

## STATE DIRECTOR'S PROTEST ANALYSIS

### PLAN: CLEAR CREEK MANAGEMENT AREA (CCMA)

**Protest No.:** PP-CA-ClearCreek-05-03

#### **Post marked:**

**Individual &/or Organization:** Moore Smith Buxton & Turcke

Address: 225 North 9<sup>th</sup> Street, Suite 420  
Boise, ID 83702

#### **State Office Evaluation Results:**

- a) After review of all planning record, the protesting party has standing through participation in the planning process.
- b) Although not all of the issues/comments were raised during the planning process, we are providing responses to all issues/comments raised in the protest.
- c) Although some of the issues/comments raised may not be germane, we are providing responses to all issues/comments raised in the protest.

#### **List of Issues/Comments Raised:**

#### **State Office Detailed Analysis of Identified Issues/Comments:**

##### **Issue/Comment 1:**

- (a) "The Amendment fails to meet the requirements of section 7(a)(1) of the ESA and may additionally lead to violations of the 'non-jeopardy' and 'take' provisions of the ESA. Specifically, the Amendment would lead to excessively concentrated travel in limited areas of the CCMA, as opposed to travel dispersed within a broader area."
- (b) "...the BLM should at least analyze, if not adopt, alternatives to the Proposed Action which allow for a trail/barren network well beyond that considered which will reasonably address visitor demand for the CCMA"

##### **Response:**

- (a) Not protestable. Not previously raised by protesting party. Plan was developed in consultation with the U.S. Fish and Wildlife service, who determined in a Biological Opinion that the Proposed Action would result in no-jeopardy to species listed under the ESA.
- (b) Protestable. See response to Issue 3(a).

**Issue/Comment 2:** The proposed action represents “the agency’s final and most comprehensive analysis of project-level, or site-specific, decision making on individual routes. The Amendment lacks sufficient analysis and/or procedures to support this level of site-specific action.”

**Response:** Not protestable. As discussed in the “Dear Reader” letter at the front of the Final Environmental Impact Statement, proposed decisions on specific routes are implementation decisions. These decisions are not protestable, but are appealable to the Interior Board of Land Appeals upon adoption of the Record of Decision.

**Issue/Comment 3:**

- (a) BLM did not address “a proposed ‘Alternative E’ which would have addressed species and resource protection issues while better addressing visitor satisfaction and safety issues.”
- (b) BLM assumes “that all routes which eventually cross private property must be closed back to the nearest intersection with a route designated ‘open’ for travel. There is no legal requirement to manage in this fashion, and such an approach actually violates applicable law where rights-of-way have been established across the properties in question”
- (c) BLM “failed to consider alternatives that would close, relocate, or limit use of the historical camping and staging areas, which direct and concentrate use within areas like Clear Creek Canyon that present the most significant and complex resource protection issues.”

**Response:**

- (a) As stated in Appendix J, page 73 of the Final EIS, the alternative developed by the Recreational Groups was reviewed and considered. The issues presented in the “Alternative E” submitted by the Recreational groups are addressed as follows:
  - a. Proposed decisions on individually routes are not protestable; however, it should be noted that 24 additional miles of routes were added to the Proposed Action, many of which were submitted in comments on the Draft EIS by the Recreational groups.
  - b. The “Stopping and Parking” action proposed by the Recreational groups was included in the Proposed Action (2005 FEIS, p. 2-7).
  - c. Camping is outside the scope of the proposed action and is not protestable.
  - d. The proposal for the boundary of the San Benito Mountains Research Natural Area submitted by the Recreational groups was analyzed in Alternative B of the 2004 Draft EIS on Page 2-23.
  - e. The proposal for barren designations submitted by the Recreational groups was within the range of alternatives analyzed in the 2004 Draft EIS pages 2-17 to 2-25.
- (b) Not protestable. As discussed in the “Dear Reader” letter at the front of the Final Environmental Impact Statement, proposed decisions on specific routes are

implementation decisions. These decisions are not protestable, but are appealable to the Interior Board of Land Appeals upon adoption in the Record of Decision. The BLM is in compliance with all appropriate federal and state right-of-way laws.

- (c) Not protestable. Outside the scope of the project. Camping and staging were addressed in the 1999 ROD page 10.

**Issue/Comment 4:** “The cumulative impacts analysis is deficient” in that it does not “adequately discuss the impact of restricting vehicle access on numerous issues, including (1) socioeconomics; (2) visitor recreation experience and safety; (3) satisfaction of, demand for vehicle-based recreation; and (4) unjustified resource impacts resulting from concentrated use at the few remaining areas and/or routes designated for vehicle travel.”

**Response:** Not protestable. Issue not previously raised in planning process. The cumulative impacts for the reduction of routes occurred in 1995. The proposed decisions established route selection criteria (see Final EIS, Appendix A, pages 2 through 9) and then selected the routes available for motorized recreation as established and analyzed in 1995 and 1999.

**Issue/Comment 5:** “The disclosure and analysis of socioeconomic impacts is deficient.” BLM “must ‘articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made....’”

**Response:** Protestable. This issue was responded to in the Final EIS, Appendix K, page 35: “Page 3-48 of the DEIS describes the social and economic conditions in the region surrounding CCMA, and page 4-54 presents an evaluation of the impacts to social and economic conditions as required by 40 CFR 1502.22.” An analysis of the existing social and economic conditions and impacts from the Proposed Action are also included in the Final EIS (pages 3-42 through 3-44, pages 4-28 through 4-31, and page 4-40). Protesting party has not raised any specific information not included in the original analysis, nor provided any reason why the existing analysis and information are incorrect.

**Issue/Comment 6:**

- (a) “The agency has not conducted any meaningful effort at evaluating recreational demand.”
- (b) “The interdisciplinary team lacks members with necessary off-highway vehicle planning background, leading to inadequate and illogical conclusions. For example, one or more play areas supposedly surround ‘closed’ areas such as mine sites or private property.”
- (c) “The proposed route network is “inadequate for recreation demand.” The “proposed 100 miles or less of single-track trail is wholly inadequate for recreation demand. This proposed mileage will not allow for reasonable conduct of historically-approved events...and... might lead to unjustified impacts due to concentration of travel.”

- (d) BLM “has improperly failed to consider authorizing travel on routes crossing private property, regardless of the existence of historical use along established rights-of-way.”

**Response:**

- (a) Protestable. The Final EIS contains an analysis of recreational demand and OHV demand (Final EIS, pages 3-30 through 3-37). Protestor does not specify any dispute or additional information to lead BLM to determine the existing analysis to be incorrect.
- (b) Partially protestable. The ID team was composed of professionals from a variety of fields, including recreation management and planning, OHV management and planning, and range of other natural resource disciplines. A complete list of preparers is contained on page 5-8 of the Final EIS. This team developed criteria to use for designating barrens as open or closed to OHV use. The criteria used to designate barren areas as open or closed are in Appendix B of the Draft and Final EISes. Protesting party raises no specific reason or information to suggest why this method should be changed.
- (c) Not protestable. As discussed in the “Dear Reader” letter at the front of the Final Environmental Impact Statement, proposed decisions on specific routes are implementation decisions. These decisions are not protestable, but are appealable to the Interior Board of Land Appeals upon adoption of the Record of Decision.
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**Issue/Comment 7:** “BLM should clarify that undesignated routes may be available for permitted use.”

**Response:** Not a protest issue; request for clarification. Pursuant to 43 CFR 8340.0-5(h), “*Closed area* means an area where off-road vehicle use is prohibited. Use of off-road vehicles in closed areas may be allowed for certain reasons; however, such use shall be made only with the approval of the authorized officer.” By regulation, closed routes and areas may be authorized for use, after appropriate environmental review, by the BLM Field Manager. Permittees may be required to post a bond to ensure that corrective maintenance activities take place following the authorized use. Designations for OHVs do not apply to “any vehicle whose use is expressly authorized by the authorized officer, or otherwise officially approved (43 CFR 8340.0-5(a)(3).”

**Issue/Comment 8:** “The amendment improperly suggests routes must be signed to be available for travel. The Amendment requires or implies that vehicle access will only be authorized on route segments or at areas that are physically signed as ‘open’ to access.... This approach is not necessary, will result in unjustified practical complications, and presents opportunities for abuse....opponents to vehicle access,...have an incentive to

remove signs...in the hopes of arguing that any route lacking a sign is effectively closed. the onus on understanding the management prescriptions and facts necessary for compliance (such as one's physical location) is on the user. Agencies enforcing similar requirements, such as hunting or fishing regulations, do not attempt to post signs on every tree outlining applicable season, bag limit and harvest rules...Instead, the amendment must clarify that general public travel is authorized only on designated routes and in designated areas, but should avoid any specific requirements."

