



## Prepared Statement of

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**U.S. House Natural Resources Committee, Subcommittee on Federal Lands**  
**Hearing on H.R. 200, H.R. 1473, H.R. 1567, and H.R. 1586**  
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### **Main Points**

- Closing the Forest Service’s 80-million-acre forest-restoration backlog is essential to conserve forests, maintain wildlife habitat, and tackle the wildfire crisis.
- The Forest Service cannot shrink the backlog if it remains bogged down by bureaucracy and litigation.
- In *Cottonwood*, the Ninth Circuit invented an unnecessary bureaucratic obstacle to forest restoration and encouraged litigation to upend this work, while producing no benefits for listed species.
- Numerous conservation organizations and three presidential administrations have supported fixing *Cottonwood* to streamline needed forest restoration.

### **Introduction**

Chairman Tiffany, Ranking Member Neguse, and members of the committee, thank you for the invitation to participate in this important discussion on forest conservation and, especially, how the Ninth Circuit’s controversial *Cottonwood* decision<sup>1</sup> interferes with the Forest Service’s ability to restore forests, protect wildlife habitat, and tackle the wildfire crisis.

My name is Jonathan Wood and I’m the vice president of law and policy at the Property and Environment Research Center. PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative applied conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Forest health has been a primary focus of PERC’s research and policy efforts including

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<sup>1</sup> *Cottonwood Environmental Law Center v. Forest Service*, 789 F.3d 1075 (9th Cir. 2015).



major reports on policies that discourage collaborative forest restoration and prescribed burning.<sup>2</sup> Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

Bozeman has been ground-zero for *Cottonwood* and for litigation challenging forest restoration generally. In fact, one of the targets of the *Cottonwood* case was the Bozeman Municipal Watershed Project in PERC’s backyard.<sup>3</sup> The project area is the main source of Bozeman’s water. It’s also where I (like countless other Bozeman residents) teach my kids to hike, appreciate nature, and enjoy the outdoors. The *Cottonwood* case, brought by self-described “radical environmentalists,”<sup>4</sup> contributed substantially to a 15-year-delay in the project and kept Bozeman exposed to the risk that a catastrophic wildfire would mar our viewshed, scorch wildlife habitat and cherished recreation areas, and leave the city with a mere 3 days of drinking water.<sup>5</sup>

Our national forests face an 80-million-acre backlog in needed restoration—a backlog that leaves our forests with excess fuels, more vulnerable to insects and disease, and less resilient to climate change and drought.<sup>6</sup> The Forest Service has struggled to treat more than a few millions of those acres per year.<sup>7</sup> And as reflected in Chairman Tiffany’s ACRES Act (H.R. 1567), the Forest Service’s method of tracking and reporting these acres has historically overstated the agency’s progress toward clearing the backlog.<sup>8</sup>

To tackle the wildfire crisis fueled by this backlog, the Biden administration has developed an ambitious strategy to significantly increase its forest restoration work over the next decade, including treating an additional 20 million acres of national forest above the business-as-usual rate.<sup>9</sup> Meeting that lofty but critical target will require greater efficiency in the years-long process of developing, approving, and implementing forest restoration projects.<sup>10</sup>

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<sup>2</sup> See Holly Fretwell & Jonathan Wood, [Fix America’s Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis](#), PERC Public Lands Report (2021); Jonathan Wood & Morgan Varner, [Burn Back Better: How Western States Can Encourage Prescribed Fire on Private Lands](#), PERC Policy Report (2023).

<sup>3</sup> See *Cottonwood*, 789 F.3d at 1080. See also Forest Service, [Bozeman Municipal Watershed Project Record of Decision](#) (2010).

<sup>4</sup> See John Meyer, [Sen. Steve Daines ought to take a hike in our forests](#), Bozeman Daily Chronicle (June 21, 2022).

<sup>5</sup> See *BMWP Record of Decision*, *supra* n. 3 at 6.

<sup>6</sup> See Forest Service, [Forest Products Modernization](#) (last visited Mar. 17, 2023). See also *Fix America’s Forests*, *supra* n. 2 at 4–16.

<sup>7</sup> See Forest Service, [USDA Forest Service Celebrates Historic Investments in 2022](#) (Feb. 6, 2023) (reporting that the Service treated 3.2 million acres in 2022); *Fix America’s Forests*, *supra* n. 2 at 4.

