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-EPG

REPLY BRIEF OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT TO PACIFIC COAST, ET AL.'S BRIEF

BROWNSTEIN HYATT FARBER SCHRECK LLP
Steven O. Sims
Dulcinea Z. Hanuschak
410 17th Street, Suite 2200
Denver, CO 80202
Telephone: (303) 223-1100
Facsimile: (303) 223-1111

Attorneys for Westlands Water District

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
Daniel J. O'Hanlon, SBN 122380
Rebecca R. Akroyd, SBN 267305
Elizabeth L. Leeper, SBN 280451
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555

Attorneys for San Luis & Delta-Mendota Water Authority and Westlands Water District

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Other Authorities

INTRODUCTION

Federal Defendants have made flow augmentation releases ("FARs") from the Central Valley Project's Trinity River Division for the benefit of anadromous fish located in the lower Klamath River in August and September each year since 2012. In this case, Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands Water District (together, "Water Contractors") challenge statutory violations stemming from the 2012 and 2013 FARs. This reply responds to the brief filed by Intervenor-Defendants/Appellees Pacific Coast Federation of Fishermen's Associations and the Institute For Fisheries Resources (together, "PCFFA"). PCFFA's brief and this reply solely address whether Water Contractors' claim that the U.S. Bureau of Reclamation ("Reclamation") failed to consult regarding the effects of the 2013 FARs under section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. section 1536(a)(2), is moot. To the extent PCFFA incorporates by reference other parties' arguments (Responsive Brief of Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources, Doc. 62 ("PCFFA Resp.") at 1) that are addressed in Water Contractors' concurrently filed cross-appeal reply brief, Water Contractors incorporate their other brief by reference.

The district court did not reach the merits of Water Contractors' ESA claim. Instead, the district court dismissed the claim for lack of standing. ER 54-56, 82. Water Contractors' concurrently filed cross-appeal reply brief explains why the

district court errs in so holding. Here, Water Contractors explain why the Ninth Circuit should also reject PCFFA's and Federal Defendants' request for dismissal of Water Contractors' ESA claim on the alternative jurisdictional basis of mootness. The claim is not moot; notwithstanding the completion of the 2013 FARs, the district court can grant effective relief. Alternatively, Reclamation's failure to consult is capable of repetition, yet evading review, and justiciable for that reason.

ARGUMENT

I. Water Contractors' Endangered Species Act Claim is Not Moot

"The burden of demonstrating mootness is a heavy one." *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) ("*Gordon*") (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *Cnty. of Los Angeles*, 440 U.S. at 631). "The basic question in determining mootness is whether there is a present controversy as to which relief can be granted." *Gordon*, 849 F.2d at 1244. PCFFA and Federal Defendants argue that because the 2013 FARs ended in September 2013, this case must be moot. PCFFA Resp. at 12-14; Reply and Response Brief for Federal Defendants, Doc. 59 ("Fed. Reply") at 45. However, effective relief still may be granted, notwithstanding the conclusion of the 2013 FARs. Hence, PCFFA and Federal Defendants fail to meet their heavy burden.

First, the district court may grant declaratory relief to remedy a present controversy. Water Contractors seek declaratory relief that the 2013 FARs "are subject to the ESA section 7 consultation requirements . . ., that Defendants have not complied with the ESA with regard to such releases, and the releases are unlawful, arbitrary, capricious, an abuse of discretion, without observance of procedure required by law, and in excess of Defendants' authority and discretion." ER 173. The Ninth Circuit has "repeatedly held that where . . . both injunctive and declaratory relief are sought but the request for an injunction is rendered moot during litigation, if a declaratory judgment would nevertheless provide effective relief the action is not moot." *Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006) (citing *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002); *Gordon*, 849 F.2d at 1245).

In *Forest Guardians v. Johanns*, the Ninth Circuit found that the U.S. Forest Service did not meet its burden to establish mootness because the district court could grant declaratory relief. Plaintiffs in that case alleged that the Forest Service violated ESA section 7 by failing to reinitiate consultation on the effects of cattle grazing. Pending appeal, the agency reinitiated consultation, and accordingly argued that no effective relief was available. Rejecting this argument, this Court noted that the case "involve[d] a continuing practice" and "the Forest Service's practice of not complying with the monitoring requirements is likely to persist despite the recent re-

consultation." *Forest Guardians*, 450 F.3d at 462. The case was not moot, because "[d]eclaratory judgment . . . would ensure that the Forest Service does not continue to fail to meet its monitoring responsibilities in the future and that it fulfills its duty under the ESA to consult with FWS as necessary." *Id*. Similarly here, Reclamation's failure to consult with the National Marine Fisheries Service ("NMFS") regarding the FARs is a continuing practice, notwithstanding Federal Defendants' shifting explanation in response to Water Contractors' ESA claims. *See* Fed. Reply at 45-46. Federal Defendants indicate their intent to make future FARs, and have not committed to conducting ESA section 7 consultation in the future. *Id*.; April 2015 Draft Long-Term Plan, Exh. 1 to Supp. Akroyd Decl. in Support of Second Request for Judicial Notice ("Supp. Akroyd Decl.") at 29. Granting declaratory judgment in this case will help ensure Reclamation does not continue to violate the ESA.

Second, declaratory relief is not the sole potential remedy. "[I]n deciding a mootness issue, 'the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief.'" *Gordon*, 849 F.2d at 1244-45 (italics in original) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). The Ninth Circuit has rejected mootness arguments "where the violation complained of may have caused continuing harm and where the court can still act to remedy such harm by limiting its future adverse effects." *Id*. at 1245. Thus, in *Pyramid Lake Paiute Tribe of Indians v.*

Hodel, 882 F.2d 364, 368 (9th Cir. 1989), the Ninth Circuit concluded that the plaintiffs' challenge to water releases was not moot because harm to the adversely-affected endangered species could be remedied "by storing in Stampede Reservoir an equivalent amount of water from the District's future allotment to be available for possible use during future spawning seasons." Similarly, in *Oregon Natural Resources Council v. U.S. Bureau of Land Management*, 470 F.3d 818, 821-22 (9th Cir. 2006), the Ninth Circuit rejected a mootness challenge where environmental review of a logging project could "yield effective post-harvest relief" through the possible imposition of mitigation and monitoring requirements. In *Gordon*, 849 F.2d at 1245, as well, this Court found a suit challenging measures governing the 1986 salmon fishing season not mooted by the conclusion of the season, as damage to the fish could be repaired or mitigated three years later.

As in *Pyramid Lake*, *Oregon Natural Resources Council*, and *Gordon*, the district court may grant effective relief that that could remedy harm to the listed species potentially adversely affected by the FARs. Contrary to PCFFA's argument (PCFFA Resp. at 13-14), Water Contractors have alleged ongoing harm from Reclamation's failure to conduct ESA section 7 consultation regarding the 2013 FARs—harm to the listed Southern Oregon/Northern California Coast ("SONCC") coho salmon in the Trinity River, and the Central Valley spring-run Chinook salmon, Sacramento River winter-run Chinook salmon, green sturgeon, and delta smelt in the

Sacramento River watershed. *See* ER 161-63, 168-69. If the district court requires ESA section 7 consultation regarding the 2013 FARs and all FARs thereafter, the imposition of reasonable and prudent measures or alternatives may mitigate any harm to past runs of listed fish, and prevent harm to future runs.[1] The district court would have "broad discretion in shaping remedies." *Garcia v. Lawn*, 805 F.2d at 1403.

In sum, because effective relief can be granted, Water Contractors' claim that Reclamation failed to comply with the ESA regarding the 2013 FARs is not moot.

II. Alternatively, Water Contractors' Endangered Species Act Claim is Capable of Repetition, Yet Evading Review

If the Court finds Water Contractors' ESA claim moot, it should decline to dismiss based on the exception to mootness for a case that is capable of repetition, yet likely to evade review. "The [capable of repetition, yet evading review] doctrine is limited to extraordinary cases in which: '(1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again.'" *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 939 (9th Cir. 1987)

[1] Water Contractors' First Amended Complaint seeks "a permanent injunction prohibiting Defendants from operating the TRD [Trinity River Division] in violation of . . . the ESA." ER 173. A permanent injunction of this kind would be one form of effective relief available to remedy Reclamation's violation of the ESA. However, as this Court explained in *Gordon*, "in deciding a mootness issue, 'the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.'" *Gordon*, 849 F.2d at 1244-45 (quoting *Garcia v. Lawn*, 805 F.2d at 1403).

("*Dunkle*"), *cert. denied*, 485 U.S. 988 (quoting *Olagues v. Russoniello*, 797 F.2d 1511, 1517 (9th Cir. 1986) (en banc), *judgment vacated on other grounds in Russoniello v. Olagues*, 484 U.S. 806 (1987)). Both elements are satisfied here.

A. The Short Duration of the Flow Augmentation Releases Will Cause the Releases to Evade Review

Due to their short duration—typically less than six weeks—future FARs will necessarily be too short to be fully litigated prior to their expiration. *See* ER 47; ER 57. 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." PCFFA Resp. at 15. Federal Defendants do not dispute that "the duration of past decisions to implement flow-augmentation releases was sufficiently short to evade review," either. Fed. Reply at 46.

Federal Defendants argue that Reclamation "is currently in the process of developing a long-term plan to protect adult salmon in the lower Klamath River," and that "[a] long-term plan is expected to be of sufficient duration to allow judicial review." Fed. Reply at 46; *see also* PCFFA Resp. at 18 ("the long-term plan will presumably be subject to § 7"). This is an argument without a difference. Federal Defendants have often stated their intent to a develop a long-term plan. *See, e.g.*, ER 46; ER 300. Federal Defendants released the first of two "Draft Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River" in December 2014. Dec. 2014 Long-Term Plan, Exh. 2 to Supp. Akroyd Decl. To date, no long-

term plan has been finalized. *See* Fed. Reply at 46 (citing 80 Fed. Reg. 41061 (July 14, 2015)). Furthermore, Reclamation has not committed to conducting ESA section 7 consultation on the long-term plan. To the contrary, the April 2015 Draft Long-Term Plan states: "The reduced cold water pool volumes will require additional evaluation of effects to listed species; and these effects *may be* significant enough to require consultation under the ESA." April 2015 Draft Long-Term Plan, Exh. 1 to Supp. Akroyd Decl. at 29 (emphasis added). The November 2015 Scoping Report for the "Long-Term Plan for Protecting Late Summer Adult Salmon in the Lower Klamath River Environmental Impact Statement" does not mention ESA consultation, let alone commit Reclamation to ESA consultation. Nov. 2015 Scoping Report, Exh. 3 to Supp. Akroyd Decl. Until a long-term plan and corresponding environmental analysis is finished, the Court should conclude that the duration of the FARs is too short to be fully litigated before they are complete. *Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999) (finding two years inadequate time to allow for full litigation); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir. 1992) (finding regulation in effect for less than one year satisfied durational component).

B. There is a Reasonable Expectation that Reclamation Will Again Fail to Conduct Endangered Species Act Consultation Regarding Flow Augmentation Releases

PCFFA and Federal Defendants argue that even though Reclamation again made flow augmentation releases in 2014 and 2015, "there is no 'reasonable expectation' that the specific harm complained of in 2013 is going to occur again in the future." PCFFA Resp. at 15; Fed. Reply at 45. PCFFA and Federal Defendants point to Reclamation's different approach to ESA-listed species in 2015, as compared to 2013. PCFFA Resp. at 17; Fed. Reply at 45-46. However, in each of these years, Reclamation failed to conduct ESA section 7 consultation regarding the FARs. While Reclamation's approach in 2015 presents a different excuse for not conducting section 7 consultation than that presented in 2013, Reclamation has consistently and repeatedly failed to conduct section 7 consultation before making the FARs. Thus, there is a "reasonable expectation" that Reclamation will again fail to conduct section 7 consultation before making future FARs.

1. Reclamation's Approach to Endangered Species Act-Listed Species in 2013 and 2014

An August 6, 2013 Reclamation memorandum regarding "Endangered Species Act Section 7 Compliance for the Lower Klamath River Late Summer Flow Augmentation from Lewiston Reservoir in 2013" ("2013 ESA Memo") confirms Reclamation's understanding that it was required to conduct section 7 consultation regarding the 2013 FARs' potential effects on listed species under the jurisdiction of

NMFS. ER 241-43; *see* 50 C.F.R. § 402.14(a) (describing duty of agency to review its actions "to determine whether any action *may affect* listed species or critical habitat") (emphasis added). The 2013 ESA Memo describes the then-proposed 2013 FARs, and states that "[t]he proposed action would affect water temperatures in the Trinity and Klamath Rivers, and possibly in Clear Creek and the Sacramento River. In turn, listed fish in the Klamath Basin and the Central Valley may be affected." ER 241. The 2013 ESA Memo further provides:

> Depending on future meteorological and hydrologic conditions and Central Valley Project (CVP) operational objectives, water used for flow augmentation may not be available for other purposes (e.g., water temperature control) in future years. Accordingly, it is appropriate to consider the effects to listed fish species and designated critical habitats in the context of ESA section 7(a)(2) consultation.

ER 242. Reclamation did not dispute that the ESA consultation requirement was triggered. *Id.*

However, Reclamation did not initiate or complete either informal or formal consultation with NMFS regarding the 2013 FARs after determining that the 2013 FARs "may affect" listed species. Federal Defendants claim that when Reclamation made its decision regarding the 2013 FARs, it was "actively engaged in formal consultation on CVP operations" with NMFS. Fed. Reply at 45. Thus, Federal Defendants argue that "[b]ecause consultation on CVP operations . . . was already ongoing, [Reclamation] made a Section 7(d) determination" in 2013. *Id*. Federal Defendants made the same argument with respect to 2014 releases. *Id*.

The claim that Reclamation had reinitiated consultation on CVP operations in 2013 and 2014 is false. In fact, Reclamation had not yet reinitiated consultation on CVP operations. Federal Defendants cite the 2013 ESA Memo and the Environmental Assessment for the 2013 Lower Klamath River Late-Summer Flow Augmentation from Lewiston Dam ("2013 EA") as evidence of pending consultation (*see* Fed. Reply at 36), but neither document supports their claim. In both the 2013 ESA Memo and the 2013 EA, Reclamation acknowledges that reinitiation of consultation on the then-remanded 2009 biological opinion had not yet occurred. The 2013 ESA Memo admits that "Reclamation *plans to submit a consultation package* that includes a supplemental/updated [biological assessment describing the proposed operation of the CVP/[State Water Project] to NMFS, to facilitate the remand of the Opinion, consistent with section 7(a)(2) of the ESA." ER 242 (emphasis added). The 2013 EA includes identical language. ER 229. Formal consultation is initiated by a written request that includes substantial information, including a biological assessment. 50 C.F.R. § 402.14(c). This documentation is commonly referred to as a "consultation package." Because Reclamation had not yet submitted a consultation package when it made the 2013 FARs, it could not conclude that the FARs were lawful under section 7(d) of the ESA. Section 7(d) is expressly limited to the time period "[a]fter initiation of consultation." 16 U.S.C. § 1536(d); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994).

2. Reclamation's Approach to Endangered Species Act-Listed Species in 2015

When Reclamation decided to make the 2015 FARs, Federal Defendants assert that "the agencies were no longer in consultation on CVP operations . . . and instead were operating the CVP in accordance with a valid biological opinion/RPA." Fed. Reply at 45-46. Thus, Federal Defendants claim that "[i]n 2015, [Reclamation] sought and obtained NMFS's written concurrence that the proposed 2015 flow-augmentation releases were consistent with the biological opinion/RPA and that formal consultation was therefore not required." Fed. Reply at 46; *see* PCFFA Resp. at 17.

The law is clear; Reclamation is excused from initiating formal consultation only if it "determines, with the written concurrence of the Director [of NMFS or the U.S. Fish and Wildlife Service], that the proposed action is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(b)(1). There is no such written concurrence from NMFS. The August 20, 2015 letter from William Stelle upon which Federal Defendants and PCFFA base their argument ("2015 Stelle Letter") does not suffice. Instead, the 2015 Stelle Letter is a response to Reclamation's proposed amendments to its 2015 drought action plan. 2015 Stelle Letter, Exh. 2 to Federal Defendants' Motion for Judicial Notice, Doc. 61 ("Fed. RJN") at 1. The 2015 Stelle Letter describes how Reclamation proposed to make the 2015 FARs under the drought contingency provisions of the 2009 NMFS biological

opinion. *Id*. While in the letter, NMFS "concurs with" the conclusions in a "biological review" document prepared by Reclamation, and states that the 2015 FARs "remain[s] consistent with the drought contingency procedures of RPA Action I.2.3.C" (*id*. at 2), the 2015 Stelle Letter nowhere states that the 2015 FARs "are not likely to adversely affect any listed species or critical habitat" or anything similar. 50 C.F.R. § 402.14(b)(1). To the contrary, the 2015 Stelle Letter notes that "[t]he potential for impacts to the cold water pool in water year 2016 as a result of the [2015 FARs] . . . is uncertain." 2015 Stelle Letter, Exh. 2 to Fed. RJN at 3.

Contrary to PCFFA's claim that "[t]here has been no showing of a 'pattern' of ESA § 7 violations or corresponding policy of doing so" (PCFFA Resp. at 17), there has been just that. Reclamation has repeatedly failed to consult. Its different excuses for this failure do not mean the failure did not occur, or that there has not been a pattern of noncompliance.

3. Ninth Circuit Precedent Supports the Court Finding a Reasonable Expectation that Reclamation Will Again Fail to Consult Under the Endangered Species Act

Case law supports the conclusion that Reclamation's practice in 2013-2015 create a reasonable expectation that Reclamation will again fail to conduct ESA consultation regarding future FARs. In *Greenpeace Action v. Franklin*, 14 F.3d at 1329, for example, this Court held that an ESA and National Environmental Policy Act ("NEPA") challenge to the Secretary of Commerce's 1991 total allowable catch

("TAC") "'may be repeated and yet evade review,'" even though the 1991 fishing season had ended. Quoting *Dunkle*, 829 F.2d at 939. The Secretary had relied on the same allegedly flawed biological opinion to develop the 1992 TAC, and had again declined to prepare an Environmental Impact Statement. *Id*. at 1330. Thus, "[t]he major issue—whether the Secretary ha[d] adequately examined the effects of pollock fishing on the Stellar sea lions—[was] likely to recur in future years." *Id*.; *see also Dunkle*, 829 F.2d at 939 (finding reasonable expectation of recurrence where "questions concerning the authority of [FWS] to regulate the subsistence hunting of migratory birds [were] likely to recur each year if not settled").

And in *Natural Resources Defense Council v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003), this Court again found a reasonable expectation that a challenge to NMFS's annual groundfish specifications management plan would recur in future years, in light of repeated invocation of a good cause specified by NMFS. Likewise in *Alaska Center for Environment v. U.S. Forest Service*, 189 F.3d at 856-57, the Court found that a NEPA challenge to the issuance of a one-year permit fell within the "repetition/evasion exception to the mootness doctrine" because there was a reasonable expectation of NMFS's failure to complete NEPA analysis recurring. The Court clarified: the issue was "not whether Powder Guides will again be issued a special-use permit without NEPA analysis," but "whether the Forest Service will issue other commercial helicopter permits in the Chugach National Forest without NEPA

analysis like the Powder Guides permit and the other two permits originally challenged." *Id*. at 857. In *American Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1018 (9th Cir. 2006), this Court again found a reasonable expectation of recurrence where the Secretary of Commerce had "expressed a clear desire" to continue to engage in the challenged action.

The effects of FARs on listed species have not been examined in an ESA section 7 consultation. Reclamation's ongoing practice of failing to conduct either formal or informal section 7 consultation on the effects of the FARs is likely to recur. Reclamation's changing excuses for not doing so—switching from claimed section 7(d) protection to purported protection by a drought plan issued in accordance with an unrelated biological opinion—does not transform Reclamation's failure to consult regarding the 2013 FARs into a one-time event. As in *Alaska Center for Environment*, 189 F.3d at 857, the issue is whether Reclamation will again make FARs without ESA analysis; the answer, given Reclamation's repeated failures, undoubtedly is yes. The exception for actions capable of repletion, yet evading review, therefore applies.

CONCLUSION

For the foregoing reasons, the Court should reject PCFFA's and Federal Defendants' request that the Court affirm the district court's finding that it lacks

jurisdiction over the Water Contractors' ESA claim on the alternative ground of mootness.

/s/ Steven O. Sims
Steven O. Sims
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
Phone: (303) 223.1257
ATTORNEYS FOR PLAINTIFF/APPELLEE/CROSS-APPELLANT, WESTLANDS WATER DISTRICT

/s/ Daniel J. O'Hanlon
Daniel J. O'Hanlon
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Phone: (916) 321-4500
ATTORNEYS FOR PLAINTIFFS/APPELLEES/CROSS-APPELLANTS, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,709 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/Daniel J. O'Hanlon
Daniel J. O'Hanlon

Attorney for San Luis & Delta-Mendota Water Authority and Westlands Water District

Date: July 29, 2016

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing REPLY BRIEF OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT TO PACIFIC COAST, ET AL.'S BRIEF with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 29, 2016.

I 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/Terri Whitman