Case No. 18-35488

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAY HYMAS, d/b/a Dosmen Farms,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR; DAVID BERNHARDT, Secretary of the United States Department of the Interior; and JAMES W. KURTH, Acting Director of the United States Fish and Wildlife Service; DOES, 1-10,
Defendants-Appellees.

On Appeal from an Order Granting Defendants' Motion To Dismiss
U.S. District Court for Eastern District of Washington
D.C. No. 4:16-cv-05091-SMJ
District Judge Salvador Mendoza, Jr.

OPENING BRIEF FOR PLAINTIFF-APPELLANT

MINSUK HAN
BETHAN R. JONES
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Counsel for Jay Hymas,
d/b/a Dosmen Farms

May 13, 2019

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INTRODUCTION

Appellant Jay Hymas brought this case to challenge the practice of the U.S. Fish and Wildlife Service (the "Service") of favoring incumbent farmers in awarding "cooperative farming agreements." In the Mid-Columbia River National Wildlife Refuge Complex, the Service has permitted the same farmers to grow crops on refuge lands for decades without any public selection process, in violation of pre-existing agency regulations and policies. After unsuccessful attempts to obtain a cooperative farming agreement, Hymas commenced this litigation against Appellees, the U.S. Department of Interior, its secretary, and the acting director of the Service. Hymas seeks injunctive and declaratory relief as well as monetary damages, including bid preparation costs.

In 2014, the United States Court of Federal Claims found that Appellees' process for selecting cooperative farmers was arbitrary and capricious. *See Hymas v. United States*, 117 Fed. Cl. 466, 502-06 (2014). Pursuant to the court's order, the Service solicited public bids for the 2015 farming season but then awarded multi-year contracts to the same incumbent farmers. In 2016, the United States Court of Appeals for the Federal Circuit vacated the judgment of the Court of Federal Claims on jurisdictional grounds. *See Hymas v. United States*, 810 F.3d 1312, 1330 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 2196 (2017). On remand,

the Court of Federal Claims transferred this case to the United States District Court for the Eastern District of Washington.

Shortly after filing an answer to Hymas's second amended complaint, the Service adopted a policy that purports to require a competitive bidding process for awarding all *future* cooperative farming agreements. Two weeks later, Appellees moved for dismissal of Hymas's claims as moot. The District Court granted that motion, concluding that the new policy made "absolutely clear" that the Service would cease its long-standing practice of favoring incumbent cooperators and that the Service's solicitation of bids for the 2015 farming season mooted Hymas's claim for bid preparation costs. Hymas appeals from the District Court's dismissal.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Hymas's claim that the Service's process for selecting cooperative farmers was unlawful arises under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"). The District Court also had subject-matter jurisdiction over Hymas's claim for the recovery of bid preparation costs under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). This Court has appellate jurisdiction under 28 U.S.C. § 1291. The District Court entered a final judgment on June 1, 2018. D. Ct. Dkt. 132

(ER 1). On the same day, Appellant filed his notice of appeal. D. Ct. Dkt. 133 (ER 106); Dkt. 1-1.

STATEMENT OF THE ISSUES

1. Whether the Service's policy, adopted during litigation, made it "absolutely clear" that the Service would cease its long-standing practice of favoring incumbent farmers in violation of pre-existing regulations and policies such that it was proper to dismiss Appellant's APA challenge to that long-standing practice as moot?

2. Whether the Service's solicitation of bids for the 2015 farming season mooted Appellant's claim for bid preparation costs incurred in prior years?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Cooperative Farming on the National Wildlife Refuges

Since the 1970s, the Service has awarded "cooperative farming agreements" to allow private farmers to grow crops on lands located within the National Wildlife Refuge System ("NWRS") so long as they agree to leave a portion of the crops to feed migratory birds and wildlife. In fiscal year 1974, across more than 100 refuges nationwide, "611 cooperative farmers cultivated 163,000 acres . . . from which they received an average 70 percent share and harvested 1,307,249 tons of crops." *Hymas v. United States*, 117 Fed. Cl. 466, 469-70 & n.2 (2014).

The cooperative farming agreements at issue in this case concern croplands within the McNary and Umatilla National Wildlife Refuges located around major agricultural areas in southeastern Washington and northeastern Oregon. Both Refuges are administered by the Service's local office, the Mid-Columbia River National Wildlife Refuge Complex, in Burbank, Washington. *See* ER 450-72.

The McNary Refuge contains approximately 700 acres of croplands in several fields. *See* ER 194. At all relevant times, the Service allowed four cooperators to farm those fields: Lonnie Blasdel, Larry Pierce, John Peterson, and Doug Strebin. *See* ER 151, 166, 171, 176 (2013 agreements); D. Ct. Dkt. 73-1 (ER 664-67); *cf.* ER 456 (map of the McNary Refuge). Of 700 acres of croplands, the cooperators farmed 540 acres that were relatively easy to irrigate. The remaining acres of croplands were far more difficult to irrigate and thus "economically undesirable for the existing cooperators." ER 200-01. By 2012, however, after having lain fallow for years, those croplands became qualified for "organic" status. *See* ER 236.

The Umatilla Refuge contains approximately 1,400 acres of croplands in two separate sets of fields. *See* ER 211. At all relevant times, the Service allowed two cooperators to farm those fields: Vern Frederickson and Jody Maddox. *See* ER 156, 161 (2013 agreements); D. Ct. Dkt. 73-1 (ER 664-67); *cf.* ER 457 (map of

the Umatilla Refuge). Frederickson farmed on the Umatilla Refuge for more than 40 years, *see* ER 357, and Maddox for more than 20 years, *see* ER 358.

B. Hymas's Attempts To Obtain a Cooperative Farming Agreement

In June 2012, Hymas contacted the Service to obtain a cooperative farming agreement for three fields within the McNary Refuge that had lain fallow (Library Field and Fields 3 and 4). Compl. ¶ 29, D. Ct. Dkt. 86 (ER 619). Lamont Glass, the manager of the McNary and Umatilla Refuges, told Hymas that the Service's policy required a "competitive public" bidding process and that Hymas could formally respond to a notice to be issued within a month. *Id.* ¶¶ 30-33 (ER 620).

In the following 10 months, Hymas contacted Glass about 15 times to inquire about the status of the notice, but no notice was posted regarding the cooperative farming agreements on the McNary Refuge for either year 2012 or 2013. *Id.* ¶ 34 (ER 620). In December 2012, Glass informed Hymas that Glass needed to get information on the cost of repairing the irrigation system on one of the fields. *Id.* ¶ 35 (ER 620). Hymas stated that he was willing to pay the cost of repairing the irrigation system, but Glass stated that the information was needed for other bidders. *Id.* ¶¶ 36, 37 (ER 620). Until February 28, 2013, Glass continued to advise Hymas that there would be a competitive public bidding process for cooperative farming agreements on the McNary Refuge. *Id.* ¶ 38 (ER 621).

