Congress of the United States
Washington, DC 20515

February 10, 2021

Mr. Gary Frazer
Asst. 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 Asst. 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 Endangered Species Act (the Services) interagency consultation regulations. The proposed revision would clarify consultation obligations for finalized forest and land management plans. A requirement to reinitiate consultation on completed programmatic decisions is not grounded in law, regulations, or logic for that matter, but rather case law established in the 2015 Ninth Circuit *Cottonwood* decision that has resulted in myriad copycat lawsuits in Montana. 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 *Cottonwood* decision contradicted the 2004 U.S. Supreme Court *Southern Utah Wilderness Alliance* decision and the Tenth Circuit *Forest Guardians* decision by ruling that a Forest Plan was an ongoing action of which the agency retained discretionary authority over. This decision established a new, ambiguous, ungrounded threshold for 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 tied the hands of land managers and wildlife biologists in the Ninth Circuit, preventing the best available science from driving decisions and created inconsistency with agencies outside of the Ninth Circuit. Since Forest Plans do not authorize ground-disturbing activities, consultation is speculative, duplicative, and does not lead to conservation benefit. For example, the Forest Service estimated that re-consultation on the Northern Rockies Lynx Management Direction required nearly 500 staff days at a cost of nearly $250,000—not accounting for U.S. Fish and Wildlife Services' resources—and resulted in no change to management and no conservation benefit. Instead, these resources were pulled away from needed conservation work and delayed forest restoration projects from going forward.

There has been resounding concern over the implications of the *Cottonwood* decision amongst agencies, Administrations, and political parties. On a bipartisan basis, Congress negotiated and passed partial exemption from the re-initiation consultations in the Fiscal Year 2018 consolidated appropriations bill.

In a letter sent May 2020, the Fish and Wildlife Service and U.S. Forest Service concurred on the need for a "permanent, comprehensive solution for re-initiation of consultation on land management plans" and stated that "by ensuring that project-specific consultations under Section 7 of the ESA consider listed species, designated critical habitat, and new information on these species, federal agencies can take more timely and efficient land management activities, continue to fulfil their conservation mandated, and further the goals of the ESA. 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 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 Obama Administration could not have been more accurate. Since 2016, there have been at least 24 lawsuits and 21 notices of intent (NOIs) to sue on *Cottonwood*-related grounds on the new information trigger for consultation alone. Montana has been ground-zero for these lawsuits, which has cost our state thousands of jobs, delayed critical wildlife habitat and forest projects, and diverted federal resources away from needed conservation work. The 60-Day Notice of Intent to Sue on the Access Amendments in the Kootenai and Lolo National Forest threatened over 140 projects, including at least 10 active timber sales, half of which were canceled. Another 60-Day Notice of Intent to Sue threatened the entire program in Helena Lewis and Clark, totaling 172 MMBF. While the Stonewall Vegetation project, the product of a collaborative working group in the Helena-Lewis and Clark National Forest, was delayed in the courtroom, nearly half the acreage burned in the Park Creek and Arrastra Creek Fires in 2017 threatening the nearby community of Lincoln. Obstructing these time-sensitive hazardous fuel projects puts Montana lives and property at risk.

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 Montana's forest, advance wildlife and restoration projects, reduce the risk of catastrophic wildfires, and support Montana timber jobs. We respectfully urge you to maintain the position of the past two Administrations and finalize this rule.

Sincerely,

Steve Daines
United States Senator

Matthew Rosendale, Sr.
Member of Congress