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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Respondents and Defendants.

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs fail to show that the United States Bureau of Reclamation ("Reclamation") violated the law in conducting environmental review for its Long-Term Water Transfer Project ("Project"). Plaintiffs' claims brought under the National Environmental Policy Act ("NEPA") are unsupported by the record, derivative of their state-law claims, and do not support finding a separate violation under NEPA, which has different standards. As to their claims brought under the Endangered Species Act ("ESA"), those claims fail at the gate because Plaintiffs have not carried their burden of showing standing to assert ESA claims. Plaintiffs provide no argument regarding standing in their brief, and the submitted declarations do not identify specific facts showing that Plaintiffs are injured by the ESA Section 7 Biological Opinion they challenge in this case. Even if the Court finds Plaintiffs have standing to assert their ESA claims, Plaintiffs have not shown that the U.S. Fish & Wildlife Service ("FWS") arbitrarily or capriciously found that the Project would not likely jeopardize the continued existence of the threatened giant garter snake, given the transfers would result in only the temporary loss of a relatively small amount of habitat and Reclamation's adoption of other conservation measures for the snake. Nor have Plaintiffs shown that Reclamation itself violated the ESA in relying on FWS' expert Biological Opinion. For the reasons set forth below and in Federal Defendants' opening brief, the Court should deny Plaintiffs' motion for summary judgment and enter judgment on behalf of the Federal Defendants on all claims.

ARGUMENT

I. Plaintiffs Have Failed to Show Standing to Assert Their ESA Claims.[1]

Plaintiffs provide no argument to support their contention that they have standing to pursue their ESA claims and the declarations provided fail to establish that these Plaintiffs have standing to assert ESA claims. Plaintiffs provide four declarations – John Herrick, Bill Jennings, Dante Nomellini, and Barbara Vlamis – and claim that these declarations suffice because they "provided standing" in *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969 (E.D. Cal. 2018) ("*AquAlliance I*"). ECF No. 48 at 8.[2] But Federal Defendants did not raise standing in *AquAlliance I*, and the Court did not

[1] Federal Defendants do not dispute Plaintiffs' standing with respect to the NEPA claims.

[2] Page citations to Plaintiffs' and Federal Defendants' briefs are to the blue, ECF-stamped page

reach this issue in its decision. *See generally AquAlliance I*, 287 F. Supp. 3d 969. Because standing goes to the issue of subject-matter jurisdiction, it may be raised at any time and may not be waived. *United States v. Jacobo Castillo*, 496 F.3d 947, 952 (9th Cir. 2007) (defects in a federal court's subject-matter jurisdiction may not be waived or forfeited). In addition, "standing is evaluated on a claim-by-claim basis." *Ctr. for Env't Sci. Accuracy & Reliability v. Nat'l Park Serv.*, No. 1:14-cv-02063-LJO-MJS, 2016 WL 4524758, at *12 (E.D. Cal. Aug. 29, 2016) ("'A plaintiff must demonstrate standing 'for each claim he seeks to press' and for 'each form of relief sought.'") (quoting *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009)). "[S]tanding is not dispensed in gross." *Id*. (citing *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)) (alteration in original).

To establish standing, a plaintiff must show (1) it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) such injury is "fairly traceable" to the challenged action; and (3) it is "'likely,' as opposed to merely speculative,' that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Alleged harms that are not causally related and specific to the ESA-listed species or protections at issue are not sufficient to bring ESA claims. *N.C. Fisheries Ass'n, Inc. v. Pritzker*, No. 4:14-CV-138-D, 2015 WL 4488509, at *6 (E.D.N.C. July 22, 2015) ("Plaintiffs have not alleged that any of their members have an 'aesthetic' or 'recreational' interest in sea turtles") (citations omitted). Here, only three of Plaintiffs' declarations discuss or mention the giant garter snake; the Declaration of Bill Jennings makes no mention of the snake or contains any facts that could otherwise establish that he or the organization of which he is a member, California Sportfishing Protection Alliance ("CSPA") has standing to pursue ESA claims. *See* ECF No. 48-2. Consequently, to the extent Plaintiff CSPA asserts such claims, they must be dismissed.

The two declarations from John Herrick and Dante Nomellini, who provide declarations from South Delta Water Agency ("SDWA") and Central Delta Water Agency ("CDWA") respectively, cite only vague and speculative injuries that fail the Supreme Court's test in *Lujan*. Specifically, the only claimed injury relating to their ESA claims from both agencies is the following paragraph:

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numbers in the upper right of the page (not the page numbers on the bottom of the page).

> CDWA[3] is gravely concerned about the impacts of the Project's water transfers on wildlife habitat and CDWA's ability to ensure a sufficient in-channel water supply of suitable quality is available for the existing agency land use of wildlife habitat. Further, to the extent the Project results in an unacknowledged jeopardy to species protected by the ESA in areas north of CDWA's jurisdiction, this could result in a disproportionate burden to conserve these species within CDWA's jurisdiction.

ECF No. 48-3, Nomellini Decl. ¶ 9. This statement alone is entirely speculative. Neither CDWA nor SDWA state that giant garter snake habitat exists within their jurisdiction, that they are engaged in any efforts to conserve the snake, or that they or any of their members has any other involvement of any sort with the species. As such, these declarations do not establish an injury sufficient to confer Article III standing over their ESA claims and must be dismissed.

