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great or small, hovering on the brink of extinction.*

VIA ELECTRONIC MAIL and CERTIFIED MAIL; RETURN RECEIPT REQUESTED

June 8, 2016

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RE: 60 Day Notice of Intent to Sue over Violations of the Endangered Species Act; Actions Relating to the Endangered Sierra Nevada Yellow-Legged Frog and Threatened Yosemite Toad and Management of the Humboldt-Toiyabe National Forest

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity (“Center”) of intent to sue the United States Forest Service (“Forest Service”) over violations of Sections 2, 7, and 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, 1536, 1538, for actions and inactions related to the federally-endangered Sierra Nevada yellow-legged frog

(*Rana sierrae*) and the threatened Yosemite toad (*Anaxyrus canorus*) in the management of the Humboldt-Toiyabe National Forest (“HTNF”). This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

The Secretary of Agriculture (“Secretary”), through the Forest Service, has failed to ensure against jeopardy through consultation with the U.S. Fish and Wildlife Service (“USFWS”) for the endangered Sierra Nevada yellow-legged frog and the threatened Yosemite toad, regarding management of lands within the Humboldt-Toiyabe National Forest (“HTNF”), including the authorization of livestock grazing, as required under the ESA section 7(a)(2) and has failed to confer on potential destruction or adverse modification of proposed critical habitat as required under the ESA section 7(a)(4). The Center, its members, and staff, have actively participated in efforts to protect the endangered yellow-legged frog and the threatened Yosemite toad including, but not limited to, petitioning for listing for the species, seeking critical habitat designation for habitat essential to the species’ recovery, monitoring grazing approvals, and attending public meetings. The Forest Service has failed to provide any formal public notice or an opportunity for the public to comment on the actions and inactions challenged by the Center. Therefore, to the extent required by law, the Center, its members, and staff, have exhausted all available administrative remedies.

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1 million members and online activists dedicated to the protection of endangered species and wild places including our public lands. The Center and its members are concerned with the conservation of imperiled species and the effective implementation of the ESA and specifically with the management of our public lands to ensure conservation of the Yosemite toad and Sierra Nevada yellow-legged frog and their habitats.

I. STATUTORY BACKGROUND

As the Forest Service is well aware, the purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend and to conserve and recover those species so that they no longer require the protections of the Act. 16 U.S.C. § 1531(b), ESA § 2(b); 16 U.S.C. § 1532(3), ESA §3(3) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”). “[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote species survival), but to allow a species to recover to the point where it may be delisted.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F3d 1059, 1069 (9th Cir. 2004).

To ensure that the statutory purpose will be carried out, the ESA imposes both substantive and procedural requirements on all federal agencies to carry out programs for the conservation of listed species and to insure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2), ESA §7(a)(2). *See NRDC v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) (action agencies have an “affirmative duty” to ensure that their actions do not jeopardize listed species and “independent obligations” to ensure that proposed actions are

not likely to adversely affect listed species). To accomplish this goal, agencies must consult with the Fish and Wildlife Service whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Federal agencies also must confer with the Fish and Wildlife Service on “any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.” 16 U.S.C. §1536(a)(4); 50 C.F.R. § 402.10. Agency “action” is defined in the ESA’s implementing regulations to “mean all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States.” 50 C.F.R. § 402.02. The act of issuing annual approvals for grazing or annual operating instructions (“AOI”) is a final agency action that clearly triggers the ESA consultation requirement. *See Oregon Natural Desert Association v. USFS*, 465 F.3d 977, 990 (9th Cir. 2006).

Moreover, section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency “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 subsection (a)(2) of this section.” The purpose of Section 7(d) is to maintain the status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

II. FACTUAL BACKGROUND

A. Sierra Nevada Yellow-Legged Frog

The Sierra Nevada yellow-legged frog (*Rana sierrae*) was listed as an endangered species on April 29, 2014. 79 Fed. Reg. 24256 (April 29, 2014) (“Final Listing Rule”). Designated critical habitat was proposed on April 25, 2013 and is expected to be finalized this year. 78 Fed. Reg. 24516. Sierra Nevada yellow-legged frogs currently exist in the montane regions of the Sierra Nevada mountain range. *Id.* at 24259. They inhabit the lakes, ponds, marshes, meadows and streams at elevations ranging from 4,500 to 12,000 feet, but can occur as low as 3,500 feet in the northern portions of their range. Sierra Nevada yellow-legged frogs are highly aquatic and generally not found more than one meter (3.3 feet) from water, although along streams they have been observed more than 22m (71 ft) from the water and have been documented to travel up to 3.3 km (2.05 mi) along streams in a single season. *Id.* at 24260. The Sierra Nevada yellow-legged frog was historically abundant and ubiquitous across many of the higher elevations within the Sierra Nevada, but have disappeared from a large fraction of their historical range. *Id.* at 24260-61. The current distribution of the Sierra Nevada yellow-legged frog is almost entirely on federal public lands managed by the United States Forest Service and the National Park Service. *Id.* at 24261. Local population-level changes were first noticed in the early 1900s although they were still abundant at many sites, and population losses continued between the 1960s and 1990s, and have continued in recent decades.

The U.S. Fish and Wildlife Service identified livestock grazing as a cause of habitat modification contributing to the conservation status of the Sierra Nevada yellow-legged frog in the final listing rule. *Id.* at 24265, 24268-70. Livestock grazing can reduce the suitability of habitat for the yellow-legged frog by impacting its ability to sustain frogs and to facilitate dispersal and migration. *Id.* at 24268. Negative impacts can be especially bad in stream areas and in other wetland systems. *Id.* Although much of the livestock grazing impact on the yellow-legged frog's status is thought to be the legacy effects of excessive historical grazing, the U.S. Fish and Wildlife Service still recognizes livestock grazing as a threat to this species. Current, ongoing grazing activities are identified in the listing rule as potentially presenting an ongoing, localized threat to individual populations. *Id.* at 24269. The authors of the interagency Conservation Assessment for the Mountain yellow-legged frog (including *Rana sierrae*) state that the potential effects of livestock grazing should be addressed for conservation of this species and, at a minimum, agencies should manage livestock grazing to reduce its potential impact to this species and its habitat. Mountain Yellow-Legged Frog Conservation Assessment at 48.¹

The Sierra Nevada yellow-legged frog has been documented in the Piute, Sardine, Silver Creek and Dumont (Silver King unit) allotments on the Humboldt-Toiyabe. Proposed critical habitat for the yellow-legged frog also overlaps with the Piute, Silver Creek and Dumont (Silver King unit) allotments.

B. Yosemite Toad

The Yosemite toad (*Anaxyrus canorus*) was listed as a threatened species on April 29, 2014. 79 Fed. Reg. 24256 (April 29, 2014) (“Final Listing Rule”). Designated critical habitat was proposed on April 25, 2013 and is expected to be finalized this year. 78 Fed. Reg. 24516. Yosemite toads are associated with wet meadows due to their breeding ecology and spend the majority of their lives in upland habitats adjacent to breeding meadows, often relying on moist upland areas such as seeps and springs as important non-breeding summer habitat. *Id.* at 24285. However, Yosemite toad adults use terrestrial habitats extensively and move an average of 275 m (902 ft) from their breeding meadows, and can move farther than 1 km (0.63 mi). *Id.* Yosemite toads also utilize rodent burrows for overwintering. *Id.* Eggs are typically laid in meadows and ephemeral pools immediately at snowmelt, followed by a period of about 40-50 days to metamorphosis. *Id.* Because Yosemite toads rely heavily on shallow, ephemeral water, they may be more sensitive to minor changes in habitat. *Id.* at 24288.

Yosemite toads historically ranged in the Sierra Nevada from the Blue Lakes region north of Ebbets Pass (Alpine county) to south of the Evolution Lake area (Fresno county), and spanned 1,460-3,630 m (4,790-11,910 ft) in elevation. *Id.* at 24286. The extent of the toad's range continues to be about the same, but within that range the toad's habitat has been degraded and may be decreasing in area, in part due to historical livestock grazing. *Id.* Population declines are thought to have occurred range-wide for the Yosemite toad. *Id.* at 24288.

