Mr. Timothy W. Pemberton  
District Attorney  
County of Alpine  
P.O. Box 248  
Markleeville, California 96120  

Dear Mr. Pemberton:

Mr. Guy Pence, District Ranger, Carson Ranger District, has forwarded your letter expressing concerns regarding the cattle allotments in the Bull Lake area. This letter responds only to part (v) that raises questions relating to the trout species present in Bull Lake.

Bull Lake was originally stocked in the late 1800’s with Heenan Lake strain of Lahontan cutthroat trout. The Department of Fish and Game (Department) treated the lake in 1956 to remove tui chubs (a non-game species) and the Lahontan cutthroat trout.

The following year the Department planted 46 Paiute cutthroat trout from Silver King Creek into Bull Lake. The success of this transplant was evaluated on September 1, 1965. Three large gill nets were fished for approximately twenty hours and yielded ten heavily spotted trout. Each appeared to be a typical Lahontan cutthroat trout, not Paiute cutthroat. It was concluded that the paiute transplant was a failure. Although failure to completely eliminate Lahontan cutthroat trout during the chemical (rotenone) treatment is the most likely explanation for the unsuccessful transplant of Paiute cutthroat, an interesting possibility exists that Lahontan cutthroat trout may have been planted instead of pure Paiutes. Recognize that the only distinction between Paiute and Lahontan cutthroat trout is the degree of spotting.

We sampled Bull Lake last year, and the genetic analyses on these trout are pending. We expect the analyses to be completed within the next two months. The analyses, when completed, probably will not delineate between Lahontan and Paiute cutthroat. However, they will tell us if the fish are introgressed with rainbow trout.

Both the Paiute and Lahontan cutthroat trout are listed under the Federal Endangered Species Act. They are not listed under the California Endangered Species Act. Therefore, it is the United States Fish and Wildlife Service’s (USFWS) that makes the determination whether the Bull Lake population of cutthroat
trout qualifies for protection. It is my understanding that the USFWS does accept some degree of introgression with rainbow trout. In the recently rewritten (January, 1995) Federal Recovery Plan for Lahontan cutthroat trout, the Bull Lake population is listed. Based upon the history of the cutthroat trout in Bull Lake, it is likely that the degree of introgression will be low and that the fish will be very similar, with respect to their genetic make-up, to pure Lahontan cutthroat trout.

If you desire additional information regarding the USFWS position on this issue, I suggest you contact Ms. Diane Windham, USFWS, 2800 Cottage Way, Room 1803, Sacramento, California 95825. The phone number is (916) 979-2725.

Hopefully, I have answered your concerns. If you have any additional questions or if we can be of further assistance, please contact Mr. Patrick O’Brien, Senior Fishery Biologist at (916) 355-7000.

Sincerely,

L. Ryan Broddrick
Regional Manager

cc: Mr. Guy Pence
   District Ranger
   Toiyabe National Forest
   1536 South Carson Street
   Carson City, NV  89701

   Mr. Wayne White
   Ms. Cay Goude
   Ms. Diane Windham
   2800 Cottage Way, Room 1803
   Sacramento, California  95825

   Mr. Patrick O’Brien
   Department of Fish and Game
   Rancho Cordova, California

bc: Mr. Russell Wickwire, Region 2
   Mr. Eric Gerstung, IFD Rancho Cordova

O’Brien:pdr

File:  IF, Chron, RF

fish95/pembrton.ltr
California Dept. of Fish & Game  
Mr. Ryan Brodderick  
1701 Nimbus Road  
Rancho Cordova, CA  95670  

Dear Ryan:  

I am enclosing a letter from Mr. Timothy Pemberton, District Attorney for Alpine County, California dated March 22, 1995, concerning the 1994 B.O. on Lahontan cutthroat trout which included Bull Lake. Mr. Pemberton has requested I forward this letter to you for your consideration.  

Our office will be responding back to him on the portion of his letter related to the B.O. and our implementation of the terms and conditions contained in that document.  

