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

NATIONAL WILDLIFE FEDERATION,  
ENVIRONMENTAL COUNCIL OF  
SACRAMENTO, FRIENDS OF THE  
SWAINSON'S HAWK, PLANNING AND  
CONSERVATION LEAGUE, and SIERRA  
CLUB,  
Plaintiffs,  
  
v.  
  
GALE A. NORTON, Secretary of  
the Interior, and STEVEN A.  
WILLIAMS, Director, United  
States Fish and Wildlife  
Service,  
Defendants.

CIV-S-03-0278 DFL/JFM

MEMORANDUM OF OPINION  
AND ORDER

Plaintiffs are various environmental organizations who challenge the Secretary of the Interior's issuance of an incidental take permit under the Endangered Species Act ("Act") for the proposed Metro Air Park ("Metro") development. The development is located adjacent to the Sacramento International

1 Airport in an area of Sacramento known as North Natomas.<sup>1</sup> Based  
2 on Metro Air Park's proposed Habitat Conservation Plan ("Plan"),  
3 the Secretary, through the Fish and Wildlife Service ("Service"),  
4 issued an incidental take permit to the Metro Air Park Property  
5 Owners Association ("Association"). Plaintiffs challenge the  
6 Plan and the permit principally on the grounds that (1) the  
7 Association has not ensured adequate funding for the mitigation  
8 measures and (2) the required mitigation is not the maximum  
9 practicable. The parties have filed cross-motions for summary  
10 judgment.

## 11 I. Facts and Procedural History

### 12 A. The Metro Air Park Project

13 The Metro project site is located next to the Sacramento  
14 International Airport, between Elkhorn Boulevard and Elverta  
15 Road. (AR 6007.) The site is located within the Natomas Basin  
16 in Sacramento County. (AR 6004.) The project contemplates  
17 development of all 1,892 acres of the site, as well as about 100  
18 acres of adjoining land needed for infrastructure. (AR 6007)  
19 The development would include commercial, light industrial, and  
20 office space, hotels, a golf course, and necessary roads and  
21 infrastructure. (AR 6007.) The site is now composed almost  
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24 <sup>1</sup> The court previously set aside a permit issued to the  
25 City of Sacramento based upon a Habitat Conservation Plan for the  
26 entire Natomas Basin. National Wildlife Federation v. Babbitt,  
128 F.Supp.2d 1274 (E.D.Cal. 2000). The Natomas Conservation  
Plan is not the subject of this action, although it is part of  
the background of events leading to the development of the Metro  
Air Park Plan.

1 entirely of agricultural lands, mostly rice fields. However, the  
2 land has lain fallow for several years. (AR 6013-14.) When in  
3 active rice cultivation, the land provides valuable habitat for  
4 the Giant Garter Snake; in its current fallow state, however, the  
5 habitat value of the land is minimal to both the snake and the  
6 Swainson's Hawk, the two species of greatest concern. (AR 7139.)

7 B. The Affected Species

8 The permit covers 14 species, but the parties focus  
9 exclusively on two: the Giant Garter Snake and the Swainson's  
10 Hawk.<sup>2</sup> The Giant Garter Snake is a threatened species under both  
11 federal and state Endangered Species Acts. 50 C.F.R. § 17.11; 14  
12 C.C.R. § 670.5(b)(4)(E). The snake lives near slow moving water,  
13 and the canals and irrigation ditches associated with rice  
14 farming can provide suitable habitat. (AR 7066.) Because the  
15 snake may range over distances of up to five miles in a few days,  
16 connectivity of the wetland habitat is important to the snake's  
17 survival. (AR 6020, 7067.)

18 The Swainson's Hawk is listed as threatened under the  
19 California Endangered Species Act. 14 C.C.R. § 670.5(b)(5)(A).  
20 The hawk nests in the Natomas Basin in the summer time and  
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22 <sup>2</sup> Of the species covered by the permit, two are currently  
23 listed under the Act: the Giant Garter Snake and the valley  
24 elderberry longhorn beetle. Two were formerly listed: the  
25 Aleutian Canada goose and the peregrine falcon. Ten are  
26 federally unlisted: the Swainson's Hawk, the white-faced ibis,  
the bank swallow, the greater sandhill crane, the tricolored  
blackbird, the northwestern pond turtle, the loggerhead shrike,  
the burrowing owl, the Delta tule pea, and the Sanford's  
arrowhead. The Swainson's Hawk is listed under the California  
Endangered Species Act.

1 migrates south for the winter. (AR 7071-72.) The hawk feeds  
2 primarily on rodents and so requires open fields and grasslands,  
3 with large nesting trees providing panoramic views. (Id.)  
4 Fields that lack adequate prey populations or that make for poor  
5 hunting because of vegetation height or density are not suitable  
6 habitat. (Id.)

7 C. The Habitat Conservation Plan

8 The Metro Plan adopts a number of mitigation measures to  
9 minimize the impact of development on covered species. The most  
10 important of these is the Plan's provision for habitat  
11 acquisition to mitigate habitat lost to development.<sup>3</sup> The Plan  
12 requires that for every acre of land developed, half an acre of  
13 habitat be permanently protected and managed to maximize its  
14 conservation value. (AR 6000.) Thus, the Plan adopts a 0.5:1  
15 ratio, with the ratio based not on habitat lost but on total land  
16 developed regardless of its value as habitat. (Id.) Because the  
17 Plan contemplates development of the entire site, conservation  
18 land will be purchased off-site.

19 The Plan closely regulates the purchase and management of  
20 mitigation lands. Seventy-five percent of the mitigation lands  
21 must be maintained as rice fields or managed marsh. (AR 6052.)  
22 This would primarily benefit the snake. The remaining 25% would  
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25 <sup>3</sup> Other mitigation measures include several intended to  
26 reduce harm to the snake during construction and the requirement  
of best management practices for rice farming, should that  
activity be resumed at the site prior to development. (AR 6052-  
6063.)

1 be preserved as upland habitat, primarily benefitting the hawk.  
2 (AR 6053.) The Plan further requires that mitigation lands  
3 consist of two habitat blocks of at least 400 acres with an  
4 interlinking water supply. (AR 7128.) All mitigation lands must  
5 be acquired within the Natomas Basin, with a requirement that 25%  
6 be in Sacramento County. (AR 6570-71.) There is no requirement  
7 that any of the lands be adjacent to or near the Metro Air Park  
8 site. In addition to the mitigation lands purchased under the  
9 0.5:1 ratio, the Plan requires the establishment of a Swainson's  
10 Hawk preserve consisting of 200 contiguous acres to compensate  
11 for the loss of a nest tree within the Metro site.<sup>4</sup> (AR 6053.)

12 At full development, the Plan requires the purchase and  
13 maintenance of 1208 acres of mitigation land. (AR 6001.) The  
14 purchase and management of this land is delegated to the Natomas  
15 Basin Conservancy ("Conservancy"). (AR 6041.) The Conservancy  
16 is a non-profit corporation, already in existence, whose purpose  
17 is the purchase and maintenance of habitat land in the Natomas  
18 Basin. (AR 7032.) The Plan incorporates the Conservancy's  
19 acquisition criteria.<sup>5</sup> (AR 6035.) These criteria require that  
20 all land purchased as mitigation land be suitable as habitat for  
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22 <sup>4</sup> The Plan requires that this land, along with the other  
23 upland habitat purchased, must be planted with the native trees  
24 preferred by nesting hawks. (AR 6054.)

25 <sup>5</sup> Plaintiffs maintain that the Natomas Basin Plan is not  
26 properly part of the record in this case. (Pls.' Reply at 18-  
19.) However, the relevant portions of the Natomas Basin Plan  
are attached to the Metro Plan as Appendix A. (AR 6091-6107.)  
The court did not find it necessary to refer to any part of the  
Natomas Plan not actually incorporated into the Metro Plan.

