No. 21-16539

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AQUALLIANCE, *et al.*,

Plaintiffs-Appellants,

v.

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)

FEDERAL DEFENDANTS' OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

California is in the midst of an historic drought. Water in the Sacramento-San Joaquin River Basin is at an almost fifty year low. To prevent remaining surface water in the Shasta Basin and its reservoirs from dropping further below critically-low levels, preserve water for Public Health and Safety purposes, and protect birds and fish, the Bureau of Reclamation created a short-term, voluntary groundwater pumping program (Program) to incentivize the use of up to 60,000 acre feet (TAF) of groundwater instead of surface water. Plaintiffs seek the extraordinary remedy of an emergency injunction pending appeal in an attempt to halt this necessary program, but fail to establish any of the requisite criteria in order to obtain their requested relief.

First, there is no likelihood of immediate, irreparable harm to Plaintiffs as a result of the Program. The Program does not allow groundwater pumping for the first time. Rather, it merely provides voluntary incentives for an activity that can occur regardless of the outcome of the Program. Program payments will not even cover the full additional costs users will incur for pumping groundwater instead of using surface water, making it speculative that the Program will result

in additional pumping. Moreover, the maximum amount of groundwater at issue in the Program (60 TAF) is inconsequential compared to the 2.25-4.5 million acre-feet (MAF) of groundwater withdrawals that occur annually in the region. Finally, given delays in funding and implementation, Reclamation currently estimates that only one-third of the approved amount of groundwater for the Program *may* be used in October before the Program ends.

Second, Plaintiffs' National Environmental Policy Act (NEPA) arguments are meritless. Reclamation provided a robust and searching analysis of potential environmental impacts, appropriately relied on prior environmental analyses, and reasonably determined the Program will not result in any significant environmental impacts.

Lastly, the balance of equities and public interest favor Reclamation. Faced with a critical drought, Reclamation seeks to implement the Program to protect public health and safety, and various species of fish and migratory birds. These goals outweigh Plaintiffs' speculative allegations of irreparable harm.

FACTUAL BACKGROUND

A. Reclamation's Voluntary Groundwater Pumping Program

Reclamation is tasked with coordinating the management of the storage and delivery of water throughout the immense Central Valley Project (CVP)—a service that millions of Californians depend upon to provide water for a variety of beneficial uses.[1] Reclamation began the 2021 water year with 2.2 MAF of water stored in Shasta Reservoir. 2-ER-134. Because of historic drought conditions, the Shasta Reservoir is projected to contain well under half of that—just 996,000 acre-feet—at the end of the year. *Id.* This 996,000 acre feet of storage is well below the 2.4 MAF of water required for minimum instream flow releases from Shasta Reservoir next year. *Id.*[2]

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[1] Reclamation does this in coordination with the State Water Project, managed by the California Department of Water Resources.

[2] The other major reservoirs in the CVP system are similarly low and in May, the Governor of California issued an Emergency Proclamation declaring a state of drought conditions in the Klamath River, Sacramento-San Joaquin Delta, and Tulare Lake Watershed counties. 2-ER-156. The Proclamation directed Reclamation and the State Water Resources Control Board to consider requests to move water, where appropriate, to areas of need, including requests involving voluntary water transfers, forbearance agreements, water exchanges, or other means to support voluntary approaches where hydrology and other conditions allow. *Id.*

If next year remains dry, Reclamation and the State of California may have only the water currently stored to rely upon for protecting Public Health and Safety water supplies. 2-ER-134. Public Health and Safety refers to the amount of water needed for consumption, for operation of necessary water and wastewater facilities, and to avoid economic disruption. *Id.* Protecting public health and safety requires providing sufficient releases from upstream reservoirs to repel salinity intrusion from the ocean into the Delta, providing water in rivers to support diversions by communities and households along rivers and in the Delta, operating export pumps from the Delta at levels required for communities that rely on CVP deliveries, and maintaining sufficient water levels in Folsom Lake to allow for operation of the municipal water supply intake. *Id.* Cities and communities depend on CVP Public Health and Safety water supplies for a minimum amount of water to drink, for sanitation, and to run hospitals and industry. *Id.*

Reclamation has limited ability to protect water in the Shasta Basin and reduce diversions of surface water by senior water rights holders, who have the contractual right for up to 2.2 MAF of water annually (1.65 million under a shortage year). 2-ER-136. Even in the

current critically dry year, senior water rights holders are entitled to divert up to 75% of the amount of water they could divert in a year with no water scarcity. *Id.* To try to protect water remaining in the Shasta Reservoir, Reclamation created the Program to incentivize, through monetary payments intended to offset costs, senior water users to use up to 60 TAF of groundwater instead of surface waters from the rivers and Shasta reservoirs. 2-ER-160. The Program, in effect only from August until October, 2021, identified 160 potentially participating wells in six counties (Shasta, Tehama, Glenn, Colusa, Yolo and Sutter) spanning an area that is 336 Thousand Acres (525 square miles). 2-ER-159.

