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DANIEL J. O'HANLON, State Bar No. 122380
dohanlon@kmtg.com
CARISSA M. BEECHAM, State Bar No. 254625
cbeecham@kmtg.com
REBECCA L. HARMS, State Bar No. 307954
rharms@kmtg.com
JENIFER N. RYAN, State Bar No. 311492
jryan@kmtg.com
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
1331 Garden Highway, 2nd Floor
Sacramento, CA 95833
Telephone: (916) 321-4500
Facsimile: (916) 321-4555

REBECCA R. AKROYD, State Bar No. 267305
rebecca.akroyd@sldmwa.org
General Counsel
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY
1331 Garden Highway, 2nd Floor
Sacramento, CA 95833
Telephone: (916) 321-4321
Facsimile: (209) 826-9698

Attorneys for Defendant/Respondent,
San Luis & Delta-Mendota Water Authority

[Additional Counsel on Next Page]

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,

Petitioners and Plaintiffs,

v.

THE UNITED STATES BUREAU OF RECLAMATION; SAN LUIS & DELTA-MENDOTA WATER AUTHORITY; U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity; U.S. FISH AND WILDLIFE SERVICE; and DOES 1 – 100,

Defendants and Respondents.

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

Related Case No.: 1:05-cv-01207-DAD-EPG
Related Case No.: 1:16-cv-00307-DAD-SKO
Related Case No.: 2:19-cv-00547-DAD-EPG
Related Case No.: 1:20-cv-00426-DAD-EPG
Related Case No.: 1-20-cv-00431-DAD-EPG

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY'S CROSS-MOTION FOR SUMMARY JUDGMENT; OPPOSITION TO PETITIONERS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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ADDITIONAL COUNSEL

ANDREA A. MATARAZZO, State Bar No. 179198
andrea@pioneerlawgroup.net
KATHRYN L. PATTERSON, State Bar No. 266023
kathryn@pioneerlawgroup.net
PIONEER LAW GROUP, LLP
1122 S Street
Sacramento, CA 95811
Telephone: (916) 287-9500
Facsimile: (916) 287-9515

Attorneys for Defendant/Respondent,
San Luis & Delta-Mendota Water Authority

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I. INTRODUCTION

In this case the San Luis & Delta-Mendota Water Authority ("Water Authority") is defending its decision, on April 9, 2020, to recertify the revised Long-Term Water Transfers Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") in compliance with the California Environmental Quality Act ("CEQA"). The Water Authority's decision concluded nearly 10 years of environmental review and litigation and conformed to this Court's 2018 rulings. *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 1037, 1042, 1045, 1049, 1075-76 (E.D. Cal. 2018) ("*2018 Opinion*").

Plaintiffs challenge the Water Authority's decision to recertify the EIS/EIR and argue it was required to scrap the entire previous document and start anew. Plaintiffs are wrong. Nothing in the Court's rulings, including the 2018 judgment and the *2018 Opinion* upon which it is based, the Administrative Record, the statutory framework, or case law supports plaintiffs' position. To the contrary, the law is clear: "[W]hether the EIR has been decertified does not alter the fact that the sufficiency of a component of the EIR has been litigated and resolved." *Ione Valley Land, Air, and Water Defense Alliance v. Cnty. of Amador*, 33 Cal.App.5th 165, 172 (2019) ("*Ione Valley*"). Res judicata and collateral estoppel bar all of plaintiffs' objections to the Water Authority's recertification of the Final EIS/EIR, except for those objections to sections of the revised EIS/EIR that address concerns identified in the *2018 Opinion. Id.* at 170. "The remaining issues were litigated and resolved, or could have been litigated and resolved, in connection with the first petition." *Id.* The Court's 2018 judgment did not require the Water Authority to revisit issues other than those the *2018 Opinion* specifically identified. *Id.*

Plaintiffs' first lawsuit challenging the EIS/EIR alleged dozens of claims. *2018 Opinion*, 287 F. Supp. 3d at 989; Water Authority Request for Judicial Notice ("Water Authority RJN"), Ex. 1, 4, 7, 12. The Court carefully considered plaintiffs' allegations and rejected most of them, with the following exceptions under CEQA:

(1) The EIS/EIR's analysis of cumulative biological impacts caused by reductions to Delta outflows must be revised to consider existing cumulative conditions;

(2) Mitigation Measure GW-1 must be revised to state more specific criteria regarding

exceptions and performance standards; and

(3) Commitments regarding focused cropland idling must be clarified as mitigation and removed from the project description.

2018 Opinion, 287 F. Supp. 3d at 1035-37, 1042, 1044-45, 1049, 1075-76.[1]

In rendering judgment based on the *2018 Opinion*, the Court found that the required corrections to the EIS/EIR were serious. *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 883-84 (E.D. Cal. 2018) ("*Order re Post-Judgment Vacatur*"); *see* Water Authority RJN, Ex. 14 (Judgment, July 5, 2018). The Court therefore ordered vacatur such that the previously certified EIS/EIR was required to be decertified and could not be relied upon for approval of any water transfers unless and until the corrections were made. Water Authority RJN, Ex. 14, ¶¶ 5, 7.

As the courts interpreting CEQA have uniformly held, vacating the EIR is a common step when *any* correction is needed. *See, e.g.*, *Sierra Club v. Cnty. of Fresno*, 57 Cal.App.5th 979, 987-91 (2020); *King & Gardiner Farms, LLC v. Cnty. of Kern*, 45 Cal.App.5th 814, 895-96 (2020) ("*King*"); *Nelson v. Cnty. of Kern*, 190 Cal.App.4th 252, 285 (2010).[2] This is the typical remedy in a CEQA case and does not provide, and should not be abused as, a return to square one for project

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[1] The Court's 133-page ruling addressed plaintiffs' claims in detail. *2018 Opinion*, 287 F. Supp. 3d 969. In doing so, the Court observed that plaintiffs raised "dozens of issues" under CEQA, the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA"). *Id*. at 989. The Court rejected most of plaintiffs' claims as lacking merit. Several of plaintiffs' claims were rejected as abandoned. *Id*. at 985, fn. 4, 996, fn. 14, 1008, fn. 17, 1034. The Court ruled in plaintiffs' favor on three of their CEQA claims, as summarized above and discussed in detail in the substantive sections that follow. The Court also ruled in plaintiffs' favor on two of their NEPA claims and on one of their ESA claims. *Id*. at 1031-32, 1053-54, 1072-74. Plaintiffs' NEPA and ESA claims have been fully addressed in compliance with the Court's rulings, as Federal Defendants show in their Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment.

[2] In *Sierra Club v. Cnty. of Fresno*, the court held that the entire EIR must be decertified when any aspect of the CEQA analysis is insufficient. 57 Cal.App.5th at 982 (holding that partial decertification of an EIR is never permitted because "an EIR is either completed in compliance with CEQA or it is not so completed"). Importantly, the court also concluded that even with complete decertification of the EIR, the lead agency would not be forced to relitigate the adequacy of other parts of the EIR once the identified error was corrected and the EIR recertified. *Id*. at 990-91. Principles of res judicata and collateral estoppel would bar such challenges. *Id*., citing *Ione Valley*, 33 Cal.App.5th at 172 (rejecting plaintiffs' arguments that court's decision not to utilize remedy of partial decertification meant that its full decertification of the EIR allowed new challenges even to parts of the EIR already upheld by the court).

opponents, requiring the lead agency to reopen the entire CEQA process. *Sierra Club*, 57 Cal.App.5th at 990-91. Rather, CEQA explicitly provides that remedies in CEQA cases are to be narrowly drafted to specifically address all identified defects and give a degree of finality to the results of litigation. Cal. Pub. Res. Code § 21168.9; *see Ione Valley*, 33 Cal.App.5th at 170 (court may not consider any newly asserted challenges arising from same material facts in existence at time of prior judgment; consideration of issues raised, or that could have been raised, in litigation leading to the prior judgment would undermine the finality of that judgment and is barred by principles of res judicata or collateral estoppel); *Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal.App.4th 314, 354 (2014) (same); *Citizens for Open Gov't v. City of Lodi*, 205 Cal.App.4th 296, 325 (2012) ("*Citizens*") (same); *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal.App.4th 455, 480 (2011) ("*Ballona Wetlands*") (same).

Plaintiffs' attempt to make out a violation of the public trust doctrine fares no better. First, in this action plaintiffs challenge only the Water Authority's preparation and certification of the EIS/EIR. An EIS/EIR has no effect on public trust resources. Second, even if the plaintiffs had challenged any individual water transfers, there is no precedent holding a local water agency must do a public trust analysis when it enters an agreement for a transfer. Trustee agencies such as the State Water Resources Control Board are the appropriate responsible bodies to consider any effect of water transfers on public trust resources. Third, the EIS/EIR satisfied any obligation to take public trust resources into account when arranging transfers. Finally, plaintiffs' public trust claim is barred by res judicata.

This case arises with a specific background and in a specific context that is central to its resolution. Most of plaintiffs' present claims are barred by principles of res judicata or collateral estoppel because they seek to relitigate issues that either were raised and actually litigated in their previous challenge to the EIS/EIR or could have been asserted at that time but were not. Barred are plaintiffs' claims related to the sufficiency of the EIS/EIR's project description, document format, description of groundwater levels and analysis and mitigation of groundwater-related impacts, cumulative impacts, climate change, the role of the Delta Stewardship Council ("DSC"), analysis and mitigation of impacts related to biological resources such as Giant Garter Snake ("GGS"), and

compliance with the public trust doctrine, among others.

The record demonstrates the Water Authority complied with the Court's 2018 rulings and all CEQA's requirements. The identified errors were corrected and the EIS/EIR recertified. The Water Authority therefore respectfully requests that the Court deny plaintiffs' motion for summary judgment and grant Federal Defendants' and the Water Authority's cross-motions for summary judgment.

II. STATEMENT OF FACTS

The U.S. Bureau of Reclamation ("Reclamation") is responsible for operating and maintaining the Central Valley Project ("CVP"), which stores and delivers water, in part, to the members of the Water Authority, consisting of water contractors in western San Joaquin Valley, San Benito, and Santa Clara counties. CEQA006 (San Luis & Delta-Mendota Water Authority Long-Term Analysis of Water Transfers Final EIS/EIR CEQA Findings of Fact (March 2020), adopted April 9, 2020 ("CEQA Findings of Fact"); CEQA051-52).[3] Each year Reclamation determines the amount of water that can be delivered to each contractor based on factors such as hydrology, reservoir storage, environmental considerations, and operational limitations. *Id*. Reclamation and the Water Authority recognize that delivery of full contract quantities to all contractors is not likely to occur in many years. *Id*. In 2014 and 2015, for example, agricultural water service contractors received a zero (0) percent allocation, and municipal and industrial water service contractors received a 50 and 25 percent allocation, respectively. *Id*. These water supply shortages lead to severe water constraints, as well as environmental and socio-economic impacts. *Id*.

Water Authority member agencies sometimes use one-year water transfers to mitigate for water supply shortages. *Id*.; CEQA166-74. The Water Authority helps negotiate those transfers. CEQA169. Transfers do not occur in many years, at least in part, because the conditions that allow

[3] The CEQA record overlaps Bates numbers for pages CEQA006 through CEQA033. As a result of the overlaps in numbering, there are two CEQA006, three each of CEQA007-9 and two each of CEQA010-33. To clarify the citations when referenced, the title of the document is included in parenthesis.

for them, such as available conveyance capacity and other factors, are not met. CEQA028 (RDEIR/SDEIS) (as defined below), 181, 7521 (no capacity to convey transfer water in 65% of years). Water transfers among willing buyers and sellers are independent discretionary actions regulated through multi-agency collaboration at the local, state, and federal levels. CEQA174-225; Water Authority RJN, Ex. 5 at 2-3.

1. The Water Authority Certified the EIS/EIR in 2015 as a Voluntary Comprehensive Review of Potential Water Transfers

Recognizing the reality of a multi-agency process and the challenges presented by variables in weather and hydrology, regulations, and operational logistics, the Water Authority joined Reclamation to prepare a long-term environmental analysis of a range of potential one-year water transfers over a period of years, in order to facilitate responsible water transfers from willing sellers to CVP contractor buyers when circumstances allow. CEQA006-7 (CEQA Findings of Fact); CEQA5278-81; Water Authority RJN, Ex. 5 at 4-5. The intent of the joint EIS/EIR was to provide an informational opportunity otherwise unavailable to the agencies or to the public by conducting a comprehensive review of the "Project" – a defined range of potential water transfer activities – over the long term and by ensuring that any potentially significant adverse impacts resulting from such transfers are disclosed and mitigated. Water Authority RJN, Ex. 5 at 4-5, 7-10.

The analysis evaluates potential environmental impacts of a large number of transfers and conservatively assumes that the entire range of transfers would occur each year over a long-term timeframe. *Id.*; *see also* CEQA5304-06, 8055-56. Actual water transfers occur far less frequently and in much smaller volumes than have been conservatively analyzed in the EIS/EIR. *Id.* Each potential transfer must be proposed, reviewed, and approved on an annual basis subject to layers of regulation in addition to the agencies' adopted mitigation measures. *Id.* In all instances, the potential transfers analyzed in the EIS/EIR, if and when any are proposed, are subject to individual review and approval on an annual basis for evaluation based on real-time assessment of hydrologic conditions, regulatory requirements, and other operational limitations to ensure responsible water transfers. *Id.*; *see* CEQA7397-98.

///

The Water Authority certified a Final EIS/EIR in 2015. CEQA006-7[4] (CEQA Findings of Fact). Plaintiffs challenged the adequacy of the EIS/EIR, alleging, among other things, that the Water Authority's certification of the EIS/EIR violated CEQA. *2018 Opinion,* 287 F. Supp. 3d at 984-86.