Finally, Barbara Vlamis' declaration, submitted on behalf of AquAlliance, similarly contains only vague, speculative injuries that are without factual support. This declaration purports to establish injury in two ways. First, Ms. Vlamis states that she communicated with FWS personnel between 2011 and 2016 about the giant garter snake and that AquAlliance as an institution was "concerned" about impacts to the giant garter snake. ECF No. 48-4, Vlamis Decl. ¶¶ 13-15. But past communications and a general institutional "concern" are not enough to establish injury. *Ctr. for Env't Sci. Accuracy & Reliability*, 2016 WL 4524758, at *14 (a declarant's "generalized interest in 'species protection' and his concomitant desire that Defendants comply with the law and use the best available science when decision-making are insufficient to establish any injury in fact."). Second, Ms. Vlamis also states that she walks around "Chico Sewer Treatment Plant for wildlife observation" and "eagerly hope[s] to see one." Vlamis Decl. ¶ 16. She further adds, vaguely, that "[h]aving had AquAlliance members observe [the giant garter snake] in east Chico has brought excitement to myself and the members of AquAlliance[.]" *Id.*

These statements are insufficient to establish any "concrete and particularized" injury that is "'likely,' as opposed to merely speculative." *Lujan*, 504 U.S. at 560-61 (citation omitted). Plaintiffs identify no evidence that the Chico Sewer Treatment Plant is known habitat for the giant garter snake, that any member of AquAlliance actually engages in wildlife observation at giant garter snake habitat, or

[3] SDWA's declaration contains an identical paragraph. *See* ECF No. 48-1, Herrick Decl. ¶ 9.

that any member has a future intention to return to known giant garter snake habitat. There are no particularized facts that any AquAlliance member has observed or attempted to observe a giant garter snake, nor evidence that these members have the expertise or knowledge to distinguish a giant garter snake from other snakes. Nor are there facts that indicate that any of these Plaintiffs, who are all organizations devoted to "confronting the escalating attempts to divert more and more water from the northern Sacramento River hydrologic region," ECF No. 9 ¶ 14, even have any organizational interest in conserving the giant garter snake or other wildlife. To the contrary, at least one Plaintiff has recently sought to enjoin Reclamation from diverting water where the purpose of the diversion was for the benefit of wildlife. *See AquAlliance v. U.S. Bureau of Reclamation*, No. 2:21-cv-01533-WBS-DMC, 2021 WL 4168534, at *7 (E.D. Cal. Sept. 14, 2021) (seeking to enjoin Reclamation project designed to divert water for migratory birds and salmon). For all of these reasons, Plaintiffs have failed to show standing to assert their ESA claims.

II. Federal Defendants Fully Complied with NEPA.

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

Plaintiffs argue that the scope of the Project includes water transfers in excess of the annual 250,000-acre-foot limitation. ECF No. 48 at 14. Specifically, Plaintiffs cite to language from the Record of Decision ("ROD") that states that the Environmental Impact Statement ("EIS") analyzes both transfers that are conveyed using Central Valley Project ("CVP") facilities as well as those conveyed using State Water Project ("SWP") facilities. *Id.*

But Plaintiffs conflate what the EIS *analyzes* with the scope of the Project and assume that any transfer analyzed by the EIS is also part of the Project. This is incorrect; Reclamation was required to analyze the cumulative impacts of its action when added to other actions, even when that action was undertaken by a non-federal actor. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002); BOR 10217. As part of this analysis, Reclamation looked to the effects of water transfers conducted under separate programs, some of which use SWP facilities and are administered by the California Department of Water Resources ("DWR"), *see, e.g.*, BOR 10221 (water transfers using SWP facilities), while others are water transfers conducted pursuant to other federal programs, *see, e.g.*, BOR 10225 (discussing water transfers to wildlife refuges conducted by Reclamation). BOR 10221. The

mere fact that the EIS considers the combined environmental impact of transfers Reclamation approves as part of this Project with transfers done under other programs is not a "sleight of hand" designed to circumvent NEPA's requirements. Indeed, had these analyses not been performed, Plaintiffs surely would have challenged Reclamation's failure to do so. *See AquAlliance*, 2021 WL 4168534, at *7 (arguing that Reclamation failed to consider cumulative effects of groundwater pumping program).

Finally, Plaintiffs do not dispute Federal Defendants' argument that NEPA has no requirement that the 250,000 acre-foot limitation on transfers be discussed as a mitigation measure. *See* ECF 43-1 at 19-20.

B. Adequacy of the EIS as an informational document under NEPA.

Plaintiffs argue that they are entitled to incorporate by reference broad sections of their brief that are devoted solely to arguments made under California law in support of their contention that the EIS is inadequate under NEPA, a federal law. ECF No. 48 at 18. They then conclude that because Federal Defendants did not address their arguments otherwise, that Reclamation's agency action should be vacated because of organizational deficiencies.

As an initial matter, however, Federal Defendants *did* address Plaintiffs' arguments – namely, that NEPA does not prohibit Reclamation from relying on portions of a previous EIS in revising a project scope and issuing a supplemental EIS. *See* ECF No. 43-1 at 20. Indeed, the 2018 draft supplemental EIS made clear what changes were being made to the 2015 EIS and the final EIS contains an appendix documenting in detail each and every addition and deletion to the prior EIS. BOR 6953-7509. Plaintiffs do not dispute this or even respond to this argument.

Instead, Plaintiffs continue to point to their section on the California Environmental Quality Act ("CEQA") as though CEQA and NEPA are perfectly interchangeable. But Plaintiffs are trying to fit a square peg into a round hole. They do not clarify how their CEQA arguments apply here, they do not cite to analogous portions of NEPA or its regulations, and they do not cite to a single case where a federal court found an EIS to be "inadequate as an informational document" in either their opening arguments or their reply.

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

In their three-sentence section in support of their argument that Mitigation Measure GW-1 is inadequate under NEPA, Plaintiffs make no effort to address Reclamation's arguments, instead stating simply that "BOR offers little rebuttal to this point." ECF No. 48 at 25.

