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SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

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11 UNITED STATES DISTRICT COURT

12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 CENTER FOR BIOLOGICAL DIVERSITY, )  
14 SIERRA CLUB, DESERT PROTECTIVE )  
15 COUNCIL, PUBLIC EMPLOYEES FOR )  
16 ENVIRONMENTAL RESPONSIBILITY, )  
17 DESERT SURVIVORS and SAN )  
18 BERNARDINO VALLEY AUDUBON )  
19 SOCIETY, )

20 Plaintiffs, )

21 v. )

22 UNITED STATES FISH AND WILDLIFE )  
23 SERVICE and KEN SALAZAR, Secretary of )  
24 the Interior, )

25 Defendants. )  
26 )  
27 )  
28 )

Case No. 09 CV 2216 W CAB

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

BY FAX

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## I. INTRODUCTION

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1. This is an action for declaratory and injunctive relief brought by Plaintiffs the Center for Biological Diversity, Sierra Club, Desert Protective Council, Public Employees for Environmental Responsibility, Desert Survivors, and San Bernardino Valley Audubon Society in connection with the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”). The Secretary of the Interior (“Secretary”) and the United States Fish and Wildlife Service (“Service”) have violated the ESA by failing to designate adequate critical habitat for the endangered Peninsular bighorn sheep (*Ovis canadensis nelsoni*) to ensure the conservation and recovery of the species. 16 U.S.C. § 1533(a)(3). On April 14, 2009, Defendants slashed critical habitat protections for this endangered species by over 55%. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Peninsular Bighorn Sheep and Determination of a Distinct Population Segment of Desert Bighorn Sheep (*Ovis canadensis nelsoni*); Final Rule, 74 Fed. Reg. 17288-17365 (April 14, 2009).

## II. JURISDICTION AND VENUE

2. Jurisdiction over this action is conferred by 16 U.S.C. § 1540(g) (citizen suit provision of the ESA); 28 U.S.C. §§ 1331 (Federal Question), 1346 (United States as defendant), 1361 (Mandamus), 2201 (Declaratory Judgment), and 2202 (injunctive relief); and/or 5 U.S.C. §§ 701 through 706 (APA) (judicial review provision of the APA).

3. Venue is properly vested in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because the species and its critical habitat are found in this district.

4. Plaintiffs provided a 60-day notice of intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. 1540(g)(2)(C), by letter to the Secretary and the Service dated and sent by certified mail and facsimile on June 11, 2009. Neither the Secretary nor the Service responded to that notice of intent to sue. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201. For all claims, Plaintiffs have exhausted all of the administrative remedies available to them.

1 **III. PARTIES**

2 5. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a national,  
3 nonprofit organization with offices Arizona, Oregon, New Mexico, Nevada, Alaska, Vermont,  
4 Washington D.C., and in Los Angeles and San Francisco, California. The Center’s mission is to  
5 protect endangered species and wild places through science, policy, education, and  
6 environmental law. The Center has over 40,000 members, many of whom reside in California.  
7 The Center’s members and staff regularly use, and will continue to use, Peninsular bighorn sheep  
8 habitat for observation, research, aesthetic enjoyment, and other recreational, scientific, and  
9 educational activities. The Center’s members and staff have and continue to research, study,  
10 observe, and seek protections for the Peninsular bighorn sheep and other species that depend on  
11 the same habitat essential to the bighorn. The Center’s members and staff derive scientific,  
12 recreational, conservation, and aesthetic benefits from the existence of the Peninsular bighorn  
13 sheep in the wild. Defendants’ violations of law are threatening the fragile gains made in the  
14 endangered Peninsular bighorn populations by undermining protections for essential habitat for  
15 the bighorn, harming the Center’s and its members’ interests in the Peninsular bighorn and its  
16 habitat. The Center brings this action on behalf of itself and its adversely affected board,  
17 members, and staff.

18 6. Plaintiff SIERRA CLUB is a national, non-profit membership organization with  
19 over 700,000 members dedicated to exploring, enjoying, and protecting the wild places of the  
20 earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to  
21 educating and enlisting humanity to protect and restore the quality of the natural and human  
22 environment; and to using all lawful means to carry out these objectives. Sierra Club frequently  
23 files citizen suits to stop activities that violate local, state or federal environmental laws and  
24 cause harm to the natural environment. Over 150,000 Sierra Club members reside in California.  
25 Sierra Club, incorporated under the laws of the State of California, maintains its national  
26 headquarters in San Francisco, California. Many of Sierra Club’s members actively use the  
27 Peninsular ranges for recreational and aesthetic purposes such as hiking and nature study and  
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1 would be personally harmed if the endangered Peninsular bighorn sheep found in this area were  
2 to become reduced in numbers or driven to extinction. Many Sierra Club members also  
3 participate in group outings to areas within the Peninsular ranges and plan to and will continue to  
4 do so on a regular basis. Sierra Club believes that Defendants' violations of the ESA may  
5 undermine the recovery and conservation of the endangered Peninsular bighorn sheep. As a  
6 result, the Sierra Club's members will lose the recreational, aesthetic, scientific, and conservation  
7 benefits they enjoy from stable and healthy populations of this species. Sierra Club brings this  
8 action on behalf of itself and its adversely affected members.

9 7. Plaintiff DESERT PROTECTIVE COUNCIL was incorporated in California in  
10 1955 as a non-profit membership 501(c)(4) membership organization. In 2002, the Desert  
11 Protective Council merged with the Desert Protective Council Foundation to become a 501(c)(3)  
12 membership organization. The mission of the Desert Protective Council is to safeguard for  
13 sustainable use by this and succeeding generations those desert areas of Southern California that  
14 are of unique or significant scenic, scientific, historical, spiritual, and recreational value, and to  
15 educate both children and adults to a better understanding of the desert, in order that the  
16 objectives of the corporation may be obtained. The Desert Protective Council has a long history  
17 of involvement in the protecting the areas where the Peninsular bighorn sheep are found  
18 including areas of essential habitat and critical habitat. Members, staff, and board members of  
19 the Desert Protective Council have visited these areas for recreational, educational, scientific,  
20 and aesthetic pursuits and plan to continue to do so in the future. The Desert Protective Council  
21 by this suit is seeking to ensure appropriate protection of the endangered Peninsular bighorn  
22 sheep and its habitat.