<sup>8</sup> See Accurately Counting Risk Elimination Solutions (ACRES) Act, H.R. 1567. See also GAO, [Wildland Fire Management: Additional Actions Required to Better Identify and Prioritize Lands Needing Fuels Reduction](#) (2003); GAO, [Western National Forests: A Cohesive Strategy is Needed to Address Catastrophic Wildfire Threats](#) (1999).

<sup>9</sup> See Forest Service, [Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America’s Forests](#) (2022).

<sup>10</sup> See Eric Edwards & Sara Sutherland, [Does Environmental Review Worsen the Wildfire Crisis?](#), PERC Policy Brief (2022). See also *Confronting the Wildfire Crisis*, *supra* n. 9 at 30 (predicting that existing “shovel ready” projects could be completed in years 1 and 2 of the plan); Forest Service, [National Prescribed Fire Program Review](#) App. A 21 (2022) (identifying the need to “streamline required environmental analysis and consultations”).



Allowing the temporary *Cottonwood* fix to expire and the Ninth Circuit’s decision to go into full effect would be a significant and unnecessary setback for forest conservation.<sup>11</sup> That’s why the Obama, Trump, and Biden administrations have expressed concern about *Cottonwood*,<sup>12</sup> why PERC and other conservation groups have supported a fix,<sup>13</sup> and why legislative proposals to reverse it, like Representative Rosendale’s FIR Act (H.R. 200), have consistently received bipartisan support.<sup>14</sup>

### **The Restoration Backlog Fueling the Wildfire Crisis**

According to the Forest Service, forty percent of the acres in the national forest system need restoration to address excess fuels, invasive species, disease and insect infestations, and other conservation challenges.<sup>15</sup> When the Department of the Interior’s 54-million-acre restoration backlog is added in,<sup>16</sup> the total area needing urgent help is larger than the state of California. The wildfire crisis is the most visible symptom of this problem but it is not the only one. Due to the backlog, many western forests are stocked full with overly dense, unhealthy, and dying stands that provide lower quality habitat, are more vulnerable to insects and disease, and are less resilient to climate change and drought.<sup>17</sup>

As with any complex phenomenon, no single factor fully explains declining forest health or the wildfire crisis. A changing climate has increased the risk of drought and extended the west’s “wildfire season.”<sup>18</sup> A massive jump in the number of people living near or recreating in forests has increased opportunities for human-caused ignitions.<sup>19</sup> But the largest factor, according to a study by Forest Service scientists, is excessive forest density and the buildup of fuels due to decades of failed fire suppression policies.<sup>20</sup>

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<sup>11</sup> See Congressional Research Service, [Legal and Practical Implications of the Ninth Circuit’s Cottonwood Environmental Law Center v. U.S. Forest Service Decision Under the Endangered Species Act](#) (2022) (discussing the temporary *Cottonwood* fix Congress enacted in 2018).

<sup>12</sup> See Pet. for Cert., *U.S. Forest Serv. v. Cottonwood*, No. 15-1387 (filed June 10, 2016); Fish & Wildlife Serv., *Proposed Rule to Amend Consultation Requirements*, 86 Fed. Reg. 2373 (January, 12, 2021); Deputy Chief Christopher French, Forest Service, Response to Questions for the Record, Senate Comm. on Energy and Natural Res. Hearing on S. 2561 (October 21, 2021) (hereinafter Deputy Chief French QFR). For ease of access, this document is appended to this testimony.

<sup>13</sup> See [Letter from PERC and Other Conservation Organizations to Senators Schumer, Carper, Manchin, Capito, and Barasso](#) (Sept. 20, 2022); News Release, [Daines, Tester, Simpson, Peterson Introduce Legislation to Reverse Disastrous Court Ruling](#) (Mar. 9, 2017) (noting support from the National Wildlife Federation, Trout Unlimited, Boone and Crockett Club, Congressional Sportsmen’s Foundation, Wildlife Management Institute, and other conservation groups).

<sup>14</sup> See [Letter from Senators Daines, Risch, Tester, Crapo, and King to the President](#) (Jan. 31, 2023) (urging the President to support a permanent *Cottonwood* fix); Congressional Sportsmen’s Found., [Two CSF Conservation Priorities Pass Senate Committee with Strong Bipartisan Support](#) (July 25, 2022).

<sup>15</sup> See *Fix America’s Forests*, *supra* n. 2 at 4.

<sup>16</sup> GAO, [Wildland Fire: Federal Agencies’ Efforts to Reduce Wildland Fuels and Lower Risk to Communities and Ecosystems](#) (2019).

