

1 STEPHAN C. VOLKER (CSB #63093)  
JOSHUA A.H. HARRIS (CSB #222886)  
2 STEPHANIE L. ABRAHAMS (CSB #257961)  
JAMEY M.B. VOLKER (CSB #273544)  
3 LAW OFFICES OF STEPHAN C. VOLKER  
436 14th Street, Suite 1300  
4 Oakland, CA 94612  
Tel: 510.496.0600  
5 Fax: 510.496.1366

6 Attorneys for Plaintiffs  
THE PROTECT OUR COMMUNITIES FOUNDATION, *et al.*

7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 THE PROTECT OUR COMMUNITIES ) Case No.  
11 FOUNDATION, BACKCOUNTRY AGAINST )  
12 DUMPS, EAST COUNTY COMMUNITY ) **COMPLAINT FOR**  
13 ACTION COALITION and DONNA TISDALE, ) **DECLARATORY AND**  
14 ) **INJUNCTIVE RELIEF**  
15 Plaintiffs, )

16 v. )  
17 )

18 UNITED STATES DEPARTMENT OF )  
19 AGRICULTURE, UNITED STATES FOREST )  
20 SERVICE, UNITED STATES DEPARTMENT )  
21 OF INTERIOR, BUREAU OF LAND )  
22 MANAGEMENT, UNITED STATES FISH AND )  
23 WILDLIFE SERVICE, THOMAS VILSACK, in )  
24 his official capacity as Secretary of the United )  
25 States Department of Agriculture, THOMAS )  
26 TIDWELL, in his official capacity as Chief of the )  
27 Forest Service, KEN SALAZAR, in his official )  
28 capacity as Secretary of the United States )  
Department of the Interior, BOB ABBEY, in his )  
official capacity as the Director of the Bureau of )  
Land Management, MIKE POOL, in his official )  
capacity as the Deputy Director of the Bureau of )  
Land Management, ROWAN GOULD, in his )  
official capacity as Acting Director of the United )  
States Fish and Wildlife Service, RANDY )  
MOORE, in his official capacity as Regional )  
Forester of the Forest Service Pacific Southwest )

1 Region, JIM ABBOTT, in his official capacity as )  
 2 California State Director of the Bureau of Land )  
 Management, REN LOHOEFENER, in his official )  
 3 capacity as Pacific Southwest Regional Director of )  
 the United States Fish and Wildlife Service, )  
 4 WILLIAM METZ, in his official capacity as Forest )  
 Supervisor of the Cleveland National Forest, )  
 5 MARGARET GOODRO, in her official capacity as )  
 Field Manager of the El Centro Bureau of Land )  
 6 Management Field Office, JIM BARTEL, in his )  
 7 official capacity as Field Supervisor of the )  
 8 Carlsbad Fish and Wildlife Service Office, )  
 9 )  
 10 Defendants. )  
 \_\_\_\_\_ )

11 **I. INTRODUCTION**

12  
 13 1. In this action, plaintiffs The Protect Out Communities Foundation, Backcountry  
 14 Against Dumps, East County Community Action Coalition, and Donna Tisdale (“plaintiffs”) ask  
 15 this Court to compel the United States Forest Service (“Forest Service”), the Bureau of Land  
 16 Management (“BLM”), and the United States Fish and Wildlife Service (“FWS”) to complete full  
 17 and adequate environmental review for the Sunrise Powerlink Transmission Line Project  
 18 (“Powerlink Project” or “Project”) and to ensure the Project’s compliance with federal  
 19 environmental laws. Specifically, this action challenges four interrelated agency actions and  
 20 omissions:

21 (1) The Forest Service’s July 9, 2010 Record of Decision (“ROD”), which  
 22 purported to approve the construction, operation, and maintenance of the Project within the  
 23 Cleveland National Forest (“CNF”), conditionally approve two special use permits to San Diego  
 24 Gas and Electric (“SDG&E”), and amend the Cleveland National Forest Land Management Plan  
 (“CNF LMP” or “Forest Plan”) to provide exceptions for the Powerlink Project;

25 (2) The Forest Service’s failure to prepare a Supplemental Environmental  
 26 Impact Statement (“SEIS”) pursuant to the National Environmental Policy Act (“NEPA”) prior to  
 27 issuing its ROD;

28 (3) BLM’s failure to prepare an SEIS pursuant to NEPA prior to approving the

1 modified Project route as presented in SDG&E’s Project Modification Report (“PMR”); and

2 (4) FWS’ failure to fully reinitiate consultation pursuant to Section 7 of the  
3 Endangered Species Act (“ESA”) after SDG&E changed the Project route.

4 Plaintiffs sue the responsible Forest Service, BLM, and FWS officials (“defendants”) pursuant to  
5 the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, for violating NEPA, 42  
6 U.S.C. § 4321 *et seq.*, the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*  
7 (“NFMA”), the Federal Land Policy Management Act, 43 U.S.C. § 1701 *et seq.* (“FLPMA”),  
8 and the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”).

9 2. The Project at issue entails a hastily conceived, poorly studied, wildfire inducing,  
10 and completely unnecessary transmission line. This transmission line would traverse 120 miles  
11 of Southern California, including 19 miles of Forest Service land in the CNF and 49 miles of  
12 BLM land, needlessly destroying invaluable public lands that provide outstanding scenery,  
13 tranquility, wilderness recreation, and critical habitat for endangered, threatened, and special  
14 status species. Plaintiffs expressed their concerns about, among other things, the Project’s  
15 impacts on wildfire risk, animal and plant species, cultural resources, visual resources, and local  
16 noise levels throughout the administrative process. However, these impacts will increase even  
17 further due to the substantial changes to the location and components of the Project proposed by  
18 SDG&E in its PMR. Nonetheless, both the Forest Service and BLM refuse to prepare an SEIS,  
19 as required by NEPA, to afford the public an opportunity to review the new and increased  
20 environmental effects of the Project prior to its approval. The Forest Service’s approval of the  
21 Project and amendments to the Forest Plan violate NEPA because they are based on the previous  
22 obsolete and defective EIS. Further, the Forest Service’s approval of the Project violates NFMA  
23 and FLPMA because the Project will have massive impacts on the CNF that are inconsistent with  
24 both the Forest Plan and the mandates presented in federal forest management laws. Finally,  
25 FWS’ failure to reinitiate consultation with the action agencies for all federally listed species  
26 potentially affected by the Project violates the ESA.

27 3. Accordingly, plaintiffs seek orders from this Court: (1) setting aside the Forest  
28 Service’s July 9, 2010 ROD for the Powerlink Project; (2) declaring that the Forest Service and

1 BLM have failed to comply with NEPA’s requirements; (3) declaring that the Forest Service has  
2 failed to comply with NFMA and FLPMA; (4) declaring that the FWS has failed to comply with  
3 the ESA’s consultation requirements; and (5) granting permanent injunctive relief pending  
4 defendants’ compliance with NEPA, NFMA, FLPMA, and the ESA.

## 5 **II. JURISDICTION AND VENUE**

6 4. This Court has jurisdiction under 28 U.S.C. section 1331 (action arising under the  
7 laws of the United States); 28 U.S.C. section 1361 (action to compel officers of the United States  
8 to perform their duties); 28 U.S.C. sections 2201(declaratory relief) and 2202 (further relief); and  
9 5 U.S.C. sections 701-706 (Administrative Procedure Act).

10 5. Venue lies in the Southern District Court of California pursuant to 28 U.S.C.  
11 section 1391(b)(2) because the Powerlink Project is located in both San Diego and Imperial  
12 Counties, and thus within this judicial district.

## 13 **III. PARTIES**

14 6. Plaintiff THE PROTECT OUR COMMUNITIES FOUNDATION (“POC”) is a  
15 community organization formed in 2009 as the successor to The Protect Our Communities Fund,  
16 which had been formed in 2006. POC is composed of numerous individuals and families residing  
17 in eastern San Diego County who are directly affected by the approval of the Powerlink Project.  
18 POC’s purpose is the promotion of a safe, reliable, economical, renewable and environmentally  
19 responsible energy future. POC’s members currently use and intend to continue to use BLM and  
20 Forest Service lands that will be directly impacted by the Powerlink Project and the energy  
21 generation facilities it will induce, including the Yuha Desert Area of Critical Environmental  
22 Concern (“ACEC”), the areas around Plaster City, Painted Gorge, Coyote Wilderness, the  
23 southern end of Anza Borrego State Park, Jacumba Wilderness, Mountain Springs, In-Ko-Pah,  
24 Desert View Tower, Valley of the Moon, Smugglers Cave, Table Mountain and Mica Gem Road,  
25 Carrizo Wilderness and Carrizo Canyon Wilderness, In-Ko-Pah ACEC, McCain Valley Resource  
26 Conservation Area, Cottonwood Campground and Pepperwood Trail, Sacatone Overlook, Carrizo  
27 Overlook, La Posta/Thing Valley, Cameron Valley, Campo, Hauser Wilderness, Cottonwood  
28 Creek, Potrero's Long Valley, Hauser Canyon, Pine Creek Wilderness, and El Monte Valley for

1 aesthetic, scientific, historic, cultural, recreational and spiritual enjoyment. POC and its members  
2 submitted comments during the BLM and Forest Service administrative review of the Powerlink  
3 Project objecting to its approval, and exhausted all available administrative remedies for that  
4 approval.

5           7. Plaintiff BACKCOUNTRY AGAINST DUMPS (“BAD”) is a community  
6 organization based in Boulevard, California, comprising numerous individuals and families  
7 residing throughout Southern California. Members of BAD are directly affected by the planning  
8 and management of the BLM and Forest Service lands through which the Project would run  
9 because that is where they live and recreate. BAD and its members are interested in the proper  
10 planning and management of those BLM and Forest Service lands in order to maintain and  
11 enhance their ecological integrity, scenic beauty, wildlife, recreational amenities, cultural  
12 resources, watershed values, and groundwater resources. BAD’s members presently use and  
13 intend to continue to use BLM and Forest Service lands that will be directly and adversely  
14 affected by the Powerlink Project and the windfarms and industrial-scale solar energy projects  
15 (collectively, “energy generation facilities”) it will induce including, for example, the McCain  
16 Valley, Cleveland National Forest, Mountain Springs, Jacumba Wilderness Area, In-Ko-Pah  
17 County Park, Desert View Tower, and the Pepperwood Trail, for aesthetic, scientific, historic,  
18 cultural, recreational and spiritual enjoyment. BAD members’ use and enjoyment of the pristine  
19 desert, forest and mountain areas of Eastern San Diego County will be greatly diminished by  
20 construction of the Powerlink Project and related energy generation facilities because such  
21 development will harm the recreational and aesthetic value of the wildlands they frequent. BAD  
22 and its members submitted comments during the BLM and Forest Service administrative review  
23 of the Powerlink Project objecting to its approval, and exhausted all available administrative  
24 remedies for that approval.

25           8. Plaintiff EAST COUNTY COMMUNITY ACTION COALITION (“ECCAC”) is a  
26 coalition of community groups with the common goal of preserving the rural quality of life and  
27 the natural resources of eastern San Diego County. ECCAC and its members seek to maintain the  
28 ecological integrity, scenic beauty, wildlife, cultural resources, recreational amenities, watershed

1 values and groundwater resources in eastern San Diego County. ECCAC's members currently  
2 use and intend to continue to use BLM and Forest Service lands that will be directly and  
3 adversely affected by the Powerlink Project and related energy development it would induce,  
4 including Hauser Wilderness, Cottonwood Creek, Potrero's Long Valley, Hauser Canyon, Pine  
5 Creek Wilderness, El Monte Valley, McCain Valley Resource Conservation Area, Carrizo  
6 Overlook, La Posta/Thing Valley and the El Capitan Mountain area for aesthetic, scientific,  
7 historic, cultural, recreational and spiritual enjoyment. ECCAC and its members submitted  
8 comments during the BLM and Forest Service administrative review of the Powerlink Project  
9 objecting to its approval, and exhausted all administrative remedies for that approval.

10 9. Plaintiff DONNA TISDALE lives on Morningstar Ranch, located two miles west  
11 of Tierra Del Sol Road in Boulevard, California. She is a member of plaintiffs BAD, POC, and  
12 ECCAC, and Chairwoman of the County of San Diego's Boulevard Planning Group. Mrs.  
13 Tisdale currently uses and intends to continue to use BLM and Forest Service lands that will be  
14 harmed by the Powerlink Project and related energy development it would induce, including the  
15 BLM's McCain Valley Resource Conservation Area, the Cleveland National Forest, Carrizo  
16 Wilderness Area, Jacumba Wilderness Area, Mountain Springs, Coyote Mountains Wilderness  
17 Area, In-Ko-Pah County Park, Desert View Tower, Yuha Desert ACEC, Hauser Wilderness Area  
18 and Wilderness Study Area ("WSA"), Pacific Crest Trail, and the Pepperwood Trail, for the  
19 following activities: hiking, family outings and recreation, wildlife and wildflower viewing,  
20 sightseeing, photography, star gazing, quiet meditation, and camping. She has spoken at public  
21 meetings opposing the Powerlink Project and authored multiple letters to the Forest Service,  
22 BLM and other agencies opposing the Project's approval, and exhausted all administrative  
23 remedies for that approval.

24 10. Defendant UNITED STATES DEPARTMENT OF AGRICULTURE is the federal  
25 agency charged with overseeing the activities of the Forest Service, including the Forest Service's  
26 administration of the CNF.

27 11. Defendant UNITED STATES FOREST SERVICE is an agency within the  
28 Department of Agriculture. Pursuant to federal law, Defendant Forest Service is responsible for

1 managing public lands within all national forests, including the CNF, for the benefit of the public.

2 12. Defendant UNITED STATES DEPARTMENT OF INTERIOR (“DOI”) is the  
3 federal agency charged with managing most of the nation’s public lands, including the public  
4 lands managed by BLM in eastern San Diego County at issue in this case.

5 13. Defendant BUREAU OF LAND MANAGEMENT is an agency within DOI.  
6 Pursuant to federal law, BLM is charged with the management of over 100,000 acres of land  
7 owned by the federal government in eastern San Diego County for the benefit of the public.

8 14. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is also an agency  
9 within DOI. Pursuant to federal law, FWS is charged with preserving endangered and threatened  
10 species and their habitat under the ESA, including the species located in the vicinity of the  
11 Powerlink Project.

12 15. Defendant THOMAS VILSACK is the Secretary of the United States Department  
13 of Agriculture. Defendant Vilsack is the federal official charged with overseeing the proper  
14 management of the Forest Service and is responsible for the actions of the Forest Service  
15 challenged in this complaint. Defendant Vilsack is sued in his official capacity.

16 16. Defendant THOMAS TIDWELL is the Chief of the Forest Service and is  
17 responsible for the actions of the Forest Service in approving the Project. Defendant Tidwell is  
18 sued in his official capacity.

19 17. Defendant KEN SALAZAR is the Secretary of DOI. Defendant Salazar is the  
20 federal official charged with the responsibility of properly managing BLM and FWS and is  
21 responsible for the actions of BLM and FWS challenged herein. Defendant Salazar is sued in his  
22 official capacity.

23 18. Defendant BOB ABBEY is the Director of BLM and is responsible for the actions  
24 of BLM in approving the Powerlink Project and PMR challenged in this action. Defendant  
25 Abbey is sued in his official capacity.

26 19. Defendant MIKE POOL is the former California Director of BLM. He approved  
27 the Powerlink rights-of-way on January 20, 2009. He is now the Deputy Director of BLM. In  
28 that capacity, he is generally responsible for the nationwide activities of BLM, including the

1 supervision of BLM employees who are named as co-defendants in this action. Defendant Pool is  
2 sued in his official capacity.

3 20. Defendant ROWAN GOULD is the Acting Director of FWS and is responsible for  
4 FWS' actions in compliance with the ESA. Defendant Gould is sued in his official capacity.

5 21. Defendant RANDY MOORE is the Forest Service's Regional Forester for the  
6 Pacific Southwest Region and is responsible for the actions of the Forest Service in approving the  
7 Powerlink Project. Defendant Moore is sued in his official capacity.

8 22. Defendant JIM ABBOTT is BLM's California State Director. His predecessor in  
9 office, Mike Pool, approved the Powerlink rights-of-way on January 20, 2009. Defendant Abbott  
10 is sued in his official capacity.

11 23. Defendant WILLIAM METZ is the Forest Supervisor for the CNF. On July 9,  
12 2010, Defendant Metz issued a ROD approving construction, operation and maintenance of the  
13 Project on CNF lands. Defendant Metz is sued in his official capacity.

14 24. Defendant MARGARET GOODRO is the Field Manager for the BLM El Centro  
15 Field Office and is responsible for management of BLM lands in the Project's vicinity.  
16 Defendant Goodro is sued in her official capacity.

17 25. Defendant JIM BARTEL is the Field Supervisor for the Carlsbad FWS Office. On  
18 November 8, 2008, BLM submitted its Biological Assessment to Defendant Bartel and requested  
19 that he initiate formal Section 7 consultation pursuant to the ESA. Defendant Bartel is sued in his  
20 official capacity.

#### 21 **IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

##### 22 **BLM's Record of Decision on the Sunrise Powerlink Transmission Line Project**

23 26. On August 31, 2006, BLM and CPUC published a Notice of Intent to Prepare a  
24 joint Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") addressing the  
25 impacts of the Powerlink Project on all lands it would traverse, including Forest Service lands  
26 within the CNF. In response, Donna Tisdale, who is a member of all organizational plaintiffs,  
27 and Denis Trafecanty, who is co-founder and President of POC, submitted numerous written and  
28 oral scoping comments. For example, Denis Trafecanty, on behalf of the Protect Our



1 Communities Fund (now The Protect Our Communities Foundation, or POC), submitted written  
2 comments on February 5, 2007. Donna Tisdale also submitted written comments, on behalf of  
3 herself, on February 25 and June 11, 2007. Both Donna Tisdale and Denis Trafecanty also made  
4 numerous oral comments at scoping hearings for this EIR/EIS. On behalf of himself and the  
5 Protect Our Communities Fund, Denis Trafecanty made oral comments at the February 5, 2007  
6 hearings in El Centro and San Diego, as well as the February 6, 2007 hearings in Wynola and  
7 Ramona, the February 7, 2007 hearing in Alpine, and the February 8, 2007 hearing in Borrego.  
8 And on her own behalf, Donna Tisdale made oral comments at the February 7, 2007 scoping  
9 hearing in Boulevard.

10 27. On January 3, 2008, BLM and CPUC published the Draft EIR/EIS for the  
11 Powerlink Project (“DEIS”). On February 25 and April 10, 2008, Donna Tisdale, personally and  
12 on behalf of Boulevard Planning Group, submitted comments on the DEIS. In addition, Donna  
13 Tisdale made comments on the DEIS at the February 25, 2008 public hearing at Pine Valley. As  
14 stated above, Donna Tisdale is a member of all organizational plaintiffs. Many other individual  
15 members of BAD, POC, and ECCAC submitted comments on the DEIS as well, including Denis  
16 Trafecanty (co-founder and President of POC and member of ECCAC), Michael Pinto (co-  
17 founder and Treasurer of POC), Gary Hoyt (member of both BAD and ECCAC), Denis Berglund  
18 (member of BAD, POC and ECCAC), Tim and Mona Petersen (members of POC and ECCAC),  
19 Cindy Buxton (member of POC) and F.W. (Bill) Parsons (member of BAD). On July 11, 2008,  
20 BLM and CPUC published a Recirculated Draft Environmental Impact Report/Supplemental  
21 Draft Environmental Impact Statement (“SDEIS”). In response to this SDEIS, Donna Tisdale  
22 submitted a comment letter on August 25, 2008. This letter stated objections to the chosen  
23 alternative and raised issues of new, significant, and previously undisclosed impacts that required  
24 further environmental review. Denis Trafecanty, Gary Hoyt, Tim and Mona Petersen, Denis  
25 Berglund and Cindy Buxton all also commented on the SDEIS. On October 13, 2008, BLM  
26 issued a Final EIR/EIS (“FEIS”).<sup>1</sup>

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27  
28 <sup>1</sup> BLM issued three environmental review documents, pursuant to NEPA, in order to review  
the impacts of the Powerlink Project. These documents, the DEIS, SDEIS, and FEIS, suffer

1           28.     On January 20, 2009, BLM issued the Record of Decision (“BLM ROD”)  
2 approving the Powerlink Project. On March 26, 2009, plaintiffs filed a Notice of Appeal of the  
3 approval with the Interior Board of Land Appeals (“IBLA”). Plaintiffs subsequently filed a  
4 Request for Stay and an extensive Statement of Reasons with the IBLA. The IBLA denied  
5 plaintiffs’ request for a stay and, after losing jurisdiction following plaintiffs’ filing of an action  
6 in this Court,<sup>2</sup> purported to deny plaintiffs’ appeal.

7           29.     Plaintiffs adequately exhausted their administrative remedies with respect to the  
8 BLM ROD by commenting extensively throughout BLM’s environmental review processes for  
9 the Powerlink Project and seeking review of BLM’s approval of the Powerlink Project in the  
10 IBLA. Because the IBLA failed to timely respond to plaintiffs’ petition for stay and eventually  
11 denied it, plaintiffs properly sued for relief in this Court without awaiting IBLA’s ruling on the  
12 merits of plaintiffs’ appeal. The IBLA was required to act on plaintiffs’ petition for stay within  
13 45 days after the end of the administrative appeal period on March 23, 2009. 43 C.F.R. §  
14 4.21(a)(3). When IBLA failed to do so, BLM’s Powerlink ROD became effective as a final  
15 agency action. *National Parks & Conservation Ass’n v. Bureau of Land Management*, 606 F.3d  
16 1058, 1064 (9th Cir. 2002) (“If an Appeals Board fails to act upon a petition for a stay or denies  
17 such a petition, the decision becomes effective immediately”); *Center for Biological Diversity v.*  
18 *U.S. Department of Interior*, 255 F.Supp.2d 1030 (D.Ariz. 2003) (holding that BLM’s decision  
19 became final once the IBLA failed to grant a stay within the prescribed time period, even though

20  
21  
22 many of the same inadequacies and are referenced collectively as the “ Powerlink EIS” or  
23 “ EIS.”

24 <sup>2</sup> On February 16, 2010, plaintiffs BAD, POC, ECCAC and Donna Tisdale brought an  
25 action in Federal District Court for the Eastern District of California (No. Civ. S-10-394  
26 FCD/KJN) against BLM and FWS challenging BLM’ s approval of the Powerlink Project  
27 and amendments to its Eastern San Diego County Resource Management Plan, and FWS’  
28 approval of biological opinions for the Powerlink Project and Resource Management Plan  
amendments. In an order dated June 8, 2010, the court, per the Honorable Frank C.  
Damrell, granted the defendants’ motion to change venue to the Federal District Court for  
the Southern District of California. The case is now proceeding in this Court before the  
Honorable Michael M. Anello, as Civ. No. 3:10-CV-01222-MMA-BGS.

1 the IBLA later issued a stay). The finality of the ROD was further confirmed when the IBLA  
2 denied plaintiffs' stay request on July 14, 2009. *National Parks & Conservation Ass'n, supra*,  
3 606 F.3d at 1064; *see also Desert Citizens Against Air Pollution v. Bisson*, 231 F.3d 1172 (9th  
4 Cir. 2000) (court reviewed BLM's Record of Decision as the final agency action because the  
5 IBLA had denied a petition for a stay). Thus, plaintiffs adequately exhausted their administrative  
6 remedies with respect to BLM's ROD and are entitled to sue for relief in this Court challenging  
7 the Forest Service's subsequent ROD, BLM's and the Forest Service's subsequent failure to  
8 prepare an SEIS, and FWS' subsequent failure to reinitiate consultation under the ESA.

### 9 **The Project Modification Report**

10 30. On May 14, 2010, SDG&E submitted a Project Modification Report for the  
11 Powerlink Project. BLM and CPUC subsequently posted the PMR to public websites and  
12 accepted public comments on the document from May 14 to June 7, 2010. Plaintiffs timely  
13 submitted detailed comments on the PMR to BLM and CPUC on June 7, 2010.

14 31. In September 2010, BLM and CPUC jointly issued their Sunrise Powerlink Project  
15 Modification Report Memorandum ("Memorandum"), which purports to analyze the Project  
16 modifications described in the PMR. Further, on September 21, 2010, BLM executed a  
17 Worksheet Determination of NEPA Adequacy ("DNA") concluding that it did not need to  
18 prepare an SEIS because the existing EIS sufficiently analyzed the modified Project. Finally, on  
19 September 22, 2010, BLM and CPUC sent a letter to the Project applicant, SDG&E, informing it  
20 of the agencies' determination that the modified Project was within the scope of the Certificate of  
21 Public Convenience and Necessity issued by CPUC and the ROD issued by BLM.

22 32. On October 21, 2010, plaintiffs timely and concurrently filed in the IBLA a Notice  
23 of Appeal and a Request for Stay of BLM's decision to forego further environmental review.  
24 The IBLA has yet to rule on plaintiffs' Request for Stay. Plaintiffs took these actions to provide  
25 BLM with ample opportunity to correct its failure to prepare additional environmental review on  
26 the Powerlink Project before resorting to the judicial system. Regardless, plaintiffs were not  
27 required to appeal BLM's decision in order to exhaust their administrative remedies, as described  
28 below.

1           33. For challenges to federal agency actions under the APA, “an appeal to ‘superior  
2 agency authority’ is a prerequisite to judicial review *only* when expressly required by statute or  
3 when an agency rule requires appeal before review and the administrative action is made  
4 inoperative pending that review.” *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (emphasis in the  
5 original). Here, however, the DNA explicitly states that it “does not constitute an appealable  
6 decision.” DNA 33. Thus, pursuant to the U.S. Department of Interior’s regulations regarding  
7 appeals of BLM decisions, plaintiffs were not required to appeal because “at the time of its  
8 rendition [the decision was] not subject to appeal to the Director or an Appeals Board.” 43  
9 C.F.R. § 4.21(c). Without a requirement that plaintiffs appeal BLM’s decision to forego  
10 additional environmental review, they did not need to appeal to exhaust their administrative  
11 remedies. *Darby, supra*, 509 U.S. at 154. Therefore, plaintiffs have adequately exhausted their  
12 administrative remedies with respect to the PMR and BLM’s decision not to prepare an SEIS, and  
13 are entitled to sue for relief in this Court.

14           34. Further, plaintiffs have adequately exhausted their administrative remedies with  
15 respect to the Forest Service’s decision not to prepare an SEIS. The Forest Service’s implicit  
16 decision was embodied in its July 9, 2010 ROD, which was accompanied by a Supplemental  
17 Information Report describing the modified Project and cursorily discussing its potential impacts.  
18 Thus, by exhausting their remedies with respect to the ROD, as described below, plaintiffs have  
19 met their exhaustion requirements for the Forest Service’s decision not to prepare an SEIS.

#### 20                                   **The Forest Service Record of Decision**

21           35. On July 9, 2009, BAD, POC, ECCAC and Donna Tisdale submitted a written  
22 comment letter to Forest Service officials opposing the Forest Service’s approval of the  
23 Powerlink Project. To provide additional information, these same commentators sent a revised  
24 version of their original comment letter to Forest Service officials on September 23, 2009. On  
25 June 29, 2010, pursuant to the Forest Service’s legal notice establishing its comment period,  
26 published in the San Diego *Union-Tribune* on May 15, 2010, BAD, POC, ECCAC and Donna  
27 Tisdale submitted yet further comments opposing the agency’s approval of the Powerlink Project.

28           36. On July 9, 2010, the Forest Service issued a ROD approving the location of

1 Powerlink Project on CNF lands and amending the CNF LMP to accommodate the Project. In  
2 response, on August 26, 2010, plaintiffs BAD, POC, ECCAC and Donna Tisdale timely filed a  
3 Notice of Appeal, Request for Stay and Statement of Reasons with the Regional Forester of the  
4 United States Department of Agriculture Forest Service. The Regional Forester responded to  
5 plaintiffs' appeal on October 14, 2010 by affirming the Forest Supervisor's July 9, 2010 decision  
6 and denying the plaintiffs' requested relief. Pursuant to 36 CFR 215.18(c), the Regional  
7 Forester's October 14, 2010 decision "constitutes the final administrative determination of the  
8 Department of Agriculture."

9 37. Plaintiffs have adequately exhausted their administrative remedies by commenting  
10 extensively to the Forest Service and seeking review of that agency's approval of the Powerlink  
11 Project with the Regional Forester. Since the Regional Forester responded to plaintiffs' appeal  
12 by affirming the Forest Supervisor's July 9, 2010 decision, the plaintiffs may properly sue for  
13 relief in this Court.

#### 14 **FWS' Failure to Reinitiate Consultation**

15 38. Plaintiffs have adequately exhausted their administrative remedies for their claim  
16 against FWS because there was no opportunity for the public to submit comments on FWS'  
17 failure to reinitiate consultation. Since there was no opportunity to comment, there were no  
18 administrative remedies available to plaintiffs. Therefore, plaintiffs have met their exhaustion  
19 requirements as to the FWS' failure to reinitiate consultation.

### 20 **V. STATEMENT OF FACTS**

#### 21 **The Sunrise Powerlink Transmission Line Project**

22 39. SDG&E seeks to construct, operate and maintain a new transmission line called the  
23 Sunrise Powerlink that would run from San Diego to Imperial Valley. To further this Project,  
24 SDG&E filed an application for a Right-of-Way Grant from BLM on November 2, 2005 and  
25 applied for a Certificate of Public Convenience and Necessity from CPUC on December 14,  
26 2005.

27 40. BLM and CPUC initiated environmental review of SDG&E's proposal by  
28 publishing a notice of intent to prepare a joint EIR/EIS on August 31, 2006. The agencies

1 published a Draft EIR/EIS (“DEIS”) for the Project on January 3, 2008. The DEIS contained  
2 more than 7,500 pages, focusing on SDG&E’s proposed – but later withdrawn – Northern Anza-  
3 Borrego Alternative.

4 41. Following the 90-day public review period, BLM and CPUC issued an SDEIS  
5 addressing new information on July 11, 2008. The SDEIS also evaluated several route revisions  
6 to each of the alternatives contained in the DEIS. Soon after, on October 13, 2008, BLM and  
7 CPUC issued the joint FEIS for the Project. The FEIS rejected the original Anza-Borrego routing  
8 proposal, selecting instead an alternative southern route named the “Environmentally Superior  
9 Southern Route” (“Southern Route”). The Southern Route stretches 120 miles across Southern  
10 California, passing through the CNF, El Monte Valley, McCain Valley, and the communities of  
11 Boulevard and Alpine. The Southern Route crosses approximately 19 miles of public National  
12 Forest System lands in the CNF and 49 miles of BLM lands. The CPUC approved the Project on  
13 December 18, 2008 and the BLM approved the Project on January 20, 2009.

14 42. Confusingly, like the DEIS, the FEIS focuses on the Anza-Borrego Alternative as if  
15 it were still the proposed route for the Project, and fails to describe and analyze the *selected*  
16 Southern Route in its entirety. Consequently, the Southern Route has never been addressed in its  
17 entirety in any NEPA document, precluding public understanding of the Project and its impacts.  
18 The Southern Route comprises a confusing array of separate alternative segments conflated with  
19 multiple smaller scale route and reroute alternatives. Information about each piece of the  
20 Southern Route was scattered throughout the DEIS, SDEIS, FEIS, and the BLM and CPUC’s  
21 comment responses. The *chosen* route “is described in Chapter H as the FEIS, in various sections  
22 of Chapter E, on detailed map sheets in Appendix 11, the response to comments, and revised  
23 Chapter 3 of the Recirculated Draft EIR/Supplemental EIS.” Supplemental Information Report  
24 (“SIR”) 3. Further, the precise alignment of the Project – as opposed to the unduly wide corridors  
25 presented in the FEIS as the Southern Route – was not identified in the FEIS, precluding site-  
26 specific assessment of the Project’s environmental impacts.

27 43. After certification of the FEIS, on November 5, 2008, BLM requested formal ESA  
28 section 7 consultation with FWS for the Project. On that same day, BLM transmitted its

1 Biological Assessment (“BA”) and requested the FWS to complete its Biological Opinion  
2 (“BiOp”) for the Powerlink Project on an expedited schedule. The BA identified ten federally  
3 listed species that were likely to be adversely impacted by the Project, including eight endangered  
4 species, and two threatened species. At the time of both BLM’s completion of its BA and FWS’s  
5 issuance of its BiOp, BLM had not yet surveyed substantial portions of the selected route for the  
6 existence of threatened and endangered species or their suitable habitats. In fact, no scientifically  
7 reliable surveys had been conducted for these species prior to BLM’s approval of rights-of-way  
8 for SDG&E. FWS issued its BiOp on January 16, 2009, meeting BLM’s request to expedite the  
9 review. Just four days later, and hours before the Obama Administration was sworn into office,  
10 BLM approved SDG&E’s Right-of-Way and Temporary Use Permit.

11 44. In its BiOp, FWS determined that the information it gained through consultation  
12 with BLM and through the NEPA process for the Project was sufficient to render an opinion  
13 regarding the Project’s effects on listed species. The BiOp concludes that six of the ten species  
14 identified by BLM and SDG&E would be affected by the Project. FWS concluded that if  
15 SDG&E complied with the mitigation measures proposed in the BiOp – specifically the survey-  
16 as-you-build requirement – the Project could proceed as planned.

17 45. FWS provided an incidental take statement for the six impacted species and their  
18 critical habitat, purportedly immunizing SDG&E and BLM from liability under the ESA.  
19 Notably, the BiOp failed to specify, as required by the ESA, the precise number, extent, location  
20 or timing of such incidental takings, stating instead that such specifications would be made  
21 following site-specific surveys conducted *after* approval of the Powerlink Project.

### 22 **The Project Modification Report**

23 46. After the CPUC and BLM approved the Southern Route and the FEIS, SDG&E  
24 changed the Project route yet again. On January 22, 2010, SDG&E submitted to CPUC and BLM  
25 an internal administrative draft of a PMR that defines changes made to the Project along its entire  
26 route subsequent to publication of the FEIS. This document presents new environmental impacts  
27 of the Project based on its modified alignment that were not analyzed in the FEIS.

28 47. On May 14, 2010, SDG&E submitted its final PMR to CPUC and BLM presenting

1 all new changes to the Project alignment and the Project’s new and increased environmental  
2 impacts. The CPUC and BLM analyzed the final PMR in their jointly-issued September 2010  
3 Memorandum. At the same time, BLM further concluded that it did not need to prepare an SEIS  
4 pursuant to NEPA in its September 2010 DNA.

5 **The Forest Service Record of Decision**

6 48. Subsequent to CPUC and BLM’s approval of the Project, William Metz, the Forest  
7 Supervisor for the CNF, issued an ROD for the Powerlink Project on July 9, 2010. The ROD  
8 approved construction, operation and maintenance of the Project on 19 miles of National Forest  
9 System lands within the CNF, as described in the PMR. The Forest Service purported to  
10 authorize the Project by issuing a 50-year special use permit to SDG&E. For areas located  
11 outside of the long-term special use permit area needed to support construction of the Project, the  
12 Forest Service purported to grant SDG&E a temporary special use permit.

13 49. In addition to approving the location of the Project within the CNF, the ROD  
14 amended the Forest Plan to provide three exceptions to the Plan. Forest Supervisor Metz  
15 concluded that these amendments were necessary precursors to issuing the special use permits to  
16 SDG&E.

17 50. Rather than prepare the further NEPA document required to document and evaluate  
18 the new information and changed circumstances of the Project that affect CNF lands, the Forest  
19 Service impermissibly issued a “Supplemental Information Report” rather than a NEPA review  
20 document along with its ROD on July 9, 2010.

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1 **VI. CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**

3 **THE FOREST SERVICE VIOLATED NEPA BY APPROVING THE POWERLINK**  
4 **PROJECT AND THE RELATED FOREST PLAN AMENDMENTS BASED ON AN**  
5 **INADEQUATE FEIS**

6 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202,**  
7 **and for violations of the National Environmental Policy Act,**  
8 **42 U.S.C. § 4321 et seq., and Administrative Procedure Act, 5 U.S.C. § 706)**

9 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL FOREST SERVICE DEFENDANTS)**

10 **The Forest Service Has an Independent Duty to Review the EIS and Ensure Its Adequacy**

11 51. The paragraphs set forth above are realleged and incorporated herein by reference.

12 52. A cooperating agency may adopt an EIS prepared by another agency without  
13 recirculating it for comment if, “after an independent review of the statement, the cooperating  
14 agency concludes that its comments and suggestions have been satisfied.” 40 C.F.R. § 1506.3(c).  
15 However, cooperating agencies cannot satisfy NEPA by adopting an inadequate EIS. “No matter  
16 how adequate the evaluation by a cooperating agency, its adoption of an inadequate FEIS is  
17 ineffectual.” *Sierra Club v. Marsh*, 714 F.Supp. 539, 558 n.22 (D.Me. 1989).

18 53. Rather, each “cooperating agency with jurisdiction by law (e.g. an agency with  
19 independent legal responsibilities with respect to the proposal) has an *independent* legal  
20 obligation to comply with NEPA.” Forty Most Asked Questions Concerning CEQ’s National  
21 Environmental Policy Act Regulations, question 30, 46 Fed.Reg. 18026 (March 23, 1981)  
22 (emphasis added). Thus, where a lead agency’s EIS is inadequate, the cooperating agency must  
23 supplement it to remedy the deficiencies.

24 54. Contrary to these requirements, the Forest Service adopted the EIS for the  
25 Powerlink Project despite the fact that the EIS is riddled with errors and omissions. Thus, the  
26 Forest Service’s approval of the Project and the related Forest Plan amendments violated NEPA.  
27 The Forest Service should have supplemented and must now supplement the EIS to remedy its  
28 many deficiencies.

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1 **The Powerlink EIS Fails to Clearly and Concisely Describe and Analyze the Selected Route**

2 55. NEPA regulations require an EIS to be “concise, clear, and to the point.” 40 C.F.R.  
3 § 1502.1. More specifically, the regulations demand that the EIS “[d]evote substantial treatment  
4 to each alternative considered in detail including the proposed action so that reviewers may  
5 evaluate their comparative merits.” 40 C.F.R. § 1502.14(b). Furthermore, the EIS must provide  
6 “a clear basis for choice among the options.” 40 C.F.R. § 1502.14.

7 56. Contrary to these requirements, the Powerlink EIS documents<sup>3</sup> were muddled and  
8 confusing and did not reveal to the reader the impacts of the selected project in a clear or concise  
9 manner. For example, the EIS contained extensive discussions of the impacts of the “*proposed*  
10 [but later *rejected*] project,” but did not provide such information about the *selected*, Southern  
11 Route. The EIS documents were plagued by a myriad of constantly changing alternatives that  
12 evaded clear communication of the impacts of each alternative. These deficiencies prevented the  
13 public from conducting informed review of and providing informed comment on, all of the  
14 different routes proposed in the EIS. Hidden among the shifting routes was the final selected  
15 project; the scant analysis of the final route was presented in vague, confusing and obscure  
16 sections of the FEIS buried among the many other revisions to alternative route options.

17 57. In addition to lacking a clear and consistent description of the selected route, the  
18 Powerlink EIS documents were inherently confusing because they failed to analyze the  
19 environmental impacts of the route as a whole. Instead, the fragmented and minimal descriptions  
20 of the impacts of the selected route were scattered throughout the EIS. Without a consistent route  
21 description, the analysis in the EIS was fundamentally and fatally flawed.

22 58. The disjointed presentation of the environmental impact analyses for the selected  
23 route was compounded by the fact that the Powerlink EIS provided unclear and differing  
24 depictions of the route. Even if a reader were able to sift through, collect and distill the variously  
25 located individual segment analyses, she would still be unable to obtain a comprehensive  
26 understanding of the selected route’s impacts because the Powerlink EIS never provided a clear

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28 <sup>3</sup>As noted above, “Powerlink EIS” refers to the Powerlink DEIS, Powerlink SDEIS, and  
Powerlink FEIS.

1 and unchanging description of the route.

2 **The Powerlink FEIS Fails to Establish the Need for the Project’s Additional Capacity**

3 59. NEPA regulations require that an EIS provide a clear statement of “the underlying  
4 purpose and need to which the agency is responding in proposing the alternatives including the  
5 proposed action.” 40 C.F.R. § 1502.13. An EIS must “be supported by evidence that the agency  
6 has made the necessary environmental analyses.” 40 C.F.R. §1502.1.

7 60. Contrary to these requirements, a true need for the Powerlink Project was not  
8 independently established in the Powerlink FEIS. For example, the FEIS failed to explain why  
9 the existing and foreseeable transmission capacity already in the planning pipeline will not foster  
10 renewable energy development even without the Powerlink Project. Had the Forest Service  
11 independently analyzed and attempted to verify SDG&E’s assertions of need for the project, it  
12 would have realized that they are misleading, contrary to fact, and ultimately do not establish any  
13 need for the project at all.

14 61. In an attempt to establish a need for the Project, the Powerlink FEIS relied on  
15 SDG&E’s projection of an electricity shortage and reliability deficiency in the San Diego area by  
16 2010 or 2011 if a major new transmission project were not built. *See* FEIS A-6, 8. However, not  
17 only did the FEIS fail to substantiate the forecasted shortage, the projection was wrong.  
18 Moreover, SDG&E has plenty of options for increasing local generation to meet future energy  
19 demand. Similarly, SDG&E could achieve its state-mandated renewable energy portfolio targets  
20 without having to construct either the Powerlink Project or any other new large-scale  
21 transmission project aimed at increasing energy imports. For these reasons, the Powerlink FEIS  
22 violated NEPA by failing to establish a need for the Project.

23 **The Powerlink FEIS’s Discussion of Affected Environment Is Inadequate**

24 62. NEPA regulations require that the EIS “succinctly describe the environment of the  
25 area(s) to be affected.” 40 C.F.R. § 1502.15. In order to evaluate the environmental  
26 consequences of the project, an accurate understanding of its current environmental setting must  
27 be developed. Detailed and specific surveys must be completed to inform the public and the  
28 decisionmakers of the current biologic, cultural, geographic, scenic, hydrologic, and historical

1 settings. These necessary surveys had not been completed prior to publication of the FEIS on  
2 October 13, 2008. Therefore, the FEIS – and the Forest Service’s subsequent decision to approve  
3 the Powerlink Project based on the EIS – contained an inaccurate description of the  
4 environmental setting and consequently, an inaccurate analysis of the environmental  
5 consequences of the Project.

6 **The Powerlink FEIS’s Analysis of the Powerlink Project’s Environmental Impacts Fails**

7 63. NEPA requires federal agencies to take a “hard look” at the environmental impacts  
8 of proposed major actions and “provide a full and fair discussion of significant environmental  
9 impacts” for the public’s review. 40 C.F.R. § 1502.1. Contrary to this mandate, the Powerlink  
10 FEIS failed to adequately address the following impacts of the Powerlink Project:

11 64. First, the Powerlink FEIS failed to adequately analyze the growth inducing impacts  
12 that excess transmission capacity will create by encouraging the development of additional  
13 energy production facilities (renewable and fossil fuel-based) in the rural and open space areas of  
14 eastern San Diego and western Imperial Counties. Relatedly, the FEIS failed to accurately  
15 portray the benefits of alternatives that would not cause such growth inducing impacts by  
16 encouraging energy production closer to and integrated into San Diego and its environs.

17 65. Second, the Powerlink FEIS failed to adequately analyze the impacts of the new  
18 transmission line on the increased risk of wildfires. FEIS Ch. 2, section 7. The FEIS failed to  
19 demonstrate that fire suppression experts and providers had been consulted, and that  
20 decisionmakers had considered (1) the transmission line’s role as a new ignition source, (2) the  
21 increased danger of fire due to the construction of wind farms, and (3) the fact that the  
22 transmission lines will traverse many remote areas that pose significant challenges to firefighting.

23 66. Third, the Powerlink FEIS failed to provide adequate information on the Project’s  
24 biological impacts by failing to include necessary surveys of the sensitive species that would be  
25 affected by the Powerlink Project, and instead relied on vague and superficial pre-construction  
26 surveys. The Powerlink FEIS failed to adequately analyze the impacts of the selected route on  
27 Peninsular bighorn sheep, the Quino checkerspot butterfly or the Arroyo toad. *See* FEIS D.2-271  
28 to 537. The Powerlink FEIS failed to address the impacts of the proposed and Project-induced

1 development of massive wind farms in the McCain Valley on sensitive species in the area. *See*  
2 FEIS, D.5-102. This development will pose significant threats to the future viability of species in  
3 the area, especially the avian species and the Peninsular bighorn sheep, and accordingly should  
4 have been discussed and analyzed in the FEIS.

5         67. Fourth, the Powerlink FEIS failed to adequately discuss the impacts of the Project  
6 on climate change. It should have estimated the quantity of greenhouse gas emissions that the  
7 project will cause, either directly or indirectly, and compared them with the greenhouse gas  
8 emissions of alternatives to the project. The FEIS presumed that a substantial portion of the  
9 electricity it would transmit would come from renewable sources, but it provided no analysis of  
10 the contrary, actual likelihood that much of the energy would in fact come from non-renewable  
11 sources, including SDG&E's own natural gas infrastructure and supplies a short distance south in  
12 Mexico. Additionally, while the FEIS summarily concluded that the overall climate change  
13 impacts of the selected and proposed routes would be identical, this conclusion was not supported  
14 by any evidence or analysis and did not constitute the "hard look" required by NEPA.

15         68. Fifth, the Powerlink FEIS's discussion of viewsheds was inadequate because it  
16 focused on the impacts of the proposed route, not the route that was ultimately selected. FEIS  
17 section D.31. Its failure to address the visual impacts of the *selected* route violated NEPA. The  
18 FEIS also failed to adequately compare the visual impacts of the chosen route with the other route  
19 options discussed in the FEIS and ignored entirely the impact of the development of wind farms  
20 in the McCain Valley on its highly scenic viewsheds.

21         69. Sixth, the Powerlink FEIS did not adequately discuss the effects of the Powerlink  
22 Project and its attendant industrial development on the rural character and quality of life of  
23 backcounty communities. FEIS D.4-112. The industrialization of affected areas of eastern San  
24 Diego County will adversely affect the lives of the residents who have chosen to live in those  
25 rural communities in part because of their close connection to nature.

26         70. Seventh, the Powerlink FEIS failed to adequately analyze the impacts of the new  
27 transmission line on the cultural and historic resources in the area, despite the fact that the  
28 transmission line will cut through areas with high historic and cultural value. Large segments of

1 the project area have not been field surveyed for the presence of cultural resources. Despite  
2 acknowledging potentially significant impacts on cultural resources, the FEIS improperly  
3 deferred determination of the cultural resource impacts until an unknown future date. Further, the  
4 FEIS neglected to disclose and analyze impacts to several known existing cultural sites in  
5 violation of NEPA.

6 71. Eighth, the Powerlink FEIS failed to adequately address the impacts of the Project  
7 on the wilderness experience of hikers, campers, other visitors and residents. FEIS D.5-102. It  
8 did not analyze the direct, adverse effect of the presence of industrial development, and the  
9 foreseeable development of wind farms in the McCain Valley, on what are presently natural  
10 landscapes.

11 72. Because the development of the Powerlink Project will involve the cutting of new  
12 roads into previously inaccessible areas, public use of these areas, whether authorized or  
13 unauthorized, will increase substantially. This increase in use is likely to result in increased fire  
14 danger, the spread of invasive species, vandalism, and disruption of habitat in remote, currently  
15 unaltered natural resource areas. These impacts were not adequately addressed in the FEIS.

16 73. Ninth and finally, the Powerlink FEIS failed to adequately address the impact of  
17 surface and groundwater use associated with the Project and its inducement of additional energy  
18 development along the selected route. Boulevard and surrounding homes and ranches have no  
19 access to imported water, and must rely on their groundwater basins to provide all of their  
20 municipal, domestic, fire suppression and agricultural needs. A substantial section of the  
21 Powerlink route is within the federally-designated Campo/Cottonwood Creek Sole Source  
22 Aquifer. The FEIS did not address the cumulative impact of other developments that may draw  
23 water from these basins. The FEIS also failed to adequately study the Project's impacts to  
24 surface water resources that may be affected by pumping, erosion and sedimentation.

25 **The Powerlink FEIS Segmented Environmental Review of Connected Actions**

26 74. NEPA requires that all connected actions be considered in the same document.  
27 Segmenting projects that are interrelated improperly understates their combined impacts. The  
28 FEIS segmented environmental review by failing to describe and analyze the environmental

1 impacts of (1) the foreseeable development of energy generation facilities in McCain Valley, (2)  
2 the foreseeable development resulting from the 2008 amendment to BLM's RMP, and (3) the  
3 foreseeable industrial growth resulting from the development of power sources, including fossil  
4 fuel based energy sources, that the Powerlink Project will induce.

5 **The Powerlink FEIS Fails to Consider a Reasonable Range of Alternatives**

6 75. NEPA requires federal agencies to study, develop and describe a reasonable range  
7 of alternatives that might avoid or mitigate a project's adverse environmental impacts. 42 U.S.C.  
8 § 4332(2)(C)(iii), (E). Contrary to this duty, the Powerlink FEIS dismissed feasible alternatives  
9 as infeasible and failed to consider other viable alternatives completely. For example, it was  
10 feasible to require consideration of an alternative that required the Powerlink Project's  
11 transmission capacity to be dedicated in whole or in part to renewable energy. Although  
12 requested by many commenters, no such alternative was included in the FEIS. Similarly, the  
13 FEIS failed to adequately consider another environmentally beneficial option – undergrounding  
14 all or most transmission lines. *See* FEIS ES-34 to 36. This alternative was feasible and would  
15 avoid many of the Project's significant impacts. Yet it was not addressed in the FEIS.

16 76. The Powerlink FEIS's failure to include adequate, accurate, and up-to-date  
17 information stymied any comparison of the alternatives that were presented. The lack of key  
18 information on the various routes' impacts precluded informed public review.

19 **The Powerlink FEIS Fails to Adequately Address the Impact of the Project**  
20 **on the CNF, Including the Need for Multiple Amendments to the Forest Plan**

21 77. NEPA requires an EIS to address the impacts of a project's compliance (or not)  
22 with state and federal environmental regulations and standards. *Sierra Club v. Forest Service*,  
23 843 F.2d 1190, 1195 (9th Cir. 1988), *citing* 40 C.F.R. § 1508.27(b)(10). Contrary to this  
24 mandate, the Powerlink FEIS failed to *fully* disclose and analyze how the selected Project route  
25 would conflict with the Forest Plan. *See* FEIS D.17.1.3, D.17.2.3. The FEIS failed to disclose all  
26 of the Project's conflicts with the Forest Plan and adequately analyze or mitigate the impacts of  
27 the resultant Forest Plan amendments. *Id.*

28 78. First, the FEIS failed to identify, analyze, and mitigate the Project's conflicts with

1 the Forest Plan’s Fire Prevention Standards, which protect the public and forest resources from  
2 wildfire, by “[r]educ[ing] the number of human-caused wildland fires and associated human and  
3 environmental impacts. . . .” *See* FEIS D.17.2.3; Forest Plan 116. Second, the FEIS failed to  
4 identify, analyze, and mitigate the Powerlink Project’s conflicts with the Forest Plan’s riparian  
5 area conservation standards, which call for the preservation of riparian areas. *See* FEIS D.17.2.3;  
6 Forest Plan Part 3 at 66, Part 1 at 41, Part 3 at 65, Part 2 at 95. Both of these impacts were left  
7 unaddressed, thus violating NEPA.

8 79. For each of these reasons, the FEIS violates NEPA. Accordingly, this Court should  
9 set aside the FEIS and the Forest Service’s approval of the Powerlink Project and amendments to  
10 the Forest Plan as contrary to NEPA and the APA.

#### 11 SECOND CLAIM FOR RELIEF

#### 12 **THE BUREAU OF LAND MANAGEMENT AND THE FOREST SERVICE VIOLATED** 13 **NEPA BY FAILING TO PREPARE AN SEIS TO ADDRESS SUBSTANTIAL POST-FEIS** 14 **PROJECT CHANGES, NEW INFORMATION, AND NEW CIRCUMSTANCES**

15 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202,**  
16 **and for violations of the National Environmental Policy Act,**  
17 **42 U.S.C. § 4321 et seq., and Administrative Procedure Act, 5 U.S.C. § 706)**

18 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL BUREAU OF LAND**  
19 **MANAGEMENT AND FOREST SERVICE DEFENDANTS)**

20 80. The paragraphs set forth above are realleged and incorporated herein by reference.

21 81. NEPA requires federal agencies to prepare an EIS for all “major federal actions  
22 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(c); *see also*  
23 40 C.F.R. § 1501.4. To ensure that federal agencies and the public make an informed decision on  
24 how to best “create and maintain conditions under which man and nature can exist in productive  
25 harmony,” an EIS must clearly and concisely describe all environmental impacts associated with  
26 a proposed action, including cumulative impacts, and must consider a reasonable range of  
27 alternatives to the proposed action. 42 U.S.C. §§ 4331(1), 4332(2)(c); 40 C.F.R. §§ 1500.1(b),  
28 1502.14, 1508.7, 1508.11 (1978).

82. NEPA requires agencies to prepare a supplemental EIS where there is a major



1 federal action remaining to occur and:

- 2 (i) The agency makes substantial changes in the proposed action that are  
3 relevant to environmental concerns; or
- 4 (ii) There are significant new circumstances or information relevant to  
5 environmental concerns and bearing on the proposed action or its impacts.

6 40 C.F.R. § 1502.9(c)(1). Further, agencies “may . . . prepare supplements when the agency  
7 determines that the purposes of the Act will be furthered by doing so.” 40 C.F.R. § 1502.9(c)(2).

8 Ideally, supplemental environmental review would be conducted by the lead agency for a project.  
9 However, cooperating agencies are independently bound by NEPA and must complete their own  
10 supplemental review if the lead agency does not accomplish it.

11 83. In determining whether an agency’s decision not to prepare an SEIS violated the  
12 law, courts in the Ninth Circuit rely heavily on two factors: the degree to which the agency  
13 considered the new information and evaluated its impact, and the degree to which the agency  
14 supported its decision not to supplement its impact statement with explanation or additional data.  
15 *See Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980).

16 84. In this case, under their respective NEPA duties as lead agency and cooperating  
17 agency for the Powerlink Project EIS, BLM and the Forest Service should have prepared and  
18 must now complete an SEIS for the Project. As discussed below, supplemental environmental  
19 review is required for three primary reasons. First, there are significant new environmental  
20 circumstances and information bearing on the Project and its impacts. Second, the Project has  
21 changed substantially in ways that impact the environment. Third, the purposes of NEPA will be  
22 furthered by supplemental environmental review due to the inadequacies of the original FEIS.

23 85. By examining the entire review process for the Powerlink Project, it is clear that  
24 most, if not all, of the information provided in the PMR and discussed in the Memorandum, the  
25 DNA, and the SIR could and should have been gathered and presented in either the original FEIS  
26 or an SEIS. This unnecessary delay in conducting the proper and required environmental review  
27 violates NEPA. Without analysis of new Project-related information in an SEIS, the public was  
28 deprived of an opportunity to fully address the Project’s impacts and the decisionmakers were  
deprived of all of the information necessary to foster informed decision making, *before the*

1 Project's approval.

2 **BLM and the Forest Service Must Prepare an SEIS to Fully Evaluate the Significant**  
3 **New Information Regarding the Project and Its Impacts**

4 86. Under NEPA, a federal agency must prepare an SEIS whenever there is “significant  
5 new . . . information relevant to environmental concerns and bearing on the proposed action or its  
6 impacts.” 40 C.F.R. 1502.9(c)(1). As with project changes and changed circumstances, courts  
7 will generally uphold an agency decision not to prepare an SEIS only if the agency has fully  
8 considered the changed circumstances, evaluated their likely impact and supported its decision  
9 with explanation and additional data, such as biological assessments completed pursuant to the  
10 ESA. *See Warm Springs Dam Task Force, supra*, 621 F.2d at 1024; *cf. Friends of the Clearwater*  
11 *v. Dombek*, 222 F.3d 552, 561 (9th Cir. 2000); *Natural Resources Defense Council v. Federal*  
12 *Aviation Administration*, 564 F.3d 549, 561-62 (2d Cir. 2009). Here, as evidenced by the PMR,  
13 BLM's Memorandum and DNA, and the Forest Service's SIR, substantial new information  
14 regarding the Project and its impacts has come to light since the publication of the FEIS.

15 87. First, significant new information reveals the Project's substantial cultural resources  
16 impacts. As BLM admits, complete baseline cultural resources information and impact analysis  
17 for the originally approved route was *completely omitted from the EIS*. Memorandum 9. Because  
18 the “exact locations of impacts for towers, lay downs, yards, and roads were not known or well-  
19 defined” in the FEIS, cultural resources impacts were not identified or analyzed until after the  
20 final route and structure locations were selected when the PMR was issued. Memorandum 1-36.  
21 This post-approval survey reveals previously undisclosed impacts to *at least 147 Cultural*  
22 *Resource Sites, including 33 on CNF lands*. SIR 11. BLM admits that some of the impacts  
23 would be significant and unmitigable. Memorandum Cultural Resources Attachment 1 to 9.  
24 Because the new cultural resources information reveals significant impacts never addressed in  
25 any NEPA document, an SEIS is required to analyze those impacts and afford the public an  
26 opportunity to review and comment thereon. 40 C.F.R. § 1502.9(c)(1).

27 88. Second, significant new information discloses the Project's significant impacts on  
28 special status wildlife. As BLM admits, “100 percent [biological] survey data for the alternatives

1 *was not available at the time the [FEIS] was published.”* Memorandum 1-12, emphasis added.  
2 The Project route was simply too ill-defined at the time the EIS was prepared for a proper NEPA  
3 review. Essential biological resources surveys and studies were completed only *after* publication  
4 of the FEIS. For example, the PBS were not monitored until 2009 (PMR 1-5), the arroyo toad  
5 was not surveyed until April through June 2009 (PMR 3-20) and riparian bird surveys were not  
6 completed until 2009 and 2010 (PMR 1-5, 3-24). Essential habitat assessments and/or protocol  
7 surveys for the golden eagle (PMR 3-23), the QCB (PMR 3-14 to 3-19), the barefoot banded  
8 gecko (PMR 3-21) and the coastal California gnatcatcher (PMR 3-22, 3-23) were likewise  
9 completed only recently – *long after the FEIS*. These surveys revealed for the first time the  
10 severity of the Project’s impacts on numerous imperiled species, such as the fact that “11  
11 gnatcatcher pairs, a single adult male and dispersing juveniles” – all endangered – were directly  
12 impacted by the Project. Recent surveys also disclosed *double* the number of active golden eagle  
13 nests near the project site, nine – instead of four. These surveys revealed the Project’s direct  
14 encroachment onto imperiled species’ occupied habitat. PMR S-3 to S-6; Memorandum 1-16, 1-  
15 17. This new information bears directly on the Project’s significant biological impacts, requiring  
16 analysis in an SEIS. 40 C.F.R. § 1502.9(c)(1).

17 89. Third, significant new information reveals the Project’s substantially greater  
18 impacts on special status plants and sensitive vegetation than those previously “determined to be  
19 significant in the [FEIS].” Memorandum 6. The PMR discloses that the Project modifications  
20 would exacerbate those significant impacts. With respect to special status plants, the modified  
21 Project would *impact 394 more acres of habitat* than the 593 acres identified for the selected  
22 design in the EIS. PMR 3-12. Similarly, the PMR shows *70 percent* and *30 percent increases* in  
23 the acreage of habitat impacted for the Nuttal’s scrub oak and Tecate tar plant, respectively. *Id.*  
24 As for sensitive vegetation, the modified Project would impact *27 percent* more acres of Diegan  
25 coastal sage scrub, *900 percent* more flat-topped buckwheat scrub acres and *46 percent* more  
26 acres of Sonoran creosote bush scrub than the originally approved project. PMR 3-9. These  
27 substantial increases in the severity of significant impact must be addressed in an SEIS. 40  
28 C.F.R. § 1502.9(c)(1).

1           90.     Fourth, significant new information discloses the Project’s greater impacts on  
2 wetlands. The PMR reveals an increase in permanent impacts to “herbaceous wetlands,  
3 freshwater, and streams (non-vegetated channel)” from 0.13 acres in the EIS to 1.1 acres resulting  
4 from the modified Project, an *eight-fold increase*. PMR S-3. Not only are these wetlands  
5 impacts significant in and of themselves, they “threaten a violation of . . . State . . . requirements  
6 imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(10). Specifically, the  
7 Project’s destruction of wetlands contravenes California’s Wetlands Conservation Policy, which  
8 provides:

9           It is the basic policy of the Resources Agency that this Agency and its  
10          Departments, Boards and Commissions will not authorize or approve projects that  
11          fill or otherwise harm or destroy coastal, estuarine, or inland wetlands.  
12          California Resources Agency, August 23, 1993, “California Wetlands Conservation Policy.”

13          Neither BLM nor the Forest Service has analyzed these new, significant wetlands impacts in a  
14          NEPA document. They must now do so by preparing an SEIS.

15           91.     Fifth, significant new information reveals the Project’s significant impacts on  
16 jurisdictional waters of the United States and California. As BLM admits, “[s]pecific acreages of  
17 impacts to jurisdictional waters were not calculated for the [project] in the [FEIS] because a  
18 jurisdictional delineation had not yet been conducted . . . [and] jurisdictional areas cannot be  
19 clearly defined until a final route . . . is selected.” Memorandum 1-15. Thus, it was not until the  
20 PMR was released that the impacts to the waters of the United States and California were  
21 disclosed, including impacts to *more than 10 acres each of state and federal jurisdictional*  
22 *waters*. PMR S-6. These impacts are not only new, they are significant. Because this  
23 information was developed after issuance of the FEIS and has never been circulated in a NEPA  
24 document, BLM and the Forest Service must now prepare an SEIS to address these impacts. 40  
25 C.F.R. § 1502.9(c)(1).

26           92.     Sixth and finally, significant new information discloses the Project’s substantial  
27 impacts on traffic and transportation. The PMR reveals that “there are three [new] locations . . .  
28 where traffic impacts would require mitigation via preparation and implementation of traffic  
control plans and related measures” and that “these three locations would operate with poor levels

1 of service and vehicular delay *exceeding the significance standards* to cause a potentially  
2 significant traffic impact.” PMR 3-52 (emphasis added). Further, the impacts of transporting  
3 water to the Project were not fully defined and analyzed in the EIS because a final water source  
4 had not yet been selected. Memorandum 6. Now it is clear that additional truck transport “would  
5 be required to distribute water to construction sites,” compounding the other new traffic and  
6 transportation impacts. PMR 3-61. There is no analysis in the EIS – or anywhere else – of how  
7 the mitigation measures listed in the EIS would even apply – if at all – to these newly identified  
8 impacts. Thus, BLM and the Forest Service must prepare an SEIS.

9 **BLM and the Forest Service Must Prepare an SEIS to Fully Evaluate**  
10 **the Substantial Changes to the Project**

11 93. Under NEPA, a federal agency must prepare an SEIS whenever there are  
12 “substantial changes in the proposed action that are relevant to environmental concerns” and have  
13 not been analyzed in a previous EIS. 40 C.F.R. 1502.9(c)(1). Further, it is not only changes in  
14 the *category* of impacts from the original to the altered project that require preparation of an  
15 SEIS; changes in *location* and *degree* of the project’s impacts also trigger the SEIS requirement.  
16 *State of New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683 (10th Cir.  
17 2009). As evidenced by the PMR, BLM’s Memorandum and DNA, and the Forest Service’s SIR,  
18 the Project has changed substantially since the original FEIS was issued, yet the defendants have  
19 failed to evaluate those changes in any further NEPA review.

20 94. First, the PMR significantly modifies the Project’s location, including changes  
21 throughout the CNF. The original FEIS analyzes a completely different route than the final route  
22 alignment described in the PMR. The modified Project route would shift the location of the  
23 transmission line well over 1,000 feet in many places, and nearly one mile on at least two  
24 segments of the line. PMR 3-46; Memorandum 2-45. Furthermore, the modified alignment  
25 moves the Project route substantially outside of the previously approved West-Wide Energy  
26 Corridor, imposing additional individual and cumulative environmental effects on CNF lands that  
27 would not have existed if the Project had remained collocated inside the corridor. These changes  
28 in Project location cause impacts on numerous vulnerable resources and are thus precisely the

1 type of project changes courts have required agencies to address in SEISs. *State of New Mexico*  
2 *ex rel. Richardson, supra*, 565 F.3d 683. For example, the modified Project would pass through  
3 new locations that have unique and higher fire risks, putting 27 additional homes at risk of  
4 wildfire. Memorandum 1-26, 1-28 to 1-30. Nonetheless, these Project changes and associated  
5 impacts have not been analyzed in a NEPA document. Further, BLM and the Forest Service give  
6 short shrift to these changes in the Memorandum, the DNA and the SIR and provide no  
7 supporting evidence to show that the changes would be minor. Therefore BLM and the Forest  
8 Service must prepare an SEIS to analyze the Project route changes. *See Warm Springs Dam Task*  
9 *Force, supra*, 621 F.2d at 1024.

10 95. Second, the PMR indicates that a substantial portion of the Project – 230  
11 transmission towers – would be built by helicopter construction, while the FEIS assumes that  
12 most of the Project would be built using conventional ground-based construction methods. PMR  
13 3-3; Memorandum 1-22. Due to the increased use of helicopters for construction, SDG&E would  
14 have to construct substantially more helicopter landing pads and there would be greater air  
15 emissions associated with the Project. Helicopter construction would significantly increase fire  
16 danger due to the reduced availability of access roads to fight potential fires. The increased  
17 helicopter noise would significantly impact Peninsular bighorn sheep (“PBS”), which occupy  
18 critical habitat the Project would traverse. The PMR reveals that much of the new helicopter  
19 construction would be conducted on Link 1 and Link 2, both of which have designated PBS  
20 *critical habitat*. For these reasons, the increased use of helicopters constitutes a substantial  
21 Project change that must be analyzed in an SEIS. The Memorandum, the DNA and the SIR fail  
22 to provide facts and analysis to support BLM’s and the Forest Service’s decisions not to prepare  
23 an SEIS, and the agencies must now do so.

24 96. Third, the PMR states for the first time that SDG&E must install 1,345 red marker  
25 balls covering the majority of the Project route. The markers, located atop static lines strung  
26 between the transmission line towers, would make the transmission lines significantly more  
27 noticeable throughout the Project route and thereby pose significant new visual impacts. The  
28 FEIS fails to specify the number or location of marker balls, let alone analyze their visual

1 impacts. See FEIS sections B.3.2.4, E.1.3, E.2.3, E.4.3. BLM’s claim in its Memorandum that  
2 the impacts of the marker balls need not be examined in an SEIS is unsupported by evidence and  
3 analysis and contrary to law. See *Warm Springs Dam Task Force, supra*, 621 F.2d at 1024; *State*  
4 *of New Mexico ex rel. Richardson, supra*, 565 F.3d 683 (holding that changes in the location of  
5 impacts will often require preparation of an SEIS).

6 97. Fourth, the modified Project would cause new and increased ground disturbances  
7 not analyzed in the EIS including new and modified construction yards (Memorandum 2-23, 2-  
8 36, 2-70, 2-91, 2-100, 2-110), more construction access pads (Memorandum 2-60), changed  
9 temporary work areas (Memorandum 2-47), six additional reconductering replacement poles  
10 (Memorandum 2), and new 10.58 acre field office headquarters (Memorandum 2-90). The  
11 significant disturbances that these changes would cause include an increase in “significant”  
12 permanent impacts to Riparian Conservation Areas in the CNF (SIR 4, 13) and “long-term visible  
13 scarring” due to vegetation clearing, grading and erosion in areas affected by the changes  
14 (Memorandum 2-51). BLM and the Forest Service must analyze these “significant” impacts in an  
15 SEIS, rather than a non-NEPA document such as the SIR. Even if, as BLM claims, “overall, the  
16 modified project would result in a decrease . . . ground disturbance” (Memorandum 10), NEPA  
17 requires subsequent environmental review if there are *any* “substantial changes in the proposed  
18 action that are relevant to environmental concerns,” such as the modified Project’s numerous new  
19 impacts never addressed in the FEIS. 40 C.F.R. § 1502.9(c)(1).

20 98. Fifth, the modified Project would use infrared lighting, an addition that harms  
21 migratory birds “that was not analyzed in the [FEIS].” SIR 10. The use of infrared lighting on  
22 towers along the Project is a substantial change that would have significant impacts on both  
23 biological and visual resources. For example, as the Forest Service admits, “[a]dding lights to  
24 most or all towers is likely to significantly increase the risk of collisions” with migrating birds  
25 and “could increase effects on bats.” SIR 10; *see also* Memorandum 1-3 (BLM admission of the  
26 possibility of the same impacts). Further, as the Forest Service also admits, the “magnitude of  
27 this effect has not been quantified” and thus the full impacts of infrared lighting will not be  
28 known until additional studies are completed. SIR 10. This is exactly the type of situation where

1 an SEIS must be prepared – a project change with a high likelihood of significant environmental  
2 harm that has not yet been fully evaluated. *See Warm Springs Dam Task Force, supra*, 621 F.2d  
3 at 1024. BLM’s assertion that implementation of FEIS Mitigation Measure B-10a would reduce  
4 the infrared lighting impacts to an insignificant level changes nothing, because the measure was  
5 not developed for – and has not been specifically evaluated in respect to – infrared lighting. As  
6 such, BLM and the Forest Service must prepare an SEIS to analyze the addition of infrared  
7 lighting.

8 99. Sixth and finally, the modified Project would include a new “storage facility on . . .  
9 land within the existing Imperial Valley Substation.” PMR S-2. This facility would consist of a  
10 new steel building approximately 60 feet by 120 feet by 30 feet. Memorandum 2-6. In addition  
11 to its size, the facility would contribute to significant visual resources impacts by reflecting  
12 sunlight off its metallic exterior. Yet, despite the massive size and reflectivity of the facility,  
13 BLM and the Forest Service have not evaluated it or its visual and other impacts in a NEPA  
14 document. The agencies must now rectify their failure by preparing an SEIS that addresses the  
15 storage facility.

16 **BLM and the Forest Service Must Prepare an SEIS to Fully Evaluate**  
17 **the Significant New Circumstances Surrounding the Project**

18 100. Under NEPA, a federal agency must prepare an SEIS whenever there are  
19 “significant new circumstances . . . relevant to environmental concerns and bearing on the  
20 proposed action or its impacts.” 40 C.F.R. 1502.9(c)(1). Courts will generally uphold an agency  
21 decision not to prepare an SEIS only if the agency has fully considered the changed  
22 circumstances, evaluated their likely impact and supported its decision with explanation and  
23 additional data, such as biological assessments completed pursuant to the ESA. *See Warm*  
24 *Springs Dam Task Force, supra*, 621 F.2d at 1024; *cf. Friends of the Clearwater v. Dombeck*, 222  
25 F.3d 552, 561 (9th Cir. 2000); *Natural Resources Defense Council v. Federal Aviation*  
26 *Administration*, 564 F.3d 549, 561-62 (2d Cir. 2009). Here, as evidenced by the PMR, BLM’s  
27 Memorandum and DNA, and the Forest Service’s SIR, the circumstances surrounding the Project  
28 have changed substantially since the original FEIS was issued.



1           101. First, FWS has proposed (in 2009) revisions to the critical habitat for the arroyo  
2 toad, which would designate new critical habitat along the Project route. 74 Fed.Reg. 52611-  
3 52664; PMR 3-20. If the proposed rule is adopted, the modified Project would impact nearly 47  
4 acres of new arroyo toad critical habitat. Memorandum 1-16. And as a result, “an additional  
5 category of habitat impacts would require mitigation.” PMR 3-20. Despite the PMR’s  
6 conclusion that the designation of new critical habitat would be a significant impact requiring  
7 mitigation, BLM dismisses it as insignificant and asserts that arroyo toad *occupied* habitat has  
8 already been studied. Memorandum 1-13. BLM’s conclusion, however, is unsupported by  
9 explanation and additional evidence as the courts require. *See Warm Springs Dam Task Force*,  
10 *supra*, 621 F.2d at 1024. Furthermore, it is contradicted by settled law differentiating occupied  
11 from critical habitat. While occupied habitat should be protected for the benefit of the species,  
12 critical habitat is “*essential* to the conservation of the species,” and therefore requires “special  
13 management considerations.” 16 U.S.C. § 1532(5)(A)(I) (emphasis added). It is clear from the  
14 plain language of the Endangered Species Act that impacts to occupied versus critical habitat are  
15 not the same and thus, BLM and the Forest Service must analyze the impact to critical habitat in  
16 an SEIS.

17           102. Second, FWS revised the critical habitat for PBS in 2009. 74 Fed.Reg. 17288-  
18 17365. As a result, *the modified Project would impact nearly seven acres of newly designated*  
19 *critical habitat*. Memorandum 1-17. This is a substantial impact and, as with the impacts to the  
20 proposed critical habitat for the arroyo toad, BLM and the Forest Service must analyze it in an  
21 SEIS. It is immaterial whether the FEIS previously analyzed impacts to occupied habitat, since  
22 occupied and critical habitat are treated much differently. 16 U.S.C. § 1532(5)(A)(I). Further, it  
23 is immaterial whether the modified Project may impact fewer acres of PBS critical habitat than  
24 before, since the new impacts are in different *locations* and therefore different in kind and degree.  
25 *See State of New Mexico ex rel. Richardson, supra*, 565 F.3d 683. BLM and the Forest Service  
26 must analyze this changed circumstance in an SEIS.

27           103. Third, FWS revised the critical habitat for QCB in 2009. 74 Fed.Reg. 28776-  
28 28862. As a result, the modified Project would impact approximately 6 acres of newly

1 designated critical habitat. Memorandum 1-13. This is a substantial impact and, as with the  
2 impacts to the newly designated critical habitat for the PBS, BLM and the Forest Service must  
3 analyze it in an SEIS. It is immaterial whether the FEIS previously analyzed impacts to occupied  
4 habitat, since occupied and critical habitat are treated much differently. 16 U.S.C. §  
5 1532(5)(A)(I). Further, it is immaterial whether the modified Project may impact fewer acres of  
6 PBS critical habitat than before, since the new impacts are in different *locations* and therefore  
7 different in kind and degree. *See State of New Mexico ex rel. Richardson, supra*, 565 F.3d 683.  
8 BLM and the Forest Service must analyze this changed circumstance in an SEIS.

9 104. Fourth and finally, subsequent to the publication of the FEIS, FWS reinstated the  
10 proposed rule to list the flat-tailed horned lizard (“FTHL”) as a threatened species. PMR 3-21, 3-  
11 22. According to BLM, *the modified Project would impact nearly 170 acres of FTHL habitat.*  
12 Memorandum 1-16. In its Memorandum, BLM attempts to trivialize this newly identified  
13 substantial impact by comparing the combined impacts on *all* special status species from the  
14 modified Project with the originally approved design. Memorandum 1-17. But the test for  
15 preparation of an SEIS is not whether, on balance, all the disparate impacts combined are greater  
16 than they were before the new circumstances arose; the test is whether *any individual* changed  
17 circumstance is significant. 40 C.F.R. § 1502.9(c)(1). Thus, BLM and the Forest Service must  
18 analyze the modified Project’s impacts on FTHL habitat in an SEIS because the species’  
19 proposed listing as “threatened” constitutes a changed circumstance.

### 20 THIRD CLAIM FOR RELIEF

#### 21 **THE FOREST SERVICE’S APPROVAL PROCESS FOR THE** 22 **POWERLINK PROJECT VIOLATED NFMA**

23 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202, and for violations of**  
24 **the National Forest Management Act, 16 U.S.C. § 1600 et seq., and Administrative**  
25 **Procedure Act, 5 U.S.C. § 706)**

26 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL FOREST SERVICE DEFENDANTS)**

27 105. The paragraphs set forth above are realleged and incorporated herein by reference.

28 106. NFMA grants the Forest Service a leading role in “assuring that the Nation

1 maintains a natural resource conservation posture that will meet the requirements of our people in  
2 perpetuity.” 16 U.S.C. § 1600(6). Land management plans, which provide for balanced and  
3 sustainable use of forest and grassland resources for outdoor recreation, forage, timber, wildlife  
4 and fish, biological diversity, productive soils, clean air, water, and minerals, guide the Forest  
5 Service in fulfilling its role as the steward of the National Forest system. 36 C.F.R. § 219.1. To  
6 ensure compliance with these plans, “[r]esource plans and permits, contracts, and other  
7 instruments for the use and occupancy of National Forest System lands *shall be consistent* with  
8 the land management plans.” 16 U.S.C. § 1604(i) (emphasis added).

9 107. The formulation of a land management plan requires the responsible officials to  
10 consider specific management criteria, such as the mandates of the Forest Service’s National  
11 Strategic Plan, existing conservation strategies, and biological opinions applicable to the planning  
12 area. 36 C.F.R. § 219.7. The Forest Service must also evaluate the merit of the scientific basis of  
13 all available analysis on which it relies. 36 C.F.R. § 219.11. While the Forest Service may  
14 amend an existing plan at any time, the decision to amend an existing plan must be based on the  
15 identification and consideration of new or changed circumstances, together with the analysis of  
16 the effects of the proposed amendment. 36 C.F.R. §§ 219.2, 219.8.

17 108. When amending an existing plan, the responsible officials must actively engage  
18 interested or affected communities, groups, and individuals in the stewardship of National Forest  
19 System lands by using “ collaborative and participatory approach[es] to land management  
20 planning.” 36 C.F.R. § 219.9. The public must be duly notified and allowed an “open and  
21 meaningful” opportunity to participate in the planning process in accordance with 36 C.F.R. §  
22 219.9. The public also has a right to file an objection to a proposed amendment, pursuant to 36  
23 C.F.R. § 219.13.

24 109. Both the FEIS and the Forest Service’s approval process for the Project completely  
25 ignore NFMA’s mandates. First, the FEIS fails to even acknowledge that the Powerlink Project  
26 would require substantial substantive amendments to the Forest Plan, in direct violation of 16  
27 U.S.C. § 1604(i). *Two years later*, the Forest Service's May 15, 2010 legal notice and comment  
28 period informed the public for the first time that Forest Service approval of the Project would

1 require amendments to the Forest Plan and would require SDG&E to obtain a special use permit.  
2 Yet neither draft plan amendments nor a draft permit were available to the public for review  
3 during the public comment period on those amendments and permit! Although the Forest Service  
4 indicated in its notice that it would prepare an SIR to address Project changes as they relate to the  
5 CNF, it failed to make the SIR available to the public during the public comment period. The  
6 Forest Service also refused to afford the public any opportunity to comment at a public hearing,  
7 despite repeated requests for a hearing by plaintiffs.

8         110. Finally, the Forest Service's SIR and ROD fail to disclose and analyze future  
9 expansions of the Project, violating NFMA's public participation requirements. The FEIS clearly  
10 indicates that SDG&E intends to expand the Powerlink Project by linking a 500 kV line and  
11 several 250 kV lines to the Project in the near future. FEIS B-5, B-23. These lines, which would  
12 be used to provide additional electricity to the power hungry Greater Los Angeles Area, would  
13 cut straight through the CNF. *See* FEIS Fig. B-12b (500 kV line to Riverside), Fig. B-12a  
14 (multiple 200 kV lines to support the 500 kV line). Since these expansions are foreseeable  
15 actions that are connected to the proposed Project, NFMA and its implementing regulations  
16 require the Forest Service to notify the public and ensure their consistency with the Forest Plan.  
17 16 U.S.C. § 1604(i); 36 C.F.R. § 219.9. Instead, the Forest Service unlawfully segmented the  
18 Project by approving the proposed Project without considering the future expansions'  
19 environmental effects, consistency with the Forest Plan, and potential future amendments to the  
20 Forest Plan.

21         111. All of these actions during the Forest Service's approval process, as described  
22 above, denied the public an opportunity to review crucial documents and information related to  
23 the Project, and thereby violated the public engagement requirements of NFMA.

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1 FOURTH CLAIM FOR RELIEF

2 **THE FOREST SERVICE’S APPROVAL OF THE POWERLINK PROJECT**  
3 **VIOLATED THE FOREST PLAN AND THUS NFMA**

4 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202, and for violations of**  
5 **the Cleveland National Forest Management Plan, National Forest Management Act, 16**  
6 **U.S.C. § 1604(i), and Administrative Procedure Act, 5 U.S.C. § 706)**

7 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL FOREST SERVICE DEFENDANTS)**

8 112. The paragraphs set forth above are realleged and incorporated herein by reference.

9 113. The National Forest Management Act directs that “[r]esource plan and permits,  
10 contracts, and other instruments for the use and occupancy of National Forest System lands shall  
11 be consistent with the land management plans.” 16 U.S.C. § 1604(i). Accordingly, “[t]he Forest  
12 Service cannot approve any of the route alternatives [for the Powerlink] without first ensuring  
13 their consistency with the [CNF] Forest Plan.” FEIS D.17-7. Contrary to this imperative, the  
14 Project violates many of the Forest Plan’s land use standards and land use zones. Despite these  
15 inconsistencies, the Forest Service authorized SDG&E’s special use of CNF lands. The Project’s  
16 significant conflicts with the Forest Plan have not been addressed, much less resolved, by any  
17 agency to date. In fact, the Forest Service has denied all requests by plaintiffs to hold public  
18 hearings on these inconsistencies. Instead of modifying the Powerlink Project to conform to the  
19 Forest Plan, the Forests Service purported to modify the Forest Plan *to conform to the Powerlink*  
20 *Project*, subordinating the public’s interest in protection of the CNF resources to SDG&E’s  
21 private profit. Although the Forest Service purported to thus sanitize the Project’s many conflicts  
22 with the Forest Plan, its many Forest Plan amendments failed to eliminate all of these conflicts  
23 including the Project’s violations of Forest Plan protections regarding fire danger, land-use zones,  
24 aesthetic values, and riparian resources.

25 114. First, the Project violates the Plan’s visual and landscape standards. First, as the  
26 FEIS concedes, “[t]he high level of change that would result from [the Project] would *not be*  
27 *consistent* with Aesthetics Management Standard S9 of the [Forest Plan] requiring activities to  
28 meet the applicable [scenic integrity object].” FEIS E.4.3-11, emphasis added. Second, the

1 Project violates Aesthetics Management S10 by degrading the applicable Scenic Integrity  
2 Objective for lands through which the Project would pass. ROD 11. Admitting that the Project  
3 fails to meet the Forest Plan’s aesthetic standards and landscape strategies, the Forest Supervisor  
4 purported to approve an “exception” to them. *Id.* But no explanation for this “exception” was  
5 provided in either the ROD or the SIR, the exact details of the exception are vague, and the  
6 exception was approved outside of the public eye. For all of these reasons, the exception is not a  
7 proper amendment to the Forest Plan and must be set aside.

8 115. Second, the Project conflicts with the Forest Plan’s special use standards for non-  
9 recreation special uses such as the Project. CNF LMP 112. Under the Forest Plan, a project  
10 proponent must obtain a special use authorization before it may develop projects in habitats of  
11 threatened, endangered, proposed and candidate species. *Id.* The authorization must avoid or  
12 minimize impacts to the species’ habitat, cultural and scenic resources, and open space values,  
13 and must assure that utilities are co-located with existing utilities whenever possible to minimize  
14 the burden and harm to National Forest System land. *Id.* But the Powerlink Project does not  
15 conform with either directive. The Project route disturbs habitat for several listed and special  
16 status species. It is clearly not co-located with the West-Wide Energy Corridor. Therefore the  
17 Project violates the special use standards set forth in the CNF LMP. Because the Project is  
18 inconsistent with the Forest Plan, it violates the NFMA, 16 U.S.C. § 1604(i).

19 116. Third, the Project conflicts with two Forest Plan standards for riparian conservation  
20 areas. Both Standard S47 and WAT1 require measures to protect riparian reserves and  
21 watersheds within the CNF. ROD 11; CNF LMP 95. The Project conflicts with these standards  
22 because it will cause significant harm to designated riparian conservation areas and watersheds in  
23 the Forest with construction of tower pads, staging areas, access roads, pull sites, and other  
24 project activities in imperiled species’ riparian habitat. *See* FEIS Figure E.2.2-1.

25 117. Fourth, the Project conflicts with many of the Forest Plan’s 21 Forest-specific  
26 design criteria. For example, CNF Standard 5 requires the Forest Service to “[c]onsolidate major  
27 transportation and utility corridors by co-locating facilities and/or expanding existing corridors.”  
28 CNF LMP 68. The Project is not co-located within the West-Wide Energy Corridor, thus

1 violating this design criteria.

2 118. Fifth, the Project conflicts with two land-use zoning restrictions in the Forest Plan.  
3 The selected route for the Project passes directly through several designated Back Country  
4 Motorized Use Restricted (“BCMUR”) and Back Country Non-Motorized (“BCNM”) land-use  
5 zones. The affected BCMUR and BCNM zones are currently undeveloped areas with few, if any,  
6 roads. CNF LMP 7-8. Major utility corridors, such as the Powerlink Project, are allowed in  
7 BCMUR zones only in “designated areas,” which include only the Valley/Serrano and West-  
8 Wide Energy Corridor. CNF LMP 4; ROD 12. In contrast, no major utility corridors are allowed  
9 in BCNM zones. Contrary to these restrictions, the selected Project route is not within the  
10 Valley/Serrano Corridor and deviates substantially from the West-Wide Energy Corridor.  
11 Although the Forest Supervisor purportedly approved an amendment to the Forest Plan that  
12 allows the Project to run through BCNM zones, as long as it avoids private property and sensitive  
13 vegetation (ROD 12), this amendment should have been presented to the public for review prior  
14 to any Forest Service action, as required by NFMA. 36 C.F.R. § 219.9.

15 119. Sixth, the Project directly conflicts with the Forest Plan’s fire prevention standards.  
16 Appendix B of the Forest Plan contains program strategies and tactics for achieving the desired  
17 conditions and goals presented in the Plan, such as preventing “human-caused wildland fires and  
18 associated human and environmental impacts.” CNF LMP 116. The construction of the  
19 Powerlink Project violates this crucial public health and safety goal in four ways. First, it allows  
20 motorized activity in restricted areas, increasing the risk of wildfire and interfering with  
21 firefighting activities. Second, it allows the construction and maintenance of overhead  
22 powerlines in dry, windy locations that will increase the probability of a wildfire, a risk that  
23 cannot be mitigated to less than significance. FEIS E.4.15; SIR 16. Third, the introduction of  
24 non-native plants, which is likely to occur during Project related activities, will increase the risk  
25 of fire ignition and the rate of spread. FEIS E.4.15. Fourth, and most important, the Project’s  
26 overhead powerlines will prevent the use of low-flying aircraft dropping fire retardant or water in  
27 areas near the lines, curtailing use of one of the most effective fire suppression techniques for  
28 remote areas. *Id.* Land-based fire crews will also be precluded from accessing areas within 1000

1 feet of the lines due to the risk of being struck or electrocuted by these high-tension lines should  
2 they break free. Because the Project conflicts with the Forest Plan’s fire safety guidelines, it  
3 violates the NFMA. 16 U.S.C. § 1604(i).

4 120. Finally, the Project conflicts with the CNF LMP’s species protection standards.  
5 According to the Plan, the Forest Service must “[m]anage habitat to move listed species toward  
6 recovery and de-listing. . . . [and] [p]revent listing of proposed and sensitive species.” CNF LMP  
7 87. Also, to protect Golden Eagles, the Forest Service must “[r]estrict human access during  
8 critical life stages.” *Id.* at 89. Contrary to these standards, by constructing and operating the  
9 Project in nesting and roosting habitat for Golden Eagles, the Project would move listed species  
10 closer to extinction, move unlisted species closer to listing as threatened or endangered, and  
11 greatly increase human access and disturbance at Golden Eagle nests. ROD 5.

12 121. The Project’s violations of the Forest Plan evade and defeat its substantive goals  
13 and violate the NFMA.

14 **FIFTH CLAIM FOR RELIEF**

15 **THE FOREST SERVICE’S APPROVAL OF**  
16 **THE POWERLINK PROJECT VIOLATED FLPMA**

17 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202, and for violations of**  
18 **the Federal Land Policy Management Act, 43 U.S.C. § 1701 et seq., and Administrative**  
19 **Procedure Act, 5 U.S.C. § 706)**

20 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL FOREST SERVICE DEFENDANTS)**

21 122. The paragraphs set forth above are realleged and incorporated herein by reference.

22 123. FLPMA grants the Secretary of Agriculture the authority to issue rights-of-way for  
23 the “transmission, and distribution of electric energy.” 43 U.S.C. § 1761(a)(4). However,  
24 “[e]ach right-of-way shall contain – (a) terms and conditions which will . . . (ii) *minimize damage*  
25 *to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the*  
26 *environment.*” 43 U.S.C. § 1765(a)(ii) (emphasis added). FLPMA also requires that “[e]ach  
27 right-of-way shall be limited to the ground which the Secretary concerned determines. . . will do  
28 no unnecessary damage to the environment.” 43 U.S.C. § 1764(a)(4).



1           124. The Forest Service’s approval of the Project violates FLPMA because it authorizes  
2 damage to the CNF’s scenic and aesthetic resources and greatly increases the risk of wildfire.  
3 Since the Project route will in fact cause significant avoidable environmental impacts, the Forest  
4 Service’s decision to approve the Project fails to “minimize damage to scenic and esthetic values  
5 and fish and wildlife habitat and otherwise protect the environment” as required by FLPMA. By  
6 (1) failing to consider and approve the three less impactful alternatives identified in the FEIS,  
7 including conservation, distributed local generation such as roof-top solar, and co-location of the  
8 Project within the existing Southwest Powerlink corridor, (2) reducing the number and extent of  
9 power lines occupying the Forest as part of an action alternative, and (3) undergrounding more  
10 than the tiny percentage of transmission lines described in FEIS Alternative 4, the Forest Service  
11 has not complied with FLPMA requirements for minimizing environmental damage from  
12 transmission line approvals.

13           125. The Project also violates FLPMA’s command that “[i]n order to minimize adverse  
14 environmental impacts and the proliferation of separate rights-of-way, the utilization of  
15 rights-of-way in common shall be required to the extent practical.” 43 U.S.C. § 1763. As noted,  
16 the Project is not co-located with either the Southwest Powerlink or the West-Wide Energy  
17 Corridor, creating significantly greater impacts to the CNF than would occur if the Project  
18 utilized “rights-of-way in common” as FLPMA requires. The Project should have been co-  
19 located “to minimize adverse environmental impacts and the proliferation of separate  
20 rights-of-way” and to “minimize damage to scenic and esthetic values and fish and wildlife  
21 habitat and otherwise protect the environment.” *Id.*; 43 U.S.C. § 1765. Because it was not, the  
22 Project’s approval violated FLPMA.

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1 SIXTH CLAIM FOR RELIEF

2 **THE FISH AND WILDLIFE SERVICE VIOLATED THE ESA BY FAILING TO**  
3 **REINITIATE SECTION 7 CONSULTATION**

4 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202,**  
5 **and for violations of the Endangered Species Act, 16 U.S.C. § 1531 et seq., and**  
6 **Administrative Procedure Act, 5 U.S.C. § 706)**

7 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL FWS DEFENDANTS)**

8 126. The paragraphs set forth above are realleged and incorporated herein by reference.

9 127. Under Section 7(a)(2) of the ESA, each of the federal defendants had a duty to  
10 consult with the FWS to ensure that their actions do not “jeopardize the continued existence of  
11 any endangered species or threatened species or result in the destruction or adverse modification  
12 of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). FWS regulations explain that an  
13 agency may satisfy this obligation through either formal or informal consultation. Formal  
14 consultation is usually required whenever an agency action “may affect listed species or critical  
15 habitat.” 50 C.F.R. § 402.14(a). However, an agency may forgo formal consultation if, after  
16 engaging in informal consultation with the FWS, both agencies determine that the proposed  
17 action “is not likely to adversely affect any listed species or critical habitat.” *Id.* § (b)(1).

18 128. Under certain circumstances, the Section 7 duty to consult can be ongoing.  
19 Agencies are required to *reinitiate* formal consultation when “discretionary Federal involvement  
20 or control over the action has been retained or is authorized by law” and:

- 21 (a) If the amount or extent of taking specified in the incidental take statement is  
22 exceeded;
- 23 (b) If new information reveals effects of the action that may affect listed species or  
24 critical habitat in a manner or to an extent not previously considered;
- 25 (c) If the identified action is subsequently modified in a manner that causes an effect  
26 to the listed species or critical habitat that was not considered in the biological  
27 opinion; or
- 28 (d) If a new species is listed or critical habitat designated that may be affected by the

1 identified action.

2 50 C.F.R. § 402.16. This mandate is imposed on both action agencies *and the FWS*. *Id.*; *Salmon*  
3 *Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (“The duty to  
4 reinitiate consultation lies with both the action agency and the consulting agency”);  
5 *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th  
6 Cir. 2001).

7 129. In this case, the FWS, as the consulting agency, violated the ESA because it failed  
8 to reinitiate formal consultation after the Project was modified in SDG&E’s PMR. The  
9 reinitiation of formal consultation is required because the PMR reveals Project changes, new  
10 information and changed circumstances that “may affect listed species or critical habitat.” 50  
11 C.F.R. § 402.14(a). First, the PMR subsequently modified the Project’s alignment by designating  
12 a new Project route that deviates from the selected Southern Route. Since the Project now has a  
13 new location that was unknown when the FWS prepared its BiOp, 50 C.F.R. section 402.16(c)  
14 mandates the FWS to reinitiate formal consultation with the action agencies in order to  
15 adequately consider the Project’s impacts on listed species and their critical habitats.

16 130. Moreover, the FWS must reinitiate consultation because new information reveals  
17 that the Project may have additional adverse effects on listed species and their habitats. For  
18 example, there were several surveys of listed species and habitat assessments conducted long  
19 after the FWS issued its BiOp on January 16, 2009: the monitoring of Peninsular bighorn sheep  
20 was not completed until December 2009, the survey for arroyo toad habitat was not completed  
21 until June 2009, habitat assessments and protocol surveys for the Quino checkerspot butterfly  
22 occurred through January 2010, and habitat assessments for the coastal California gnatcatcher  
23 were not completed until as late as January 2010. PMR 1-5, 3-14 to 3-19. Since the FWS did not  
24 have any of this information when it completed its BiOp, 50 C.F.R. section 402.16(b) mandates  
25 the agency to reinitiate formal consultation.

26 131. Finally, the FWS must reinitiate formal consultation because it has designated *new*  
27 *critical habitat for three listed species and has proposed listing of one species that are adversely*  
28 *affected by the Project since the agency issued its BiOp on January 16, 2009*. On April 14, 2009,

1 the FWS adopted a final rule that revised the critical habitat for Peninsular bighorn sheep along  
2 the Project route. 74 Fed.Reg. 17288-17365. The FWS also issued proposed rules to revise  
3 arroyo toad critical habitat along the Project route on October 13, 2009 and Quino checkerspot  
4 butterfly critical habitat along the Project route on June 17, 2009. 74 Fed.Reg. 52611-526643; 74  
5 Fed.Reg. 28776-28862. In addition, on March 2, 2010, the FWS reinstated its proposed rule to  
6 list the flat tailed horned lizard which inhabits lands along the Project route as a threatened  
7 species. 75 Fed.Reg. 9377-9379. Since all of these actions occurred after the FWS prepared its  
8 BiOp for the Powerlink Project and these species “may be affected” by the Project due to its  
9 modified alignment, 50 C.F.R. section 402.16(d) mandates the FWS to reinitiate consultation  
10 with the action agencies. Its failure to do so violates the ESA and thus constitutes a failure to  
11 proceed in the manner required by law in violation of the APA.

## 12 **VII. RELIEF REQUESTED**

13 WHEREFORE, plaintiffs pray for judgment against the defendants as follows:

- 14 1. For permanent injunctive relief enjoining the Forest Service, BLM and other action  
15 agencies from approving any ongoing and future construction activities pending defendants’  
16 compliance with NEPA, NFMA, FLPMA, ESA and the APA;
- 17 2. For permanent injunctive relief enjoining the Forest Service’s July 9, 2010 approval  
18 of the Project and related Forest Plan amendments;
- 19 3. For declaratory judgment that the Forest Service violated NEPA, 42 U.S.C. § 4321  
20 *et seq.*, by adopting the inadequate FEIS and relying on it in approving the Project and related  
21 Forest Plan amendments;
- 22 4. For declaratory judgment that the Forest Service and BLM defendants violated  
23 NEPA, 42 U.S.C. § 4321 *et seq.*, by failing to prepare an SEIS prior to approving the Project;
- 24 5. For declaratory judgment that the Forest Service failed to comply with NFMA, 16  
25 U.S.C. § 1600 *et seq.*, FLPMA, 43 U.S.C. § 1701 *et seq.*, their implementing regulations, and the  
26 APA, 5 U.S.C. § 701 *et seq.*, in its approval of the Project;
- 27 6. For declaratory judgment that the FWS failed to comply with the ESA, 16 U.S.C. §  
28 1531 *et seq.*, in its consultation with the action agencies;

