SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, **Petitioner,** **v.** **CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, DIVISION OF OFF-HIGHWAY MOTOR VEHICLE RECREATION; and MATHEW FUZIE, in his official capacity,** **Respondents,** **CALIFORNIA OFF-ROAD VEHICLE ASSOCIATION; ECOLOGIC PARTNERS, INC.; TIERRA DEL SOL FOUR-WHEEL DRIVE CLUB,** **Intervenors.**	Case Number: 34-2013-80001495 **RULING ON SUBMITTED MATTER** Hearing Held: Date: November 17, 2017 Time: 9:00 a.m. Dept.: 29 Judge: Timothy M. Frawley

Petitioner Public Employees for Environmental Responsibility has filed a petition for writ of mandate to challenge the manner in which Respondent Department of Parks and Recreation is managing the Ocotillo Wells State Vehicular Recreation Area. Petitioner claims that the Department has mandatory statutory duties to monitor and protect cultural and archeological resources within the park, and that the Department has abused its discretion by violating those duties. Petitioner seeks a writ of mandate ordering the Department to suspend its existing "open riding" policy and restrict riders of off-highway vehicles (OHVs) to designated trails, pending the preparation and implementation of a "remedial cultural resource protection plan." The court shall deny the requested petition.

Background Facts and Procedure

The Off-Highway Vehicle Recreation Act

Respondent Department of Parks and Recreation operates over 264 state parks, of which nine are designated as "state vehicular recreation areas" (SVRAs) operated by the Department's Off-Highway Motor Vehicle Recreation Division.

The Off-Highway Vehicle Recreation Act, Public Resources Code § 5090.01 *et seq.*, is the primary state law regulating SVRAs. The Legislature found that off-highway motor vehicles are enjoying "ever-increasing popularity" in California, but that "indiscriminate and uncontrolled use" of those vehicles could have a deleterious impact on the environment, wildlife habitats, native wildlife, and native flora. (Cal. Pub. Res. Code § 5090.02.)

The Legislature declared that "effectively managed areas and adequate facilities for the use of off-highway vehicles and conservation and enforcement are essential for ecologically balanced recreation." (*Ibid.*) The stated intent of the Act is to provide, expand, and manage new and existing off-highway motor vehicle recreational areas, facilities, and opportunities in a manner that will "sustain long-term use." (*Ibid.*)

The Act charges the Department with certain duties and responsibilities relating to implementation of the Off-Highway Motor Vehicle Recreation Program. (Cal. Pub. Res. Code §§ 5090.32, 5090.08.) The Department's duties and responsibilities include, among other things, (1) planning, acquisition, development, conservation,[1] and restoration of lands in SVRAs; (2) management, maintenance, administration, and operation of lands in SVRAs; (3) conducting surveys and studies as necessary or desirable for implementing the program; and (4) preparing and implementing general plans to serves as guides for future development, management, and operation of SVRAs. (Cal. Pub. Res. Code §§ 5090.32, 5002.2.)

Public Resources Code section 5090.43 establishes criteria for establishing and managing SVRAs. It provides, in relevant part:

[1] Conservation is defined in the Act to mean activities, practices, and programs that "sustain soils, plants, wildlife, and their habitat." (Cal. Pub. Res. Code § 5090.10.) However, the Department's regulations define conservation to include activities, practices, and programs developed and/or implemented to sustain and preserve soils, plants, wildlife and their habitat, and natural and Cultural Resources. (14 C.C.R. § 4970.01.) Cultural Resources is defined consistent with the statutory criteria for designation as a "historical resource" in the California Register of Historical Resources. (Cf. 14 C.C.R. § 4970.01 with Cal. Pub. Res. Code § 5024.1(c).)

> State vehicular recreation areas shall be established on lands where there are quality recreational opportunities for off–highway motor vehicles and in accordance with the requirements of Section 5090.35. Areas shall be developed, managed, and operated for the purpose of making the fullest public use of the outdoor recreational opportunities present. The natural and cultural elements of the environment may be managed or modified to enhance the recreational experience consistent with the requirements of Section 5090.35. (Cal. Pub. Res. Code §§ 5090.43.)

It also provides:

> If off–highway motor vehicle use results in damage to any natural or cultural values, appropriate measures shall be taken to protect these lands from any further damage. These measures may include the erection of physical barriers and shall include the restoration of natural resources and the repair of damage to cultural resources. (Cal. Pub. Res. Code §§ 5090.43.)

In addition, section 5090.43 provides that "sensitive areas" may be designated within SVRAs to protect natural and cultural values, if the Off-Highway Motor Vehicle Recreation Commission "holds a public hearing and makes a recommendation therefor." When so designated, sensitive areas must be managed in accordance with the requirements applicable to "natural and cultural preserves," set forth in Public Resource Code sections 5019.71 and 5019.74.[2] (Cal. Pub. Res. Code §§ 5090.43.)

Section 5090.35 establishes land conservation standards for SVRAs. It provides:

> The protection of public safety, the appropriate utilization of lands, and the conservation of land resources are of the highest priority in the management of the state vehicular recreation areas; and, accordingly, the division shall promptly repair and continuously maintain areas and trails, anticipate and prevent accelerated and unnatural erosion, and restore lands damaged by erosion to the extent possible. (Cal. Pub. Res. Code § 5090.35(a).)

Section 5090.35, subdivisions (b) and (c) require the Department to establish soil conservation standards and habitat protection plans for each SVRA, to monitor the conditions of soils and

[2] A cultural preserve is statutorily defined as an area of outstanding cultural interest established within the boundary of a state park system for the purpose of protecting features "which represent significant places or events in the flow of human experience." (Cal. Pub. Res. Code § 5019.74.)

wildlife habitat in the SVRA, and to "close and restore" any noncompliant portions of the SVRA where such standards are not being met. (Cal. Pub. Res. Code § 5090.35(b), (c).) Section 5090.35, subdivision (f), added in 2004, further provides that the Department "shall monitor and protect cultural and archaeological resources" within SVRAs. (Cal. Pub. Res. Code § 5090.35(f).)

