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10
11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 SIERRA FOREST LEGACY, CENTER FOR) Case No.:
15 BIOLOGICAL DIVERSITY, SIERRA CLUB,)
and DEFENDERS OF WILDLIFE,)
16 Plaintiffs,) COMPLAINT FOR DECLARATORY
vs.) AND INJUNCTIVE RELIEF
17)
18 UNITED STATES FOREST SERVICE;)
19 ABIGAIL KIMBELL, in her official capacity as)
Chief of the Forest Service; CHARLES MYERS,)
20 in his official capacity as Associate Deputy Chief)
of the Forest Service; RANDY MOORE, in his)
official capacity as Regional Forester, Region 5,)
United States Forest Service; BETH)
21 PENDLETON, in her official capacity as Deputy)
Regional Forester, Region 5, U.S. Forest)
22 Service; UNITED STATES FISH AND)
WILDLIFE SERVICE; and NATIONAL)
23 MARINE FISHERIES SERVICE,)
24 Defendants.)

1 **INTRODUCTION**

2 1. At issue in this litigation is an amendment to the “land and resource management
3 plans” (or “forest plans”) for the Sierra Nevada national forests that eliminates vital protections for
4 numerous species and habitats set forth in those plans – the Sierra Nevada Forests Management
5 Indicator Species Amendment (“MIS Amendment”). Forest plans govern nearly every activity in
6 national forests and must include provisions to monitor the health of species and forest ecosystems.
7 The forest plans for all ten of the Sierra Nevada national forests previously included detailed
8 monitoring requirements for certain bellwether species (known as “management indicator species”
9 or “MIS”) to ensure well-distributed and healthy populations of all plant and animal communities
10 throughout the national forests, including monitoring within each forest as well as throughout the
11 Sierra Nevada.

12 2. The MIS Amendment marks a dramatic shift in the United States Forest Service’s
13 (“Forest Service”) responsibilities for managing the Sierra’s diverse flora and fauna. The MIS
14 Amendment eliminates the Forest Service’s obligation to monitor the health of over 40 species of
15 fish and wildlife, many of which are already on the brink of extinction. For the thirteen remaining
16 management indicator species, the MIS Amendment expressly overrules judicial decisions requiring
17 that the Forest Service monitor such species prior to implementing site-specific projects. As a result,
18 the MIS Amendment removes an important safety net for numerous imperiled, at risk, and sensitive
19 species and increases the risk that logging and other activities in the national forests will adversely
20 affect wildlife and their habitat.

21 3. Plaintiffs Sierra Forest Legacy, Center for Biological Diversity, Sierra Club, and
22 Defenders of Wildlife (collectively, “plaintiffs”) allege that the Forest Service’s adoption of the MIS
23 Amendment violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370f,
24 the Endangered Species Act (“ESA”), 16 U.S.C. § 1531-1544, the regulations implementing these
25 statutes, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. Plaintiffs also allege
26 that the United States Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service
27 (“NMFS”) violated the ESA by concurring with the Forest Service’s determination that the MIS
28 Amendment will not have any effect on threatened and endangered species or critical habitat.

1 Plaintiffs seek a declaration that the MIS Amendment is contrary to law, an order setting aside the
2 MIS Amendment and the wildlife agencies' concurrences, and an injunction prohibiting the Forest
3 Service from implementing the MIS Amendment and also reinstating the monitoring requirements
4 for MIS in the preexisting forest plans.

5 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

6 4. Plaintiffs bring this action pursuant to the APA, 5 U.S.C. §§ 701-706, and the ESA,
7 16 U.S.C. § 1540(g). This Court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C.
8 § 1331 (federal question) and may issue a declaratory judgment and further relief pursuant to 28
9 U.S.C. §§ 2201-02. An actual controversy exists between plaintiffs and defendants.

10 5. Pursuant to 16 U.S.C. § 1540(g)(2)(A)(i), plaintiffs notified defendants of the
11 violations of the ESA alleged herein more than 60 days before commencing this action. *See* May 2,
12 2008 letter to Edward T. Schaffer *et al.* from Gregory C. Loarie, attached hereto. Despite such
13 notice, defendants have failed to remedy their violations of the ESA.

14 6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e), because plaintiff
15 Sierra Club is incorporated in this district and maintains its headquarters in the County of San
16 Francisco.

17 7. Assignment to the San Francisco Division of this judicial district is proper because
18 plaintiff Sierra Club maintains its headquarters in San Francisco. Civil L.R. 3-2(c).

19 **PARTIES**

20 8. Plaintiff Sierra Forest Legacy ("Legacy") is a Sacramento-based coalition of local,
21 regional, and national environmental organizations dedicated to protecting and restoring the Sierra
22 Nevada's national forests. Legacy works to protect and restore the forests, wild lands, wildlife, and
23 watersheds of the Sierra Nevada through scientific and legal advocacy, public education and
24 outreach, and grassroots forest protection efforts. Legacy has a long history of involvement with
25 Forest Service management of national forests throughout the Sierra Nevada.

26 9. Plaintiff Center for Biological Diversity is a nonprofit organization with offices in
27 San Francisco, Sacramento, Joshua Tree, Los Angeles, and San Diego, California, as well as a
28 number of other states. The Center works through science, law, and policy to secure a future for all

1 species hovering on the brink of extinction. The Center is actively involved in species and habitat
2 protection in the Sierra Nevada. The Center has over 40,000 members throughout the United States
3 and the world.

4 10. Plaintiff Sierra Club is a nonprofit organization headquartered in San Francisco,
5 California, with over 700,000 members, approximately 185,000 of whom reside in California. The
6 Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth, to practice and
7 promote responsible uses of the Earth's ecosystems and resources, to educate and enlist humanity in
8 the protection and restoration of the quality of the natural and human environment, and to use all
9 lawful means to carry out those objectives. Since its inception the Sierra Club and its members have
10 advocated for the protection of forest ecosystems throughout the Sierra Nevada.

11 11. Plaintiff Defenders of Wildlife ("Defenders") is a national, non-profit membership
12 organization dedicated to the protection of all native wild animals and plants in their natural
13 communities. Based in Washington, D.C., and with four offices in California, Defenders has more
14 than 500,000 members nationwide, including over 70,000 in California. Defenders counts among its
15 priorities ensuring the conservation of wildlife and habitat on federal public lands, with particular
16 emphasis on national forests. The ten national forests of the Sierra Nevada are a critical component
17 of this work in California, where Defenders has worked diligently to protect imperiled species and
18 the habitats upon which these species depend.

19 12. Plaintiffs have members who live and work near and visit national forests throughout
20 the Sierra Nevada that are affected by the MIS Amendment. They use these national forest lands for
21 a variety of purposes, such as hiking, backpacking, skiing, photography, scientific study, wildlife
22 observation, hunting, and fishing, and intend to continue to do so on an ongoing basis in the future.
23 Plaintiffs' members derive recreational, spiritual, professional, aesthetic, educational, and other
24 benefits and enjoyment from engaging in these activities in healthy forests occupied by well-
25 distributed and robust populations of fish and wildlife.

26 13. The MIS Amendment is adversely affecting plaintiffs' members' use and enjoyment
27 of national forests in the Sierra Nevada by terminating the Forest Service's responsibility to collect
28 information concerning the health of numerous species in the Sierra Nevada, by eliminating

1 requirements in individual forest plans that safeguard against population declines of those species
2 and degradation of their habitat, and by authorizing numerous logging projects and herbicide
3 spraying projects even though the Forest Service has not obtained MIS monitoring data previously
4 required as a pre-condition to such projects. All of these actions increase the likelihood that forest
5 managers will fail to detect and address adverse impacts on species and the habitat upon which those
6 species depend and that species and habitat will be degraded, thereby diminishing plaintiffs'
7 members' enjoyment of the Sierra Nevada forests.

8 14. Plaintiffs have a long history of involvement in planning and decision making
9 relating to MIS and the MIS Amendment. Plaintiffs have raised concerns regarding the Forest
10 Service's failure to monitor adequately MIS with respect to numerous logging projects and have
11 filed successful litigation challenging the Forest Service's failure to comply with MIS requirements
12 set forth in its regulations and forest plans. With respect to the Forest Service's adoption of the MIS
13 Amendment, plaintiffs provided oral testimony at a scoping meeting, filed written scoping
14 comments and comments on the draft environmental impact statement, and filed an administrative
15 appeal challenging the decision.

