

April 23, 2013

To: Director (210)
Attn: Brenda Hudgens-Williams
20 M Street SE, Room 2134LM
Washington, DC 20003

Re: Proposed Resource Management Plan, Clear Creek Management Area

Standing

My name is William Spence. I am filing this Protest on behalf of myself, the Bay Area Mineralogists (BAM), the American Lands Access Association (ALAA) and the Santa Clara Valley Gem & Mineral Society (SCVGMS) based in San Jose, California. Acting on behalf of myself and these groups, I have attended half of the hearing/scoping meetings related to Clear Creek; attended the 2/22/10 Socioeconomic workshop at the invitation of BLM; and engaged in multiple, one-on-one written and verbal communications with District Manager Rick Cooper, Planning Coordinator Sky Murphy, Geologist Tim Moore, and/or Archaeologist Erik Zaborsky during the course of the RMP's development. My attendance at the Hollister hearing of 1/14/10 is evidenced in Appendix B, and attendance at the Socioeconomic workshop is documented in Attachment 2 to Appendix C of the Proposed RMP. In addition I travelled to San Francisco to meet privately with EPA representatives Johnson, Den and Stralka concerning their methodology. Commencing in late 2012 I communicated with State BLM officials Kenna and Stifel by telephone in an attempt to expedite closure of the BLM-EPA-Cal OHV dispute.

Background

Mineralogy is the study of naturally occurring inorganic chemicals in crystal form. Understanding minerals and typical mineral associations helps to understand geology more broadly, including the relationships between rock types and ores and minerals of economic significance. Members of Bay Area Mineralogists have been personally responsible for identifying and scientifically describing several new mineral species from CCMA. It should be noted that CCMA is a geologically and mineralogically unique area that has produced certain mineral species that have been found nowhere else and others that, although not unique here, are of uniquely fine quality. It is difficult to explain to a layman just how special CCMA is to mineralogists.

Lapidary arts involve the creation of jewelry and decorative art from naturally occurring inorganic materials. Historically CCMA has been a source for clubs like SCVGMS of excellent lapidary "rough" in the form of plasma agate, jadeite and other stones—not to mention the semi-precious gemstone, benitoite. While nephrite jade (actually a dense form of serpentine) is relatively common in places like Big Sur, actual jadeite is extraordinarily rare, and CCMA is one of the few places where such material can be found in California.

Informally we refer to both of these groups as "rockhounds".

Protest

I and the above organizations protest the Proposed RMP on the grounds that BLM has failed to comply with the National Environmental Policy Act (NEPA) in the following respects:

- 1. The Proposed RMP fails to consider in good faith the unique requirements of mineralogists and rockhounds.** By mid-2010 BLM had indicated its intent to restrict the number of annual CCMA visits per user to 5. After consultation I notified DM Rick Cooper that the rockhound community could comply with such a limit provided that we continued to have access to a listed subset of the full road and trail system in CCMA. (E-mail of October 28/29, 2010, Attachment 1 hereto). Enabling this approach, the Draft RMP dated November 2009 had included a paragraph in section 4.1.8.1 stating:

“Special recreation permits for hobby gem and mineral collection would be issued on a case-by-case basis. Under this alternative [Alternative E, the Preferred Alternative], the requirement to obtain a special recreation permit for rockhounding would have negligible impact [emphasis added] on CCMA visitors because the opportunities for hobby gem and mineral collection would continue to be available in the ACEC.”

This provision led me and the rockhounding community to believe that reasonable accommodations would be made in the final RMP. As a result we continued to maintain a low profile, assuming the good intentions of BLM.

The Proposed RMP, without explanation, consultation or advance warning, contains no similar provision, and the roads and trails outlined in my e-mail (above) are designated “closed” under the Proposed RMP. On April 8 of this month I telephoned DM Rick Cooper seeking an explanation for this omission, and he had none. He requested that I re-send the e-mail, which I did with amplification of the comments. (Attachment 2.) During the course of the phone call Rick Cooper indicated that he was unaware of the location of a particular collecting locality (the so-called “artinite pit”) which is well known to mineralogists and to previous employees of the Hollister office. It had also been explicitly mentioned in the 10/28/10 e-mail. He also seemed not to grasp the difficulty of hiking from the proposed open “Loop” to and from various collecting localities in the space of one day.

Together these revelations indicate that in the RMP process the Hollister DM (who we assume to be the primary policymaker of the Plan) has not adequately familiarized himself with the nature of who rockhounds are, what rockhounds do in CCMA or of the collecting localities there. Without such knowledge, it is impossible to design a workable plan that will have “negligible impact” on our hobby.

