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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

**ORDER**

This environmental litigation concerns implementation of a 2012 biological opinion (“BiOp”) prepared by the National Marine Fisheries Service (“NMFS”). That BiOp addresses the continued operation of two different dams maintained by the Army Corps of Engineers (“Corps”) and located along the upper portions of the Yuba River in

1 Northern California. Plaintiffs South Yuba River Citizens League and Friends of the  
2 River (“Plaintiffs”) allege that by extending certain deadlines contained in the 2012 BiOp  
3 at the request of the Corps, the NMFS has exacerbated the risk to certain threatened  
4 fish and in so doing has violated provisions of the Endangered Species Act, 18 U.S.C.  
5 § 1531, et seq. (“ESA”). Plaintiffs have sued the NMFS, the Corps, and various  
6 governmental officials (collectively referred to as “Federal Defendants” unless otherwise  
7 noted). According to Plaintiffs, their objective was to compel NMFS and the Corps to  
8 implement all the measures called for in the 2012 BiOp. Pls.’ Compl., ¶¶ 41-46.

9 The Federal Defendants moved to stay Plaintiffs’ case on grounds that because  
10 the NMFS had already agreed to prepare a new BiOp that had the potential to obviate  
11 the need for all or part of this litigation, a stay was appropriate pending issuance of that  
12 new BiOp. By Memorandum and Order filed August 13, 2013, this Court agreed with the  
13 Federal Defendants and stayed Plaintiffs’ case. That Order also denied the concurrently  
14 pending Motion for Preliminary Injunction filed by Plaintiffs. Moreover, given the stay  
15 imposed, the Court further denied Plaintiffs’ Motion for Partial Summary Judgment as  
16 moot, while permitting that motion to be reinitiated should the stay be lifted.<sup>1</sup>

17 Through the Motion presently before the Court, Plaintiffs move to dismiss the  
18 case now that the new BiOp was issued by the NMFS on May 12, 2014. Plaintiffs further  
19 move for attorneys’ fees and costs, calculated at \$465,227.95 in fees and \$2,764.83 in  
20 costs as of the filing of the Motion. Moreover, by the time of the filing of their Reply,  
21 Plaintiffs allege that their fees had risen by some \$106,155.00 for time incurred in  
22 drafting the reply and supporting documentation, bringing the total fees claimed for some  
23 \$571,383.07. While not opposing Plaintiffs’ request for dismissal, the Federal  
24 Defendants assert that Plaintiffs are not entitled to recover fees and costs because they

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25 <sup>1</sup> The August 13, 2013 Memorandum and Order also stayed Yuba County Water Agency v.  
26 National Marine Fisheries Service, et al., Case No. 2:13-cv-00042-MCE-EFB (“YCWA”), which was related  
27 to the present matter by Order dated June 27, 2013. That case challenged the effects of water and  
28 hydroelectric interests of the measures designed to restore fish habitat as contemplated by the 2012 BiOp,  
and this Court’s stay order also denied as moot a motion for partial summary judgment filed by the Plaintiff  
in that case. The present motion pertains to the environmental lawsuit only. On September 15, 2014, this  
Court approved a stipulation dismissing the YCWA action, with each side bearing its own fees and costs.

1 cannot be considered a prevailing party. The Court agrees. Consequently, while the  
2 Court GRANTS Plaintiffs' unopposed request that their case be dismissed, Plaintiffs  
3 concurrent requests for fees and costs are DENIED.<sup>2</sup>

4 The ESA allows the court to award costs of litigation to any party when, upon  
5 issuance of a final order, "the court determines such award is appropriate." 16 U.S.C.  
6 § 1504(g)(4). These provisions were "meant to expand the class of parties eligible for  
7 fee awards from prevailing parties to partially prevailing parties—parties achieving some  
8 success, even if not major success." Ruckelshaus v. Sierra Club, 463 U.S. 680, 688  
9 (1993) (emphasis in original). A party achieves the requisite degree of success if he  
10 succeeds "on any significant issue in litigation which achieves some of the benefit  
11 sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Nonetheless,  
12 insofar as the ESA's fee shifting provisions operate as a waiver of sovereign immunity,  
13 they must be "construed strictly in favor of" the government. Ruckelshaus, 463 U.S. at  
14 685. As the Supreme Court has noted, "trivial success on the merits, or purely  
15 procedural victories," fail to qualify for a fee award. Id. at 688 n.9. A party seeking fees  
16 must show that the lawsuit made "a substantial contribution to the goals of [the ESA] to  
17 be entitled to attorneys' fees." Carson-Truckee Water Conservancy v. Sec'y of the  
18 Interior, 748 F.2d 523, 526 (9th Cir. 1984). Alternatively, fees may be awarded under  
19 the ESA if the plaintiff obtains a "judicial imprimatur" of "success on the merits" that  
20 "alter[ed] the legal relationship of the parties." Watson v. County of Riverside, 300 F.3d  
21 1092 1096 (9th Cir. 2002), citing Buckhannon Board and Care Home, Inc. v. West Va.  
22 Dep't of Health, 532 U.S. 598, 600 (2001).

23 Three different BiOps issued by the NMFS between March 27, 2002 and  
24 November 21, 2007 concluded that the Corps' activities in operating and maintaining the  
25 Daguerre and Englebright dams along the upper Yuba River did not jeopardize the  
26 viability of three ESA-listed anadromous fish species, the Central Valley spring-run

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27  
28 <sup>2</sup> Having determined that oral argument was not of material assistance, the Court ordered this  
matter submitted on the briefs in accordance with E.D. Local Rule 230(g).

1 Chinook Salmon, the Central Valley steelhead and the southern green sturgeon. Then,  
2 following separate litigation involving the propriety of the third 2007 BiOp, the Corps  
3 reinitiated consultation with the NMFS which resulted in issuance of a fourth BiOp in  
4 2012. Unlike its predecessors, the 2012 BiOp concluded that the Corps' activities in  
5 maintaining the two dams blocked access to suitable habitat and spawning areas for the  
6 fish species at issue. The BiOp recommended reasonably prudent alternative ("RPA")  
7 proposals that the NMFS believed would help safeguard fish viability and included  
8 measures like near and long-term fish passage, gravel injection to improve spawning  
9 habitat, predator control, channel restoration and species monitoring. On November 27,  
10 2012, after the Corps expressed both scientific and technical concerns about  
11 implementing the measures as proposed, the NMFS extended several of the deadlines  
12 contemplated by the 2012 BiOp. That decision prompted Plaintiffs herein to file the  
13 present action, which seeks to compel implementation of the 2012 BiOp, on January 11,  
14 2013.

15 In the meantime, on February 26, 2013, the Corps formally requested reinitiation  
16 of consultation proceedings under Section 7 of the ESA and agreed to continue  
17 implementing certain actions that would benefit the subject fish species during that  
18 additional consultation. The NMFS agreed to the requested reinitiation and, on April 11,  
19 2013, committed to develop a schedule that envisioned completion of a new BiOp on or  
20 before May 12, 2014, provided that the Corps provided the underlying biological  
21 assessment by October 22, 2013.

22 As stated above, given those reinitiation proceedings, this Court agreed that a  
23 stay made sense in order to avoid litigating the propriety BiOp that was already in the  
24 process of being superseded. The Court rejected Plaintiffs' request that additional  
25 measures be taken, beyond those that the NMFS already agreed to take. It did order,  
26 consistent with the timetable advanced by Federal Defendants, that the Corps submit its  
27 final biological assessment by October 22, 2013, and that a new biological opinion be  
28 issued by May 12, 2014. The Court further ordered that the Federal Defendants

1 continue to engage in the mitigation measures it had already agreed to take to safeguard  
2 fish populations, stating as follows:

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

13 August 13, 2013 Mem. and Order, ECF No. 42, 20:9-15.

14 The NMFS issued its new BiOp on May 12, 2014, in accordance with the Court's  
15 Order, and consistent with the Order the previously imposed stay was lifted at that time.  
16 As indicated above, in the wake of that new BiOp, Plaintiffs now move to both dismiss  
17 their case premised on the 2012 BiOp and to recover the fees and costs they incurred in  
18 litigating that case. Federal Defendants oppose any fee or costs entitlement, arguing  
19 that Plaintiffs' "won no favorable rulings on the merits of any claim; did not prevail on any  
20 disputed factual or legal issue" and "achieved none of the goals of their litigation." Defs.'  
21 Op'n, 5:13-16.

22 The case docket indeed shows that Plaintiffs failed to prevail on any of the  
23 motions filed in this matter: they unsuccessfully opposed the Federal Defendants' stay  
24 request, their motion for a preliminary injunction was denied on the merits, and the  
25 motion for partial summary judgment they offered was denied as moot once the matter  
26 was stayed. Rather than enforce the provisions of the 2012 BiOp as Plaintiffs sought by  
27 way of their lawsuit, their case in fact concluded with the issuance of a new BiOp over  
28 Plaintiffs' vigorous objection. Despite their lack of objective success, Plaintiffs  
nonetheless contend that they achieved the requisite success on the merits by:  
1) obtaining a court order requiring the Corps to implement mitigation measures that it  
had already agreed to take; 2) reducing to a date certain the deadlines the Federal  
Defendants had already agreed to take with regard to preparation of the biological

1 assessment and BiOp; 3) achieving an automatic lift of the stay once the new BiOp  
2 issued; and 4) providing the catalyst for the Corps to conduct a reconnaissance study of  
3 fish passage alternatives on the Yuba River. Pls.' Mot, 1:22-2:7.<sup>3</sup>

4 With respect to Plaintiffs' first claim that it should be entitled to fees and costs  
5 because it reduced certain actions, already proposed by the Federal Defendants, to a  
6 court order, the Court disagrees. The Declaration of Randy Olsen submitted by the  
7 Federal Defendants in support of their Motion to Stay makes it clear that the Corps "will  
8 undertake" certain mitigation measures "to ensure that adverse effects to species and or  
9 designated critical habitat are minimized," including "continu[ing] the existing 5,000 tons  
10 annual gravel placement monitoring program" and continuing to implement and monitor  
11 the placement of "large woody material," both as described in the 2012 BiOp. ECF  
12 No. 23-3, ¶ 39. Given the Corps' unequivocal representation that these mitigation  
13 measures would continue during the consultation period, the fact that the Court reduced  
14 that assurance to order form is insufficient to comprise any appreciable success on  
15 Plaintiffs' part, let alone significantly change the respective position of the parties. While  
16 Plaintiffs argue that a court order permits Plaintiffs to advocate contempt proceedings in  
17 the event of noncompliance, that potentiality is not enough under the particular  
18 circumstances present here to support an award of fees and costs.

19 Plaintiffs' argument that Federal Defendants failed to always distribute, on an  
20 annual basis, gravel and large woody material into the Yuba River between 2008 and  
21 2012 is also not enough to tip the scales in Plaintiffs' favor when the BiOps in effect at  
22 that time did not require such placement on an annual basis. Decl. of Randy P. Olsen,  
23 ECF No. 60-6, ¶¶ 8-11. With regard to Plaintiffs' compliance with the 2012 BiOp, the

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24 <sup>3</sup> Plaintiffs also claim they successfully opposed the Federal Defendants' October 2, 2013 Motion  
25 to Extend the Stay (ECF No. 43). That Motion, however, was made because of an unanticipated  
26 September 30, 2013 lapse in the appropriations act for funding executive agencies (causing a virtual  
27 shutdown of the federal government) and because the Federal Defendants did not know at that time when  
28 funding would be restored by Congress. In fact, however, appropriations were restored on October 17,  
2013, allowing the Corps to provide its biological assessment to the NMFS prior to the October 22, 2013  
deadline. Consequently, the Federal Defendants voluntarily withdrew their extension request on that basis  
prior to the scheduled October 31, 2013 hearing. ECF No. 45, 3:5-13. Under those circumstances, the  
Court rejects Plaintiffs' claim that they were responsible for the deadline being satisfied.

1 evidence shows that the Corps injected 500 tons of gravel in both 2012, 2013 and 2014.  
2 Id. at ¶ 10.

3 With regard to the large woody placement, the 2007 BiOp required only that the  
4 Corps develop and implement a long-term program to replenish such woody  
5 material in the lower Yuba River within four years of the date of the November 2007  
6 BiOp. Id. at ¶ 12. Consistent with that timetable, a Large Woody Material Management  
7 Plan was submitted by the Corps to the NMFS for approval on December 19, 2011. Id.  
8 at ¶ 13. Wood placement was scheduled to begin on an annual basis in 2012. Because  
9 heavy rains in late 2012 made road providing access to the wood supply impassable,  
10 and since the United States Forest closed the roads until Spring 2013, the Corps notified  
11 the NMFS of the corresponding delay. The required woody placement thereafter did not  
12 occur until December 2013, with a second annual placement to occur in late 2014. Id. at  
13 ¶ 15. Under these circumstances, Plaintiffs' claim that the Corps had "a long history of  
14 failing to implement" the requirements for placement of large woody material (and gravel),  
15 and that Federal Defendants would fail to implement those measure absent a court  
16 order, simply does not comport with the facts.

17 The mere fact that an order was forthcoming in the wake of Federal Defendants'  
18 assurances that mitigation measures would continue did not, contrary to Plaintiffs' claim,  
19 contribute substantially to the implementation of the ESA so as to justify an award of  
20 fees and costs.

21 Plaintiffs' second and third claims, that obtaining a date certain for issuance of a  
22 new BiOp and lifting of the court's stay also constituted the requisite success on the  
23 merits, are equally unavailing. The Federal Defendants' own proposed order submitted  
24 in support of its motion to stay or remand the related YCWA case proposed the following  
25 schedule for the ESA consultation: "By October 22, 2013, the Corps shall submit to  
26 NMFS the final biological assessment...Within 201 days of receipt by the Corps of the  
27 biological assessment [i.e., by May 12, 2014] NMFS shall issue a final Biological Opinion  
28 on the Corps' proposed action." YCWA, ECF No. 44-2, 2:1-7. Significantly, after the

1 Federal Defendants moved for a corresponding stay in this case, the Court adopted the  
2 same deadlines already proposed by the Federal Defendants in YCWA. ECF No. 42,  
3 20:2-8. Moreover, the Federal Defendants' own Motion to Stay sought "a stay of all  
4 proceedings in the above-captioned litigation pending completion of the ongoing ESA  
5 Section 7 consultation process between NMFS and the Corps." ECF No.23, 2:9-10.  
6 Therefore this Court's adoption of the consultation schedule and stay advanced by the  
7 Federal Defendants hardly had anything to do with Plaintiffs' own efforts, or their  
8 success thereon, so as to support any entitlement to fees and costs.

9 Plaintiff's fourth and final grounds for arguing they achieved success on the merits  
10 rests with their contention that the threat of ongoing litigation, once the stay was lifted,  
11 provided the necessary "catalyst" for the Corps to finally conduct a reconnaissance  
12 study of fish passage alternatives on the Yuba River in 2014. Under a "catalyst" theory,  
13 however, there must be a causal link between the relief obtained (here the  
14 reconnaissance study) and the lawsuit. Or. Natural Resource Council v. Turner,  
15 863 F. Supp. 1277, 1281 (D. Or. 1994). The requisite causal connection exists where  
16 the litigation was a "material factor" in the resulting actions. Ass'n of Cal. Water  
17 Agencies v. Evans, 386 F.3d 879, 886 (9th Cir. 2004).

18 Although the Corps was required to conduct studies related to fish passage past  
19 the dams in the 2012 BiOp, the delay in commencing the reconnaissance study had  
20 nothing to do with the lawsuit. As the Declaration of Cheree Peterson explains, the  
21 Corps may not initiate any reconnaissance study without first receiving appropriations  
22 from Congress. ECF No. 60-4, ¶ 3. In March of 2010, the Corps began efforts to initiate  
23 a study as it submitted its Fiscal Year 2012 budget proposals. The Corps' February  
24 2011 budget submission sought \$100,000.00 funding to assess fish passage at the  
25 Daguerre and Englebright Dams. Id. at ¶ 6, 7. Nonetheless, the Consolidated  
26 Appropriations Act for 2012, P.L. 112-74, did not contain funding for the so-called Yuba  
27 River Reconnaissance Study. Id. at ¶ 8. The Fiscal Year 2013 Budget renewed the  
28 \$100,000.00 study request, but again no funding was provided. It was not until




1 January 17, 2014, that an appropriation for the study (ultimately in an increased amount  
2 of \$150,000.00) was finally made. As Ms. Peterson, Chief of the Civil Works Integration  
3 Division for the Corps' South Pacific Division, explained, it was the delay in receiving the  
4 required appropriations, which had been sought long before this lawsuit was initiated in  
5 2013, as opposed to anything relating to this lawsuit itself, that ultimately permitted the  
6 study to proceed. See id. at ¶ 6. Accordingly the Court rejects Plaintiffs' contention that  
7 there was any causal connection between their lawsuit and authorization for the study.

8 For all of the above reasons, this Court determines that it would not be  
9 appropriate to award Plaintiffs the costs of litigation they incurred pursuant to 16 U.S.C.  
10 § 1504(g)(4). Consequently, Plaintiffs' Motion for Dismissal and for Attorneys' Fees and  
11 Costs (ECF No. 51) is GRANTED in part and DENIED in part.<sup>4</sup> The Motion is granted  
12 with regard to Plaintiffs' unopposed request for dismissal but denied with respect to fees  
13 and costs. This matter having been concluded in its entirety, the Clerk of Court is  
14 directed to close the file.

15 IT IS SO ORDERED.

16 Dated: January 29, 2015

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20 MORRISON C. ENGLAND, JR., CHIEF JUDGE  
21 UNITED STATES DISTRICT COURT  
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27 <sup>4</sup> The Court notes that the Federal Defendants also have filed a Motion to Strike, or in the  
28 Alternative for Leave to File Sur-Reply, given Plaintiffs' claim, as set forth in their reply papers to the  
instant motion, that they are entitled to an additional \$106,155.00 for fees incurred in drafting the reply.  
Because the Court has concluded that Plaintiffs are not entitled to fees and costs of any kind, that Motion  
(ECF No. 68) is DENIED as moot.