16 15. Plaintiffs have been, are being, and will continue to be adversely affected and
17 irreparably injured by the Forest Service's decision to adopt the MIS Amendment. These injuries
18 are actual and concrete and would be redressed by the relief sought herein. Plaintiffs have no
19 adequate remedy at law.

20 16. Defendant United States Forest Service is an administrative agency within the
21 Department of Agriculture responsible for managing national forests, including national forests
22 within the Sierra Nevada that are affected by the MIS Amendment.

23 17. Defendant Abigail Kimbell is the Chief of the Forest Service. She is sued in her
24 official capacity.

25 18. Defendant Charles Myers is the Associate Deputy Chief of the Forest Service. Mr.
26 Myers was the appeal deciding officer who denied plaintiffs' administrative appeal. Mr. Myers is
27 sued in his official capacity.

1 26. NFMA requires that the Forest Service adopt forest plans for each national forest unit
2 that govern all subsequent activities within the forest. Among other things, forest plans must
3 “provide for diversity of plant and animal communities.” 16 U.S.C. § 1604(g)(3)(B).

4 27. In 1982, the Forest Service promulgated regulations under NFMA that establish a
5 process for adopting, revising, and amending forest plans. 36 C.F.R. Part 219 (1982). The 1982
6 regulations also set forth essential elements of all forest plans. For example, the 1982 regulations
7 require that the Forest Service “maintain viable populations of existing native and desired non-native
8 vertebrate species in the planning area.” *Id.* § 219.19. A “viable population” is defined as “one
9 which has the estimated numbers and distribution of reproductive individuals to insure its continued
10 existence is well distributed in the planning area.” *Id.*

11 28. In order to estimate the effects of forest management on fish and wildlife, the 1982
12 regulations direct the Forest Service to identify “management indicator species” (“MIS”) whose
13 population changes “are believed to indicate the effects of management activities.” *Id.*
14 § 219.19(a)(1). The 1982 regulations require that “population trends of the management indicator
15 species will be monitored and relationships to habitat changes determined.” *Id.* § 219.19(a)(6). The
16 1982 regulations further provide that, in the development of forest plans, proposed forest plans and
17 forest plan alternatives must establish “objectives” for the maintenance and improvement of habitat
18 for MIS; prescribe measures to mitigate adverse impacts on MIS; and state and evaluate planning
19 alternatives in terms of the amount and quality of habitat and of population trends of MIS. *Id.*
20 § 219.19(a)(1)-(7). Forest plans must also include a detailed description of monitoring requirements,
21 including the actions, effects, or resources to be measured and the frequency of measurement;
22 expected reliability of monitoring; and the time when evaluation will be reported. *Id.*
23 § 219.12(k)(4).

24 29. Careful monitoring of MIS enables the Forest Service to identify on-the-ground
25 activities that are impacting adversely both the MIS themselves and fish and wildlife with similar
26 habitat needs, and to change management activities to ensure that fish and wildlife populations do
27 not decline in number such that they may become unable to survive in the long-term. The scientific
28 community, including both Forest Service and independent scientists, widely recognizes the

1 importance of MIS monitoring as an “early warning” system to identify and address unforeseen
2 adverse impacts on species and forest ecosystems.

3 **The Sierra Nevada Forest Plans**

4 30. Pursuant to NFMA and the 1982 regulations, the Forest Service adopted forest plans
5 for each of the ten national forests in the Sierra Nevada in the 1980s and early 1990s. Together,
6 these forest plans identified approximately 60 MIS. The Forest Service designated these species as
7 MIS because it believed their population changes would indicate the effects of management
8 activities. Many of the species have been found to be vulnerable and either known or suspected to
9 be decreasing in number.

10 31. For each MIS, the Sierra Nevada forest plans include detailed monitoring protocols,
11 management objectives, and specific thresholds that, if exceeded, would trigger the Forest Service’s
12 reconsideration of management direction and/or its adoption of actions to mitigate adverse impacts
13 to MIS. The thresholds established in the forest plans require that the Forest Service reconsider
14 management activities based upon a variety of factors, such as population declines, declines in
15 habitat quality, and reduction in nesting success.

