

**No. 13-35631**  
**(Cross-Appeal No. 13-35624)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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COTTONWOOD ENVIRONMENTAL LAW CENTER,

*Plaintiff-Appellee,*

v.

UNITED STATES FOREST SERVICE, et al.,

*Defendants-Appellants,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
(Hon. Dana L. Christensen)  
Civil Case No. 12-45

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**BRIEF OF AMICI CURIAE**  
**BIG WILD ADVENTURES AND NATURAL EXPOSURES**  
**IN SUPPORT OF COTTONWOOD ENVIRONMENTAL LAW CENTER**  
**AND INJUNCTIVE RELIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), amici Big Wild Adventures and Natural Exposures state that neither entity has a parent corporation and that no publicly-held corporation owns more than 10% of the stock in either entity.

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## **STATEMENT OF IDENTITY, INTERESTS, AND AUTHORITY OF AMICI**

The amici are businesses that depend on an intact Greater Yellowstone Ecosystem and its native species, including the Canada lynx (“lynx”).

Big Wild Adventures is a guide and outfitting company that has operated for 35 years and has led over 1000 guided trips in the Bitterroot, Lewis & Clark, Custer, Shoshone, Bridger-Teton, and Caribou-Targhee National Forests and in Yellowstone National Park. Big Wild Adventures is licensed by the U.S. Forest Service, the National Park Service, the Fish and Wildlife Service, and the Bureau of Land Management, and is a leading backpacking company in the western United States.

Natural Exposures is a tour company that has led nature photography tours in Yellowstone National Park since 2001. Founded by a world-renowned wildlife and nature photographer, the company specializes in the opportunity to witness and photograph the biological diversity of a cohesive and intact ecosystem.

These appeals have significant implications for the health of the Greater Yellowstone Ecosystem, its forests and native species, and for businesses and individuals whose livelihoods are based on conserving this ecosystem, including its endangered and threatened animals. These amici have a particular interest in this Court’s resolution of the issues of irreparable harm and injunctive relief under the Endangered Species Act presented by Appellant Cottonwood Environmental Law



Center (“Cottonwood”). An injunction would effectuate the Endangered Species Act’s purpose to protect the Canada lynx and its habitat and also would protect the commercial and public interests in this habitat.

This brief is filed with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-3.

### **RULE 29(C)(5) STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), these amici state that no party’s counsel authored this brief in any part, no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief, and that no person other than these amici contributed money that was intended to fund the preparation or submission of this brief.

### **SUMMARY OF THE ARGUMENT**

This amicus brief demonstrates that intact critical habitat of the Canada lynx has substantial private and public economic value and reinforces Cottonwood’s arguments concerning injunctive relief. The Forest Service’s violation of Section 7 of the Endangered Species Act, which threatens to fragment and degrade this critical habitat, likely will result in economic harm to these amici and other businesses that rely on the Greater Yellowstone Ecosystem. Amici urge the Court to enjoin the Forest Service’s projects that may affect lynx critical habitat until the agency complies with the Endangered Species Act.

## ARGUMENT

SUBSTANTIAL ECONOMIC INTERESTS SUPPORT CONSERVATION OF AN INTACT GREATER YELLOWSTONE ECOSYSTEM, INCLUDING CANADA LYNX CRITICAL HABITAT, AND THE COURT SHOULD GRANT AN INJUNCTION TO AVOID IRREPARABLE HARM TO THESE ECONOMIC INTERESTS.

- A. An Intact Greater Yellowstone Ecosystem Has Significant Private and Public Economic Value, And An Injunction Is Needed To Avoid Harm From Projects That May Affect Lynx Critical Habitat.

Congress enacted the ESA “to provide a means whereby the ecosystems upon which threatened and endangered species depend may be conserved.” 16 U.S.C. § 1531(b). The Act’s focus conserving individual species and ensuring their survival and recovery is especially relevant to keystone species that serve significant functions within their ecosystem, because the absence of keystone species can result in the cascading loss of other species and, ultimately, destruction of the ecosystem itself. William Bond, *Keystone Species—Hunting the Snark?*, 292 *Science* 63, 63 (2001).

