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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SOUTH YUBA RIVER CITIZENS
LEAGUE, a non-profit corporation, and
FRIENDS OF THE RIVER, a non-profit
corporation,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE; REBECCA M. BLANK, as
Acting Secretary of Commerce;
RODNEY MCINNIS, as Regional
Administrator of the NMFS Southwest
Region; UNITED STATES ARMY
CORPS OF ENGINEERS; JOHN
MCHUGH, as Secretary of the Army;
COLONEL WILLILAM J. LEADY, P.E.,
as District Commander, Sacramento
District,

Defendants.

No. 2:13-cv-00059-MCE-EFB

No. 2:13-cv-00042-MCE-CKD

(Related Cases)

MEMORANDUM AND ORDER

1 YUBA COUNTY WATER AGENCY,
2 Plaintiff,

3 NEVADA IRRIGATION DISTRICT;
4 PACIFIC GAS AND ELECTRIC
5 COMPANY; STATE WATER
6 CONTRACTORS, INC.; BROPHY
7 WATER DISTRICT, HALLWOOD
8 IRRIGATION COMPANY,

9 Plaintiff-Intervenors,

10 v.

11 NATIONAL MARINE FISHERIES
12 SERVICE; UNITED STATES
13 DEPARTMENT OF COMMERCE;
14 REBECCA M. BLANK, in her official
15 capacity as Acting Secretary of
16 Commerce; RODNEY R. MCINNIS, in
17 his official capacity as Regional
18 Administrator, Southwest Region,
19 National Marine Fisheries Service; U.S.
20 ARMY CORPS OF ENGINEERS;
21 LIEUTENANT GENERAL THOMAS P.
22 BOSTICK, in his official capacity as
23 Commanding General of U.S. Army
24 Corps of Engineers; and COLONEL
25 WILLIAM J. LEADY, P.E., in his official
26 capacity as District Commander,
27 Sacramento District, U.S. Army Corps
28 of Engineers,

Defendants.

22 By way of the present litigation, two groups of Plaintiffs separately challenge the
23 propriety of a biological opinion prepared by the National Marine Fisheries Service
24 (“NMFS”) in connection with the continued operation of two different dams maintained by
25 the Army Corps of Engineers (“Corps”) and located along the upper portions of the Yuba
26 River in Northern California.

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1 The first lawsuit is being pursued by two different environmental groups and argues that
2 by extending certain deadlines contained in the biological opinion at the request of the
3 Corps, the NMFS has violated provisions of the Endangered Species Act, 16 U.S.C.
4 § 1531, et seq. (“ESA”) by exacerbating the risk to certain threatened fish. The second
5 action, brought by the Yuba County Water Agency (five other water and power entities
6 have intervened as additional plaintiffs since the lawsuit was commenced), is concerned
7 not with fish but how measures to restore fish habitat, as advocated by the NMFS, may
8 adversely affect water and hydroelectric interests.

9 Presently before the Court is the environmental plaintiffs’ request for preliminary
10 injunctive relief, as well as motions filed by the federal defendants in both lawsuits to
11 stay these proceedings.¹ Stay is sought in order to allow the NMFS, which has already
12 agreed to revisit the conclusions contained in its 2012 study, to prepare a new
13 assessment that may well obviate the need for all or part of this litigation. The defense
14 claims that allowing both actions to proceed simultaneously under those circumstances
15 would likely be both wasteful and inefficient. The environmental plaintiffs, on the other
16 hand, argue that the Corps must implement certain safeguards to protect fish if any stay
17 is ordered, and seek a mandatory injunction to ensure that what they view as key
18 provisions of NMFS’ current recommendations are followed in the meantime.

19 As set forth below, the Court finds that the environmental plaintiffs have not met
20 their burden of demonstrating the need for a preliminary injunction in this matter. The
21 Court will, however, stay both actions pending issuance of a new biological opinion and
22 will further establish deadlines for completion of that opinion.

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27 ¹ The defendants in both proceedings at issue herein will be collectively referred to as “federal
28 defendants” or “the government” in this Memorandum and Order unless otherwise indicated.

BACKGROUND

Both of these lawsuits, which were related by Order filed June 27, 2013, challenge a 300-page Biological Opinion (“BiOp”) issued on February 20, 2012, by the NMFS.²The BiOp was prepared to evaluate the Corps’ long-term operation and maintenance of two dams along the upper Yuba River (“the Project”). The BiOp specifically addressed the effects of the project on three anadromous³ fish species which are listed as threatened under the Endangered Species Act (“ESA”). The affected species include the Central Valley spring-run Chinook salmon, the Central Valley steelhead and the southern green sturgeon. The Yuba River provides habitat to three ecologically significant units of those fish.

