OHMVR Substantial Participates in Taking of and Damage to Private Property

Comments prepared for the OHMVR Commission Meeting, May 16, 2024

The OHMVR Division of the California Department of Parks and Recreation has provided substantial funding to numerous organizations for a purpose that violates constitutional protections afforded to property owners in both the U.S. Constitution and the California Constitution. In an area known as the West Mojave Route Network Project (WMRNP) the OHMVR Division has funded designation and promotion of hundreds of off-highway motor vehicle routes on approximately 265,000 acres of private property. OHMVR funds have been designated to install thousands of route markers on private property throughout the WMRNP; funds have been provided to Friends of Jawbone and OwlsheadGPS to produce and distribute maps that promote off-highway motor vehicle recreation on private property throughout the WMRNP; and funds have been provided to Friends of Jawbone and Transition Habitat Conservancy to install kiosks with large format signs that promote off-highway motor vehicle recreation on private property throughout the WMRNP. Figure 1 shows a portion of the Jawbone Canyon and Ridgecrest Area map from Friends of Jawbone. On the portion of the map included in the figure I have identified 115 designated routes on privately owned sections of land that include approximately 96,000 acres of private property. The upper right-hand corner of the map shows an insignia from "California State Parks OHV." The back provides credit for production of the map: "This map is produced through a partnership between the Bureau of Land Management Ridgecrest Field Office, the State of California Off-Highway Motor Vehicle Recreation Division, and Friends of Jawbone." On this map, sections of private property are shown as gray squares. Designated off-highway motor vehicle routes are shown as green lines. BLM land is shown as white squares.

Designation of off-highway motor vehicle recreation routes on private property by the Bureau of Land Management (BLM) is not authorized in the Designation Criteria in the Code of Federal Regulations. Specifically, 43 CFR 8342.1 states that "The authorized officer shall designate all public lands as either open, limited, or closed to off-road vehicles. All designations shall be based on the protection of the resources of the public lands, the promotion of the safety of all the users of the public lands, and the minimization of conflicts among various uses of the public lands; and in accordance with the following criteria." The BLM understands that 43 CFR 8342.1 restricts route designation to public lands. For example, on p. 4-115 of their 2019 Final Supplemental Environmental Impact Statement, the BLM states that "BLM cannot designate routes on non-BLM land." Despite this restriction on route locations, the map in Figure 1 shows hundreds of routes on private