Ocotillo Wells SVRA

Ocotillo Wells is one of nine SVRAs operated by the Department. When originally established in 1976, Ocotillo Wells included about 14,600 acres of land. With additional land acquisitions, Ocotillo Wells now encompasses approximately 85,000 acres of land. The federal Bureau of Land Management owns approximately 21,500 of the total acreage, while the State and private property owners own the remaining 65,000 acres.

The present-day boundary of Ocotillo Wells resembles a triangle. State Route 22, which runs east-west, forms the boundary for the north corner of the park, which is nicknamed "Truckhaven." Pole Line Road runs north-south and divides the remainder of the park into western and eastern sections. All of land that is south of State Route 22 and west of Pole Line Road, totaling about 49,640 acres, is designated for "distributed use riding" (aka "open riding"), meaning OHVs are not required to stay on trails. The area east of Pole Line Road, approximately 28,499 acres, is designated as a trails-only riding area. There are signs erected at intervals along the border of Pole Line Road that read, "Area East of Pole Line is Designated Trails ONLY[.] No Open Riding." (JS000264.)

Portions of the Truckhaven area, north of State Route 22, also are designated trails-only. While other portions of the Truckhaven area are not designated trails-only, there are signs erected throughout the Truckhaven area requesting riders to "Stay on Existing Trails." (JS000435.)

The terrain of Ocotillo Wells is relatively flat desert landscape, with areas of rough topography, and seven large washes that run across the park from west to east towards the Salton Sea. The soil is generally soft and sandy. Wind and water erosion is "substantially evident" in the area. (AG040066.)

The shoreline of Lake Cahuilla, the ancient and larger predecessor to the Salton Sea, runs through the park. The high water (or 40-foot contour) enters the park on the southern boundary several miles west of Pole Line Road, cuts an arc through the lower eastern portion of the park, and then crosses back over to the western side of Pole Line Road, where it proceeds

north to the northern boundary of the park. A number of trails follow the contour of the ancient Lake Cahuilla shoreline.

Surveys of Ocotillo Wells have identified a significant number of cultural and archaeological resources located within the park. Cultural and archaeological resources include both sites and isolates. An artifact is an object made or altered by humans that is at least 50 years old. An isolate is one or two isolated artifacts with no other cultural materials within 50 meters. An archaeological "site" is a location, at least 45 years of age, consisting of at least three associated artifacts or a single feature. (AG037584; see also Collier, p.51.) A feature is a non-moveable location of past human activity.

For example, a 50-year-old ring tab beer can would be an artifact. One or two 50-year-old ring tab beer cans, with no other artifacts within 50 meters, would be an isolate. A collection of three or more 50-year-old ring tab beer cans would be a "site."

The Department employs two archaeologists at Ocotillo Wells on a permanent basis, one full time and one "permanent intermittent," who works at the park up to nine months a year. There are also between two and four seasonal archaeologists who work at the park. Staff archaeologists conduct periodic site surveys and examinations as part of their regular duties. (Aitchison Depo., pp. 33, 39-40.) In addition to staff archaeologists, trained volunteers, known as site stewards, help monitor sites and record observations. In 2016, twelve site stewards logged over 200 hours of cultural resource monitoring. (Aitchison Depo., p.44.)

The Department focuses its surveys on the areas of the SVRA with the highest use and the highest potential for impacts to cultural resources, such as heavily used trails in proximity to the 40-foot contour for the ancient Lake Cahuilla shoreline.

The Department uses DPR-Form 523 to record cultural sites and isolates. Only the first page of the form, called a "Primary Record," is used to record an isolate. It includes information describing the resource, its location, and other identifying information. For cultural sites, additional pages are attached, including an "Archaeological Site Record." In addition to a site's dimensions and other detailed information, the Archaeological Site Record includes a section for the archaeologist to describe the site's features, setting, and any existing "alterations and/or disturbances" as well as the agent that causes the disturbance.

In addition to Form 523, the Department uses a form entitled "Archaeological Site Condition Assessment Record" (or ASCAR). This form allows for tracking specific "disturbances" at identified sites. (AG036507-544.)

Over the years, Ocotillo Wells' cultural resources have been identified and recorded in a number of archaeological surveys. Some of the larger surveys included: a 1984 Department survey of about 1,800 acres, focusing on the ancient Lake Cahuilla shoreline; a 1989 University of Riverside survey of 28,640 acres of the eastern portion of the park, including an intensive survey of 5,890 acres; and a 1998-99 Department survey of 14,860 acres to identify potentially significant sites eligible for the National Register of Historic Places.

From 2008 through 2011, Department Archaeologist Marla Mealey led a multi-year surveying project to reexamine and relocate the sites identified in the previous 1998-99 survey. (AG039746.) This project resulted in a 300-page report titled the Archaeological Site Reexamination and Reconnaissance at Ocotillo Wells SVRA 2008 through 2011 (aka, the "Mealey Report"). (AG039727 *et seq.*, 040086, 040110; JS000060.) The Mealey Report examined 1,750 acres and identified a total of 444 sites and isolates, consisting of 131 previously identified sites, 132 newly identified sites, and 181 newly identified isolates. (*Ibid.*)

In 2015, AECOM, a Bureau of Land Management consultant, issued a "Class I Cultural Resources Inventory," which identified and summarized all of the previous surveys of the cultural resources in Ocotillo Wells. (AG040049-304.) The AECOM Report identifies 869 cultural resources (sites and isolates) within the Ocotillo Wells SVRA. (AG040091; Collier, p.94.) Of these 869 resources, 376 are isolates and 469 are sites.[3] Of the 469 sites, 388 are prehistoric, 54 are historic, 23 are multicomponent, and 4 are of unknown age. (AG040091.)

In March and April of 2017, Department staff conducted surveys of heavily used roads and trails to determine if they impacted cultural resources and, if so, to consider mitigation. The survey covered roughly 50 meters on either side of each trail's centerline, including portions of the Pumpkin Patch, Crossover, Textbook, East Bank, and Gas Dome trails. (Collier, pp.22, 25-27, 63.) In addition to the 469 sites discussed in the Mealey/AECOM reports, Department staff identified another 123 cultural resources, including approximately 70 new sites.

The surveys conducted in the Spring of 2017 did not overlap with the surveys reported in the Mealey/AECOM reports. Taken together, the AECOM Report, the Mealey Report, and the 2017 Spring surveys document all of the cultural resources surveyed to date in the SVRA. (Collier, pp.140-141; Aitchison, pp.192-193.) In all, between 500 and 600 archaeological sites have been identified. Many of the sites are in close proximity to the ancient Lake Cahuilla shoreline. (AG038730, 038735, 039619.)

[3] The remainder consists of objects, debris, monuments, roads, natural features, or unknown resources.

Although it is not entirely clear how much of Ocotillo Wells has been surveyed for cultural resources, it is undisputed that large portions of the park have not been comprehensively surveyed. The surveys described in the AECOM Report seem to suggest that at least 47,000 acres have been surveyed, but this includes acreage that has been surveyed more than once. The Department estimates that since 2013, it has surveyed about 1,300 acres per year, focusing on areas that have (or have high potential for) "significant" cultural resources.[4] (Aitchison, pp.57-58.) Petitioner, in contrast, relies on evidence suggesting that only about 20-30% of the park's total acreage has been surveyed.

Many of the surveyed sites, especially the prehistoric sites, have "significant" information potential and thus may qualify for inclusion on the California or National Register of Historic Places. (AG040018-19, 040103; Collier, p.102; see also AG036593-94.) However, the Department has reviewed very few of the sites for eligibility for listing. For example, of the 469 sites listed in the AECOM Report, only 25 have been reviewed for listing. Of those, 15 were determined to be eligible or potentially eligible, and 10 were not. (AG040261-301.) The Mealey Report specifically recommended that all areas of the SVRA not previously surveyed, especially those along roads and trails within open riding areas, should be examined, as there likely are "significant numbers of previously undocumented sites" within Ocotillo Wells. (AG040019.)

The Department uses a variety of tools and strategies to protect cultural resources. The tools/strategies include (1) keeping the location of resources confidential, to protect them from looters and vandals; (2) restricting riders to trails in portions of the park containing sensitive resources; (3) closing roads/trails to protect sensitive resources; (4) using fencing, barriers, vegetation, or mulching to prevent/discourage riding in certain areas; (5) conducting site evaluations before projects and special events; (6) signage; (7) law enforcement;[5] (8) educational programs; and (9) consultations with Native American tribes.

The parties disagree whether the Department's methods are sufficient to protect the cultural resources at the park. Petitioner contends that OHV "impacts" to cultural resources are "well documented." Petitioner notes that numerous sites within the park are located in open riding areas, or are bisected by, or in close proximity to, roads or trails, exposing those sites to OHV use. Petitioner argues that nearly half of the archaeological sites identified in the Mealey Report were "disturbed" by OHV tracks, which damaged or threatened to damage the cultural artifacts or features at those sites.

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[4] The Department also contends that it continuously monitors for cultural resources when carrying out specific projects.

[5] Four rangers are stationed at Ocotillo Wells. They patrol the park and issue citations for violations.

The Department does not dispute that OHV tracks have been observed at or near many resource sites. However, the Department contends the evidence shows the "great majority of sites" – approximately 85% -- are in good, good to fair, or fair condition. Less than 7% are in fair to poor condition, and less than 9% are in poor condition. (Lee Decl., ¶ 7.) Of the sites in poor condition, the Department argues the evidence does not show that their poor condition is due primarily to OHV use, or that "significant" resources were damaged. Focusing on the condition of the sites at the park as a whole, the Department argues its methods reasonably have protected the park's significant cultural resources.

On October 3, 2017, the Governor signed Senate Bill 249, amending the Off-Highway Vehicle Recreation Act, effective January 1, 2018. As relevant here, SB 249 will result in the following changes to the Act:

- Amends the definition of "conservation" in Public Resources Code § 5090.10 to include activities, practices, and programs that protect and sustain cultural resources, in addition to soils, plants, wildlife, and habitats.
- Adds Public Resources Code § 5090.13, defining "monitoring program" to mean a program that provides "periodic evaluations of the condition of resources and informs adaptive management within state vehicular recreation areas."
- Adds Public Resources Code § 5090.14, defining "adaptive management" to mean using "the results of information gathered through a monitoring program or scientific research to adjust management strategies and practices to conserve cultural resources and provide for the conservation and improvement of natural resources."
- Amends Public Resources Code § 5090.24 to require the Off-Highway Motor Vehicle Recreation Commission to prepare a report that, among other things, addresses the condition of natural and cultural resources in SVRAs and summarizes the resource monitoring data collected and restoration work completed by the Department.
- Amends Public Resources Code § 5090.32 to make clear the Department's Division of Off-Highway Motor Vehicle Recreation has a duty to "[p]rovide for the conservation of natural and cultural resources, including appropriate mitigation."
- Amends Public Resources Code § 5090.35, subdivision (a) to (1) include the "conservation of natural and cultural resources" as the "highest priority" in the management of SVRAs; (2) require the Department to anticipate and prevent "off-highway vehicle impacts to the extent possible;" and (3) "take steps necessary to prevent damage to significant natural and cultural resources" within SVRAs.
- Amends Public Resources Code § 5090.35, subdivision (c) to delete the requirement to "monitor" cultural and archaeological resources. As amended, subdivision (c) provides:

"The division shall protect natural, cultural, and archaeological resources within the state vehicular recreation areas."

- Amends Public Resources Code § 5090.35, subdivision (a) to provide that SVRAs shall be developed, managed, and operated for the purpose of providing the fullest "appropriate" public use of the vehicular recreational opportunities present, in accordance with the requirements of the Act, "while providing for the conservation of cultural resources and the conservation and improvement of natural resource values over time."
- Amends Public Resources Code § 5090.35, subdivision (c) to require that repairs to damage occur "promptly." As amended, subdivision (c) provides: "If off-highway motor vehicle use results in damage to any natural or cultural resources or damage within sensitive areas, appropriate measures shall be promptly taken to protect these lands from any further damage. These measures may include the erection of physical barriers and shall include the restoration of natural resources and the repair of damage to cultural resources."

Requests for Judicial Notice

The court grants the Department's requests for judicial notice of the legislative history of Public Resources Code section 5090.35(f) and the map of the Ocotillo Wells SVRA published on the Department's website.

The court grants Intervenors' requests for judicial notice of the current Ocotillo Wells SVRA General Plan, dated April 1982; the Scoping Summary for the Ocotillo Wells SVRA Plan, dated July 2015; and the current and previous versions of Public Resources Code section 5090.35(f).

Evidentiary Objections

The court rules as follows on the Department's objections to Petitioner's evidence. Objection Nos. 12, 13, 14 (Collier Depo., pp.80, 145-46), 16 (Aitchison Depo., p.147), 22 (Collier Depo., pp.147-49), and 24 (AItchison Depo., p.212) are sustained. All other objections are overruled.

The court shall overrule Petitioner's evidentiary objection to the entirety of Dr. Hale's expert deposition testimony.

Stipulation to Amend Case Management Order

The parties have submitted a stipulation for an order to amend the prior case management order with regard to the authentication of documents and deposition transcripts. The court shall issue the stipulated order under separate cover.

Motions to File Documents Under Seal

Petitioner and the Department both have filed motions for an order to file unredacted versions of pleadings under seal.

California Rule of Court 2.550 provides that the court may order that a record be filed under seal only if the court expressly finds facts that establish: (1) there exists an overriding interest that overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest.

The court finds that there exists an overriding interest in maintaining the confidentiality of the specific location of cultural and archaeological resources at Ocotillo Wells, and the specific methods used by the Department to protect such resources at each specific location, to prevent disclosure of information that potential looters or vandals could use to locate the resources. This overriding interest supports sealing the unredacted pleadings. If the documents are not sealed, the public could discover the specific location of cultural and archaeological resources, which would put the resources at risk of looting and/or vandalism. The proposed sealing order is narrowly tailored and there is no less restrictive means available to preserve the confidentiality of the information at issue.

This order shall not prevent public disclosure of methods used by the Department to manage cultural, natural, and other resources at Ocotillo Wells and SVRAs generally, such as, for example, the use of signs, fences, barricades, vegetation, mulch, trails, etc.

Stipulation re Substitution of Redacted Briefs

After reviewing the filed briefs in this case, the Department determined that certain information in the briefs of Petitioner and Intervenors should have been redacted. Petitioner and Intervenors subsequently agreed to additional redactions to their pleadings, and the parties filed a stipulation to replace Petitioner's redacted briefs and Intervenors' unredacted

brief with different versions. The court shall approve the stipulation. However, as the court ruled above, the court does not agree with the Department that examples of certain types of protective measures that the Department uses or may use to protect cultural and other resources in SVRAs is confidential information. It is only confidential if a particular type of readily-identifiable protective measure is associated with a specific type of resource within Ocotillo Wells, such that disclosure of the type of protective measure used would allow persons to locate the particular resource. It is not confidential that the Department uses signs, fencing, barricades, etc., to control where OHV riders go and thereby manage the resources at the park.[6]

Arguments of the Parties

Petitioner's First Amended Petition for Writ of Mandate challenges the manner in which the Department manages and operates the Ocotillo Wells SVRA. Petitioner claims that under state law the Department has a mandatory duty to monitor and protect cultural and archeological resources within the park. Petitioner alleges that the Department has abused its discretion by failing to adequately survey and document cultural resources within the park; by failing to monitor the condition of previously-identified resources; by allowing open riding in areas with resources accessible to OHVs; by failing to maintain an adequate (50-foot) buffer between designated trails and resource sites; and by failing to adequately respond to reports of damaged or threatened sites.[7]

Petitioner seeks a writ of mandate ordering the Department to survey and monitor all of the cultural resources in the park, and to suspend its "open riding policy" until the Department adopts a "remedial cultural resource protection plan" to protect all identified cultural resources.

The Department responds that, due to the amendments made by SB 249, some of Petitioner's claims – namely, those based on the alleged failure to "monitor" resources – should be deemed moot because the amendments removed the "monitor" requirement from the statute.

[6] If the Department protected artifacts by burying them in the sand, for example, disclosing this would not help persons locate artifacts. In contrast, if the Department were to construct large moats around particular types of resources, and use moats only for this purpose, disclosing this fact would allow persons to locate those types of resources by searching for the moats.

[7] The First Amended Petition also alleges that the Department abused its discretion by failing to anticipate and prevent unnatural erosion, and to restore lands damaged by erosion. However, Petitioner has elected not to pursue this claim. (See Opening Brief, p.3, fn.4.)

To the extent Petitioner's claims are not moot, the Department argues that Petitioner has not met its burden to show an abuse of discretion. The Department denies that it has any duty to identify every cultural resource within the park, and argues that it reasonably has exercised its discretion to focus "monitoring" efforts on the portions of the park with the highest OHV use and the highest potential for impacts to significant cultural resources, usually in connection with "project evaluations."

The Department also contends that its "open riding policy" is a reasonable exercise of its discretion in light of the "competing statutory mandates" to balance cultural resource protection with OHV recreation. The Department disputes that cultural resources at the park are "unprotected," and contends that it has wide discretion to determine how such resources should be protected, while providing for OHV recreation. The Department argues that not all resources merit the same level of protection; the Department contends that it reasonably uses different methods to protect different types of resources. (See, e.g., Aitchison, pp.304-05; AG040018.)

Nor is it an abuse of discretion, the Department argues, to allow riding on trails that run through or near less significant resource sites. Despite "threats" of damage, the Department contends there are few reports of OHV damage to archaeological artifacts or features. The Department argues that if a site is not considered significant, leaving the artifacts in place, and allowing OHVs to ride through or near the site is reasonable, especially where closing and re-routing a road or trail could have greater environmental impacts. The Department also defends the decision to use Pole Line Road as a boundary between the open riding and trails-only portions of the park because it is easy for visitors to comply with and for rangers to enforce.

Finally, the Department denies that it has failed to respond to reports of damage to resources. (See AG037102, 037203-11, 039150; Aitchison Dec., ¶ 20.) While Petitioner may be dissatisfied with the scope of the Department's responses, that is not sufficient to justify a writ.

Intervenors California Off-Road Vehicle Association, Ecologic Partners, Inc., and Tierra Del Sol Four-Wheel Drive Club also oppose the petition. Intervenors argue that Petitioner's claim for a traditional writ of mandate fails because the Off-Highway Vehicle Recreation Act imposes no clear ministerial duties on the Department. In the absence of a clear duty, Intervenors argue there can be no finding of an abuse of discretion.

Intervenors also argue that the petition fails because there has been no "final" agency action to review. Intervenors argue that the only final agency action that can be challenged is the Department's adoption of a General Plan for the Ocotillo Wells SVRA. Because the time to

challenge that Plan has long since passed, Intervenors argue this lawsuit constitutes an impermissible collateral attack on the General Plan.

In any event, Intervenors note, the Department currently is in the process of updating the Ocotillo Wells General Plan, including the cultural resource protection objectives. Thus, Intervenors argue, Petitioner has an adequate remedy at law in the form of an action to challenge the updated General Plan.[8] Intervenors contend the soon-to-be updated General Plan renders the requested petition a futile act.

Intervenors also contend the petition should be denied on the merits because Petitioner has failed to show that the Department is not "monitoring" or "protecting" the "significant" resources in the park. Intervenors contend that the Department has done an "excellent job" of exercising its discretion to balance the "competing" interests it serves in the Ocotillo Wells SVRA.

Standard of Review

An ordinary writ of mandate lies to compel the performance of a duty that is required by law. (Civ. Proc. Code § 1085.) As a general rule, a traditional writ of mandate will not lie unless there is a clear, present, and usually ministerial duty to act. Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. (*Gordon v. Horsley* (2001) 86 Cal.App.4th 336, 350.) However, mandamus may issue to compel an agency to exercise discretion when it has refused to act, and to exercise its discretion under a proper interpretation of the law. Mandamus also will lie to correct an abuse of discretion. (*Cal. Teachers Ass'n v. Ingwerson* (1996) 46 Cal.App.4th 860, 865.)

In determining whether a public agency has abused its discretion, the court may not substitute its judgment for that of the agency. (*Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 965.) Abuse of discretion must appear very clearly before courts will interfere. Where there is fair and reasonable ground for difference of opinion, the agency's action should stand. (*Ibid*; see also *Miller v. City and County of San Francisco* (1959) 174 Cal.App.2d 109, 111-112.)

Thus, where an agency is vested with discretion, traditional mandate may lie, but only if the petitioner is able to show the action taken is so palpably unreasonable and arbitrary as to constitute an abuse of discretion as a matter of law. (*Weinstein, supra,* 237 Cal.App.4th at

[8] Intervenors argue that the Off-Highway Vehicle Recreation Act also provides an adequate remedy in the form of an administrative proceeding to have portions of the park declared "sensitive areas" under Public Resources Code § 5090.43(c). The court rejects the claim that this is an adequate remedy at law.

p.965; *Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780; *Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 235; *County of Sacramento v. Loeb* (1984) 204 Cal.Rptr. 756, 759-760; see also *Cal. Correctional Supervisors Org. v. Dep't of Corr.* (2002) 96 Cal.App.4th 824, 827 [where a statute leaves room for discretion, a challenger must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standards]; *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1613 [mandamus will issue only if the discretion to act legally can be exercised in only one way].) This is a highly deferential test.

A challenged administrative action comes before the court with a strong presumption that the agency's official duty has been regularly performed, and the burden is on the petitioner to show the agency's action is invalid. (*Alejo, supra*, 212 Cal.App.4th at p.780.)

Discussion

Is mandate relief available?

Intervenors raise a number of arguments as to why Petitioner has failed to allege facts sufficient to state a claim upon which mandate relief can be granted. Specifically, Intervenors argue (i) a writ of mandate cannot issue because the Department's duties are not purely ministerial, (ii) suit does not lie because there has been no "final" agency action other than adoption of the 1982 General Plan, which no longer can be challenged, and (iii) Petitioner has an adequate administrative remedy through commenting on the pending General Plan update.

Most of these arguments previously were raised, and rejected, in the parties' demurrers. The court will not revisit them here except to repeat that this lawsuit is not a challenge to the existing General Plan or to the pending General Plan update. It is a lawsuit to compel the performance of official duties required by law, which duties Petitioner contends are not being performed.

The court is mindful that the Department generally is required to prepare a general plan for each SVRA and that the general plan is the primary management document for each park unit. However, the current General Plan was adopted in 1982, many years before the relevant statutory duties were imposed, and the updated General Plan has not been completed. The allegations of the petition do not allege that the current General Plan is unlawful or that the pending General Plan update is flawed. Thus, the petition cannot be characterized as an

improper collateral attack on the General Plan.[9] Mandamus relief is available if Petitioner can meet its burden to show a clear abuse of discretion.

Would issuance of a writ be a useless or futile act?

