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

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

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I. ARGUMENT

A. STANDARD OF REVIEW

San Luis Delta Mendota Water Authority ("SLDMWA") misconstrues *Sierra Club v. County of Fresno*, 6 Cal.5th 502 (2018) ("*Sierra Club*") to argue that all of Plaintiffs' CEQA claims are reviewed under the substantial evidence standard. Dkt. 44 at 22:23-23:6. SLDMWA asserts that "if the EIR includes evidence on the issue, then the sufficiency of the analysis is subject to the substantial evidence standard." Dkt. 44 at 23:2-4. However, *Sierra Club* rejected an identical argument asserting a distinction "between claims that a required discussion has been omitted altogether and claims that a required discussion is insufficient, with the former subject to de novo review and the latter subject to substantial evidence review." *Sierra Club, supra*, 6 Cal.5th at 516. Rather, "[t]he ultimate inquiry . . . is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and meaningfully consider the issues raised by the proposed project.' The inquiry presents a mixed question of law and fact. As such, it is generally subject to independent review." *Id*.

B. PLAINTIFFS HAVE STANDING SUFFICIENT FOR SUMMARY JUDGMENT

The Bureau of Reclamation ("BOR") argues Plaintiffs lack standing for their NEPA and ESA claims. BOR's arguments lack merit. In response, Plaintiffs submit the attached declarations supporting Plaintiffs' standing, averring essentially the same interests and injuries that provided standing in *AquAlliance v. Bureau of Reclamation*, 287 F. Supp. 969 (2018) ("*AquAlliance I*"). *See Summers v. Earth Island Inst.*, 555 U.S. 488, 500-501, 508-509 (2009) (standing declarations properly admitted before judgment); *Western Watersheds Project v. BLM*, 971 F. Supp. 2d 957, 968 (E.D. Cal. 2013) (extra-record declarations admissible to support standing).

C. PLAINTIFFS' CLAIMS ARE NOT BARRED BY RES JUDICATA

1. The 2018 *AquAlliance* Court Vacated the Project Under Federal, not State Law.

In *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 880 (E.D. Cal. 2018) ("*AquAlliance I Remedy*"), Judge O'Neill fully vacated, without remand, the 10-year transfer project approvals, the 2015 EIS/R, and the 2015 BiOp, in their entireties. The remedy was issued pursuant to the federal Administrative Procedures Act, 5 U.S.C. section 706(2)(A), and *not* California Public Resources

Code section 21168.9, which the Judgment never cites. *See* Dkt. 45 at 5:18-19, RJN Exh. 14. This fact is fatal to SLDMWA, which bases its arguments almost entirely on CEQA. *See, e.g.* Dkt. 44 at 12-15, 24-26. Unlike the federal default remedy of vacatur without remand (*see AquAlliance I Remedy* at 880), CEQA provides that a state court must issue a peremptory writ of mandate specifying what the agency must do to come into compliance with CEQA, and must retain jurisdiction over a case until compliance is shown. *See* Cal. Pub. Res. Code § 21168.9. Because the *AquAlliance I* court did not employ this state law process, res judicata arguments based on Public Resources Code section 21168.9 are inapplicable.

During the remedy phase in *AquAlliance I*, Defendants jointly argued, "[b]y initiating the action in the forum court, Plaintiffs are asking for the grant of federal remedies. The equitable analysis applicable to vacatur in federal actions is settled, and its application to a joint environmental review process for integrated federal and state agency actions is both the legal and logical course." Plaintiffs' RJN, Exh. 1, Dkt. 76 at 4. As noted, the Court agreed. SLDMWA's contrary argument now, that state law must apply, should be rejected. It is true that Defendants alternatively argued, "[t]he Court's order must include only those mandates necessary to achieve compliance with CEQA." Plaintiffs' RJN, Exhibit 1, Dkt. 76 at 4. The Court complied with that request by vacating the entire document.

This Court recently noted in *Hayes v. Rojas*, 2021 U.S. Dist. LEXIS 222412 at *5, fn. 4 (E.D. Cal. Nov. 17, 2021) that District courts in this Circuit have only applied federal remedy standards in federal question cases with supplemental state law claims, as in this case. *See also*, *In re JPMorgan Chase Derivative Litig.*, 263 F. Supp. 3d 920, 930-31 (E.D. Cal. 2017). To apply res judicata pursuant to state law in this case, where the 2018 remedy sounded purely in federal law, would be "incompatible with federal interests," including fairness and the "integrity of [federal courts'] own processes." *See Semtek Intern Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-509 (2001) .

Guidance is provided by *High Country Conservation Advocates v. U.S. Forest Service*, 333 F. Supp. 3d 1107, 1118-1119 (D. Colo. 2018) ("*High Country II*") (remanded on other grounds in *High Country Conservation Advocates v. U.S. Forest Service,* 951 F.3d 1217 (10th Cir. 2020)); *see also Bowman v. City of Berkeley*, 122 Cal. App. 4th 572, 591 (2004) (NEPA cases persuasive for CEQA). *High Country II* involved challenges to a federal agency lease modification allowing coal mining in a

national forest. *High Country II* at 1113. In *High Country I* the court had vacated the lease approvals and did not remand any issues for reconsideration. *High Country II* at 1114. The federal agency later issued new NEPA documents for the project, and Plaintiffs again challenged the decision. *Id.* at 1116. The Court noted that "[t]he newly issued SFEIS and lease modifications were 'supplemental' administrative actions only in the sense that they incorporated by reference substantial information from earlier, vacated administrative actions." The court therefore held that "plaintiffs are not barred by res judicata from proposing new alternatives or considered to have waived arguments not raised in prior administrative proceedings." *Id.* at 1119. Here, as in *High Country II*, the EIR was fully vacated, and the 2019 EIS/R was circulated for a new project not covered by res judicata.

SLDMWA's res judicata arguments rely primarily on one state case, *Ione Valley Land, Air, & Water Defense Alliance, LLC v. Cnty. of Amador* 33 Cal. App. 5th 165 (2019) ("*Ione*") which is readily distinguishable. *Ione* involved an EIR to a quarry project, which was challenged by writ petition resulting in a *partial* recirculation of the EIR to fix two issues. *Ione* at 169. The partially recirculated EIR was again challenged, and the court found that the objections to non-traffic related issues were barred by res judicata because they "were litigated and resolved, or could have been litigated and resolved, in connection with the first petition, and the writ of mandate did not require the County to revisit issues other than traffic impacts." *Id.* at 170. Here, unlike in *Ione*, the EIR was *not* ordered to be partially recirculated. *See AquAlliance I Remedy* at 880-4 Dkt. 45 at 5:18-19, RJN Exh. 14. SLDMWA's authorities all followed the procedures dictated by Public Resources Code section 21168.9, unlike *AquAlliance I*. *See*, *Sierra Club*, 57 Cal. App. 5th at 986 (court retained jurisdiction over EIR cure); *King & Gardiner Farms, LLC v. Cnty. of Kern,* 45 Cal. App. 5th 814, 895-96 (2020) (order specifying steps for recirculation); *Nelson v. Cnty. of Kern*, 190 Cal. App. 4th 252, 285 (2010) (same).

2. Background Conditions and Key Aspects of the Proposed Project Have Changed.

Under the Federal standard, res judicata applies only where "(1) the same parties, or their privies, were involved in the prior litigation, (2) the prior litigation involved the same claim or cause of action as the later suit, and (3) the prior litigation was terminated by a final judgment on the merits." *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 (9th Cir. 2002) ("*CDWA*") (citations omitted);

see also, *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) ("Under both California and federal law, collateral estoppel applies only where it is established that (1) the issue necessarily decided at the previous proceeding *is identical* to the one which is sought to be relitigated . . .") (emphasis added). To determine whether two lawsuits involve the same claims, the factor "most important is 'whether the two suits arise out of the same transactional nucleus of facts.'" *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398 (9th Cir. 1992) (cites omitted). Here, "we must narrowly construe the scope of that earlier action." *CDWA*, *supra*, 306 F.3d at 953. "[T]he issues litigated must not be 'merely similar,' but must be 'identical.'" *Id.*, citing *Fund For Animals,* 962 F.2d at 1399. The facts here differ from *AquAlliance I*, including a new project scope and participants, a significantly revised EIS/R, new public and scientific comments on climate change, a historic drought, regulatory changes, and new historically low groundwater levels that serve as the new Project threshold of significance.

a. The 2019 Project Itself Differs from the 2015 Project.

Here, the basic facts of the 2019 EIS/R changed so fundamentally from the 2015 LTWT EIS/R that the claims at issue here arise out of a different "nucleus of facts." First, the 2019 EIS/R increased sellers and seller service areas compared to the 2015 project. *Compare* CEQA 14634 to CEQA 5292. SLDMWA admits these facts. *See e.g.*, Dkt. 44 at 28-29. Second, the project timeframe changed from ten years to six years. SLDMWA argues that the timeframe in the EIS/R stayed the same as years 2015-2024, but this ignores the fact that the 2015 EIS/R was fully vacated, rendering the 2019 EIS/R a six-year project. *See* Dkt. 44 at 30, fn. 10. Third, the potential quantity of water at issue changed, with the 2015 LTWT upper limit of 600,000 or 360,000 acre-feet ("AF") per year changed to 713,000 AF per year in the 2019 EIR/R. CEQA13717, 565. SLDMWA's brief does attempt to refute the 713,000 AF upper limit, instead arguing generally that the alleged 250,000 AF cap will apply. *See* Dkt. 44 at 27-29.

In *CDWA* the Ninth Circuit found analogous changes fatal to res judicata. There, no res judicata existed where a second lawsuit involved a different source of water, a different management plan, and changed amounts of water. *See CDWA* at 952-953. Collateral estoppel arguments were also denied because the timeframe between the projects was different, with a previous challenge of 1995-97, versus the second case involving a plan adopted in 1999. *Id.* at 953. Here too the "nucleus of facts" is distinctly

different from *AquAlliance I*, with different sources of water, different amounts of water, under a different timeline, in background conditions significantly changed from the earlier iteration. Thus, there was no way for Plaintiffs to have addressed these changes in the prior action. As this Court must "narrowly construe" the scope of the earlier action, the changed facts defeat any res judicata arguments. *Id.* Similarly, collateral estoppel could not apply because the issues litigated are not identical. *Id.* SLDMWA's citations to authority are all distinguishable. Dkt. 44 at 25-26. *See*, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077-81 (9th Cir. 2003) (five lawsuits over same Tahoe regional plan, no vacatur of original plan); *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc*., 298 F.3d 1137, 1142-1143 (9th Cir. 2002) (bankruptcy dispute, no environmental plan vacatur); *Mycogen Corp. v. Monsanto Co*., 28 Cal.4th 888, 896 (2002), *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal.App.4th 1180, 1202 (2004), and *Cnty. of Los Angeles v. Cnty. of Los Angeles Assessment Appeals Bd*., 13 Cal.App.4th 102, 108 (1993) (inapplicable state standards).

b. The Environmental Conditions Affected by the 2019 Project Changed.

Between 2015-2019 the environmental conditions surrounding the Project were far from "identical." These include a historic drought that significantly reduced historic low groundwater levels that now serve as the threshold of significance under the new Project. *See* CEQA010912. These changes directly led to thirty "temporary change orders" issued by the State Water Board that permitted BOR and the California Department of Water Resources to cause water quality in the Sacramento River and Bay-Delta to fall below standards set forth in applicable Basin Plans and permits, which standards were assumed to be in place by the 2015 EIS/R. *See* CEQA014232-14233, 014235. Defendants and public commenters noted significant new climate change information and modeling. For example, Plaintiffs' comments on the RDEIS/SDEIS pointed out important new studies on the environmental effects of climate change released in 2018, including California's Fourth Climate Change Assessment issued in 2018 and a joint study California Office of Environmental Health Hazard Assessment and California EPA. CEQA10917-10920. These studies found that California was experiencing rising temperatures, a pattern of increasing dryness, more extreme weather, and decreases in Sierra snowpack and runoff among other changes directly germane to the Project and its effects. *See id.* These significantly changed

conditions in which the Project would occur make res judicata inapplicable. *See, e.g., Levi Strauss & Co. v. Blue Bell*, 778 F.2d 1352, 1356 (9th Cir. 1985) ("If different facts are in issue in a second case from those that were litigated in the first case, then the parties are not collaterally estopped . . . ").

c. The 2019 EIS/R Changed Significantly from the 2015 EIS/R.

SLDMWA asserts that Plaintiffs are barred from challenging Mitigation Measure GW-1. *See* Dkt. 44 at 36:16-38:9, 42:18-23. This argument fails since SLDMWA admits they changed Mitigation Measure GW-1 in the RDEIR in response to the *2018 Opinion*. *See e.g.*, Dkt. 44 at 37:3-20. Defendants argue that Plaintiffs are barred from arguments regarding historic lows as performance standards. Dkt. 44 at 42:18-24. Defendants mischaracterize these arguments as the same as in *AquAlliance I*. Critically, between 2015 and 2019, regional groundwater levels hit new, lower, historical lows than those considered in 2015. *See*, *e.g.*, Dkt. 40 at 39, fn. 9; CEQA6552. The threshold of significance therefore changed and the pending case arises based on new facts. *See*, *e.g.* Dkt. 40 at 12:27-13:4; CEQA010912.

Defendants further argue that "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." *See* Dkt. 44 at 44:2-4, 5-18, 33, fn. 23. Again, in addition to changed environmental conditions, the EIR itself significantly revised its climate change sections, in part in response to the Court's Order in *AquAlliance I*. *See, e.g.* CEQA509-510 ("The RDEIR/SDEIS replaced the following sections of the 2014 Draft EIS/EIR […] Climate Change: added impact analysis to describe potential impacts of climate change on the project.")

D. VIOLATIONS OF CEQA AND NEPA

1. <u>The EIS/R's Arbitrary 250,000 Acre-Foot Limitation Violates Both CEQA and NEPA.</u>

a. The project description is unstable and inaccurate in violation of CEQA and NEPA.

BOR and SLDMWA both respond to this argument in their respective briefs. Dkt. 43-1 at 18:12-20:3 [BOR], Dkt. 44 at 27:8 – 31:10 [SLDMWA]. BOR does not dispute applicable law cited by Plaintiffs, instead arguing, "[t]ransfers not subject to [BOR's] approval are not within the scope of the Project." Dkt. 43-1 at 19:9-10. BOR provides no citation for this assertion, which is false. BOR's Record of Decision ("ROD") refutes BOR's claim that the EIS/R's analysis is limited to "transfers

through CVP facilities," providing: "The EIS/EIR analyzed potential transfers to CVP contractors. *These potential transfers could be conveyed through the Delta using either CVP or SWP facilities*, depending on availability." BOR14081 (emphasis added). BOR further admits the resulting prejudice: "[T]ransfers that occur without any involvement of Reclamation are not part of the 250,000 acre-foot limitation on transfers occurring under the Project." Dkt. 43-1 at 19:13-15. Thus, BOR's brief expressly acknowledges that the scope of the Project includes water transfers which the BOR would ignore and not count toward a 250,000 AF limitation. This sleight of hand violates NEPA and CEQA. *N. Alaska Envtl. Ctr. v. United States DOI, Bureau of Land Mgmt.*, 983 F.3d 1077, 1092 (9th Cir. 2020) (NEPA review demands "an accurate description of the [agency's] proposed action"); 40 C.F.R. § 1502.10 (EIS must "encourage good analysis and clear presentation of the alternatives including the proposed action"); *Cty. of Inyo v. City of L.A.*, 71 Cal.App.3d 185, 192 (1977) ("[a]n accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient EIR").

SLDMWA relies on an internal meeting agenda from April 2018 to argue the EIS/R does not rely on the reduced 250,000 AF transfer limit to minimize project impacts. Dkt. 44 at 28:11–18. While SLDMWA correctly quotes from this unexplained statement from a "kickoff meeting summary," the later EIS/R plainly relied on the reduced transfer limit to minimize GHG emissions, explaining in relevant part, "The following parameters were applied to transfer water supplies to simulate climate change . . . Demands were also constrained by the upper limit of 250,000 acre-feet." CEQA782.

SLDMWA repeats its argument that res judicata prevents Plaintiffs from challenging enforceability of the 250,000 AF transfer limit. The Court did not, and logically could not, consider whether the later-developed 250,000 AF transfer limit was enforceable.

SLDMWA offers string citations supporting its argument that CEQA projects may evolve or reduce in scope prior to project approval. Dkt. 44 at 30:3–31:1. These cases are irrelevant here, where an earlier project was vacated and abandoned in favor of a new project that is proposed and approved based on a new EIS/R. *See also* Dkt. 43-1 at 35:11 (BOR describes project as "different action").

In sum, the Project includes water transfers that do not count toward the 250,000 limit, yet the EIS/R relies on the 250,000 limit to minimize environmental effects in violation of NEPA and CEQA.

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

Plaintiffs' opening brief explains that the 250,000 acre-foot transfer limit violates CEQA whether considered an element of the project description or a mitigation measure. *See*, *Lotus v. Dep't of Transp.*, 223 Cal.App.4th 645, 656, n. 8 (2014). SLDMWA argues that "a reduced scope of the project is not mitigation." Dkt. 44 at 31:15-16. First, CEQA Guidelines sections 15124(c) and 15378(c) do not provide, as SLDMWA claims, that "elements that establish the characteristics of the project itself are not mitigation measures." SLDMWA fails to address CEQA Guidelines section 15126.4(a)(2), cited in Plaintiffs' opening brief, which defines mitigation measures as including "measures which are proposed by the project proponents to be included in the project." Dkt. 40 at 20:24–21:6. While that subdivision also explains, "Mitigation measures be incorporated into the plan, policy, regulation, or project design," they must nevertheless be "fully enforceable through permit conditions, agreements, or other legally binding instruments." *Id.* The relevant issue is not whether mitigation is set forth in the mitigation monitoring and reporting plan or incorporated into a project description, but whether it is "fully enforceable" in documentation that exits outside of the CEQA document. SLDMWA cites several legal authorities it claims establish that an EIR's project description alone constitutes adequate enforceability. Dkt. 44 at 32:22–33:27. SLDMWA's reliance on *Envtl. Council of Sacramento v. City of Sacramento* 142 Cal.App.4th 1018 (2006) is misplaced because that decision addresses future "baseline assumptions" and not, as here, whether a lead agency may disregard limitations on project intensity set forth only in an EIR's project description. SLDMWA cites Public Resources Code section 21081.6(b) to state, "the agency makes restrictions and limitations enforceable by incorporating them into the project design" (Dkt. 44 at 33:4-5), but SLDMWA fails to identify any "plan, policy, regulation, or project design" incorporating the 250,000 AF restriction. *See*, *e.g.* CEQA5-9 (resolution adopting project).

SLDMWA's other cited cases highlight the lack of adequate enforceability here. In *Ctr. for Biological Diversity v. Cnty. of San Bernardino*, 247 Cal.App.4th 326, 350–351 (2016), the court considered petitioner's argument that "average annual groundwater withdrawal in excess of 50,000 acre-feet is reasonably foreseeable and indeed anticipated." The court engaged in a fact-based analysis, and found that the increased excess was not a concern because "the 105,000 acre-feet capacity is only

reached when two pipelines are in use," and further, "the Plan, which was referenced in the 2012 Memorandum and the water purchase and sale agreement, specifically states the average and maximum annual withdrawal rates of 50,000 acre-feet and 75,000 acre-feet, respectively." *Id*. SLDMWA cannot identify any such technical or legal prohibitions on third party agencies purporting to transfer water in excess of 250,000 AF per year in reliance on the EIS/R.

Similarly, SLDMWA cites to *Covington v. Great Basin Unified Air Pollution Control Dist*., 43 Cal.App.5th 867, 874 (2019) to argue that an "agency may presume that restrictions and limitations incorporated in project approvals will be followed." Dkt. 44 at 33:2-4. In *Covington*, the petitioner argued that substantial evidence did not support the EIR's air emissions conclusions. The court found that how the EIR calculated air emissions was immaterial because "the project must comply with the permit to operate, which limits the emissions of n-pentane to 410 pounds per day." Here, SLDMWA is unable to identify any similar binding agreement or permit imposing the 250,000 AF limitation on water transfers. Rather than identify any such document, SLDMWA points to BOR, stating, "Reclamation will enforce it during its review of future transfer proposals" based on *Citizens Opposing a Dangerous Env't. v. Cnty. of Kern* 228 Cal.App.4th 360, 383 (2014) ("*CODE"*). Dkt. 44 at 33:18. This is unavailing. Addressing petitioner's claim that mitigation for aviation safety was not enforceable, the *CODE* court disagreed with petitioners, identifying a specific regulatory process, and indeed a specific approval process, addressing the enforceability concern. *CODE, supra*, 228 Cal.App.4th at 383. The same is not true here. SLDMWA's record citations provide no similar process by BOR ensuring enforceability of the 250,000 AF transfer limit. Dkt. 44 at 33:15-16. To the contrary, BOR's separate brief makes clear that BOR would ignore Project transfers approved by DWR, taking the legal position that such transfers "are not part of the 250,000 acre-foot limitation on transfers occurring under the Project." Dkt. 43-1 at 19:14. SLDMWA provides no authority supporting this under CEQA.

