STEVE DAINES
MONTANA

320 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-2651

United States Senate

COMMITTEES
APPROPRIATIONS
COMMERCE, SCIENCE AND TRANSPORTATION
ENERGY AND NATURAL RESOURCES
INDIAN AFFAIRS

September 16, 2016

The Honorable Lisa Murkowski
Chairman
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

The Honorable Maria Cantwell
Ranking Member
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

The Honorable Fred Upton
Chairman
Energy and Commerce Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Frank Pallone
Ranking Member
Energy and Commerce Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Rob Bishop
Chairman
Natural Resources Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Raúl Grijalva
Ranking Member
Natural Resources Committee
U.S. House of Representatives
Washington, DC 20515

Chairmen Murkowski, Upton & Bishop and Ranking Members Cantwell, Pallone & Grijalva:

As you and your colleagues on the conference committee for comprehensive energy legislation continue to deliberate, I wanted to highlight several provisions that are critically important to Montana and urge you to reach strong and meaningful agreement on them.

I strongly support the provision in the Senate-passed energy bill to permanently reauthorize the Land and Water Conservation Fund and urge conferees to adopt this language in the conference report. Further, the Senate bill provides for the reinstatement and contract extensions for two clean hydropower projects at two existing dams in Montana (sec. 3003 and 3004) which are critical to job creation, tax revenue, and affordable power in the area. I also urge conferees to support the inclusion of the *Western Water Supply and Planning Enhancement Act* in the conference report. This legislation would improve the efficiency of existing water supply infrastructure, ease the regulatory burden on new projects and protect water rights that are critical to the prosperity of the western United States. In particular, it would authorize two essential rural water projects in Montana, the Dry-Redwater Rural Water System and the Musselshell-Judith Rural Water System, which would facilitate water treatment and deliver to over 22,500 residents in Montana and North Dakota.

I also support the provisions to classify hydropower as a renewable fuel and streamline the permitting process for renewables, establish a pilot project to streamline drilling permits if less than twenty-five percent of the minerals within the spacing unit are federal minerals, improve federal permitting of critical and strategic mineral production, and allow for regional reliability assessments of federal rules. In addition, I strongly back and urge inclusion of the *Bipartisan Sportsmen's Act* that promotes and protects access to Montana's public lands and increases recreational opportunities for hunters and anglers. Further, I support the provisions that would create transparency in *Equal Access to Justice Act* payments (Sec. 10215) and allow flexibility of federal agencies to better manage vegetation in transmission corridors.

Moreover, Montana is home to two of the crown jewels of the Park System: Glacier National Park and Yellowstone National Park. I am proud to represent these Parks as well as other units of the NPS within our state's borders. As our nation celebrates the Centennial of the National Park Service, I support section 104909 of the Senate-passed S. 2012 which would establish a National Park Service Centennial Fund and the Second Century Endowment Fund to help fund signature projects associated with the Centennial and other projects like trail maintenance to facilitate a new century of public enjoyment of the National Parks.

In addition, I wish to provide a comprehensive discussion detailing why the energy conference should include strong reforms that accelerate the management of our National Forests, address the chronic problem of fringe litigation against responsible projects, and fix the unsustainable wildfire funding challenge. Over seven million federally-controlled acres in Montana are at high risk of wildfire—and tens of millions more nationwide—but unfortunately barriers to management continue to slow much-needed treatments on these acres. As discussed and substantiated in numerous hearings in both the Senate and House, far too often important forest health and restoration projects take several years to get through the overly cumbersome regulatory process, with many subsequently hit by litigation. Such obstruction, the Forest Service has further testified, diverts agency personnel from preparing needed restoration work.

Currently in Region 1 there are twenty-one projects under litigation, thirteen of which were developed through a collaborative process. The overwhelming majority of these lawsuits are filed by a handful of fringe groups, and independent academic research has found that between forty and fifty percent of timber harvest volume in Montana is encumbered by litigation. Just this week, the Ninth Circuit enjoined the collaboratively-developed East Reservoir project in Montana's Kootenai National Forest that was just two days away from getting started, indefinitely delaying the responsible harvest of thirty-nine million board feet and important fuels reduction and habitat restoration work. Largely due to excessive regulations, chronic litigation, and the fear of litigation, timber supply from our National Forests remains woefully inadequate. Sadly, the number of mills in Montana has fallen over the past generation from thirty to eight, costing thousands of Montanans their jobs, and the remaining mills are operating at only sixty to seventy percent capacity even though demand for wood is growing.

