

1 LAURENS H. SILVER (SBN 55339)
2 CALIFORNIA ENVIRONMENTAL LAW PROJECT
3 P.O. Box 667
4 Mill Valley, California 94942
5 Telephone: (415) 515 - 5688
6 Facsimile: (510) 237 -6598
7 E-mail: larrysilver@earthlink.net

8 *Attorney for Desert Protective Council*

9 MICHAEL R. LOZEAU (Cal. Bar No. 142893)
10 RICHARD DRURY (Cal. Bar No. 163559)
11 CHRISTINA M. CARO (Cal. Bar. No. 250797)
12 SAMUEL B. JOHNSTON (Cal. Bar No. 252896)
13 LOZEAU | DRURY LLP
14 410 12th Street, Suite 250
15 Oakland, CA 94607
16 Tel: (510) 836-4200
17 Fax: (510) 836-4205
18 E-mail: richard@lozeaudrury.com
19 michael@lozeaudrury.com
20 sam@lozeaudrury.com

21 *Attorneys for Plaintiffs, Laborers' International Union of North America Local Union No.*
22 *1124, Hector Casillas, and John Norton.*

23
24
25
26
27
28
**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

DESERT PROTECTIVE COUNCIL, a
California nonprofit corporation, LABORERS'
INTERNATIONAL UNION OF NORTH
AMERICA LOCAL UNION NO. 1184, an
organized labor union; Hector Casillas, an
individual; and John Norton, an individual

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE
INTERIOR; KEN SALAZAR, Secretary, U.S.
Department of the Interior; UNITED STATES
BUREAU OF LAND MANAGEMENT;
ROBERT ABBEY, Director, U.S. Bureau of
Land Management; TERI RAML, District

Case No.: _____

**COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

[National Environmental Policy Act;
Federal Land Management and Policy Act;
Administrative Procedure Act; California
Environmental Quality Act PRC §21000, et
seq.; CCP §1094.5 (§1085); State Planning
and Zoning Law (Govt. Code §65300 *et*
seq.); California Fish & Game Code §§2081
et seq., 3503.5, 3511, 4700; Declaratory
Relief (CCP §1060)]

1 Manager, BLM California Desert District;
2 MARGARET GOODRO, Field Manager, BLM
3 El Centro Field Office; COUNTY OF
4 IMPERIAL, CALIFORNIA; BOARD OF
5 SUPERVISORS OF THE COUNTY OF
6 IMPERIAL; OCOTILLO EXPRESS LLC, a
7 wholly-owned subsidiary of PATTERN
8 ENERGY GROUP LP, a Delaware Limited
9 Partnership; PATTERN ENERGY GROUP LP,
10 a Delaware Limited Partnership,

11 Defendants.

12 INTRODUCTION

13 1. This is a civil action for declaratory and injunctive relief arising under laws of the
14 United States and of the State of California. Plaintiffs DESERT PROTECTIVE COUNCIL,
15 LABORERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL UNION NO.
16 1184 ("LIUNA"), Hector Casillas, and John Norton (hereinafter "Plaintiffs") challenge the
17 Bureau of Land Management's ("BLM") and other approvals relating to the Ocotillo Wind
18 Energy Facility ("OWEF" or "Project") on BLM land in Imperial County, California. The
19 approvals by BLM challenged herein include a right-of-way ("ROW") grant by BLM for the
20 OWEF and a Plan Amendment ("PA") to the California Desert Conservation Area ("CDCA")
21 Plan of 1980. Plaintiffs challenge these actions by the BLM as violating the National
22 Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 *et. seq.*, the Federal Land Management
23 and Policy Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et. seq.*, the Bald and Golden Eagle
24 Protection Act ("BGEPA"), 16 U.S.C. § 1701 *et. seq.*, and the Administrative Procedure Act
25 ("APA"), 5 U.S.C. § 500 *et. seq.* Plaintiffs seek a declaratory judgment and an injunction that
26 among other things sets aside the aforementioned approvals.

27 2. In this action, Plaintiffs also challenge the approvals of the OWEF project awarded by
28 the County of Imperial, California ("County"), including the certification of the Final

1 Environmental Impact Statement/Environmental Impact Report, adoption of Conditional Use
2 Permit (“CUP”) No. 10-0007, adoption of Variance No. 10-0001, and associated Findings.
3 Plaintiffs allege that these approvals were in violation of the California Environmental Quality
4 Act (“CEQA”), Public Resources Code (“PRC”) § 21000 *et. seq.*, the California Endangered
5 Species Act (“CESA”), California Fish and Game Code (“FGC”) § 2050 *et. seq.*, the California
6 Fish and Game Code, including but not limited to §§ 3503.5, 3511, and 4700 thereof,
7 California’s Planning and Zoning Law (Govt. Code §65300 *et seq.*).
8

9 3. The OWEF is a mammoth project proposal that would convert over 10,000 acres of
10 public lands into an industrial wind energy facility consisting of some 112 wind turbines and
11 associated industrial electrical facilities. According to the Record of Decision (“ROD”) released
12 by BLM, the OWEF would involve “installation of wind turbines, ... the construction of new
13 access roads, an operation and maintenance (O&M) facility with associated utility routing, the
14 electrical collection system, the Project substation, the utility switchyard, utility staging and
15 storage areas, up to three permanent meteorological towers, temporary work areas, fencing, and
16 a concrete batch plan/construction laydown area.” (ROD, p. 2) All of this is slated to be
17 constructed in an area which was, until BLM’s approval of this project, protected by the CDCA
18 Plan against projects that would disturb the desert ecosystem such as wind development
19 projects. Thus, the BLM has amended the CDCA Plan to allow for wind projects such as
20 OWEF.
21

22 4. BLM has identified the project site as containing high value lands for numerous
23 protected species, including golden eagle, burrowing owl, Peninsula bighorn sheep, migratory
24 birds, bats, and other species. In evaluating the project’s impact on these and other protected
25 species, BLM ignored relevant scientific information, failed to assess the baseline from which
26
27
28

1 to measure impacts, failed to fully and accurately assess some impacts and overlooked others,
2 and failed to provide avoidance or mitigation measures sufficient to bring the project into
3 compliance with law. For these reasons and others set forth herein, Plaintiffs seek: (i) an order
4 setting aside BLM's ROD, and approval of a FEIS/EIR, and a ROW grant and CDCA Plan
5 Amendment for the OWEF and remanding the matter to BLM to correct the defective analyses
6 identified herein; (ii) an injunction prohibiting BLM from issuing a notice to proceed for the
7 Project or, if such notice has already been issued, halting the Project and any ground-disturbing
8 activities until Defendants' violations are remedied; and (iii) such other relief as is requested
9 herein.
10

11 5. In certifying the FEIS/EIR for the OWEF project and approving CUP No. 10-0007 and
12 Variance No. 10-0001, the County abused its discretion and failed to proceed in a manner
13 required by law. The project description and environmental setting information in the FEIS/EIR
14 was inadequate, unstable and incomplete. The FEIS/EIR fails to perform and/or complete
15 required surveys for threatened and endangered species, and fails to adequately evaluate impacts
16 to biological resources, among other resources. The FEIS/EIR fails to identify feasible or
17 adequate mitigation measures. The County's Findings justifying its Statement of Overriding
18 Considerations are not supported by substantial evidence, fail to ensure compliance with all
19 other laws and regulations in violation of CEQA, and are not in compliance with noise
20 standards embodied in the County's Noise Ordinance. The FEIS/EIR fails to assure that impacts
21 to state-listed species will be fully mitigated in violation of California Fish and Game Code
22 ("FGC") § 2081 et. seq. The Mitigation, Monitoring, and Reporting Program approved by the
23 County and the conditions attached to the CUP approved by the County violate the FGC by
24 failing to prevent the take of species that are fully protected against incidental take under,
25
26
27
28

1 without limitation, California FGC §§ 3503.5, 3511 and 4700. Recirculation of the FEIS/EIR, or
2 alternatively, a supplemental EIR is required due to the addition of significant new information
3 to the FEIS/EIR before certification of the FEIS/EIR. The project was approved by the County,
4 moreover, in violation of the County's General Plan and zoning regulations.

5 6. Plaintiffs request a peremptory writ of mandate in the first instance ordering the County
6 to set aside its certification of the FEIS/EIR and any and all project approvals including but not
7 limited to the CUP and Variance, and to comply with all provisions of CEQA, CESA, the Fish
8 and Game Code, land use and planning laws, and other applicable laws prior to further
9 consideration of the OWEF project.
10

11 7. Should Plaintiffs prevail on the merits, they will seek an award of attorneys' fees, costs,
12 and other expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or
13 pursuant to California Code of Civil Procedure § 1021.5, and any and all other applicable
14 provisions of law.
15

16 **JURISDICTION AND VENUE**

17 8. Jurisdiction is proper in this Court pursuant to the APA's scope of review provision, 5
18 U.S.C. § 706(2), and 28 U.S.C. § 1331 (federal question jurisdiction). This Court has
19 jurisdiction under 28 U.S.C. § 1331 because this action involves an agency of the United States
20 as a defendant, and arises under the laws of the United States, including NEPA, 42 U.S.C. 4331
21 *et. seq.*, FLPMA, 43 U.S.C. § 1701 *et. seq.*, and the Administrative Procedure Act, 5 U.S.C. §
22 500 *et. seq.* An actual, justiciable controversy exists between Plaintiffs and Defendants. This
23 court may also issue a declaratory judgment or injunction pursuant to 28 U.S.C. §§ 2201 and
24 2202. Defendants' actions are final and subject to judicial review under 5 U.S.C. §§ 702, 704,
25
26
27
28

1 and 706. Supplemental jurisdiction over state claims is proper in this Court pursuant to 28
2 U.S.C. § 1367.

3 9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e)(1),
4 because a substantial part of the events giving rise to Plaintiffs' claims occurred in this judicial
5 district. Defendant Pattern has an office in San Diego County, in La Jolla at 4225 Executive
6 Square, Suite 260, La Jolla, CA.
7

8 **PARTIES**

9 **A. Plaintiffs**

10 10. Plaintiff DESERT PROTECTIVE COUNCIL is a 501(c) (3) non-profit membership
11 organization founded in 1954 with nationwide membership. Its mission is to safeguard and
12 preserve for this and succeeding generations the scenic, historical, spiritual, natural, cultural and
13 recreational values of the southwest deserts and to educate children and adults to a better
14 understanding of the deserts. The DPC works through education, land stewardship and
15 advocacy. The DPC's board, staff and members use the lands and waters within the CDCA
16 planning area, including the lands and waters that would be affected by the proposed Project,
17 for quiet recreation (including hiking and camping), photography, scientific research, aesthetic
18 pursuits, and spiritual renewal. The DPC has participated in land use planning efforts across the
19 American southwest deserts for decades, including having participated in the 1970's public
20 process resulting in the enactment by Congress of FLPMA. DPC participated extensively in the
21 hearings held on the CDCA Plan.
22
23
24

25
26 11. Plaintiff LIUNA Local Union No. 1184 is a non-profit laborers' and public service
27 employees' union with numerous members living in Imperial County. LIUNA Local Union No.
28

1 1184 has about 4,000 members in Riverside and Imperial Counties. LIUNA Local Union No.
2 1184 and its members in Imperial County have several distinct legally cognizable interests in
3 this project.

4 12. Plaintiff LIUNA Local Union No. 1184 members purchase utility services in California,
5 and to the extent that the OWEF project will result in changes in electricity rates in the region,
6 LIUNA Local Union No. 1184 members will be directly impacted.
7

8 13. Plaintiff LIUNA Local Union No. 1184 members enjoy the natural environment of
9 Imperial County and the California desert areas in particular. LIUNA Local Union No. 1184
10 members regularly travel to the California Desert Conservation Area to enjoy its peaceful
11 repose and diversity and rarity of species of plants and animals. As members of the public,
12 moreover, LIUNA Local Union No. 1184 members possess an ownership interest in public
13 resources present in the California Desert Conservation Area including but not limited to the
14 species therein listed under the state and federal Endangered Species Acts.
15

16 14. Plaintiff LIUNA Local Union No. 1184 members living in Imperial County participate
17 in the local job markets of Imperial County and towns and cities in Imperial County. The Fiscal
18 Impact Study prepared by the Development Management Group, Inc. for the project and dated
19 March 15, 2012 projects that the project will generate “approximately 350 full time- equivalent
20 construction jobs lasting an average of 18 months and 17.5 permanent operational jobs. The
21 land is currently void of any commercial job creating activity and therefore each of these jobs is
22 a net new job to the regional economy.” Thus, the impact of the project on the local job market
23 will directly and significantly impact both the ability of LIUNA Local Union No. 1184
24 members to acquire employment in the region and the quality and pay-grade of jobs in the
25
26
27
28

1 region. LIUNA member may be exposed constructions hazards such as Valley Fever and other
2 construction-related risks that have not been adequately analyzed or mitigated.

3 15. Plaintiff LIUNA Local Union No. 1184 represents construction workers and public
4 service employees in many settings, including collective bargaining, seeking employment,
5 training programs, legal rights, job safety, and workplace fairness. LIUNA Local Union No.
6 1184 advocates for programs and policies that promote good jobs and a healthy natural and
7 working environment for workers and their families. An important part of LIUNA Local Union
8 No. 1184's ongoing advocacy involves participating in and, where appropriate, challenging
9 Projects that would result in harmful environmental effects, or the violation of environmental
10 laws, to the detriment of the interests of LIUNA Local Union No. 1184's members. The
11 interests of LIUNA Local Union No. 1184's members in this project are unique and will be
12 directly impacted by the outcome of this proceeding. LIUNA Local Union No. 1184's interests
13 are not adequately represented by other parties.
14

15 16. Plaintiff Hector Casillas resides in El Centro, CA near the proposed project site. Mr.
16 Casillas and his property would be directly impacted by the construction, operation,
17 maintenance, and decommissioning of the project. His interests are unique and are not
18 adequately represented by other parties.
19

20 17. Plaintiff John Norton resides in Niland, CA near the proposed project site. Mr. Norton
21 and his property would be directly impacted by the construction, operation, maintenance, and
22 decommissioning of the project. His interests are unique and are not adequately represented by
23 other parties.
24

25 18. Plaintiff LIUNA Local Union No. 1184 participated at the administrative level by
26 submitting comments in writing and orally at the hearing on the project held by the Imperial
27
28

1 County Planning Commission on March 28, 2012. LIUNA Local Union No. 1184 has been and
2 remains willing to discuss a solution with the County and the BLM. Notwithstanding LIUNA
3 Local Union No. 1184's attempts to engage the County and the BLM regarding the concerns
4 LIUNA Local Union No. 1184 has with this project, the County's Planning Commission has
5 disregarded LIUNA Local Union No. 1184's concerns, failed to correct its errors, and approved
6 the project.
7

8 **B. Defendants**

9 19. Defendant United States Department of the Interior is an agency of the federal
10 government. Ken Salazar is the Secretary of the United States Department of the Interior and is
11 sued here in his official capacity. On May 11, 2012, Secretary Salazar approved the ROD for
12 OWEF.
13

14 20. Defendant United States Bureau of Land Management ("BLM") is the agency within the
15 United States Department of the Interior that manages the national system of public lands
16 including the approximately 12,500 acres comprising the OWEF project site. Robert Abbey is
17 the Director of BLM and is sued here in his official capacity. On May 9, 2012, Director Abbey
18 approved the right-of-way grant for the OWEF. Defendant Teri Raml is District Manager of the
19 United States Bureau of Land Management's California Desert District Office and named
20 herein in an official capacity. Defendant Margaret Goodro is Field Manager of the United States
21 Bureau of Land Management's El Centro Field Office and named herein in an official capacity.
22
23

24 21. Defendant County of Imperial is a public and state agency within the State of California,
25 with its headquarters in El Centro, California. The County of Imperial is the lead agency for the
26 OWEF under CEQA. The County of Imperial is the agency which prepared and certified a Final
27 Environmental Impact Report for the OWEF. It has also approved a Variance, CUP, and
28

1 Implementation Agreement for the OWEF project. The County of Imperial approved the
2 OWEF on April 25, 2012, and thereafter submitted to the State Clearinghouse for posting a
3 CEQA Notice of Determination (“NOD”).

4 22. Defendant County of Imperial has principal responsibility for determining whether
5 projects within the County’s jurisdiction are consistent with the County’s General Plan, Land
6 Use Ordinances, and other applicable laws. Defendant Board of Supervisors of the County of
7 Imperial serves as the legislative body of Imperial County for the planning and provision of
8 services related to public needs and the requirements of state and federal laws. As the elected
9 representative of the people of Imperial County, the Board of Supervisors establishes overall
10 county priorities and sets policy.
11

12 23. Defendant Board of Supervisors of the County of Imperial is the governing body of the
13 County and is ultimately responsible for reviewing and approving or denying the Project. The
14 Board of Supervisors of the County of Imperial and its members are sued here in their official
15 capacities.
16

17 **C. Other Defendants and Necessary Parties (FRCP_19_)**
18

19 24. Defendant Ocotillo Express LLC was identified on the Notice of Determination filed by
20 Imperial County as the “Project Applicant.” No other party was identified by the NOD as a Real
21 Party in Interest. *See* PRC § 21167.6.5(d). Defendant Ocotillo Express, LLC is a wholly-
22 owned subsidiary of Pattern Energy Group, LP.
23

24 25. Defendant Pattern Energy Group, LP is the parent company of Defendant Ocotillo
25 Express, LLC. Pattern Energy Group, LP’s interest as parent company of the company that is
26 directly involved in ownership and operation of the OWEF would be directly impacted by this
27 litigation.
28

LEGAL BACKGROUND

A. The National Environmental Policy Act

26. Congress enacted NEPA in recognition of the “profound impact of man’s activity on the interrelations of all components of the natural environment,” including “industrial expansion, resource exploitation, and new and expanding technological advances.” 42 U.S.C. § 4331(a).

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).

27. NEPA requires that federal agencies prepare a “detailed statement”—known as an environmental impact statement—for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. The environmental impact statement, or “EIS,” is intended to create an open, informed, and public decision-making process that insures “that environmental information is available to public officials and citizens before decisions are made and before actions are taken” and “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1. A federal agency’s obligation to prepare an EIS extends to any federal action that “will or may” have a significant effect on the environment. 40 C.F.R. § 1508.3 (emphasis added). The federal agency must “[r]igorously explore and objectively evaluate” a range of alternatives to proposed federal actions and their impacts in the EIS. 40 C.F.R. § 1502.14(a).

28. The evaluation of mitigation measures is an essential component of an EIS.

A federal agency is required to evaluate possible mitigation measures in defining the scope of the EIS, in examining impacts of the proposed action and alternatives, and in explaining its ultimate decision. See 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c), 1508.25(b).

1 29. Agencies must insure the professional integrity, including scientific integrity, of the
2 discussion and analysis in an EIS. 40 C.F.R. § 1502.24. The information in an EIS must be of
3 high quality, as accurate scientific analysis, expert agency comments, and public scrutiny are
4 essential to implementing NEPA. 40 C.F.R. §§ 1500.1(b), 1502.24

5 **B. The Federal Land Policy and Management Act**

6
7 30. FLPMA sets forth the general management framework for the public lands based on the
8 principles of multiple use and sustained yield. *See* 43 U.S.C. § 1732(a). FLPMA requires that
9 BLM “develop, maintain, and, when appropriate, revise land use plans” for the public lands, 43
10 U.S.C. § 1712(a), and that the agency “[i]n managing the public lands . . . take any action
11 necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).
12

13 31. FLPMA establishes a heightened standard for the management of the California Desert
14 Conservation Area—the act specifically provides “for the immediate and future protection and
15 administration of the public lands in the California desert within the framework of a program of
16 multiple use and sustained yield, and the maintenance of environmental quality.” 43 U.S.C. §
17 1781(b) (emphasis added). FLPMA mandated the preparation of the California Desert
18 Conservation Area Plan, *see* 43 U.S.C. § 1781(d), the goal of which is:
19

20 to provide for the use of the public lands, and resources of the California Desert
21 Conservation Area, including economic, education, scientific, and recreational uses, in a
22 manner which enhances wherever possible—and which does not diminish, on balance—the
environmental, cultural, and aesthetic values of the Desert and its productivity.

23 BLM, The California Desert Conservation Area Plan 1980 as amended at 5-6 (1999).

24 32. The BLM derives its authority to grant rights-of-way for the distribution of electric
25 energy from FLPMA, Title V (43 U.S.C. 1761 -1771) and its implementing regulations (43
26 C.F.R. Part 2800). FLPMA authorizes BLM to “grant, issue, or renew rights-of-way over,
27 upon, under, or through” the public lands for, among other uses, “systems for generation,
28

transmission, and distribution of electric energy.” 43 U.S.C. § 1761(a). Each right-of-way shall contain terms and conditions that, among other purposes, will “require compliance with State standards for public health and safety, environmental protection...if those standards are more stringent than applicable federal standards.” Each right of way permit must contain terms and conditions which will “minimize the damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” 43 U.S.C. § 1765(a)(ii). Furthermore, each right-of-way shall contain terms and conditions that “require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards.” 43 U.S.C. § 1765(a)(iv).

33. Under 43 CFR §2805.12 (a), the project applicant is obligated to comply with the Secretary’s terms and conditions in the ROW permit requiring compliance with all existing Federal laws and regulations and state laws and regulations applicable to the authorized use (43 CFR 2805.12(a)), with the Secretary’s terms and conditions relating to preventing damage to “scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat”, and public health and safety (43 CFR(i)(1). 43 CFR(i)(3)(i)-(iii) and with those state standards that are more stringent than federal standards and that relate to public health and safety, environmental protection, and siting, constructing operating and maintaining any facilities on the ROW (43 CFR(i)(6).

C. The Administrative Procedure Act

34. The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

1 35. The APA provides that a court shall set aside agency “findings, conclusions, and
2 actions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
3 with law.” 5 U.S.C. § 706(2)(A).

4 **D. The California Environmental Quality Act**

5 36. CEQA requires that an agency analyze the potential environmental impacts of its
6 proposed actions in an environmental impact report (“EIR”) (except in certain limited
7 circumstances). See, e.g., PRC § 21100. The EIR is the very heart of CEQA. “The ‘foremost
8 principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford
9 the fullest possible protection to the environment within the reasonable scope of the statutory
10 language.” *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.
11 App. 4th 98, 109.
12

13
14 37. CEQA has two primary purposes. First, CEQA is designed to inform decision makers
15 and the public about the potential, significant environmental effects of a project. 14 Cal. Code
16 Regs. (“CEQA Guidelines”) § 15002(a)(1). “Its purpose is to inform the public and its
17 responsible officials of the environmental consequences of their decisions before they are made.
18 Thus, the EIR ‘protects not only the environment but also informed self-government.’” *Citizens*
19 *of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been
20 described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its
21 responsible officials to environmental changes before they have reached ecological points of no
22 return.” *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (“*Berkeley Jets*”) (2001) 91
23 Cal. App. 4th 1344, 1354; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
24
25

26 38. Second, CEQA requires public agencies to avoid or reduce environmental damage when
27 “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation
28

measures. CEQA Guidelines § 15002(a)(2) and (3); See also, *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” PRC § 21081; 14 Cal.Code Regs. § 15092(b)(2)(A) & (B).

39. While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 409, fn. 12 (1988). As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at 1355:

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946)

E. The California Fish and Game Code

40. The FGC provides for the protection of wildlife species and habitat within the state of California. Under the FGC, it is unlawful to take any bird, mammal, fish, reptile, or amphibian except as provided in the FGC.

1 41. Incidental take of species listed as threatened or endangered in California under the FGC
2 may be authorized only under certain circumstances, including but not limited to the following:

3 (i) the take is incidental to an otherwise lawful activity; (ii) the impacts of the authorized take
4 shall be minimized and fully mitigated; (iii) the measures required to meet this obligation shall
5 be roughly proportional in extent to the impact of the authorized taking on the species; (iv)
6 where various measures are available to meet this obligation, the measures required shall
7 maintain the applicant's objectives to the greatest extent possible; (v) the applicant shall ensure
8 adequate funding to implement the [minimization and mitigation] measures, and for monitoring
9 compliance with, and effectiveness of, those measures. See FGC § 2081.
10

11 42. Under the FGC, certain wildlife species specified in the statute itself are selected for
12 extraordinary protection in that they are protected against take altogether except in
13 exceptionally rare circumstances limited to management for the purposes of protection or
14 recovery. Such species are referred to as “fully protected” in that a blanket prohibition prevents
15 the authorization of incidental take of these species. See FGC §§ 3503.5, 3511 and 4700.
16 Included in this category of California fully protected wildlife species are several species that
17 either occur on the project site or would be impacted by the project, including Peninsula bighorn
18 sheep, burrowing owl, and golden eagle.
19
20

21 **F. California Business and Professions Code § 17200 *et. seq.***

22 43. Under California’s unfair competition statute, BPC § 17200 *et. seq.*, any person who
23 engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court
24 of competent jurisdiction. Actions for relief pursuant to BPC § 17200 *et. seq.* may be brought
25 by a person who has suffered injury in fact and has lost money or property as a result of the
26 unfair competition.
27
28

FACTUAL ALLEGATIONS

1
2 44. The CDCA is a 25-million acre expanse of land in southern California designated by
3 Congress in 1976 through the Federal Land Policy and Management Act. About 10 million
4 acres are administered by the U.S. Bureau of Land Management (BLM). When Congress
5 created the CDCA it recognized its special values, proximity to the population centers of
6 southern California, and the need for a comprehensive plan for managing the area. Congress
7 mandated that any such management plan be based on the concepts of multiple use, sustained
8 yield, and maintenance of environmental quality. Congress directed BLM to prepare and
9 implement a comprehensive, long-range plan for the management, use, development and
10 protection of the public lands within the CDCA. The CDCA Plan establishes goals for
11 protection and for use of the Desert. It designates distinct multiple use classes for the lands
12 involved, and it establishes a framework for managing the various resources within these
13 classes.
14

15
16 45. Much of the project site is essential habitat for the federally endangered Peninsular
17 bighorn sheep (“PBS”) including areas formerly designated as critical habitat for that species
18 and the proposed project also borders currently designated critical habitat. Recent sightings of
19 bighorn in the area, including a ewe group, show that this area is occupied habitat and essential
20 to the survival and recovery of the species. In addition, the project site provides occupied
21 habitat for the flat-tailed horned lizard—a BLM special status species— that requires protection
22 to preclude further population declines and the subsequent need for listing. The project also
23 appears to be located in an established migratory pathway, discovered in 2003 and continuously
24 documented since, for the state-listed threatened Swainson’s hawk. The project site also
25 contains habitat used by raptors and other birds including golden eagles and burrowing owls,
26
27
28

1 bats, rare plants, and other species. The FEIS/EIR admits that the project will result in take of
2 golden eagle and burrowing owl.

3 46. On March 9, 2012, BLM published the FEIS/EIR for the OWEF Project. On April 25,
4 the County of Imperial certified the FEIS/EIR for the OWEF project and approved the CUP,
5 Variance, Findings and Statement of Overriding Considerations, and an Implementation
6 Agreement related to the OWEF project. The project came to be referred to as the “Refined
7 Project” based on certain changes that had occurred in the project design since the original
8 proposal was evaluated in the Draft Environmental Impact Statement/Environmental Impact
9 Report. On March 9, 2012, BLM published its PA for the CDCA Plan. On May 11, 2012, BLM
10 published its ROD for the OWEF project. On May 11, 2012, the El Centro Field Office of the
11 BLM issued its ROW grant to Ocotillo Express, LLC. On May 14, 2012, the El Centro Field
12 Office of the BLM issued its Notice to Proceed (NTP) to Ocotillo Express, LLC.

15 47. LIUNA Local Union No. 1184 member Hector Casillas resides in El Centro, CA near
16 the proposed project site. Mr. Casillas and his property would be directly and adversely
17 impacted by the construction, operation, maintenance, and decommissioning of the OWEF
18 project. Implementation of the OWEF project would directly result in the diminution of the
19 monetary value of Mr. Casillas’s property. His interests are unique and are not adequately
20 represented by other parties.

22 48. LIUNA Local Union No. 1184 member John Norton resides in Niland, CA near the
23 proposed project site. Mr. Norton and his property would be directly and adversely impacted by
24 the construction, operation, maintenance, and decommissioning of the project. Implementation
25 of the OWEF project would directly result in the diminution of the monetary value of Mr.
26 Norton ’s property. His interests are unique and are not adequately represented by other parties.
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLAIMS FOR RELIEF

First Claim for Relief:

BLM's approvals for the OWEF Project Violate the APA and NEPA

49. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged herein.

50. BLM is in violation of the APA, NEPA, and the NEPA implementing regulations as a result of its grant of a right-of-way for the OWEF Project on the basis of the agency's final EIS for the following reasons:

a. The FEIS/EIR fails to adequately describe the affected environment including, without limitation, accurately assessing the presence of PBS on the project site. 40 C.F.R. §1502.15.

b. The FEIS/EIR fails to adequately consider, analyze, or disclose the direct, indirect and cumulative effects of the OWEF project on the environment, including but not limited to: adverse impacts on terrestrial and migratory species, including but not limited to species protected under the BGEPA and other laws;

c. BLM failed to evaluate the cumulative effects of widespread utility-scale renewable energy development in the California Desert and other threats for the CDCA population of golden eagle, Swainson's hawk, Peninsula bighorn sheep and other species;

d. The ROD fails to adequately address whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. 40 C.F.R. § 1505.2(c);

1 e. BLM failed to take a “hard look” at the adverse impacts of the OWEF Project for
2 golden eagles and other species and failed to develop measures to mitigate for such impacts
3 prior to granting a right-of-way for the Project.

4 51. The failure of BLM to comply with NEPA in preparing the FEIS/EIR, ROD, ROW grant
5 and NTP constitutes arbitrary and capricious agency action, and was an abuse of discretion and
6 not in accordance with law, pursuant to the APA. 5 U.S.C. § 706(2).
7

8 **Second Claim for Relief:**

9 **BLM’s approvals for the OWEF project violate BGEPA**

10 52. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
11 herein.
12

13 53. Section 668 of BGEPA prohibits “take” or “disturbance” of golden eagles “without
14 being permitted to do so” by FWS. 16 U.S.C. § 668(a)-(b); *Id.* § 668c. The OWEF project is
15 likely to take eagles in violation of BGEPA and its implementing regulations.

16 54. By approving the Project without requiring the developer to either obtain a take permit
17 or determining that all take would be avoided based on a completed APP, without properly
18 taking into account the cumulative impacts of the Project, BLM’s grant of a right-of-way for the
19 Project is arbitrary and capricious, an abuse of discretion, and contrary to BGEPA and
20 BGEPA’s implementing regulations.
21

22 **Third Claim for Relief:**

23 **BLM’s Approval of a Right-of-Way for the OWEF Project**

24 **Violates FLPMA**

25
26 55. Plaintiffs incorporate each of the foregoing allegations as if they were fully
27 realleged herein.
28

1 56. BLM's grant of a right-of-way for the OWEF Project and amendment of the California
2 Desert Conservation Area Plan is arbitrary and capricious, an abuse of discretion, not otherwise
3 in accordance with law, and violates FLPMA, the FLPMA implementing regulations, and the
4 APA because:

5 a. BLM failed to conduct an adequate inventory of the resources of the Project
6 area—including but not limited to golden eagles and foraging habitat for golden eagles, as well
7 as assessing the impacts of the project on Swanson's Hawks using the BLM lands as a spring
8 migratory corridor—as required by 43 U.S.C. § 1711(a) and 43 C.F.R. § 1610.4-3 prior to
9 granting the right-of-way;
10

11 b. BLM's determination in its ROD that its ROW grant conditions will "protect
12 public health and safety, prevent unnecessary damage to the environment, and ensure that the
13 Project will not result in unnecessary or undue degradation of public lands" is arbitrary and
14 capricious, an abuse of discretion, and violates BLM's obligation under 43 U.S.C. §1732(b) to
15 "prevent unnecessary or undue degradation of the lands." Said determination violates the APA
16 because (a) BLM failed to adequately identify, assess, and implement sufficient mitigation
17 measures for the Project and (b) BLM based its determination on the deficient FEIS/EIR and
18 FWS's deficient biological opinion.
19

20 c. The CDCA PA violates FLPMA's requirement that BLM prevent unnecessary or
21 undue degradation of public lands. 43 U.S.C § 1732(b). The BLM has failed to show that it is
22 "necessary" or even appropriate to approve the proposed large-scale industrial wind project on
23 these MUC class L lands in sensitive wildlife habitat adjacent to parks and wilderness or that
24 there are no other suitable alternative sites within the CDCA or elsewhere.
25
26
27
28

1 d. The CDCA PA violates FLPMA’s planning provisions which require that in
2 developing and revising land use plans, the BLM consider many factors and “use a systematic
3 interdisciplinary approach to achieve integrated consideration of physical, biological, economic,
4 and other sciences . . . consider the relative scarcity of the values involved and the availability
5 of alternative means (including recycling) and sites for realization of those values.” 43 U.S.C. §
6 1712(c). It is also inconsistent with the FLPMA provisions which contemplate that BLM will
7 prepare and maintain adequate inventory data on the resources of an area and that information
8 be used to inform the planning process. 43 U.S.C. § 1711(a); 43 U.S.C. § 1701(a)(2). BLM has
9 not prepared or maintained an adequate inventory of resources on BLM lands in the CDCA in
10 general or this area in particular. The lack of comprehensive data undermines analysis of how
11 the proposed plan amendment would affect both the resources on site and also undermines the
12 BLM’s ability to take the needed “systematic approach” or “integrated consideration” to
13 planning or plan amendments on the public lands in this area overall.

14 e. The BLM approvals, including the ROD and ROW, violate FLPMA’s
15 requirement that “each right-of-way shall contain . . . terms and conditions which . . . require
16 compliance with State standards for public health and safety, environmental protection, and
17 siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if
18 those standards are more stringent than applicable Federal standards” and which minimize
19 damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the
20 environment. 43 USC 1765(a)(iv). Among other reasons, BLM has violated this provision
21 because the OWEF project, as approved, will result in the take of species that are “fully
22 protected” against incidental take under California law. Specifically, California FGC §§ 3503.5,
23 3511, and 4700 prevent authorization of take of burrowing owl, golden eagle, and Peninsula
24
25
26
27
28

1 bighorn sheep (PBS) respectively. BLM has in effect authorized take of burrowing owl and
2 golden eagle, and possibly PBS, in violation of these California laws; each of which effective
3 authorizations, in turn, constitutes separate violations of 43 USC 1765(a)(iv). In approving
4 OWEF the Secretary has failed in his duty under Section 505 a, 43 USC 1765(a) to establish
5 terms and conditions that will “minimize damage to scenic and esthetic values and fish and
6 wildlife habitat and otherwise protect the environment.”
7

8 f. The FEIS/EIR states that the OWEF project will likely result in take of
9 burrowing owl and golden eagle and contains provisions which explicitly allow such take to
10 occur. The Secretary failed to set out terms and conditions that minimize damage to burrowing
11 owl and golden eagle. Further, in violation of his duties, the Secretary has purported to
12 authorize take of burrowing owl and golden eagle in violation of both state and federal law.
13
14

15 **Fourth Claim for Relief:**

16 **Violation of County General Plan Noise Element Standards and Land Use**

17 **Ordinance Prohibitions**

18
19 57. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
20 herein.
21

22 58. As approved by the County OWEF CUP 110-0007 contains a condition authorizing the
23 facility to operate at sound levels up to 70 dB leq “as measured at the nearest residence using
24 the “A” scale. Additionally the OWEC project is permitted to exceed this level by 10% if the
25 noise is “intermittent and during daylight hours.”

26 59. Under the County General Land Use Plan Noise Element, the applicable limits (at the
27 property line) are for Residential (R-1) 50 decibels (one hour average sound level) from 7 am to
28 10 pm and 45 DB from 10 pm to 7 am.

1 60. Title 9, Division 7, Noise Abatement and Control, §90701.00 defines a “disturbing”,
2 excessive, or offensive noise” as “any sound or noise conflicting with the levels or criteria or
3 levels set forth in this article. §90702.00A provides:

4 “It shall be unlawful for any person to cause noise by any means to
5 the extent that the applicable one hour average sound level set out in the
6 following table is exceeded, at any location in the County of Imperial on or
beyond the boundaries of the property on which the noise is produced.”

7 61. Under the County Land Use Ordinance, Division 7, §907 it is unlawful:

8 “...for any person to make, continue, or cause to be made or
9 continued, within the limits of Imperial County, any disturbing, excessive, or
10 offensive noise which causes discomfort or annoyance to any reasonable
person of normal sensitivity residing in the area.”

11
12 62. The 70 dB maximum sound levels for the Project as measured at the R-1 property line,
13 established in the CUP, exceed the levels permitted under the County’s Land Use Ordinance
14 and the Noise Element.

15 **Fifth Claim for Relief:**

16
17 **CEQA Inadequacy of the FEIR As An Adequate Informational Document and**
18 **Inadequacy of the Project Description**

19 63. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
20 herein.

21
22 64. In determining the ambient sound levels emitted by the project at the full operational
23 level, the FEIR omitted 45 days of weather data when the worst case conditions would occur.

24 65. The data set used in the FEIR excluded the coldest and dampest part of the year. The
25 data was only for 320 days. The data set excluded 13.5% of the data (45 winter days) when
26 worst case conditions were most likely to occur.
27
28

1 66. The FEIR failed to disclose this missing date. As a result the sound outputs of the
2 project may have been understated, and the effects of the Project on neighboring residents
3 understated as well.

4 **Sixth Claim for Relief:**

5 **CEQA Inadequate Description of Project Setting**

6
7 67. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
8 herein.

9 68. CEQA Guideline §15125(a) requires a description of the actual ambient noise levels
10 existing at the Project boundary as they exist at the time environmental analysis is commenced.

11 69. The FEIR failed to describe the actual ambient noise levels existing at the Project
12 boundary.

13
14 70. The measurements taken were near freeways and do not show true ambient noise levels
15 in Ocotillo or Nomirage.

16 71. No measurements were taken to establish nighttime pre-project noise levels.

17 72. The EIR contained an inadequate description of the project setting with respect to sound,
18 and violated CEQA Guidelines §15125(a).
19

20 **Seventh Claim for Relief:**

21 **County's Statement of Overriding Considerations Does Not Comport With Pub.**

22 **Res. Code §21002.1**

23
24 73. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
25 herein.
26
27
28

1 74. The County's Statement of Overriding Considerations determines that the significant
2 impacts of sound output of the Project on Ocotillo residents need not be mitigated because of
3 other economic and societal gains warranting an override.

4 75. Pub. Res. Code §21002.1(d) prohibits a lead agency from approving a project with
5 significant impacts if the project is not otherwise permissible under applicable law and
6 regulations.
7

8 76. The sound levels authorized for the project exceed limits set forth in County law and
9 regulations. The County acted ultra vires when it approved a project in violation of County
10 laws.
11

12 **Eighth Claim for Relief:**

13 **The Variance for OWEC is Unlawful Under County Land Use Ordinances and Govt.**

14 **Code §65906**

15 77. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
16 herein.
17

18 78. Govt. Code §65906 provides that "variances from the terms of the zoning ordinances
19 shall be granted only when because of special circumstances applicable to the property
20 including size, shape, topography, location or surroundings, the strict application of the zoning
21 ordinance deprives such property of privileges enjoyed by other property in the vicinity and
22 under identical zoning classifications."
23

24 79. In approving the Variance for the Project the County did not comply with Govt. Code
25 65906 since it made no findings whatsoever that extraordinary circumstances warranted the
26 conferring of a variance. Variances relating to permissible height of wind towers are "facility
27 siting standards" within the meaning of 43 CFR §2805.12(i).
28

1 80. Pursuant to Land Use Ordinance §90202.08(A) approval of a variance may be granted
2 only if the Director/Commission/Board of Supervisors first determines that the variance
3 satisfies the criteria set forth in Govt. Code §65906. Govt. Code §65906 provides that:

4 “A variance shall not be granted for a parcel of property, which authorizes
5 a use or activity which is not otherwise expressly authorized by the zone
6 regulation governing the parcel of property.”

7 81. The 450 feet tall wind turbines in OWEC are not comparable to communication towers.
8 The grant of a variance is not consistent with the height limit in Zone S-1, because the proposed
9 wind turbine is not a communication tower. §90518.07 provides:

10 Buildings or structures in the S-1 zone shall not exceed 35 feet,
11 except for communication towers, which are 100 feet..

12 82. The same is true for Open Space Zone, Zone S-2 which gives the same height limit:

13 Maximum height limit in the S-2 zone shall be 40 feet, except for communication
14 towers which are 100 feet. (§90519.07)

15 83. Similarly the Government/Special Public G/S Zone mentions no towers other than
16 communication towers.

17 Buildings or structures in the G/S zone shall not exceed six (6) stories or 80 feet,
18 except communication towers which are 100 feet. (§90520.07)

19
20 **Ninth Claim for Relief:**

21 **Significant New Information Concerning Peninsula Bighorn Sheep and Swanson’s Hawk**
22 **Warranted The Preparation of a Supplemental EIR or an Addendum, But County Failed**
23 **to Comply With CEQA Guidelines §§15163, 15164.**
24

25 84. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
26 herein.

27 85. The Center for Biological Diversity, by letter dated March 27, 2012 identified new
28 information relating to use of the site by Peninsula Bighorn Sheep, as well as use of the site and

1 nearby areas by Swainson's Hawks during spring migration on their way to rest and refuel ear
2 Borrego Springs and in Anzo Borrego State Park. The Center stated:

3
4 While we recognize that the FEIR has deleted some wind towers from the
5 proposed project that will benefit habitat for the federally and state listed
6 endangered Peninsular bighorn sheep (PBS), we submit recent documentation of
7 PBS within 500 meters of one of the turbine locations (Attachment 1a-e). These
8 photographs and GPS locations were documented on March 11, 2012. These data
9 suggest that PBS are currently using the project area, and that impacts to them
10 and their existing habitat needs to be reanalyzed at a minimum. Because little
11 data exists on how PBS use their range, especially in the early spring months
12 when they are more likely to use the lower bajadas for forage, because of the
13 "green up" of plant growth at lower elevations, we recommend that additional
14 surveys be done on the project site to evaluate how PBS actually use the site.

15 The project site lies directly within one of the great migration corridors for the
16 state- listed threatened Swainson's hawk (*Buteo swainsoni*), and a sizeable
17 migration corridor for turkey vultures (*Cathartes aura*) which are protected under
18 the Migratory Bird Treaty Act. While we knew that Swainson's hawks traversed
19 the project site and submitted comments on that issue on the DEIR, we were
20 unaware until recently that a significant migration corridor has been detected in
21 the area in 2003. This migration corridor for both species has been systematically
22 documented each spring since 2003 from February through April, and continues
23 to currently be monitored.

24 Last year alone (2011), 8,902 Swainson's hawks were counted in nearby
25 Borrego Valley. 1,437 turkey vultures were also documented last year. All these
26 data are available at <http://hawkcount.org/siteinfo.php?rsite=545> and we provide
27 Attachment 2, which is an Excel workbook of Hawkcount statistics from 2003-
28 2011. Clearly these data were not considered in the environmental impact
analysis, and therefore need to be re-analyzed, considered for ways to avoid,
minimize and mitigate any impacts and be incorporated into the FEIR in order to
comply with CEQA.

86. The new information described, supra, required, pursuant to CEQA Guideline §§15163,
15164, the preparation of a Supplemental EIR, or at the least an Addendum to the EIR.

87. The County did not produce either an addendum or a Supplemental EIR.

Tenth Claim for Relief:

Violations of the California Environmental Quality Act (CEQA)

1 88. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
2 herein.

3 89. In making the OWEF approvals described herein, The County of Imperial prejudicially
4 abused its discretion in violation of CEQA pursuant to Public Resources Code § 21168 and
5 Code of Civil Procedure 1094.5 because:

6 a. The County of Imperial failed to proceed in the manner required by law in
7 preparing and certifying the FEIS/EIR;

8 b. The FEIS/EIR is inadequate as an informational document;

9 c. The County's determinations in the FEIR are not supported by substantial
10 evidence in the record;

11 d. The County adopted Findings that are not supported by substantial evidence in
12 the record;

13 e. The County failed to proceed in a manner required by law in issuing approvals
14 which are not supported by substantial evidence in the record; and

15 f. As more fully described below.

16 90. In making the OWEF approvals described herein, The County of Imperial prejudicially
17 abused its discretion in violation of CEQA by approving and certifying a FEIS/EIR which fails
18 to accurately describe the environmental setting for the project in that, among other ways, the
19 FEIS/EIR fails to adequately assess the presence, without limitation, of:

20 a. PBS on the project site;

21 b. special status plant species on the project site;

22 c. migratory and other birds including burrowing owls on the project site;

23 d. avian migration corridors on the project site;

24 e. bats on the project site

25 f. barefoot banded gecko on the project site;

26 g. Colorado Desert fringe-toed lizards on the project site.

27 **Eleventh Claim for Relief:**

28 **Violation of CEQA: Failure to Analyze Significant Effects**

1 91. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
2 herein.

3 92. The County of Imperial prejudicially abused its discretion and failed to proceed in a
4 manner required by law and failed to support its decisions by substantial evidence in that the
5 FEIS/EIR fails to adequately analyze the OWEF Project's significant adverse effects upon the
6 environment including, but not limited to, the effects:

- 7 a. on the PBS and its habitat;
- 8 b. on the golden eagle and its habitat;
- 9 c. on the burrowing owl and its habitat;
- 10 d. on the Swainson's hawk and its habitat;
- 11 e. on the flat-tailed horned lizard and its habitat;
- 12 f. on barefoot banded gecko and its habitat
- 13 g. on migratory corridors of raptors and other birds;
- 14 h. on special-status plant species;
- 15 i. on cryptobiotic soil crusts;
- 16 j. on jurisdictional wetlands and waters.

17
18 **Twelfth Claim for Relief:**

19 **Violation of CEQA: Failure to Provide Adequate Mitigation Measures**

20 93. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
21 herein.

22 94. The County of Imperial prejudicially abused its discretion and failed to proceed in a
23 manner required by law and failed to support its decisions by substantial evidence in that the
24 FEIS/EIR fails to provide adequate mitigation measures for the OWEF Project's significant
25 adverse impacts upon the environment including, but not limited to, the effects:

- 26 a. on special-status plant species;
- 27 b. on cryptobiotic soil crusts;
- 28 c. due to fire;

- d. on flat-tailed horned lizard;
- e. on birds;
- f. on golden eagle;
- g. on burrowing owl;
- h. on PBS and its habitat;
- i. on barefoot banded gecko.

95. The County of Imperial prejudicially abused its discretion and failed to proceed in a manner required by law and failed to support its decisions by substantial evidence in that the FEIS/EIR authorizes the deferment of mitigation measures for burrowing owl and other species without adequate performance criteria, in violation of CEQA.

Thirteenth Claim for Relief:

Violation of CEQA: Deficient Alternatives Analysis

96. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged herein.

97. The County of Imperial is required to consider and adopt feasible alternatives to substantially lessen significant adverse effects on the environment. PRC § 21002, 21102.1(a), 21100(b)(4); 14 CCR § 15126(a). CEQA requires government agencies “to consider alternatives to proposed actions affecting the environment.” PRC § 21001(g). Moreover, “CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible.” 14 CCR § 15021(a); PRC §§21001, 21002.1.

98. The lead agency is required to select the environmentally preferable alternative unless it is infeasible. The FEIS/EIR designated Alternative 3 to be the environmentally preferable alternative. Despite the feasibility of Alternative 3, the County rejected this Alternative and adopted instead what is referred to as the “Refined Alternative” in violation of CEQA. This constitutes a prejudicial abuse of discretion and a failure to proceed according to law.

99. The County of Imperial prejudicially abused its discretion and failed to proceed in a manner required by law and did not support its OWEF approvals with substantial evidence in

1 that the FEIR for the OWEF FEIS/EIR fails to provide an adequate justification for rejecting the
2 distributed power alternative.

3 **Fourteenth Claim for Relief:**

4 **Violation of CEQA: Deficient Cumulative Impacts Analysis**

5 100. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
6 herein.

7 101. “Cumulative impacts” are defined as “two or more individual effects which, when
8 considered together, are considerable or which compound or increase other environmental
9 impacts.” 14 CCR § 15355. “The cumulative impacts can result from individually minor but
10 collectively significant projects taking place over a period of time.” 14 CCR § 15355(b).

11 102. The OWEF project’s FEIS/EIR is deficient in that it failed to adequately identify and
12 analyze cumulative impacts related to the OWEF project, including but not limited to:

- 13 a. cumulative impacts to sensitive botanical resources;
- 14 b. cumulative impacts to special-status plant species;
- 15 c. failure to define the specific area that was encompassed in the cumulative
16 impacts analysis (i.e., acreage), thus precluding independent analysis, or an evaluation of the
17 validity of the FEIS/EIR’s conclusions regarding the Project’s contribution to cumulative
18 impacts;
- 19 d. cumulative impacts to golden eagles;
- 20 e. cumulative impacts to PBS;
- 21 f. cumulative impacts to barefoot banded gecko;
- 22 g. cumulative impacts of the OWEF project in conjunction with other reasonably
23 probable future projects.

24 103. The County of Imperial prejudicially abused its discretion and failed to proceed in a
25 manner required by law in that it failed adequately to discuss, analyze or provide mitigation for
26 cumulative impacts resulting from the actions proposed by the OWEF project.

27 **Fifteenth Claim for Relief:**

28 **Violation of CEQA: Failure to Comply with California FGC § 2081 *et. seq.***

1 104. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
2 herein.

3 105. The County of Imperial violated CEQA by approving a project with unmitigated
4 significant impacts in that the FEIS/EIR fails to fully mitigate impacts to species listed under
5 the California Endangered Species Act (CESA). CA FGC § 2081 *et. seq.*; PRC § 21002.1(c)(2).
6 Such state-listed species include, without limitation:

- 7 a. barefoot banded gecko;
- 8 b. Swainson's hawk;
- 9 c. willow flycatcher;
- 10 d. PBS.

11 106. Neither the Mitigation, Monitoring and Reporting Program, nor the CUP Conditions
12 require the Project sponsor to obtain an incidental take permit.

13 **Sixteenth Claim for Relief:**

14 **Violation of CEQA: Failure to Recirculate a Revised EIR**

15 107. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
16 herein.

17 108. A lead agency is required to recirculate an EIR when significant new information is
18 added to the EIR after public notice is given of the availability of the draft EIR for public
19 review but before certification. 14 CCR § 15088.5(a)(3). Significant new information was
20 added, or is required to be added, to the FEIS/EIR triggering this recirculation requirement.
21 Specifically, the California Department of Fish and Game published on March 7, 2012 an
22 updated report concerning mitigation for the burrowing owl. The FEIS/EIR relies on an earlier,
23 outdated version of this report. The FEIS/EIR must be revised and recirculated for public
24 review of this new significant information;

25 **Seventeenth Claim for Relief:**

26 **Violation of CEQA: Failure to Justify Statement of Overriding Considerations**

27 109. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
28 herein.

1 110. The County has failed to provide substantial evidence to justify its Statement of
2 Overriding Considerations in violation of 14 CCR § 15093.

3 **Eighteenth Claim for Relief:**

4 **Violation of CEQA: Failure to Adequately Mitigate Impacts to Anza-Borrego State Park**

5 111. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
6 herein.

7 112. PBS is a species listed in California as threatened, pursuant to the California Endangered
8 Species Act, FGC § 2050 *et. seq.* PBS occur in the Anza-Borrego State Park (ABSP). The
9 FEIS/EIR fails to evaluate, analyze and mitigate the adverse impacts from the project on the
10 biological and aesthetic resources of the ABSP, a protected wilderness area that borders the
11 project site. The failure of the FEIS/EIR to fully mitigate for impacts to PBS will adversely
12 impact the PBS in the ABSP and the biological resources within the ABSP. The approval of the
13 project by the County in the face of this failure violates CEQA. Pub. Res. Code §21002.1(c). In
14 addition, the FEIS/EIR's analysis of the impacts to the extraordinarily rare desert viewshed seen
15 from the ABSP admits that this impact will not be mitigated to a level that is less than
16 significant. Nevertheless, the County approved the project, stating that this impact is "at an
17 acceptable level in light of the social, legal, economic, environmental, technological and other
18 project benefits" of the project. This Finding is not supported by substantial evidence in the
19 record.

20 **Nineteenth Claim for Relief:**

21 **Violation of California Business and Professions Code §17200 *et. seq.***

22 113. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged
23 herein.

24 114. The implementation of the OWEF project by Ocotillo Express, LLC as approved would
25 violate provisions of the California Fish and Game Code, including provisions protecting listed
26 and fully protected species against take, among other laws, including state law pertaining to
27 variances as well as local law pertaining to noise from the Project, as alleged supra.
28 Implementation of the project, moreover, would adversely impact the property values of

1 neighboring residents, including the property of LIUNA member Hector Casillas. Therefore,
2 implementation of the OWEF project would constitute unfair competition as defined in
3 Business and Professions Code § 17200 *et. seq.* Injunctive relief is available under Bus. Prof.
4 Code §17203 to enjoin (i) any business practice that constitutes unfair competition or (ii) any
5 person (including any natural persons, corporations, firms, partnerships, joint stock companies,
6 associations and other organizations of persons) who proposes to engage in unfair competition
7 from such action. Compensatory relief is also available under Bus. Prof. Code §17203 to
8 plaintiffs who have suffered pecuniary injury resulting from an act of unfair competition. Hector
9 Casillas stands to suffer precisely such pecuniary injury resulting from implementation of the
10 OWEF project because the value of his land will diminish in value as a consequence.

11 115. The implementation of the OWEF project by Ocotillo Express, LLC as approved would
12 violate provisions of the California Fish and Game Code, including provisions protecting listed
13 and fully protected species against take, among other laws including state law pertaining to
14 variances as well as local law pertaining to noise from the Project, as alleged supra .

15 Implementation of the project, moreover, would adversely impact the property values of
16 neighboring residents, including the property of LIUNA member John Norton. Therefore,
17 implementation of the OWEF project would constitute unfair competition as defined in
18 Business and Professions Code § 17200 *et. seq.* Injunctive relief is available under Bus. Prof.
19 Code §17203 to enjoin (i) any business practice that constitutes unfair competition or (ii) any
20 person (including any natural persons, corporations, firms, partnerships, joint stock companies,
21 associations and other organizations of persons) who proposes to engage in unfair competition
22 from such action. Compensatory relief is also available under Bus. Prof. Code §17203 to
23 plaintiffs who have suffered pecuniary injury resulting from an act of unfair competition. John
24 Norton stands to suffer precisely such pecuniary injury resulting from implementation of the
25 OWEF project because the value of his land will diminish in value as a consequence.

26
27 **PRAYER FOR RELIEF**

28 WHEREFORE, the Plaintiffs respectfully request that this court:

- 1 A. Declare that BLM’s record of decision, final EIS, and grant of a right-of-way for the
2 OWEF Project violates NEPA, the NEPA implementing regulations, FLPMA, the FLMPA
3 implementing regulations, BGEPA, the BEGPA implementing regulations, and the APA.
- 4 B. Declare that Pattern Energy will be unable to comply with the Secretary’s terms and
5 conditions in the ROW permit related to complying with all existing Federal laws and
6 regulations and state laws and regulations applicable to the authorized use (43 CFR 2805.12(a)),
7 or with the Secretary’s terms and conditions relating to preventing damage to “scenic, aesthetic,
8 cultural, and environmental values, including fish and wildlife habitat”, and public health and
9 safety (43 CFR(i)(1), 43 CFR(i)(3)(i)-(iii) or with those state standards that are more stringent
10 than federal standards and that relate to public health and safety, environmental protection, and
11 siting, constructing operating and maintaining any facilities on the ROW (43 CFR(i)(6).
- 12 C. Vacate BLM’s record of decision, final EIS, and grant of a right-of-way for the OWEF
13 Project and remand the matter to the agency for review in compliance NEPA, the NEPA
14 implementing regulations, FLPMA, the FLMPA implementing regulations, BGEPA, the
15 BEGPA implementing regulations, and the APA.
- 16 D. Issue an injunction prohibiting BLM from issuing a notice to proceed for the OWEF
17 Project, or, if such notice has already been issued, halting the OWEF Project until Defendants’
18 violations are fully remedied.
- 19 E. Issue a Writ of Mandate Ordering Defendant County of Imperial to vacate and set aside
20 its approval of the OWEF Project, including its certification of the Final Environmental Impact
21 Report and all related Findings and approvals, and to follow substantive California regulations
22 and statutes, including the California Environmental Quality Act and the California Fish and
23 Game Code, in any review of and decision for the OWEF Project;
- 24 F. Issue interlocutory and permanent injunctive relief enjoining Defendant Ocotillo
25 Express, LLC from engaging in any activity pursuant to the OWEF project until
26 the Project complies with all applicable California regulations and statutes, including
27 requirements of the California Environmental Quality Act and the California Fish and Game
28 Code;

1 G. Issue an order for reasonable attorneys' fees and costs under the Equal Access to Justice
2 Act, 28 U.S.C. § 2412, and/or pursuant to California Code of Civil Procedure § 1021.5, and any
3 other application provisions of law;

4 H. Issue an order for costs of suit;

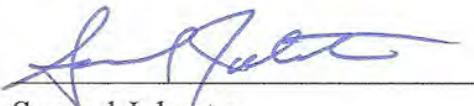
5 I. Issue such other and further equitable or legal relief as the Court deems proper.

6
7 Respectfully Submitted,

8 May 25, 2012

LOZEAU DRURY LLP

9
10
11 Richard T. Drury




Samuel Johnston
Michael R. Lozeau
Christina M. Caro
Samuel B. Johnston
Attorneys for Petitioners and Plaintiffs
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA LOCAL UNION NO. 1184

12
13
14
15
16 Respectfully Submitted,

17
18 May 25, 2012


CALIFORNIA ENVIRONMENTAL LAW
PROJECT



Laurens H. Silver
Attorney for Petitioner and Plaintiff
DESERT PROTECTIVE COUNCIL

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


Laurens H. Silver
Attorney for Petitioners and Plaintiffs
DESERT PROTECTIVE COUNCIL

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Desert Protective Council, et al.

(b) County of Residence of First Listed Plaintiff **Imperial County**
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Laurens H. Silver SB No. 55339
P.O. Box 667
Mill Valley, CA 94942 415-515-5688

DEFENDANTS

United States Department of the Interior, et al.

County of Residence of First Listed Defendant **San Diego**
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 U.S.C. § 4331 et. seq.; 43 U.S.C. § 1701 et. seq.; 5 U.S.C. § 500 et. seq.

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$
UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE **Hayes**DOCKET NUMBER **12 CV 1167 WQH (MDD)**

DATE

SIGNATURE OF ATTORNEY OF RECORD

May 25, 2012

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE