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E-filing

8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 BERRYESSA FOR ALL,
12 Plaintiff,

13 vs.

14 UNITED STATES BUREAU OF
15 RECLAMATION, an agency of the United
16 States Department of the Interior; DIRK
17 KEMPTHORNE, in his official capacity as
18 Secretary, United States Department of the
19 Interior; ROBERT W. JOHNSON, in his
20 official capacity as Commissioner, United
21 States Bureau of Reclamation; KIRK C.
22 RODGERS, in his official capacity as
23 Regional Director, Mid-Pacific Region, United
24 States Bureau of Reclamation; MICHAEL R.
25 FINNEGAN, in his official capacity as Area
26 Manager, Central California Area Office,
27 United States Bureau of Reclamation;
28 FRANK MICHNY, in his official capacity as
Regional Environmental Officer, Mid-Pacific
Region, United States Bureau of Reclamation;
and PEDRO "PETE" LUCERO, in his official
capacity as Chief, Recreation Resources
Division, Central California Area Office, and
formerly Park Manager, Lake Berryessa
Recreation Division, Mid-Pacific Region,
United States Bureau of Reclamation,
Defendants.

Civil Case No.:

070770259

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

(Administrative Procedure Act, 5 U.S.C.
§§ 701 et seq.; National Environmental
Policy Act, 43 U.S.C. §§ 4321 et seq.)

Complaint For Declaratory and Injunctive Relief

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RICHARD H. HARRIS
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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1 **PRELIMINARY STATEMENT**

2 1. This is a civil action for declaratory and injunctive relief. Plaintiff BERRYESSA
3 FOR ALL (“Plaintiff” or “BFA”) challenges the failure of Defendants UNITED STATES
4 BUREAU OF RECLAMATION, et al. (collectively “Defendant” or “BOR”) to comply with
5 applicable Federal law, and arises under and alleges violations of the National Environmental
6 Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq. and its implementing regulations, and the
7 Administrative Procedure Act (“APA”), 5 U.S. C. §§ 701 et seq.

8 2. Specifically, Plaintiff BFA seeks judicial review of Defendant BOR’s Record of
9 Decision (“ROD”) for the Future Recreation Use and Operations of Lake Berryessa, Solano
10 Project, Napa, California, Mid-Pacific Region, June 2, 2006 [referred to as the Visitor Services
11 Plan (“VSP”)] and the Final Environmental Impact Statement (“FEIS”) released in November
12 2005. Plaintiff BFA seeks a declaration that Defendant BOR’s VSP ROD and the FEIS for the
13 Solano Project – Lake Berryessa violates the NEPA, the APA, and Federal law.

14 **JURISDICTION AND VENUE**

15 3. This Court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (action
16 presenting a federal question); 28 U.S.C. § 1346 (United States as a defendant); 28 U.S.C. §
17 2201(declaratory judgment); and 28 U.S.C. § 2202 (injunctive relief). The requested relief is
18 proper under the APA, 5 U.S.C. §§ 701 et seq.; the NEPA, 42 U.S.C. §§ 4321 et seq.; and the
19 Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d).

20 4. Venue is properly vested in this Court under 28 U.S.C. § 1391(e)(1)&(2), as a
21 substantial part of the events and omissions giving rise to the claims occurred or will occur in
22 Napa County, California; a substantial part of the property that is the subject of the claim is
23 situated in Napa County, California; and a number of Plaintiff BFA’s members and supporters
24 reside within the Northern District of California.

25 5. A present and actual controversy exists between the parties to this action.

26 6. Any available administrative remedies have been exhausted. There is no
27 administrative appeal remedy available to Plaintiff BFA. Copies of communications to and from

1 Defendant BOR with respect to the administrative appeal issue is appended as Exhibit A.

2 7. Defendant BOR's challenged VSP ROD and the FEIS for the Solano Project –
3 Lake Berryessa is a final agency action that is subject to this Court's review under the APA, 5
4 U.S.C. §§ 702 and 704.

5 INTRADISTRICT ASSIGNMENT

6 8. Assignment to either the San Francisco Division or the Oakland Division is
7 proper pursuant to Civil L.R. 3-2(c)(d) because a substantial part of the events or omissions
8 which give rise to the claim occurred or will occur in Napa County, California; and a substantial
9 part of the property that is the subject of the action is situated in Napa County, California.

10 PARTIES

11 9. Plaintiff BERRYESSA FOR ALL ("BFA") is an unincorporated non-profit
12 association consisting of approximately 1,000 members and supporters, mostly residing in the
13 greater San Francisco Bay Area, with common and community interests as long-term
14 permittees/stakeholders at seven resorts located at Defendant BOR's Lake Berryessa Recreation
15 Area in Napa County, California. With its offices located in Brentwood, California, Plaintiff
16 BFA's primary focus and overall mission includes the preservation of the public's family-
17 oriented recreational living and lifestyle at Lake Berryessa, which BFA's members and
18 supporters and their families have utilized and enjoyed for almost 50 years (shortly after
19 Defendant BOR first created the reservoir with the completion of the Solano Project's
20 Monticello Dam in 1957). Plaintiff BFA is committed to protecting equal recreational
21 opportunities and community interests for all segments of the public at Lake Berryessa. Plaintiff
22 BFA brings this action on behalf of itself and its members and supporters.

