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Congress and the Executive Can Do Much More

Revisiting the Healthy Forest Challenge

Executive Summary

- America's forests have undergone radical changes over the last century, due in large part to past management decisions that have left the forests unnaturally dense and susceptible to disease, drought, and catastrophic wildfire.
- Despite efforts to facilitate forest restoration through the Healthy Forest Initiative and the Healthy Forests Restoration Act, there are still significant barriers to effective management of the nation's forests.
- This paper identifies several impediments to effective public lands management.
    - Administrative appeals and litigation continue to plague efforts to restore the nation's forests, despite efforts to reduce both.
    - Categorical exclusions, a mechanism to avoid lengthy administrative processes for environmentally insignificant projects, recently have been eviscerated by the U.S. Court of Appeals for the Ninth Circuit.
    - Another mechanism, stewardship contracting, is hampered by inadequate contract lengths that discourage the participation of potential contractors and additional federal regulations discouraging this form of contracting.
    - Congress and federal land management agencies have not placed enough emphasis on treatment of hazardous fuels buildup in our nation's forests and too much emphasis on fire suppression. Numerous economic studies show that treatment is more cost-effective than suppression.
- This paper offers several suggestions to reform the judicial process to reduce frivolous lawsuits, re-establish the effectiveness of categorical exclusions, improve the effectiveness of stewardship contracting, and redirect resources from wildfire suppression to hazardous fuels reduction treatment.

Introduction

America's forests have undergone radical changes over the last century, due in large part to previous fire suppression policies and lack of active and effective management. This has led to a situation where the forests have become unnaturally dense making them susceptible to disease, drought, and catastrophic wildfire. Catastrophic wildfires pose a significant threat to a wide range of resources, including threatened and endangered species' habitats, commercially valuable forest and rangeland products, public and private property, and air and water. Forest management tools, such as mechanical thinning, prescribed burning, and other methods, can help reduce forest density and the destructiveness of catastrophic wildfire.

To facilitate forest restoration, the Bush Administration implemented the Healthy Forest Initiative in 2002, and Congress passed the Healthy Forests Restoration Act in 2003. Although these new programs have been helpful, there are still significant administrative and legal barriers to effective public lands management. Further improvements to current law are needed to expedite the restoration of the nation's forests. This paper identifies five impediments to effective public lands management and propose ways to deal with those impediments. The impediments can be broken down into two categories: legal deficiencies and administrative.

Summary of Statutory Impediments

Problem: Administrative appeals and litigation have proceeded largely unabated since passage of the Healthy Forests Restoration Act. These lawsuits are often frivolous and designed merely to delay projects and tie federal agencies into knots.

> ***Recommended Solution****:* To ensure that forest protection efforts are not thwarted by frivolous litigation, Congress should revisit the fee-shifting provisions of the nation's environmental laws to conform them with the Equal Access to Justice Act (EAJA). The EAJA provides fees to prevailing plaintiffs in citizen suits where, among other things, the government's position was not "substantially justified." That EAJA standard should apply to cases challenging forestry service actions. Additionally, where appropriate, the federal courts should be allowed to require plaintiffs to post a bond to cover the cost of delaying projects if they fail to prevail in court.

Problem: The effectiveness of "categorical exclusions" – an important management tool, which allows public lands managers to avoid the cumbersome administrative process for environmentally insignificant projects – has been eviscerated by a recent court ruling, which ruled that they should be subject to notice, comment, and appeal.

> ***Recommended Solution****:* Congress should explicitly exempt categorical exclusions from legal procedures for notice, comment, and appeal. Such language exists in legislation offered by the House Committee on Agriculture (H.R. 4091).

Problem: Stewardship contracting is another potentially useful tool to facilitate hazardous fuels removal. However, statutory language limits its effectiveness. First, contract lengths are limited to a maximum of ten years. This discourages potential contractors, who need longer amortization periods to recoup their investments, from participating in stewardship contracts.

Second, contract lengths are limited even further by a requirement that the Forest Service obligate upfront large sums of money to protect contractors from the financial risks of project cancellation. Because of the requirement, the Forest Service has largely restricted itself to single-year contracts.

