

**ENVIRONMENTAL LAW FOUNDATION**

1736 Franklin Street, 8th Floor, Oakland, California 94612 • 510/208-4555

**Comments on**

**Operations and Proposed Expansion of  
Mammoth Bar Off-Highway Vehicle Recreation Area,  
Middle Fork of the American River  
Auburn State Recreation Area, California**

**on behalf of**

**Friends of the River  
Sierra Club - Placer Group  
Protect American River Canyons**

**by**

**Tara L. Mueller  
Associate Attorney  
ENVIRONMENTAL LAW FOUNDATION**

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On behalf of Friends of the River (FOR), the Sierra Club-Placer Group, and Protect American River Canyons, we submit the following general comments on the current operations and proposed expansion of the off-highway vehicle recreation area (OHVRA) at Mammoth Bar on the Middle Fork of the American River. This area is owned by the U.S. Bureau of Reclamation ("the Bureau") but managed by the California Department Parks and Recreation ("the Department") pursuant to a cooperative agreement between the two agencies.

The Department has acknowledged, both in public meetings and in writing, that it (and the Bureau) are subject to all applicable requirements of state and federal law, including the California Environmental Quality Act (CEQA), National Environmental Policy Act (NEPA), both the federal and state Endangered Species Act (ESA), and laws governing streambed alteration and dredge and fill activities. Yet, the Department and the Bureau do not appear to be in compliance with such laws.

In general, the operation and incremental expansion of the Mammoth Bar OHVRA raises serious questions regarding numerous state and federal environmental laws, plans and policies. We discuss these legal concerns below. Given these seriously legal issues, the proposed expansion cannot proceed until the area is brought into compliance with applicable laws and policies. However, if the Department and the Bureau choose to continue with the expansion planning process, the process can only proceed consistent with state and federal law, as outlined below.

Please note that these comments are not exhaustive and are preliminary only. We are likely to raise additional issues and provide additional input if and when the Mammoth Bar planning process proceeds.

### STATE LEGAL ISSUES

#### **A. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA).**

##### **1. Current Operations at the Mammoth Bar OHVRA Appear to Have Been Conducted in Violation of CEQA.**

###### **a. CEQA applies to the current operations at Mammoth Bar.**

Since grant monies became available in fiscal year 1992-93 through the OHV Trust Fund,<sup>1</sup> the Department and the Bureau have constructed two moto-cross tracks, a jumping track, a 270-space parking lot, several miles of new trails, and other amenities such as a ridgetop ramada at the

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<sup>1</sup> The OHV Trust Fund is funded through an off-highway vehicle license fee and gas tax. (Veh. Code § 38225.) Fifty percent of the monies in the fund are available for appropriation for local assistance grants and fifty percent are available to support the Division of Off Highway Motor Vehicle Recreation in the Department of Parks and Recreation (acting alone or in concert with agencies of the United States pursuant to a cooperative agreement, as is the case here). (Pub. Res. Code §§ 5090.55, 5090.61.) The revenues available to support the Division may be used for implementing the Division's OHV program and for the planning, acquisition, development, construction, maintenance, administration, operation and conservation of lands in the OHV system. (Pub. Res. Code § 5090.61(b).)

Mammoth Bar OHVRA. Because the Department views the Mammoth Bar OHVRA as an "interim use" that will be flooded by the proposed Auburn Dam at some point in the future, the Department apparently eluded all CEQA review of these projects. As the Department has stated in its grant applications for OHV trust funds, "[s]ince it was perceived that the OHV area would be inundated within the near future, the resulting resource damage seemed acceptable at the time [the OHV area was established]."<sup>2</sup> OHV use has been allowed in the Mammoth Bar area on this basis for approximately the last *twenty-five* years.

Furthermore, even if the OHV area could appropriately be deemed an "interim use" after twenty-five years of operation and no foreseeable end in sight, there is no exemption from CEQA for "interim uses" in any case. The Department therefore has been violating that statute by operating and significantly expanding the Mammoth Bar OHVRA without undertaking any CEQA review.

CEQA review is required for all discretionary projects carried out or approved by a public agency. (Cal. Pub. Res. Code § 21080(a).) A "project" is an activity that will result in a direct or reasonably foreseeable indirect physical change in the environment. (Cal. Pub. Res. Code § 21065.) "Project" includes: (1) an activity directly undertaken by a public agency; (2) an activity undertaken by a person that is supported in whole or in part by contracts, grants, loans, or other forms of assistance from a public agency; or (3) issuance to a person of a permit, lease, license, certificate or other entitlement by a public agency. (*Id.*; 14 Cal. Code Regs. § 15378(a)(3).) The activities undertaken by the Department at the Mammoth Bar OHVRA clearly qualify as "projects" subject to CEQA: they are either activities directly undertaken by the Department or funded by the Department that have resulted in direct and indirect physical changes to the environment.

Moreover, even if CEQA itself were not enough, the Off-Highway Motor Vehicle Recreation Act (hereafter "OHMVRA" - *see* Sec. B below) expressly states that grants for the "planning, acquisition, development, construction, maintenance, administration, operation, and conservation of trails, trailheads, areas, and other facilities for off-highway motor vehicles" must be made in compliance with CEQA. (Cal. Pub. Res. Code § 5090.50; *see also* § 5090.32(e).) The OHMVRA also clearly commands that "every applicant for a grant [in this case, the Department] shall comply with CEQA." (Pub. Res. Code § 5090.50.)

Neither CEQA nor the OHVMRA contain any statutory or categorical exemption from CEQA for applications to OHV activities.<sup>3</sup> Therefore, the Department was required to prepare an initial study for each of these activities and determine whether to prepare a negative declaration, mitigated negative declaration, or environmental impact report (EIR).

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<sup>2</sup> See, e.g., Mammoth Bar OHV Grant application, 2/25/94.

<sup>3</sup> Given the potentially devastating environmental effects of OHV use, the Department cannot reasonably rely on the "catch-all" categorical CEQA exemption. This requires a determination, supported by substantial evidence, that there is *no possibility* that the activity in question may have a significant environmental effect. (14 Cal. Code Regs. § 15061.) Such determination cannot be made here.

b. **The Department cannot rely on prior, plan-level documents for CEQA compliance.**

The Department acknowledges that it is subject to CEQA.<sup>4</sup> The Department also admits that OHV activities have "produced substantial resource damage in the Mammoth Bar area."<sup>5</sup> Yet, despite repeated requests from several organizations and individuals (including FOR), the Department has not produced *any* CEQA documentation for any of the previous activities undertaken at the Mammoth Bar OHVRA with OHV trust funds — not even a notice of exemption.<sup>6</sup>

Instead, the Department has attempted to justify its lack of CEQA analysis by claiming that the activities were conducted under the auspices of the Auburn State Recreation Area Interim Resource Management Plan (IRMP), an alleged "NEPA document," and the Auburn Reservoir Project—Folsom Lake State Recreation Area General Plan (AFGP), which is purported to be a "CEQA environmental impact report level document." (*Ibid.*) This statement is both factually and legally incorrect.

First, as a factual matter, neither the IRMP or the AFGP can be deemed the equivalent of an environmental impact statement (EIS) under NEPA or an EIR under CEQA. Neither document is labeled as an environmental review document, nor do these documents include any independent environmental analysis of the environmental effects of these plan-level documents. Absent such consideration, including analysis of alternatives and mitigation measures, the IRMP and AFGP cannot be deemed to be the equivalents of an EIS and EIR under NEPA and CEQA. Nor is the Department entitled under CEQA to rely on such plan level documents without conducting any independent environmental review under CEQA, because its regulatory program has not been certified as a "functional equivalent" program under CEQA. (Cal. Pub. Res. Code § 21080.5; 14 Cal. Code Regs. § 15251.)

Second, as a legal matter, even if the IRMP and AFGP could appropriately be deemed the "functional equivalent" of an EIS and EIR under NEPA and CEQA, this does not exempt the Department from further CEQA compliance when implementing future activities under the IRMP and AFGP. Under CEQA, even if a program-level EIR is prepared on a general plan or other similar document, specific projects proceeding under the plan are not automatically exempted from CEQA review. Rather, subsequent environmental review is streamlined and can be "tiered off" of the program-level document. The lead agency must still prepare an initial study for each specific project to determine whether the project may have new environmental effects or may require new mitigation measures that are not analyzed or included in the program level EIR. (Cal. Pub. Res. Code §

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<sup>4</sup> Letter from CDPR (Bruce Kranz) to FOR (Casey), 11/21/96: "...both CEQA and NEPA must be complied with when an 'action' is to be undertaken in the area."

<sup>5</sup> Mammoth Bar OHV grant application, 2/3/95.

<sup>6</sup> See, e.g., letter from acting CDPR Director Patricia Megason to California State Senator John Burton, 4/23/98.

21094(c); 14 Cal. Code Regs. § 15168(c).) If so, the lead agency must prepare a subsequent project-specific EIR. (Cal. Pub. Res. Code § 21094(a).) Subsequent environmental review may then incorporate *relevant* portions of the program EIR by reference, but must still analyze the project-specific environmental effects that were not analyzed in detail in the program EIR. (14 Cal. Code Regs. § 15168(d); Cal. Pub. Res. Code § 21094(a), (e).) Furthermore, if a program EIR is vastly out of date (as the AFGP would be if it were a program EIR), it may be inappropriate to rely on any aspect of the prior document.

For these reasons, the Department cannot lawfully rely on the IRMP and AFGP as its CEQA documentation for any past or future improvements or expansion activities at the Mammoth Bar OHVRA.

**c. The Department's construction activities at Mammoth Bar constitute improper "piecemealing" of the project description under CEQA.**

Finally, the Department's incremental expansion, construction and reconstruction activities at the Mammoth Bar OHVRA constitute improper "piecemealing" of the Department's overall improvement and expansion plans for the area. As the California Supreme Court has stated in the landmark case of Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 284 (1975), CEQA mandates that "environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences."

This is precisely what the Department is doing by, for example, constructing a 270-vehicle parking lot which, the Department has indicated, will determine the "carrying capacity" for the entire OHVRA, constructing several miles of new trails, and other similar activities which implement the Department's expansion plans on an incremental basis. This is directly contrary to CEQA and denies the public any opportunity to review and comment upon the overall project. It also unlawfully commits the Department to a course of action (expansion) prior to public review and comment, and prior to a formal agency decision whether and in what manner to proceed with such expansion.

**2. CEQA Also Applies to the Proposed Expansion of the Mammoth Bar OHVRA.**

The Department is currently considering three potential expansion alternatives. Within those alternatives is the possibility of approximately doubling the size of the Mammoth Bar OHVRA by constructing anywhere from 1.4-to-7.35 new miles of trails and other facilities, and by increasing the acreage of the area by up to 1561 acres.

- a. CEQA requires the Department to prepare an EIR on the proposed expansion of the Mammoth Bar OHVRA.

(1) Legal standard for preparation of an EIR.

An EIR is required whenever there is substantial evidence to support a fair argument that a significant environmental impact *may* occur. (Cal. Pub. Res. Code § 21080(c)(1); 14 Cal. Code Regs. §§ 15064(g)(1), 15070(a); Friends of B Street v. City of Hayward, 106 Cal. App. 3d 988, 1000-1003 (1980).)

