Title

Impossible evidence: The legal dismal cycle of regulating off-roading in the California desert

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Abstract:

A forty-year battle over off-road vehicle use in the California desert hinges on a deceptively simple question: how many miles of roads and trails were present in 1980? The only problem is that the answer to this question is impossible. This article seeks to understand the history and effects of this impossible regulatory demand through the concept of "impossible evidence," which describes evidence that is legally demanded but cannot or does not exist. I detail the rise of impossible evidence through the history of off-road vehicles in California, in which an essentially unregulated activity slowly comes under the purview of a growing environmental administrative state. I then track the 2009 *CBD v. BLM* decision to show how evidence becomes impossible. Finally, I discuss the implications of impossible evidence for the future of the California desert, revealing how the demand for impossible evidence creates an unworkable legal "dismal cycle" through administrative law, while allowing for the continuation of the same problem of off-road vehicle route proliferation.

Keywords: regulation, administrative law, evidence, legal geography, land management, environmental governance

Highlights:
- Administrative law is central to environmental law and politics
- Administrative law's focus on process demands alignment between future and past
- Impossible evidence is when regulations demand evidence that cannot exist
- Impossible evidence perpetuates litigation while environmental damage continues

1. "Only Crazy People and Lawyers"

In fall 2017, Talia[1] sat across from me at a restaurant in Yucca Valley, telling me what she had recently learned in her new position managing California desert issues at a "Big Green" environmental organization: "Everyone has given up on WEMO. The only people still involved are crazy people and lawyers." She was referring to WEMO, the West Mojave Transportation Network Plan, a route designation plan for off-highway vehicles (OHVs).[2] This plan would determine how many miles of roads and trails in WEMO's three million acres of Bureau of Land Management (BLM) lands will be open to OHV use. More broadly, though, WEMO was a forty-year battle between OHV users and conservationists in the California Desert—a battle that hadn't yet resulted in a finalized plan. The long-standing nature of this issue meant that entire careers had started and ended since it began, leaving the only people interested in the issue to be "crazy people," lawyers, Talia, and me.

WEMO's ongoing (re)litigation was so endless that it was a permanent part of the job for BLM employees who managed the WEMO planning process. At a public lands roundtable that Talia and I attended in October 2017, a BLM employee described WEMO as "caught up in litigation." At the time, Talia and I found his comment strange, as BLM was actually in the planning process (again), and, in his role, he certainly knew that he was saying something inaccurate. We speculated about why he made this statement on the three-hour car ride home, but it wasn't until later that I understood: Perhaps the difference between planning and litigation didn't matter.

This article tracks the relationship between planning and litigation through WEMO, a plan that has been trapped in a forty-year-long planning and litigation process. In short, this article tracks how WEMO has been stuck in the vagaries of administrative law, a broad body of law that determines how federal decision-making is done. I show how administrative law is an essential part of contemporary environmental conflict, a point that I hope is picked up by other nature-society geographers. By following this long planning-and-litigation cycle, I also argue that ongoing intractable formal litigation cannot be understood without its counterpart, informal on-the-ground activity that occurs while litigation is ongoing.

This article also makes a broad historical argument: I argue that administrative law litigation has become the arena to debate certain kinds of land use problems. To do this, I follow an extended history of one case, the *Center for Biological Diversity et al vs. BLM* (2009),[3] which the BLM employee referenced obliquely. In *CBD*, eleven environmental groups sued BLM about the proposed WEMO plan, arguing that the plan was not made according to BLM's own guidelines. While CBD's case was essentially a procedural demand under the Administrative Procedure Act, it hinged on an assertion that BLM create new plans that follow from previous ones, and therefore that today's trails match those that BLM had designated in years prior. At the crux of this procedural case is a demand for what I call "impossible evidence," a term I use to describe the historical, scientific, and legal problem of a regulatory demand for evidence that does not—and cannot—exist. Impossible evidence has implications for understanding the broader history of off-highway vehicle management as well

1 A pseudonym.

2 OHVs in the contemporary usage include any motorized vehicle driven off paved roads in the California desert, including street-legal vehicles (e.g. cars, licensed motorcycles) and vehicles meant for exclusive off-road use (e.g. dune buggies, dirt bikes, side-by-sides, ATVs). While the contemporary term for these vehicles is off-highway vehicle, this term did not become the primary language until the 1990s. While these terms can be used somewhat interchangeably, I use ORV primarily for pre-1990s vehicles, and OHV for vehicles used 1990s to present.

3 746 F. Supp. 2d 1055 (N.D. Cal. 2009). Hereafter, "*CBD*."

as the regulatory bind of many federal agencies by revealing the paradox when information is both legally mandated and practically impossible.

Impossible evidence reveals two related problems in the geographies of law, planning, and bureaucracy. First, impossible evidence highlights a classic problem at the center of legal geography and studies of bureaucracy: the "tension between legal discourse and the spatiality of social life" (Blomley and Clark 1990, 439). Here, this plays out on the grounds of formal legal action (litigation) and planning processes as they contrast with the informal proliferation of OHV trails. While ongoing litigation over designated trail locations continues, new trails are being created on the ground every day. This route proliferation problem increases the difference between trails designated in formal planning documents and the network of trails on the ground, which makes it more difficulty to determine what the baseline is. This ultimately contributes to more litigation, and what I call the legal dismal cycle.

