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NORTHERN DISTRICT OF CALIFORNIA

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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

WDB

CV 08 5646

15 CENTER FOR BIOLOGICAL DIVERSITY,  
16 SIERRA CLUB, and CALIFORNIA  
17 WILDERNESS COALITION

) Case No. \_\_\_\_\_

18 Plaintiffs,

) **COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

19 v.

20 U.S. BUREAU OF LAND MANAGEMENT,  
21 DIRK KEMPTHORNE, Secretary of the Interior,  
22 and U.S. FISH & WILDLIFE SERVICE

23 Defendants.

## I. INTRODUCTION

1  
2 1. This is an action for declaratory and injunctive relief challenging the continuing  
3 failure of agencies within the United States Department of Interior to comply with the National  
4 Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.*, the Federal Land Policy and  
5 Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1785, and the Endangered Species Act  
6 ("ESA"), 16 U.S.C. § 1531 *et seq.*, in managing the public lands and threatened and endangered  
7 species of the California Desert. Continuing a long history of violations, Defendants again have  
8 failed to comply with NEPA, FLPMA, and the ESA by refusing to incorporate actions necessary  
9 to protect public lands from adverse impacts of excessive off-road vehicle use and to preserve  
10 and recover threatened and endangered species, including the Peninsular bighorn sheep and other  
11 threatened and endangered species, in their land and wildlife management planning for the  
12 California Desert Conservation Area ("CDCA").

13 2. Specifically, Plaintiffs challenge the United States Bureau of Land Management's  
14 ("BLM") adoption of the Coachella Valley Plan amendments to the CDCA Plan because, among  
15 other things: BLM legitimized and adopted vehicle routes that were illegally created; failed to  
16 provide adequate environmental review; failed to provide the public with the information  
17 required by NEPA; and failed to ensure against jeopardy for listed species or destruction or  
18 adverse modification of critical habitat. The Fish and Wildlife Service also violated the ESA by  
19 issuing biological opinions that are invalid. BLM also violated FLPMA, Presidential Executive  
20 Orders, other federal laws, its own regulations, and the CDCA Plan, all of which require that the  
21 agency minimize the effects of motorized vehicle use, including off-road vehicle ("ORV") use,  
22 on public land resources. Most egregiously, BLM approved the use of the so-called Dunn Road  
23 by motorized vehicles although this road was created illegally by trespass and its continued use  
24 adversely impacts Peninsular bighorn sheep habitat and lambing areas.

25 3. In creating the CDCA, Congress declared that the California Desert ecosystem is  
26 "extremely fragile, easily scarred, and slowly healed." 43 U.S.C. § 1781(a)(2). The Peninsular  
27 bighorn sheep and other native species are irreplaceable parts of this fragile ecosystem. Absent  
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1 proper management by BLM, including compliance with NEPA, FLPMA, the Endangered  
2 Species Act ("ESA"), and other statutes, these fragile ecosystems and the species that depend on  
3 them are in grave danger of disappearing forever. Plaintiffs seek an order from the Court  
4 overturning BLM's unlawful management decisions and requiring the agency to comply with  
5 NEPA, FLPMA, the ESA, and other statutes, regulations, orders and plans, and to protect these  
6 species and their habitats.

## 7 II. JURISDICTION AND VENUE

8 4. Jurisdiction over this action is conferred by 16 U.S.C. § 1540(g) (ESA); 28 U.S.C.  
9 §§ 1331 (federal question), 1346, (United States as defendant), 2201 (declaratory judgment), and  
10 2202 (injunctive relief), and 5 U.S.C. §§ 701 through 706 (APA).

11 5. On March 23, 2006, Plaintiffs, by facsimile and certified mail, sent a notice of  
12 intent to sue to BLM and FWS for violations of the ESA related to BLM's management of the  
13 CDCA pursuant to the CDCA Plan and various plan amendments including the Coachella Valley  
14 Plan. On May 19, 2006, Plaintiffs received a response from Defendant BLM indicating that the  
15 agency had taken various actions in order to address some of the violations described in  
16 Plaintiffs' notice letter. For all claims brought pursuant to the ESA and/or the APA Plaintiffs  
17 have exhausted all of the administrative remedies available to them.

18 6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because  
19 Plaintiff Sierra Club is incorporated and has its national headquarters in San Francisco, Plaintiff  
20 California Wilderness Coalition is incorporated and based in Oakland, and Plaintiff Center for  
21 Biological Diversity maintains an office in San Francisco.

## 22 III. INTRADISTRICT ASSIGNMENT

23 7. This action is properly assigned to the San Francisco Division of this court  
24 because Plaintiff Sierra Club has its national headquarters in San Francisco, Plaintiff California  
25 Wilderness Coalition is based in Oakland, and Plaintiff Center for Biological Diversity maintains  
26 an office in San Francisco.

1 **IV. RELATED CASES**

2 8. This case is related to Center for Biological Diversity, et al. v. Bureau of Land  
3 Management, Case No. C-00-0927 WHA-JCS (N.D. Cal.) as defined by Local Rule 3-12(a).

4 **V. PARTIES**

5 9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, nonprofit  
6 organization with its main office in Tucson, Arizona and a regional office in San Francisco,  
7 California. The Center's mission is to protect endangered species and wild places through  
8 science, policy, education, and environmental law. The Center has approximately 60,000  
9 members, many of whom reside in California. The Center's members and staff regularly use,  
10 and will continue to use, lands throughout the CDCA, for observation, research, aesthetic  
11 enjoyment, and other recreational, scientific, and educational activities. The Center's members  
12 and staff have and continue to research, study, observe, and seek protections for the Peninsular  
13 bighorn sheep, Coachella Valley milk-vetch, Coachella Valley fringe-toed lizard, and other listed  
14 and sensitive species of the CDCA. The Center's members and staff derive scientific,  
15 recreational, conservation, and aesthetic benefits from these species' existence in the wild.  
16 Defendants' violations of law may cause adverse impacts to Peninsular bighorn sheep  
17 populations and degradation of habitat used by the bighorn, and adverse impacts to other  
18 resources of the CDCA, harming the Center's and its members' interests in the bighorn and its  
19 habitat and other resources of the CDCA. Defendant's violations of law are also leading the  
20 decline of other listed and sensitive species within the Coachella Valley plan area and the  
21 degradation of habitat occupied by these species, harming the Center's and its members' interests  
22 in these species and their habitats. The Center brings this action on behalf of itself and its  
23 adversely affected members and staff.

24 10. Plaintiff SIERRA CLUB is a national, non-profit membership organization with  
25 over 700,000 members dedicated to exploring, enjoying, and protecting the wild places of the  
26 earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to  
27 educating and enlisting humanity to protect and restore the quality of the natural and human  
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1 environment; and to using all lawful means to carry out these objectives. Sierra Club frequently  
2 files citizen suits to stop activities that violate local, state or federal environmental laws and  
3 cause harm to the natural environment. Over 150,000 Sierra Club members reside in California.  
4 Sierra Club, incorporated under the laws of the State of California, maintains its national  
5 headquarters in San Francisco, California. Many of Sierra Club's members actively use the  
6 CDCA for recreational and aesthetic purposes such as hiking and nature study and would be  
7 personally harmed if the threatened and endangered species found on the CDCA, including the  
8 Peninsular bighorn sheep, were to become reduced in numbers or driven to extinction. Many  
9 Sierra Club members also participate in group outings to the CDCA and will continue to do so  
10 on a regular basis. Sierra Club believes that Defendants' actions will cause the continued decline  
11 of Peninsular bighorn sheep and other listed and sensitive species populations within the  
12 Coachella Valley plan area of the CDCA. If these declines continue, the Sierra Club's members  
13 will lose the recreational, aesthetic, scientific, and conservation benefits they enjoy from stable  
14 and healthy populations of these species. Sierra Club brings this action on behalf of itself and its  
15 adversely affected members.

16 11. The CALIFORNIA WILDERNESS COALITION ("CWC") is a statewide, non-  
17 profit organization that was founded in 1976. CWC is incorporated under the laws of the State of  
18 California, maintains its headquarters in Oakland, California. CWC's members use the areas in  
19 which the BLM has approved motorized vehicle use and other activities to take place without  
20 adequate NEPA documentation or ESA consultation. CWC defends the pristine landscapes that  
21 make California unique and provide clean air and water, a home to wildlife, and a place for  
22 spiritual renewal. CWC is the only organization dedicated to protecting and restoring  
23 California's wild places and native biodiversity on a statewide level. Its members have been  
24 harmed by the acts and omissions set out in this complaint.

