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12 SOUTH YUBA RIVER CITIZENS LEAGUE

13 IN THE UNITED STATES DISTRICT COURT  
14 FOR THE EASTERN DISTRICT OF CALIFORNIA

15 SOUTH YUBA RIVER CITIZENS LEAGUE

Civil No.: 2:13-cv-00059-MCE-EFB<sup>1</sup>

17 Plaintiff,

18 v.

**19 SECOND AMENDED NOTICE OF  
20 RELATED CASES**

19 NATIONAL MARINE FISHERIES SERVICE,  
20 UNITED STATES DEPARTMENT OF  
21 COMMERCE; REBECCA M. BLANK, in her  
22 official capacity as Acting Secretary of Commerce;  
23 RODNEY R. MCINNIS, in his official capacity as  
24 Regional Administrator, Southwest Region,  
25 National Marine Fisheries Service

26 Defendants.

25 Pursuant to Local Rule 123, South Yuba River Citizens League ("SYRCL") and Friends of the  
26 River file this Second Amended Notice of Related Cases. SYRCL and Friends of the River file this  
27 Second Amended Notice of Related Cases to apprise the Court of their filing of a First Amended

1 Complaint in this case that adds parties and claims to this case and thus affects whether this case is  
2 related to previously filed cases in this Court.

3 This case, hereinafter referred to as "*SYRCL II*," is related as defined by Local Rule 123 to the  
4 following case filed in this Court: *South Yuba River Citizens League, et. al v. National Marine*  
5 *Fisheries Service, et al.*, Case No. 2:06-cv-02845-LKK-JFM ("*SYRCL I*"). The instant case is also  
6 related to an action filed in this Court on January 9, 2013: *Yuba County Water Agency v. NMFS*, Case  
7 No. 2:13-cv-00042-MCE-CKD ("*YCWA*"). Per Local Rule 123, *SYRCL I*, *SYRCL II* and *YCWA* are all  
8 related because they meet the four criteria in subsection (a) of Local Rule 123: they effectively involve  
9 the same parties and are based on similar claims; they involve mostly the same property; they involve  
10 similar questions of fact and some of the same questions of law; and, most importantly, their  
11 assignment to the same Judge is likely to effect a substantial savings of judicial labor. Accordingly,  
12 *SYRCL II* and *YCWA* should be assigned to the Judge who heard *SYRCL I*. *SYRCL II* and *YCWA* should  
13 then be consolidated as the most efficient way to adjudicate these two similar pending cases.

14 Yuba County Water Agency's Response to SYRCL's Notice of Related Case (Case No. 2:06-  
15 cv-02845, Dkt. 502) (Jan. 15, 2013) ("*YCWA's Response*") contends that *SYRCL II* and *YCWA* are  
16 related, but neither case is related to *SYRCL I* and that while judicial economy would be served by  
17 assigning *SYRCL II* and *YCWA* to the same Judge, there would be no judicial economy in assigning  
18 these two cases to the Judge who decided *SYRCL I*. The Judge in *SYRCL I* presided over six years of  
19 intensive litigation concerning what duties the Endangered Species Act ("*ESA*") imposes on the Army  
20 Corps of Engineers ("*the Corps*") and the National Marine Fisheries Service ("*NMFS*") with respect to  
21 these agencies' treatment of three threatened species of anadromous fish in the Yuba River: spring  
22 Chinook salmon, steelhead, and green sturgeon. It is simply incredible for *YCWA* to assert that the  
23 *SYRCL I* Judge could not resolve with less judicial labor the similar factual and legal issues concerning  
24 these species' survival in the Yuba that are also raised in *SYRCL II* and *YCWA*.

25 **Brief Statement of Relationship of Cases**

26 Both *SYRCL I* and *SYRCL II* are citizen suits brought by SYRCL and Friends of the River  
27 seeking to preserve the existence and promote recovery of ESA-listed threatened species of  
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1 anadromous fish in the Yuba River. Both suits address what constitutes a valid biological opinion that  
2 meets the requirements of ESA section 7 for a particular federal project on the Yuba River--the Army  
3 Corps of Engineers' ("Corps") operation and maintenance of Daguerre Point and Englebright Dams  
4 ("Daguerre" and "Englebright"), and the Corps' licensing of water diversions on the lower Yuba River,  
5 (collectively the "Project"). *YCWA* also seeks to address what constitutes a valid biological opinion for  
6 the Project. *SYRCL I*, *SYRCL II* and *YCWA* further pose the factual and legal question of what  
7 measures a biological opinion should require the Corps to implement to mitigate the impacts of the  
8 Project on spring Chinook salmon, steelhead, and green sturgeon. Finally, *SYRCL I*, *SYRCL II* and  
9 *YCWA* address what measures the Corps should implement to comply with the ESA on the Yuba  
10 River. *SYRCL I*, *SYRCL II* and *YCWA* are thus related within the meaning of Local Rule 123.