Rockhounding locations in CCMA are widely dispersed around the entire CCMA area. Few are within reasonable hiking distance of the roads designated as “open” under the Proposed Plan. Indeed, much of the Loop runs through the San Benito Natural Reserve where collecting would be prohibited in any event. Historically the extensive network of roads developed during mining days has enabled rockhounds to make efficient use of daylight hours by minimizing travel time and maximizing collecting time. As a practical matter refusal by BLM to permit access to the road and trail network would make collecting virtually impossible for all but the youngest and healthiest among us.

We therefore urge BLM to include in the CCMA Record of Decision and the Final RMP the following provision:

“On request, BLM will issue special recreation permits for hobby gem and mineral collecting in CCMA. Such permits will authorize travel by highway-legal vehicles on R- and T- designated BLM routes that are reasonably necessary or advisable to reach the intended collecting locality or localities. Such permits will not authorize off-trail travel, even if permitted vehicles are capable thereof (except in case of emergency or other compelling circumstances). Use of such special recreation permits will remain subject to “days per year” access limits as otherwise stated in this RMP.”

- 2. Age Discrimination/Americans with Disabilities Act.** Generally speaking, rockhounds are almost entirely over the age of 40, and many are over 65. While we recreate by hammering and prying at rock outcrops, many of us have joint, heart or other health issues that counsel against extended hiking with heavy backpacks in rough terrain. Under the Proposed RMP, hiking from the approved Loop to rockhounding sites would typically involve hiking between two to six miles with elevation changes of up to 700'. In most cases the outbound trip would be downhill, and the return trip, to be completed 2 hours before sunset, would be uphill. Such an ordeal would be unworkable for 65-year olds. CCMA has historically provided a rockhounding venue where collectors can use the established network of roads to essentially drive up to collecting sites. Without such access, we are essentially foreclosed from recreation in CCMA. For the majority of rockhounds the Proposed RMP is unworkable without access provisions like the one proposed in section 1 above. Denial of such access would be tantamount to age discrimination by BLM.

Similarly certain collectors of any age may have physical disabilities that make cross-country hiking impossible. Closing access to the roads network in CCMA may constitute a violation of the Americans with Disabilities Act with respect to such rockhounds.

For these reasons as well, we urge inclusion of the recommended paragraph stated in section 1 above.

- 3. BLM improperly issued an Emergency Closure of CCMA, closing off all recreational access to CCMA and relieving BLM of the responsibility to keep the NEPA planning process moving forward.**

BLM's NEPA Handbook (Handbook H-1790-1) states at Section 2.3 Emergency Actions, that:

“In the event of an emergency situation, immediately take any action necessary to prevent or reduce risk to public health or safety, property, or important resources. ... The CEQ regulations (40 CFR 1506.11) provide that in an emergency “alternative arrangements” may be established to comply with NEPA. Alternative arrangements do not waive the requirement to comply with NEPA, but establish an alternative means for compliance.

The CEQ regulations for alternative arrangements for dealing with such emergencies are limited to the actions necessary to control the immediate effects of the emergency....” [emphasis added]

Examples of emergencies where emergency action is appropriate in Section 2.3 include wildfire suppression and hazardous material spills.

In the case of CCMA, BLM abruptly and arbitrarily (and outside the parameters of the above stated policy) issued an Emergency Closure Order in response to EPA's theoretical determination that naturally occurring asbestos posed an unacceptable risk to users of CCMA, despite the fact that recreation had gone on in CCMA for decades with no anecdotal evidence that risk approaching the magnitude calculated by EPA really exists. In the absence of actual harm of the sort claimed by EPA to CCMA users, it was unreasonable, arbitrary and in bad faith for BLM to declare an emergency.

A central assumption of the NEPA planning process is that the status quo (i.e. the Plan currently in effect) should remain unaffected until a new Plan is approved in good faith compliance with the NEPA process. As a result the burden of moving forward with the new Plan rests with its advocates—typically BLM. Procedurally, the effect of the CCMA closure was to abruptly discard the status quo and immediately implement a restrictive regime representing the most radical of the draft plan alternatives. This emergency action also had the unfortunate effect of relieving BLM at all levels of any sense of urgency relative to completion of a new Plan. As a result and notwithstanding the mandate imposed by 40 CFR 1500.5 Reducing Delay, we are currently completing the fifth year of NEPA planning for Clear Creek—a process that should ordinarily take less than two years. Total denial of recreation opportunities in CCMA has been enforced by BLM during that entire period of time. This is not good faith compliance with the spirit and letter of NEPA.

4. As implemented, the NEPA process was a sham with a pre-determined outcome, amounting to a denial of substantive due process of law.

