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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 **Center for Biological Diversity, et al.,**) Case No. _____
14)
15 Plaintiffs,) **DECLARATION OF BRIAN LENEVE**
16 v.)
17 **Bureau of Land Management, et al.,**)
18 Defendants.)

19 I, Brian LeNeve, do hereby state and declare as follows:

20 1. I submit this affidavit in support of Plaintiffs' Motion for Summary Judgment.

21 . The facts stated herein are personally known to me and, if called as a witness, I would and
22 could competently testify thereto.

23 2. I am a painting contractor and reside in Carmel, California, in Monterey County.

24 I have a bachelor's degree in business administration and have been a member and president of
25

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1 two sportsman's organizations and president of a local painting contractor's association. .

2 3. The Clear Creek Management Area ("CCMA") is in San Benito County, which is
3 in the area of influence of the Monterey Bay Chapter of CNPS. Monterey CNPS Chapter
4 members have been visiting the CCMA for many years, and one or more of our members have
5 been working on a flora of San Benito Mountain (part of the CCMA) for approximately 40 years.
6 Our chapter usually takes at least one field trip a year to the CCMA, and other members visit at
7 different times.

8 4. The serpentine soils of the CCMA offer a chance to view a unique assemblage of
9 plants not found any place else in the world. Not only is this the only place in the world where
10 Jeffery Pine (*Pinus jefferyi*), Coulter Pine (*Pinus coulteri*) and Incense Cedar (*Calocedrus*
11 *decurrens*) grow together, it is the home to one federally threatened plant species, the San Benito
12 Evening-primrose (*Camissonia benitensis*) ("CABE") and 10 special status plant species. The
13 CCMA is also home to numerous invertebrate, amphibian, reptile, bird and mammal species of
14 management concern.

15 5. I have been a member of the Monterey Bay Chapter of the California Native Plant
16 Society (CNPS) for 15 years, and am currently vice president. I have been visiting the CCMA
17 for 12 years as an amateur botanist, and have made countless trips to the CCMA over the last
18 three years to familiarize myself with the current condition of the land and the issues involved.

19 6. My 50 years of hunting, fishing, and over 20 years as an amateur botanist,
20 combined with my extensive knowledge of the CCMA have given me considerable knowledge
21 regarding the status of CABE. I have been asked by Jim Weigand, the California State OHV
22 Ecologist for the Bureau of Land Management ("BLM"), to be a part of an "expert" team to
23 identify actual potential CABE sites. I was a member of the CCMA Technical Review Team
24 ("TRT") from February of 2002 until November 12, 2003, at which time BLM ceased holding
25 meetings. In these capacities I have communicated my conclusions, based on my experience and

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1 observations in the field, that BLM has failed and continues to fail to protect CAGE from Off
2 Highway Vehicle (OHV), as set forth more fully below.

3 7. It is acknowledged that Off Highway Vehicle (“OHV”) use is the biggest single
4 threat to the existence of CAGE. OHV use damages CAGE by trampling plants under tires,
5 changing the soil make up where plants are known to occur, and by eliminating potential CAGE
6 habitat. This may happen directly through compaction and erosion of soil in actual or potential
7 CAGE habitat, or indirectly through erosion that causes sediment to discharge onto the terraces
8 on which CAGE live. OHV riding causes sedimentation by crushing and thereby loosening the
9 soil base. When rains come, such loose soil is washed downstream, often onto the streamside
10 terraces that form CAGE habitat. An example of this can be seen in the photos attached hereto.
11 Photo Exhibit 1 shows crushed and loose soil on the left side due to motorcycle riding, and intact
12 soil on the right side that has not yet been disturbed by OHVs. *See* Exhibit 1, attached hereto,
13 photo taken by Brian Leneve in March 2003 on road R011 in the CCMA. Photo Exhibit 2 shows
14 a close up of a barrens area, where riding has dislodged soil, which is now vulnerable to erosion
15 when rains come. *See* Exhibit 2, attached hereto, photo taken by Emily Roberson on a CCMA
16 visit with me in October 2004 on road R011 in the CCMA.