The Program allows Reclamation to manage water under its more junior rights. 2-ER-136–137. If successful, the Program would preserve water in Shasta Reservoir to increase the amount of storage for next year for use by residents, hospitals, industry, farms, fish, and birds. 2-ER-134–135. The Program would also provide water to support birds migrating along the Pacific Flyway[3] and reduce or avoid their die-off

[3] The Pacific Flyway represents an area where birds (particularly waterfowl such as ducks, geese, etc.) migrate from Alaska down through

and deadly diseases. *Id.* This time of year migratory birds land in lakes, marshes, refuges, and flat areas of rivers in California's Central Valley. *Id.* Normally 275,000 rice acres would be post-harvest flooded in the Sacramento Valley and provide suitable habitat for use by migratory birds. *Id.* Because of the drought, it is estimated there will be only 80,000 acres available this year. *Id.* Birds will die if more water is not available. *Id.*

To evaluate the Program's potential environmental effects, and determine whether it would result in significant environmental impacts, Reclamation prepared and released a Draft Environmental Assessment (Draft EA) on July 7, 2021, for public comment. 2-ER-150–181. Plaintiffs provided comments on the draft Environmental Assessment and actively participated in the administrative process. 2-ER-214–229. Reclamation addressed these comments, 2-ER-191–197, before issuing a final EA. 2-ER-150–181. On August 4, 2021, Reclamation issued a Finding of No Significant Impact (FONSI), which

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Canada, Washington, Oregon, California, and then to Mexico and beyond, all the way into South America.

determined the Program would have no significant impacts and no environmental impact statement (EIS) was required. *Id.*

Although the Program was approved in August, funding was only received this month and contracts are just now being entered. 2-ER-137. Reclamation hopes water will be used on the rice fields in October for the imminent arrival of migrating birds. *Id.* As of today, only four districts have identified willing landowners to participate and provide approximately 11,000 acre-feet of groundwater in October to support waterfowl migrating along the Pacific Flyway and reduce or avoid die-offs due to outbreaks of deadly disease. Supplemental Declaration of David Mooney (Supp. Mooney Dec.) ¶4. Actual participation may vary. *Id.* The remaining three districts could identify a combined maximum 8,000 acre-feet of additional groundwater for the Pacific Flyway in October, but have not yet committed. *Id.* Although the irrigation season has largely concluded, water users can seek reimbursement for use of groundwater instead of surface water during the entirety of the Program period from August 4, through October 31, 2021. 2-ER-137.

B. The District Court Litigation

On August 27, 2021, 23 days after Reclamation approved the Program, Plaintiffs filed a complaint alleging that the Program violated NEPA and the Administrative Procedure Act (APA). 1-ER-332-359. Five days later, Plaintiffs moved for a temporary restraining order, which was denied on September 7. 2-ER-140. On September 9, the court held a two-hour hearing on Plaintiffs' motion for a preliminary injunction, 2-ER-24-99, and denied the motion on September 14, 2021. 1-ER-3-21.

The district court found that Plaintiffs had not made any of their requisite showings for an injunction. First, the court found that Plaintiffs did not show a likelihood of immediate irreparable harms. Instead, the court found that the harm Plaintiffs "allege will occur to property, groundwater-dependent ecosystems, threatened species, and the water supply, is largely speculative." 1-ER-5–9.

Second, the district court found that Plaintiffs were not likely to succeed on the merits of any of their arguments. 1-ER-9-19. Indeed, the court found that Reclamation complied with NEPA by adequately considering each of the six challenged issues, including: existing

conditions; impacts to third party groundwater users; impacts to groundwater dependent ecosystems, surface hydrology, and threatened species; mitigation; greenhouse gas emissions; and cumulative effects. *Id.*

Third, the district court found that that the balance of equities and public interest favored denying the preliminary injunction. 1-ER-19–21. The court found that Reclamation is "attempting to deal as best it can with the critical problem of too little water to meet the essential needs of all of the users in the Sacramento River Valley" and that the benefits of preserving available surface water are many. The court recognized that time is of the essence since the Program is "only in effect from August to October, 2021–a portion of which has already elapsed, with no implementation thus far –further delay risks entirely precluding the project's implementation, and therefore its expected beneficial impact." *Id.*

On September 17, 2021, Plaintiffs filed a notice of appeal of the court's order. Six days later, Plaintiffs requested this court issue an injunction pending appeal without first seeking redress in the district court. For the reasons set forth herein, no injunction should be issued.

ARGUMENT

I. Plaintiffs did not comply with Rule 8

Plaintiffs' motion should be denied for violating Federal Rule of Appellate Procedure 8(a) by not first bringing this motion in district court. A request for a stay or injunction pending appeal "must ordinarily be made in the first instance in the district court" unless it would be "impracticable" to do so. Fed. R. App. Proc. 8(a)(1)(C), (a)(2)(A)(i).

Plaintiffs do not cite any authority supporting their argument that it would be "futile" to file this motion in the district court simply because it raises "the same arguments" that the district court already rejected. Mot. 43. No "futility" exception exists and other courts have recognized that "it does not necessarily follow from the refusal to grant a preliminary injunction that the district court would also refuse injunctive relief pending appeal." *See Bayless v. Martine*, 430 F.2d 873, 879 n.4 (5th Cir. 1970).

Moreover, Plaintiffs brought their original TRO and PI motion in the district court before any contracts were signed. 2-ER-137. Now, several contracts have been entered and Reclamation has an estimate of

how much groundwater may be used for the Program in October before the Program ends. Mooney Supp. Dec. ¶4. The only case Plaintiffs cite in their brief on this issue holds that when new facts exist the district court should be the first to consider them on a motion for injunction pending appeal. Mot. 42, citing *Chemical Weapons Working Group v. Department of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996).

II. The legal standard for injunction pending appeal

Injunction pending appeal is "an extraordinary and drastic remedy" that should be granted in only exceptional circumstances. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). Plaintiffs bear the burden of establishing (1) that it is likely to succeed on the merits of its appeal; (2) that it is likely to suffer irreparable harm absent injunctive relief; (3) "that the balance of equities tips in [its] favor"; and (4) "that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

The core issue in any request for injunctive relief is that a "plaintiff must demonstrate that there exists a significant threat of irreparable injury." O*akland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). The Supreme Court has "held that

plaintiffs must demonstrate that harm is likely, not just possible." *Cascadia Wildlands v. Scott Timber Co.*, 715 F. App'x 621, 623 (9th Cir. 2017) (citing *Winter*, 555 U.S. at 22). This is so even where environmental damage is alleged, *see Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 544-45 (1987); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). In environmental cases, Plaintiffs must demonstrate irreparable harm to *their* interests. *Hilo v. Exxon Corp.*, 997 F.2d 641, 643 (9th Cir. 1993). The demonstrated harm must be immediate, individualized, and substantiated with evidence. *Caribbean Marine Servs. Co. Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1998); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171, n.6 (9th Cir. 2011).

Because an injunction is "never awarded as of right," 555 U.S. at 24, the moving party must make a "clear showing" that it has met all four requirements of the standard, *id.* at 22. Failure to establish any one of the required elements precludes preliminary relief. *Id.* at 24. As elaborated below, Plaintiffs cannot make the required showing.

III. Plaintiffs have not demonstrated immediate, irreparable harm from the Program

As an initial matter, Plaintiffs cannot show irreparable harm due to an insufficient causal link between the Program and groundwater

pumping. "There must be a 'sufficient causal connection' between the alleged irreparable harm and the activity to be enjoined" to justify injunctive relief. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018). Here, the Program uses payments to third parties to incentivize groundwater pumping rather than the use of surface waters. But Reclamation does not have direct control over how much groundwater these parties ultimately choose to pump from their wells. Moreover, payments to the users of groundwater under the program will not cover the full additional cost users will incur for pumping groundwater instead of surface water. 1-ER-8; 2-ER-51, 2-ER-137. Accordingly, any harms resulting from possible pumping linked to the Program are vague, attenuated, and speculative.

The Program also cannot create immediate, irreparable harm because it has experienced delays in implementation and contracts are just now being entered. 1-ER-15; 2-ER-31–32; Mooney Supp. Dec. ¶4. The Program ends in October, leaving a short window for its implementation. 1-ER-13. Although Reclamation hopes some pumping happens *posthaste* to benefit migrating birds, only four districts have identified willing landowners to participate and provide approximately

11,000 acre-feet of groundwater in October to support waterfowl migrating along the Pacific Flyway. Mooney Supp. Dec. ¶4. Actual participation may vary. *Id.* The remaining three districts could identify a maximum of 8,000 acre-feet of additional groundwater for the Pacific Flyway in October, but have not yet committed. *Id.* Thus, Reclamation currently estimates that only one-third of the approved amount of groundwater for the Program *may* be used in October before the Program ends. *Id.*

Moreover, even if all 60 TAF were pumped, groundwater pumping in the region accounts for 2.25 MAF and can be as high as 4.5 MAF in dry years. 2-ER-175. An additional 60 TAF is inconsequential to overall groundwater withdrawals. The 160 wells identified for potential use in the Program are spread throughout six counties and span 525 square miles. 2-ER-159. The eight owners of those wells are limited to a maximum amount of groundwater they could pump under the Program. 2-ER-161. In addition to time and quantity constraints, the typical production from wells in this area is only between 10 and 100 acre-feet a day. Accordingly, pumping possibly linked to the Program will be small, making any threat of irreparable harm speculative.

Given these already significant obstacles to demonstrating any likelihood of irreparable harm, Plaintiffs' numerous conclusory allegations about harms do not support emergency relief. First, Plaintiffs demonstrate only generalized harms to private and public property that have already occurred and are not tied to the Program. Mike Billiou's declaration complains of land subsidence that pre-dates the Program, beginning in 2010–more than a decade before the Program was conceived. 2-ER-289–290. A court may not "consider harm that will occur irrespective of an injunction, *i.e.* harm that the award of an injunction will not alleviate or prevent." *Defs. of Wildlife v. U.S. Army Corps of Eng'rs*, 730 F. App'x 413, 415 (9th Cir. 2018). Mr. Billiou also fails to link Program activities to any actual, immediate likelihood of further subsidence, instead only declaring he is "gravely concerned" that groundwater extraction will cause him injury. 2-ER-289. Although Mr. Billiou identifies one relevant well in proximity to his property, he fails to demonstrate any actual likelihood that the well owner will receive payments through the Program, that the well owner will pump water due to those payments, or that pumped water attributable to the payments will cause further subsidence on his

property. *See* Mot. 36; 2-ER-137. Likewise, the Custis Declaration discusses prior groundwater pumping in 2013, but does not quantify the predicted effect of the Program on existing groundwater. 3-ER-301.

Second, Plaintiffs' allegations about "impacts to surface waters" do not rise to the level of immediate, irreparable harm. Mot. 38. No significant decreases in surface water flows are expected given the minimal water at issue and the short duration of the Program. 2-ER-177. Although the EA says reduced stream flow could "potentially" affect fish habitats, the FONSI concluded any impact would not be significant. 2-ER-168, 204–213. Moreover, that EA discussion was in the context of groundwater use "to irrigate crops." *Id.* The irrigation season has now passed and no significant pumping for this purpose is expected in October. 2-ER-137. As such, there are no irreparable, immediate harms associated with surface waters.

Third, Plaintiffs' argument that groundwater dependent ecosystems (GDE) "could" be harmed is speculative. *See* Mot. 39. The EA's acknowledgement that there "could" "potential[ly]" be an impact to GDEs shows that Reclamation took the requisite hard look at possible harms. After a thorough evaluation and consideration of U.S. Fish and

Wildlife Service data with respect to species listed for protection under the Endangered Species Act (ESA), the EA concluded that the Program would not have any significant impact on groundwater dependent ecosystems (GDEs). 2-ER-205–212. The EA also specifies that pumping would not occur in GDEs adjacent to a riverine environment. 2-ER-175. Ultimately, Plaintiffs do not provide a basis for any specific harm to the GDEs linked to the the Program. *See* 1-ER-7.

Finally, Plaintiffs' arguments about groundwater pumping that has already occurred is inapposite. *See* Mot. 40–41. To the extent water users have already performed groundwater pumping, such actions are not within Reclamation's control. Even *if* water users previously pumped groundwater in hopes of getting reimbursed, those activities already occurred and do not demonstrate *imminent* harm that is preventable by an injunction. *See Carribean Marine Service Co.*, 844 F.2d at 674 ("[A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief.").

Plaintiffs have failed to establish a likelihood of imminent, irreparable harm and their request for an injunction pending appeal should be denied.

IV. Plaintiffs will not succeed on the merits.

Plaintiffs have failed to demonstrate a likelihood of success on the merits, or even raise substantial questions as to the merits, on each of their six NEPA claims.

NEPA does not mandate particular results; it establishes procedural requirements for assessing the potential environmental impacts of an agency's decisions. *See* 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). Pursuant to NEPA, federal agencies prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Where an EIS is not categorically required, the agency must prepare an Environmental Assessment (EA) to determine whether the environmental impact is significant and warrants an EIS. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2004). If, through the EA, the agency determines that an EIS is not required, the agency issues a Finding of No Significant Impact (FONSI). *Id.*

The Court reviews Plaintiffs' NEPA claims pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012). The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

A. Reclamation appropriately considered existing environmental conditions.

Plaintiffs waived their "environmental conditions" claim by failing to raise it in their comments to the EA. 2-ER-214–229; *See Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 764–65 (2004) (holding that failure to raise a concern during this process results in waiver of the ability to pursue that claim in litigation); *Havasupai Tribe v. Robertson,* 943 F.2d 32, 34 (9th Cir. 1991); *Vermont Yankee Nuclear Power Corp.,* 435 U.S. at 553.

Plaintiffs' environmental conditions claim also lacks merit because Reclamation reasonably relied on adequate data in the EA. Mot. 11–15.

The EA incorporates by reference water years 2014 and 2015 as a baseline against which to measure the Program's effects on groundwater levels. 2-ER-170–171, 175–176. In considering the environmental impacts of a project, an agency is permitted to rely on data of its choosing, as long as it is reasonable for it to do so. *Marsh*, 490 U.S. at 378 ("An agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive.").[4] Using 2014 and 2015 data as a baseline was appropriate here because 2014 and 2015 were critical drought years that represented historic

[4] Plaintiffs admit Reclamation was allowed to rely on this data but argue it had to summarize the information. Mot. 14. That argument lacks merit because the EA specifically includes either the Section number or table number of the pertinent document. It is well-established that under NEPA, a court should not "fly-speck" environmental analyses and hold them "insufficient on the basis of inconsequential, technical deficiencies.'" *Ctr. for Sierra Nevada Conservation v. U.S. Forest Serv.*, 832 F. Supp. 2d 1138, 1149 (E.D. Cal. 2011) (citing *Friends of the Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998)). If Plaintiffs believed a reference was missing or insufficient, or they were otherwise unable to understand what was relied on, they should have raised this during the comment period and their failure to do so waives this argument. *Dep't of Transp.,* 541 U.S. at 764-65. The failure to include a pinpoint cite is not sufficient basis to grant an injunction. *Sierra Forest Legacy,* 951 F. Supp. at 1111.

groundwater lows. *Id*. at 170–171. It was also reasonable for Reclamation to rely on the existing data because of the Program's brief duration, from August to October, and comparably small amount of water, 60 TAF. 2-ER-175, 210.

Moreover, existing conditions will be further evaluated once specific wells are identified. 2-ER-175. The Program includes monitoring wells "prior to, during, and following the program." *Id*. It also includes using "any" monitory network information, including individual monitoring wells and wells monitored by the California Department of Water Resources and participating Sacramento River Settlement Contractors (SRSC), that are in the vicinity of Program wells. 2-ER-175. Plaintiffs' "existing conditions" argument is meritless.

B. Reclamation appropriately considered impacts to third party groundwater users.

Plaintiffs' claim that Reclamation did not adequately address effects to third party groundwater users is meritless. Mot. 15–18. As a threshold matter, the small amount of water at issue in the Program, 60 TAF, spread over 336,000 acres (525 square miles), will not affect third party groundwater users. Nonetheless, as discussed above, Reclamation considered historical data for the Program area and also

requires monitoring of regional and local groundwater levels. 2-ER-175. Thus, once participating wells are identified, they will be monitored "prior to, during, and following the program." *Id*. Monitoring to avoid effects is an estiblished best practice and acceptable under NEPA. *See Protect our Communities Found. v. Jewell*, 825 F.3d 571, 582 (9th Cir. 2016); *Nat'l Parks & Conservation Ass'n v. U.S. Dept. of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000). It is also appropriate for ongoing monitoring to inform mitigation as the Program goes forward.

Here, not only will monitoring occur, but the Program also allows individuals to file complaints and shut down wells. 2-ER-170–175. Wells that receive complaints will be shut down immediately and cannot resume participation until the issue is investigated and evaluated. *Id.* Thus, although Reclamation does not expect the Program to impact third party groundwater users, these measures are provided in an abundance of caution. This approach is analogous to having an Accidental Spill Plan: you do not expect an accidental spill but are prepared in case it happens. Mitigation in the form of monitoring and complaints precludes significant impacts from occuring.

Plaintiffs' argument that Program pumping has already harmed its members is specious. Mot. 16. Although Reclamation expects pumping to occur in the future, no Program contracts have been entered and no Program-specific groundwater pumping has occurred. Billiou's complaints date back to 2010 and are not be attributed to this Program. Custis' claim that the Program could change groundwater by as much as ten feet is false. The EA limits the amount of water each participant can provide. 2-ER-161. The EA also identified 160 possible wells over 500 square miles to minimize impacts. 2-ER-159. Real world conditions discredit Custis' claims and show that Plaintiffs' arguments lack merit. Their request for an injunction should be denied.

C. Reclamation appropriately considered impacts to surface hydrology, groundwater dependent ecosystems, and threatened species

Plaintiffs' claim that Reclamation failed to appropriately consider impacts to surface hydrology is false. Mot. 18–19. The EA specifies that no significant decreases in surface water flows are expected. 2-ER-174. Any temporary decrease in surface flows would be *de minimis* given the Program's minimal amount of water and short time frame. The *maximum* reduction possible under the Program would be 60,000

acre-feet over the 90-day Program duration. This translates to only 336 cubic feet per second (cfs). Current flow on the Sacramento River at Bend Bridge is 7400 cfs. As such, any effect on flow would be minimal. Pumping would also not occur in GDEs adjacent to a riverine environment, creating benefits for these habitats that depend on surface water for recharge. 2-ER-169. The EA specifically addressed surface water diversions and required they remain "in Shasta Reservoir as carryover storage or provide for water quality and/or health and safety uses downstream." 2-ER-177.

Plaintiffs' claim that Reclamation failed to appropriately evaluate impacts on groundwater dependent ecosystems is also baseless. Reclamation adequately considered GDEs using comparable information from the nearby Yuba Groundwater Sustainability Plans (GSP). 2-ER-169. It was appropriate for Reclamation to use the Yuba GSP because the affected environment does not yet have an established GSP. The Yuba GSP, which includes the portion of the Feather River and adjacent lands, is similar enough to be applicable. 2-ER-169. Based on information from the Yuba GSP, "Reclamation conclude[d] that groundwater pumping for the Proposed Action does not impact

shallow groundwater conditions, as those are driven by contributions from the Sacramento River and from nearby irrigated agriculture." *Id.* The EA also incorporated information regarding GDEs from the 2019 Longterm Water Transfer EIS/EIR by reference. 2-ER-169. Reclamation is entitled to rely on data it reasonably believes is comparable.

Finally, Plaintiffs' claim that Reclamation did not sufficiently consider listed species is also baseless. The EA specifically recognizes that Yellow-billed Cuckoo habitat is located in the Program's proposed action area and that the Program will not significantly impact this habitat. 2-ER-170. The EA provides a similar analysis regarding the Valley Elderberry Longhorn Beetle. *Id.* Plaintiffs' complaint that Beetle habitat near specific wells was not analyzed attacks a strawman. Mot. 23–25. Reclamation does not know which wells will participate in the Program and thus cannot perform Plaintiffs' requested analysis. Instead, as discussed above, Reclamation reasonably described and analyzed the Program area in general terms based on data from comparable nearby areas. Reclamation reasonably concluded the Program would not affect future suitability of the Beetle or Cuckoo or

their habitat. *Japanese Vill. LLC v. Fed. Transit Admin.*, 843 F.3d 445, 468 (9th Cir. 2016); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) ("[I]t does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment.").

D. Reclamation reasonably established groundwater monitoring as a sufficient mitigation for the Program.

Plaintiffs' claim about the Program's mitigation plan are meritless. NEPA does not impose a substantive duty to mitigate. *Robertson*, 490 U.S. at 351–53. It also does not require that any mitigation plan be fully developed at the time the project is analyzed and approved. *Id.* at 353; *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000) (noting that a mitigation plan "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements."). Even for an EIS, rather than an EA, if the document discusses mitigation measures in "sufficient detail to ensure that environmental consequences have been fairly evaluated," the agency has met its NEPA obligations. *City of Carmel-by-the-Sea v. U.S. Dept. of Trans*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson*, 490 U.S. at 353); *Hapner v. Tidwell*, 621

F.3d 1239, 1246 (9th Cir. 2010) (holding that more than a "perfunctory description of mitigating measures" is sufficient).

Here, Reclamation's discussion of its monthly monitoring mitigation satisfies NEPA's "hard look" standard. *City of Carmel-by-the-Sea*, 123 F.3d at 1154. The monthly monitoring is designed to ensure prompt corrective actions in the unlikely event a significant environmental effect occurs with the groundwater. Reclamation also incorporated the mitigation measure into the Program and made it an enforceable component of the Program. 2-ER-162. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1114 (9th Cir. 2012); *Ctr. for Biological Diversity v. FWS*, 807 F.3d 1031, 1046 n.12 (9th Cir. 2015); *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008).

Plaintiffs' argument that the EA's "proposed mitigation measures lacking any analytical data to support the conclusion that they would mitigate otherwise significant impacts" is meritless. Mot. 26. Reclamation used an established network with benchmarks from 2014 and 2015 and will also use any available network information from individual monitoring wells and wells monitored by the California

Department of Water Resources and participating SRSCs. 2-ER-162. The wells must comply with any applicable Sustainable Groundwater Monitoring Act network monitoring, which balances groundwater supplies to halt overdraft. The EA also specifies that once Program participants are identified, monitoring will occur "prior to, during, and following the program." *Id.*

Looking at regional monitoring networks on a broad scale is appropriate given the small quantity of water involved in the Program. The EA describes historic volumes of groundwater pumping that, on average, account for 2.25 MAF with dry years, up to as much as 4.5 MAF. If regional monitoring identifies well performance outside the realm of expected performance then Reclamation will take action. Indeed, if changes occur, the EA takes the wells off-line and effectively assumes the Program wells are not performing properly until proven otherwise. Reclamation's application of a very strict monitoring program for such a small amount of waters satisfies its obligations under NEPA.

Plaintiffs' assertion that Reclamation relies, in part, on its groundwater monitoring commitment "to conclude that the Program

will not have significant effects" is misleading. Mot. 27. Monitoring to avoid effects is an established best practice and acceptable under NEPA. *See Protect our Communities Found.*, 825 F.3d 571, 582; *Nat'l Parks & Conservation Ass'n*, 222 F.3d at 681 n.4.

Plaintiffs' desire for Reclamation to do more monitoring–of third party wells, GDEs, and listed species–is irrelevant because NEPA and an EA do not evaluate whether more could be done. *Tri-Valley CAREs*, 671 F.3d at 1129 (citing 40 C.F.R. § 1508.9) ("The purpose of an EA is not to compile an exhaustive examination of each and every event that potentially could impact the [] environment. Such a task is impossible, and never-ending."). Here, Reclamation has shown that it reasonably considered well monitoring for the purposes of NEPA.

E. Reclamation appropriately considered greenhouse gas emissions.

Plaintiffs' claim that Reclamation did not adequately consider greenhouse gas emissions lacks merit. Given the Program's limited 90-day duration, Reclamation determined the proposed pumping would not materially change agriculture pumping in the area as discussed repeatedly herein. 2-ER-164. Nonetheless, the EA recognizes that "groundwater pumping with diesel and natural gas-fueled engines …

emits air pollutants through exhaust" and that "three pollutants: carbon dioxide (CO2), methane (CH4), and nitrous oxide (N2O) . . . contribute to GHG." 2-ER-164–165. To evaluate the significance of those emissions, and ultimately determine there was no significant impact, the EA incorporated by reference the Initial Study/Environmental Assessment for 2021 Tehama-Colusa Canal Authority In-Basin Water Transfers (TCCA IS/EA). *Id.*

Thus, contrary to Plaintiffs' argument, the EA considered potential GHG emissions resulting from the Program, and reasonably determined that they would not be significant. In addition to the TCCA IS/EA showing that greenhouse gas emissions would not be significant from this program, CARB's Airborne Toxic Control Measure (ATCM) already addresses diesel particulate matter (PM) and criteria pollutant emissions from stationary diesel-fueled compression ignition (CI) engines. *See* Stationary Diesel ATCM | California Air Resources Board. CARB therefore already ensures that any impacts are not significant. Reclamation was entitled to rely on this GHG data in considering the environmental impacts of the Program. *Marsh*, 490 U.S. at 378.

Finally, Plaintiffs incorrectly argue that Reclamation lacks support for its assertion that, "[a]ll 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." Mot. 29. In completing its NEPA review, Reclamation met its obligation to consider whether Program effects would violate Federal, State, Tribal, or local law protecting the environment. 40 C.F.R. § 1501.3(b)(2)(iv). Indeed, Reclamation pledged in its Environmental Commitment 2, regarding air quality, that "[a]ll water agencies would operate their groundwater pumps in compliance with the local rules and regulations. Under the Proposed Action, participants would provide evidence of registration of diesel energy sources with their local district." 2-ER-162.

F. Reclamation appropriately considered cumulative effects.

Plaintiffs' argument that Reclamation failed to consider the Program's cumulative effects is meritless. Reclamation examined the groundwater pumping already occurring in the region to determine cumulative effects. The proposed pumping, which is limited to at most 60 TAF, is miniscule compared to the 2.25 MAF of groundwater

pumping that occurs in standard years and 4.45 MAF that occurs in dry years. 2-ER-175. Reclamation reasonably concluded that the 60 TAF proposed by the voluntary program is well within the range of historic pumping patterns for the basins where the voluntary groundwater pumping is proposed and thus would have no significant cumulative effect. *Ctr. for Env. Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1007-08 (9th Cir. 2011). Reclamation therefore adequately considered the cumulative effect of the program.

V. The balance of equities and public interest favor denying an injunction pending appeal.

When the government is a party, the balance of equities and public interest merge as one factor. *Drakes Bay Oster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The public interest may preclude an injunction even if the other requirements are satisfied. *Id.* at 32–33; *see also Weinberger*, 456 U.S. at 312-13 (1982). Indeed, "[f]or 'several hundred years,' courts of equity have enjoyed 'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944)). Under Ninth Circuit law,

the balance of hardships must "tip sharply towards the plaintiff" for preliminary relief to issue. *Alliance*, 632 F.3d at 1135.

Here, the balance of equities and the public interest weigh strongly against the issuance of an injunction pending appeal. As described above, the alleged harm to Plaintiffs is speculative and remote whereas the harm to public health, safety and species is significant. Indeed, Plaintiffs admit "there is a strong public interest in protecting the water supply for the public," Mot. 33, which is exactly what the Program is designed to do. Plaintiffs' alleged interest in protecting species and habitat is also best served by the Program going forward.

California is in the midst of the worst drought since 1977. 2-ER-134. The reserves in the Shasta Reservoir are alarmingly low. *Id.* A fundamental purpose of the Program is to incentivize water users to use groundwater instead of surface waters to protect the critically low water in the Shasta Reservoir. *Id.* Protection of water in the Shasta Basin is necessary for the health and safety of people throughout California, salmon and other fish in the Basin, and other species and their habitats. *Id.* Moreover, using groundwater to flood local rice fields

keeps the water in the district and also promotes the protection of species and habitat in the Pacific Flyway. 2-ER-134–37.

Reclamation's identified Public Health and Safety water threshold is the amount of water needed for consumption, operation of necessary water and wastewater facilities, and avoidance of economic disruption. 2-ER-134. Cities and communities depend on CVP Public Health and Safety water supplies for a minimum amount of water to drink, for sanitation, and to run hospitals and industry. *Id.* Maintaining the Public Health and Safety threshold requires sufficient releases from upstream reservoirs to repel salinity intrusion from the ocean into the Delta, providing water in rivers to support diversions by communities and households along rivers and in the Delta, operating export pumps from the Delta at levels required for communities that rely on CVP deliveries, and maintaining sufficient water levels in Folsom Lake to allow for operation of the municipal water supply intake. *Id.*

Time is of the essence for Program benefits to occur. 2-ER-135. Migratory birds have begun their fall migration south. *Id.* Since the mid-1800s, less than 10% of the historical wetland habitat in California remains. *Id.* Along the migration route it is important for birds to have

areas to rest and feed. A significant habitat used by migratory birds is the flooded post-harvest rice fields in the Sacramento Valley, which provide critical food and loafing resources, especially near managed wetland complexes. *Id.* When water is too scarce, the cost of flooding post-harvest fields with water exceeds the cost of other methods of removing the rice straw. Consequently, while 275,000 rice acres would normally be post-harvest flooded in the Sacramento Valley, this winter it is estimated to only be around 80,000 acres. *Id.* If additional rice acres are not flooded, large amounts of these migratory birds will likely die due to cholera outbreaks caused by overcrowding at the reduced habitats. *Id.* The Program must proceed as planned to provide migratory waterfowl habitat along the Pacific Flyway.

Time is also of the essence to protect the endangered winter-run Chinook salmon, which are found only in the Upper Sacramento below Shasta Dam and Keswick Reservoir. 2-ER-135. These fish rely on cold water releases from Shasta Reservoir to incubate as eggs before they hatch and swim to the ocean to mature. In years with low reservoir storage, like this year, cold water is a limited resource. *Id.* Winter-run Chinook salmon are projected to experience 80% temperature

dependent mortality in the egg to fry stages and will experience additional losses from other sources of mortality in the upper river and in their migration down the Sacramento River and out to the ocean. *Id.* As such, it is critical to be able to extend the ability to maintain cold water temperature in the Shasta Reservoir.

The foregoing shows that Plaintiffs' request for extraordinary relief contravenes the public interest and should be denied. *Winter*, 555 U.S. at 33 (holding that plaintiffs' ecological concerns were "plainly outweighed" by the public interest); *Weinberger*, 456 U.S. at 312 (1982) ("[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of [an] injunction.")

CONCLUSION

For these reasons, Plaintiffs' motion for an injunction pending appeal should be denied.

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Respectfully submitted,

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Certificate of Compliance

The foregoing response is 7,150 words, and is accompanied by a motion to file a response exceeding the length limit permitted by Ninth Circuit Rules 27-1 and 32-3. The type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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