The Department's approval of a plan to expand the Mammoth Bar OHVRA is clearly a "project" under CEQA, for the same reasons described in Section A.1.2 above. Therefore, the pertinent inquiry is whether this project may have a significant effect on the environment. (Cal. Pub. Res. Code § 21100.) If so, the Department must prepare an EIR on the project. (*Id.*) A project meets the significance threshold for preparation of an EIR if there is substantial evidence to support a *fair argument* that the project *may* have a significant environmental effect. (Gentry v. City of Murrieta, 36 Cal. App. 4th 1359, 1399-1400 (1995); Cal. Pub. Res. Code §§ 21080(d), 21100(a); 14 Cal. Code Regs. §§ 15063(b)(1), 15064(a)(1).) Stated another way, the lead agency may prepare a negative declaration or mitigated negative declaration *only* if there is *no* substantial evidence that the project, as proposed or revised, may have a significant environmental effect. (Cal. Pub. Res. Code § 21080(c); 14 Cal. Code Regs. §§ 15063(b)(2), 15070.)

A "significant environmental effect" is defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, [and] fauna." (14 Cal. Code Regs. § 15382; Cal. Pub. Res. Code § 21068.) In evaluating the significance of a project's environmental effects, the lead agency must consider both direct, as well as reasonably foreseeable indirect, physical changes in the environment which may be caused by the proposed project. (14 Cal. Code Regs. § 15064(d); Bozung, 13 Cal. 3d at 281-283.)

In some cases, however, the lead agency *must* treat an environmental effect as potentially significant and prepare an EIR. Such "mandatory findings of significance" are triggered in cases where a project has the potential to: (1) substantially degrade the quality of the environment; (2) substantially reduce the habitat of a fish or wildlife species; (3) cause a fish or wildlife population to drop below self-sustaining levels; (4) threaten to eliminate a plant or animal community; (5) reduce the number or restrict the range of a rare, threatened or endangered species;<sup>7</sup> (6) eliminate important examples of California history or prehistory; or (7) cause significant cumulative impacts. (14 Cal. Code Regs. § 15065.)

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<sup>7</sup> Importantly, threatened and endangered species are defined to include not just species listed under the state and federal ESAs, but those that are *de facto* threatened and endangered. (14 Cal. Code Regs. § 15380.)



(2) The proposed expansion will have significant environmental effects requiring preparation of an EIR.

Here, the proposed expansion triggers a number of CEQA's mandatory findings of significance - particularly the findings regarding endangered species and historic resources. For example, the Department's OHV trust fund grant application dated February 25, 1994 indicates that bald eagles have been sighted at Mammoth Bar. In addition, the American River Wild and Scenic River eligibility study states that the American River canyons support a unique and significant array of listed, proposed and candidate animal species and species of special concern, including the peregrine falcon, bald eagle, red-legged frog, foothill yellow-legged frog, western pond turtle, and golden eagle.<sup>8</sup>

An *Auburn Journal* article states that areas in the Mammoth Bar OHVRA have had to be fenced off to protect rare, threatened and endangered species and historic resources.<sup>9</sup> Finally, the Department's Mammoth Bar OHVRA Newsletter indicates that the U.S. Fish and Wildlife Service (USFWS) and the Department's Resource Management Division have "provided the planning team with a list of sensitive flora and fauna that may be present in or may be affected by projects in the proposed planning area."<sup>10</sup> Other evidence indicates the presence of potentially significant archeological, cultural and historic resources in the area.<sup>11</sup>

Moreover, even absent the mandatory findings of significance, there is substantial evidence to indicate that the proposed expansion will have a potentially significant environmental effect. The project will adversely impact an area that has been determined to be "eligible" for designation as a federal Wild and Scenic River (WSR) and for designation as a National Recreation Area (NRA).<sup>12</sup> Both the WSR and NRA studies state that the area has "outstanding" characteristics and resource values, including fish, wildlife, ecological, scenic, geologic, cultural, and recreational values. For example, the American River WSR eligibility study concludes that the wildlife habitat in the Middle Fork is "of exceptionally high quality and diversity," and that the Middle Fork possesses both ecosystem diversity and unique biological communities.<sup>13</sup>

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<sup>8</sup> U.S. Bureau of Reclamation, "Final Report of the American River Water Resources Investigation—Technical Team's Inventory and Recommendation for Wild and Scenic Eligibility..." 1993; see also IRMP, p. 61.

<sup>9</sup> *Auburn Journal*, "Park It In Here," 2/20/94.

<sup>10</sup> CDPR, "Mammoth Bar OHVRA Management Plan," Newsletter # 1, no date.

<sup>11</sup> *Ibid.*; see also "American River National Recreation Area Feasibility Study," U.S. Bureau of Land Management, September 1990; IRMP, p. 94.

<sup>12</sup> Bureau of Reclamation, *op cit*; see also "American River NRA Feasibility Study."

<sup>13</sup> Memo from Susan Hoffman, Chief, Division of Planning and Technical Services, Bureau of Reclamation, to Interagency Study Team re "Determination of Wild and Scenic Eligibility of Segments of the American River," 2/1/93; see also Bureau of Reclamation, *op cit*.

In addition, in 1996, the USFWS noted that the American River canyons, including the Middle Fork, are critical wildlife corridors that represent "the best remnants of the low elevation canyon ecosystems which once flowed unimpounded through the western Sierra Nevada foothills."<sup>14</sup> Such habitats are "the most important, most at-risk, and highest priority habitats in California for the conservation of neotropical migratory birds."<sup>15</sup>

Other potentially adverse environmental impacts include, but are not limited to: negative visual and aesthetic effects, erosion and degradation of water quality, increase in ambient noise, interference with other recreational opportunities (such as rafting, kayaking, and hiking), and public safety issues.<sup>16</sup> Finally, the project is likely to have significant cumulative impacts on the immediate environment and the surrounding region.<sup>17</sup>

The Department admits that OHV use can have a deleterious impact on the environment.<sup>18</sup> The IRMP likewise acknowledges that the existing OHV area has caused "uncorrected erosion and other resource damage," impacts that are likely to increase with expansion of the area.<sup>19</sup>

In sum, not only does the proposed expansion trigger the mandatory findings of significance in CEQA Guidelines § 15065, but there is clearly substantial evidence in the record to support a fair argument that the project may have a significant environmental effect. Therefore, the Department is legally required to prepare an EIR.

**b. Scope of the EIR.**

The primary purposes of an EIR are to: (1) ensure that government officials intelligently take account of the environmental consequences of their decisions; and (2) demonstrate to the public that the government decision-makers have adequately considered those consequences. (Laurel Heights Improvement Assn. v. U.C. Regents, 47 Cal. 3d 376, 392 (1988); Bozung, 13 Cal. 3d at 283; 14 Cal. Code Regs. § 15003(d).) An EIR identifies the significant effects of a project on the environment, identifies alternatives to the project, and indicates the manner in which those significant effects can

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<sup>14</sup> U.S. Army Corps of Engineers, Supplemental Information Report, "American River Watershed Project," Vol. 5, App. J, March 1996.

<sup>15</sup> *Ibid.*

<sup>16</sup> See CEQA Guidelines, App. G; see also Sierra Club comments to CDPR dated Feb. 10, 1998.

<sup>17</sup> These significant effects cannot be avoided by characterizing the proposed expansion as "re-establishment" of a pre-existing use, since the pre-existing use was unauthorized under state and federal law. Even if legally authorized, this is irrelevant for purposes of CEQA analysis, since such use still will cause environmental damage, thereby triggering CEQA requirements.

<sup>18</sup> Letter to Sierra Club (Terry Davis) from CDPR (Stuart Hong), 2/25/98.

<sup>19</sup> IRMP, pp. 84, 88; see also pp. 130, 143, 153.

be avoided or mitigated. (Cal. Pub. Res. Code § 21002.1(a).) CEQA directs that lead agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen or avoid the project's significant environmental effects. (Cal. Pub. Res. Code § 21002.)

**(1) The EIR must analyze a reasonable range of alternatives.**

The core of an EIR is the discussion of alternatives. (Citizens of Goleta Valley v. Board of Supervisors, 52 Cal. 3d 553, 564 (1990); *see also* County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 183, 203 (1977) ("[a] major function of an EIR is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed".)) The alternatives section of the EIR must evaluate the "comparative merits" of a reasonable range of alternatives to the project *or to the location of the project*. (14 Cal. Code Regs. § 15126(d); Goleta, 52 Cal. 3d at 566 (holding that EIR must analyze alternative sites).) The alternatives selected for analysis must focus only on those that would avoid or substantially reduce the project's significant environmental effects, *even if these alternatives would impede to some degree the attainment of project objectives or would be more costly*. (14 Cal. Code Regs. § 15126(d)(1) and (5).)

The three alternatives presently under consideration all involve varying degrees of expansion of the existing OHVRA. Under the above standards, however, the alternatives analysis should include closure of the OHV area and relocation to an alternative, less environmentally damaging site. The EIR should include a regional analysis of appropriate alternative sites. Although the Department has indicated that it has eliminated any alternative sites from consideration, it is clearly not permitted to do so prior to commencement of the CEQA review process. Alternatives may only be omitted from further consideration during the CEQA process if they are determined to be infeasible. This determination must be explained and justified in the EIR and supported by substantial evidence. The Department has not demonstrated that closure of the area and reestablishment elsewhere is infeasible.

The analysis must also consider other less environmentally damaging alternatives such as reducing current operations at the Mammoth Bar site by eliminating new trail development and closing existing trails with significant erosion problems.

**(2) Other EIR requirements.**

The EIR also must include an adequate project description, sufficient baseline information regarding the existing physical setting, a thorough evaluation of the project's environmental effects (including cumulative effects), and mitigation measures for each significant effect identified in the EIR.

**(a) The EIR must include a complete and accurate project description.**

CEQA requires an EIR to include a complete and accurate project description. The project description must include: (1) the precise location and boundaries of the proposed project depicted on a detailed map, preferably topographic; (2) a statement of the project's objectives; (3) a general

description of the project's technical, economic, and environmental characteristics; and (4) a statement regarding the intended uses of the EIR. (14 Cal. Code Regs. § 15124.) An inaccurate, misleading, or curtailed project description prevents the public and the decision making agency from adequately evaluating this project's environmental effects. (See County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 192-193 (1977) (an "accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient" environmental analysis).)

To date, we have seen no complete and detailed description of the proposed project. The Department must develop a specific project description which includes the precise location of new trails and other facilities, as shown on a topographic map, and a statement of the project's objectives.

**(b) The EIR must adequately describe the environmental setting.**

CEQA requires an EIR to describe the environmental setting in the vicinity of the project, from both a local and regional perspective.<sup>20</sup> The description must place special emphasis on resources that are rare or unique to the region that would be affected by the project. (14 Cal. Code Regs. § 15125(a).) The discussion of the environmental setting must also include a discussion of any inconsistencies between the project and applicable local or regional plans. (14 Cal. Code Regs. § 15125(b).) The environmental setting must be described in sufficient detail to allow the reader to understand how the project will affect the environment. (San Joaquin Raptor/Wildlife Rescue Assn. v. County of Stanislaus, 27 Cal. App. 4th 713 (1994).)

Here, the EIR must precisely describe the Mammoth Bar OHVRA and surrounding Middle Fork canyon environment, including a description of important species of flora and fauna, habitat types, cultural, historic and scenic resources, and other unique aspects of the canyon environment. The existing environment must be described from both a local and a regional perspective (upstream and downstream). The EIR must also discuss the project's consistency with the AFGP, IRMP and other applicable laws, plans and policies.

