

HONORABLE BENJAMIN H. SETTLE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY, <i>et al.</i> ,)	No. 3:12-CV-05109-BHS
)	
Plaintiffs,)	PLAINTIFFS’ FIRST MOTION FOR
v.)	PARTIAL SUMMARY JUDGMENT
)	
NATIONAL PARK SERVICE, <i>et al.</i> ,)	NOTE ON MOTION CALENDAR:
)	December 7, 2012
Defendants,)	
)	

I. MOTION.

Pursuant to Rule 56, Plaintiffs hereby move for partial summary judgment and respectfully request the Court enter an order finding Defendants Doug Morrill and Larry Ward, in their official capacities as Natural Resources Director and Hatchery Manager, respectively, for the Lower Elwha Klallam Tribe (collectively, “Elwha Defendants”) in violation of section 9 of the Endangered Species Act (“ESA”). Plaintiffs further move the Court pursuant to Rule 56 for an order finding Defendant Department of Interior (“DOI”) in violation of section 7(a)(2) of the ESA for failing to consult or, in the alternative, finding biological opinions issued by NOAA Fisheries Service (“NMFS”) arbitrary, capricious, and not in accordance with law.

II. INTRODUCTION.

The removal of two dams on the Elwha River will be the largest dam removal project in United States history, opening up over seventy miles of river habitat to salmonids. These efforts have been mandated by an act of Congress directing the full restoration of the Elwha River ecosystem and native anadromous fisheries, and are expected to cost taxpayers approximately \$324.7 million. This project, as envisioned by Congress, affords a unique opportunity for wild salmonids to quickly re-colonize large expanses of pristine habitat.

The Elwha Defendants, however, intend to flood the river with hatchery fish to expedite commercial harvests. These large releases of hatchery fish will overwhelm the small and fragile populations of wild salmonids, thereby impeding or even preventing the full recovery of wild fish. The Elwha Defendants' hatchery operations cause illegal take of salmonids listed as threatened under the ESA. Plaintiffs request with this motion that the Court find the Elwha Defendants to be in violation of the ESA for such unauthorized "take."

The Elwha Defendants' hatchery programs are funded by DOI, and DOI is therefore required to consult with NMFS and the United States Fish and Wildlife Service ("FWS") under section 7(a)(2) of the ESA regarding the effects these programs have on threatened salmonids. Plaintiffs request the Court find DOI in violation of the ESA for failing to comply with these consultation requirements. To the extent that DOI asserts that such consultation has occurred, Plaintiffs request the Court find the biological opinions issued by NMFS facially inadequate.

III. THE ENDANGERED SPECIES ACT.

A. The Prohibition on "Take" of ESA-Listed Species.

When the ESA was passed in 1973 it "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*,

1 437 U.S. 153, 180 (1978). The stated purpose of the statute is to conserve threatened and
 2 endangered species and to protect the ecosystems upon which those species depend. 16 U.S.C.
 3 § 1531(b). “Conserve” is defined to mean to use all methods necessary to bring the species to a
 4 point where the protections afforded by the statute are no longer necessary. 16 U.S.C. § 1532(3).
 5

6 The ESA contains protections designed to save species from extinction. *See Babbitt v.*
 7 *Sweet Home Ch. of Comtys. for a Great Or.*, 515 U.S. 687, 690 (1995). Implementation
 8 responsibilities are assigned to the Secretaries for the Departments of Commerce and Interior,
 9 who have delegated responsibilities to NMFS and FWS, respectively. *See* 50 C.F.R. § 402.01.
 10

11 Section 4 of the ESA prescribes mechanisms by which NMFS and FWS list species as
 12 endangered or threatened.¹ 16 U.S.C. §§ 1532(16) and 1533(a). Section 9 of the ESA makes it
 13 unlawful to “take” endangered species. 16 U.S.C. § 1538(a)(1)(B). The take prohibition has
 14 generally been applied to “threatened” species by regulations promulgated under section 4(d) of
 15 the ESA.² *See* 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.21 and 17.31(a); 50 C.F.R. § 223.203(a).
 16

17 “Take” is defined broadly to include harass, harm, wound, kill, trap, capture, or collect a
 18 protected species. 16 U.S.C. § 1532 (19). “Harm” includes significant habitat modification
 19 which kills or injures fish by significantly impairing essential behavioral patterns, including
 20 breeding, spawning, rearing, migrating, feeding, or sheltering. 50 C.F.R. § 222.102; *see also*
 21 *Sweet Home*, 515 U.S. 687. NMFS defines “harass” to include actions that have the potential to
 22 injure an animal or disrupt its normal behavioral patterns to a point where such behaviors are
 23 abandoned or significantly altered. *Third Decl. of Brian A. Knutsen* (“Knutsen Decl.”), p. 48.
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 27 ¹ An “endangered species” is one “in danger of extinction throughout all or a significant portion of its
 28 range,” and a “threatened species” is a “species which is likely to become an endangered species within
 the foreseeable future...” 16 U.S.C. § 1532(6) and (20).

² Section 9 of the ESA makes it unlawful to violate any such regulation. 16 U.S.C. § 1538(a)(1)(G).

1 **B. Section 7(a)(2) of the ESA and Incidental Take Statements.**

2 Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized,
3 funded, or carried out by such agency...is not likely to jeopardize the continued existence of any
4 endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). In carrying out this
5 mandate, federal agencies are required to consult with NMFS and/or FWS (the “consulting
6 agencies”) for actions that “may affect” ESA-listed species. 50 C.F.R. § 402.14(a) and (b). Such
7 consultation concludes with the consulting agency’s issuance of a biological opinion determining
8 whether the action is likely to jeopardize ESA-protected species. 50 C.F.R. § 402.14(h)(3).
9

10 If the consulting agency concludes that jeopardy is not likely or can be avoided with
11 reasonable and prudent alternatives, the biological opinion is to include an “incidental take
12 statement” specifying terms under which take of listed species incidental to the action may
13 occur. 16 U.S.C. § 1536(b)(4); *Aluminum Co. of Am. v. Adm’r, Bonneville Power Admin.*, 175
14 F.3d 1156, 1159 (9th Cir. 1999). Any take in compliance with an incidental take statement is not
15 prohibited by the ESA. 16 U.S.C. §§ 1536(b)(4) and (o)(2); 50 C.F.R. § 402.14(i)(5).
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18 **C. NMFS’ 4(d) Rule and 4(d) Limits for Threatened Salmonids.**