### 11 ***I. Overlap of Parties***

12 There is significant overlap among the parties to *SYRCL I*, *SYRCL II* and *YCWA*. Following  
13 *SYRCL*'s and Friends of the River's filing of their First Amended Complaint, *SYRCL II* now has even  
14 more of the same parties as the other two cases. *SYRCL II* has all the same plaintiffs (*SYRCL* and  
15 Friends of the River) and all the parties named as defendants at the time of judgment (NMFS and the  
16 Corps) as *SYRCL I*.<sup>1</sup> *YCWA* has two of the same defendants (NMFS and the Army Corps of Engineers)  
17 as *SYRCL I* and the plaintiff in *YCWA* (*YCWA*) was a defendant-intervenor in *SYRCL I*.

18 *YCWA*'s Response apparently argue that because the parties to *SYRCL I*, *SYRCL II* and *YCWA*  
19 are not identical, the cases should not be seen as related. *YCWA* Response at 2-3. This argument is  
20 without merit. One, *YCWA*'s Response itself argues that *SYRCL II* and *YCWA* should be seen as  
21 related--even though the parties in these two cases are not identical. Two, *SYRCL I*, *SYRCL II* and  
22 *YCWA* functionally should be seen as having the same parties. While *SYRCL* and Friends of the River  
23 are not presently parties to *YCWA* and *YCWA* is not a party to *SYRCL II*, this situation will  
24 undoubtedly not persist. *SYRCL II* and *YCWA* both ask the Court to decide whether NMFS's February  
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26 <sup>1</sup> *YCWA* was an original defendant in *SYRCL I*, but *YCWA* was dismissed as a defendant before the  
27 final judgment. *YCWA* remained as an intervenor defendant, along with other water agencies.

1 2012 Biological Opinion ("the BiOp") issued for the Project pursuant to ESA section 7 comports with  
2 the law. To avoid risk of inconsistent rulings on this question, *SYRCL II* and *YCWA* should be  
3 consolidated--which would make all these entities party to a common case. If the cases are not  
4 consolidated, undoubtedly *YCWA*, *SYRCL* and Friends of the River will all seek to intervene in each  
5 other's cases to protect their interests in the common questions that will be adjudicated in the two  
6 cases.

7 ***II. Overlap In Property Location***

8 The same property and geographic location is germane to *SYRCL I*, *SYRCL II* and *YCWA*. All  
9 three cases concern the Yuba River and, in particular, these appurtenances located on the river:  
10 Daguerre, Englebright and a water diversion known as the Brophy Diversion.

11 *YCWA*'s Response seeks to argue that *YCWA* is not related to *SYRCL I* because *YCWA*  
12 challenges the BiOp, issued in 2012, which expands the analyzed action area to include the Yuba  
13 watershed above Englebright whereas the biological opinion challenged in *SYRCL I* did not address  
14 this geographic area. *YCWA*'s Response further argues that because the BiOp concludes that the  
15 operations of the Yuba River Development Project (the "YRDP") and Yuba-Bear/Drum-Spaulding  
16 Projects ("YBDSP") are interrelated and interdependent with the Corps' Yuba River project whereas  
17 the 2007 biological opinion did not have such a conclusion *SYRCL I* and *YCWA* are not related.  
18 *YCWA* here sidesteps that *functionally* the geographic area at stake in *SYRCL I* is essentially the same  
19 as in *YCWA*: the Yuba River and its existing and potential habitat for three ESA-protected species.  
20 That the BiOp has a somewhat expanded analysis from the 2007 biological opinion does not negate  
21 that the Judge who heard *SYRCL I* has acquired substantial familiarity and expertise with the issues  
22 that will be litigated in *YCWA*, which will definitely include Daguerre, Englebright, and the Brophy  
23 Diversion, and can thus hear the case more efficiently than another Judge of this Court.