> ***Recommended Solution****:* Congress should change the law to increase contract lengths for stewardship contracts, and to allow the Forest Service, and other agencies to engage in stewardship contracting, to cover cancellation costs out of current appropriations, similar to the Department of Defense.

Summary of Administrative Impediments

Problem: Too much emphasis is given to fire suppression over hazardous fuels treatment. For example, the Forest Service's FY 2006 enacted level including $282 million for hazardous fuels treatment versus $690 million for fire suppression (See p. 10-11, infra). Several economic studies show that treatment is more cost-effective than suppression.

> ***Recommended Solution****:* In setting priorities, responsible agencies should emphasize treatment over suppression. Congress can help the agencies change emphasis through appropriations.

Problem: There is some confusion within the Forest Service about performance and payment bond policies for service contracts. Field managers sometimes inappropriately require contractors to post performance bonds, discouraging contractor participation.

> ***Recommended Solution****:* The Forest Service must ensure that its field managers understand the policies regarding performance and payment bonds to avoid imposing unnecessary requirements on potential contractors.

This paper will address each of these impediments and the possible solutions in more depth. Prior to this, the paper will provide background to the current forest health crisis, what has been done to fix the problem, and how to proceed from here.

Background to a Continuing Crisis

In 2002, the Forest Service produced a report that explained how requirements for detailed documentation, administrative appeals of proposed forest treatment projects, lawsuits, and injunctions have all delayed needed projects and made it difficult for federal land management agencies to carry out necessary forest restoration and hazardous fuels treatments.[1] Part of the problem was that much of the effort and cost associated with the project approval process was attributed to the need to "bulletproof" the decisions from potential appeals. This led to an extraordinarily lengthy, complex, and often redundant decision-making process that did not add value or aid in decision making, but was necessary only to prevent decisions from being litigated. As the Forest Service explained it:

[1] U.S. Department of Agriculture/Forest Service, *The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management*, June 2002.

> Too often, the Forest Service is so busy meeting procedural requirements, such as preparing voluminous plans, studies, and associated documentation, that it has trouble fulfilling its historic mission: to sustain the health, diversity, and productivity of the nation's forests and grasslands to meet the needs of present and future generations. Too frequently, the paralysis results in catastrophe.[2]

That "catastrophe" includes uncontrolled fires.

In an attempt to address this predicament, the Administration devised the Healthy Forest Initiative, which was released in August of 2002, and Congress passed the Healthy Forests Restoration Act of 2003, which the President signed into law on December 3, 2003.[3]

The Healthy Forest Initiative sought to improve and expedite the development and implementation of forest-restoration projects through reducing the number of overlapping environmental reviews, developing methods to weigh the short-term risks against the long-term benefits, and developing guidance to consistently apply the National Environmental Policy Act (NEPA).

The Healthy Forests Restoration Act also contains numerous provisions to streamline the process to avoid unnecessary and wasteful delays. It established a pre-decisional administrative review process that serves as the sole means by which a person can seek administrative review regarding an authorized hazardous fuels reduction project on National Forest Service land. It limited the number of alternatives to be addressed during environmental review to three (whereas there were no limits previously). It limited judicial review to only those issues raised during the administrative process and allowed judicial review only after the administrative process was exhausted. It limited the length of preliminary injunctive relief to 60 days, and made projects subject to judicial review only in the U.S. district court for the district in which the federal land to be treated is located.

Time of Transition From Old to New System

With the creation of these new and improved tools to streamline the environmental review and appeals process, land management agencies are in a time of transition. Progress is being made, though the administrative process remains slow and plagued by appeals, litigation delays, and other problems. As of July 2006, the Forest Service has used the new authorities provided in the Act to treat only 77,000 acres,[4] while 20 million acres were targeted for treatment by the Act. However, the rate of treatment under the Act is slowly increasing as land management agencies learn to use the new tools. In 2005, the Forest Service treated 23,000 acres under the HFRA authority; this year, the Forest Service expects to treat 90,000 acres under the new law.[5] Forest restoration efforts conducted under the separate authorities of the

[2] USDA/Forest Service, June 2002.
[3] Public Law 108-148.
[4] *Billings Gazette*, "Fire Prevention Efforts Too Slow, Senators Say," July 20, 2006.
[5] Dale Bosworth, Chief, U.S. Forest Service, testimony before the Senate Energy and Natural Resources Committee, July 19, 2006. The 2006 numbers were provided by the U.S. Forests Service.