<sup>17</sup> See *Fix America’s Forests* n. 2 at 8–13.

<sup>18</sup> See *Burn Back Better*, *supra* n. 2 at 4.

<sup>19</sup> See *id.*

<sup>20</sup> See Sean A. Parks et al., [High-Severity Fire: Evaluating Its Key Drivers and Mapping Its Probability Across Western US Forests](#), *Environmental Research Letters* (2018).

Fire is nothing new to western forests, which are adapted to flames due to climate, terrain, and indigenous tribes' use of controlled fire for millennia.<sup>21</sup> However, recent catastrophic wildfires are far more destructive than historical fire regimes. They are more likely to threaten old-growth trees, wipe out habitat for wildlife, and cause erosion that degrades watersheds and fish habitat.<sup>22</sup> Even mighty giant sequoias—some of which have withstood life in California's rugged Sierra Nevada mountains for thousands of years—are at risk. The National Park Service estimates that 10–20% of the world's remaining members of this species have been killed by wildfires since 2020.<sup>23</sup> Wildfire emissions are also a major climate concern. California's record wildfire year in 2020, for example, released twice the amount of emissions that the state cut between 2003 and 2019.<sup>24</sup>

Since 2005, the United States has three times eclipsed 10 million acres burned by wildfires in a year—an unfathomable total just a few decades ago—with the vast majority of that acreage concentrated in the West.<sup>25</sup> And due to growing populations near forests, modern fires also threaten communities and property in ways not seen before.<sup>26</sup> Nearly 100,000 structures have burned in wildfires since 2005, with two-thirds of that destruction occurring since 2017.<sup>27</sup> California's Camp Fire in 2018 was the deadliest and most destructive in that state's history, killing 85 people and destroying most of the town of Paradise, CA in less than 24 hours.<sup>28</sup>

Forest restoration efforts, including mechanical thinning and prescribed fire, are urgently needed to reduce wildfire damage and promote forest resilience. The effectiveness of these tools was demonstrated in 2021 during Oregon's Bootleg Fire, which ultimately burned more than 400,000 acres.<sup>29</sup> Firefighters reported that where both treatments had been applied, fire intensity was reduced, the crowns of trees were left intact, and the blaze became a more manageable ground fire. Reports also indicated that an area where scheduled prescribed burns had been delayed suffered more damage than areas where treatments had been completed.<sup>30</sup>

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<sup>21</sup> See *Burn Back Better*, *supra* n. 2 at 4.

<sup>22</sup> See *Fix America's Forests*, *supra* n. 2 at 8–10.

<sup>23</sup> See Dr. Kristen Shive, et al., [2021 Fire Season Impacts to Giant Sequoias](#) (last visited Mar. 19, 2023).

<sup>24</sup> Michael Jerrett, Amir S. Jina, Miriam E. Marlier, [Up in smoke: California's greenhouse gas reductions could be wiped out by 2020 wildfires](#), 300 *Env'tl Pollution* 119888 (2022).

<sup>25</sup> See *Fix America's Forests*, *supra* n. 2 at 10–11.

<sup>26</sup> See *Burn Back Better*, *supra* n. 2 at 4.

<sup>27</sup> Headwaters Economics, [Wildfires Destroy Thousands of Structures Each Year](#) (2022).

<sup>28</sup> National Institute of Standards & Technology, [New Timeline of Deadliest California Wildfire Could Guide Lifesaving Research and Action](#) (Feb. 8, 2021).

<sup>29</sup> See *Burn Back Better*, *supra* n. 2 at 5.

<sup>30</sup> See Sara Sutherland & Eric Edwards, [How Environmental Red Tape Inflames Wildfire Risk](#), PERC Reports (2022).



The Forest Service has simply not been able to keep up with forest restoration needs. From 2009 to 2018, it averaged restoration treatments on less than 4 million acres per year.<sup>31</sup> But this does not mean that the Service would catch up in 20 years, as dividing an 80-million-acre backlog by 4 million acres per year would suggest. The Forest Service tracks acres treated in a non-intuitive way that precludes such easy comparison. If a Forest Service projects calls for treating 1,000 acres with commercial thinning, non-commercial thinning, piling and burning, and broadcast burning over 4 years, it may count this project as 4,000 acres treated: 1,000 commercially thinned in year 1; 1,000 non-commercially thinned in year 2; 1,000 pile-burned in year 3; and 1,000 prescribed burned in year 4. For more than two decades, the GAO has criticized the Forest Service's approach as creating perverse incentives and generating misleading data.<sup>32</sup> Requiring accurate reporting on treated acres, Chairman Tiffany's proposed ACRES Act (H.R. 1567) would help address this problem and better ensure responsible management.

### **The Bozeman Municipal Watershed Project and the *Cottonwood* Decision**

In 2004, the Custer-Gallatin National Forest and the city of Bozeman, Montana determined that wildfire risks threatened 80% of the city's water supply, along with valuable wildlife habitat, recreational areas, and homes and infrastructure. The Forest Service and the city began work on a plan to fix the problem by restoring a forested area on the outskirts of town.<sup>33</sup>

Carrying that plan out, however, would prove much more difficult. It took three years to prepare a draft NEPA analysis.<sup>34</sup> While the Forest Service was working on finalizing it, a federal court reversed the delisting of the local grizzly bear population, triggering additional Endangered Species Act analysis and delaying a final decision.<sup>35</sup> When that analysis was completed, several organizations objected to it. The Forest Service resolved those objections in 2011 and formally approved the project, 7 years after the process began. At that point several especially litigious organizations filed lawsuits challenging the project.<sup>36</sup>

In *Cottonwood*, an environmental litigation group challenged the Bozeman Municipal Watershed Project and two other projects under the Endangered Species Act. In 2009, while the projects were being developed, the Fish and Wildlife Service designated nearly 10,000 square miles within the

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<sup>31</sup> See *Federal Agencies' Efforts to Reduce Wildlife Fuels*, *supra* n. 16.

<sup>32</sup> See *Wildland Fire Management*, *supra* n. 8; *Western National Forests*, *supra* n. 8.

<sup>33</sup> See *BMWP Record of Decision*, *supra* n. 3.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *Salix v. Forest Service*, 944 F. Supp. 2d 984 (D. Mont. 2013); *Alliance for the Wild Rockies v. Krueger*, 950 F. Supp. 2d 1196 (D. Mont. 2013). Between 2007 and 2017, more litigation challenging forest restoration projects was filed in the District of Montana than anywhere else in the country. See *Fix America's Forests*, *supra* n. X at 38 (reporting that Montana had 50% more of this litigation than the second-place district, the Eastern District of California). A handful of especially litigious groups are responsible for this concentration.

Greater Yellowstone Ecosystem as critical habitat for the Canada lynx.<sup>37</sup> In analyzing the project, the Forest Service thoroughly considered this development and concluded that the project would have no impact on the critical habitat.<sup>38</sup> Nonetheless, the plaintiffs demanded the project be stopped because the Forest Service had not re-initiated consultation with the Fish and Wildlife Service over a forest plan that had been completed years before the critical habitat designation was made.<sup>39</sup> A federal court issued an injunction blocking the project while the litigation played out.<sup>40</sup>

Section 7 of the Endangered Species Act requires federal agencies to consult with the Fish and Wildlife Service (or, for aquatic species, the National Marine Fisheries Service) whenever any “action” it authorizes, funds, or carries out is likely to jeopardize a listed species or adversely modify its critical habitat.<sup>41</sup> The statute suggests consultation is a one-time event that must be completed within 90 or 180 days of when the federal agency requests the Fish and Wildlife Service’s opinion.<sup>42</sup> However, the Fish and Wildlife Service has, by regulation, defined it as a continuing obligation. Under that regulation, the agency must re-consult for at least some actions whenever a new species is listed, new critical habitat is designated, or “new information” is discovered.<sup>43</sup> Thus, agencies routinely reconsult over ongoing projects, including forest restoration projects.

The question in *Cottonwood*, however, was whether the Forest Service must also reinitiate consultation over the forest plan. These plans provide a general road map for future management decisions but do not authorize any on-the-ground activity.<sup>44</sup> That must be done through a subsequent action, like the Bozeman Municipal Watershed Project, that goes through its own environmental analysis and ESA consultation. Prior to *Cottonwood*, the apparent answer to this question was “no.” The Supreme Court had, interpreting essentially identical language in the National Environmental Policy Act, held that land management plans like this are not continuing actions and, therefore, do not require supplemental analysis.<sup>45</sup> The Tenth Circuit had considered the precise question in *Cottonwood* and held that once a federal land management plan is issued the action is complete and Section 7’s consultation requirement no longer applies.<sup>46</sup>

The Ninth Circuit went the other way, holding that federal agencies must reinitiate consultation at the forest plan level whenever there is a new species listed, critical habitat designated, or any other

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<sup>37</sup> See Susan Gallagher, [Protected land for lynx expands](#), Seattle Times (Feb. 25, 2009).

<sup>38</sup> See *BMWP Record of Decision*, *supra* n. 3 at 26.

<sup>39</sup> See *Salix*, 944 F. Supp. 2d 984.

<sup>40</sup> *Id.*; *Alliance for the Wild Rockies*, 950 F. Supp. 2d 1196.

<sup>41</sup> 16 U.S.C. § 1536(a).

<sup>42</sup> *Id.* § 1536(a)(3) (referring to “prospective agency action”); *id.* § 1536(b) (setting deadlines for completing consultation)

<sup>43</sup> 50 C.F.R. § 402.16.

<sup>44</sup> *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007).

<sup>45</sup> *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

<sup>46</sup> *Forest Guardians*, 478 F.3d 1149.



new information.<sup>47</sup> Essentially reading the word “action” out of the statute, the court held that so long as an agency could take some future hypothetical action affecting the species, like amending an existing forest plan, then it must perpetually consult over past, completed actions—even those that have no on-the-ground impact on the species.<sup>48</sup>

The Obama administration urged the Supreme Court to reverse this outlier decision, explaining that it “has the potential to cripple the Forest Service and BLM’s land-management functions” and to distract the Fish and Wildlife Service from activities that could actually benefit listed species.<sup>49</sup> Unfortunately, the Supreme Court declined to review the Ninth Circuit’s aberrant decision.<sup>50</sup>

Soon after the Supreme Court passed on the case, the Forest Service requested consultation with the Fish and Wildlife Service. That process would take nearly a year, with several rounds of back-and-forth between the two agencies.<sup>51</sup> According to the Forest Service, this single reconsultation cost the agency more than \$250,000.<sup>52</sup> And, ultimately, it concluded that the forest plan was not likely to destroy or adversely modify lynx critical habitat and, therefore, required no change.<sup>53</sup>

In 2020, 16 years after the project was initiated, the federal court lifted the injunction and allowed the project to finally proceed. Notably, the extended delays and mountain of additional paperwork did not result in any material change to the project or benefit to any species. The project is being implemented today in exactly the way it was proposed more than a decade ago. But the attorneys who brought the case made \$300,000 in attorney’s fees paid by the government.<sup>54</sup>

And, of course, the litigation group behind *Cottonwood* promptly filed a new lawsuit challenging the project, arguing that all of the analysis should be redone yet again because a new scientific study had been published.<sup>55</sup> That case, fortunately, didn’t go very far and the project is currently being implemented.<sup>56</sup>

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<sup>47</sup> *Cottonwood Environmental Law Center*, 789 F.3d at 1084–88.

<sup>48</sup> *Id.*

<sup>49</sup> See Pet. for Cert., *supra* n. 12.

<sup>50</sup> *Forest Serv. v. Cottonwood Env't L. Ctr.*, 137 S. Ct. 293 (2016).

<sup>51</sup> See Fish and Wildlife Service, [Biological Opinion on the Effects of the Northern Rockies Lynx Management Direction on Designated Critical Habitat for Canada Lynx](#) (2017).

<sup>52</sup> Deputy Chief French QFR, *supra* n. 12 at 1–2.

<sup>53</sup> See *Biological Opinion on the Effects of the Northern Rockies Lynx Management Direction*, *supra* n. 51 at 31.

<sup>54</sup> See [Stipulated Settlement Agreement](#), *Cottonwood Env't. Law Ctr. v. Forest Service*, 12-cv-45 (Apr. 27, 2017).

<sup>55</sup> See Helena Dore, *Federal judge tosses lawsuit against three southwest Montana timber projects*, Bozeman Daily Chron. (Dec. 19, 2020).

<sup>56</sup> See *id.*



### **The Need for a *Cottonwood* Fix**

Soon after the Supreme Court declined to review *Cottonwood*, Congress responded by passing a temporary fix. That fix provided that neither the Forest Service nor the Bureau of Land Management needed to reinitiate consultation over completed land management plans, with certain qualifications, whenever a new species is listed or critical habitat is designated.<sup>57</sup> That decision staved off, even if only temporarily, *Cottonwood*'s full negative effects.

Even so, the exceptions to the temporary fix have given a preview of what's to come without a permanent fix. According to the Forest Service, 27 lawsuits had been filed and another 49 had been threatened as of October of 2021.<sup>58</sup> Those cases resulted in five injunctions.<sup>59</sup> Today, the temporary fix expires and, without further action from Congress, we're about to see the full effect of the Ninth Circuit's decision.