Second, drawing on a classic description of the off-road "dismal cycle," I argue that the demand for impossible evidence contributes to an ongoing legal dismal cycle. The legal dismal cycle is used to understand how the courtroom has become the central venue for managing off-road vehicle use in California, and how this too has become a problem. While a plan remains in litigation, route proliferation, or the unauthorized creation of trails by users, continues. I argue that the legal dismal cycle, in emphasizing the "plan" and a cycle of impossible evidence, reinforces the idea that the courtroom is the appropriate venue for considering these problems, and ultimately leaves on-the-ground enforcement as a secondary concern.

Together, these two problems explore the relationship between the courtroom and practice, reconsidering them through a lens of understanding the relationship between enforcement and administrative law litigation. By centering the role of administrative law, I hope to recuperate a boring legal setting into a site of contestation with real consequences—although, in this case, the consequences are in some ways counterproductive to the goals of environmentalist litigants. Indeed, part of what this article examines is how this cycle of litigation has failed to achieve its goal—namely, preventing OHV-caused damage in the desert.

This motivation for this article came from two years of ethnographic research in the California desert between 2015-2019, including the fateful dinner and roundtable described above. As part of a broader project on conflict over the public-private checkerboard in the California desert (AUTHOR), I began my investigation into the history of off-roading because it was both profoundly important and "the hidden thing that no one talks about," as one environmentalist told me. In addition to ethnographic research with environmentalists, land managers, and local historians, as well as attendance at public meetings about OHV use, this article has been supplanted by additional interviews with OHV users involved in planning processes and with representatives from environmental organizations about more substantive issues related to the case. Historical portions of this article draw on archival and public records research, including archival research conducted at National Archives in Riverside and San Bruno; the Public Lands Foundation archive in Phoenix, Arizona; the BLM (Central Coast Field Office); and the personal archives of Rick Sieman. Public records consulted included approximately forty reports, plans, and studies made by non-profits, research entities, federal agencies, and researchers. Finally, this article drew direction from a federal lands law course audited at UC Berkeley's Law School in 2019.

In what follows, I track the history of impossible evidence, beginning with a brief detour through the geography of planning, administrative law, and evidence. Then, I provide a

brief overview of the relationship between off-road vehicles and the regulatory state, revealing how an "outlaw" activity becomes subject to state power, first by attempts at enforcement and then through regulation and planning. In the following section, I then examine how planning processes become subject to litigation through judicial review under the 1946 Administrative Procedure Act (APA) that governs the procedures through which federal agencies make decisions. Finally, I turn to the 2009 *CBD v. BLM* case, which reveals the role that impossible evidence plays in the courtroom, and the implications that it has for the future of the California desert.

2. Geographies of Planning, Law, and Evidence

The history of off-road vehicles is one in which an essentially unregulated activity comes under the purview of both science and the law during the growth of the environmental administrative state. This is not a new story for nature-society geographers, who have shown how bureaucrats render contentious and underregulated issues like extraction into seemingly technical or apolitical processes like environmental impact reporting (Atkins 2020, Campero et al 2021). Researchers have demonstrated the limits of environmental review in addressing community concerns (Li 2015, Delabre and Okereke 2020), as well as the afterlives of these documents in controlling not only extraction and revenues of natural resources, but people's actions (Spiegel 2017). Drawing inspiration from these accounts of planning processes—which were routed, in part, through the California desert (Woodhouse 2019)--this article focuses on a different element of the afterlife of a contested planning document: litigation.

After an environmental impact statement is finalized, it is common for environmental groups to sue (Ruple and Race 2020). In this article, I focus on the administrative law strategy that has been common in environmental law since *Sierra Club v. Morton* (1972),[4] which determined that environmental groups have standing to sue the government for its permitting and planning decisions. The administrative law strategy is become one of the predominant, if not *the* predominant, mode that environmentalists use to challenge federal decision-making today (Zeit 1995, Kalen 2009). While scholars have critiqued litigation as a road to "shallow" victories for environmentalists (Perkins 2022, 168), such quick dismisal ignores how administrative law and its focus on process (Bennett and Layard 2014, Delaney 2015) shapes outcomes, which is my focus here.

Administrative law cases evaluate how an agency made their decision, including what evidence was used to inform those decisions. Legal procedures circumscribe what can be included as evidence, or what is inadmissible (Spiegel 2021, Blomley 2015). By excluding certain kinds of evidence and including others, rules around evidence often shape results, and can perpetuate injustice (Gill 2020, Jeffrey 2021). Even as evidence can be narrowly circumscribed in a courtroom, evidence itself is not given, it takes work to make "uncertain results into meaningful facts" (Hodzic 2013, 87). This article considers an unusual case in which evidence cannot exist but is legally required, or, in the words of one senior biologist at a Big Green non-profit, when evidence has been "alluded to on paper, but is a fantasy."

Impossible evidence coexists unhappily with bureaucracy. Bureaucracy depends, in part, on making "a world regulated by such [bureaucratic and regulatory] principles seem natural and inevitable, and anything else a dreamy fantasy" (Graeber 2015). Bureaucracy is a world of "mundane sites" (Bennett and Layard 2015, 413) and "mind-numbing details" (Valverde 2012, 4), but the problem of impossible evidence calls into question the naturalization of such principles. It is through examining these material and legal infrastructures of planning processes and administrative law litigation (Gilson 1999,

4 405 U.S. 727 (1972).

AUTHOR 2021) shape the ways that decisions are made, the possibilities for future litigation, and the future of the California desert.

Dirt biking is a particularly fruitful site to study the material and legal infrastructures of environmental regulation because of the way that the sport grew up alongside the environmental administrative state. The sport has also been overlooked in academic literature: While desert environmentalists often consider OHV use to be at the "top of [the] list of issues," attention to OHV use within the social sciences is scant aside from management and policy articles focusing on how to address the negative impacts of OHV use (e.g. Custer et al 2017, Switalski 2018) and phenomenological accounts of the experience of driving (e.g., Bishop 1996, Rollins 2006). In fact, research about OHVs often begins by stating there is an "absence of adequate information" about the topic (Bleich 1988, 159). I examine how this absence of information becomes impossible evidence in the courtroom, and the implications of this for considering the environmental administrative state through considering the BLM. In the following section, I track how the unregulated sport comes to the attention of the federal government as an enforcement, and later planning, problem.

3. From Policing to Planning

In 1968, the BLM published their first report about off-roading. "The Motorcycle and Public Land in California" identifies the phenomenon as one of massive scale in Southern California, estimating 130,000-140,000 riders in the California desert alone, with an additional 250,000-300,000 spectators each year (BLM 1968a). The BLM—like others researching the topic at the time—understood the rise of dirt biking as related to post-World War II prosperity and population growth in California; it was a new kind of leisure in an increasingly affluent society (BLM 1968a). The BLM also recognized it as a new problem that they didn't know how to address, as "land use laws and regulations and organizational capabilities were not designed to cope with this kind of use" (BLM 1968a). In other words, they needed to develop ways to control what had been an essentially unregulated recreational practice. While BLM's initial attempts to limit the damage from ORVs included both enforcement and planning, they eventually began to focus on regulatory strategies to control ORV use.

The "astounding" (McBee 2015, 92) rise of motorcycling in the post-World War II period was complemented by an equally astounding rise of riding motorcycles off-road. As a result of postwar suburbanization, many riding locations were lost—or just became more crowded (AUTHOR 2018, Grey 1959). Motorcyclists fled cities: aided by the growth of the interstate highway system, they created new "playgrounds" on public lands (Bard 1973, Westec 1978, Author 2018). As they moved farther out, cyclists created conflict: ranchers complained about cyclists harassing their livestock on leased lands (AUTHOR 2023). But it also brought negative impacts on the land: motorcyclists created new trails just by riding cross-country, leaving scars on the landscape that were visible from the sky, and damaging fragile soils.

[Figure 1: Early aerial image of route proliferation in Panoche Hills area from 1968, after one year of intensive use. Lighter areas indicate trails, notice "spiderweb" patterns and near-complete denuding of landscape on hillsides in the bottom of the image. Note also that there is little large vegetation that would stop riders, which also enabled further proliferation. The Panoche area was permanently closed to off-road use in 1970 because of these issues (BLM 1968b; Author 2023)

This problem, which would later be called "route proliferation" was evident in every location where motorcycles could play, but was worse in deserts and grasslands, areas where less dense vegetation couldn't stop them.

For this reason, it's not surprising that motorcycle management was a problem for the predominantly BLM-managed California desert, which only a short drive away from the rapidly growing Los Angeles. ORVs soon became a uniquely BLM problem, as BLM national director (1948-1953) and historian Marion Clawson remembered: "one of the Bureau's special problems [was] use of off-highway vehicles" (1971, 119). In the late 1960s, then-California state director of the BLM, Russell Penny, put it, motorcycle use grew "faster than our regulatory, management, and legislative machinery" (q. in McLane 2012, 165).

Off-road motorcycling grew just as the BLM's regulatory machinery was rapidly changing. When the BLM was founded in 1946, it was considered to be a "captured" agency that kowtowed to the desires of livestock users and extractors, and without much capacity (Selznick 1949). "The Bureau of Livestock and Mining," as it was occasionally called, was often compared unfavorably to the US Forest Service, the latter of which was considered to be staffed by experts (see Foss 1960; Skillen 2009, 42-43). As the BLM sought to professionalize in 1960s (Skillen 2009), their growth in capacity coincided with a recreational boom.

BLM hoped that the ORV problem would allow them to hire law enforcement officers (BLM 1970, 51), but it wasn't until 1972 that they were able to hire their first "desert ranger" to monitor ORV events (McLane 2012, 180). A year later, they published an interim critical management plan to manage vehicles. Without real enforcement capabilities, though, rangers couldn't do much more than monitor. They were also severely understaffed: only twenty-six men were charged with patrolling the BLM's eighteen million acres (Kaldenberg 1997). This understaffing was known at the highest levels of government: one BLM ranger reported that President Ford told him that "FLPMA [the Federal Lands Policy and Management Act of 1976] was necessary so the BLM could control motorcycles in the desert" (McLane 2012, 274).

FLPMA, often known for having ended homesteading and mining claims, was also the organic act of the BLM, specifying the agencies and priorities in a comprehensive way. FLPMA also reshaped the California desert by creating the California Desert Conservation Area, a twenty-five million acre area in Southern California, and created a desert planning process that was unique to the area. FLPMA also enhanced BLM's law enforcement capacities, though it didn't solve the problems the BLM had with motorcycles (Richter 1978, 37; BLM 1977).

Despite these positive developments, BLM still had significant enforcement challenges in the desert, which eventually led them to pursue a courtroom strategy. In 1978, organizers for Barstow-to-Vegas, a popular cross-country race, was denied a permit because of the detrimental effects of motorcycles on vegetation and organizers' previous inability to follow the conditions of the permit—including that organizers couldn't keep racers to stay on the course. After the denial, a group of motorcyclists decided to stage a protest ride. Days before the protest ride was scheduled to occur, BLM sought an injunction to stop the advertised ride. As Gerald Hillier, the district manager, argued at the time: "it was basically the advice of counsel, to me, that this was the proper way to go to transfer this confrontation into the courtroom before you, as opposed to having it *[sic]* on the ground confrontation with our rangers" (Richter 1978, 37). In other words, he moved the venue of conflict from the field—the area of enforcement—into the courtroom.

Hillier decided to take the riders to court partly because BLM did not have enough capacity to enforce the law on the ground.[5] Even with the cooperation of a local sheriff's office and the highway patrol, the BLM thought that their ability to stop a proposed protest ride of five thousand people was "virtually nonexistent" (Richter 1978, 38). Additionally, Hillier emphasized that the course closure didn't stop vehicular use elsewhere in the CDCA: "if they want to go crosscountry, whatever they want to do in those open areas they can do" (39). By both pointing to his inability to stop an organized protest ride and the "very, very massive area of the desert where people can go," (40), Hillier indicated that enforcement can play only a very small role in stopping unauthorized ORV use, and that actions taken by individual motorcyclists cannot be truly controlled by the federal government. His best hope, he thought, was to handle them in the courtroom.

Unfortunately, Hillier's case backfired spectacularly, making Louis McKey, one of the protest organizers known as the Phantom Duck of the Desert, into a "folk hero" (q. in Woodhouse 2019, 328). This did not, however, change the importance of the courtroom for the BLM. Over the next two years, the agency completed the desert plan, cementing the importance of participatory planning and administrative law for BLM's future.

4. From Planning to Litigation

In 1976, FLPMA fundamentally changed the BLM by outlining its responsibilities and by creating a new process to plan land use in the California desert. In so doing, it cemented the administrative agency processes—and the courtrooms that govern them—as the venue to resolve ORV conflicts.

Soon after FLPMA passed, the BLM began its planning processes for the California Desert Conservation Area (CDCA). Holding meetings across the state advertised on television and radio, the BLM attempted to engage the general public—even those who thought that their comments would never make it on the record, because BLM "will throw that tape in the garbage, anyway" (BLM 1978). This impressive—and, at the time, unprecedented—planning effort was BLM's attempt to regulate the desert at a landscape scale. This unique planning process was, in part, to manage the heavy ORV use that was unusually intense in the California desert. FLPMA—and with it, the BLM—recognized the value of recreation and simultaneously tried to outline its limits.

The processes were part of a broader "social negotiation of the exploitation of a dynamic resource landscape" within the BLM (Bakker 2000, 10). The CDCA planning process resulted in a plan that would become the precedent for all future planning, including setting regions—like WEMO—that would be used in the future. The CDCA also cemented categories of "open," "limited," and "closed" ORV areas. In "open" areas, vehicles could travel anywhere, with or without roads (see, for example, Johnson Valley, west of the Marine Corps Base in Figure 2). Limited—in 1980 broken into two distinct categories of "approved" and "existing" routes--designated areas where vehicles could not travel cross-country and create new trails, but could travel on formally approved or existing (normally unmaintained and unpaved) roads or single-track trails. Finally, "closed" areas were those where no travel was permitted (e.g. wilderness areas) (BLM 1980, 88).

[INSERT FIGURE 2]

Figure 2: CDCA plan map, 1980. BLM managed lands in color; private lands in white, and other federal lands (National Park Service, Department of Defense, etc.) in gray. As per the map's legend, the different colors indicate open, limited, and closed areas for off-road vehicles

5 This lack of resourcing is "ultimately political," as Nick Gill et al (2020, 948) argue.

(BLM 1980).

But the extensive planning process did not result in agreement. As soon as the plan was finalized, it was contested by the American Motorcyclist Association and other groups who sued. They claimed that their "traditional recreational vehicle use of the California desert" would be impaired by the decision and that the BLM had not appropriately considered their interests.[6] Although they later dropped this case—one environmentalist suggested that perhaps AMA and the other parties decided that the "California Desert Plan was working very much in their favor" (Wheat 1999, 79)--the litigation was just beginning.

The AMA case was only the first in a series of lawsuits that preceded the 2009 *CBD v. BLM* case, and was part of a growing set of environmental law cases that focused on administrative process. By the early 2000s, most environmental law cases were administrative law (Kalen 2009). However, administrative law is often overlooked in geographies of environmental issues: Stuck between "vacuous platitudes about the place of the administrative government in a constitutional democracy and the numbing detail of daily bureaucratic life in the regulatory state" (Cass et al 2020, I), the administrative state is often considered profoundly boring, or, perhaps, a "fine scotch" of the law (Tatel 2010,1). But in a government in which administrative agencies rule environmental issues, "admin is where the action is" (Tatel 2010, 1).

Administrative law is central to environmental law precisely because executive-branch agencies like the Environmental Protection Agency, Department of the Interior and Department of Agriculture make wide-ranging decisions regarding land use, natural resource extraction, and environmental regulation (Zeit 1995). As executive agencies, their decision-making processes can be contested under the Administrative Procedure Act of 1946, a wide-ranging law that Antonin Scalia argued is "a sort of superstatute, or subconstitution, in the field of administrative process" (Scalia 1978, 363). While there have been contemporary calls to reform the APA (Walker 2017, Rubin 2004), it remains at the center of rule-making processes and setting standards for judicial review of agency decisions.

Administrative law depends on judicial review: in short, the legal concept through which judges can examine and decide whether an agency followed an appropriate decision-making process. Judicial review determines if a decision was "arbitrary and capricious," or when formal decisions or changes in policy made by the agency are not supported by evidence. In these cases, the court decides if they should defer to the agency's interpretation, or if the agency interpretation is based on an "impermissible construction of the statute" (Rubin 2004, 142). In other words, judicial review reevaluates the final decision made by the agency by examining the evidence of how they came to their decision, and how their present proposals differs from past plans that they might modify.

Another way to consider judicial review is through deference and the separation of powers. Judicial review serves to balance power between Congress, the Court, and agencies. This is not only a political question, but one about the role of expertise. When enacted, the APA's review standards balanced against a fear of "administrative absolutism" embodied by Soviet jurists and their vast administrative system (American Bar Association q. in Sunstein 2019, 1644). As a result, as Sheila Jasanoff puts it, "[American] courts enjoy an authority unparalleled in the Western world to question the expert judgments of executive agencies" (1995, 69).

6 American Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983).

This debate over agency expertise has always been political. While in the 1960s and 1970s, the left critiqued agency deference as allowing for regulatory capture and weakening the role of the courts (Sunstein 2019, 1618), today conservatives oppose agency deference in an attempt to decrease the power of the administrative state. For example, conservatives like Neil Gorsuch and Clarence Thomas argue today that the deference to agencies "wrests from courts the ultimate interpretive authority to 'say what the law is' " (Michigan v. EPA, 135 S. Ct. 2699 (2015) q. in Sunstein 2019; see also Walters 2023).

In *CBD*, environmentally-oriented groups, including the Center for Biological Diversity, the Wilderness Society, and nine other environmental organizations, sued the BLM to charge that agency deference should not be followed, as BLM didn't justify their final plan.

5. *CBD v. BLM* (2009)

Using the APA, the plaintiffs sued under three laws to question whether the BLM had made decisions appropriately: FLPMA, National Environmental Policy Act (NEPA), and the Endangered Species Act. CBD won the first two of these claims. In their decision, the court decided, that the BLM did not follow their obligations under the FLPMA (and CDCA), and NEPA planning processes.

At the heart of the issue is that today's OHV routes are tied to a 1980 baseline under the CDCA Plan.[7] In their decision, the court highlights "an inherent tension between the CDCA Plan's statement that OHV routes in "limited" areas are confined to those in existence at the time of the adoption of the 1980 Plan, and the factual reality that the BLM did not have an inventory or listing of what these routes were in 1980" (*CBD* 8). These existing routes of travel were defined as "a route established before approval of the Desert Plan in 1980" (1982 amendment q. in *CBD* 7), but, of course, such inventories didn't exist. In other words, the WEMO plan today requires, by definition, relying on list of trails that doesn't exist. This is, as the court puts it, the "roots of the current litigation" (ibid).

Since the late 1960s, the BLM had attempted to create maps of existing routes in their initial studies (BLM 1969). In 1973, an interim critical management program was approved to try to create rules during what the BLM saw as a management emergency. The plan designated areas as open, limited, and closed to vehicles, but was hamstrung by lack of field data—they couldn't complete on-the-ground surveys everywhere before the plan was finalized (BLM 1973). Despite its shortcomings, the interim plan provided a framework for later processes, and became the basis of what BLM hoped would become a clear administrative record on which to base future decision-making.

Five years after the 1980 Desert Plan, a new survey of the Barstow and Ridgecrest Resource Areas revealed that the limited surveys from the 1973 interim plan and the 1980 CDCA plan were incomplete. It also revealed how regulations meant to make management easier were already impossible. While a 1982 amendment to the CDCA had pegged the future trails to be designated to trails existing in 1980, employees knew it was unworkable. As Bruce DiGennaro, a BLM employee, put it in the public record,

> "Enter the 1982 Desert Plan amendment to the Motorized Vehicle Access Element. For the sake of time as well as my own sanity, I am not going to attempt to explain this amendment to you here. . . . In concept it represents a somewhat perverted definition of "Designated routes and trails" by attempting to identify and designate all roads and trails in the desert while maintaining a user perception of "Existing

7 This case, in many ways is uniquely the best-case scenario for environmental groups, as there is a clear legal hook for them in FLPMA and CDCA. In similar cases about degradation caused by ORVs in Utah, environmentalists have been unsuccessful because they have not been able to show how BLM failed to legal mandates (Blumm and Bosse 2007).

roads and trails" knowing it could never fully accomplish the first task." (q. in *CBD* 8fn7)

DiGennaro's statement shows how the problem of evidence of trail locations was not only annoying, but impossible. While users—ORV riders and other recreationists—ideally believe that the BLM has omnipotent knowledge of the trail system, the BLM can never actually complete the survey, and will never know what the routes from the past were.

The BLM can never know the past in part because of what land managers call "route proliferation," which describes how off-highway vehicle routes can be created in the California desert through only a couple of passes by users (BLM 1981). Route proliferation is technically illegal—it's the result of people leaving established trails through undisturbed areas. But it's quite common, and, after enough use, it is hard to tell the difference between designated trails and those created by users. On the ground, proliferation looks, as one environmentalist put it to me in an interview, like "a bowl of spaghetti." In contrast to the orderly set of trails that BLM imagined, proliferating routes often appear to have no logic. They can weave in and out of existing and/or approved trails to crisscross the landscape, providing many routes to one destination. Route proliferation, like OHV use more broadly, has negative ecological impacts. Individual tracks compact desert soils, increasing erosion and removing or damaging plants (Davidson and Fox 1974, Sheridan 1979, Wilshire 1983). Because of the nature of arid ecosystems, these impacts are long-lasting and difficult to restore to their original condition (Switalski 2018).

As a result of proliferation, every time the BLM conducts a new survey of desert roads, they find "significant mileage increases" from their previous survey (*CBD* 40). In fact, the BLM has never recorded a decrease in the trail mileage in their surveys. This is because the difference between a user-created trail and a BLM designated trail can be hard to parse. This is particularly true for motorcycle trails, which were the most prevalent use before 1980, are even more difficult in this regard, as their single "transportation linear disturbance"—rather than two lines, separated by brush—is hard to distinguish from natural rills that cut into desert hillsides.[8] The problem this challenges can be seen in Figure 2, where designated routes (green) are overrun by linear disturbances, both next to wilderness areas (green slash background) and open areas (red slash areas) in a WEMO subregion near Ridgecrest.

[insert Figure 3]
Caption: Map of designated trails in WEMO subregion near Ridgecrest. Note the large amount of "transportation linear disturbances," which are also known as route proliferation. (BLM 2019b)

These challenges can also make past satellite image data, which might otherwise be called upon for mapping trail locations, useless.

Route proliferation helps explain the affective qualities of DiGennaro's statement, which evokes his exhaustion as a bureaucrat who is attempting to do the impossible. Like lawyers and judges who become exhausted by the practical problems of administering evidence (Jeffrey 2021, 907; Grunstein and Banerjee 2007), DiGennaro is clearly frustrated by the system of surveying trails because it puts him in an impossible position, in which he is expected to know the trails out there even as he clearly cannot.

DiGennaro and other BLM employees are keenly aware of the problem that attempting to designate new routes poses. In the 2009 decision, the judges excerpt from BLM employee

8 WEMO meeting, Joshua Tree, April 25, 2018.

emails to make this point. In one 2003 email, an employee voices his concern that, if they deviate from the regulatory standard—limiting routes to those in 1980—that "we may be heading toward an unsecured situation" (q. in *CBD*, 34). In response, the WEMO project manager, Bill Haigh, said that the BLM would need to make changes to the original plan—the one that sets up the limit—and explain why they deviate from the plan. This correspondence is ignored in the final plan, as the plan simply "ignores the language capping OHV routes to those listing in 1980" and ends up designating thousands more miles of roads and trails that were not included in earlier lists (36).

BLM is still stuck with the "difficult, if not impossible" task in which they are trying to reconstruct the past, the 1980 OHV route network (*CBD* 35fn27). The trail network that they cannot map is what I call impossible evidence, when legal and regulatory demands for evidence outstrips the possibility for its existence. In this case, the demand for a baseline that ties present conditions to the past (Alagona et al 2012, Barandiaran 2020) is no longer viable because the past data does not exist, and it is impossible to reconstruct given historical and contemporary route proliferation. When BLM recognized this problem, one of the affective reactions was exhaustion—the knowledge that BLM should be able to do something, but cannot. The practical solution, however, was to ignore the rule altogether in their 2006 plan, in which the BLM attempted to ignore differences between the present and the past, "normalizing a degraded environment" of the present and transporting it into the past (Barandiaran 2020, 60). In the subsequent litigation, the BLM failed to convince the judges that they had paid adequate attention to the old plan. Rather than skillfully navigate dangers of capacity cuts and litigation (Martin 2021), the BLM ends up in what I call the legal dismal cycle.

6. The Legal Dismal Cycle

In 1970, Diana Dunn, then director of research for the National Recreation and Park Association, wrote an article about "The Dismal Cycle" that described her understanding of ORVs, or, as she calls them, "motorized recreation vehicles" (MRVs). I repeat her version of the dismal cycle in full below, both because it reflects conservation-oriented understandings of the time and because it demonstrates the intractability of the problem of unauthorized use.

> 1. MRV sales produce a small, identifiable group of owners of a particular vehicle displaying one common problem: no land of their own.
> 2. They begin to use public or private land, with or without permission.
> 3. The group grows, damage occurs, and initial conflict develops.
> 4. Either (A) Users are prohibited completely and no alternative sight is offered (return to #2), or (B) some informal agreement is reached, usually with public land managers.
> 5. The existence of approved site is publicized by the users (to friends) and by vehicle dealers (to potential customers): more sales, more users.
> 6. 'Bad apples' emerge to jeopardize the initial agreement; conservationists, neighbors, other user types form a coalition which forces a 'shot-gun wedding' between recreation vehicle users and the manager. More sales, more users, and more outsiders begin to come.
> 7. 'Self-organization and policing' as well as explicit management controls are initiated. Subtle co-optation of public agency has occurred, and the manager feels compelled to make the 'marriage' work.
> 8. Publicity about favorable features is distributed. *Equilibrium* is attained; more sales, more users.
> 9. Too many 'bad apples,' too much damage, too few 'police,' and the *Saturation Point* is reached. The anticoalition reactivates. A 'final straw' event occurs.
> 10. The manager declares total elimination of MRVs from the area. If alternative site is offered, go to #4B; if not, go to #2 and repeat cycle. (Dunn 1970, 14, 48)

Though her analysis is necessarily reductive, it reveals common understandings of that time and today: increasing ORV use prompts regulation from the state (#2-4, #6-10) that settles into an uneasy "equilibrium" in which growth continues until a "saturation point" is reached

(#8). A "final straw" happens, but only to restart a cycle of conflict between environmentalists, land managers, and ORV users. Like the 'wicked problem' that would be coined three years later by Rittel and Webber (1973), Dunn's analysis continues to ring true to environmentalists today.

Dunn's dismal cycle provides both a model from which I build the legal dismal cycle. The key difference is the actors involved: While Dunn's cycle shows a conflict between ORV users and a coalition as mediated by the government, the legal dismal cycle hardly includes contemporary OHV users at all. That is, rather that the conflict being between ORV users, land managers, and an anticoalition, today's conflict is almost entirely between the anticoalition and land managers *about* OHV use. The legal dismal cycle goes like this:

1. The chronic underresourcing of the land manager results in a lack of data that can be used to establish a legally-mandated baseline.
2. Without agency enforcement, unauthorized use continues, making it harder to reconcile a degraded state today with a less degraded past.
3. The problem of impossible evidence exhausts agencies, and they try to ignore or modify the baseline in order to create a plan.
4. When an agency doesn't, or cannot, reconcile their current plan with an unknown past, environmental groups sue, claiming that the agency did not meet legal requirements.
5. The court decides against the agency because they fail to meet mandatory requirements and their decision is "arbitrary and capricious" under administrative law.
5. After the court case, the agency is sent back to a new plan-making cycle, in which they face a similar—if not the same—problem as before, and must expend resources on creating a new plan and divert it from elsewhere. While the plan is "caught up in litigation," as the BLM official put it in the introduction, unauthorized use continues without enforcement or a plan. Return to #2.

The legal dismal cycle epitomizes the "apparent dysfunction around environmental governance in the American West today" (Martin 2021, 195). But it also shows how what had become a practical problem—unauthorized use that becomes unmanageable under the ORV dismal cycle—is remade in the courtroom into a new and different kind of vicious cycle. As an attorney for a Big Green put it, "you wind up relitigating a lot of things, and the agencies do learn. The first plan is bad, and then they [BLM] says 'we'll fix it;' the second plan is not great, then they fix it again. Our litigation gets narrower and narrower." This process continues, resulting in "spiraling" litigation.

What are the effects of the legal dismal cycle on the desert? Without closure on the ongoing litigation or actual enforcement, the same problems from Dunn's dismal cycle seem to return. As the biologist for the Big Green put it, "These are public lands that anyone can go out on and do whatever they want. It's always been a conundrum and continues to be." While the litigation runs in circles and the hand-wringing continues, she told me, the "degradation on the landscape does move forward."

7. The End of the (Base)Line

After the 2009 court case, BLM was sent back to the drawing board to attempt to solve the problem of the impossible evidence, and spent nearly ten years coming up with a new Record of Decision (RoD), a process that I witnessed first-hand at planning meetings held throughout the California desert from 2016-2019. In the meantime, the BLM was also ordered to put in place some mitigation measures, including signing, mapping, and limited

enforcement in some particularly devastated areas.[9] Perhaps unsurprisingly, the 2019 RoD was met immediately with a lawsuit from the Center of Biological Diversity and five other organizations. In it, the plaintiffs complain that "Defendants have repeated many of the same basic errors and violations that they committed during their first attempt, as well as several additional violations" (*CBD* 2021, 2). The legal dismal cycle continues.

In the new plan, the BLM intends to eliminate the controversial baseline that was at the center of the 2009 decision. While the 2009 decision had emphasized that the court "does *not* hold that OHV route designations in the WEMO are forever frozen at the 1980 OHV route network," the judges had required that the BLM be required to make an amendment with a "reasoned explanation" as to "why post-1980 routes should be designated" (*CBD* 2009, 36). In the BLM's new plan, their four "action alternatives" proposed to allow BLM to designate new roads and trails in the future, without heeding the limiting logic of the original baseline, which they achieve by eliminating a baseline entirely (*CBD* 2021, 41, see also BLM 2019a, 4-12).

In the meantime, the surveyed trails in the WEMO planning area have increased dramatically. While a 2001-2002 inventory that was used to develop the 2006 plan (litigated in *CBD* 2009) had identified approximately 8,000 miles of known routes in the WEMO area, the 2012-2013 inventory identified 15,000 miles, effectively doubling the total number of trails (*CBD* 2021, 29-30). While there is debate as to whether this new number is due to recent route proliferation or inadequate previous survey coverage (30), it was clear that the court case did little to change proliferation on the ground, and that BLM planning didn't do much.

While the legal dismal cycle continues, so does route proliferation. Ongoing route proliferation has negative impacts beyond what environmentalists see as unseemly trails on the landscape. As has been documented extensively by geologists and biologists since the late 1970s, route proliferation significantly increases erosion and impacts both desert plants and animals (Webb and Wilshire 1983). Impacts of OHV use will only get worse, as as plants and animals will become more stressed by more variable rainfall and hotter temperatures as the climate warms. In the meantime, OHVs continue to be litigated.

8. Conclusion

In 1979, David Sheridan, in a report for the Council on Environmental Quality, begins his preface by highlighting the "extremely touchy" nature of ORVs. "Of the several issues which arise out of public use decisions—grazing, surface mining, water diversion, forest cutting, and wilderness designation—none, in this author's experience, is as volatile at off-road vehicles" (v). Four decades later, debates over OHV use have changed not in substance—they are the "same arguments from the old times," as one OHV representative told me—only managed in the courtroom.

In this article, I have outlined a historical shift in which ORV use in the California desert moved from being a conflict between users resolved through planning to being a legal conflict about use. Culminating in a series of court cases, including the 2009 *CBD v. BLM* case, I showed that the BLM was hamstrung by a demand for impossible evidence. Impossible evidence, I argued, is impossible precisely because of the problem of route proliferation, in which unauthorized use creates new trails over time, which renders the 1980 route baseline impossible for land managers to uncover. Impossible evidence also creates legal limbo, making it impossible to move forward on a route plan without the assurance of a past

9 Center for Biological Diversity et al v. BLM. 2021. "Complaint for Declaratory Judgment and Injunctive Relief." Case 3:21-cv-7171. (N.D. Cal). Hereafter *CBD* 2021.

baseline.

Impossible evidence is not unique to the California desert, and, in fact, will become increasingly common in many contexts, as has already been discussed in the context of baseline-setting in historical ecology under conditions of climate change (Alagona et al. 2012). By examining the shifting baseline in this context, I asked a new question: how does this baseline become a problem not only for scientists, but for administrative process? As administrative law and environmental law become increasingly entangled, how will the problem of a lack of baseline—a lack of environmental past—shape possibilities for new futures?

Impossible evidence, and the seemingly-interminable series of lawsuits around it, have real impacts. One of the problems with the legal dismal cycle, I argued, is that the cycle of litigation operates alongside and parallel to the still-existing problem of OHV route proliferation in the California desert. This reveals how the BLM often fails to successfully navigate between capacity cuts and litigation, instead ending in a situation in which capacity cuts are exacerbated by ongoing litigation. The BLM's inability to finalize a plan means not only that more of their resources are shifted to litigation, but that they cannot officially designate routes on the ground. As a result, the same problems that had already haunted the desert for decades are exacerbated. This problem is not unique to the BLM, and points to challenges that other land management agencies, like the US Forest Service, also face.

Impossible evidence also indicates how central administrative law strategies have become for contemporary environmental organizations, but that the success of this strategy is limited. In this case, continued (illegal or unofficial) use was only curbed in areas most impacted by route proliferation—any enforcement was only in dire cases. In the meantime, the number of unofficial routes ticks up and becomes part of a network of trails used by OHV drivers, making it harder close them in the future. Ironically, the environmentalist-led litigation—intended to *decrease* the number of routes in the California desert—instead ends in the endless proliferation of new informal routes alongside administrative gridlock that prevents the designation of official ones. This also raises a practical question for environmental organizations about how administrative law has shaped the structure of contestation over agency planning processes, and how the ongoing politicization of administrative law—in tandem with capacity cuts to these organizations—shape the efficacy of this strategy.

Back in the desert, no scientific solution exists to counter the missing baseline, and it is now up to the courts to determine whether a legal solution exists. In October 2023, the hearing for the most recent WEMO case began, and the judge will need to determine how to measure the impacts of OHV use against the baseline that BLM is attempting to eliminate. As both a scientific and legal artifact, the baseline will be reinterpreted and remade yet again, with implications for the "official" routes in the desert. Whether or not such "official" designations have impacts on the ground, though, is a separate question.

As the WEMO case continues, other cases like it are winding their way through the courts. Leaving administrative law only to "crazy people and lawyers" is no longer an option. Beyond the Bureau of Land Management, administrative law has been at the center of contemporary debates for a range of environmental issues, including contemporary debate over the "major questions doctrine" in the 2022 *West Virginia v. EPA* case (Walters 2023). This case, which reveals broader attempts to defang administrative agencies by conservative courts and the continuing politics of administrative law, should push geographers and policymakers to understand how administrative law—that is, *how* decisions are made—shapes

contemporary environmental outcomes and the future of federal lands.

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