SUMMARY

The Imperial Sand Dune Recreations Area (ISDRA) is a victim of abuse of the Endangered Species Act (ESA) where 49,300 acres were temporarily closed as part of a March 2000 lawsuit settlement pending a Recreation Area Management Plan (RAMP). The plan and its components were challenged several times by the anti-access groups and it took approximately 14 years for the new plan to be implemented.

In 2014 the new plan re-opened the 49,300 acres. However, the Bureau of Land Management (BLM) wanted a plan that would withstand further legal challenges and so closed approximately 9000 acres of land deemed critical habitat (CH) that were open before the initial law suit. This closure included the Patton Valley Travel Corridor (PVTC): a section of dunes that heretofore had never been closed.

The ASA vigorously protested this action but it is the federal agencies that make the final decision. There does not appear to be a legal basis that provides an avenue to challenge the lack of a PVTC in court.

The ASA sees 3 options:

- Delist the PMV with the hope that it removes the closure – this will take at least 5 years and there is no guarantee that a delisting will not require land closure.
- Ask US Fish and Wildlife Service (FWS) that the CH be reduced based on a new economic analysis that considers financial impacts on affected parties and public health and safety concerns. These could justify a PVTC and could provide a defensible basis for the federal agencies.
- Pursue a PVTC without either of the above – this would be a simple request to the federal agencies to improve public safety and to accommodate the dune users.

BACKGROUND

The ESA is frequently abused to implement land closures. The common method employed by anti-access group(s), environmentalists, and other green advocacy groups (collectively GAGs) is to find a species that inhabits the desired area to be closed, then petition the FWS to list it as threatened or endangered under the ESA. Preferably, this species exists nowhere else and has specific habitat needs.

Once a plant is listed, CH is usually designated and arguments are made that the CH must to be protected. In most cases, while not a legal requirement, this means closure to most activities other than hiking in the CH. Other technicalities of the ESA are also used to close areas. This method has been employed by GAGs many times with a high degree of success.

This was the case at the ISDRA. Not only did the GAGs want the Peirson's Milk Vetch (PMV) CH closed to OHVs, but most of the dunes south of Highway 78.

In 1998 several GAGs filed and garnered a listing for the PMV under the ESA. The threat was clear because the plant ostensibly grows nowhere outside the ISDRA.

The California Desert Conservation Area Plan (CDCA) is a plan that establishes goals for protection and for use of the Desert. It designates distinct multiple use classes for the lands involved, and it establishes a framework for managing the various resources within these classes. The plan is mandated under the California Desert Protection Act. More information can be obtained here: http://www.blm.gov/ca/st/en/fo/cdd/cdca_highlights.html

When any land decisions or plans are to be implemented on lands where ESA protected species occur, a consultation is required with the FWS under Section 7 of the ESA. The courts ruled this was the case when the CDCA was implemented.

Center for Biological Diversity (CBD) v. Bureau of Land Management *(quoted from the May 2003 Final Environmental Impact Statement for the Imperial Sand Dunes Recreation Area Management Plan and Proposed Amendment to the California Desert Conservation Plan 1980)*

On March 16, 2000, the Center for Biological Diversity, and others (Center) filed for injunctive relief in U.S. District Court, Northern District of California (court) against the Bureau of Land Management (BLM) alleging that the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the FWS on the effects of adoption of the CDCA Plan, as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species.

Although BLM has received biological opinions on selected activities, consultation on the overall CDCA Plan is necessary to address the cumulative effects of all the activities authorized by the CDCA Plan. Consultation on the overall Plan is complex and the completion date was uncertain. Absent consultation on the entire Plan, the impacts of individual activities, when added together with the impacts of other activities in the desert are not known. The BLM entered into negotiations with plaintiffs regarding interim actions to be taken to provide protection for endangered and threatened species pending completion of the consultation on the CDCA Plan. Agreement on these interim actions avoided litigation of plaintiffs' request for injunctive relief and the threat of an injunction prohibiting all activities authorized under the Plan. These interim agreements have allowed BLM to continue to authorize appropriate levels of activities throughout the planning area during the lengthy

consultation process while providing appropriate protection to the desert tortoise and other listed species in the short term.

By taking interim actions as allowed under 43 CFR Part 8364.1, BLM contributes to the conservation of endangered and threatened species in accordance with 7 (a) (1) of the ESA. BLM also avoids making any irreversible or irretrievable commitment of natural resources that would foreclose any reasonable and prudent alternative measures that might be required as a result of the consultation on the CDCA plan in accordance with 7 (d) of the ESA. On November 3, 2000, the stipulation respecting Peirson's milk-vetch became effective which temporarily closed approximately 49,000 acres in the open area until the completion of this EIS and the respective RAMP. *(end quote)*

Possibility Temporary Closures would become Permanent

As stated above, a new RAMP was in development by the BLM El Centro Filed Office (ECFO). Because it had occurred several times in the past, it was feared that, unopposed, the temporary closures would be codified by the new RAMP and the temporary closures would become permanent.

A RAMP becomes the guidebook for all subsequent managers of the area in question and is the official policy on how the area is to be managed. The life of a RAMP can be 15 years or more. Once approved, an amendment is made to the CDCA. From then on changes to the RAMP are extremely difficult, expensive, and time consuming at best.

RAMP PROCESS

The BLM is responsible to develop a draft RAMP, or DRAMP, that abides by many laws such as National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), ESA, the Federal Land Policy Management Act (FLPMA), and so on. An environmental impact statement (EIS) must also be developed. Developing a RAMP and an EIS are very costly in terms of time and resources.

Initially, scoping meetings are held to help define the direction the new RAMP should take. Basic issues and area user concerns are collected. Unfortunately, these meetings are not negotiations. They are simply data gathering events held by the BLM.

Multiple RAMP alternatives are developed with only one being the preferred alternative: the alternative that BLM wishes to implement with the new RAMP. If there are species listed under the ESA in the management area in question, the BLM must consult with FWS as mandated under Section 7 of the ESA. This alternative must obtain a "No Jeopardy" biological opinion from the FWS before the final RAMP can be implemented. In other words, in the opinion of FWS, the new RAMP will not place the survival of any listed species in jeopardy once implemented.

Once the DRAMP is fully developed, a mandatory public comment period takes place. The purpose is to bring forth any issues that BLM may have missed and any errors it may have made. Comments are solicited and submitted through various channels.

Once the comments are received and the comment period ends, the BLM may or may not act upon the comments in modifying the final RAMP. When the BLM is confident they have produced a complete and sufficient RAMP, a record of decision is made in the Federal Register and the RAMP is published. It is only at this time that the new RAMP is made public for all to see. A protest period follows and if the RAMP survives, it is implemented.

ASA FOUNDED in 2000

Knowing that a new RAMP was in development and knowing that it was very likely the temporary closures would become permanent, the ASA was formed.

It was evident that if the OHV community remained silent, the BLM would side with the unopposed GAGs as usual. It was feared that without sufficient comments to the RAMP from the sand sport community the GAGs would steam roll their way to permanently closing most of the ISDRA. From there, the rest of the area could also be in jeopardy.

The ASA was successful in educating the sand sport community about the RAMP. Dune enthusiasts submitted hundreds of meaningful comments to the BLM. A new RAMP was published that did not include the temporary closures as permanent.

Subsequently, the CBD challenged the RAMP, the biological opinion, the CH designation, and many other aspects of the RAMP multiple times. The 9th Circuit Court granted their requests for restraining orders and the temporary closures remained in place. In addition, the court ordered the BLM to re-work the RAMP to address the issues brought forth by the CBD. The court also ordered the FWS to revisit the PMV CH designation.

The ASA responded by providing economic analysis that were used in the re-designation of the CH resulting in less acres. We commissioned several studies on the PMV in hopes of proving that OHV use would not drive the plant to extinction. We hired attorneys to represent the OHV community in many legal proceedings. The ASA filed 2 petitions to delist the PMV to no avail. The ASA engaged in many other activities to further our goal that will not be listed here as they are outside the scope of this article.

The ASA met with CBD and Public Employees for Environmental Responsibility (PEER) on several occasions in an attempt to reach an agreement on the closures. The meetings were unproductive as CBD and PEER were steadfast at wanting the temporary closures to become permanent. They knew that without the opposition of the ASA, they could get their desired closures. The threat was that they would pursue more closures at the ISDRA: ASA maintained that any closure must be science driven and we did not yield.

THE FINAL RAMP

In 2012, the BLM distributed a new DRAMP that addressed the concerns of the court. The ASA again analyzed the document and educated the OHV community in making useful comments.

As before, the ASA submitted its set of comments. Hundreds of ASA members submitted their own comments. Almost all of the submissions contained a comment regarding the need for a corridor to Patton Valley through the proposed closure.

Unfortunately this need went ignored by the BLM who maintained their perceived need to close all of the PMV CH so the FWS would render a favorable biological opinion.

The new RAMP was recorded in the Federal Register in June of 2013. Final court proceedings delayed the implementation until May of 2014.

The final RAMP re-opened the 49,300 acres temporarily closed but also closed all of the PMV CH to OHV use: about 9,000 acres. The BLM's rational for closing all of the PMV CH is explained at the following link.
http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/elcentro/isdra.Par.78681.File.dat/RAMPFacts&FAQs.pdf

For convenience, the rational is quoted here as well as the BLM's reasoning behind the erratic boundaries.

"Q - Why isn't there an open corridor to Patton Valley?

A – The BLM based all closures on scientific monitoring of Pierson's Milk-vetch to balance sustainable OHV recreation and conservation. The previous Sand Highway area to Patton Valley was included in monitoring cells which had high populations of Pierson's Milk-vetch. In order to develop a balanced and defendable plan, and to reopen the 49,000 acres of administrative closures, the BLM will manage 100% of critical habitat as closed to OHV recreation."

"Q - Why does the closure have such an irregular shape?

A - The closure boundaries follow the Pierson's Milk-vetch critical habitat designation by the U.S. Fish and Wildlife Service. The designation follows the boundaries of the monitoring cells (25 meters by 25 meters) of actual high density populations of Pierson's Milk-vetch observed in 2005.

Q - Why didn't the BLM straighten out the closure boundaries instead of using the irregularly shaped critical habitat boundaries established by the U.S. Fish and Wildlife Service?

A - The BLM based the RAMP on the best available science. If the boundaries were straightened, critical habitat would have been opened to OHV recreation, or open OHV lands would have been closed. Neither decision would have been scientifically based or defendable."

NEXT STEPS

It has been suggested that we strongly urge the BLM ECFO to create a corridor through the closure to Patton Valley.

Creating a corridor could require an amendment to the CDCA. Assuming even if BLM ECFO had the resources, this would be a long and time consuming endeavor. A new EIS could be required along with a section 7 consultation with FWS. Other land use laws would also have to be taken into account. It is possible that the result could be no different than what we have today.

By court order, FWS has until 2019, or 5 years, to develop a "recovery plan" for the PMV. If FWS had the resources, they could start on the plan now. The plan, among other things, will contain metrics that enables the FWS to state when the plant is recovered and can be de-listed under the ESA. It is assumed that if the plant is delisted, there will be no need for CH and thus no closure but there is no guarantee this would be the case. It is possible the ASA can assist in some way to shorten the 5 years.

Information on recovery plans can be found on the FWS web at: http://www.fws.gov

It is also possible that a new economic analysis can be used as the legal basis to petition FWS for a reduction in CH acreage that would at least provide a PVTC.

When our attorneys decide which, if any, of the above is the most viable option, ASA will pursue it.