2. The EIS/R is Inadequate as a CEQA Informational Document.

The EIR fails as an informational document because the Lead Agencies failed to circulate an entire EIR, and the EIR is not "organized and written in a manner that will make [it] meaningful and useful to decision-makers and the public." Cal. Pub. Res. Code § 21003(b); Guidelines § 15088.5(a).

As discussed in detail in Sections I.C and I.D.2, *supra*, SLDMWA's argument that vacatur of the 2015 EIS/R did not require circulation of a new EIR is misplaced. In 2018, the Defendants jointly argued that the EIS/R should not be vacated in full, but instead that the specific deficiencies identified by the Court should have been "promptly addressed in the supplemental analysis and documentation that the agencies intend to complete . . . ." Dkt. 76 at 5; *see also id.* at 6 (arguing "[t]he identified errors in the environmental documents are discrete and readily corrected."). The Court disagreed, and rather than ordering a partial supplemental analysis, as Defendants requested, the Court vacated the EIS/R in full. *cf. Washoe Meadows Cnty. v. Dept. of Parks & Recreation*, 17 Cal.App.5th 277, 289-90 (full vacatur of EIR required where violations were "obstacle to informed public participation").

It is unsurprising, then, that Defendants' decision to nonetheless circulate only a partial EIS/R resulted in an incomplete and incomprehensible environmental document. As demonstrated in Plaintiffs' opening brief, and only confirmed by Defendants' opposition, here the public was presented with a disjointed, convoluted, and informationally inadequate EIR. *See*, Dkt. 44 at 35:10-36:15. In order to consider "the entire document" so as to "understand the EIR as a whole," as SLDMWA advocates, decision makers are required to review portions of the 2014 DEIS/R, revised portions of the 2014 DEIS/R as presented in the vacated 2015 FEIS/R, stand-alone sections from the 2015 FEIS/R that were recirculated in the 2019 RDEIS/R, and further revisions presented in Exhibits Q, R, and S to the 2019 FEIS/R. Dkt. 44 at 35:5-6. CEQA requires that an EIR should "be organized and written in a manner that will make [it] meaningful and useful to decision-makers and to the public." Cal. Pub. Res. Code § 21003(b). The 2019 RDEIS/R failed this mandate. *See also*, *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal. 5th 918, 941 (2017), quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412* ,442 (2007) ("Information scattered here and there in EIR appendices" is not a substitute for "a good faith reasoned analysis.").

Even assuming, *arguendo*, that SLDMWA was not required to circulate a complete EIR after vacatur, as SLDMWA's motion argues, it was required to recirculate the sections to which "significant new information" was added. Guidelines § 15088.5(a). Plaintiffs' Motion set forth in detail the significant new information added to the RDEIR, which necessitated recirculation of the supplemented or revised sections. Dkt. 40 at 24:2-24. SLDMWA, however, ignores this argument and instead simply

sets forth the rule articulated in Guidelines Section 15088.5 with no accompanying analysis. Dkt. 44 at 34:19-35:2. Rather than repeat arguments already made but disregarded by SLDMWA concerning the significance of the information added, Plaintiffs direct the Court to the discussion in its Motion. Dkt. 40 at 24:1-24. Further, SLDMWA's repeated assertions that the revisions to the EIR are confined "to the three identified areas of deficiency" by the District Court, thus limiting the scope of required recirculation, are belied by BOR's Opposition: "[t]he agencies also changed several aspects of the LTWT project; notably, they reduced the length of the LTWT project from ten to six years and reduced the annual maximum quantity of water that could be transferred . . . . the agencies *also made numerous revisions to many of the previous EIS's sections*, such as those addressing water quality, groundwater resources, climate change, fisheries, and vegetation and wildlife." Dkt. 44 at 19:12-13; *see also* 18:17-18; 18:22-23; Dkt. 43-1 at 12:25-27; 13:16-21 (emphasis added). SLDMWA's failure to circulate the sections to which significant new information was added violates CEQA. *Vineyard*, 40 Cal.4th at 449 (where a new potentially significant impact has not yet been addressed, the agency's determination rejecting recirculation was not supported by substantial evidence).

3. The EIS/R is Inadequate as a NEPA Informational Document.

BOR's reliance on *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) is baseless. There, the government "did not argue waiver but instead . . . incorporat[ed] by reference the argument contained in its brief to the Board on the first appeal," and so the argument was waived. *Ibid*. Here, Plaintiffs do not "incorporate by reference" at all, instead referring to an earlier recitation of the record to eliminate duplication in the brief. *See* Dkt. 40 at 25:9. BOR's citation to 40 C.F.R. § 1502.9(d) for authority to prepare "supplements to either draft or final environmental impact statements" is inapposite. Dkt. 43-1, 20:21. That citation does not authorize, as here, partial supplemental draft and final supplemental EIS's that suffer from the organizational deficiencies described in Plaintiffs' opening brief and are otherwise unaddressed in BOR's opposition. Compare Dkt. 40 at 23:10-24:20 and Dkt. 43-1 at 20:23-27.

4. The EIS/R's Analysis and Mitigation of Groundwater Pumping Impacts Violates CEQA.

SLDMWA ignored the arguments set forth in Plaintiffs' Motion demonstrating that the FEIR lacks sufficient analysis or mitigation to support the conclusion that groundwater substitution transfer impacts will be less than significant. Instead, the Opposition asserts that because Mitigation Measure

GW-1 ("GW-1") was "revised to close the gaps identified in the 2018 Opinion, [it] avoids potentially significant impacts from groundwater level declines such as impacts to other legal users of water, land subsidence, [and] vegetation . . . ." Dkt. 44 at 42:13-16. Convinced these revisions satisfy *all* duties imposed under CEQA, SLDMWA discusses in vague generalities the reasons why the FEIR is purportedly sufficient, and fails to substantively address, let alone refute, Plaintiffs' contentions.

a. The SLDMWA Violated CEQA by Ignoring Comments by Mr. Custis.

The FEIR asserts the Project will not have a significant adverse impact on shallow-rooted groundwater dependent ecosystems ("GDEs") because (1) there are very few areas in the Seller transfer area where depth to groundwater is less than 15 feet; (2) of these areas, GDEs are present only in a "few locations in the North Delta associated with wetlands;" and (3) modeling has been conducted in these locations showing that groundwater drawdown will be de minimis. CEQA 7358, 5602. Plaintiffs' Motion set forth evidence presented in expert Kit Custis' comments directly contravening these assertions. Dkt. 40 at 28:6-23. Exhibits submitted by Mr. Custis demonstrate there are large portions of the Seller transfer area where (1) depth to groundwater is less than 10 feet; (2) GDEs are present; and (3) groundwater modeling has not been conducted to determine whether the anticipated groundwater drawdown will be minimal, therefore avoiding significant impacts to GDEs. Dkt. 40 at 28:6-29:3; 29:14-25. The FEIR fails to even acknowledge this issue. Despite SLDMWA's string citations in support of its contention that concerns regarding GDEs were sufficiently addressed, in response to the *specific concern* described above and articulated by Mr. Custis in Comment 9-201, the Response states, "Please refer to Response to Comment 9-200," summarizes that response, and ignores the evidence presented. CEQA 8247-48. The FEIR fails to respond to the concern set forth in Comment 9-201. *Id*.

Because the SLDMWA cannot direct the Court to an FEIR response to this comment, the Opposition fails to address the substantive issues raised therein and instead simply contends it is entitled to ignore expert comments, asserting that "[t]he EIS/EIR's conclusions are grounded in expert opinion and supporting data, and therefore are supported by substantial evidence. CEQA requires nothing more." Dkt. 44 at 39:9-12 (internal citations omitted). In support, Defendants cite to CEQA Guideline section 15151 for the proposition that "disagreements among experts do not invalidate an EIR." *Id*. at 39:12. However, SLDMWA omits a critical portion of the Guidelines section. The cited sentence reads in full, "Disagreement among experts does not make an EIR inadequate, *but the EIR should summarize the*

main points of disagreement among the experts." *Id*. (emphasis added). Case law elucidates this requirement, explaining that the EIR must also *"explain the agency's reasons for accepting one set of judgments instead of another*." *Ass'n of Irritated Residents v. Cnty. of Madera* 107 Cal.App.4th 1383, 1391 (2003) (emphasis added). Defendants failed to respond to the serious concern raised by Mr. Custis regarding the accuracy of the basic facts and analysis relied upon by SLDMWA. *See, e.g.*, *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal.App.4th 1099, 1106 (2004) ("[W]hen an agency fails to proceed as required by CEQA, harmless error analysis is in applicable."). SLDMWA was required to summarize the points of disagreement between its own experts and Mr. Custis, and explain why it chose not to accept the evidence offered. This procedural requirement serves as an additional basis for de novo review of this claim. *Sierra Club, supra*, 6 Cal.5th at 512.

Further, SLDMWA's characterization of the discrepancy in evidence as merely a "disagreement" among experts, as well as its argument that a "lead agency need not conduct every recommended test or perform all requested research," is a disingenuous attempt to minimize the severity of the omitted analysis. Dkt. 44 at 39:12-14. SLDMWA failed to address an expert comment presenting evidence from a California state agency demonstrating that the foundational facts upon which the SLDMWA made a finding of no significant impact to GDEs was simply incomplete and inaccurate. Case law is clear that

> The requirement that the [Lead Agency] spell out its differences" with experts "'helps ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. Where comments from responsible experts [] disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project . . . these comments may not simply be ignored. *There must be good faith, reasoned analysis in response*.'

