Testimony of
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Before
Energy and Natural Resources Committee
United States Senate
On
Section 2310 of S. 1460, the Energy and Natural Resources Act of 2017, and H.R. 1873, the Electricity Reliability and Forest Protection Act.

Thank you Chairman Murkowski and Ranking Member Cantwell for the opportunity to provide testimony regarding vegetation management requirements for electricity assets located on federal lands.

The Wilderness Society works on behalf of its more than 1 million members and supporters to protect wilderness and inspire Americans to care for our wild places. We are dedicated to ensuring the conservation and sound management of our shared national lands.

We support efforts to develop needed energy resources where and when appropriate, and when conducted in a responsible manner. This includes responsibly developing the renewable wind, solar, and geothermal resources found on our public lands, including through the Public Lands Renewable Energy Development Act (S. 282), sponsored by Senators Heller, Heinrich, Gardner, Risch, Daines, and others. The Wilderness Society works closely with industry, the Federal land management agencies, and others to advocate for appropriate siting of electrical transmission infrastructure on public lands, especially when necessary to make the development of renewable energy possible. As with any form of development on public lands, the development and maintenance of renewable energy and electricity transmission infrastructure must take place in a responsible manner that protects the ecological integrity and many other public interests in our public lands.

Since this Committee's important work on utility vegetation management ("UVM") standards in the Energy Policy Act of 2005, UVM practices have improved substantially. At the same time, the importance of strong UVM practices continues to grow as climate change is causing longer wildfire seasons, larger and more severe wildfires, longer growing seasons, changing plant-species distributions, increased insect and disease activity, and more intense, more frequent and longer-lasting drought, wetness, and weather events. The impacts of these climate-related dynamics on UVM are well-established, and they underscore the need for pro-active, well-planned, and adaptable UVM programs to ensure reliability and reduce wildfire risk.

Utilities have important obligations to meet UVM standards and ensure reliable electricity transmission, and it is necessary for Federal land managers to work

cooperatively and consistently with utilities to allow them to carry out UVM to meet those obligations. At the same time, Federal land management agencies have important land management and public interest obligations to meet in managing utility rights-of-way and UVM, and it is necessary for utilities to work cooperatively with the agencies to ensure those stewardship obligations are met.

There are many examples of exemplary collaboration between utilities and Federal land managers to carry out effective UVM programs, and recent efforts by the utilities and agencies have expanded those efforts. At the same time, we understand that there is more that can be done to improve the management of rights-of way across Federal lands to ensure that utilities can and do meet their UVM obligations in a manner that is consistent with sound stewardship of our public lands. It also is important to recognize that the challenges in coordinating UVM between utility and landowner are not limited to Federal land managers; utilities often choose to site transmission lines on Federal lands because of the significant siting and maintenance challenges associated with private lands.

Cooperation is essential to any effective and sustainable UVM program, and we believe it should be the touchstone for any legislation to advance reliability, wildfire protection, and public land management in the context of UVM. We appreciate that the Federal land management agencies and utilities have embraced the importance of a cooperative approach to advancing UVM.[1] We also believe there is an important role for public participation in decisions affecting our public lands, and that role should be respected and protected in a manner that is consistent with the utilities' and agencies' ability to meet their UVM obligations.

The Wilderness Society opposes H.R. 1873 because it fails to appropriately recognize the Federal land management agencies' obligations or the public's interest in Federal land management and because it fails to provide for the necessary cooperation that will improve effective and sustainable UVM on Federal lands. H.R. 1873 would establish counterproductive limitations and obligations on both utilities and Federal land managers,

[1] The importance of a cooperative approach was embraced in testimony on the version of H.R. 1873 that was introduced in the 114th Congress (H.R. 2358) at a hearing in the House Natural Resources Committee's Subcommittee on Water, Power, and Oceans on May 20, 2015, by the BLM ("BLM appreciates any opportunity to work collaboratively with all our stakeholders and partners, including utility companies, and recognizes the value of advance planning for future maintenance needs when possible. Ongoing communication and coordination are also critical to ensuring that both the BLM and the utility can respond to vegetation management requirements in a timely manner."), the Forest Service ("To enhance cooperation and efficiency in maintenance of electric transmission and distribution line rights-of-way, the Agency encourages utilities to meet with field personnel, explain required actions, and work collaboratively to develop plans for getting work done."), and the Missoula Electric Cooperative ("We also work diligently to maintain good relations and open communications with the various Forest Service Offices and Ranger Districts with which we interact. In many cases, those district offices and the people that staff them live locally and have a vested interest in the health and welfare of the forest, and it shows. A great example of this level of cooperation occurs regularly during the clearing of danger trees outside of our rights-of-way during routine Operations and Maintenance activities.").

inappropriately shift costs from utilities to taxpayers and agencies, and undermine the public interest in the management of their public lands.

To the extent additional legislation is necessary, section 2310 of S. 1460, on the other hand, provides a strong foundation for improving coordination and cooperation between utilities and Federal land managers to ensure that utilities can effectively and appropriately meet their UVM obligations. While we would like to make a number of important suggestions—largely technical in nature—to improve section 2310, the bill provides a thoughtful framework for legislation to advance UVM on public lands. We would welcome the opportunity to work with the Committee on our suggestions if the legislation moves forward.

H.R. 1873: Electricity Reliability and Forest Protection Act

H.R. 1873 would amend the Federal Land Policy and Management Act by adding a new section 512 to address UVM on rights-of-way for electrical transmission and distribution facilities on National Forest System lands, public lands administered by the Bureau of Land Management ("BLM"), and other lands under the jurisdiction of the Secretary of the Interior.

Rather than foster the cooperation between utilities and Federal land managers that is essential for the development and implementation of sound vegetation management plans and practices, H.R. 1873 embraces a unilateral approach whereby utilities tell the agencies what they are going to do and the legislation directly authorizes the utilities to do it. For example, H.R. 1873 would prevent utilities and land managers from including activities in vegetation management plans that would require anything beyond annual notice, description, and certification by the utility for its planned activities. It also would give utilities (including those without approved plans), blanket approval to conduct vegetation management activities to meet clearance requirements, leaving the agencies with no authority but to allow such activities, and leaving the utilities with little incentive to cooperate or even prepare a vegetation management plan.

As a result of its inconsistent, broad, and contradictory provisions regarding the application of State and local requirements, H.R. 1873 also could leave utilities and Federal land managers in the untenable position of having to comply with conflicting, inapplicable, or inadequate State and local requirements for fire safety and electric system reliability. The application of Federal, State, and local requirements for UVM on Federal lands differs depending on the nature and location of the facility and the scope of the requirements. H.R. 1873 fails to appropriately deal with these differences and could significantly complicate—rather than facilitate—UVM as a result.

The effect of H.R. 1873's provisions mandating the application of a categorical exclusion process to vegetation management plans are, at best, unclear. To the extent the bill authorizes or mandates a blanket exemption for vegetation management plans from the requirements for public participation and environmental analysis under the National

Environmental Policy Act, H.R. 1873 would undermine sound stewardship of our public lands. We note that both the Forest Service and BLM have already established a number of categorical exclusions that apply to many routine UVM activities, and those authorities are routinely utilized by the agencies in the context of UVM.

H.R. 1873's provisions on liability also are overbroad and unclear. Proposed section 512(f) provides that utilities "shall not be held liable for wildfire damage, loss or injury, including the cost of fire suppression" if the Secretaries don't allow utilities to operate consistently with an approved vegetation management plan. But nothing in the bill states that the release of liability is limited to situations where the Secretaries' decisions are an actual and proximate cause of the damages, potentially leaving the agencies (and ultimately, taxpayers) to cover the damages caused by the utilities' negligence (or even gross negligence), for example. This is particularly troubling given that the actions could be contrary to Federal law and that the legislation provides utilities with blanket authority to unilaterally take actions to maintain clearance requirements.

Finally, H.R. 1873 dramatically compounds all of these problems by inappropriately broadening the application of its provisions. For example, the bill authorizes vegetation management plans to broadly apply to "adjacent" Federal lands, and the bill's liability and other provisions apply to preexisting vegetation management plans, regardless of whether those plans meet current or future standards.

Title V of the Federal Land Policy and Management only governs rights-of-way on public lands managed by the BLM and National Forest System lands (not including lands designated as Wilderness). Rights-of-way on lands administered by other agencies within the Department of the Interior are governed by other statutes and regulations that address the unique missions and obligations of those agencies.

Nevertheless, H.R. 1873 would apply the bill's new provisions through FLPMA to *all* lands under the jurisdiction of the Secretary of the Interior, including lands managed by the National Park Service, Fish and Wildlife Service, and Bureau of Reclamation, and potentially to trust and restricted fee lands of Native American Tribes and individuals (and other lands) that are under the jurisdiction of the Bureau of Indian Affairs as well.[2] So, for example, given that H.R. 1873 could be read to include Tribal and individual trust and restricted lands within its scope, the potential application of State and local requirements, the lack of consideration of Tribal requirements, and the broad waiver of liability would contravene important principles of Federal Indian law and policy.

For these and other reasons, The Wilderness Society opposes H.R. 1873.

[2] The "Background and Need" section of the House report on the bill states that the "bill deals specifically with electricity ROWs on U.S. Forest Service (Forest Service) and Bureau of Land Management (BLM) lands," but the text of the bill is explicit that it applies "to public lands [administered by the BLM] and other lands under the jurisdiction of the Secretary." H.R. Rept. 115-165 at 2, 4.

Section 2310 of S. 1460, the Energy and Natural Resources Act of 2017

The Wilderness Society appreciates the thoughtful approach reflected in section 2310 of S. 1460, which corrects the many flaws of H.R. 1873. We also appreciate the opportunity to make some suggestions for its improvement.

Like H.R. 1873, section 2310 would amend FLPMA to add a new section 512 covering UVM, but section 2310 would establish a process for developing and implementing vegetation management plans that would encourage cooperation between utilities and Federal land managers. The process leaves utilities and the agencies sufficient flexibility to develop plans to improve coordination, proactive planning, and adaptive management to ensure sound UVM that meets applicable requirements.

The Wilderness Society has some suggestions to clarify and improve a few provisions in the bill. Proposed section 512(f)(2) authorizes utilities to carry out certain activities if the agencies fail to respond in timely manner to a utility request in accordance with an approved vegetation management plan. It is reasonable for utilities to expect a timely response to requests made in accordance with an approved plan. However, agency personnel sometimes are called away on emergency assignments such as wildfires, for example, that might delay a response beyond what was anticipated in a plan's schedule. Utilities already have authority to conduct emergency UVM activities without prior agency approval (a practice confirmed by subsection (e)), and subsection (f) may counterproductively result in plan schedules that result in unnecessary delays for routine approvals. Alternatively (or at least in addition), section 2310 should impose a mandatory duty on the Secretaries to respond in accordance with the approved schedules to ensure that Federal land managers do not routinely fail to respond to utilities' requests.

Section 2310 contemplates that approved vegetation management plans include necessary activities adjacent to rights-of-way. Indeed, depending on the width of a right-of-way, it can be necessary to conduct UVM activities in the border zone adjacent to a right-of-way, particularly when hazard trees pose a risk to the facility. Given the inherent ambiguity of the term "adjacent", however, we suggest clarifying the intent of the relevant provisions by referring to hazard trees or other standard criteria used in UVM standards to define the scope of activities on adjacent lands that are necessary to meet applicable UVM standards.

Proposed section 512(c)(3)(E) requires vegetation management plans to describe processes for identifying changes in conditions and for modifying plans when necessary, but it leaves the utilities' and agencies' authorities to withdraw from a plan if modifications cannot be agreed to unclear. An explicit statement that the Secretary and the owner/operator may withdraw their approval for a plan that proves to be unworkable if modifications cannot be agreed to would help clarify the provision and ensure that both parties retain their ability to efficiently and effectively meet their obligations.

Again, thank you for the opportunity to testify. We would welcome the opportunity to work with Committee staff on these and a few other minor suggestions if the legislation moves forward.