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Working to protect and restore Western Watersheds and Wildlife

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BY EMAIL and U.S. MAIL (Delivery Confirmation)

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Re: Notice of Intent to Sue over Violations of the Endangered Species Act Regarding Impacts to Lahontan Cutthroat Trout from Authorized Livestock Grazing on Humboldt-Toiyabe National Forest Grazing Allotments in the Upper Reese River Watershed, Nevada

Dear Secretary Bernhardt, Secretary Perdue, and others:

In accordance with the Endangered Species Act's (ESA) citizen suit provision, 16 U.S.C. § 1540(g), Western Watersheds Project (WWP) hereby provides notice of its intent to sue for violations of Sections 7 and 9 of the ESA, 16 U.S.C. §§ 1536, 1538. The violations concern the Forest Service's authorization of livestock grazing within the Austin Ranger District on the Humboldt-Toiyabe National Forest, which harms threatened Lahontan cutthroat trout (LCT).

As explained below, grazing on several Forest Service-administered allotments may affect and is likely to adversely affect LCT and its habitat. The agency has failed to meet its obligations

under the ESA because it has authorized and continues to authorize livestock grazing without consulting with the U.S. Fish & Wildlife Service (USFWS) over the extent of the effects to the species or, for the sole allotment where it has consulted with the USFWS—most recently in 1991—has failed to adhere to the conditions of the USFWS letter of concurrence (LOC) or acted inconsistently with assumptions made in the LOC, thereby requiring reinitiation of consultation.

LEGAL FRAMEWORK

Under Section 7 of the ESA, each federal agency must consult with the USFWS to “insure that any action authorized, funded, or carried out by such agency” does not jeopardize the continued existence of ESA-listed species. 16 U.S.C. § 1536(a)(2). Jeopardize means to reduce appreciably the likelihood of either the survival or recovery of the species in the wild by reducing the reproduction, numbers, or distribution of the species. 50 C.F.R. § 402.02; *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 932–33 (9th Cir. 2008).

During the consultation process, if the action agency (in this case, the Forest Service) concludes in a biological assessment (BA) that the activity is not likely to adversely affect the listed species, and the USFWS concurs with that conclusion in a LOC, then the consultation is complete—a process called “informal consultation.” 50 C.F.R. §§ 402.12, 402.13, 402.14(b). If, however, the action agency or the USFWS determines that the activity is likely to adversely affect the listed species, then the USFWS engages in “formal consultation” and completes a biological opinion (BO) to determine whether the activity will jeopardize the species. *Id.* § 402.14. After initiation of consultation, the federal agency and the permit/license applicant “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate” the jeopardy prohibition. 16 U.S.C. § 1536(d).

The ESA and its regulations prohibit “take” of listed species, where take includes harassing, harming, wounding, or killing the species. 16 U.S.C. §§ 1538, 1533(d), 1532(19). The USFWS, however, can authorize take of a listed species through an incidental take statement (ITS) that accompanies a BO if the taking is incidental to an otherwise lawful activity and does not cause jeopardy to the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

Once the consultation is complete, the agencies have a duty to ensure that it remains valid. Reinitiation of consultation is required and shall be requested by the action agency or the USFWS if: (a) the amount or extent of take specified in the ITS is exceeded; (b) new information reveals effects of the action that may affect listed species in a manner or to an extent not previously considered; (c) the identified action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the BO; or (d) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16. The obligation to reinitiate consultation if new information reveals effects of the action that may affect listed species in a manner or to an extent not previously considered applies to both formal and informal consultation. *Conservation Cong. v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014).

In addition, even after consultation is complete, the action agency has an ongoing substantive obligation under ESA Section 7(a)(2) to ensure that its implementation of activities it authorizes does not jeopardize the continued existence of listed species or adversely modify

critical habitat. See *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1004 (D. Or. 2010).