24 ***III. Overlap In Claims, Fact And Law Issues And Judicial Economy Warrants Assigning All***  
25 ***Cases To The SYRCL I Judge.***

26 The substantial overlap in the claims (arising under the ESA or Administrative Procedure Act  
27 "APA") and fact and law issues warrants assigning *SYRCL II* and *YCWA* to the Judge that decided  
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1 *SYRCL I*. *SYRCL I* concerned a series of biological opinions NMFS had issued pursuant to ESA  
2 section 7 authorizing the Corps' operation and maintenance of the Project to perpetuate incidental take  
3 of the protected fish species on the Yuba River provided the Corps complied with certain conditions.  
4 In *SYRCL I*, SYRCL and Friends of the River brought a claim under the APA against NMFS claiming  
5 the last of these biological opinions, issued November 21, 2007, was arbitrary and capricious for its  
6 failure to analyze all impacts of the Project and the interaction between the environmental baseline and  
7 the Project's impacts, and for its failure to reach conclusions concerning the impacts to the protected  
8 species that were supported by the relevant administrative record. SYRCL sought and was awarded  
9 summary judgment in *SYRCL I* establishing that the November 2007 biological opinion was arbitrary  
10 and capricious. In its motion for summary judgment, SYRCL presented to the Court substantial  
11 excerpts from a 40,000 page administrative record. The Court issued a lengthy decision that was  
12 published in the Federal Supplement. *South Yuba River Citizens League v. NMFS*, 723 F. Supp. 2d  
13 1247 (E. D. Cal. 2010). This decision analyzed numerous and highly detailed technical issues relevant  
14 to whether the biological opinion was arbitrary and capricious and represented extensive judicial  
15 investment in mastering detailed technical issues relevant to the environmental fate of three threatened  
16 species. The Court in *SYRCL I* subsequently issued an injunction requiring NMFS to issue a new  
17 biological opinion by February 29, 2012. This court-ordered new biological opinion is the focus of  
18 both *SYRCL II* and *YCWA*.

19 In *SYRCL I*, SYRCL and Friends of the River also brought a claim against the Corps for  
20 perpetuating unlawful take in violation of ESA section 9 due to the Corps' failure to comply with the  
21 2007 biological opinion. SYRCL and Friends of the River's ESA section 9 claim survived a motion to  
22 dismiss and a motion for summary judgment, but was ultimately dismissed for prudential mootness  
23 when the Court awarded SYRCL and Friends of the River part of the remedy they sought under their  
24 ESA section 9 claim, an injunction requiring the Corps to implement various remedial measures to  
25 protect the threatened fish, on other grounds.

26 In *SYRCL II*, SYRCL and Friends of the River contend that by extending the deadlines to  
27 implement various remedial measures required by the BiOp without considering the impact of these  
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1 deadline extensions on the protected species, NMFS has once again acted in an arbitrary and capricious  
2 manner with respect to its obligations under ESA section 7. For SYRCL to prevail on its claim, the  
3 Court will necessarily have to find that the BiOp's original deadlines were validly imposed. In YCWA,  
4 YCWA argues that the BiOp is arbitrary and capricious by going too far in its protections of the  
5 species and should be vacated. Resolving these competing contentions will require a Judge of this  
6 Court to review the same technical issues and much of the same extensive body of scientific literature  
7 that constituted the 40,000 page administrative record pertinent in *SYRCL I*. Additionally, the same  
8 Judge should hear both *SYRCL II* and *YCWA* to avoid the danger of inconsistent rulings concerning  
9 whether the BiOp as originally issued was valid.

10 In *SYRCL II*, SYRCL and Friends of the River again assert a claim that the Corps is violating  
11 ESA section 9 by failing to comply with the BiOp. SYRCL and Friends of the River again seek an  
12 injunction requiring the Corps to implement remedial measures to assist the threatened fish.

13 The Judge who hears *SYRCL II* and *YCWA* will be called upon to resolve some of the same  
14 questions of law raised by YCWA and/or the Federal Defendants in *SYRCL I* including but not limited  
15 to:

- 16 1. What is the "action area" of the Project as defined by 50 C.F.R. § 402.02?
- 17 2. Are the effects of the ongoing existences of Daguerre and Englebright effects of the  
18 Project that must be mitigated by remedial measures mandated by the biological opinion or  
19 are these effects merely part of the environmental baseline that need not be mitigated?
- 20 3. What are the limits of the Corps's authority to implement remedial measures to mitigate  
21 harm to ESA-protected fish species in the Yuba?

22 These legal issues were raised in one or more of the following briefs in *SYRCL I*: the Federal  
23 Defendants' Memorandum In Opposition To Plaintiffs' Motion For Partial Summary Judgment and In  
24 Support Of Federal Defendants' Cross Motion For Summary Judgment (Dkt. 295-2); the Federal  
25 Defendants' Brief In Opposition To The Plaintiffs' Final Remedy Motion (Dkt. 372); and YCWA's  
26 Response To Plaintiffs' Final Remedy Brief (Dkt. 370).

27 Given the extensive record, involving thousands of pages of scientific studies about the  
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1 protected species at issue and the conditions on the Yuba River, it would effect a substantial savings of  
2 judicial effort if the Court which presided over *SYRCL I* during its six years of litigation were to handle  
3 both *SYRCL II* and *YCWA*.

4 With this extensive overlap in claims and issues of fact and law, it is baseless for *YCWA* to  
5 argue that *SYRCL I*, *SYRCL II* and *YCWA* are not sufficiently related such that judicial economy would  
6 not be served by assigning *SYRCL II* and *YCWA* to the Judge of this Court most familiar with these  
7 claims and issues. For example, it is simply outlandish for *YCWA* to assert that the Judge who held  
8 that the 2007 biological opinion failed to consider several issues and failed to reach reasoned  
9 conclusions supported by the evidence and who ordered NMFS to adopt a new biological opinion has  
10 not acquired extensive understanding of the pertinent factual issues that would allow him to more  
11 efficiently adjudicate the validity of the current biological opinion. *YCWA's* Response argues that  
12 because the BiOp was issued in 2012 whereas the biological opinion at issue in *SYRCL I* was issued in  
13 2007, the administrative record for the BiOp will not include documents that created the record for the  
14 2007 biological opinion. Incredibly, *YCWA* further argues that because of the gap in time between  
15 issuance of the administrative records, "it is unlikely that the questions of fact that will be involved in  
16 the *YCWA* and *SYRCL II* cases will be similar to the questions of fact that were involved in the *SYRCL*  
17 *I* case." *YCWA* Response at 5. It is as if *YCWA* would have the Court ignore that *YCWA* and *SYRCL*  
18 *II*, just like *SYRCL I*, concern whether the Project impacts the Yuba River's threatened fish species,  
19 whether NMFS has required the Corps to implement reasonable and prudent measures/alternatives to  
20 address those impacts, and whether the Corps is implementing the measures to protect the fish species  
21 that the ESA requires. Rather than being unlikely, it is a certainty that *SYRCL II* and *YCWA* will  
22 present very similar questions of fact to those in *SYRCL I*. It is also a certainty that many of the key  
23 scientific documents that formed the relevant record in *SYRCL I* will be part of the relevant record  
24 before the Court in *SYRCL II* and *YCWA*. As *YCWA* should be well aware, the BiOp's 30 page list of  
25 supporting references includes numerous documents written prior to 2007 and many key documents  
26 that were part of the record before the Court in *SYRCL I*. See Plaintiffs' Status Report and Notice  
27 Concerning New Biological Opinion (Biological Opinion, Attachment 1 at 269-299) (Case No.: 2:06-  
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1 cv-02845 LKK-JFM) (Dkt. 467) (March 12, 2012). For example, the BiOp repeatedly relies upon the  
2 following study to support its conclusions: *Lindley, S. T., R. S. Schick, E. Mora, P. B. Adams, J. J.*  
3 *Anderson, S. Greene, C. Hanson, B. May, D. McEwan, R. B. MacFarlane, C. Swanson, and J. G. Williams.*  
4 *2007. Framework for assessing viability of threatened and endangered Chinook salmon and steelhead in*  
5 *the Sacramento-San Joaquin Basin. San Francisco Estuary and Watershed Science 5: Article 4.* SYRCL  
6 and Friends of the River made this study an exhibit in *SYRCL I*, argued that it should be deemed part of the  
7 administrative record for the 2007 biological opinion, and further explained to the Court in detail why this  
8 study's analysis supported plaintiffs' prevailing on their claims. *E.g.*, Memorandum Of Points And  
9 Authorities In Support Of Plaintiffs' Motion For Partial Summary Judgment On Claims 3 and 4 at 6 (Dkt.  
10 279-2) (June 8, 2009).

11 **Conclusion**

12 For the reasons stated herein, *SYRCL I*, *SYRCL II*, and *YCWA* are related cases and notice of  
13 such is hereby given. *SYRCL II* and *YCWA* should be consolidated and heard by the same Judge who  
14 heard *SYRCL I*. Consolidation is the most efficient use of judicial resources because the decisions in  
15 both cases turn on whether the BiOp, as originally issued, is valid.

16  
17 Respectfully Submitted,

18 Dated: January 28, 2013

19  
20 By: 

21 \_\_\_\_\_  
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23 Environmental Advocates  
24 Attorney for SYRCL and Friends of the River  
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