Congressman Rosendale's Forest Information Reform Act (H.R. 200) would permanently fix *Cottonwood* by clarifying that perpetual reconsultations over forest plans are not required. Notably, it would not affect reconsultation over individual projects to implement these plans and, therefore, would not sacrifice any species conservation.

#### *A Cottonwood fix is necessary to reduce the forest-restoration backlog and tackle the wildfire crisis*

In 2022, the Biden administration released a 10-year strategy to tackle the wildfire crisis, which calls for restoring 20 million acres of national forest system land over and above the Forest Service's usual workload.<sup>60</sup> To meet that ambitious but essential goal, the agency needs a reliable and efficient process for developing, approving, and implementing forest restoration projects. Unfortunately, the current process is slow and cumbersome. A recent study by PERC found that on average it takes 3.6 years after the environmental review process is initiated to begin on-the-ground work for a project involving mechanical treatment and 4.7 years for a project involving a prescribed burn.<sup>61</sup> If an environmental impact statement is required, these timelines shoot up to 5.3 and 7.2 years, respectively.<sup>62</sup> For litigated projects, tack on an additional 2 years.<sup>63</sup> The Wildfire Crisis Strategy's 10-year goals cannot be met if projects are tied up for most of that time in paperwork.

Without a permanent fix, *Cottonwood* would add additional delays and bureaucracy to forest restoration projects not captured in the above figures. According to Forest Service estimates, the

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<sup>57</sup> P.L. 115-141, § 208, 132 Stat. 1065 (2018).

<sup>58</sup> Deputy Chief French QFR, *supra* n. 12 at 2.

<sup>59</sup> *See id.*

<sup>60</sup> *See Confronting the Wildfire Crisis*, *supra* n. 9.

<sup>61</sup> *See Does Environmental Review Worsen the Wildfire Crisis?*, *supra* n. 10 at 8.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 9–10.





temporary fix’s expiration means that the agency must reinitiate consultation over 187 species across 36 national forests.<sup>64</sup> This will take the agency 5-10 years to complete at a cost of several million dollars—money which, otherwise, could fund on-the-ground restoration work.<sup>65</sup> Vicki Christiansen, the former Forest Service Chief, summed up the problem well: “the consequences are severe.... [T]his Cottonwood decision is duplicative.... It takes numerous resources away from getting work done on the ground.”<sup>66</sup>

Endangered and threatened species and other wildlife may pay the price for bureaucratic delays. In 2011, the Klamath National Forest proposed a project to reduce wildfire risks in northern spotted owl habitat.<sup>67</sup> For ten years, the project was held up due to objections over impacts to the owl.<sup>68</sup> Ultimately, 2021’s Antelope Fire “burned through the site before a single chainsaw touched a tree, destroying the owl habitat that the environmental groups were trying to save,” according to the Sacramento Bee.<sup>69</sup> And the negative impacts to wildlife can continue long after the last flame is put out. In New Mexico, Rio Grande cutthroat trout are still struggling a decade after a catastrophic wildfire burned through Bandelier National Monument.<sup>70</sup>

Although *Cottonwood* is limited to the Ninth Circuit, its effects will be felt far beyond. The Ninth Circuit covers Arizona, California, Oregon, Washington, Idaho, Montana, Alaska, and Hawaii, states which contain a disproportionate share of the national forest system.<sup>71</sup> When forests in these states burn, they release smoke that travels hundreds of miles, exposing countless communities to harmful pollutants.<sup>72</sup> They also threaten landscapes and species valued by people around the country and, indeed, around the world.<sup>73</sup>

Projects in neighboring states may also be affected if litigants can find a way of filing cases challenging them in the Ninth Circuit. Such stark differences in the law among circuits encourages forum shopping. In 2019, an environmental litigation group filed a case in Arizona seeking to block forest restoration projects throughout Region 3, which includes all of New Mexico.<sup>74</sup> The Forest Service identified the injunction from that case—and the region’s foresters need to catch up after

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<sup>64</sup> Deputy Chief French QFR, *supra* n. 12 at 2.

<sup>65</sup> *See id.*

<sup>66</sup> *See Legal and Practical Implications, supra* n. 11 at 10.

<sup>67</sup> *See* Ryan Sabelow & Dale Kasler, [Wildfire scientists push back against C.A environmentalists](#), Sacramento Bee (Oct. 17, 2021).

