

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.)	PRELIMINARY INJUNCTION
)	
NATIONAL PARK SERVICE, <i>et al.</i> ,)	NOTE ON MOTION CALENDAR:
)	December 14, 2012
Defendants,)	
)	

I. MOTION.

Pursuant to Rule 65, Plaintiffs hereby move for a preliminary injunction directing 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”) to take such actions as are necessary to: (1) prevent the release of hatchery steelhead and coho salmon smolts into the Elwha River or its tributaries, or, alternatively, to reduce such releases to 50,000 steelhead smolts and 50,000 coho smolts annually; and (2) prevent the hatchery’s steelhead broodstock collection activities. Plaintiffs request such relief

1 remain in effect until the Court determines the hatchery programs to be in compliance with the
2 Endangered Species Act (“ESA”)¹ or until final relief is entered, whichever occurs first.

3 **II. INTRODUCTION.**

4 The Elwha Defendants have operated a hatchery on the Elwha River in violation of the
5 ESA for many years. Until now, the harm these operations have inflicted on threatened
6 salmonids has been mostly confined to the lower five miles of the river below the Elwha Dam.
7 The dams on the Elwha River are now coming down under direction from Congress and federal
8 tax dollar expenditures of \$325 million. Fish released from the Elwha Defendants’ facility this
9 spring will return to the Elwha River in the coming years and access seventy miles of mainstem
10 and tributary habitat above the former dam sites, most of which lies within the Olympic National
11 Park. These hatchery fish will overwhelm the small fragile wild fish populations that remain in
12 the river, severely impeding or even preventing the full recovery of native anadromous fish.
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15 The hatchery fish harm wild salmonids through a variety of mechanisms. Perhaps the
16 most troubling occurs through genetic introgression. Hatchery fish become domesticated and
17 thereby less fit to survive and reproduce in the wild. When these fish are allowed to spawn in
18 the wild, they transfer their maladaptive genes to the wild population. This can greatly reduce
19 the reproductive success of wild fish, inhibiting and even preventing the full recovery of
20 depressed populations. Hatchery fish further harm wild populations through ecological
21 interactions, such as increased competition for food and territory. Hatchery structures and
22 activities can also injure wild fish, and hatchery operations can expose wild populations to
23 diseases and parasites.
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28 ¹ Attached hereto as **Appendix A** is a list of acronyms used herein and in Plaintiffs’ First Motion for
29 PLAINTIFFS’ FIRST MOTION FOR PRELIMINARY INJUNCTION - 2
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1 The Elwha River above the dam sites lies mostly within the Olympic National Park and
 2 the Olympic Wilderness Area, and is uniquely pristine due to the statutory protections afforded
 3 these public lands. The river’s wild salmonid populations are currently depressed due to the
 4 dams’ impacts, but it is anticipated that these populations will quickly expand as they are able to
 5 access and recolonize habitat above the dams. The Elwha Defendants’ hatchery operations
 6 threaten this recovery. The hatchery programs are designed to expedite commercial fishery
 7 harvests, and are therefore sized well-beyond what is acceptable under hatchery standards given
 8 the depressed status of wild salmonid populations in the Elwha River. The large-scale releases
 9 of hatchery fish proposed to occur this spring will have severely deleterious effects on the wild
 10 fish populations and their recovery potential.
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12
 13 There have been ample opportunities for the Elwha Defendants to bring their hatchery
 14 programs into compliance with the ESA. The Elwha Defendants began modifying their hatchery
 15 operations in connection with the dam removal project by at least 2005, when they initiated a
 16 native Elwha River winter-run steelhead program by capturing ESA-protected fish from the
 17 river. The Elwha Defendants then completed the Elwha River Fish Restoration Plan (“Fish
 18 Restoration Plan”) in 2008, which describes the hatchery strategies that will be implemented in
 19 conjunction with dam removal. However, the Elwha Defendants did not submit new plans
 20 describing these hatchery operations to NOAA Fisheries Service (“NMFS”) for review and
 21 approval under the ESA until July 31, 2012—seven years after some of the programs began.
 22 The ESA and the National Environmental Policy Act (“NEPA”) now demand a thorough
 23 evaluation of these plans before they can be approved.
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1 Congress declared a national priority of protecting threatened and endangered species in
2 enacting the ESA. The Supreme Court has held that this congressional prioritization prevents
3 the District Courts from conducting a traditional balancing of the equities when determining
4 whether to issue enjoin ESA violations. Rather, the ESA demands that unlawful actions be
5 enjoined until compliance with the statute is achieved.
6

7 Plaintiffs request with this motion that the Court enjoin the unlawful releases of hatchery
8 steelhead and coho salmon proposed to occur this spring to prevent irreparable injury to
9 threatened salmonids. Alternatively, Plaintiffs request the Court order a reduction in these
10 unlawful releases to no more than 50,000 steelhead smolts and 50,000 coho salmon smolts
11 annually. Releases of this size would ensure these stocks are preserved during the dam removal
12 process and continue to provide for the hatchery’s broodstock supply, while greatly reducing the
13 unlawful harm inflicted on threatened salmonids. Plaintiffs also request with this motion that the
14 Court enjoin the Elwha Defendants’ unlawful and unnecessary steelhead broodstock activities
15 proposed to occur this winter (2012-2013) to prevent irreparable harm to threatened steelhead.
16 Finally, Plaintiffs request that this preliminary relief remain in effect until the Court finds, upon
17 motion or hearing, that the Elwha Defendants’ hatchery programs are in compliance with the
18 ESA or until final relief is entered, whichever occurs first.
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22 **III. ENDANGERED SPECIES ACT.**

23 Plaintiffs have filed a motion for partial summary judgment that includes a detailed
24 description of the ESA. Dkt. 67, 2:24-5:3. Plaintiffs do not repeat that description here, but
25 instead incorporate it with this reference.
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1 **IV. STATEMENT OF FACTS.**

2 Plaintiffs' motion for partial summary judgment similarly includes a detailed statement of
3 facts. Dkt. 67, 5:4-14:11. Plaintiffs do not repeat that description here, but instead incorporate it
4 with this reference and address additional facts relevant to this motion.

