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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AQUALLIANCE; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA WATER IMPACT NETWORK; CENTRAL DELTA WATER AGENCY; SOUTH DELTA WATER AGENCY,

Plaintiffs,

v.

THE UNITED STATES BUREAU OF RECLAMATION; SAN LUIS & DELTA-MENDOTA WATER AUTHORITY; U.S. DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity; U.S. FISH AND WILDLIFE SERVICE; AND DOES 1-100,

Respondents and Defendants.

No. 1:20:cv-00878-DAD-EPG

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Regulations

INTRODUCTION

Under review in this case is the United States Bureau of Reclamation ("Reclamation") and San Luis Delta-Mendota Water Authority's ("SLDMWA") environmental review for the Long-Term Water Transfer Project, which provides for a framework whereby sellers with an excess of water can seek approval from Reclamation to transfer water to buyers in need. Under the program, Reclamation reviews proposals from water users who seek to transfer water. If the proposals meet Project requirements, Reclamation will approve up to 250,000 acre-feet of water transfers per year. Pursuant to the National Environmental Policy Act ("NEPA"), Reclamation analyzed the effects of its action – i.e., approval of a water transfer which uses Reclamation's facilities – and issued an Environmental Impact Statement ("EIS"). Additionally, because the agency action may affect the giant garter snake, a species listed as threatened under the Endangered Species Act ("ESA"), Reclamation underwent formal ESA Section 7 consultation with the U.S. Fish and Wildlife Service ("FWS") for the Project.

Plaintiffs allege that Reclamation violated NEPA and both agencies violated the ESA. But these allegations lack merit. Plaintiffs' NEPA challenges are little more than tacked-on claims appended to their sections on California state law. These arguments cannot be leveraged in support of the contention that NEPA was violated. With respect to their ESA claims, Plaintiffs misstate and largely ignore the reasoning and supporting evidence underlying FWS' reasonable, expert scientific judgment that Reclamation's proposed action is not likely to jeopardize the continued existence of the giant garter snake. Consequently, the Court should deny Plaintiffs' motion for summary judgment and enter judgment on behalf of the Federal Defendants.

LEGAL BACKGROUND

I. NEPA

The National Environmental Policy Act ("NEPA") both informs agency decision-makers of the environmental effects of proposed federal actions and ensures that the information is available to the public so that it "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). NEPA achieves this end by imposing procedural requirements; it does not mandate particular results or impose substantive environmental obligations. *Id*. at 350-52 ("NEPA itself does not mandate particular results,

but simply prescribes the necessary process."); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989); *see also Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996); *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072-73 (9th Cir. 2001). "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson*, 490 U.S. at 351 (footnote citation omitted). Thus, NEPA does not require agencies to "elevate environmental concerns over other appropriate considerations." *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (per curiam). "Rather, it require[s] only that [an] agency take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983); *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1035 (9th Cir. 2012).

To this end, NEPA requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must contain a detailed discussion of "the environmental impact of the proposed action," "adverse environmental effects which cannot be avoided," and "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.13. In considering the adequacy of an EIS, a reviewing court must "make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *California. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). In doing so, courts must consider whether the analysis includes a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016) (quoting *Churchill Cnty.*, 276 F.3d at 1071-72). The reviewing court "may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." *Or. Env't Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) (citation omitted).

II. ESA

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species[.]" 16 U.S.C. § 1531(b). A species is "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16

U.S.C. § 1532(6). FWS interprets "in danger of extinction" to describes a species "that is currently on the brink of extinction in the wild." *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 83 (D.D.C. 2011), *aff'd sub nom. In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.--MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013). By contrast, a species is "threatened" if not currently on the brink of extinction, but is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). The species at issue here, the giant garter snake, was listed as threatened in 1993. FWS 1502.

Among the protections accruing to ESA-listed species are those from ESA Section 7(a)(2). That section requires all federal agencies, in consultation with what is known as the "consulting agency," to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat . . . ." 16 U.S.C. § 1536(a)(2). Consistent with this requirement, when an agency plans to take an action over which it has discretionary involvement or control, the agency, known as the "action agency," must determine whether "its actions" "may affect" a listed species or its designated critical habitat. 50 C.F.R. § 402.14(a). If the action agency determines that its action "may affect" listed species or its designated critical habitat, it enters into either "formal consultation" with the consulting agency, which is FWS or the National Marine Fisheries Service ("NMFS") depending on the species involved, or engages in "informal consultation" to determine if formal consultation is needed. 50 C.F.R. § 402.13; 402.14(a)-(b)(1). In this case, the action agency is Reclamation, while the consulting agency is FWS. If the action agency determines that its proposed action "is likely to adversely affect" a listed species, as Reclamation did here, the action agency must engage in formal consultation with the consulting agency. 50 C.F.R. § 402.14(b)(1).

Where formal consultation is performed, the consulting agency prepares a biological opinion based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). The biological opinion includes a summary of the information upon which the opinion is based, a discussion of the effects of the proposed action on listed species or their designated critical habitat, and the consulting agency's opinion on "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(h)(1)-

(4). In making this "jeopardy" determination, the consulting agency evaluates "the current status and environmental baseline of the listed species or critical habitat," the "effects of the action," and "cumulative effects." *Id*. § 402.14(g)(2)-(3). If the biological opinion concludes that the adverse effects of the proposed action on listed species (that required formal consultation in the first place) do not rise to the level of likely causing jeopardy to the continued existence of the species, the consulting agency can issue an "incidental take statement" ("ITS") identifying the impact of such taking and specifying reasonable and prudent measures and terms and conditions considered "necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i-v). If the action agency implements its action as proposed and complies with the terms and conditions of the incidental take statement, the specified level of take is exempt from the ESA Section 9 prohibition on "take" of listed species. 16 U.S.C. § 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5); *Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1159 (9th Cir. 1999).

FACTUAL BACKGROUND

I. Central Valley Project

Reclamation manages the Central Valley Project ("CVP"), which is one the "largest and most important water projects in the United States." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014). The CVP consists of a series of storage reservoirs, pumps, canals, and other conveyance facilities that store and deliver water to multiple users for irrigation and municipal and industrial (M&I) purposes in the Sacramento and San Joaquin Valleys and the east and south San Francisco Bay Areas. BOR 5551-52. Delivery of this water to high-demand areas has helped make the Central Valley of California one of the most agriculturally productive regions in the world. In all, approximately 9 million acre-feet[1] of water are managed through the CVP, and approximately 7 million acre-feet of water are delivered annually for agricultural, urban, and wildlife use. *See About the Central Valley Project*, https://www.usbr.gov/mp/cvp/about-cvp.html (last visited Nov. 10, 2021).

Reclamation is also responsible for managing CVP water for fish hatcheries and wildlife refuges and the protection, restoration and enhancement of fish, wildlife, and associated habitats. BOR 5551.

[1] An acre-foot of water is the volume of water required to cover one acre of surface area to the depth of one foot, or approximately 43,560 cubic feet.

Each year, Reclamation determines how much water can be delivered to each water user based on current conditions. *Id.* Water supply availability is affected by a number of factors and "[w]ater shortages lead to severe water constraints especially in the southern portion of the CVP." *Id.* For decades, water transfers from willing sellers to willing buyers have been used to help reduce impacts of water shortages. BOR 5564.

II. The 2015 Long-Term Water Transfer Project

In September 2015, Reclamation and SLDMWA (collectively "the agencies") approved of a Long-Term Water Transfer ("LTWT") project whereby water users could transfer water through the Delta to willing buyers using CVP, State Water Project ("SWP"), and local facilities for a 10-year period from 2015 to 2024 (the "2015 LTWT Project"). BOR 9604. Under the 2015 LTWT Project, the agencies do not transfer the water themselves; instead, the agencies review and approve water transfer proposals from willing sellers to buyers. *Id.* Sellers could make water available for transfer through groundwater substitution, cropland idling, crop shifting, reservoir release, and conservation. *Id.* The 2015 LTWT made up to 511,094 acre-feet of water available per year through these sources. BOR 9606.

Plaintiff AquAlliance and several others filed suit challenging the 2015 LTWT Project under NEPA, the California Environmental Quality Act ("CEQA), and the ESA. *See AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 985-86 (E.D. Cal. 2018). In 2018, this Court found portions of the challenged EIS unlawful. *Id.* at 1076. Specifically, with respect to the claims asserted against the federal defendants, the Court found that: (1) the 2015 LTWT EIS did not adequately assess the impacts associated with ongoing climate change in violation of NEPA; and (2) FWS did not use the best available science in approving Reclamation's measures for conservation of the giant garter snake. *Id.* at 1032, 1075-76. As a result, the Court vacated the agencies' decision. *Id.* at 1076.

