

Clear Creek

9 July 2008

Sky Murph
EPS

Clear Cr Schedule

Approved (Dvr Director's Sched)

DN + DO (Prep + Scop)	2007
DP (Draft)	2008
BQ + DR (Proposed + ROD)	2009

Actual ?

Was talked to Sandra McG - will
and in final review stage if no
is necessary - Will wait to see if Draft comes
in this yr. - (maybe not)

DEPARTMENT OF THE INTERIOR

TASKING PROFILE

ACCN #: 347419 Status: C Fiscal Year: 2006
Document Date Received Date Due Date Action Office Signature Level Doc Source
03/09/2006 03/10/2006 LLM AA ATTY

Addressee: Gale A. Norton

From: Brian Litmans
Counsel for the California Native Plant Society and the Center for Biological Diversity
7107 Holly Ave
Takoma Park
Maryland
20912

Subject Text: RE: 60 Day Notice of Intent to File Suit for Violations of the Endangered Species Act
Concerning BLM's Ongoing Management of the Clear Creek Management Area.

Recommended Surnames:

Mail Carrier: FX Mail Track#:

Cross Reference:

Copies To: SIO-Exec; SOL; LLM; FWS

Status Tracking:

Correspondence Specialist: MFeeney Corresp. Specialist Phone: 513-0705

Closed Comments:

Signed:

ES

RECEIVED

848002

Brian A. Litmans 06 MAR 10 PM 2:57
Attorney at Law

7107 Holly Ave
Takoma Park, Maryland 20912
Tel: 301.587.2619
Fax: 301.587.2619
litmans@worldnet.att.net

OFFICE OF THE
EXECUTIVE SECRETARIAT

FAX TRANSMITTAL PAGE

TO: Secretary Cook Norton
FROM: Brian Litmans
FAX #: 202 208 6956

DATE: 03-09-06

No. of Pages (including cover sheet): 06

Remarks:

Please contact me if you have any difficulties receiving all 6 pages. Otherwise please consult with DOJ counsel already involved in this case prior to contacting me.

Thank you
Brio *[Signature]*

CONFIDENTIALITY NOTICE

The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of this information by persons or entities other than the intended recipient is prohibited. If you received this message in error, please contact the sender by telephone to arrange for return of the documents.

Brian Litmans

301.587.2619 • litmans@worldnet.att.net

Attorney at Law

7107 Holly Ave., Takoma Park, MD, 20912

VIA FACSIMILE AND CERTIFIED MAIL

March 9, 2006

Mike Pool
California Director
Bureau of Land Management
2800 Cottage Way, Suite W-1834
Sacramento, CA 95825-1886
Fax: 916.978.4699

Honorable Gale Norton
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
Fax: 202.208.6956

RE: 60-Day Notice of Intent To File Suit for Violations of the Endangered Species Act Concerning BLM's Ongoing Management of the Clear Creek Management Area.

On behalf of the Center for Biological Diversity ("Center") and the California Native Plant Society ("CNPS"), I am writing to express their ongoing concerns regarding the Bureau of Land Management's ("BLM") continuing management of the Clear Creek Management Area. This letter serves as formal notice of intent to sue under the Endangered Species Act ("ESA") to the extent that such notice is required by law. See 16 U.S.C. § 1540(g). In the event that the BLM does not comply with the law, the Center and CNPS are prepared to amend their complaint concerning *Center for Biological Diversity v. Bureau of Land Management*, 5:04-cv-4736(JF) currently before the Honorable Judge Fogel in the United States District Court for the Northern District of California, and seek immediate injunctive relief against the BLM for its ongoing violations of the ESA.

Background

The Bureau of Land Management's Clear Creek Management Area ("CCMA") provides habitat for a number of rare and imperiled serpentine endemic species, including the federally listed San Benito Evening-primrose, *Camissonia benetensis* ("CABE" or

"Evening-primrose"). CABE is a highly imperiled species endemic to serpentine-derived alluvial deposits only found within the vicinity of the CCMA. Due to its imperiled nature, CABE was listed as threatened in 1985.

The CCMA continues to be heavily used by off road vehicles ("ORVs") and remains one of the top destinations for such use throughout the State of California. Clear Creek became a focused use area because the serpentine habitats offered open slopes for ORV use. According to the draft recovery plan for CABE, BLM and the U.S. Fish and Wildlife Service ("FWS") have identified ORV use as the principle threat to the plant for more than 30 years. CNPS, FWS and BLM have repeatedly documented widespread, severe direct and indirect damage to soils and plants due to ORVs. ORVs drive over occurrences of CABE and other species. They damage soil, increase wet and dry sedimentation, and continue to generally degrade occupied and potential CABE habitat.