¹ Brown et al. 2014. Mountain Yellow-Legged Frog Conservation Assessment for the Sierra Nevada Mountains of California, USA . USDA Technical Report RS-TP-038. (Attached).
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In its final listing rule, the U.S. Fish and Wildlife Service identified livestock grazing as a factor contributing to degradation of the Yosemite toad's habitat within the Sierra Nevada. *Id.* at 24289. Livestock grazing has the potential to affect all life stages of the Yosemite toad. Yosemite Toad Conservation Assessment at 46.² Grazing can negatively affect riparian and aquatic systems through changes in hydrologic functioning, nutrient cycling, and herbaceous biomass productivity, soil compaction, vegetation removal, and nutrient redistribution. *Id.* The risks related to livestock grazing are particularly high for the Yosemite toad because riparian and meadow systems are both key habitats for the toad and also key livestock forage areas. *Id.* at 50. The authors of the interagency Conservation Assessment for the Yosemite toad recommend that the potential effects of livestock grazing be included in management considerations for the toad and state that, at a minimum, agencies should manage grazing activity to reduce its potential impact to the toad and its habitat. *Id.*

Based on the documented negative impacts of livestock grazing on meadow habitats, the U.S. Fish and Wildlife Service considers grazing to be a prevalent threat with moderate impacts to the Yosemite toad and a potential limiting factor in the range-wide population recovery of the Yosemite toad. 79 Fed. Reg. 24256, 24291 (April 29, 2014).

The Yosemite toad has been documented on the Piute, Sardine, Poison Creek and Dumont (Silver King unit) allotments on the Humboldt-Toiyabe. Proposed critical habitat for the Yosemite toad also overlaps with the Piute and Sardine allotments.

C. 2016 Annual Operating Instructions for Grazing Allotments on the HTNF

A letter dated April 20, 2016 to the Borda Land & Sheep Co. serves as the Annual Operating Instructions (“AOIs”) for the 2016 grazing season on the Dumont S&G, Silver Creek S&G and Piute C&H allotments on the Carson and Bridgeport Ranger Districts. There is nothing in the letter nor in any other records readily available to the public to indicate that the Forest Service consulted with the Fish and Wildlife Service on any of these allotments for the Sierra Nevada yellow-legged frog and Yosemite toad, or that they conferred regarding the impacts to proposed critical habitat for both species. While the description and instructions for Silver Creek mention a Biological Opinion (“BiOp”; 2009-F-0209-R035) and includes instructions pursuant to this BiOp; this BiOp is dated prior to the ESA-listing of the Sierra Nevada yellow-legged frog and Yosemite toad and the instructions fail to mention these species; therefore that BiOp cannot be relied on to ensure against jeopardy for these species.

A letter dated March 21, 2016 to the F.I.M. Corporation serves as the 2016 AOIs for the 2016 grazing season for the Poison Creek S&G. The AOI acknowledges a known population of Yosemite toad on the allotment at Beartrap Lake and instructs that sheep stay 1/4 of a mile away from the lake; however, there is no mention of consultation with the Fish and Wildlife Service regarding the Yosemite toad on this allotment.

² Brown et al. 2015. Yosemite Toad Conservation Assessment. USDA Technical Report RS-TP-040. (Attached)

The Center requested copies of all AOIs for 2016 from the HTNF through a Freedom of Information Act Request and was provided with AOIs for Borda and FIM only as of May 27, 2016. No AOI was provided that included the Sardine allotment. If the HTNF has issued any AOIs for the Sardine allotment allowing grazing in 2016 as of this time without consultation and conference with the USFWS, those AOIs are also included by reference within this Notice.

III. VIOLATIONS OF THE ESA

A. Failure to Consult

Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the FWS whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined in the ESA’s implementing regulations to “mean all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States....” 50 C.F.R. § 402.02.