23 10. Plaintiff BFA and its members and supporters use and enjoy, on an ongoing basis,
24 the recreational living and lifestyle at Lake Berryessa as long-term permittees/stakeholders. The
25 present and future enjoyment of these benefits by Plaintiff BFA and its members and supporters
26 has been, is being, and will continue to be irreparably harmed by Defendant BOR's disregard of
27 statutory requirements and the failure to comply with the NEPA, the APA and Federal law.

1 11. The Defendants in this action are:

2 A. UNITED STATES BUREAU OF RECLAMATION (“BOR”), an agency
3 of the United States Department of the Interior, is charged with the responsibility of managing
4 the development and use of water resources in the Western United States, and ensuring
5 compliance with the NEPA through the APA and Federal law, with oversight and administration
6 of the operations at Lake Berryessa Recreation Division, Mid-Pacific Region, Napa County,
7 California.

8 B. DIRK KEMPTHORNE, in his official capacity as Secretary of the
9 Interior, United States Department of the Interior, has the ultimate responsibility to enforce and
10 implement provisions of the NEPA within the Department of the Interior and subordinate
11 agencies, including the United States Bureau of Reclamation.

12 C. ROBERT W. JOHNSON, in his official capacity as Commissioner, United
13 States Bureau of Reclamation, has the responsibility to enforce and implement provisions of the
14 NEPA within the Bureau of Reclamation.

15 D. KIRK C. RODGERS, in his official capacity as Regional Director, Mid-
16 Pacific Region, United States Bureau of Reclamation, approved Defendant BOR’s VSP ROD
17 and the FEIS for the Solano Project – Lake Berryessa, and has the responsibility to enforce and
18 implement provisions of the NEPA within the Mid-Pacific Region.

19 E. MICHAEL R. FINNEGAN, in his official capacity as Area Manager,
20 Central California Area Office, United States Bureau of Reclamation, recommended Defendant
21 BOR’s VSP ROD and the FEIS for the Solano Project – Lake Berryessa, and has the
22 responsibility to enforce and implement provisions of the NEPA within the Central California
23 Area Office, Mid-Pacific Region.

24 F. FRANK MICHNY, in his official capacity as Assistant Regional Director
25 for Technical Services, Mid-Pacific Region, United States Bureau of Reclamation, and formerly
26 as Regional Environmental Officer/Chief of the Division of Environmental Services, concurred
27 with Defendant BOR’s VSP ROD and the FEIS for the Solano Project – Lake Berryessa, and is

1 and was vested with responsibility for issues relating to the NEPA within the Mid-Pacific
2 Region.

3 G. PEDRO "PETE" LUCERO, in his official capacity as Chief, Recreation
4 Resources Division, Central California Area Office, and formerly as Park Manager, Lake
5 Berryessa Recreation Division, Mid-Pacific Region, United States Bureau of Reclamation, is and
6 was vested with responsibility for issues relating to the NEPA within the Central California Area
7 Office, and the Lake Berryessa Recreation Division, Mid-Pacific Region.

8 **STATUTORY INFORMATION**

9 **I. National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq.**

10 12. The NEPA, 42 U.S.C. §§ 4321 et seq., is the "basic national charter for the
11 protection of the environment," and is intended to ensure that federal agencies fully consider
12 environmental consequences before taking an action, and that the public is fully informed of
13 these consequences. 40 C.F.R. § 1500.1. The NEPA embodies the national policy of
14 encouraging productive and enjoyable harmony between man and the environment, and to
15 promote efforts to prevent or eliminate damage to the environment. 42 U.S.C. § 4321.

16 13. The Federal government under the NEPA has the responsibility to preserve
17 important historic, cultural, and natural aspects of the national heritage, and maintain, wherever
18 possible, an environment which supports diversity and variety of individual choice. 42 U.S.C. §
19 4331(b)(4).

20 14. The NEPA and the Council on Environmental Quality's ("CEQ") implementing
21 regulations, 40 C.F.R. §§ 1500-1517, requires all agencies of the federal government to prepare a
22 "detailed statement" regarding all "major federal actions significantly affecting the quality of the
23 human environment." 42 U.S.C. § 4332(C). The Environmental Impact Statement ("EIS") must
24 describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental
25 effects which cannot be avoided should the proposal be implemented," (3) alternatives to the
26 proposed action, (4) "the relationship between local short-term uses of man's environment and
27 the maintenance and enhancement of long-term productivity," and (5) any "irreversible or
28 irretrievable commitment of resources which would be involved in the proposed action should it
be implemented. 42 U.S.C. § 4332.

1 15. The purpose of an EIS is to provide full and fair discussion of significant
2 environmental impacts and to inform decision makers and the public of reasonable alternatives
3 which would minimize adverse impacts to the environment. 40 C.F.R. § 1502. “The NEPA
4 process is intended to help public officials make decisions that are based on understanding of
5 environmental consequences, and take actions that protect, restore, and enhance the
6 environment.” 40 C.F.R. § 1500.1(c). Federal agencies must to the fullest extent possible
7 encourage and facilitate public involvement in the decision making process. 40 C.F.R. §
8 1500.2(d).

9 16. Federal agencies must consider the direct, indirect, and cumulative environmental
10 impacts of their actions. Indirect effects are those “caused by the action and are later in time or
11 farther removed in distance but are still reasonably foreseeable.” 40 C.F.R. § 1508.8.
12 Cumulative impacts include impacts of “other past, present, and reasonably foreseeable future
13 actions regardless of what agency (federal or non-federal) or person undertakes such other
14 actions.” 40 C.F.R. § 1508.7.