19 NMFS has promulgated regulations under section 4(d) of the ESA that apply the take
20 prohibition to several threatened salmonid species, including Puget Sound steelhead and Puget
21 Sound Chinook salmon. 50 C.F.R. §§ 223.102(c)(8) and (23), and 223.203(a). NMFS created
22 exclusions from this rule, commonly referred to as the “4(d) Limits.” 50 C.F.R. § 223.203(b).
23

24 One exclusion—Limit 5—allows for take resulting from artificial fish propagation
25 programs operating in compliance with a NMFS-approved Hatchery Genetic Management Plan
26 (“HGMP”). 50 C.F.R. § 223.203(b)(5). NMFS has established rigid criteria for reviewing and
27 approving HGMPs. 50 C.F.R. §§ 223.203(b)(5)(i)(A)-(I). Another exclusion—Limit 6—
28

1 authorizes take resulting from the implementation of a “joint tribal/state [resource management]
2 plan” that NMFS has determined “will not appreciably reduce the likelihood of survival and
3 recovery of affected threatened [species].” 50 C.F.R. § 223.203(b)(6)(i).

4 **IV. STATEMENT OF FACTS.**

5 **A. The Elwha River and the Elwha Restoration Project.**

6
7 The Elwha River flows north on the Olympic Peninsula in Washington State for
8 approximately forty-five miles before emptying into the Strait of Juan de Fuca near Port
9 Angeles. *Knutsen Decl.*, p. 173; *id.* at 191. The river’s watershed encompasses approximately
10 321 square miles, approximately 267 of which are within the boundaries of the Olympic National
11 Park. *Id.* at 173; *id.* at 191. Nearly all of the Olympic National Park is protected as a wilderness
12 area under the Wilderness Act. Pub. L. 100-668, 102 Stat. 3961 (Nov. 16, 1988). The Elwha
13 River remains in uniquely pristine condition largely due to the protections afforded these federal
14 public lands, and is believed to be one of the largest, mostly intact watersheds in the
15 conterminous United States. *Knutsen Decl.*, pp. 175, 180; *id.* at 191.

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18 The Elwha River was once one of the most productive anadromous fish streams in the
19 Pacific Northwest. *See id.* at 182; *and see id.* at 185, 189. Anadromous fish hatch in freshwater,
20 migrate to saltwater, and then return to their natal freshwater to spawn. *Id.* at 192.

21
22 The Elwha and Glines Canyon Dams were constructed on the Elwha River early last
23 century without fish passage structures, and have blocked upstream anadromous fish passage to
24 more than 70 miles of mainstem and tributary habitat since around 1911. *Id.* at 173; *id.* at 187,
25 189-90. Anadromous fish returning to spawn have been confined to the lower 4.9 miles of the
26 river below the Elwha Dam, and have therefore not had access to the vast majority of the river’s
27 spawning habitat. *Id.* at 173; *id.* at 186-87, 190. The result was a “precipitous decline of

1 salmonid populations to fewer than 3,000 naturally spawning fish [in 2005] compared to an
2 estimated 392,000 fish prior to dam construction.” *Id.* at 185, 187.

3 Congress mandated the full restoration of the Elwha River ecosystem and native
4 anadromous fisheries in the Elwha River Ecosystem and Fisheries Restoration Act, Pub. L. 102-
5 495, 106 Stat. 3173 (Oct. 24, 1992) (“Elwha Act”). The Elwha Act authorized the Secretary of
6 the Interior to acquire and remove the Elwha River dams to accomplish this objective. Pub. L.
7 102-495, § 3(a), 106 Stat. 3173, 3174. The total cost of the project—constituting the largest dam
8 removal in United States history—is estimated to be around \$325 million. *Knutsen Decl.*, p. 195.
9 Dam removal began in September 2011, and is expected to last two and a half to three years. *Id.*

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12 **B. Threatened Salmonids.**

13 Three species of salmonids listed as threatened under the ESA are present in the Elwha
14 River watershed—Puget Sound steelhead, Puget Sound Chinook salmon, and bull trout.

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16 **1. Threatened Puget Sound steelhead.**

17 Steelhead is the name commonly applied to the anadromous form of the species
18 *Oncorhynchus mykiss*. 72 Fed. Reg. 26,722 (May 11, 2007). Steelhead migrate from freshwater
19 to saltwater, and then back to their natal freshwater for spawning. *See id.* *O. mykiss* that do not
20 migrate to saltwater, but rather exhibit a resident freshwater life-history, are commonly known as
21 rainbow trout or redband trout. *Id.* Steelhead can spend up to seven years in freshwater prior to
22 migrating to sea, and then up to three years in saltwater before returning to their natal streams for
23 spawning. *Id.* Steelhead can spawn more than once during their lifespan (are iteroparous). *Id.*

24 The Puget Sound distinct population segment of steelhead was listed as a threatened
25 species under the ESA in 2007. *Id.* The listed species includes naturally spawned steelhead in
26 the river basins of the Strait of Juan de Fuca, Puget Sound, and Hood Canal, Washington,

1 bounded to the west by the Elwha River (inclusive) and to the north by the Nooksack River and
2 the Dakota River (inclusive). *Id.*; 50 C.F.R. § 223.102(c)(23). The ESA section 9 take
3 prohibition applies to this species. 50 C.F.R. §§ 223.102(c)(23) and 223.203(a).

4 **2. Threatened Puget Sound Chinook salmon.**

5 Chinook salmon is the largest of the Pacific salmon species. 69 Fed. Reg. 33,102, 33,108
6 (June 14, 2004). Chinook salmon in Puget Sound are predominately “ocean-type,” meaning they
7 migrate to saltwater during their first year after hatching. *See id.* at 33,108-09. The timing of
8 return to freshwater for Chinook salmon varies between populations. *Id.* at 33,108.

9 NMFS has listed the Puget Sound Chinook salmon evolutionary significant unit as a
10 threatened species under the ESA. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160
11 (June 28, 2005). The listed species includes all naturally spawned populations from the rivers
12 flowing into Puget Sound and the Strait of Juan De Fuca from the Elwha River, eastward,
13 including rivers flowing into Hood Canal, South Sound, North Sound and the Strait of Georgia.
14 50 C.F.R. § 223.102(c)(8). The listed species also includes twenty-six artificial propagation
15 programs, including the Elwha River Chinook salmon hatchery program. *Id.* The ESA section 9
16 take prohibition has been applied to threatened Puget Sound Chinook salmon. 50 C.F.R. §§
17 223.102(c)(8) and 223.203(a).

18 **3. Threatened bull trout.**

19 Bull trout are members of the Salmonidae family native to the Pacific Northwest and
20 western Canada. 64 Fed. Reg. 58,910 (Nov. 1, 1999). Bull trout can exhibit either a resident or
21 migratory life history. *Id.* Resident bull trout spend their entire life cycle in tributary streams
22 where spawn and rear. *Id.* Migratory bull trout rear in tributary streams for one to four years
23 after hatching and then migrate to larger bodies of water—rivers, lakes, or saltwater—to mature.

1 *Id.* Resident and migratory bull trout may be found together, and both forms may produce
2 offspring exhibiting resident and migratory behavior. *Id.*

3 FWS has listed the coterminous United States bull trout population as a threatened
4 species and applied to it the ESA take prohibition. *Id.*; 50 C.F.R. §§ 17.21 and 17.31(a).

5
6 **C. The Elwha Defendants' Hatchery Programs.**

7 Elwha Defendant Larry Ward has managed the Lower Elwha Klallam Tribe's hatchery
8 operations since 1988. *Knutsen Decl.*, pp. 201, 203; *id.* at 91. Mr. Ward is responsible for
9 managing all hatchery operations and other fish enhancement activities, maintaining the hatchery
10 and associated facilities and equipment, and supervising hatchery staff. *Id.* at 88; *id.* at 91; *id.* at
11 201. Mr. Ward is under the supervision of the Lower Elwha Klallam Tribe's Fisheries
12 Manager/Natural Resources Director. *Id.* at 88; *id.* at 203.

14 Elwha Defendant Doug Morrill has been the Fisheries Manager/Natural Resources
15 Director for the Lower Elwha Klallam Tribe since 2002. *Id.* at 116. Mr. Morrill oversees the
16 hatchery and fisheries programs. *Id.* at 115-15; *id.* at 237-38.

18 The hatchery operated by the Elwha Defendants is located in the lower Elwha River,
19 approximately one mile from the river's mouth. *Id.* at 174. The hatchery operations are funded
20 by DOI and its sub-agencies the Bureau of Indian Affairs ("BIA") and the National Park Service
21 ("NPS"). Dkt. 51, ¶ 103 (admitting Complaint, Dkt. 1, ¶ 103, sixth sentence); *Knutsen Decl.*, p.
22 120; *id.* at 138; *id.* at 244; *id.* at 204, 207; *id.* at 231-32.

24 **1. The Chambers Creek steelhead program.**

25 A non-native steelhead program has been implemented at the hatchery since around
26 1978. *See id.* at 206; *id.* at 245. This program utilizes a highly-domesticated stock known as
27 Chambers Creek steelhead. *See id.* at 206; *and see id.* at 176.

1 The Chambers Creek steelhead program targets a broodstock collection of approximately
2 200,000 to 250,000 eggs each year from adult fish returning to the hatchery in December and
3 January. *See id.* at 207-08; *and see id.* at 246. These fish are reared at the hatchery to yearling
4 smolts and then approximately 65,000 to 150,000 are released into the Elwha River in the spring.
5 *See id.* at 207; *and see id.* at 246; *and see id.* at 261. Approximately 51,500 and 61,000
6 Chambers Creek steelhead smolts were released into the Elwha River in 2010 and 2011,
7 respectively. *Id.* at 261; *and see id.* at 207-08.

9 Plaintiffs notified the Elwha Defendants of their intent to seek a preliminary injunction to
10 prevent the release of Chambers Creek steelhead after this lawsuit was filed. Dkt. 19, 2:1-5. The
11 Elwha Defendants subsequently entered into an agreement with Plaintiffs under which releases
12 of Chambers Creek steelhead into the Elwha River would not occur in 2012, and the Court
13 entered an Order to enforce that agreement. Dkt. 19. Chambers Creek steelhead were therefore
14 not released in 2012. *See Knutsen Decl.*, p. 270. However, this program has not been
15 discontinued, and proposals to terminate the program have been rejected. *See id.* at 233-36.

18 **2. The Native Elwha River steelhead program.**

19 The Elwha Defendants began operating a native Elwha River steelhead program in 2005.
20 *Id.* at 209; *id.* at 125; *id.* at 260. The stated purposes of this plan are to preserve the stock during
21 dam removal and to support fishing opportunities after dam removal. *Id.* at 122-23.

23 Broodstock for this program was developed by collecting and capturing eggs and fry of
24 wild native Elwha River steelhead. *Id.* at 209, 212-13; *id.* at 126; *id.* at 177-49. Each year from
25 2005 through 2011 between 431 and 2,731 wild steelhead eggs and fry were removed from the
26 Elwha River during the months of May through July. *Id.* at 128; *id.* at 261; *id.* at 214. These fish
27 have been taken to the hatchery, reared for four years to adults, and then “spawned” (*i.e.*, killed

1 for their eggs and sperm) to provide hatchery broodstock. *Id.* at 128-29. The last year that wild
2 steelhead eggs and fry were collected was in 2011, and those fish will remain at the hatchery
3 until they are killed in 2015. *Id.* at 126-27.

4 Starting this winter, eggs and fry from wild steelhead are no longer collected in the Elwha
5 River, and returning adults will instead be captured for broodstock purposes. *Id.* at 126, 128; *id.*
6 at 215. It is proposed that a maximum of 500 adult steelhead will be captured each year for this
7 purpose. *Id.* at 125, 128. Both hatchery-origin and wild (“natural-origin”) adult steelhead
8 returning to the Elwha River will be captured and killed for broodstock purposes. *Id.* at 126.

