JASON R. FLANDERS (SBN 238007)
Email: jrf@atalawgroup.com
AQUA TERRA AERIS LAW GROUP
4030 Martin Luther King Jr. Way
Oakland, CA 94609
Phone: 916-202-3018

MICHAEL B. JACKSON (SBN 53808)
Email: mjatty@sbcglobal.net
P.O. Box 207
Quincy, CA 95971

Attorneys for Petitioners and Plaintiffs AquAlliance, California Sportfishing Protection Alliance, and California Water Impact Network

Patrick M. Soluri (SBN 210036)
Osha R. Meserve (SBN 204240)
James C. Crowder (SBN 327653)
SOLURI MESERVE, A Law Corporation
510 8th Street
Sacramento, California 95814
Telephone: (916) 455-7300
Facsimile: (916) 244-7300
Email: patrick@semlawyers.com; osha@semlawyers.com; james@semlawyers.com

Attorneys for Petitioners and Plaintiffs Central Delta Water Agency and South Delta Water Agency

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

AQUALLIANCE; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA WATER IMPACT NETWORK; CENTRAL DELTA WATER AGENCY; SOUTH DELTA WATER AGENCY, Petitioners and Plaintiffs, v. THE UNITED STATES BUREAU OF RECLAMATION; SAN LUIS & DELTA-MENDOTA WATER AUTHORITY; U.S. DEPARTMENT OF INTERIOR; DAVID BERNHARDT, in his official capacity; and; DOES 1 through 100, Respondents and Defendants.	CASE NO. 1:20-cv-878-DAD-EPG PETITIONERS AND PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT Date: TBD Time: TBD Dept.: TBD

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 56(a), Petitioners and Plaintiffs AquAlliance, California Sportfishing Protection Alliance, California Water Impact Network, Central Delta Water Agency, South Delta Water Agency, and Local Agencies of the North Delta ("Plaintiffs") respectfully move for summary judgment of declaratory relief that Respondents' U.S. Bureau of Reclamation ("BOR"), the San Luis & Delta –Mendota Water Authority ("SLDMWA"), and the U.S. Fish and Wildlife Service (collectively, "Respondents") "Long-Term Water Transfers" project approval, including certification and decision upon the joint Environmental Impact Statement / Environmental Impact Report ("EIS/R") and 2019 Biological Opinion prepared for the project, violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq.; the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and the California Environmental Quality Act ("CEQA"), Cal. Pub. Resources Code § 21000 et seq.

Plaintiffs further ask the Court to issue an injunction (1) vacating and setting aside the Project approval, (2) vacating and setting aside certification and approval of the EIS/R, (3) vacating and setting aside all subsequent approvals rendered based on the invalidated EIS/R, and (4) prohibiting Respondents from undertaking any actions based on the invalidated EIS/R. This motion is based on the accompanying memorandum, the pleadings previously filed with the Court, the lodged state and federal administrative records of proceedings, and such other evidence as the Court deems appropriate.

I. INTRODUCTION

In 2020, the United States Bureau of Reclamation ("BOR") and the San Luis Delta Mendota Water Authority ("SLDMWA") attempted to rectify the shortcomings of their 2015 EIS/R and Biological Opinion ("2015 BiOp") for a broad program of water transfers in California that were vacated by this District Court. CEQA 5.[1] However, much like the previous iteration, the 2019 EIS/R for the Long-Term Water Transfers ("LTWT") project remains wholly inadequate, and violates the law. Given the sheer size of the project area, the number of actors involved, and the precarious state of California water, Defendants' CEQA, NEPA, and ESA violations threaten significant environmental harm to California ecosystems, and to all users of California's public water resources.

The EIS/R completely ignores the actual amount of water that could be transferred in any given year, and instead, arbitrarily limits the amount to 250,000 acre-feet ("AF") without reasoning or enforcement. The EIS/R also fails as an informational document by cobbling together disparate pieces of the invalidated 2015 EIS/R and administrative record, with selectively updated sections in 2019, rendering the EIS/R inaccessible, unintelligible, and out of date. Analysis of groundwater dependent ecosystems ("GDEs") focuses solely on deep-rooted vegetation and completely disregards impacts to shallow-rooted vegetation that would likely be impacted by the LTWT. Impacts to third party groundwater users, and cumulative effects, are also not fully analyzed or mitigated.

The EIS/R fails to disclose and analyze the Delta Stewardship Council's role and jurisdiction within the Project. Defendants provide conclusory statements that water transfers under the Project do not fall within the purview of the Delta Stewardship Council, all the while ignoring the Delta Stewardship Council's comments that the Project would need to comply with the Delta Plan. Similarly, SLDMWA failed to document any compliance with the Public Trust Doctrine at all, which it argues is not required. Finally, the EIS/R fails to adopt adequate mitigation measures for several of the LTWT's impacts, including to groundwater and listed species.

[1] In this action, BOR and FWS each prepared their own administrative records, while Petitioners elected to prepare the CEQA record. The FWS record is identified in this brief with the prefix "FW" followed by the Bates number of the referenced page. BOR's record initially failed to include Bates numbers and was therefore unusable. Plaintiffs incorporated the entirety of BOR's record into its CEQA record, and applied Bates number with the prefix "CEQA." BOR provided a Bates stamped record on 9/10/21, too late for incorporation here.

The 2019 BiOp for the LTWT effects to the federally listed giant gartersnake ("GGS") is defective in several areas as well, which invalidates the FWS's no jeopardy determination. Additionally, BOR violated its duty under Section 7(a)(2) of the ESA to ensure that an action would not jeopardize a listed species, when it ignored the fact the BiOp analyzed a project timeframe that was inconsistent with the EIS/R and affirmatively misconstrued scientific literature revealing that the BiOp's conservation measures were ineffective at avoiding take of GGS.

II. STATEMENT OF FACTS

A. 2015-2024 LTWT

In late 2010 and early 2011, BOR published a Notice of Intent in the Federal Register and a Notice of Preparation in the California State Clearinghouse for a "Long-Term Water Transfers" project. The final EIS/R was released in 2015, and certified by SLDMWA later that year. CEQA 5. The LTWT project was originally a ten-year programmatic analysis of water transfers. CEQA 14687. These water transfers were to occur between willing sellers upstream of the Delta and water users south of the Delta and in the San Francisco Bay area. CEQA 14688. All transfers under the LTWT project were to use the Central Valley Project ("CVP') and/or the State Water Project ("SWP") as conveyance mechanisms to move water. CEQA 14688. Plaintiffs, along with other parties, challenged the 2015 LTWT in United States District Court for the Eastern District of California, in *AquAlliance, et al., v. U.S. Bureau of Reclamation*, *et al.*, 287 F. Supp. 3d 969 (E.D. Cal. 2018) (*AquAlliance*).

On February 15, 2018, the District Court entered judgment, vacating SLDMWA and BOR's decisions to approve the LTWT EIS/R, and the 2015 BiOp. *AquAlliance,* 287 F. Supp. 3d at 1076. The District Court found violations of the National Environmental Protection Act, 42 U.S.C. § 4321 et seq. ("NEPA"), California Environmental Quality Act, Cal. Pub. Resources Code § 21000 et seq. ("CEQA"), and the Endangered Species Act, 16 U.S.C. § 1531 et seq. ("ESA"). These violations included inadequate analysis of biological impacts due to reduced Delta outflows, improperly deferred mitigation for groundwater impacts, inadequate mitigation for land subsidence, inadequate analysis of climate change, and inadequate analysis and mitigation for impacts to the GGS. The District Court vacated the LTWT project approvals, the 2015 EIS/R, and the 2015 BiOp, in their entireties.

In February 2019, BOR and SLDMWA released a Draft Revised EIS/R which shortened the initial 2015-2024 LTWT to 2019-2024. The changes to the new LTWT project include, new sellers, a shortened timeline, and a new BiOp. However, these updated documents fail to rectify many of the flaws detailed in the District Court's ruling.

B. 250,000 AF Limit

The 2015 LTWT did not provide any upper limit on water transfers, other than the values imposed by the BiOps on the Coordinated Operations of the CVP and SWP, which limited transfers to either 600,000 or 360,000 AF depending on the water year type (e.g. very dry, normal). CEQA 14717.

The 2019 LTWT, by contrast, purports to limit the amount of water that can be transferred to 250,000 AF. CEQA 512. This limit is based on buyers' self-reported demand. *Id*. The demand is based on CVP contractors that have identified an interest in purchasing water. CEQA 511. However, nothing described in the EIS/R actually restricts buyers from using the LTWT to buy water from willing sellers. Additionally, the 250,000 AF limitation is not a result of sellers' inability to produce water, in fact, agencies selling water have the ability to transfer over 713,000 AF. CEQA 565. Similarly, the sellers are not limited to 250,000 AF by any mechanism within the EIS/R. *Id*.

C. Effects of Transfers on Groundwater

The EIS/R acknowledges, but fails to fully disclose, analyze, or mitigate, multiple adverse environmental effects caused by the additional Project groundwater pumping. The Project pumping would have the effect of reducing the amount of water flowing in surface waters with a connection to groundwater. In turn, this "reduction in stream flow could result in a substantial adverse effect on riparian and wetland natural communities associated with these creeks because root zones would be dewatered to such an extent to cause die back of riparian tree and shrub foliage, branches or entire plants." CEQA 884. Further, "[w]ater made available for transfer from groundwater substitution pumping actions would reduce groundwater levels near the participating wells, which could affect surrounding third parties or potentially cause subsidence." CEQA 535. Finally, the cumulative impacts of these effects, in combination with other groundwater pumping in the affected basins, and especially during times of drought, would be worse still. The EIS/R notes that groundwater levels in the project area had still not recovered to pre- 2014-2015 drought levels. CEQA 663. Nevertheless, the EIS/R uses

groundwater level "historical lows" as the typical threshold to determine whether any effect to groundwater related resources is significant. The historical low under the 2019 EIS/R would therefore be lower than the historical low threshold used in the invalidated 2015 EIS/R. The Lead Agencies' program thus facilitates a literal race to the bottom of aquifers.

D. Delta Stewardship Council's Role in Transfers

The Delta Stewardship Council ("DSC") was established under the Sacramento-San Joaquin Delta Reform Act of 2009. CEQA 10843. The DSC is charged with adopting and implementing the Delta Plan. *Id*. Additionally, the DSC was granted regulatory authority over "covered actions" in the Delta. *Id*. The DSC made a preliminary determination that the LTWT would be considered a "covered action" under the Delta Plan. *Id*. According to the Delta Reform Act, a covered action must file a certification of consistency indicating the action is consistent with the Delta Plan. CEQA 10844.

Buyers and sellers are authorized to enter into multi-year agreements. CEQA 568. The DSC submitted comment letters for the 2014 Draft EIS/R and the 2015 Final EIS/R, regarding its concern that the regulations and policies related to the Delta Plan are not set forth in the EIS/R. CEQA 3898. Specially, the Delta Plan had been omitted from the regulatory setting, SLDMWA failed to determine whether transfers under the Project would be required to obtain a Certification of Consistency, and failed to determine whether the Delta Plan policies would be implicated in the Project. CEQA 3898. The DSC reiterated the same concerns for the 2019 EIS/R. CEQA 3899. The Lead Agencies dismissed these concerns by asserting, "single-year water transfers are considered exempt action under the Delta Plan." *Id*. Further, "[i]f the Lead Agencies enter into a multi-year transfers agreement, the required Certifications of Consistency with the Council would be filed at that point." *Id*.

E. Climate Change and the Project

After explaining all the possible impacts climate change could have on the 2015 Project, the court in *AquAlliance* found that the EIS/R did not explain how the information in the EIS/R could be reconciled with the conclusion that climate change would be a less than significant impact. *AquAlliance, supra,* 287 F. Supp. 3d at 1032. Rather than produce a more adequate analysis, here the EIS/R only analyzes the narrow issue of how climate change may affect the physical quantity of water available for transfer. CEQA 3887. Further, the EIS/R limited analysis of climate impacts is purportedly based on

evaluating potential future climate conditions under three climate change modeled scenarios: The Central Tendency, Hot-Dry, and Warm-Wet. CEQA 5521. "The Hot-Dry and Warm-Wet scenarios serve as the 'bookends' to the climate change analysis and the Central Tendency scenario is in the middle of the range of all projected temperatures and precipitations." *Id*. The EIS/R admits that the amounts of water demanded would be "substantially higher" under the Hot-Dry scenario, without providing reasoning, the EIS/R relies on the Central Tendency to conclude that impacts to the proposed action from climate change would be less than significant. CEQA 5527.

F. Effects of Crop Idling on Giant Garter Snakes

The GGS is listed as threatened under the ESA. 58 Fed. Reg. 54053. Water transfers conducted through crop idling lead to mortality of the GGS; therefore, Defendants have obtained an incidental take statement from FWS. FW 1490-1493. An incidental take statement provides an exception to the ESA's Section 9 take prohibition. 16 U.S.C. § 1538. The issuance of the incidental take statement is reliant on BOR implementing conservation measures to minimize impacts to the GGS. FW 1490.

The GGS requires water between May 1 and October 1, and to a lesser extent throughout the other months of the year. FW 1486. "Ditches, canals, other agricultural conveyance features, and rice fields all provide suitable aquatic habitat for the snake. Rice fields in particular, provide additional aquatic habitat that snakes utilize for cover from predators and for foraging on fish and amphibians during the active season." FW 1486. Additionally, recent research shows, "canal density, the proportion of adjacent rice agriculture and wetlands, and underlying soils appear to be stronger drivers [than tule marsh] for giant garter snake occupancy." CEQA 2593.

The expected loss of habitat due to LTWT cropland idling/shifting is up to 60,693 acres a year. FW 1486. This reduction of suitable habitat would likely increase stress to the GGS due to "loss of areas that provide foraging opportunities, the loss of cover from known predators, and the potential for reduced reproduction and recruitment." FW 1487. These reductions will increase snake mortality due to "greater risk of predation, decreased fitness and reproduction, and injury from vehicles or farm equipment while they try to relocate from areas being idled to other aquatic habitats." FW 1487. The conservation measures fail to address this precarious situation. Instead, the conservation strategy is

premised focused on "movement corridors" and maintaining water in drains and conveyance infrastructure. FW 1475. The proposed movement corridors are inadequate to ensure survivability of GGS populations and without proper protection of the GGS' suitable habitat its survival rate will be decreased, calling into question the BiOp's no jeopardy determination.

III. STANDARD OF REVIEW

Generally, summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). However, Plaintiffs seek judicial review of a final agency action pursuant to CEQA, NEPA, and ESA, claims are based on judicial review of a certified and lodged administrative record, "the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006) (quoting *Occidental Eng'g Co. v. Immigration & Naturalization Serv.,* 753 F.2d 766, 769 (9th Cir. 1985)). In this context, summary judgment becomes the "mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with [the law]." *Id*. at 90.

A. The APA, NEPA and ESA

Plaintiffs' NEPA and multiple ESA challenges are brought pursuant the APA. A court conducting judicial review under the APA may not resolve factual questions, but determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Engineering*, 753 F.2d at 769. The APA provides that the court shall "hold unlawful" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

"Judicial review of agency decision-making under NEPA asks whether the agency took a 'hard look' at the proposed action as required by a strict reading of NEPA's procedural requirements." *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir. 2008). "Through these procedural requirements, NEPA seeks to make certain that agencies 'will have available, and will carefully consider, detailed information concerning significant environmental impacts, and that the relevant information will be made available to the larger [public] audience.'" *N.*

Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1075 (9th Cir. 2011). "In reviewing the adequacy of an EIS under NEPA, we employ 'a rule of reason' analysis to determine whether the discussion of the environmental consequences included in the EIS is sufficiently thorough." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020). This analysis evaluates whether an agency took a "hard look" at probable consequences. *Id*.