16 32. In 2001, the Forest Service adopted a comprehensive Sierra-wide monitoring strategy
17 that applies to all ten national forests in the Sierra Nevada. That strategy, set forth in Appendix E to
18 the 2001 Sierra Nevada Forest Plan Amendment, established additional, regional monitoring
19 requirements for the MIS identified in the individual forest plans as well as new monitoring
20 requirements for certain other “species at risk” (“SAR”).

21 33. In 2004, the Forest Service replaced the 2001 Sierra Nevada Forest Plan Amendment
22 with a revised plan that explicitly incorporated the regional monitoring requirements set forth
23 previously in Appendix E. In approving the revised plan, the Chief of the Forest Service explained
24 that the continued viability of several imperiled species in the Sierra Nevada could only be assured
25 by implementing the monitoring requirements in Appendix E.

26 34. Numerous courts have held that the Forest Service may not approve site-specific
27 projects that may have an impact on fish and wildlife if it has not collected monitoring data for MIS
28 and SAR as required by the 1982 NFMA regulations and Appendix E. *See, e.g., Earth Island Inst. v.*

1 *United States Forest Serv.*, 442 F.3d 1147, 1173-76 (9th Cir. 2006); *Sierra Nevada Forest*
2 *Protection Campaign v. Tippin*, 2006 WL 2583036, *19-20 (E.D. Cal. 2006); *Sierra Club v.*
3 *Eubanks*, 335 F. Supp. 2d 1070, 1081-82 (E.D. Cal. 2004).

4 **The MIS Amendment**

5 35. On December 14, 2007, the Regional Forester adopted the MIS Amendment, which
6 amends the forest plans for all ten national forests in the Sierra Nevada with respect to the
7 monitoring requirements for MIS and SAR. A stated purpose of the MIS Amendment is to reverse
8 judicial decisions requiring that the Forest Service monitor MIS and SAR prior to implementing site-
9 specific projects. To that end, the MIS Amendment makes several fundamental changes to forest
10 plan requirements for Sierra Nevada MIS and SAR.

11 36. First, the MIS Amendment reduces the total number of designated MIS from
12 approximately 60 to 13 species. The Amendment removes from the list of MIS eleven threatened or
13 endangered species, designates MIS that do not adequately represent the habitat needs and
14 characteristics of species removed from the list of MIS, and fails to account for certain habitat types
15 that were represented by the former MIS. By removing species from the list of MIS, the MIS
16 Amendment not only terminates the Forest Service's obligation to collect monitoring data for them,
17 it also effectively terminates numerous related forest plan requirements related to the former MIS,
18 including monitoring protocols, management objectives, specific thresholds, and mitigation designed
19 to address declines in MIS found as a result of MIS monitoring efforts.

20 37. Second, the MIS Amendment provides that the Forest Service may proceed with
21 implementing site-specific projects that affect MIS habitat even if the Forest Service has not
22 collected monitoring data for those species required by the forest plans. The MIS Amendment also
23 terminates all of the monitoring requirements for SAR set forth in Appendix E.

24 38. Third, the MIS Amendment adds new MIS that were not previously identified as MIS
25 by any of the Sierra Nevada forest plans. For new MIS, the MIS Amendment does not establish a
26 monitoring plan or protocol, management objectives, specific thresholds, or mitigation measures
27 that individual Sierra Nevada forest plans included for the previously designated MIS. Such
28 provisions would trigger the adjustment of management activities when MIS monitoring data

1 demonstrates that MIS are in decline. The Forest Service explicitly defers evaluation of a
2 monitoring plan for MIS, including discussion of the nature, amount, and intensity of proposed
3 monitoring, until an unspecified, future time and process that will not undergo public review and
4 evaluation pursuant to NEPA.

5 39. Finally, the MIS Amendment exempts numerous previously approved projects from
6 MIS monitoring requirements, including the minimal requirements established by the MIS
7 Amendment.

8 40. The Regional Forester prepared an environmental impact statement (“EIS”) under
9 NEPA that purports to analyze the environmental effects of the MIS Amendment. The EIS discloses
10 that for at least two decades Forest Service monitoring of MIS has provided “relevant useful
11 information” about the ecological health of the Sierra Nevada forests. However, according to the
12 EIS, the Forest Service decided to take action to reverse judicial decisions requiring that the Forest
13 Service comply with its duty to collect monitoring data for MIS and SAR before implementing site-
14 specific projects. The EIS does not analyze the impacts of reducing monitoring activities throughout
15 the Sierra Nevada forests on species removed from the list of MIS, species for which former MIS
16 serve as proxies, or the habitat of such species. The EIS also does not analyze the impacts of
17 eliminating monitoring protocols, management objectives, specific thresholds, and mitigation for
18 previously designated MIS, or the impacts of eliminating the requirement that MIS monitoring occur
19 prior to implementation of site-specific projects. As such, the EIS concludes that the MIS
20 Amendment will have “no ecological effects.”

21 41. The Regional Forester also prepared a Biological Assessment of the impact of the
22 MIS Amendment on ESA-listed species that concludes that the MIS Amendment will have “no
23 effect” on threatened or endangered species because it is a programmatic decision that “will not
24 authorize or trigger any ground-disturbing activities.”

25 42. On October 4, 2007, NMFS sent a letter to the Regional Forester concurring that the
26 MIS Amendment will have “no effect” on ESA-listed salmonid species. On October 12, 2007, the
27 Deputy Division Chief of the California/Nevada Operations Office of FWS sent an email to the
28 Forest Service indicating that FWS agreed with the Forest Service’s “no effect” determination.

1 Based on its arbitrary determination that the MIS Amendment will have “no effect” on ESA-listed
2 species, and the equally arbitrary concurrences of FWS and NMFS, the Regional Forester did not
3 engage in formal consultation with FWS or NMFS.

4 **Procedural History**

5 43. On December 14, 2007, the Deputy Regional Forester of the Pacific Southwest
6 Region of the Forest Service, through authority delegated by the Regional Forester, signed the
7 record of decision approving the MIS Amendment.

8 44. On February 4, 2008, plaintiffs appealed the Regional Forester’s decision to adopt the
9 MIS Amendment to the Chief of the Forest Service pursuant to 36 C.F.R. § 217.8(f).

10 45. Under 36 C.F.R. § 217.8(f), the Chief was required to make a decision with respect to
11 plaintiffs’ administrative appeal within 160 days – *i.e.*, by July 14, 2008.

12 46. On July 24, 2008, the Chief exercised authority under 36 C.F.R. § 217.13(a) to extend
13 until August 20, 2008 the deadline for making a decision on plaintiffs’ administrative appeal.

14 47. On August 25, 2008, the Associate Deputy Chief of the Forest Service, through
15 authority delegated by the Chief of the Forest Service, signed a decision denying plaintiffs’
16 administrative appeal.

17 48. The Forest Service has implemented the MIS Amendment by applying it to numerous
18 site-specific projects. For example, the Forest Service has implemented the MIS Amendment by
19 exempting previously approved projects from all MIS monitoring requirements, including the
20 monitoring requirements in effect when the projects were approved.

21 **CLAIMS FOR RELIEF**

22 **FIRST CLAIM FOR RELIEF**

23 **(Violations of the National Environmental Policy Act and APA)**

24 49. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
25 the preceding paragraphs.

26 50. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R.
27 § 1500.1. NEPA requires that all agencies of the federal government prepare a “detailed statement”
28 that discusses the environmental effects of, and reasonable alternatives to, all “major Federal actions

1 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This
2 statement is commonly known as an environmental impact statement or EIS.

3 51. NEPA and its implementing regulations require that EISs “rigorously explore and
4 objectively evaluate” all reasonable alternatives to a proposed action. 40 C.F.R. § 1502.14. EISs
5 must devote “substantial treatment” to each alternative considered in detail, including the proposed
6 action, “so that reviewers may evaluate their comparative merits.” *Id.* Moreover, agencies must
7 ensure that “the proposal which is the subject of the environmental impact statement is properly
8 defined.” *Id.* § 1502.4(a).