President's Healthy Forest Initiative have also been slow, but improving. In 2005, the Forest Service treated 100,000 acres under the Initiative, and expects to treat 130,000 acres this year.[6]

It is important to remember, though, that hazardous fuels reduction projects are still conducted under the old system that existed, with all its deficiencies, prior to the creation of the new healthy forests tools. In 2005, a total 4.2 million acres were treated, nearly all pursuant to the old system.[7] This is due to the fact that numerous projects are ongoing and were initiated *before* the new healthy forest tools were implemented in 2003; their project-specific environmental reviews have been on the books for years. For example, prescribed burns in the southern United States must be conducted on a yearly basis because of the growth rate of vegetation in the South, and the necessary environmental reviews were completed prior to 2003, and continue to apply. There is no need to conduct another environmental review using the new healthy forest tools. These prescribed burn projects in the South account for about 2 million acres of treatments per year. Other large, multi-year projects that began before 2003 also are conducted under existing project-specific environmental reviews. Once these projects are completed, the environmental reviews will have run their course. All new hazardous fuels reduction projects will have to undergo new environmental reviews, which will be completed using the new, streamlined healthy forests tools.

The new healthy forest authorities are not hindering work from proceeding under other authorities but are augmenting that work and becoming a larger portion of that work each year, as noted above. Each year the total number of acres treated continues to increase, and is projected to reach 4.6 million acres in 2007. The Forest Service also continues to put more acres into the administrative process pipeline. Its current *Healthy Forests Report* shows that there are currently 555,000 acres in the planning stage.[8]

The transition from the old cumbersome system is underway, but the Forest Service is nowhere close to treating the 20 million acres targeted by the Act. The problems that hinder progress are outlined and discussed below.

Statutory Impediments to Effective Forest Restoration

This section will describe the various legal impediments that delay hazardous fuels treatment and propose solutions to these impediments.

Continued Litigation Burdens Slow Forest Treatment

Although the Healthy Forest Initiative and Healthy Forests Restoration Act have provided some relief from burdensome litigation and helped speed up forest restoration, there are still significant delays due in part to lengthy appeals. For example, prior to passage of the Act, the Government Accountability Office found that about 58 percent of appealable decisions were

[6] Dale Bosworth, July 19, 2006. The 2006 numbers were provided by the U.S. Forest Service. Bosworth stated in his testimony that the Forest Service expected to treat 208,000 acres this year under HFI, but due to a heavy fire season, it had to divert resources to firefighting.
[7] USDA/Forest Service, *Overview of FY 2007 President's Budget*, February 8, 2006 – revised.
[8] USDA, *Healthy Forests Report*, October 1, 2006.

appealed.[9] It appears that the rate has hardly changed. According to Mark Rey, Under Secretary for Natural Resources and Environment at the U.S. Department of Agriculture, half of the projects initiated under the Act are under appeal, significantly slowing hazardous fuels treatments.[10]

Litigation remains a significant problem for another reason – nearly all projects conducted under the laws are mixed projects. In other words, there are several components to each project that fall outside the law's authority and, instead, are subject to separate cumbersome administrative processes, appeals, and litigation, slowing and even stopping many healthy forest projects. Few projects are pursued only under the Act's authority, so its reforms have limited reach.