15 17. Even after the completion of the NEPA process, where an agency learns of
16 “significant new circumstances” or new “information relevant to environmental concerns and
17 bearing on the proposed action or its impacts,” the agency must undertake further review under
18 NEPA. 40 C.F.R. § 1502.9(c).

19 18. The NEPA does not contain a separate provision for judicial review. Issues
20 relating to compliance with the NEPA are reviewed under the APA. 5 U.S.C. §§ 702 & 704.

21 19. Defendant BOR’s NEPA Handbook is currently under revision and is not
22 available to the public. According to a notice posted on the BOR’s website, anyone with
23 questions regarding the NEPA procedures are directed to contact the BOR. (See:
24 www.usbr.gov/nepa/).

25 **II. Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 et seq.**

26 20. In the absence of any specific statutory review procedures, the APA grants a
27 general right of review of any adverse, final government agency action. 5 U.S.C. §§ 702 & 704.
28 A legal action, including an action for declaratory judgment, may be brought in a court of

1 competent jurisdiction. The action for judicial review may be brought against the United States,
2 the agency by its official title, or the appropriate officer. 5 U.S.C. § 703. On such conditions as
3 may be required and to the extent necessary to prevent irreparable injury, the reviewing court
4 may issue all necessary and appropriate process to postpone the effective date of an agency
5 action or to preserve status or rights pending conclusion of the review proceedings. 5 U.S.C. §
6 705.

7 21. The APA, under scope of judicial review, provides inter alia as follows:

8 “To the extent necessary to decision and when presented, the reviewing court shall decide all
9 relevant questions of law, interpret constitutional and statutory provisions, and determine the
10 meaning or applicability of the terms of an agency action. The reviewing court shall –

- 11 (1) compel agency action unlawfully withheld or unreasonably delayed; and
12 (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
13 (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
14 with law;
15 (B) contrary to constitutional right, power, privilege, or immunity;
16 (C) in excess of statutory jurisdiction, authority, or limitations, or short of
17 statutory right;
18 (D) without observance of procedure required by law;
19 [E & F omitted].

20 In making the foregoing determinations, the court shall review the whole record or those parts of
21 it cited by a party, and due account shall be taken of the rule of prejudicial error.” 5 U.S.C. §
22 706.

23 **ADMINISTRATIVE BACKGROUND**

24 22. On November 7, 2000, Defendant BOR published a “Notice of intent to prepare
25 an environmental impact statement” for the Solano Project – Lake Berryessa; Napa, California.
26 (“Notice of Intent”). 65 FR 216 (November 7, 2000). The published Notice of Intent contained
27 the following pertinent information:

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1 “SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, as
2 amended, the Bureau of Reclamation (Reclamation) is initiating a formal Visitor Services
3 Planning effort for the Lake Berryessa Recreation Area. Reclamation intends to prepare an
4 environmental impact statement (EIS) for implementing the provisions of the plan. The purpose
5 of the Visitor Services Plan is to determine the type and level of commercial facilities and
6 services that are necessary and appropriate for future long term operations. The current
7 concession contracts expire in 2009 and the Visitor Services Plan will be used as a basis for
8 future concession prospectuses.”

9 “Visitor Services Plan

10 The Visitor Services Plan will identify and develop the requirements, terms, and conditions for
11 new competitive concession contracts that will be developed by the Federal Government. Some
12 of the issues to be addressed in the plan include day-use needs, long-term and short-term
13 recreational vehicle and trailer sites, campground development, marina development,
14 consolidation or expansion of operations, new services development and construction, retention
15 or removal of existing facilities, food and beverage service needs, overnight lodging facilities,
16 and support for marina based activities, i.e., fishing (individual and tournament), swimming,
17 water skiing, etc.” (Emphasis added). 65 FR 216.

18 23. On June 2, 2006, Defendant BOR adopted the Record of Decision (“ROD”) for
19 the Future Recreation Use and Operations of Lake Berryessa, Solano Project, Napa, California,
20 Mid-Pacific Region [referred to as the Visitor Services Plan (“VSP”)]. BOR’s VSP ROD for the
21 Solano Project – Lake Berryessa followed the preparation and issuance of a Draft Environmental
22 Impact Statement (“DEIS”), dated October 2003, and a Final EIS (“FEIS”), released November
23 2005, including references to BOR’s 1992/1993 Reservoir Area Management Plan (“RAMP
24 ROD”), in the NEPA compliance process.

25 24. Lake Berryessa is the operating reservoir for Defendant BOR’s Solano Project
26 and was initially authorized by the Secretary of the Interior on November 11, 1948, under the
27 terms of the Reclamation Project Act of 1939. Monticello Dam was completed in 1957, which

1 dammed Putah Creek to create Lake Berryessa and the Lake Berryessa Recreation Area.