25 12. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM")  
26 is a federal agency within the Department of Interior charged with the management of public  
27 lands, including those within the CDCA, and has legal responsibility for ensuring that its actions  
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1 comply with NEPA, FLPMA, the ESA, and the all other federal laws.

2 13. Defendant DIRK KEMPTHORNE is the Secretary of the United States  
3 Department of the Interior and, among other things, is charged with overseeing the management  
4 of the nation's BLM lands and compliance with NEPA, FLPMA, and the ESA. The Secretary is  
5 charged with implementing statutes, regulations, management plans and Executive Orders 11644  
6 and 11989 on the lands within his control. The Secretary is the federal official in whom the ESA  
7 vests final responsibility for providing biological opinions and protecting species listed under the  
8 ESA. The Secretary has delegated responsibility for the administration and implementation of  
9 the ESA to the United States Fish and Wildlife Service. Secretary Kempthorne is sued in his  
10 official capacity as Secretary of the Department of the Interior.

11 14. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("Service" or  
12 "FWS") is an agency of the United States government, and is an agency within and under the  
13 jurisdiction of the Department of the Interior. Through delegation of authority from the  
14 Secretary, the Service administers and implements the ESA, and is legally responsible for the  
15 protection and management of the fish, wildlife, and native plant resources of the United States,  
16 through enforcement and implementation of the ESA. The Service is also charged with  
17 determining through the consultation process whether federal agency actions that affect listed  
18 species or designated critical habitats comply with the ESA.

## 20 VI. LEGAL BACKGROUND

### 21 A. Federal Land Policy and Management Act, Regulations, Executive Orders 22 Regarding ORVs, and the CDCA Plan.

23 15. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-  
24 1785, declares that the public lands be managed for multiple uses in a manner that will protect  
25 the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric,  
26 water resource, and archeological values. 43 U.S.C. § 1701 (a)(7) & (8).

27 16. As part of FLPMA, Congress designated 25 million acres of southern California  
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1 as the California Desert Conservation Area ("CDCA"). 43 U.S.C. § 1781(c). About half of the  
2 CDCA is public land under BLM management.

3 17. FLPMA contains several provisions related to BLM's planning and management  
4 of lands such as the CDCA. In carrying out any action in the CDCA, BLM is required to act in  
5 accordance with FLPMA and its implementing regulations. See 43 U.S.C. §§ 1731, 1740.

6 18. FLPMA requires that BLM develop a "comprehensive, long-range plan for the  
7 management, use, development, and protection of the public lands within the [CDCA]." 43  
8 U.S.C. § 1781(d).

9 19. FLPMA requires that BLM prepare and maintain a current inventory of all public  
10 lands and their resources. 43 U.S.C. §1711(a). Similarly, FLPMA provides that the systematic  
11 inventory of public lands and their resources form the basis of the land use planning process. 43  
12 U.S.C. §1701(a)(2). Accordingly, the regulations implementing FLPMA require that BLM  
13 collect resource and environmental inventory data and information and that the inventory data  
14 and information "shall be collected in a manner that aids application in the planning process,  
15 including subsequent monitoring requirements." 43 C.F.R. §1610.4-3.

16 20. To protect and conserve the CDCA and its resources, FLPMA also requires that  
17 BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or  
18 undue degradation of the lands." 43 U.S.C § 1732(b).

19 21. In 1972, President Nixon issued Executive Order 11644, entitled "Use of Off-  
20 Road Vehicles on the Public Lands." That Executive Order imposed a number of specific and  
21 non-discretionary duties on the Secretary to control and minimize the effects of off-road vehicle  
22 ("ORV") use. These duties include: classifying all BLM lands as either "open," "closed," or  
23 "limited" to ORV travel; designating trails for ORV use in limited areas; marking areas and trails  
24 and providing the public with maps depicting such classifications and designations; minimizing  
25 the effects of ORV use on specifically identified natural resources; and monitoring ORV impacts  
26 throughout BLM lands.

27 22. In 1978, President Carter issued Executive Order 11989, which amended  
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1 Executive Order 11644 (collectively “the Executive Orders”), and gave federal agencies  
2 additional direction and authority to control ORV use. Executive Order 11989 empowered  
3 federal agencies to adopt a “closed, unless signed open” policy, and also to immediately close  
4 areas suffering from ORV damage. The Executive Orders were enacted in furtherance of the  
5 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., and are found in the  
6 note following 42 U.S.C. § 4321.

7 23. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42.  
8 These regulations further implement, and largely restate, the planning, informational, and  
9 monitoring requirements of the Executive Orders. Specifically, the regulations require that the  
10 BLM locate ORV trails so as “to minimize damage to soil, watershed, vegetation, air, or other  
11 resources of the public lands and to prevent impairment of wilderness suitability,” 43 C.F.R. §  
12 8342.1(a), “to minimize harassment of wildlife or significant disruption of wildlife habitats,” 43  
13 C.F.R. § 8342.1(b), and prohibit trails in “officially designated wilderness areas or primitive  
14 areas,” 43 C.F.R. § 8342.1(d). The regulations also require BLM to close areas to ORVs where  
15 ORVs are causing or will cause negative impacts to soil, vegetation, wildlife, wildlife habitat,  
16 cultural resources, wilderness suitability, or threatened and endangered species. 43 C.F.R. §  
17 8341.2(a). An area closed to ORVs under this provision can only be reopened to such vehicles if  
18 BLM “determines that the adverse effects have been eliminated and measures implemented to  
19 prevent recurrence.” Id.

20 24. In September of 1980, the BLM, as the Secretary of Interior’s designee, published  
21 and implemented a land management plan for the CDCA. Since its adoption in 1980, BLM has  
22 made over 100 amendments to the CDCA Plan.

23 25. The CDCA Plan requires, among other things, that motorized vehicle routes be  
24 “located to minimize harassment of wildlife or significant disruption of wildlife habitats. Special  
25 attention will be given to protect endangered or threatened species or their habitats.” CDCA Plan  
26 at 79. Further, the CDCA Plan guidelines provide that “[a]ll State and Federally listed species  
27 and their critical habitats will be fully protected.” CDCA Plan at 20. BLM violated these and  
28

1 other requirements of the CDCA Plan in adopting the Coachella Valley plan amendments.

2 **B. The National Environmental Policy Act**

3 26. The purpose of the National Environmental Policy Act ("NEPA") is to "promote  
4 efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA's  
5 fundamental purposes are to guarantee that: (1) agencies take a "hard look" at the environmental  
6 consequences of their actions before these actions occur by ensuring that the agency carefully  
7 considers detailed information concerning significant environmental impacts; and (2) agencies  
8 make the relevant information available to the public so that it may also play a role in both the  
9 decisionmaking process and the implementation of that decision. See, e.g., 42 U.S.C. §  
10 4332(2)(C); 40 C.F.R. § 1500.1.

11 27. NEPA and the regulations promulgated thereunder by the Council on  
12 Environmental Quality ("CEQ") require that all federal agencies, including the BLM, must  
13 prepare an environmental impact statement ("EIS") for all "major Federal actions significantly  
14 affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. §  
15 1501.4.

16 28. An EIS must provide a detailed statement of: (1) the environmental impact of the  
17 proposed action; (2) any adverse environmental effects that cannot be avoided should the  
18 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship  
19 between local short-term uses of the environment and the maintenance and enhancement of long-  
20 term productivity; and (5) any irreversible and irretrievable commitments of resources that would  
21 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

22 29. NEPA is intended to insure that agencies make informed choices when federal  
23 decisions are likely to have environmental consequences. To that end, an EIS must "inform  
24 decision-makers and the public of the reasonable alternatives which would avoid or minimize  
25 adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA  
26 also requires federal agencies to accurately describe the affected environment (also called the  
27 baseline or environmental setting) and the consequences of the action, to analyze the direct,  
28

1 indirect, and cumulative impacts of the proposed action. 40 C.F.R. §§ 1502.15, 1502.16, 1508.7,  
2 1508.8. One of the most important aspects of NEPA is that the agency is required to consider the  
3 cumulative effects of its actions, which the CEQ regulations describe as:

4 the impact on the environment which results from the incremental impact of the  
5 action when added to other past, present, and reasonably foreseeable future  
6 actions regardless of what agency (Federal or non-Federal) or person undertakes  
7 such other actions. Cumulative impacts can result from individually minor but  
8 collectively significant actions taking place over a period of time.

