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California Energy Commission  
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Docket No. 09-RENEW EO-01  
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Subject: DRECP NEPA/CEQA

This comment letter is filed on behalf of the BlueRibbon Coalition (BRC), a national trail-based recreation group, regarding the draft Desert Renewable Energy Conservation Plan (DRECP) Environmental Impact Report/Environmental Impact Statement (EIR/EIS).

This document shall not supplant the rights of other BRC representatives, clubs, or individual members to submit their own comments and the agency should consider and appropriately respond to all comments received to this proposed planning project.

BRC staff attended the November 13, 2014 DRECP public meeting in Sacramento and believes the planning group, in their preferred alternative (PA), should be commended for their hard work over the last several years to craft a proposal that protects in regulation existing legal dispersed and destination OHV recreation throughout the project area. The DRECP in its preferred alternative would codify most OHV use by placing it in Special Recreation Management Areas (SRMAs) or Extensive Recreation Management Areas (ERMAs). We support this approach.

The PA also integrates the development of renewable energy infrastructure and resource conservation with other existing uses and values in the plan area via Development Focus Areas (DFAs). Although the PA identifies over 2M acres as DFAs, it reduces the estimated ground disturbance in DFAs to a maximum of 177,000 acres or 9% of the DFAs. BRC appreciates that most, if not all, existing legal OHV recreation was not included in that 177,000 acres. In addition, BRC appreciates an historic agreement by the planning group that any recreational opportunities (including OHV) which are displaced by renewable energy development on said 177,000 acres would, for the first time, require full mitigation.

As previously stated, BRC wants to honor the collaborative spirit between stakeholders in the planning group that helped forge the PA by strongly supporting its tenets. However, there are several issues that could be problematic in the long-term if not corrected in the final decision.

## **NLCS Overlap/Impact on SRMA/ERMA Designations**

On page 33 of Volume IV.14 (Table IV.14.12), it states the PA would designate an additional 3,827,000 acres of National Conservation Lands.

BRC is concerned that commercial and competitive motorized events taking place under Special Recreation Permits (SRPs) would be prohibited should National Landscape Conservation System (NLCS) designations overlay SRMAs, ERMAs, or legal OHV recreation not in either of the aforementioned recreation management areas. Long-term casual OHV recreation could also be impacted.

On page one of Volume IV.14 it states the DRECP would identify and describe which areas would be managed as National Conservation Lands as a component of the National Landscape Conservation System (NLCS). On page 22 of Volume IV.14, it states that commercial and competitive (SRP) events would be prohibited except for those uses that would enhance the opportunity for visitors to experience and enjoy the *ecological, cultural, and scientific values* of the National Conservation Land unit and would not adversely impact the nationally significant ecological, cultural, or scientific values.

Omnibus Public Land Management Act of 2009 - SEC. 2002. ESTABLISHMENT OF THE NATIONAL LANDSCAPE CONSERVATION SYSTEM - states that NLCS shall be managed "in a manner that protects the values for which the components of the system were designated."

The Federal Land Policy and Management Act of 1976 - TITLE VI DESIGNATED MANAGEMENT AREAS CALIFORNIA DESERT CONSERVATION AREA- Sec. 601. [43 U.S.C. 1781] (a) The Congress finds that-

- (1) the California desert contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population....

We believe the NLCS legal framework and administration is sufficiently new and untested as to create a great potential for risk and uncertainty. We would recommend the DRECP avoid overlap with or incorporation of NLCS guidance to the extent possible.

**Recommendation:** Amend the DRECP PA by adding "*recreational*" as a value should NLCS designations overlap SRMAs, ERMAs, or lands with existing legal opportunity. Or, consider other mitigation measures that protect current casual and permitted OHV activities in the affected areas.

## **DFA designations on Private Lands**

BRC understands that some of the DFA designations include private property that could be acquired by public agencies for future energy development. Some of those lands most certainly provide outstanding OHV recreation including access corridors between adjacent public land sites.

California has some of the strongest hold harmless laws regarding liability for the landowner (including public land agencies) in the country. In 2000, Laura A. Reimche, Staff Counsel California Department of Parks and Recreation, presented an overview at the 15<sup>th</sup> National Trails Symposium.

Link to Full Report

<http://www.americantrails.org/resources/safety/LiabilityCA.html>

BRC incorporates by reference herein, and brings attention to, the following excerpted portions of the report:

**"I. THE GROWING TREND TO PROTECT THE LANDOWNER**

The Courts and the Legislature have expressed a clear policy to permit the use of available recreational property, both public and private, in its natural condition, without placing the burden and expense of altering the property and defending claims for injuries on the landowner.

**III. RECREATIONAL USE OF PRIVATE PROPERTY**

**A. LIABILITY OF A PRIVATE LANDOWNER**

Basic rule of liability: Landowner owes a duty of reasonable care to any person coming onto private property. See California Civil Code § 1714; and Rowland v. Christian 69 Cal.2d 108 (1968).

**B. PROTECTIONS FOR THE OWNER OR POSSESSOR OF PRIVATE PROPERTY BEING USED FOR RECREATIONAL PURPOSES**

1. Immunity under CA Gov't Code § 831.4 also protects private grantor of an easement.

2. California Civil Code § 846 provides that a private landowner (or one having any possessory interest in land) owes no duty to those who comes upon his/her property for "any recreational purposes". This applies to both trespassers and permittees but not to express invitees. See Delta Farms Reclamation District No. 2028 v. Superior Court 33 Cal.3d 699 (1983), cert. denied.

This immunity protects private landowner (and Federal Government) only.

Define entering property for "any recreational purposes". See Ornelas v. Randolph 4 Cal.4th 1095 (1993). It doesn't matter what the injured party is doing at the time of the incident.

Protection applies in California to lands that are fenced as well as those that are made more intentionally accessible. See Ornelas v. Randolph 4 Cal.4th 1095 (1993). But, Utah sees it differently. See Perrine v. Kennecott Mining 911 P2d 1290 (Supreme Court of Utah 1996).

The land does not have to be suitable for recreational purposes. See Colvin v. Southern California Edison 194 Cal.App.3d 1306 (1987).

Immunity is not lost by (1) limiting permission to enter property (See Mansion v. U.S., 945 F.2d 1115 (9th Cir. 1991)) or (2) by issuing a general invitation to members of the public to visit for an event. See Ravell v. U.S., 22 F.3d 960 (9th Cir. 1994).

Protection is not limited to injuries caused directly by a condition of the land. See *Shipman v. Boething Treeland Farms, Inc.* 77 Cal.App.4th 1424 (2000).

3. Protection of § 846 not available if:

(a) There is willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. A duty arises when you know about prior injuries caused by the same condition. Attempts to guard or warn against known dangers have to be reasonable only. See *Bacon v. Southern California Edison* 53 Cal.App.4th 854 (1997);

(b) specific consideration is paid to landowner for the recreational use; or

(c) person is expressly invited to enter the premises.

Regarding the limitations of (b) and (c), the court in *Johnson v. Unocal*, 21 Cal.App.4th 310 (1993), held that allowing a company picnic did not constitute an express invitation. Further, requiring a hold harmless agreement and trash pickup in exchange for allowing the picnic, was not consideration to the landowner such that the immunity did not apply.

Invitation does not have to be for a recreational purpose. *Calhoon v. Lewis* 96 Cal.Rptr.2d 394 (2000) &ndash; friend invited to come pick up property owner's son; injured on skateboard while waiting.

4. Right to Reimbursement of Legal Fees: California Civil Code § 846.1

Landowners have failed to take advantage of this protection, enacted in 1996. It provides private land owners and public land trusts with the right to seek reimbursement of attorneys' fees incurred in defending actions brought by recreational users. Up to \$25,000 can be paid by the State Board of Control if certain requirements are met.

C. ADJOINING LANDOWNERS ARE NOT LIABLE FOR ACTIVITIES OF TRAIL USERS. California Public Resources Code §5075.4.”

***Recommendation:*** Continue to provide historic OHV use of access routes should said lands be acquired by a public agency for an energy project. Should mitigation measures be needed, the agency should consider a “mitigation strategy” that might include trail reroutes or designated access corridors through the project area.

## **ACEC Impacts to OHV Recreation**

Historically, Area of Critical Environmental Concern (ACEC) designations have functionally created bureaucratic momentum to functionally ban existing legal OHV recreation that occurred on said lands before the ACEC designation unless explicitly authorized in the ACEC’s worksheet. It is essential to recognize, and avoid or mitigate the associated loss of historical OHV opportunity through ACEC designations.

***Recommendation:*** Where ACEC designations overlap SRMAs, ERMAs, or lands that contain existing legal OHV recreation, consider language that authorizes existing OHV use in the ACEC or use a SRMA or ERMA

designation instead. BRC requests mitigating the loss of 3,000 acres of OHV open use lands in the Spangler Hills OHV Open Area to the Christmas Canyon ACEC with a commensurate expansion of the OHV Open Area.

### **CPA Impacts to OHV Recreation**

BRC is concerned that some recreation sites and their access roads may be located on private property within proposed Conservation Planning Areas (CPA's). Such access routes or recreation sites are at risk for closure if acquired as a CPA.

***Recommendation:*** Existing OHV routes that act as access corridors onto adjacent designated routes on public lands should be automatically designated open until a public route designation process is completed. Consideration should also be giving to existing and traditional campsites, staging areas, trailheads, and similar infrastructure.

### **DFA in Ocotillo Wells East SRMA**

The PA would allow geothermal energy development with no surface occupancy on this unit. Although BRC prefers that no geothermal energy development (surface or non-surface) development occur on this unit, should such development become necessary, it should be non-surface (i.e. side drilling) so as to not impact OHV recreation in the project site.

### **Unfunded Mandates**

BRC is concerned that no additional funding has been identified to manage OHV recreation in the project area. BRC supports managed OHV recreation on public lands and believes it will take a significant commitment of resources including staff time and materials for items such as trail maintenance, signing, education, and enforcement to implement this effort.

***Recommendation:*** The DRECP should identify corresponding funding streams such as federal appropriations, grant programs, or partnerships from which monies/support can be obtained to implement the final decision.

### **Support for Extending the Comment Period**

BRC requests a 60 day extension of the public comment period in order for local OHV stakeholders to complete their analysis of the DRECP's potential adverse impacts on OHV recreation (both casual and permitted) or OHV access to non-motorized recreation. Said route network is just over 14,000 miles.

BRC thanks the DRECP planning team and responsible parties for allowing us the opportunity to comment on this all too important project. Please feel free to contact us should there be any questions.

Respectfully submitted,

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