III. The 2019 Long-Term Water Transfers Project

In December 2018, the agencies issued for public comment a Revised Environmental Impact Report/ Supplemental Environmental Impact Statement ("SDEIS") changing several aspects of the previous 2015 LTWT Project as well as addressing the deficiencies identified by the Court in *AquAlliance*, 287 F. Supp. 3d at 1076. After receiving, considering, and responding to public

comments, the agencies released the final Environmental Impact Statement/ Environmental Impact Report in September 2019. BOR 9538.

As with the 2015 LTWT Project, the EIS issued for the revised 2019 LTWT Project (also, "the Project") analyzes the environmental effects of water transfers from willing sellers upstream of the Delta to willing buyers south of the Delta or in the San Francisco Bay area when infrastructure capacity is available to convey the water between the parties. BOR 9573. In order to make water available for the transfers, sellers must take an action to reduce their consumptive use or must release additional volumes of their stored water. *Id.* Sellers can make this water available through the previously-mentioned methods of water transfer. Specifically, those methods are groundwater substitution, which occurs when sellers choose to pump groundwater in lieu of diverting surface water supplies; reservoir release, which is when a seller releases stored reservoir water for transfer; cropland idling/cropland shifting, which involves making water available for transfer that would have been used for agricultural production by either idling a crop field entirely or shifting crops to a lower water use crop; and conservation, whereby sellers take actions to reduce the diversion of surface water by the transferring entity by reducing irrecoverable water losses. BOR 9578-79.

The agencies also changed several aspects of the LTWT project; notably, they reduced the length of the LTWT project from ten to six years[2] and reduced the annual maximum quantity of water that could be transferred from 511,094 acre-feet to 250,000 acre-feet. BOR 362-69. Aside from downsizing the scope of the original project, the agencies also made numerous revisions to many of the previous EIS's sections, such as those addressing water quality, groundwater resources, climate change, fisheries, and vegetation and wildlife. *See generally* BOR 360-509 (SDEIS); *see also* BOR 6953-7509 (Appendix Q, listing revisions to the 2014 EIS).

In April 2020, Reclamation signed the Record of Decision ("ROD") implementing the proposed action, which is to: "(1) review any proposed transfers and approve them (if appropriate); and (2) facilitate the conveyance of proposed and approved transfers through the Delta." BOR 14079. Before Reclamation approves of any specific transfer, it will "ensure that impacts of the proposed transfer are

[2] Although envisioned as a six-year program from 2019-2024, Reclamation did not approve the ROD until April 2020 and thus only five years remained when adopted.

within the scope of analysis in the Final EIS/[Environmental Impact Report ("EIR")] and include all environmental commitments and mitigation measures." *Id.* In May 2021, Reclamation issued an amended ROD to clarify its ESA Interagency Cooperation responsibilities as they pertain to transfers involving cropland idling and crop shifting. *See* ECF No. 39-2 at 4, Supp. BOR 4. More specifically, the amended ROD clarified that Reclamation would reinitiate ESA Section 7 consultation with FWS should cropland idling/shifting transfers occur in more than the expected number of years, i.e., more than two years out of the program's six-year lifespan. ECF No. 39-2 at 11, Supp. BOR 11.

IV. ESA

As noted above, Reclamation determined that the Project may affect the giant garter snake. The giant garter snake is primarily an aquatic species that is endemic to wetlands in the Sacramento and San Joaquin Valleys of California. FWS 2861. The snake inhabits marshes, sloughs, ponds, small lakes, low gradient streams, and other waterways and agricultural wetlands, such as irrigation and drainage canals and rice fields. FWS 1502, 2861. "Perennial wetlands provide the highest quality habitat for the giant garter snake, and ricelands, with the interconnected water conveyance structures, serve as an alternative habitat in the absence of higher-quality wetlands." FWS 2855. Among other limitations, rice fields provide aquatic habitat for the snake only when fields are flooded during the summer growing season and when they have grown sufficient vegetation to provide cover from predators. FWS 2863; CEQA 874. Acreage in rice production also varies from year to year based on market conditions and other factors, and "hence, rice fields do not represent habitats that are available on a long-term basis." FWS 1506, 1512. The majority of observed giant garter snake occurrences in rice production areas in the Sacramento and San Joaquin Valleys have been in water supply and drainage canals, not rice fields. *Id*; *see also* FWS 912 (85% of known snake occurrences in water canals and ditches); FWS 1297 (citing 2017 study that giant garter snakes "were strongly associated with water conveyance canals and made 'little use of rice field themselves'"). Nevertheless, studies indicate that giant garter snakes occupying canals need some adjacent rice fields or natural, perennial wetlands of the kind the snake historically occupied before rice agriculture arrived. FWS 1295, 1297-98, 1304.

In November 2018, Reclamation requested formal ESA consultation with FWS to evaluate the impact of Reclamation's proposed water transfer program from 2019 to 2024 on the giant garter snake.

FWS 1319. In its biological assessment ("BA") describing its proposed action, Reclamation advised that only water transfers based on cropland idling/shifting would adversely affect the snake by temporarily removing some of its rice field habitat. *Id*. at 1327-28. Groundwater substitution transfers do not affect the giant garter snake. Reclamation further advised that based on historical data, cropland idling/shifting transfers were expected only during two years of the six-year program (one-third of years). FWS 1464. In a number of recent years, there have been no cropland idling/shifting transfers approved by Reclamation. For example, Reclamation approved such transfers during only three years of the ten-year period from 2009 to 2018 (in 2009, 2014, and 2015). FWS 1485.

In its BA, Reclamation proposed a number of measures to limit the expected adverse effects of cropland idling/shifting transfers on the snake, including: (1) a limit on the annual amount of cropland idling/shifting water transfers in acre-feet (which effectively limits the rice field acreage that could be idled/shifted in a year and leaves the vast majority rice acreage planted in the project area); (2) a prohibition on cropland idling/shifting transfers in rice field habitat immediately adjacent to nine, identified important giant garter snake populations; and (3) a requirement that program participants will maintain adequate water in canals and ditches near idled fields. FWS 1472, 1475, 1486-89. Reclamation also agreed to extensive reporting regarding its transfer program and the funding of research by snake experts with the U.S. Geological Survey ("USGS") to enable FWS to monitor the impacts of cropland idling/shifting and to develop additional conservation measures if necessary. FWS 1476, 1492-93.

In May 2019, FWS issued its ESA Section 7 biological opinion finding that Reclamation's proposed action of cropland idling/shifting transfers in two years, including its restrictions on the volume and location of transfers and measures directed at garter snake conservation, was not likely to jeopardize the continued existence of the species. FWS 1462-1501. Consistent with the ESA, the biological opinion and associated ITS only provide Reclamation with an exemption from ESA Section 9's prohibition on the take of the snake for the expected two years of cropland idling/shifting transfers analyzed in the biological opinion. FWS has required, and Reclamation has agreed, that re-initiation of ESA consultation and thus a new jeopardy analysis would be required if more than two years of transfers are proposed. FWS 1462; ECF No. 39-2 at 12, Supp. BOR 12.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") requires courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Gardner v. U.S. Bureau of Land Mgmt.,* 638 F.3d 1217, 1224 (9th Cir. 2011) (quoting 5 U.S.C. § 706(2)(A)). An agency decision is arbitrary and capricious if it

> 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.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). The Ninth Circuit has endorsed the use of summary judgment to review agency actions governed by the APA. *See*, *e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). The court's role is not to determine whether there are genuine disputes of fact, but instead to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. Immigr. & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985). Under the standard of review, the agencies' findings are presumptively correct, and Plaintiffs have the burden of showing otherwise. *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 601 ("the agency's decision is 'entitled to a presumption of regularity'") (citation omitted)); *see also Ellis v. Housenger*, 252 F. Supp. 3d 800, 808 (N.D. Cal. 2017) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

ARGUMENT

I. Plaintiffs Have Failed to Establish Standing Sufficient for Summary Judgment

At the threshold, Plaintiffs lack standing to pursue their claims because they have not met their burden to provide claim-specific facts demonstrating their standing. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). To establish standing, a plaintiff must show (1) it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) such injury is "fairly traceable" to the challenged action; and (3) it is "'likely,' as opposed to merely speculative,' that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation omitted). Here, two of the Plaintiffs are organizations and three are public agencies. Second Amended Complaint, ECF No. 24 at 4-8 ("Am. Compl."). Organizational

plaintiffs must show either that they have "representational standing," which is contingent upon the ability of at least one of its members to bring suit, or that they have "organizational standing," which turns instead on whether the organization itself has suffered an injury-in-fact. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-379 (1982). If suing on behalf of their members, organizations also must show that the interests the organization seeks to vindicate are germane to the organization's purports, and that neither the claim asserted nor the relief requested requires the participation of individual members. *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019). Further, at the summary judgment stage, a plaintiff cannot rely on "mere allegations" and instead must set forth evidence and specific facts for each element of standing. *Lujan*, 504 U.S. at 561. Plaintiffs have failed to meet the foregoing standards.