9 40 C.F.R. § 1508.7. In the context of route designations including ORV routes, NEPA requires  
10 that agencies such as the BLM consider and disclose to the public the cumulative impacts of the  
11 designations on biological resources, vegetation, water quality, cultural resources and other  
12 resources of the public lands.

13 30. When preparing an EIS, an agency must ensure that high quality information is  
14 available to the agency and the public before any decision is made or action is taken. Accurate  
15 scientific analysis, expert agency comments, and public scrutiny are essential to implementing  
16 NEPA. 40 C.F.R. § 1500.1(b). The agency is required to identify clearly all of its assumptions,  
17 to explain any inconsistencies, to disclose all methodologies used, to rebut all contradictory  
18 evidence, to eliminate guesswork, to make explicit reference to sources relied upon for  
19 conclusions, and to record in an understandable manner the basis for those conclusions. 40  
20 C.F.R. § 1502.24.

21 31. NEPA requires federal agencies to “study, develop, and describe appropriate  
22 alternatives to recommended courses of action in any proposal which involves unresolved  
23 conflicts concerning alternative uses of available resources.” 42 U.S.C. §4332(2)(E). The  
24 analysis of alternatives is the “heart” of the environmental review process; the EIS must  
25 “rigorously explore and objectively evaluate all reasonable alternatives,” in order to “provid[e] a  
26 clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. §  
27 1502.14(a). Alternatives that must be considered include the following: (1) no action  
28 alternative, (2) other reasonable courses of actions, and (3) mitigation measures (not in the  
proposed alternative). A “reasonable range” of alternatives must be considered, and this must

1 include consideration of full protection of all the resources involved. The exclusion of  
2 reasonable alternatives from review under an EIS renders the analysis invalid.

3 32. In addition to alternatives and impacts, NEPA requires agencies to consider  
4 mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. §  
5 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental  
6 consequences and mitigation measures).

### 7 C. Endangered Species Act

8 33. *Listing of Species.* The ESA requires the Secretary of the Interior (“the  
9 Secretary”) to issue regulations listing species as endangered or threatened based on the present  
10 or threatened destruction, modification, or curtailment of a species’ habitat or range;  
11 overutilization for commercial, recreational, scientific, or educational purposes; disease or  
12 predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade  
13 factors affecting the species’ continued existence. 16 U.S.C. § 1533(a)(1). An endangered  
14 species is one “in danger of extinction throughout all or a significant portion of its range.” 16  
15 U.S.C. § 1532(a). A threatened species is one that will become endangered if current  
16 circumstances continue. The ESA requires that the Secretary make listing determinations “solely  
17 on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).  
18 Only if officially listed does a species receive the full protection of the ESA. The ultimate goal  
19 of the law is to conserve and recover species so that they no longer require the protections of the  
20 ESA. 16 U.S.C. §§ 1531(b), 1532(3). The Secretary has delegated his authority under the ESA  
21 to the FWS for terrestrial species including the Peninsular bighorn sheep, Coachella Valley  
22 fringe-toed lizard, Coachella Valley milk-vetch and other listed species found in the Coachella  
23 Valley Plan.

24 34. *Critical Habitat.* Concurrently with listing a species as threatened or endangered,  
25 the Secretary must also designate the species’ “critical habitat.” 16 U.S.C. § 1533(b)(2).  
26 “Critical habitat” is the area that contains the physical or biological features essential to the  
27 “conservation” of the species and which may require special protection or management  
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1 considerations. 16 U.S.C. 1532(5)(A). The ESA requires the Secretary to make critical habitat  
2 designations and amendments “on the basis of the best scientific data available.” 16 U.S.C. §  
3 1533(b)(2). The ESA defines “conservation” to mean “...the use of all methods and procedures  
4 which are necessary to bring any endangered species or threatened species to the point at which  
5 the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. §1532(3). This  
6 definition of “conservation” is broader than mere survival; it also includes the recovery of  
7 species. *Id.*

8 35. *Recovery Plans.* Section 4(f) of the ESA requires the Secretary to “develop and  
9 implement plans . . . for the conservation and survival of endangered species and threatened  
10 species.” 16 U.S.C. §1533(f). Recovery plans must include a description of site-specific  
11 management actions that may be necessary to achieve the conservation and survival of the  
12 species; objective, measurable criteria which, when met, would result in a determination that the  
13 species be removed from the list; and estimates of the time required and the cost to carry out  
14 those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that  
15 goal. 16 U.S.C. § 1533(f)(1).

16 36. *Duty to Conserve.* Federal agencies have an affirmative duty to promote the  
17 conservation (*i.e.*, recovery) of threatened and endangered species. Section 2(c) of the ESA  
18 provides that it is “...the policy of Congress that all Federal departments and agencies shall seek  
19 to conserve endangered species and threatened species and shall utilize their authorities in  
20 furtherance of the purposes of this Act.” 16 U.S.C. §1531(c)(1). Section 7(a)(1) also establishes  
21 an affirmative duty to conserve. 16 U.S.C. § 1536(a)(1). The duty to conserve applies equally  
22 to the Secretary of Interior and other agencies.

23 37. *Duty to insure survival and recovery; duty to consult.* Pursuant to Section 7(a)(2)  
24 of the ESA, all federal agencies must “insure that any action authorized, funded or carried out by  
25 such agency . . . is not likely to jeopardize the continued existence of any endangered or  
26 threatened species or result in the destruction or adverse modification of habitat of such species .  
27 .. determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the acting  
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1 agency must prepare a biological assessment for the purpose of identifying all endangered or  
2 threatened species which are likely to be affected by the action, 16 U.S.C. § 1536(c)(1), and must  
3 consult with FWS whenever such actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2);  
4 50 C.F.R. § 402.14(a). Because BLM’s adoption and implementation of the CDCA plan and the  
5 Coachella Valley plan amendment is a federal action affecting the Peninsular bighorn sheep,  
6 Coachella Valley fringe-toed lizard, Coachella Valley milk-vetch and other listed species, BLM  
7 was required to consult with FWS on these plans.

8       38. *Biological opinion.* Consultation under Section 7(a)(2) results in the preparation  
9 of a Biological Opinion (“BiOp”) by FWS that determines if the proposed action is likely to  
10 jeopardize the continued existence of a listed species or destroy or adversely modify a species’  
11 critical habitat. The BiOp must include a summary of the information on which it is based and  
12 must adequately detail and assess how the action affects listed species and their critical habitats.  
13 16 U.S.C. § 1536(b)(3). Additionally, a BiOp that concludes that the agency action is not likely  
14 to jeopardize a listed species or destroy or adversely modify its critical habitat must include an  
15 Incidental Take Statement which specifies the impact of any incidental taking, provides  
16 reasonable and prudent measures necessary to minimize such impacts, and sets forth terms and  
17 conditions that must be followed. 16 U.S.C. § 1536(b)(4). Where an agency action may affect a  
18 listed species, the absence of a valid BiOp means that the action agency has not fulfilled its duty  
19 to insure through consultation that its actions will neither jeopardize a listed species nor destroy  
20 or adversely modify the species’ critical habitat.

21       39. The BiOp must include an evaluation of the “cumulative effects on the listed  
22 species.” 50 C.F.R. § 402.14(g)(3). In addition to effects of other federal actions, “cumulative  
23 effects” include “effects of future State or private activities, not involving Federal activities, that  
24 are reasonably certain to occur within the action area of the Federal action subject to  
25 consultation.” 50 C.F.R. § 402.02.

26       40. Throughout its analysis, the BiOp must utilize the “best scientific and commercial  
27 data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). FWS must consider all the  
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1 relevant factors and articulate a rational connection between the facts and its ultimate conclusion.