Importantly, the scourge of fringe litigation is far from just a Montana or Region 1 problem. There are approximately twenty additional active lawsuits initiated by obstructionist groups in other states, including in California, Alaska, Oregon, Washington, Utah, Colorado, and southern Idaho. I would particularly highlight a disturbing recent example in which Montana's most

frequent litigator filed a lawsuit against the Forest Service's collaboratively-developed North Fork Mill Creek A to Z Project near Colville, Washington, threatening to delay a project that diverse stakeholders put forward after much good-faith deliberation. In total, over the past decade there have been hundreds of lawsuits against vegetation management projects across the country. Just as a business could not remotely reach its potential if faced with such unending litigation, the Forest Service faces a crippling and costly legal and administrative burden that makes it impossible to sufficiently manage our National Forests.

It is important to stress that such litigation is ***not*** the result of friction between industry and mainstream environmental groups. Rather, as evidenced by the North Fork Mill Creek A to Z project in Washington and many others, the chronic litigation being experienced in many parts of the West is impeding projects that are created by industry, environmental, and county officials, among others, working together for the benefit of our forests. **Simply put, the litigation we are seeing over and over again is obstructing the very type of science-based, community-driven projects that the Forest Service seeks to encourage and implement.** Unless Congress passes critically-needed reforms, this kind of litigation will only further demoralize collaborative participants and continue to limit the value of the collaborative process.

Montanans and others have put forward numerous reforms that would increase responsible management. Based on their feedback, **and with the intention of pushing for reforms that can get signed into law**, I offer the following recommendations that can both make a meaningful difference on the ground while, I believe, gaining bipartisan and Administration support:

Close loopholes exploited by obstructionist groups in the courtroom

- Codify in law the Obama Administration's position that federal agencies are not required to consult with the Fish and Wildlife Service at a programmatic level when new critical habitat is designated or a new species is listed. Currently there are conflicting circuit court interpretations in the Ninth (*Cottonwood Environmental Law Center v. Forest Service*) and Tenth Circuits (*Forest Guardians v. Forsgren*) on this matter of wide-ranging import, and the Department of Justice recently petitioned the Supreme Court regarding the discrepancy (*Forest Service v. Cottonwood Environmental Law Center*). I urge you to statutorily settle the matter in the energy bill by affirming the Administration's legal position.

- Include strong deference language. While by itself not sufficient to address the litigation challenge, I appreciate that the discussion draft put forward by Chairman Murkowski and Ranking Member Cantwell requires courts in certain circumstances to give substantial deference to the expertise of the Secretary, which is consistent with existing court precedent with respect to adjudicating the arbitrary and capricious standard under the *Administrative Procedures Act*. I urge you to strengthen this language, however, to maximize its impact and further limit the ability of judges to override the science-based findings of federal agencies in their development of projects.

These provisions directly respond to conflicting or misguided court rulings against the Forest Service. While the Forest Service would still need to comply with all federal environmental laws

and perform robust analysis of projects, the provisions address loopholes that have allowed obstructionist groups to successfully block responsible projects notwithstanding the Forest Service's completion of voluminous, good-faith environmental and scientific analyses.

Limit injunctions

- Adopt the House-passed provision in H.R. 2647 such that Section 106 of the *Healthy Forest Restoration Act* (HFRA) applies to injunction motions for new critical response and other emergency designation authorities contained in the energy conference report. Section 106 of HFRA has been fundamentally bipartisan since its inception in 2003 and was included in the bipartisan forest health provisions in the 2014 Farm Bill. I ask that you include this important provision in the energy conference.

- Require courts to make specific factual findings that establish clear and convincing entitlement to injunctive relief. Enjoining a project and overriding the science-based findings of federal agencies should occur only if courts articulate findings demonstrating the errors of the agencies' conclusion. This provision would strengthen that expectation.

While not all litigated projects are enjoined, at least eight projects are currently blocked in Region 1 alone (and many more in the past) due to an injunction. As seen with the East Reservoir project mentioned above, injunctions have immediate adverse impacts on the economy and environment in the project areas. Further, they slow down and discourage new critically-needed forest management projects, because the Forest Service must attend to the lengthy litigation process and feels compelled to conduct even more analysis on new projects in hopes of avoiding additional litigation and injunctions. These provisions would limit their impact.

Strengthen the objections process

- Require objectors to meet with the Forest Service, if requested by the agency, to resolve issues before filing litigation (with authority to do a conference call if meeting face-to-face is impractical). If the objector does not participate, I urge you to stipulate that they have not exhausted all of their administrative remedies and are therefore not subject to judicial relief.

- Direct the Forest Service to make objection resolution meetings open to all interested parties, or all commenters on the project, and allow all those parties to speak.

While the objections process can be very useful and frequently results in changes to projects after hearing from community members, obstructionists have routinely filed objections as a mere formality on the road to litigation, providing "recycled" content unrelated to the project at hand and consistently failing to show up at resolution meetings. These actions make a mockery of the objections process, and the commonsense provisions above are needed to both help restore the integrity of the objections process and discourage obstructionist litigation.

Remove financial incentives for chronic litigation

- Place a firm cap on attorneys' fees and hourly wage (such as $195/hour, indexed for inflation) established in accordance with 28 U.S.C. §2412(d)(1)(B), with no departure allowed from this rate in relation to special expertise or degree of success. I urge you to also specify that these restrictions apply to all fee awards regarding forest management projects, specifically including the *Endangered Species Act* and the *Clean Water Act*.

- Direct courts to reduce awards to reflect the exact percent of claims won.

While the *Equal Access to Justice Act* serves a critical purpose of holding federal agencies accountable for their actions, the law has been exploited by repeat litigators—it financially helps prop them up—and only encourages more litigation. In fact, according to research by Todd Morgan of the University of Montana, repeat litigators in Region 1 alone received hundreds of thousands of dollars in EAJA payments between 2003 and 2013. Building on the transparency provision already contained in the Sportsmen Package of the energy bill, these additional modest reforms would address the unintended consequences of current law.

Implement judicial review reform

- Develop a binding arbitration pilot process that will serve as the sole method for judicial review for certain collaboratively-developed projects.

- Provide that any member of a collaborative shall be entitled to intervene as of right in any litigation concerning a project developed with that collaborative. This would include any parties that have made substantial economic investments in a project and have a significantly protectable interest under the *National Environmental Policy Act*.

While not exhaustive, these reforms would increase the likelihood of timely decisions that affirm the Forest Service's responsible forest management actions. And, collectively, the recommendations I have put forward on behalf of Montanans would incentivize, reward, and protect collaboratively-developed projects and provide meaningful litigation relief. In doing so, they would help restore active management and consequently protect and create forest jobs, reduce the risk of wildfires, protect watersheds and improve water quality, improve wildlife habitat, expand recreational opportunities, and increase revenues for forested counties. Accordingly, I strongly urge you to include them in the energy conference report.

Further, I urge you to include reforms that reduce red tape in the development of forest management projects. I support expanding existing categorical exclusions for combatting insect infestations to *all* collaboratively-developed critical response projects, and expanding to *all* collaborative projects the authority that currently allows for only an Action and No-Action alternative for environmental assessments and environmental impact statements in certain circumstances. I also conceptually support the Senate discussion draft's provision to accelerate restoration work for certain tree species (though I ask that it include lodgepole pine), as well as expediting and protecting projects carried out under the *Tribal Forest Protection Act*. I urge you to ensure that these new authorities are drafted such that they are workable and utilized to their

maximum benefit. In addition, I ask you to further empower state foresters to carry out cross boundary and landscape scale restoration projects, as proposed in S. 3310.

Finally, I urge you to include strong wildfire funding reform that treats catastrophic wildfires as natural disasters. While increased management can reduce the risk and severity of fires, issues such as drought and weather are, like natural disasters, outside of the control of land managers and contribute to the conditions that make fires today more catastrophic than ever. It is therefore necessary and appropriate for Congress to budget for such fires in a similar manner as other natural disasters. As a cosponsor of the bipartisan *Wildfire Disaster Funding Act*, I strongly support the approach to reform taken in that legislation. With that said, I can alternatively support other solutions, including linking to FEMA disaster funding, so long as they both address the issue of fire borrowing and relieve the Forest Service of the unsustainable costs associated with catastrophic wildfires.

Thank you for your consideration of my views, and I look forward to working with you as conference negotiations continue.

Sincerely,

Steve Daines

STEVE DAINES
United States Senator