In their second amended complaint, Plaintiffs make only broad and general allegations regarding their alleged interests and do not identify any actual or imminent, concrete harm to themselves or their members allegedly flowing from the challenged actions that could be remedied by the Court. Am. Compl. at 4-8. In addition, Plaintiffs have not submitted any declarations in support of standing, as required at the summary judgment stage. *See Wash. State Farm Bureau v. Nat'l Marine Fisheries Serv.*, No. C06-388Z, 2006 WL 4914810, at *6 (W.D. Wash. Dec. 20, 2006) (finding plaintiffs failed to establish standing by failing to submit affidavits and other evidence in support of standing). In fact, the organizational plaintiffs do not identify any named members that would have standing on their own. Am. Compl. at 4-8. Nor do Plaintiffs show that the other requirements for representational standing are met. *Id*. In particular, while challenging FWS' biological opinion for the giant garter snake and alleging that Reclamation unreasonably relied on the biological opinion, Plaintiffs do not even allege in their second amended complaint how any Plaintiff has standing to bring these ESA claims. Accordingly, Plaintiffs have failed to show standing and their claims should be dismissed.

II. Federal Defendants Fully Complied with NEPA

Reclamation prepared a thorough EIS which carefully analyzes the environmental impacts of the proposed action and ultimately adopted a measured approach in order to meet the needs of water users in California. All aspects of the EIS have been subject to public review, and Reclamation has considered, responded to, and incorporated modifications to the EIS as a result of comments from the public.

Through this process, Reclamation fully complied with the requirements of NEPA and its implementing regulations and, accordingly, the Federal Defendants are entitled to summary judgment regarding Plaintiffs' NEPA claims.

Plaintiffs make little effort to genuinely mount a NEPA challenge and instead tack their NEPA arguments to the tail end of their CEQA arguments in the hopes that something sticks. But CEQA is a product of California state law. It has different legal requirements and courts apply different standards of review in measuring whether an agency has fulfilled its obligations. In other words, Plaintiffs' NEPA claims are an afterthought and represent a kitchen-sink approach that purports to transfer the burden of applying the law to the facts first to the Federal Defendants and ultimately to the Court. By doing so, Plaintiffs do not and cannot meet their burden of demonstrating that Federal Defendants violated NEPA.

A. The EIS does not arbitrarily limit transfers to 250,000 acre-feet per year.

Plaintiffs contend that the project description is unstable and inaccurate because "nothing in the EIS/R actually demonstrates that Defendants could ensure buyers and sellers adhere to [the 250,000 acre-foot] limit." ECF No. 40 at 19. This contention lacks merit. First, Reclamation must review and approve of any transfers that occur under the project to ensure that the overall amount of transfers it approves stays below the 250,000 acre-foot limit. BOR 8198-99. Reclamation also conducts field visits and requires sellers to monitor and report the amount of water pumped using, for example, certified flow meters attached to water pumps and groundwater measurements conducted before and after transfers take place. *See, e.g.*, BOR 9489-95.

Second, Plaintiffs' argument that there could be 713,000 acre-feet of water transfers per year mischaracterizes the EIS. Although the table cited by Plaintiffs lists amounts which total more than 713,000 acre-feet of water that these sellers could theoretically make available for transfer, the table also notes this amount would not be reached under the project because transfers "would be limited to less than 250,000 acre-feet in any one year, based on the buyers' demands for transfers." BOR 9617. They also argue that the real amount of water transfers could be more than 713,000 acre-feet and, at the very least, there is no "agency or other authority" that keeps track of the total amount of water transferred under the 2019 LTWT Project. ECF 40 at 20. But again, Reclamation must review and approve transfers that use CVP facilities and implements several measures to ensure that water transfer amounts

listed are accurate. BOR 8198-99, 9489-95.

Third, Plaintiffs argue that Reclamation's review and approval process is inadequate because it "overlooks the situation where the approval comes from DWR, not BOR." ECF No. 40 at 19. Specifically, Plaintiffs rely on this quote from the EIS: "The Final EIS/EIR addresses the transfer of water to CVP contractors from CVP and non-CVP sources of supply that must be conveyed through the Delta using CVP, SWP, and local facilities. These transfers require approval from Reclamation and/or the Department of Water Resources (DWR) . . ." *Id.* In other words, Plaintiffs seem to suggest that transfers occur under the Project that only require the approval of DWR and not Reclamation.

This is incorrect. Transfers not subject to Reclamation's approval are not within the scope of the Project. Indeed, the federal actions at issue are Reclamations review and approval (if appropriate) of proposed transfers and the facilitation of those approved transfers through CVP facilities. BOR 14079; *see also* BOR 7540 ("Reclamation's Potential Action is to review and approve potential transfer activities, if appropriate, based on detailed review of the specific proposed transfer."). Thus, transfers that occur without any involvement of Reclamation are not part of the 250,000 acre-foot limitation on transfers occurring under the Project. Instead, such transfers are considered as part of the cumulative effects analysis and, indeed, the final sentence of the paragraph from which Plaintiffs' quote, which Plaintiffs omit from their quotation, explains that these "[n]on-CVP transfers are analyzed in combination with the Action Alternatives in the cumulative analysis." BOR 9574.

Finally, Plaintiffs also contend that Reclamation's limitation of transfers to 250,000 acre-feet "is being used to artificially minimize potential environmental impacts" and that the 250,000 acre-foot limitation on transfers must be discussed as a mitigation measure. ECF No. 40 at 21. However, as previously discussed, the agency action at issue is, in brief, Reclamation's decision to approve up to 250,000 acre-feet of water transfers per year for the duration of the Project based on the demands of water users using CVP facilities. BOR 9580. This upper limit is not arbitrary and instead was derived through historical data and an analysis of the actual demand by buyers. BOR 9606. Furthermore, Plaintiffs cite no authority for the argument that the agency's defined scope of its action must be discussed as mitigation. Nor can they, as it defies common sense; the entire purpose of NEPA would be frustrated if federal agencies were not permitted to define the scope of the actions they intend to take.

Aberdeen & Rockfish R.R. Co. v. Students Challenging Regul. Agency Procs. (S.C.R.A.P.), 422 U.S. 289, 322 (1975) ("In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken.").

B. The EIS was adequate for informational purposes under NEPA.

Plaintiffs argue that the EIS is inadequate as an informational document under NEPA because it relies on sections from the previously vacated 2015 EIS and adds new chapters. ECF No. 40 at 22. As an initial matter, Plaintiffs primarily cite to California state law in support of their arguments, which imposes different requirements, with specific requirements that an information document be adequate. *See id.*; *see also Sierra Club v. Cnty. of Fresno*, 6 Cal. 5th 502, 510, 431 P.3d 1151, 1158 (2018) (detailing the standard for determining whether an EIR is adequate as an informational document). Moreover, Plaintiffs, in their NEPA section, state that, "[a]s discussed in detail above" – i.e., in their section arguing that SLDMWA violated CEQA – the EIS is inadequate under NEPA. ECF No. 40 at 26. However, such arguments do not apply to the federal government. *Mayo v. United States*, 319 U.S. 441, 445 (1943) (citing the supremacy clause of the Constitution). Moreover, Plaintiffs cannot make such blanket arguments through incorporation by reference to other sections of their brief. *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (arguments made by incorporation through reference are waived).

To the extent that Plaintiffs argue that Reclamation violated NEPA by relying on portions of the 2015 EIS, such an argument lacks merit. NEPA does not prohibit Reclamation from relying on portions of a previous EIS in revising the project scope and issuing a supplemental EIS. To the contrary, such supplementations are expressly contemplated and permitted. 40 C.F.R. § 1502.9(d) (describing situations in which supplemental EISs may be issued). Plaintiffs' contention that the EIS is "nonsensical" as a result of supplementation is equally unfounded. Not only did the draft supplemental EIS issued in 2018 make clear what revisions were being made to the 2015 EIS, but the final EIS issued contains an entire appendix (Appendix Q) which details nearly every single addition and deletion to the prior EIS. BOR 6953-7509. It is difficult to imagine what other steps Reclamation could have taken to ensure the public understood the changes being made to the previous EIS.

C. The EIS complies with NEPA's requirements regarding mitigation.

NEPA requires that an EIS contain a discussion of possible mitigation measures, but it 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."). So long as the EIS discusses mitigation measures in "sufficient detail to ensure that environmental consequences have been fairly evaluated," an agency's NEPA obligations have been met. *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson*, 490 U.S. at 353).

Plaintiffs argue that Mitigation Measure GW-1 ("GW-1") is inadequate under NEPA. But as with their charge that the EIS is an inadequate informational document, Plaintiffs again purport to apply state law requirements against Reclamation and fail to explain how any federal law was violated. Indeed, Plaintiffs begin their argument by conceding that NEPA does not have substantive mitigation requirements in contrast to California state law. ECF No. 40 at 33. They nevertheless contend (in the same sentence) that the EIS violates NEPA "[a]s noted in Section IV(A)(1)(c) above[.]" *Id.* But the section cited by Plaintiffs argues that the EIR fails the substantive mitigation requirements under California law, and Plaintiffs make no effort to explain how this could also apply under federal law where no such requirements exist.

The only substantive argument Plaintiffs appear to make is that GW-1 will not, in their estimation, "effectively mitigate significant adverse effects to [groundwater-dependent ecosystems]."[3] *Id.* at 34. Again, this appears to be a legal requirement under CEQA, not NEPA. *See, e.g.*, *Gray v. Cnty. of Madera*, 167 Cal. App. 4th 1099, 1116 (2008) (finding a violation of CEQA because the

[3] Plaintiffs' argument nevertheless lacks merit. Essentially, Plaintiffs contend that GW-1 is inadequate because it does not require monitoring or mitigation of shallow-rooted vegetation. ECF No. 40 at 26. GW-1 does not require such monitoring because Reclamation determined that shallow-rooted vegetation was unlikely to be affected. In areas near surface water, Reclamation noted that such vegetation would not be affected by groundwater pumping due to the proximity of surface water. BOR 7537. Instead, the areas likely to be affected are areas farther from surface water; however, "the groundwater levels are substantially below the surface" in these areas, and hence shallow-rooted vegetation would be unaffected by changes in the groundwater levels. *Id.*

mitigation measures would not actually be "effective in remedying the potentially significant problem . . .").

Instead, NEPA requires that agencies "discuss potential mitigation measures" and assess "whether the proposed mitigation can be effective." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012) (citations omitted). The EIS does just that and concludes that its mitigations measures would be effective. The EIS explains that Mitigation Measure GW-1 is designed "avoid significant adverse environmental effects from groundwater level declines" by "monitoring groundwater levels and land subsidence in the period during which groundwater is being pumped in lieu of diverting the surface water." BOR 9749. It then details how the monitoring measures will be implemented, describes the various components that comprise the monitoring program, and ultimately concludes this measure would prevent any "potentially significant unavoidable impacts[.]" BOR 9749-54. Moreover, the EIS contains detailed analyses of the effectiveness of the mitigation measures as compared to the agency action without any mitigation measure in place. *See, e.g.*, BOR 9584-95, 9748, 9957 (tables comparing significance of impact before and after mitigation); BOR 9599 (explaining how mitigation measures would avoid groundwater pumping-related subsidence), 9751 (concluding that GW-1 would avoid significant effects to vegetation).

D. The EIS adequately analyzes the impacts of climate change.[4]

Plaintiffs make two arguments with respect to sufficiency of the EIS's analysis of climate change under NEPA. First, they contend that the EIS does not explain how climate change may affect the 2019 LTWT Project's impacts on the environment, and "instead only analyzes the narrow issue of how climate change may affect the physical quantity of water available for transfer." ECF No. 40 at 44.[5] This assertion is incorrect. As an initial matter, Plaintiffs downplay the importance of determining the availability of water for transfer as a "narrow" in focus. *Id.* But the purpose of the Project as a whole is to allow water users to use "water transfers to help reduce potential impacts of [water] shortages," and

[4] Sections IV(A)(4), (5), and (7) of Plaintiffs' brief do not state that they are being brought pursuant to NEPA and only advance arguments under California state law. Accordingly, the Federal Defendants do not address these claims here.

[5] Page citations to Plaintiffs' brief at ECF No. 40 are to the blue, ECF-stamped page numbers in the upper right of the page (not the page numbers on the bottom of the page).

thus nearly the entire EIS is devoted to analyzing and measuring the available water resources available and the effect on the environment when those resources are transferred from one user to another. BOR 9573. It thus logically follows that any discussion of the effects of climate change on the Project begins with an assessment of the impacts of climate change on the quantity of water available for transfer. The EIS does just that, detailing the changes in water supplies that occur under different scenarios. BOR 9851-52. The EIS then concludes that climate change would likely impact the Project by increasing the demand for water transfers. BOR 9852. However, because the increase in demand due to climate change would be within the annual limit of water transfers analyzed under the Project, the EIS concluded that the impacts of climate change on the Project were not significant. *Id.*

Second, Plaintiffs also take issue with the EIS's conclusion that water transfers under the Project would not significantly affect Delta outflow. Specifically, Plaintiffs criticize the EIS's usage of the CalSim II model, which relies on hydrological conditions between 1970 and 2003 and, according to Plaintiffs, "therefore does not account for climate change." ECF No. 40 at 45. Plaintiffs' assertion that climate change did not occur between 1970 and 2003 is without basis or support. Moreover, as explained in response to public comments on the usage of this model, this period of time provides an accurate look at the Sacramento Valley's historical range of hydrology, as it includes numerous severe drought years, many of which were worse than recent drought years, as well as wet years. BOR 7520. Plaintiffs' criticism of the EIS therefore amounts to little more than a disagreement with the conclusions of the EIS. As such, it is an improper basis for a challenge under NEPA. *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 526 (9th Cir. 1994) ("NEPA does not require us to decide whether an EIS is based on the best scientific methodology available or to resolve disagreements among various experts."), *as amended on denial of reh'g* (Dec. 20, 1994).

III. Federal Defendants Fully Complied with the ESA

Plaintiffs' claims brought under the ESA also should be rejected by the Court. In its May 2019 biological opinion, FWS fully explained the bases for its determination as the expert consulting agency that Reclamation's proposed cropland idling/shifting transfers are not likely to jeopardize the continued existence of the threatened giant garter snake. FWS' analysis is rational and fully supported by the administrative record. For the most part, Plaintiffs fail to engage FWS' reasoning and supporting

evidence and instead largely base their case on the false premise that Reclamation and FWS entirely rely on maintaining water in canals and ditches to avoid jeopardy to the snake. ECF No. 40 at 54-61 (accusing Reclamation and FWS of a "mitigation strategy" of "merely keeping water in canals"). While a requirement to maintain water in conveyances near idled fields is one important conservation measure for the snake, that is not remotely the only or principal basis for the no-jeopardy determination. In other respects, Plaintiffs mischaracterize FWS' no-jeopardy analysis and the record. And contrary to Plaintiffs' argument, ECF No. 40 at 52-53, FWS correctly analyzed whether two years of cropland idling/shifting transfers was likely to cause jeopardy to the snake, because Reclamation proposed two years of cropland idling/shifting transfers during its six-year program based on data showing that such transfers in fact occur about one-third of years. Nothing in the ESA or case law requires FWS to make a counterfactual assumption that such transfers would occur more often, let alone every year as Plaintiffs demand. Plaintiffs' largely duplicative claim that Reclamation unlawfully relied on the biological opinion also fails. ECF No. 40 at 61-64. For this claim, Plaintiffs mostly advance the same false premises and arguments used to directly challenge the biological opinion as against FWS. *Id*. For these reasons and as discussed fully below, the Court should grant summary judgment to Federal Defendants on Plaintiffs' ESA claims.

A. FWS' biological opinion reasonably concluded that the transfers would not jeopardize the giant garter snake.

Contrary to Plaintiffs' inaccurate presentation, FWS principally rested its no-jeopardy determination on the amount and location of rice fields that may be idled/shifted in a given year. As a result of these limitations, FWS found that only a relatively small portion of the snake's rice field habitat – which is a subset of the species' total habitat and does not include higher quality perennial wetlands and other water bodies and conveyances where most snakes are found – would be temporarily affected by Reclamation's proposed action. FWS 1486-89, 1491; ECF No. 39-2 at 14-16. FWS found that even with the maximum annual amount of idling/shifting transfers allowed under the program, and factoring in the maximum potential amount of other idling/shifting transfers not approved by Reclamation, but

considered as part of "cumulative effects" in the biological opinion, at least 80% of rice field acreage in the project area would remain available to the snake based on average historical rice production. *Id*.[6]

In addition, since the prior 2015 biological opinion reviewed by this Court, FWS issued a recovery plan for snake that identifies nine "recovery units" for the species to aid in recovery planning. FWS 2855. "A recovery unit is a special unit of the listed species' range that is geographically or otherwise identifiable and is essential to the recovery of the entire listed species." FWS 2873-74. The boundaries of the nine recovery units were defined using a giant garter snake habitat suitability model and "represent the potential extent of giant garter snake habitat in the Central Valley as known at the time of listing and updated with recent surveys." FWS 2874. Using these recovery units and after examining in detail where cropland idling/shifting could occur across the project area, FWS found that idling/shifting transfers would occur in only six of the nine recovery units, and that the maximum amount of habitat impacted per year in those six units was "relatively small," ranging from only 0.1% to 5.8% of the total acreage of the recovery unit. FWS 1481-83, 1487. Accordingly, FWS found that the "level of anticipated take is not likely to result in jeopardy to the snake" because the "temporary loss" of the maximum rice field acreage idled/shifted in a year was not significant "relative to the overall rice land that is available to the snake in the action area of the program." FWS 1491; *id*. at 1487.