Recommendation: Addressing Excessive Litigation – Attorney's Fees

Congress can address the burdens of excessive litigation by examining the attorney's fee provisions that govern this area of law. Taxpayers have paid millions of dollars to environmental groups in recent years due to fee-shifting statutes. For example, the *Sacramento Bee* has reported that, in the 1990s, the federal government paid $31.6 million in attorney's fees for 434 environmental cases, and the average award was more than $70,000 (with some in the millions of dollars).[11] By some reports, there are as many as 7,100 cases being litigated by the Environment and Natural Resources Division of the Justice Department.[12] It is reasonable to assert that the availability of attorney's fees creates a financial incentive to file lawsuits.

It is important to understand the source of the environmental groups' "rights" to attorney's fees. Most citizen lawsuits against the federal government, including those brought under the Administrative Procedures Act (APA), are covered by the fee provisions found in the Equal Access to Justice Act (EAJA). The EAJA provides that "a court shall award to the prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[13] Thus, to be awarded attorney's fees, the plaintiff must "prevail," the government's position must *not* have been "substantially justified," and awarding the fees should not be otherwise "unjust." The EAJA fee provision, especially insofar as it denies fees when the government's position was "substantially justified," is designed to prevent the government from litigating in bad faith, mounting absurd or frivolous arguments of its own in order to dissuade citizen lawsuits. But if the government has good arguments — "substantially justified" arguments — then no fees should be awarded.

The APA is not the only source of relief for environmental plaintiffs. Several environmental statutes have even broader fee provisions,[14] most significantly the Endangered

[9] GAO, *Forest Service: Information on Appeals and Litigation Involving Fuels Reduction Activities*, October 2003.
[10] Mark Rey, testimony before the House Committee on Agriculture, November 15, 2005.
[11] *Sacramento Bee*, "Litigation Central: A Flood of Costly Lawsuits Raises Questions About Motive," April 24, 2001.
[12] *Caspar Star Tribune*, "Feds to Energy: Help fight these lawsuits," June 16, 2004.
[13] 28 U.S.C. § 2412(d)(1)(A).
[14] See attorney's fee provisions for the following statutes: Endangered Species Act 16 U.S.C § 1540(g)(4); Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604(a); Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(a); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659(a); Emergency Planning and Community Right to Know Act (EPCRA) 42 U.S.C. §

Species Act (ESA), which provides, "The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."[15] So, whereas a plaintiff bringing a case under the APA must meet the thresholds described above, a plaintiff suing under the ESA must only convince the court that the award is "appropriate." This is a lower standard than in the EAJA, and — as the Supreme Court has recognized — realistically means that the party need only achieve "some success" in the litigation, even if the vast majority of the plaintiff's claims fail on the merits.[16] Nor is there any protection for the taxpayer if the government litigates in good faith, making "substantially justified" arguments. This rule has the practical effect of encouraging plaintiffs to broaden their arguments and ask for far more than the law justifies, slowing the government's forest protection efforts and driving up costs to taxpayers through litigation.

First, Congress should conform the attorney's fee provisions of the environmental statutes used to challenge forest projects to those in the EAJA. The broad fee provisions of the ESA (and other environmental statutes) give courts too much discretion, and do not adequately protect tax dollars. The purpose of a fee-shifting provision should be to reward legitimate claims and to force the government to litigate in good faith; it should not have the practical effect of guaranteeing a court challenge to nearly every government action on behalf of the public good. The Equal Access to Justice Act, as written, seeks to strike a balance that is lacking in many the environmental laws.

Second, questions have been raised as to whether the EAJA is enforced properly by the courts. Congress should investigate how the EAJA's threshold tests — whether the plaintiffs "prevailed," whether the government's position was not "substantially justified," and whether a fee award would be "unjust" — are enforced in court. Of particular concern is the interpretation of the "substantially justified" prong, where some courts appear to be treating a position as not substantially justified simply because it does not prevail in court. An egregious example arose in a 2002 case in the Ninth Circuit, where the court held that the government's position was not substantially justified even when that position had *prevailed* in the district court before being reversed on appeal.[17] As Judge Alex Kozinski argued in dissent, "After today's ruling, it's hard to imagine a case where the government will not have to pay fees after losing. The district court adopted the government's position, and we reversed only after noting there was no case directly on point. If that's not substantial justification, what is?"[18] More investigation is necessary to determine whether this is a problem deserving of statutory action. Congress may need to provide greater definition to the terms of the EAJA to prevent courts from misconstruing the law's text and purpose.

