Consolidated Case Nos. 20-35412, 20-35414, 20-35415, and 20-35432

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,
Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Defendants-Appellants,

TRANSCANADA KEYSTONE PIPELINE, LP, *et al.*,
Intervenor-Defendants-Appellants,

AMERICAN GAS ASSOCIATION, *et al.*,
Intervenor-Defendants-Appellants,

and

STATE OF MONTANA,
Intervenor-Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Montana
No. 4:19-cv-00044-BMM

PLAINTIFFS' RESPONSE TO MOTION TO VACATE DECISIONS BELOW

DOUG HAYES
ERIC HUBER
Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
Boulder, CO 80301
(303) 449-5595
doug.hayes@sierraclub.org
eric.huber@sierraclub.org

Counsel for Sierra Club and Northern Plains Resource Council

JACLYN H. PRANGE
CECILIA SEGAL
ALEXANDER TOM
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100
jprange@nrdc.org
csegal@nrdc.org
atom@nrdc.org

Counsel for Natural Resources Defense Council and Bold Alliance

JARED MARGOLIS
Center for Biological Diversity
2852 Willamette Street # 171
Eugene, OR 97405
(971) 717-6401
jmargolis@biologicaldiversity.org

ERIC GLITZENSTEIN
Center for Biological Diversity
1411 K Street, NW, Suite 1300
Washington, DC 20005
(202) 849-8401
eglitzenstein@biologicaldiversity.org

Counsel for Center for Biological Diversity and Friends of the Earth

TIMOTHY M. BECHTOLD
Bechtold Law Firm, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Counsel for all Plaintiffs-Appellees

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INTRODUCTION

The district court correctly held that Section 7 of the Endangered Species Act ("ESA") required the U.S. Army Corps of Engineers to initiate consultation with the expert wildlife agencies before it reissued Nationwide Permit 12 in 2017. Nationwide Permit 12 ("NWP 12" or "the Permit") is used approximately 14,000 times per year to discharge dredged and fill material into our nation's rivers, streams, and wetlands for the construction of pipelines and other utility lines. Because those activities "may affect" species listed as endangered or threatened under the ESA, the Corps' reissuance of NWP 12 required consultation to ensure that the NWP 12 program will not jeopardize imperiled wildlife.

The district court declared NWP 12 unlawful and remanded it to the Corps to complete the required ESA consultation. Due to the gravity of the Corps' violations, the district court also vacated and enjoined the use of NWP 12 for the construction of new oil and gas pipelines. Although this Court denied motions to stay the injunction and vacatur pending appeal, the U.S. Supreme Court subsequently limited that relief to the Keystone XL pipeline. However, Federal Defendants and Defendant-Intervenors never obtained a stay of the declaratory ruling or the remand to the Corps.

More than a year after the district court ordered the Corps to consult with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, there is no indication that the Corps ever started that process. Instead, the Corps proceeded to again reauthorize NWP 12 at the very end of the prior administration, well before its scheduled termination in 2022. *See* 86 Fed. Reg. 2744 (Jan. 13, 2021). In doing so, the Corps once more avoided programmatic Section 7 consultation in exactly the manner the district court declared to be unlawful.

Now—after reauthorizing NWP 12 without ever addressing the ESA violation at issue in this case—Federal Defendants have moved this Court to find that the early reissuance of NWP 12 in 2021 moots these appeals. Federal Defendants also ask the Court to vacate the district court's orders under *United States v. Munsingwear*, 340 U.S. 36 (1950). Plaintiffs agree that the appeals are moot as to the district court's injunctive relief and vacatur of the 2017 iteration of NWP 12 and do not oppose *Munsingwear* vacatur regarding the relief that Plaintiffs previously abandoned on appeal.

However, Federal Defendants' motion ignores the district court's declaratory relief and remand to the Corps to complete ESA consultation. There are important factual questions—not readily answerable from the appellate record—regarding how the latest reissuance of NWP 12 affects the

parties' dispute as to that relief. Furthermore, Plaintiffs have other claims—under the Clean Water Act and the National Environmental Policy Act—that are not at issue in these interlocutory appeals. Whether the remaining relief and additional claims are moot should be determined by the district court in the first instance. The Court should therefore remand to the district court to evaluate these questions and determine mootness. *See United States v. Brandau*, 578 F.3d 1064, 1069-70 (9th Cir. 2009). Should the district court decide that any aspects of the case are moot, it can then determine whether to vacate the relevant portions of its orders pursuant to *Munsingwear*, but it would be premature for the Court to address those arguments now.

If the Court nonetheless declines to remand the mootness issue and concludes that these appeals no longer present a live case or controversy, it should still remand the question of *Munsingwear* vacatur to the district court. Given the circumstances of this case—including the Corps' voluntary conduct in causing mootness—the Court should follow its "established practice" of remanding to the district court to weigh the equities and determine whether to vacate the remaining aspects of its orders. *Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996).

ARGUMENT

I. The mootness issue should be remanded to the district court

"A case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Dominguez v. Kernan*, 906 F.3d 1127, 1132 (9th Cir. 2018) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). To determine whether a case has become moot on appeal, this Court looks to whether it "can give the appellant any effective relief in the event that it decides the matter on the merits in his favor." *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1068 (9th Cir. 2010) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986)). Here, Federal Defendants have not carried their "heavy burden" to demonstrate that there is no effective relief this Court could issue in these appeals. *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1011 (9th Cir. 2018).

In arguing that the case is moot, Federal Defendants focus on two elements of the relief awarded by the district court: injunctive relief and vacatur of the 2017 NWP 12. Fed. Mot. 10-11.[1] Plaintiffs agree that this case is

[1] Federal Defendants also argue that this case is "prudentially" moot, Fed. Mot. 15, but it is unclear whether there is a "prudential" mootness doctrine that could justify dismissal of the appeals. This Court has explicitly declined to adopt the doctrine outside of the bankruptcy context, *see Maldonado v. Lynch*, 786 F.3d 1155, 1161 n.5 (9th Cir. 2015) (en banc), and as the Supreme Court has explained, "[a]s long as the parties have a concrete interest,

moot as to those forms of relief. First, the Supreme Court has stayed the district court's injunction and vacatur, except as they apply to Keystone XL, and Plaintiffs subsequently disavowed that stayed relief before this Court. Pls.' Ans. Br. 49. Thus, as discussed below, it is appropriate to vacate the corresponding portions of the district court's orders. *See infra* p.11. There is no longer a live dispute as to that abandoned relief. Second, as to Keystone XL, Federal Defendants apparently agree that even if that project were to proceed under NWP 12, it would have to do so under the 2021 version. *See* Fed. Mot. 15 (suggesting that any future controversy would "concern[] the 2021 Permit's application to Keystone XL"). The parties therefore lack any "concrete interest," *Dominguez*, 906 F.3d at 1132 (citation omitted), in affirmance or reversal of the Keystone XL-specific vacatur.

However, the district court also issued declaratory relief and—particularly relevant here—ordered a remand to the Corps to carry out programmatic ESA Section 7 consultation. Federal Defendants' motion says nothing about that relief, which was never stayed. That silence, by definition, cannot carry Federal Defendants' "heavy burden" to establish that their appeal of the district court's grant of declaratory relief and remand is moot. *Ctr. for*

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however small, in the outcome of the litigation, the case is not moot," *Chafin*, 568 U.S. at 172 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012)).

Biological Diversity, 894 F.3d at 1011 (burden not met where record was insufficient to support defendants' "bare assertion" of facts); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (declaratory relief not moot where "the challenged governmental activity . . . has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties").

Nonetheless, Plaintiffs agree that recent developments raise factual issues regarding whether Federal Defendants or Defendant-Intervenors have any remaining stake in their appeals. Accordingly, this Court should follow its practice of remanding to the district court to resolve those factual questions and determine whether a case or controversy still exists regarding Plaintiffs' ESA claim, *see, e.g.*, *Brandau*, 578 F.3d at 1069-70, and if so, whether those developments require the court to modify its orders.

For example, the district court can engage in any necessary factfinding regarding the status of its remand to the Corps. The Corps has now had over a year to carry out the required consultation and could have undertaken many steps in furtherance of the remand even while protecting its appellate rights. *See Shays v. Fed. Election Comm'n*, 340 F. Supp. 2d 39, 49-51 (D.D.C. 2004). Yet the Corps has remained conspicuously silent as to any such efforts.

In addition, the district court is in the best position to assess what effect, if any, the 2021 reauthorization of NWP 12 should have on the remand to the Corps to complete consultation on the 2017 Permit. Contrary to Federal Defendants' representation that the 2017 version of NWP 12 "is no longer operative," Fed. Mot. 8, the Corps' 2021 reauthorization stated that "[a]ctivities authorized by the 2017 NWPs currently remain authorized by those NWPs *until March 18, 2022*," 86 Fed. Reg. at 2747 (emphasis added). Accordingly, the 2017 Permit is currently in effect and will be for many months. The record does not disclose how many more water crossings will be constructed as part of projects already verified under the 2017 Permit. However, given the sheer volume of activities authorized under the 2017 Permit—an estimated 14,000 uses per year, SER-10–11—there may well be a substantial amount of outstanding activities under the 2017 Permit that could affect listed species. The Corps' consultation, in turn, could result in changes that mitigate harms from those activities, and provide crucial information so the Corps can ensure that the cumulative impacts of the 2017 NWP 12 have not, and will not, jeopardize listed species.

Consequently, the district court would be in the best position to consider the current factual context and, in view of that, whether an ongoing case or controversy remains as to the declaratory relief and remand to the Corps and,

if so, whether the terms of the remand should be modified in view of the activities that continue to be carried out under the 2017 NWP 12 and/or in light of the issuance of the new iteration of NWP 12.

The district court is likewise best suited to determine whether the 2021 NWP 12 harms Plaintiffs "in the same fundamental way." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993); *see also Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053–54 (9th Cir. 2013) (appeal not moot where agency continued the challenged behavior). In reauthorizing NWP 12, the Corps *again* refused to conduct ESA consultation, *see* 86 Fed. Reg. at 2849, despite the district court's ruling. Federal Defendants suggest that the Corps' decision to repeat that violation was justified by material differences in the 2021 Permit and a new record, Fed. Mot. 12-13, but those record-based arguments should be addressed by the district court in the first instance, particularly given that it already has a case before it challenging the Corps' failure to consult on the 2021 Permit, *see* Compl., *Ctr. for Biological Diversity v. Spellmon*, No. 4:21-cv-47-BMM (D. Mont. May 3, 2021), ECF No. 1; Fed. Mot. 13 n.5.

This Court's cases necessitate remand under these circumstances. The Court has held that remand is appropriate where factual questions exist that bear on potential mootness. *See, e.g.*, *Brandau*, 578 F.3d at 1069-70 (remanding

for district court to hold evidentiary hearing on mootness); *Von Kennel Gaudin v. Remis*, 282 F.3d 1178, 1183-84 (9th Cir. 2002) (denying motion to dismiss and remanding for district court to resolve factual dispute as to mootness). This Court has likewise found remand appropriate for the district court to address a change in circumstances that implicates the relief ordered. *See, e.g.*, *NRDC. v. Winter*, 513 F.3d 920, 922 (9th Cir. 2008) (remanding to allow district court to consider the effect of new executive actions on injunction); *Hoisington v. Williams*, 499 F. App'x 693, 695 (9th Cir. 2012) (remanding injunctive relief claims for further proceedings due to changed circumstances).

Brandau is instructive. There, the government argued that the appeal was moot because the challenged policy had been replaced while the appeal was pending. *Brandau*, 578 F.3d at 1066-67. The Court remanded the case for factual development, noting that the government had provided "no information at all regarding the practical effect of the new [policy]." *Id.* at 1067; *see also id.* at 1069-70. Here, as explained, questions remain as to how the issuance of a new version of NWP 12 affects the district court's remand to complete ESA consultation, which the Corps has apparently failed to comply with. As in *Brandau*, *id.* at 1069-70, remand to the district court for further factual development is warranted.

Finally, remand is also appropriate because Plaintiffs have other claims that are not at issue in these interlocutory appeals, including facial claims under the Clean Water Act and the National Environmental Policy Act. 2-TC_ER-963, -966–68; 1-ER-60–64. As Federal Defendants acknowledge, those claims are "not technically before this Court." Fed. Mot. 20 n.9. Therefore, at the very least, a remand or further proceedings are necessary for the district court to consider the alleged mootness of those claims in the first instance. *See Akina v. Hawaii*, 835 F.3d 1003, 1011 & n.3 (9th Cir. 2016) (dismissing as moot interlocutory appeal from denial of preliminary injunction and explaining that "[w]e pass no judgment on what aspects of the plaintiffs' lawsuit continue to present a live controversy"); *In Def. of Animals v. U.S. Dep't of Interior*, 648 F.3d 1012, 1013 (9th Cir. 2011) (per curiam) (similarly dismissing interlocutory appeal as moot and "express[ing] no opinion here as to whether the entire action is moot").

In sum, Plaintiffs agree that there is no longer a live controversy regarding the injunctive and vacatur elements of the district court's relief. But Federal Defendants have failed to establish that these appeals are moot insofar as they concern the other forms of relief, particularly the remand to the Corps to engage in programmatic ESA Section 7 consultation. The record on appeal is insufficient to resolve that question. Therefore, remand to the district court is

appropriate to consider in the first instance the present factual context, whether it renders the remand ordered by the district court moot, and, if not, whether it warrants any revision to that form of relief. *See, e.g.*, *Brandau*, 578 F.3d at 1067-70.

II. The *Munsingwear* vacatur issue should also be remanded to the district court

Even if this Court declines to remand the mootness issue and concludes that the entire case is moot, the Court should still remand the question of *Munsingwear* vacatur to the district court. A discussed above, Plaintiffs do not oppose *Munsingwear* vacatur as to the portions of the district court's orders granting the relief that Plaintiffs abandoned on appeal—the district court's injunction and vacatur as to projects besides Keystone XL—and would not object to vacatur of those parts of the orders on remand. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512-13 (1989). However, Federal Defendants *also* seek vacatur of the rest of the district court's orders and the relief granted: the declaratory relief, the remand to the agency to complete Section 7 consultation, and the vacatur of NWP 12 as to Keystone XL. The district court is in the best position to consider *Munsingwear* vacatur in the first instance, both to address any factual disputes about causation and to balance the equities to

determine whether vacating its orders is appropriate. *See Dilley v. Gunn*, 64 F.3d 1365, 1370-71 (9th Cir. 1995).

Munsingwear vacatur is fundamentally an equitable remedy, and hence the party seeking it must establish an "equitable entitlement" to it. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994); *Dilley*, 64 F.3d at 1370 (noting that "the touchstone of vacatur is equity"). Under the equitable test set forth in *Bancorp*, the decision below generally should not be vacated where the party seeking vacatur caused or contributed to the alleged mootness. *Bancorp*, 513 U.S. at 24, 26 (denying motion for vacatur where mootness was caused by settlement); *see also Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982) (party that moots its own appeal "is in no position to complain that [its] right of review of an adverse lower court judgment has been lost"); *Am. Civil Liberties Union of Nev. v. Masto*, 670 F.3d 1046, 1066 (9th Cir. 2012) (where party seeking vacatur caused mootness, court retained authority to dispose of case in manner "most consonant to justice" (quoting *Bancorp*, 513 U.S. at 24)). In such situations, this Court's "established practice" is to remand to the district court for it to consider "vacating its own judgment after an independent review of the equities." *Cammermeyer*, 97 F.3d at 1239. Where further factual development is necessary to determine whether a party caused mootness, "the appropriate course" is

similarly to remand for the district court to resolve those issues and then "determine whether to vacate its order." *Norsworthy v. Beard*, 802 F.3d 1090, 1092 (9th Cir. 2015) (per curiam); *accord Dilley*, 64 F.3d at 1370-71 (noting this Court's "established procedure" of remanding for district court "to determine [causation] as a threshold matter" and then apply the appropriate vacatur analysis in the first instance).

Here, even assuming that all relief—including the remand to the Corps—has been rendered moot, it is readily apparent that the Corps' own actions caused the alleged mootness. For example, it is undisputed that although the 2017 NWP 12 does not expire until 2022, the Corps opted to reauthorize a new version of the Permit after the district court's ruling in early 2020 and long before expiration of the current Permit, without engaging in any Section 7 consultation. Federal Defendants suggest that the premature reauthorization of NWP 12 was "wholly unrelated" to this litigation. Fed. Mot. 19 (quoting *Dilley*, 64 F.3d at 1372); *see also id.* at 17. But the 2021 reissuance flatly contradicts that characterization, acknowledging that the Corps reissued NWP 12 "partly to address issues raised in [the district court's] decision in *Northern Plains Resource Council, et al., v. U.S. Army Corps of Engineers, et al.,* (Case No. CV 19-44-GF-BMM) . . . ." 86 Fed. Reg. at 2747.

And even if the Corps' own representation did not foreclose that argument, the suspicious timing—including finalization of the new Permit in the last days of the outgoing administration—strongly suggests that the Corps' actions were related, and at least raises factual questions that the district court would be in the best position to consider. *See Norsworthy*, 802 F.3d at 1092; *Dilley*, 64 F.3d at 1371. Although the Corps first announced that it was considering changes to some NWPs in October 2017, even the Fall 2019 unified agenda did not provide any specific timeframe for doing so; in fact, the agenda provided alternatives, such as conducting a rulemaking to modify those NWPs rather than reissuing them or taking no action until the next scheduled rulemaking in 2022. *Cf.* Fed. Mot. 17 & n.7.[2] In other words, contrary to Federal Defendants' suggestion, the Corps had not previously committed to reissuing NWP 12 early.

Because Federal Defendants caused the alleged mootness "by replacing the challenged [permit]," the Court should follow its "established practice" and remand for the district court to balance the equities and decide whether to vacate its own order. *Cammermeyer*, 97 F.3d at 1239. To the extent that

[2] *See also* Office of Info. & Regul. Affairs, Office of Mgmt. & Budget, *Reissuance and Modification of Nationwide Permits, Fall 2019 Unified Agenda*, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=0710-AA84 (last visited May 27, 2021).

Defendant-Intervenors also request *Munsingwear* vacatur on their own behalf—and assuming that some Defendant-Intervenors did not cause the alleged mootness—that does not dictate a different outcome here. While this Court "typically" vacates without remanding to the district court when a party seeking *Munsingwear* vacatur did not cause mootness, *All. for the Wild Rockies v. Savage*, 897 F.3d 1025, 1032 (9th Cir. 2018), the Court has not established a rule that this disposition is "typically" appropriate when *another* party seeking vacatur *was* responsible for mootness. Rather, "the decision whether to vacate turns on the conditions and circumstances of the particular case." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (internal quotation marks and citation omitted). Here, reflexively granting Defendant-Intervenors' requests would overlook the Corps' own conduct in causing the asserted mootness: apparently defying the district court's remand for over a year (despite failing to obtain a stay of that relief from the district court, this Court, or the Supreme Court), and then attempting to moot Plaintiffs' claims by repeating the same legal violation. Rewarding the agency with *Munsingwear* vacatur under these circumstances would endorse the Corps' total disregard of federal courts' authority based solely on the mere presence of aligned intervenor-appellants.[3]

[3] The Corps' conduct here distinguishes these appeals from cases where a governmental defendant moots a previously aligned intervenor-appellant's

Accordingly, this case warrants the closer scrutiny that accompanies a remand to the district court to allow it to balance the equities and determine whether it should vacate its own order. *See Dilley*, 64 F.3d at 1370-71; *Cammermeyer*, 97 F.3d at 1239. Any "attendant hardships" that Defendant-Intervenors may assert in support of *Munsingwear* vacatur can also be considered by the district court in the first instance. *Dilley*, 64 F.3d at 1371 (citation omitted); *cf. Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998) (observing that "a district court should enjoy greater equitable discretion when reviewing [possible vacatur of] its own judgments than do appellate courts operating at a distance"). And should Federal Defendants contend that the Corps had *new*, legitimate reasons for refusing to consult on this iteration of NWP 12, the district court is uniquely well situated to assess those arguments as well, given that it already has a case before it challenging

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appeal by reversing course and *redressing* the legal violation identified by the district court. *See Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 104-05 (D.C. Cir. 2016) (revision of regulations to remove unlawful exception); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (promulgation of new rule removing "portions of the Roadless Rule that were substantively challenged by" plaintiffs); *League of Conservation Voters v. Biden*, 843 F. App'x 937, 938 (9th Cir. 2021) (revocation of executive order that district court held exceeded President's statutory authority). In those circumstances, a court can more easily find that the agency was not "motivated by a desire to avoid or undermine the district court's ruling" and that "the orderly operation of the appellate system is not being frustrated." *Wyoming*, 414 F.3d at 1213 & n.6.

the failure to consult on the 2021 Permit. *See* Compl., *Ctr. for Biological Diversity v. Spellmon*, No. 4:21-cv-47-BMM (D. Mont. May 3, 2021), ECF No. 1.

As the Supreme Court noted in *Bancorp,* when federal courts contemplate equitable relief such as vacatur of a decision below, they must take account not only of the parties' particular interests but also the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Bancorp*, 513 U.S. at 26-27 (citation omitted).

For these reasons, even if this Court determines that the entire case is moot, it should remand with instructions to the district court to consider the present factual context, weigh the relevant equities, and determine whether *Munsingwear* vacatur is warranted under these circumstances.

CONCLUSION

The Court should remand to the district court with instructions to vacate the portions of the court's orders granting relief that Plaintiffs disclaimed on appeal—namely, the injunction and vacatur of NWP 12 as to projects besides Keystone XL. All other issues raised by Federal Defendants' motion—i.e., whether there remains a case or controversy as to the other relief ordered by the district court and, if not, whether *Munsingwear* vacatur related to that relief

is warranted—should be remanded to the district court for resolution in the first instance.

Respectfully submitted,

Dated: May 28, 2021

/s/ Doug Hayes
Doug Hayes
/s/ Eric Huber
Eric Huber
Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
Boulder, CO 80301
(303) 449-5595
doug.hayes@sierraclub.org
eric.huber@sierraclub.org

Attorneys for Sierra Club and Northern Plains Resource Council

/s/ Jaclyn Prange
Jaclyn Prange
/s/ Cecilia Segal
Cecilia Segal
/s/ Alexander Tom
Alexander Tom
Natural Resources Defense Council
111 Sutter Street, Floor 21
San Francisco, CA 94104
(415) 875-6100
jprange@nrdc.org
csegal@nrdc.org
atom@nrdc.org

Attorneys for Bold Alliance and Natural Resources Defense Council

/s/ Jared Margolis
Jared Margolis
Center for Biological Diversity
2852 Willamette Street # 171
Eugene, OR 97405
(971) 717-6401
jmargolis@biologicaldiversity.org

/s/ Eric Glitzenstein
Eric Glitzenstein
Center for Biological Diversity
1411 K Street, NW, Suite 1300
Washington, DC 20005
(202) 849-8401
eglitzenstein@biologicaldiversity.org

Attorneys for Center for Biological Diversity and Friends of the Earth

/s/ Timothy M. Bechtold
Timothy M. Bechtold
Bechtold Law Firm, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorney for all Plaintiffs–Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing response contains 3,999 words, excluding the material exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f). This complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) and Circuit Rules 27-1(1)(d) and 32-3(2).

I also certify that the foregoing motion has been prepared in a proportionately spaced typeface using Microsoft Word Calisto MT 14-point font. This complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

/s/ Alexander Tom

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing response on May 28, 2021, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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