

1 Michael W. Graf (CA Bar # 136172)  
Law Offices  
2 227 Behrens Street  
El Cerrito CA 94530  
3 Telephone: (510) 525-7222  
Facsimile: (510) 525-1208  
4

5 Brian Litmans (AK Bar # 0111068)  
7107 Holly Ave  
6 Takoma Park, MD 20912  
Telephone: (301) 587-2619  
7 Facsimile: (301) 587-2619  
*Pro Hac Vice*

8 Attorneys for Plaintiffs  
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10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN JOSE DIVISION**  
13

14 **Center for Biological Diversity, and** ) Case No. \_\_\_\_\_  
15 **California Native Plant Society, non-profit** )  
organizations, ) **COMPLAINT**  
16 )  
Plaintiffs, ) **(Environmental Matter)**  
17 )  
v. )  
18 **Bureau of Land Management, and Mike** )  
19 **Pool, State Director of the Bureau of Land** )  
Management for California, )  
20 Defendants. )  
21 )

22 **INTRODUCTION**

23 1. Defendants Bureau of Land Management (“BLM”) and State Director of the  
24 BLM for California Mike Pool are violating the Endangered Species Act (“ESA”), 16 U.S.C. §§  
25

1 1531-1544, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, by failing to  
2 reinstate consultation on the management of off road vehicles within the Clear Creek  
3 Management Area (“CCMA”) on the San Benito Evening-primrose, *Camissonia benitensis*  
4 (“CABE”).

5 2. Defendants have failed to meet their procedural and substantive duties required by  
6 the ESA by failing to implement provisions of the 1997 Biological Opinion for the Clear Creek  
7 Management Area (“BO”) that were designed to prevent jeopardy to the San Benito Evening-  
8 primrose from damage caused by off-road vehicles and failure, therefore, to reinstate  
9 consultation as prescribed by the 1997 BO and ESA regulations.

10 3. This action seeks: (1) a declaratory judgment that Defendants are required to  
11 reinstate consultation for the management of the Clear Creek Management Area on the San  
12 Benito Evening-primrose under the ESA and have failed to do so; (2) a declaratory judgment that  
13 Defendants’ continued management of the CCMA in contradiction to the 1997 BO jeopardizes  
14 the continued existence of the San Benito Evening-primrose; (3) an order compelling Defendants  
15 to comply with the ESA by reinstating consultation with the U.S. Fish and Wildlife Service  
16 (“FWS”); and (4) a permanent injunction closing the CCMA to off road vehicle use pending  
17 completion of the consultation process.

### 18 JURISDICTION AND VENUE

19 4. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question)  
20 because this action arises under the law of the United States, including the Endangered Species  
21 Act, 16 U.S.C. §§ , the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, the  
22 Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., and the Equal Access to Justice Act  
23 (“EAJA”), 28 U.S.C. §§ 2412 et. seq. There is a present, actual and justiciable controversy  
24 between the parties, and the requested relief is therefore proper under 28 U.S.C. § 2201

1 (declaratory relief) and § 2202 (injunctive relief), 16 U.S.C. §§ 1540(c) and (g) (action arising  
2 under the ESA and citizen suit provision), and 5 U.S.C. §§ 701-706.

3 5. To the extent required by the citizen suit provision of the ESA at 16 U.S.C. §  
4 1540(g), Plaintiffs fully informed the Defendants of the claims in this suit over sixty days ago.  
5 The Defendants have neither adequately answered nor remedied the alleged violations.  
6 Therefore, an actual controversy exists between the parties within the meaning of 28 U.S.C. §  
7 2201.

8 6. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) because a  
9 substantial portion of the violations occur in this district and pursuant to 28 U.S.C. § 1391  
10 because all or a substantial part of the events or omissions giving rise to the claims herein  
11 occurred within this judicial district, Defendants maintain offices in this district, the public lands  
12 and resources in question are located in this district, and Plaintiffs Center for Biological  
13 Diversity and California Native Plant Society maintain offices in this district.

14 7. Intradistrict Assignment. Pursuant to Local Civil Rule 3-2(c), the appropriate  
15 intradistrict assignment of this case is to the San Jose Division because the action occurs within  
16 San Benito county.

