

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

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

**Oversight Hearing on “Burdensome Litigation and Federal Bureaucratic Roadblocks to  
Manage our Nation’s Overgrown, Fire-Prone National Forests”**

**June 8, 2017**

Chairman McClintock, Ranking Member Hanabusa, and members of the subcommittee, thank you for the opportunity to join you today to discuss solutions to the challenging issue of modern forest management.

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

WELC is also deeply engaged in collaborative forest conservation in Oregon, working closely with the Blue Mountains Forest Partners on the Malheur National Forest in eastern Oregon, the Ochoco Forest Collaborative on the Ochoco National Forest, the Deschutes Collaborative Forest Project on the Deschutes National Forest, and the Wallowa-Whitman Forest Collaborative on the Wallowa-Whitman National Forest.

I am a proud environmental litigator. My primary focus of litigation is federal public lands forest management, and my practice includes cases involving the Endangered Species Act, National Environmental Policy Act, National Forest Management Act, Oregon and California Lands Act, and other land management statutes. I am an Adjunct Professor of Law at Lewis and Clark Law School, where I have taught Forest Law & Policy to upper division law students for the past 11 years. Both my litigation and pedagogy have been heavily influenced by not only my collaborative experience, but also my tenure as Natural Resources Counsel for Congressman DeFazio, a former Member of this Committee: I am honored to share with my clients and students the lessons I learned on Capitol Hill from the Congressman, who knows and understands natural resources issues better than most. As the Representative of the most timber-dependent district in the country, I have learned much from Congressman DeFazio about the needs and challenges of natural resources-based rural communities.

I am also a member of the National Advisory Committee for Implementation of the National Forest System Land Management Planning Rule, which is charged with overseeing

implementation of the Forest Service's 2012 planning rule that affects management on 193 million acres of federal forestland across the country. My service on the Committee has been incredibly rewarding, both personally and professionally. Working with my fellow Committee members and Forest Service partners, we have created important outreach and educational materials for the public and state, local, and tribal government partners; submitted formal recommendations to the Secretary of Agriculture and Chief of the Forest Service on Forest Service policy and guidance; developed procedures for assessing the wilderness qualities on our national forestlands; and daylighted potential planning challenges and crafted solutions to them, all with the goal of developing and implementing better forest plans that meet the needs of the American public.

As a proud – and successful – environmental litigator in the Pacific Northwest on forest management issues, many are surprised to learn about my deep commitment to collaboration. It is this work that I wish to share with the Subcommittee, because I believe it represents an alternative narrative to what is usually divisive and positional rhetoric that does little to recognize and solve actual forest management and socioeconomic problems.

### ***Collaboration in the Iron Triangle***

The “Iron Triangle” forests of the Blue Mountains of eastern Oregon include the Umatilla, Wallowa-Whitman, and Malheur National Forests. Historically, these dry, fire-friendly Ponderosa pine forests were managed extremely intensively, first for cattle and sheep grazing and later for timber production as well. The Malheur produced one of the largest timber sales in Forest Service history: the 1922 billion board foot Bear Valley sale, which kept a single purchaser flush with virgin old growth Ponderosa pine and larch for years. This type of extraction, plus fire suppression that began in earnest around the same time, created degraded forest conditions and decades later would eventually bust much of the industrial infrastructure. Community wellbeing declined.

In 2003, I attended a forest plan revision meeting for the Iron Triangle forests in Portland, Oregon. Although Portland is usually fairly safe turf for conservationists, Grant County had bused in dozens of community members to express their displeasure with current Forest Service management of the Malheur National Forest, where they lived. Consequently, I was outnumbered and my home field advantage vaporized, particularly when the public comment period opened and very loud and angry voices were leveled at the Forest Service and “all of the environmental litigation shutting down the forest.”

At one of the breaks, I was approached (more like “cornered”) by Grant County Commissioner Boyd Britton, who was flanked by a number of very large and burly men: representatives of the local logging industry in Grant County. The commissioner politely introduced himself to me, shook my hand, looked me square in the eye and said, “I hear you’re the environmental attorney who keeps kicking our butts in court. That’s not working for us in Grant County. I want to take you out to the Malheur forest to talk about the future. And I’ll even bring you back.” Not an invitation to be declined.

Months later, I visited Grant County and took Commissioner Britton up on his offer. Not my first trip to the County, however, as I had been there regularly for administrative appeal resolution meetings, a required step in the administrative review process of Forest Service timber sales. (Today we have a predecisional “objection” process, rather than a post-decisional “appeal” process, but the function is largely the same: to attempt to resolve concerns with a project prior to implementation.) Accompanying my conservation organization clients in appeal resolution meetings was a frequent occurrence, not because my clients were unsavvy and couldn’t represent themselves well in that forum, but because “lawyering up” shows you’re serious about your concerns: as we know, the fear of litigation is a powerful motivator. Also a powerful motivator was the “escort” I received each time I left the Forest Supervisor’s office in John Day: several large pickup trucks would tailgate my Subaru until I crossed the county line.

While Commissioner Britton promised to bring me back from the Malheur woods, I wasn’t entirely convinced of his good will, so I brought with me a colleague from the American Forest Resources Council (AFRC) who I had worked with on a first-of-its-kind large landscape restoration project on the Gifford Pinchot National Forest in southwest Washington. My hope was that my industry colleague could represent my sincere desire to work with nontraditional allies to improve forest management, even though I remained a lawyer willing to litigate if necessary.

A small group from Grant County (including loggers, citizens, grazing permittees, and others) and I and my colleague spent two days touring the Malheur and talking about what we saw and what we wanted to see, both for the forest and for the communities dependent on it. Although there were many tense exchanges and a lot of angry charges levelled at the Forest Service, environmentalists, and loggers, there were kernels of potential agreement: we all loved the forest and were concerned about its ability to persist, and as the forest was threatened by overstocked stands, climate change, fire suppression, and the legacy of historic management practices, so were the surrounding communities. Something needed to change. We decided to keep talking.

Commissioner Britton wasn’t being hyperbolic about my litigation affecting his community and forest. At the time, I had already won several lawsuits challenging timber sales on the Malheur, and had a number of pending cases in court as well. At the time of our first field tour, I was preparing at least a half a dozen new lawsuits challenging a number of post-fire salvage sales proposed in the wake of the 2002 fire season. Moreover, because the Forest Service usually shifts much (if not all) of its planning efforts into salvage after a large wildfire – which serves to pause or shelve “green” timber sale program planning due to limited resources – when I eventually won those lawsuits in federal court, the Malheur National Forest was essentially without a viable timber sale program.

While stopping ecologically damaging timber sales is the goal of many of my clients, achieving this objective was not without its costs. On “the dry side” in Oregon (i.e., east of the cascade crest and its rain shadow), forests need fire to flourish. Fire suppression, and the resulting increase in tree density and shift in species composition from pine and larch to grand fir, has pushed these forests into a condition that laypeople like me call “out of whack.” We have more trees of the wrong species in places where they don’t belong, and a lack of big old trees of the species we want that provide valuable wildlife habitat; so the populations of many terrestrial and

aquatic species are in decline as a result. More trees of the wrong (and uncharacteristically thirsty) species in a dry landscape means that our rivers and streams go dry well before they should in increasingly hot and dry summers, which strand and kill listed bull trout. We have fires that burn in ways scientists can no longer explain, but believe is tied to the effects of climate change in the intermountain west. Those fires, while beneficial in many ways, also consume private property and threaten the lives of our fire fighters. These outcomes were not satisfactory to me or many of my conservation clients, so something had to change.

After many difficult conversations, the Blue Mountains Forest Partners (BMFP) was formed in 2006. BMFP is a partnership of diverse interests (loggers, ranchers, conservationists, elected officials, tribes, and others) working together to enhance forest ecosystem health, encourage economic opportunities, and promote public safety in Grant County, Oregon. We hoped that by working together, we would be able to accomplish more for the land and communities than we could under the status quo.