Additionally, the ESA should be construed in light of the statute's purpose "to provide comprehensive protection for endangered and threatened species." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 699 (1995). A biological opinion is arbitrary and capricious if it fails to consider all relevant factors, fails to consider an important aspect of the problem presented, fails to explain its conclusions satisfactorily, or fails to demonstrate a rational connection between the facts found and the choice made." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001). Alternatively, a biological opinion is invalid if it fails to use the best available scientific information. 16 U.S.C. § 1536(a)(2). The Court must perform a "thorough, probing, in-depth review." *N. Spotted Owl v. Hodel*, 716 F. Supp. 479, 481-82 (W.D. Wash. 1988). "While courts must defer to an agency's reasonable interpretation of equivocal scientific evidence, such deference is not unlimited. The presumption of agency expertise may be rebutted if its decisions, even though based on scientific expertise, are not reasoned." *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000).

Further, private plaintiffs may bring claims under the ESA's citizen-suit provision. 16 U.S.C. § 1540(g)(1). Section 7(a)(2) of the ESA states, "[e]ach Federal agency shall, in consultation with the assistance of the Secretary [of Commerce or the Interior] insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). Though claims brought under the citizen-suit provision are separate from the APA claims, the APA's arbitrary and capricious standard of review applies. *W. Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 496 (9th Cir. 2011).

B. CEQA

Under CEQA, courts must determine whether the agency prejudicially abused its discretion by

either: (1) failing to proceed in the manner required by law, or (2) reaching a decision or determination that is not supported by substantial evidence. *Laurel Heights Improvement Ass'n. v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 392 (1988) (*Laurel Heights I*). As the California Supreme Court has explained, when reviewing an agency's compliance with CEQA, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 435 (2007) (*Vineyard*).

If an EIR fails to address an issue or omits essential information, courts employ de novo review to determine whether the agency violated the statute's disclosure requirements. *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal. 5th 918, 935 (2017) (*Banning Ranch*). Similarly, the sufficiency of an EIR's discussion of environmental impacts is reviewed de novo. *Sierra Club v. Cty. of Fresno*, 6 Cal. 5th 502, 512-16 (2018) (*County of Fresno*). "The ultimate inquiry ... is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [citations omitted] .... The inquiry presents a mixed question of law and fact. As such, it is generally subject to independent review." *County of Fresno*, *supra*, 6 Cal.5th at 516.

For purposes of determining when an EIR must analyze an environmental issue, courts apply the "fair argument" test, such that an EIR must analyze every issue for which the record provides a "fair argument" of significant impact. *Visalia Retail, LP v. City of Visalia*, 20 Cal.App.5th 1, 13 (2018); *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal.App.4th 1099, 1109 (2004).

By contrast, courts use the "substantial evidence" test to review an agency's "substantive factual conclusions." *Vineyard*, *supra*, 40 Cal.4th at 435. But "the existence of substantial evidence supporting the agency's ultimate decision ... is not relevant when one is assessing a violation of [CEQA's] information disclosure provisions." *Cmtys. for a Better Env't v. City of Richmond,* 184 Cal.App.4th 70, 82 (2010) (*CBE*) [italics added]. While substantial evidence review involves deference to the lead agency's role as fact-finder, such deference does not mean abdication of vigorous judicial review. *Laurel Heights I, supra,* 47 Cal.3d at 409 ["We do not suggest that a court must uncritically rely on

every study or analysis presented by a project proponent in support of its position..."].

C. The Public Trust Doctrine

"Generally, an agency's regulatory approval is reviewed for abuse of discretion, which is established if the agency failed to comply with required procedures or made findings that are not supported by substantial evidence. [Citation.] However, to the extent the [the agency] purported to interpret the common law public trust doctrine, its legal conclusions are reviewed de novo." *S.F. Baykeeper, Inc. v. State Lands Com.*, 29 Cal. App. 5th 562, 576, (2018).

IV. ARGUMENT

A. VIOLATIONS OF NEPA and CEQA[2]

1. By Arbitrarily Limiting Transfers to 250,000 Acre-Foot a Year, the EIS/R Violates Both CEQA and NEPA.

Defendants have taken the 2015 project and essentially scaled it back: a halved time period that commences five years after the original start date; increases in sellers and seller service areas; increases in the available amounts of each "source" of water; and a naked, unenforceable assurance that transfers in any one year would not exceed 250,000 AF because, supposedly, "[b]uyers have identified that their demand" does not exceed that amount. CEQA 512, 514. Defendants rely on this transfer limitation to constrict the breadth of environmental analysis that would be required if the project description contained all water that could be transferred. CEQA 565. Additionally, the transfer limit is used as de facto mitigation in order to lower the significance of the Project's impacts. "The distinction between elements of a project and measures designed to mitigate impacts of the project may not always be clear." *Lotus v. Dep't of Transp.,* 223 Cal.App.4th 645, 656, n. 8 (2014). Here, it is unnecessary to resolve that question with respect to the 250,000 AF transfer limit because it violates CEQA and NEPA whether considered an element of the Project Description or mitigation.

[2] To avoid duplication, analogous violations of both CEQA and NEPA are discussed together. To avoid confusion, however, each subsection heading will clearly identify whether claim asserts a violation of NEPA, CEQA or both.

a. The project description is unstable, inaccurate and violates both CEQA and NEPA.

CEQA requires "[a]n accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient EIR." *Cty. of Inyo v. City of L.A.*, 71 Cal.App.3d 185, 192 (1977). On the other hand, "[a] curtailed, enigmatic or unstable project description draws are a red herring across the path of public input." *Id*. at 198. "Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal…and weigh other alternatives in the balance." *Cty. of Inyo, supra,* 71 Cal.App.3d at 192-193. A project description is deficient where the characterization of expected project operations is inadequately supported by evidence that the project will operate within its described limits. *See Ctr. for Biological Diversity v. Cty. of San Bernardino*, 247 Cal.App.4th 326, 350 (2016). Here the Project is described as having a limit on annual water transfers, but nothing in the EIS/R actually demonstrates that Defendants could ensure buyers and sellers adhere to this limit. Therefore, the Project's description is deficient and misleading. The EIS/R does not include any mechanism for enforcing this arbitrary cap. During public comment periods BOR was notified that the 250,000 AF limitation was unenforceable. BOR responded:

> Reclamation must review and approve potential transfers annually. This review and approval process provides an opportunity for Reclamation to verify that the overall amount of transfers it approves stays below this upper limit. This is only part of the review process; Reclamation also reviews potential transfers to make sure that they meet all requirements in the EIS/EIR and sellers/buyers incorporate mitigation measures.

CEQA 3873-3874.

Not only does this statement lack actual enforcement details, it overlooks the situation where the approval comes from DWR, not BOR. "The Final EIS/EIR addresses the transfer of water to CVP contractors from CVP and non-CVP sources of supply that must be conveyed through the Delta using CVP, SWP, and local facilities. These transfers require approval from Reclamation and/**or the Department of Water Resources (DWR)** . . . ." CEQA 540 [emphasis added]. Transfers that do not use CVP facilities occur without Defendants' approval.

Further, Table 2-2 lists the entities that could transfer water, and includes maximum quantities that each agency could make available through different methods. CEQA 5292. The maximum quantities that could be transferred equal over 713,000 AF, a far cry from the 250,000 AF "upper limit."

CEQA 5304. Even if one may presume that buyers and sellers would voluntarily adhere to the transfer cap, there is no indication that other agencies would even know whether their transfers fall within the arbitrary volumetric cap of 250,000 AF per year. The EIS/R does not designate any agency or other authority to keep track of the total amount of water transferred in relationship to this Project.

Additionally, there is nothing in the EIS/R substantiating the claim that buyers' demands could not exceed 250,000 AF per year. Without a way to enforce, or even track, the total acre-foot of transfers, it is inaccurate to describe the Project as capped at 250,000 AF per year. Consequently, the artificial annual total transfers considered unlawfully truncates analysis of the Project's impacts.

Finally, the purported 250,000 AF transfer limitation runs afoul of NEPA. While courts have not conducted the same level of analysis regarding project descriptions under NEPA, a project description cannot be arbitrary and capricious. Per NEPA regulations, an EIS must include a description of the proposed action. 43 C.F.R. § 46.415(a)(2); *See*, *N. Alaska Envtl. Ctr. v. United States DOI, Bureau of Land Mgmt.*, 983 F.3d 1077, 1092 (9th Cir. 2020) (NEPA review demands "an accurate description of the [agency's] proposed action," cites and quotes omitted). Additionally, the contents of an EIS must: "encourage **good analysis and clear presentation of the alternatives including the proposed action."** 40 C.F.R. § 1502.10 [emphasis added].

Here, the project description fails to meet the basic requirement of providing a clear and accurate presentation of the proposed action. As explained above, the project description arbitrarily constricts the amount of water the EIS/R uses to analyze the environmental impacts of the Project. This violates NEPA by failing to describe and analyze the proposed project.

b. The 250,000 AF limitation is unenforceable mitigation.

Under CEQA, mitigation includes "[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation." Cal. Code Regs., tit. 14, §§ 15000 et seq. ["CEQA Guidelines"], 15370. Mitigation measures may be incorporated into project plans, policies, or designs—but they nevertheless remain mitigation measures. CEQA Guidelines, § 15126.4(a)(2). CEQA Guidelines state:

> The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other person which are not included but the

> lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project.

CEQA Guidelines, § 15126.4(a)(1)(A).

By asserting that the 250,000 AF cap "could decrease effects to some resource analyses," the transfer limit cap is acting as a mitigation measure that is "included in the project" pursuant to CEQA Guidelines section 15126.4(a)(1)(A). Mitigation measures must be fully enforceable through some legally binding instrument. CEQA Guidelines, § 15126.4(a)(2). The EIS/R's bare assurances that BOR will not allow transfers to exceed 250,000 AF does not make the transfer limit enforceable mitigation. The EIS/R must include some specific condition of approval, mitigation measure or agreement that is legally enforceable. Relevant information is absent from the EIS/R, such as how BOR would keep track of transfers, prioritize transfers, or address transfers which would exceed the limit. Without this information the EIS/R fails as an informational document.

c. The EIS fails to address the 250,000 acre-foot limitation as mitigation under NEPA.

Mitigation measures under NEPA include "[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation." 40 C.F.R. § 1508.1(s)(2). While NEPA does not have the substantive requirements for mitigation measures as CEQA, NEPA requires an EIS to consider the effectiveness of mitigation measures. *See* 40 C.F.R. §§ 1502.14(e), 1502.16. An EIS must discuss mitigation measures "with sufficient detail to ensure that environmental consequences have been fairly evaluated." *S. Fork Band Council of W. Shoshone v. U.S. DOI*, 588 F.3d 718, 727 (9th Cir. 2009), quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). "An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." *South Fork*, *supra*, 588 F.3d at 727.

As previously discussed, the EIS/R authorizes far more than 250,000 AF through the LTWT program. This limit is being used to artificially minimize potential environmental impacts. The EIS/R does discuss the transfer limit as a mitigation measure in any sense. The EIS/R implicitly assumes the effectiveness of the transfer limit as a mitigation measure, despite the fact it is unenforceable and is absent of critical details such as how BOR will keep track of transfers, how it will prioritize transfers, or what happens when a proposed transfer would exceed the arbitrary limit. Without this information, the

EIS/R cannot provide an accurate assessment of the transfer limit as a mitigation measure under NEPA.

2. The EIS/R is Inadequate as an Informational Document.

By circulating a mashup of sections from the previously vacated 2015 EIS/R with new chapters written for the 2019 EIS/R, the 2019 EIS/R fails as an informational document. Both the existing environmental conditions, and the scope of the proposed project, had also changed between 2015 and 2019. The patchwork 2019 FEIS/R is nonsensical and should be set aside.

In 2018, the Court in *AquAlliance* granted in part Petitioners' motion for summary judgment. *AquAlliance, supra*, 287 F. Supp. 3d at 1076. Thereafter, the Parties engaged in two rounds of briefing on remedy, where the Lead Agencies argued for remand without vacatur, which would have allowed for only partial recirculation of the EIS/R. *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 880 (E.D. Cal. 2018). The Court rejected this argument, and "determined that vacatur is appropriate as to both the FEIS/R and the BiOp/ITS" in their entirety, after considering the "seriousness of the agency's errors." *Id*. at 882-4; *cf. Washoe Meadows Cmty. v. Dep't of Parks & Recreation,*17 Cal.App.5th 277, 289-90 (2017) (full vacatur of EIR required where violations were "obstacle to informed public participation"). The 2015 EIS/R violated CEQA and NEPA and was thus vacated entirely.

But in 2019, the Lead Agencies continued to rely on scattered pieces of the vacated FEIS/R, and refused to fully recirculate a new EIS/R, resulting in a piecemeal environmental review consisting of an amalgamation of portions of the 2014 DEIS/R, revised portions of the 2014 DEIS/R as presented in the vacated 2015 FEIS/R, isolated and disconnected sections from the 2015 FEIS/R that were recirculated in the 2019 RDEIS/R, and further revisions to that document presented in Exhibits Q, R, and S to the 2019 FEIS/R. The outcome is a fundamentally deficient FEIS/R that fails "to include relevant information [and] precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process," and constitutes an abuse of discretion. *Kings Cty. Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 712 (1990); *see also Robertson, supra,*, 490 U.S. at 356 (1989) (EIS should demonstrate full environmental review, and "provide[] a springboard for public comment").

a. The EIS/R is Inadequate as an Informational Document Pursuant to CEQA

CEQA requires that an EIR should "be organized and written in a manner that will make [it] meaningful and useful to decision-makers and to the public." Pub. Res. Code § 21003(b).

> [Information that can only] be gleaned from a diligent search of the EIR appendices and other elements of the administrative record" constitutes "a fragmented presentation [that] is inadequate. Readers of an EIR should not be required to 'ferret out an unreferenced discussion in related material. The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. "Information scattered here and there in EIR appendices," or a report "buried in an appendix," is not a substitute for "a good faith reasoned analysis."

Banning Ranch, supra, 2 Cal.5th at 941 (2017), quoting *Vineyard, supra*, 40 Cal.4th at 442.

The FEIS/R constitutes precisely the type of deficient environmental review prohibited by CEQA and NEPA. The responses to comments alone are extremely convoluted and provide just one example of the failure of the FEIS/R to be "written in a manner that will make [it] meaningful and useful to . . . the public." Pub. Res. Code § 23001(b). The FEIS/R includes (1) comments and responses to comments from the 2014 DEIS/R, which appear to be identical to the responses to comments included as Appendix J to the 2015 FEIS/R[3] (CEQA 7369); (2) responses to 2019 RDEIS/R comments referring readers to (a) the 2014 DEIS/R (CEQA 8130); (b) the Appendix R 2015 FEIS/R responses to comments (CEQA 8123); (c) the RDEIS/R itself (CEQA 8126); (d) a newly disclosed Addendum to the 2014 DEIS/R (CEQA 8127); (e) the Appendix S common responses to comments in the FEIS/R; and (f) an attachment to Appendix S of the 2019 FEIS/R that was not actually attached (CEQA 8087-8092); and (4) exceedingly confusing references to the FEIR/Appendices such as, "The methodology and assumptions are described in Section J.5.6 (Section K.5.6) and the results are presented in Section J.6 (Section K.6) in Appendix J of the RDEIR/REIS (renamed to Appendix K)." CEQA 8070. This exemplifies the extent to which the piecemealed FEIS/R disorients the reader and is wholly inadequate as an informational document to meaningfully inform public participation and agency decision-making.

