

To: eroberso@blm.gov[eroberso@blm.gov]; l50porte@blm.gov[l50porte@blm.gov]; Donald Hoffheins[dhoffhei@blm.gov]
From: Gary Torres
Sent: 2017-02-09T13:12:59-05:00
Importance: Normal
Subject: Fwd: Indian Creek plan from Utah
Received: 2017-02-09T13:13:33-05:00
[Indian Creek ATV Petition for Stay.pdf](#)
[ATT00001.htm](#)

Sent from my iPhone

Begin forwarded message:

From: "Winston, Beverly" <bwinston@blm.gov>
Date: February 9, 2017 at 10:54:09 AM MST
To: "Moody, Aaron" <aaron.moody@sol.doi.gov>, Gary Torres <gtorres@blm.gov>
Cc: "Sklar, Ryan" <ryan.sklar@sol.doi.gov>, Lara Douglas <ledouglas@blm.gov>, John Steiger <john.steiger@sol.doi.gov>, Lola Bird <lbird@blm.gov>
Subject: Re: Indian Creek plan from Utah

Gary, Aaron and others,
To my knowledge, Kristin and the rest of BLM leadership have not get to Indian Creek during an earlier briefing this week, and the response to the appeal is due tomorrow.

I could not send this BP forward because it does not answer 2 questions leadership is sure to have (below).

First preference would be to have this BP fixed immediately (like within 2 hours) and the second would be to have someone from SOL brief leadership, but we might require both.

My questions are these:

(b)(5) DPP, (b)(5) ACP

[REDACTED]

Thank you.

Bev

On Tue, Feb 7, 2017 at 3:34 PM, Moody, Aaron <aaron.moody@sol.doi.gov> wrote:

Looping John.

(b)(5) DPP, (b)(5) ACP

Hope that helps.

Aaron G. Moody
Assistant Solicitor, Branch of Public Lands
Division of Land Resources
Office of the Solicitor
U.S. Department of the Interior
202-208-3495

NOTICE: This e-mail (including attachments) is intended for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected by applicable law. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, copying, or use of this e-mail or its contents is strictly prohibited. If you receive this e-mail in error, please notify the sender immediately and destroy all copies.

On Tue, Feb 7, 2017 at 2:50 PM, Sklar, Ryan <ryan.sklar@sol.doi.gov> wrote:

Aaron,

(b)(5) DPP, (b)(5) ACP

Thanks,
Ryan

On Tue, Feb 7, 2017 at 2:41 PM, Winston, Beverly <bwinston@blm.gov> wrote:

Aaron,

(b)(5) DPP, (b)(5) ACP

Bev

On Tue, Feb 7, 2017 at 8:30 AM, Winston, Beverly <bwinston@blm.gov> wrote:

Yes. We think this will get tagged on and want to be ready.

On Mon, Feb 6, 2017 at 8:48 PM, Aaron Moody <aaron.moody@sol.doi.gov> wrote:

(b)(5) DPP, (b)(5) ACP
[REDACTED]

Sent from my iPad

On Feb 6, 2017, at 3:58 PM, Winston, Beverly <bwinston@blm.gov> wrote:

Aaron and Ryan,

(b)(5) DPP, (b)(5) ACP
[REDACTED]
[REDACTED]
[REDACTED]

Thanks,

Bev

p.s. Aaron, adding you to the briefing invite.

--

Bev Winston

Bureau of Land Management | Public Affairs

202-912-7239 | bwinston@blm.gov

<Indian Creek ATV Trail BP 02.06.17.docx>

--

Bev Winston

Bureau of Land Management | Public Affairs

202-912-7239 | bwinston@blm.gov

--

Bev Winston

Bureau of Land Management | Public Affairs

202-912-7239 | bwinston@blm.gov

--

Ryan Sklar

Acting Senior Litigation Specialist
Bureau of Land Management
U.S. Department of the Interior
202-208-4695

NOTICE: This e-mail (including attachments) is intended for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected by applicable law. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, copying, or use of this e-mail or its contents is strictly prohibited. If you receive this e-mail in error, please notify the sender immediately and destroy all copies.

--

Bev Winston
Bureau of Land Management | Public Affairs
202-912-7239 | bwinston@blm.gov

Neal Clark (Oregon State Bar #100834)
 Southern Utah Wilderness Alliance
 P.O. Box 968
 Moab, Utah 84532
 (435) 259-7090

House Counsel for Appellant Southern Utah Wilderness Alliance

Aaron M. Paul (Colorado Bar #40422)
 Grand Canyon Trust
 4454 Tennyson St.
 Denver, Colorado 80212
 (303) 477-1486
 apaul@grandcanyontrust.org

Attorney for Appellants Grand Canyon Trust,
 Great Old Broads for Wilderness, and
 Utah Chapter Sierra Club

**INTERIOR BOARD OF LAND APPEALS
 OFFICE OF HEARINGS AND APPEALS
 UNITED STATES DEPARTMENT OF THE INTERIOR**

SOUTHERN UTAH WILDERNESS ALLIANCE,)	
GRAND CANYON TRUST,)	IBLA No.
GREAT OLD BROADS FOR WILDERNESS,)	
UTAH CHAPTER SIERRA CLUB,)	Re: Monticello Field Office's
)	Finding of No Significant Impact
Appellants,)	and Decision Record for the
v.)	Proposed Right-of-Way by San Juan
)	County for an ATV Trail in the
U.S. BUREAU OF LAND MANAGEMENT,)	Indian Creek Area, Environmental
)	Assessment DOI-BLM-UT-090-
Respondent.)	06-05 (December 2016)

APPELLANTS' PETITION FOR A STAY

The Southern Utah Wilderness Alliance (SUWA), the Grand Canyon Trust ("the Trust"), Great Old Broads for Wilderness ("Broads"), and the Utah Chapter Sierra Club (collectively, "Appellants"), pursuant to 43 C.F.R. Part 4, respectfully submit this timely Petition for a Stay of the Bureau of Land Management's (BLM's) December 14, 2016 Finding of No Significant

Impact (FONSI) and Decision Record (DR) for the Proposed Right-of-Way by San Juan County for an ATV Trail in the Indian Creek Area, analyzed in Environmental Assessment DOI-BLM-UT-090-06-05 (December 2016) (“Indian Creek EA”). Ex. A.

STATEMENT OF FACTS

The Indian Creek ATV project authorizes the construction of new all-terrain vehicle (ATV) trails and three new parking areas on BLM-managed public land in the Indian Creek corridor, a world-class scenic and quiet-recreation destination, which the President included in a new national monument designated just two weeks after BLM published its record of decision for the project. *See* Ex. B, Photographs of Indian Creek ATV Trail Project Area; Ex. C, Proclamation 9558, Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139 (Dec. 28 2016); Ex. D, Map, Bears Ears National Monument. Located near the eastern boundary of Canyonlands National Park, Indian Creek is famous for its dramatic and sheer Wingate Sandstone cliffs and irreplaceable cultural resources. In addition to being an internationally treasured rock climbing destination, Indian Creek is also the gateway into the Needles District of Canyonlands National Park. Beyond the sheer sandstone walls, the water of Indian Creek continues its journey downstream towards its eventual confluence with the Colorado River. The Indian Creek ATV project area includes lands that possess wilderness characteristics and that are currently proposed for wilderness designation in a bill before the United States Congress. *See* Ex. E, EA, Appendix G- Wilderness Characteristics Inventory; Ex. F, EA, Appendix A, Map 10- Upper Indian Creek Wilderness Inventory Unit; America’s Red Rock Wilderness Act, H.R. 2430, S. 1375 (114th Congress). In addition, the project area falls within BLM’s Indian Creek Special Recreation Management Area (SRMA).

