

**No. 09-17354**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**SIERRA FOREST LEGACY, A PROJECT OF THE TIDES CENTER, *et al.*,  
Plaintiff-Appellants**

**v.**

**UNITED STATES FOREST SERVICE, *et al.*,  
Defendant-Appellees**

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**On Appeal From a Judgment of the United States District Court  
for the Northern District of California  
No. 3:08-cv-04240-SC**

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**SETTLEMENT AGREEMENT**

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## **SETTLEMENT AGREEMENT**

The Parties to these actions, Plaintiffs-Appellants Sierra Forest Legacy, a project of the Tides Center, Sierra Club, the Center for Biological Diversity, and Defenders of Wildlife (“Legacy”); and Defendants the United States Forest Service, officials of the Forest Service named in the complaint, namely the Chief of the Forest Service, Deputy Chief of the Forest Service, the Regional Forester for Region 5 of the U.S. Forest Service, and the Deputy Regional Forester for Region 5 of U.S. Forest Service (“Forest Service”), the United States Fish and Wildlife Service, and the National Marine Fisheries Service (collectively, “Federal Defendants”), by and through their undersigned counsel of record, hereby agree to the following Settlement Agreement in order to resolve this action and to avoid the need for further litigation before the Court.

WHEREAS:

On September 9, 2008, Legacy filed a lawsuit in federal district court (Case No. 3:08-cv-04240-SC) challenging the Forest Service’s adoption of the Sierra Nevada Forests Management Indicator Species Amendment Record of Decision and Final Environmental Impact Statement (“MIS Amendment”). The MIS Amendment identified a new list of species that would be monitored in all national forests in the Sierra Nevada, as well as monitoring protocols for those species. Legacy also challenged the related concurrences of the U.S. Fish and Wildlife Service and the

National Marine Fisheries Service that consultation under the federal Endangered Species Act was not required because the MIS Amendment would have “no effect” on species listed as “threatened” or “endangered” under that law.

On February 19, 2009, the district court dismissed Legacy’s claims against the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for lack of subject matter jurisdiction.

On August 27, 2009, the district court granted summary judgment in favor of the Forest Service on Legacy’s claims that the Forest Service violated NEPA and the Endangered Species Act in adopting the MIS Amendment.

On October 22, 2009, Legacy filed this appeal in the Ninth Circuit Court of Appeals. Subsequently, the parties entered into the Ninth Circuit’s mediation program, and have agreed to a stay of Legacy’s appeal while the parties have engaged in productive settlement discussions.

NOW THEREFORE,

The Parties have reached an agreement for informal resolution of this matter, and hereby agree and stipulate as follows:

1. The Forest Service agrees to hire Conservation Biology Institute (“CBI”) to convene and oversee a scientific peer review of the MIS Amendment, as outlined in the Scope of Work attached hereto as Exhibit A.

2. The Parties agree that the scientific peer review identified in paragraph 1 is to be an independent process performed by individual scientists under the supervision of CBI. The Forest Service agrees to consider any recommendations resulting from the peer review. However, the Parties also agree that neither this Settlement Agreement nor the peer review identified in paragraph 1 requires the Forest Service to adopt any of the recommendations of the peer review, to alter the MIS Amendment or any forest plan, or to take any other agency action not explicitly required in this Settlement Agreement.

3. Legacy agrees to pay CBI a minimum of \$ 30,000 to defray costs of the scientific peer review identified in paragraph 1. Legacy agrees to use good faith efforts to raise an additional \$ 10,000 to further defray costs incurred by CBI in connection with the scientific peer review identified in paragraph 1.

4. The Forest Service agrees to pay CBI the remaining costs incurred by CBI in connection with the scientific peer review identified in paragraph 1. According to the scope of work, the peer review will have total costs not to exceed \$95,600.

5. The terms of this Settlement Agreement shall become effective upon the date the counsel of record for the last Party signs the Settlement Agreement.

6. Within 14 calendar days of the effective date of this Settlement Agreement, Legacy will voluntarily dismiss the above-captioned appeal as to all

Federal Defendants. Dismissal shall be with prejudice, except that pursuant to Ninth Circuit General Orders, Appendix A(45), dismissal shall be without prejudice to reinstatement of the appeal as specified in Paragraphs 7 and 12 below.