9 52. NEPA and its implementing regulations further require that EISs “provide full and
10 fair discussion of significant environmental impacts.” *Id.* § 1502.1. EISs must analyze the
11 environmental impacts of the proposed action and alternatives, including direct effects, indirect
12 effects, and cumulative effects. *Id.* §§ 1502.16, 1508.7, 1508.8; 42 U.S.C. § 4332(c).

13 53. The EIS for the MIS Amendment fails to describe and evaluate adequately each of
14 the project alternatives. The EIS fails to describe adequately the no action alternative because it
15 only identifies the pre-existing MIS, the habitat types that those species represent, and the general
16 type of monitoring that will be used for each species (*e.g.*, habitat, population, or recovery plan).
17 The EIS does not describe the pre-existing forest plan requirements relating to MIS, including the
18 management objectives, key elements of the MIS monitoring program (*e.g.*, where and how
19 frequently monitoring will occur), or other management provisions that act as thresholds that trigger
20 the Forest Service’s reconsideration of management direction and/or its adoption of mitigation that
21 would prevent forest projects from adversely affecting MIS. These omissions deprive the public and
22 the decision maker the opportunity to fully evaluate the choice between alternatives. Furthermore,
23 the EIS erroneously states that “[n]one of the current habitat and wildlife management strategies are
24 contingent upon current MIS lists and associated monitoring strategies,” and that “none of the
25 current monitoring provides an essential component necessary for the protection of any particular
26 species or habitat.” Sierra Nevada Forests Management Indicator Species Amendment Final
27 Environmental Impact Statement (“FEIS”) at 48. In fact, many provisions in the forest plans are
28 designed specifically to address declines in MIS detected as a result of MIS monitoring.

1 54. The EIS fails to describe adequately the proposed alternative. According to the EIS,
2 the proposed alternative only identifies new MIS and the habitats they represent, how those MIS
3 were selected, and whether monitoring of such species will be “habitat trend” or “habitat trend and
4 distribution population modeling.” The EIS fails to disclose that the proposed alternative effectively
5 eliminates existing forest plan requirements for species that the MIS Amendment removes from the
6 list of MIS, including provisions designed to trigger the Forest Service’s reconsideration of
7 management direction and/or the adoption of mitigation measures to prevent forest projects from
8 adversely affecting MIS. Without MIS monitoring data, many provisions in forest plans designed to
9 address declines in species previously designated as MIS will never take effect and, thus, essentially
10 are terminated by the Forest Service’s decision to remove such species from the list of MIS. The
11 EIS’ description of the proposed alternative also fails to describe the required elements of an MIS
12 monitoring plan, including the frequency, reliability, and time for evaluation of monitoring, *see* 36
13 C.F.R. § 219.12(k)(4), and fails to describe required MIS management objectives and mitigation
14 measures, *see* 36 C.F.R. § 219.19(a). The Forest Service explicitly and unlawfully defers analysis of
15 an MIS monitoring plan to a future process outside of the NEPA process.

16 55. The EIS similarly fails to analyze how each of the other management alternatives will
17 affect existing forest plan requirements relating to species that the MIS Amendment removes from
18 the list of MIS, and does not describe adequately the required monitoring, management objectives,
19 or mitigation requirements related to the new MIS.

20 56. By failing to describe adequately the proposed, no action, and other alternatives, the
21 EIS prevents informed consideration of the “comparative merits” of the various alternatives and fails
22 to analyze adequately all of the environmental effects of the proposed action. *See* 40 C.F.R.
23 § 1502.14.

24 57. The EIS for the MIS Amendment is premised on the Forest Service’s incorrect
25 assumption that the MIS Amendment will have “no ecological effects.” As a result, the EIS fails to
26 disclose and analyze adequately significant environmental effects of adopting the MIS Amendment.
27 For example:
28