[3] The RDEIS/R instructed the public *not to comment* on the 2014 DEIS/R that was not being recirculated, and then simply re-appended the 2015 responses to comments that were vacated by the Court. The responses routinely show strikethrough and underline revisions made from the 2014 draft to the FEIS/R, but it is unclear whether these revisions are actually included in the 2019 FEIS/R. This wholly precluded effective public participation and environmental review.

There are too many such instances to set forth within the confines of a briefing limit. For example, while the RDEIS/R recirculated the 2014 DEIS/R Section 3.2 by including only section 3.2.4, Cumulative Effects regarding water quality, the FEIS/R made extensive revisions throughout the remainder of the 2014 DEIS/R Chapter 3.2, including, *inter alia*, thirty pages of revisions to water quality, dam storage, and stream flow data, without recirculating such revisions for public comment in the RDEIS/R.[4] CEQA 8323-8348. The FEIS/R revisions to the portion of the 2014 DEIS/R not recirculated also state that "[w]ater transfers could change reservoir storage in San Luis Reservoir and could result in water quality impacts," but conclude these impacts will not be significant based on modeling. CEQA 8348. However, the public had no opportunity to review and comment on such modeling. In addition, the FEIS/R included numerous revisions incorporating new information that may be indicative of significant adverse effects, including (1) acknowledged changes in "streamflows in the Sacramento and San Joaquin Rivers and their tributaries as a result of water transfers [that] could result in increased soil erosion" (CEQA 8357); (2) the statement, unaccompanied by any additional information or analysis, that a "portion of refuge transfers could come from cropland idling transfers . . . [which] could affect soils on agricultural fields . . . ." despite responses to 2014 DEIS/R comments asserting that refuge transfers were expressly excluded from the project (CEQA 8359; CEQA 7388); (3) the deletion of three creeks[5] from those in which "there is no evidence of the presence of special-status fish species," indicating that there are, apparently, special-status fish species present (CEQA 8364); and (4) the addition of data to approximately 377 pages in Appendix Q, including purported new groundwater figures regarding existing groundwater conditions and modeling results. CEQA 8437–8814. The uncirculated revisions are significant, bearing on issues of known public controversy, but the FEIS/R fails to present sufficient information to evaluate associated environmental impacts, and the public has been deprived of the opportunity to comment. *See Mountain Lion Coal. v. Fish & Game Com.*, 214 Cal.App.3d 1043 (1989); CEQA Guidelines § 15088.5(a); *Vineyard*, 40 Cal.4th at 449.

[4] Additional revisions to Section 3.2 included (1) adding "Water Acceptance Criteria" for "constituents of concern that would affect downstream users" (CEQA 8318); (2) revising Section 3.2 to include a new discussion of the Sustainable Groundwater Management Act (*Id.*); and (3) 2019 revisions to the 2014 DEIS/R baseline water quality sample results (CEQA 8318-8319).

[5] The three deleted creeks are Seven Mile Creek, Wilson Creek, and Spring Valley Creek.

The 2015 FEIS/R, which included the 2014 DEIS/R, responses to 2014 DEIS/R comments, and revisions to the 2014 DEIS/R, was fully vacated. Accordingly, the only option for the Lead Agencies to comply with CEQA was to circulate a new and complete draft EIS/R. In failing to do so, the Lead Agencies abused their discretion, creating a piecemealed FEIS/R that is extremely convoluted and virtually impossible for a reader to follow, thwarting the EIR's purpose of providing information "in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project." *Vineyard*, 40 Cal.4th at 442.

b. The EIS/R is Inadequate as an Informational Document Pursuant to NEPA.

The deficiencies in the FEIS/R described above also violate NEPA. "The EIS is the linchpin of NEPA's procedural requirements." *Ctr. for Biological Diversity, supra, v.* 982 F.3d at 734. "NEPA's requirements 'are to be strictly interpreted to the fullest extent possible' in accord with the policies embodied in the Act," including the provision of "important information to the public and any party interested in the proposed environmental action" via, *inter alia*, "diligent efforts to involve the public in preparing and implementing its NEPA procedures." *Id*., at 734-35, quoting *California v. Block,* 690 F.2d 753, 769 (9th Cir. 1982), *Robertson*, *supra*, 490 U.S. at 356, 40 C.F.R. § 1506.6 (a). Accordingly, NEPA requires "agencies to take a 'hard look' at the environmental consequences of their actions by preparing an EIS" which must "provide a full and fair discussion of significant environmental impacts" of the project. *Lands Council v. McNair*, 537 F.3d 981, 1001-02 (9th Cir. 2008). "Publication of an EIS, both in draft and final form, [] serves a larger informational role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' and, *perhaps more significantly*, provides a springboard for public comment." *Robertson*, 490 U.S. at 349, quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (emphasis added). The Lead Agency must "provide the public with 'sufficient information to . . . generate meaningful comment.'" *Sierra Club v. Flowers*, 423 F. Supp. 2d 1273, 1329 (S.D. Fla. 2006) (quoting 33 C.F.R. § 325.3(a)); 40 C.F.R. §§ 1500.1(b), 1506.6.

Judicial review of an EIS requires "a pragmatic judgment whether the EIS's form, content, and preparation foster both informed decision-making and informed public participation." *Native*

Ecosystems Council v. Marten, 883 F.3d 783, 795 (9th Cir. 2018). Similarly to CEQA, NEPA instructs that "an agency that has prepared an EIS cannot simply rest on the original document," must "continue to take a 'hard look at the environmental effects of its planned action, even after a proposal has received initial approval," and is required to prepare a supplemental EIS if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" and a major Federal action remains to occur. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000), quoting *Robertson*, 490 U.S. at 374; 40 C.F.R. § 1502.9(d)(1)(ii).

As discussed in detail above, the FEIS/R was not presented in a manner that demonstrated a wholistic environmental analysis, nor facilitated meaningful public review – indeed relying on portions of the vacated EIS while instructing the public not to comment on the same. Further, significant new circumstances and information affecting the Project and its impacts have been identified since the FEIS/R was published in 2015, including new baseline conditions, and a new project scope, and the Lead Agencies were required to circulate a complete EIS. The Lead Agencies have a duty not only to take a "hard look" the environmental effects of the project, but also to present such information in a manner that will "foster both informed decision-making and informed public participation." The foregoing deficiencies illuminate the extent to which the Lead Agencies have failed to do so here.

3. The EIS/R Lacks Sufficient Information or Analysis to Support Any Conclusion That Groundwater Pumping Impacts Will be Less Than Significant

Mitigation Measure GW-1 ("GW-1") requires that groundwater transfer pumping is halted once groundwater levels reach the "trigger" of either the local Basin Management Objectives ("BMOs") or the historic low groundwater level where no BMO exists. CEQA 5426. GW-1 purports to "avoid potentially significant adverse environmental effects from groundwater level declines such as . . . adverse effects to groundwater-dependent vegetation." CEQA 5424. However, GW-1 does not require monitoring or mitigation of potentially significant effects to shallow-rooted groundwater-dependent vegetation, instead requiring mitigation for deep-rooted vegetation only. As a result, GW-1 fails to prevent significant impacts to groundwater-dependent ecosystems, vegetation, and other wildlife habitats ("GDEs") that lie within the anticipated area(s) of shallow groundwater drawdown.

GW-1 similarly fails to prevent significant impacts to third parties. GW-1 aims to "avoid potentially significant adverse environmental effects from groundwater level declines such as (1) impacts to other legal users of water; [and] (2) land subsidence . . . ." CEQA 5424. CEQA requires that mitigation measures are likely to be effective, but GW-1 fails to require sufficient monitoring, preventative, and corrective actions to actually mitigate subsidence, resulting in significant impacts to third parties. *See*, *Sierra Club v. Cty. of San Diego,* 231 Cal.App.4th 1152*,* 1169 (2014).

a. The EIS/R's discussion of impacts to groundwater dependent ecosystems is subject to de novo review pursuant to CEQA.

In concluding that the Proposed Action will not result in significant impacts to GDEs, the Lead Agencies failed to consider evidence from a qualified expert, excluded large portions of the Seller transfer area from analysis without explanation, and relied upon non-existent monitoring requirements. The Lead Agencies' analysis of the effects of the Proposed Action on GDEs is inadequate because it "lacks analysis or omits the magnitude of the impact," which is subject to de novo review. *See*, *County of Fresno,* 6 Cal.5th at 510, 514-515 ("adequacy of discussion claims are not typically amenable to substantial evidence review"). In the alternative, even if subject to the more deferential substantial evidence standard, the Lead Agencies' finding that GW-1 will mitigate effects to GDEs to a less than significant level is not supported by substantial record evidence.

b. The FEIS/R Ignores Potentially Significant Impacts to GDEs in Violation of CEQA.

The FEIR concludes that no significant adverse impacts to GDEs will occur:

> As discussed in the Assessment Methods (Appendix P), if groundwater levels are more than 15 feet below ground surface, a change in groundwater levels would not likely affect overlying terrestrial resources. In a few locations in the North Delta associated with wetlands, groundwater elevations are less than 15 feet below ground surface and natural communities reliant on groundwater are more likely to be impacted. In these areas, modeling indicates that the maximum reductions would be 0.3-0.8 feet, with full recharge. The increases in subsurface drawdown would be too small to affect natural communities . . . which rely on groundwater for all or part of their water supply.

CEQA 5602. This conclusion ignores evidence submitted by a qualified expert, fails to conduct an analysis of effects to terrestrial vegetation along rivers and creeks where depth to groundwater is less than 15 feet, and relies upon non-existent mitigation measures.

1. The Lead Agencies Ignored Evidence Submitted By a Qualified Expert.

The FEIR and Appendix P assert that the Project will not have a significant adverse impact on GDEs because (1) there are very few locations in the Seller transfer area where groundwater levels are less than 15 feet below surface; and (2) in those "few locations in the North Delta" where depth to groundwater is less than 15 feet and GDEs are present, modeling shows that groundwater drawdown would be less than one foot, and GDEs would adjust their root growth to accommodate the change.

AquAlliance expert Kit Custis commented on the RDEIR, attaching exhibits showing large portions of the Sacramento Valley where the depth to groundwater is less than 15 feet *and* GDEs are present. CEQA 8247 (based on "review of the DRW-GDEs-GIS website, more than just deep-rooted vegetation is mapped in the seller's transfer water source area north of the Sacramento Delta.") The Custis comment exhibits included "a screen print from the DWR-GDEs-GIS web site for the middle portion of the transfer water source area surrounding Sutter Buttes that show numerous areas of vegetation;" a "color coded Spring 2018 groundwater depth contour maps of the Sacramento Valley taken from DWR's Groundwater Information Interactive Map Application," indicating there are large areas of the Sacramento Valley where groundwater depths are less than 15 feet; and a "composite map of the area in Exhibit 18 with Exhibit 19b a color shaded contour map of the depth to groundwater in the Spring of 2018." *Id; see also* CEQA 11095 - 11099. Mr. Custis explained that his composite map exhibit "shows that there are a number of areas of terrestrial vegetation where the depth to groundwater is 10 feet or less . . . . Therefore, the existing data on GDEs and shallow groundwater depths in the seller's transfer water source area north of the Sacramento Delta suggest that there are a number of areas where GDEs could be impacted by a lowering of groundwater level during transfer pumping." CEQA 8247-8248; *see also* CEQA 8249. Mr. Custis noted the FEIR did not include maps of the "few locations in the North Delta associated with wetlands" where modeling was conducted showing that drawdown would not have significant impacts on GDEs. CEQA 8247.[6] The Lead Agencies provided a response irrelevant

[6] In addition, Mr. Custis commented that the Lead Agencies had omitted any maps showing "areas where the depth to groundwater is less than 15 feet." CEQA 8247. The response indicated that Appendix F had been updated to include hydrographs showing depth to groundwater. Remarkably, eight out of the ten shallow well hydrographs added to Appendix F show a recent depth to groundwater *at or less than 15 feet*, directly contradicting the statement that "shallow groundwater is typically deeper than 15 feet in most locations under existing conditions." *See* Appendix F, Figures F-10 (CEQA 6539), F-11 (CEQA 6540), F-12 (CEQA 6541), F-13 (CEQA 6542), F-15 (CEQA 6544), F-16 (CEQA 6545), F-17 (CEQA 6546), F-19 (CEQA 6548), and F-20 (CEQA 6549); *See also* CEQA 11255 (noting the same).

to the articulated concerns, referring Mr. Custis to the EIS/R discussions and responses regarding deep-rooted vegetation. CEQA 8248. These comments were reiterated for the FEIR/S, and again dismissed without analysis. *See* CEQA 11255, 11219.

The failure to meaningfully consider or respond to Mr. Custis' comments violates CEQA. "Where comments from responsible experts . . . disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project . . . these comments may not simply be ignored. *There must be good faith, reasoned analysis in response*." *Banning Ranch, supra,* 2 Cal.5th 918, 940 (2017)(cites, quotes omitted). This requirement "helps to ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug." *Id*.; *See also Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs*., 91 Cal.App.4th 1344, 1367, 1371 (2001) (abuse of discretion where "EIR failed to acknowledge the opinions of . . . experts who cast substantial doubt on the adequacy of the EIR's analysis"); *Santa Clarita Org. for Planning v. Cty. of L.A.*, 106 Cal.App.4th 715, 723 (2003) (same).

After an extremely laborious search, Petitioners did, in fact, find a map of areas where the EIS/R modeling was conducted. Buried in Appendix R, Comments and Responses *on the 2014 Draft EIS/EIR*, is a response to the same concern articulated by CDFW stating "the EIS/EIR doesn't identify where these 'few locations in the North Delta' are located or the natural communities that occur in these areas . . . CDFW recommends that the EIS/EIR identify and discuss the North Delta and the natural communities associated with those areas in greater detail." CEQA 7443. The Lead Agencies responded that "Figure 3.3-28c shows the changes in groundwater levels in the North Delta. The North Delta areas referenced in Section 3.8 include RD 2068, Pope Ranch, and Sacramento County Water Agency." *Id*. A comparison of Figure 3.3-28c (*which was not included in the 2019 FEIS/R*) and Exhibit 20 provided by Mr. Custis reveal that there are *large swaths* of the Seller Transfer Area where depth to groundwater is less than 15 feet, GDEs are present, and no modeling of effects to GDEs has been conducted. CEQA 14975, 11099.

The Lead Agencies ignored evidence from a qualified expert and concluded there are no significant impacts to shallow-groundwater-dependent GDEs by sticking their heads in the sand. CEQA demands more. The FEIS/R is inadequate as an informational document because it "lacks analysis or

omits the magnitude of the impact." *County of Fresno*, 6 Cal.5th at 514; *see also*, *Banning Ranch*, *supra*, 2 Cal.5th at 941 (information only found "from a diligent search of the EIR appendices and other elements of the administrative record" constitutes "a fragmented presentation [that] is inadequate. Readers of an EIR should not be required to 'ferret out an unreferenced discussion in related material. . . . Information scattered here and there in EIR appendices, or a report buried in an appendix, is not a substitute for a good faith reasoned analysis.'" [cites, quotes omitted].) The FEIR's finding of no significant impacts to GDEs violated procedural disclosure requirements, and is not supported by substantial record evidence.