NEPA requires that agencies "discuss potential mitigation measures" and assess "whether the proposed mitigation measures can be effective." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012) (citations omitted). Plaintiffs do not dispute that Reclamation discussed potential mitigation measures nor do they dispute that Reclamation assessed whether the proposed mitigation can be effective. Instead, they disagree with Reclamation's conclusions regarding effectiveness because they claim that critical information was omitted. But disagreement with an agency's conclusions is not a basis for overturning an agency decision. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553-55, 558 (1978) (NEPA does not allow a court to overturn an agency action because it disagrees with the agency's decision or with its conclusions about the scope, breadth, or effect of the environmental impacts of the project at issue).

D. The EIS adequately analyzes the impacts of climate change.

Plaintiffs advance two arguments in support of their contention that Reclamation's analysis of climate change in the EIS was inadequate. First, Plaintiffs argue that the EIS "does not analyze how the Project will exacerbate climate change effects," that it limits its analysis of climate change to water availability, and that Reclamation relies on outdated data. ECF No. 48 at 25-27. Second, Plaintiffs argue that the EIS arbitrarily disregards the "hot-dry" climate change scenario. *Id.* at 27.

As an initial matter, this argument is based upon the assumption that the Project *will* exacerbate climate change effects. However, NEPA does not require worst-case analysis. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) (EIS is not required to include a worst-case analysis). Instead, Reclamation was required to "analyze reasonably foreseeable environmental consequences of major Federal actions, but should not consider those that are remote or speculative." Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097 (June 26, 2019) (hereinafter "Draft Guidance").[4]

[4] In 2019, this Draft Guidance replaced the guidance discussed by this Court in *AquAlliance*, 287

The EIS describes changing conditions associated with climate change, including changes to annual temperature, precipitation, sea levels, snowpack, and streamflow, and then discusses impacts associated with those changes, such as wildfire hazards, changes to water supply and demand, effects on infrastructure, and changes to growing seasons. BOR 9838-42. The EIS further discusses the consequences of each of the proposed actions and how these actions might affect climate change, such as potential increases or decreases to greenhouse gas emissions. BOR 9857. Plaintiffs' assertion that the EIS does not discuss how the Project might contribute to climate change is contrary to the record.

With respect to Plaintiffs' argument that Reclamation relied on outdated data, this contention lacks merit. Essentially, Plaintiffs argue that the climate change modeling of CalSim II is inaccurate because it does not include the most recent hydrological years. ECF No. 48 at 26. But Plaintiffs mischaracterize how this data was used and selected; as explained in the EIS, this data is representative of a wide variety of hydrological years and was perturbed to varying degrees to simulate the compounding effects of climate change. BOR 9845. In other words, Plaintiffs ask the Court to second-guess Reclamation's decision and expertise regarding the usage of this model. However, a court "may not substitute its judgment for that of the agency concerning the wisdom or prudence of [the agency's] action." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (per curiam) (alteration in original) (quoting *Or. Env't Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)).

Likewise, Plaintiffs' argument that Reclamation should not have relied on the Central Tendency scenario is another attempt to second-guess the agency's expertise. To model the future effects of climate change, Reclamation looked to five representative climate futures referred to as "ensemble" scenarios. BOR 6765. Specifically: (1) a Warm-Dry scenario; (2) a Warm-Wet scenario; (3) a Hot-Dry scenario; (4) a Hot-Wet scenario; and (5) a Central Tendency scenario. BOR 6766. The first four scenarios represent book-end scenarios which are less likely to occur. *Id.*; *see also* BOR 98798. By contrast, the Central Tendency contains a large number of projections and is the most likely "consensus" of the various projections. BOR 98798-99. Not only does the EIS explain this, but the logic in selecting the scenario most likely to occur is apparent on its face. Moreover, as discussed above, NEPA does not

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F. Supp. 3d at 1028.

require worst-case analysis. *Robertson*, 490 U.S. at 356.

III. Federal Defendants Fully Complied with the ESA.

A. FWS reasonably analyzed the expected number of years of cropland idling/shifting transfers under Reclamation's program.

Plaintiffs continue to argue that FWS was required to analyze whether six years of crop idling/shifting transfers would jeopardize the giant garter snake, without regard to the fact that: (1) such transfers are not authorized every year and likely would occur in at most two years of Reclamation's six-year program based on historical experience; (2) Reclamation advised FWS it expected two years of transfers in its ESA Biological Assessment and thus obtained ESA incidental take coverage for only two years of transfers; and (3) no unexamined harm to the giant garter snake could possibly occur from additional years of transfers because Reclamation has committed to re-initiate ESA consultation before authorizing any additional years of transfers. ECF No. 48 at 33-35; ECF No. 43-1 at 35-38.

Plaintiffs advance this argument *not* because they claim that six years of transfers are likely under the program, but because the EIS and ROD do not "expressly limit" crop idling/shifting transfers to two years, i.e., additional years of transfers are *possible* under the program. ECF No. 48 at 34 ("the project approved by [Reclamation] is a program of water transfers that *may* include transfers in each of those six years") (emphasis added). First, under the ESA regulations, Reclamation's Biological Assessment describes the agency action to be analyzed in a Biological Opinion, and Reclamation proposed as its agency action to approve only two years of crop idling/shifting transfers in its Biological Assessment. *See* ECF No. 43-1 at 36-37 (citing 50 C.F.R. § 402.14(c)(1), 402.14(g)(3)); FWS 1275; 1281. Consistent with the Biological Assessment, Reclamation's subsequently amended ROD clarified that Reclamation will authorize no more than two years of crop idling/shifting transfers before reinitiating ESA consultation. ECF No. 39-2 at 11, Supp. BOR 11. But even accepting Plaintiffs' argument that the EIS and original ROD define the agency action, the record here fully supports Reclamation's finding that its action as described in the EIS/ROD was likely to result in two years of crop idling/shifting transfers, which FWS fully analyzed. Nothing in the ESA, its regulations, or the case law prohibits FWS from relying on reasonable assessments of the likely effects of the agency action. And here the record fully supports Reclamation's finding that its action as described in the

EIS/ROD was likely to result in two years of crop idling/shifting transfers, which FWS fully analyzed in the Biological Opinion. ECF No. 43-1 at 35-36.