17 **PARTIES**

18 8. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY (“The Center”) is a non-  
19 profit organization with offices in Idyllwild, Berkeley, and San Diego, California, Phoenix and  
20 Tucson, Arizona, and Silver City, New Mexico. The Center is dedicated to the preservation,  
21 protection, and restoration of biodiversity, native species, ecosystems, and public lands. The  
22 Center has approximately 7,000 members, many of whom reside in California. The Center’s  
23 members and staff regularly use the Clear Creek Management Area for observation, research,  
24 aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center’s  
25 members and staff derive scientific, recreational, conservation and aesthetic benefits from the

1 Salton Sea and its ecosystem. The Center brings this action on behalf of itself and its adversely  
2 affected members and staff.

3 9. Plaintiff the CALIFORNIA NATIVE PLANT SOCIETY (“CNPS”) is a non-  
4 profit organization of more than 10,000 laypersons and professional botanists organized into 33  
5 chapters throughout California. The mission of the California Native Plant Society is to increase  
6 understanding and appreciation of California’s native plants and to conserve them and their  
7 natural habitats, through education, science, advocacy, horticulture and land stewardship. CNPS  
8 members and chapters work closely with the Bureau of Land Management other State and  
9 Federal agencies to manage and conserve rare and common botanical resources in California.  
10 CNPS members have extensively used the Clear Creek Management Area for over a decade for  
11 research, education and recreation.

12 10. Members and staff of the plaintiff organizations regularly visit the Clear Creek  
13 Management Area and intend to continue to use and enjoy the Clear Creek Management Area  
14 frequently and on an on-going basis in the future. Many also reside near or adjacent to the  
15 CCMA.

16 13. The plaintiff organizations have an organizational interest in the proper and  
17 lawful management of the Clear Creek Management Area and lawful protection of the San  
18 Benito evening primrose provided by the Endangered Species Act.

19 14. In addition to the activities described above, members and staff of each plaintiff  
20 organization have participated extensively in administrative actions to protect the San Benito  
21 evening primrose in the Clear Creek Management Area from potentially damaging activities.

22 15. Plaintiffs’ members and staff also rely on Defendants to comply fully with all  
23 provisions of the ESA, including the Section 7 consultation requirements and provisions of the  
24 existing 1997 BO, which mandate that federal agencies incorporate protections for threatened  
25 and endangered species into project planning, design, and implementation. Plaintiffs’ members

1 and staff spend time within the areas of the Clear Creek Management Area that area adversely  
2 affected by the Defendants' failure to either comply with explicit provisions that FWS identified  
3 when making its 1997 BO jeopardy determination or to reinstate consultation for the  
4 management of the CCMA absent compliance with those provisions. Plaintiffs' members and  
5 staff have been, are being, and unless the relief requested is granted, will continue to be  
6 adversely affected and injured by the Defendants' failure to comply with mitigation measures  
7 identified in the 1997 BO, which were the basis for FWS's finding that the proposed  
8 management plan would not jeopardize the San Benito Evening-primrose.

9       16. Plaintiffs' members and staff have also suffered harm to their conservation,  
10 recreational, scientific, and aesthetic interests, as a result of the Defendants' failure to re-initiate  
11 consultation with FWS as mandated by Section 7 of the ESA. Plaintiffs' members and staff rely  
12 on the Section 7 consultation process established by Congress to protect threatened and  
13 endangered species, and their designated critical habitat, from injuries inflicted by federal agency  
14 management. The consultation process provides agency decision-makers, Plaintiffs, and the  
15 public with essential information regarding the effects of such actions on threatened and  
16 endangered species. Plaintiffs are being denied the benefits of the ESA's Section 7 consultation  
17 process.

18       17. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM")  
19 is an agency or instrumentality of the United States, and is charged with managing the public  
20 lands and resources within the Clear Creek Management Area in accordance and compliance  
21 with federal laws and regulations.

22       18. Defendant MIKE POOL is sued solely in his official capacity as State Director of  
23 the BLM for California. The State Director is the BLM official responsible for the proper and  
24 lawful management of the Clear Creek Management Area, and has principal authority for the  
25 actions and inactions herein alleged.

1 **LEGAL BACKGROUD**

2 19. The Endangered Species Act, 16 U.S.C. § 1531 et seq., was enacted, in part, to  
3 provide a “means whereby the ecosystems upon which endangered species and threatened  
4 species depend may be conserved ... [and] a program for the conservation of such endangered  
5 species and threatened species....” 16 U.S.C. § 1531(b).

6 20. In order to fulfill these purposes, Federal agencies are required to consult with the  
7 FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely  
8 to jeopardize the continued existence of any endangered species or threatened species.” 16  
9 U.S.C. § 1536(a)(2) (“Section 7 consultation”).

10 21. Section 7 consultation is required for “any action [that] may affect listed species  
11 or critical habitat.” 50 C.F.R. § 402.14. An agency “action” is defined in the ESA’s  
12 implementing regulation to include “actions directly or indirectly causing modifications to the  
13 land, water, or air.” 50 C.F.R. § 402.02.

14 22. At the completion of the Section 7 consultation process FWS issues a Biological  
15 Opinion that determines if the agency action is likely to jeopardize the species’ continued  
16 survival. If so, the opinion may specify “Reasonable and Prudent Alternatives” designed to  
17 avoid jeopardy while allowing the agency to proceed with the action. 16 U.S.C. § 1536(b).

18 23. The agency “shall” reinstitute formal consultation with FWS “(b) If new  
19 information reveal effects of the action that may affect listed species or critical habitat in a  
20 manner or to an extent not previously considered; (c) If the identified action is subsequently  
21 modified in a manner that causes an effect to the listed species or critical habitat that was not  
22 considered in the biological opinion....” 50 C.F.R. §§ 402.16(b) and 402.16(c).

23 24. Section 7(d) of the ESA provides that the pending completion of formal  
24 consultation with the FWS, the action agency “shall not make any irreversible or irretrievable  
25 commitment of resources with respect to the agency action which has the effect of foreclosing

1 the formulation or implementation of any reasonable and prudent alternative measures which  
2 would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d). The intent of Section  
3 7(d) is to avoid harm to the affected species pending the completion of interagency consultation.

#### 4 **FACTS GIVING RISE TO PLAINTIFFS’ CAUSE OF ACTION**

##### 5 **Background**

6 25. The Bureau of Land Management’s Clear Creek Management Area provides  
7 habitat for a number of rare and imperiled serpentine endemic species, including the federally  
8 listed San Benito evening-primrose, *Camissonia benetinsis* (“CABE”).

9 26. CABE is a highly imperiled species endemic to serpentine-derived alluvial  
10 deposits only found within the vicinity of the CCMA. Its’ population fluctuates widely both  
11 spatially and temporally, with population numbers ranging from a few hundred to 165,000. Due  
12 to its imperiled nature, CABE was listed as a threatened species in 1985. 50 Fed. Reg. 5758. Of  
13 27 known occurrences, 20 are entirely and 2 are partially on lands administered by the BLM. 18  
14 of those sites are within the CCMA.

15 27. The CCMA is heavily used by off Off-road vehicles (“ORVs”). The CCMA  
16 became a focused use area because the serpentine habitats offered open slopes for ORV use.  
17 ORV damage was cited as a primary reason for the listing of CABE. The Fish and Wildlife  
18 Service listed the species as threatened rather than endangered based on the assumption that the  
19 BLM would implement conservation measures to promote species recovery. See 50 Fed. Reg.  
20 5757.

21 28. According to the 2003 FWS Draft Recovery Plan for San Benito Evening-  
22 Primrose (“Draft Recovery Plan”), BLM and the FWS have identified ORV use as the principle  
23 threat to the plant for more than 30 years.

24 29. Plaintiffs, FWS and BLM have repeatedly documented widespread, severe direct  
25 and indirect damage to soils and plants due to ORVs. ORVs drive over occurrences of CABE

1 and other species. They damage soil, increase wet and dry sedimentation, and generally degrade  
2 habitat quality in the area.

3 30. The 2002-2003 and 2003-2004 ORV recreation seasons saw widespread use of  
4 the CCMA and recorded damage to CAGE and CAGE habitat as a result of ORV use. As the  
5 rainy season has begun, the 2004-2005 season is now underway. BLM has made no indications  
6 that it will close the CCMA to ORV use in order to protect CAGE. The season is likely run  
7 through the spring of 2005.

### 8 Management History

9 31. In August of 1995, BLM released the Clear Creek Management Area Proposed  
10 Resource Management Plan Amendment (“RMP”) and Final Environmental Impact Statement  
11 (“FEIS”). The FEIS selected a preferred alternative that would determine management for the  
12 30,000-acre Serpentine Area of Critical Environmental Concern (“ACEC”) within the 50,000-  
13 acre CCMA for the next 15 years. The ACEC has also been designated as a Hazardous Asbestos  
14 Area because of the high level of asbestos in the soils. The preferred alternative identifies five  
15 Resource Condition Objectives (“RCOs”): (1) reduce asbestos exposure and emissions while still  
16 providing opportunities for ORV use, minimize dust emissions from main roads, and ensure that  
17 the Bureau employees meet all requirements of the Occupational Safety and Health  
18 Administration; (2) protect existing populations of CAGE and attempt to expand its range; (3)  
19 reduce erosion and sediment transport in all CCMA watersheds; (4) expand the boundaries of the  
20 San Benito Mountain Natural Area to cover 4082 acres and redesignate it as a Research Natural  
21 Area; and (5) manage the CCMA for dispersed ORV use and, based upon resource management  
22 criteria, establish open or closed areas as conditions and resources may warrant.