**(c) The EIR must include a complete analysis of the project's environmental effects.**

CEQA requires an EIR to clearly identify and describe the potentially significant direct and indirect environmental effects<sup>21</sup> of the project, considering both short term and long term effects.

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<sup>20</sup> "Environment" is defined as the physical conditions which exist in the area that will be affected by the project, including land, air, water, minerals, flora, fauna, noise, and objects of aesthetic or historical significance. (Cal. Pub. Res. Code § 21060.5; 14 Cal. Code Regs. § 15360.)

<sup>21</sup> A significant environmental effect is defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects historic or aesthetic significance." (14 Cal. Code Regs. § 15382; see also Cal. Pub. Res. Code § 21068.)

The discussion must include:

*the relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution [and] concentration, human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, scenic quality, and public services. (14 Cal. Code Regs. § 15126(a).)*

CEQA also requires an EIR to analyze the cumulative impacts of the project under consideration, when added to other closely related past, present and reasonably foreseeable future projects. (14 Cal. Code Regs. § 15130.) "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (14 Cal. Code Regs. § 15355.) Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time." (*Id.*)

The EIR must analyze the following potentially significant impacts of the proposed OHVRA expansion: visual quality and aesthetics, wildlife and vegetation (particularly impacts on endemic and sensitive species, habitat connectivity and corridors), water quality (erosion, sedimentation, discharges of oil and grease), noise (especially impacts to other recreational users of the American River canyon), air quality (particularly cumulative impacts on particulate and ozone emissions in the Sacramento Valley region, a non-attainment area), traffic, recreation and public safety.<sup>22</sup>

- (d) **The EIR must include mitigation measures for each significant effect identified, as well as a mitigation monitoring program.**

CEQA requires an EIR to include specific mitigation measures to avoid or minimize *each* significant impact identified, including the impacts of alternatives. (14 Cal. Code Regs. § 15126(c).) In addition, prior to approving the project, the Department must adopt a mitigation monitoring and reporting program pursuant to Pub. Res. Code § 21081.6.

## **B. OFF-HIGHWAY MOTOR VEHICLE RECREATION ACT (OHMVRA).**

### **1. The OHMVRA Applies to the Mammoth Bar OHVRA.**

The OHMVRA (Cal. Pub. Res. Code § 5090.01 *et seq.*) governs all off-highway vehicle recreation areas which receive grant monies from the Division of Off-Highway Motor Vehicle Recreation in the Department (hereafter "the Division").

The OHMVRA applies to the Mammoth Bar OHVRA because it applies to all state vehicular recreation areas and trails within the state park system. (Cal. Pub. Res. Code §§ 5090.08, 5090.09.) This system consists of areas and trails that are "established primarily to provide facilities and recreational opportunities for the purposes of operating off-highway motor vehicles." (Cal. Pub.

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<sup>22</sup>

See Sierra Club comments re. Mammoth Bar, 2/10/98

Res. Code § 5090.40.) The Mammoth Bar OHVRA was established by the Department solely for the purposes of providing facilities and recreational opportunities for OHV enthusiasts. The Mammoth Bar OHVRA therefore falls within the definition of a state vehicular recreation area that is within the state park system.

Even if Mammoth Bar cannot be considered an "official" state vehicular recreation area, the OHMVRA still applies to the Mammoth Bar area because the act governs all areas managed pursuant to cooperative agreements between agencies of the state and the United States "for any joint undertaking of any function that the [D]ivision is authorized by [the Act] to perform." (Cal. Pub. Res. Code § 5090.55(a).) The Department has entered into such a cooperative agreement with the Bureau for management of the Mammoth Bar area.<sup>23</sup> The act expressly states that "[a]ll new acquisitions, development projects, and cooperative agreements shall be subject to the uniform application of soil, wildlife and habitat protection standards required at state vehicular recreation areas." (Cal. Pub. Res. Code § 5090.55(c).)

## **2. The Mammoth Bar OHVRA Is In Violation of the OHMVRA.**

The Mammoth Bar OHVRA is not currently in compliance with the OHMVRA, and is therefore may not be eligible to receive any further grant funds from the Division for future expansion unless and until it is brought into compliance with this statute.

### **a. The Mammoth Bar OHVRA is not in compliance with the OHMVRA's soil loss and habitat protection requirements.**

The OHMVRA requires the Department to adopt a generic soil loss standard by January 1, 1991, which is at least sufficient to allow rehabilitation of OHV areas and trails. The Department adopted such standard in a document entitled "Soil Conservation Guidelines/Standards for Off-Highway Vehicle Recreation Management." In addition, by July 1, 1989, the Department was to have inventoried wildlife populations and their habitats in each OHV area and prepared a wildlife habitat protection program "to sustain a viable species composition specific to each area." (Cal. Pub. Res. Code § 5090.35(b).) The OHMVRA prohibits the Division from funding trail construction projects unless such projects are in compliance with the soil loss standards and wildlife protection program adopted by the Department pursuant to Pub. Res. Code § 5090.35(b). (Cal. Pub. Res. Code § 5090.35(f).)

The Department must annually monitor each area's compliance with the soil loss standards and habitat protection program. (Cal. Pub. Res. Code § 5090.35(c).) If the soil loss standards and habitat protection program requirements are not being met in a given area, the Department must direct the Division to close the area or any portion funded by the OHV Trust Fund, to repair the area and prevent accelerated erosion.

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<sup>23</sup> See USBR Contract Nos. 14-06-200-3193A (Amendatory), Dec. 27, 1966 and 14-06-200-8523A, Jan. 17, 1977.

In short, the area must remain closed (either temporarily or permanently) until the soil loss standards and habitat protection program requirements can be met. (Cal. Pub. Res. Code § 5090.35(d), (e).)

It is unclear whether the Mammoth Bar OHVRA is in compliance with the soil loss standards adopted by the Department. These standards require the Department to do, among other things, the following: 1.) assess the conditions of exiting roads and trails and repair those in need of maintenance; 2.) conduct soil and vegetation survey; 3.) assess site erosion potential; 4.) determine whether site runoff meets applicable runoff standards; 5.) perform a revegetation assessment for each OHV Trust Fund project.

Further, the Department must adopt and comply with an erosion control and habitat management plan, riparian protection guidelines, sediment and runoff control measures, and a maintenance and monitoring plan for each OHV trust fund project. Finally, such project must comply with specific and detailed design guidelines. The Department should demonstrate that it is in compliance with each of these standards and requirements.

In addition, the Department has failed to adopt a habitat protection program for the Mammoth Bar OHVRA, as required by Pub. Res. Code § 5090.35(b). It therefore cannot be determined whether the Mammoth Bar area is in compliance with the OHMVRA's requirement that each area maintain a viable species composition. For this reason, it is not legal or appropriate for the Department to receive any further OHV trust fund monies for expansion of the area until the Department adopts a habitat protection program and determines whether the Mammoth Bar area is in compliance with the program. If the Mammoth Bar area is not in compliance, as we suspect it will not be, the area should be closed and rehabilitated, either temporarily or permanently. (*See also* discussion below.)

**b. The Mammoth Bar OHVRA is in violation of OHMVRA conditions on use of OHV Trust Funds.**

The OHMVRA prohibits the disbursement and expenditure of OHV Trust Fund monies for development or construction of a new trail, trailhead, area or other OHV facility unless all of the following conditions are met:

- (1) the recipient of the funds (in this case, the Department and the Bureau) has completed wildlife habitat and soil surveys and has prepared a wildlife habitat protection program to sustain a viable species composition for the project area;
- (2) the recipient agrees to monitor the conditions of the soils and wildlife in the project area each year in order to determine whether the soil loss standard . . . and the wildlife habitat protection programs are being met; and

- (3) the recipient agrees that, whenever the soil loss standard . . . and wildlife habitat protection programs are not being met in any project area, the recipient will temporarily close and repair . . . that area . . . until [these requirements] are capable of being met. (Pub. Res. Code § 5090.53(b).)

The Department has not complied with any of the above conditions for receipt of grant funds in the past, and it has not indicated willingness to comply with such requirements in the future.<sup>24</sup>

The Department therefore is not eligible to receive any additional OHV Trust Fund monies for trail construction or other activity to operate or expand the OHV area until it can demonstrate its ability and willingness to meet the legal criteria for receipt of such funds.

### C. CALIFORNIA ENDANGERED SPECIES ACT (CESA).

#### 1. CESA Consultation Requirements.

CESA requires each state agency to consult with the Department of Fish and Game (DFG) to insure that any project it proposes to authorize, fund or carry out is not likely to jeopardize the continued existence of any species listed as endangered or threatened under CESA. (Cal. Fish and Game Code § 2090(a).) Consultation is triggered whenever a state agency: (1) is a lead agency under CEQA;<sup>25</sup> and (2) proposes to authorize, fund or carry out a project that may jeopardize the continued existence of a state listed species or adversely modify or destroy its essential habitat.<sup>26</sup> (Cal. Fish and Game Code § 2090(a); Cal. Pub. Res. Code § 21104.2.)

At the conclusion of the consultation process, the DFG must issue a written finding, based on the best available scientific information, as to whether the proposed project is likely to: (1) jeopardize a listed species' continued existence; (2) result in destruction or adverse modification of habitat "essential to [a listed species'] continued existence"; or (3) result in an incidental taking of a member or members of a listed species. (Cal. Fish and Game Code § 2090(b).) If a jeopardy finding is issued, the finding must specify those "reasonable and prudent alternatives," consistent with conserving the species, that would prevent the adverse impact to the species or its essential habitat. (Cal. Fish and Game Code § 2091.) In any case where a finding concludes that an incidental taking of a listed species will occur, the opinion also must include "reasonable and prudent measures" that would minimize the adverse effects of the taking. (*Id.*)

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<sup>24</sup> See letter from CDPR's Megason to Senator Burton, 4/23/98.

<sup>25</sup> A lead agency is an agency that has the principal responsibility for carrying out or approving a "project" that may have a significant environmental effect. (Cal. Pub. Res. Code § 21067.)

<sup>26</sup> A state agency "project" is the same under CESA as under CEQA. (Cal. Fish and Game Code § 2064; Cal. Pub. Res. Code § 21065.)



2. **The Department Must Consult With the DFG Regarding the Proposed Expansion.**

Since the Department is a state lead agency under CEQA for purposes of the proposed expansion, the Department must consult with DFG on the impacts of the proposed expansion on state listed species, which include bald eagle, peregrine falcon and a number of state listed plant species.<sup>27</sup> Protocol surveys must be conducted for these and other listed species which may be present in the area of the proposed expansion. The DFG then must issue a biological opinion based on this information.

In addition, the lists of sensitive flora and fauna developed by the USFWS and the Department must be made available for public review through the CEQA process. The Department also has indicated that a comprehensive analysis of known wildlife, including rare and endangered species will be conducted. This must be incorporated into the CEQA analysis and CESA consultation and made available to the public for review.

**D. FISH AND GAME CODE § 1601: STREAMBED ALTERATION**

1. **Legal Standards and Requirements.**

Section 1601 of the California Fish and Game Code prohibits any state agency from undertaking a construction project, without first submitting construction plans to the DFG, if the project will: (1) divert, obstruct or change the natural flow, or the bed, channel or bank of any designated river, stream or lake which contains an existing fish or wildlife resource; (2) use any material from any designated streambed; or (3) result in the disposal or deposition of debris, waste, or other material containing pavement, where it can pass into any designated river, stream or lake.<sup>28</sup> (Cal. Fish and Game Code § 1601(a).)

Within thirty days of receipt notification from a state agency, the Department must determine whether an existing fish or wildlife resource<sup>29</sup> may be substantially adversely affected by the proposed activity. If so, it must notify the state agency of the existence of the fish and wildlife resource and provide a "specific and detailed" description of such resource. (*Id.*) The DFG also must propose "reasonable modifications in the proposed construction that will allow for the protection and continuance of the fish or wildlife resource." (*Id.*) The DFG may conduct an on site investigation of the proposed construction prior to developing mitigation measures. (*Id.*)

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<sup>27</sup> The Department also has violated CESA in the past by failing to consult with DFG on the prior activities at Mammoth Bar.

<sup>28</sup> The DFG has designated nearly every natural stream, river and lake in the state of California as subject to section 1601 of the Fish and Game Code.

<sup>29</sup> The Fish and Game Code defines "fish" broadly to include "wild fish, mollusks, crustaceans, invertebrates, or amphibians" and any part, spawn or ova thereof. (Cal. Fish and Game Code § 45.)

A state agency *may not commence operations* on a construction project until: (1) the DFG has found that the project will not substantially adversely affect an existing fish or wildlife resource, or (2) the DFG's mitigation proposals have been incorporated into the project. (Cal. Fish and Game Code § 1601(c).)

**2. The Existing Activities Are In Violation of, and the Proposed Expansion Is Subject to, the Requirements of Section 1601.**

The Department admits that activities at Mammoth Bar OHVRA must comply with the requirements of Fish and Game Code § 1601.<sup>30</sup> The moto-cross track was unlawfully constructed and reconstructed within the high water mark of the river, within the DFG's section 1601 jurisdiction. An article in the *Auburn Journal* indicates that this track caused 300 tons of sediment, sand and gravel to be washed downstream *in one storm event* alone.<sup>31</sup>

Further, several tons of sand and gravel, presumably from the Middle Fork channel, were used to construct the facility's new parking lot, likewise in violation of section 1601. Finally, the Department's applications for OHV trust funds and the IRMP both acknowledge there is a serious sedimentation problem with ongoing operations of the Mammoth Bar OHVRA.<sup>32</sup> The expansion will only exacerbate this problem. Therefore, the Department must notify the DFG of the proposed expansion and obtain a section 1601 streambed alteration agreement for this project.

**E. THE DEPARTMENT HAS IGNORED ITS PUBLIC TRUST RESPONSIBILITIES.**

Both the existing OHVRA and proposed expansion are inconsistent with the Department's duties under the state's Public Trust Doctrine. Under California law, each state agency has a public trust responsibility to protect the state's navigable waterways, and land lying between the high and low water marks of these waters, for purposes of fish and wildlife preservation, fishing, recreation, and aesthetic enjoyment, among other things. (*City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980); *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 434 (1983); *Marks v. Whitney*, 6 Cal. 3d 251, 259 (1971).)

In the landmark case of *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 441 (1983), the California Supreme Court explained this public trust doctrine as follows:

*the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . .*

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<sup>30</sup> letter from CDPR's Kranz to FOR's Casey, 11/21/96.

<sup>31</sup> *Auburn Journal*, "A Beaten Path: Storms Change Face of Vehicle Park, Recreation Areas," 1/16/95.

<sup>32</sup> See IRMP, pp. 84, 88, 130.

(*Id.* at 441.) This duty carries with it the "implied power to do everything necessary to the execution and administration of the trust." (People v. California Fish Co., 166 Cal. 576, 597 (1913).)

There are several key aspects of this public trust duty. First, the "dominant theme" and "core" of this duty is the state's obligation "to exercise continued supervision over the trust". (National Audubon, 33 Cal. 3d at 426, 437; Harbor Hut, 148 Cal. App. 3d at 1154.) Second, the state must act to "prevent parties from using the trust in a harmful manner", and to "protect public trust resources whenever feasible." (National Audubon, 33 Cal. 3d at 437, 446.)

Third, as trustee, the state has a responsibility to "bear in mind" its duty as trustee and consider the effect of its actions upon the public trust. (*Id.* at 447.) Thus, the state has "an affirmative duty to take the public trust into account" in all of its decision making. (*Id.* at 446.) Even if a project is "practically necessary" to further an important public interest, the state nevertheless must consider the effects of its action and to preserve the public trust as "far as consistent" with the public interest. (*Id.* at 447.)

In addition, California common law has established a parallel public trust duty to protect the state's fish and wildlife resources. For over one hundred years, California courts have held that title to the fish and wildlife resources of the state are held in trust by the state of California for the benefit of the people. (*See, e.g., Ex Parte Maier*, 103 Cal. 476, 483 (1894) ("[t]he wild game within [the] state belongs to the people in their collective, sovereign capacity" and "is not the subject of private ownership"); Arroyo v. State, 40 Cal. Rptr. 2d 627, 630-31 (1995) ("California courts deem wild animals to be owned by the people of the state").) In maintaining this public trust interest, "[t]he state has the duty to preserve and protect wildlife." (Betchart v. California State Dept. of Fish and Game, 158 Cal. App. 3d 1104, 1106 (1984).)

The Mammoth Bar OHVRA is inconsistent with the state's duty to protect and maintain the public trust interest in streams and fish and wildlife for the benefit of *all* the people of the state. Instead, the state is allowing one interest group, OHV enthusiasts, to use these commonly held resources for their own benefit, to the detriment of other users.

**F. THE MAMMOTH BAR OHVRA IS INCONSISTENT WITH THE AUBURN RESERVOIR PROJECT—FOLSOM LAKE STATE RECREATION AREA GENERAL PLAN (AFGP).**

The existing OHVRA and the proposed expansion are inconsistent with the AFGP in several significant respects. The AFGP establishes land use policies for the Auburn and Folsom Lake State Recreation Areas. Most importantly, the AFGP generally *prohibits* use of OHV's except for official purposes for protection of human life and park resources.<sup>33</sup>

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<sup>33</sup> California Department of Parks and Recreation, "Auburn Reservoir Project/Folsom Lake State Recreation Area General Plan," (November 1988), p. 61.

The AFGP does acknowledge the existing OHV use at Mammoth Bar, but states that this area will be closed and another, much smaller OHV area established in the Hidden Canyon area (50 parking spaces).<sup>34</sup>

However, even if OHV use were permitted at Mammoth Bar, the Mammoth Bar OHVRA would be patently inconsistent with the AFGP. The plan declares that the Department will "pursue a program of scenic management that will aim to *maintain or enhance* scenic quality."<sup>35</sup> Newly proposed roads, parking areas and other developments must be "carefully studied." The plan also states that existing features which degrade visual quality will be *ameliorated or eliminated*.<sup>36</sup> The AFGP further requires the Department to "control and/or eliminate degrading features and intrusions on the environment," including "obnoxious or incongruent noises" and "poorly located roads and trails."<sup>37</sup> Finally, the AFGP directs the Department to monitor developed areas for adverse impacts on natural and cultural resources. If adverse impacts are found, the Department must modify allowable use intensities and/or take other necessary steps to arrest and repair resource damage.<sup>38</sup>

Instead of maintaining or enhancing the extraordinary scenic value of the Middle Fork canyon by phasing out the OHVRA, as required by the AFGP, the Department is proposing to *expand* the area and to build new trails, roads and other facilities, *without* careful study and analysis. Worse, the Department has already constructed a new parking lot, jumping track, trails and other amenities which degrade the unique environment and scenic value of the Middle Fork canyon, in derogation of numerous general plan goals and policies. Further, the OHVRA clearly results in obnoxious and incongruent noises, poorly located roads and trails, severe erosion problems, and other adverse environmental impacts, which therefore must be controlled or phased out, *not* expanded, under the AFGP.

The AFGP also requires the Department to prevent "destructive or unnatural erosion" and to restore and revegetate denuded areas. Important natural areas must be protected for the public's enjoyment. The Department must "determine the extent and status of" any populations of rare and endangered species and take steps "*as necessary to protect and enhance* their populations." The Department must also protect and manage other, non-endangered wildlife populations for public enjoyment.<sup>39</sup>

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<sup>34</sup> Auburn/Folsom general plan, pp. 102-103.

<sup>35</sup> Auburn/Folsom general plan, p. 56.

<sup>36</sup> *Ibid.*

<sup>37</sup> Auburn/Folsom general plan, p. 60.

<sup>38</sup> Auburn/Folsom general plan., p. 62.

<sup>39</sup> Auburn/Folsom general plan, p. 57.

Again, both the existing OHVRA and proposed expansion contravene these policies. The OHVRA has resulted, and will continue to result, in severe erosion and destruction of native vegetation. The Department has failed to adequately restore and revegetate these areas. The Department has also failed to determine the extent and status of rare, endangered and other sensitive species, and failed to take adequate steps to protect and enhance these species. The OHVRA likely has had and will continue to have adverse effects on rare, endangered and other sensitive species that reside in the area.

## **FEDERAL LEGAL ISSUES**

### **A. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA).**

#### **1. The Bureau Must Prepare an EIS on the Proposed Expansion.**

NEPA requires federal agencies to prepare an environmental impact statement (EIS) for every "major federal action" that may significantly affect the quality of the human environment.<sup>40</sup> (42 U.S.C. § 4332(2)(C).) Major federal actions are those with effects that *may* be major and which are *potentially* subject to federal responsibility and control. (40 C.F.R. § 1508.18.) Major federal actions include adoption of federal policies, plans, programs, and approval of specific projects, such as construction or management activities located in a particular geographic area. (*Id.*, § 1508.18(b).)

The Bureau owns the land on which the Mammoth Bar OHVRA is located, and it has signed a cooperative agreement with the Department to manage the area. Pursuant to this agreement, the Bureau has jointly submitted requests for OHV grant funding to the Division to implement specific OHVRA expansion and improvement projects, including the latest proposed expansion. As explained in section I.A above, the proposed expansion is likely to have major environmental impacts, including impacts on human relationships to the environment, particularly those of other recreational users. Therefore, because this proposal is subject to federal oversight and control and may have major environmental effects, it qualifies as a "major federal action" subject to NEPA.

Further, because the proposal may significantly affect the environment, the Bureau must prepare an EIS. Under NEPA regulations, the determination of significance must be made considering a range of factors focusing on the context and intensity of the action. These factors include the unique characteristics of the area in question, and whether: (1) the effects of the action are likely to be highly controversial; (2) the effects of the action involve unique or unknown risks; (3) the action may establish a precedent; (4) the action may result in cumulative impacts; (5) the action may cause the loss or destruction of significant cultural or historical resources; (6) the action may adversely affect species listed under the federal ESA; and (7) the action threatens to violate a federal, state or local law. (40 C.F.R. § 1508.27.)

The proposed expansion meets all of the above criteria for significance. The Mammoth Bar

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<sup>40</sup> "Human environment" is defined broadly under NEPA to include the natural and physical environment and the relationship of people to that environment. (40 C.F.R. § 1508.14.)

OHVRA is located in a highly unique area that is of national significance in terms of its scenic, recreational, cultural, wildlife and other values. As previously mentioned, the Middle Fork of the American River is eligible for designation as a Wild and Scenic River and a National Recreation Area. In addition, the proposed expansion is highly controversial, may establish a negative precedent for location of OHV areas in the State of California, may result in significant cumulative impacts on the American River Canyon, and may affect significant cultural and historical resources and threatened and endangered species, and may be in violation of several federal, state and local laws and policies..

Given these circumstances, it is clearly *not* appropriate for the Bureau to rely on a categorical exclusion, finding of no significant impact (FONSI), or mitigated FONSI in this case. Therefore, the Bureau must prepare an EIS on the proposed expansion. The environmental documentation for the project should be a joint EIS/EIR prepared in conjunction with the Department, which satisfies both the requirements of both NEPA and CEQA.

## 2. Scope of the EIS.

The primary purpose of an EIS is "to serve as an action-forcing device to insure that the policies and goals of [NEPA] are infused into the ongoing programs and actions of the Federal Government." (40 C.F.R. § 1502.1.) An EIS must "provide a full and fair discussion of significant environmental impacts and inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." (*Id.*)

An EIS includes several mandatory components. First, it must include a statement of the project's purpose and need. (40 C.F.R. § 1502.13.) The Bureau has thus far failed to justify the purpose of and need for the proposed expansion of Mammoth Bar. The Bureau asserts that expansion is necessary due to increased demand for OHV areas; yet nowhere is this alleged "demand" documented, nor has the Bureau demonstrated that the increased demand, if it exists, cannot be accommodated elsewhere.

Second, the EIS must "rigorously explore and objectively evaluate" the comparative merits of a reasonable range of alternatives. (40 C.F.R. § 1502.14.) The alternatives analysis is the "heart" of the EIS. (*Id.*) The EIS must also discuss the reasons for eliminating any alternatives from detailed study, and must devote "substantial treatment" to those alternatives that are discussed in detail. (*Id.*, § 1502.14(b).) The range of alternatives must include those that are not within the Bureau's jurisdiction - in this case, alternative sites for the Mammoth Bar OHVRA — as well as a "no action" alternative. (*Id.*, § 1502.14(c)-(d).) Here, the no action alternative is no expansion of the existing OHVRA. Finally, the EIS must include mitigation measures for each alternative. (*Id.*, § 1502.14(f).)

Third, the EIS must describe the environment that would be affected by, and the impacts of, the various alternatives, including the proposed action. (40 C.F.R. §§ 1502.15, 1502.16.)

The impact analysis must include a discussion of any unavoidable adverse impacts, the relationship between short term uses of the environment and maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would occur if the proposal is implemented. The impact analysis must include a discussion of direct, indirect and cumulative effects of, and mitigation measures for, the proposed action and any alternatives.<sup>41</sup> Finally, the analysis must discuss possible conflicts between the proposed action and the objectives of federal, regional, state and local plans and policies. including the AFGP and the IRMP. (40 C.F.R. § 1502.16.) The EIS/EIR must meet all of these requirements in order to pass muster under NEPA.

## **B. BUREAU OF RECLAMATION REGULATIONS AND POLICIES**

### **1. The Mammoth Bar OHVRA Violates 43 C.F.R. Part 420**

Pursuant to Executive Order Nos. 11644 and 11989<sup>42</sup> (May 24, 1977), the Bureau has adopted regulations governing use of OHVs on reclamation lands.<sup>43</sup> (43 C.F.R. Part 420.) These regulations contain strict limitations on OHV use in order to "protect the land resources" and "ensure that any permitted use will not result in a significant adverse environmental impact or cause irreversible damage to existing ecological balances." (43 C.F.R. § 420.1.)

In general, reclamation lands are *closed* to OHV use, unless a specific trail or area has been opened in accordance with the requirements of the regulations. (43 C.F.R. § 420.2.) Before any area may be opened to OHV use, the regional director of the Bureau must promulgate area-specific regulations consistent with the criteria in the general regulations. (43 C.F.R. § 420.21(b).) The regional director also must periodically inspect designated areas and trails to determine the conditions resulting from OHV use. If such use will cause or is causing "considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historical resources," the director must "immediately close" such areas. The area may not be reopened until the director determines that "the adverse effects have been eliminated and measures have been implemented to prevent future recurrence." (43 C.F.R. § 420.21(c).)

OHV areas and trails must be located to minimize damage to soil, watershed, vegetation, and other resources and to minimize harassment of wildlife and significant disruption of wildlife habitats. (43 C.F.R. § 420.22(a).)

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<sup>41</sup> Direct effects are those which are caused by the action and which occur at the same time and place. Indirect effects are reasonably foreseeable effect which are caused by the action but which occur at a later time or are further removed in distance. (40 C.F.R. § 1508.8.) Cumulative effects are the impacts on the environment that result from the incremental impact of the action when added to other past, present and reasonably foreseeable future federal and non-federal actions. (40 C.F.R. § 1508.7.)

<sup>42</sup> dated Feb. 8, 1972 and May 24, 1977 respectively.

<sup>43</sup> "Reclamation lands" are lands within the custody or control of the Bureau. (43 C.F.R. § 420.5(c).)

OHV areas may *not* be located in areas "possessing unique natural, wildlife, historic, cultural, archeological, or recreational values" unless these values will not be adversely affected. (43 C.F.R. § 420.22(b).) Importantly, reclamation lands being managed by state entities (as is the case here) *must be administered consistent with the above requirements and all other applicable federal laws and regulations.* (43 C.F.R. § 420.25(a)(2).)

The Mammoth Bar OHVRA does not appear to be in compliance with these regulations and therefore may be operating unlawfully. First, it does not appear that the director of the Bureau has promulgated regulations specific to the Mammoth Bar area. Second, there is evidence to indicate that the Mammoth Bar area has caused considerable damage to the surrounding area, including soil, vegetation, wildlife, wildlife habitat, and potential cultural or historical resources. Third, the trails have not been located to minimize damage to such resources. Fourth, and most importantly, the Mammoth Bar OHVRA actually is located in an area in which OHV use is *prohibited* under the regulations. As previously discussed, the Middle Fork of the American River has been found to have unique and outstanding natural, wildlife, historic, cultural and recreational values.

These issues not only raise serious questions about any expansion of OHV activities, but they also call into question the existing OHV use.

**2. The Mammoth Bar OHVRA Is Inconsistent With the Auburn State Recreation Area Interim Resource Management Plan (IRMP).**

The proposed expansion of the Mammoth Bar OHVRA also is inconsistent with the IRMP, which is a joint federal-state resource management plan adopted for the area. The IRMP establishes several planning goals and management guidelines for the Auburn State Recreation Area, which includes the Mammoth Bar OHVRA.

First, the IRMP establishes an overall planning goal of minimizing environmental damage caused by recreational use and development and restoring areas damaged by such use wherever possible.<sup>44</sup> The proposed expansion is clearly inconsistent with this overall goal of the IRMP. Indeed, the IRMP repeatedly acknowledges the significant resource damage and erosion problems caused by the *existing* OHV area.<sup>45</sup> The expansion obviously will significantly exacerbate this problem.

Second, the IRMP's overall management guideline provides that "any land use proposal made prior to completion of Auburn Dam" must meet one of the following four criteria: (1) be directly associated with construction of Auburn Dam; (2) be for purposes of fish and wildlife mitigation or enhancement; (3) provide for cultural or historic preservation or mitigation; or (4) provide for safe public use and recreational opportunities. The proposed expansion meets none of the above criteria, and in fact is contrary to these criteria.

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<sup>44</sup> IRMP, p. 92.

<sup>45</sup> See, e.g., IRMP pp. 84, 88, 130, 143, 153.



Third, the IRMP establishes several specific management guidelines for each area of potential impact. Guidelines relevant to the Mammoth Bar OHVRA include, but are not limited to:

- 1) Trails in conflict with key wildlife habitat areas, or areas at risk of degrading water quality subject to erosion, should be rerouted or closed.
- 2) The viewshed is to be maintained. Development should be located outside of scenic areas, adjacent to existing structures, or along the edges of scenic areas where vistas will be less interrupted. Development should not be allowed on ridgelines.
- 3) Newly proposed roads, parking areas, and other developments should be evaluated to determine their effects on scenic quality. *Proposals that would have an adverse impact on the viewshed should be revised or rejected.*
- 4) Before any facility is constructed, it should comply with [NEPA] and other environmental protection laws. Each project should be evaluated for NEPA and National Historic Preservation Act compliance on a case-by-case basis.
- 5) Rare and endangered plants and animals and their habitats should be protected and managed for their perpetuation in accordance with state law.
- 6) Prior to any deleterious activity, the affected area must be surveyed by a qualified resource ecologist . . . during the appropriate season.
- 7) Riparian . . . areas should be managed for their long term preservation and enhancement.
- 8) Management of soils should prevent destructive or unnatural erosion.<sup>46</sup>

The proposed expansion is fundamentally inconsistent with these resource management guidelines. The Bureau and the Department are not managing this scenic viewshed and critical wildlife area in a manner that will ensure its long term protection and minimize and mitigate existing resource damage. Instead, the Bureau and the Department are proposing to significantly *increase* the already extensive resource damage and impacts to the viewshed that the IRMP admits has resulted from ongoing operation of the Mammoth Bar OHVRA. Moreover, the agencies are trying to cut corners on required procedures by, for example, not preparing a NEPA analysis of the proposed expansion and failing to conduct protocol wildlife and vegetation surveys of the expansion area.

Nor is the existing OHVRA in compliance with the management guidelines established by the IRMP. Among other things, contrary to the IRMP, the Bureau and the Department have, failed to: (1) close trails that conflict with wildlife use and that present erosion problems; (2) protect rare and endangered species that may be impacted by the OHV area; (3) manage the Mammoth Bar

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<sup>46</sup> IRMP, pp. 108-110.

riparian corridor for its long term preservation and protection, rather than for OHV use; and (4) manage soils to prevent erosion. The agencies even have constructed, without prior environmental analysis and public review required by the IRMP, environmentally damaging projects that are clearly inconsistent with the IRMP, such as a 270-space parking lot and a ramada on top of the ridge.

**3. Resource Management Plan for the Mammoth Bar Area of the Auburn State Recreation Area (MBRMP)**

Although apparently never finalized, this document was intended to be a "tier" to the IRMP. It includes OHV resource management objectives, short term resource management actions, erosion control priorities, and resource damage monitoring requirements. The goals of the IRMP provide the basis for the MBRMP (see above). The MBRMP's stated overall goal for the Mammoth Bar area is to "provide for the perpetuation of the cultural and natural resources of the Mammoth Bar area unimpaired for future generations by providing . . . facilities designed to minimize and limit the extent of damaging uses."

New OHV trails must avoid all sensitive natural and cultural features, including rare plants and animals and their habitats, wetlands, springs and seeps, meadows and grasslands, riparian areas, steep slopes and erodible soils. Areas with historic OHV use that may affect sensitive resources, and areas where historic riding has caused unacceptable erosion and vegetation damage, must be closed. OHV use must be limited to designated areas.

As with the IRMP, both the existing operations and proposed expansion are inconsistent with the MBRMP. Trails have not avoided sensitive natural and cultural features, and trails that have caused damage to these resources have not been closed. Nor has OHV use effectively been limited to designated areas as required by the plan. The proposed expansion will likely amplify these problems.