Again, many are surprised that an environmental attorney would be involved in such an effort. But litigation is just one tool in the social change toolbox: litigation is a great way to stop “bad” things from happening, but it is a blunt instrument and not a great way of making “good” things happen. Collaboration, on the other hand, is an inherently creative tool that allows diverse views to be heard and reflected in the ultimate decision made on the ground. Furthermore, as the Subcommittee is aware, federal forest management is a legally complex arena, and the Forest Service – and the public – are often ill-equipped to understand and work within this regulatory framework. In my view, having an external partner with legal expertise and federal policy experience at the table is indispensable to creating the conditions for success, and I believe my partners on the Malheur would agree.

Beginning in 2006, the Blue Mountains Forest Partners started working on its first collaborative project. It was tiny – just a few hundred acres – and probably didn’t do much in the grand scheme of things to alter landscape health. It also took more than two years to develop, which was extremely frustrating to everyone involved: my timber partners hated talking about their “feelings” about the forest, my conservation colleagues hated talking about cutting more trees, county government hated having to justify the socioeconomic needs of the community, and I suspect that the Forest Service wasn’t too happy either about talking to all of us at once, which can be a bit dizzying.

But this was an important exercise in going slow to go fast: by spending time with affected stakeholders in the forest – learning each interest’s concerns and visions for the future – we were able to better understand where our partners were coming from and therefore to develop projects and approaches that met these needs. Critically important to our success, BMFP members and our Forest Service partners also started to spend time together socially (usually at the local pub after field tours and meetings), which has had an incredible impact in the unicorn of forest management: rebuilding trust. As Cesar Chavez once said, “If you really want to make a friend, go to someone’s house and eat with him...the people who give you their food give you their heart.” We have found this to be true on the Malheur.

We have also found that deeply engaging science and scientists is essential to collaborative success. To that end, BMFP has worked closely with Dr. Norm Johnson (Oregon State University), Dr. Jerry Franklin (University of Washington), Dr. James Johnston (Oregon State University), Dr. Trent Seager (Oregon State University), Dr. Kerry Kemp (The Nature Conservancy), Paul Hessburg (Forest Service Pacific Northwest Research Station), Vicki Saab (Forest Service Pacific Southwest Research Station), local Forest Service resource specialists, and others, to develop “zones of agreement” for forest management.<sup>1</sup> These science-based zones of agreement outline an ecological issue we’re concerned about and suggest management prescriptions that the Forest Service could use when developing large landscape restoration projects. We have developed zones of agreement for upland forest restoration (including dry pine and moist mixed conifer forest types), riparian restoration, aspen restoration, and goshawk management; we’re also dipping our toes into the waters of the third rail of forest management: post-fire management. Often these zones of agreement are reflected in the Forest Service’s “purpose and need” statements found in environmental analysis documents.

But even new-found trust and scientific backing aren’t always enough to make large landscape restoration successful. Just as BMFP was beginning to increase the size of our planning areas from a few hundred acres to a few thousand acres, Congress passed the Collaborative Forest Landscape Restoration Act (CFLRA)<sup>2</sup>. Working with the Forest Service and our colleagues in the Harney County Restoration Collaborative, BMFP developed a proposal for the first round of funding made available in 2010. Unsuccessful but undeterred, we applied again in 2011 as the Southern Blues Restoration Coalition and received approval and funding to implement restoration treatments on more than 640,000 acres of the Malheur National Forest.<sup>3</sup> Funding did not reach the forest until the fall of 2012 as a result of congressional budgeting and funding impasses.

At the same time, our key wood processing partner – Malheur Lumber Company, owned and operated by Ochoco Lumber Company – was struggling to find sufficient raw material to keep the mill open: while our collaborative efforts were starting to bear fruit in the form of larger projects with more merchantable volume, few projects had yet to hit the ground. Consequently, in the fall of 2012, Malheur Lumber announced it would close, and Grant County would lose its last remaining sawmill – and with it, more than 70 family-wage jobs.<sup>4</sup> In a county with only about 7,000 people, the economic impact would be similar to Nike or Intel closing up shop in Portland and laying off its entire workforce.

Everyone who was involved in responding to the impending loss of Malheur Lumber would agree that without the Blue Mountains Forest Partners, the mill would be closed today. Instead, BMFP and our local, state, and federal partners worked furiously to craft a solution that would keep MLC open and restoration on track. Senators Ron Wyden and Jeff Merkley worked with their congressional colleagues to secure additional funding for Forest Service planning and implementation. The Forest Service expedited planning (while complying with all environmental review requirements) to move out-year timber sales to next-quarter offerings, increased funding from the Regional and Washington Office to kick-start planning within our CFLRP boundary, increased its planning teams from one to three fully staffed and funded teams, decreased planning times from 2-3 years to 18 months, and developed a 10-year stewardship contract to provide certainty to local contractors and loggers so that they could invest in new equipment and

employees necessary to do the work.<sup>5</sup> The State of Oregon provided financial and personnel resources to the Forest Service to complete timber marking and contract oversight capacity, and made available grant funds to Malheur Lumber to modernize and expand its milling infrastructure. The collaborative group stepped up our game by expanding our social agreement around more “controversial” forest management treatments by engaging scientific experts to help us increase the pace, scale, and quality of forest restoration, and lent our voice to the call for more Forest Service capacity. We all leaned in, rightly believing that it takes a village to restore a forest and its communities.

It worked. Just two years later, we were no longer on the brink of socioecological collapse on the Malheur National Forest.<sup>6</sup> In fact, in 2014 the Southern Blues Restoration Coalition sought and received the only expansion ever granted in the Collaborative Forest Landscape Restoration Program, allowing us to extend our CFLRP planning area to 840,000 acres, nearly all of the “treatable” (non-Wilderness, etc.) acres on the entire 1.7 million acre Malheur National Forest: we were now treating twice the acreage in half the time. Along with it came an additional infusion of funding, which has allowed the Forest Service to dramatically expand its restoration footprint on the forest and created important socioeconomic benefits: the Forest Service has hired at least an additional 48 permanent employees and scores of seasonal staff to help ensure it meets its project planning, development, and administrative obligations; timber harvest has increased from 32.7 million board feet to 75 million board feet annually; Iron Triangle, Malheur Lumber Company, and other subcontractors together have hired at least 50 new employees to help ensure project implementation obligations and commitments are met; Iron Triangle has increased the wages it pays its employees by nearly \$1,000,000 and has increased the number of contractors it uses in both counties and increased investment in equipment by over \$5,000,000; unemployment numbers in Grant and Harney counties have dropped from 14% and 11.7%, respectively, to 8.1% and 6.8%; home sales within Grant County have increased by over 200% since 2012; and Grant School District #3 has experienced a halt to its nearly 15-year decline in enrollment, from a high of 990 students to a low of 587 students, and in fact experienced a 4.8% increase to 615 students, which has resulted in additional local school funding coming from the State of Oregon. No changes to the National Environmental Policy Act (NEPA) or other laws, or access to the courts, were required for these accomplishments: just hard work.

### ***Collaborative Forest Restoration Works, But Challenges Remain***

The numbers don’t lie: collaborative forest restoration works. And, of interest to this Subcommittee, there hasn’t been a single timber sale lawsuit on the Malheur National Forest since 2003. None of these benefits would have occurred without the tireless dedication of Forest Service staff on the Malheur National Forest: these are good people who I now count among my closest friends.

Despite our success thus far, future success is not assured. The President’s budget proposes to cut Forest Service funding by 11%, and assumes the Forest Service will do more with less, a laughable fallacy. And, it proposes to eliminate entirely the Collaborative Forest Landscape Restoration Program, without which our restoration work would likely cease. Eliminating this program now, when most CFLRPs are only halfway through their program of 10-year work, would represent yet another broken promise to rural America.

Other challenges remain. Last year's Malheur Wildlife Refuge occupation in Harney County to the south has emboldened a violent and unstable contingency in Grant County to the north, many of whom truly believe that "restoration" and "collaboration" are a United Nation's plot to seize control of private property (indeed, Grant County maintains the distinction of being a "UN-Free Zone"<sup>7</sup> – so far, blue helmets haven't been spotted within county limits). While refuge occupiers raised a number of important concerns about federal land management, they do not believe in open, transparent, and inclusive civil dialogue to address those concerns as I and my BMFP partners do.

On the other side of the equation, some in the conservation community likewise are distrustful of collaboration, and continue to raise the specter of litigation to derail our restoration efforts. However, working closely with our Forest Service partners, BMFP has been able to provide support to our NEPA planners on the Malheur about how to avoid some of the legal pitfalls that result in litigation, which means that large projects – up to 60,000 acres in size – actually hit the ground and have a beneficial ecological and socioeconomic impact. This isn't about "bullet-proofing" NEPA documents: it is about clearly and concisely documenting the expected environmental consequences of large landscape restoration, supported by place-based peer-reviewed research and adaptive management.<sup>8</sup>

External challenges also remain. For example, perhaps the number one factor that delays project development and environmental analysis on the Malheur – as well as on other national forests across the country – is agency personnel turnover and the lack of adequate funding for key programs. The planning rule FACA committee has also heard this from nearly every stakeholder we have interviewed over the past four years: when a key Forest Service person – whether district ranger or fish biologist or forest supervisor or whomever – leaves their forest or position, it creates an outsized impact on the people left behind. Often positions are not filled for months or years, or an "acting" position is created that only temporarily and incompletely fills the gap. Just when a new person is brought up to speed (which often takes a substantial amount of time, as relationship-building does), they leave their position in order to advance their career elsewhere. Planning efforts stall and stop, only to be restarted later by others who may not understand or appreciate either the ecological or socioeconomic setting. While Forest Service personnel come and go, stakeholders remain, which frustrates the all-important aspect of relationship building. One cannot build a relationship with a revolving door.

Similarly, inadequate funding means the Forest Service is literally told to do more with less. Important program areas such as wildlife habitat improvement, monitoring, and adaptive management are underfunded or not funded at all, but these are the very programs that stakeholders like BMFP rely on to build social agreement around forest management. Congress' failure to fix the fire funding problem means we continue to rob Peter to pay Paul, meanwhile programs to reduce hazardous fuels – so we can get ahead of the restoration problem – are raided to pay for fire suppression.

There are solutions to these challenges, if we have the wisdom to implement them.

First, the Forest Service's new planning rule is a fabulous, if complex, tool that represents our best chance to finally get forest planning right. The rule's emphasis on upfront public engagement, the use of science in planning, adaptive management, and ecological and socioeconomic sustainability represent an enlightened approach to multiple use management. Addressing perennial management challenges at the landscape level – such as how to manage forests after wildfire, or the continued viability of wide-ranging species such as the northern spotted owl – is exactly the right approach and is enshrined in the planning rule.

Second, Congress should finally fix the fire funding and borrowing problem. With the effects of global climate change becoming ever more real and obvious to those of us who spend time in our national forests, we will see more fire on the landscape. The question is not whether these lands will burn, but how and when. We need to get ahead of the problem by increasing the pace, scale and quality of restoration, not by dipping into other worthy programs, but rather by addressing how large fire suppression efforts are funded.

Third, programs to build agreement on forest management should be fully funded and expanded. As the Blue Mountains Forest Partners have shown on the Malheur National Forest, the Collaborative Forest Landscape Restoration Program is essential to increasing the pace, scale, and quality of restoration *without any streamlining of environmental laws or processes*. When you have social agreement, you don't need to cut corners to get the job done. Indeed, as Mr. DeFazio has remarked in another context, “we cannot streamline our way out of our funding shortfall.”<sup>9</sup>

Relatedly, Congress should recognize and accept that NEPA and other federal environmental laws, as well as litigation to enforce the congressionally-declared purposes of those laws, are not the barrier to implementation that many claim. While it is true that a court-ordered injunction *can* stop projects, the vast majority of forest management projects are implemented without any judicial action.<sup>10</sup> The very small percentage of projects that are challenged in court, and are halted by court order, simply demonstrate that the democratic process works: a judge will only enjoin a project that is “arbitrary, capricious, or not in accordance with law.” As a nation of laws that guarantees all citizens the right to petition their government for redress, I believe that we as Americans should demand that our government act only in accordance with the law; and if the law has been violated, action should cease and wrongdoers held accountable. Indeed, our country was founded on this principle.

Finally, as our nation flirts with devolving into hot rhetorical debate over a myriad of issues, we all must do our part to embrace another founding democratic principle: informed civil discourse. Federal forest management is a highly-charged issue precisely because so many people feel so passionately about this renewable – but not replaceable – resource. Modern forest management is no longer a technical question or problem; it is a social one, driven by multiple perspectives and desires. We must be kind and gracious with those who disagree with us, and always seek to understand and find a better way to resolve the disagreement. Sometimes we will fail, and litigation may result. But presuming that reducing litigation by limiting access to the courts or other streamlining efforts will reduce the discord over forest management is a foolish proposition, because such a “solution” represents a technocratic fix to a social problem, and is the wrong tool for the job.

I look forward to continuing the civil dialogue by answering any questions that the Subcommittee may have. Thank you for the opportunity to share my thoughts and experiences with you.

Sincerely,



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<sup>1</sup> BMFP zones of agreement are available at: <http://www.bluemountainsforestpartners.org/-work/zones-of-agreement/>.

<sup>2</sup> 16 U.S.C. § 7303.

<sup>3</sup> The Southern Blues Restoration Coalition's CFLRP proposal is available at:

<http://www.bluemountainsforestpartners.org/work/research-and-reports/>.

<sup>4</sup> See, Richard Cockle, *Plan to save Malheur Lumber Co. sawmill stems from unusual alliance*, THE OREGONIAN, Sept. 14, 2012, available at [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/09/plan\\_to\\_save\\_malheur\\_lumber\\_co.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/09/plan_to_save_malheur_lumber_co.html).

<sup>5</sup> The 10-year stewardship contract represents 86% of the private employment, and all existing wood manufacturing infrastructure, in Grant and Harney Counties.

<sup>6</sup> A recent piece created in partnership with the Forest Service and the State of Oregon captures well our experience on the Malheur National Forest and is available at <https://spark.adobe.com/page/bG8wBdrKy9vGO/>.

<sup>7</sup> Jeff Mapes, *United Nations ambassador says Grant County's 'U.N.-free zone' is 'not grounded in reality'*, THE OREGONIAN, Feb. 11, 2011, available at [http://blog.oregonlive.com/mapesonpolitics/2011/02/united\\_nations\\_-\\_ambassador\\_says.html](http://blog.oregonlive.com/mapesonpolitics/2011/02/united_nations_-_ambassador_says.html).

<sup>8</sup> See generally, Johnston, J. D., Bailey, J. D., Dunn, C. J., and Lindsay, A. A. In press. *Historical fire-climate relationships in contrasting interior Pacific Northwest forest types*. *Fire Ecology* 13(2); Johnston, J.D. 2017. *Forest successional along a productivity gradient following fire exclusion*. *Forest Ecology and Management* 392:45-57; Johnston, J. D., Bailey, J. D., and Dunn, C. J. 2016. *Influence of fire disturbance and biophysical heterogeneity on pre-settlement ponderosa pine and mixed conifer forests*. *Ecosphere* 7(11).

<sup>9</sup> See, <http://democrats.transportation.house.gov/news/press-releases/defazio-norton-chao-we-cannot-streamline-our-way-out-our-transportation-funding>.

<sup>10</sup> See, Miner et al., *Twenty Years of Forest Service Land Management Litigation*, 112 J. FOR. 32 (2014); GOVERNMENT ACCOUNTABILITY OFFICE, *Forest Service: Information on Appeals, Objections, and Litigation Involving Fuel Reduction Activities, Fiscal Years 2006 through 2008* (2010); Jacqueline Vaughn & Hanna J. Cortner, *George W. Bush's Healthy Forests: Reframing the Environmental Debate* (2005).