

Statement of Glenn Casamassa
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Before the
Senate Committee on Energy and Natural Resources
Subcommittee on Public Lands, Forests and Mining
Concerning
S. 32 – California Desert Protection and Recreation Act of 2017, S. 468 – Historic Routes
Preservation Act, S. 941 – Yellowstone Gateway Protection Act S. 1230 – Water Rights
Protection Act, S. 1271 – Fowler and Boskoff Peaks Designation Act, S. 1548 – Oregon
Wildlands Act,
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Chairman Lee, Ranking Member Wyden, members of the Subcommittee, thank you for the opportunity to present the views of the U.S. Department of Agriculture (USDA) regarding S.32 – the California Desert Protection and Recreation Act of 2017, S.468 – the Historic Routes Preservation Act, S.941 – the Yellowstone Gateway Protection Act, S. 1230 – the Water Rights Protection Act, S. 1271 – the Fowler and Boskoff Peaks Designation Act, and S. 1548 – the Oregon Wildlands Act. I am Glenn Casamassa, Associate Deputy Chief for the National Forest System (NFS), USDA Forest Service.

S. 32 – California Desert Protection and Recreation Act of 2017

S. 32 contains several provisions affecting USDA including an addition to the San Gorgonio Wilderness on the San Bernardino National Forest, establishment of sections of Deep Creek and Holcomb Creek and the Whitewater River on the San Bernardino National Forest as Wild, Scenic, and Recreational Rivers, transfer of administrative jurisdiction of 40 acres of National Forest System land to the Bureau of Land Management (BLM), and creation of a Renewable Energy Resource Conservation Fund. We defer to Department of Interior (DOI) for their views on sections affecting DOI agencies.

Section 1301(c), as added to the California Desert Protection Act of 1994 by section 101(a) of S. 32, would designate a 7,141-acre wilderness addition on the west and south ends of the existing 95,953-acre San Gorgonio Wilderness; this addition includes 1,000 acres of private property owned by the Wildlands Conservancy. The area that would be designated is currently an inventoried roadless area. USDA supports this wilderness addition as it would improve management efficiencies in this area, and we would like to work with the Subcommittee to ensure that the roadless areas can be consistently managed pursuant to this Act and the Wilderness Act.

Section 104(2) of the bill would amend the Wild and Scenic Rivers Act to add paragraphs (214) and (215) to designate approximately 76.3 miles of the specified rivers as part of the National

Wild and Scenic Rivers System. Of this total, approximately 34.5 miles of Deep Creek, including its principal tributary, Holcomb Creek, and approximately 17.1 miles of the North, Middle and South Forks of the Whitewater River are within the boundary of the San Bernardino National Forest and would be administered by the Forest Service. In order to ensure consistency with the current provisions of the Wild and Scenic Rivers Act and the 2014 Revision of the San Bernardino National Forest Plan, the Department would like to work with the Subcommittee to make some technical corrections in Section 104(2).

The Forest Service has found each of these rivers to be eligible for designation based on their free-flowing character and regionally important river-related values. USDA supports designation of these eligible rivers as Wild and Scenic based on general support from the communities of interest and consistency of designation with the current management of National Forest System lands within the river corridors.

Section 1705 of the bill would transfer administrative jurisdiction of over approximately 40 acres of National Forest System land to the BLM for inclusion in the proposed Alabama Hills National Scenic Area. This is an isolated parcel of land and the USDA supports the transfer of administrative jurisdiction to the BLM.

S. 468 – Historic Routes Preservation Act

S. 468 would create a new procedure for resolving claims for rights-of-way for roads and trails crossing National Forest System lands and lands managed by DOI agencies. USDA defers to DOI for their views on the effects of this bill on DOI agencies. An 1866 statute, known as R.S. 2477, granted rights-of-way on unreserved public land for public highways. However, since the statute did not require any documentation or recording to perfect the right-of-way, the legal process for identifying valid rights-of-way under R.S. 2477 can become costly and time consuming.