2. The Court Upheld the EIS/EIR Against Most Challenges But Found Three Flaws Related to CEQA Compliance

The Court's ruling addressed plaintiffs' claims and allegations in detail and rejected the vast majority of them. *2018 Opinion,* 287 F. Supp. 3d 969. The Court identified three issues of CEQA compliance requiring the Water Authority's further attention and entered judgment on July 5, 2018. *Id.* at 1035-37, 1042, 1044-45, 1049, 1075-76; Water Authority RJN, Ex. 14. Of the many allegations plaintiffs made, the Court ordered the Water Authority only to address three CEQA concerns if the agency elected to proceed with the long-term EIS/EIR analysis:

(1) With regard to the cumulative impact of reductions to Delta outflows, the EIR failed to consider whether any additional effect caused by the proposed action should be considered significant given the existing cumulative condition in the Delta. *2018 Opinion,* 287 F. Supp. 3d at 1035-37.

(2) Open-ended exceptions to minimum monitoring requirements in Mitigation Measure GW-1 made it impossible to find that the monitoring program was enforceable or would be effective at avoiding potential significant impacts. *Id.* at 1042. Specifically, the deficiencies in Mitigation Measure GW-1 were:

a. Mitigation Measure GW-1 lacked performance standards to avoid impacts to third parties (increased pumping costs and decreased yield) in areas where quantitative Basin Management Objectives ("BMOs") do not exist. *Id.* at 1044-

[4] The CEQA record's index references a link to document CEQA000006, Exhibit A to Board Memo - Final EIS/EIR CEQA Findings of Fact SLDMWA. The link in the index is broken and in order to access the document, the file must be opened directly from the file folder "CEQA Admin Record\images\0001a" by selecting the document titled CEQA000006. The majority, if not all of the references to CEQA Findings of Fact in this memorandum list bates number 000006 initially to identify the document so as to guide the Court in retrieving the document, but the actual content of focus starts on the following referenced page therein.

45.

b. Mitigation Measure GW-1 created a loophole in the mitigation plan that would permit non-infrastructure related impacts (such as impacts to aquifer capacity) to occur. *Id.* at 1049.

(3) The EIR cannot rely on "environmental commitments" designed to ensure that cropland idling would be focused in areas where GGS occurrence probability is low to conclude that the impact on GGS population is not significant, because (a) those commitments were fatally unclear; and (b) the commitments served no independent project purpose, such that incorporating them into the project descriptions ran afoul of CEQA according to the opinion in *Lotus v. Dept. of Transportation*, 223 Cal.App.4th 645 (2014). *Id.* at 1075-76.

For these reasons, the Court ordered the Water Authority to vacate its 2015 certification of the EIS/EIR under CEQA. Water Authority RJN, Ex. 14, ¶ 7.

Aside from these flaws, plaintiffs' many other challenges to the Water Authority's CEQA compliance were denied. *2018 Opinion*, 287 F. Supp. 3d at 996, 1006, 1008, 1014, 1016, 1019, 1020, 1023, 1028, 1037, 1041, 1042, 1047-48, 1049, 1051, 1062. The Water Authority was not required to start the CEQA process anew and acted properly by focusing the revised EIS/EIR on the specific issues the Court identified. *See, e.g.*, *Ione Valley*, 33 Cal.App.5th at 172*; East Sacramento Partnership for a Livable City v. City of Sacramento*, 5 Cal.App.5th 281, 303 (2016) ("*East Sacramento*"); *Citizens*, 205 Cal.App.4th at 302; *Lotus*, 223 Cal.App.4th at 658; *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal.App.4th 1099, 1112 (2004) ("*Protect Amador*"). Indeed, under CEQA, the Water Authority was entitled to rely on the express direction from the Court and determine the scope of the revised analysis based on the Court's direction. *Friends of the Santa Clara River v. Castaic Lake Water Agency*, 95 Cal.App.4th 1373, 1387 (2002).

3. The Court Determined Necessary Corrections Were "Serious," But Distinct

As is typical in a CEQA case, the Court's 2018 judgment required that the Water Authority's certification of the EIS/EIR be vacated *for the reasons stated in the Court's ruling* and no others.

Water Authority RJN, Ex. 14 at 1-2; *see* Cal. Pub. Res. Code § 21168.9(b); *Ione Valley*, 33 Cal.App.5th at 172. In evaluating whether it would remand without vacatur, the Court concluded that the agencies' errors related to GGS conservation measures were serious, and thus could not be severed as to avoid vacatur or to allow partial decertification. *Order re Post-Judgment Vacatur*, 312 F. Supp. 3d at 882-884; *see* Cal. Pub. Res. Code § 21168.9(a). Accordingly, the Water Authority complied with the Court's 2018 rulings and all CEQA's requirements by revising and recirculating the EIS/EIR to address the identified flaws. The identified errors were corrected and the EIS/EIR recertified. CEQA005-007 (Water Authority Resolution No. 2020-461).

4. The Water Authority Addressed the Identified Issues in its Revised Draft EIS/EIR

In February 2019, in compliance with CEQA's requirements and the Court's *2018 Opinion* and 2018 judgment, the Water Authority recirculated for public comment a revised Draft EIR pertaining to the three identified areas of deficiency before again considering whether to certify the EIR and approve any proposed action. CEQA005 (Water Authority Resolution No. 2020-461); CEQA007-473 (Revised Draft EIR/Supplemental Draft EIS ("RDEIR/SDEIS"); CEQA5247-48, 8280-81, 10204. Comments were received and considered, and written responses were provided in accordance with CEQA. Cal. Code Regs., tit. 14, § 15088 ("Guidelines"); CEQA5247-48; CEQA8279-9087 (Final EIS/EIR Appendix Q); CEQA8053-8278 (Final EIS/EIR Appendix S); CEQA10204-205. Plaintiffs' comments raised issues that were well outside the scope of the required corrections, asserting then – as now – that because the EIS/EIR had been "fully vacated," they could relitigate the entire document. *See, e.g.*, CEQA10649-62, 10881-936.

In November 2019, the Final EIS/EIR was provided to all commenting public agencies prior to consideration for certification by the Water Authority Board of Directors. CEQA14576-593.[5]

[5] At least 10 days before certifying a final EIR, the lead agency must provide any public agency that commented on the draft EIR with a written proposed response to the agency's comments. Guidelines § 15088(b). The response may be in a printed format or in an electronic copy. *Id*. This requirement may be met by providing the agency with a copy of the final EIR or by making a separate response. Cal. Pub. Res. Code § 21092.5(a). The Water Authority complied with this requirement and ensured ample opportunity for precertification review by sending the Final EIS/EIR to all agencies that commented in November 2019 and again in March 2020. CEQA14576-619.

Several entities submitted further comments on the 2019 Final EIS/EIR. CEQA11212-12767. Written responses to comments received on the Final EIS/EIR are not required under CEQA. Cal. Pub. Res. Code § 21091(d)(1); Guidelines § 15088(a). The Water Authority nevertheless carefully considered all comments received prior to recertification of the EIS/EIR and provided written responses to those comments where appropriate. CEQA10204, 10362-75, 11212-2767, 14595-619, 8279-9087 (Final EIS/EIR Appendix Q); 8053-8278 (Final EIS/EIR Appendix S). The Final EIS/EIR presents the entire joint EIS/EIR document consisting of the Draft EIS/EIR and the recirculated RDEIR/SDEIS, as revised in response to comments received on those documents and in the errata in Appendix Q of the Final EIS/EIR. Guidelines § 15132; CEQA006 (CEQA Findings of Fact) 009-10 (CEQA Findings of Fact); CEQA5213-10203 (Complete Final EIS/EIR) 10341, 14620. Additionally, it consists of all comments and recommendations received on the Draft EIS/EIR and the recirculated RDEIR/SDEIS, as well as responses of the agencies to significant environmental points raised in those comments. *Id.*

On April 9, 2020, the Water Authority exercised its independent judgment in reviewing the information contained in the EIS/EIR and, in compliance with CEQA, recertified it based on substantial evidence in light of the whole record. CEQA001 (Notice of Determination); CEQA005-9 (Water Authority Resolution No. 2020-461); CEQA006-32 (CEQA Findings of Fact).

III. STANDARDS OF DECISION

The claims against the Water Authority arise under state law. The Court is exercising supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367. "When a district court sits in diversity, or hears state law claims based on supplemental jurisdiction, the court applies state substantive law to the state law claims." *Mason and Dixon Intermodal, Inc. v. Lapmaster Intern. LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011). The Court is reviewing the Water Authority's decision to recertify the EIS/EIR, following a first proceeding in which the Water Authority was ordered to correct the EIS/EIR in three specific respects. *2018 Opinion*, 287 F. Supp. 3d. at 1035-37, 1042, 1044-45, 1049, 1075-76. What is now before this Court is the sufficiency of the Water Authority's revised EIS/EIR document, not the sufficiency of the earlier EIS/EIR. *Ione Valley*, 33 Cal.App.5th at 171-173; *National Parks & Conserv. Ass'n v. Cnty. of Riverside*, 71 Cal.App.4th 1341, 1352

(1999) ("*National Parks*"); *see also* Cal. Pub. Res. Code § 21005(c); Guidelines § 15234(d).

A. Summary Judgment

The Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Record-review cases such as this one do not involve material factual disputes. *2018 Opinion*, 287 F. Supp. 3d at 989; *Crenshaw Subway Coalition v. Los Angeles Metro. Transp. Auth.*, No. CV 11-9603 FMO (JCx), 2015 WL 6150847 (C.D. Cal., Sept. 23, 2015) (federal court reviewing CEQA claims against joint EIS/EIR); *see Sierra Club v. Tahoe Regional Planning Agency*, 916 F. Supp. 2d 1098, 1107 (E.D. Cal. 2013) ("Although the parties bring cross-motions for summary judgment, this is a record-review case and there are no material facts in dispute. The ordinary standards for summary judgment are therefore not implicated. Instead, the court must determine whether either party is entitled to judgment as a matter of law.") (citations and footnote omitted); *see also Occidental Engineering Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985) ("Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is 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.").

B. CEQA

Review of plaintiffs' CEQA claims is based on an "abuse of discretion" standard. *Laurel Heights Imp. Ass'n v. Regents of Univ. of Cal.*, 6 Cal.4th 1112, 1132-33 (1993) ("*Laurel Heights II*"); *National Parks*, 71 Cal.App.4th at 1352. Plaintiffs must demonstrate that the Water Authority has not proceeded in a manner required by law or that its decision to recertify the revised EIS/EIR is not supported by substantial evidence. Cal. Pub. Res. Code § 21168.5; *see 2018 Opinion*, 287 F. Supp. 3d at 988. The agency's decision is given substantial deference and presumed correct. *Santa Monica Baykeeper v. City of Malibu*, 193 Cal.App.4th 1538, 1546 (2011) ("*Santa Monica*"). The Court "does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." *Laurel Heights Imp. Ass'n v. Univ. of Cal.*, 47 Cal.3d 376, 392 (1988) ("*Laurel Heights I*"). The issue for a reviewing court is not whether substantial evidence in the record supports any of the challengers' assertions, but whether substantial evidence

supports the agency's decisions. *Id.* at 409.

"[A] reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 435 (2007) ("*Vineyard*"). The Court reviews "de novo whether the agency has employed the correct procedures, scrupulously enforc[ing] all legislatively mandated CEQA requirements." *Id.* (citation and quotation marks omitted). For instance, "[w]hen an agency fails to include information mandated by CEQA in the environmental analysis, the agency fails to proceed in a manner required by law." *San Diego Citizenry v. Cty. of San Diego*, 219 Cal.App.4th 1, 12 (2013). But "where the agency includes the relevant information, but the [factual] adequacy of the information is disputed, the question is one of substantial evidence." *Id.*; *see 2018 Opinion*, 287 F. Supp. 3d at 988.

"The determination of whether an agency has proceeded in the manner required by law is based on a review of the record as a whole: Where some facts show a failure to comply, but the record as a whole supports a finding of compliance, courts should find compliance based on the evidence in the whole record." *San Diego Citizenry*, 219 Cal.App.4th at 12-13 (citation and quotation marks omitted). Further, an EIR is presumed adequate under CEQA, and the party challenging the EIR bears the burden of proving its inadequacy. *Rialto Citizens v. City of Rialto*, 208 Cal.App.4th 899, 924-25 (2012). Thus, "an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." *Defend the Bay v. City of Irvine*, 119 Cal.App.4th 1261, 1266 (2004); *see also King*, 45 Cal.App.5th at 850; *2018 Opinion*, 287 F. Supp. 3d at 989.

Case law confirms that all of plaintiffs' CEQA claims are of the type that are reviewed under the substantial evidence standard. A number of plaintiffs' arguments, for example, concern the sufficiency of the EIS/EIR's project description and impact analysis, the adequacy of certain mitigation measures, and allegations that important information was omitted from the EIS/EIR. *See, e.g.*, Plaintiffs' Motion for Summary Judgment, September 13, 2021, Document 40 ("Doc. 40") at 9:9-40:22. These types of claims are reviewed for support by substantial evidence in the record.

Laurel Heights II, 6 Cal.4th at 1134-35; *Vineyard*, 40 Cal.4th at 435; *San Diego Citizenry*, 219 Cal.App.4th at 12-13. While plaintiffs might characterize omitted information claims as subject to de novo review for compliance with the law, if the EIR includes evidence on the issue, then the sufficiency of the analysis of the issue is subject to the substantial evidence standard. *San Diego Citizenry*, 219 Cal.App.4th at 12; *Santa Monica*, 193 Cal.App.4th at 1546. Substantial evidence review is appropriate for factual determinations that underlie the analysis in an EIR. *Sierra Club v. Cnty of Fresno*, 6 Cal.5th 502, 514, 516 (2018). "[T]o the extent a mixed question requires a determination whether statutory criteria were satisfied, de novo review is appropriate; but to the extent factual questions predominate, a more deferential standard is warranted." *Id*.