2 41. If an action's impact on a species' habitat threatens *either* the recovery or the  
3 survival of a species, the BiOp must conclude that the action adversely modifies critical habitat.  
4 The ESA defines critical habitat as areas which are "essential to the conservation" of listed  
5 species. 16 U.S.C. § 1532(5)(A). The ESA's definition of "conservation" includes the recovery  
6 of species. *See* 16 U.S.C. § 1532(3). Thus, the definition of "adverse modification" of critical  
7 habitat in 50 C.F.R § 402.14, limiting the term's meaning to degradation of critical habitat for  
8 *both* the survival and recovery of a listed species, is facially inconsistent with the statute and is  
9 therefore invalid. Multiple courts, including this Court, have ruled accordingly.

10 42. *Prohibition against "take."* Section 9 of the ESA and its implementing  
11 regulations prohibit any person from "taking" a threatened or endangered species. 16 U.S.C. §  
12 1538(a)(1); 50 C.F.R. § 17.31. A "person" includes private parties as well as local, state, and  
13 federal agencies. 16 U.S.C. § 1532(13). "Take" is defined broadly under the ESA to include  
14 harming, harassing, trapping, capturing, wounding, or killing a protected species either directly  
15 or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. §  
16 1532(19). The ESA not only bans the acts of parties directly causing a take, but also bans the  
17 acts of third parties whose acts bring about the taking.

18 43. One exception to Section 9's take prohibitions is relevant here. A federal agency  
19 may take listed species only in accordance with an "Incidental Take Statement." 16 U.S.C. §  
20 1536(b)(4). If the terms and conditions of the Incidental Take Statement are followed, the  
21 federal agency and any permittee are exempted from Section 9's take prohibitions. 16 U.S.C. §  
22 1536(o)(2).

## 23 VII. FACTUAL BACKGROUND

### 24 A. The California Desert Conservation Area Plan

25 44. The California desert is a rich and unique environment teeming with "historical,  
26 scenic, archeological, environmental, biological, cultural, scientific, educational, recreational,  
27 and economic resources." 43 U.S.C. § 1781(a)(2). Though vast, this desert and its resources are  
28

1 “extremely fragile, easily scarred, and slowly healed.” *Id.* Human activities can easily threaten  
2 rare and endangered species of wildlife and plants in this sensitive ecosystem. 43 U.S.C. §  
3 1781(a)(3). To protect and conserve this desert and its resources, Congress designated 25  
4 million acres of southern California as the California Desert Conservation Area (“CDCA”). 43  
5 U.S.C. § 1781(c). About half of the CDCA is public land under BLM management. *Id.*  
6 Congress mandated that the Secretary of the Interior develop a “comprehensive, long-range plan  
7 for the management, use, development, and protection of the public lands within the [CDCA].”  
8 43 U.S.C. § 1781(d).

9 45. In September of 1980, the BLM adopted the California Desert Conservation Area  
10 Plan and since that time, BLM has made over 100 amendments to the CDCA Plan including  
11 adopting the Coachella Valley Plan amendments.

12 46. Motorized vehicle use including use by off road vehicles or ORVs can cause  
13 damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water  
14 quality and riparian health; harm to wilderness areas and wilderness values; and harm to cultural  
15 resources. As detailed below, pursuant to the Coachella Valley plan amendment to the CDCA  
16 Plan BLM allows harm from motorized vehicles to occur including impacts to the Peninsular  
17 bighorn sheep, its habitat, and other resources of the CDCA within the Coachella Valley  
18 planning area.

#### 19 **B. The Peninsular Bighorn Sheep and Other Listed Species**

20 47. Peninsular bighorn sheep live in hot, desert regions with steep, open slopes,  
21 canyons and washes where the land is rough, rocky and sparsely vegetated in the Peninsular  
22 Mountain Ranges from the San Jacinto Mountains south into Baja California, Mexico. 66 Fed.  
23 Reg. 8650. Peninsular bighorn generally live between 300 and 4,000 feet elevation and produce  
24 one lamb per year. 66 Fed. Reg. 8650. While lambing occurs from January through August,  
25 most lambs are born between February and April. 66 Fed. Reg. 8651. Bighorn require open  
26 terrain to detect and avoid predators, are wide-ranging and can traverse long distances. 66 Fed.  
27 Reg. 8653-55.

1           48. On May 8, 1992, the Peninsular bighorn sheep were first proposed to be listed as  
2 an endangered species under the federal Endangered Species Act. 57 Fed. Reg. 19837. On  
3 March 18, 1998, after extended delay (and federal litigation that is not relevant here), the  
4 population segment of the Peninsular bighorn sheep north of the Mexican border was listed as  
5 endangered. 63 Fed. Reg. 13134-50. The rule listing the Peninsular bighorn as a endangered  
6 species states, "Habitat loss (especially canyon bottoms), degradation, and fragmentation  
7 associated with the proliferation of residential and commercial development, roads and  
8 highways, water projects, and vehicular and pedestrian recreational uses are threats contributing  
9 to the decline of Peninsular bighorn sheep throughout its range." 63 Fed. Reg. 13143. The  
10 primary threats to survival of the bighorn are habitat destruction and fragmentation, predation,  
11 human-related disturbance including from motorized vehicles, disease, and low lamb  
12 recruitment. 66 Fed. Reg. 8650-51.

13           49. On October 25, 2000, the Service adopted the Recovery Plan for Bighorn Sheep  
14 in the Peninsular Ranges, California. The Recovery Plan was developed in cooperation with  
15 other agencies and entities including the BLM. The ongoing threats to the Peninsular bighorn as  
16 stated in the recovery plan include "human activities such as hiking, mountain biking, hang  
17 gliding, horseback riding, camping, hunting, livestock grazing, dog walking, and use of aircraft  
18 and off-road-vehicles [which] have the potential to disrupt normal bighorn sheep social  
19 behaviors and use of essential resources, or cause bighorn sheep to abandon traditional habitat."  
20 Recovery Plan at 43.

21           50. The Service designated critical habitat for Peninsular bighorn sheep on February  
22 1, 2001. 66 Fed Reg. 8650, 8652. The critical habitat designation was based on an ecosystem  
23 approach taking into account that the bighorn "requires many essential resources spread across  
24 the greater landscape that allows the species to adapt to natural and unnatural environmental  
25 processes." 66 Fed. Reg. at 8653. The final designation includes 844,897 acres of land the  
26 Service deemed essential to the conservation and recovery of the Peninsular bighorn sheep. 66

1 Fed. Reg. 8655.<sup>1</sup>

2 51. The survival of the Peninsular bighorn sheep is in serious question. The  
3 population of bighorn in the Peninsular Range declined dramatically from approximately one  
4 thousand one hundred seventy-one (1,171) adult bighorn in 1979 to about two hundred eighty  
5 (280) adult bighorn in 1996. The population has made some gains during recent years. Of the  
6 remaining population, at the last published count in 2006, there were 800 Peninsular bighorn in  
7 the United States. The local population includes the San Jacinto Mountain ewe group and the  
8 Santa Rosa Mountains ewe group which consist of 25 and 64 adult bighorn, respectively. These  
9 ewe groups suffered an especially dramatic decline prior to listing. During the 1970s in the San  
10 Jacinto mountains, 150 bighorn were seen just at one sighting in one canyon; whereas there are  
11 only 25 bighorn today in the entire mountain range.

12 52. Following the listing of the Peninsular bighorn sheep, BLM did not enter into  
13 consultation with the FWS to address the CDCA Plan's impact on the Peninsular bighorn sheep  
14 and other listed species. Instead, BLM decided to "update" the CDCA Plan through a series of  
15 bioregional plan amendments, which, in theory, would implement the various recovery plans and  
16 provide for protection of the listed species in each sub-area. These bioregional plans constantly  
17 remained "a year away from completion" for over a decade.

18 53. In 2000, tiring of BLM's illusory promises of "imminent" CDCA plan  
19 consultation and completion, and fearing for the survival of the Peninsular bighorn sheep and  
20 other species, Plaintiffs in this action challenged BLM's failure to consult with FWS as to the  
21 effects of the CDCA Plan on listed species. Center for Biological Diversity, et al. v. Bureau of  
22 Land Management, Case No. C-00-0927 WHA-JCS (N.D. Cal.). As a result of that suit, the  
23 parties entered into a Consent Decree requiring BLM to enter into formal consultation with FWS  
24 and requiring BLM to take interim protective measures to protect listed species pending  
25

26 <sup>1</sup> Pursuant to a consent decree resulting from a challenge to the critical habitat designation,  
27 approximately 5% of the designated critical habitat was vacated and the Service began a process  
28 of revising the designation. As relevant here, the all public lands at issue in this litigation remain  
designated as critical habitat.