On December 28, 2016, to secure greater protection for the exceptional natural, cultural, and scientific resources that Indian Creek and neighboring areas contain, the President designated 1.35 million acres of public land surrounding the Bears Ears buttes in southeastern Utah as the Bears Ears National Monument. Ex. C. Recognizing that the region is “one of the densest and most significant cultural landscapes in the United States,” *id.* at 1139, the President created the Monument to “preserve its cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources,” ensuring that these values “remain for the benefit of all Americans.” *Id.* at 1143.

This is not the first time BLM has authorized construction of the Indian Creek ATV project. Relying on an earlier version of the EA, the agency previously authorized construction of the exact same project in February 2015. Appellants appealed that decision to the Interior Board of Land Appeals and sought a stay pending appeal. *See* Appellants’ Petition for a Stay, IBLA 2015-127, IBLA 2015-135 (Mar. 30, 2015). The Board granted the stay, finding that the Indian Creek ATV trail would irreparably harm Appellants, that the balance of hardships and public interest favored granting a stay, and that there was a sufficient likelihood that Appellants would succeed on the merits. *See* Order, IBLA 2015-127, IBLA 2015-135. BLM then filed a motion asking the Board to vacate and remand the agency’s decision so that BLM could conduct additional analysis. The Board granted BLM’s motion on August 10, 2015.¹

In December 2015, SUWA sent an e-mail to BLM’s Monticello Field Office requesting a 30-day public comment period on any revised EA for the Indian Creek ATV trail. Ex. H, Email from N. Clark to B. Quigley (December 11, 2015). BLM did not respond. A year later, without prior public notice or a comment period, and just two weeks before the designation of the Bears

¹ The background of the Indian Creek ATV project prior to August 2015 is explained in detail in Appellants’ Statement of Reasons (SOR) in IBLA 2015 127. *See* Ex. G, IBLA 2015 127 Appellants’ SOR (pp. 1 6 excerpt).

² The Director of the Office of Hearings and Appeals or an Appeals Board may make a decision effectively immediately, *see* 43 C.F.R. 4.21(a)(1), but neither has done so here.

Ears National Monument, BLM issued a new DR and FONSI—again approving construction of the ATV trail based on a revised EA (December 2016).

The December 2016 DR authorizes BLM to proceed with Alternatives B and C in the EA. Alternative B includes construction of a 5.66-mile ATV trail with a 12-foot-wide disturbance corridor and two parking areas. Alternative C, the so-called “mitigation segment,” includes construction of a 0.72-mile ATV trail with a 12-foot-wide disturbance corridor and a parking area. In total, BLM’s decision authorizes the construction of approximately 6.4 miles of new ATV trails and three new parking areas on BLM-managed public lands.

BLM’s decision to approve construction of the Indian Creek ATV trail violates: (1) the Bears Ears National Monument Proclamation, because it is inconsistent with the Proclamation’s travel-planning provisions; (2) the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, because BLM failed to make a diligent effort to involve the public in preparing the revised EA; (3) the National Historic Preservation Act (NHPA), 53 U.S.C. §§ 300101 *et seq.*, because BLM failed to make a “reasonable and good faith effort” to identify cultural resources on or near designated motorized routes that will receive increased ATV use as a result of BLM’s decision; and (4) the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§1701 *et seq.*, because BLM authorized construction of a segment of the ATV trail through a riparian area and active floodplain in contravention of the Monticello Field Office Resource Management Plan (RMP). BLM, Monticello Field Office, Record of Decision and Approved RMP (November 2008), *available at* <https://www.blm.gov/programs/planning-and-nepa/plans-in-development/utah> (last visited December 17, 2016).

Appellants respectfully request that the Board immediately stay BLM’s decision to build the Indian Creek project. Appellants also request that BLM’s decision be set aside and remanded.

STANDING

I. Appellants are Proper Parties to Pursue this Appeal

Under 43 C.F.R. § 4.410(a), appellants must meet two requirements in order to appeal BLM’s decision to the Board: (1) they must be parties to the case; and (2) they must be adversely affected by the decision being appealed. *W. Watersheds Project (WWP)*, 185 IBLA 293, 298 (2015). Furthermore, “[w]hen an organization alleges representational standing . . . ‘it must demonstrate that one or more of its members has a legally cognizable interest in the subject matter of the appeal, coinciding with the organization’s purposes, that is or may be negatively affected by the decision.’” *Wildlands Defense and Deep Green Resistance*, 187 IBLA 233, 236 (2016) (citing *WWP*, 185 IBLA at 298-99). Appellants meet these requirements.

A. Appellants Are Parties to the Case

An appellant is a “party to a case” if, among other grounds, the appellant “participated in the process leading to the decision under appeal, e.g., . . . by commenting on an environmental document.” 43 C.F.R. § 4.410(b). Furthermore, “the Board has held that an appellant satisfied the ‘party to the case’ requirement when it had expressly requested leave to participate in that process, but BLM foreclosed the opportunity to do so.” *Wildlands Defense*, 187 IBLA at 237 (citing *Predator Project*, 127 IBLA 50, 53 (1993)). Here, SUWA and Great Old Broads for Wilderness are parties to the case because they have engaged at every step of the public process for the multiple iterations of the Indian Creek ATV project—starting with the initial 2011 draft EA, through BLM’s voluntary vacatur and remand of IBLA 2015-127. The Trust and Sierra Club, likewise, are parties to the case. They participated in the process leading to the most recent decision to build the Indian Creek project by commenting on the last version of the EA for which BLM sought and considered public comments, *see* Exs. I and Y, and they too appealed BLM’s

prior decision to approve the project, *see* IBLA 2015-127, 2015-135. SUWA, moreover, expressly requested an opportunity for public comment on the revised EA now under appeal, an opportunity BLM foreclosed when it issued its decision without a public comment period. *See* Ex. H, Email from N. Clark to B. Quigley (requesting a 30-day public comment period on any revised EA); *see also* Ex. J, Email from D. Hoffheins to N. Clark (December 16, 2016) (acknowledging receipt of the December 11, 2015 email requesting a public comment period and explaining BLM's rationale for not providing one).

B. Appellants Have an Adversely Affected, Legally Cognizable Interest

As set forth in the Bloxham Declaration, SUWA is a Utah non-profit corporation with approximately 13,000 members, dedicated to the sensible management of all public lands within the State of Utah, including the preservation and expansion of wilderness. SUWA's members have an interest in the wilderness, wildlife, recreational, scenic and other natural and cultural resources managed by BLM in Utah. SUWA brings this action on its own behalf and on the behalf of its adversely affected members. SUWA members and staff use and enjoy the specific lands within the Indian Creek area that is the subject of this petition for hiking, biking, climbing, sight seeing, other recreation, and solitude. *See* Ex. K, Bloxham Decl. at ¶¶ 2-5.