**C. THE MAMMOTH BAR OHVRA IS NOT IN COMPLIANCE WITH THE REQUIREMENTS OF SECTIONS 404 AND 401 OF THE CLEAN WATER ACT.**

Clean Water Act (CWA) section 404 (33 U.S.C. § 1344), prohibits the discharge of dredged or fill material into any "navigable waters," without a permit issued by the Army Corps of Engineers (Army Corps). Navigable waters are defined by the CWA as the "waters of the United States," and includes waterways such as the Middle Fork of the American River. (33 U.S.C. § 1362; 40 C.F.R. § 230.3(s)(3).) "Discharge of dredged or fill material" includes the placement of *any* material into the waters of the United States which has been dredged or excavated from such waters, or which is used primarily for replacing an aquatic area with dry land or changing the bottom elevation of a water body. (33 C.F.R. §§ 323.2(c), (d), (e).) "Dredged or fill material" includes rock, sand, dirt, or other construction material. (*Id.*, § 323.2(e), (f).)

The Bureau's and the Department's construction of the jumping track within the high water mark of the Middle Fork was a discharge of dredged or fill material into waters of the United States.

Accordingly, the Bureau and the Department were required to obtain a permit pursuant to Section 404 of the Clean Water Act and have acted in violation of that statute. Further, if the proposed expansion would involve discharge of any dredged or fill material into or near the river bed or channel, a Section 404 permit will be required.

In determining whether or not to permit a discharge, the Corps must apply the Environmental Protection Agency's (EPA's) section 404(b)(1) guidelines and conduct a so-called "public interest" review. The 404(b)(1) guidelines prohibit the Corps from permitting a discharge if: (1) there is a practicable alternative that would have a less adverse environmental impact; (2) the discharge would cause or contribute to significant degradation of the waters of the United States; or (3) the discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem. (40 C.F.R. §§ 230.10, 230.12(a)(3).)

The public interest review process requires the Corps to evaluate the direct and cumulative impacts of the proposed discharge and the intended use of waters of the United States on the public interest and weigh these against expected benefits of the proposal. As part of this process, the Corps must consider "[a]ll factors relevant to the proposal" including effects on conservation, economics, aesthetics, general environmental concerns, wetlands, fish and wildlife values, land use, flood hazards, shoreline erosion and accretion, recreation, water supply and conservation, and water quality, among other factors. (33 C.F.R. § 320.4(a).) The Corps must deny a Section 404 permit application if it determines that the discharge would be contrary to the public interest.

Besides adding a layer of environmental protection to otherwise environmentally destructive activities, a Section 404 permit also triggers the requirements of Section 401 of the CWA. (33 U.S.C. § 1341(a)(1).) Section 401 requires any applicant for a federal permit (e.g. a section 404 permit) to provide the permitting agency (e.g. the Corps) with a certification from the state (in this case, the Central Valley Regional Water Quality Control Board) that any proposed discharge will comply with the applicable requirements of the CWA and state law. The state may impose conditions of approval on the water quality certification to ensure that the discharge will meet all applicable federal and state water quality standards. (PUD No. 1 v. Jefferson County, 114 S. Ct. 1900 (1994).) No federal license or permit may be granted unless the required certification has been obtained or waived. (33 U.S.C. § 1341(2)(1).)

#### **D. FEDERAL ENDANGERED SPECIES ACT.**

##### **1. The Bureau Must Consult With the USFWS Regarding the Proposed Expansion Pursuant to Section 7 of the ESA.**

Under Section 7(a)(2) of the ESA, all federal agencies have a duty to insure that any federal agency action they authorize, fund or otherwise carry out does not jeopardize the continued existence of any listed species or adversely modify or destroy designated critical habitat. (16 U.S.C. § 1536(a)(2).) Federal "agency actions" include, but are not limited to: (1) actions to conserve listed species and their habitats; (2) issuance of regulations; (3) granting of licenses, permits, easements, contracts, and leases; and (4) actions that directly or indirectly cause changes to air, land or water.

(50 C.F.R. § 402.02.) The Bureau's involvement in the proposed expansion as a co-lead agency constitutes a federal agency action subject to Section 7. In addition, if the proposed expansion requires a dredge and fill permit from the U.S. Army Corps pursuant to Section 404 of the Clean Water Act, the corps' issuance of the permit is also a federal agency action subject to Section 7 of the ESA.

If a federal agency proposes to carry out an action that may adversely affect listed species or critical habitat, it must formally consult with the USFWS regarding the impact of this action on listed species and designated critical habitat (if any). In this case, the Bureau and potentially the Army Corps must consult with the USFWS regarding the impacts of the proposed expansion, and dredge and fill permit, respectively, on federally listed species including bald eagle, peregrine falcon and red legged frog. During the consultation process, the federal agency action cannot make an "irreversible and irretrievable commitment of resources" that would foreclose the agency's ability to implement "reasonable and prudent alternatives."<sup>47</sup> (16 U.S.C. § 1536(d).) In other words, the action agency cannot go forward with the project until consultation is completed.

During formal consultation, the USFWS must, among other things: (1) review all relevant information concerning the listed species and critical habitat; (2) evaluate the current status of the species and critical habitat; and (3) analyze the direct, indirect and cumulative effects of the action on the species and critical habitat. (50 C.F.R. § 402.14(g).) Within 45 days after the conclusion of formal consultation, the USFWS must issue a biological opinion as to whether the proposed agency action could jeopardize any listed species or adversely modify or destroy designated critical habitat. (16 U.S.C. § 1536(b)(3)(A).) The biological opinion must be based on the best available scientific information, and describe how the proposed agency action will affect the listed species, including an analysis of direct, indirect and cumulative effects. (16 U.S.C. § 1536(a)(2).)

If the USFWS issues a jeopardy opinion, it must include reasonable and prudent alternatives that would avoid jeopardy. (16 U.S.C. § 1536(b)(3)(A).) If the action will result in a "take" of any listed species (see below), the biological opinion must also include an "incidental take statement." The incidental take statement authorizes the federal agency to take certain members of the species, provided such taking will not jeopardize the species and the agency implements "reasonable and prudent measures" to minimize the adverse impacts of the taking. (16 U.S.C. § 1536(b)(4).)

## **2. The Department Must Obtain an Incidental Take Permit for the Proposed Expansion Pursuant to Section 10 of the ESA.**

Alternatively, assuming for the sake of argument that the Bureau's involvement in the proposed expansion is *not* a federal agency action subject to Section 7 consultation requirement, and no Section 404 permit is required from the Army Corps, the Department is still subject to the ESA. The ESA prohibits any "person," *which includes any state agency*, from "taking" a federally listed

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<sup>47</sup> Reasonable and prudent alternatives are those that: (1) can be implemented in a manner consistent with the purposes of the proposed agency action; (2) are within the agency's legal authority and jurisdiction to implement; (3) are economically and technologically feasible; and (4) would not jeopardize the species or adversely modify or destroy critical habitat. (50 C.F.R. § 402.02.)

species, unless the person obtains a "incidental take permit" from the USFWS. (16 U.S.C. §§ 1532(13), 1538(a)(1)(B), 1539(a)(1).) "Take" is defined under the federal ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." (16 U.S.C. § 1532(19).) "Harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." (50 C.F.R. § 17.3.) This definition of "harm" was upheld by the U.S. Supreme Court. (Sweet Home Chapter of Communities v. Babbitt, 115 S. Ct. 2407 (1995).)

The ongoing activities and proposed expansion at Mammoth Bar OHVA have the potential to "take" federally listed species in violation of the ESA, either directly through crushing by OHVs, or indirectly through habitat modification from trail and facility construction, maintenance and use, erosion and sedimentation, and other impacts. Federally listed species which are present or may be present in the project area include bald eagle, peregrine falcon and red-legged frog and possibly others. Accordingly, the Department may need to obtain an incidental take permit from the USFWS.

#### E. WILD AND SCENIC RIVERS ACT (WSRA) CONSIDERATIONS.

In January 1993, the Bureau determined that three segments of the North and Middle Forks of the American River are eligible for designation as a "wild and scenic river" under the WSRA. This eligibility determination includes 23 miles of the Middle Fork from Oxbow Dam to the confluence of the North Fork of the American River. The area where the Mammoth Bar OHVRA is located has been determined eligible for "scenic" designation. The chief of the Division of Planning and Technical Services for the Bureau further determined that, within one-quarter mile of the river, these eligible segments will be managed to protect all outstandingly remarkable values, including fish, wildlife, ecological, scenic, cultural and recreational, until the determination is made whether these river segments are suitable for inclusion within the wild and scenic river system.<sup>48</sup>

The Bureau study noted the Middle Fork's outstandingly remarkable values, all of which could be impacted by existing or expanded OHV activities:

<u>Recreation:</u>	Western States Trail and whitewater rafting;
<u>Scenic:</u>	Land and water forms, due to the deep and steep canyon walls. Rugged terrain;
<u>Wildlife:</u>	Candidate species for both federal and state endangered or threatened listings;
<u>Fish:</u>	Rainbow trout and habitat;
<u>Ecological/</u>	
<u>other values:</u>	Unique biological communities, including ecosystem diversity and butterflies.

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<sup>48</sup> Susan Hoffman, chief, Division of Planning and Technical Services, Bureau of Reclamation, memo to Interagency Study Team re *Determination of Wild and Scenic Eligibility of Segments of the American River*, Feb, 1, 1993; see also Bureau of Reclamation, American River Water Resources Investigation, Technical Team's Inventory and Recommendation for Wild and Scenic River Eligibility and Preliminary Classification, North and Middle Forks American River, Jan. 7, 1993.

Both the proposed expansion and current OHV activities have the potential to adversely impact the outstanding values that made this river segment eligible for national designation. User conflicts in and around Mammoth Bar harm the "recreation" values, especially with motorized recreation degrading the outdoor experience for other users with engine noise, dust, etc. "Scenic" values, already harmed by some of the incremental work done for the OHV area, would be impacted further by the addition of new trails.

"Wildlife" degradation would include fragmentation and disruptions within previously unspoiled habitat corridors (e.g., new trails upstream of the current OHV area) and motorized recreation impacts to listed and candidate threatened and endangered species. Degradation of water quality and fish habitat from Mammoth Bar erosion threatens the "fishery" values of the Middle Fork American. And finally, OHV activities (current and expanded) have had or could have impacts to the unique biological communities (butterflies populations, for example) and to the river's ecosystem biodiversity in general.

#### 1. Non-degradation - Section 10A, WSRA

Clearly, any expansion of the Mammoth Bar OHVRA is highly likely to adversely affect the outstanding values in this eligible segment of the Middle Fork, particularly given that the soil type at Mammoth Bar is considered highly erodible (as documented by the U.S. Soil Conservation Service and in the Corps' American River Watershed Investigation EIS). The proposed expansion would extend OHV use one and one-half miles upstream to Poverty Bar.

This area is currently a primitive, near wilderness region. Since one of the criteria for a "scenic" classification is "no substantial evidence of human activity," the enlarged OHV area plainly could jeopardize a suitability determination for this region of the Middle Fork.<sup>49</sup>

Expansion of the Mammoth Bar OHVRA is also contrary to the WSRA "non-degradation clause" (Sec. 10A),<sup>50</sup> and the interim management direction in response to the Interagency Wild and Scenic Rivers study. In recognition of the eligible status of the Middle Fork American River, and as noted above, the Bureau stated that "...all outstandingly remarkable values identified within these segments and within one-quarter mile of the river will be protected as required under the WSRA." We urge the Bureau to consider this in its planning.