1 completion of consultation and implementation of the Plan amendments. Subsequently, BLM  
2 and FWS entered into the required consultation.

3 54. As relevant here, interim measures to protect the Peninsular bighorn included, but  
4 were not limited to, closing the Dunn road to unauthorized vehicular traffic, limiting  
5 maintenance and prohibiting improvement of Dunn road, prohibiting all commercial use of  
6 Dunn road, and maintaining voluntary seasonal trail closures during lambing season.

7 55. Several other listed species are also found in the Coachella Valley planning area  
8 and may be adversely affected by the BLM's management actions. These include, but are not  
9 limited to: the Coachella Valley milk-vetch (*Astragalus lentiginosus coachellae*) which occurs  
10 in dunes and sandy washes and which was listed as an endangered species on October 6, 1998  
11 (63 Fed. Reg. 53596-53615); and the Coachella Valley fringe-toed lizard (*Uma inornata*) which  
12 also is found only in the native sand dominated habitats of the Coachella Valley and which was  
13 listed as a State endangered species in California on October 2, 1980 and as a threatened species  
14 under the Federal ESA on September 25, 1980 (45 Fed. Reg. 63812-63820). Among the interim  
15 management actions that BLM agreed to in the settlement discussed above, were the following:  
16 for the Coachella Valley milk-vetch, the BLM agreed to interim measures to manage all habitat  
17 of this endangered plant on BLM lands and to maintain the hydrologic regime and sand sources  
18 which would also benefit the Coachella Valley fringe-toed lizard along with implementation of a  
19 vehicle closure of Windy Point.

20 **C. Adoption of the Coachella Valley Plan amendment to the CDCA Plan.**

21 56. In June 2002, BLM issued a combined Proposed California Desert Conservation  
22 Area Plan Amendment for the Coachella Valley (hereinafter, "Coachella Valley Plan") and a  
23 Draft Environmental Impact Statement for the Coachella Valley Plan ("Draft CVP EIS") which  
24 proposed specific management measures for public lands within the CDCA managed by the  
25 BLM in the Coachella Valley planning area in Riverside County. Plaintiffs submitted comments  
26 to the BLM regarding the Draft EIS.

27 57. In October 2002, BLM issued a combined final version of the Proposed Coachella  
28

1 Valley Plan and a Final EIS. ("Final EIS"). Plaintiffs filed protests with the BLM regarding the  
2 Final EIS and proposed decision.

3 58. On December 27, 2002, BLM issued a Record of Decision approving the  
4 Coachella Valley Plan. The ROD constituted final agency action for the Coachella Valley plan  
5 amendment and the accompanying Final EIS.

6 59. Before the Coachella Valley Plan amendment was approved, FWS issued several  
7 biological opinions that apply to species within the planning area two of which are particularly  
8 relevant here. On December 23, 2002, the FWS issued the Endangered Species Consultation on  
9 the Effects of the California Desert Conservation Area Plan on Peninsular Bighorn Sheep,  
10 Riverside and Imperial Counties, California FWS-ERIV/IMP-2810.2 ("2002 Peninsular Bighorn  
11 BiOp") which covers all BLM management issues affecting Peninsular bighorn sheep within the  
12 Coachella Valley Planning area. In addition, on December 24, 2002, FWS issued the  
13 Endangered Species Consultation/Conference on the Effects of the Proposed California Desert  
14 Conservation Area Plan Amendment for the Coachella Valley on 10 Listed Plants and Animals  
15 and one Proposed Species, Riverside County, California FWS-ERIV-3066.2 ("2002 Ten Species  
16 BiOp") also relating to the BLM's proposed Coachella Valley Plan amendment.

17 60. In approving the Coachella Valley plan amendment through the ROD BLM relied  
18 on the 2002 Peninsular Bighorn BiOp and the 2002 Ten Species BiOp. Both of these biological  
19 opinions are flawed and invalid and, therefore, BLM violated the procedural and substantive  
20 mandates of the ESA in issuing the ROD and approving the Final EIS and the Coachella Valley  
21 plan amendment in reliance on those biological opinions. Accordingly, On March 23, 2006,  
22 Plaintiffs provided BLM with a 60-day notice of intent to sue for violations of the ESA.

23 61. In response to the 60-day notice, by letter dated May 19, 2006, BLM stated that it  
24 had, as relevant here, "re-initiated consultation on the effects of the CDCA Plan on the critical  
25 habitat of the Peninsular Ranges population of the bighorn sheep . . . [,] initiated consultation on  
26 the critical habitat[] of the . . . Coachella Valley milk-vetch which were designated after the  
27 previous biological opinions were issued on the Coachella Valley Plan amendment to the CDCA  
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1 Plan, . . . [and] initiated consultation on the effects of the CDCA Plan, as amended by the  
2 Coachella Valley Plan amendment, on the critical habitat of the Coachella Valley fringe-toed  
3 lizard . . .”

4 62. By letter dated November 29, 2007, and again by letter dated September 11, 2008,  
5 Plaintiffs requested that BLM provide information regarding progress on these re-consultations.  
6 By letter dated January 10, 2008, and again by letter dated September 29, 2008, the BLM  
7 responded that BLM had not received any response from the U.S. Fish and Wildlife Service to  
8 the re-initiated consultations as relevant to the Peninsular bighorn sheep, the Coachella Valley  
9 milk-vetch, and the Coachella Valley fringe-toed lizard in the Coachella Valley Plan area.

10 63. As a result, although BLM claims that it has re-initiated consultation, because  
11 FWS has failed to respond to BLM, it appears that the consultation process has not properly been  
12 re-initiated, much less completed, and the violations outlined in the 60-day notice remain.  
13 Accordingly, BLM has failed to ensure against jeopardy and adverse modification of critical  
14 habitat through consultation as required under Section 7 of the ESA and BLM cannot lawfully  
15 rely on the 2002 Peninsular Bighorn BiOp and/or the 2002 Ten Species BiOp in managing the  
16 Coachella Valley Plan area.

17 64. On May 18, 2006, BLM also issued a document entitled “Expiration of  
18 Administrative Closure Decisions; Coachella Valley Plan Amendment to the California Desert  
19 Conservation Area Plan,” signed by Field Manager Gail Acheson, reference number 6780 CA  
20 660. In that two-page document, BLM provided its “determination” that with the signing of the  
21 ROD for the Coachella Valley Plan Amendment in 2002, the administrative closures to ORVs of  
22 Dunn Road and Windy Point were “obsolete” and provided “specific written determination” to  
23 that effect. However, because BLM cannot lawfully rely on the two biological opinions relevant  
24 to these closure areas, BLM determination was unlawful. Unless and until BLM ensures through  
25 consultation (or re-consultation) with FWS that reopening the Dunn Road or Windy Point will  
26 not jeopardize the species at issue or destroy or adversely modify critical habitat, BLM cannot  
27 lawfully make any determination to reopen the Dunn Road or Windy Point. Moreover, while  
28

1 consultation or re-consultation is ongoing (if it is), BLM cannot make any irreversible or  
2 irretrievable commitments of resources, including reopening these areas.

3         65. The Coachella Valley Plan amendment as adopted in the ROD provides for  
4 multiple use of the lands managed by BLM, and also includes many areas within the Santa Rosa  
5 and San Jacinto Mountains National Monument where planning is shared by both BLM and the  
6 Forest Service. Some BLM lands within the National Monument are designated for motorized  
7 vehicle use as “limited” and include several “open” routes. Dunn Road, Dry Wash route, and the  
8 access route from Royal Carrizo are designated as “closed” routes under the plan but research  
9 and motorized commercial recreational access remain among the “permitted uses” of these roads.  
10 Coachella Valley FEIS at 2-12 to 2-13.

