



# Sierra Forest Legacy

*Protecting Sierra Nevada Forests and Communities*



April 2, 2007

USDA Forest Service (via electronic mail)  
Pacific Southwest Region  
Attn: Brenda Kendrix

Re: Sierra Nevada Forest MIS Amendment

These comments on the Forest Service's February 21, 2007 proposal to revise the list of management indicator species (MIS) and associated monitoring strategies are submitted on behalf of Sierra Forest Legacy, California Trout, Defenders of Wildlife, California Native Plant Society, and Sierra Club. We appreciate this opportunity to comment and thank you for hosting an open house to provide information and answer questions.

We believe that the existing monitoring requirements for MIS and related species are an essential part of the land management plans and provide a valuable safety net to reduce the likelihood of plan implementation having significant adverse environmental impacts. Although we are open to considering minor fine-tuning of the MIS lists and monitoring requirements to address clear problems (e.g., requiring monitoring of species that do not have suitable habitat within the planning area, or including as MIS species that are not at all affected by Forest Service management), we would oppose an across the board dilution of the existing monitoring requirements.

## **I. THE EXISTING MONITORING REQUIREMENTS PLAY A CENTRAL ROLE IN THE FOREST SERVICE'S CONSERVATION STRATEGY FOR MIS AND SPECIES AT RISK AND SHOULD NOT BE WEAKENED.**

The Forest Service is proposing to revise the monitoring requirements for MIS set forth in the land resource management plans (LRMPs) for the Sierra Nevada national forests. The scoping notice states that the decision will likely be a "non-significant forest plan amendment" and that the decision "will improve the ability of these national forests to provide for the diversity of plant and animal communities." Contrary to this statement, we are concerned that the revision of existing monitoring requirements will have significant environmental consequences and will weaken, not strengthen, existing protection for species and biological diversity. We also believe that the proposal is likely to constitute a significant plan amendment, particularly given that it affects the entire planning area for national forests throughout the Sierra Nevada.

The monitoring requirements for MIS and related species, such as sensitive species and species at risk (SAR), are set forth in the individual LRMPs and in the 2001 and 2004 Frameworks, which amended the LRMPs. Appendix E of the 2001 Framework

established a comprehensive monitoring strategy for MIS and related species. The 2004 Framework subsequently readopted the requirements of Appendix E.

The monitoring requirements for MIS and related species are an integral part of the Forest Service's conservation strategy for these species; therefore, weakening these requirements could have significant, adverse environmental consequences and should, at a minimum, be accompanied by a full environmental impact statement (EIS) rather than an environmental assessment. In adopting the 2004 Framework, the Forest Service significantly increased both the amount and intensity of planned logging, thereby increasing the risk to the viability of numerous species, particularly species associated with old forests. (Sierra Nevada Forest Protection Campaign et al. 2004). Similarly, the 2004 Framework weakened the 2001 Framework's protection for watersheds, streams, meadows, and riparian areas, increasing the risk to the viability of species associated with aquatic habitats.

To address the "uncertainty" caused by weakening protection for MIS and related species in the 2004 Framework, the Regional Forester emphasized the importance of using an "adaptive management" approach that would allow the agency to change course if the plan resulted in adverse consequences to species. (USDA Forest Service 2004a, p. 12). Similarly, in reviewing the plan, the Chief of the Forest Service found that "managing habitat to maintain viable populations of the California spotted owl, the Pacific fisher, and American marten can only be assured by using subsequent site-specific evaluations and the adaptive management and monitoring strategy." (USDA Forest Service 2004b).

The monitoring program that the Forest Service is proposing to change is an integral part of adaptive management, and therefore a central component of the Forest Service's conservation strategy for MIS and related species. Appendix E makes clear that "the success of adaptive management is dependent upon a well-designed, adequately funded, and carefully implemented monitoring and research program." (App. E at E-5.) More specifically, the monitoring requirements set forth in Appendix E

will provide managers with information about the status and change in populations and habitats of species at risk. This information will be useful in determining potential impacts of projects on sensitive species and will provide an early warning system for species known to be at risk, yielding information that may aid in preventing listing.

(App. E at E-63).

