

# MEMORANDUM

TO: Members of Congress  
FROM: U.S. Senator Steve Daines (MT)  
RE: Why Congress must promptly reverse the Ninth's Circuit decision in *Cottonwood Environmental Law Center v. United States Forest Service (Cottonwood)*  
DATE: November 3, 2016

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## Background:

In 2015 the Ninth Circuit Court ruled in *Cottonwood* that the U.S. Forest Service (FS) needed to reinitiate consultation with U.S. Fish and Wildlife Service (FWS) at the programmatic (plan) level following the 2009 designation of critical habitat for the Canada lynx.<sup>1</sup> As a result of this ruling, courts have stopped projects during the consultation process throughout the 18 national forests inhabited by lynx. The Department of Justice (DOJ), advocating a view shared by the FS and FWS, argued that the *Endangered Species Act* does not require re-initiation of consultation on completed forest plans and that only project-level analysis is needed.<sup>2</sup> The Tenth Circuit in 2007 ruled in favor of the FS/FWS' position in a similar case, *Forest Guardians v. Forsgren*.<sup>3</sup> In May 2016, DOJ filed a writ of certiorari petition to the U.S. Supreme Court to ask for review of the *Cottonwood* ruling and resolve the conflicting circuit opinions. On October 11, 2016, the Supreme Court denied this request, allowing the Ninth Circuit's *Cottonwood* decision to stand.<sup>4</sup>

## Why *Cottonwood* matters:

- Substantially increases unnecessary paperwork requirements without conservation benefit – DOJ indicated that *Cottonwood* “has the potential to... impose substantial and unwarranted burdens on FWS and NMFS (National Marine Fisheries Service).”<sup>5</sup> The cert petition further noted that there are “more than 850 listed species” in the geographical area of the Ninth Circuit,<sup>6</sup> and emphasized the “sheer volume of agency resources that would be required to adhere” to *Cottonwood*.<sup>7</sup> **Unless Congress acts**, this ruling will further increase the regulatory burden on federal agencies, drain limited budgets, and consume much time and energy of agency personnel, without improving analyses related to endangered species, which, as emphasized by DOJ on behalf of FS and FWS, are already protected by project-level consultation processes.<sup>8</sup>
- Delays much-needed management projects – DOJ contended that *Cottonwood* “has the potential to cripple the Forest Service and BLM’s (Bureau of Land Management) land management functions...”<sup>9</sup> Further, numerous associations representing forest products businesses, livestock ranchers, and recreation interests submitted an amici curiae brief<sup>10</sup> further explaining why *Cottonwood*’s “unnecessary and redundant” burdens will harm efforts to reduce the risk of wildfire, expand recreational opportunities, improve wildlife habitat, and safeguard grazing access. **Unless Congress acts**, this ruling will impose significant new barriers to properly managing federal lands.
- Encourages more litigation against important management projects – According to the FS, there are currently 17 Notices of Intent to Sue and 8 open cases related to the re-initiation of consultation issue.<sup>11</sup> Many of these lawsuits were filed by repeat litigators. Just this week, the Ninth Circuit applied its *Cottonwood* reasoning to block a project to reduce wildfire risk and protect watersheds near Bozeman, MT.<sup>12</sup> **Unless Congress acts**, the *Cottonwood* ruling could result in the delay or outright halting of numerous ready-to-go projects to improve forest health, protect watersheds, enhance habitat, expand grazing, and increase recreation. These projects have all been cleared by the agency which is responsible for protecting endangered species.

## What can—and should—Congress do:

Federal agencies already perform robust analyses regarding a project’s potential impact on ESA species. *Cottonwood* is simply about whether additional process is required. To avoid the “crippling” impacts on federal land management across Ninth Circuit states, Congress should statutorily reverse the *Cottonwood* decision by amending federal law to codify DOJ’s legal position in legislation enacted this year.

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<sup>1</sup> *United States Forest Service v. Cottonwood Environmental Law Center*, Petition for a Writ of Certiorari, U.S. Department of Justice and U.S. Department of Agriculture; <http://www.scotusblog.com/wp-content/uploads/2016/07/15-1387-cert-petition.pdf>; See Appendix A for Ninth Circuit ruling.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Forest Guardians v. Forsgren*; <http://caselaw.findlaw.com/us-10th-circuit/1278367.html>

<sup>4</sup> <http://www.scotusblog.com/case-files/cases/united-states-forest-service-v-cottonwood-environmental-law-center/>

<sup>5</sup> <http://www.scotusblog.com/wp-content/uploads/2016/07/15-1387-cert-petition.pdf>, Page 33.

<sup>6</sup> The Ninth Circuit region consists of Alaska, Washington, Oregon, California, Montana, Idaho, Nevada, Arizona, Hawaii, Guam, and the Northern Mariana Islands

<sup>7</sup> <http://www.scotusblog.com/wp-content/uploads/2016/07/15-1387-cert-petition.pdf>, Pages 33-34.

<sup>8</sup> See Department of Justice’s brief in the Ninth Circuit for *Cottonwood Environmental Law Center v. U.S. Forest Service* for further discussion on why the Administration believes project level analysis satisfies ESA requirements and interests; Pages 56-58.

<sup>9</sup> <http://www.scotusblog.com/wp-content/uploads/2016/07/15-1387-cert-petition.pdf>, Page 33.

<sup>10</sup> American Forest Resource Council et al amici curiae brief in support of DOJ petition; <http://www.scotusblog.com/wp-content/uploads/2016/07/15-1387-AFRC-Amicus.pdf>

<sup>11</sup> Tables provided to Senator Daines’ office by U.S. Forest Service on October 17, 2016. Available from the Senator’s office by request.

<sup>12</sup> *Alliance for the Wild Rockies and Native Ecosystems Council v. U.S. Forest Service & U.S. Fish and Wildlife Service*; <http://cdn.ca9.uscourts.gov/datastore/memoranda/2016/11/01/14-35069.pdf>