

Comment on How to Fix the Ninth Circuit *Cottonwood* Decision through Regulation

Property and Environment Research Center (PERC)

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Main Points:

- The Fish and Wildlife Service should finalize the proposed rule to fix the Ninth Circuit decision that impedes efficient forest restoration by requiring redundant analysis under the Endangered Species Act.
- America’s wildfire crisis is getting worse. There is broad agreement that increasing active forest restoration efforts, such as mechanical thinning and prescribed burning, will improve ecosystem health and reduce the risk of catastrophic wildfires.
- 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.

The Property and Environment Research Center (PERC) respectfully submits this comment in response to the Department of the Interior’s request for recommendations to reduce regulatory burdens while promoting responsible stewardship of America’s public lands and resources. Specifically, PERC urges the Fish and Wildlife Service to fix the Ninth Circuit *Cottonwood*¹ decision by finalizing the rule it proposed in January 2021.² This rule would amend Fish and Wildlife Service regulations to clarify there is not a duty to reinitiate consultation under the Endangered Species Act (ESA) for “approved land management plan[s] prepared” under the Federal Land Policy and Management Act and National Forest Management Act.³ This proposed rule has already received public comment and remains pending. This move will remove duplicative layers of analysis to improve forest restoration and help win the wildfire wars without compromising protections for imperiled wildlife.

¹ *Cottonwood Env’t L. Ctr. v. Forest Serv.*, 789 F.3d 1075 (2015).

² Regulations for Interagency Cooperation, 86 Fed. Reg. 2373 (proposed Jan. 12, 2021).

³ *Id.* at 2374.

The Property and Environment Research Center

PERC is the national leader in market solutions for conservation, with over 45 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. Unlike other conservation groups, PERC is firmly committed to private property rights and pursuing conservation through voluntary markets and incentives, rather than top-down regulation. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

The Need for Forest Restoration

According to the Forest Service, about 40% of the acres in the national forest system are in need of restoration.⁴ When the Department of the Interior's 54-million-acre restoration backlog is added in,⁵ the total area of federal land that needs 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 of 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.⁶

Fire is nothing new to western forests, which were traditionally adapted to flames due to climate, terrain, and Indigenous tribes' use of controlled fire for millennia.⁷ 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.⁸ Even mighty giant sequoias, one of the most fire-adapted tree species, are at risk. The National Park Service estimates that 10–20% of the world's remaining sequoias have been killed by wildfires since 2020.⁹

Forest restoration efforts, including mechanical thinning and prescribed fire, are urgently needed to reduce wildfire damage and promote forest resilience. A new meta-analysis published in the journal *Forest Ecology and Management* found that combining mechanical thinning with prescribed burns

⁴ Holly Fretwell & Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis* 4, PERC Public Lands Report (Apr. 12, 2021). The Forest Service manages 193 million acres of land, 80 million of which are in need of restoration, according to the agency.

⁵ Government Accountability Office, *Wildland Fire: Federal Agencies' Efforts to Reduce Wildland Fuels and Lower Risk to Communities and Ecosystems* (Dec. 2019).

⁶ See Fretwell & Wood, *Fix America's Forests*, *supra* n.4 at 8–13.

⁷ See Jonathan Wood & Morgan Verner, *Burn Back Better* 4, PERC (Jan. 10, 2023).

⁸ See Fretwell & Wood, *Fix America's Forests*, *supra* n.4 at 8–10.

⁹ See Dr. Kristen Shive et al., *2021 Fire Season Impacts to Giant Sequoias*, National Parks Service (2021).

reduces the severity of subsequent wildfires in an area by 62–72%.¹⁰ Importantly, the efficacy of these treatments did not vary among forest types assessed in the study and was high across a range of fire weather conditions. The effectiveness of these tools was demonstrated in 2021 during Oregon’s Bootleg Fire, which ultimately burned more than 400,000 acres.¹¹ 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.¹²

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, 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.¹³

Carrying that plan out, however, would prove much more difficult. It took three years to prepare a draft National Environmental Policy Act analysis.¹⁴ While the Forest Service was working on finalizing it, a federal court reversed the delisting of the local grizzly bear population, triggering additional ESA analysis and delaying a final decision.¹⁵ When that analysis was completed and the project was approved, 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.¹⁶

These lawsuits ended in the *Cottonwood* decision, where an environmental litigation group challenged the Bozeman Municipal Watershed Project and two other projects under the ESA. In 2009, while the projects were being developed, the Fish and Wildlife Service designated nearly 10,000 square miles

¹⁰ Kimberley Davis et. al., *Tamm Review: A Meta-Analysis of Thinning, Prescribed Fire, and Wildfire Effects on Subsequent Wildfire Severity in Conifer Dominated Forests of the Western US*, 561 *Forest Ecology and Mgmt.* 121885 (June 1, 2024).

¹¹ See Wood & Verner, *Burn Back Better*, *supra* n.7 at 5.

¹² See Sara Sutherland & Eric Edwards, *How Environmental Red Tape Inflames Wildfire Risk*, PERC Reports (June 23, 2022).

¹³ See Forest Serv., *Bozeman Municipal Watershed Project Record of Decision* (Nov. 2011) (hereinafter BMWP ROD).

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *Salix v. Forest Serv.*, 944 F. Supp. 2d 984 (D. Mont. 2013); *All. 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 Fretwell & Wood, *Fix America’s Forests*, *supra* n.4 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.

within the Greater Yellowstone Ecosystem as critical habitat for the Canada lynx.¹⁷ In analyzing the Bozeman Municipal Watershed Project, the Forest Service thoroughly considered this development and concluded that the project would have no impact on the critical habitat.¹⁸ Nonetheless, the plaintiffs argued the project should be stopped because the Forest Service had not re-initiated consultation with the Fish and Wildlife Service over the Custer-Gallatin’s overall forest plan that had been completed years before the critical habitat designation was made.¹⁹ A federal court issued an injunction blocking the project while the litigation played out.²⁰

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 may jeopardize a listed species or adversely modify its critical habitat.²¹ 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.²² However, the Fish and Wildlife Service has, by regulation, defined it as a continuing obligation. Under that regulation, the agencies must re-consult whenever a new species is listed, new critical habitat is designated, or “new information” is discovered.²³ Thus, agencies routinely reconsult after a development relevant to an ongoing project, including forest restoration projects.

The question in *Cottonwood*, however, was whether any new development also requires the Forest Service to reinitiate consultation over the general forest plan. These plans provide a general road map for future management decisions but do not authorize any on-the-ground activity.²⁴ 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 similar 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.²⁵ The Tenth Circuit had considered the precise question in *Cottonwood* and held

¹⁷ See Susan Gallagher, [Protected land for lynx expands](#), Seattle Times (Feb. 25, 2009).

¹⁸ [BMWP ROD](#), *supra* n.13 at 34.

¹⁹ See *Salix*, 944 F. Supp. 2d 984.

²⁰ *Id.*

²¹ 16 U.S.C. § 1536(a).

²² *Id.* § 1536(a)(3) (referring to “prospective agency action”); *id.* § 1536(b) (setting deadlines for completing consultation)

²³ 50 C.F.R. § 402.16.

²⁴ See *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007).

²⁵ *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004).

that once a federal land management plan is issued the action is complete and Section 7's consultation requirement no longer applies.²⁶

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 new information.²⁷ 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 then it must perpetually consult over past, completed actions—even those that have no on-the-ground impact on the species.²⁸

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.²⁹ Unfortunately, the Supreme Court declined to review the Ninth Circuit’s aberrant decision.³⁰

Soon after the Supreme Court passed on the case, the Forest Service requested consultation with the Fish and Wildlife Service over the forest plan. That process would take nearly a year, with several rounds of back-and-forth between the two agencies.³¹ According to the Forest Service, this single reconsultation cost the agency more than \$250,000.³² And, ultimately, it concluded that the forest plan was not likely to destroy or adversely modify lynx critical habitat and, therefore, required no change.³³ Once the plan-level reconsultation was complete, project-level consultations could be redone.

In 2020, 16 years after the project was initiated, the federal court lifted the injunction and allowed the project to finally proceed. Notably, extended delays and a 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.³⁴ And the litigation group promptly filed a new lawsuit challenging the project, arguing that all of the analysis should be redone yet again because

²⁶ See *Forest Guardians*, 478 F.3d 1149.

²⁷ *Cottonwood*, 789 F.3d at 1084–88.

²⁸ *Id.*

²⁹ See Pet. for Cert., *Forest Serv. v. Cottonwood Env’t L. Ctr.*, No. 15-1387 (filed June 10, 2016).

³⁰ *Forest Serv. v. Cottonwood Env’t L. Ctr.*, 137 S. Ct. 293 (2016).

³¹ See Fish and Wildlife Serv., *Biological Opinion on the Effects of the Northern Rockies Lynx Management Direction on Designated Critical Habitat for Canada Lynx* (Oct. 18, 2017).

³² Forest Serv., *Response to Questions for the Record, Senate Comm. on Energy and Natural Res.* Hearing on S. 2561 1-2 (October 21, 2021) (hereinafter Deputy Chief French QFR).

³³ See *Biological Opinion on Northern Rockies Lynx*, *supra* n.31 at 31.

³⁴ See *Stipulated Settlement Agreement, Cottonwood Envtl. L. Ctr. v. Forest Service*, 12-cv-45 (Apr. 27, 2017).

a new scientific study had been published.³⁵ That case, fortunately, didn't go very far, and the project is currently being implemented.³⁶

The Need for a *Cottonwood* Fix

According to Forest Service estimates, 36 national forests are vulnerable to having all forest restoration efforts ground to a halt by a *Cottonwood* lawsuit.³⁷ To avoid these lawsuits, the Forest Service has to reinitiate consultation for over 187 species, which will take the agency 5–10 years to complete at a cost of several million dollars—money that otherwise could fund on-the-ground restoration work.³⁸ 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.”³⁹

Often, endangered and threatened species and other wildlife pay the price for bureaucratic delays when a catastrophic wildfire wipes out a significant portion of their remaining habitat. In 2011, the Klamath National Forest proposed a project to reduce wildfire risks in northern spotted owl habitat.⁴⁰ For ten years, the project was held up due to objections over impacts to the owl.⁴¹ 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.”⁴² 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.⁴³

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

³⁵ See Helena Dore, [Federal judge tosses lawsuit against three southwest Montana timber projects](#), Bozeman Daily Chron. (Dec. 19, 2020).

³⁶ See *id.*

³⁷ See [Deputy Chief French QFR](#), *supra* n.32 at 2.

³⁸ See *id.*

³⁹ Cong. Rsch. Serv., [Legal and Practical Implications of the Ninth Circuit's Cottonwood Environmental Law Center v. U.S. Forest Service Decision Under the Endangered Species Act](#) (Aug. 2, 2022) (discussing the temporary Cottonwood fix Congress enacted in 2018).

⁴⁰ See Ryan Sabelow & Dale Kasler, [Wildfire scientists push back against CA environmentalists](#), Sacramento Bee (Oct. 17, 2021).

⁴¹ See *id.*

⁴² See *id.*

⁴³ See Susan Montoya Bryan, [Post-wildfire conditions result in poor recovery for fish](#), Associated Press (Mar. 10, 2023).

which contain a disproportionate share of the national forest system.⁴⁴ When forests in these states burn, they release smoke that travels hundreds of miles, exposing countless communities to harmful pollutants.⁴⁵ They also threaten landscapes and species valued by people around the country and, indeed, around the world.⁴⁶ 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 among circuits encourages forum shopping. In 2019, for instance, an environmental litigation group filed a case in Arizona seeking to block forest restoration projects throughout Region 3, which includes all of New Mexico.⁴⁷ The Forest Service identified the injunction from that case—and the mass of work that piled up as a consequence of the delay—as a contributing factor in the prescribed burn that grew out of control and became the 340,000 acre Hermit’s Peak fire.⁴⁸

Reversing Cottonwood would not undermine the Endangered Species Act

While reversing *Cottonwood* would remove a significant obstacle to forest restoration, it would not sacrifice protections for species. As the Tenth Circuit explained in *Forest Guardians*, forest plans and similar land management plans are not self-implementing.⁴⁹ They are, the court explained, “more akin to ‘road maps’ . . . creating a vision” for future forest management decisions.⁵⁰ 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 ESA. The rule announced in the case did not exist during the Act’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 implementation of the ESA, rather than the reverse. Indeed, by significantly increasing the burden on the Fish and Wildlife Service to perform a significant number of duplicative consultations, the decision distracts from the ESA’s on-the-ground efforts to recover species.

⁴⁴ See Fretwell & Wood, *Fix America’s Forests*, *supra* n.4 at 16. 85% of cases challenging forest restoration projects are filed in courts within the Ninth Circuit.

⁴⁵ See Nadja Popovich & Josh Katz, *See How Wildfire Smoke Spread Across America*, N.Y. Times (July 21, 2021). See also Environmental Protection Agency, *Why Wildfire Smoke is a Health Concern* (last accessed Mar. 2, 2023).

⁴⁶ See Kyle Dickman, *To Save Sequoias From Wildfire, We Must Save Them From Ourselves*, Outside (July 13, 2022).

⁴⁷ See *WildEarth Guardians v. Fish and Wildlife Serv.*, 416 F. Supp. 3d 909 (D. Ariz. 2019).

⁴⁸ See Forest Serv., *Gallinas-Las Dispensas Prescribed Fire Declared Wildfire Review* (June 2022).

⁴⁹ See *Forsgren*, 478 F.3d at 1154.

⁵⁰ See *id.* at 1155.

Cottonwood's supporters claim that it is essential to species conservation and imposes virtually no burdens on the Forest Service.⁵¹ But their arguments are self-refuting. One claimed a document “debunked” any argument that *Cottonwood* produces delays because the Custer-Gallatin National Forest’s reconsultation in response to *Cottonwood* took less than 4 months.⁵² In fact, the document shows that the consultation took nearly a year.⁵³ The Forest Service was only able to limit the delay to a year by devoting 400 employee days to the work at a cost of \$250,000.⁵⁴ Another group asserts that fixing *Cottonwood* would “gut” the consultation process.⁵⁵ The only example they cite for this hyperbolic assertion is a reconsultation over several frog species in the Sierra Nevada mountain range.⁵⁶ But that reconsultation resulted in no change to the forest plan or benefits to the species, it was simply duplicative.⁵⁷ At a time when the Forest Service has neither time nor money to spare, it cannot reasonably be expected to complete 5-10 years’ worth of duplicative reconsultations.⁵⁸

Cottonwood was wrongly decided

Finally, the Fish and Wildlife Service should fix *Cottonwood* because the Ninth Circuit’s decision was wrong. The ESA does not impose a free-floating consultation requirement for federal agencies. Instead, it requires only that they consult over any “action” they approve, fund, or carry out that may affect

⁵¹ See Bart Johnsen-Harris & Lauren McCain, *Cottonwood Overhaul Threatens Strength of the ESA*, Defs. of Wildlife (Dec. 22, 2022); Press Release, *Completion of Northern Rockies Lynx Analysis Discredits Montana Senators’ Rationale for Weakening Endangered Species Act*, Ctr. for Biological Diversity (Dec. 4, 2017).

⁵² See *id.*

⁵³ See *Biological Opinion on Northern Rockies Lynx*, *supra* n.31 at 1, 4 (stating that the consultation was initiated on Nov. 2, 2016, and concluded on Oct. 18, 2017).

⁵⁴ *Deputy Chief French QFR*, *supra* n.32 at 2.

⁵⁵ See Johnsen-Harris & McCain, *Cottonwood Overhaul Threatens Strength of the ESA*, *supra* n.51.

⁵⁶ See *Letter from Alaska Wilderness League et al., to House and Senate Leadership* (Dec. 13, 2022).

⁵⁷ See Fish and Wildlife Serv., *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 this case, the Forest Service had previously consulted after the Fish and Wildlife 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 *Cal. Cattlemen’s Assoc. v. Fish and Wildlife Serv.*, 369 F. Supp.3d 141 (D.D.C. 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).

⁵⁸ See *Deputy Chief French QFR*, *supra* n.32 at 2.

species or their critical habitats.⁵⁹ 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.⁶⁰ This conclusion is compelled by Supreme Court precedent⁶¹ and was explicitly confirmed by the Tenth Circuit.⁶²

The Ninth Circuit, on the other hand, essentially read the “action” requirement out of the statute. It ruled that 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 previously completed actions. There is no limiting principle to this theory, however. 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.⁶³ And supporters of *Cottonwood* have already indicated they want to stretch the decision to other agencies.⁶⁴ 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.

Request for Regulatory Reform

The U.S. Fish and Wildlife Service should finalize rule to confirm that *Cottonwood* is legally invalid and limit consultations to projects with direct on-the-ground impacts, thereby reducing unnecessary bureaucratic delays in forest restoration without compromising protections for imperiled wildlife.

⁵⁹ 16 U.S.C. § 1536(a).

⁶⁰ See Pet. for Cert., *supra* n.29 at 28–32.

⁶¹ See *S. Utah Wilderness All.*, 542 U.S. at 73.

⁶² See *Forest Guardians*, 478 F.3d at 1154–55.

⁶³ See Pet. for Cert., *supra* n.29 at 28–32.

⁶⁴ See [Letter from Alaska Wilderness League](#), *supra* n.56 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).