The BLM has made some efforts to protect the species and its habitat. Some sensitive areas have been closed to ORV use. Fences have been erected, a law enforcement officer is assigned to the area, and the agency regularly monitors ORV impacts in CABE habitat. Unfortunately, these efforts have so far been inadequate and unless BLM can actually curtail use of OHVs to only those trails, routes, and play areas signed open BLM will remain in violation of its independent duty under Section 7(a)(2) of the ESA to ensure that its ongoing actions and authorized activities are not likely to jeopardize the Evening-primrose. In the past, fences have been repeatedly cut or otherwise removed. And, as of this day, ORV riders continue to ride in areas that are not signed open. These OHV uses in closed areas continue to threaten the Evening-primrose.

Management History

In August of 1995, BLM released the Clear Creek Management Area Proposed Resource Management Plan Amendment ("RMP") and Final Environmental Impact Statement ("FEIS"). The FEIS selected a preferred alternative that would determine management for the 30,000-acre Serpentine Area of Critical Environmental Concern within the 50,000-acre CCMA for the next 15 years. For management of ORV use, BLM's preferred alternative sought to reduce the existing 420 miles of designated routes in the CCMA to 270 miles. Open recreation areas were to be reduced from the current 4000 acres of barrens used by ORVs throughout the CCMA to 900 acres.

In September of 1997, FWS released the Biological Opinion for the Clear Creek Management Area/Resource Management Plan Amendment and Final Environmental Impact Statement and the Proposed Administrative Site Development Plan, San Benito and Fresno Counties, California ("1997 Biop"). The Biop assessed the proposed management of ORV use in the CCMA on CABE and the vernal pool fairy shrimp. The Biop noted that potential still exists that continued use of the CCMA by ORVs would result in impacts including the irreversible and irretrievable commitment of resources but that these impacts should be minimized by the following management actions specified in the preferred alternative: (1) implementation of a designed route system; (2) elimination of more than two-thirds of the barren areas from ORV use; and (3) provisions for a high

level of monitoring and immediate protection of occurrences once they are discovered, as well as adaptive management measures. Strongly influenced by the measures promised by BLM, and based on expectation of compliance with the measures mandated by the Biop, FWS found that continued management of the CCMA, as proposed in the Final EIS, was not likely to jeopardize CAGE.

In 1999, the BLM released the Record of Decision ("ROD"), which amended the 1985 Hollister Resource Management Plan and replaced the 1986 Clear Creek Management Plan. The ROD concluded an outstanding nine year process – three years to prepare the draft EIS, three years to issue the final EIS, and another three years to issue the ROD. Unfortunately, issuance of the ROD did not lead to adequate protections for CAGE.

On November 8, 2004 CBD and CNPS filed suit in the Northern District of California against BLM for failing to comply with the ESA. Specifically, CBD and CNPS alleged that BLM was in violation for the ESA for failing to reinstate consultation and for failing to ensure that its actions are not likely to jeopardize the Evening-primrose. On October 4, 2005 the court dismissed CBD and CNPS's claim concerning reinstatement because the BLM had reinstated consultation with FWS and FWS had issued a new biological opinion.

On January 13, 2006, BLM issued a new ROD for management of the CCMA, which designated routes and play areas. Previous to issuance of the 2006 ROD, BLM consulted with the FWS, which resulted in the issuance of a biological opinion from FWS on September 2, 2005. The 2005 BO and 2006 ROD are strikingly similar to the 1997 BO and 1999 ROD. The 2006 ROD designates routes and play areas at levels matching that originally proposed in the 1995 EIS. The 2005 BO found that OHV use at these similarly reduced levels would not jeopardize the Evening-primrose.

On February 24, 2006 the court issued an order that requested (1) that plaintiffs CBD and CNPS clarify their second claim concerning BLM's ongoing violation of its independent duty to ensure that its actions are not likely to jeopardize the Evening-primrose by (a) providing a new 60-day notice and (b) amending their complaint after the 60-day period has run; and (2) that the BLM issue a report by the end of June summarizing how BLM has implemented the 2006 ROD.