11         66. The Coachella Valley Plan amendment approved activities that will cause harm to  
12 the Peninsular bighorn sheep, and other listed, rare and imperiled species. The BLM and Service  
13 both have acknowledged that the Coachella Valley Plan amendment, including the provisions  
14 allowing motorized use of the Dunn Road, will cause harm to the Peninsular bighorn sheep due  
15 to harassment and loss of habitat. Indeed, as a conservation measure, the BiOp recommended  
16 that in order to help implement the recovery plan for Peninsular bighorn sheep, BLM  
17 “Deconstruct, reclaim, and allow native plant communities to become established on BLM-  
18 managed portions of the Dunn Road,” and to “Close the Martinez Canyon ‘Cherry Stem’ to off-  
19 road vehicles, and adequately enforce the closure.” 2002 10 Species BiOp at 23. However,  
20 BLM failed to follow all of these recommendations.

21         67. By authorizing any motorized vehicle use of the Dunn road BLM circumvented  
22 site-specific review for the construction of a road in this area and attempted to legitimize a route  
23 that was created illegally by trespass on public lands. BLM thereby inaccurately identified the  
24 true environmental setting or baseline for this planning process and, as a result, BLM’s analysis  
25 of the impacts of the plan is inaccurate. Moreover, by attempting to legitimize a route created by  
26 trespass, BLM obscures its own failure to properly manage and protect these public lands from  
27 degradation from unauthorized and illegal activities.

1 **D. FLPMA Violations.**

2 68. BLM violated FLPMA in adopting the Coachella Valley Plan amendment.  
3 FLPMA requires that BLM prepare and maintain a current inventory of all public lands and their  
4 resources. 43 U.S.C. §1711(a). Similarly, FLPMA provides that the systematic inventory of  
5 public lands and their resources form the basis of the land use planning process. 43 U.S.C.  
6 §1701(a)(2). Accordingly, the regulations implementing FLPMA require that BLM collect  
7 resource and environmental inventory data and information, and that the inventory data and  
8 information “shall be collected in a manner that aids application in the planning process,  
9 including subsequent monitoring requirements.” 43 C.F.R. §1610.4-3.

10 69. Among the significant resources in the Coachella Valley planning area are the  
11 desert streams and springs that wildlife depend on, and the Peninsular bighorn sheep, the  
12 Coachella Valley fringe-toed lizard, the Coachella Valley milk-vetch and other listed, rare and  
13 sensitive native plants and wildlife species and their habitats.

14 70. While there is some data on Peninsular bighorn sheep populations, BLM failed to  
15 prepare and maintain a current inventory of the habitat resources and other resources in this area  
16 that could be relied on in the planning process. BLM’s failure to monitor, inventory, or study  
17 many of the listed and special status species and other unique resources of the Coachella Valley  
18 planning area prior to approving the ROD and plan amendment means that BLM has failed to  
19 prepare and maintain a current inventory of all public lands and their resources, and has failed to  
20 follow FLPMA’s mandate that the systematic inventory of public lands and their resources form  
21 the basis of the land use planning process. 43 U.S.C. §1711(a); 43 U.S.C. §1701(a)(2); 43  
22 C.F.R. §1610.4-3.

23 71. FLPMA requires that in administering the use, occupancy and development of  
24 public lands, the BLM “shall, by regulation or otherwise, take any action necessary to prevent  
25 unnecessary or undue degradation of the lands.” 43 U.S.C § 1732(b).

26 72. In designating routes for motorized use and ORV use in the Coachella Valley  
27 Plan amendment, including the Dunn Road, BLM also failed to minimize impacts to resources of  
28

1 these public lands, including listed species and habitats, as required by the regulations and  
2 executive orders and other laws.

3 **E. NEPA Violations.**

4 73. The BLM also violated several provisions of NEPA in its issuance of the ROD  
5 and approval of the FEIS for the Coachella Valley Plan amendment.

6 74. NEPA requires agencies to analyze alternatives as well as the direct, indirect, and  
7 cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8. The FEIS for the  
8 Coachella Valley plan amendment is deficient in this regard.

9 75. In addition to alternatives and impacts, NEPA requires agencies to consider  
10 mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. §  
11 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental  
12 consequences and mitigation measures).

13 76. The deficiencies in environmental review of the Coachella Valley Plan  
14 amendment include, but are not limited to, the following: the EIS failed to adequately consider  
15 environmental impacts including impacts to biological resources, wilderness, water resources,  
16 soils, air quality, and listed and sensitive species; the EIS failed to adequately identify the  
17 environmental setting; the EIS failed to consider a reasonable range of alternatives; the EIS used  
18 an improper no action alternative; the EIS failed to adequately identify or analyze cumulative  
19 impacts; the EIS failed to analyze sufficient mitigation measures to address the impacts on listed  
20 and sensitive species, air quality, non-motorized recreation, soils, water resources, wilderness,  
21 and many other resources. Moreover, BLM failed to adequately respond to public comments and  
22 protests. For all these reasons, and others, BLM's environmental review for the Coachella Valley  
23 Plan amendment was inadequate and in violation of NEPA.

24 77. For example, the FEIS for the Coachella Valley Plan amendment fails to analyze a  
25 reasonable range of alternatives and failed to analyze any alternative that would require the Dunn  
26 Road, which was created illegally by trespass, to be closed to all motorized uses and to provide  
27 for restoration of the habitat damaged by the road for the benefit of the Peninsular bighorn. By,  
28

1 *inter alia*, failing to analyze any alternative that would fully comply with the recommendations  
2 of the Peninsular bighorn Recovery Plan or to consider any alternative that would permanently  
3 close and restore the illegally constructed Dunn road BLM violated NEPA. The FEIS also failed  
4 to provide an accurate description of the environmental setting or baseline because, for example,  
5 it failed to accurately identify historic Peninsular bighorn habitat used for lambing and foraging  
6 and to propose any alternative that would sufficiently protect those essential habitat areas.  
7 Moreover, for the Coachella Valley fringe-toed lizard and Coachella Valley milk-vetch the FEIS  
8 fails to provide even the most basic information about habitat location and status, and utterly  
9 fails to identify likely impacts to the species under the proposed plan amendment and provides  
10 no analysis of such impacts in light of which the alternatives could be compared.

11 **F. ESA Violations**

12 78. Both the 2002 Ten CV Species Biological Opinion issued on December 24, 2002,  
13 and the 2002 Peninsular Bighorn Biological Opinion issued on December 23, 2002, which BLM  
14 relied on in approving the ROD for the Coachella Valley Plan are invalid. FWS violated Section  
15 7 by issuing biological opinions that fail to meet the requirements of the statute and regulations.  
16 BLM also violated its duties under Section 7 by relying on invalid biological opinions in  
17 adopting the ROD and has failed to insure against jeopardy and destruction or adverse  
18 modification of critical habitat.

19 79. The 2002 Ten Species BiOp fails to provide any meaningful analysis of whether  
20 management of BLM lands pursuant in the Coachella Valley planning area is likely to cause  
21 destruction or adverse modification to critical habitat, and specifically, fails to analyze impacts to  
22 conservation and recovery of the Peninsular bighorn and other species. Moreover, FWS relied  
23 on an invalid definition of adverse modification in preparing the 2002 Ten Species BiOp, and on  
24 this basis alone BLM could not properly rely on this biological opinion in approving the ROD  
25 and cannot rely on it in managing the public lands and resources in this area. For example, in  
26 evaluating impacts from ORV use, the 2002 Ten Species BiOp notes that the plan would allow  
27 "limited" use of many areas, 47 miles of trails would be designated "open," and stopping,  
28

1 parking and vehicle camping would be allowed within 100 feet of the center line of any open  
2 route unless the area was fenced closed. However, the BiOp does not even attempt to quantify  
3 the likely impacts to each of the species that may result from these activities.

4 80. The 2002 Ten Species BiOp also acknowledges that the availability of open  
5 routes on BLM lands facilitates unauthorized use of BLM lands and private lands which will  
6 inevitably cause take of the Coachella Valley fringe-toed lizard and harm its habitat. But the  
7 BiOp takes a wait and see stance, requiring only inspections at the outset, then, only after new  
8 violations occur, setting deadlines for posting boundaries, establishing baseline conditions from  
9 which to measure the impacts, and developing additional management measures and strategies  
10 which will have defined thresholds and timelines to trigger management measures. Because the  
11 BiOp thus allows known impacts including take of the Coachella Valley fringe-toed lizard and  
12 harm to its habitat which are not authorized by the ITS to continue indefinitely, it violates the  
13 ESA and BLM's reliance on the BiOp is arbitrary and capricious.

14 81. As a conservation measure, the BiOp recommended that in order to help  
15 implement the recovery plan for Peninsular bighorn sheep, BLM "Deconstruct, reclaim, and  
16 allow native plant communities to become established on BLM-managed portions of the Dunn  
17 Road," and to "Close the Martinez Canyon 'Cherry Stem' to off-road vehicles, and adequately  
18 enforce the closure." 2002 Ten Species BiOp at 23. Both of these measures should have been a  
19 required as part of the terms and conditions of the ITS and adopted by BLM as part of the ROD  
20 because they are reasonable and prudent measures that are necessary to protect bighorn sheep  
21 from harm and to protect critical habitat from adverse modification. As a result, the 2002 Ten  
22 Species BiOp is invalid.

23 82. The 2002 Peninsular bighorn BiOp concluded that BLM's proposed management  
24 of the CDCA in Riverside and Imperial Counties would not jeopardize the Peninsular bighorn  
25 sheep populations nor destroy or adversely modify the critical habitat for the Peninsular bighorn  
26 sheep. 2002 Peninsular Bighorn BiOp at 51. In reaching this conclusion the FWS relied on a  
27 definition of "adverse modification" of critical habitat that does not comply with the statute.  
28

1 Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service, 378 F.3d 1059, 1070 (9th Cir.  
2 2004). Thus, the 2002 Peninsular Bighorn BiOp's conclusion of no adverse modification of  
3 Peninsular Bighorn critical habitat is in conflict with the ESA and binding precedent. Indeed, the  
4 FWS' bare conclusion that the plan will not adversely modify bighorn sheep critical habitat in  
5 the face of contrary evidence in the 2002 Peninsular Bighorn BiOp itself amply illustrates how  
6 the FWS has read the recovery goal out of the ESA.

7 83. The FWS' own analysis in the 2002 Peninsular Bighorn BiOp shows that many  
8 activities allowed under the Coachella Valley plan amendment will destroy or adversely modify  
9 bighorn sheep critical habitat. For example, the BiOp acknowledges that management of public  
10 access to trails via "voluntary" measures has not been very effective and that "the level of human  
11 disturbance may have caused bighorn sheep to avoid useable habitat, forage with less efficiency,  
12 and expend additional energy," but the BiOp nonetheless fails to identify human disturbance as a  
13 potential cause of "adverse modification" of bighorn sheep critical habitat. *See id.* at 38 (stating  
14 that 42% of people contacted chose to ignore voluntary closures of trails to protect bighorn  
15 sheep).

16 84. The 2002 Peninsular bighorn BiOp clearly shows that BLM management of the  
17 Coachella Valley planning area will likely harm Peninsular bighorn sheep and is likely to  
18 destroy or adversely modify critical habitat. The biological opinion identified cumulative  
19 impacts to Peninsular Bighorn due to low flying aircraft and increasing development on private  
20 lands including several projects that would directly impact the bighorn populations and critical  
21 habitat. However, the BiOp failed to analyze the cumulative effects of these and other projects  
22 on the bighorn or its designated critical habitat.

23 85. The 2002 Peninsular bighorn BiOp's Incidental Take Statement ("ITS") is  
24 inadequate in many ways including, but not limited to: failing to provide either a number or other  
25 method for quantifying the permitted amount of take of Peninsular bighorn sheep; failing to  
26 provide a clear trigger for re-consultation; and including reasonable and prudent measures that  
27 are too vague and, thereby, completely unenforceable. 2002 Peninsular Bighorn BiOp at 53-54.

1 The ITS provides no clear statement regarding the amount of take authorized, if any, nor does it  
2 explain how impacts from BLM management are to be distinguished from other impacts to the  
3 species nor how or when the determination that statistically significant changes in the population  
4 have occurred is to be made. FWS' failure to quantify the allowable take in any meaningful  
5 way means that the BiOp unlawfully fails to provide a clear "trigger" for re-initiation of  
6 consultation. See Id. at 59. For each of these reasons and more, the BiOp, and its accompanying  
7 ITS fail to comply with the ESA.

8 86. As part of the settlement of earlier actions mechanized maintenance and  
9 construction activities on Dunn Road were prohibited. With the adoption of the Coachella  
10 Valley Plan BLM sought to change these prohibitions and re-open Dunn Road, however, because  
11 FWS has not yet issued a valid biological opinion regarding impacts to Peninsular bighorn and  
12 its critical habitat from the plan, BLM cannot lawfully re-open Dunn Road or consider any new  
13 site-specific actions along Dunn Road (including mechanized maintenance or construction)  
14 which may adversely impact the Peninsular bighorn or destroy or adversely modify its critical  
15 habitat even if those actions appear to be consistent with the plan.

#### 16 VIII. CLAIMS FOR RELIEF

17 87. For each of the Claims in this Complaint, Plaintiffs incorporate by reference each  
18 and every allegation set forth in this Complaint as if set out in full below.

#### 19 First Claim for Relief

#### 20 (Against the BLM for Violations of FLPMA, its implementing Regulations, 21 relevant Executive Orders, and CDCA Plan requirements)

22 88. BLM has failed to collect and maintain a current inventory of the environmental  
23 resources of the CDCA, including in the Coachella Valley planning area, in violation of Section  
24 201 of FLPMA, 43 U.S.C. §1711(a). By failing to provide current data and inventory on many  
25 species and other resources before approving the Coachella Valley plan amendment, BLM  
26 violated its duty under the statute and undermined the regulatory requirements that current  
27 inventory data and information will be used to inform the planning process and assist in  
28

1 formulating subsequent monitoring requirements. 43 CFR §1610.4-3.

2 89. The planning proscriptions in the Coachella Valley plan amendment and ROD  
3 and the routes adopted by BLM in the Coachella Valley plan amendment and ROD do not  
4 comply with the executive orders, laws and regulations governing designation of routes because,  
5 *inter alia*, the BLM failed to consider the factors required by FLPMA, the executive orders,  
6 regulations and the CDCA Plan, such as minimizing impacts of route designations on public  
7 lands resources, and avoiding and minimizing impacts to listed species and rare habitats. As a  
8 result, BLM violated the statute, the regulations, the executive orders, and the CDCA Plan and  
9 failed to take all actions "necessary to prevent unnecessary or undue degradation of the lands."  
10 43 U.S.C § 1732(b).

11 90. BLM's adoption of the Coachella Valley plan amendment, the ROD and the FEIS  
12 is a final agency action subject to judicial review under the APA. 5 U.S.C. §§701-706, 706(2).

13 91. For each of the above reasons, and others, BLM's adoption of the Coachella  
14 Valley plan amendment, the ROD and the FEIS, is arbitrary, capricious, and not in accordance  
15 with law as required by FLPMA, its implementing regulations, relevant executive orders, the  
16 CDCA Plan, and the APA, and subject to judicial review under the APA. 5 U.S.C. §§701-706,  
17 706(2).

### 18 **Second Claim for Relief**

#### 19 **(Against the BLM for Violations of NEPA and CEQ Regulations)**

20 92. BLM has violated NEPA and its implementing regulations by issuing a ROD  
21 adopting the Coachella Valley plan amendment, and by approving the Final EIS for the  
22 Coachella Valley plan amendment that failed to meet the requirements of NEPA. 42 U.S.C. §  
23 4331 *et seq.*; 40 C.F.R. § 1500.1 *et seq.* BLM's environmental review for the plan in the Final  
24 EIS for the Coachella Valley plan amendment is arbitrary, capricious, and otherwise not in  
25 accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably  
26 delayed, in violation of 5 U.S.C. § 706.

27 93. An EIS must provide a detailed statement of: (1) the environmental impact of the  
28

1 proposed action; (2) any adverse environmental effects that cannot be avoided should the  
2 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship  
3 between local short-term uses of the environment and the maintenance and enhancement of long-  
4 term productivity; and (5) any irreversible and irretrievable commitments of resources that would  
5 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C). An EIS  
6 must “inform decision-makers and the public of the reasonable alternatives which would avoid  
7 or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R.  
8 § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative  
9 impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8. In addition to alternatives and  
10 impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental  
11 impacts of the proposed action. 40 C.F.R. § 1502.14 (alternatives and mitigation measures); 40  
12 C.F.R. § 1502.16 (environmental consequences and mitigation measures).

