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UNITED STATES DEPARTMENT OF INTERIOR
BOARD OF LAND APPEALS

SALINAS RAMBLERS MOTORCYCLE)
CLUB; AMERICAN MOTORCYCLIST)
ASSOCIATION DISTRICT 36;) IBLA NO. _____
CALIFORNIA ASSOCIATION OF 4)
WHEEL DRIVE CLUBS; CALIFORNIA)
OFF-ROAD VEHICLE ASSOCIATION;) **INITIAL STATEMENT OF**
OFF-ROAD BUSINESS ASSOCIATION;) **REASONS AND PETITION FOR**
and THE BLUERIBBON COALITION;) **STAY**
)
Appellants,)
)
)
vs.)
)
)
BUREAU OF LAND MANAGEMENT;)
MIKE POOL, State Director, BLM)
California; Bob Beehler, Hollister Field)
Office Field Manager;)
)
)
Respondents.)
_____)

On June 28, 2005, the Salinas Ramblers Motorcycle Club, American Motorcyclist Association District 36, California Association of 4 Wheel Drive Clubs, California Off-Road Vehicle Association, Off-Road Business Association and the BlueRibbon Coalition (the “Recreational Groups”) submitted their notice of appeal in this matter. The appeal seeks review

of the Decision of the Bureau of Land Management, Hollister Field Office, dated May 25, 2005, entitled Closure Order, and the associated Environmental Assessment and Finding of No Significant Impact, EA-CA-190-05-21. Pursuant to and within the time allowed by 43 C.F.R. § 4.412, the Recreational Groups hereby provide this Initial Statement of Reasons and Petition for Stay. Submitted contemporaneously herewith and incorporated within the Recreational Groups' Statement of Reasons is the Declaration of Paul A. Turcke and attached exhibits A-J, as well as the Declaration of Ed Tobin and attached exhibits K and L. In addition to these materials, the Recreational Groups anticipate filing additional materials prior to expiration of the 30 day period described in 43 C.F.R. § 4.412(a).

FACTUAL AND PROCEDURAL BACKGROUND

The Decision restricts the Recreational Groups' access to the Clear Creek Management Area ("CCMA"), which is located in Central California and managed by the BLM Hollister Field Office. The CCMA encompasses 75,829 acres of land, including 10,668 acres of private inholdings and 1,964 acres of state lands. Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for the Clear Creek Management Area at ES-1 (attached as Exhibit "J" to the Declaration of Paul A. Turcke). Thus, about 63,197 of the area within the CCMA boundary is managed by BLM. About 30,128 acres of those lands lie within an Area of Critical Environmental Concern ("ACEC"), at least in part due to "high concentrations of natural asbestos occurring in its serpentine soils." *Id.*

Despite the potential for concern over risks associated with these soils, the CCMA has long been a popular and highly visited destination for recreation and other human activities. BLM acknowledges that the:

CCMA has been an important recreation destination for central California residents for over 35 years. In 1995, BLM noted that “Clear Creek was among the top five most popular areas cited by California off-highway-vehicle users.” “CCMA has been most popular with motorcyclists who use the area for hill climbing, trail riding, and camping. Other common recreation activities include 4-wheel drive off-highway vehicle driving, hobby gem/mineral collecting, and sightseeing. Most recreational use of CCMA occurs between November and April, or during the wet season, as the summer months are plagued with hot, dry, and dusty conditions.

Federal Defendants’ Cross-Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Cross-Motion and in Opposition to Plaintiffs’ Motion for Summary Judgment filed on behalf of Defendants BLM and Director Pool on April 29, 2005, in *Center for Biological Diversity et al. v. Bureau of Land Management et al.*, Case No. CV-04-4736 (N.D. Cal.). at 4-5 (attached as Exhibit “G” to the Declaration of Paul A. Turcke) (citation omitted). While “wet season” use is more popular, there remains active and important recreational visitation to the CCMA even during the “dry” summer months. Declaration of Ed Tobin at ¶ 5. In addition to individual or small group recreation access, the CCMA is home to long-running and popular vehicle-based events, including the Quicksilver Enduro hosted by Appellant Salinas Ramblers Motorcycle Club since 1973. Declaration of Ed Tobin at Exhibit “K”, ¶ 4 (and attachments).