As a top predator, the lynx is a keystone species because it depends on the snowshoe hare, its primary prey, which itself plays a substantial role in maintaining the ecosystem’s diversity. R. Davic, *Ecological Dominants vs. Keystone Species: A Call for Reason*, 4 *Conservation Ecology* r2 (2000). Absent the lynx, the hare population would expand unchecked, devastate vegetation, and

eventually damage other species in the food web. Michael E. Soulé & John Terborgh, *Conserving Nature at Regional and Continental Scales—A Scientific Program for North America*, 49 *BioScience* 809, 810 (1999). Conserving the Greater Yellowstone Ecosystem requires maintaining its keystone species, including the lynx.

As one of the few temperate ecosystems in the United States with its native vertebrate species intact, the Greater Yellowstone Ecosystem is an incredibly rich and valuable resource with substantial commercial and public economic value. Because of the lynx's keystone role in the Greater Yellowstone Ecosystem, its value embodies and reflects that larger ecosystem.

**1. The Intact Greater Yellowstone Ecosystem Has Substantial Commercial Value.**

**a. Eco-Tourism In The Greater Yellowstone Ecosystem Generates Significant Economic Activity And Employment.**

Montana's booming tourism industry has generated notable economic growth throughout the state. The tourism industry created nearly 75,000 jobs over the past decade, and from 2011 to 2012 alone, tourist spending grew by 15%, generating \$3.3 billion in additional revenue. *Montana Economy at a Glance*, Montana Dept. of Labor & Industry (May 2013). In 2013, the tourism industry comprised nearly 20% of the state's private employment and 20% of all employment growth. *Montana Economy at a Glance* (2013); Christine Oschell,

*The Montana Tourism Industry: The People and the Businesses*, Institute for Tourism & Recreation Research 4 (July 2012).

Ecotourism is the fastest-growing sector of the tourism industry. Unlike logging and other destructive activities, ecotourism generates income and employment while placing little to no burden on the environment or local culture.

Ray Rasker, *Montana's Economy and the Role of Federally Protected Lands*, Headwaters Economics (2012).

Within the tourism industry, 15% of employment is attributable to wilderness outfitters and guides. *Id.* In 2005, the State's nearly 1000 outfitting and guiding companies served 318,600 clients, generating many millions in revenue and spending throughout the state. N. Nickerson, et al., *Montana's Outfitting Industry: Economic Impact and Industry-Client Analysis*, Institute for Tourism and Recreation Research, University of Montana 3, 19 (March 2007).<sup>1</sup>

In 2005, ecotourism clients spent more than \$110 million on guided trips in the Greater Yellowstone Ecosystem, and from 2011 to 2012, non-resident visitors alone spent almost \$73 million on guided tours. *Id.*; K. Grau, *Nonresident Travel Spending in Montana Travel Regions and Counties*, University of Montana's

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<sup>1</sup> Outfitters provide tours in the following forests: Custer National Forest, Flathead National Forest, Gallatin National Forest, Helena National Forest, Kootenai National Forest, and Lolo National Forest. C. Oschell & N. Nickerson, *Baseline Information for Region 1 Needs Assessment*, Institute for Tourism & Recreation Research, University of Montana 8 (2008).

Institute for Tourism & Recreation 3 (2013). To meet this demand, outfitters employed more than 4300 people, paid nearly \$51 million in wages, and spent \$27 million on guide-related purchases. *Id.*

The tourism industry's economic impacts compare favorably with those of extractive business like the timber industry. For example, gross receipts for recreation from 1986 to 2012 exceeded those for timber by more than 15-fold in the Flathead, Helena, Kootenai, Lewis & Clark, Lolo, Bridger-Teton, Gallatin, Shoshone, Bitterroot, Beaverhead, Clearwater, Custer, and Bighorn National Forests: gross receipts from recreation totaled approximately \$4.2 million compared to gross receipts from timber sales that totaled approximately \$270,000. Ray Rasker, *National Forest Gross Receipts from Commercial Activities FY 1986-2012*, Headwaters Economics (2012).

These data demonstrate the substantial economic interest in conserving and maintaining the Greater Yellowstone Ecosystem and the wildlife that depend on that ecosystem, including the Canada lynx. These interests are embodied by amici Big Wild Adventures and Natural Exposures.

As one of the leading backpacking companies in the United States, Big Wild Adventures specializes in trips to remote areas for clients who seek a wilderness experience, including an opportunity to view native animals in their natural habitat. In 2013, Big Wild Adventures grossed approximately \$150,000 in revenue,

primarily from non-resident clients, and re-injected approximately \$120,000 into the local economy, mainly through payments to their guides and other employees.

Similarly, Natural Exposures specializes in nature photography tours that capitalize on the biodiversity of the Greater Yellowstone Ecosystem. The company emphasizes “the power of great imagery to tell the stories of the creatures and the land that have no voice,” and the corresponding responsibility to conserve these animals and their habitats.

**b. Eco-Tourism In the Greater Yellowstone Ecosystem Depends On Conserving The Intact Ecosystem.**

Because tourists are drawn to natural areas for their wildlife and beauty, the economic value of Montana’s ecotourism industry depends on the natural value of the surrounding ecosystem. Penny Oosterzee, *Ecotourism and Biodiversity Conservation-Two Way Track*, 6 *Pacific Conservation Biology* (2000) the future of Montana’s ecotourism industry and corresponding job creation depends on conserving the integrity of the Greater Yellowstone Ecosystem, which is inextricably linked to the lynx and other keystone species.

In response to a survey about the importance of the Montana’s attributes, non-resident tourists ranked the opportunity to view wildlife as one of the three

most important reasons for their trip.<sup>2</sup> *Statewide Vacation Visitor Geotourism Characteristics*, University of Montana College of Forestry & Conservation (Jan. 2010). Moreover, more than half of respondents indicated that it was “very important” to them that the state maintain existing outdoor recreation facilities such as natural or wild areas and wildlife viewing areas. Norma Nickerson and Elizabeth Metcalf, *Public Recreational Use Study: 2012*, Institute for Tourism & Recreation Research 7 (Feb. 2013).

Because the number of tourists would decline concurrently with a decline in wildlife, biodiversity is a part of the Greater Yellowstone Ecosystem’s value and an indicator of economic growth. Penny Oosterzee, *Biodiversity Conservation and Ecotourism: An Investigation of Linkages, Mutual Benefits, and Future Opportunities*, Biodiversity Series, Paper No. 5 (1995). In light of this correlation, conserving the intact ecosystem serves as a catalyst for economic growth. Oosterzee (2000). Ecotourism and the intact Greater Yellowstone Ecosystem are interdependent, and the substantial commercial interest in the Greater Yellowstone Ecosystem depends on mechanisms that maintain that ecosystem’s integrity.

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<sup>2</sup> On a scale of 1 (not at all) to 6 (most important), clean air and water received an average score of 5.5, while the opportunity to view wildlife received an average score of 5.4.

## **2. The Intact Greater Yellowstone Ecosystem Generates Substantial Public Value That Likely Will Be Harmed By These Projects.**

In addition to the commercial interest in the Greater Yellowstone Ecosystem, “[i]t is also appropriate to consider the broader public interest in the preservation of the forest and its resources.” *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1308 (9th Cir. 2003). The public interest in the Greater Yellowstone Ecosystem includes both the conservation of, and experiences stemming from, biodiversity.

Economists traditionally define capital in the context of manufactured goods, but the earth’s resources also are capital - natural capital. R. Costanza & H. Daly, *Natural Capital and Sustainable Development*, 6 *Conservation Biology* 37, 38 (March 1992). An ecosystem’s value is comprised of its tangible and intangible goods in addition to the services it provides, such as biodiversity, clean water, aesthetics, and other services. R. Costanza, et al., *The value of the world's ecosystem services and natural capital*, 387 *Nature* 253, 253 (May 15, 1997).

Congress enacted the ESA to promote biodiversity by ensuring the survival of threatened or endangered species through conservation of their habitat. 16 U.S.C. § 1531(b). The public has a direct economic interest in biodiversity, and the governmental investment in conserving species gives an approximate measure of this interest.



Since the Fish and Wildlife Service listed the Canada lynx as a threatened species in 2000, federal and state agencies have spent many millions of dollars to conserve it. 65 Fed. Reg. 16053, 16086 (March 24, 2000). In the past ten years alone, these agencies have invested \$32,729,427 in protecting the lynx.<sup>3</sup> *Federal and State Endangered and Threatened Species Expenditures FY 2012*, U.S. Fish and Wildlife Services 9 (2013). When juxtaposed against the threat posed by the Forest Service's projects, the agency's violation establishes a clear likelihood of irreparable harm to the public investment in the lynx.

For example, in 1994 the Fish and Wildlife Service conducted a study to determine biodiversity's use and non-use values in Yellowstone National Park. *Final Environmental Impact Assessment: The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho*, U.S. Fish and Wildlife Service (1994). Focusing on gray wolves, this study estimated the total value of the wolves' continued existence at \$8.3 million annually based on the amount tourists were willing to spend for the opportunity to view wolves, the amount tourists actually spent visiting the ecosystem, and the amount they were willing to spend for the satisfaction of knowing the wolves were in the Park. *Id.* at 33.

While this study did not address the lynx, it demonstrated the public's broader economic interest in biodiversity in the Greater Yellowstone Ecosystem

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<sup>3</sup> In 2012 alone, spending totaled \$ \$4,941,283.

and substantiated the significant public economic value in preserving biodiversity. C. Jean, et al., *Vital Signs Monitoring Plan for the Greater Yellowstone Network*, National Park Service 7 (2005). Allowing the Forest Service to proceed with projects that may affect lynx critical habitat before conducting the consultation required by Section 7 would pose a likelihood of harm to these substantial public interests.

B. The District Court Misconstrued The Standard For An Injunction Once It Had Found A Violation Of Section 7 Of The Endangered Species Act.

In 2007, the Forest Service adopted a set of guidelines known as the Lynx Amendments that were intended to ensure that Forest Service activities altering the habitat of the Canada lynx would not jeopardize its continued existence or adversely modify its designated critical habitat. The Forest Service relied on these guidelines in modifying twenty forest management plans in the Northern Rockies/Greater Yellowstone Ecosystem. Northern Rockies Lynx Management Direction Summary, U.S. Forest Service S-6 (Mar. 2007).

However, in 2009, the Fish and Wildlife Service designated additional critical habitat for the Canada lynx in the Flathead, Helena, Kootenai, Lewis & Clark, Lolo, Bridger-Teton, Gallatin, and Shoshone National Forests, as well as in Grand Teton, Yellowstone, and Glacier National Parks. 74 Fed. Reg. 8616-18, 8623 (Feb. 25, 2009). Despite these new and additional designations of critical

habitat, the Forest Service failed to re-initiate consultation with the Fish and Wildlife Service to modify the Lynx Amendments in response to these designations.

The district court held that this failure to re-initiate consultation violated Section 7 of the ESA, but refused to enjoin projects that may affect this newly-designated lynx critical habitat, finding that Cottonwood had not demonstrated an adequate likelihood of irreparable harm. *Salix v. U.S. Forest Service*, 944 F. Supp.2d 984, 1002 (D. Mont. 2013).

This decision misconstrued the standard for an injunction under Section 7 of the ESA, which tips the balance sharply in favor of protecting endangered species. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 187 (1978). Because the value of these listed species is “incalculable,” Congress intended that the Endangered Species Act “halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184. An injunction is the appropriate remedy for the Forest Service’s failure to re-initiate consultation after the FWS designated additional lynx critical habitat because this failure threatens irreversible damage to both the lynx and its habitat, which satisfies the requisite showing for an injunction. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033-34 (9th Cir. 2007), *citing Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental

injury, by its nature...is often permanent or at least of long duration, i.e., irreparable.”).

Despite recognizing that this Court has held that (1) the remedy for a substantial procedural violation of the Endangered Species Act “must” be an injunction, and (2) the agency in violation of Section 7 has the burden to prove that a particular action is non-jeopardizing to avoid an injunction, the district court held that Cottonwood had not met some undefined burden to demonstrate irreparable harm. *Salix*, 944 F. Supp. at 1001-02, citing *Nat. Wildlife Fedn. v. NMFS*, 422 F. 3d 782, 793 (9th Cir. 2005), and *Wash. Toxics Coalition v. EPA*, 413 F. 3d 1024, 1034 (9th Cir. 2005). This holding directly contradicted this Court’s precedents by placing the risks of the Forest Service’s illegal conduct on the lynx, rather than on the agency.

## **CONCLUSION**

Absent compliance with Section 7, the Forest Service’s projects that may affect lynx critical habitat pose a likelihood of irreparable harm to the significant commercial and public economic interests in conservation of the lynx and the Greater Yellowstone Ecosystem. This Court should enjoin these projects until completion of the consultation required by the Endangered Species Act.

Respectfully submitted this 28th day of January, 2014.

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## **CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Fed. R. App. P. 28.1(e)(2)(B) that this brief is proportionately spaced, has a typeface of 14 points or more and contains 2,722 words. I used Microsoft Word 2010.

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## **CERTIFICATE OF SERVICE**

I certify that on January 28<sup>th</sup>, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accompanied by the CM/ECF system.

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