7. Pursuant to Ninth Circuit General Orders, Appendix A(45), Legacy shall be entitled to move for reinstatement of the above-captioned appeal if any of the following conditions occur:

- a. CBI notifies the Parties that it cannot complete the peer review described in paragraph 1 because the Forest Service or Legacy has not made the payments required in paragraphs 3 and 4 respectively;
- b. A Party notifies the other Party that it cannot make the payments required of it in paragraphs 3 or 4, as applicable; or
- c. CBI has not completed the peer review within 18 months of the effective date of this agreement.

8. In the event that the Ninth Circuit Case is reinstated pursuant to Paragraph 12 below, the Parties agree that the Settlement Agreement shall not be used as evidence in the litigation.

9. The Parties agree that Legacy and the Federal Defendants shall each bear their own attorneys' fees, costs, and expenses for the above-captioned appeal up to the date the Settlement Agreement is signed by all parties, and the prior proceedings in District Court. The Parties further agree that no Party may seek reimbursement or an

award of attorneys' fees, costs, or expenses for the enforcement of this Settlement Agreement nor for time spent in connection with implementation of the Settlement Agreement. Nothing in this Settlement Agreement prevents any claims for attorneys' fees and costs in this matter in the event that the Settlement Agreement is not fully implemented and Legacy elects to pursue the appeal. If either Party breaches their respective obligations in paragraphs 3 and 4, that Party agrees not to seek fees or costs if the appeal is reinstated.

10. This Settlement Agreement is the result of compromise and settlement and does not represent an admission by any Party to any fact, claim, or defense in any issue in this lawsuit.

11. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that Federal Defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

12. The Parties agree that in no event shall any Party seek an order of contempt nor shall any Party be entitled to monetary damages for breach of this Agreement. In addition, before seeking any relief for breach of this Agreement, the Parties agree to provide written notice of any dispute as to compliance with this Agreement to the other Party prior to seeking relief from the court, and both Parties must make a good faith effort to resolve the dispute informally within 30 days after

the written notice (“dispute resolution period”). In the event the Parties are not able to resolve the dispute within the dispute resolution period, the peer review has not been completed, and the peer review will not be completed because of the breach of a Party, Legacy may within 28 days after the dispute resolution period, reinstate its appeal pursuant to Ninth Circuit General Orders Appendix A(45). Legacy may also reinstate its appeal pursuant to Ninth Circuit General Orders Appendix A(45) within 28 days if CBI has not produced the peer review report by 18 months after the effective date of this Agreement.

13. This Settlement Agreement shall be governed by and construed under federal law.

14. This Settlement Agreement contains all of the agreements between the Parties. The Parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this Settlement Agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this Settlement Agreement must be in writing, and must be signed and executed by the counsel of record for the Parties.

15. The undersigned representatives of the Parties certify that they are fully authorized by the respective Parties whom they represent to enter into the terms and conditions of this Settlement Agreement and to legally bind such Parties to it.

Signature on a counterpart or authorization of an electronic signature shall constitute a valid signature.

DATED: 6/1/2012

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# **Exhibit A**

# **Scope of Work**

May 31, 2012

## **INDEPENDENT SCIENCE FACILITATION IN SUPPORT OF A SETTLEMENT AGREEMENT REGARDING THE 2007 SIERRA NEVADA FORESTS MANAGEMENT INDICATOR SPECIES AMENDMENT**

This scope of work covers tasks to be performed by the Conservation Biology Institute (CBI) to facilitate a scientific review processes in support of a settlement agreement between Sierra Forest Legacy et al.<sup>1</sup> and the USDA Forest Service concerning a 2007 amendment to the Land and Resource Management Plans (forest plans) for the 10 National Forests in the Sierra Nevada related to Management Indicator Species (MIS) lists and associated monitoring. Dr. Wayne Spencer of CBI would serve as Science Facilitator, with support from Ms. Jerre Stallcup. This scope is revised from an earlier version based on discussion with the parties involved in the settlement, and it responds to written questions prepared jointly by the parties (confidential communication dated May 17, 2011).

Fundamental issues that this scope attempts to address:

1. The parties agree that this science review process should include both post-hoc peer review of the previous MIS program and 2007 amendment and proactive recommendations for improving and ensuring the scientific soundness of the MIS program (or other future similar regulatory constructs, such as the application of a “focal species” approach).
2. The parties desire independent evaluations and recommendations from individual scientists as well as common or consensus recommendations developed by the scientists via a facilitated discussion and reporting process. The recommendations document should be formatted for potential publication in an appropriate peer-reviewed forum, such as a USDA Forest Service general technical report (GTR), although this scope does not require the report to be submitted for publication.
3. The parties want the group of scientists to offer unbiased, science-based review and advice. The scientists should provide strong expertise in the fields of ecological indicators, adaptive management, wildlife monitoring, development of monitoring programs, and other pertinent fields; and the group should represent the diversity of thoughts and backgrounds related to monitoring types and theories.
4. The Forest Service has requested that the scientists recognize that the Service faces operational constraints, has limited resources for monitoring programs, has

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<sup>1</sup> Sierra Forest Legacy, Sierra Club, Defenders of Wildlife, and Center for Biological Diversity, represented by Earthjustice.

project-level analysis requirements for MIS that necessitate species-specific knowledge of habitat needs and result in costs beyond those associated with monitoring, and carries out other ecological monitoring; and that therefore the scientists should consider innovative ways of maximizing information benefits and MIS identification and monitoring effectiveness in light of these other efforts and constraints.

5. The process is to be an *independent* peer review/evaluation process performed by individual scientists, not by a committee established by any government agency. There is no statutory mandate for this process. Any comments or recommendations offered by the participating scientists are not binding on any agency or other party, and the deliberations of these individuals can be performed privately, without need for public noticing.

### **Task Descriptions**

The following tasks are designed to meet the goals of independent review of the MIS program and recommendations for refinement to increase scientific defensibility and effectiveness. CBI will manage all tasks and facilitate the science review and advisory process. To ensure the independence of the advisory process, representatives of the parties shall not contact individual advisors except during facilitated meetings, workshops, or webinars arranged by the Facilitator.

The Facilitator will facilitate a discussion among the Science Advisors to attempt to reach consensus on the review and recommendations of the panel, to identify such areas of consensus, clarify differences of opinion, and make the recommendations as feasible as possible. Wherever possible, recommendations will include alternatives that may vary in costs, effectiveness, etc. The Facilitator will ensure that conflicting opinions are objectively reflected in the Science Advisors' report(s). We assume that compilation, printing, and distribution of documents needing review by Advisors or to be considered during their deliberations will be performed by the parties.

**Task 1. Select and Manage Science Advisors.** The Facilitator will assist the parties with identifying candidate scientists, interview the candidates, and select the final group of advisors. A draft list of about 15 candidates has already been developed by the parties. The facilitator will review this list to ensure it adequately covers the diversity of approaches, types, and theories of monitoring, and may suggest additional candidates, with approval of the parties. Once the list of candidates is final, the Facilitator will select 4-8 scientists that best cover the diversity of expertise needed, while minimizing redundancies (e.g., by not selecting multiple reviewers known as proponents of similar monitoring approaches). The Facilitator will contact individuals to determine their interest and availability to serve, and will establish agreements as needed to secure their commitment to the process and to establish any needed payment for their services.

The Facilitator will be responsible for coordinating the advisory process, ensuring that the Science Advisors understand their charge, channeling any pertinent questions between the parties and the Science Advisors, and ensuring that pertinent issues are addressed appropriately.

**Task 2. Coordinate Review of the Questions.** The Facilitator will first review the list of

questions developed by the parties and may suggest revisions. A final set of questions will be developed via in-person meeting, email, and/or phone conferences with the parties to ensure that all agree to the final list of questions. The Facilitator will then distribute the questions (and any other pertinent documents) to the reviewers along with instructions and a schedule for performing the review and submitting their answers to the Facilitator. The Facilitator will organize a phone conference or webinar involving the scientists and representatives of the parties to discuss the questions and the context for advisor reviews. Representatives of the parties will jointly inform the advisors about goals, approaches, issues, and concerns. The Facilitator and representatives of the parties may make presentations and answer questions, as necessary, to acquaint the Science Advisors with these issues. The Facilitator will ensure that the Science Advisors fully understand this information and their roles relative to this scope of work. The Facilitator will collate answers to the questions submitted by the reviewers and summarize the process and the content of the reviews, identifying major commonalities between the reviews, and discussing any major differences between the reviews. This will help in developing the scope of issues to be discussed in more detail at a science advisory workshop (Task 3) and to help develop the final recommendation document (Task 4).

**Task 3. Organize and Facilitate Science Advisory Workshop(s).** The Facilitator will work with the parties and Science Advisors to determine the optimal timing and scope of a science-advisory workshop to discuss the individual review of questions and recommendations (Task 2) and to refine science-based recommendations for improving the MIS program (or other future similar regulatory constructs, such as the application of a “focal species” approach). We currently assume one 2-day workshop will suffice. Prior to the workshop, the Facilitator will develop a detailed agenda and, with assistance from the parties and based in part on the results of Task 2, will identify any additional materials, issues, or questions to be addressed at the workshop.

The Facilitator will also help the parties with logistics planning for science workshops, including establishing requirements for meeting rooms (size, seating arrangements, presentation materials, etc.), arranging lodging, etc.

The first portion of the workshop will include representatives of the parties to answer any outstanding questions the Science Advisors may have. The second portion of the workshop will be for Science Advisors only, so they can deliberate and develop recommendations in private. The Facilitator will ensure that by the end of the workshop the Science Advisors understand the process and schedule for compiling their inputs into a report, as well as their individual responsibilities for delivering and reviewing report sections.

**Task 4. Prepare Draft Recommendations Report.** The Facilitator will be responsible for ensuring timely delivery of a clear and useful report presenting the Science Advisors’ answers to the questions, the Facilitator’s summary, and the individual and consensus recommendations from the Science Advisors to the parties. The Facilitator will also serve as first author/editor of the contents, to be prepared cooperatively by all advisors, and with opportunity for all advisors to review and concur with report contents prior to release to the parties. The Facilitator will ensure that conflicting opinions are objectively reflected in the report. The report will focus on recommendations for the MIS program (or other future similar regulatory constructs, such as the application of a “focal species”

approach) while fully considering the operational, funding, and other constraints faced by the Forest Service, other monitoring and analysis efforts performed by the Forest Service, and other issues or constraints that may affect design of a cost-effective and efficient monitoring and adaptive management program. The report will be formatted consistent with requirements for a USDA Forest Service GTR or other appropriate publication and submitted to the parties for review.

**Task 5. Revise and Finalize Draft Report.** The Facilitator and advisors will revise the draft report based on comments received from the parties. Changes will only be made in response to comments pointing out factual errors or unclear or ambiguous language, or to address additional information raised by the parties (e.g., potential alternatives to the scientific recommendations to help address constraints identified by the parties). Comments specifically requesting changes to the science-based recommendations will not be addressed, unless advisors agree that this is warranted.

Once the report is finalized, it will be made available to the parties and the parties will get together to discuss the report and public distribution. This scope neither requires nor prohibits publication of the final document as a GTR or other peer-reviewed document, nor does it any way limit the use of the final report by any party.

#### *Estimated Costs*

Assumptions: (1) Includes travel costs (airfare, lodging, and meals) for two CBI employees to run one 2-day workshop, assumed to be in/near Sacramento; (2) Science Advisor costs assume an average of \$4,000 for up to 8 advisors, to cover an honorarium and any travel costs for workshop attendance; (3) Assumes workshop venues to be arranged free of charge by USFS.

CBI (time and expenses):	\$63,600
Science Advisors, not to exceed:	\$32,000
Total, not to exceed:	\$95,600

**Note:** Due to uncertainties about the final number of Advisors, and whether and how much funding each Advisor may require for an honorarium and travel costs, it may be advisable to first enter into an agreement with CBI for CBI costs only, and to seek additional funding to cover costs for the Advisors once they and their funding requirements are identified.