2. The FEIS/R Omits Analysis of Impacts to GDEs Along Rivers and Creeks.

Section 3.8 of the FEIS/R states that in addition to the locations in the North Delta with shallow groundwater, discussed above, "groundwater levels are likely to be less than 15 feet below ground surface along rivers and creeks and terrestrial vegetation in these areas could be affected by changes in the groundwater and surface water interactions. Further analysis of the effects of groundwater substitution pumping on natural communities due to changes in stream flow are discussed below under Rivers and Creeks." CEQA 5602-3. However, the "Rivers and Creeks" section does not discuss such impacts to terrestrial vegetation, and instead concludes that "impacts to terrestrial species in the following waterways are less than significant," listing 24 rivers or creeks to which this conclusion applies. CEQA 5605. Regarding 11 rivers or creeks for which historical flow data is limited or not available, the FEIS/R states, "[c]hanges in flows to individual streams . . . could have a substantial effect on the riparian natural communities and associated wildlife habitat. Impacts from stream flow reductions within any of the aforementioned streams on riparian communities . . . is considered potentially significant and is discussed in detail in Section 3.8.2.4.3 . . . ." CEQA 5606. The FEIS/R likewise notes that impacts from flow reductions in Cache Creek[7] and Stony Creek "on riparian communities . . . is considered potentially significant and is discussed in detail in Section 3.8.2.4.3 . . . ." CEQA 5606. This cross-referenced section, however, is expressly limited to analyzing effects to "candidate, sensitive, or special-status species," rather than terrestrial vegetation found in areas alongside creeks and rivers with depth to groundwater of less than 15 feet. CEQA 5611.

The FEIS/R admits that "[d]ue to the complex interaction between groundwater and surface

[7] Cache Creek would experience up to 31% flow reduction in critical water years during November. CEQA 5561.

water, negative impacts would result from a reduction in creek flows to downstream wetland and riparian habitats. Decreased surface flows could potentially impact downstream natural communities, such as seasonal wetland and managed wetland habitats, which are reliant on creek and river flows for all or part of their water supply." CEQA 5611-12. Regardless, the FEIS/R concludes that while the Proposed Action may "cause flow reductions of greater than ten percent" in Cache Creek, Stony Creek, and "other small creeks where no data are available on existing streamflows," the impacts of groundwater substitution flows on special-status plants would be less than significant. This conclusion is based on mitigation measures that are *not* required by GW-1, asserting that

> Groundwater wells within the seller's service area will be monitored by the seller with the goal of identifying whether groundwater substitution pumping is causing substantial adverse impacts on groundwater levels *and associated vegetation that rely on shallow groundwater*. . . .

CEQA 5621. However, GW-1 does not require monitoring of shallow groundwater GDE effects. CEQA 10157-58. The EIS/R further provides that

> [i]f actions taken to make water available for transfer result in loss of trees along streams, the seller will plant, maintain, and monitor replacement trees to ensure successful reestablishment of lost trees. Implementation of this measure would reduce significant effects on special-status plants and migratory birds that occupy streamside habitats because riparian vegetation that provides habitat to these species would recover as the result of natural groundwater recharge.

CEQA 5621. First, this assertion contradicts the previous conclusions that adverse effects to GDEs would be avoided. Second, because no shallow rooted vegetation monitoring is required, it would be unlikely, if not impossible, to trigger this mitigation for impacts to shallow rooted vegetation.[8] Third, this analysis assumes, without any support, that natural recharge will correct any environmental impacts that occur. This contradicts the EIS/R finding that groundwater levels had not returned to levels before the prior drought. CEQA 663. Further, no guidance is provided as to the amount of time an adverse

[8] In the same vein, the EIS/R state that "[g]roundwater substitution pumping could reduce flows in small streams and wetlands associated with areas of groundwater withdrawal and in downstream areas. Reduced stream flows could result in stress on the riparian community and reduce riparian habitat suitability for the species. This impact is considered potentially significant. Implementation of [GW-1] that would monitor groundwater fluctuations and implement a revegetation plan for substantial vegetation loss would reduce this impact to a less than significant level." CEQA 5625. Again, however, GW-1 does not require monitoring for impacts to shallow-rooted vegetation, nor revegetation for shallow-rooted vegetation if impacts occur.

impact could occur before it will be corrected.

Finally, the FEIS/R comes full circle in relying on groundwater depths contravened by Appendix F hydrographs and Mr. Custis' comments to support its determination of no significant impacts to terrestrial vegetation and GDEs:

> The reduction in stream flow could result in a substantial adverse effect on riparian and wetland natural communities associated with these creeks because root zones would be dewatered to such an extent to cause die back of riparian tree and shrub foliage, branches or entire plants. The Proposed Action would have a less than significant effect on natural communities that rely solely on groundwater because increases in drawdown would be too small to cause a substantial effect on vegetation that relies on groundwater. Because groundwater modeling shows that shallow groundwater levels are more than 15 feet below ground surface in most locations that could be affected by groundwater substitution, potential impacts on natural communities are expected to be less than significant.

CEQA 5623. Accordingly, the FEIS/R does not discuss impacts to terrestrial vegetation alongside streams and creeks with depth to groundwater of less than 15 feet, and relies upon non-existent monitoring and revegetation provisions to purportedly mitigate impacts to GDEs.

c. GW-1 Does Not Prevent Significant Impacts to GDEs in Violation of CEQA.

Public Agencies "should not approve projects as proposed if there are . . . feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." Pub. Resources Code, § 21002. A mitigation measure must be "feasible or effective in remedying the potentially significant problem" it is intended to address. *Gray v. Cty. of Madera*, 167 Cal.App.4th 1099, 1116 (2008); *see also Sierra Club v. County of San Diego*, 231 Cal.App.4th 1152, 1168 (2014) (no evidence that recommendations for reducing greenhouse gas emissions would be enforceable or effective). GW-1 is relied upon to mitigate significant impacts to "groundwater-dependent vegetation," but does not require monitoring or mitigation for shallow-rooted vegetation: "To avoid significant effects to vegetation . . . sellers will monitor groundwater level data to verify that significant adverse effects to deep-rooted vegetation are avoided. This monitoring is only required in areas with deep-rooted vegetation" and "is not required in areas with no deep-rooted vegetation . . . ." CEQA 10157-58. Accordingly, GW-1 does not require identification, evaluation, monitoring, or mitigation of groundwater-dependent vegetation with roots shallower than 10 feet. While GW-1 purportedly mitigates impacts to terrestrial species, natural communities, and special-status species from reduced flows in creeks, flows to wetlands, and riparian habitats due to groundwater substitution

pumping, it is devoid of any requirements that would successfully do so, including: (1) identification or mapping of GDE's and other wildlife habitats that lie within the anticipated area of shallow groundwater drawdown; (2) monitoring of impacts to GDEs prior to, during, or after groundwater pumping; or (3) groundwater level triggers to be set in order to protect these resources. *See* Comments 9-208 (CEQA 8251-8252); 9-163 (CEQA 8222); 9-201 (CEQA 8247); 9-204 (CEQA 8249). Nor does the FEIS/R establish a correlation between the historic low groundwater levels and impacts to streamflow, GDEs, shallow-rooted vegetation, terrestrial species, or any Sustainable Groundwater Management Act ("SGMA") undesirable effects. CEQA 11249. Further, the FEIR does not require establishment of baseline conditions for GDEs within the area of potential transfer pumping prior to commencing transfers. CEQA 8227; CEQA 8250.

The California Department of Fish and Wildlife ("CDFW") voiced these concerns, noting that GW-1 "may be insufficient to address potential impacts" to habitats and special status species because "[i]nadequate mitigation triggers, insufficient monitoring, and un-protective thresholds allow for habitat degradation – both vegetated and aquatic – to go unnoticed and unmitigated until species loss has already occurred," and that the "presence of GDEs in the Seller Service Area [] suggests that the potential for habitat and species loss could be significant if the monitoring and mitigation requirements are not strengthened." CEQA 8270; *see also* Comments 9-65 (CEQA 8164-8165); 9-163 (CEQA 8222); 9-207 to 9-208 (CEQA 8251-8252); 9-200 to 9-204 (CEQA 8246-8249). The Lead Agencies failed to meaningfully respond to this and similar comments regarding impacts to GDEs, instead discussing the mitigation of impacts to deep-rooted vegetation. For example, Response S-200 states that in "upland habitats, *vegetation that relies on shallow groundwater may be more sensitive to changes in groundwater levels*; however, it is expected that the monitoring triggers would catch the lowering of groundwater levels soon enough . . . to allow for recharge before there is a substantial reduction in the health of *deep-rooted vegetation*." CEQA 8247; *see also* Responses 9-203 (CEQA 8249); 9-201 (CEQA 8248); 9-208 (CEQA 8251). GW-1 as drafted does not avoid significant impacts to GDEs.

d. The Analysis of Impacts to GDEs Violates NEPA.

The inadequate analysis of impacts to GDEs also violates NEPA. As noted in Section IV(A)(1)(c) above, while NEPA does not have substantive mitigation requirements, an EIS must discuss

mitigation measures "with sufficient detail to ensure that environmental consequences have been fairly evaluated." *South Fork*, *supra*, 588 F.3d at 727, quoting *Robertson*, 490 U.S. at 352. "An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." *Id*. For the reasons discussed in detail above, the conclusion that GW-1 will effectively mitigate significant adverse effects to GDEs is contingent upon the Lead Agencies' refusal to consider evidence proffered by a qualified expert showing the presence of GDEs in large areas of the Seller Transfer Area with groundwater depths of less than 10 feet. The failure to address this analytical gap falls far short of fulfilling NEPA's requirement that the environmental consequences of the Project be fairly evaluated.

4. GW-1 Does Not Avoid Significant Impacts to Third Parties.

GW-1 is the sole mitigation measure relied upon to avoid significant impacts to third parties, including land subsidence impacts and impacts to third party wells. GW-1 fails to require sufficient monitoring or mitigation to effectively do so in violation of CEQA. *Gray,* 167 Cal.App.4th at 1116.

a. GW-1 does not avoid significant land subsidence impacts to third parties.

The FEIS/R asserts that "[m]onitoring requirements at the participating pumping well and suitable monitoring well(s) would detect impacts to third parties and land subsidence." CEQA 5425. However, there are no specific requirements contained in GW-1 that would ensure timely detection. GW-1's impact analysis, monitoring, and mitigation measures lack information regarding the current areas and amounts of subsidence, as well as methods, timing, and organizations transfer sellers need to coordinate their subsidence monitoring. For example, GW-1 doesn't require the seller to comply with DWR's Best Management Practices for land subsidence monitoring networks. *See* Comment 9-164 (CEQA 8222-8223).

The primary corrective action in GW-1 to prevent subsidence is to stop pumping when groundwater levels reach the trigger of either Best Management Objectives ("BMO"), or the historic groundwater low level where no BMO exists, and wait for levels to recover to above the trigger before pumping can resume. GW-1 does not require any other specific actions to prevent subsidence. CEQA 8253; *see also* CEQA 8175, CEQA 8104; CEQA 8105. This ignores, among other things, the subsidence

implications that arise from the unchecked ability of transfer sellers to utilize a new historic low groundwater low level each year. First, the historic low groundwater levels now are lower now than for the 10-year Transfer Plan, and the FEIS/R *actively encourages* applicants to take advantage of the new historic lows from the prior drought, such that the applicable trigger levels are less "restrictive." CEQA 5425. Worse, GW-1 allows for new historically low groundwater levels to become the baseline year after year. For example, if a cumulative project causes the historical groundwater low to be exceeded, the following year transfer project may incorporate the new historical low. Petitioners raised this concern in commenting on the SDEIS/RDEIR, and the Lead Agencies' response simply regurgitates the language of GW-1 and does not refute Petitioners' comment. CEQA 8182, 8178. Thus, the increasingly historic low groundwater levels cannot be used as a reliable threshold to avoid subsidence.

GW-1 also fails to ensure that third parties will be compensated for land subsidence damages. GW-1 lacks specific information regarding the rate and amount of land subsidence that is considered significant enough to trigger corrective action. And transfer sellers are not required to demonstrate that they have the financial ability to reimburse third parties for mitigation costs. No procedures are identified for third parties to make a claim of land subsidence; how and by whom a claim will be reviewed and approved; what information is required to make a claim; or whether a claim of impacts or injury that occurs after the year of the transfer pumping will be accepted. *See* Comment 9-210 (CEQA 8253-8254). The "Coordination Plan" the Lead Agencies identify in their response to comments as purportedly alleviating this concern is severely lacking in these requisite details. *See* CEQA 5427-5428; CEQA 8254; CEQA 8187. The Coordination Plan states, in its entirety,

> The monitoring program will include a plan to coordinate the collection and organization of monitoring data. This plan will describe how input from third parties (i.e. groundwater wells not participating in water transfers) will be incorporated into the monitoring program and will include a plan for communication with Reclamation as well as other decision makers and third parties. Additionally, Reclamation, SLDMWA, and potential seller(s) will coordinate closely with potentially affected third parties to collect and monitor groundwater data. If a third party expects that it may be affected by a proposed transfer, that party should contact Reclamation and the seller with its concern. The burden of collecting groundwater data will not be the responsibility of the third party. If warranted, additional groundwater level monitoring may be incorporated in the monitoring and mitigation plans required by [GW-1].

CEQA 5427-5428. In responding to a comment regarding the insufficient procedures for third parties to make claims, the Lead Agencies state that GW-1 "has been revised to include the requirements on reporting and investigation of third-party impacts from the Technical Information for Preparing Water Transfer Proposals (Reclamation and DWR 2015)." CEQA 8254. Despite this assurance, the language of GW-1 itself does not incorporate any specific procedures. Further, in responding to a comment regarding the Proposed Action's dependence upon the DRAFT Technical Information for Preparing Water Transfer Proposals as a mitigation measure, the Lead Agencies state that they "do not defer to the Technical Information for Preparing Water Transfer Proposals (Reclamation and DWR 2015) but include the document as guidance when developing mitigation measures. The mitigation measures included in the EIS/EIR have been developed to be independent . . . ." CEQA 8143. And even more confusingly, in response to a different comment, the Lead Agencies state GW-1 "has been revised and is different from the measure discussed in the Technical Information for Preparing Water Transfer Proposals (Reclamation and DWR 2015)." CEQA 8255. Regardless, the *AquAlliance* court considered the same issue and found, "[t]o the extent the FEIS/R relies on another document as a 'reference' in this manner, the FEIS/R must stand on its own in terms of its requirements and performance standards." *AquAlliance*, 287 F. Supp.3d at 1040-41. Accordingly, GW-1 requirements must be contained within the text of the FEIS/R itself in order to be relied upon by the Lead Agencies. As stated, GW-1 is inadequate.

b. GW-1 does not prevent significant impacts to third party well use.

While acknowledging that "[g]roundwater substitution transfers could increase costs to water users for groundwater pumping, deepening existing wells, or drilling new wells in areas where groundwater levels decline as a result of the transfer," the FEIS/R does not provide adequate measures to mitigate this significant impact. CEQA 5726. The FEIS/R states that "[g]roundwater substitution transfers would cause groundwater levels to decline in local areas . . . . Decreased groundwater levels would increase pumping costs for nearby well owners who are not participating in groundwater substitution transfers. Increased costs would reduce net farm revenues and, subsequently, household spending in the regional economy." CEQA 5726. The FEIS/R conceded that

> After a single year, pumping costs in most areas would increase about $0.64 to $1.60 per AF. In some areas in Sacramento, Glenn and Sutter counties, pumping costs could increase

> up to $3.20 to $4.80 per AF for nearby wells close to 0.25 miles from the transfer well. In some areas of Colusa and Yuba counties, groundwater levels could decline up to about 25 feet, which would be an increase in pumping costs between $6.40 and $8.00 per AF . . . . Reduction in groundwater levels could also result in existing wells that may not be participating in the water transfers to dry out. This would require either deepening existing wells or drilling new wells to continue to pump groundwater. Deepening or drilling new wells would result in excessive costs to third parties and would be a substantial adverse economic effect.

CEQA 5726-5727. In order to mitigate, the FEIS/R relies solely on GW-1:

> [GW-1] would reduce the effects of increased groundwater pumping costs for well owners in areas where groundwater levels decline as a result of transfers. This would reduce adverse economic effects of increased pumping costs. [GW-1] also includes monitoring and mitigation actions to prevent wells from going dry or to mitigate the third party in the event that a well goes dry. Section 3.3.4.1.2 describes the monitoring plan that sellers must complete for groundwater substitution transfers and to address third party concerns. Section 3.3.4.1.3 details the mitigation plan for third party effects.

CEQA 5727. However, the FEIS/R *does not contain* a Section 3.3.4.1.2 or 3.3.4.1.3. GW-1 does not provide any specific procedures for calculating the increases in cost of pumping or assessing the design and cost of modifications to infrastructure, nor specify the monitoring and mitigation actions that would "prevent wells from going dry." And, as discussed above regarding subsidence, transfer sellers are not required to prove they have the financial ability to mitigate increased pumping costs or wells that dry up, and there are no stated procedures for third parties to make claims. Without these standards, affected third parties will have considerable difficulty obtaining any mitigation. *See* CEQA 8254.

5. GW-1 Does Not Avoid Cumulatively Considerable Impacts.

GW-1 does not prevent cumulatively considerable impacts to groundwater resources. While the climate crisis and corresponding persistent drought increasingly strain California's finite water supply, the FEIR summarily concludes that Project impacts will be "insubstantial," ignoring the magnitude of the existing problem and the contributions of the Project thereto.

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects." *Golden Door Props., LLC v. Cty. of San Diego*, 50 Cal. App. 5th 467, 527 (2020), quoting CEQA Guidelines § 15355, subd. (b). "'[C]onsideration of the effects of a project or projects as if no others existed would encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural environment . . . . This would effectively

defeat CEQA's mandate to review the actual effect of the projects upon the environment.' The agency must interpret this requirement to 'afford the fullest possible protection of the environment.'" *Id.*, quoting *Las Virgenes Homeowners Fed'n v. Cty. of L.A.*, 177 Cal. App. 3d 300, 306 (1986); *Friends of the Eel River v. Sonoma Cty. Water Agency*, 108 Cal. App. 4th 859, 868 (2003). Further, "[t]he greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." *Cmtys. for a Better Env't v. Cal. Res. Agency*, 103 Cal. App. 4th 98, 120 (2002). "The total absence of consideration of the existing environmental problems . . . is a legal failure that is potentially prejudicial to the FEIS/R's analysis." *AquAlliance*, 287 F. Supp. 3d at 1037.

California's groundwater resources are rapidly depleting, with levels continuing to decline to new historic lows year after year. Not only does the cursory cumulative impacts analysis fail to consider or even *acknowledge* this existing environmental problem, or the extent to which it will be aggravated by the Project, but the FEIR treats the incessant lowering of historic groundwater levels as an opportunity to be taken advantage of by groundwater substitution applicants by encouraging them to use monitoring wells with records that reflect historic drought conditions, such that the applicable trigger levels are less "restrictive." CEQA 5425. The FEIR assures readers that while the "Proposed Action in combination with other cumulative projects would contribute to groundwater level declines in the region" which "could result in significant effects to groundwater resources," the implementation of GW-1 will ensure that the Projects' contribution to such declines is "insubstantial" because GW-1 requires the halting of transfer pumping when historic groundwater levels are reached. CEQA 5430 – 5431. In relying on GW-1 to purportedly mitigate impacts to less than cumulatively considerable, the Lead Agencies ignore the severity of the existing environmental problem and "use[] the magnitude of the current [] problem . . . to trivialize the project's impact." *Kings Cty. Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 718 (1990). The FEIR acknowledges, on the one hand, that groundwater levels have yet to recover to pre-drought 2011 levels in Seller Service Areas, yet establishes post-drought levels as the halting trigger, effectively ensuring that groundwater resources will *never* have the

opportunity to recover to pre-drought levels.[9] *See* Comment 9-88 (CEQA 8178). Touting the guaranteed permanence of the lowest groundwater levels in recorded history as successful avoidance of cumulatively considerable impacts constitutes a "total absence of consideration of the existing environmental problems" and "is a legal failure." *AquAlliance*, 287 F. Supp. 3d at 1037. The question is not whether the "Proposed Action's incremental contribution to groundwater resources impacts is insubstantial" as compared to preexisting conditions, "but whether any additional amount" of impacts to groundwater resources "should be considered significant in light of the serious nature of the [] problem." CEQA 5431; *Kings Cty. Farm Bureau*, 221 Cal. App. 3d at 718; *see also AquAlliance*, 287 F. Supp. 3d at 1036 ("the guiding criterion on the subject of cumulative impact is whether any additional effect caused by the proposed project should be considered significant given the existing cumulative effect"); *L.A. Unified Sch. Dist. v. City of L.A.*, 58 Cal. App. 4th 1019 (1997) (same).

Further, as discussed above, the cumulative impacts analysis ignores that GW-1 allows for new historically low groundwater levels to become the baseline each year. For example, if a cumulative project causes the historical groundwater low to be exceeded, the following year transfer project may incorporate the new historical low. Alternatively, even assuming a cumulative project similarly prohibits drawdown below the historical low, and the low has been reached due to the Project, there would be no remaining groundwater available for the cumulative project, resulting in a significant effect to its implementation.[10] The Lead Agencies do not refute Petitioners' comment on this point, confirming that

[9] For example, "groundwater levels in the Sacramento Valley Groundwater Basin have recovered to better than spring 2016 levels but have not improved to pre-drought levels (prior to 2011)." CEQA 5404 - 5405; "[G]roundwater level declines in the San Joaquin Valley slowed because of wet conditions in 2017 but have not recovered to pre-drought levels (pre-2011 levels)." CEQA 5406; "During the recent drought from 2011 to 2016, water levels in the Redding Area Groundwater Basin . . . decreased up to 18 feet." CEQA 5402; *See also, e.g.*, Figure F-46 (CEQA 6575) (maximum groundwater elevation decreases of -60.2 feet in Glenn County, -49.7 feet in Colusa County, -29.9 feet in Tehama County, -18.7 feet in Butte County, and -8.5 feet in Shasta County for shallow wells from spring 2004-2017).

[10] The cumulative effects analysis in the FEIR does not discuss whether any of the six "projects considered for the groundwater resources cumulative condition" allows historic groundwater levels to be exceeded, and states that the projects are "described in more detail in Chapter 4 of the 2014 Draft EIS/EIR." FEIR CEQA 5430 – 5431. This serves as yet another example of the piecemeal nature of the FEIR – in order to fully understand the cumulative effects of the Proposed Action, the reader is instructed to analyze a portion of a fully vacated EIS/EIR that used a different baseline condition for a different project.

groundwater levels will remain at or below the current historic low levels, resulting in a cumulatively considerable impact to groundwater resources. *See* Comment 9-94 (CEQA 8182).

Finally, the significance of the cumulative effects of the Project were not adequately reflected in the FEIR due to the omission of the Five-Year Warren Act Contracts for Conveyance of Groundwater in the Tehama-Colusa and Corning Canals – Contract Years 2018 – 2023. CEQA 11239. Although the contracts will convey up to 86,200 acre-feet of groundwater per contract year in the Tehama-Colusa Canal to downstream users, the Lead Agencies omitted this project from the cumulative effects analysis, stating they "considered whether there were 'other plans, projects, or programs' that should be included in the cumulative analysis, but in review found that none needed to be added." CEQA 11239-11240; CEQA 11216; CEQA 8061. "The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately." *Golden Door Props., LLC*, 50 Cal. App. 5th at 528, quoting *Rodeo Citizens Assn. v. Cty. of Contra Costa*, 22 Cal. App. 5th 214, 231 (2018). Here, the Lead Agencies' decision to omit from the analysis a project that will convey up to 86,000 acre-feet per year makes little sense when compared to the projects the Lead Agencies found merited inclusion: SWP water transfers (6,800 acre-feet made available through groundwater substitutions); Glenn-Colusa ID's Supplemental Supply program (annual pumping volume not to exceed 28,500 acre-feet); and Davis-Woodland Water Supply Project (diversion of 45,000 acre-feet of water/year from the Sacramento River). CEQA 5430-5431. Given this omission, the EIS/R fails to consider the severity of the cumulative Project effects.

6. The EIS/R Fails to Adequately Assess Impacts Associated With Climate Change.

a. The EIS/R does not analyze how the Project will exacerbate climate change effects.

Faced with the greatest environmental crisis in modern history, the Lead Agencies elected to abdicate their responsibility to conduct the requisite climate change analysis, instead engaging in an impermissibly narrow review that focuses solely on the impact climate change will have on the amount of water available for transfer. CEQA 8069. The FEIS/R fails to evaluate the extent to which the Project will exacerbate the adverse effects of climate change impacts on fisheries, groundwater, vegetation, third parties, and local and regional economies, in violation of CEQA.

CEQA requires an EIR to evaluate the effects of the Proposed Action on the environment. Cal. Pub. Res. Code §§ 21100, 21061. While "CEQA 'does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents,' [it] does mandate 'an analysis of how a project might exacerbate existing environmental hazards.'" *AquAlliance*, 287 F. Supp. 3d at 1026, quoting *Cal. Bldg. Indus. Ass'n. v. Bay Area Air Quality Mgmt. Dist*., 62 Cal. 4th 369, 392 (2015) ("*CBIA I*"); CEQA Guidelines, § 15126.2. Climate change, an existing environmental hazard, is discussed in EIS/R Section 3.6 and Appendix K. The EIS/R purports to analyze climate impacts by evaluating potential future climate conditions under three modeled scenarios: The Central Tendency, Hot-Dry, and Warm-Wet. CEQA 5521.

Petitioners commented on the failure to consider the ways in which the Project might exacerbate climate change impacts beyond the effect on water transfers, including increased drought, reduced snowpack and runoff, rising temperatures, groundwater, ground subsidence, and deep-rooted vegetation. *See* Comments 9-103 to 9-110 (CEQA 8188-8192); Comment 2-14 (CEQA 8069). In response to each comment by AquAlliance identifying discrete climate effects that will be exacerbated by the Proposed Action, the FEIS/R responds by referencing the climate modeling and analysis in Section 3.6 and Appendix K of the FEIS/R. *Id*. As noted, these sections do not analyze how the Proposed Action will exacerbate climate impacts to resources other than water available for transfer, and fail to constitute meaningful environmental review, or substantial evidence supporting conclusions, regarding the exacerbating effects of the Proposed Action on other resources impacted by climate change.

Regarding fisheries and special-status fish, the FEIS/R admits that the Project will generally cause flows in rivers and creeks to be lowered, including a ten percent reduction in mean monthly flows for the Sacramento, Feather, Yuba, and American Rivers, and a greater than 10 percent reduction in flow in certain year classes in 6 creeks, with Cache Creek experiencing up to a 31% lower flow during critical years in November. *See* CEQA 5559; CEQA 8115. The FEIS/R foregoes any analysis of how these impacts will exacerbate projected flow reductions resulting from climate change, despite the fact that Appendix K notes that under the Hot-Dry scenario, total runoff in the Sacramento basin is predicted to decrease by nearly 4 million acre-feet when compared to the No Climate Change scenario. CEQA 7184.

Section 3.6 and Appendix K also note that under the Central Tendency scenario, in-stream flows in the Sacramento and San Joaquin River basins will experience a decrease in March – May and July – October, and water transfers are likely to occur from July – September. CEQA 7186, CEQA 7188-7189; CEQA 5550. Accordingly, from July – September, water transfers facilitated by the Proposed Action have the potential to exacerbate climate change impacts to stream flow. However, the FEIS/R does not analyze how or to what extent the Project will exacerbate the effects of climate change by transferring water resources out of the project area at times when those resources are already stressed by climate change and needed for other resources such as aquatic species, vegetation, irrigation, or recreation.[11]

b. The EIS/R arbitrarily disregards the potential impacts presented by the "hot-dry" climate change scenario.

The EIS/R arbitrarily disregards the potential climate change impacts presented by the "Hot-Dry" CalLite modeling scenario, reasoning that it is "a bookend scenario [that] reflects a longer climate horizon than the next six years." This conclusion is belied by the obvious climate emergencies Californians presently face. The Lead Agencies rely on this arbitrary decision to support their finding that Project impacts will be less than significant:

> Transfer demands and supplies are substantially higher under the Hot-Dry scenario . . . in comparison to the without climate change scenario . . . While the changes described under the Hot-Dry scenario reflect changes of a greater magnitude, this is a bookend scenario and reflects a longer climate horizon than the next six years . . . the effects are likely to be similar to those described under the Central Tendency scenario . . . Therefore, impacts to the Proposed Action from climate change would be less than significant, since the annual demands, supplies, and frequency of transfers do not change much under the without climate change and [Central Tendency] scenarios.

CEQA 5527. The FEIS/R provides no explanation as to why the Central Tendency scenario is more likely to reflect expected changes in the next six years than the Hot-Dry scenario, nor why it is appropriate to completely discount the effects of the Hot-Dry scenario, which may occur over the life of the Proposed Action. *See* Responses 2-13 to 2-15 (CEQA 8065-2070), 9-103 to 9-106 (CEQA 8188-

[11] For example, the FEIS/R notes that Spring Chinook migration occurs from March – September (CEQA 5550), which corresponds with the months Appendix K predicts will experience decreases in stream flows under the Central Tendency scenario and during which water transfers will occur. CEQA 5550; CEQA 7186. The FEIS/R fails to consider how monthly variations to in-stream flow caused by climate change are exacerbated by water transfers facilitated by the Proposed Action, including potential adverse effects to Spring Chinook, other fisheries resources or special status fish, wildlife and vegetation, recreation, third-parties, and local and regional economies. *See* CEQA 11233.

8190); (CEQA 11214). This constitutes an insufficient "description of an environmental impact" "because it lacks analysis or omits the magnitude of the impact." *Sierra Club*, 6 Cal. 5th at 514.

c. The lead agencies cannot rely on the 2018 AquAlliance decision to justify deficient climate change CEQA review.

In responding to a comment that the RDEIR is lacking a CEQA-compliant climate change analysis, the Lead Agencies assert collateral estoppel in order to justify their deficient review, stating,

> Page 63 of the District Court ruling stated that "Plaintiffs bear the burden of identifying evidence of exacerbation. This makes sense in light of the fact that the exacerbation standard is an exception to the general rule that an EIR need not evaluate the impacts of the environment on a proposed project. Plaintiffs' motion for summary judgment that the FEIS/R's climate change analysis violates CEQA is DENIED; the Authority's cross-motion is GRANTED." The ruling is final, and this issue cannot be reasserted.

CEQA 8064. The assertion of collateral estoppel is misplaced. First, the 2018 *AquAlliance* decision vacated and set aside the Project approval as well as the entirety of the 2015 FEIS/R and BiOp. *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878 (E.D. Cal. 2018). Second, the Proposed Action is a separate and distinct project from the Final Long-Term Water Transfer that was approved and subsequently vacated by the District Court. The Lead Agencies cannot rely on a decision regarding a different project to assert collateral estoppel here. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) ("Under both California and federal law, collateral estoppel applies only where it is established that (1) the issue necessarily decided at the previous proceeding *is identical* to the one which is sought to be relitigated . . .") (emphasis added)). The facts involved in the Proposed Action are different from those at issue in the 2018 *AquAlliance* decision, including: (1) a wholly distinct project that includes new sellers, a shortened time-frame, and unenforceable limits on water transfers; (2) a significantly changed scope from the project originally contemplated over five years ago; (3) new public and scientific comment on the revised EIS/R climate change section; and (4) a change in circumstances, including a historic drought in the interim and significantly reduced historic low groundwater levels that now serve as the threshold of significance. Given the different facts at issue, collateral estoppel is inapplicable. *See, e.g., Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1356 (9th Cir. 1985) ("Similarity between the issues does not suffice; collateral estoppel is applied only when the issues are identical. If different facts are in issue in a second case from those that were litigated in the first case,

then the parties are not collaterally estopped from litigation in the second case"); *Wash. Pub. Power Supply Sys. v. Pittsburgh-Des Moines Corp.*, 1993 U.S. App. LEXIS 1660, at *11 (9th Cir. Jan. 26 1993) (applying federal law) ("Similarity between the issues is not sufficient; collateral estoppel is applied only when the issues are *identical.* The Ninth Circuit has strictly applied the identity requirement. [Citing cases].") (emphasis in original). Collateral estoppel does not apply here.

d. The EIS/R Failed to Address Climate Change in its NEPA Analysis.

The district court in *AquAlliance* found that the original EIS/R violated NEPA because it failed to address the impact of climate change. *AquAlliance, supra*, 287 F. Supp. 3d 969 at 1032. The EIS/R now purports to address the impact of climate change, but it does not.

Rather than explain how climate change may affect the Project's impacts on the environment, the EIS/R instead only analyzes the narrow issue of how climate change may affect the physical quantity of water available for transfer. CEQA 3887 ["to comply with NEPA, the RDEIR/SDEIS evaluated the impacts of climate change scenarios on the quantity of water potentially available for transfer"]. Such a narrow focus is inconsistent with both the District Court's ruling in *AquAlliance* and applicable law. The District Court's decision in *AquAlliance* quoted CEQ's "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions," which states, "When assessing the effects of climate change on a proposed action . . . [t]he reasonably foreseeable affected environment should serve as the basis ***for evaluating and comparing the incremental effects of alternatives***." *AquAlliance, supra*, 287 F. Supp. 3d 969 at 1028 [emphasis added]. The court in *AquAlliance* also noted, "In evaluating the treatment of climate change in the FEIS/R, the Court finds *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224 (E.D. Wash. 2016), to be instructive, even though the relevant sections of that case concern the ESA's best available science standard." *AquAlliance, supra*, 287 F. Supp. 3d 969 at 1031. *Wild Fish Conservancy*, in turn, held, "NMFS failed to adequately consider the effects of climate change in the BiOp's analysis of the Hatchery's operations and water use." *Wild Fish Conservancy, supra*, 221 F. Supp. 3d 1224 at 1228. In other words, an agency must consider the effects of climate change in its analysis of a project's impacts.

This is not a theoretical deficiency. The district court in *AquAlliance* found the original EIS/R's analysis deficient in part because,

> the present condition of the Delta is already precarious, due in part to reduced Delta outflows. AR 151608 (SWRCB Report indicating that current Delta flows are insufficient to support public trust resources, which include fish and wildlife). Yet, the FEIS/R fails to account for this in its cumulative impacts analysis.

AquAlliance, supra, 287 F. Supp. 3d at 1036–1037. The Revised EIS/R purported to include an updated analysis of cumulative Delta outflow, and ultimately concluded the Project's incremental impact was less than significant because "the changes in Delta outflow associated with the potential water transfers are insubstantial and occur only during wetter conditions." CEQA 657. But the EIS/R's analysis of Delta outflow is expressly based on the CalSim II model, which relies on hydrological conditions only up through 2003 and therefore does not account for climate change. CEQA 6051. Other modeling reveals that climate change will reduce net Delta outflow during these periods. CEQA 455-456. In other words, the Project's incremental impact on net Delta outflow might be exacerbated by climate change, and BOR failed to take the requisite hard look by ignoring this. It continues to fail to consider an important aspect of the problem. *Pub. Citizen v. Nuclear Regulatory Com'n,* 573 F.3d 916 (9th Cir. 2009).

The same is true regarding other potential impacts. With respect to salinity in particular, the "accelerating" rates of sea level rise "are associated with increasing salinity in the Delta, which influences the suitability of its water for agricultural, urban, and environmental uses." CEQA 445.

The EIS/R must incorporate climate change predictions in its analysis of cumulative water quality impacts, and every other section of the EIS/R where such predictions are relevant.

7. The EIS/R Failed to Disclose and Analyze the Delta Stewardship Council's Jurisdiction over the Project.

A CEQA lead agency is required to discuss other regulatory regimes, and the potential ramifications for mitigation measures and alternatives, which may apply to its project. CEQA Guidelines, §§ 15124(d)(1)(C), 15126.6(f)(1); *Banning Ranch, supra,* 2 Cal.5th at 936-938. The lead agency cannot delay such analysis until a later phase of the project; doing so violates CEQA's policy of integrated review. *Banning Ranch*, *supra*, 2 Cal.5th at 939. Omitting this discussion is a failure to proceed in a manner required by law, with no deference from a reviewing court. *Id*. at 942.

The Delta Stewardship Council provided extensive comments on the Project, detailing why the Project constitutes a "covered action" under the Delta Plan, and noting the SDEIS/RDEIR lacked any discussion of the Delta Plan. CEQA 3898-3905. SLDMWA's response was a perfunctory rejection that the Delta Plan applied to the Project and that the Project is not a covered action because it falls within an exemption for single-year temporary water transfers. *Ibid*. Additionally, the response states, "[i]f the Lead Agencies enter into multi-year transfers agreement, the required Certifications of Consistency with the Council would be filed at that point." CEQA 3899.

This response is inadequate and the EIS/R fails under *Banning Ranch* by not discussing the possible applicability of the Delta Plan. The EIS/R fails to disclose what potential Delta Plan policies could apply to the Project, whether the Project is consistent with the Delta Plan, or what achieving consistency would mean for the Project and its mitigation measures. Defendants may disagree with the Council's claim that the Project is a covered action subject to the Delta Plan, but that does not excuse Defendants' failure to provide any discussion about the possible applicability of the Delta Plan. Defendants' assertion that it can delay analysis of Delta Plan consistency to individual water transfers is wrong. Even if the Delta Plan would only apply to multi-year transfers covered by the Project, Defendants must still make "a good faith attempt to analyze project alternatives and mitigation measures in light of applicable [Delta Plan] requirements." *Banning Ranch*, *supra*, 2 Cal.5th at 941.

The District Court rejected a similarly inaccurate characterization of a project by BOR in *NRDC v. Zinke,* 347 F. Supp. 3d 465, 507–508 (E.D. Cal. 2018), noting:

> Relatedly, the Bureau cannot maintain plausibly that it has no intention of approving transfers in the future in light of the 10-year water transfer program at issue in the related case of *AquAlliance v. Bureau of Reclamation*, 287 F. Supp. 3d 969 (E.D. Cal. 2018). The Court takes judicial notice of the fact that the project challenged in that case involved an effort by water users and Reclamation to secure programmatic environmental approval for regular transfers from SRS Contractors to other users south of the Delta. *Id.* Nothing in the record of that case even remotely suggests Reclamation is inclined to abandon its plans to continue such transfers in the future. *See* [CITATION] (requesting remand without vacatur suggesting that errors identified by the Court in environmental approval documents are "discrete and readily corrected"). Federal Defendants urge the Court to disregard this related case because it concerns a 10-year transfer program that is not the conduct or action challenged in this case. [CITATION]. This belies logic. If Reclamation is seeking long-term approval for transfers it previously performed in an ad hoc manner, it is at least plausible to infer that Reclamation will in the future continue to make transfers like the ones alleged to have caused take in 2014 and 2015.

Id. A virtually identical analysis applies here. Defendants cannot approve a 5-year transfer program and then claim that there is no such program for purposes of evading Delta Plan consistency review. The EIS/R violates CEQA by failing to adequately discuss the regulatory regimes involved in the Project.

8. Analysis of Mitigation Measure VEG & WILD 1 is Inadequate under CEQA.

CEQA requires that an EIR discuss mitigation measures that can minimize the project's significant environmental effects. Cal. Pub. Res. Code §§ 21002, 21002.1(a), 21100(b)(3), 21151; CEQA Guidelines, § 15126.4. First, the mitigation measure must be demonstrably effective. *See Sierra Club v. Cty. of San Diego*, 231 Cal.App.4th 1152, 1168 (2014) [no evidence that recommendations for reducing greenhouse gas emissions would be enforceable or effective]; *Gray v. Cty. of Madera*, 167 Cal.App.4th 1099, 1116 (2008) [impacts to adjoining groundwater users not avoided]. To be effective, the implementation of a mitigation measure also cannot be delayed beyond the start of the project activity that causes the impact in question. *POET, LLC v. State Air Res. Bd.*, 218 Cal.App.4th 681, 740 (2013). Second, mitigation measures must not be remote and speculative. *Fed'n of Hillside & Canyon Ass'ns v. City of L.A.,* 83 Cal.App.4th 1252, 1260 (2000). A court may find mitigation measures identified in an EIR legally inadequate if they are so undefined that it is impossible to gauge their effectiveness. *Pres. Wild Santee v. City of Santee*, 210 Cal.App.4th 260, 281 (2012).

Third, an EIR may not defer the formulation of mitigation measures to a future time, but mitigation measures may specify performance standards that would mitigate the project's significant effects and may be accomplished in more than one specified way. *Sacramento Old City Ass'n. v. City Council*, 229 Cal.App.3d 1011 (1991); CEQA Guidelines, § 15126.4(a)(1). Thus,

> for [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process (e.g., at the general plan amendment or rezone stage), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated.

Defend the Bay v. City of Irvine, 119 Cal.App.4th 1261, 1275-1276 (2004).

Conversely, "[i]mpermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be

mitigated in the manner described in the EIR." *Clover Valley Foundation v. City of Rocklin*, 197 Cal.App.4th 200, 236 (2011). For example, "[a]n EIR is inadequate if '[t]he success or failure of mitigation efforts . . . may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.'" *CBE, supra,* 184 Cal.App.4th at 92.

The EIS/R impermissibly defers the required analysis. The EIS/R determined that water transfers could negatively affect GGS by reducing aquatic habitat, but determined that the impact would be less than significant with mitigation. CEQA 527. The EIS/R states that implementation of VEG and WILD-1 "will reduce the potential for death or decreased fitness of individual giant garter snake due to reduced water availability by maintaining adequate water in water conveyance ditches and canals adjacent to idled/shifted fields." CEQA 875. The mitigation measure states:

> Reclamation will monitor the effectiveness of the conservation measures by funding giant garter snake distribution and occupancy research. The research, conducted by USGS, includes annual sampling of giant garter snake within the action area and focuses on their distribution and occupancy dynamics. The research is designed to evaluate the effectiveness of the conservation measures to maintain giant garter snake occupancy at sites transferring water via this program.

CEQA 5177. This is nothing more than deferred mitigation – the mitigation measure would allow the impacts to GGS to be significant until BOR conducted enough research to determine how the water transfers actually affect the GGS. CEQA 5177. Similarly, BOR will discuss the "effectiveness of the Project conservation measures," once it finds out the transfers are having "unanticipated effects." CEQA 5177. Mitigation Measure VEG and WILD-1 cannot be deemed effective if BOR must continually reevaluate the effectiveness of the mitigation.

Additionally, VEG and WILD-1 are not based on substantial evidence in the record. For example, the mitigation measure relies heavily on water being kept in drainage ditches and canals. CEQA 5174. However, no evidence in the record suggests this alone will reduce the impact to GGS to less than significant. To the contrary, relevant technical studies contained in the record establish that this mitigation strategy is not effective. There are several instances in the BiOp and Administrative Record that identify rice fields and/or wetlands as the best indicator for snake occurrences and survival rate.

> Giant gartersnakes are strongly associated with the canals that supply water to and drain water from rice fields; these canals provide much more stable habitat than rice fields because they maintain water longer and support marsh-like conditions for most of the giant gartersnake active season. Nonetheless, our results suggest that maintaining canals without neighboring rice fields would be detrimental to giant gartersnake populations, with decreases in giant gartersnake survival rates associated with less rice production in the surrounding landscape.

CEQA 48451.

The BiOp notes that "reduction in rice fields will likely make snakes relocate to other areas to find available foraging areas, which put them at a greater risk of predation, decreased fitness and reproduction, and injury from vehicles or farm equipment while they try to relocate from areas being idled to other aquatic habitats." FW 1487. The 5-year review of the GGS states, "By far the most serious threats to giant garter snake continue to be loss and fragmentation of habitat from urban and agricultural development and loss of habitat associated with changes in rice production." CEQA 49862. The GGS Recovery Plan concludes, "Perennial wetlands provide the highest quality habitat for the giant garter snake, and ricelands, with the interconnected water conveyance structures, serve as an alternative habitat in the absence of higher-quality wetlands." CEQA 100696.

Additionally, BOR's own BA cites a study that states, "'maintaining canals that support the habitat components giant garter snakes select most (terrestrial vegetation on banks, tules and other emergent vegetation in canals)' without neighboring rice cultivation led to a decrease in GGS survival rates." CEQA 14552.

The EIS/R simply ignores the science in the record and relies on mitigation of unsubstantiated effectiveness. A reviewing court should not defer to an agency's determination that mitigation measures will work when it is not apparent and the record does not provide evidence showing the effectiveness of the mitigation. *King & Gardiner Farms, LLC v. Cty. of Kern*, 45 Cal.App.5th 814, 866 (2020).

B. SLDMWA FAILED TO COMPLY WITH THE PUBLIC TRUST DOCTRINE

"California and its agencies have 'an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses wherever feasible.'" *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 1061 (E.D. Cal. 2018), quoting *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal.3d 419, 446 (1983) ("*National Audubon*"). Courts are to "look

with considerable skepticism upon any governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties." *Zack's, Inc. v. City of Sausalito*, 165 Cal.App.4th 1163, 1176 (2008). In commenting on the RDEIR/SDEIS, Petitioners requested that the Lead Agencies conduct "an analysis . . . of the impacts of the Project on public trust uses" pursuant to the common law Public Trust Doctrine. CEQA 8146.

SLDMWA based its refusal to conduct any public trust analysis on two grounds. First, it asserted that "potential water transfers evaluated or approved by Reclamation and SLDMWA" are not subject to a public trust analysis conducted by the agencies "because these agencies do not have [] public trust responsibilities that are applicable to water transfers." CEQA 8146. Second, SLDMWA erroneously contends that *its* public trust duties were fulfilled by written comments on the project received from the California Department of Fish and Wildlife. Case law reaches the opposite result on both claims.

First, it is firmly established that "[g]overnment has a duty to consider the public trust interest when making decisions impacting water that is imbued with the public trust." *Envtl. Law Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 861 (2018). In *Environmental Law Foundation,* the California Court of Appeal was asked to determine whether "the public trust doctrine appl[ies] to the extraction of groundwater that adversely impacts . . . navigable waterway[s]." *Environmental Law Foundation*, 26 Cal. App. 5th at 858. In holding that it does, the Court rejected the argument that because groundwater itself is not navigable, the doctrine doesn't apply, and that rather, the "dispositive issue is . . . whether the challenged activity allegedly harms a navigable waterway" and "thereby violates the public trust." *Id*. at 859-60. The Court further rejected an assertion by the County of Siskiyou mirroring the one made here by the Lead Agencies – that the County "never had and, continues to not have, any fiduciary duties involving groundwater," and therefore was not required "to consider the potential adverse impact of groundwater extraction" on a navigable waterway pursuant to the Public Trust Doctrine. *Id*. at 867, 852. The Court held that the County "shares responsibility for administering the trust and 'may not approve of destructive activities without giving due regard to the preservation of those resources.'" *Id*. at 867-868; *see also San Louis & Delta-Mendota Water Auth. v. Jewell*, 52 F. Supp. 3d 1020, 1069 (E.D. Cal. 2014) ("All entities holding appropriative state water rights, including

the [U.S.] Bureau [of Reclamation], 'hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust'"), aff'd in part, rev'd in part sub nom, *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216 (9th Cir. 2017).

While "[t]here is no set 'procedural matrix' for determining state compliance with the public trust doctrine," "*any action* which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore only be made if there has been *full consideration* of the state's public interest in the matter . . . . Only with such a safeguard can there be any assurance that the public interest will get adequate public attention.'" *S.F. Baykeeper, Inc.v. State Lands Com.*, 242 Cal. App. 4th 202, 234 (2015) (emphasis added), quoting *Citizens for East Shore Parks v. State Lands Com.*, 202 Cal.App.4th 549, 576 (2011); *Zack's*, 165 Cal.App.4th at 1188-89. The Doctrine has thus been held to apply to city government (*see*, *Zack's v. City of Sausalito*, 165 Cal.App.4th at 1176; and *Santa Barbara Channelkeeper v. City of San Buenaventura*, 19 Cal. App. 5th 1176, 1186, (2018)["parties acquiring rights in trust property, such as water flowing in a stream, generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust," cites and quotes omitted]), and has been held applicable to water districts (*Abatti v. Imperial Irrigation Dist.*, 52 Cal.App.5th 236, 256-266 (2020)). In *Abatti*, the Court of Appeal reasoned that "[a] primary duty of irrigation districts is to distribute water," "[m]ultiple provisions of the Water Code authorize irrigation districts to carry out their purposes and duties and accord them broad discretion in doing so," and that "California courts have long held that irrigation districts operate in a public capacity." *Id*. at 257. Here, SLDMWA functions exclusively for the benefit of its member water districts. There can be no argument but that the water it conveys through these transfers is encumbered by the Public Trust Doctrine, and that SLDMWA has failed in its duty to "take the public trust into account in the planning and allocation of water resources, and to protect public trust uses wherever feasible." *See, National Audubon*, 33 Cal.3d at 446.

Further guidance on this issue is provided by the 2018 *AquAlliance* Court, which observed that "an analysis under the public trust doctrine is an independent duty that attaches to *any* agency approval of a project that implicates public trust resources." *AquAlliance*, 287 F. Supp. 3d at 1060 (emphasis

added). While the Court denied Petitioners' motion for summary judgment on public trust grounds due to a pleading defect—the prior suit alleged violations of CEQA only, and did not include an independent cause of action for violation of the Public Trust Doctrine—Plaintiffs here include a cause of action for violation of the Public Trust Doctrine. Dkt. 24 at 32. The 2018 *AquAlliance* opinion did not indicate the Lead Agencies were exempt from conducting the requisite public trust analysis.

Second, SLDMWA defends its refusal to comply the Public Trust Doctrine by arguing that the CDFW is "a Trustee Agency" that "has the relevant public trust responsibilities. CDFW reviewed the RDEIR/SDEIS and provided comments in comment letter 10." CEQA 8146. SLDMWA may not skirt its obligation to conduct a public trust analysis simply because CDFW submitted a comment letter. "The brief acknowledgement of the obligation of other agencies to protect public trust resources reinforces our conclusion that the [Lead Agency] did not implicitly consider its own obligations under the public trust doctrine as part of its CEQA review of this project." *San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal.App.4th 202, 242 (2015) ("*SF Baykeeper*"). CDFW is not a Lead Agency, and has no authority to approve or deny approval of the Project. Moreover, CDFW's letter itself contains no public trust doctrine analysis, never mentions the public trust, and speaks only to biological resources, which are but one of several protected public trust uses, which also include navigation, waterborne commerce, recreation, and scientific study. *See*, *SF Baykeeper*, 242 Cal.App.4th at 234, 240, quoting *State Water Res. Control. Bd. Cases*, 136 Cal.App.4th 674, 778 (2006); CEQA 8267.

SLDMWA's refusal to undertake any Public Trust Doctrine assessment of the project, prior to approval, is an abdication of its "duty . . . to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *National Audubon* at 441.

C. VIOLATIONS OF THE ESA

1. The 2019 BiOp Analyzed an Agency Action That is Not Coextensive with the Project.

The ESA requires biological opinions to be coextensive with the action authorized. 50 C.F.R. § 402.02. Here, assuming *arguendo* the "upper limit" is enforceable, the EIS/R authorizes 250,000 AF to

be transferred between 2019 and 2024, a total of six years. CEQA 546. However, the BiOp analyzes the effect of water transfers occurring in only two of those six years. FW 1462. These are not coextensive.

Guidance is provided in *NRDC v. Rodgers,* 381 F. Supp. 2d 1212, 1237 (E.D. Cal. 2005), which vacated the FWS's jeopardy opinion because the consultation analyzed significantly less water than was authorized to be transferred. The court noted that "[r]ather than analyzing the effects of 2.1 million acre-feet of water delivery, FWS explained that its effects analysis is conducted under the expectation that water will be delivered to CVP service contractors in quantities that approximate historic deliveries …" *Id*. at 1238. Therefore, FWS only consulted on "approximately less than half of what was authorized in the long-term contracts." *Id*. The court found this amounted to FWS failing to "evaluate the effects of the entire authorized agency action." *Id*. at 1239. Further,

> As discussed above, "biological opinions must be coextensive with the agency action." *Conner,* 848 F.2d at 1457–58 (9th Cir. 1988). There is no question that ESA requires that all impacts of agency action—both present and future effects—be addressed in the consultation's jeopardy analysis. *Id.* The fact that it was thought by FWS that "delivery of full contract quantities is unrealistic" and that "deliveries continue to be impacted by existing climate, hydrology, actions and statutes, ... socio-economic factors" does not excuse consulting on the "entire agency action," which was the authorized delivery of over 2.1 million acre-feet of water, and nothing less than that.

Id.

Here, the 2019 BiOp addresses a truncated agency action limited to transfers occurring in only two years of the six-year program. *Rodger*s is directly on point and should compel the same result. Although the 2019 BiOp correctly observes, "The proposed project consists of approval of water transfers to CVP contractors over a 6-year period (2019-2024)" (FW 1464), the 2019 BiOp's analysis of impacts is nevertheless premised on its assumption that transfers would only occur during two of those years: "Based on historic transfer volumes, the complexities of moving water through the pumping stations, and economic factors, *it is expected* that water transfers related to the proposed project will only occur two times during the six remaining years." FW 1487 (emphasis added). FWS's speculation, which forms the foundation of the 2019 BiOp's analysis, is simply inconsistent with the federal action approved by BOR. As in *Rodgers*, this is an arbitrary decision by FWS and fails to properly analyze the potential impacts to GGS populations. The decision is arbitrary and capricious and violates the ESA.

2. The BiOp Fails to Rationally Connect Facts and Decisions Made By FWS.

A BiOp is arbitrary and capricious if it fails to "consider the relevant factors and articulate a rational connection between the facts found and the choice made." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1121 (9th Cir. 2012). The district court in *AquAlliance* found the 2015 BiOp to be arbitrary and capricious in part due to its failure to justify abandonment of block size limitations on fallowed parcels:

> The Final BiOp acknowledges that fallowing fields in a "checkerboard pattern" may be beneficial to snakes and indicated that long term fallowing can reduce or eliminate habitat. AR 7939. So far as the Court can determine, the BiOp does not explain how, in light of these findings, the conservation measures avoid jeopardy. . . . Here, the BiOp explicitly considers the issue of fallowing patterns (both spatial and temporal) and acknowledges the import of those patterns, but then fails to articulate why the conservation measures avoid jeopardy, in light of the fact that the measures contain no constraints on how close fallowed fields may be to one another nor any limit on the number of consecutive years a field may lie fallow.

AquAlliance, supra, 287 F. Supp. 3d at 1073.

Despite the court's holding that FWS must clarify this inconsistency, the subsequent 2019 BiOp fails to address this point at all. Rather, BOR purports to address the 2015 BiOp's identified deficiency in its revised 2019 BA, asserting in relevant part:

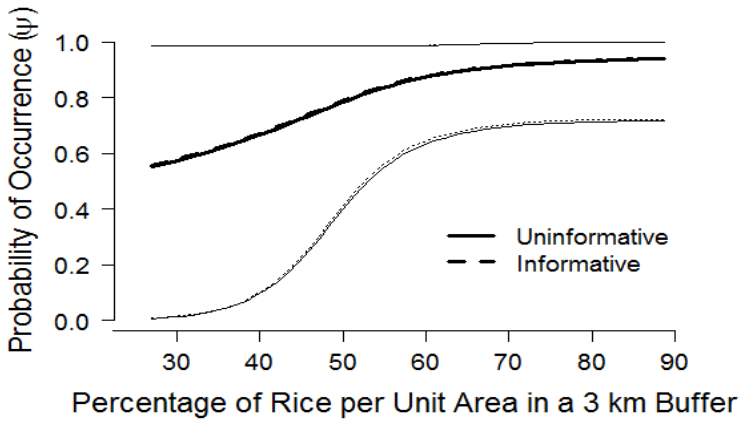
> The block size commitment was proposed to reduce effects on GGS individuals that might be displaced due to crop idling. The basis for these commitments was that "proximity to water results in decreased stress on snake populations." (USBR 2009). Reclamation is unaware of any research supporting these specific commitments so they were removed ***in favor of current measures that are supported by multiple years of research***. The current conservation measures included in the document focus heavily on maintaining water in ditches and canals to retain habitat for resident GGS and reduce the potential effects that could occur if GGS individuals were displaced due to crop idling.

FW 1294 [emphasis added].

According to BOR, its prior conservation strategy was abandoned in favor of a strategy to "maintain[] water in ditches and canals," which BOR characterizes as "supported by multiple years of research." This assertion, which is tellingly unsupported by any study or publication, is demonstrably false. The relevant research – including research performed as required by the 2015 BiOp's conservation

measures – demonstrates the absence of any scientific support for BOR's conclusion that merely maintaining water in canals is adequate to avoid jeopardy.

The first such report was prepared by the United States Geological Survey ("USGS") entitled "Effects of Rice Idling on Occupancy Dynamics of Giant Gartersnakes (*Thamnophis gigas*) in the Sacramento Valley of California" ("2016 Occupancy Report"). The 2016 Occupancy Report was intended to be "only the first year of a multi-year study," that would ultimately be able to "[q]uantify the effects of rice idling on colonization and extirpation probabilities of giant gartersnakes" and also "[e]valuate the effectiveness of current conservation measures for maintaining occupancy." FW 967. The 2016 Occupancy Report provided "data summary and field observations [for] May – September 2016." FW 961. While cautioning that it was just the first year of study, the 2016 Occupancy Report nevertheless noted, "The large sample size and high detection rates of snakes during this first year of study are promising" in terms of the data's predictive ability. FW 965. Refuting BOR's statement that no research supporting idling block size restrictions, the 2016 Occupancy Report found, "Occupancy was positively related to the spatial extent of active rice growing within 1, 2, and 3 km of the site." FW 965. Indeed, 2016 Occupancy Report actually graphed the increased probability of GGS occurrence based on percentage of rice per unit area in a 3 km buffer area. FW 989 (Figure 6).



By establishing that GGS occupancy increases dramatically with the percentage of active rice production within 3km, the 2016 Occupancy Report squarely supports the use of idling block size limitations as a conservation strategy.

Another report released in 2017 by USGS scientists, entitled "Behavioral Response of Giant Gartersnakes (*Thamnophis gigas*) to the Relative Availability of Aquatic Habitat on the Landscape," directly contradicts BOR's conclusion that only maintaining water in canals is effective to avoid jeopardy, much less supported by "years of research." CEQA 82346-82489. The study's abstract states:

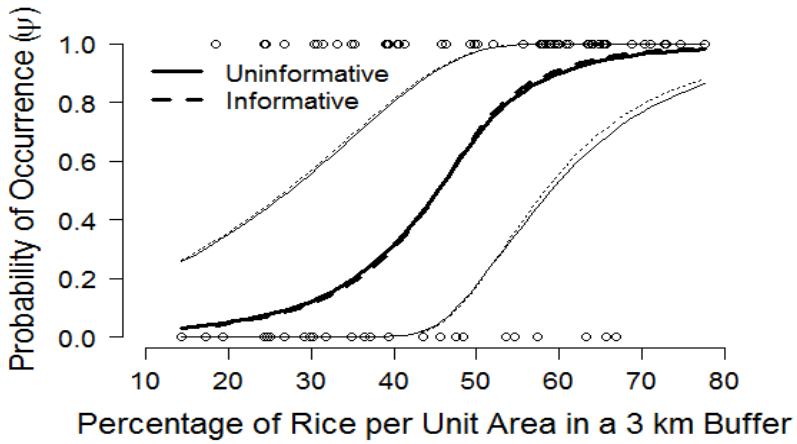
> Giant gartersnakes are strongly associated with the canals that supply water to and drain water from rice fields; these canals provide much more stable habitat than rice fields because they maintain water longer and support marsh-like conditions for most of the giant gartersnake active season. ***Nonetheless, our results suggest that maintaining canals without neighboring rice fields would be detrimental to giant gartersnake populations, with decreases in giant gartersnake survival rates*** associated with less rice production in the surrounding landscape.

CEQA 82423 (emphasis added). The study's discussion section further explains:

> Although the amount of rice on the landscape did not influence the health or home range sizes of giant gartersnakes, and giant gartersnakes avoided cultivated rice itself, increased mobility of female giant gartersnakes and especially improved survival when rice is abundant indicate that cultivated rice is an essential component of giant gartersnake habitat in the contemporary landscape. In our study, decreased availability of rice, which is strongly correlated with a decrease in the extent of aquatic habitat available on the landscape, had direct negative consequences for giant gartersnakes through decreased survival rates. Results indicate that although most individuals did not use rice, and those that did only ventured into the fields between mid-June and early September, ***maintaining water in canals alone would not adequately support giant gartersnakes***.

CEQA 82422 [emphasis added].

In 2018, USGS released a "data summary of field observations" for "June – September 2017," essentially the second year of the 2016 Occupancy Report. FW 1391-1425 ("2017 Occupancy Report"). The 2017 Occupancy Report reconfirmed the 2016 Occupancy Report's finding, stating, "The



proportion of area in rice production surrounding a site was positively related to the probability of giant gartersnakes occurring there." FW 1402. Figure 5 in the 2017 Occupancy Report again demonstrated this clear relationship between proximity to active rice production and GGS occurrence:

FW 1424.

BOR's BA provides no detail to support its conclusory assertion that to "maintain[] water in ditches and canals" is "supported by multiple years of research." Rather, it is based on BOR's egregious mischaracterization of the science, which is revealed through the plain language of the studies themselves and so not even a matter of competing expert opinions. In short, best available science in no way supports BOR and FWS' decision to abandon block size limitations on crop idling, in favor of merely keeping water in canals. This decision is arbitrary and capricious and is a violation of the ESA.

3. Conservation Measures Do Not Support a No Jeopardy Finding.

a. The BiOp fails to explain how only maintaining water in ditches and canals would avoid jeopardy.

As established above, a BiOp must "consider the relevant factors and articulate a rational connection between the facts found and the choice made." *Ctr. for Biological Diversity, supra*, 698 F.3d at 1121. The district court previously vacated the 2015 BiOp in part because it did not explain how its conservation measures supported a finding of no jeopardy:

> The BiOp appears to explain that the conservation measures' focus on prioritizing retention of water in drains and canals is sufficient because "canals and ditches known to be suitable for snakes ... represent 85% of the known snake occurrence.". [CITATION] But, even assuming snakes are found more frequently in canals and ditches, this does not explain why it is acceptable to focus on retention of water in canals and ditches to the detriment of maintaining appropriate rice field habitat the BiOp itself considers "important."

AquAlliance, supra, 287 F. Supp. 3d at 1073. Incredibly, the 2019 BiOp does not answer the court's question. In fact, as explained above, the developing science more clearly establishes that this mitigation strategy is not effective. There are several instances in the BiOp and Administrative Record that identify habitat (i.e., rice fields and/or wetlands) as the best indicator for snake occurrences. The 5-year review determined the most significant threat to GGS is loss and fragmentation of habitat. FW 1478. The BiOp also summarizes studies completed during previous water transfers, noting that "the proportion of area

in rice production surrounding a site was positively related to the probability of snake occurrence." FW 1486. The BA cites one study that states, "'maintaining canals that support the habitat components giant garter snakes select most (terrestrial vegetation on banks, tules and other emergent vegetation in canals)' without neighboring rice cultivation led to a decrease in GGS survival rates." FW 1297.

The 2019 BiOp's conservation measures completely ignore the extensive scientific data that states water in canals is simply not enough. The only conservation measure that attempts to provide mitigation in the form of habitat is conservation measure 4, which is completely inadequate, as discussed further, below. FWS and BOR have created conservation measures that contradict the best available science and, therefore, do not support the BiOp's no jeopardy determination.

b. Manufacturing the concept of "important snake populations" as a mechanism to allow more parcels to utilize crop idling is arbitrary and capricious.

FWS violates the ESA by relying on a conservation measure that lacks any scientific detail, and is based on an arbitrarily created designation seemingly designed only to side-step the conclusions of scientific studies as well as the district court's findings in *AquAlliance*. FWS's determination that the two years of LTWT crop-idling water transfers would not jeopardize the continued existence of the GGS is based on the BiOp's proposed conservation measures. FW 1489, 1491. However, the 2019 BiOp fails to explain the scientific basis for conservation measure 4, which prohibits cropland idling in designated areas, which the BiOp refers to as "important snake populations." FW 1475. The 2019 BiOp and 2018 BA both fail to provide any scientific or background information for its newly-designated concept of "important snake populations." The only explanation of "important snake populations," or why its included in the conservation measures, includes:

> Important snake populations have been previously identified by biologists from the Service, WERC, and other contract biologists. These populations of snakes were identified as occurring in, or being connected to, areas that are considered public or protected (Figure 4, Appendix A). These areas have specific management plans for the snake either for mitigation lands or as wildlife refuges. **One factor influencing the importance of these areas is that they can provide a refuge for the snake independent of rice production.** Connectivity between these snake populations is equally important. (B. Halstead pers comm. 2018).

FW 1479 [emphasis added].

First, as discussed above, without adjacent rice fields GGS survival rate decreases. FW 1297. Here, the BiOp dedicates areas as "important snake populations" because they provide refuge regardless of rice production. This is an absurd conclusion and conflicts with every study cited in this brief. This decision alone is arbitrary and capricious and creates an unjustifiable conservation measure.

Second, the statement fails to provide information regarding the biologists' determinations, or the studies being referred to. A careful review of the record reveals that the BiOp's formulation of "important snake population" is unsupported by scientific literature, and the asserted geographic scope, i.e., limited to identified waterbody channels, is refuted by scientific studies.

The term "important snake populations" is not found in the several studies contained in the Administrative Record, such as the GGS Recover Plan (CEQA 50024-50096), 2006 5-Year Review (CEQA 49832-49878), or USGS' Literature Review of Giant Gartersnake (*Thamnophis gigas*) Biology and Conservation (CEQA 60251-60298). The term is new to the 2019 BiOp.

In fact, the term "important snake populations" is not even used in the 2015 BiOp, which instead focused on a conservation strategy of "requiring crop idling/substitution to occur away from high priority habitat and areas with high likelihood of snake occurrence." FW 913. The shift from "high priority habitat and areas with high likelihood of snake occurrence" in the 2015 BiOp to "important snake populations" in the 2019 BiOp is not mere semantics because, while they appear similar, the geographic scope for the newly-manufactured "important snake populations" is, unlike the 2015 BiOp, limited to water channels and excludes any adjacent fields. Compare FW 924-937 and FW 1496-1501.

Limiting the scope of "important snake populations" to the canals and ditches is inconsistent with available science. The BiOp states, "current snake populations are closely associated with historic wetland areas that contain suitable habitat (i.e., rice fields and associated irrigation canals)." FW 1478. The 2018 BA states under Habitat Requirements:

> Giant garter snakes inhabit marshes, sloughs, ponds, small lakes, low gradient streams, other waterways, agricultural wetlands such as irrigation and drainage canals and rice fields, and the adjacent uplands. Essential habitat components consist of: 1) adequate water during the snake's active period (i.e., early spring through mid- fall) to provide a prey base and cover; 2) emergent, herbaceous wetland vegetation, such as cattails and bulrushes, for escape cover and foraging habitat; 3) upland habitat for basking, cover, and retreat sites; and 4) higher elevation uplands for cover and refuge from flood waters. In addition, GGS

> rely on canals and ditches as movement corridors. These corridors provide important habitat and are used during daily movement within a home range.

FW 1296.

Similarly, the GGS Recovery Plan investigates best practices to provide suitable GGS habitat. It states that habitat for GGS needs to be preserved in two block pairings, which provide contiguous buffered perennial wetland and rice land habitat. CEQA 100728. These two blocks must be connected via a corridor of aquatic and upland habitat with no less than a half-mile width. CEQA 100728.

Exacerbating the failure to identify any science supporting the newly-minted concept of "important snake populations," the record indicates that this is simply an attempt by BOR to justify idling more acreage without running afoul of the ESA or the district court's decision in *AquAlliance*. In *AquAlliance*, the court noted that between 70 and 100 percent of land within the water districts were considered "priority habitat areas." *AquAlliance, supra*, 287 F. Supp. 3d at 1069-70. The mapping of the priority habitat areas was completed by overlying two datasets, one focused on GGS occurrences, the second focused on historic and contemporary conditions that were good predictors of GGS in areas of rice agriculture. *Id*. at 1069. The BiOp found the biggest threat to snakes is loss and fragmentation of habitat and found that, "by requiring crop idling/substitution to occur away from high priority habitat areas with high likelihood of snake occurrence, and by maintaining movement corridors for snakes in areas where crop idling occurs, it is expected that snakes will be able to reach suitable habitat despite drying due to crop idling." *Id*. at 1072. However, the conservation measures permitted crop idling within high priority habitat areas as long as adequate water remained in the major irrigation and drainage ditches. *Id*. The court found this to be inconsistent. *Id*.

Rather than address this discrepancy, BOR and FWS simply abandoned its strategy of requiring crop idling/substitution "away from high priority habit" altogether, and created an entirely new scheme called "important snake populations." The phrase "high priority habitat" no longer even appears in the 2019 BiOp. FW 1462-1501. Also inexplicably omitted entirely in the 2019 BiOp are the maps showing the expansive "high priority habitat" where crop idling would be avoided under the 2015 BiOp. FW 924-937. Both BOR and FWS provide no explanation whatsoever for their complete abandonment of this conservation strategy, which is arbitrary and capricious. The Ninth Circuit explains:

> "Agencies are entitled to change their minds," [citation omitted] . . . However, an agency also "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (emphases and internal quotation marks omitted). Under certain circumstances, an agency's prior factual findings or conclusions may be "relevant data" such that an agency must "articulate a satisfactory explanation" when it changes its mind.

Defenders of Wildlife v. Zinke, 856 F.3d 1248, 1262 (9th Cir. 2017).

This new identifier of "important snake populations" dramatically constricted, compared to the mapping in *AquAlliance*, the amount of land that would be prohibited from crop idling transfers. FWS and BOR have failed to provide any evidence showing how "important snake populations" were created. This is especially problematic because it completely diverges from the science and prior determination of priority habitat in the 2015 BiOp. For example, in *AquAlliance*, the Conway Preservation Group's had 18,965 acres in the water district, every one of those acres was determined to be priority habitat, and would have potentially been prohibited to crop idling. *AquAlliance,* 287 F. Supp. 3d at 1070. In contrast, the 2019 BiOp notes that up to 31.62 percent of Conway Preservation Groups land may be idled. FW 1172. Failure to provide reasoning or citations to facts relied upon, undermines the determination that conservation measure 4 will minimize impacts to GGS.

In summary, the use of "important snake populations" is arbitrary. As just one component of the habitat required to sustain GGS populations, these waterbody channel areas do little to protect the GGS, and are inconsistent with habitat requirements identified by numerous studies. Reliance on this fundamentally flawed concept renders the BiOp's conservation measures inadequate to support a no jeopardy determination.

4. BOR Violated its Duty Under ESA Section 7(a)(2).

BOR has an "independent, substantive duty under ESA Section 7 to ensure that its actions are not likely to jeopardize" endangered or threatened species, or adversely modify their critical habitat. *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1010 (D. Ariz. 2011). Simply consulting with the FWS, in isolation, "does not satisfy an agency's duty under the [ESA]." *Id.* at 1010 (quoting *Res. Ltd., Inc. v. Robertson,* 35 F.3d 1300, 1304 (9th Cir. 1994)) [modification in original]. Further, "[a]rbitrarily and capriciously relying on a faulty Biological Opinion violates [an action agency's

substantive] duty." *Id.* at 1010 (quoting *Defenders of Wildlife v. EPA,* 420 F.3d 946, 976 (9th Cir. 2005), *rev'd on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644 (2007)). Courts have held that where a BiOp fails to "articulate a rational connection between its findings in the BiOp and its no jeopardy and no adverse modification conclusions. The [action agency's] reliance on a legally flawed BiOp is arbitrary and capricious." *Id*.

Here, as explained above, the BiOp is legally flawed. But the record reveals that BOR's actions have gone well beyond just passively relying on a faulty BiOp. BOR knew its BA had misconstrued the applicable scientific evidence, and affirmatively continued the same strategy of misconstruing technical studies in annual reports that it prepared pursuant to the 2015 BiOp.

As just one example, a GGS technical report prepared in 2018 stated unequivocally, "Results indicate that although most individuals did not use rice, and those that did only ventured into the fields between mid-June and early September, maintaining water in canals alone would not adequately support giant gartersnakes." CEQA 82422. Incredibly, BOR blatantly mischaracterized this technical study in 2018 by stating, "This study supports the importance of maintaining water in canals adjacent to fallowed rice fields." FW 1238 ["2017 Annual Compliance Report for the Bureau of Reclamation's Central Valley Project Long-term Water Transfers (2015 – 2024)"]. A plain reading of the quoted material above reveals BOR's characterization to be inexcusably false.

Clearly relying uncritically on the BA's misrepresentations, the FWS' BiOp incorporates the same flawed reasoning and scientific information. BOR did not just accept the findings from FWS, it produced those findings for FWS. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV 01-640-RE, 2005 WL 1398223, *3;2005 U.S. Dist. LEXIS 16345, *38 [court finds the action agency liable where it embraced the same fundamental legal flaws set forth in the applicable environmental document]. BOR's warm and knowing embrace of the flawed BiOp is a direct violation of BOR's duty to ensure that any action authorized, funded, or carried out by such agency … not likely to jeopardize the continued existence of any endangered species or threatened species[.]" 16 U.S.C. § 1536(a)(2).

In addition to repeatedly misconstruing technical reports in order to support its fundamentally flawed mitigation strategy, BOR also knew the BiOp would only analyze two years out of the LTWT's

six-year timeframe. As discussed previously, the BA informed the FWS that it only needed to analyze two of the six years. Instead of fairly addressing the obvious inconsistency, BOR doubled down on the faulty analysis by stating:

> Soluri Meserve's assertion that he [sic] BiOp limits transfers to two of the next six years is not accurate, and they have misrepresented the information in the BiOp regarding Reclamation's historical account of the patter of past transfers with respect to how often transfers are expected to occur in the future. However, ***the BiOp for the GGS makes clear that transfers could occur every year over the next six years, and the analysis in the BiOp is conservatively based on the possibility of transfers in each of the next six years***.

CEQA 14345-14346 (emphasis added).

This is demonstrably false. The BiOp states "[u]nder the proposed project, up to approximately 250,000 AF of water can be made available for transfer in any two years of the remaining six years through groundwater substitution, cropland idling/crop shifting, reservoir releases, or conservation measures…" FW 1464. Further, the BiOp's "Effects" section states, "[t]he Proposed project is expected to result in the temporary loss of habitat from the cropland idling/shifting of **a maximum of 60,693 acres of rice land a year for two years over the programs six years**[]." FW 1486 [emphasis added]. Finally, the BiOp concludes, "it is the Service's opinion that the two years of water transfers as proposed from 2019-2024, are not likely to jeopardize the continued existence of the snake." FW 1489.

More than a year after the initial Record of Decision, BOR filed a supplemental administrative record including a revised Record of Decision that completely reverses itself on the critical question of whether the BiOp is limited to analyzing water transfers in just two years, stating in relevant part:

> Second, Soluri Meserve's assertion that the BiOp limits transfers to two of the next six years is not accurate, and they have misrepresented the information in the BiOp regarding Reclamation's historical account of the pattern of past transfers with respect to how often transfers are expected to occur in the future. As stated above, ***consistent with the BiOp, Reclamation will not approve cropland idling and shifting transfers for more than two years prior to 2024 without reinitiating ESA consultation***.

Supp_AR_12 (emphasis added).

This wholesale reversal is indicative of BOR's cynical attitude to the truth. BOR was well aware of this inconsistency and failed to rectify it. Rather than taking action to remedy those flaws, BOR repeatedly doubled down on its flawed and sometimes completely fabricated statements. At a minimum,

BOR has acted arbitrarily and capriciously and violated Section 7 of the ESA by relying on a BiOp that it knew full well was flawed and did not support a no jeopardy determination.

V. CONCLUSION

The EIS/R and BiOp failed to fulfill their statutory mandates to support sound environmental decision-making, failed to follow disclosure procedures mandated by law, failed to support their conclusions with applicable evidence and analysis, and should therefore be set aside.

Respectfully submitted,

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AQUA TERRA AERIS LAW GROUP

/s/Jason R. Flanders
Jason R. Flanders
Attorney for Plaintiffs
AquAlliance, CSPA, and C-WIN
4030 Martin Luther King Jr. Way
Oakland, CA 94609
Email: jrf@atalawgroup.com
Phone: 916-202-3018

SOLURI MESERVE, A LAW CORPORATION

/s/ Patrick M. Soluri (as authorized on 9/13/21)
Patrick M. Soluri
Attorney for Plaintiffs
Central Delta Water Agency, South Delta Water Agency
510 8th Street
Sacramento, CA 95814
Email: patrick@semlawyers.com
Phone: (916) 455-7300

I attest that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

/s/Jason R. Flanders
Jason R. Flanders