23 32. To meet the RCOs, the FEIS preferred alternative identified the following  
24 management activities: (1) minimize asbestos exposure; (2) protect sensitive plants and  
25 communities (including fencing, annual inventories, monitoring and closures); (3) enhance water



1 quality and reduce erosion; (4) expand the San Benito Mountain Natural Area; and (5) designate  
2 the CCMA a Limited Use Area for management of ORV use, including closure of the CCMA to  
3 ORVs when appropriate. For management of ORV use, BLM's preferred alternative sought to  
4 reduce the then existing 420 miles of designated routes in the CCMA to 270 miles. Open  
5 recreation areas were to be reduced from the then existing 4000 acres of barrens used by ORVs  
6 throughout the CCMA to 937 acres.

7 33. In September of 1997, FWS released the Biological Opinion for the Clear Creek  
8 Management Area/Resource Management Plan Amendment and Final Environmental Impact  
9 Statement and the Proposed Administrative Site Development Plan, San Benito and Fresno  
10 Counties, California ("1997 BO"). The 1997 BO assessed the proposed management of ORV  
11 use in the CCMA on CABE and the vernal pool fairy shrimp. The 1997 BO noted that potential  
12 still exists that continued use of the CCMA by ORVs would result in impacts, including the  
13 irreversible and irretrievable commitment of resources, but that these impacts would be  
14 minimized by the following management actions specified in the preferred alternative: (1)  
15 implementation of a designed route system; (2) elimination of more than two-thirds of the barren  
16 areas from ORV use; and (3) provisions for a high level of monitoring and immediate protection  
17 of occurrences once they are discovered, as well as adaptive management measures.

18 34. The BO also identified closure of the CCMA in the event of (i) excessive ORV  
19 damage to CABE and its habitat or (ii) inadequate protection for CABE sites, as a key measure  
20 to ensure that CABE is not jeopardized. The 1997 BO set out the following criteria as thresholds  
21 for such closure of the CCMA: (1) fifteen incidents of resource damage to known protected  
22 Bureau-managed CABE occurrences (ten incidents of damage results in posted warnings); (2)  
23 insufficient funds or personnel leading to ineffective habitat protection, barrier construction (i.e.  
24 fences), , or area patrol (3) failure to meet threshold levels of monitoring (levels set by a mutual  
25 agreement from FWS and BLM). The area would be reopened when the problem that caused the

1 closure had been resolved or mitigated to a level mutually deemed adequate by FWS and BLM.  
2 Based on mitigation measures promised by BLM in its ROD, and on expectation of compliance  
3 with those measures mandated by the BO, FWS found that continued management of the  
4 CCMA, as proposed in the Final EIS, was not likely to jeopardize CABE.

5 35. In 1999, the BLM released the Record of Decision (“ROD”), which amended the  
6 1985 Hollister Resource Management Plan and replaced the 1986 Clear Creek Management  
7 Plan. The ROD concluded a nine year process – three years to prepare the draft EIS, three years  
8 to issue the final EIS, and another three years to issue the ROD.

9 36. In September of 2003, the FWS published a Draft Recovery Plan for the San  
10 Benito Evening-Primrose. The Draft Recovery Plan notes that about two-thirds of the CABE  
11 occurrences have been adversely affected by ORV use. It found that actions needed for recovery  
12 include: (1) protecting all known occurrences and suitable habitat; (2) reducing or eliminating  
13 soil erosion and stream sedimentation in the watersheds that support habitat for CABE; (3)  
14 developing and implementing a species management plan; (4) establishing a seed collection; and  
15 (5) developing and implementing a public education and awareness program. The Draft  
16 Recovery Plan notes that “uncontrolled [ORV] use has been the biggest threat to San Benito  
17 Evening Primrose and its habitat.” The Recovery Plan cites BLM and scientific observations of  
18 this problem dating back to 1970. The Draft Recovery Plan also describes numerous problems  
19 with BLM’s management of ORV use within the CCMA and of CABE and its habitat. It states  
20 that “[v]istor use in the CCMA has been steadily increasing over the past decade. The 2002  
21 season saw a substantial increase in use over the previous seasons because the OHV community  
22 initiated an aggressive advertising campaign....” Further, FWS asserts that current visitor use is  
23 likely to be higher than the 50,000 ORV visitor use days/year. Other problems cited in the Draft  
24 Recovery Plan include numerous delays and failures by BLM to implement promised CABE  
25 protection measures, and particularly inadequate law enforcement to meet species protection