Banning Ranch Conservancy, supra, 2 Cal.5th at 940-41, quoting *People v. County of Kern* 39 Cal.App.3d 830, 841-42 (1974) (cites omitted) (emphasis original). SLDMWA's refusal to do so also results in a separate violation of CEQA due to the EIR's failure as an informational document. *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus*, 27 Cal.App.4th 713, 728-9 (1994) ("Without accurate and complete information pertaining to the setting of the project . . . it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the [] project.") The SLDMWA's "failure to provide clear and definite analysis of the location, extent and character of wetlands," and other areas with shallow-rooted GDEs, "possibly within [the project] precludes th[e] court from concluding that all the environmental impacts of the [project] were identified and analyzed in

the FEIR." *Id*. "The misleading nature of the discussion and the failure to include relevant evidence renders the EIR inadequate as an informational document." *Id*., quoting *Kings Cnty. Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 718 (1990).

b. SLDMWA Failed to Analyze Effects to GDEs Along Rivers and Creeks.

Defendants assert the Proposed Action will not have a significant adverse effect on shallow-rooted GDEs because "groundwater modeling results indicate that shallow groundwater is typically deeper than 15 feet in most locations under existing conditions," which "is substantially below the rooting depth of typical vegetation associated with upland communities." CEQA7358. However, in addition to the "few locations in the North Delta" discussed above, the FEIR acknowledges that "groundwater levels are likely to be less than 15 feet below ground surface along rivers and creeks and terrestrial vegetation in these areas could be affected by changes in the groundwater and surface water interactions." CEQA5602-3. Analysis of the identified potential impacts to GDEs in these areas is required to determine whether significant impacts will occur, and if so, to mitigate them. *San Joaquin Raptor Rescue Center v. Cnty. of Merced*, 149 Cal.App.4th 645, 660 (2007); Guidelines §15126.2(a).

The FEIR is devoid of such analysis. Plaintiffs' Motion extensively detailed the import of the omitted discussion. Dkt. 40 at 30:9-32:13. SLDMWA chose not to address this argument in its Opposition, instead opting for extremely general assertions as to the overall sufficiency of the analysis of groundwater substitution transfer impacts. Dkt. 44 at 38:10-22. Because SLDMWA failed to include any discussion of this issue, it has waived the right to do so on reply. *See, e.g.*, *Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived"). A review of every record citation in SLDMWA's Opposition section IV(A)(3)(a) reveals that effects to shallow-rooted GDEs along rivers and creeks where depth to groundwater is likely to be 15 feet or less *is never discussed*. Dkt. 44 at 37:24-40:11. This renders the FEIR insufficient as an informational document. Alternatively, the finding of no significant impact to GDEs is unsupported by substantial evidence.

c. GW-1 Does Not Prevent Significant Impacts to GDEs.

Plaintiffs' Motion detailed the numerous ways in which GW-1 is insufficient to prevent significant effects to GDEs, but SLDMWA failed to substantively refute these contentions. Dkt. 40 at 32:26-33:10; Dkt. 44 at 38:10-40:11. SLDMWA proffers highly generalized assertions, such as, "[p]otential 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." Dkt. 44 at 38:19-22. In support, Defendant cites to Appendix P, "Methods for Assessing Impacts on Natural Communities and Special-Status Plants and Wildlife." *Id*. at 38:22-24. The Lead Agencies also cite to Appendix P repeatedly in responses to comments raising concerns about effects on shallow-rooted GDEs, including in Response to Comment 9-200, which SLDMWA contends "explain[s] the methodology and rationale supporting its determination" that GDEs will not suffer significant adverse effects. Dkt. 44 at 38:25-39:1; *see, e.g.*, CEQA 8246, 8269, 8271. However, the discussion in Appendix P regarding effects of groundwater substitution transfers on natural communities is a single page, and the discussion of effects to shallow-rooted GDEs is shorter still, and confirms that groundwater "could be much shallower" than 15 feet in wetland and riparian habitats. CEQA 7358. The discussion does assert, without evidence, that "faster recharge of groundwater" occurs in riparian systems (where less permeable soils actually create wetlands and prevent recharge), but this is insufficient to address all of the GDEs potentially affected by the Project. *See*, Dkt. 40 at 28:6-29:3; 29:14-25.

A review of all relevant FEIR excerpts cited in the Opposition reveals the substantial analytical gap by the Lead Agencies in reaching the conclusion that impacts to shallow-rooted GDEs will be less than significant. The repeated refrain is that "[b]ecause groundwater modeling shows that shallow groundwater levels are more than 15 feet below ground surface in most locations that could be affected by groundwater substitution, potential impacts on natural communities are expected to be less than significant." CEQA5623; *see also* CEQA140, 7358, 8117, 8267 (all iterations of same). This statement is generally followed by the contention that "GW-1 [] would further minimize potential impacts to natural communities in areas where existing groundwater depths are less than 15 feet below ground surface." CEQA5623; *see also* CEQA0138, 8117. However, these contentions ignore the FEIR's own admission that groundwater depths are less than 15 feet below ground surface: (1) by rivers and streams; (2) in "a few locations in the North Delta;" and (3) in eight of ten Appendix F shallow well hydrographs. Dkt. 40 at 28:24-28. These assertions also ignore the evidence presented by Mr. Custis that large portions of the Seller transfer area have a depth to groundwater of less than 15 feet. *Id.* at 28:9-20. And, as explicitly stated in the FEIR, *GW-1 does not require monitoring or mitigation for shallow-rooted groundwater dependent ecosystems or vegetation*, rendering GW-1 inapplicable. CEQA 10157-58

("[S]ellers will monitor groundwater level data to verify that significant adverse effects to deep-rooted vegetation are avoided. This monitoring is only required in areas with deep-rooted vegetation" and "is not required in areas with no deep-rooted vegetation . . . .").

Finally, SLDMWA takes care to note that after responding to CDFW's highly critical comments on the DEIR regarding GW-1 and, *inter alia*, "the potential for habitat and species loss [to] be significant if the monitoring and mitigation requirements are not strengthened," CDFW did not further comment on the FEIR, purportedly "indicating its concerns were addressed." CEQA 8270; Dkt. 44 at 39:17-40:2. In support, SLDMWA cites *Citizens for East Shore Parks v. State Lands Comm.*, 202 Cal.App.4th 549 (2011). There, while Plaintiffs asserted the Lead Agency failed to "consult" with trustee agencies about the Project, the Lead Agency had sent notice and a copy of the DEIR to both trustee agencies, requesting comments within 45 days, to which neither trustee agency responded. *Id*. at 568. The court in that case cited CEQA Guidelines § 15207 for the proposition that if "any public agency or person who is consulted with regard to an EIR . . . fails to comment . . . it shall be assumed . . . that such agency or person has no comment to make." *Id*. at 568. Here, the CDFW commented extensively on the DEIR and was not "consulted with regard to" the FEIR, rendering *Citizens* factually distinct and therefore inapposite. Moreover, SLDMWA made no changes to GW-1 in response to CDFW's comments, raising the question of how its concerns that GW-1 "allow[s] for habitat degradation . . . to go unnoticed and unmitigated until species loss has already occurred" could have been addressed. CEQA 8270. SLDMWA goes on to attempt to diminish the significance of the concerns articulated by CDFW, stating that "[c]omments from a responsible agency are not dispositive on a given issue, and the lead agency may reject criticism from an expert or regulatory agency . . . ." Dkt. 44 at 40:26-28. In so doing, SLDMWA endeavors to use CDFW's comments as both a sword and a shield, arguing on the one hand that they are immaterial for purposes of determining whether GW-1 effectively mitigates significant impacts to GDEs, and on the other that they are so meaningful as to fulfill SLDMWA's obligation to consider the public trust. Dkt. 44 at 53:22-24; CEQA8146.

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

Rather than address the issues identified by Plaintiffs regarding the ways in which GSW-1 fails to avoid significant impacts to third parties, SLDMWA copies and pastes GW-1 language from the FEIR and asserts that because such revisions purportedly address the issues identified by the *AquAlliance*

Court, GW-1 de facto "avoids potentially significant impacts from groundwater level declines such as impacts to other legal users of water [and] land subsidence." Dkt. 44 at 42:13-16. However, recirculated Section 3.3 discussing GW-1 it is not insulated from challenge. *See*, *e.g.*, Guidelines § 15088.5; Cal. Pub. Res. Code § 21092.1. The only argument made by Plaintiffs and addressed by SLDMWA concerns the use of historic low groundwater levels "as performance standards to avoid impacts in areas where quantitative BMOs do not exist," with SLDMWA asserting that the "[u]se of historic groundwater levels in areas without quantitative BMOs is consistent with the approach for areas with quantitative BMOs . . ." Dkt. 44 at 42:19-20, 43:2-3. However, Plaintiffs' primary point of contention regarding the use of historic low groundwater levels to mitigate impacts to third parties is that "historic low groundwater levels cannot be used as a reliable threshold" to prevent subsidence because transfer sellers can use new historic low groundwater levels each year if the previous low is exceeded by a cumulative project. Dkt. 40 at 34:27-35:10. As discussed in more detail in below, Defendants have *never* refuted this assertion, including in the Oppositions, and instead continually avoid the issue. Dkt. 44 at 42:24-43:8. In so doing, SLDMWA implicitly confirms that new historic lows can, in fact, be utilized each year.

SLDMWA fails to discuss many concerns Plaintiffs raise regarding impacts to third parties, including, *inter alia*, the failure of GW-1 to (1) include specific requirements that would ensure timely detection of land subsidence and impacts to third parties; (2) ensure third parties will be compensated for land subsidence damages, including identification of procedures to make a claim; (3) provide specific procedures for calculating the increases in costs of pumping or costs of infrastructure modifications; and (4) identify monitoring and mitigation actions that would prevent wells from going dry. Dkt. 40 at 34:17-37:17. SLDMWA cannot address these arguments on reply. *Bazuaye*, *supra*, 79 F.3d at 120.

In sum, GW-1 violates CEQA because it is not "feasible or effective in remedying the potentially significant problem" it addresses. *Gray v. Cnty. of Madera*, 167 Cal.App.4th 1099, 1116 (2008).

