

1 MCGREGOR W. SCOTT
United States Attorney
2 BRIAN ENOS (CSBN #201316)
Assistant U.S. Attorney
3 2500 Tulare St., Suite 4401
Fresno, CA 93721
4 Telephone: (559) 497-4000
Facsimile: (559) 497-4099
5

6 RONALD J. TENPAS
Assistant Attorney General
7 BRUCE D. BERNARD
Trial Attorney
General Litigation Section
8 Environment and Natural Resources Division
U.S. Department of Justice
9 1961 Stout Street, 8th Floor
Denver, Colorado 80294
10 Telephone: (303) 844-1361
Facsimile: (303) 844-1350
11 e-mail: bruce.bernard@usdoj.gov

12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

14 COUNTY OF INYO

15 Plaintiff,

16 v.
17

18
19 DEPARTMENT OF THE INTERIOR,
DIRK KEMPTHORNE, in his capacity as
20 Secretary of the United States Department of the
Interior, NATIONAL PARK SERVICE,
21 MARY A. BOMAR, in her capacity as Director,
National Park Service,
22 JAMES T. REYNOLDS, in his capacity as
Superintendent, Death Valley National Park,

23 Defendants, and

24 SIERRA CLUB, *et al.*,

25 Defendant-Intervenors.
26
27
28

No. 1:06-CV-01502-AWI-DLB

DECLARATION OF GERALD J. MAGEE

[Filed concurrently with Memorandum of Points and Authorities]

Dennis L. Beck
U.S. Magistrate Judge

Anthony W. Ishii
U.S. District Court Judge

Hearing Date: June 23, 2008
Hearing Time: 1:30 p.m.
Hearing Location: Courtroom 3

1 I, Gerald J. Magee, declare as follows:

2 1. This Declaration is submitted on behalf of Federal Defendants and pertains to
3 Federal Defendants' Motion to Dismiss filed concurrently herewith.

4 2. I have personal knowledge of the matters stated herein and, if called as a witness,
5 could and would competently testify thereto.

6 3. I am currently employed by the Bureau of Land Management, U.S. Department of
7 the Interior ("BLM"), in the Oregon State office. I have served as the Oregon/Washington
8 Environmental Protection Specialist since April 1984. From September 1976 to February 1979,
9 I was an Outdoor Recreation Planner on the California Desert Plan Staff. I have a Bachelor of
10 Science degree in Environmental Planning & Management from the University of California,
11 Davis (1976) and expect to complete a Master of Studies in Environmental Law from Vermont
12 Law School this summer (2008).

13 4. I have reviewed the Complaint filed by the County of Inyo in this case and am
14 familiar with the locations of the claimed roads, i.e., the Petro Road, the Lost Section Road -
15 South, the Last Chance Road and the Padre Point Road. I was personally involved in the BLM
16 planning process that resulted in the lands underlying the claimed roads being designated as
17 Wilderness Study Areas. An explanation of BLM's wilderness review and planning process for
18 these lands is provided in Paragraphs 6 to 15 below.

19 5. I have reviewed the documents attached as Exhibit B to the Declaration of Bruce
20 D. Bernard which were produced by Inyo County in response to discovery requests asking for
21 documents relating to BLM's 1979 designation and management of Wilderness Study Areas
22 ("WSAs") in Inyo County (document nos. 1-119) ("documents received from Inyo County").

23 6. My personal experience working on wilderness review and the California Desert
24 Plan started in September 1976 as I conducted recreation, visual resources and primitive area
25 inventories of BLM-administered lands in the California Desert.

26 7. Within a month, the Federal Land Policy & Management Act of 1976
27 ("FLPMA") was passed, giving BLM wilderness authority and establishing the California Desert
28 Conservation Area ("CDCA"). FLPMA required BLM to study, within fifteen years of the Act's

1 passage, certain “roadless areas of five thousand acres or more.” However, FLPMA also
2 included specific provisions concerning planning and protection of the resources of the CDCA.
3 FLPMA required the “immediate and future protection and administration” of the CDCA and
4 required BLM to complete a comprehensive, long-range plan for the management of the CDCA
5 by September 30, 1980. Because of this requirement for completing a comprehensive, long
6 range plan for management and protection of the CDCA by 1980, the wilderness inventory and
7 study process was accelerated for lands within the CDCA.