5 **A. The Proposed Hatchery Releases and Broodstock Collection Activities.**

6 This motion addresses releases of hatchery steelhead and coho salmon and the
7 broodstock collection activities for the steelhead program. The Elwha Defendants plan to release
8 approximately 175,000 hatchery steelhead smolts and approximately 425,000 hatchery coho
9 salmon smolts beginning in April 2013. *Third Dec. of Brian A. Knutsen Decl.* ("Third Knutsen
10 Decl."), pp. 216, 220 (Dkt. 74-1, pp. 48, 52). These fish are to be released into the lower Elwha
11 River from the hatchery. *Id.* The Elwha Defendants intend to capture adult steelhead returning
12 to the hatchery this winter for broodstock. *Id.* at 126, 128 (Dkt. 74, pp. 34, 36). Both hatchery-
13 origin and wild (natural-origin) steelhead are proposed to be taken for this purpose. *Id.*

14 **B. Harm to Threatened Salmonids from the Elwha River Hatchery Programs.**

15 As explained in Plaintiffs' summary judgment motion, the Elwha Defendants have
16 implemented hatchery programs in violation of the ESA for many years. Dkt. 67, 8:6-11:2, 15:4-
17 20:2. The hatchery fish previously released have been confined to the somewhat degraded lower
18 five miles of the Elwha River. *See Third Knutsen Decl.*, p. 186 (Dkt. 74-1, p. 18). Fish released
19 in the spring of 2013 will have access to the pristine upper watershed when they return in the
20 coming years. These fish will interact with the depressed wild salmonid populations in a manner
21 that will inhibit recovery and prevent achieving the Elwha River's recovery potential.

22 It was once believed that hatchery programs could provide abundant salmon for harvest
23 in replacement of natural production systems. Dkt. 68, ¶ 18. As noted by James Lichatowich, a

1 salmon management expert, today it is understood that hatcheries have contributed to the decline
2 of salmonid populations and their listings as threatened and endangered species under the ESA:

3 The evidence has been accumulating and today the weight of that evidence is
4 clear: hatcheries are part of the salmon's problem. The myth that hatcheries are
5 the solution to the problem of the salmon's declining abundance is still strong and
6 it is a formidable impediment to the incorporation of our current scientific
7 understandings of the effects of hatcheries into salmon management and recovery
8 programs. A situation clearly exemplified by the Elwha recovery program.

9 *Id.*

10 The Hatchery Scientific Review Group ("HSRG") reviewed the Fish Restoration Plan
11 and the Hatchery Genetic Management Plans ("HGMPs") for the Elwha Defendants' operations
12 earlier this year. *See Third Knutsen Decl.*, pp. 250-51 (Dkt.74-1, pp. 82-83). The HSRG is a
13 congressionally-established independent scientific panel charged with evaluating hatchery
14 programs and their impacts on wild salmonids. *See id.* at 249 (Dkt. 74-1, p. 81); *and* Dkt. 68, ¶
15 9. The HSRG identified the "excessive hatchery program combined with the lack of a structured
16 adaptive management process driven by an effective monitoring and evaluation program" as its
17 greatest concern regarding the plans to restore fish to the Elwha River. *Third Knutsen Decl.*, p.
18 251 (Dkt. 74-1, p. 83). The concerns of the HSRG have gone unanswered, as the Elwha
19 Defendants continue to implement excessively-sized hatchery programs without effective
20 monitoring and adaptive management.

21 There are three salmonid species present in the Elwha River watershed that are listed as
22 threatened species under the ESA—Puget Sound steelhead, Puget Sound Chinook salmon, and
23 bull trout. Dkt. 69, ¶¶ 25-28. The proposed hatchery releases will cause unlawful take of these
24 species and irreparable injury to the Elwha River steelhead and Chinook salmon populations and
25 to ESA listed segments to which those local populations belong.
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1 **1. Harm from genetic introgression.**

2 The Elwha Defendants’ proposed release of hatchery steelhead will harm wild steelhead
3 through genetic introgression. The adverse effects from such genetic introgression will be
4 significant and enduring.

5 As explained in Plaintiffs’ motion for summary judgment, reduced fitness resulting from
6 genetic introgression is one of the greatest concerns with hatchery programs. Dkt. 67, 11:15-24.
7 Dr. Gordon Luikart, an expert in animal conservation and population genetics, explains:

8 Hatchery domestication results from a process analogous to natural selection, but
9 occurring under unnatural conditions—the individual fish “selected” are those
10 better adapted to live in unnatural conditions.... The process results in loss of the
11 ability to avoid predation, loss of disease resistance, loss of ability to forage and
12 spawn efficiently, etc. This artificial selection pressure is strong; it results in
13 rapid adaptation to captivity with loss of the ability to survive and reproduce
14 effectively in the wild.

