partners often span a relatively short duration given the time needed to complete forest restoration work.

Current stewardship contract authority generally allows the Forest Service to enter into 10-year stewardship contracts with outside entities.[26] In many cases, however, these timelines are not enough. For instance, PERC research finds that it can take longer than five years for the agency to even begin to implement certain mechanical treatments. For ambitious, forest-wide restoration efforts, the Forest Service needs flexibility to enter contracts of appropriate length and options to easily extend contracts, especially where anticipated projects must navigate environmental reviews and potential litigation. Absent such flexibility, short time limits may discourage potential partners, investors, and timber buyers.

This is especially true where long-term success depends on motivating the timber industry to increase mill capacity and develop markets for small-diameter timber products. Even with investment and subsidies from the federal government to support building this infrastructure, these industries are reliant on a dependable, long-term source of timber. Longer-term contracts to harvest timber, for

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[24] *See* Holly Fretwell and Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC Public Lands Report (April 2021).
[25] *Ibid.*
[26] In some high-risk fire areas, contracts can be extended for up to 20 years. *See* Holly Fretwell and Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC Public Lands Report (April 2021).

example, would allow the Forest Service to better work with the timber industry as a partner in forest restoration work.

Private partners have the potential to bring resources to the table to increase forest restoration work. Congress should explicitly grant the Forest Service the authority to enter into longer-term contracts and cooperative agreements for forest restoration work with the flexibility to easily extend contracts to help scale up public-private partnerships.

Conclusion

Eighty million acres of national forests need restoration to reduce wildfire risk and protect the benefits of healthy forests. Though the Biden administration has committed to doubling the acreage of forest restoration work over the next decade, completing this work will take more than money. The current reality is that red tape and a need for partners hinder the Forest Service's ability to get this restoration work done. Congress has the opportunity to work with the Forest Service to make reforms that promote collaboration instead of conflict and increase partnership opportunities. If these aims are accomplished, forest managers can make true progress to fix America's forests.