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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, a non-profit
corporation;

14
15 Petitioners,

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.
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Case No.: 07CS00077

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

Date: January 26, 2007

Time: 11 a.m.

Dept: 11

Judge: Hon. Gail Ohanesian

Action Filed: January 19, 2007

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 enjoining State Parks from permitting
7 or otherwise authorizing the use of the recently acquired Desert Cahuilla Acquisition for any and all off-
8 road vehicle activity pending a final judgment on the merits of this lawsuit, development of a
9 management plan for the area, and compliance with CEQA.

10 As the Center will show in this brief and in its case in chief, State Parks (1) failed to comply with
11 CEQA before opening these newly acquired lands for use by off-road vehicles, and (2) the use of off-
12 road vehicles on the Project site has caused, and is likely to continue to cause, irreparable harm to the
13 environmental resources of the Desert Cahuilla Acquisition.

14 Under these circumstances, a stay preventing State Parks from allowing any off-road vehicle use
15 of the Project site under C.C.P. § 1094.5(h) is necessary because 1) the public interest will not suffer if
16 the stay is issued and 2) the agency will be unlikely to ultimately prevail on the merits. See Medical Bd.
17 v. Superior Court (1991) 227 CA 3d 1458, 1461. Indeed, a stay is critical to preserving the public’s
18 interest in the environmental resources of these newly acquired State owned lands that were intended to
19 be an addition to Anza-Borrego Desert State Park. For example, these lands have been found to be
20 essential to the preservation and recovery of the endangered Peninsular Bighorn Sheep which is also a
21 “fully protected species” under California Law. Fish & Game Code § 4700(b)(2). A stay is also critical
22 to preserving the public’s interest in the geological and archaeological resources of the area including
23 one of the best remaining examples of the ancient shoreline of Lake Cahuilla. Furthermore, a temporary
24 restraining order (“TRO”) is appropriate because Petitioners are more than likely to prevail on the merits
25 of their CEQA claims given these and the following facts, and because the balance of hardships clearly
26 tips in favor of environmental and species protection.

27 A TRO is requested to enjoin only off-road vehicle use of the Desert Cahuilla Acquisition lands.
28 The requested TRO is intended to maintain the status quo on the ground until such time as this Court

1 issues an order with respect to the Petition for Writ of Mandate and Complaint for Declaratory and
2 Injunctive Relief (“Writ”) and Respondents fully comply with their duties under CEQA.

3 **STATEMENT OF FACTS**

4 **A. Background of the Acquisition**

5 Petitioners challenge Respondent California Department of Parks and Recreation’s failure to
6 comply with CEQA in its acquisition and management of approximately 4,000 acres of undeveloped
7 desert habitat in Imperial County ostensibly acquired as an addition to the Anza-Borrego Desert State
8 Park (the “Project”) because Respondent State Parks has and is continuing to allow indiscriminate and
9 destructive off-road vehicle use of the Project area without having conducted environmental review as
10 required by law.

11 Respondent State Parks issued a Notice of Exemption for the proposed project that stated that the
12 lands would be acquired as “an addition to the Anza-Borrego Desert State Park.” Notice of Exemption,
13 Department of Parks and Recreation, “Desert Cahuilla Acquisition Project-Phase 1(04/05-CD-09),”
14 State Clearinghouse Number 2004118395 (November 29, 2004). However, after the Notice of
15 Exemption was issued, and the land was transferred to State Parks in September, 2006, State Parks
16 changed its position and stated that the lands are being jointly managed by Anza-Borrego Desert State
17 Park and the Ocotillo Wells State Recreational Vehicle Area (“OWSRVA”). See Declaration of Lisa
18 Belenky filed January 19, 2007, Exhibit 4 (press release). As part of the joint management but without
19 any plan in place, from September 2006 to the present, State Parks has allowed extensive off-road
20 vehicle use of the Project area that not only may but most certainly is causing significant impacts to the
21 environment.

22 The Project area includes critical habitat for the endangered Peninsular Bighorn Sheep, rare
23 geological formations (including the shoreline of ancient Lake Cahuilla), rare and threatened plants
24 including Orcutt’s Aster and California Fan Palm oases, important cultural resources such as Native
25 American “sleeping circles,” and many paleontological and archeological sites.

26 As the Legislature stated:

27 The purpose of state parks shall be to preserve outstanding natural, scenic, and cultural
28 values, indigenous aquatic and terrestrial fauna and flora, and the most significant
examples of ecological regions of California, such as the Sierra Nevada, northeast
volcanic, great valley, coastal strip, Klamath-Siskiyou Mountains, southwest mountains

1 and valleys, redwoods, foothills and low coastal mountains, and desert and desert
2 mountains.

3 Pub. Res. Code § 5019.53 (emphasis added). Pursuant to statute, off-road vehicles can only be
4 permitted where the “terrain [is] capable of withstanding extensive human impact.” Public Resources
5 Code § 5019.56(a); see also Pub. Res. Code § 5090.02(a) (“the indiscriminate and uncontrolled use of
6 those vehicles may have a deleterious impact on the environment, wildlife habitats, native wildlife, and
7 native flora”). Nothing in the Public Resources Code or elsewhere allows State Parks to permit the use
8 of off-road vehicles in ecologically sensitive areas or destroy environmental and cultural resources such
9 as those found on the Desert Cahuilla Acquisition. As discussed in detail below, State Parks’ own report
10 admits that past off-road vehicle use of the Desert Cahuilla Acquisition site has shown that the terrain
11 and the significant ecological, geological, and cultural resources cannot withstand such extensive human
12 impact from off-road vehicle use. Nonetheless, State Parks recently allowed a large off-road vehicle
13 event to take place on the Project site (the so called “Truckhaven Challenge” on January 20-21, 2007),
14 without undertaking any CEQA review.

15 In essence, State Parks has engaged in a classic “bait and switch” tactic by providing a Notice of
16 Exemption based on one project description when acquiring the lands, and then carrying out a different
17 project on those lands. Because State Parks failed to accurately describe the Project in its Notice of
18 Exemption, and the actual Project as it is being carried out by State Parks could not be exempted from
19 CEQA review under any categorical exemption or otherwise, State Parks cannot rely on the Notice of
20 Exemption for the Project. Therefore, State Parks failed to comply with CEQA and the CEQA
21 Guidelines before approving the Project in violation of the law.

22 Petitioners seek a stay and TRO from this Court that would halt State Parks’ current management
23 practices that allow off-road vehicle use on the Project site until proper environmental review is
24 conducted pursuant to CEQA. A Stay and TRO will allow the current environmental status quo to be
25 preserved, without further off-road vehicle damage, so that meaningful environmental baseline data can
26 be collected and the resources of the Project site preserved while CEQA review is conducted.

27 **B. Overview of Affected Resources**

28 The Desert Cahuilla Acquisition lands are owned by the State of California and administered by
the California Department of Parks and Recreation. As described in the January 2006 report prepared

1 by State Parks staff in anticipation of the inclusion of the acquisition lands into Anza-Borrego Desert
2 State Park, the Project area provides a significant example of the ancient western shoreline of Lake
3 Cahuilla and an outstanding example of the desert ecosystem that has been established in this unique
4 environment (including rare California Fan Palm oases and rare plants such as Pierson's pincushion and
5 Orcutt's woody-aster). See Exhibit 2 to Declaration of Lisa Belenky filed January 19, 2007, at 2, 6-9,
6 (California State Parks, Colorado Desert District, "Natural & Cultural Resources Overview, Desert
7 Cahuilla Acquisition Project, Imperial County, California," January 2006 at 2, 6-9); Id. at Appendix II
8 ("Botanical Resources Technical Report, Desert Cahuilla Acquisition Project, Imperial County,
9 California," September 2005 and Appendices thereto at Appendix 4-1 "Fan Palm Census" and photos).
10 The acquisition was intended to protect the unique resources of the Project area. As State Parks noted,
11 past off-road vehicle use "in the south-central and southeastern portions of the project area has resulted
12 in disturbance to soils and vegetation including destruction of the palm grove at Four Palms." Id. at 3.
13 In addition, "the soils in the project area are alluvial in origin, and therefore highly erodable." Id. at 2.
14 Much of the land has been designated as critical habitat for the highly endangered Peninsular Bighorn
15 Sheep and also contains significant environmental, geological, and archaeological characteristics. See
16 Id.; Declaration of Esther Rubin, filed on January 19, 2007; Declaration of David Bloom, filed
17 concurrently herewith.

18 Since the Desert Cahuilla Acquisition lands were transferred to State Parks in September, 2006,
19 State Parks has not developed or put in place any management plan for the area and has allowed ORVs
20 to indiscriminately ride all over these lands. State Parks has allowed completely un-regulated off-road
21 vehicle use of the site to occur despite State Parks' own report on the site that shows that off-road
22 vehicle use has severely damaged the resources of the site. Because no management plan has been
23 developed and no official routes have been designated on the Project site, off-road vehicles go wherever
24 they please and are creating an ever-increasing set of tracks diverging in all directions—many of them
25 newly forged by ORVs every day including "hill climbs" up steep slopes that have never previously
26 been disturbed. See Declaration of Lawrence Hogue filed January 19, 2007; Declaration of Terry
27 Weiner filed January 19, 2007.

28 The archeological and cultural resources of the site are also extraordinary and State Parks has

1 recognized that they are in need of protection. These resources include “sleeping circles” and fish traps
2 used by Native Americans in the area for hundreds or thousands of years. Similar archeological
3 resources in the area currently managed as part of the Ocotillo Wells State Vehicle Recreation Area
4 (“OWSVRA”) have been significantly impacted by off-road vehicle use there.

5 [A]rcheologists have noted the potential threats from off-highway vehicles, particularly
6 quads and motorcycles on the remaining archeological resources at the site. Schneider
7 (2005) commented on the obliteration of all cultural resources from the same ancient lake
8 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.

9 Exhibit 2 at 11 (California State Parks, Colorado Desert District, “Natural & Cultural Resources
10 Overview, Desert Cahuilla Acquisition Project, Imperial County, California,” January 2006);
11 Declaration of Esther Rubin filed January 17, 2007 (noting her own observation of the damage to palms
12 and potential impacts on use of critical habitat by endangered Peninsular Bighorn Sheep); Declaration of
13 David Bloom (noting his personal observation that similar geological features and other resources in
14 OWSVRA have been totally destroyed); Declaration of Carol Ziegler filed January 19, 2007 (discussing
15 destruction of geological features at OWSRVA and the potential loss of the fossil record and the desert
16 pavement in the newly acquired lands).

17 Perhaps most egregiously under CEQA, since the Desert Cahuilla Acquisition lands were
18 transferred to State Parks in September, 2006, State Parks has not undertaken the surveys and other data
19 collection necessary to establish the environmental baseline for these newly acquired State Lands so that
20 a proper CEQA analysis can be conducted. Because a through inventory and environmental analysis of
21 the existing resources has not yet been conducted by State Parks, at this time there is no guarantee that
22 biological, geological, cultural, and archaeological resources are being adequately protected. In
23 addition, Petitioners are informed that neither the California Department of Fish and Game nor the U.S.
24 Fish and Wildlife Service has been contacted or consulted regarding the potential impacts of off-road
25 vehicle use of the Project site on the endangered Peninsular bighorn sheep, its critical habitat, or rare and
26 sensitive plants known to occur on the site.

27 For all these reasons, and others, Petitioners seek an order from this Court that will protect these
28 newly acquired State Parks lands from any additional destruction by off-road vehicles and require the

1 California Department of Parks and Recreation to provide adequate interim protection of this site until
2 adequate CEQA review is completed and a management plan adopted that protects these resources.

3 **C. The Recent Truckhaven Challenge Event at Project Site January 20-21, 2007**

4 On the weekend of January 20-21, an event known as the Truckhaven Challenge took place on
5 the Project site. Petitioners are informed and believe that hundreds off-road vehicles took part in that
6 event. Real Party in Interest, California Off Road Vehicle Association (“CORVA”), sponsored the
7 event and sought a special event permit from State Parks. When Petitioners sought a Stay in this Court
8 on January 19, 2007, at 3 p.m., CORVA’s counsel stated that CORVA had withdrawn its permit
9 application and cancelled the event. [Note: Petitioners have requested the reporters’ transcript of that
10 hearing.] After the hearing in this Court, on the evening of January 19, 2007, a notice appeared on
11 CORVA’s website stating that the event was cancelled. However, on Saturday, January 20, 2007, the
12 event appears to have gone forward as planned. See Declaration of David Hogan. For example, (1)
13 there was a large banner at the staging area stating “Welcome to _____ Truckhaven Challenge!” with
14 the word “CORVA’s” taped over in red tape but clearly visible on the banner, (2) there was a table
15 selling t-shirts and raffle tickets for the event, and (3) there was a marked route for the event. Id. at
16 Exhibits 1, 3, 4, 5, 9.

17 Pursuant to State Parks’ regulations, a special event permit for “activities which are beyond the
18 scope of activities and operations conducted in units under the control of the Department of Parks and
19 Recreation” may only be issued by District Superintendents, in their discretion, if the event is found to
20 be “[c]onsistent with existing state policies and laws” and when “it is found to be in the best interest of
21 the Department of Parks and Recreation.” 14 CCR § 4301(j). Petitioners aver that this event was not
22 consistent with state policies and laws because (1) State Parks failed to comply with CEQA for the
23 acquisition of the Desert Cahuilla site or before allowing this event or any other off-road vehicle use of
24 the site to occur, Pub. Res. Code § 21000 *et seq.*; and (2) the event was not consistent with State Parks’
25 statutory mandate to “to preserve outstanding natural, scenic, and cultural values, indigenous aquatic and
26 terrestrial fauna and flora, and the most significant examples of ecological regions of California.” Pub.
27 Res. Code § 5019.53.

28 Moreover, Petitioners had been informed that neighboring landowners, including the State Lands

1 Commission and the Anza Borrego Foundation, had denied access across their lands for the Truckhaven
2 Challenge event and that State Parks had been informed of these denials. Exh. 1 to Declaration of Lisa
3 Belenky (Letter from State Lands Commission to CORVA with map). Because the Desert Cahuilla
4 Acquisition lands are interspersed in a checker-board pattern with the State Lands Commission lands
5 and the Anza Borrego Foundation lands, nearly all off-road vehicle use on the Project site also crosses
6 onto those lands. See Exh. 1 (map). At this time Petitioners have not as yet been able to determine
7 whether the off-road vehicles participating in the event crossed lands belonging to the State Lands
8 Commission or the Anza-Borrego Foundation.

9 Despite the fact that the event was more than likely to significantly impact the environmental
10 resources of the Desert Cahuilla Acquisition lands, and despite the fact that no permit was issued for the
11 event, State Parks allowed the Truckhaven Challenge to go forward without undertaking any CEQA
12 analysis regarding the impacts of the event on the existing environmental resources of the Project site.

13 **ARGUMENT**

14 **A. AN EX PARTE STAY OR TEMPORARY RESTRAINING ORDER SHOULD BE**
15 **ISSUED**

16 California Rule of Court section 379, subd. (g) states, “An applicant must make an affirmative
17 factual showing in a declaration containing competent testimony based on personal knowledge of
18 irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte.” The
19 attached declarations make clear that Petitioners will suffer irreparable harm if off-road vehicle use is
20 allowed to continue at the Project site without prior proper CEQA review. This ex parte proceeding is
21 necessary to forestall injury to the environment (including biological, geological, and archaeological
22 resources) and the public interest in general, and to otherwise prevent off-road vehicle use from further
23 impacting the Desert Cahuilla Acquisition until this Court issues an order on the Motion.

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

26 This lawsuit seeks a writ of mandamus under Code of Civil Procedure section 1094.5 to stay, or
27 TRO enjoining, all off-road vehicle use of the Desert Cahuilla Acquisition Project site until State Parks
28 has fully complied with CEQA. Section 1094.5(h) permits this Court to stay the operation of State
Parks’ action provided that the Court is satisfied that 1) such a stay would not be against the public

1 interest, and 2) the agency will be unlikely to ultimately prevail on the merits. See Medical Bd. v.
2 Superior Court (1991) 227 CA 3d 1458, 1461.

3 California Code of Civil Procedure 526(a) states that “an injunction may be granted in the
4 following cases: 1) when it appears by the complaint that the plaintiff is entitled to the relief demanded,
5 and the relief, or any part thereof, consists in restraining the commission or continuance of the act
6 complained of, either for a limited period or perpetually; 2) when it appears by the complaint or
7 affidavits that the commission or continuance of some act during the litigation would produce waste, or
8 great or irreparable injury, to a party to the action.”

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

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

21 As generally explained above, the environmental resources of the site are unique, fragile and in
22 need of protection. Off-road vehicle use of the Project site has already caused destruction of habitat, rare
23 and special status plants, geological, cultural, and archeological resources and, therefore, continued off-
24 road vehicle use of the site is more than likely to continue to cause such destruction. Just as the damage
25 to the resources caused by off-road vehicle use in the past will be difficult or impossible to restore, the
26 damage likely to be caused in the future will be irrevocable in many instances such that no amount of
27 monetary compensation would adequately compensate Petitioners or the public. Needless to say, critical
28 habitat for the endangered Peninsular Bighorn Sheep cannot be quickly or easily replaced nor can rare

1 California Fan Palm oases, fossil beds, soils or other geological or cultural features once they are
2 disturbed. The harm resulting from ongoing off-road vehicle use of this site is accordingly truly
3 irreparable. Even a wholesale victory on the merits would not compensate for this loss.

4 We note that the traditional balancing of the equities has essentially been eliminated in cases
5 involving endangered species by the federal courts. See, e.g., Tennessee Valley Authority v. Hill, 437
6 U.S. 153, 194 (1978) (“In Congress’ view, projects that jeopardized the continued existence of
7 endangered species threatened incalculable harm . . . [Since Congress] decided that the balance of
8 hardships and the public interest tip heavily in favor of endangered species. . . . We may not use equity’s
9 scales to strike a different balance”). Thus, once a federal ESA plaintiff shows even a modicum of
10 likelihood of success on the merits of a claim concerning an action that may jeopardize endangered
11 species, or simply raises “serious questions” on the matter, issuance of preliminary injunctive relief
12 becomes virtually automatic. Thomas v. Peterson, 753 F.2d 754, 764-765 (9th Cir. 1985) (“[i]t is not
13 the responsibility of plaintiffs to prove, nor the function of courts to judge, the effect of a proposed
14 action on an endangered species when proper procedures have not been followed”). Rather, plaintiffs
15 need only show that “the circumstances triggering the procedural requirement exist, and that the
16 required procedures have not been followed.” Id. Once this is established, irreparable damage to a
17 listed species must be presumed. Id. at 764.

18 In any event, a stay or injunction here cannot harm State Parks or Real Party CORVA or its
19 members. The neighboring OWSRVA, which is owned and managed by State Parks, contains more
20 than 70,000 acres of land designated for off-road vehicle use just south of the Project site. To the extent
21 that State Parks or Real Party claims a financial harm, it should be noted that economic injury, even if it
22 is present, is not “irreparable.” Sampson v. Murray, 415 U.S. 61, 90 (1974). Thus, the balance of
23 hardships tips squarely in favor of Petitioners.

24 **2. Petitioners Are Likely to Prevail On The Merits Because CEQA Review was**
25 **Required for the Acquisition of the Project Site If the Intent was to use the**
26 **Site as an addition to the Ocotillo Wells State Recreational Vehicle Area.**

27 State Parks failed to engage in any CEQA review for the Project as it is now described by the
28 agency. This constitutes a prejudicial abuse of discretion. The acquisition of land is a “project” under
CEQA. A “project” under CEQA includes “the whole of an action, which has a potential for resulting in

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

6 While acquisition of the Project site as an addition to Anza-Borrego Desert State Park (the
7 original project as described in the Notice of Exemption) could arguably be exempt under a categorical
8 exemption to CEQA, the acquisition of the site as an addition (in part or in whole) to the Ocotillo Wells
9 State Recreational Vehicle Area (the current project as described by State Parks) could not be exempt
10 under any CEQA exemption or otherwise. See Petition for Writ at ¶¶ 15, 20, 29, 31, 36, 37. CEQA
11 review would be necessary for an addition to OWSVRA because the use of the Project site (in whole or
12 in part) by off-road vehicles would unquestionably cause a direct physical change to the affected area
13 and the biological and environmental resources of the site. None of those potential impacts were
14 analyzed by State Parks before changing the project description for the Desert Cahuilla Acquisition in
15 violation of CEQA.

16 Because environmental review is required before State Parks can lawfully allow the newly
17 described project to go forward in whole or in part, the Project site cannot be managed by OWSRVA as
18 an off-road vehicle area and should not be used by any off-road vehicles unless and until State Parks
19 completes adequate CEQA review for the newly described project. In sum, given State Parks’ complete
20 failure to comply with CEQA for its newly described project, Petitioners are more than likely to prevail
21 on the merits of their CEQA claim.

22 3. A Stay Is In the Public Interest

23 As discussed, Code of Civil Procedure section 1094.5(h) permits this Court to stay the operation
24 of State Parks’ action provided the Court is satisfied that a stay would not be against the public interest.
25 Here, the public interest is best served by preserving the status quo condition of the resources and
26 enjoining any off-road vehicle use of the property. In enacting CEQA, the Legislature similarly
27 declared that “it is the policy of the state to: . . . Develop and maintain a high-quality environment now
28 and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental

1 quality of the state.” Pub. Resources Code § 21001. An order barring any off-road vehicle use on the
2 Desert Cahuilla Acquisition pending a final judgment on the merits would certainly not run counter to
3 the public interest as expressed in these Legislative declarations.

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

5 A party seeking provisional injunctive relief may also support its request with a showing that the
6 remedy sought will not disturb the status quo. Transcentury Properties, Inc v. State of California, (1974)
7 41 Cal.App.3d 835. In this case, the relief sought clearly preserves the status quo and prevents further
8 harm from occurring. Petitioners seek an order which does no more than prevent the disturbance of
9 significant environmental resources including rare and sensitive plants, critical habitat for the
10 endangered Peninsular bighorn sheep as well as important geological, cultural, and archeological
11 resources.

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

14 The proposed Stay and TRO seek only to restrain State Parks from authorizing off-road vehicle
15 use of the Desert Cahuilla Acquisition lands until the required CEQA review has been conducted by
16 State Parks in order to preserve the status quo – the existing condition of the resources—without further
17 damage. Therefore the TRO is narrowly tailored to limit only activities that are known to cause the
18 most imminent and irreparable impacts to the site and the biological, cultural, geological and
19 archeological resources therein.

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

22 Petitioners do not anticipate that State Parks will seek a bond in the event the Court grants a stay
23 or TRO. However, unlike preliminary injunctions, there is no Code requirement that the Court must
24 order an undertaking or bond upon granting a TRO. If the Court is inclined to impose a bond or
25 undertaking requirement, that amount should be nominal. Courts “retain ‘common law discretion’ to
26 waive undertakings, or to require only nominal undertakings, in meritorious environmental lawsuits.”
27 See Remy & Thomas, Guide to the California Environmental Quality Act (10th ed. 1999) at 646; see
28 also Kostka & Zischke, Practice Under the California Environmental Quality Act (October 2004) §
23.89, at 1012-1013. There is a “presumption that the public interest in preventing damage to the

1 environment, pending a hearing on the merits, is greater than the damage to the project sponsor's
2 pocketbook." Kotska & Zischke at 1012.

3 It is well settled in the federal courts that either no bond, or only a nominal bond, should be
4 imposed in environmental litigation, regardless of any economic harm that a defendant may allegedly
5 suffer as a result of an injunction. See, e.g., People ex rel. Van De Kamp v. Tahoe Regional Plan, 766
6 F.2d 1319 (9th Cir. 1985); Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322 (9th Cir. 1975).
7 California courts have followed this principle. See Mangini v. J.G. Durand International (1994) 31
8 Cal.App.4th 214, 219. Requiring a substantial bond or undertaking in this case would impose an
9 unreasonable burden on Petitioners, non-profit organizations acting not out of private financial interest,
10 but rather on behalf of the public. The imposition of more than a nominal bond or undertaking in this
11 case could force Petitioners to forgo an injunction altogether and would severely chill future public
12 interest litigation.


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

15 CONCLUSION

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

18 Respectfully submitted,

19 Date: January 23, 2007

20 
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