11046(a)(1); Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6972 ; Safe Drinking Water Act, 42 U.S.C. § 300j-8; and the Toxic Substances Control Act, 15 U.S.C. § 2619.

[15] See 16 U.S.C. § 1540(g)(4).

[16] *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983) (construing parallel language in the Clean Water Act).

[17] *United States v. Real Property at 2659 Roundhill Dr.*, 283 F.3d 1146 (9th Cir. 2002).

[18] *Id.* at 1156 (Kozinski, J., dissenting); *see also United States v. Marolf*, __ F.3d __, 794 (2002) (Fernandez, J., dissenting) ("turning out to be wrong is not enough to justify an award of fees").

Recommendation: Addressing Excessive Litigation – Bonding

Another approach to managing the flood of litigation is through bonding requirements. This approach was recently demonstrated by federal judge Donald Molloy, a Clinton-appointed U.S. district judge in Montana. In a lawsuit brought by several environmental groups to stop a timber project in a beetle-infested area in Montana, the judge ordered plaintiffs to post a $100,000 bond to cover the cost of delaying the project in the event that the project is allowed to go forward. The judge explained that the bond would "ensure meaningful accountability" if the appeals court upheld his ruling that the project served the public interest and should proceed. If the environmental groups lose the case, they lose the money posted.[19] Due to the procedural intricacies of the case, the bond was never actually posted, nor was the required posting of the bond repudiated by a higher court or by Judge Molloy himself.[20]

Bonding requirements will not be appropriate in all cases, but in Judge Molloy's decision, he recognized that, at times, such measures will be necessary to ensure that litigation is not used as a costless delaying tactic. Given the criticism that greeted Judge Molloy's ruling, as well as the Ninth Circuit's generally pro-plaintiff approach in environmental cases, Congress should make clear that nothing in federal law should be construed to prevent federal courts from requiring bonds in appropriate cases. This tool to ensure a just litigation process should remain available to the courts.

Use of Categorical Exclusions Threatened

The National Environmental Protection Act (NEPA) provides for public participation in resource management decisions and their potential environmental impacts. This participation includes a notice, comment, and appeal process, culminating in the creation of an environmental assessment or environmental impact statement. NEPA also provides a mechanism, known as a categorical exclusion, for "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."[21] The rationale for these "categorical exclusions" is to avoid a lengthy administrative process for environmentally insignificant projects.

A categorical exclusion is not just something that the Forest Service or other resource agencies can invoke on a whim, but is itself developed through an extensive rulemaking exercise.[22] It begins with the agency gaining experience with certain categories of activities through numerous environmental assessments and hands-on experience and, through that experience, determining that such activities pose no significant environmental impact. At that point, the agency pulls together the data collected from previous environmental assessments and proposes a categorical exclusion, which is then subjected to a public notice and comment period and an administrative appeals period. Individuals or groups can challenge a project as not fitting

[19] *Native Ecosystems Council vs. Kimbell*, Docket No. CV 05-110-M-DWM in District of Montana. See in particular, order dated 12/20/05. See also, *Associated Press State & Local Wire*, Judge orders environmental groups to post bond in logging case," December 23, 2005.
[20] *Native Ecosystems Council vs. Kimbell.*
[21] 40 CFR 1508.4.
[22] Rey, November 15, 2005.

within a categorical exclusion or they can challenge the categorical exclusion itself. Thus, public participation is still permitted, but only insofar as the categorical exclusion is concerned; the project itself is not subject to the full administrative process.

The effectiveness of categorical exclusions was threatened recently by a federal court decision of the Ninth Circuit in San Francisco. In *Earth Island Institute vs. Del Pengilly*, environmental groups argued that all projects covered under categorical exclusions are subject to notice, comment, and appeal.[23] The court did not disallow categorical exclusions *per se*, but found that the projects conducted under many of the existing categorical exclusions must be subject to notice, comment, and appeal. This holding effectively eviscerated the usefulness of these categorical exclusions. These activities include, but were not limited to, prescribed burns, thinning, and other activities related to hazardous fuels reductions. The whole point of categorical exclusions was to eliminate the unnecessary burden on the government for environmentally insignificant projects.