The Trust, Broads, and Sierra Club have similar missions and interests in protecting the Indian Creek Area. The Trust is a non-profit, public lands advocacy organization whose mission is to protect and restore the Colorado Plateau, a region that includes the Indian Creek area. *See* Ex. L, Peterson Decl. ¶ 3. Broads is a national grassroots organization, led by elders, that engages and inspires activism to preserve and protect wilderness and wild lands. Ex. L., Peterson Decl. ¶ 4. Broads got its start in 1989, working to protect the extraordinary splendor, wildness and diversity of southern Utah public lands. *Id.* The Sierra Club is America's largest grassroots

environmental organization, with more than 2.4 million members and supporters nationwide and more than 4,200 members that live in Utah. *See* Ex. K, Bloxham Decl. ¶ 5. The Sierra Club works to safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and litigation. *Id.*

Appellants are adversely affected by the Indian Creek ATV project. The interests of SUWA and Sierra Club members and staff have been injured and impaired by BLM's decision to approve and eventually construct these ATV trails and parking areas—which includes the permanent loss of wilderness-quality lands—in violation of the Bears Ears National Monument Proclamation, NEPA, FLPMA and the NHPA. *See* Ex. K, Bloxham Decl. at ¶¶ 2-5. The Trust and Broads are similarly injured. Tim Peterson, a member of both organizations, has visited the Indian Creek area many times and intends to do so again in the late winter or spring of 2017. *Ex. L Id.* ¶¶ 3–6. In the past, Mr. Peterson has enjoyed the natural beauty and solitude of the Indian Creek area, which he has used for hiking, sightseeing, photography, and quiet recreation and renewal. *Id.* If the Indian Creek ATV trail is built, Mr. Peterson's recreational, aesthetic, and other interests in the natural environment of the Indian Creek area will be adversely affected by increased noise, dust, crowding, and the environmental degradation that will be caused by the ATV trail. *Id.* at ¶¶ 6–8, 15. Appellants' injuries can be favorably redressed by a decision setting aside BLM's DR/FONSI for the Indian Creek ATV project and remanding the decision to BLM to fully comply with federal law. *Id.* at 16.¶

ARGUMENT

I. The Indian Creek Project Should be Stayed to Maintain the Status Quo

To stay BLM's decision, four matters must be weighed: (1) the likelihood of immediate and irreparable harm if the stay is not granted; (2) the relative harm to the parties if the stay is

granted or denied; (3) the likelihood of the appellant's success on the merits; and (4) the public interest. *See* 43 C.F.R. § 4.21(b). These considerations justify a stay in this case.

A. Appellants Will Suffer Irreparable Harm

Wilderness is a finite resource whose conservation has been made a “national priority” by Congress, starting with the Wilderness Act of 1964, 16 U.S.C. § 1131 *et seq.*, and carried into FLPMA and other statutes and regulations. “Among the resources to be managed on federal lands, lands with statutorily-defined wilderness characteristics are of particular importance. Congress identified the conservation of such lands as a national priority in the Wilderness Act of 1964.” *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1097 (9th Cir. 2008).

Absent an immediate stay, the project will cause serious, irreparable environmental damage to wilderness-quality lands in Indian Creek. The Indian Creek ATV project includes a portion of the 6,350-acre Upper Indian Creek wilderness inventory unit, an area that BLM determined possesses wilderness characteristics and therefore qualifies as wilderness under the requirements of the 1964 Wilderness Act. *See* Ex. E, Wilderness Characteristics Inventory; Ex. F, Wilderness Characteristics Unit Map. If constructed, the Indian Creek ATV project will bisect the Upper Indian Creek wilderness character unit, resulting in a complete and permanent loss of wilderness characteristics on 939.51 acres of BLM-managed public lands. EA at 65, 79. Furthermore, the EA contemplates that “[w]ork is expected to begin immediately after authorization,” EA at 13, or “in spring of 2017.” EA at 44. “The total time to complete all the work associated with the construction and improvement of the proposed ATV trail route is estimated at about 4 days.” EA at 13. In either instance, a stay is necessary because of the high probability that construction of the trail will commence before the Board issues a final ruling.

The Supreme Court has stated that “environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” *Village of Gambell*, 480 U.S. at 545; *see also New Mexico v. Watkins*, 969 F.2d 1122, 1137 (D.C. Cir. 1992) (stating that aesthetic injury is not compensable in money damages and likewise concluding that non-trivial statutory violation required injunction). In this case, irreparable harm to the project area and its natural resources will occur as a result of BLM’s authorization. *See* EA at 65, 79 (acknowledging a permanent loss of wilderness characteristics); *see also* EA at 10, 61; Ex. U, EA, Appendix B- Interdisciplinary Checklist (acknowledging permanent destruction of riparian and upland vegetation).

As the Board determined in a prior appeal of this project, the permanent and complete loss of wilderness characteristics, as to make an area no longer eligible for inclusion in a wilderness area, constitutes irreparable harm. Ex. M, IBLA 2015-127, Order at 4; *see also* Ex. V, *S. Utah Wilderness Alliance*, IBLA 2016-74, Order at 8 (March 9, 2016) (finding that the permanent loss of wilderness characteristics on 136 acres of land resulting from project construction constituted irreparable harm). Appellants’ members will be irreparably harmed by the unnecessary destruction of this sensitive environment and a stay is thus necessary to preserve the *status quo*. *See* Ex. K, Bloxham Decl. ¶ 7; Ex. L, Peterson Decl. ¶ 6, 15.

Moreover, Appellants are procedurally harmed by BLM’s decision. As courts have recognized in the context of procedural NEPA violations, “[o]rdinarily when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance.” *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998) (observing that “the proper remedy for substantial

procedural violations of NEPA ... is an injunction” since “injunctions serve[] the purpose of ‘preserving the decision makers’ opportunity to choose among policy alternatives”) (internal citations omitted).

As explained below, BLM violated the Bears Ears National Monument Proclamation, NEPA, the NHPA, and FLPMA by approving the Indian Creek ATV project. Without a stay, BLM will have no chance to cure its legal errors and re-evaluate the project’s impacts on the natural environment before irreversibly damaging it. This irreparably harms Appellants.

B. The Balance of Hardships Favors a Stay

In cases involving the preservation of the environment, the balance of harms usually favors granting an injunction. *See Wilderness Soc’y v. Tyrrel*, 701 F. Supp. 1473, 1479 (E.D. Cal. 1988) (noting that “when environmental injury is ‘sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment’”) (citing *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987)).

The balance of harms weighs heavily in favor of granting a stay here. Without one, construction of the project will begin almost immediately and significant environmental damage will result before the Board can review BLM’s decision. *See* EA at 13, 44 (stating that “[w]ork is expected to begin immediately after authorization” or “in spring of 2017”). That environmental damage, moreover, will degrade the recently created Bears Ears National Monument, a land-protection designation that promotes Appellants’ interests in securing lasting preservation of the region. On the other hand, BLM cannot establish any harm that counterbalances the environmental damage that will occur without a stay. As the Board noted in our previous appeal of this project, “since this issue has been pending before BLM since the County applied for a ROW nearly 10 years ago, we would be surprised if it could articulate any harm to its interests

by our granting a stay pending appeal.” Ex. M, *SUWA*, IBLA 2015-127, Order, 4 (May 14, 2015). Neither BLM nor the project proponent will suffer financial harm from a delay in building the ATV trail. And regardless, the irreparable environmental damage that will result from building the trail would outweigh any harm BLM might attribute to a delay. As the District Court for the District of Columbia has said, a stay:

[W]ould serve the public by protecting the environment from any threat of permanent damage....While granting the [stay] would inconvenience defendants and those parties holding specific interests in the lands at issue, denying the motion could ruin some of the country’s great environmental resources—and not just for now but for generations to come.