Pursuant to the ESA, before authorizing any livestock grazing that may affect the Sierra Nevada yellow-legged frog and the Yosemite toad, the Forest Service must initiate full formal consultation with the Fish and Wildlife Service on all allotments where either species has been documented and must confer with USFWS on all allotments containing proposed critical habitat. This notice is specifically focused on the allotments posing the greatest risk to Sierra Nevada yellow-legged frog and/or the threatened Yosemite toad: Piute, Sardine, Poison Creek, Silver Creek and Silver King allotments. Sierra Nevada yellow-legged frog and/or Yosemite toad were observed on all of the above allotments, and many of these allotments also contain proposed critical habitat for Sierra Nevada yellow-legged frog and/or Yosemite toad.

The Forest Service recently completed authorizations of annual livestock grazing on these allotments for 2016, as described above, despite the Forest Service's failure to initiate and complete consultation and conference with the USFWS on these allotments for the Sierra Nevada yellow-legged frog and Yosemite toad. Because livestock grazing has the potential to undermine the conservation and recovery of these species, jeopardize the continued existence of the species, and destroy or adversely modify proposed critical habitat, the Forest Service’s actions and inactions in this regard violate the ESA.

B. Violation of Section 7(d); Commitment of Resources Before Consultation is Completed.

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency “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 subsection (a)(2) of this section.” The purpose of Section 7(d) is to maintain the status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its designated critical habitat.

The Forest Service must initiate consultation with the Fish and Wildlife Service regarding impacts to the listed species, when an agency fails to do so the prohibitions of Section 7(d) will apply.

C. Violation of Section 9; Unlawful Taking of Listed Species.

The ESA also prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. The definition of “take” in 16 U.S.C. § 1532(19), states,

The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

If grazing proceeds in areas occupied by the toad and frog before the needed consultations are completed, the Forest Service will be in violation of Section 9 of the ESA because grazing may, and is likely to, harm, harass, or kill Yosemite toads and Sierra Nevada yellow-legged frogs directly and through significant impacts to occupied habitat.

The Center urges the Forest Service to correct these violations. In accordance with its duties to conserve and recover the endangered yellow-legged frog and the threatened Yosemite toad, the Forest Service must initiate consultation and conference with the USFWS regarding impacts to the species and proposed critical habitats and withdraw or suspend its authorizations of any livestock grazing on allotments where grazing may affect Yosemite toad and Sierra Nevada yellow-legged frog for the 2016 grazing season, unless and until consultation is completed.

IV. CONCLUSION

We urge the Forest Service and the BLM to initiate formal consultation for livestock grazing on the Piute, Sardine, Poison Creek, Silver Creek and Silver King allotments and, pursuant to Section 7(d), withdraw or suspend the AOIs issued for grazing on these allotments in 2016.

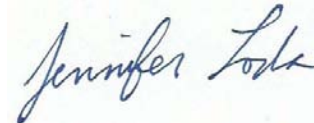
In addition, we urge the Forest Service to initiate comprehensive formal consultation with the Fish and Wildlife Service concerning the impacts of all of their ongoing management actions that may affect the endangered Sierra Nevada yellow-legged frog and threatened Yosemite toad pursuant to Section 7(a)(2) of the ESA, and, pursuant to Section 7(d), refrain from authorizing any activities that may affect the species or its critical habitat until such consultation is completed.

If the Forest Service does not act within 60 days to correct its violations of the ESA, the Center for Biological Diversity will pursue litigation in federal court against the agencies and officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me.

Sincerely,



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References:

Brown, Cathy; Hayes, Marc; Green, Gregory; MacFarlane, Diane and Amy Lind. 2015. Yosemite Toad Conservation Assessment. USDA Technical Report RS-TP-040.

Brown, Cathy; Hayes, Marc; Green, Gregory and Diane MacFarlane. 2014. Mountain Yellow-Legged Frog Conservation Assessment for the Sierra Nevada Mountains of California, USA . USDA Technical Report RS-TP-038.