15 Dkt. 70, ¶ 21. The maladaptive genes are transferred to wild fish populations if the hatchery fish
16 are allowed to reproduce in the wild. *Id.* at ¶ 22. This reduces the productivity of the wild
17 population. *See id.* at ¶¶ 22-23, 35.

18 The Elwha Defendants’ steelhead program was developed using Elwha River winter-run
19 steelhead eggs and fry. *Id.* at ¶ 29. These fish have been reared in a hatchery environment for
20 three or four years to an adult stage, and then “spawned” (killed for their eggs and sperm). *Id.*
21 The broodstock collected from that process is then reared in a hatchery environment for two
22 years prior to release. *Id.* These processes provide substantial opportunities for domestication,
23 and the released smolts most likely have greatly reduced fitness. *Id.* at ¶¶ 32-35.

24 The program is designed to produce hatchery fish that will return as adults and spawn in
25 the wild in the newly-accessible reaches of the Elwha River above the dam sites. *Id.* at ¶ 31.

26 The hatchery fish will therefore interact genetically with the wild steelhead, and thereby reduce

1 the reproductive success of the wild population. *Id.* at ¶¶ 32, 34. Available studies indicate that
2 these reductions are significant. *Id.* at ¶¶ 34-35. The maladaptive genes will persist in the wild
3 population for many generations even after the hatchery program has ceased. *Id.* at ¶ 47.

4 The HSRG has developed guidelines to protect the productivity of wild fish populations.
5 One guideline provides that hatchery fish should constitute no more than half of the adult fish on
6 spawning grounds if the hatchery broodstock is entirely natural-origin fish, and much less than
7 half if, as is the case with the Elwha Defendants' steelhead program, wild fish are a small
8 percentage of the broodstock. *Id.* at ¶ 38. The Elwha River wild steelhead population is severely
9 depressed, with less than 200 returning adults annually. *Id.* Returning adults from the Elwha
10 Defendants' proposed release of 175,000 hatchery steelhead smolts will overwhelm these wild
11 fish at a ratio of anywhere from three-to-one to eight-to-one. *Id.* "This will result in
12 significantly lowered fitness of the wild population through repeated cross-breeding between the
13 remaining wild adults and the domesticated and increasingly inbred hatchery fish." *Id.*

14 The genetic effects from the Elwha Defendants' steelhead program are highly likely to
15 cause significant impairment to the fitness of the wild Elwha River winter-run steelhead
16 population. *Id.* at ¶ 36. The reduction in reproductive success will likely have serious and long-
17 lasting harmful effects on the rate that the native steelhead population can rebuild and recolonize
18 the newly accessible habitat made available by the removal of the two dams. *Id.* at ¶¶ 35, 47.

23 **2. Harm from ecological interactions.**

24 The Elwha Defendants' proposed releases of hatchery steelhead and coho salmon will
25 cause take of threatened salmonids through ecological interactions. The harmful effects to the
26 threatened salmonid populations, which are currently severely depressed, will be significant.
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1 Dr. Jack Stanford is an expert in salmonids and river ecology. Dkt. 69, ¶¶ 2-12. He
2 explains that hatchery fish can harm wild salmonids by increasing competition for food resources
3 and for territory. *Id.* at ¶ 21. Further, hatchery fish can prey on wild fish. *Id.*

4 The 175,000 hatchery steelhead smolts and 425,000 hatchery coho salmon smolts
5 proposed to be released this spring will compete with wild native Elwha River steelhead smolts,
6 Chinook salmon smolts, and juvenile bull trout for food and for rearing and sheltering space in
7 the lower Elwha River and in the estuary and nearshore environments. *Id.* at ¶¶ 34, 50. These
8 hatchery fish are larger than their wild counterparts, and therefore have competitive advantages.
9 *Id.* These competitive interactions will kill and injure threatened salmonids. *Id.* Threatened
10 Chinook salmon, steelhead, and bull trout will also be killed and injured by the released hatchery
11 fish through predation. *Id.* at ¶¶ 35, 50.

12 3. Harm from hatchery structures and activities.

13 Threatened salmonids are further harmed by certain hatchery structures and activities.
14 Finally, the hatchery operations pose a significant risk of pathogen or parasite transfer.

15 The smell of the hatchery operations acts as a false attractant to wild returning adult
16 steelhead. *Id.* at ¶ 36. Threatened steelhead will injure themselves by attempting to swim or
17 jump past the hatchery outfall gates if the gates are closed. *Id.* If the gates are open, the fish will
18 enter the hatchery holding ponds. *Id.* Fish trapped in the holding ponds may be returned to the
19 Elwha River, in which case they will have reduced spawning success due to the disruption in
20 migration. *Id.* The Elwha Defendants also intend to kill some threatened returning adult wild
21 steelhead to incorporate into their broodstock. *See Third Knutsen Decl.*, p. 126 (Dkt. 74, p. 34).

22 The releases of hatchery fish also pose a significant risk of transferring diseases to wild
23 threatened salmonids. Dkt. 70, ¶ 46. As Dr. Luikart explains, “[t]his occurs because...the

1 unnaturally high densities of fish maintained in captivity leads to increased risk of infection and
2 thus subsequent transmission through water or directly from fish released by hatcheries into wild
3 native populations.” *Id.* These risks are of enormous and increasing concern given the recent
4 spread of both native and introduced European salmonid pathogens. *Id.* at ¶ 16.

5
6 **4. Lack of adequate monitoring increases the risks of severe harm.**

7 The lack of adequate protocols and funding for monitoring, evaluation, and adaptive
8 management magnifies the risks associated with the massive hatchery programs proposed for the
9 Elwha River. The Elwha Defendants have prioritized funding the enormous production levels at
10 the hatchery, while allocating inadequate funds to monitor the risks associated therewith.

11
12 As previously noted, the congressionally-chartered HSRG identified the lack of adequate
13 monitoring and adaptive management of the hatchery programs as a great concern with the plans
14 to restore fish to the Elwha River. *Third Knutsen Decl.*, p. 251 (Dkt. 74-1, p. 83). The HSRG
15 found that a revised monitoring and adaptive management plan (“MAMP”) should be developed
16 and subjected to peer-review before implementation. *Id.* at 250 (Dkt. 74-1, p. 82). The HSRG
17 was further troubled by the apparent lack of funding necessary to support the rigorous adaptive
18 management required. *Id.* at 262 (Dkt. 74-1, p. 94).

19
20 James Lichatowich served as a special consultant to the HSRG in its review of the Elwha
21 Defendants’ hatchery programs. *Id.* at 249 (Dkt. 74-1, p. 81). Mr. Lichatowich explains that the
22 harm caused by the genetic and ecological interactions described by Drs. Luikart and Stanford is
23 magnified by the lack of adequate monitoring and evaluation because ill effects will not be
24 timely detected nor appropriate remedial actions taken. Dkt. 68, ¶ 20; *see also* Dkt. 70, ¶ 39.

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26
27 In addition to the lack of a completed MAMP, there is not sufficient funding for even the
28 most basic monitoring and evaluation necessary for the hatchery programs. Mr. Lichatowich

1 points out that the Fish Restoration Plan admits the lack of such funding. Dkt. 68, ¶ 21. The
2 most recent incomplete draft MAMP similarly acknowledges inadequate funding:

3 The overall budget for completing ten years of monitoring as described in Section
4 5 to facilitate the adaptive management process described in Section 4 is \$16.8
5 million (Table 20). This is equivalent to approximately \$1.2 to \$1.6 million per
6 year... A total of approximately \$650,000 has been identified for this monitoring
7 thus far.

8 * * * * * * * * * * * *

9 The most basic monitoring and adaptive management activities would cost
10 \$725,000 to \$1 million per year during the ten year period... [This] would not
11 provide any information regarding the mechanisms [sic] influence restoration.
12 Thus, if restoration does not progress, managers would lack much of the
13 information [sic] to understand why. Funding the entire monitoring program
14 would be required to address these questions.

15 *Fourth Decl. of Brian A. Knutsen* (“Fourth Knutsen Decl.”), p. 5. These hatchery programs thus
16 lack funding for even one year of the most basic monitoring required.

17 **C. The Hatchery Programs Are Not Necessary to Preserve the Stocks.**

18 The Elwha Defendants have asserted, without evidence or evaluation, that the hatchery
19 programs are necessary to ensure the persistence of these stocks during the dam removal process.

20 *See Third Knutsen Decl.*, pp. 122-23 (Dkt. 74, pp. 30-31). No such risk of extirpation exists.

21 Dr. Stanford has undertaken extensive investigations and studies related to river ecology
22 and salmonids. Dkt. 69, ¶¶ 2-3, 6-11, and pp. 21-69. Dr. Stanford has reviewed sediment data
23 from gages on the Elwha River downstream of the Elwha Dam since dam removal began. *Id.* at
24 ¶ 41. The sediment levels that have occurred are comparable to those that occur for longer
25 periods in glacier-fed rivers such as the Copper and Susitna Rivers in Alaska, which have
26 healthy populations of salmon and steelhead. *Id.*

1 There are also numerous side channels below the Elwha Dam and between the two dams
2 that will not experience the same levels of suspended sediments as the mainstem. *Id.* Similarly,
3 there are tributaries between the two dams that will be unaffected by increased suspended
4 sediments, many of which have high quality salmonid habitat. *Id.* These side channels and
5 tributaries provide extensive habitat protected from increased suspended sediments. *Id.*
6

7 Dr. Stanford thus concludes that the steelhead and coho salmon hatchery programs are
8 not necessary to prevent extirpation of these stocks during the dam removal process. *Id.* at ¶¶
9 41, 52; *see also*, Dkt. 68, ¶ 29.
10

11 **D. The Size of the Hatchery Programs are not Necessary to Prevent Extirpation.**

12 The proposed releases of hatchery steelhead and coho salmon are far in excess of what
13 would be necessary to ensure against extirpation during the dam removal process. These
14 programs are not designed to preserve the species, but rather to expedite commercial harvests.
15 Similarly, there is no apparent need to collect adult steelhead this winter for broodstock.
16

17 The proposed release of 175,000 hatchery steelhead smolts is expected to return 1,300
18 adults to the Elwha River annually. Dkt. 70, ¶ 43. Only 200 to 500 of these adults are proposed
19 to be taken to supply the hatchery's broodstock, leaving the remaining hatchery fish to interact
20 with wild steelhead. *Id.* This is far in excess of what is appropriate for a conservation hatchery
21 program. *Id.* The Elwha Defendants' data indicates that annual releases of 50,000 steelhead
22 smolts would be more than sufficient to supply continued broodstock collections and ensure
23 preservation of the stock. *Id.* at ¶ 48.
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25 The proposed release of 425,000 coho salmon smolts is similarly far in excess of what
26 would be necessary to protect this stock from any risks associated with dam removal activities.
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28 The Elwha Defendants propose to take only 400 to 600 returning adult coho salmon each year
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1 for broodstock. *Third Knutsen Decl.*, p. 143 (Dkt. 74, p. 51). Based upon Elwha Defendants’
2 data, a release of 50,000 smolts would be sufficient to meet this objective. Dkt. 69, ¶ 54.

