No. 14-35791

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

ANSWERING BRIEF OF TRIBAL DEFENDANTS-APPELLEES

Cory J. Albright, WSBA # 31493
Jane G. Steadman, WSBA # 44395
KANJI & KATZEN, PLLC
401 Second Ave. S., Suite 700
Seattle, WA 98104
Phone: (206) 344-8100
Fax: (866) 283-0178

Stephen H. Suagee, WSBA # 26776
Office of General Counsel
Lower Elwha Klallam Tribe
2851 Lower Elwha Rd.
Port Angeles, WA 98363
Phone: (360) 452-8471
Fax: (360) 452-3428

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

GLOSSARY OF ACRONYMS

BiOp	Biological Opinion
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission
FWS	U.S. Fish and Wildlife Service
HGMP	Hatchery and Genetic Management Plan
HSRG	Hatchery Scientific Review Group
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPS	National Park Service
RMP	Resource Management Plan
WDFW	Washington Department of Fish and Wildlife

INTRODUCTION

The district court reached the unavoidable conclusion that Plaintiffs' Endangered Species Act (ESA) claim to enjoin the Lower Elwha Klallam Tribe's native Elwha River steelhead and salmon hatchery programs for causing unlawful "take" became moot after the National Marine Fisheries Service (NMFS) exempted those programs from the take prohibition in December 2012. The court accordingly dismissed Plaintiffs' take claim against tribal employees Robert Elofson, Larry Ward, Doug Morrill, and Mike McHenry (Tribal Defendants) for lack of subject matter jurisdiction. In doing so, it faithfully applied this Court's precedent and joined numerous other district courts holding that a plaintiff may not continue to litigate an ESA claim to enjoin activities after the expert agency has exempted those activities from the take prohibition.

For a century, the Elwha and Glines Canyon Dams blocked access to 90 percent of the Elwha basin, and pushed once abundant Elwha River steelhead and salmon populations to the brink of extirpation (i.e., local extinction). In 2014, the federal government substantially completed removal of the dams pursuant to the 1992 Elwha River Ecosystem and Fisheries Restoration Act (Elwha Act). Over the next several years, more than 24 million cubic yards of sand, rock, and mud that was trapped behind the dams will choke the lower river and threaten to complete the extirpation of these populations by smothering egg nests (redds), suffocating

juveniles and killing their food source, and preventing adults from reaching their spawning grounds.

Under the Elwha Act and the ESA, restoration of these fish populations is mandatory, and extirpation is not an option. NMFS and the U.S. Department of the Interior accordingly concluded that conservation-based hatchery programs are necessary to provide a safe haven for native Elwha River steelhead and salmon during the dam removal process, to maintain their genetic diversity, and to ensure that sufficient fish survive to recolonize the Elwha basin following dam removal. Plaintiffs oppose the use of hatchery programs in general and in this particular restoration effort. They view dam removal as an opportunity for an experiment to test their hunch that these fragile populations would survive the unprecedented discharge of sediment without hatchery support. The Tribe's approved programs, by contrast, are the product of two decades of sustained collaboration between federal, state, and tribal biologists and the independent scientific community.

Plaintiffs appeal the district court's order dismissing their ESA claim for injunctive relief against the Tribal Defendants for lack of subject matter jurisdiction. However, NMFS exempted the Tribe's hatchery programs from the take prohibition more than two years ago, and Plaintiffs identify no effective relief that was available after the issuance of the take exemptions. Nor do they dispute the extensive record evidence confirming that the Tribe has implemented the

hatchery programs in accordance with those exemptions. There is no hint of any case or controversy as to the Tribal Defendants, and the district court's order dismissing Plaintiffs' claim as moot should be affirmed.

Plaintiffs also appeal the district court's order denying partial vacatur of the December 2012 decision documents that exempted the hatchery programs from the take prohibition. But NMFS issued new documents in December 2014 and January 2015 that supersede the challenged documents, and Plaintiffs' vacatur request is therefore moot. In any event, the record before the court counseled strongly against vacatur. Plaintiffs' request sought to effectuate substantial reductions in the hatchery release of ESA-listed native Elwha River steelhead and native Elwha River coho salmon and, if granted, threatened to extirpate these fish, to defeat the will of Congress, and to gravely harm the Tribe's culture and identity.

JURISDICTIONAL STATEMENT

The Tribal Defendants generally agree with Plaintiffs' jurisdictional statement but further note that Plaintiffs alleged their claim for prospective injunctive relief against the Tribal Defendants under the doctrine of *Ex Parte Young*, 209 U.S. 123, 155-56 (1908).[1] SER 407 (9:22-23); *Burlington N. Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007).

[1] The Federal Defendants' supplemental excerpts of record are cited herein as "SER." Plaintiffs' excerpts of record are cited herein as "ER."

STATEMENT OF THE ISSUES

1. Whether Plaintiffs' ESA Section 9 claim against the Tribal Defendants to enjoin the Tribe's hatchery programs for causing unlawful take became moot after NMFS exempted those programs from the take prohibition in December 2012 and no effective relief remained available. ER 39-47.

2. Whether Plaintiffs' request to partially vacate the December 2012 decision documents that exempted the hatchery programs from the take prohibition is moot where those documents have been superseded, and if not, whether the district court abused its discretion by denying vacatur where it threatened extirpation of native Elwha River steelhead and coho salmon.[2] ER 8; SER 63.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Devastation of Elwha River Steelhead and Salmon Wrought by the Elwha and Glines Canyon Dams.

Elwha River steelhead and salmon are central to the Lower Elwha Klallam Tribe's culture, diet, economy, and ceremonial way of life. SER 163-166 (¶¶ 2, 5-7); SER 416. At the First Salmon Ceremony each spring, the Tribe welcomes and gives thanks for the return of the fish that feed tribal elders and families and mark

[2] The Tribal Defendants concur in the arguments presented by the Federal Defendants with respect to the other issues raised on appeal and, to avoid redundancy, do not separately brief those issues here.

every wedding, funeral, and other significant event in the community. SER 164-165 (¶¶ 2, 6). The Tribe's reservation on the Olympic Peninsula comprises approximately 1,000 acres along and including the Elwha River where it flows into the Strait of Juan de Fuca, just west of the City of Port Angeles, Washington. SER 163, 165-166 (¶¶ 1, 7). In the 1855 Treaty of Point No Point, Klallam leaders, including those from Elwha Village, reserved "[t]he right of taking fish, at all usual and accustomed grounds and stations," and a secure place to live in exchange for ceding hundreds of thousands of acres of aboriginal territory to the United States. SER 165-166 (¶ 7); SER 416; *Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-62 & n.2, 686-87 (1979).

In 1912, adult Elwha River steelhead and salmon returning from the sea ran into a concrete wall. SER 167, 169 (¶¶ 9, 10, 14). The Elwha and Glines Canyon Dams cast a shadow over the Tribe's homeland for the next century. A blowout during construction of the Elwha Dam flooded the tribal community, and when completed, the dam's reservoir inundated the Tribe's Creation Site. SER 167-170 (¶¶ 9, 10, 11, 16); SER 417-418. The dams blocked all fish passage, denying Elwha River steelhead and salmon access to more than 90 percent of their spawning and rearing habitat. S. Rep. No. 102-447, at 9 (1992); SER 746, 782.

Prior to the dams, the Elwha River supported abundant anadromous fisheries, including steelhead and all five species of Pacific salmon—Chinook,

sockeye, coho, pink, and chum. SER 651. But these native fish populations have plummeted to less than one percent of their historic size, destroying the Tribe's traditional economic base, frustrating its treaty fishing right, and threatening its way of life. SER 416-419; S. Rep. No. 102-447, at 5, 10; SER 167-168 (¶¶ 10-11, 13); ER 1266. Today, Elwha River steelhead and salmon populations hover on the brink of extinction—indeed, some are already extinct. S. Rep. No. 102-447, at 9. Recent data, for example, show that annual steelhead returns have been as low as 45 fish. SER 18 (¶ 27); SER 93-94 (¶ 35); SER 320-321 (¶ 30); SER 782.

B. The Elwha Act and the Federal Decision to Use Hatchery Programs to Preserve and Restore Elwha River Salmonids.

The Tribe remained determined to undo this damage. In 1978, the Elwha Dam failed a federally required safety inspection, which in turn barred federal spending on flood control, housing, and economic development on the reservation. SER 169-170 (¶ 16). The Tribe persuaded the Federal Energy Regulatory Commission (FERC) to issue an emergency order mandating repairs to the Elwha Dam, and soon attained a leading role in dam-relicensing proceedings and related negotiations and lobbying. SER 169-170 (¶¶ 16-17). The Tribe's efforts produced an extraordinary settlement among diverse government and private stakeholders—including the Tribe; FERC, the National Park Service (NPS), NMFS, the U.S. Fish and Wildlife Service (FWS), and the Bureau of Indian Affairs; the state of Washington, Clallam County, and the City of Port Angeles; private hydropower,

timber, and industrial interests; commercial and sport fishermen; and the environmental community—regarding the future of the dams and the restoration of native Elwha River steelhead and salmon. *E.g.*, SER 412.

Congress approved the Elwha River Ecosystem and Fisheries Restoration Act on October 24, 1992. Pub. L. No. 102–495, 106 Stat. 3173 (1992). Congress directed the Secretary of the Interior to acquire the dams, to submit to Congress a plan "for the full restoration of the Elwha River ecosystem and the native anadromous fisheries" by January 31, 1994, and to take steps necessary to implement that plan. *Id.* §§ 3-4. The Secretary assigned NPS—the primary federal land manager in the Elwha basin, which is home to Olympic National Park—to serve as lead agency in implementing the Elwha Act. SER 2312, 2317. In a 1995 Environmental Impact Statement (EIS), NPS considered alternatives for achieving river restoration, including complete or partial removal of the dams or modifications for fish passage. SER 2312; *see also* SER 2575-2578. NPS chose the only alternative it found would satisfy the purpose of the Elwha Act—complete removal of both dams. SER 2316; SER 1773-1774; *see also* SER 2575.

NPS next considered alternatives for implementing dam removal and fisheries restoration in a 1996 EIS. SER 1798-1801. It examined the lethal risk posed to Elwha River steelhead and salmon by the discharge of sediment accumulated behind the dams, which modeling predicted would kill the vast

majority of salmonids at all life stages, and the role of hatchery programs in mitigating that risk. SER 2005-2006. A plan developed by federal, state, and tribal biologists appended to the 1996 EIS found that a combination of natural recolonization and hatchery programs provided the best option for Elwha River fish restoration following dam removal.[3] SER 1841 (discussing Appx. 2, SER 2216-2232). The plan discussed numerous aspects of hatchery operations, including broodstock collection and preliminary estimates of release levels for various fish populations. SER 1843-1844, 2217, 2229; *see also* SER 1761-1769.

In its 1996 Record of Decision, NPS chose an alternative with hatchery supplementation as both a dam removal mitigation measure and a fish restoration measure.[4] SER 1761, 1765, 1769. NPS further determined that the Tribe's hatchery facility was necessary for this purpose. SER 1764-1765. Natural

[3] Since 1996, this plan has undergone numerous reviews and revisions to incorporate the best available science. SER 1148-1337; SER 1729-1731; SER 1340-1343; ER 1358-1365; SER 1725-1728; SER 1732-1733; SER 1747-1759; SER 301-305 (¶¶ 6-28). The most recent iteration of the Elwha River Fish Restoration Plan was issued in April 2008 as a National Oceanic and Atmospheric Administration Fisheries Technical Memorandum. ER 1120-1254. The plan is a "scientific framework guiding efforts to return successful, reproducing fish to the Elwha River basin," and the plan "identifies research, methodologies, and strategies required to preserve and restore Elwha River fish populations before, during, and after removal of the Elwha and Glines Canyon dams." ER 1142, 1130.

[4] During hearings on the Elwha Act, Congress heard extensive testimony regarding the anticipated role of hatchery programs in the restoration effort, and the Secretary's 1994 report to Congress indicated that such programs would be necessary to preserve the critically depressed native Elwha River steelhead and salmon populations. SER 431-432; SER 2682.

recolonization, without hatchery support, was considered by NPS but "declined in favor of using releases of fish from hatcheries for most stocks to speed restoration with little or no compromise of genetic conservation goals." SER 2141. In 2005, NPS prepared a supplemental EIS regarding dam removal and various aspects of fisheries restoration, including the relocation of the tribal hatchery facility. ER 1264-1265; SER 1366-1724.

C. Development of the Tribe's Conservation-Based Hatchery Programs by Consensus of the Scientific Community.

The Tribe's native Elwha River steelhead and native Elwha River coho, chum, and pink salmon hatchery programs were carefully crafted to prevent the extinction and to maintain the genetic diversity of these genetically unique populations during the dam removal process, as well as to ensure sufficient surviving adult populations to recolonize the newly accessible spawning habitat in the Elwha basin following dam removal. *E.g.*, SER 761-762, 782; ER 434-435; SER 3-12 (¶¶ 5-11, 15-16); SER 72-73, 85-99 (¶¶ 7-8, 23-43); SER 136-137 (¶¶ 17-22); SER 124-125 (¶ 8). The Lower Elwha Klallam Tribe Department of Natural Resources developed each program through a collaborative process with scientists from NMFS, NPS, FWS, the U.S. Geological Survey, and the Washington Department of Fish and Wildlife (WDFW) (collectively, the Elwha Fisheries Technical Group). SER 300-305 (¶¶ 2-28); SER 754-758.

The Tribe implements each program pursuant to a Hatchery and Genetic Management Plan (HGMP) that sets forth the program's purpose and governs its day-to-day operation, including the collection of broodstock and the production of juvenile fish, the number and timing of hatchery releases, and related monitoring and adaptive management activities.[5] *See* SER 575-602 (chum salmon); SER 976-1016 (pink salmon); SER 1017-1053 (steelhead); SER 1054-1088 (coho salmon). For example, the Tribe began drafting the native Elwha River steelhead HGMP in 2004 in consultation with the Elwha Fisheries Technical Group, and it initiated the program in 2005. SER 302 (¶ 11). The Tribe updated this HGMP in 2006 after further consultation with NMFS. SER 302 (¶ 12). It substantially revised the steelhead HGMP to address the final recommendations of the 2008 Fish Restoration Plan, *supra* n.3, which followed NMFS's listing of Puget Sound steelhead as threatened under the ESA in 2007. SER 302-303 (¶¶ 14-15); 72 Fed. Reg. 26,722 (May 11, 2007). In 2010 and 2011, the Tribe made further revisions to the HGMP in consultation with NMFS and the Elwha Fisheries Technical

[5] The Tribe operates these conservation programs independently, not as part of any broader state or intertribal hatchery program. Individual Indian tribes and state and federal agencies operate scores of different hatchery programs throughout the Pacific Northwest for many different purposes. WDFW, for example, operates a separate hatchery program for native Elwha River Chinook salmon upstream of the tribal hatchery. SER 301 (¶ 3). Plaintiffs' suggestion that all hatchery programs in Puget Sound constitute a single project, Dkt. 22-1 at 51-52, misapprehends the nature of hatchery management by these separate sovereigns.

Group, in part to reflect operational changes associated with the new hatchery facility, which was constructed as a mandatory dam removal mitigation measure. SER 303 (¶¶ 15-16); ER 1265, 1269; SER 1761.

To ensure that the Tribe's HGMPs incorporate the best conservation-based hatchery practices and protect the fragile river-born fish populations, including ESA-listed species, the programs were submitted to the Hatchery Scientific Review Group (HSRG) on several occasions. SER 303-305 (¶¶ 18-28); SER 317-318 (¶¶ 21-22). The HSRG is a congressionally authorized independent review panel composed of experts nominated by the American Fisheries Society and possessing specialized knowledge of steelhead and salmon. SER 303 (¶ 18); SER 317 (¶ 21). The Tribe revised its hatchery programs after each review to incorporate HSRG recommendations. SER 303-305 (¶¶ 20-27).

In 2011, the Tribe again requested that the HSRG review its revised HGMPs, and on January 31, 2012, the HSRG issued its 150-page Review of the Elwha River Fish Restoration Plan and Accompanying HGMPs (HSRG Report). SER 303-304 (¶¶ 17, 24-25); SER 1148-1337. The Tribe made substantial revisions to the HGMPs in response to the HSRG Report, and submitted the final plans to NMFS for review on August 1, 2012. SER 304-305 (¶¶ 26-27). The HSRG reviewed these final HGMPs in November 2012 and found that they "are in

agreement with the HSRG recommendations" and "provide clear direction for the restoration of salmon and steelhead in the Elwha Basin." SER 605-606.

D. NMFS's Approval of the Tribe's HGMPs Under the 4(d) Rule.

Under Section 9 of the ESA, it is unlawful to "take" any endangered species of fish or wildlife.[6] 16 U.S.C. § 1538(a)(1)(B). The ESA does not by its terms apply this prohibition to threatened species. 16 U.S.C. § 1538(a)(1). Instead, Section 4(d) of the Act delegates discretionary authority to the Secretaries of Commerce and the Interior to extend the prohibition to threatened species under their respective jurisdiction. *Id.* § 1533(d). Subject to several exemptions or "Limits," the Secretary of Commerce acting through NMFS has extended the take prohibition to threatened salmonids, including Puget Sound steelhead and Puget Sound Chinook salmon.[7] 50 C.F.R. § 223.203(a)-(b). This regulation is commonly known as the 4(d) Rule.

NMFS reviewed the Tribe's HGMPs under the 4(d) Rule. SER 760. Under Limits 5 and 6, the take prohibition does not apply to a hatchery program where NMFS has approved an HGMP or joint plan between the state of Washington and a treaty Indian tribe for that program. 50 C.F.R. § 223.203(b)(5)-(6). For the four

[6] "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[7] The Secretary of the Interior acting through FWS has extended the take prohibition to threatened bull trout. 50 C.F.R. § 17.31(a).

tribal programs, NMFS evaluated, among other things, each program's broodstock collection, spawning, rearing, and juvenile release practices, and potential genetic and ecological effects on threatened river-born populations, including competition, predation, disease transfer, and genetic introgression. SER 765-825; 50 C.F.R. § 223.203(b)(5)(i)(A)-(K), (b)(6)(iii).

NMFS approved the Tribe's HGMPs under the 4(d) Rule on December 10, 2012 (the 4(d) Approval). SER 760-833; ER 260-268. In the 4(d) Approval, NMFS concluded that "[w]ithout the proposed supportive breeding effort, the genetically unique Elwha river native steelhead population would likely be at high risk of extinction" due to "deleterious habitat conditions . . . during the natural fish migration, spawning, incubation and rearing life stages." SER 782; *see also* ER 262 (Deputy Regional Administrator concurring that the programs "incorporate best management practices and hatchery reforms considered necessary to provide for program operation while minimizing potential risks to ESA-listed species," and stating further that the programs "are widely supported in the regions' salmon management and scientific communities to reduce the risk" of extirpation).

In connection with this agency action, NMFS prepared a Biological Opinion (BiOp) on December 10, 2012, weighing both the risks and the benefits of the hatchery programs to threatened Puget Sound steelhead and threatened Puget Sound Chinook salmon. ER 404, 501-568. It found:

> The already depressed populations are now further threatened with extinction from the effects of the release of massive quantities of stored sediments as the dams are removed . . . . [W]ithout proactive intervention, the conditions that will be present in the river below the dams . . . may result in mortality rates approaching 100% for any naturally rearing fish, virtually eliminating local, genetically viable salmon and steelhead brood sources for recolonization.

ER 587. The BiOp included an Incidental Take Statement (ITS) that addressed potential take associated with the implementation of the programs.[8] ER 588-599. Take resulting from activities undertaken "in compliance with the terms and conditions specified in a written [incidental take] statement . . . shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(o)(2); *see also id.* § 1536(b)(4); 50 C.F.R. § 402.14(i)(5).

In a prior July 2012 BiOp and ITS, NMFS had conditioned its conclusion that dam removal would not jeopardize the continued existence of ESA-listed Puget Sound steelhead on the implementation of the Tribe's steelhead hatchery program, which NMFS had determined prevents and mitigates for take caused by dam removal. SER 550-551, 557-558. The ITS provided for broodstock collection to support this program. SER 560. NMFS subsequently listed the hatchery-born

[8] In connection with the 4(d) Approval, NMFS also consulted with FWS regarding the potential effects of its action on threatened bull trout. On December 3, 2012, FWS issued a BiOp and ITS covering any take of bull trout incidental to the implementation of the hatchery programs. SER 697-701. Also in connection with the 4(d) Approval, NMFS completed an Environmental Assessment and Decision Notice pursuant to the National Environmental Policy Act. ER 260-403.

Elwha River steelhead population as threatened under the ESA alongside its river-born counterpart. 79 Fed. Reg. 20,802, 20,811 (Apr. 14, 2014); SER 16 (¶ 23).

II. PROCEDURAL HISTORY

Plaintiffs did not enter this twenty-year administrative and scientific process until its conclusion. On September 16, 2011, the day before physical removal of the dams commenced, Plaintiffs sent the Federal Defendants a 60-day notice of intent to sue. ER 1017-1027. Two months later, Plaintiffs sent the Tribal Defendants a 60-day notice alleging in general terms that hatchery programs harm ESA-listed fish and that the Tribal Defendants were liable for take because they had not secured take exemptions for the hatchery programs. ER 1029-1033. Plaintiffs filed this action on February 9, 2012, ten days after the issuance of the HSRG Report, as the Tribe was undertaking final revision of its HGMPs for submission to NMFS. ER 972-1015; *supra* at 11.

While the Federal Defendants were the primary target of the lawsuit, Plaintiffs also asserted a single claim for injunctive relief against the Tribal Defendants, alleging that the hatchery programs cause unlawful take of ESA-listed fish. ER 1010 (¶ 183). Plaintiffs acknowledged that this claim was contingent on the absence of approved HGMPs, an ITS, or some other exemption from the take prohibition for the hatchery programs. ER 1001 (¶¶ 136-137). The Tribal and Federal Defendants explained to the court that "they are currently engaged in an

administrative process that will likely moot the majority, if not all, of [Plaintiffs'] claims for relief." SER 392 (2:22-25). Over Plaintiffs' objection, the district court accommodated this process by setting discovery and dispositive motions deadlines in May and June 2013, respectively. SER 388. Plaintiffs conducted extensive written discovery and depositions during 2012—the Tribal Defendants produced over 36,000 pages of documents regarding hatchery operations and the development of the HGMPs.

On October 16, 2012, NMFS published notice of its intent to approve the Tribe's HGMPs under the 4(d) Rule, and invited public comments on the proposed decision for thirty days. 77 Fed. Reg. 63,294 (Oct. 16, 2012). NMFS explained that pursuant to this pending approval, the "take prohibitions would not apply to activities implemented in accordance with the . . . HGMPs." SER 604. Plaintiffs nevertheless moved for summary judgment against the Tribal Defendants one month later, on November 15, 2012. SER 385. Plaintiffs argued that the Tribe's hatchery programs harm ESA-listed fish and that "[t]his take is not authorized by an incidental take statement or otherwise." SER 386 (15:5-9). One week later, they moved for a preliminary injunction to enjoin the spring 2013 steelhead and coho salmon hatchery releases and broodstock collection to support the steelhead program. ER 1458 (Dkt. 81).

In response to Plaintiffs' motion for summary judgment, the Tribal Defendants explained that substantial aspects of Plaintiffs' claim against them were already moot, that NMFS's forthcoming decision under the 4(d) Rule would likely moot the claim in its entirety, and that they would move to dismiss the claim at that time.[9] SER 333-341. The Tribal and Federal Defendants also submitted substantial evidence from Elwha River salmonid experts demonstrating that the Tribe's conservation-based hatchery programs do not in fact harm ESA-listed fish, and that Plaintiffs thus could not prevail on the merits of their take claim. SER 312-332; SER 345-374; SER 375-384; *see also infra* at 47-48.

On December 10, 2012, NMFS approved the Tribe's HGMPs under the 4(d) Rule. *Supra* at 13. NMFS explained that the 4(d) Approval exempted the hatchery programs from the ESA take prohibition. SER 760, 825; *see supra* at 12. NMFS and FWS also issued BiOps in December 2012, including ITSs that similarly exempted the hatchery programs from the take prohibition if implemented in accordance with their terms and conditions. ER 588; SER 697; *see*

[9] The Tribe previously operated a Chambers Creek (non-native) steelhead hatchery program, which provided fishing opportunity for both Indians and non-Indians and which played an important role in the tribal economy. SER 310-311 (¶¶ 7-8). The Tribal Council terminated the program after soliciting the recommendations of NMFS and NPS, WDFW, the independent HSRG, and its own citizens and Tribal Fish Committee. SER 343-344; SER 306 (¶¶ 33-36). The final hatchery release from this terminated program occurred in spring 2011, nearly a year before this case was filed. SER 343-344; SER 802; ER 416.

supra at 14. The Federal Defendants filed the decision documents with the court on December 13, 2012. SER 296-298.

Without reaching these take exemptions, the district court on December 19, 2012, denied Plaintiffs' motion for summary judgment, finding that Plaintiffs had not carried their burden to show that the hatchery programs actually take listed fish. SER 291-292. The court further commented:

> In light of the significant procedural and substantive deficiencies in Plaintiffs' motion, the timing of the motion must be addressed. Premature summary judgment motions are generally disfavored. Combined with the significant burden a moving party must meet when it bears the burden of persuasion at trial and the fact that the motion was noted for consideration three days before a highly relevant government opinion [i.e., the 4(d) Approval] was scheduled to be issued, the motion appears to be designed to be strategically preemptive.

SER 295 (8:2-7). The next day, Plaintiffs voluntarily withdrew their motion to enjoin the spring 2013 steelhead and coho salmon hatchery releases and steelhead broodstock collection. ER 1460 (Dkt. 113).

The Tribal Defendants then moved to dismiss Plaintiffs' claim as moot because the 4(d) Approval and ITSs exempted the hatchery programs from the take prohibition and thereby immunized the Tribal Defendants from potential liability under Section 9 of the ESA. SER 264-286. On February 12, 2013, the district court dismissed the claim for lack of subject matter jurisdiction and terminated the Tribal Defendants as parties:

> In approving the Tribe's HGMPs and joint resource management plan ("RMP") with the State, NMFS expressly provided that its approval exempts the programs from the "take" prohibition[.] . . . The ITS's issued by NMFS and FWS also recognize the exemption from potential "take" liability that they provide. . . . Therefore, the Tribal Defendants shall be dismissed and the matter can proceed with Plaintiffs' challenges to the government decisions and actions.

ER 42-44. Plaintiffs did not move for entry of judgment under Fed. R. Civ. P. 54(b) or to certify an interlocutory appeal under 28 U.S.C. § 1292(b). Instead, they voluntarily dismissed their parallel Section 9 take claim against the Federal Defendants. SER 258 (2:6-8).

One year after the order dismissing the Tribal Defendants, Plaintiffs moved for reconsideration and for a preliminary injunction against the dismissed Tribal Defendants to enjoin the spring 2014 steelhead and coho salmon hatchery releases and steelhead broodstock collection. ER 1466 (Dkt. 180). The district court denied the untimely motion for reconsideration, and stated that it would not consider the injunction motion because it was directed at dismissed individuals over whom it lacked jurisdiction. SER 215 (3:18-21), 216 (40:21-24). Plaintiffs appealed and moved orally for an injunction pending appeal, which the district court denied. ER 1466 (Dkt. 185).

Plaintiffs then filed an emergency motion for injunction pending appeal in this Court to enjoin the spring 2014 steelhead hatchery release. SER 204-205. The Tribal and Federal Defendants moved to dismiss the appeal for lack of jurisdiction.

On April 7, 2014, the Court dismissed the appeal, noting the dismissal of the Tribal Defendants one year earlier and explaining that "[t]he district court's March 12, 2014 denial of plaintiffs' motion for reconsideration is not an appealable interlocutory order refusing an injunction under 28 U.S.C. § 1292(a)(1)." SER 186-187. The Court denied as moot Plaintiffs' emergency motion for injunction pending appeal. SER 187.

On March 26, 2014, the district court resolved Plaintiffs' remaining claims against the Federal Defendants on cross motions for summary judgment. With one exception, the court granted summary judgment to the Federal Defendants on all claims, including all remaining ESA claims. ER 19-24, 30-32. The court granted summary judgment to Plaintiffs on their claim that the National Environmental Policy Act (NEPA) required NMFS to analyze an alternative in its Environmental Assessment (EA) for the 4(d) Approval regarding the annual hatchery release of fewer steelhead and coho salmon, or to better explain why such an alternative would not meet the purpose of the proposed action.[10] ER 25-29.

On May 19, 2014, Plaintiffs moved to partially vacate NMFS's December 2012 4(d) Approval and NMFS's December 2012 ITS, seeking to effectuate lower

[10] Plaintiffs suggest that the dismissed Tribal Defendants violated this order and released coho salmon in response to it. Dkt. 22-1 at 35. The Tribe takes exception to this allegation, which it has previously demonstrated to be false. SER 188-206 (explaining the biological and environmental conditions that dictated the timing of the release and relevant procedural and jurisdictional issues).

steelhead and coho salmon release and steelhead broodstock collection levels. ER 1468 (Dkt. 200); SER 181. The Tribe and the Federal Defendants explained that vacatur was not warranted because it would threaten extirpation of native Elwha River steelhead and coho salmon and was not necessary to prevent harm to other ESA-listed fish during the brief agency remand. ER 1468 (Dkts. 203, 204). The district court denied Plaintiffs' vacatur request and Plaintiffs' motion for reconsideration. ER 8; SER 63.

The court entered judgment on September 4, 2014, and this appeal followed. ER 1469 (Dkts. 219, 223). Plaintiffs moved for an injunction pending appeal to reduce the spring 2015 steelhead and coho salmon hatchery releases and steelhead broodstock collection, which the district court denied. ER 1470-1471 (Dkts. 224, 237). Plaintiffs then filed an urgent motion for injunction pending appeal in this Court requesting the same relief. Dkt. 15-1. The Court denied Plaintiffs' motion on February 26, 2015. Dkt. 32.

On December 15, 2014, NMFS issued a supplemental EA analyzing an additional alternative regarding the annual hatchery release of fewer steelhead and coho salmon, thereby addressing the single NEPA flaw found by the district court. Dkt. 18-3 at 3-4 (¶¶ 4-5), 7-254. On the same day, NMFS issued a new BiOp and ITS for the hatchery programs. Dkt. 18-3 at 4 (¶ 6), 256-525. On January 9, 2015, NMFS issued a new approval of the Tribe's HGMPs under the 4(d) Rule. Dkt. 20-

1 at 2; Dkt. 20-2; Dkt. 20-3. These decision documents replace and supersede the December 2012 documents.

SUMMARY OF THE ARGUMENT

The district court properly dismissed as moot Plaintiffs' take claim against the Tribal Defendants. Plaintiffs freely acknowledged at the outset of this action that they could not pursue a claim to enjoin unlawful take where the ESA take prohibition does not apply to the activities they seek to enjoin. The 4(d) Approval and ITSs issued in December 2012 exempted the hatchery programs from the take prohibition and thus immunized the Tribal Defendants from potential ESA liability. Plaintiffs do not identify any effective injunctive relief that remained available following the issuance of the take exemptions. Nor do they dispute that the Tribe was implementing the hatchery programs in accordance with the take exemptions at the time of the dismissal, and has continued to do so. There is nothing left to litigate, and the order of dismissal should be affirmed.

The district court also properly denied partial vacatur of NMFS's December 2012 4(d) Approval and ITS. As a threshold matter, Plaintiffs' vacatur request is moot because those decision documents have been replaced and superseded. It serves no purpose for this Court to consider vacatur of non-operative documents. In any event, vacatur of the ITS was not available in the first instance because the district court upheld the BiOp and ITS in their entirety. This Court's precedent is

clear, moreover, that vacatur is not appropriate where it would threaten extirpation of a species—in this case, ESA-listed native Elwha River steelhead and native Elwha River coho salmon.

STANDARD OF REVIEW

The district court's order granting the Tribal Defendants' motion to dismiss for lack of subject matter jurisdiction is reviewed de novo. *Coyle v. P.T. Garuda Indonesia*, 363 F.3d 979, 984 n.7 (9th Cir. 2004). Mootness is a question of law reviewed de novo. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). The district court's findings of fact on this jurisdictional issue are reviewed for clear error. *Coyle*, 363 F.3d at 984 n.7.

The district court's remedial order denying partial vacatur of NMFS's December 2012 4(d) Approval and ITS is reviewed for abuse of discretion. Dkt. 22-1 at 40; *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). A decision "is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

This Court may affirm the district court on any ground supported by the record and briefed by the parties. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003).

ARGUMENT

I. PLAINTIFFS' ESA CLAIM TO ENJOIN THE HATCHERY PROGRAMS BECAME MOOT AFTER NMFS EXEMPTED THE PROGRAMS FROM THE TAKE PROHIBITION.

Plaintiffs' claim against the Tribal Defendants sought to enjoin the hatchery programs for causing unlawful take. That claim became moot in December 2012 after NMFS exempted the hatchery programs from the take prohibition. No effective relief was available, and no case or controversy remained to be litigated. The Tribal Defendants and NMFS, moreover, have repeatedly confirmed the Tribe's implementation of the hatchery programs in accordance with the approved HGMPs. Plaintiffs advance no argument to the contrary, and the district court's order of dismissal should be affirmed.

A. No Effective Relief Was Available After NMFS Issued the Take Exemptions in December 2012.

From the start, Plaintiffs' claim against the Tribal Defendants hinged on the lack of an exemption from the ESA take prohibition for the hatchery programs. Plaintiffs' November 2011 60-day notice of intent to sue alleged in the most general of terms that hatchery programs harm ESA-listed fish and that "the Hatchery Operators have not secured authorizations or exemptions that shield them from liability under section 9 of the ESA." ER 1032-1033. Plaintiffs' complaint similarly premised their claim on the allegation that the Tribal Defendants "have not obtained authorization, exception, or exemption" from the take prohibition

through NMFS's approval of HGMPs, the issuance of an incidental take permit, or otherwise. ER 1001 (¶¶ 136-137); *see also* ER 983-985 (¶¶ 48, 53). Moreover, to establish constitutional standing, Plaintiffs conceded that their "injuries would be redressed by an order requiring the Elwha Defendants to discontinue causing unlawful 'take' of ESA-protected species until such time they prepare, and NMFS approves, HGMPs for the hatchery programs. NMFS' approval of the HGMPs would authorize take of Chinook salmon and steelhead." SER 408 (11:16-21); *see also* SER 405 (2:13-18), 406 (8:23-26), 409 (15:4-7) (alleging that the hatchery programs cause unlawful take because NMFS has not approved HGMPs).

As the district court found, given the nature and framing of Plaintiffs' claim against the Tribal Defendants, "everything changed" more than two years ago with the culmination of the HGMP development process. ER 41. On December 10, 2012, NMFS approved the Tribe's four HGMPs (and WDFW's Chinook salmon HGMP) under Limit 6 of the 4(d) Rule. *Supra* at 13. On its face, the 4(d) Approval exempted the hatchery programs from the ESA take prohibition. SER 825 ("If the Regional Administrator concurs with this recommended determination, take prohibitions would not apply to activities implemented in accordance with the five co-manager HGMPs composing the hatchery RMP for salmon and steelhead populations in the Elwha River watershed."); ER 266 (Regional Administrator, concurring). Accordingly, this exemption immunized the

Tribal Defendants from potential liability. 65 Fed. Reg. 42,422, 42,423 (July 10, 2000) ("The limits describe circumstances in which an entity or actor can be certain it is not at risk of violating the take prohibitions or of consequent enforcement actions, because the take prohibitions would not apply to programs or activities within those limits.").

To be clear, an approved HGMP is not a federal permit or authorization required to operate a fish hatchery, and the operation of a hatchery program is not unlawful in the absence of such approval. *See id.* ("NMFS emphasizes that these limits are not prescriptive regulations. The fact of not being within a limit does not mean that a particular action necessarily violates the ESA or this regulation."). But if NMFS approves an HGMP, the program becomes exempt from the ESA take prohibition otherwise extended to threatened salmonids by the 4(d) Rule. *See supra* at 12. That is precisely what happened here.

NMFS and FWS also issued ITSs in December 2012 that provided a second exemption from the take prohibition for the Tribe's implementation of the hatchery programs. ER 588 ("[T]aking that is incidental to an otherwise lawful agency action is not considered to be prohibited taking under the ESA, if that action is performed in compliance with the terms and conditions of this incidental take statement."); SER 697 (same); *see also* SER 558 (same); *supra* at 14. Like the 4(d) Approval, the ITSs immunized the Tribal Defendants from potential liability

with respect to potential effects on ESA-listed salmonids. *See, e.g., Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001) (explaining that an ITS "functions as a safe harbor provision immunizing persons from Section 9 liability and penalties for takings committed during activities that are otherwise lawful and in compliance with its terms and conditions").

Article III of the Constitution limits the federal courts' jurisdiction to actual cases or controversies, *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997), and prohibits courts from taking further action on the merits in moot cases, *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1076 (9th Cir. 2001). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 804 (9th Cir. 2009) (quotation marks omitted). "If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed." *Am. Rivers*, 126 F.3d at 1123.

Under the ESA citizen suit provision, Plaintiffs' claim against the Tribal Defendants was allowable "for the purpose of obtaining injunctive relief only"—this relief is "forward looking, and is intended to prevent a defendant from taking an endangered or threatened species." *Marina Point Dev. Co.*, 566 F.3d at 804; *see also* 16 U.S.C. § 1540(g)(1)(A). Following the issuance of the take exemptions, no effective relief was available because the take prohibition did not apply to the

hatchery programs. There was no unlawful take to prevent, and thus there was nothing for the district court to enjoin.[11] Plaintiffs' own pleadings confirmed they could not maintain a Section 9 take claim to enjoin the hatchery programs once the programs were not subject to the take prohibition.[12] *Supra* at 24-25. The district court accordingly dismissed Plaintiffs' claim against the Tribal Defendants for lack of subject matter jurisdiction. ER 42-45.

This Court's precedent is equally clear that Plaintiffs could not continue to pursue a take claim to enjoin activities after NMFS exempted those activities from the take prohibition. In *Marina Point Development Co.*, the Court found that a Section 9 claim was moot where the take prohibition no longer applied to the species at issue and the defendant's activities thus could not constitute unlawful take. 566 F.3d at 804-05. Similarly, the Court held in March 2015 that the issuance of a federal permit incorporating the terms of an ITS mooted the plaintiff's appeal of the district court's order dismissing its take claim against the local government permittee. *Wild Equity Inst. v. City & County of San Francisco*, No. 13-15046, 2015 WL 1322659, at *1 (9th Cir. Mar. 25, 2015); *cf. Pac. Lumber*

[11] Relief under the *Ex Parte Young* doctrine, pursuant to which Plaintiffs asserted their claim against the Tribal Defendants, is similarly limited to prospective injunctive relief to enjoin an ongoing violation of federal law. *Supra* at 3.

[12] Indeed, following the issuance of the take exemptions in this case, Plaintiffs voluntarily withdrew their motion to preliminarily enjoin the hatchery programs, and voluntarily dismissed their parallel Section 9 claim against the Federal Defendants. *Supra* at 18-19.

Co., 257 F.3d at 1073-74 (recognizing that issuance of incidental take permit moots ESA claim against permittee).

A large body of district court case law from this circuit further supports the conclusion that the issuance of a take exemption moots a Section 9 take claim premised on the absence of such exemption. *E.g.*, *Wild Equity Inst. v. City & County of San Francisco*, No. C 11-00958 SI, 2012 WL 6082665, at *3-4 (N.D. Cal. Dec. 6, 2012); *Or. Wild v. Connor*, No. 6:09-CV-00185-AA, 2012 WL 3756327, at *2-3 (D. Or. Aug. 27, 2012); *Or. Natural Res. Council v. Bureau of Reclamation*, No. 91-6284-HO, 1993 U.S. Dist. LEXIS 7418, at *24-25 (D. Or. Apr. 5, 1993). In circumstances similar to those in this case, one district court explained in its dismissal order:

> Plaintiff's . . . claim for relief is predicated on the allegation that defendant did not have an ITS. These circumstances changed when NMFS issued an ITS to defendant. In fact plaintiff expressly acknowledged that an ITS exempts defendant from Section 9 liability. . . . The actions challenged by plaintiff . . . have been explicitly authorized by NMFS . . . and are no longer even allegedly "wrongful."

Or. Wild, 2012 WL 3756327, at *2-3 (citations omitted). District court case law from other circuits holds the same. *E.g.*, *Friends of Merrymeeting Bay v. Miller Hydro Group*, No. 2:11-cv-36-GZS, 2013 WL 145603, at *4 (D. Me. Jan. 14, 2013); *S. Utah Wilderness Alliance v. Madigan*, No. 92-1094-LFO, 1993 WL 19650, at *1 (D.D.C. Jan. 6, 1993); *see also Animal Welfare Inst. v. Beech Ridge*

Energy LLC, 675 F. Supp. 2d 540, 580-81 (D. Md. 2009) (enjoining construction of wind turbines "unless and until an [Incidental Take Permit] has been obtained").

In short, NMFS's approval of the Tribe's HGMPs under the 4(d) Rule redressed Plaintiffs' alleged injury and mooted their claim against the Tribal Defendants. *See, e.g.*, *Alliance for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 601 (9th Cir. 2014). Issuance of the ITSs by NMFS and FWS had the same effect. As the district court observed, "the case law makes sense: once the government issues an approval to take endangered species, the fight lies with the government and not the entity that received such approval."[13] ER 43. Plaintiffs' opening brief does not identify *any* effective relief that the district court could have granted with respect to the Tribal Defendants following the issuance of the take

[13] *Native Fish Society v. National Marine Fisheries Service*, No. 3:12-cv-00431-HA, 2013 U.S. Dist. LEXIS 111505 (D. Or. May 16, 2013), does not hold to the contrary. Dkt. 22-1 at 71. In that case, the district court recognized that approved HGMPs for the Sandy River Hatchery "provide[d] immunity from § 9 liability." *Native Fish Soc'y*, U.S. Dist. LEXIS 111505, at *38. The court "ha[d] no trouble in conceiving of a situation in which the issuance of an ITS would moot a plaintiff's claims or allegations." *Id.* at *34 n.6. However, it "appear[ed] that a limited portion of the Sandy Hatchery's proposed operations [were not] covered under the HGMPS," and thus were not exempt from the take prohibition. *Id.* at *33, 39-40. The court also found that plaintiff's original, detailed notice letter alleged that the programs, which according to the court had a "dreadful track record," could not "be operated in compliance with § 9 absent extraordinary changes to the Hatchery's operations," and was sufficient to support new claims. *Id.* at *31-33. None of these circumstances is present here. *See also infra* at 36.

exemptions, and any such argument is waived.[14] *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived.").

B. The Tribal Defendants Proved the Take Exemptions.

Plaintiffs' argument that the Tribal Defendants did not properly plead and prove the take exemptions has no merit. Lack of subject matter jurisdiction may, of course, be raised at any time. Fed. R. Civ. P. 12(h)(3). Plaintiffs' own 60-day notice letter, complaint, and motion for summary judgment expressly stated that their claim against the Tribal Defendants was contingent on the lack of approved HGMPs, an ITS, or some other take exemption for the hatchery programs. *See supra* at 15-16, 24-25. The Tribal Defendants pled the defense of lack of subject matter jurisdiction in their answer, and raised both the existing and forthcoming take exemptions as defenses to Plaintiffs' motion for summary judgment. *Supra* at 17; ER 880; SER 337-341. The Federal Defendants promptly filed the relevant agency decision documents with the district court following their issuance. *Supra*

[14] The district court rejected Plaintiffs' argument, which they do not renew in this Court, that injunctive relief remained available to remove the final returning adults from the terminated Chambers Creek steelhead program because the Tribe had already committed to remove those fish pursuant to the 4(d) Approval and ITS. ER 45; SER 802; ER 596 (¶ 3.d); SER 311 (¶ 9); SER 306 (¶ 38). The final surviving adults from the Chambers Creek program returned in 2014, and NMFS has confirmed that the Tribe successfully removed those fish from the Elwha River. Dkt. 18-3 at 273-74; Dkt. 20-3 at 44-45, 58; SER 51.

at 18. There was no technical pleading barrier to the district court's finding of mootness and its order of dismissal.[15]

The Tribal Defendants also proved the take exemptions. They demonstrated that the 4(d) Approval and ITSs were applicable and in force and exempted the hatchery programs from the ESA take prohibition. SER 266-271. They further demonstrated that the approved HGMPs complied with the procedural and substantive requirements of Limit 6 of the 4(d) Rule, which NMFS itself had affirmatively concluded. SER 270 (quoting NMFS's finding that the HGMPs submitted by the Tribe and WDFW meet all of the requirements for HGMPs under Limit 6 of the ESA 4(d) Rule). Plaintiffs do not dispute this now, and they did not dispute it in the court below.

Plaintiffs claim, however, that the Tribal Defendants' motion to dismiss was not supported by evidence that the Tribe was implementing the hatchery programs in accordance with the approved HGMPs. Dkt. 22-1 at 73. This is flatly incorrect. The Tribal Defendants produced and cited to the first declaration of 25-year Hatchery Manager Larry Ward and the first and second declarations of 12-year Natural Resources Director Doug Morrill, the individuals responsible for day-to-day hatchery operations and co-authors of the HGMPs. Mr. Ward and Mr. Morrill

[15] Plaintiffs do not argue, nor could they credibly do so, that it was prejudicial for the district court to consider the mootness effect of the take exemptions without the Tribal Defendants' first formally amending their answer.

confirmed that the Tribe was implementing the hatchery programs in conformity and compliance with the approved HGMPs, that it intended to do so in the future, and that it was fully capable of doing so.[16] SER 270-271, 276 (citing SER 310 (¶¶ 2-5), SER 300-301 (¶¶ 2, 4-5)); ER 257-258 (¶ 2).

The district court thus properly found that "the Tribal Defendants have submitted evidence that the hatchery programs are operated in compliance with the government's approvals," and found "meritless" Plaintiffs' vague suggestion to the contrary. ER 46. This finding was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014) (defining clear error). The Tribal Defendants fully carried their burden under the 4(d) Rule. *See, e.g.*, *Or. Wild*, 2012 WL 3756327, at *3 ("[T]he existence of an ITS and defendant's statement of compliance and future compliance render plaintiff's remaining claim in this lawsuit moot.").

And there is more. The district court's finding is confirmed by extensive,

[16] Plaintiffs now object to Mr. Morrill's second declaration, Dkt. 22-1 at 73 n.16, which reiterated his first, ER 257-258 (¶ 2), but they did not object below and the argument is waived. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998). They also object that Mr. Ward and Mr. Morrill did not have the foundation to confirm compliance with the 4(d) Approval, Dkt. 22-1 at 73 n.17, but they did not object below and that argument is also waived. Nor does it have any merit. *E.g.*, SER 300-308 (Mr. Ward explaining in detail his personal knowledge of the hatchery programs, development of the HGMPs, and various aspects of day-to-day hatchery operations).

uncontroverted evidence that the Tribe has implemented the hatchery programs in accordance with the 4(d) Approval and the terms and conditions of the ITS since the order of dismissal. For example, the Tribal Defendants again demonstrated compliance with the take exemptions in connection with Plaintiffs' request to partially vacate those exemptions. SER 154-162 (¶¶ 2-5, Exs. 1-3) (confirming compliance in June 2014 and attaching NMFS communications from April 2013, October 2013, and January 2014 confirming same); SER 145 (¶ 5) (same).

NMFS, which is responsible for ensuring compliance with the 4(d) Approval and which has sole authority to withdraw the take exemption it provides, 50 C.F.R. § 223.203(b)(6)(v), has also repeatedly confirmed the Tribe's compliance with the 4(d) Approval and the terms and condition of the ITS. *E.g.*, SER 99, 102-105 (¶¶ 44, 50-53) (June 2014); SER 23, 26-28 (¶¶ 36, 42-45) (September 2014); *see also* SER 40-59 (September 2014 letter from NMFS, FWS, and NPS to Plaintiffs confirming compliance). As recently as December 2014, NMFS found in the superseding BiOp that "[t]he hatchery programs have been implemented consistent with fish production, monitoring and evaluation and annual reporting actions evaluated and approved in the 2012 hatchery Opinion."[17] Dkt. 18-3 at 281.

[17] Although this additional information was not before the district court at the time of its order of dismissal, the Court may consider it for purposes of mootness. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) ("Consideration of new facts may . . . be mandatory . . . when developments render a controversy moot and thus divest us of jurisdiction.").

Plaintiffs do not dispute any of this. They do not argue anywhere in their brief that the Tribal Defendants were implementing the hatchery programs in noncompliance with the take exemptions at the time of the order of dismissal. Nor do they argue that the Tribal Defendants have violated the terms of the exemptions at any time since. Plaintiffs have not advanced, and hence have waived, any argument that alleged noncompliance with the take exemptions precluded the district court's finding of mootness.[18] *See Smith*, 194 F.3d at 1052.

Instead, they argue only that pre-suit notice is not required to "address issues related to" the December 2012 4(d) Approval and ITS. Dkt. 22-1 at 74. But Plaintiffs fail to identify any actual "issues" they seek to "address" with respect to those now-superseded documents. *Supra* at 21-22. More importantly, federal court jurisdiction is strictly limited by Plaintiffs' November 2011 60-day notice letter. *See Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520-22 (9th Cir. 1998); 16 U.S.C. § 1540(g)(2)(A)(i). Notice must be "sufficiently specific to inform the alleged violator about what it was doing wrong, so that it knew what corrective actions would avert a lawsuit." *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143 (9th Cir. 2002) (internal punctuation

[18] Plaintiffs have abandoned the false allegations of noncompliance made in the court below. *E.g.*, ER 46; SER 61. NMFS, moreover, expressly negated those allegations in its December 2014 BiOp and January 2015 4(d) Approval. *See* Dkt. 18-3 at 266-279; Dkt. 20-3 at 29, 33, 52-53, 63-66.

omitted). Plaintiffs' cursory letter, ER 1032-1033, effectively posed two options: (1) terminate the hatchery programs altogether; or (2) complete the ongoing administrative process to secure exemption from the take prohibition, which the Tribe was already pursuing, and which occurred more than two years ago.

Plaintiffs' notice letter *does not even mention* the native Elwha River steelhead and native Elwha River coho, chum, and pink salmon programs covered by the 4(d) Approval and the ITS, let alone allege noncompliance with those take exemptions. ER 1029-1033. The district court correctly found that Plaintiffs have not provided the Tribal Defendants sufficient notice of any alleged ESA violation that can be cured, and thus they may not prosecute a claim for noncompliance with the take exemptions in this action.[19] ER 43, 45-46; *see also Wild Equity Inst.*, 2012 WL 6082665, at *3; *Or. Wild*, 2012 WL 3756327, at *3.

C. The Case Law Cited by Plaintiffs Does Not Support Their Position.

Citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000), Plaintiffs suggest that the Tribal Defendants have

[19] The facts do not support Plaintiffs' assertion that this mandatory notice requirement undermines the protection of ESA-listed fish. Dkt. 22-1 at 76. Following the dismissal of the Tribal Defendants in February 2013, Plaintiffs did not notify the Tribal Defendants of any alleged noncompliance with the take exemptions, as the district court suggested they do. ER 46-47. Although they did send a notice 18 months later, they have not filed a new action based on those allegations. SER 65. If Plaintiffs had a colorable claim of noncompliance at the time of the dismissal, or at any time since, they could have commenced a new action for injunctive relief long ago.

not made it clear that their alleged "violations" could not reasonably be expected to recur. Dkt. 22-1 at 72-73. Plaintiffs' reliance on *Friends of the Earth* is misplaced. First, Plaintiffs do not identify—and certainly have not established—any actual "violations" that occurred in the first instance. An approved HGMP is not a federally required permit, and the district court denied Plaintiffs' motion for summary judgment, holding they had not proved that the hatchery programs cause take. *See supra* 18, 26. Plaintiffs have not challenged that order on appeal.[20]

Second, the question in *Friends of the Earth* was whether, following repeated undisputed violations of its National Pollution Discharge Elimination System permit, the defendant's post-complaint permit compliance mooted a claim for civil penalties under the Clean Water Act. 528 U.S. at 179-80. Civil penalties, however, are not available under the ESA citizen suit provision. 16 U.S.C. § 1540(g)(1)(A). The *Friends of the Earth* plaintiff did not dispute that its request for injunctive relief, which is the only relief available in an ESA citizen suit, was moot. 528 U.S. at 178-79; *id.* at 196-97 (Stevens, J., concurring).

[20] The district court could have granted summary judgment to the Tribal Defendants following the issuance of the take exemptions. Plaintiffs fully litigated their take claim, conducting discovery and then filing their own motion for summary judgment. *Supra* at 16. They argued that the hatchery programs "cause take of threatened salmonids. This take is not authorized by an incidental take statement or otherwise. Accordingly, the Elwha Defendants are in violation of section 9 of the ESA." SER 386 (15:5-9). After the exemptions issued, the alleged take was, in Plaintiffs' own words, "authorized."

Even more fundamentally, NMFS's issuance of the take exemptions in December 2012 was the culmination of a careful, stepwise process begun long before Plaintiffs filed this action—it is hardly the "voluntary cessation" of a legal violation by a bad actor who may "return to his old way" following dismissal. *Id.* at 189 (quotation marks omitted). The Tribe and its federal and state partners, in collaboration with the independent scientific community, carefully crafted the approved HGMPs over the course of a decade. *Supra* at 9-11. The Tribe's commitment to protect and restore Elwha River steelhead and salmon cannot be questioned, and even assuming for the sake of argument some "violation" occurred in the past, which it did not, there can be no reasonable expectation that any such violation will recur. Plaintiffs point to nothing in the record suggesting otherwise, and their bare speculation is not sufficient to overcome mootness. *See*, *e.g.*, *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007); *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1511 (9th Cir. 1994).

Nor do the Clean Water Act cases cited by Plaintiffs, Dkt. 22-1 at 75, stand for the remarkable proposition that a notice letter sufficient to establish subject matter jurisdiction at the outset of a case can preclude a later finding of mootness (and consequent dismissal for lack of subject matter jurisdiction), no matter what intervening events might occur in the course of the case. *E.g.*, *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("The defendant's

later changes to its operations and plans may affect standing; the question of ongoing violations or remedies; or mootness.") (citations omitted). In those cases, moreover, the notice letters identified specific instances of non-compliance with *existing permit* requirements, such that the plaintiffs could pursue allegations that defendants' post-notice compliance efforts (i.e., their development of plans) failed to adhere to the explicit permit requirements previously noticed. *Id.*; *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 917, 920 (9th Cir. 2004) (notice letter described permit sections and requirements "in detail"). That is a far cry from this case, in which the claim against the Tribal Defendants was predicated on the *nonexistence* of *exemptions* from the take prohibition (which were secured soon thereafter), and in which Plaintiffs' notice letter did not even identify the specific hatchery programs alleged to cause take.[21] ER 1033.

D. NMFS's December 2012 ITS Exempted the Tribe's Hatchery Programs from the Take Prohibition.

Plaintiffs' argument that NMFS's December 2012 ITS did not exempt the hatchery programs from the take prohibition because the Tribe is not an action agency, Dkt. 22-1 at 76-77, was rejected by this Court in *Ramsey v. Kantor*, 96 F.3d 434, 442 (9th Cir. 1996): "[A] party that is neither a federal agency nor an

[21] *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964 (9th Cir. 2002), *withdrawn as moot*, 355 F.3d 1203 (9th Cir. 2004), does not support Plaintiffs' position. There, the court allowed supplementation of pleadings in the context of an ongoing Section 7 consultation claim. *Id.* at 975.

applicant can take members of a listed species without violating the ESA, provided the actions in question are contemplated by an [ITS] . . . and are conducted in compliance with the requirements of that statement." *Id*. In *Ramsey*, the plaintiff argued that the ITS at issue did not cover the implementation of fishing regulations by the states of Oregon and Washington. 96 F.3d at 440-41. This Court found, however, that the plain language of the ESA "does not limit the protection afforded by an [ITS] to federal agencies or applicants," and that the scope of activities evaluated by the BiOp and ITS "clearly include more than just actions to be undertaken directly by the five [federal] agencies." *Id.* at 441 (discussing 16 U.S.C. § 1536(o)(2)).

Plaintiffs' argument fails for the same reason. The Tribe's implementation of the hatchery programs is "clearly contemplated" and "explicitly falls within the bounds of the actions approved" by the December 2012 ITS. *Ramsey*, 96 F.3d at 442; ER 588-600. In fact, potential take incidental to the implementation of the programs is the entire focus of the ITS. ER 588-592. The ITS thus provides the Tribal Defendants additional protection from potential Section 9 take liability. *See Ramsey*, 96 F.3d. at 442.

In any event, Plaintiffs conceded below that the ITS exempted the hatchery programs from the take prohibition: "The ITS issued with NMFS' December 10, 2012 BiOp also exempts from liability under section 9 of the ESA take resulting

from the hatchery programs, so long as the operations comply with the terms and conditions of the ITS." SER 185 (23:22-24); *see also* SER 184 (20:8-16) (same). The argument is therefore waived. *See, e.g.*, *United States v. Rees*, 447 F.3d 1128, 1130 (8th Cir. 2006) ("Because Rees . . . expressly conceded the argument before the district court, we will not address it.").

In sum, Plaintiffs point to nothing showing that any case or controversy remained after the issuance of the take exemptions, and the Tribal Defendants have amply proved those exemptions. The federal courts lack jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Am. Rivers*, 126 F.3d at 1123 (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)). Plaintiffs identify no purpose that remand would serve, and any further proceedings would be a gross waste of the courts' and the parties' resources. *E.g.*, *Harper v. Clark*, 372 F. App'x 824, 825 (9th Cir. 2010). The district court's order of dismissal should be affirmed.

II. PLAINTIFFS' REQUEST TO VACATE THE DECEMBER 2012 TAKE EXEMPTIONS IS MOOT, AND REGARDLESS, DENIAL OF VACATUR WAS NECESSARY TO GUARD AGAINST THE RISK OF EXTIRPATION.

Plaintiffs' request to partially vacate NMFS's December 2012 4(d) Approval and NMFS's December 2012 ITS is moot because those decision documents have been replaced and superseded. Even if the request were not moot, the record

strongly supports the district court's denial of partial vacatur. Vacatur of the ITS was not an available remedy because the district court upheld the validity of the BiOp and ITS in their entirety, and this Court's precedent is clear that vacatur was not appropriate because it threatened extirpation of ESA-listed Elwha River steelhead and Elwha River coho salmon.

A. Plaintiffs' Request for Partial Vacatur Is Moot Because the December 2012 Take Exemptions Have Been Superseded.

Plaintiffs devote but a single page to their argument that NMFS's December 2012 4(d) Approval and ITS should be partially vacated, Dkt. 22-1 at 57, and for good reason: the request is moot. "[T]he issuance of a superseding BiOp moots issues on appeal relating to the preceding BiOp." *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) (holding that where NMFS issued an ITS in 2011 that replaced a prior 2010 ITS, a challenge to the 2010 ITS was moot). Similarly, where the Bureau of Safety and Environmental Enforcement approved a revised spill response plan that replaced the prior plan, a challenge to the prior plan was moot. *Native Vill. of Point Hope v. Salazar*, 680 F.3d 1123, 1131 (9th Cir. 2012).

The same is true here. The December 2012 take exemptions that Plaintiffs seek to vacate were replaced and superseded by NMFS's December 2014 ITS and January 2015 4(d) Approval. *Supra* at 21-22. There is no point in this Court's reviewing whether the district court should have vacated the now-superseded

decision documents because the Court can "no longer grant effective relief as to the now non-operative" documents. *Native Vill. of Point Hope*, 680 F.3d at 1131. Plaintiffs' vacatur request is moot.[22]

B. Vacatur of the ITS Was Not an Available Remedy Because the District Court Upheld the BiOp and ITS in Their Entirety.

Even if Plaintiffs' vacatur argument were not moot, it is entirely lacking in merit. The district court rejected Plaintiffs' challenge to the now-superseded December 2012 BiOp and ITS. ER 30-32. They have not challenged that decision on appeal. It is axiomatic that a plaintiff is not entitled to relief unless it succeeds on the merits of the claim. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("[A] remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the . . . violation.") (quotation marks omitted). Accordingly, vacatur of the ITS was not an available remedy in the first instance.

Plaintiffs' conclusory statement that the December 2012 ITS was "subject to NEPA" is incorrect. Dkt. 22-1 at 57. This Court recently explained that NEPA does not apply to Biological Opinions where another federal action will trigger that

[22] Plaintiffs acknowledged in the court below that vacatur, where warranted, is only available pending agency remand. SER 182 (8:15-16), 183 (12:1-3, 12:7-8). NMFS completed the remand process in this case when it issued the supplemental EA in December 2014. *Supra* at 21.

statute. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 644 (9th Cir. 2014), *cert. denied sub nom. Stewart & Orchards v. Jewell*, 135 S. Ct. 948 (2015), and *State Water Contractors*, 135 S. Ct. 950 (2015); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 430 F. Supp. 2d 1328, 1335 (S.D. Fla. 2006) (explaining that such a requirement would waste limited agency resources). Here, NMFS's approval of the HGMPs under the 4(d) Rule triggered NEPA, not its preparation of the BiOp and ITS.[23]

At any rate, Plaintiffs failed to plead or raise the argument that NMFS was required to complete a NEPA analysis for the December 2012 BiOp and ITS. The district court found that "Plaintiffs clearly failed to address this issue of the ITS's dependence on the EA during the liability phase of this proceeding." SER 63 (2:10-13) (denying reconsideration and noting its lack of "legal or equitable authority to set aside an action that was otherwise in accordance with law"). The argument is accordingly waived. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (explaining that NEPA claim insufficiently presented to district court is waived on appeal).

[23] The Federal Register notice cited by Plaintiffs merely restates the unremarkable proposition that NMFS's determination under the 4(d) Rule is subject to NEPA. Dkt. 22-1 at 57 (citing 76 Fed. Reg. 45,515 (July 29, 2011)). NMFS said the same thing with respect to its review of the Tribe's HGMPs. 77 Fed. Reg. 63,294, 63,295 (Oct. 16, 2012) ("NEPA requires Federal agencies to conduct an environmental analysis of their proposed actions . . . . NMFS expects to take action on a joint state/tribal plan under the 4(d) rule . . . .").

C. The Record Before the District Court Established that Vacatur Threatened Extirpation of Elwha River Steelhead and Coho Salmon and Was Not Necessary to Prevent Harm to ESA-Listed Fish.

Even if Plaintiffs' request to partially vacate the now-superseded 4(d) Approval and ITS were not moot, on the record before the district court, the denial of vacatur was not an abuse of discretion. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080-81 (9th Cir. 2010) (stating that "relief for a NEPA violation is subject to equity principles"). Plaintiffs sought partial vacatur to constrain the Tribe's implementation of the hatchery programs—specifically, to impose the take prohibition on the Tribe's releases of native Elwha River steelhead and coho salmon and its collection of steelhead broodstock above Plaintiffs' preferred levels. *Supra* at 20-21. In practical terms, Plaintiffs sought to force the Tribe to destroy hundreds of thousands of hatchery-born ESA-listed Elwha River steelhead and hatchery-born Elwha River coho salmon being reared for release, and to curtail broodstock collection necessary to ensure continuation of the steelhead program.

Vacatur of an agency action depends on the seriousness of the agency's error and the disruptive consequences of an interim change pending remand. *Cal. Cmtys. Against Toxics v. U.S. Envtl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012). Where extirpation may result from vacatur, the scales of equity tip sharply in favor of leaving the decision in place while the agency corrects its procedural error. *Id.*; *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir.

1995). Denial of vacatur was required in this case because it threatened extirpation of genetically unique Elwha River steelhead and salmon populations—precisely the disruptive consequence this Court has prohibited—and was not necessary to prevent harm to ESA-listed fish.

Before the court was evidence that the two dams had blocked fish passage for a century, resulting in critically depressed fish populations. *Supra* at 5-6. Prior to dam removal, the annual returning steelhead population averaged fewer than 150 fish and had dropped as low as 45 fish. *Supra* at 6. Federal, state, and tribal expert agencies and the independent HSRG agreed that the 24 million cubic yards of sediment unleashed by dam removal threatens extirpation of the fragile Elwha River populations. ER 412; SER 782; *supra* at 7-14. They further agreed that the Tribe's conservation-based hatchery programs are necessary to guard against this risk, to protect what genetic diversity remained, and to ensure sufficient surviving fish to populate the newly accessible upper watershed after dam removal. *Supra* at 9. In recognition of these realities, NMFS had listed the hatchery-born native Elwha River steelhead population as threatened under the ESA, *supra* at 14-15, and had affirmatively required the Tribe to maintain the HGMP's specified release levels to prevent jeopardy to Puget Sound steelhead, ER 593 (¶ 1.b).

Although the district court questioned why the EA did not include a detailed alternative with reduced hatchery release levels, *supra* at 20, the Federal

Defendants provided substantial evidence during remedy briefing that the release and broodstock collection levels approved by NMFS were necessary to achieve the aforementioned goals.[24] SER 72-73, 79, 85-99 (¶¶ 7-8, 18, 23-43); SER 125-129 (¶¶ 10-12, 15-16); SER 133-136 (¶¶ 6-19); *see also* SER 606 (HSRG letter indicating that coho hatchery program is "sized appropriately"). The Federal Defendants also provided evidence that heavy sedimentation had, in fact, already proven lethal to thousands of ESA-listed native Elwha River Chinook salmon. SER 80-84, 119-120 (¶¶ 20-21, Ex. 4).

The record, moreover, contained overwhelming evidence that vacatur was not necessary to prevent harm to ESA-listed fish. The Federal and Tribal Defendants submitted testimony from Elwha River salmonid experts disproving each of Plaintiffs' allegations and explaining, in detail, the absence of evidence showing adverse genetic or ecological interactions between hatchery- and river-born Elwha River fish populations. *E.g.*, SER 127-128 (¶¶ 13-14); SER 378-383 (¶¶ 10-22); SER 323-326 (¶¶ 35-42). These experts explained that the hatchery-born fish Plaintiffs disparage possess genes identical to those of the river-born fish

[24] At the time of Plaintiffs' vacatur request, NMFS had already provided a date by which it would issue for public comment a draft supplemental EA analyzing this reduced hatchery release alternative, which suggested that the "agency [would] be able readily to cure [the] defect in its explanation" and "counsel[ed] remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). NMFS completed the remand in December 2014. *Supra* at 21.

they claim will suffer genetic harm. SER 73-74, 89-91 (¶¶ 9, 30-31) (explaining that genes in the hatchery population, including those Plaintiffs pejoratively term "maladapted," Dkt. 22-1 at 27, come from the wild population); SER 380-381 (¶¶ 15-16); SER 367 (¶ 36); SER 323-326 (¶¶ 36-41) (emphasizing that domestication, if it happens at all, is likely to be temporary and reversible); SER 127-128 (¶ 13) (same). Defendants' experts also explained the absence of evidence that hatchery-born native Elwha River steelhead or coho salmon compete with or prey upon other ESA-listed fish. *E.g.*, SER 329-331 (¶¶ 50-52, 54); SER 812 (stomach content analyses show no piscivorous behavior). They further noted Plaintiffs' failure to account for the numerous precautions and mitigation measures taken at the Tribe's hatchery specifically to avoid the generalized risks Plaintiffs fear. SER 331 (¶ 55); SER 148, 150-151 (¶¶ 13, 18-21); SER 126-127 (¶ 11).

Moreover, Plaintiffs had failed to establish on summary judgment that the hatchery releases actually take listed fish, and the district court and this Court had denied Plaintiffs' prior motions to enjoin the Tribe's implementation of the hatchery programs.[25] *Supra* at 18-20. In the face of the significant risk of

[25] Mere issuance of the 4(d) Approval did not establish that any harm would occur. Availing oneself of an *exemption* from potential liability is not an *admission* that harm occurs. NMFS is required to issue an ITS "when take might occur, even where take is unlikely." *Pub. Employees for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 113-15 (D.D.C. 2014) (discussing Ninth Circuit precedent), *appeal dismissed sub nom. Pub. Employees for Envtl. Responsibility v. Cruickshank*, No. 14-5117, 2014 WL 3014869 (D.C. Cir. June 11, 2014).

extirpation, the absence of harm to ESA-listed fish, and these prior decisions, the district court was more than reasonably justified in denying partial vacatur.

In short, by not disturbing the 4(d) Approval and ITS during remand, the district court respected the ESA's "institutionalized caution" mandate and acknowledged NMFS's comparative expertise regarding the needs of ESA-listed fish. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009) ("Assessing a species' likelihood of extinction involves a great deal of predictive judgment. Such judgments are entitled to particularly deferential review."). The continued existence of native Elwha River steelhead and coho salmon was at stake, and with it, Congress's purpose in enacting the 1992 Elwha Act, and the Tribe's cultural way of life. *Supra* at 4-7. Leaving the 4(d) Approval and ITS in place while NMFS expeditiously addressed the district court's sole procedural concern, which has now occurred, was the correct result.

CONCLUSION

For the foregoing reasons, the Tribal Defendants request that the Court affirm the district court's orders dismissing the Tribal Defendants for lack of subject matter jurisdiction and denying partial vacatur of NMFS's December 2012 4(d) Approval and December 2012 ITS.

DATED this 13th day of April, 2015.

Respectfully submitted,

s/ Cory J. Albright
s/ Jane G. Steadman
Cory J. Albright, WSBA # 31493
Jane G. Steadman, WSBA # 44395
KANJI & KATZEN, PLLC
401 Second Ave. S., Suite 700
Seattle, WA 98104
Phone: (206) 344-8100
Fax: (866) 283-0178
calbright@kanjikatzen.com
jsteadman@kanjikatzen.com

s/ Stephen H. Suagee
Stephen H. Suagee, WSBA # 26776
Office of General Counsel
Lower Elwha Klallam Tribe
2851 Lower Elwha Rd.
Port Angeles, WA 98363
Phone: (360) 452-8471
Fax: (360) 452-3428
steve.suagee@elwha.nsn.us

Counsel for the Tribal Defendants-Appellees

STATEMENT OF RELATED CASES
REQUIRED BY CIRCUIT RULE 28-2.6

Tribal Defendants-Appellees Robert Elofson, Larry Ward, Doug Morrill, and Mike McHenry are unaware of any related cases pending before this Court.

DATED this 13th day of April, 2015.

s/ Cory J. Albright
Cory J, Albright, WSBA # 31493
KANJI & KATZEN, PLLC
401 Second Ave. S., Suite 700
Seattle, WA 98104
Phone: (206) 344-8100
Fax: (866) 283-0178
calbright@kanjikatzen.com

Counsel for the Tribal Defendants-Appellees

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 12,309 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman 14 point font.

DATED this 13th day of April, 2015.

s/ Cory J. Albright
Cory J. Albright, WSBA # 31493
KANJI & KATZEN, PLLC
401 Second Ave. S., Suite 700
Seattle, WA 98104
Phone: (206) 344-8100
Fax: (866) 293-0178
calbright@kanjikatzen.com

Counsel for the Tribal Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015, I electronically filed this ANSWERING BRIEF OF TRIBAL DEFENDANTS-APPELLEES with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

DATED this 13th day of April, 2015.

s/ Cory J. Albright
Cory J, Albright, WSBA # 31493
KANJI & KATZEN, PLLC
401 Second Ave. S., Suite 700
Seattle, WA 98104
Phone: (206) 344-8100
Fax: (866) 283-0178
calbright@kanjikatzen.com

Counsel for the Tribal Defendants-Appellees