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8 CENTER FOR BIOLOGICAL DIVERSITY and  
DESERT PROTECTIVE COUNCIL

9  
10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SACRAMENTO

12 CENTER FOR BIOLOGICAL DIVERSITY, a  
non-profit corporation; and DESERT  
13 PROTECTIVE COUNCIL, an non-profit  
corporation;

14  
15 Petitioner,

16 v.

17  
18 CALIFORNIA DEPARTMENT OF PARKS  
AND RECREATION; CALIFORNIA  
19 DEPARTMENT OF GENERAL SERVICES;  
and DOES 1 - 20, inclusive;

20  
21 Respondents.

22 CORVA; and DOES 21 through 40,

23 Real Parties in Interest.  
24  
25  
26  
27  
28

Case No.:

**PETITIONER'S OPENING  
MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT OF THEIR  
EX PARTE APPLICATION FOR STAY  
AND TEMPORARY RESTRAINING  
ORDER**

1 **INTRODUCTORY STATEMENT**

2 This motion concerns recently acquired State Park lands in Imperial County known variously as  
3 the “Desert Cahuilla Acquisition,” “Truckhaven,” and “the former Freeman Properties,” (hereinafter  
4 “Desert Cahuilla Acquisition”) that provide critical habitat for the endangered Peninsular Bighorn  
5 Sheep, contain many rare and sensitive species, rare California Fan Palm oases, and unique geological,  
6 cultural, and anthropological sites. This is a motion for an order: (1) to prevent Respondent California  
7 Department of Parks and Recreation (“State Parks”) from issuing any special use permit or other  
8 authorization for the use of the recently acquired Desert Cahuilla Acquisition for off-road vehicle events  
9 including but not limited to the upcoming 12<sup>th</sup> Annual Truckhaven Challenge scheduled for January 20-  
10 21, 2007, and (2) enjoining State Parks from permitting or otherwise authorizing the use of the recently  
11 acquired Desert Cahuilla Acquisition for the 12<sup>th</sup> Annual Truckhaven Challenge, any other special event  
12 including off-road vehicles, or any other public off-road vehicle activity pending a final judgment on the  
13 merits of this lawsuit, development of a management plan for the area, and compliance with CEQA.

14 As the Center will show in this brief and in its case in chief, State Parks cannot lawfully issue a  
15 special event permit for the Truckhaven Challenge because: (1) State Parks failed to comply with  
16 CEQA, even though the special event permit was clearly subject to the information disclosure  
17 requirements of that statute and (2) the Truckhaven Challenge is likely to cause irreparable harm to the  
18 environmental resources of the Desert Cahuilla Acquisition.

19 Under these circumstances, a stay preventing State Parks from issuing any such permit under  
20 C.C.P. § 1094.5(h) is necessary because 1) the public interest will not suffer if the stay is issued and 2)  
21 the agency will be unlikely to ultimately prevail on the merits. See Medical Bd. v. Superior Court  
22 (1991) 227 CA 3d 1458, 1461. Indeed, a stay is critical to preserving the public’s interest in the  
23 environmental resources of these newly acquired State owned lands that were intended to be an addition  
24 to Anza-Borrego Desert State Park. For example, these lands have been found to be essential to the  
25 preservation and recovery of the endangered Peninsular Bighorn Sheep which is also a “fully protected  
26 species” under California Law. Fish & Game Code § 4700(b)(2). A stay is also critical to preserving  
27 the public’s interest in the geological and archaeological resources of the area including one of the best  
28 remaining examples of the ancient lake bed of Lake Cahuilla. Furthermore, a temporary restraining

1 order (“TRO”) is appropriate because Petitioners are more than likely to prevail on the merits of their  
2 CEQA claims given these and the following facts, and because the balance of hardships clearly tips in  
3 favor of environmental and species protection.

4 A TRO is requested to enjoin only public ORV use of the Desert Cahuilla Acquisition lands.  
5 The requested TRO is intended to maintain the status quo on the ground until such time as this Court  
6 issues an order with respect to the Petition for Writ of Mandate and Complaint for Declaratory and  
7 Injunctive Relief (“Writ”) and Respondents fully comply with their duties under CEQA.

## 8 STATEMENT OF FACTS

### 9 A. Overview of Affected Resources

10 The event at issue is called the “12<sup>th</sup> Annual Truckhaven Challenge,” scheduled to take place on  
11 January 20-21, 2007. This event for off road vehicles (“ORVs”) will occur on land owned by the State  
12 of California and administered by the California Department of Parks and Recreation. Much of the land  
13 has been designated as critical habitat for the highly endangered Peninsular Bighorn Sheep and also  
14 contains significant environmental, geological, and archaeological characteristics. See Exhibit 2 to the  
15 Declaration of Lisa T. Belenky (“Exhibit 2”); Declaration of Esther Rubin (“Rubin Decl.”); Declaration  
16 of David Bloom, filed concurrently herewith.

17 As described on the website of Real Party in Interest California Off Road Vehicle Association  
18 (“CORVA”), the Truckhaven Challenge sponsored by CORVA consists of two major events. On  
19 Saturday, January 20<sup>th</sup>, 2007, participants will drive a 20 mile course and will also have the opportunity  
20 to leave the main course and pursue “more difficult” alternate routes. See Exhibit 3 (website pages). On  
21 Sunday, January 21<sup>st</sup>, 2007, as stated in the event poster, participants will, as part of the “Satellite  
22 Safari,” be able to “pick their own route,” and will essentially be on their own as to where they drive  
23 their ORV. Id. In other words, the “Truckhaven Challenge”, as described by the sponsor, CORVA, will  
24 allow extensive use of the lands in question and there will at times be little or no supervision as to where  
25 participants drive their vehicles.

26 Petitioners have been informed that neighboring landowners, including the State Lands  
27 Commission and the Anza Borrego Foundation, have denied access across their lands for the  
28 Truckhaven Challenge event and that State Parks has been informed of these denials. Exh. 1 (Letter

1 from State Lands Commission to CORVA with map). Because the Desert Cahuilla Acquisition lands  
2 are interspersed in a checker-board pattern with the State Lands Commission lands and the Anza  
3 Borrego Foundation lands, it will be nearly impossible for State Parks or CORVA to approve a route  
4 that will not trespass onto those lands where permission for the event has been denied. See Exh. 1  
5 (map). Therefore, any permit issued by State Parks for the Truckhaven Challenge could be interpreted  
6 as encouraging the use of lands that the event sponsor, CORVA, has been denied access to.

7 Since the Desert Cahuilla Acquisition lands were transferred to State Parks in September, 2006,  
8 State Parks has not developed or put in place any management plan for the area and has allowed ORVs  
9 to indiscriminately ride all over these lands. State Parks' staff has indicated that the event may be  
10 restricted to existing trails where resources are not impacted. However, since no routes have been  
11 designated, the "existing trails" consist of an ever-increasing set of tracks going in all directions—many  
12 of them newly forged by ORVs every day including "hill climbs" up steep slopes that have never  
13 previously been disturbed. See Declaration of Lawrence Hogue; Declaration of Terry Weiner.  
14 Moreover, as no environmental analysis has yet been conducted by State Parks, at this time there is no  
15 guarantee that biological, geological, and archaeological resources will be adequately protected. In  
16 addition, Petitioners are informed that neither the California Department of Fish and Game nor the U.S.  
17 Fish and Wildlife Service has been contacted or consulted regarding the potential impacts of the event  
18 on the endangered Peninsular bighorn sheep, its critical habitat, or rare and sensitive plants known to  
19 occur on the site.

20 The archeological and cultural resources of the site are also extraordinary and in need of  
21 protection. These resources include "sleeping circles" and fish traps used by Native Americans in the  
22 area for hundreds or thousands of years. Similar archeological resources in the area currently managed  
23 as part of the Ocotillo Wells State Vehicle Recreation Area ("OWSVRA") have been significantly  
24 impacted by off-road vehicle use there.

25 [A]rcheologists have noted the potential threats from off-highway vehicles, particularly  
26 quads and motorcycles on the remaining archeological resources at the site. Schneider  
27 (2005) commented on the obliteration of all cultural resources from the same ancient lake  
28 shoreline just south of County Road S-22, in the recently expanded OWSVRA, and  
recommended, in particular, protection of the desert pavement covered terraces in the  
western portion of the acquisition project and for the Four Palms spring area.

1 Exhibit 2 at 11 (California State Parks, Colorado Desert District, “Natural & Cultural Resources  
2 Overview, Desert Cahuilla Acquisition Project, Imperial County, California,” January 2006);  
3 Declaration of Esther Rubin; Declaration of David Bloom (noting his personal observation that similar  
4 geological features and other resources in OWSVRA have been totally destroyed); Declaration of Carol  
5 Ziegler (discussing destruction of geological features at OWSRVA and the potential loss of the fossil  
6 record and the desert pavement in the newly acquired lands).

7 Perhaps most egregiously under CEQA, since the Desert Cahuilla Acquisition lands were  
8 transferred to State Parks in September, 2006, State Parks has not undertaken the surveys and other data  
9 collection to establish the environmental baseline for these newly acquired State Lands so that a proper  
10 CEQA analysis can be conducted. For all these reasons, and others, Petitioners seek an order from this  
11 Court that will protect these newly acquired State Parks lands from any additional destruction by off-  
12 road vehicles and require the California Department of Parks and Recreation to provide adequate interim  
13 management of this site until adequate CEQA review is completed.

14 **B. Regulatory Background of the Proposed Special Event Permit**

15 Petitioners are informed that CORVA has requested a special event permit from State Parks for  
16 its “Truckhaven Challenge” on lands recently acquired by State Parks—lands that are meant to be part  
17 of Anza-Borrego State Park. Pursuant to State Parks’ regulations a special event permit for “activities  
18 which are beyond the scope of activities and operations conducted in units under the control of the  
19 Department of Parks and Recreation” may only be issued by District Superintendents, in their discretion,  
20 if the event is found to be “[c]onsistent with existing state policies and laws” and when “it is found to be  
21 in the best interest of the Department of Parks and Recreation.” 14 CCR § 4301(j). Petitioners aver that  
22 the disputed event is not consistent with state policies and laws because (1) State Parks has failed to  
23 comply with CEQA for the acquisition of the Desert Cahuilla site or in preparing to issue this special  
24 event permit, Pub. Res. Code § 21000 *et seq.*; and (2) the disputed event is not consistent with State  
25 Parks’ statutory mandate to “to preserve outstanding natural, scenic, and cultural values, indigenous  
26 aquatic and terrestrial fauna and flora, and the most significant examples of ecological regions of  
27 California.” Pub. Res. Code § 5019.53.

28 Despite the fact that the Truckhaven Challenge will allow upwards of 400 ORVs on state park

1 lands and would significantly impact the environmental resources of State owned lands, State Parks  
2 nonetheless intends to issue a permit for the event on Friday, January 19, 2007, after a “ride-through” of  
3 the route with CORVA and State Parks Staff on that same day. State Parks intends to issue the permit  
4 without any opportunity for public comment and without undertaking any CEQA analysis regarding the  
5 existing environmental resources of the site or the impacts of the proposed special event for which the  
6 permit is sought.

7 **ARGUMENT**

8 **A. AN EX PARTE STAY OR TEMPORARY RESTRAINING ORDER SHOULD BE**  
9 **ISSUED**

10 California Rule of Court section 379, subd. (g) states, “An applicant must make an affirmative  
11 factual showing in a declaration containing competent testimony based on personal knowledge of  
12 irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte.” The  
13 attached declarations make clear that Petitioners will suffer irreparable harm if the Truckhaven Challenge  
14 is allowed to proceed without proper CEQA review. This ex parte proceeding is necessary to forestall  
15 injury to the environment (including biological, geological, and archaeological resources) and the public  
16 interest in general, and to otherwise prevent ORV use from further impacting the Desert Cahuilla  
17 Acquisition until this court issues an order on the Motion.

18 **B. PETITIONERS HAVE MET THE STANDARDS FOR ISSUANCE OF A STAY**  
19 **OR TEMPORARY RESTRAINING ORDER**

20 This lawsuit seeks a writ of mandamus under Code of Civil Procedure section 1094.5 to stay or  
21 set aside any special event permit State Parks may issue for the “Truckhaven Challenge” scheduled to  
22 take place on January 20-21, 2007. Section 1094.5(h) permits this Court to stay the operation of State  
23 Parks’ action and the effect of any permit issued provided that the Court is satisfied that 1) such a stay  
24 would not be against the public interest, and 2) the agency will be unlikely to ultimately prevail on the  
25 merits. See Medical Bd. v. Superior Court (1991) 227 CA 3d 1458, 1461.

26 California Code of Civil Procedure 526(a) states that “an injunction may be granted in the  
27 following cases: 1) when it appears by the complaint that the plaintiff is entitled to the relief demanded,  
28 and the relief, or any part thereof, consists in restraining the commission or continuance of the act  
complained of, either for a limited period or perpetually; 2) when it appears by the complaint or

1 affidavits that the commission or continuance of some act during the litigation would produce waste, or  
2 great or irreparable injury, to a party to the action.”

3 In regard to temporary restraining orders, courts have used a two-prong test: 1) the likelihood  
4 that petitioner will prevail on the merits and 2) the interim harm that the petitioner is likely to sustain if  
5 the injunction were denied as compared to the harm that Real Party is likely to sustain if the injunction  
6 were issued. See Readylink Healthcare v. Cotton, (2005) 126 Cal.App.4<sup>th</sup> 1006, 1016, citing Whyte v.  
7 Schlage Lock Co., (2002) 101 Cal.App.4<sup>th</sup> 1443, 1449-1450. However, it is well established that the  
8 more likely it is that plaintiffs will prevail, the less severe the interim harm that plaintiffs must show to  
9 obtain interim relief, particularly when the proposed TRO maintains, rather than alters, the status quo.  
10 King v. Meese, (1987) 43 Cal.3d 1217, 1227, 1228. Indeed, where the showing of the likelihood of  
11 success is sufficient, plaintiff need not show that the balance of harms tips in his or her favor at all.  
12 Common Cause of California v. Board of Supervisors, (1989) 49 Cal.3d 432, 447; Pleasant Hill  
13 Bayshore Disposal v. Chip-It Recycling, (2001) 91 Cal.App.4<sup>th</sup> 678, 696.

14 **1. Petitioners Will Suffer Irreparable Harm If A TRO Is Not Issued**

15 As generally explained above, the environmental resources of the site are unique, fragile and in  
16 need of protection. If the event is allowed to proceed, the destruction of habitat, rare and special status  
17 plants, geological, cultural, and archeological resources is more than likely and such damage will be  
18 irrevocable in many instances such that no amount of monetary compensation would adequately  
19 compensate Petitioners or the public. Needless to say, critical habitat for the endangered Peninsular  
20 Bighorn Sheep cannot be quickly or easily replaced nor can rare California Fan Palm oases, fossil beds,  
21 soils or other geological features once they are disturbed. The harm resulting from even a few days of a  
22 large ORV event on this site is accordingly truly irreparable. Even a wholesale victory on the merits  
23 would not compensate for this loss.

24 We note that the traditional balancing of the equities has essentially been eliminated in cases  
25 involving endangered species by the federal courts. See, e.g., Tennessee Valley Authority v. Hill, 437  
26 U.S. 153, 194 (1978) (“In Congress’ view, projects that jeopardized the continued existence of  
27 endangered species threatened incalculable harm . . . [Since Congress] decided that the balance of  
28 hardships and the public interest tip heavily in favor of endangered species. . . . We may not use equity’s

1 scales to strike a different balance”). Thus, once a federal ESA plaintiff shows even a modicum of  
2 likelihood of success on the merits of a claim concerning an action that may jeopardize endangered  
3 species, or simply raises “serious questions” on the matter, issuance of preliminary injunctive relief  
4 becomes virtually automatic. Thomas v. Peterson, 753 F.2d 754, 764-765 (9th Cir. 1985) (“[i]t is not  
5 the responsibility of plaintiffs to prove, nor the function of courts to judge, the effect of a proposed  
6 action on an endangered species when proper procedures have not been followed”). Rather, plaintiffs  
7 need only show that “the circumstances triggering the procedural requirement exist, and that the  
8 required procedures have not been followed.” Id. Once this is established, irreparable damage to a  
9 listed species must be presumed. Id. at 764.

10 In any event, a stay or injunction here cannot harm Real Party CORVA except to the extent that  
11 CORVA must delay its event until CEQA review is completed or re-locate its event to a more  
12 appropriate venue such as the neighboring OWSRVA. To the extent that CORVA claims a financial  
13 harm, it should be noted that economic injury, even if it is present, is not “irreparable.” Sampson v.  
14 Murray, 415 U.S. 61, 90 (1974). Thus, the balance of hardships tips squarely in favor of Petitioners.

## 15 **2. Petitioners Are Likely to Prevail On The Merits**

### 16 **a) CEQA Review was Required for the “Truckhaven” Permit**

17 State Parks has chosen not to engage in any CEQA review whatsoever prior to issuing a permit  
18 for the Truckhaven Challenge and is waiting until the last possible moment to issue the permit –  
19 allowing CORVA to delay providing details of the “route” until the day before the proposed event. This  
20 constitutes a prejudicial abuse of discretion. The Permit is a “project” under CEQA, and is not  
21 otherwise exempt from CEQA requirements. Thus, at least some level of environmental review is  
22 required before State Parks can lawfully issue any special event permit for the Truckhaven Challenge  
23 event.

### 24 **b) A Special Event Permit Determination is a “Project” Under CEQA**

25 CEQA unambiguously defines a “project” as “an activity which may cause either a direct  
26 physical change in the environment . . . and which is any of the following: . . . (c) An activity that  
27 involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by  
28 one or more public agencies.” Pub. Resources Code § 21065. A “project” under CEQA includes “the

1 whole of an action, which has a potential for resulting in either a direct physical change in the  
2 environment, or a reasonably foreseeable indirect physical change in the environment[.]” CEQA  
3 Guidelines, 14 C.C.R. § 15378(a). A public agency action that will not have an immediate effect on the  
4 environment but that will culminate in a physical impact on the environment is a project under CEQA.  
5 Fullerton Joint Labor Union High Sch. Dist. v. State Bd. of Educ., (1982) 32 Cal.3d 779, 795.

6 Here, issuing a special event permit is a discretionary action by the State Parks District  
7 Superintendent. 14 CCR § 4301(j). The Truckhaven Challenge event will unquestionably cause a  
8 direct physical change to the affected area and the biological, and environmental resources of the site.  
9 This event could not lawfully occur on this site but for State Parks’s issuance of a special event permit.  
10 14 CCR § 4301(j). Therefore, State Parks is required to undertake CEQA review before issuing a  
11 special event permit for the Truckhaven Challenge and its failure to do so is a violation of law.

12 In sum, Petitioners are more than likely to prevail on the merits of their CEQA claim.

### 13 **3. A Stay Is In the Public Interest**

14 As discussed, Code of Civil Procedure section 1094.5(h) permits this Court to stay the operation  
15 of State Parks’ action provided the Court is satisfied that a stay would not be against the public interest.  
16 Here, the public interest is best served by staying the effect of any special use permit issued by State  
17 Parks for the Truckhaven Challenge. In enacting CEQA, the Legislature similarly declared that “it is the  
18 policy of the state to: . . . Develop and maintain a high-quality environment now and in the future, and  
19 take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.”  
20 Pub. Resources Code § 21001. An order barring the effect of any special use permit issued for the  
21 Truckhaven Challenge and other public ORV use on the Desert Cahuilla Acquisition pending a final  
22 judgment on the merits would certainly not run counter to the public interest as expressed in these  
23 Legislative declarations.

### 24 **4. Petitioners Seek to Maintain the Status Quo**

25 A party seeking provisional injunctive relief may also support its request with a showing that the  
26 remedy sought will not disturb the status quo. Transcentury Properties, Inc v. State of California, (1974)  
27 41 Cal.App.3d 835. In this case, the relief sought clearly preserves the status quo and prevents further  
28 harm from occurring. Petitioners seek an order which does no more than prevent the disturbance of

1 significant environmental resources including rare and sensitive plants, critical habitat for the  
2 endangered Peninsular bighorn sheep as well as important geological, cultural, and archeological  
3 resources.

4 **5. Petitioners Seek A TRO That Is Narrowly Tailored To The Most Imminent**  
5 **and Irreparable Injuries**

6 The proposed TRO seeks only to restrain State Parks from issuing special use permits and  
7 authorizing ORV use of the Desert Cahuilla Acquisition lands until the required CEQA review has been  
8 conducted by State Parks in order to preserve the status quo – the existing condition of the resources—  
9 without further damage. Therefore the TRO is narrowly tailored to limit only activities that are known  
10 to cause the most imminent and irreparable impacts to the site and the biological, cultural, geological  
11 and archeological resources therein.

12 **C. THE COURT SHOULD NOT REQUIRE ANY BOND OR NO MORE THAN A**  
13 **NOMINAL BOND.**

14 Petitioners anticipate that CORVA will seek a bond in the event the Court grants a stay or TRO.  
15 However, unlike preliminary injunctions, there is no Code requirement that the Court must order an  
16 undertaking or bond upon granting a TRO. If the Court is inclined to impose a bond or undertaking  
17 requirement, that amount should be nominal. Courts “retain ‘common law discretion’ to waive  
18 undertakings, or to require only nominal undertakings, in meritorious environmental lawsuits.” See  
19 Remy & Thomas, Guide to the California Environmental Quality Act (10th ed. 1999) at 646; see also  
20 Kostka & Zischke, Practice Under the California Environmental Quality Act (October 2004) § 23.89, at  
21 1012-1013. There is a “presumption that the public interest in preventing damage to the environment,  
22 pending a hearing on the merits, is greater than the damage to the project sponsor’s pocketbook.”  
23 Kotska & Zischke at 1012.

24 It is well settled in the federal courts that either no bond, or only a nominal bond, should be  
25 imposed in environmental litigation, regardless of any economic harm that a defendant may allegedly  
26 suffer as a result of an injunction. See, e.g., People ex rel. Van De Kamp v. Tahoe Regional Plan, 766  
27 F.2d 1319 (9th Cir. 1985); Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322 (9th Cir. 1975).  
28 California courts have followed this principle. See Mangini v. J.G. Durand International (1994) 31  
Cal.App.4th 214, 219. Requiring a substantial bond or undertaking in this case would impose an

1 unreasonable burden on Petitioners, non-profit organizations acting not out of private financial interest,  
2 but rather on behalf of the public. The imposition of more than a nominal bond or undertaking in this  
3 case could force Petitioners to forgo an injunction altogether and would severely chill future public  
4 interest litigation.

5 Accordingly, Petitioners respectfully request that the Court exercise its discretion to require no  
6 bond or only a nominal bond.

7 **CONCLUSION**

8 For all the forgoing reasons, Petitioners respectfully request the Court to GRANT their motion  
9 for a temporary stay order and TRO.

10 Respectfully submitted,

11 Date: January 19, 2007

12  
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