Fixing Forest Plan Consultation
Effects of the “Cottonwood” case

Beaverhead-Deerlodge Working Group * March 3, 2021
Lawson Fite | General Counsel, American Forest Resource Council
Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.
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Reinitiation – Four Factors **Plus** Discretion/Control

- Take Limit Exceeded
- New Information
- Action Modified
- New species listed / CH designated
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→ *Discretionary Federal involvement or control over*

*the action has been retained or is authorized by law*
Ninth Circuit decision, 2015

- Lynx critical habitat designated over 35,000 mi$^2$
- Required re-initiated consultation on 18 completed National Forest Plans
- Resulted in injunctions on timber sales >150 mmbf
- “[C]ompels the responsible agencies to divert scarce public resources to the fulfillment of potentially cumbersome procedural measures that both agencies have determined to be unnecessary to achieve compliance with the ESA.” U.S. Cert. Petition (June 2016).
Court Conflicts

• In 2007, Tenth Circuit ruled that completed FP not subject to reinitiate

• Obama Admin asked Supreme Ct to review *Cottonwood*:

  Decision “compels the responsible agencies to divert scarce public resources to the fulfillment of potentially cumbersome procedural measures that both agencies have determined to be unnecessary to achieve compliance with the ESA.” U.S. Cert. Petition (June 2016).
Regulatory/Legislative Fixes

Take Limit Exceeded

New Information

Action Modified

New species listed / CH designated
Why It Matters: Fire, Insects, Disease, Drought

- Over 80 million acres at risk
- Massive emissions, property damage, loss of life from fires
- Changes are possible and necessary

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