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

SLDMWA relegates its discussion of cumulative project impacts on groundwater resources to a footnote, contending that the "EIS/EIR responded to plaintiffs' concerns" regarding the ability for new historically low groundwater levels to become the baseline each year "and noted the portions of the analysis that addressed them," citing CEQA8178, containing Response 9-88. Dkt. 44 at 43:24-26. However, the record demonstrates that the FEIR plainly failed to respond to this concern. *Compare*,

CEQA8182 (stating, among other things, that "GW-1 is premised only upon maintaining groundwater levels at or below historically low groundwater levels, but admits that as historical groundwater levels lower still, GW-1 will simply incorporate the new historically low groundwater level as a baseline"), with Response to Comment 9-88, stating that "[u]nder Mitigation Measure GW-1, transfer-related pumping would be halted if historic low groundwater levels are reached and transfer-related pumping would not continue below historic low groundwater levels." CEQA8178. This response fails to refute or consider that new historic lows were reached following the 2015 EIS/R, causing cumulatively considerable effects, or that transfer pumping, in conjunction with other groundwater pumping, can cumulatively contribute to new historic lows that would then become the new threshold of significance.

Plaintiffs raised additional cumulative impact arguments (Dkt. 40 at 37:18-40:19) that SLDMWA has failed to refute and thereby waived. *Bazuaye*, *supra*, 79 F.3d at 120.

7. The EIS/R's Analysis and Mitigation of Groundwater Pumping Impacts Violates NEPA.

NEPA requires mitigation measures be discussed in sufficient detail to ensure environmental consequences are fairly evaluated, as well as an "assessment of whether the [mitigation] can be effective." *S. Fork Band Council of W. Shoshone v. U.S. DOI*, 588F.3d 718, 727 (9th Cir. 2009). The omission of critical information regarding the extent of shallow groundwater present within the Project area upon which GDEs rely renders such fair evaluation and assessment impossible. *See* Section I.D.4. BOR offers little rebuttal to this point. *See*, Dkt. 40 at 34:1-9; Dkt. 43-1 at 21:2-10.

8. The EIS/R Fails to Adequately Assess Impacts Associated with Climate Change.

SLDMWA does not address a single substantive argument made by Plaintiffs with regard to the deficient FEIR/S analysis of how the Project will exacerbate climate change effects, nor the manner in which the FEIR/S arbitrarily disregards the potential impacts presented by the "hot-dry" climate change scenario. Instead, the SLDMWA relies entirely on the argument that this claim is barred by res judicata and/or collateral estoppel, failing to identify which doctrine is applicable. Dkt. 40 at 42:2-4. As such, SLDMWA has waived the right to address these issues on reply. *Bazuaye*, *supra*, 79 F.3d at 120. The analysis that follows responds to the arguments raised by BOR in its separate brief.

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

The EIS/R limits its analysis of climate change to how it may affect water availability for transfers. CEQA3887; *see also* Dkt. 43-1 at 22-23. This narrow focus violates NEPA by failing to take

a hard look at the environmental effects including all foreseeable direct and indirect effects. *N. Alaska Envtl. Ctr. v. Kempthorne* 457 F.3d 969, 975 (9th Cir. 2006). "The reasonably foreseeable affected environment should serve as the basis for evaluating and comparing the incremental effects of alternatives." *AquAlliance*, *supra*, 287 F.Supp.3d at 1028. The EIS/R here has failed to do so.

BOR ignores the potential impacts the Project will have in the Delta, such as fluctuations in outflows, salinity intrusion, and sea level rise. BOR331-332, 341-342. This is particularly alarming because the Delta has been deemed to be in a crisis state. Cal. Water Code § 85001; *see also AquAlliance*, *supra*, 287 F.Supp.3d 1036-1037 ["the record suggests that the present condition of the Delta is already precarious, due in part to reduced Delta outflows."]. BOR has not taken the required "hard look" at how climate change will exacerbate the impacts of the proposed project. The EIS/R fails to analyze the incremental impact to net Delta outflows, acceleration of sea level rise, and the effects to salinity. These impacts will likely be exacerbated by climate change and negatively affect Delta water quality. BOR331 (sea level rise increases salinity levels in the Delta).

BOR has not refuted its failure to analyze how the proposed action would exacerbate effects of climate change. Instead, it asserts that the EIS/R concludes the Project would increase demand for water transfers due to changes in water supply. Dkt. 43-1 at 23, citing BOR9852. The EIS/R concludes that because the increase would be within annual limits, the impact of climate change is not significant. *Id*. Further, the EIS/R concluded that changes in Delta outflows associated with water transfers would only occur during wetter conditions and would ultimately be insubstantial. BOR9721. However, these conclusions only address the narrow issue of changes to water quantities available for transfer.

Additionally, the EIS/R relies on outdated data that does not reflect the effects of climate change after 2003. BOR5637. BOR argues that Plaintiffs' assertions are merely a "disagreement with the conclusions of the EIS." Dkt. 43-1 at 23. BOR references its response to comments to explain the usage of CalSim II and the date range of 1970 to 2003. Dkt. 43-1 at 23. BOR asserts this timeframe provides a historic range of hydrology for the Sacramento Valley. *Id*. However, this is precisely the problem – by stopping at 2003 BOR has not included data incorporating climate change impacts after 2003, whereas other modeling shows potential impacts to Delta outflows. BOR341-342.

BOR points to a 2014 response to comment to provide reasoning for the use of this data. Dkt. 43-1 at 23. BOR argues that because various times between 1970 and 2003 were drier than 2004 to 2014, the overall analysis is adequate. Dkt. 43-1 at 23. The response to comment cited by BOR continues:

> The most recent 11-year period is not outside the range of the historical record or the period analyzed in the EIS/EIR. While it is possible that the next 10 years may become the driest on record, potentially influenced to an unknown extent by climate change, it would be speculative to develop hydrology for the 2015 through 2024 period as a series of 10 consecutive critical years based on potential climate change or as a worst-case condition.

BOR7521. BOR also took this position in the prior *AquAlliance* case, which the Court determined to be a straw man and, in light of the record, failed to identify any evidence that it would be "speculative to develop hydrology for the period of analysis in the [FEIS/R]." *AquAlliance*, *supra*, 287 F.Supp.3d at 1030. Incredibly, BOR now relies on the same argument that using historical hydrology is adequate because it "includes numerous severe drought years, many of which were worse than recent drought years, as well as wet years." Dkt. 43-1 at 23. This analysis fails to analyze whether the Project's incremental impact on Delta outflow may be exacerbated by climate change.

b. The EIS/R arbitrarily disregards the "hot-dry" climate change scenario effects.

Plaintiffs previously explained that BOR acted arbitrarily by disregarding impacts illustrated by different climate models. Dkt. 40 at 42. The EIS/R relies on the Central Tendency scenario; however, there is no explanation showing the Central Tendency scenario more accurately reflects expected changes than other climate scenarios. *See* BOR8331-8333. BOR also fails to rebut Plaintiffs' assertion that the use of the Central Tendency scenario is arbitrary and BOR has still failed to provide an adequate justification for relying solely on the Central Tendency scenario. Dkt. 40 at 42. The EIS/R's states:

> While the changes described under the Hot-Dry scenario reflect changes of a greater magnitude, this is a bookend scenario and reflects a longer climate change horizon than the next six years. The effects are more likely to be similar to those described under the Central Tendency scenario, which represents a middle of the range projected climate change scenario more consistent with expected changes in the next six years.

BOR 9852. BOR, however, has failed to provide any evidence supporting this determination, and so use of the Central Tendency is arbitrary in violation of NEPA.

9. <u>The EIS/R Failed to Disclose and Analyze Delta Stewardship Council Jurisdiction.</u>

Plaintiffs' opening brief explains that the EIS/R violated CEQA by failing to discuss the regulatory authority of the Delta Stewardship Council ("DCS"), and the implications for mitigation

measures and alternatives that may apply to the Project. Dkt. 40 at 45:21- 47:3. In response, SDLMWA argues the claim is precluded by res judicata. Dkt. 45 at 45:13- 22; *but see*, Section I(C), above.

SLDMWA then attempts to side-step the merits a second time by asserting that DSC's concern was satisfied and so, presumably, this Court should be satisfied as well. SLDMWA again cites *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 568 for the proposition that the DSC's purported decision not to make "further" comments or "further meetings" means that "its concerns have been addressed." Not so. As explained above in section I.D.4.c., *Citizens* is irrelevant where, as here, the agency previously expressed those concerns in writing during the public comment period, and no project changes were made. SLDMWA also relies on *Citizens for a Sustainable Treasure Island v. City & Cty. of S.F.,* 227 Cal. App. 4th 1036,1062 (2014) (*Treasure Island*), and yet in that decision the court noted, a "letter from the Coast Guard indicated it 'reviewed and is comfortable with the proposed consultation process which addressed the concerns raised in our September 3, 2010 letter.'" *Id*. SLDMWA cites no follow up communication from the DSC indicating its concerns were satisfied, and SLDMWA's self-serving hearsay is not credible evidence. Dkt. 44 at 46:9-18.

Moreover, the plain language of DSC's comment indicates that it could not be fully addressed by merely "strik[ing] all references to multi-year transfer from the document" since DSC's concern was broader. Compare CEQA10419 and 10844. DSC's letter states, "In addition to the program-level analysis of Long-term Water Transfers analyzed in the 2015 Final EIS/EIR and RDEIR/SDEIS, each individual multi-year water transfer agreement that is made possible by this proposed project would need to be considered and evaluated." CEQA10844. Merely eliminating references to "individual multi-year water transfer agreements" does not address DSC's concern that the Project itself constitutes – as its very name implies – a multi-year water transfer program. There is no credible evidence in the record demonstrating whether this concern was satisfied and, if so, how. Further, simply mischaracterizing the Project as somehow not comprising a multi-year water transfer program is inadequate, as this Court recently noted in *NRDC v. Zinke*, 347 F. Supp. 3d 465, 507–508 (E.D. Cal. 2018) (describing the Project as "seeking long-term approval for transfers it previously performed in an ad hoc manner").

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

Plaintiffs' opening brief explains in detail that the effectiveness of mitigation measure VEG & WILD-1 is highly uncertain, and the EIS/R violates CEQA by not candidly disclosing this uncertainty.

Dkt. 40 at 47:7-49:22. An "EIR must identify and explain the uncertainty in the effectiveness of the mitigation measures proposed." *King & Gardiner Farms, LLC v. County of Kern* 45 Cal.App.5th 814, 866–867 (2020). Relying yet again on the false premise that the EIR/S was only required to narrowly address deficiencies previously identified in the *AquAlliance* decision, SLDMWA literally ignores this argument and thereby waives it. Dkt. 44 at 47:3-48:4.