8 8. In January 1978, my field partner and I performed BLM’s first wilderness
9 inventory in the vicinity of the Riverside Mountains, which was part of the CDCA. We used this
10 experience and interviews of Forest Service wilderness personnel to craft a wilderness inventory
11 process that was later adopted for the intensive CDCA effort as well as BLM’s national effort. I
12 then became the Desert Plan Staff representative to the Riverside District Wilderness Inventory
13 Team when CDCA-wide wilderness inventories began in late spring/early summer 1978. We
14 were assigned to rotating two-person crews (four crews total) that conducted the original
15 comprehensive wilderness inventory and the subsequent rounds of field validations that followed
16 each extensive public review period (involving multiple meetings and workshops). After
17 moving to the Bakersfield District (as District Wilderness Coordinator) in 1979, I was detailed
18 back to the CDCA planning staff from June to September 1980 to assist with completion of the
19 Final EIS and CDCA plan. At that time, I authored the wilderness sections of the FEIS and Final
20 Plan.

21 9. As part of the CDCA planning and wilderness review process mandated by
22 FLPMA, BLM inventoried the CDCA lands in the late 1970s to determine whether areas were
23 roadless and had wilderness character, and should be designated as WSAs. As part of its
24 obligation to inventory roadless areas, the BLM California State Office issued the “California
25 Desert Conservation Area Wilderness Inventory and Study Program” (April 19, 1978)) to guide
26 the initial CDCA inventory and study process until completion of BLM’s “Wilderness Inventory
27 Handbook” on September 27, 1978. A true and accurate copy of the CDCA Wilderness
28 Inventory and Study Program guide is attached hereto as Exhibit A; a true and correct copy of

1 the BLM Wilderness Inventory Handbook is attached hereto as Exhibit B. These documents
2 provided uniform guidance for wilderness review on public lands under BLM jurisdiction. In
3 particular, the Wilderness Inventory Handbook defined the term “roadless” as follows: “The
4 word roadless refers to the absence of roads which have been improved and maintained by
5 mechanical means to insure relatively regular and continuous use. A way maintained solely by
6 the passage of vehicles does not constitute a road.” This definition is identical to that in the
7 legislative history of FLPMA. House of Representatives Report 94-1163, page 17, May 15,
8 1976. The Wilderness Inventory Handbook makes clear that the words “improved and
9 maintained” encompass all physical actions taken to keep the road open to vehicular traffic,
10 including improvement that does not entail formal construction and maintenance involving the
11 use of hand tools as well as power machinery or tools. The Handbook further clarifies that the
12 phrase “relatively regular and continuous use” means that vehicular use has occurred and will
13 continue to occur on a relatively regular basis, including roads that access water sources,
14 recreation sites and mining claims. Finally, the Handbook notes that, even with the definition
15 and clarifications and examples provided by the Handbook, there was room for varying opinions
16 concerning the existence of “roads.” It therefore added certain key principles in determining
17 “roadlessness.” These guiding principles included seeking the “widest possible range of public
18 opinion from diverse points of view” in looking for the presence or absence of roads, and taking
19 into account that the purpose of the wilderness inventory was to “find those places on the public
20 lands which, by their very nature, truly have the attributes and the character of wilderness.” In
21 describing the wilderness review process, the Handbook makes clear that the review is a very
22 public process involving notice and multiple opportunities for public comment.

23 10. In conducting the wilderness inventories, wilderness inventory team members
24 delineated the boundaries of roadless areas by comparing all visible vehicle routes against the
25 definition of “roadless.” All routes not meeting the “roads” criteria were deemed to be “ways.”

26 11. The wilderness inventory process was completed in 1979. On March 30, 1979,
27 the BLM State Director for California published a list of designated WSAs totaling
28 approximately 5.5 million acres of CDCA lands. California Desert Conservation Area,

1 Wilderness Inventory - Final Descriptive Narratives, published March 31, 1979, 44 Fed. Reg.
2 19,044-45 (March 30, 1979). The WSAs designated in 1979 included the:

- 3 a. Greenwater Range WSA (CDCA 147), encompassing 153,295 acres;
- 4 b. Greenwater Valley WSA (CDCA 148), encompassing 61,519 acres;
- 5 c. Last Chance Mountain WSA (CDCA 112), encompassing 42,202 acres;
- 6 d. Panamint Dunes WSA (CDCA 127), encompassing 109,403 acres.

7 As a wilderness inventory team member, I personally participated in conducting the wilderness
8 inventory for CDCA 147, Greenwater Range, and CDCA 148, Greenwater Valley.

9 12. I have reviewed the Final Descriptive Narratives, including the maps of the WSAs
10 that accompanied those Narratives, and determined with respect to each of the roads claimed by
11 Inyo County in this case that:

- 12 a. The claimed Petro Road is located entirely within the Greenwater Range WSA
13 (CDCA 147).
- 14 b. The claimed Lost Section Road - South is located entirely within the Greenwater
15 Valley WSA (CDCA 148).
- 16 c. The claimed Last Chance Road, with the exception of a "cherry stem" that
17 corresponds to the northern one-half mile of the claimed road, is located within
18 the Last Chance Mountain WSA (CDCA 112).
- 19 d. The claimed Padre Point Road is located entirely within the Panamint Dunes
20 WSA (CDCA 127).

21 13. Once an area of land was included within the boundary of a WSA, certain
22 management obligations arose pursuant to FLPMA. Section 603© of FLPMA required that
23 "During the period of review of such [WSAs] and until Congress has determined otherwise,"
24 BLM "shall continue to manage such [WSAs] ... in a manner so as not to impair the suitability
25 of such areas for preservation as wilderness." This mandate required BLM to manage all lands
26 within a WSA in a manner that preserved their suitability for wilderness preservation, regardless
27 of whether BLM itself later recommended the lands suitable or unsuitable for wilderness. This
28 management obligation remained in effect until Congress either designated the lands as

1 wilderness or released the lands from further wilderness consideration. In furtherance of this
2 mandate, BLM issued its “Interim Management Policy and Guidelines for Lands Under
3 Wilderness Review” in December 1979, which applied to all WSAs. The Interim Management
4 Policy and Guidelines describes BLM's standard for interim management (i.e., during the period
5 of wilderness review and until the Congress acts on the President's recommendations) as
6 requiring “that lands under wilderness review must be managed so as not to impair their
7 suitability for preservation as wilderness.” 44 Fed. Reg. 72,014, 72,015 (Dec. 12, 1979).

8 14. The next phase of wilderness planning after the inventory phase is the study
9 phase, wherein BLM makes recommendations as to whether the lands within a given WSA are
10 suitable or unsuitable for wilderness designation. For lands within the CDCA, the wilderness
11 study phase was integrated with the CDCA planning process and culminated with BLM's
12 publication of the Draft Environmental Impact Statement for the Draft CDCA plan in February
13 1980, the Final Environmental Impact Statement for the Proposed CDCA plan in September
14 1980, and issuance of the CDCA final plan Record of Decision in December 1980. The EISs
15 analyzed a range of wilderness suitability and unsuitability recommendations for the WSAs,
16 and the impact analyses assumed that wilderness designation of any WSA would result in
17 closure of all vehicle routes not qualifying as roads under the “roadless” definition.

18 15. The final phase of wilderness planning is the reporting phase, where the land
19 managing agency reports its findings and recommendations to Congress. The CDCA wilderness
20 study results were included in BLM's Statewide Wilderness Study Report. The BLM's Statewide
21 Wilderness Study Report was completed in 1990.

22 16. On October 31, 1994, Congress enacted the California Desert Protection Act of
23 1994 (“CDPA”) which designated all of the lands encompassed by the Greenwater Range,
24 Greenwater Valley, Last Chance Mountain, and Panamint Dunes WSAs as part of the Death
25 Valley National Park Wilderness Area pursuant to the Wilderness Act and FLPMA.

26 17. The documents received from Inyo County make it apparent that the issue of
27 potential wilderness designation was a controversial and public issue in Inyo County. The
28 documents reveal that potential wilderness designation and other potential restrictions on use

1 that were being considered as part of the wilderness review and CDCA planning process were
2 controversial and not popular with the County government. The documents received from Inyo
3 County make it clear that the CDCA planning process provided notice and opportunity for input
4 from Inyo County and the public generally, and that the County was closely involved with the
5 CDCA planning and wilderness review process from the beginning of the planning process in
6 1977 and continuing through to its completion.

7 18. The documents received from Inyo County reveal that the Board of Supervisors
8 actively followed the CDCA planning process, nominated representatives to the CDCA Advisory
9 Committee, met with BLM representatives and personnel, directed the County Planning
10 Department and County Planning Commission to work with BLM, and adopted a number of
11 resolutions explaining the County's concerns with the CDCA planning and wilderness review
12 process to California's Congressional delegation and to the Department of the Interior.

13 19. The documents received from Inyo County indicate that the focus of much of
14 Inyo County's expressed concerns with the CDCA planning process was the potential for
15 inconsistency and interference between the CDCA plan and wilderness review with the Inyo
16 County General Plan's designation of areas open to multiple uses and served by the maintained
17 county road system or otherwise accessible by motorized vehicles. The County expressed strong
18 concerns that roadless determinations or other protection alternatives presented in the CDCA
19 plan could result in the closure of portions of the County maintained road system.

20 20. Among other documents received from Inyo County expressing these concerns is
21 Resolution No. 78-111, adopted by the Inyo County Board of Supervisors in 1978, which noted
22 the County's concern that BLM's roadless determinations under the Wilderness Act and FLPMA
23 failed to take into account the County's position that a maintained County road system served
24 much of the CDCA. (Document no. 24, Resolution 78-111, Sept. 5, 1978). This 1978 resolution
25 directed the County Planning Department and Planning Commission to work with the BLM on
26 the CDCA Inventory and Study Program to ensure "that the Inyo County General Plan is not
27 violated by restricting Multiple use concepts in the area and that the County road system as well
28 as the Public roads in the area are clearly recognized and preserved for use of the General Public

1 as well as mining and recreation activities.”

2 21. The documents received from Inyo County also include two 1979 resolutions
3 adopted by the Inyo County Board of Supervisors expressing the concern that the CDCA
4 planning and wilderness inventory process could result in roadless determinations that would not
5 allow for multiple use of the area. (Document no. 43, Resolution 79-40, May 15, 1979;
6 Document no. 45, Resolution 79-120, Oct. 23, 1979).

7 22. The documents received from Inyo County also include two 1980 resolutions
8 adopted by the Board of Supervisors that express the concern that roadless determinations or
9 other protective aspects of the CDCA plan could result in closure of portions of the “maintained
10 county road system” and expressing opposition to the protection alternative of the CDCA plan.
11 (Document no. 50, Resolution 80-51, May 6, 1980; Document no. 55, Resolution 80-124, Nov.
12 18, 1980).

13 23. The documents received from Inyo County show that the County was aware of
14 the designation of WSAs encompassing the roads it now claims in this litigation. Included
15 among these documents is a letter from the State Director of BLM to the Chairman of the Inyo
16 County Board of Supervisors transmitting advance copies of the WSA maps and explaining that
17 publication of the Federal Register notice announcing the WSA designations was scheduled for
18 March 30, 1979. (Document no. 40, Letter from State Director, BLM, to Chairman, Inyo County
19 Board of Supervisors). The documents also include a copy of that March 30, 1979 Federal
20 Register notice of publication of the CDCA Wilderness Inventory - Final Descriptive Narratives.
21 (Document no. 37, Copy of 44 Fed. Reg. 19,044-45, March 30, 1979).

22 Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the
23 foregoing is true and correct to the best of my knowledge, information and belief.

24

25 Executed this 9th day of May, 2008, in Portland, Oregon.

26

27

28

By:


GERALD J. MAGEE