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16 UNITED STATES DISTRICT COURT  
 17 EASTERN DISTRICT OF CALIFORNIA

18 Friends of the River,  
 19  
 20 Plaintiff,  
 21  
 22 v.  
 23 National Marine Fisheries Service, *et al.*,  
 24  
 25 Defendants.

Case No. 2:16-cv-00818-JAM-EFB

STIPULATION AND ORDER TO  
 DISMISS PORTIONS OF PLAINTIFF'S  
 COMPLAINT, YCWA  
 COUNTERCLAIMS

26 This Stipulation is entered into by and between Plaintiff Friends of the River, Defendant-  
 27 Intervenor Yuba County Water Agency ("YCWA"), and Defendants National Marine Fisheries Service  
 28 ("NMFS"), Penny Pritzker as Secretary of Commerce, United States Army Corps of Engineers  
 ("Corps"), Lt. General Todd T. Semonite, Commanding General of the Corps, S.M.R. Jewell as  
 Secretary of the Interior, Bureau of Land Management ("BLM"), and Neil Kornze, Director of the BLM.

WHEREAS, Plaintiff filed a Complaint for Declaratory and Injunctive Relief (Document No. 1)  
 on April 20, 2016;

///

1 WHEREAS, on October 7, 2016, YCWA filed a motion to intervene, (Document No. 16), and,  
2 on October 13, 2016, the Court issued an order granting YCWA’s motion to intervene (Document No.  
3 18);

4 WHEREAS, on October 17, 2016, YCWA filed a Counterclaim against Plaintiff in YCWA’s  
5 Answer alleging that Plaintiff’s Ninth and Tenth Claims and parts of Plaintiff’s Seventh Claim violated  
6 the Restated Stipulation of Settlement Between Plaintiff and Defendant Yuba County Water Agency;  
7 Amended Order Dismissing Plaintiff’s Claims and Relief Against YCWA (“2009 Settlement  
8 Agreement and Order”) entered by this Court on June 15, 2009 in *South Yuba River Citizens*  
9 *League, et al. v. National Marine Fisheries Service, et al.*, Case No. 2:06-CV-02845-LKK-JFM  
10 (E.D. Cal. Document No. 291) because Plaintiff’s Ninth and Tenth Claims and parts of Plaintiff’s  
11 Seventh Claim asserted claims relating to the Brophy Diversion (water diversion infrastructure owned  
12 and operated by YCWA on the Yuba River) that the 2009 Settlement Agreement and Order bars  
13 Plaintiff from asserting;

14 WHEREAS, YCWA contends that the allegations in paragraphs 126, 127, and 128 of Plaintiff’s  
15 Seventh Claim that the Corps has caused take of protected species in violation of Endangered Species  
16 Act (“ESA”) section 9, 16 U.S.C. § 1538(g), by issuing and extending a license to YCWA for the  
17 Brophy Diversion, are barred by the 2009 Settlement Agreement and Order;

18 WHEREAS, Plaintiff does not admit that the 2009 Settlement Agreement and Order bars it from  
19 bringing its Ninth and Tenth Claims and the aforementioned allegations in its Seventh Claim;

20 WHEREAS, the Parties, through their authorized representatives and without either adjudication  
21 of Plaintiff’s Ninth and Tenth Claims and the allegations in Plaintiff’s Seventh Claim concerning the  
22 Corps perpetuating take of protected species by issuing and extending a license to YCWA or admission  
23 by the Defendants of any alleged violation or other wrongdoing in connection with these claims, have  
24 chosen to resolve this action through settlement and to avoid the costs and uncertainties of litigation of  
25 these claims;

26 WHEREAS, YCWA and the Plaintiff, through their authorized representatives and without  
27 either adjudication of YCWA’s Counterclaim against Plaintiff or admission by Plaintiff of any alleged  
28

1 violation or other wrongdoing alleged in this Counterclaim, have chosen to resolve this Counterclaim  
2 through settlement and to avoid the costs and uncertainties of litigation of this claim;

3 WHEREAS, the Plaintiff shall be granted leave to file and shall file an Amended Complaint  
4 which shall omit any claims or allegations that YCWA contends are barred by the 2009 Settlement  
5 Agreement;

6 **NOW THEREFORE IT IS HEREBY STIPULATED BETWEEN THE PARTIES AND**  
7 **ADJUDGED, ORDERED AND DECREED BY THE COURT AS FOLLOWS:**

8 1. Plaintiff's Ninth and Tenth Claims are dismissed with prejudice and S.M.R. Jewell, the BLM  
9 and Neil Kornze, Director of BLM, are dismissed as parties, effective on the date that the Court issues  
10 an order approving this stipulation.

11 2. The portion of Plaintiff's Seventh Claim alleging, in paragraphs 126, 127, and 128, that the  
12 Corps has caused take of protected species in violation of ESA section 9, 16 U.S.C. § 1538(g), by  
13 issuing and extending a license to YCWA for the Brophy Diversion is dismissed with prejudice,  
14 effective on the date that the Court issues an order approving this stipulation.

15 3. YCWA's Counterclaim asserted in its Answer against Plaintiff is dismissed without  
16 prejudice, effective on the date that the Court issues an order approving this stipulation. However,  
17 YCWA shall not refile claims against Plaintiff for breach of the 2009 Settlement Agreement and Order  
18 so long as Plaintiff only pursues the claims and remedies remaining in the Amended Complaint.

19 4. Plaintiff shall be granted leave to file and shall file Plaintiff's Amended Complaint attached  
20 hereto as Exhibit A within five days of the Court issuing an order approving this stipulation; Plaintiff  
21 and YCWA agree that the Amended Complaint does not assert any claims or allegations that are, or pray  
22 for any relief that is, barred by the 2009 Settlement Agreement.

23 5. All Defendants shall have 30 days from the date that Plaintiff files its Amended Complaint to  
24 file Answers to the Amended Complaint.

1 6. Plaintiff shall not in this case seek any order from the Court that would directly or indirectly  
2 require YCWA to reduce diversions of water from the Brophy Diversion, restrict YCWA from operating  
3 the Brophy Diversion, or require YCWA to modify the Brophy Diversion.

4 7. Plaintiff may pursue the following allegations in its Amended Complaint:<sup>1</sup>

5 (a) the allegations in its First Claim that the Corps' October 2013 Biological Assessment for the  
6 U.S. Army Corps of Engineers' Ongoing Operation and Maintenance of Englebright Dam and Reservoir  
7 on the Yuba River ("Englebright BA") is arbitrary, capricious, an abuse of discretion and not in  
8 accordance with the ESA because it excludes the Corps' issuance and ongoing administration of a  
9 license to YCWA for the operation of the Brophy Diversion from the Corps' actions on the Yuba River  
10 ("Corps Yuba Action") that presently require ESA consultation;

11 (b) the allegations in its Second Claim that NMFS's concurrence ("Englebright Concurrence"), in  
12 a letter to Colonel Michael J. Farrell, Commander, U.S. Army Corps of Engineers, Sacramento District,  
13 on May 12, 2014 (File Number WCR-2013-3), with the Englebright BA's narrow definition of the Corps  
14 Yuba Action is arbitrary, capricious, an abuse of discretion and not in accordance with the ESA to the  
15 extent that NMFS determined that the Corps' issuance and ongoing administration of the Corps' license  
16 for the Brophy Diversion is a future action for which no ESA consultation is presently required;

17 (c) the allegations in its Third Claim that the May 12, 2014 Biological Opinion for the Corps'  
18 Operation and Maintenance of Daguerre Point Dam and Fish Ladders ("Daguerre BiOp") is arbitrary,  
19 capricious, an abuse of discretion, and not in accordance with the ESA because it does not analyze the  
20 entire Corps Yuba Action, which should lawfully include the Corps' issuance and ongoing  
21 administration of the license to YCWA for operation of the Brophy Diversion;

22 (d) the allegations in its Fourth Claim that NMFS's rescission of the February 29, 2012  
23 Biological Opinion for the U.S. Army Corps of Engineers Operation and Maintenance of Englebright  
24 and Daguerre Point Dams and Englebright Reservoir on the Yuba River (File number  
25 151422SWR2006SA00071) ("2012 BiOp") and its replacement with the legally inadequate Daguerre  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Federal Defendants do not join in ¶7 of this Stipulation.

1 BiOp is arbitrary, capricious, an abuse of discretion and not in accordance with the ESA because the  
2 Daguerre BiOp did not analyze the Corps' issuance and ongoing administration of the license for the  
3 Brophy Diversion as part of the Corps Yuba Action; and

4 (e) the allegations in its Fifth Claim that the Corps has failed to comply with its ESA section  
5 7(a)(2) procedural duties by failing to include the Corps' issuance and ongoing administration of the  
6 license for the Brophy Diversion in its Englebright BA and by failing to include this licensing as part of  
7 the Corps Yuba Action upon which the Corps and NMFS consulted.

8 As the sole relief for the allegations in the First, Second, Third, Fourth and Fifth Claims  
9 discussed in subparagraphs (a)-(e) above, Plaintiff shall seek an order ruling that the Daguerre BiOp, the  
10 Englebright Concurrence, and the Englebright BA are arbitrary and capricious, and that the Corps  
11 violated its ESA section 7(a)(2) procedural duties, vacating the Englebright Concurrence and Daguerre  
12 BiOp, and requiring the reinitiation of consultation between NMFS and the Corps over the Corps'  
13 issuance, ongoing administration, or extension of a license to YCWA for the Brophy Diversion.

14 Defendants do not waive and may assert any defenses to Plaintiff's claims or requested remedies  
15 in this paragraph.

16 8. This stipulation shall not limit the rights of each Defendant and YCWA to deny any of the  
17 allegations described in the preceding paragraphs, to assert any defenses, or to oppose the request for  
18 relief described in the preceding paragraph.

19 9. Plaintiff and YCWA shall bear their own costs in conjunction with Plaintiff's Ninth and Tenth  
20 Claims, the dismissed portions of Plaintiff's Seventh Claim, and YCWA's counterclaim against  
21 Plaintiff. Plaintiff agrees not to file a memorandum of costs with the Court against YCWA, or otherwise  
22 claim or seek to recover costs or attorneys' fees against YCWA, in connection with this Action.

23 Plaintiff further agrees that this Stipulation shall not provide grounds to claim or seek any form of  
24 compensation from Federal Defendants for attorneys' fees, expert fees, or costs of litigation incurred  
25 from Plaintiff's litigation against YCWA in this matter (including for time expended preparing this  
26 stipulation or the Amended Complaint contemplated in Paragraphs 2 and 3 of this stipulation) where  
27 such compensation is otherwise prohibited by law.

28 Dated: November 23, 2016

Respectfully submitted,

1  
2 /s/ Christopher a Sproul  
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Attorneys for Defendant-Intervenor

21 **ORDER**

22 Pursuant to stipulation, **IT IS SO ORDERED.**

24 Dated: 11/28/16

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/s/ John A. Mendez  
Hon. John A. Mendez  
United States District Court Judge