2 25. Subsequently, the BOR entered into an agreement with Napa County to manage
3 recreation at Lake Berryessa. Napa County. BOR, between 1958 and 1959, awarded contracts
4 to seven concessionaires to develop and manage designated areas along the lakeshore for
5 recreation purposes. Over time, the concessionaires, citing the need for year-around revenue,
6 permitted private owners (“permittees/stakeholders”) to locate trailers and mobile homes for
7 long-term use at Lake Berryessa’s seven resorts with the approval of and permits issued by Napa
8 County and the BOR. Permittees/stakeholders have added significant costly improvements to
9 and around their units, including decks, docks, driveways, sheds, and landscaping. In 1975, the
10 BOR terminated the recreation management agreement with Napa County. The concession
11 contracts with the seven concessionaires were then transferred to the BOR. Under the authority
12 of Public Law 96-375, dated October 3, 1980, the Secretary of the Interior renewed the existing
13 concession contracts for two successive 10-year periods, with the cumulative 50-year terms now
14 scheduled to expire in 2008 and 2009.

15 26. Defendant BOR’s Purpose and Need Statement in its Draft Environmental Impact
16 Statement (“DEIS”), dated October 2003, Chapter 1, Page 33, states in pertinent part:

17 “The purpose of this project is to develop a comprehensive plan for the redevelopment
18 and management of visitor services (commercial and non-commercial) to support traditional,
19 short-term, and diverse outdoor recreation opportunities at Lake Berryessa. These recreation
20 opportunities will be compatible and in compliance with all applicable laws, regulations, and
21 codes, and will be consistent with the project purpose and the Reservoir Area Management Plan
22 (RAMP).”

23 “The project is needed to correct over four decades of resort operations under which
24 prime recreational areas have been reserved for long-term trailer site permittees, to the exclusion
25 of the majority of visitors to Lake Berryessa. Such practice is in conflict with modern
26 Reclamation policies regulating exclusive use of public property.” (Emphasis added).

27 27. Defendant BOR’s Purpose and Need Statement in the Draft EIS contradicts and

1 ignores the Notice of Availability (“NOA”) of the Draft EIS published in the Federal Register,
2 which provides in pertinent part: “Some of the issues to be addressed in the VSP includes day
3 use needs, long-term and short term recreational vehicle and trailer sites...” (Emphasis added).
4 68 FR 211 (October 31, 2003).

5 28. Defendant BOR’s DEIS was issued in October 2003 [after the publication of the
6 Notice of Intent in the Federal Register (November 7, 2000)] during the NEPA compliance
7 process and before the adoption of the VSP ROD and FEIS on June 2, 2006.

8 29. Defendant BOR, in announcing the VSP ROD for the Solano Project – Lake
9 Berryessa, after its adoption on June 2, 2006, proclaimed: “The VSP ROD limits future
10 development of the concession areas to facilities that support short-term, traditional, non-
11 exclusive, and diverse recreation opportunities at the lake. All privately owned trailers, mobile
12 homes, and associated personal property must be removed from Federal property at Lake
13 Berryessa.” (Emphasis added). VSP ROD (June 2, 2006), Executive Summary. [See the BOR
14 Mid-Pacific Region website, “Lake Berryessa Visitor Services Plan (VSP)”:
15 www.usbr.gov/mp/berryessa/].

16 **CLAIM FOR RELIEF**

17 **Violations of the National Environmental Policy Act (“NEPA”), 43 U.S. C. §§ 4321 et seq.** 18 **and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 et seq.**

19 30. Plaintiff BFA incorporates herein by reference each and every allegation set forth
20 in this Complaint.

21 31. Defendant BOR’s Notice of Intent to prepare an EIS for the Solano Project – Lake
22 Berryessa, published in the Federal Register on November 7, 2000, clearly states, “The purpose
23 of the Visitor Services Plan is to determine the type and level of commercial facilities and
24 services that are necessary and appropriate for future long-term operations.” Under the heading
25 “Visitor Services Plan,” the Notice of Intent further identifies and specifies issues to be
26 addressed, which includes “long-term and short-term recreational vehicle and trailer sites.”
27 (Emphasis added). 65 FR 216.

1 32. During the NEPA compliance process, Defendant BOR issued its Draft EIS in
2 October 2003, stating, “The purpose of this project is to develop a comprehensive plan for the
3 redevelopment and management of visitor services (commercial and non-commercial) to support
4 traditional, short-term, and diverse outdoor recreation opportunities at Lake Berryessa.”
5 (Emphasis added). DEIS (October 2003), Chapter 1, Page 33. See FEIS (November 2005),
6 Chapter 1, Page 33. Defendant BOR’s VSP ROD, adopted on June 2, 2006, provides in
7 pertinent part: “The VSP ROD limits future development of the concession areas to facilitate that
8 support short-term, traditional, non-exclusive, and diverse recreation opportunities at the lake.”
9 It further mandates, “All privately owned trailers, mobile homes, and associated personal
10 property must be removed from the Federal property at Lake Berryessa.” (Emphasis added).
11 VSP ROD (June 2, 2006), Executive Summary, 2. Facilities.