- 1 A. The MIS Amendment terminates the Forest Service’s responsibility to collect forest-
2 specific and region-wide monitoring data for numerous species that the decision
3 removes from the list of MIS. The MIS Amendment also eliminates Appendix E
4 requirements to monitor SAR. The MIS Amendment thus removes a critical safety
5 net for species that it drops from the list of MIS and SAR and increases the likelihood
6 that these species will be harmed by projects in the national forests.
- 7 B. The MIS Amendment affects other species in the Sierra Nevada national forests by
8 providing that monitoring is no longer required for numerous MIS and SAR that
9 before served as “proxies” for species with similar population characteristics and
10 habitat requirements, but which were not themselves subject to monitoring as MIS or
11 SAR. The MIS Amendment does not establish a sufficient number and quality of
12 replacement MIS. As a result, the MIS Amendment increases the likelihood that
13 forest managers will fail to identify and address threats to such species and their
14 habitat.
- 15 C. The MIS Amendment effectively terminates provisions included in individual forest
16 plans that would otherwise trigger the Forest Service’s reconsideration of
17 management direction and/or its adoption of mitigation for species that were removed
18 from the list of MIS if, for example, MIS monitoring data demonstrate that species’
19 populations are in decline. By eliminating the mechanism for monitoring such
20 species the Forest Service will not have the information that would trigger its
21 responsibility to reconsider management direction and/or adopt mitigation measures.
22 The MIS Amendment also fails to establish a monitoring plan, management
23 objectives, management thresholds, or mitigation measures for species that the MIS
24 Amendment adds to the list of MIS. This further increases the likelihood that forest
25 managers will fail to identify and address threats to such species and their habitat.
- 26 D. The MIS Amendment reduces drastically the overall amount of monitoring of species
27 and habitat that will occur throughout the Sierra Nevada national forests. The MIS
28 Amendment reduces the number of MIS from approximately 60 to only 13 species and

1 eliminates Appendix E requirements for monitoring SAR. In the process of
2 eliminating over 40 species from the list of MIS, certain habitat types are no longer
3 represented by MIS and will not be monitored. Reducing the overall amount of
4 monitoring in this manner may adversely affect species removed from the list of MIS
5 and SAR, species for which the former MIS serve as proxies, and the habitat of such
6 species by further increasing the likelihood that forest managers will not identify and
7 address adverse impacts on them.

8 E. The MIS Amendment provides that the Forest Service may implement site-specific
9 projects even if it has not obtained monitoring data for MIS and SAR. The MIS
10 Amendment thus authorizes and allows to proceed numerous logging and herbicide-
11 spraying projects that were previously enjoined or delayed because of the Forest
12 Service's failure to obtain adequate population data for MIS and SAR. These
13 projects, as well as future projects approved by the Forest Service without adequate
14 MIS monitoring data, may cause significant adverse impacts and will be much more
15 likely to contribute to further declines of MIS and SAR.

16 58. The final EIS fails to disclose, analyze, resolve, or otherwise take a "hard look" at
17 any of these significant environmental impacts, as required by NEPA.

18 59. The Forest Service's failure to define and evaluate adequately the proposed action
19 and its alternatives, and the agency's failure to disclose and analyze adequately the MIS
20 Amendment's significant and adverse environmental impacts, is contrary to NEPA and its
21 implementing regulations and therefore is arbitrary, capricious, contrary to law, and without
22 observance of procedure required by law, in violation of the APA, 5 U.S.C. § 706(2).

23 **SECOND CLAIM FOR RELIEF**

24 **(Violations of the Endangered Species Act and APA)**

25 60. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
26 the preceding paragraphs.

27 61. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires that each federal agency,
28 in consultation with FWS and/or NMFS, "insure" that any action authorized, funded, or carried out

1 by the agency is not likely to jeopardize the continued existence of any threatened or endangered
2 species or result in the destruction or adverse modification of the critical habitat of such species.
3 “Action” is defined to include the promulgation of regulations; actions that may directly or indirectly
4 cause modifications to the land, water, or air; and actions that are intended to conserve listed species
5 or their habitat. 50 C.F.R. § 402.02.

6 62. A federal agency proposing an “action” (the “action agency”) must request from
7 FWS and NMFS a list of any threatened or endangered species that may be present in the project
8 area. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If threatened or endangered species may be
9 present, the federal agency must prepare a “biological assessment” to determine whether the
10 proposed action “may affect” listed species. 50 C.F.R. § 402.12. If the agency determines that its
11 proposed action “may affect” threatened or endangered species or critical habitat, the agency must
12 engage in “formal consultation” with FWS and/or NMFS, depending on the species. *Id.* § 402.14.
13 Courts have recognized that the “may affect” hurdle is extremely low, encompassing “any possible
14 effect, whether beneficial, benign, adverse, or of an undetermined character.” *Citizens for Better*
15 *Forestry v. United States Dep’t of Agric.*, 481 F. Supp. 2d 1059, 1091 (N.D. Cal. 2007).