Even if mandamus is an appropriate remedy, Intervenors argue the court should deny the requested writ because it is unnecessary due to the pending General Plan update. Intervenors argue, correctly, that the updated General Plan will guide the management and operation of the park, including its cultural resources. Further, the environmental review prepared in connection with the General Plan update will fully analyze the potential environmental impacts of the General Plan's elements. Thus, Intervenors argue there is no "practical benefit" to issuing a writ to enforce "abstract rights" in advance of the new General Plan.

Intervenors' argument has some logical appeal. If, as part of the new General Plan, the Department will significantly alter how it manages cultural resources in the park, then there is little practical benefit to analyzing whether the Department's existing, soon-to-be-outdated, approach is or is not lawful.

One problem here is that there is no way to know when the Department will complete its General Plan update, or how the updated General Plan will propose to manage cultural resources to comply with statutory requirements. Thus, the court cannot say that issuance of a writ would be a useless or futile act, even though there is a risk that subsequent events may render the writ moot or diminish its impact.[10]

Are Petitioner's claims moot?

Closely related to Intervenors' claim that the petition is futile because of the pending General Plan update is the Department's claim that the petition is moot because of the recently enacted, but not yet effective, changes to the Off-Highway Vehicle Recreation Act.

A mandate proceeding is moot when, as a result of events occurring after the action or decision at issue, the agency is no longer empowered or able to perform the duty at issue. (See *Treber v. Superior Court of San Francisco* (1968) 68 Cal.2d 128, 134; see also *Roscoe v. Goodale* (1951)

[9] Nevertheless, if Petitioner is successful, a writ commanding the Department to amend its General Plan to bring it into compliance with the law theoretically would be an appropriate remedy. (See, e.g., *Morris v. Harper* (2001) 94 Cal.App.4th 52, 63.)

[10] At minimum, to the extent the governing laws are unchanged, this court's decision would allow the Department to exercise its discretion under a proper interpretation of the law.

105 Cal.App.2d 271, 273 [court will refuse to issue writ when it is useless, unenforceable, or unavailing].) Here, due to changes in the statutory scheme at issue in this case, the Department argues this proceeding, or at least certain claims made in this proceeding, are moot.

The court agrees with the Department that it would make little sense to interpret existing laws that, due to recent amendments, will no longer be in effect as of January 1, 2018. Even if the Department has misinterpreted such laws, issuing a writ would be useless and futile since the laws will cease to exist in less than two months.

Likewise, interpreting new laws that have not yet taken effect would amount to little more than an improper advisory opinion, advising what the law would be based upon a hypothetical state of facts. (See *Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1040.) Such amendments will be considered by the Department when it prepares its updated General Plan to guide the management of resources at the park. (Cal. Pub. Res. Code § 5002.2.) Effective January 1, 2018, such management plans must be developed "in consideration of statutorily required state and regional conservation objectives," and "[p]rovide for the conservation of natural and cultural resources, including appropriate mitigation." (See recent amendments to Cal. Pub. Res. Code § 5090.32(g), (l), effective January 1, 2018.) The Department is given the power and responsibility to decide, in the first instance, the meaning and scope of such new laws.

For these reasons, the court concludes that the issues decided in this case must be limited to those claims that are based on the specific statutory duties that both exist under the current statutory scheme and that will continue to exist after the recently-enacted amendments take effect on January 1, 2018. The court shall not consider claims based on statutory language that will be removed, or added for the first time, when the January 1, 2018, amendments take effect.

The statutory duties that are not significantly impacted by the January 1, 2018, amendments are described below. First, the Department has (and will continue to have) statutory duties to manage the lands in the park in a manner to maintain sustained long-term use as an SVRA. (Cal. Pub. Res. Code § 5090.32(b); see also § 5090.02.)

Second, as part of its management responsibilities, the Department is (and will remain) responsible for "conservation" of lands in the park, which is to be accorded the "highest priority" in the management of the park. (Cal. Pub. Res. Code §§ 5090.32(b), 5090.35.) However, the term "conservation" only refers to activities, practices, and programs that

"sustain soils, plants, wildlife, and their habitat," and does not (yet) include cultural resources. (See recent amendments to Cal. Pub. Res. Code §§ 5090.10, 5090.35(a).)

Third, the Department has (and will continue to have) a statutory duty to "protect" cultural and archaeological resources within the park. (Cal. Pub. Res. Code § 5090.35(f).) Effective January 1, 2018, there is no explicit requirement that the Department "monitor" cultural resources. However, some level of monitoring or scientific research is implied from the Department's duty to "manage" and "protect" the park's cultural resources. (See recent amendments to Cal. Pub. Res. Code §§ 5090.13, 5090.14, 5090.32; see also § 5090.24(h)(4).) In addition, the Department is (and will remain) responsible for conducting such "surveys" and "studies" as are "necessary or desirable" for implementing the OHV recreation program. (Cal. Pub. Res. Code § 5090.32(h).)

Fourth, the Department has (and will continue to have) a duty to manage the park and the resources in the park so as to make the "fullest public use of the outdoor recreational opportunities present," while also adhering to the requirement to "protect" the park's cultural resources. (Cal. Pub. Res. Code § 5090.43(a).)

Finally, if OHV use results in damage to any natural or cultural resources, the Department has (and will continue to have) a duty to take "appropriate measures" to protect the lands from "any further damage." (Cal. Pub. Res. Code § 5090.43(c).) Appropriate measures "may" include the erection of physical barriers, and "shall" include the "repair of damage to cultural resources." (*Ibid.*)

<u>Has the Department abused its discretion by failing to adequately monitor the condition of previously-identified resources?</u>

Petitioner claims that the Department has failed to comply with a statutory duty to "monitor" cultural and archaeological resources in the park because the Department has surveyed only about 20-30% of the park's 85,000 acres, and because the Department does not have a program requiring periodic evaluations of the condition of surveyed sites.[11]

However, as described above, the recently-enacted amendments to section 5090.35(f) deleted the language explicitly requiring the Department to "monitor" cultural resources. While some amount of monitoring or research may be implied from the Department's duty to "manage"

[11] Petitioner has not alleged that the Department is violating its duty to conduct adequate "surveys" under section 5090.32(h). Petitioner only has alleged a failure to "monitor" under section 5090.35(f). Nevertheless, including section 5090.32(h) would not alter the court's conclusion in this case.

and "protect" the park's cultural resources, the court finds no support for Petitioner's claim that the Department must "survey" the entire 85,000-acre park or conduct regular, periodic evaluations of the 500-600 identified sites in the park. (Cf. Cal. Pub. Res. Code § 5090.35(c) [requiring the Department to make an "inventory" of wildlife populations and their habitats].)

Where, as here, the duty of a public body is broadly defined, the manner in which that duty is carried out requires the exercise of a high degree of discretion. Mandate does not lie to control the exercise of that discretion unless the action taken is so palpably unreasonable and arbitrary as to constitute an abuse of discretion as a matter of law. (*Bldg. Indus. Ass'n v. Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1646; *AIDS Healthcare Found. v. Los Angeles Cty. Dept. of Pub. Health* (2011) 197 Cal.App.4th 693, 701-03.)

Here, in light of its resource constraints, the Department has made the decision to concentrate its surveying and monitoring efforts on the areas of the park (i) with the highest potential for impacts to significant cultural resources, such as the ancient Lake Cahuilla shoreline, or (ii) that may be affected by development or special event projects. The court does not find this to be an abuse of discretion.

Has the Department abused its discretion by allowing open riding in areas with resources that are accessible to OHVs?

With respect to cultural sites that have been identified, Petitioner alleges the Department is abusing its discretion by allowing open riding in the vicinity of such sites, without physical barriers or any other protections to prevent riders from accessing and disturbing the sites. Petitioner argues that, as a result, cultural resources are exposed to potential damage from OHVs.

The Department does not dispute that some cultural resources located in the open riding area are accessible to OHVs, but the Department disputes that this means the sites are wholly "unprotected," or that the area must be closed to open riding.

The Department explains that the risks to cultural resources include not just OHV riding, wildlife, and natural processes, but also looting and vandalism by visitors to the park. To protect against these risks, the Department uses a variety of tools and strategies. The Department has found that different tools and strategies work for different areas and different types of resources.

For some resources, the Department may restrict riders to trails, or use physical barriers, fencing, or vegetation to prevent or dissuade riders from accessing sensitive sites. For other resources, the Department aims to protect the resources simply by maintaining the confidentiality of their location. Admittedly, these resources are exposed to the threat of damage from OHVs. However, as Petitioner concedes, employing different means of protecting resources would not eliminate the threat of damage; it would, at most, change the nature and scope of the threats presented, and not necessarily in a way that is more protective of the resources.

Petitioner seems to suggest the Department must restrict riders to designated trails throughout the park to fulfill its duty to "protect" cultural resources. However, as the Department and Intervenors persuasively argue, the duty to "protect" cultural resources cannot be read or understood in isolation. In addition to protecting cultural resources, the statutory scheme requires the Department to balance the competing duty to make the "fullest public use of the outdoor recreational opportunities present." (Cal. Pub. Res. Code § 5090.43(a); see also § 5090.02 [it is the intent of the Legislature that existing OHV recreational areas be "expanded"].)

Here, the evidence shows that the Department reasonably employs different protective measures depending on the circumstances, including the significance of the particular resources.[12] In some circumstances, the Department employs fencing or barricades. In other circumstances, it does not. In light of the "competing statutory mandates" to balance cultural resource protection with OHV recreation, this is not an abuse of discretion.

Petitioner argues that the Department must construct more physical barriers and fences to protect resources in the open riding areas. However, aside from cost, the Department points out that constructing physical barriers or fences is not always the most appropriate method to protect cultural resources, since physical structures may draw attention to the resources, subjecting them to the threat of looters or vandals. Native American tribal members sometimes do not want access to cultural resources blocked. And barricades and fencing can present hazards to OHV riders. These potential hazards must be balanced against the duty to protect cultural resources.

At the hearing, Petitioner conceded that less significant resources may be deserving of less protection, but argued that the Department has failed to assess the significance of the resources in the park. Of the 469 sites listed in the AECOM report, Petitioner notes, only 25 have been reviewed for listing on the California or National Register of Historic Places.

[12] It is not an abuse of discretion to conclude that 50-year-old bullet casings and aluminum cans are not as significant as important tribal cultural sites.

However, the significance of a resource can be determined without conducting a formal review for purposes of listing on the California or National Register of Historic Places. The fact that only a portion of the sites have been reviewed for listing does not show that the Department has failed to consider the significance of the sites.

Further, Petitioner ignores that the Department must operate in a world of budgetary constraints and limited resources. For the same reason that it is not reasonable to expect the Department to survey the entire 85,000-acre park, it is not necessarily reasonable to expect the Department to evaluate 469 sites for listing on the California or National Register of Historic Places.

Petitioner argues that using Pole Line Road as a boundary is arbitrary and capricious because the ancient Lake Cahuilla shoreline extends past Pole Line Road into the open riding area. However, underlying this argument is Petitioner's assumption that the Department is required to prioritize resource protection over OHV recreation. As described above, this is not correct. The current statutory scheme requires the Department to balance resource protection against the competing duty to make the "fullest public use of the outdoor recreational opportunities present."[13]

In addition, while moving the open riding area boundary farther to the west might be "more protective" of resources, this does not mean that the selection of Pole Line Road as a boundary is arbitrary and capricious. As the Department explains, Pole Line Road is used as a boundary, at least in part, because it is easy to recognize and enforce. This is a legitimate, non-arbitrary reason for using Pole Line Road as the boundary.

Petitioner argues that the Department's protection measures are insufficient because many cultural resource sites are exposed to potential damage from OHVs. However, the relevant test is not whether every site is fully shielded from potential damage, but whether the Department is taking reasonable measures to protect cultural resources in the park, while also making the "fullest public use of the outdoor recreational opportunities present."[14]

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[13] Effective January 1, 2018, § 5090.35(a) shall establish "conservation of natural and cultural resources" as the "highest priority" in the management of the park. The Department necessarily will need to consider this change in the law as part of its revision to the General Plan, which may impact the Department's open riding policies, protection measures, and/or policies of attempting to preserve documented cultural resources in place.

[14] While there may be particular sites where additional action is required to protect significant cultural resources from damage which diminishes their cultural significance, the court is not persuaded that the Department necessarily is required to erect barricades or fences around all of the cultural resources, or to strictly limit open riding to areas where no cultural resources are located.

The Department argues that it has wide discretion to determine how such resources should be protected, while providing for OHV recreation. The court agrees. The court may not substitute its judgment for that of the public entity. If reasonable minds may disagree as to the wisdom of the agency's discretionary determination, the agency's decision must be upheld. (*California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1443.) Applying this highly deferential standard of review, the court is not persuaded that the Department's open riding policy constitutes a clear abuse of discretion.[15]

Has the Department abused its discretion by failing to maintain an adequate (50-foot) buffer between designated trails and known resource sites?

Petitioner next contends that the Department has abused its discretion because the Department has failed to maintain an adequate buffer between designated trails and known cultural resource sites in the trails-only area east of Pole Line Road. Petitioner argues that, unfortunately, not all riders stay on the designated trails. Relying on the testimony of Dr. Schneider, Petitioner argues that a 50-foot buffer is necessary to reduce the chances that riders will damage cultural resources. Petitioner argues that the Department, despite knowing that certain trails bisect or pass very near to cultural sites, has taken no steps to alter the trail routes or to otherwise protect the cultural resources.

The Department acknowledges the risk of potential damage to resources but defends its decision to maintain the existing trails, arguing that the significant resources are being protected. The Department cites evidence showing that the majority of the sites that are bisected or near official trails are in fair to good condition. Only two are in fair-to-poor condition.

The Department argues that it has a reasoned basis for not closing or re-routing the trails, or fencing the cultural resource, which is that taking such actions could draw attention to the existence of the artifacts or (in the case of fencing) create a hazard to riders. In addition, the environmental impacts from closing and re-routing a trail could be greater than allowing the riding to continue.

Based on the record before it, the court cannot conclude that the Department has abused its discretion by failing to require a minimum 50-foot buffer between trails and cultural resource sites. While there may be specific locations where a buffer is unquestionably required due to

[15] Moreover, even if the court were persuaded that the Department has failed to meet its duty to protect cultural resources, the court's remedy would be to issue a writ commanding the Department to revise its General Plan to comply with the requirements of the law – an undertaking that already is underway.

the proximity of the artifact, the significance of the artifact, the geography, the heavy use of the trail, etc., the court is not persuaded that a 50-foot buffer necessarily is required for every site. This is a matter that is better addressed and resolved as part of the Department's General Plan update, rather than this litigation.

Has the Department abused its discretion by failing to adequately respond to reports of damaged or threatened sites?

Petitioner's final argument is that the Department has abused its discretion by systematically failing to follow-up on reports of damage to resources. However, the evidence in the record shows that the Department has responded to reports of damage and taken steps to protect the affected resources. (See AG037102, 037203-04, 037211, 039020-23, 039150.)

Petitioner argues that the Department has failed to respond to numerous documented reports of "disturbances and threats" to identified sites. However, the statutory language at issue applies when there is "damage" to cultural resources, not when there merely is a threat of potential damage.[16] (See Cal. Pub. Res. Code § 5090.43(c).) This court cannot, in the exercise of its power to interpret, rewrite the statute. (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 369.)

Disposition

The Department's management of the Ocotillo Wells SVRA involves highly discretionary decisions wherein the Department must apply competing statutory directives to specific factual conditions at the park. Petitioner has attempted to show that the Department's management decisions have been so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. However, the Petitioner has succeeded only in showing that the Department is not managing the park in the manner that Petitioner would prefer. Such differences of opinion are not sufficient to support issuance of a writ. (See *Unruh v. Piedmont High School Dist.* (1935) 4 Cal.App.2d 390, 393.) Accordingly, the petition is DENIED.

This ruling shall serve as the court's statement of decision. Counsel for the Department is directed to prepare a formal judgment; submit it to opposing counsel for approval as to form;

[16] Petitioner takes the position that any "disturbance" to a cultural site, such as OHV tracks, constitutes "damage" that must be "repaired." The court is not persuaded. In the court's view, the statutory duty to "repair" and protect from "further damage" is concerned with harm to resources which diminished or eliminated their significance as a cultural resource. The statutory duty to "protect" cultural resources is broader, but – under current law – involves a great deal of discretion, as it must be balanced against the competing duty to make the "fullest public use of the outdoor recreational opportunities present."

and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

Pursuant to Government Code section 6103.5, Respondent Department shall be entitled to recover the amount of any fees it would have been charged had it not been for the provisions of Section 6103. If collected, such amounts shall be due and payable to the clerk of the court. If the Department determines not to seek collection of the filing fee, it shall so notify the clerk.

Dated: Jan. 2, 2018

Hon. Timothy M. Frawley
California Superior Court Judge
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

Daniel F. Gallery
Jesse W. Barton
Gallery & Barton
1112 I Street, Suite 240
Sacramento, CA 95814

David P. Hubbard
Michael P. Masterson
Gatzke Dillon & Balance LLP
2762 Gateway Road
Carlsbad, CA 92009

Michael R. Lozeau Esq.
LOZEAU DRURY LLP
410 12th Street, Suite 250
Oakland, CA 94607

Baine P. Kerr
Erica B. Lee
Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: January 2, 2018 Signed: F. Temmerman, Courtroom Clerk