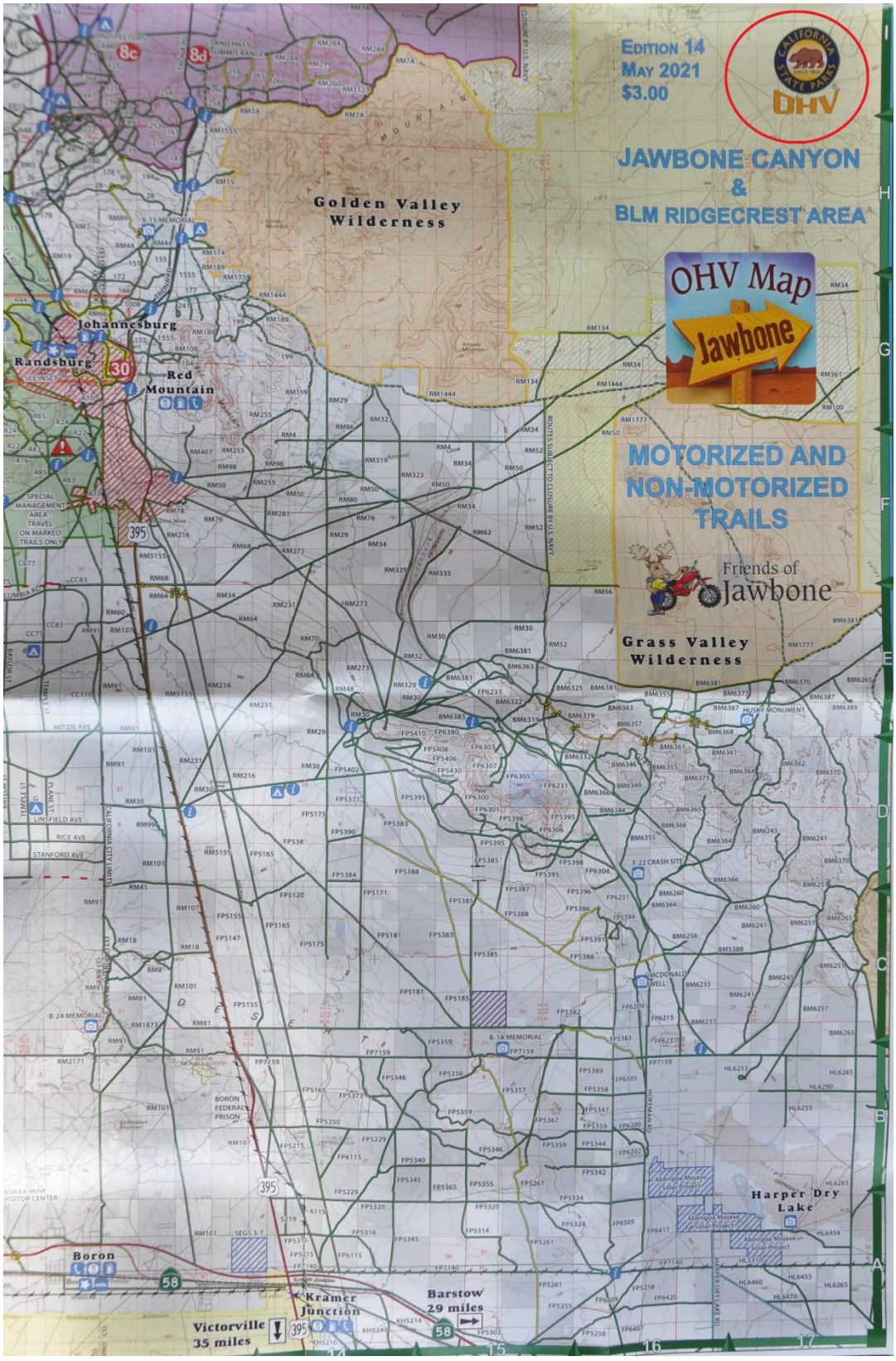

Figure 1: Friends of Jawbone Canyon and Ridgecrest Area map

tortoise habitat outside of DCH with 260 more miles of OHV Open and OHV Limited routes as compared to the No Action Alternative. Moreover, Alternative 5 has a lower potential impact with 3808.7 fewer acres of stopping/parking/camping within DCH and 60,104.4 fewer acres for desert tortoise habitat outside of DCH for all probability ranges as compared to the No Action Alternative.

Table 4.4-32 summarizes the indirect impacts associated with all alternatives of the WMRNP. BLM cannot designate routes on non-BLM lands, however, route designation on BLM-managed lands may result in the development of linear features on lands which are not under the jurisdiction of BLM. For example, in an area which has private lands intermixed with BLM-managed lands, linear features may develop on private lands as the public traverses private lands to continue along a route which has been designated OHV Open or OHV Limited on BLM-managed lands. These linear features can be divided into two categories: those that can be accessed only through BLM-managed lands (that is, the non-BLM parcel(s) are completely surrounded by BLM-managed lands) and those which can be accessed through adjoining private lands without the need to pass through BLM-managed lands. The highest amount of linear features on non-BLM Lands accessible by BLM-Managed Lands that may result in indirect impacts is the 90 percent model probability range from the USGS Model, and the least is the 100 percent model probability range.

Table 4.4-32. All Alternatives - Areas of Indirect Impact

Areas of Indirect Impact	Probability from USGS Model	Linear Features (Mileage)
Linear Features on Non-BLM Lands Accessible by BLM-Managed Lands Only	0	71.2
	0.1	88.2
	0.2	74.2
	0.3	91.0
	0.4	130.6
	0.5	170.5
	0.6	155.7
	0.7	301.9
	0.8	1037.1
	0.9	1290.2
	1.0	24.9
Linear Features on Non-BLM Lands Accessible from Private Lands	0	0
	0.1	0.2
	0.2	3.7
	0.3	1.8
	0.4	12.5
	0.5	6.7
	0.6	8.6
	0.7	24.6
	0.8	80.3
	0.9	47.7
	1.0	0

Figure 2: FSEIS page 4-115

property. Moreover, on the ground there are thousands of route designation markets, funded by the OHMVR division. Examples of these route signs and their locations are shown in Figures 3 and 4.

Figure 3: San Bernardino APN 0504-032-05-0000 is private property.

Figure 4: San Bernardino APN 0504-231-10-0000 is private property.

Although the BLM has primary responsibility for WMRNP route designations, California courts have held that any local, county, municipal, or state government agency in California that substantially participates in taking or damage to private property can be held liable for the taking. For example, in Arreola v. County of Monterey (2002) 99 Cal.App.4th 722 the court ruled that "A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. So long as the plaintiffs can show substantial participation, it is immaterial 'which sovereign holds title or has the responsibility for operation of the project.'"

Beyond liability to the landowners, the OHMVR Division has participated in the creation of a dangerous condition. The OHMVR Division does not provide adequate notice to riders that there is private property throughout the network, and has repeatedly refused requests from my to OHMVR and California Department of Parks and Recreation leadership to provide protective barriers to separate riders from private property in the vicinity of my property. The CDPR has a mandatory duty under Public Resources Code 5075.3(i), which states in part that "[t]he department [of Parks and Recreation] shall erect fences along any trail when requested to do so by the owner of adjacent land." This should be done without delay because, as specified in California Government Code §815.6 "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." I do not see that the department has "exercised reasonable diligence to discharge the duty." Quite to the contrary, Department of Parks and Recreation Senior Counsel Kathryn Tobias, in personal communication to me responding to my request for fencing has stated to me that "I am not going to debate you on this subject. The Attorney General will handle any litigation for the Department of Parks and Recreation." This establishes a high burden for landowners. According to policy stated by DPR Senior Counsel Tobias, a landowner must successfully bring a lawsuit against the Department of Parks and Recreation in order to get the department to fulfill a duty mandated in statute (Cal. Gov. Code §5075.3(i)). This clearly contradicts the duty created by the statute: "[t]he department shall erect fences along any trail when requested to do so by the owner of adjacent land."

Finally, I point out that the usual immunities that are available to government entities in California are limited to dangerous conditions that exist on or were created by a government entity on its own land or on land belonging to a partner government entity. In this case, the OHMVR has supported designation of private property for a dangerous activity, has not warned users that they have placed routes on private property that may not be suitable for

off-highway motor vehicle recreation, and the land does not belong to any of the participating government entities. For that reason, none of the usual immunities will be available to government entities for designation of off-highway motor vehicle recreation routes on private property. In effect, the designation of routes on private property has been undertaken without a legal basis, and therefore liability for accidents on private property will be shared by all of the entities that have been involved in the designation of private property for off-highway motor vehicle recreation.