16 63. Formal consultation under Section 7 of the ESA culminates with the preparation of a
17 biological opinion by FWS and/or NMFS that (a) examines whether the proposed action is likely to
18 jeopardize threatened or endangered species or result in the destruction or adverse modification of
19 their critical habitat and (b) sets forth any necessary measures for avoiding, minimizing, and
20 mitigating any adverse impacts. *See generally* 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. An action
21 agency may avoid formal consultation only by engaging in “informal consultation” with FWS and/or
22 NMFS and obtaining their written concurrence that the project is not likely to adversely affect
23 threatened or endangered species or critical habitat. 50 C.F.R. § 402.13(a). However, courts have
24 made clear that the Forest Service may not rely on an arbitrary, capricious, or unsupported “no
25 effects” determination as a basis for failing to comply with Section 7 consultation requirements.
26 *See, e.g., Lockyer v. United States Dep’t of Agric.*, 459 F. Supp. 2d 874, 911 (N.D. Cal. 2006).

27 64. In fulfilling the consultation requirements of Section 7(a)(2), each agency must use
28 the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2).

1 65. According to the Forest Service, the national forests of the Sierra Nevada provide
2 habitat for almost 50 threatened and endangered species. The MIS Amendment may affect many of
3 those threatened and endangered species in several ways.

4 66. First, the MIS Amendment removes 11 threatened and endangered species from the
5 list of MIS, such as Central Valley spring run Chinook salmon and Lahontan cutthroat trout. FEIS,
6 App. A, p.83. The MIS Amendment also discontinues the coordinated and Sierra-wide monitoring
7 of numerous threatened and endangered species that are identified as MIS and SAR in Appendix E,
8 such as the California red-legged frog and Sierra Nevada bighorn sheep. The Forest Service’s
9 decision to terminate the pre-existing requirement to monitor directly these threatened and
10 endangered species increases substantially the likelihood that forest managers will fail to identify
11 and address threats to such species and their habitat.

12 67. Second, the MIS Amendment provides that monitoring is no longer required for
13 numerous MIS and SAR that before served as important “proxies” for threatened and endangered
14 species that have similar population characteristics and habitat needs, but were not themselves
15 subject to monitoring as MIS or SAR. The Forest Service’s decision to terminate monitoring of
16 species represented by these proxy MIS and SAR further increases the likelihood that adverse
17 impacts to threatened and endangered species and their habitat will go unnoticed and unaddressed.

18 68. Finally, the MIS Amendment fails to establish a sufficient number or quality of
19 replacement MIS and fails entirely to specify how the monitoring of the new MIS will be conducted.
20 The Forest Service did not establish MIS for important habitat types, nor did it establish adequate
21 proxies for the many threatened and endangered species in the Sierra Nevada national forests. At
22 the same time, the Forest Service discontinued Sierra-wide monitoring under Appendix E critical for
23 maintaining wildlife viability throughout the range. This drastic reduction in monitoring throughout
24 the Sierra may have a significant adverse impact on threatened and endangered species.
25 Additionally, the Forest Service’s determination that monitoring MIS and SAR is no longer required
26 will allow the Forest Service to proceed with activities, such as logging, that may have an adverse
27 impact on threatened and endangered species.

1 D. Set aside the record of decision approving the MIS Amendment, enjoin the Forest
2 Service from implementing the MIS Amendment and any projects approved pursuant to the MIS
3 Amendment, and order the Forest Service to reinstate the pre-existing forest plan requirements
4 relating to MIS and SAR;

5 E. Award plaintiffs their costs of litigation, including reasonable attorneys' fees and
6 costs, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 and the ESA, 16 U.S.C.
7 § 1540(g)(4); and

8 F. Grant plaintiffs such additional relief as the Court may deem just and proper.

9 Respectfully submitted,

10 Dated: September 9, 2008

11 _____
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