USDA understands and appreciates the interest in addressing issues associated with R.S. 2477, and would like to work with the bill's sponsors and the Committee toward resolving several outstanding concerns.

Current travel management regulations require the Forest Service to designate the system of roads, trails, and areas for motorized access on National Forest System lands through an open and public travel management planning process that allows for the balancing of road and trail access with other natural resource and recreational values. Under the Travel Management Rule Forest Service travel planning is closely coordinated with counties, states, and municipalities. These travel management regulations expressly recognize rights-of-way held by public road authorities, and exclude them from regulation by the Forest Service under the Travel Management Rule. The Forest Service frequently authorizes roads through the national forests that primarily serve as components of state and local transportation systems by granting federal road use permits, entering into cooperative road maintenance agreements, and issuing easements

to states and counties under various federal authorities. USDA believes the shared goal of federal, state, and local cooperation to meet transportation needs can best be met by effectively utilizing and applying existing statutory and regulatory processes.

Claims of rights-of-way under R.S. 2477 can be extremely complex on national forests, most of which were reserved by the early 20th century. Public highway rights-of-way under R.S. 2477 could only be established on unreserved lands, and therefore had to meet all elements necessary for perfection of a right-of-way prior to the reservation of land for national forest purposes. Considering that there is often no documentation or recording to evidence the creation of these rights-of-way, claim evaluation requires a detailed historical inquiry into the facts surrounding the establishment of the road.

R.S. 2477 claims on National Forest System land are currently handled on a case-by-case basis, and as a matter of law may only be brought by a government entity. USDA appreciates that the current processes for resolving these claims can, in certain circumstances, result in financial burdens to federal, state, county, or local governments, and the federal court system. The Forest Service also acknowledges that some governmental claimants have experienced delays and inconsistent responses due to the lack of a cohesive policy for addressing R.S. 2477 claims in the past and a lack of staff with expertise in the complex historical, factual and legal reviews needed to evaluate R.S. 2477 claims. Nonetheless, USDA believes that the procedures established by S. 468 could result in challenging new burdens and new issues. Such burdens and issues could be avoided under existing law because federal agencies are capable of making administrative determinations, and claimants may use the Quiet Title Act to challenge adverse administrative determinations within twelve years in federal district court.

USDA asserts that the current process of working with counties and states – where claims are dealt with case by case, mostly through granting of road permits, cooperative road agreements, special use authorizations, easements, and through the title claim process only when necessary – is preferable to S. 468. Where a state or county has an interest in maintaining a road as part of its public transportation system, the Forest Service has often been willing to grant easements under the Federal Land Policy Management Act or Federal Roads and Trails Act, or consenting to grant of Federal Highway Act easements. If these tools do not meet the needs of government road authorities, the Forest Service is able to make informal title determinations under R.S. 2477, which can avoid the disputes over title claims that can necessitate legal action.

Of significant concern is the workload that would likely be generated under S. 468. Section 3(3) would allow for companies and individuals to bring claims, in addition to states, counties, and public road agencies, and Section 5(f)(1) would require the Forest Service to review each claim within 120 days. This could result in thousands of claims that would not otherwise be brought. The Forest Service does not have the resources to evaluate thousands, or even hundreds, of claims simultaneously in a 120 day review period. This workload challenge is magnified by the likelihood that many non-governmental claims could be speculative and possibly conflict with

the preference of the state or county road agency that presently has the authority to assert such claims. The workload of responding to these claims would be considerable, and necessitate diverting resources from other critical Forest Service priorities. Additionally, the imposition of personal liability on government officials in Section 8(b)(2) will make it difficult for agencies to find personnel willing to participate in the review process.

