No. 21-16539

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AQUALLIANCE et. al,

Plaintiffs-Appellants,

v.

THE UNITED STATES BUREAU OF RECLAMATION, et. al,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:21-cv-01533-WBS-DMC
Hon. William B. Shubb

PLAINTIFF-APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL
EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
RELIEF REQUESTED OCTOBER 1, 2021

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and California Water Impact Network

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26-1, Plaintiff-Appellees make the following disclosures:

1. For nongovernmental corporate entities please list all parent corporations: None.

2. For nongovernmental corporate entities please list all publicly held companies that hold 10% or more of the party's stock: None.

DATED: September 23, 2021 AQUA TERRA AERIS LAW GROUP

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INTRODUCTION

On September 17, 2021, Plaintiff-Appellants AquAlliance, California Water Impact Network, and California Sportfishing Protection Alliance (hereafter "AquAlliance") appealed the United States District Court for the Eastern District of California's order denying AquAlliance's motion for preliminary injunction. Dkt. 1-1; 1-ER-3. Pursuant to Rule 8 of the Federal Rules of Appellate Procedure ("FRAP") AquAlliance now moves for a preliminary injunction pending resolution of the appeal. Appellants seek an order compelling Appellees Bureau of Reclamation, Department of Interior, and Secretary of Interior Debra Haaland (hereafter "Reclamation" OR "BOR"), to cease all proceedings and activities related to Reclamation's "Groundwater Actions to Offset Surface Water Diversions from the Sacramento River in Response to Drought in 2021" (the "Action"). As discussed, below, and in the accompanying declarations, the Action threatens immediate irreparable harm to Appellants by increasing groundwater pumping in areas already at or below historically low groundwater levels, threatening land subsidence, third-party well interference and damage, reductions in overlying surface water flows, and significant adverse effects to groundwater dependent vegetation and habitats. The Action was approved in violation of the National Environmental Policy Act ("NEPA") based on a wholly inadequate "Environmental Assessment" and "Finding of No Significant Impact".

CASE SUMMARY

The Action subsidizes and incentivizes groundwater pumping across the Redding Area Groundwater Basin, and the Sacramento Valley Groundwater Basin. 2-ER-173. Current groundwater conditions in the Action area are already at or below historic lows reached during the 2014-2015 drought. Declaration of Kit Custis at ¶ 11. Existing "station data and historical subsidence measurements for the six subsidence monitoring stations associated with the Project area . . . show measurable ground surface displacement." Custis Decl. ¶ 24. Adverse impacts to property owners from groundwater pumping are already occurring, and would worsen from additional pumping by the Action. *E.g.*, Declaration of Michael Billiou at ¶¶ 8-17.

On July 7, 2021, Reclamation posted an Environmental Assessment evaluating the impacts of the Proposed Action (hereafter the "Draft EA"). Reclamation provided the public with just one week to comment on the Draft EA, received numerous comments letters, and issued a Final Environmental Assessment (hereafter the "EA"). On August 4, 2021, based on the analysis contained in the EA, Reclamation issued a Finding of No Significant Impact (FONSI-21-06-BDO) (hereafter the "FONSI"). The FONSI concluded that the Proposed Action in the EA would have no significant impact on the human environment. 2-ER-209-11.

On June 30, 2021, *before* the EA was publicly released, Reclamation stated in a letter to potential project participants that "Reclamation can prepare an environmental review and reach a Finding of No Significant Impact . . ," indicating that Reclamation had reached its NEPA conclusions before even undertaking its NEPA review. 2-ER-201.

The stated purpose of the Proposed Action is to "offset surface water diversions from the Sacramento River…[and] incentivize further reductions above current commitments in order to make additional surface water supply available in the Sacramento River." 2-ER-156. Reclamation purports to achieve this goal by funding additional pumping of groundwater by "entities in the pilot project who operate existing groundwater wells…." 2-ER-156, 207.

The EA, however, is severely misleading and fails to provide any evidentiary support for its assertion that groundwater extracted by the Proposed Action will result in up to 60,000 acre-feet of surface water to remain in stream, untouched. Nor, even if true, does the EA provide any evidence or analysis of how such waters would be used for specific beneficial purposes. *See* Custis Decl. ¶¶ 25-27. Nowhere does the EA provide any specific information describing any likely beneficial environmental project effects, beyond conclusory assertions that the Action will be beneficial. Worse still, the EA admits, but fails to reconcile the fact,

that additional groundwater pumping from the Action will, itself, deplete connected surface water supplies. 2-ER-168-169.

Somewhat shockingly, the EA repeatedly asserts a goal of maximum groundwater pumping, even encouraging well owners to establish new historic low groundwater levels through this Action. For example, the EA states that "the groundwater level data collected during this drier year with the proposed voluntary approach provides an opportunity to gather additional groundwater level that would be not available absent the approach." 2-ER-161-162. Similarly, the Bureau has instructed water users that "non-Transfer Program Settlement Contractors may wish to *establish historic lows* on their wells and use this opportunity to establish baseline conditions of their wells for use in future transfers." 2-ER-201 (emphasis added). Kit Custis observes that:

> This approach seems to miss the fact that DWR has a regional monitoring program that is ongoing without the Project. The opportunity for gathering additional data seems to imply that the pumping stresses caused by the Project wouldn't occur without the funding being provided by the BOR. This suggests that one of the purposes of the Project is to facilitate a region wide aquifer stress test in order to measure how much groundwater can be extracted during a drought.

Custis Decl. ¶ 9. An ulterior project goal to establish new historic low groundwater levels is a clearly significant effect that cannot support a FONSI.

The EA states that "The SRSCs[1] and Reclamation propose groundwater pumping by participating SRSCs during August through October 2021 under a pilot/demonstration project." 2-ER-156. The Proposed Action would fund both future, and past, groundwater pumping, thus incentivizing additional groundwater pumping, and adverse effects, even before BOR enters into formal contracts with each participant.

Injunctive relief pending appeal is warranted because AquAlliance is likely to succeed on the merits, as the EA is materially deficient in the numerous ways discussed briefly in this section and as set forth more fully below. Also as set forth below, AquAlliance and its members face a genuine threat of irreparable harm if the Action is not enjoined. The public interest and balance of equities favors the injunctive relief here, since Reclamation can point to *no evidence* in the EA that the Action will result in any environmental benefit, compared to the extensive evidence in the EA and the accompanying declarations showing significant environmental harms.