C. The Public Trust Doctrine

Plaintiffs raise a question of law as to whether the Water Authority was required to conduct a public trust analysis in certifying the EIS/EIR. An allegation that an agency failed to comply with a procedural requirement of the public trust doctrine raises a question of law. *Citizens for E. Shore Parks v. State Lands Comm'n*, 202 Cal.App.4th 549, 573 (2011). The Court exercises its independent judgment in review of this issue. *Ibid*.

D. The Endangered Species Act ("ESA")

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06, standard of review applies to plaintiffs' ESA claims. *Bennett v. Spear*, 520 U.S. 154, 174 (1997); *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). The APA requires plaintiffs to show that the Defendants' actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Jewell*, 747 F.3d at 601. "The standard of review is highly deferential; the agency's decision is entitled to a presumption of regularity, and [the court] may not substitute its judgment for that of the agency." *Jewell*, 747 F.3d at 601. The Court must uphold the agency's findings "[e]ven if the evidence is susceptible of more than one rational interpretation." (citations omitted).

In reviewing plaintiffs' ESA claims under the arbitrary and capricious standard, the Court must defer to the United States Fish and Wildlife Service ("USFWS") on matters within its scientific and technical expertise. *Consol. Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1058 (E.D. Cal. 2010)

(citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005)); *The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) ("We are to be 'most deferential' when the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science.'").

Indeed, as this Court has recognized:

> A federal court lacks the expertise and/or background in fish biology, hydrology, hydraulic engineering, water project operations, and related scientific and technical disciplines that are essential to determining how the water projects should be operated on a real time, day-to-day basis. The scientific, engineering, and operational constraints under which the Projects are managed on a day-to-day basis are of mind-boggling complexity and sensitivity, requiring the highest level of skill, competence, and experience.

Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1195, 1214 (E.D. Cal. 2008). An agency warrants deference to matters within its scientific and technical expertise unless it "completely failed to address some factor, consideration of which was essential to making an informed decision." *Consol. Delta Smelt Cases*, 717 F. Supp. 2d at 1058. Here, plaintiffs do not, and cannot, show that USFWS completely failed to consider a factor essential to developing an informed biological opinion. Thus, USFWS' scientific and technical expertise warrants deference.

E. Plaintiffs' Claims Attempt to Reframe Issues that Are Barred by Res Judicata or Collateral Estoppel

Where a judgment entered by a federal court decides an issue of state substantive law, state law determines the claim-preclusive effect of the judgment, unless state claim preclusion law is incompatible with federal interests. *Semtek Intern Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-509 (2001) (judgment entered in case based on diversity jurisdiction); *Hately v. Watts*, 917 F.3d 770, 777 (4th Cir. 2019) (same rule applies where judgment entered in case based on supplemental jurisdiction). While "Ninth Circuit authority suggests that California state courts determine the preclusive effect of a prior federal court judgment by applying federal standards . . . California case law is not in accord: California courts will determine the preclusive effect of a federal diversity judgment under California law if that law is 'compatible with federal interests.'" *Prieto v. U.S. Bank Nat. Ass'n*, No. CIV S-09-901 KJM EFB, 2012 WL 4510933, (E.D. Cal., Sept. 30, 2012) at *8 (applying California standards for claim preclusion where both supplemental and diversity

jurisdiction applied, and state claims predominated); *see also Billion International Trading, Inc. v. Universal Sportswear, Inc.*, No. CV 12-6705-GW(EX), 2013 WL 12403058 (C.D. Cal., Feb. 21, 2013) at *6 (noting California cases applying California standards to determine preclusive effect of federal judgments). As the claims against the Water Authority are based on supplemental jurisdiction, California courts have extensively addressed the application of res judicata and collateral estoppel in the context of CEQA, and there is no incompatibility with federal interests, the Water Authority submits that California standards for res judicata and collateral estoppel should be applied here. But there is no material difference between California and federal standards, and hence plaintiffs' claims are barred regardless of which standards are applied.

"'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896 (2002). Res judicata applies when "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding." *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal.App.4th 1180, 1202 (2004).[6] Upon satisfaction of these conditions, res judicata bars "not only . . . issues that were actually litigated but also issues that could have been litigated." *Id.*; *see also Ione Valley*, 33 Cal.App.5th at 171-173. Collateral estoppel, or issue preclusion, is similar to res judicata. "Collateral estoppel forecloses relitigation of an issue that (1) is identical to one decided in a prior case (2) involving the same party or parties. . . and (3) which resulted in a final judgment on the merits." *Cnty. of Los Angeles v. Cnty. of Los Angeles Assessment Appeals Bd.*, 13 Cal.App.4th 102, 108 (1993).[7]

[6] Essentially the same three factors determine the application of res judicata under federal standards: an "'(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) (quoting *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n.3 (9th Cir. 2002).

[7] Federal standards for collateral estoppel likewise require: "'(1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated (by the party against whom preclusion is asserted) in the prior litigation; and (3) the determination of the issue in

Here, in light of the *2018 Opinion* and 2018 judgment, plaintiffs may not raise and relitigate claims identical to those previously litigated or that otherwise could have been asserted in the prior action. These include, at a minimum, plaintiffs' claims regarding the EIS/EIR's project description, document format, description of groundwater levels and analysis and mitigation of groundwater-related impacts, cumulative impacts, climate change, the role of the DSC, analysis and mitigation of impacts related to biological resources such as GGS, and compliance with the public trust doctrine. As discussed more fully in each of the substantive sections below, these claims are now barred by the doctrines of res judicata or collateral estoppel.

IV. ARGUMENT

Under CEQA and as directed by the Court's orders (of substance and effect essentially equivalent to a writ of mandate as contemplated in California Public Resources Code section 21168.9), the Water Authority was required to correct the flaws the Court identified before considering recertification of the EIR. *Protect Amador*, 116 Cal.App.4th at 1112. That is exactly what the Water Authority did. The form of the correction is a matter for the Water Authority to determine in the first instance. *Id*., citing Cal. Pub. Res. Code § 21168.9(c). "Likewise, whether the correction requires recirculation of the EIR, in whole or in part, is for the Agency to decide in the first instance in light of the legal standards governing recirculation of an EIR prior to certification." *Id*., citing Cal. Pub. Res. Code § 21092.1, Guidelines § 15088.5, and *Laurel Heights II*, 6 Cal.4th at 1129-30. Plaintiffs repeatedly misrepresent the posture of this case and go so far as to allege that the Water Authority's "only option" was to start the CEQA process from scratch. Doc. 40 at 16:2-3. Plaintiffs' failure to present a full and fair view of the record is fatal to their claims. *2018 Opinion*, 287 F. Supp. 3d at 989; *California Native Plant Soc'y v. City of Rancho Cordova*, 172 Cal.App.4th 603, 626 (2009); *Defend the Bay*, 119 Cal.App.4th at 1266; *Markley v. City Council*, 131 Cal.App.3d 656, 673 (1982).

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the prior litigation must have been a critical and necessary part of the judgment in the earlier action.'" *McQuillon v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004), (quoting *Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir.1996).)

A. The EIS/EIR Fulfills the Substantive and Procedural Requirements of CEQA

The *2018 Opinion* and resulting 2018 judgment vacated the Water Authority's certification of the EIS/EIR based on the Court's ruling that the CEQA analysis required certain corrections. *2018 Opinion*, 287 F. Supp. 3d at 1035-37, 1042, 1044-45, 1049, 1075-76; Water Authority RJN, Ex. 14, ¶¶ 5, 7. The Water Authority commenced revisions to the EIS/EIR in August 2018 to comply with CEQA as directed. CEQA10414-15. The Water Authority corrected every flaw the Court identified, and in doing so complied with CEQA's substantive and procedural requirements.

1. The Project Description Remains Clear, Complete, and Finite

The CEQA project description was litigated at length, and the Court's 2018 rulings rejected all of plaintiffs' arguments. *2018 Opinion*, 287 F. Supp. 3d at 996-1008. Specifically, the Court carefully evaluated and rejected plaintiffs' allegations that "the Project description violates CEQA because: (1) the description of the timing, amount, location, and frequency of transfers are entirely uncertain; and (2) the FEIS/R's 'carriage water' project component improperly conflates a mitigation measure with the project itself and is completely undefined." *Id*. at 996. Among the Court's conclusions was that the EIS/EIR's description of the "timing, amount, location, and frequency of transfers" complied with CEQA. *Id*. at 997-1003.

In this round of litigation, plaintiffs again assert that the EIS/EIR's project description is "unstable" and "inaccurate," claiming that it "constrict[s] the breadth of environmental analysis that would be required if the project description contained all the water that could be transferred," and that "the transfer limit is used as a de facto mitigation in order to lower the significance of the Project's impacts." Doc. 40 at 9:16-19; *see id*. at 3:6-15, 9:10-12:11. Plaintiffs' reframing of the revised project description as an "arbitrary limit" and "unenforceable" mitigation measure is nonsensical, it runs counter to basic CEQA principles, and it strains beyond reason in an attempt to relitigate arguments the Court rejected. Doc. 40 at 3:6-15, 9:10-12:11; *2018 Opinion*, 287 F. Supp. 3d at 997-1003.

All that has changed since the Court made its 2018 determination is that the revised EIS/EIR's project description plainly stated a fact that has *always* existed: in many years, water transfers do not occur, and when they do the amounts most often do not, if ever, approach the

potential upper limits. CEQA028 (RDEIR/SDEIS), 181, 8055-56. As the RDEIR/SDEIS explained:

> The 2014 Draft EIS/EIR analyzed transfers of up to 511,094 acre-feet, but this amount of water is substantially greater than the buyer demand or the amounts that actually have been historically transferred. After Reclamation and SLDMWA completed the Long-Term Water Transfers EIS/EIR process, the only year with transfers that occurred under that document was in 2015. In 2015, SLDMWA purchased 164,153 acre-feet, and East Bay Municipal Utility District purchased 13,268 acre-feet (Reclamation 2018). The buyers have considered their demand for transfers between 2019 and 2024 and have determined that their demand is less than what was included in the 2014 Draft EIS/EIR. This RDEIR/SDEIS presents (and analyzes) transfers from 22 multiple sellers, but all transfers (combined) in a year would be limited so as not to exceed 250,000 acre-feet. This change could decrease effects to some resource analyses, but the changes would not represent a material change to the analysis.

CEQA028 (RDEIR/SDEIS); 5281 (Final EIS/EIR); *see also* CEQA039-042, 8055-56.

From the outset, the Water Authority made clear that it was not "constricting" or "truncating" the previous environmental analysis.[8] To the contrary, it described an annual limit of 250,000 acre-feet to clarify that the maximum transfer volume studied in the EIS/EIR was well above typical yearly activities:

> The 2015 EIS/EIR based the impacts analysis on the previous upper limit of 511,094 acre-feet. The Revised EIS/EIR is relying on that previous analysis and will not revise analysis to reflect the reduced effects of the new upper limit.

CEQA10415; *see also* 8055-56.[9]

[8] When determining the new content for the RDEIR/SDEIS, the Water Authority considered changed conditions and included relevant information. CEQA8054-55, 8126; *see* CEQA006 (CEQA Findings of Fact), 009-10; *Silverado Modjeska Recreation and Park Dist. v. Cnty. of Orange*, 197 Cal.App.4th 282, 301-04 (2011) ("*Silverado*") (describing principles governing recirculation at various stages of EIR preparation). This information was incorporated where appropriate, which resulted in changes primarily to the groundwater resources section of the EIS/EIR. CEQA8055; CEQA069-100. Other sections required fewer changes or did not require changes. CEQA8055; *see* CEQA007-156 (RDEIR/SDEIS).

[9] The 2014 Draft EIS/EIR included potential transfers up to the upper limits included in the 2008 USFWS and 2009 National Marine Fisheries Service ("NMFS") Biological Opinions on the Long-Term Operations of the CVP and State Water Project ("SWP"). CEQA8055. These quantities were further limited by willing sellers, buyer demand, and available capacity, such that the amount actually transferred would be substantially less in most years. *Id*. This limitation is discussed in Section 2.3.2.5 of the 2014 Draft EIS/EIR. *Id*.

Nor did the addition of new potential sellers change the highly conservative overestimate of environmental effects described in the EIS/EIR. CEQA8054-55, 8055-56; *see* Water Authority RJN, Ex. 5 at 8, 9-10-, Ex. 8 at 1-3. The potential new sellers create additional opportunities for buyers who seek to negotiate transfers, but these transfers would not all be available when buyers may want to purchase them, and they would be further limited by buyer demand and other factors such as conveyance capacity. CEQA8054-55, 8055-56. The addition of potential sellers would not increase the amount actually transferred, which not only is capped at the upper limit of 250,000 acre-feet, but also is constrained by a host of other factors such as hydrology, environmental and water quality regulations, operational limits, and pumping capacity. *Id.*; *see* Water Authority RJN, Ex. 5 at 2-4, 5, 9, 10-12, Ex. 8 at 2, 3.

