JEAN E. WILLIAMS
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
JOHN H. MARTIN
Trial Attorney, CO Bar 32667
Wildlife & Marine Resources Section
999 18th St., South Terrace Suite 370
Denver, CO 80202
john.h.martin@usdoj.gov
Tel: (303) 844-1383

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY *et al*., Plaintiffs, v. DEBRA HAALAND, Secretary of the Interior, *et al*., Defendants,	Case No. CV-20-00106-TUC-RCC DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

ARGUMENT 1

I. The Biological Opinion reasonably addressed the potential hydrologic impacts of Fort operations. 1

A. The Groundwater Demand Accounting reasonably considered the conservation easements. 2

1. The certain consequence of the Preserve Petrified Forest Easement is the permanent preclusion of future groundwater pumping for agricultural irrigation. 2

2. The groundwater demand accounting reasonably quantified the groundwater usage precluded by the PPF parcel easement. 8

3. The agencies had a reasonable basis to exclude assumed return flows. 11

B. FWS considered all available groundwater modeling information. 13

1. Plaintiffs ignore key facts. 13

2. Plaintiffs misstate applicable law. 14

3. The agencies reasonably defined the agency action and Fort-attributable effects. 16

4. The agencies' arguments are based on their administrative records. 19

C. The agencies reasonably considered the effects of climate change. 21

II. The agencies expressly considered short-term impacts to the Huachuca water umbel. 23

III. The Army may rely on the 2014 Biological and Conference Opinion. 23

IV. The Army had a reasonable basis for its no-effect finding for the southwestern willow flycatcher. 24

V. The Army may rely on the Conference Opinions for the cuckoo and gartersnake. 25

VI. The Conference Opinions have a rational basis. 27

VII. Reinitiation of consultation is not required. 28

CONCLUSION 29

TABLE OF AUTHORITIES

Alaska v. Lubchenco,
825 F. Supp. 2d 209 (D.D.C. 2011) 15
Anderson v. Yungkau,
329 U.S. 482 (1947) 26, 28
Baltimore Gas & Elec. Co.,
462 U.S. 87 (1983) 15
Cherry v. Steiner,
543 F. Supp. 1270 (D. Ariz. 1982) 10
Conner v. Burford,
848 F.2d 1441 (9th Cir. 1988) 19
Crow Indian Tribe v. United States,
965 F.3d 662 (9th Cir. 2020) 19
Ctr. for Biological Diversity v. Bartel,
470 F.Supp.2d 1118 (S.D. Cal. 2006) 6, 7
Ctr. for Biological Diversity v. Rumsfeld,
198 F. Supp.2d 1139 (D. Ariz. 2002) 4, 5, 10
Ctr. for Biological Diversity v. Salazar,
804 F. Supp. 2d 987 (D. Ariz. 2011) 13, 16
Ctr. for Biological Diversity v. United States Bureau of Reclamatio,
143 F.3d 515 (9th Cir. 1998) 8
Defs. of Wildlife v. U.S. Dep't of Navy,
733 F.3d 1106 (11th Cir. 2013) 20
Defs. of Wildlife v. Zinke,
856 F.3d 1248 (9th Cir. 2017) 4

Environmental Action Ass'n v. Surface Transportation Board,
602 F.3d 687 (5th Cir. 2010) 8
Greenpeace v. National Marine Fisheries Service,
80 F. Supp. 2d 1137 (W.D. Wash. 2000) 15, 16
In re Operation of Mo. River Sys. Litig.,
421 F.3d 618 (8th Cir. 2005) 20
McFarland v. Kempthorne,
545 F.3d 1106 (9th Cir. 2008) 20
Miller v. Lehman,
801 F.2d 492 (D.C. Cir. 1986) 20
National Wildlife Federation v. National Marine Fisheries Service,
184 F.Supp.3d 861 (D. Or. 2016) 6
Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,
524 F.3d 917 (9th Cir. 2008) 4, 12
Natural ResourcesDefense Council v. Kempthorne,
506 F. Supp. 2d 322 (E.D. Cal. 2007) 19
National Wildlife Federation v. National Marine Fisheries Service,
839 F.Supp.2d 1117 (D. Or. 2011) 6
Oceana, Inc. v. Pritzker,
125 F. Supp. 3d 232 (D.D.C. 2015) 18
Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation,
426 F.3d 1082 (9th Cir. 2005) 20
Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy,
898 F.2d 1410 (9th Cir. 1990) 12, 24
San Luis & Delta-Mendota Water Auth. v. Jewell,
747 F.3d 581 (9th Cir. 2014) 15, 20, 24
San Luis & Delta-Mendota Water Auth. v. Salazar,
760 F. Supp. 2d 855 (E.D. Cal. 2010) 24

San Luis & Delta-Mendota Water Auth. v. United States,
672 F.3d 676 (9th Cir. 2012) 20
Sauer v. U.S. Dep't of Educ.,
668 F.3d 644 (9th Cir. 2012) 26
Shafer & Freeman Lakes Env't Conservation Corp. v. Fed. Energy Regul. Comm'n
992 F.3d 1071, 1093 (D.C. Cir. 2021) 21
Sierra Club v. Marsh,
816 F.2d 1376 (9th Cir. 1987) 5
Silver v. Pueblo Del Sol Water Co.,
244 Ariz. 553 (Ariz. 2018) 10
Stop H–3 Ass'n v. Dole,
740 F.2d 1442 (9th Cir.1984) 24
United States v. Renzi,
769 F.3d 731 (9th Cir. 2014) 2, 3, 9
WildEarth Guardians v. United States Fish & Wildlife Serv.,
416 F. Supp. 3d 909 (D. Ariz. 2019) 22

STATUTES

5 U.S.C. § 706 20
Pub. L. No. 108-136 12

FEDERAL REGULATIONS

50 C.F.R. 402.02 ..... 3, 4, 7, 15
50 C.F.R. 402.10 26
50 C.F.R. 402.14(g) 3
50 C.F.R. 402.14(i)(1) 27
50 C.F.R. 402.16 26
50 C.F.R. 402.16(a)(2) 29

50 C.F.R. 402.16(a)(4) 26
50 C.F.R. 402.17 3
50 C.F.R. § 402.14(g)(8) 4

Other Authorities

84 Fed. Reg. 44,993 ..... 4, 5
84 Fed. Reg. 44,976, 45,002-04 (Aug. 27, 2019) 4
84 Fed. Reg. 44,990 4
84 Fed. Reg. 44,987 28

INTRODUCTION

Plaintiffs' combined response and reply brief on summary judgment, ECF 28 ("Reply"), is as notable for the issues it avoids as for the new points it makes. It ignores that Fort Huachuca's activities are designed to increase the regional groundwater component of baseflow in the Upper San Pedro River from 2012 to 2030. Plaintiffs ignore the Fort's many conservation projects - such as strategically located effluent recharge projects and reduced groundwater demand - that drive such increases and positive trends. They ignore the caveats, critiques, and limitations to the alternative factual scenarios they offer, as well as the agencies' plain rationales for rejecting those implausible alternative scenarios, and a series of other facts from record evidence that conflicts with their dire prognosis. Finally, Plaintiffs' arguments are largely based on legal theories with little support in the Endangered Species Act ("ESA") or applicable regulations. As explained below and in Defendants' Combined Cross-Motion and Opposition, ECF 25 ("XMSJ"), the Court should grant summary judgment in the defendant agencies' favor and deny Plaintiffs' motion.