3 The steelhead broodstock collection activities proposed for this winter (2012-2013) are
4 not necessary. The Elwha Defendants removed wild steelhead eggs and smolts from the Elwha
5 River each year between 2005 and 2011, which are being raised for four years and then spawned
6 to provide broodstock that are reared for two year prior to release. *Third Knutsen Decl.*, pp. 128-
7 29 (Dkt. 74, pp. 36-37). This program will continue to supply broodstock needs through 2015
8 (for the 2017 releases). This program has been successful, with wild eggs and fry removed in
9 2005 allowing for a release of 178,116 smolts in 2011. *Id.* at p. 129 (Dkt. 74, p. 37). There is
10 thus no need to remove wild returning adult steelhead this winter as proposed.
11

12 **V. STANDARD OF REVIEW.**

13 Generally, to obtain a preliminary injunction, a “plaintiff...must establish that he is likely
14 to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
15 relief, that the balance of equities tips in his favor, and that an injunction is in the public
16 interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).²
17

18 This standard, however, is significantly altered where violations of the ESA are involved.
19 The Supreme Court has held that the “language, history, and structure of the [ESA] indicates
20 beyond doubt that Congress intended endangered species to be afforded the highest of
21 priorities,” and that once Congress has so “decided the order of priorities in a given area, it
22 is...for the courts to enforce them when enforcement is sought.” *Tenn. Valley Auth. v. Hill*, 437
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27 ² The Ninth Circuit continues to apply the “serious questions” version of the “sliding scale” test. *Alliance*
28 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). Under this test, “serious questions
29 going to the merits” and a balance of hardships that tips sharply in the plaintiff’s favor supports a
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1 U.S. 153, 174, 194 (1978). Traditional equitable balancing therefore does not apply because the
2 “plain intent of Congress in enacting the statute was to halt and reverse the trend toward species
3 extinction, *whatever the cost.*” *Id.* at 184 (emphasis added); *Nat’l Wildlife Fed’n v. Nat’l Marine*
4 *Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005) (“The traditional preliminary injunction
5 analysis does not apply to injunctions issued pursuant to the ESA.”).

6
7 Courts do not balance equities, hardships, and public interests in determining whether to
8 issue an injunction under the ESA. *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987);
9 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d at 793-94 (“In cases involving the
10 ESA, Congress removed from the courts their traditional equitable discretion in injunction
11 proceedings of balancing the parties’ competing interests.” (internal citations omitted)).
12 “Congress has decided that...the balance of hardships always tips sharply in favor of the
13 endangered or threatened species.” *Wash. Toxics Coalition v. Env’tl. Prot. Agency*, 413 F.3d
14 1024, 1035 (9th Cir. 2005).

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16
17 The Supreme Court has repeatedly reaffirmed its holding in *Tennessee Valley Authority*.
18 *See, e.g., United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 496-97 (2001)
19 (“Congress’ ‘order of priorities,’ as expressed in the [ESA], would be deprived of effect if the
20 District Court could choose to deny injunctive relief.”); *and Amoco Prod. Co. v. Vill. of*
21 *Gambell*, 480 U.S. 531, 543 n.9 (1987) (ESA “foreclosed the traditional discretion possessed by
22 an equity court”); *and Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982) (“Refusal to
23 enjoin the action [at issue in *Tennessee Valley Authority*] would have ignored the ‘explicit
24 provisions of the [ESA].’”).
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1 **VI. ARGUMENT.**

2 **A. Plaintiffs are Likely to Succeed on the Merits.**

3 Plaintiffs' motion for partial summary judgment establishes that Elwha Defendants are in
4 violation of the ESA and that Plaintiffs are therefore likely to succeed on the merits.³ See Dkt.
5 67, 15:4-20:2. Elwha Defendants are likely to remain in violation of the ESA.

6
7 NMFS issued a biological opinion with an incidental take statement on July 2, 2012
8 (“2012 NMFS BiOp”) that purports to authorize take resulting from limited hatchery
9 operations—broodstock collection activities. *Third Knutsen Decl.*, pp. 49-50 (Dkt. 73-2, pp. 17-
10 18). It does not authorize take associated with other hatchery operations, including the steelhead
11 and coho salmon releases from the hatchery into the lower Elwha River. *See id.* at 48 (Dkt. 73-2,
12 p. 16). The take authorization is conditioned upon completing by June 30, 2012, and fully
13 implementing by September 14, 2012, a NMFS-approved MAMP. *Id.* at 51-53 (Dkt. 73-2, pp.
14 19-21). These conditions were not met. *See id.* at 239 (Dkt. 74-1, p. 71). Further, there is not
15 sufficient funding to implement even the most basic components of the MAMP. *Fourth Knutsen*
16 *Decl.*, p. 5. The take authorization for broodstock collection activities is therefore ineffective.
17 *See* 16 U.S.C. §§ 1536(b)(4) and (o)(2); 50 C.F.R. § 402.14(i)(5).

18
19 Moreover, Plaintiffs are likely to succeed in having the NMFS 2012 BiOp set aside once
20 the administrative record for that agency action is produced. The 2012 NMFS BiOp authorizes
21 take of ESA-listed salmonids for hatchery broodstock, which it considers part of the project
22 under review, but it does not address the severe adverse effects associated with the subsequent
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27 in the public interest. *Id.* at 1135.