Nat’l Wildlife Fed’n v. Burford, 676 F. Supp. 271, 279 (D.D.C. 1985), *aff’d*, 835 F.2d 305 (D.C. Cir. 1987).

C. Appellants Are Likely to Succeed on the Merits

To show a sufficient likelihood of success on the merits, an appellant “need not show it will prevail on appeal. Rather, it need only show ‘sufficient justification’ for their having a ‘likelihood . . . of success on the merits.’” *SUWA*, IBLA 2015-127, Order, 4. Furthermore:

‘it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.’

Sierra Club, 108 IBLA 381, 385 (1989) (emphasis added) (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)); *see also Wyo. Outdoor Council*, 153 IBLA 379, 388 (2000) (same). As described below, BLM’s decision violates the Bears Ears National Monument Proclamation, NEPA, the NHPA, and FLPMA.

1. Constructing and Designating the Indian Creek Project for ATV Use Is Inconsistent with the Bears Ears National Monument Proclamation

The Bears Ears National Monument Proclamation identifies a host of “objects of historic and scientific interest” that the Monument is meant to preserve—from rock art, ancient cliff

dwellings, and ceremonial sites, to landscapes and riparian areas that support a diverse array of wildlife and traditional practices of Native American tribes. Ex. C at 1139–43. Among other directives, the Proclamation instructs the Secretaries of Interior and Agriculture, “[f]or purposes of protecting and restoring [these] objects,” to “prepare a transportation plan that designates the roads and trails where motorized and non-motorized mechanized vehicle use will be allowed.” *Id.* at 1145. These designations must be “consistent with the care and management of such objects,” and “[a]ny additional roads or trails designated for motorized vehicle use must be for the purposes of public safety or protection of such objects.” *Id.*

These transportation-planning provisions now govern the route-designation process for motorized vehicles in the Monument, including the Indian Creek area. And those provisions apply to and preclude construction of the new trails and parking lots included in the Indian Creek project. Though BLM’s Monticello Field Office signed its record of decision for the Indian Creek project on December 14, 2016—two weeks before the President created the Monument—the Field Office decision was not immediately effective. Rather, under Department of Interior regulations the Field Office’s decision could not be effective until at least January 14, 2017—the day after the 30-day period for appealing the decision expires. *See* 43 C.F.R. § 4.21(a) (rendering decisions ineffective during the period for filing an appeal); 4.411(a) (providing 30 days to file an appeal to the Board).² The decision is thus subject to the Proclamation.³

Under the Proclamation, new routes like the Indian Creek ATV trails and parking areas may be designated for motorized vehicle use only for the purpose of public safety or protection of the objects the Monument safeguards. *Id.*; *see also* Ex. W (explaining that off-highway-vehicle

² The Director of the Office of Hearings and Appeals or an Appeals Board may make a decision effectively immediately, *see* 43 C.F.R. 4.21(a)(1), but neither has done so here.

³ Regardless, the trails and parking lots have not yet been built and are subject to the transportation planning provisions of the Monument Proclamation for that reason.

use of existing trails may continue only if consistent with the “care and management of monument resources” and that “new roads or trails designated for motorized vehicle use would be for the purposes of public safety or protection of the monument.”). BLM’s decision to build the new trails and parking lots of the Indian Creek project contravenes these provisions, for it proposes to construct the project for the purpose of responding to San Juan County’s right-of-way application and to “provide for multiple recreational uses of the public lands,” EA at 3–4, not for public safety or the protection of the objects described in the Monument Proclamation.

BLM’s decision is accordingly arbitrary, capricious, and not in accordance with law, and must be set aside under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2).

2. BLM Violated the National Environmental Policy Act

a. BLM Did Not Properly Involve the Public in Preparing the Latest EA

BLM violated NEPA by failing to provide for public participation during development of the most recent version of the Indian Creek EA. NEPA requires BLM to “[m]ake diligent efforts to involve the public in preparing and implementing [the agency’s] NEPA procedures.”

40 C.F.R. § 1506.6(a). NEPA further requires that BLM, “to the fullest extent possible[,] . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” *Id.* § 1500.2(d). This regulatory framework “clearly envisions active public involvement in the NEPA process.” *S. Utah Wilderness Alliance*, 122 IBLA 334, 341 (1992). “Because the statutory and regulatory scheme heavily favor public participation, such participation must be the norm, and BLM must have a compelling reason for not providing any public comment period during the EA process.” *Id.* at 342. The purposes of NEPA “cannot be met when . . . there has been little or no public involvement.” *Lynn Canal Conservation, Inc.*, 167 IBLA 136, 145 (2005). Despite SUWA’s formal request for a comment period, Appellants’

longstanding and well-documented interest in the Indian Creek ATV trail, and the significant public concern regarding the trail, BLM failed to provide the public with an opportunity to comment on—or even review—the Indian Creek EA prior to signing the DR and FONSI.

In *SUWA*, the appellant requested an opportunity to comment on a proposed oil and gas exploration project in an area with numerous resource values including wilderness characteristics. 122 IBLA at 336. BLM declined to allow for public comment on the EA. *Id.* at 341-42. The Board held that BLM’s failure to allow for public comment violated NEPA, explaining that NEPA “clearly envisions active public involvement.” *Id.* at 341. Moreover:

The short delay created by permitting public input would have been outweighed by the benefits receiving such comments would have had on the quality of the EA. For example, if BLM had considered the concerns raised by [appellant] . . . before rendering its approval decision, the deficiencies in the EA . . . may well have been rectified earlier, possibly obviating the need for this appeal.

SUWA, 122 IBLA at 342. On remand, the Board ordered BLM to “provide a public comment period on the revised EA prepared for this project.” *Id.*

Similarly, in *Lynn Canal*, the Board held that BLM had improperly failed to allow public participation in its NEPA decision-making process, explaining that the purposes of NEPA “cannot be met when . . . there has been little or no public involvement.” 167 IBLA at 145. After recounting BLM’s repeated failures to properly involve the public, the Board noted:

The requirement in 40 CFR 1501.4(b) that an agency involve the public “to the extent practicable” in preparing an EA, the requirement in 40 CFR 1501.4(e)(1) that a FONSI be made available to the public, the requirement of 40 CFR 1506.6(a) that Federal agencies “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures,” the requirement of 40 CFR 1506.6(b) that environmental documents be made available, and the requirement of 40 CFR 1506.6(d) that an agency solicit information from the public would be diminished or rendered meaningless if an agency can, as in this case, complete an EA and FONSI without any notice to the public calculated to allow participation and an opportunity to challenge the decision.

Lynn Canal Conserv. Inc., 167 IBLA at 145. *See also id.* (stating that NEPA’s requirement that an agency provide the public with notice of the availability of an EA “means documents upon which comments can be made, not documents and decisions which are *fait accompli*.”).

BLM has not met these public-participation obligations in this case. It did not issue a scoping notice to the public. Nor did BLM solicit public input on the draft revised EA. Instead, BLM responded to SUWA’s December 2015 request for a 30-day public comment period only *after* the agency signed the DR/FONSI in December 2016. On December 16, 2016—after SUWA asked about the lack of public involvement in developing the revised EA—the Monticello Field Office Manager, Don Hoffheins, responded that the “2016 decision” was a “continuation of the process for the earlier EAs, which did involve 30 day public comment periods,” one in which the agency attempted to address the criticisms Appellants raised in their prior appeal to the Board. *See* Ex. J, Email from D. Hoffheins to N. Clark. BLM’s response went on to assert that the agency has discretion over providing opportunities for public comment, that the agency was authorized to “revise the EA without initiating another public comment period,” and that BLM did not provide a public comment period because it believed it had addressed all the concerns Appellants previously raised. *Id.*

This reasoning is arbitrary. Deciding not to provide a public comment period was a breach of BLM’s duty to involve the public in the NEPA process “to the fullest extent possible,” 40 C.F.R. § 1500.2(d), given the longstanding history, context, and controversy surrounding the Indian Creek ATV trail, as well as the fact that the revised Indian Creek EA contains substantial new analysis that is relevant and important to members of the public.

First, the shortcomings of BLM’s analysis were acknowledged by the agency when it voluntarily asked the Board to vacate and remand its February 2015 decision. As BLM said then,

“[u]pon further consideration of the project and the Board’s [Order granting SUWA’s Petition for a Stay], BLM has decided to conduct further analysis of the visual impacts of the proposed ATV trail and other project details.” Ex. N, IBLA 2015-127, BLM’s Motion to Vacate and Remand, 2 (August 5, 2015); EA at 3. BLM’s recognition of the deficiencies in the prior EA makes it all the more important for the agency to solicit public involvement in the EA-revision process.⁴ Second, BLM is aware of the significant level of public interest in the Indian Creek ATV project, as evidenced by the thousands of comments received from individuals and organizations over the course of this proposal. EA at 81-82; EA, Appendix C, H, *available at* https://eplanning.blm.gov/epl-front-office/eplanning/docset_view.do?projectId=66242¤tPageId=95209&documentId=93003 (last visited December 22, 2016); *see also* 43 C.F.R. § 46.305(b) (BLM is encouraged to seek comments on an environmental assessment “when the level of public interest . . . warrants”). Finally, it is disingenuous for BLM to support its position with the rationale that it “may receive public comments” even though the agency did not provide for a public comment period. Such a statement ignores the facts in the present case and places an unreasonable burden on the public to comment on a project without having the requisite information needed to meaningfully engage in the NEPA process.

The NEPA process “heavily favor[s] public participation” and such participation “must be the norm.” *SUWA*, 122 IBLA at 341. BLM has not met this standard in the present case, for it has entirely failed to provide a “compelling reason for not providing any public comment period during the EA process.” *SUWA*, 122 IBLA at 342. The Indian Creek ATV trail involves extensive resource conflicts, including permanent loss of wilderness-quality lands, is located in the new Bears Ears National Monument and in close proximity to Canyonlands National Park,

⁴ Instead of adjusting the project to respond to public concerns, BLM instead undertook a process that apparently resulted in “no change in the proposed action . . . no changes in the alternatives and . . . no changes in the conclusions.” Ex. J, Email from D. Hoffheins to N. Clark.

has been subject to a high degree of public controversy and concern, and previously resulted in Appellants' successful IBLA appeal of this same project—all of which point to a clear need for public involvement in development of the revised Indian Creek EA. Furthermore, the Indian Creek EA includes substantial and relevant new analysis, which could have been significantly improved by public input. BLM's failure to make any effort, let alone a diligent effort, to involve the public in preparation of the revised Indian Creek EA falls short of the level of public engagement envisioned by NEPA and its implementing regulations.

b. BLM Must Supplement the EA to Analyze the Monument Designation

Federal agencies must supplement environmental assessments under NEPA when major federal action remains to occur and “new information is sufficient to show that the remaining action will ‘affect[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered.” *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 374 (1989) (quoting 42 U.S.C. § 4332(2)(C)); 40 C.F.R. § 1502.9(c).⁵ When agencies are confronted with potentially significant new information or circumstances after preparing an EA, they must take a “hard look” at these new matters to determine whether a proposal’s impacts will be significant or significantly different than those already considered.⁶

Major federal action remains to occur here given that BLM’s decision to proceed with the Indian Creek project was not yet effective when the Bears Ears National Monument was created (*see supra* p. 12), and because BLM has yet to commence, let alone complete, construction of the ATV trails and parking areas. *See Marsh*, 490 U.S. at 374 (ongoing construction of dam that was

⁵ The standards for supplemental environmental assessments are the same as those for supplemental environmental impact statements. *See S. Utah Wilderness Alliance*, 301 F.3d 1217, 1238 n.19 (10th Cir. 2002) *rev’d on other grounds by* 542 U.S. 55.

⁶ *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557–558 (9th Cir. 2000) (“When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [supplementation]”); *Marsh*, 490 U.S. at 378 (Courts must “carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision based on its evaluation of the significance or lack of significance of the new information.”).

under review in the challenged NEPA analysis was ongoing major federal action); *see also Norton v. SUWA*, 542 U.S. 55, 73 (2004) (explaining that the prerequisite of ongoing major federal action was satisfied in *Marsh* because construction of the dam was not yet complete).

And BLM has breached NEPA’s supplementation requirements by failing to take a “hard look” at whether the impacts of the Indian Creek ATV project will be “significant or significantly different” as a result of the creation of Bears Ears National Monument. The Monument Proclamation identifies a wealth of objects in the Monument that are to be protected, including not only cultural resources, but also sacred and natural landscapes. *See* Ex. C at 1139–40. The EA has not evaluated how construction and use of the Indian Creek ATV trails and parking lots may affect these objects. *See* Peterson Decl. ¶ 5, 7 (describing cultural objects and sacred areas in the Indian Creek area that are not documented, are to be protected by the Monument, and that are threatened by the Indian Creek project). And the Monument designation will undoubtedly lead to on-the-ground changes in and around the Indian Creek region—as a result of withdrawing the area from entry and other disposition under the public land laws, through development of a management plan to protect and restore Monument objects, and through transportation planning that will alter motorized-vehicle use of the Monument. Indeed, similar monument designations have led to increased visitation,⁷ a probable on-the-ground change in the new Bears Ears National Monument that BLM must consider here, for a change in visitation would affect BLM’s analysis of noise caused by use of the proposed Indian Creek ATV trails and adjacent routes, the likelihood of conflicts among recreational uses, and other visitation-dependent issues assessed in the EA.

⁷ *See, e.g.,* Ex. X, BBC Res. & Consulting, Economic Impacts of National Monument Designation 16 (Aug. 22, 2012) (showing pre and post monument designation visitation steadily increased to more than double in the years following designation of four national monuments in the early 2000s).

3. BLM Violated the National Historic Preservation Act

BLM also violated the NHPA when it approved the Indian Creek project because the agency failed to make a “reasonable and good faith effort” to identify cultural resources on existing designated routes that will experience a shift, concentration, or expansion of use due to approval of the Indian Creek project.