23 8. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY  
24 ("PEER") is a national, non-profit corporation based in Washington, D.C. with chapters  
25 throughout the United States, including California. PEER represents current and former federal  
26 and state employees of land management, wildlife protection, and pollution control agencies who  
27 are frustrated by the failure of governmental agencies to enforce or faithfully implement the

1 environmental laws entrusted to them by Congress. The ability of PEER's members to  
2 independently critique agency decisions frequently is compromised by conflicts between their  
3 duties as employees of a federal agency to uphold the law and the risk of disciplinary action for  
4 insubordination. Consequently, PEER's members rely on PEER to criticize agency action,  
5 including the use of litigation, on their behalf. PEER members and staff regularly use the lands  
6 where the Peninsular bighorn sheep occur and historically occurred for observation, research,  
7 aesthetic enjoyment, and other recreational, scientific, and educational activities. PEER  
8 members and staff research, study, and observe the endangered Peninsular bighorn sheep and  
9 visit its habitat and plan to continue to do so in the future. PEER's members and staff derive  
10 scientific, recreational, conservation, and aesthetic benefits from the Peninsular bighorn sheep's  
11 continued existence in the wild. PEER believes that Defendants' actions in violation of the ESA  
12 will harm PEER's members interests because they will lose the recreational, aesthetic, scientific,  
13 and conservation benefits they enjoy from stable and healthy populations of the Peninsular  
14 bighorn sheep and conservation of its native habitat. PEER brings this action on behalf of itself  
15 and its adversely affected members.

16 9. Plaintiff DESERT SURVIVORS is a California non-profit corporation centered in  
17 Oakland, California. Desert Survivors is a conservation organization with approximately 800  
18 members focused on the protection of desert plants, wildlife and ecosystems. Desert Survivors  
19 also engages in a vigorous program of public education about desert lands and their unique  
20 character. Desert Survivors' primary goals are to protect fragile desert lands and to teach visitors  
21 to those lands about their value. Desert Survivors members place a high value on the continuing  
22 existence and essential value of desert wildlife and wilderness. Desert Survivors leads  
23 educational trips to desert lands. Desert Survivors has led more than 400 such trips to the desert  
24 in the last fourteen years. Desert Survivors members and directors value the desert as a natural  
25 ecosystem inhabited by special plants and animals, have visited the Peninsular bighorn habitat in  
26 the past and plan to do so again in the future. Desert Survivors will continue to lead trips,  
27 including service trips, to the desert areas of California as part of its ongoing program of  
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1 monitoring desert wilderness. A major goal of these trips is to study desert plants and animals in  
2 their natural habitats, and to monitor their condition. The endangered Peninsular bighorn sheep is  
3 among the species that Desert Survivors studies and has an interested in conserving because of  
4 its rarity and because of the fragility of its habitat. Desert Survivors members value desert  
5 wildlife living in its wild and natural condition, and enjoy the inspiration and educational  
6 benefits of observing wildlife in this habitat and plan to continue to do so in the future. Desert  
7 Survivors members and directors have actively sought to protect desert wilderness as a place  
8 where threatened and endangered wildlife may flourish, where their habitat may remain  
9 unimpaired by development and excessive human interference. Desert Survivors members and  
10 directors derive scientific, recreational, conservation, and aesthetic benefits from the Peninsular  
11 bighorn sheep's existence in the wild. Desert Survivors believes that Defendants' violations of  
12 the ESA and failure to designate adequate critical habitat may undermine the conservation of the  
13 Peninsular bighorn sheep and, as a result, Desert Survivors' members will lose the recreational,  
14 aesthetic, scientific, and conservation benefits they enjoy from stable and healthy populations of  
15 the this species and conservation of its native habitat. Desert Survivors brings this action on  
16 behalf of itself and its adversely affected members and directors.

17       10. Plaintiff SAN BERNARDINO VALLEY AUDUBON SOCIETY ("Audubon") is  
18 a California non-profit public benefit corporation with 2000 members many of whom who will  
19 be directly affected by this action. The purpose of Audubon is to educate the public about the  
20 environment, planning and infrastructure issues, and to take action to protect the region's natural  
21 heritage areas when necessary. Many Audubon members receive personal, scientific,  
22 professional, and spiritual benefit from the existence in the wild of rare, sensitive, threatened and  
23 endangered species that inhabit the Peninsular ranges including the Peninsular bighorn sheep.  
24 Audubon members will be directly affected by the actions in this litigation, and its components,  
25 as described herein. Members, board, and staff of Audubon regularly use and enjoy, and intend  
26 to continue to use and enjoy, lands within the Peninsular ranges—where the endangered  
27 Peninsular bighorn is found—for recreation, observation, research, aesthetic enjoyment, and

1 other scientific, conservation, spiritual, or educational activities. The Audubon's members,  
2 board, and staff also regularly research, study, and observe the endangered Peninsular bighorn in  
3 the Peninsular ranges. The Audubon's members, board, and staff derive spiritual, recreational,  
4 scientific, and aesthetic benefits from the continued existence of endangered Peninsular bighorn  
5 sheep population and its associated habitat upon which it depends throughout its range in  
6 southern California and are and will be harmed by Defendants' actions.

7 11. By slashing protections and failing to properly designate critical habitat for the  
8 endangered Peninsular bighorn sheep the Defendants' actions will hinder implementation of  
9 protective measures essential for the species' survival and recovery, and for the protection of  
10 habitat on which the bighorn relies. The Plaintiffs' above-described biological health, cultural,  
11 educational, scientific, aesthetic, conservation and recreational interests have been, are being,  
12 and will continue to be adversely affected and irreparably injured by the failure to issue a legally  
13 sufficient critical habitat designation for the Peninsular bighorn sheep. Therefore, the Plaintiffs  
14 have been and will continue to be irreparably damaged by the Defendants actions that  
15 undermined critical protections for the Peninsular bighorn sheep and failed to properly designate  
16 critical habitat for the species.