In response to comments on the RDEIR/SDEIS regarding transfer limits, the EIS/EIR further explained:

> Some comments on the 2014 Draft EIS/EIR reflected some confusion as to the upper limits for water transfers associated with the Proposed Action. Some reviewers seemed to believe that potential transfers would only be limited by the amounts set forth in the biological opinion (i.e., totals of 600,000 or 360,000 acre-feet, depending on water year type). Some reviewers of the 2014 Draft EIS/EIR generally referred to the upper limit of 600,000 acre-feet as the upper limit of water transfers assessed in the EIS/EIR, but in reality, that upper limit in the biological opinion was only one factor limiting the amount of water transferred and there are several other more restrictive factors that would limit the transfers. To avoid confusion, the RDEIR/SDEIS clarified that transfers up to that upper limit would not occur because of the many other limiting factors, and changed the upper limit for transfers covered by this EIS/EIR to 250,000 acre-feet. This does not represent a substantive change to the project, but rather a clarification of the overall potential size of the project. The analysis in the 2014 Draft EIS/EIR was conservative because it analyzed far more water transfers than would likely occur, and the analysis continues to be conservative with the clarifying change to the upper limit.

CEQA8055.

The EIS/EIR's analysis remains a highly conservative scenario, i.e., *over-estimating potential water transfers*, based on volumes of water much higher than actually could be transferred through the Delta in any given year. *Id.*; CEQA10423-25; *see 2018 Opinion*, 287 F. Supp. 3d at 999. But the project description has not substantially changed, nor has the scope of the EIS/EIR's environmental impact analysis. CEQA8055-56, 10424-425. Plaintiffs' attempt to find fault in the

project description by complaining about *reductions* in the anticipated scope and duration of the project therefore fails.[10]

Furthermore, the CEQA process, if working properly, as it did here, often results in project changes reducing the severity of environmental impacts. "'The CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal.'" *Kings Cnty. Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 736-37 (1990), quoting *Cnty. of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 199 (1977); *see also River Valley Pres. Project v. Metro. Transit Dev. Bd.*, 37 Cal.App.4th 154, 168, fn. 11 (1995). The requirement that a project description be consistent throughout the EIR does not mean that the project cannot change as it proceeds through CEQA review and other stages in the approval process. *See, e.g., East Sacramento*, 5 Cal.App.5th at 292; *Western Placer Citizens v. Cnty. of Placer*, 144 Cal.App.4th 890, 898 (2006) ("*Western Placer*").

An EIR's project description does not become deficient if the lead agency approves a smaller project than is originally described in the EIR or approves only part of the project analyzed in the EIR. *See Dusek v. Redev. Agency*, 173 Cal.App.3d 1029, 1040 (1985). A lead agency may approve a revised version of the proposed project that incorporates characteristics of an alternative that will reduce the projects impacts if all components of the revised project were evaluated in the EIR. *South of Mkt. Comm. Action Network v. City & Cnty. of San Francisco*, 33 Cal.App.5th 321, 335 (2019); *see also Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 533 (2008) (lead agency is not required to grant "blanket approval" of proposed project described in the EIR; it has "the flexibility to implement that portion of a project which satisfies their environmental concerns"). A lead agency may approve project changes that reduce its environmental impacts without revising the EIR's

[10] Plaintiffs also assert that the EIS/EIR's project description is improperly "scaled back" because it includes "a halved time period that commences five years after the original start date." Doc. 40 at 9:12-16. In reality, however, the revised EIS/EIR simply recognized the passage of time and reflected the fact that only a portion of the 10-year timeframe of the original EIS/EIR remains; it made no material change in the analysis or activities being evaluated. The Project's timeframe and the period of evaluation in the EIS/EIR are exactly the same – 2015-2024. CEQA5894, 15585.

project description. *Western Placer*, 144 Cal.App.4th at 905.

Here, the revised EIS/EIR's refinements to the project description were made to reflect the actual scope of transfer activities – transfers do not occur in most years, and when they do occur, the volumes are much less than those analyzed in the EIS/EIR as potential maximums. CEQA181. Contrary to plaintiffs' allegations, the reduced upper limits in the project description did nothing to constrain or "truncate" the EIS/EIR's environmental analysis. CEQA017-19 (RDEIR/SDEIS), 27-28 (RDEIR/SDEIS), 063-156. The EIS/EIR's analysis was, and remains, based on a range of potential transfer volumes that overstates actual water transfers and overstates environmental impacts. *Id.; 2018 Opinion*, 287 F. Supp. 3d at 996-1008; *see* Water Authority RJN, Ex. 5 at 8, 9-10, Ex. 8 at 1-3.

(a) The Project's Size and Scope Are Integral Components of Its Description, Not Mitigation Measures

Plaintiffs also assert the EIS/EIR violates CEQA "by arbitrarily limiting transfers to 250,000 acre-foot [sic] a year" Doc. 40 at 9:10; *see id.* at 9:10-12:11, as this reduction in scope is unenforceable "mitigation." This argument lacks merit. The reduced scope of the project is not mitigation.

Size and scope are basic elements of any project's description; if an activity is not within the size and scope of the project analyzed in the CEQA document, it cannot be approved without further environmental review. *Save Berkeley's Neighborhoods v. Regents of Univ. of Cal.*, 51 Cal.App.5th 226, 237 (2020) ("*Save Berkeley*"); *Fund for Envt'l Defense v. Cnty. of Orange*, 204 Cal.App.3d 1538, 1549-50 (1988).[11] "This is a routine application of basic CEQA requirements." *Save Berkeley* at 237. Elements that establish the characteristics of the project itself are not mitigation measures. Guidelines §§ 15124(c), 15378(c); *Lotus*, 223 Cal.App.4th 656, fn. 8; *see also Save Round Valley v. Cnty. of Inyo*, 157 Cal.App.4th 1437, 1450-51, fn. 7 (2007) (CEQA analysis is properly based on

[11] Changes to a project, standing alone, are not sufficient to trigger the requirement for further CEQA analysis. The changes must result in new or substantially more severe significant impacts. *Concerned Dublin Citizens v. City of Dublin*, 214 Cal.App.4th 1301, 1318 (2013); *Comm. for Re-Evaluation of the T-Line Loop v. San Francisco Mun. Transp. Agency*, 6 Cal.App.5th 1237, 1254 (2016).

description of anticipated "envelope" of activities constituting project's size and location). Moreover, regardless of whether some aspect of the project is properly characterized as a mitigation measure or a component of the project itself, "[a]ny mischaracterization is significant, however, only if it precludes or obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures." *Mission Bay Alliance v. Office of Comm. Investment & Infrastructure*, 6 Cal.App.5th 160, 185 (2016).

Here, the agencies' purpose in revising the project description to include an upper limit of 250,000 acre-feet per year is clearly explained in the EIS/EIR – to clarify that the maximum transfer volume studied was well above typical yearly activities. CEQA028 (RDEIR/SDEIS); 5281 (Final EIS/EIR). As the stated in the revised EIS/EIR:

> This RDEIR/SDEIS presents (and analyzes) transfers from multiple sellers, but all transfers (combined) in a year would be limited so as not to exceed 250,000 acre-feet. This change could decrease effects to some resource analyses, but the changes would not represent a material change to the analysis.[12]

CEQA028 (RDEIR/SDEIS) [italics added]; *see also* CEQA8055-56.

The revised EIS/EIR analyzed the full range of potential transfers and did not rely on the 250,000-acre-foot upper limit to lessen or avoid environmental impacts or to justify findings that impacts will be mitigated to less-than-significant levels. CEQA017-19 (RDEIR/SDEIS), 27-28 (RDEIR/SDEIS), 39-42 (RDEIR/SDEIS), 63-156, 5281, 8055-56, 10415; *see also* CEQA006, 16-32 (CEQA Findings of Fact).

(b) As the Court Already Determined, Reclamation's Annual Review of Potential Transfers Ensures Enforcement of Project Limits

CEQA does not require that every component of the project description be made a condition of approval or a mitigation measure to be enforceable. *Environmental Council of Sacramento v. City*

[12] Plaintiffs selectively quote this statement from the revised EIS/EIR to twist its meaning, alleging that "[b]y asserting that the 250,000 AF cap 'could decrease effects to some resource analyses,' the transfer limit cap is acting as a mitigation measure that is 'included in the project' pursuant to CEQA Guidelines section 15126.4(a)(1)(A)." Doc. 40 at 12:3-5. Plaintiffs' quote omits the second half of the same sentence, which confirms that the "*the changes would not represent a material change to the analysis*" and the EIS/EIR did not rely on any such decrease to support its conclusions. CEQA028 (RDEIR/SDEIS).

of Sacramento, 142 Cal.App.4th 1018, 1035 (2006) (lead agency may presume that project will be implemented consistent with project description); *Covington v. Great Basin Unified Air Pollution Control Dist.*, 43 Cal.App.5th 867, 874 (2019) (agency may presume that restrictions and limitations incorporated in project approvals will be followed); *see* Cal. Pub. Res. Code § 21081.6(b) (when agency approves plan or framework for later approvals, the agency makes restrictions and limitations enforceable by incorporating them into the project design); *2018 Opinion*, 287 F. Supp. 3d at 1006-08. An EIR also need not evaluate the possibility that a project might be expanded when there is no evidence in the record that the expansion and the impacts that might result are reasonably foreseeable. *Save Round Valley*, 157 Cal.App.4th at 1451.

Here, the Water Authority, as CEQA lead agency, prepared the EIS/EIR to facilitate review of a defined range of potential voluntary water transfers between or among willing buyers and sellers – the "Project" – in an approach to CEQA review the Court upheld. *2018 Opinion*, 287 F. Supp. 3d at 990-1003. As before, the timing, amount, location, and frequency of potential CVP transfers, including potential buyers and sellers and their service areas, are identified in the revised EIS/EIR within a defined range, subject to annual review by Reclamation. CEQA011-19 (RDEIR/SDEIS), 34-60 (RDEIR/SDEIS), CEQA10204-205; *2018 Opinion*, 287 F. Supp. 3d at 999-1001; *see also id*. at 996-1003. The 250,000-acre-foot upper limit is a characteristic inherent in the proposed project and is not vague as to how it will be enforced; Reclamation will enforce it during its review of future transfer proposals. CEQA011-19 (RDEIR/SDEIS), 29 (RDEIR/SDEIS), 34-60 (RDEIR/SDEIS), 8055-56, 10204-205; *see 2018 Opinion*, 287 F. Supp. 3d at 994-95; *see also id*. at 996-1003; *Citizens Opposing a Dangerous Env't v. Cnty. of Kern*, 228 Cal.App.4th 360, 383 (2014) (CEQA lead agency may rely on regulatory authority of federal agency). As the Court already explained:

> [E]ach transfer will be evaluated to determine whether that transfer is consistent with the parameters of the FEIS/R or whether, alternatively, site-specific conditions require additional evaluation beyond that provided in the FEIS/R itself. The Court finds this to be a reasonable approach, providing an appropriate level of detail under the circumstances. The FEIS/R is what it is and provides CEQA approval only for what it describes and evaluates.

2018 Opinion, 287 F. Supp. at 1001.

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Plaintiffs' attempt to relitigate the project description ignores the foundational CEQA principle – an EIR serves as CEQA compliance only for the project it analyzes. *Id*. ("The FEIS/R is what it is and provides CEQA approval only for what it describes and evaluates.") Any water transfer activities outside the scope analysis in the EIS/EIR would require further environmental review. *Id*. Simply put, if the Water Authority, Department of Water Resources ("DWR"), or any other public agency considers transfer proposals outside the scope of analysis of this project, then the public agency may not rely on this EIS/EIR for their CEQA compliance. *Id*.; *see Center for Biological Diversity v. County of San Bernardino*, 247 Cal.App.4th 326, 348-49 (2016); Water Authority RJN, Ex. 5 at 8-9, Ex. 8 at 10.[13]

2. The Revised EIS/EIR Clearly Presents Necessary Information

Plaintiffs contend the EIS/EIR "is inadequate as an informational document," asserting that the Water Authority was required "to circulate a new and complete" CEQA document, and that "[i]n failing to do so, the Lead Agencies abused their discretion, creating a piecemealed FEIS/R that is extremely convoluted and virtually impossible for a reader to follow." Doc. 40 at 16:2-5; *see id.* at 13:2-16:7.[14] The record in this case shows that Plaintiffs' allegations are without merit.

The Court's decision to vacate certification of the prior EIS/EIR in no way contemplated that the agencies would completely restart their review. *2018 Opinion*, 287 F. Supp. 3d 969; *Order re Post-Judgment Vacatur*, 312 F. Supp. 3d 878; Water Authority RJN, Ex. 14 (Judgment, July 5, 2018). CEQA requires an EIR that has been made available for public review, but is not certified, to be recirculated only if significant new information has been added to the EIR. Guidelines §

[13] In support of their argument, plaintiffs cite *CBD* for the proposition that a project description violates CEQA if its characterization of expected project operations is unsubstantiated. Doc. 40 at 10:8-11. In the *CBD* case, however, the court *upheld* the lead agency's project description and rejected claims, similar to those plaintiffs advance here, that the scope and duration of the project were "unstable, not finite, and misleading." 247 Cal.App.4th at 348-51, distinguishing *City of Santee v. Cnty. of San Diego*, 214 Cal.App.3d 1438, 1450-51 (1989) (EIR for interim expansion of detention facility lacked sufficient information to support characterization as "temporary").

[14] As discussed in detail above, plaintiffs' portrayal of "vacatur" as a wholesale rejection of the EIS/EIR misrepresents the facts and the law. *2018 Opinion*, 287 F. Supp. 3d 969; *Ione Valley*, 33 Cal.App.5th at 172; *Town of Atherton*, 228 Cal.App.4th at 354; *Citizens*, 205 Cal.App.4th at 325; *Ballona Wetlands*, 201 Cal.App.4th at 480.

15088.5; *2018 Opinion*, 287 F. Supp. 3d at 1049. The entire document need not be circulated if revisions are limited to specific portions of the document. Guidelines § 15088.5(c); *see Protect Amador*, 116 Cal.App.4th at 1112; *Silverado*, 197 Cal.App.4th at 301-04.

When determining whether an EIR meets required standards for clarity, the entire document must be considered; an EIR should not be invalidated unless it appears that decision-makers would not understand the EIR as a whole. Cal. Pub. Res. Code § 21003(b); Guidelines §§ 15140, 15147; *San Franciscans for Reasonable Growth v. City & Cnty. of San Francisco*, 193 Cal.App.3d 1544, 1548-49 (1987) ("*San Franciscans*"); *see also* Guidelines § 15160 (any format may be used to tailor an EIR to fit varying situations and uses).

Here, at every stage, Reclamation and the Authority provided all necessary information in a readily accessible and clearly organized format. *See* CEQA009-19 (RDEIR/SDEIS (Executive Summary)), 021-24 (RDEIR/SDEIS (Table of Contents)), 026-28 (RDEIR/SDEIS (outline of revised sections)), 030 (RDEIR/SDEIS (document availability and processing)), 031 (RDEIR/SDEIS (Figure 1-1 – Document Roadmap)); CEQA5247-48 (Final EIS/EIR (Executive Summary)); CEQA8279-80 (Final EIS/EIR (Appendix Q – Document Structure)); CEQA10204 (Staff Memorandum to Water Authority Board (April 9, 2020) re Final EIS/EIR ["Water Authority Board Memo"]; CEQA10341 (Ex. B (EIS/EIR Reference Page)); *see also* CEQA8054-55, 8105-06.

The Final EIS/EIR presents the entire joint EIS/EIR document consisting of the Draft EIS/EIR and the recirculated RDEIR/SDEIS, as revised in response to comments received on those documents. CEQA5217-39 (Final EIS/EIR (Table of Contents)), 8279-80 (Final EIS/EIR (Appendix Q – Document Structure)), 8279-9087 (Final EIS/EIR (Appendix Q)).[15] Additionally, it consists of

[15] *See* Guidelines § 15132 (contents of final EIRs), *id*. at § 15132(b) (same). The lead agency may provide an opportunity for members of the public to review the final EIR before the project is approved, but it is not required to do so; CEQA requires public review only at the draft EIR stage. Cal. Pub. Res. Code § 21092; Guidelines §§ 15087, 15089(b). The lead agency must, however, provide each agency that commented on the draft EIR with a copy of the lead agency's proposed response to that agency's comments at least 10 days before certifying the final EIR. Cal. Pub. Res. Code § 21092.5. Although many agencies simply release the final EIR to all commenting agencies and to the public 10 days before the anticipated date for certifying it, the Water Authority afforded several months during which the Final EIS/EIR could be reviewed prior to its certification. CEQA006 (CEQA Findings of Fact), 009 (CEQA Findings of Fact); CEQA10204 (Water Authority

all comments and recommendations received on the Draft EIS/EIR and the recirculated RDEIR/SDEIS, as well as responses of the agencies to significant environmental points raised in those comments. CEQA5213-10203 (Final EIS/EIR (Appendix R – Comments and Responses on the 2014 Draft EIS/EIR; Appendix S – Comments and Responses on the RDEIR/SDEIS; Appendix T – Comment Letters on the 2014 Draft EIS/EIR; Appendix U – Comment Letters on the 2019 RDEIR/SDEIS)); CEQA10204-205 (Water Authority Board Memo).

The format of the Final EIS/EIR and approach to public review in response to the Court's rulings, as well as changes to the project and its circumstances, fully comply with the requirements of CEQA. Guidelines §§ 15140, 15147; *San Franciscans*, 193 Cal.App.3d at 1548-50; CEQA10204-205; *see, e.g.*, CEQA009-19 (RDEIR/SDEIS (Executive Summary)), 021-24 (RDEIR/SDEIS (Table of Contents)), 026-28 (RDEIR/SDEIS (outline of revised sections)); 030 (RDEIR/SDEIS (document availability and processing)); 031 (RDEIR/SDEIS (Figure 1-1 – Document Roadmap)); CEQA8279-80 (Final EIS/EIR (Appendix Q – Document Structure)); *see also* CEQA8054-55; Guidelines § 15160 (any format may be used to tailor an EIR to fit varying situations and uses).[16]

3. Mitigation Measure GW-1 Was Revised as Directed by the Court to Ensure Potential Groundwater-Related Impacts Are Fully Mitigated

The Court previously considered plaintiffs' numerous challenges to the EIS/EIR's analysis

Board Memo).

[16] In addition, throughout this process, the Water Authority evaluated all comments and information in light of CEQA's standards governing recirculation, including the information documented as errata in Appendix Q of the Final EIS/EIR. CEQA006-33 (CEQA Findings of Fact); 069-100, 8054-55; *see* Guidelines § 15088.5(f), (g). The Water Authority determined, on the basis of substantial evidence, that no "significant new information" had emerged that would require further revision or recirculation of the EIR. CEQA009-10 (CEQA Findings of Fact). *See Protect Amador*, 116 Cal.App.4th at 1112; *Silverado*, 197 Cal.App.4th at 301-04. An agency's decision whether to recirculate the EIR based on changes made to it after public review is governed by the substantial evidence standard. Guidelines § 15088.5(e); *Laurel Heights II*, 6 Cal.4th at 1133-1135. "[A]n agency's explicit or implicit decision not to recirculate is given 'substantial deference' and is presumed 'to be correct.'" *San Francisco Baykeeper v. State Lands Com.*, 242 Cal.App.4th at 224, citing *Citizens for a Sustainable Treasure Island v. City and Cnty. of San Francisco*, 227 Cal.App.4th 1036, 1063-1064 (2014).

and mitigation of groundwater-related impacts and rejected all plaintiffs' claims except one. The Court directed that Mitigation Measure GW-1 be revised to state more specific criteria regarding exceptions and performance standards. *2018 Opinion*, 287 F. Supp. 3d at 1037-49.[17] Specifically, the Court directed the Water Authority to revise Mitigation Measure GW-1 to address the following distinct concerns:

- Eliminate open-ended exceptions to minimum monitoring requirements to ensure the monitoring program is enforceable and effective. *Id*. at 1042.
- Add performance standards to avoid impacts to third parties (increased pumping costs and decreased yield) in areas where quantitative BMOs do not exist. *Id*. at 1043-45.
- Close the loophole in the mitigation plan that would permit non-infrastructure related impacts (such as impacts to aquifer capacity) to occur. *Id*. at 1049.

As discussed below, the Water Authority accordingly revised Mitigation Measure GW-1. *See, e.g.*, CEQA5425-28; *see also id*. at 5424-39.

In this round of litigation, plaintiffs again criticize Mitigation Measure GW-1 regarding impacts to third parties (Doc. 40 at 25:10-28:17) and cumulative effects (Doc. 40 at 28:18-31:19) and contend the EIS/EIR lacks sufficient information or analysis to conclude that groundwater pumping impacts will be less than significant (Doc. 40 at 17:17-24:24). Plaintiffs attempt to reframe issues related to groundwater pumping and Mitigation Measure GW-1, in an effort to relitigate them. Doc. 40 at 17:17-31:19. Plaintiffs are barred from doing so. *Ione Valley*, 33 Cal.App.5th at 171-173; *Town of Atherton*, 228 Cal.App.4th at 354; *Citizens*, 205 Cal.App.4th at 325; *Ballona Wetlands*, 201 Cal.App.4th at 480. In any event, as discussed below, the record shows plaintiffs' assertions regarding the EIS/EIR's groundwater impact analysis and mitigation are without merit.

(a) The EIS/EIR Described Potential Impacts to Groundwater-Dependent Ecosystems and Identified Appropriate Mitigation

Plaintiffs seek to relitigate the sufficiency of the EIS/EIR's analysis of groundwater

[17] The Court rejected all of plaintiffs' other allegations concerning groundwater levels and groundwater-related impacts and mitigation, which they now attempt to remix in order to relitigate. *2018 Opinion*, 287 F. Supp. 3d at 1008, 1014, 1016, 1019, 1020, 1023, 1028, 1037, 1041, 1042, 1047-48, 1049; *see id*. 1010, fn. 20 (plaintiffs' "mixing of issues" complicates review); Doc. 40 at 17:17-31:19.

pumping-related impacts by asserting that Mitigation Measure GW-1 "fails to prevent significant impacts to groundwater-dependent ecosystems, vegetation, and other wildlife habitats ('GDEs') that lie within the anticipated area(s) of shallow groundwater drawdown." Doc. 40 at 17:25-27. As plaintiffs themselves recognize, however, "the same concern" regarding groundwater pumping impacts they allege here was raised in comments on the 2014/2015 EIS/EIR and could have been raised in the previous litigation. Doc. 40 at 20:14-19; *2018 Opinion*, 287 F. Supp. 3d at 1043; *see, e.g.*, CEQA7394-95, 16709-10, 16763-64, 16708-10, 17008, 17038-39, 17154-56, 17303, 17316-18, 19074-81, 19169-85; *see also* CEQA17473-516, 17517-18527. As a result, plaintiffs are barred from raising that concern now.

Moreover, the record shows plaintiffs' concern is without merit. The EIS/EIR properly described existing conditions, groundwater levels, and potential impacts to groundwater-dependent ecosystems, including both deep-rooted and shallow-rooted vegetation and associated wildlife, at a level of detail that affords an informed understanding of their nature and magnitude. *E.g.*, CEQA073, 087, 094-96, 117, 138, 5426-27, 5429, 5621-24, 6529-600, 6888, 6900, 6922, 7358-59, 8117; *see Sierra Club v. Cnty. of Fresno*, 6 Cal.5th at 520; *Chico Advocates v. City of Chico*, 40 Cal.App.5th 839, 850 (2019); *North Coast Rivers Alliance v. Marin Mun. Water Dist.*, 216 Cal.App.4th 614, 622 (2013) ("*NCRA*").

Potential impacts to deep-rooted vegetation that are mostly reliant on shallow groundwater are mitigated by Mitigation Measure GW-1. CEQA140-41, 5426-29, 5623-24, 10365. Potential impacts to vegetation communities, namely riparian habitat, are less likely to be impacted by groundwater level changes; the EIS/EIR therefore, concluded that a substantial adverse impact will not occur and that the impacts are less than significant. CEQA7356-66 (Final EIS/EIR (Appendix P- Methods for Assessing Impacts on Natural Communities and Special-Status Plants and Wildlife)).

Plaintiffs' contrary comments were considered, and responses were provided in which the Water Authority explained the methodology and rationale supporting its determination. CEQA8246-47 (Final EIS/EIR (Appendix S- Comments and Responses on the 2019

RDEIR/SDEIS; Comment response 9-200)).[18] The Water Authority did not respond, as plaintiffs assert, by simply dismissing the need for the analysis or mitigation requested. CEQA8117, 8227-28, 8247-48, 8267-70, 10363-72. In some instances, when additional information or revisions to the mitigation measures were requested, the Water Authority agreed. *See, e.g.*, CEQA7380-83, 8254, 8279, 10362-63. When more analysis and mitigation was requested regarding shallow-rooted groundwater-dependent vegetation, however, the Water Authority carefully considered the comments and determined, based on substantial evidence, that the impacts would not be significant and the identified mitigation measures were sufficient, such that further inquiry was not required. CEQA7372, 7374, 8117, 8227-28, 8247-48, 8267-70, 10363, 10365, 10367, 10369-70. The EIS/EIR's conclusions are grounded in expert opinion and supporting data, and therefore are supported by substantial evidence. *National Parks*, 71 Cal.App.4th at 1365-66. CEQA requires nothing more. Guidelines § 15151 (disagreements among experts do not invalidate an EIR); 15204(a); *id*. at § 15204(a) (lead agency need not conduct every recommended test or perform all requested research); *Rodeo Citizens Ass'n v. Cnty. of Contra Costa*, 22 Cal.App.5th 214, 226 (2018) (CEQA requires only that an EIR provide a reasonable and practical analysis of environmental impacts); *Banning Ranch v. City of Newport Beach*, 211 Cal.App.4th 1209, 1228 (2012) (same).[19]

The Final EIS/EIR also responded to comments on the RDEIR/SDEIS made by the California Department of Fish and Wildlife ("CDFW"), which afforded CDFW several months, from November 2019 to April 2020, to provide additional input on this issue. CEQA006 (CEQA

[18] The question for the reviewing court is not whether the challenger has provided evidence that is contrary to the lead agency's conclusions. *National Parks*, 71 Cal.App.4th at 1366. Rather, the court determines only whether the lead agency's determinations are supported by substantial evidence. *Id*.; *Defend the Bay*, 119 Cal.App.4th 1267.

[19] *See also* Guidelines § 15151 (an EIR's evaluation need not be exhaustive); *City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal.App.4th 889, 898 (2009) (same). Courts do not require technical perfection or scientific certainty. *Sierra Club v. Cnty. of Fresno*, 6 Cal.5th at 515, 520; *South of Mkt. Comm. Action Network*, 33 Cal.App.5th at 331; *Banning Ranch*, 211 Cal.App.4th at 1228; *Residents Ad Hoc Stadium Comm. v. Board of Trustees*, 89 Cal.App.3d 274, 285 (1979) ("[It] is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project").

