Case Nos. 14-17493, 14-17506, 14-17515 and 14-17539

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,
Plaintiffs-Appellees/Cross-Appellants,

v.

SALLY JEWELL, *et al.*,
Defendants-Appellants/Cross-Appellees,

HOOPA VALLEY TRIBE and YUROK TRIBE,
Intervenor-Defendants-Appellants/Cross-Appellees,

and

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, *et al.*,
Intervenor-Defendants/Appellees,

On Appeal from the United States District Court for the Eastern District of California, Case No. 1:13-cv-01232-LJO-GSA

RESPONSIVE BRIEF OF PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES

JAN HASSELMAN (WSBA # 29107)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Phone: (206) 343-7340
Fax: (206) 343-1526
E-mail: jhasselman@earthjustice.org

Attorney for Intervenor-Defendants/Appellees Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources

CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1

Intervenor-Defendants/Appellees Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources have no parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respectfully submitted this 1st day of July, 2016.

/s/ Jan Hasselman

JAN HASSELMAN (WSBA # 29107)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Phone: (206) 343-7340
Fax: (206) 343-1526
E-mail: jhasselman@earthjustice.org

Attorney for Intervenor-Defendants/Appellees Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources

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INTRODUCTION

Pacific Coast Federation of Fishermen's Associations and the Institute For Fisheries Resources (hereinafter, "PCFFA") respectfully submits this brief in response to the opening brief and response of San Luis & Delta-Mendota Water Authority and Westlands Water Districts (hereinafter, the "Districts"). PCFFA was a defendant-intervenor in the District Court action below. Unlike the federal agency defendants and defendant-intervenors Hoopa Valley Tribe and Yurok Tribe, PCFFA did not appeal the District Court's decision, and hence did not file an opening brief. However, it opposes the Districts' appeal. In this responsive brief, PCFFA only addresses the Districts' appeal of the lower court's Endangered Species Act ("ESA") ruling, and joins by reference the positions of the Hoopa and the Yurok with respect to the non-ESA issues involved in this appeal.

The Districts' appeal of the ESA issue should not delay this Court. In bringing its challenge to the 2013 flow augmentation releases, the Districts took a kitchen-sink approach, bringing a sweeping array of claims. With respect to the ESA, the Districts counter-intuitively argued that the decision of the Bureau of Reclamation ("Bureau") to augment flows for the protection of lower Klamath River salmon was a violation of the ESA because the Bureau should have consulted with the National Marine Fisheries Service ("NMFS"), pursuant to § 7 of the ESA, in order to determine whether that flow augmentation could cause

jeopardy to ESA-protected salmon in the Klamath River and Central Valley. Although the parties' briefing on the issue focused chiefly on the merits, the District Court dismissed the claim on the grounds that the Districts lacked standing to pursue a claim under ESA § 7, and did not reach the merits.

PCFFA agrees that the ESA issues are not justiciable, but does not ask this Court to affirm the District Court's decision on the grounds of standing. Instead, as discussed below, the ESA issues are moot because they concern compliance with procedures now long complete, and that are unlikely to be repeated in the future. Under the law of this Circuit, such moot claims are non-justiciable and should be dismissed.

FACTUAL BACKGROUND

I. THE TRINITY RIVER AND THE 2002 FISH KILL

Originating in the Trinity Mountains of Northern California, the Trinity River is the largest tributary of the Klamath River, one of the major west coast river systems.[1] The Trinity joins the Klamath at Weitchpec, 44 miles upstream of the mouth of the Klamath; the stretch below the confluence of the two rivers is referred to as the lower Klamath. ER 41. The Trinity and Klamath are used by anadromous fish, including chinook and coho salmon and steelhead, for

[1] The Federal defendants and Tribes have provided extensive background information in their opening briefs. PCFFA focuses here on issues relevant to the ESA issues only.

reproduction and rearing of juveniles. ER 41-42. Upon hatching, juvenile anadromous fish remain in these river systems for a period of between several months to several years before migrating out to the ocean. Following a period of between three and six years in the ocean, these fish will return to the lower Klamath and migrate back upriver to their natal streams to spawn. *Id*.