[1] SRSC refers to the Sacramento River Settlement Contractors, who are the proposed project participants. 2-ER-156, 161.

STATEMENT OF JURISDICTION

The Court has authority to hear this Motion pursuant to Rule 8 of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

Whether this Court should issue a preliminary injunction pending resolution of AquAlliance's appeal, preventing Reclamation from taking any action in furtherance of the Proposed Action, including:

1. Whether Appellants would suffer a genuine threat of irreparable harm in the absence of a preliminary injunction;
2. Whether Appellants are likely to succeed on the merits, or present serious questions going to the merits; and,
3. Whether the balance of equities and public interest favors an injunction.

STANDARD OF REVIEW

In ruling on a motion for preliminary injunction pending appeal, the Ninth Circuit applies the same "standard employed by district courts when considering a motion for a preliminary injunction." *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). Specifically, "[a] plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. NRDC,*

Inc., 555 U.S. 7, 20 (2008). A stronger showing with regard to one element "may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The sliding scale used by the Ninth Circuit means that "a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *Id.* at 1132.

LEGAL BACKGROUND

NEPA's goals are to (1) "prevent or eliminate damage to the environment and biosphere," (2) "stimulate the health and welfare" of all people, and (3) "encourage productive and enjoyable harmony between [hu]man[kind] and [the] environment." 42 U.S.C. § 4321. To fulfill these purposes, NEPA requires that: (1) agencies take a "hard look" at the environmental impacts of their actions before the actions occur, thereby ensuring "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and (2) "the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "General statements about 'possible' effects

and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). Similarly, "[c]onsideration of cumulative impacts requires some quantified or detailed information" that results in a "useful analysis," even when the agency is preparing an EA and not an EIS. *See Kern v. United States Blm*., 284 F.3d 1062, 1075 (9th Cir. 2002) (internal quotation marks omitted). "[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Id*. (internal quotation marks omitted).

When an agency undertakes final agency action that fails to comply with NEPA, such action is unlawful and set must be aside under the APA. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 679 n.2 (9th Cir. 2001) ("Although NEPA does not provide a private right of action for violations of its provisions, private parties may enforce the requirements of NEPA by bringing an action against the federal agency under § 10(a) of the Administrative Procedure Act."). The APA allows the reviewing court to set aside a final agency action only if it is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law." 5 U.S.C. § 706(2)(A). "A decision is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to

consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *O'Keeffe's, Inc. v. United States Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). An agency action is also arbitrary and capricious if the agency fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)).

ARGUMENT

I. Appellants at Least Present Serious Questions on the Merits, and are Likely to Succeed.

"While a violation of NEPA does not automatically require the issuance of an injunction, 'the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction.'" *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (quoting *Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983). The sliding scale used by the Ninth Circuit means that "a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips

sharply in [plaintiff's] favor.'" *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

> [S]erious questions" refers to questions which cannot be resolved…at the hearing on the injunction and as to which the court perceives a need to preserve the status quo ….[They] are "substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Republic of Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). Such questions "need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits.'" *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quoting *Nat'l Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

AquAlliance here can demonstrate a likelihood of success on the merits, and, at a minimum, serious questions to the merits that warrant preservation of the status quo. AquAlliance's Complaint documents dozens of flaws with Reclamation's NEPA review. Most prominently, the EA failed to take a hard look at impacts to groundwater resources, including highly likely impacts to third-party wells, surface waters, and groundwater dependent ecosystems, including habitat for species listed under the Endangered Species Act, and including cumulative effects. Moreover, the mitigation proposed by the EA does nothing before

significant impacts occur, and even then, remains inadequate. The EA also fails to take a hard look at greenhouse gases, or whether the groundwater extraction proposed by the Action complies with appliable federal, state, and local laws. While the EA provides vague and inadequate information about the regional effects of the Action, the EA does nothing at all for localized effects.

"If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)). "[C]ursory and inconsistent" analysis is insufficient to support a finding of no significant impact. *Id.* at 1213. The EA demonstrably fails these standards.

A. The EA Fails to Describe Existing Environmental Conditions.

The first fundamental flaw is the EA's failure to accurately describe the existing environmental conditions that would be affected by the Proposed Action. "Establishing appropriate baseline conditions is critical to any NEPA analysis… Without establishing the baseline conditions which exist . . . before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA." *W.*

Watersheds Project v. Bernhardt, No. 1:18-cv-00187-REB, 2021 U.S. Dist. LEXIS 108470, at *42 (D. Idaho June 9, 2021) (quoting *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 400 (9th Cir. 1988)). Reclamation failed to establish baseline groundwater conditions, groundwater-surface water connections, and groundwater dependent ecosystem conditions, in the Action Area, as required by NEPA.

The EA does identify the location of the 160 potential Action wells for groundwater pumping, but the EA provides no further information regarding existing groundwater or environmental conditions in those specific areas. 2-ER-159, 161; 3-ER-346 (Cmpl. at ¶ 48). The EA also excludes from its description of existing conditions prior groundwater pumping occurring this year, which has resulted in historic groundwater lows. *Id.*; 2-ER-192 – 193. Without a description of present groundwater conditions or current extraction trends, there is no way for Reclamation or the public to meaningfully evaluate the potential direct, indirect, and cumulative effects of the Action on groundwater supplies, nor on the private and public wells, surface waters, and ecosystems, which rely on those resources. The lack of an adequate baseline means the EA has failed to take a hard look at the potential effects of the Proposed Action.

These concerns were raised in public comments prior to adoption of the EA and FONSI, despite the one-week comment period. 2-ER-217 ("Reclamation failed to take a hard look . . ., providing virtually no meaningful information to ascertain

the environmental effects of the proposed project, including specifically where such pumping would occur, and what the existing conditions at those locations look like, now, in the midst of drought"); 2-ER-195; 2-ER-220-221; 2-ER-230 ("Monitoring well 22N01W29N000M data clearly show that the pumping in that deep strata has affected the 600' B level above it . . . . Excessive drawdowns [from prior pumping] are obvious, yet also ignored and unexplained"); 2-ER-232 ("These areas are again experiencing serious problems in 2021"); 2-ER-234 ("We have already been damaged by the loss of recharge, as the pumped water is exported out of the area of origin. . . . allowing this project will further exacerbate an already stressed aquifer system, and continue to damage the residents that live here"); 2-ER-184; 2-ER-247 ("GDEs [groundwater dependent ecosystems] support federal special status species present in the project area. There is no analysis of GDE rooting depths, or any specific species of plant communities that may be impacted by the transfers"); 2-ER-248 ("The EA ignores all of these publicly available resources regarding GDEs found in the Action Area"). Present groundwater levels in the Project Area are known or estimable, and should have been considered. *See*, Custis Decl. at ¶¶ 11, 19

Instead of taking a hard look, the EA cites to four prior independent NEPA documents: the Long-Term Water Transfers Environmental Impact Statement (EIS)/Environmental Impact Report (2019 LWT EIS/EIR) and Record of Decision

(ROD), May 7, 2021; and the Long-Term Operation (LTO) of the Central Valley Project (CVP) and State Water Project (SWP) EIS (2019 LTO EIS) and ROD, February 19, 2020. 2-ER-173. While these documents may describe long-term regional conditions in general terms, they do not provide current groundwater conditions in and around the Action wells. Department of Interior and CEQ regulations do permit Reclamation to incorporate by reference existing NEPA documents in subsequent environmental analysis. *See* 43 C.F.R. § 46.120, and 40 C.F.R. § 1501.12. However, reference to entire sections of lengthy environmental documents without more specific explanation fails to satisfy NEPA requirements. *See City of Carmel-By-The Sea v. United States DOT*, Civ. No. 92-20002 SW, 1998 U.S. Dist. LEXIS 21441, at *8-10 (N.D. Cal. July 22, 1998) ("[T]he EIS fails to specify all the relevant portions of the very lengthy Draft and Final EIRs. The reference obliquely points readers to the 'Cumulative Impact Sections' of the Carmel Valley Master Plan EIR."). Reclamation must also "briefly describe" the content of the relevant material that is incorporated by reference, including a summary of the "conclusions reached." *Id* at *10. In its description of the affected environment related to groundwater resources, the EA relies on entire sections and appendices from previously completed environmental impact statements; namely, Reclamation's cursory reference to the LWT EIS/EIR and LTO EIS/EIR fails to adequately summarize the content or conclusions of those documents, which does

not and cannot provide an adequate baseline description of 2021 conditions during an historic drought. This, at least, poses a serious question on the merits.

B. The Action Permits Significant Effects to Third Party Groundwater Users.

The EA includes no information or analysis whatsoever with which a reader could determine where significant adverse effects to third party properties, including land subsidence, and impacts to groundwater wells, might occur. Discussing existing conditions, the EA generally admits that "[s]ubsidence in these regions are generally related to groundwater pumping and subsequent consolidation of loose aquifer sediments." 2-ER-174. The EA further admits that Project groundwater pumping "could decrease groundwater levels, increasing the potential for subsidence." 2-ER-175. The EA then immediately dismisses this concern, stating: "However, the volume of groundwater pumping under the Proposed Action is insignificant relative to the total groundwater pumping within the Redding Area and Sacramento Valley groundwater basins where the voluntary groundwater pumping is proposed." *Id.*

This analysis fails to consider impacts at an individual well or property level, by arbitrarily comparing the pumping volume to large regions as a whole. This is not a hard look at localized effects and has been rejected by the Ninth Circuit. *See*

Anderson v. Evans, 314 F.3d 1006, 1019 (9th Cir. 2002) (gray whale population effects, alone, were insufficient; "the summer whale population in the local Washington area may be significantly affected. Such local effects are a basis for a finding that there will be a significant impact...."); and *Fund for Animals v. Norton*, 281 F. Supp. 2d 209. 232-33 (D.D.C. 2003) (plaintiff likely to succeed on merits of NEPA claim where "even if the predicted impacts of the proposed take of 525 swans on the 3,600 strong swan population of the entire state of Maryland are likely to be minimal, the impacts may be substantially greater on the local level."); *Blue Mountains*, *supra*, 161 F.3d at 1213.

EA commenters noted that project participant pumping has harmed and could likely continue to harm non-participant water supply wells, which Reclamation dismissed again by a non-sequitur reference to total regional groundwater production. 2-ER-185-186; *see also* 2-ER-221.

With no analysis of potential impacts to non-participant wells, the EA simply waits for such effects to occur, stating that "Reclamation will rely on 3rd party complaints of individual performance." 2-ER-176. Hence, Reclamation will only consider effects to third parties *after they occur*. This violates a basic tenant of NEPA that environmental review must occur before "making an irreversible and irretrievable commitment of resources." *Metcalf v. Daley*, 214 F.3d 1135, 1142-43 (9th Cir. 2000); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir.

1988)("[p]roper timing is one of NEPA's central themes.") After third party injury occurs is simply too late for Reclamation to determine if the production wells caused the impacts. The EA fails to provide the public with any way of knowing which wells will extract what quantities, when, nor analyzed such extraction against the existing groundwater conditions in the area. Further, the Environmental Commitment provides no standards to guide BOR's evaluation, and no assurances that any harms would be ameliorated. This cannot support a finding of no significant impact.

The approved Action's stated intent is to incentivize groundwater pumping, and the EA leaves open the option to provide subsidization, including entering into any agreement or contract for the same, *after* groundwater pumping has been completed. 2-ER-160-162. After the pumping has occurred, none of the EA's environmental commitments could possibly have any retroactive effect. For such agreements, therefore, reliance on EC-1 cannot support a FONSI.

When commenters expressed concern that the injury to third party groundwater users may infringe upon private and public groundwater appropriative rights, the EA responded with its oft-repeated phrase: "[p]articipants under the Proposed Action will comply with all applicable state and Federal laws. Participants will acquire all required and applicable permits or licenses from the appropriate Federal, State, or local authorities necessary for the delivery of water."

2-ER-162. This is the extent of the analysis contained in the EA as to the extent to which the Action may conflict with other laws. Thus, the EA and FONSI fail to rely on any evidence to reach the conclusion that the Action would comply with all relevant law, and an EIS should have been prepared. See, 40 C.F.R. § 1501.3(b)(2)(iv).

Finally, and despite comments on the Draft EA specifically raising the issue, the EA fails to address, even in a cursory manner, the impact on shallow groundwater conditions resulting from pumping occurring at deeper portions of the aquifer. 2-ER-186; Custis Decl. ⁋⁋ 11, 15, 18, 23, 27; 3-ER-347 (Cmpl. at ¶ 51). This constitutes a failure to look at an important aspect of the problem.

C. Reclamation failed to take a hard look at impacts to surface hydrology, groundwater dependent ecosystems, and threatened species.

i. Hydrology and surface waters

The EA makes clear that the Proposed Action will decrease surface water flows in the Project Area: "[t]his additional use of groundwater will reduce stream flows during and after pumping as the groundwater aquifer refills." 2-ER-168 (emphasis added). Reductions from stream flows during a historic drought would be a significant adverse effect the EA simply fails to analyze. *See* 2-ER-168-171,

2-ER-176-177. And the fact the EA suggests effects to stream flows would continue "after pumping" illustrates how lowered groundwater levels can continue to draw down surface flows over a longer period of time than the pumping period alone. Commenters raised significant concerns that groundwater pumping depleting surface water flows could be illegal and cause legal injury to water users. 2-ER-225-228; 2-ER-236-244. In response, Reclamation's EA offered no analysis whatsoever, instead simply repeating that "Participants under the Proposed Action must comply with applicable State and Federal laws." *See* 2-ER-192, 194-195. This lack of analysis fails to constitute a hard look, can cannot support a FONSI.

The EA asserts several times throughout that groundwater extraction resulting from the Proposed Action will "reduce reliance on surface water diversions in this very dry year…[and] increase availability of water for beneficial purposes in the Sacramento Valley…." 2-ER-177 [modifications added]. There is no support in the EA, however, for ensuring that surface water diversions will actually be offset or curtailed by groundwater pumping. Indeed, neither EC 1 nor any other aspect of the Proposed Action, actually mandates curtailed use of surface waters by Project beneficiaries. *See also* Custis Decl. ¶ 23; section V.A.4, *infra*. Nor does the EA anywhere disclose or analyze how such retained water would actually be delivered or used for any environmental benefits. The EA's failure to take a hard look at the purported beneficial effects of the Action also violates

NEPA. 40 C.F.R. § 1501.3 ("In considering the degree of the effects, agencies should consider . . . [b]oth beneficial and adverse effects . . ."); *see*, *Sierra Club v. United States Army Corps of Eng'rs*, 772 F.2d 1043, 1049 (2d Cir. 1985)(Congress intended NEPA to serve as "an environmental full disclosure law" that enables the public to "weigh a project's benefits against its environmental costs.").

ii. Groundwater Dependent Ecosystems

The EA defines groundwater dependent ecosystems ("GDEs") as "ecosystems that are supported, permanently or intermittently, by groundwater resources. 2-ER-167. A common GDE species in the Project Area is the Valley Oak, which can rely on groundwater to depths of eighty feet below the surface. 2-ER-189; 3-ER-352 (Cmpl. at ¶70). The EA admits that "[i]ncreased subsurface drawdown will potential [sic] affect fish habitats, such as . . . riparian . . . habitats . . . . Decreased amounts of surface water in these habitats could affect fish species of management concern" 2-ER-168. Commenters raised substantial concerns regarding the EA's failure to establish existing GDE conditions, and analyze or avoid likely adverse effects to GDEs. 2-ER-196; 2-ER-225-227; 2-ER-247-249.

In reaching its conclusion that the Proposed Action will have no significant effect on GDEs, the EA relies wholly on analysis contained in the Yuba County Groundwater Sustainability Plan ("Yuba GSP"). 2-ER-169; 3-ER-351-352 (Cmpl. at ¶¶ 67-69). Reclamation relies on the Yuba GSP's finding that shallow

groundwater conditions, *along the Feather River*, are affected by changes to water in irrigated lands, fields, canals, or drains, rather than due to groundwater withdrawals such as those resulting from the Proposed Action. 2-ER-169. The analysis in the Yuba GSP, however, is inapposite, given that the Proposed Action is within the Sacramento River Valley and Redding Groundwater Basin, extending from Shasta County to Sacramento County, close to 150 miles. 2-ER-159; 3-ER-352 (Cmpl. at ¶ 68-69). Where the Yuba GSP carefully details the location of GDEs within *its* geographical boundaries and utilizes monitoring well data to support its conclusions regarding the impact of groundwater extraction on those ecosystems, the EA contains no such analysis of the Project Area. *See*, *W. Watersheds Project, supra,* 2021 U.S. Dist. LEXIS 108470, at *42 (explain). Reclamation's incorporation by reference of the Yuba GSP is inadequate, moreover, where the EA provides no citation to specific portions of the 700-plus page document. *City of Carmel-By-The Sea,* supra, 1998 U.S. Dist. LEXIS 21441, at *8-10. The geography and regulatory settings for the Yuba GSP and the Action area are quite distinct, but not discussed in the EA.

Notwithstanding the fact that the EA notes that GDEs "are of concern within one-half mile of the participating well," Reclamation does not identify which of the 160 participating wells have GDEs within the half-mile radius. 2-ER-167. Instead, the EA directs the public to make that determination on its own. The EA directs the

public to a separate GIS mapping system, and to Google Maps, that illustrate the location of GDEs generally throughout the entire state, without any reference to the location of project wells. 2-ER-167. While Reclamation notes that the mapping system "could be used to identify deep rooted vegetation near the participating pumping wells[,]" it asks the public to conduct that analysis rather than taking the requisite hard look itself. *Id.*

Finally, and just as with the EA's analysis of impacts to groundwater resources, Reclamation again downplays potential adverse effects to GDE's and surface waters by comparing additional pumping facilitated by the project with total groundwater extraction across the entire Sacramento River Valley. 2-ER-169. This regionwide abstraction fails to analyze potential local impacts to GDE and is flawed for the same reasons set forth above in Section V.A.2, supra. *See also Blue Mountains*, supra, 161 F.3d at 1213; *Anderson*, *supra*, 314 F.3d at 1019; and *Fund for Animals*, *supra*, 281 F. Supp. 2d at 232-33.

This haphazard approach to the analysis of impacts to GDEs does not constitute a hard look required by NEPA, and cannot support the Finding of No Significant Impact.

iii. Listed Species

The EA fails to take a hard look at the impacts of the Proposed Action to the Valley Elderberry Longhorn Beetle (the "Beetle") or the Wester Yellow-billed Cuckoo (the "Cuckoo"), two species present in the Project Area and listed as threatened pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et seq*.

First, the EA again broadly references the LTO EIR/EIS, and LWT EIR/EIS for their respective analysis of listed species affected by those respective actions. 2-ER-167. The cursory and haphazard incorporation of these documents, without more specific reference or discussion of the relevant conclusions reached, fails to constitute a hard look at potential impacts to special status species or adequately describe baseline conditions in the Project Area. *See* Section V.A.1, supra; *and City of Carmel-By-The Sea,* supra, 1998 U.S. Dist. LEXIS 21441, at *8-10.

With regard to the Cuckoo, the EA does not take a hard look at the impacts of the Proposed Action, despite the fact that critical habitat for the species is located within the Project Area, extending along Sacramento River from Red Bluff to Colusa. 2-ER-168; 3-ER-354 (Cmpl. at ¶ 79). The EA only mentions, and without reference to the Cuckoo or its critical habitat, that migratory birds broadly rely on managed wetland and flooded agriculture. The EA fails to describe Cuckoo habitat in the Project Area that are not managed wetlands or flooded agriculture, and whether there will be adverse impacts to those environments. Reclamation

completely fails to substantiate its assertion that there "are no changes to critical habitat for the Wester Yellow-billed Cuckoo in the Proposed Action area." 2-ER-170. To the extent that the EA relies on the same analysis contained in its discussion of impacts to GDEs (Section V.A.3.i, supra) to conclude that, "[t]here are no changes proposed by the participants relative to irrigated lands, or water levels in fields, canals, or drains, as a result of the Proposed Action[,]" that analysis is flawed.

As it relates specifically to the Beetle, the EA relies on the same analysis set forth in its discussion on impacts to GDEs to conclude that the Proposed Action will not have a significant effect on the species. Specifically, the EA concludes that the GDEs providing habitat for the Beetle rely on shallow groundwater that is not affected by the withdrawal resulting from the Proposed Action. The EA reaches this conclusion without any actual description of the location, extent, or nature of VELB habitat in the Project Area. As discussed, above, that analysis is flawed because it relies on the inapposite Yuba GSP, does not take a hard look at the potential impacts to the species, and cannot provide a basis for a finding of no significant impact.

Finally, Reclamation states in conclusory fashion that it "maintains flows in the Sacramento River in accordance with Reclamation's operation and regulatory requirements." 2-ER-170. But the EA provides no information on Reclamation's

relevant operational and regulatory obligations. Commenters on the Action noted that Reclamation delivered substantial amounts of water early in the drought year that should have been held over for summer and fall obligations. 2-ER-215. Reclamation simply concludes, again, without information or analysis, that it will comply with "all applicable state and Federal laws." This is not a hard look at effects.

For these reasons, the EA fails to take a hard look at the potentially significant adverse effects of the Action on ESA listed species.

D. Environmental Commitment 1 (EC 1) is insufficient to mitigate significant effects of the Project.

"An agency's decision to forego issuing an EIS may be justified in some circumstances by the adoption of such measures." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733-34 (9th Cir. 2001) (citing *Wetlands Action Network v. United States Army Corps of Eng'rs,* 222 F.3d 1105, 1121 (9th Cir. 2000); *Friends of Payette v. Horseshoe Bend Hydroelectric Co.,* 988 F.2d 989, 993 (9th Cir. 1993)). Mitigation measures prescribed by an EA must be "developed to a reasonable degree." *Id.* at 734 (quoting *Wetlands Action Network v. United States Army Corps of Eng'rs,* 222 F.3d 1105, 1121 (9th Cir. 2000)). Here, "[a] 'perfunctory description' [citation] or 'mere listing' of mitigation measures, without more supporting data, is

insufficient to support a finding of no significant impact." *Id.* (quoting *Wetlands Action Network* 222 F.3d at 1121) (citations and quotations omitted).

In *Nat'l Parks, supra*, 241 F.3d 722, the EA proposed mitigation measures lacking any analytical data to support the conclusion that they would mitigate otherwise significant impacts. *Id.* Federal defendants, moreover, proposed to evaluate the efficacy of the measures through continued study after the project was approved and implemented. The court held with regard to the lack of data supporting the mitigation measures:

> There is a paucity of analytic data to support the Parks Service's conclusion that the mitigation measures would be adequate in light of the potential environmental harms….[T]he Parks Service did not conduct a study of the anticipated effects of the mitigation measures nor did it provide criteria for an ongoing examination of them or for taking any needed corrective action (except for the plan to conduct 'studies'). As with the rest of its proposal, it planned to act first and study later."

Id. See also Wyo. Outdoor Council v. United States Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1251 (D. Wyo. 2005) (Mitigation requiring 1:1 replacement ratio for filled wetlands was vague and speculative where there was "no other evidence support[ing] a finding that such a ratio is even possible.…[T]he record is devoid of any information whatsoever that would support the efficacy of wetland replacement mitigation."); *and Siskiyou Reg'l Educ. Project v. Rose*, 87 F.Supp. 2d

1074, 1102 (D. Or. 1999) (efficacy of mitigation measures must be supported in EA by "analytical data")

Throughout the EA, Reclamation relies, in part, on EC 1 to conclude that the Action will not have significant effects. 2-ER-170-171, 175-176. Environmental Commitment 1 states, "[r]egional groundwater levels will be monitored. Reclamation will evaluate the affected area to assess which groundwater wells under the Proposed Action may need to reduce or cease pumping until groundwater levels recover. Groundwater levels will be monitored monthly (or weekly as feasible)…." 2-ER-162. As to individual impacts to third party wells, as discussed above, EC 1 relies on "3rd party complaints," with no harm avoidance, nor explanation of after the fact mitigations to offset adverse effects (beyond simply waiting for rain) of individual performance. 2-ER-170-171, 175-176.

The EA provides no analytical data or support for its conclusions that monitoring occurring at month-long intervals (with additional time thereafter to actually analyze the monitoring results) will be sufficient to mitigate or avoid potentially adverse impacts; nor does it describe how long it will take for impacted wells or groundwater resources to recover once pumping is stopped or curtailed pursuant to EC 1. Custis Decl. ¶¶ 12, 22, 23, 24, 28. Nor is there any consideration of long-term damage to well structure from the pumping. In fact, EC 1 provides no quantitative *or* qualitative criteria to determine when EC 1 should even be

implemented to curtail or reduce pumping at a given well. Here, EC 1 provides only a "perfunctory description" of proposed mitigation measures lacking the requisite "analytical data" sufficient to support a finding of no significant impact. *See Nat'l Parks, supra*, 241 F.3d at 734; *Wyo. Outdoor Council, supra*, 351 F. Supp. 2d at 1251; and *Siskiyou Reg'l Educ. Project, supra,* 87 F.Supp. 2d at 1102.

EC 1 does not prescribe monitoring of actual effects occurring to third-party wells, GDEs, surface waters, or threatened species. Instead, the after-the-fact groundwater monitoring prescribed by the measure is used as a proxy for real-time monitoring of the impacts to resources that rely on adequate groundwater supply. The proxy, however, is fundamentally flawed, because the EA has not even analyzed the potential effects of groundwater extraction resulting from the Action on GDEs, surface waters, or threatened species. EC 1 cannot provide a basis for concluding that the Action will have less than significant impacts.

E. Reclamation failed to take a hard look at greenhouse gas emissions.

In an EA, agencies "must communicate the '*actual* environmental effects resulting from . . . emissions' of greenhouse gas, not just quantify them. *California v. Bernhardt*, 472 F. Supp. 3d 573, 623 (N.D. Cal. 2020) (quoting *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216-

17 (9th Cir. 2008)) (modifications added). The EA not only fails to evaluate any environmental effects of greenhouse gas emissions resulting from the proposed action, it does not even quantify the expected increase in emissions, or describe baseline emissions conditions in the Action Area.

The EA notes that "CARB uses a threshold of 25,000 metric tons CO2 per year as a threshold for including facilities in its cap-and-trade regulation. ([17 Cal. Code Regs., §§ 95800-96023].)" 2-ER-165. The EA fails to disclose whether or why this would constitute any meaningful standard for consideration of the effects of this project, or whether the project would exceed that threshold.

Similarly, the EA explains that "All diesel-fueled engines are subject to CARB's Airborne Toxic Control Measure (ATCM) for Stationary Ignition Engines ([17 Cal. Code of Regs., § 93115])" (2-ER-166), but that regulation provides no regulation of GHG at all. Thus, when the EA repeats its unsupported assertion that "All pumps proposed to be used by the water agencies would operate in compliance with all rules and regulations at the federal, state, and local levels, including the ATCM," the EA again fails to provide any meaningful description of the environmental effects of the project, falling far short of the requisite hard look; and the proposed "Environmental Commitment" is essentially none. 2-ER-165-166.

F. Reclamation failed to take a hard look at the cumulative effects of the Proposed Action.

Prior to its repeal, 40 C.F.R. § 1508.7 defined "cumulative impact" as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions…Cumulative Impacts can result from individually minor but collectively significant actions taking place over a period of time." Under § 1508.7, Federal agencies were required to consider the cumulative impacts of a proposed action when preparing and environmental assessment. *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004). Revised CEQ regulations repealed § 1508.7. 40 C.F.R. §1508.1(g)(3); *See also* 2-ER-177.

In April, 2021, the Department of the Interior released a secretarial order requiring that departments, "not apply the 2020 Rule in a matter that would change the application of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020." 2-ER-255; *see also* 2-ER-177. In light of SO 3399, Reclamation exercised its discretion such that "cumulative effects of implementation of reasonably foreseeable projects are analyzed" in the EA. 2-ER-177.

Where AquAlliance's claims against Reclamation for flawed cumulative effects analysis arises out of NEPA and the APA, and because Reclamation

"exercised its discretion to include the…analysis in its NEPA evaluation…that analysis therefore is properly subject to arbitrary and capricious review under the APA." *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004). *Citizens for Alts. v. Abraham,* No. CIV 99-321 MCA/ACT, 2004 U.S. Dist. LEXIS 34826, at *55 (D.N.M. June 30, 2004) (internal quotations omitted) ("Because the Federal Defendants exercised their discretion to include an environmental justice analysis in the SEIS-II, that analysis therefore is properly subject to arbitrary and capricious review under the APA.")

The Cumulative Effects analysis in the EA is flawed on its face and fails to account for, assess, or quantify any cumulative effects. The EA acknowledges the severely depleted water supplies in the region, and "anticipates groundwater pumping by other water users to supplement available surface water supplies . . . ." 2-ER-177-178. The ER simply dismisses this problem by noting that additional pumping would occur "with our without the Proposed Action." *Id.* This misses the point, which is what effects occur *with* the Action. The EA completely fails to answer this question. The EA does, however, indicate effects could be significant. For example, EC-1 may require groundwater pumping to halt once historic lows are breached, or after third-party complaints occur, but the EA goes on to acknowledge that, following such cessation, "a groundwater well may continue to be operated" by the participant, but outside of the Action. 2-ER-175. Given existing drought and

water supply shortage conditions, such cumulative effects to groundwater supplies, surface water supplies, and attendant habitats, would very likely be significant, but go completely unanalyzed by the EA, and cannot support a FONSI. 3-ER-355-357 (Cmpl. at ¶¶ 81-86).

II. Public Interest and Balance of Equities

Injunctive relief and preservation of the status quo is in the public interest; and the balance of equities favors a grant of AquAlliance's motion.

First, "[t]he preservation of our environment, as required by NEPA…is clearly in the public interest." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (citation omitted). "When the proposed project may significantly degrade some human environmental factor, injunctive relief is appropriate." *Sierra Club v. Bosworth,* 510 F.3d 1016, 1033 (9th Cir. 2007) (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 737 (9th Cir. 2001)). As the Complaint and this motion make clear, Reclamation's EA is patently deficient and the Action threatens to degrade groundwater resources, third-party wells, surface hydrology, groundwater dependent ecosystems, and threatened species in the Action Area, without a full consideration of the significant adverse effects. The present motion seeks to prevent these adverse environmental effects pending full judicial review of the merits. Conversely, nowhere does the EA even *attempt* to disclose or analyze the purported environmental benefits of the Project, which are

speculative at best. Thus, the balance of harms and equities strongly favors granting the injunction to avoid significant adverse environmental effects.

Next, "ensuring that government agencies comply with the law is a public interest of the 'highest order.'" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F. Supp. 2d 1143, 1162 (W.D. Wash. 2002) (quoting *Seattle Audubon Soc'y v. Evans*, 771 F.Supp. 1081, 1096 (W.D. Wash. 1991)). "The public has an undeniable interest in the [Government's] compliance with NEPA's environmental review requirements and in the informed decisionmaking that NEPA is designed to promote." *Colo. Wild, Inc. v. United States Forest Serv*, 523 F. Supp. 2d 1213, 1223 (D. Colo. 2007) (modifications added). Similarly, "[t]he balance of equities and the public interest [will] favor issuance of an injunction" if there is a situation where "a potentially environmentally damaging program [would] proceed without an adequate record of decision" in the absence of preliminary relief. *Bosworth*, 510 F.3d at 1033. This interest is undoubtedly implicated by the present action, which centers on Reclamation's complete failure to comply with NEPA's procedural requirements by meaningfully evaluating the effects of the Action, especially before an irretrievable commitment of resources.

There is also a strong public interest in protecting the water supply for the public, including AquAlliance's members, as well as all residents residing in and

near the Project Area, who rely on adequate groundwater supply to their private wells for domestic and agricultural use.

To the extent that Reclamation formulates an economic interest of the Project beneficiaries in the Proposed Action, "the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim." *Lands Council v. McNair,* 537 F.3d 981, 1005 (9th Cir. 2008).

The public interest and balance of equities favors the grant of AquAlliance's motion.

III. Irreparable Harm

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 545 (1987). To establish irreparable harm AquAlliance must demonstrate an "immediate threatened injury." *Caribbean Marine Servs. Co. v. Baldrige,* 844 F.2d 668, 674 (9th Cir. 1988). This standard requires that "a presently existing actual threat [] be shown, though the injury need not be certain to occur." *Merino v. Gomez*, No. 2: 21-cv-0572 KJN P, 2021 U.S. Dist. LEXIS 73990, at *4 (E.D. Cal. Apr. 16, 2021) (citing *Zenith Radio Corp. v.*

Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969)). The fact that the EA fails to identify the precise timing, location, and quantities of groundwater that will be extracted due to the Action is a failure of Reclamation's NEPA compliance that does not eliminate Appellants' genuine *threat* of irreparable harm. *See*, *Inland Empire Waterkeeper v. Corona Clay Co.*, Nos. 20-55420, 20-55678, 2021 U.S. App. LEXIS 28322 at *14 (9th Cir. Sep. 20, 2021)("The injury is not simply 'informational'—rather, Corona's failure to report creates a genuine threat of undetected past or future polluted discharge, harming the plaintiff [] . . . .").

These environmental impacts, by their nature, cannot be remedied by money damages. Regardless, the EA offers no compensation, and NEPA provides no damages as remedy. The harm to AquAlliance's members interests here are irreparable.

G. Impacts to Non-Participant Groundwater Users

Approving additional groundwater extractions during this critical drought, not long after the prior drought, and with essentially no meaningful environmental analysis, monitoring, or mitigation, is at best reckless. Other regions of California such as the San Joaquin Valley are suffering even worse effects from persistent aquifer drawdown, such as widespread irreversible subsidence, and groundwater management in the Sacramento Valley is now trending in the same direction.

AquAlliance's members that rely on private wells for agricultural and domestic use face a genuine threat of irreparable harm from the Action, which threatens damage to private and public property, including groundwater wells, buildings, and infrastructure, due to ongoing and worsening land subsidence, and aquifer depletion. Custis Decl. ¶¶ 4, 14-22, 24; Vlamis Decl. ¶¶ 14, 16-18.

Appellants' declarant Mike Billiou shows first-hand how participant groundwater pumping can and does destroy existing infrastructure and interfere with non-participant water supply. Billiou Decl. ¶¶ 8-17. Mr. Billiou attaches to his declaration a map detailing the location of one Action participant's wells, and the area of subsidence impacts resulting from their operation in relation to Mr. Billiou's property. Billiou Decl. ¶ 16. Given the past harms caused by the same groundwater pumping that is projected to increase due to the Action, there exists a genuine threat that if the Action proceeds, additional irreparable harm will occur.

Appellants' expert Kit Custis confirms that the injuries experience by Mr. Billiou would be threatened throughout the Action area. Custis Decl. at ¶ 14 ("Third-party wells, such as those of Mr. Billiou, will likely experience greater decline in groundwater levels the closer they are to a pumping voluntary well"); *see also*, Custis Decl. at ¶¶ 14-22 (analyzing publicly available well data and reports to opine that Action effects could likely be significant). Mr. Custis declares that existing localized data already "show measurable ground surface

displacement" at "six subsidence monitoring stations associated with the Project area." Custis Dec ¶ 24. Subsidence is caused by groundwater pumping, and further pumping will likely cause further subsidence. The EA makes no commitment to avoid pumping in such areas. Indeed, Mr. Custis further observes that "[t]he EA failed to acknowledge that the groundwater levels . . . in August 2021, are most likely lower than the 2014-15 levels that are being proposed as the standard for evaluating harm." Custis Decl. at ¶ 11, 19. Even the EA itself confirms that "Some locales show early signs of persistent drawdown . . . could be early signs that the limits of sustainable groundwater use have been reached in these areas." 2-ER-173. Again, however, the EA's "environmental commitments" do not avoid significant adverse effects from occurring in the Action area, despite the historically poor existing conditions. As Mr. Custis explains:

> The Project Environmental Commitment 1 (EC-1) proposal for monthly groundwater monitoring, or weekly if feasible, will allow for extended periods where the groundwater levels are below the levels during the 2014-15 drought. The effect of long delays in the detection and reporting of harmful groundwater levels when combined with a reliance on regional groundwater measurement is likely to create local conditions where third-party landowners and their wells are significantly or irreparably harmed. This harm can occur even though pumping is reduced or ceased once BOR is made aware of the decline in groundwater level.

Custis Decl. ¶ 4, *see also* ¶ 24.

While the EA fails to meaningfully document the existing conditions surrounding the Action production wells, and fails to analyze how additional

pumping in these areas will affect third-parties, the EA's inadequate analysis only demonstrates its failure to comply with NEPA; it should not and cannot be argued that the EA's failure to provide sufficient information about the Action's effects render reasonable concerns about threats of irreparable harm speculative. On the contrary, all evidence indicates that damage to infrastructure and groundwater users throughout the Action area has already been occurring; rendering the threat of harm from additional pumping to be genuine, and not speculative. Indeed, the EA actually encourages participants to reach new groundwater historic lows, a literal race to the bottom trend that has been ongoing for some time. 2-ER-161; 2-ER-201; Custis Decl. ¶ 9. Thus, additional groundwater pumping from the Action presents a genuine threat of irreparable harms.

H. **Impacts to Surface Waters**

As noted, above, the EA admits that "[t]his additional use of groundwater will reduce stream flows during and after pumping as the groundwater aquifer refills." 2-ER-168. This threat of harm is not speculative, but rather, acknowledged by the EA. Additional reductions in surface water flows during a historic drought clearly constitutes a threat of significant irreparable harm. See Custis Decl. ¶¶ 10, 18, 25-28. Commenters raised numerous concerns that groundwater pumping depleting surface water flows could be illegal and cause legal injury to water users

(2-ER-225-228; 2-ER-236-244), which the EA completely failed to analyze (2-ER-192, 194-195). The Action should be enjoined to prevent further loss of streamflow during existing drought conditions.

I. Impacts to Groundwater Dependent Ecosystems

The Action drawdown of groundwater levels, and surface water flows, will in turn deprive ecosystems of needed water, a need only heightened by the existing drought conditions. Custis Decl. ¶¶ 10, 23; Vlamis Decl. ¶ 15; 2-ER-247-249. Again, the EA admits that "[i]ncreased subsurface drawdown will potential [sic] affect fish habitats, such as . . . riparian . . . habitats . . . . Decreased amounts of surface water in these habitats could affect fish species of management concern" 2-ER-168. However, the EA fails to identify specifically where GDEs exist in the Action area, leaving it to the public to perform the analysis required by NEPA. The failure of Reclamation to adequately disclose and analyze the Action's effects only heightens, not diminishes, Appellants' reasonable concerns that the Action threatens irreparable harm. *See*, *Inland Empire Waterkeeper* at 14 ("failure to report creates a genuine threat of undetected past or future . . . harm[] . . ." [emphasis added]). The EA offers the blanket assurance that groundwater basins are recharged by rainfall annually. 2-ER-173. Given the ongoing historic drought, this is wholly speculative, giving rise to a genuine threat of irreparable harm.

J. The Effects of the Action are Ongoing and/or Imminent

Appellees will argue that because the Action subsidizations are voluntary, and because no reimbursement contracts have been entered into, Appellants' claims of immediate irreparable harm are unfounded. This is incorrect for several reasons.

First, this applies an incorrect legal standard. "Plaintiffs' 'must demonstrate immediate threatened injury." *Caribbean Marine Servs. Co.*, 844 F. 2d at 674. "A presently existing actual threat must be shown, although the injury need not be certain to occur." *Merino v. Gomez*, No. 2: 21-cv-0572 KJN P, 2021 U.S. Dist. LEXIS 73990, at *4 (E.D. Cal. Apr. 16, 2021) (citing *Zenith Radio Corp. v. Hazeltine* Research, Inc., 395 U.S. 100, 130-31 (1969)). Because the Action's fundamental purpose is to incentivize additional groundwater pumping, the effects of the Action are reasonably threatened, even if uncertain to occur.

Second, the record demonstrates that Reclamation and the participants have planned that this additional groundwater pumping and subsidization *will occur* for some time. 2-ER-201. Indeed, at oral argument, Reclamation asserted, for the first time, that the Action is actually part of the whole of a larger project regarding water allocations and uses between Reclamation and the Sacramento River Settlement Contractors consisting of up to 200,000 acre-feet of water, a fact never disclosed in the EA. 2-ER-53-54. Following months of planning, it seems

extremely unlikely that an Action participant would now eschew free groundwater pumping funding from Reclamation, during a time of water shortage.

Third, the EA states that the Action would occur from August through October, indicating that this motion comes within the proposed Action implementation timeframe. 2-ER-156, 189, 207. Entering contracts is imminent.

Finally, waiting until a contract is entered into is too late to seek injunctive relief, wherein groundwater pumping could commence immediately; or, indeed, could already have occurred and is subject to retroactive reimbursement. Because the Action plan and purpose has been to incentivize additional groundwater pumping, it is more than reasonable to infer that such additional pumping will actually occur. Given that groundwater levels already sit at or below historical lows, damage to third party well is already occurring, and stream flows are already severely diminished by the drought, Appellants' members face a particularized threat of imminent irreparable harm worsening such effects should the project proceed.

IV. The Court Should Impose No Bond.

Federal Rule of Appellate Procedure 8 provides: "The court may condition relief on a party's filing a bond or other security in the district court." The Ninth Circuit has held that "special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute." *People of*

State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985), amended, 775 F.2d 998 (9th Cir. 1985). Accordingly, courts "routinely impose either no bond or a minimal bond in public interest environmental cases." *City of S. Pasadena v. Slater*, 56 F.Supp.2d 1106, 1148 (C.D. Cal. 1999).

Plaintiffs are each nonprofit environmental organizations seeking to enforce environmental laws in the public interest, satisfying the standards for waiver of any bond. Moreover, compliance with the requested injunction requires Reclamation to actually *refrain* from spending, approving, or allocating additional funds to further implement the Action. Accordingly, AquAlliance requests no bond, or a nominal bond of at most $1,000, be required.

V. Renewed Motion for Preliminary Injunction in the District Court would be Futile and Impracticable.

FRAP(8)(a)(1)(C) states that "[a] party must ordinarily move first in the district court for . . . an injunction while an appeal is pending," but subsection (a)(2)(A)(i) permits moving first in the Court of Appeals if "moving first in the district court would be impracticable." Here, moving first in the District Court would be impracticable and futile because all issues presented by this motion were fully considered and ruled upon by the District Court less than two weeks ago. In *Chemical Weapons Working Group v. Department of the Army*, for example, the

court explained that "[w]hen the district court's order demonstrates commitment to a particular resolution, application for a stay from that same district court may be futile and hence impracticable." 101 F.3d 1360, 1362 (10th Cir. 1996). The *Chemical Weapons* court further explained that impracticability and futility *are not* met when "relief is sought predominantly on the basis of new evidence . . . . [that] has not yet been considered by the district court." *Id*.

Here, the futility and impracticability test is met, because this motion relies exclusively on the record of evidence that was submitted to the District Court, raising the same arguments for preliminary injunctive relief, below. While Appellants have submitted updated Declarations from Ms. Vlamis, Mr. Custis, and Mr. Billiou on appeal, these declarations were updated to reflect the present dates and judicial proceeding only, and include no new substantive facts on which this motion relies. The District court has clearly committed to a particular resolution of these issues, and resubmission of the exact motion to the District Court would be impracticable to timely avoid the pending threat of irreparable harm from the Action.

CONCLUSION

The threat of substantial adverse harms from groundwater pumping funded by the Action is imminent, and Reclamation's gross violations of NEPA warrant

injunctive relief and preservation of the status quo pending resolution of AquAlliance's appeal.

DATED: September 23, 2021

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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