ARGUMENT

I. The Biological Opinion reasonably addressed the potential hydrologic impacts of Fort operations.

Plaintiffs present several unsupported theories to challenge the agencies' determination that the Fort's activities would result in a net groundwater surplus beginning in 2014. Specifically, Plaintiffs challenge two lines of evidence supporting the agencies' conclusion that there will be a surplus: the net groundwater demand accounting of the Fort's aggregate groundwater usage and the yield associated with its conservation measures, as well as a second line of evidence in groundwater modeling that the Fort's activities would also increase the regional groundwater component of baseflow in the Upper San Pedro River starting in 2014 and enduring at least through 2030. However, the agencies' findings are reasonable and supported by the evidence.

A. The Groundwater Demand Accounting reasonably considered the conservation easements.

1. The certain consequence of the Preserve Petrified Forest Easement is the permanent preclusion of future groundwater pumping for agricultural irrigation.

The Army's acquisition of a conservation easement on the Preserve Petrified Forest ("PPF") parcel indisputably precludes future groundwater pumping and agricultural irrigation on 480 acres that had historically been used to grow pasture crops such as alfalfa. XMSJ at 19-26. The agencies properly considered whether the conservation easement was reasonably certain to preclude significant future irrigation, not (as Plaintiffs argue) whether future irrigation was otherwise reasonably certain to occur. The established history of agricultural irrigation on the PPF parcel also provides a rational basis for the agencies' use of a standardized agricultural water duty in analyzing the beneficial impacts of the conservation easement. Against this record, Plaintiffs' offer their own different opinion, emphasizing a different future scenario where the PPF parcel might have instead have been subdivided into four-acre lots with absolutely no agricultural uses on these smaller lots requiring irrigation.

A shortcoming in Plaintiffs' argument is their choice to ignore the broader history of the PPF parcel in evaluating the effects of the conservation easement. These blinders extend beyond discounting the parcel's history of agricultural irrigation. The apparent cessation of alfalfa farming and associated agricultural irrigation on the PPF parcel also corresponds to the purchase of the property in October, 2005, by a real estate investor "who had no interest in owning the property," but was extorted to make the purchase by a corrupt congressman. *United States v. Renzi*, 769 F.3d 731, 737, 739, 741, 743 (9th Cir. 2014) (discussing Rep. Renzi's demand for purchase of PPF parcel and Army's interest in conservation easement). The Army's long-standing interest in acquiring the environmentally sensitive PPF parcel, as noted in this decision, supports the agencies' analysis. That the Army was also thwarted in acquiring the PPF parcel for several years

by the criminal acts described in *Renzi* undermines Plaintiffs' depiction of the Army as unjustly claiming conservation credit for the PPF purchase. *United States v. Renzi*, 769 F.3d 731, 742 (9th Cir. 2014) (affirming extortion and honest-services fraud convictions)

The *Renzi* decision's review of the dealings around the PPF parcel also illustrates the weakness in Plaintiffs' argument. *See* Reply at 3. For example, Plaintiffs' argument would preclude any conservation credit for the Army had it worked with the Nature Conservancy to acquire the PPF property in 2004 while irrigation pumping was ongoing (a prospect noted in *Renzi*, 769 F.3d at 741 n.14.). That outcome is illogical, and the outcome here should not differ because the PPF parcel was unsuccessfully held for speculation for several years.

Even if the PPF conservation easement did not enjoin active groundwater pumping for irrigation in 2013, the easement certainly does preclude the resumption of agricultural pumping on 480 acres with an indisputable history of agricultural irrigation. FWS004902 (FWS rationale for value of conservation easements). The agencies have a reasonable basis for their evaluation of the benefit of the retirement of agricultural irrigation on the PPF parcel. Under the deferential standard of review, Plaintiffs' focus on selective facts taken out of context does not prove the agencies' analysis to be arbitrary.

As a threshold legal issue, Plaintiffs' argument misapplies the ESA regulatory requirement that a consequence of an agency action (whether adverse or beneficial) be "reasonably certain to occur" before it is factored in a Biological Opinion as within the "effects of the action." This requirement is primarily found in the definition of "effects of the action" 50 C.F.R. 402.02. Plaintiffs' demand for proof of "actual water savings" with evidence that irrigation would have immediately resumed and of a "necessary biological response" proven only by the imminent cessation of irrigation has no basis in these regulatory definitions. Reply 3-5. Plaintiffs improperly demand proof of issues above and beyond the consequences of the acquisition of the easement.

Plaintiffs' cited caselaw misreads the Services' Part 402 regulations to impose different burdens for considering a beneficial effect of an agency action than in finding an

adverse effect of the same action. The U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service (collectively "the Services") re-stated their long-held position on the proper application of the "reasonably certain to occur" standard for delineating "effects of the action" to be considered in a Biological Opinion, in order to dispel confusion created by some caselaw and contradictory applications. 84 Fed. Reg. 44,976, 45,002-04 (Aug. 27, 2019) (explaining disagreement with *National Wildlife Federation v. National Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir. 2008), *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp.2d 1139, 1152 (D. Ariz. 2002) and *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1258 (9th Cir. 2017)); *see also* 84 Fed. Reg. at 44,990 (noting beneficial actions are not held to any higher standard in evaluating effects of the action, contrary to some caselaw).

The basic analysis required by 50 C.F.R. 402.02 and 402.14(g) is that the beneficial effects of the conservation easement for the PPF parcel are reasonably certain to occur because the easement precludes future groundwater pumping for agricultural irrigation on this parcel. FWS004639, FWS004902; ECF 26-3 at 4. In the preamble to their recent rulemaking, the Services delineated the range of probability that would encompass "reasonably certain to occur" as being "not speculative but does not have to be guaranteed." 84 Fed. Reg. 44,993; *see also* FWS015974 (ESA Handbook discussing examples that predators may follow new road or that new housing may introduce predating cats). Importantly, the information on which an agency determines the certainty of an effect "need not be dispositive, free from all uncertainty, or immune from disagreement to meet this standard," and "does not mean the nature of the information must support that a consequence or activity is guaranteed to occur." 84 Fed. Reg. 44,993. This guidance from the Services on the proper application of the "reasonably certain to occur" standard defeats Plaintiffs' argument that the agencies also had to show that resumption of irrigation was imminent.

Plaintiffs' cited caselaw does not demonstrate the agencies' analysis here lacks a

reasonable basis either. Their primary support for the demanding burden they advocate is the unremarkable statement in *Center for Biological Diversity v. Rumsfeld* that "[m]itigation measures must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise—enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." 198 F. Supp.2d at 1152 (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987). Their argument reads far too much into this ambiguous statement. *Rumsfeld* found the BiOp there unlawful, i.e. "a substantive violation of the prohibition against jeopardy," because it "failed to include the necessary mitigation measures to address the long term adverse impacts of the Army's proposed activities over the next ten years. Instead, the Final [BiOp] proposed to identify mitigation measures within three years." *Id*. at 1152, 1157. This decision addressed whether mitigation projects would occur, and not any argument over how to evaluate the beneficial effects of mitigation measures.

The sole sentence from *Rumsfeld* that Plaintiffs repeatedly quote is based on a generic cite to *Sierra Club v. Marsh*. That case involved an agency's failure to acquire 188 acres of bird habitat for a wildlife refuge pending a lawsuit over easements on the habitat. *Marsh*, 816 F.2d at 1379-80. The court held the agency had violated the ESA in not "insuring the acquisition and preservation of the mitigation lands," as that acquisition had been a necessary condition of the BiOp. *Id.* at 1386. The court also held, in passing, that the "reasonably certain" standard was not even pertinent to deciding a claim over whether the agency was obligated to reinitiate ESA consultation given the impasse in property acquisition. *Id.* at 1388. Thus, this case did not apply the reasonably certain standard to whether a mitigation project itself would have beneficial effects. Rather the question turned on whether the mitigation lands would be acquired at all.

The circumstances in *National Wildlife Federation v. National Marine Fisheries Service* are almost identical (and its holdings inapplicable here), in finding that the BiOp "impermissibly relies on mitigation measures that are not reasonably certain to occur"

because the agencies had "failed to adequately identify specific and verifiable mitigation plans beyond 2013," but instead promised "to figure it all out in the future." 839 F.Supp.2d 1117, 1125 n.3, 1128 (D. Or. 2011). The same claims were repeated in the next chapter of that long-running controversy in *National Wildlife Federation v. National Marine Fisheries Service*, 184 F.Supp.3d 861, 903 (D. Or. 2016). Plaintiffs' cite (Reply at 4) to a portion of that decision at 184 F. Supp. 3d 861 that does not even apply the "reasonably certain" standard, but instead focused on the agencies' failure to address the scientific uncertainty as to whether benefits to the fish species were reasonably certain to result from some habitat improvement projects. *Id.* at 903. This decision framed its analysis as whether the agencies had reasonably considered the best available scientific information about the strength of the correlation between habitat improvement in specific areas and overall fish abundance. That dispute is a far cry from Plaintiffs' collateral attack here on whether the agencies reasonably measured the forgone water usage attributable to a conservation easement. *Id*. at 903-06. The issue here is not a question of scientific foundation, but whether the law supports Plaintiffs' demand for an impossibly stringent test for acquisition of conservation easements. This latter *National Wildlife Federation* case does not support their argument, as Plaintiffs' argument does not challenge FWS' consideration of scientific uncertainty.

Plaintiffs misquote (Reply at 4) the rationale and holding *Southwest Center for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118, 1123-24 (S.D. Cal. 2006). That decision set aside a tiered ESA consultation structure (i.e. deferral of site-specific project analyses) because FWS had "locked in any mitigation that could be recommended or would be required" in a later project by reference to a plan it had not directly reviewed "*and* that uses mitigation measures that FWS had previously concluded are ineffective, experimental, and inadequate given the strict needs of the imperiled vernal pool species." *Id.* at 1124. Plaintiffs distort the quotation by omitting the Court's rationale that FWS had rejected the same mitigation measures it later mandated, among several other flaws. There is no similar inconsistency in this case.

Plaintiffs also misrepresent (Reply at 4) Defendants' argument as being that the "reasonably certain" test does not apply to the activities of third parties. Our argument is actually (again) that Plaintiffs misapply the "reasonably certain" provision in the definition of "effects of the action" in demanding proof that third parties would imminently resume irrigation on the PPF parcel. The agencies have reasonably applied the "effects of the action" test, especially the reasonable certainty prong in two required ways: first, that this mitigation project was reasonably certain to occur (because the easement was purchased and recorded), and second that the reasonably certain consequence of the Army's action is that groundwater pumping for agricultural irrigation on the PPF parcel is permanently prevented (again, because the easement is now an enforceable real property restriction).

The Services recently revised the definition of "effects of the action" at 50 C.F.R. 402.02 to use the word "consequence," in place of the previous catalogue of different types of effects, such as direct and indirect effects (though without changing the "reasonably certain" standard). The choice of "consequence" as a synonym for "effect" illustrates the error in Plaintiffs' argument that Defendants also needed to prove "whether someone would have irrigated the PPF parcel absent an easement." Reply at 4. What happens on the PPF parcel "absent an easement" is not a "consequence" of the imposition of an easement, and is thus not a mandatory consideration in determining whether the agencies properly ascribed a beneficial effect to acquisition of the easement. Rather the issue is whether the easement does what it purports to do – actually and permanently forbid agricultural irrigation on the parcel.

Thus Plaintiffs' citation (Reply at 4) to *Medina County Environmental Action Ass'n v. Surface Transportation Board* is inapposite. 602 F.3d 687, 702 (5th Cir. 2010). The cited holding in that case was that the agency need not consider future development in the area as a cumulative effect (i.e. a third party activity "not involving federal activities"). *Id.* at 694, 701. There is no contention in this case that future agricultural irrigation on the PPF parcel is a cumulative effect.

A more relevant precedent is *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, a decision upholding as reasonable a generalized BiOp mitigation requirement that an agency obtain and protect 1,400 acres, without requiring a demonstration that the location, project specificity, or time frame of the mitigation eliminated a specific adverse effect. 143 F.3d 515, 518-19 (9th Cir. 1998). The court found it sufficient that FWS had considered the relevant factors and reasonably found that the species could survive the loss of habitat until the specified acreage of replacement habitat could be protected, especially in light of the deference due to FWS' expertise. *Id*. at 523.

The agencies' conclusion that the PPF easement permanently precluded the resumption of irrigation using groundwater has a rational basis in the documented history of agricultural irrigation on the parcel and the proof the easement does what it purports to do. Plaintiffs have not carried their burden to show this decision to be arbitrary.[1] *Medina Cnty.*, 602 F.3d at 702-03 (noting plaintiffs' burden). The applicable standard is whether the conservation easement is reasonably certain to preclude significant future irrigation, not whether such irrigation was otherwise reasonably certain to occur. The former inquiry is properly trained on the consequences of the Army's action, while the latter question requires speculation into a hypothetical alternative scenario.

2. The groundwater demand accounting reasonably quantified the groundwater usage precluded by the PPF parcel easement.

Plaintiffs object (Reply at 5-10) to the agencies' calculation of the groundwater usage precluded by the PPF parcel conservation easement. The established water duty for agricultural irrigation provides a rational basis for quantifying the volume of groundwater pumping permanently retired. Though Plaintiffs prefer a smaller volume of

---

[1] There is no conflict between the agencies' groundwater modeling (assuming no groundwater pumping on the PPF parcel in either scenario) and the inclusion of a credit in the groundwater demand accounting. *See* XMSJ at 25-26. The groundwater modeling accurately reflects the fact that the conservation easement permanently precludes agricultural irrigation on that property regardless of future Fort operations.

water based on assumed residential use, none of their extra-record evidence proves that agricultural irrigation on the PPF parcel was permanently halted and would not have resumed. Moreover, Plaintiffs ignore that the agencies' net groundwater demand accounting includes the volume of groundwater pumping the easement precludes, based on a standardized water duty. The credit is not a calculation of water usage that would have occurred without the easement. Even that alternative benchmark is satisfied because Cochise County, as purchaser and current owner of the PPF parcel, had the right to allow resumption of groundwater pumping for agricultural irrigation but for the Army's acquisition of the conservation easement.

None of Plaintiffs' arguments show the agencies' analysis to be arbitrary. The apparent cessation of agricultural irrigation in 2006 does not render the agencies' analysis irrational or unlawful, especially in light of the unusual ownership history of the PPF parcel caused by its owners' criminal schemes with Rep. Renzi. *Renzi*, 769 F.3d at 743. Plaintiffs' demand that the property was bound for residential development makes no sense in light of that history, or the fact that the parcel was never sold or developed for residential development despite years of marketing (as shown by Plaintiffs' extra-record evidence). ECF 19-3. Also, just because a property is marketed for residential development has no bearing on a purchaser's eventual use of property. Plaintiffs' speculation does not undermine the record evidence showing a long history of agricultural irrigation on the PPF parcel for alfalfa hay farming, and more recent grazing use. XMSJ at 20-21, 25; *see also* ECF 19-1 at 4 ("The Property has been used for cattle grazing and irrigated crop land throughout its history with the exception of the use by the War Department during World War II."); FWS005645-650. Moreover, irrigation with groundwater is permissible even on lots as small as two acres, such as for pastures or orchards. A.R.S. § 45-402(18); ARMY002571. In the final analysis, the conservation easement reasonably addresses the threat of diminishing baseflows in the Upper San Pedro River and satisfies even the unduly stringent test proposed by *Rumsfeld*, 198 F. Supp. 2d at 1152.

It is not probative that the PPF parcel did not have a pivot sprinkler system installed at the time of the property's purchase by the County. That set of equipment was not critical to the County's purchase specifically to prevent future agricultural irrigation. Plaintiffs also fail to explain how their calculation (Reply at 6) of a $424,000 cost to purchase brand-new center pivot systems is a probative fact when it is plain that the cost of irrigation equipment (including for flood irrigation) is a typical business expense for farmers and ranchers, and that irrigation of cropland is widespread across the United States, including for the specific purpose of growing hay and pasturage in the Upper San Pedro River basin. XMSJ at 25 and ECF 26-4. Again, Plaintiffs do not show that the agencies were unreasonable in how they calculated the volume of precluded future water use.

Plaintiffs also misstate Arizona law (Reply at 5) in arguing that a future owner of the PPF parcel could not have resumed groundwater pumping because the pumping was "discontinued irrigation." They ignore that Arizona's rules on abandonment of a prior use do not apply to the pumping of groundwater located outside a designated Active Management Area ("AMA"), precisely the situation with the existing wells on the PPF parcel. *See* U.S. Statement of Facts ("SOF") ¶ 85 (ECF 26) (citing ARMY002601-03); XMSJ at 23; *See also Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 557 (Ariz. 2018) (Arizona has codified the right of overlying landowners to "[w]ithdraw and use groundwater for reasonable and beneficial use" in areas outside AMAs (alteration in original) (citation omitted)); A.R.S. § 45-411(A) (identifying Arizona's AMAs); A.R.S. § 45-452 (AMA rules); *Cherry v. Steiner*, 543 F. Supp. 1270 (D. Ariz. 1982), opinion approved and adopted by 9th Circuit at 716 F.2d 687 (9th Cir. 1983) (describing Arizona groundwater law).

Plaintiffs have no response to the reality that the conservation easement was the only certain means to permanently prevent significant groundwater pumping and agricultural irrigation on the PPF parcel. This conservation easement thus has reasonably

certain beneficial consequences in protecting baseflows in the Upper San Pedro River and is properly included in the agencies' groundwater demand accounting.

3. The agencies had a reasonable basis to exclude assumed return flows.

The agencies also reasonably omitted irrigation return flows in calculating the credits for the PPF parcel, as well as the easements on the Clinton/Drijvers Ranch. XMSJ at 27-28. The agencies have been using the same quantification approach since 2002, unchallenged by Plaintiffs until now, including through previous litigation over the 2007 BiOp. Plaintiffs' failure to challenge a basic issue in quantifying the value of conservation easements is not one where they can change positions at will. Throughout this case, Plaintiffs focus on the volumes of groundwater pumping, and their claimed consequences, without a single recognition of the beneficial impacts of the return flows, i.e. recharge, they seek to have accounted for here. Plaintiffs may not take inconsistent positions in ignoring return flows in all situations but here, when it suits them. The Court should uphold the agencies' calculation of the groundwater usage precluded and retired by these several conservation easements.

Plaintiffs also criticize (Reply at 10-12) the agencies for referencing (XMSJ at 28) the Army's annual reports on implementation of the BiOp to rebut Plaintiffs' several arguments challenging the groundwater demand accounting. The agencies have explained elsewhere the administrative law rationale for the Army's inclusion of its annual implementation reports to FWS in its administrative record, and will not repeat that argument here. ECF 27 at 11, 16. Plaintiffs declined to move in a timely manner to strike the Army's post-BiOp annual reports from its administrative record, as they might have done under the original stipulated scheduling order (ECF 14 at 2), or as revised with a second opportunity for administrative record motions (ECF 23), and cannot be heard now with a late objection.[2]

---

[2] Plaintiffs may not proffer yet another extra-record declaration and associated and extra-record evidence. ECF 28-1. Their proffer is far too late where the deadlines for disclosing such information, and moving for admission of such evidence, have long since

The point of the agencies' Statement of Facts ¶ 125 (and the table therein) is to illustrate that the agencies have a solid factual basis for the conclusion in the 2014 BiOp that the Fort's conservation measures cumulatively generate a net groundwater surplus beginning in 2014 and continuing to date. It also shows Plaintiffs fail to consider that other values in the net groundwater accounting have also changed and overall still offset any potential reduction in water savings from the challenged agricultural conservation easements and recharge projects. These new data will be further reviewed in the agencies' next round of ESA consultation, but are also relevant here to demonstrate the rational basis for the Army's continued reliance on the 2014 BiOp, in response to Plaintiffs' claim that such reliance is arbitrary. Reply at 24 (arguing Army has violated ESA); *see also Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1416 (9th Cir. 1990) (recognizing role of action agency in reviewing post-BiOp evidence).

Plaintiffs also make the unsupported and novel legal argument (Reply at 12) that the net groundwater accounting fails to consider "carried over liability" for unmitigated groundwater deficit. It is not possible to respond to this contention insofar as it is not supported with any argument or law, especially application of Section 321 of the 2004 National Defense Authorization Act, Pub. L. No. 108-136, § 321, 117 Stat. 1437 (2003) ("2004 NDAA") to "any present and future Federal agency action at Fort Huachuca." The legal theory also appears contrary to existing caselaw applying ESA Section 7. *See Nat'l Wildlife Fed'n*, 524 F.3d at 930 ("[t]he proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions *in the present and*

---

passed. ECF 14 at 2. Moreover, Plaintiffs miss the point, as the table at SOF ¶ 125 includes all conservation easements located in the "action area" for the Fort's operations. The task before the Court is not to decide the contents of an updated net groundwater demand accounting in advance of the next planned consultation. Rather the question is whether the Army's continued reliance on the 2014 BiOp is reasonable, in light of post-BiOp developments.

future human and natural contexts." (alteration in original) (citation omitted)) The Court should deny this stray contention as unfounded.

B. FWS considered all available groundwater modeling information.

Plaintiffs' continued attack (Reply at 12-22) on the agencies' groundwater modeling again fails for multiple reasons. The Court may reject Plaintiffs' challenge to the groundwater modeling for the simple reason that the administrative record shows the agencies actually considered the GeoSystems Analysis report ("GSA") and provided a rational explanation for not adopting its modeling assumptions or results due to its inaccuracies, uncertainties, and limitations, especially about future population projections. XMSJ at 10-15. In short, GSA is not the best available science on the effects of the Fort's groundwater usage. Moreover, the future impacts modeled in the GSA scenario are not reasonably certain to occur as a consequence of the Fort's operation through 2030, as indicated by the caveats of GSA's own authors and underscored by the agencies' discussions of groundwater modeling. As a wholly independent reason, the GSA report cannot constitute best available information the agencies were obligated to utilize because the GSA modeling uses projections of the future Fort-attributable population that conflict with Section 321 of the 2004 NDAA, and are thus irrelevant to the ESA analysis dictated by that statute. XMSJ at 16 (citing *Ctr. for Biological Diversity v. Salazar,* 804 F. Supp. 2d 987, 1006 (D. Ariz. 2011)).

1. Plaintiffs ignore key facts.

Plaintiffs ignore key points in the agencies' opening brief (XMSJ at 11-15). First, they do not address the caveats and limitations to GSA stated by its own authors that its assumptions about long-term population growth and groundwater usage, especially the amounts attributable to the Fort, created significant uncertainty in their results. *See* SOF 55, 57, 58, 59. GSA states that its analysis is based on "notoriously inaccurate" population projections, especially the assumption that Fort-attributable population would grow as a fixed share of a locally increasing overall population. *See* SOF 55. FWS022585/ARMY008189-90. This caveat to GSA is a primary reason its results do not

indicate any reasonably certain future adverse effects attributable to the Fort. This caveat is doubly important because the Army informed the GSA authors of the population growth discrepancy in 2010, and later stated in its Programmatic Biological Assessment for Ongoing and Future Military Operations and Activities at Fort Huachuca, Arizona ("PBA") that the assumptions in GSA were inaccurate based on population data available during ESA consultation in 2013-14[3]. *See* SOF 55 (citing FWS022611/ARMY008217); ARMY000574-576; FWS004762-63 (adopting Army modeling and analysis).

The agencies' groundwater modeling instead used a lower, fixed estimate of Fort-attributable pumping precisely because the estimates in GSA and other existing modeling were demonstrably inaccurate when compared to actual population growth rates available during the ESA consultation. ARMY00574-576. The agencies also noted other limitations to groundwater modeling such as the inability to include beneficial impacts from some significant sources of effluent recharge and conservation easements. SOF 66; ARMY000580. Thus, the "precipitous declines" (Reply at 19) in baseflow that Plaintiffs claim the agencies ignored are actually the result of GSA's use of unrealistically inflated (and ever increasing) population growth estimates, especially for Fort-attributable population and groundwater usage, and exacerbated by the groundwater modeling's exclusion of significant beneficial impacts from mitigation and conservation measures. The agencies expressly evaluated the GSA report, but did not utilize its assumptions or results beyond 2030 because it was not the best available information.

2. Plaintiffs misstate applicable law.

Plaintiffs also fail to address the caselaw establishing that the agencies possess the discretion and special expertise applied here to determine what constitutes the "best scientific data available." *Balt. Gas & Elec. Co.*, 462 U.S. 87, 103 (1983); XMSJ at 12, 16-17 (collecting cases). Courts are to defer especially to the expert agencies' choice of

[3] Plaintiffs misrepresent (Reply at 20) a passage in GSA where it reports that Army personnel noted the inaccuracies of deriving Fort-attributable population based on an overall regional population growth rate. SOF 55 (citing FWS022611/ARMY008217).

modeling. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 620 (9th Cir. 2014); *see also Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 220-21, 223 (D.D.C. 2011) (stating that, "even if plaintiffs can poke some holes in the agency's models, that does not necessarily preclude a conclusion that these models are the best available science").

Another problem with Plaintiffs' argument is that, in ignoring the caveats and limitations to modeling stated in GSA and as stated by the agencies, Plaintiffs also fail to show that the adverse effects on baseflows predicted in GSA are reasonably certain to occur, especially the asserted longer-term effects circa-2050. Plaintiffs castigate (Reply at 21) the agencies' discussion of uncertainty. However, the degree of certainty in whether a future activity and future consequence will occur is central to the analysis of the effects of the action. 50 C.F.R. 402.02. As discussed above supra at 4, the ESA does not require the agencies to consider potential effects, especially the depiction of future potential baseflow reductions in 2050, if those effects are not reasonably certain to occur.[4] In addition to GSA's use of inaccurate population projections, that model also does not simulate the effects of Fort operations occurring through 2024, but instead assumes ever increasing Fort-attributable water usage thereafter for decades in conflict with the agencies' own definition of the agency action at issue and their assessment that such operations beyond 2030 are uncertain. XMSJ at 14-15.

Plaintiffs argue (Reply at 13-14, 20-21) that the agencies were affirmatively obligated to ignore these uncertainties and make uncertain projections about an open-ended agency action, citing *Greenpeace v. National Marine Fisheries Service*, 80 F. Supp. 2d 1137, 1150 (W.D. Wash. 2000). That case is inapposite because its holding is limited to the principle that "the ESA requires a comprehensive biological opinion that addresses the full scope of the agency action—in this case the groundfish fishery

---

[4] As GSA itself notes, the principal utility of that report lies in its identification of the potential locations where Fort-attributable pumping may be more likely than other locations to impact regional baseflows (not that particular baseflow volumes are reasonably certain to occur), an issue the BiOp addresses. FWS022585 (GSA 4-2).

management plans in their entirety." *Id.* at 1150. Nothing in that decision supports Plaintiffs' effort to expand the agency action here (i.e. Fort operations) decades past 2024, or their demand that the agencies utilize uncertain projections of the Fort-attributable populations and gross (but not net) groundwater usage after 2030. Moreover, in *Greenpeace*, the agency admitted the existence of available information it had not evaluated, in contrast to the agencies' explanation here about the absence of reasonably certain projections of future Fort-attributable and comprehensive basin-wide activities, populations, and groundwater usage. GSA does not contain such reasonably certain projections.

3. The agencies reasonably defined the agency action and Fort-attributable effects.

Plaintiffs fail to show that the agencies acted unreasonably in defining the agency action as Fort operations through 2024, and then relying on groundwater modeling simulations to identify the effects of Fort operations from 2011 through 2030 as one line of evidence regarding the effects of that agency action. XMSJ at 6, 14 (explaining agencies' choice of analysis periods) (citing, inter alia, FWS004764, ARMY000573-74; SOF 67, 69. Plaintiffs have no persuasive rebuttal (Reply at 14-15, 21) to the precedent in *Salazar* where the court upheld a similar time-limited focus of analysis, and also found the linkage of Fort-attributable water usage to general population trends to violate Section 321 of the NDAA. XMSJ at 15-16 (discussing *Salazar*, 804 F. Supp. 2d at 1005-06). Their responses on both points are unpersuasive attempts to pass off discrete holdings in the government's favor as somehow adverse. Their reading of *Salazar* is simply contrary to its plain meaning.

Undeterred by this direct precedent, Plaintiffs present a new argument that the agencies' consideration of groundwater modeling through 2030 is inadequate because of a supposed 25-year lag between groundwater pumping and effects on baseflow. Reply at 12-17. This argument is contrary to the agencies' administrative records. First, the assumption of a 25-year lag period is based on a misuse of an article in the Army

administrative record. ARMY018996; SOF 30. In short, that article made a simplified assumption of a 25-year lag period based on a hypothetical aquifer and assumptions about the many variables that affect the response of an aquifer to groundwater pumping, such as transmissivity of the subsurface layers, pumping locations and rates. *See also* SOF 67, 69, 75, 98 (addressing modeling of effects through 2030).

The BiOp disclosed that there was not one easily quantified time lag between pumping and effects on baseflow, but instead that the best available information is presented in the groundwater modeling and its spatially and temporally explicit results. FWS004765; FWS004686-87; *See also* SOF 98. The one article discussing the concept of lag-time based on a hypothetical does not show that the agencies' groundwater modeling of effects through 2030 ignores any relevant issue or is otherwise unrepresentative of aquifer conditions or future effects. Rather, the agencies' groundwater modeling is a more complex analysis of the effects of the Fort-attributable groundwater usage through 2030 in the context of cumulative water usage in the Upper San Pedro watershed.

Unlike Plaintiffs' simplistic assumption of a 25-year time lag, the agencies' groundwater modeling addressed the complexities in estimating future effects on baseflows by including analysis of effluent recharge where feasible (and noting that some beneficial recharge and other conservation easements could not be incorporated into modeling). ARMY000564-6; ARMY000580; FWS0004762-63. The agencies' discussion of the beneficial effects on baseflow of recharging effluent into shallow groundwater layers near the San Pedro River at strategic locations demonstrates that Plaintiffs have overly simplified the complexities in evaluating the effects of continued pumping at major groundwater well locations. ARMY000580-82. In short, Plaintiffs ignore the ways in which effluent recharge serves to protect baseflows from the effects of groundwater pumping in deeper layers of the aquifer. The agencies' groundwater modeling shows that the Fort's overall activities are unlikely to cause a decrease in the regional groundwater component of baseflow in the mainstem of the Upper San Pedro

River from 2014 through 2030, even when including past groundwater withdrawals in the environmental baseline. FWS004763-66.

The agencies' position remains supported by *Oceana, Inc. v. Pritzker*, 125 F. Supp. 3d 232 (D.D.C. 2015). XMSJ at 18. Plaintiffs seek to avoid that court's plain holding that the agencies were not obligated to expand the agency action there by assuming continuous fishery operations (and take of sea turtles) for decades. *Id.* at 249. Plaintiffs cite the government's brief there (Reply at 12-15) to argue that the agency still modeled some effects decades into the future. They ignore that this fact did not matter to the court's affirmation of a ten-year agency action, as the Population Viability Assessment ("PVA") they cite was a side consideration at best. *Id*. at 244-45. The PVA is also distinct from the issues in this case insofar as that type of population forecasting model considered the effect on future turtle populations of a specific number of turtle mortalities occurring during the ten-year action period. *Id*. at 247-48. Plaintiffs ignore how that analysis differs from analyses such as GSA, whose scenarios necessarily include continuation of Fort-attributable groundwater usage for decades past the 2024 (or 2030) end of the agency action. Plaintiffs have not shown the agencies ignored any analysis like a PVA that can isolate the effects of a discrete ten-year action in modeling long-term impacts, or that such an analysis would provide a better evaluation than the groundwater scenarios the agencies did model. And Plaintiffs also ignore the fact that the agencies here did calculate the effects of groundwater usage six years past 2024, out to 2030, specifically to address the time-lag issue and identify trends in the effects to the regional groundwater component of baseflows in the San Pedro River.[5] *See* SOF 67; FWS004763-64; ARMY000573-4.

[5] The agencies addressed the post-2030 landscape with Army's finding that "[b]eyond the model forecast period (2030), there would likely be no effects on water conditions based on the projected surplus in the net groundwater demand and the modeled positive trends in baseflow in the San Pedro River." ARMY000186.

Plaintiffs cite *Natural Resources Defense Council v. Kempthorne* (Reply at 16, 21) to challenge the agencies' limitation of the agency action to Fort operations through 2024. 506 F. Supp. 2d 322, 359 (E.D. Cal. 2007). This cite is inapposite because the stray sentence they quote from a long and complicated case traces back only to a decision that found an agency had unreasonably segmented its analysis of an agency decision to issue oil and gas leases but exclude later hydrocarbon production on those leases. *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). Here the agencies have considered the effects of groundwater pumping past 2024 through 2030, clearly distinguishing this case from the failures in *Kempthorne* and *Conner* to analyze the agencies' own defined agency action.

Moreover, Plaintiffs too glibly assert that GSA contains data the agencies were obligated to use. As explained above, the problems with GSA lie in its use of notoriously inaccurate assumptions about future populations and groundwater use, as contrasted with the agencies' stated reasons for not speculating along those same lines given the absence of any reasonably certain projections of Fort groundwater usage past 2030, as well as the bias inherent in excluding the beneficial impacts of Fort conservation projects from the analysis.

Thus Plaintiffs' argument (Reply at 19) is not aided by *Crow Indian Tribe v. United States*, 965 F.3d 662, 679 (9th Cir. 2020). Though that case dealt with an agencies' failure to adequately consider a long-term issue, it is inapposite here because the agencies here provided a solid reason to find GSA an unreliable and uncertain indicator of effects decades in the future. And because *Crow Tribe* addresses an ESA species de-listing decision under ESA Section 4, it had no occasion to also consider the importance of a defined agency action term (such as Fort operations through 2024) in a Section 7 consultation analysis.

4. The agencies' arguments are based on their administrative records.

Plaintiffs' final argument is the mistaken contention that the agencies' arguments in this case are inadmissible as post-hoc rationales and/or based on inadmissible post-

decisional information. They argue (Reply at 19) that the only permissible arguments are those that FWS expressly stated in the BiOp, citing *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005). The applicable standard is less demanding, as "a decision may be upheld if the agency's reasoning may be reasonably inferred, [though] it is impermissible to 'infer an agency's reasoning from mere silence.'" *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 700 (9th Cir. 2012) (quoting *Pac. Coast*, 426 F.3d at 1091).

Moreover, "there is no requirement that every detail of the agency's decision be stated expressly in the ... BiOp. The rationale is present in the administrative record underlying the document, and this is all that is required." *In re Operation of Mo. River Sys. Litig*., 421 F.3d 618, 634 (8th Cir. 2005) (citation omitted); *see e.g. McFarland v. Kempthorne*, 545 F.3d 1106, 1112–13 (9th Cir. 2008) (an agency's rationale must be upheld where its reasoning can be reasonably discerned from the entire record.); *Jewell*, 747 F.3d at 606 ("[W]e ultimately conclude that we can discern the agency's reasoning and that the FWS's 2008 BiOp is adequately supported by the record[.]") This standard of review is even required by the APA's reference to the "whole record." 5 U.S.C. § 706; *See also Miller v. Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1986) ("[I]f the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference.") (citation omitted); *Defs. of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1120 (11th Cir. 2013) (same).

Another reason to consider the PBA and other documents in the administrative records as supporting the BiOp here is because FWS adopted the Army's groundwater modeling presented in the PBA, referencing its analysis numerous times. *See, e.g.*, FWS004762-63; FWS004682-83. The agencies' rationale for not using the longer-term inaccurate projections in GSA can be easily discerned in the Army's PBA. That document cogently explains the groundwater modeling and its results. The PBA also pointed to the inaccurate population growth projections in GSA, cited NDAA Section

321, and also explained the reasons for limiting the agency action to Fort operations through 2024. *See, e.g.,* ARMY000573-76; ARMY000049.

Moreover, the agencies did not use any post-decisional information in arguing against the GSA report. XMSJ at 11-19; SOF 62, 66, and 67. Plaintiffs themselves ignore the caveats noted by GSA's authors. SOF 55, 57-59; *see e.g.*, FWS022585/ARMY008189-90. GSA noted that its baseflow capture findings "hinge on pumping estimates" that are themselves based on long-range population projections, each step of which is subject to significant uncertainty. Thus GSA explained that its simulation outputs can have some utility, such as "spatial distributions of stream impacts, . . . but little stock should be placed in absolute values of stream stage or discharge," the very (uncertain) result that Plaintiffs improperly represent as a forgone certainty. See SOF 55, 102. FWS022580/ARMY008184. Plaintiffs' argument that the agencies cannot rely on the caveats in GSA is absurd.

In their ESA consultation in 2013-2014, the agencies chose to rely on groundwater modeling scenarios extending to 2030. This modeling is not arbitrary where the agencies explained the shortcomings of the modeling in GSA, and chose to use different variables in their own scenarios. The agencies' explanation of their modeling is rational. *See, e.g., Shafer & Freeman Lakes Env't Conservation Corp. v. Fed. Energy Regul. Comm'n*, 992 F.3d 1071, 1093 (D.C. Cir. 2021) ("The point of administrative review is not to settle the scientific debate, but to ensure that the Service 'explain[ed] the assumptions and methodology used in preparing the model[.]'" (alterations in original) (citation omitted)) With the agencies now actively planning a new consultation with new groundwater modeling analysis based on the latest information, Plaintiffs' critiques of the 2013 PBA and 2014 BiOp are rapidly approaching mootness.

C. The agencies reasonably considered the effects of climate change.

The agencies' opening brief adequately reviewed their analysis in the BiOp and supporting PBA of the consequences of climate change for the hydrology in the Upper San Pedro watershed. XMSJ at 29-35. Plaintiffs do not show that analysis to be arbitrary

or otherwise unlawful, but merely repeat their contention that the agencies should have analyzed a range of potential changes in precipitation patterns through a technically complicated redesign of the groundwater model. As with their prior arguments, this argument is also based on the mistaken assertion that such changes in precipitation are sure to occur, paired with disinterest in the caveats and limitations of the one study they cite as their preferred modeling. *See* SOF 38-47, 94-97, 119-120.

The BiOp expressly incorporated the Army's PBA for its detailed discussion of the likely effects of climate change, and then expanded on that discussion, including a discussion of likely decreases in streamflow. FWS0004668-004671. These analyses in the BiOp and PBA are not arbitrary or capricious, as demonstrated by the court's upholding of a similar analysis of climate change in *WildEarth Guardians v. United States Fish & Wildlife Serv.*, 416 F. Supp. 3d 909, 934–35 (D. Ariz. 2019). Plaintiffs' only bid to distinguish that case is to argue that there will be "synergistic" and "exacerbated" impacts. Reply at 23. This argument fails because the agencies, especially in the BiOp, expressly considered how the Fort's (largely positive) effects on future baseflows might occur against a worsening backdrop of otherwise decreasing streamflows. XMSJ at 30-32. This analysis is all that is required to consider the Fort-attributable effects comprehensively with other potential effects such as climate change.

Plaintiffs' theory of compounded impacts due to the Fort derives from their misplaced reliance on the GSA report and other dated analyses such as Serrat-Capdevila et al. 2007 (FWS035308). Plaintiffs ignore that the actual data available during consultation revealed the Fort-attributable groundwater usage to be less than evaluated in GSA and Serrat-Capdevila, and with more beneficial impacts due to conservation projects such as effluent recharge at strategic locations, that were not considered in those studies. XMSJ at 32; SOF 43, 57, and 125.

There is no legal or factual basis for Plaintiffs' claim that the agencies ignored the likely consequences of climate change on the baseflows of the Upper San Pedro River or any available information, or that the agencies were required to quantitatively model the

effects on recharge in the fashion Plaintiffs demand, using their preferred assumptions and data.

II. The agencies expressly considered short-term impacts to the Huachuca water umbel.

Plaintiffs provide a cursory reply (Reply at 24) to the agencies' analysis (XMSJ at 35-37) of the potential short-term impacts to the umbel, again tying this claim to their separate challenge to the agencies' groundwater modeling and their assertion that the Fort's beneficial impacts to San Pedro baseflows are illusory.

Their argument illogically rests on unrelated issues and unproven assertions. Their original argument about the umbel was that the agencies ignored short-term impacts to umbel habitat that might develop in the 2012-2014 timeframes, before the onset of the beneficial impacts and increases to baseflows shown by the agencies' groundwater modeling and net groundwater demand accounting. ECF 18 at 42. Their (misplaced) argument now seems to be that the beneficial impacts to baseflows fade into a deficit after 2030, as shown by the longer-term analyses in the GSA simulation. That disagreement over long-term effects does not undermine the groundwater modeling results showing an increase in the regional groundwater component of baseflow in the Upper San Pedro River from 2012 to 2030 attributable to the Fort's conservation efforts. FWS0004763. Moreover, this groundwater modeling is not based on any benefits from the conservation easements that Plaintiffs claim are illusory. FWS004762-63.

Plaintiffs' argument on the umbel lacks any support, given their failure to address the BiOp's pointed analysis of how the umbel is not jeopardized by the potential short-term exposure to small declines in San Pedro baseflows before 2014. FWS004765-004772; XMSJ at 36. The Court should defer to the agencies' reasonable analysis of the potential short-term impacts to the Huachuca water umbel.

III. The Army may rely on the 2014 Biological and Conference Opinion.

Plaintiffs misstate (Reply at 24) the law governing the Army's reliance on the 2014 BiOp. In the context of factual attacks on a BiOp, the Ninth Circuit allows an

action agency such as the Army to satisfy the arbitrary and capricious standard of review even if it relies on an "admittedly weak" BiOp, so long as there is no "information the Service did not take into account-- which challenges the opinion's conclusions." *Pyramid Lake Paiute Tribe of Indians*, 898 F.2d at 1415 (citation omitted); *Stop H–3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir.1984). This analysis of whether the Army's reliance on the BiOp is rational differs from a direct APA challenge to FWS's issuance of the BiOp. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 966 (E.D. Cal. 2010), *aff'd in part, rev'd in part sub nom. San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014) ("In the former case, the critical question is whether the action agency's reliance was arbitrary and capricious, not whether the BiOp itself is somehow flawed." (citation omitted)) Plaintiffs fail to recognize or address this distinction between their claims and thus have failed to support their claim that the Army violated ESA Section 7 due to claimed errors in the BiOp.

IV. The Army had a reasonable basis for its no-effect finding for the southwestern willow flycatcher.

The Army made an express finding that Fort operations through 2024 would have no effect on the southwestern willow flycatcher ("flycatcher"), supported by a wholly rational and legal basis for not consulting with FWS over that species. XMSJ at 37-39; ARMY00224; ARMY00187-190; ARMY000128-132. The agencies' briefing pointed to the plainly different reasons the Army stated in its PBA for finding a possible effect of Fort operations on the yellow-bellied cuckoo ("cuckoo"). ARMY00190, ARMY000225. In short, as argued in the agencies' opening brief, the different treatment is because of the potential adverse effects of Fort-attributable groundwater pumping on cuckoo habitat in the lower Babocomari River. ARMY000190; ARMY00225. There is no need for the PBA to explain why its findings differ because there is no inconsistency between these two findings. It suffices instead that the difference in the Army's rationale for these two species is obvious in the PBA, where its reasoning may be plainly discerned.

Plaintiffs argue that the Army ignored that the lower Babocomari River is also flycatcher habitat. Reply at 25. This argument is inconsistent with the PBA. Plaintiffs advance the ambiguous proposition that the two species "rely on similar habitat," citing ARMY000130-131, ARMY000187. These citations actually undercut their rationale, as these portions of the PBA explain why the Babocomari River downstream of the Babocomari Cienega lacks flycatcher habitat. In this area, the river is incised and "the riparian habitat is very narrow," but has adjacent mesquite thickets. ARMY000130, ARMY000132. However, the flycatcher prefers "dense contiguous vegetation," comprised of various native and non-native tree and shrub species, but not mesquite. ARMY000128; FWS017199 at D-14 ("[R]iparian mesquite woodlands ('bosques') do not provide willow flycatcher breeding habitat"). Flycatcher habitat may exist upstream in the Babocomari Cienega, but the Fort's activities do not affect Babocomari River baseflows at that location. ARMY000187-88. Plaintiffs' effort to depict the lower Babocomari River as potential flycatcher habitat fails. *See* SOF 10, 19, 103.

Plaintiffs also challenge again the results of the agencies' groundwater modeling results that predict Fort-attributable increases in baseflows to the Upper San Pedro River mainstem through 2030. Plaintiffs provide no reason, nor does GSA provide a rationale, to doubt the results of the agencies' groundwater modeling results that show small increases in the mainstem Upper San Pedro baseflows through 2030, well past the date for completion of a new BiOp, and new effects determination for the flycatcher. That is to say, Army's no effect determination for both the mainstem San Pedro as well as the lower Babocomari River, based on review of potential effects through at least 2030, has a rational basis. The no-effect finding for the flycatcher should be upheld.

V. The Army may rely on the Conference Opinions for the cuckoo and gartersnake.

Defendants will not repeat their analysis of the ESA regulations at 50 C.F.R. 402.10 and 402.16 demonstrating that neither regulation imposed a mandatory duty on the Army to reinitiate consultation on the conference opinions for the northern Mexican

gartersnake and cuckoo after their formal ESA-listing in 2014. XMSJ at 39-40. As the agencies previously argued, the Army may continue to rely on the conference opinions for the duration of their term through March 31, 2024. FWS004630. Plaintiffs also appear to have abandoned their reinitiation claim against FWS by their failure to address FWS' distinct argument that there is no cognizable Administrative Procedure Act claim against that agency for reinitiation of consultation. XMSJ at 39 n.17.

Plaintiffs' response to the agencies' construction of the two relevant regulations is easily refuted. First, they never address the plain meaning of the Services' choice of "may" in 50 C.F.R. 402.10, when contrasted against the use of "shall" in other sections of the same regulation. *See, e.g., Sauer v. U.S. Dep't of Educ.*, 668 F.3d 644, 651 (9th Cir. 2012) ("[W]hen the same [provision] uses both 'may' and 'shall,' . . .the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory[.]" (second alteration in original) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). Plaintiffs do not address the possibility that the Services intended that a conference opinion might last for a defined term, without imposing additional procedural responsibilities. This curt dismissal is not responsive to Defendants' citation to regulatory preamble language indicating that is exactly the Services' intention.

Plaintiffs also offer an unpersuasive alternative reading of the reinitiation of consultation regulation at 50 C.F.R. 402.16. They argue the Army may not avoid reinitiation of consultation (disregarding also that the conference opinion resulted from conferencing, not a consultation). Their sole rationale is the mistaken proposition that the agencies' argument would render superfluous the provision at 402.16(a)(4) requiring reinitiation of consultation "if a new species is listed or critical habitat designated." That specific reinitiation trigger still applies to an agency action that is not otherwise addressed in a conference opinion on a proposed species or proposed critical habitat. That may be the case if a new species is both proposed for listing and listed after an agency has completed formal consultation, or if an agency's informal conferencing discussions do not result in issuance of a conference opinion. In those situations, an

action agency has no formal conference opinion it can rely upon to demonstrate its compliance with ESA Section 7. Here again, Plaintiffs do not address the agencies' plain language construction of the regulation.

Plaintiffs also offer the theory that the Army must nonetheless secure a BiOp with an incidental take statement covering the gartersnake or face liability under ESA Section 9 based on the conference opinion's forecast that the Fort's operation may cause take of the gartersnake. That theory is beside the point, as there is no ESA Section 9 claim in this case. Moreover, there is no proof the Fort's operations have taken even one gartersnake. That point is borne out by the conference opinion's incidental take statement for gartersnake, anticipating take of gartersnakes only if the Fort's operations caused the reduction of baseflow in the lower Babocomari River and the reduction of wetted habitat in that area, or if the Fort conducted certain prescribed burns in its East Range. FWS004884. There is no evidence that either set of events has actually occurred. It is more likely that no take has occurred insofar as FWS opined that the "conservation measures proposed by Fort Huachuca include sufficient measures to minimize incidental take," such that it did not even specify any terms and conditions or reasonable and prudent measures for the Army to implement in order for take to not be prohibited. FWS004885; *see also* 50 C.F.R. 402.14(i)(1) (specifying elements of incidental take statement). Thus, Army's adherence to its own conservation measures suffices under the opinion to avoid prohibited take of any gartersnake.

VI. The Conference Opinions have a rational basis.

Plaintiffs largely abandon the arguments in their opening brief challenging the conference opinion on the gartnersnake, replaced with the new argument that FWS failed to identify a tipping point for the species' survival and recovery. Reply at 28-29. They claim that the lower Babocomari River will suffer low recruitment levels due to lowered baseflows. They ignore FWS' point that the adverse effects of a reduced baseflow are very small, and will have a minor effect on a species in an area that exhibits little value as habitat for a source population due to the presence of non-native species. FWS004880.

The low to very low local populations in this area are connected to better habitat and larger meta-populations located upstream and downstream, offering better opportunities for foraging and reproduction. FWS004883. FWS did explain why the risk of this small reduction in baseflows does not amount to an appreciable impact on the gartersnake, and will avoid any possible tipping point. *Id*. In any event, FWS is not required to identify a specific "tipping point" beyond which a species cannot recover from any additional adverse effect because there is no such requirement in the ESA or the ESA regulations for making section 7(a)(2) determinations. 84 Fed. Reg. at 44,987.

Plaintiffs also provide no basis to doubt FWS's no-jeopardy conference opinion for the cuckoo. Their reply does not respond to the agencies' explanation that the forested habitat and prey species availability for this species will not be seriously or significantly affected by the Fort's operation. XMSJ at 41-42.

VII. Reinitiation of consultation is not required.

Plaintiffs filed their lawsuit almost six years after FWS issued its BiOp and after the Army informed them it had already begun preparing for a new consultation to conclude before March 2024. Yet, Plaintiffs nonetheless commenced litigation that should soon be mooted by new ESA consultation. Plaintiffs' reinitiation claim illustrates their desperation to claim an outsized role in the administrative process of ESA consultation. The points they raise go to broad topics—such as the effectiveness of conservation projects, climate change, and groundwater modeling—that the agencies have addressed in past consultations, and will address anew based on the best available scientific and commercial information. Their reinitiation claim seeks merely to beat the agencies to the punch by raising obvious topics the agencies are already on a schedule to address in consultation, though the agencies will surely do so based on a more comprehensive review of the available information than Plaintiffs' selective presentation.

Plaintiffs again ignore the Army's annual reports presenting a more comprehensive review of the Fort's net groundwater demand, and that show decreased water usage and additional conservation projects. This evidence rebuts their claim that

the agencies over-estimated water conservation so significantly as to trigger reinitiation. Plaintiffs also fail to explain how new data on climate change and projected temperature increases (a quintessential cumulative effect or change in an environmental baseline) reveals new "effects of the action . . . not previously considered." 50 C.F.R. 402.16(a)(2). As such, new climate change science cannot trigger reinitiation over Fort operations.

Plaintiffs also unconvincingly claim their consultant's report was not prepared for purposes of litigation. XMSJ at 44 (explaining that challenges to BiOp may not be based on post-hoc expert analyses) Their consultant's hydrologic report is dated November 21, 2019, and was enclosed with Plaintiffs' notice of intent to sue the Army sent two weeks later on December 3, 2019. ECF 19-6; ECF 9 ¶6. This report is an inadmissible analysis of Plaintiffs' preferred assumptions about future Fort activities and other variables in groundwater modeling. Its bias is obvious in its conflation of actual surface flows in the surface waters of the Upper San Pedro River with potential reductions in the regional groundwater component of baseflow of the river, without providing any caveats and limitations to its analysis of the sort disclosed in all other groundwater modeling analyses in the agencies' records.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Defendants and deny Plaintiffs' cross motion.

Dated this 7th day of June, 2021.

Respectfully submitted,

JEAN E. WILLIAMS
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

/s/ John H. Martin
JOHN H. MARTIN (Colo. Bar 32667)
Wildlife & Marine Resources Section
999 18th St., South Terrace Suite 370

Denver, CO 80202
john.h.martin@usdoj.gov
Tel: (303) 844-1383
Fax: (303) 844-1350

Of Counsel:

JUSTIN TADE
Office of the Solicitor
United States Department of the Interior

MARK HOLYCROSS
United States Army Legal Services Agency, Environmental Law Division
United States Department of the Army

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

This memorandum complies with the applicable word-count limitation because it contains 9,930 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, motion, signature block, and certificates of counsel.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served upon counsel of record through the Court's electronic service system which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

Dated: June 7, 2021 */s/ John H. Martin*