1 needs. Perhaps most significantly, the Draft Recovery Plan does not set recovery criteria  
2 because of the continued severe imperilment of the species primarily due to ORV use. Instead,  
3 the goal set by the Draft Recovery Plan is to prevent the uplisting of the species to endangered  
4 status. “The short term objective for ... this species is to *eliminate or reduce current threats* so  
5 that [FWS] can retain threatened status and do[es] not have to reclassify the species as  
6 endangered” (emphasis added).

7 37. On October 3, 2003, CNPS sent a letter to California Director Mike Pool  
8 regarding BLM plans for the CCMA set out in a September 29, 2003 meeting with CNPS staff.

9 38. On December 3, 2003, the BLM responded to CNPS’s October 3, 2003 letter. His  
10 letter set out BLM’s plans for CABA habitat protection.

11 39. On November 12, 2003, CNPS sent a letter to Robert Beehler, BLM Hollister  
12 Office Manager, bringing to the BLM’s attention a October 2003 CABA monitoring report  
13 documenting at least ten incidents of damage to CABA occupied sites and eleven or more  
14 incidents of damage to potential sites. All incidents were documented OHV tracks within BLM  
15 documented occupied and potential CABA habitat. With only one exception, BLM recorded  
16 three or more sets of tracks within CABA sites. Also two fences that had been erected to protect  
17 occupied CABA sites had been taken down, presumably by riders to allow access to the areas.

18 40. On November 20, 2004 CNPS sent a letter to Connie Rutherford of the U.S. FWS  
19 concerning CABA protection issues at the CCMA and seeking verification of incident reports.

20 41. CNPS and FWS discussed the letter by telephone and the incident reports were  
21 verified.

22 42. In December of 2003, following the measures identified in the 1997 BO for  
23 CCMA closure in the event of excessive ORV damage in CABA habitat, the Hollister Field  
24 Office released a warning notice which informed the public that resource damage had exceeded  
25

1 acceptable thresholds (10 incidents of damage) and that further damage could result in CCMA  
2 closure.

3 43. In December of 2003, BLM also released the Interim Protection Strategy for  
4 CABE (“IPS”). The BLM referred CNPS to its Interim Protection Strategy as the primary means  
5 by which BLM proposed to prevent jeopardy to CABE pending finalization of the new RMP.  
6 The IPS noted that several sites continue to receive non-compliance for protection of CABE  
7 habitat. The IPS acknowledges that the 1997 BO-10 incident threshold for non-compliance for  
8 the 2003-2004 season has been exceeded, and that continued non-compliance might continue.  
9 The IPS also identified the 1997 BO criteria which would result in closure of the CCMA under  
10 the IPS protection measures.

11 44. On November 26, 2003, the BLM implemented an emergency closure of part of  
12 the Larious Canyon area, within the CCMA to protect CABE. Larious Canyon is a site of 2  
13 important CABE occurrences. Fencing to protect Larious Canyon is listed in the IPS as a high  
14 priority item. However, in March of 2004, BLM allowed a motorcycle “enduro” race through  
15 upper Larious Canyon. In this race, at least 2-300 motorcycles traversed the area. Although the  
16 race did not cross the closed area, it did cause widespread soil damage and sedimentation into the  
17 closed area and occupied CABE habitat.

18 45. On March 21, 2004 CNPS and the Center sent Mike Pool and Secretary Norton a  
19 60-day Notice of Intent to File Suit for violations of the Federal Land Policy and Management  
20 Act, the National Environmental Policy Act, and the ESA.

21 46. In May of 2004, the BLM released the Draft Resource Management Plan  
22 Amendment and Draft Environmental Impact Statement for the Clear Creek Management Area  
23 (“DEIS”). The DEIS presents information about the value, delicacy and degradation of  
24 resources in the CCMA. The DEIS states that the CCMA exhibits “a fragile ecology, diversity  
25 and assemblage of rare and unique plants. In total, Clear Creek and surrounding watersheds

1 support plant and animal communities that are important from the perspective of California  
2 native biodiversity.” Regarding damage to CAGE habitat, the DEIS states that “moderately high  
3 to extremely high rates of soil erosion appear to be concentrated near routes, [and] hillclimbs....”  
4 Regarding CAGE, the DEIS states that several areas are “high priority for ... protection as a  
5 result of continued damage by OHV use in sensitive species habitat.” Further, runoff from the  
6 CCMA has caused mercury and asbestos concentrations in nearby Hernandez reservoir to exceed  
7 drinking water standards.