17 8. Over the last three years in my capacity as a member of the TRT, I have consulted
18 with BLM staff regarding impacts to CAGE from OHV in the CCMA. During this time, period,
19 I have visited the CCMA approximately 30 times to assess the impacts that are occurring and to
20 evaluate the effectiveness of BLM’s efforts to protect the species. Based on my experience
21 during this time, I have concluded that BLM’s current management of the CCMA fails to protect
22 CAGE. Further, I have concluded that BLM’s failure cannot be remedied by simply creating a
23 new management regime on paper since my experience indicates that BLM is unable to enforce
24 even the existing restrictions that are supposed to apply to OHV use. Instead, my experience is
25 that BLM has failed to enforce its stated policy of “limited” access to OHVs in the CCMA,

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1 leading to an outlaw mentality on the part of OHV riders that has grown over the last decade as
2 OHV use in the CCMA has increased. I base this statement on my numerous observations, as set
3 forth more fully below, of OHV riders cutting fences to ride in closed areas, ignoring closed
4 signs, riding wherever they want without regard to so-called “designated” or “allowed” trails. All
5 of these activities have either direct or indirect adverse impacts on CABE.

6 **Observations of OHV Use in Open Areas and Barrens**

7 9. BLM’s 1995 Management Plan and Final EIS states that BLM would adopt a
8 “limited” use policy for the CCMA. Under this approach, OHV riders would be limited to two
9 types of riding. First, in limited use areas, riders would be limited to riding on designated routes.
10 Second, on specified open play areas known as “barrens,” riders could ride anywhere they wish.
11 The 1995 FEIS states that BLM would reduce the then existing 420 miles of routes in limited
12 access areas within the CCMA to 270 miles. *See* Litmans Decl., Ex. C at 8; Ex. D at 9. Open
13 “barrens” were to be reduced from the then existing 4000 acres used by OHVs throughout the
14 CCMA to 937 acres. *Id.* The 1995 FEIS states that during the interim period until BLM
15 completed its designation, posting and implementation of these management objectives, the
16 interim route network would be limited to 155 miles and the open barrens would be limited to
17 207 acres, with the remainder conditionally closed. *See* Litmans Decl., Exhibit B at viii. The
18 1999 ROD changed the interim policy from reduced use to “allowed” use on all identified routes.

19 10. Since 1995, BLM has not implemented these management objectives. Instead,
20 over the last decade the amount of trail usage in limited access areas and the amount of open
21 barrens has increased considerably. BLM has in fact acknowledged they have now inventoried
22 440 miles of routes and indicate that 15% (or 66 more miles of routes) appear on aerial photos
23 bringing the total to 506 miles. However they also state that the inventory is not complete. *See*
24 Litmans Decl., Ex. N at 2-6.) Although BLM states there may be 506 miles of actual routes
25

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1 BLM only maintains 270 miles of those 506 leaving the remainder to erode and contribute to the
2 sedimentation problem. In my experience, 440 miles is a gross underestimation of the amount of
3 trails currently being used in the CCMA by OHV riders. First, in my experience there are
4 numerous undesignated trails in the CCMA that lack any official sign postings. Such trails may
5 be significant and cause serious erosion damage to CAGE habitat. *See Exhibit 3, attached hereto,*
6 *a photo taken by Brian Leneve on September 27, 2003 in Larious Canyon, showing a deeply*
7 *rutted OHV trail that is not on the BLM's "user map" and is not signed as a route.*