BLM has long authorized human access to the CCMA, including to the ACEC and areas allegedly containing “asbestos.” Much of this planning history is not specifically germane to the Recreational Groups challenge, except to establish the agency’s long record of theoretically analyzing numerous issues, including potential asbestos risk, and allowing continued human visitation. The planning history is addressed in several of the materials submitted herewith, including Exhibit “G” to the Declaration of Paul A. Turcke at 5-10, and Exhibit “J” to that Declaration at 1-1 through 1-5. BLM is currently conducting formal public planning to evaluate

various management issues, specifically including the Draft Resource Management Plan Amendment and Draft Environmental Impact Statement, which process “describes and analyzes a number of alternatives for designating routes and areas [for vehicle use], protecting sensitive resources and threatened species, and incorporating new significant planning on federal lands administered by [BLM].” Exhibit “J” to Turcke Declaration, cover letter to Draft Plan Amendment and DEIS. The DEIS was released in approximately May, 2004, and was the subject of public meetings and was open to public comment for a period of 90 days. *Id.* BLM is presently awaiting the results of consultation with the U.S. Fish and Wildlife Service, which it anticipates will conclude with the receipt from the Service of a biological opinion in August, 2005. Exhibit “G” to Turcke Declaration at 9-10. At that time BLM apparently intends to conclude the Plan Amendment’s formal decision-making process with a decision “that will result in a system of designated routes and barrens...” implementing applicable law and planning direction. *Id.* at 10.

As the above-cited materials describe, the CCMA is also home to interesting flora and fauna, specifically including the San Benito evening-primrose (*Camissonia benitensis*), which is listed as a threatened species under the Endangered Species Act. Exhibit “G” to Turcke Declaration at 4. Two organizations focusing on protection of endangered species and the primrose filed suit against BLM in November of 2004, alleging that BLM’s management of vehicle access to the CCMA violated the Endangered Species Act. See, generally, Exhibit “G” to Turcke Declaration. Cross-motions for summary judgment have been submitted in that case and are set for oral argument on July 15, 2005.

For whatever reason, BLM has determined, through the Decision, to immediately close the ACEC to all human access between June 4 and October 15, 2005. The Decision was publicly

announced through a news release issued on May 25, 2005. The associated “closure order” states the Decision is now necessary “to ensure visitor safety and protect public land users from potential health risks associated with naturally occurring asbestos....” Closure Order, Exhibit “B” to Turcke Declaration. The order further states that public access “during this time period create a significant hazard and risk associated with exposure to asbestos.” *Id.* The closure order was apparently justified by Environmental Assessment EA-CA-190-05-21 and the project’s Decision Record/Finding of No Significant Impact, which in their combined entirety total thirteen (13) pages. EA, Exhibit “C” to Turcke Declaration. The EA specifically states its purpose includes responding “to EPA’s Technical Memorandum titled “Human Health Risk Assessment – Asbestos Air Sampling [CCMA] September 15, 2004.” *Id.* at 3. A copy of the “Technical Memorandum” is attached as Exhibit “D” to the Turcke Declaration. The Technical Memorandum states:

The results of this study suggests [sic] that further sampling is needed to confirm the results of this one-time sampling and to determine if risk management-based mitigation measures are needed to reduce exposures of recreational motorcycle riders to naturally occurring asbestos at the CCMA.

Technical Memorandum at 2 (emphasis added). Regardless of this request for “further sampling” and study, BLM issued the Decision. After hastily announcing the Decision, BLM has apparently proceeded to implement the closure, despite its failure to formally serve the Decision as required as a prerequisite to implementation. Declaration of Ed Tobin at ¶ 7.

There was minimal, if any, formal agency analysis involving the interested public which preceded the Decision. At best, there was cryptic mention of a possible need for a “dry-season closure” in a May, 2005, “Clear Creek Bulletin” and the ensuing meeting held on May 17, 2005. Declaration of Ed Tobin at ¶ 2-3 and Exhibit “L.” There were no “scoping” or other public

meetings typically associated with BLM planning and analysis under the National Environmental Policy Act. *Id.* at ¶ 3. There was no opportunity for public review of, or comment upon, the proposed “dry-season closure.” *Id.* This absence of public planning occurs despite the fact that BLM had certainly been contemplating the topic since at least receipt of the Technical Memorandum. In fact, BLM was apparently in ongoing dialogue with the EPA on the subject, and EPA was actively advocating that BLM take aggressive action to restrict visitor access. See, Undated letter from the EPA addressed to BLM (attached as Exhibit “H” to the Turcke Declaration) referenced at p. 30, n. 24 of the Exhibit “G” to the Turcke Declaration; Comments to the Draft Plan Amendment and DEIS dated December 1, 2004 (attached as Exhibit “I” to the Turcke Declaration). In fact, despite the ultimate release of the Decision scant days before its stated implementation date, BLM’s counsel represented in the ESA lawsuit in on April 29, 2005, a “likelihood that OHV use will be prohibited in CCMA during the summer months of 2005.” Exhibit “G” to Turcke Declaration at 30, n. 24. For whatever reason, BLM refused to conduct any formal analysis or public involvement regarding a possible dry-season closure despite actively considering the subject since at least September, 2004.

The Decision immediately and irreparably impacts the Recreational Groups’ interests. One cannot enjoy reasonable access to the CCMA’s trails without riding on those portions traversing the ACEC and closed area. Tobin Declaration at ¶ 5. This situation either precludes access entirely or creates dangerous “back and forth” traffic. *Id.* Additionally, BLM has altered the regulatory “status quo” on the verge of a new decision, causing significant procedural harm. *Id.* at ¶ 6.

Upon issuance of the Decision, counsel for the Recreational Groups wrote to BLM and Department of Interior Officials outlining their concerns with the Decision. Letter dated June 6,

2005 (attached as Exhibit “E” to the Turcke Declaration). In a response dated 4 days later, BLM announced its failure to reconsider the Decision and response to the points raised by counsel for the Recreational Groups. Letter dated June 10, 2005 (attached as Exhibit “F” to the Turcke Declaration). In light of this response and the continued implementation of the Decision, the Recreational Groups have appealed to this Board, and are attempting to obtain leave from the Court in the ESA litigation, to declare unlawful and set aside the Decision.

STATEMENT OF REASONS

For the following reasons, the Decision is illegal and must be set aside. As noted above, the Recreational Groups may submit an additional Statement of Reasons and additional supporting material and argument.

A. Standard of Review.

The federal statutes and regulations at issue in this appeal are ultimately made reviewable in federal court under the Administrative Procedure Act. See, e.g., ONRC Action v. BLM, 150 F.3d 1132, 1135 (9th Cir. 1998). The APA waives the United States’ sovereign immunity for those aggrieved by “final agency action.” 5 U.S.C. §§ 702, 704; Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990). If this threshold requirement is met, APA section 706(2) presents the relevant standard of review, which allows a court to “hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....” 5 U.S.C. § 706(2). This is generally referred to as the “arbitrary and capricious” standard although APA section 706(2) contains six (6) subsections outlining different flaws to be avoided by the agency. The arbitrary and capricious standard is deferential and does not allow a reviewing court to substitute its judgment for that of the agency:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made....Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added). A reviewing court or this Board is therefore not empowered to disagree with the agency, but must scrutinize the rationale for the agency decision to at least determine there is some rational basis for the agency's conclusion.

B. BLM is Illegally Implementing the Decision During the Appeal Period.

BLM is attempting to implement a closure decision that has never been properly "served" upon affected individual or published in the Federal Register. A decision subject to appeal "will not be effective during the time in which a person adversely affected may file a notice of appeal..." 43 C.F.R. § 4.21(a)(1). The exceptions to this rule, notably a "full force and effect" pronouncement by the "the Director," are not applicable here. *Id.* A decision is subject to appeal for a period of "30 days after the date of service" or, for individuals not "served," for 30 days after the date of publication of the decision in the Federal Register. 43 C.F.R. § 4.411(a). "Service" as used in these regulations refers to "delivering the copy [of decision document] personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau." 43 C.F.R. § 4.401(c). "Personal service"

contemplates face-to-face delivery as in a judicial context, which “may be proved by an acknowledgment of service signed by the person to be served.” *Id.* at (c)(2).

The Decision has never been properly served and has not been published in the Federal Register. Tobin Declaration at ¶ 7. In this context, and consistent with typical agency practice, it would be logical to initiate the appeal period by Federal Register publication. Public access to the CCMA does not involve a discrete or easily-identified populace, compared to a grazing decision affecting a single permittee’s terms and conditions. While it was not served, the Decision indicates it is subject to appeal. Exhibit “C” to Turcke Declaration at 13. Thus, the appeal period remains open. As the appeal period has not ended the Decision cannot yet become effective without violating the mandatory direction of 43 C.F.R. § 4.21(a)(1). On this basis alone the Board should immediately stay BLM’s further implementation of the Decision.

C. The Decision is Not Supported by Sound Science or Rational Analysis.

In addition to their procedural challenges, the Recreational Groups intend to challenge the substance of the Decision and associated scientific analysis. The Recreational Groups have retained an expert witness to assist in this argument, and intend to present his testimony and related argument in an additional documents which will be submitted within the time prescribed by 43 C.F.R. § 4.412(a).

D. The Decision Illegally Excluded the Public from the NEPA Process.

The Decision mocks both NEPA’s policy and implementing regulations through its unabashed exclusion of the public from BLM’s decision-making process. NEPA and its implementing regulations require early and meaningful involvement of the public in planning for any major federal action which may significantly affect the human environment. 42 U.S.C. § 4332. In adopting and implementing NEPA procedures, BLM “must insure that environmental

information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1. BLM cannot predetermine the outcome of a NEPA process by making its decision on the proposal without, or prior to, involving the public. In addition to involving the public, BLM must provide the public with accurate and high quality information to afford the public’s legally required meaningful participation in the NEPA process. “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b).

NEPA requires that federal agencies evaluate the potential impacts of proposed actions while those actions are still proposed.

NEPA has twin aims. First, it “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.” Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.

Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97 (1983) (citations omitted). These requirements, among others, require BLM to take a “hard look” at the impacts to the environment even potentially associated with a proposed action. *Marsh v. ONRC*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Proper analysis must evaluate the effects of a proposal upon “the human environment,” which the regulations clarify “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment....” 40 C.F.R. § 1508.14.

The Decision was not generated through the mandated public involvement. In fact, any analysis of the underlying issues was seemingly hidden from public view. BLM had ample opportunity to initiate even perfunctory public planning efforts at least as early as September, 2004. If anyone would have been aware of BLM’s attempts to involve the public, it would have

been Mr. Tobin, who has actively worked with BLM on special events and vehicle access issues in general for years. Tobin Declaration at ¶ 2 and at Exhibit “K” ¶¶ 2-4. No such public involvement occurred here. *Id.* at ¶ 3. BLM, on the other hand, was sufficiently confident of its intent to issue a “dry-season closure” in 2005 to so represent to the EPA and the federal court sitting in San Jose. See, Exhibit “H” to Turcke Declaration at 1 (“We are pleased with the BLM decision to implement a CCMA closure for the summer 2005 season based on the results of air sampling conducted in September, 2004); Exhibit “G” to Turcke Declaration at 30, n. 24 (predicting on April 29, 2005, a “likelihood that OHV use will be prohibited in CCMA during the summer months of 2005.”). Probably due in large part to this complete absence of public involvement, BLM generated a NEPA “analysis” containing a paltry thirteen (13) pages, virtually unheard of today for a decision involving any degree of technical analysis or controversy.

The Decision violates the spirit and letter of NEPA and its implementing regulations. The Board should declare unlawful and set aside the Decision and instruct BLM to evaluate the issues addressed in the Decision through a public process allowing the “hard look” mandated by NEPA.

E. The Decision Constitutes Illegal Action Concerning the Ongoing Planning Process.

The Decision is an illegal action affecting proper completion of the ongoing management plan amendment for route and area designation. While BLM is involved in a public planning process but has not yet issued a record of decision, NEPA’s implementing regulations prohibit BLM from taking any action “concerning the proposal...which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a).

BLM is currently involved in a public planning process to designate areas and routes for vehicle access in the CCMA. See, Exhibit “J” to the Turcke Declaration. As part of that process, BLM has issued and received public comment upon the DEIS, but has not yet issued a Final EIS or record of decision. The DEIS specifically addresses the topic of possible dry-season closure, and promises “management guidance common to all alternatives” in that process including specific substantive and procedural components. *Id.* at 2-3 and 2-4 (identifying routes to remain open and requiring, prior to instituting a closure, that BLM conduct monitoring and post warning notices for a specified time period). The DEIS further refers the public to Appendix C, which again recites that these required elements and procedures will be a part of any “seasonal closure” considered in any alternative in the DEIS and public planning process. *Id.* at Appx. C, p. 6. The Decision ignores and deviates from these provisions. Furthermore, the Decision necessarily prejudices consideration of the DEIS alternatives as the Decision has effectively included a CCMA-wide closure to all human access from June to mid-October. The timing of this development is particularly problematic, at the end of a long and expensive planning process and on the verge of BLM’s final decision. The law prevents BLM from taking this type of action concerning proposals undergoing NEPA review.

Again, the Decision violates the mandatory procedures of NEPA and its implementing regulations. The Board should declare unlawful and set aside the Decision and order that BLM complete the ongoing NEPA process free from the interference and prejudice associated with the Decision.

PETITION FOR STAY

The Board should immediately grant a petition for stay to rectify BLM’s egregious procedural errors here. The Recreational Groups hereby immediately petition for a stay of the

Decision pursuant to 43 C.F.R. § 4.21. A successful petition for stay must address the following factors:

- (i) The relative harm to the parties if the stay is granted or denied,
- (ii) The likelihood of the appellant's success on the merits,
- (iii) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (iv) Whether the public interest favors granting the stay.

43 C.F.R. § 4.21(b)(1). Given the unique procedural history and flaws here, the Recreational Groups satisfy these criteria.

There is virtually no harm to BLM associated with a stay. BLM has allowed for “dry-season” access to the CCMA for decades. To the extent BLM has significant ongoing activities involving CCMA management, they are unrelated to the “dry-season closure.” Conversely, the Recreational Groups and the visiting public are being illegally excluded from any access to portions of their public lands, despite having historically enjoyed that access. The relative harm to the parties favors granting a stay.

The likelihood of success tips sharply in the Recreational Groups' favor and should be considered a dispositive factor here. BLM's failure to properly distribute or publish the Decision is egregious and reveals the shoddy procedural attention to detail permeating the Decision. BLM and the public have invested significant resources in the public planning process, only to see the alternatives ignored and modified by the Decision. NEPA's core requirements include meaningful public participation, while the Decision blatantly excludes the public. The Recreational Groups have a strong case on the merits.

The procedural errors identified in the Statement of Reasons result in irreparable procedural harm. The Recreational Groups are particularly concerned that the Decision has effectively altered the EIS and Plan Amendment's pre-Record of Decision status quo. In other

words, the Decision has the effect of including a “dry-season closure” in all action alternatives before BLM for decision. Tobin Declaration at ¶ 6. Even a favorable decision here must come in time to be fully considered by BLM prior to the final decision on the ongoing EIS and planning process. Additionally, the Recreational Groups’ and their members are suffering daily harm to their recreational and aesthetic interest under the Decision. *Id.* at ¶ 5. In response, BLM cannot point to irreparable harm associated with continued summer use, particularly in light of the historical and undisputable access that has occurred for decades which is now prohibited.

Finally, the public interest also favors a stay. A stay will send the message that federal agencies cannot exclude the public voice from the planning process. Decisions about access to public lands should include the public. Instead, BLM here was apparently allowed pressure from other agencies and its litigation strategy to override public involvement. The Board should send a strong message that will ensure that BLM and other agencies do not so confuse their priorities in the future.

CONCLUSION

The Decision is based upon flawed science and was spawned through illegal procedure. The Board should immediately stay implementation of the Decision and remand this matter to the BLM for mandatory procedures.

Dated this _____ of July, 2005.

MOORE SMITH BUXTON & TURCKE,
CHARTERED

Paul A. Turcke
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Statement of Reasons and Petition for Stay and the herein-referenced Declaration of Paul A. Turcke and Declaration of Ed Tobin were delivered on July ____, 2005, by placing the same in the U.S. Mail, certified delivery, return receipt requested, addressed to the following:

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