Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

August 11, 2022

Submitted electronically via Forest Service Comment Portal at:
https://cara.fs2c.usda.gov/Public/CommentInput?project=NP-3239

Christopher French, Deputy Chief
U.S. Forest Service
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250-0003

Tracy Stone-Manning, Director
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Nez Perce Tribe's Comments in Response to Request for Information on Federal Old-Growth and Mature Forests

Dear Deputy Chief French and Director Stone-Manning:

On behalf of the Nez Perce Tribe ("Tribe"), thank you for the opportunity to comment on the U.S. Forest Service's ("Forest") and Bureau of Land Management's ("BLM") (collectively "agencies") request for information ("RFI") on federal old-growth and mature forests to inform the response to Executive Order 14072: Strengthening the Nation's Forests, Communities, and Local Economies issued on April 22, 2022. The agencies published the notice and request for comments in the Federal Register on July 15, 2022, for a 30-day comment period. This letter and the appended comments represent the comments of the Tribe.

According to the notice, the agencies are seeking input on Section 2(b) of Executive Order 14072, which "calls on the Secretaries of Agriculture and the Interior, within one year, to define, identify, and complete an inventory of old-growth and mature forests on Federal lands, accounting for regional and ecological variations, as appropriate, and making the inventory publicly available."[1]

[1] Request for Information (RFI) on Federal Old-Growth and Mature Forests, 87 Fed. Reg. 42,493 (Jul. 15, 2022).

The agencies "recognize definition development as a pivotal first step in meeting the subsequent identification and inventory requirements of E.O. 14072."[2] The agencies further note that "[t]his effort is also directly connected to the Secretary's Memorandum 1077-004: Climate Resilience and Carbon Stewardship of America's National Forests and Grasslands."[3]

Since time immemorial, the Nez Perce people, or *Nimiipuu*, have occupied and used for subsistence, cultural, ceremonial, and commercial purposes over 13 million acres in what is now the states of Idaho, Oregon, Washington, and Montana. To preserve our way of life, the Tribe negotiated a treaty with the United States in 1855 in which the Tribe reserved, and the United States secured, its right to fish, hunt, gather, pasture, and travel across its vast aboriginal homeland.[4] The Tribe's treaty-reserved rights and other interests are foundational to the existence of the *Nimiipuu* and define our sacred and enduring relationship to these lands and waters. Today, Tribal members exercise treaty rights throughout the Tribe's ancestral homeland, including on millions of acres of land encompassing numerous national forests and BLM-managed districts.

As fiduciary, the United States and all its agencies owe a trust duty to the Tribe to protect all of its treaty-reserved resources.[5] This trust relationship has been described as "one of the primary cornerstones of Indian law"[6] and has been compared to the relationship existing under the common law of trusts, with the United States as trustee, the tribes as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.[7] This duty includes the protection of the habitats on which the Tribe's treaty-reserved resources rest because the right to exercise presumes the continued existence of the conditions necessary to support these resources.[8]

Treaty tribes, such as the Nez Perce, have been recognized as managers of their treaty-reserved resources.[9] As manager, the Tribe has devoted substantial time, effort, and resources to the recovery and co-management of treaty-reserved resources on National Forest System and BLM lands. The right to take fish and other resources reserved by the Tribe presumes the continued existence of the conditions necessary to support treaty-reserved resources on these lands.[10]

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[2] *Id.*
[3] *Id.*
[4] Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957.
[5] *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).
[6] Felix Cohen, Handbook of Federal Indian Law 221 (1982).
[7] *See, e.g., Mitchell*, 463 U.S. at 225.
[8] *See Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), cert. denied, *Sunnyside Valley Irrigation District v. United States*, 474 U.S. 1032 (1985).
[9] *United States v. Washington,* 384 F. Supp. 312, 339-40, 403 (W.D. Wash. 1974) *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).
[10] *See e.g.*, *Sohappy v. Smith*, 302 F.Supp. 899 (D.Or. 1969), aff'd, *United States v. Oregon*, 529 F.2d 570 (9th Cir. 1976); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979); *United States v. Washington*, 853 F.3d 946, 959 (9th Cir. 2017), *aff'd*, *Washington v. United States*, 138 S. Ct. 1832 (2018).

The Tribe acknowledges the agencies' view that this RFI does not, by itself, change any current forest management policies or practices. We agree, however, that it will set the foundation for how old-growth and mature forests are defined, identified, monitored, and managed across lands and waters upon which the Tribe depends. The RFI, therefore, is an important undertaking requiring consultation and coordination with the Tribe to evaluate potential impacts on our rights and interests.

Unfortunately, the Tribe learned on July 21, 2022, that the Forest Office of Tribal Relations held an informational meeting for tribes on the RFI on July 20, 2022. The Tribe has no record of receiving an invitation from the Forest for this meeting and was not otherwise contacted. Our understanding is that, at that meeting, the Forest announced the commencement of a 120-day consultation period for the RFI. The Tribe is unaware whether BLM also held an informational meeting for tribes and extended a consultation period.

The Tribe accordingly requests that, consistent with applicable Executive Orders and agency policies on tribal consultation and coordination, the agencies contact the Tribe to schedule a government-to-government consultation to discuss the Tribe's comments and any preliminary proposed definition framework and process for identifying and inventorying mature and old-growth forests. The Tribe also reserves the option to supplement its comments based on the government-to-government consultation with the agencies as well as other information developed or exchanged during the 120-day consultation period.

Please contact Marie Baheza, Executive Assistant, Nez Perce Tribal Executive Committee, at mariea@nezperce.org or (208) 843-2253, to schedule a consultation. For other questions, please contact Mike Lopez, Senior Staff Attorney, at mlopez@nezperce.org or 208-843-7355.

Sincerely,

Samuel N. Penney

Samuel N. Penney
Chairman

Nez Perce Tribe's Comments on the Request for Information (RFI) on Federal Old-Growth and Mature Forests
(August 11, 2022)

The U.S. Forest Service ("Forest"), and the Bureau of Land Management ("BLM") (collectively "agencies") are responding to the Executive Order 14072: Strengthening the Nation's Forests, Communities, and Local Economies, which requires them to define old-growth and mature forests on Federal lands; complete an inventory and make it publicly available; coordinate conservation and wildfire risk reduction activities; identify threats to mature and old-growth forests; develop policies to address threats; develop Agency-specific reforestation goals by 2030; develop climate-informed reforestation plans; and develop recommendations for community-led local and regional economic development opportunities.[11]

The Forest and BLM are seeking input on Section 2(b) which focuses on the development of a definition for old-growth and mature forests on Federal land and a process to identify and inventory old-growth and mature forests. The agencies are requesting information on the following questions:[12]

What criteria are needed for a universal definition framework that motivates mature and old-growth forest conservation and can be used for planning and adaptive management?

> The Nez Perce Tribe ("Tribe") is heavily engaged with federal actions proposed by federal land agencies, specifically the Forest and BLM. The Tribe tracks and reviews planning and project activities across BLM lands and many National Forests (13 National Forests under Regions 1, 4, and 6). Each Forest has their own direction and guidance for defining, identifying, and inventorying mature and old-growth forests. The Tribe suggests convening local and regional working groups to develop a standardized definition framework for the conservation and management of mature and old-growth forests. Local and regional experts on old-growth and mature forests can provide key characteristics of these systems that can be used for planning across geographic scales.
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> The framework should allow for and capture multiple definitions based on regional differences, climate considerations, geology, topography, natural range of variability, successional pathways, fire regimes, disturbance regimes, forest functionality, and resource and social values. The framework should include ecological integrity, function, and structure to have relevance for old-growth dependent species.
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> The framework needs to allow for defining components of old-growth (i.e., for individual trees) and mature forest (i.e., for stands, communities, landscapes, etc.) at meaningful spatial and temporal scales, including their ecological significance.

[11] Strengthening the Nation's Forests, Communities, and Local Economies, 87 Fed. Reg. 24,851 (Apr. 22, 2022).
[12] Request for Information (RFI) on Federal Old-Growth and Mature Forests, 87 Fed. Reg. 42,493 (Jul. 15, 2022).

What are the overarching old-growth and mature forest characteristics that belong in a definition framework?

Characteristics to consider include the age of individual trees, clumps of trees, stands, and mature forest (i.e., age at multiple scales) should be treated as a defining characteristic, along with other morphological, structural, and functional characteristics, such as bark thickness, amount of heartwood, presence of belowground root connections, vertical and horizontal structure, patch size and distribution (connectivity), resiliency, carbon capture, amount of soil organic carbon, biodiversity, nutrient cycling, successional stage, climatic niches, presence of old-growth dependent species, life-history requirements of species, amounts and types of down and standing woody debris, and species composition and size (e.g., diameter at breast height) of old-growth and mature forests. These characteristics should be developed or defined specific to geographic regions, climate, topography, and soil types. Other characteristics to consider are social and resource values of old-growth and mature trees and forests.

How can a definition reflect changes based on disturbance and variation in forest type/composition, climate, site productivity and geographic region?

To account for disturbance and variation in forest ecosystems, the concept of forest archetypes can be used, which are model forest ecosystems in terms of disturbance regimes, stand dynamics, and structural and compositional features.[13] Using this conceptual framework, mature and old-growth forests would be described for each forest model archetype and/or habitat type. Forests of the same archetype are similar in terms of their disturbance regimes, development processes, and structure.

Local and regional science and guidance should also be part of the definition framework[14] but supplemented with new and/or updated information and inventory tools.

How can a definition be durable but also accommodate and reflect changes in climate and forest composition?

The use of best available science, with periodic review incorporating new science and trends can support a dynamic, flexible definition.

What, if any, forest characteristics should a definition exclude?

The definition should steer clear of the "one size fits all" approach. Old-growth characteristics, and minimum criteria, vary within and across regions, forest types, and site-specific conditions.

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[13] Palik, B.J., D'Amato, A.W., Franklin, J.F. and Johnson, K.N., 2020. Ecological silviculture: Foundations and Applications. Waveland Press.

[14] Van Pelt, R. 2008. Identifying Old Trees and Forests in Eastern Washington. Washington State Department of Natural Resources, Olympia, WA. 166 p.; Franklin, J.F., K.N. Johnson, D.J. Churchill, K. Hagmann, D. Johnson, and J. Johnston. 2013. Restoration of Dry Forests in Eastern Oregon: A Field Guide. The Nature Conservancy, Portland, OR. 202 p.

Identifying and Inventorying Mature and Old-Growth Forests

In addition to the preceding questions, the Forest and BLM are seeking input on a process for identifying and inventorying mature and old-growth forests for the purposes of developing policies for conservation and management strategies. The agencies need to acknowledge the limitations of current databases, such as the Forest Inventory and Analysis database, for identifying and inventorying mature and old-growth forests and should use local and regional information to fill data gaps.

Light Detection and Ranging, or LiDAR, is one active remote sensing system that can be used to measure vegetation height across wide areas with better accuracy, in some cases, than the traditional forest stand exams. Integrated within a Geographic Information System and query mechanism, mature and old-growth forests could be delineated based on criteria identified in the definition framework. Nearest Neighbor imputation methods have proven to be effective tools for characterizing vegetation structure and species composition in forested landscapes across large regions.