9 The native Elwha River steelhead broodstock are reared to age two smolts prior to their
10 release. *Id.* at 127, 132, 134; *id.* at 216. Approximately 175,000 steelhead are released under
11 this program each year beginning in March or April and lasting through June. *Id.* at 123, 134; *id.*
12 at 215-16. The first such release of 178,000 smolts occurred in 2011. *Id.* at 261; *id.* at 127, 129

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15 **3. The coho salmon program.**

16 There has been a coho salmon program at the hatchery since around 1978 intended to
17 support commercial and recreational fisheries. *Id.* at 257; *and see id.* at 140. A native Elwha
18 River stock is used. *Id.* at 257; *id.* at 138, 141.

19 Broodstock for the coho salmon program is obtained from adults returning to the
20 hatchery between October and December. *Id.* at 218; *id.* at 142. The program currently targets a
21 collection of 400 to 600 adults for broodstock purposes. *Id.* at 218; *id.* at 143. The coho salmon
22 are reared for approximately one year before being released beginning in March or April and
23 lasting through May. *Id.* at 144; *id.* at 220. The coho salmon program previously targeted an
24 annual release of 750,000 smolts, but that number was reduced to 425,000 in the last several
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1 years. *Id.* at 220; *and see id.* at 144. Actual releases in recent years have varied between
 2 218,468 and 426,316 smolts. *Id.* at 258; *id.* at 143.

3 **D. Harm to Wild Salmonids Caused by Hatchery Programs.**

4 Hatchery programs harm wild salmonids through a variety of mechanisms. Harm results
 5 from genetic introgression, ecological interactions, and transfers of pathogens and parasites.
 6

7 James Lichatowich is a fishery and salmonid expert with extensive experience and
 8 recognitions. *First Decl. of James Lichatowich* (“Lichatowich Decl.”), ¶¶ 2-11. Mr.
 9 Lichatowich recently served as a special consultant to the Hatchery Scientific Review Group
 10 (“HSRG”)³ in its review of the Elwha River hatchery programs. *Id.* at ¶ 9. Mr. Lichatowich
 11 explains that while it was once believed that hatcheries benefited wild populations, it is now
 12 understood that hatchery programs have contributed to the listing of salmon species as threatened
 13 and endangered under the ESA. *Id.* at ¶ 18.

14
 15 Dr. Gordon Luikart is a leading expert on wildlife population genetics from the
 16 University of Montana’s Flathead Lake Biological Station. *First Decl. of Gordon Luikart*
 17 (“Luikart Decl.”), ¶¶ 2-12. As he explains, fish quickly adapt to hatchery environments through
 18 evolutionary processes (natural selection). *Id.* at ¶ 21. In the process, fish rapidly lose the ability
 19 to avoid predation, resist disease, and forage and spawn efficiently. *Id.* When hatchery fish are
 20 able to crossbreed with wild fish, the maladaptive genes are transferred to the wild population.
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 22 *Id.* at ¶ 22. The resultant offspring die prior to spawning at much higher rates than would
 23 otherwise occur with two wild parents. *Id.* at ¶¶ 22-25.
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28 ³ The HSRG is a congressionally chartered independent scientific panel charged with evaluating hatchery
 29 programs and their impacts on wild salmonids. *Lichatowich Decl.*, ¶ 9.

1 Dr. Jack Stanford is a premier expert on salmonid and river ecology with 47 years of
2 professional experience, the last 32 of which he has served as the director of the University of
3 Montana's Flathead Lake Biological Station. *First Decl. of Jack Stanford* ("Stanford Decl."), ¶¶
4 2-12. Dr. Stanford explains that the ecological risks posed by hatchery programs include those
5 associated with competition between wild and hatchery fish for food resources, rearing space and
6 spawning territory, and predation of wild fish by hatchery fish. *Id.* at ¶¶ 21-22. Additionally,
7 spawning migration of wild salmonids can be disrupted by hatchery obstructions and by the wild
8 fish being attracted to the smell of hatchery discharges. *Id.* at ¶¶ 21, 23. Hatchery operations
9 also pose significant risks of transferring disease or pathogens to wild salmonid populations. *Id.*
10 at ¶ 24; *and Luikart Decl.*, ¶¶ 16, 46.

13 **E. Biological Opinions for Impacts to Salmonids.**

14 FWS and NMFS have issued biological opinions under section 7(a)(2) of the ESA
15 associated with dam removal on the Elwha River. The biological opinions have not addressed
16 the severe adverse effects hatchery programs have on wild salmonids, nor have they authorized
17 the take caused by the Elwha Defendants' hatchery programs.

19 NMFS issued a biological opinion for the Elwha River Restoration Project dated
20 November 20, 2006 ("NMFS 2006 BiOp"). *Knutsen Decl.*, pp. 296-348. Only two fish
21 restoration activities were evaluated as part of the project—collection of Chinook salmon
22 broodstock and planting of hatchery fish in the upper Elwha River by helicopter. *Id.* at 302. The
23 NMFS 2006 BiOp did not evaluate the adverse effects of the Elwha Defendants' hatchery
24 operations. *Id.* at 328-39. The incidental take statement included therein only authorized take of
25 Puget Sound Chinook salmon caused by increased sediment from dam removal— Puget Sound
26 steelhead was not an ESA-listed species at the time. *Id.* at 344-45.

1 NMFS issued another biological opinion dated July 2, 2012 (“NMFS 2012 BiOp”) in
2 response to this lawsuit. *Id.* at 7-64. The fish restoration activities evaluated in the NMFS 2012
3 BiOp are limited to some Chinook salmon hatchery operations and out-planting of salmonids in
4 the upper and middle Elwha River. *Id.* at 14-15. The NMFS 2012 BiOp states that other Elwha
5 River hatchery operations are not part of the project under review. *Id.* at 15. The biological
6 opinion therefore does not evaluate the adverse effects of the Elwha Defendants’ lower river
7 hatchery operations (although it recites a generic summary of hatchery effects). *Id.* at 34-43.

9 The NMFS 2012 BiOp includes an incidental take statement that purports to authorize
10 “take” of threatened steelhead and Chinook salmon caused by some hatchery activities—the
11 handling of fish for transferring to unaffected areas and for hatchery broodstock collection. *Id.* at
12 50. Take associated with other hatchery activities, including from fish releases into the lower
13 river, is not authorized. *See id.* at 48. Further, the incidental take statement requires a NMFS-
14 approved monitoring and adaptive management plan (“MAMP”) be submitted to NMFS by June
15 30, 2012 and fully implemented by September 14, 2012. *Id.* at 51-53. The MAMP has not been
16 completed and approved, and whether it will ever be implemented is questionable. *See id.* at ¶
17 2.h, *id.* pp. at 154-69; *id.* at 221; *id.* at 238-39; *id.* at 356.

20 FWS issued a biological opinion dated February 24, 2000, evaluating the impacts of dam
21 removal on threatened bull trout (“FWS 2000 BiOp”). *Id.* at 272-94. The FWS 2000 BiOp did
22 not evaluate the effects of the Elwha Defendants’ hatchery programs as part of the action under
23 review. *Id.* at 284-89. FWS included an incidental take statement authorizing take of bull trout
24 caused by dam removal and construction activities. *Id.* at 290-91. The incidental take statement
25 does not authorize take of bull trout associated with any hatchery operations. *Id.*
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1 **F. The Elwha Defendants’ Recent Submission of HGMPs.**

2 The Elwha Defendants recently submitted HGMPs to NMFS seeking approval under
 3 Limit 6 of the 4(d) Rule (50 C.F.R. § 223.203(b)(6)) for four artificial propagation programs—
 4 programs for native steelhead, and for coho, chum, and pink salmon. *Id.* at 149. These HGMPs
 5 have not been approved. NMFS’ approval would authorize the release of up to 7.5 million
 6 hatchery fish into the Elwha River each year. *Id.* at 354. This action would significantly affect
 7 the environment and threatened salmonids and therefore requires preparation of an
 8 environmental impact statement under the National Environmental Policy Act, which has not
 9 been undertaken. *See* 43 U.S.C. § 4332(2)(C); *and see* 40 C.F.R. § 1508(b)(9).
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12 **V. STANDARD OF REVIEW.**

13 A party may move for summary judgment under Rule 56 on all or part of a claim, and
 14 such relief shall be granted “if the movant shows that there is no genuine dispute as to any
 15 material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P.
 16 56(a). Motions for partial summary judgment facilitate litigation by eliminating matters prior to
 17 trial for which there is no genuine issue of fact. *See Lahoti v. Vericheck, Inc.*, 586 F.3d 1190,
 18 1202 n.9 (9th Cir. 2009).
 19

20 A material fact is one relevant to the claim—“[d]isputes over irrelevant or unnecessary
 21 facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec.*
 22 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). There is no genuine issue of fact “[w]here
 23 the record taken as a whole could not lead a rational trier of fact to find for the nonmoving
 24 party.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the
 25 movant demonstrates the absence of genuine issues of material fact, the nonmoving party must
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1 set forth, by affidavit or otherwise, specific facts showing that there is a genuine issue for trial.
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv.*, 809 F.2d at 630.

3 **VI. ARGUMENT.**

4 **A. The Elwha Defendants are in Violation of Section 9 of the ESA.**

5 The Chambers Creek steelhead program, the native steelhead program, and the coho
6 salmon program cause take of threatened salmonids. This take is not authorized by an incidental
7 take statement or otherwise. Accordingly, the Elwha Defendants are in violation of section 9 of
8 the ESA.⁴

9
10 **1. Unauthorized take from the Chambers Creek steelhead program.**

11 Chambers Creek steelhead are highly-domesticated hatchery fish, and therefore pose
12 severe risks to wild steelhead. The Elwha Defendants have continued the Chambers Creek
13 steelhead program despite numerous expressions of concern and requests for termination from
14 agency experts. Chambers Creek steelhead released in 2010 and 2011 will have access to the
15 Elwha River above the dam site when they return as adults, and will cause take of threatened
16 Puget Sound steelhead through genetic and ecological interactions.

17 NMFS identified Chambers Creek steelhead hatchery programs as a concern when it
18 listed Puget Sound steelhead as a threatened species under the ESA:

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23 ⁴ Elwha Defendants Mr. Morrill and Mr. Ward are proper defendants for this claim asserted under the *Ex*
24 *Parte Young* Doctrine. Such a claim is not a suit against the individual, but rather is a suit against the
25 official's office. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187 (9th Cir. 2003). The individuals named
26 must have some connection with execution of the illegal or unconstitutional conduct. *See Los Angeles*
27 *County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); and see *Hartmann v. Calif. Dep't of*
28 *Corrections & Rehabilitation*, No. 1:10-CV-00045-LJO-SMS, 2010 U.S. Dist. LEXIS 41522, at *23
(E.D. Cal. April 28, 2010) (named officials should have job duties that relate to the challenged conduct
and should be able to respond to an order on injunctive relief). Mr. Morrill is the Natural Resources
Director, charged with oversight of the fisheries and hatchery programs, and Mr. Ward is the hatchery
manager. *See supra* Sec. IV.C.

1 The [Biological Review Team (“BRT”)] concluded that efforts by hatchery
2 managers to prevent natural spawning by Chambers Creek winter-run...hatchery
3 fish were unlikely to be completely effective, with potentially adverse
4 consequences. The BRT concluded that opportunities for genetic and ecological
interactions between hatchery and wild steelhead in Puget Sound were substantial,
with significant potential to reduce natural productivity.

