CENTER *for* BIOLOGICAL DIVERSITY

July 23, 2021

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Re: Inyo National Forest and Bureau of Land Management CRMPs
(Owens River Headwaters and Cottonwood Creek)

Dear USFS and BLM:

The Center for Biological Diversity submits the following scoping comments regarding the Owens River Headwaters and Cottonwood Creek CRMPs.

The Center for Biological Diversity is a non-profit conservation organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.7 million members and supporters throughout the United States, including residents in California and members who regularly visit and enjoy the Owens River Headwaters and Cottonwood Creek Wild and Scenic Rivers and intend to do so in the future. The Center has worked for many years to protect imperiled plants and wildlife, the habitat they depend on, open space, air and water quality in California on public lands managed by the Bureau of Land Management and the Inyo National Forest.

Background

Congress classifies rivers, or segments thereof, as a "wild," "scenic," or "recreational" river. 16 U.S.C. § 1273(b). "Wild" rivers are those in their most natural state, representing "vestiges of primitive America." *Id.* § 1273(b)(1). Wild rivers are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. *Id.* "Scenic" rivers are "rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads." *Id.* § 1273(b)(2). "Recreational" rivers are "readily accessible . . . may have some development along their shorelines, and . . . may have undergone some impoundment or diversion in the past." *Id.* § 1273(b)(3).

Congress designated eight (8) segments of the Owens Headwaters (along the Upper Owens River, Glass Creek and Deadman Creek) as follows: 6.3 miles as wild, 6.6 miles as scenic, and 6.2 miles as recreational. 16 U.S.C. § 1274 (a)(197). Owens Headwaters and its adjacent riparian areas provide habitat for many species including the threatened Yosemite toad and a wide diversity of butterflies. Congress designated two (2) segments of Cottonwood Creek as follows: 17.4 miles as wild and 4.1 miles as recreational. 16 U.S.C. § 1274 (a)(198). Cottonwood Creek

and its adjacent riparian corridors provide habitat for many species including sage grouse, Paiute cutthroat trout, and spotted bats. The designated wild segment of Cottonwood Creek is located on the Inyo National Forest while the designated recreational segment of Cottonwood Creek is located on BLM managed public land.

In administering wild and scenic rivers (WSRs), the Wild and Scenic Rivers Act (WSRA) requires agencies "to protect and enhance the values which caused [the river] to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting [the river's] esthetic, scenic, historic, archeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area." 16 U.S.C. § 1281(a).

The WSRA further requires agencies to develop comprehensive management plans. Two core aspects of a river's management plan are the identification of the river area's "outstandingly remarkable values" and "user capacities" that ensure protection of the river's values. The management plan must ensure that "user capacities" are established that prevent harm to the river's values. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1034 (9th Cir. 2008) ("A standard must be chosen that does in fact trigger management action before degradation occurs."); 16 USCS § 1274(d)(1) ("[T]he Federal agency charged with the administration of each component of the National Wild and Scenic Rivers System shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values. The plan shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this Act.")

The Ninth Circuit has addressed user capacity issues in depth:

> Analyzing the plain meaning of the terms within the phrase "address . . . user capacities" as well the Secretarial Guidelines, we interpreted the requirement to "address . . . user capacities" to mean that the CMP must include *specific measurable limits on use*. [T]he plain meaning of the phrase "address . . . user capacities" is simply that the CMP *must deal with or discuss the maximum number of people that can be received at a WSRS*. However, the plain meaning does not mandate one particular approach to visitor capacity.
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> Furthermore, the Secretarial Guidelines interpret[ed] the WSRA to require the preparation of river [m]anagement plans [that] state . . . the kinds and amounts of public use which the river area can sustain without impact to the [outstandingly remarkable values] [ORVs], and to mandate ongoing studies to determine the quantity and mixture of recreation and other public use which can be permitted without adverse impact on the resource values of the river area. The Secretarial Guidelines, however, do not require one particular method of limiting user capacity. They do not mandate, for example, a numerical cap on visitors.