12 33. In a classic “bait and switch” maneuver, Defendant BOR misled the public in its
13 published Notice of Intent for the EIS on November 7, 2000, by formally announcing that the
14 purpose of the Visitor Services Plan was to determine the type and level of commercial facilities
15 and services for long-term operations, including issues addressing long-term and short term
16 recreational vehicle and trailer sites. 65 FR 216. Defendant BOR’s DEIS issued in October
17 2003, (issued during the NEPA compliance process) completely ignores the Notice of Intent’s
18 reference to long-term recreational vehicle and trailer sites, and focuses solely on traditional,
19 short-term, and diverse outdoor recreation opportunities. DEIS (October 2003), Chapter 1, Page
20 33. See FEIS (November 2005), Chapter 1, Page 33. Moreover, the Notice of Availability
21 (NOA) of the Draft EIS published in the Federal Register contradicts and ignores BOR’s
22 mandate that, “Some of the issues to be addressed in the VSP include day use needs, long-term
23 and short-term recreational vehicle and trailer sites...” 68 FR 211 (October 31, 2003).
24 Defendant BOR completed its deception of the public by adopting the VSP ROD and the FEIS
25 for the Solano Project – Lake Berryessa on June 2, 2006, limiting future development to facilities
26 that support short-term, traditional, non-exclusive, and diverse recreation opportunities, and
27 mandating that all privately owned trailers, mobile homes, and associated personal property must
28 be removed from the Federal estate. VSP ROD (June 2, 2006). The foregoing scenario supports
and substantiates the conclusion that Defendant BOR, evidencing lack of good faith, had a

1 “predetermined” plan (i.e. to eliminate long-term permittee/stakeholder uses at Lake Berryessa)
2 even before engaging in the NEPA compliance process.

3 34. As a direct and consequential result of errors and omissions in the NEPA
4 compliance process and, particularly, the failure to address the specific purposes published in the
5 Notice of Intent for the EIS, and the failure to examine the overreaching direct, indirect, and
6 cumulative environmental effects at issue, Defendant BOR’s conduct in the NEPA compliance
7 process is and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance
8 with law in violation of the NEPA and the APA § 706(2)(A).

9 35. Furthermore, Defendant BOR’s FEIS (November 2005) and the VSP ROD (June
10 2, 2006) for the Solano Project – Lake Berryessa are legally inadequate, and in violation of
11 the NEPA, the APA, and Federal law for a number of reasons, including, but not limited to, the
12 following:

13 A. The premise for Defendant BOR’s erroneous assertion and conclusion that long-
14 term private permittee/stakeholder’s use is “in conflict with modern Reclamation (BOR) policies
15 regulating exclusive use of public property” is neither based on nor supported by any applicable
16 statute, code, or regulations. (Emphasis added). The term “exclusive use” is not even defined in
17 the Glossary attached to Defendant BOR’s VSP ROD for the Solano Project – Lake Berryessa.
18 VSP ROD (June 2, 2006).¹

19 B. Defendant BOR cites, as the basis of decision and issues evaluated, “The purpose
20 and need for the Federal Action takes into consideration Reclamation’s current policy regulating
21 private long-term exclusive use of public property; public health, safety, environmental, and
22 building codes, regulations, laws; and the 1992 RAMP, that states Reclamation’s desired goals as
23 follows: ‘...to provide outdoor recreation facilities and services for the visiting public at Lake
24 *Berryessa which will accommodate a variety of aquatic-related recreation experience
opportunities, to the extent and quality and in such combination that will protect the aesthetic*

25 ¹ The only citation for the definition of the term “exclusive use” is found in the BOR Reclamation Manual,
26 Directives and Standards (LND 04-01, amended April 29, 2002), which is not cited in the VSP ROD or referenced
27 in BOR’s NEPA compliance documents: “Exclusive use is any use that excludes other appropriate public recreation
28 use or users for extended periods of time. Exclusive use includes, but is not limited to, boat docks, cabins, trailers,
manufactured or mobile homes, structures, roads, or other amenities that are determined by Reclamation to be
exclusive use.” LND 04-01 neither eliminates nor prohibits “exclusive use,” other than the definition of the term.
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1 and recreational values and assure optimum short-term recreational use and enjoyment and
2 social benefit.' (1992 RAMP, page 4.)” [See VSP ROD (June 2, 2006), VI. Basis of Decision
3 and Issues Evaluated, page 11]. Interestingly, the same quoted language is attributed in another
4 section of the VSP ROD to a different source document [Public Use Plan (“PUP”), Amendment
5 Number 2]. BOR acknowledges that the updated PUP was never officially adopted by the
6 agency. [See VSP ROD (June 2, 2006), II. Background, page 2, second and fourth paragraphs].²

7 **It is important to note that BOR’s cited 1992/1993 RAMP ROD neither terminates nor**
8 **prohibits long-term permittee/stakeholder uses at Lake Berryessa. Defendant BOR’s**
9 **misleading statements and boot-strap conclusions are not supported, but in fact are**
10 **contradicted, by the NEPA administrative record.**³

11 C. Defendant BOR’s plan creates “exclusive uses” for non-motorized water craft and
12 a trail system for non-motorized recreation. The regional trail system for non-motorized
13 recreation is allegedly to be built without the use of Federal appropriations and with “minimal”
14 cost to BOR. The term “minimal” is not defined, and is not referenced in any cost allocation or
15 budgetary plan in BOR’s VSP ROD and Final EIS for the Solano Project – Lake Berryessa.

16 D. Defendant BOR’s statement in the VSP ROD for the Solano Project – Lake
17 Berryessa states that the project is intended to integrate on a lake-wide basis, “the widest
18 practical spectrum of recreation experience for the visiting public.” Nevertheless, with little or
19 no study and the absence of any impact analysis, BOR summarily and permanently terminated
20 sites for over 1,300 long-term permittees/stakeholders, a large, if not the largest, single group
21 that contributes to the local economy and who have enjoyed recreational experiences at the Lake

22 ² “In 1972, the National Park Service updated the 13-year-old PUP at the request of Reclamation.” “The updated
23 plan was never officially adopted...” (Emphasis added). After assuming recreation management for Lake
24 Berryessa in 1975, Reclamation reviewed the PUP and all existing commercial developments. Reclamation
25 concluded that the PUP was essentially satisfactory but that it should be amended to take existing concession
26 facilities into account. Reclamation also revised its recreation and land use objective for the lake, stating its aim
27 was...” (Quoted language in body, with citation to PUP, Amendment Number 2).

28 ³ The 1992/1993 RAMP ROD mandates continued long term uses: “*Continued Long-term Uses* – Long-term
exclusive uses will be allowed in concession areas. Current long-term exclusive uses assist in supporting necessary
services for the short-term users and low cost public access. These long-term exclusive uses will be located or
relocated in areas that are neither prime shoreline locations that are desirable for short-term uses nor conflict with
other greater public needs. Long-term uses will be designated to blend more effectively with the natural
environment.” 1992/1993 RAMP ROD (February 1993), IV. Basis of Decision and Issues Evaluated, *Continued
Long- Term Uses*.

1 Berryessa for most of its 50 year history. Furthermore, BOR only agrees to provide perfunctory
2 transition services (limited administrative services) without any funding and no financial
3 assistance for the displaced permittees/stakeholders at Lake Berryessa.

4 E. Defendant BOR, again contrary to its promise to integrate its VSP ROD program,
5 failed to provide and submit any substantive socio-economic studies and analysis to document or
6 substantiate its promise to support economic goals of surrounding communities, especially
7 gateway communities. A comprehensive socio-economic study and analysis should have been
8 prepared and is necessary and required to document permittees/stakeholders role in providing
9 substantial economic support to Lake Berryessa concessionaires and surrounding communities,
especially gateway communities.

10 F. Defendant BOR's promise to manage the recreation operations on an "adaptive"
11 basis to address and contend with new, evolving, or unforeseen circumstances is not based on
12 any accepted science or management plan. This means that BOR will be reacting to new,
13 evolving, or unforeseen circumstances without any advance planning effort except when a crisis
14 develops. This lack of planning effort is unacceptable for any project, whether private or
15 government, as future use and planning issues are essential and must be addressed in the NEPA
16 compliance process.

17 G. Defendant BOR's tactic to require the geographic location of certain facilities for
18 annual occupancy to be above elevation 455' MSL plus 100 LF buffer is another example of
19 BOR's intent and plan in its scheme to eliminate existing long-term permittee/stakeholder uses at
20 Lake Berryessa.⁴ Using this water influence zone criterion, BOR's own relatively new
21 Administrative Office and Visitor Center building complex located at 5520 Knoxville Road,
22 Napa, California (commonly referred to as "Government Point") will be required to be
23 demolished and relocated for failure to comply with BOR's own geographic location standard.
24

25 ⁴ The VSP ROD states that "All cabins, park models, or cottages approved by Reclamation for annual occupancy...
26 must be located above elevation 455' plus 100 LF (Linear Feet) buffer. VSP ROD (June 2, 2006), 5.c. It should be
27 noted that the 1993 RAMP ROD provides in pertinent part: "Long-term uses located at elevations 450 feet to 455
28 feet may remain so long as they are: (1) floodproofed and/or securely anchored per Reclamation Instructions; and
(2) are not subject to removal for other reasons." [Reservoir Floodplain (440 to 455 feet mean sea level)]. RAMP
ROD (February 1993), Appendices, Preferred Actions Selected for Implementation, 34.
Complaint For Declaratory and Injunctive Relief 14

1 H. Defendant BOR engaged and participated in a flawed and defective public
2 comment and scoping process for the Draft and Final EIS and the VSP ROD for the Solano
3 Project – Lake Berryessa. BOR falsely reported: “During the two comment periods Reclamation
4 received more than 3,400 comment letters and e-mails...” VSP ROD, VIII. Comments Received
5 on the Final EIS, pg. 15. BOR’s Mid-Pacific Region acknowledged that during the NEPA
6 compliance process it received petitions from concerned and interested citizens with over 12,000
7 signed signatures supporting the continuation of long-term permittee/stakeholder uses at Lake
8 Berryessa. It is obvious that Defendant BOR either purposefully ignored the signed petitions or
9 made a biased administrative decision to count the petitions as a single or few comments instead
10 of giving true weight to the thousands of interested citizens who made the effort to express their
11 position to the BOR. Defendant BOR’s action is another example of the government’s flagrant
12 misconduct, which constitutes arbitrary, capricious conduct, an abuse of discretion, and
13 otherwise is not in accordance with law.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff BFA respectfully requests that the Court:

- 16 A. Declare that Defendant BOR has violated and continues to violate the NEPA, the
17 APA and Federal law;
- 18 B. Declare that Defendant BOR withdraw and set aside any proposed action pursuant
19 to the BOR’s VSP ROD and the FEIS for the Solano Project – Lake Berryessa, adopted on June
20 2, 2006, until or unless such time as the BOR demonstrates to the Court that it has complied with
21 the NEPA, the APA and Federal law;
- 22 C. Retain jurisdiction of this matter until Defendant BOR has fulfilled all of its legal
23 obligations under the NEPA, the APA, and Federal law; .
- 24 D. Award Plaintiff BFA its costs of suit and attorney fees, and other disbursements,
25 including expert fees, for this action pursuant to the Equal Access to Justice Act, 28 U.S.C. §
26 2412;
- 27 E. Grant such additional and further relief as Plaintiff BFA may request or the Court
28 may deem just and appropriate.

1 **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

2 Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the
3 named parties, there is no such interest to report.

4
5 Dated this 16th day of January, 2007.

6
7 Respectfully submitted,

8
9 

10
11 FRANK A. IWAMA (CSB No. 45377)
12 Iwama Law Firm
13 67 Wessex Way
14 San Carlos, CA 94070-1740
15 Telephone: (650) 591-6200
16 E-mail: frankiwama@gmail.com

17
18 Attorneys for Plaintiff Berryessa For All
19
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25
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27

EXHIBIT "A"

67 Wessex Way
San Carlos, CA 94070
Tel: (650) 591-6200
Fax: (650) 508-8689



Fax

To: William Rinne, Commissioner
Bureau of Reclamation

From: Frank A. Iwama

Fax: (202) 513-0309 **Pages:** 3

Phone: (202) 513-0501 **Date:** June 30, 2006

Re: Notice of Administrative Appeal **CC:** Kirk C. Rogers, Regional Director

Urgent **For Review** **Please Comment** **Please Reply** **Please Recycle**

*** Comments:**

Please deliver to Commissioner William Rinne. Thank you.

If there are any problems or questions regarding this facsimile transmission, please contact this office at (650) 591-6200.

CONFIDENTIALITY NOTICE: This facsimile transmission may contain confidential and privileged information and is intended only for the use of the above-named addressee. Any dissemination, copying or distribution of the information is strictly prohibited. If you received this facsimile transmission in error, please immediately notify this office by telephone at (650) 591-6200. Thank you.

IWAMA LAW FIRM

FRANK A. IWAMA
ATTORNEY & COUNSELOR AT LAW

67 WESSEX WAY
SAN CARLOS, CALIFORNIA
94070-1740 U.S.A.

TEL (650) 591-6200
FAX (650) 508-8689
EMAIL frankiwama@gmail.com

Via Facsimile (202) 513-0309
Original via U.S. Postal Service

June 30, 2006

William Rinne
Acting Commissioner
Bureau of Reclamation
Department of the Interior
1849 C Street NW
Washington, DC 20240-0001

Re: **Notice re Administrative Appeal (NEPA VSP ROD)**
Petitioners/Appellants: Henry "Hank" Howard and Don Lombardi, Sr.¹
National Environmental Policy Act (NEPA)
Visitor Services Plan (VSP) Record of Decision (ROD)²
Adopted on June 2, 2006 by the Bureau of Reclamation's (BOR) Mid-
Pacific Region, Sacramento, California

Dear Commissioner Rinne:

This Notice re Administrative Appeal (NEPA VSP ROD) is filed as a procedural precaution to preserve, if required, any administrative appeal rights that petitioners/appellants may be required to exercise with the Bureau of Reclamation (BOR) to contest the NEPA decision issued on June 2, 2006 for the VSP ROD.

Based on research and confirmation received from the BOR Commissioner's Office in Washington, DC and the Mid-Pacific Region Office in Sacramento, California,³ we are confident that BOR presently does not have any administrative appeal process following a NEPA decision. Nevertheless, in the exercise of caution to avoid any future issue regarding a failure to exhaust administrative remedies, petitioners/appellants take the

¹ Messrs. Howard and Lombardi are long-term permittees and own mobile homes and personal property located at the Steele Park Resort, within the Bureau of Reclamation's (BOR) Lake Berryessa, Solano Project, Napa, California, and actively participated in BOR's National Environmental Policy Act (NEPA) compliance decision process that resulted in the Record of Decision (ROD) for the Visitor Services Plan (VSP).

² The VSP ROD, formally titled "Future Recreation Use and Operations of Lake Berryessa" Solano Project, Napa, California, was adopted by BOR's Mid-Pacific Region, Sacramento, California on June 2, 2006.

³ E-mails received on June 30, 2006 from Kerry Rae, Acting Chief of Staff, BOR Commissioner's Office, Washington, DC and Janet Sierzputowski, Public Affairs Office, BOR Mid-Pacific Region Office, Sacramento, California.

Commissioner William Rinne
Re: Notice re Administrative Appeal (NEPA VSP ROD)
June 30, 2006
Page Two


opportunity of filing this Notice re Administrative Appeal (NEPA VSP ROD) with BOR to memorialize their good-faith effort to exercise administrative appeal rights.

The grounds of petitioners/appellants' administrative appeal, include but are not limited to, the following:

- BOR's NEPA decision was not based on rational findings and were based on and constituted arbitrary and capricious conduct;
- the decision was not based on actual facts in the administrative record, including missing data, and constituted an error in judgment;
- the decision was not based on correct factors required by the law and resulted from a flawed process;
- the decision did not adequately consider important impact considerations, including soci-economic impacts that will directly result from the decision; and
- the decision failed to consider and adequately provide for the mitigation of economic damages and harm that will directly result from the permanent relocation and removal of private permittee trailers and mobile homes from the federal estate.

Your response in acknowledging receipt of this correspondence is appreciated.

Very truly yours,



FRANK A. IWAMA

Cc: Kirk C. Rogers, Regional Director
BOR Mid-Pacific Region
Henry "Hank" Howard
Don Lombardi, Sr.

