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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRIENDS OF THE RIVER, a non-
profit corporation,

Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants.

No. 2:16-cv-00818-JAM-JDP

**ORDER GRANTING PLAINTIFF'S
MOTION FOR REMAND AND STAY,
DENYING PLAINTIFF'S MOTION FOR
REMAND SCHEDULE**

This matter is before the Court on Friends of the River's ("Plaintiff") motion for an order of remand, remand schedule, and stay of Section 9 claim. Mot. to Remand and Stay, ECF No. 85. The National Marine Fisheries Service ("NMFS") and the United States Army Corps of Engineers ("CORPS") (collectively, "Federal Defendants") partially opposed this motion. Defs.' Resp., ECF No. 86. Intervenor Defendants, Yuba County Water Agency, also partially opposed this motion. Intervenor Def.'s Opp'n., ECF No. 87.

For the reasons set forth below, the Court GRANTS Plaintiff's motion for an order of remand, DENIES Plaintiff's motion for a remand schedule and GRANTS Plaintiff's motion for

1 stay of their Section 9 claim during the remand.¹

2 I. BACKGROUND

3 The Corps operates and maintains two dams on the Yuba River,
4 Daguerre Point, and Englebright. First Amended Compl. ("FAC"),
5 ECF No. 25 ¶ 46. On May 12, 2014, the NMFS issued a biological
6 opinion ("BiOp") for Daguerre finding that the Corp's activities
7 were not likely to jeopardize the survival or recovery of three
8 fish species listed as threatened under the Endangered Species
9 Act ("ESA"). FAC ¶ 94. NMFS also issued a letter of concurrence
10 ("LOC") agreeing with the Corp's assessment that its activities
11 at Englebright were not likely to adversely affect the listed
12 species. FAC ¶ 95. Plaintiff brought nine claims against
13 Federal Defendants challenging these decisions under both the
14 Administrative Procedure Act ("APA") and the ESA. See generally
15 FAC. In an order issued February 22, 2018, this Court denied
16 Plaintiff's motion for summary judgment and granted summary
17 judgment to the Defendants. Order, ECF No. 62.

18 The 9th Circuit reversed and remanded in part this Court's
19 grant of summary judgment, finding that the NMFS' 2014 BiOp and
20 LOC were arbitrary and capricious. Friends of the River v. NMFS,
21 786 Fed. App'x 666, 669 (9th Cir. 2019). Additionally, the 9th
22 Circuit found that Plaintiff's Section 9 "take" claim was not
23 adequately considered and directed this Court to consider the
24 legal merits of the claim. Id. at 670-71. Considering the 9th
25 Circuit's ruling, Plaintiff now moves this Court to order a

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27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for September 15, 2020.

1 remand to the NMFS so it can reassess its 2014 BiOp and LOC, as
2 well as a stay of the Section 9 claim during the remand. Mot. 2-
3 3. Both Federal and Intervenor Defendants agree that the Section
4 9 claim should be stayed. Resp. 1; Opp'n 3.

5 II. OPINION

6 A. NMFS Options on Remand

7 1. Legal Standard

8 If the grounds for agency action are inadequate and a court
9 remands that action as a result, the agency on remand may either
10 "offer a fuller explanation of the agency's reasoning at the
11 time of the agency action" or "[a]lternatively, the agency can
12 deal with the problem afresh by taking new agency action." Dep't
13 of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct.
14 1891, 1907-08 (2020) (internal quotation marks and citation
15 omitted).

16 2. Analysis

17 Plaintiff and Federal Defendants agree that on remand the
18 NMFS may choose to either offer a more in-depth explanation of
19 its original findings, or it can deal with the problem afresh by
20 taking new agency action. Resp. 4; Pls.' Reply 1-2, ECF No. 89.
21 However, Intervenor Defendants disagree, arguing that the
22 language of the 9th Circuit's Order limits the NMFS on remand to
23 only providing a "fuller explanation, based on the existing
24 record of proceedings." Opp'n 13.

25 The Court agrees with Plaintiff and Federal Defendants that
26 the NMFS may comply with the 9th Circuit's Order by taking a new
27 agency action, in this case issuing a new BiOp, if it so
28 chooses. Resp. 4; Reply 1-2. Intervenor Defendants are correct

1 that, in its Order, the 9th Circuit directed a remand of the
2 2014 opinions to the NMFS "for further explanation." Friends of
3 the River, 786 Fed. App'x at 668. However, the Order also
4 directed this Court to remand to the NMFS so that it may
5 "reassess" its 2014 opinions, indicating that the NMFS may also
6 choose to change its approach by adopting a new BiOp. Id. at
7 670. This is consistent with the 9th Circuit's citation to
8 Florida Power & Light Corporation for the proposition that "if
9 the reviewing court simply cannot evaluate the challenged agency
10 action on the basis of the record before it, the proper course,
11 except in rare circumstances, is to remand to the agency for
12 additional investigation or explanation." Id. (quoting Fla.
13 Power & Light co. v. Lorion, 470 U.S. 729, 744 (1985)) (emphasis
14 added). Further, the Supreme Court's recent decision in
15 Department of Homeland Security, makes clear that on remand an
16 agency may either provide a better explanation of its action or
17 engage in a new agency action. Dep't of Homeland Sec., 140 S.
18 Ct. at 1908.

19 Additionally, Intervenor Defendant's suggest that the ESA
20 itself prevents NMFS from engaging in a new agency action.
21 Opp'n 12-14. First, they argue that under the ESA the decision
22 to reinitiate consultation rests with the action agency, in this
23 case the Corps. Opp'n 12. The Court disagrees. While the NMFS
24 may lack authority to order the Corps to comply with its request
25 for consultation, see Sierra Club v. Marsh, 816 F.2d 1376, 1386
26 (9th Cir. 1987), it does have the authority to reinitiate
27 consultation when circumstances warrant, see Salmon Spawning &
28 Recovery All. v. Gutierrez, 545 F.3d 1220, 1229 (9th Cir. 2008).

1 Thus, on remand the NMFS may choose to reinitiate consultation,
2 in collaboration with the Corps and issue a new BiOp. Second,
3 Intervenor Defendants argue that the NMFS may not redefine the
4 scope of the proposed agency action. Opp'n 14. However, as
5 Plaintiff points out, this was an issue on appeal that the 9th
6 Circuit did not reach because of the inadequacies of the BiOp
7 and LOC. Reply 7. As such, this issue need not be addressed by
8 the Court at this time but may be relitigated by the parties
9 after NMFS completes its work on remand.

10 B. Conditions on Remand

11 1. Legal Standard

12 Although "courts may not 'usurp[]an administrative
13 function' they retain equitable powers to shape an appropriate
14 remedy", including the parameters of a remand order. Friends of
15 Wild Swan v. U.S. Envntl. Prot. Agency, 74 F. App'x 718, 721-22
16 (9th Cir. 2003) (quoting FPC v. Idaho Power Co., 344 U.S. 17, 20
17 (1952)).

18 2. Analysis

19 Plaintiff and Intervenor Defendants both argue that the
20 Court should impose a schedule for the NMFS on remand. Mot. 4-
21 5; Opp'n 4. Additionally, Plaintiff urges this Court to require
22 the NMFS to file quarterly reports documenting its progress.
23 Mot. 7. While the Court is sympathetic to the parties' desire
24 for a prompt resolution given the various interests and
25 threatened species at stake, the Court declines to impose a
26 schedule in this case. Because the NMFS has the discretion to
27 decide how it will comply with the remand order, it is difficult
28 to determine how long it will take. Resp. 5. Additionally, the

1 usual complexities of issuing a thorough BiOp, coupled with the
2 new uncertainties of operating during the COVID-19 pandemic,
3 warrant giving NMFS flexibility in complying with the remand.
4 Grothe Decl. 4-5. As the agency entrusted with ensuring
5 compliance with the ESA, the Court is confident that the NMFS
6 will comply with the remand order "as expeditiously as possible
7 in coordination with the Corps" under the circumstances. Resp.
8 5. The Court will however continue to monitor NMFS' compliance
9 with this Order by requiring the parties to file periodic joint
10 status reports that include specific details regarding the work
11 completed and actions taken by NMFS as well as best estimates as
12 to when its work will be completed. The first joint status order
13 shall be filed ninety days from the date of this Order, i.e.
14 January 29, 2021 and every ninety days thereafter until the
15 matter is ready for further review by this Court.

16 III. ORDER

17 For the reasons set forth above, the Court GRANTS
18 Plaintiff's Motion to remand and DENIES Plaintiff's Motion for a
19 remand schedule. Plaintiff's Motion to stay consideration of the
20 Section 9 claim during the remand period is GRANTED.

21 IT IS SO ORDERED².

22 Dated: October 30, 2020

23 
24 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

25 _____
26 ² The court agrees with Defendants that entry of judgement is
27 premature at this stage. See Nat. Res. Def. Council v. Evans,
28 243 F. Supp.2d 1046, 1047 (N.D. Cal. 2003) ("An order remanding a
matter to an administrative agency is a non-final interlocutory
order.").