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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Petitioners and Plaintiffs,

v.

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

Defendants and Respondents.

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

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

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Date: TBD
Time: TBD
Crtrm.: TBD

Date Action Filed: May 11, 2020

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I. INTRODUCTION

As shown in the opening brief of the San Luis & Delta-Mendota Water Authority ("Water Authority") (Doc. 44), the record of these proceedings and the authorities that govern them support the Water Authority and the U.S. Bureau of Reclamation's ("Reclamation") (together, "agencies") approach to environmental review. The EIS/EIR evaluated a defined range of potential water transfers that might occur over a 10-year period, all of which are subject to the jurisdiction of Reclamation. *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 999-1001 (E.D. Cal. 2018) ("*2018 Opinion*"). While this Court's 2018 ruling identified specific errors in the EIS/EIR as it was certified in 2015, nearly all plaintiffs' claims challenging the adequacy of the document were rejected. *Id*. at 996, 1006, 1008, 1014, 1016, 1019, 1020, 1023, 1028, 1037, 1041, 1042, 1047-48, 1049, 1051, 1062; *see* Doc. 44 at 1:22-2:4, fn. 1, 6:5-7:24. In addressing the Court's limited, albeit specific, concerns, the Water Authority's 2020 recertification of the EIS/EIR complied with the Court's rulings and all state law requirements.

II. MOST OF PLAINTIFFS' CLAIMS ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL UNDER STATE AND FEDERAL STANDARDS

Plaintiffs argue their claims are not barred because: (1) the Court "vacated the project under federal, not state law"; and (2) "background conditions and key aspects of the project have changed." Doc. 48 at 1:22-6:19.[1] Under both state and federal legal standards, however, plaintiffs may not

[1] Many of plaintiffs' arguments are based on inaccurate assertions, speculation with no foundation in fact, and a skewed view of the record. *See, e.g.*, Doc. 44 at 13:16-15:8, 16:21-17:18, 20:13-21:1, 21:13, fn. 12, 33:12-14. Plaintiffs continue to complicate review by mixing issues. Doc. 44 at 26, fn. 17; *2018 Opinion*, 287 F. Supp. 3d at 1010, fn. 20. Plaintiffs attempt to repackage their previously rejected "improper lead agency" (*2018 Opinion*, 287 F. Supp. 3d at 989-96) and "uncertain project description" (*id*. at 996-1003) arguments by asserting that Reclamation lacks sufficient jurisdiction over the range of transfers analyzed in the EIS/EIR to enforce project conditions, and that Reclamation would "ignore Project transfers approved by DWR." Doc. 48 at 9:20-23; *see id*. at 6:22-9:23. The Court already affirmed that Reclamation has jurisdiction over all project transfers within the scope of the EIS/EIR and can effectively enforce project conditions and mitigation measures. *2018 Opinion*, 287 F. Supp. 3d at 1001; Doc. 44 at 21:20-23:9. Plaintiffs also selectively quote documents. *See, e.g.*, Doc. 44 at 21:13, fn. 12. Other claims simply misrepresent the record, such as an assertion that CDFW was "not 'consulted with regard to' the FEIR." Doc. 48 at 16:13-15; CEQA5909; 8265-75. Plaintiffs' failure to set out a full view of the record is fatal to their claims. *2018 Opinion*, 287 F. Supp. 3d at 989; *Citizens for a Sustainable Treasure Island v. City and Cnty.*

raise and relitigate claims identical to those they already litigated or could have asserted in the prior action.

Essentially the same three factors determine application of res judicata under both state and federal law: (1) an identity of claims; (2) a final judgment on the merits; and (3) privity between parties. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003); *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles*, 126 Cal.App.4th 1180, 1202 (2004). Likewise, both state and federal standards for collateral estoppel require: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated (by the party against whom preclusion is asserted) in the prior litigation; and (3) determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *McQuillon v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004); *Cnty. of Los Angeles v. Cnty. of Los Angeles Assessment Appeals Bd.*, 13 Cal.App.4th 102, 108 (1993). No material difference exists between state and federal legal standards, and hence plaintiffs' claims are barred regardless of which standards are applied. Doc. 44 at 13:16-14:28.

A. The Court's Vacatur Order Does Not Void the Substantive Standards of Res Judicata and Collateral Estoppel Under Either State or Federal Law

Plaintiffs argue that, notwithstanding the Court's *2018 Opinion* rejecting nearly all of their claims challenging the EIS/EIR, they are free to relitigate the same claims and issues because the Court' Judgment vacated the EIS/EIR. Doc. 48 at 1:23-3:22. Plaintiffs' portrayal of "vacatur" as a wholesale rejection of the EIS/EIR is insupportable. *See, e.g.*, Doc. 44 at 2:5-4:6, 16:1-7, 23:16-24:3; *see also AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 880-83 (E.D. Cal. 2018) ("*Order re Vacatur*"). Far from vitiating the rulings in the *2018 Opinion*, the Judgment states it is "[p]ursuant to and consistent with" the *2018 Opinion*. Water Authority RJN, Ex. 14.

Under the federal Administrative Procedure Act ("APA"), the normal remedy to correct legal error in an agency action is to "set aside" the action. 5 U.S.C. § 706(2); *Order re Vacatur*, 312 F. Supp. 3d at 880-81. Vacatur is the ordinary and presumptive remedy when a federal court finds any

of San Francisco, 227 Cal.App.4th 1036, 1064 (2014); Doc. 44 at 11:18-22, 15:19-24.

legal error in an agency's decision. *Order re Vacatur*, 312 F. Supp. 3d at 881 (flawed action must be vacated except "in rare circumstances"); *id*. at 882 (quoting *Klamath-Siskiyou*, 109 F. Supp. 3d at 1242) (even if the agency's error is slight, vacatur is required unless it would cause "serious and irremediable harms that significantly outweigh the magnitude of the agency's error"); *Southeast Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("*Southeast Alaska*") *vacated and remanded on other grounds by Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 271 (2009) (court typically should "vacate the agency's action and remand to the agency to act in compliance with its statutory obligations").

This Court therefore ordered the Water Authority to vacate its 2015 certification of the EIS/EIR, having identified specific flaws that required correction. Water Authority RJN, Ex. 14, ¶ 7. This meant the previously certified EIS/EIR could not be relied on to approve any water transfers until the corrections were made. *Id*. at ¶¶ 5, 7.[2] Remand to the agency to correct the identified legal flaws in its action is inherent in remedies under the APA. *Southeast Alaska*, 486 F.3d at 654.

Plaintiffs offer no authority, or policy rationale, to support their position that vacatur robs a judgment of its res judicata and collateral estoppel effect. There is none. Plaintiffs' argument that res judicata and collateral estoppel do not apply in this case because the Court did not adopt the writ procedure of California Public Resources Code section 21168.9 is nonsensical; by that standard no judgment entered by federal courts would have res judicata or collateral estoppel effect, because none adopt that procedure. Plaintiffs' reliance on the choice of law discussion in *Hayes v Rojas*, No. 1:20-cv-01820, 2021 U.S. Dist. LEXIS 222412 (E.D. Cal. Nov. 17, 2021) is unavailing; regardless of whether state or federal standards of res judicata and collateral estoppel apply here, plaintiffs' rehashed CEQA claims are barred. Doc. 44 at 13:16-15:8. Plaintiffs offer no explanation for their assertion that giving res judicata or collateral estoppel effect to the judgment would be incompatible

[2] The practical effect of a federal court's order to vacate the agency's action is that in the interim, while the agency complies with the judgment, no further implementation activities can take place. *Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. 21-35144, U.S. Dist. LEXIS 22584, at *8 (D.Mont. 2021); *Pollinator Stewardship Council v. United States EPA*, 806 F.3d 520, 532 (9th Cir. 2015). Essentially the same rules apply under state law. Doc. 44 at 2:11-3:11, 8:1-8, 15:10-15; Cal. Pub. Res. Code, § 21168.9; *Ione Valley Land, Air, and Water Defense Alliance v. Cnty. of Amador*, 33 Cal.App.5th 165, 172 (2019) ("*Ione Valley*").

with federal interests under *Semtek*. To the contrary, judicial economy strongly favors not consuming federal court resources by relitigating the issues already decided in the *2018 Opinion*, or issues that could have been raised previously but were not.

Plaintiffs cite *High Country Conservation Advocates v. U.S. Forest Service*, 333 F. Supp. 3d 1107 (D. Colo. 2018) ("*High Country II*") for the proposition that any agency action (and associated EIS or EIR) that is "vacated" without an order for the court's reconsideration at a later date necessarily results in "new NEPA [or CEQA] documents" and a "new project not covered by res judicata." Doc. 48 at 2:23-3:9. Plaintiffs' construction of the *High Country II* opinion is erroneous and the absurd results that would stem from their extremely broad procedural interpretation, untethered to the facts, are manifest. That the *High Country II* court vacated the lease at issue without ordering reconsideration did not in any way drive that court's res judicata analysis. 333 F. Supp. 3d at 1118-19. Rather, the operative facts in *High Country II* showed that the supplemental EIS and lease modifications at issue there were not truly supplemental. *Id*. at 1118-19.

Here, the Court's decision to vacate certification of the EIS/EIR did not require the agencies to completely restart their review. *Order re Vacatur*, 312 F. Supp. 878. In issuing its vacatur order, the Court itself contemplated the procedure the agencies followed, noting the "supplemental analyses and related procedures aimed at addressing the flaws the Court identified," might be completed by early 2019. *Id.* at 881; *see id*. at 882 (evaluating disruption that might result given timing of potential completion of remand process and transfer season). The Court also observed the agencies correctly summarized the types of issues to be addressed on remand. *Id*. at 881, 883.[3]

[3] The Court determined the necessary corrections to the EIS/EIR pursuant to CEQA were "serious," but distinct. Doc. 44 at 7:25-8:8. Plaintiffs' contrary argument is unaided by their citation to *Washoe Meadows Community v. Dept. of Parks & Rec.*, 17 Cal.App.5th 277 (2017) ("*Washoe*"). Doc. 48 at 10:1-9. The *Washoe* court found that the EIR in that case was wholly deficient as an informational document – "it set forth four or five very different alternatives" and failed to "identify a preferred alternative." *Washoe*, 17 Cal.App.5th at 285. "Rather than providing inconsistent descriptions of the scope of the project at issue, the DEIR did not describe a project at all." *Id*. at 288. *Washoe* has no bearing here, because this Court's 2018 rulings made no such finding in relation to the EIS/EIR. Doc. 44 at 6:5-8:8. The EIS/EIR was decertified, but for limited and very different reasons than those that led to decertification of the EIR in the Washoe case. *Washoe*, 17 Cal.App.5th at 285, 288. "[W]hether the EIR has been decertified does not alter the fact that the sufficiency of a component of the EIR has been litigated and resolved." *Ione Valley*, 33 Cal.App.5th at 172.

In short, the Court's vacatur order was typical and its decision not to allow the agencies' actions to stand while they were corrected was routine. *Id*. at 880-84. Vacatur of the EIS/EIR and related decisions did not alter the res judicata/collateral estoppel effect of the Court's judgment, which bars plaintiffs from raising claims they actually litigated or could have litigated before, regardless of whether state or federal standards are applied. Doc. 44 at 13:16-15:8.

B. Neither the Project Nor Its Circumstances Have Substantially Changed

Plaintiffs argue that the principles of res judicata and collateral estoppel do not apply because the "earlier project was vacated and abandoned in favor of a new project that [was] proposed and approved" by the agencies "based on a new EIS/R." Doc. 48 at 7:22-25. Plaintiffs' depiction of these events is grossly inaccurate; the record shows that plaintiffs' allegations of a "new project," "new EIS/R," and "changed circumstances" are not credible. Doc. 44 at 8:9-9:17, 16:1-33:28.

1. No Substantial Project Changes Were Made

Plaintiffs allege substantial project changes as to sellers, timeframe, and quantity of water, such that "the claims at issue here arise out of a different 'nucleus of facts.'" Doc. 48 at 4:12-5:12. The record belies plaintiffs' claims. CEQA028, 039-042, 181, 5281, 5894, 8054-56, 10415, 10423-25, 15585. The project has not substantially changed, nor has the scope of the EIS/EIR's analysis. Doc. 44 at 16:1-20:10; *see* Water Authority RJN, Ex. 5 at 205, 8-12, Ex. 8 at 1-3.[4]

2. No Substantial Changes in Environmental Conditions Have Occurred

Plaintiffs allege that "new information and modeling" regarding the "environmental effects of climate change" make res judicata inapplicable. Doc. 48:5:13-6:3. They point to studies finding

[4] Plaintiffs assert that *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002) ("*CDWA*") is analogous, because it held res judicata did not apply "where the second lawsuit involved a different source of water, a different management plan, and changed amounts of water." Doc. 48 at 4:23-25. *CDWA* is inapposite. The record here shows that plaintiffs' allegations of substantial changes in the project and environmental analysis are groundless. CEQA028 (RDEIR/SDEIS), 039-042, 181, 5281 (Final EIS/EIR); 5894, 8054-56, 10415, 15585. Furthermore, *CDWA* did not involve a prior EIS/EIR. 306 F.3d at 946, 951-53. Rather, in evaluating the application of res judicata principles, the *CDWA* court had to search the record for the "most similar" prior action, which was a lawsuit brought related to a water release plan that involved a distinctly different nucleus of facts. *Id*. at 953, fn. 12. Plaintiffs have not made, and cannot make, any such showing here. *See* Doc. 44 at 16:1-20:10; Water Authority RJN, Ex. 5 at 2-5, 8-12, Ex. 8 at 1-3.

that California is "experiencing rising temperatures, a pattern of increased dryness, more extreme weather, and decreases in Sierra snowpack and runoff," which they argue "significantly changed the conditions in which the Project would occur." *Id*. Here again, the record belies Plaintiffs' claims. Climate change and its effects have been broadly known for many years and were addressed in the EIS/EIR certified in 2015 in compliance with CEQA. *2018 Opinion*, 287 F. Supp. 3d at 1018, fn. 25, 1023-28; *see Concerned Dublin Citizens v. City of Dublin*, 214 Cal.App.4th 1301, 1320 (2013) (climate change information does not constitute changed circumstances under CEQA). Plaintiffs' previous challenge to the EIS/EIR made identical allegations regarding climate change, increasing global temperatures, prolonged and severe drought, declining snowpack and streamflow, and other evolving environmental conditions. Water Authority RJN, Ex. 11, 12; *see also id.*, Ex. 4 at 25:19-28:15, Ex. 5 at 12:27-14:16, 15:3-16:23, 17:3-18:1, Ex. 7 at 11:25-13:9, Ex. 8 at 5:2-7:3. The Court's *2018 Opinion* considered, and expressly rejected, plaintiffs' climate-related CEQA claims. 287 F. Supp. 3d at 1024-28 ("Plaintiffs' motion for summary judgment that the FEIS/R's climate change analysis violates CEQA is denied"); *see id*. at 1010-14, 1017-20, 1018, fn. 25, 1023.[5] Plaintiffs' assertions that this lawsuit involves materially different issues are insupportable.

3. The Court Ruled that Historic Lows Are an Appropriate Benchmark as a Baseline to Measure and Avoid Project-Related Impacts

Plaintiffs assert that the "historic low" performance standards set forth in Measure GW-1 are inadequate to avoid cumulatively considerable impacts because they would "allow[] for new historically low groundwater levels to become the baseline each year." Doc. 40 at 30:12-13; *see id*. at 18:1-9; Doc. 48 at 17:13.[6] First, however, the Court already rejected plaintiffs' assertions. 287 F.

[5] Plaintiffs allege that "temporary change orders" issued by the State Water Resources Control Board ("SWRCB") between 2015 and 2019 also are environmental conditions "far from 'identical'" to those involved previously. Doc. 48 at 5:14-20. But the Court already found their argument asserting impacts resulting from the frequency of temporary change orders "is at its heart nonsensical." *2018 Opinion*, 287 F. Supp. 3d at 1033; *see* Water Authority RJN, Ex. 5 at 11, fn. 8; Ex. 8 at 7:4-19.

[6] Plaintiffs allege they raised additional cumulative impact arguments "that SLDMWA has failed to refute." Doc.48 at 18:9-10. The discussion plaintiffs reference is a remixing and recasting of their baseline, environmental setting, and cumulative impact arguments that the Court already rejected.

Supp. 3d at 1049; *see id*. at 1042-49. Moreover, as the Court's extensive analysis explained, lowered groundwater levels, including "new historic lows" do not, of themselves, indicate worsening environmental conditions. *Id.* at 1043; Doc. 44 at 26:1-3, 26:26-28, 32:24-28. Groundwater levels may change, and a new historic low may occur, but it is not that change, in isolation, that represents a significant incremental or cumulative environmental effect. 287 F. Supp. 3d at 1043; *see id*. at 1017-18.[7] The purpose of identifying the historic low (or any other baseline, threshold, or performance standard) as a benchmark prior to initiating project-related pumping is *to measure the project's contribution* to any potential secondary effects of reduced groundwater levels, such as permanent subsidence or impacts to third parties (i.e., increased pumping costs or decreased yield), to ensure that it is not incrementally significant or cumulatively considerable. Cal. Code Regs., tit. 14 §§ 15064(h)(1)-(4), 15125 ("Guidelines"); *Sierra Club v. West Side Irrig. Dist*, 128 Cal.App.4th 690, 701-04 (2005).

The Court ruled that historic low levels were proper thresholds to trigger land surface elevation measurements and other actions to address potential subsidence impacts (*see* 287 F. Supp. 3d at 1045-49), but also must be expressly stated as a performance standard for areas in which quantitative BMOs do not exist to avoid significant impacts to third parties. *Id*. at 1043-45; Doc. 44 at 29:12-22. The revised EIS/EIR complied with the Court's ruling by revising the monitoring protocol in Measure GW-1 to apply the identified trigger points to avoid potential third party impacts as well as land subsidence. CEQA5425-26, 5428; *see also id*. at 5424-39; Doc. 44 at 29:17- 31:17; *2018 Opinion*, 287 F. Supp. 3d at 1042-45, 1049. The relative geographic position of the historic low at the time project activities may occur does not weaken or otherwise affect the requirements of Measure GW-1. CEQA5425-26, 5428; *see id*. at 5424-39. Regardless of its location, project activities must stop if the historic low (existing conditions baseline) is reached at either the participating pumping well(s) or the monitoring well(s). CEQA5425-26, 5428. Measure GW-1

2018 Opinion, 287 F. Supp. 3d at 1008, 1013-14, 1016, 1017-18, 1019, 1020, 1023, 1028, 1037, 1041, 1042-43, 1045-48, 1049; *see* Doc. 44 at 32:9-33:18.

[7] The Court observed that long-term data regarding hydrologic conditions in the project vicinity do not support plaintiffs' allegations concerning "permanently," "incessantly," or "persistently" declining groundwater levels. *2018 Opinion*, 287 F. Supp. 3d at 1013-14, 1017-20.

further provides that "[t]ransfer-related pumping could not continue from this well (in the same year or a future year) until groundwater levels recovered to above the groundwater level trigger." *Id*. Project activities are not permitted to cause or contribute to new historic lows or otherwise change the existing environmental conditions, which ensures that significant impacts from project-related pumping activities are avoided, both incrementally and cumulatively in conjunction with other groundwater pumping. *Id*.; Guidelines, §§ 15064(h)(1)-(4), 15125.[8]

III. THE AGENCIES COMPLIED FULLY WITH CEQA AND NEPA

Plaintiffs' claims against the Water Authority arise under state law; the Court is exercising supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367. Doc. 44 at 9:18-10:1. Consistent with the California Supreme Court's guidance, substantial evidence review is appropriate for factual determinations that underlie the analysis in an EIR. *See 2018 Opinion*, 287 F. Supp. 3d at 1045. The "ultimate inquiry" is whether the EIR "includes enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Sierra Club v. County of Fresno*, 6 Cal.5th 502, 516 (2018). An EIR's evaluation need not be exhaustive, however, and courts do not require technical perfection or scientific certainty. *Id*. at 515, 520; Guidelines § 15151. An EIR is not uninformative simply because a reader opposed to the project is committed to finding fault with it. Guidelines §§ 15151, 15204; *City of Irvine v. County of Orange*, 238 Cal.App.4th 526, 549 (2015).

The stability of the EIS/EIR's project description is addressed in the Water Authority's opening brief (Doc. 44) at 16:8-23:9, and in section II.B.1 above.

The EIS/EIR's sufficiency as an informational document is addressed in the Water Authority's opening brief (Doc. 44) at 23:10-25:15.

[8] The existence of significant cumulative impacts caused by other projects is not, standing alone, evidence that the project's impact is cumulatively considerable. Guidelines § 15064(h)(4). It must be shown that the project will contribute to it for the impact to be characterized as a project-related cumulative impact. *Sierra Club*, 128 Cal.App.4th at 701-02. An agency may find a project's incremental effect less than significant when its contribution to a cumulative impact is insubstantial. *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155, 174 (2011).

A. The Water Authority Considered and Responded to All Comments

Plaintiffs seek to reframe issues concerning groundwater levels and groundwater-related impacts and mitigation that the Court already rejected. Doc. 44 at 26:22-29:11; *2018 Opinion*, 287 F. Supp. 3d at 1043. Moreover, the EIS/EIR's description of existing conditions, groundwater levels, and impacts to groundwater-dependent ecosystems affords an informed understanding of their nature and magnitude. Doc. 44 at 27:10-15. In opposition, plaintiffs allege that the Water Authority inadequately responded to comments on the revised draft EIR. Doc. 48 at 12:6-14:3, 16:4-23. The facts and the law show otherwise. Doc. 44 at 27:25-29:11. The Water Authority carefully considered comments by Mr. Custis, including Comment 9-201. Doc. 44 at 28:1-16. The responses described why potential impacts to shallow-rooted vegetation would not be significant, explaining that most vegetation in areas with shallow groundwater depends primarily on surface water seepage. *Id.; see* Guidelines §15382; *Oakland Heritage Alliance v. City of Oakland*, 195 Cal.App.4th 884, 889 (2011) (agency need not find zero impact to conclude it is not significant).

Plaintiffs' assertions regarding responses to CDFW's comments likewise misrepresent the record. Doc. 48 at 16:3-23. They argue that "the CDFW commented extensively on the DEIR and was not 'consulted with regard to' the FEIR . . ." *Id*. The record, however, documents the agencies' ongoing consultation with CDFW, which continued through finalization of the EIS/EIR. CEQA5909. The Final EIS/EIR and responses to comments were provided to CDFW for comment in November 2019 and again in March 2020, prior to certification in April 2020. CEQA14581, 14598. Responses to CDFW's comments explained why no change to Measure GW-1 was warranted. CEQA8265-75. CDFW submitted no further comments on the EIS/EIR, and its concerns thus were addressed. Doc. 44 at 28:17-29:3; Guidelines § 15207.

B. Effects to Vegetation and Wildlife Along Rivers and Creeks Are Not Significant

Plaintiffs contend that the EIS/EIR "failed to analyze effects to GDEs along rivers and creeks." Doc. 48 at 14:3-14. The record shows otherwise. Doc. 44 at 26:22-27:24. Vegetation and wildlife along rivers and creeks where depth to groundwater is likely to be 15 feet or less – namely riparian habitat – are discussed in section 3.8.2.4 of the EIS/EIR. CEQA5602-23. The analysis explains groundwater and surface water relationships and the reasons why riparian habitat in these

areas is not significantly groundwater dependent. CEQA5602-03, 5613. Along rivers and creeks, where plaintiffs assert there should be greater emphasis on analyzing potential effects of groundwater pumping, the EIS/EIR explains that surface water would continue to flow in the creeks and rivers, and water would seep from the creeks and rivers into the ground, providing a source of water for riparian vegetation. CEQA5604-05, 5611, 5621. Farther from creeks and rivers, the groundwater table is typically much deeper than 15. CEQA5623. Groundwater would be well below the depth of most riparian vegetation, which is less likely to be impacted by groundwater level changes. CEQA17155; Doc. 44 at 27:18-24. The EIS/EIR therefore concluded, based on substantial evidence, that no significant adverse impact to riparian vegetation along rivers and creeks would occur. Doc. 44 at 27:18-29:11; CEQA7356-66; *National Parks & Conserv. Ass'n v. County of Riverside*, 71 Cal.App.4th 1341, 1365-66 (1999); Guidelines § 15151.

Plaintiffs' argument that "GW-1 does not prevent significant impacts to GDEs" misses the point. Doc. 48 at 14:23-16:3. They contend the EIS/EIR failed to analyze the "extent and character of wetlands" and "other areas with shallow-rooted GDEs" that could be within the project area. Doc. 48 at 13:24-27. But as the EIS/EIR explained, wetlands and other shallow-rooted vegetation typically are not significantly groundwater dependent; they rely on surface water. CEQA5602-05, 5611, 5613, 5621. The EIS/EIR concluded no significant impact to riparian vegetation and associated wildlife would occur, and no mitigation measures are required. *Id.*

C. Measure GW-1 Prevents Significant Impacts to Third Parties

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." Doc. 48 at 17:7-11. Plaintiffs' "primary point" illustrates the mixing of issues and refusal to confront the record that dominate plaintiffs' briefing. First, the Court addressed plaintiffs' arguments regarding the use historic low groundwater levels as a baseline against which to measure project impacts and concluded the approach is reasonable. *2018 Opinion*, 287 F. Supp. 3d at 1017-20. Second, the Court determined that Measure GW-1's use of historic lows as a threshold was appropriate (*id*. at 1045-

47), and further determined the measure was sufficient to prevent land subsidence and any related damages so long as it was revised to close the loophole regarding alternative use of "local thresholds of subsidence" that would permit non-infrastructure related impacts (e.g., impacts to aquifer capacity) to occur (*id*. at 1048-49). Third, potential impacts to third parties and potential impacts related to subsidence are analytically distinct issues. Groundwater-related impacts to third parties are analyzed in terms of increased pumping costs and decreased yield, not "land subsidence damages" as plaintiffs allege. *Id*. at 1044; Doc. 48 at 17:16-17. Measure GW-1 prevents the project from causing potential impacts to third parties by requiring project-related pumping to stop if the historic low groundwater level (baseline) is reached. CEQA5425-26, 5428; *see also id*. at 5424-39. "Transfer-related pumping could not continue from this well (in the same year or a future year) until groundwater levels recovered to above the groundwater level trigger." *Id*. Project-related pumping thus is not permitted to increase pumping costs, reduce yields, or otherwise cause or contribute to any worsening of existing environmental conditions. *Id*.

D. Measure GW-1 Prevents Any Significant Contribution to Cumulative Impacts

Measure GW-1's ability to prevent project-related cumulative impacts is addressed in the Water Authority's opening brief (Doc. 44 at 29:12-32:8, 32:13, fn. 22) and in section II.B.3 above.

E. Measure VEG and WILD-1 Protects the Giant Garter Snake

The Court's *2018 Opinion* found the EIS/EIR's restrictions on the locations of cropland idling transfers were unclear. 287 F. Supp. 3d at 1075. To establish clear limits, Measure VEG and WILD-1 now incorporates GGS habitat requirements for rice-growing regions based on the U.S. Fish & Wildlife Service 2017 Recovery Plan. CEQA151; 8074-78, 10371-72. The Recovery Plan sets out, and the EIS/EIR incorporated, the best available information regarding measures to avoid significant impacts on the species and to promote its recovery. *Id*. By defining areas where cropland idling transfers would not be permitted and incorporating the recommendations of the Recovery Plan, the agency's conclusion that Measure VEG and WILD-1 avoids any significant impact to GGS is supported by substantial evidence, in compliance with CEQA. Doc. 44 at 36:1-37:4.

F. The Delta Plan Does Not Apply to the Project

The project is not a "covered action" under the Delta Reform Act and is not subject to the

jurisdiction of the Delta Stewardship Council ("DSC"). Doc. 44 at 34:1-35:28. The Water Authority has not "approved" multiple years of transfers. *Id*.; *2018 Opinion*, 287 F. Supp. 3d at 1000-01. The EIS/EIR studies a potential range of potential transfers subject to annual review by Reclamation. Water Authority RJN, Ex. 5 at 3:15-4:2, 8:18-26, fn. 4, 33:22-35:24; Ex. 8 at 14:17-17:4. The Water Authority does not regulate water transfers. *Id*., Ex. 5 at 3-5. Indeed, plaintiffs previously claimed that the Water Authority was an improper lead agency because it lacked any authority to coordinate a transfer program. *Id*., Ex. 8 at 2:3-5 (plaintiffs' claim the project is a "random assortment" of activities outside the Water Authority's control "cobbled together" in one document). The Court rejected plaintiffs' claim because although the Water Authority's role is limited, Reclamation's role is not. *2018 Opinion*, 287 F. Supp. 3d at 989-996. Plaintiffs now allege the Water Authority violated CEQA because it "cannot approve a 5-year transfer program and then claim that there is no such program for purposes of evading Delta Plan consistency review." Doc. 40 at 37-38; Doc. 48 at 21:14-24, citing *NRDC v. Zinke*, 347 F. Supp. 3d 465, 507-508 (E.D. Cal. 2018); Doc. 48 at 21:22-24. There is no "transfer program" to approve; individual water transfers are voluntary among independent buyers and sellers and must be annually reviewed and approved by Reclamation. *2018 Opinion*, 287 F. Supp. 3d at 1000-01.

IV. THE WATER AUTHORITY DID NOT VIOLATE ANY PUBLIC TRUST OBLIGATION IN CERTIFYING THE EIS/EIR

A. EIR Certification Is Not a Project Approval Requiring a Public Trust Analysis

The Water Authority's decision to certify the EIS/EIR could not violate the public trust doctrine, because that decision had no effect on public trust resources; any approval of transfers would come separately and later. Doc. 44 at 37-38. Plaintiffs attempt to recast the certification as an approval of "the transfers evaluated by" the EIS/EIR. Doc. 48 at 23:21-23. The resolution by which the Water Authority's board acted proves otherwise; it says: "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." CEQA007 (emphasis added). Because plaintiffs' complaint challenges only the Water Authority's certification of an environmental review document, which itself is not an approval of any transfer,

plaintiffs' public trust claim necessarily fails.

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

Even if plaintiffs had challenged a transfer arranged by the Water Authority, the Water Authority would be the wrong defendant in a claim based on the public trust doctrine. Doc. 44 at 40:1-41:27. *National Audubon* explains that role must be served by an appropriate responsible body, and the Water Authority is not in a position to serve that role for transfers of CVP water. *Id*.

Plaintiffs first argue that the doctrine applies to "any agency approval" of a decision that implicates public trust resources. Doc. 48:14-21. This argument fails both because EIR certification is not a decision that itself implicates public trust resources, and because plaintiffs ignore the directive in *National Audubon* that public trust balancing is to be done by an appropriate "responsible body." *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 447 (1983). And for CVP operations, the SWRCB has already done so. March 15, 2000, Revised Water Right Decision 1641 [Decision 1641]; *SWRCB Cases*, 136 Cal.App.4th 674, 777-79 (2006).

Second, plaintiffs again misrepresent *Abatti v. Imperial Irrigation District* 52 Cal.App.5th 236 (2020) as holding that water supply agencies such as the Water Authority hold public trust obligations. Doc. 48 at 31:21-32:5, citing *Abatti*, 52 Cal.App.5th 236. It does not. *Abatti* involved a farmer-water user's challenge to an irrigation district's water allocation among its users, and a claim that farmers owned rights to the water based on historical use. *Id*. *Abatti* briefly references the public trust doctrine as a "limit on water rights" but it goes no further in analyzing the doctrine or applying it to the facts of the case. *Id*. at 256. Third, plaintiffs observe the *2018 Opinion* found the Water Authority an appropriate CEQA lead agency for preparation of the EIS/EIR, and that the public holds rights to public trust resources. None of these arguments establishes that the Water Authority would have obligations under the public trust doctrine when agreeing to purchase transfer water.

C. The Water Authority's CEQA Analysis Discussed Potentially Impacted Public Trust Resources

Plaintiffs are wrong that the Water Authority may not rely on its CEQA documents to satisfy any public trust obligations. This Court recognized that an agency may discharge its public trust

obligation (if any) through the CEQA process. *2018 Opinion*, 287 F. Supp. 3d at 1060 (citing *Baykeeper* at 240-243). Plaintiffs misconstrue *Baykeeper*, where the court was clear that the State Lands Commission could have satisfied its public trust duties through its CEQA process, but based on the record before the court, did not. 242 Cal.App.4th at 210-11. Despite plaintiffs' unsupported assertions to the contrary, "consideration" of public trust resources need not utilize the term "public trust" or any other magic words nor follow the steps outlined by plaintiffs. Doc. 48 at 32:21-23. Plaintiffs do not dispute that the CEQA documents address public trust resources. *See* Doc. 44 at 53:13-28.

V. PLAINTIFFS' ESA CLAIMS BASED ON YEARS OF TRANSFER FAIL

As explained in the Water Authority's opening brief, plaintiffs repeated argument that the agency action analyzed in the 2019 BiOp is not coextensive with the "Project" is plainly wrong. The proposed action evaluated in the 2019 BiOp mirrors that described by Reclamation in the Biological Assessment. *Compare* FWS 001279-1281 *and* 1462. Reclamation's Biological Assessment explicitly limits cropland idling and shifting transfers to two of the remaining six years of the program. As the amended Record of Decision explains, if cropland idling and shifting transfers are proposed for more than two of the six years, Reclamation will reinitiate consultation. Plaintiffs' ignorance of the record cannot support their claims, and this argument must fail.

The Water Authority defers to, and incorporates by reference, federal defendants' brief for remaining arguments related to plaintiffs' claims under the federal ESA.

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