Findings of Fact), 009 (CEQA Findings of Fact); CEQA8265-70, 10204. CDFW submitted no further comments on the EIS/EIR, indicating its concerns were addressed. CEQA10362-63; Guidelines § 15207; *Citizens for E. Shore Parks*, 202 Cal.App.4th at 567.[20]

Plaintiffs simply disagree with the EIS/EIR's approach and dispute its conclusions regarding how impacts to groundwater-dependent resources should be evaluated. Doc. 40 at 17:17-24:24. But an agency's determination whether an impact is significant is ultimately a question that calls for the exercise of judgment based on scientific information and other relevant data. Guidelines § 15064(b)(1); *Citizen Action to Serve All Students v. Thornley*, 222 Cal.App.3d 748, 755 (1990). Plaintiffs' continued disagreement with the Water Authority's analysis and conclusions, while their right, is immaterial to the adequacy of the EIS/EIR. *Vineyard*, 40 Cal.4th at 435; *Laurel Heights I*, 47 Cal.3d at 393, 408-09; *see NCRA*, 216 Cal.App.4th at 642.

(b) Mitigation Measure GW-1 Addresses All Groundwater-Related Impacts as the Court Directed

The Court's *2018 Opinion* required revisions to Mitigation Measure GW-1 to: (1) eliminate open-ended exceptions to minimum monitoring requirements regarding monitoring on a monthly basis "where possible" and weekly during pumping "unless site specific information indicates a different interval should be used" (*2018 Opinion*, 287 F. Supp. 3d at 1042); (2) add performance standards to avoid impacts to third parties (increased pumping costs and decreased yield) in areas where quantitative basin management objectives ("BMOs") do not exist (*id*. at 1043-45); and (3) close the loophole in the mitigation plan that would permit non-infrastructure related impacts (such as impacts to aquifer capacity) to occur (*id*. at 1049). Accordingly, the Water Authority revised Mitigation Measure GW-1 to include the following requirements, among others:

> (1) **Groundwater Level Monitoring**. Sellers will collect measurements of groundwater levels in both the participating wells (those 20 wells being used in lieu of diverting surface water that is being made available for transfer) and monitoring wells. Groundwater level measurements will be used to identify potential concerns for both

[20] Comments from a responsible agency are not dispositive on a given issue, and the lead agency may reject criticism from an expert or regulatory agency as long as its reasons for doing so are supported by substantial evidence. *Laurel Heights I*, 47 Cal.3d at 408; *NCRA*, 216 Cal.App.4th at 642; *California Native Plant Soc'y*, 172 Cal.App.4th at 626; *Assoc. of Irritated Residents v. Cnty. of Madera*, 107 Cal.App.4th 1383, 1397 (2003).

third party impacts and irreversible subsidence based on the identified trigger points. Groundwater level monitoring will include measurements before, during, and after transfer-related substitution pumping. The seller will measure groundwater levels as follows:

- Prior to transfer: Groundwater levels will be measured in both the participating pumping well(s) and the monitoring well(s) monthly from March in the year of the proposed transfer-related substitution pumping until the start of the transfer. Monitoring will also be conducted on the day that the transfer-related substitution pumping begins, prior to the pump being turned on.

- During transfer-related substitution pumping: Groundwater levels will be measured in both the participating pumping well(s) and the monitoring well(s) weekly throughout the transfer-related substitution pumping period.

- Post-transfer pumping: Groundwater levels will be measured in both the participating well(s) and the monitoring well(s) weekly for one month after the end of transfer-related substitution pumping, after which groundwater levels will be measured monthly through March of the year following the transfer.

(2) **Groundwater Level Triggers**. The primary criteria used to identify potentially significant impacts to groundwater levels are the BMOs set by GMPs. In the Sacramento Valley, Shasta, Tehama, Glenn, Butte, Colusa, Sutter, Yuba, Nevada, Placer, Sacramento and Yolo counties have established GMPs to provide guidance in managing the resource.

In areas where quantitative BMO groundwater level triggers exist, sellers will manage groundwater levels to these triggers and initiate the mitigation plan (discussed below) if groundwater levels reach the trigger. In areas where quantitative BMOs do not exist, sellers will manage groundwater levels to maintain them above the identified historic low groundwater level (trigger) and will initiate the mitigation plan (discussed below) if groundwater levels reach the trigger. Most of the quantitative BMOs within the Seller Service Area are tied to historic low groundwater levels. Therefore, the use of historic low groundwater levels in areas without quantitative BMOs is consistent with the approach for areas with quantitative BMOs. As part of a seller's transfer proposal subject to Reclamation's review and approval, the seller will need to identify the monitoring wells and the specific groundwater level trigger for each well (established through the local BMO or the historic low groundwater level for that well).

Groundwater level declines due to pumping occur initially at the pumping well and then propagate outward from that location. The magnitude of groundwater level decline caused by pumping also decreases with increasing distance from the pumping well. Therefore, groundwater level declines caused by transfer pumping would be measured first at the pumping well and subsequently at the monitoring well. The decline would be greatest at the pumping well and lower at the monitoring well. Therefore, it is likely that groundwater levels in the pumping well would decline to the historic low level sooner than at the monitoring well(s). The monitoring well(s) would provide information surrounding the well to avoid potential cumulative impacts...

> (3) **Groundwater Resource Mitigation**. If groundwater level triggers are reached at the participating pumping well(s) or the suitable monitoring well(s) (either BMO triggers or historic low groundwater levels), transfer-related pumping would stop from the participating pumping well that reached the trigger. Transfer- related pumping would be stopped when the trigger is first reached at either the participating pumping well(s) or the suitable monitoring well(s). Transfer-related pumping could not continue from this well (in the same year or a future year) until groundwater levels recovered to above the groundwater level trigger. Implementation of the mitigation plan thus avoids any potentially significant groundwater impacts.

CEQA5425-6, 5428; *see also id*. at 5424-39.

In this manner, Mitigation Measure GW-1 was revised to remove the previously open-ended exceptions to monitoring requirements and provides clear requirements on the frequency of monitoring before, during, and after transfer-related substitution pumping. The measure also was revised to include a quantitative performance standard related to impacts to groundwater resources and third parties in areas where quantitative BMOs do not exist. Lastly, the mitigation measure was revised to close the loophole regarding non-infrastructure impacts by requiring transfer-related pumping to be stopped if the groundwater level trigger is reached. Mitigation Measure GW-1 thus was revised to close the gaps identified in the *2018 Opinion*, and thereby avoids potentially significant impacts from groundwater level declines such as impacts to other legal users of water, land subsidence, vegetation, and groundwater quality. CEQA5424-39; *2018 Opinion*, 287 F. Supp. 3d at 1042-45, 1049.

In attempting to relitigate arguments regarding "significant impacts to third parties, including land subsidence impacts and impacts to third party wells," plaintiffs object to the use of historic lows as performance standards to avoid impacts in areas where quantitative BMOs do not exist. Doc. 40 at 25:10-28:17. In doing so, plaintiffs repeat assertions made in their comments on the 2014/2015 EIS/EIR and in their previous lawsuit, which were rejected by the Court in its *2018 Opinion*, 287 F. Supp. 3d at 1049; *see id*. at 1042-49. Again, those assertions are barred. The Court correctly concluded plaintiffs' objections are without merit. *Id*. Furthermore, the revised EIS/EIR explained the basis for using historic lows as groundwater level triggers where quantitative BMOs do not exist. *See, e.g.*, CEQA5274, 5418-19, 5421, 5425-26, 5428-29, 8178, 10368.[21] Most of the

[21] As the revised EIS/EIR explained:

quantitative BMOs within the Seller Service Area are tied to historic low groundwater levels. CEQA5421, 10368. Use of historic low groundwater levels in areas without quantitative BMOs is consistent with the approach for areas with quantitative BMOs and is supported by substantial evidence, in compliance with CEQA. CEQA7383-85, 7406, 7468, 7507, 7602, 7711, 7741, 8104-05, 8106, 8120, 8169, 8175, 8178, 8179, 8181, 8184, 8230, 8255, 8353-54, 10368; *see 2018 Opinion*, 287 F. Supp. 3d at 1049 (upholding EIS/EIR's "use of BMOs as the operative performance standard (where BMOs exist)"); *Rialto Citizens*, 208 Cal.App.4th at 942 (mitigation measure that included specific performance standards sufficient to ensure potential impact would be mitigated).

4. The EIS/EIR Properly Accounts for Cumulative Impacts, Including Climate Change, as Determined by the Court's *2018 Opinion*

Plaintiffs assert that Mitigation Measure "GW-1 does not prevent cumulatively considerable impacts to groundwater resources," citing "the climate crisis and corresponding persistent drought" that "increasingly strain California's finite water supply." Doc. 40 at 28:18-20.[22] Plaintiffs argue

> BMOs represent locally-driven objectives to maintain health of the groundwater basin in each area. In areas where local BMOs are not available, historic low groundwater levels are identified as groundwater level triggers. Most of the quantitative BMOs within the Seller Service Area are tied to historic low groundwater levels. Therefore, the use of historic low groundwater levels in areas without quantitative BMOs is consistent with the approach for areas with quantitative BMOs. These groundwater level triggers are the best available tools to avoid potential impacts to the environment as well as to third parties, and to avoid irreversible subsidence. If these triggers are reached, transfer-related pumping would stop from the well(s) near the monitoring well that reached the trigger. Irreversible subsidence would only occur when groundwater levels are below historic low levels (USGS 2017); therefore, this measure would also avoid any potential irreversible (permanent) subsidence. Stopping transfer-related pumping would stabilize groundwater levels to above historic low levels and avoid any potentially significant effects related to subsidence or third-party impacts caused by transfer-related pumping. Implementation of Mitigation Measure GW-1 would avoid permanent subsidence and reduce land subsidence impacts to less than significant.

CEQA5421.

[22] Plaintiffs further assert that the "historic low" performance standards set forth in Mitigation Measure GW-1 are inadequate to avoid cumulatively considerable impacts because they would "allow[] for new historically low groundwater levels to become the baseline each year." Doc. 40 at 30:12-13. The EIS/EIR responded to plaintiffs' concerns and noted the portions of the analysis that addressed them. CEQA8178. Moreover, as discussed in detail above, historic low groundwater levels are appropriate performance standards because they are consistent with the approach for areas with quantitative BMOs and are the best available tools to avoid potential impacts to the

that "[t]he EIS/R does not analyze how the Project will exacerbate climate change effects." Doc. 40 at 33:5-8; *see id.* 31:20-35:5. Plaintiffs' claims regarding the Water Authority's CEQA evaluation of issues related to cumulative impacts and climate change are barred by the doctrines of res judicata and/or collateral estoppel. *2018 Opinion*, 287 F. Supp. 3d at 1018, fn. 25, 1023-28 ("Plaintiffs' motion for summary judgment that the FEIS/R's climate change analysis violates CEQA is denied"), 1034-37 (evaluating plaintiffs' claims regarding cumulative impacts and finding insufficient information in the EIS/EIR only as to Delta outflow); *Ione Valley*, 33 Cal.App.5th at 171-173; *Town of Atherton*, 228 Cal.App.4th at 354; *Citizens*, 205 Cal.App.4th at 325; *Ballona Wetlands*, 201 Cal.App.4th at 480; *see* Doc. 40 at 28:17-35:5. The revised EIS/EIR was prepared to make corrections required by the Court's *2018 Opinion*, and in doing so, the Water Authority satisfied its duties under CEQA.

The record shows that plaintiffs' allegations of "changed circumstances" and characterizations of the project as "separate and distinct" from the actions challenged in the prior litigation are specious. Doc. 40 at 34:3-35:6; *see, e.g.*, CEQA028 (RDEIR/SDEIS), 039-42, 181, 5281, 8054-55; *2018 Opinion*, 287 F. Supp. 3d at 996-1008; *see also* Water Authority RJN, Ex. 11, Ex. 12. The Water Authority was not required to reopen other areas of the document or to revisit issues that plaintiffs already litigated unsuccessfully. *2018 Opinion*, 287 F. Supp. 3d at 1018, fn. 25, 1023-28, 1034-37; *see* Doc. 40 at 34:3-35:6.[23]

environment as well as to third parties, and to avoid irreversible subsidence. CEQA5421, 5425-26, 5428-29, 10368. Also as noted above, the Court upheld Mitigation Measure GW-1's use of quantitative BMOs as performance standards to avoid any significant groundwater-related impact in the previous litigation. *2018 Opinion*, 287 F. Supp. 3d at 1049.

[23] The Court's *2018 Opinion* considered, and expressly rejected, plaintiffs' claim that the EIS/EIR failed to include "any meaningful analysis of whether the Proposed Action would exacerbate existing climate change hazards." 287 F. Supp. 3d at 1026-28, applying *California Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist.*, 62 Cal.4th 369, 386 (2015) and *East Sacramento*, 5 Cal.App.5th at 296-97; *see* Water Authority RJN, Ex. 11, Ex. 12. Plaintiffs' assertions that this lawsuit involves "a wholly distinct project" and materially different issues have no basis in law or fact. Doc. 40 at 34:3-35:5.

5. Consultation with the DSC Confirmed the Delta Plan Does Not Apply to the Project

Plaintiffs assert the EIS/EIR omitted information regarding the statutory role of the DSC. Doc. 40 at 36:21-38:3. Relying on comments from the DSC on the RDEIR/SDEIS, plaintiffs allege that the EIS/EIR violates CEQA "by not discussing the possible applicability of the Delta Plan" to the project. *Id*. at 37. Plaintiffs' claim fails for three principal reasons: (1) Plaintiffs' claim is barred by the doctrines of res judicata and/or collateral estoppel; (2) the regulatory sections of the EIS/EIR only discuss regulations and policies governing the project and do not discuss plans, such as the Delta Plan, that are inapplicable; and (3) the Water Authority responded to the DSC's comments and consulted extensively with the DSC to ensure all concerns were addressed prior to recertifying the EIS/EIR. *See, e.g.*, CEQA8080-87 (Final EIS/EIR (Appendix S - Comments and Responses on the 2019 RDEIR/SDEIS; Response to Comment Letter 4)). CEQA8081, 10373, 14619-20.[24]

The revised EIS/EIR was prepared to make corrections required by the Court's *2018 Opinion* 287 F. Supp. 3d at 1035-37, 1042, 1044-45, 1049, 1075-76. Again, the Water Authority was not required to reopen other areas of the document to "discuss regulatory regimes" that plaintiffs now allege are "involved in the Project." Doc. 40 at 38:2-3; *see* Doc. 40 at 31:20-35:5; Doc. 40 at 36:21-38:3. Plaintiffs' assertions relate to aspects of the project that were disclosed in the original EIS/EIR and have not been subsequently modified. CEQA7448-53, 8080-81, 10372. All of plaintiffs' contentions regarding "possible applicability of the Delta Plan" could have been asserted in their prior lawsuit, and therefore are barred in this case. *Ione Valley*, 33 Cal.App.5th at 171-173; *Town of Atherton*, 228 Cal.App.4th at 354; *Citizens*, 205 Cal.App.4th at 325; *Ballona Wetlands*, 201 Cal.App.4th at 480.

[24] The DSC's comment letter on the RDEIR/SDEIS observed, as a threshold matter, that it raised issues that had previously been addressed and were beyond the scope of the EIR's recirculation. CEQA8080-81. Because all of the DSC's comments either were actually raised or could have been raised during the original EIS/EIR process, and because these comments do not otherwise relate to that portion of the EIS/EIR that was revised and recirculated. Plaintiffs' claims based on these comments are barred by res judicata and/or collateral estoppel. *Ione Valley*, 33 Cal.App.5th at 171-173; *Town of Atherton*, 228 Cal.App.4th at 354; *Citizens*, 205 Cal.App.4th at 325; *Ballona Wetlands*, 201 Cal.App.4th at 480.

In any event, the project is not a "covered action" under the Delta Plan, which treats single-year water transfers as exempt from DSC jurisdiction. CEQA8081, 10372-73. As is explained in the EIS/EIR, all potential transfers in the range studied as part of the project *must be reviewed and approved on an annual basis and are single-year water transfers*. CEQA7397-98, 8081. The DSC does not have jurisdiction over the potential transfer actions analyzed by the EIS/EIR, and as such, the DSC and Delta Plan were not discussed as part of the regulatory framework. CEQA7397-98, 7450-51, 8081, 10372-73; Guidelines § 15124(d)(1) (lead agency need only list those agencies, approvals, and consultation requirements known to apply).[25]

Furthermore, the Water Authority not only substantively responded to all of the DSC's comments regarding the Delta Plan, the Water Authority also consulted with the DSC on several occasions, via telephone and in person, to discuss the DSC's concerns and address them. CEQA10373, 10417-20. Before certifying the revised EIS/EIR, the Water Authority provided the DSC with its additional clarifying revisions making clear that multi-year transfers cannot be approved using this document; only single-year transfers are included in the project. CEQA14619-20; Guidelines §§ 15096(b), (c); *see Citizens for a Sustainable Treasure Island*, 227 Cal.App.4th at 1062 (lead agencies may meet with commenters to resolve concerns). The DSC made no further comments, requested no further meetings, and its concerns thus were addressed. *Id.*; Guidelines § 15207; *Citizens for E. Shore Parks*, 202 Cal.App.4th at 567.

[25] Plaintiffs assume that the Delta Plan applies to the Project and the EIS/EIR therefore must make "a good faith attempt to analyze project alternatives and mitigation measures in light of [Delta Plan] requirements." Doc. 40 at 37:15-17, quoting *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918, 924 (2017). *Banning Ranch* has no bearing where, as here, the lead agency considered the potential applicability of a plan or regulatory regime and determined it did not apply to the proposed project. *See id*. at 925, 936-38. In *Banning Ranch*, the lead agency failed to discuss the Coastal Act's requirements for environmentally sensitive habitat areas ("ESHAs") despite the facts that the project site was in the coastal zone, was undisputedly subject to the Coastal Commission's permitting jurisdiction under the Coastal Act, and evidence showed the project site included ESHAs. *Id*. The court therefore found "the regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the *Banning Ranch* EIR's analysis of feasible alternatives." *Id*. at 937. None of the factors involved in the *Banning Ranch* analysis are implicated in this case. Moreover, plaintiffs' contentions regarding the EIS/EIR's analyses of alternatives were rejected in the previous round of litigation. *2018 Opinion*, 287 F. Supp. 3d at 1054-59. Likewise, plaintiffs' contentions regarding mitigation measures were rejected, with limited exceptions, in the previous round of litigation. *Id*. at 1037-51.

6. Revised Mitigation Measure VEG and WILD-1 Complies with CEQA and Protects the Giant Garter Snake

The Court considered plaintiffs' numerous challenges to the EIS/EIR's analysis and mitigation of impacts related to the GGS and rejected all plaintiffs' claims other than its finding that environmental commitments in the EIS/EIR "designed to ensure that [cropland] idling would be focused in areas where GGS occurrence probability is low" were fatally unclear. *2018 Opinion*, 287 F. Supp. 3d at 1075. Accordingly, the Water Authority revised the EIS/EIR to include Mitigation Measure VEG and WILD-1 to avoid cropland idling actions in areas where they could result in the substantial loss or degradation of habitats supporting important GGS populations by requiring, among other things, that:

> Fields abutting or immediately adjacent to areas with known important giant garter snake populations (Appendix H) will not be permitted to participate in cropland idling/shifting transfers. Important giant garter snake populations are defined for purposes of this mitigation measure as populations previously identified by biologists from USFWS, USGS, and possibly contract biologists. These populations of giant garter snakes were identified early on as identified in previous consultations and are in, or connected to, areas that are considered public or protected. Most of these areas have specific management plans for giant garter snakes either for mitigation or as wildlife refuges. One factor influencing the importance of these areas is that they can provide a refuge for snakes independent of rice production.
>
> Fields abutting or immediately adjacent to the following areas are considered important giant garter snake populations: Little Butte Creek between Llano Seco and Upper Butte Basin Wildlife Area; Butte Creek between Upper Butte Basin and Gray Lodge Wildlife areas; Colusa Basin drainage canal between Delevan and Colusa National Wildlife Refuges; Gilsizer Slough; Colusa Drainage Canal Land side of the Toe Drain along the Sutter Bypass; Willow Slough and Willow Slough Bypass in Yolo County; Hunters and Logan Creeks between Sacramento and Delevan National Wildlife Refuges; Lands in the Natomas Basin.

CEQA151.

Mitigation Measure VEG and WILD-1 incorporates GGS habitat requirements for rice-growing regions based on the U.S. Fish & Wildlife Service 2017 Recovery Plan for GGS. *Id.*; 8074-78, 10371-72. Implementation of Mitigation Measure VEG and WILD-1 addresses the Court's concern by clarifying what is meant by "areas where GGS occurrence is low," and protects GGS

and other species from potential reductions in emergent wetland communities and open water that provide habitat for them. CEQA8074-78, 10371-72. The Water Authority's conclusion that Mitigation Measure VEG and WILD-1 thus avoids any significant impact to GGS is supported by substantial evidence in compliance with CEQA. *Id*.

B. The Water Authority Did Not Violate Any Public Trust Obligation in Certifying the EIS/EIR

Plaintiffs contend that the Water Authority's "refusal to undertake any Public Trust Doctrine assessment of the project, prior to approval, is an abdication of its 'duty . . . to protect the people's common heritage of streams, lakes, marshland and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.'" Doc. 40 at 43:19-22. The Court rejected plaintiffs' public trust claim in the *2018 Opinion*, 287 F. Supp. 3d at 1089-1062, and should reject it again.

In the prior litigation, plaintiffs argued that "the [F]EIS/R failed to evaluate consistency with the Public Trust Doctrine" and thereby violated CEQA. *2018 Opinion*, 287 F. Supp. 3d at 1059. The Court rejected this claim, holding there is no legal requirement that a CEQA document "contain a public trust consistency analysis." *Id.* at 1061–1062. Plaintiffs have now repackaged their claim as "an independent cause of action for violation of the Public Trust Doctrine." Doc. 40 at 43. This repackaged public trust claim fails as well. The Water Authority had no obligation to conduct a public trust analysis before recertifying the EIS/EIR, its CEQA review addressed potential impacts to public trust resources from transfers, and the claim is barred by res judicata.

1. No Public Trust Analysis Was Required to Support the Water Authority's Approval of the EIS/EIR

In the *2018 Opinion*, the Court observed "[a]s *Baykeeper* held, an analysis under the public trust doctrine is an independent duty that attaches to any agency approval of a project that implicates public trust resources." 287 F. Supp. 3d at 1060 (citing *San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal.App.4th 202, 235 (2015)). Here, the Water Authority, as CEQA lead agency, prepared the EIS/EIR to facilitate review of a defined range of potential voluntary water transfers between or among willing buyers and sellers – the "Project" – in an approach to CEQA review the

Court upheld. *2018 Opinion*, 287 F. Supp. 3d at 990-1003. As is explained in the EIS/EIR, all potential transfers in the range studied as part of the Project must be reviewed and separately approved on an annual basis. CEQA7397-98, 8081. Approval of a study such as an EIS/EIR, all that is challenged here, does not trigger application of the public trust doctrine because such as approval has no impact on public trust resources.

The cases on which plaintiffs principally rely for their argument that the Water Authority had a duty to perform a public trust analysis before certifying its EIS/EIR are distinguishable because each involved issuance of a lease or a permit that authorized activities that would impact public trust resources.[26] In *Baykeeper*, *supra*, the State Lands Commission approved a lease for dredge mining of sand from sovereign lands under San Francisco Bay. *Baykeeper*, 242 Cal.App.4th at 210. In *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983) the State Water Resources Control Board issued licenses for the diversion of water from streams flowing into Mono Lake. In *Environmental Law Foundation v. State Water Resources Control Board*, 26 Cal.App.5th 844 (2018), the County of Siskiyou issued permits for installation of groundwater wells located near a river, where pumping of groundwater would affect water levels in the river and hence public trust resources such as salmon. In *Zack's, Inc. v. City of Sausalito*, 165 Cal.App.4th 1163 (2008), a city leased of portions of a street that was built on submerged land and tidelands, and uses allowed by the lease blocked public access.

None of these cases support application of the doctrine when the only action at issue is an agency's certification of a programmatic CEQA document. In contrast to these cases, the Water

[26] Plaintiffs also cite to three more cases that did not even involve an alleged violation of the public trust doctrine. In *San Luis & Delta-Mendota Water Authority v. Jewell*, 52 F. Supp. 3d 1020, 1069 (E.D. Cal. 2014) the doctrine was raised as support for an action taken by the Bureau of Reclamation. The court found the doctrine was "not dispositive of any claim in this case." *Id.* at 1069. In *Santa Barbara Channelkeeper v. City of San Buenaventura*, 19 Cal.App.5th 1176 (2018), there was no project approval at issue; the defendant sought to file a cross-complaint against other diverters on the Ventura River to challenge the reasonableness of their diversions. *Abatti v. Imperial Irrigation District*, 52 Cal.App.5th 236 (2020), involved review of an irrigation district's allocation of water among its water users, and a claim by some that they owned rights to the water based on historical use. *Abatti* involved the trust relationship between in irrigation district and its landowners, but not the public trust doctrine.

Authority's approval of the EIS/EIR has no effect at all on public trust resources. The intent of the joint EIS/EIR was to provide an informational opportunity otherwise unavailable to the agencies or to the public by conducting a comprehensive review of the "Project" – a defined range of *potential* water transfer activities – over the long term and by ensuring that any potentially significant adverse impacts resulting from such transfers are disclosed and mitigated. Water Authority RJN, Ex. 2 at 4-5, 7-10. As demonstrated in the Water Authority's April 9, 2020 Resolution, the Water Authority approved certification of the EIS/EIR, adoption of CEQA Findings of Fact, and adoption of a Mitigation Monitoring and Reporting Program. CEQA005-9 (Water Authority Resolution No. 2020-461). The Water Authority's Resolution did not include approval of any individual water transfer, and instead states that "the *potential* transfer activities described in the 2019 Final EIS/EIR, subject to the conditions, agreements, policies, or criteria established by the Board, *may be implemented* consistent with the terms of the 2019 Final EIS/EIR." CEQA000007 (emphasis added). On the face of the Resolution, it is clear the Water Authority did not approve an action that will have an impact on the environment and public trust resources.

In certifying the EIS/EIR, the Water Authority did not approve any transfer nor a "program" of transfers. Instead, the EIS/EIR acknowledges and discusses the requirement for future approval of any individual transfer evaluated for potential environmental impacts in the EIS/EIR. CEQA174-225; Water Authority RJN, Ex. 2 at 2-3. As explained above, water transfers among willing buyers and sellers are independent discretionary actions regulated through multi-agency collaboration at the local, state, and federal levels. *Ibid*. As set forth in the EIS/EIR, "Reclamation must approve each transfer and will not approve a transfer if it will violate CVPIA principles and other state and federal laws." CEQA000175. "Transfers of CVP water outside of the CVP place of use require [State Water Resources Control Board] review and approval." CEQA000176.

In sum, plaintiffs' claim against the Water Authority for violation of the public trust doctrine fails, because the Water Authority's approval of the EIS/EIR is not the type of agency decision that can trigger an obligation to do a public trust analysis.