In fact, the Ninth Circuit has held that FWS may rely on reasonable assumptions about the likely on-the-ground effects of an agency's proposed action. For example, in *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 981 (9th Cir. 2006), the Ninth Circuit found that FWS was entitled to rely on an action agency's reasonable projections and assumptions about the effects of its action in the affected area. In *Northern Alaska*, the Ninth Circuit recognized that "the precise location and extent" of future activities affecting a listed species were unknown, and found that FWS "properly relied on a reasonable and foreseeable . . . scenario," even without a guarantee that the agency approving those activities would limit them to that scenario. *Id*.; *see also Jayne v. Sherman*, 706 F.3d 994, 1005 (9th Cir. 2013) (per curiam) (FWS could rely on assumptions about the agency action where nothing in the record demonstrated that those assumptions were arbitrary). Consistent with this authority and contrary to Plaintiffs' argument, FWS did not analyze a "piecemealed project," ECF No. 48 at 34; FWS analyzed the likely effects of the six-year program on the giant garter snake – based on Reclamation's reasonable conclusion that idling/shifting transfers were likely to occur during at most two years of the program.

Other authority supports FWS' reliance on reasonable assessments of the likely scope and effects of the agency action on listed species. In our opening brief, ECF No. 43-1 at 38, Federal Defendants pointed to *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007), in which this Court found that an ESA Section 7 biological opinion could make reasonable assumptions about the likely effects of the agency's action, which there concerned operation of the CVP/SWP. *Id*. at 386-87. The Court found that FWS is "entitled to make reasonable assumptions about the operational volume of water flows, water levels, temperature, and quality based on the historical and projected data in the administrative record." *Id*. at 387. In making that finding, the Court distinguished an earlier decision cited by Plaintiffs in their opening brief, *Natural Resources Defense Council v. Rodgers*, 381 F. Supp. 2d 1212 (E.D. Cal. 2005), in which the Court had found that FWS was required to analyze the full quantity of water deliveries under contracts approved by Reclamation. *Kempthorne,* 506 F. Supp. 2d at 387; *see* ECF No. 48 at 34. Plaintiffs argue on reply that the present case is "more akin" to *Rodgers* and that the holding of *Kempthorne* is inapplicable here because "*Rodgers* dealt with the authorization of the

water service contracts and *Kempthorne* dealt [with] the operation of the CVP." ECF No. 48 at 34-35. First, as pointed out in Federal Defendants' opening brief and consistently ignored by Plaintiffs,[5] Reclamation *did not* authorize water transfers in issuing the ROD or EIS; rather, it does so on a seasonal basis roughly in April/May following the submission and review of applications by sellers. *See* ECF No. 43-1 at 13, 36 (citing BOR 9614-15, 9934-35, 14079). More fundamentally, Plaintiffs identify no reason why different tests for evaluating agency assessments of the likely effects of a proposed action should apply to one type of action (operation of a water transfer system) versus another type of action (a program to authorize water transfers on a seasonal basis). In any event, *Kempthorne* is not meaningfully distinguishable. In that case, the assumptions regarding operation of the CVP/SWP found reasonable by the Court were based on data regarding when "delivery of full water service contract entitlements," would occur, i.e., "in a wet water year when sufficient water is available." *Kempthorne*, 506 F. Supp. 2d at 387. Such factual information is not much, if any, different than the facts underlying Reclamation's assessment that two years of idling/shifting transfers were likely during the program. *See* ECF No. 43-1 at 35-36 (noting factors including water availability and pumping capacity that affect whether crop idling/shifting transfers occur). Here, as in *Kempthorne*, where Plaintiffs have failed to show that the scenario identified by Reclamation and examined by FWS was "factually impossible," the Court should defer to the agencies' expertise regarding the effects of the action. *Kempthorne*, 506 F. Supp. 2d at 387.

Plaintiffs further argue that FWS could not lawfully rely on the requirement that Reclamation reinitiate ESA consultation before authorizing any additional years of crop idling/shifting transfers. ECF No. 48 at 35. But in *Northern Alaska*, discussed above, the Ninth Circuit found that FWS could rely on reasonable assumptions about the on-the-ground activities that would likely occur from the agency action and, in doing so, expressly relied on the ESA's requirement to reinitiate consultation to address any changes in the effects of the action from those analyzed in the biological opinion. 457 F.3d at 981. The Ninth Circuit noted that, just as in this case, "if future actions differ from . . . assumptions," the agency must reinitiate consultation with FWS under ESA Section 7. *Id*. Plaintiffs cite *American*

[5] For example, Plaintiffs incorrectly assert that "[t]he proposed action identified in the EIS/R authorizes water transfers every year over a six-year period from 2019 to 2024." ECF No. 48 at 33. Reclamation did not authorize any water transfers with the EIS or ROD.

Rivers v. U.S. Army Corps of Engineers, 271 F. Supp. 2d 230, 255 (D.D.C. 2003), which is not binding on this Court and does not support their argument. ECF No. 48 at 35. There, the D.C. District Court found only that FWS had improperly limited its analysis of the effects of the agency action to one year, when the action would continue to have effects in later years. *Am. Rivers,* 271 F. Supp. 2d at 255 (finding FWS had to analyze the "present and future effects of the 2003 low summer flows on these species"). In short, the Court found it was not reasonable to assume only one year of effects on the factual record in that case. Here Reclamation reasonably found that at most two years of transfers were likely during the six-year program based on historical experience and the fact – undisputed by Plaintiffs – that the capacity needed for idling/shifting transfers does not even exist in 65% of the years studied. ECF No. 43-1 at 35-36.

In addition, in *American Rivers*, the Court was concerned that FWS' analysis would not result in a "comprehensive assessment of the impacts" of the activity on listed species. Here, as explained in Federal Defendants' opening brief, FWS will examine in any reinitiated consultation the effects of the completed years of crop idling/shifting, based on the ongoing U.S. Geological Survey ("USGS") research on the giant garter snake required by the Biological Opinion. ECF No. 43-1 at 15, 32. Thus, FWS' jeopardy analysis for any additional years of transfers would be more informed and based on updated data, by analyzing those transfers in a re-initiated consultation. For all of these reasons and those in Federal Defendants' opening brief, the Court should reject Plaintiffs' argument that FWS improperly analyzed the likely two years of transfers under the program.

B. FWS reasonably found no jeopardy to the snake based on multiple factors including the relatively small amount of rice habitat temporarily affected.

As explained in Federal Defendants' opening brief, Plaintiffs seriously mischaracterizes the Biological Opinion in asserting that its entire basis is a purported strategy to maintain water in canals and ditches. ECF No. 43-1 at 23-27, 30-31. Rather, FWS principally rested its no-jeopardy determination on the fact that a relatively small portion of the snake's rice field habitat – which again, is a subset of the species' total habitat and does not include higher quality perennial wetlands and other water bodies and conveyances where most snakes are found – would be temporarily affected by Reclamation's proposed action. ECF No. 43-1 at 24-26. Specifically, FWS found that even with the

maximum annual amount of idling/shifting transfers allowed in a given year, and factoring in the maximum potential amount of other idling/shifting transfers not approved by Reclamation, but considered as part of "cumulative effects," at least 80% of rice field acreage in the project area would remain available to the snake based on average historical rice production. *Id*. FWS also cited other facts in support of its no-jeopardy determination, including that (1) a relatively small portion of the species' habitat in the snake's nine recovery units would be temporarily affected by crop idling/shifting transfers; (2) such transfers will not be approved for rice acreage immediately adjacent to nine identified important snake populations; (3) transfer program participants must maintain sufficient water levels in canals and other water conveyances near idled fields (where most snakes are found); and (4) Reclamation is required to provide regular reports regarding the transfer program each year (including the location of all idled parcels) which, along with the ongoing, required USGS field research on the effects of idling/shifting on the snake, will inform any future ESA consultation. *Id*. at 23-26. All of these findings support FWS' expert determination that the proposed action is not likely to jeopardize the snake, which is entitled to substantial deference under the standard of review. ECF No. 43-1 at 16, 28.

On reply, Plaintiffs nevertheless insist that their inaccurate portrayal of the Biological Opinion is correct and that Federal Defendants' argument to the contrary "is easily refuted" by a lone statement in the Biological Opinion that "[t]he cumulative loss of 18.4 percent of available rice foraging habitat for the snake will be an adverse effect on the snake," which Plaintiffs argue "expressly requires adoption of 'conservation measures' that 'help minimize the potential for adverse effects.'" ECF No. 48 at 36. The Incidental Take Statement of the Biological Opinion does require that conservation measures described by Reclamation as part of its proposed action be included in water sales contracts, which would include maintaining water in canals and ditches near idled rice fields. FWS 1491-92. But that hardly means that those conservation measures (let alone the one seized upon by Plaintiffs) are the entire basis for FWS' no-jeopardy conclusion. While it certainly took into account the conservation measures proposed by Reclamation, FWS analyzed the amount and location of rice habitat that could be temporarily lost in relation to the total rice habitat available, and determined that the "level of anticipated take is not likely to result in jeopardy to the snake" because the "temporary loss" of the maximum rice field acreage idled/shifted in a year was not significant "relative to the overall rice land that is available to the snake

in the action area of the program." FWS 1491; *id*. at 1487. Plaintiffs' argument that FWS rested its no-jeopardy determination on a strategy to maintain water and canals in ditches is demonstrably incorrect.

C. FWS did not find that Reclamation's program would result in the loss of 20% of the snake population.

Having previously ignored FWS' reliance on the relatively small amount of rice habitat that would be temporarily affected, Plaintiffs now argue that FWS purportedly concluded that, in finding that at least 80% of the rice habitat would be maintained (on top of other types of habitat), the proposed action would result in a "20 percent population loss" in a given year of transfers. ECF No. 48 at 36. This claim is not true. While admitting that FWS "never clearly articulated" this purported finding, Plaintiffs premise this claim on FWS' finding in the Incidental Take Statement that, because FWS *could not* determine the precise number of snakes that could be "taken" within the meaning of the ESA, FWS used the "habitat affected" as a surrogate limit of the amount of take allowed, consistent with the ESA Section 7 regulations. ECF No. 48 at 36; FWS AR 1490. First, the Incidental Take Statement is a mechanism to limit and monitor take so that the effects analyzed in the Biological Opinion are not exceeded. *See* 50 C.F.R. § 402.14(i)(3), (4) (requiring reinitiation of consultation if the specified take is exceeded). The ESA regulations thus provide that where necessary:

> [a] surrogate (e.g., similarly affected species *or habitat* or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.

50 C.F.R. § 402.14(i)(1)(i) (emphasis added). Thus, as the Section 7 regulations make clear, FWS used habitat as a surrogate for take because it *could not quantify* the number of snakes taken. Indeed, the Biological Opinion expressly states as much, which Plaintiffs entirely ignore: "[t]he Service is unable to quantify an exact number of snakes that will be taken as a result of the proposed project because it is impossible to know how many individuals may be present in the action area." FWS AR 1490.

Plaintiffs' argument is facially incorrect for other reasons shown by the record. First, claiming a 20% population loss would occur based on the temporary loss of that amount of rice habitat assumes

that (1) all snakes are located in rice fields; (2) snakes are equally distributed across the project area; and (3) snakes are not mobile and cannot move to alternative aquatic habitat. None of these assumptions are true. FWS 912 (85% of snake occurrences in water canals and ditches); ECF No. 43-1 at 33 (citing literature finding that snakes are found in natural wetlands of the kind they occupied before rice agriculture); FWS 1481-83 (describing varying concentrations of snakes in different portions of the nine recovery units, e.g., noting that the "majority of [snake] occurrences" are located in certain protected areas of the Butte Basin recovery unit and finding that "[t]he American Basin Recovery Unit contains the most known occurrences of the snake" and "[t]he majority of these occurrences are located in the Natomas Basin"); FWS 1293, 1475, 1489, 2887 (referring to the snake's use of agricultural land with canals and irrigation structures as movement corridors). In their opening brief, Plaintiffs themselves argue that USGS has found that the number of snakes found in a given location *varies* depending on the proportion of rice grown in a three-kilometer buffer (until the probability of occurrence flattens out and stops increasing after rice acreage exceeds about 55-60%). ECF No. 40 at 55-56. Plaintiffs' argument also assumes that all "take" within the meaning of the ESA results in the loss or death of an individual. In fact, "take" is defined more broadly to include impacts that do not necessarily result in death. 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *see also* 50 C.F.R. § 17.3(c)(3) (further defining "harm" to include activities that impair a species' essential behavioral patterns, but not necessarily kill them). While FWS did find that the transfers would likely result in the mortality of some individual snakes, it did not find that any particular number, let alone 20% of the population, would be lost in a given year. FWS AR 1487, 1490.

D. FWS reasonably found based on the available data that the temporary loss of a relatively small amount of rice habitat will not likely jeopardize the snake, not that rice habitat is unimportant to the species.

Again distorting Federal Defendants' position, Plaintiffs argue that FWS suggests that rice fields are "not important to [giant garter snake] recovery" and "not relevant" to the snake. ECF No. 48 at 37. To be clear, it is not Federal Defendants' position that rice fields are unimportant or irrelevant to the giant garter snake. Indeed, Federal Defendants expressly acknowledge that while most snake occurrences are in ditches and canals, "studies indicate that giant garter snakes occupying canals need

some adjacent rice fields or natural, perennial wetlands of the kind the snake historically occupied before rice agriculture arrived." ECF No. 43-1 at 14. However, Federal Defendants have accurately and reasonably pointed out that rice field habitat is less desirable than natural, perennial wetlands because (1) the snake only occupies rice fields when the fields are flooded during the growing season and have grown sufficient vegetation to provide cover from predators; and (2) rice fields are not permanent habitat because farmers may idle or convert fields to other uses irrespective of Reclamation's water transfer program. *Id*. at 14, 33. While not disputing that the species needs some rice habitat in the absence of perennial wetlands, FWS merely found that the temporary loss of a relatively small portion of the species' rice habitat would not jeopardize the species, based on the available data.

Plaintiffs continue to point to no evidence contradicting this conclusion and offer no convincing rebuttal to record evidence supporting FWS' determination. As explained in Federal Defendants' opening brief, FWS noted that in 2017, when rice production was less in counties that had reported data, USGS found an increase in snake occurrences. ECF No. 43-1 at 28-29. Plaintiffs' cite this finding as evidence that FWS claims that rice field habitat is "not important" to the snake. ECF No. 48 at 37. As explained above, that is not FWS' position. Rather, in recognizing that rice production declined but snake occurrence increased in 2017, FWS found only that the available data indicate that some loss of rice field habitat does not necessarily result in decreased snake numbers. FWS 1487. Plaintiffs argue that this conclusion is contradicted by the USGS report cited by FWS. ECF No. 48 at 38-39. As explained in Federal Defendants' opening brief, that is not the case: USGS preliminarily found that the probability of snake occurrence increased sharply if the proportion of fields growing rice within three kilometers was over 40%, but after rice acreage exceeds about 55-60%, the probability of snake occurrence flattens out and stops increasing. ECF No. 40 at 55-56. As Federal Defendants explained, these data if anything support FWS' judgment that 100% of the rice in the project area need not be maintained to avoid jeopardy. *Id*. Plaintiffs have no response to this point on reply and simply ignore it. ECF No. 48 at 37-38.

Plaintiffs further suggest that FWS' finding regarding the increased number of snakes observed by USGS in 2017 despite decreased rice production is unavailing because USGS did not survey all of the same sites in 2016 and 2017. ECF No. 48 at 37-38 n.3. While some sites surveyed in 2016 were not

available in 2017, USGS examined fewer sites overall in 2017 (65 sites) compared to 2016 (83 sites), yet still found more snakes at fewer sites in 2017 (91 snakes captured in 2016 versus 110 snakes captured in 2017). FWS 1486. In addition, in Sutter County, where reported rice production fell most dramatically between 2016 and 2017 (from 119,00 acres to 4,700 acres) and USGS examined the same number of sites between years (13), USGS found 16 snakes at 9 of 13 sites in 2016 and 20 snakes at 8 of 13 sites in 2017, i.e., more snakes were found at the same number of sites in 2017 despite the large fall in rice production. FWS 977, 1410, 1484. As FWS emphasized in the Biological Opinion, all of the USGS snake occurrence data – including that cited by Plaintiffs – is preliminary and additional years of studies are necessary before more definitive conclusions can be drawn regarding the impacts of crop idling/shifting on the giant garter snake. FWS 1487-88 ("multiple years of data should be collected and analyzed" and "Conservation Measures 5 through 8 will provide monitoring and new research to better help determine the potential effects of cropland idling/shifting on the snake"). But FWS was required to make an expert judgment based on the best available data regarding whether the amount and location of the lost habitat would jeopardize the species, and found that was not the case here given that the rice habitat losses were not permanent and the vast majority of rice field habitat (in addition to other, unaffected habitat in perennial wetlands and water conveyances) would remain available to the snake even assuming the maximum crop idling/shifting transfers. Without evidence contradicting that conclusion not considered by FWS, which does not exist here, the Court should defer to FWS' expert determination. *See*, e.g., *Cent. Ariz. Water Conservation Dist. v. U.S. EPA*, 990 F.2d 1531, 1540 (9th Cir. 1993) (courts are to be "particularly deferential when reviewing agency actions involving policy decisions based on uncertain technical information.") (citation omitted).

E. Plaintiffs do not show that unspecified "block size" limitations on idled parcels are necessary to avoid jeopardy.

Plaintiffs continue to suggest on reply that, absent limitations on the size or distribution of idled rice fields, FWS could not find that Reclamation's proposed action would avoid jeopardy. ECF No. 48 at 38-39. As explained in Federal Defendants' opening brief, FWS analyzed the distribution of potentially idled parcels across the project area, and found that they would not be so concentrated in individual recovery units that insufficient habitat would be available for the snake in any recovery unit.

ECF No. 43-1 at 31. Plaintiffs assert that "there is no evidence that the entirety of each recovery unit is suitable habitat." ECF No. 48 at 39. But these recovery units were identified based on habitat suitability models for the snake, and while they contain some non-habitat (e.g., roads and buildings), they indisputably contain extensive irrigated agricultural fields, protected natural wetland areas, and networks of water conveyance structures including canals, levees, and ditches, all of which may be used by the snake, along with upland areas that the snake uses during the winter season. FWS 2861, 2874. Plaintiffs have the burden of proof under the standard of review, *see Ellis v. Housenger*, 252 F. Supp. 3d 800, 808 (N.D. Cal. 2017), and they have not shown that any substantial part of the recovery units identified by FWS are not suitable habitat. Plaintiffs also point to no other data in the administrative record that would have allowed FWS to perform a better analysis of the amount of habitat potentially affected in each recovery unit. Under the ESA, FWS must only prepare a biological opinion based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). "Absent superior data[,] occasional imperfections do not violate" the ESA best available [data] standard." *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080–81 (9th Cir. 2006) (citing *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001)).

Moreover, Plaintiffs nowhere identify the specific "block" size or distribution limitations they advocate, let alone record evidence showing that such restrictions are necessary to avoid jeopardy. *See*, e.g., ECF No. 40 at 55 (referring to "block size restrictions" but not identifying what those are in terms of acres or any other measure). In their opening brief, Plaintiffs make a passing reference to the snake's recovery plan for the proposition that certain configurations of habitat should be preserved, ECF No. 40 at 60, but that plan does not discuss crop idling or any restrictions on such activity. Rather, the recovery plan identifies a specific habitat configuration (including significant perennial wetlands, not rice field habitat) that must be permanently protected to ultimately recover and de-list the species. FWS 2885-87. In their opening brief, Plaintiffs also cited this Court's observation in the prior case that FWS' 2015 biological opinion stated that a "checkerboard pattern" of idled parcels may minimize impacts to the snake. ECF No. 40 at 54. But the 2015 biological opinion did not find that block size limits were necessary to achieve a sufficient distribution of idled parcels on the landscape. FWS 909, 913-914. In fact, without any such restrictions in place under the transfer program analyzed in the 2015 biological

opinion, the rice fields idled in 2015 are distributed relatively widely across multiple sellers in the project area and even within individual water districts, particularly in the larger districts where the majority of transfers occurred that year. *See*, e.g., FWS 2838-2846; FWS 1496-1501. Farmers make individual decisions to idle parcels, and Plaintiffs point to no evidence that idled fields are likely to be so concentrated as to eliminate sufficient rice field habitat in a given location occupied by snakes. In addition, given the extensive network of irrigation canals and ditches in these fields, snakes can readily move past idled fields to active rice fields nearby; any idled fields in a given location do not prevent such movement. FWS 1293, 1475, 2887. For all of these reasons, Plaintiffs have not shown that FWS arbitrarily found no jeopardy in the absence of block size or distribution limitations on idled parcels.

F. FWS reasonably relied in part on the prohibition on idling rice fields immediately adjacent to nine important giant garter snake populations.

As explained in Federal Defendants' opening brief, FWS reasonably relied in part on the additional protection afforded to nine important snake populations in finding no jeopardy, namely a restriction on idling rice fields adjacent to these populations. ECF No. 43-1 at 31-32. In their opening brief, Plaintiffs advanced a series of mistaken arguments regarding these populations, including that they purportedly were identified for the first time in the 2019 Biological Opinion and that the protections were limited to water bodies and did not include adjacent rice fields. Plaintiffs have apparently abandoned the first argument, and now admit in their reply brief that affording additional protections to these populations is "helpful." ECF No. 48 at 39-40. Plaintiffs instead argue that the protections for these nine populations, along with maintaining water in canals and ditches, is insufficient to avoid jeopardy, in light of FWS' purported finding that Reclamation's action would result in the loss of 20% of the population in a year. *Id*. at 39. FWS did not find that 20% of the population would be lost in a given year, as explained above. Federal Defendants also have explained that FWS' no-jeopardy determination was principally based on the relatively small amount of rice field habitat that would be temporarily affected by Reclamation's action, along with several other factors including but not limited to the additional protections for habitat adjacent to the important populations.

Plaintiffs also continue to argue on reply that the protections for these populations are limited to "waterbodies" and "exclude rice fields," but for the first time advance this claim based on post-

decisional, extra-record evidence that may not be considered by the Court, and in any event, does not support their argument. ECF No. 48 at 40-41. Plaintiffs point to two alleged instances in 2021 – two years after issuance of the challenged 2019 Biological Opinion – where Reclamation allegedly allowed crop idling/shifting transfers for fields adjacent to the identified important snake populations. *Id*. Plaintiffs argue that the Court may consider evidence outside the administrative record for the purpose of reviewing their ESA claims. *Id*. at 40 n.4 (citing *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011)). However, *Kraayenbrink* concerned claims brought under the ESA citizen-suit provision. *Kraayenbrink* , 632 F.3d at 495-96. Plaintiffs' challenge to the merits of FWS' Biological Opinion is brought under the Administrative Procedure Act ("APA"), not the ESA citizen-suit provision. *See Bennett v. Spear*, 520 U.S. 154, 160, 171-74 (claims alleging that an ESA biological opinion are unlawful under ESA Section 7 are APA claims, not ESA citizen-suit claims). Thus, *Kraayenbrink* provides no support for Plaintiffs' reliance on extra-record evidence to challenge FWS' biological opinion. In addition, regardless of any limited exceptions to record review principles articulated in *Kraayenbrink*, the Ninth Circuit has held that "[p]arties may not use 'post-decision information as a new rationalization either for sustaining or attacking the agency's decision.'" *Ctr. for Biological Diversity v. U.S. EPA*, 90 F. Supp. 3d 1177, 1198 (W.D. Wash. 2015) (citing *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986). Thus, Plaintiffs may not rely on evidence post-dating the Biological Opinion in challenging the merits of the Biological Opinion.

Should the Court elect to consider this post-decisional evidence, the Court must likewise consider additional extra-record evidence attached to this brief that explains the circumstances regarding one of Plaintiffs' allegations. Specifically, Plaintiffs attach a letter showing that Glenn-Colusa Irrigation District proposed idling rice acreage located more than 50 meters from an important snake population, where the landowners agreed to maintain rice in a 50-meter zone adjacent to the snake population. ECF No. 48 at 40; ECF No. 49 at 28. In 2021, Reclamation did approve a relatively small volume of crop idling/shifting transfer based on maintenance of a 50-meter rice zone adjacent to the population, but only after conferring with FWS and the USGS giant garter snake researchers, who found that maintaining rice in a 50-meter area adjacent to the population was consistent with the intent of the Biological Opinion and was supported by preliminary data showing that 50% or more of giant garter snake occurrences

were within 50 meters of the adjacent canals. *See* Exhibit 1 at 2-3 (60-Day Compliance Report for 2021 Transfers). While this decision is not even part of the Biological Opinion under review by the Court, Plaintiffs cannot show that this approach is unreasonable. Rice fields are generally divided into sections with a technique called "field checking," which are earthen divisions that split a field into multiple cells. *Id*. Some farmers may have larger fields that contain areas hundreds of feet away from an important population, while a neighboring farmer has smaller, checked parcels. Absent FWS' approach, one farmer's acreage could be idled merely because it is already subdivided into smaller parcels, while a farmer next door with a larger, unchecked field could not do so even if both farmers have acreage a similar distance from a population. That would make no sense and be inconsistent with the intent of Reclamation's action analyzed in the Biological Opinion. In sum, Reclamation is not approving idling/shifting transfers in rice acreage that in fact is immediately adjacent to important populations.

The second alleged instance cited by Plaintiffs is based on an apparent mistake by the water district and does not represent any departure by Reclamation from prohibiting crop idling/shifting transfers in areas immediately adjacent to the identified important populations. Plaintiffs assert that Reclamation approved Reclamation District 108's request for idling rice fields adjacent to an important snake population because the fields were separated from the population by various structures including a levee berm, canal, and road. ECF No. 48 at 41; ECF No. 49 at 46. However, Reclamation District 108 neither contains nor is adjacent to any of the nine identified important snake populations. FWS 1498 (map showing the location of Reclamation District 108 in relation to the important snake populations). Plaintiffs attach a letter from Reclamation District 108 stating that "[t]he Colusa Basin Drainage Canal (Colusa Drain), which runs along [Reclamation District] 108's western boundary, has been identified by [FWS] as having important snake populations." ECF No. 49 at 46. This statement is incorrect; while FWS did identify a portion of the Colusa Basin Drainage Canal as containing an important snake population, that portion is well to the north of Reclamation District 108. FWS 1498. In short, Plaintiffs' second alleged instance is based on a clear mistake and does not support their argument.

For all of these reasons, Plaintiffs' attempt to undercut FWS' reliance in part on the additional protection afforded to rice acreage adjacent to important snake populations fails.

G. Contrary to their argument, Plaintiffs have not identified a single instance of Reclamation providing "inaccurate information" to FWS.

As explained in Federal Defendants' opening brief, Reclamation has not violated any duty it has under ESA Section 7(a)(2) because it neither withheld any information from FWS nor mischaracterized any information provided to FWS, as alleged by Plaintiffs. ECF No. 43-1 at 38-39. In their reply, Plaintiffs assert they "established that [Reclamation] disseminated inaccurate information." ECF No. 48 at 42. But in their opening brief Plaintiffs alleged only one specific instance of such conduct, which Federal Defendants rebutted and Plaintiffs do not even attempt to rehabilitate on reply. *See* ECF No. 43-1 at 39. To the extent Plaintiffs' ESA Section 7(a)(2) claim against Reclamation is premised on its larger narrative that Reclamation misled FWS into believing that maintaining water in ditches and canals was sufficient to avoid jeopardy, Federal Defendants have shown that FWS did not rely on that one conservation measure in finding that Reclamation's action would not likely jeopardize the giant garter snake. In sum, Plaintiffs' allegations that Reclamation purportedly led FWS astray are baseless, contradicted by the record, and do not give rise to an ESA Section 7(a)(2) claim against Reclamation.

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