**Response:** Protestable. Protesting party raised this issue as a comment on the Draft EIS. The Final EIS contains the response on page 25 of Appendix K. Page 1-12 of the Draft EIS and Final EIS states, "It would be a formidable task to attempt to sign or physically close all routes or areas within the CCMA where OHV use would not be authorized." The remainder of the section provides a rationale of the proposed CCMA signage policy, including the following points: BLM wants to emphasize what routes are available versus those that are unavailable; the cost of signing all closed routes would be prohibitive; and the fact that the user is responsible for being aware of which routes are open for OHV use. In addition, the proposed route signage strategy will allow visitors to become familiar with the open route network and reduce the likelihood of OHV users becoming disoriented and getting lost on unmarked / unsigned routes. The protestor proposed signing scenario not only has the potential to endanger lost visitors, but professional emergency personnel on search and rescue missions as well because users would not have any way to identify their location on a map. The signing of all closed routes would also detract from visitor experience, as the signs would begin to dominate the landscape. The proposed method of route marking is used widely in travel management planning, and has proven effective in other Limited Use Areas.

For all of these reasons, BLM continues to believe that the proposed strategy for implementing the route designations is the best course of action for the CCMA. BLM will continue to provide visitor education materials, including user maps, bulletins, informational kiosks, and the phone-in hotline.

**Issue/Comment 9:** "The Recreational Groups support aggressive and effective enforcement of reasonable and properly-implemented travel restriction... The Amendment does not specifically address enforcement issues... clarification should include a commitment to budget support, a substantial increase in enforcement personnel and training, physical resources such as maps and signing necessary to effective prosecution of citations, and creative options such as outreach to organized visitor groups and the presence of 'citizen patrols' to improve compliance with travel prescriptions."

**Response:** Not protestable. Law Enforcement staffing levels, BLM budget allocations and the establishment of citizen patrols are outside the scope of the planning process. Resources such as route maps and signing are addressed in the Final EIS, Appendix C.

**Issue/Comment 10:** "There is no reasonable basis for 'asbestos' - related closures."

**Response:** Not protestable. This issue is outside the scope of this Final EIS and will be addressed if necessary in a separate NEPA planning process after release of the U.S. Environmental Protection Agency’s Final Risk Assessment, as described in the Final EIS, page 1-10: “The U.S. Environmental Protection Agency is currently conducting an asbestos exposure evaluation study in the Clear Creek Management Area. This study will provide further information on the exposure levels from various types of activities in the CCMA. Upon completion of this study, BLM will work with EPA and the public to appropriately respond to the new information. If the information is significantly different than the 1992 risk assessment, BLM will expeditiously initiate a NEPA process to consider the new information and potential management responses at the CCMA in light of any new findings.”

**Issue/Comment 11:** “The proposed “wet season” closure procedure is too inflexible” as the “prescriptions fail to properly address the unique characteristics of the CCMA.”

**Response:** Not protestable. Wet season closures are outside the scope of this planning process. Wet season closures were adopted in the 1999 ROD as follows: “...Road closure to vehicle use during periods of extreme wet weather will be enforced. The BLM will implement wet season closures when road conditions are such that sustained vehicle use will compromise the integrity of the road surface and/or when BLM patrol persons determine that accessing the area will be unsafe for employees or visitors.”

**Issue/Comment 12:** “The agency has not properly disclosed expansion of the San Benito Mountain Natural Area” as it “was not previously disclosed and has not been subject to necessary public input.”

**Response:** Protestable. Expansion of the San Benito Mountain Natural Area is discussed in the Draft EIS and Final EIS as part of the purpose and need (Draft EIS, pages 1-5 through 1-6; Final EIS pages 1-4 through 1-5) and analyzed throughout both documents. The 1995 CCMA FEIS and corresponding 1999 Record of Decision also addressed the expansion of the RNA. The current planning effort establishes the specific boundaries of the 4082 acre area.