> We concluded that the VERP framework, as set out in the 2000 CMP, failed sufficiently to address user capacities because it did not adopt quantitative measures sufficient to ensure its effectiveness as a current measure of user capacities. Rather than establish specific indicators or standards to implement the VERP, the 2000 CMP provided examples of indicators and standards. By only providing illustrative standards, the [2000] CMP fail[ed] to yield any actual measure of user capacities, whether by setting limits on the specific number of visitors, by monitoring and maintaining environmental and experiential criteria under the VERP framework, or through some other method. This fail [ure] to provide any concrete measure of use, we found, was inconsistent with our interpretation of the phrase "address . . . user capacities."
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> We instructed that [o]n remand, the NPS shall adopt specific limits on user capacity consistent with both the WSRA and the instruction of the Secretarial Guidelines that such limits describe *an actual level of visitor use that will not adversely impact the Merced's ORVs.*

Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1029-30 (9th Cir. 2008).

Cottonwood Creek

Outstandingly Remarkable Values (ORVs)

We generally agree with the findings regarding Cottonwood Creek's ORVs—scenery, wildlife, fisheries, botany, and cultural for the Forest Service segment, and scenery, wildlife, botany, and recreation for the BLM segment.

However, we believe that "fish" should also be an ORV for the BLM segment. We understand, as noted in the Draft Plan, that presently "the [BLM] segment is habitat for brown trout, a popular game species, which precludes Paiute cutthroat trout establishment (BLM 2002)." (Cottonwood Draft Plan, Appendix B, Resource Assessment at B-16.) The Draft Plan also notes however that "the recovery plan for the Paiute cutthroat trout calls for the expansion of the population throughout the Cottonwood basin and into the BLM segment." (*Id*.) Given the importance of the BLM segment to the recovery of the Paiute cutthroat trout, fish should be added as an ORV for the BLM segment of Cottonwood Creek.

The BLM segment meets the criteria identified in the Draft Plan regarding fish. As stated in the Draft Plan, "[f]ish values include either indigenous fish populations or habitat or a combination of these river-related conditions (BLM 2012)" and with respect to habitat, "[t]he river provides exceptionally high-quality habitat for fish species indigenous to the region of comparison [and of] particular significance is habitat for wild stocks and/or federal or state listed or candidate, threatened, endangered, or BLM sensitive species." (Cottonwood Draft Plan, Appendix B, Resource Assessment at B-7.) Here, the BLM segment contains habitat for the Paiute cutthroat trout that is important for the recovery of this federally listed species. The discussion of fish as

an ORV for the BLM segment addresses non-native brown but does not address the Paiute cutthroat trout.

Given the BLM's obligation to assist in the conservation of ESA-listed species, adding fish as an ORV for this WSR segment will help ensure that occurs, such as helping to prioritize removal of brown trout from the BLM segment to aid recovery of Paiute cutthroat trout. On the other hand, not identifying fish as an ORV will lead to avoidable conflicts between the recreational use of the BLM segment for a brown trout fishery, and the need to recover an ESA-listed species. Specifically, under the proposal, recreational fishing for brown trout would take precedence over species recovery and the CRMP would be reinforcing that outcome rather than facilitating the recovery of the Paiute cutthroat trout. Thus, while recreation can and should remain an important aspect of the BLM segment, one aspect of recreation should not be allowed to usurp the potential for recovery of the Paiute cutthroat trout. Including fish as an ORV for the BLM segment will help prevent such an imbalance of priorities and will assure that the ESA intent is met.

Cottonwood Creek is also included in a BLM Area of Critical Environmental Concern (ACEC) and recently designated California Desert National Conservation Lands (CDNCL) under the Desert Renewable Energy Conservation Plan. That plan requires that BLM apply for water rights under NLCS-SW1 which states:

> Apply for water rights on a case-by-case basis to protect water dependent California Desert National Conservation Lands values.

This requirement should be part of the Cottonwood Creek Wild and Scenic River Comprehensive River Management Plan in order to protect water and ORVs.

User Capacity

In addition to an ORV for scenery, the Forest Service segment is "wild" and located in the White Mountains Wilderness. Therefore, solitude is an essential aspect of this part of the WSR. Similarly, while the BLM segment is not in the wilderness area, the area is remote and popular for dispersed camping, and is valued for its nature and solitude. Consequently, when addressing user capacity, impacts to solitude must be part of the analysis.

For the wild segment of Cottonwood Creek, the User Analysis identifies 30 users per day as the capacity based on the following equation: Total daily user capacity estimate = 6 [primitive campsites in the analysis area] x (2 vehicles per site x 2.5 occupancy) = 30 visitors per day However, the analysis also notes that current trail use is very low, often zero persons per day, and never more than seven persons per day. While we appreciate that 30 users per day may appear to be a relatively low number, there is no explanation as to why/how up to 30 users per day will: (1) not cause harm to the ORVs present in the wild segment of Cottonwood Creek, especially as to rare species like the bi-state distinct population segment of sage grouse and the Nelson desert bighorn sheep, both of which are Species of Conservation Concern, and the threatened Paiute cutthroat trout,[1] or (2) impede the solitude and wild aspect of this WSR.

[1] The Recovery Plan for the Paiute cutthroat trout management actions for this area include: "3.2.4 Maintain recreation opportunities as primitive and semiprimitive. Directing large numbers

Moreover, because the current maximum use of seven persons per day does not appear to show harm to the ORVs, the Plan should consider adopting this known user capacity. In addition, the Draft Plan states: "Consider closing and restoring dispersed campsites to natural conditions, where they are adversely affecting water quality." (Cottonwood Draft Plan at 32.) We believe that "consider" should be removed such that it reads: "Close and restore dispersed campsites to natural conditions where they are adversely affecting water quality."

For the recreational segment of Cottonwood Creek, the User Analysis identifies the daily capacity as a total of 30 inbound vehicles per day. That was then "multiplied by the average vehicle occupancy of 2.5 visitors," which "translates to a numeric user capacity estimate of 75 visitors per day that can be accommodated in the recreation segment of Cottonwood Creek without adversely impacting river values or water quality." (Cottonwood Draft Plan, Appendix A, User Capacity Analysis at 12.) The basis was that "the numeric user capacity for the recreation segment of Cottonwood Creek was estimated as the maximum number of visitors that can be accommodated in the area per day without the number of camping groups exceeding the physical design capacity of the dispersed campsites." (*Id*. at 27.) Here too, it would be helpful to see an explanation as to why the user capacity should be the same as the design capacity, as opposed to a lower number. That is especially so given that the BLM segment is valued for its nature and solitude, and is also habitat for species like the spotted bat.

The trigger for management is stated as: "All dispersed campsites are occupied on 50% or more of monitoring days . . . ." (Draft Plan at 36). Given the low current use, it appears to us it would be prudent to set a lower trigger, such as "25% of dispersed campsites are occupied on 50% or more of monitoring days for one year." That will help ensure that any unanticipated aspects of increased use are caught early/quickly.

We also ask that alternatives be analyzed, such as an alternative that examines not only a lower User Capacity in line with current use, but alternatives that examine lower triggers, such as the one discussed above.

Grazing

The South Oasis grazing allotment is located partially within the WSR corridor. There is no discussion, however, regarding how this allotment will or will not lead to impacts to ORVs or water quality. Further, while the Draft Plan notes that the Cottonwood grazing allotment has been vacant since 2000 and the grazing structures have not been maintained, there is no discussion of whether the allotment could be used in the future and if so how that would be addressed with respect to impacts to ORVs or water quality. The Draft Plan states, "Monitor grazing use for water quality impacts" (Draft Plan at 37), but contains no mechanisms to ensure that grazing does not impede water quality or ORVs.

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of recreational users to North Fork of Cottonwood Creek would inevitably stimulate unauthorized angling for Paiute cutthroat trout. Because Paiute cutthroat trout are currently present in very low numbers and are extremely vulnerable to angling, recreational access to the basin should be maintained at appropriate levels." Recovery Plan at 56.

Owen's River Headwaters

Outstandingly Remarkable Values (ORVs)

For the Owen's River Headwaters, we generally agree with the ORV findings in the Draft Plan—scenery, wildlife, botany, recreation, and geologic/hydrologic. However, there is no mention or discussion of the Sierra Nevada red fox, a very rare species that has been proposed for ESA listing (on January 8, 2020) and will likely be finalized for listing in the near future. This species' current range includes the Owens River Headwaters area (see, e.g., https://ecos.fws.gov/ServCat/DownloadFile/169289 at 18).[2] The fox should therefore be included and addressed as part of the wildlife ORV discussion.