We are also concerned about the potential administrative burden to state and local government agencies due to the proliferation of public rights-of-way should privately asserted claims be granted. As these rights-of-way would not be federal roads, they would be managed by state and local government. Some states such as Wyoming recognized the burden of allowing non-governmental entities to claim R.S. 2477 rights-of-way and acted to prevent this situation. In Wyoming, any R.S. 2477 claim that was not accepted by the Board of County Commissioners and filed in the county records by January 1, 1924 was precluded. *See Yeager v. Forbes*, 78 P.3d 241, 255 (Wyo. 2003). The clear Wyoming goal of ensuring local government control over the transportation system is a goal that is likely shared by other western states. Allowing individuals to make R.S. 2477 claims would run counter to that goal. If a county does not want a route established through a federal agency process by a private party, it would have to vacate that right-of-way. The county decision to vacate could be contested administratively and challenged in court. Further, if private entities bring claims without sufficient evidence, valid claims may be denied. There would be no opportunity to have a reviewing court supplement the administrative record.

One of the primary goals of S. 468 appears to be to reduce the need to resolve legal disputes in the courts. The Forest Service currently has the means to resolve or avoid legal disputes administratively under existing authorities. Both the Intermountain and Rocky Mountain Regions have worked on Non-Binding Administrative Determination policies to avoid the need for costly litigation. As best practices are developed they can be shared across other western Regions.

Another purpose of S. 468 is to achieve judicial and administrative efficiency (Section 2). The proposed mechanism for doing this is to move the initial review of R.S. 2477 claims into a new administrative forum where an administrative record would establish the relevant facts, presumably more quickly and at a significantly lesser cost than establishing the facts through a judicial process. Any subsequent judicial review would be limited to that administrative record (Section 6(a)(2)). Unfortunately, the goal of efficiency is in tension with the need for certainty of title. The requirement to complete determination of such complex issues on strict and short timelines will likely compromise the certainty of title. In typical circumstances regarding routes constructed over the public domain in the late 1800s or the early 1900s, the historical documentation necessary to prove, or disprove, the claim is very difficult to obtain. There is no central repository to query for the necessary facts. Federal records, county records, state records, local historical societies and historic newspapers are all consulted. When records are located, they are often in various stages of disrepair that are difficult to decipher, and often require

historical experts to place the basic record of evidence into context. Granting sufficient time and expertise for these reviews is critical given the interest in securing valid title – both for the claimant and the agency.

USDA would like to further engage with the Committee and the bill's sponsors regarding these complex issues and other technical and legal concerns in S. 468 toward the goal of reducing burdens on all parties, and resolving these land access issues efficiently and in cooperation with states and counties. Resolution of claims of interests in federal lands, including claims for R.S. 2477 rights-of-way, is an important component of the administration of national forests for all Americans. Access to national forests for the many goods, services, and opportunities they provide is fundamentally important, and road access through the national forests to meet the transportation needs of state and local governments is equally important. Again, we appreciate the interest in helping to address these important issues.

S. 941- Yellowstone Gateway Protection Act

S. 941 would withdraw certain National Forest System land in the Emigrant Crevice area located in the Custer Gallatin National Forest, Montana, from the mining and mineral leasing laws of the United States, subject to valid existing rights.

USDA supports domestic energy and mineral production as an important use of the National Forest System. Mining and energy development are an important source of jobs and can be a driver of local economies, especially in rural America. Employing modern technology, mineral and energy resources can be developed in many locations in ways that safeguard environmental protections. USDA seeks to manage these resources and activities in balance with the other natural resources, values, and economic drivers found on and around the national forests.

Toward that balancing effort, on November 22, 2016, the Bureau of Land Management (BLM) published a notice in the Federal Register announcing that the Forest Service had filed an application requesting that the Secretary of the Interior withdraw, for a 20-year term and subject to valid existing rights, approximately 30,370 acres of National Forest System lands from location and entry under the United States mining laws, but not from leasing under mineral and geothermal laws.

