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THE PROTECT OUR COMMUNITIES FOUNDATION,
7 BACKCOUNTRY AGAINST DUMPS, and DONNA TISDALE

8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 THE PROTECT OUR COMMUNITIES
FOUNDATION, BACKCOUNTRY AGAINST
12 DUMPS, and DONNA TISDALE,

13 Plaintiffs,

14 vs.

15 KEN SALAZAR, in his official capacity as
Secretary of the United States Department of the
Interior; ROBERT ABBEY, in his official
16 capacity as Director of the United States Bureau
of Land Management; MARGARET L.
17 GOODRO, in her official capacity as El Centro
Field Office Manager for the United States
18 Bureau of Land Management; UNITED STATES
BUREAU OF LAND MANAGEMENT, a
19 federal agency; and UNITED STATES
20 DEPARTMENT OF THE INTERIOR, a federal
agency,

21 Defendants.

) Civ. No.

) **COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 **INTRODUCTION**

2 1. In 1976 Congress enacted unprecedented protection for the California Desert
3 Conservation Area (“CDCA”) in recognition of the fact that “the California desert environment is
4 a total ecosystem that is extremely fragile, easily scarred, and slowly healed,” and because “the
5 California desert environment and its resources, including certain rare and endangered species of
6 wildlife, plants, and fishes, and numerous archeological and historic sites, are seriously
7 threatened by air pollution, inadequate Federal management authority, and pressures of increased
8 use” 43 U.S.C. §§ 1781(a)(2) and (3). Congress directed the Secretary of the Interior to
9 “prepare and implement a comprehensive, long-range plan for the management, use,
10 development, and protection of the public lands within the California Desert Conservation Area”
11 in part “to conserve these resources for future generations.” 43 U.S.C. §§ 1781(d), 1781(a)(4).
12 The Bureau of Land Management first published its CDCA Plan in 1980, and has since amended
13 it numerous times. This Plan recognizes the critical importance of pursuing activities such as
14 “energy development and transmission . . . *without compromising* the basic desert resources of
15 soil, air, water, and vegetation, or public values such as wildlife, cultural resources, or
16 magnificent desert scenery.” CDCA Plan at 6 (emphasis added).

17 2. Plaintiffs THE PROTECT OUR COMMUNITIES FOUNDATION,
18 BACKCOUNTRY AGAINST DUMPS, and DONNA TISDALE (collectively, “plaintiffs”) seek
19 to protect approximately 10,151 acres of the CDCA from industrial scale energy development in
20 the form of the Ocotillo Wind Energy Facility (the “Project” or “Ocotillo Project”). The Project
21 includes the construction of 112 wind turbines along with a substation and switchyard, service
22 roads, an administration building, and associated transmission facilities. The Project will
23 fundamentally alter an enormous area of the CDCA and destroy many of the site’s natural and
24 cultural resources, including numerous special status species and a cultural landscape that is
25 currently used for cultural and religious purposes by a variety of local Native American Tribes
26 and contains nearly 300 archeological sites. In addition, the Project threatens the health and
27 welfare of local inhabitants and will significantly diminish desert vistas from many key viewing
28 areas, including Anza-Borrego Desert State Park.

1 3. Plaintiffs thus challenge the approval of the Project by defendants KENNETH
2 SALAZAR, ROBERT ABBEY, MARGARET L. GOODRO, the UNITED STATES BUREAU
3 OF LAND MANAGEMENT, and the UNITED STATES DEPARTMENT OF THE INTERIOR
4 (collectively, “BLM” or “BLM defendants”) for violations of the National Environmental Policy
5 Act (“NEPA”), 42 U.S.C. section 4321 *et seq.*, the Federal Land Policy Management Act
6 (“FLPMA”), 43 United States Code section 1701 *et seq.*, the Migratory Bird Treaty Act
7 (“MBTA”), 16 U.S.C. sections 701 *et seq.*, Administrative Procedure Act (“APA”), 5 U.S.C.
8 sections 701 *et seq.*, and regulations promulgated thereunder.

9 4. First, BLM’s NEPA review of the Ocotillo Project was inadequate. BLM and
10 Imperial County’s joint February, 2012, Proposed Plan Amendment and Final Environmental
11 Impact Statement/Final Environmental Impact Report (“FEIS”) fails to (1) provide a detailed and
12 independent project purpose and need, (2) analyze all reasonable alternatives to the Project, (3)
13 study all of the components of the Project, (4) disclose many of the Project’s adverse
14 environmental impacts, (5) formulate specific mitigation measures to reduce the Project’s impacts
15 on affected natural resources, and (6) respond adequately to comments.

16 5. Second, BLM violated FLPMA because its approval of the Project, including both
17 the approval of the right-of-way (“ROW”) in the Record of Decision (“ROD”) for the Project and
18 the approval of a CDCA Plan Amendment (“Plan Amendment”), will cause the destruction of a
19 large swath of the CDCA, which is contrary to provisions of both FLPMA and the CDCA Plan
20 itself.

21 6. Third, BLM violated the MBTA by failing to secure a permit for the take of the
22 many protected bird species that will be harmed by the Project.

23 7. Accordingly, plaintiffs seek orders from this Court: (1) granting preliminary
24 injunctive relief restraining defendants from taking any action that would result in any change to
25 the physical environment in connection with the Project pending a full hearing on the merits; (2)
26 declaring defendants violated the APA by failing to comply with NEPA, FLPMA and the MBTA;
27 and (3) granting permanent injunctive relief overturning BLM’s Project approvals pending
28 defendants’ compliance with NEPA, FLPMA, the MBTA and the APA.

1 **JURISDICTION AND VENUE**

2 8. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal
3 question), 1337 (regulation of commerce), 1346 (United States as defendant), 1361 (mandamus
4 against an officer of the United States), 2201 (declaratory judgment), and 2202 (injunctive relief),
5 and under the Administrative Procedure Act (“APA”), 5 U.S.C. sections 701-706 (review of final
6 agency action) because (1) the action arises under the APA, NEPA, FLPMA and the MBTA; (2)
7 BLM is an agency of the United States government and the individual defendants are sued in
8 their official capacities as officers of the United States; (3) the action seeks a declaratory
9 judgment voiding BLM’s final agency approval of the Project, including its approval of both the
10 Project right-of-way and the CDCA Plan Amendment; and (4) the action also seeks further
11 injunctive and mandamus relief until BLM complies with applicable law.

