



# FEDERAL FOREST RESOURCE COALITION

## FFRC Weekly Report for Friday, October 5, 2018

**The Train Has Left the Station on Farm Bill:** On Monday, the 2014 farm bill expired and with its expiration, roughly 40 programs lost funding. Now it's up to USDA to pick up the pieces while farm bill negotiators seek common ground. Agriculture Secretary Sonny Perdue offered assurances that critical features of ag and food policy will continue even without a farm bill.

In a statement to POLITICO, Perdue noted that SNAP benefits will still flow to recipients and the farm safety net will remain in place for now, because most commodity programs are tied to the crop year, not to the fiscal year, which begins October 1.

"USDA will continue to work within our authorities to provide the best customer service possible to our farmers and ranchers across the country in the interim," Perdue said. The department will "continue to implement provisions of the 2014 farm bill within the limits of the law and work with the Congress, providing technical assistance as needed, until a new bill is passed."

Several forestry programs, including the 2014 Bill's insect & disease categorical exclusion, Stewardship Contracting Authority, and the ability to use designation by description on all timber sales remain in effect. The "streamlined EA/EIS" that allows the Forest Service to consider only the proposed action and the "no action" alternative" on larger projects, expired with the 2014 bill last weekend.

On Thursday, the leaders of the House and Senate Agriculture Committees came out of their meeting arm-in-arm, saying they had made some progress on less controversial titles and programs. This was the first face-to-face meeting since Conaway pinned the blame on the Senate leaders for dragging their feet in the talks.

"Getting the farm bill done is really important, but it's got to be important to everybody negotiating, and right now I don't get the sense that getting something done has quite the sense of urgency with my Senate colleagues as it does with me," Conaway said last week.

House Natural Resources Chairman Rob Bishop (R-UT) and Bruce Westerman (R-AK) – the two GOP Natural Resources panel members on the farm bill conference committee – placed the blame for Farm Bill delays on Stabenow's side in a press statement. Failing to close the

forestry title, they said, was holding up a deal they see as crucial to helping Western states dealing with catastrophic wildfires.

The House-passed farm bill includes forest management provisions aimed at lowering wildfire risks and speeding up emergency responses by scaling back forestry regulations. Conservation groups have argued some of the provisions go too far in scrapping environmental protections.

“Despite good faith efforts by the farm bill conferees, Senate Democrats refuse to even discuss these needed reforms,” Bishop and Westerman said, noting that nearly 1 million acres are now on fire nationwide. “We urge our Senate colleagues to listen to the stories of the farmers and ranchers affected by catastrophic wildfire, and work swiftly to finalize the 2018 farm bill.”

Forestry is one of the many titles in the farm bill that had not been completed before House members recessed last week to hit the campaign trail. What does this mean? Well this is a sign of how much ground negotiators still have to cover before they can say they’re approaching a final deal. Both GOP and Democrat Ag leaders have said they want to conclude a farm deal as quickly as possible in the lame duck, as the farm economy has been battered by falling prices and retaliatory tariffs on American farm products.

### **It Comes Down to A Frog: Occupied vs. Unoccupied Habitat Dispute Triggers Takings**

**Case:** The Supreme Court spent the first case of its new term grappling with whether it’s reasonable to “drain the swamp” – in order to save a frog.

The eight justices (you may have heard – there is vacancy on the court) seemed to be headed toward a 4-4 split on whether the Fish and Wildlife Service can designate a “critical habitat” on land where threatened or endangered species do not currently live. The case could open the door to new restrictions on the Endangered Species Act.

At issue is the dusky gopher frog, a species with only around 135 adults living in the wild, most of which live near one pond in Mississippi. In addition to that Mississippi range, the Fish and Wildlife Service in 2012 identified 1,544 acres of timberland in Louisiana that it said could one day be home to a frog population. The landowners, including timber company Weyerhaeuser, objected to their land being designated critical habitat when the frog hasn’t lived there since the 1960s and could not survive there without the land being restored to specific conditions.

The government defended the critical habitat designation, saying that even if the area is not immediately capable of supporting a frog population and the companies cannot be ordered to comply, it should still be listed as critical habitat to foster potential future restoration.

The court’s liberal justices indicated that they don’t believe habitat designations necessarily have to be limited to areas a species currently lives.

“We know ‘habitat’ doesn’t just mean where a species lives,” Justice Elena Kagan said

during oral arguments on Monday. She added that while there may be limits for species that could live in a large swath of areas, the dusky gopher frog has unusually specific habitat requirements that restrict the places it can survive.

Justice Ruth Bader Ginsburg questioned whether the landowners are actually impacted by the mere designation of the land as critical habitat. Weyerhaeuser can continue its logging opportunities without having to get any federal permission. The designation means the land had an “immediate loss of value,” said Timothy Bishop, a lawyer representing Weyerhaeuser. It impacted plans to turn some of the land into a new neighborhood, and the designation would have to be disclosed to any potential buyers, he added.

After initially saying this was a “typical agency case,” Justice Stephen Breyer, changed his tune and joined the conservatives in pressing the government to be more specific about what part of the Endangered Species Act authorizes this sort of action.

“What is in the record that suggests what is in the secretary’s discretion and not outside it?” Breyer asked, apparently searching for more specifics as to what the law says about the Interior Department’s powers.

Land can be considered critical habitat even if the necessary restoration will not take place immediately or if the landowner has no interest in restoration, Solicitor Edwin Kneeder argued. Designating the land is still required under the law, and helps experts identify areas for other types of conservation efforts, such as the government or a conservation nonprofit purchasing the land.

If the court does find itself deadlocked, there are two paths forward.

The justices could issue a tied ruling that would in effect leave in place the lower court’s ruling upholding the designation of critical habitat, but without creating a Supreme Court precedent. Or, they could wait until the current vacancy is filled, returning them to nine justices, and then have the case re-argued. That process, which the court went through for several cases after the arrival of Justice Neil Gorsuch last year, could take several months.

In addition, the impact of this case could be limited by an ongoing Interior Department rulemaking. The Fish and Wildlife Service in July proposed new procedures for identifying non-inhabited critical habitat. It would require the government to conclude that currently occupied areas are not enough to ensure a species’ conservation, and to conclude that there is a “reasonable likelihood” that designating new critical habitat would contribute to that conservation. This potential rule would apply only to future habitat designations, however, not past decisions such as for the dusky gopher frog.

**Senate Panel Moves to Reauthorize LWCF, Daines Arbitration Bill:** On Tuesday, two days after the Land and Water Conservation Fund expired, the Senate Energy and Natural Resources Committee voted 16-7 to permanently reauthorize and fully fund the program. The bipartisan bill, S. 569, sponsored by Sen. Maria Cantwell (D-WA), would provide

dedicated annual funding of \$900 million. This mandatory funding would bypass the discretionary funding process, which has provided about half that amount in recent years.

The Committee also approved a pilot bill from Sen. Steve Daines (R-MT) on a narrowly bipartisan vote (13 to 10, with Sen. Joe Manchin (D-WV) joining the majority) that would allow some disputes over forest management projects in Idaho, Montana, and Wyoming to be settled through binding arbitration rather than the courts.

“Litigation from a few fringe groups is having a devastating impact on Montana,” Daines told the committee. “It’s a constant, unending barrage of lawsuits, now spanning more than a decade, and it’s hurting our forests and crushing our wood products communities. We have, in essence, replaced loggers with lawyers.”

Daines said two or three groups in Montana sue on a regular basis against projects that are otherwise driven by collaboration and enjoy widespread community backing. While he didn’t specifically name the groups, anyone involved in the issue knew exactly who he was talking about. Currently, Daines said, 28 timber sales are under litigation in Montana, and 21 of those are now enjoined. The results have tied up 21 million board feet of timber, he said, leaving thousands of acres of forest in need of fuel reduction.

“A single fringe group is responsible for the vast majority of these lawsuits,” Daines said. “My bill allows the Forest Service to resolve these disputes over collaboratively driven projects through a qualified arbitrator rather than in the courtroom.”

FFRC has long advocated for experimenting with alternative dispute resolution methods, like arbitration, and called for their adoption in the 2018 Farm Bill. The path forward for the Daines bill is unclear, but at least it is now approved by Committee and can be attached to legislation that moves in what promises to be a busy lame duck session.

The path for LWCF is equally murky. Chairwoman Lisa Murkowski (R-AK) voted against the measure, saying that while she supports permanent reauthorization of LWCF, she has “very serious reservations” about mandatory funding without providing an offset. “I am concerned about the mandatory side of the ledger here,” said Murkowski. She did agree to work with Cantwell and their House counterparts to discuss the differences and find mutual agreement on LWCF, ideally by the end of the year.

While the LWCF bill cleared the committee on a bipartisan vote, five Republican Senators voted no. And, as noted last week, House Natural Resources Chairman Rob Bishop (R-UT) has said that mandatory funding would be a “deal breaker” for the House.

The Committee also cleared the Restore America’s Parks Act (RAPA), which provides funding for infrastructure at National Parks and Wildlife Refuges. FFRC has been approached by USDA to try to add the National Forests to that bill.

**Tongass – Roadless Issues “about more than timber”:** In a public hearing on a proposal to revisit the application of the 2001 Roadless Rule to the Tongass National Forest

Wednesday, an Alaskan Department of Natural Resources official said the drive to open more of Tongass National Forest isn't just about boosting timber production. Alaska DNR Deputy Commissioner Heidi Hansen pushed back against the criticism that Alaska is seeking the change as a giveaway to a shrinking timber industry, saying "this is about a lot more than timber." She went on to mention hydroelectric production and mineral interests as other enterprises that depend on access to the forest and may gain importance in the long run.

This action by the Forest Service comes as a response to Alaska's petition to lift a 2001 Roadless Area Conservation Rule for the Tongass. About 9.3 million acres in the Tongass is designated to roadless (another 5.7 million is designated Wilderness, where no roads are permitted either). Forest Service officials said they are not looking to change the land management plan for the Tongass, but that the plan could receive a closer look later, depending on the outcome of the roadless rule.

Proponents, including state officials and Sen. Lisa Murkowski (R-AK), say the Tongass should be considered separately from other national forests, due in part to southeast Alaska's economic reliance on it. Restricting road construction under the 2001 rule stymies timber as well as other businesses that depend on forest access. Between roadless areas and wilderness designations, over 88 percent of the forest is not open to development.

Critics say opening more areas to roads would spoil pristine areas and encourage clearcutting of old trees. The region's small timber industry, including FFRC member Viking Lumber, is almost entirely reliant on timber from the Tongass to meet their customers' needs.

The hearing was the only public meeting scheduled outside the state of Alaska before the scoping period on the proposal ends October 15. Further public comment periods are expected as the Forest Service drafts environmental impact statements and other documents related to the state-specific rulemaking. The Forest Service expects to draft an environmental impact statement by next summer, with a final rule published in the summer of 2020.

**Nostalgia Moment: Timber Sales Expected to Exceed 3 BBF for the First Time in 21 Years:** While the Cut and Sold Reports have yet to post, we expect National Forest timber sales will exceed 3 Billion Board Feet for the first time since 1997. Some fun facts about that year:

- *Titanic* cleaned up at the box office (Ironically, *The Lost World* was third...)
- *Candle in the Wind* by Elton John topped the Billboard Top 100 (again, ironically, "I'll be missing you" was third...)
- The Green Bay Packers won the Super Bowl
- Gas was about \$1.20 a gallon
- Bill Imbergamo was named Executive Director of the National Association of State Foresters.

Obviously, someone born in 1997 is now old enough to vote, drink, drive, get married, etc. Here's hoping we clear the 6 BBF hurdle before they are old enough to retire.

**A to Z Stewardship Sale Clears Legal Challenge:** A federal judge has ruled against efforts by the Alliance of the Wild Rockies to halt a planned forest management project on the Colville National Forest, the U.S. Attorney's Office announced Thursday, according to the *Spokane Spokesman-Review*.

The alliance filed a lawsuit in 2016 challenging the U.S. Forest Service's decision that same year to approve the North Fork Mill Creek A to Z Stewardship Project, which had been designed through a collaborative process with local conservation groups, the Forest Service, and FFRC member Vaagen Brothers Lumber Co.

Among several claims, attorneys for AWR argued the Forest Service had violated the National Forest Management Act when it allowed Vaagen Brothers to pay for the contractor who conducted the NEPA reviews for the project.

But U.S. District Court Judge Rosanna Malouf Peterson ruled that the Vaagen Brothers contract was based on open and fair bidding and that it did not violate the law. She also found no conflict of interest in allowing the timber company to hire the subcontractor "because the extensive record in the case showed that the objectivity and integrity of the NEPA process had not been compromised," according to a news release.

"Sound forest management benefits the American public and provides needed resources and recreational experiences close to our communities," U.S. Attorney Joseph Harrington said in the release. The A to Z project will produce timber for several years, and will reduce both fire and insect hazards on the Colville.

**Three Bats Proposed for State Listing in Pennsylvania: Little Impact Expected on Management of Allegheny NF, Other Timberlands:** While the proposed listing of the northern long-eared bat, tri-colored bat and little brown bat on the state's endangered and threatened species list is hoped to stave off extinction, the preliminary action is not expected to impact the local forest industry, according to the Forest Service and Pennsylvania-based industry groups.

According to the Pennsylvania Game Commission, the three bat species have been decimated by white-nose syndrome, a fungus that has killed millions of bats in the United States and Canada. The proposals to list the three species as endangered and threatened under State law will be brought back to the Board of Game Commissioners' January meeting for a final vote. The Northern Long-Eared Bat (NLEB) was listed as a threatened species under the federal Endangered Species Act in 2015. FFRC and others in the industry worked to ensure that that listing didn't stymie needed management of hardwood forests, which can actually improve bat habitat.

Collin Shephard, acting public affairs officer for the Allegheny, said if the proposals go through, there will not be any additional sites regulated unless they are identified in the future as habitats for bats.

“Right now I wouldn’t expect (the forest industry) to notice the difference, we don’t expect any impacts through the state listing on the Allegheny,” Shephard said. As a result of the NLEB listing, the ANF had implemented a number of conservation or mitigation measures under its 2007 forest plan.

“(The forest plan) is mostly in the name of the Indiana bat (listed as endangered of extinction in 1967), but it also benefits the other species in question,” she explained. “You protect the sites for the species when they’re most sensitive. These are hibernating bats meaning they stay relatively locally and hibernate in caves.”

Therefore, the mitigation measures will protect the bats in hibernacula, or hibernating sites. “Also in a bat’s life history is the maternity roost (in a tree) — that’s where a mama bat will raise her pups during the summer season,” she continued. “Those pups are particularly vulnerable for a two-month period in the summer, roughly June and July when they can’t fly yet.”

Susan Swanson of the FFRC affiliated Allegheny Hardwood Utilization Group said she, too, doesn’t expect a great impact on the forest industry from the proposed measures. The group’s mission is the education and promotion of management of Pennsylvania hardwoods benefiting citizens of the state of Pennsylvania.

“From what I have heard so far I don’t expect a big change for the industry as we are already currently using mitigation measures for the Indiana bat and these should be the same,” Swanson said.

Bryan Burhans, Executive Director of the Game Commission, noted the agency “strives to work whenever possible with industry, to save jobs, and be a part of sound state government. “But we cannot look the other way as bats tumble toward extinction. This agency has statutory and state constitutional commitments to represent and conserve all wildlife for today and tomorrow. Because bats have lost upward of 97 percent of their historic populations in Pennsylvania, every remaining bat matters.”

### **Upcoming Events:**

The House remains on recess this week, and the Senate is expected to wrap up their work next week and head home to campaign.

Next Wednesday, the Senate Committee on Environment and Public Works will hold a [hearing](#) to examine species recovery and management.