What is more, SLDMWA misconstrues this Court's decision. SLDMWA argues that the only clarification required by this Court was "clarifying what is meant by 'areas where GGS occurrence is low." Dkt. 44 at 47:27-28. Untrue. This Court's decision in *AquAlliance* directly questioned the effectiveness of VEG & WILD-1, stating, "[E]ven assuming snakes are found more frequently in canals and ditches, this does not explain why it is acceptable to focus on retention of water in canals and ditches to the detriment of maintaining appropriate rice field habitat the BiOp itself considers 'important.'" *AquAlliance, supra*, 287 F. Supp. 3d at 1073. "As a result, the Court finds that the FEIS/R cannot lawfully rely on the Environmental Commitments to avoid evaluating what may otherwise be a substantial adverse effect." *Id.* at 1075. SLDMWA's cramped view of the Court's judgment fails.

Even if the basis of the Court's judgment were limited to the narrow issue of "clarifying what is meant by 'areas where GGS occurrence is low,'" the EIS/R and 2019 BiOp have failed to provide such clarity. The record does not support SLDMWA's false suggestion that all lands outside of "important snake populations" are areas of low GGS occurrence. *Id.* SLDMWA's citations to CEQA8074-78 and 10371-72 in no way establish that areas of high GGS occurrence are limited to "important snake populations." Tellingly, the DEIS/R itself never even mentions, much less discusses, "areas where GGS occurrence is low," and instead simply states, "Mitigation Measures VEG and WILD-1 also prohibits transfers from areas with important giant garter snake populations, thereby maintaining protected habitats and movement corridors for use by several populations of giant garter snake." CEQA5614.

Prohibiting idling only in "important snake populations" does not avoid crop idling in all areas of high GGS occurrence. The record overwhelmingly establishes that areas of high GGS occurrence are vastly larger than the tiny areas identified as "important snake populations." Compare FWS1496-1501 [maps of "important giant garter snake populations"] with FWS924-937 [maps depicting "Giant Garter

Snake Priority Habitat"]. Using the Conway Preservation Group, LLC property ("Conway Property") as an example, only the smallest portion – all within the channel of the Willow Slough and Bypass – is identified as "important snake population" and yet literally 100 percent of the Conway Property is identified as "Giant Garter Snake Priority Habitat." Compare FWS1501 and 928.

Further refuting SLDMWA's suggestion that areas of GGS occurrence includes everything outside of "important snake populations," FWS explains that the priority GGS habitat identified in these maps are "areas where snakes have a high likelihood of occurrence." (FWS894.) The "priority habitat" is specifically defined as "Habitat Suitability x Probability of Occurrence Bounded by Top 75%." FWS 928. Thus, vast tracts of areas with high GGS occurrence are located outside of designated "important snake populations," and so prohibiting transfers in "important snake populations" simply does not "ensure that idling would be focused in areas where GGS occurrence probability is low" as previously contemplated by this Court in *AquAlliance, supra*, 287 F. Supp. 3d at 1075.

E. SLDMWA FAILED TO COMPLY WITH THE PUBLIC TRUST DOCTRINE

1. SLDMWA Approved a Project Triggering its Public Trust Doctrine Duties

a. The Project Approval Must be Reviewed for Public Trust Doctrine Consistency.

SLDMWA argues that it was not required to ensure its Project approval was consistent with the Public Trust Doctrine because, it claims, it actually did not approve any project at all. Dkt. 44 at 48-49. SLDMWA's attempt to cast all future components of project implementation as hypothetical and speculative is disingenuous—the EIS/R makes clear that SLDMWA's members need and will use the water transfers approved by and through the Project. *See*, *e.g.*, CEQA5248 ("The purpose of the [RDEIR/S] . . . is to . . . make transfers more implementable . . ., especially when hydrologic conditions and available pumping capacity are unknown until right before the transfer season.") Accordingly, SLDMWA approved the transfers evaluated by the EIS/R. CEQA7 ("The Water Authority determines 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.") To this end, SLDMWA further "adopt[ed] each of the mitigation measures and monitoring requirements identified in the 2019 Final EIS/EIR . . . ." CEQA7. There can be no real dispute but that SLDMWA approved a Project. *See also*, CEQA5279 ("The purpose of the Proposed

Action is to approve and facilitate voluntary transfers of water . . . ."), CEQA5279 ("Project Objectives"). SLDMWA's attempt to describe its approval as something other than approval of the Project runs counter to CEQA. *See* Guidelines Section 15378(c) ("The term 'project' does not mean each separate government approval"). Indeed, while there is no set "procedural matrix" for agency compliance with the public trust doctrine (*Citizens for East Shore Parks*, 202 Cal.App.4th at 576), "such actions should not be taken in some fragmentary and publicly invisible way." *S.F. Baykeeper, Inc. v. State Lands Com.*, 242 Cal. App. 4th 202, 234 (2015). An agency must consider the Public Trust even in its planning, and SLDMWA cites no authority for the proposition that a specific type of action is required. *See*, *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal.3d 419, 446-7 (1983) ("affirmative duty to take the public trust into account in the *planning* and allocation of water resources" [emphasis added]).

Case law makes clear that SLDMWA should have considered consistency with the Public Trust Doctrine before approving the Project. *See*, *Baykeeper* at 234 (public trust doctrine applies to "[a]ny action which will adversely affect traditional public rights in trust lands . . ." [emphasis added]).

2. SLDMWA is a Governmental Agency with Public Trust Doctrine Obligations.

Citing no basis in law, SLDMWA invites the Court onto a slippery slope where some governmental agencies are bound by the duties imposed by the Public Trust Doctrine, while others are not. Dkt. 44 at 40-1. SLDMWA offers no bright line test, nor any factors to consider, to determine whether the Public Trust Doctrine applies, because none exist. Instead, "an analysis under the public trust doctrine is an independent duty that attaches to *any agency* approval . . . that implicates public trust resources." *AquAlliance*, 287 F. Supp. 3d at 1060 (emphasis added); *see also*, *Envtl. Law Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 861 (2018) ("[g]overnment has a duty to consider the public trust interest when making decisions impacting water that is imbued with the public trust.").

SLDMWA attempts to distinguish *Abatti v. Imperial Irrigation Dist.*, 52 Cal. App. 5th 236, 256-266 (2020)) by claiming that the "court's brief reference to the public trust doctrine . . . played no part in the outcome of the case." Dkt. 44 at fn. 28. In fact, *Abatti* discussed the Public Trust Doctrine under the opinion section "Applicable Law," showing it was directly applicable to the case. *Abatti* at 257. As *Abatti* describes, "[t]his doctrine derives from the principle that water is a shared resource . . . ." *Id.* Hence, the nature of the Public Trust Doctrine arises from a governmental duty to respect a public property right, not in some artificial limitation that applies to some governmental entities but not others.

Further, *Abatti* discussed why irrigation districts are bound by the Doctrine, which Petitioners delineated in their Motion (Dkt. 40 at 51:16-19), but which SLDMWA failed to distinguish. SLDMWA is a joint powers authority ("JPA") comprised of over a dozen water districts, and the powers and duties of the member districts cannot be extinguished by acting through a JPA. *See*, *e.g.*, *Burbank-Glendale-Pasadena Airport Auth. v. Hensler*, 83 Cal. App. 4th 556, 563 (2000) ("Airport Authority derives the power of eminent domain from the three joint power cities").

SLDMWA further argues that California state agencies are better positioned to protect the Public Trust resources here. This argument fails in two ways. First, the Court in *AquAlliance I* rejected Petitioners' argument that SLDMWA was an improper CEQA lead agency, owing to its limited scope, instead finding that "the Authority has a more significant role in the overall project than does [the California Department of Water Resources]." *AquAlliance I* at 993. Second, this again misses the point that the Public Trust is a public property right that must be respected by any governmental action. *See*, *e.g.*, *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 452 (1892) ("It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties"); *People v. Monterey Fish Products Co.*, 195 Cal. 548, 563 (1925) (accord).

In sum, SLDMWA has no basis in law to argue that a JPA has no duty to evaluate whether its actions may interfere with the public's interests in Public Trust resources. SLDMWA's arguments it has no duty to consider the Public Trust must be rejected.

3. SLDMWA Failed to Satisfy its Public Trust Doctrine Obligations.

Finally, SLDMWA incorrectly argues that its CEQA review satisfied any Public Trust Doctrine duties it may have. First, SLDMWA does not and cannot dispute that the EIS/R contained no express Public Trust Doctrine analysis. For instance, the EIS/R fails to identify which affected resources are encumbered by the Public Trust, and whether the actions affecting such resources are "trust uses" or "non-trust uses." *See*, *Audubon* at 446-447, and *Baykeeper* at 237-238 (consumptive uses, including agricultural and municipal supply, are not recognized public trust uses). In *Baykeeper v. State Land Commission*, the court considered nearly identical facts as here, where the lead agency failed to include any evaluation of the Public Trust Doctrine, *as such*, and instead relied on its general CEQA review as sufficient. The court rejected this approach:

> CEQA review of a project involving sovereign property does not necessarily satisfy the SLC's public trust obligations. *Id.* Only where the CEQA review process encompasses public trust issues does the CEQA review satisfy the project proponent's public trust obligations.

AquAlliance at 1060 (citing *Baykeeper v. State Lands Commission* at 241-42). Here, Petitioners submitted written comments noting that the EIS/R had failed to consider such public trust issues, which SLDMWA then eschewed any responsibility to address in response to comments. SLDMWA argues its Trust obligations were satisfied by the fact the California Department of Fish and Wildlife commented on the EIS/R (Dkt. 44 at 53), which Plaintiffs addressed in their Motion (Dkt. 40 at 52:6-18).

4. Plaintiffs' Public Trust Cause of Action is Not Barred by Res Judicata.

SLDMWA wrongly argues that, compared to *AquAlliance I*, "[a]ll that has changed in this proceeding is plaintiffs' legal theory." Dkt. 44 at 54:25. Not so. As documented above in Section I.C.2., between the 2015 EIS/R at issue in *AquAlliance I* and this case, the proposed project itself changed, in the face significant environmental developments in climate change, groundwater supplies, and the Delta water quality regulatory landscape. Finally, Plaintiffs' interests advanced in *AquAlliance I* are not the same as in this case, since *AquAlliance I* alleged only CEQA non-compliance, where CEQA provides public information and disclosure of environmental effects prior to any project approval; while the Public Trust Doctrine, in contrast, imposes mandatory substantive duties to protect public resources.