Section 106 of the NHPA requires federal agencies, prior to approving an “undertaking,” to “take into account the effect of the undertaking on any historic property.” 54 U.S.C. § 306108. Historic property is defined as “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.” *Id.* § 300308. BLM is required to “make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.” 36 C.F.R. § 800.4(b)(1). Three types of surveys may be utilized by BLM in order to identify cultural resources:

A **Class I** survey relies on existing information and is “a professionally prepared study that includes a compilation and analysis of all reasonably available cultural resource data and literature, and a management-focused, interpretative, narrative overview, and synthesis of the data.” [BLM Manual] § 8110.2.21.A.1. A **Class II** survey involves on-the-ground surveying and is a “probabilistic field survey” or “statistically based sample survey” that “aids in characterizing the probable density, diversity, and distribution of cultural properties in an area.” *Id.* § 8110.2.21.B.1. A **Class III** survey is an on-the-ground intensive survey of the entire subject area “intended to locate and record all historic properties” and “provides managers and cultural resource specialists with a complete record of cultural properties.” The Class III survey is the most frequently employed method of inventory. *Id.* § 8110.2.21.

S. Utah Wilderness Alliance et al. v. Burke et al., 981 F. Supp. 2d 1099, 1108 (D. Utah 2013) (citing BLM Manual 8110 - Identifying and Evaluating Cultural Resources (Dec. 3, 2004)).

Recent federal court decisions and BLM guidance establish the principle that a “reasonable and good faith effort” to identify cultural resources requires a Class II or Class III inventory where there is a reasonable expectation that an agency’s decision will result in a shift, concentration, or expansion of motorized use on existing, designated motorized routes. *SUWA*, 981 F. Supp. 2d at 1109; *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988 (9th Cir. 2013). This requirement stems from a recognition that, just because a motorized route is currently designated as open does not mean that new or additional damage to cultural resources will not occur as a result of changes in the use of that route. *See SUWA*, 981 F. Supp. 2d at 1108-09 (noting BLM’s acknowledgement that “there is some potential to affect sites that may be located on designated routes” and “[c]ontinuing use on those roads may be an adverse effect on any sites located therein.”). Here, BLM failed to conduct an adequate cultural resources inventory on designated routes where there existed a reasonable expectation that BLM’s approval would result in a shift, concentration, or expansion of use on those routes.

a. Existing Routes Will Experience a Shift, Concentration, or Expansion of Motorized Use as a Result of BLM’s Decision

Though the very purpose of the Indian Creek ATV trail is to connect Lockhart Basin (an area heavily utilized for motorized recreation) to the Lavender and Davis Canyon area (which receives very little motorized recreational use), the EA maintains—without any supporting data—that there is only a “potential” for a “slight” increase in ATV use on designated routes near the project area, including those that the Indian Creek trail is designed to connect. EA at 54; DR at 11. In support of this determination, BLM provides only anecdotal evidence that: (1) ATV users can already access Lavender and Davis Canyons if they park along Highway 211, unload their ATVs, and ride into the area from there, EA at 54; and (2) “[b]ased on conversations with

BLM field staff,” an ATV connector route in a remote location in San Juan County, called the Cedar Mesa ATV Trail, “did not appreciably increase ATV use in the area.” *Id.*

These conclusions contradict BLM’s own analysis, data, and the underlying project purpose, all of which indicate that BLM had, or should have had, a reasonable expectation that the Indian Creek ATV trail will result in a more-than-slight increase in use on some or all of the designated routes within the vicinity of the project area, including Davis and Lavender Canyons.

In the EA, BLM acknowledged that “[a]uthorization of the ATV trail could increase the use on designated routes that the ATV trail would connect to,”⁸ EA at 45. Indeed, BLM included the “mitigation segment” specifically to encourage increased use along routes D0575 and D1346 in an effort to ameliorate National Park Service (NPS) concerns regarding the anticipated expansion of motorized travel on designated routes within the Lavender Canyon, Davis Canyon, and Bridger Jack Mesa area.⁹ *See* EA at 64 (noting that the “benefit of [Alternative C] is that is would lessen the possible increase in numbers in Davis and Lavender Canyon, Bridger Jack Mesa, and [the] Dugout Ranch areas” and that, due to the possibility for a “loop experience” the route “may also result in being a preferred route for many ATV users . . .”). Thus, the likely result of the “mitigation segment” is the expansion of ATV use on routes D0575 and D1346—the routes that would be utilized to complete the proposed loop created by Alternative C. DR, 9 (stating that “Alternative C provides ATV riders an option for riding back to the parking area north of Hamburger Rock instead of riding toward Davis and Lavender Canyon” and that “BLM will encourage use of this route through directional signs.”).

⁸ The designated routes at issue are generally located to the south and west of Highway 211 (*i.e.*, Lavender Canyon, Davis Canyon, and Bridger Jack Mesa areas) and also the routes forming the eastern and northern boundary of the BLM identified Upper Indian Creek wilderness character unit (impacted as a result of the “mitigation segment” and subsequent ATV loop ride). *See* Ex. O, EA, Appendix A, Map 5 Designated Roads within the Indian Creek [Special Recreation Management Area]. Specifically, these routes are identified by BLM as D0459, D0492, D0494, D0495, D0497, D0571, D0575, D1291, D1297, D1346, D1439, D1443, D1456, D1493, D3265, D3266, and D4858. *Id.*

⁹ These areas include routes D0459, D0492, D0494, D0495, D0497, D0571, D1291, D1297, D1439, D1443, D1456, D1493, D3265, D3266, and D4858.

Even with BLM’s “mitigation segment,” the agency predicts an increase in motorized use on designated routes in the areas bordering Canyonlands National Park, which include Davis and Lavender Canyons. DR, 11. And BLM’s own traffic counter data strongly suggests that this increase will not be “slight.” Ex. P, BLM’s Indian Creek Traffic Counter Data.¹⁰ That data shows that roughly ten times more motorized use now occurs annually on the Lockhart Basin Road (which connects Lockhart Basin to the northern terminus of the Indian Creek ATV trail) than on the Lavender-Davis Canyon Road (which connects Lavender and Davis Canyon area to the southern terminus of the Indian Creek ATV trail). *See id.* (showing a traffic count of 6,396 trips for the Lockhart Basin Road during the six months of measurement in 2014 and only 696 for Lavender-Davis Canyon Road during a partially overlapping six-month period). Although the traffic data includes all forms of motorized transportation, the information paints a reliable picture of the difference between existing recreational motorized use occurring in the Lockhart Basin area as compared to the Lavender and Davis Canyon areas.¹¹ This data—which has never been disclosed or discussed at any point in the NEPA process—shows that BLM’s conclusion that the increase in ATV use will be “slight” is arbitrary, and substantiates concerns raised in comments submitted by NPS¹² and others regarding the stark difference in ATV traffic in Lockhart Basin versus the Lavender Canyon, Davis Canyon, and Bridger Jack Mesa area.

¹⁰ BLM’s traffic counter data was obtained from BLM’s attorney, Cameron Johnson, as part of IBLA 2015 127. Ex. P also includes an annotated map showing the approximate locations of BLM’s traffic counters for Lockhart Basin Rd. and Lavender Davis Rd. (based on information provided by BLM).

¹¹ This comparison remains accurate when adjusting for seasonal differences in the measurement periods for the two roads. Although the total figures for Lockhart Basin Road and Davis Lavender Canyon Road during 2013 appear at first glance to be comparable, this is a false comparison as BLM did not gather data for the Lockhart Basin Road during the spring of 2013 (the time of year when the Lockhart Basin Road receives its peak use levels). *See* EA at 54 (noting that motorized use near Lavender Canyon, Davis Canyon, and the Bridger Jack areas “is heaviest in the spring and fall.”).

¹² NPS stated: “[T]he proposed action is designed explicitly to connect heavily used ATV areas in Lockhart Basin and around Hamburger Rock to more than 20 miles of designated routes in Davis and Lavender Canyons that extend to the eastern boundary of the park. *By connecting a high use ATV area with an extensive network of lesser used routes, it is likely that the proposed action will greatly increase ATV use of Davis and Lavender Canyons.*” Ex. Q, NPS Comments on Indian Creek EA, 1 (Dec. 21, 2011) (emphasis added).

BLM also maintains that the Indian Creek ATV trail would not significantly increase use because ATVs can currently access the Lavender and Davis Canyon area by parking along Highway 211. But the fact that ATV users *can* legally access Lavender and Davis Canyons from Highway 211 does not necessarily mean that they *are* accessing the area in that manner, which is borne out by BLM's own objective data. The exponentially greater level of current recreational motorized use in Lockhart Basin, which includes numerous ATV trails and parking areas, suggests that the difficulty of accessing Lavender and Davis Canyons from Highway 211 deters recreational motorized use in that area, a conclusion that is consistent with the stated purpose for the Indian Creek ATV trail—to ease ATV movement between the two areas. In sum, there is a reasonable expectation that the Indian Creek ATV trail will result in a material shift, concentration, or expansion of motorized use on routes in the vicinity of the Indian Creek trails and parking areas.

b. BLM Violated the NHPA by Failing to Conduct a Class II or III Inventory for Routes Affected by the Indian Creek ATV Trail

The *SUWA* and *Montana Wilderness* decisions relied on BLM Instruction Memorandum (IM) 2007-030, which states, “[w]here there is a reasonable expectation that a proposed designation will shift, concentrate, or expand travel into areas where historic properties are likely to be adversely affected, Class III inventory and compliance with section 106 [of the NHPA], focused on areas where adverse effects are likely to occur, is required prior to designation.” Ex. R, BLM IM 2007-030- Clarification of Cultural Resource Considerations for Off-Highway Vehicle (OHV) Designation and Travel Management (December 15, 2006); *SUWA*, 981 F. Supp. 2d at 1108; *Montana Wilderness*, 725 F.3d at 1006, 1008. In analyzing BLM's guidance, the Ninth Circuit Court of Appeals stated, “[t]he memorandum suggests that a Class I survey will suffice when a transportation plan proposes to maintain the status quo, but that a Class III

inventory should be used when a plan *authorizes new roads or increased traffic on existing roads.*” *Montana Wilderness*, 725 F.3d at 1006 (emphasis added); *see also SUWA*, 981 F. Supp. 2d at 1108 (same).¹³

In 2012, BLM issued IM 2012-067, which superseded IM 2007-030. Ex. S, BLM Instruction Memorandum No. 2012-067- Clarification of Cultural Resource Considerations for Off-Highway Vehicle Designations and Travel Management (February 10, 2012). Although IM 2012-067 makes some substantive changes to IM 2007-030, it retains the underlying principle relied on by the courts, that “[w]here there is a reasonable expectation that a proposed designation will shift, concentrate or expand travel into areas where historic properties are likely to be adversely affected, Class II or Class III inventory focused on areas where adverse effects are likely to occur is recommended prior to designation.” IM 2012-067.

BLM did not comply with this mandate, for the agency conducted only a Class I inventory of fifteen designated routes near the Indian Creek ATV trail,¹⁴ EA at 28, and failed to conduct any cultural resources analysis for two additional routes (*i.e.*, D1291 and D1439). As discussed above, BLM had, or should have had, a reasonable expectation that approval of the Indian Creek ATV trail will result in more motorized use on some or all of the designated routes in the vicinity of the approved trail. This is especially pertinent for the primary routes associated with Alternative C’s “mitigation segment” loop (*i.e.*, D0575 and D1346), the primary routes in and connecting to Lavender Canyon (*i.e.*, D0492, D0494, D0495, D0497, D0498, D0571, and D1297), and the primary routes in and connecting to Davis Canyon (*i.e.*, D1443, D1456, and

¹³ Though *SUWA* and *Montana Wilderness* involved travel management plan revisions, their holdings apply equally to the site specific route designation at issue here, given that BLM’s decision will result in formal designation of the ATV trail through an amendment to the existing travel management plan. Indian Creek DR, 1 (stating that “BLM will designate the ATV trails as part of the Monticello Field Office’s Travel Management Plan.”).

¹⁴ These routes were D0492, D0494, D0495, D0497, D0571, D0575, D1279, D1297, D1346, D1433, D1443, D1456, D3265, D3266, D4858. BLM’s Class I inventory involved “using BLM Monticello Field Office files and the State Historic Preservation Office GIS data to identify known sites along or in” the 15 designated routes. EA, 28.

D4858). *See also* EA, Appx. A. Map 6 (depicting the routes connecting to the proposed ATV trails and parking lots). In addition, BLM failed to conduct any cultural resources inventory on two routes in these areas (*i.e.*, D1291 and D1439) even though Appellants notified BLM in their prior appeal that the agency’s analysis of these routes was deficient. *See* Statement of Reasons, IBLA 2015-127 at 26–30, n.9.

BLM’s failure to conduct a Class II or Class III cultural resources inventory of the fifteen routes it reviewed—and its failure to conduct any inventory on two other routes at issue in IBLA 2015-127—violates the NHPA. BLM did not make a “reasonable and good faith effort” to identify cultural resources on the routes likely to see more use if the Indian Creek connector trails and parking lots are built. Instead, BLM arbitrarily determined that any increase in motorized use on these routes would be “slight,” and elected not to fully analyze how changed use of those routes would affect cultural resources. Without engaging in the on-the-ground effort involved in a Class II or Class III cultural resources inventory, it is impossible for BLM to fully understand the extent or location of existing cultural resources that may be adversely impacted by its decision. “[W]ithout that good faith inventory, there is no valid basis for concluding that the plan had no adverse impacts to cultural resources.” *SUWA*, 981 F. Supp. 2d at 1108.

4. The Project Does Not Conform to the Monticello RMP, Violating FLPMA

FLPMA requires BLM to manage public lands in accordance with land use plans and to ensure that site-specific project approvals conform to those plans. 43 U.S.C. § 1732(a); *see also* 43 C.F.R. § 1610.5-3(a); *see also* 43 C.F.R. § 1601.0-5(b) (stating that “[c]onformity or conformance means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.”). Here, BLM’s authorization to construct the

“mitigation segment” ATV trail (*i.e.*, Alternative C) does not conform to the Monticello RMP’s prohibition on surface-disturbing activities within active floodplains or within 100 meters of riparian areas. The trails BLM proposes to build would cross 1,611 feet of an active floodplain and riparian area, EA at 30, violating the Monticello RMP’s strict prohibition on surface-disturbing activities in active floodplains and within 100 meters of riparian areas. Monticello RMP, RIP-5, 113; Indian Creek EA at 29-30; Indian Creek DR at 1, 6-7.

In the EA, BLM recognized that “[r]iparian zones in the [Monticello Field Office (MFO)] are some of the most diverse and productive systems,” yet those systems comprise only “1 percent of the 1.8 million acres in the [MFO]” EA at 29. “[E]ven though they are a small component to the overall landscape,” the agency continued, “functions and habitat values provided by these areas are essential to humans . . . wildlife species . . . and ecological processes.” *Id.* Consistent with these observations, the Monticello RMP prohibits surface-disturbing activities in floodplains and riparian areas with extremely limited exception:

No new surface-disturbing activities are allowed within active floodplains or within 100 meters of riparian areas unless it can be shown that: a) there are no practicable alternatives or, b) all long-term impacts can be fully mitigated or, c) the activity will benefit and enhance the riparian area.

Monticello RMP, RIP-5, 113.

BLM violated this prohibition by approving construction of part of the “mitigation segment” directly across the Indian Creek riparian area and floodplain, potentially using a trail cat (*i.e.* a small dozer) to do so. EA at 61. At an approved trail width of 12 feet, the total surface disturbance in the floodplain and riparian area would be 0.44 acres. EA at 30. In addressing the direct adverse effects of trail construction and ongoing ATV use, BLM states:

Although located to minimize effects on other vegetation, construction would uproot and remove vegetative material to establish the route. This equipment may also be used to cut the wash banks to enable crossing of the drainage. ATV trail

use would suppress future plant regrowth within the trail tread through compaction of the soils and the crushing of new vegetation.

EA at 61; DR at 5-6. Indirect adverse effects from the trail “could be caused by a small percentage of ATV riders driving up and down the Indian Creek channel. Unauthorized use could lead to disturbance to the banks, terraces, and benches of Indian Creek’s floodplains and riparian areas upstream and downstream from the proposed trail.” EA at 61.

BLM contends that its decision conforms to the Monticello RMP because “all long-term impacts can be fully mitigated:”

The direct effects of trail construction, use and maintenance *would likely allow for proper functioning conditions of riparian communities to be maintained*, because they are within a narrow linear corridor that would not alter the stream channel morphology and change the functions of the channel appropriate for the climate and landform.

EA at 61; DR at 6 (emphasis added). The agency has also added a plan to complete vegetation improvements elsewhere in the Indian Creek riparian area as compensatory mitigation for the damage the trail will cause. *Id.* at 21–22, 61; DR at 6. Last, BLM states, “[i]f off-trail use along the proposed mitigation segment shows impairment of the proper functioning condition of the riparian area, changes in stream channel morphology, or destabilizes banks outside of the trail alignment, BLM will pursue a variety of options from enforcement, restoration, to closing the route in the most extreme situation.” EA at 62.

BLM’s conclusion that all long-term impacts to the Indian Creek riparian area can be fully mitigated is without merit. Off-trail “compensatory” vegetation treatments would only change the mix of vegetation in parts of Indian Creek without adding riparian area to replace the riparian area lost by the Indian Creek crossing, and those treatments would do nothing to offset further degradation that would be caused by illegal ATV use off-trail in Indian Creek. And maintaining proper functioning condition (PFC) of the Indian Creek riparian area is not sufficient

to ensure full mitigation of all long-term impacts. PFC is “a qualitative method for assessing the condition of riparian-wetland areas.” BLM Technical Reference (TR) 1737-15- A User Guide to Assessing Proper Functioning Condition and the Supporting Science for Lotic Areas (1998), 1, *available at*: <https://www.blm.gov/or/programs/nrst/files/Final%20TR%201737-15.pdf> (last visited December 23, 2016). PFC is “*not designed to be the sole indicator of overall health of a riparian ecosystem or a tool for monitoring riparian health . . . as the protocol does not contain a means for obtaining objective data on stream characteristics.*” Ex. T, Catlin Decl. ¶ 6 (*quoting* Elmore, W., Letter from National Riparian Service Team to Jim Catlin) (emphasis added). Instead, the proper, BLM-approved, evidence-based tool for monitoring riparian health is called “Multiple Indicator Monitoring.” *Id.*; *see also* BLM Technical Reference 1737-23- Multiple Indicator Monitoring (MIM) of Stream Channels and Streamside Vegetation (2011), *available at*: <https://www.blm.gov/nstc/library/pdf/MIM.pdf> (last visited December 23, 2016).

According to TR 1737-23, the “MIM protocol is designed to be objective, efficient, and effective for monitoring streambanks, stream channels, and streamside riparian vegetation . . . [and] the long-term indicators described in this protocol are useful for monitoring changes that occur on the streambank and in the channel as a result of management activities other than grazing.” Catlin Decl. ¶ 6; TR 1737-23, 155. Thus, BLM erred in its reliance on PFC as a means to ensure full mitigation of all long-term impacts to the Indian Creek riparian area resulting from construction and ongoing use of the “mitigation segment.” *See* Catlin Decl., ¶ 6-7 (stating “BLM’s reliance on PFC as a monitoring tool to assess the potential adverse impacts from the ‘mitigation segment’ (*i.e.*, Alternative C), and to ensure that all long-term impacts are fully mitigated, is misplaced. PFC is not a monitoring tool and does not involve objective data collection and comparison.”).

Furthermore, although Appellants raised this issue in IBLA 2015-127, BLM still “has not inventoried the project site using MIM, and therefore lacks an ability to conduct ongoing monitoring based on objective data collection and comparison. As such, BLM has no means to objectively evaluate whether the Indian Creek riparian area and floodplain are being adversely impacted and, thus, cannot ensure that all long-term impacts to the riparian area and floodplain will be fully mitigated.” *Id.* at ¶ 7.

In total, BLM has failed to provide sufficient information to support its conclusion that Alternative C falls within the narrow exception to the RMP’s strict prohibition on surface-disturbing activities within a riparian area and floodplain. In so doing, BLM failed to consider its own technical, peer-reviewed scientific information that calls into question its determination that all long-term adverse impacts can be fully mitigated. Thus, BLM’s decision violates FLPMA, as the approved “mitigation segment” is a surface-disturbing activity that cannot be fully mitigated, and therefore does not conform to the Monticello RMP’s prohibition on surface-disturbing activities within 100 meters of a floodplain and riparian area.

D. The Public Interest Favors a Stay

Because Appellants seek to compel BLM to follow federal laws designed to protect the environment, granting a stay would serve the public interest, especially in the wake of the recent designation of the Indian Creek area as part of the Bears Ears National Monument. *See Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp.2d 156, 163 (D.D.C. 2002) (stating that “[c]ourts have not hesitated to enjoin an agency action that was taken in violation of NEPA.”). A stay would protect the environment and the new Monument from immediate and potentially unnecessary degradation and harm until the merits of Appellants’ claims can be fully addressed. *See State of Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978) (stating that “in most cases, ...

it is possible and reasonable for the courts to insist on strict compliance with NEPA, and actions can, consistently with the public interest, be enjoined until such compliance is forthcoming.”) (internal citation omitted). This is in the public interest.

CONCLUSION

Appellants respectfully request that the Board immediately stay BLM’s EA, DR, and FONSI for the Proposed Right-of-Way by San Juan County for an ATV Trail in the Indian Creek Area, DOI-BLM-UT-090-06-05 (December 2016). Appellants also request that BLM’s decision be remanded and set-aside for full compliance with NEPA, the NHPA, FLPMA, and the Bears Ears National Monument Proclamation.

December 24, 2016



Neal Clark
Southern Utah Wilderness Alliance

January 13, 2017



Aaron M. Paul
Grand Canyon Trust

*Attorney for Appellants Grand Canyon Trust,
Great Old Broads for Wilderness, and
Utah Chapter Sierra Club*