8
9 11. Second, riders in many instances simply treat limited access as "open"
10 recreational areas similar to open barrens, on which they may ride wherever they wish. In
11 support of this observation, I have included two photos taken by Congressman Sam Farr on a
12 visit with me to the CCMA on December 11, 2004, showing the impacts of what I have observed
13 to be typical riding patterns by OHVs in limited access areas within the CCMA. These photos
14 show that riders typically pay little attention to whether or not a route is "designated" but instead
15 simply ride wherever they please, treating the hillside like an open play area. Each of the areas
16 depicted in this photo are directly above CAGE habitat, however, and therefore have significant
17 indirect impacts on CAGE due to erosion caused sedimentation onto CAGE habitat. *See Exhibit*
18 *4, attached hereto, photo of Larious Canyon, taken on December 11, 2004; Exhibit 5, attached*
19 *hereto, photo from Road R002 looking into Larious Canyon, taken on December 11, 2004.*
20 These photos show numerous tracks that are certainly not counted in BLM's "database" of routes
21 currently in existence. In my experience, this type of trail proliferation, common throughout
22 limited access areas in the CCMA, makes it impossible to determine the extent of current trail
23 usage. These photos also illustrate that the mere "designation" of an "open" trail does not
24 prevent riders from riding wherever they wish. In my experience and observation, BLM has not
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1 demonstrated the ability to control such unregulated riding within limited access areas. In my
2 experience, BLM has not proposed any workable strategy for keeping riders on designated trails.
3 As a result, adverse impacts to CABE continue.

4 12. Further, the 2004 DEIS acknowledges 2800 acres of open barrens within the
5 CCMA, as opposed to the management objective of 970 acres. Even this number is a gross
6 underestimation, given that riders treat limited access areas throughout the CCMA as open play
7 areas, without regard to whether or not an open areas is “designated.” See Exhibits 4-5, attached
8 hereto. As discussed above, OHV riding on barrens immediately above CABE sites causes
9 sedimentation for years to come. When motorcycles ride on barrens they pulverize the soil
10 making it easier to wash down in rain events or blow away in dry wind events as occurs in the
11 summer. See Exhibits 1-2, attached hereto. Both of these means of transporting new sediment to
12 a CABE site are detrimental to the makeup of the soil CABE needs to survive.

13 13. My understanding in reading the 1995 FEIS was that BLM intended to restrict
14 riding in the CCMA during the interim period prior to BLM’s designation and implementation of
15 enforceable restrictions on designated routes and open play areas. Thus, the 1995 FEIS stated an
16 interim goal of 155 miles for designated routes, and 207 acres for open barrens, which would be
17 *raised only after* BLM had implemented the necessary management protections for CABE. See
18 Litmans Decl., Exhibit B at viii. Instead, the opposite result has occurred, with increasing OHV
19 riders on an ever increasing number of trails within the CCMA, while BLM continues to move
20 slowly on finalizing, much less implementing, any coherent management strategy.

22 **Riding in Closed Areas**

23 14. My experience is that OHV riders routinely recreate in areas that are technically
24 “closed” to OHV riding by either ignoring trail signs or cutting fences. Over the last three years
25 I have witnessed numerous countless OHV tracks in closed areas. In my experience, posting

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1 “closed” signs has little effect in preventing OHV riding from occurring. On a December 11,
2 2004 visit to the CCMA, I detected motorcycle tracks (often multiple tracks) in closed areas on
3 the closed side behind 28 out of 32 posted “closed signs.” See Exhibit 6, attached hereto, is a
4 photo taken by Congressman Farr on this site visit along Road R008 showing one of these closed
5 signs, in this case with multiple motorcycle tracks on the closed side.

6 15. Even where areas have been fenced, significant OHV riding continues to occur. .
7 See Exhibit 7, attached hereto, photo taken by Brian LeNeve on March 2002, in the Sawmill
8 Creek drainage inside of the San Benito Research Natural Area showing a fence cut to enter the
9 RNA. During the 2003-2004 season, for example, I made nine visits to the four most affected
10 CABE sites in three different months. The four sites are 122100 Upper Clear Creek Canyon (1),
11 121100 Upper Clear Creek (2), 61100 Larious Tributary, and 51300 Indian Hill. These visits
12 took place on December 1, 2003; December 21, 2003; December 26, 2003; March 14, 2004;
13 March 21, 2004; March. 28, 2004; April 4, 2004; April.11, 2004; and April 25, 2004. During
14 these nine trips, I discovered six cut or damaged CABE site fences (only 2 of the 4 sites were
15 fenced), motorcycle tracks on the combined four sites a total of 21 different times, and a
16 minimum of 97 different motorcycle tracks. See e.g., Exhibit 8, attached hereto, photo taken by
17 Brian LeNeve on March 14, 2004, Larious Canyon CABE site, taken by Brian LeNeve, showing
18 fence cut to allow entrance into fenced off CABE site.
19

