

**Congress of the United States**  
**Washington, DC 20515**

February 11, 2021

Mr. Gary Frazer  
Assistant Director  
Endangered Species  
U.S. Fish and Wildlife Service  
MS:JAO/3W  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Mr. Samuel D. Rauch, III  
Deputy Assistant Administrator  
Regulatory Programs  
National Marine Fisheries Service  
Office of Protected Resources  
1315 East-West Highway  
Silver Spring, MD 20910

Dear Mr. Frazer and Mr. Rauch,

We write today in support of the proposed rule published on January 12, 2021 to amend the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) interagency Section 7 consultation regulations under the Endangered Species Act. The proposed revision would clarify consultation obligations for finalized forest and land management plans. We urge you to finalize this rule in order to preserve the land planning process, re-establish consistency within land management agencies, remove any ambiguity that could be exploited in litigation, and ensure the Services' time and resources are not further diverted from critical wildlife conservation work.

The Ninth Circuit Court of Appeals' ruled in *Cottonwood Environmental Law Center v. United States Forest Service (Cottonwood)* that a completed Forest Plan was an action of which the agency retained discretionary authority and control. This decision established a new, ambiguous, ungrounded threshold for Section 7 consultation on completed programmatic actions, effectively setting a litigation trap for the Forest Service and subjugating the agency to a never-ending procedural exercise.

The decision has tied the hands of land managers and wildlife biologists in the Ninth Circuit, preventing the best available science from driving decisions and has created inconsistency with agencies outside of the Ninth Circuit. Since January 2016, there have been at least 28 lawsuits and 50 notices of intent (NOIs) to sue the Forest Service involving ESA new information claims, challenging both plan-level and project-level decisions. This has blocked essential forest restoration projects from moving forward putting communities and wildlife at risk and costing thousands of jobs. One *Cottonwood* lawsuit in 2019 shutdown all logging and thinning, timber sales, and prescribed burns in all of New Mexico's Forests and almost stopped the Capitol Christmas Tree from being cut out of the Carson National Forest. The New Mexico forests were the victims of inconsistency, since New Mexico is in the Tenth Circuit, which has rejected *Cottonwood*, while the suit was filed within the Ninth Circuit in Arizona.

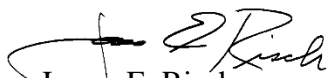
The proposed rule would fix this issue by clarifying that reinitiation of consultation is not required for previously-approved BLM and FS land management plans when new information reveals that effects of a plan may affect listed species or critical habitat in a manner or to an extent not previously considered, provided that any authorized actions for which the new information is relevant will be addressed through a separate action-specific consultation.

While this rule was initiated by the Trump Administration, the position it establishes was supported by the last two Democratic Administrations. In 1995, the Clinton Administration submitted a petition for writ of certiorari in *Pacific Rivers Council v. Thomas* arguing that "the mere existence of a plan is not [an] 'action' within the


meaning of Section 7(a)(2) of the ESA, and Section 7(a)(2) does not in any event require the Forest Service to consult about forest plans themselves, so long as it otherwise fulfills its duty to insure that site-specific activities are not likely to jeopardize the continued existence of listed species or adversely affect their critical habitat.” Similarly, the Obama Administration’s 2016 petition for writ of certiorari stated that the *Cottonwood* decision “has the potential to cripple the Forest Service and BLM’s land management functions and to impose substantial and unwarranted burdens on FWS and NMFS.”

The proposed rule will allow land managers and wildlife biologists to follow the best-available science for consultation. It will remove an ambiguity in current regulations that have led to more lawsuits than conservation work. This rule is critical to improve the health of our nation’s forests, advance wildlife restoration projects, reduce the risk of catastrophic wildfires, and support timber jobs. We respectfully urge you to maintain the position of the past two Democratic Administrations and finalize this rule.

Sincerely,



James E. Risch  
United States Senator



Matthew Rosendale, Sr.  
Member of Congress

/s/ Steve Daines  
Steve Daines  
United States Senator

/s/ Russ Fulcher  
Russ Fulcher  
Member of Congress

/s/ John Barrasso, M.D.  
John Barrasso, M.D.  
United States Senator

/s/ Mike Simpson  
Mike Simpson  
Member of Congress

/s/ Mike Crapo  
Mike Crapo  
United States Senator

/s/ Yvette Herrell  
Yvette Herrell  
Member of Congress

/s/ Kevin Cramer  
Kevin Cramer  
United States Senator

/s/ James R. Baird  
James R. Baird  
Member of Congress

/s/ Cynthia M. Lummis  
Cynthia M. Lummis  
United States Senator

/s/ Dan Newhouse  
Dan Newhouse  
Member of Congress