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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Center for Biological Diversity, et al.,

No. CV-20-00106-TUC-RCC

Plaintiffs,

ORDER

v.

David Bernhardt, et al.,

Defendants.

Before the Court is Plaintiffs Center for Biological Diversity, Maricopa Audubon Society, and Sierra Club's (collectively "Plaintiffs") Motion for Summary Judgment (Doc. 17)¹ and Motion to Complete or Supplement the Administrative Record (Doc. 24). The Court also considers Defendants United States Fish and Wildlife Service ("FWS"), David Bernhardt (in his official capacity as Secretary of the Interior), Aurelia Skipwith (in her official capacity as Director of the FWS), Amy Leuders (in her official capacity as Regional Director of FWS Southwest Region), Mark Esper (in his official capacity as Secretary of

¹ Documents and the associated page numbers refer to the CM/ECF generated documents and page numbers for this case.

1 Defense), Ryan McCarthy (in his official capacity as Secretary of the Army), and Laura
2 Potter's (in her official capacity as Senior Commander of Fort Huachuca) (collectively
3 "Defendants" or "Agencies") Combined Cross-Motion for Summary Judgment. (Doc. 25.)

4 This matter challenges the conclusion in FWS's 2014 Biological Opinion ("BiOp"),
5 which determined that Fort Huachuca's ("Fort") groundwater pumping² near the San Pedro
6 River Basin did not jeopardize the existence of four species: the western yellow-billed
7 cuckoo, the southwestern willow flycatcher, the Huachuca water umbel, and the northern
8 Mexican gartersnake. (Doc. 1.) According to Plaintiffs, the Fort erroneously assumed that
9 the purchase of the Preserve Petrified Forest ("PPF") and the Clinton/Drijvers easements
10 would offset the water deficit from the Fort's groundwater pumping. (Doc. 18 at 38–46.)
11 Plaintiffs assert that the Fort's groundwater pumping in fact results in a groundwater deficit
12 that threatens the named species. (*Id.* at 46.) They allege FWS's BiOp was faulty because
13 the projected effects of groundwater pumping did not look far enough into the future;
14 Plaintiffs believe the effects of the Fort's pumping will not be apparent until long after the
15 timeline considered by FWS. (*Id.* at 33–37.) Furthermore, Plaintiffs contend that the BiOp
16 failed to consider the cumulative effects of the Fort's groundwater pumping and climate
17 change. (*Id.* at 38–42.) Finally, Plaintiffs assert that the Agencies failed to reinstate
18 consultation after the listing of the cuckoo and gartersnake. (*Id.* at 48–55.)

19 As a result, Plaintiffs claim that the 2014 BiOp was arbitrary and capricious and ask
20 the Court to vacate the BiOp and order reinstatement of consultation. (*Id.* at 63.) Plaintiffs
21 also ask the Court to supplement the Administrative Record ("AR") with several additional
22 documents. (Doc. 24.) The Agencies counter that the Court should grant summary
23 judgment in their favor because the 2014 BiOp was valid. (Doc. 25.) They further assert
24 that supplementation of the AR is inappropriate. (Doc. 27.)

25 The Court first reviews the statutory framework for claims under the Endangered
26 Species Act, determines where supplementation is appropriate, and then analyzes the
27 parties' cross-summary judgment motions.

28 ² The Fort pumps, on average, 5,648 acre-feet per year ("APY") of groundwater.
(FWS022569.)

1 **I. STATUTORY AND REGULATORY BACKGROUND**

2 *a. The Endangered Species Act*

3 The Endangered Species Act ("ESA"), 16 U.S.C. § 1531, et seq., "is a
4 comprehensive scheme with the broad purpose of protecting endangered and threatened
5 species." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1106
6 (9th Cir. 2012); *see also* 16 U.S.C. § 1531.³ When enacting the ESA, Congress was
7 primarily concerned with "halt[ing] and revers[ing] the trend toward species extinction,
8 whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Yet, the ESA was
9 intended not only "to forestall the extinction of the species (i.e., promote species survival),
10 but to allow a species to recover to the point where it may be delisted." *Gifford Pinchot*
11 *Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). To address
12 these concerns, the ESA requires federal agencies to adhere to certain procedural and
13 substantive requirements. *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir. 2006).
14 These duties are as follows:

15 1. Informal Consultation and Biological Assessment

16 "Procedurally, before initiating any action in an area that contains threatened or
17 endangered" land-based species, federal action agencies (in this instance, the Fort) must
18 informally consult with the appropriate consulting agency (in this instance, FWS) "to
19 determine the likely effects of any proposed action on the species and its critical habitat."
20 *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1051 (9th Cir. 2013). If a listed
21 species may be present in an action area, the action agency must create a Biological
22 Assessment. 16 U.S.C. § 1536(c)(1). The Biological Assessment is used to identify "any
23 endangered species or threatened species which is likely to be affected by such action," *id.*,
24 and to determine whether to engage in formal consultation, 50 C.F.R. § 402.12(k)(1). The
25 Biological Assessment may serve as the basis for a BiOp. 50 C.F.R. § 402.12(k)(2).

26 2. Formal Consultation and Biological Opinion

27 If an action agency finds that an action may affect a listed species or its habitat, the

28 ³ Unless otherwise noted, internal quotation marks and citations have been omitted when
quoting and citing authority throughout this Order.

1 action agency must typically initiate formal consultation with the appropriate consulting
2 agency. 50 C.F.R. § 402.14(a). The formal consultation process culminates in the
3 consulting agency's production of a BiOp that advises the action agency as to whether the
4 proposed action, either alone or in combination with other effects, would endanger the
5 existence of the listed species or adversely modify its habitat. *Conservation Cong.*, 720
6 F.3d at 1051 (citing 50 C.F.R. § 402.14(g)(4)). The BiOp must conclude whether the
7 agency's action jeopardizes the listed species; this is referred to as the "jeopardy" or "no
8 jeopardy" opinion. 50 C.F.R. § 402.14(h)(1)(iv). An action that jeopardizes a species is one
9 that "reduce[s] appreciably the likelihood of both the survival and recovery of a listed
10 species in the wild by reducing the reproduction, numbers, or distribution of that species."
11 50 C.F.R. § 402.02. The BiOp's "jeopardy" or "no jeopardy" opinion must be based on "the
12 best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R.
13 §§ 402.14(c), (h)(iv)(A)–(B). A BiOp is a final action that may be reviewed by the district
14 court. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

15 Substantively, Section 7 of the ESA imposes an independent and continuing
16 obligation upon action agencies to avoid actions that would jeopardize the existence of a
17 listed species or adversely modify its habitat. 16 U.S.C. § 1536(a)(2). Therefore, the action
18 agency cannot be relieved of its duty to adhere to the ESA simply through compliance with
19 the BiOp; it has an independent duty to ensure that its reliance is not arbitrary or capricious.
20 *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir.
21 1990) (determining that while consultation "satisfies procedural obligations," substantive
22 obligations cannot be met through reliance on the BiOp alone); *Wild Fish Conservancy v.*
23 *Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) ("Arbitrarily and capriciously relying on a faulty
24 Biological Opinion violates [the ESA Section 7] duty.").

25 To ensure compliance with the independent substantive duties created by Section 7,
26 action agencies like the Fort must reinitiate consultation if: (1) "new information reveals
27 effects of the action that may affect listed species or critical habitat in a manner or to an
28 extent not previously considered"; (2) the action considered in the BiOp is "subsequently
modified in a manner that causes an effect to the listed species or critical habitat that was

1 not considered in the BiOp"; (3) "a new species is listed or critical habitat designated that
2 may be affected by the identified action"; or (4) the injury to the species (a/k/a "take") is
3 greater than anticipated. 50 C.F.R. § 402.16(a)(1)–(4).

4 3. Species Proposed for Listing

5 When a species has been proposed for listing, but is not currently listed, the action
6 agency must "confer" with the consulting agency if an action would "likely jeopardize the
7 continued existence of any proposed species" or "result in the destruction or adverse
8 modification of [the] proposed critical habitat." 16 U.S.C. § 1536(a)(4); 50 C.F.R. §
9 402.10(c). If the action agency and consulting agency find that a conference is warranted,
10 the agencies may later enter into formal consultation. 50 C.F.R. §§ 402.10(c)–(d). After
11 conferring, the agencies issue a conference opinion. *Id.* The conference opinion "may be
12 adopted as the [BiOp] when the species is listed or critical habitat is designated, but only
13 if no significant new information is developed . . . and no significant changes to the Federal
14 action are made that would alter the content of the opinion." *Id.*

15 *b. District Court's Standard of Review*

16 A court may "set aside the agency decision if it is 'unsupported by substantial
17 evidence' or 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
18 with the law.'" *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). An
19 agency decision is arbitrary and capricious if the agency "has relied on factors which
20 Congress had not intended it to consider, entirely failed to consider an important aspect of
21 the problem, offered an explanation for its decision that runs counter to the evidence before
22 the agency, or is so implausible that it could not be ascribed to a difference in view or the
23 product of agency expertise." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551
24 U.S. 644, 658 (2007).

25 **II. FACTUAL AND PROCEDURAL HISTORY**

26 *a. 1999, 2002, and 2007 BiOps*

27 This is not the first time the effects of the Fort's actions on the groundwater along
28 the Upper San Pedro River Basin and the Babocomari River have been challenged. The
district court previously determined that FWS's 1999 BiOp—which found that the Fort's

1 groundwater pumping would not jeopardize the water umbel or the flycatcher—was
2 arbitrary and capricious. *Ctr. for Biological Diversity v. Rumsfeld* ("Rumsfeld"), 198 F.
3 Supp. 2d 1139, 1157 (D. Ariz. 2002). The court explained that the 1999 BiOp failed to
4 consider a relevant factor because it "refused to commit to any specific mitigation measures
5 related to its groundwater use or to balance water use on the base" *Id.*

6 In 2002, the Agencies issued a new BiOp that was challenged and resulted in
7 reinitiation of consultation and a subsequent BiOp in 2007. *Ctr. for Biological Diversity v.*
8 *Salazar*, 804 F. Supp. 2d 987, 994 (D. Ariz. 2011). But, in 2011, the district court again
9 found the 2007 BiOp was arbitrary and capricious because it did not (1) evaluate the effects
10 of the Fort's action on the listed species and habitat, (2) rationally link its findings to the
11 no jeopardy conclusion, (3) provide specific mitigation measures, and (4) show the
12 mitigation measures were likely to occur. *Id.* at 1010.

13 *b. 2013 Programmatic Biological Assessment*

14 Subsequent to the court's 2011 ruling, the Fort created a Programmatic Biological
15 Assessment ("PBA") that determined the Fort's actions would have no effect on the
16 flycatcher, may affect the Huachuca water umbel, and would benefit the cuckoo and
17 gartersnake. (ARMY000001.) The PBA evaluated the Fort's actions over a ten-year period,
18 from 2014 to March 2024, and considered the effects of the Fort's actions through 2030.
19 (FWS004630; FWS004764.) The Agencies then reinitiated formal consultation.
20 (ARMY000001–0674.)

21 *c. 2014 BiOp*

22 The formal consultation ended when the instant BiOp was issued in March 2014.
23 (FWS04609–05022.) The 2014 BiOp adopted information from the PBA, including a
24 USGS Groundwater Model and a Groundwater Demand Accounting. (ARMY000555–
25 587; ARMY000653–660.) FWS also included a Conference Opinion for the gartersnake
26 and billed cuckoo. (FWS004860–887; FWS4888.)

27 *i. USGS Groundwater Model*

28 The USGS Groundwater Model assessed groundwater levels both with and without
the Fort's action, and then evaluated the impact the Fort's actions would have on baseflows

1 in the San Pedro River Valley. (FWS004763–765.) The model assumed the Fort's
2 groundwater pumping would remain constant from 2011 to 2030. (ARMY000575–576.) It
3 predicted that the Fort's actions would result in a positive effect on the net regional
4 groundwater component of baseflow in the Upper San Pedro River. (FWS004763;
5 FWS004776–778.) This groundwater surplus did not account for the water savings
6 produced from the Fort's easement purchases. (FWS004763.) FWS determined the
7 Groundwater Model constituted the best available evidence upon which to base the effect
8 of groundwater pumping on baseflows in the San Pedro River Basin. (FWS004765.)

9 ii. Groundwater Demand Accounting

10 Also included in the PBA and adopted in part by the 2014 BiOp, the Groundwater
11 Demand Accounting considered groundwater withdrawals, water consumption attributable
12 to the Fort, and mitigation measures—including easement purchases. (ARMY000653–
13 660.) Like the USGS Groundwater Model, the Groundwater Demand also found the Fort's
14 actions would result in water savings through 2022. (FWS004774–775.)

15 Therefore—based on the findings in the PBA, the USGS Groundwater Model, and
16 the Groundwater Demand Accounting—the 2014 BiOp concluded that the Fort's actions
17 would result in a groundwater surplus and that the Fort's conservation measures would
18 increase baseflows through 2030. (FWS004775–776; FWS004763–764; FWS004771.) As
19 before, FWS limited its assessment of the Fort's actions to a ten-year period (through 2024)
20 and measured changes through 2030, but it determined it could not predict operations
21 further into the future because "there would be significant uncertainty in predicting federal
22 government programs due to federal fiscal laws, the nature of the budget process, and
23 uncertainty of mission requirements." (FWS004630.)

24 As a result, the 2014 BiOp concluded the Fort's action was not likely to affect the
25 water umbel or adversely modify its habitat. (FWS004334.) In addition, two Conference
26 Opinions in the BiOp determined the Fort's groundwater pumping would not jeopardize
27 the then-unlisted gartersnake, (FWS004860–887; FWS004449) or the cuckoo,
28 (FWS004888–922; FWS004494), or adversely modify the proposed critical habitat of the
gartersnake, (FWS004882.) FWS released a revised BiOp on May 16, 2014.

1 (FWS004609.)

2 Since the release of the revised 2014 BiOp, the northern Mexican gartersnake was
3 listed as threatened, 79 Fed. Reg. 38,678 (July 8, 2014), and later the yellow-billed cuckoo,
4 79 Fed. Reg. 59,992 (Oct. 3, 2014).⁴

5 **III. MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

6 As a preliminary matter, Plaintiffs' Motion to Supplement seeks an order permitting
7 the expansion of the AR to include five documents: (1) an Easement Report ("ER") (Doc.
8 19-1); (2) an Arizona Republic Article ("AzRA") (Doc. 19-3); (3) a Cochise Conservation
9 and Recharge Network ("CCRN") Presentation (Doc. 19-4); (4) a Climate Science Report
10 (Doc. 19-5); and (5) the Prucha Hydrology Report (Doc. 19-6). Plaintiffs believe the
11 documents show that the Agencies ignored relevant information when coming to their no
12 jeopardy conclusion and when they refused to reinitiate consultation. (Doc. 24 at 18–19.)
13 Specifically, Plaintiffs believe the excluded documents demonstrate that the Fort's
14 conclusion that it had "retired" an actual water use through the purchase of the PPF
15 easement was illusory. (*See generally* Doc. 18 at 39–42.) The illusory savings, Plaintiffs
16 contend, make the "no jeopardy" finding in the 2014 BiOp arbitrary and capricious. (*Id.* at
17 32, 41, 45.)

18 *a. Standard of Review*

19 The district court's review in ESA litigation is limited to "the administrative record
20 already in existence, not some new record made initially in the reviewing court." *Camp v.*
21 *Pitts*, 411 U.S. 138, 142 (1973). "The whole administrative record . . . consists of all
22 documents and materials directly or indirectly considered by agency decision-makers and
23 includes evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555.
24 Correspondingly, "[c]ourts . . . may grant a motion to complete the administrative record
25 where the agency has not submitted the 'whole' record." *Id.*

26 A court starts with the presumption that the administrative record is complete. *Ctr.*

27 _____
28 ⁴ Both the umbel and the flycatcher were listed as endangered species prior to the
formulation of the 2014 BiOp. 62 Fed. Reg. 665 (Jan. 6, 1997) (umbel), 60 Fed. Reg. 10695
(Feb. 27, 1995) (flycatcher).

1 *for Biological Diversity v. Wolf*, 447 F. Supp. 3d 965, 973 (D. Ariz. 2020). To rebut this
2 presumption, a plaintiff must present clear evidence that identifies the proposed documents
3 with specificity and "non-speculative" reasons why plaintiff believes the agency
4 considered but did not include the documents in the AR. *Oceana, Inc. v. Pritzker ("Oceana*
5 *I")*, No. 16-cv-06784-LHK (SVK), 2017 WL 2670733, at *2 (N.D. Cal. June 21, 2017).
6 However, a court need not consider extra-record evidence when there is no showing that
7 the court must look beyond the AR to determine whether the agency ignored relevant
8 information. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988), *amended*,
9 867 F.2d 1244 (9th Cir. 1989).

10 A court's review of extra-record evidence is limited to instances when (1) the
11 evidence is necessary to decide "whether the agency has considered all the relevant factors
12 and has explained its decision," (2) an "agency has relied on documents not in the record,"
13 (3) consideration "explain[s] technical terms or complex subject matter," or (4) plaintiffs
14 show an agency acted in bad faith. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir.
15 2005). "[T]he 'relevant factors' exception only applies when Federal Defendants fail to
16 consider a general subject matter that is demonstrably relevant to the outcome of the
17 agency's decision, not when specific hypotheses and/or conclusions are omitted from
18 consideration." *In re Delta Smelt Consol. Cases*, No. 1:09-CV-1053 OWW DLB, 2010 WL
19 2520946, at *5 (E.D. Cal. June 21, 2010). "[A] plaintiff must establish more than just that
20 the [extra-record] document is relevant. In fact, the document in question must do more
21 than raise 'nuanced points' about a particular issue; it must point out an 'entirely new'
22 general subject matter that the defendant agency failed to consider." *Pinnacle Armor, Inc.*
23 *v. United States*, 923 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013).

24 *b. Easement Report ("ER")*

25 First, Plaintiffs assert that prior to the 2014 BiOp, the Agencies used the October
26 22, 2013 ER to develop the Fort's November 2013 PBA of future Fort activities. (Doc. 24
27 at 12–14.) The ER informed the Agencies that irrigation on the PPF easement ceased in
28 2006 and the center pivots that distributed water were no longer in working order. (*Id.* at
12.) Plaintiffs argue Defendants considered the ER because it was disclosed as part of

1 Plaintiffs' FOIA request and on November 20, 2013, the ER was emailed to Daniel Haws,
2 the Fort's attorney and the overseer of the Fort's PPF easement water savings determination.
3 (*Id.* at 9, n.4.)

4 Defendants agree that the Court may take judicial notice of the ER because it is a
5 public record and is incorporated by reference as an exhibit to the Deed of Perpetual
6 Conservation Easement for the PPF property. (Doc. 27 at 9–10.) But, Plaintiffs ask that if
7 the Court considers the ER, that it also consider the Deed of Perpetual Conservation
8 Easement for the PPF and the North Dakota State University article *Selecting a Sprinkler*
9 *Irrigation System*. (*Id.* at 9 (citing Docs. 26-3, 26-4).) Plaintiffs do not object to the
10 inclusion of the deed and the article. (*See* Doc. 29 at 7, n.7.)

11 Defendants further contend that the ER cannot be used to complete the AR for
12 Plaintiffs' ESA claims or for any challenge to the Army's PBA because Plaintiffs have not
13 shown the Agencies considered the ER when calculating groundwater demand for the PBA.
14 (Doc. 27 at 11.) In support, Defendants note that the ER was emailed on November 20—
15 the same day the deed for the PPF easement was recorded. (*Id.*) By that date, the Agencies
16 had already calculated the overall water savings for retiring the PPF easement as 2,588
17 APY. (*Id.*) By November 25, the Army had sent the PBA to FWS along with a request to
18 reinitiate consultation. (*Id.* at 12.) So, Defendant argues, the ER was post-decisional, was
19 not considered by the Agencies, and should not be part of the AR. (*Id.*) Defendants state
20 that even if Plaintiffs have shown Defendants possessed the ER, they did not show that the
21 ER was considered in the calculation of groundwater savings. (*Id.*)

22 Plaintiffs reply that the ER is not post-decisional because it was given to the
23 Agencies six months before the May 16, 2014 BiOp was issued, prior to the completion of
24 the Section 7 consultation process. (Doc. 29 at 4.) Moreover, Plaintiffs assert the Deed for
25 the PPF easement was considered by the Agencies, and the ER is incorporated by reference
26 through the Deed, so it follows that the ER should be included in the AR. (*Id.*) Defendants'
27 choice to ultimately disregard the ER does not prevent it from being included in the record,
28 Plaintiffs contend. (*Id.*) Plaintiffs believe the ER shows that FWS ignored "the fact that
irrigation was almost certain not to occur again" prior to the purchase of the easement

1 because the pivots had been removed. (*Id.* at 5.)

2 Despite this fact, Defendants counter that the ER does not undermine the Agencies'
3 (1) contention that the historical use of the PPF was agricultural, and (2) determination of
4 the water savings attributed to the PPF purchase. (Doc. 27 at 13.)

5 "Federal Rule of Evidence 201 permits a court to take judicial notice of facts not
6 subject to reasonable dispute that 'can be accurately and readily determined from sources
7 whose accuracy cannot reasonably be questioned.'" *Friends of the Clearwater v. Higgins*,
8 523 F. Supp. 3d 1213, 1222 (D. Idaho 2021). In addition, "material considered, but then
9 discounted or otherwise not relied upon, is part of the record." *Oceana, Inc. v. Pritzker*
10 ("*Oceana II*"), No. 16-cv-06784-LHK (SVK), 2017 WL 2670733, at *5 (N.D. Cal. June
11 21, 2017).

12 Plaintiffs present non-speculative evidence that the ER was relevant and that the
13 Agencies considered it, but even if they had not, the Court may take judicial notice of the
14 ER. The ER suggests the irrigation system was not functioning at the time of the PPF
15 easement purchase. This is a relevant factor because it weighs against the likelihood of the
16 PPF being used for irrigation in the future and FWS's ability to use any purported water
17 savings for the no jeopardy analysis. Furthermore, the 2014 BiOp states that the "entire
18 irrigation infrastructure remain[ed] in place, and nothing precluded the current or future
19 landowners from irrigating the land." (FWS004639; FWS001609.) The ER contradicts this
20 assertion. Moreover, because the ER was incorporated by reference into the Deed for
21 Perpetual Conservation Easement for the PPF, and the easement purchase provided the
22 basis for the Agencies to claim a groundwater surplus, the Court finds that the Fort
23 considered the ER, at least indirectly. Plaintiffs have met the requirements for
24 supplementing the AR. In addition, with no objection from Plaintiffs, the Court considers
25 Defendants' Deed of Perpetual Conservation Easement for the PPF and the North Dakota
26 State University article *Selecting a Sprinkler Irrigation System*.

27 After considering the ER, however, the Court finds that it supports the Defendants'
28 position that the Fort's purchase of the PPF easement retired a groundwater use. It is true
the ER indicates irrigation ceased in 2006 and the pivots were not functional at the time.

1 (Doc. 19-1 at 3, 5.) But the ER also states that three agricultural irrigation wells *could still*
2 *be used* for irrigation and that the property was being leased for agricultural purposes. (*Id.*
3 at 3.) In addition, the *Selecting a Sprinkler Irrigation System* article shows the costs related
4 to repairing sprinkler irrigation systems, supporting Defendants' contention that even with
5 broken pivots, the easement could have been repaired and used for agricultural irrigation.
6 (Doc. 26-4 at 4.) On the whole, the ER suggests that although the easement was not
7 currently being used in such a manner, it was not yet "retired" and could plausibly have
8 been fixed and used for agricultural irrigation in the future. Thus, the Court incorporates
9 the ER into the AR but finds it does not undermine the Fort's conclusions.

10 *c. Arizona Republic Article ("AzRA")*

11 The AzRA is a news story indicating that the real estate listing for the PPF easement
12 was zoned for residential use. (Doc. 19-3 at 3.) Plaintiffs allege the AzRA quoted FWS and
13 the Fort, demonstrating that the document "passed before the eyes" of the Agencies and
14 should be included in the AR. (Doc. 24 at 14.)

15 Like they claim with the ER, Defendants claim there is no evidence suggesting they
16 reviewed the AzRA. (Doc. 27 at 13.) This article, they state, was released in September
17 2007, shortly after the 2007 BiOp, not during the consideration of the 2014 BiOp. (*Id.*) In
18 addition, they assert that just because the author spoke to someone in public relations that
19 does not mean that the Agencies' decisionmakers knew of or considered this article. (*Id.* at
20 14.) Moreover, Defendants claim the article's assertions are double hearsay and not
21 admissible. (*Id.*) Finally, Defendants believe the AzRA could be construed as sales puffery,
22 a way to promote the property in an attempt to sell it. (*Id.*) Sales puffery does not convert
23 the easement from what it was originally used for (agricultural irrigation) to residential use,
24 Defendants claim. (*Id.*) Thus, Defendants assert the AzRA does not undermine FWS's
25 conclusion that purchasing the PPF easement stopped a potential agricultural groundwater
26 use. (*Id.*)

27 The administrative record includes documents which the decisionmaker reviewed
28 as well as "documents that were considered and relied upon by subordinates who provided
recommendations to the decision-maker." *Regents of Univ. of Calif. v. U.S. Dep't of*

1 *Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324, at *2 (N.D. Cal. Oct. 17, 2017).

2 The Court finds that Plaintiffs have not shown Defendants considered the AzRA
3 when formulating the 2014 BiOp. Plaintiffs simply say that Defendants' representatives
4 commented in this article but do not indicate that these alleged representatives had any role
5 in the creation of the 2014 BiOp or the Fort's evaluation of groundwater savings. Moreover,
6 the long length of time between the publication of the article in 2007 and the 2014 BiOp
7 weighs against concluding that the Agencies reviewed the AzRA when developing the
8 2014 BiOp. Therefore, Plaintiffs have not provided clear, non-speculative evidence that
9 the Agencies considered this article.

10 While the AzRA stated that the PPF easement was listed and marketed for
11 residential development, this does not undermine Defendants' assertion that the PPF
12 easement's prior use was agricultural, or that the purchase eliminated the possibility the
13 easement could be used for agricultural purposes in the future. Because the property was
14 ultimately converted to the PPF easement, the AzRA is not definitive evidence of future
15 use of the land, nor does it undermine Defendants' analysis that the historic use was for
16 agricultural purposes. Therefore, Plaintiffs have not shown the AzRA was relevant to
17 Defendants' determination that the purchase of the easement halted agricultural use
18 indefinitely. Thus, the Court will not supplement the AR with the AzRA article.

19 *d. CCRN Presentation, Climate Science Report, and Prucha Hydrology Report*

20 Plaintiffs claim on December 3, 2020 they provided the Agencies—and the
21 Agencies acknowledged receipt of—three new studies showing the adverse impact of the
22 Fort's groundwater pumping. (Doc. 24 at 15.) At that time, Plaintiffs asked to reinitiate a
23 Section 7(a)(2) consultation based on this new evidence and gave notice of their intent to
24 file a citizen's suit. (*Id.*) Plaintiffs claim Defendants refused, giving rise to Plaintiffs'
25 seventh and ninth causes of action alleging the Agencies violated their Section 7
26 substantive duty by failing to reinitiate consultation. (Doc. 1 at 47–51.) Plaintiffs believe
27 the documents should be included in the AR because the Agencies considered and
28 possessed these documents when they refused to reinitiate consultation. (*Id.*) Moreover,
Plaintiffs assert Defendants cannot ignore a request for reinitiation of consultation simply

1 by leaving evidence out of the AR, and these documents show there was new information
2 that mandated a new consultation. (*Id.* at 16.)

3 Defendants respond that these studies should not be part of the AR because Plaintiffs
4 cannot challenge the conclusions in an ESA consultation simply by presenting post-
5 decisional evidence. (Doc. 27 at 14.) Defendants believe that permitting this post-
6 decisional evidence would allow Plaintiffs to create their own AR by mailing a demand
7 letter and including their preferred AR documents on the eve of litigation. (*Id.* at 15.) More
8 pointedly, Defendants claim they did not refuse to reinitiate consultation and had planned
9 to begin consultation in 2021 in preparation of a new Biological Assessment. (*Id.*)

10 Plaintiffs reply that they do not submit these documents to support their claims that
11 the 2014 BiOp is arbitrary and capricious. (Doc. 29 at 8.) Rather, they are to show that new
12 information required reinitiation of consultation, thus they are not post-decisional. (*Id.* at
13 9.) Plaintiffs also state Defendants reference the documents in their response to the notice
14 of intent to sue, and that the reference precludes the argument that the studies should be
15 excluded from the AR. (*Id.*)

16 An ESA citizen-suit claim allows private persons to "commence a civil suit" against
17 a governmental agency for failure to perform any non-discretionary act or duty. 16 U.S.C.
18 § 1540(g)(1)(C). As previously stated, Section 7 of the ESA creates a substantive duty to
19 "insure that any action authorized, funded, or carried out by such agency . . . is not likely
20 to jeopardize" the existence of the species or adversely modify its habitat. 16 U.S.C. §
21 1536(a)(2). However, an action agency "may not rely solely on a[n] FWS [BiOp] to
22 establish conclusively its compliance with its substantive obligations." *Pyramid Lake*
23 *Paiute Tribe of Indians*, 898 F.2d at 1415. To comply, the consulting and action agencies
24 must reinitiate consultation when "new information reveals effects of the action that may
25 affect listed species or critical habitat in a manner or to an extent not previously
26 considered." 50 C.F.R. §§ 402.16(b), (d).

27 In general, agency decisions under the ESA are governed by the Administrative
28 Procedure Act ("APA"). *Good Samaritan Hosp., Corvallis v. Mathews*, 609 F.2d 949, 951
(9th Cir. 1979) (citing 5 U.S.C. § 706(2)). Under the APA, post-decisional documents are

1 not included in the AR. *Friends of the Clearwater*, 523 F. Supp. 3d at 1222 ("post-decision
2 information cannot be used to challenge the merits of the agency's decision"). However,
3 the APA only applies where there is "no other adequate remedy in a court." 5 U.S.C. § 704.
4 Because an ESA citizen-suit provides a private remedy by statute, the APA is not
5 applicable when determining the scope of the court's review. *Washington Toxics Coal. v.*
6 *Envntl. Prot. Agency*, 413 F.3d 1024, 1034 (9th Cir. 2005); *W. Watersheds Project v.*
7 *Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011) ("because the ESA provides a citizen suit
8 remedy—the APA does not apply in such actions"). In a citizen-suit, the court "may
9 consider evidence outside the administrative record for the limited purposes of reviewing
10 Plaintiffs' ESA claim." *W. Watersheds Project*, 632 F.3d at 497; *Wildearth Guardians v.*
11 *U.S. Fed. Emergency Mgmt. Agency*, No. CV 10-863-PHX-MHM, 2011 WL 905656, at *3
12 (D. Ariz. Mar. 15, 2011). Under these circumstances, the court has discretion to permit
13 supplementation for the purpose of the ESA citizen suit, *id.* (citing *San Francisco*
14 *Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002)), and may consider post-
15 decisional information if it encompasses "evidence that is relevant to the question of
16 whether relief should be granted," *Wildearth Guardians v. U.S. Fed. Emergency Mgmt.*
17 *Agency*, No. CV 10-863-PHX-MHM, 2011 WL 905656, at *3 (D. Ariz. March 15, 2011).
18 However, "because the [post-decisional] evidence is not part of the record, it must be
19 otherwise admissible." *Friends of the Clearwater*, 523 F. Supp. 3d at 1222; *Orr v. Bank of*
20 *Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

21 Plaintiffs conveyed the proposed documents several years after the release of the
22 2014 BiOp. The documents, therefore, should not supplement the AR for the purpose of
23 considering the merits of Plaintiffs' challenge to the 2014 BiOp. However, Plaintiffs
24 present the proposed documents to demonstrate that the Agencies violated the ESA by
25 erroneously refusing to reinstate consultation after receiving the information contained in
26 the documents and the notice of intent to sue. It is impossible to determine whether the
27 reinstitution of consultation was necessary without considering the documents. Therefore,
28 the Court will allow the AR to be supplemented with the three documents.

In summary, the Court supplements the AR with the ER, the Deed of Perpetual

1 Conservation Easement for the PPF, and the North Dakota State University article entitled
2 *Selecting a Sprinkler Irrigation System*. It also supplements the AR with the CCRN
3 Presentation, Climate Science Report, and Prucha Hydrology Report for the sole purpose
4 of considering Plaintiffs' allegation that Defendants violated their substantive duty when
5 they refused to reinitiate Section 7 consultation. The Court will not, however, include the
6 AzRA in the AR.

7 **IV. MOTION FOR SUMMARY JUDGMENT**

8 *a. Standard of Review*

9 "Summary judgment is a particularly appropriate tool for resolving claims
10 challenging agency action." *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1215
11 (D. Mont. 2010). When the facts are undisputed, upon summary judgment, a court must
12 "determine whether or not as a matter of law the evidence in the administrative record
13 permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d
14 766, 769 (9th Cir. 1985). The Court finds the AR establishes the facts necessary for judicial
15 review, and it may render an opinion as a matter of law.

16 *b. Administrative Procedure Act ("APA")*

17 Agency decisions under the ESA are governed by the APA, and for summary
18 judgment, "[t]he review is not a determination of whether there is any genuine issue as to
19 any material fact . . . , but rather whether the agency action was arbitrary, capricious, an
20 abuse of discretion, not in accordance with law, or unsupported by substantial evidence on
21 the record taken as a whole." *Good Samaritan Hosp., Corvallis*, 609 F.2d at 951 (citing 5
22 U.S.C. § 706(2)).

23 "Review under the arbitrary and capricious standard is deferential" *Nat'l Ass'n*
24 *of Home Builders*, 551 U.S. at 658. The reviewing court's "role is simply to ensure that the
25 [agency] made no 'clear error of judgment' that would render its action 'arbitrary and
26 capricious.'" *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc),
27 *overruled on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). A
28 decision is not arbitrary and capricious when "a rational connection [exists] between facts
found and conclusions made by the defendant agencies." *Conservation Cong. v. Finley*,

1 774 F.3d 611, 617 (9th Cir. 2014). Accordingly, a reviewing court should "not vacate an
2 agency's decision unless" the agency (1) "has relied on factors which Congress had not
3 intended it to consider," (2) ignored "an important aspect of the problem," (3) explained its
4 decision with no evidence, or (4) provided an explanation that "is so implausible that it
5 could not be ascribed to a difference in view or the product of agency expertise." *Nat'l*
6 *Ass'n of Home Builders*, 551 U.S. at 658 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*
7 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

8 If the court finds the record is insufficient to support the agency's action, "the proper
9 course, except in rare circumstances, is to remand to the agency for additional investigation
10 or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

11 *c. GeoSystems Report*

12 FWS's no jeopardy determination relied upon the USGS Groundwater Model's
13 simulation of the effects on baseflows through 2030 and on a Groundwater Demand
14 Accounting. (ARMY000555–587; ARMY000653–660.) FWS considered the
15 Groundwater Model the best available evidence for evaluating "future baseflow
16 conditions." (FWS004682.) Plaintiffs disagree, contending that two other reports provided
17 the best available evidence of the effect of groundwater pumping on the water levels along
18 the San Pedro River: the Geosystems Report and the Lacher Report. (Doc. 18 at 35.)
19 Plaintiffs believe the Agencies' failure to consider these models violated the ESA. (*Id.* at
20 34.)

21 The GeoSystems Report was prepared for the Fort by an independent hydrology
22 firm, GeoSystems Analysis, Inc., based on the USGS Groundwater Model. (FWS022558.)
23 The GeoSystems Report considered baseflows in the San Pedro River Basin, anticipating
24 that the Fort's groundwater pumping would continue at the same rate through 2105.
25 (FWS022555–556; FWS022558.) It assessed baseflow declines from the Fort's action at
26 three intervals: 2003, 2050, and 2105. (FWS022575.) The GeoSystems Report anticipated
27 that peak declines should occur in 2050, wherein two areas of the San Pedro and
28 Babocomari rivers will be pumped dry. (FWS022580.)

Plaintiffs contend FWS turned a blind eye to the effects occurring after 2030,

1 truncating its analysis so that FWS could claim the Fort's groundwater pumping had a
2 positive impact. (Doc. 18 at 35.) Plaintiffs believe the Agencies could not ignore the
3 GeoSystems Report's conclusion that the results of the Fort's action are delayed, causing
4 "peak impacts to stream flows 25 years later—that is, in 2050." (Doc. 28 at 22.) And so,
5 Plaintiffs claim that by limiting the assessment to 2030, FWS ignored the lag time between
6 groundwater pumping and the resultant baseflow declines. (Doc. 18 at 35–36.) Moreover,
7 Plaintiffs claim the Agencies cannot unreasonably assume there would be no pumping after
8 2030. (Doc. 28 at 22.) Furthermore, Plaintiffs claim that by limiting the analysis to 2030,
9 the Agencies have violated their state statutory duty to ensure water can be utilized "for at
10 least one hundred years." (*Id.* at 22, n.8 (citing A.R.S. § 45-576(L)(1)).) Therefore,
11 Plaintiffs assert FWS overlooked an important aspect of the problem, and the Agencies
12 conclusions did not rationally relate to the best available data, violating the ESA.

13 Defendants counter the Fort did, in fact, consider the GeoSystems Report in the
14 Groundwater Modeling analyses for the PBA and adopted the relevant and reliable
15 portions. (Doc. 25 at 18–19.) However, FWS claims it adopted the Army's Groundwater
16 Modeling as the best scientific evidence available because there were flaws in the
17 GeoSystems Report. (*Id.* at 17–18.) The Fort disagreed with the population growth
18 estimates—the GeoSystems Report assumed that the Fort's population growth would
19 steadily increase, but this projection was "demonstrably inaccurate." (*Id.* at 19, 22.)
20 Similarly, the GeoSystems Report anticipated ever-increasing pumping, but the Agencies
21 note that even the GeoSystems Report admits it likely overstated pumping and the effect
22 on baseflow. (*Id.* at 19–21.) Instead, the Fort utilized a constant value. (*Id.* at 19, 22.) In
23 addition, the Agencies state that they did consider the lag time between pumping and its
24 effect on groundwater levels by extending their analysis beyond the ten-year action period,
25 adding six years. (*Id.* at 25.) Moreover, Defendants note that the agency action under
26 consideration in the 2014 BiOp was the Fort's groundwater pumping until 2024, and
27 estimating baseflow beyond 2030 extends beyond an action that is reasonably certain to
28 occur because of the "uncertainty in predicting government programs, budgets, and
missions" (*Id.* at 21–22.) Finally, under Section 321 of the Defense Authorization Act

1 of 2004, the Fort cannot be liable for the water consumption not attributable to the Fort,
2 and the GeoSystems Report's overestimation of the amount of groundwater pumping
3 makes the Fort accountable for non-Fort water consumption. (*Id.* at 23.) Plaintiffs'
4 argument is a mere disagreement with the Agencies' conclusions, the Agencies claim, but
5 does not constitute an ESA violation. (*Id.* at 23.)

6 To come to a no jeopardy conclusion, agencies must use "the best scientific and
7 commercial data available." 16 U.S.C. § 1536(a)(2). An agency cannot "disregard[]
8 available scientific evidence that is in some way better than the evidence [it] relies on."
9 *Native Ecosystems Council v. Marten*, 883 F.3d 783, 791 (9th Cir. 2018). However, the
10 court must "conduct a particularly deferential review of an agency's predictive judgments
11 about areas that are within the agency's field of discretion and expertise . . . as long as they
12 are reasonable." *Lands Council*, 537 F.3d at 993; *Forest Guardians v. U.S. Forest Serv.*
13 (*FG v. USGS*), 329 F.3d 1089, 1099 (9th Cir. 2003). A court may not "substitute [its]
14 judgment for the agency's in determining which scientific data to credit, so long as the
15 [agency's] conclusion is supported by adequate and reliable data." *Conservation Cong.*,
16 774 F.3d at 620. Courts can "reject an agency's choice of a scientific model only when the
17 model bears no rational relationship to the characteristics of the data to which it is applied."
18 *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014).

19 Here, FWS chose to rely upon the USGS Groundwater Model over the GeoSystems
20 Report as the best available evidence. The Agencies acknowledged—but ultimately
21 disregarded—parts of the GeoSystems Report. FWS provided cogent reasons for doing so:
22 (1) the Fort was unable to accurately predict its actions beyond 2024, and so the
23 GeoSystems Report's assumption of the Fort's groundwater use beyond 2030 was too
24 speculative; (2) the GeoSystems Report made a faulty assumption that the Fort's population
25 would steadily increase; (3) the population estimate resulted in groundwater use not
26 attributable to the Fort; and (4) the calculations in 2050 and 2105 extended the effects of
27 the Fort's actions beyond the time that the actions were reasonably certain to occur.

28 First, there was no requirement under the ESA that FWS assess the actions of the
Fort beyond ten years, and previous BiOps have similarly limited timeframes. *See Ctr. for*

1 *Biological Diversity*, 804 F. Supp. 2d at 994 ("Under the ESA, FWS must *evaluate the*
2 *impacts of the entire agency action*, which include the Fort's operations *from 2006 to*
3 *2016.*") (emphasis added); *see also Rumsfeld*, 198 F. Supp. 2d at 1147 (biological
4 assessment evaluated the Fort's actions for a ten-year period); *Oceana II*, 125 F. Supp. 3d
5 at 247 (limiting BiOp term to ten years); *see* Interagency Cooperation–Endangered Species
6 Act of 1973, 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (the effects of an agency's action
7 "will involve consideration of the present environment . . . as well as the environment that
8 will exist *when the action is completed . . .*").

9 Second, "[a] consequence [of an agency's action] is caused by the proposed action
10 if it would not occur but for the proposed action and *it is reasonably certain to occur.*" 50
11 C.F.R. § 402.02(d) (emphasis added). While groundwater pumping is likely to continue, it
12 is unclear from the data to what extent. In addition, FWS observed that the GeoSystems
13 Report did not have reliable data about either population growth or water usage. FWS's
14 conclusion that the GeoSystems's estimate was inaccurate was rational, as was FWS's
15 reliance on the USGS Groundwater Model. Although some amount of groundwater
16 pumping is likely to occur beyond 2030, Plaintiffs have not shown that the GeoSystems
17 Report provides superior scientific data such that FWS was required to utilize it as the best
18 available evidence.

19 Next, Plaintiffs claim the ten-year limit violates state statute, but do not explain how
20 the statute creates a duty to consider effects for one-hundred years in an ESA claim. The
21 agency must consider impacts on the environment during the action, 51 Fed. Reg. 19,932,
22 and FWS has considered six years beyond when the Fort's action is reasonably certain to
23 occur.

24 In addition, Section 321 of the Defense Authorization Act of 2004 limits the Fort's
25 Section 7 responsibility for water consumption, stating that water use "that is not the direct
26 or indirect effect of the agency action . . . shall not be considered in determining whether
27 such agency action is likely to jeopardize the continued existence of any endangered or
28 threatened species" National Defense Authorization Act for Fiscal Year 2004, Pub. L.
No. § 108-136, 117 Stat. 1392, 1437 (2004). Because the GeoSystems Report

1 overestimated the population, it made the Fort accountable for non-Fort water use. FWS
2 reasonably decided that this projection was not reliable and was not the best available
3 evidence.

4 In sum, the Agencies did not disregard the best available evidence. Rather, the
5 Agencies considered the studies and determined that the USGS Groundwater Model
6 constituted the best available evidence. This is a reasonable analysis, and the Court gives
7 deference to this decision.

8 *d. Lacher 2011 Report*

9 The second report Plaintiffs believe constitutes the best available evidence is a study
10 performed by Dr. Laurel Lacher ("Lacher Study"). The Lacher Study was also based in
11 part on the USGS Groundwater Model. Plaintiffs claim Defendants did not consider the
12 Lacher Study's negative calculations of surface flows in 2050, and conveniently only
13 disclosed the earlier 2003 and 2030 measurements, which show "positive impacts" on the
14 San Pedro River Basin. (Doc. 18 at 35.) As with the GeoSystems Report, Plaintiffs claim
15 FWS's disregard of Lacher's assessment of the effects of groundwater pumping past 2030
16 ignores the fact that there is a "time lag between groundwater pumping and the subsequent
17 effects on stream flows," which only becomes apparent when considering a longer timeline
18 than utilized in the USGS Groundwater Model. (*Id.* at 35.)

19 Defendants note that the Lacher Study was flawed from the beginning; it assumed
20 an increase in population that "proved to be eight percent higher than the actual population
21 in 2010." (Doc. 25 at 22.) The Lacher Study is therefore provably inaccurate because data
22 provided during consultation showed "a decline in Fort-attributable water demand." (*Id.* at
23 22–23.) Defendants state the Lacher Study is also flawed because it assumes the Fort's
24 groundwater pumping will continue to increase through 2105. (*Id.* at 21.)

25 Defendants reiterate that the 2014 BiOp only assessed the Fort's actions up until
26 2024 because of the inability to anticipate federal programs, budgeting, and mission
27 requirements. (*Id.* at 13.) Defendants again claim the ten-year time frame is reasonable and
28 consistently used to evaluate the effects of an agency's actions. (*Id.* at 22.) In addition, the
Agencies state that they did consider lag time by extending their analysis to 2030. (*Id.* at

1 25.) Nevertheless, despite the Lacher Study's deficiencies, Defendants claim they evaluated
2 it and explained how they used the information. (*Id.* at 23.)

3 A consequence [of an agency's action] is caused by the proposed action if it would
4 not occur but for the proposed action and *it is reasonably certain to occur*. 50 C.F.R. §
5 402.02(d) (emphasis added). In addition, Section 321 limits the Fort's Section 7
6 responsibility for water consumption to preclude water use "that is not the direct or indirect
7 effect of the agency action." Pub. L. No. 108-136, 117 Stat 1392, 1437 (2004).

8 Like the GeoSystems Report, the Agencies considered the Lacher Study, noted its
9 weaknesses, and decided not to adopt the study's conclusions beyond 2030 because it
10 overestimated the Fort's population, resulting in an overestimation of the Fort's
11 groundwater use. Moreover, Defendants reasonably found that to evaluate an agency's
12 action beyond ten years made the data unreliable and the Fort could not foresee that the
13 current action would be reasonably certain to occur beyond 2024. The district court has
14 previously found ten years is an acceptable time for determining the effects of groundwater
15 pumping. *See Ctr. for Biological Diversity*, 804 F. Supp. 2d at 994; *Rumsfeld*, 198 F. Supp.
16 2d at 1147; *Oceana II*, 125 F. Supp. 3d at 247. The Court finds that the 2014 BiOp
17 acknowledged the Lacher Study, noted its weaknesses, and assessed the applicable affects
18 during the applicable time. The Court cannot find that this analysis was arbitrary and
19 capricious. The 2014 BiOp's conclusions are supported by adequate and reliable data
20 during the ten-year evaluation period and Defendants have rationally explained why the
21 Lacher Study's conclusions were unreliable and did not constitute the best available
22 evidence.

23 *e. Babocomari River Assessment to 2053*

24 Plaintiffs next say that Defendants inexplicably abandoned their rationale for
25 limiting the effects to 2030 when they used a 50-year timeline to evaluate the effects on
26 the Babocomari River. (Doc. 18 at 37.) This inconsistency fails to utilize the best available
27 evidence and is arbitrary and capricious, Plaintiffs argue. (*Id.* at 36–37.) FWS responds
28 that the 50-year estimate was not drawn from the GeoSystems Report or the Lacher Study,
but rather from Leake et al. (2008). (Doc. 25 at 25–26.) Defendants contend that Leake

1 included effects of the Fort's groundwater pumping based on "simulated groundwater
2 conditions from 1902 through 2003," and not a prospective analysis of future use. (*Id.* at
3 26.) FWS reasoned that the timelines in the data available were inconsistent, and the Leake
4 data was used to estimate the effects of conservation easements on stream discharge in the
5 Babocomari River because the Groundwater Modeling did not do so. (*Id.*)

6 Where an agency's conclusions are supported by "adequate and reliable data," and
7 the agency "considers all relevant data," a court must defer to the agency's judgment, "even
8 when it is imperfect, weak, and not necessarily dispositive." *Conservation Cong.*, 774 F.3d
9 at 620. Moreover, "the mere fact that the [agency] might have adopted 'internally
10 inconsistent' positions throughout the decision-making process d[oes] not render the [the
11 agency's] final decision arbitrary and capricious." *Nw. Coal. for Alternatives to Pesticides*
12 *v. U.S. E.P.A.*, 544 F.3d 1043, 1051 (9th Cir. 2008). A district court may "uphold a decision
13 of less than ideal clarity if the agency's path may reasonably be discerned." *Nat'l Ass'n of*
14 *Home Builders*, 551 U.S. at 658.

15 The Court concludes that FWS's explanation for including the Leake study to
16 measure the effects of groundwater pumping on the Babocomari River until 2050 was
17 reasonably discernable. Leake provided adequate and reliable data about the future effects
18 of groundwater pumping that Plaintiffs' two studies could not. Leake's assessment limited
19 the effects of the Fort's groundwater pumping to the Fort's actions in the applicable ten-
20 year action period. Unlike the GeoSystems Report, Leake did not speculatively anticipate
21 future use beyond the action term. In addition, as noted previously, FWS considered and
22 explained why it did not rely upon the GeoSystems Report to determine anticipated effects
23 beyond 2050. The Court cannot find FWS's reliance is arbitrary or capricious.

24 *f. Retired Agricultural Irrigation from PPF and Clinton/Drijvers Purchase*

25 Plaintiffs next claim that to reach a no jeopardy conclusion, the Agencies
26 erroneously concluded that the purchase of the PPF and Clinton/Drijvers easements retired
27 sources of agricultural irrigation. (Doc. 18 at 38.) However, Plaintiffs believe that because
28 (1) the PPF easement had not been used for agricultural purposes since 2005, (2) the
irrigation pivots were not in working order, and (3) the property was zoned and marketed

1 for sale as residential,⁵ that the PPF purchase did not, in fact, retire a source of agricultural
2 water usage. (*Id.* at 38–42.) Plaintiffs believe FWS should not be permitted to calculate the
3 PPF easement as a water credit because it did "not retire a reasonably certain water source,"
4 and so the BiOps's alleged water savings violate the ESA. (*Id.* at 42.)

5 Defendants argue that Plaintiffs are setting the bar too high because they do not need
6 to demonstrably prove the PPF easement would have been used for agricultural irrigation,
7 only that it was "reasonably certain to occur." (Doc. 25 at 29.) Without the PPF easement,
8 Defendants state that under Arizona water law there is no "restriction on a private owner
9 pumping as much groundwater" as desired, including "the amount necessary to grow alfalfa
10 or another crop." (*Id.* at 30.) Defendants claim they retired a source of agricultural irrigation
11 simply because the purchase halted the possibility of future use for that purpose. (*Id.* at 31.)
12 The Agencies claim the standard does not require proof that the pivots were working or
13 that alfalfa irrigation would commence absent the purchase, only that "any agricultural
14 irrigation would resume." (*Id.* at 31–32.) When the PPF easement was purchased,
15 Defendants claim Plaintiffs' evidence shows it was being used for agricultural grazing. (*Id.*
16 at 32 (citing Doc. 19-1 at 3–4).) Moreover, the status of the center pivots is non-dispositive
17 because alfalfa and other crops do not require center pivot irrigation. (*Id.* at 32.)

18 The Ninth Circuit has held that mitigation measures may be included as
19 part of a proposed action and relied upon only where they involve specific
20 and binding plans and a clear, definite commitment of resources for future
21 improvements to implement those measures. . . . Furthermore, . . .
22 mitigation measures supporting a BiOp's no jeopardy or no adverse
23 modification conclusion must be reasonably specific, *certain to occur*, and
24 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.

25
26 *Ctr. for Biological Diversity*, 804 F. Supp. 2d at 1001. An agency action must be supported
27 by clear and substantial information indicating the result is reasonably certain to occur.

28 ⁵ Per the Court's decision not to permit supplementation of the AR with the AzRa article,
the Court does not address the issue of the marketing of the PPF easement.

1 Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation,
2 84 Fed. Reg. 44,976–77 (Aug. 27, 2019). To provide "clear and substantial" evidence there
3 must be "a firm basis to support a conclusion that a consequence of an action is reasonably
4 certain to occur." *Id.* at 44,977. Speculation is insufficient; however, "clear and substantial
5 evidence" does not "mean the nature of the information must support that a consequence
6 *must be guaranteed to occur*, but rather, that it must have *a degree of certitude.*" *Id.*
7 (emphasis added).

8 Because the Agencies looked at historic use of the land for agricultural irrigation,
9 the land's ability to again be used in this manner, the fact the PPF easement was leased and
10 occupied for agricultural grazing use, and sale of the PPF easement prevented the
11 possibility of agricultural water use indefinitely, Defendants have shown that future
12 agricultural irrigation was reasonably likely to occur and the determination that the PPF
13 easement purchase retired a potential agricultural irrigation use was not arbitrary and
14 capricious.

15 *g. Fort Action and Climate Change*

16 Plaintiffs next claim that FWS did not properly consider the effects on groundwater
17 recharge⁶ from climate change and groundwater pumping. (Doc. 18 at 46–48.) Plaintiffs
18 believe FWS should have relied upon the findings in Serrat-Capdevila et al. 2007, a study
19 which concluded that climate change will lead to an 8% decline in recharge by 2030 and
20 near 14% by 2050. (Doc. 28 at 28.) Plaintiffs indicate the Agencies conceded that the
21 existing models were flawed and that a revised modeling was necessary but arbitrarily
22 relied on the USGS Groundwater Model, which erroneously presumed that water recharge
23 will remain the same over time. (Doc. 19 at ¶ 95–96.) Then, instead of applying Serrat-
24 Capdevila's evidence of declines, Plaintiffs assert the Fort simply provided a general
25 "buffer of 72 AFY to provide for the potential for variations in groundwater use due to
26 climate." (Doc. 18 at 49.) Plaintiffs claim this buffer is woefully inadequate, and

27 ⁶ According to Plaintiffs, recharge is essential to the survival of the listed species because
28 it "create[s] pressure on the aquifer, which drives groundwater laterally and upward into
both the San Pedro and Babocomari rivers as year-around baseflows that support riparian
habitat and species." (Doc. 18 at 20 (citing FWS004679, FWS004681).)

1 Defendants may not bypass their climate analysis merely by claiming the existing modeling
2 is insufficient and then providing generalized estimates. (*Id.* at 49–50.) Plaintiffs state
3 because there is no "rational basis" for this estimate, the 72 AFY buffer violates the ESA.
4 (*Id.* at 49–50.)

5 Defendants counter that they are not required to evaluate the cumulative effects of
6 climate change and Fort action on the listed species. (Doc. 25 at 38.) The Agencies assert
7 that the Fort's PBA acknowledged that climate change could significantly affect surface
8 flows in the San Pedro River. (*Id.* at 37.) FWS reviewed multiple scientific studies that
9 predicted less rain, decreased streamflow, and reduction in habitat. (*Id.*) FWS states it also
10 reviewed the Serrat-Capdevila study, but found it was outdated, did not reflect the Fort's
11 anticipated groundwater consumption, and was not intended to measure impacts so far into
12 the future. (*Id.* at 37, 40.) FWS claims it was not required to adopt any quantitative estimate
13 of decreased precipitation, and FWS provided sufficient explanation as to why they did not
14 adopt the conclusions found in Serrat-Capdevila. (*Id.* at 36.)

15 FWS also states the 2014 BiOp recognized that the effects of climate change "may
16 be hard to predict and likely to occur non-linearly." (*Id.* at 37.) For instance, FWS noted
17 that it would be difficult to anticipate future water trends given the inconsistency between
18 predicted precipitation and actual precipitation. (*Id.* at 41.) And so, the Agencies adopted
19 Pool and Dickinson 2007 as their preferred groundwater flow model but recognized it too
20 was imperfect—it used "a constant value for the natural recharge component" and assumed
21 "a constant annual precipitation rate." (*Id.* at 40.) Thus, Defendants allege the constant
22 value of recharge and precipitation was a reasonable means to evaluate a complicated
23 matter. (*Id.*) Finally, FWS claims it was acceptable to conclude that since the Groundwater
24 Modeling found that the Fort's actions would result in increased groundwater, the increased
25 flow would "not worsen the still deteriorating baseline conditions" caused by climate
26 change. (*Id.* at 39.)

27 "It is . . . not the Court's place to tell the agency how to consider climate change in
28 its analysis, it simply must consider it." *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d
1224, 1233 (E.D. Wash. 2016). Still, the agency's climate change "analysis must consider

1 []the best available science, which it discusses elsewhere in the BiOp" *Wild Fish*
2 *Conservancy*, 221 F. Supp. 3d at 1234. In general, the court gives deference to an agency's
3 predictions about the possible effects of climate change. *See FG v. USGS*, 329 F.3d at 1099.
4 However, an agency cannot simply summarize the effects of climate change and then
5 analyze the proposed action under the assumption that climate change will have no effect.
6 *Wild Fish Conservancy*, 221 F. Supp. 3d at 1233–34. Moreover, "it is not enough for [an
7 agency] to simply invoke 'scientific uncertainty' to justify its action. . . . Rather, [the
8 agency] must explain why uncertainty justifies its conclusion, otherwise, [the court] might
9 as well be deferring to a coin flip." *Zinke*, 900 F.3d at 1072. But the climate analysis does
10 not require the agency "to conduct new tests or make decisions on data that does not yet
11 exist." *Id.* at 1233 (quoting *San Luis & Delta–Mendota Water Auth. v. Locke*, 776 F.3d
12 971, 995 (9th Cir. 2014)). If a plaintiff cannot point to scientific data omitted from
13 consideration, the claim fails. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th
14 Cir. 2006).

15 Here, FWS evaluated all the evidence, including Serrat-Capdevila, and noted how
16 climate change would affect the listed species and critical habitat. FWS acknowledged that
17 climate change would likely increase temperatures, decrease precipitation, reduce
18 streamflow, and negatively affect the listed species. (FWS004670–671, FWS004870;
19 FWS004897.) FWS concluded that the impact of climate change was difficult to quantify
20 because of the various complicated factors at play. (FWS004669.) The BiOp noted that the
21 data was mixed and the results conflicting. For instance, FWS indicated that while
22 precipitation was likely to decrease, "there is presently no model consensus on how the
23 summer monsoon regime in the Southwestern U.S. will change" and noted that monsoons
24 account for a large portion of annual rainfall. (FWS004670.) FWS also acknowledged that
25 streamflow and base flow were likely to decrease even if rainfall increased. (FWS004670.)
26 But, FWS added, five global climate models "predicted slightly wetter conditions."
27 (FWS004671.) These observations demonstrate the complexities FWS faced when
28 determining how to address the effects of climate change.

The Court finds FWS did not merely abdicate responsibility by claiming "scientific

1 uncertainty" but rather FWS reasonably explained that because of the complex factors that
2 could affect the climate change analysis, substituting an uncertain amount of AFY with a
3 constant value was reasonable. The Agencies were required to consider the effects of
4 climate change but not to quantify the combined decreased baseflow from the Fort's action
5 and decreased precipitation due to climate change. FWS also reasonably relied upon Pool
6 and Dickinson, and explained why it did not believe Serrat-Capdevila constituted the best
7 evidence for the climate analysis. Furthermore, as stated in Sections IV(c) and (d), the
8 Agencies were not required to assess action beyond 2030. The Agencies have formed a
9 rational connection between the data available and the choices made.

10 *h. Groundwater Accounting Method*

11 Plaintiffs also argue that FWS overestimated the amount of water saved from the
12 easement purchase. (Doc. 19 at 28–29.) Plaintiffs believe FWS calculated the water savings
13 as the "total amount of groundwater . . . used to irrigate alfalfa." (*Id.* at 28.)
14 (ARMY000527.) But Plaintiffs contend alfalfa only consumes 3.4 AFY per acre, and any
15 additional water used for irrigation is re-absorbed and is returned to the aquifer,
16 replenishing groundwater. (*Id.* at 28.) Plaintiffs claim FWS should have calculated the
17 amount of water used minus the amount of water that would be returned to the aquifer
18 instead of simply calculating the overall water use. (*Id.* at 28.) Because FWS ignored the
19 appropriate calculations to come to their water savings, Plaintiffs claim the no jeopardy
20 findings were baseless. (Doc. 18 at 29.)

21 Defendants retort that the calculation is consistent with that used in 2002 for the
22 Clinton and Drijvers easements in the Arizona Department of Water Resources's
23 ("ADWR") 1991 Hydrographic Survey Report. (Doc. 25 at 34–35.) To re-calculate now
24 would require reassessing the calculations of past conservation credits that were never
25 challenged. (*Id.*) Plaintiffs rely upon the ADWR 2005 Report (ARMY002495–002713),
26 but the Agencies claim the ADWR 2005 is not a scientific analysis of water duty return
27 flows, and it merely assumes that water in excess of that consumed by the plants is returned
28 to the aquifer. (Doc. 25 at 34.) Other sources have calculated different numbers of return
as well, the Agencies note. (*Id.*) Even using the lower 3.4 AFY per acre, Defendants claim

1 if they recalculated the water duty now the result would be different than Plaintiffs
2 anticipate because Defendants would “include the significantly reduced Fort-attributable
3 groundwater demand . . . and additional conservation easements acquired by the Army
4 since the BiOp was issued.” (*Id.* at 35.)

5 “[I]t is not enough for [an agency] to simply invoke ‘scientific uncertainty’ to justify
6 its action. . . . Rather, [the agency] must explain why uncertainty justifies its conclusion . .
7 . .” *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018).

8 In the PBA, when determining how much water savings occurred with the purchase
9 of the PPF easement, the Fort observed that the numeric calculation for water duty was
10 based on ADWR's 1991 Hydrographic Survey Report. The Fort explained that "water duty
11 is defined as the total amount of water that must be applied to a portion of irrigated acreage
12 to successfully produce a crop based on the crop type and the effectiveness of water
13 management and application to meet the water needs of the crop." (ARMY000527.) The
14 Fort calculated, "the formula to estimate the Fort's credit for retiring irrigation on
15 agricultural lands is: Retired Agricultural Pumping = Acres of irrigated land retired x 5.4
16 acre-feet per acre." (*Id.*) For the PPF easement, the Fort multiplied the PPF easement's 480
17 acres x 5.4 acre-feet per acre water duty then subtracted 4 acre-feet for rural water use,
18 "result[ing] in an overall savings of 2,588 acre-feet per year of groundwater pumping."
19 (ARMY00519.)

20 The 1991 ADWR Report states that the consumptive use of water by plants is the
21 "amount of water that is needed by the crop for growing and cooling" and that "[a]ny
22 computed water duty should reflect average irrigation water use over a long period of time."
23 (ARMY001778.) The 2005 ADWR Report similarly describes consumptive use as "the
24 volume of water used by plants for growth and transpiration." (ARMY002572.) While the
25 amount of water utilized for consumptive use appears to be debatable (*see* ARMY002674),
26 the fact that any amount over the consumptive level replenishes the aquifer is not.

27 The Fort's calculation does not contemplate that any groundwater would be returned
28 to the aquifer: this failure makes the PBA—and therefore the 2014 BiOp—arbitrary and
capricious. Defendants admit that water used in excess of plant usage is returned to the

1 aquifer but claim the parties simply disagree how much. During oral argument, the
2 Agencies admitted the Fort previously took credit for such returns under different
3 circumstances, but claimed the credit was acceptable in those instances because the
4 calculations were definite. (Doc. 39 at 41.) The Agencies also purport to have a rational
5 basis for their calculation of "return flows," stating "the water duty actually represents the
6 best estimate of the amount of water that would be pumped were these irrigation wells [on
7 the PPF easement] turned on." (*Id.* at 40.) This statement ignores one half of the equation.
8 It assumes that the best estimate of water saved is the amount of water pumped, but it
9 ignores that a portion of that pumped water would have returned to the aquifer had it been
10 used for irrigation. The Agencies give no reason to believe that *no* return is a reasonable
11 calculation. Thus, the return should not be credited to the Fort. To do so would be like
12 asking for full payment for a roof repair, knowing that up to 40% of the roof still leaks. It
13 amounts to an undeserved benefit.

14 The Agencies admit this is a quandary that will be addressed during formal
15 consultation for the next BiOp. (*Id.* at 41.) Simply because the Fort's equation has not
16 previously been challenged does not negate the Agencies' substantive duty to avoid actions
17 that jeopardize listed species. Including the return to the aquifer would decrease the
18 groundwater saved, altering the Fort's groundwater credit for retiring a source of
19 agricultural irrigation. Ultimately, this may change the jeopardy analysis.

20 The Court therefore finds the 2014 BiOps' calculation for easement credit is
21 arbitrary and capricious because it "ignored an important aspect of the problem." *Nat'l*
22 *Ass'n of Home Builders*, 551 U.S. at 658.

23 *i. Mandatory Adoption or Reinitiation of Consultation*

24 Next, Plaintiffs assert once the gartersnake and cuckoo were listed, the Agencies
25 were required to either adopt the no jeopardy Conference Opinions or reinitiate
26 consultation to address the flaws in the Opinions. (Doc. 18 at 57.) FWS did neither, which
27 Plaintiffs claim violated Section 7 of the ESA.⁷ (*Id.* at 58.) Plaintiffs claim two sections of

28 ⁷ The Court does not address Plaintiffs' claim that these actions violated ESA section 9 as there is no section 9 allegation in the Complaint.

1 the Code of Federal Regulations ("C.F.R.") require FWS act on the Conference Opinion
2 when a species is listed—50 C.F.R. § 402.10(a)(4)⁸ and § 402.16(b).

3 Defendants claim the Conference Opinions are valid—even after the species were
4 listed—because FWS *may choose* to adopt the Conference Opinions as the BiOp or to
5 reinitiate consultation, but these choices are not mandated. (Doc. 25 at 46.) Also, because
6 there was never a consultation, only a conference, the Agencies assert the reinitiation of
7 consultation regulations do not apply. (*Id.* at 47.) Moreover, Defendants argue Plaintiffs
8 have no cognizable claim to enforce reinitiation of consultation under the ESA citizen-suit
9 provision or as a violation of APA Section 706. (*Id.* at 45, n.17.)

10 Under the C.F.R. addressing conferencing for proposed species, certain measures
11 are mandated when a species is proposed for listing. In this instance, the action agency
12 "shall confer" with FWS regarding actions that are "likely to jeopardize the continued
13 existence" of any "species proposed to be listed" or that may "result in the destruction or
14 adverse modification of critical habitat proposed to be designated for such species." 50
15 C.F.R. §402.10(a); 16 U.S.C. §1536(a)(4). This conference culminates in a conference
16 opinion. 50 C.F.R. §402.10(d).

17 However, FWS is not required to adopt the conference opinion as a final BiOp once
18 a proposed species is listed, nor does the C.F.R. require the initiation of formal consultation
19 upon listing. *See* 50 C.F.R. §402.10(d). The C.F.R.'s permissive language prevents the
20 Court from interpreting these options as mandatory. The regulations note that upon listing,
21 a conference opinion "*may* be adopted as the biological opinion" 50 C.F.R. §402.10(d)
22 (emphasis added). In addition, 50 C.F.R. § 402.10(c) does not require initial consultation
23 upon listing, much less reinitiation of consultation. The C.F.R. indicates that "[i]f the
24 proposed species is subsequently listed or the proposed critical habitat is designated prior
25 to the completion of the action, the Federal agency must review the action to determine
26 *whether formal consultation is required.*" 50 C.F.R. § 402.10(c) (emphasis added). There
27 is no indication in the regulations regarding conferencing demonstrating that, after a

28 ⁸ Plaintiffs cite to 50 C.F.R. § 402.16(d) (2019). This subsection has since been amended
and identical language is now found in 50 C.F.R. § 402.16(a)(4) (2020).

1 species is listed, FWS must either adopt the conference opinion as the BiOp or engage in
2 formal consultation.

3 Nor can the Court find that the situation here is governed by the reinitiation of
4 consultation regulation—50 C.F.R. § 402.16. Under this section, reinitiation of
5 consultation is required when "a new species is listed or critical habitat designated that may
6 be affected by the identified action." 50 C.F.R. § 402.16(a)(4). On the surface, this appears
7 to require reinitiation of consultation for all newly listed species. However, in this instance,
8 FWS issued a Conference Opinion without formal consultation, and so the conference was
9 regulated under 50 C.F.R. § 402.10, whose language permits, but does not mandate, formal
10 consultation. 50 C.F.R. § 402.10 ("*If* requested by the Federal agency *and* deemed
11 appropriate by the Service, the conference *may* be conducted in accordance with the
12 procedures for formal consultation in § 402.14.") (emphasis added). With no requirement
13 for formal consultation, it would be illogical to conclude that *reinitiation* of consultation is
14 mandated. *See e.g.*, Reinitiation of Consultation, 84 Fed. Reg. at 45,011 (Sept. 26, 2019)
15 (agreeing reinitiation unnecessary for species after listing when prior to listing species
16 included in consultation for programmatic land management plan). This interpretation does
17 not render 50 C.F.R. § 402.16(a)(4) superfluous as Plaintiffs imagine, however, because a
18 species which had no existing conference opinion would still be required to reinitiate
19 consultation.

20 The Agencies conferred about the effects of the Fort's action on the gartersnake and
21 cuckoo but chose not to adopt the Conference Opinions as the BiOp. The regulation's
22 language allows for this. 50 C.F.R. §402.10(d). Once listed, FWS was not required to
23 reinitiate consultation as no initial consultation had occurred.

24 *j. Flawed Conference Opinion*

25 Plaintiffs also assert FWS cannot adopt the Conference Opinions because they are
26 fundamentally flawed and so reliance upon them is arbitrary and capricious. (Doc. 18 at
27 57.)

28 The Court agrees. For the reasons stated in Section V(h), the Agencies' groundwater
mitigation calculation was arbitrary and capricious. Thus, the Conference Opinion that

1 bases its no jeopardy opinion on the flawed mitigation credit is also arbitrary and capricious
2 because it overlooked an important issue relevant to the no jeopardy analysis. *See Nat'l*
3 *Ass'n of Home Builders*, 551 U.S. at 658.

4 *k. Claims Under the ESA's Citizen-Suit Provision*

5 Plaintiffs claim that subsequent to the 2014 BiOp, additional information was
6 released which shows the Fort's groundwater pumping results in adverse modification of
7 the listed species and their critical habitat. (Doc. 18 at 29.) First, Plaintiff's claim the Fort
8 released a report showing the actual on-base stormwater capture was less than anticipated
9 in the BiOp. (*Id.*) Second, Plaintiffs believe new climate change studies will show climate
10 change has a greater impact than previously anticipated, warranting a new consultation
11 regarding climate change effects on the listed species. (*Id.* at 30.) Third, hydrologist Dr.
12 Robert Prucha issued a report that "identifies even greater declines along the San Pedro
13 River than those identified in the GeoSystems Report" (*Id.*) Plaintiffs state they told
14 the Agencies about the new information on December 3, 2019, and requested that the
15 Agencies reinitiate consultation. (*Id.*) Plaintiffs claim the Agencies have not done so,
16 violating their Section 7 substantive duty. (*Id.*)

17 Defendants respond that ordering reinitiation is unnecessary because they are
18 currently planning reinitiation of consultation for 2021.⁹ (Doc. 25 at 49.) Defendants also
19 claim there is no need to reinitiate consultation simply because the Fort overestimated
20 recharge amounts in its 2013 mitigation measures plan. (*Id.*) The Agencies claim
21 precipitation varies by location, and updated data still shows a groundwater surplus. (*Id.* at
22 50.) Moreover, the Agencies aver that the upcoming reinitiation will consider the updated
23 precipitation rates and the best available evidence on climate change. (*Id.*) Finally, the
24 Prucha report predicts impacts on surface flows in 2100, and for the reasons previously
25 stated, these projections beyond the Fort's action are uncertain and do not "trigger
26 immediate reinitiation before the Army and FWS complete a new consultation and a new

27 ⁹ At oral argument on September 21, 2021, Defendants stated informal consultation was
28 ongoing and they "anticipate[d] completing a new consultation with the issuance of a new
Biological Opinion by the end of 2022," but had not yet begun the process of reinitiation
of consultation. (Doc. 38 at 26–27.)

1 BiOp before 2024." (*Id.* at 50–51.)

2 The ESA's citizen-suit provision empowers "any person" to "commence a civil suit
3 on his own behalf" against "the Secretary where there is alleged a failure of the Secretary
4 to perform any act or duty under section 1533 . . . which is not discretionary." 16 U.S.C. §
5 1540(g)(1)(C). The duties of the Secretary are delegated to FWS under 50 C.F.R. §
6 402.01(b). "Irrespective of whether an ESA claim is brought under the APA or the citizen-
7 suit provision, the APA's 'arbitrary and capricious' standard applies." *W. Watersheds*
8 *Project*, 632 F.3d at 481.

9 FWS and the action agency must reinitiate consultation if "new information reveals
10 effects of the action that may affect listed species or critical habitat in a manner or to an
11 extent not previously considered" or "a new species is listed or critical habitat designated
12 that may be affected by the identified action." 50 C.F.R. §402.16(b), (d). If the court finds
13 the record is insufficient to support the agency's action, "the proper course, except in rare
14 circumstances, is to remand to the agency for additional investigation or explanation." *Fla.*
15 *Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

16 The reinitiation issue is not mooted simply because there are plans to reinitiate
17 consultation in the near future. *See Nw. Env'tl. Def. Ctr. v. United States Army Corps of*
18 *Eng'rs*, 479 F. Supp. 3d 1003, 1027 (D. Or. 2020). Here the Agencies must reinitiate formal
19 consultation because the Fort overestimated the groundwater credit for the PPF easement.
20 *See Section IV(h)*. This oversight requires reinitiation because "the project's net effect on
21 listed species and their habitat will be greater than previously thought." *See Pacificans for*
22 *a Scenic Coast v. Cal. Dep't of Transp.*, 204 F. Supp. 3d 1075, 1092 (N.D. Cal. 2016).

23 Accordingly, IT IS ORDERED:

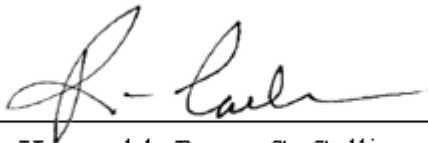
- 24 1) Motion to Complete or Supplement the Administrative Record is GRANTED IN
25 PART and DENIED IN PART to the extent provided herein. (Doc. 24).
- 26 a. The Court supplements the Administrative Record with the ER, the Deed of
27 Perpetual Conservation Easement for the PPF, and the North Dakota State
28 University article entitled *Selecting a Sprinkler Irrigation System*.
- b. The Court supplements the Administrative Record with the CCRN

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Presentation, the Climate Science Report, and the Prucha Hydrology Report for the sole purpose of considering Plaintiffs' allegation that Defendants violated their substantive duty when they refused to reinitiate Section 7 consultation.

- c. The Court will not include the AzRA in the Administrative Record.
- 2) Plaintiffs' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART to the extent provided herein. (Doc. 17.)
- 3) Defendants' Combined Cross-Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART to the extent provided herein. (Doc. 25.)
- 4) The Fort and FWS must reinitiate a formal Section 7(a)(2) consultation and formulate a superseding BiOp that conforms with the terms of this Order.
- 5) This case is DISMISSED.

Dated this 31st day of March, 2022.



Honorable Raner C. Collins
Senior United States District Judge