The Trinity River Division ("TRD") is a dam on the upper Trinity River that is a component of the Central Valley Project ("CVP"), and impounds the Trinity Reservoir, which stores roughly 2.5 million acre-feet of water. *Id*. Following the creation of the TRD, over 80% of the runoff of the Trinity watershed above Lewiston Dam was diverted out of the basin, to the Sacramento watershed, to serve irrigation needs. ER 43. This resulted in a sharp decrease in Klamath basin anadromous fish species, contributing to the listing of the Southern Oregon Northern California coastal ("SONCC") coho salmon as a threatened species under the Endangered Species Act ("ESA"). The substantial efforts of the federal agencies, Tribes, and state to restore habitat and salmon populations in the Trinity and Klamath Rivers are the subject of discussion in other parties' briefs.

In 2002, at least 34,000 adult fish, mostly Chinook salmon but including some SONCC coho, died in the lower Klamath River as a result of a disease outbreak. ER 45. The event was widely recognized as the largest fish kill in the history of the nation, and wreaked havoc ecologically and economically. *See*

generally ER 765 (docket # 48) (PCFFA intervention materials). This outbreak was attributed to pathogens exacerbated by high temperatures and a lower volume of water flowing through the river system, coupled with highly concentrated fish populations within the diminished rivers. ER 45. In 2003 and 2004, the Bureau successfully sought to avoid a repeat fish kill by releasing additional water from the TRD into the Trinity—the additional flow reduces temperatures and increases volumes in a way that reduces the risk of disease transmission. *Id*. The confluence of low flow conditions, warm temperatures, and high numbers of returning salmon occurred again in 2012, and, again, acting on the recommendation of fisheries managers, the Bureau released additional water to stave off a fisheries crisis in the lower Klamath. ER 45-46. No fish kills occurred that year either.

II. THE 2013 FLOW AUGMENTATION AND THE DISTRICTS' LAWSUIT

The situation of high adult salmon returns, low water volumes, and high temperatures presented itself again in 2013, with fisheries managers again recommending flow augmentation from TRD to avoid mass fish mortality. ER 46-47. As discussed elsewhere, the Bureau conducted an environmental assessment evaluating the impacts of such action. As part of its analysis, the Bureau assessed the impacts of flow augmentation on ESA-listed species under NMFS jurisdiction and found it to be in compliance with the ESA. ER47; *see also* ER 241 (Bureau memo re. ESA compliance); ER 229 ("NMFS representatives were involved in

development of the recommendations that formed the basis of the Proposed Action."). The Bureau observed that TRD operations were already considered under the Central Valley ESA consultation process, and that even though that biological opinion was being rewritten pursuant to a court order, implementation of short-term flow augmentation would be consistent with the limits of the ESA on actions undergoing consultation. ER 241. The memo also observed that consultation was ongoing on a supplement to that biological opinion covering SONCC salmon, and that flow augmentation would benefit and not harm those salmon. *Id*.

Plaintiffs—Central Valley irrigation districts opposed to using TRD water for the purpose of fisheries protection—moved for a temporary restraining order and preliminary injunction immediately after the Bureau's 2013 decision to proceed with flow augmentation, but the ESA issues were not briefed during that process. After initially granting a temporary restraining order, the Court ultimately denied the preliminary injunction request without addressing the ESA issues, ER 1, and the 2013 flow augmentation was completed by September of that year. Plaintiffs subsequently moved for summary judgment on all issues. ER 771 (docket #112). With respect to the ESA, the gravamen of their claim was that, even though the flow augmentation was undertaken for the benefit of salmon, the ESA requires correspondence between the agencies reflecting NMFS' written

concurrence in the Bureau's determination that salmon would not be harmed by the TRD releases. *See* ER 160-63.

The federal defendants, Tribes, and PCFFA cross-moved for summary judgment on the ESA issue (as well as all other issues). Federal defendants explained that the flow augmentation was, in fact, developed in partnership with NMFS, and that the effects would be beneficial for salmon in the lower Klamath, and have no effect on Central Valley-run species. ER771 (docket # 121). In its cross-motion for summary judgment on the ESA issue, PCFFA explained how Trinity River operations were already part of an ongoing § 7(a)(2) ESA consultation process for the CVP, and how the law allows operation of the TRD while consultation is ongoing as long as it does not represent "an irreversible or irretrievable commitment" of resources. 16 U.S.C. § 1536(d). *Id*. (docket #116). PCFFA further explained that ESA regulations authorize departures from normal consultation standards in emergencies. *Id*. *citing* 50 C.F.R. § 402.05.[2]

While the Court was considering the cross-motions for summary judgment, the Bureau was forced to plan for another round of flow augmentation in the fall of

[2] As PCFFA explained, at the time of the challenged action, the CVP biological opinion had been overturned by a District Court, but its implementation was not enjoined. ER 771. Thus, consultation on the effects of CVP operations, including the TRD, was ongoing at the time of the challenged action. Subsequently, the Ninth Circuit overturned the District Court's decision and found the challenged biological opinion (including TRD operations) to be adequate under the ESA. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014).

2014 due to yet another year of low flows and high returns. Again, the Districts sought emergency relief from the District Court, which was denied without addressing the ESA issues. ER 17. The administrative record subsequently revealed that, as in 2013, the Bureau documented its conclusion that implementation of the flow augmentation plan was consistent with the ESA. *See* Exhibit 1 to Federal Defendants' Motion for Judicial Notice ("2014 Reck Memo").

In its order denying the motion for a preliminary injunction and TRO as to the 2014 flow augmentation, the Court highlighted a concern over the Bureau's practice of repeatedly making last-minute decisions regarding flow augmentation without a long term plan. The Court admonished:

> NOTE: Federal Defendants are hereby on notice that the Court will view future [flow augmentation releases] (and requests to enjoin them) in light of all the circumstances, including the fact that the Federal Defendants' repeatedly have treated as "emergency" circumstances that appear to merit a consistent, reasoned, policy rationale. All involved deserve a reasonable opportunity to challenge any such rationale, and all interested, including the Court, deserve to be able to give to these issues "the time and attention they deserve." Failure to heed this notice may disappoint Defendants in future orders.

ER 32. The District Court's admonition reflected the belief, shared by several parties, including PCFFA, that the Bureau should prepare a long-term plan for addressing the need for flow augmentation in the Trinity and lower Klamath, rather than treat each event as an emergency. As discussed further below, development of such a plan has been ongoing.

Shortly thereafter, the Court ruled on the pending cross-motions for summary judgment related to the 2013 flows. With respect to the Districts' claim that the flows violated the ESA, the Court did not reach the merits. ER33. Instead, reasoning that the Districts' interests were in "ensuring the continued delivery of water, not in species protection," the Court ruled that the Districts lacked standing to pursue the issue. ER 54-56. Moreover, the District Court found that the Districts had not demonstrated a reasonably probability that flow augmentation impairs ESA-listed species. On that basis too, the Court ruled, the Districts' lacked standing. *Id.* The Districts, federal defendants, and tribal defendant-intervenors subsequently timely appealed various aspects of the District Court order.

III. THE LONG-TERM PLAN AND THE 2015 LAWSUIT

Subsequently, the Bureau continued work on a long-term plan that would provide a policy structure (and NEPA compliance via a full environmental impact statement) to deal with the potential need for future flow augmentation in the Trinity. 80 Fed. Reg. 41061 (July 14, 2015) ("Notice of Intent To Prepare a Draft Environmental Impact Statement for the Long-Term Plan To Protect Adult Salmon in the Lower Klamath River, Humboldt County, California"). The Bureau states that the EIS is scheduled to be completed during the summer of 2016. Fed. Defendants Opening Brief, at 28.

While work on the long-term plan was ongoing, and after this appeal had

begun, yet another season of drought necessitated yet another plan to address low flows in the Trinity during the late summer of 2015. For the third time, the Districts filed an action that included a host of different statutory claims, including alleged violations of ESA in both 2014 and 2015. Yet again, the Districts moved for a TRO and preliminary injunction, but did not specifically address the ESA issues. Yet again, the District Court denied the motion without mentioning ESA. Summary judgment briefing has not yet begun in the 2015 litigation.

However, the Bureau in 2015 handled § 7 ESA consultation differently than in 2013 and 2014. As noted above, in 2013 and 2014, the District concluded that implementation of flow augmentation was authorized under § 7(d) of the ESA because it fell under ongoing consultations on TRD and Central Valley operations. ER 241 (2013 ESA memo); 2014 Reck Memo, *supra*. The focus of the Districts' ESA claim had been that the Bureau failed to receive a written concurrence from NMFS through the § 7 consultation process that the action would not adversely affect listed species. *See, e.g.*, ER 160-63. In 2015, in contrast, the agencies *did* complete the consultation process via a concurrence letter. Specifically, on August 20, 2015, NMFS regional administrator Will Stelle sent a letter to the Bureau formally concurring in the Districts' determination that implementation of the 2015 flows would not adversely affect coho salmon in the lower Klamath River, or chinook, steelhead or sturgeon in the Central Valley. *See* Exhibit 2 to Federal

Defendants' Motion for Judicial Notice (July 1, 2016) ("2015 Stelle Letter"). Under the ESA regulations, the § 7 consultation process is complete once the agency receives such a concurrence letter from NMFS. *See* 40 C.F.R. § 402.14(b)(1). Moreover, because issuance of a long-term plan to address the flow situation in the Trinity may be imminent, it is not expected that the Bureau of will proceed with one-time plans in the future, thereby avoiding the question of whether consultation on such plans is necessary.

ARGUMENT

As discussed above, the District Court rejected the Districts' ESA claims based on standing, finding that the Districts' interests were not in protecting wildlife, but in securing for itself some of the water that was going to protect lower Klamath River salmon. PCFFA does not ask this Court to affirm the District Court's standing decision, but asks that the ESA issues should be dismissed on the alternative jurisdictional basis of mootness. *See Sohappy v. Hodel*, 911 F.2d 1312, 1321 (9th Cir. 1990) (dismissing claim based on an alternative rationale of mootness). Moot cases, in which the issues surrounding the claim are no longer "live" or where the parties no longer have an interest in the decision, are not justiciable. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

"The basic question in determining mootness is whether there is a present

controversy as to which effective relief can be granted." *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) (*citing United States v. Geophysical Corp*., 732 F.2d 693, 698 (9th Cir. 1984)). While courts have stated that the party claiming mootness has a "heavy burden" of demonstrating that the court lacks the ability to give any effective relief, *Pintlar Corp. v. Fidelity and Casualty Co. of N.Y.*, 124 F.3d 1310, 1312 (9th Cir. 1997), this burden is by no means insurmountable, and courts find actions moot all the time. *See, e.g., Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002); *Center for Food Safety v. Vilsack*, 502 Fed.Appx. 647648–49 (9th Cir. 2012); *Center for Biological Diversity v. Marina Point Development Co.*, 566 F.3d 794, 805 (9th Cir. 2008). One well-recognized but narrow exception to mootness occurs where the alleged injury is "capable of repetition yet evading review." *Center for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007).

This Court should find that the appellees' 2013 ESA claim is moot and hence non-justiciable. First, the flow augmentation and associated administrative procedure being challenged were completed in the fall of 2013. It is inarguable that there is no longer any "live" controversy with respect to these completed agency actions. Second, while normally an event lasting a few weeks, decided on an accelerated schedule, is the kind of agency action that would be "capable of repetition yet evading review," that exception is inapplicable here. In light of the

NMFS' concurrence in 2015 that the Bureau has fully complied with ESA consultation regulations, as well as the likelihood that any further short-term plans will give way to a single long-term plan, whatever alleged flaw there was with respect to the 2013 flows is not likely to repeat itself. Accordingly, the Court should affirm the District Court's dismissal of the ESA consultation claim on the alternative jurisdictional basis of mootness.

I. THE DISTRICTS' ESA CLAIM WITH RESPECT TO THE 2013 FLOWS IS NO LONGER "LIVE" AND THERE IS NO RELIEF AVAILABLE

The United States Constitution only delegates federal court jurisdiction to cases concerning live controversies, and prohibits the issuing of advisory opinions. *Oregon v. F.E.R.C.*, 636 F.3d 1203, 1206 (9th Cir. 2011). It follows that where the plaintiff can no longer obtain any relief, a case is rendered moot and must be dismissed. *Ruvalcaba v. City of L.A.*, 167 F.3d 514, 521 (9th Cir. 1999).

Where the federal court cannot undo a challenged act, the claim is moot and non-justiciable. *Bernhardt v. County of Los Angeles*, at 871. Claims are not necessarily moot where an action is completed but a "burden remains live." *Northwest Environmental Defense Center v. Gordon*, at 1244-45. For example, in *Gordon*, plaintiffs challenged overfishing of salmon species that had already been completed by the time of judicial review. The court found that the claimed overfishing would result in lower salmon harvest in three years when that generation of salmon returned to breed. Accordingly, the court decided that the

issue was not moot because relief could still be had in the form of efforts to restore the depleted salmon population. *Id* at 1245.

This exception for completed actions is limited by two conditions. First, plaintiffs must be able to show some kind of *future* harm caused by the completed action. *See Feldman v. Bomar*, 518 F.3d 637, 642–43 (9th Cir. 2008). In *Feldman*, the plaintiffs raised animal rights concerns about the killing of feral pigs. *Id.* However, at the time of the decision, the feral pigs had already been killed. *Id.* The court determined that the matter was moot based on the fact that no further harm could come to the pigs, which were already dead. *Id.* Second, the exception for mootness based on continuing burden is limited by the condition that the ongoing burden must not be "so remote and speculative that there is no tangible prejudice to the existing interests of the parties." *Id.* at 642 (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012, 1015 (9th Cir.1990)). In *Gordon*, the burden endured as a result of a very clear connection between overharvesting a stock of salmon one year, and the quantity of that salmon stock available in later years. 849 F.2d at 1245.

Here, the flow augmentation in question, as well as the administrative process that preceded it, occurred in the summer of 2013 and has concluded. As in *Feldman*, the alleged act being contested here is complete and irreversible because the release was temporary and specific to the conditions presented in that year.

There has been no allegation made that any harm at all occurred as a result of the claimed procedural failure to consult under § 7, and certainly no claim of ongoing or future harm of the kind described in *Gordon*. *Id*. Indeed, the District Court specifically found that the Districts had failed to show any impact to their interests arising from the flow augmentation deliveries. ER 55. Accordingly, the appellees' claims regarding ESA § 7 procedure is no longer live and there is no present controversy where relief can be granted.

II. THE "CAPABLE OF REPETITION" EXCEPTION TO MOOTNESS IS INAPPLICABLE HERE

Claims that would otherwise be moot can be decided where the alleged act is "capable of repetition yet evading review." *Center for Biological Diversity*, 511 F.3d at 965. This exception is limited to "extraordinary cases," and contingent on meeting two requirements. *Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 939 (9th Cir. 1987). The first requirement is that the harm be "inherently limited in duration" and therefore will almost always render the issue moot prior to a federal court's decision. *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509-10 (9th Cir. 1994). The second requirement is a "reasonable expectation" that this plaintiff will experience this specific injury in the future. *Id*.; *see also* ER 58 (finding Districts' NEPA claims were moot, and applying two factor test above). The burden falls on the plaintiffs to demonstrate a "reasonable expectation" that they will be subjected to the

challenged act again. *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985). However, a conclusory statement by the plaintiff that the act could possibly happen again is not sufficient to justify a "capable of repetition" exception to mootness. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173,187 (1979).

PCFFA does not dispute that the harm in question is "inherently limited in duration" in a way that satisfies the first prong of this test. Over the past few years, the Bureau has made late summer flow augmentations in a short amount of time prior to initiating the flows, which last around six weeks. *Id*. There is no possibility that the legality of these annual actions can be fully tested before they are complete. *Id*.

However, the Districts' ESA claims fail under the second test because there is no "reasonable expectation" that the specific harm complained of in 2013 is going to occur again in the future. In evaluating the likelihood of repetition in the future, courts often look to determine whether the act being contested occurred repeatedly in the past. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). Where the defendant's act is part of a continuation of a consistent policy or behavior then the exception for "capable of repetition" is applicable. *Id.* (so long as the state maintains the electoral system it has utilized consistently for the last 30 years, the problem raised by the plaintiff is capable of repetition). Conversely, in *Illinois*

State Board of Elections v. Socialist Workers Party, the court determined that, in the absence of a history of repeating the act in question or an existing law indicating that the act was part of current policy, there was no reason to assume that it was capable of repetition. 440 U.S. 173,187 (1979).

Courts similarly look to the defendant's behavior following the act in question. *See, e.g.*, *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir. 1992). A defendant's subsequent repetition of the contested action constitutes evidence of capable of repetition. *Id.* at 1329-30. Conversely, in *Foster v. Carson*, the policy being challenged had expired and the state did not renew it subsequently. 347 F.3d 742, 744-45 (9th Cir. 2003). The court determined that there was no evidence to justify a capable of repetition exception. *Id.* at 748-49. In *Forest Guardians v. Johanns*, the court found the capable of repetition exception applicable because the ESA § 7 consultation process contested there required annual repetition and, throughout the litigation process, the Forest Service proved unwilling to change its behavior. 450 F.3d 455, 462-63 (9th Cir. 2003). This combination of impending ESA § 7 consultations and the defendant's unwillingness to change its approach made the likelihood of recurrence non-speculative and justified the use of this exception. *See Alliance for the Rockies v. U.S. Dept. of Agriculture*, 772 F.3d 592, 601 n.4 (9th Cir. 2014) (distinguishing *Forest Guardians* and determining that its use of the capable of repetition

exception was only applicable where there is an "uncooperative" defendant agency with an automatic annual obligation under section 7).

Here, there is no reasonable expectation that the claimed procedural shortcoming in 2013—essentially, the failure to complete the ESA consultation process via a written concurrence letter from NMFS—will occur again. Indeed, the record shows that for the 2015 flow augmentation, such written concurrence was received prior to initiating the releases. *See* 2015 Stelle Letter, *supra*. By obtaining a written concurrence through the ESA consultation regulations, the absence of which was the only conceivable violation of § 7 that the Districts could make, the Bureau of Reclamation has demonstrated that the claimed violation in 2013 is unlikely to recur. There also has been no showing of a "pattern" of ESA § 7 violations or corresponding policy of doing so. Accordingly, cases such as *Moore*, in which plaintiffs demonstrated a long-term pattern of behavior over decades, are inapplicable. 394 U.S. at 816. As in *Socialist Workers Party*, 440 U.S. at 187, and *Foster*, 347 F.3d at 748-49, the appellees' unsupported speculation that the act may occur again is not sufficient to justify the "capable of repetition" exception to mootness.

Future ESA claims relating to short-term flows needed to protect salmon are also unlikely due to the Bureau's commitment to finalizing a long-term plan, consistent with the District Court's admonition, that would obviate the need for

last-minute plans, and corresponding § 7 consultation with NMFS. As a federal agency action, the long-term plan will presumably be subject to § 7, and if plaintiffs have concerns over the Bureau's compliance with that process, it is a different question that can be addressed in a separate action.

Given the absence of a historical pattern of behavior on the Bureau of Reclamation's part, the Bureau's different path to § 7 compliance in 2015, and the likelihood that single-year plans will soon be a thing of the past, there are no indicia of future repetition. As a result, the exception for actions "capable of repetition" is inapplicable here, and the claim is moot.

CONCLUSION

For the foregoing reasons, PCFFA respectfully requests that this Court affirm the District Court's finding that it lacks jurisdiction over the Districts' ESA claims on the alternative grounds of mootness.

Respectfully submitted this 1st day of July, 2016.

/s/ Jan Hasselman
JAN HASSELMAN (WSBA # 29107)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Phone: (206) 343-7340
Fax: (206) 343-1526
E-mail: jhasselman@earthjustice.org

Attorney for Intervenor-Defendants/Appellees Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6): it has been prepared in 14-point Times New Roman.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B): it contains 4,214 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Jan Hasselman
Jan Hasselman

STATEMENT OF RELATED CASES

Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources joins in the statement of related cases in the Opening Brief for the Federal Appellants.

Dated: July 1, 2016.

/s/ Jan Hasselman
Jan Hasselman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 1, 2016.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jan Hasselman
Jan Hasselman