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

NATIONAL WILDLIFE FEDERATION,  
et al.,  
  
Plaintiffs,  
  
v.  
  
GALE NORTON,  
  
Defendant.

CIV-S-04-0579 DFL JFM

MEMORANDUM OF OPINION  
AND ORDER

Plaintiffs National Wildlife Federation, Friends of the Swainson's Hawk, Planning and Conservation League, and Sierra Club allege that the Secretary of the Interior violated the Endangered Species Act by approving the Natomas Basin Habitat Conservation Plan and issuing incidental take permits to the City of Sacramento and Sutter County. By orders of July 2, 2004 and July 19, 2004, the court permitted the City of Sacramento, Sutter County, and several landowners in the affected area to intervene as defendants. The parties now cross-move for summary judgment.

This is the second time that the court has been asked to

1 review a habitat conservation plan for the Basin. See Nat'l  
2 Wildlife Fed'n v Babbitt, 128 F.Supp.2d 1274 (E.D. Cal. 2000)  
3 ("Natomas I"). In Natomas I, the court held that the habitat  
4 conservation plan was inadequate. For the reasons that follow,  
5 the court now finds that the revised plan satisfies the  
6 requirements of the Endangered Species Act ("ESA").

7 I. Background

8 A. History of the Habitat Conservation Plan

9 The Natomas Basin is a low-lying region of approximately  
10 53,000 acres in Sacramento and Sutter Counties. (Administrative  
11 Record ("AR") 59.) The Basin is home to the Giant Garter Snake  
12 ("GGS") and the Swainson's Hawk, the two species of greatest  
13 concern in this litigation. In 1993, the Secretary listed the  
14 GGS as a threatened species under the Endangered Species Act  
15 ("ESA").<sup>1</sup> The Swainson's Hawk has not been listed as a  
16 threatened species by the Secretary; however, it has been so  
17 listed by the California Department of Fish and Game under the  
18 California Endangered Species Act. 14 C.C.R. § 670.5(b)(5)(A),  
19 Cal. Fish & Game Code § 2067. The GGS is an elusive animal that  
20 lives in rice fields and drainage ditches; it is found only in  
21 rice-growing regions of the Central Valley, including rice-  
22 growing areas in the Basin and associated canals. The Swainson's  
23 Hawk is migratory, wintering in Central and South America and  
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25 <sup>1</sup> A "threatened" species is any species which is likely to  
26 become an endangered species within the foreseeable future  
throughout all or a significant portion of its range. 16 U.S.C.  
§ 1532(20).

1 spending March to September in the Central Valley. The hawk  
2 forages on small rodents found in large open fields and nests in  
3 large trees; there are approximately 50 identified hawk nesting  
4 sites in the Basin and the riparian corridor of the Sacramento  
5 river. (AR 952-55.)

6 The ESA conditions the Secretary's issuance of an incidental  
7 take permit ("ITP") upon her approval of a habitat conservation  
8 plan ("HCP). The ITP allows activity, here development, that  
9 could injure or harm - "take" in the language of the statute --  
10 an endangered or threatened species. Without an ITP, developers  
11 would be subject to serious penalties, including criminal  
12 prosecution, for any injury to an endangered or threatened  
13 species. 16 U.S.C. §§ 1538, 1540. The history of the  
14 development of the Natomas Basin HCP is outlined in Natomas I and  
15 need not be repeated here in detail. See Nat'l Wildlife Fed'n v  
16 Babbitt, 128 F.Supp.2d at 1277-78. In brief, the first HCP for  
17 the Basin was a regional conservation plan designed to cover  
18 development in the entire Basin. Id. at 1279. The 1997 HCP  
19 anticipated that five jurisdictions -- the City, Sacramento  
20 County, Sutter County, Reclamation District No. 10, and the  
21 Natomas Central Mutual Water Company -- would apply for ITPs.  
22 Id. The HCP was designed to permit development of 17,500 acres  
23 of Basin land over the 50-year life of the ITPs, with mitigation  
24 lands acquired at a .5-to-1 ratio as land was developed. Id. at  
25 1280. The acquisitions were to be funded with mitigation fees  
26 paid by developers in the relevant jurisdictions. Id. In the

1 end, however, only the City applied for a permit under the HCP.  
2 Despite the lack of participation by the other jurisdictions, the  
3 Secretary granted an ITP to the City, finding that the issuance  
4 of an ITP to the City, with the limitations imposed by the HCP,  
5 would not likely jeopardize the continued existence of the  
6 species covered by the HCP, including the GGS and the Swainson's  
7 Hawk. Id. at 1282-84.

8         The Secretary's issuance of an ITP to the City was  
9 challenged by various organizations, among whom were the  
10 plaintiffs in the present action. On August 15, 2000, the court  
11 found that several of the Secretary's findings were unreasonable  
12 and violated the ESA, thereby setting aside the Secretary's  
13 issuance of the ITP. Id. at 1292-1300. Specifically, the court  
14 found that the Secretary erroneously concluded that: (1) the HCP  
15 minimized and mitigated the impact of the permitted takings "to  
16 the maximum extent practicable;" (2) the City had ensured  
17 adequate funding for the mitigation plan; and (3) issuance of the  
18 ITP to the City, in the absence of participation by the other  
19 jurisdictions, would not jeopardize the continued existence of  
20 the covered species. Id. On this last issue, the court found  
21 that a principal failing of the 1997 ITP was that it relied upon  
22 an HCP that took a regional approach to conservation, covering  
23 the entire 53,000-acre Basin, when in fact only the City sought  
24 an ITP and agreed to be bound by the HCP. Id. at 1291, 1299.  
25 The HCP failed to analyze possible effects on the species in the  
26 event that the other jurisdictions -- primarily Sacramento and

1 Sutter counties -- failed to subscribe to the HCP. However, the  
2 court upheld the conclusion that the HCP would not result in  
3 jeopardy to the covered species were it implemented by the five  
4 jurisdictions envisioned by the HCP. Id. at 1295-98.

5 After the 1997 ITP was set aside, the City revised the HCP  
6 to address the flaws identified by the court. Currently before  
7 the court is a revised HCP, covering development only by the City  
8 and Sutter. This second Natomas Basin HCP ("NBHCP") was approved  
9 by the Secretary in April 2003. At the same time, the Secretary  
10 granted ITPs to the City and Sutter, authorizing a total of  
11 15,517 acres of development.<sup>2</sup> Shortly thereafter, the Service  
12 and the Secretary issued the required supporting documents: a  
13 Biological Opinion ("BiOp") examining effects upon the species  
14 listed in the proposed ITP, Findings and Recommendations  
15 supporting the issuance of an ITP, a final EIR/EIS, and the  
16 Record of Decision, in which the Secretary adopted the Service's  
17 findings and announced her decision to issue the ITPs.<sup>3</sup>

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19  
20 <sup>2</sup> The NBHCP also anticipates development of 1,983 acres in  
21 the Metro Air Park project. (Pl.'s Mot. at 5-6.) An ITP was  
22 previously issued for that project, an action the court upheld in  
Nat'l Wildlife Fed'n v. Norton, 306 F.Supp.2d 920 (E.D. Cal.  
2004) ("Metro Air Park"). In total the NBHCP anticipates 17,500  
acres of development in the Basin.

23 <sup>3</sup> The final EIR/EIS was prepared to comply with the public  
24 agencies' obligations under the National Environmental Policy Act  
25 and the California Environmental Quality Act. The EIR/EIS  
26 evaluates a broader range of potential environmental impacts.  
The adequacy of the EIR/EIS is not challenged in this action.  
However, because the EIR/EIS is part of the record of decision,  
the analysis and responses to comments in the EIR/EIS are  
relevant to evaluating the Secretary's conclusions under the ESA.

1 B. The Final NBHCP

2 The purpose of the NBHCP is to "promote biological  
3 conservation in conjunction with economic and urban development  
4 within the permit area." (AR 19.) The final NBHCP envisions  
5 participation by the City and Sutter, but does not depend on  
6 participation by both entities. (Id. at 50-51.) The NBHCP  
7 covers 22 species, with particular attention to the GGS and the  
8 Swainson's Hawk, since they are prominent in the Basin, listed as  
9 threatened under state or federal law, and occupy habitat that  
10 will also benefit other covered species. (Id. at 64.) The NBHCP  
11 anticipates that development by the City and Sutter will be  
12 limited to 15,517 acres -- 8,050 acres within the City and 7,467  
13 acres in Sutter County -- and provides that approval of any  
14 development beyond this limit -- whether by the City and Sutter  
15 or by other entities -- will trigger reevaluation and possible  
16 amendment of the plan, and could result in suspension or  
17 revocation of the City and Sutter permits. (Id. at 20, 23-26,  
18 110.)

19 Like the 1997 HCP, the primary mitigation measure relied on  
20 in the NBHCP is acquisition and enhancement of reserve properties  
21 at a .5-to-1 ratio for all of the lost habitat, to be funded by  
22 developer fees.<sup>4</sup> (Id. at 36, 169-98.) The 8,750 acres of  
23 reserve land will be divided in the following fashion: 50% in  
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25 <sup>4</sup> The plan also requires other minimization and avoidance  
26 measures. In particular, the plan calls for preservation of the  
"Swainson's Hawk Zone," a one-mile strip of land adjacent to the  
Sacramento River, which contains many of the Swainson's Hawk  
nesting sites in the Basin. (AR 1032, 1034.)

1 rice cultivation that will serve as habitat for the GGS; 25% in  
2 managed marsh habitat for the GGS; and 25% in upland habitat that  
3 could be used for foraging by the Swainson's Hawk. (Id. at 37.)

4 The NBHCP offers the following reasons to support the adequacy of  
5 the .5-to-1 ratio: (1) the reserves will provide higher quality  
6 habitat than the lands to be developed, especially given that the  
7 reserves will be managed for the covered species; (2) much of the  
8 land to be developed is of limited value as habitat but will be  
9 assessed as if it were of value; (3) the reserves will provide  
10 permanent habitat for the covered species; (4) the NBHCP provides  
11 monitoring and adaptive management to protect the species; and  
12 (5) the reserves will be large and biologically viable. (Id. at  
13 132-33.) On this last point, the NBHCP requires that, by the end  
14 of the 50-year term of the plan, there must be one reserve of at  
15 least 2,500 acres in size, with the remaining reserves in blocks  
16 of 400 acres or more that will be connected by watercourses.

17 (Id. at 140.) The NBHCP also provides that setback zones should  
18 be "considered" prior to the acquisition of reserve lands and  
19 that, if possible, reserve lands should be located 800 feet or  
20 more from urban development. (Id. at 142.)

21 The NBHCP contains several provisions designed to ensure  
22 that its environmental objectives will be achieved and that  
23 development will not outpace the acquisition of mitigation lands.  
24 One of these provisions is a 200-acre "cushion" of mitigation  
25 land, which requires that, as of September of each year, the  
26 Natomas Basin Conservancy ("NBC") -- which is the entity that

1 owns, acquires, and manages the reserve lands -- must have  
2 acquired at least 200 more acres of reserve land than necessary  
3 to mitigate all of the development approved to that date before  
4 any further development is permitted. (Id. at 213-14.) This  
5 requirement is intended to assure that the NBC will never be  
6 unable to find and acquire mitigation lands for development that  
7 has already been approved. The NBHCP also calls for increases in  
8 the mitigation fees, as necessary and without a cap, to pay for  
9 increased costs of land acquisition and reserve management. (Id.  
10 at 211.) "Catch-up fee" ordinances enacted by the City and  
11 Sutter will require developers who have received development  
12 approval to pay the increased mitigation fees if they have not  
13 yet engaged in ground-disturbing activity. (Id. at 212.)

14       The NBHCP also imposes monitoring and review obligations  
15 designed to ensure that the plan will achieve the desired  
16 conservation objectives and goals. Two types of monitoring are  
17 required by the plan: (1) compliance monitoring, to assure that  
18 the reserves are properly acquired and managed; and (2)  
19 biological effectiveness monitoring, to determine whether the  
20 assumptions of the plan hold true in practice over time. (Id. at  
21 217-32.) Beyond these continuing obligations, the plan also  
22 calls for broad reviews at designated development milestones. An  
23 overall program review will be conducted once 9,000 acres of  
24 development have been approved. (Id. at 239-41.) The overall  
25 program review will be made available for public review and  
26 comment. (Id.) The NBHCP also calls for an independent mid-



1 point review by each permittee to address the possibility that  
2 development might proceed faster in one jurisdiction than the  
3 other. (Id.) The NBHCP also provides for "adaptive management"  
4 to respond to the monitoring, reviews, or other new scientific  
5 data. (Id. at 234-38.) Should the adaptive management  
6 provisions prove insufficient, the NBHCP can be amended or  
7 revised, or, in the worst case, the permits could be suspended or  
8 revoked. (Id. at 252-56.)

9 The NBHCP concedes that there will be harm to the species  
10 listed in the permit, but contends that the harm will be  
11 significantly reduced by the measures described above. (Id. at  
12 263-330.) The NBHCP further finds that the proposed level of  
13 mitigation is the "maximum extent practicable," relying on  
14 economic analysis. (Id. at 332-36.) Finally, the NBHCP  
15 concludes that the plan as proposed is the best option among  
16 other possible alternatives in light of biological and financial  
17 considerations. (Id. at 336-38.)

18 Through the implementation agreement, the City and Sutter  
19 agree to be bound by the terms of the NBHCP, which are also  
20 incorporated into the ITP. (Id. at 806-55.)

21 C. The 2003 Biological Opinion

22 The Biological Opinion ("BiOp") is an evaluation by the  
23 Service's wildlife biologists of the potential effects of  
24 issuance of the ITPs on the species identified in the plan and  
25

1 the proposed ITPs.<sup>5</sup> 16 U.S.C. § 1536. While acknowledging that  
2 the proposed development will have both direct and indirect  
3 negative effects on the GGS, the BiOp ultimately concludes that  
4 the ITPs will not affect the viability of the GGS population  
5 within the Natomas Basin or the viability of the species as a  
6 whole. (AR 1028.) This finding is based on several factors: (1)  
7 the minimization and take avoidance measures imposed by the  
8 NBHCP, including pre-construction surveys and de-watering and  
9 fencing of canals; (2) the protection, enhancement, restoration,  
10 or creation of 6,562.5 acres of higher quality reserves for the  
11 snake; (3) the maintenance of connectivity between reserve lands;  
12 (4) the continued existence of 16,000 acres of GGS habitat that  
13 will remain in the Basin after development; and (5) the creation  
14 of year-round protected habitat in the reserves specifically  
15 managed to benefit the GGS and not subject to the vagaries of  
16 rice farming. (Id.)

17 The BiOp similarly acknowledges that the Swainson's Hawk  
18 will suffer some negative impacts from implementation of the  
19 proposed action, including the loss of up to 20% of its nesting  
20 habitat and 40% of its foraging habitat in the Basin, most of  
21 which is of high or moderate quality. (Id. at 1032-37.)

22 However, the BiOp concludes that the proposed action will not  
23 jeopardize the survival of the Central Valley population of the  
24 Swainson's Hawk or the species as a whole because: (1) the

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26 <sup>5</sup> The BiOp is required by the ESA because the issuance of  
an ITP is a federal action. See part II.A, infra.

1 reserves created will provide foraging opportunities at the  
2 appropriate time of year, during nesting; (2) approximately  
3 13,000 acres of foraging habitat will not be affected; (3) the  
4 acquired foraging habitat will be closer to the nesting trees;  
5 (4) more high quality foraging habitat will be created; and (5)  
6 significant foraging habitat exists to the west, in Yolo County.  
7 (Id. at 1039.) In sum, the BiOp concludes that issuance of ITPs  
8 to the City and Sutter will not appreciably reduce the likelihood  
9 of the survival and recovery of these species in the wild.

10 D. The 2003 Findings and Recommendations

11 The Findings and Recommendations represent the Service's  
12 findings in light of the information in the NBHCP and the BiOp.  
13 The Service concludes that the impacts of the issuance of the  
14 ITPs will be minimized and mitigated to the maximum extent  
15 practicable. (Id. at 1182.) Specifically, the Service finds  
16 that the injury to the species covered by the permit will be  
17 mitigated to the maximum extent practicable by: (1) the measures  
18 identified in the NBHCP; (2) establishment, enhancement, and  
19 active management of 7,758.5 acres of high-quality reserve  
20 habitat; (3) establishment of a monitoring and reporting plan;  
21 and (4) use of a funding mechanism that contains assurances that  
22 the NBHCP will be implemented. (Id. at 1184-85.) The Service  
23 finds that the harm will be minor for all of the covered species,  
24 except the GGS, and that, for all covered species, including the  
25 GGS, the consequences of the harm will be effectively mitigated  
26 by the conservation measures provided for by the NBHCP. More

1 specifically, as to the Swainson's Hawk, the Service determines  
2 that the degree of injury will be low because: (1) the majority  
3 of the foraging habitat that will be lost is currently not  
4 available to the hawk during its nesting season<sup>6</sup>; (2) substantial  
5 foraging habitat will exist in the Basin even after the planned  
6 development; and (3) substantial foraging habitat will remain in  
7 Yolo County. (Id. at 1188-89.) The Service further concludes  
8 that any injury will be effectively mitigated for the reasons  
9 stated in the BiOp and described above.

10 As to the GGS, the Service acknowledges that there is a  
11 higher likelihood of injury to the GGS, but still concludes that  
12 the injury will be effectively mitigated by the measures included  
13 in the NBHCP, including: (1) limits on construction during the  
14 GGS dormant period; (2) pre-construction surveys and dewatering;  
15 (3) the creation of managed marsh habitat; (4) the acquisition of  
16 rice fields and their management with "snake friendly practices";  
17 and (5) the assurances of connectivity of snake habitat. (Id. at  
18 1190-91.)

19 The Findings and Recommendations conclude that, in addition  
20 to effectively mitigating for the anticipated harm, the NBHCP  
21 provides for mitigation to the "maximum extent practicable,"  
22 relying on the economic analysis prepared in conjunction with the  
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24 <sup>6</sup> The Swainson's Hawk nests and breeds in the Basin from  
25 March to September. However, under current conditions, much of  
26 the potential foraging habitat is cultivated with crops that  
either do not provide good foraging habitat for the Swainson's  
Hawk or do not provide good foraging habitat until August or  
September, after young have fledged. (AR 725-49.)

1 NBHCP. (Id. at 1192-93.) The Findings and Recommendations  
2 likewise conclude that the City and Sutter have ensured adequate  
3 funding for the plan through: (1) the mitigation fee program,  
4 which includes five different components and which is not capped;  
5 (2) the catch-up fee ordinance; and (3) the 200-acre cushion of  
6 mitigation land. (Id. at 1194-95.) Finally, the Findings and  
7 Recommendations conclude that the issuance of the ITPs will not  
8 appreciably reduce the likelihood of survival and recovery of any  
9 of the covered species, including the Swainson's Hawk and GGS.  
10 (Id. at 1196-99.) In accordance with these Findings, the Service  
11 recommends that the Secretary of the Interior approve the ITPs  
12 for the City and Sutter.

13 The Findings and Recommendations became the decision of the  
14 Secretary of Interior once she adopted them in the Record of  
15 Decision and issued the two ITPs.<sup>7</sup> This suit followed in March  
16 2004. Plaintiffs seek a ruling that the Secretary's findings are  
17 not supported by the record and that the Secretary's approval of  
18 the NBHCP and issuance of the ITPs should be revoked.

## 19 II. Statutory Standards and Requirements

### 20 A. The Endangered Species Act

21 The purpose of the ESA is to "conserve ecosystems upon which  
22 endangered and threatened species depend" and "to provide a  
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24 <sup>7</sup> Although the Secretary made the final decision to issue an  
25 ITP, her conclusions depend on the analysis and findings of the  
26 Service. Therefore, although the Secretary is the named  
defendant in this case, the court will frequently refer to the  
BiOp and Findings and Recommendations of the Service in reviewing  
the decision of the Secretary.

1 program for the conservation of such endangered species." 16  
2 U.S.C. § 1531(b). As a means of achieving this goal, Section 9  
3 of the ESA prohibits private individuals from "taking" endangered  
4 or threatened species. Id. § 1538(a)(1)(B). The ESA defines  
5 "take" to include "harm" to animals. Id. § 1532(19). The  
6 Service has defined "harm," within the meaning of "take," to  
7 include "significant habitat modification or degradation where it  
8 actually kills or injures wildlife," a definition that has been  
9 upheld by the Supreme Court. 50 C.F.R. § 17.3 (2004); Babbitt v.  
10 Sweet Home Chapter for Cmty. for a Great Or., 515 U.S. 687, 696,  
11 115 S.Ct. 2407 (1995).

12 The broad scope of Section 9 is limited by several  
13 exceptions, found in Section 10. Specifically, Section 10  
14 authorizes the Secretary to issue a permit, an ITP, for any  
15 taking that is incidental to the carrying out of an otherwise  
16 lawful activity. 16 U.S.C. § 1539(a)(1)(B). To receive an ITP,  
17 the permit applicant must submit an HCP that specifies: (i) the  
18 impact which will likely result from such taking; (ii) what steps  
19 the applicant will take to minimize and mitigate such impacts,  
20 and the funding that will be available to implement such steps;  
21 (iii) what alternative actions to such taking that the applicant  
22 considered and the reasons why such alternatives were not  
23 selected; and (iv) such other measures that the Secretary may  
24 require as necessary or appropriate for the purposes of the plan.  
25 Id. § 1539(a)(2)(A); 50 C.F.R. § 17.22 (2004). The Secretary  
26 must issue an ITP upon finding that: (i) the taking will be

1 incidental; (ii) the applicant will, to the maximum extent  
2 practicable, minimize and mitigate the impacts of the taking;  
3 (iii) the applicant has ensured adequate funding for the HCP;  
4 (iv) the taking will not appreciably reduce the likelihood of the  
5 survival and recovery of the species in the wild; and (v) any  
6 additional measures required by the Secretary will be undertaken.  
7 16 U.S.C. § 1539(a)(2)(B).

8 Section 7 of the ESA applies to federal actions, and  
9 requires federal agencies, through consultation with the Service,  
10 "to insure that any action authorized, funded, or carried out" by  
11 the agency is "not likely to jeopardize the continued existence  
12 of any endangered species or threatened species." Id. §  
13 1536(a)(2). Issuance of an ITP is an agency action that requires  
14 the Service to engage in internal consultation and prepare a BiOp  
15 evaluating whether issuance of the ITP will result in jeopardy to  
16 any endangered or threatened species. Id. § 1536(b). An action  
17 will result in "jeopardy" if it will "reduce appreciably the  
18 likelihood of both the survival and recovery of a listed species  
19 in the wild. . . ." 50 C.F.R. § 402.02 (2004). The required  
20 jeopardy analysis under Section 7(a)(2) is identical in almost  
21 all respects to the inquiry under Section 10(a)(2)(B)(iv).  
22 Natomas I, 128 F.Supp.2d at 1286. In considering whether the  
23 action will jeopardize a species, the Service must evaluate the  
24 effects of the action and any cumulative effects on the listed  
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1 species.<sup>8</sup> 50 C.F.R. § 402.14(g) (2004).

2 B. The Administrative Procedure Act

3 Review of final agency actions under the ESA is governed by  
4 the Administrative Procedure Act ("APA"). 5 U.S.C. § 706;  
5 Pacific Coast Fed'n of Fishermen's Ass'ns v. NMFS, 265 F.3d 1028,  
6 1034 (9th Cir. 2001). The APA provides that the court must "hold  
7 unlawful and set aside agency action, findings and conclusions"  
8 that are "arbitrary, capricious, an abuse of discretion or  
9 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An  
10 agency action is arbitrary and capricious if the agency failed to  
11 consider relevant factors, failed to articulate a rational  
12 connection between the facts found and the choice made, or made a  
13 clear error of judgment. Baltimore Gas & Elec. Co. v. NRDC, 490  
14 U.S. 87, 105-06, 103 S.Ct. 2246 (1983); Pacific Coast Fed'n of  
15 Fishermen's Ass'ns, 265 F.3d at 1034; Greenpeace v. NMFS, 80  
16 F.Supp.2d 1137, 1150 (W.D. Wash. 2000). Review under this  
17 standard is "searching and careful," but "narrow." Marsh v. Or.  
18 Natural Res. Council, 490 U.S. 360, 378, 109 S.Ct. 1851 (1989).  
19 The court should not substitute its judgment for that of the  
20 agency, but rather must determine whether the evidence in the  
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23 <sup>8</sup> "Effects of the action" are the direct and indirect  
24 effects of an action on the species or critical habitat, together  
25 with the effects of other activities that are interrelated or  
26 interdependent on that action, that will be added to the  
environmental baseline. 50 C.F.R. § 402.02 (2004). "Cumulative  
effects" are "those effects of future State or private  
activities, not involving Federal activities, that are reasonably  
certain to occur within the action area of the Federal action  
subject to consultation." Id.



1 administrative record permitted the agency to make the decision  
2 it did. Baltimore Gas & Elec. Co., 462 U.S. at 97; Occidental  
3 Eng'g Co. v. INS, 753 F.2d 766, 769-70 (9th Cir. 1985). The  
4 agency decision need not be ideal, so long as the agency gave at  
5 least minimal consideration to the relevant facts contained in  
6 the record. Southwest Ctr. for Biological Diversity v. Bureau of  
7 Reclamation, 143 F.3d 515, 523, quoting Ctr. for Marine  
8 Conservation v. Brown, 917 F.Supp. 1128, 1143 (S.D. Tex. 1996).

9 Deference to the agency is especially appropriate where the  
10 challenged decision relies upon the agency's expertise. Mt.  
11 Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993).  
12 The court should defer to the agency's reasonable interpretation  
13 and resolution of equivocal or conflicting evidence, including  
14 conflicting expert opinions. Friends of Endangered Species, Inc.  
15 v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985); Cent. Ariz. Water  
16 Conservation Dist. v. EPA, 990 F.2d 1531, 1539 (9th Cir. 1993).

17 Plaintiffs challenge three of the Secretary's conclusions as  
18 arbitrary and capricious under the APA: (1) that the injury to  
19 the GGS and Swainson's Hawk will not appreciably reduce the  
20 likelihood of survival and recovery of these species; (2) that  
21 the NBHCP will minimize and mitigate the effects of any taking to  
22 the maximum extent practicable; and (3) that the City and Sutter  
23 will ensure adequate funding for the required mitigation.

24 (Compl. ¶¶ 55-72.)<sup>9</sup> The court addresses these three contentions  
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26 <sup>9</sup> Defendants do not contest plaintiffs' standing to challenge the Secretary's issuance of the ITPs and approval of the NBHCP.

1 in the following sections.

2 III. No Jeopardy to Survival Findings

3 Plaintiffs allege that the Secretary erroneously concluded  
4 that development activity permitted under the NBHCP will not  
5 appreciably reduce the likelihood of the survival and recovery of  
6 the Swainson's Hawk and the GGS. 16 U.S.C. §§ 1536, 1539. At  
7 the heart of plaintiffs' argument is their contention that the  
8 Secretary gave insufficient consideration to the development that  
9 is likely to occur in the remainder of the Basin, outside the  
10 City's current boundaries and Sutter County, over the 50-year  
11 term of the NBHCP, and to the effect of this additional  
12 development on the viability and efficacy of the planned reserves  
13 and the survival of the species. (Pls.' Mot. at 19.)

14 Plaintiffs' arguments generally fall into three categories: (1)  
15 the Service failed to analyze the lack of binding commitments  
16 from other jurisdictions and, at the same time, erroneously  
17 relied on voluntary mitigation measures by those jurisdictions;  
18 (2) the Service failed to consider the cumulative impacts of  
19 other proposed projects in the Basin; and (3) the Service failed  
20 to consider the lack of protection of the 800-foot reserve  
21 setbacks.

22 A. Failure to Analyze the Lack of Binding Commitments by  
23 Other Jurisdictions

24 Plaintiffs argue that the Service failed to address the lack  
25 of binding commitments to the NBHCP by other entities -- namely,  
26 the County of Sacramento, the Natomas Mutual Water Company, and

1 Reclamation District 1000 -- and instead assumed that these  
2 entities will continue their current course of conduct. (Id.)  
3 Plaintiffs rely on Natomas I, in which the court faulted the  
4 Secretary for issuing an ITP to the City alone, based on a  
5 regional HCP that assumed participation of five jurisdictions.  
6 128 F.Supp.2d at 1295-96, 1299. However, unlike the 1997 HCP,  
7 the non-participation of the other jurisdictions is specifically  
8 considered and addressed in the present NBHCP; the Secretary  
9 determined that the lack of participation would not negatively  
10 impact implementation of the plan.

11 As to the water agencies, plaintiffs argue that the plan  
12 erroneously assumes that the water agencies will continue to  
13 maintain the network of canals and irrigation ditches that will  
14 connect the reserves. All parties agree that the connectivity of  
15 habitat provided by the irrigation system is essential to the  
16 survival of the GGS. In response, defendants contend that this  
17 issue was looked at in great detail and that, for a number of  
18 reasons, the Service reasonably concluded that hydrological  
19 connectivity would not be affected by the failure of the water  
20 districts to participate. First, the Service found that  
21 connectivity corridors will remain open because they will  
22 continue to be needed for drainage and irrigation of agricultural  
23 lands. (AR 1611-14.) Of course, this assumes that much of the  
24 Basin will continue in agriculture, a point addressed further  
25 below, but if this assumption is correct then irrigation canals  
26 will still be necessary. The Service further analyzed whether

1 current management practices by farmers and the water agencies  
2 are sufficient to protect the snake as it moves through the  
3 corridors and concluded that they are. (Id.) Second, the Service  
4 reasoned that any decision by the water agencies to close or fill  
5 the canals would necessarily require further federal  
6 consultation, either because the activity would result in a  
7 "taking" under the ESA or because it would require a § 404 Clean  
8 Water Act permit, and that any adverse impacts to the GGS could  
9 be mitigated at that time. (Id.) Third, the Service noted that  
10 the NBHCP includes other measures to protect connectivity,  
11 including yearly evaluations of connectivity and the use of  
12 mitigation fees to purchase canals or channels, if needed. (Id.)  
13 Finally, and closely related to the third point, the Service also  
14 relied on the NBC's status as a landowner and, therefore, as a  
15 shareholder in the Natomas Mutual Water Company, increasingly  
16 able to influence the water company's decision-making as the NBC  
17 acquires new land and shares. (Id. at 1612, 1028.)

18       The issue of connectivity is discussed in the NBHCP, the  
19 BiOp, and in the Final EIR/EIS, both as part of the original  
20 analysis and in response to comments. (Id. at 134-37; 888-90,  
21 1027-28, 1611-14, 1955-58, 1999-2000, 2005-06, 2132-44.) All of  
22 the arguments now advanced by defendants have been addressed in  
23 these documents. Taken together, the four considerations  
24 advanced by the Service rationally explain how connectivity will  
25 be maintained. It cannot fairly be said that the Service and, by  
26 extension, the Secretary, failed to consider the issue. Nor does

1 it appear, in light of the evidence in the record, that the  
2 Secretary was "arbitrary and capricious" or made a clear error of  
3 judgment in concluding that connectivity would not be  
4 significantly affected by the failure of the water agencies to  
5 participate.

6 Plaintiffs similarly argue that the Secretary failed to  
7 consider the non-participation of Sacramento County and  
8 erroneously assumed that Sacramento County's land in the Basin  
9 will remain devoted to agricultural uses. (Pls.' Mot. at 19-21.)  
10 The NBHCP and the BiOp do assume that development in the Basin  
11 will be limited to the 17,500 acres in the permit areas and  
12 relies on that assumption in concluding that sufficient habitat  
13 will remain for the covered species. (AR 1026.) This assumption  
14 is based on the current land use plans of Sacramento County.  
15 (Id. at 121, 1055.) The NBHCP, BiOp, and EIR/EIS also conclude  
16 that because any future development in the Basin not covered by  
17 the HCP and ITPs would likely result in injury to listed species,  
18 any future development in the Basin would require new federal  
19 approvals. Any such approvals would in turn require a new HCP  
20 and ITP for the particular project, and could also lead to  
21 revision of the existing NBHCP, were the additional development  
22 to exceed the assumed limits in the NBHCP. (Id. at 121, 1055,  
23 1617-32.) The court previously upheld reliance of the Service on  
24 the general plans of the City, Sutter, and Sacramento County to  
25 determine the probable extent of development and the likely  
26 impacts to the covered species. Natomas I, 128 F.Supp.2d at

1 1296. Although these plans can be changed, they are the best  
2 current information about future development. Given that any  
3 development outside of the NBHCP would be subject to its own  
4 environmental review, the decision of the Service to rely on the  
5 general plan of Sacramento County to predict future development  
6 in Sacramento County is not unreasonable.<sup>10</sup>

7 Plaintiffs also argue that the Service ignored the  
8 development of "agricultural-residential rural estates" and other  
9 small projects in Sacramento County whose impacts have not, and  
10 will not, be mitigated. (Pls.' Reply at 8, 14-15, 20-22.)  
11 However, the impacts of such developments were considered in the  
12 NBHCP and the EIR/EIS, and their impact was determined to be  
13 small. (AR at 61, 1630, 1979, 2082-83.) The Service considered  
14 these developments and rationally determined that they would not  
15 result in jeopardy to the covered species.

16 Finally, plaintiffs cite a number of cases for the  
17 proposition that the Service cannot rely on "voluntary" and  
18 "speculative" mitigation measures by the water agencies,  
19

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20 <sup>10</sup> One of the benefits of a regional HCP is that it removes  
21 the incentive to be among the first to develop and the potential  
22 unfairness to those landowners who, for whatever reason, choose  
23 to develop at a later time. Those who develop at the end of the  
24 line may find that they cannot obtain an ITP because so much  
25 habitat has already been affected by earlier development. The  
26 same dynamic occurs as between regional HCPs. Thus, the decision  
not to participate in the NBHCP may place Sacramento County in a  
more difficult position if it later seeks an ITP. Thus, while  
plaintiffs contend that future development will vitiate the  
NBHCP, it is more likely that, if future development in the  
County will have this effect, the Secretary will decline to issue  
ITPs for development in the County or will insist on mitigation  
that may be considerably greater than that required by the NBHCP.

1 individual landowners, or Sacramento County in reaching a no-  
2 jeopardy conclusion. (Pls.' Mot. 21-22 n.12; Pls.' Reply at 13.)  
3 However, in the cases cited by plaintiffs, the Service assumed  
4 that the third-party would undertake affirmative acts that would  
5 mitigate injury to a species, even though those actions were  
6 speculative or voluntary. In this case, by contrast, the Service  
7 merely evaluated the baseline conditions in the Basin and  
8 concluded, based on articulated reasons, that those conditions  
9 were not reasonably likely to change without further federal  
10 review and approval.

11 Accordingly, the Secretary's finding that the failure of  
12 other jurisdictions to participate in the NBHCP does not  
13 undermine its effectiveness is not arbitrary, capricious or  
14 clearly erroneous. The fatal flaw of the earlier HCP was that it  
15 was a regional conservation plan that assumed all jurisdictions  
16 would participate and gave no attention to the possibility that  
17 some would not. 128 F.Supp.2d at 1291. This plan, by contrast,  
18 focuses on the two permittees and explains why further  
19 development or action by any other entity would require  
20 additional federal approvals. The plan does not assume or  
21 require the participation of any third parties to be effective.  
22 Plaintiffs' claim that the plan depends on the voluntary actions  
23 of third-parties is without merit.

24 B. Failure to Consider the Cumulative Impacts of the Joint Vision  
25 MOU and Other Proposed Projects

26 Plaintiffs argue that the Service failed to undertake an

1 adequate cumulative effects analysis, as required by the ESA,  
2 because it failed to consider the impacts of the so-called "Joint  
3 Vision" development and other proposed projects. (Pls.' Mot. at  
4 22-31.) Specifically, plaintiffs focus on a Memorandum of  
5 Understanding entered into in December 2002 by the City of  
6 Sacramento and Sacramento County, commonly referred to as the  
7 "Joint Vision MOU," which sets forth several principles for going  
8 forward with annexation and urbanization of 10,000 acres in  
9 Sacramento County currently designated for agricultural use.  
10 (Id.) This 10,000-acre area is not part of the 17,500 acres that  
11 the NBHCP projects for development in the entire Basin and, were  
12 development of the 10,000 acres to occur, this might well be a  
13 significant change in circumstances that could destroy the  
14 effectiveness of the NBHCP. Because the "Joint Vision MOU" is by  
15 no means a concrete plan for development, the court finds that  
16 the Service was correct in finding that the lands covered by the  
17 MOU are not reasonably likely to be developed and, therefore,  
18 need not be the subject of a cumulative effects analysis.

19 The purpose of the Joint Vision MOU is to "define a mutually  
20 acceptable set of proposed principles that the City and  
21 [Sacramento] County are prepared to consider when considering  
22 future land use planning" in the Basin. (AR 2374.) The  
23 principles set forth are "intended to guide future discussion and  
24 the ultimate negotiation of an agreement between the County and  
25 the City." (Id. at 2377.) The MOU asserts that growth in the  
26 Basin is "inevitable," and assigns to the City the primary



1 responsibility for planning new growth in the area. (Id. at  
2 2373, 2375.) However, the MOU also contemplates that any  
3 implementation of its principles will require discretionary  
4 legislative actions by the relevant land-use jurisdictions and  
5 further state and federal environmental review. (Id. at 2374-  
6 75.)

7 The ESA requires the Service, in evaluating whether the ITP  
8 will affect the likelihood of survival and recovery of the  
9 covered species, to consider "cumulative effects" on the species.  
10 50 C.F.R. § 402.02 (2004). These effects are defined to include  
11 the "effects of future state or private actions, not involving  
12 federal activities, that are reasonably likely to occur." Id.  
13 By negative implication, the Service is not required to analyze  
14 the effects of future federal actions. Similarly, it is not  
15 required to analyze non-federal actions that are not reasonably  
16 likely to occur. Future federal actions include actions that  
17 require federal authorization, through permitting or funding.  
18 Loggerhead Turtle v. County of Volusia, 120 F.Supp.2d 1005, 1017  
19 n.20 (M.D. Fla. 2000); Cal. Native Plant Soc.'y v. Norton, 2004  
20 WL 1118537 at \*14 (S.D. Cal. Feb. 10, 2004). Although the  
21 regulations do not define when an effect is "reasonably certain"  
22 to occur, the FWS HCP Handbook offers the following  
23 explanation<sup>11</sup>:

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24  
25 <sup>11</sup> Defendants argue that the Handbook is entitled to  
26 deference under the standard set forth in United States v. Mead Corp., 533 U.S. 218, 226-27, 121 S.Ct. 2164 (2001). Plaintiffs do not dispute that the interpretation of "reasonably certain" in the Handbook is entitled to deference, nor do they offer an

1 the more State, tribal, or local administrative  
2 discretion remaining to be exercised before a  
3 proposed non-federal action can proceed, the less  
4 there is a reasonable certainty the project will be  
5 authorized. Speculative non-federal actions that may  
6 never be implemented are not factored into the  
7 cumulative effects analysis . . . . The action agency  
8 should consider the economic, administrative, and legal  
9 hurdles remaining before the action proceeds.

7 United States Fish & Wildlife Service and National Marine  
8 Fisheries Service, Endangered Species Act Consultation Handbook  
9 4-30 (1998).

10 In support of their argument that the "no jeopardy" finding  
11 was arbitrary and capricious in light of the cumulative effects  
12 on the species, plaintiffs contend: (1) the additional 10,000  
13 acres of development proposed in the MOU is reasonably certain to  
14 occur; (2) the development of this acreage fatally undermines the  
15 NBHCP; (3) the development will not necessarily require further  
16 federal approval; and (4) the Service was required to consider  
17 its effects upon the species covered by the ITP but failed to do

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19 alternate interpretation of the term. In enacting the ESA,  
20 Congress gave the Service authority to promulgate binding  
21 regulations. 16 U.S.C. § 1540(f). However, the Handbook  
22 definition is not a regulation, but a mere interpretation of a  
23 regulation. The court in Mead explicitly found that  
24 interpretations contained in agency manuals are not entitled to  
25 the highest level of deference. 533 U.S. at 234. Nonetheless, a  
26 court may still defer to an agency's interpretation of its own  
regulation, depending upon "the thoroughness evident in its  
consideration, the validity of its reasoning, its consistency  
with earlier and later pronouncements, and all those factors  
which give it power to persuade, if lacking power to control."  
Id. at 227-230, 234-38, quoting Skidmore v. Swift & Co., 323 U.S.  
134, 140, 65 S.Ct. 161 (1944). Applying this standard, the court  
finds that the Service's interpretation is entitled to deference  
and is a reasonable construction of the regulation.

1 so. (Pls.' Mot. at 22-31.)

2 In concluding that development of the 10,000 acres within  
3 the Joint Vision MOU was not "reasonably certain," the Service  
4 relied on the numerous discretionary steps remaining before any  
5 development could occur, and the preliminary nature of the Joint  
6 Vision MOU. These discretionary steps include: land-use  
7 planning, environmental review, biological resources evaluation,  
8 compliance with local, state, and federal laws, and approval of  
9 the plan by the City, County, and Local Agency Formation  
10 Commission ("LAFCO"). (AR 1617.) If these regulatory hurdles  
11 are surmounted, further review will be required by federal  
12 agencies under the ESA and the NBHCP.

13 Furthermore, the Joint Vision MOU is only a "conceptual  
14 agreement" designed to "establish principles to form the  
15 parameters of a future agreement or agreements." (Id. at 2373.)  
16 The MOU is not a concrete development proposal establishing a set  
17 level of development or land use patterns. (Id. at 2373-77.) No  
18 funds are committed. (Id.) The MOU does not change the existing  
19 agricultural-use designation for any of the 10,000 acres. (Id.  
20 at 2374.) The MOU does not waive any existing land use  
21 requirements but explicitly contemplates the necessity for  
22 further discretionary approvals and environmental review. (Id.)  
23 Given the tentative, general nature of the MOU and the  
24 considerable number of local, state, and federal approvals that  
25 would be required before any development of the 10,000 acres  
26 could occur, the Service did not err in determining that the

1 Joint Vision development was not reasonably certain to occur and  
2 need not be considered by the Service in conducting its jeopardy  
3 analysis.

4 In addition, the Service reasonably concluded that the MOU  
5 would require federal action because any future development will  
6 require: (1) a new ITP and therefore a new evaluation by the  
7 Service of possible injury to protected species from that  
8 development if the ITP is approved; and (2) a reevaluation of the  
9 efficacy of the NBHCP in light of the proposed development.

10 Indeed, the City has a powerful incentive to assure that  
11 development under the MOU is consistent with federal  
12 requirements; through the implementation agreement, the City has  
13 committed to ensuring that additional development does not occur  
14 in the Basin without federal review. Thus, were the MOU lands to  
15 develop without federal review -- an unlikely prospect given that  
16 the MOU assigns control to the City -- the City could face  
17 revocation of its existing ITP under the NBHCP. (Id. at 20-21.)  
18 Therefore, any further development will necessarily be a federal  
19 action because further federal approval will be required under  
20 any scenario that could impair the efficacy of the NBHCP.<sup>12</sup> The

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21  
22 <sup>12</sup> Plaintiffs cite two cases for the proposition that the  
23 MOU must be considered now as a cumulative impact. Neither case  
24 is binding and neither is on point. In NWF v. Norton, 332  
25 F.Supp.2d 170,177-79 (D.D.C. 2004), the court found that the  
26 Service entirely ignored small-scale state and local projects  
that were reasonably certain to occur and, in fact, ignored its  
own conclusion that habitat degradation was a significant threat  
to the panther. Here, the Service explicitly considered the  
possibility of additional development and determined that any  
development would be subject to additional federal review. In  
Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2005 WL

1 Service is entitled to assume that private individuals and the  
2 relevant agencies will seek the required federal approvals before  
3 proceeding with activities that could result in a taking of a  
4 protected species. Natomas I, 128 F.Supp.2d at 1298. The  
5 determination of the Service that any development under the Joint  
6 Vision MOU would be a federal action and, therefore, need not be  
7 included in the cumulative effects analysis, is not arbitrary or  
8 clearly erroneous, particularly given that development of the  
9 10,000 acres is not "reasonably certain" to occur.

10 C. Impact of the Joint Vision on the Acquisition of Reserves

11 Plaintiffs argue that, in addition to the direct destruction  
12 of 10,000 acres of habitat through the Joint Vision development  
13 addressed above, the Service also should have considered the  
14 probable effect of the Joint Vision development on the ability of  
15 the NBC to acquire sufficient reserves. (Pls.' Mot. at 30.)

16 Plaintiffs argue that, of the 53,000 acres in the Basin, 7,000  
17 acres are already developed, 17,500 acres are approved for  
18 development under the NBHCP, and 10,000 are contemplated for  
19 development under the Joint Vision, leaving only 18,000 acres for  
20 mitigation of the impacts of both the NBHCP development and the  
21 Joint Vision development. (Id.)

22 Plaintiffs' scenario is unlikely and, more importantly, is  
23

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24 1278878 at \*18-21 (D.Or. 2001), the court held that the agency  
25 had the discretion to consider the impacts of future actions that  
26 were reasonably certain to occur, even though such actions would  
require additional federal approvals, not that it was required to  
do so.

1 adequately addressed in the record. First, as discussed above,  
2 at this point, the Joint Vision development is not reasonably  
3 likely to occur. Second, if and when a concrete development  
4 proposal is put forth, it will be the subject of additional  
5 federal and state environmental review. The Service, and the  
6 court, are entitled to assume at this point that future  
7 development will not be permitted if sufficient mitigation land  
8 is unavailable and the development will result in jeopardy.<sup>13</sup>  
9 Furthermore, the NBHCP provides a fail-safe measure to ensure a  
10 sufficient supply of mitigation land. The NBHCP provides that,  
11 if off-site mitigation land is not available for purchase by the  
12 NBC, development must either stop or the developer must provide  
13 an in-lieu dedication of sufficient mitigation land. (AR 804.)  
14 Finally, the EIR/EIS did consider the impact of the Joint Vision  
15 on the acquisition of mitigation lands, but concluded that it was  
16 not a pressing concern at this time, for the reasons addressed  
17 above. (Id. at 1618.) For these same reasons, the court finds  
18 that the Service did not clearly err in concluding that the  
19 Joint Vision MOU does not vitiate the NBHCP.

20 D. Other Proposed Developments

21 Finally, plaintiffs argue that the Service erred in failing  
22

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23 <sup>13</sup> The court notes, however, that the Service and those  
24 seeking an ITP in the future will face an uphill battle if they  
25 attempt to argue that additional development in the Basin beyond  
26 17,500 acres will not result in jeopardy. The NBHCP, BiOp,  
EIR/EIS, and Findings and Recommendations are all predicated on  
the assumption that development in the Basin will be limited to  
17,500 acres and that the remaining lands will remain in  
agricultural use. (AR 20-24, 862, 866-67, 1171-72, 1617-18.)

1 to analyze the cumulative impacts of other specific development  
2 proposals moving forward in the Basin. (Pls.' Mot. at 22-27.)  
3 However, the final EIR/EIS specifies that all of these projects  
4 will require future federal approval because they are not covered  
5 by any of the ITPs issued under the NBHCP. (AR 1624-31.)  
6 Moreover, the record reflects multiple reasons why the Service  
7 concluded that these developments are not reasonably certain to  
8 occur: (1) the areas are not currently planned for urban  
9 development under existing land use plans; (2) the lands are  
10 located outside the City's sphere of influence, the City limits,  
11 and the urban services boundary; (3) no urban services are  
12 available; and (4) there are significant legal and planning  
13 hurdles to development. (Id. at 1055, 1216, 1614-32.)  
14 Plaintiffs, by contrast, present no evidence in the record  
15 showing that these projects are anything more than the optimistic  
16 day dreams of developers. In light of the reasoned analysis by  
17 the Service as to why the impacts of these proposals need not be  
18 considered, and in the absence of any evidence that the Service  
19 made a clear error of judgment, the decision to exclude  
20 consideration of these projects was not arbitrary or clearly  
21 erroneous.

22 E. Failure to Consider the Lack of Protection of Setbacks

23 Finally, plaintiffs argue that the no-jeopardy conclusion  
24 was erroneous because it depends on 800-foot setbacks for the  
25 reserve lands but does not protect the setbacks from development.  
26 (Pls.' Mot. at 32; Pls.' Reply at 26.) As discussed above, one

1 of the acquisition criteria for reserve lands is that they should  
2 be located at least 800 feet from lands currently designated or  
3 used for urban development. (AR 889.) The plan does not  
4 contemplate that the setback lands will be acquired by the NBC,  
5 but assumes that the setback areas will be agricultural lands  
6 within the Basin. (Id. 889-90.) However, after reserve lands  
7 are acquired, the setbacks are not required to be managed in any  
8 particular fashion and later could be used for urban development.  
9 (Id.) Plaintiffs argue that the failure to protect the setbacks  
10 fatally undermines the no-jeopardy conclusion. (Pls.' Mot. at  
11 32; Pls.' Reply at 26.)

12 However, the Service explicitly stated in the BiOp that the  
13 setbacks are not a permanent aspect of the mitigation program but  
14 are, instead, a mere acquisition criteria, to be considered and  
15 achieved, if possible. (AR 889-90.) Therefore, the Service's  
16 no-jeopardy conclusion did not erroneously assume or depend on  
17 permanent protection of the 800-foot setbacks. Moreover, the  
18 NBHCP provides for re-evaluation of the status and adequacy of  
19 the setback criteria during the mid-point reviews. (Id. at 142-  
20 3.) The Service's determination that the reserve system would  
21 prevent jeopardy to the GGS and Swainson's Hawk considered the  
22 potential impact of development in the setback zone. This  
23 determination was not arbitrary or capricious.

24 F. Summary

25 In sum, plaintiffs have not pointed to evidence  
26 demonstrating that the "no-jeopardy" finding was arbitrary and



1 capricious. Although the Secretary did not reach the conclusions  
2 plaintiffs desire, the record indicates that the Secretary  
3 considered the relevant factors and articulated a rational  
4 connection between the facts found and the conclusions reached.  
5 The Service addressed the non-participation of other agencies,  
6 considered the potential Joint Vision development plan, and did  
7 not depend on the 800-foot preferred setbacks in reaching the no-  
8 jeopardy conclusion. The no jeopardy finding is not arbitrary or  
9 clearly erroneous.

10 IV. Mitigate to the Maximum Extent Practicable

11 Prior to issuing an ITP, the Secretary must determine that  
12 the permit applicant will, to the maximum extent practicable,  
13 minimize and mitigate the impacts of the taking. 16 U.S.C. §  
14 1539(a)(2)(B)(ii). There are two components to this finding: (1)  
15 the adequacy of the mitigation program in proportion to the level  
16 of injury -- take -- that will result; and (2) whether the  
17 mitigation is the maximum that can be practically implemented by  
18 the applicant. Metro Air Park, 306 F.Supp.2d at 927-28. These  
19 two factors are evaluated on a sliding scale, such that a  
20 stronger showing on one factor may compensate for a weaker  
21 showing on the other. Id. For instance, where the habitat lost  
22 is of minimal or no value to the covered species and the  
23 mitigation plan more than compensates for the level of injury,  
24 the applicant need not do more, even if it would be financially  
25 feasible. Id. at 928. Here, plaintiffs assert that the  
26 Service's findings on both aspects are arbitrary and capricious.

1 A. Proportionality to the Injury

2 Plaintiffs argue that the Service erred in finding that the  
3 .5-to-1 mitigation ratio sufficiently compensates for the injury  
4 that will occur to the GGS and the Swainson's Hawk as a result of  
5 the development authorized by the ITPs. (Pls.' Mot. at 35.)

6 1. Giant Garter Snake

7 As a result of the development authorized by the ITPs, 8,512  
8 acres of GGS snake habitat will be destroyed. (AR 1021.) The  
9 Service determined that, if unmitigated, this would result in  
10 considerable harm to the GGS. (Id. at 1190.) However, this  
11 habitat will be replaced by 2,187 acres of restored marshlands  
12 and 4,375 acres of rice habitat, resulting in an effective  
13 mitigation ratio, for the GGS, of approximately .75-to-1. (Id.  
14 at 1191.)

15 The Service offers several reasons why the reserve lands  
16 adequately compensate for the loss of some habitat. Unlike  
17 existing habitat, reserve habitat: (1) will be protected in  
18 perpetuity; (2) will be actively managed for the snake; (3) will  
19 not be subject to the continual disturbance caused by farming or  
20 canal maintenance; (4) will be available year round; (5) will not  
21 be unavailable to the snake because of canal maintenance  
22 activities; and (6) will be relatively free of human intrusion.  
23 (Id. 1026, 1191.) The restored marsh is considered particularly  
24 valuable replacement habitat, as it is the preferred habitat for  
25 the GGS. (Id. at 1191.) The Service also emphasizes the  
26 provisions of the NBHCP that preserve connectivity and minimize

1 disturbances during construction activity. (Id. at 1190-92.)  
2 The Service concludes that the combination of on-site  
3 minimization measures and the new high-quality wetland habitat  
4 will effectively mitigate for the harm to the GGS of the  
5 development permitted by the ITP and the NBHCP. (Id. at 1192.)  
6 The Service's analysis considers the relevant issues and is a  
7 reasoned explanation as to why the mitigation measures are  
8 proportionate to the possible injury or take.

## 9 2. Swainson's Hawk

10 Two types of Swainson's Hawk habitat will be affected by the  
11 development authorized by the ITPs: nesting habitat and foraging  
12 habitat. (Id. at 1188-89.) Approximately 80% of the nesting  
13 habitat in the Basin, most of it in the Swainson's Hawk Zone,  
14 will remain after the authorized development. (Id. at 1032.)  
15 Although four nest trees will be removed as a result of the  
16 authorized development, the City has committed to planting 60  
17 replacement nesting trees. (Id. at 1033.) The Service  
18 determined that this was adequate to mitigate for the removal of  
19 nest trees and the small loss of nesting habitat, particularly  
20 given that most of the nesting trees in the area of authorized  
21 development are not active. (Id. at 1034.) Plaintiffs do not  
22 point to any evidence in the record to contradict this  
23 conclusion, or any evidence that the Service should have  
24 considered, but did not. The Service evaluated the available  
25 scientific information and reached a reasonable conclusion that  
26 the effects to nesting habitat would be fully mitigated.

1           The impact to Swainson's Hawk foraging habitat is  
2 quantitatively more significant. Approximately 40% of the  
3 Basin's potential foraging habitat, some 9,188 acres, will be  
4 lost as a result of the authorized development. (Id. at 1034.)  
5 The NBHCP provides for acquisition of 2,187.5 acres of high-  
6 quality upland foraging habitat. (Id. at 731.) Approximately  
7 1,000 acres of additional foraging habitat will be available  
8 through the fallowed rice lands and upland components of the  
9 managed marsh. (Id. at 732.) However, even with the reserve  
10 lands, there will be a net loss of approximately 6,000 acres of  
11 potential foraging habitat.

12           Nonetheless, the Service concludes, for reasons discussed at  
13 length in the BiOp, the Findings and Recommendations, and an  
14 Addendum to the EIR/EIS, that the loss of this habitat would  
15 result in a low level of harm to the hawk if mitigated as  
16 required by the NBHCP. (Id. at 1034-39, 1189-90, 726-47.) The  
17 Service concludes that despite the quantitative losses in  
18 habitat, the replacement habitat will likely be qualitatively  
19 equivalent. (Id.) The technical memorandum identifies at least  
20 three reasons why the Swainson's Hawk will not be negatively  
21 affected by the loss of habitat. First, the 2,187.5 acres of  
22 replacement habitat will all be of high quality, managed  
23 specifically for the hawk. (Id. at 731.) Even under the worst-  
24 case implementation scenario, where more than half of the reserve  
25 lands would consist of current high-value habitat, rather than  
26 newly created high-value habitat, the NBHCP will result in an

1 increase of 353 acres of high-value habitat.<sup>14</sup> (Id. at 742.)

2 Second, under the NBHCP, the temporal availability of  
3 foraging opportunities would be maintained or improved. (Id.)  
4 Under current conditions, much of potential foraging habitat is  
5 available in September, when row crops such as corn are  
6 harvested, and in June. (Id. at 737.) By contrast, relatively  
7 little foraging habitat is available during the other months the  
8 Swainson's Hawk is in the Basin -- April, May, July, and August.  
9 (Id.) Under the most likely implementation scenarios for the  
10 NBHCP, foraging opportunities would be increased during the  
11 months of April, May, and June, with the anticipated effect of  
12 increasing nesting density and reproductive success. (Id. at  
13 740-41, 744.)

14 Third, the acquired reserves will likely be in closer  
15 proximity to nesting trees. (Id. at 745.) A primary acquisition  
16 criteria for upland reserves is proximity to known or potential  
17 nesting trees. (Id. at 156.) Proximity of foraging habitat to  
18 nesting trees has been linked to reproductive success for the  
19 Swainson's Hawk. (Id. at 738.) For all of these reasons, the  
20 Service concludes that any harm to the Swainson's Hawk as a  
21 result of lost foraging lands will be effectively mitigated by  
22 the reserve lands. The Service considered the relevant  
23 scientific evidence in the record and articulated reasons for its  
24

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25 <sup>14</sup> The analysis also offers several reasons why this  
26 situation, "Scenario 3," is not likely to occur. (AR 745.)  
Instead, Scenario 1 or 2, which both result in a net increase of  
1,455 acres of high-value habitat, are determined to be more  
likely to occur. (Id.)

1 ultimate conclusion that the mitigation was sufficient.

2 In response to this technical analysis, plaintiffs point to  
3 a letter from James Estep, a leading expert on the Swainson's  
4 Hawk and Chair of the Swainson's Hawk Technical Advisory  
5 Committee. (Id. at 1244-46.) In his letter, Estep references  
6 earlier comments submitted by the Swainson's Hawk Technical  
7 Advisory Committee, which indicated that increased foraging  
8 habitat is needed to protect the Swainson's Hawk from losses.  
9 (Id.) He then criticizes the technical analysis prepared in  
10 response to these comments. (Id.) Specifically, while Estep  
11 admits that it is "literally possible" to double rodent  
12 production on half the foraging land, he asserts that this  
13 concept has "since been widely dismissed." (Id. at 1245.) He  
14 calls Appendix K an "attempt to construct models designed to  
15 justify the same flawed biological reasoning." (Id.)

16 This single letter from a respected expert is insufficient  
17 to show that the Service's conclusions are arbitrary or clearly  
18 erroneous. The Service responded to early comments with an  
19 extensive technical analysis of the effectiveness of the  
20 mitigation strategy, with references to multiple expert reports  
21 to support its conclusions. (Id. at 727-49.) Although Estep  
22 asserts that the conclusions of Appendix K are "flawed," he does  
23 not offer any explanation as to why the conclusions are flawed or  
24 offer any expert opinions to contradict these conclusions.  
25 Moreover, the court defers to the agency's reasonable resolution  
26 of conflicting opinions from experts, since the Service's

1 wildlife experts are in a much better position than the court to  
2 evaluate such evidence. See Friends of Endangered Species, Inc.,  
3 760 F.2d at 986; Cent. Ariz. Water Conservation Dist., 990 F.2d  
4 at 1539. Finally, although plaintiffs fault the Service for  
5 approving an HCP with less than a one-to-one mitigation ratio and  
6 cite other HCPs from surrounding areas that have higher ratios,  
7 they provide no evidence that these HCPs cover the same species,  
8 involve the same quality of habitat issues, or involve the same  
9 economic or demographic variables.

10 Based on the evidence in the record, the Secretary's  
11 determination that the mitigation was proportionate to the  
12 expected take of the GGS and Swainson's Hawk is not arbitrary or  
13 capricious. However, because the NBHCP results in a net loss of  
14 habitat, including moderate and high value habitat, for both the  
15 GGS and the Swainson's Hawk, this is not one of those rare cases  
16 where the habitat to be developed is of such low value that the  
17 feasibility of further mitigation is irrelevant.

#### 18 B. Feasibility of Further Mitigation

19 Plaintiffs argue that the Service erroneously relied on the  
20 permittees' analysis of the feasibility of additional mitigation,  
21 rather than conducting an independent analysis of practicable  
22 alternatives. (Pls.' Mot. at 36-37.) Plaintiffs also argue that  
23 even the economic analysis prepared by the City and Sutter  
24 supports a higher mitigation ratio. (Id. at 30.) The economic  
25 analysis prepared by the permittees indicates two reasons why  
26 increased mitigation, specifically a 1-to-1 mitigation ratio,

1 would not be practicable or feasible: (1) the mitigation fees  
2 charged under the NBHCP are already substantially higher than  
3 fees charged under the HCPs in other California jurisdictions;  
4 and (2) the fees that would be charged under a higher mitigation  
5 ratio might well push the costs of development beyond the  
6 industry standard of feasibility. (AR 441-444, 455-57.)

7       On the first point, the economic analysis compares the  
8 proposed NBHCP mitigation fees to costs under the City of  
9 Bakersfield HCP, the City of Coalinga HCP, the South Sacramento  
10 HCP, and the Yolo County HCP and finds that the fees charged by  
11 these jurisdictions are substantially lower than the fees  
12 proposed under the NBHCP. (Id. at 457.) However, this analysis  
13 is not dispositive on the question of feasibility because the  
14 level of mitigation fees the market will bear is tied to the  
15 relevant real estate market and the land-use composition of the  
16 development. Therefore, without any evidence that the lands  
17 covered by these HCPs have similar market conditions and land-use  
18 plans, these comparisons are of little value in determining the  
19 feasibility of a higher mitigation fee under the NBHCP.

20       However, the expert economic analysis also evaluates the  
21 market conditions in the Sacramento region and analyzes the  
22 effect of the proposed fees on the cost-effectiveness of the  
23 proposed development, looking at the cost burdens imposed by the  
24 combination of the proposed NBHCP fees and infrastructure fees,  
25 such as fees for schools, water, wastewater, and traffic. (Id.  
26 at 441-44, 457-60, 494.) The analysis finds that the estimated



1 total fees for residential development within the permit areas  
2 would be approximately 13-14% of the estimated sales price of a  
3 residential unit. (Id. at 441.) It also finds that a 15% fee  
4 burden is generally the "feasibility benchmark" for residential  
5 development, although a 20% cost burden may be feasible,  
6 depending on specific financial considerations. (Id.)

7         The analysis determines that alternatives calling for  
8 increased mitigation would not push the cost burden beyond the  
9 15% benchmark under current conditions, but offers two reasons  
10 why increased mitigation might become infeasible. First, the  
11 analysis notes the City originally adopted a low infrastructure  
12 fee for the North Natomas area that eliminated certain funding  
13 and programs, including funding for police, fire services, bike  
14 trails and community center facilities. (Id. at 441, 443, 457-  
15 60.) However, that fee program is currently under revision, and  
16 the development impact fees are anticipated to increase, raising  
17 the overall fee burden. (Id.) Second, because the mitigation  
18 fees are not capped, and land acquisition prices are rising  
19 rapidly, the mitigation fees might be increased substantially to  
20 generate the funds necessary to buy mitigation lands. The  
21 analysis notes that this is particularly likely if mitigation is  
22 required at a 1-to-1 ratio, because developable land would become  
23 even more scarce. (Id.)

24         The Findings and Recommendations consider the economic  
25 analysis offered by the permittee and also offer three further  
26 reasons why additional mitigation is impracticable. (Id. at

1 1193.) First, the Findings and Recommendations point out that  
2 there is no cap on the mitigation fee over the 50-year term of  
3 the plan. (Id.) Second, the Service notes that the mitigation  
4 fee more than doubled since the time the economic analysis was  
5 prepared, so that the cost burdens might now be at or past the  
6 industry benchmarks of feasibility. (Id.) What was theoretical  
7 at the time the economic analysis was prepared, has become the  
8 reality. Finally, the Findings and Recommendations state that  
9 further fee increases are expected in the future, which could  
10 push costs beyond the industry benchmarks for feasibility. (Id.)

11 Plaintiffs contend that: (1) the project applicants did not  
12 examine an adequate range of alternatives; (2) the economic  
13 analysis does not support the finding of "impracticability"; and  
14 (3) the Service's two-page analysis is insufficient to support  
15 the finding of impracticability. (Pls.' Mot. at 38-39.) As to  
16 the first argument, defendants did consider two alternatives that  
17 called for an increased mitigation ratio. (AR 3351.)

18 Plaintiffs do not indicate what other alternatives should have  
19 been considered or cite any legal precedent to support this  
20 position. (Pls.' Reply at 36.) Plaintiffs' second argument --  
21 that the economic analysis does not support a finding of  
22 impracticability -- is based on a flawed interpretation of the  
23 word "practicable" as used in the statute. Plaintiffs assert  
24 that since the economic analysis does not state that increased  
25 fee levels are totally infeasible, the City and Sutter have not  
26 met their burden of showing that additional mitigation would be

1 impracticable. (Id. at 37-38; Pls.' Mot. at 39.) As this court  
2 previously found in Metro Air Park, 306 F.Supp.2d at 928 n.12,  
3 "practicable" as used in the ESA does not simply mean "possible,"  
4 as opposed to impossible, but has the more nuanced meaning of  
5 "reasonably capable of being accomplished." The economic  
6 analysis noted a number of uncertainties that could push the fee  
7 burden beyond the feasibility benchmark and doom all development.  
8 In light of these uncertainties, and the rapid rise in fees noted  
9 in the Findings and Recommendations, the Service rationally  
10 concluded that additional mitigation was not "reasonably capable  
11 of being accomplished" without jeopardizing the proposed  
12 development. Ultimately this question is not a matter of  
13 arithmetic based on firm figures and projections but a judgment  
14 call given the uncertainties of the real estate market and the  
15 various other factors that affect development costs and rewards.  
16 In the circumstances here, particularly in light of rapidly  
17 rising land costs, the Secretary's finding represents a  
18 reasonable judgment.

19 Plaintiffs' final argument is that the Service abrogated its  
20 duties by relying on the analysis of the permit applicants to  
21 determine whether additional mitigation would be practicable.  
22 However, the case relied on by plaintiffs, Gerber v. Norton, 294  
23 F.3d 173, 185 (D.C. Cir. 2002), is readily distinguishable. In  
24 Gerber, the Service relied on the developer's word that the  
25 proposed alternative was impracticable, without any supporting  
26 analysis. 294 F.3d at 185. Here, the City and Sutter provided

1 an extensive expert analysis to substantiate the conclusion that  
2 additional mitigation was not practicable. Furthermore, the  
3 Service went beyond the information provided by the City and  
4 Sutter, noting, for instance, that mitigation fees had increased  
5 significantly since the economic analysis was prepared.<sup>15</sup>

6 Based on the foregoing analysis, the finding of the  
7 Secretary that the NBHCP would minimize and mitigate the impacts  
8 of the proposed action to the maximum extent practicable is not  
9 arbitrary and capricious. The Service and the Secretary  
10 evaluated both proportionality and practicability and rationally  
11 determined that the proposed level of mitigation: (1) would  
12 effectively compensate for the injury to species that would occur  
13 under the ITPs; and (2) was the maximum practicable in the  
14 circumstances.

#### 15 V. Failure to Ensure Adequate Funding

16 Plaintiffs' final claim is that the NBHCP fails to ensure  
17 adequate funding for the plan, as required by 16 U.S.C. §  
18 1539(a)(2)(B)(iii). (Pls.' Mot. at 40.) Plaintiffs make three  
19 arguments as to why funding is not ensured: (1) the NBHCP relies  
20 on unfunded voluntary measures such as setbacks and connectivity;  
21

22  
23 <sup>15</sup> Plaintiffs also contend that the Service had a duty to  
24 inquire whether a modified development scenario -- for example,  
25 commercial as opposed to residential -- would have been possible  
26 and permitted additional mitigation. (Pls.' Reply at 37-38.)  
However, plaintiffs have not provided any legal precedent for  
this position and the court previously rejected a similar  
argument. See Metro Air Park, 306 F.Supp.2d at 928 (holding that  
it is best to "avoid unduly enmeshing the Service in developers'  
economic affairs and projections.").

1 (2) the permittees have not "guaranteed" that they will fund the  
2 mitigation plan in the event that the developer fees prove  
3 inadequate; and (3) developers are immune from retroactive fee  
4 increases. (Id.; Pl.'s Reply at 39-41.) With regard to the  
5 first argument, as discussed above in Section III.A, the NBHCP  
6 does not rely on unfunded voluntary measures to ensure success --  
7 funds are provided for ensuring connectivity and the plan does  
8 not "rely" on the 800-foot setback zones, which are merely a  
9 preferred acquisition criteria. (AR 135, 140-41.)

10 The second and third arguments are based on the same  
11 hypothetical fact scenario. Plaintiffs assert that since the  
12 fees will be set and then paid by developers on an annual basis,  
13 the fees collected may be insufficient if property costs increase  
14 between the time the fees are collected and the time mitigation  
15 lands are purchased. (Pls.' Mot. at 40.) As a result,  
16 plaintiffs argue, funding for the NBHCP has not been "ensured" by  
17 the City and Sutter.<sup>16</sup> (Id.) However, the NBHCP includes  
18 several fail-safe provisions to protect against rising land costs  
19 during the period between collection of fees and acquisition of  
20 reserve lands. First, the NBHCP requires the NBC to maintain a  
21 200-acre "cushion" of reserve lands, so that development will not  
22 outpace the acquisition of mitigation land. (AR 213-14.)

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23  
24 <sup>16</sup> Plaintiffs point to some speculation by the court in  
25 Natomas I "that it is not clear that a funding mechanism that is  
26 not backed by the applicant's guarantee could ever satisfy the  
requirement of § 1539(a)(2)(B)(iii)." This language is not  
holding and merely raises a question that is answered in this  
opinion.

1 Second, if land acquisition costs increase before the City and  
2 Sutter have an opportunity to adjust the mitigation fees, the  
3 developer can be required to dedicate land rather than paying the  
4 fee. (Id. at 804, 1195.) Although plaintiffs argue that  
5 "funding shortfalls" are still possible with land dedications,  
6 the court fails to see how this could occur; if there is a  
7 dedication of the required mitigation land, the landowner will  
8 not have to pay the land acquisition component of the mitigation  
9 fee, and the NBC will obtain the appropriate amount of reserve  
10 land. Third, the "catch-up" fee ordinances further protect  
11 against rising land costs, as they narrow the window between fee  
12 payment and acquisition of mitigation land. (Id. at 212.)  
13 Finally, unlike the funding mechanism found inadequate in Natomas  
14 I, the mitigation fees are not capped under the NBHCP, so that  
15 fees can be increased to compensate for rising land costs. (Id.  
16 at 212.)

17 In the Findings and Recommendations, the Service relied on  
18 all of these elements to find that the City and Sutter had  
19 adequately ensured funding for the plan. (Id. at 1194-96.)  
20 While it is true, as plaintiffs assert, that developers are  
21 protected from retroactive fee increases, plaintiffs have not  
22 pointed to any evidence in the record suggesting that such  
23 retroactive fee increases would be necessary under the NBHCP.  
24 The NBHCP is structured to avoid the need for retroactive fee  
25 increases through foresight and advance planning. Plaintiffs  
26 have not shown that the NBHCP, as structured, will not adequately

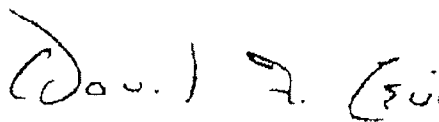
1 fund the required mitigation. The finding of the Secretary that  
2 the plan adequately ensures funding is not arbitrary or  
3 capricious.

4 VI. Conclusion

5 For the foregoing reasons, defendants' motion for summary  
6 judgment is GRANTED and plaintiffs' motion for summary judgment  
7 is DENIED. The clerk shall enter judgment.

8 IT IS SO ORDERED.

9 Dated: September 7, 2005

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14 DAVID F. LEVI  
15 United States District Judge  
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