17 12. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("Service" or  
18 "FWS") is an agency of the United States government, and is an agency within and under the  
19 jurisdiction of the Department of the Interior. Through delegation of authority from the  
20 Secretary, the Service administers and implements the ESA, and is legally responsible for the  
21 designation and revision of critical habitat for the endangered Peninsular bighorn sheep.

22 13. Defendant KEN SALAZAR, is the Secretary of the Department of Interior. The  
23 Secretary of the Interior ("Secretary") is the federal official charged with responsibility for  
24 decisions regarding designations of critical habitat. He is sued in his official capacity.

#### 25 **IV. BACKGROUND LAW**

26 14. The ESA is a federal statute designed to protect endangered and threatened  
27 species so that they can recover to the point that they no longer require protection under the Act.

1 Among the primary purposes of the ESA are to “provide a means whereby the ecosystems upon  
2 which endangered species and threatened species depend may be conserved, [and] to provide a  
3 program for the conservation of such endangered species and threatened species.” ESA § 2(b),  
4 16 U.S.C. § 1531(b). To this end, section 4 of the ESA requires the Secretary to protect such  
5 species by listing them as either “threatened” or “endangered.” 16 U.S.C. § 1533. “Species” as  
6 defined in the ESA, “includes any subspecies of fish or wildlife or plants, and any distinct  
7 population segment of any species of vertebrate fish or wildlife that which interbreeds when  
8 mature.” ESA §3(16), 16 U.S.C. § 1532(16). “Conserve” and “conservation,” as defined in the  
9 ESA, “mean to use and the use of all methods and procedures necessary to bring any endangered  
10 species or threatened species to the point at which the measures provided pursuant to this chapter  
11 are no longer necessary.” ESA § 3(3), 16 U.S.C. § 1532(3).

12 15. To accomplish the goals of the Act, the ESA also requires that the Secretary  
13 designate areas of critical habitat for endangered species necessary for the conservation of the  
14 species in order to provide the habitat necessary to promote recovery of the species such that the  
15 protections of the ESA are no longer needed. ESA §§ 4(a)(3)(A), 3(5)(A) and (3), 16 U.S.C. §§  
16 1533(a)(3)(A), 1532(5)(A) and (3). “Critical habitat” means

- 17 i. the specific areas within the geographical area occupied by the species at  
18 the time it was listed in accordance with the provisions of section 1533 of  
19 this title, on which are found those physical or biological features (I)  
20 essential to the conservation of the species and (II) which may require  
21 special management considerations or protection; and
- 22 ii. specific areas outside the geographical area occupied by the species at the  
23 time it is listed in accordance with the provisions of section 1533 of this  
24 title, upon a determination by the Secretary that such areas are essential  
25 for the conservation of the species.

26 ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A).

27 16. The Secretary must designate critical habitat “on the basis of the best scientific  
28 data available and after taking into consideration the economic impact, and any other relevant  
29 impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). Section  
30 4(b)(2) of the ESA provides that some areas may be excluded from designation as critical habitat



1 based on other considerations, but habitat may not be excluded from designation as critical  
2 habitat if the “failure to designate such area as critical habitat will result in the extinction of the  
3 species concerned.” ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2). Designated critical habitat is  
4 protected from adverse modification pursuant to Section 7(a)(2) of the ESA. 16 U.S.C. §  
5 1536(a)(2). The Secretary must also develop and implement recovery plans for the conservation  
6 and survival of endangered and threatened species. ESA § 4(f), 16 U.S.C. § 1533(f). The  
7 Secretary has delegated the authority to designate critical habitat and develop and implement  
8 recovery plans to the Service.

## 9 **V. FACTS**

10 17. Peninsular bighorn sheep live in hot, desert regions with steep, open slopes,  
11 canyons and washes where the land is rough, rocky and sparsely vegetated in the Peninsular  
12 Mountain Ranges from the San Jacinto Mountains south into Baja California, Mexico. 66 Fed.  
13 Reg. 8650 (Feb. 1, 2001). Peninsular bighorn are usually found between 300 and 4000 feet  
14 elevation and generally produce one lamb per year. 66 Fed. Reg. 8650. Lambing occurs from  
15 January through August; most lambs are born between February and April. 66 Fed. Reg. 8651.  
16 The primary threats to survival of the bighorn are habitat destruction and fragmentation,  
17 predation, human-related disturbance, disease, and low lamb recruitment. 66 Fed. Reg. 8650,  
18 8650-51. Bighorn require open terrain to detect and avoid predators, are wide-ranging and can  
19 traverse long distances. 66 Fed. Reg. 8653- 8655.

20 18. The Peninsular bighorn sheep distinct population segment of desert bighorn sheep  
21 was listed as endangered under the ESA in 1998 because its numbers had declined and it was  
22 further threatened by disease, insufficient population recruitment, habitat loss and fragmentation,  
23 and an increase in predation coinciding with a decrease in population numbers. Endangered and  
24 Threatened Wildlife and Plants; Endangered Status for the Peninsular Ranges Population  
25 Segment of the Desert Bighorn Sheep in Southern California; Final Rule, 63 Fed. Reg. 13134  
26 (March 18, 1998). The listing was undertaken in response to a 1991 Sierra Club listing petition  
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1 and eventual lawsuit brought by the Sierra Club in the Eastern District of California to compel  
2 listing of the Peninsular bighorn. 63 Fed. Reg. 13137.

3 19. Although required by Section 4 of the ESA to designate critical habitat for the  
4 Peninsular bighorn at the time of listing, FWS failed to do so on the erroneous ground that such  
5 designation was “not prudent”, 16 U.S.C. § 1533(a)(3)(A). In 1998, the Southwest Center for  
6 Biological Diversity (now the Center for Biological Diversity) and Desert Survivors, challenged  
7 the “not prudent” finding and sought to require FWS to designate a critical. *Southwest Center*  
8 *for Biological Diversity et al. v. Babbitt*, CIV 98-02296 IG (S.D. Cal.). Pursuant to a 1999  
9 settlement in that matter, the FWS agreed to designate critical habitat for the species.

