United States Department of the Interior

BUREAU OF LAND MANAGEMENT
California State Office
2135 Butano Drive
Sacramento, California 95825-0451
March 11, 1998

8560(P)
CA-930

EMS TRANSMISSION: 3/11/98
Information Bulletin **No. CA-98-38**

To: DM, CDD, FMs, Bishop, Bakersfield, Ridgecrest, Barstow, Needles, El Centro and Palm Springs

From: DSD, Natural Resources

Subject: Preliminary Policy Concerning American Indian Requests for Motorized Access within Wilderness Designated by the California Desert Protection Act (CDPA)

Field offices have requested policy clarification for implementing Section 705(a) of the CDPA titled "Native American Uses and Interests - Access". In particular, the offices asked if motorized access into wilderness areas by tribal members is allowed. Based on the following analysis of the intent of Section 705(a), Indians may gain motorized access within the wilderness only if they possess:

1. Specific treaty rights;
2. Private existing rights, such as a pre-wilderness right-of-way;
3. Uses tied to a special provision in the Wilderness Act (e.g., grazing permit); or
4. Inholder rights such as those identified in Section 708 of the CDPA (e.g., tribal owned lands within the wilderness boundaries).

The following is the analysis of this rationale. We will attempt to explain the meaning of Section 705(a) and examine what effect the 1964 Wilderness Act and the 1978 American Indian Religious Freedom Act (AIRFA) have on the issue.

I. CDPA:

Unlike the Wilderness Act and nearly all previous wilderness enabling bills, the CDPA makes a specific reference to American Indian historical uses within wilderness areas designated in that Act. Section 705(a) (16 U.S.C. 1133(c)) of the CDPA titled "Native American uses and Interests - Access" reads:

In recognition of past use of the National Park System units and wilderness areas (designated) under this Act by Indian people for traditional cultural and religious purposes, the Secretary shall ensure access to such park system units and wilderness areas by Indian people for such traditional cultural and religious purposes. In implementing this section, the Secretary, upon the request of an Indian tribe or Indian religious community, shall temporarily close to the general public use of one or more specific portions of the park system unit or wilderness area in order to protect the privacy of traditional cultural and religious activities in such areas by Indian people. Any such closure shall be made to affect the smallest practicable area for the minimum period necessary for the such purposes. Such access shall be consistent with the purpose and intent of Public Law 95-341 (42 U.S.C. 1996) commonly referred to as the "American Indian Religious Freedom Act' and with respect to areas designated as wilderness, the Wilderness Act (78 Stat.890:; 16 U.S.C. 1131).

Beyond the language in the Section, the legislative history of Section 705(a) sheds little additional information about this Section. Both the Senate Committee Report of the CDPA, issued on October 26, 1993, and the House Committee Report, issued May 10, 1994, contained similar language on Native American access. Discussions with a staff members from the Senate and House who helped prepare this Section indicated there was almost no dialogue about Section 705(a) when it was debated in the House and Senate. However, the staff members explained the authors of this Section used much of the same language from Section 507 of Public Law 100-225 called the Act of the December 31, 1987, designating the El Malpais National Monument and National Conservation Area (see Attachment A). In particular, they used similar phrases regarding access, closures, and the consistency of actions to the purpose and intent of the 1978 "American Indian Religious Freedom Act" (AIRFA) and Wilderness Act. We suspect, the language used in Section 507 of Public Law 100-225 was written to reemphasize AIRFA since the El Malpais National Monument and National Conservation Area is extremely important to American Indians for traditional cultural and religious uses.

Section 705(a) has three key phrases which provide BLM management direction when dealing with Indian access requests in wilderness (see attachment C). They are:

1. BLM "...shall ensure access ... by Indian people for such traditional cultural and religious purposes...".

2. BLM "... upon request by Indian people and Indian religious community, shall temporarily close to the general public use to protect the privacy for traditional cultural and religious activities in such areas by Indian people..." and "...any such closure shall be made to affect the smallest practicable area for the minimum period necessary...".

3. Access in both above circumstances "... shall be consistent with purpose and intent..." of both AIRFA and the 1964 Wilderness Act (WA).

The first two phrases are clear and do not require further interpretation. These phrases should adequately provide BLM managers sufficient management direction, especially when analyzing alternatives through the NEPA process.

The third phrase in Section 705(a) is clear that access must be in compliance with **both** AIRFA and WA when determining the proper management access decisions for motorized access. In other words, Section 705 (a) does not exempt Indian people from the Wilderness

Act prohibitions. Thus, neither the CDPA itself nor its legislative history supports the conclusion Indian people may gain access in wilderness by means and methods that are prohibited by the public at large.

Since both must apply, we will review how both these Acts address motorized access and determine what legislative authority for authorizes motorized use in wilderness .

II. INTERPRETATION OF AIRFA REGARDING MOTORIZED USE IN WILDERNESS

As mentioned earlier, AIRFA was a joint resolution of Congress and a policy document which reaffirmed American Indian identity and culture. It was not a statute which altered other laws of the United States. It emphasized First Amendment constitutional rights in regards to religious practices and was primarily enacted because Congress found that Indian people have and are still suffering religious persecution primarily because of a lack of understanding by the government of their culture. AIRFA requires the "... United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions ... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites...". The President also directed Federal departments and agencies responsible for administering relevant laws to evaluate their policies and procedures with native religious leaders to determine appropriate changes to protect and preserve Native American religious cultural rights and practices.

There have been numerous but sometimes confusing court cases attempting to further interpret and clarify AIRFA. Perhaps the most noted AIRFA case was one ruled by the Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Association* (1988). It held that AIRFA created no separate rights or cause of action. Most of the lower court decisions have focused on requiring agencies to pursue more comprehensive consultation processes with tribes.

In conclusion, this Act recognizes Native American religious cultural rights and practices and requires agencies to protect their first amendment rights in regards to religious freedom and their right of access to their religious sites. However, it is silent when determining if there are rights associated with motorized access within wilderness areas, it is important to note that the Act does not repeal the existing laws such as the Wilderness Act and its prohibitions.

III. INTERPRETATION OF WILDERNESS ACT REGARDING MOTORIZED USE

Section 4(c) of the Wilderness Act outlines the 9 prohibitions in wilderness which includes the prohibition for motorized use. However, this portion of the Act and Section 5(c) has **specific** exceptions to the motorized use prohibition. They include:

1. Private existing rights (PER): There is no precise definition for PER. However, as related in Section 701 of FLPMA they generally include authorizations or pending authorization or withdrawals such as rights-of-ways, leases, permits, etc. which occurred prior to designation

2. Uses necessary to meet the minimum requirements for the administration of the area for the purpose of the WA: BLM is charged for administering the wilderness areas under its jurisdiction including measures required in emergencies involving the health and safety of persons within the area This exception applies for our **own** administrative use only. If the State Director determines Indian peoples' motorized access is required for our administrative purposes, the State Director may issue a formal decision. This decision would be rare.

3. Special provisions: There are other special provisions in the Wilderness Act which may allow for motorized use which are outlined in Sections 4(d) and 5 of the Act. These could include operations associated with pre-wilderness grazing permit, access to State-owned or private owned lands surrounded by wilderness, and valid mining claims or occupancies. None specifically referenced Indian religious use.

4. Special provisions tied to designating the area as wilderness: The CDPA designated 69 wilderness areas. There were numerous special provisions provided for in the Act. Section 708 provides "... adequate access to non-federally owned land or interests in lands within ... wilderness areas ... which will provide the owner of such lands or interests in lands the reasonable use and enjoyment." An interpretation of Section 708 is provided in Instruction Memorandum No. CA-95-137. Generally this guidance provided that such rights were similar to those listed in number 1 above.

The Wilderness Act does not contain for Indian people a **specific** reference or exception to the nine prohibitions. However, if a proposal by Indian people is tied to any one of the three special provisions or exceptions listed above, an authorization could be allowed.

IV. CONCLUSION

Based on an interpretation using both Acts, BLM cannot deny access by tribes for religious uses in wilderness areas and any decisions on access requests **requires** consultation with the tribe before a decision is rendered. However, when the request is for **motorized access** within wilderness, it can only be allowed if it is tied to a special provision or exception outlined in Section 4(c) and 5 of the Wilderness Act or the CDPA.

If you have any questions about this interpretation, please contact Paul Brink, California BLM Wilderness Coordinator, at 916-978-4641 or Russ Kaldenberg, California Indian Coordinator/State Archeologist, at 916-978-4635.

Signed
Carl Rountree
DSD, Natural Resources

Authenticated
AJ Ajitsingh
Records Management

cc:
Ken Mahoney, AZ-930
John Skibinski, Bakersfield
Chris Roholt, CDD
Jeff Jarvis, WO-240, 1000LS