8 47. In April, 2004, BLM released monitoring data showing that at least 18 instances  
9 of damage to CAGE sites had occurred so far in that use season.

10 48. On May 17, 2004, CNPS sent a letter to BLM California Director Mike Pool  
11 noting that the BLM monitoring data showed that the level of damage exceeded a criterion set  
12 for closure of the CCMA in the BO. CNPS requested that the BLM close the CCMA to ORV use  
13 until the NEPA process is completed, the accompanying ROD is finalized and implementation of  
14 the ROD has begun. [should we include the monitoring report as an exhibit?]

15 49. On June 14, 2004, Mike Pool sent a letter in response to CNPS’s May 17, 2004  
16 letter denying CNPS’s request to close the CCMA. The BLM did not rebut any of CNPS’s  
17 contentions regarding BLM’s failure to protect CAGE or that CAGE is in need of protection  
18 from ORV use. Rather, BLM’s primary reason for not closing the CCMA was that the 2003-  
19 2004 ORV season was essentially over and, thus, closure would at this time accomplish little in  
20 terms of achieving better protection of CAGE and its habitat. BLM did note that for the 2004-  
21 2005 season, it intends on stepping up enforcement efforts and to continue aggressive  
22 implementation of the IPS. However, to date implementation of the IPS has been consistently  
23 behind schedule and, according to BLM, no IPS work has been done, with the exception of  
24 monitoring, since April of 2004 due to high and possibly dangerous asbestos dust levels within  
25

1 the CCMA. BLM did not consult with FWS before deciding to refuse CNPS's request to close  
2 the CCMA.

3 50. On June 14, 2004, the BLM also responded to Plaintiffs' 60-day Notice of Intent  
4 to File Suit for violations of the Federal Land Policy and Management Act, the ESA, and the  
5 National Environmental Policy Act. In its response, the BLM stated that there are currently at  
6 least 700 miles of routes, but asserted that there is "no appreciable difference" between the miles  
7 of existing routes and those extant in 1995. However, the 1999 ROD acknowledged only 420  
8 miles of routes and we have no evidence that there were 700 miles in 1995. BLM attempted to  
9 reconcile this difference by claiming that there were already 700 or more miles of routes in 1995,  
10 but that most had not been inventoried. The 1999 ROD also committed to closing all but 270  
11 miles of routes. This has not occurred, nor does the BLM claim it has. BLM staff also state that  
12 total miles of uninventoried routes is not known. Further, the current Draft EIS and Draft  
13 Recovery Plan acknowledge that there have been substantial increases in ORV use in the CCMA  
14 in recent years. The DEIS states that over the last 3 years there has been an average increase in of  
15 5% per year of ORV use visits to the CCMA. Currently there are 50,188 ORV visits per year, an  
16 increase of 7,500 (15%) over the past 3 years. Increased ORV use is likely to be correlated with  
17 increased illegal route proliferation.

### 18 **BLM Inaction**

19 51. BLM has failed to follow the 1999 ROD, the FEIS, and the 1997 BO with regards  
20 to protection of CABA.

21 52. For example, BLM states in the 1999 ROD that any new CABA occurrence will  
22 be protected within one year. In 1998 a CABA population was discovered in Larious Canyon but  
23 fencing to protect the population was not constructed until 2002, and has only recently been  
24 completed. It is still unclear how effective this fencing will be. Upper Larious Canyon, a source  
25

1 of sediment damaging to the Larious CABA habitat, has not yet been closed or fenced, although  
2 BLM has long stated that such fencing was needed.

3 53. Furthermore, BLM has failed to adequately fence off areas to protect CABA sites.  
4 Every monitoring visit by BLM to CABA sites has shown ORV trespass in Upper Clear Creek,  
5 Indian Hill complex and Larious Canyon, with other sites also showing signs of occasional to  
6 frequent trespass. In one ORV use season, 2000 to 2001, a CABA population in upper Clear  
7 Creek was reduced from 1476 plants to only 20 plants with incidents of damage increasing from  
8 7 to 11. The following year, 2002, the population site was reduced to 10 plants with 8 incidents  
9 taking place. In 2003 there were zero plants left with 22 incidents of damage. Although this  
10 population site experienced damage incidents and showed significant loss from year to year,  
11 BLM has not yet fenced the area.

12 54. Although BLM states in the ROD that the CCMA must be “managed to ensure  
13 that all sensitive species and communities maintain or enhance their condition,” only one of the  
14 13 sensitive species has been fully inventoried, while BLM continues to make route, trail and  
15 barren designations with little or no knowledge of where other sensitive species occur.

16 55. Although the FEIS stated that use of the barrens would be reduced to 937 acres  
17 and the BO recognized reduction in barrens use as a necessary mitigation measure, the 2004  
18 DEIS no action alternative indicates that there are currently 2800 acres of barrens open to ORV  
19 use.

20 56. Although there have been more than 10 instances of damage of CABA every year  
21 since monitoring began in 1983, BLM has only issued one warning letter: for the 2004 season.

22 57. Although there have been over 15 incidents of damage to CABA sites in each year  
23 since monitoring began, BLM has never followed BO requirements to close the CCMA when 15  
24 incidents occur. As of April 2004, BLM had recorded at least 18 incidents of damage. There  
25

1 have also been at least 19 ORV entries into potential CABB habitat recorded by BLM. BLM  
2 has not closed the CCMA in 2004 or any other year.

3 58. Finally, the FWS stated in its final rule listing CABB as threatened under the ESA  
4 that the designation was based on implementation of “protective measures by BLM.” 50 Fed.  
5 Reg. 5757 (emphasis added). These protective measures have not been implemented, as  
6 documented in this complaint and in the FWS Draft Recovery Plan, thus placing the plant at risk  
7 of “uplisting” to endangered status under the ESA.

8 **FIRST CLAIM FOR RELIEF:**  
9 **VIOLATION OF THE ENDANGERED SPECIES ACT**  
10 **Failure to Reinitiate Consultation**

11 59. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

12 60. Defendants have failed to comply with the mitigation measures identified in the  
13 1997 BO issued by FWS. The 1997 BO primarily focuses on the effects of ORV recreation in  
14 the CCMA. The FWS “no jeopardy” determination for the San Benito Evening-primrose was  
15 predicated on BLM’s adherence to mitigation measures FWS and BLM collaboratively proposed  
16 to protect the San Benito Evening-primrose from ORV impacts. Defendants’ failure to  
17 implement those measures alters the proposed actions in a manner which undermines the validity  
18 of the “no jeopardy” findings and requires re-initiation of consultation with FWS.

19 61. The 1997 BO specifically describes when the CCMA must be closed in order to  
20 protect CABB and prevent jeopardy. The CCMA is to be closed to ORV use when 15 incidents  
21 of damage to known protected occurrences are recorded. The area can be reopened once the  
22 likelihood of further damage is reduced to a level mutually agreeable to FWS and the BLM.

23 62. The 1997 BO states that “[t]his opinion is strongly influenced by the measures  
24 that the Bureau developed and proposed during the course of this consultation that are intended  
25 to monitor the condition of *C. benitensis* occurrences and compliance by [ORV] users in the



1 CCMA.” The FWS foresaw that ORV use may have to be curtailed within the CCMA as the  
2 BLM implemented the proposed protective measures for CABA.

3 63. The 1997 BO, as well as the ESA implementing regulations, 50 C.F.R. §§  
4 402.16(b) and 402.16(c), state that re-initiation of formal consultation is required if: (1) new  
5 information reveals effects of the agency action that may adversely affect listed species or  
6 critical habitat in a manner or to an extent not considered in the BO; and (2) the agency action is  
7 subsequently modified in a manner that causes an effect to listed species or critical habitat that  
8 was not considered in this BO.

9 64. In this case, new information reveals effects of the current management of the  
10 CCMA which are adversely affecting CABA and were not considered in the 1997 BO. First,  
11 management of the CCMA has allowed expanded use of the serpentine barrens. The 1998 ROD  
12 anticipated 937 acres of open barrens, yet currently there are at least 2800 acres of open barrens.  
13 This open access area for ORV use is having a far greater impact than predicted by the 1997 BO  
14 because the BO anticipated that the BLM would reduce the acreage of open play areas to  
15 approximately 200 acres and then expand them to a maximum of approximately 900 acres. Yet  
16 the 2004 DEIS no action alternative indicates that current use is at 2800 acres, far above the  
17 amount considered by FWS. Second, route proliferation has taken place. The 1998 ROD stated  
18 that there would be 270 miles of designated vehicle routes. The overall reduction in routes from  
19 420 miles to 270 miles was part of the basis for the “no jeopardy” opinion in the 1997 BO. Yet,  
20 the 2004 DEIS states that there are at least 398 miles of routes; and BLM and Plaintiff staff and  
21 members believe that actual current miles total closer to 700-1000 miles. This total vehicle route  
22 mileage within the CCMA is far above what was proposed in the 1998 ROD and what was relied  
23 upon in the 1997 BO “no jeopardy” finding. Third, and most importantly, at least 18 incidents of  
24 damage have been recorded by BLM for 2004, as of April 2004. Although the threshold for  
25 closure of the CCMA is 15 incidents, BLM has yet to close the area and had denied plaintiffs’

1 petition in its May 17, 2004 letter to Mike Pool to close the area pursuant to the 1997 BO. These  
2 three pieces of new information all reveal that the CAGE is being impacted to an extent not  
3 considered in the 1997 BO. Consequently, re-initiation of formal consultation is required.

4 65. BLM's current and ongoing management, which has been inconsistent with the  
5 1998 ROD, the preferred alternative selected in the FEIS and the proposed action considered in  
6 the 1997 BO, reveals that the agency action has been subsequently modified in a manner or to an  
7 extent not considered in the 1997 BO. The FWS predicated its "no jeopardy" finding on BLM's  
8 proposed protective measures, yet BLM has failed to implement those measures (halting route  
9 proliferation, reducing use of the barrens, and reducing incident of damage and closing the  
10 CCMA as required by the mitigation measures proposed in the 1997 BO), allowing for ORV  
11 impact to CAGE in a manner and to an extent not considered by FWS. Consequently, re-  
12 initiation of formal consultation is required.

13 **SECOND CLAIM FOR RELIEF:**  
14 **VIOLATION OF THE ENDANGERED SPECIES ACT**

15 **Current Management of the CCMA Jeopardizes the San Benito Evening Primrose**

16 66. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

17 67. The FWS predicated its "no jeopardy" finding on BLM's proposed protective  
18 measures. However, BLM has failed to implement those measures, placing the San Benito  
19 Evening-primrose in jeopardy. By failing to halt route proliferation, expanded use of the  
20 barrens, and allowing ORV use to continue and increase despite over 15 recorded incidents of  
21 damage to CAGE and its habitat, BLM has failed to ensure that its management of the CCMA is  
22 not likely to jeopardize the continued existence of CAGE, as required by Section 7(a)(2) of the  
23 ESA.

24 68. The San Benito Evening-primrose is an annual plant whose population numbers  
25 fluctuate widely in both space and time depending on climatic conditions. It is thus dependent  
on the maintenance and protection of sufficient amounts of both occupied and unoccupied

1 suitable habitat in order to accommodate annual shifts in reproduction, numbers and locations.  
2 The serpentine soils and streamside terraces where CAGE occurs are extremely fragile and easily  
3 damaged by ORV use and by deposition of sediment from eroding slopes and barrens. This  
4 damage is extremely difficult, if not impossible, to reverse once it has occurred. As unregulated  
5 ORV use and damage to CAGE habitat continues, the number of suitable acres is decreasing in  
6 both occupied and unoccupied sites. As suitable habitat is destroyed, areas where the species can  
7 reproduce and maintain itself in years of appropriate climatic conditions are reduced. If this  
8 habitat destruction continues unchecked, this species will be placed at jeopardy of extinction.

9 **PLAINTIFFS PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

11 1. Order, declare and adjudge that Defendants are in violation of 16 U.S.C. §  
12 1536(a)(2) and its implementing regulations, 50 C.F.R. §§ 402.16(b) and 402.16(c) by failing to  
13 re-initiate consultation with the FWS on the impact of current CCMA management on the San  
14 Benito Evening-primrose, in light of Defendants' failure to follow prescribed measures integral  
15 to the 1997 BO finding that CCMA management would not jeopardize the San Benito Evening-  
16 primrose;

17 2. Order, declare and adjudge that Defendants are in violation of the ESA, 16 U.S.C.  
18 § 1536(a)(2), by jeopardizing the San Benito Evening-primrose through its failure to implement  
19 required mitigation measures which formed integral components of the 1997 BO's finding of no-  
20 jeopardy;

21 3. Direct by injunctive relief that Defendants are required to take the necessary  
22 actions to re-initiate and complete consultation with the FWS over the impacts of current and  
23 planned management of the CCMA so as to ensure that continued management, in light of  
24 Defendants' failure to comply with the 1997 BO mitigation measures, does not violate the ESA;