On March 29, 2013, Hymas scheduled a meeting with Glass as well as two officials at the Mid-Columbia River National Wildlife Refuge Complex, Charlie Stenvall and Jeff Howland. *Id.* ¶ 42 (ER 621). At that meeting, Stenvall told Hymas that no competitive bidding process had ever taken place for cooperative farming – contrary to what the Refuge manager had told Hymas repeatedly for more than half a year. *Id.* ¶ 44 (ER 621). Hymas was told that the Service would award a cooperative farming agreement for the Library Field, which no cooperator had farmed, to an existing cooperator for other fields and that the award would be made without competitive bidding. *Id.* ¶¶ 42, 45 (ER 621). The Service installed a new irrigation system in the Library Field, making it easier to farm. *See* ER 235. Hymas was told that the Service would convert Field 4 to native habitat because the Refuge had too much food for wildlife. Compl. ¶ 43, D. Ct. Dkt. 86 (ER 621). Previously, Field 4 had not been farmed because no incumbent cooperators were "willing to deal with" the labor-intensive irrigation system there. ER 235.

At the March 29, 2013 meeting and later in writing, Hymas requested that the Service consider him for all cooperative farming agreements administered by the Mid-Columbia River National Wildlife Refuge Complex in 2013. Compl. ¶ 45, D. Ct. Dkt. 86 (ER 621); *see* ER 244 (Hymas's 2013 bid). On April 15, 2013, Hymas received a letter from Stenvall, rejecting his bids. Compl. ¶¶ 47, 48, D. Ct. Dkt. 86 (ER 622); *see* ER 243 (Apr. 12, 2013 letter from Stenvall). In his letter,

Stenvall stated that the Service was "not soliciting bids for the cooperative farming program on the Complex for this year" because "[o]pen bids for cooperative farming on the Refuges are sought when new lands are brought into the farming program or if existing farmlands become available due to the loss of a cooperator." ER 243. He further stated that, "[o]nce initially established, we generally continue to utilize existing cooperators for those lands unless there is a problem with their performance." *Id.*

After denying Hymas's attempts to obtain a cooperative farming agreement in 2012 and 2013 – and after Hymas filed his lawsuit – the Service purported to consider Hymas's bid for the 2014 farming season, *see* ER 348, and for the 2015 farming season, *see* D. Ct. Dkt. 73-1, ¶ 6 (ER 666). However, the Service awarded cooperative farming agreements to the same individuals who had been farming at the Mid-Columbia River National Wildlife Refuge Complex for decades. *See id.* In his second amended complaint, Hymas challenged the Service's selection of cooperators in 2012, 2013, 2014, and 2015, Compl. Count III, ¶¶ 83-84, D. Ct. Dkt. 86 (ER 627), among other claims. Hymas sought monetary damages for the recovery of the bid preparation costs he had incurred, a declaratory judgment that the Service's selection of cooperative farmers was unlawful, and an injunction, among other relief. *Id.* at 24-26 (ER 633-35).

II. STATUTES, REGULATIONS, AND POLICIES

A. Statutes and Regulations

In 1946, Congress amended An Act to Promote the Conservation of Wildlife, Fish, and Game, and for other Purposes, to authorize the Service "to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat," among other enumerated goals. Act of Aug. 14, 1946, ch. 965, § 1, 60 Stat. 1080, 1080 (codified as amended at 16 U.S.C. § 661). Congress required that the lands "made available to the Secretary of the Interior for the purposes of th[e] Act," such as the National Wildlife Refuges, "be administered directly or under cooperative agreements entered into . . . under such rules and regulations . . . as may be adopted by [the Secretary]." *Id.*, 60 Stat. 1081 (codified as amended at 16 U.S.C. § 664).

Pursuant to its rulemaking authority under the statute, in 1960, the Service promulgated a regulation allowing the Service to enter into cooperative agreements with individuals on a wildlife refuge. *See* 25 Fed. Reg. 8397, 8413 (Sept. 1, 1960) (codified at 50 C.F.R. § 29.2) ("Cooperative agreements with persons for crop cultivation . . . or the harvest of vegetative products . . . on wildlife refuge areas may be executed on a share-in-kind basis when such agreements are in aid of or benefit to the wildlife management of the area.").

B. U.S. Department of Interior Manual

As a bureau managed by the United States Department of Interior, the Service is bound by the provisions of the Departmental Manual. *See* 011 DM 1.2B (2018).[1] Under the provisions of the Departmental Manual effective as of January 9, 2008, *see* D. Ct. Dkt. 60-46, 505 DM 2 (2008) (ER 670), the Department "strongly encourage[s]" "[c]ompetition in making awards through cooperative agreements" and requires the Service to "make awards based on the merits," *id.*, 505 DM 2.13 (ER 678). The Departmental Manual requires "synopses of all cooperative agreement . . . opportunities [to] be posted to Grants.gov (www.grants.gov)." *Id.*, 505 DM 2.12 (ER 677). It further directs the Service to "develop procedures which provide for an independent objective evaluation of the applications prior to award" of cooperative agreements and to ensure "applications are scored on the basis of announced criteria." *Id.*, 505 DM 2.16A (ER 679).

C. U.S. Fish and Wildlife Service Policies

On January 16, 2014, the Service adopted Part 516 of the Fish and Wildlife Service Manual for all Service "employees who administer and manage grant and cooperative agreement awards." 516 FW 6.2A (ER 681). Under its Manual, the Service "must encourage competition when making grant and cooperative

[1] Chapter 1 of Part 011 of the Departmental Manual is available on the Department of the Interior's website at https://www.doi.gov/sites/doi.gov/files/elips/documents/chapter_1_purpose_and_structure.pdf.

agreement awards." 516 FW 6.7A (ER682). But the Service can award cooperative agreements without competition if one of certain enumerated criteria is present to justify issuing "a single source award[]," such as in cases where "a unique or innovative idea" is proposed or "a compelling and unusual urgency" exists. *Id.* & tbl. 6-3 (ER 682-83).

In addition, on February 26, 2014 – 10 months after Hymas commenced this litigation – the Service retroactively reinstated a "Refuge Manual" that it had previously terminated as of December 31, 2007, for the purpose of "converting the myriad of separate manuals" to the Service Manual.[2] The Refuge Manual had required the Service to select cooperative farmers according to the general procedures established for selecting individuals pursuing any type of use of a refuge for profit. *See* 6 RM 4.8A(3) (adopting procedures set forth in 5 RM 17) (ER 282); 5 RM 17.11 (providing for process of selecting economic use permittees) (ER 299). Under the Refuge Manual, "[w]here the available space . . . is limited" – as here where croplands within refuges are limited – "a permittee selection

[2] *See* ER 604-05 (3/25/1992 Director's Order No. 42 terminating Refuge Manual); ER 608 (2/26/2014 Amend. 15 to Director's Order No. 42 reinstating Refuge Manual); *see also* D. Ct. Dkt. 60-44, at 3 (9/27/1993 Amend. 1 extending termination date to 12/31/1994) (ER 687); *id.* at 4 (Amend. 12 extending termination date to 12/31/2005) (ER 688); ER 606 (extending termination date to 12/31/2006); ER 607 (Amend. 13 extending termination date to 12/31/2007).

process must be used to *equitably* limit the number of permittees." 5 RM 17.11A(1) (ER 299) (emphasis added).

As a "preferred" process of equitably selecting cooperative farmers, the Refuge Manual provided for (i) full and open competitive bidding process, (ii) an informal bidding process, and (iii) other equitable process such as a lottery or auction. 5 RM 17.11A(1)(a), (b) (ER 299-300). Even if full and open competitive bidding process were not to be used, the Refuge Manual specified that a refuge manager "should request bid quotations from any persons or agencies who may be interested in the [cooperative farming]" to "avoid favoritism in the bid process." 5 RM 17.11A(1)(a) (ER 299).

While the foregoing processes were generally preferred, the Refuge Manual also allowed for a "priority system" that could be used where it was "more appropriate to program needs." 5 RM 17.11A(1)(c) (ER 300). Under the priority system, in case of the "*renewal* of any privilege" – such as a renewal of a previous cooperative farming agreement for a certain field – "[p]revious . . . cooperators shall have priority over all other applicants . . . so long as there has been compliance with the provisions of the previous . . . agreement." 5 RM 17.11A(1)(c).1 (ER 300) (emphasis added).[3]

[3] In cases not involving the renewal of a prior cooperative agreement, the priority would be given to (1) applicants who owned the land at the time

D. McNary and Umatilla Refuge Cropland Management Plans

The Mid-Columbia River National Wildlife Refuge Complex adopted "Cropland Management Plans" for the Umatilla and McNary Refuges in 1996 and 1999, respectively. *See* ER 210 (Umatilla Plan); ER 193 (McNary Plan); *cf.* 6 RM 4.4A (requiring "[e]ach refuge on which cropland management occurs [to] have a current cropland management plan") (ER 277).

Recognizing the lack of "[o]ptions for providing a more natural means to secure food supplies for area waterfowl," ER 195, 213, the two Cropland Management Plans analyze three alternative methods of producing crops on the Refuges and conclude that cooperative farming agreements are the preferred production method, *see* ER 198-201 (estimating direct farming on McNary Refuge to require "[s]ignificant start up funding" and $77,000 in annual costs); ER 217-21 (estimating direct farming on Umatilla Refuge to require $429,000 in startup costs and $93,000 in annual costs).

According to the Plans, "[c]ooperators are selected in accordance with Refuge manual guidelines as outline[d] in 5RM 17.11A," ER 202, 223, which,

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the federal government acquired it, so long as they "reside and use land in the local vicinity"; (2) applicants who were tenants of the land at the time the federal government acquired it, so long as they "reside and use land in the local vicinity"; (3) applicants who "reside and use land in the local vicinity"; (4) applicants who use land in but do not reside in the local vicinity; and (5) applicants from outside the local vicinity, in that order. 5 RM 17.11A(1)(c).2-6 (ER 300-01).

as discussed above, preferred competitive bidding or other equitable process "[t]o avoid favoritism," 5 RM 17.11A(1)(a) (ER 299), while allowing for a priority system where appropriate for program needs, *see supra* pp. 10-11. Other than these references to the general provisions of the Refuge Manual, the two Cropland Management Plans do not address specifically which of the three preferred selection processes (full and open competitive bidding process, informal bidding process, or other equitable process such as a lottery or auction) the Service should use to select cooperators. Nor do they state any specific program needs rendering the priority system appropriate for the Refuges.

III. PROCEDURAL HISTORY

A. Proceedings Before the Court of Federal Claims

On April 25, 2013, Hymas filed a *pro se* complaint in the United States Court of Federal Claims, challenging the Service's selection of cooperators in 2012 and 2013. *See* D. Ct. Dkt. 60-2 (ER 703-14). In a memorandum prepared on April 29, 2013, "to facilitate judicial review," the Refuge manager Glass explained that the Service awarded a cooperative farming agreement for the Library Field to Lonnie Blasdel, who had been a cooperator for Fields 3 and 7 of the McNary Refuge but not for the Library Field. ER 235. Glass explained that the Service's award was justified under the Refuge Manual's priority system, notwithstanding the fact that the Refuge Manual was not then in effect, "[b]ecause Mr. Blasdel is a

former cooperator." ER 237. Glass also explained that allowing Hymas to farm the Library Field alone would limit the Service's ability to provide food to wildlife during the hunting season. *See id.* On the same day, Glass wrote a separate memorandum to justify the Service's award of five other contracts to incumbent cooperators by relying on the priority system. *See* ER 239-42.

At the direction of the court, *see Hymas*, 117 Fed. Cl. at 504, the Service requested Hymas (and the incumbent cooperators) to indicate whether they had interest in entering into cooperative farming agreements for the 2014 farming season. *See* ER 344-51. Instead of inquiring about Hymas's farming experience or ability to supply equipment, the Service asked for information pertaining only to his eligibility under the priority system. *See* ER 348; *see also* ER 359-60 (Hymas's response). One of the incumbent farmers failed to respond by the date requested, *see* ER 361, but the Service nonetheless awarded 2014 cooperative farming agreements (with a five-year term) to the same incumbent farmers, *see* ER 366-86. The Service also prepared memoranda to justify its reliance on the priority system. *See* ER 340-43; ER 362-65.

In February 2014, through *pro bono* counsel appointed by the Court of Federal Claims, Hymas filed an amended complaint, challenging the Service's selection of cooperators in 2013 and 2014. *See* D. Ct. Dkt. 60-34 (ER 689-702). In July 2014, the Court of Federal Claims held that the Service's cooperative

farming agreements were subject to the competitive bidding requirements under federal procurement laws and that the Service's selection of cooperators was arbitrary and capricious. *See Hymas*, 117 Fed. Cl. at 502-06. Specifically, the court held that (1) the Service was not authorized to rely on the Refuge Manual's priority system for the 2013 and 2014 farming seasons because it had been terminated, *id.* at 504-05; (2) the Service's reliance on the priority system violated the requirements under the Departmental Manual that "the Service conduct an objective review of the merits and rank qualified applicants, before the cooperative farming agreements were awarded," and that the Service provide "public notice," *id.* at 504; and (3) "[r]elying on the priority system that ensures an incumbent or prior farmer-cooperator will continue to be awarded cooperative farming agreements in near-perpetuity, was arbitrary, capricious, lacked a rational basis and prejudiced Mr. Hymas, as well as other potential farmer-cooperators," *id.* at 506.

