

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

**Senate Environment and Natural Resources Committee,  
Subcommittee on Public Lands, Forests, and Mining**

**Legislative Hearing on S. 4625, National Prescribed Fire Act of 2020 (Wyden)**

**November 18, 2020**

Chairman Lee, Ranking Member Wyden, and members of the subcommittee, thank you for the opportunity to join you today to discuss S. 4625, the National Prescribed Fire Act of 2020, introduced by Senator Ron Wyden (D-OR) and co-sponsored by Senator Manchin (D-WV) and Senator Cantwell (D-WA).

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 Northern Blues Forest Collaborative on the Wallowa-Whitman and Umatilla National Forests. WELC's work with these forest collaboratives, our service on Oregon Governor Brown's Council on Wildfire Response, and dialogue with forest and fire ecology experts and land managers, has informed our position on S. 4625 and led to our support for this much-needed legislation.

This year, my home state of Oregon experienced yet another record-setting wildfire season. Dry conditions exacerbated by the effects of global climate change, along with strong east winds, combined to fan the flames of dozens of wildfires that eventually consumed more than a million acres of forestland, thousands of residences and structures, and unfortunately, too many lives. Our bluebird Oregon skies were orange for weeks, causing severe health concerns for a population already struggling with the global COVID-19 respiratory pandemic. Urban centers of Talent and Phoenix, Oregon made national news as they burned, causing terrified residents to chaotically flee. While managers are still assessing the damage and the causes of these fires are under investigation, it appears that several of the most destructive blazes were sparked by powerlines and other anthropogenic sources.

Experts tell us that the era of megafires is here, and that we should begin to expect “gigafires,” blazes that burn more than a million acres. California is no stranger to large conflagrations, and I fear Oregon and other western states must also come to terms with this “new normal.”

And yet, it need not be this way.

In 2009, Congress enacted the Federal Land Assistance, Management, and Enhancement Act (FLAME Act), which directed the Department of Agriculture (USDA) and the Department of the Interior (DOI) to develop a national cohesive wildland fire management strategy to comprehensively address wildland fire management across all lands in the United States. In 2010, the intergovernmental Wildland Fire Leadership Council initiated the National Cohesive Wildland Fire Management Strategy (Cohesive Strategy)<sup>1</sup> effort, which focuses on achieving three essential national goals: 1) **restore and maintain landscapes** so that landscapes across all jurisdictions are resilient to fire-related disturbances; 2) **create fire-adapted communities** so that human populations and infrastructure can withstand a wildfire without loss of life and property; and 3) **ensure a safe, effective, and efficient risk-based wildfire response** across all jurisdictions.

The Cohesive Strategy thus establishes a national vision “to safely and effectively extinguish fire, when needed; use fire where allowable; manage our natural resources; and as a Nation, live with wildland fire.”<sup>2</sup> In order to achieve this vision, decision makers must address all three prongs of the Cohesive Strategy. Failing this, the West will continue to burn and change cherished landscapes in ways that society cannot tolerate.

Senator Wyden, joined by Senators Manchin and Cantwell, understands this dynamic. S. 4625 focuses on two important Cohesive Strategy elements: restoring and maintaining landscapes, and ensuring a safe and effective wildfire response. The Cohesive Strategy identifies the use of prescribed wildland fire and managed wildfire as one of the most effective, and least costly, methods of reducing hazardous fuels and reintroducing fire into fire-dependent ecosystems, thus restoring and maintaining landscapes. Similarly, the Cohesive Strategy identifies the use of prescribed and natural fire as a tool to assist land managers in fighting future wildfires: although perhaps counterintuitive, experts tell us that we can – and must – use fire to fight fire.<sup>3</sup>

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<sup>1</sup> Wildland Fire Leadership Council, *National Cohesive Wildland Fire Management Strategy*, available at <https://www.forestsandangelands.gov/strategy/index.shtml> (last visited Nov. 14, 2020).

<sup>2</sup> *Id.*

<sup>3</sup> CNN, *Her tribe tamed wildfires for generations. Their method might surprise you* (Oct. 29, 2020), available at <https://www.cnn.com/videos/us/2020/10/29/california-wildfires-native-americans-prescribed-burn-eg-orig.cnn> (last visited Nov. 14, 2020); Amanda Monthei, *Land Managers Can't Burn the West Fast Enough*, THE ATLANTIC (Oct. 28, 2020), available at [https://www.theatlantic.com/science/archive/2020/10/prescribed-burns-are-failing/-616889/?utm\\_source=feed](https://www.theatlantic.com/science/archive/2020/10/prescribed-burns-are-failing/-616889/?utm_source=feed) (last visited Nov. 14, 2020); Anna M. Phillips, *As wildfires explode in the West, Forest Service can't afford prevention efforts*, LOS ANGELES TIMES (Oct. 21, 2020), available at <https://www.latimes.com/politics/story/2020-10-21/amid-worsening-wildfires-the-forest-service-is-short-of-funds-and-delaying-fire-prevention-work> (last visited Nov. 14, 2020);

S. 4625 directs the federal land managers at the United States Forest Service (Forest Service) and Department of the Interior to dramatically increase the number and size of prescribed fires conducted on federal lands, increases the federal and nonfederal workforce trained to utilize prescribed fire as a management tool, modernizes prescribed fire training programs, creates programs to incentivize and collaboratively implement prescribed fire on federal and nonfederal lands, and importantly creates a public education program regarding the benefits of and reasons for prescribed fire use.<sup>4</sup>

The legislation also amends the civil liability standard for federal prescribed burners, establishing a “gross negligence” standard of care to facilitate an increase in fire use. Research has shown that higher standards of care, while well-meaning, effectively preclude prescribed fire in many states.<sup>5</sup> Where adopted, a gross negligence liability standard has been shown to work to protect both burners and private property owners.

S. 4625 addresses another barrier to increased prescribed fire use: compliance with the Clean Air Act, which generally prohibits anthropogenic “exceedances” (i.e., temporary violations) of air quality standards. As an initial matter, WELC is a staunch supporter of our federal bedrock environmental laws; and as someone who has traveled internationally to places without air quality controls, I can definitively testify that our Clean Air Act is a law that should be celebrated for the clean air it provides for our nation.

However, as someone who lived through this summer’s wildfires – where the air quality in Portland, Oregon temporarily ranked as the worst in the world – I can also testify that if the increased use of prescribed fire can reduce the likelihood of future summers with orange skies and catastrophically unhealthy air, then we must allow for the production of more “good smoke” in service of creating more resilient landscapes for the future. S. 4625 meets this need by directing the agencies to utilize the “exceptional events” procedures currently within the Clean Air Act for large prescribed fires, provided that burners follow a strict process approved by state

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Philip Connors, *We Made Wildfire an Enemy for 110 Years. It Could Have Been an Ally*, NEW YORK TIMES (Sept. 20, 2020), available at <https://www.nytimes.com/-2020/09/22/us/forest-fires-fighting-history.html> (last visited Nov. 14, 2020).

<sup>4</sup> A relevant criticism of S. 4625 is that it utilizes an existing “mascot” for a prescribed burner program named “Burner Bob.” See, Title II, Section 205. Because such mascots can be highly effective in government-sponsored public education programs, it is important to utilize such opportunities to address social inequities where appropriate. Given that the land management agencies, and the Forest Service in particular, struggle with appealing to women and people of color – especially in fire-related programs and positions – WELC strongly recommends that the identity of the public education campaign mascot should be “Burner Betty” to better advance gender equity within the federal land management agencies.

<sup>5</sup> See, Schultz et al., *Prescribed Fire Policy Barriers and Opportunities: A Diversity of Challenges and Strategies Across the West* (Summer 2018), available at [https://ewp.uoregon.edu/sites/ewp.uoregon.edu/files/WP\\_86.pdf](https://ewp.uoregon.edu/sites/ewp.uoregon.edu/files/WP_86.pdf) (last visited Nov. 14, 2020).

and federal officials. WELC believes that this process is sufficiently protective of air quality and public health, while also balancing ecological and public safety needs.<sup>6</sup>

Relatedly, WELC tentatively supports the creation in S. 4625 of *administrative* categorical exclusions to facilitate the use of prescribed fire. We do not support the creation of *legislative* categorical exclusions that seek to avoid full compliance with the National Environmental Policy Act, as many legislative proposals do. However, the rulemaking required by S. 4625 compels the land management agencies to base prescribed fire categorical exclusions on prior analyses and monitoring results, and requires the use of extraordinary circumstances to effectively rule out instances when a categorical exclusion would not be appropriate for use. Requiring a transparent rulemaking process consistent with the Administrative Procedure Act, which allows for public comment and environmental review, protects the public's interest in an informed administrative process and decisionmaking.

The National Prescribed Fire Act of 2020 is an important step forward in achieving the vision of the Cohesive Strategy. By increasing the amount of fire on the landscape on our terms, we can make important progress on safely and effectively restore degraded landscapes, better protect homes and communities, and ensure that when we must, that we are able to suppress the most threatening wildfires. Because S. 4625 addresses these needs, it enjoys broad support from myriad stakeholders, including forest collaboratives, fire protection associations, conservationists, forest products companies, restoration contractors, tribes, and members of the Oregon State Legislature, among many others. I urge the Subcommittee to report out this legislation.

Thank you for the opportunity to share my thoughts and experiences with you.

Sincerely,



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<sup>6</sup> Other legislative proposals such as S. 2882, the Wildfire Defense Act (Harris), nicely compliment S. 4625. S. 2882 creates a grant program for communities to address not only the health effects of smoke, but also assists communities in undertaking community protection (i.e., “home hardening”) efforts. The Subcommittee should consider combining these two legislative proposals at a future mark-up.