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6 BACKCOUNTRY AGAINST DUMPS, THE PROTECT
OUR COMMUNITIES FOUNDATION, EAST COUNTY
7 COMMUNITY ACTION COALITION, and DONNA TISDALE

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

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

16 v.)
17)

18 JIM ABBOTT, in his official capacity as California)
State Director of the United States Bureau of Land)
19 Management, REN LOHOEFENER, in his official)
capacity as Pacific Southwest Regional Director of)
20 the United States Fish and Wildlife Service, KEN)
SALAZAR, in his official capacity as Secretary of)
21 the United States Department of the Interior, BOB)
ABBEY, in his official capacity as the Director of)
22 the Bureau of Land Management, MIKE POOL, in)
his official capacity as the Deputy Director of the)
Bureau of Land Management, SAM HAMILTON,)
23 in his official capacity as the Director of the Fish)
and Wildlife Service, UNITED STATES)
24 DEPARTMENT OF THE INTERIOR, BUREAU)
25 OF LAND MANAGEMENT, UNITED STATES)
DEPARTMENT OF THE INTERIOR, FISH AND)
26 WILDLIFE SERVICE,)
27)

28 Defendants.)
_____)

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I. INTRODUCTION

1. This action seeks to protect extraordinary public lands that provide outstanding scenery, tranquility, wilderness recreation and wildlife habitat for endangered species including the Peninsular bighorn sheep and the Quino checkerspot butterfly from needless destruction by a hastily conceived, poorly studied, wildfire-inducing and completely unnecessary powerline project. Plaintiffs Backcountry Against Dumps, *et al.* (“plaintiffs”) challenge five interrelated agency actions by the United States Bureau of Land Management (“BLM”) and the United States Fish and Wildlife Service (“FWS”):

(1) BLM’s amendment of its Resource Management Plan (“RMP” or “Plan”) and approval of its related Final Environmental Impact Statement (“RMP FEIS”) for the spectacular rugged mountains, deep verdant valleys and high pristine deserts of eastern San Diego County;

(2) FWS’ approval of a Biological Opinion for the RMP;

(3) BLM’s summary dismissal of plaintiffs’ comprehensive protest to the RMP;

(4) BLM’s approval of two rights-of-way for the construction of the 500 Megawatt Sunrise Powerlink Transmission Line Project (“Powerlink Project”) through eastern San Diego County and related Final Environmental Impact Statement (“Powerlink FEIS”); and

(5) FWS’ approval of a Biological Opinion for the Powerlink Project.

Plaintiffs sue the responsible BLM and FWS officials (“defendants”) pursuant to the Administrative Procedure Act (“APA”) for violations of the National Environmental Policy Act, 42 U.S.C. section 4321 *et seq.* (“NEPA”), the Federal Land Policy Management Act, 43 U.S.C. section 1701 *et seq.* (“FLPMA”), the Endangered Species Act, 16 U.S.C. section 1531 *et seq.* (“ESA”), and the National Historic Preservation Act, 16 U.S.C. section 470 *et seq.* (“NHPA”).

2. There are four sequential agency actions culminating in this suit:

(1) BLM’s proposal for a new RMP for Eastern San Diego County in December 2007 (“2007 RMP”) based on an EIS prepared earlier that year;

(2) BLM’s abrupt amendment of its proposed 2007 RMP in October 2008 (“2008 RMP”) to rezone 12,185 acres of the highly scenic and sensitive McCain Valley National

1 Cooperative and Wildlife Management Area (“McCain Valley”) without further environmental
2 review as required under NEPA and without further consultation with FWS as required under
3 ESA;

4 (3) FWS’ hurried preparation of a Biological Opinion in November 2008 to
5 accommodate the Powerlink Project before its alignment was precisely identified, before
6 inventories of plants and wildlife in the alignment were conducted, before the Powerlink
7 Project’s impacts thereon were known, and before any site-specific mitigations of those unknown
8 impacts were even proposed, much less adopted;

9 (4) BLM’s abrupt amendment of its 2008 RMP just two months later in January
10 2009 (“2009 RMP”) and approval of powerline rights-of-way to allow construction of the
11 massive Powerlink Project and thousands of acres of wind farm and other industrial development
12 far outside the designated Southwest Powerlink (“SWPL”) utility corridor and instead within the
13 heart of the highly scenic and sensitive McCain Valley. This last RMP amendment was likewise
14 adopted without adequate environmental review as required by NEPA and based on a wholly
15 deficient Biological Opinion.

16 3. In February 2007, BLM released a Draft RMP and Draft EIS (“Draft RMP DEIS”)
17 for the Eastern San Diego County Planning Area (“Planning Area”). The RMP directs the future
18 land uses for approximately 102,869 acres of BLM-administered mountains, valleys, lakes, rivers
19 and high desert within the Planning Area. After receiving extensive public comments on the
20 Draft RMP, BLM produced a Proposed RMP and Final EIS (“Proposed RMP FEIS”) in
21 December 2007. But then BLM’s seemingly completed RMP process was abruptly hijacked to
22 accommodate a proposal by San Diego Gas & Electric Company (“SDG&E”) to build a
23 mammoth 500 MW powerline from Imperial County across San Diego County to the coast. On
24 July 28, 2008, BLM proposed fundamental changes to the RMP (hereinafter the “2008
25 Amendments”) that significantly altered the Proposed RMP’s resource valuation criteria, opening
26 up vast areas of previously undisturbed and protected lands to industrial-scale energy
27 development including the Powerlink Project. BLM declined to conduct a supplemental
28 environmental review of its new, development-intensive planning alternative; it claimed that the

1 impacts of the revisions were addressed within the spectrum of the original alternatives in its
2 December 2007 RMP FEIS. BLM's reliance on the 2007 FEIS's analysis, however, is not
3 supported by the record.

4 4. To the contrary, BLM's last-minute changes to the RMP constituted an unstudied,
5 wholesale revision of the land use plan for much of the remaining wildlands in eastern San Diego
6 County, including the highly valued McCain Valley. As such, BLM's action required the
7 preparation of a supplemental EIS. Nonetheless, on October 10, 2008, BLM approved its newly
8 revised RMP without any further environmental review.

9 5. Exacerbating BLM's failure to adequately analyze the RMP's impacts under NEPA,
10 FWS failed to conduct an adequate study of the RMP's effects on threatened and endangered
11 species under ESA. FWS's September 30, 2008 Biological Opinion ("RMP BiOp") failed to
12 include the best available scientific and commercial data, turned a blind eye to BLM's concurrent
13 approval of the Powerlink Project (discussed below), and failed to adequately address the 2008
14 Amendments to the RMP. BLM's wholesale adoption of the recommendations within the RMP
15 BiOp similarly violated ESA, as BLM has an independent duty to ensure that its actions do not
16 jeopardize endangered and threatened species or adversely modify their critical habitat.

17 6. On November 17, 2008, plaintiff Backcountry Against Dumps ("BAD") filed a
18 lengthy and detailed administrative protest appealing BLM's approval of the RMP. On January
19 12, 2009, BLM summarily dismissed BAD's protest on the asserted grounds it "included
20 comments, opinions, or observations which were not substantiated with a concise statement of
21 why [BLM's] proposed decision is believed to be wrong; [and it included] issues not previously
22 raised in the planning process; and/or issues not germane to the planning process." To the
23 contrary, BAD's protest was extensively "substantiated" with an extensive discussion of the
24 factual and legal reasons why the 2008 RMP violated NEPA, ESA and other environmental laws.
25 BLM's perfunctory dismissal of BAD's protest was arbitrary and capricious because it ignored
26 the substance of BAD's protest and failed to explicate any reasoned basis for its summary
27 rejection of BAD's appeal. Revealing its apparent, inexplicable bias against BAD, BLM did not
28 dismiss other parties' appeals that presented issues similar to those raised in BAD's appeal;

1 rather, BLM considered and addressed those protests. BLM’s dismissal of BAD’s protest is
2 contrary to FLPMA and its regulations, which require BLM to follow and apply in a rational
3 manner applicable environmental laws in its adjudication of RMP protests.

4 7. Concurrent with, but ignored within, its RMP review process, BLM was also
5 considering the Powerlink Project. SDG&E asked BLM to grant to it two rights-of-way and the
6 above-mentioned, one-time RMP exemption (styled a “use permit”) to allow it to build a 500 kV
7 transmission line from the Imperial Valley Substation to a proposed 500/230 kV substation in San
8 Diego County near the western boundary of Cleveland National Forest. The approval also
9 included a 230 kV line from that same proposed substation to the existing Sycamore Canyon
10 substation located in San Diego. En route, the transmission line would connect with several
11 energy generation facilities, including proposed wind farms in McCain Valley and a geothermal
12 facility. The Powerlink, in its current alignment, requires an exemption from the RMP to allow
13 the project to cross the McCain Valley, which lies far outside of the RMP-designated utility
14 corridor.

15 8. Despite the fact that the Powerlink would require an immediate and substantial
16 amendment to the freshly minted RPM, BLM acted as though the RMP and Powerlink approvals
17 were unrelated. BLM approved the RPM without mentioning Powerlink or the special exemption
18 necessary to allow the construction of the transmission line outside of the utility corridor. Thus,
19 BLM’s plan to allow rapid industrial development of the McCain Valley was divided into two
20 separate approvals – the first to allow the long-term development of wind farms and other energy
21 development projects, and the second to permit the construction of a power line that would
22 significantly increase the rate and intensity of that development. BLM failed to consider the *de*
23 *facto* Powerlink amendment to the RMP together with the 2008 Amendments, thereby denying
24 the public and BLM decisionmakers an accurate understanding of the timing and likely intensity
25 of energy development in the McCain Valley and other sensitive areas to be impacted.
26 Consequently, the *combined* effects of the RMP revisions and the transmission line exemption
27 were never examined. The agency’s refusal to study the Powerlink and the increased
28 development allowed by the RMP in the same EIS violated NEPA. This analytic failing is

1 repeated in FWS's RMP and Powerlink BiOps and in BLM's ESA decisions based thereon,
2 wherein the effects of the RMP are considered independent of the effects of the Powerlink, a
3 violation of ESA.

4 9. BLM's approval of the rights-of-way for the Powerlink Project on January 20, 2009
5 was based on a completely inadequate NEPA review process. Most significantly, BLM
6 concentrated the majority of its efforts on analyzing the so-called proposed project, a route whose
7 western segments passed far to the north of the route ultimately selected. At the last minute,
8 BLM changed course and decided to approve a southern route that had not been adequately
9 defined and described, and was never thoroughly reviewed, in the EIS (hereinafter the "selected
10 route"). This abrupt substitution of a far different route stymied public participation in the NEPA
11 review and resulted in a fatally flawed EIS analysis of the selected route. The Powerlink EIS
12 failed to adequately or consistently describe the selected route or comprehensively address its
13 impacts; rather its description and analysis are incomplete, contradictory, and confusingly
14 scattered over many chapters of different volumes of the environmental review documents.
15 Accordingly, plaintiffs ask this Court to require BLM to produce a complete analysis of the
16 *selected* route – not just of the previously proposed, but now *rejected* route – before it reconsiders
17 its approval of the Powerlink along that new alignment.

18 10. In addition to BLM's significant NEPA violations, the agency also failed to comply
19 with FPLMA by siting the Powerlink through some of the most pristine natural resource areas
20 remaining in eastern San Diego County. BLM also violated NHPA by ignoring the impacts of
21 the project on cultural and historic resources and by shutting the public out of the NHPA review
22 process. Additionally, FWS's analysis of the effects of the project on listed species under ESA
23 was incomplete and inaccurate in substantial respects. As a result, the Powerlink BiOp and
24 BLM's reliance on the information and mitigation measures contained therein violated ESA.

25 11. For these reasons, as explicated more fully below, plaintiffs seek to set aside FWS's
26 BiOps for the 2008 RMP and the Powerlink Project, and to set aside BLM's approval of the
27 RMP, dismissal of plaintiffs' protest, and approval of the Powerlink rights-of-way and one-time
28 exemption from the 2008 RMP as arbitrary and capricious and in violation of NEPA, 42 U.S.C. §

1 4321 *et seq.*; FLPMA, 43 U.S.C. § 1710 *et seq.*; ESA, 16 U.S.C. § 1531 *et seq.*; NHPA, 16
2 U.S.C. § 1531 *et seq.*; their implementing regulations; and the APA, 5 U.S.C. § 701 *et seq.* If the
3 RMP BiOps and 2008 RMP are allowed to stand and construction of the Powerlink Project is
4 allowed to proceed, significant areas of untrammelled mountain and high desert wildlands in
5 eastern San Diego County will be degraded into massive construction sites and eventually into
6 permanent, industrial energy corridors.

7 **II. JURISDICTION AND VENUE**

8 12. This Court has jurisdiction in accordance with 28 U.S.C. § 1331 (action arising
9 under the laws of the United States); 28 U.S.C. § 1361 (action to compel officers of the United
10 States to perform their duties); 28 U.S.C. §§ 2201 (declaratory judgment) and 2202 (further
11 relief), and 5 U.S.C. §§ 701-706 (the APA).

12 13. Venue lies in the Eastern District Court of California, under 28 U.S.C. § 1391(e)
13 because the offices of defendants Jim Abbott, BLM's State Director for California, and of Ren
14 Lohofener, FWS' Regional Director for the Pacific Southwest Region, are located in
15 Sacramento, within this judicial district.

16 **III. PARTIES**

17 14. Plaintiff BAD is a community organization comprising numerous individuals and
18 families residing in the Boulevard region of eastern San Diego County. Members of BAD are
19 directly affected by BLM's land use planning and management of the Planning Area because that
20 is where they live and recreate. BAD and its members are interested in the proper planning and
21 management of BLM lands within the Planning Area in order to maintain and enhance their
22 ecological integrity, scenic beauty, wildlife, recreational amenities, cultural resources, watershed
23 values, and groundwater resources. Some members of BAD rely for their entire domestic,
24 municipal and agricultural water supply on the vulnerable aquifers of eastern San Diego County
25 that are threatened with contamination and overdrafting by ongoing and proposed land use
26 development. Members of BAD submitted comments throughout the RMP and Powerlink
27 Project proceedings.

28 15. Plaintiff The Protect Our Communities Foundation ("POC") is a community

1 organization composed of numerous individuals and families residing in eastern San Diego
2 County who are directly affected by the approval of the Powerlink Project. POC's purpose is the
3 promotion of a safe, reliable, economical, renewable and environmentally responsible energy
4 future. POC's members use BLM lands for aesthetic, scientific, historic, cultural, recreational
5 and spiritual enjoyment. BLM's RMP amendments and the subsequent Powerlink Project
6 threaten the use and enjoyment of these public resources by POC's members. Members of POC
7 submitted comments throughout the RMP and Powerlink Project proceedings.

8 16. Plaintiff East County Community Action Coalition ("ECCAC") is a coalition of
9 community groups with the common goal of preserving their rural quality of life and the natural
10 resources of eastern San Diego County. ECCAC and its members seek to maintain the ecological
11 integrity, scenic beauty, wildlife, cultural resources, recreational amenities, watershed values and
12 groundwater resources in eastern San Diego County. ECCAC's members use BLM lands for
13 aesthetic, scientific, historic, cultural, recreational and spiritual enjoyment. BLM's RMP
14 amendments and the subsequent Powerlink Project threaten to harm the use and enjoyment of
15 these public resources by ECCAC's members as well as the public at large. Members of ECCAC
16 submitted comments throughout the RMP and Powerlink Project proceedings.

17 17. Plaintiff Donna Tisdale lives on Morningstar Ranch, located two miles west of
18 Tierra Del Sol Road in Boulevard, California. Her residence and business rely exclusively on
19 well water. She is an active member of multiple community groups, including co-plaintiffs BAD,
20 POC, and ECCAC, and is a sitting member of the County of San Diego's Boulevard Planning
21 Group. Donna Tisdale advocates for the preservation of rural areas of Southern California and
22 was featured on the front page of the Washington Post as a voice against the Powerlink Project.
23 Donna Tisdale uses BLM lands that will be affected by the project for recreational and spiritual
24 activities. The RMP and the Powerlink Project will adversely affect Donna Tisdale's interests by
25 introducing industrial development into the McCain Valley and surrounding areas, thereby
26 harming her use and enjoyment of the public natural resources in the area. She has spoken at
27 public meetings related to the Powerlink Project and authored multiple letters opposing the
28 project on behalf of community groups and herself and submitted them to BLM and the

1 California Public Utilities Commission (“CPUC”).

2 18. Defendant JIM ABBOTT is BLM’s California State Director. His predecessor in
3 office, Mike Pool, approved the RMP and the Powerlink Project rights-of-way across BLM lands
4 challenged in this action on January 20, 2009. Defendant JIM ABBOTT is sued in his official
5 capacity as BLM’s California State Director.

6 19. Defendant REN LOHOEFENER is the Director of the Pacific Southwest Region of
7 FWS, and is responsible for the actions of FWS in approving the two Biological Opinions
8 challenged in this action. Defendant Lohofener is sued in his official capacity.

9 20. Defendant KEN SALAZAR is the Secretary of the United States Department of the
10 Interior. Defendant Salazar is the federal official charged with the responsibility for the proper
11 management of BLM and FWS and is responsible for the actions of BLM and FWS challenged
12 herein. Defendant Salazar is sued in his official capacity.

13 21. Defendant BOB ABBEY is the Director of BLM and is responsible for the actions
14 of BLM in approving the RMP and the Powerlink Project challenged in this action. Defendant
15 Abbey is sued in his official capacity.

16 22. Defendant MIKE POOL is the former California Director of BLM. He approved
17 the RMP and the Powerlink rights-of-way on January 20, 2009. He is now the Deputy Director
18 of BLM. In that capacity, he is generally responsible for overall activities of BLM nationwide,
19 including the supervision of the official acts of those BLM employees who are named as co-
20 defendants. Defendant Pool is sued in his official capacity.

21 23. Defendant SAM HAMILTON is the Director of the FWS and is, in that capacity,
22 responsible for the overall activities of FWS nationwide, including the preparation of the
23 Biological Opinions at issue in this case. Defendant Hamilton is sued in his official capacity.

24 24. Defendant UNITED STATES DEPARTMENT OF INTERIOR (“DOI”) is the
25 federal agency charged with managing most of the nation’s federally owned lands, including the
26 public lands managed by BLM in eastern San Diego County at issue here, and with administering
27 both ESA and FLPMA on a nationwide basis.

28 25. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT (“BLM”) is

1 an agency within DOI. Pursuant to federal law, BLM is charged with the management of over
2 100,000 acres of land owned by the federal government in eastern San Diego County for the
3 benefit of the public consistent with the requirements of NEPA, FLPMA, ESA, NHPA and the
4 APA.

5 26. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”) is also
6 an agency within DOI. Pursuant to federal law, FWS is charged with the preservation of
7 endangered and threatened species under ESA, and was required to comply with ESA’s
8 requirements when it prepared the Biological Opinions for the RMP and the Powerlink Project
9 challenged in this action.

10 **IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

11 **A. RMP**

12 27. On March 2, 2007, BLM issued a Notice of Availability of the Draft RMP Draft
13 Environmental Impact Statement (“DEIS”) for the new RMP. On May 31, 2007, plaintiff BAD
14 submitted a comment letter critiquing BLM’s selection of Alternative E, pointing out the
15 inadequacies of the Draft RMP DEIS, and highlighting the Draft RMP’s failure to protect
16 endangered species, wildlife habitat, and recreational, cultural, watershed and visual resources.
17 On December 7, 2007, BLM published a Notice of Availability of the Proposed RMP FEIS.
18 BAD timely protested this decision on January 7, 2008. Without ruling on BAD’s protest or
19 completing adoption of its Draft RMP, on July 28, 2008, BLM abruptly issued a substantially
20 revised proposed RMP that allowed industrial development of the McCain Valley and other
21 sensitive lands. On August 27, 2008, BAD submitted a comment letter on the proposed RMP
22 amendments, pointing out that the impacts of the substantial additional development were
23 potentially considerable, but had not been addressed as required by NEPA and other
24 environmental laws. Notwithstanding BAD’s comment and without conducting any additional
25 environmental review, on October 10, 2008, BLM approved the proposed RMP. BAD submitted
26 a timely protest challenging BLM’s approval of the 2008 RMP on November 17, 2008. BAD’s
27 protest was summarily dismissed by BLM’s then State Director Mike Pool on January 12, 2009.
28 Plaintiffs had no further administrative remedy such as an appeal to the Interior Board of Land

1 Appeals (“IBLA”) because an RMP approval is not an implementation-level decision. *See*, RMP
2 ROD, p. 20, *citing* 43 CFR Part 4.

3 **B. Powerlink Project**

4 28. On August 31, 2006, BLM and CPUC published a Notice of Intent to Prepare a
5 joint Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) addressing the
6 impacts of the Powerlink Project. On January 3, 2008, they published the Draft EIS/EIR for the
7 Powerlink Project (“Powerlink DEIS”). On February 25 and April 10, 2008, Donna Tisdale,
8 personally and on behalf of Boulevard Planning Group, submitted comments on the Powerlink
9 DEIS. As stated above, Donna Tisdale is a member of all organizational plaintiffs. Other
10 individual members of BAD, POC, and ECCAC submitted comments on the Powerlink DEIS as
11 well. On July 11, 2008, BLM published a Supplemental Powerlink DEIS (“Powerlink SDEIS”).
12 In response to this Powerlink SDEIS, Donna Tisdale submitted a comment letter on August 25,
13 2008. This letter stated objections to the chosen alternative and raised issues of new, significant,
14 and previously undisclosed impacts that required further environmental review. On October 13,
15 2008, BLM issued a Final EIS/EIR (“Powerlink FEIS”).¹

16 29. On January 20, 2009, BLM issued the Record of Decision (“ROD”) approving the
17 Powerlink. On March 26, 2009, plaintiffs filed a Notice of Appeal of the approval with the
18 Interior Board of Land Appeals (“IBLA”). Plaintiffs subsequently filed a Request for Stay and an
19 extensive Statement of Reasons with the IBLA. The IBLA denied plaintiffs’ request for a stay
20 and has yet to issue a final determination on plaintiffs’ appeal.

21 30. Plaintiffs have adequately exhausted their administrative remedies by seeking
22 review of BLM’s approval of the Powerlink Project in the IBLA. Because plaintiffs timely filed
23 a petition for stay of the project and it was denied, plaintiffs may properly sue for relief in this
24 Court without awaiting IBLA’s ruling on the merits. *National Parks & Conservation Ass’n v.*

25
26 ¹BLM issued three environmental review documents, pursuant to NEPA, in order to
27 review the impacts of the Powerlink Project. These documents, the Powerlink DEIS,
28 Powerlink SDEIS, and Powerlink FEIS, suffer many of the same inadequacies and are
referenced collectively as the “Powerlink EIS.”

1 *Bureau of Land Management* 586 F.3d 735, 740 (9th Cir. 2009) (“If an Appeals Board fails to act
2 upon a petition for a stay or denies such a petition, the decision becomes effective immediately”
3 [citing 43 C.F.R. §§ 4.21(a)(3), (c)] No decision which at the time of its rendition is subject
4 to appeal to the Director or an Appeals Board shall be considered final so as to be agency action
5 subject to judicial review under 5 U.S.C. 704, *unless* a petition for a stay of decision has been
6 timely filed and the decision being appealed has been made effective” by the denial of the
7 petition for stay (emphasis added)). Thus, plaintiffs have adequately exhausted their
8 administrative remedies.

9 V. STATEMENT OF FACTS

10 Bureau of Land Management’s Eastern San Diego County Resource Management Plan

11 31. On July 14, 2004, BLM published a Notice of Intent to Prepare an RMP and the
12 associated DEIS for the Eastern San Diego County Planning Area. The preliminary scoping
13 period commenced on July 14, 2004 and continued through October 12, 2004.

14 32. On March 2, 2007, BLM issued a notice of availability of the Draft RMP DEIS. In
15 it, BLM disclosed that FWS had identified ten federally listed species as occurring within the
16 Planning Area, four of which were known to occur on BLM-administered lands: Peninsular
17 bighorn sheep, Least Bell’s vireo, the Arroyo toad, and Quino checkerspot butterfly. BLM had
18 not, at that time, prepared a biological assessment but informed the public that a “Biological
19 Assessment will be prepared” to address the effects of the RMP.

20 33. The Draft RMP DEIS analyzed five alternatives for the RMP: the no-action
21 alternative, the visitor experience-focused alternative, the natural preservation-focused
22 alternative, the development-intensive alternative, and the balanced alternative (“Alternative E”).
23 Alternative E downgraded 9,304 acres from visual resource management (“VRM”) Class II to a
24 management class that would permit industrial development in those areas. The majority of the
25 downgraded acreage was concentrated in McCain Valley West, a public recreation area of
26 immense scenic, scientific, cultural and wildlife value. BAD submitted a comment letter on May
27 31, 2007 (“2007 Comment”), critiquing BLM’s preferred Alternative E and the analysis thereof
28 insofar as it allowed industrial development in McCain Valley. Other comments raised similar

1 issues. BLM's response to BAD's and the public's concerns regarding the gaps in the agency's
2 environmental analysis and related resource allocation decisions stressed the agency's intent to
3 promote renewable energy projects above all other considerations.

4 34. On November 20, 2007, approximately two weeks before issuance of the Proposed
5 RMP FEIS, BLM requested formal ESA section 7 consultation with FWS with regard to the
6 likely impacts of Alternative E on listed species and sent FWS a Biological Assessment ("BA").

7 35. On December 7, 2007, BLM published a Notice of Availability of the Proposed
8 RMP FEIS. 72 Fed. Reg. 69, 226 (Dec. 7, 2007). The Proposed RMP selected Alternative E as
9 the proposed action.

10 36. On January 7, 2008, BAD filed a timely protest of the Proposed RMP FEIS,
11 pursuant to 43 C.F.R. 1610.5-2 (1983). BLM received eight other protests during the thirty day
12 protest period. Additionally, on December 20, 2007, a renewable energy company, PPM Energy,
13 sent a memorandum to the Secretary of the DOI, informing the Secretary that BLM's RMP
14 conflicted with the company's proposed 200 megawatt windpower project in McCain Valley.
15 The memorandum requested the Secretary to "direct" the BLM Director to review the Proposed
16 RMP FEIS and make the appropriate changes. The Office of the Secretary contacted BLM that
17 same day.

18 37. On July 28, 2008, BLM published a Notice to Provide Opportunity to Comment on
19 Changes to the RMP, i.e. the 2008 Amendments. The notice was purportedly a response to the
20 protest letters submitted by BAD and other parties with regard to the Proposed RMP FEIS. 73
21 Fed.Reg. 43,779 (July 28, 2008). However, BLM did not respond to the concerns raised in
22 BAD's protest. Instead, the notice only responded to purported concerns that the agency was
23 being "overly-restrictive" in not allowing more wind energy development. *Id.*

24 38. The 2008 Amendments included two very significant changes to the RMP. First,
25 instead of Alternative E, BLM elected to pursue a development-intensive alternative. The 2008
26 Amendments downgraded both McCain Valley East and McCain Valley West from VRM Class
27 II and III, respectively, to Class IV, the category allowing maximum, including industrial,
28 development. *Id.* The amendments also caused additional acreage to be withdrawn from

1 recreational use and allocated instead to renewable energy development. Out of the 40,954 acres
2 that had been previously managed in accordance with VRM Class II objectives, now only 12,824
3 would retain such management classification. This change in VRM classifications opened the
4 door to wide-spread energy development in previously protected areas, without required
5 environmental reviews.

6 39. The 2008 Amendments included a second change, which revised the allowed uses
7 within VRM Class II areas. This change allows for mineral leasing and industrial development of
8 the remaining 12,824 acres of VRM Class II lands. These two changes to the RMP increased
9 lands available for development by 31,623 acres – a three-fold increase from the originally
10 Proposed RMP.

11 40. On August 27, 2008, BAD submitted a comment on the 2008 Amendments,
12 informing BLM that a supplemental EIS was required under NEPA to address the significant
13 impacts of the announced changes and also restating its prior grounds for protest under ESA,
14 FLPMA, and NEPA. In addition to BAD's comment, BLM received approximately fifty other
15 comments, identifying the need for a supplemental EIS and asking for further discussion of
16 impacts on visual and recreational resources, threatened and endangered species, and
17 groundwater as a result of renewable energy and geothermal development. BLM responded that
18 a supplemental EIS was not necessary because the two changes proposed by the 2008
19 Amendments were "within the spectrum of alternatives analyzed in the Draft RMP DEIS, made
20 available by BLM in March of 2007." BLM did not prepare a supplemental EIS, nor did it
21 produce any further ESA documentation related to the increased effects of the RMP on listed
22 species.

23 41. On September 30, 2008, FWS issued its BiOp on the RMP. It revealed that BLM
24 had requested formal consultations only as to the Quino checkerspot butterfly. FWS determined,
25 based on its analysis of the proposed action, that the RMP would also result in adverse effects on
26 the Least Bell's vireo and the Peninsular bighorn sheep. *Id.* FWS also noted in its RMP BiOp
27 that "survey efforts throughout the Planning Area have *not* been sufficient to determine the actual
28 extent of use across the area." (Emphasis added.) FWS failed to request a new or updated

1 Biological Assessment (“BA”) from BLM to address the impacts of the 2008 Amendments and
2 based its RMP BiOp on the obsolete BA for the Proposed (but rejected) RMP – rather than on the
3 Final RMP as modified by the 2008 Amendments, which allowed three times more industrial
4 development.

5 42. Nowhere in any of their environmental reviews did either BLM or FWS mention
6 the pending approval of the Powerlink Project or attempt to address the combined impacts of that
7 project with the development-intensive RMP.

8 43. On October 10, 2008, BLM’s then California State Director Mike Pool signed the
9 RMP Record of Decision (“ROD”). The ROD constitutes BLM’s final agency action and was
10 effective immediately.

11 **BLM’s Dismissal of Plaintiffs’ Protest**

12 44. On November 17, 2008, BAD submitted a protest letter, appealing BLM’s adoption
13 of the 2008 RMP ROD and the associated RMP FEIS. BAD’s November 17, 2008 protest raised
14 the same grounds of objection as those raised by BAD’s comment on the 2008 Amendment, and
15 incorporated by reference a protest submitted by plaintiff Donna Tisdale and the Boulevard
16 Planning Group in the parallel Powerlink proceeding. The State Director summarily dismissed
17 BAD’s protest on January 12, 2009 on the asserted grounds that the protest “included comments,
18 opinions, or observations which were not substantiated with a concise statement of why [BLM’s]
19 proposed decision is believed to be wrong; issues not previously raised in the planning process;
20 and/or issues not germane to the planning process.” There is no further administrative appeal by
21 which plaintiffs could seek review of BLM’s 2008 RMP.

22 **The Sunrise Powerlink Transmission Line Project**

23 45. On August 31, 2006, BLM and the CPUC published a notice of intent to prepare a
24 joint EIS/EIR for the Powerlink Project. The agencies published the Powerlink DEIS on January
25 3, 2008, which initiated a 90-day public review period, ending on April 11, 2008. The Powerlink
26 DEIS contained more than 7,500 pages, focusing on SDG&E’s proposed Northern Anza-Borrego
27 Alternative.

28 46. On July 11, 2008, BLM issued the Powerlink SDEIS, which purportedly analyzed

1 two connected actions: (1) a proposed windfarm in La Rumorosa, Mexico; and (2) additional
2 transmission and substation upgrades. The Powerlink SDEIS also included and analyzed several
3 route revisions to each of the alternatives in the Powerlink DEIS. The Powerlink SDEIS was
4 followed by a 45-day public review period that ended on August 25, 2008.

5 47. On October 13, 2008, BLM issued the Powerlink FEIS along with four volumes of
6 agency responses to public comments. Notably, the FEIS for the Powerlink Project was
7 published three days *after* BLM had already – and prematurely – approved the RMP.

8 48. In the Powerlink FEIS Executive Summary, BLM indicated its selection of the
9 “Final Environmentally Superior Southern Route (SWPL) Alternative,” or the selected route.
10 This route will run approximately 125 miles across the width of California from the Imperial
11 Valley to San Diego. The Project will cross lands under the control of BLM, United States Forest
12 Service, United States Marine Corps Air Station Miramar, California State Parks, San Diego
13 County and City, and privately owned lands.

14 49. Confusingly, the Powerlink FEIS contained an extensive description of the
15 proposed (but ultimately rejected) project. The selected route, however, was *not* described in its
16 entirety within any of the Powerlink FEIS documents, making a thorough understanding of the
17 project very difficult. The selected route was made up of multiple sections: the I-8 Alternative,
18 the BCD Alternative, and the Modified Route D Alternative, as well as multiple smaller scale
19 route alternative and reroute alternates. Information about each piece of the selected route was
20 scattered throughout the Powerlink EIS and the responses to comments. Further, the precise
21 alignment of the project within these wide corridor segments was never identified, preventing
22 site-specific assessment of the project’s environmental impacts.

23 50. In addition to these fundamental NEPA defects, the Powerlink FEIS also failed to
24 adequately address, *inter alia*: (1) the need for the project’s additional transmission capacity; (2)
25 the specific impacts of the project, including growth-inducing, fire, biological, climate change,
26 watershed, rural character and quality of life, wilderness and recreational resources, cultural
27 resources, increased public access, and groundwater impacts; (3) the cumulative impacts of the
28 project along with other foreseeable projects; (4) a reasonable range of alternatives; and (5) the

1 impacts of the project on the Cleveland National Forest, including the need for multiple
2 amendments to the applicable Cleveland National Forest Plan. The Powerlink FEIS also
3 improperly segmented environmental review of the project's many connected actions.

4 51. On November 5, 2008, BLM requested formal ESA section 7 consultation with
5 FWS in connection with the Powerlink Project. On that same day, BLM transmitted its BA and
6 requested that FWS complete its Powerlink BiOp on an expedited schedule. The BA identified
7 ten federally listed species that were likely to be adversely impacted by the Powerlink, including
8 eight federally endangered species, and two federally threatened species. BLM had not yet
9 received approval of this species list from FWS, as required by ESA. Furthermore, at the time of
10 both BLM's completion of its BA and FWS's issuance of its Powerlink BiOp, BLM had not yet
11 surveyed substantial portions of the selected route for the existence of threatened and endangered
12 species, or their suitable habitats. In fact, no scientifically reliable surveys had been conducted
13 for these species prior to BLM's approval of the Powerlink rights of way. FWS issued its
14 Powerlink BiOp on January 16, 2009, meeting BLM's request to expedite the review. Just four
15 days later, and hours before the Obama Administration was sworn into office, on January 20,
16 2009, BLM approved the Powerlink rights of way and temporary use permit.

17 52. In its Powerlink BiOp, FWS determined that the information it gained through
18 consultation with BLM and through the Powerlink NEPA process was sufficient to render an
19 opinion with regard to the effects of the project on listed species. The BiOp concludes that six of
20 the ten species identified by BLM and SDG&E would be affected by the Powerlink. These
21 include the Peninsular bighorn sheep, the Quino checkerspot butterfly, the threatened San Diego
22 thornmint, the Coastal California gnatcatcher, the endangered Least Bell's vireo, and the Arroyo
23 toad, as well as portions of their critical habitats. FWS concluded that *if* SDG&E complied with
24 the mitigation measures proposed in the Powerlink BiOp – specifically the survey-as-you-build
25 requirement – the Powerlink Project could proceed as planned.

26 53. FWS's no jeopardy/adverse modification determination hinged on SDG&E's
27 commitment to conduct additional surveys prior to initiating construction, and to replace through
28 purchase of new habitat, permanently destroyed designated critical habitat within the project area.

1 However, the Powerlink BiOp failed to: (1) identify any suitable habitat available for purchase,
2 (2) evaluate whether this unidentified substitute habitat would adequately replace existing habitat
3 without harm to the species, and (3) reconcile its assumption that this substitute habitat exists
4 with BLM’s admission that the approximately 600 acres of permanently lost habitat due to the
5 Powerlink “may not be available for replacement in the quantities and specific types that are
6 affected.”

7 54. FWS provided an incidental take statement for the above six species and their
8 critical habitat, purportedly immunizing SDG&E and BLM from liability under the ESA.
9 Notably, the Powerlink BiOp failed to specify as ESA requires the precise number, extent,
10 location or timing of such incidental takings, stating instead that such specifications will be made
11 following site-specific surveys prior to the construction of the Powerlink.

12 55. Despite multiple ESA requirements to do so, the Powerlink BiOp failed to address
13 the effects of the following interrelated projects: (1) SDG&E’s plans for future expansion of the
14 Powerlink, consisting of four more 230 kV lines and two more 500kV lines that would connect to
15 one of the substations of the Powerlink; (2) the La Rumorosa wind farm, proposed to be
16 constructed by SDG&E’s parent, Sempra Energy, in northern Mexico; (3) a solar facility,
17 proposed by Stirling Energy Systems, to be located in the Imperial Valley; (4) the Tule Wind
18 Project, proposed for the McCain Valley; and (5) the Esmeralda-San Felipe Geothermal Project,
19 to be located in Truckhaven, California. The geothermal and solar projects alone would result in
20 the permanent loss of 2,500 additional acres of habitat.

21 56. In addition, the final selection of the selected route ignored FPLMA requirements
22 that BLM condition approval of transmission lines in ways that minimize damage to the
23 environment and that lines must be co-located to the extent possible.

24 57. Finally, BLM ignored NHPA provisions that require complete investigation of the
25 cultural resources in the area and also require public access and input to the NHPA review
26 process, as explicated below.

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1 **VI. CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**

3 **BLM'S RMP VIOLATED NEPA**

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

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

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

9 59. NEPA requires all federal agencies to prepare an EIS for all major projects
10 significantly affecting the quality of the human environment. 42 U.S.C. § 4331(2)(c). An EIS
11 must describe the impacts of the proposed action, and alternatives to that action in order to allow
12 federal agencies and the public to make an informed decision on how to best “create and maintain
13 conditions under which man and nature can exist in productive harmony.” 42 U.S.C. §§ 4331(1),
14 4332(2)(c); 40 C.F.R. §§ 1500.1(b), 1508.11 (1978). BLM’s Proposed RMP FEIS’s discussion
15 of impacts, alternatives, and mitigation measures was wholly inadequate, as outlined below.

16 **The Project Description in the Proposed RMP FEIS Is Inadequate**

17 60. The Proposed RMP FEIS did not contain a description of the alternative RMP
18 selected in the ROD. Alternative D in the FEIS significantly differed from the Final RMP and
19 thus did not accurately describe the chosen land use plan.

20 **The Proposed RMP FEIS Fails in Its Discussion of the Impacts of the Proposed Action**

21 61. The discussion of impacts in the Proposed RMP FEIS was inadequate in the
22 following ways, among others: (1) although the Proposed RMP FEIS admitted that the Planning
23 Area was highly susceptible to fire, it ignored the increased fire risks associated with the RMP;
24 (2) the Proposed RMP FEIS failed to disclose and address the substantial adverse impacts on
25 wildlife habitat and other environmental resources that will result from the RMP’s reduction in
26 the acreage of protected Areas of Critical Environmental Concern (“ACEC”) from 26,479 to just
27 14,956 acres; (3) the Proposed RMP FEIS did not clearly describe how industrial development
28 would impact listed species or analyze the extent of those impacts; (4) the Proposed RMP FEIS

1 failed to adequately analyze the impacts of the RMP and its amendments on the cultural resources
2 of the area; (5) the RMP designated 34,933 acres of land for geothermal leasing, yet provided no
3 meaningful discussion of the significant adverse impacts of such development; (6) the Proposed
4 RMP FEIS did not adequately analyze the visual and other scenic impacts of the changes to the
5 VRM classification; (7) the impacts to groundwater quantity are ignored in the Proposed RMP
6 FEIS, despite the potential for groundwater use associated with the RMP Amendment's
7 additional energy development; (8) the Proposed RMP FEIS failed to adequately address the
8 impact to lands formerly designated within ACEC; (9) the Proposed RMP FEIS failed to
9 adequately evaluate the mineral resources of the area that would be depleted by the Final RMP's
10 additional energy development; (10) the Proposed RMP FEIS failed to adequately evaluate the
11 recreational and other impacts of the changes to the RMP; and (11) the Proposed RMP FEIS did
12 not discuss the impacts of the changes to VRM Class II areas described in the ROD.

13 **The Proposed RMP FEIS Fails to Adequately Analyze**
14 **and Compare the Impacts Caused by the Evaluated Alternatives**

15 62. BLM's discussion and comparison of the alternatives analyzed in the Proposed
16 RMP FEIS was not sufficient because the description of each alternative did not provide enough
17 detail to support an informed decision and because BLM failed to fully discuss the environmental
18 impacts of renewable energy development and mineral leasing in reference to each alternative.
19 Furthermore, the Proposed RMP FEIS failed to analyze the foreseeable impacts of the
20 contemplated wind farms, solar facilities, and geothermal energy production facilities.

21 **The Discussion of Mitigation Measures in the Proposed RMP FEIS**
22 **and the RMP Record of Decision Are Inadequate**

23 63. NEPA requires that mitigation measures be discussed in the EIS and the ROD with
24 "enough definition to allow for a meaningful review and evaluation of the plan to ensure that is
25 would be successful." 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c); 42 U.S.C. §
26 4332(2)(C)(ii). A mere listing of mitigation measures is not enough. *League of Wilderness*
27 *Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). Both
28 the Proposed RMP FEIS and the ROD simply provided lists of mitigation measures, rather than a

1 “meaningful” description of the measures as NEPA requires.

2 **BLM’s Statement of Irreversible and Irretrievable Commitments is Inadequate**

3 64. Every recommendation or final agency action resulting in significant effects to the
4 human environment must be accompanied by a detailed statement by the responsible agency on
5 “any irreversible and irretrievable commitments of resources which would be involved in the
6 proposed action should it be implemented.” 42 U.S.C. § 4332(c)(v).

7 65. The RMP represents an irreversible and irretrievable commitment of resources,
8 because it opens habitat, critical to the survival of threatened and endangered species, to future
9 development. BLM’s NEPA analysis, however, was limited to the following notably
10 uninformative sentence: “Any lands disposed of would reduce the wildlife habitat on BLM
11 administered lands in the Planning Area, depending on the use of that land once it leaves federal
12 ownership.” This statement failed to provide a “detailed statement” of potential losses because it
13 provided no information as to which habitat of which species would be harmed, and where, how,
14 why and to what degree such habitat would be harmed. BLM’s analysis appears as a mere
15 formality, leaving the public and the agency in the dark as to the nature and extent of the habitat
16 impacts.

17 **BLM’s Failure to Prepare a Supplemental EIS To Address Changes**
18 **to the Draft RMP DEIS and the Proposed RMP FEIS Violates NEPA**

19 66. BLM failed to prepare a supplemental EIS to address the impacts of the 2008 RMP
20 Amendments. Under NEPA, a supplemental EIS must be prepared if there are significant new
21 circumstances or information relevant to environmental concerns, and the new circumstances or
22 information will affect the environment in a significant manner or to a significant extent, and
23 those effects have not already been considered by the agency.

24 67. The 2008 RMP Amendments have significant environmental impacts because they
25 redefined VRM Class II management criteria to permit leasable mineral entry and renewable
26 energy development, allowing developed uses on all Class II designated lands in the Planning
27 Area. This change, taken together with the visual resource management classifications outlined
28 in the ROD, effectively opened about 40 percent of the Planning Area to energy development.

1 Had BLM maintained the VRM definitions and allocations as they appeared in both the Draft
2 RMP DEIS and the Proposed RMP FEIS, close to 90 percent of the Planning Area would be
3 protected from such development. This change altered the environmental impact of the RMP
4 significantly beyond that which was envisioned by the Draft RMP DEIS and Proposed RMP
5 FEIS. Therefore, a supplemental EIS was required under NEPA to address the impacts of this
6 substantial revision on the affected environment.

7 **The Proposed RMP FEIS Fails to Consider the Powerlink Project's Exemption from the**
8 **RMP and the Effects of that Exemption on the Eastern San Diego County Environment**

9 68. The Proposed RMP FEIS failed to describe or analyze BLM's concurrent
10 deliberations on a major exemption to the RMP that would allow the Powerlink transmission line
11 to cut through the Planning Area in areas outside of the RMP designated utility corridor. BLM
12 was aware of the contemplated exemption and should have prepared a supplemental EIS to
13 address the impacts of the increased level of energy development allowed under the new
14 development-intensive RMP along with the Powerlink.

15 69. For the foregoing reasons, BLM's aforesaid actions violated NEPA. Accordingly,
16 under the APA, 5 U.S.C. § 706(a), this Court should hold unlawful and set aside defendants'
17 October 10, 2008 approval of the RMP as violative of NEPA.

18 **SECOND CLAIM FOR RELIEF**

19 **FWS'S RMP BIOLOGICAL OPINION AND BLM'S**
20 **RELIANCE THEREON VIOLATED ESA**
21 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2202-2201,**
22 **and for violations of the Endangered Species Act, 16 U.S.C. § 1531 et seq.**
23 **and Administrative Procedure Act, 5 U.S.C. § 706)**

24 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

25 70. The paragraphs set forth above are realleged and incorporated herein by reference.

26 71. The Endangered Species Act establishes a three-step consultation procedure to
27 assure that federal agencies undertaking or approving an action ("action agencies"), such as BLM
28 here, adequately confer with the FWS regarding the potential adverse impacts of proposed
projects on federally-listed threatened and endangered species. 16 U.S.C. § 1536(a)(2); 50 C.F.R.

1 § 402.12; *Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation*,
2 138 F.Supp.2d 1228, 1240-47 (N.D. Cal. 2001) (“*PCFFA*”). These three steps require the action
3 agency to: (1) advise FWS of the area in which the plan activities are proposed (and in response,
4 FWS must provide the federal agency with a list of the endangered and threatened species in the
5 plan area); (2) “prepare a ‘[biological assessment]’ to determine whether such species ‘[are]’
6 likely to be affected’ by the action” (*PCFFA, supra*, 138 F.Supp.2d at 1240, quoting from *Pacific*
7 *Rivers Council v. Thomas*, 753 F.2d 754, 763 (9th Cir.1985); 50 C.F.R. § 402.12(i)); and (3) not
8 proceed with the project until FWS has prepared a formal BiOp evaluating the project’s potential
9 to adversely affect any species or potentially affected critical habitat. 16 U.S.C. § 1536(b); 50
10 C.F.R. § 402.14. Thereafter, the action agency must independently ensure that any action that it
11 takes will not jeopardize the survival of any listed species or adversely modify its habitat. 16
12 U.S.C. § 1536(a)(2).

13 **BLM Failed to Consult with the U.S. Fish and Wildlife Service and**
14 **Prepare a Supplemental BA Regarding the 2008 Revisions to the RMP**

15 72. As alleged above, after issuing its RMP BA, BLM changed the VRM
16 classifications of significant portions of the Planning Area and altered the allowed uses within
17 certain VRM classifications, thereby substantially increasing the level of development allowed
18 under the new Plan. BLM, however, did not prepare a supplemental RMP BA or otherwise
19 update its consultation information to address the newly amended RMP’s much greater adverse
20 effects. This failure violated ESA.

21 **The RMP BiOp Does Not Adequately Address Effects of the 2008 Revisions to the RMP**

22 73. Because BLM failed to prepare a supplemental RMP BA, the RMP BiOp does not
23 adequately address the effects of the 2008 RMP Amendments on listed species. The RMP BiOp
24 acknowledges the changes in the RMP, but fails to fully address the increased effects of the RMP
25 on listed species.

26 **The RMP BiOp Fails to Address the Impacts of the Sunrise Exemption on the RMP**

27 74. FWS’s RMP BiOp does not comply with ESA because it fails to account for the
28 effects of the development of the Powerlink Project outside of the RMP’s designated utility

1 corridor. At the time that BLM was considering the RMP, it was also deliberating on the
2 Powerlink Project, the effects of which change the RMP analysis by allowing, through a
3 purported one-time exemption from the Plan, construction of the Powerlink Project outside of the
4 utility corridor, thereby inducing development of substantial new energy production facilities
5 along the Powerlink route. By turning a blind eye to the critical impacts of this known project,
6 the RMP analysis de-emphasized the impacts of the downgrading of the VRMs and ignored the
7 increased likelihood that renewable energy projects would be built within the McCain Valley and
8 other sensitive areas in the near future.

9 **The RMP BiOp Fails to Use the Best Scientific and Commercial Information Available**

10 75. FWS's lack of surveys of the Planning Area prevented the preparation of an
11 accurate analysis of the effects of the RMP amendments on listed species. Consequently, FWS's
12 RMP BiOp was inaccurate and incomplete and therefore violated ESA. The RMP BiOp did not
13 base its conclusions on actual surveys; rather it deferred a complete analysis of the RMP's effects
14 until surveys later become available. FWS's failure to timely procure species surveys severely
15 inhibited its ability to accurately assess the effects of the RMP on listed species. Further, the
16 RMP BiOp failed to address the information contained in BAD's November 17, 2008 protest and
17 therefore did not utilize the best scientific and commercial data available.

18 **BLM's Adoption of the Conclusions in the RMP BiOp Violate ESA**

19 76. FWS's preparation of the flawed BiOp, and BLM's reliance thereon, violate ESA's
20 requirement under 16 U.S.C. section 1536(b) that FWS conduct adequate consultation and under
21 16 U.S.C. section 1536(a)(2) that BLM ensure that its actions will not cause jeopardy to listed
22 species, or adversely modify their critical habitat.

23 77. For the foregoing reasons, defendants' approvals of the Biological Opinions, the
24 RMP and the Powerlink Project violated ESA. Accordingly, this Court should set aside FSW's
25 2008 RMP BiOp and BLM's approval of its 2008 RMP as contrary to ESA and the APA.

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1 on wildlife resources and listed species within the Planning Area, in violation of the requirement
2 to carefully weight those benefits; and

3 (5) failing to conduct a reasoned analysis of the relative need for industrial
4 development and the commensurate loss of areas of high visual value and critical environmental
5 concern and recreation, as well as critical habitat, in violation of its duties to “consider [the]
6 relative scarcity of the values involved and the availability of alternative means . . . for the
7 realization of those values,” and “[to] weigh the long-term benefits to the public against the short-
8 term benefits.”

9 81. For the foregoing reasons, BLM’s approvals of the RMP and the Powerlink Project
10 violated FLPMA. Accordingly, this Court should set aside those approvals as contrary to
11 FLPMA and the APA.

12 **FOURTH CLAIM FOR RELIEF**

13 **BLM’S DISMISSAL OF BAD’S PROTEST VIOLATED FLPMA**
14 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2201 -2202,**
15 **and for violations of the Federal Land Policy Management Act,**
16 **43 U.S.C. § 1711 et seq., 43 C.F.R. 1610.5-2, and**
17 **the Administrative Procedure Act, 5 U.S.C. § 706)**

18 **(ALLEGED BY BAD AND DONNA TISDALE AGAINST DOI AND BLM**
19 **DEFENDANTS)**

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

21 83. Pursuant to FLPMA, 43 U.S.C. § 1711(a), BLM promulgated 43 C.F.R. 1610.5-2,
22 to provide for a one-stage protest process for review of public objections to its resource
23 management plans. 43 C.F.R. 1610.5-2. BLM’s regulations for protests to its land planning
24 decisions provide that a protest letter must set forth, among other requirements, “[a] concise
25 statement explaining why the State Director’s decision is believed to be wrong.” 43 C.F.R.
26 1610.5-2 (1983).

27 84. On November 17, 2008, BAD submitted a protest letter, appealing the adoption of
28 the RMP, pursuant to 43 C.F.R. section 1610.5-2 (1983). BAD’s November 17, 2008 protest
raised objections to the RMP on the grounds that the 2008 Amendments, and the RMP in its

1 entirety, were based on deficient environmental reviews that violate NEPA, ESA, and FLPMA.
2 Then California State BLM Director Mike Pool issued a decision summarily dismissing
3 plaintiffs' protest on January 12, 2009. The primary reason given by BLM was that plaintiffs'
4 letter allegedly failed to contain a short statement "explaining why the State Director's decision is
5 believed to be wrong." Yet, plaintiffs' letter clearly contains such a statement. Defendants'
6 dismissal of plaintiffs' protest was arbitrary and capricious because (1) the dismissal fails to
7 provide an adequate explanation of BLM's reasons for dismissing the protest and (2) BAD's
8 protest clearly did satisfy the requirements of the applicable regulation. Accordingly, BLM
9 lacked grounds for dismissing BAD's protest for failing to fulfill that requirement. Its dismissal
10 of BAD's protest was therefore arbitrary and capricious and contrary to the governing regulation,
11 in violation of FLPMA and the APA.

12 85. For the foregoing reasons, BLM's dismissal of BAD's protest was contrary to
13 FLPMA and the APA. Accordingly, this Court should set aside BLM's dismissal of BAD's
14 protest and BLM's subsequent approval of the RMP and the Powerlink Project.

15 **FIFTH CLAIM FOR RELIEF**

16 **BLM FAILED TO COMPLY WITH NEPA IN GRANTING RIGHTS OF WAY**
17 **AND TEMPORARY USE PERMIT FOR THE POWERLINK PROJECT**
18 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2202-2201, and for violations of**
19 **the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. and Administrative**
20 **Procedure Act, 5 U.S.C. § 706)**

21 **(ALLEGED BY ALL PLAINTIFFS AGAINST DOI AND BLM DEFENDANTS)**

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

23 86. The paragraphs set forth above are realleged and incorporated herein by reference.

24 87. NEPA regulations require an EIS to be "concise, clear, and to the point." 40 C.F.R.
25 § 1502.1. More specifically, the regulations demand that the EIS "[d]evote substantial treatment
26 to each alternative considered in detail including the proposed action so that reviewers may
27 evaluate their comparative merits." 40 C.F.R. § 1502.14(b). Furthermore, the EIS must provide
28 "a clear basis for choice among the options." 40 C.F.R. § 1502.14.

1 88. Contrary to these requirements, the Powerlink EIS documents² were muddled and
2 confusing and did not reveal to the reader the impacts of the selected project in a clear or concise
3 manner. For example, the Powerlink EIS contained extensive discussions of the impacts of the
4 “*proposed* [but later *rejected*] project,” but did not provide such information about the *selected*,
5 Southern Route. The Powerlink EIS documents were plagued by a myriad of constantly changing
6 alternatives that evaded clear communication of the impacts of each alternative. These
7 deficiencies prevented the public from conducting informed review of and providing informed
8 comment on, all of the different routes proposed in the Powerlink EIS. Hidden among the
9 shifting routes was the final selected project; the scant analysis of the final route was presented in
10 vague, confusing and obscure sections of the Powerlink FEIS buried among the many other
11 revisions to alternative route options.

12 89. In addition to lacking a clear and consistent description of the selected route, the
13 Powerlink EIS documents were inherently confusing because they failed to analyze the
14 environmental impacts of the route as a whole. Instead, the fragmented and minimal descriptions
15 of the impacts of the selected route were scattered throughout the Powerlink EIS. Without a
16 consistent route description, the analysis in the Powerlink EIS was fundamentally and fatally
17 flawed.

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

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

25 91. NEPA regulations require that an EIS provide a clear statement of “the underlying
26

27
28 ²As discussed previously, “Powerlink EIS” refers to the Powerlink DEIS, Powerlink
SDEIS, and Powerlink FEIS.

1 purpose and need to which the agency is responding in proposing the alternatives including the
2 proposed action.” 40 C.F.R. § 1502.13. An EIS must “be supported by evidence that the agency
3 has made the necessary environmental analyses.” 40 C.F.R. §1502.1.

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

11 93. In an attempt to establish a need for the Project, the Powerlink FEIS relied on
12 SDG&E’s projection of an electricity shortage and reliability deficiency in the San Diego area by
13 2010 or 2011 if a major new transmission project were not built. *See* Powerlink FEIS, A-6, 8.
14 However, not only did the Powerlink FEIS fail to substantiate the forecasted shortage, the
15 projection was wrong. Moreover, SDG&E had plenty of options for increasing local generation
16 to meet future energy demand. Similarly, SDG&E could achieve its state-mandated renewable
17 energy portfolio targets without having to construct either Powerlink or any other new large-scale
18 transmission project aimed at increasing energy imports. For these reasons, the Powerlink FEIS
19 violated NEPA by failing to establish a need for the Project.

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

21 94. NEPA regulations require that the EIS “succinctly describe the environment of the
22 area(s) to be affected.” 40 C.F.R. § 1502.15. In order to evaluate the environmental
23 consequences of the project, an accurate understanding of its current environmental setting must
24 be developed. Detailed and specific surveys must be completed to inform the decision maker of
25 the current biologic, cultural, geographic, scenic, hydrologic, and historical settings. These
26 necessary surveys had not been completed prior to BLM’s January 2009 decision to approve the
27 Powerlink Project. Therefore, the decision to approve the Powerlink Project was based on an
28 inaccurate description of the environmental setting and subsequently, an inaccurate understanding

1 of the environmental consequences of the project.

2 **The Powerlink FEIS's Analysis of the Powerlink Project's Environmental Impacts Fails**

3 95. NEPA requires federal agencies to take a "hard look" at the environmental impacts
4 of proposed major actions and "provide a full and fair discussion of significant environmental
5 impacts" for the public's review. 40 C.F.R. § 1502.1. Contrary to this mandate, the Powerlink
6 FEIS failed to adequately address the following impacts of the Powerlink Project:

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

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

19 98. The Powerlink FEIS failed to provide adequate information on the project's
20 biological impacts by failing to include necessary surveys of the sensitive species that would be
21 affected by the Powerlink Project, and instead relied on vague and superficial pre-construction
22 surveys. The Powerlink FEIS failed to adequately analyze the impacts of the selected route on
23 Peninsular bighorn sheep, the Quino checkerspot butterfly or the Arroyo toad. *See* Powerlink
24 FEIS, Ch. D.2 at 271-537. The Powerlink FEIS failed to address the impacts of the proposed
25 development of massive wind farms in the McCain Valley on sensitive species in the area. *See*
26 Powerlink FEIS, Ch. D.5 at 1-102. This development will pose significant threats to the future
27 viability of species in the area, especially the avian species and the Peninsular bighorn sheep, and
28 accordingly should have been discussed and analyzed in the FEIS.

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

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

18 101. The Powerlink FEIS did not adequately discuss the effects of the Powerlink Project
19 and its attendant industrial development on the rural character and quality of life of backcounty
20 communities. Powerlink FEIS Ch. D.4 at 1-112. The industrialization of affected areas of
21 eastern San Diego County will adversely affect the lives of the residents who have chosen to live
22 in those rural communities in part because of their close connection to nature.

23 102. The Powerlink FEIS failed to adequately analyze the impacts of the new
24 transmission line on the cultural and historic resources in the area, despite the fact that the
25 transmission line will cut through areas with high historic and cultural value. Large segments of
26 the project area have not been field surveyed for the presence of cultural resources. Despite
27 acknowledging potentially significant impacts on cultural resources, the Powerlink FEIS
28 improperly deferred determination of the cultural resource impacts until an unknown future date.

1 Further, the Powerlink FEIS neglected to disclose and analyze impacts to several known existing
2 cultural sites in violation of NEPA.

3 103. The Powerlink FEIS failed to adequately address the impacts of the project on the
4 wilderness experience of hikers, campers, other visitors and residents. Powerlink FEIS, Ch. D.5
5 at 1-102. It did not analyze the direct, adverse effect of the presence of industrial development,
6 and the foreseeable development of wind farms in the McCain Valley, on what are presently
7 natural landscapes.

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

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

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

24 106. NEPA requires that all connected actions be considered in the same document.
25 Segmenting projects that are interrelated improperly understates their combined impacts. BLM
26 segmented environmental review by failing to analyze in the Powerlink FEIS foreseeable
27 development: (1) in McCain Valley, (2) resulting from the 2008 amendment to BLM's RMP, and
28 (3) resulting from future development of power sources, including fossil fuel based energy

1 sources, that the Powerlink Project will induce.

2 **The Powerlink FEIS Fails to Consider the Cumulative Impacts**
3 **of the Project Along with Other Foreseeable Projects**

4 107. The Powerlink FEIS failed to analyze many foreseeable projects that will contribute
5 to significant cumulative impacts including impacts resulting from the project in combination
6 with the development that is now allowed in the McCain Valley under the amendment to BLM’s
7 RMP. These projects combined with the Powerlink Project could cause widespread cumulative
8 impacts to the natural resources of San Diego and Imperial Counties, including the foreseeable
9 industrialization of areas that have survived up until now as undisturbed habitat and open space.

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

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

21 109. The Powerlink FEIS’s failure to include adequate, accurate, and up-to-date
22 information stymied any comparison of the alternatives that were presented. The lack of key
23 information on the various routes’ impacts precluded informed public review.

24 **The Powerlink FEIS Fails to Adequately Address the Impact of the Project**
25 **on the Cleveland National Forest, Including the Need for Multiple Amendments**
26 **to the Applicable Forest Plan**

27 110. NEPA requires an EIS to address the impacts of the project’s compliance (or not)
28 with state and federal environmental regulations and standards. *Sierra Club v. Forest Service*,

1 843 F.2d 1190, 1195 (9th Cir. 1988), *citing* 40 C.F.R. § 1508.27(b)(10). Contrary to this
2 mandate, the Powerlink FEIS failed to disclose that the selected route would require major
3 amendments to the Forest Plan for the Cleveland National Forest (CNF). Nor did the Powerlink
4 FEIS adequately analyze or mitigate the impacts resulting from such an amendment.
5 Furthermore, the Powerlink FEIS failed to adequately address the many inconsistencies of the
6 Powerlink Project with the current Forest Plan’s environmental protections.

7 111. First, the discussion of the CNF Forest Plan in the Powerlink FEIS was inconsistent
8 and confusingly scattered throughout the document. Powerlink FEIS, E.2.2-22; E.3.1-3;
9 Appendix 14; F0003-1 to F0003-10 at 4-20 to 4-26. Second, the Powerlink FEIS failed to
10 adequately address the Powerlink Project’s conflicts with the Forest Plan’s Fire Prevention
11 Standards, which protect the public and forest resources from wildfire, by “[r]educ[ing] the
12 number of human-caused wildland fires and associated human and environmental impacts. . . .”
13 Forest Plan at p. 116. Third, the Powerlink FEIS did not address the cumulative impacts of the
14 project’s impacts along with the master special use permit currently under review for all SDG&E
15 powerlines that cross Forest Service lands. Fourth, the Powerlink FEIS failed to adequately
16 address the project’s conflicts with several Forest Plan land-use zones, such as its Back Country
17 Motorized Use Restricted Zone. Forest Plan at 7. The Powerlink FEIS contained misleading
18 information with regard to the Project’s consistency with those land-use zones, providing
19 contradictory information and failing to disclose that powerlines are inconsistent with those
20 zones. Fifth, the Powerlink FEIS failed to adequately address the Powerlink Project’s conflicts
21 with the Forest Plan’s riparian area conservation standards, which call for the preservation of
22 riparian areas. Forest Plan, Part 3, page 66; Part 1, page 41; Part 3, page 65; Part 2, page 95. The
23 Powerlink FEIS neither identified the riparian areas that will be affected, nor adequately
24 mitigated the project’s impacts on them. Sixth, even though the selected route is likely to impact
25 suitable habitat for the Laguna Mountain skipper and San Diego thornmint, thorough surveys for
26 these two species were not conducted along the selected route prior to approval of the project.
27 Powerlink FEIS, E.2.2. Seventh, the Powerlink FEIS did not adequately identify activities with
28 the potential to harm heritage resources or develop suitable mitigation measures for the same

1 reason. *Id.*, E.2.4. These impacts thus were left unaddressed, a violation of NEPA.

2 112. For each of these reasons, BLM’s Powerlink FEIS violates NEPA. Accordingly,
3 this Court should set aside BLM’s Powerlink FEIS and BLM’s approval of the rights-of-way and
4 use permit for the Powerlink Project as contrary to NEPA and the APA.

5 **SIXTH CLAIM FOR RELIEF**

6 **THE PROJECT APPROVAL VIOLATES FLPMA**
7 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2202-2201, and for violations of**
8 **the Federal Land Policy Management Act, 43 U.S.C. §1701 et seq. and Administrative**
9 **Procedure Act, 5 U.S.C. § 706)**

10 **(ALLEGED BY ALL PLAINTIFFS AGAINST DOI AND BLM DEFENDANTS)**

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

12 114. The Federal Land Policy Management Act directs that:

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

19 43 U.S.C. § 1701(a)(8).

20 115. FLMPPA further requires agencies that are considering applications for rights-of-
21 way to limit to the extent feasible the natural resource damage of the proposed project. 43
22 U.S.C. § 1765. FLPMA mandates that “[e]ach right-of-way shall be limited to the ground which
23 the Secretary concerned determines [. . .] will do no unnecessary damage to the environment.” 43
24 U.S.C. § 1764. FLPMA also requires that “[e]ach right-of-way shall contain . . . terms and
25 conditions which will . . . minimize damage to scenic and esthetic values and fish and wildlife
26 habitat and otherwise protect the environment.” 43 U.S.C. § 1765. These requirements are
27 strictly enforced and cannot be easily counterbalanced by project proponents’ claims of
28 inconvenience or cost. *Trout Unlimited v. U.S. Dept. of Agriculture*, 320 F.Supp.2d 1090, 1108
(D. Colo. 2004).

1 116. Contrary to these mandates, BLM failed to consider terms and conditions that
2 would avoid or reduce the Powerlink Project’s impacts, such as (1) requiring SDG&E to commit
3 a certain percentage of its capacity to renewable energy transmission; (2) including terms and
4 conditions in the rights-of-way (“ROW”) that would require undergrounding of the line in, at a
5 minimum, the most sensitive areas; (3) selecting a “non-wire” alternative such as relying on
6 distributed power generated in or near the urban demand centers; and finally, (4) providing terms
7 and conditions in the ROW that address McCain Valley’s outstanding scenic and habitat
8 resources.

9 117. Further, FLPMA requires that rights-of-way be co-located to the extent feasible. 43
10 U.S.C. § 1763. Contrary to this mandate, BLM failed to require co-location of the Powerlink
11 Project along side the existing Southwest Powerlink transmission line “to minimize adverse
12 environmental impacts and the proliferation of separate rights-of-way” (*id.*) and to “minimize
13 damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the
14 environment” (43 U.S.C. § 1765).

15 118. For the foregoing reasons, BLM’s approval of the Powerlink Project’s rights-of-
16 way violated FLPMA. Accordingly, this Court should set aside BLM’s approval as contrary to
17 FLPMA and the APA.

18 SEVENTH CLAIM FOR RELIEF

19 **FWS’S POWERLINK BIOLOGICAL OPINION AND BLM’S** 20 **RELIANCE THEREON VIOLATED ESA**

21 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2202-2201, and for violations**
22 **of the Endangered Species Act, 16 U.S.C. § 1531 et seq. and Administrative Procedure Act,**
23 **5 U.S.C. § 706)**

24 **(ALLEGED BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

25 **FWS Failed to Follow the Proper Section 7 Consultation Procedures Under ESA**

26 119. The paragraphs set forth above are realleged and incorporated herein by reference.

27 120. Under section 7 of ESA, any agency that authorizes, funds, or carries out an action
28 must “insure that [such action] is not likely to jeopardize the continued existence of any
endangered species or threatened species or result in the destruction or adverse modification of

1 habitat.” 16 U.S.C. § 1536(a)(2). In order to achieve this goal, before approving a project that
2 might affect listed species, the action agency must consult with FWS to determine which species
3 may be affected, the extent of those adverse impacts, and how they can be mitigated. These
4 consultation requirements are met through the preparation of a biological assessment (“BA”) by
5 the action agency, potentially a biological opinion (“BiOp”) by FWS, and potentially an
6 incidental take statement (“ITS”) by both.

7 121. Defendants violated these consultation requirements. The entirety of the ESA
8 process for the Powerlink Project took place in just over one month, even though its impacts
9 extend across nearly 125 miles of highly varied habitats. This rushed and incomplete
10 consultation was not sufficient to accomplish adequate, thorough, and meaningful analysis of the
11 effects of the project on listed species. Without adequate consultation these species will not be
12 sufficiently protected as required by ESA.

13 **FWS Failed to Use the Best Available Science in Making Determinations Under the ESA**

14 122. ESA mandates that “each agency shall use the best scientific and commercial data
15 available.” 15 U.S.C. § 1536(a)(2). In order to fulfill this requirement, the action agency must
16 provide FWS with data “which can be obtained during the consultation for an adequate review of
17 the effects that an action may have upon listed species or critical habitat.” 50 C.F.R. § 402.14(d).
18 If an agency fails to provide such information, as BLM has failed to do here, the best available
19 data requirement has not been met and ESA review must be deemed inadequate. *Roosevelt*
20 *Campobello Intern. Park Com’n v. U.S. E.P.A.*, 684 F.2d 1041, 1055 (1st Cir. 1982).

21 123. The best available data rule requires that the information relied upon is accurate and
22 accepted as the best available information that currently exists. However, BLM’s BA reveals that
23 surveys were initiated on the proposed route but *not on the selected route*, and therefore the data
24 used is not pertinent or accurate. Additionally, FWS’s no jeopardy determination is based in its
25 entirety on SDG&E’s commitment to conduct future surveys prior to commencing construction.
26 FWS failed to comply with the best available data requirement when it rendered an opinion in the
27 absence of surveys of the entirety of the affected project area and relied on future, unverified
28 information.

1 124. Finally, the short time given to review the effects of the Powerlink Project on
2 endangered and threatened species also violated the best available data requirement under ESA.
3 A mere one month and eight days cannot provide enough time for BLM and FWS to consult,
4 perform scientific studies, review those studies, and make a meaningful determination about the
5 impacts on listed species of a project that extends nearly 125 miles across deserts, mountains,
6 rivers, valleys and many rural communities.

7 **The Powerlink BiOp Failed to Address the Entire Project**

8 125. The Powerlink BiOp did not consider SDG&E’s plans for future expansion of the
9 Powerlink facilities, nor does it include the effects of the multiple renewable energy projects
10 proposed to be located in McCain Valley and along the Powerlink route that would be dependent
11 on the construction of the transmission line. Some of these projects were deemed “connected
12 actions” for the purposes of NEPA, but ignored in the Powerlink BiOp. The effects should have
13 been considered as indirect effects, cumulative effects, interconnected project effects, or growth-
14 inducing effects under ESA. These energy development projects will have destructive impacts on
15 the desert and mountain ecosystems in the Imperial Valley, and eastern San Diego County,
16 harming federally listed endangered species on both sides of the U.S.-Mexican border. Therefore
17 the Powerlink BiOp should have included information about the impacts of these related projects.

18 **The Powerlink BiOp Failed to Accurately and**
19 **Completely Describe the Action Area and Baseline Conditions**

20 126. The Powerlink BiOp ignored the multiple, related renewable energy projects that
21 will be constructed nearby and will rely on the Powerlink transmission capabilities. Thus, the
22 Powerlink BiOp failed to describe the areas affected by these related projects, the listed species
23 that inhabit those areas, and the baseline conditions of these projects. These omissions violated
24 ESA.

25 **The Powerlink BiOp’s Mitigation Measures are Unproven and Potentially Ineffective**

26 127. The Powerlink BiOp’s mitigation measures violated ESA standards because they
27 were unproven and likely to be ineffective. The principal mitigation measure only described a
28 “Habitat Management Plan” to be created in the future – and thus represents a classic example of

1 a plan to make a plan, not real mitigation. FWS thus failed to ensure that the mitigation being
2 adopted would be effective and that suitable lands were in fact available to compensate for loss of
3 habitat *before* the decision to proceed was made. Thus, the habitat mitigation measures on which
4 the Powerlink BiOp relied failed to assess whether, much less assure that, mitigation would be
5 feasible and effective.

6 **Approval of the Incidental Take Statement Violates the ESA and BLM Policy**

7 128. ESA requires that an incidental take statement (“ITS”) specify “the impact of such
8 incidental taking on the species.” 16 U.S.C. § 1536(b)(4)(i); 50 C.F.R. § 402.14(i)(1). This
9 impact should be expressed in terms of a specific number of individual listed animals or plants
10 whenever possible. *Oregon Natural Resources Council (“ONRC”) v. Allen*, 476 F.3d 1031, 1037
11 (9th Cir. 2006); *Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife, Bureau of Land*
12 *Management*, 273 F.3d 1229, 1249 (9th Cir. 2001). Under no circumstances can the agency
13 merely quantify “take” in terms of acreage of habitat. *ORNC v. Allen*, 476 F.3d at 1037-38. Such
14 a vague description provides no precise trigger for the re-initiation of consultation because it is
15 impossible to know when the number of species taken rises to the level of adverse modification
16 or jeopardy. *Id.* at 1038. Contrary to this prohibition, the Powerlink BiOp relies on habitat-based
17 thresholds to trigger re-initiation of consultation with regard to the coastal California gnatcatcher,
18 the Least Bell’s vireo, the Arroyo toad, the Quino checkerspot butterfly, and the Peninsular
19 bighorn sheep, in clear violation of ESA and BLM policy.

20 **BLM’s Reliance on the Powerlink BiOp Also Violates ESA**

21 129. BLM has an independent duty to ensure that the actions it approves do not
22 jeopardize endangered or threatened species. BLM’s reliance on FWS’s faulty Powerlink BiOp
23 thus also violates ESA.

24 130. For the foregoing reasons, defendants’ approval of the Powerlink Project and its
25 BiOp violate ESA. Accordingly, this Court should set aside those approvals as contrary to ESA
26 and the APA.

27 ///

28 ///

1 **EIGHTH CLAIM FOR RELIEF**

2 **FAILURE TO SURVEY FOR HISTORIC PROPERTIES AND PROVIDE PUBLIC**
3 **NOTICE OF A PROGRAMMATIC AGREEMENT VIOLATED THE NHPA**
4 **(For declaratory and injunctive relief under 28 U.S.C. §§ 2202-2201 and for violations of**
5 **the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* and Administrative**
6 **Procedure Act, 5 U.S.C. § 706(2))**

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

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

9 132. Congress enacted the NHPA, 16 U.S.C. § 470 *et seq.*, to “accelerate federal historic
10 preservation programs” and to foster cooperation between federal, state, and local authorities. 16
11 U.S.C. § 470. The NHPA requires federal agencies to consider the effects of an “undertaking” on
12 a site or object included, or eligible for inclusion, in the National Register, and requires that the
13 Advisory Council on Historic Preservation administering the Act be given an opportunity to
14 comment upon the proposed undertaking. 16 U.S.C. § 470. “The goal of consultation is to
15 identify historic properties potentially affected by the undertaking, assess its effects and seek
16 ways to avoid, minimize or mitigate any adverse effects on historic properties.” 36 C.F.R. §
17 800.1(a).

18 **BLM’s Failure to Survey for Historic Properties Violates NHPA**

19 133. Where, as here, alternatives being considered consist of large corridors, “the agency
20 official may use a phased process to conduct identification and evaluation efforts.” 36 C.F.R. §
21 800.4(b). “The agency official may also defer final identification and evaluation of historic
22 properties if it is specifically provided for in a . . . programmatic agreement executed pursuant to
23 § 800.14(b) . . .” *Id.* The process, however, must still:

24 establish the likely presence of historic properties within the area of potential
25 effects for each alternative or inaccessible area through background research,
26 consultation and an appropriate level of field investigation, taking into account the
27 number of alternatives under consideration, the magnitude of the undertaking and
its likely effects, and the views of the SHPO/THPO and any other consulting
parties.

28 *Id.* Contrary to this mandate, before approving the RMP and the Powerlink Project, BLM failed

1 to survey for and establish the likely presence of historic properties “within the area of potential
2 effects” for the project and each alternative. BLM therefore violated the NHPA.

3 **BLM Failed to Provide Public Notice and Gather Public Input**

4 134. Under the NHPA, public input is “essential to informed Federal decision-making in
5 the [NHPA section]106 process.” 36 C.F.R. 800.2(d). The NHPA regulations direct that “[t]he
6 agency official shall seek and consider the views of the public in a manner that reflects the nature
7 and complexity of the undertaking and its effects on historic properties” *Id.* BLM may
8 satisfy the public involvement requirement by using “the agency’s procedures for public
9 involvement under the NEPA or other program requirements in lieu of public involvement
10 requirements in subpart B of this part, *if they provide adequate opportunities for public*
11 *involvement consistent with this subpart.*” 36 C.F.R. § 800.2(d)(3), emphasis added.

12 135. Contrary to this mandate, in fashioning a programmatic agreement (“PA”) under 36
13 C.F.R. 800.14(b)(3), BLM failed to provide adequate opportunities for public involvement. First,
14 BLM provided barely over one page of cryptic text in the Powerlink DEIS that discusses its intent
15 to create and adopt a PA, leaving the public without an adequate opportunity to comment on this
16 complex topic. Second, BLM published the Powerlink FEIS in October 2008, two months *before*
17 *the PA was created*, leaving no realistic way for the public to be involved in the decision-making
18 process.

19 136. For the foregoing reasons, BLM’s approval of the RMP and the Powerlink Project
20 violated the NHPA. Accordingly, BLM’s approvals of the RMP and the Powerlink Project
21 should be set aside as contrary to the NHPA and the APA.

22 **XIII. RELIEF REQUESTED**

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

24 1. For declaratory judgment that BLM’s dismissal of plaintiffs’ November 17, 2008
25 protest to the RMP was arbitrary and capricious and in violation of the Federal Land Policy
26 Management Act, 43 U.S.C. § 1711 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §
27 701 *et seq.*;

28 2. For declaratory judgment that the RMP violates the Federal Land Policy

1 Management Act, 43 U.S.C. § 1716, the National Environmental Policy Act, 42 U.S.C. § 4321 *et*
2 *seq.*, the National Historic Preservation Act, 16 U.S.C. § 4321, their implementing regulations,
3 and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*;

4 3. For declaratory judgment that BLM’s Biological Assessments and FWS’s
5 Biological Opinions for the RMP and the Powerlink Project, and BLM’s reliance thereon, violate
6 the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act, 5
7 U.S.C. § 701 *et seq.*;

8 4. For preliminary and permanent injunctive relief enjoining BLM’s implementation
9 of the RMP on the grounds that it is arbitrary and capricious and a violation of the above listed
10 federal environmental laws;

11 5. For declaratory judgment that BLM’s January 20, 2009 approvals of two rights of
12 way and a temporary use permit for the Powerlink Project violate the National Environmental
13 Policy Act, 42 U.S.C. § 4321 *et seq.*, the Federal Land Policy Management Act, 43 U.S.C. §
14 1716, the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, the National Historic Preservation
15 Act, 16 U.S.C. § 4321, their implementing regulations, and the Administrative Procedure Act, 5
16 U.S.C. § 701 *et seq.*;

17 6. For preliminary and permanent injunctive relief enjoining BLM from approving any
18 ongoing and future construction activities pursuant to BLM’s approvals of two rights of way and
19 a temporary use permit for the Powerlink Project;

20 7. For an order awarding plaintiffs their costs of litigation, including attorney’s fees,
21 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or as otherwise provided by law;
22 and

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