The impact of this ruling is that the notice, comment, and appeal process could add up to 135 days to the approval process. If the level of public interest and comment is high, then an appeals period, which could be as long as 105 days, would be required. The Forest Service has determined that, as a result of the *Earth Island Institute* case, more than 800 projects became subject to notice, comment, and appeal, affecting 900,000 acres of hazardous fuels reduction projects for FY2006 alone.[24]

Recommendation: Re-establish the effectiveness of categorical exclusions

To re-establish the effectiveness of categorical exclusions, Congress should explicitly exempt categorical exclusions from the Appeals Reform Act. The House Committee on Agriculture has offered legislation (H.R. 4091) to ratify part 215 of title 36 of the Code of Federal Regulations. The legislation explicitly states that "procedures for legal notice and opportunity to comment do not apply to…projects and activities which are categorically excluded from documentation in an environmental impact statement or environmental assessment…."[25] The bill asserts that this regulation is in full compliance with the public law establishing the Forest Service's decision-making and appeals process.[26]

Barriers to Effective Stewardship Contracting

Stewardship contracting could be a very useful tool to expedite forest restoration projects. Authorized in the Omnibus Appropriations Act for FY2003, stewardship contracting allows federal agencies charged with managing U.S. forest lands to enter into contracts or agreements with communities, non-profit organizations, or private businesses (referred to as "contractors" in the following discussion) to perform services, such as mechanical thinning, in exchange for forest and rangeland products. Much of the timber product removed during mechanical thinning is of little value, so allowing contractors to remove some valuable timber products helps pay for

[23] __F.3d.__, 2006 WL 2291168 (9th Cir., Aug. 10, 2006).
[24] Rey, November 15, 2005. Here, Rey is referring to the 2005 district court opinion.
[25] 36 CFR 215.4.
[26] Section 322 of the Department of the Interior and Related Agencies Appropriations Act, 1993 (Public Law 102-381).

the otherwise prohibitive costs of mechanical thinning projects. Stewardship contracting has been used successfully on several forest health projects, but has been limited in scope.

There are several reasons why stewardship contracting is not used as extensively as it could be. Two major impediments are inadequate contract lengths that discourage the participation of potential contractors, and federal regulations that discourage more extensive use of stewardship contracting by the Forest Service.

First, the maximum term of a stewardship contract was set at 10 years in the appropriations act, which is too short to induce many potential contractors to bid on contracts.[27] Many contractors, who might otherwise be interested in entering into a stewardship contract, would not be able to recover their costs even during a 10-year contract length, because their amortization schedules are much longer. For example, manufacturers of engineered wood products (which could put to good use the small-diameter, low-value, lumber produced from mechanical thinning) cannot recover their upfront capital costs in 10 years.[28] Because of high transportation costs, it is often not economical to haul the wood to existing plants, so new plants need to be constructed near the raw resources. By extending the available contract term, more businesses would be willing to enter into stewardship contracts. One contractor has suggested, "A 10-year contract might be feasible if the investors were assured of an automatic renewal for another 10 years if the conditions of the first contract were satisfactorily completed."[29]

Another reason stewardship contracts are not used more extensively is a costly requirement related to the obligation of agency funds. Multi-year contracts may be subject to cancellation by the federal government, thus federal acquisition regulations require civilian agencies that enter into such contracts to obligate funds to cover the "cancellation costs" of contractors in the event of cancellation. The purpose of the regulation is to protect contractors from the financial risks of project cancellation. The funds "must be sufficient to cover any potential cancellation and/or termination costs…."[30] These costs are based on the agency's best estimate of the portion of the contractor's investment that cannot be recouped if the contract is cancelled. This may include the cost of equipment, training, and other sunk costs assumed by contractors.

A Forest Service briefing paper explains that this requirement "serves as a disincentive to a [federal public lands] manager opting to perform stewardship contract work on a multi-year contract basis."[31] Indeed, as a result of this regulation, of the 206 stewardship contracts the Forest Service entered into, only one is a multi-year contract. The other 205 are one-year contracts and not subject to the same requirement. In the one multi-year stewardship project that the Forest Service has entered into – the White Mountain Stewardship project in the Apache-

[27] R. Wade Mosby, Senior Vice President, Collins Pine Company, testimony before the House Resources Committee, Subcommittee on Forests and Forest Health, April 27, 2006.
[28] Mosby, April 27, 2006.
[29] Mosby, April 27, 2006.
[30] See Federal Acquisition Regulation 17.104(c).
[31] U.S. Forest Service, Southwest Region, *Contingency Liability Requirements Limit Use of Stewardship Contracting Authority* (undated briefing paper). Also see, U.S. Forest Service, *Stewardship Contracting Assessment*, (prepared by David MacCleary), November 23, 2004 for further reference to the problem with the cancellation ceiling.

Sitgreaves National Forests in Arizona – it had to obligate $500,000 to cover cancellation costs.[32] That is a half million dollars that was not available for other projects.[33] It is not hard to see that numerous multi-year contracts would have a large budgetary impact on the Forest Service, and explains its preference for one-year contracts.

Recommendation: Cover cancellation costs from current appropriations

Because Forest Service budgets are limited, the amount of money that can be tied up in reserve funds to cover cancellation costs is also limited and the number of stewardship contracts that can be entered into is restricted. It has been recommended that the Forest Service's contingent liability be managed on something other than a project-by-project basis.[34] The Department of Defense, which has engaged in multi-year contracting for decades, is not required to obligate funds to cover the cancellation costs in the event of a project cancellation. The DoD pays the cancellation costs from one of three sources:

- "appropriations originally available for the performance of the contract concerned;
- "appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or
- "funds appropriated for those payments."[35]

In other words, the DoD is expected to pay costs to contractors in the event of a project cancellation, but it does not have to set aside money up front to cover those costs. Instead, it is allowed to cover those costs upon cancellation out of current appropriations. Similar language could be adopted for stewardship contracting, especially since project cancellations are rare.[36]

Recommendation: Reduce obligation to cover cancellation costs

Another possible solution would be to establish a reserve fund to cover potential cancellation costs of all stewardship contracts on a fractional basis. Since most projects are not cancelled, there is no need to obligate funds to cover the full potential cancellation costs of each project. It should be sufficient to obligate only a fraction of the total potential liability of all projects, based on past cancellation percentages. The Forest Service says that only five percent of stewardship contracts have been cancelled. However, since nearly all stewardship contracts are one-year contracts, this number may not translate to multi-year contracts. Additional analysis of, and experience with, multi-year contracts may be needed to ascertain the correct number. However, DoD's experience with multi-year contracts (which expose contractors to far greater financial risk) suggests that a similar approach would work well within the context of stewardship contracts.

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[32] This is actually a fairly low number, because the successful offerer (contractor) that was awarded the contract did not have to make any investments in equipment or facilities. Situations where the successful offerer must make large capital investments the reserve fund would have to be much larger for the given project.
[33] U.S. Forest Service, Southwest Region, (undated briefing paper).
[34] U.S. Forest Service, Southwest Region; and Douglas C. Morton, Megan E. Roessing, Ann E. Camp, and Mary L. Tyrrell, *Assessing the Environmental, Social, and Economic Impacts of Wildfire*, Yale University, School of Forestry & Environmental Studies, Global Institute of Sustainable Forestry, May 2003.
[35] 10 U.S.C. 2306b.
[36] According to the Forest Service, about five percent of stewardship contracts are cancelled.

Administrative Impediments to Effective Use of Existing Tools

Federal land management agencies must ensure that existing tools are used effectively to address forest health issues. To the extent necessary, Congress can step in and provide guidance or legislation to aid the agencies in these efforts.