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2. The Water Authority Is Not the Appropriate Agency to Conduct a Public Trust Analysis With Respect to Any Eventual Transfers

Plaintiffs' public trust argument fails for a second reason. Assuming a requirement to conduct a public trust analysis may apply to approvals of water transfers, there is no precedent for imposing such an obligation on an entity such as the Water Authority. The Water Authority is a joint powers authority consisting of local public agencies who hold contracts for CVP water supply, water supply they provide to areas of the western San Joaquin Valley, and to San Benito and Santa Clara counties. CEQA5249, 8008-09; *see also* CEQA7371 (Common Response 1). As described in the EIS/EIR, the Water Authority will seek to negotiate one-year transfers on behalf of its member agencies in years when they could experience shortages. CEQA5249. In this capacity, the Water Authority is seeking to secure badly needed additional water supplies for its member agencies. Given its limited scope of responsibility and authority, and its purpose, the Water Authority is not well positioned to act in the role of trustee for public trust resources. Indeed, no case holds that an agency such as the Water Authority is the proper agency to decide the necessary and appropriate level of protection for public trust resources under the public trust doctrine.

In *National Audubon*, the California Supreme Court explained that determining the appropriate level of protection for public trust resources, if any, requires a balancing of competing societal interests that should be decided by a "responsible body." It observed "[i]n the case before us, the salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct. This is not a case in which the Legislature, the Water Board, or any judicial body has determined that the needs of Los Angeles outweigh the needs of the Mono Basin, that the benefit gained is worth the price. Neither has any responsible body determined whether some lesser taking would better balance the diverse interests." *National Audubon*, 33 Cal.3d at 447. In contrast here, a "responsible body" – the State Water Resources Control Board – has considered application of the public trust doctrine in relation to CVP operations, and has decided upon reasonable protection for public trust resources. The terms and conditions included in the water right permits issued by the State Water Resources Control Board for the CVP reflect its balancing of protection of public trust resources with water supply needs,

pursuant to the obligation announced in *National Audubon*. March 15, 2000, Revised Water Right Decision 1641 [Decision 1641]; *State Water Resources Control Board Cases*, 136 Cal.App.4th 674, 777-79 (2006). Where they have jurisdiction and within the scope of their authority, trustee state agencies such as the CDFW, the State Lands Commissions, and the State Water Resources Control Board, not the Water Authority, are the appropriate "responsible bodies" to address the reasonable protection of the state's public trust resources.

Plaintiffs cite *Baykeeper* for the proposition that an agency is not excused from its own public trust obligation simply because other agencies may also have obligations under the doctrine. Doc. 40 at 43. But that does not answer the question whether the Water Authority has a public trust obligation. The defendant agency involved in *Baykeeper*, the State Lands Commission, is indisputably a trustee state agency with obligations to manage state lands consistent with the trust, and hence that other agencies might also have duties did not excuse it from fulfilling its duties. *Baykeeper*, 242 Cal.App.4th at 232. Plaintiffs also cite to *Environmental Law Foundation v. State Water Resources Control Bd*. in which the court found that a "county, as a subdivision of the state, shares responsibility for administering the public trust and may not approve of destructive activities without giving due regard to the preservation of those resources." 26 Cal.App.5th at 867–868. But counties hold broad jurisdiction and police powers within their boundaries (Cal. Const., art. XI, §§ 1, 7[27]), unlike a more narrowly focused agency such as the Water Authority. No court has found that an agency with limited authority such as the Water Authority has public trust obligations.[28]

The Court should reject plaintiffs' request that it make the unprecedented ruling that an agency such as the Water Authority is required to act as a trustee agency under the public trust doctrine.

[27] "A county . . . may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const., art. XI, § 7.

[28] Plaintiffs erroneously claim *Abatti v. Imperial Irrigation District* held the public trust doctrine is "applicable to water districts." Doc. 40 at 42. *Abatti* did not even involve an application of the public trust doctrine; the *Abatti* court's brief reference to the public trust doctrine as a "limit on water rights" played no part in the analysis or outcome of the case. 52 Cal.App.5th at 256.

3. The Water Authority's CEQA Analysis Satisfied Any Public Trust Obligation

Plaintiffs' public trust argument fails for a third reason. As the Court observed in the *2018 Opinion*, a duty to do a public trust analysis "may be discharged through the CEQA process." 287 F. Supp. 3d at 1060 (citing *Baykeeper* at 240-243). Even assuming the public trust doctrine applied to the Water Authority's approval of the environmental analysis in the EIS/EIR, the Water Authority's CEQA analysis satisfied that obligation. The public trust doctrine does not dictate any specific process by which a state agency must take public trust resources "into account." "[E]ven assuming some obligation to 'consider' other public trust uses, neither *National Audubon* nor *Carstens* impress into the public trust doctrine any kind of procedural matrix." *Citizens for E. Shore Parks*, 202 Cal.App.4th at 576. Moreover, "evaluating project impacts within a regulatory scheme like CEQA is sufficient 'consideration' for public trust purposes." *Id*. at 577.

The Water Authority's CEQA Findings of Fact summarize its review and analysis of the pertinent public trust resources, including fisheries, vegetation and wildlife and recreation. CEQA006-33 (CEQA Findings of Fact), 185-198. Specifically, the Water Authority reviewed potential impacts to fisheries, including impacts to reservoir storage, stream flows, watersheds, the Delta and its tributaries, and concluded that any potential impacts were less than significant. CEQA00190-191. The Water Authority similarly reviewed potential impacts to vegetation and wildlife and concluded that, with mitigation, any potential impacts were less than significant. CEQA00191-193. The Water Authority also reviewed potential impacts to recreation, including impacts to surface levels in reservoirs and changes in river flows, and found impacts to be less than significant. CEQA00195-196. Additionally, the CDFW, the state trustee agency for fish and wildlife resources, reviewed the EIS/EIR and provided comment as to potential impacts and mitigation that the Water Authority took into account. CEQA8265-8277. Ultimately, the EIS/EIR concludes there will be no adverse impact to these public trust resources resulting from any eventual transfers within the ranges studied. CEQA006-33 (CEQA Findings of Fact). Because the EIS/EIR analysis showed no impact to public trust resources from any potential future transfers, there was no necessity for the Water Authority to weigh such impacts against the need for water supply provided by transfers.

Plaintiffs argue that CDFW's discussion of biological resources standing alone is an insufficient public trust analysis, ignoring the EIS/EIR's review of other public trust resources described above. While the EIS/EIR does not address waterborne commerce or navigation, there is no conceivable impact of transfers on these public trust uses, and plaintiffs offer none. Doc. 40 at 40:23-43:22; *see Baykeeper*, 242 Cal.App.4th at 232 (public trust resources include "public rights of commerce, navigation, fishery, and recreation"). The potential transfers, which are relatively small in volume, and would result in more water remaining in the river system for a longer distance for diversion south of the Delta, would not adversely impact those uses.

Hence, even assuming the Water Authority had a duty under the public trust doctrine to take the impact of transfers on public trust resources into account, it satisfied that duty through its CEQA review.

4. Plaintiffs' Public Trust Claim Is Barred by Res Judicata

Plaintiffs' public trust claim fails for a fourth reason. It is barred by res judicata. Res judicata bars "not only . . . issues that were actually litigated but also issues that could have been litigated." *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal.App.4th at 1202; *see also Ione Valley*, 33 Cal.App.5th at 171-173. Here, plaintiffs could have, but did not, properly raise their public trust claim in their first action. Hence, their public trust claim in this second action is barred.

As discussed above (*supra*, § III.E), the elements necessary for res judicata are satisfied. There is no question the prior proceeding resulted in a final decision on the merits, and the "parties in the present proceeding or parties in privity with them were parties to the prior proceeding." *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal.App.4th at 1202. The two proceedings involve the same cause of action, because they are based on the same alleged primary right – plaintiffs' right as members of the public to enforce public trust obligations, and the Water Authority's alleged duty to perform a public trust analysis, and plaintiffs' alleged injury from a failure to perform that duty. All that has changed in this proceeding is plaintiffs' legal theory. In the prior proceeding plaintiffs argued the Water Authority had violated CEQA by not performing a public trust analysis. *2018 Opinion*, 287 F. Supp. 3d at 1059. The Court rejected this claim, holding there is no legal requirement that a CEQA document "contain a public trust consistency analysis."

Id. at 1061–1062. Plaintiffs now reassert their claim as "an independent cause of action for violation of the Public Trust Doctrine." Doc. 40 at 43. But they cannot escape res judicata by shifting legal theories. "The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based." *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal.App.4th at 1202. This revised legal theory could have been, but was not, properly raised in the prior litigation. It is now barred by res judicata.

For all of these reasons, plaintiffs' repackaged public trust claim should be rejected.

C. Plaintiffs' ESA Claims Against Reclamation and the USFWS Based on the Number of Years of Transfers Should Be Rejected

The Water Authority defers to the federal defendants' brief for rebuttal of plaintiffs' claims under the federal ESA. There is one contention plaintiffs make in the context of their ESA arguments, however, that is based on a distortion of the scope of the proposed action subject to ESA section 7 consultation that the Water Authority must address. Plaintiffs assert that the agency action analyzed in the 2019 BiOp is not coextensive with the "Project." Doc. 40 at 43:24-44:27. Specifically, plaintiffs argue that the EIS/EIR "authorizes" transfers for every year from 2019-2024, but that the "BiOp analyzes the effect of water transfers occurring in only two of those six years." Doc. 40 at 44:1-2 (emphasis in original). This contention is false.

In describing the proposed transfers, Reclamation's Biological Assessment provides:

> The Proposed Action consists of approval of water transfers to CVP contractors over a 6-year period (2019–2024). These transfers may result from forbearance actions taken by the sellers and may include Base Supply and Project Water from willing sellers located upstream of the Delta. Water transfers in the Proposed Action represent only a portion of the expected overall water transfers in the central valley of California during the 6-year period. The remaining transfers are not dependent on Reclamation's approval; this BA considers these transfers in the context of cumulative impacts.
>
> Under the Proposed Action, up to approximately 250,000 acre-feet of water could be made available for transfer in each water year through groundwater substitution, cropland idling/crop shifting, reservoir releases, or conservation measures (Table 2-1). The total amount of water under consideration for transfer depends on how water is made available (Table 2-2). The totals in Table 2-2 cannot be added together to calculate the maximum amount of water being considered for transfer by year (i.e., 250,000 acre-feet is less than the amount of groundwater substitution transfers and cropland idling/crop shifting

> transfers being considered). Although agencies could make water available through groundwater substitution, cropland idling/shifting, reservoir releases, conservation measures, or a combination of all methods, they would not make the full quantity available through all methods. *In total, transfers will be limited to 250,000 AF per water year for two water years of the program duration.*

FWS 001279-1281 (emphasis added). The 2019 BiOp "evaluates the effects of the proposed program over the remaining six years of the term of the program (2019-2024)." FWS 001462. The 2019 BiOp explains, "Reclamation anticipates the transfer of water in any two years out of the remaining six years of the program (2019-2024). However, if transfers are proposed in more than two years, Reclamation will reinitiate consultation, as necessary. Transfers are subject to approval by Reclamation on an individual basis annually." FWS 001462. The scope of the proposed action is accurately described and appropriately evaluated in the 2019 BiOp.

Plaintiffs cite the original Record of Decision to argue that Reclamation has misrepresented the BiOp as analyzing the impacts of transfers every year in the six year period, and argue the BiOp did not evaluate the appropriate scope of the proposed action. Doc. 40 at 54:1-8. Plaintiffs are well aware that Reclamation issued an amended Record of Decision. Doc. Nos. 39, 39.1, 39.2. The amended Record of Decision states:

> The BiOp found that two years of water transfers involving cropland idling and shifting would not cause jeopardy to the GGS. Without reinitiating section 7 consultation with USFWS concerning the potential effects on the GGS and consistent with the BiOp, Reclamation will not exceed two years of cropland idling and shifting transfers prior to 2024.

SUPP_AR_000011. Further, Reclamation deleted the sentence from the original Record of Decision that could be read to suggest transfers could occur in each of the six years, and replaced it with this statement: "As stated above, consistent with the BiOp, Reclamation will not approve cropland idling and shifting transfers for more than two years prior to 2024 without reinitiating ESA consultation." SUPP_AR_000012.

Plaintiffs' contortions are an attempt to fit this case within the facts of *Natural Resources Defense Council v. Rodgers*, 381 F. Supp. 2d 1212, 1240 (E.D. Cal. 2005). In that case, Reclamation sought consultation with respect to water deliveries, and stated that it was seeking consultation "on

full contract [amounts] for each district." *Id*. at 1239. Despite this explicit request, USFWS evaluated only the effects of water deliveries in amounts similar to historical deliveries, which were far lower that the full contract amounts. *Id*. at 1239-40. The court found that USFWS did not analyze the proper scope of the action. *Id*. at 1240. The court explained, "In this regard, the Bureau candidly related the scope of activity it sought to have authorized, and the FWS simply ignored that request." *Id*.

Here, the proposed action evaluated in the 2019 BiOp mirrors that described by Reclamation in the Biological Assessment. *Compare* FWS 001279-1281 *and* 1462. Reclamation's Biological Assessment explicitly limits cropland idling and shifting transfers to two of the remaining six years of the program. As the amended Record of Decision explains, if cropland idling and shifting transfers are proposed for more than two of the six years, Reclamation will reinitiate consultation. Plaintiffs' attempt to create a claim based on a supposed mismatch between the proposed action and the scope of the analysis in the BiOp should fail.

V. CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied, and the Water Authority's cross-motion for summary judgment should be granted.

DATED: November 12, 2021

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By: */s/ Daniel J. O'Hanlon*
Daniel J. O'Hanlon
Attorneys for Defendant/Respondent,
San Luis & Delta-Mendota Water Authority

DATED: November 12, 2021

PIONEER LAW GROUP, LLP

By: */s/ Andrea A. Matarazzo*
Andrea A. Matarazzo
Attorneys for Defendant/Respondent,
San Luis & Delta-Mendota Water Authority