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See* Susan Montoya Bryan, [Post-wildfire conditions result in poor recovery for fish](#), AP (Mar. 10, 2023).

<sup>71</sup> *See Fix America’s Forests, supra* n. 2 at 16. 85% of cases challenging forest restoration projects are filed in courts within the Ninth Circuit. *See id.* at 38.

<sup>72</sup> *See* Nadja Popovich & Josh Katz, [See How Wildfire Smoke Spread Across America](#), N.Y. Times (July 21, 2021). *See also* EPA, [Why Wildfire Smoke is a Health Concern](#) (last accessed Mar. 2, 2023).

<sup>73</sup> *See* Kyle Dickman, [To Save Sequoias From Wildfire, We Must Save Them From Ourselves](#), Outside (July 13, 2022).

<sup>74</sup> *See WildEarth Guardians v. Fish & Wildlife Service*, 416 F. Supp. 3d 909 (D. Ariz. 2019).

missing a year of their work because of it—as a factor in the prescribed burn that grew out of control and became the 340,000-acre Hermit’s Peak fire.<sup>75</sup>

*Reversing Cottonwood would not undermine the Endangered Species Act*

While reversing *Cottonwood* would remove a significant obstacle to forest restoration, it wouldn’t sacrifice protections for species. As the Tenth Circuit explained in *Forest Guardians*, forest plans and similar land management plans are not self-implementing.<sup>76</sup> They are, the court explained, “more akin to ‘road maps’ . . . creating a vision” for future forest management decisions.<sup>77</sup> These plans can only affect listed species by being implemented through individual projects. And all of these projects must already go through consultation and address impacts to newly listed species, designated critical habitat, or discovered information.

Fixing *Cottonwood* would also not interfere with implementation of the Endangered Species Act. The rule announced in the case did not exist during the statute’s first four decades. It has never applied in most of the country. And even where and when it has applied, Congress has sharply limited its application through the temporary fix. Thus, allowing the decision to go fully into effect is likely to upset settled implementation of the Endangered Species Act, rather than the reverse, by significantly increasing the burden on the Fish and Wildlife to do a significant number of duplicative consultations that distract from its on-the-ground efforts to recover species.

*Cottonwood*’s supporters claim that it is essential to species conservation and imposes virtually no burdens on the Forest Service.<sup>78</sup> But their arguments are self-refuting. One claimed a document “debunked” any argument that *Cottonwood* produces delays because the Custer-Gallatin National Forests’ reconsultation over the lynx critical habitat took less than 4 months.<sup>79</sup> But the document actually shows that the consultation took nearly a year.<sup>80</sup> The Forest Service was only able to limit the delay this much by devoting 400 employee days to the work at a cost of \$250,000.<sup>81</sup> Another group asserts that fixing *Cottonwood* would “gut” the consultation process.<sup>82</sup> The only example they cite for this hyperbolic assertion is a reconsultation over several frog species in the Sierra Nevadas.<sup>83</sup>

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<sup>75</sup> See Forest Service, [Gallinas-Las Dispensas Prescribed Fire Declared Wildfire Review](#) (2022).

<sup>76</sup> See 478 F.3d at 1154.

<sup>77</sup> See *id.* at 1155.

<sup>78</sup> See Bart Johnsen-Harris & Lauren McCain, [Cottonwood Overhaul Threatens Strength of the ESA](#), Defenders of Wildlife (Dec. 22, 2022); Press Release, [Completion of Northern Rockies Lynx Analysis Discredits Montana Senators’ Rationale for Weakening Endangered Species Act](#), Center for Biological Diversity (Dec. 4, 2017).

<sup>79</sup> See [Completion of Northern Rockies Lynx Analysis](#), *supra* n. 78.

<sup>80</sup> See [Biological Opinion on the Effects of the Northern Rockies Lynx Management Direction](#), *supra* n. 51 at 1, 4 (stating that the consultation was initiated on Nov. 2, 2016 and concluded on Oct. 18, 2017).

<sup>81</sup> Deputy Chief French QFR, *supra* n. 12 at 2.

<sup>82</sup> See [Cottonwood Overhaul Threatens Strength of the ESA](#), *supra* n. 78.

<sup>83</sup> See [Letter from Alaska Wilderness League, et al., to House and Senate Leadership](#) (Dec. 13, 2022).