The Englebright dam, constructed in 1941 (“Englebright”), marks the division between the upper and lower Yuba and is 260 feet high. Englebright has no fish ladders and completely blocks access of the migrating fish to the upper reaches of the Yuba. The much smaller (26 foot) Daguerre Point dam, located about 10 miles downstream from Englebright and built in 1910 (“Daguerre”), does have fish ladders initially constructed in 1911 and most recently repaired in 1964 and 1965. Those fishways, located on either side of the dam abutment, do conceivably permit fish to travel upstream. Both dams were built to retain hydraulic mining sediment and debris released into the Yuba by Gold Rush-era placer mining.

Between March 27, 2002, and November 21, 2007, the NMFS, which is entrusted with safeguarding anadromous fish species like those involved here, issued three different biological opinions regarding the Corps’ activities at the two dams. All three BiOps concluded that the Corps’ Project activities in operating and maintaining the two dams did not jeopardize the three fish species.

² The 2012 BiOp is attached as Exhibit A to the Declaration of Howard Brown, ECF No. 44-3, Case No. 2:13-cv-00042.

³ An anadromous fish, born in fresh water, spends most of its life in the sea before returning to fresh water to spawn. Anadromous species include both salmon and sturgeon.

1 The third November 21, 2007, BiOp ultimately prompted litigation by SYCRL that was
2 adjudicated before another court in this district. In that case, the court ultimately found
3 that certain aspects of the 2007 BiOp violated the provisions of the ESA and its
4 implementing statutory framework under the Administrative Procedure Act (“APA”). See
5 South Yuba River Citizens League v. NMFS, 723 F. Supp. 2d 1247 (E.D. Cal. 2010)
6 (merits proceedings). Following this decision the Corps voluntarily reinitiated
7 consultation with the NMFS in order to prepare a new BiOp. That process resulted in
8 preparation of the 2012 BiOp that is the subject of the cases now before this Court.

9 The 2012 BiOp unlike its predecessors, concludes the Corps’ project adversely
10 affects the concerned fish because it blocks access to 478 miles of suitable habitat
11 above Englebright for spring Chinook, 143 miles above Englebright for steelhead, and
12 2-7 kilometers above Daguerre for green sturgeon. The BiOp concludes both that these
13 areas represent critical habitat and that in its absence the continued existence of the
14 fish would likely be jeopardized. The BiOp further finds that upstream passage at
15 Daguerre is inadequate and that overlapping use of spawning areas below Englebright
16 by both spring and fall-run Chinook has resulted in hybridization of those previously
17 distinct species.

18 The new BiOp included reasonably prudent alternative (“RPA”) measures that the
19 NFMS believed would help avoid jeopardizing the listed species. The recommended
20 RPAs included various measures like near and long-term fish passage, gravel injection
21 to improve spawning habitat, predator control, channel restoration and species
22 monitoring. The RPAs were to be carried out pursuant to a phased, decades-long
23 program of conservation to ameliorate the effects of the project on the listed fish.

24 The Declaration of Brad Cavallo, a fish scientist retained by one of the
25 environmental plaintiffs, the South Yuba River Citizens League (“SYRCL”), opines that
26 achieving comprehensive long-term measures for fish protection will require measures
27 like the removal of Daguerre and Englebright entirely, or the construction of completely
28 new structures or channels to allow fish passage past Daguerre and Englebright.

1 See Cavallo Decl., 2:13-cv-00059, ECF No. 29-2, ¶ 46. Cavallo flatly states that “each
2 additional year the Corps fails to adequately mitigate [this] substantial harm ... brings the
3 Listed Species closer to extinction and reduces the likelihood of recovery.” *Id.* at 47.
4 He argues that planning for volitional fish passage must begin immediately, as
5 envisioned by the BiOp, in order to be in place by 2020. *Id.* at 51. Another expert
6 retained by SYRCL, fisheries biologist Gary Reedy, concurs that timely passage of fish
7 passage design is critical to avoid jeopardy to the listed species’ survival and recovery.
8 Reedy Decl., 2:13-cv-00059, ECF No. 29-3, ¶ 17.

9 After issuance of the 2012 BiOp, the Corps and NMFS held a series of meetings
10 between March and September of 2012 to discuss the Corps’ concerns about
11 implementing the BiOp. On November 27, 2012, the NMFS extended several RPA
12 deadlines to the Corps for various practical reasons, including the Corps’ intent to
13 reinstate the consultation proceedings that had led to the BiOp in the first place. The
14 Corps expressed both scientific and technical concerns as well as concern that the
15 measures called for in the BiOp were beyond its statutory and fiscal authority to
16 implement. Thereafter, on February 26, 2013, the Corps formally requested reinitiation
17 of consultation proceedings under Section 7 of the ESA and agreed to continue
18 implementing certain actions with near term completion dates that would benefit the
19 subject fish species during the period of additional consultation. That consultation was
20 viewed as appropriate to address new scientific and technical information relevant to the
21 Corps’ action on listed species,⁴ to clarify the nature and scope of the Corps’ action, to
22 clarify the scope of the action area, and to ensure that any RPA is within the scope of
23 the Corps’ legal authority. Decl. of Randy P. Olsen, 2:13-cv-00042, ECF No. 44-4, ¶ 15.

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28 ⁴ By that time, two years of new information had been gathered since the 2012 Biological
Assessment, which included information and date only up to 2010.

1 The interim measures that the Corps agreed to implement pending the renewed
2 consultation proceedings include the inspection and maintenance of the Daguerre fish
3 ladders, placement and monitoring of 5,000 tons of gravel for spawning habitat,
4 salmonid redd surveys as specified in the BiOp, and the implementation and monitoring
5 of large woody material between Englebright and Daguerre, as also called for in the
6 BiOp. The Corps viewed these measures as both within its authority and appropriations
7 its ability to carry out by way of funding appropriation. The Corps further represented it
8 would not make any irreversible or irretrievable commitment of resources in the
9 meantime that would affect implementation of additional measures in the future.

10 The NMFS agreed to reinitiation as requested and, on April 11, 2013, committed
11 to develop the necessary schedule for those proceedings. It believes that assuming
12 receipt of a sufficient underlying biological assessment from the Corps by October 22,
13 2013 as planned, a new BiOp can be prepared on or before May 12, 2014.

14 The Yuba County Water Agency (“YCWA”) filed its lawsuit on January 9, 2013,
15 alleging that the 2012 BiOp contains “factual and legal inadequacies” under the ESA that
16 make it “arbitrary and capricious” under the Administrative Procedures Act.⁵ The
17 government contends that significant overlap exists between the claims raised in
18 YCWA’s complaint and the issues identified by the Corps as the basis for reinitiation of
19 consultation. YCWA’s interest in the dams stems from hydroelectric power it obtains.
20 Controlled water releases from Englebright are made through two hydroelectric power
21 facilities that are owned, operated and maintained by the YCWA and PG&E,
22 respectively. The powerhouses operate pursuant to licenses issued by the Federal
23 Energy Regulatory Commission (“FERC”).

24 On March 18, 2013, the SYRCL (a second environmental group, Friends of the
25 River, was subsequently added as a second party plaintiff) filed its own lawsuit.

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27 ⁵ As indicated above, five other water and power entities (the Nevada Irrigation District, Pacific
28 Gas and Electric Company, The State Water Contractors, Inc., the Brophy Water District and the Hallwood
Irrigation Company) subsequently intervened as additional plaintiffs in YDWA’s lawsuit.

1 That action challenges federal defendants' compliance with the RPA recommendations
2 as set forth in the 2012 BiOp, and further challenges federal defendants' alleged failure
3 to proceed in a timely fashion that avoids jeopardizing the listed fish or adversely
4 modifying their critical habitat. SYRCL expresses particular concern with NMFS' consent
5 to extend certain of the deadlines contained in the 2012 BiOp as requested by the
6 Corps, and argues that extension was arbitrary and capricious.

7 Given the reinitiation of proceedings with NMFS, the Federal Defendants allege
8 that a stay of both cases would avoid duplicative and wasteful litigation, and would also
9 avoid delaying an administrative process that could be stymied if available resources
10 have to be diverted to defending a BiOp that is already in the process of being
11 superseded. SYRCL asks that the Court grant preliminary injunctive relief, in the event
12 the action is stayed, in order to mandate that additional measures are taken (beyond
13 those steps the Corps says it will continue to implement in the meantime) to protect the
14 subject fish species pending a new BiOp. YCWA's concern with the 2012 BiOp stems
15 from fear that its provisions will affect ongoing licensing proceedings with FERC. YCWA
16 asks that any stay order contain provisions that preclude reference to or reliance on the
17 2012 BiOp while reinitiation proceedings are underway.

18 19 **STATUTORY BACKGROUND**

20
21 The ESA was enacted "to provide a means whereby the ecosystems upon which
22 endangered species and threatened species depend may be conserved" and "to provide
23 a program for the conservation of such endangered species and threatened species."
24 16 U.S.C. § 1531(b). The ESA delineates several substantive mandates to achieve that
25 stated goal. ESA section 7(a)(2) requires Federal agencies to "insure that any action
26 authorized, funded, or carried out by such agency ... is not likely to jeopardize the
27 continued existence of or result in the destruction or adverse modification of designated
28 critical habitat for such species." 16 U.S.C. § 1536(a)(2).