10 20. A recovery plan was developed for the endangered Peninsular bighorn sheep and  
11 the final version was published on October 25, 2000. U.S. Fish and Wildlife Service, Recovery  
12 Plan for Bighorn Sheep in the Peninsular Ranges, California (2000) (hereafter “Recovery Plan”).

13 The members of the recovery team were:

- 14 • Don Armentrout, Bureau of Land Management, Susanville
- 15 • California Dr. Vein Bleich, California Department of Fish and Game,  
Bishop, California
- 16 • Dr. Walter Boyce, University of California, Davis, California
- 17 • Tom Davis, Agua Caliente Band of Cahuilla Indians, Palm Springs,  
California
- 18 • James DeForge, Bighorn Institute, Palm Desert, California
- 19 • Diane Freeman, U.S. Forest Service, Idyllwild, California
- 20 • Mark Jorgensen, California State Parks, Colorado Desert District, Borrego  
Springs, California
- 21 • Stacey Ostermann, Bighorn Institute, Palm Desert, California
- 22 • Esther Rubin, University of California, Davis, California
- 23 • Dr. Oliver A. Ryder, Zoological Society of San Diego, San Diego,  
California
- 24 • Pete Sorensen, U.S. Fish and Wildlife Service, Carlsbad, California
- 25 • Steve Torres, California Department of Fish and Game, Sacramento,  
California
- 26 • Dr. John Wehausen, University of California, White Mountain Research  
Station, Bishop, California

26 Recovery Plan at v.

27 21. Peninsular bighorn sheep are distributed across their range in a metapopulation

1 structure, which is a group of subpopulations (in this case, at least 8) linked by the movement of  
2 a limited number of animals. Steep terrain and high visibility, which allow the Peninsular  
3 bighorn to escape predators and safely rear their young, are essential components of Peninsular  
4 bighorn habitat. Recovery Plan at 6, 10. Various other features of mountain topography  
5 (including cliffs, boulders, overhangs, and protected caves) allow the bighorn to seek shade  
6 during hot conditions and shelter during inclement weather. *Id.* In addition, alluvial fans and  
7 washes are used to forage during cooler months, as crucial water sources, and as linkages  
8 between neighboring mountainous regions. *Id.* at 6-7.

9         22. Habitat loss is a particularly serious threat to Peninsular bighorn because “they  
10 live in a narrow band of lower elevation habitat that represents some of the most desirable real  
11 estate in the California desert and is being developed at a rapid pace.” Recovery Plan at 38.

12         23. Human disturbance has been suggested to be detrimental to bighorn sheep  
13 (Graham 1980; MacArthur et al. 1982; Etchberger et al. 1982) and the recovery plan notes that in  
14 conjunction with development, other forms of disturbance may inhibit Peninsular bighorn from  
15 using essential lower elevation habitat. Recovery Plan at 155. The FWS recognized the  
16 importance of addressing human activity in the final rule: “increased human activity and  
17 disturbance adjacent to and within Peninsular bighorn sheep habitat may threaten bighorn by  
18 altering their behavior. This altered behavior can lead to bighorn sheep abandoning their habitat  
19 and preventing use of preferred habitat, including lambing areas, water sources, and foraging  
20 areas, and cause negative physiological effects.” 74 Fed. Reg. at 17322 (emphasis added).

21         24. The recovery plan emphasizes that in order to maintain a viable population and  
22 sufficient genetic variation, the recovery effort should entail implementing actions that allow for  
23 intergroup movements along corridors that connect subpopulations. Recovery Plan at 58, 60, 77.  
24 Additionally, the plan emphasizes that habitat conservation will “depend on rapid and adequate  
25 protection of lower elevation areas that provide critical resources, such as foraging, watering,  
26 lambing, and rearing habitats.” *Id.* at 68. The recovery plan also made note that one could not  
27 delineate essential habitat based solely on known use patterns because (1) population numbers

1 are currently low; (2) bighorn sheep are difficult to detect; (3) use patterns are only known for a  
2 short time period; (4) telemetry data only represent the area used by marked animals, not the area  
3 used by all animals; and (5) human disturbance likely inhibits use of some lower elevation  
4 habitat. *Id.* at 155.

5 25. Critical habitat was designated for the Peninsular bighorn sheep for the first time  
6 in 2001. Endangered and Threatened Wildlife and Plants; Final Determination of Critical  
7 Habitat for Peninsular Bighorn Sheep; Final Rule. 66 Fed. Reg. 8649 8677 (February 1, 2001)  
8 (“2001 Designation”). In the 2001 Designation, the FWS included 844,897 acres in the  
9 Peninsular ranges as critical habitat for bighorn in line with guidelines laid out in the recovery  
10 plan. 2001 Designation, 66 Fed. Reg. at 8650.

11 26. On March 7, 2005, the Agua Caliente Band of Cahuilla Indians challenged the  
12 2001 Designation alleging that the economic analysis was insufficient. Other parties intervened  
13 as plaintiffs and the Sierra Club and the Center intervened as defendants in that action. On July  
14 31, 2006, an order was entered that remanded the critical habitat designation back to the Service  
15 for new rulemaking and provided a limited partial vacature of critical habitat on certain lands.  
16 *Agua Caliente Band, et al. v. Norton, et al.*, Case No. 5:05-cv-00187 VAP (C.D. Cal.).

17 27. In October, 2007 the FWS issued a new proposed critical habitat designation.  
18 Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the  
19 Peninsular Bighorn Sheep (*Ovis canadensis nelsoni*) and Proposed Taxonomic Revision;  
20 Proposed Rule, 72 Fed. Reg. at 57740-80 (October 10, 2007) (“Proposed Rule”).

21 28. In August, 2008, the FWS issued another proposed rule and notice of the  
22 availability of the economic analysis. Proposed rule; reopening of comment period, revised  
23 proposed critical habitat, notice of availability of draft economic analysis, notice of public  
24 hearings, and amended required determinations; Endangered and Threatened Wildlife and Plants;  
25 Designation of Critical Habitat for the Peninsular Ranges Population of Desert Bighorn Sheep  
26 (*Ovis Canadensis nelsoni*); 73 Fed. Reg. 50498-529 (August 26, 2008). The FWS proposed  
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1 some changes to the proposed critical habitat and provided notice of availability of the draft  
2 economic analysis.

3 29. The draft economic analysis was based on economic predictions that were  
4 unrealistic even at the time the economic analysis was prepared and were certainly proved  
5 unrealistic by the time the final designation was made in 2009 after the current economic  
6 slowdown was well underway. The economic analysis also inappropriately attributed costs to  
7 critical habitat designation including, e.g., time delays, regulatory uncertainty, and “stigma.”  
8 Some of these costs would be the same with or without critical habitat designation and many are  
9 attributable more properly to poorly sited project proposals regardless of the presence of the  
10 bighorn, for example, projects proposed on alluvial fans in flood zones.

11 30. On April 14, 2009, the final critical habitat designation was published consisting  
12 of 376,938 acres. Endangered and Threatened Wildlife and Plants; Designation of Critical  
13 Habitat for Peninsular Bighorn Sheep and Determination of a Distinct Population Segment of  
14 Desert Bighorn Sheep (*Ovis canadensis nelsoni*); Final Rule, 74 Fed. Reg. 17288-365 (April 14,  
15 2009) (“Final Rule”).

16 31. The 2007 and 2008 proposed designations and the 2009 final designation cut the  
17 2001 critical habitat designation by 467,959 acres, a reduction of over 55%.

18 32. The scientists who were asked to review the proposed critical habitat designation  
19 as peer reviewers raised substantial concerns, from a biological perspective, regarding the severe  
20 reduction in the critical habitat for this endangered species particularly because the areas  
21 excluded constitute a significant portion of the species range and much of the essential habitat  
22 necessary for conservation of the species. *See generally* Peer Review Letter from Walter Boyce,  
23 DVM, PhD, Professor and Director, UC Davis Wildlife Health Center, to U.S. Fish and Wildlife  
24 Service (Dec. 7, 2007) (“Boyce”); Peer Review Letter from Esther Rubin, Ph.D., Conservation  
25 Biology Institute, to Jim Bartel, Field Office Supervisor, U.S. Fish & Wildlife Service (Dec. 8,  
26 2007) (“Rubin (2007)”); Peer Review Letter from James R. DeForge, Executive Director, The  
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1 Bighorn Institute, to Jim Bartel, Field Office Supervisor, U.S. Fish & Wildlife Service (Dec. 6,  
2 2007) (“DeForge”).

### 3 VI. VIOLATIONS OF LAW

4 ***A. The 2009 Final Critical Habitat Designation Fails to Ensure Conservation of the***  
5 ***Species in Violation of the ESA By Improperly Excluding Habitat Necessary to***  
6 ***Maintain Connectivity and Habitat Linkages.***

7 33. The FWS failed to designate significant portions of the Peninsular bighorn’s  
8 occupied range needed to maintain connectivity between subpopulations. Peer reviewers of the  
9 2007 proposed designation criticized the proposal for exactly this reason, yet the final  
10 designation remains highly fragmented. *See* Boyce at 2; DeForge at 2; Krausman at 3; Rubin at  
11 2-3; Wehausen at 3. In the final designation, FWS states that “[b]ecause of the metapopulation  
12 structure of the Peninsular bighorn sheep population, it is important for genetic exchange and the  
13 conservation of the [species] to ensure space for movement and connectivity between ewe  
14 groups. Furthermore, maintaining connectivity within the metapopulation will help safeguard  
15 against local extinctions of the remaining subpopulations.” 74 Fed. Reg. 17321. Despite this  
16 recognition of the importance of maintaining connections between subpopulations, the final  
17 designation excluded these connections.

18 34. Not only did the proposed and final designations exclude connectivity corridors in  
19 general, the final designation excludes even corridors that FWS recognizes to be in use. 74 Fed.  
20 Reg. 17315. In fact, FWS acknowledges that there is hard evidence that rams are moving  
21 between ewe groups in Unit 1 and Unit 2A and that the animals “must have traveled through the  
22 intervening habitat,” yet the intervening habitat is still excluded from the final designation. *Id.*  
23 Indeed, FWS refused to consider designating habitat essential to connectivity in the final  
24 designation despite numerous public comments and the input of the peer reviewers. 74 Fed. Reg.  
25 17288. An science-based examination of three different habitat models also concluded that all  
26 three models would result in maintaining a continuity of habitat for Peninsular bighorn and that  
27 the maintenance of such habitat is still possible for the bighorn. Rubin, Stermer, Boyce, and  
28 Torres, “Assessment of Predictive Habitat Models for Bighorn Sheep in California’s Peninsular

1 Ranges” (August 2009) Journal of Wildlife Management, 73(6):859-869. 2009 doi:  
2 10.2193/2008-240. (this paper was submitted to FWS in draft form during the designation  
3 process).

4 35. The exclusion of habitat required to maintain connectivity in the final critical  
5 habitat designation also contradicts the FWS’ own Recovery Plan. Recovery Plan at 58-60. By  
6 stripping these important habitat areas from the critical habitat designation, the FWS could  
7 ultimately promote the decline of the species rather than its recovery in violation of the ESA.

8  
9 ***B. The Final Critical Habitat Designation Improperly Excluded Low-elevation  
and Alluvial Fan Habitat Crucial to the Survival and Recovery of the Species.***

10 36. In its 2007 proposed designation, the FWS eliminated 250,000 acres of vital low-  
11 elevation and alluvial fan habitat with no scientific justification. Rubin at 4; DeForge at 2-3.  
12 After 3 out of 5 peer reviews criticized the loss and emphasized the importance of low elevation  
13 and alluvial fan habitat to the survival and recovery of Peninsular bighorn (*see* Boyce at 1;  
14 DeForge at 2-3; Rubin at 4), the FWS included some additional areas of these habitat types in the  
15 final designation (36,240 acres were added to the earlier proposal, some of which was low  
16 elevation habitat). 74 Fed. Reg. 17317. The FWS acknowledges that “alluvial fans, washes, and  
17 valley bottoms . . . provide important foraging areas . . . and maintain habitat connectivity;” in  
18 fact, these habitats are listed as primary constituent elements for Peninsular bighorn. *Id.* at  
19 17322. Nevertheless, even with the inclusion of some additional acres of low-elevation and  
20 alluvial fan habitat, the final designation still eliminates over 200,000 acres of this crucial habitat  
21 type for Peninsular bighorn even though the excluded areas meet the definition of critical habitat.  
22 This is in direct contradiction to the Recovery Plan (Recovery Plan at 68) and the best available  
23 science. Because the critical habitat designation fails to provide sufficient essential habitat to  
24 promote the conservation or recovery of the Peninsular bighorn, it violates both the letter and the  
25 spirit of the ESA.

1 ***C. The Final Critical Habitat Designation Improperly Excluded Areas of Essential***  
2 ***Habitat.***

3 37. The final critical habitat designation eliminates a large amount of essential habitat  
4 that falls within the Coachella Valley Multiple Species Habitat Conservation Plan (“MSHCP”).  
5 74 Fed. Reg. 17334-17342. The Coachella Valley MSHCP allows for additional loss of bighorn  
6 habitat to development in the covered area and thus arguably does not promote conservation and  
7 recovery of the endangered Peninsular bighorn. The final rule states that these areas were  
8 excluded under Section 4(b)(2) because designation could interfere with cooperative  
9 relationships between the FWS and the agencies and private landholders represented by the  
10 MSHCP.

11 38. The final designation also excludes significant amounts of essential habitat for the  
12 species that may be covered by the draft Agua Caliente Habitat Conservation Plan. 74 Fed. Reg.  
13 17334-17342. The Agua Caliente plan is still in draft form, allows for additional loss of bighorn  
14 habitat to development in the covered area, and has not been formally approved, thus any  
15 potential benefits for bighorn under this plan are speculative at best. The final rule states that  
16 these areas were excluded under Section 4(b)(2) because designation could interfere with  
17 cooperative relationships between the FWS and the Tribe.

18 39. FWS provides only general statements regarding the supposed impacts to  
19 cooperative relationships and there is no evidence presented that a critical habitat designation  
20 would actually interfere with these relationships or what factors the Secretary considered in  
21 weighing the benefits of designation against any potential impacts to these relationships. For  
22 example, the final designation provides no indication that the Secretary considered the need to  
23 provide a safety net or “floor” of protection for the species’ habitat on these lands in the event  
24 the MSHCP is invalidated or otherwise terminated, or if the draft Tribal HCP is not finalized or  
25 fails to provide adequate protections.

26 40. Excluding areas of essential habitat that are covered or will be covered in the  
27 future by other management plans and/or conservation plans, is not a reasonable justification for  
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1 excluding areas from the protection that a designation of critical habitat provides. Whether such  
2 exclusions are made at the beginning of the process in the proposed critical habitat designation or  
3 are excluded from a final critical habitat designation, pursuant to ESA section 3(5)(A) or 4(b)(2),  
4 these omissions are equally indefensible. The ESA's definition of critical habitat as an area that  
5 may need special management does not mean that it needs additional management, only that it  
6 needs to be managed for the conservation of the species. Areas that are purportedly protected  
7 under some management plans now or are proposed for protection in draft plans clearly need  
8 special management and may, in fact, need additional special management. These areas should  
9 all be designated as critical habitat.

10 41. In the past, the Service has argued that essential habitat which may not need  
11 management beyond that already present does not meet the definition of critical habitat under  
12 3(5)(A). In the case of the Mexican spotted owl, the district court in Arizona explicitly struck  
13 down this reasoning. The court concluded that the FWS was improperly interpreting "may need  
14 special management" as "may need additional management." *Center for Biological Diversity, et*  
15 *al. v. Norton*, 240 F. Supp. 2d 1090, 1099 (D. Az. 2003). The court found that the existence of a  
16 management plan, far from being a reason to exclude an area from critical habitat, is indisputable  
17 proof that the area qualifies as critical habitat.

18 Whether habitat does or does not *require* special management by Defendant or  
19 FWS is not determinative on whether or not that habitat is "critical" to a  
20 threatened or endangered species. What is determinative is whether or not the  
21 habitat is "essential to the conservation of the species" and special management of  
22 that habitat is possibly necessary. 16 U.S.C. § 1532(5)(A)(i). Thus, the fact that a  
23 particular habitat does, in fact, require special management is demonstrative  
24 evidence that the habitat is "critical." [FWS], on the other hand, takes the  
25 position that if a habitat is actually under "adequate" management, then that  
26 habitat is *per se not* "critical." This makes no sense. A habitat would not be  
27 subject to special management and protection if it were not essential to the  
28 conservation of the species. The fact that a habitat is already under some sort of  
management for its conservation is absolute proof that habitat is "critical."

26 *Id.* (emphasis in original). The court clearly established that the FWS cannot exclude essential  
27 habitat simply because it is covered by some management plan. The FWS should have applied

1 this standard to the Peninsular bighorn critical habitat revision and included in the final critical  
2 habitat all those areas within the boundaries of conservation and/or management plans because  
3 these areas meet the definition of critical habitat by nature of their need for special management.  
4 Because the final rule does not do this, it is invalid.

5 ***D. The 2007 Proposal Itself was Inadequate to Provide for Species Recovery and***  
6 ***Conservation.***

7 42. In addition to lack of habitat connectivity and low-elevation habitat and exclusion  
8 of areas requiring special management, the 2007 proposal was inadequate on its face because it  
9 was based on an overly narrow interpretation of “occupied” habitat. 72 Fed. Reg. 57746. In  
10 particular it eliminated all areas in which there were few to no specific occurrence records dating  
11 back to the time of listing. *Id.* at 57746, 57748. This narrow interpretation of “occupation”  
12 presents several problems. First, it does not address the problem of false absences: it assumes  
13 that no data means no sheep. DeForge at 3; Rubin at 4. False absences may occur because (1)  
14 the area has not been surveyed, (2) the species was not detected during the survey due to  
15 seasonal or infrequent use, or (3) the species was not detected due to its coloration and  
16 camouflage. Rubin at 4-5; 66 Fed. Reg. 8659 (“such logic overlooks the fact that bighorn sheep  
17 are wide-ranging animals adapted to exploiting sparsely distributed resources over large tracts of  
18 land . . .”); Recovery Plan at 155 (“bighorn sheep are difficult to detect; . . . data on radio-  
19 collared animals . . . represents only the area used by marked animals, not the entire herd”).  
20 Indeed, the 2001 final designation made specific mention of the fact that because resources are  
21 not evenly distributed across the landscape and because the spatial distribution of resources  
22 changes over time, Peninsular bighorn need to adjust their own distributions to meet their needs.  
23 66 Fed. Reg. 8655. Further, shifts in home range by Peninsular bighorn are necessary and  
24 important because they allow forage plants to re-grow and recover from the Peninsular bighorn  
25 feeding habits. *Id.* Since the 2007 proposed critical habitat designation does not address these  
26 issues including redistribution of resources, it does not account for the necessary fluctuations in  
27 Peninsular bighorn range, nor does it account for areas that have not been surveyed or that may

1 be occupied seasonally or infrequently.

2 43. Further, even using FWS' narrow interpretation of "occupied habitat," the  
3 proposed rule failed to include even areas that were documented to be occupied at or since the  
4 time of listing. Rubin at 5; DeForge at 3-4. One peer review documents at least 1000 Peninsular  
5 bighorn locations tracked by GPS collars that were not included in the proposal. Rubin at 5.  
6 These 1000 locations were based on the tracking of only 34 animals, about 5% of the population  
7 at the time of tracking. *Id.* Thus, it is highly likely that even many additional occupied areas  
8 were left out. The Service later acknowledged that some data sets had been overlooked in  
9 preparing the proposed designation.

10 44. Moreover, assuming for the sake of argument alone that FWS' definition of  
11 "occupied habitat" were valid (which it is not), FWS should have considered designation of  
12 much of the essential habitat that was eliminated in the proposal even if it had been unoccupied  
13 at the time of listing because that habitat is needed for recovery. *See* 16 U.S.C. § 1532(5)(A),  
14 ESA § 3(5)(A). Removing critical habitat designation from (or failing to consider designation  
15 of) essential habitat areas, even if those areas have no recorded use by bighorn, inappropriately  
16 bases the designation solely on the extremely reduced population level at the time of listing. 66  
17 Fed. Reg. 8659; Rubin at 4; Service at 155. The reduced population level of this endangered  
18 bighorn population still has a contracted geographical distribution and it was even further  
19 reduced at the time of listing. Given that the goal of critical habitat designation is to give the  
20 species a chance to survive and recover, far more area than is currently occupied or was occupied  
21 at the time of listing should be designated. 66 Fed. Reg. 8659.

22 ***E. The 2009 Final Designation Did Not Cure the Shortcomings of the Proposal.***

23 45. In response to the comments regarding shortcomings of the proposed designation  
24 identified by the peer reviews, the 2009 final designation reinstated a mere 36,240 acres of  
25 critical habitat to the 2007 proposal, while simultaneously eliminating other, different acreage as  
26 a result of exclusions under section 4(b)(2) of the ESA. 74 Fed. Reg. 17317. Even if no new  
27 area had been eliminated, the addition of the 36,240 acres would represent a mere 8% of the land  
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1 originally excluded from the proposal by the FWS. As adopted, the final critical habitat  
2 designation has a greater net exclusion of essential habitat than the proposed designation. *Id.*

3 46. The FWS responded to comments about survey inaccuracy and false absences by  
4 expanding the time frame in which they accepted occupancy data (from 1988 in the final as  
5 opposed to 1998 in the proposal). 74 Fed. Reg. at 17324. The Service also included information  
6 from data sets it had omitted in the proposed designation. However, even with these additions  
7 the Service’s reliance on a limited set of occupancy data still improperly assumes that annual  
8 surveys are conducted over every area within the essential habitat equally, that the Peninsular  
9 bighorn occupy only their home range and do not roam, that the Peninsular bighorn can be  
10 spotted during every survey, and that the spatial distribution of resources remains the same over  
11 time. None of these assumptions is accurate or reflects the best available science.

12 47. Again, assuming for the sake of argument alone that the FWS’ narrow definition  
13 of “occupied” habitat were valid (which it is not), the final designation, like the proposal, still  
14 excludes habitat that the Service acknowledges to be in use by bighorn. For example, the final  
15 designation eliminates the movement corridors between units 1 and 2A even though radio collar  
16 data shows conclusively that rams have spent time in both of those units and thus must have used  
17 the intervening habitat. 74 Fed. Reg. at 17315. The final designation clearly did not resolve the  
18 shortcomings of the 2007 proposed designation, which was inadequate. The final critical habitat  
19 designation fails to adequately ensure the conservation and recovery of the Peninsular bighorn  
20 sheep and therefore violates the ESA.

21 48. The Final Rule fails to ensure that the designated critical habitat is sufficient to  
22 conserve the species and promote recovery. Because Defendants failed to designate sufficient  
23 critical habitat to conserve the species, Defendants violated Section 4(a)(3) of the ESA. 16  
24 U.S.C. § 1533(a)(3) .

25 49. Defendants’ failure to designate sufficient critical habitat to conserve the species  
26 will impair implementation of the Recovery Plan. Therefore, Defendants’ designation is also  
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1 contrary to their duty to implement the Recovery Plan as set forth in Section 4(f) of the ESA. 16  
2 U.S.C. § 1533(f).

3 50. Under Section 4(b)(2) of the ESA, the Secretary “may exclude any area from  
4 critical habitat if he determines that the benefits of such exclusion outweigh the benefits of  
5 specifying such area as part of the critical habitat, unless he determines, based on the best  
6 scientific and commercial data available, that the failure to designate such area as critical habitat  
7 will result in the extinction of the species concerned.” 16 U.S.C. § 1533(b)(2). Because the  
8 failure to designate sufficient critical habitat may result in extinction of the species, Defendants  
9 violated the Act by excluding habitat necessary to the survival of the species from the Final Rule  
10 pursuant to Section 4(b)(2) of the ESA. 16 U.S.C. § 1533(b)(2).

11 51. Defendants claim that they were not relying on the invalidated regulatory  
12 definition of “destruction or adverse modification” of critical habitat, but have not adopted a new  
13 regulatory definition. *See* 74 Fed. Reg. 17328; 50 C.F.R. § 402.02; *Gifford Pinchot Task Force*  
14 *v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1069-70 (9th Cir. 2004). Moreover, Defendants  
15 nonetheless failed to adequately assess the benefits of designation of critical habitat for the  
16 species and conservation. Defendants failed to properly identify and analyze the benefits of  
17 designating critical habitat before weighing the costs and benefits necessary to justify the  
18 exclusion of habitat from critical habitat designation pursuant to Section 4(b)(2) of the ESA. 16  
19 U.S.C. § 1533(b)(2). Therefore, Defendants acted in violation of Section 4(b)(2) of the ESA. 16  
20 U.S.C. § 1533(b)(2).

21 52. The Service ignored potential benefits to the species that result from designation  
22 of critical habitat that are not provided by listing alone. In addition, the Service did not evaluate  
23 benefits to other species, ecosystems, and the human environment provided by the potential non-  
24 consumptive uses of essential habitat areas that would be enhanced by the critical habitat  
25 designation, including, for example, preservation of other rare and imperiled species,  
26 preservation of soils, reduced runoff, and clean water. The Service also failed to evaluate the  
27 potential economic benefits and savings associated with critical habitat designation to public  
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1 health and local communities. In addition, the Service failed to evaluate the economic benefits  
2 and savings that would accrue from implementation of the Recovery Plan and timely recovery of  
3 the species.

4 53. In assessing the benefits of excluding areas from designation as critical habitat,  
5 the FWS relied on unsupported assumptions regarding the potential benefits to cooperative  
6 working relationships with other entities. For example, the FWS repeatedly states that excluding  
7 areas within the Coachella Valley MSHCP will benefit cooperation with the local governmental  
8 entities and others but fails to provide any basis for this claim or to acknowledge that these same  
9 areas were already designated as critical habitat during the time the MSHCP was developed and  
10 approved.

11 54. The Service violated Section 4(b)(2) of the ESA because it failed to undertake a  
12 reasoned analysis in making its determination of whether the benefits of exclusion of certain  
13 areas from the critical habitat designation outweighed the benefits of inclusion. Because the  
14 critical habitat designation is invalid, the Service is in violation of the ESA.

## 15 **VII. CLAIM FOR RELIEF**

### 16 **For Violations of the Endangered Species Act**

17 55. Plaintiffs incorporate herein by reference each and every allegation set forth in  
18 this Complaint as if set out in full below.

19 56. Defendants failed to issue a legally sufficient critical habitat designation for the  
20 endangered Peninsular bighorn sheep, in violation of Section 3 and Section 4 of the ESA. 16  
21 U.S.C. §§ 1532(5)(A) and 1533(a)(3)(A). Defendants' violations include, but are not limited to:  
22 failing to rely on the best scientific and commercial data available in determining the extent of  
23 essential habitat and designating critical habitat; relying on a definition of occupied habitat that is  
24 not supported by science; ignoring evidence and data regarding use of essential habitat by the  
25 species; and relying on unsupportable assumptions concerning the benefits to the species of  
26 inclusion of areas in critical habitat, the benefits of exclusions of areas of essential habitat from  
27 the critical habitat designation, and failing to properly undertake the required balancing in  
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1 accordance with Section 4(b)(2) of the ESA. 16 U.S.C. § 1533(b)(2).

2 57. For each of the above reasons, and others, Defendants failed perform their non-  
3 discretionary duties as required by the ESA, and have acted in a manner that is arbitrary,  
4 capricious, and not in accordance with law. ESA § 11(g), 16 U.S.C. § 1540(g); 5 U.S.C. §  
5 706(2)(A).

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing  
8 the following relief

9 (1) Declare that Defendants Ken Salazar, Secretary of the Interior, and the United  
10 States Fish and Wildlife Service violated the ESA by issuing an inadequate designation of  
11 critical habitat for the endangered Peninsular bighorn sheep on April 14, 2009, that fails to  
12 provide sufficient critical habitat necessary for conservation of the species;

13 (2) Direct by injunction that the Secretary and the Fish and Wildlife Service issue a  
14 revised critical habitat designation for the endangered Peninsular bighorn sheep which corrects  
15 these errors, and which otherwise provides for the conservation of the species, by a date certain;

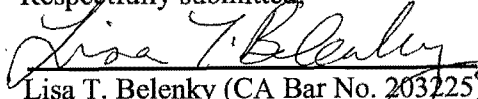
16 (3) In order to protect the species pending the completion of an adequate critical  
17 habitat designation for the endangered Peninsular bighorn sheep, enjoin the Secretary of the  
18 Interior and the United States Fish and Wildlife Service from issuing any incidental take permit,  
19 approval, biological opinion, or concurrence pursuant to Section 7 of the ESA, for any actions  
20 that may harm the endangered Peninsular bighorn sheep or cause destruction or adverse  
21 modification to Peninsular bighorn sheep habitat within all areas of critical habitat designated on  
22 February 1, 2001, consisting of 844,897 acres of habitat, 66 Fed. Reg. 8650, including those  
23 areas that were excluded from the 2009 final designation as critical habitat by Defendants on in  
24 the April 14, 2009, Final Rule, 74 Fed. Reg. 17288-365.

25 (5) Grant Plaintiffs their fees, costs, expenses and disbursements, including  
26 reasonable attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal  
27 Access to Justice Act, 28 U.S.C. § 2412; and

1 (6) Grant Plaintiffs such additional and further relief as the Court deems just and  
2 proper.

3  
4 DATED: October 7, 2009

Respectfully submitted,



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