12 9. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391(e)(2)
13 because BLM and one or more individual defendants officially reside, one or more of plaintiffs’
14 causes of action arose, and all of the lands and waters involved in the action are located in this
15 judicial district.

16 10. There exists now between the parties hereto an actual, justiciable controversy in
17 which plaintiffs are entitled to have a declaration of their rights, a declaration of BLM’s
18 obligations and further relief because of the facts and circumstances hereinafter set forth.

19 11. This Complaint is timely filed within the applicable six-year statute of limitations
20 set forth in 28 U.S.C. section 2401(a).

21 12. Plaintiffs have standing to assert their claims and have exhausted all applicable
22 remedies.

23 **PARTIES**

24 13. Plaintiff THE PROTECT OUR COMMUNITIES FOUNDATION (“POC”) is a
25 community organization formed in 2009 as the successor to The Protect Our Communities Fund,
26 which had been formed in 2006. POC is composed of numerous individuals and families residing
27 in Imperial County, including the Ocotillo area, and eastern San Diego County who are directly
28 affected by BLM’s amendment to the CDCA and approval of the Ocotillo Project. POC’s

1 purpose is the promotion of a safe, reliable, economical, renewable, and environmentally
2 responsible energy future. POC's members currently use and intend to continue to use BLM
3 lands affected by the Plan Amendment and the Ocotillo Project for aesthetic, scientific, historic,
4 cultural, recreational, and spiritual enjoyment. Construction and operation of the Ocotillo Project
5 threatens to harm the use and enjoyment of these public resources by POC's members as well as
6 the public at large. Furthermore, the Project and the infra- and low-frequency sound it will emit
7 threaten significant physical and mental harm to those POC members who live in Ocotillo or
8 elsewhere within 1.25 miles of a Project wind turbine. POC therefore seeks review of BLM's
9 Project approvals.

10 14. Plaintiff BACKCOUNTRY AGAINST DUMPS ("Backcountry") is a community
11 organization comprising numerous individuals and families residing in Imperial County,
12 including the Ocotillo area, and eastern San Diego County who are directly and will continue to
13 be directly affected by the Ocotillo Project and the CDCA Plan Amendment. Backcountry and its
14 members are vitally interested in proper land use planning and management of BLM lands within
15 this planning area in order to maintain and enhance their ecological integrity, scenic beauty,
16 wildlife, recreational amenities, and resources. Backcountry's members use the BLM lands
17 affected by the Project and the Plan Amendment for aesthetic, scientific, historic, cultural,
18 recreational, and spiritual enjoyment. Construction and operation of the Ocotillo Project
19 threatens to harm the use and enjoyment of these public resources by Backcountry's members as
20 well as the public at large. In addition, the Project and the infra- and low-frequency sound it will
21 emit threaten significant physical and mental harm to those Backcountry members who live in
22 Ocotillo or elsewhere within 1.25 miles of a Project wind turbine. Backcountry therefore seeks
23 review of BLM's Project approvals.

24 15. Plaintiff DONNA TISDALE lives on Morningstar Ranch, located two miles west of
25 Tierra Del Sol Road in Boulevard, California. She is a member of Backcountry and POC. She is
26 also the Chairwoman of the County of San Diego's Boulevard Planning Group. Mrs. Tisdale
27 currently uses and intends to continue to use BLM lands that will be harmed by the CDCA Plan
28 Amendment and the Ocotillo Project for activities such as hiking, family outings, recreation,

1 wildlife and wildflower viewing, sightseeing, photography, star gazing and quiet meditation.
2 Construction and operation of the Ocotillo Project will harm Ms. Tisdale's use and enjoyment of
3 these public resources. Mrs. Tisdale therefore seeks review of BLM's Project approvals.

4 16. Plaintiffs' injuries are fairly tracable to BLM's actions. Construction and operation
5 of the Ocotillo Project will harm plaintiffs' use of the Project area for recreational activities
6 including nature study, wildlife and wildflower viewing, scenic enjoyment, photography, hiking,
7 family outings, star gazing and meditation. These injuries are actual, concrete, and imminent.
8 Plaintiffs have no plain, speedy, or adequate remedy at law. Accordingly, plaintiffs seek
9 injunctive, mandamus, and declaratory relief from this Court to rectify BLM's unlawful acts and
10 thereby redress plaintiffs' injuries.

11 17. To the extent required, plaintiffs exhausted all available administrative remedies.

12 18. Defendant KENNETH SALAZAR is the Secretary of the United States Department
13 of the Interior and, in that capacity, was responsible for BLM's Project approvals. He is sued in
14 his official capacity.

15 19. Defendant ROBERT ABBEY is the Director of BLM and is sued in his official
16 capacity. In that capacity, he is generally responsible for the activities of BLM nationwide.
17 Defendant ABBEY is responsible for BLM's approval of the CDCA Plan Amendment.

18 20. Defendant MARGARET L. GOODRO is BLM's El Centro Field Office Manager.
19 She is responsible for BLM's approval of the Project right-of-way.

20 21. Defendant UNITED STATES DEPARTMENT OF INTERIOR ("DOI") is the
21 federal agency charged with managing most of the nation's federally owned lands, including the
22 Project site at issue here. DOI is also charged with ensuring compliance with applicable laws,
23 including but not limited to NEPA, FLPMA and the MBTA, in the management of those lands.

24 22. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT is an agency
25 within DOI. Under federal law, BLM is charged with the management of federal lands including
26 the Project site for the benefit of the public and consistent with all applicable laws.

27 **BACKGROUND**

28 23. Ocotillo Express LLC proposes to construct the Ocotillo Wind Energy Facility in

1 Imperial County, California, on lands managed by BLM. The Project site is in the Yuha Desert,
2 which is in the Colorado Desert portion of the larger Sonoran Desert. The Ocotillo Project would
3 convert approximately 10,151 acres of largely untrammelled desert wild lands into a
4 315-megawatt (MW) wind energy facility.

5 24. The Project includes: 112 wind turbine generators and transformers; an electrical
6 collection system and substation; administration, operations and maintenance facilities;
7 transmission lines; meteorological towers; a temporary asphalt batch plant; parking; temporary
8 construction lay down areas; and a switchyard, loop in and other associated facilities necessary
9 for connecting the Project to the Sunrise Powerlink Transmission Line (“Powerlink”). The
10 Project also includes approximately 42 miles of access roads, which would be completely cleared
11 of vegetation and graded. During the construction phase, these roads would be 36 feet wide to
12 accommodate access to the site for the large-tracked cranes necessary for turbine erection. Post-
13 construction, permanent road width would be 20 feet. The wind turbine generators would be
14 approximately 448 feet in height. The three proposed meteorological towers would be 262.5 feet
15 in height. By comparison, the California Tower in San Diego’s Balboa Park is a mere 198 feet.

16 25. The Project’s industrial facilities will be sited on two separate parcels of BLM-
17 administered lands surrounding the unincorporated community of Ocotillo. The Project’s wind
18 turbines will be as close as 0.5 miles to Ocotillo residences, and will be even closer to some of the
19 residences in the surrounding area. *See* FEIS, Figure 4.18-9B. Nearly all of Ocotillo’s 100-plus
20 residences will be within 1.25 miles of at least one turbine. In addition to its close proximity to
21 Ocotillo-area residences, the Project site is nearby or directly adjacent to numerous other
22 sensitive land uses. Specifically, the site is immediately north of the Jacumba Wilderness Area,
23 approximately two miles west of the Yuha Basin Area of Critical Environmental Concern,
24 approximately 1.5 miles southwest of the Plaster City Off-Highway Vehicle Open Area,
25 approximately one mile south of the Coyote Mountains Wilderness, and immediately adjacent to
26 Anza-Borrego Desert State Park on its Western border. The Project would be visible from all of
27 these special land use areas.

28 26. Land use of the Project site is governed by the CDCA Plan of 1980, as amended.

1 Because the CDCA Plan does not specifically authorize development of the Project, BLM
2 amended the Plan to allow construction of the Project. The Project site and surrounding areas are
3 classified as Multiple-Use Class L (Limited Use) areas. The Limited Use classification calls for
4 low intensity use and protection of sensitive natural resources.

5 27. In December 2010, Pattern Energy Group (through Ocotillo Express LLC)
6 submitted an application to BLM for a right-of-way and for an amendment to the CDCA Plan to
7 allow it to construct the Project on BLM-managed lands. At the same time, Ocotillo Express also
8 submitted an application to Imperial County for a Conditional Use Permit for the operation of the
9 Project and for a variance for the allowable height for the turbine and tower.

10 28. In response to Ocotillo Express' applications, BLM and Imperial County prepared
11 and issued a Draft Environmental Impact Statement/Draft Environmental Impact Report
12 ("DEIS") in June 2011. The agencies then received numerous public and agency comments on
13 the Project, including plaintiffs' extensive October 6, 2011, comments.

14 29. In March 2012, BLM and Imperial County issued the FEIS and Proposed Plan
15 Amendment for the Project. The FEIS addressed six alternatives and identified multiple adverse
16 and unavoidable impacts, including impacts to air quality, cultural resources, noise,
17 paleontological resources, public health and safety, vegetation resources, aquatic resources, visual
18 resources, and wildlife resources.

19 30. In accordance with BLM's regulations, plaintiffs timely filed a protest of the
20 CDCA Plan Amendment on April 9, 2012.

21 31. Imperial County approved the Project on or about April 25, 2012.

22 32. On April 26, 2012, the U.S. Fish and Wildlife Service ("FWS") issued a Biological
23 Opinion ("BiOp") for the Project.

24 33. On or about May 11, 2012, BLM approved Ocotillo's right-of-way application,
25 expressly granted the right-of-way to Ocotillo Express LLC, approved the CDCA Plan
26 Amendment, and denied plaintiffs' protest thereof.

27 34. In this lawsuit, plaintiffs challenge BLM's Project approvals and associated
28 environmental review under NEPA, FLPMA and the MBTA.

1 **FIRST CLAIM FOR RELIEF**

2 (Violation of the National Environmental Policy Act)

3 (Against All Defendants)

4 35. The paragraphs set forth above are realleged and incorporated herein by reference.

5 36. Defendants' actions in approving the Project and certifying the FEIS constitute
6 violations of NEPA, 42 U.S.C. section 4321 *et seq.*, and its implementing regulations, 40 C.F.R.
7 section 1500 *et seq.* Defendants' approval of the Project without complying with NEPA
8 constitutes a failure to proceed in accordance with law in violation of the APA, 5 U.S.C. section
9 706(2)(A) and (D). Without limitation, BLM's actions violate NEPA and are therefore unlawful
10 in the respects alleged below.

11 **The FEIS Fails to Specify BLM's Purpose and Need for the Project**

12 37. NEPA requires EISs to "specify the underlying purpose and need to which the
13 agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. §
14 1502.13. BLM must not "adopt[] private interests to draft a narrow purpose and need statement."
15 *National Parks & Conservation Assn. v. U.S. Bureau of Land Mgmt* ("NPCA v. BLM"), 606 F.3d
16 1058, 1071 (9th Cir. 2010). The Department of the Interior's "NEPA handbook explains that the
17 'purpose and need statement for an externally generated action must describe the BLM purpose
18 and need, *not an applicant's or external proponent's purpose and need.*'" *Id.* at 1071 n. 9
19 (emphasis in original).

20 38. The FEIS states that BLM's purpose and need is to
21 respond to a FLPMA ROW application submitted by the Applicant to construct,
22 operate, maintain, and decommission a wind energy-generating facility and
23 associated infrastructure on public lands administered by the BLM in compliance
24 with FLPMA, BLM ROW regulations, and other applicable Federal laws and
25 policies.
26 FEIS 1-3. This statement of purpose and need adopts the applicant's goals and fails to consider
27 the underlying federal purpose and need for its approval of the Project. Accordingly, BLM's
28 statement of purpose and need violates NEPA.

27 **The FEIS Fails to Analyze and Improperly Dismisses Feasible and Environmentally Superior Alternatives**

28 39. NEPA requires that an EIS "[r]igorously explore and objectively evaluate all

1 reasonable alternatives” so that “reviewers may evaluate their comparative merits.” 40 C.F.R. §
2 1502.14 (quote); 42 U.S.C. § 4332. Furthermore, “[a]n agency may not define the objectives of
3 its action in terms so unreasonably narrow that only one alternative among the environmentally
4 benign ones in the agency’s power would accomplish the goals of the agency’s action, and the
5 EIS would become a foreordained formality.” *NPCA v. BLM*, 606 F.3d at 1070 (internal
6 quotations and citations omitted). “The existence of a viable but unexamined alternative renders
7 an environmental impact statement inadequate.” *Friends of Yosemite Valley v. Kempthorne*, 520
8 F.3d 1024, 1038 (9th Cir. 2008). The FEIS excludes from analysis numerous feasible
9 alternatives, including off-site alternatives and renewable energy alternatives besides industrial-
10 scale wind power. The fact that many of these alternatives would be less environmentally
11 damaging and more economically beneficial highlights the impropriety and biasing impact of
12 their exclusion.

