

Attachment E

Report on Winter Use of the Rubicon Trail January 2009—Monte Hendricks (Edited March 2009)

In December 2008 Pearse Umlauf with the National Off-Road Association issued a national “take action” alert which you can find here: http://salsa.wiredforchange.com/o/5568/t/3916/campaign.jsp?campaign_KEY=2486 This alert asked the 4x4 community to flood an El Dorado County Supervisor’s office with phone calls opposing the consideration of a winter wet season closure of the Rubicon Trail.

Let’s take a look at what the leaders of the 4x4 community publicly say about winter use of the Rubicon Trail.

Randy Burleson is currently president of the Rubicon Trail Foundation and is a member of “Friends of the Rubicon.” Mr. Burleson gave public comment at the Sept. 20, 2007 meeting of the California Off Highway Motor Vehicle Recreation Commission where he made this statement:

“I wanted to show a few slides about winter wheeling. It's one of the least impactful forms of recreation. It's beautiful up there. You're recreating ten feet above the trail. And the payoff is you get out into the resource when very few other people are out there, and it's just beautiful, and it's one of the best times of the year to recreate with the least impact.”

(source: <http://ohv.parks.ca.gov/pages/1140/files/2007-09-20%20ohv%20commission%20meeting.pdf>)

On December 18, 2008 Mr. Burleson made the following statement on a Internet forum used by the 4x4 community: “The Rubicon starts above 6000 feet, where there is a solid blanket of snow across most all the winter months... any rational person can see that winter OHV use is the least-impactful time of year, with a solid layer of snow between tires and the ground. Sadly, the anti's aren't approaching this rationally.”

(source: <http://www.pirate4x4.com/forum/showthread.php?t=743029>)

The 4x4 community paints a picture that in the winter time the Rubicon Trail is covered with a solid blanket of snow ten feet thick and that their use during the winter causes the least impact, implying that everything is frozen hard and that their vehicles stay on the snow surface and never touch the water and the wet saturated soils below.

Are the 4x4 community’s public statements honest and factual?

As many of you know I am an avid back country skier with more than twenty years of experience skiing in the Loon Lake and Rubicon Trail area. Daytime temperatures in the winter are commonly above freezing (in fact as I type this the temperature at the Van Vleck weather station at 6700 ft. is 54 degrees F, (14 Jan. 2009 09:00) source: <http://cdec.water.ca.gov/cgi-progs/queryF?VVL>). Liquid water is running in the streams and tributaries and is ponding in flat areas melting any snow above it. In many areas as my previous reports have shown, the Rubicon Trail is downcut by erosion where it has captured the natural water courses and it is the streambed. It is rare, except in the very highest snowfall years to have a snow depth approaching ten feet in this area. Winter wet season is the most destructive time to have vehicles using the trail. This is reflected in the Eldorado National Forest’s decision to implement a winter season closure on all native surface—dirt—roads in their new travel management plan which is in effect now.

How about my statements, are they honest and factual?

Let’s take a look at evidence from the 4x4 community itself with their own photos posted on the Internet documenting what occurs with winter use of the Rubicon Trail.



Photo taken Dec. 13, 2003



Photo taken Dec. 13, 2003



Photo taken March 17, 2004



Photo taken Feb. 26, 2005



Photo taken Feb. 26, 2005



Photo taken Feb. 26, 2005



Photo taken February 2006



Photo taken Feb. 10, 2006



Photo taken Feb. 10, 2006



Photo taken March 27, 2007



Photo taken March 2007



Photo taken Jan. 19, 2008



Photo taken Feb. 16, 2008



Photo taken Feb. 20, 2008

About the dates the photos were taken: Digital photos have what is called “exif” data imbedded with the image at the time the photo is taken. This data usually includes date, time, camera model, and exposure information. Exif data can be read with various computer programs, many of them free such as Microsoft Photo Pro Tools.



Photo taken Feb. 20, 2008



Photo taken April 26, 2008

You have just looked at a collection of 4x4 users' photos spanning the years from 2003 to 2008. Various different months are also represented. This good sample shows open water and vehicles through the snow in the water and down to the ground. You have also seen a rollover caused by this uneven and slippery terrain. Rollovers commonly cause vehicles to leak fluids. These photos support my statements, observations and experience with winter conditions along the Rubicon Trail. They do not support the statements by Mr. Burleson and the 4x4 community.

Long overdue changes are necessary to protect the continuing use of the Rubicon Trail as an important and historic 4x4 route. These changes include a restoration program to address the massive resource damage caused by many years of unmanaged and irresponsible use; limiting use to street licensed and street legal 4x4 vehicles only; quotas limiting number of vehicles; use and permit fees so the users directly help pay for the costs associated with management, restoration, and upkeep of the trail; and a winter wet season closure to protect the trail from the continuing abuse shown in these photos. These are positive changes that are imperative to ensure the future of the Rubicon Trail. Unfortunately the 4x4 community appears disinclined to support positive actions.

Information on snow depth in the Rubicon Trail area. The closest snow survey station is Van Vleck. It sits a little higher than the immediate Rubicon Trail terrain. My experience is that it usually has 1 to 2 feet more snow than on the Rubicon Trail. This chart shows 2006, an above average snowpack year, and 2007, a below average snowpack year. The average ten feet of snow claimed by the 4x4 community would equal 120 inches.

Source: http://cdec.water.ca.gov/cgi-progs/selectQuery?station_id=VVL&sensor_num=&dur_code=D&start_date=2005&end_date=now

Van Vleck Snow Survey Station operated by SMUD

<u>Date</u>	<u>snow depth in inches</u>
31 Jan 2006	70.7
27 Feb 2006	57.2
27 Mar 2006	108.7
1 May 2006	90.6
1 Jun 2006	26.9
30 Jan 2007	32.4
1 Mar 2007	96.6
29 Mar 2007	60
24 Apr 2007	52.1

This station records water content of the snow pack in inches. Snow depth is calculated by dividing inches of water content by snow pack density. Snow pack density changes throughout the winter and I calculated snow depth by using actual density measurements taken during the monthly snow surveys by field crews at the comparable Wrights Lake Snow Course.

Example: 21.2 inches of water content divided by a recorded snow pack density of 30% equals a snow depth of 70.7 inches

Fair Use Disclaimer

The “Fair use” doctrine is codified in the Copyright Act of 1976 and states in part: “... the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.”¹ The doctrine recognizes that there are circumstances in which the Act’s goals of encouraging creative and original work are better served by allowing the use of copyrighted work than prohibiting such use.² Thus, the doctrine provides an affirmative defense to claims of copyright infringement and creates a limited privilege to use the copyrighted materials in a reasonable manner and without the owner’s consent.³ The scope of the fair use doctrine is wider when use relates to issues of public concern.⁴ A copyrighted work is fair use, if the public interest in free flow of information outweighs the copyright holder’s interest in exclusive control over his/her work.⁵ The statutory criteria for fair use and the statutory fair use exception in general were intended by Congress to codify, not to supercede, the common law doctrine of fair use.⁶ One of the most important factor in determining whether use of copyrighted work is fair is whether use tends to interfere with sales of the copyrighted material.⁷ Other factors include the purpose and character of use, the nature of the copyrighted material, and the amount and substantiality of material used in relation to copyrighted work as a whole.⁸

¹ 17 USCA § 107.

² *Robinson v. Random House, Inc.*, 877 F.Supp. 830, 840 (1995).

³ *Id.*, *Fisher v. Dees*, 794 F. 2d 432, 435 (1986).

⁴ *National Rifle Ass’n of America v. Handgun Control Federation of Ohio*, 15 F.3d 559, 562 (1994). See also, *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044 (1983).

⁵ *Lamb v. Starks*, 949 F.Supp. 753, 757 (1996).

⁶ *Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, 482 F.Supp. 741, 745 (1980).

⁷ *Amsinck v. Columbia Pictures Industries, Inc.*, 862 F.Supp. 1044, 1048 (1994). See also, *Love v. Kwitny*, 706 F.Supp. 1123 (1989) (effect of use upon the potential market for or value of the copyrighted work); *National Rifle Ass’n of America*, supra (effect of use upon potential market for or value of copyrighted work).

⁸ 17 USCA § 107; *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc.*, 900 F.Supp. 1287, 1299, 1300 (1995). See also, *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F.Supp. 1283 (1991); *Twin Peaks Productions, Inc. v. Publications Intern. Ltd.*, 996 F.2d 1366 (1993). See also, *CSM Investors, Inc. v. Everest Development, Ltd.*, 840 F.Supp. 1304 (1994); *American Geophysical Union v. Texaco Inc.*, 802 F.Supp. 1 (1992).