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# Legal and Practical Implications of the Ninth Circuit's *Cottonwood Environmental Law Center v. U.S. Forest Service* Decision Under the Endangered Species Act

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## Legal and Practical Implications of the Ninth Circuit's *Cottonwood Environmental Law Center v. U.S. Forest Service* Decision Under the Endangered Species Act

The Endangered Species Act of 1973 (ESA; P.L. 93-205) generally requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (together, the Services), as applicable, when their discretionary actions may affect either species listed under the ESA or the designated critical habitat for those species. The consultation process is intended to ensure federal agencies do not jeopardize listed species or adversely modify listed species' critical habitat. The process also may require significant resources from the federal agency and the Services and might delay implementation of agency actions.

The Services' implementing regulations require federal agencies to *reinitiate* this consultation process when any of four specified triggering events takes place that may change the Services' conclusions about the effects of the action. Concerns over allocation of resources and project delays due to the consultation process under the ESA have caused certain stakeholders to question which agency actions meet the regulatory criteria for triggering reinitiation of consultation requirements and, as a policy matter, which agency actions *should* trigger such requirements. Other stakeholders contend that reinitiating consultation ensures listed species and critical habitat are protected and that the requirements should apply broadly.

A critical recent issue has been whether adopted plans for managing areas of federal land do (or should) require reinitiation of consultation when triggered. This issue has been raised on multiple occasions with respect to land and resource management plans (*forest plans*) adopted by the U.S. Forest Service (FS) under the National Forest Management Act (NFMA; P.L. 94-588) to manage the National Forest System. The issue also extends to land use plans adopted by the Bureau of Land Management (BLM) for managing public lands under the Federal Land Policy and Management Act of 1976 (FLPMA; P.L. 94-579). The Ninth and Tenth Circuits have reached different conclusions on reinitiating consultation in the context of forest plans. In 2015, the Ninth Circuit held in *Cottonwood Environmental Law Center v. U.S. Forest Service (Cottonwood)* that the FS must reinitiate consultation on forest plans when a triggering event occurs—in that case, the designation of critical habitat in the area affected by the action. This holding is consistent with Ninth Circuit precedent (specifically, its 1994 decision in *Pacific Rivers Council v. Thomas*) but conflicts with the 2007 Tenth Circuit opinion in *Forest Guardians v. Forsgren*, which held that the FS did not need to consult on an adopted forest plan.

In 2018, Congress enacted legislation that modified how the *Cottonwood* decision applies to certain forest plans and BLM land use plans. Under that legislation, the Secretary of Agriculture generally need not reinitiate consultation for previously adopted forest plans when new species are listed or critical habitat is designated under the ESA, subject to certain limitations. The law also exempted certain BLM land use plans under FLPMA from reinitiation of consultation for new species or new designations of critical habitat. In 2019, the Services amended the implementing regulations to include these exemptions and extend the exemption to all BLM land use plans. That statutory exemption is limited—there are still circumstances in which the FS and BLM must reinitiate consultation—and when such circumstances occur, the agencies remain subject to different rules in the Ninth and Tenth Circuits.

Due to the limitations of the 2018 legislation, debate continues over whether Congress should act again to address the ESA's requirements for reinitiating consultation. Some stakeholders and agency officials contend that reinitiating consultation on adopted forest plans in response to a triggering event is inefficient and duplicative, because those issues are addressed during project-level consultation. In contrast, other stakeholders contend that reinitiating consultation is more efficient at the plan level and that any potential impacts are relatively minimal. The extent to which the *Cottonwood* decision has impacted FS resource allocations and operations is difficult to ascertain, primarily due to data constraints. In light of these considerations, Congress could consider enacting legislation to clarify how the reinitiation requirement applies to forest plans and land use plans.

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The Endangered Species Act of 1973 (ESA) generally requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (together, the Services), as applicable, when their discretionary actions may affect either species listed under the act or designated critical habitat for those species.<sup>1</sup> The Services' implementing regulations require federal agencies to reinitiate this consultation process when certain triggering events take place that may change the Services' conclusions about the effects of the action.<sup>2</sup> These processes are intended to ensure federal agencies do not jeopardize listed species or adversely modify listed species' critical habitat.<sup>3</sup> They also may require significant resources from the federal agencies and the Services and may delay implementation of agency actions.

Stakeholders and courts have disagreed as to whether consultation must be reinitiated when a triggering event occurs in relation to U.S. Forest Service (FS) forest plans, which are adopted to guide FS decisionmaking about land use while they remain in effect. The Ninth and Tenth Circuits have addressed this issue and have reached differing conclusions. In 2015, the Ninth Circuit held in *Cottonwood Environmental Law Center v. U.S. Forest Service (Cottonwood)* that the FS must reinitiate consultation under the ESA on previously adopted forest plans when one of the four triggering events under the regulations occurs.<sup>4</sup> The Ninth Circuit's *Cottonwood* holding conflicts with the 2007 Tenth Circuit opinion in *Forest Guardians v. Forsgren*,<sup>5</sup> in which that court held the FS did not need to consult on an adopted forest plan.

Concerns over allocation of resources and project delays have caused certain stakeholders to question whether *Cottonwood* was correctly decided. As a policy matter, some have questioned whether forest plans *should* be subject to reinitiation of consultation requirements. Other stakeholders maintain that reinitiating consultation on forest plans when the regulatory triggers occur protects listed species and critical habitat and may streamline such analyses for future projects subject to the plan.

This report provides background on FS forest plans and projects and on ESA consultation. The report then describes the underlying circuit court decisions and analyzes how certain provisions of the FY2018 consolidated appropriations bill,<sup>6</sup> which amended the law in response to the *Cottonwood* decision, might be interpreted by courts. The report concludes with a section on issues for Congress and options Congress may consider to address the issues.

## Forest Plans and ESA Section 7 Consultation

Whether federal agencies must consult with the Services before taking or continuing with their actions depends on the nature of the action and its anticipated effect on listed species and critical habitat. This section describes the requirements governing FS planning for managing national forest units. It also describes the Section 7 consultation process under the ESA that the FS may be required to undertake for such plans and projects.

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<sup>1</sup> 16 U.S.C. § 1536(a)(2).

<sup>2</sup> 50 C.F.R. § 402.16.

<sup>3</sup> 16 U.S.C. § 1536(a)(2).

<sup>4</sup> *Cottonwood Env't. Law Ctr. v. FS*, 789 F.3d 1075 (9<sup>th</sup> Cir. 2015). These four triggering events are discussed below in "Reinitiation of Consultation."

<sup>5</sup> *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10<sup>th</sup> Cir. 2007).

<sup>6</sup> P.L. 115-141, § 208, 132 Stat. 1065 (2018).

## FS Forest Plans and Projects

The National Forest System (NFS) comprises nearly 193 million acres of federal lands and consists of over 200 units designated as national forests, national grasslands, and other designations.<sup>7</sup> The FS engages in two different levels of planning for managing the NFS: unit-level planning and project-level planning.<sup>8</sup> At the unit level, the National Forest Management Act of 1976 (NFMA) requires the FS to prepare and update comprehensive land and resource management plans (i.e., *forest plans*).<sup>9</sup> These forest plans establish the framework for guiding project-level planning and decisionmaking within the NFS unit.