20 **BLM’s Inability or Unwillingness to Enforce Restrictions**

21 16. In my experience, BLM has not taken the measures necessary to protect CABE
22 and continues to manage the CCMA in a manner designed to appease OHV riders at the expense
23 of other users of the CCMA. For example, after completing the 1995 FEIS, BLM stated to the
24 Fish and Wildlife Service that its highest priority was to “fence all known occurrences of CABE
25

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1 by November, 1996. Any known occurrences left unprotected by Nov.1996 will be protected by
2 closure of all routes that threaten the habitat until adequately protected. Any new occurrence or
3 suboccurrences found on public land will signed for protection within 4 weeks and protected
4 with fence within 12 weeks.” *See* Litmans Decl., Ex. I at 4. However, in my experience, this has
5 not occurred. One site found in Larius Canyon (61100 Larius Tributary) in 1998 was not
6 protected until 2004, allowing unrestricted travel over the site for seven years. Since fencing was
7 established in 2004, I have found that fence cut five times in the first year and OHV use
8 continuing in this area.

9 17. BLM has also not totally fenced in another CABE site (251100 Jade Mill), nor
10 has it assessed the remainder of the Jade Mill site as CABE habitat as required by the USFWS
11 1997 Biological Opinion (“BO”). *See* Litmans Decl., Ex. C at 9 (“However, the use of the Jade
12 Mill as a camping area needs to be analyzed as much of the used area, while not currently
13 occupied appears suitable for this species.”). The BO found Jade Mill to be potential CABE
14 habitat, which should have been protected to allow for recovery of the species. Without new
15 areas the species cannot expand and recover, and if it cannot expand it remains threatened or
16 endangered. Instead, BLM continues to allow camping on the remainder of the site without
17 designating the area as a camping site and without providing proper facilities for campers such as
18 a public latrine. Absent proper facilities, campers continue to destroy an actual CABE site. BLM
19 has also failed to complete fencing projects identified in the Interim Protection Strategy
20 including projects #6-9 and #12. *See* Litmans Decl., Exhibit J at 6.

21 18. Prior to the filing of this lawsuit, there were two CABE sites in Upper Clear
22 Creek that were not fenced despite the fact that BLM was aware of these sites from the time
23 CABE was first listed as threatened back in 1985. While the area these two sites are located in is
24 closed to OHV use, BLM has not been able to prevent riders from entering and recreating in this
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1 area. Riders, in fact, are blatant enough to ride immediately passed closed area signs. By not
2 fencing the sites as required, BLM allowed use of these sites to anyone who would ride into the
3 closed area, a common occurrence, which, as discussed above, I observed tracks 28 out of 32
4 times I visited the Upper Clear Creek area. Due to this lawsuit, BLM did finally fence the area
5 in 2004.

6 19. According to the 1997 BO, BLM is supposed to post warning signs to OHV riders
7 when 10 incidents of OHV trespass on CABE sites are detected, and is required to close the
8 CCMA to OHVs when 15 incidents of trespass occur. According to BLM's own monitoring
9 reports, BLM has detected over 15 incident of damage in 1999, 2002, 2003 and 2004. See
10 Litmans Decl., Exs. W (16 incidents in 1999), Y (20 incidents in 2002), Z (15 incidents in 2003),
11 and O (18 incidents in 2004). However, BLM has never closed the CCMA to OHV riders.
12 Moreover, until I wrote to BLM with a specific request based on my own observations, prior to
13 November 2003 BLM had *never* even posted a warning to OHV riders, which is supposed to be
14 automatically triggered by 10 incidents of OHV trespass.
15

16 20. Despite the fact that the number of BLM's recorded incidents of trespass have
17 continually exceeded the level requiring OHV closure under the 1997 BO, in my experience
18 considerably more OHV trespass occurs on CABE sites than is reported by BLM.