I have informed Mr. Pemberton that the Forest Service does not have any information to be able to respond to him on part (v) of his letter, which asks for proof that the fish in Bull Lake are a Federally-listed threatened species. Mr. Pemberton is asking if you can provide him with an answer to his question on this subject.  

Thank you for your assistance, please contact Jane Schmidt at (702) 882-2766 if you have any questions on this matter.  

Sincerely,  

GUY W. PENCE  
District Ranger  

Enc. letter  

cc: CAF&G, Eric Gerstung  
USFWS, Sacramento  
Mr. Pemberton  
SO, Bob Larkin
Re: USFWS Biological Opinion on Grazing Activities Affecting Lahontan and Paiute Cutthroat Trout

Gentlemen:

At the March 7, 1995, meeting of the Alpine County Board of Supervisors, I was authorized to direct correspondence to each of you regarding the above-referenced matter. Please note the following:

(i) On July 11, 1994, the United States Department of the Interior, Fish and Wildlife Service ("USFWS") prepared a writing relating to "Formal Consultation of U.S. Forest Service Grazing Allotments Affecting Federally Listed Fish in California." The correspondence was directed to Mr. Ronald Stewart, Regional Forester (Region 5), U.S. Forest Service, in response to Mr. Stewart's request for formal consultation pursuant to Section 7 of the Endangered Species Act ("ESA"). The correspondence addressed several grazing allotments, including the Highland Lakes Allotment (Stanislaus National Forest), the Bull Canyon Allotment and the Slinkard C&H Grazing Allotment (Toiyabe National Forest), each within Alpine County, California. The correspondence contained a Biological Opinion by the USFWS regarding continued existence of the Lahontan and Paiute Cutthroat Trout (Oncorhynus Clarki Lenshawi and Oncorhyncus Clarki). The USFWS also prepared "Grazing Standards for Biological Opinions" the purpose of which was to provide
Region-wide restrictions on grazing allotments, including those allotments located in Alpine County. The Grazing Standards for Biological Opinions stated that agreement had been reached on several "policy issues." Those policy issues asserted:

1. All proposed grazing restrictions would be measured against an environmental baseline of no authorized grazing;

2. Grazing is likely to at least slow the recovery of degraded watershed, riparian and stream conditions for each listed species of fish; and

3. Achievement of desired protection for the species could be achieved only if there were (1) no grazing within the watershed affecting the endangered species, or (2) habitat conditions had reached or were near the site's potential and would not be impaired by grazing.

I am informed the grazing restrictions described in the Biological Opinion shall be incorporated into each of the allotment permits and annual grazing plan.

(ii) Neither the July 11, 1994, correspondence (Biological Opinion) nor the Grazing Standard for Biological Opinions made any reference to the National Environmental Protection Act ("NEPA"), 42 USC 4331-4347, or any regulation implementing NEPA.

(iii) The Biological Opinion imposes significant limitations upon grazing activities in the Alpine County allotments, the effect of which is to curtail ranching activities on public lands. Ranching is one of the few business activities carried out in Alpine County and contributes to the County's employment and economy.1/

1/ Alpine County’s economy has traditionally been based upon natural resources utilized for mining, timber production and ranching (grazing). These industries (together with tourism) are the source of nearly all local employment. Alpine County's population is approximately 1,200. The labor force consists of approximately 514 people. See: 1990 Decennial Census. The unemployment rate (based on California Employment Development Department Population Statistics) is 13%, not including the chronically unemployed. According to California Department of Employment Development statistics, unemployment among Native Americans is 30%.
(iv) The Biological Opinion did not address any aspect of the human environment. Alpine County contends that the Biological Opinion (and its implementation) is "major federal action" within the meaning of NEPA and, therefore, an Environmental Impact Statement ("EIS") is required before the action is implemented. See: Westlands Water Dist. v. U.S. Dept. of Interior (E.D. Cal., 1994) 850 F.Supp 1388, 1422. The federal agency cannot avoid an EIS on the grounds the proposed action has only "beneficial" environmental effects. See: 40 CFR 1508.8. The EIS must consider the economic and social impacts of the Biological Opinion.

The Federal Ninth Circuit Court of Appeals has ruled that an EIR must be prepared if "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." (Emphasis in original) See: LaFlamme v. FERC (1988) 852 F. 2d 389, 397. See also: City and County of San

2/ NEPA requires that an EIS shall be prepared for all "major federal actions significantly affecting the human environment." See: 42 USC 4332(2)(c); Lockhart v. Kenops (1991) 927 F.2d 1028, 1033. In order to determine whether a federal action affects the environment, a consideration of a variety of factors is required by the regulations. See: 40 CFR 1508.27; 40 CFR 1508.14; Morris v. Myers (1993) 845 F. Supp. 750, 755. Included among those factors is "[t]he degree to which the effects on the quality of the human environment are likely to be controversial." See: 40 CFR 1508.27(4); Lockhart v. Kenops, supra, 1035. It is appropriate for the federal agency to address any demonstrated or potentially significant impacts upon cultural, economic or social matters." See: Goodman Group, Inc. v. Dishroom (1982) 679 F. 2d 182, 185.

The Forest Service Manual states the term "human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. ". . . [E]conomic or social effects are not intended by themselves to require preparation of an environmental impact statement. [If] an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss these effects on the human environment."

The Forest Service Manual sets objectives for Forest Service compliance with NEPA and requires the Forest Service to "fully consider the impacts . . . on the physical, biological, social and economic aspects of the human environment." See: Forest Service Manual, Section 1950.2(2).
Therefore, when implementing the Biological Opinion (and related grazing restrictions) the Forest Service is under an affirmative duty to fully consider impacts upon human environment, including the social and economic impacts of implementation of Biological Opinion.

(v) The Biological Opinion assumes, without describing the evidence, that the listed species is actually present in Bull Lake and curtails grazing in the Bull Lake allotment. Apparently, no comprehensive DNA analysis has been conducted to confirm the identity of the species in Bull Lake. The species was introduced to Bull Lake in 1956 by personnel employed by the California Department of Fish and Game. Attached hereto as Exhibit A is a handwritten letter from Jim Richard, who carried out the transplanting. His letter states that the fish placed into Bull Lake were "hybridized" and not the pure Paiute trout.

Alpine County respectfully requests that an EIS be prepared for implementation of the grazing restrictions set forth in the Biological Opinion, including a thorough analysis of the impacts upon the human environment.

Alpine County also respectfully requests the Forest Service to provide any evidence which it may possess in support of the assertion any listed species exists in Bull Lake (including the results of any DNA testing or protein electrophoresis).

Your anticipated cooperation is appreciated.

Very truly yours,

Timothy W. Pemberton

Enclosure
Sorry for the delay in answering your letter of Sept 23 but we just returned from a trip to Colorado.

In regards to Bull Lake, Alpine Co. In 1954 or 1955, I chemically treated Bull Lake to rid the lake of the non-game fish then present. In 1956, as I recall, headwater Cutthroat Trout were transplanted from Silver King Fl. To Bull Lake. This was done before hybridization in 1962 or so that the Silver King fish had become hybridized with Rainbow Trout and Golden Trout. In 1958 I went into Bull Lake and found the transplanted fish had disappeared in the outlet stream. Due to the fact that the lake was scheduled for a plant from the air from within 5 or 6 days I pulled out to contact the office to cancel the airplane ingredient into Bull Lake.

Because some of the transplanted fish were hybridized to begin with the fish within Bull Lake were not pure "Cutthroat Trout," and appeared more like Cutthroat Trout. Even the hexan lake fish were not considered pure in the early 50's. Silver King Fl has been chemically treated a number of times to try and re-establish pure "Cutthroat Trout." 

I am not certain on what FWC has done on Bull Lake in recent years so I am of no help there.

I hope the above will be of some help to you.

Sincerely,

Jim Richard

FALLS MOUNTAIN

Exhibit A