But that reconsultation resulted in no change to the forest plan or benefits to the species, it was simply duplicative.<sup>84</sup> And, of course, these examples do not reflect what would happen now that the temporary fix is expiring and the Forest Service suddenly faces 5-10 years' worth of reconsultations to complete all at once at a cost of time and money the agency doesn't have to spare.<sup>85</sup>

*Cottonwood was wrongly decided*

Finally, Congress should fix *Cottonwood* because the Obama administration's position in the case was correct and the Ninth Circuit's decision was not. The Endangered Species Act does not impose a free-floating consultation requirement for federal agencies. Instead, it requires that they consult over any "action" they approve, fund, or carry out that is likely to harm species or their critical habitats.<sup>86</sup> This limits consultation to proposed or ongoing agency actions. Once a forest plan or other land-use plan is finalized, the action is complete and the consultation requirement no longer applies.<sup>87</sup> This conclusion is compelled by the logic of a 2004 Supreme Court decision.<sup>88</sup> And it is explicitly confirmed by the Tenth Circuit.<sup>89</sup>

The Ninth Circuit, on the other hand, essentially read the action requirement out of the statute. According to it, so long as an agency has the power to potentially take some future action that might affect a species, it must perpetually reconsult over its past, completed actions. As the Obama administration warned in urging Supreme Court review of the case, there is no limiting principle to this theory. Unless it is reversed, there's no reason to expect it to be limited to forest plans and other land management plans. Instead, every agency could have to repeatedly consult over every regulation they've ever issued every time a new species is listed, critical habitat is designated, or a new study comes out.<sup>90</sup> And supporters of *Cottonwood* have already indicated they want to stretch the decision

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<sup>84</sup> See also Fish and Wildlife Service, [\*Amendment of the Programmatic Biological Opinion on Nine Forest Programs on Nine National Forests in the Sierra Nevada of California for the Endangered Sierra Nevada Yellow-legged Frog, Endangered Northern Distinct Population Segment of the Mountain Yellow-legged Frog, and Threatened Yosemite Toad\*](#) 2, 58 (June 15, 2017) (deeming the Forest Service's existing standards and best management practices were already sufficient). These groups have also emphasized the remarkably short amount of time spent on this consultation (10 days). But this amount of time is misleading. In that case, the Forest Service had previously consulted after the Service proposed critical habitat for the frogs and toad and prospectively addressed and regulated the proposed areas as if they had already been designated. See [\*Programmatic Biological Opinion on Nine Forest Programs on Nine National Forests in the Sierra Nevada of California for the Endangered Sierra Nevada Yellow-legged Frog, Endangered Northern Distinct Population Segment of the Mountain Yellow-legged Frog, and Threatened Yosemite Toad\*](#) (Dec. 19, 2014). See also *California Cattlemen's Assoc. v. Fish & Wildlife Service*, 369 F.Supp.3d 141 (D.D.C. Mar. 27, 2019) (denying grazing permittees' standing to challenge the critical habitat designation because the Forest Service began regulating to conserve "essential habitat" more than a decade earlier and the designation led to no new restrictions).

<sup>85</sup> See Deputy Chief French QFR, *supra* n. 12 at 2.

<sup>86</sup> 16 U.S.C. 1536(a).

<sup>87</sup> See Pet. for Cert., *supra* n. 12 at 28–32.

<sup>88</sup> See *Southern Utah Wilderness Alliance*, 542 U.S. at 73.

<sup>89</sup> See *Forest Guardians*, 478 F.3d at 1154–55.

<sup>90</sup> See Pet. for Cert., *supra* n. 12 at 28–32.



to other agencies.<sup>91</sup> Neither the Fish and Wildlife Service nor other federal agencies have the bandwidth for such an unlawful, unprecedented, and unnecessary expansion of the consultation requirement.

### **Conclusion**

Shrinking the 80-million-acre restoration backlog that fuels the wildfire crisis is an urgent conservation challenge. *Cottonwood* erects unnecessary red tape and encourages special-interest litigation that would hinder the Forest Service's ambitious 10-year goals in the Wildfire Crisis Strategy. Allowing the temporary *Cottonwood* fix to expire and the decision to fully go into effect would be a serious setback to forest restoration. Congress should act now to fix the Ninth Circuit's errant decision.

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<sup>91</sup> See Letter from Alaska Wilderness League, *supra* n. 83 at \*3 (suggesting *Cottonwood* be applied to the Environmental Protection Agency, Army Corps of Engineers, Department of Transportation, Federal Emergency Management Agency, and other agencies).