FAI – BOR E-mails re NEPA Administrative Appeals Issue

NEPA Administrative Appeal Inbox

From: Frank Iwama <frankiwama@gmail.com> Mailed-By: gmail.com
To: **Kerry Rae** <krae@usbr.gov>
Date: **Jun 29, 2006 1:51 PM**
Subject: **NEPA Administrative Appeal**

To: Kerry Rae
Deputy Chief of Staff
U.S. Bureau of Reclamation
Washington, D.C.

Dear Ms. Rae:

Thank you for promptly returning my telephone call to the U.S. Bureau of Reclamation (BOR) requesting information regarding administrative appeal procedures following the issuance of a National Environmental Policy Act (NEPA) decision for a BOR project. It is my understanding based on our discussion that BOR does not have any administrative appeal procedures following the issuance of a NEPA decision. I request your cooperation and assistance in providing me with a cite or reference to a BOR policy or procedure that confirms that BOR does not have any administrative appeal procedures following the issuance of a NEPA decision. In the event that there is no BOR policy or procedure on this issue, please provide me with written confirmation that there is no BOR administrative appeal procedures following the issuance of a NEPA decision.

Again, thank you for your cooperation and assistance. Best regards.

Frank A. Iwama

Tel: (650) 591-6200
E-mail: frankiwama@gmail.com

From: Kerry Rae <KRAE@usbr.gov> Mailed-By: usbr.gov
To: frankiwama@gmail.com
Date: **Jun 30, 2006 6:58 AM**
Subject: **Re: NEPA Administrative Appeal**

Good morning Mr. Iwama,
Per your question below, and our conversation yesterday, I am replying to confirm that Reclamation does not have an administrative appeals process for NEPA decisions. And as we do not have such a process or procedure in place, there is nothing I can point you to or cite that confirms this other than assuring

you that is the case via this email.
Thank you, Kerry

From: Frank Iwama <frankiwama@gmail.com>
To: **Kerry Rae** <KRAE@usbr.gov>
Date: **Jun 30, 2006 9:48 AM**
Subject: **Re: NEPA Administrative Appeal**

Mailed-By: gmail.com

Dear Ms. Rae:

Thank you so much for your courtesy in confirming that Reclamation does not have an administrative appeals process for NEPA decisions. I will share this information with concerned citizens who have questions regarding a recently issued NEPA decision Reclamation completed before adopting the Record of Decision for the Visitor Services Plan at Lake Berryessa, Napa, California. Your response is extremely helpful and clarifies the issue since other agencies within the Department of the Interior (e.g. Bureau of Land Management) have a formal administrative appeals process for reviewing NEPA decisions.

Subsequent to our telephone discussion yesterday, I received the same verbal response from a Reclamation official at the Mid-Pacific Region in Sacramento, California. Before contacting you, I was unsuccessful in finding a definitive answer to this question after thoroughly reviewing numerous Internet sites, including several search engines, and legal research at the law library. My Internet research included reviewing Reclamation's main website and the Mid-Pacific Region's website announcing the Record of Decision for the Visitor Services Plan. I also thoroughly read Reclamation's Record of Decision for the Visitor Services Plan, which was adopted on June 2, 2006.

Please enjoy a great 4th of July weekend. Best regards.

Frank A. Iwama

Mimi Iwama <mimiiwama@yahoo.com> wrote:
Date: Fri, 30 Jun 2006 11:42:40 -0700 (PDT)
From: Mimi Iwama <mimiiwama@yahoo.com>
Subject: Re: NEPA
To: Janet Sierzputowski <JSIERZPUTOWSKI@mp.usbr.gov>

Dear Ms. Sierzputowski,

Thank you very much for your prompt and diligent response to the question regarding administrative appeal rights following BOR's NEPA Record of Decision. Your citation to BOR's NEPA Handbook and the reference to the CEQ site is appreciated.

United States District Court *E-filing*
NORTHERN DISTRICT OF CALIFORNIA

Berryessa For All

SUMMONS IN A CIVIL CASE

CASE NUMBER:

v.

C 07 0259

United States Bureau of Reclamation et al.

SI

TO: (Name and address of defendant)

Kevin V. Ryan
U.S. Attorney
Northern District of California
450 Golden Gate Avenue, 11th Floor
San Francisco, CA 94102

and Named Defendants

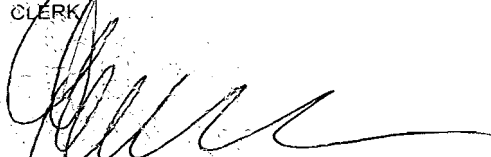
YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Frank A. Iwama
Iwama Law Firm
67 Wessex Way
San Carlos, CA 94070

an answer to the complaint which is herewith served upon you, within ⁶⁰ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

Richard W. Wieking

CLERK



(BY) DEPUTY CLERK

DATE January 16, 2007

United States District Court *E-filing*
NORTHERN DISTRICT OF CALIFORNIA

Berryessa For All

SUMMONS IN A CIVIL CASE

CASE NUMBER:

v.

C 07 0259

United States Bureau of Reclamation et al.

SI

TO: (Name and address of defendant)

Kevin V. Ryan
U.S. Attorney
Northern District of California
450 Golden Gate Avenue, 11th Floor
San Francisco, CA 94102

And Named Defendants

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Frank A. Iwama
Iwama Law Firm
67 Wessex Way
San Carlos, CA 94070

an answer to the complaint which is herewith served upon you, within ⁶⁰ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

Richard W. Wieking

CLERK



(BY) DEPUTY CLERK

DATE January 16, 2007