In reaching its no-jeopardy finding, FWS further relied on the facts that: (1) only two years of idling/shifting transfers can occur before a new ESA consultation and jeopardy analysis occurs for any additional years of such transfers; (2) idling/shifting transfers will not be approved for rice acreage adjacent to nine, identified important snake populations; (3) transfer program participants must maintain sufficient water levels in canals and other water conveyances near idled fields; and (4) Reclamation is required to provide regular and extensive reports regarding the transfer program each year (including the location of all idled parcels), which along with the ongoing, required USGS field research on the effects of idling/shifting on the snake, will inform any future ESA consultation. FWS 1464, 1475-76, 1479-80,

[6] FWS' biological opinion originally calculated that a maximum of 18.4% of total rice production in the project area could idled/shifted in a year based on average rice production from 1992-2017, including transfers considered as part of cumulative effects. FWS 1489. After minor corrections to the transfer volumes for two districts, the maximum rice field acreage idled/shifted increases slightly to 19.5%, meaning that over 80% of rice acreage will be maintained for the snake even if the maximum idling/shifting transfers occur in a given year. ECF No. 39-2 at 14-16, Supp. BOR 14-16.

1486-88, 1491-93. Thus, FWS' no-jeopardy conclusion rested on multiple factors, and was not premised entirely or even principally on the requirement that program participants maintain sufficient water in irrigation canals and ditches near idled fields, contrary to Plaintiffs' portrayal.

In advancing their inaccurate narrative, Plaintiffs notably rely on isolated statements from *Reclamation*. *See*, *e.g.,* ECF No. 40 at 54-55, 57 (citing statements in Reclamation's BA and referring to "BOR's conclusion" about avoiding jeopardy). FWS is the expert wildlife agency in this case, and it made the no-jeopardy determination under review by the Court. And while the Reclamation statements cited by Plaintiffs indicate that Reclamation viewed maintaining water in canals as important for the giant garter snake, that is hardly reason to find FWS' biological opinion arbitrary and capricious. Giant garter snakes extensively use irrigation canals and ditches and are most frequently found in such water conveyances. FWS 912, 1297. Indeed, a USGS paper cited in Plaintiffs' own brief states that giant garter snakes "are strongly associated with the canals that supply water to and drain water from rice fields" and "these canals provide much more stable habitat than rice fields because they maintain water longer and support marsh-like conditions for most of the giant [garter snake] active season." ECF No. 40 at 49 (citing CEQA AR 48451). On these facts, FWS did not arbitrarily rely in part on the conservation measure to maintain sufficient water in irrigation canals and ditches near idled rice fields.

Plaintiffs further emphasize at various points that FWS found that "adverse" effects and "take" or "mortality" of the snake would occur from the temporary loss of some rice field habitat under Reclamation's water transfer program. ECF No. 40 at 14, 49. But the mere presence of some temporary adverse effects does not foreclose a no-jeopardy conclusion. If that were the case, there would never be a no-jeopardy biological opinion since a biological opinion is only prepared in formal consultation premised on the existence of some adverse effects to the species. 50 CFR § 402.14(b)(1). The issue in formal ESA Section 7 consultation is whether adverse effects are likely to rise to the level of jeopardy to the continued existence of the species. 50 C.F.R. § 402.14(h)(1(iv); *see also* 16 U.S.C. § 1536(a)(2). FWS reasonably found that was not the case here for the reasons explained above and further below, including that the vast majority of rice field and other habitat would remain available for the snake in the action area and the nine recovery units. *See Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 957 (9th Cir. 2003) (the agencies "identified the most troublesome problems . . ., realized the magnitude of

those problems, and then determined that mitigation measures . . . would lower the threats to the grizzlies enough that the Stimson Project would not place the existence of the species in jeopardy.").

FWS' no-jeopardy determination is particularly entitled to deference by this Court given that "[l]imited data" exists regarding the impacts of cropland idling/shifting transfers on the snake and FWS has taken appropriate steps to address that fact. FWS 1476. *See also* FWS 1397 (USGS finding that the extent and magnitude of the effects of idling/shifting transfers on giant garter snakes is "currently unknown"). In part for this very reason, FWS has required the ongoing research on the snake by USGS as part of the biological opinion and ITS:

> This research is designed to evaluate the effectiveness of the conservation measures to maintain snake occupancy at sites transferring water via this program. This research is ongoing since 2015 and is expected to aid in maintaining effective conservation measures and identifying any changes that may enhance their effectiveness in the future.

FWS 1476. This adaptive management approach is reasonable here, against the backdrop that FWS has limited the exemption provided by the biological opinion's associated incidental take statement, or ITS. Specifically, FWS provided an exemption from "take" only for the habitat lost as a result of the two years of cropland idling/shifting transfers analyzed in the biological opinion, as required by the ESA. FWS 1490-91; 16 U.S.C. § 1536(b)(3)-(4). Given this limitation, Reclamation as a practical matter cannot authorize more than two years of idling/shifting transfers without a new jeopardy analysis. This will allow FWS to obtain more definitive data regarding the effects of the cropland idling/shifting before any additional years of transfers are reviewed in a new ESA Section 7 consultation, and will enable FWS to identify any additional measures needed to address impacts to the snake going forward.

And importantly, the species at issue here, the giant garter snake, was listed as "threatened" in 1993, *i.e.*, is not currently on the brink of extinction, but was likely to become endangered in the foreseeable future based on existing threats to the species and its habitat without adequate conservation measures. FWS 1502-15. It is entirely rational and consistent with the letter and purposes of the ESA to allow some temporary, limited habitat loss, absent data showing the amount would jeopardize the continued existence of the species. This is particularly true for a threatened species like the snake that does not imminently face extinction and can be recovered over time (with appropriate measures that may, from time to time, need adjustment as new data becomes available). As more fully discussed

below, Plaintiffs have not identified any scientific evidence showing that two years of the maximum amount of idling/shifting transfers allowed by Reclamation will likely jeopardize the species.

And notwithstanding the uncertainties here, FWS was required to make an expert judgment in the 2019 biological opinion, based on the best scientific information then available, regarding whether the amount and location of idling/shifting transfers proposed by Reclamation is likely to jeopardize the species. 16 U.S.C. § 1536(a)(2). FWS found no jeopardy and such expert agency judgments, particularly when based on limited or imperfect data regarding the scientific issues at hand, are not to be lightly disturbed under the deferential APA standard of review. *See*, *e.g.*, *Cent. Ariz. Water Conservation Dist. v. U.S. EPA*, 990 F.2d 1531, 1540 (9th Cir. 1993) (courts are to be "particularly deferential when reviewing agency actions involving policy decisions based on uncertain technical information."); *Am. Mining Cong. v. U.S. EPA*, 907 F.2d 1179, 1187 (D.C. Cir. 1990) ("[i]t is not the court's role to 'second-guess the scientific judgments' of the agency, which 'may apply [its] expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like.'") (citations omitted); *Pac. Rivers v. Bureau of Land Mgmt.*, 815 F. App'x 107, 109 (9th Cir. 2020) ("We 'are not to act as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering the agency to explain every possible scientific uncertainty.'" (citing *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010)).

B. Plaintiffs fail to identify any evidence contradicting FWS' no-jeopardy finding.

While claiming that FWS arbitrarily found jeopardy was not likely, Plaintiffs fail to point to any scientific evidence not considered by FWS, let alone any evidence undermining FWS's no-jeopardy analysis. In particular, Plaintiffs do not identify any evidence showing that all of the rice field habitat in the project area and recovery units must be off limits to cropland idling/shifting transfers, or that the amount of such transfers proposed by Reclamation for two years is too much to avoid jeopardy. The available evidence cited by FWS in the biological opinion is to the contrary, as discussed below.

In the biological opinion, FWS considered data from the ongoing USGS research indicating that the idling/shifting of some rice fields does not necessarily reduce snake populations. FWS noted that "in 2017, when rice production was less in counties that had reported data, [USGS] found an increase in

snakes from the previous year." FWS 1486-87; *see also id*. at 1476, 1478. FWS stated, "[w]hile these fluctuations in rice production continue in the Sacramento Valley, the two years of [USGS] studies indicate that snake populations in the Sacramento Valley are not declining in sampled locations when rice production is less." FWS 1487. In their brief, Plaintiffs point to the same USGS snake occurrence data for 2016 and 2017 as evidence that the species needs some rice field habitat. ECF No. 40 at 55-56. First, as the biological opinion notes, the USGS studies issued as part of this research were preliminary and only from two years when idling/shifting transfers under Reclamation's program did not occur (although rice production fell between these years for other reasons and observed snake occurrence nevertheless increased). FWS 1487-88.[7] As FWS noted, "[t]o determine the effects to the snake from crop idling and the effectiveness of the conservation measures, multiple years of data should be collected and analyzed." *Id*. Indeed, the more recent of the two USGS papers cited by Plaintiffs states that, "[t[he extent and magnitude of the effects of the loss of rice as habitat for wildlife caused by water transfers is currently unknown, particularly for secretive species like giant [garter snakes]." FWS 1397.

In any event, FWS considered the preliminary USGS data cited by Plaintiff and nothing in that data contradicts FWS's no-jeopardy determination. As FWS itself noted in the biological opinion, USGS found that the probability of snake occurrence increased sharply if the proportion of fields growing rice within 3 kilometers was over 40%. FWS 1486. But as shown by graphs in Plaintiffs' own brief, the USGS data indicates that after rice acreage exceeds about 55-60%, the probability of snake occurrence flattens out and stops increasing. ECF No. 40 at 55-56. If anything, these data support FWS' expert judgment that 100% of the rice in the project area need not be maintained to avoid jeopardy. And as discussed above, a very small percentage of the area in each of the snake's recovery units could be idled/shifted assuming the maximum amount of transfers (from zero to 5.8% of the unit), and only about 20% of the rice acreage in the overall project area could be idled/shifted. In addition, "multiple other factors may limit the transfers to a smaller amount" than the maximum analyzed by FWS, including limits on water system transfer capacity and potential outages, water availability, and state water quality

[7] Plaintiffs cite two USGS papers issued by USGS' Western Ecological Resource Center ("WERC") as part of the multi-year, ongoing snake research required by FWS. ECF No. 40 at 54-57; FWS 1476, 1478, 1485. Both USGS papers state that the data contained therein "are preliminary and are subject to revision." CEQA 962; FWS 1391.

requirements. FWS 1472-74. Even assuming the maximum cropland idling/shifting transfers in a year, the preliminary USGS data cited by Plaintiffs do not show that idling/shifting transfers at the levels possible under Reclamation's program will jeopardize the species.

C. Plaintiffs mischaracterize FWS' analysis of the proposed cropland idling/shifting.

While Plaintiffs do not identify any scientific evidence that the proposed amount of idling/shifting transfers is likely to jeopardize the species, they instead assert that the Court faulted the prior 2015 biological opinion for failing to consider "the issue of fallowing patterns (both spatial and temporal)," and claim that FWS and Reclamation make the same errors again in adopting a purported "strategy" to maintain water in "ditches and canals" and allegedly abandoning past conservation measures for the snake. ECF No. 40 at 54. This argument fails for three reasons. First, as shown above, maintaining sufficient water for snakes in irrigation structures is far from Reclamation's whole strategy for avoiding jeopardy to the snake and that this one, albeit valuable conservation measure was not the sole or even principal basis for FWS' no-jeopardy determination. Second, as more fully discussed below and as this Court has previously recognized, FWS properly analyzed the specific action and conservation measures proposed by Reclamation that were under review in the 2019 biological opinion, and FWS was not required to explain any alleged departures by Reclamation from past conservation measures. *AquAlliance*, 287 F. Supp. 3d at 1067-69, 1068 n.54 (holding the "key question is whether the [final 2015 biological opinion] satisfied the relevant [no jeopardy] legal standard").

Third, Plaintiffs wrongly assert that FWS did not address the temporal and spatial distribution of idling/shifting transfers. With respect to temporal distribution, it is critical to understand the substantial difference between Reclamation's proposed actions that were analyzed in the 2015 and 2019 biological opinions. For the 2015 biological opinion, Reclamation had proposed *ten years* of idling/shifting transfers, in the same annual amount proposed here. FWS 886; *see also AquAlliance*, 287 F. Supp. 3d at 1065. On those facts, Plaintiffs relied on an expert's letter for the proposition that transfers should not occur for more than two consecutive years in a field. *AquAlliance*, 287 F. Supp. 3d at 1067-68, 1070-71, 1073. Under the 2019 biological opinion, by contrast, no fields can be idled for more than two years in a row. After two years of idling/shifting transfers, Reclamation must re-initiate consultation, and FWS will perform a new jeopardy analysis that takes into account USGS' updated research including analysis

of the impacts, if any, of those two years of idling/shifting transfers. Thus, the 2019 biological opinion squarely addresses Plaintiffs' concern regarding the temporal distribution of idled parcels by its nature.

Similarly, FWS addressed the spatial distribution of idled rice fields in the biological opinion. As discussed above, FWS performed a detailed, species-recovery-unit analysis showing that given the geographic distribution of parcels that could be idled in particular water districts across the project area, the idled fields would not be so concentrated in particular recovery units that insufficient rice field habitat was available for the snake to persist in these nine recovery units. FWS 1472, 1481-83. No idling/shifting transfers will occur in three units, while the maximum rice acreage idled in the remaining six is 5.8% of the recovery unit. *Id*. The 2015 biological opinion did not contain any such recovery-unit analysis (nor could it have, given that the recovery plan identifying the recovery units was issued in 2017). FWS 2852. This new analysis alone contradicts Plaintiffs' argument that FWS did not consider the spatial distribution of idled fields in the 2019 biological opinion. Further, also relevant to this consideration is FWS' discussion in the biological opinion of the additional protections afforded to rice field habitat near the nine important snake populations. As noted, Reclamation will not approve idling/shifting transfers immediately adjacent to these important populations. FWS 1475, 1479-80, 1487. FWS reasonably found this represents an important additional spatial restriction on the location of the idled fields that will enhance the species' chances of survival and recovery. FWS 1487, 1489.

D. Plaintiffs' arguments regarding the additional protections for nine important snake populations are contradicted by the record.

Perhaps recognizing that the protections for these nine populations constitute limits on idled rice acreage, Plaintiffs attempt to diminish their scientific basis and effectiveness. ECF No. 40 at 58-61. Their arguments are contradicted by the record. As an initial matter, Plaintiffs are wrong in suggesting at several points that these protections are "limited to identified waterbody channels." *Id*. at 59; *see also id*. at 59 (protections are "limited to water channels and excludes any adjacent fields"). As the biological opinion makes plain, there is a prohibition on idling/shifting transfers in *rice acreage immediately adjacent* to these nine populations. FWS 1475, 1480 (stating that the "following areas with, *or adjacent to*, important snake populations will not be permitted to participate in cropland idling/shifting transfers" and identifying maps of these nine identified populations in the biological opinion, and further stating

that the prohibition extends to "[f]ields abutting or immediately adjacent" to the nine identified populations) (emphasis added); *see also id*. at 1489 ("areas *adjacent to* and including important snake populations are excluded from cropland idling/shifting") (emphasis added).

Plaintiffs are even further misguided in suggesting these populations came from nowhere for the first time in the 2019 biological opinion. ECF No. 40 at 60 (referring to a purported "newly-minted concept of 'important snake populations'"). As Plaintiffs acknowledge, the biological opinion states that the "[i]mportant snake populations have been previously identified by biologists from [FWS, USGS' WERC (which is engaged in the ongoing snake research)], and other contract biologists." FWS 1479; ECF No. 40 at 58. Plaintiffs point to no evidence showing that this statement is inaccurate. The 2015 biological opinion prohibited idling/shifting transfers adjacent to the *identical* nine populations. *Compare* FWS 896 *with* FWS 1480. FWS' most recent five-year status review for the snake also describes a number of these populations, including those in Natomas Basin, the Colusa Basin drainage canal, Gilsizer Slough, and Willow Slough Bypass. *Compare* FWS 1480 *with* FWS 2659. The biological opinion further notes where these populations are located in the recovery units, further supporting their importance to the snake. FWS 1481-83. Several of these populations also are located at least in part in known snake preserves and conservation banks. FWS 1469.

Indeed, Plaintiffs mainly take issue with the fact that these nine populations were identified by FWS, USGS and other biologists based in part on their presence in such protected areas less dependent on rice production. ECF No. 40 at 58-59. As FWS explained, these populations:

> were identified as occurring in, or being connected to, areas that are considered public or protected (Figure 4, Appendix A). These areas have specific management plans for the snake either for mitigation lands or as wildlife refuges. One factor influencing the importance of these areas is that they can provide a refuge for the snake independent of rice production.

FWS 1481. This makes complete sense given that: (1) such protected areas are less threatened by human activities and thus may be a key component for the recovery of the species; and (2) rice fields in fact are less stable habitat for the snake. Farmers may idle rice fields or shift them to other crops for market or other reasons such as crop rotation practices, independent of Reclamation's transfer program. Between 2016 and 2017, reported rice production fell in the Sacramento Valley, yet there were no

idling/shifting transfers approved in 2017. FWS 1483, 1485, 1487. *See also* FWS AR1506, 1512 (finding that perennial wetlands – of the kind located in many protected areas – are higher quality habitat and that "rice fields do not represent habitats that are available on a long-term basis.").

Apparently suggesting that they know better than the biologists, Plaintiffs assert that identifying important populations based in part on their ability to take refuge in superior, protected natural habitat is "absurd," and "conflicts with every study cited in [their] brief" because "without adjacent rice fields, [giant garter snake] survival decreases." ECF No. 40 at 59. First, identifying important populations in part based on their reduced reliance on rice does not mean that *no* rice is grown adjacent to them. Reclamation has agreed not to approve idling/shifting transfers for rice field habitat adjacent to these populations. Second, the studies indicate that snakes occupying canals need some rice field habitat *or natural, perennial wetlands*. FWS 1297 (citing 2017 study finding that "canal density, the proportion of adjacent *rice agriculture and wetlands*, and underlying soils appear to be stronger drivers for [snake] occupancy") (emphasis added); FWS 1298 (citing 2016 study finding that snake behavior was variable "with some individuals remaining in canals for the entire active season, others selecting rice and venturing into it, and still others remaining in *restored wetlands where no rice was available to them*.") (emphasis added); FWS 1304 (Sacramento Valley has more than 50,000 acres of managed wetlands designed primarily to benefit wintering waterfowl, and both "[i]rrigated rice land and wetlands in the [Valley] provide potential habitat for the [snake]"). The giant garter snake evolved in and long occupied natural wetlands before rice production arrived on the scene. FWS 1295 ("Historically, [the snake] was distributed in wetlands throughout the Central Valley"). Thus, Plaintiffs' uniformed and unsupported assertion that giant garter snakes cannot survive without rice fields is patently incorrect.

For all of these reasons, it was not arbitrary or capricious for FWS to rely – again, only in part – on the additional protections for these nine important populations in finding no jeopardy.

E. FWS properly analyzed the action proposed by Reclamation, not alleged departures from prior conservation measures.

In the prior case, Plaintiffs argued – as they again argue now – that FWS' biological opinion unlawfully failed to explain Reclamation's abandonment of "block size limitations on fallowed parcels." ECF No. 40 at 54-57; *AquAlliance*, 287 F. Supp. 3d at 1067. The Court flatly rejected this argument.

AquAlliance, 287 F. Supp. 3d at 1067-68 ("the conservation measures incorporated into the BiOp are not FWS policy. Rather, they are part of the action agency's (i.e., Reclamation's) proposed [2015 LTWT Project]."). The Court similarly found that Plaintiffs' argument that FWS "arbitrarily weakened" protections between its draft and final 2015 biological opinions failed because "[t]he relevant question here is whether FWS lawfully concluded that the proposed [2015 LTWT Project] would not jeopardize [the giant garter snake]." *Id*. at 1068. Indeed, as the Ninth Circuit has held, the ESA does not compel FWS to make the proposed action more or less protective of ESA-listed species. *See Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) ("The Secretary was not even required to pick the best alternative or the one that would most effectively protect the Flycatcher from jeopardy."). *See also Pac. Rivers v. U.S. Bureau of Land Mgmt.*, No. 6:16-cv-01598-JR, 2018 WL 6735090, at *11 (D. Or. Oct. 12, 2018) ("nothing in the ESA or its implementing regulations require the consulting agency to compare the acting agency's prior plan to the currently proposed action") (citing, *inter alia*, *AquAlliance*, 287 F. Supp. 3d at 1067-68). The Court should similarly reject Plaintiffs' rehashed argument regarding block size limitations in this case.

In another argument premised on alleged past conservation practices, Plaintiffs argue that for the 2015 biological opinion, Reclamation protected certain "priority habitat," but that this approach was abandoned in favor of the "entirely new scheme called 'important snake populations.'" ECF No. 40 at 60-61. Incredibly, Plaintiffs now claim that "crop idling would be avoided under the 2015 [biological opinion]" in this "priority habitat." *Id*. But in the prior case, Plaintiffs argued the exact opposite: that Reclamation's "priority habitat" proposal had no value because idling/shifting could still occur in these areas, and this Court agreed that FWS could not rely on the proposal absent more explanation in a new biological opinion. *AquAlliance, et al. v. U.S. Bureau of Reclamation, et al.*, No. 1:15-cv-00754-LJO-BAM (E.D. Cal. Sept. 15, 2016), ECF No. 51 at 35 ("the only areas that are not permitted to participate in cropland idling/shifting are those with 'known priority snake populations.' [AR citation omitted]. Areas with 'priority habitat' remain eligible to participate in crop idling, and so the rice fields themselves are not protected."); *AquAlliance*, 287 F. Supp. 3d at 1066, 1069-1072. Reclamation is no longer relying on the "priority habitat" concept and it was not an element of FWS' no-jeopardy finding at issue here.

It is also important to recognize again the very substantial differences between the 2015 and 2019 opinions. Unlike in the prior case, this Court is not reviewing a conclusion that ten years of transfers will not jeopardize the snake. Consistent with its obligation to review the action proposed by the action agency, FWS has made a more limited determination that the proposed two years of transfers, with a requirement to re-initiate ESA consultation for any additional years, is not likely to jeopardize the species. Since the 2015 biological opinion, FWS also issued a recovery plan that allowed it to analyze the amount and distribution of potential idling/shifting transfers in the recovery units, which supports FWS' no-jeopardy finding. Since the 2015 biological opinion, USGS also found that snake occurrence did not fall between 2016 and 2017 when rice production fell in counties that reported data. The Court has before it a new biological opinion and new administrative record, and past conservation measures for a different action do not factor into the issue before the Court.

F. FWS reasonably analyzed the expected number of years of cropland idling/shifting transfers based on data showing such transfers do not occur every year.

Contrary to Plaintiffs' argument, ECF No. 40 at 52-53, FWS also lawfully analyzed Reclamation's proposed two years of idling/shifting transfers during the six year program. FWS 1275, 1464. Plaintiffs' argument that FWS was required to analyze the effects of a different, hypothetical action not proposed by Reclamation – six years of such transfers – has no legal merit or factual basis in the record. First, the record shows that idling/shifting transfers do not happen every year; indeed, no such transfers were approved by Reclamation in the three years leading up to the 2019 biological opinion (in 2016, 2017, and 2018). FWS 1485. During the most recent 10-year period preceding the biological opinion (from 2009-2018), idling/shifting transfers occurred only during *three of the ten years* (or less than one-third of the years). *Id.*[8] As explained by Reclamation, a number of factors affect the amount of, as well as the potential for, idling/shifting transfers in a given year, including water availability, restrictions on pumping capacity due to the biological opinions addressing CVP/SWP operations, and state water quality requirements. FWS 1289-1292. Indeed, Reclamation found that pumping capacity is available only about 35% of the time during the months when water transfers occur;

[8] Older data specific to cropland idling/shifting transfers are not in the administrative records, but Reclamation did not approve water transfers of any kind – neither idling/shifting nor groundwater substitution transfers – during four additional years from 2000 to 2008. BOR 67.

"[i]n other words, the pumps have no capacity for transfer water in 65 percent of the years studied." FWS 1291. At bottom, Plaintiffs ask this Court to find that FWS was compelled to make a counter-factual assumption that idling/shifting transfers would occur every year for six straight years when the administrative record before the Court shows that would almost certainly never happen.

Plaintiffs also fail to explain how any unanalyzed "take" of the snake could occur and potentially cause jeopardy. As noted above, FWS has required (and Reclamation has committed) to reinitiate ESA consultation if more than two years of cropland idling/shifting transfers are proposed. Further, Reclamation authorizes cropland idling/shifting transfers on an annual, "seasonal" basis roughly in April/May after buyers and sellers negotiate water transfer contracts during the wet season. FWS 1292; BOR 9614-15, 9934-35. Given this annual timing, Reclamation will know that it has exhausted the two years of transfers analyzed in the biological opinion a full year before it could authorize a third year of transfers. During that one-year period, Reclamation can request re-initiation of ESA consultation if additional years of transfers may occur during the remaining life of the program, and can complete that consultation well before those additional transfers might be authorized. For the 2019 biological opinion, the ESA consultation took about six months. FWS 1270, 1462. And as discussed above, a new consultation for any additional years of idling/shifting transfers will have the benefit of USGS' ongoing research on the snake and thus may be based on more definitive information on the impacts of cropland idling/shifting transfers on the snake. The agencies' approach is reasonable and by definition will avoid any jeopardy to the species, consistent with ESA Section 7(a)(2). *See Selkirk Conservation All.*, 336 F.3d at 964 (ESA Section 7(a)(2) does not dictate a specific method that FWS must employ to analyze potential jeopardy; it only requires a method that adequately considers the impacts to the species.)

Plaintiffs' argument also is inconsistent with the regulations implementing ESA Section 7(a)(2). Under those regulations, a federal action agency initiates formal consultation by submitting a written request to FWS, which must include "a description of the proposed action." 50 C.F.R. § 402.14(c)(1). FWS' responsibility is then to evaluate the effects of that action. *Id*. § 402.14(g)(3). Here, Reclamation proposed cropland idling/shifting transfers during "two transfer seasons." FWS 1275; 1281 ("In total, transfers will be limited to 250,000 [acre-feet] per water year for two water years of the program duration."). The ESA regulations do not provide FWS with the authority to evaluate the effects of a

different action than the one proposed by the action agency. *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1217 (D. Idaho 1993) (consulting agency is not "required to develop and evaluate alternatives to the action proposed by the [action agency]; it must simply evaluate the effects of the proposed action . . . ."); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, No. 97–CV–775, 1998 WL 1988556, *10 (W.D. Wa. May 29, 1998) ("Under the ESA, NMFS must analyze the action *as proposed* by the proponent agencies.") (emphasis in original). The statute and regulations identify only one scenario when the consulting agency can propose and analyze an alternative to the proposed action: if FWS concludes that the proposed action would jeopardize the species, it must identify "reasonable and prudent" alternative actions that it believes would avoid the likelihood of jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2). Here, FWS found no jeopardy and thus did not propose a reasonable and prudent alternative. In that situation, FWS was not empowered to analyze a different action than the "two seasons" of idling/shifting transfers proposed.

As sole legal support for their argument, Plaintiffs cite *Natural Resources Defense Council v. Rodgers*, 381 F.Supp.2d 1212,1237 (E.D. Cal. 2005) ("*NRDC v. Rodgers*"), which is distinguishable and a non-binding district court decision. ECF No. 40 at 53. In that case, the Court found among other problems that Reclamation had proposed to approve contracts authorizing the delivery of more than 2.1 million acre-feet of water per year for 25 years, and that more than one Reclamation official "explicitly told FWS that it was to consult on 'full contract [amounts]," and yet FWS assumed that a much lower volume of deliveries consistent with historic deliveries would occur in reaching a no-jeopardy finding. *NRDC v.* Rodgers, 381 F. Supp. 2d at 1237-1239. Notably, the proposed action – approval of the long-term water delivery contracts – authorized the full 25 years of deliveries at the contract amounts. *Id*. Here, Reclamation did not propose to authorize six years of idling/shifting transfers, nor has it done so to date. In another major distinction, idling/shifting transfers are not authorized in a single set of contracts entered at one time but rather on an annual basis each spring, and Reclamation has committed to re-initiate ESA consultation before a third year of idling/shifting transfers are authorized. In *NRDC v. Rodgers*, there was no similar, firm re-initiation requirement: the biological opinion indicated only that Reclamation would consider whether deliveries above historic averages "may affect" the species, and the court found that "the trigger for further consultation is not reached until [Reclamation] delivers

[amounts under the contracts] well in excess of the actual amount analyzed by FWS in its BiOp." *Id*. at 1239, n.49, n.50. Here, no cropland idling/shifting transfers in excess of those analyzed by FWS can be authorized by Reclamation until a re-initiated ESA consultation is completed.

This Court also has found that *NRDC v. Rodgers* does not foreclose FWS from relying on reasonable assumptions about the likely effects of an agency's action or compel it to assume a maximum scenario contrary to the evidence before the agency. In *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007), this Court rejected an argument based on *NRDC v. Rodgers* that a biological opinion improperly made reasonable assumptions about the likely effects of the agency's action, which there concerned operation of the CVP/SWP. *Id*. at 386-87. The Court found that FWS is "entitled to make reasonable assumptions about the operational volume of water flows, water levels, temperature, and quality based on the historical and projected data in the administrative record." *Id*. at 387. Here, Reclamation likewise reasonably expects to authorize only two years of idling/shifting transfers during the six-year life of its program, and FWS reasonably and consistent with the ESA and regulations analyzed that proposed action. But in the event that Reclamation desires to authorize additional years of transfers, re-initiation of ESA consultation and a full new jeopardy analysis is required consistent with Reclamation's obligation to avoid jeopardy to the snake.

G. Plaintiffs' separate ESA citizen suit claim against Reclamation fails.

Separate from their claim against FWS challenging the merits of the 2019 biological opinion, Plaintiffs additionally argue that Reclamation unlawfully relied on FWS's biological opinion because it is "flawed" and Reclamation purportedly "misconstrued the applicable scientific evidence." Pls.' Mot. at 61-64. Setting aside that the biological opinion is not flawed for the reasons explained above, Plaintiffs' claim against Reclamation fails legally and factually.

As the Ninth Circuit has explained, in judging an action agency's reliance on a biological opinion, the consulting agency's "actions, or lack thereof, in preparing its opinions are relevant [] only to the extent that they demonstrate whether the [action agency's] reliance on the reports is 'arbitrary and capricious.'" *Pyramid Lake v. Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (citation omitted). An agency's reliance on a biological opinion is not arbitrary and capricious and "will satisfy its obligations under the [ESA] if a challenging party can point to no 'new'

information . . . which challenges the opinion's conclusions," and such new information was available to the action agency, but was withheld by the action agency and not provided to the consulting agency. *See id.* at 1415; *City of Tacoma, Wash. v. Fed. Energy Regul. Comm'n*, 460 F.3d 53, 75 (D.C. Cir. 2006) (the question is not whether the biological opinion is "somehow flawed"); *Protect Our Lakes v. U.S. Army Corps of Eng'rs*, No. 1:13-cv-402-JDL, 2015 WL 732655, at *3-4 (D. Me. Feb. 20, 2015). Plaintiffs cite a non-binding district court case, *Center for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1010 (D. Ariz. 2011), finding that a flawed biological opinion *ipso facto* puts the action agency in violation of ESA Section 7(a)(2). ECF No. 40 at 61-62. The decision contains no reasoning for that proposition and is against the weight of authority. Plaintiffs also cite *Resources Limited Inc. v. Robertson*, 35 F.3d 1300, 1304-05 (9th Cir. 1993), *as amended on denial of reh'g* (July 5, 1994), but there the court found that an agency had arbitrarily relied on a biological opinion where plaintiff alleged the agency "selectively withheld" information from FWS and the court agreed the agency had not provided FWS "with all of the data and information required" by the ESA regulations. Here, Plaintiffs do not identify any information withheld by Reclamation challenging the biological opinion.

In any event, Plaintiffs have hardly shown that Reclamation falsely presented any scientific information to FWS. In the only specific example cited in their brief, Plaintiffs point to a USGS report stating that "maintaining water in canals alone would not adequately support giant garter snakes." ECF No. 40 at 62 (citing CEQA AR 82422). Plaintiffs claim that Reclamation "mischaracterized" this study in a 2018 compliance report to FWS by stating that, "[t]his study supports the importance of maintaining water in canals adjacent to fallowed rice fields." ECF No. 40 at 62 (citing FWS 1238). However, this USGS paper contains other statements that *support* Reclamation's supposedly false statement, including that "[g]iant [garter snakes] are strongly associated with the canals that supply water to and drain water from rice fields." CEQA AR82354. If that were not enough, in Reclamation's purportedly misleading compliance report, Reclamation expressly advised FWS that the USGS study also indicated that the complete "lack of rice production" adjacent to occupied canals appeared detrimental to snakes, but that additional research was needed to determine why. FWS AR 1238. Reclamation did not mischaracterize the study, let alone withhold any information from FWS; it identified the study for FWS to evaluate. To the extent Plaintiffs vaguely rely on other portions of their brief accusing Reclamation of misconstruing

data, ECF No. 40 at 62, ultimately Plaintiff is working from the same incorrect premise, woven throughout its brief, that Reclamation's whole strategy is to maintain water in canals.[9] In sum, Plaintiffs do not identify any information that Reclamation withheld from FWS calling into question the biological opinion, and thus Plaintiffs' ESA citizen suit claim against Reclamation fails.

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[9] Plaintiffs also attempt to rely on Reclamation's correction of a mistaken statement in its original record of decision that FWS had analyzed six years of cropland idling/shifting transfers. ECF No. 40 at 53-55 (citing CEQA 14345-46). The bottom line is that Reclamation removed the mistaken statement from the ROD, while also confirming that consistent with the 2019 biological opinion, Reclamation "will not approve cropland idling and shifting transfers for more than two years prior to 2024 without reinitiating ESA consultation." ECF No. 39-2 at 12, Supp. BOR 12.