I would like to thank Chairman Cochran, Ranking Member Harkin, and the members of the Committee for inviting me here to comment on HR 1904, the Healthy Forests Restoration Act of 2003.

My name is Donald J. Kochan and I am an outgoing Visiting Assistant Professor of Law at George Mason University School of Law. During the past academic year, I taught Property Law and Environmental Law and Regulation. As my visit at George Mason comes to a close, I will be taking an appointment as a John M. Olin Fellow in Law at the University of Virginia School of Law during the 2003-2004 academic year. For the record, I am testifying today on my own behalf and not as a representative of any organization. I am pleased to provide the following comments on HR 1904 to the Committee, focusing primarily on the judicial review provisions included in the bill.

I. Introduction

The Healthy Forests Restoration Act, HR 1904, is a necessary and sound legislative effort to protect and conserve our nation's forests, public lands, and the environmental and economic values contained therein. As recent events demonstrate, too often our United States Department of Agriculture and its subordinate Forest Service - along with the Department of Interior and its subordinate the Bureau of Land Management ("BLM") - have been hindered from protecting the integrity and health of National Forest System lands and public lands by misunderstood concepts of conservation and environmental protection. It should be understood that human intervention is sometimes necessary to conserve forests and that it can, indeed, assist in protecting the environmental values that lie at the heart of our nation's preservationist efforts. As I have often told my students, conservation and preservation efforts require responsible management if they are to achieve their goals.

The Healthy Forests Restoration Act presents an important effort toward solving management problems faced by the Forest Service and BLM. But, it is important that the need for HR 1904 is not limited to federal natural resources management alone - catastrophic fire risks directly affect lives and adjacent private property and private forest lands. While addressing Forest Service and BLM management authorities, HR 1904 at the same time presents a responsible and effective balance with the concerns for citizen participation in the management and conservation of our nation's forest resources.

Others will undoubtedly testify as to the merits and necessity of providing the Forest Service and BLM with the authority to effectively manage the National Forest System and public lands, including the ability to achieve hazardous fuel reduction on such lands. My comments focus particularly on the advisability of enacting legislation that allows citizen oversight of Forest Service and BLM action in this regard while creating a system of judicial review that does not hamper the Forest Service and BLM from dealing with what are often imminent wildfire hazards within the National Forest System and on the public lands. This focus addresses primarily sections 105 through 107 of HR 1904. It is necessary that the Forest Service and BLM have authority to apply their particular expertise toward the management of our forests without waiting indefinitely for a judicial ruling during a time in which exists the risks of imminent fire hazards.

The judicial review provisions in HR 1904 are constitutionally valid and represent sound public

policy, as they help to ensure that our nation's forest resources will not burn as burning questions of Forest Service and BLM authority go unaddressed in the federal courts. Moreover, the judicial review requirements of HR 1904 will not divert or distract our federal courts from effectively managing their dockets and other case priorities.

II. Background of HR 1904's Judicial Review Provisions

HR 1904 provides that interested citizens shall have the opportunity to participate in, and challenge when they feel necessary, Forest Service and BLM decisions for forest health management. The unique characteristic of HR 1904 lies in the boundaries it sets for preliminary injunctions. The bill would require preliminary injunctions granted by a federal court against a project implemented under this legislation be reevaluated every 45 days, and encourages completion of judicial review within 100 days. A court could extend preliminary injunctions an unlimited number of times at the end of each 45-day interval. After any decision to renew an injunction, the agency involved is required to notify Congress of the decision.

I agree with the House Judiciary Committee's finding that such a limitation on, and review of, preliminary injunctions is necessary. As the House Judiciary Committee stated, it is critical to stress efficient decision making on preliminary injunctions that limit the Forest Service's and BLM's abilities to address forest health matters and important to ensure that a federal court remain engaged in such cases rather than allow judicial delay to create unnecessary risks to governmental conservation efforts:

Currently, preliminary stays on fuels reduction projects can remain in effect for months before a court finally reaches a decision on the overarching merits of the legal challenge. These long delays can by themselves defeat the purposes of a forest treatment project, particularly if a project is aimed at stemming the spread of disease or insect infestation to uninfected forest lands. In these cases, judicial delay is just as lethal as judicial defeat for the government. Without curbing anyone's ability to pursue a full range of judicial procedures, this provision would ensure that the court remains engaged on the status of a project, including the extent to which management inaction is exacerbating wildfire and forest health risks. The bill admonishes, in non-binding terms, Federal courts considering a legal challenge to a hazardous fuels reduction project to take all necessary steps required in order to issue a decision on the merits of the legal challenge within 100 days.

House Rep. No. 108-96 Part 2, at 4-5.

III. Constitutionality of HR 1904

The Healthy Forests Restoration Act's limitation on preliminary injunctions is constitutionally sound. In addition to its other legislative authorities, Congress has a constitutional responsibility and prerogative to manage National Forest System and public lands under the Property Clause of the U.S. Constitution. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. Const. Art. IV, Sec. 3, cl. 2 (emphasis added).

Similarly, Congress has the power to define and limit the jurisdiction of the Article III federal courts, including the ability to limit their equitable jurisdiction. The 45-day limitation on preliminary injunctions is consistent with this power of Congress. Such limitations on judicial authority are hardly unprecedented. Comparable priority provisions have been made in the past,

have consistently been upheld upon judicial review. Indeed, Congress has the constitutional authority to preclude litigants from an opportunity for a preliminary injunction altogether in certain situations, and has done so in the past. See, e.g., Norris-Laguardia Act of 1932, 29 U.S.C. §§ 101, 105. Here, HR 1904 simply balances the equities and limits the duration of a preliminary injunction (with unlimited renewal opportunities) in consideration of the seriousness of the issue and the dilemmas faced by the Forest Service and BLM, rather than prohibiting such injunctions altogether.

Moreover, nothing in HR 1904 directs any particular outcome from federal judges and leaves them independent to consider the merits of each case. Encouraging federal judges to reach a speedy resolution in appeals under this legislation is a responsible exercise of Congress's stewardship over the government's property while leaving intact the independence of federal judges.

Finally, Congress has the power to limit the discretion of federal agencies. Precluding agencies from granting waivers to the time limits established in HR 1904 is consistent with Congress's authority and many similar limitations already placed on agency discretion.

IV. The Standard for Injunctive Relief in HR 1904 is Consistent With Current Applicable Law
Section 107 in HR 1904 sets forth a standard for granting injunctive relief that simply mirrors existing standards already adopted in the federal courts. The provisions concerning the balancing of interests and particularly the requirement that long-term harms be considered when evaluating the public interest do not substantively change existing law. This provision is important, however, because it provides security, and a reminder, that both short-term and long-term harms will be evaluated when deciding whether to issue an injunction. Without this reminder, the heat of public debate could deflect a court's attention from its already-recognized responsibility to remain cognizant of long-term harms that may be affected by injunctive relief.

V. The Judicial Review Provisions in HR 1904 Should Not Adversely Affect the Caseload of Federal Courts or the Priorities of Decision Making
HR 1904's judicial review provisions will not impede the efficient operation of the federal court system. The arguments that courts would likely have to delay and adversely impact other cases in order to comply with the requirements of HR 1904 are overstated.

First, requiring that preliminary injunctions be revisited and potentially renewed every 45 days is particularly appropriate to hazardous fuel reduction issues in our federal forested lands. The natural resources are often subject to seasonal variations and other forces of nature that uniquely present the potential for dramatic changes in the public interest factors that must be weighed in deciding whether to grant or sustain a preliminary injunction against Forest Service or BLM action. The speed with which insect infestations and disease can spread through forests and the extraordinary fire risk created in areas that have been ravaged by insects and disease warrants quick responses to natural threats - which cannot occur without quick review of Forest Service and BLM decisions to exercise their authorities to manage such risks.
In most civil cases, after granting a preliminary injunction, circumstances do not change. However, rapid changes in conditions on forest lands can be expected, making it more likely that a court should reconsider and perhaps alter an initial decision to grant a preliminary

injunction. Unfortunately, disease, insects, and fire do not obey preliminary injunctions. Furthermore, requiring that preliminary injunctions be renewed should require a minimal commitment of judicial resources. The bulk of evidence and legal issues that must be considered in granting any preliminary injunction under HR 1904 will be presented and reviewed in the initial decision that determines whether or not to grant the initial preliminary injunction. It is true that the court will be required to revisit this decision after 45 days, but most of the administrative record necessary to make this next determination will have already been reviewed by the court. Much like status reports required by courts in many forms of litigation, the 45-day renewal requirement simply ensures that neither the parties nor the court is permitted to unduly ignore a case, delay its conclusion, or fail to acknowledge changed circumstances. Similarly, this requirement is unlikely to crowd out other cases because the issues involved on the merits in the cases that will be affected by HR 1904 do not require evidentiary trials but instead are almost always resolved on cross-motions for summary judgment (followed by a relatively short oral argument). The 45-day limitation simply puts pressure on the parties and judges to ensure timely briefing and resolution of cases, rather than pushing forward trials that would monopolize a court's calendar.

The provisions of HR 1904 should also not be otherwise expected to divert, delay, or adversely impact resources committed to other types of cases. For one thing, courts have long been faced with the need to balance their dockets according to priorities set out by Congress or identified by litigants. In fact, litigants themselves often have control to create expedited review - as soon as any case of any kind becomes subject to a preliminary injunction, current judicial caseload management already typically affords these cases a priority irrespective of congressional directives like those contained in HR 1904.

The expected volume of cases challenging actions taken pursuant to authority granted in HR 1904 also can hardly be seen as a major disruption in the federal court docket. As I understand, the total number of cases pending during any given recent year with National Environmental Policy Act, Endangered Species Act, or National Forest Management Act challenges to Forest Service actions has been in the range of only 100-120. This number is a drop in the bucket when it comes to total civil filings in the federal district courts which have reached over 250,000 filings in each of the past few years. See Federal Judicial Caseload Statistics (2002), at App. C, http://www.uscourts.gov/caseload2002/tables/c00mar02.pdf. HR 1904 should not be expected to significantly increase this number of challenges to Forest Service or BLM activities. As evidence of that fact, there has not been a significant increase in the number of lawsuits challenging Forest Service activities even in the past few years when the budget for fire control initiatives has increased.

Even if there is a minimal diversion away from other cases as a result of HR 1904, particularly those cases in federal court for money damages, it is certainly not unwarranted. Those types of cases will result in an ultimate judgment that is largely unaffected by a small increase in the passage of time - which is also why the typical case does not qualify for a preliminary injunction. Conversely, the case of forest and public land management involves risks of time delays that mean the risk of the loss of valuable national environmental and economic resources due to wildfires, insect infestation, and disease.

Note also that it should be absolutely clear that nothing in HR 1904 changes the substance of environmental laws that the Forest Service and BLM must obey and under which litigants can sue. Moreover, limitations on preliminary injunctions included in HR 1904 do nothing to affect parties from receiving a final decision on the merits and appropriate relief. Cognizant of this fact, the Forest Service and BLM will have an incentive to act within their statutory authority and act responsibly in making any hazardous fuel reduction decisions. Nothing in any limitations on preliminary injunctions precludes ex post review under HR 1904, which should lead to caution on the part of the Forest Service and BLM to take wise action and final review should provide a remedy if these agencies act improvidently.

The admonishment that judicial review under HR 1904 should be heard within 100 days is similarly sound. Again, judges are under no binding requirement by this provision. It does nonetheless send an important signal of Congress's priorities and preferences and underscores the unique nature of cases that hinder the efficient, timely management of fragile forest resources. Furthermore, this provision should not be expected to cause judges to divert their attention from more important cases - the legislation admonishes completion within 100 days only "to the maximum extent practicable." Article III judges are well-attuned to the equities involved in controlling their dockets and should be expected to take into account Congress's admonishment without unduly prejudicing any other cases.

Finally, to the extent Congress is concerned about the burden on the federal judiciary from HR 1904, the solution is not to reject the sound policy contained therein. Instead of risking the health of our nation's forest resources, those with such concerns might consider expanding judicial resources and streamlining the appointments process to eliminate vacancies on many of the federal courts. There have often been decisions to grant the federal courts additional resources when new legislative priorities demand it. To the extent any such additional resources become required, the priorities for forest health and conservation identified in HR 1904 should be no exception.

VI. Conclusion

I encourage Congress to pass HR 1904, the Healthy Forests Restoration Act of 2003. I again thank the Committee for allowing me to provide these comments.