F. VIOLATIONS OF THE ESA

1. The BiOp Analyzed a Proposed Action That is Not Coextensive with the Project.

The proposed action identified in the EIS/R authorizes water transfers every year over a six-year period from 2019 to 2024. BOR9580, 9583, 9602. And while the FEIS/R could certainly have done so, it never represents that crop idling transfers would be limited to only two of the six years, much less expressly limit water transfers as such. Notwithstanding, BOR argues that FWS's analysis of "Reclamation's proposed two years of idling/shifting transfers during the six year program," was adequate and lawful. Dkt. 43-1 at 35:13-15. To provide evidence for this statement, BOR cites to BOR's BA and FWS's BiOP; but BOR tellingly omits any citation to the actual proposed action memorialized in the EIS/R or ROD. Dkt. 43-1 at 35, citing FW1275, 1464.

Further, BOR asserts that "the record shows that idling/shifting transfers do not happen every year[.]" Dkt. 43-1 at 35:17. Perhaps BOR is correct, but BOR cannot identify any record evidence

showing that the proposed action is limited in any way to only two years of crop idling transfers. The court in *Conner v. Burford* explains, "[T]he scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action." *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988), italics in original. The court continues on to note, "We interpret the term 'agency action' broadly…'caution can only be exercised if the agency takes a look at all the possible ramifications of the agency action.'" *Id*.

BOR argues, "The ESA regulations do not provide FWS with the authority to evaluate the effects of a different action than the one proposed by the action agency." Dkt. 43-1 at 36:28-37:1. This does not help BOR since the project approved by BOR is a program of water transfers that may include transfers in each of those six years. BOR9602, 14079. BOR could have easily limited the scope of its action to only include water transfers in two of the six years, but chose not to do so. *Id*. FWS may not review a piecemealed action, as *North Slope Borough* explains: "[T]he legal adequacy of any "biological opinion" . . . must first be tested by matching the meaning of "agency action" in that opinion with a legal definition of that same term." *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980).

By analyzing a piecemealed project, FWS failed to comply with the ESA. Neither the EIS/R nor BOR's ROD limit transfers to two years; therefore, the proposed action is the authorization of water transfers every year between 2019 and 2024. BOR9602, 14079 ("transfers over the period 2020 through 2024."). The 2019 BiOp does not analyze this agency action.

In an attempt to argue that *NRDC v. Rodgers*, 381 F. Supp. 2d 1212 (E.D. Cal. 2005) is distinguishable, BOR cites to *NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 386-387 (E.D. Cal. 2007) for the proposition that FWS can make reasonable assumptions about various aspects of the project. Dkt. 43-1 at 38:10-12. In this case, "Reclamation . . . reasonably *expects* to authorize only two years of idling/shifting transfers during the six-year life of its program, and FWS reasonably and consistent with the ESA and regulations analyzed that proposed action." Dkt. 43-1 at 38:12-14 [italics added]. This is not the type of assumption the court in *Kempthorne* allowed. The court in *Kempthorne* distinguished the facts from *Rodgers* because *Rodgers* dealt with the authorization of the water service contracts and *Kempthorne* dealt the operation of the CVP. *Kempthorne*, *supra*, 506 F. Supp. 2d at 387. The

Kempthorne court determined that the agency could make reasonable assumptions regarding the operational aspect of the Operations Criteria and Plan, such as flows, water levels, temperature and quality based on projected data. *Id*. Here, FWS artificially truncated the number of years analyzed in the BiOp. *Id*. This is more akin to *Rodgers*, where FWS analyzed only half of the authorized contract allocations.

2. FWS Relied on Re-Initiation to Unlawfully Segment Consultation.

In a separate attempt to justify the two-year transfer limitation, BOR relies heavily on the idea BOR could reinitiate consultation with FWS if a third year of crop idling transfers is proposed. Dkt. 43-1 at 15, 30, 35-38; Dkt. 43-1 at 38:14-16. However, the ESA does not authorize an agency to justify its piecemealed review of the proposed action by pointing to re-initiation of consultation at some future time. *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 255 (D.D.C. 2003).

> If FWS were allowed to apply such a limited scope of consultation to all agency activities, any course of agency action could ultimately be divided into multiple small actions, none of which, in and of themselves, would cause jeopardy. Moreover, such impermissible segmentation would allow agencies to engage in a series of limited consultations without ever undertaking a comprehensive assessment of the impacts of their overall activity on protected species.

Id. This is precisely what BOR and FWS are doing here, in violation of law.

3. FWS Fails to Rationally Connect the Scientific Record and the BiOp's Conclusions

> The Court in *AquAlliance* identified two specific logical flaws in the 2019 BiOp:
> [T]he BiOp explicitly considers the issue of fallowing patterns (both spatial and temporal) and acknowledges the import of those patterns, but then fails to articulate why the conservation measures avoid jeopardy, in light of the fact that the measures contain no constraints on how close fallowed fields may be to one another nor any limit on the number of consecutive years a field may lie fallow;
> [⁋. . .⁋]
> [E]ven assuming snakes are found more frequently in canals and ditches, this does not explain why it is acceptable to focus on retention of water in canals and ditches to the detriment of maintaining appropriate rice field habitat the BiOp itself considers "important."

AquAlliance, *supra*, 287 F. Supp. 3d at 1073. FWS whitewashes these flaws and minimizes the Project's predicted impact on GGS populations. FWS also rehashes one of the same failed arguments in *AquAlliance*, and then attacks a strawman argument never raised by Plaintiffs.

a. FWS misrepresents the 2019 BiOp and the Project's impact on GGS populations.

In an effort to sidestep directly addressing the flawed logic in its conservation strategy, FWS misconstrues the 2019 BiOp by claiming that its conservation strategy is not based primarily on maintaining water in canals. Dkt. 43-1 at 24:18-19 ("FWS principally rested its no-jeopardy determination on the amount and location of rice fields that may be idled/shifted in given year"); *see also* Dkt. 43-1 at 30:10-12. This false statement is easily refuted by the 2019 BiOp itself, which acknowledges, "The cumulative loss of 18.4 percent of available rice foraging habitat for the snake *will be an adverse effect* on the snake." FWS1489, italic added.[1] This admittedly adverse effect expressly requires adoption of "conservation measures" that "help minimize the potential for adverse effects." *Id*.

The resulting dramatic impact on the GGS population is revealed by the 2019 BiOp's admission: "[T]he quantification of habitat lost as a result of the proposed action serves as a direct surrogate for the snakes that will be lost." FWS1490. While never clearly articulated by FWS either in the BiOp or its briefing to this Court, this means that the Project is expected to take approximately 19.5 percent of the GGS population in a single year. FWS1489. FWS fails to acknowledge this 20 percent population loss, much less explain how such a precipitous population loss can avoid jeopardy without the need for conservation measures related to rice habitat.

FWS relies on *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 957 (9th Cir. 2003) to argue that some adverse impact to a protected species is lawful under the ESA so long as that agency "realized the magnitude of those problems." Dkt. 43-1 at 26:28 – 27:1.) In *Selkirk*, FWS "identified and considered at length the primary causes of grizzly bear mortality," and from that consideration FWS considered the efficacy of the proposed Conservation Agreement. *Id*. The court found FWS provided a rational connection between best available science regarding threats to grizzlies and the measures to mitigate those threats. *Id*. Here, by contrast, FWS has failed to describe how it has addressed the one-year 20 percent mortality in GGS population resulting from implementing the Project. If a 20 percent population loss within one year does not jeopardize that species, then what percentage loss would constitute "jeopardy"? The 2019 BiOp and FWS's brief are conspicuously silent.

b. FWS misrepresents the importance of rice fields and available technical studies.

[1] FWS explains the correct percentage is 19.5 percent of rice production. Dkt. 43-1 at 25:25 fn. 6.

Turning to its logically flawed mitigation strategy that focuses on maintaining water in canals, FWS repeats its prior failed argument that rice fields are a less important habitat component than water canals. Dkt. 43-1 at 26:4-16. While it may be true that GGS spend more time in canals than rice fields, FWS simply cannot avoid the best available science consistently showing that that rice fields are an important component of GGS habitat. *AquAlliance* at 1073. FWS simply ignores this Court's prior rejection of its argument, instead appearing to address the Court's analysis by merely eliminating the word "important" in describing rice fields as a component of GGS habitat.[2] Such reliance on semantics fails. Whether or not the 2019 BiOp uses the word "important," there is no question that rice fields are a necessary component of GGS habitat. CEQA82422 ("maintaining water in canals alone would not adequately support giant gartersnakes"); CEQA82423 ("maintaining canals without neighboring rice fields would be detrimental to giant gartersnake populations, with decreases in giant gartersnake survival rates associated with less rice production in the surrounding landscape"); FW1297 ("'maintaining canals that support the habitat components giant garter snakes select most (terrestrial vegetation on banks, tules and other emergent vegetation in canals)' without neighboring rice cultivation led to a decrease in GGS survival rates"); FW1402 ("The proportion of area in rice production surrounding a site was positively related to the probability of giant gartersnakes occurring there").

FWS points to a paragraph in the 2019 BiOp discussing fluctuations in rice production to suggest that rice fields are not important to GGS recovery. Dkt. 43-1 at 26:26-27:4. The 2019 BiOp discusses a 2017 USGS report, which states, "While these fluctuations in rice production continue in the Sacramento Valley, the two years of [USGS] studies indicate that snake populations in the Sacramento Valley are not declining in sampled locations when rice production is less." Dkt. 43-1 at 29:1-4; FWS1487. According to FWS, because rice production decreased from 2016 to 2017 but more GGS individual were trapped (91 individuals in 2016 and 110 in 2017), rice production is not relevant to GGS populations. *Id*. Setting aside that the 2016 and 2017 studies do not include GGS surveys on all of the

[2] The 2015 BiOp repeatedly acknowledges that rice fields are an "important" component of GGS habitat. FW902 ("Thus both rice fields and canals are important habitats for the snake"); *see also* 905, 908, 911. Following the *AquAlliance* decision, the 2019 BiOp removed every reference to the word "important" in describing rice fields. FWS1462-1501.

same properties[3], this is at best an overly simplistic interpretation of the two referenced studies. In fact, the scientists who performed the studies reached the opposite conclusion to FWS, explaining:

> [T]wo site-level covariates were related to giant gartersnake occupancy: the proportion of the surrounding landscape in rice production and the capture rate of tadpoles (Tables 5–7). For all three buffer distances, the proportion of the area surrounding a site that was actively growing rice was positively related to giant gartersnake occupancy. . . The probability a site was occupied by giant gartersnakes *increased sharply* if the proportion of rice grown within a 3 km buffer of the site increased above 40% (Figure 5).

FW1401 (italic added); *see also* FW1403 ("top models for giant gartersnake occupancy generally included efforts of the proportion of area in rice production"). FWS's woefully simplistic correlation argument is refuted by the very same study that it relies upon.

Put simply, the best available science provides that GGS populations require proximity to active rice fields. Block size and distribution limitations ensure this proximity, whereas simply maintaining water in canals does not. Neither the BiOp nor FWS's opposition brief provide a rational explanation changing the conservation strategy from focusing on block size and distribution limitations to maintaining water in canals. While FWS argues that "past conservation measures for a different action do not factor into the issue before the Court," the Ninth Circuit has held otherwise. *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1262 (9th Cir. 2017). *Defenders of Wildlife* was cited in Plaintiffs' opening brief and ignored in FWS' opposition brief. Dkt. 43-1 at 33:25-35:11.

c. FWS's attempted deflections are without merit.

Side-stepping its failure to rationally explain the 2019 BiOp, FWS argues, "Plaintiffs do not identify any evidence showing that *all of the rice field habitat in the project area and recovery units must be off limits* to cropland idling/shifting transfers, or that the amount of such transfers proposed by Reclamation for two years is too much to avoid jeopardy." Dkt. 43-1 at 28:22-24, (italic added). FWS relies on this mischaracterization to argue that "graphs in Plaintiffs' own brief . . . support FWS' expert judgment that 100% of the rice in the project area need not be maintained to avoid jeopardy." Dkt. 43-1 at 29:17-18. This is an obvious straw man because Plaintiffs never argued that crop idling transfers

[3] Of the 83 occupancy sites in 2016, 65 were sampled in 2017. The remaining sites could not be sampled either because the canal was dry (3) sites or because the scientists did not have permission to access the site in 2017 (15 sites). In 2017, the scientists added an additional 12 occupancy sites. FWS1398.

should be prohibited on "all of the rice field habitat." Instead, Plaintiffs have shown that conservation measures utilizing block size and distribution limits would avoid jeopardy. Dkt. 40 at 54-55, 57, 60.

FWS's assertion that no scientific study supports the position that "the amount of such transfers . . . is too much to avoid jeopardy" is refuted by the 2019 BiOp, which concludes that the predicted one-year 20 percent of GGS population decline requires the imposition of conservation measures. FWS 1491. The record further demonstrates that FWS's adopted mitigation strategy of "maintaining canals without neighboring rice fields would be detrimental to giant gartersnake populations." CEQA 82423.

d. The 2017 GGS Recovery Plan does not moot the deficiencies from AquAlliance I.

FWS suggests that the deficiencies previously identified in *AquAlliance I* are somehow mooted by FWS's subsequent issuance of the GGS recovery plan in 2017. Dkt. 43-1 at 35:6 – 11. Not so. FWS first asserts that the amount of idling is "a very small percentage of the area in each of the snake's recovery units." Dkt. 43-1 at 29:21; 25:15. FWS fails to explain how this percentage is at all relevant. It is not relevant because there is no evidence that the entirety of each recovery unit is suitable habitat. Relevant information is the percentage rice fields that are idled since the BiOp expressly relies on rice fields as a direct surrogate for GGS take. FWS 1490; *Sierra Club v. United States Department of the Interior*, 899 F.3d 260, 272 (4th Cir. 2018). FWS' reliance on rice fields as a surrogate for GGS take seriously undermines its argument that rice fields are unimportant to GGS survival. *See*, *id*. at 266.

e. Protecting important snake populations does not support abandonment of block size and distribution limitations.

With respect to the BiOp's reliance on "important snake populations," Plaintiffs do not dispute that there might be genetically-important GGS snake populations, or that it is helpful to protect these genetically important populations. Plaintiffs do contend, however, that the record fails to support a conservation strategy relying on protection of "important snake populations" to avoid jeopardy resulting from 20 percent loss to the population. FWS implicitly acknowledges as much, since the BiOp's primary conservation measure to address the acknowledged population decrease is to maintain water in canals, and Conservation Measure 4's protection of "important snake population" provides "additional protections for these nine important populations." Dkt. 43-1 at 33:23.

FWS also not dispute Plaintiffs' argument that the geographic scope of identified "important snake populations" is limited to waterbodies that, by definition, exclude rice fields and so may not be idled in the first place. Dkt. 43-1 at 31:19-25. Implicitly conceding this point, FWS argues that Conservation Measure 4 nevertheless "constitute[s] limits on idled rice acreage" because "there is a prohibition on idling/shifting transfers *in rice acreage immediately adjacent to these nine populations*." *Ibid*., italic added. FWS states, "Reclamation has agreed not to approve idling/shifting transfers for rice field habitat adjacent to these populations." Dkt. 43-1 at 33:9. This is incorrect and, reinforcing BOR's violations of its duties under Section 7 of the ESA, BOR has authorized idling/shifting transfers of rice fields immediately adjacent to "important snake populations."

For the 2021 transfer year, BOR approved idling/shifting transfers in the Glenn-Colusa Irrigation District ("GCID"). Plaintiffs' RJN, Exhibit 2.[4] An exhibit to a crop idling contract explains:

> The District is proposing to idle three parcels adjacent to important giant garter snake habitat (the Colusa Drain). However, after consultation with Reclamation, the landowners have agreed to plan a 50 meter wide section of rice along the portion of their parcels adjacent to the drain to provide sufficient habitat for the giant garter snake. As a result, no land within 50 meters of the Colusa Drain will be in the idling program.

Id. at Exhibit D [letter from GCID re: conservation measures]. Thus, BOR authorized idling three rice fields adjacent to an admittedly important snake population because a 50-meter buffer was carved out. The BiOp does not, however, provide that idling will be prohibited only on the first 50 meters of adjacent rice fields.

Similarly, BOR has approved Reclamation District 108's request to idle fields adjacent to "important snake populations." Plaintiffs' RJN, Exhibit 3, Exhibit D [RD 108 Crop Idling/Shifting Conservation Measures]. RD 108 defends this action by arguing that adjacent rice fields are not really adjacent, stating, "Between the irrigated fields and the Colusa Drain are a Federal project Levee landside berm, large irrigation canal, a road, a drainage canal, and a farm road. . . Both the main irrigation canal and the drainage canal provide a path for GGS to move along the fields adjacent to the Colusa Drain, even if fields are idled during the 2021 Water Transfer." *Id*.

[4] "We may consider evidence outside the administrative record for the limited purposes of reviewing Plaintiffs' ESA claim." *Western Watersheds Project v. Kraayenbrink* 632 F.3d 472, 497 (9th Cir. 2011).

Evidence therefore reveals that Conservation Measure 4's protection of "important snake populations" does not, in fact, "constitute limits on idled rice acreage." BOR will deem an otherwise adjacent field to be not adjacent if that field is "separated" by a landside berm, canal, levee or road. And if it is impossible to identify any such physical separation, BOR will simply constrict the BiOp's prohibition to only the first 50 meters of the adjacent rice field. Conservation Measure 4 is not an adequate substitute for maintaining block size and distribution limitations on crop idling.

FWS argues, "Reclamation is no longer relying on the 'priority habitat' concept." This is no doubt by design since, as noted in *AquAlliance*, doing so would prohibit idling on 70 to 100 percent of land within seller water districts. *AquAlliance,* 287 F. Supp. 3d at 1069-70. To avoid imposing meaningful restrictions on potential water transfers through prohibiting idling in "priority habitat," or even imposing block size and distribution limits, BOR proposed, and FWS rubberstamped, a concept that appears specifically designed to avoid imposing such "limits on idled rice acreage."

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

Though FWS is the expert agency pursuant to the ESA, BOR nevertheless has a duty to ensure its actions are not likely to jeopardize a threatened species. 16 U.S.C. 1536(a)(2). Plaintiffs have demonstrated that BOR provided the flawed scientific reasoning FWS relied upon in its no jeopardy determination. Dkt. 40 at 62. Further, FWS now asserts in its brief that BOR was responsible for the truncated proposed action that FWS relied on it to produce a no-jeopardy finding. Dkt. 43-1 at 35:13-15; FW1491. While FWS's finger pointing to BOR strengthens Plaintiffs' citizen suit action against BOR, it does nothing to change the fact that the proposed action analyzed in the 2019 BiOp is incongruent with the underlying LTWT project and therefore violates the ESA.

BOR cites to *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990), to argue that an agency's reliance on a BiOp is not arbitrary if Plaintiffs have not pointed to "new" information which challenges the BiOp's conclusions. Dkt. 43-1 at 38-39. However, that aspect of the case deals with plaintiffs arguing that FWS's BiOp contains faulty analysis. The court found that FWS was not a party to the action and, without plaintiffs pointing to new information not considered by FWS, there is no reason to believe its reliance on the report is arbitrary and capricious.

Pyramid Lake Paiute Tribe of Indians, *supra*, 898 F.2d at 1415. That case, as well as the others cited by BOR, are markedly different than the facts here. In this case, Plaintiffs have established that BOR disseminated inaccurate information, FWS's BiOp is based on that inaccurate information, and BOR has acted arbitrarily and capriciously by relying on the BiOp. In response to FWS' claim that BOR "has agreed not to approve idling/shifting transfers for rice field habitat adjacent to [important snake] populations," Plaintiffs have established this is not true. FWS is a proper defendant in Plaintiffs' APA claim, and BOR is a proper defendant in Plaintiffs' citizen suit action. Finger pointing between the two agencies is irrelevant since both claims and the respective proper defendants are before this Court, and proper relief for either claim is to vacate the BiOp in its entirety.

II. CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment and further vacate and set aside the EIS/R and 2019 BiOp.

Respectfully submitted,

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

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