Publication of the Federal Register notice temporarily segregated the lands for up to two years from location and entry under the United States mining laws while the withdrawal application is being processed. The lands have otherwise been and will remain open to such forms of disposition as may be allowed by law on National Forest System lands, including leasing under the mineral and geothermal leasing laws. This notice also began a 90 day public comment opportunity to provide input on the withdrawal application, and announced a public meeting, which was held on January 18, 2017, in Livingston, Montana. Thousands of comments were received. These comments were largely, though not universally, supportive of proceeding with

the withdrawal application. On June 17, the Custer Gallatin National Forest released a scoping notice, the beginning of the formal environmental review process under the National Environmental Policy Act. The proposed action is to withdraw these areas from future mineral entry under the 1872 Mining Law, subject to valid existing rights, for 20 years. Passage of S. 941 would render this administrative withdrawal process moot.

S. 1230 – Water Rights Protection Act

USDA recognizes the primacy of the states to allocate water and defers to the states to manage their processes as they relate to appropriation of water from sources located on National Forest System (NFS) lands. USDA also strives to collaborate with state water allocation agencies and engage in their processes where appropriate.

The purposes of the NFS were established by Congress in 1897 and were primarily focused on the protection of water and watersheds and securing a continuous supply of timber. For more than 100 years, the American people have depended on the availability of clean water from the national forests and grasslands to support communities, agriculture, recreation, wildlife, and other needs. USDA, through the Forest Service, serves as stewards of the national forests, so that water remains available to meet the Nation's needs. Continuity of the Forest Service's multiple-use mission, including the ability of the Forest Service to appropriately manage use and occupancy of NFS lands, is vital to fulfilling that stewardship role for present and future generations. Abundant, sustainable flows of water are important for healthy watersheds, and healthy watersheds are critical to America's water supply. USDA and the Forest Service seek to be good neighbors and good partners with states, Tribes, communities, water rights holders, and the general public we serve in helping to sustain water resources on NFS lands.

USDA supports the overall goal of S. 1230 to ensure the integrity of state systems for allocating water and associated property rights for those who have obtained water rights in prior appropriation doctrine states. With respect to the Forest Service, S. 1230 primarily affects permits authorizing uses of NFS lands, including permits for grazing, recreational uses, water facilities, and a wide variety of other uses. Sections 3(1) and 3(2) of the bill would prohibit the agency from including in a permit a requirement that an applicant or permit holder transfer water rights to the United States as a condition of obtaining a Forest Service permit, and would prohibit the Forest Service from requiring an applicant or permit holder to acquire water rights supporting the authorized use in the name of the United States as a condition of the permit. USDA understands that these prohibitions address the bill's primary goal relating to the ownership of water rights, and USDA believes that implementing the provisions of Section 3(1) and Section 3(2) accomplish that goal.

However, four provisions in the bill do raise more fundamental concerns with regard to the ability of the Forest Service to fulfill its statutory mandates by appropriately managing surface occupancy through land use authorizations. These provisions could adversely affect the agency's ability to carry out its multiple-use stewardship mission for NFS lands under the

Multiple Use–Sustained Yield Act (MUSYA) and meet the requirements of other applicable statutes including the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

The language in Section 3(3) in combination with the phrase “or on any impairment of title” in Section 3(1) could have the effect of precluding any term or condition in a special use authorization that could be related to the exercise of water rights, since any such condition could be deemed to impair that water right. As a result, the Forest Service would lose a critical mechanism under the framework of federal law to appropriately balance the many multiple uses of NFS lands through land use authorizations if an applicant or holder of that authorization also held a water right under state law. We note that a similar bill in the House of Representatives, H.R. 2939, does not contain the language in Section 3(3). We recommend that Section 3(3) also be deleted from S. 1230 and that a targeted amendment be made to Section 3(1) to reinforce the intent of the savings clause in Section 5.

Additionally, the scope of the bill extends to unperfected or invalid claims of water rights. Section 2(2) defines the term “water right” to include water rights for which only an application for a state water right or permit has been filed. Under section 2(2), an applicant for a permit could challenge a condition in a Forest Service permit on the grounds that the condition would affect a requested water right or permit, regardless of whether the applicant would ever be able to legally acquire that right or permit from the state. Furthermore, to the extent section 2(2) appears to address only water rights that are acquired or put to beneficial use, the scope of the bill appears to be limited to water rights in prior appropriation doctrine states. This intent should be clarified in the definitions to expressly exclude water rights in riparian doctrine states, where water rights are appurtenant to the land.

