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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICARDO HERNANDEZ,)	
)	
Petitioner,)	CASE NO. 2:07-cv-00839-RSL-JLW
)	
v.)	
)	
R.J. SUBIA, Warden,)	ORDER VACATING DEFERRAL OF
)	REPORT AND RECOMMENDATION
Respondent.)	
_____)	

This Court entered an “Order Deferring Preparation of Report and Recommendation” on October 30, 2009. (*See* Docket 17.) As of that date, this case had already been pending for a substantial period of time. This Court presumed a decision in *Hayward v. Marshall*, a case pending for decision before a limited en banc panel in the U.S. Court of Appeals for the Ninth Circuit, would be forthcoming in a reasonable period of time. 512 F.3d 536 (9th Cir. 2008), *reh’g en banc granted*, 527 F.3d 797 (9th Cir. 2008). *Hayward* presents issues sufficiently similar to those in this case that it seems likely the en banc decision in *Hayward* will have significant implications for the resolution of petitioner’s case.

Hayward was argued and submitted on June 24, 2008, and thus it has been over nineteen (19) months since its submission, and almost four (4) months since this Court deferred action in this case. As of the date of this Order, *Hayward* remains undecided, and

01 this Court has no information as to when an opinion might be forthcoming.


02 Fairness to the parties requires that this Court move ahead on the merits of this case.

03 The “Order Deferring Preparation of Report and Recommendation” is therefore VACATED.

04 This Court will file a Report and Recommendation in the very near future.

05 In deciding to vacate the “Order Deferring Preparation of Report and
06 Recommendation,” the Court is mindful of the need to balance competing interests, as defined
07 in *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110-11 (9th Cir. 2005), and *Yong v. INS*, 208
08 F.3d 1116, 1120-21 (9th Cir. 2000), and as applied by Judge Wallace in *Nelson v. Sisto*, 2009
09 WL 2579194 (E.D. Cal. 2009). This Order to proceed is based primarily upon two facts.
10 First, the petition in this case was originally filed on May 2, 2007. (*See* Docket 1.) Petitioner,
11 who remains confined, has waited over thirty-three (33) months for the District Court to
12 address the merits of his petition. Secondly, the filing of a Report and Recommendation by
13 the U.S. Magistrate Judge, while it serves to advance the case toward a ruling, does not
14 constitute a final disposition by the District Court. If *Hayward* is decided while the Report
15 and Recommendation is pending before the U.S. District Judge, he will be able to take that
16 decision into account in ruling upon this case.

17 DATED this 24th day of February, 2010.

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20 JOHN L. WEINBERG
21 United States Magistrate Judge
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