Violations

1. **BLM is in violation of Section 7(a)(2) of the ESA for failing to ensure that its ongoing management of the CCMA does not jeopardize CAGE.**

BLM is currently attempting to implement the recently issued 2006 ROD. The ESA mandates that all agencies meet an independent duty where by they ensure that their actions are not likely to jeopardize a listed species. Since 1995, it has been evident that in order for BLM to meet its independent duty under the ESA it must reduce OHV use. Ongoing management of the CCMA has fallen far short of this mandate. In fact, instead

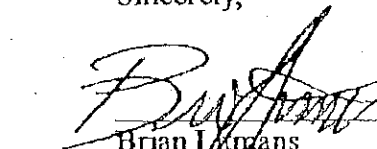
of reducing routes, BLM permitted OHV use to proliferate throughout the CCMA by 2 to 3 times and allowed free play areas to expand to an unknown extent.

In January of 2006, BLM issued a new ROD which identifies a designated route network and open play areas. Furthermore, it has declared that unless a route is signed open it must be considered closed. The ROD designated routes at approximately 270 miles and play areas at 450 acres. The 2005 BO stated that reduction of OHV use to these designated levels would not jeopardize the Evening-primrose. However, the 2005 BO did not address whether continued use at levels exceeding that set out in the 2006 ROD would not jeopardize the Evening-primrose. Consequently, ongoing inability on behalf of BLM to ensure that OHV use is actually limited to designated routes and trails will continue to result in a violation of its independent duty under the ESA to ensure that its actions are not likely to jeopardize the Evening-primrose under Section 7(a)(2) of the ESA. This violation will exist regardless of new management plans which may replace the 2006 ROD so long as use continues to exceed the levels found necessary by FWS to avoid jeopardy.

Conclusion

Only by demonstrating that it can and will ensure that OHV use is limited to those trails, routes and play areas designated open, can BLM ensure that its actions are not likely to jeopardize the Evening-primrose. As last documented by Brian LeNeve during a trip to the CCMA in January, OHV use continues to take place on closed routes. Continued failure to limit OHV use is a continuing and ongoing violation of BLM's independent duty under the ESA. The Center for Biological Diversity and the California Native Plant Society sincerely hope BLM will promptly address these violations. If BLM does not show signs that it is addressing these violations, we will pursue further litigation in federal court. If you have any questions or would like to meet to discuss this matter, or feel this notice is in error, I suggest you first contact your legal counsel at the Department of Justice prior so that counsel may contact me. Thank you for your immediate attention to this matter.

Sincerely,



Brian LeNeve
Counsel for the California Native
Plant Society and the Center for
Biological Diversity

cc (via e-mail):

Michael R. Eitel
U.S. Department of Justice

Environment & Natural Resources Division
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
michael.eitel@usdoj.gov

Paul A. Turcke
Moore Smith Burton & Turcke
Attorneys at Law
225 North 9th Street, Suite 420
Boise, ID 83
pat@msbtlaw.com

Michael W. Graf
Law Offices
227 Behrens Street
El Cerrito, CA 94530
mwgraf@aol.com

RECEIVED

Brian Litmans
Attorney at Law

848187

301.587.2619 litmans@worldnet.att.net

7107 Holly Ave., Takoma Park, MD, 20912

OFFICE OF THE
EXECUTIVE SECRETARIAT

VIA FACSIMILE AND CERTIFIED MAIL

March 9, 2006

Mike Pool
California Director
Bureau of Land Management
2800 Cottage Way, Suite W-1834
Sacramento, CA 95825-1886
Fax: 916.978.4699

Honorable Gale Norton
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
Fax: 202.208.6956

RE: 60-Day Notice of Intent To File Suit for Violations of the Endangered Species Act Concerning BLM's Ongoing Management of the Clear Creek Management Area.

On behalf of the Center for Biological Diversity ("Center") and the California Native Plant Society ("CNPS"), I am writing to express their ongoing concerns regarding the Bureau of Land Management's ("BLM") continuing management of the Clear Creek Management Area. This letter serves as formal notice of intent to sue under the Endangered Species Act ("ESA") to the extent that such notice is required by law. See 16 U.S.C. § 1540(g). In the event that the BLM does not comply with the law, the Center and CNPS are prepared to amend their complaint concerning *Center for Biological Diversity v. Bureau of Land Management*, 5:04-cv-4736(JF) currently before the Honorable Judge Fogel in the United States District Court for the Northern District of California, and seek immediate injunctive relief against the BLM for its ongoing violations of the ESA.

Background

The Bureau of Land Management's Clear Creek Management Area ("CCMA") provides habitat for a number of rare and imperiled serpentine endemic species, including the federally listed San Benito Evening-primrose, *Camissonia benetensis* ("CABE" or

"Evening-primrose"). CAGE is a highly imperiled species endemic to serpentine-derived alluvial deposits only found within the vicinity of the CCMA. Due to its imperiled nature, CAGE was listed as threatened in 1985.

The CCMA continues to be heavily used by off road vehicles ("ORVs") and remains one of the top destinations for such use throughout the State of California. Clear Creek became a focused use area because the serpentine habitats offered open slopes for ORV use. According to the draft recovery plan for CAGE, BLM and the U.S. Fish and Wildlife Service ("FWS") have identified ORV use as the principle threat to the plant for more than 30 years. CNPS, FWS and BLM have repeatedly documented widespread, severe direct and indirect damage to soils and plants due to ORVs. ORVs drive over occurrences of CAGE and other species. They damage soil, increase wet and dry sedimentation, and continue to generally degrade occupied and potential CAGE habitat.

The BLM has made some efforts to protect the species and its habitat. Some sensitive areas have been closed to ORV use. Fences have been erected, a law enforcement officer is assigned to the area, and the agency regularly monitors ORV impacts in CAGE habitat. Unfortunately, these efforts have so far been inadequate and unless BLM can actually curtail use of OHVs to only those trails, routes, and play areas signed open BLM will remain in violation of its independent duty under Section 7(a)(2) of the ESA to ensure that its ongoing actions and authorized activities are not likely to jeopardize the Evening-primrose. In the past, fences have been repeatedly cut or otherwise removed. And, as of this day, ORV riders continue to ride in areas that are not signed open. These OHV uses in closed areas continue to threaten the Evening-primrose.

Management History

In August of 1995, BLM released the Clear Creek Management Area Proposed Resource Management Plan Amendment ("RMP") and Final Environmental Impact Statement ("FEIS"). The FEIS selected a preferred alternative that would determine management for the 30,000-acre Serpentine Area of Critical Environmental Concern within the 50,000-acre CCMA for the next 15 years. For management of ORV use, BLM's preferred alternative sought to reduce the existing 420 miles of designated routes in the CCMA to 270 miles. Open recreation areas were to be reduced from the current 4000 acres of barrens used by ORVs throughout the CCMA to 900 acres.

In September of 1997, FWS released the Biological Opinion for the Clear Creek Management Area/Resource Management Plan Amendment and Final Environmental Impact Statement and the Proposed Administrative Site Development Plan, San Benito and Fresno Counties, California ("1997 Biop"). The Biop assessed the proposed management of ORV use in the CCMA on CAGE and the vernal pool fairy shrimp. The Biop noted that potential still exists that continued use of the CCMA by ORVs would result in impacts including the irreversible and irretrievable commitment of resources but that these impacts should be minimized by the following management actions specified in the preferred alternative: (1) implementation of a designed route system; (2) elimination of more than two-thirds of the barren areas from ORV use; and (3) provisions for a high

level of monitoring and immediate protection of occurrences once they are discovered, as well as adaptive management measures. Strongly influenced by the measures promised by BLM, and based on expectation of compliance with the measures mandated by the Biop, FWS found that continued management of the CCMA, as proposed in the Final EIS, was not likely to jeopardize CAGE.

In 1999, the BLM released the Record of Decision ("ROD"), which amended the 1985 Hollister Resource Management Plan and replaced the 1986 Clear Creek Management Plan. The ROD concluded an outstanding nine year process – three years to prepare the draft EIS, three years to issue the final EIS, and another three years to issue the ROD. Unfortunately, issuance of the ROD did not lead to adequate protections for CAGE.

On November 8, 2004 CBD and CNPS filed suit in the Northern District of California against BLM for failing to comply with the ESA. Specifically, CBD and CNPS alleged that BLM was in violation for the ESA for failing to reinitiate consultation and for failing to ensure that its actions are not likely to jeopardize the Evening-primrose. On October 4, 2005 the court dismissed CBD and CNPS's claim concerning reinitiation because the BLM had reinitiated consultation with FWS and FWS had issued a new biological opinion.

On January 13, 2006, BLM issued a new ROD for management of the CCMA, which designated routes and play areas. Previous to issuance of the 2006 ROD, BLM consulted with the FWS, which resulted in the issuance of a biological opinion from FWS on September 2, 2005. The 2005 BO and 2006 ROD are strikingly similar to the 1997 BO and 1999 ROD. The 2006 ROD designates routes and pay areas at levels matching that originally proposed in the 1995 EIS. The 2005 BO found that OHV use at these similarly reduced levels would not jeopardize the Evening-primrose.

On February 24, 2006 the court issued an order that requested (1) that plaintiffs CBD and CNPS clarify their second claim concerning BLM's ongoing violation of its independent duty to ensure that its actions are not likely to jeopardize the Evening-primrose by (a) providing a new 60-day notice and (b) amending their complaint after the 60-day period has run; and (2) that the BLM issue a report by the end of June summarizing how BLM has implemented the 2006 ROD.

Violations

- 1. BLM is in violation of Section 7(a)(2) of the ESA for failing to ensure that its ongoing management of the CCMA does not jeopardize CAGE.**

BLM is currently attempting to implement the recently issued 2006 ROD. The ESA mandates that all agencies meet an independent duty where by they ensure that their actions are not likely to jeopardize a listed species. Since 1995, it has been evident that in order for BLM to meet its independent duty under the ESA it must reduce OHV use. Ongoing management of the CCMA has fallen far short of this mandate. In fact, instead

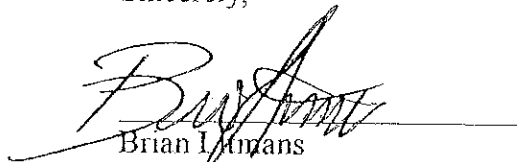
of reducing routes, BLM permitted OHV use to proliferate throughout the CCMA by 2 to 3 times and allowed free play areas to expand to an unknown extent.

In January of 2006, BLM issued a new ROD which identifies a designated route network and open play areas. Furthermore, it has declared that unless a route is signed open it must be considered closed. The ROD designated routes at approximately 270 miles and play areas at 450 acres. The 2005 BO stated that reduction of OHV use to these designated levels would not jeopardize the Evening-primrose. However, the 2005 BO did not address whether continued use at levels exceeding that set out in the 2006 ROD would not jeopardize the Evening-primrose. Consequently, ongoing inability on behalf of BLM to ensure that OHV use is actually limited to designated routes and trails will continue to result in a violation of its independent duty under the ESA to ensure that its actions are not likely to jeopardize the Evening-primrose under Section 7(a)(2) of the ESA. This violation will exist regardless of new management plans which may replace the 2006 ROD so long as use continues to exceed the levels found necessary by FWS to avoid jeopardy.

Conclusion

Only by demonstrating that it can and will ensure that OHV use is limited to those trails, routes and play areas designated open, can BLM ensure that its actions are not likely to jeopardize the Evening-primrose. As last documented by Brian LeNeve during a trip to the CCMA in January, OHV use continues to take place on closed routes. Continued failure to limit OHV use is a continuing and ongoing violation of BLM's independent duty under the ESA. The Center for Biological Diversity and the California Native Plant Society sincerely hope BLM will promptly address these violations. If BLM does not show signs that it is addressing these violations, we will pursue further litigation in federal court. If you have any questions or would like to meet to discuss this matter, or feel this notice is in error, I suggest you first contact your legal counsel at the Department of Justice prior so that counsel may contact me. Thank you for your immediate attention to this matter.

Sincerely,



Brian L. Adams

Counsel for the California Native
Plant Society and the Center for
Biological Diversity

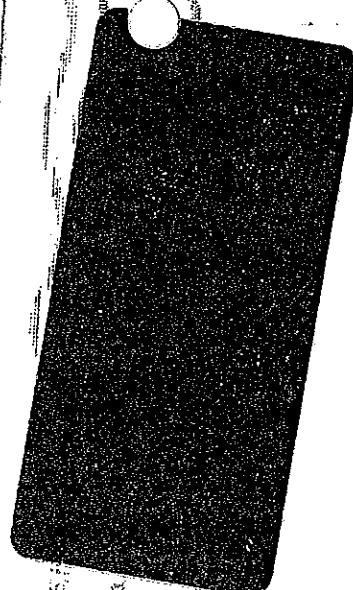
cc (via e-mail):

Michael R. Eitel
U.S. Department of Justice

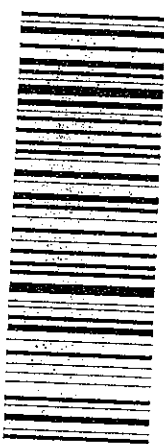
Environment & Natural Resources Division
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
michael.eitel@usdoj.gov

Paul A. Turcke
Moore Smith Burton & Turcke
Attorneys at Law
225 North 9th Street, Suite 420
Boise, ID 83
pat@msbtlaw.com

Michael W. Graf
Law Offices
227 Behrens Street
El Cerrito, CA 94530
mwgraf@aol.com



RETURN RECEIPT
REQUESTED



7003 1660 0007 5256 0299

CERTIFIED MAIL™

Brian Litmans
7107 Holly Ave
Takoma Park, MD 20912

RETURN RECEIPT
REQUESTED

Honorable Gale Norton
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