The authority of the states to allocate and permit the use of waters in prior appropriation doctrine states is recognized by the Forest Service and federal law. However, section 4(2)(B) would potentially limit the agency’s ability to develop and present accurate analyses of water resources in environmental analysis documents under NEPA that involve effects on groundwater and surface water in states that do not manage them as connected resources, potentially subjecting the agency to additional litigation or impacting pending litigation.

Section 5 provides that the prohibitions in the bill will not affect other applicable authorities (including the ESA and Federal Power Act). We also appreciate that Section 5 recognizes that the federal government owns a wide variety of water rights, including federal reserved water rights as noted in section 5(d). However, as stated above the prohibition in Section 3(3) on including terms and conditions in land use authorizations to protect water sources could affect the Forest Service’s ability to comply with these and other applicable laws. We are also concerned that there could be a shift in the burden for protecting water resources to states, Tribes, or local governments. Targeted changes to Sections 3 and 5 could alleviate these concerns and clarify the bill’s intent, so that the limitations on the Forest Service authority to

include terms and conditions in permits would not affect the agency's ability to comply with these other laws. Again we point to H.R. 2393 as an example of language that would bolster the intent of Section 5.

These comments pertain to the effect of the bill on the Forest Service and management of NFS lands. USDA defers to DOI to comment on the impacts of the bill on DOI agencies and the federal lands under their jurisdiction.

S. 1271 – Fowler and Boskoff Peaks Designation Act

S. 1271 would name one mountain peak within the Lizard Head Wilderness on the Uncompahgre National Forest for Charlie Fowler, and another peak in the same wilderness for Christine Boskoff. As a general matter, the Forest Service recommends adherence to naming guidance provided by the U.S. Board on Geographic Names (BGN), which discourages naming unnamed features within wilderness unless an overriding need can be demonstrated. In recognition of the contributions to mountaineering made by Fowler and Boskoff, USDA does not oppose S. 1271.

S. 1548 – Oregon Wildlands Act

Wild & Scenic River Designations

Section 202(a) amends the existing designation in Section 3(a)(69) of the Wild and Scenic Rivers Act to change the starting and ending points of the three main segments of the Chetco River consistent with the Siskiyou National Forest Land and Resource Management Plan. The total length of the Chetco Wild and Scenic River would remain 44.5 miles. In addition, this amendment would effectuate a mineral withdrawal of the Federal land within the boundary of the segments of the Chetco River designated as a wild and scenic river. Typically under the Wild and Scenic Rivers Act, only Federal lands within segments designated as wild are subject to a mineral withdrawal. USDA is supportive of these technical changes as they provide a more appropriate naming convention, and better reflect management classifications and direction for the Chetco River.

Section 202(b) officially changes the name of “Squaw Creek” to “Whychus Creek” to better reflect local usage, current geographic nomenclature standards, and the name change approved by the U.S. Board on Geographic Names in 2005. This section also updates the location description in the existing designation in section 3(a)(102) of the Wild and Scenic Rivers Act to incorporate several other name changes. USDA strongly supports this much-needed technical correction to remove the offensive name of the designations.

Section 203 would designate approximately 10.4 miles of streams on National Forest System lands as part of the National Wild and Scenic Rivers System: 5.9 miles of Wasson Creek and 4.5 miles of Franklin Creek, both on the Siuslaw National Forest. USDA defers to the Department of

the Interior in regard to the proposal to designate the 4.2-mile segment of Wasson Creek flowing on lands administered by BLM.