1 the covered species. For example, lands acquired as wetlands  
2 mitigation must contain the appropriate soils to support marsh or  
3 rice farming, have adequate setbacks, be hydrologically connected  
4 to other parcels, and have an adequate water supply. (AR 6093.)  
5 There are corollary criteria for upland mitigation purchases.  
6 (AR 6105.) There are also detailed management programs to  
7 maintain wetlands for the benefit of the snake and other wetland  
8 species and to maintain uplands for the hawk and other upland  
9 species. (AR 6092-6107.)

10 The mitigation measures in the Plan are funded through  
11 mitigation fees paid by each developer when the developer obtains  
12 a grading permit. (AR 6000-01.) These fees are currently set at  
13 \$10,027 per acre.<sup>6</sup> (Defs.' Mot. at 14.) There are a number of  
14 measures intended to ensure adequate funding for the mitigation  
15 requirements. The fees are subject to automatic annual  
16 adjustments, tied to the rate of inflation. (AR 6049.) The  
17 Conservancy also possesses the authority and responsibility to  
18 raise the fees to adjust for any increased costs of achieving the  
19 required mitigation ratio or maintaining the habitat value of the  
20 conservation lands. (AR 6045.)

21 Additionally, each developer must become a member of the  
22 Metro Air Park Property Owners Association and subscribe to its  
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24 <sup>6</sup> The Plan originally set the per-acre fee at \$5,993. (AR  
25 6043.) The fee was increased by the Conservancy in 2003 to its  
26 present level. (Defs.' Mot. at 26 n. 21.) Of the original fee,  
\$3,000 was allocated for land acquisition, with the remainder  
going to various administrative and maintenance costs. (AR  
6043.)

1 Covenants Conditions & Restrictions ("CC&Rs"). (AR 6007.) The  
2 Association is the permittee and is required to implement all of  
3 the provisions of the Plan, upon which the permit is conditioned.  
4 The permit also requires the Association to adhere to the Metro  
5 Air Park Implementation Agreement ("Agreement"). (AR 6592.) The  
6 Agreement further obligates the Association to carry out the  
7 provisions of the Plan. (AR 6559-60.) The CC&Rs give the  
8 Association the authority to raise fees as necessary. (AR  
9 17199.) The Association has the authority to place a lien on any  
10 parcel whose owner refuses to pay additional fees assessed by the  
11 Association. (AR 6050.)

12 Finally, the Plan requires a program review after  
13 development of the site has reached 800 acres, or roughly the  
14 halfway point. (AR 6066.) During the review, an additional 200  
15 acres may be developed; therefore, a maximum of 1000 acres may be  
16 developed before completion of the review and re-certification of  
17 the Plan and the permit. (Id.) This allows for adjustments to  
18 the Plan for changed conditions such as spikes in land costs or  
19 the unavailability of adequate mitigation lands on the open  
20 market. The Plan also requires that all of the required  
21 mitigation land must have been purchased before the issuance of  
22 grading permits for the final 10% of land within the Metro site.  
23 (AR 6575.) This provision is intended to ensure that all  
24 mitigation lands are purchased and set aside before the site is  
25 fully developed and before the remaining fees have been set and  
26 collected.



1 permit is arbitrary and capricious. They argue that: (1) there  
2 is inadequate evidence to find that the authorized take will not  
3 jeopardize the survival and recovery of the species; (2) the Plan  
4 does not ensure sufficient funding; and (3) there is no  
5 demonstration that the Plan mitigates to the "maximum extent  
6 practicable." As will become apparent, the case largely turns on  
7 the uncontested fact that the Metro site now provides only poor  
8 habitat for both the snake and the hawk.

9 A. Statutory Framework

10 The Endangered Species Act requires the Secretary to  
11 determine whether a given species qualifies for protection as  
12 endangered or threatened, and confers significant protection on  
13 species that are so listed. Section 9 of the Act makes it  
14 unlawful for any person subject to the jurisdiction of the United  
15 States to "take" any member of any endangered or threatened  
16 species. See 16 U.S.C. § 1538(a)(1). The Act defines "take" as  
17 "to harass, harm, pursue, hunt, wound, kill, trap, capture, or  
18 collect." 16 U.S.C. § 1532(19). "Harm" is further defined by  
19 regulation to include killing or injuring a protected species  
20 through "significant habitat modification or degradation" that  
21 impairs "essential behavioral patterns, including breeding,  
22 feeding, or sheltering." 50 C.F.R. § 17.3.

23 \_\_\_\_\_  
24 have presented affidavits substantially similar to those  
25 presented to the court in Babbitt, 128 F.Supp.2d at 1289-90.  
26 Those affidavits show that the plaintiffs meet the requirements  
of associational standing. Plaintiffs also meet the  
constitutional case or controversy requirement. See Lujan v.  
Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130  
(1992)

1 Section 9's broad prohibition on taking is limited by  
2 several exceptions identified in § 10. Most importantly for  
3 present purposes, § 10 allows the Secretary to issue an  
4 incidental take permit, which authorizes its holder to take some  
5 members of protected species when the taking is incidental to  
6 carrying out an otherwise lawful activity. See 16 U.S.C. §  
7 1539(a). The permittee is not liable for any taking that falls  
8 within the scope of the permit.

9 To obtain a permit, an applicant must develop and submit a  
10 habitat conservation plan, which specifies (1) the likely impact  
11 to the species from the proposed takings; (2) the steps the  
12 applicant will take to minimize and mitigate such impacts and the  
13 funding available for such mitigation; (3) alternative actions  
14 considered, and the reasons for not selecting them; and (4) such  
15 other measures as the Secretary may require as necessary or  
16 appropriate for the purposes of the plan. See 16 U.S.C. §  
17 1539(a) (2) (A). Upon submission of a permit application and  
18 related conservation plan, "the Secretary shall issue the  
19 permit," if she finds, after opportunity for public comment, that  
20 (i) the taking will be incidental; (ii) the applicant will, to  
21 the maximum extent practicable, minimize and mitigate the impacts  
22 of such taking; (iii) the applicant will ensure that adequate  
23 funding for the plan will be provided; (iv) the taking will not  
24 appreciably reduce the likelihood of the survival and recovery of  
25 the species in the wild; and (v) other measures required by the  
26 Secretary will be met. 16 U.S.C. § 1539(a) (2) (B). The permit

1 "shall contain such terms and conditions as the Secretary deems  
2 necessary or appropriate to carry out the purposes of this  
3 paragraph." Id. If the Secretary finds that a permittee is not  
4 complying with the terms and conditions of the permit, she must  
5 revoke the permit. 16 U.S.C. § 1539(a) (2) (C).

6 B. Will the Authorized Take Jeopardize the Survival and  
7 Recovery of the Species?

8 The plaintiffs argue that the Service's decision to issue  
9 the permit was arbitrary and capricious because the Service  
10 failed to demonstrate that the take authorized by the permit will  
11 not jeopardize the covered species. (Pls.' Mot. at 26-31.)  
12 Plaintiffs contend that the Service did not have the necessary  
13 information to make a no jeopardy finding because the mitigation  
14 land to be purchased under the Plan has not been identified.  
15 Plaintiffs also make a number of arguments based on the effects  
16 of the Plan on individual snakes living at the site.

17 1. Failure to Identify Mitigation Lands

18 The Act requires the Service to find that "the taking will  
19 not appreciably reduce the likelihood of the survival and  
20 recovery of the species in the wild." 16 U.S.C. §  
21 1539(a) (2) (B) (iv). The Service did make such a finding; however,  
22 plaintiffs contend that such a finding could have no basis in  
23 fact because no mitigation lands have been identified. (Pls.'  
24 Mot. at 27-28.) They argue that without the identification of  
25 specific mitigation lands the value of these lands as habitat to  
26 the covered species is unknown and unknowable.

1           The Metro Plan incorporates detailed land acquisition  
2 criteria. It also requires that the acquired land be managed for  
3 the benefit of the covered species and describes how that will be  
4 accomplished. The Service found that the current habitat value  
5 of the Metro site is quite limited, a finding that the plaintiffs  
6 do not contest.<sup>8</sup> (AR 7090-96, 7136.) Under the Plan  
7 approximately 2000 acres of poor habitat will be exchanged for  
8 1000 acres of conservation lands specifically managed to foster  
9 habitat for both the snake and hawk. The Service could  
10 rationally conclude that the Plan's acquisition criteria and  
11 management scheme ensure that mitigation land will provide  
12 habitat superior to that lost at the site and that far from  
13 jeopardizing the species, the Plan will enhance their prospects  
14 for survival.<sup>9</sup>

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17           <sup>8</sup> This finding distinguishes this case from Babbitt, 128  
18 F.Supp.2d at 1298. In Babbitt, the Natomas Basin Plan failed to  
19 assess the value of the habitat on land within the development  
20 area. That Plan improperly assumed that all land in the Basin  
was of equal habitat value, although only some of the land was  
subject to the permit.

21           <sup>9</sup> Plaintiffs also argue that Sierra Club v. Marsh, 816 F.2d  
22 1376, 1389 (9th Cir. 1987), requires that all mitigation lands  
23 must be purchased prior to issuing a permit conditioned upon  
24 mitigation through habitat acquisition. However, the holding of  
25 Sierra Club is based on the particular facts of that case,  
26 especially the critical nature of the habitat involved, a factor  
that is missing here. The Ninth Circuit has held that Sierra  
Club does not generally require the purchase of mitigation lands  
before issuance of a permit. See Southwest Ctr. for Biological  
Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 523-24  
(9th Cir. 1998). There is no general rule requiring purchase of  
mitigation lands prior to the issuance of a permit under the Act.

1                   2. The Survival of Individual Snakes

2           Plaintiffs argue that the Plan fails to ensure the survival  
3 of individual snakes that may currently be living on the Metro  
4 site. (Pls.' Mot. at 28-30.) However, a habitat conservation  
5 plan need not demonstrate the survival of individual members of a  
6 covered species. Rather, the successful plan must ensure the  
7 continued viability of covered species, and the Service concluded  
8 that the Metro Plan does just that. The Service's conclusion is  
9 not arbitrary because certain individual snakes may be harmed by  
10 development on the site. The very purpose of the permit  
11 provisions of the Act is to allow the take of individual members  
12 of a species that the Act would otherwise prohibit.

13                   C. Does the Plan Adequately Ensure Funding?

14           To obtain a permit, an applicant must "ensure that adequate  
15 funding for the plan will be provided." 16 U.S.C. §  
16 1539(a)(2)(B)(iii). Plaintiffs argue that the Association has  
17 not ensured adequate funding of the Metro Plan. (Pls.' Mot. at  
18 23-26.) There are a number of provisions of the Plan intended to  
19 ensure the adequacy of its funding. Most important are the  
20 provisions of the CC&Rs that give the Association the authority  
21 to impose any necessary supplemental fees on already-developed  
22 parcels - such that the first developers may yet be liable for an  
23 additional assessment if future land costs soar - and the  
24 provisions of the Agreement that require the Association to  
25 impose supplemental fees if necessary to fully implement the  
26 Plan. The mid-point review and requirement that all mitigation

1 lands be purchased before the final 10% of the Plan site is  
2 developed provide some additional assurances. However,  
3 plaintiffs argue that these provisions are inadequate because the  
4 property owners could simply dissolve the Association rather than  
5 impose additional fees upon themselves. (Pls.' Reply at 11-15.)  
6 Plaintiffs imagine a scenario in which land costs rise steeply,  
7 most of the area is developed quickly under a fee that is too low  
8 to pay for conservation lands, and it is necessary to reach back  
9 to earlier developers for supplemental fees. Plaintiffs contend  
10 that developers will simply dissolve the Association rather than  
11 pay the additional fees.

12 In addition to being speculative, plaintiffs' argument also  
13 fails to recognize that dissolution of the Association would be  
14 unlawful under the terms of the permit. As a matter of state  
15 corporate law, the Association, a California corporation, has the  
16 ability to dissolve. But the CC&Rs provide that "no provision. .  
17 . relating to the [Plan] and the [permit]. . . may be modified,  
18 revoked or terminated without prior written consent of the  
19 [Service] and the [California Department of Fish and Game]." (AR  
20 17105.) Dissolution of the Association would require the  
21 revocation of all, or at least most, of the CC&Rs, including many  
22 related to the Plan. Therefore, dissolution would require the  
23 permission of both the federal and state agencies. Dissolution  
24 of the Association would also be a violation of the Agreement, in  
25 which the Association obligated itself to fully carry out the  
26 Plan's conservation measures.

1           Moreover, the permit allows incidental take conditioned upon  
2 compliance with, and implementation of, the Plan. Thus, the  
3 permit gives the property owners certain rights (to take covered  
4 species) but also imposes certain duties (to fully implement the  
5 Plan). These duties do not end with the payment of the initial  
6 mitigation fee or with the acquisition of mitigation land. For  
7 instance, wetlands must be continually managed as either rice  
8 fields or marsh, both of which require seasonal flooding and  
9 draining. (AR 6097.) Management of the wetlands also requires  
10 periodic removal of exotic pest plants. (AR 6099.) The Plan  
11 also requires the monitoring of trees planted to provide  
12 Swainson's Hawk habitat, with replanting if necessary. (AR  
13 6054.) If the developers dissolve the Association, and this  
14 leads to a failure to fully implement the Plan, then their  
15 actions violate the permit. The Act permits the government to  
16 pursue civil and criminal penalties against "any person who  
17 knowingly violates. . . any provision of any" incidental take  
18 permit.<sup>10</sup> 16 U.S.C. § 1540(a)(1), (b)(1). The developers would  
19 be subject to these penalties if they dissolved the Association  
20 in order to avoid assessments necessary to implement the Plan.

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24           <sup>10</sup> There is no indication in the statute that only parties  
25 to the permit are subject to these penalties - the use of "any  
26 person" indicates just the opposite. Therefore, the fact that  
the developers are not parties to the permit is not relevant. So  
long as they "knowingly" violate the terms of the permit they may  
be liable.

1           D. Does the Plan Mitigate to the Maximum Extent  
2           Practicable?

3           To issue an incidental take permit, the Service must find  
4 that the habitat conservation plan minimizes and mitigates the  
5 impacts of incidental take "to the maximum extent practicable."  
6 16 U.S.C. § 1539(a)(2)(B)(ii). The term "maximum extent  
7 practicable" is not defined in the statute, nor in any formal  
8 agency regulations.<sup>11</sup> It joins together two somewhat opposing  
9 concepts, "maximum" and "practicable,"<sup>12</sup> without providing the  
10 key to their reconciliation. Plaintiffs seem to argue that, in a  
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12           <sup>11</sup> The Service's Habitat Conservation Planning Handbook  
13 does contain a definition of "maximum extent practicable." See  
14 Habitat Conservation Planning Handbook at 7-3,4. The Handbook  
15 provides that the maximum extent practicable finding "typically  
16 requires consideration of two factors: adequacy of the  
17 minimization and mitigation program, and whether it is the  
18 maximum that can be practically implemented by the applicant."  
19 Id. That definition basically resembles the approach taken by  
20 the Service in its Findings and Recommendations in this case.  
21 (See AR 7140.)

22           <sup>12</sup> The parties do not explicitly consider the meaning of  
23 the term "practicable." The implication in the plaintiffs'  
24 briefs is that "maximum extent practicable" means the most that  
25 can possibly be done - in other words, the most the developers  
26 could pay while still going forward with the project. While the  
meaning of the term "practicable" in the statute is not entirely  
clear, the term does not simply equate to "possible."  
"Practicable" is often used in the law to mean something along  
the lines of "reasonably capable of being accomplished." Black's  
Law Dictionary (7th ed. 1999). For example, "practicable" is  
defined in a Federal Highway Administration regulation as  
"capable of being done within reasonable natural, social, or  
economic constraints." 23 C.F.R. § 650.105(k). "Practicable" is  
used twice in Fed.R.Civ.P. 23 and neither time is it synonymous  
with "possible." Courts also universally interpret the phrase  
"as soon as practicable," which is common in insurance policies,  
to mean "within a reasonable time." See, e.g., Ormet Primary  
Aluminum Corp. v. Employers Ins. of Wausau, 725 N.E.2d 646, 655  
(Ohio 2000).

1 plan designed like this one, where the development of land on-  
2 site is mitigated through the purchase and set-aside of land off-  
3 site, the maximum extent practicable requirement means that the  
4 plan must require the purchase of as much mitigation land as the  
5 particular developer possibly could afford while still going  
6 forward with the development. The environmentally superior  
7 alternative for the species would always be the preservation or  
8 creation of as much habitat as possible before the project would  
9 be rejected by a developer as too expensive. The Service,  
10 however, does not approach the maximum extent practicable  
11 requirement in this way. Rather, the Service looks to whether  
12 the mitigation is "rationally related to the level of take under  
13 the plan." (AR 7140.)

14 The statutory language is consistent with the Service's  
15 interpretation. The statute requires that "the applicant will,  
16 to the maximum extent practicable, minimize and mitigate the  
17 impacts of" its take. 16 U.S.C. § 1539(a)(2)(B)(ii). The words  
18 "maximum extent practicable" signify that the applicant may do  
19 something less than fully minimize and mitigate the impacts of  
20 the take where to do more would not be practicable. Moreover,  
21 the statutory language does not suggest that an applicant must  
22 ever do more than mitigate the effect of its take of species.  
23 Thus, if a permit authorized the destruction of one acre of  
24 habitat that normally supports one individual member of a  
25 protected species, it would not be necessary for the applicant to  
26 create 100 acres of new habitat that would support some 100

1 individuals of the species, even if the particular developer  
2 could afford to do so. The Service's construction of the  
3 statute is entitled to deference under Chevron U.S.A. Inc. v.  
4 Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct.  
5 2778 (1984).<sup>13</sup> Because the phrase "maximum extent practicable"  
6 is at best ambiguous, the court will defer to the construction of  
7 the agency, so long as it is reasonable. Id. at 844. The  
8 Service's view of the statutory language as requiring that the  
9 level of mitigation must be "rationally related to the level of  
10 take under the plan" is entirely reasonable and avoids absurd  
11 results.<sup>14</sup> It also avoids unduly enmeshing the Service in  
12 developers' economic affairs and projections.

13 Using this construction of the statute, the Service made a  
14 finding that "the level of mitigation provided for in the [Plan]  
15 more than compensates for the impacts of take that will occur  
16

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17 <sup>13</sup> The court recognizes that there is uncertainty about  
18 when agency interpretations receive Chevron deference. See  
19 Richard Pierce, Administrative Law Treatise § 3.5 (4th ed. 2004  
20 supp.). Formal agency rules announced after notice and comment  
21 clearly do receive full deference, while more informal agency  
22 determinations may not. See United States v. Mead Corp., 533  
23 U.S. 218, 230, 121 S.Ct. 2164 (2001) (holding that a statutory  
24 construction in a Customs letter received no deference). The  
25 court is persuaded that Chevron deference is appropriate in this  
26 instance given the "interstitial nature" of this legal question,  
the importance of the meaning of "maximum extent practicable" to  
the administration of the permit scheme, and the "expertise" of  
the Service. See Barnhart v. Walton, 535 U.S. 212, 222, 122  
S.Ct. 1265 (2002).

<sup>14</sup> Under plaintiffs' interpretation, a permit that allows  
disturbance of one acre of Giant Garter Snake habitat could  
require the developer to create and manage one thousand acres of  
replacement habitat if that was the maximum the developer could  
afford.

1 under the plan.”<sup>15</sup> (AR 7140.) Based on such a finding, the  
2 Service was under no obligation to inquire whether additional  
3 mitigation was financially possible. All that was reasonably  
4 required to mitigate had been included in the Plan.<sup>16</sup>

5 Even accepting plaintiffs’ contention that the statute  
6 requires mitigation up to the financial breaking point, there is  
7 sufficient evidence here from which to draw that conclusion. The  
8 Service had evidence that the total development fees for the  
9 Metro Air Park project are among the highest in the Sacramento  
10 region, so the imposition of the higher fees necessary to  
11

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13 <sup>15</sup> Plaintiffs argue that other evidence shows that the  
14 agency’s conclusion that the Plan mitigated to the maximum extent  
15 practicable is arbitrary and capricious. They cite a number of  
16 internal documents from Service biologists questioning the  
17 adequacy of the mitigation ratio. (Pls.’ Mot. at 17-18.)  
18 However, the mere existence of internal disagreements between  
19 agency experts does not make the agency’s decision arbitrary or  
20 capricious. Aluminum Co. of Am. v. Bonneville Power Admin., 175  
21 F.3d 1156, 1161-62 (9th Cir. 1999). Plaintiffs also argue that  
22 the 0.5:1 ratio in the Metro Plan is significantly lower than  
23 that required by other plans in the region. (Pls.’ Mot. at 19-  
24 20.) These plans, however, deal with additional species and use  
25 very different methods for calculating the mitigation ratio.  
26 (See, e.g., San Joaquin County Plan 4.1.2.) Their use of higher  
ratios is not determinative of what is adequate or practicable in  
the Metro Plan, particularly given that the development lands  
currently provide little or no habitat of value.

<sup>16</sup> Plaintiffs argue that the Service had to consider an  
increased mitigation alternative in order to make a finding that  
further mitigation measures were not practicable. It is true  
that consideration of a higher mitigation alternative will often  
be useful to the Service when determining whether additional  
mitigation is practicable. See Babbitt, 128 F.Supp.2d at 1292;  
HCP Handbook at 7-3. However, in the Metro Plan, increased  
mitigation would mean the purchase of more land for habitat.  
Since the Service found that the mitigation provided “more than  
compensates” for the impact of take, it was not necessary to  
consider alternatives that would do even more.

1 purchase more habitat would make the project uncompetitive with  
2 other development in the area. (AR 7140.) The developers are  
3 also exposed to liability for supplemental fees should those  
4 prove necessary. This evidence is adequate to support the  
5 Service's conclusion that higher mitigation fees are  
6 impracticable, given that the existing lands are of little value  
7 and that mitigation fully compensates for any taking.

8 IV. Conclusion

9 The Fish and Wildlife Service made all of the proper  
10 statutory findings before issuing the incidental take permit for  
11 the Metro Air Park development. The Service's ultimate  
12 conclusion that the mitigation measures included in the Metro Air  
13 Park Habitat Conservation Plan would benefit the Giant Garter  
14 Snake and the Swainson's Hawk, along with the other covered  
15 species, is reasonable given the degraded nature and poor quality  
16 of the habitat on the development site. The Service's decision  
17 to issue the permit is not arbitrary and capricious. Therefore,  
18 plaintiffs' motion for summary judgment is DENIED; defendants'  
19 cross-motion for summary judgment is GRANTED.

20  
21 IT IS SO ORDERED.

22 Dated: \_\_\_\_\_.

23  
24  
25 \_\_\_\_\_  
26 DAVID F. LEVI  
United States District Judge