



## USDA Forest Service

Date: Dec. 5, 2016

**Topic:** Cottonwood Environmental Law Center v. Krueger decision (hereafter referred to as Cottonwood).

**Issue 1:** Substantial disruption to Agency program delivery may result from the Ninth Circuit's decision in Cottonwood, including litigation and injunctions of ongoing projects in lynx critical habitat, and defense of numerous related cases and Notices of Intent to sue (NOIs) directed toward Forest Plans and projects within the Ninth Circuit.

### Key Points:

- The implications of Cottonwood extend beyond NFs with lynx critical habitat. There are similar lawsuits and multiple NOIs directed at projects on other NFs within the Ninth Circuit and beyond. A case was filed in the Federal District Court for the District of Columbia alleging the same reinitiation of consultation issue on the Superior National Forest last June. The court's decision may extend the range of the Cottonwood ruling beyond the 9<sup>th</sup> Circuit.
  - Pending litigation within the 9<sup>th</sup> Circuit with project injunctions:
    - Alliance for the Wild Rockies v. Marten (Custer/Gallatin)— Greater Red Lodge Vegetation Management Project
    - Alliance for the Wild Rockies v. Christensen (Gallatin)— East Boulder Hazardous Fuels Reduction Project and Bozeman Municipal Watershed Project
    - Alliance for the Wild Rockies v. Savage (Kootenai) — East Reservoir Restoration Project
  - Pending litigation within the 9<sup>th</sup> Circuit (no injunction):
    - Friend of the Wild Swan v. Garcia (Lolo)—Challenging Colt Summit Restoration and Fuel Reduction Project
    - Alliance For the Wild Rockies v. USFS (Payette)— Lost Creek/Boulder Creek Restoration Project
- There is now greater uncertainty as to whether project implementation can proceed when a program-level consultation has started, even when project consultation considering the effects upon lynx critical habitat has been completed. The recent preliminary injunction decision concerning the Greater Red Lodge vegetative management project in the Custer-Gallatin National Forest said that the project consultation had to *incorporate* the findings from the Lynx Amendment consultation. This is an example of the project not being able to proceed pending the outcome of a programmatic consultation, even though the Greater Red Lodge consultation independently assessed the effects upon lynx critical habitat. As a result of the District Court's decision, the Greater Red Lodge project will be "on hold" pending completion of the Lynx Amendment consultation. Further project consultation and site-specific NEPA analysis may be required, depending upon the outcome of the Lynx Amendment consultation.
- Re-initiation of programmatic consultation for new listings, designation of critical habitat, and new information can pause project- implementation and may result in a continuous holding pattern. Program-level consultations are subject to re-initiation when "new information" such as scientific studies are made available, which occurs frequently. Repeated initiation of program-level consultations may be a barrier projects cannot cross, resulting in a continuous loop of consultation.
- Within the Ninth Circuit a large number of species have been listed under the ESA and critical habitat has been designated for several species since the completion of programmatic consultation for forest plans and/or large-scale plan amendments (i.e. PACFISH/INFISH).
- Compliance with the Cottonwood decision will depend upon conversations between the FS WO, Regions, USFWS, and NOAA Fisheries. Issues to be resolved include clarifying the geographic scope of re-initiated consultations, the species to be included in the consultation, and the conceptual scope (i.e. limiting consultation to a determination of whether a plan is an adverse modification of critical habitat, the need to include new information, evaluating increases in incidental take, etc.).
- Regions 1, 6 and 4 are evaluating ongoing projects in lynx, bull trout, salmon, and steelhead critical habitat for their vulnerability to injunctive relief and R1 is farthest along here.

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- The Forest Service and regulatory agencies have limited capacity to undertake programmatic consultation efforts without affecting analysis and consultation on new projects and activities.
- Vegetation management projects in lynx critical habitat within forests covered by the Lynx Amendment
  - Approximately 80 vegetation management projects (timber sales, precommercial thinning, fuels treatments, prescribed burns, etc.) occur in lynx critical habitat in R1, R2, and R4, and could be litigated and possibly enjoined.
  - Awarded timber sale volume for projects with signed decisions = approximately 318,282 CCF (159.1 MMBF) on 14,285 acres.
  - FY 17 timber sale volume for projects with signed decisions yet to be offered and awarded = Approximately 262,869 CCF (131.4 MMBF) and 17,764 acres.
  - Projects in lynx critical habitat account for about 29% (190,690 CCF or 95.3 MMBF) of the Northern Region's planned FY17 timber volume.

**Issue 2:** Broader litigation risk posed by the Cottonwood case; legislative considerations

**Key Points:**

- The implications of the Cottonwood case are broad, e.g. NOI's for reinitiation of consultation for lynx, bull trout, salmon, and steelhead critical habitat. The Ninth Circuit has long had a view of forest plans as commitments of resources which is contrary to the agency's view. The Ninth Circuit decision challenges USDA's long standing position with regard to the nature of Forest Plans.
- The Ninth Circuit's decision in Cottonwood requires that whenever a triggering event (under ESA) occurs, a federal agency must reinitiate consultation on *every affected programmatic plan and existing regulation* over which the agency has discretion or control, *i.e.* if the programmatic action will govern future agency actions, or if the agency has the authority to amend or repeal the existing plan or regulation.
- This interpretation provides an avenue for challenge of the programmatic consultation for all affected forest plans, rules (such as 2012 Planning Rule) as a result of the ESA triggering event. The re-initiation of programmatic consultation may delay implementation of projects that tier to completed programmatic actions such as timber sales, livestock grazing permits, and special use permits.
- The Cottonwood decision is based upon the ESA regulation requiring section 7 consultation reinitiation "*where discretionary federal involvement or control over the action has been retained or is authorized by law.*"
- The underlying decision conflicts with *Forest Guardians v. Forsgren* 478 F.3d 1149 (10<sup>th</sup> Circ. 2007).
- The Ninth Circuit's decision has implications for the agency's programmatic NEPA and NFMA compliance as well.

**Background:**

The District Court of Montana and the Ninth Circuit ruled in Cottonwood that the Forest Service must reinitiate consultation at the plan level following the USFWS listing of lynx critical habitat in 2009. This decision is based upon the 1994 decision that Forest Plans are ongoing agency actions subject to reinitiation under the Endangered Species Act (Pacific Rivers Council v Thomas), and timber sales are per se irretrievable actions that must be halted during programmatic consultation. In Cottonwood, the 9<sup>th</sup> Circuit held that even though the Lynx Amendments were a completed action, the Forest Service retained discretion and control over the plans, therefore reinitiation of programmatic consultation was required pursuant to 50 CFR 402.16 to respond to the designation of critical habitat. The Solicitor General petitioned for writ of certiorari to the Supreme Court in May 2016 and October 11 the Supreme Court denied certiorari for this case. Thus, Cottonwood has immediate and direct effect on forests plans in the 9<sup>th</sup> Circuit that were subject to the 2007 Northern Rockies Lynx Amendment and then had critical habitat designated. These Forests are the Custer-Gallatin National Forest, Flathead National Forest, Helena National Forest, Idaho Panhandle National Forests, Kootenai National Forest, Lolo National Forest, and the Okanogan-Wenatchee National Forest. Forests in Washington and Oregon continue to tier to the 2000 lynx conservation agreement and their plans have not been amended to address lynx. . Several projects in other lawsuits have been enjoined based upon the adverse Cottonwood decision. The exact scope of these impacts will be worked out in the courts in the months to come.