19 21. BLM's monitoring significantly underestimates the extent and frequency of OHV
20 trespass on CABE habitat in several ways. First, BLM's method fails to record the frequency of
21 OHV trespass on CABE sites. This happens because BLM conducts its monitoring on a monthly
22 basis, at which time its staff visits each CABE site and reports the condition of the site in regards
23 to impacts on the species. BLM considers that regardless of the number of tracks seen in each of
24 their monthly visits, or the number of tracks that have come and gone, tracks observed during
25 that monthly visit constitute a single "incident" of trespass. In other words, regardless of how

1 many tracks there are in a month, or how many times during the month tracks were made, under
2 BLM's calculations, the multiple tracks count as one incident per site per month.

3 22. To give an example, during my frequent CCMA visits between December 2003 to
4 April 2004, I recorded different tracks on one of the four CAFE site on seven of my nine visits,
5 in three separate month periods. However, because BLM only counts "incidents" once a month,
6 BLM would only have recorded three incidents for that site, not seven. I found evidence of
7 trespass 21 times out of a possible 36 (9 x 4) during my nine site visits to the four CAFE sites
8 during this three month period alone, yet BLM only reported 18 incidents in the *entire year*,

9 23. In addition, as discussed above, BLM would not distinguish between numerous
10 motorcycle tracks at a single site on its monthly visit. For example, in a December 26, 2003 visit
11 to an Upper Clear Creek CAFE site, I observed between 25 and 50 different OHV tracks. (*See*
12 *Photo Exhibit 9 attached hereto, taken by Brian LeNeve.*) In my view, these tracks represent
13 dozens of incidents of trespass alone at this one site, yet BLM records such violations as a single
14 incident. During my nine visits in the three-month period from December 2003 to April 2004, I
15 detected a *minimum* of 97 different tracks on four CAFE sites.

16 24. Second, BLM's monitoring approach does not account for the fact that rain
17 washes away motorcycle tracks, making them undetectable in many instances. For example,
18 Exhibit 10 to this declaration is a photo I took of motorcycle tracks at the same Upper Clear
19 Creek CAFE site as depicted in Exhibit 9, but five days earlier on December 21, 2003. The
20 photo depicts four motorcycle tracks. Two of the tracks reveal tread marks, indicating that no
21 rain has occurred since the trespass. The other two demonstrate how tracks may fade after
22 rainstorms; each is hardly noticeable. In my experience, any significant storm will eliminate
23 tracks altogether, thereby erasing the evidence of trespass for subsequent BLM monitors.

24 25. Third, the BO only requires action based on damage to occupied CAFE sites.
25 While BLM does record damage to some potential CAFE sites nothing is done about the

1 damage, and BLM has not even fully identified all potential CABE sites. It also goes without
2 saying that excessive OHV riding above CABE sites causing sediment erosion and significant
3 indirect impacts to CABE sites is not recorded as incidents requiring either warnings or eventual
4 closure. In my experience, this approach fails to document the real threat that OHV riding is
5 posing to CABE, which requires good quality habitat to recover in the hope of eventual de-listing
6 under the federal ESA.

7 26. At this point in time, I do not believe that BLM is committed to taking the action
8 necessary to protect CABE in the CCMA and thereby to avoid jeopardy to the species as set
9 forth in the 1997 BO. A key component of the 1997 BO, was that BLM would have sufficient
10 law enforcement to regulate OHV riding in the CCMA. Since I have been involved with the
11 CCMA, since 2002, however, BLM has had, and continues to have only one full time law
12 enforcement official to patrol an area BLM now states is over 70,000 acres. More to the point,
13 the evidence that I have collected, as well as BLM's own monitoring reports showing repeated
14 violations of trespass in CABE sites, shows that the existing law enforcement regime is
15 inadequate. Yet a review of BLM's website reveals no plans to hire new law enforcement staff.
16 Moreover, BLM's website further reveals that the positions of Park Ranger, Trails Restoration,
17 Coordinator and Supervisory Law Enforcement Ranger are all *vacant*. See
18 <<http://www.ca.blm.gov/hollister/directory.html>> (Printout attached as Exhibit CC to the
19 Declaration of Brian Litmans). In my experience, without a clear commitment to enforcement,
20 BLM will have little ability to implement whatever management program it eventually adopts to
21 protect CABE in the CCMA.
22

23 27. Besides lacking in personnel, it is my experience that BLM does not have the
24 willingness to restrict OHV riding in the CCMA in the absence of direct court action. An
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1 example of what I am referring to is a recent OHV race (Enduro). The 2005 Quicksilver Enduro
2 was scheduled to occur on 2-20-05. Federal Register Notice Vol. 5, No. 24 (ca-190-98-1610-AF-
3 24-1a) requires a 3-day closure of the CCMA if, after 8" of rain for the season, there is 1/2" in 24
4 hrs or 1" in 72 hrs. The notice also says that if the "road and trail surfaces have not dried
5 sufficiently to allow traffic without damage to surface, the area shall remain closed." *Id.* In the 3-
6 day period of February 15, 2005 to February 17, 2005 there was 1.51 inches of rain. *See*
7 <<http://cdec.water.ca.gov/cgi-progs/previous/DLYPCP>> for reports from the 4 rain gauges at the
8 CCMA (SRI, HDZ, SPA, and IDR gauges)
9

10 28. Thus, the BLM was required to close the CCMA for 3 days from February 18
11 through February 20, 2005. In addition, on February 18, 2005, there was 0.51" of rain, so the
12 area should have been closed for 3 days based on that event, or until February 21, 2005. In any
13 event, since the race was scheduled for February 20, 2005, either rain event should have closed
14 the CCMA for the race. Further, it was also not dry enough to allow traffic on February 20, 2005
15 because BLM would not allow myself or other vehicles to enter the CCMA. In fact, it was wet
16 enough that with a little rain on February 21, 2005 (0.3025 inches) BLM reclosed the areas.

17 29. Rather than closing the CCMA, BLM allowed the race to be held while closing
18 the CCMA to all 4x4 vehicles except those involved with the race. The 1997 BO states that wet
19 season use of roads breaks down road berms and increases sediment in creeks, which has an
20 adverse effect on CAFE.

21 30. In my experience, BLM's decision to hold the 2005 Quicksilver Enduro despite
22 wet weather conditions that required BLM to close the area is illustrative of BLM's inability to
23 impose meaningful restrictions on OHV use in the CCMA, and demonstrates BLM's priority of
24 ensuring that races take place over protection of the CCMA and the primrose. In my experience,
25

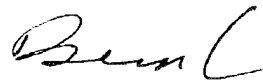
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1 BLM cannot and does not have the will to stop unauthorized entry onto CAFE sites or stop the
2 erosion and sedimentation that harms CAFE populations and CAFE habitat. The only way to
3 protect this threatened species and prevent other sensitive species from becoming threatened or
4 endangered is to substantially limit OHV use throughout the CCMA until BLM can develop a
5 plan to prevent further damage to CAFE. This was BLM's stated intention in its 1995 FEIS, but
6 BLM has simply never implemented this stated condition to avoid jeopardy to CAFE under the
7 federal ESA. This plan would have to include additional Law Enforcement to insure compliance
8 with the plan, a system to monitor and verify compliance with the plan, and consequences for
9 OHV non-compliance. It is my opinion that, faced with the alternative of closure, responsible
10 members of the OHV community could assist BLM implementing effective regulatory measures
11 to eliminate damage to CAFE and its habitat. Without BLM's commitment to take such action,
12 however, it is unlikely that this species will recover.
13

14 I declare under the penalty of perjury that the foregoing is true and correct and was
15 executed this 28th day of March 2005 at Carmel, California.
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18 _____
19 BRIAN LENEVE
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