1 In addition to these measures which apply to a Section 7 challenge, ESA section
2 9(a)(1)(B) also prohibits any "taking" of species listed as endangered under the ESA.

3 Whenever agency action "may affect" a threatened or endangered species or
4 critical habitat, the agency must consult with the appropriate "consulting agency," here
5 the NMFS. 50 C.F.R. § 402.14(a). If the proposed action is "likely to adversely affect" a
6 listed species or its critical habitat, "formal consultation" is required. 50 C.F.R.
7 § 402.14(b).

8 Formal consultation begins when the action agency, here the Corps, transmits a
9 written request to the consulting agency (NMFS). This request can take the form of a
10 "biological assessment" which describes the proposed action and evaluates its potential
11 effects. See 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. Formal consultation concludes
12 with the issuance of a biological opinion by the consulting agency. 50 C.F.R.
13 § 402.14(l)(1). The BiOp assesses the likelihood of jeopardy to the species as well as
14 the likelihood that destruction or adverse modification of critical habitat will occur. See
15 50 C.F.R. § 402.14(g).

16 Section 7(d) of the ESA allows an agency like the Corps to proceed with its
17 intended activities after the consultation process is initiated so long as the action does
18 not result in "any irreversible or irretrievable commitment of resources with respect to the
19 agency action which has the effect of foreclosing the formulation or implementation of
20 any reasonable and prudent alternative measures..." 16 U.S.C. § 1536(d)

21 If the proposed action may cause jeopardy or adverse modification, the BiOp can
22 include reasonable and prudent alternatives ("RPAs") that the consulting agency
23 "believes would avoid the likelihood of" jeopardy or adverse habitat modification."
24 50 C.F.R. § 402.02. RPAs must include measures that can "be implemented in a
25 manner consistent with the intended purpose of the action, "that are consistent with the
26 scope of the [action agency's] legal authority and jurisdiction," and are "economically and
27 technologically feasible." Id.

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1 A BiOp may also include an Incidental Take Statement (“ITS”) that if followed
2 provides the action agency with a safe harbor from liability under the Section 9
3 prohibition on take of listed species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

4 An agency action can be reinitiated, as has occurred here, under certain
5 circumstances, including new information on the listed species, unanticipated levels of
6 incidental take, or new information on the proposed action. 50 C.F.R. § 402.16. After
7 reinitiation of consultation, an action agency like the Corps may also proceed with its
8 action so long as it avoids the same “irreversible or irretrievable commitment of
9 resources” that could foreclose either formulation or implementation of any subsequently
10 developed RPA. 16 U.S.C. § 1536(d).

11 SYRCL’s complaint here is premised on both Section 7 and Section 9 of the ESA.
12 Additionally, plaintiffs in the related YCWA lawsuit argue that the 2012 BiOp fails and
13 should be set aside either because of factual and legal inadequacies. Given those
14 alleged shortcomings, the YCWA plaintiffs contend that the BiOp is “arbitrary and
15 capricious”, made “without observance of procedure required or law,” or “otherwise not
16 in accordance with the law” as set forth in the Administrative Procedures Act (“APA”).
17 5 U.S.C. § 706(2)(A) and (D).

18 ANALYSIS

19 A. Environmental Plaintiffs’ Motion for Preliminary Injunction

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23 Through this motion, the SYRCL and Friends of the River (collectively “SYRCL”)
24 seek to compel the federal defendants to implement six more of the measures
25 recommended by the 2012 BiOp beyond those measures the Corps has already agreed
26 to take while reinitiation proceedings are pending. SYRCL maintains, in accordance with
27 the BiOp’s findings, that Englebright and Daguerre are jeopardizing the survival and
28 recovery of the subject fish species.

1 The federal defendants oppose that request on grounds that the 10-month period during
2 which reinitiation proceedings will take place does not warrant the requested mandatory
3 injunction. Since the measures at issue are designed to unfold over a twenty-year
4 period, and will address protection and survival concerns over a century, the government
5 maintains that the subject fish will not be irreparably damaged by the brief, ten-month
6 period it will take to obtain a new BiOp.

7
8 **1. Standard**

9
10 Issuance of preliminary relief in advance of a decision on the merits is always
11 considered an “extraordinary and drastic remedy” (Munaf v. Geren, 553 U.S. 674,
12 689-90 (2008)) that “may be awarded upon a clear showing that the plaintiff is entitled to
13 such relief.” Winter v. Natural Res. Def. Council, 555 U.S. 7, 22 (2008). A party
14 requesting such relief must show that “he is likely to succeed on the merits, that he is
15 likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
16 equities tips in his favor, and that an injunction is in the public interest.” Stormans, Inc. v.
17 Selecty, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting Winter, 555 U.S. at 20).
18 Alternatively, under the so-called “sliding scale” approach, as long as a plaintiff
19 demonstrates the requisite harm and shows that an injunction is in the public interest, a
20 preliminary injunction can still issue so long as serious questions going to the merits are
21 raised and the balance of hardships tips sharply in Plaintiff’s favor. Alliance for Wild
22 Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (finding that sliding scale test
23 for issuance of preliminary injunctive relief remains viable after Winter). In the context of
24 an ESA violation, because the balance of hardships and the public interest generally tips
25 heavily in favor of endangered species, the court can largely dispense with weighing
26 those factors so long as a merits violation is likely to have occurred and irreparable harm
27 is established. Sierra Club v. Marsh, 816 F.2d 1376, 1383-84 (9th Cir. 1987).

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1 In determining the likelihood of success in the context of a preliminary injunction,
2 agency action should be upheld in accordance with the provisions of the APA unless it is
3 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”
4 *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010);

5 A request for mandatory injunctive relief, like that sought here, “goes well beyond
6 simply maintaining the status quo *pendente lite* [and] is particularly disfavored.” *LGS*
7 *Architects v. Concordia Homes of Nev.*, 434 F.3d 1150, 1158 (9th Cir. 2006) (citation
8 omitted) (emphasis in original). Therefore, “when a mandatory preliminary injunction is
9 requested, the district court should deny such relief, ‘unless the facts and law clearly
10 favor the moving party.’” *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

11

12 **2. Analysis**

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14 In attempting to show the requisite irreparable harm, the SYRCL argues that
15 Englebright blocks historic, highly valuable Upper Yuba habitat for the threatened
16 species and also cuts off key upstream tributaries. According to Plaintiffs, Englebright
17 further traps gravel needed to create a health spawning substrate in the Yuba River
18 downstream from the dam. Plaintiffs go on to assert that the 1964 fish ladders at
19 Daguerre are inadequately designed and operated. Plaintiffs maintain that all these
20 factors impact both species’ viability and habitat and further constitute an unauthorized
21 taking under the ESA given the precarious nature of the threatened fish. Plaintiffs assert
22 that the federal defendants’ refusal to do anything beyond maintaining the status quo
23 until a new BiOp is prepared constitutes both a Section 7 and a Section 9 ESA violation.

24 In response, the Federal Defendants point out that it has voluntarily agreed to
25 undertake those measures it has the authority and funding to carry out, including
26 salmonid surveys, gravel injection, placement of large woody material and improvements
27 to existing fish ladder operation.

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1 Since all these measures benefit the species, and since the government represents it
2 plans to take no affirmative action during the interim reinitiation period that would harm
3 the species in any way, it asserts that the requisite clear showing of irreparable harm has
4 not been made with respect to a Section 7 challenge to action affecting the species and
5 their critical habitat.

6 Plaintiffs must show a “definitive threat of future harm to protected species” under
7 Section 7 of the ESA; “mere speculation” as to the incremental possibility” of such risk is
8 insufficient. Nat’l Wildlife Fed’n v. Burlington N.R.R., 23 F.3d 1508, 1512 n.8 (9th Cir.
9 1994). Moreover, “[i]rreparable harm to ESA listed species has to be measured at the
10 species level,” and a “plaintiff must present a concrete showing of probable deaths
11 during the interim period and of how these deaths may impact the species.” Nw. Envtl.
12 Def. Ctr. v. U.S. Army Corps of Eng’rs, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011)
13 (quotation omitted).

14 Additionally, with respect to a Section 9 “taking” claim under the ESA, the
15 environmental plaintiffs must make a “concrete showing of probable deaths during the
16 interim period” and demonstrate “how those deaths may impact the species.” Id. at
17 1317. To meet this burden, plaintiffs must prove by a preponderance of the evidence
18 that a “reasonably certain threat of imminent harm to a protected species” exists.
19 Marbled Murrelet v. Babbitt, 83 F.3d 1061, 1066 (9th Cir. 1996); Defenders of Wildlife v.
20 Bernal, 204 F.3d 920, 925 (9th Cir. 200). A “potential” injury to the species is
21 “inadequate to establish Section 9 liability.” Swinomish Indian Tribal Cmty. v. Skagit
22 Cnty Dike Dist. No. 22, 618 F. Supp. 2d 1262, 1270 (W.D. Wash. 2008). Plaintiffs have
23 not made the requisite showing under either Section 7 or Section 9.

24 Here, any impact to the affected species must be seen in context. The
25 Englebright Dam has been in place, and has blocked fish passage to the upper Yuba
26 River, for more than seventy years. The Daguerre Point Dam was constructed over a
27 century ago. Any effects upon Chinook, steelhead and sturgeon have been ongoing for
28 decades.

1 Aside from arguing in conclusory fashion that the species are now at a critical point,⁶
2 Plaintiffs have made no real effort to quantify the effects of continued dam operation on
3 these species, and more importantly have made no attempt whatsoever to quantify any
4 impact occurring during the interim 10-month period that will elapse between now and
5 the expected completion of a new BiOp in May of 2014. The relevant inquiry for
6 preliminary injunction purposes is whether the requested relief is necessary to avoid
7 irreparable harm during the interim period that the relief is to be provided. N.W. Env't'l
8 Def. Ctr. v. U.S. Army Corps of Eng'rs, 817 F. Supp. 2d at 1315.

9 Given the decades that the dams in question have been in place, the problematic
10 nature of establishing irreparable harm based on a 10-month window is hardly
11 surprising. In addition, the RPAs called for in the 2012 BiOp in themselves look to the
12 long rather than the short term. That is consistent with the fact that population viability
13 analysis for risk to the subject fish species is evaluated over a 100-year time frame, and
14 not over a period of months as Plaintiffs would have the Court believe. Decl. of Howard
15 Brown, 13-cv-00059, ECF No. 34-1, ¶¶ 16-17. The approach taken by the 2012 BiOp is
16 consistent with this analysis. In assessing long-term survival and viability, the BiOps'
17 conclusions are based on modeling and scientific inferences projecting effects on the
18 listed species over a span of 100 years. 2012 BiOp, Ex. A to Brown Decl, pp. 38, 202.

19 Examination of the injunctive relief measures that the environmental plaintiffs
20 seek to compel by way of mandatory injunction also indicates a long-term approach. Of
21 the six measures that plaintiffs demand, four are not even scheduled to occur during the
22 reinitiated consultation period. Others call for planning steps or studies without any on
23 the ground effects that could either cause or prevent irreparable harm to the species.

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27 ⁶ Plaintiffs' opening brief states unequivocally that the six additional actions sought by way of
28 mandatory injunction "cannot be delayed any longer due to the urgent need to reduce the primary
stressors on the listed fish populations." ECF No. 29-1, Case No. 2:13-cv-00059, 17:24-26, citing Gary
Reddy Decl. ¶ 17.

1 To warrant a preliminary injunction, however, the environmental plaintiffs must show that
2 each item of injunctive relief they seek is necessary to avoid irreparable harm to the
3 listed species during the interim period. See South Yuba River Citizens League v.
4 NMFS, 804 F. Supp. 2d 1045, 1057 (E.D. Cal. 2011)

5 The first item that the environmental plaintiffs propose, the development and
6 implementation of fish passage at Englebright and Daguerre by July 2018, “will provide
7 no benefit to the listed species in the interim period” and therefore must be denied. *Id.*
8 The second request, which calls for three times as much gravel placement than that
9 agreed to by the Corps (15,000 tons versus 5,000 tons) has also not been shown to
10 prevent irreparable harm within the next 10 months. The third measure, implementation
11 of a long-term channel plan, would not occur at the earliest until 2019, more than four
12 years after the interim period now under consideration has expired. The fourth proposed
13 item of mandated relief, placement of more woody debris for fish growth and survival, is
14 negated by the Corps’ already stated willingness to begin placement of such material
15 this year. Fifth, the proposed predation control measures are not scheduled to be
16 implemented until 2015 and the biological status quo will not be altered in the interim.
17 Sixth and finally, the development of a green sturgeon monitoring and management
18 plan will not be implemented until 2016 and therefore will also have no effect on the
19 status quo in the meantime.

20 While the Court recognizes the environmental plaintiffs’ concern that these
21 measures must in some instances be started, at least for planning purposes, in the near
22 future in order to be completed by the applicable deadlines, any harm during the
23 meantime has not been quantified at all, much less to the extent necessary to justify the
24 extraordinary relief represented by a mandatory injunction. The requested injunction is
25 denied.

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1 **A. Federal Motions for Stay and/or Remand**

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3 Having determined that Plaintiffs in the SYRCL case have not established the
4 propriety of a mandatory preliminary injunction, the Court must now consider whether
5 either the SYRCL or the YCWA case should be stayed while the reinitiation proceedings
6 take place over the coming 10 months. The federal defendants argue that it is wasteful
7 and inefficient to litigate compliance with multi-decade conservation measures in the
8 2012 BiOp, given the fact that an ongoing Section 7 consultation is in process that will
9 produce a new BiOp likely superseding the 2012 BiOp in any event. The Court agrees.

10

11 **1. Standard**

12

13 A power to stay proceedings is “incidental to the power inherent in every court to
14 control the disposition of the causes on its docket with economy of time and effort for
15 itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). A
16 court may enter a stay “pending resolution of independent proceedings which bear upon
17 the case... whether the separate proceedings are judicial administrative or arbitral in
18 character...” Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863-64 (9th Cir.
19 1979). This is true even if the issues in such proceedings are not necessarily controlling
20 with respect to the action before the court. *Id.* In exercising its discretion, the court must
21 evaluate the competing interests affected by either granting or refusing a stay, including
22 “the hardship or inequity which a party may suffer in being required to go forward, and
23 the orderly course of justice measured in terms of the simplifying or complicating of
24 issues, proof, and questions of law which could be expected to result from a stay.”
25 Lockyer v. Mirant Corp. 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted).

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1 **2. Analysis**

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3 The federal defendants contend that because reinitiation will likely resolve,
4 narrow, or clarify the issues, a stay will avoid “wasteful duplication of effort.” Chronicle
5 Publ’g. Co. v. Nat’l. Broad. Co., 294 F.2d 744, 747-48 (9th Cir. 1961). Significantly, too,
6 where agencies proposed to resolve disputed issues administratively, courts should
7 ordinarily “allow agencies to cure their own mistakes rather than wasting the courts’ and
8 the parties’ resources reviewing a record that both sides acknowledge to be incorrect or
9 incomplete.” Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993). These
10 principles apply with particular force in the context of complex environmental regulatory
11 schemes like that encompassed by the ESA. See, e.g., Lands Council v. McNair,
12 629 F.3d 1070, 1074 (9th Cir. 2010).

13 As the government posits, “[f]orcing Defendants to proceed in the instant litigation,
14 when it is already clear that the outcome of the [administrative proceedings] will impact
15 the final resolution of this case, would be prejudicial.” J.M. Martinac Shipbuilding
16 Corp. v. Washington, 2007 WL 445438 at *4 (W.D. Wash 2007). Defendants maintain
17 that without a stay, the parties will be required to litigate, and the Court to adjudicate, the
18 same fundamental issues that are already being reconsidered by the involved agency,
19 here NMFS. Moreover, as the federal defendants also point out, a stay is prudent in
20 order to avoid “potentially inconsistent results” that could occur if the pending litigation
21 and the administrative reinitiation were to proceed simultaneously. See Cal. Dep’t of
22 Water Res. v. Powerex Corp., 653 F. Supp. 2d 1057, 1065 (E.D. Cal. 2009). In addition,
23 the government also represents that forcing the litigation to proceed would divert scarce
24 agency resources from the ongoing ESA consultation. Finally, defendants correctly
25 point out that scientific judgments and technical analyses are ordinarily matters within
26 the agency’s particular expertise, and are accordingly more efficiently and effectively
27 resolved by the agency itself.

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1 See Lands Council v. McNair, 629 F.3d at 1074 (9th Cir. 2010) (reviewing court must be
2 “at its most deferential” with respect to such matters). According to Defendants, that
3 factor also points towards permitting the NMFS to resolve disputed issues with respect to
4 the 2012 BiOp prior to judicial involvement.

5 As already set forth above with respect to the environmental plaintiffs’ preliminary
6 injunction request, there is no evidence that species’ viability will be imperiled in any
7 concrete way during the coming year. Pending completion of the new BiOp, the Corps
8 will continue to maintain the safety and security of the dams, and will also continue to
9 carry out measures beneficial to fish, to the extent it concludes it has the statutory
10 authority to do so. The Court concludes a stay of the SYRCL litigation is appropriate
11 under those circumstances with the caveat that deadlines will be imposed with respect to
12 completion of both the preliminary biological assessment and the subsequent biological
13 opinion as requested by the SYRCL and agreed upon by the government. The Court
14 has equitable discretion to set a reasonable schedule in that regard. See Ctr for
15 Biological Diversity v. Norton, 212 F. Supp. 2d 1217, 1221 (S.D. Cal. 2002) (in remand
16 context).

17 With regard to the YCWA action, the issue is somewhat different since the plaintiff
18 power companies are concerned that absent an immediate decision on the merits of the
19 2012 BiOp, their ability to obtaining hydroelectric relicensing from FERC may be
20 compromised. YCWA and PG&E worry, for example, that in the long run, modification to
21 the Englebright and Daguerre dams will be detrimental to their interest in using hydraulic
22 head created by the dams for hydropower and water diversion. Under the terms of the
23 existing RPA, however, no such modification would occur until 2020 at the earliest. In
24 addition, the 2012 BiOp contains no terms affecting any existing FERC license (see
25 2012 BiOp, Ex. A. to Decl. of Howard Brown, 2:13-cv-00042, ECF No. 44-3, p. 152) and
26 FERC has already concluded that because the 2012 BiOp is “under revision and is
27 under legal review,” it does not constitute “new information relative to the ongoing
28 hydroelectric relicensing process.” Howard Decl., ¶ 13.

1 Nonetheless, fearing that the 2012 BiOp could be an issue in the future, YCWA asks, if
2 the case is stayed, that the Court's Order contain provisions that NMFS will not cite nor
3 rely on the 2012 BiOp in any future filings with FERC, that NMFS will not directly nor
4 indirectly rely on the 2012 as precedent. The Federal Defendants have expressed no
5 opposition to those conditions and they will be incorporated within the Court's order as
6 set forth below.

7 The Court recognizes that the federal defendants' motion in the YCWA case
8 initially requests this Court remand the matter back to NMFS for further consideration,
9 with the YCWA action being dismissed in the meantime. In the SYRCL case, however,
10 only a stay of proceedings is sought. Voluntary remand, like whether to grant a stay, is a
11 matter within the Court's inherent power. See Trujillo v. Gen'l Elec. Co., 621 F.2d 1084,
12 1086 (10th Cir. 1980). As counsel for the government conceded at the time of oral
13 argument, there is no significant difference between those two remedies. In the Court's
14 view, because NFMS has already agreed to reinstate proceedings, which a remand
15 would have accomplished, a simple stay makes sense in order to permit that already-
16 begun reinstatement process to run its course.

17 18 **CONCLUSION**

19
20 For the reasons set forth above, Plaintiff SYRCL's Motion for Preliminary
21 Injunction (ECF No. 29 in Case No. 2:13-cv-00059-MCE-EFB) is DENIED. The federal
22 defendants' Motion For Stay of Proceedings in Case No. 2:13-cv-00059-MCE-EFB is
23 GRANTED. The federal defendants' Motion for Voluntary Remand or Stay of
24 Proceedings (ECF No. 44 in Case No. 2:13-cv-00042-MCE-CKD) is DENIED with
25 respect to remand but GRANTED with regard to the alternatively requested stay.

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1 IT IS FURTHER ORDERED as follows:

2 1. By October 22, 2013, the Corps shall submit to NMFS the final biological
3 assessment required for NMFS, in turn, to complete a new biological assessment for the
4 Project/

5 2. By May 12, 2014, NMFS shall issue its final biological opinion for the
6 Project.

7 3. The stay as to both related cases shall be automatically lifted, without
8 further court order, upon issuance of said final biological opinion.

9 4. During the pendency of reinitiation proceedings, which will conclude with
10 issuance of NMFS' final biological opinion, the Corps is directed to continue its ongoing
11 efforts to ameliorate any adverse effects of the project upon the subject fish. Said
12 measures are to include a) inspection and maintenance of the Daguerre fish ladders;
13 b) placement and monitoring of 5,000 tons of gravel for spawning habitat; c) salmonid
14 redd surveys as specified in the 2012 BiOp; and d) placement and monitoring of large
15 woody material between Englebright and Daguerre, as also called for in the 2012 BiOp.

16 5. During the pendency of the reinitiation process, NMFS will not cite nor rely
17 on the 2012 BiOp or its RPAs, in any further filings with FERC involving relicensing
18 proceedings for a) Plaintiff YCWA's Yuba River Development Project; b) Plaintiff-
19 Intervenor Nevada Irrigation District's Yuba-Bear Hydroelectric Project; or c) Plaintiff-
20 Intervenor Pacific Gas and Electric Company's Drum-Spaulling Project. NMFS is
21 further directed, during the same period, not to directly or indirectly rely on the 2012
22 BiOp or any of its provisions for purposes of establishing the environmental baselienece
23 in any consultations regarding the aforementioned relicensing proceedings.

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1 Given the stays being ordered by this Court as set forth above, the following
2 motions are DENIED as moot, without prejudice to being reinitiated if and when the stays
3 are lifted: a) Plaintiffs' Joint Motion for Partial Summary Judgment in Case No. 2:13-cv-
4 00059-MCE-CKD (ECF No. 64); b) Plaintiffs' Motion for Partial Summary Judgment in
5 Case No 2:13-00042-MCE-EFB (ECF No. 20); and c) Federal Defendants' Motion for
6 Stay of Summary Judgment Proceedings in Case No. 2:13-cv-00042-MCE-CKD (ECF
7 No. 67).

8 IT IS SO ORDERED.

9 Dated: August 12, 2013

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MORRISON C. ENGLAND, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT