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10.521B.02

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

THE PROTECT OUR COMMUNITIES FOUNDATION, BACKCOUNTRY AGAINST DUMPS, and DONNA TISDALE, Plaintiffs, vs. DANIEL M. ASHE, Director of U.S. Fish and Wildlife Service; REN LOHOEFENER, Regional Director, Pacific Southwest Region, for U.S. Fish and Wildlife Service; JIM A. BARTEL, Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service; U.S. FISH AND WILDLIFE SERVICE, a federal agency; and UNITED STATES DEPARTMENT OF THE INTERIOR, a federal agency, Defendants.	Civ. No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs THE PROTECT OUR COMMUNITIES FOUNDATION, BACKCOUNTRY AGAINST DUMPS, and DONNA TISDALE (collectively, "plaintiffs") seek to protect approximately 10,151 acres of desert lands in Imperial County from industrial scale energy development in the form of the Ocotillo Wind Energy Facility (the "Project" or "Ocotillo Project"). The Project includes the construction of 112 wind turbines along with a substation and switchyard, service roads, an administration building, and associated transmission facilities. The Project will fundamentally alter an enormous area of the natural landscape surrounding the small town of Ocotillo, much of which is prime habitat for Peninsular bighorn sheep.

2. As authorized by the Administrative Procedure Act ("APA"), 5 U.S.C. sections 701 *et seq*., plaintiffs herein challenge the issuance of a Biological Opinion ("BiOp") for the Project by defendants DANIEL M. ASHE, REN LOHOEFENER, JIM A. BARTEL, U.S. FISH AND WILDLIFE SERVICE, and the UNITED STATES DEPARTMENT OF THE INTERIOR (collectively, "FWS" or "FWS defendants") for violations of the Endangered Species Act ("ESA"), 16 U.S.C. section 1531, *et seq*. The BiOp failed to adhere to the requirements of the ESA in multiple respects.

3. First, the BiOp improperly downplayed the significance of lower elevation, valley-floor habitat for Peninsular bighorn sheep – the type of habitat that will be destroyed by the Project – within the Project site. The BiOp's skewed and unsupported analysis ignores previous statements from FWS itself attesting to the critical importance of such habitat both for foraging and for bighorn sheep inter-population movement.

4. The BiOp also failed to analyze the effects of the stress caused by the Project on sheep populations that remain in the area and continue to use habitat that is nearby or within the Project site. Studies indicate that many Peninsular bighorn sheep are likely to remain in the area of the Project, but that those that remain will be adversely affected by the stress of living in close proximity to the industrial scale Project. These stress levels could cause a reduction of reproductive success and cause the population to decrease. FWS failed to analyze the effects of such stress levels on individual sheep and on the population as a whole.

5. Additionally, the BiOp failed to disclose and evaluate the potential consequences of a pending lawsuit seeking to reestablish critical habitat designation for significant parts of the Project site, which could vastly alter FWS' analysis of the effects of the Project on the area's bighorn sheep.

6. And finally, FWS failed to use the best scientific and commercial data available when preparing the BiOp for the Project. FWS ignored reports of sheep activity in the Project area that showed that the BiOp underestimated the number of bighorn sheep that use the Project site on a regular basis.

7. These inadequacies reveal multiple shortcomings in FWS' analysis. The BiOp therefore violates ESA. Accordingly, plaintiffs seek orders from this Court: (1) granting preliminary injunctive relief stopping all activities on the Project site that would result in any change to the physical environment pending a full hearing on the merits; (2) declaring that defendants violated the APA by failing to comply with the ESA; and (3) granting permanent injunctive relief overturning FWS' BiOp and thus stopping Project construction pending defendants' compliance with ESA.

JURISDICTION AND VENUE

8. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal question), 1337 (regulation of commerce), 1346 (United States as defendant), 1361 (mandamus against an officer of the United States), 2201 (declaratory judgment), and 2202 (injunctive relief), and under the Administrative Procedure Act ("APA"), 5 U.S.C. sections 701-706 (review of final agency action) because (1) the action arises under the APA and ESA; (2) FWS is an agency of the United States government and the individual defendants are sued in their official capacities as officers of the United States; (3) the action seeks a declaratory judgment voiding FWS' BiOp, which constitutes a final agency action; and (4) the lawsuit also seeks further injunctive and mandamus relief until FWS complies with applicable law.

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

judicial district.

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

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

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

PARTIES

13. Plaintiff THE PROTECT OUR COMMUNITIES FOUNDATION ("POC") is a community organization formed in 2009 as the successor to The Protect Our Communities Fund, which had been formed in 2006. POC is composed of numerous individuals and families residing in Imperial County, including the Ocotillo area, and eastern San Diego County who are directly affected by the Ocotillo Project. POC's purpose is the promotion of a safe, reliable, economical, renewable and environmentally responsible energy future. POC's members currently use and intend to continue to use the lands affected by the Project for aesthetic, scientific, historic, cultural, recreational, and spiritual enjoyment. Construction and operation of the Project threatens to harm the use and enjoyment of these public resources by POC's members as well as the public at large. Further, POC members are vitally interested in preservation of Peninsular bighorn sheep populations in southern California, which are threatened by the construction of the Project. POC therefore seeks review of FWS' BiOp.

14. Plaintiff BACKCOUNTRY AGAINST DUMPS ("Backcountry") is a community organization comprising numerous individuals and families residing in Imperial County, including the Ocotillo area, and eastern San Diego County who are directly and will continue to be directly affected by the Ocotillo Project. Backcountry's members use the Project site for aesthetic, scientific, historic, cultural, recreational, and spiritual enjoyment. Construction and operation of the Ocotillo Project threatens to harm the use and enjoyment of these public resources by Backcountry's members as well as the public at large. In addition, members of

Backcountry are vitally interested in preservation of Peninsular bighorn sheep populations in southern California, which are threatened by the construction of the Project. Backcountry therefore seeks review of FWS' BiOp.

15. Plaintiff DONNA TISDALE lives on Morningstar Ranch, located two miles west of Tierra Del Sol Road in Boulevard, California. She is a member of Backcountry and POC. She is also the Chairwoman of the County of San Diego's Boulevard Planning Group. Mrs. Tisdale currently uses and intends to continue to use the lands that will be harmed by the Ocotillo Project for activities such as hiking, family outings, recreation, wildlife and wildflower viewing, sightseeing, photography, star gazing, and quiet meditation. Construction and operation of the Project will harm Ms. Tisdale's use and enjoyment of these public resources. Mrs. Tisdale is also keenly interested in the protection of local Peninsular bighorn sheep populations and their habitat. Mrs. Tisdale therefore seeks review of FWS' BiOp.

16. Plaintiffs' injuries are fairly tracable to FWS' actions. Construction and operation of the Ocotillo Project pursuant to FWS' BiOp will harm plaintiffs' use of the Project area for all of the activities listed above, including but not limited to recreation, sightseeing, and meditation. Further, the Project will cause adverse effects to the Peninsular bighorn sheep population that frequents the Project site and the surrounding area. These injuries are actual, concrete, and imminent. Plaintiffs have no plain, speedy, or adequate remedy at law. Accordingly, plaintiffs seek injunctive, mandamus, and declaratory relief from this Court to rectify FWS' unlawful acts and thereby redress plaintiffs' injuries.

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

18. Defendant DANIEL M. ASHE is the Director of FWS. As Director, he is responsible for FWS' BiOp for the Project.

19. Defendant REN LOHOEFENER is the Regional Director for FWS' Pacific Southwest Regional Office. As Regional Director, he is responsible for FWS' BiOp for the Project.

20. Defendant JIM A. BARTEL is the Field Supervisor at FWS' Carlsbad office. As Field Supervisor, he is responsible for FWS' BiOp for the Project.

21. Defendant UNITED STATES DEPARTMENT OF INTERIOR ("DIO") is the federal agency charged with managing most of the nation's federally owned lands, including the Project site at issue here. DOI is also charged with ensuring compliance with applicable laws, including ESA.

22. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency within DOI. FWS is charged with protection of endangered species through its implementation of ESA.

BACKGROUND

I. PENINSULAR BIGHORN SHEEP

A. Listing History and Related Documents

23. FWS has issued the following Federal Register notices listing the Peninsular bighorn sheep under the Endangered Species Act:

Original Listing
63 Fed. Reg. 13134
Date of Final Listing Rule: March 18, 1998
Entity Listed: Bighorn sheep (Peninsular Ranges Population), (*Ovis canadensis*)
Classification: Endangered

Proposed Critical Habitat
65 Fed. Reg. 41405
Date of Critical Habitat Proposed Rule: July 5, 2000

Final Critical Habitat
66 Fed. Reg. 8650
Date of Critical Habitat Final Rule: February 1, 2001

Revised Final Critical Habitat
74 Fed. Reg. 17288
Date of Revised Critical Habitat Final Rule: April 14, 2009

FWS has also prepared two additional documents concerning actions needed for the recovery of the endangered Peninsular bighorn sheep:

Recovery Plan for Bighorn Sheep in the Peninsular Ranges, California (hereinafter "Recovery Plan")
Date Issued: October 25, 2000

Peninsular Bighorn Sheep, 5-year review: Summary and Evaluation (hereinafter "5-year Review")
Date Issued: April 21, 2011

B. General Background

24. The bighorn sheep (*Ovis canadensis*) is a large mammal that became established in

North America after crossing the Bering land bridge from Eurasia during the late Pleistocene era. 66 Fed. Reg. 8650 (Feb. 1, 2001). The term "desert bighorn" is used to describe bighorn sheep that inhabit dry and relatively barren desert environments. *Id.*

25. The Peninsular Mountain Ranges are the home of the distinct population segment of desert bighorn sheep that are at stake in this case, Peninsular bighorn sheep or *Ovis canadensis nelsoni*. 74 Fed. Reg. 17288 (April 14, 2009). Peninsular bighorn sheep inhabit the mountains and deserts between the San Jacinto Mountains of southern California and the Volcan Tres Virgenes Mountains near Santa Rosalia, Baja California, Mexico. 66 Fed. Reg. 8650. Peninsular bighorn sheep have pale brown coats and permanent horns, which become rough and scarred with age. *Id.* The horns grow coiled in males, whereas in females, they are smaller and not coiled. *Id.*

26. In general, Peninsular bighorn sheep inhabit steep, open slopes, canyons, and washes in hot and dry desert regions where: the land is rough, rocky, and sparsely vegetated; average annual precipitation is less than 4 inches; and daily high temperatures average 104 degrees Fahrenheit in the summer. *Id.* Bighorn sheep frequently use ridge benches or canyon rims adjacent to steep slopes or escarpments for lambing. *Id.* As discussed below, alluvial fans (sloping deposits of gravel, sand, clay, and other sediments that spread fan-like at the base of canyons and washes) are also used for breeding, feeding, and movement. *Id.*

27. Peninsular bighorn sheep eat a wide variety of plants. *Id.* The high metabolic demands of ewes during pregnancy and lactation require the seasonal availability of high protein forage sources such as found on the deeper, more productive soils of alluvial fans and canyon bottoms. *Id.* Peninsular bighorn ewes normally produce only one lamb per year. *Id.* Lambing occurs from January through August, with most lambs being born between February and April. *Id.* at 8651. Peninsular bighorn ewes maintain a high degree of site fidelity to their home range, which they frequently pass on to their offspring. *Id.* Rams do not demonstrate the same level of site fidelity. *Id.* They tend to range more widely, often moving among ewe groups and mountain ranges. *Id.*

28. In the Peninsular Ranges, a burgeoning human population and increased activity adjacent to and within bighorn sheep habitat are adversely affecting bighorn sheep. *Id.* These

human activities alter bighorn sheep behavior, which evolved in the absence of human disturbance. *Id*. Human development and activities including construction and use of roads and structures harm sheep through habitat loss and fragmentation, and other disturbances. *Id*.

29. Peninsular bighorn sheep populations in the United States declined from historic levels of several thousand animals to an estimated 1,171 individuals in 1971, about 570 individuals in 1991, and just 276 animals in 1996. *Id*.; BiOp 17. Prompted by litigation seeking their listing under the Endangered Species Act (*Sierra Club v. Babbitt*, CV-S-95-299-EJG-GGH (E.D. Cal.)), FWS finally listed Peninsular bighorn sheep as endangered on March 18, 1998. 63 FR 13134. Since 1998, Peninsular bighorn sheep have experienced a partial recovery. 5-year Review 20.

C. Importance of Low-lying Desert Lands for Foraging and Movement

30. Both the 5-year Review and the Recovery Plan for Peninsular bighorn sheep emphasize the importance of valley habitat "to provide nutritious forage during droughts and other challenging periods, such as lactation." 5-year Review, p. 12. FWS' Recovery Plan explains:

> In the Sierra Nevada and Mojave Desert, the timing of forage green-up in winter is strongly influenced by elevation and mediated through temperature [citations]. Low rolling terrain and washes seasonally provide an important source of high quality forage, with a greater diversity of browse species than in steeper terrain [citations]. Washes also provide a source of high quality browse for longer in the summer than do other areas [citation]. [Researchers have] noted that these areas became increasingly important to bighorn sheep not only in summer but during any period of limited forage availability. [Researchers have also] observed bighorn sheep feeding in flat terrain in Canyonlands National Park, and reported that plant production was higher in flatter terrain than in steeper areas. Similarly, [researchers have] reported that during periods of sexual segregation, rams exploited rolling hills and flat terrain for their superior forage. After localized summer rainfall events, washes and alluvial fans provide the diverse, high quality forage that is especially important to lactating ewes [citations]. [Researchers] describe the importance of succulent spring foods at lower elevations to lactating ewes.

Recovery Plan, p. 7. The 5-year Review emphasizes that "[b]ighorn ewes have very demanding energy and protein requirements during late gestation, lambing, and nursing" and warns that "[t]he survival of newborn ungulates can be at risk if sufficient nutrients are not acquired by ewes during late gestation and nursing." 5-year Review, p. 14. Similarly, the Recovery Plan cites a study that found that when "ewes were confined to a pen and prevented from" accessing the

"greater herbaceous growth" of "alluvial fans and washes," "they and their lambs died of malnutrition." Recovery Plan, p. 8. Thus, alluvial fans and washes "are more important sources of higher quality forage than steeper, rockier soils." 5-year Review, p. 15. The Recovery Plan concludes that habitat conservation will "depend on rapid and adequate protection of lower elevation areas that provide critical resources, such as foraging, watering, lambing, and rearing habitats." Recovery Plan, p. 68.

31. As for sheep movement, in its initial Federal Register notice designating critical habitat, FWS explained the need to protect a wide array of sheep habitat, including both steep slopes and valley floors, to provide sheep with adequate corridors for inter-population movement:

> . . . bighorn sheep in the Peninsular Ranges consist of a series of interconnected subpopulations (termed a metapopulation by Levins (1970)) that exchange individuals and/or genetic material [citations]. The interchange of individuals within this metapopulation can prevent otherwise isolated sub-populations from going extinct and enhance the genetic fitness and demographic augmentation of subpopulations. As in any metapopulation, habitat destruction and fragmentation can impede movement, thereby degrading the ability of the subpopulations to interact and persist [citations]. This is particularly true for large mammals that range widely to locate and exploit unpredictably changing sources of food, water, and shelter [citations]. Accordingly, we have used an ecosystem approach [citations] to delineate critical habitat that includes all of the essential habitat components needed for recovery of bighorn sheep metapopulation in the Peninsular Ranges.

66 Fed. Reg. 8653. The Recovery Plan emphasizes that "[a]reas of flat terrain, such as valley floors, serve as important linkages between neighboring mountainous regions, thereby allowing sheep temporary access to resources [] in neighboring areas, and allowing gene flow to occur between subpopulations." Recovery Plan, p. 7; *see also, id*. at 58, 60, 77; 5-year Review, p. 12 (stressing that "[i]n addition to mountainous terrain, other types of habitat are fundamental to bighorn sheep" including "[a]reas of gentle terrain, such as valley floors," that provide access to important resources such as forage and water and "allow gene flow between subpopulations").

FWS has warned that development of the flatter desert lands in the Ocotillo Region could significantly harm sheep forage and movement. 5-year Review, p. 35-36. After describing the multiple projects proposed for the area, including the Ocotillo Project at issue here, an unnamed solar energy facility east of the Project site, another wind energy project in the Jacumba Mountains, a housing development in Ocotillo, and the Sunrise Powerlink Transmission Project

that cuts through the Project site, the 5-year Review warns:

> . . . the cumulative impact of these projects would *curtail north-south movement opportunities and access to seasonal resources on alluvial fans along the base of the desert escarpment*. The timeline for construction of these renewable energy projects is very short (1 to 2 years), effectively exposing Peninsular bighorn sheep in this area to a vastly different landscape in a brief time. The effect of multiple energy projects . . . will *significantly reduce corridors for movement between the Coyote and Jacumba Mountains, as well as southeast movement across the Imperial Valley towards Mexico.* Peninsular bighorn sheep are already very limited in their movement across the eastbound lanes of Interstate 8, which essentially inhibits southward movement towards Mexico in the Jacumba Mountains. All of these factors, taken together, will *increasingly contribute to fragmentation of Peninsular bighorn sheep habitat, potentially hindering a reconnection with subpopulations in Mexico*.

5-year review, p. 35-36, emphasis added. For these reasons, the Project's development of the valley floor may permanently separate sheep populations north of the Project from those inhabiting lands south of Interstate 8 and in Mexico.

D. Lack of Sheep Sign Is Not a Good Indication of Habitat Value

32. The Recovery Plan warns that identification of occupied and other high value sheep habitat should not be based solely on known or observed use patterns because (1) population numbers are low; (2) bighorn sheep are difficult to detect; (3) use patterns are only known for a short time period; (4) telemetry data only represent the area used by marked animals, not the area used by all animals; and (5) human disturbance likely inhibits use of some lower elevation habitat. *Id*. at 155. Thus, sheep sign alone is not a good indicator of habitat use and value.

33. The 5-year Review points out that "[d]uring [inter-population] movements [across valley floors], bighorn sheep are known to move quickly, using the shortest route possible to cross side valleys." 5-year Review, p. 12. Given their quick crossings of valley floors, sheep do not leave extensive sign of their fleeting presence. Accordingly, the lack of readily apparent sign does not indicate that valley terrain is not important habitat for inter-population movements that are critical to the survival of the bighorn sheep metapopulation.

34. Thus, sheep sign alone should not be used to determine the use and value of bighorn sheep habitat.

E. Poor Dispersers

35. Even when sheep do not entirely avoid areas disturbed by humans, they nonetheless alter their use of essential resources in response to the disturbance, resulting in negative physiological effects or abandonment of traditional habitats. In FWS' terminology, Peninsular bighorn sheep are "poor dispersers," meaning that "[w]hen habitat is lost or modified, the affected group is likely to remain within their familiar surroundings but with a reduced likelihood of population persistence, due to reduced quantity and/or quality of resources." Recovery Plan 38.

36. For example, desert bighorn sheep populations near rapidly growing urban areas in Arizona and New Mexico gradually declined to extinction, or nearly so, rather than moving to other nearby habitat. 66 Fed. Reg. 8652. Disease and predation did not appear to be responsible for the extinctions. *Id*. Rather, according to FWS, the increased numbers of humans in sheep habitat coupled with a loss of low elevation habitat due to urbanization caused the declines. *Id*.

F. Critical Habitat

37. FWS failed to designate critical habitat at the time of its initial listing of the Peninsular bighorn sheep. *Id*. On December 18, 1998, the Southwest Center for Biological Diversity (predecessor to CBD) and Desert Survivors challenged FWS' failure to designate critical habitat. *Southwest Center for Biological Diversity et al. v. Babbitt*, CIV 98-02296 IG (S.D.Cal.); *see also* 66 Fed. Reg. 8651. On September 17, 1999, FWS settled with the plaintiffs in that case, agreeing to comply with a schedule for reviewing the decision not to designate critical habitat and for publishing a Recovery Plan for Peninsular bighorn sheep. Pursuant to the settlement, on October 31, 2000, FWS published its Recovery Plan, and on February 1, 2001, it designated 844,897 acres of desert lands as critical habitat for Peninsular bighorn sheep. 66 Fed. Reg. 8650.

38. On April 14, 2009, FWS reversed course and drastically reduced the amount of critical habitat designated for the sheep, cutting it to 376,938 acres. 74 Fed. Reg. 17288-17365. FWS thus eliminated approximately 467,959 acres of former critical habitat, a reduction of over 55 percent.

39. In response, on October 7, 2009, CBD and other conservation groups sued FWS,

asking the Court to overturn the new designation and order FWS to reconsider its rule reducing bighorn critical habitat. *Center for Biological Diversity v. Fish and Wildlife Service*, Case No. 3:09-cv-2216 (S.D. Cal.). The plaintiffs argued, *inter alia*, that FWS ignored the importance of lower elevation, flat lands, such as alluvial fans, for sheep movement and forage.

40. FWS prevailed at the district court, and plaintiffs appealed. Briefing is set to be completed by late 2012. Ninth Circuit Case No. 11-57057, Dkt. 10. Substantial parts of the Project site were previously designated critical habitat and could be affected by a Ninth Circuit decision overturning FWS' reduced critical habitat designation.

II. OCOTILLO PROJECT

41. Ocotillo Express, LLC proposes to construct the Ocotillo Wind Energy Facility in Imperial County, California, on lands managed by the Bureau of Land Management ("BLM"). The Project site is in the Yuha Desert, which is in the Colorado Desert portion of the larger Sonoran Desert. According to the BiOp, "[s]everal named, dry desert washes cut through the project site and run generally from west to east." BiOp 19. In addition, "hundreds of additional unnamed washes cut through the project site." *Id*. The Ocotillo Project would convert approximately 10,151 acres of the largely untrammeled Project site into a 315-megawatt (MW) wind energy facility.

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

43. The Project's industrial facilities will be sited on two separate parcels of BLM-administered lands surrounding the unincorporated community of Ocotillo. The Project's wind turbines will be as close as 0.5 miles to Ocotillo residences. And nearly all of Ocotillo's 100-plus residences will be within 1.25 miles of at least one turbine. In addition to its close proximity to Ocotillo-area residences, the Project site is nearby or directly adjacent to numerous other sensitive land uses. Specifically, the site is immediately north of the Jacumba Wilderness Area, approximately two miles west of the Yuha Basin Area of Critical Environmental Concern, approximately 1.5 miles southwest of the Plaster City Off-Highway Vehicle Open Area, approximately one mile south of the Coyote Mountains Wilderness, and immediately adjacent to Anza-Borrego Desert State Park on its Western border. The Project would be visible from all of these special land use areas.

44. Land use of the Project site is governed by the CDCA Plan of 1980, as amended. Because the CDCA Plan does not specifically authorize development of the Project, BLM amended the Plan to allow construction of the Project. The Project site and surrounding areas are classified as Multiple-Use Class L (Limited Use) areas. The Limited Use classification calls for low intensity use and protection of sensitive natural resources.

III. PROCEDURAL BACKGROUND

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

46. BLM and Imperial County prepared and issued a Draft Environmental Impact Statement/Draft Environmental Impact Report ("DEIS") in June 2011.

47. An initial biological assessment was prepared in mid-2011. Pursuant to FWS' direction, BLM submitted a revised biological assessment on August 2, 2011.

48. The agencies received numerous public and agency comments on the DEIS, including plaintiffs' extensive October 6, 2011, comments.

49. In March 2012, BLM and Imperial County issued the Final Environmental Impact Statement/Final Environmental Impact Report ("FEIS") for the Project. The FEIS addressed six alternatives and identified multiple adverse and unavoidable impacts, including impacts to air quality, cultural resources, noise, paleontological resources, public health and safety, vegetation resources, aquatic resources, visual resources, and wildlife resources.

50. On April 26, 2012, the U.S. Fish and Wildlife Service ("FWS") issued the BiOp, which purports to address the impacts of the Project on Peninsular bighorn sheep. The BiOp admits that lower elevation, valley habitat is important for both foraging and inter-population movements, but then discounts the effects of the Project on either of these habitat values. With regard to the Project site's value as a foraging habitat, the BiOp claims that Project construction and operation will "not represent a substantial loss of habitat for Peninsular bighorn sheep" for 2 reasons: (1) the "site now is only sporadically used by sheep" based on an alleged lack of sheep sign; and (2) the site "represents small fraction of comparable habitat otherwise available to the population." BiOp 29. The BiOp does not discuss FWS' previous position that lack of sign should not be used to determine bighorn habitat use or value. *Id*. It also does not provide any support for its position that comparable habitat is available to nearby bighorn populations. *Id*.

51. With regard to movement, the BiOp focuses on inter-population movement to the south of the Project, where the nearest population of sheep already exist. In doing so, it ignores the substantial impediment to future population connectivity presented by the Project, i.e. movement between populations on the southern and northern sides of the Project.

52. The BiOp also did not address the bighorn sheep's inability to relocate from an area being developed and the effects of elevated stress levels in local bighorn populations caused by the Project.

53. On or about May 11, 2012, BLM approved Ocotillo's right-of-way application and the Project's CDCA Plan Amendment, and denied plaintiffs' protest thereof.

FIRST CLAIM FOR RELIEF

(Violation of the Endangered Species Act)

(Against all FWS Defendants)

54. Plaintiffs incorporate by reference all preceding paragraphs.

55. The Endangered Species Act requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species. *See* 16 U.S.C. section 1536(a)(2). Section 7 of the ESA establishes a three-step consultation procedure to assure that federal agencies undertaking or approving an action ("action agencies"), such as BLM 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. § 402.12; *Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation*, 138 F.Supp.2d 1228, 1240-47 (N.D. Cal. 2001) ("*PCFFA*"). These three steps require the action agency to: (1) advise FWS of the area in which potentially harmful activities are proposed (and in response, FWS must provide the action agency with a list of the endangered and threatened species in the area); (2) "prepare a '[biological assessment]' to determine whether such species '[are]' likely to be affected' by the action" (*PCFFA*, 138 F.Supp.2d at 1240 (quoting *Pacific Rivers Council v. Thomas*, 753 F.2d 754, 763 (9th Cir.1985)); 50 C.F.R. § 402.12(I)); and (3) if listed species are likely to be affected, not proceed with the project until FWS has prepared a formal biological opinion evaluating the project's potential to adversely affect any listed species or its critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Thereafter, the action agency must independently ensure that any action it takes will not jeopardize the survival of any listed species or adversely modify its habitat. 16 U.S.C. § 1536(a)(2).

56. Biological opinions issued by FWS pursuant to ESA section 7 are reviewed under the APA to determine whether the opinion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A biological opinion is arbitrary and capricious when "it has failed to articulate a satisfactory explanation for its conclusions or when it has entirely failed to consider an important aspect of the problem." *Greenpeace v.*

National Marine Fisheries Service, 80 F.Supp.2d 1137, 1147 (W.D.Wash., 2000).

57. Further, when preparing biological opinions, FWS is required by ESA to use the best scientific and commercial data available to it to ensure that the actions being evaluated are not likely to jeopardize listed species. *See* 16 U.S.C. § 1536(a)(2); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (agency violated ESA by failing to analyze best scientific and commercial data available); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (agency failure to gather listed species and habitat data violated ESA because the agency failed to provide the best scientific and commercial data available).

58. Here, FWS' BiOp is arbitrary and capricious and thus violates the APA and ESA because it "failed to articulate a satisfactory explanation for its conclusions" and also "failed to consider an important aspect of" the Project's effects on Peninsular bighorn sheep. *Greenpeace*, 80 F.Supp.2d at 1147. Further, the BiOp failed to incorporate the best available scientific data with regard to sheep observations and is thus invalid.

The BiOp Is Arbitrary and Capricious Because It Improperly Downplays the Significance of Lower Elevation, Valley-floor Habitat for Peninsular Bighorn Sheep Within the Project Site for Foraging

59. The BiOp failed to adequately address the value of the lower elevation habitat for sheep forage within the Project site. BiOp 46. FWS failed to even mention the forage values to sheep of lower elevation habitat in its explanation of the BiOp's conclusions. *Id.* Because FWS "failed to articulate a satisfactory explanation for its conclusions" and/or "entirely failed to consider" the Project's effects on local sheep populations' available forage habitat, its decision was arbitrary and capricious and therefore violated the APA and ESA. *Greenpeace*, 80 F.Supp.2d at 1147.

60. In particular, FWS entirely failed to support its conclusion that other areas in the region provide "comparable habitat otherwise available to the population." In fact, the Ocotillo Valley is uniquely suited for sheep foraging because it is: (1) surrounded on three sides by occupied, essential habitat that provides escape terrain from the low elevation foraging habitat; (2) located adjacent to lambing habitat heavily used by a subpopulation of sheep that is

"expanding in population numbers and spacial distribution" (BiOp 39); and (3) covered by hundreds of washes and alluvial fans, which FWS recognizes as providing critical forage habitat during challenging periods, such as gestation and lactation, and during periods of drought. FWS ignored these unique characteristics of the Project site in concluding that other areas of comparable habitat are available to local sheep populations.

61. FWS' assertion that the sheep's allegedly sporadic use of the Project site demonstrates that the site is of low forage habitat value is arbitrary and capricious for four separate reasons: (1) FWS failed to support its conclusion with adequate evidence or provide information on its attempt to locate sheep sign within the Project site; (2) FWS ignored its own previous position that lack of sign is a poor indicator of habitat use and value; (3) FWS failed to reconcile its conclusion with its previous statements that low elevation valley habitat provides critical foraging habitat during times of drought and other challenging times; and (4) FWS failed to account for future needs of the expanding population of bighorns south of the Project site.

62. In light of the important habitat value of the lower elevation lands on the Project site for foraging, the BiOp's minimization of the effects of the Project on the local sheep populations violated the APA and ESA.

The BiOp Is Arbitrary and Capricious Because It Improperly Downplays the Significance of Lower Elevation, Valley-floor Habitat for Peninsular Bighorn Sheep Within the Project Site for Inter-Population Movement

63. The BiOp also trivializes the value of the Project site's valley habitat for sheep movement and genetic diversity. For example, the BiOp asserts that dispersal, or one way sheep movements that promote colonization of unpopulated areas and genetic diversity, "is not expected to be affected by the proposed action." *Id*. Further, it claims that the Project "would not disrupt population connectivity." *Id*. at 46.

64. FWS, however, "failed to articulate a satisfactory explanation for its conclusions" and/or "entirely failed to consider" the Project's deleterious effects on the inter-population movement of bighorn sheep, and therefore its decision violated the APA and ESA. *Greenpeace*, 80 F.Supp.2d at 1147. First, the BiOp's analysis focuses almost exclusively on sheep movement

from south of the Project to areas further south of the Project. BiOp 35-37, 39, 46. It does not examine the permanent impediment created by the Project between the populations south of the Project and those north of the Project.

65. Second, the BiOp contradicts its ultimate conclusion by admitting that the "relative value of the project site as a travel corridor is uncertain . . . ." BiOp 36.

66. Third, the BiOp's support for its claim that Peninsular bighorn sheep do not use the Project site for inter-population movement is based on the same lack of sign discussed above. But lack of sign does not indicate that the area is not used as an important travel corridor. Indeed, prior FWS documents have explained that rams that are moving from one subpopulation to another, take the most direct route and move as quickly as possible. Thus, such movements would be hard to detect after the fact as little sign would be left.

67. Fourth, the BiOp ignores the need – if Peninsular bighorn sheep continue to recover – for future sheep populations to use the Project site for inter-population movement to expand their range and ensure genetic diversity among isolated subpopulations.

68. Because the BiOp improperly downplayed the habitat value of the lower elevation areas of the project site for inter-population movement without evidentiary support and explanation, it violates the APA and the ESA.

The BiOp Is Arbitrary and Capricious Because It Fails to Analyze the Effects of the Stress Caused by the Turbines on Sheep Populations that Remain In the Area And Continue to Use Habitat That Is Nearby or Within the Project Site

69. As discussed, FWS has described Peninsular bighorn sheep as "poor dispersers," meaning that "[w]hen habitat is lost or modified, the affected group is likely to remain within their familiar surroundings but with a reduced likelihood of population persistence, due to reduced quantity and/or quality of resources." Recovery Plan 38. The BiOp fails to address the Peninsular bighorn sheep's known proclivity for staying in disturbed areas despite new human activities and analyze the effects that the attendant harmful levels of stress will have on individual bighorn as well as the local population overall.

The BiOp Is Arbitrary and Capricious Because It Fails to Disclose and Evaluate the Potential Consequences of the Pending Lawsuit Regarding Alterations to Peninsular Bighorn Sheep Critical Habitat

70. Neither the BiOp, nor the Incidental Take Statement, discusses the potential ramifications on the Project's configuration and operation if the Center for Biological Diversity's lawsuit challenging FWS' reduction in the Peninsular bighorn sheep's critical habitat overturns that reduction, and therefore both fail to adequately "consider an important aspect of the problem" in violation of the ESA *Greenpeace*, 80 F.Supp.2d at 1147.

The BiOp Failed to Use the Best Available Scientific Evidence

71. FWS also failed to use the best scientific and commercial data available when preparing the BiOp. For example, FWS failed to discuss, let alone incorporate into its estimate of Peninsular bighorn sheep impacts, CBD's March 11, 2012, documentation of bighorn sheep use of a known lambing area within 500 meters of Project turbine number 25. This information, including photographs and mapped GPS locations, was attached to CBD's March 27, 2012, comment letter to the Imperial County Planning and Development Services Department, which was also sent via email to two FWS employees that same day.

72. The new information presented to FWS by CBD should have been incorporated into the BiOp because, as the BiOp states on page 48, the "anticipated level of incidental take for Peninsular bighorn sheep is based on the number of individuals seen within 600 yards of proposed turbine sites," particularly turbines 24 and 25. With CBD's recent documentation of multiple Peninsular bighorn sheep with 500 meters of turbine 25, the BiOp's conclusion that the Project would "significantly impair essential behavioral patterns of [only] five ewes" is revealed to be a substantial understatement. BiOp, p. 49 The impacts to Peninsular bighorn sheep are likely to be much greater.

73. Because FWS thus failed to use the best scientific and commercial data available to ensure that BLM's actions were not likely to jeopardize listed species, it violated the ESA. By failing to comply with the ESA in its review of the Project, FWS failed to proceed in the manner required by law, in violation of the APA, 5 U.S.C. section 706(2)(A) and (D).

PRAYER FOR RELIEF

74. As relief for the above violations of law, plaintiffs respectfully request that this Court:

1. Adjudge and declare that the FWS' Biological Opinion for the Project violates the ESA and the APA;

4. Order FWS to withdraw its Biological Opinion and prepare a new one that complies with the requires of the ESA;

5. Preliminarily and permanently enjoin FWS from initiating or permitting any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until FWS has complied with the requirements of ESA;

6. Award plaintiffs their reasonable attorneys' fees and costs and expenses incurred in connection with the litigation of this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, ESA, or as otherwise provided by law; and

6. Any other relief that this Court deems just and proper.

Dated: September 11, 2012

Respectfully submitted,

s/ *Stephan C. Volker*
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