Appeal No. 14-35791

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY, *et al.*,

Plaintiffs-Appellants,

vs.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BIA	U.S. Bureau of Indian Affairs
BiOp	Biological Opinion
DOI	U.S. Department of Interior
DPS	Distinct Population Segment
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionary Significant Unit
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service
HGMP	Hatchery and Genetic Management Plan
HSRG	Hatchery Scientific Review Group
ITS	Incidental Take Statement
MAMP	Monitoring and Adaptive Management Plan
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPS	U.S. National Park Service
RMP	Resource Management Plan
WDFW	Washington State Department of Fish and Wildlife

INTRODUCTION

Removal of the Elwha River dams is a historic undertaking, constituting the Nation's largest salmonid restoration project to date. Unfortunately, this project is jeopardized by the implementation of substantial hatchery programs without clearly defined monitoring and adaptive management strategies needed to detect and reduce the harmful effects of the programs.

The Defendants suggest that their plan to flood the Elwha River with hatchery fish in a supposed effort to restore "wild" salmonids underwent timely and thorough review by the scientific community in accordance with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). Nothing could be further from the truth.

Despite having two decades to comply with these statutes and provide opportunities for public participation that are required *before* actions are taken, Federal Defendants had yet to analyze the hatchery strategy and alternatives thereto under NEPA or the ESA when the Conservancy filed its lawsuit in 2012. Instead, after the Complaint was filed, the Federal Defendants hastily issued two biological opinions ("BiOp") and three incidental take statements ("ITS") under the ESA and an environmental assessment ("EA") and finding of no significant impact under NEPA. This occurred *after* the hatchery plans had been developed and funded and were being implemented. These rushed *post hoc* efforts taken in

response to litigation fall far short legal requirements and threaten to undermine the Elwha River restoration efforts being implemented at an enormous public expense.

SUPPLEMENTAL STATEMENT OF FACTS

A recurring theme to Federal Defendants' Brief is that their older NEPA documents fully and adequately evaluated the adverse effects of, and alternatives to, the hatchery programs being implemented in conjunction with dam removal. *E.g.*, Fed. Defs.' Br., pp. 8, 16. This is not supported by the record.

The 1995 Programmatic environmental impact statement ("EIS") evaluated whether to remove the dams and did not address fish restoration options. *See* ER 1374-78. The document merely presented recovery estimates with the presumption of no hatchery production and suggested that recovery time may be less with supplementation efforts. *See* ER 1386-89, 1391.

The 1996 Implementation EIS evaluated alternative methods to remove the dams. ER 1319-20. The appended Fish Restoration Plan presented the general options available for fish restoration, including natural recovery, and indicated that some hatchery supplementation would occur and that all options would continue to be investigated. ER 1348-63. There was no evaluation of the adverse effects of implementing hatchery programs in conjunction with dam removal or of alternatives thereto. *See* ER 1328-63. The Federal Defendants point to a single

sentence in an effort to refute this fact. *See* Fed. Defs.' Br., p. 18. That sentence was discussing the "No Action alternative"—under which the dams would be left in place—and merely indicated that the genetic integrity of native stocks would be harmed if the dam removal did not occur and the then-existing hatchery programs continued. *See* ER 1335.

In representing that the 1995 Implementation supplemental EIS ("SEIS") addressed the effects of the hatchery programs, the Federal Defendants again point to general statements on the "No Action alternative" under which the dams would be left in place; comments that vaguely state that the then-existing hatchery programs would impact fish because of "genetic problems" if the dams were not removed. *See* Fed. Defs.' Br. p. 8 (citing to SER 1525, 1564).

Contrary to Federal Defendants' representations, these older NEPA documents did not evaluate the effects of implementing the hatchery programs in conjunction with dam removal or alternatives to those programs whatsoever—much less take the "hard look" required by NEPA. Nor could they given that "[s]ince 1995 [the Department of Interior ("DOI")]…worked to identity the…strategies for fisheries restoration," including the preferred role of hatcheries. *See* ER 1131, 1151; *see also* Fed. Defs.' Br., pp. 54-55 (programs were "substantially undefined" as of 2012).

ARGUMENT

I. NMFS Violated NEPA by Approving the Hatchery Programs Without Preparing an EIS.

NEPA demands that the National Marine Fisheries Service ("NMFS") prepare an EIS if there are "substantial questions" about whether the hatchery programs "*may*" significantly affect the environment. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005) (emphasis in original). NMFS' approval of the annual release of over 7.5 million hatchery fish into a pristine watershed undergoing the largest dam removal project in the Nation's history clears this "low standard." *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011). Accordingly, NMFS violated NEPA by approving the hatchery programs without preparing an EIS.

A. NMFS' failure to prepare an EIS is not cured by tiering.

NMFS argues it was not required to prepare an EIS because the choice to use hatcheries was made in 1996—outside of the statute of limitations—and because its EA tiered to "prior EISs." Fed. Defs.' Br., pp. 16, 18. These arguments are unavailing.

This Court has rejected this type of statute of limitations arguments. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781-84 (9th Cir. 2006). Plaintiffs in *Pit River* challenged the failure to prepare an EIS for a 1998 decision to extend a lease—plaintiffs did not challenge the original 1988 lease "[b]ecause the statute of

limitations ha[d] run." 469 F.3d at 773-77, 781. The Court held that an EIS was required for the lease extension because it affected the status quo by extending legal rights to the leased land and because the NEPA documents that preceded the 1988 lease were insufficient. *See id.* at 781-84.

The Conservancy is not challenging the vague and undefined "decision" to use hatcheries purportedly made by the National Park Service ("NPS") in 1996. The Conservancy is challenging NMFS' Limit 6 Approval, December 2012 BiOp and the ITS issued therewith, and failure to prepare an EIS for its approval of substantial hatchery programs. *See* ER 251-53. These agency actions unquestionably affect the status quo because, regardless of any decision NPS made in 1996, NMFS' actions were required under the ESA for both the implementation of the hatcheries and for Federal Defendants' funding of them. *See* 16 U.S.C. § 1536(a)(2) (ESA consultation required for funding). This claim is therefore not barred by a statute of limitations and NMFS' failure to prepare an EIS is not cured by a series of old NEPA documents that do not even address the effects of the hatchery programs. *See Pit River*, 469 F.3d at 781-84.

An EIS is required because the prior NEPA documents do not actually discuss the impacts of the hatchery programs—much less take the requisite "hard look." *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993, 997-98 (9th Cir. 2004) (inadequate EA not cured by tiering to EIS

that included only "general statements" about cumulative effects). Contrary to NMFS' suggestion, mere "contemplation" of hatchery programs in a prior EIS is insufficient to fulfill NEPA's mandates. *See* Fed. Defs.' Br., pp. 18-19;[1] *and see Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1210, 1214 (9th Cir. 1998) (EIS required for a site-specific logging proposal even though prior forest-wide EIS contemplated logging).

NMFS' tiering arguments are similar to those rejected in *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800 (9th Cir. 1999). There, the Court held that an inadequate NEPA analysis was not cured by tiering to a prior EIS prepared when the current action was uncertain, "mentioned only in a pool of possible projects," and "not concrete enough to allow for adequate analysis." *Muckleshoot Indian Tribe*, 177 F.3d at 809-11. Similarly, the Implementation EIS and appended Fish Restoration Plan merely listed the general options for fish restoration, stated all options would continue to be investigated, and provided no analysis of adverse effects or alternatives. *See* ER 1348-63. The Court should reject NMFS' argument that it may avoid preparation of an EIS that takes a "hard

[1] *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1422-24 (9th Cir. 1989), does not support NMFS' position. There, the Court found the prior EIS actually considered the "type and magnitude" of the action, unlike the EIS here. *See id.*

look" at the hatchery programs and alternatives by tiering to prior EISs that do not include any analyses of the programs whatsoever.

B. The context and intensity of NMFS' actions require an EIS.

An EIS was required because, given, the context and intensity of NMFS' actions, there are, at a minimum, "substantial questions" as to whether there may be a significant effect on the environment. *See* 40 C.F.R. § 1508.27; *and see Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1219-20 (9th Cir. 2008). While the presence of a single NEPA significance factor may require an EIS, the existence of several such factors here requires NMFS prepare an EIS that takes a hard look at the scope of programs it has approved and alternatives thereto. *See Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1220. NMFS' finding of no significant impact ("FONSI") does not provide the "convincing statement of reasons to explain why a project's impacts are insignificant" that is needed to avoid an EIS. *See id* (citation omitted).

1. The context is extraordinary.

NMFS suggests it may ignore the "extraordinary context" of the dam removal project because prior NEPA documents accounted for such context and "contemplated" hatchery supplementation. Fed. Defs.' Br., p. 20. As described above, the older EISs did not evaluate the effects of implementing hatchery programs in conjunction with dam removal. Moreover, NMFS is required to

consider the context in which its current actions will occur in determining whether an EIS is required. 40 C.F.R. § 1508.27(a). NMFS has not provided any support for its position that it is absolved of this requirement if other NEPA documents have considered other actions occurring within the same context.

NMFS suggests that the history of hatchery programs unlawfully operating in the Elwha River without required ESA authorization somehow affects the context of its actions. *See* Fed. Defs.' Br., p. 20. This argument is unconvincing given that areas above the dam sites were free of hatchery fish and that NMFS' actions were legally necessary under the ESA for the continued funding and implementation of the hatchery programs. *See* ER 1160.

2. Unique geographic areas are affected.

NMFS' FONSI inaccurately found that no actions will occur within unique geographic areas. *See* ER 398; *and* Pls. Op. Brief., p. 29. NMFS now abandons that position and instead argues that there will not be significant impacts on unique geographic areas because hatchery fish are compatible with the Wilderness Act. Fed. Defs.' Br., pp. 21-22. This litigation position is not entitled to deference. *See Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008). Releasing millions of fish produced at an industrial hatchery complex is not managing the area so as to "preserve its natural conditions" as required by the Wilderness Act. *See* 16 U.S.C. § 1131(c). Further, NMFS does not even address other significant

impacts on unique areas, including the loss of areas free of hatchery fish. *See* Plfs.' Op. Br., p. 29.

3. The action may set precedent.

NMFS wrongly argues that its approvals are not likely to set a precedent for future actions with significant effects. Fed. Defs.' Br., p. 35. NMFS is currently evaluating whether to approve over 100 other hatchery and genetic management plans ("HGMPs") from programs throughout Puget Sound. *See* Fed. Defs.' Br., p. 22. NMFS recently cited the EA challenged here in support of its decision to scrap a draft EIS prepared for those Puget Sound HGMPs in lieu of smaller watershed based NEPA analyses. 80 Fed. Reg. 15,986, 15,987 (March 26, 2015). Thus, NMFS is citing the EA as precedent for segmenting out review of the Puget Sound hatcheries into smaller NEPA analyses. Further, NMFS' reliance on older EAs for programs on the Snake River and Hood Canal indicates that the agency's approval of the Elwha River programs with an EA adds to a "chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1162-63 (9th Cir. 1998) (internal quotations omitted).

4. The effects of the actions are highly uncertain.

NMFS suggests that the adverse effects of the hatchery programs are not so highly uncertain as to warrant an EIS because, according to NMFS, hatchery

supplementation is necessary to restore salmonid populations. Fed. Defs. Br., pp. 23-24; *see also* ER 307 (the EA finds that, "on balance," the benefits of the hatcheries "outweigh" adverse effects). Such balancing cannot occur in an EA, but rather is only appropriate in an EIS. *See Sierra Club v. Marsh*, 769 F.2d 868, 874-76 (1st Cir. 1985); *and see Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2002).

Contrary to NMFS' current claim there is "near-certainty" the hatchery programs are needed, its own experts predict that salmonids would rapidly establish self-sustaining populations within two to twenty years without hatchery production. *See* Fed. Defs.' Br., pp. 23-24; *and* ER 468, 478; *see also* ER 1151. These contradictory statements raise substantial questions about the need for the hatchery programs and the scope of their impacts and benefits, which should be considered in an EIS. *See Native Ecosystems Council*, 428 F.3d at 1239.

The record is replete with uncertainties regarding all aspects of the project. *See* Fed. Defs.' Br., p. 24; *and see* Pls.' Op. Br., pp. 31-33. This is not surprising given the unprecedented nature of the dam removal and salmonid restoration project and the fact that the use of hatcheries to produce naturally-spawning fish is "unproven." *See* ER 559. The multitude of uncertainties are far more significant than those at issue in the cases Federal Defendants rely upon. *See, e.g., Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006) (one potential uncertainty).

5. The effects of the actions are controversial.

NMFS acknowledges an action is "highly controversial" if there is a "substantial dispute" about the "size, nature, or effect" of the action. Fed. Defs.' Br., pp. 26-27. In arguing that no such controversy exist, NMFS focuses on the number and source of comments provided during its brief public comment period. *See id.* This Court has found that critical testimony submitted by a plaintiff can demonstrate a controversy and has not suggested that some threshold number of comments is needed. *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193-94 (9th Cir. 1988).

The Conservancy's experts[2] demonstrate there is not the "virtual agreement" that existed in *Friends of Endangered Species, Inc. v. Jantzen,* 760 F.2d 976, 986 (9th Cir. 1985). NMFS omits that in *Friends of Endangered Species*, "virtual agreement" existed not only among government officials but also "private parties[] and local environmentalists." 760 F.2d at 986. Here, multiple organizations

[2] Federal Defendants' efforts to discredit these experts as being "paid" and "far from the Elwha" is absurd. *See* Fed. Defs.' Br., pp. 26-27. The experts' credentials speak for themselves—they are some of the Nation's leading experts on salmonid and animal genetic issues. *See* ER 679-80, 691-95, 697-99, 716-65, 767-70, 790-97. Two of the experts are so frustrated by the tragedy of implementing oversized and poorly designed hatchery programs in the Elwha River that they did not even charge for their extensive work. *See* ER 682, 700. One of the experts is James Lichatowich, former Assistant Chief of Fisheries for the State of Oregon and the special consultant to the congressionally-chartered Hatchery Scientific Review Group for its review of these very hatchery programs. ER 680-81.

devoted to saving wild fish populations, leading scientists, and the congressionally-chartered Hatchery and Scientific Review Group ("HSRG") have all raised serious concerns about the size, nature, and effect of the hatchery programs. *See* Plfs.' Op. Br., pp. 33-34; *and see* ER 679-89, 707-09, 713-14, 785-86, 1036.

6. There are significant effects on ESA-listed species.

The hatchery programs will have serious and lasting negative effects on ESA-listed Chinook salmon and steelhead and their critical habitat. *See* Pls.' Op. Br., pp. 12-14. NMFS attempts to justify its failure to prepare an EIS by opining that, "on balance," the benefits of its actions outweigh the adverse effects to ESA-listed species. *See* Fed. Defs.' Br., pp. 28-30. Again, such balancing cannot be done in an EA; rather, an EIS is required to weigh "significant negative impacts of the proposed action against the positive objectives of the project." *See Anderson*, 371 F.3d at 494; *and see Sierra Club v. Marsh*, 769 F.2d at 874-76. An EIS is required because, at a minimum, there are substantial questions as to whether there will be significant effects to ESA-listed species. *See* ER 1036; ER 307 (NMFS cannot predict duration or magnitude of adverse genetic effects).

7. There are cumulatively significant effects.

NMFS was required to prepare an EIS because "it is reasonable to anticipate a cumulatively significant impact on the environment" from the Elwha River programs and the other one hundred-plus programs that collectively release tens of

millions of hatchery fish into Puget Sound each year. *See* 40 C.F.R. § 1508.27(b)(7); *and see* ER 413-14. NMFS violated NEPA by segmenting out its review of the Elwha River programs in an effort to avoid significant effects that require an EIS. *See* 40 C.F.R. § 1508.27(b)(7).

a. A single NEPA document was required for NMFS' action on Puget Sound hatcheries.[3]

NMFS was required to prepare a single NEPA document for its review of Puget Sound hatcheries under the 4(d) Rule because they are part of a single proposal submitted in 2004, were announced simultaneously, are reasonably foreseeable, and are located in the same watershed. *See* Pls.' Op. Br., pp. 36-37.

Contrary to NMFS' contention, the supposed 1996 decision to use hatcheries with dam removal did not absolve it of the requirement to evaluate Puget Sound hatcheries in a single NEPA document. *See* Fed. Defs.' Br., pp. 32-33. The "decision" to use all Puget Sound hatcheries was made before the submission to NMFS was made in 2004 seeking ESA approval of all Puget Sound hatcheries. This is not a distinguishing feature of the Elwha River programs.

[3] Contrary to NMFS' contention, the Conservancy's comments gave more than adequate notice of this issue. *See* Fed. Defs.' Br., pp. 31-32; *and see* ER 676 (discussing failure to account for cumulative impacts of hatchery programs throughout the Puget Sound region in NMFS' document); *and see Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) (expressing concern on issue was adequate). "[P]recise legal formulations" or "magic words" are not needed to exhaust administrative remedies. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965-66 (9th Cir. 2002).

The Court should also reject NMFS' argument that the submission of revised HGMPs for the Elwha River programs allowed it to segment its review. *See* Fed. Defs.' Br., pp. 33-34. The revised HGMPs were submitted in response to this litigation along with a request for expedited review outside of the Puget Sound NEPA process. *See* ER 1048. NMFS' contention that its subsequent segmentation was proper—after twice announcing its intent to prepare a comprehensive Puget Sound-wide EIS—is a litigation position not entitled to deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988).

b. <u>There are cumulatively significant effects that require an EIS</u>.

The Court should reject NMFS' implausible assertion that there are not significant cumulative effects from the approximately 114 hatchery programs in Puget Sound seeking NMFS' approval. *See* Fed. Defs.' Br., p. 31.

The EA and FONSI do not supply the "convincing statement of reasons" as to why there are not significant effects required to avoid an EIS. *See Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1220 (citation omitted). The EA includes only the most conclusory statements as to cumulative effects without even identifying, let alone analyzing, the actual cumulative impacts of hatchery programs in Puget Sound. *See* ER 381-82, ER 399, ER 401. Such "generalized, conclusory assertions" are insufficient. *See Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 893 (9th Cir. 2007).

NMFS relies on the EA's "Affected Environment" section, but that simply describes the environmental baseline and does not substitute for an actual analysis of cumulative impacts. Fed. Defs.' Br., p. 30; *and see* ER 382; *and see Muckleshoot Indian Tribe*, 177 F.3d at 810-812. Overall, NMFS' EA is nothing like that in the only case the agency cites where the EA actually included "detailed accounts" of past projects' impacts. *See* Fed. Def. Br., p. 31; *and Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1007-1010 (9th Cir. 2011).[4]

8. <u>The actions case a significant loss of scientific resources</u>.

NMFS disregards the unique opportunity that the dam removal and salmonid restoration project present to study natural salmonid recovery in response to large-scale dam removal. This loss is far more significant than that at issue in the opinion relied upon by NMFS where a single professor lost his ability to take students on a field trip. *See Lockhart v. Kenops*, 927 F.2d 1028, 1035 (8th Cir. 1991).

[4] NMFS' reliance on a BiOp in an effort to cure its deficient cumulative effects analysis is impermissible. *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002) (cannot tier to non-NEPA document); *and see Blue Mountains Biodiversity Project*, 161 F.3d at 1214 (agency's position must be in the EA).

II. The District Court Erred in Not Vacating NMFS' Agency Actions.

The Defendants argue that the issue of whether the District Court erred in vacating the deficient EA rather than the associated agency documents is moot. *See* Fed. Defs.' Br., pp. 35-36; *and see generally* Hat. Defs.' Br., pp. 41-44. In doing so, they rely on mootness decisions involving non-NEPA claims that are inapposite. *See, e.g.*, Fed. Defs.' Br., pp. 35-36. Issuance of a new NEPA document does not moot a NEPA claim such as this. *See, e.g., Pit River*, 469 F.3d at 785 ("we have repeatedly held that dilatory or ex post facto environmental review cannot cure an initial failure to undertake environmental review"); *and see Nat'l Audubon Soc'y v. Butler*, 160 F. Supp. 2d 1180, 1185-87 (W.D. Wash. 2001) (issuance of new EA during litigation did not moot NEPA claim). Nor does the new EA render moot the necessary remedy stemming from the successful NEPA claim—this Court has rejected arguments that the preparation of a purported "adequate EA" renders a remedy moot. *See Metcalf v. Daley*, 214 F.3d 1135, 1145-46 (9th Cir. 2000) (ordering the district court to set aside a FONSI and the underlying agency action and "begin the NEPA process afresh").[5]

[5] The Conservancy did not waive its argument that the ITS should be vacated. The Conservancy's pleadings alleged that NMFS violated NEPA and requested that the ITS be set aside and that Defendants be enjoined from "authorizing…the… hatchery programs until compliance with NEPA…is achieved." ER 252-254. The district court bifurcated briefing on liability and remedy below, so the Conservancy's summary judgment motion focused on the NEPA deficiencies and

III. DOI Violated NEPA in Funding and Implementing the Hatcheries.

DOI has never taken the "hard look" required by NEPA for its decisions to enter into a contracts to fund the hatchery programs or to implement those programs. The 1996 Implementation EIS is devoid of any evaluation of the effects of the hatchery programs or their alternatives. Even if that document—prepared sixteen years before dam removal began—can reasonably be construed to constitute an analysis of the hatchery programs, DOI was required to prepare a supplemental NEPA evaluation for its decision to fund and implement these programs as part of the dam removal project.

A. The funding agreements are part of the "whole" record.

Federal Defendants' contention that the series of agreements to fund the Elwha hatcheries entered into by the Secretary of DOI should not be included in the administrative record is remarkable. *See* ER 81. The agreements were entered into by "the United States of America, through the Secretary of the [DOI]"—a party to this lawsuit. ER 81. These agreements and funding thereunder are central to the claims and agency decisions at issue. The Conservancy alleges, *inter alia*, that the Secretary's funding of the hatcheries violated the ESA and NEPA. *E.g.*, ER 1003. NMFS' challenged decisions purport to analyze funding provided under

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its remedy brief addressed which agency actions should be vacated for the NEPA violation—the Limit 6 Approval and the ITS. *See* ER 213.

the agreements. ER 418; ER 602. These agreements are part of the "whole" record because, at a minimum, they were indirectly considered by the agencies. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

B. DOI's actions required compliance with NEPA procedures.

The Conservancy's First and Third Claims allege that DOI and its Secretary violated NEPA by, *inter alia*, funding and implementing the various hatchery programs described in the Fish Restoration Plan without preparing an EIS or an alternatives analysis. ER 1001-03; *see also* ER 977-78 (alleging injuries stemming from DOI's funding). In opposing Federal Defendants' early motion to dismiss, the Conservancy explained that its uncontroverted allegation that DOI has decided to fund and implement the hatchery programs sufficiently allege final agency actions but, to the extent the district court was to make factual findings on this issue, it should first allow jurisdictional discovery. *See* ER 965-66; *see also* ER 993-94.

Federal Defendants and the district court mischaracterize these claims as dependent upon a theory that the Fish Restoration Plan is itself a final agency action under the APA. *See* ER 63-64. The Court should reject this reframing of the Conservancy's claims—the "plaintiff is the 'master' of his complaint" and jurisdiction should not be determined based upon the defendant's

mischaracterization of the allegations. *See Ultramar Am., Ltd. v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir. 1990).

The Court should similarly reject Federal Defendants' argument that the allegations challenging DOI's funding were "not sufficiently particular." Fed. Defs.' Br., p. 41. The Conservancy plainly identified DOI's funding of the "operation and maintenance costs" for the hatcheries. *See* ER 993-94, 1001-03. Any contention that the Conservancy should have alleged the details of DOI's funding agreements prior to obtaining the documents through discovery or production of the administrative record demonstrates that the district court erred in denying the Conservancy's request for jurisdictional discovery before granting an early motion to dismiss. *See* ER 965-66; *and see Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003).

The Court should reject DOI's contentions that it was not required to comply with NEPA because of a provision in the contract allowing the Hatchery Defendants to "redesign" programs and because DOI supposedly has limited ability to reduce the funding. Fed. Defs.' Brief, p. 42. DOI should not be allowed to escape NEPA requirements by agreeing to contrart terms and, moreover, the "redesign" provision does not even apply to funds for hatchery operations. *See* ER 82-83 (describing funds that may not be reallocated). Similarly, although DOI claims it has limited ability to reduce funding, the contract explains that funding

for hatchery operations is "awarded on a one-time-only basis and…not guaranteed to be funded in subsequent fiscal year(s)." ER 82-83.

C. DOI violated NEPA by not completing any NEPA process.

DOI violated NEPA by funding and implementing the hatchery programs without first preparing an EIS or EA and without first conducting an alternatives analysis. The district court erred in dismissing claims related to these violations—the First and Third Claims. *See* ER 59-61; *and see* ER 1001-03.

DOI is incorrect in asserting that a claim challenging its failure to comply with NEPA is time-barred. *See* Fed. Defs.' Br., p. 42. DOI's recent agreement to fund the hatcheries is a new agency action that changed the status quo by granting legal rights related to funding of the hatchery. *See Pit River*, 469 F.3d at 781-84. DOI was required to comply with NEPA for this new action because the prior NEPA documents did not address its effects whatsoever. *See id.*; *and see* Pls.' Op. Br., p. 51 (current strategies significantly different than those previously contemplated).

The post-hoc EA issued by NMFS for its ESA approval of the hatcheries does not cure DOI's NEPA violations. *See* Fed. Defs.' Br., p. 43. First, the actions and alternatives evaluated in that NEPA document do not evaluate DOI's funding of the hatchery programs whatsoever. *See* ER 280-83. Moreover, preparation of an EA **after** a contract is signed committing the agency to a particular course of

action does not fulfill NEPA's requirement to take a "hard look" at the consequences of an action. *See Metcalf*, 214 F.3d at 1143-45.

D. Alternatively, DOI failed to timely supplement its NEPA efforts.

To the extent prior documents can be construed to constitute analyses for DOI's actions, supplementation was required because the current fish restoration strategies are significantly different than those vaguely described in the 1996 Implementation EIS and because of significant developments in the scientific understanding of adverse genetic effects from hatcheries. Pls.' Op. Br., pp. 51-52.

The FONSI issued during this litigation which Federal Defendants contend "effectively determin[ed] that no new information warranted a supplemental EIS" ignores the substantial differences between the 1996 and current fish restoration strategies. *See* Fed. Defs.' Br., p. 46; *and see* Pls.' Op. Br., pp. 51-52; *and compare* ER 1348-63 *with* ER 1120-54. The FONSI's contention that "new science" merely confirmed the historical understanding of adverse genetic effects is unsupported by the record because the 1996 Implementation EIS lacks any discussion of such effects. *See* Fed. Defs.' Br., p. 46. Thus, even if the statement regarding "new science" were true—which it is not—supplementation was required because extensive new studies have demonstrated significant adverse effects from genetic introgression and such effects were not analyzed whatsoever

in the prior NEPA documents. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).[6]

IV. DOI Violated the ESA by Failing to Consult.

DOI violated the ESA by funding the Elwha River hatchery programs without consulting on the effects the programs have on ESA-listed salmonids.

A. The district court erred in striking materials submitted in support of an ESA citizen suit claim.

This Court has twice, and only twice, addressed whether review of ESA citizen suit claims is limited to an administrative record, and both times held it is not. *See Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1030, 1034 (9th Cir. 2005); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011). Those decisions remain controlling precedent and the district court therefore erred in striking materials submitted in support of such a claim. *See Hart v. Massanari*, 266 F.3d 1155, 1170-71 (9th Cir. 2001); *and see* ER 16-17.

It was argued in *Washington Toxics* "that the proceeding contravened APA standards because the district court conducted its review outside an administrative record…" 413 F.3d at 1030. The Court rejected these arguments. *Id.* at 1034.

[6] There is no support for Federal Defendants' contention that this claim—reviewed *de novo*—is waived because the Conservancy did not discuss the district court's reasoning for rejecting the claim in the Opening Brief. *See* Fed. Defs.' Br., pp. 46-47. The Conservancy plainly presented this issue by citing to the district court's order rejecting the claim and fully arguing that DOI unlawfully failed to supplement its NEPA efforts. Op. Br., pp. 20, 50-52.

Federal Defendants' contention that the scope of review issue was not addressed in *Washington Toxics* is confounding given that the Court has explicitly stated otherwise. *See Kraayenbrink*, 632 F.3d at 497.

The Court addressed this issue again in *Krayyenbrink*:

> Intervenors argue that this court may not look to extra-record material in conducting a review under the ESA. As we explained in *Washington Toxics Coalition*, the APA applies only where there is "no other adequate remedy in a court," 5 U.S.C. § 704, and—because the ESA provides a citizen suit remedy—**the APA does not apply in such actions**. Therefore, under *Washington Toxics Coalition* **we may consider evidence outside the administrative record for the limited purposes of reviewing Plaintiffs' ESA claim**.

632 F.3d at 497 (internal citations omitted) (emphasis added). The Court should reject Federal Defendants' invitation to ignore this unequivocal language and interpret *Kraayenbrink* as merely allowing supplementation of the record under Administrative Procedure Act ("APA") standards. *See* Fed. Defs.' Br., p. 51. The Court did not hold that district courts have discretion to allow supplementation in ESA citizen suits; rather, it held that the APA's limited scope of review does not apply.[7]

This holding was not internally inconsistent or inconsistent with prior Ninth Circuit case law as Federal Defendants contend. Rather, the Court held that the

[7] The district court, affirmed by this Court, rejected the very interpretation Federal Defendants urge—that extra-record materials are allowed in ESA citizen suit claims only under the APA's limited exceptions to record review. *See W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1323 (D. Idaho 2007).

APA's *scope of review*—limited to an administrative record—does not apply to ESA citizen suits, thereby affirming its decision in *Washington Toxics*. *Kraayenbrink*, 632 F.3d at 497. The Court also reaffirmed decisions finding that the APA's *standard of review*—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law—does apply to such claims. *Id.* at 481, 496; *see also Ctr. for Sierra Nev. Conservation v. U.S. Forest Serv.*, 832 F. Supp. 2d 1138, 1148 n.5 (E.D. Cal. 2011).

The Supreme Court's decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), has no applicability to this issue. That case involved two APA claims: (1) a claim under section 509(b)(1)(D) of the Clean Water Act ("CWA"), 33 U.S.C. § 1369(b)(1)(D); and (2) a claim challenging a BiOp. *Id.* at 655.[8] There was no ESA citizen suit claim, nor was the citizen suit provision mentioned in the opinion.

Nor did this Court overrule, *sub silentio*, its prior explicit rulings in *Karuk Tribe of California v. United States Forest Service*, 681 F.3d 1006 (9th Cir. 2012)

[8] The ESA citizen suit provision does not provide jurisdiction to challenge a BiOp, ITS, or most other actions taken by NMFS and FWS under their responsibilities in implementing the ESA—*i.e.*, as regulators. *See Bennett v. Spear*, 520 U.S. 154, 173-74 (1997). Such actions are reviewable under the APA if they constitute a final agency action, such as with a BiOp and ITS. *Id.* at 173-79. The citizen suit provision provides jurisdiction for claims against regulated parties for failing to comply with statutory requirements, including the requirement to consult under section 7(a)(2) of the ESA. *See id.* at 173-74; *and Wash. Toxics*, 413 F.3d at 1034.

(*en banc*). The single sentence in *Karuk Tribe*, without any argument or analysis, indicating that it was a "record review case" "cannot reasonably be read to implicitly or silently overrule" Circuit precedent. *Nw. Coalition for Alternatives to Pesticides v. U.S. Envtl. Prot. Agency*, 920 F. Supp. 2d 1168, 1174 (W.D. Wash. 2013). Rather, this isolated statement on an issue that was not presented or argued constitutes dicta that neither creates nor overrules precedent. *See Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1065-66 (9th Cir. 1996); *and United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (*en banc*) (Kozinski, J., concurring); *and Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 n.5 (1993).

Federal Defendants' reliance on cases interpreting other statutes is unavailing. At issue in *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193-94 (9th Cir. 2000), was a provision that authorized suits only against government agencies. *See* 16 U.S.C. § 3117. In contrast, the ESA, authorizes "a citizen suit" against agencies and private parties alike, indicating an intent for a *de novo* hearing. *See* 16 U.S.C. § 1540(g)(1)(A); *and see Nabors v. United States*, 568 F.2d 657, 659-60 (9th Cir. 1978). Further, an ESA citizen suit claim, such as that for unlawful "take" of a protected fish, does not challenge agency decisions, but rather "advance[s] an enforcement action and require[s] proof of harm and

causation" for which all relevant evidence should be considered. *See Or. Natural Desert Ass'n v. Kimbell*, 593 F. Supp. 2d 1217, 1220 (D. Or. 2009).

B. The claim does not challenge actions by BIA.

DOI was required to consult on its funding of hatcheries regardless of whether its funding flows through a sub-agency. *See* 16 U.S.C. § 1536(a)(2); *and see* ER 81 (funding agreements are entered into by the Secretary of DOI and cover funds that "flow through" BIA). It is undisputed that the Conservancy provided notice to DOI and its Secretary for their failure to consult on this funding. *See* ER 1018, 1022-23. The Court should reject Federal Defendants' argument that pre-suit notice was required to be issued to BIA, a party that the Conservancy has never asserted a claim against. Fed. Defs.' Br., pp. 48-49.

C. The failure to consult claim is not moot.

Federal Defendants have not carried their "heavy burden" in establishing that their post-Complaint efforts have rendered DOI's failure to consult on its funding of the hatchery programs moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *and see Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006).

It is undisputed that DOI has not consulted on the effects of the hatchery program for Chambers Creek steelhead, a highly-domesticated non-native stock, that it funded for many years. *See* Fed. Defs.' Br., pp. 47-48 (DOI only consulted

on efforts to harvest returning Chambers Creek hatchery fish); *and see* ER 155. The Court should reject Federal Defendants' suggestion that this violation is moot because they believe there has not been genetic introgression.[9] The consultation requirements of section 7 of the ESA apply to any action funded by a federal agency that "may affect" ESA-listed species—this is a "'relatively low' threshold" triggered by any possible effect. *See Karuk Tribe*, 681 F.3d at 1027; *and* 16 U.S.C. § 1536(a)(2); *and* 50 C.F.R. § 402.14(a).

The "may affect" threshold for consultation is plainly present for the Chambers Creek steelhead program. Dr. Gordon Luikart, a leading researcher in animal genetics, used genetic data obtained from NMFS to conclude that the evidence of genetic introgression of Chambers Creek genes into wild Elwha and Dungeness steelhead is compelling, the introgression "will likely continue to have adverse effects on the fitness of the wild populations for at least three to five generations (10-20 years)," and that the reductions in productivity can be significant. ER 135-37, 141-42, 155-66, 790-97. Further, these non-native fish may continue to spawn in the Elwha River even though they are not currently being released from the hatchery. ER 614-15; ER 156. The "benefit of the doubt"

[9] Federal Defendants' self-serving assertions about the lack of genetic introgression are not entitled to deference because they "rest on a foundation tainted by procedural error"—the failure to consult as required by the ESA. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011).

about any scientific uncertainty regarding whether Chambers Creek stocks will continue to affect ESA listed species and trigger consultation should be given to the species. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006) (quoting *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)).

This claim is not moot because relief may be granted to remedy the continuing harm from DOI's past violations. *See Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988). The Chambers Creek program likely inflicted significant and lasting harm on the wild steelhead population. Section 7 of the ESA requires an evaluation of these effects and a determination of appropriate measures to minimize such effects. *See* 16 U.S.C. § 1536(b)(4)(C)(i)-(ii), (iv); *and see* 50 C.F.R. § 402.14(i)(1)(i)-(ii), (iv). DOI's assertion that the Conservancy has not explained what purpose consultation will serve is misplaced. *See* Fed. Defs.' Br., p. 48. DOI bears the "heavy burden" of demonstrating the claim is moot by showing there is no longer "*any* effective relief [that] may be granted." *See Forest Guardians*, 450 F.3d at 461 (emphasis in original). "It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper [consultation] procedures have not been followed." *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985).

This claim is not also not moot because relief may be entered to prevent DOI from funding the Chambers Creek program in the future without consulting should this program be reinitiated. *See Forest Guardians*, 450 F.3d at 461-63. "It is well-settled" that the voluntary termination of an activity does not deprive a federal court of the power to determine the legality of the practice—if it did, "courts would be compelled to leave the defendant free to return to his old ways." *Laidlaw*, 528 U.S. at 189 (internal quotation omitted). Notably, the Chambers Creek program was only halted under the threat of a preliminary injunction and the Hatchery Defendants expressly reserved their right to restart releases. See ER 967-71.

This claim is also not moot with respect to the hatchery programs that are included in the December 2012 BiOp. DOI's failure to consult is not cured by consulting after it had entered into a contract committing to the fund the hatcheries. *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998). At a minimum, declaratory relief remains available to ensure these violations—which lasted for many years and likely persist for other hatcheries throughout Puget Sound—do not recur at the expiration of the December 2012 BiOp, which only covers the first two of four phases of fish recovery. *See Forest Guardians*, 450 F.3d at 461-63; *and see* ER 416-17.

V. The July 2012 BiOp is Not in Accordance with Law.

The July 2012 BiOp is not in accordance with the ESA because it authorized the collection of fish to supply the hatcheries' broodstock without evaluating the adverse effects of hatchery releases. Contrary to Federal Defendants' contentions, this violation is not cured by the December 2012 BiOp.

The Court should reject Federal Defendants' contention that, in segmenting ESA consultations, "NMFS appropriately analyzed the information and proposals before it." *See* Fed. Defs.' Br., pp. 52-53. NMFS is required to prepare a comprehensive BiOp that evaluates the "effects of the action," which include the effects of interrelated and interdependent actions. *Conner*, 848 F.2d at 1453-54; *and see* 50 C.F. R. § 402.02. "'The test for interrelatedness…is 'but for' causation: but for the federal project, these activities would not occur.'" *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1113 (9th Cir. 2012) (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987)). The actions analyzed and authorized by the July 2012 BiOp included the collection of returning adult fish to supply the hatcheries' broodstock—*i.e.*, eggs and milt. ER 921, 957. The subsequent release of hatchery smolts could not occur "but for" that activity. These two actions—collection of broodstock and releases of hatchery smolts—are interrelated and lack independent utility such that the ESA requires consideration of their effects in a comprehensive BiOp. NMFS argues that smolt releases would

occur regardless of dam removal, but ignores that smolt releases would not occur without broodstock collection, which is one of the actions authorized by the July 2012 BiOp. *See* Fed. Defs.' Br., pp. 53-54.

The Court should reject NMFS' contradictory contention that the July 2012 BiOp did consult on hatchery releases. The July 2012 BiOp merely lists, "[i]n brief," the categories of adverse effects associated with hatcheries in general as described in a guidance document. ER 944, 947; *and see* ER 1059-70. It does not actually evaluate the extent that any of those effects will occur from the Elwha River hatchery programs. *See* ER 944, 947. Further, the ITS issued with the July 2012 BiOp does not describe the extent of take anticipated to result from the hatchery releases as required if the consultation actually addressed those actions. *See* 16 U.S.C. § 1536(b)(4)(C)(i); *and* 50 C.F.R. § 402.14(i)(1)(i); *and see* ER 955-57. While NMFS is required to use the best available information and need not wait for perfect information, the July 2012 BiOp is entirely devoid of any discussion of the extent of adverse effects actually anticipated from releases of hatchery fish in the Elwha River. This does not fulfill the consultation requirements of section 7 of the ESA. *See* 50 C.F.R. § 402.14(h)(2); *and see Nw. Envtl. Advocates v. U.S. Envtl. Protection Agency*, 855 F. Supp. 2d 1199, 1226 (D. Or. 2012).

The December 2012 BiOp does not remedy this violation, as Federal Defendants suggest, but instead demonstrates the problems with the unlawfully segmented consultation. The July 2012 BiOp estimated that 85 adult Chinook salmon and 85 adult steelhead would be taken annually as a result of all monitoring and collection activities, including for broodstock purposes. ER 957. The December 2012 BiOp, however, estimates that up to 1,700 adult Chinook salmon and 500 adult steelhead will be taken annually for broodstock collection alone, and the ITS issued therewith authorizes this additional take. *See* ER 591. Although the broodstock collection activities addressed in the two BiOps are not co-extensive, the December 2012 BiOp includes all broodstock collection activities in the environmental baseline and thus did not evaluate the harm from the additional take authorized. *See* ER 425, 431, 494-95.

VI. The Hatchery Defendants did not Meet their Heavy Burden in Establishing Mootness.

The Hatchery Defendants ask the Court to hold that a claim challenging longstanding unlawful take of an ESA-listed species becomes moot when a conditional exemption to liability is issued in the middle of litigation and that the plaintiff, if it remains concerned about the take, must then issue a new 60-day pre-suit notice letter and file a new lawsuit addressing the recent exemption. This Court has never issued such a holding and it should not do so here.

The Hatchery Defendants unlawfully operated hatchery programs without any ESA authorization whatsoever for over a decade.[10] Their programs included one using a non-native and highly-domesticated stock known as Chambers Creek steelhead—which they continued despite requests for its discontinuance from WDFW, NMFS, and NPS and only discontinued to avoid a preliminary injunction. *See* ER 1071-92; *and* ER 967-71. The Conservancy initiated these proceedings as dam removal neared in an effort to bring the programs into compliance with the ESA before they cause irreparable harm to native Elwha River salmonids and their ability to recovery.

The pre-suit notice expressed concerns with the substantial hatchery programs being implemented in conjunction with dam removal, explaining that they pose serious ecological risks to native salmonids, "significantly lower" reproductive fitness, "create severe competition" for resources, expose wild fish to diseases, and lack adequate monitoring and adaptive management. ER 1031-33. The letter explained that the Hatchery Defendants violate section 9 of the ESA because the hatchery programs described in the Fish Restoration Plan[11] cause

[10] ESA compliance was required beginning in 1999 when Puget Sound Chinook salmon and bull trout were listed as threatened species. *See* 64 Fed. Reg. 14,308 (March 24, 1999); *and* 64 Fed. Reg. 58,910 (Nov. 1, 1999).

[11] The Fish Restoration Plan includes all of the Hatchery Defendants programs, including that for native steelhead; thus, any suggestion that the notice letter did not address certain programs is incorrect. *See* ER 1178-86, 1231-37.

"take" of protected species—both direct mortality and by significantly disrupting behavioral patterns. *Id.* The Complaint alleged these same concerns and violations and made broad requests for relief, including injunctive relief requiring the Hatchery Defendants comply with the ESA. ER 995-96, 1010, 1014. Both the pre-suit notice and the Complaint accurately explained that there was no ESA authorization whatsoever. ER 1001, 1033. However, these instruments cannot reasonably be read to have merely sought ESA approval in and of itself.

The Conservancy moved for summary judgment against the Hatchery Defendants on November 15, 2012—over nine months after the Complaint was filed. *See* Hat. Defs.' Br, p. 16.[12] The district court characterized the motion as "[p]remature"[13] and denied it as "fact intensive" without any discussion of the facts presented other than to comment on the extent of the Conservancy's supporting materials. SER 289, 291-92, 295. The decision was confounding given that it was

[12] The Conservancy had diligently pursued discovery since filing the Complaint. *See* Hat. Defs.' Br., p. 16.

[13] The district court also characterized the motion as "strategically preemptive" because it was filed before NMFS approved the hatchery programs. SER 295. NMFS had been indicating its intent to approve these hatchery programs for **over eight years**. *See* ER 414; *and* 69 Fed. Reg. 26,364 (May 12, 2004). The Conservancy was seeking to move this litigation forward given the ongoing nature of the ESA violations and the fact that dam removal was underway. There is certainly no requirement that a citizen suit plaintiff wait to see if a defendant will eventually come into compliance with the ESA.

undisputed that the Hatchery Defendants were capturing wild ESA-listed steelhead from the Elwha River, holding them in captivity, and killing them for broodstock in violation of the ESA—this unequivocal "take" was supported by their own hatchery plans certified under penalty of law by Hatchery Defendant Larry Ward. *See* ER 823-24, 829; *see also* ER 144.[14, 15]

NMFS filed the Limit 6 Approval and December 2012 BiOp with the Court on December 13, 2012, and the Hatchery Defendants filed their motion to dismiss seven days later. *See* ER 1460. The motion did not assert that the hatchery programs were in compliance with the Limit 6 Approval or the December 2012 BiOp's ITS. The Hatchery Defendants did not submit **any** evidence with the motion, but instead cited to declarations signed before the Limit 6 Approval and December 2012 BiOp were even issued that merely stated, in conclusory fashion, that the hatchery programs were being operated as described in the HGMPs. *See* ER 1460; *and* SER 301, 310.

[14] These activities began in 2005 and the undisputed ESA violations had thus been occurring since Puget Sound steelhead were listed in 2007. *See* ER 823-24; ER 144. Thus, the Hatchery Defendants' representations that there have never been violations represents a complete lack of candor to this Court. *See* Hat. Defs.' Br., p. 38.

[15] The district court's order was plainly erroneous in several regards beyond the scope of issues presented here.

The Conservancy filed its Second Supplemental Complaint, without objection from the Hatchery Defendants, challenging NMFS' new approval documents and alleging that the Hatchery Defendants are not in compliance with the Limit 6 Approval and the December 2012 BiOp's ITS and that their "take" was therefore not authorized. *See* ER 245, 248-49.[16] This pleading again sought broad relief, including injunctive relief against the hatchery programs until ESA compliance is achieved. *See* ER 254.

The district court then granted the Hatchery Defendants' motion to dismiss, holding that, once NMFS issues an approval, an ESA "take" claim becomes moot and "the fight lies with the government." *See* ER 43. The district court further held that new pre-suit notice is required to challenge compliance with NMFS' approval documents and therefore denied the Conservancy's request for discovery related to the newly-issued approval. *See* ER 46. The district court indicated that

[16] As explained in the pre-suit notice, the Conservancy has been concerned since the beginning by the lack of adequate monitoring and adaptive management to detect harmful effects from the hatcheries and to phase out the programs. *See* ER 1032. The HGMPs incorporate a monitoring and adaptive management plan ("MAMP"), which they state "creates and implements" the necessary measures. *E.g.*, ER 827. However, NMFS' EA explains that the MAMP contains only recommendations, many of which are "not reasonably certain to occur." ER 287. Further, the HGMPs indicate that, while ample funds have been allocated towards fish production, insufficient funds exist for monitoring. *E.g.*, ER 827. The Conservancy therefore remains concerned as to the Hatchery Defendants' compliance with monitoring and adaptive management requirements of the Limit 6 Approval and the ITS.

its resources were being "unnecessarily consumed" by the Conservancy's failure to stipulate to dismissal. ER 43-44. This decision ignored the plain language of the applicable regulation and this Court's precedents.

A. Condition Exemptions to Liability do not Moot a Take Claim.

The Hatchery Defendants and the district court's decision completely ignore the actual language of the 4(d) Rule in finding that the Limit 6 rendered the take claim moot.

The 4(d) Rule describes the legal effect of the Limit 6 Approval:

> Affirmative Defense. In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section[17]…, any person claiming the benefit of any [4(d) Limit] shall have a defense where the person can demonstrate that the limit is applicable and was in force, and that the person fully complied with the limit at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent…

50 C.F.R § 223.203(c). The ESA provides a similar description for an ITS:

> Burden of Proof. In connection with any action alleging a violation of section 9…, any person claiming the benefit of any exemption or permit under [the ESA] shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

16 U.S.C. § 1539(g).

These provisions make clear that, in cases such as this, the claim is for "take" and a 4(d) Limit or ITS provides only a conditional defense to that claim.

[17] This paragraph applies the take prohibition. *See* 50 C.F.R. § 223.203(a).

Indeed, the Supreme Court and this Court have explained that parties remain subject to liability under section 9 of the ESA after an ITS is issued. *Bennett v. Spear*, 520 U.S. 154, 170 (1997); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001). Both the Limit 6 Approval and the ITS explain that they are only effective when there is complete compliance with the applicable requirements. ER 266; ER 592-93. Thus, issuance of the Limit 6 Approval and ITS did not moot or otherwise alter the Conservancy's claim. Further, although it is the Hatchery Defendants' burden to raise these defenses, the Conservancy supplemented its pleadings to allege non-compliance with the Limit 6 Approval and ITS. ER 245, 248-49.

This Court's precedents relied upon by the Hatchery Defendants do not support their mootness argument. *See* Hat. Defs.' Br., pp. 28-29. In *Center for Biological Diversity v. Marina Point Development Company*, 566 F.3d 794, 804-05 (9th Cir. 2009), the Court found that a take claim became moot when the affected species was delisted under the ESA and future violations therefore could not occur. Here, in contrast, future violations can occur despite the issuance of the conditional exemptions. *See Bennett*, 520 U.S. at 170; *Ariz. Cattle*, 273 F.3d at 1239. In *Wild Equity Institute v. City and County of San Francisco*, No. 13-15046, 2015 U.S. App. LEXIS 4854 (9th Cir. March 25, 2015)—an unpublished opinion designated as "not precedent"—the plaintiff acknowledged its claim was moot.

See Circuit Rule 36-3(a). Finally, in *Environmental Protection Information Center v. Pacific Lumber Company*, 257 F.3d 1071, 1073-74 (9th Cir. 2001), the Court discussed a claim alleging a violation of section 7(d) of the ESA—which prohibits commitments of resources *during* ESA consultation—that became moot because the prohibition terminates when consultation concludes. This decision is inapposite because, as discussed above, the take prohibition does not terminate with the issuance of a conditional exemption to liability.

Only one other district court has addressed whether issuance of a 4(d) Limit in the middle of litigation renders moot a take claim. In a thorough opinion that describes the nature of a take claim and the legal effect of the 4(d) Limits and an ITS, the district court held that the claim was not moot. *Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, No. 3:12-CV-00431-HA, 2013 U.S. Dist. LEXIS 111505, at *24-34 (D. Or. May 16, 2013).

B. New notice was not required to address the Limit 6 Approval.

Notably absent from the Hatchery Defendants' argument that a new pre-suit notice was required is the actual language of the notice requirement. The ESA does not require a plaintiff to issue a new pre-notice when a conditional exemption to liability is issued in the middle of litigation.

The ESA requires notice "of the violation." 16 U.S.C. § 1540(g)(2)(A)(i). The only ESA violation alleged against the Hatchery Defendants is that for "take"

of protected species. *See* ER 1010. It is **not** a violation of the ESA to disregard the requirements of the Limit 6 Approval or the ITS. *See Bennett*, 520 U.S. at 170 (agencies are free to disregard ITS); *and Native Fish Soc'y*, 2013 U.S. Dist. LEXIS 111505, at *30; *and see* 16 U.S.C. § 1538. There is nothing in the ESA that required the Conservancy to provide a new pre-suit notice of these defenses created in the middle of the litigation. The Court should reject the Hatchery Defendants' invitation to create new hurdles for citizen suits seeking to protect endangered species beyond those set by Congress. *See Alliance for the Wild Rockies v. U.S. Dep't of Argic.*, 772 F.3d 592, 601-04 (9th Cir. 2014).

The Hatchery Defendants' efforts to distinguish decisions holding that "[s]ubject matter jurisdiction is established by providing notice that is adequate on the date it is given to the defendant" are misplaced. *See Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 920 (9th Cir. 2004). The notice in *Waterkeepers* alleged the defendant was violating the CWA by discharging pollutants without a permit and by not developing a plan required by the permit. *Id.* at 917. The Court held that new notice was not required to challenge the adequacy of a subsequently developed plan. *Id.* at 920.[18] The Court did not find

[18] There are relevant distinctions between ESA and CWA citizen suits. First, plaintiffs cannot enforce violations of the Limit 6 Approval or ITS under the ESA citizen suit provision, the only enforceable "violation" is for "take." *Supra*, pp. 37-39. In contrast, the CWA authorizes citizen suits to enforce against unpermitted discharges and for any violation of a CWA permit. *See* 33 U.S.C. § 1365(a)(1), (f).

that the pre-suit notice adequately covered this new claim, as Hatchery Defendants suggest, rather, it held that such notice is not required. *See id.*; *see also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964, 974-75 (9th Cir. 2002), *withdrawn as moot*, 355 F.3d 1203 (9th Cir. 2004) (where there was a failure to consult claim, new notice was not required to challenge the subsequent consultation because the defendant "would not have reasonably interpreted the initial complaint…as one that simply sought consultation in and of itself…").

C. The Hatchery Defendants did not Prove Compliance with the Exemptions.[19]

The Hatchery Defendants—as the proponents of the exemptions—had the burden of proving compliance with the terms and conditions of the ITS and the Limit 6 Approval. *See* 50 C.F.R § 223.203(c); *and see* 16 U.S.C. § 1539(g). The

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Second, a regulation has been promulgated detailing the notice requirements for the CWA, while no such regulation exists for the ESA. *See* 40 C.F.R. § 135.3. The district court here erroneously applied case law interpreting the language of that CWA regulation. *See* ER 45-46.

[19] The district court's "factual findings" in its mootness order should not be reviewed for clear error. *See* Hat. Defs.' Br., pp. 23, 33. That decision was issued on a motion to dismiss without an evidentiary hearing or an opportunity to conduct discovery on the new approvals. *See* ER 46. Thus, the district court did not make factual findings subject to a clear error review standard, but was instead required to presume the Conservancy's allegations as true. *See McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001); *see also Rhoades v. Avon Products, Inc.*, 824 F.2d 799, 803 (9th Cir. 2007). The order should be reviewed de novo. *See Arrington v. Wong*, 237 F.3d 1066, 1069 (9th Cir. 2001).

Hatchery Defendants point only to declarations asserting that the hatchery programs are being implemented in the manner described in the HGMPs. *See* Hat. Defs.' Br., pp. 32-33. This is entirely insufficient, as it does not address compliance with the terms and conditions of the ITS or the Limit 6 Approval which is required for an exemption to be effective. *See* ER 264-66; *and see* ER 592-99.[20]

Finally, this Court should reject the Hatchery Defendants' request to act as a fact-finder and hold that their "uncontroverted" evidence generated since their dismissal proves compliance with the Limit 6 Approval and ITS. *See* Hat. Defs.' Br., pp. 33-34. These materials are uncontroverted because the district court dismissed the Hatchery Defendants and denied the Conservancy an opportunity to conduct discovery on these very issues. *See* ER 46. The Conservancy should be allowed discovery on such jurisdictional issues before any findings are made. *See Laub*, 342 F.3d at 1093. Without such discovery or an evidentiary hearing, the Conservancy's allegations on these issues should be presumed true. *See McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001).

[20] The Court should also reject Hatchery Defendants' contention that pleading a general lack of subject matter jurisdiction defense satisfied their obligation to plead a 4(d) Limit. *See* 50 C.F.R § 223.203(c).

CONCULSION

The Conservancy respectfully requests the Court reverse the rulings and judgment of the district court described herein and in the Opening Brief and remand with appropriate instructions.

RESPECTFULLY SUBMITTED this 28th day of May, 2015.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)

This brief is accompanied by a motion to file an overlength brief. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-2, I hereby certify that the foregoing Plaintiffs-Appellants' Reply Brief is proportionally spaced and contains 10,290 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief was created on Microsoft Office Word, using Times New Roman, 14 font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Plaintiffs-Appellants' Reply Brief in Case No. 14-35791 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on May 28, 2015.

I further certify that counsel for the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Appeal No. 14-35791

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY, *et al.*,

Plaintiffs-Appellants,

vs.

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

PLAINTIFFS-APPELLANTS' MOTION TO EXCEED TYPE-VOLUME LIMIT FOR REPLY BRIEF

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Plaintiffs-Appellants Wild Fish Conservancy, *et al.* (collectively, "the Conservancy") hereby move the Court under Circuit Rule 32-2 for relief from the type-volume limit imposed on their reply brief by Appellate Rule 32(a)(7). That rule requires that the Conservancy's reply brief not exceed 7,000 words. The Conservancy respectfully requests that the Court grant relief from this limit and accept for filing the reply brief submitted herewith, which contains 10,290 words (excluding those portions identified by Appellate Rule 32(a)(7)(B)(iii)). As described in the attached declaration of counsel, the Conservancy has substantial need to file an overlength brief and has worked diligently to reduce the brief's length.

Counsel for the Federal Defendants has represented that her clients take no position on the requested extension. Counsel for the Hatchery Defendants has represented that his clients do not intend to take a position on the motion.

RESPECTFULLY SUBMITTED this 28th day of May, 2015.

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I, Brian Knutsen, declare as follows:

1. I am lead counsel for Plaintiffs-Appellants Wild Fish Conservancy, et al. (collectively, "the Conservancy") in this appeal.

2. This appeal is particularly complex because it involves several claims, multiple federal agencies, and various agency actions and a separate claim against hatchery operators, all of which include numerous sub-issues. Nevertheless, the Conservancy was able to file an opening brief within the word limit. Defendants-Appellees filed two response briefs that address mostly different claims and issues. Additional space is needed to adequately respond to these lengthy arguments in a manner that sufficiently represents my clients' interests.

3. I am aware of and take seriously the admonition of Circuit Rule 32-2 that motions to file an overlength brief are disfavored. I have worked diligently to make the brief as short as possible and have substantially edited the brief. I have practiced law for over ten years and have handled multiple federal appeals but have never requested to file an overlength merits brief in a federal appellate court (I have sought to file overlength briefs related to motions). However, I was unable to meet the type-volume limit for this reply brief given the unique complexity of this appeal and the extent of arguments raised in the two response briefs.

4. On May 28, 2015, I contacted counsel for Defendants-Appellees and requested their clients' position on the relief requested by this motion. Counsel for

the Federal Defendants represented that her clients take no position on the requested extension. Counsel for the Hatchery Defendants represented that his clients do not intend to take a position on the motion.

5. For these reasons and those stated in the accompanying motion, I respectfully request that the Court grant the Conservancy's motion to file the overlength reply brief submitted herewith.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge.

Executed on this 28th day of May, 2015 at Portland, Oregon.

s/ Brian A. Knutsen
Brian A. Knutsen, WSBA No. 38806

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Plaintiffs-Appellants' Motion to Exceed Type-Volume Limit for Reply Brief in Case No. 14-35791 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on May 28, 2015.

I further certify that counsel for the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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