5 72 Fed. Reg. at 26,728. As dam removal on the Elwha River drew near, a white paper was
6 prepared by experts from NMFS and the Lower Elwha Klallam Tribe to evaluate the risks of
7 continuing the Chambers Creek steelhead program. *Knutsen Decl.*, pp. 358-62. The document
8 found that there is a high likelihood of interaction between Chambers Creek steelhead and wild
9 steelhead and other salmonids. *Id.* at 362. The paper concludes that “Chambers Creek hatchery
10 steelhead pose a significant risk to the wild steelhead and rainbow trout in the Elwha.” *Id.*
11 Experts from NMFS, NPS, and the Washington Department of Fish and Wildlife sent letters in
12 the spring of 2010 expressing similar concerns and requesting that the Chambers Creek program
13 be discontinued. *Id.* at 371-75; *id.* at 367-69; *id.* at 364-65. The program continued nonetheless.
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15
16 *See supra*, Sec. IV.C.1.

17 Approximately 51,500 Chambers Creek steelhead smolts were released into the Elwha
18 River in the spring of 2010, and approximately 61,000 were released in the spring of 2011.
19
20 *Knutsen Decl.*, p. 261. These fish will return to the Elwha River in the next two to three years as
21 adults, where they will have access to newly-accessible spawning grounds above the Elwha Dam
22 site. *Stanford Decl.*, ¶¶ 43, 45; *Luikart Decl.*, ¶ 52. Some of these fish will interact genetically
23 with wild Puget Sound steelhead. *Stanford Decl.*, ¶¶ 45-46; *Luikart Decl.*, ¶ 53. The resultant
24 offspring will have significantly reduced fitness for survival in the wild than would otherwise
25 occur, and will therefore die at higher rates prior to spawning. *Stanford Decl.*, ¶ 46; *Luikart*
26 *Decl.*, ¶ 53. Chambers Creek steelhead will also compete with wild Puget Sound steelhead for
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1 mates and preferred spawning locations, which will reduce the spawning success of wild
2 steelhead. *Stanford Decl.*, ¶ 46.

3 The 2010 and 2011 Chambers Creek steelhead releases thus constitute significant habitat
4 modifications that kill and injure threatened Puget Sound steelhead by impairing essential
5 behavioral patterns, including spawning, rearing, feeding, and sheltering. *Stanford Decl.*, ¶ 46;
6 *and see Luikart Decl.*, ¶¶ 21, 53. Such harm and harassment to threatened salmonids constitutes
7 “take.” *See* 50 C.F.R. § 222.102; *and see Knutsen Decl.*, p. 48. This take is not authorized under
8 the ESA. *See supra* Sec. IV.E.

9
10
11 **2. Unauthorized take from the native steelhead program.**

12 The native steelhead program causes take of threatened salmonids. This take occurs as a
13 result of capturing and killing protected steelhead for the captive rearing program, genetic and
14 ecological interactions, and facility effects. This take violates section 9 of the ESA.

15 Threatened Puget Sound steelhead eggs and fry have been collected and captured from
16 the Elwha River to develop broodstock for the native steelhead program. *Supra*, Sec. IV.C.2.
17 Between 2,731 and 431 eggs and fry were taken each year between 2007 and 2011 in the months
18 of May through July. *Knutsen Decl.*, p. 261; *id.* at 214.⁵ These fish are being reared at the
19 hatchery for four years to an adult stage and then killed for their eggs and sperm, with those
20 collected in 2011 to be terminated in 2015. *Supra*, Sec. IV.C.2. This conduct constitutes take.
21 *See* 16 U.S.C. § 1532(19) (defining take to include kill, capture, and collect); *and see* 50 C.F.R. §
22 222.102 (defining protected wildlife to include eggs and offspring). This take was not addressed
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27 ⁵ This motion addresses violations that have occurred since December 11, 2006, as the Complaint was
28 filed on February 9, 2012 and the applicable statute of limitations period is five years and sixty days. *See*
29 Dkt. 1; *and see* 28 U.S.C. § 2462; *and see Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th
Cir. 1987) (discussing Clean Water Act citizen suit provision similar to that of the ESA).

1 in an incidental take statement prior to the NMFS 2012 BiOp dated July 2, 2012, thus take
2 occurring prior to that date violated section 9 of the ESA. *See supra* Sec. IV.E. This take
3 continues to violate the ESA because the MAMP requirements of the incidental take statement
4 have been violated. *See id.*; and 16 U.S.C. §§ 1536(b)(4) and (o)(2); and 50 C.F.R. §
5 402.14(i)(5); and *see Bennett v. Spear*, 520 U.S. 154, 178 (1997) (an incidental take statement
6 authorizes take only where there is compliance with the prescribed conditions).
7

8 The spring releases of approximately 175,000 hatchery steelhead smolts in 2011 and
9 2012 cause take through genetic introgression. One of the purposes of these releases is to
10 produce returning hatchery adults that will spawn in the wild. *Luikart Decl.*, ¶ 31. These
11 hatchery fish will have reduced fitness for survival and reproduction in the wild, and some of
12 them will transfer their maladaptive genes to the wild steelhead population through cross-
13 breeding. *Id.* at ¶¶ 32-34; *Stanford Decl.*, ¶ 33; *Lichatowich Decl.*, ¶ 26. The result will be
14 offspring that are less able to survive in the wild and that die at a higher rate prior to spawning.
15 *Luikart Decl.*, ¶¶ 32, 34; *Stanford Decl.*, ¶ 33; *Lichatowich Decl.*, ¶ 26.
16
17

18 These releases also cause take of threatened salmonids through ecological interactions.
19 The released hatchery smolts will compete with wild steelhead smolts, Chinook salmon smolts,
20 and juvenile bull trout for food and for rearing and sheltering space in the lower Elwha River and
21 in the estuary and nearshore environments. *Stanford Decl.*, ¶ 34; and *see Lichatowich Decl.*, ¶
22 27. Such competition will injure and kill some threatened Puget Sound steelhead smolts,
23 threatened Puget Sound Chinook smolts, and threatened bull trout. *Stanford Decl.*, ¶ 34; and *see*
24 *Lichatowich Decl.*, ¶ 27. The hatchery smolts will also kill and injure some protected Chinook
25 salmon and steelhead smolts through predation. *Lichatowich Decl.*, ¶ 27. Some of the released
26 hatchery steelhead will not migrate to salt water, but will instead remain in the river. *Stanford*
27
28

1 *Decl.*, ¶ 35. These fish will kill and injure some rearing wild steelhead, rearing juvenile Chinook
2 salmon, and bull trout by predation throughout the accessible reaches of the Elwha River. *Id.*

3 The 2011 and 2012 releases of hatchery steelhead thus cause take in the form of
4 significant habitat modifications that kill and injure threatened steelhead, threatened Chinook
5 salmon, and threatened bull trout by impairing their essential behavioral patterns. *See* 50 C.F.R.
6 § 222.102; *and see Knutsen Decl.*, p. 37. This take results from the genetic and ecological
7 interactions discussed above, and is not authorized under the ESA. *See supra*, Sec. IV.E.
8

9 Finally, the native steelhead hatchery program causes take by creating a false attractant to
10 returning adult threatened steelhead. *Stanford Decl.*, ¶ 36. These fish, attracted by the smell of
11 the hatchery fish, will either injure themselves on the hatchery outfall gates or enter the hatchery
12 and become trapped in the holding ponds. *Id.* Such injury or trapping is take under the ESA.
13 *See* 16 U.S.C. § 1532(19). This take is not authorized. *See supra*, Sec. IV.E.
14

15 **3. Unauthorized take from the coho salmon program.**
16

17 The releases of hatchery coho salmon cause take of threatened salmonids through
18 ecological interactions, including predation. Such take violates section 9 of the ESA.

19 Large numbers of hatchery coho salmon have been released each spring from 2007
20 through 2012—available data indicates annual releases from 218,468 to 426,316 smolts.
21 *Knutsen Decl.*, p. 143; *id.* at 258. These relatively large smolts prey upon and compete for food
22 and for rearing and sheltering space with wild steelhead smolts, Chinook salmon smolts, and
23 juvenile bull trout in the lower Elwha River and in the estuary and nearshore environment.
24 *Stanford Decl.*, ¶ 50. Each of these releases thus constitutes significant habitat modifications that
25 kill and injure threatened salmonids by disrupting their essential behavioral patterns. *Id.* This
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1 harm and harassment is unauthorized take under the ESA. *See* 50 C.F.R. § 222.102; *and see*
2 *Knutsen Decl.*, p. 48; *and see supra*, Sec. IV.E.

3 **B. DOI has Failed to Consult as Required Under Section 7(a)(2) of the ESA.**

4 DOI is in violation of section 7(a)(2) of the ESA for funding the hatchery programs
5 without first consulting with NMFS and FWS regarding the effects these programs have on
6 threatened Puget Sound salmonids.
7

8 The consultation requirements of section 7(a)(2) of the ESA apply to any action
9 “authorized, funded, or carried out” by a federal agency that “may affect” ESA-listed species.
10 *See* 16 U.S.C. § 1536(a)(2); *and* 50 C.F.R. § 402.14(a)-(b); *and Karuk Tribe of Cal. v. United*
11 *States Forest Serv.*, 681 F.3d 1006, 1011 (9th Cir. 2012) (*en banc*). Such consultation is to occur
12 before the agency engages in activities that may affect protected-species and is intended to
13 ensure that the actions will not jeopardize listed species. *Karuk Tribe*, 681 F.3d at 1020.
14

15 “Agency action,” for purposes of section 7(a)(2) of the ESA, includes any action funded
16 by a federal agency. *Id.*; 40 C.F.R. § 402.02 (defining “action”). DOI (which includes BIA and
17 NPS) fund the Elwha Defendants’ hatchery programs. *See supra*, Sec. IV.C. The “may affect”
18 standard sets a relatively low threshold—consultation is required if the action may affect a
19 protected species, regardless of whether the effect is beneficial, benign, adverse, or of an
20 undefined character. *Karuk Tribe*, 681 F.3d at 1027. Consultation is not required only for
21 actions that will have “no effect” on listed-species. *Id.* The hatchery programs have severe
22 adverse effects on threatened salmonids, and cause take of such protected species. *See supra*,
23 Secs. IV.D and VI.A. Consultation is therefore required.
24

25
26
27 DOI has not consulted with NMFS and FWS regarding the effects the hatchery programs
28 have on threatened Puget Sound Chinook salmon, threatened Puget Sound steelhead, and

1 threatened bull trout. *See supra*, Sec. IV.E. Accordingly, DOI is in violation of section 7(a)(2)
 2 of the ESA for funding these hatchery programs without first consulting.

3 **C. NMFS' Biological Opinions are Arbitrary and Not in Accordance with Law.**

4 To the extent that Federal Defendants assert that the NMFS 2006 BiOp or the NMFS
 5 2012 BiOp constitute ESA consultation for DOI's funding of the hatchery operations, those
 6 biological opinions are arbitrary and not in accordance with law.⁶ *See Bennett*, 520 U.S. at 174-
 7 79 (challenges to biological opinions are reviewed under the Administrative Procedure Act
 8 ("APA")); *and see* 5 U.S.C. § 702(2)(A).

9
 10 The NMFS 2006 BiOp does not meet the ESA consultation requirements in regards to the
 11 hatchery operations. Biological opinions must evaluate the effects of the entire agency action
 12 under review, looking at all possible ramifications. *Wild Fish Conservancy v. Salazar*, 628 F.3d
 13 513, 521 (9th Cir. 2010); *and see* 50 C.F.R. § 402.14(h)(2) (a "detailed discussion of the effects
 14 of the action on listed species" is required). The NMFS 2006 BiOp does not include any
 15 discussion whatsoever of the adverse effects of the hatchery programs. *Knutsen Decl.*, pp. 328-
 16 39. Further, if the action may cause take of protected species, an incidental take statement must
 17 be included that specifies the extent of take. 50 C.F.R. § 402.14(i)(1)(i). The incidental take
 18 statement in the NMFS 2006 BiOp does not specify the extent of take caused by hatchery
 19 operations and does not even address take of steelhead. *Knutsen Decl.*, pp. 344-45.

20
 21 The NMFS 2012 BiOp also does not comply with the ESA consultation requirements in
 22 regards to the hatchery programs. The document explicitly states that most of the hatchery
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 27 ⁶ Plaintiffs request the Court address this argument only if Federal Defendants assert that these biological
 28 opinions fulfill DOI's obligation to consult triggered by its funding of the hatchery programs. Plaintiffs
 29 reserve the right to challenge these biological opinions on additional grounds after Federal Defendants
 produce their supplemental administrative record.

1 programs are not part of the action reviewed. *Id.* at 15. The NMFS 2012 BiOp therefore does
 2 not include the “detailed discussion” of the effects of the Elwha Defendants’ hatchery programs
 3 required, but instead includes only a generic (“in brief”) recitation of hatchery effects. *Id.* at 34-
 4 43; *and see* 50 C.F.R. § 402.14(h)(2). Further, the incidental take statement does not specify the
 5 extent of take caused by hatchery operations (other than for broodstock collection activities) as
 6 required. *Knutsen Decl.*, pp. 49-50; *and see* 50 C.F.R. § 402.14(i)(1)(i).

8 The NMFS 2006 BiOp and the NMFS 2012 BiOp do not constitute ESA consultation for
 9 DOI’s funding of the hatchery programs. However, to the extent that Federal Defendants assert
 10 otherwise, the biological opinions are, on their face, arbitrary and not in accordance with law.

11
 12 **D. Plaintiffs Provided Pre-Suit Notice and the Violations are Ongoing.**

13 Plaintiffs provided the required pre-suit notice of their ESA citizen suit claims. Dkt. 10,
 14 ¶¶ 2, 4; *and see* 16 U.S.C. § 1540(g)(2)(A)(i).

15 Further, the violations addressed herein were “ongoing” at the time the complaint was
 16 filed as required under the ESA citizen suit provision. *See Gwaltney of Smithfield, Ltd. v.*
 17 *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64-65 (1987).⁷ Violations are ongoing if (1) they
 18 continued on or after the date the complaint was filed or (2) if, on the date the complaint was
 19 filed, there was a continuing likelihood of a recurrence in intermittent or sporadic violations. *See*
 20 *Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000); *and*
 21 *Save Our Bays & Beaches v. City & County of Honolulu*, 904 F.Supp. 1098, 1116-17 (D. Haw.
 22 1994) (relevant inquiry is whether the risk of defendant’s continued violation had been
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26 ⁷ *Gwaltney* involved the Clean Water Act (“CWA”) citizen suit provision. 484 U.S. at 52. That provision
 27 is substantially similar to the ESA citizen suit provision. *Compare* 33 U.S.C. §§ 1365(a)(1) and (b)(1)(A)
 28 *with* 16 U.S.C. §§ 1540(g)(1)(A) and (g)(2)(A)(i). These provisions are therefore interpreted similarly.
 29 *See Saint John’s Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1062-63 (9th
 Cir. 2009); *and see Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1072-73 (9th Cir. 1996).

1 completely eradicated on the date the complaint was filed). Intermittent or sporadic violations
2 do not cease to be “ongoing” until the date when there is no real likelihood of repetition.

3 *Southwest Marine, Inc.*, 236 F.3d at 998.

4 The violations addressed herein are ongoing. The challenged hatchery programs and the
5 take resulting therefrom have continued to occur since the complaint was filed. *See supra*, Sec.
6 VI.A(1)-(3). While Chambers Creek steelhead have not been released since the Complaint was
7 filed, the likelihood of continued illegal releases continued after the complaint was filed and
8 continues today. *See Knutsen Decl.*, pp. 151-52; *id.* at 233-36. Similarly, DOI’s failure to
9 consult under section 7(a)(2) of the ESA has continued.
10

11
12 **E. Plaintiffs Have Standing.**

13 An association has organizational standing if at least one member has standing to sue in
14 his or her own right, the interests at stake are germane to the organization’s purpose, and neither
15 the claim asserted nor the relief requested requires participation of the individual member.

16 *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003).

17
18 Plaintiffs have at least one member that has standing in his own right—1) a member that
19 has suffered an “injury in fact”; where 2) the injury is fairly traceable to the challenged conduct;
20 and 3) it is not merely speculative that the injury will be redressed by a favorable decision. *See*
21 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).⁸

22
23 The “injury in fact” requirement is satisfied if an individual adequately shows an
24 aesthetic or recreational interest in a particular place or animal and shows reasonable concerns
25 that those interests are impaired by the defendant’s conduct. *Ecological Rights Found. v. Pac.*
26

27
28 ⁸ The Court has jurisdiction is standing is established for one plaintiff. *See Massachusetts v. Envtl. Prot.*
Agency, 549 U.S. 497, 518 (2007).

1 *Lumber Co.*, 230 F.3d 1141, 1147, 1151 (9th Cir. 2000); *Friends of the Earth*, 528 U.S. at 183-
2 84. William McMillan is a member of Wild Fish Conservancy that regularly recreates in and
3 around the Elwha River. *First Decl. of William McMillan*, ¶¶ 2, 14-22. Mr. McMillan's use and
4 enjoyment of the Elwha River watershed is injured by the violations addressed herein and by Mr.
5 McMillan's reasonable concerns related thereto. *Id.* at ¶¶ 23-35. The traceability requirement is
6 satisfied because these injuries can be fairly traced to the challenged conduct. *See Ecological*
7 *Rights Found.*, 230 F.3d at 1152. The injuries are redressable by an order requiring compliance
8 with the ESA. *See Covington v. Jefferson County*, 358 F.3d 626, 639 (9th Cir. 2004).

9
10 The conservation interests at issue in this motion are plainly germane to Plaintiffs'
11 purposes. *First Decl. of Kurt Beardslee*, ¶¶ 2-3. Similarly, Plaintiffs' objectives are plainly
12 within the zone of interests Congress intended the ESA to protect and therefore satisfy prudential
13 standing requirements. *See Bennett*, 520 U.S. at 162-66. Finally, the claims at issue do not
14 require Mr. McMillan's participation.
15

16 **VII. CONCLUSION.**

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18 For the foregoing reasons, Plaintiffs respectfully request the Court enter an order granting
19 summary judgment as described.
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1 RESPECTFULLY SUBMITTED this 15th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the attorneys of record.

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