The Committee of Scientists convened to review the Forest Service's planning regulations raised a similar point about the importance of monitoring:

Monitoring is crucial if performance evaluations are to provide accurate and useful information. It also serves as an early warning system against unforeseen risks involved in management activities. Monitoring procedures need to be incorporated into planning procedures and should be designed to be part of the

information used to inform decisions. Adaptive management and learning are not possible without effective monitoring of actual consequences from management activities. (Committee of Scientists 1999).

We are concerned that a proposal to substantially weaken the existing monitoring requirements will negate the effectiveness of this “early warning system,” with potentially grave environmental consequences.

To date, it appears that the Forest Service has essentially not implemented the monitoring requirements set forth in Appendix E. Thus, as stated in the 2005 FEIS for the Creeks project on the Lassen National Forest, “to date no specific information on the results of the monitoring [required by the 2001 and 2004 Framework] have been made available.” (Creeks FEIS, p. C-93, Response to Comment 32-46). It is inappropriate to modify these requirements, which were established based upon careful consideration and a lengthy public process, without at least attempting to implement them.

In addition to serving as a key component of adaptive management, the existing monitoring requirements are also intended to provide valuable information for purposes of assessing the environmental impacts of projects and plans. The monitoring requirements in Appendix E are designed to inform Forest Service decisionmaking “at the Forest and bioregional scales” and to allow assessment of the impacts of projects on these species. (App. E at E-2, E-63). Therefore, weakening the monitoring requirements could undermine the Forest Service’s assessment of environmental impacts and serve to sweep under the rug potentially significant adverse consequences.

Although not stated explicitly in the scoping notice, it is apparent that a central purpose of the proposed amendment is to remove a legal obstacle that is currently preventing many timber sales from going forward. A series of recent court cases have emphasized the importance of the existing monitoring requirements and have held that timber sales may not proceed until the Forest Service complies with its monitoring duties. Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147 (9th Cir. 2006); Sierra Nevada Forest Protection Campaign v. Tippen, 2006 WL 2583036 (E.D. Cal. 2006); Sierra Club v. Eubanks, 335 F. Supp. 2d 1070 (E.D. Cal. 2004). Rather than obtaining the required monitoring data – which would provide the “early warning system” necessary to avoid significant environmental impacts to MIS and related species – the Forest Service is apparently aiming to weaken or eliminate these monitoring requirements. We object to this course of action on both legal and policy grounds.

## II. THE LIST OF HABITAT AND ECOSYSTEM TYPES SHOULD BE EXPANDED

The scoping notice proposes ten major habitats or ecosystem types that would be represented by MIS. We believe that this list needs to be expanded to capture other important wildlife-habitat relationships.

The proposed list includes only two categories relating to conifer forests in the Sierra: early seral and mid/late seral (trees above 11” diameter). This list should be expanded to

include, at a minimum, mixed conifer forests, red fir forests, eastside forests, and higher quality old forests (trees above 24" diameter, i.e., CWHR 5 and 6). The list needs to include both lower elevation mixed conifer forests and higher elevation red fir forests because these forest types support different species assemblages. For example, the Pacific fisher predominantly inhabits the lower elevation mixed conifer forests, whereas the American marten predominantly inhabits the higher elevation mixed conifer/red fir forests. Beyond that, red fir forests constitute a different ecosystem type with different plant associations. Moreover, as the Forest Service has stated, logging pursuant to the Quincy Library Group project "has the potential to fragment high elevation red fir vegetation." (USDA Forest Service 1999a, p. 123, emphasis added). Because red fir forests provide unique habitat and are affected by Forest Service management, they should be separately represented by MIS. Similarly, because forest types "such as eastside mixed-conifer and eastside pine forests are the types most deficient in high quality late successional forest relative to their potential and to pre-settlement conditions," (USDA Forest Service 1999b, p. 3-62), eastside forests should also be separately represented by MIS.

The category of mid/late seral (trees above 11" diameter) is overly broad. Whereas forests of this size are generally abundant in the Sierra (i.e., CWHR 4), forests categorized by large trees (i.e., 24" diameter and greater, or CWHR 5/6) have been greatly depleted as a result of logging. Species like the California spotted owl and Pacific fisher are closely associated with CWHR 5 forests but far less associated with CWHR 4 forests. Canopy cover is also a critical habitat characteristic; old forest wildlife like the owl and fisher are closely associated with dense canopy cover (i.e., CWHR D) but far less so with moderate canopy cover (CWHR M) and not at all with lower canopy cover. These important distinctions could be lost by lumping all these habitat types into only two conifer forest categories.