### FS Forest Plans

Forest plans guide the FS's management of the plan area by identifying desired resource conditions on the ground; determining the suitability of lands for various uses; and specifying the objectives, standards, and guidelines for activities and uses in the plan area.<sup>10</sup> Forest plans provide management direction and are programmatic in nature, meaning they “provide a framework for future proposed actions.”<sup>11</sup> Specific on-the-ground actions to accomplish those management objectives are referred to as *projects*.<sup>12</sup> Forest plans generally do not authorize individual actions or projects, nor do they commit the FS to take any specific action.<sup>13</sup> Forest plans may, however, constrain the FS from authorizing future projects or activities in specific areas.<sup>14</sup>

When developing forest plans, the FS must comply with laws of general applicability that govern federal agency actions. These laws include the ESA's consultation requirements, as well as the National Environmental Policy Act (NEPA), National Historic Preservation Act, and others.<sup>15</sup> For example, a designated agency official must approve forest plans by publishing the decision

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<sup>7</sup> The National Forest System (NFS) is defined at 16 U.S.C. § 1609(a).

<sup>8</sup> 36 C.F.R. § 219.2.

<sup>9</sup> P.L. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600–14). The implementing regulations are promulgated at 36 C.F.R. pt. 219 subpt. A. For more information on U.S. Forest Service policies, guidance, and instruction for implementing the forest planning requirements, see U.S. DEP'T OF AGRICULTURE FOREST SERV., FOREST SERVICE MANUAL, ch. 1920, Land Management Planning (2019) [hereinafter FSM\_1920], <https://www.fs.fed.us/im/directives/fsm/1900/>, and U.S. DEP'T OF AGRICULTURE FOREST SERV., LAND MANAGEMENT PLANNING HANDBOOK FSH 1909.12, ch. 20, (2015) [hereinafter FSH 1909.12\_20], [https://www.fs.fed.us/im/directives/fsh/1909.12/wo\\_1909.12\\_20\\_Land%20Management%20Plan.docx](https://www.fs.fed.us/im/directives/fsh/1909.12/wo_1909.12_20_Land%20Management%20Plan.docx). *Forest plans* is inclusive of plans for all NFS units, including grasslands and others.

<sup>10</sup> 36 C.F.R. §§ 219.2(b), 219.7(e).

<sup>11</sup> 50 C.F.R. § 402.02 (definition of “programmatic consultation”).

<sup>12</sup> 36 C.F.R. § 219.2(b).

<sup>13</sup> Forest plans must include a list of projects that may be proposed within the three to five years after the plan is adopted, but the plan must explicitly state that the inclusion of those possible projects is not a commitment to those actions. 36 C.F.R. §§ 219.7(f)(1), FSH 1909.12\_20, *supra* note 9. See specifically § 22.34 – Proposed and Possible Actions. It is possible for a project to be approved concurrently with a forest plan, but the project is not considered a plan component or part of the plan. FSH 1909.12\_20, *supra* note 9 **Error! Bookmark not defined.**, at 28.

<sup>14</sup> FSH 1909.12\_20, *supra* note 9. See specifically § 22.13 – Standards and § 22.14 – Guidelines.

<sup>15</sup> National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321–47); National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified at 54 U.S.C. § 300101 *et seq.*). Other relevant laws of general applicability include the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 500 *et seq.*).

document—a Record of Decision—in a process that is informed by the preparation of an environmental impact statement developed according to NEPA procedures.<sup>16</sup>

The NMFA requires the FS to revise forest plans at least every 15 years to address changing conditions, management goals, and public use.<sup>17</sup> However, forest plans may be amended at any time to address time-sensitive or specific resource issues.<sup>18</sup> Amendments can address new information, changed resource conditions, or other changed circumstances. Plan amendments vary in scale and scope; some amendments may apply broadly across the entire NFS unit covered by the plan area, and other amendments may apply narrowly to a specific resource or area within the NFS unit.<sup>19</sup> At times, the FS has amended several forest plans simultaneously to address changing conditions across larger geographic scales and multiple NFS units. The time it takes to complete a plan amendment varies considerably, depending on the scope and nature of the amendment.<sup>20</sup> While FS guidance documents envision plan developments or revisions being completed within four years,<sup>21</sup> most revisions take between five and seven years to complete.<sup>22</sup> The FS has developed 130 plans to guide the management of 110 administrative units of the NFS, with some plans covering multiple NFS units. As of January 2022, the FS reported that 72 plans required revision (meaning they are older than 15 years) and 19 plans were under revision.<sup>23</sup>

## **FS Projects**

Projects are the on-the-ground actions that implement the forest plan prepared for a particular unit. Projects are defined in regulation as “an organized effort to achieve an outcome on NFS lands identified by location, tasks, outputs, effects, times, and responsibilities for execution.”<sup>24</sup> Projects may include activities such as timber harvests, trail maintenance, or issuance of special use authorizations for pipelines across NFS lands, among many others. Projects must comport with the resource objectives established in the forest plans.<sup>25</sup>

Projects must be planned, evaluated, and implemented in accordance with FS procedures that prescribe how to comply with applicable statutory requirements, such as those regarding ESA consultation. The timing and scope of review for a given project may vary based on the specific statutory authority underpinning each project’s implementation, the types of resources at the site

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<sup>16</sup> 42 U.S.C. §§ 4321-4347; FSH 1909.12\_20, *supra* note 9, at 22. See CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by Linda Luther, for more information on NEPA.

<sup>17</sup> 16 U.S.C. § 1604(f)(5)(A). Annual appropriations laws have included a provision specifying that the Secretary of Agriculture is not considered to violate the requirements of RPA/NFMA solely because a forest plan has not been revised within 15 years, if the Secretary acts in good faith to update such plans. *See, e.g.*, Further Consolidated Appropriations Act, 2020, P.L. 116-94, div. D, § 407, 133 Stat. 2534 (2019) (codified at 16 U.S.C. § 1604 note).

<sup>18</sup> 16 U.S.C. § 1604(f)(4). For more information on plan amendments, see FSH 1909.12\_20, *supra* note 9, at 18.

<sup>19</sup> 36 C.F.R. § 219.13.

<sup>20</sup> The scope of the environmental analysis (e.g., categorical exclusion, environmental assessment, or environmental impact statement) and subsequent decision document (e.g., decision memo, decision notice, or a Record of Decision) for a forest plan amendment will also depend on the scope and nature of the amendment. FSH 1909.12\_20, *supra* note 9, at 22.

<sup>21</sup> FSH 1909.12\_20, *supra* note 9, at 5.

<sup>22</sup> National Forest System Land Management Planning, 77 Fed. Reg. 21,161, 21,169 (Apr. 9, 2012).

<sup>23</sup> Data provided by the U.S. Forest Service Legislative Affairs office in January 2022.

<sup>24</sup> 36 C.F.R. § 219.19.

<sup>25</sup> 50 C.F.R. § 219.15.

that could be affected, and the level of those potential effects. In some circumstances, a project may be planned concurrently with a plan amendment to ensure compliance.

## Section 7 Consultation Under the ESA

The FS must comply with the requirements of Section 7 of the ESA, among other procedural requirements, when adopting and carrying out forest plans and projects.<sup>26</sup> Depending on the anticipated effect of the federal agency's action on listed species and designated critical habitat, Section 7 may require federal agencies to initiate a consultation process with the Services. The requirements for consultation are necessary background for the Ninth Circuit's decision in *Cottonwood*.

Section 7 of the ESA requires that federal agencies ensure their discretionary actions, including the actions of nonfederal parties granted a federal approval, permit, or funding, are "not likely to jeopardize the continued existence" of any endangered or threatened species or adversely modify or destroy critical habitat.<sup>27</sup> The consultation requirements apply only when there is an action involving "discretionary Federal involvement or control," not when actions are mandated by statute.<sup>28</sup> The Services' implementing regulations define an agency *action* as

All activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

- (a) actions intended to conserve listed species or their habitat;
- (b) the promulgation of regulations;
- (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
- (d) actions directly or indirectly causing modifications to the land, water, or air.<sup>29</sup>

If federal agency actions might *adversely affect* any listed species or its critical habitat, the agency must consult with the Services to determine whether the agency action is likely to *jeopardize* any listed species or adversely modify critical habitat.<sup>30</sup> This process is referred to as a *Section 7 consultation*.

## Initial Consultation Under Section 7

Before undertaking a proposed action, such as a FS project, a federal agency must determine whether its proposed action might affect listed species or designated critical habitat.<sup>31</sup> If listed species or critical habitat may be present in the area affected by the action, the federal agency must assess whether the action is likely to have an effect on such species or critical habitat. Depending on the nature of the action, the agency first completes a biological evaluation or

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<sup>26</sup> 16 U.S.C. § 1536(a). For more information on the ESA in general, see CRS Report R46677, *The Endangered Species Act: Overview and Implementation*, by Pervaze A. Sheikh, Erin H. Ward, and R. Eliot Crafton.

<sup>27</sup> 16 U.S.C. § 1536(a).

<sup>28</sup> 50 C.F.R. § 402.03.

<sup>29</sup> *Id.* § 402.02.

<sup>30</sup> *Action* includes any activity authorized, funded, or carried out by a federal agency, including permits and licenses. *See id.*

<sup>31</sup> 16 U.S.C. § 1536(a)(2).

*biological assessment* (BA) of the action's likely effects.<sup>32</sup> Informal consultation with the Services is available at this stage.

If the agency determines an action is not likely to adversely affect any listed species or its critical habitat, and the Services agree, then the Services can write a letter of concurrence and no further consultation is needed.<sup>33</sup> If the agency determines, however, that the action is likely to adversely affect a listed species or critical habitat, the agency must initiate formal consultation with the Services on the action's effects.<sup>34</sup>

During formal consultation, the relevant Service evaluates the BA (or other biological evaluation) and other information provided by the agency, as well as the best available commercial and scientific data, to determine if the action—as proposed—is likely to jeopardize listed species or adversely modify critical habitat.<sup>35</sup> Once consultation is complete, the Service issues a *biological opinion* (BiOp) discussing the Service's analysis and conclusion.<sup>36</sup> If the Service determines the action is *not* likely to jeopardize listed species or adversely modify critical habitat, it issues a *no jeopardy BiOp*.<sup>37</sup> If the Service determines the action *is* likely to jeopardize listed species or adversely modify critical habitat, the Service must suggest any *reasonable and prudent alternatives* (RPAs) the agency could undertake that the Service believes would avoid jeopardizing the species or adversely modifying critical habitat.<sup>38</sup> If no RPAs are feasible, then the agency proposing the action must (1) forgo the action, (2) risk violating the ESA, or (3) obtain a formal exemption from the penalties of the ESA.<sup>39</sup>

If the Services issue a no jeopardy BiOp or a jeopardy BiOp with RPAs, the Services must provide the federal agency with an *incidental take statement* (ITS). The ITS must include (1) the anticipated impact of any incidental taking (as defined by the ESA) of the species, (2) reasonable and prudent measures necessary or appropriate to minimize the impact, and (3) terms and conditions with which the federal agency must comply to implement those measures.<sup>40</sup> If the federal agency complies with the terms and conditions of the ITS when carrying out the action, any taking of listed species as part of the action is exempt from the ESA's prohibition on take.<sup>41</sup>

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<sup>32</sup> 16 U.S.C. § 1536(c). The Services' implementing regulations only require biological assessments (BAs) for "major construction activities." 50 C.F.R. § 402.12(b). The regulations define *major construction activity* to mean "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in [NEPA]." *Id.* § 402.02. Federal agencies may still prepare a BA for other types of agency actions, but they may opt instead to prepare a biological evaluation that need not comply with the regulatory requirements for BAs. *Id.* § 402.12(b).

<sup>33</sup> 50 C.F.R. § 402.13. The Services and the federal agency conducting the action may undertake informal consultation to determine whether formal consultation is required. *Id.* During this process, the Services may suggest modifications to the action that avoid likely adverse effects on listed species or critical habitat. *Id.*

<sup>34</sup> Formal consultation also is required if the action may affect listed species or critical habitat and the agency does not prepare a BA and does not engage in informal consultation with the Services. *Id.* § 402.14(a)-(b).

<sup>35</sup> *Id.* § 402.14.

<sup>36</sup> *Id.* § 402.14(h).

<sup>37</sup> *Id.* §§ 402.14–15; U.S. FISH & WILDLIFE SERV., *Glossary* (last updated Dec. 18, 2019), <https://www.fws.gov/midwest/endangered/glossary/index.html>.

<sup>38</sup> 16 U.S.C. § 1536(b)(3).

<sup>39</sup> 16 U.S.C. § 1536(g); 50 C.F.R. § 402.15.

<sup>40</sup> 16 U.S.C. § 1536(b). The ESA defines *take* to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). *Incidental take* is the amount of take of a listed species that occurs due to an otherwise lawful action. 50 C.F.R. § 402.02.

<sup>41</sup> 16 U.S.C. § 1536(o)(2).



The ESA requires the Services to complete consultations within 90 days for a wholly federal action (i.e., no nonfederal applicant or grant recipient involved), unless the appropriate Service and the federal agency mutually agree to a longer period (up to 150 days) and reasons are given for the delay.<sup>42</sup> However, in practice, formal consultation may take a year or more. Most consultations result in no jeopardy opinions, and nearly all of the rest identify RPAs for the project that allow the agency to move forward.<sup>43</sup>

The Services' implementing regulations allow agencies to engage in *programmatic consultations* for programmatic actions, such as forest plans.<sup>44</sup> Programmatic consultations may be used to address multiple agency actions that are similar, frequently occurring, or routine in a particular geographic area or to analyze the effects of programs, plans, policies, or regulations that provide a framework for future specific actions.<sup>45</sup> The federal agency must conduct a separate Section 7 consultation for any individual projects conducted pursuant to a programmatic action, such as a forest plan, that may affect listed species or critical habitat, but that consultation process may be streamlined if there is a programmatic BiOp in place.<sup>46</sup>

### Reinitiation of Consultation

After a consultation is complete, federal agencies may be required to reinitiate consultation with the Services. A federal agency must reinitiate consultation, or the Service may request it, when (1) the agency has retained “discretionary Federal involvement or control over the action” or such involvement or control is “authorized by law” and (2) one or more of the following triggering events occurs:

1. The amount or extent of taking specified in an incidental take statement is exceeded
2. New information on the species or action reveals effects of the action that may affect species or critical habitat in a manner or to an extent not previously considered
3. The identified action is sufficiently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence, or
4. A new species is listed or critical habitat designated that may be affected by the identified action<sup>47</sup>

When consultation is reinitiated, the Services and relevant federal agency generally follow the same process as an initial consultation. The Services and federal agency may be able to expedite the process by relying on analyses conducted for the initial consultation to the extent the action is

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<sup>42</sup> 16 U.S.C. § 1536(b)(1). The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) begin the 90-day clock when they receive a complete BA with all the information needed for consultation; action agencies are often asked for more information than the data submitted in the original BA. Action agencies often object to the delays; the Services respond that consultation requires adequate data about the project.

<sup>43</sup> Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions about a Controversial Provision of the U.S. Endangered Species Act*, 112 PROC. NAT'L ACAD. OF SCI. 15,844–49 (2015).

<sup>44</sup> 50 C.F.R. § 402.02.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Section 7: Types of Endangered Species Act Consultations in the Greater Atlantic Region* (Dec. 14, 2018), <https://www.fisheries.noaa.gov/insight/section-7-types-endangered-species-act-consultations-greater-atlantic-region>.

<sup>47</sup> 50 C.F.R. § 402.16.

the same and the underlying data are still the best scientific and commercial data available. The reinitiated consultation must account for any changes to the action, modifications to the listed species or critical habitat present in the action area, or new information on those species or critical habitat and the action's anticipated effect on them.

## Enforcement and Citizen Suits

The Secretaries of the Interior, Commerce, Agriculture, and Treasury and the Department of Homeland Security are charged with enforcing the ESA and ensuring its requirements are followed, including the Section 7 consultation provisions.<sup>48</sup> The ESA also authorizes the use of *citizen suits*, allowing “any person” to bring a civil suit “to enjoin any person, including the United States and any other governmental instrumentality or agency” for violations of any provision of the ESA or the implementing regulations, including federal agencies that are subject to consultation requirements.<sup>49</sup> Any person seeking to file such a suit must provide 60 days’ written notice—a notice of intent (NOI) to sue—to the Secretary of the Interior and the alleged violator.<sup>50</sup>

In the consultation context, for example, a nongovernmental organization could notify the FS of its intent to sue the agency for violating the ESA by failing to reinitiate consultation on an adopted forest plan after one of the Services designates critical habitat within plan area. The Secretary does not have any obligation to respond to the organization’s notification. When at least 60 days have passed after the notification, the nongovernmental organization may file its suit at any time; the nongovernmental organization also may choose not to file the suit after providing notice. In court, that organization would have the legal burden to prove the FS failed to reinitiate consultation in violation of the ESA.<sup>51</sup>

## Legal History and Implications of *Cottonwood*

Courts have reached different conclusions about how the ESA consultation requirements, and particularly the requirement to reinitiate consultation, apply to previously adopted forest plans. Specifically, the Ninth and Tenth Circuits have reached different conclusions in interpreting this requirement.<sup>52</sup> The Ninth Circuit’s *Cottonwood* decision, moreover, led to legislative and regulatory actions that modified the effect of that decision.

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<sup>48</sup> 16 U.S.C. § 1540(e)(1).

<sup>49</sup> The ESA defines *person* as “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” *Id.* § 1532(13). *Id.* § 1540(g)(1)(A).

<sup>50</sup> *Id.* § 1540(g)(2)(A).

<sup>51</sup> *See, e.g.,* *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt. Regul. Env’t*, 871 F. Supp. 2d 1312, 1323 (S.D. Ala. 2012).

<sup>52</sup> For reference, the Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. U.S. COURTS FOR THE NINTH CIRCUIT, *Map of the Ninth Circuit*, <https://www.ca9.uscourts.gov/information/circuit-map/> (last visited Aug. 1, 2020). The Tenth Circuit has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, *General Information*, <https://www.ca10.uscourts.gov/clerk/general-information> (last visited Aug. 1, 2022).

## Ninth Circuit's 1994 *Pacific Rivers Council* Decision

In 1994, the Ninth Circuit held in *Pacific Rivers Council v. Thomas* that the FS was required to reinitiate consultation on a forest plan after the National Marine Fisheries Service listed the chinook salmon—which resided in the area covered by the forest plan—as a threatened species.<sup>53</sup> The court concluded that forest plans are “ongoing agency action” because they “have an ongoing and long-lasting effect even after adoption” because “every individual project planned in both national forests involved in this case is implemented according to the [forest plans].”<sup>54</sup> The court accordingly determined that ESA’s Section 7 consultation requirements continued to apply to forest plans after their adoption.<sup>55</sup> In its opinion, the court determined that adopted forest plans were “actions” within the meaning of Section 7 of the ESA without addressing the implementing regulations that interpret that provision.

## Supreme Court's 2004 *Southern Utah Wilderness Alliance* Decision

In 2004, the Supreme Court issued a decision, *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), that became influential in analyzing the applicability of ESA consultation obligations after a forest plan has been adopted.

*SUWA* addressed a different statute, NEPA, which requires federal agencies to examine the possible environmental impacts of any “major federal action.” Similar to the Services’ requirement to reinitiate consultation under the ESA in response to certain triggering events, the Council on Environmental Quality (CEQ) has issued regulations under NEPA requiring that federal agencies supplement their environmental reviews when “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”<sup>56</sup> The question before the Court was whether these regulations required BLM to supplement its environmental analysis for a land use plan that it had previously adopted.<sup>57</sup>

The Supreme Court held that BLM was not required to supplement its NEPA analysis. The CEQ supplementation regulation, the Court said, applies “only if ‘there remains ‘major federal actio[n]’ to occur.”<sup>58</sup> The *SUWA* Court determined that the “[a]pproval of a [land use plan]’ is a major Federal action” that requires NEPA review, wherein the “land use plan is the ‘proposed action’ contemplated by the regulation.”<sup>59</sup> However, the Court held that the “action is completed when the plan is approved” and therefore there was “no ongoing ‘major Federal action’ that could require supplementation.”<sup>60</sup>

*SUWA* does not govern whether the FS or BLM must reinitiate consultation under the ESA for forest plans or land use plans, respectively, because NEPA involves a different statutory context with different requirements for when further analysis is required. The Tenth Circuit and the FS

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<sup>53</sup> 30 F.3d 1050, 1053–56 (9<sup>th</sup> Cir. 1994).

<sup>54</sup> *Id.* at 1053.

<sup>55</sup> *Id.* at 1053–56.

<sup>56</sup> 40 C.F.R. § 1502.9(c)(1)(ii).

<sup>57</sup> *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 72–73 (2004).

<sup>58</sup> *Id.* at 72–73 (citing *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360 (1989)).

<sup>59</sup> *Id.* at 73 (emphasis in original).

<sup>60</sup> *Id.*

found *SUWA* to be persuasive authority, however, when concluding that federal agencies are not required to consult under the ESA on adopted programmatic actions.

## Tenth Circuit's 2007 Forest Guardians Decision

Three years after the Supreme Court's *SUWA* decision, the Tenth Circuit addressed whether the FS must consult under the ESA on adopted forest plans in *Forest Guardians v. Forsgren*. Forest Guardians alleged that the FS was required to consult on adopted forest plans for the Carson and Santa Fe National Forests after the FWS listed a distinct population segment of the Canada Lynx as threatened.<sup>61</sup> The Tenth Circuit held that Forest Guardians had not alleged agency "action" sufficient to trigger the consultation requirements in Section 7 of the ESA.<sup>62</sup> The Tenth Circuit declined to follow the Ninth Circuit's interpretation of the ESA consultation requirement in *Pacific Rivers Council*. Instead, the court applied reasoning similar to *SUWA*'s to hold that the FS need not consult on adopted forest plans.<sup>63</sup>

Though the Tenth Circuit recognized that a forest plan "might authorize an activity or program" that could constitute "action" requiring ESA consultation, it noted that forest plans "'typically do not approve or execute projects and activities,' and do not authorize the irreversible commitment of forest resources."<sup>64</sup> The court also observed that "'only in the presence of such activity or program, *i.e.*, 'agency action,' does a duty to consult ever arise under § 7(a)(2) [of the ESA]."<sup>65</sup> Accordingly, though the Tenth Circuit did not preclude the possibility that a forest plan, as opposed to a project, might directly authorize a particular activity or program, the court determined that implementation of the forest plan after its adoption did not—on its own—constitute "action" requiring ESA consultation.<sup>66</sup>

In so holding, the Tenth Circuit disagreed with the Ninth Circuit's analysis in *Pacific Rivers Council*, concluding it was "painfully apparent that 'standards,' 'guidelines,' 'policies,' 'criteria,' 'land designations,' and the like appearing within a ... [forest plan] do not constitute 'action' requiring consultation under § 7(a)(2) of the ESA."<sup>67</sup> The Tenth Circuit compared forest plans to agency regulations—the "promulgation of regulations" is by definition an "action" under the consultation regulations, but the implementation of existing regulations has not been considered "ongoing action."<sup>68</sup> Finding no mention in the complaint of any specific activity, project, or program that the forest plan authorized, the Tenth Circuit accordingly held that the plaintiffs had not alleged any "action" requiring ESA consultation.<sup>69</sup>

## Ninth Circuit's 2015 Cottonwood Decision

In 2015, the Ninth Circuit revisited the question of whether adopted forest plans are agency action that require consultation in *Cottonwood Environmental Law Center v. U.S. Forest Service*.<sup>70</sup> After

<sup>61</sup> *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1151 (10<sup>th</sup> Cir. 2007).

<sup>62</sup> *Id.* at 1156–57. The court did not address the implementing regulations requiring reinitiation of consultation.

<sup>63</sup> *Id.* at 1160.

<sup>64</sup> *Id.* at 1156 (quoting 36 C.F.R. § 219.3(b)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1156–57.

<sup>67</sup> *Id.* at 1159.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1157–60.

<sup>70</sup> 789 F.3d 1075 (9<sup>th</sup> Cir. 2015).

the FWS listed a distinct population segment of Canada Lynx as a threatened species, the FS proposed the Northern Rocky Mountains Lynx Management Direction (i.e., the *Lynx Amendments*). The FS initiated and completed consultation for the Lynx Amendments and subsequently amended the forest plans for 18 national forests.<sup>71</sup> Months later, the FWS designated additional critical habitat for the Canada Lynx that included areas within 11 of those national forests.<sup>72</sup> The FS declined to reinitiate consultation on the Lynx Amendments after the FWS designated the additional critical habitat.<sup>73</sup>

The Cottonwood Environmental Law Center (Cottonwood) sued the FS for declining to reinitiate consultation after the FWS designated the additional critical habitat.<sup>74</sup> The FS, relying on *SUWA*, argued it was not obligated to reinitiate consultation because the agency action was complete when the agency adopted the Lynx Amendments and amended the forest plans.<sup>75</sup> The Ninth Circuit disagreed. Unlike the prior Ninth and Tenth Circuit decisions, the *Cottonwood* opinion relied on the Services' regulations implementing the ESA to determine that the FS was required to reinitiate consultation. The court observed that under those regulations—unlike the NEPA requirements at issue in *SUWA*—the obligation to reinitiate consultation “does not terminate when the underlying action is complete” but rather continues so long as the agency retains “discretionary Federal involvement or control.”<sup>76</sup> Because the FS “remains ‘involve[d]’ in the Forest Plans” and “retains exclusive ‘control’ over its own Forest Plans through their implementation,” the court determined that forest plans are agency actions that require reinitiation of consultation.<sup>77</sup> Accordingly, the court held that the FS was required to reinitiate consultation for the affected forest plans when the FWS designated additional critical habitat for the Canada Lynx.<sup>78</sup>

## Policy Considerations Following the *Cottonwood* Decision

Following the Ninth Circuit's decision in *Cottonwood*, the FS was required to reinitiate consultation for previously adopted forest plans when triggering events occurred in the Ninth Circuit but not the Tenth Circuit. Some stakeholders, including agency officials, expressed concerns about the decision's effects, claiming the *Cottonwood* decision negatively affected FS resources and operations.<sup>79</sup> For example, agency officials have testified that “the consequences are severe.... [T]his *Cottonwood* decision is duplicative.... It takes numerous resources away from getting work done on the ground.”<sup>80</sup> Other stakeholders claim any potential effects are relatively

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<sup>71</sup> *Id.* at 1077–78.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1078–79.

<sup>75</sup> *Id.* at 1084–85.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1087–88.

<sup>78</sup> *Id.* at 1088.

<sup>79</sup> For examples of statements claiming that the decision resulted in negative impacts to agency resources and operations, see U.S. Congress, Sen. Comm. on Energy and Nat. Res., *Hearing to Consider Pending Legislation*, 117<sup>th</sup> Cong., 1<sup>st</sup> sess., Oct. 21, 2021 (testimony of Christopher French, Deputy Chief, FS); U.S. Congress, Sen. Comm. on Energy and Nat. Res., *The President's Budget Request for the USDA Forest Service for Fiscal Year 2020*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 9, 2019, S. HRG. 116-301 (testimony of Vicki Christiansen, Chief, FS); and National Association of State Foresters, “NASF submits official comments on proposed Cottonwood rule,” press release, Feb. 11, 2021, <https://www.stateforesters.org/newsroom/nasf-submits-official-comments-on-proposed-cottonwood-rule/>.

<sup>80</sup> U.S. Congress, Sen. Comm. on Energy and Nat. Res., *The President's Budget Request for the USDA Forest Service*

minimal.<sup>81</sup> Potential resource-related effects generally would include staff time (e.g., the time expended engaging in reinitiation of consultation, responding to NOIs, or judicial challenges relative to performing other tasks), while potential operations-related concerns would generally include projects being delayed while plan-level consultation is reinitiated and as a result of the judicial review process.

Some stakeholder concerns are based on the different procedural requirements that exist across NFS regions or units as a result of the different Ninth and Tenth Circuit decisions. Only those NFS units within the jurisdiction of the Ninth Circuit are bound by the *Cottonwood* decision. NFS regions and units do not align with circuit court boundaries (see **Figure 1**), so there may be instances where certain NFS units are subject to different requirements related to reinitiating consultation than other units within the same region. Understanding which requirements apply may create challenges and may contribute to real or perceived implementation constraints for the FS and related stakeholders.

- In total, 123 million acres and 128 units of the NFS system are within the Ninth Circuit (64% of the total NFS acreage and 39% of the total NFS units).<sup>82</sup> This includes the entirety of NFS Regions 5, 6, and 10 and portions of NFS Regions 1, 4, and 3.
- In total, 42 million acres and 57 units of the NFS system are within the Tenth Circuit (22% of the total NFS acreage and 20% of the total NFS units).<sup>83</sup> This includes portions of NFS Regions 2, 3, 4, and 8.

For more information on potential effects of the *Cottonwood* decision on FS resources, see “Evaluating the Effects of the Cottonwood Decision.”

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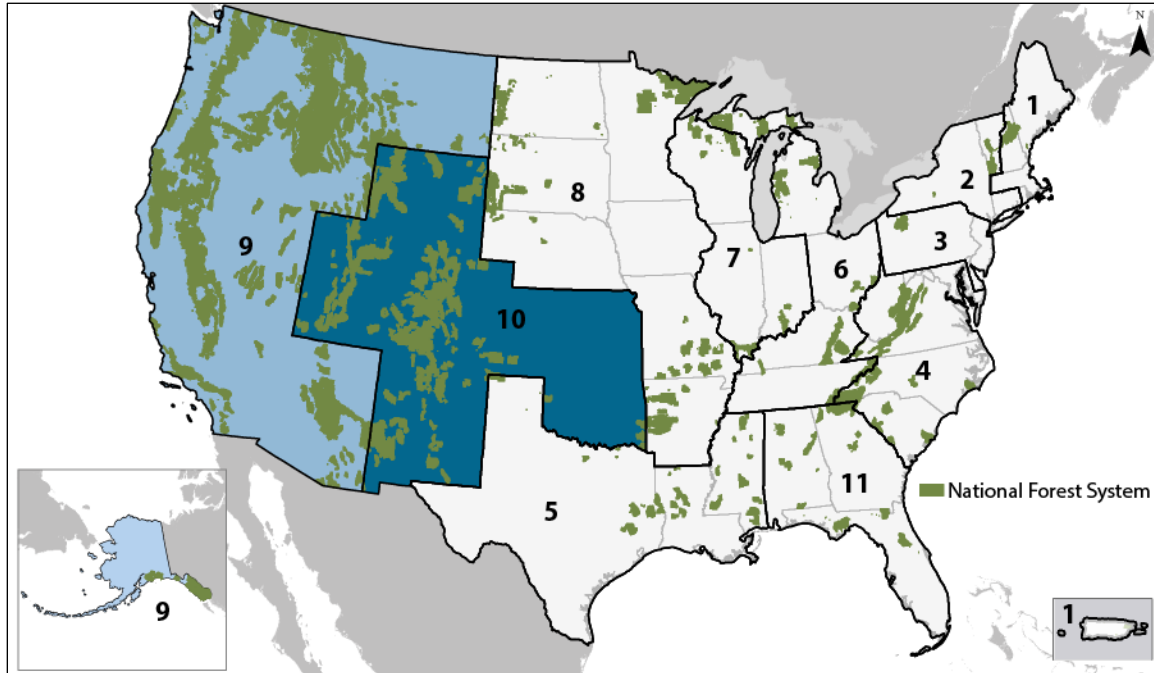
for *Fiscal Year 2020*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 9, 2019, S. HRG. 116-301 (testimony of Vicki Christiansen, Chief, FS).

<sup>81</sup> For examples of statements claiming that impacts are minimal, see Center for Biological Diversity, “Recent Federal Agency Cooperation on Sierra Nevada Frog Conservation Undermines Rationale for Altering Act,” press release, July 10, 2017, [https://www.biologicaldiversity.org/news/press\\_releases/2017/sierra-nevada-frogs-07-10-2017.php](https://www.biologicaldiversity.org/news/press_releases/2017/sierra-nevada-frogs-07-10-2017.php).

<sup>82</sup> CRS calculations using data from FS, *Land Areas Report (LAR)—as of September 30, 2021*, Table 4, <https://www.fs.fed.us/land/staff/lar/LAR2021/LARTable4.pdf>.

<sup>83</sup> *Ibid.*

**Figure I. Federal Circuit Court Regions Relative to the National Forest System**



**Source:** Prepared by CRS from data available from FS Geodata Clearinghouse, at <http://data.fs.usda.gov/geodata/> and the U.S. Courts, <https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>.

**Notes:** Alaska and the conterminous United States and Puerto Rico are represented at different scales. Hawaii and other U.S. territories are not included because they do not contain National Forest System lands.

## Legislative Response in FY2018 Omnibus Act

In 2018, Congress enacted legislation that modified how the *Cottonwood* decision applies to certain forest plans and BLM land use plans. The FY2018 consolidated appropriations act (omnibus act) amended 16 U.S.C. § 1604 to provide that the Secretary of Agriculture need not reinitiate consultation for previously adopted forest plans when new species are listed or critical habitat is designated.<sup>84</sup> This exemption from the requirement to reinitiate consultation does *not* apply if

- (i) 15 years have passed since the date on which the Secretary [of Agriculture] adopted the [forest] plan ... ; and
- (ii) 5 years have passed since [March 23, 2018, when the omnibus bill was enacted,] or the date of the listing of a species as threatened or endangered for a species known to occur on the unit or the designation of critical habitat within the unit [pursuant to the ESA], whichever is later.<sup>85</sup>

<sup>84</sup> P.L. 115-141, § 208, 132 Stat. 1065 (2018). The Services have subsequently amended the regulation requiring reinitiation of consultation to incorporate this exception and extend it to land management plans developed by the Bureau of Land Management (BLM) pursuant to the Federal Land Policy and Management Act (FLPMA). Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976, 45,017 (Aug. 27, 2019); 50 C.F.R. § 402.16.

<sup>85</sup> P.L. 115-141, § 208; 16 U.S.C. § 1604(d)(2)(B).

As discussed above, federal law requires the Secretary of Agriculture to revise forest plans “at least every 15 years.”<sup>86</sup> Although Congress has provided that the FS does not violate that requirement if it is “acting expeditiously and in good faith” to revise out-of-date plans,<sup>87</sup> those plans would *not* be exempt from the requirement to reinitiate consultation. Even for those out-of-date forest plans, the exemption from the requirement to consult remains available until five years after the later of (1) the enactment of the omnibus act or (2) the listing of the species or the designation of critical habitat (i.e., the triggering event).<sup>88</sup> The provision clarifies that the exemption does not modify the Secretary’s obligation to consult on specific projects under a plan or on modifications, amendments, or revisions to a plan.<sup>89</sup>

In practice, this provision exempts all forest plans—even out-of-date ones—from the requirement to reinitiate consultation under one of the four triggering events—newly listed species or designated critical habitat—for at least five years following the omnibus act (i.e., until March 23, 2023).<sup>90</sup> After that time, the FS could be required to reinitiate consultation for out-of-date forest plans if five years have passed since a new species was listed that is “known to occur on the unit” or critical habitat was designated within the unit after the forest plan was adopted.<sup>91</sup> In effect, the omnibus act provision appears to postpone the need to reinitiate consultation after the relevant triggering event rather than permanently exempting the Secretary from reinitiating consultation. No court has interpreted this language to date.

The omnibus act also exempted BLM from reinitiating consultation for previously adopted land use plans for lands in the Oregon and California Railroad grant land or Coos Bay Wagon Road grant land when new species are listed or critical habitat is designated.<sup>92</sup> Unlike the exemption for forest plans, this exemption did not include any additional conditions. As with the forest plan provision, the BLM exemption provision makes clear that the exemption does not affect consultation obligations for projects, development of new land use plans, or revisions or other significant changes to existing land use plans.<sup>93</sup>

The scope of the omnibus act exemption is limited. It addresses only forest plans and a limited number of BLM land use plans—not other programmatic agency actions that might be subject to the requirement to reinitiate consultation. Furthermore, the Services’ regulations (and thus the *Cottonwood* decision) require reinitiation of consultation after three other triggering events not addressed in the omnibus act: (1) exceeding the amount or extent of take specified in the incidental take statement; (2) new information revealing that the effects of the agency action “may affect listed species or critical habitat in a manner or to an extent not previously considered”; or (3) subsequent modification of the agency action “in a manner that causes an

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<sup>86</sup> 16 U.S.C. § 1604(f)(5)(A). Any such revision does not qualify for the exemption and would require consultation, which would include any species listed or critical habitat designated since the FS adopted the forest plan. P.L. 115-141, § 208; 16 U.S.C. § 1604(d)(2)(C).

<sup>87</sup> *See, e.g.*, P.L. 116-6, § 407, 133 Stat. 259 (2019); P.L. 115-141, § 407, 132 Stat. 688 (2018); P.L. 115-31, § 407, 131 Stat. 495 (2017).

<sup>88</sup> P.L. 115-141, div. O, tit. II, § 208; 16 U.S.C. § 1604(d)(2)(B).

<sup>89</sup> P.L. 115-141, div. O, tit. II, § 208; 16 U.S.C. § 1604(d)(2)(C).

<sup>90</sup> P.L. 115-141, div. O, tit. II, § 208; 16 U.S.C. § 1604(d)(2)(B).

<sup>91</sup> *Id.*

<sup>92</sup> P.L. 115-141, div. O, tit. II, § 209; 43 U.S.C. § 2606. The Oregon and California Railroad grant land and Coos Bay Wagon Road lands consist of nearly 3 million acres of land within 18 counties in the state of Oregon. For context, BLM manages 244 million acres in total.

<sup>93</sup> *Id.*



effect to the listed species or critical habitat that was not considered” in the initial consultation.<sup>94</sup> The omnibus act did not affect those requirements. The omnibus act also did not affect the requirement to consult with respect to a project carried out pursuant to a forest plan or the modification, amendment, or revision of a forest plan.<sup>95</sup>

## Services’ 2019 Amendments to the ESA Implementing Regulations

In 2019, the Services amended the ESA implementing regulations to incorporate a provision similar to the FY2018 omnibus provision, among other things.<sup>96</sup> The Services’ regulations went beyond the legislative exemption in a few substantive ways. First, they created a regulatory exemption for all land use plans adopted by BLM, not just those managing the specific lands included in the FY2018 omnibus act.<sup>97</sup> The Services also allowed that regulatory exemption to extend to BLM land use plans indefinitely, without the timing limitations of the FY2018 omnibus act applied to forest plans, because they anticipated that BLM would keep its land use plans up to date.<sup>98</sup> For forest plans, the Services’ regulations incorporated the 15-year limitation included in the omnibus legislation.<sup>99</sup> Second, they rephrased the clarification from the omnibus act to explicitly provide that the exemption applies to either forest plans or land use plans only if “any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation.”<sup>100</sup>

Pursuant to the FY2018 omnibus legislation and the Services’ regulations, the FS and BLM are not required to reinitiate consultation for forest plans that meet certain conditions and land use plans when new species are listed or new critical habitat is designated. For the remaining three triggers, existing case law would require the FS to reinitiate consultation in the Ninth Circuit but not in the Tenth Circuit.

In January 2021, the Services proposed additional amendments to the implementing regulations for Section 7 consultation. Among other things, the proposed rule would eliminate the time constraints for the forest plan exemption.<sup>101</sup> The proposed revisions also would exempt forest plans and land use plans from the requirement to reinitiate consultation when “receipt of new information revealing effects of the action that may affect the listed species or critical habitat in a manner or to an extent not previously considered,” which currently triggers reinitiation.<sup>102</sup> The proposed rule would add an explicit limitation that the exemption applies only if the triggering information (i.e., new listing, new designation, or new information) would be addressed in any future consultations for specific actions.<sup>103</sup> If the regulatory amendments were adopted as proposed, the FS and BLM would not be required to reinitiate consultation for new listings or critical habitat or new information as long as such information would be accounted for in any project-specific consultations.

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<sup>94</sup> 50 C.F.R. § 402.16(a)(1)–(3).

<sup>95</sup> P.L. 115-141, div. O, tit. II, § 208; 16 U.S.C. § 1604(d)(2)(C).

<sup>96</sup> 84 Fed. Reg. 44,976 (Aug. 27, 2019).

<sup>97</sup> 50 C.F.R. § 402.16(b).

<sup>98</sup> 84 Fed. Reg. 44,976, 45,011 (Aug. 27, 2019).

<sup>99</sup> *Id.*

<sup>100</sup> 50 C.F.R. § 402.16(b).

<sup>101</sup> 86 Fed. Reg. 2373, 2379 (Jan. 12, 2021).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

## Considerations for Congress

Congress may consider enacting legislation to clarify how consultation under the ESA applies to land use plans adopted by the FS and BLM. This section provides stakeholder perspectives on requiring reinitiation of consultation on forest plans and other programmatic actions. It then outlines the potential effects of the *Cottonwood* decision on FS resources and operations. Finally, this section provides legislative options for Congress to address the decision if Congress so chooses.

## Stakeholder Views on Section 7 Consultation for Programmatic Plans

Stakeholders differ on the appropriate requirements for consultation under the ESA for forest and land use plans. Some stakeholders assert that requiring reinitiation of consultation for programmatic forest and land use plans when changed circumstances occur (e.g., a new species is listed, critical habitat is designated, or new information on listed species becomes available) might block or delay many FS forest management activities. For example, some stakeholders might argue that if the FS or BLM has to reinitiate consultation on a forest or land use plan each time there is sufficient new information on a listed species, the implementation of projects under the plan may be delayed during the consultation process.<sup>104</sup> Further, some stakeholders claim that reinitiating consultation on plans consumes agency resources and has no direct conservation benefit, since consultation is done on individual projects under the plan.<sup>105</sup> Stakeholders in favor of reinitiating consultation at the program or plan level due to any of the four triggers to reinitiate consultation argue that consultation under Section 7 of the ESA at the programmatic level does not cause significant delays.<sup>106</sup>

Underlying these differences is a general disagreement among stakeholders on the appropriate and most efficient level of planning at which the FS should address new listings or critical habitat designations and the other triggering events that require additional consultation. In particular, agency officials contend that the requirement to reinitiate consultation on forest plans is duplicative and an inefficient allocation of resources because those issues are addressed during project-level consultation.<sup>107</sup> Although the timing and scope of project-level planning varies, most projects would be subject to some level of ESA Section 7 consultation. Because of this, agency officials and other stakeholders contend that project-level consultation would sufficiently capture any on-the-ground issues related to potential triggering events that had occurred since the adoption of the underlying forest plan. Some stakeholders also contend that consultation at the

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<sup>104</sup> Letter from American Woodcock Society et al. to Hon. Joe Manchin, Chairman, Senate Comm. on Energy and Nat. Res., Oct. 20, 2021, [https://congressionalsportsmen.org/uploads/page/Final\\_Cottonwood\\_Sign\\_On\\_Letter\\_10-20-2021\\_1.pdf](https://congressionalsportsmen.org/uploads/page/Final_Cottonwood_Sign_On_Letter_10-20-2021_1.pdf).

<sup>105</sup> Letter from Nat'l Ass'n of State Foresters to U.S. Fish and Wildlife Serv., Public Comments, Feb. 11, 2021, <https://southernforests.org/legislation/position-statements/federal-forest-management/NASF%20Public%20Comments%20to%20USFWS%20on%20Cottonwood-Proposed-Rule%20-%20February%202021.pdf>.

<sup>106</sup> Brett Hartl, *Documents Debunk Sen. Daines' Endangered Species Act, Forest Management Claims*, Center for Biological Diversity, July 10, 2017, [https://www.biologicaldiversity.org/news/press\\_releases/2017/sierra-nevada-frogs-07-10-2017.php](https://www.biologicaldiversity.org/news/press_releases/2017/sierra-nevada-frogs-07-10-2017.php).

<sup>107</sup> Am. Woodcock Society, Archery Trade Ass'n, and Backcountry Hunters and Anglers, et al., *Cottonwood Fix*, Congressional Sportsmen's Foundation, Oct. 20, 2021, [https://congressionalsportsmen.org/uploads/page/Final\\_Cottonwood\\_Sign\\_On\\_Letter\\_10-20-2021\\_1.pdf](https://congressionalsportsmen.org/uploads/page/Final_Cottonwood_Sign_On_Letter_10-20-2021_1.pdf).

program or plan level could increase the need for resources and may lead to more lawsuits that could delay projects from being implemented, resulting in potential economic hardship for entities involved in the projects.<sup>108</sup> Stakeholders who favor plan-level consultation assert that it is necessary to fully consider the effects of new information on species and habitat, and in particular the cumulative effects of multiple activities on listed species.<sup>109</sup> They contend that plan-level reviews can address broader threats and conservation solutions that cannot be determined at the project or site level.<sup>110</sup>

## Evaluating the Effects of the *Cottonwood* Decision

Estimating or analyzing the effects of the *Cottonwood* decision (and the subsequent omnibus legislative fix) on FS operations and resources is challenging, primarily due to data constraints. The FS and other stakeholders contend that the *Cottonwood* decision and any resulting reinitiation of consultation has had detrimental effects on FS operations. This includes claims of projects being delayed while consultation is reinitiated or while staff is occupied with responding to NOIs or legal challenges. Agency officials have testified, for example, that reinitiating consultation “takes numerous resources away from getting work done on the ground.”<sup>111</sup>

The FS has provided limited data to support or refute these claims.<sup>112</sup> Similar to many other federal agencies, the FS does not routinely track or report the cost or personnel time associated with the development of forest plans or project-level decisions, engaging in consultation, or responding to administrative or judicial challenges to those decisions.<sup>113</sup> For project-level planning, the FS does not routinely track the time between the publication of a decision document and the on-the-ground implementation of that project.<sup>114</sup> Because of these limitations, there is insufficient baseline data with which to authoritatively identify and compare the effect specific factors may have on staffing or project development and implementation timelines. These data constraints also limit resource allocation comparisons between those national forests bound by the different circuit court decisions.

Different methodological approaches could possibly identify the presence or absence of specific effects. For example, examining data regarding agency outputs or other performance metrics (e.g., acreage treated to reduce wildfire risk, miles of streams restored, volume of timber sold or

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<sup>108</sup> Joe Fox, *Public Comments Processing: Attn: U.S. Fish and Wildlife Service*, Nat'l Ass'n of State Foresters, Feb. 11, 2021, <https://www.stateforesters.org/wp-content/uploads/2021/02/NASF-Comments-to-FWS-Cottonwood-Proposed-Rule-02112021.pdf>.

<sup>109</sup> Defenders of Wildlife, “New Land Management Legislation Could Harm Imperiled Wildlife,” press release, June 24, 2020, <https://defenders.org/newsroom/new-land-management-legislation-could-harm-imperiled-wildlife>.

<sup>110</sup> *Ibid.*

<sup>111</sup> U.S. Congress, Sen. Comm. on Energy and Nat. Res., *The President's Budget Request for the USDA Forest Service for Fiscal Year 2020*, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 9, 2019, S. HRG. 116-301 (testimony of Vicki Christiansen, Chief, FS).

<sup>112</sup> To assess the effects of the *Cottonwood* decision on FS operations, CRS requested data and documents from the FS. In response to this request, the FS provided CRS with data to estimate the potential effects of receiving and responding to Notice of Intentions (NOIs) on ESA-related challenges to project implementation. Because CRS is unable to independently verify whether the data are accurate or complete, they are not included herein. The FS also provided data estimating that re-consultation on the Lynx Amendments required nearly 500 staff days at a cost of \$246,555. However, the FS did not contextualize these figures relative to the use of FS resources for other purposes, so their significance is unclear.

<sup>113</sup> U.S. Government Accountability Office, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, GAO-14-370, April 2014, <https://www.gao.gov/products/gao-14-370>.

<sup>114</sup> For some projects, implementation may not occur within a certain time period following publication of the decision document to provide for administrative objections to those decisions to be filed and addressed.

harvested) across different NFS units and time frames could potentially identify any operations-related impacts.<sup>115</sup> CRS examined FS timber harvest data from FY2015 (the year *Cottonwood* was decided) through FY2021 and was unable to identify any noticeable difference in the overall volume of timber sold or harvested across the entire NFS and between the NFS units covered by the Ninth Circuit relative to other NFS units. A robust statistical analysis may reveal trends and identify the related causal factors. This may be an area of interest to academic researchers. Alternatively, Congress could consider requesting the Government Accountability Office conduct an official audit.

Even with adequate baseline data from which to draw comparisons, it may be difficult to assess what level of resource allocation is effective or efficient because those metrics may be, to some extent, value-based and not purely objective. For example, some may believe that reinitiation of consultation for any reason is an effective use of agency resources only if it results in a changed or improved decision or agency action and that purely procedural improvements are not an efficient allocation of resources. Others may believe that reinitiation of consultation is an effective use of agency resources even if it does not result in a changed decision, particularly if the process satisfies the agency's statutory and legal obligations and provides transparency in the government decisionmaking process.

## **Legislative Alternatives for Reinitiation of Consultation on Forest Plans**

As discussed above, pursuant to the FY2018 omnibus act and the Services' regulations, the FS and BLM are not required to reinitiate consultation for forest plans that meet certain conditions and land use plans when new species are listed or new critical habitat is designated. For the remaining three triggers, existing case law would require the FS to reinitiate consultation in the Ninth Circuit but not in the Tenth Circuit.

Congress may retain this status quo or enact legislation to clarify whether and how the reinitiation of consultation requirements apply to forest plans and land use plans. If Congress views reinitiation of consultation on forest plans and land use plans as a good use of agency resources in the interest of species protection, Congress could enact legislation requiring the FS and BLM to reinitiate consultation on all forest plans and land use plans whenever any of the regulatory triggers occurs. If Congress concludes that changed circumstances (such as new listings or studies) are best addressed only at the project level or that reinitiation of consultation on forest plans and land use plans is not necessary for species protection or is not an efficient means of achieving that goal, Congress could provide that no forest plan or land use plan that has already been adopted, amended, or revised is subject to reinitiation of consultation for any regulatory trigger. As an example, S. 2561 in the 117<sup>th</sup> Congress would appear to preclude forest plans and land use plans from constituting the types of "actions" to which the requirements to reinitiate consultation apply under the regulations, among other things.<sup>116</sup>

Congress could also opt for a more targeted approach. For example, Congress could eliminate the time limits on the statutory exemption enacted in 2018. That approach would make all forest plans exempt from reinitiation of consultation for new listings and new critical habitat designations, regardless of when the listing or designation occurred or when the forest plan was

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<sup>115</sup> The FS reports progress on selected performance metrics across the entire NFS in its annual budget justifications. For example, see the "Summary of Performance" section starting on p. 166 of the FY2023 Budget Justification, at <https://www.fs.usda.gov/sites/default/files/2022-03/FS-FY23-Congressional-Budget-Justification.pdf>.

<sup>116</sup> S. 2561, 117<sup>th</sup> Cong. (2021).

last revised. Congress could also include within the exemption additional triggers for reinitiation. For example, the Forest Information Reform Act, H.R. 1174 in the 117<sup>th</sup> Congress, would preclude the FS and BLM from being required to reinitiate consultation on forest plans and land use plans on the basis of new listings, new critical habitat designations, or new information that reveals effects of an action that may affect listed species or critical habitat in a way not considered in the initial consultation.<sup>117</sup> Alternatively, Section 105 of the Emergency Wildfire and Public Safety Act of 2020, S. 4431 in the 116<sup>th</sup> Congress, would have allowed such plans to be subject to reinitiation for consultation based on new information, but it would have limited that trigger to information that was “influential scientific information,” peer reviewed, and publicly published.<sup>118</sup> In so doing, Congress could clarify whether forest plans and land use plans are subject to reinitiation of consultation for the two remaining triggers (i.e., exceeding the incidental take statement or modifying the action in a way that affects the analysis) or continue to leave that determination to the courts.

As a practical matter, of the three triggers that Congress has not addressed, requiring (or exempting) reinitiation of consultation for forest plans and land use plans may not have a significant impact on how often the agencies must reinitiate consultation for two of them: (1) exceeding the incidental take statement and (2) modifying the action in a way that affects the analysis. Under the Services’ regulations, forest plans and land use plans generally are not subject to an incidental take statement because they do not authorize any specific actions directly.<sup>119</sup> Similarly, if BLM or the FS were to modify a plan in a way that would affect the analysis of the plan’s effects on listed species or critical habitat, the agency likely would have to follow amendment procedures established by statute, which would separately trigger Section 7 consultation requirements for the amendment or revision.<sup>120</sup> Exempting such plans from the reinitiation trigger for modifying the action may not have a significant practical effect because consultation would be required for the amendment.

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<sup>117</sup> H.R. 1174, 117<sup>th</sup> Cong. (2021).

<sup>118</sup> S. 4431, 116<sup>th</sup> Cong. § 105 (2020). *See also* H.R. 7978, 116<sup>th</sup> Cong. § 105 (2020).

<sup>119</sup> 50 C.F.R. § 402.14(i)(6); *see also* FWS and NMFS, Final Rule, Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements, 80 Fed. Reg. 26,832 (May 11, 2015).

<sup>120</sup> 16 U.S.C. § 1604(a), (f); 43 U.S.C. § 1712(a), (c).

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