The Forest Service conducted an evaluation of the Wasson and Franklin Creeks to determine their eligibility for wild and scenic river designation as part of the forest planning process for the Siuslaw National Forest. However, the Agency has not conducted a wild and scenic river suitability study, which provides the basis for determining whether to recommend a river as an addition to the National System. Wasson Creek was found eligible as it is both free-flowing and possesses outstandingly remarkable scenic, recreational and ecological values. USDA supports designation of the 1.7 miles of the Wasson Creek on NFS lands based on the segment's eligibility. At the time of the evaluation in 1990, Franklin Creek, although free flowing, was found not to possess river-related values significant at a regional or national scale and was therefore determined ineligible for designation. However, USDA does not oppose Franklin Creek's designation at this time.

Section 205(a) would amend the Wild and Scenic Rivers Act by adding additional segments in the Elk River watershed to the National Wild and Scenic Rivers System on the Siskiyou National Forest. These additions would increase the Elk's designated wild and scenic river mileage from approximately 29 miles to 63.4 miles. USDA takes no position on these additional designated segments. None of the additional segments are currently identified as eligible or suitable for wild and scenic river designation under the 1989 Siskiyou National Forest Land and Resource Management Plan. However, USDA would be happy to work with the Subcommittee to provide additional relevant information concerning the Elk River segments identified in this bill.

Wilderness Designations

Section 301 of the bill would designate 56,100 acres managed by the Bureau of Land Management (BLM) and by the Forest Service as an addition to the Wild Rogue Wilderness. USDA supports this addition of wilderness on National Forest System.

Section 301(b) would expand the Wild Rogue Wilderness in Oregon by designating 56,100 acres of land currently managed by the Bureau of Land Management and the Forest Service as wilderness. The "Proposed USFS Wilderness" identified in this section and on the referenced "Wild Rogue Wilderness Additions" map is located along a "cherry stem" into the existing wilderness area. The "cherry stem" originally allowed for the existence of a Level II Forest System Road, part of the designated "Grave Creek to Marial Back Country Byway," and the continuation of the Marial Lodge, a permitted resort. Marial Lodge accommodates hikers in the spring, rafters through the summer and commercial fishing trips in the fall. Proposed boundary adjustments in this area appear to be consistent with the continuation of the present and current use of the existing facilities.

Section 301(b)(1)(A) also includes language that turns back administration of a portion of the existing Wild Rogue Wilderness from Forest Service to BLM management. The Forest Service is

currently authorized to manage this BLM area through a Memorandum of Understanding. USDA does not see any issues of concern related to management of this expanded Wilderness area. However, we would like to work with the Subcommittee to develop a detailed "inset map" in the legislation to ensure that the boundaries between BLM and USFS parcels are clear and unambiguous.

Section 302 would designate the Devil's Staircase Wilderness (30,540 acres) on lands managed by the Forest Service and BLM surrounding Wasson Creek. Approximately 24,000 acres of this wilderness would be on the Siuslaw National Forest. Section 302(h) of the bill also would effectuate the transfer of administrative jurisdiction of an approximately 49 acre parcel managed by BLM to the Forest Service to be managed as part of the Siuslaw National Forest. This parcel includes a site of cultural significance to the Coos, Lower Umpqua, and Siuslaw Indians. Approximately 7,800 acres of the NFS lands are within the Wasson Creek Undeveloped Area and were evaluated for wilderness characteristics in the 1990 Siuslaw National Forest Land and Resource Management Plan. The proposed Devil's Staircase Wilderness provides an outstanding representation of the Oregon Coast Range and would enhance the National Wilderness Preservation System. There is an existing road within the proposed boundary of this wilderness that would require decommissioning by heavy equipment prior to designation as wilderness or allowance for use of mechanized equipment for this purpose after the enactment. USDA supports the designation of the proposed Devil's Staircase Wilderness.

Other portions of this bill would designate additional BLM lands and rivers flowing on BLM lands and would be administered by the Secretary of the Interior. Therefore, USDA defers to Department of the Interior on these proposed designations.

This concludes my written testimony. Again I thank the Subcommittee for holding this hearing and providing the opportunity to testify, and I look forward to answering your questions at the appropriate time.