Another important habitat type not represented in the proposed list is burned forests. Certain species, such as the black-backed woodpecker, are closely associated with burned forests. This habitat type is affected by Forest Service management in the form of salvage logging and fuels reduction projects (see Hutto 2006). Therefore, this type should be represented by MIS.

The category of snags/cavity nesters should be expanded to reflect the relative size, species and decay class of snags. Certain species, such as the pileated woodpecker and American marten, are closely associated with large snags, whereas far more species can utilize small snags and use them during different periods of the decay process. Therefore, we support expanding the snag/cavity nester category to include at least two habitat types, based on the relative size of the trees.

The habitat types represented should include shrubs. Research by PRBO and others has documented that numerous songbirds are closely associated with mature shrubs and that the populations of these species appear to be declining as a result of Forest Service management. (USDA Forest Service 2005, 2006). Therefore, it is important to have MIS that represent this habitat type.

Aspen stands are another important habitat type that should be represented by MIS, based upon research in the Sierra Nevada and elsewhere indicating that this is a unique ecological type affected by Forest Service management. (See, e.g., USDA Forest Service 2005, 2006; Shepperd et al. 2006).

### III. “BUDGET CONSTRAINTS” SHOULD NOT TRUMP THE NEED FOR EFFECTIVE MONITORING

As described above, the monitoring plan set forth in Appendix E and in the individual LRMPs is an essential part of adaptive management, which in turn is necessary to ensure the viability of numerous species as required by law. The Forest Service cannot forego necessary monitoring based on unsubstantiated “budget constraints” when it has a legal duty to ensure viability of species and provide a safety net against possible listings.

The Forest Service has a long history of failing to undertake legally required monitoring. As the GAO has reported:

[A]dequate monitoring of the effects of past management decisions is critical to accurately estimate the environmental effects of similar future decisions. Moreover, monitoring can be used as an effective tool when the effects of a decision may be difficult to determine in advance because of uncertainty or costs. However, the Forest Service (1) has historically given low priority to monitoring during the annual competition for scarce resources, (2) continues to approve projects without an adequate monitoring component, and (3) generally does not monitor the implementation of its plans as its regulations require. The Forest Service’s past failure to monitor represents a lost opportunity to reduce the costs and time of future decision-making. (U.S. GAO 1997).

Similarly, in another report the GAO found:

When actions to benefit wildlife are included in [Forest Service] land use plans, they are frequently not performed. Although agency regulations require the monitoring of how land use plans are carried out, the monitoring has generally not been performed and little data have been collected.... No single reason fully explains the limited attention provided by the Forest Service and BLM to wildlife protection and enhancement objectives. A key factor, however, centers around traditional agency deference to consumptive uses of the land. Agency land use priorities, budgets, and staffing have often reflected the pattern of meeting grazing, logging, and mining objectives first and providing for wildlife as circumstances permitted. (U.S. GAO 1995).

The monitoring requirements in Appendix E were specifically designed to be cost effective and not unduly onerous. Appendix E established a “multi-species monitoring approach” that can be used to address “the majority of species that require distribution and relative abundance population data.” According to the Forest Service, the monitoring

plan in Appendix E “is likely to be a highly efficient and effective approach.” (App. E, p. E-21). Additional research by Forest Service researchers documents that a multi-species monitoring approach such as that set forth in Appendix E can be effective and cost efficient. (Manley et al. 2004, 2005). The Forest Service has not even attempted to implement Appendix E, and therefore would not appear to have any new information regarding the projected costs of the program.

The proposal to forego any monitoring or data analysis that exceeds “budget constraints” is both overly vague and overly broad. Given that the Forest Service has historically underfunded monitoring, that this failure to monitor has resulted in species declines and listings, and that monitoring and adaptive management are critically linked to species viability, past budgets should not be a guide to future monitoring. If the Forest Service lacks the budget to implement adequate monitoring, then it should not implement the activities – such as logging and livestock grazing – whose impacts require monitoring. Indeed, the courts have recognized the logic of this approach by repeatedly enjoining timber sales that the Forest Service has proposed in the absence of required monitoring. Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147 (9th Cir. 2006); Sierra Nevada Forest Protection Campaign v. Tippen, 2006 WL 2583036 (E.D. Cal. 2006); Sierra Club v. Eubanks, 335 F. Supp. 2d 1070 (E.D. Cal. 2004).

#### IV. ANY CHANGES SHOULD NOT BE RETROACTIVE.

The scoping notice proposes that the changes to the monitoring requirements for MIS and related species be retroactive and apply to site-specific decisions that have already been made. This proposal is objectionable on both legal and policy grounds.

There is a strong presumption against retroactive application of laws and regulations. Landgraf v. USI Film Products, 511 U.S. 244 (1994). The Ninth Circuit has recognized that there is an “absolute bar against an agency’s retroactive rulemaking absent statutory authority” Newman v. Apfel, 223 F.3d 937, 942 (9th Cir. 2000). “Nothing in NFMA suggests an intent to allow the Forest Service to retroactively revise its regulations.” Forest Conservation Council v. Jacobs, 374 F. Supp. 2d 1187, 1202 n.10 (N.D. Ga. 2005); see also Defenders of Wildlife v. Johanns, 2005 WL 2620564, \*7 (N.D. Cal. 2005). For this reason, the Ninth Circuit has held that the version of plans and regulations that was in effect at the time of decision continues to apply. Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797, 800 n. 3 (9th Cir. 2005).

The monitoring requirements are an essential part of the adaptive management strategy for the 2004 Framework. Therefore, weakening the monitoring requirements would weaken one of the key legs upon which the Framework (and projects implementing the Framework) stands. Any site-specific projects approved to date were approved based upon the premise that the projects comply with existing laws and management plans. Any change to these plans, such as a weakening of the monitoring requirements, would constitute significant new information and changed circumstances that require

supplemental environmental documentation under the National Environmental Policy Act.

For these reasons, any changes to the monitoring requirements should apply prospectively only, and at a minimum cannot lawfully be applied to projects that have already been approved.

#### V. THE MIS LIST SHOULD NOT NECESSARILY BE UNIFORM ACROSS THE SIERRA NEVADA.

The scoping notice states the Forest Service's intent to adopt a uniform list of MIS that would apply across the entire Sierra Nevada. Although we understand the desirability of promoting uniformity, there are important indicator species that do not presently inhabit all national forests of the Sierra Nevada, such as the Pacific fisher, the Yosemite toad, and the Mt. Lyell salamander. These species are important indicators of the health of sensitive habitats within some, but not all, of the national forests. Therefore, they should continue to be listed as MIS for those forests.

#### VI. Habitat Objective and Monitoring Triggers

The environmental analysis should disclose specific habitat objectives and population objectives for all monitored species or suites of species. The Forest Service should establish clear "triggers" that will be put in place which define the response pathway for changes in management when monitoring goals are not met or when monitoring responses clearly indicate a need to change management. Specific triggers should be identified for at-risk species such as the Pacific fisher.

#### VII. Suitability Criteria

The environmental analysis must clearly define the terms such as "affected by management" and explain to what degree a species must be affected to be suitable for monitoring and identify what types of Forest Service management the agency considers as likely to be affecting MIS.

The Forest Service must also clearly define how the agency intends to judge the degree to which a species must reside on Forest Service land and for what part of its life cycle, to be counted as suitable for monitoring. Certain species may only spend a short period of their lifecycle on Forest Service land but that period of habitat use may be critical to the animal's survival and may be tied to a critical habitat, wetland, etc.

Finally, we request that you consider implementing Appendix E as it was intended, rather than weakening those requirements before they have been tried. Forest monitoring is the foundation of sound planning and will greatly advance the agency's credibility and meet its stewardship responsibilities. We request the Forest Service invite Forest Service Researcher Patricia Manley to re-engage agency partners in an open discussion of the state of the art of Multiple Species Inventory and Monitoring, an available and tested

methodology, and we also request you fully explore the development of a comprehensive MOU between The Region, PSW Research, and the University of California and stakeholder groups to utilize the upper division and graduate students in wildlife ecology, biometrics, and other fields and use this potential to complement a permanent and independent Forest Service monitoring team who would guide this effort.

Thank you for considering our comments.

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