28 ³ Alternatively, Plaintiffs have shown “serious questions going to the merits” to meet the sliding scale
29 test. *See Alliance for the Wild Rockies*, 632 F.3d at 1134.

1 releases of hatchery fish into the lower Elwha River. *See Third Knutsen Decl.*, pp. 14-15, 40
2 (Dkt. 73-1, pp. 9-10; Dkt. 73-2, p. 8). Biological opinions must evaluate the effects of the entire
3 action, including the effects of all interrelated and interdependent actions. *Conner v. Burford*,
4 848 F.2d 1441, 1453 (9th Cir. 1988); 50 C.F.R. §§ 402.02 (defining “Effects of the action”) and
5 402.14(h)(2). A “but for” causation standard is applied to determine interrelatedness and
6 interdependence. *Marsh*, 816 F.2d at 1387. The hatchery releases plainly meet this test—but for
7 the broodstock collection activities, the smolt releases would not occur. Accordingly, Plaintiffs
8 are likely to succeed on their challenge to the NMFS 2012 BiOp and have that document, and the
9 take authorization provided therein, set aside as not in accordance with law. *See* 5 U.S.C. §
10 706(2)(A) (“The reviewing court shall...set aside agency action...found to be...not in
11 accordance with law”); *and see Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036-37 (9th
12 Cir. 2007) (invalidation of a biological opinion invalidates the incidental take statement included
13 therein).

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17 **B. Irreparable Injury is Likely in the Absence of a Preliminary Injunction.**

18 Congress enacted a policy of “institutionalized caution” in the ESA intended to protect
19 species. *Tenn. Valley Auth.*, 437 U.S. at 194. To fulfill this legislative mandate, the “remedy for
20 a substantial procedural violation of the ESA—a violation that is not technical or de minimis—
21 must...be an injunction of the project pending compliance with the ESA.” *Wash. Toxics*
22 *Coalition*, 413 F.3d at 1029, 1034-35 (affirming injunction pending ESA compliance); *see also*
23 *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177-78 (9th Cir. 2002) (ESA violation
24 “compelled the court to grant injunctive relief”); *and Pac. Rivers Council v. Thomas*, 30 F.3d
25 1050, 1056-57 (9th Cir. 1994) (enjoining activities that “may affect” protected fish pending ESA
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1 compliance); *and Marsh*, 816 F.2d at 1383-84, 1389 (plaintiff “is entitled to injunctive relief if
2 the [defendant] violated a substantive or procedural provision of the ESA...”).

3 Accordingly, an injunction should be issued upon a showing that there is a likelihood of
4 future harm to an animal protected under the ESA. *Nat’l Wildlife Fed’n v. Burlington N. R.R.,*
5 *Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994); *Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060,
6 1066 (9th Cir.1996) (“A reasonably certain threat of imminent harm to a protected species is
7 sufficient for issuance of an injunction under section 9 of the ESA”); *Defenders of Wildlife v.*
8 *Bernal*, 204 F.3d 920, 925 (9th Cir. 1999) (disrupting the normal behavioral patterns of a single
9 pygmy-owl would constitute take requiring an injunction); *Forest Conservation Council v.*
10 *Rosboro Lumber Co.*, 50 F.3d 781, 787-88 (9th Cir. 1995) (significantly impairing the essential
11 behavioral patterns of a single pair of protected owls constituted harm requiring an injunction).

12 Plaintiffs have submitted declarations from three well-qualified and respected experts
13 demonstrating not only that future take of threatened salmonids will occur, but that the harm
14 inflicted will be severe and lasting. Moreover, such harm will not be limited to individual fish or
15 to the Elwha River salmonid populations, but rather will extend to the ESA-listed segments.

16 Dr. Luikart explains that “[t]he harmful effects on the fitness of wild spawning steelhead
17 caused by the hatchery programs...are highly likely to cause significant impairment to the fitness
18 of the Elwha River wild winter-run steelhead population and thereby to the Puget Sound
19 steelhead [distinct population segment (“DPS”).]” Dkt. 70, ¶ 36. “Any introgression of
20 maladaptive genes from hatchery fish into the wild fish population will likely have long-lasting
21 adverse effects on that population and its ability to fully recover.” *Id.* at ¶ 47. Dr. Luikart
22 further finds that the steelhead brookstock collection activities proposed for this winter (2012-
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1 2013) will interfere with the spawning success of wild steelhead, and that such reductions will
2 harm the depressed Elwha River steelhead population. *Id.*

3 Dr. Stanford addresses harm resulting from ecological interactions, including increased
4 competition for resources and predation. Dkt. 69, ¶¶ 34-35, 50. Dr. Stanford finds that the
5 releases of hatchery steelhead and coho salmon will most likely cause severe and long lasting
6 harm to the Elwha River winter-run steelhead and Chinook salmon populations. *Id.* at ¶¶ 37, 51.
7 The wild populations of steelhead and Chinook salmon are currently severely depressed, and any
8 harm inflicted on individual fish can therefore be significant to the population. *Id.* at ¶ 51. Dr.
9 Stanford concludes that the hatchery releases will most likely hinder, and may even prevent, the
10 full recovery of wild native steelhead and Chinook salmon. *Id.* at ¶¶ 37, 51.

13 Mr. Lichatowich concurs in the opinions expressed by Drs. Luikart and Stanford, finding
14 that the steelhead “hatchery program has a high probability of delaying and otherwise impairing
15 the recolonization of the Elwha River by native steelhead.” Dkt. 68, ¶ 30. It is Mr.
16 Lichatowich’s opinion that this program should therefore be “immediately eliminated to prevent
17 likely long term severe harm to the wild native Elwha River winter-run steelhead population and
18 its ability to fully recover.” *Id.* at ¶ 31.

21 “The size and pristine condition of the Elwha River watershed provide the largest
22 potential population size for winter steelhead of all the rivers entering the Strait of Juan de Fuca.
23 This watershed constitutes a unique component of the geographic and evolutionary diversity of
24 the Puget Sound steelhead DPS.” Dkt. 69, ¶ 25. Recovery of the Elwha River steelhead
25 population is therefore essential to the recovery of the ESA-listed population segment—the
26 Puget Sound steelhead DPS. *Id.* The harm posed by the Elwha Defendants’ hatchery programs
27 therefore constitutes significant harm to the entire Puget Sound steelhead DPS. *Id.* at ¶¶ 25, 42.

1 Similar principles apply to the harm posed to the Elwha River Chinook salmon population and
2 the ESA-listed segment to which it belongs—the Puget Sound Chinook salmon evolutionary
3 significant unit. *Id.* at ¶ 51.

4 **C. The Balance of Harms and Public Interest Favor a Preliminary Injunction.**

5 As discussed herein, the legislative mandates of the ESA preclude traditional equitable
6 balancing. *E.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d at 793-94; and
7 *Wash. Toxics Coalition*, 413 F.3d at 1035. Nonetheless, these factors weigh in favor of an
8 injunction here. The “balance of harms will usually favor the issuance of an injunction to protect
9 the environment.” *Amoco Prod. Co.*, 480 U.S. at 545. Similarly, preserving the “precious,
10 unreplenishable resources” of our natural environment promotes the public interest. *See*
11 *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002), *overruled on other*
12 *grounds by Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

13 Implementation of the massive hatchery programs in Elwha River represents a tragic lost
14 opportunity. The Elwha River Restoration Project is the largest dam removal and salmon
15 restoration project in United States history, costing tax payers approximately \$325 million. This
16 project offers a unique chance to fully restore anadromous fish populations to a largely pristine
17 ecosystem, while also gaining knowledge about how large river systems respond to dam removal
18 that will help guide future policy decisions for other rivers. As the HSRG noted:

19 Removal of the Elwha and Glines Canyon dams offers a unique opportunity to
20 learn about watershed restoration processes. Suppose, for example, that
21 spontaneous colonization is very rapid and efficient (which some scientists argue
22 to be the case). If we fail to recognize and understand this, not only will we delay
23 success by employing ineffective strategies, we also will have wasted valuable
24 financial resources in the process. In other words, when we fail and learn nothing
25 from it, there is a double loss to society.

1 *Third Knutsen Decl.*, p. 252 (Dkt. 74-1, p. 84). The Elwha Defendants' hatchery programs are
2 realizing the societal losses prophesied by the HSRG. These excessive programs that prioritize
3 commercial harvests over restoration will delay or prevent the full recovery of Elwha River
4 salmonid populations. *See* Dkt. 68, ¶¶ 30-31; Dkt. 69, ¶¶ 37, 42, 51, 53; Dkt. 70, ¶¶ 35-36, 47.
5 Equal troubling, however, is that responsible officials and the public will be ignorant of the
6 cause of the lack of recovery because of the inadequate monitoring and evaluation. Dkt. 68, ¶
7 21; *and see Fourth Knutsen Decl.*, p. 5.

9 **D. The Requested Scope of the Injunction is Appropriately Tailored.**

10 Injunctive relief must be appropriately tailored to remedy the specific harm alleged. *Park*
11 *Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011).
12 Plaintiffs' requested injunction is appropriately tailored to address the ESA violations at issue
13 and the likely irreparable harm expected to result therefrom.
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15 The releases of steelhead and coho salmon and the steelhead broodstock collection
16 activities will cause illegal take of threatened salmonids. Dkt. 68, ¶¶ 26-27; Dkt. 69, ¶¶ 33-36,
17 50; Dkt. 70, ¶¶ 32, 34, 47. These activities will harm the Elwha River wild steelhead and
18 Chinook salmon populations and their ability to fully recover, and thereby also harm the ESA-
19 listed segments to which those populations belong. Dkt. 68, ¶¶ 30-31; Dkt. 69, ¶¶ 37, 42, 51, 53;
20 Dkt. 70, ¶¶ 35-36, 47, 49. Accordingly, these unlawful activities should be enjoined.
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22 The releases of hatchery fish are not necessary to prevent extirpation of the stocks during
23 dam removal. Dkt. 69, ¶¶ 41, 52. However, to the extent any risk of extirpation is present,
24 annual releases of 50,000 steelhead smolts and 50,000 coho smolts would ensure against such
25 risk while also reducing the harm to threatened salmonids. *Id.* at ¶ 54; Dkt. 70, ¶ 48. There is no
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1 need to conduct the steelhead broodstock collection activities this winter because the captive
 2 rearing program continues to provide broodstock for this program. Dkt. 70, ¶ 48.

3 **E. A Nominal Bond is Appropriate.**

4 Rule 65(c) provides the Court with discretion when determining whether a bond should
 5 be required in conjunction with a preliminary injunction and, if so, what amount should be
 6 required. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999); *California ex rel. Van*
 7 *De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. Cal. 1985). No bond,
 8 or only a nominal bond, is appropriate in this case.

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 11 Waiver of the bond requirement, or imposition of a very minimal bond, is customary and
 12 favored in cases where non-profit organizations have brought suit in the public interest to protect
 13 the environment. For example, in *Van De Kamp*, the Ninth Circuit upheld a District Court's
 14 injunction that prevented an approval process for development projects until plans were adopted
 15 in compliance with an interstate compact intended to protect Lake Tahoe. 766 F.2d at 1322-23.
 16 The District Court waived the bond requirement for the non-profit plaintiff, and the Ninth Circuit
 17 upheld that decision. *Id.* at 1325. The Ninth Circuit found that it was important for courts not to
 18 allow a bond requirement to effectively deny access to judicial review and, accordingly, that
 19 special precautions must be taken to ensure access to the courts for citizens and non-profit
 20 organizations where Congress has provided for private enforcement of a statute, like it has for
 21 the ESA. *See id.* at 1325-26.⁴ The Ninth Circuit also found that the non-profit's likelihood of
 22 success on the merits "tips in favor of a minimal bond or no bond at all." *Id.* at 1326.
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28 ⁴ The Ninth Circuit had previously ruled that litigation in the public interest is an important consideration
 29 favoring a minimal, or no, bond. *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975).

1 The principles in *Van De Kamp* have been repeatedly applied in cases where, as here,
2 non-profit organizations seek to enforce public rights through citizen suit actions. *See, e.g.,*
3 *Rosemere Neighborhood Ass'n v. Clark County*, No. 11-CV-5213-RBL, 2012 U.S. Dist. LEXIS
4 47917, at *1-2 (W.D. Wash. April 4, 2012) (waiving bond requirement for plaintiff's requested
5 preliminary injunction to prevent Clean Water Act violations); *Ctr. for Food Safety v. Vilsack*,
6 753 F.Supp.2d 1051, 1061-62 (N.D. Cal. 2010) (waiving bond requirement for preliminary
7 injunction issued under NEPA claims); *Or. Natural Desert Ass'n v. Kimbell*, No. 07-1871-HA,
8 2009 U.S. Dist. LEXIS 50361, at *8 (D. Or. June 15, 2009) (waiving bond requirement for
9 preliminary injunction issued to prevent ESA violations); *Save Strawberry Canyon v. Dep't of*
10 *Energy*, 613 F.Supp.2d 1177, 1190-91 (N.D. Cal. 2009) (denying request to require bond for
11 preliminary injunction issued under NEPA claims); *Cal. Native Plant Soc'y v. U.S. Env'tl. Prot.*
12 *Agency*, No. C06-03604 MJJ, 2007 U.S. Dist. LEXIS 49660, at *66, 73 (N.D. Cal. July 10,
13 2007) (requiring no bond where plaintiffs raised serious questions going to the merits of their
14 NEPA claims).
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18 No bond, or a nominal bond, is appropriate here under the considerations discussed in
19 *Van De Kamp* and similar cases. Plaintiffs are non-profit organizations seeking to enforce public
20 rights provided by Congress in the ESA citizen suit provision, and have no financial stake in this
21 litigation. Dkt. 72, ¶¶ 2-3, 7; *First Decl. of Robert J. Margulis* ("Margulis Decl."), ¶¶ 2, 4, 6;
22 *First Decl. of William Atlas* ("Atlas Decl."), ¶¶ 2, 10; *First Decl. of Pete Soverel* ("Soverel
23 Decl."), ¶¶ 2, 6. Plaintiffs have limited funds, most of which are restricted to specific
24 environmental restoration, research, or similar projects. Dkt. 72, ¶ 4, *Margulis Decl.*, ¶ 4; *Atlas*
25 *Decl.*, ¶¶ 5, 6; *Soverel Decl.*, ¶ 4. Requiring a substantial bond here would therefore effectively
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1 deny Plaintiffs' access to judicial review, and have a chilling effect on future efforts to vindicate
2 public rights. Dkt. 72, ¶¶ 5-7; *Margulis Decl.*, ¶ 5 *Atlas Decl.*, ¶¶ 7-9; *Soverel Decl.*, ¶ 5.

3 **VII. CONCLUSION.**

4 For the foregoing reasons, Plaintiffs respectfully request the Court issue a preliminary
5 injunction against the Elwha Defendants as specified herein.⁵
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7 RESPECTFULLY SUBMITTED this 21st day of November, 2012.

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28 ⁵ Plaintiffs provided Elwha Defendants notice of their intent to seek preliminary relief as they had
committed to do. *Fourth Knutsen Decl.*, p. 8; Dkt. 19, 3:12-15.

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 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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APPENDIX A

ACRONYMS

BIA	Bureau of Indian Affairs
DOI	United States Department of the Interior
DPS	Distinct Population Segment
ESA	Endangered Species Act
ESU	Evolutionary Significant Unit
FWS	United States Fish and Wildlife Service
FWS 2000 BiOp	Biological Opinion issued by FWS in 2000
HGMP	Hatchery Genetic Management Plan
HSRG	Hatchery Scientific Review Group
MAMP	Monitoring and Adaptive Management Plan
NEPA	National Environmental Policy Act
NMFS	NOAA Fisheries Service (National Marine Fisheries Service)
NMFS 2006 BiOp	Biological Opinion issued by NMFS in 2006
NMFS 2012 BiOp	Biological Opinion issued by NMFS in 2012
NPS	National Park Service