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Delivered via U.S. Mail and email to cahornmp@ca.blm.gov

CCMA RMP/EIS Comments
Attn: Planning Coordinator
DOI-BLM, Hollister Field Office
20 Hamilton Court
Hollister, CA 95023

RE: Supplemental comments to CCMA/Hollister RMP DEIS

Dear Planning Coordinator:

Please accept these supplemental comments to the Clear Creek Management Area Draft Resource Management Plan & Draft Environmental Impact Statement (the "DEIS") released November 2009. These supplemental comments follow our original comments, submitted on March 5, 2010 and are submitted on behalf of our client the BlueRibbon Coalition, as well as its numerous participating individual and organizational members, which specifically include but may not be limited to the Salinas Ramblers Motorcycle Club, Timekeepers Motorcycle Club, American Motorcyclist Association D36, California Enduro Riders Association, and the California Association of 4 Wheel Drive Clubs. Individual and/or organizational members of any of these organizations may submit their own comments, and all such comments must be separately and independently evaluated by BLM. Any communications regarding these comments should be directed to Paul A. Turcke at the contact information listed above and to pat@msbtlaw.com.

While we remain concerned with the DEIS for all the reasons expressed in our March 5 comments, we are primarily concerned in these supplemental comments with the issue of the Hollister Field Office's approach to perceived liability issues and the choices made by the HFO to address them. The DEIS reflects an unmistakable concern by the agency of its potential liability stemming from public motorized use within the CCMA. The HFO's response to this concern is to prefer, to the exclusion of other viable alternatives, specific management schemes directed at reducing that perceived liability by severely restricting access. The agency's premise is erroneous, and its preferred alternative may have the ironic result of creating liability where none would otherwise exist. Indeed, "decisions whether and how to make federal lands safe for

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visitors require making policy judgments protected by the discretionary function exception” to the Federal Tort Claims act. *Rosebush v. United States*, 119 F.3d 438, 443, 6th Cir. 1997). In the FTCA, Congress did not extend the waiver of sovereign immunity to:

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). If a case falls within this statutory exception, known as the discretionary function exception, the district court lacks subject matter jurisdiction. *Feyers v. United States*, 749 F.2d 1222, 1225 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985). The Supreme Court has articulated a two-part test to determine whether a particular claim falls within this exception. *United States v. Gaubert*, 499 U.S. 315 (1991). The first query is whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice. *Id.* at 322-23. If the challenged act or omission is deemed discretionary, the second prong examines whether the conduct is “of the kind that the discretionary function exception was designed to shield.” *Id.* In other words, the more specific the scheme, the less likely it may be that the discretionary function exception applies. So, for example, where agency guidelines did not mandate the specific manner in which campground fire pits would be managed for safety, the failure to warn the public about potential hazards related to fire pits did not constitute an act that gave the district court jurisdiction under the FTCA. *Rosebush*, 119 F.3d at 442. But here, in addition to establishing goals and objectives, the DEIS also establishes specific management actions that remove that protected discretion. DEIS at 4. There is no mandate to restrict use due to naturally occurring asbestos, but the DEIS undertakes specific mechanisms to do so. All the mitigation and other tools the BLM seeks to implement require specific, intense monitoring and enforcement, and this sets up the agency for liability questions.

In addition to potentially creating liability, the HFO’s preferred alternative—as well as its entire range of alternatives—fails to consider other viable, reasonable means of addressing whatever risk may exist. While asbestos is not unique to the CCMA in California, the HFO is charting its own, new course with its decision-making framework. The Forest Service region covering California, Region 5, is no stranger to naturally occurring asbestos, as serpentine is the state rock and naturally occurring asbestos can be found in 44 of California’s 58 counties. *See* Naturally Occurring Asbestos (NOA) in El Dorado County, *available at* <http://www.co.el-dorado.ca.us/emd/apcd/asbestos.html>. The Regional Office produced a document providing visitors with information. Even acknowledging the EPA study conducted at the CCMA, the document does not make the same falling-sky conclusion that the HFO has here. Indeed, the Shasta-Trinity National Forest, which issued the Final Environmental Impact Statement on its travel plan recently, did not feel the need to implement the kind of sledgehammer-to-an-ant management scheme the HFO did here. This is significant, as a Forest Service Map indicating areas in California more likely to contain NOA places the Shasta-Trinity in the heart of asbestos country. *See* Map, Areas More Likely to Contain Naturally Occurring Asbestos Within National Forests in Region 5, *available at* http://www.fs.fed.us/r5/noa/pdfs/R5_NOA.pdf. In fact, in a letter from the Regional Forester dated February 11, 2009, forest supervisors were directed that

[a]ny management decisions regarding NOA must be based on sound data and analysis. According to EAP, the scientific assessment of actual public health risks associated with NOA is a complex and time intensive process. Until such studies are performed, the Region will not have definitive information regarding actual employee and public health risks posed by NOA on [Forest Service] lands. Therefore, *no decisions are being made or direction issued at this point in time to restrict or alter public access to and/or recreational use of the national forests.*

Motorized Travel Management Final Environmental Impact Statement, Six Rivers National Forest, p. 557 (emphasis added). As the HFO is aware, San Benito County recently adopted a similar approach, opening roads and installing warning signs. *See* County takes on Feds over Clear Creek Closure, The Weekend Pinnacle Online, *available at* <http://www.pinnaclenews.com/news/contentview.asp?c=268117>. One need not look hard for potential risk on public lands, and any visitor to public lands will without much effort discover a warning sign or other informational presentation identifying the potential for risk. Lands in BLM's jurisdiction obviously present all manner of risk to visitors. The HFO's logic, though, also supports a conclusion that public lands ought to be rendered inaccessible or nearly so based on unsubstantiated concerns about public health. The HFO should avoid the potential for the creation of liability and follow an approach more like that of the Forest Service.

We also understand that the state of California has commissioned an independent, qualified review of the 2008 EPA Risk Assessment, and that such review is ongoing. Such an analysis will present critical information that will likely constitute new information relevant to environmental concerns. *See*, 40 CFR § 1502.9(c)(1)(ii). Alas, the closing date of the period to submit supplemental comments will close before that review can be completed, thus precluding analysis of that review for consideration in the NEPA process.

We appreciate the opportunity to comment, and look forward to further participation in the planning process. Please contact us if you have questions or wish to discuss these comments further.

Sincerely,

MOORE, SMITH, BUXTON & TURCKE, CHTD.

A handwritten signature in blue ink, appearing to read "Carl J. Withroe" and "Paul A. Turcke" combined together.

Paul A. Turcke
Carl J. Withroe