Emphasize Treatment over Suppression

The agencies responsible for managing the nation's forests must give higher priority to fuels treatment over fire suppression, and Congress can encourage this change through appropriations. A new study by researchers at the School of Forestry at Northern Arizona University found that the cost of treatment (hazardous fuels reduction) is less than the costs associated with not reducing hazardous fuels.[37] The study found that, "continuing the current policy of favoring fire suppression over prevention does not represent a rational economic choice. All with-treatment scenarios had lower present-value of costs than the no-treatment alternative."[38] The study also states, "Using conservative economic values, we found that avoided future costs justify spending $238 to $601 per acre for hazard reduction treatments in the southwest."[39]

In another study, the Rural Technology Initiative (a partnership between the University of Washington College of Forest Resources, and Washington State University, Department of Natural Resource Sciences and Cooperative Extension) tallied the wildfire costs avoided – including those associated with fire fighting, timber and facilities losses, regeneration and rehabilitation, and others – through hazardous fuels treatments, then subtracted the treatment costs and found that for forests at high risk from wildfire, the net benefits from hazards fuels treatment is $1,483 per acre. For moderate-risk forests, the net benefit is $688.[40] These findings confirm those of other studies showing that treatment costs less than suppression.[41] Yet, the Forest Service's FY2006 enacted level included approximately $282 million for hazardous fuels treatment versus $690 million for fire suppression.[42] This funding imbalance displays misplaced priorities.

Clarify Confusion Over the Appropriate Use of Performance and Payment Bonds

Federal land management agencies also need to ensure that they are correctly applying federal acquisition regulations, with regard to performance and payment bonds. For some types

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[37] G.B. Snider and P.J. Daugherty, "The Irrationality of Continued Fire Suppression: An Avoided Cost Analysis of Fire Hazard Reduction Treatments Versus No Treatment," (in review) *Journal of Forestry*. This paper is initially presented at the Ecological Restoration of Southwest Ponderosa Pine and Pinyon-Juniper Ecosystems, a joint meeting of the Southwest and Intermountain Sections of the Society of American Foresters in St. George, UT, May 11-13, 2005.

[38] Snider and Daugherty, (in review).

[39] Snider and Daugherty, (in review).

[40] Larry Mason, Bruce Lippke, and Kevin Zobrist, "Investment in Fuel Removals Avoid Future Public Costs," *RTI Fact Sheet*, May 2004.

[41] See, S.J. Pyne, P.L. Andrews, and R.D. Laven, *Introduction to Wildland Fire*, John Wiley and Sons Inc., New York, 1996; P.J. Daugherty and G.B. Snider, "Ecological and Market Economics," in *Ecological Restoration and Ponderosa Pine Forests*, P. Friederici (ed.), Island Press, Washington, D.C., 2003.

[42] Figures provided by the Office of Management and Budget.

of federal contracts (generally construction contracts), contractors are required to post performance and payment bonds to ensure adequate performance of the contract. In general, performance and payment bonds are not required for service contracts, though there are situations where they may be permitted.[43] There is some confusion on this policy within the Forest Service, as there have been complaints, particularly from smaller operators, that the bonding requirements are too cumbersome and limit their ability to work on Forest Service contracts. According to one contractor, "The Forest Service must modify its contractual requirements to reduce the need for bonds or small businesses will find it difficult to finance work on Forest Service contracts."[44] The Forest Service needs to ensure that its field managers understand the policy regarding performance and payment bonds to avoid imposing unnecessary requirements on potential contractors.

Conclusion

Millions of acres of U.S. forests continue to be at high risk from catastrophic wildfire, due to overgrowth, disease, insect infestation, and weather-related damage. Administrative and legislative solutions are available to enhance the effectiveness of existing authorities to ensure the restoration of the nation's valuable forests, and they should be pursued.

[43] See Federal Acquisition Regulation 28.103.
[44] Gary Erickson, Manager, Bighorn Lumber Company, Inc., testimony before the Senate Committee on Small Business and Entrepreneurship, February 19, 2004.