14-35791

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY, *et al.*,

Plaintiffs-Appellants,

v.

NATIONAL PARK SERVICE, *et al.*,

Defendants-Appellees,

and

ROBERT ELOFSON, in his official capacity as the Director of the River Restoration Project for the Lower Elwha Klallam Tribe, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, Case No. 3:12-CV-05109-BHS
The Honorable Benjamin H. Settle

RESPONSE BRIEF FOR THE FEDERAL DEFENDANTS

JOHN C. CRUDEN
Assistant Attorney General

CARTER (COBY) HOWELL
JOSEPH T. MATHEWS
DAVID C. SHILTON
JENNIFER SCHELLER NEUMANN
Attorneys
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-2767
jennifer.neumann@usdoj.gov

Of Counsel:
CHRISTOPHER FONTECCHIO
Office of NOAA General Counsel
Department of Commerce
Seattle, Washington

ERIC W. NAGLE
KELLY R. POWELL
Office of the Solicitor
Department of the Interior
Portland, Oregon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

REGULATIONS:

GLOSSARY

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
EA	Environmental Assessment
EIS	Environmental Impact Statement
ER	Excerpts of Record
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
HGMP	Hatchery and Genetic Management Plan
Implementation EIS	Elwha River Ecosystem Restoration Implementation, Final Environmental Impact Statement, November 1996
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPS	National Park Service
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement
SER	Supplemental Excerpts of Record
WFC	Plaintiffs Wild Fish Conservancy, *et. al*

STATEMENT OF JURISDICTION

Plaintiffs Wild Fish Conservancy, *et. al* (collectively, WFC), brought suit against the National Park Service (NPS), U.S. Department of the Interior (Interior), U.S. Fish and Wildlife Service (FWS), U.S. Department of Commerce, National Marine Fisheries Service (NMFS), and certain officials at those agencies (collectively, Federal defendants) pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 701-706, National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, and Endangered Species Act (ESA), 16 U.S.C. §§ 1531, *et seq.* ER233-ER255;[1] ER810-ER817, ER972-ER1014. WFC alleged that agency actions related to fish hatcheries operated by employees of the Lower Elwha Klallam Tribe (Tribal defendants) and the State of Washington (not a defendant), violated those acts. Except as explained *infra*, the district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345.

The district court entered final judgment on September 4, 2014. ER1. WFC timely appealed on September 18, 2014. ER65-ER67; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

For 100 years, two dams prevented fish from moving more than 5 miles from Puget Sound up the Elwha River. The dams blocked 70 miles of pristine habitat, mostly in Olympic National Park, and altered the remaining habitat. The dams

[1] ER[page number] refers to WFC's Excerpts of Record. SER[page number] refers to the Federal and Tribal defendants' supplemental excerpts of record.

reduced native salmonid numbers, lead to the extirpation of some Elwha runs, and NMFS listed Elwha steelhead and Chinook salmon (which are part of the Puget Sound designated populations of those species), as threatened under the ESA. Between 2011 and 2014, NPS, at the direction of Congress, removed the dams. Though the dams are gone, their removal is allowing millions of cubic yards of sediment that accumulated behind the dams to wash downriver.

The Federal defendants, along with the Lower Elwha Klallam Tribe, the Washington Department of Fish and Wildlife, and independent scientific reviewers, spent twenty years studying dam removal and preparing for how best to protect the remnant native stocks from the sediment – which scientists predicted sometimes would be deadly and other times thick enough to seriously disrupt fish life activities. The scientists agreed the best approach in the short term was to rear juvenile native fish in protected hatcheries, then release the smolts when they could quickly and safely exit seaward, thereby protecting them from the sediment. Once sediment levels decrease (which will take several years), these native fish will be able to reproduce in the river without hatchery support. The evidence demonstrated that the risk of extinction was too great to forego hatchery protection. After robust NEPA and ESA processes, NMFS exempted hatchery operations from the regulatory prohibition on "take" of the listed salmonids.

In 2012, WFC sued, alleging that the Tribal defendants' operation of fish hatcheries violated the ESA and that the Federal defendants violated NEPA, the ESA, and the APA in exempting the hatcheries from the prohibition on take of the listed salmonids and in providing funding. WFC's primary concerns are that hatchery fish will compete with wild spawners for resources and will cause genetic changes leading to a reduction in fitness. The appeal presents the following issues.

1. Whether NMFS's conclusion that the hatcheries would not have significant effects was arbitrary or capricious where the overall restoration project had been analyzed in three prior environmental impact statements and NMFS's environmental assessment explained that hatchery operations would minimize any harmful effects.

2. Whether NMFS's completion of the remand moots WFC's challenge to the district court's interim remedy order and, if not, whether the court abused its discretion by declining to vacate the agency actions for a procedural violation of NEPA when vacatur could have imperiled native stocks.

3. Whether the district court correctly concluded that WFC cannot challenge agency funding decisions because the technical memorandum named in the complaint is not a final agency action that consummates a decisionmaking process and has no legal effect and WFC failed to give the required notice to the Bureau of Indian Affairs under the ESA.

4. If the complaint properly challenges funding decisions, whether the Federal defendants analyzed the effects of providing funds under both NEPA and the ESA.

5. Whether the district court correctly found that NMFS's issuance of take exemptions mooted the claim alleging the Tribal defendants violated the ESA by taking threatened species.

STATEMENT OF THE CASE

A. Legal Background

1. NEPA

NEPA is a procedural statute that does not mandate substantive results. It "simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002) (citations omitted). NEPA requires federal agencies to prepare an EIS only for "major Federal actions significantly affecting the quality" of the human environment. 42 U.S.C. § 4332(2)(C). An agency may first prepare an environmental assessment (EA) to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). If the agency makes a finding of no significant impact (FONSI), no EIS is required. *Id.*

2. ESA

The ESA provides substantive and procedural protections for species listed as either "endangered" (at risk of extinction, 16 U.S.C. § 1532(6)), or "threatened" (at

risk of becoming endangered, *Id.* § 1532(20)). For example, ESA § 9 prohibits the taking of endangered – but not threatened – species. *Id.* § 1538(a). For threatened species, ESA § 4(d) directs NMFS to issue regulations it "deems necessary and advisable to provide for the[ir] conservation." *Id.* § 1533(d). Regulations promulgated under this authority are referred to as "4(d) Rules" and NMFS may use this authority to extend protections afforded endangered species to threatened species. Puget Sound steelhead and Chinook salmon, including certain hatchery-spawned fish, are listed as threatened and protected against "take" by 4(d) Rules. 50 C.F.R. § 223.203(a); 50 C.F.R. § 17.44(w). NMFS exempted certain actions from this take prohibition. 50 C.F.R. § 223.203(b).

One of these exemptions, known as "Limit 6," excludes "actions undertaken in compliance with a resource management plan developed jointly by the State[] of Washington . . . and the Tribes," provided that certain conditions are satisfied. *Id.* Such plans include Hatchery and Genetic Management Plans (HGMPs). The primary condition is that NMFS must determine "that implementing and enforcing" the plan for hatchery operations "will not appreciably reduce the likelihood of survival and recovery of affected threatened [species]." *Id.* § 223.203(b)(6)(i). Hatchery operators (and others) can apply to NMFS for a "4(d) determination" if they plan to undertake activities covered by one of the exemptions and wish to be exempted from liability for take. But the ESA does not require salmon hatcheries to obtain federal authorization

and a hatchery which did not cause take would not violate the ESA even without a 4(d) exemption.

The ESA also requires federal agencies to consult with the expert wildlife agency (in the case of salmonids, NMFS), to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." *Id.* § 1536(a)(2). Formal consultation concludes with NMFS's issuance of a biological opinion (BiOp) assessing the likelihood of jeopardy to the species. *Id.* § 1536(b)(3)(A). If NMFS issues a "no jeopardy" BiOp, but determines that the action may incidentally take individual members of a listed species, it issues an incidental take statement (ITS) specifying the impact of the take, reasonable and prudent measures to minimize the impact of the take, and mandatory terms and conditions to implement the reasonable and prudent measures. *Id.* § 1536(b)(4)(i)-(iv). Any incidental take in compliance with an ITS's terms and conditions is not prohibited. *Id.* § 1536(o)(2).

B. Factual Background

1. Study of dam removal and effects on salmonids.

In 1992, Congress enacted the Elwha River Ecosystem and Fisheries Restoration Act (Elwha Act), Pub. L. No. 102-495 (Oct. 24, 1992) (reproduced at SER2730-SER2735), with the intent of "full restoration of the Elwha River ecosystem and the native anadromous fisheries." Elwha Act § 3(c). The Act authorized Interior

to acquire the two dams on the River from their private owners if the Secretary determined that full restoration required dam removal. *Id.* at § 3(a).

The Elwha salmonid populations were critically depressed after a century of being confined to less than ten percent of their former habitat. NMFS listed Puget Sound Chinook salmon as threatened in 2005 and Puget Sound steelhead as threatened in 2007. *See* 79 Fed. Reg. 20,802, 20,809, 20,811 (April 14, 2014). Other salmon species in the river are significantly depressed or have been extirpated. ER309-ER317, SER1174-SER1175, SER1200-SER1201, SER1226-SER1227, SER1266, SER1286-SER1288. Current returns of most salmonids are largely hatchery-origin, and in most cases, hatchery support has existed for decades. ER422, ER428, ER430, ER434-ER435, ER437-ER441; *see also* ER299.

While dam removal had the potential to restore wild runs by opening and restoring habitat, it also involved significant short-term risk to all remaining native stocks from millions of cubic yards of sediment trapped behind the dams washing downriver. For example, NPS found that after dam removal, 40% to 60% of the time, sediment would exceed 1,000 parts per million (ppm) below the former dam sites, a level lethal to salmonids at chronic exposures. ER1342. Scientists also predicted many days of sediment loads that would cause behavioral changes interfering with salmonid life functions, including migration and breeding. ER1342-ER1343.

The Federal defendants extensively studied these problems and concluded that hatchery support was necessary. NPS's first Fish Restoration Plan was transmitted to Congress in 1994 as part of a report required by the Elwha Act. ER1417-ER1432. The plan included hatchery support. *Id.* In 1995, NPS prepared a programmatic EIS, then decided to remove the dams. SER1773, SER2311.

In 1996, NPS, along with other federal agencies and the Lower Elwha Klallam Tribe, finalized a second EIS, on Elwha River Restoration Implementation (the Implementation EIS), which examined expected sediment loads, effects on fish, sediment management strategies, fish restoration strategies – including hatchery support – and ecosystem restoration measures. *E.g.*, ER1304, ER1320-ER1326, ER1340-ER1345. The Implementation EIS included an updated Fish Restoration Plan, which included hatchery support, and NPS selected that plan in its 1996 Record of Decision. ER1348-ER1357; SER1761. During the next decade, plans for fish restoration became more refined and underwent peer review by independent scientists, including the congressionally-requested, independent Hatchery Scientific Review Group (HSRG). *See, e.g.*, SER605, SER1148, ER1301. In 2005, NPS prepared a supplement to the Implementation EIS, due, among other factors, to the Chinook's listing. SER1392. The SEIS acknowledged potential adverse genetic, competition, and other effects from hatcheries. SER1525-SER1526, SER1528, SER1564.

In 2008, after considerable regional collaboration, NMFS's Northwest Fisheries Science Center published a technical memorandum containing updated strategies and best practices for restoring native Elwha salmonids. ER1120. Like earlier plans outlining the need for hatchery supplementation as mitigation, the 2008 memorandum reflected scientific consensus to recommend "artificial propagation for certain stocks as a primary and effective means to meet plan preservation and restoration objectives." ER1130. The memorandum explained that *"[t]hese hatchery facilities will be safe havens, serving as gene banks for Elwha River fish populations*, protecting fish from predicted high sediment loads in the river during the dam removal process, and ensuring that no year-class of fish is lost because of dam removal activities." ER1149. The overwhelming conclusion of scientists evaluating the Elwha River Restoration Project over the years has been that hatchery support is a critical tool to protect and restore the native Elwha stocks, including threatened steelhead and Chinook. *See, e.g.*, SER1160. The hatcheries are an interim measure and will be phased out once natural spawning in the upper basin reaches sufficient numbers. ER261, ER280, ER294-ER295.

The Federal defendants do not operate hatcheries on the Elwha. Instead, the agencies contemplated that existing hatcheries operated by the Tribe and State would be modified as necessary to provide appropriate hatchery support. *E.g.*, ER1349. At issue are the Tribe's hatcheries for native stocks of steelhead (threatened), coho, and

chum salmon, Washington's hatchery for Chinook salmon (threatened) and the Tribe and Washington's joint hatchery for pink salmon. ER261. Because of the unique restoration goals, the programs are operated to prevent extirpation and speed recovery.

After the Elwha's Chinook were listed and while steelhead were proposed for listing, NPS consulted under the ESA and NMFS agreed that dam removal would have significant short-term adverse effects on Chinook and steelhead. SER473-SER476. Hatchery support was an important element of NMFS's determination that dam removal would not cause jeopardy. SER450-SER451, SER480-SER481. NPS later reinitiated consultation and in July of 2012, NMFS again found dam removal would harm listed salmonids in the short term, but continued hatchery supplementation would guard the native fish against extirpation. SER556. Once again, NMFS concluded that dam removal, taking into account the beneficial effects from hatcheries, was not likely to jeopardize listed salmonids. SER557-SER558.

2. The actions at issue: Federal review of the HGMPs and funding.

At issue here is not the overall restoration project implemented by NPS or whether hatcheries would be used – those decisions were made in 1996 and not challenged by WFC – but NMFS' review of the HGMPs (the operational plans for the hatcheries developed by the Tribe and Washington State) for compliance with Limit 6 of the 4(d) Rule, and funding from NPS and the Bureau of Indian Affairs (BIA). In

deciding whether to approve a take exemption, NMFS, in cooperation with NPS and BIA, prepared an EA that analyzed four alternatives in detail and incorporated by reference the prior EISs. ER269-ER392. NMFS found no significant environmental impact. ER393-ER402.

In a parallel process, the federal agencies consulted under the ESA with NMFS. ER418. NMFS evaluated the effects of the hatchery programs proposed by the Tribe and the State on ESA-listed Chinook salmon and steelhead in a December 2012 BiOp, which concludes that the "already depressed populations are now further threatened with extinction from the effects of the release of massive quantities of stored sediments . . . ." ER587. NMFS agreed with the HSRG "that the supportive breeding strategies proposed in the HGMPs are likely to be successful at preserving the existing genetic resources of salmon and steelhead throughout the period of adverse habitat conditions . . . ." *Id.* NMFS further found that

> without proactive intervention, the conditions that will be present in the river below the dams during and immediately following dam removal *may result in mortality rates approaching 100% for any naturally rearing fish*, virtually eliminating local, genetically viable salmon and steelhead brood sources for recolonization. Fish straying from other river systems . . . might repopulate the Elwha watershed over time, but *extirpation of remaining native salmon and steelhead populations resulting from dam removal is not an acceptable option* . . . .

Id. (emphases added). The December 2012 BiOp is accompanied by an ITS covering hatchery operations. ER588-ER599. Based on these analyses, NMFS approved the HGMPs, finding they met the Limit 6 criteria. ER266.

C. Procedural Background

WFC sued in February 2012. The district court dismissed the Tribal defendants in February 2013 after NMFS's 4(d) determination mooted the § 9 take claim against them. ER39-ER47.

A year later, WFC sought reconsideration of that order and to enjoin the Tribal defendants' spring 2014 releases of coho and steelhead. The court denied the motion. Dkt. 185. WFC appealed and sought an emergency injunction pending appeal. This Court dismissed the appeal for lack of jurisdiction. SER187.

While that appeal was pending, the district court issued a decision on cross-motions for summary judgment on the remaining claims against the Federal defendants. The court upheld NMFS's ESA analysis in full. ER30-ER32. With respect to the NEPA claims, the court held, *inter alia*, that the agencies did not have to further supplement the Implementation EIS and the EA properly considered cumulative effects. ER19-ER22, ER24. It held, however, that NMFS did not adequately explain its reasons for declining to consider in depth an alternative with reduced smolt release numbers. ER27-ER29.

In July 2014, the district court issued a remedy order partially vacating the EA to the extent it contemplated the release of more than 50,000 steelhead and 50,000 coho salmon smolts, but declined to vacate the 4(d) determination or ITS. ER7-ER8; *see also* SER63.

WFC filed the present appeal and sought an injunction limiting spring 2015 releases of steelhead and coho. On January 9, 2015, NMFS completed a new 4(d) determination, based on a revised EA and reinitiated Biological Opinion, finding once again that the programs met the criteria for an exemption from ESA §9. *See* Citation of Supplemental Authority, submitted Jan. 15, 2015. This Court denied the injunction motion on February 26, 2015.

SUMMARY OF ARGUMENT

WFC raises myriad challenges to the Federal defendants' analysis of the Tribe's and State's plans for fish hatcheries to preserve native Elwha fish during the extreme sediment loads following dam removal and to speed recolonization of the river. At bottom, WFC prefers its own judgment that hatcheries should not be used – even though dam removal risks extirpation of native stocks – to the judgments of the expert federal agencies Congress entrusted with these decisions. For the reasons below and that follow in the argument section, WFC's contentions are incorrect.

The Federal defendants appropriately analyzed the environmental effects of their actions by relying in part on three previous environmental impact statements for the overall restoration project. They examined the specifics of the plans for the hatcheries and reasonably concluded that they would not have a significant effect on the environment because, among other reasons, the effects of hatcheries are well-known and mitigation measures are required to reduce any harmful effects here. WFC is incorrect that the Elwha hatcheries needed to be analyzed with plans for

other Puget Sound hatcheries because those plans were proceeding on separate timelines, under separate proposals, and none of the programs depended on another.

WFC's allegation that the district court should have vacated the exemptions for the hatcheries while the agencies prepared additional NEPA analysis on remand is moot because the remand is complete. Regardless, the order is consistent with this Court's holdings that agency actions may be left in place to protect the environment.

The district court correctly dismissed WFC's claims challenging a 2008 technical memorandum describing preferred hatchery strategies. That memorandum is not a final agency action because the scientific opinions in the document are not the consummation of a decisionmaking process, nor does the document have any legal effect. WFC's complaint cannot be read to challenge any other final agency action authorizing federal funding and even if it could, the agencies conducted appropriate environmental analyses on those decisions. The district court properly denied discovery on this issue because the question of whether the technical memorandum is a final agency action is a legal question.

With respect to the Endangered Species Act claims, the district court properly limited its review to the administrative record. The Act does not provide its own standard of review, accordingly, the Administrative Procedure Act applies. On the merits, the Interior Department agencies properly consulted as required by the Endangered Species Act on the funding they provide to the hatcheries and in any

event, WFC failed to provide the Bureau of Indian affairs with the requisite notice of its intent to sue 60 days in advance. WFC is likewise wrong that NMFS improperly divided its consultations. NMFS responded to the proposals before it: a request by NPS to reinitiate consultation on the broader Elwha restoration project, and later requests by the Tribe and State to determine whether the Elwha River hatchery plans meet the standards for an exemption from the prohibition on taking listed species.

Finally, the district court correctly concluded that NMFS's determination that the hatchery plans are exempt from the take prohibitions mooted WFC's claim alleging that the tribal defendants took listed species. The claim was also properly dismissed because plaintiffs failed to provide notice of any alleged violation of NMFS's exemption.

STANDARD OF REVIEW

The claims against the Federal defendants are brought under the Administrative Procedure Act (APA). This Court reviews the district court's "grant of summary judgment de novo, thus reviewing directly the agency's action under the . . . arbitrary and capricious standard." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir.2004). Under the APA's narrow standard of review, agency action may be held unlawful only if "the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the

product of agency expertise." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*) (internal quotation marks and citations omitted). Agency factual conclusions are reviewed for "substantial evidence," a standard more deferential than the "clearly erroneous" standard for appellate review of trial court findings. *See Dickinson v. Zurko*, 527 U.S. 150, 162, 164 (1999); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014); *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1133-34 (9th Cir. 2010). This Court must uphold agency actions so long as "there is a rational connection between the facts found and the choices made" unless the agency "committed a clear error of judgment." *Oregon Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007).

A district court applies traditional equitable principles when it enters an order to remedy a NEPA violation, and this Court reviews such orders for abuse of discretion. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1081 (9th Cir. 2010).

ARGUMENT

I. NMFS complied with NEPA by preparing an environmental assessment for the HGMPs.

A. The decision to use hatcheries to mitigate dam removal impacts was made in the 1996 Implementation ROD and NMFS appropriately tiered to the prior EISs.

The district court correctly held (ER19-ER22) that the choice to use hatcheries was made *not* in NMFS's 4(d) determination, but in the 1996 ROD. SER1765. The time to challenge that decision passed long ago. ER19 (citing 28 U.S.C. § 2401(a), six-

year statute of limitations for APA claims). WFC does not challenge that holding, other than to contend that the 1996 Implementation EIS "does not actually evaluate the effects" of the decision to use hatchery fish. Br. 40-41. This argument should have been made in a challenge to the 1996 ROD and is now time-barred.[2] *See* ER19.

The actual decisions under review here – approval of HGMPs specifying the precise numbers and species of fish to be released and federal funding for the hatcheries – are far narrower and were appropriately analyzed in an EA tiered to the prior EISs. Contrary to WFC's incorrect assertion (Br. 40) that tiering "merely allows an agency to avoid repeating discussions from a previous broader EIS," the regulations encourage agencies to "tier their environmental impact statements to eliminate repetitive discussions…*and to focus on the actual issues ripe for decision at each level of environmental review*." 40 C.F.R. § 1502.20 (emphasis added). Tiering is appropriate when an agency moves (A) from a broad EIS on a plan to a narrower environmental analysis "of lesser scope," or (B) from an EIS "on a specific action at an early stage (such as need and site selection) to . . . a subsequent statement or analysis at a later stage (*such as environmental mitigation*)." 40 C.F.R. § 1508.28 (emphasis added). That is exactly what happened here.

[2] WFC did not meaningfully participate in any of the EISs' public notice and comment periods, and only engaged the agencies on the eve of NMFS's determination to exempt hatchery operations under Limit 6.

The 1996 EIS and ROD extensively analyzed adverse sedimentation impacts on salmonids and included hatchery support as part of the restoration action – indeed, as mitigation. ER1320, ER1323-ER1326. WFC is incorrect that the 1996 EIS contains no "discussion of the adverse effects of hatchery programs," and no discussion of alternatives. Br. 40. The 1996 EIS acknowledges that "continued use of hatchery stocks" would "cause the genetic integrity of the existing native stocks to deteriorate." ER1335. The fish restoration plan included as an appendix contains alternatives for restoring most stocks and acknowledges predation by hatchery fish on native salmonids. ER1348-ER1357. This level of discussion of adverse impacts was appropriate given the decision being made (whether hatcheries should be used to mitigate the short-term effects of dam removal) and the context in which it was made (where sedimentation risked extirpation).

The 2012 EA tiered to the prior EISs and focused on the impacts of the specific hatchery plans, including the quantity and duration of fish releases. ER283, ER286. Moreover, hatchery supplementation is a mitigation measure, which is both "of lesser scope" and "at a later stage" in the planning process. 40 C.F.R. § 1508.28; *see also* SER1761, SER1764-SER1765, SER1768-SER1769. This is the type of tiering

contemplated by the regulations. *See Oregon Natural Res. Council v. Lyng*, 882 F.2d 1417, 1422-24 (9th Cir. 1989) (upholding EA where prior EIS contemplated the action).[3]

B. **Approving the HGMPs did not significantly affect the environment and no EIS was required**.

Determining whether an action may "significantly" affect the environment "requires considerations of both context and intensity." 40 C.F.R. § 1508.27. "Context simply delimits the scope of the agency's action, including the interests affected." *Nat'l Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 731 (9th Cir. 2001). "Intensity refers to the 'severity of impact,' and the regulations identify ten factors that agencies should consider in evaluating intensity." *In Def. of Animals v. U.S. Dep't of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014).

There is no significant impact under NEPA "[i]f the proposed action does not significantly alter the status quo." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1125 (9th Cir. 2012). "At bottom, an agency need only provide a convincing statement of why the threat did not require an EIS to satisfy NEPA". *Id.* (internal quotations marks omitted). Here, contrary to WFC's assertions (Br. 26-39), NMFS carefully evaluated the context and intensity factors and provided a convincing statement of why the effects of the action were not significant.

---

[3] The cases WFC cites (Br. 40) are not to the contrary. In *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 781-84 (9th Cir. 2006), the agency prepared no environmental analysis for a lease extension. In *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009), this Court held the agency could not rely on a draft EIS discussing impacts from a *different* project.

WFC disagrees with NMFS's scientific conclusion that the negative effects of hatchery fish will be insignificant. But NMFS has decades of scientific support for its conclusion and "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

1. The context did not require an EIS.

WFC's description of the context is misguided. Br. 27-28. WFC strays well beyond the specific actions being analyzed – whether to approve the HGMPs and federal funding – and focuses on Elwha restoration as a whole. The Federal defendants have already taken into account the extraordinary context of the overall restoration project by preparing three EISs for it, two of which contemplated hatchery supplementation as a means of preserving and restoring native salmonids. *E.g.*, ER1348-ER1363, SER1374-SER1375, SER1395, SER1768-SER1769, SER2141-SER2142, SER2453-SER2454, SER2513.

Moreover, WFC misses an important element of the context: hatcheries for most stocks are not new and were critical to conserving the remaining native Elwha fish while the dams were in place and natural survival in the lower river was gravely threatened. Approximately 95% of recent threatened Chinook salmon returns are hatchery origin and the program has operated since 1976. ER310, ER422, SER1175. Coho salmon are over 90% hatchery-origin and have been hatchery-raised

consistently since the 1950s. ER299, ER316, SER1200; ER1187-ER1188. The chum salmon hatchery has operated since at least 2005 and there were prior chum hatchery operations on the river. SER1266, ER1191-ER1192. The current steelhead program began in 2005 with exclusively wild, native embryos. ER824, SER1227. The native Chinook and steelhead released from the hatcheries are themselves protected under the ESA.[4] 79 Fed. Reg. at 20,802, 20,809, 20,811; *see also Trout Unlimited v. Lohn*, 559 F.3d 946, 952 (9th Cir. 2009). Pink salmon lacked a historic hatchery program, but their populations are critically low. SER1286-SER1287; ER1195-ER1197. The context here does not require another EIS.

2. There were no significant effects on a unique geographic area.

The intensity factors also do not require an EIS. NMFS properly concluded that the hatchery programs will not have significant effects on unique geographic areas. ER398; 40 C.F.R. § 1508.27(b)(3). For example, NMFS determined, in cooperation with NPS as manager of the Olympic Wilderness, that the presence of hatchery-origin Elwha stocks was "compatible with the Wilderness Act policy" and values. ER382; *see also* SER748.

WFC's assertion of significant effects on unique geographic areas is based solely on its disagreement with NMFS over whether the effects on steelhead and

[4] The Tribe previously raised an early run of steelhead from another basin (Chambers Creek), but terminated that program in 2011. ER299.

salmon will be significant. Br. 28-29. Primarily, WFC claims the rainbow trout population in Olympic National Park above the dam sites will assist with steelhead recovery and that hatchery-raised native steelhead will harm the trout by interbreeding. Br. 29. However, NMFS found that genetic effects on steelhead would be small because program design would minimize them. ER394; *see also* ER515-ER557. NMFS is entitled to rely on those scientific opinions. *Marsh*, 490 U.S. at 378. Moreover, this claim ignores that the trout above the former dam sites are *not* part of the ESA-listed steelhead population. ER476. It is the genetic uniqueness of the native Elwha River steelhead that the hatchery is designed to preserve. *Id.*

3. The action did not establish a precedent.

NMFS properly concluded that the 4(d) determination for the hatchery programs would not "establish a precedent for future actions with significant effects" nor was it "a decision in principle about a future consideration." 40 C.F.R. § 1508.27(b)(6). WFC asserts this factor is implicated because "*[r]emoval of the dams* on the Elwha Rivers [sic] is unprecedented" and NMFS is in the process of making 4(d) determinations for over 100 other HGMPs for hatcheries on other waterways around Puget Sound. Br. 30-31 (emphasis added). Again, WFC conflates the action at issue with the overall dam removal and salmon restoration project, which were already evaluated in three EISs.

Regardless, analyzing the HGMPs in an EA was not precedent-setting – "the proposed hatchery programs are similar in nature and scope to similar hatchery

actions over the past several years," for example on the Snake River and Hood Canal, which were analyzed in EAs. *See* ER400. Nor has approval of the Elwha HGMPs "thoughtless[ly] set[] in motion" any future action. *Presidio Golf Club v. NPS*, 155 F.3d 1153, 1162-63 (9th Cir. 1998). "EAs are usually highly specific to the project and the locale, thus creating no binding precedent." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011). The approval does not commit NMFS to approve future HGMPs or preclude preparation of an EIS. NMFS' future decisions will depend on the specific details of the hatchery plans at issue. *See* SER746.

4. The effects of the 4(d) determination were not "highly uncertain."

The NEPA "regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are 'highly' uncertain." *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006); *see also* 40 C.F.R. § 1508.27(b)(5). As the FONSI here recognizes, the "proposed operation of the programs is similar to other recent hatchery operations in many areas of the Pacific Northwest, and the procedures and effects are well known." ER399. The EA acknowledges potential genetic diversity and fitness reduction risks from hatchery production, but finds that supplementation will help preserve and restore wild salmonid populations at high risk of extirpation in the wake of dam removal. ER306-ER307; *see also* ER516 ("hatchery intervention is a legitimate and useful tool" to avert extirpation). The EA also recognizes that hatcheries "benefit natural-origin salmon

and steelhead through marine-derived nutrient cycling effects, by preserving and increasing abundance and spatial structure, retaining genetic diversity, and potentially increasing productivity of a natural origin population . . . ." ER307, ER397. Thus, the record reflects near-certainty that hatchery supplementation is needed to preserve and restore Elwha salmonid populations and that negative effects will be minimal. ER340-ER358, ER523, ER560.

WFC attempts to flyspeck the EA, but an agency's candid disclosure of some uncertainty does not dictate preparation of an EIS. *See Envtl. Prot. Info. Ctr.*, 451 F.3d at 1011. For example, although NMFS acknowledged that the precise magnitude and duration of fitness loss from genetic introgression is unknown, the risk is not "highly uncertain." ER307. Recent studies demonstrate "demographic benefits to natural production from hatchery fish spawning in the wild," and that "genetic risk management measures" in the HGMPs would reduce the potential for domestication. *Id.*; ER536-ER541. "Simply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial or highly uncertain." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005).

WFC further contends there are uncertainties regarding mitigation, but it fails to demonstrate that mitigation is so highly uncertain as to require an EIS. 40 C.F.R. § 1508.27(b)(5). An agency "is not required to develop a complete mitigation plan

detailing the precise nature . . . of the mitigation measures so long as the measures are developed to a reasonable degree." *Bering Strait Citizens for Resp. Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 955 (9th Cir. 2008) (quoting *Nat'l Parks*, 241 F.3d at 734) (internal quotation marks omitted). Mitigation and monitoring measures for the HGMPs incorporate certain recommendations from the Monitoring and Adaptive Management Plan, a 142-page scientific framework document that "present[s] strategies to address uncertainty." ER450; *see also* SER834-SER975. The FONSI explains that the HGMPs reduce uncertainty by providing "explicit steps to monitor and evaluate these uncertainties in a manner that allows timely adjustments to minimize or avoid adverse impacts." ER398. The uncertainty NMFS acknowledges in the EA is "that quotient of uncertainty which is always present when making predictions about the natural world," and does not rise to the level of significance requiring preparation of another EIS. *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009).

While WFC complains that not all the measures in the Monitoring and Adaptive Management Plan have long-term funding, the EA explains that it considered only the measures reasonably certain to occur. ER287; *see also, e.g.*, SER1046 (steelhead HGMP monitoring), SER1130-SER1131 (Chinook HGMP monitoring). For example, the HGMPs commit the operators to measures, such as monitoring juvenile out-migrants and genetic analysis of natural smolts. SER1046,

SER1130-SER1131, ER447. Other measures such as spawning surveys, fish relocation, and tagging will be conducted by NPS as discussed in the July and December 2012 BiOps. ER555-ER557. Other parts of the Monitoring and Adaptive Management Plan may not be necessary; the plan is only a list of recommended practices. Regardless, mitigation plans "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 (9th Cir. 2000).

5. The effects of the action were not highly controversial

NMFS reasonably found that the effects of the action were not "highly controversial." ER398; 40 C.F.R. § 1508.27(b)(4). Effects are controversial only if a "substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982). "A substantial dispute exists when evidence…casts *serious doubt* upon the reasonableness of an agency's *conclusions*." *Humane Soc. v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010) (internal quotation marks omitted) (emphases added).

Here, no such controversy exists. NMFS received *one* comment letter opposing the proposed hatchery programs – from litigation counsel for WFC. ER398, ER645. While WFC cites the three litigation declarations it submitted with its comment letter, (Br. 34), they do not show a substantial dispute "as to the size, nature, or effect" of the action. *Found. for N. Am. Wild Sheep*, 681 F.2d at 1182. Rather, two are from

WFC's paid experts, who are colleagues at a University of Montana field station, far from the Elwha. ER698, ER768. The third scientist served as a consultant for the HSRG (ER681), but the HSRG's report concluded that the hatchery plans will preserve native Elwha River salmonids during deadly sediment releases, will add viable natural populations of these species, and acknowledged the negative effects. SER1160-SER1162. The Federal agencies, State officials, and Tribal officials with long term, specific knowledge and experience regarding the Elwha River, its fish populations, and dam removal all agree. *E.g.*, ER340-ER341, ER344-ER345, ER348-ER349, ER352, SER577, SER979, SER1019, SER1056, SER1091-SER1092. This Court has held that no controversy exists in similar circumstances: where there is "agreement . . . among local, state, and federal government officials" and "[o]nly appellant and its two experts are critical." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). NEPA does not require "unanimity of opinion, expert or otherwise."[5] *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150-51 (9th Cir. 1997).

Moreover, the sole case WFC cites in support of its position, *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193-94 (9th Cir. 1988) (cited at Br. 33-34), was not simply a case where a few isolated experts were critical of an EA. In *Sierra Club*,

[5] Likewise, NMFS's Regional Administrator noting the "broad attention" paid to "the hatchery/wild topic," ER1058 (quoted at Br. 34), does not show a substantial scientific dispute casting serious doubts on the agency's conclusions.

multiple "conservationists, biologists, and other experts" identified problems the agency overlooked with a clear-cutting regeneration technique described as ""experimental"" and that might have been harmful to regeneration. *Id.* Moreover, *Sierra Club* erroneously applied a "reasonableness" review standard to the question of whether an EIS was needed. The Supreme Court subsequently rejected that heightened standard and held that the APA's narrow arbitrary and capricious standard applies to an agency's decision not to prepare an EIS. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330 (9th Cir. 1992) (citing *Marsh*, 490 U.S. at 376-77).

6. The action did not significantly adversely affect listed species.

Agencies must consider the "degree to which the action may adversely affect a[] . . . threatened species or its [critical] habitat . . . ." 40 C.F.R. § 1508.27(b)(9); *see also Envt'l Prot. Info. Serv.*, 451 F.3d at 1012. An EIS is not required any time there are adverse impacts as WFC contends, but only if the adverse effects will be significant. *Native Ecosystems Council*, 428 F.3d at 1240.

NMFS appropriately acknowledged the risk of adverse effects such as genetic effects, competition, and predation, but explained that these risks would be "minimal." ER396-ER397. It also found that the hatchery programs will *benefit* listed species by "add[ing] marine-derived nutrients," "increas[ing] total and natural-origin abundance and spatial structure," and "preserv[ing] the [steelhead and salmon] populations when turbidity levels are high and detrimental to natural-origin fish

survival." ER340-ER341, ER344-ER345. The EA explains that "newly accessible habitat would be of higher quality than existing habitat, so productivity would be expected to improve relative to baseline conditions." ER341. The FONSI also notes the BiOp's conclusions that on balance the hatchery programs are necessary to avoid extirpation and "would not jeopardize the continued existence" of any listed species. ER396-ER397; *see also* ER569, ER585.

WFC nonetheless asserts that the hatchery programs "threatened to delay, and even prevent, full recovery of the Elwha River salmonid populations." Br. 34. This assertion is unsupported by anything in the administrative record besides WFC's own comments. The record confirms that hatchery support would have minimal adverse effects on listed species and, as acknowledged in the three prior EISs prepared by NPS, would have significant benefits in light of the unique extirpation risk. ER415-ER417, ER1131, SER1160. The HGMPs are designed to achieve restoration with natural-origin salmonids. ER1035 (Benefits include "[a]dding viable natural populations" and preserving "existing genetic resources."). While the HSRG review of draft HGMPs stated that "*prolonged* hatchery influence *may* lead to loss of fitness in natural populations, *potentially* resulting in reduced or delayed restoration," ER1036 (emphasis added), both the HGMPs and monitoring plans were revised to respond to this concern and the Tribe and State only sought a take exemption for operations during the first two of the Restoration Plan's four phases. *E.g.*, ER261, ER416-

ER417, SER1056, SER1067, SER1091-SER1092, SER1032, SER1047, SER1011, SER1091-SER1092.

WFC is wrong that critical habitat would be significantly affected. Br. 35. NMFS explained there were "no expected impacts on critical habitat . . . because activities associated with the HGMPs . . . would not be expected to remove or destroy critical habitat elements." ER 397. NMFS then noted that effects on critical habitat "were considered in the ESA section 7 consultation." *Id.*; *see also* ER568-ER569. The BiOp acknowledges the competition and predation effects that concern WFC, but concludes they will be minimized by beneficial management practices, the vast expanse of newly available habitat, and that the primary constituent elements of critical habitat are not expected to be substantially impacted. ER 585; *see also* ER569. NMFS's conclusion was not arbitrary or capricious.

7. No cumulatively significant impacts required an EIS.

WFC contends that an EIS is required because of cumulatively significant effects and that the Elwha River HGMPs must be analyzed in a programmatic EIS with all Puget Sound hatcheries. Br. 36-39. Neither is correct.

a. There are no significant cumulative impacts.

NMFS considered the cumulative impacts from past and present actions, including hatchery operations outside the Elwha, in both the "Affected Environment" section of the EA and "the associated biological opinion." ER381-ER382, ER399, ER401 (referencing ER299, ER304-ER321, ER508-ER567, ER569-ER570). The EA

evaluates the direct and indirect effects on these baseline conditions. ER381, ER339. NMFS also addressed the cumulative impacts of potential future actions, like future Puget Sound hatchery programs, fishing activities, habitat restoration, and climate change. ER381-ER384. NMFS observed that if cumulative effects do not allow recovery goals to be met, "adjustments to fisheries and to the hatchery production levels and management actions would likely be proposed." ER382. With respect to the effects of concern to WFC, the EA observed that monitoring and adaptive management "would help mitigate potential for adverse cumulative impacts." *Id.*

Based on these analyses, NMFS reasonably determined that cumulative impacts would not be significant. ER399. The FONSI explained that other hatchery programs in the region are "guided by the same legal agreements, mitigation responsibilities, and managed by the same agencies." *Id.* Based on the analysis of the impacts of those programs in the EA, "[a]ny cumulative impacts are not expected to rise to the level of significance." *Id.* These conclusions were not arbitrary or capricious in light of the knowledge of these ongoing programs. *See Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1007-1011 (9th Cir. 2011).

b. NMFS did not have to analyze all Puget Sound HGMPs in one EIS.

WFC's comments on the draft EA failed to allege that the Elwha HGMPs had to be analyzed in a single, programmatic EIS with other Puget Sound HGMPs. *See*

ER675-ER676. The argument is therefore waived. *Vermont Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 553 (1978).

Even if not waived, agencies must prepare a single EIS only for "connected" or "cumulative" actions, as defined by the regulations, although they may choose to prepare a single EIS for "similar" actions. 40 C.F.R. § 1508.25; *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1306 (9th Cir. 2003). This Court has also stated that a single NEPA document "is required for distinct projects when there is a single proposal governing the projects." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002). WFC does not argue that the actions are "connected."[6] Cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2). Agencies receive substantial deference when using their technical expertise to determine whether to prepare a comprehensive EIS because such a determination "requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

Nothing required NMFS to examine the Elwha River HGMPs in a single, programmatic EIS with all other Puget Sound hatchery programs. The decision to

[6] Regardless, the Elwha HGMPs would have been necessary for restoration of Elwha native salmonids irrespective of other Puget Sound hatcheries, so there is no improper segmentation. *See N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1087–88 (9th Cir. 2011); *Dombeck*, 304 F.3d at 894.

use hatcheries in the restoration of the Elwha was made in 1996, long before hatchery managers submitted two regional Resource Management Plans (RMPs) in 2004 for Puget Sound hatcheries,[7] and proceeded on a separate time schedule for good reason given the subsequent submittal of revised HGMPs solely for the Elwha, as well as removal of the dams and resulting sedimentation. *See* ER417, ER1048. This Court has declined to find "cumulative actions" where the actions "proceeded on separate time schedules" and where, as here, "nothing…suggests that the agency intended to segment review." *Earth Island Inst.*, 351 F.3d at 1305; *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000 (9th Cir. 2004).

WFC also incorrectly claims that "[b]ecause there is a single proposal governing the projects," namely the 2004 RMPs, "a single NEPA document is required." Br. 37. While the 2004 RMPs summarized the four then-current Elwha River HGMPs (along with other Puget Sound hatcheries), in 2011 and 2012, the Tribe and State submitted five new Elwha River HGMPs for NMFS's approval. *See* ER279, ER414, ER1048. Those new HGMPs were not part of the 2004 regional RMPs (indeed, the 2004 RMPs did not include plans for a pink salmon hatchery) and the State and tribes have

[7] The regional RMPs were the "proposed framework" summarizing over 100 HGMPs and describing how Washington State and the relevant tribes (collectively referred to as the co-managers) "would jointly manage hatchery programs in Puget Sound . . . ." 76 Fed. Reg. 45,515 (July 29, 2011); *see* ER1153-ER1154. After an extended public comment period, *see* 79 Fed. Reg. 69,470 (Nov. 21, 2014), 79 Fed. Reg. 43,465 (July 25, 2014), NMFS withdrew the draft EIS for those RMPs in light of the co-managers' submittal of revised RMPs, generally on a watershed-by-watershed basis. 80 Fed. Reg. 15,986 (Mar. 26, 2015).

now withdrawn the RMPs in favor of a basin-by-basin grouping in most instances. ER414, ER1048, 80 Fed. Reg. at 15,986. Thus, WFC is incorrect that the Elwha HGMPs were part of a single proposal that needed to be analyzed together.

The role of the Tribe and State in defining the action is a key distinction from situations where a federal agency defines its own management program, such as Forest Service vegetation management. *See Ctr. for Envtl. Law & Policy*, 655 F.3d at 1007-1011. NMFS does not manage hatcheries, but rather is tasked with evaluating the applications for 4(d) determinations submitted by applicants. Where the Tribe and State submitted separate HGMPs for the Elwha hatcheries, and NMFS exercised its technical expertise in finding no significant cumulative effects requiring analysis in a single NEPA document, this Court should defer to the agency's expertise. WFC would have NMFS place the 4(d) application on hold pending receipt of final applications from all hatchery programs in the Puget Sound region. NMFS's regulations do not require that result. *See* 50 C.F.R. § 223.203(b)(6).

8. There was no significant loss of scientific resources.

The NEPA regulations instruct agencies to consider "[t]he degree to which the action . . . may cause loss or destruction of significant scientific, cultural, or historical resources." 40 C.F.R. § 1508.27(b)(8). NMFS properly found the action area "includes none of the aforementioned structures or resources." ER400. WFC incorrectly asserts that the restoration project itself is a "scientific resource" because it

provides an "opportunity to further scientific understanding" of natural recolonization after dam removal. Br. 39.

A lost opportunity to study the natural environment is not a "scientific resource." If it were, this factor would be triggered for nearly every federal action affecting the environment. Agencies must consider tangible "resources" that are significant for scientific, cultural, or historical values, not mere opportunities to study the environment. *Lockhart v. Kenops*, 927 F.2d 1028, 1035 (8th Cir. 1991) (professor's desire to study canyon for educational and scientific reasons did not risk loss of scientific resources). Regardless, the decisions to remove the dams and use hatcheries to prevent extirpation and speed recovery of native salmonids already have been analyzed in multiple EISs. The alleged "lost opportunity" is not occurring as a result of the approval of the HGMPs.

II. The propriety of the remedy order is moot because the remand is over.

WFC contends the district court should have vacated the 4(d) determination and ITS while NMFS prepared the analysis required on remand – a reduced-release alternative. Br. 42. This issue is moot because, as the Federal defendants previously informed this Court, on December 15, 2014, NMFS finalized an EA analyzing a reduced-release alternative and completed a new BiOp and ITS. *See* Citation of Supplemental Authority, submitted Jan. 15, 2015. NMFS signed a new 4(d) determination on January 9, 2015, before any additional hatchery releases occurred. *Id.* Because no further action remains on remand, whether the district court erred by

not vacating the 4(d) determination and ITS during remand is moot. *See, e.g.*, *Alliance for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 601 (9th Cir. 2014); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir. 2003). WFC has not identified any harm it suffered while NMFS conducted the additional NEPA analysis nor how such harm could be redressed now.

In any event, the court did not abuse its discretion. As it acknowledged, "'[w]hen equity demands, [an action] can be left in place while the agency follows the necessary procedures to correct its action.'" ER33 (quoting *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012)). The district court found a procedural flaw in the EA – a failure to explain one aspect of the document. It did not find substantive defects in NMFS's decision to approve the HGMPs. Vacatur could have seriously harmed already imperiled fish populations by forcing the Tribe to terminate the juvenile release which would result in no or substantially fewer adults returning to re-populate the Elwha. *See, e.g.*, ER587. This Court allows activities to continue pending NEPA compliance where, as here, "enjoining government action allegedly in violation of NEPA might actually jeopardize natural resources," *Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983), and has repeatedly "condemned efforts to use NEPA as an obstructionist tactic" to prevent agencies from taking environmentally protective actions. *Jewell*, 747 F.3d at 644 (internal quotation marks omitted).

Moreover, WFC's contention that the *ITS* did not comply with NEPA was never pleaded in the complaint nor raised in district court and accordingly is waived. *Compare* ER248-ER249, ER252 (specific allegations against ITS) *with* ER253 (pleading 4(d) determination violated NEPA); *see also* SER63. Regardless, a consulting agency does not need to prepare NEPA analysis prior to issuing a BiOp and ITS, so long as there is (as here) a "downstream" agency required to perform NEPA analysis. *San Luis*, 747 F.3d at 644-45. The § 4(d) determination and ITS are independent final agency actions, each marking the consummation of a decisionmaking process and carrying its own legal significance. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). If NMFS' NEPA analysis for the 4(d) determination is infirm, it does not follow that a wholly separate ITS, issued under ESA § 7, should be vacated for NEPA purposes. As the ITS here complied with all applicable laws, there could be no basis for vacating it. ER8, ER31-ER32.

III. The district court properly dismissed the NEPA claims against Interior.

A. The 2008 Fish Restoration plan is not a final agency action.

WFC's first and third claims alleged the Federal defendants failed to prepare NEPA analysis for the 2008 Fish Restoration Plan. ER1001-ER1003. The district court properly dismissed the claims because that plan is not is a final agency action. ER59-ER61.

NEPA claims must be brought under the APA. To invoke the APA's limited waiver of sovereign immunity, a plaintiff must identify a discrete final agency action.

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62 (2004). "[F]inality is . . . a jurisdictional requirement," *Ukiah Valley Medical Center v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990)) and a plaintiff must demonstrate jurisdiction. *Thompson v. McCombe,* 99 F.3d 352, 353 (9th Cir. 1996).

The 2008 Fish Restoration Plan is not final agency action as WFC contends. Br. 49-50. It is neither the consummation of a decisionmaking process, nor does it have legal consequences. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d. 586, 593 (9th Cir. 2008). The plan is a technical memorandum providing scientific review of restoration actions. ER1130. It is a compilation of scientific information developed primarily by biologists who cannot authorize or fund any agency action. *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA,* 313 F.3d 852, 860 (4th Cir. 2002).

1. No consummation

The 2008 Fish Restoration Plan was not the "ultimate administrative position" nor "the agency's 'last word' [on the issue]." *See Fairbanks*, 543 F.3d at 592. Further agency decisionmaking was expected. *See id.* at 593. The plan explained the "strategies" it contained were "intended to be adaptive, based on observed responses of various populations" and that unsuccessful strategies may be discontinued "in favor of options that are more likely to produce healthy self-sustaining populations." ER1132. The plan is most akin to the "tentative recommendation" discussed in *Bennett*. 520 U.S. at 178. Indeed, many people who prepared the 2008 Fish

Restoration Plan do not even work for a Federal agency. ER1122, ER1130, ER1142. These scientists, while undoubtedly providing valuable advice, cannot consummate Interior's or NMFS's decision-making processes. *Compare* ER1142, *with* SER1772 (1996 ROD signature page).

2. No legal consequences

The Fish Restoration Plan also does not determine any obligation "from which 'legal consequences' will flow." *Bennett*, 520 U.S. at 177-78. Its technical, scientific guidance is not binding on any entity and does not authorize any action. *E.g.*, ER1142 (identifying "research, methodologies, and strategies" and describing "methods proposed" for restoration). While it is likely that federal agencies will pay close attention to the biologists' guidance, they are not legally bound by it and there is no risk of civil or criminal penalties. Indeed, the NOAA Science Center (which issued the document and is not a defendant) could withdraw it tomorrow and nothing would change.

Not all agency pronouncements create judicially enforceable rights. *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003). There is a distinction between scientific and technical advice an agency may consider in its decision-making process and an actual decision that binds the agency or alters a legal relationship. *See Fairbanks*, 543 F.3d at 593-94 ("It does not itself command [the plaintiff] to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of 'immediate compliance' nor of defiance."); *Nat'l Ass'n of Home Builders v. Norton*, 415

F.3d 8, 14-15 (D.C. Cir. 2005) (voluntary scientific survey protocols did not have legal effect); *Northcoast Envtl. Law Ctr. v. Glickman*, 136 F.3d 660, 662 (9th Cir. 1998) (inter-agency management plan, developed by experts, merely setting forth guidelines and goals for research, management strategies, and information sharing not final agency action because no actual or immediate effect); *W. Radio Servs. Co., v. Espy*, 79 F.3d 896, 900-02 (9th Cir. 1996) (internal agency guidance does not have "independent force and effect of law"). NEPA analysis is required only to the extent the plan is incorporated into future decisions. *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1069 (9th Cir. 2002). To the extent the HGMPs reflect recommendations in the 2008 Fish Restoration Plan, the EA and FONSI analyzed those effects.

Moreover, WFC is incorrect that the 2008 Fish Restoration Plan was "issued under the Elwha Act" and "incorporated" into a federal project or the 1994 report delivered to Congress. Br. 45, 49. The Elwha Act directed Interior to "prepare a report on the acquisition of the [dams] and . . . plans for the full restoration of the Elwha River ecosystem and the native anadromous fisheries and submit such report on or before January 31, 1994 . . . ." Elwha Act § 3(c). The Act further directs Interior "to take such actions as are necessary to implement" the 1994 report "sixty days after submission of the report" and acquisition of the dams. *Id.* § 4(a)(1). Although an appendix to the Report contained a fish restoration plan, the Act did not speak to future fish restoration plans, or make them binding, final agency actions.

Moreover, even if WFC's reading of the Act were correct, any challenge to the utilization and funding of hatcheries would be time-barred because the 1994 Elwha Report already determined that hatcheries would be used in that way. SER2682.

B. The complaint's reference to "funding" of hatcheries does not identify a final agency action.

WFC attempts to recast its complaint as challenging the lack of NEPA documentation for contributions to "funding" of the Tribe's and State's hatcheries. Br. 44-49. Those allegations also fail.

Every mention of "funding" in the complaint refers back to the 2008 Fish Restoration Plan (ER1001-ER1003), and as the district court explained, that document is simply not a final agency action. ER59-ER61. Even if the complaint could be read to challenge "funding" in general (and it cannot), such an allegation is not sufficiently particular to identify a final agency action. *See S. Utah Wilderness Alliance*, 542 U.S. at 64 (plaintiff must "'direct its attack against some *particular* "agency action" that causes it harm'") (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (emphasis added)). The complaint here failed to identify such a final agency action.

C. Any challenges to funding fail on their merits.

Moreover, even if "funding" were a sufficiently particular agency action (it is not), WFC failed to show that any funds provided by the Bureau of Indian Affairs (BIA) to the Tribe's hatchery or by NPS to the State's hatchery rose to the level of

"major federal action" triggering NEPA obligations. *See Sierra Club v. Penfold*, 857 F.2d 1307, 1313 (9th Cir. 1988).

WFC did not name BIA as a defendant. Regardless, BIA "lacked the degree of decision-making power, authority, or control . . . needed to render it a major federal action." *Ka Makani 'O Kohala Ohana Inc. v. Water Supply,* 295 F.3d 955, 960 (9th Cir. 2002) (internal quotations omitted); *see also Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1101 (9th Cir. 2007). BIA provides funds for hatchery operations as part of annual funding agreements entered into pursuant to the Tribal Self-Governance Act. The agreements explain that the Tribe "has broad authority to consolidate and redesign the programs . . . without further approval of the Secretary." ER81. Moreover, the amount of funding for hatchery operations can only be reduced in very limited circumstances, not including environmental concerns. *See* 25 U.S.C. § 450j-1(b)(2); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 766 (2004).

Equally unavailing is the contention that NPS violated NEPA. NPS's decision to fund hatcheries to protect Elwha fish stocks during dam removal was made nearly 20 years ago in the Implementation ROD. SER1761, SER1769 ("The Lower Elwha Klallam Tribe fish hatchery will be modified (i.e., increase water delivery, incubation and early rearing improvements) to produce broodstock and fish for outplanting."). WFC is time-barred from challenging that decision. 28 U.SC. § 2401(a).

Regardless, NPS and BIA were cooperating agencies on the 2012 EA. ER269. That EA and FONSI analyze the impacts of approving and funding the HGMPs. ER399 (funding effects "are entirely encompassed within the effects of the hatchery programs themselves"). To the extent that NPS or BIA needed to analyze the effects of their hatchery funding under NEPA, they conducted that analysis in the 2012 EA.

D. The district court acted within its discretion when it declined to supplement NMFS's administrative record with the Bureau of Indian Affairs' general funding agreements for the Tribe.

Judicial review under the APA is limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Friends of the Earth v. Hintz*, 800 F.2d 822, 828 (9th Cir. 1986). "The whole administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quotation marks, citation and emphasis omitted).

Supplementation of the administrative record should be permitted only if the plaintiff shows supplementation is:

> (1) . . . necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, [or] . . . (4) when plaintiffs make a showing of agency bad faith.

Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006); *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (cautioning restraint "so that the exception does not undermine the general rule").

WFC asserts the district court should have supplemented the administrative record with funding agreements between BIA, an agency of the Interior Department, and the Tribe, but does not argue that any of the above exceptions applies. Br. 43-44 (citing ER81-ER93). The BIA is not a named defendant, so it is unsurprising that BIA's funding agreements, which cover everything from tribal scholarships to road maintenance, are not part of the NPS, FWS, or NMFS administrative records. An agency compiling an administrative record is not required to comb files in other parts of the agency to find potentially relevant information. *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1305-06 (D.C. Cir. 1991).

The only justification WFC offers is that NMFS's 4(d) determination and biological opinion "state that the actions analyzed include [BIA's] funding of hatchery operations." Br. 43 (citing ER418, ER602). But WFC presents no evidence that the funding *agreements* were considered by NMFS. Rather, NMFS explained that the environmental effects of any funding "are entirely encompassed within the effects of the hatchery programs themselves . . . ." ER399; *see also* ER418, ER602. Accordingly, NMFS had no reason to consider the details of funding agreements; instead, it properly focused on analyzing the impacts of the proposed programs. *See Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 457 (D.C. Cir. 1994) (information compiled by other agencies but never submitted to decisionmaking agency not part of administrative record). The district court correctly concluded the agreements are not

part of the administrative records. ER36. Regardless, WFC has not shown what relevance the funding agreements have to the claims pled in this litigation (which challenge the 2008 Fish Restoration Plan), so if the district court abused its discretion, it was harmless error.

E. The district court properly denied jurisdictional discovery.

The district court correctly denied discovery on the question of jurisdiction. *But see* Br 49-50. This court "will not interfere with the trial court's refusal to grant discovery except upon the clearest showing that the dismissal resulted in actual and substantial prejudice to the litigant" and such refusal "is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). In NEPA cases, a district court abuses its discretion by denying discovery only if a plaintiff has "'made a sufficient showing that a fact-intensive analysis is required before a conclusion can be made as to whether [NEPA analysis was required].'" *Rattlesnake Coal.*, 509 F.3d at 1102 n.1 (quoting *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1092 (9th Cir. 2003)).

WFC failed to make such a showing here, because, as the district court explained, "whether the Fish Restoration Plan is a final agency action is a question of law based on a publically available document." ER63. WFC contends only that discovery "would have revealed DOI's contract that funds the hatchery through

2015" (Br. 49), but such a fact could not save the complaint's allegations that the *Fish Restoration Plan* required NEPA compliance because it was not final agency action.

F. NPS reasonably decided not to prepare a second supplement the 1996 EIS.

WFC is incorrect that NPS needed to supplement the 1996 Implementation EIS to analyze the HGMPs. Br. 50-52. Agencies must supplement an EIS only where there are "substantial changes in the proposed action" or "significant new circumstances or information" relevant to environmental concerns. 40 C.F.R. 1502.9(c)(1). A decision not prepare a supplemental EIS will not be overturned absent a "clear error of judgment." *Marsh*, 490 U.S. at 377-78, 385.

Here, NPS cooperated in NMFS' preparation of the EA on the HGMPs, adopted that EA, and concluded that impacts of the hatchery programs would not be significant. SER229-SER254. NPS determined that the hatcheries would not have significant effects, effectively determining that no new information warranted a supplemental EIS, and the new science "confirmed the scientific community's historical, fundamental understanding of how hatchery fish may affect wild stocks." SER237. As the district court correctly found, NPS's FONSI "completely undermine[s] any argument that implementation of the HGMPs presents a seriously different picture of the likely environmental harms of hatchery fish on the wild runs" and that a supplemental EIS is necessary. ER23. WFC does not challenge (or even mention) this holding on appeal, therefore the issue is waived. *E.g.*, *Arpin v. Santa*

Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001). Regardless, NPS's determination was not arbitrary or capricious.

IV. Interior consulted on funding.

A. The district court properly entered judgment in favor of the Federal defendants on the failure to consult claim.

WFC contends that Interior, through BIA and NPS, provided funds for hatchery operations without consulting under the ESA. Br. 52-54. To the extent the complaint can be read to allege a failure to consult on funding decisions rather than the 2008 Fish Restoration Plan, which has no legal effect (*see supra* at 38-41), the district court properly concluded that such a claim is moot because the agencies have consulted and WFC failed to provide the ESA-required notice to challenge BIA's funding. ER32, SER292-SER293.

1. The failure to consult claim is moot.

The December 2012 BiOp includes consultation on federal funding provided by BIA and NPS. ER418. Any claim that those agencies failed to consult is moot. *Alliance for the Wild Rockies*, 772 F.3d at 601; *see also supra* at 36.[8]

WFC makes no argument to show that its claim related to NPS funding is live. With respect to BIA funding, the only relief WFC asserts is necessary is to "counteract the ongoing harmful effects of the Chambers Creek steelhead program."

[8] The Federal defendants consulted multiple times on the decision to use hatcheries during the dam removal process as well as on discrete hatchery operations for restoration. *See, e.g.*, *supra* at 10-11.

Br. 53. The Tribe stopped releasing Chambers Creek juveniles in 2011 and the last adults returned in 2014. ER578, ER596. NMFS analyzed the effect of harvesting returning adults. ER529. WFC does not explain what purpose additional consultation could serve. Indeed, recent science shows "no trace" of Chambers Creek genetic introgression. SER802, *see also* SER363-SER365. And when WFC's own experts were asked how they would manage Chambers Creek operations, both said they would harvest the last year of returning adults and discontinue juvenile releases, which is exactly what happened. SER221, SER225-SER226. WFC has not shown there is a live controversy with respect to the alleged lack of consultation.

2. WFC failed to provide the ESA-required notice to BIA.

WFC's opening brief does not challenge the district court's holding that it failed to give proper pre-suit notice of BIA's alleged violation. ER32, SER292-SER293. Any such argument is therefore waived. *E.g.*, *Arpin*, 261 F.3d at 919.

Regardless, the holding was correct. Under the ESA, a plaintiff must give both the alleged violator and the relevant Secretary written notice of a violation 60 days before suing. 16 U.S.C. § 1540(g)(2)(A)(i). Strict compliance with the notice requirement is "a mandatory, not optional, condition precedent for suit." *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26 (1989). Failing to "strictly comply" with the 60-day notice requirement is a jurisdictional defect and "absolute bar" to bringing suit under the ESA. *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998). The notice must also "sufficiently alert" the potential

defendants "to the actual violation" that will be alleged in the complaint. *Id.* WFC sent a 60-day notice letter to each federal defendant specifically mentioning every agency at issue in this litigation except BIA, which is also not a defendant. ER1017-ER1027. While WFC sent its letter to the Secretary of the Interior, notice on a parent agency is insufficient to assert claims against a sub-agency. *Alliance for the Wild Rockies*, 772 F.3d at 604, n.8. The district court correctly held that WFC's letter was insufficient to provide notice regarding the need to consult on BIA's funding. ER32.

B. The district court properly limited review to the administrative record.

If the citizen suit claim is not moot and WFC provided adequate notice, contrary to WFC's assertion (Br. 52), the district court was well within its discretion in limiting its review to the administrative record. ER16-ER17; *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971 (9th Cir. 2014); *Jewell*, 747 F.3d at 603.

The APA's judicial review framework applies to suits brought under the ESA's citizen suit provision, 16 U.S.C. § 1504(g)(1)(A). "[W]here Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme] Court has held that consideration *is to be confined to the administrative record* and that no de novo proceeding may be held." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963) (emphasis added). This Court likewise rejected an argument that district courts should review de novo suits brought under a citizen suit provision similar to the ESA's, explaining that the APA applies to review

of agency action "in the absence of a stated exception." *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000); *see also Webster v. Doe*, 486 U.S. 592, 607 (1988) (Scalia, J., dissenting).

In the ESA, Congress did not expressly exclude citizen suits against federal agencies from the APA's review procedures. Rather, it was silent. Thus, ESA citizen suit challenges to federal agency action are subject to the APA's judicial review provisions. *See Jewell*, 747 F.3d at 601; *see also Bennett*, 520 U.S. at 174 (requiring "clearest of statutory direction" to read ESA citizen suit provision as abrogating APA principle). The APA generally confines review to the administrative record. 5 U.S.C. § 706 ("court shall review the whole record or those parts of it cited by a party"); *Carlo Bianchi*, 373 U.S. at 714-15; *San Luis*, 747 F.3d at 602-03; *Ctr. for Biological Diversity*, 450 F.3d at 943. As this Court reaffirmed *en banc*, "[a]n agency's compliance with the ESA is reviewed under the Administrative Procedure Act." *Karuk Tribe of Calif. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012); *accord Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012).

This Court's decisions in *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 476-77, 497 (9th Cir. 2011), and *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1030, 1034 (9th Cir. 2005), do not require a different result. Although *Kraayenbrink* stated that "the APA does not apply," 632 F.3d at 497, that statement conflicts with *Kraayenbrink*'s holding, one page earlier, that APA § 706 governs judicial review of

ESA claims. *Id.* at 496. *Kraayenbrink* does not purport to distinguish *Carlo Bianchi* or this Court's decisions on the issue. In light of those binding precedents, *Kraayenbrink* must be read as having allowed supplementation of the administrative record under a recognized exception to the record review rule, not wholesale (and silent) abandonment of long-standing principles of administrative law.

Nor did *Washington Toxics* hold that the APA is inapplicable to ESA citizen suits. Rather, *Washington Toxics* held only that it was not necessary to challenge "final" agency action in accordance with 5 U.S.C. § 704 to plead an ESA citizen suit claim. 413 F.3d at 1034. To say that the final agency action requirement in APA Section 704 does not apply to citizen suits says nothing about what standard and scope of review apply to that action, and certainly is not a holding that APA Section 706 is inapplicable, especially given the above principles. Moreover, *Washington Toxics* is inconsistent with a later Supreme Court decision. In *National Association of Home Builders v. Defenders of Wildlife,* 551 U.S. 644 (2007), the Supreme Court evaluated whether the EPA had complied with ESA § 7(a)(2). There, the Court unambiguously imported the APA, including the finality requirement, into its ESA evaluation. 551 U.S. at 659 ("federal courts ordinarily are empowered to review only an agency's *final* action, see 5 U.S.C. § 704"); *see also id.* at 657 (applying APA's "arbitrary and capricious" standard to EPA permitting decision). *Home Builders* leaves no doubt that

claims challenging an action agency's compliance with the ESA are evaluated under APA principles.

Moreover, this Court's *en banc* decision in *Karuk Tribe* also applied APA record review principles to an ESA suit. 681 F.3d at 1017 ("Because this is a record review case, we may direct that summary judgment be granted to either party based upon our review of the administrative record."). To the extent *Kraayenbrink* conflicts with *Karuk Tribe*, the latter, *en banc* decision controls. *See United States v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011). Indeed, the arbitrary and capricious standard and record review are integrally related. *Carlo Bianchi*, 373 U.S. at 715 (arbitrary and capricious standard has "consistently been associated with a review limited to the administrative record"); *Powell*, 395 F.3d at 1030 ("Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making.").

C. NMFS did not improperly divide its consultations.

WFC incorrectly contends that NMFS failed to consult on the entire agency action in the July 2012 BiOp, and deferred full consideration of the effects of hatchery fish to the December 2012 BiOp. Br.54-56. WFC's argument is legally and factually inaccurate. As a legal matter, NMFS appropriately analyzed the information and proposals before it. The July 2012 BiOp was the result of NPS's July 2011 request to reinitiate consultation on its "ongoing action to fully restore the Elwha River

Ecosystem and native anadromous fisheries." ER920, *see also* ER914. That action includes removing the dams and "implementing fisheries restoration projects." ER920. As discussed above, the restoration of the Elwha Basin was a separate and distinct federal action, carried out primarily by NPS. In contrast, the December 2012 BiOp was the result of consultation related to the Tribe's and State's proposals: specifically, on NMFS's determination of whether the Tribe's and State's hatchery operations fall within limit 6 of the 4(d) rule and on federal funding provided for those specific operations. ER418. WFC identifies no provision of the ESA or implementing regulations that required these consultations to be combined as a single action.

The ESA regulations define the "*effects* of the action" to include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline" and explain that "[i]nterrelated actions are those that are part of a larger action *and depend on the larger action for their justification*. Interdependent actions are those that have *no* independent utility apart from the action under consideration. 50 C.F.R. 402.02 (emphasis added). Contrary to WFC's contention (Br. 55), NMFS found that the operations were not interrelated or interdependent because the NPS action was not the "'but for'" cause of the hatchery programs because they "existed prior to the proposed action and the program

operators have demonstrated their intent to continue . . . ." ER922. While broodstock collection was part of the NPS action, it was appropriate to limit consideration of the release of hatchery progeny to the available information because hatchery operations would have continued regardless, as NMFS explained. *Id.*

Regardless, NMFS analyzed the effects of releases in the July BiOp, and found that while there are adverse effects associated with future operation, over the long term these adverse effects would not preclude recovery of the listed species. For example, NMFS explained in the July BiOp that the

> consultation for the Chinook salmon HGMP will take into account the general risks of hatchery programs. Some of the information generated for that consultation is relevant to assessing the effects of the temporary supportive breeding program associated with the proposed action over the duration of the dam removal and early watershed recovery phases. To the extent that part of those hatchery operations are also part of this proposed action, *we analyze the effects here.*

ER943-ER944 (emphasis added). The July BiOp proceeded to describe the effects. ER944. Based on this analysis and the rest of the BiOp, NMFS concluded: "There are potential negative effects from continued hatchery supplementation programs beyond the term of the proposed action. Because those programs are substantially undefined but expected to be eliminated or substantially reduced as recovery occurs, the precise extent of effects is uncertain. Based on available information about the likely direction of the programs, the effects of hatchery operations are not likely to substantially impede recovery." ER955; ER948 (citing scientific studies including NMFS' 2011 reference document for consultations on steelhead and salmon for

hatchery programs). Thus, the effects of Tribal and State hatcheries were analyzed in the July BiOp.

While WFC asserts the July BiOp was "plainly insufficient," it never explains how NMFS could have conducted a more robust analysis when the HGMPs were still being developed by the State and Tribe. NMFS has a statutory obligation to base its biological opinion on the best data and information *available* within prescribed time limits (usually 135 days). 16 U.S.C. § 1536(a)(2), (b); 50 C.F.R. § 402.14(e). It has no duty to wait for perfectly refined actions or to compile information not available. *Jewell*, 747 F.3d at 602. Nothing precludes NMFS from preparing parallel consultations on different actions; it just must ensure that all of the effects are analyzed with the best available information.

In any event, NMFS comprehensively evaluated all adverse effects in the December BiOp. ER497-ER508 (factors considered); ER508-ER557 (risks and benefits of programs); ER571 (effects on Chinook); ER577-584 (effects on steelhead); ER586-ER588 (conclusions). WFC does not dispute that the December BiOp considered all relevant factors and effects, including describing potential take from hatchery releases (ER589-ER591) and nothing in the regulations precludes NMFS from providing supplemental (and more thorough) analyses in multiple BiOps.

Nor is WFC helped by *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (cited at Br. 55). In *Connor,* FWS relied on an "incremental-step consultation" where

it did not analyze future adverse effects of oil and gas leasing *at all* because that analysis would take place in an undetermined future consultation. *Id.* at 1452. Here, NMFS did not temporally segment the July BiOp and avoid consideration of adverse effects. The July BiOp analyzed NPS's proposed action with the best available information even though the co-managers were still finalizing the proposed hatchery programs. *See* ER921-ER922. NMFS then conducted another consultation when more information became available through the final HGMPs. ER497-ER508. Now that both BiOps are complete, there can be no doubt that NMFS comprehensively analyzed all of the effects of hatchery operations.

V. The claim against the Tribal defendants is moot.

WFC pled one claim against the Tribal defendants: that operation of the hatcheries resulted in "take" of threatened species. ER1010. We address WFC's contentions to the extent they implicate proper interpretation of the ESA.

WFC made its allegation before NMFS approved the HGMPs and issued the ITS. The Tribe now operates its hatchery programs pursuant to approved HGMPs. Accordingly, those activities are not subject to the take prohibition. The Tribe provided evidence of compliance with Limit 6 and the ITS. ER257-ER258; *see also* SER40-SER59. The district court found the programs "are operated in compliance with the government's approvals." ER46. Absent credible evidence of non-compliance, it makes no sense to remand to the district court to make the same

finding. The district court correctly dismissed the claim against the Tribal defendants as moot. ER43-ER47.

Moreover, the district court correctly found that WFC failed to comply with the ESA's notice requirement because WFC's notice alleged only that the hatcheries were taking listed species without securing an exemption. ER45-ER46, ER1033. The Tribal defendants secured that exemption when NMFS issued the Limit 6 determination and ITS. WFC attempts to avoid the 60-day notice requirement by asserting that it need only provide notice that take is occurring because the Limit 6 determination and ITS are affirmative defenses. Br. 59-61. WFC's position ignores the plain language of its notice and would eliminate the notice requirement's purpose – to allow alleged violators to abate a violation without litigation. *See Sw. Ctr.*, 143 F.3d at 520-22. While this Court has stated that new notice is not required in some circumstances of "post-notice compliance efforts" (Br. 60, citing cases), here, NMFS changed the legal landscape when it issued the 4(d) determination and ITS. WFC needed to give the Tribal defendants notice of how they allegedly were not complying with those authorizations; indeed, WFC still cannot identify any instance of non-compliance.

Finally, the district court correctly concluded that the December 2012 ITS provides independent coverage for any take associated with the Tribe's activities. *See*

16 U.S.C. § 1536(o)(2); *Ramsey v. Kantor*, 96 F.3d 434, 441-42 (9th Cir. 1996) (take by third party (not federal agency or applicant) may be exempted by an ITS).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

s/ JENNIFER S. NEUMANN
CARTER (COBY) HOWELL
JOSEPH T. MATHEWS
DAVID C. SHILTON
JENNIFER SCHELLER NEUMANN
Attorneys
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-2767
jennifer.neumann@usdoj.gov

Of Counsel:
CHRISTOPHER FONTECCHIO
Office of NOAA General Counsel
Department of Commerce
Seattle, Washington

ERIC W. NAGLE
KELLY R. POWELL
Office of the Solicitor
Department of the Interior
Portland, Oregon

APRIL 2015
90-8-6-07312

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND LOCAL RULE 31.1

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,928 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Jennifer S. Neumann
JENNIFER S. NEUMANN

STATEMENT OF RELATED CASES

The Federal defendants are unaware of any related case currently pending in this Court within the meaning of Circuit Rule 28-2.6.

Plaintiffs previously attempted to appeal the district court's denial of their motion seeking reconsideration of the district court's dismissal of the tribal defendants from the suit. This Court dismissed that appeal for lack of appellate jurisdiction. *Wild Fish Conservancy v. Nat'l Park Serv.*, 9th Cir. No. 14-35196 (order dated Apr. 7, 2014).

CERTIFICATE OF SERVICE

I hereby certify that on *April 13, 2015*, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/ Jennifer S. Neumann
JENNIFER S. NEUMANN