

HONORABLE BENJAMIN H. SETTLE

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' RESPONSE TO LOWER
v.	)	ELWHA TRIBAL DEFENDANTS'
	)	MOTION TO DISMISS, OR, IN THE
NATIONAL PARK SERVICE, <i>et al.</i> ,	)	ALTERNATIVE, MOTION FOR A
	)	MORE DEFINITE STATEMENT
Defendants,	)	
	)	

---

Plaintiffs Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Flyfishers Steelhead Committee, and Wild Salmon Rivers d/b/a Conservation Angler (collectively, "WFC") hereby respond to Lower Elwha Defendants' Motion to Dismiss, or, in the Alternative, Motion for a More Definite Statement, Dkt.26 (April 12, 2012), and respectfully request the Court deny the motion.

**I. INTRODUCTION.**

As the Elwha Defendants recognize, the removal of the two dams on the Elwha River presents an invaluable opportunity to restore the "legendary fish runs" in the Elwha River. However, the Elwha Defendants fail to acknowledge that the continuation and expansion of

1 commercial hatchery programs at the Lower Elwha Klallam Tribe (“Tribe”) hatchery are causing  
2 and will continue to cause significant harm to wild native fish species in the Elwha River,  
3 thereby frustrating restoration efforts. Indeed, federal, state, and independent scientists have  
4 warned that the Tribe’s hatchery programs described in the Fish Restoration Plan pose serious  
5 threats to the recovery of wild fish populations. The Elwha Defendants are implementing these  
6 programs despite the widespread concerns.  
7

8 The Elwha River wild fish populations are at critically small numbers due to degraded  
9 habitat conditions caused by the two dams. These include three fish listed as threatened under  
10 the Endangered Species Act (“ESA”)—Puget Sound Chinook salmon, Puget Sound steelhead,  
11 and bull trout. The large scale and poorly monitored hatchery programs conducted by the Elwha  
12 Defendants are causing “take” of these species and threatening their recovery. The hatchery is  
13 not operated in accordance with a Hatchery Genetic Management Plan (“HGMP”) approved by  
14 NOAA Fisheries Service (“NMFS”) as sufficiently minimizing harm to wild fish. The take  
15 caused by the hatchery programs therefore violates section 9 of the ESA. 16 U.S.C. §  
16 1538(a)(1)(B).  
17  
18

19 Despite the Elwha Defendants’ arguments to the contrary, WFC’s Complaint is replete  
20 with factual allegations concerning how the Tribe’s hatchery programs harm wild fish species,  
21 how such harm constitutes violations of the ESA, the Elwha Defendants’ respective official  
22 positions associated with the hatchery programs, and how the hatchery programs injure WFC and  
23 its members. These allegations are more than sufficient to satisfy the notice pleading  
24 requirements. WFC’s allegations, and the reasonable inferences drawn therefrom, establish its  
25 constitutional standing and state a claim for which the Court can grant relief. Further, the claim  
26  
27  
28

against the Elwha Defendants is ripe because their violations of section 9 of the ESA have begun and will continue to occur.

## II. LEGAL FRAMEWORK.

WFC has provided a detailed explanation of the ESA in its response to the Federal Defendants' motion to dismiss. Instead of repeating that information here, WFC incorporates that discussion by this reference and provides further information particularly relevant to the issues presented by the Elwha Defendants' motion. *See Pls.' Resp. to Fed. Defs.' Mot. to Dismiss*, Sec. II.A.

Section 9 of the ESA makes it unlawful to "take" threatened or endangered species. 16 U.S.C. § 1538(a)(1)(B).<sup>1</sup> "Take" is defined broadly to include kill, harass, and harm protected species. 16 U.S.C. § 1532 (19). "Harm" includes habitat modification that kills or injures fish by impairing behavioral patterns, including breeding, migrating, feeding, or sheltering. 50 C.F.R. § 222.102; *see Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995). Section 10 of the ESA provides a mechanism by which NMFS and the Fish and Wildlife Service ("FWS") can issue permits authorizing "take" associated with activities intended to enhance the survival of the affected species. 16 U.S.C. § 1539(a)(1)(A).<sup>2</sup> Issuance of such permits requires consideration of several factors, including the effects the activity would

<sup>1</sup> While section 9 only references "endangered" species, U.S. Fish and Wildlife Service ("FWS") and NMFS have generally applied the take prohibition to "threatened" species through protective regulations promulgated under section 4(d) of the ESA. *See* 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.31(a); 50 C.F.R. § 223.203(a). Section 9 of the ESA makes it unlawful to violate any such regulation. 16 U.S.C. § 1538(a)(1)(G).

<sup>2</sup> NMFS and FWS can also issue "take" permits under section 10 of the ESA for activities that will not appreciably reduce the likelihood of survival and recovery of the protected species. 16 U.S.C. § 1539(a)(2)(B)(iv); 50 C.F.R. § 222.307(c)(2)(iii); 50 C.F.R. § 17(b)(2)(i)(D). Parties seeking such a permit are required to develop a habitat conservation plan that will minimize adverse effects to ESA-listed species. 16 U.S.C. § 1539(a)(2)(A); 50 C.F.R. § 17.22(b)(1)(iii); 50 C.F.R. § 222.307(b)(5).

1 have on wild populations and whether the proposed activity would conflict with other programs  
2 intended to enhance the survival of the species. 50 C.F.R. § 17.22(a)(2); 50 C.F.R. § 222.308(c).

3 Several species of salmonids native to the Elwha River have been listed as threatened  
4 under the ESA. Puget Sound Chinook salmon and Puget Sound steelhead are listed as  
5 threatened. 64 Fed. Reg. 14,308 (March 24, 1999) (Chinook); 70 Fed. Reg. 37,160 (June 28,  
6 2005) (same); 72 Fed. Reg. 26,722 (May 11, 2007) (steelhead). NMFS has applied the “take”  
7 prohibition to these species, subject to several exceptions known as the “4(d) Rule Limits.”<sup>3</sup> 50  
8 C.F.R. § 223.203(a); 50 C.F.R. §§ 223.102(c)(8) and (c)(23). The coterminous United States  
9 population of bull trout is listed as a threatened species under the ESA, and FWS has applied the  
10 “take” prohibition to threatened species. 64 Fed. Reg. 58,910 (Nov. 1, 1999); 50 C.F.R. § 17.31.  
11

12 Two of the 4(d) Rule Limits established by NMFS are potentially relevant here. Take of  
13 Puget Sound Chinook salmon and Puget Sound steelhead caused by an artificial propagation  
14 program are not unlawful if NMFS has approved a Hatchery Genetic Management Plan, or  
15 HGMP, for the program. 50 C.F.R. § 223.203(b)(5). NMFS can only approve HGMPs if they  
16 meet specific detailed criteria. 50 C.F.R. § 223.203(b)(5)(i)(A)-(K). One requirement is that  
17 HGMP must minimize the hatchery program’s genetic and ecological effects on natural  
18 populations. 50 C.F.R. § 223.203(b)(5)(i)(E). Another 4(d) Rule Limit applies for joint State-  
19 Tribe resource management plans implementing treaty fishing rights that have been reviewed  
20 and approved by NMFS. 50 C.F.R. § 223.203(b)(6). NMFS’ approval requires a finding that the  
21 plan will not appreciably reduce the likelihood of survival and recovery of ESA-protected  
22 species. 50 C.F.R. § 223.203(b)(6)(i).  
23  
24  
25  
26  
27

28 <sup>3</sup> These exceptions are known as the 4(d) Rule Limits because NMFS applied the “take” prohibition to these  
29 threatened species and established these exceptions under its authority described in section 4(d) of the ESA.

### III. STATEMENT OF FACTS.

WFC has provided a detailed statement of facts describing the Elwha River, its watershed, and its salmonids. Instead of repeating that information here, WFC incorporates that discussion by this reference and provides further information particularly relevant to the issues presented by the Elwha Defendants' motion. *See Pls.' Resp. to Fed. Defs.' Mot. To Dismiss*, Sec. III.

The Tribe operates a large scale commercial hatchery on the Elwha River that produces coho, chum and pink salmon, and steelhead. Dkt. 1, ¶¶ 97, 104. The Fish Restoration Plan describes these hatchery programs in detail. *See First Decl. of Brian A. Knutsen*, pp. 56-99. The Elwha Defendants are officials of the Tribe with duties related to fisheries, including management of the hatchery programs. Dkt. 1, ¶¶ 29-32.

The hatchery programs managed by the Elwha Defendants harm wild native fish species in the Elwha River through a variety of mechanisms. Hatchery fish are less fit to survive in the wild than their wild counterparts, and when hatchery and wild fish are allowed to interbreed, the resulting offspring are less fit to survive and reproduce in the wild than would otherwise occur with wild parents. *Id.* at ¶ 111. Releasing hatchery fish also harms wild fish by increasing competition for resources, such as food sources and rearing space. *Id.* at 113. Released hatchery fish can also prey on wild fish, expose them to diseases, and cause increased predation. *Id.*

The Tribe's hatchery programs cause "take" of threatened Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout through these and other mechanisms. *Id.* at 116. The Elwha Defendants assert that they will secure NMFS' approval of HGMPs for their hatchery programs. Dkt. 26, 9:13-10:3. However, the Elwha Defendants have operated and continue to operate the hatchery and release hatchery fish into the Elwha River that harm protected species

1 and have yet to secure any authorization for such activities. Dkt. 1, ¶ 183 (the actions causing  
2 take are ongoing).

#### 3 **IV. STANDARD OF REVIEW.**

4 The Elwha Defendants' challenges to the Court's jurisdiction on constitutional standing  
5 and ripeness grounds are reviewed under Rule 12(b)(1). *See Chandler v. State Farm Mutual*  
6 *Automobile Insurance Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). In reviewing these facial  
7 challenges to subject matter jurisdiction, the Court "must accept as true all material allegations of  
8 the complaint and must construe the complaint in favor of the complaining party." *Maya v.*  
9 *Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (*citing Warth v. Seldin*, 422 U.S. 490, 501  
10 (1975)).  
11

12 In reviewing the Elwha Defendants' motion to dismiss for failure to state a claim, all  
13 material facts alleged in the Complaint should be accepted as true and construed in the light most  
14 favorable to WFC. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). The  
15 Complaint does not need to state "detailed factual allegations, but must contain sufficient factual  
16 matter to state a claim to relief that is plausible on its face." *Id.* "A claim has facial plausibility  
17 when the plaintiff pleads factual content that allows the Court to draw the reasonable inference  
18 that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not  
19 akin to a 'probability requirement,' but it asks for more than a sheer possibility that [the]  
20 defendant has acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).  
21

#### 22 **V. ARGUMENT.**

23 The Court should deny the Elwha Defendants' motion to dismiss. WFC's complaint  
24 includes extensive factual allegations that are more than sufficient to establish constitutional  
25 standing and the ripeness of this case for judicial review. These factual allegations meet the  
26

1 federal pleading standards and state a claim upon which relief can be granted. Therefore, the  
 2 Court need not order a more definite statement.

3 **A. WFC has Alleged Sufficient Facts to Establish Constitutional Standing.**

4 To survive a motion to dismiss, a plaintiff must allege, but need not prove, the elements  
 5 of constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A plaintiff  
 6 must allege that he:  
 7

8 (1) has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b)  
 9 actual or imminent, not conjectural or hypothetical; (2) the injury is fairly  
 10 traceable to the challenged action of the defendant; and (3) it is likely, as opposed  
 to merely speculative, that the injury will be redressed by a favorable decision.

11 *Maya*, 658 F.3d at 1067. Organizations such as WFC have representational standing to bring suit  
 12 on behalf of its members where the members would otherwise have standing to sue in their own  
 13 right. *See Citizens of Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003)

14 “At the pleading stage, general factual allegations of injury resulting from the defendant's  
 15 conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace  
 16 those specific facts that are necessary to support the claim.” *Maya*, 658 F.3d at 1068 (*citing*  
 17 *Defenders of Wildlife*, 504 U.S. at 561 (alteration in original) (*quoting Lujan v. Nat’l Wildlife*  
 18 *Fed’n*, 497 U.S. 871, 889 (1990))).  
 19  
 20

21 **1. WFC has alleged facts sufficient to establish injury-in-fact.**

22 The “injury in fact” requirement in environmental cases is satisfied if an individual  
 23 adequately shows an aesthetic or recreational interest in a particular place or animal and shows  
 24 reasonable concerns that those interests are impaired by the defendant’s conduct. *Ecological*  
 25 *Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147, 1151 (9th Cir. 2000); *Friends of the*  
 26 *Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) *Defenders of*  
 27  
 28

1 *Wildlife*, 504 U.S. at 562-563 (“the desire to use or observe an animal species, even for purely  
2 esthetic purposes, is undeniably a cognizable interest for purpose of standing”).

3 The Complaint includes sufficient allegations to establish injury to WFC’s members.  
4 WFC’s members “regularly spend time in areas in and near the Elwha River,” engaging in a  
5 wide variety of activities, including hiking, camping, swimming, and snorkeling. Dkt. 1, ¶ 14.  
6 These members observe, study, photograph, and otherwise appreciate wildlife and wildlife  
7 habitat in and around the Elwha River. *Id.* These members have fished in the Elwha River, and  
8 will do so in the future if and when wild fish populations recover to such a point that fishing will  
9 not harm conservation and recovery. *Id.* WFC’s members “derive scientific, educational,  
10 recreational, health, conservation, spiritual, and aesthetic benefits from the Elwha River and the  
11 surrounding area, from native fish species in Elwha River and other species that depend on such  
12 fish species, and from the existence of a natural, wild and healthy Elwha River ecosystem.” *Id.*  
13 at ¶ 15.

14 WFC’s members’ interests are being harmed by the Elwha Defendants’ hatchery  
15 programs, and by the members’ reasonable concerns related to such programs. Large numbers of  
16 hatchery fish are raised in the Tribe’s hatchery and released into the Elwha River. Dkt. 1, ¶ 97-  
17 100, 104. These releases harm, and result in “take” of, ESA-protected salmonids. *Id.* at ¶¶ 110-  
18 13, 116. These hatchery programs will impede, and may even prevent, the recovery of native  
19 wild salmonids in the Elwha River. *Id.* at ¶¶ 110-14. NMFS has not reviewed and approved an  
20 HGMP for these hatchery programs to ensure that they are not causing excessive harm to wild  
21 salmonids, including ESA-protected species, and the “take” caused by these programs violates  
22 section 9 of the ESA.



WFC's members are harmed by the unlawful hatchery programs. *See Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) (increased risk of harm based on a violation of a statute is sufficient to show the injury is not conjectural or hypothetical). WFC's members are extremely concerned about the Elwha Defendants' illegal hatchery programs, and these well-substantiated concerns significantly affect their use and enjoyment of the Elwha River. *Id.* at ¶ 17. WFC's members will use the Elwha River less frequently, and will enjoy the river less when they do visit, because of the harm the hatchery programs cause to wild native fish. *Id.* The members will not fish in the river because the hatchery programs will prevent the wild fish populations from recovering to a point where fishing could occur without impeded recovery. These factual allegations are sufficient to establish a cognizable injury-in-fact.

## 2. WFC has alleged sufficient facts to establish traceability.

The issue in the traceability inquiry is whether the alleged injury can be fairly traced to the defendants' challenged conduct, rather than that of some other actor not before the Court. *Ecological Rights Found.*, 230 F.3d at 1152. WFC has alleged facts sufficient to establish traceability. The injuries complained of are being caused by the Elwha Defendants' hatchery programs.

WFC alleges its claim against the Elwha Defendants in their official capacities for non-monetary, prospective injunctive relief, under the *Ex Parte Young* doctrine.<sup>4</sup> Dkt. 1, ¶ 183, Req. for Rel. L and M; *Salt River Project Agricultural Improvement & Power District v. Lee*, 672

<sup>4</sup> The only relevant inquiry in determining whether *Ex Parte Young* applies to overcome a tribal official's claim of sovereign immunity is whether the plaintiffs have alleged an ongoing violation of federal law and seek prospective injunctive relief. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). This test is satisfied here. *See* