

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

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NORTHERN PLAINS RESOURCE COUNCIL, et al.,  
*Plaintiffs/Appellees, v.*

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

TC ENERGY CORPORATION, et al.,  
*Intervenor-Defendants/Appellants, and*

STATE OF MONTANA,  
*Intervenor-Defendants/Appellants.*

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Appeal from the United States District Court for the  
District of Montana

No. 4:19-cv-00044 (Hon. Brian Morris)

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**MONTANA'S RESPONSE TO MOTION TO VACATE**

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The Federal Appellants have filed a motion to vacate the district court's orders below because these appeals are now moot. *See* ECF 150-1 at 6. Montana agrees that these cases are moot as a result of the 2021 reissuance of Nationwide Permit 12 ("NWP 12"), *see* 86 Fed. Reg. 2744 (Jan. 13, 2021), and agrees that, on that basis alone, the district court's decisions should be vacated and the cases remanded with instructions to dismiss.

In the proceedings below, the district court found that the U.S. Army Corps of Engineers' ("Corps") 2017 reissuance of NWP 12 failed to conduct Endangered Species Act ("ESA") programmatic consultations. 1-ER-47-59. While the Corps maintains that nationwide ESA § 7 programmatic consultations for nationwide permits are voluntary, *id.* at 2848, the Corps did conduct a biological assessment of the proposed reissuance:

In the biological assessment prepared by the Corps for this rulemaking activity, the Corps presents a substantial amount of data to demonstrate the actions it takes to comply with section 7 of the ESA, including the number of formal and informal section 7 consultations it conducts with the [U.S. Fish and Wildlife Service] and [National Marine Fisheries Service] and the number of regional programmatic consultations and other tools it has developed with the FWS and NMFS.

*Id.* at 2849; *see also* 82 Fed. Reg. 1860, 1956, 1944 (Jan. 6, 2017) (stating that § 7 ESA programmatic consultations, including biological assessments, were not necessary in the 2017 reissuance of nationwide permits).

As Montana pointed out in its reply brief, Plaintiffs’ (collectively, “NPRC”) ESA concerns were exclusive to the Keystone XL Pipeline and regional at best. *See* ECF 138 at 8–9 (explaining that NPRC only articulated a concern with the American burring beetle and pallid sturgeon in specific geographic areas allegedly impacted by Keystone). Thus, the Corps’ 2021 reissuance of NWP 12—and its attendant regional consultations—are sufficient to moot these appeals. *American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (“If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed.”); *see, e.g., Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) (“the issuance of a superseding [Biological Opinion] moots issues on appeal relating to the preceding BiOp.”). Additionally, when an appeal is mooted, the appropriate posture is to vacate the decision below. *See* ECF 150-1 at 23–24 (explaining how the *Munsingwear* doctrine requires such relief here).

Accordingly, Montana supports the Federal Appellants' motion to vacate decisions below.

Respectfully submitted this 28th day of May, 2021.

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the length limitation of Circuit Rule 27-1(1)(d) because it does not exceed 5,200 words.
2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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