13 40. It is clear from the outset of the section entitled “Alternatives Considered but
14 Eliminated from Detailed Analysis” that BLM used Ocotillo Express’ narrow goal of developing
15 a wind energy facility in Ocotillo as the driving consideration for selecting and eliminating
16 alternatives. Most prominently, in the introduction of that section, BLM just parroted all of the
17 *private applicant’s objectives*. FEIS 2-45. This alone demonstrates that BLM’s analysis was
18 improperly skewed toward meeting Ocotillo Express’ narrow and self-serving objectives – not
19 BLM’s overall management goals.

20 41. The FEIS then lists many alternatives that were initially considered but quickly
21 eliminated from detailed analysis, including projects using other types of renewable energy, such
22 as solar, geothermal, biomass, tidal, and wave energy, as well as conservation and demand-side
23 management and distributed solar generation alternatives. FEIS 2-48. The FEIS explains that
24 “these alternatives were not carried for NEPA purposes by the BLM because they do not respond
25 to the Agency’s purpose and need . . . to respond to [Ocotillo Express’ right-of-way] application
26 for a wind energy generation facility on public lands.” FEIS 2-48. Thus, the alternatives were
27 eliminated from consideration at the outset *not* because they did not fulfill *BLM’s* broader
28 resource management goals, such as encouraging renewable energy development, but because the

1 *applicant* wanted to build a *wind* energy facility *near Ocotillo*. *Id.* Indeed the *only* action
2 alternatives considered in the FEIS were slightly altered variations of the proposed project. FEIS
3 ES-5; 2-2 to 2-3. BLM thus violated NEPA by substituting its own purpose and need for the
4 project with Ocotillo Express’ much narrower objective of constructing the proposed wind energy
5 project in the Ocotillo area. *NPCA v. BLM*, 606 F.3d at 1070.

6 42. Additionally, the FEIS failed to analyze any off-site alternatives. The FEIS
7 dismisses off-site alternatives on the ground that wind projects of comparable electrical output
8 would not be feasible elsewhere within the County. The FEIS fails to consider potential project
9 sites *outside* Imperial County. It also fails to consider the feasibility of comparably sized projects
10 that use other forms of renewable energy technology in off-site locations. This violates NEPA.

11 **The FEIS Fails to Analyze All Parts of the Project**

12 43. The FEIS fails to analyze the impacts of the “collection line” that runs between Site
13 1 and Site 2 of the Project. FEIS, Figure 2.1-2. In fact, the line is repeatedly depicted as outside
14 of the Project boundaries. *Id.*; FEIS, Figure 3. The FEIS’ failure to address this portion of the
15 Project violates NEPA’s requirement that BLM take a hard look at all of the Project’s impacts
16 through the EIS.

17 44. In addition, the FEIS fails to analyze the recent change to the utility switchyard that
18 would allow for the construction of additional 500-kV and 230-kV lines. This new Project
19 component requires analysis, including but not limited to an analysis of its growth inducing
20 impacts. The FEIS does not include any analysis of these growth inducing impacts.

21 **The FEIS Fails to Take a “Hard Look” at Myriad Environmental Impacts**

22 45. Under NEPA, an EIS must take a “hard look” at the environmental impacts of
23 proposed major federal actions and provide a “full and fair discussion” of those impacts. 40
24 C.F.R. § 1502.1; *see also National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733
25 (9th Cir. 2001). The FEIS’ discussion of many of the Project’s environmental impacts is absent
26 or inadequate, as explained below.

27 ***Noise Impacts***

28 46. The FEIS fails to calculate, disclose or otherwise adequately analyze the impacts of

1 infrasound and low-frequency noise (“ILFN”) from Project operations. The Project, however, is
2 likely to produce enough ILFN to cause a significant adverse environmental impact. Despite the
3 evidence submitted by plaintiffs and others demonstrating that the Project-generated ILFN will
4 likely affect nearby residents’ health and welfare, BLM conclusorily dismisses ILFN impacts as
5 “unlikely to be cause for concern to health.” FEIS 5-53. Yet BLM’s assertion is not supported
6 by the applicable science, which the FEIS fails to adequately analyze in any case. Furthermore,
7 the factual basis underlying the FEIS’ no-impact conclusion – that no residences are close enough
8 to proposed wind turbines to be impacted – is refuted by evidence elsewhere in the FEIS itself.
9 Because the FEIS did not properly analyze or mitigate this impact, it violates NEPA.

10 47. BLM also violated NEPA by failing to accurately calculate and present the
11 Project’s audible noise impacts. For instance, the FEIS’ ambient noise measurements in the
12 Ocotillo area do not conform to established standards. In addition, the FEIS fails to normalize the
13 estimated Project sound levels to account for land use compatibility, thereby understating the
14 Project’s noise impacts.

15 ***Noise Impact Mitigation Measures***

16 48. Dozens of residences in Ocotillo, Coyote Wells and the surrounding areas are
17 located within 1 mile of at least one of the Project’s wind turbines. *See* FEIS 3.2-5 to 3.2-6; FEIS
18 figures 3.6-3b, 4.18-9B. To avoid the negative health impacts from wind-turbine generated
19 ILFN, such as sleep disturbance, tinnitus (ringing of the ear), nausea, unsteadiness and general
20 disequilibrium, experts recommend setbacks from large wind projects of *at least* 1 mile. FEIS
21 4.11-13. BLM ignored evidence submitted to it from experts pertaining to the need to provide an
22 adequate setback as mitigation for noise impacts and therefore violated NEPA.

23 ***Public Health Impacts – Dirty Electricity***

24 49. Electric and magnetic field (“EMF”) pollution often comes in the form of stray
25 voltage or “dirty electricity.” Stray voltage is electricity that is dumped or otherwise escapes
26 from wind turbine facilities and migrates through the ground or other media to impact human and
27 wildlife health. Dirty electricity is electromagnetic energy that flows along a conductor and
28 deviates from a pure 60-Hz sine wave. As numerous electrical pollution measurements have

1 shown, wind turbines can produce significant electrical pollution in the form of stray voltage and
2 dirty electricity. And if not adequately filtered, stray voltage and dirty electricity can be
3 propagated through the substations and onto transmission and distribution lines. By traveling
4 both along power lines and through the ground, stray voltage and dirty electricity can impact
5 people and structures more than 0.5 miles from the wind turbine source. As numerous recent
6 studies cited by plaintiffs in their DEIS and FEIS comments show, the health impacts of dirty
7 electricity and stray voltage can be severe. These studies have linked dirty electricity and stray
8 voltage with an increase in ailments such as diabetes, fibromyalgia, chronic fatigue syndrome,
9 and attention deficit disorder, among others. The FEIS presents only a minimal discussion of
10 EMF pollution and does not address the studies presented by plaintiffs and others in comments.
11 It therefore violates NEPA.

12 ***Visual Impacts – Wind Turbine Shadow Flicker***

13 50. Shadow flicker is caused by the sun rising or setting behind the rotating blades of a
14 turbine. The shadow created by the rotating blades can cause alternating light and dark shadows
15 to be cast on roads or nearby premises resulting in distraction and annoyance to drivers and
16 residents. Shadow flicker can present substantial hazards to drivers passing on nearby roads
17 because it often distracts them. Indeed, these impacts are substantial enough that some
18 jurisdictions have imposed minimum roadway setbacks for wind turbines. Here, two major
19 highways – Imperial Highway S2 and Interstate 8 – run through portions of the Project site, yet
20 the FEIS fails to examine the substantial hazard that shadow flicker poses to passing drivers. The
21 FEIS response to comments acknowledges that some of the turbines could “cause shadow flicker
22 visible from the road,” yet fails to analyze the impacts this would have on passing drivers. The
23 FEIS’ failure to analyze this potentially significant impact violates NEPA.

24 51. In addition, the FEIS fails to consider mitigation measures for the Project’s shadow
25 flicker impacts. This deficiency also violates NEPA.

26 ***Visual Impacts – Substation; Utility Switchyard; Operations and Maintenance Facility;
27 Observation Tower; Parking***

28 52. The Project includes a substation, utility switchyard, operations and maintenance
facility, and a parking lot. The substation is described as a “2.1-acre substation” with steel

1 structures . . . on concrete footings to support switches, electrical buswork, instrument
2 transformers, lightning arrestors . . . as well as termination structures for incoming and outgoing
3 transmission lines.” FEIS 2-7. The utility switchyard covers 23.5 acres and includes “circuit-
4 breakers, disconnects, switches and associated structures, buildings, and relay protection.” FEIS
5 2-7. The operations and maintenance facility is described as a 3.4 acre facility comprising four,
6 permanent administrative, maintenance, and storage building structures” surrounded by a
7 “permanent 7-foot-high security fence.” FEIS 2-5. The 50-foot observation tower will be located
8 at the operations and maintenance facility. *Id.* In addition, an unknown number of parking spots
9 will be constructed at the operations and maintenance facility. *Id.*

10 53. Focused on the visual impacts of the wind turbines, the FEIS fails to address the
11 visual impacts of these other Project facilities in both the text of its impacts analysis and its visual
12 simulations. Accordingly, the FEIS’ visual impacts analysis violates NEPA.

13 ***Visual Impacts – Visual Resource Management (“VRM”) Class***

14 54. The significance of the visual effects of the Project on the area was assessed by
15 comparing the level of visual contrast between the alternatives and the existing landscape
16 character. According to the FEIS, the Project site falls under BLM’s Visual Resource
17 Management (“VRM”) Class IV, which allows “a high level of change to the landscape,
18 including activities that may dominate views.” FEIS 4.18-1. The FEIS refers the reader to its
19 appendices for a more thorough evaluation of the visual resources. The appendices, however,
20 identify the Project site as a VRM Class II and III landscape (FEIS E-2-6). These classifications
21 are much more protective of viewsheds and do not allow activities that will attract the attention of
22 (Class II) or “dominate the view of the casual observer” (Class III). *Id.*; Appendix E-1.

23 55. Because the FEIS fails to consistently describe the Project site’s VRM
24 Classification, it violates NEPA.

25 ***Biological Impacts – Avian Species***

26 56. First, the FEIS does not include an analysis of the Project’s contribution to total
27 cumulative golden eagle mortality in California, which is already approaching precipitous levels.
28 Tellingly, the FEIS does not even address the cumulative impacts to golden eagles *on the Project*

1 *site*. It ignores, for example, the impacts from the continuing construction of the Powerlink,
2 which bisects the Project site.

3 57. Second, the FEIS fails to properly analyze the Project's noise impact on birds.
4 Particularly sensitive species in – or potentially in – the Project area include the loggerhead
5 shrike, burrowing owl, and Le Conte's thrasher. FEIS 4.21-6 to 7. The FEIS does not address
6 the Project's noise impacts on these and other bird species in the area.

7 58. Third, the FEIS largely ignores the impacts of the Project on the myriad local bat
8 species, claiming that the site is not frequented by many bats. This claim is based on the FEIS'
9 assessment that there are not adequate standing water sources on site to foster the invertebrate
10 prey that would attract bats to the site. FEIS, p. 4.21-7. Yet the Project proponent will be
11 required to construct water basins on the site that will provide the very invertebrate habitat the
12 FEIS claims does not exist. FEIS, p. 4.19-11; p. 4.19-64. The FEIS fails to address the Project's
13 potential to attract bats to the site and the consequent hazards to those bats. These hazards
14 include not only death through direct collision with wind turbines, but also harm through
15 barotrauma, a condition in which the air pressure differential caused by the wind turbines injures
16 bats' lungs, causing them to bleed. Barotrauma was not adequately addressed in the FEIS.

17 59. Fourth, the FEIS failed to adequately address the color of the Project's wind
18 turbines. While lighter color turbines may be visually preferable for humans, white, light gray,
19 and yellow turbines may attract the most flying insects – and hence the birds and bats that feed on
20 them. The FEIS' failure to analyze the impacts of turbine color selection on biological resources
21 violates NEPA.

22 60. Fifth, despite the federal Environmental Protection Agency's ("EPA's") requests to
23 do so, BLM failed to undertake nocturnal avian surveys that shed light on the avian collision
24 impacts and provide critical information for mitigating those impacts. In fact, the FEIS admits
25 that "[i]t is likely that nocturnal species such as owls (Order Strigiformes), nightjars (Family
26 Caprimulgidae), etc., and species that migrate at night would be at a higher risk of collision as
27 compared to diurnally active species, as the [wind turbine generators ("WTGs")] may not be
28 visible to the species migrating at night." FEIS, p. 4.21-17. BLM's failure to study nocturnal

1 impacts violates NEPA.

2 ***Biological Impacts – Peninsular Bighorn Sheep***

3 61. The Project site encompasses nearly 3,700 acres of Essential Habitat designated by
4 the U.S. Fish and Wildlife Service for the endangered Peninsular bighorn sheep. FEIS 4.21-8.
5 The Project also occupies land previously designated as Critical Habitat for the sheep. Pending
6 litigation may force restoration of this previous designation. *Center for Biological Diversity, et*
7 *al. v. U.S. Fish and Wildlife Service, et al.*, Ninth Circuit Docket No. 11-57057. The FEIS fails to
8 consider whether restoration of this designation would require revision of the FEIS’ analysis of
9 the Project’s impacts on and mitigation measures for Peninsular Bighorn Sheep.

10 62. Further, the FEIS admits that “[i]t is not known how [Peninsular bighorn sheep]
11 would respond when the WTG blades are operating.” FEIS 4.21-22. Instead of filling this
12 analytic gap through appropriate studies and monitoring, the FEIS justifies its analytic omissions
13 by stating that no “studies of [Peninsular bighorn sheep] use of wind energy project sites are
14 available.” *Id.* This significant informational gap violates NEPA.

15 63. Finally, the FEIS only cites studies that favor its position that the Peninsular
16 bighorn sheep will likely adapt over time to the presence of wind turbines, ignoring studies that
17 say the opposite in violation of NEPA.

18 ***Cultural Resources***

19 64. The FEIS identifies the Project site and surrounding area as rich in archaeological
20 and cultural resources. FEIS, Section 3.4. A survey commissioned by BLM found 287
21 archaeological sites within the Project area. *Id.*, 3.4-22. The Project site *remains* an important
22 location for cultural and religious purposes for local Native American Tribes. Yet the FEIS does
23 not analyze the impacts of Project construction and operation on *current* ceremonial uses. FEIS,
24 p. 4.4-21 (“BLM was not able to analyze in detail the impacts the project might have on [current]
25 ceremonial uses from an access or visual, auditory, and atmospheric intrusion perspective”).

26 65. Relatedly, BLM failed to determine whether the entire Project site constitutes a
27 traditional cultural property (“TCP”) or cultural landscape eligible for listing on the National
28

1 Register of Historic Places. FEIS, p. 3.4-17 (“BLM acknowledges that further research may also
2 reveal the potential for there to exist within the proposed [Project site] a cultural landscape”); p.
3 5-17. Without this information, decisionmakers could not determine the significance of Project
4 approval on the overall value of the Project site to local Tribes.

5 66. Additionally, the FEIS fails to adequately address the cumulative impacts of the
6 Project on cultural resources because it arbitrarily limits the scope of its analysis to the Project
7 site plus a 10-mile radius around the Project site. FEIS 4.4-31. Yet the majority of the projects
8 that are considered cumulative in the FEIS for *other* purposes fall outside of the 10-mile radius.
9 FEIS, Figure 4.1-1a. Moreover, the geographic boundaries of the Tribes for whom the Project
10 site is culturally significant extend far beyond the artificial 10-mile radius. For example, the
11 Quechan Tribe’s Fort Yuma Reservation is centered in Yuma, Arizona, approximately *90 miles*
12 from the Project site. BLM’s restricted cumulative cultural impacts analysis failed to take a hard
13 look at cumulative cultural impacts and thus violates NEPA.

14 ***Lands and Realty***

15 67. As discussed above, the Project site is surrounded by numerous special land use
16 areas, including the Jacumba Wilderness Area, the Yuha Basin Area of Critical Environmental
17 Concern, the Plaster City Off-Highway Vehicle Open Area, the Coyote Mountains Wilderness,
18 and the Anza-Borrego Desert State Park. The FEIS’ lands and realty section fails to adequately
19 discuss the impacts of the Project on these lands.

20 ***Increased Access***

21 68. Greater access to the remote areas of the Project site will increase the spread of
22 invasive species, disruption of natural resources, the risk of wildfires, air pollution, and threats to
23 archaeological sites, among other impacts. The FEIS’ failure to identify and mitigate the increase
24 in impacts due to the increased Project site access violates NEPA.

25 ***Soil Resources – Desert Pavement***

26 69. The Project area includes large areas of desert pavement, a unique and sensitive
27 geologic feature that protects underlying sands from wind and water erosion. FEIS, p. 3.4-3.
28

1 Project construction will destroy desert pavement and thereby cause extensive erosion of the soils
2 on the Project site. Despite EPA’s numerous critiques of the EIS process for not addressing
3 desert pavement, the FEIS does not analyze the Project’s impacts on this natural resource or
4 attempt to mitigate these impacts. It therefore violates NEPA.

5 ***Environmental Justice***

6 70. Executive Order 12898 (1994) requires federal agencies to analyze the effects of
7 proposed projects on minority communities. The FEIS’ environmental justice section does not
8 address the disproportionate impacts of the Project on the region’s Native Americans, including
9 the effects of the Project on cultural and religious sites in the area. FEIS, p. 4.5-1. The FEIS
10 does so by limiting the scope of its environmental justice analysis to include only communities
11 that are found within one-half mile of the Project site. FEIS, p. 3.5-1. This artificial limitation
12 violates NEPA by excluding the minority communities that will be most profoundly affected by
13 the Project.

14 **The FEIS Improperly Defers Analysis of Mitigation Measures**

15 71. The FEIS defers specification of numerous mitigation measures until after the
16 completion of environmental review. The deferred measures include, among others, the Spill
17 Prevention Containment and Countermeasure Plan, the Construction Waste Management Plan,
18 the Restoration Plan, the Noxious Weed Control Program, the Integrated Pest Management
19 Program, the Traffic Management Plan, the Transportation Plan, the Storm Water Pollution
20 Prevention Plan, the Cultural Resource Monitoring and Mitigation Plan, the Fugitive Dust
21 Control Plan, the Dust Abatement Plan, and the Eagle Conservation Plan. BLM’s deferral of all
22 of these mitigation plans violates NEPA.

23 72. In addition, the FEIS defers analysis of the site-specific geologic hazards until after
24 Project approval. FEIS 4.11-40. Mitigation measure PHS-3 requires Ocotillo Express to prepare
25 a “full geotechnical study,” which will then be used to determine the final siting and design of the
26 Project facilities. Changing the design and location of the turbines to avoid geotechnical hazards,
27 however, may produce significant impacts on other categories of resources, such as cultural and
28

1 biological resources. A full geotechnical study and report should have been completed and
2 presented in the DEIS so that the public could comment on the adequacy of the study. Deferring
3 this analysis until *after* BLM has completed the NEPA process and made a decision on the
4 Project violates NEPA.

5 **BLM Failed to Adequately Respond to Comments**

6 73. BLM failed to adequately address many of the comments submitted to it on the
7 DEIS, including, but not limited to, critical information about infrasound and low-frequency
8 noise, water resources, noise, and dirty electricity. BLM’s failure to address the concerns raised
9 in public comments violates NEPA.

10 **SECOND CLAIM FOR RELIEF**

11 (Violation of FLPMA)

12 (Against All Defendants)

13 74. Plaintiffs incorporate by reference all preceding paragraphs.

14 75. FLPMA, 43 U.S.C. section 1701 *et seq.*, mandates that the “Secretary shall manage
15 the public lands under principles of multiple use and sustained yield, *in accordance with the land*
16 *use plans . . . developed under [43 U.S.C. section] 1712 . . . when they are available.” 43 U.S.C.*
17 *§ 1732(a) (emphasis added).* The Project is a high-intensity, single use of resources that would
18 displace all other uses and destroy at least 10,151 acres of desert habitat in the CDCA. ROD ES-
19 1. The CDCA Plan provides for four distinct multiple use classes (“MUC”) based on the
20 sensitivity of resources in each area. The proposed Project site is in MUC Class L (Limited Use),
21 which “protects sensitive, natural, scenic, ecological, and cultural resources values.” According
22 to the CDCA Plan, “[p]ublic lands designated as Class L are managed to provide for generally
23 lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive
24 values are not significantly diminished.” CDCA Plan at 13.

25 76. The Project is *high*, not low, intensity. Its operation would destroy a large number
26 of sensitive natural resources, as detailed above. Therefore, the Project directly conflicts with the
27 CDCA Plan’s overarching protections of the “sensitive, natural, scenic, ecological, and cultural
28

1 resources values of the site.” *Id.* The Project’s noise levels and blade-impact mortality on birds
2 alone preclude the Project’s compliance with the CDCA Plan’s protections of sensitive avian
3 species. Further, the Project’s severe adverse impacts on the area’s spectacular scenic resources
4 flatly conflict with the CDCA Plan’s protection of scenery. CDCA Plan at 13; FEIS 1-9. The
5 Project also conflicts with protection of the area’s Peninsular bighorn sheep. FEIS 1-9; CDCA
6 Plan at 13; FEIS App. F4-41; FEIS App. O 6.

7 77. With respect to sensitive species, the CDCA Plan requires BLM “to conserve
8 and/or recover listed species, and to initiate conservation measures to reduce or eliminate threats
9 to BLM sensitive species to minimize the likelihood of and need for listing.” FEIS 4.8-5. The
10 FEIS identifies a number of BLM sensitive species, including the Peninsular bighorn sheep, flat-
11 tailed horned lizard, barefoot banded gecko, Golden Eagles, and migratory birds and bats that the
12 Project will harm. *Id.* In its evaluation of the Project’s consistency with the CDCA Plan’s MUC
13 Class L, the FEIS simplistically concludes that all of the sensitive species “on the project site
14 would be protected under a number of mitigating measures meant to avoid, minimize, or
15 compensate for impacts from the project” FEIS 4.8-5. Even with mitigation, however, the
16 Project will directly harm identified sensitive species in violation of the CDCA Plan
17 requirements.

18 78. The Project’s significant wildlife impacts are numerous, though BLM has avoided
19 specifying many of them by simply failing to analyze them. For example, as discussed above, the
20 FEIS states that “[i]t is not known how [Peninsular bighorn sheep] would respond when the
21 [turbine] blades are operating” FEIS 4.21-22. Nonetheless, BLM admits that the Project
22 will “have a significant direct impact to 167.2 acres of USFWS Essential Habitat for [Peninsular
23 bighorn sheep].” FEIS 4.21-24. The FEIS also acknowledges that the Project “could result in
24 significant impacts to special status nesting bird species resulting from destruction or
25 abandonment of active nests or mortality of adults, young, or eggs” and shows that the risk of
26 collision during operation of the wind turbines has the potential to significantly impact golden
27 eagles, multiple raptor species and a long list of “special status avian species.” FEIS 4.21-25 to
28

1 4.21-26. While some of the mitigation measures listed in the FEIS may reduce these impacts,
2 those measures will not protect special status avian species to the extent called for in the CDCA
3 Plan. Therefore, BLM’s approval of the Project violated FLPMA.

4 79. BLM’s Project approval also violated FLPMA because the Project will conflict
5 with the CDCA Plan’s protection of scenery. According to the FEIS appendices addressing
6 visual resources, the Project area has been designated as a VRM Class II and III area. VRM II
7 requires that all activities “retain the existing character of the landscape” and “not attract that
8 attention of the casual observer.” VRM III only allows a “moderate or lower” level of change to
9 the “characteristic landscape” and does not allow activities that “dominate the view of the casual
10 observer.” FEIS-2-4; Appendix E-1. The analysis of the Project’s visual impacts in the body of
11 the FEIS, however, states that the Project would “take place on BLM-administered lands to be
12 managed under a Interim VRM Class IV designation.” FEIS 4.18-1. Neither the FEIS, nor
13 BLM’s ROD clarifies this contradiction in the VRM classifications. The CDCA Plan requires
14 that “visual values be considered and that those considerations be documented as part of the
15 decision-making process.” FEIS E-2-6. BLM failed to consider the visual values of the Project
16 in a consistent analysis. It also did not document its consideration of the visual values in a
17 consistent manner. BLM’s approval of the Project thus violated the Plan and FLPMA.

18 80. Additionally, BLM’s Project approval violated FLPMA and the CDCA Plan by
19 failing to ensure adequate protection of cultural resources. The CDCA Plan requires that “Native
20 American cultural and religious values will be protected and preserved.” FEIS 4.8-2. The FEIS
21 goes on to explain that mitigation measures will “ensure that preservation and protection of
22 Native American cultural and religious values associated with cultural resources is accomplished
23” FEIS 4.8-2. The ROD, however, undercuts that assurance by admitting that, in the end,
24 “there will be *unmitigated* adverse affects associated with the [] Project” on cultural resources.
25 ROD 30. Thus, BLM admits that it failed to protect and preserve “Native American cultural and
26 religious values” and thereby violated the CDCA Plan. *Id.*

27 81. FLPMA also directs that:
28

1 the public lands be managed in a manner that will protect the quality of scientific,
2 scenic, historical, ecological, environmental, air and atmospheric, water resource,
3 and archeological values; that, where appropriate, will preserve and protect certain
4 public lands in their natural condition; that will provide food and habitat for fish and
wildlife and domestic animals; and that will provide for outdoor recreation and
human occupancy and use.

5 43 U.S.C. § 1701(a)(8). FLPMA mandates that “[i]n managing the public lands the Secretary
6 shall . . . take any action necessary to prevent unnecessary or undue degradation of the lands.” *Id.*
7 § 1732(b). Contrary to these mandates, the Plan Amendment approves a wind energy project on
8 desert land that will be visible for miles and degrade, impair, or destroy countless resources. The
9 CDCA Plan Amendment’s allowance of widespread, intensive wind energy development on these
10 desert lands violates FLPMA because it substantially degrades a valuable scenic resource within
11 the Planning Area.

12 **THIRD CLAIM FOR RELIEF**

13 (Violation of the Migratory Bird Treaty Act)

14 (Against All Defendants)

15 82. Plaintiffs incorporate by reference all preceding paragraphs.

16 83. The Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. sections 701 *et seq.*, directs
17 that unless otherwise permitted, “it shall be unlawful at any time, by any means or in any manner,
18 to . . . take [or] kill . . . any migratory bird . . . nest, or egg of any such bird . . . included in the
19 terms of the conventions between the United States and Great Britain . . . the United Mexican
20 States . . . the government of Japan . . . and the Union of Soviet Socialist Republics for the
21 conservation of migratory birds and their environments” 16 U.S.C. sections 703.

22 84. The MBTA applies with equal force to federal agencies as it does to private
23 individuals. *Humane Society of the U.S. v. Glickman*, 217 F.3d 882, 884-88 (D.C.Cir. 2000);
24 *American Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1032 (D.C.Cir. 2008). And it may be
25 enforced against the federal government by private citizens through the APA. *Id.* “[A]nyone
26 who is ‘adversely affected or aggrieved’ by an agency action alleged to have violated the MBTA
27 has standing to seek judicial review of that action.” *City of Sausalito v. O’Neill*, 386 F.3d 1186,
28

1 1203-1204 (9th Cir. 2004). Under the MBTA, federal agencies such as defendant BLM must
2 “seek authorization from the Secretary” of the Interior before approving activities – such as
3 operation of the Project’s wind turbines – that directly kill migratory birds. *Id.*, 386 F.3d at 1225.

4 85. Numerous migratory bird species inhabit or use the Project site, including the
5 golden eagle, the burrowing owl, the Swainson’s hawk, the Cooper’s hawk, the Vaux’s swift, the
6 Brewer’s sparrow, the Le Conte’s thrasher, the loggerhead shrike, the sharp-shinned hawk, the
7 long-eared owl, the brant, the ferruginous hawk, the northern harrier, the willow flycatcher, the
8 merlin, the prairie falcon, the peregrine falcon, the osprey, the turkey vulture, and the red-tailed
9 hawk. FEIS 3.23-4 to 8.

10 86. As the FEIS recognizes, the Project is likely to kill many of these migratory birds
11 during both the construction and operation phases. FEIS 4.21-4 (Project construction “may result
12 in direct mortality [of burrowing owls] through crushing of adults, young, or eggs within burrows
13”), 4.21-6 (Project “could result in direct and indirect impacts to nesting bird species
14 protected under . . . the Migratory Bird Treaty Act”), 4.21-11 to 12 (similar impacts from Project
15 operation), FEIS 4.21-13 (“Operation of the [Project] would impact avian and bat species as a
16 result of collisions with project features”), 4.21-17 (burrowing owl, Vaux’s swifts, Brewer’s
17 sparrows, and loggerhead shrikes all “at risk of collision with the turbines”), 4.21-18 (red-tailed
18 hawks “at high risk of collision” with turbines). The Project Avian and Bat Protection Plan
19 further estimates the likely fatality rates for some of the bird species found on site. FEIS
20 Appendix L6 at 34 (up to 35 estimated raptor kills per year, or 0.11 fatalities per megawatt per
21 year), 40 (significantly higher fatality rates for non-raptor species).

22 87. Despite the fact that the Project is likely to kill many migratory birds during both
23 the construction and operation phases, BLM has not applied for or secured any permits under the
24 MBTA for killing migratory birds. FEIS 1-15 (failing to list an MTBA permit as an
25 “[e]ntitlement[] [r]equired for the [p]roposed [Project]”). Nor did BLM condition its Project
26 approvals on the Project applicant, Ocotillo Express LLC, obtaining the necessary MBTA
27 permits. ROD 20-26.

1 88. By failing to first obtain or require that the Project applicant or operators obtain an
2 MBTA permit, BLM violated the MBTA (16 U.S.C. section 703) and the APA's prohibition on
3 unlawful agency action (5 U.S.C. section 706(2)(A) and (D)) by approving the Project and the
4 resultant slaughter of scores of migratory birds.

5 **PRAYER FOR RELIEF**

6 89. As relief for the above violations of law, plaintiffs respectfully request the
7 following:

- 8 1. Adjudge and declare that the BLM's May 2012 approval of a right-of-way
9 and CDCA Plan amendment for the Project violates NEPA, FLPMA, the
10 MBTA, and the APA;
- 11 2. Order BLM to withdraw its EIS, Plan Amendment, and right-of-way grant
12 for the Project until such time as it has complied with the requirements of the
13 NEPA, FLPMA, the MBTA, and their implementing regulations;
- 14 3. Preliminarily and permanently enjoin BLM from initiating or permitting any
15 activities in furtherance of the Project that could result in any change or
16 alteration of the physical environment unless and until the defendants
17 comply with the requirements of NEPA, FLPMA, the MBTA, and their
18 implementing regulations;
- 19 4. Award plaintiffs their reasonable attorneys' fees and costs and expenses
20 incurred in connection with the litigation of this action pursuant to the Equal
21 Access to Justice Act, 28 U.S.C. § 2412, or as otherwise provided by law;
22 and
- 23 5. Any other relief that this Court deems just and proper.

24 Dated: September 11, 2012

Respectfully submitted,

25 s/ Stephan C. Volker
26 STEPHAN C. VOLKER
27 Attorney for Plaintiffs THE PROTECT OUR
28 COMMUNITIES FOUNDATION, BACKCOUNTRY
AGAINST DUMPS, and DONNA TISDALE