“The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law.” [40 CFR 1500.3, Mandate] [emphasis added]

NEPA was designed to establish a land use planning procedure that would solicit and incorporate input from the public as well as other agencies in order to provide for multi-purpose recreation on federal lands that optimally meets the needs and desires of all parties. The letter of the law requires BLM, in this case, to follow certain procedural steps to solicit and collect input from the public. The spirit, or intent, of the law requires that the information so collected should be evaluated and incorporated into the plan in good faith before firm decisions are made. Good faith implementation would necessarily require dialogue to ensure that BLM understands the nuances of the public inputs. In the case of rockhounds in CCMA, as pointed out in Section 1 above, decision-making personnel at BLM did not avail themselves of the opportunity to ask questions to clarify rockhounds' needs, even though those needs had been provided with some specificity. Our inputs were provided in writing (e-mails referenced in Section 1) with the expectation that they would be evaluated and understood or that BLM would contact us for additional information or clarification. That did not happen.

The actual NEPA process began with the unexpected announcement of the Emergency Closure of CCMA. Hearings and meetings were held, ostensibly to solicit public input, but the information and opinions received were not incorporated into the RMP. It was obvious to attendees at the meetings that the OHV community would be banned from CCMA by EPA's study. The extent to which other user groups would be regulated or restricted was questionable. Meetings and hearings generally became “venting” sessions for members of the OHV community who could read the writing on the wall. Many of the comments at the meetings were abusive and angry, and I determined to submit our inputs by e-mail or in person in order to avoid them.

At all times during the NEPA process the RMP was essentially a “black box” to which we could submit comments, receipt of which would be acknowledged, but at no time did BLM provide any feedback or questions in response, nor did BLM make commitments or assurances of any kind. Without such guidance, participants could only guess if they had provided BLM with inputs that would be useful to their cause or to BLM’s planning process.

While I share the frustration of the OHV community with the bad faith implementation of the NEPA process, I nevertheless emphasize here that rockhounds needs can be met if BLM incorporates the provision stated in Section 1 above.

5. BLM relied on an EPA study that it knew or had reason to know was flawed and probably fraudulent. Much has already been written on this subject, and powerful political forces have weighed in that the EPA is not to be challenged in this matter. However, there is good reason to believe that the EPA study at Clear Creek lacked scientific integrity and that BLM personnel knew of that shortcoming.

- a. EPA’s test runs at Clear Creek were done in the month of September. Ordinarily CCMA is closed to all recreation from June 1 through September 30, precisely because of the dusty conditions. Similarly BLM bans heavy equipment such as bulldozers from CCMA during those months. EPA’s own photos clearly show bulldozer tracks on the roads during the test runs. It is difficult to escape the conclusion that the roads in the test area were “dragged” or roughed up prior to the test runs in an already dry month when recreation is not permitted in any event. If true, this alone amounts to scientific fraud insofar as any samples obtained would not be representative of actual recreational use. BLM personnel were present at these trials and must have been aware of these facts.
- b. CCMA covers an area of between 30 and 40 square miles (my estimate). EPA’s test runs were conducted solely in an area of about 1 square mile, centered on R-1, Clear Creek Road, and the adjacent reclaimed Alpine Mine and the Clear Creek Mine. In years past this particular area housed miners and their families, and equipment such as retorts for heating cinnabar were operated there as well. In terms of industrial contamination this may be the dirtiest square mile in CCMA. There is photographic evidence of asbestos flange gaskets in this area. (Three Rocks Research) R-1 is well known by users to be the dustiest road in CCMA. I submit that EPA did not scientifically design their study to collect representative data from random points with variable soil conditions around the full extent of CCMA. Instead, they focused all of their trials in an area known to be dusty and contaminated. It helped them to get the results they wanted, and it shows a lack of scientific integrity.
- c. My understanding is that the field readings of fibers were counted by a lab which based its estimation of how much “asbestos” was found, and what species, on the aspect ratio of the particles seen under a high power microscope. This was performed according to a protocol to which I was denied access by EPA on the ground that it was a proprietary procedure of one of their consultants. Many of the minerals in CCMA, including non-asbestos minerals, can have long aspect ratios. Permitting EPA to hide the protocol is unacceptable scientific methodology.
- d. The fiber counts provided by the lab then were massaged by EPA statistician Dan Stralka, essentially multiplying the field counts by the IRIS risk factor developed by an EPA lab from epidemiological studies of asbestos diseases. (The IRIS numbers are themselves a matter of contention and differ significantly from similar factors used by OSHA.) In doing so, EPA used what Dan Stralka called “health conscious assumptions”, which is to say, he employed a

statistical device known as a 95th percentile control limit. In layman's terms this technique padded the result by an order of magnitude, and my understanding was that there are sequential calculations resulting in repeated "pads". The resulting user risk scenarios therefore contained calculated risks far greater than anything observed among real world users of CCMA. I'm not a statistician, and maybe I don't understand it, but it warrants investigation and a clear explanation.

- e. Although the final EIS doesn't emphasize tremolite asbestos as the major danger in CCMA, in personal discussions with EPA's Den and Johnson, they frequently emphasized the presence of tremolite in CCMA (where it comprises less than 1% of all "asbestos") and its extremely hazardous nature in producing mesothelioma, cancer of the pleural cavity. They emphatically cited the case of Libby, Montana as a prime example of this. "One fiber could kill you." The events at Libby occurred in the 1990's and were loudly trumpeted by a Spokane newspaper and CBS's 60 Minutes. But in 2000 (prior to the CCMA RMP hearings) the Agency for Toxic Substances and Disease Registry (ATSDR) determined that 1) deaths at Libby were attributable overwhelmingly to asbestosis (clogged lungs resulting from occupational exposure levels); 2) there was no evidence of elevated cancer rates in lungs or elsewhere; and 3) nearly all deaths were among mine workers, not among family members who handled the contaminated clothes of the workers. EPA had made claims contrary to all of these findings in the course of the CCMA investigation. EPA's contention that workers' families were being sickened by asbestos from their clothes explains the decontamination facility installed outside CCMA to wash off BLM vehicles before they return to Hollister. The alleged long latency period of mesothelioma (30+ years) caused by tremolite is EPA's justification for exercising special caution for children in CCMA where 99+% of asbestos is chrysotile. EPA incorporated hysterical and untrue arguments derived from the experience at Libby into the discussion of CCMA, the use patterns and geology of which bear no resemblance to Libby. They similarly misrepresented the findings of other epidemiological studies in Turkey and elsewhere.
- f. Notwithstanding EPA's theoretical risk calculations, there is little or nothing in the way of anecdotal (i.e. actual known cases) data supporting the claimed risks of respiratory cancer at CCMA. I don't believe that BLM really believes the EPA study, but it provides convenient cover to take controversial actions that BLM would like to implement for more mundane reasons like budgets and manpower requirements, pleasing the wilderness lobby and getting rid of troublesome users.

- 6. EPA improperly intimidated other public officials at the state and county levels.** Early in the RMP process I contacted county health officers in adjacent Monterey and Fresno counties to inquire if EPA's theoretical risk had ever been borne out by actual unexpected occurrences of respiratory cancers among workers at the now-closed asbestos mines or among recreational users of CCMA. In both cases they refused to discuss the issue with me and told me that I needed to talk to EPA.

Following the hiring of IERF consultants by Cal Parks OHV Division, it is reliably rumored that EPA caused Governor Brown to dismiss the Asst. Parks Director who commissioned the study, Daphne Greene, a diligent public servant who was ably serving her constituency. Such pressure also resulted in the issuance of the August 30, 2011 letter from Greene's superior, Ruth Coleman, stating, without details, "the Administration's" confidence in EPA's findings at Clear Creek. This letter is located in the Proposed Plan at end of Appendix C. (About a year later Coleman was herself fired after the Sacramento Bee discovered and published that while

threatening to close 70 state parks due to budget shortfalls, her Parks Department had been hiding a multi-million dollar stash from the State Treasurer and allowing staff to cash out unused overtime.)

While I have no “smoking gun” on this issue, there is ample circumstantial evidence that EPA has used its political status to intimidate non-federal agencies whose views on the dangers of asbestos at CCMA might not coincide with theirs. These actions, in my view, decrease EPA’s credibility.

On behalf of myself, BAM, ALAA and SCVGMS I respectfully submit that BLM failed to meaningfully consider the needs of the rockhound community; used a seriously flawed EPA study as an excuse for taking unpopular and highly arbitrary administrative actions at CCMA; and used the NEPA process to legitimize those actions while failing to genuinely consider user inputs in accordance with the spirit of the law. The process has taken far too long and required hundreds of private citizens in the user communities to devote countless hours to understanding federal administrative processes, environmental science, environmental law and medical science. We have been forced to devote countless hours to lobbying for reasonable access to public lands, which access ought to be ours as a right of citizenship.

I believe that because of the issues outlined above, a revocation of this RMP and a restoration of the status quo ante at Clear Creek is warranted. On behalf of BAM, ALAA and SCVGMS I urge that at a minimum BLM should incorporate the special permit provision stated in Section 1 hereof as a part of the Record of Decision and Final RMP.

Sincerely yours,

William Spence
President, Bay Area Mineralogists
California Central Coast Representative, American Lands Access Association
Public Lands Representative, Santa Clara Valley Gem & Mineral Society