User Capacity

The Owens Draft Plan states that "the limiting factor for recreational use in the recreational and scenic segment of Owens River Headwaters is the physical design capacity of the developed and dispersed campsites in the area [of which there are a total of 112 campsites, a group campsite which can accommodate up to 50 people, and 50 dispersed campsites]." (Owens Draft Plan at 21.) The Draft Plan then "estimated numeric daily user capacity for the scenic and recreational segments of Owens River Headwaters . . . by multiplying the number of available campsites by the number of visitors per campsite." (*Id.*) The Draft Plan arrived at 950 visitors per day as the user capacity ("Developed campground user capacity: 112 sites x 6 visitors per site = 672 visitors per day; Group campsite: 1 site x 50 visitors per site = 50 visitors per day; Dispersed campsites: 50 sites x 5 visitors per site = 250 visitors per day; Total daily user capacity estimate = 950 visitors per day." (*Id.*)

For the wild segment, the Draft Plan states: "Based on discussions with and direction from USFS, a threshold of no more than two encounters with other groups per hour while hiking was used to estimate the numeric user capacity for the wild segment of the Owens River Headwaters." (Owens Draft Plan at 26.) The result was that "the numeric user capacity for this river segment is estimated as a total 18 people per day." (*Id.*)

We ask that additional information and explanation be provided regarding the following:

- How the CRMP will ensure that user capacity does not lead to harmful impacts to Yosemite toads (such as the occupied habitat at Glass Creek Meadow), Sierra Nevada red fox, and other wildlife. We see that in the desired conditions section that the Draft Plan states: "Habitat conditions for threatened, endangered, proposed, or candidate species or species of conservation concern in the designated river corridor are improving over time. Enhancement of habitat for threatened, endangered, proposed, candidate, and sensitive species, such as the Yosemite Toad and western singlespike sedge will be emphasized in management activities." (Owens Draft Plan at 28.) However, we did not see a discussion regarding how those desired conditions will be

[2] The California Natural Data Base (CNDDB) also documents two occurrences of the Sierra Nevada red fox in 1988 along Deadman Creek (AMAJA03012).

addressed with respect to the Yosemite toad or other species such as the Sierra Nevada red fox.

- How the CRMP will ensure that there will not be harmful impacts to the seasonal migration corridor for mule deer in the Deadman Creek WSR corridor.

- How the CRMP will ensure that there will not be harmful impacts to the high diversity of butterfly species, such as the nine species that are species of conservation concern.

The triggers for Owens River Headwaters are the following for the scenic/recreational segments:

> Trigger 1: All campsites are occupied at one to two of the camping locations (Big Springs Campground, Glass Campground, Deadman Campground, the group campsite, or the dispersed campsites) on 25% or more of monitoring days for one year
>
> Trigger 2: All campsites are occupied at three or more of the camping locations (Big Springs Campground, Glass Campground, Deadman Campground, the group campsite, or the dispersed campsites) on 25% or more of monitoring days for two years

and the following for the wild segments:

> Trigger 1: Hourly intergroup encounters on the Glass Creek Meadow Trail reaches the threshold level of intergroup encounters per hour [2] on 50% or more of monitoring days for one year
>
> Trigger 2: Hourly intergroup encounters on the Glass Creek Meadow Trail reaches threshold level of intergroup encounters per hour [2] on 50% or more of monitoring days for two consecutive years

We ask that those triggers be reduced to better ensure that harm is avoided to water quality and ORVs— for example: "Trigger 1: <u>50% of</u> campsites are occupied at one to two of the camping locations (Big Springs Campground, Glass Campground, Deadman Campground, the group campsite, or the dispersed campsites) on 25% or more of monitoring days" and Trigger 2: "<u>50% of</u> campsites are occupied at three or more of the camping locations (Big Springs Campground, Glass Campground, Deadman Campground, the group campsite, or the dispersed campsites) on 25% or more of monitoring days for two years". This is especially needed given the current use for the scenic/recreational segments wherein Glass and Big Springs Campgrounds were only fully occupied on 3-4% of the days when data was collected. Similarly for the wild segments, the triggers should be in terms of <u>25%</u> or more of monitoring days not 50% to account for the current low use level.

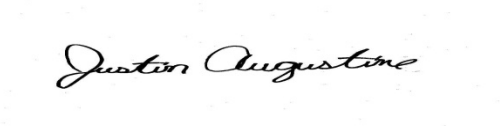
We also ask that alternatives be addressed that examine lower user capacities, especially with respect to the 950 users per day capacity which is considerably higher than the current use wherein Glass and Big Springs Campgrounds were only fully occupied on 3-4% of the days when data was collected. One alternative needs to include maintaining the current use as limits

for the CRMP, because the USFS has documented minimal impacts with this level of use, assuring that the values for which the WSR designation was adopted are maintained into the future.

Conclusion

Thank you for addressing these comments and please keep us on the list of interested public for all notices associated with this project.

Sincerely,



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