FACTUAL BACKGROUND

Species and listing status. Lahontan cutthroat trout (*Oncorhynchus clarkii henshawi*) are an inland subspecies of cutthroat trout endemic to the Lahontan Basin in northern Nevada, eastern California, and southeastern Oregon. See USFWS LCT 5-year review (2009).

LCT live in both lakes and streams, but are obligate stream spawners. *Id.* at 7. Spawning occurs from April through July, depending on location and annual conditions. *Id.* Eggs are deposited in small gravels within riffles and tailouts, often in tributary streams and headwater reaches. *Id.* Eggs hatch 4-6 weeks later, and juveniles emerge from substrate after an additional 13 to 23 days. *Id.* at 8.

LCT were listed as endangered in 1970, then subsequently downlisted to threatened in 1975. *Id.* at 5. The prohibition against take in 16 U.S.C. § 1538 has been extended to LCT, with an exception only allowing take in accordance with applicable state law. 50 C.F.R. § 17.44(a). Critical habitat has never been designated for the species.

The LCT currently inhabits only a small percentage of its historic range. *Id.* at 9, 12 (map). Within the Humboldt River watershed, it occupies only 7.9 percent of its historic habitat, and within the Reese River sub-watershed, only 3 percent. *Id.* at 115 (map), 139. Within the Reese River sub-watershed, LCT are isolated because of limited connectivity between tributaries and the Reese River. *Id.* at 159.

Currently-occupied habitat in the Reese River Watershed. Only about 15.3 total miles of streams in the Reese River sub-basin are occupied. 2009 5-year review at 149. Nearly all (14.2 miles) are managed by the Forest Service. *Id.* at 153. According to 2018 data for the Humboldt Geographic Management Unit obtained from the USFWS, LCT are present in short sections of several headwater tributaries to the Reese River on the west side of the Toiyabe Range: Washington Creek, San Juan Creek, Cottonwood Creek, Tierney Creek, Marysville Creek, Mohawk Creek, and Crane Creek.

Grazing in LCT habitat in the Austin Ranger District. These streams occur within three grazing allotments administered by the Humboldt-Toiyabe National Forest's Austin Ranger District. From north to south, the allotments are Washington, Tierney Creek, and Marysville. Within the allotments, the streams flow through the following pastures:

Washington allotment

- Washington Creek (North Mountain pasture)
- Cottonwood Creek (South Mountain pasture)
- San Juan Creek (South Mountain pasture)

Tierney Creek allotment

- Tierney Creek (South Mountain pasture and private riparian pasture)

Marysville allotment

- Marysville Creek (Marysville/New York pasture)
- Mohawk Creek (Mohawk/Crane pasture)
- Crane Creek (Mohawk/Crane pasture)

All of the occupied habitat for LCT conservation populations in the Reese River sub-basin is grazed. 2009 5-year review at 162.

Three entities hold grazing permits on these allotments and the Forest Service issues annual operating instructions (AOIs) for these allotments, including for each of the past six years. BTAZ Nevada, LLC is the permittee on the relevant areas of the Washington allotment. Permitted use is for 430 cow/calf pairs from 6/1 to 9/30 for a total of 1725 head months (HM). In 2018, authorized use was for 275 cow/calf pairs from 7/1 to 9/30 for a total of 832 HM and rotation was first through North Mountain pasture and second through South Mountain pasture (undefined move dates). Allowable utilization standards on the AOI include 55% riparian grasses and 25% riparian shrubs.

Reese River Valley, LLC is the permittee on the Tierney Creek allotment. Permitted use is for 200 cow/calf pairs from 4/21 to 9/30 for a total of 570 HM. In 2018, authorized use in the North and South Mountain pastures was for 150 cow/calf pairs from 6/1 to 9/10 for a total of 503 HM. Allowable utilization standards on the AOI include 55% riparian grasses and 25% riparian shrubs.

On Marysville allotment, the permittee is Doris Brooks and Karl Brooks. Permitted use is for 175 cow/calf pairs from 4/1 to 10/30 for a total of 700 HM. In 2018, authorized use in the Marysville pasture was for 80 cow/calf pairs from 4/1 to 10/30 for a total of 560 HM. Crane and Mohawk pastures were not authorized for use in 2018 (rested). In 2017, use was authorized in Crane pasture by 80 cow/calf pairs from 5/1 to 10/30 for a total of 481 HM and in Mohawk pasture by 110 cow/calf pairs from 4/1 to 4/30 for 108 HM. Marysville pasture was rested in 2017. *Id.* Allowable utilization standards on the AOIs are 55% riparian grasses and 25% riparian shrubs.

Impacts to LCT from Forest Service-authorized grazing. Livestock grazing affects LCT both directly and indirectly. These fish require well-vegetated and stable stream channels, clean gravel, cold water, and complex cover. *See* 2009 5-year review at 14. Livestock grazing degrades these conditions, including by removing riparian vegetation, destabilizing stream banks, widening and incising stream channels, lowering water tables, reducing pool frequency, increasing soil erosion, and degrading water quality. *Id.* at 29–30. These effects reduce cover, increase summer water temperatures, promote formation of anchor ice in winter, and increase sediment that suffocates redds (spawning nests) and irritates fish gills. Grazing harms LCT through these adverse habitat effects on the allotments at issue, and may also prevent recovery and recolonization where their populations are now depressed or absent.

According to the USFWS, the majority of occupied LCT habitat in the Reese River sub-basin is in only fair condition, and none is in excellent condition. *Id.* at 168. WWP has documented poor habitat conditions from grazing on these allotments, including unstable

streambanks, erosion, sedimentation, lack of riparian vegetation regeneration, lowered water tables, and headcuts. WWP has also documented that exclosures apparently constructed to protect springs, wet meadows, and riparian habitat on LCT-occupied streams on these allotments are completely non-functional, including a number of exclosures on San Juan, Washington, and Marysville Creeks.

Livestock can also harm LCT by directly trampling on redds, which contain thousands of eggs. A single trampling incident can kill a majority of those eggs. Wading livestock also crush and dislodge vulnerable young, which remain in the gravels near the redd for weeks after hatching. Livestock access to LCT spawning habitat from April through at least July places redds at risk. Livestock displace juvenile fish from protective streamside cover, increasing the risk of predation, and harass spawning adult fish, causing them to move from their nests, disrupting spawning activities and forcing them to expend vital energy. This harm and take occurs or potentially occurs in the allotments at issue because permitted grazing seasons overlap potential spawning and rearing periods for LCT.

New scientific information on the importance of habitat recovery to LCT has emerged in recent years, as has increased recognition of the effects of climate change on salmonids including LCT. Drought has also increasingly negatively affected these species. Updated information on local populations of these species shows that some local populations have decreased in number, and other local populations have been extirpated. For example, several populations in the Reese River sub-watershed (Stewart, N.F. Stewart, M.F. Stewart) have disappeared between 2009 and 2018, according to current data. *See* 2009 5-year review at 146.

The grazing permits and AOIs for these allotments do not contain mandatory terms and conditions that limit streambank alteration or riparian stubble height, and the allowable utilization levels for riparian grasses and shrubs are too high to adequately protect LCT and other species that rely on functional riparian ecosystems.

Consultation history. On August 8, 2018, WWP submitted a FOIA request to the Humboldt-Toiyabe National Forest that included a term seeking records for these allotments of “[a]ny biological assessment, biological opinion, or letter of concurrence regarding Lahontan cutthroat trout, regardless of date.” According to the documents that the Forest Service produced in response to this request, the agency has not complied with Section 7 of the ESA with respect to its consultation duties with the USFWS over impacts to LCT from grazing on any of the allotments.

Specifically, for Washington allotment, the only record of any consultation is a letter dated November 24, 1992 from the USFWS to the Austin Ranger District documenting a site visit to the Washington allotment and providing comments and management recommendations for the allotment.

For Tierney Creek allotment, there are several records of informal consultation in the FOIA response. These include comments dated February 22, 1983 from the USFWS on the development of an allotment management plan that advise the Forest Service to complete a biological assessment. There are also several records of consultation from 1991, including a

biological evaluation by the Forest Service, and comments and an LOC dated October 2, 1991 from the USFWS. The LOC is based on a number of conditions that no longer occur (according to the grazing permit and AOI), including a 10% bank alteration standard, and a 25% utilization standard, yearly monitoring and reporting, periodic rest in the mountain pastures, and certain long-term improvements to habitat conditions.

On Marysville allotment, the only record of consultation is a brief concurrence letter regarding proposed rotenone application to eradicate brown trout in Crane Creek in 1989. There is no record of consultation over grazing.

VIOLATIONS OF THE ENDANGERED SPECIES ACT

In its ongoing authorizations of grazing on the Washington, Tierney Creek, and Marysville allotments (including term grazing permits and the 2014–2019 AOIs), the Forest Service has failed to consult with the USFWS over the site-specific, indirect, and cumulative impacts of grazing and failed to ensure that such authorized grazing is not jeopardizing LCT, in violation of its duties under 16 U.S.C. § 1536. Moreover, the Forest Service has never considered whether the impacts from the authorized grazing would reduce appreciably the likelihood of either survival or recovery of LCT, as is required to ensure that the activity will not jeopardize the species. 50 C.F.R. § 402.02. In doing so, the Forest Service has failed to rely on the best available science. 16 U.S.C. § 1536(a)(2).

To the extent the Forest Service has ever consulted with the USFWS over impacts to LCT from grazing on these allotments, it has failed to comply with, implement, or act consistently with the terms and assumptions of previous BAs, LOCs, or other informal consultation documents. Those failures violate § 7(a)(2) and 50 C.F.R. § 402.16 for Tierney Creek allotment because the abandonment in the most recent AOIs of the strict bank alteration and utilization standards relied on in the 1991 LOC constitutes new information regarding the effects of the action that may affect listed species in a manner or to an extent not previously considered; because there is new information regarding the status of the species that was not previously considered; and because other aspects of the grazing has been modified since 1991 causing effects not previously consider; all of which require reinitiation.

Available information indicates that the Forest Service has authorized ongoing grazing on these allotments that has caused, is causing, and will continue to cause “take” of LCT to occur every year in the form of habitat destruction and harm and harassment to adult fish as well as juvenile fish, larvae, and redds (eggs), in violation of the ESA. 16 U.S.C. § 1538. None of the ongoing take is authorized by a valid ITS. There is every indication that Forest Service authorization of grazing is likely to continue to cause violations of the prohibition against take in 2019, 2020, and future years.

To the extent that the Forest Service initiates or reinitiates consultation over the impacts of grazing on these allotments, but continues to authorize grazing, such action would, in addition to continuing to violate § 7(a)(2), violate ESA § 7(d), which requires agencies to avoid making irreversible or irretrievable commitments of resources. 16 U.S.C. § 1536(d). Until the Forest

Service and USFWS complete consultation, they must comply with the requirement to avoid jeopardy, as well as the requirements under § 7(d).

PARTY GIVING NOTICE

The address and phone number of the party giving notice is:

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CONCLUSION

As set forth above, WWP intends to pursue litigation in federal court after sixty days, and will seek injunctive, declaratory, and other relief, including an award of fees and expenses incurred in investigating and prosecuting this action. To avoid litigation, the Forest Service should cease authorization of grazing on these allotments until the agency initiates (or reinitiates) and completes consultation with the USFWS over the impacts of the ongoing authorized livestock grazing on LCT, described above.

If you have any questions, wish to discuss this matter further, or believe this notice is in error, please contact us.

Sincerely,

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