13 94. The ROD and FEIS that BLM prepared for the Coachella Valley plan amendment  
14 failed to comply with each of these requirements of NEPA. The FEIS does not analyze a full  
15 range of alternatives, include a proper and accurate “no action” alternative, a proper description  
16 of the environmental baseline or setting, or adequately analyze the impacts of the proposed  
17 action on the resources of CDCA. The FEIS also fails to consider mitigation measures to reduce  
18 the impacts of the proposed action on the resources of the Coachella Valley planning area within  
19 the CDCA. In addition, BLM failed to maintain a current inventory of resources and therefore  
20 the environmental review relied on outdated, inaccurate and inadequate information in analyzing  
21 the impacts of the proposed action.

22 95. For each of the above reasons, and others, BLM’s adoption of the ROD and FEIS  
23 for the Coachella Valley planning area is arbitrary, capricious, and not in accordance with law as  
24 required by NEPA, its implementing regulations, and the APA, and is subject to judicial review  
25 under the APA. 5 U.S.C. §§701-706, 706(2).

1 **Third Claim for Relief**

2 **(Against FWS for Issuing Unlawful Biological Opinions)**

3 96. FWS' issuance of the 2002 Peninsular Bighorn Sheep Biological Opinion and the  
4 2002 Ten Species Biological Opinion, were arbitrary, capricious, and inconsistent with the law  
5 because, among other things, the biological opinions relied on an unlawful definition of critical  
6 habitat, failed to address the cumulative effects of the proposed actions on species and critical  
7 habitats as required by ESA and its implementing regulations, failed to consider cumulative or  
8 aggregate effects of the various activities approved in the plan on the species and critical  
9 habitats, the Incidental Take Statements failed to adequately specify the impact of the incidental  
10 taking on the species and failed to adequately specify reasonable and prudent measures necessary  
11 to minimize such impacts, and failed to include terms and conditions implementing such  
12 reasonable and prudent measures. 16 U.S.C. § 1536(b)(4).

14 97. For each of the above reasons, and others, FWS' issuance of the 2002 Peninsular  
15 Bighorn Biological Opinion and the 2002 Ten Species Biological Opinion was arbitrary,  
16 capricious, and not in accordance with law as required by the APA, and is subject to judicial  
17 review thereunder. 5 U.S.C. §§ 701 through 706.

18 **Fourth Claim for Relief**

19 **(Against BLM and FWS for Violating the ESA By Failing to Insure Against  
20 Jeopardy and Destruction or Adverse Modification of Critical Habitat)**

21 98. BLM and FWS are violating Section 7(a)(2) of the ESA and its implementing  
22 regulations as set forth at 50 C.F.R. § 402.16 by failing to ensure through consultation that  
23 BLM's approval and implementation of the Coachella Valley plan amendments to the CDCA  
24 Plan would not jeopardize the Peninsular bighorn sheep or destroy or adversely modify its  
25 critical habitat, or jeopardize the Coachella Valley milk-vetch or Coachella Valley fringe-toed  
26 lizard, or destroy or adversely modify its critical habitat. BLM is violating this provision by  
27

1 implementing the Coachella Valley Plan in reliance on the 2002 Peninsular Bighorn Biological  
2 Opinion and the 2002 Ten Species Biological Opinion notwithstanding the fact that the  
3 conclusions in the biological opinions are unsubstantiated and unlawful and the ITS statements  
4 are invalid. FWS is violating this provision by authorizing BLM to take federal actions that may  
5 jeopardize the Peninsular bighorn sheep or destroy or adversely modify its critical habitat, and  
6 may jeopardize Coachella Valley milk-vetch or Coachella Valley fringe-toed lizard, or destroy or  
7 adversely modify its critical habitat. These violations are subject to judicial review under 16  
8 U.S.C. § 1540(g).

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiffs respectfully request that this Court:

12 (1) Adjudge and declare that Defendant Bureau of Land Management's  
13 implementation of the California Desert Conservation Area Plan though the approval of the  
14 Record of Decision for the Coachella Valley Plan amendment violates the Federal Land Policy  
15 and Management Act, its implementing regulations, relevant Executive Orders, and the CDCA  
16 Plan;

17 (2) Adjudge and declare that Defendant Bureau of Land Management's  
18 implementation of the California Desert Conservation Area Plan though the approval of the  
19 Record of Decision for the Coachella Valley Plan amendment and the adoption of the Final EIS  
20 violates the National Environmental Policy Act and its implementing regulations;

21 (3) Adjudge and declare that Defendant Fish and Wildlife Service's 2002 Ten  
22 Species BiOp and 2002 Peninsular Bighorn BiOp for the California Desert Conservation Area  
23 Plan amendments are arbitrary, capricious and inconsistent with the law;

24 (4) Adjudge and declare that Defendant Fish and Wildlife Service's issuance of the  
25 2002 Ten Species BiOp and 2002 Peninsular Bighorn BiOp violated Section 7(a)(2) of the ESA  
26 because the agency has illegally concluded that BLM's actions will not jeopardize the Peninsular  
27 bighorn sheep, Coachella Valley milk-vetch, or Coachella Valley fringe-toed lizard or destroy or  
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1 adversely modify designated critical habitat;

2 (5) Order Defendant Fish and Wildlife Service to vacate and set aside the 2002 Ten  
3 Species BiOp and 2002 Peninsular Bighorn BiOp for the California Desert Conservation Area  
4 Plan;

5 (6) Adjudge and declare that Defendant Bureau of Land Management's  
6 implementation of the California Desert Conservation Area Plan in the Coachella Valley Plan  
7 violates Section 7(a)(2) of the ESA because the agency has failed to insure that its actions do not  
8 jeopardize the Peninsular bighorn sheep, or destroy or adversely modify its critical habitat or  
9 jeopardize Coachella Valley milk-vetch, or Coachella Valley fringe-toed lizard or destroy or  
10 adversely modify designated critical habitat;

11 (7) Pending the completion of adequate biological opinions for the Peninsular  
12 bighorn sheep, Coachella Valley milk-vetch, or Coachella Valley fringe-toed lizard the within  
13 the Coachella Valley planning area of the California Desert Conservation Area Plan, enjoin  
14 Defendants Fish and Wildlife Service and Bureau of Land Management from issuing any permit,  
15 approval, or other action that may adversely affect the Peninsular bighorn sheep, Coachella  
16 Valley milk-vetch, or Coachella Valley fringe-toed lizard in this area;

17 (8) Pending the completion of adequate biological opinions for the Peninsular  
18 bighorn sheep, Coachella Valley milk-vetch, or Coachella Valley fringe-toed lizard within the  
19 Coachella Valley planning area of the California Desert Conservation Area Plan, require  
20 Defendants to submit quarterly status reports to Plaintiffs and the Court describing their progress  
21 in complying with the Court's order;

22 (9) Order Defendant Bureau of Land Management's to vacate and set aside the  
23 Record of Decision for the Coachella Valley Plan amendment;

24 (10) Pending the completion of an adequate Record of Decision and Environmental  
25 Impact Statement for the Coachella Valley Plan amendment, enjoin Defendant Bureau of Land  
26

1 Management from authorizing any motorized vehicle use on the Dunn Road or any actions to  
2 maintain, repair, or improve the route created by trespass, and from authorizing any off-road  
3 vehicle use in Coachella Valley milk-vetch habitat in the Windy Point area.

4 (11) Pending the completion of an adequate Record of Decision and Environmental  
5 Impact Statement for the Coachella Valley Plan amendment order Defendant Bureau of Land  
6 Management to impose such other restrictions on motorized vehicle use (including off-road  
7 vehicle) use as may be necessary to protect the resources of the these public lands;

8 (12) Award Plaintiffs their fees, costs, expenses and disbursements, including  
9 reasonable attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal  
10 Access to Justice Act, 28 U.S.C. § 2412; and

11 (13) Grant Plaintiffs such additional and further relief as the court deems just and  
12 proper.

13 DATED: December 18, 2008

14 /s/ 

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27  
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