The Court of Federal Claims ordered the Service to terminate cooperative farming agreements in effect at the end of the 2014 farming season and ordered Hymas to move for bid and proposal costs. *Id.* at 509. Pursuant to that order, in November 2014, the Service terminated cooperative agreements that were then effective. *See* D. Ct. Dkt. 73-1, ¶ 5 (ER 665). After a public bidding process, in February 2015, the Service awarded five procurement contracts to the five

incumbents, Blasdel, Peterson, Pierce, Frederickson, and Maddox, with a three-year term and two one-year renewal options. *See id.* ¶ 6 (ER 666).

B. Proceedings Before the Federal Circuit

In January 2016, the United States Court of Appeals for the Federal Circuit vacated the judgment of the Court of Federal Claims for lack of jurisdiction. *See Hymas v. United States*, 810 F.3d 1312 (Fed. Cir. 2016). The Federal Circuit held that the Service's cooperative farming agreement was not a procurement contract, but a cooperative agreement through which the Service provides *assistance* to private farmers to promote wildlife conservation, *id.* at 1328, and thus not subject to review by the Court of Federal Claims, *id.* at 1327.

C. Proceedings Before the Eastern District of Washington

On remand from the Federal Circuit, the Court of Federal Claims transferred the case to the United States District Court for the Eastern District of Washington. *See* D. Ct. Dkt. 60 (ER 668). Appellees moved to dismiss Hymas's claims as moot, on the basis that all cooperative agreements previously awarded in 2013 and 2014 had expired or been replaced by new contracts awarded in February 2015. *See* D. Ct. Dkt. 73 (ER 658-63). On November 30, 2016, the District Court held that "a live controversy exists and Hymas's claims are not moot" because (1) the court could grant Hymas "damages in the amount of his bid preparation costs," regardless of whether the challenged agreements were in effect; (2) in light of

the Federal Circuit decision, the Service could repeat the challenged conduct; and (3) the Service's award of cooperative agreements with a one-year term could evade review given their short duration. D. Ct. Dkt. 80, at 5-6 (ER 37-38).

In December 2016, with the District Court's leave, *see id.* at 6-7 (ER 38-39), Hymas filed *pro se* a second amended complaint, seeking damages and injunctive and declaratory relief. *See* D. Ct. Dkt. 86 (ER 610-57).[4] In March 2017, the District Court dismissed Hymas's claims except for Count III, in which he alleged that the Service's "award of [cooperative farming agreements] from 2012 through 2015 was arbitrary, capricious, an abuse of discretion, and contrary to law." D. Ct. Dkt. 96, at 18 (ER 31).

D. The Service's 2017 Policy

On August 3, 2017, 10 days after Appellees filed their answer, *see* D. Ct. Dkt. 119 (ER 130-50), the Service issued a policy stating that it would employ an "open, competitive process" in awarding all future cooperative farming agreements on National Wildlife Refuges, newly dubbed as "Cooperative Agricultural Agreements." U.S. Fish & Wildlife Serv., *Habitat Management Practices, Ch. 2 Cooperative Agricultural Use*, 620 FW 2 (Aug. 3, 2017) (the "2017 Policy"), *available at* https://www.fws.gov/policy/620fw2.pdf (ER 122-29). Two weeks

[4] On August 22, 2016, Hymas's *pro bono* counsel appointed by the Court of Federal Claims withdrew because he was not admitted to practice in the State of Washington and was unable to find local counsel. *See* D. Ct. Dkts. 67, 70.

later, Appellees moved to dismiss Hymas's claims as moot. *See* D. Ct. Dkt. 122 (ER 107-18).

The Service issued the 2017 Policy without a formal rulemaking process. The 2017 Policy supersedes the section of the Refuge Manual that provided for various methods of selecting cooperative farmers, including the priority system. *See* 2017 Policy at 1 (stating that the 2017 Policy "[s]upersedes all other policies related to cooperative agricultural use on refuges, including 6 RM 4, 'Cropland Management,' . . . and applicable parts of 5 RM 17, 'Administration of Special Uses,' including, but not limited to, section 17.11") (ER 122).

Although the 2017 Policy affirms that the "Cooperative Agricultural Agreement" is a "cooperative agreement," § 2.4D (ER 124) – and not a "procurement contract" – it asserts that the Cooperative Agriculture Agreement will nevertheless *not* be subject to the regulations and policies generally applicable to "cooperative agreements" (as well as to all financial assistance awards generally), *see* § 2.2E (ER 123). Those regulations and policies require competition unless one of the enumerated criteria is met to justify issuing "a single source award[]" instead. *See supra* pp. 9-10 (discussing Part 516 of the Service Manual).

According to the 2017 Policy, however, the Service will still employ its own version of "an open, competitive process." § 2.5 (ER 124). Under this "open, competitive process," the Service will publish a "Notice of Cooperative Agricultural

Opportunity" on the appropriate NWRS website for any cooperative farming agreements "as that opportunity becomes available." § 2.11A (ER 126-27). The Service will "score and rank each application based on objective criteria," § 2.11C (ER 127), but these criteria may "vary depending on the needs and objectives" of the Service, § 2.12A (ER 127). Mirroring the priority system in the Refuge Manual, the first objective criterion is "[e]xperience in the type of agricultural opportunity posted, especially *personal experience on NWRS lands or comparable land*." § 2.12B(1) (ER 128) (emphasis added). Other criteria include experience in cultivating crops, having proper equipment, and "[o]ther objective criteria necessary to ensure the cooperative agriculture meets the resource management objectives of the NWRS lands." § 2.12B(2)-(4) (ER 128).

The 2017 Policy does not apply to any of the cooperative farming agreements currently effective in the McNary and Umatilla Refuges. It states that "[t]he Service will respect any existing Cooperative Agriculture Agreements (CAA) until the term of those agreements have ended or up to 5 years from when this policy was enacted, whichever comes first." § 2.2D. The Service awarded five cooperative farming agreements on February 1, 2015, to five incumbent farmers, all of which had a three-year term and were renewable for another two years. *See* D. Ct. Dkt. 73-1, ¶ 6 (ER 666).

E. The District Court's Dismissal Order

On May 29, 2018, the District Court granted Appellees' motion to dismiss, holding that (1) the August 2017 Policy mooted Hymas's claims for injunctive and declaratory relief because "it is now absolutely clear" that the Service's allegedly wrongful behavior could not be expected to recur, D. Ct. Dkt. 130, at 11 (ER 12); and (2) all cooperative farming agreements for which Hymas submitted bids "were terminated and reopened for bids" for the 2015 farming season, rendering Hymas's claim for bid preparation costs moot, *id*. In a footnote, the court stated that "Hymas did not submit a bid" for the 2013 farming season. *Id.* at 11 n.1.

STANDARD OF REVIEW

A district court's dismissal of an action for mootness is reviewed de novo. *See Bell v. City of Boise*, 709 F.3d 890, 896 (9th Cir. 2013). "A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence. Where jurisdiction is intertwined with the merits, [the court] must assume the truth of the allegations in a complaint unless controverted by undisputed facts in the record." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (citation and alterations omitted).

SUMMARY OF ARGUMENT

I. The District Court erred in dismissing Hymas's APA claim as moot solely on the basis of the Service's 2017 Policy. Appellees failed to meet their "formidable burden" of showing that the 2017 Policy made it "absolutely clear" the Service would cease its long-standing practice of favoring incumbent farmers in awarding cooperative farming agreements. When Appellees moved to dismiss Hymas's claims as moot, a mere two weeks had passed since the Service adopted the 2017 Policy, and the policy had no effect on the existing cooperative farming agreements. Appellees provided no facts demonstrating that the Service's practice of favoring incumbents had changed at all. Indeed, the 2017 Policy itself directs the Service to consider an applicant's "personal experience on NWRS lands" as the first "objective" criterion. In light of the Service's history of violating pre-existing regulations and policies requiring competition, it cannot be ruled out that the Service will continue to favor incumbent farmers, as it has done for decades. This is particularly true given the Service's repeated pronouncements that favoring incumbents through a priority system, not a competitive process, is the most appropriate method for its needs.

II. The District Court erred in dismissing Hymas's claim for bid preparation costs as moot. First, the District Court erred in limiting the scope of Hymas's claim for bid preparation costs to those incurred in connection with the

2014 farming seasons, despite Hymas's allegations that he submitted bids for prior farming seasons and records supporting the same. Second, while the Service terminated certain cooperative agreements at the end of the 2014 farming season and solicited bids for the 2015 farming season, that solicitation did not "completely and irrevocably" eradicate the effects of the Service's arbitrary and capricious practice of favoring incumbents in prior farming seasons. Hymas was deprived of an opportunity to be fairly considered for cooperative farming agreements that expired before the solicitation, and Hymas could never again be considered for farming during the prior seasons that already had passed. Even after the solicitation, the Service awarded contracts to the same incumbents who had farmed on the Refuges for decades. Hymas's claim for bid preparation costs, as well as his APA claim, are not moot.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING HYMAS'S APA CLAIM AS MOOT

The District Court erred by dismissing Hymas's APA claim solely on the basis of the Service's 2017 Policy – adopted four years after Hymas commenced this litigation. The government bears a "formidable burden" when claiming that its voluntary cessation of a challenged practice renders a case moot. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). It must be "absolutely clear [that] the allegedly wrongful behavior could not reasonably be

expected to recur." *Id.* The government did not meet this "formidable burden" below, and the District Court's conclusion to the contrary ignored established law.

A. The District Court's Ruling That the Service's 2017 Policy Alone Rendered Hymas's APA Claim Moot Was Contrary to Law

1. As this Court held in *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991), the government may not rely "exclusively on its post-litigation promulgation of a new . . . policy" when moving to dismiss on mootness grounds. *Id.* at 1507. In *Gluth*, the Arizona Department of Corrections argued that a new library access policy mooted a claim by prisoners that the department had failed to provide constitutionally adequate access to the courts. *Id.* At argument, the department conceded its exclusive reliance on the new policy was "overreaching," and this Court emphasized that the department had "provided no *facts* to support its claim that the inmate access situation had changed at all." *Id.*; *see also Natural Res. Def. Council v. County of Los Angeles*, 840 F.3d 1098, 1104 (9th Cir. 2016) (criticizing the district court's failure to "cite any positive evidence" that the defendants would not resume the allegedly wrongful behavior).

When Appellees filed their motion to dismiss here, a mere two weeks had passed since the Service's adoption of the 2017 Policy. Like in *Gluth*, Appellees "provided no *facts* to support [their] claim that the [Service's practice of awarding cooperative farming agreements] had changed at all." 951 F.2d at 1507. Indeed, the 2017 Policy applied to none of the cooperative farming agreements that were

effective in the McNary and Umatilla Refuges, whose contract terms may extend until 2020. *See* § 2.2D (stating "[t]he Service will respect any existing Cooperative Agriculture Agreements (CAA) until the term of those agreements have ended") (ER 123); D. Ct. Dkt. 73-1, ¶ 6 (ER 666) (noting that five contracts awarded on February 1, 2015, had a three-year term and were renewable for another two years). In deeming the 2017 Policy alone sufficient to moot Hymas's APA claim, the District Court stripped the government's burden of any meaningful weight.

2. Nor are the government's assurances in its motion to dismiss that it will cease favoring incumbent cooperators sufficient to moot this case. It is axiomatic that a defendant's bare assertion that the alleged wrongdoing will no longer occur cannot meet the "formidable" burden required for mootness. *See United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968) ("[A]ppellees' own statement that [the challenged actions would not recur] . . . , standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes."); *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1009 (9th Cir. 1978) ("[T]he city's own statement of mootness cannot support an affirmance on that ground."); *accord Center for Biological Diversity v. Export-Import Bank of the United States*, 894 F.3d 1005, 1011 (9th Cir. 2018).

While the government is presumed to act in good faith, this presumption "cannot overcome a court's wariness of applying mootness under 'protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.'" *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953)); *see Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) ("We presume that a government entity is acting in good faith when it changes its policy, but when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again.") (citation omitted). As described further below, the 2017 Policy simply does not meet the threshold standards to deprive the District Court of its power to adjudicate this case on the merits.

B. The Service's 2017 Policy Does Not Make It "Absolutely Clear" That the Service Will Cease Its Long-Standing Practice of Favoring Incumbent Cooperators

1. The government's voluntary cessation of wrongful conduct generally moots a claim only where there are sufficient procedural safeguards in place to constrain the government from later reverting back to the offending behavior. *See Fikre v. FBI*, 904 F.3d 1033, 1039 (9th Cir. 2018); *see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 963 n.1 (9th Cir. 1999) (concluding that a changed policy was insufficient to moot a case because the policy, adopted

after the commencement of the suit, was "'not implemented by statute or regulation and could be changed again'") (quoting *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998)). First and foremost, the 2017 Policy promising "open, competitive process" for future awards does not moot Hymas's APA claim because the Service "remains practically and legally free to return to [its] old ways despite abandoning them in the ongoing litigation." *Fikre*, 904 F.3d at 1039 (alteration in original).

This Court's decision in *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013), is instructive. In *Bell*, the district court found a § 1983 suit challenging the enforcement of city ordinances in certain circumstances moot following the Boise Chief of Police's issuance of a "Special Order," with instructions to post the order in the Policy Manual, prohibiting enforcement of the ordinances in the challenged circumstances. *Id.* at 900. On appeal, this Court reversed, concluding the claim was not moot because, "[e]ven assuming Defendants have no intention to alter or abandon the Special Order, the ease with which the Chief of Police could do so counsels against a finding of mootness." *Id*. This Court particularly emphasized that the Special Order was "not a formal written enactment of a legislative body and thus was not subject to any procedures that would typically accompany the enactment of a law." *Id.*; *see Martin v. City of Boise*, 920 F.3d 584, 607 (9th Cir. 2019) (explaining that, in *Bell*, the Court "emphasized that the Special Order was a statement of administrative policy and so could be amended or reversed

at any time"). The Court also observed the Special Order was not "referenced or incorporated in the Ordinances." *Bell*, 709 F.3d at 900; *see also Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991) ("[A] case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the [offending] provision.").

Here, the 2017 Policy is not a "regulation," as posited in Appellees' motion to dismiss, D. Ct. Dkt. 122, at 5 (ER 111), but an informal policy that did not go through notice-and-comment rulemaking. As in *Bell*, there is nothing to prevent the Service from returning to a priority system by issuing a new policy. While the 2017 Policy purports to supersede the sections of the Refuge Manual regarding the selection of cooperative farmers, no corresponding change has been made in any Refuge-level cropland management plans or other Service documents to affirm the 2017 Policy. *See Bell*, 709 F.3d at 900 (emphasizing that "[n]or is the Special Order referenced or incorporated in the Ordinances").

The 2017 Policy also states that the newly dubbed "Cooperative Agriculture Agreement" will *not* be subject to the regulations and policies generally applicable to all awards of cooperative agreements that require competition. § 2.2E (ER 123). While the Service avows that it will employ an "open, competitive process," the first "objective" criterion by which the Service will rank applicants is "personal experience on NWRS lands." § 2.12B(1) (ER 128). On the face of the 2017

Policy, therefore, it is unclear – far from "absolutely clear" – that the Service's own version of an "open, competitive process" will be any different in practice from its long-standing practice of favoring incumbent or prior farmers.

2. Moreover, as the Court of Federal Claims has observed, the Service has a history of relying on *ad hoc* policy pronouncements and disregarding its own policies and manuals, which should further dissuade this Court from finding mootness solely on the basis of the 2017 Policy. *See Gluth*, 951 F.2d at 1507 ("Even assuming that the policy meets constitutional standards on its face, given the Department's history of allegedly denying access arbitrarily and the vagueness of the new policy, it cannot be said 'with assurance' that there is no 'reasonable expectation' that the alleged violations will recur.").

First, when the Service explained in *post hoc* memoranda that it had relied on the Refuge Manual in awarding 2013 and 2014 cooperative agreements, *see* ER 340-43; ER 362-65, the Service had no authority to invoke the Refuge Manual because it had been terminated at the end of 2007. It was only 10 months after Hymas's filing of his complaint against Appellees that the Service retroactively reinstated the Refuge Manual to justify its practice of favoring incumbent cooperators. *See supra* p. 10 & note 2.

Second, even if the Refuge Manual had been in effect, the Service violated its terms by giving priority to an incumbent farmer when awarding a cooperative

farming agreement for a new field that had not been farmed before. *See* ER 237 (relying on priority system to award Library Field to Lonnie Blasdel). Because the Library Field was a new field that became available for cooperative farming, there was no previous cooperator for that field. Therefore, there was no "renewal of any privilege" or "previous . . . agreement" to justify giving priority to Blasdel under the Refuge Manual. 5 RM 17.11A(1)(c).1 (ER 300).

Third, the Service's practice of favoring incumbent farmers violated the Departmental Manual by failing to conduct an "independent objective evaluation," D. Ct. Dkt. 60-46, 505 DM 2.16A (2008) (ER 679), "based on the merits," *id.*, 505 DM 2.13 (ER 678), before awarding cooperative agreements. Indeed, in soliciting interests for the 2014 cooperative farming agreements, the Service reflexively chose incumbent farmers even though one of them failed to express interest by the required due date. *See* ER 344 (requesting response from Strebin by 12/5/2013); ER 361 (Strebin's response on 12/16/2013); ER 367 (selecting Strebin despite Hymas's timely response); *cf.* ER 359-60 (Hymas's response). In addition, no record exists that the Service has complied with the notice requirement under the Departmental Manual. *See* D. Ct. Dkt. 60-46, 505 DM 2.12 (2008) (requiring all cooperative agreement opportunities to be posted online) (ER 677).

Fourth, the Service's reliance on the priority system violates its own manual, which allows the Service to award a cooperative agreement without competition

only if one of the enumerated criteria, such as in cases of "a unique or innovative idea" or "a compelling and unusual urgency," is present. 516 FW 6.7A & tbl. 6-3 (ER 682-83).

3. Where a mere change in policy has been deemed sufficient to moot a case, the policy was "entrenched" and "permanent"; "ha[d] been in place for a long time when [the court] consider[ed] mootness," *Rosebrock*, 745 F.3d at 972, 976; and was "unequivocal," *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000).

These safeguards are particularly important where the defendant has never admitted that the ceased conduct was wrongful. *See Forest Guardians v. Johanns*, 450 F.3d 455, 460, 462 (9th Cir. 2006) (Forest Service's practice of not monitoring utilization levels of grazed allotment likely to persist despite interim monitoring because the agency "argued throughout th[e] litigation that it is not required to meet th[ose] monitoring requirements"); *Armster v. U.S. Dist. Court for Cent. Dist. of California*, 806 F.2d 1347, 1359 (9th Cir. 1986) (finding the government's assertion that the alleged wrongdoing would not reoccur "far from credible," particularly "because the Justice Department has never conceded that the [conduct] was unlawful"); *Porter v. Bowen*, 496 F.3d 1009, 1016, 1017 (9th Cir. 2007) (letter from California Secretary of State to the California legislature tolerating the operation of vote-swapping websites pending clarification of state election code did not moot lawsuit because "the Secretary has maintained throughout the nearly seven years

of litigation . . . that [her predecessor] had the authority under state law to threaten [plaintiffs] with prosecution").

Here, the 2017 Policy is neither entrenched nor sufficiently unequivocal to moot Hymas's claims and deny his right of judicial review. The Service filed its motion to dismiss on August 17, 2017, a mere two weeks after the 2017 Policy was adopted. Further, as discussed above, the 2017 Policy does not "unequivocally" rule out that the Service will not, in practice, apply a priority system. The 2017 Policy allows for consideration of a non-exhaustive list of factors, the first of which is "[e]xperience in the type of agricultural opportunity posted, especially personal experience on NWRS lands or comparable land." § 2.12B(1) (ER 128).

The regulatory context of this case is also telling. *See Gluth*, 951 F.2d at 1507. The Service invoked a priority system even though the Refuge Manual clearly preferred formal or informal competitive bidding or other equitable process such as a lottery over a priority system. *See* 5 RM 17.11A(1)(c) (ER 300). Appellees have argued throughout this litigation that their priority system was the most appropriate method and was not arbitrary and capricious. *See Forest Guardians*, 450 F.3d at 462. For example, during the course of this litigation, on November 21, 2013, the Service issued a "Cooperative Farming Selection Process" memorandum reaffirming that a priority system is the most appropriate method for awarding cooperative farming agreements. ER 340-42. Critically, the justifications given

for using the priority system – "experience participating in the cooperative program" and "experience with using land in the local vicinity" – are the same objective criteria that the Service may take into account under the 2017 Policy. In fact, as noted, the Service has demonstrated that, even when operating under the pretense of a competitive system, the same cooperators always receive the cooperative farming agreements. *See* D. Ct. Dkt. 73-1 (ER 664-67).

In short, the Service's 2017 Policy does not possess any of the required indicia to make "absolutely clear" the alleged wrongdoing will not recur. *Friends of the Earth*, 528 U.S. at 190. Hymas's APA claim is not moot.

II. THE DISTRICT COURT ERRED IN DISMISSING HYMAS'S CLAIM FOR BID PREPARATION COSTS AS MOOT

In addition to his claim for injunctive and declaratory relief under the APA, Hymas sought to recover his bid preparation costs under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Hymas's claim is based on the implied contract theory that the Service breached its promise of "honest and fair consideration" that induced Hymas to spend his money to prepare his bids. *See Heyer Prods. Co. v. United States*, 177 F. Supp. 251, 252 (Ct. Cl. 1959).

A. The District Court Erroneously Found That Hymas Submitted Bids for Cooperative Farming Agreements Only in 2014

As an initial matter, the District Court erroneously limited the scope of Hymas's claim for bid preparation costs to those incurred in preparing bids for the

2014 cooperative farming agreements. The District Court refused to accept as true Hymas's allegations in the complaint that he bid on 2012 and 2013 cooperative agreements, and found, without citing any authority or record material, that "Hymas did not submit a bid for the 2013 [cooperative farming agreements]." D. Ct. Dkt. 130, at 11 n.1 (ER 12). The District Court then concluded – erroneously, as discussed in Part II.B – that the Service's solicitation of bids in November 2014, pursuant to the order of the Court of Federal Claims, mooted Hymas's claim for 2014 bid preparation costs. *See id.* at 11.

Where the issue of mootness is "intertwined with the merits," the court "must assume the truth of the allegations in a complaint unless controverted by undisputed facts in the record." *Warren*, 328 F.3d at 1139 (alterations omitted). Here, the question whether the Service's solicitation of bids for the 2015 farming season mooted Hymas's claim for bid preparation costs is intertwined with the merits of his claim: (1) whether Hymas was induced by the Service to spend his money to prepare bids and (2) whether the Service acted arbitrarily and capriciously in violation of its promise of "honest and fair consideration." But the District Court failed to "assume the truth of the allegations in a complaint" that were amply demonstrated by the record. *See id.*

In his second amended complaint, Hymas alleged that he submitted bids for cooperative farming agreements in 2013. *See*, *e.g.*, Compl. at 25, Prayer for Relief,

¶ 14, D. Ct. Dkt. 86 (alleging that he submitted "the sole bid for Library Field 4 in 2013") (ER 634); *see also id.*, Count III, ¶ 84 (challenging the Service's selection of cooperators in 2012, 2013, 2014, and 2015) (ER 627). After Hymas first contacted the Mid-Columbia River National Wildlife Refuge Complex in June 2012, the Refuge manager Glass repeatedly invited Hymas to respond to an imminent public notice – inducing Hymas to spend his money to prepare his bid. Compl. ¶¶ 29-38, D. Ct. Dkt. 86 (ER 619-21). For a 10-month period, Hymas visited the Refuges, discussed the condition of the irrigation system with Glass, and offered to pay the cost of repairing the system, *id.* ¶¶ 34-38 (ER 620-21), all for the purpose of obtaining a cooperative farming agreement. After the Service's months-long stonewalling, on April 3, 2013, Hymas "formally request[ed] to be included in any of the 8 contracts that will be given [in 2013]." ER 244. By a letter dated April 12, 2013, *see* ER 243, the Service "rejected [Hymas's] bid as to all eight contracts." Compl. ¶ 47, D. Ct. Dkt. 86 (ER 622).

No "undisputed facts" in the record controvert Hymas's allegations that he submitted bids for the 2013 cooperative farming agreements. The District Court erred in liming the scope of Hymas's claim for bid preparation costs.

B. The District Court Erred in Holding That the Service's Solicitation of Bids for the 2015 Farming Season Mooted Hymas's Claim for Bid Preparation Costs Incurred in Prior Years

An agency's solicitation of bids to correct a challenged award moots a protestor's claim for bid preparation costs incurred in connection with the original

bid only if such corrective action "completely and irrevocably eradicate[s] the effects" of the challenged award. *Square One Armoring Serv., Inc. v. United States*, 123 Fed. Cl. 309, 324 (2015). Indeed, the corrective action line of cases cited in Appellees' motion to dismiss, *see* D. Ct. Dkt. 122, at 8-9 (ER 114-15), and relied on by the District Court, reaffirm and apply this foundational principle.

For example, in a bid protest challenging the Department of Education's award of debt-collection contracts, the department issued a corrective action that stayed performance on the contracts at issue and allowed the protestors an opportunity to submit new proposals for evaluation. *See Continental Serv. Grp., Inc. v. United States*, 132 Fed. Cl. 570, 574 (2017). However, until the correction action was completed, the protestor incurred a loss of $7 million in revenue per month because it was unable to receive or compete for new debt-collection accounts. The court found this economic injury prevented the protestor's claim from being moot because the corrective action did not "'completely and irrevocably eradicate the effects of the violation.'" *Id*. at 577 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) (alterations omitted).

Similarly, in *GTA Containers, Inc. v. United States*, 103 Fed. Cl. 471 (2012), the court found that the Marine Corps' cancellation of contracts awarded did not moot a protest to that award because work was "still proceeding on the awarded contract under the auspices of military necessity." *Id.* at 481. Thus, the corrective

action was found "only a partial termination of the allegedly illegal contract award." *Id.*

1. Here, as an initial matter, four of the 2013 cooperative farming agreements on which Hymas had bid unsuccessfully had a one-year term and thus expired in early 2014. *See* ER 151 (award to Strebin for 3/1/2013 to 2/28/2014); ER 156 (award to Frederickson for 2/20/2013 to 3/1/2014); ER 161 (award to Maddox for 2/20/2013 to 3/1/2014); ER 166 (award to Peterson for 3/1/2013 to 2/28/2014).

Naturally, these cooperative agreements were not among those that the Service had to terminate and solicit in November 2014, pursuant to the order of the Court of Federal Claims. *See* D. Ct. Dkt. 73-1, ¶ 5 (ER 665). Therefore, Hymas's claim for bid preparation costs concerning these four 2013 cooperative agreements was not mooted by any action taken by the Service in November 2014.

2. Hymas's claim for bid preparation costs is also not moot with respect to those cooperative agreements that the Service did terminate at the end of the 2014 farming season. The Service's solicitation of bids for the 2015 farming season did not "completely and irrevocably eradicate[]" the effects of the Service's practice of favoring incumbent farmers, *Davis*, 440 U.S. at 631, because Hymas already had been deprived of an opportunity to farm during the 2012, 2013, and 2014 farming seasons.

As in *GTA Containers*, the Service's termination of the 2014 cooperative agreements and subsequent solicitation was "only a partial termination of the allegedly illegal" cooperative farming agreements, 103 Fed. Cl. at 481, which already had been implemented for several farming seasons. *See* D. Ct. Dkt. 73-1, ¶¶ 3-5 (award to Pierce was implemented for two seasons from 4/11/2013 to 11/24/2014; award to Blasdel for two seasons from 4/26/2013 to 11/24/2014; award to Frederickson for one season from 3/11/2014 to 11/24/2014; awards to Maddox, Peterson, and Strebin for one season from 3/20/2014 to 11/24/2014) (ER 665). Lost opportunities to be considered for awards in prior farming seasons were not, and could not be, retroactively rectified. As in *Continental Service Group*, Hymas's economic injury, while not recoverable itself, nevertheless prevents his claim for bid preparation costs from being moot.

Square One Armoring – the only case cited by the District Court in support of its dismissal of Hymas's claim for bid preparation costs, *see* D. Ct. Dkt. 130, at 11 (ER 12) – is inapposite here. The court in *Square One Armoring* dismissed a claim for bid proposal costs as not *ripe* while the corrective action was being completed because the plaintiff may still be awarded the contract. 123 Fed. Cl. at 330 (citing *Beta Analytics Int'l, Inc. v. United States*, 75 Fed. Cl. 155, 159 (2007)); *see B&B Med. Servs., Inc. v. United States*, No. 13-463C, 2014 WL 3587275, at *7 n.18 (Fed. Cl. June 23, 2014) ("B & B's request for bid preparation and proposal

costs is not yet ripe because B & B remains in the competition for the contract and may be awarded the contract."); *Technical Innovation, Inc. v. United States*, 93 Fed. Cl. 276, 279 n.2 (2010) (same).

Here, the Service's corrective action was limited to "farming services starting with the 2015 season." ER 387. Thus, unlike in *Square One Armoring*, Hymas could never again be considered for farming during the prior seasons that already had passed. *See Beta Analytics Int'l*, 75 Fed. Cl. at 159. And, to be sure, even after the Service's competitive bidding, all cooperative farming agreements were awarded to the incumbent farmers. *See* D. Ct. Dkt. 73-1, ¶ 6 (ER 666).

Despite the 2017 Policy and the Service's termination of cooperative farming agreements in November 2014, a live controversy exists. Hymas is entitled to (1) a declaratory judgment that the Service's long-standing practice of favoring incumbent farmers is unlawful, (2) an injunction, and (3) the bid preparation costs he incurred to obtain cooperative farming agreements for the 2012, 2013, and 2014 farming seasons.

CONCLUSION

The District Court's judgment should be reversed.

Respectfully submitted,

/s/ Minsuk Han

MINSUK HAN
BETHAN R. JONES
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Counsel for Jay Hymas,
d/b/a Dosmen Farms

May 13, 2019

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant states that there are no other cases pending in this Court related to the case being briefed.

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-1 FOR CASE NO. 18-35488

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limitation permitted by Ninth Circuit Rule 32-1. This brief was prepared in Times New Roman 14-font and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), as well as the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 9,004 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office Word 2013) used to prepare this brief.

/s/ *Minsuk Han*

Counsel for Jay Hymas, d/b/a Dosmen Farms

STATUTORY AND REGULATORY ADDENDUM

1. 5 U.S.C. § 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 16 U.S.C. § 664 provides:

§ 664. Administration; rules and regulations; availability of lands to State agencies

Such areas as are made available to the Secretary of the Interior for the purposes of sections 661 to 666c of this title, pursuant to sections 661 and 663 of this title or pursuant to any other authorization, shall be administered by him directly or in accordance with cooperative agreements entered into pursuant to

the provisions of section 661 of this title and in accordance with such rules and regulations for the conservation, maintenance, and management of wildlife, resources thereof, and its habitat thereon, as may be adopted by the Secretary in accordance with general plans approved jointly by the Secretary of the Interior and the head of the department or agency exercising primary administration of such areas: *Provided*, That such rules and regulations shall not be inconsistent with the laws for the protection of fish and game of the States in which such area is situated: *Provided further*, That lands having value to the National Migratory Bird Management Program may, pursuant to general plans, be made available without cost directly to the State agency having control over wildlife resources, if it is jointly determined by the Secretary of the Interior and such State agency that this would be in the public interest: *And provided further*, That the Secretary of the Interior shall have the right to assume the management and administration of such lands in behalf of the National Migratory Bird Management Program if the Secretary finds that the State agency has withdrawn from or otherwise relinquished such management and administration.

3. The Little Tucker Act, 28 U.S.C. § 1346(a)(2), provides:

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * *

> **(2)** Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.
>
> * * *

4. 50 C.F.R. § 29.2 provides:

§ 29.2 Cooperative land management.

Cooperative agreements with persons for crop cultivation, haying, grazing, or the harvest of vegetative products, including plantlife, growing with or without cultivation on wildlife refuge areas may be executed on a share-in-kind basis when such agreements are in aid of or benefit to the wildlife management of the area.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed electronically 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 May 13, 2019.

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/ *Minsuk Han*

Minsuk Han
Counsel for Jay Hymas, d/b/a Dosmen Farms