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<sup>49</sup> The Department's previous assertion that the OHV activities at Mammoth Bar are not "mutually exclusive" from protection of the "outstandingly remarkable values" on the Middle Fork defies common sense and appears to indicate an inappropriate bias in favor of OHV expansion, to the detriment of other values that deserve equal if not greater consideration. (see e.g., letter from CDPR's Kranz to FOR's Casey, 11/21/96).

<sup>50</sup> The Wild and Scenic Rivers Act (16 U.S.C. 1271-1287); see also "Final Revised Guidelines for Eligibility, Classification and Management of River Areas," (Federal Register/ Vol. 47, No. 173, Sept 2, 1982) p. 39458.

### CONCLUSION

In sum, as these comments demonstrate, the existing OHV area at Mammoth Bar is in violation of numerous state and federal environmental laws, including CEQA, Fish and Game Code § 1601, Clean Water Act § 404, the OHVMA, Bureau of Reclamation regulations, as well as the AFGP and IRMP.

In light of this, the proposed expansion may not proceed until the area is brought into compliance with these laws, or is closed and relocated elsewhere. If the Department and the Bureau insist on proceeding with the proposed expansion, they must prepare a joint EIS/EIR, undergo state and federal agency consultation under CESA and the ESA, and obtain Section 1601 and Section 404 permits.

# ***APPENDIX***

## **photos of the Mammoth Bar Off-Highway Vehicle Recreation Area**

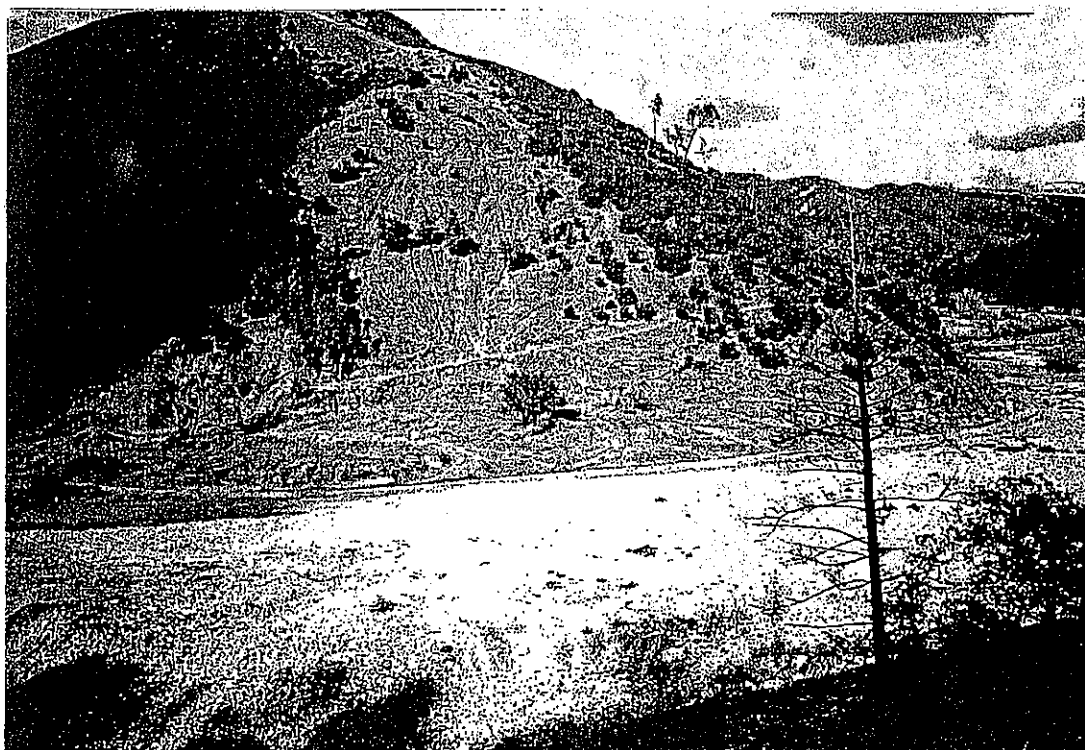
**Plates 1-3**



# Mammoth Bar OHVRA



March 1997. Note motocross track at the far left of photo and *new* switchback trail near top of hill. View looking north from across Middle Fork American River.



March 1990. *Before* OHV Trust Fund grants and construction activities.



March 1997. Motocross tracks and parking lots adjacent to Middle Fork American River.



February 1995. Closeup of motocross track adjacent to river with parking lot behind.



**March 1994.** Overview of Mammoth Bar OHVRA. Parking lot and motocross tracks right and center of photo. View looking east upstream.



**February 1995.** Closeup of area with partial view of motocross track. View looking north.

**FAX TRANSMISSION COVER SHEET****BILL LOCKYER**  
Attorney GeneralState of California  
**DEPARTMENT OF JUSTICE**

8

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TO: NAME: CARL DRAKE  
OFFICE: OFF-HIGHWAY MOTOR VEHICLE RECREATION/DP&R  
LOCATION: SACRAMENTO  
FAX NO. (916) 324-1610

FROM: NAME: ELLYN S. LEVINSON, Deputy Attorney General  
Department of Justice, Attorney General's Office  
455 Golden Gate Avenue, Suite 11000  
San Francisco, California 94102-3664

FAX NO. (415) 703-5480/(8) 593-5480

PHONE NO. (415) 703-5518/(8) 593-5518

**MESSAGE/INSTRUCTIONS**

1 BILL LOCKYER, Attorney General  
Of The State Of California  
2 JOHN DAVIDSON  
Supervising Deputy Attorney General  
3 ELLYN S. LEVINSON (State Bar No. 077176)  
Deputy Attorney General  
4 455 Golden Gate Avenue, Suite 11000  
San Francisco, California 94102-3664  
5 Telephone: (415) 703-5518  
Facsimile: (415) 703-5480  
6

Attorneys for Respondent and Defendant

7  
8  
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF SACRAMENTO  
11  
12

13 FRIENDS OF THE RIVER; SIERRA CLUB; and  
14 ENVIRONMENTAL LAW FOUNDATION,

Petitioners and Plaintiffs,

15 v.  
16

17 RUSTY AREIAS, in his official capacity as the  
Director of the California Department of Parks and  
Recreation; CARL DRAKE, in his official capacity as  
18 the Chief of the California Division of Off-Highway  
Motor Vehicle Recreation; CALIFORNIA  
19 DEPARTMENT OF PARKS AND RECREATION;  
CALIFORNIA DIVISION OF OFF-HIGHWAY  
20 MOTOR VEHICLE RECREATION; and OFF-  
HIGHWAY MOTOR VEHICLE RECREATION  
21 COMMISSION,

22 Respondents and Defendants.  
23  
24

Case No.: 00CS00591

STIPULATION FOR  
SETTLEMENT AND DISMISSAL

25 The parties to this action and their counsel of record are the following:

26 Friends Of The River; Sierra Club; and Environmental Law Foundation

27 ("petitioners and plaintiffs") are represented by Iryna A. Kwasny, Esq. of the Environmental Law  
28

1.  
STIPULATION FOR SETTLEMENT AND DISMISSAL

Case No. 00CS00391

1 Foundation.

2 California Department of Parks and Recreation (hereinafter referred to as the  
3 "Department"); and California Division of Off-Highway Motor Vehicle Recreation (hereinafter  
4 referred to as the "Division"); ("respondents and defendants") are represented by Bill Lockyer,  
5 Attorney General of the State of California by Ellyn S. Levinson, Deputy Attorney General.  
6 Respondents and defendants Off-Highway Motor Vehicle Recreation Commission, Rusty Areias  
7 and Carl Drake have previously been dismissed from this action.

8 The parties to this action, by and between their counsel of record stipulate to the  
9 following agreement in order to completely resolve the underlying action which challenges the  
10 legality of certain off-highway motor vehicle activities at Auburn State Recreational Area. The  
11 area in which the off-highway motor vehicle activities occur is commonly referred to "Mammoth  
12 Bar Off-Highway Motor Vehicle Recreation area."

### 13 SECTION I

#### 14 Comprehensive Management Studies

##### 15 Mammoth Bar

16 1. Immediately following execution of this stipulation, Department staff will  
17 convene a meeting of a task force to be comprised of two plaintiffs' representatives, two  
18 representatives of the Off-Highway Motor Vehicle users group and Department staff, hereinafter  
19 Mammoth Bar Task Force.

20 2. The purpose of the task force is to design the scope of a long-term  
21 comprehensive management study for all Off-Highway Motor Vehicle activities within the  
22 Mammoth Bar Off-Highway Motor Vehicle Recreational area.

23 3. The scope for a Request For Proposals for the management study will be  
24 prepared by the Department staff in consultation with Department of Fish and Game, the U.S.  
25 Fish and Wildlife Service, and task force members for the purposes of contracting with an  
26 interdisciplinary independent consultant who will conduct the study. The actual Request For  
27 Proposals and consulting contract will be developed by the Department in conformity with state  
28

2. \_\_\_\_\_

STIPULATION FOR SETTLEMENT AND DISMISSAL

Case No. 00CS00391

1 law and will be funded by the Department. It is the intent of the parties that the study will be  
2 completed not later than 18 months from execution of this stipulation.

3 4. Plaintiffs and defendants agree that the study will include, but not be  
4 limited to the following:

5 a. An identification of all necessary permits required by regulatory agencies  
6 for recreational activities undertaken within Mammoth Bar Off-Highway Motor  
7 Vehicle area;

8 b. A combined soils and wildlife habitat survey at the Mammoth Bar Off  
9 Highway Motor Vehicle area;

10 c. An analysis of environmental effects from recreational uses allowed at  
11 Mammoth Bar Off-Highway Motor Vehicle Recreational area.

12 Auburn State Recreational Area

13 5. Concurrent with creation of the Mammoth Bar Task Force, Department  
14 staff will convene a meeting of a larger task force to be comprised of representatives from  
15 recreational activities at Auburn State Recreational Area, including, but not limited to,  
16 representatives of the Off-Highway Recreational Vehicle Community hereinafter Auburn State  
17 Recreation Area Task Force. The purpose of the Auburn State Recreational Area Task Force is  
18 to design the scope of a long-term comprehensive management study for recreational activities  
19 within the Auburn State Recreational Area. The purpose of the study is to aid the Department in  
20 deciding on the appropriate type location and level of recreational uses in the Auburn State  
21 Recreational Area, including the Mammoth Bar Off-Highway Motor Vehicle area.

22 6. The management study for the Auburn State Recreational Area will  
23 include but not be limited to:

24 a. An identification of all necessary permits required by regulatory agencies  
25 for recreational activities undertaken within Auburn State Recreational Area;

26 b. An analysis of environmental effects from recreational uses allowed at  
27 Auburn State Recreational Area.  
28

3.

SECTION 2Interim Management Plan

The interim management plan takes effect immediately upon execution of this stipulation and shall remain in effect until completion of the comprehensive long-term management studies described in Section 1. During the interim period the Department agrees to operate the Mammoth Bar Off Highway Motor Vehicle facility as follows:

1. The Department will place signs designating river access at appropriate sub-entrance locations, including the Mammoth Bar Off Highway Motor Vehicle facility and the confluence, within the Auburn State Recreation Area. Also, the Department will request the cooperation of Cal-Trans on placement of signage on I-80 for the Auburn State Recreation Area, that identifies multi-recreational uses of the unit, following consultation with the parties.

2. Non-motorized recreation is allowed at all times when the Park is open, consistent with the maximum protection of public health and safety. Non-motorized uses will not be allowed on the moto-cross track while motorized uses are being conducted. The terms and conditions of special events may exclude conflicting uses, and other specific situations as deemed appropriate by the managing entity for the purpose of public safety. Motorized recreation will continue to be allowed on Sundays, Mondays, and Thursdays, and for the period October 1 through March 31, also on Fridays.

3. Summer closing time will be one-half hour after sunset, but in no event later than 9:00 p.m. Summer is defined as the period April 1 through September 30.

4. Applications for special event permits for activities proposed at Auburn State Recreation Area will be reviewed by the designee of the Director of the Department of Parks and Recreation, and forwarded for comment to Friends of the River, the Mother Lode Chapter of the Sierra Club, District 36 of the American Motorcycle Association, the Mammoth Bar Riders Association, and other interested parties upon request. Decisions on such applications will be at the sole discretion of the Director or his designee.

5. A Wildlife Habitat Protection Plan for the Mammoth Bar Off Highway



1 Motor Vehicle area will be developed by Department staff in connection and compliance with  
2 the preparation and submission of an Off Highway Motor Vehicle cooperative agreement  
3 proposal by the U.S. Bureau of Reclamation for fiscal year 2001-2002 grant cycle. Department  
4 staff will confer with staff from the Department of Fish and Game and the U.S. Fish and Wildlife  
5 Service in connection with preparation of this plan. The plan will comply with Title 14  
6 California Code of Regulations § 4970.15 (proposed by the Division to the Office of  
7 Administrative Law in May 2000).

8           6. Notice of the public meeting required by California Code of Regulations  
9 Title 14 § 4970.09, at which time the U.S. Bureau of Reclamation's Mammoth Bar Off Highway  
10 Motor Vehicle cooperative agreement application is scheduled to be discussed, will be provided  
11 by Department staff to the Friends of the River, Mother Lode Chapter of the Sierra Club, District  
12 36 of the American Motorcycle Association and Mammoth Bar Riders Association specifically,  
13 as well as to the general community and other interest groups and parties.

14           7. The Department will immediately proceed with the process to close and  
15 rehabilitate non-designated unauthorized motor vehicle trails.

16           8. Immediately upon execution of this stipulation, the Department will  
17 initiate the process of conducting a soils survey at the Mammoth Bar Off Highway Motor  
18 Vehicle area. The Soils Survey will be undertaken by an independent consultant mutually  
19 agreeable to the Department and plaintiffs' representatives. The scope of the survey shall include  
20 but not be limited to the following:

- 21           a. The survey is to be of the entire Mammoth Bar Off Highway Motor
- 22           Vehicle area, including the trails, track and staging area.
- 23           b. The survey will utilize the Department's 1991 publication entitled "Soil
- 24           Conservation Guideline/Standards. ("Guidelines").
- 25           c. Trails and facilities constructed, or existing prior to November 1991 will
- 26           be rated as described in Section G, commencing at page 52 of the Guidelines.
- 27           d. New projects built or facilities reconstructed since November 1991 will be
- 28

1 rated, as prescribed in Section G of the Guidelines, and will also be evaluated for  
2 their compliance with all other standards set forth in the Guidelines for "new  
3 projects." For purposes of this stipulation, "New Projects" in the Guidelines  
4 means facilities that have been built or reconstructed subsequent to adoption of  
5 the Guidelines in 1991. Within 30 days of the execution of this stipulation, the  
6 parties will develop an inventory of these trails and facilities that will, at a  
7 minimum, include all moto-cross tracks, motorized trails, and the staging area.  
8 These projects shall not be construed as "new" for CEQA or NEPA purposes.  
9 This evaluation will be incorporated into the comprehensive management study  
10 described in Section One paragraphs 1 through 4 of this stipulation.

11 c. The soil survey will also develop criteria to temporarily close trails to  
12 prevent damage from use when a trail and/or facilities are subject to a rain event.

13 9. In consultation with the appropriate regulatory permitting agency/ies, the  
14 Department will identify and apply for any environmental regulatory permits and/or agreements  
15 which are required for activities and projects at Mammoth Bar Off-Highway Motor Vehicle area.  
16 If a required permit or agreement from a permitting regulatory agency/ies for a particular activity  
17 or project is not, or cannot be, obtained by the time the the comprehensive studies described in  
18 Section 1 are concluded the activity or project will be discontinued.

### 19 SECTION 3

#### 20 Miscellaneous

21 1. The parties will request a joint meeting with Folsom Field Office Staff and  
22 the California Director of the U.S. Bureau of Land Management, or his designee, to discuss  
23 whether any ongoing recreational activities at the Auburn State Recreational Area, including  
24 Mammoth Bar Off Highway Motor Vehicle area jeopardize those Outstandingly Remarkable  
25 Values for which the North and Middle Forks of the American River were determined to be  
26 eligible for Wild and Scenic River status. Defendants will request that the appropriate U.S.  
27 Bureau of Land Management staff submit a written determination concerning this issue and that  
28

determination will be provided by Division staff to the Friends of the River, the Mother Lode Chapter of the Sierra Club, District 36 of the American Motorcycle Association and the Mammoth Bar Riders Association.

2. No expansion of the Off Highway Motor Vehicle area will occur during this interim management period.

3. Defendants will pay plaintiffs' actual attorneys' fees in an amount not less than \$20,000.00, and not more than \$50,000.00, to be determined by the parties or upon motion to the court.


4. It is the intention of the parties that this stipulation be incorporated into a court order.

5. Upon execution of the stipulation by all parties, plaintiffs will file a dismissal of the entire current action, without prejudice to the refiling of a new action limited to a claim that this agreement has been breached by defendants. The dismissal of this action does not prejudice the filing of a new action for a violation that occurs after dismissal of this action.

Dated: \_\_\_\_\_

IRYNA A. KWASNY, Esq.  
Attorney for Petitioners and Plaintiffs

Dated: 7-20-00

  
ELLYN S. LEVINSON  
Deputy Attorney General  
Attorney for Respondents and Defendants

Dated: \_\_\_\_\_

CHARLES E. CASEY, Plaintiff  
Friends of the River

Dated: \_\_\_\_\_

TERRY DAVIS, Plaintiff  
Sierra Club

7.

STIPULATION FOR SETTLEMENT AND DISMISSAL

Case No. 00CS00391

TOTAL P.02

determination will be provided by Division staff to the Friends of the River, the Mother Lode Chapter of the Sierra Club, District 56 of the American Motorcycle Association and the Marinak Bar Riders Association.

2. No expansion of the Off Highway Motor Vehicle area will occur during this interim management period.

3. Defendants will pay plaintiffs' actual attorneys' fees in an amount not less than \$20,000.00, and not more than \$50,000.00, to be determined by the parties or upon motion to the court.

4. It is the intention of the parties that this stipulation be incorporated into a court order.

5. Upon execution of the stipulation by all parties, plaintiffs will file a dismissal of the entire current action, without prejudice to the refiling of a new action limited to a claim that this agreement has been breached by defendants. The dismissal of this action does not prejudice the filing of a new action for a violation that occurs after dismissal of this action.

Dated: 7/20/00

  
IRYNA A. KWASNY, Esq.  
Attorney for Petitioners and Plaintiffs

Dated: \_\_\_\_\_

ELLYN S. LEVINSON  
Deputy Attorney General  
Attorney for Respondents and Defendants

Dated: 7/20/00

  
CHARLES E. CASEY, Plaintiff  
Friends of the River

Dated: \_\_\_\_\_

TERRY DAVIS, Plaintiff  
Sierra Club

1 determination will be provided by Division staff to the Friends of the River, the Mother Lode  
2 Chapter of the Sierra Club, District 36 of the American Motorcycle Association and the  
3 Mammoth Bar Riders Association.

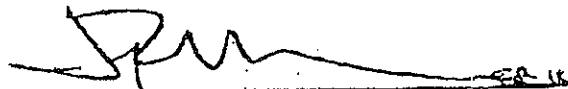
4 2. No expansion of the Off Highway Motor Vehicle area will occur during  
5 this interim management period.

6 3. Defendants will pay plaintiffs' actual attorneys' fees in an amount not less  
7 than \$20,000.00, and not more than \$50,000.00, to be determined by the parties or upon motion  
8 to the court.

9 4. It is the intention of the parties that this stipulation be incorporated into a  
10 court order.

11 5. Upon execution of the stipulation by all parties, plaintiffs will file a  
12 dismissal of the entire current action, without prejudice to the refiling of a new action limited to a  
13 claim that this agreement has been breached by defendants. The dismissal of this action does not  
14 prejudice the filing of a new action for a violation that occurs after dismissal of this action.

15  
16 Dated: 7/22/00

  
IRYNA A. KWASNY, Esq.  
Attorney for Petitioners and Plaintiffs

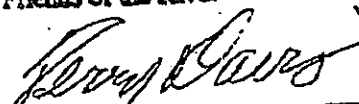
17  
18  
19 Dated: \_\_\_\_\_

ELLYN S. LEVINSON  
Deputy Attorney General  
Attorney for Respondents and Defendants

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22 Dated: \_\_\_\_\_

CHARLES E. CASEY, Plaintiff  
Friends of the River

23  
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25 Dated: 7/20/00

  
TERRY DAVIS, Plaintiff  
Sierra Club

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7.  
STIPULATION FOR SETTLEMENT AND DISMISSAL

Case No. 00CS00391

1 Dated: July 20, 2000

  
2 RUSTY ARELLAS, Director  
3 Department of Parks and Recreation  
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**PROOF OF SERVICE**

I, W. Christian Geckeler, hereby declare:

I am over the age of 18 years and am not a party to this action. I am employed in the county of Alameda. My business address is Public Interest Law Offices, 1736 Franklin Street, Ninth Floor, Oakland, CA 94612.

On July 21, 2000, I caused to be served the attached:

**I. STIPULATION FOR SETTLEMENT AND DISMISSAL**

☒ BY MAIL. I caused the above identified document addressed to the party listed below to be deposited for collection at the Public Interest Law Offices or a certified United States Postal Service box following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service on this day.

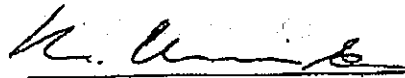
☐ BY HAND DELIVERY. I caused the above-identified document(s) to be delivered by hand to the party(ies) listed below.

☐ BY FEDERAL EXPRESS. I caused the above identified document(s) to be placed in a sealed Federal Express envelope(s) with delivery fees fully prepaid, for next business day delivery to the party(ies) listed below.

☐ By FACSIMILE. I caused the above identified document(s) to be sent by facsimile transmission to the party(ies) listed below at the facsimile number(s) shown.

Ellyn S. Levinson  
Office of the Attorney General  
455 Golden Gate Ave., Suite 11000  
San Francisco, CA 94102-3660  
Telephone: (415) 703-5518

1 I declare under penalty of perjury, under the laws of the State of California, that the  
2 foregoing is true and correct, and that this Declaration was executed at Oakland, California on  
3 July 21, 2000.  
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W. Christian Geckeler

DECLARANT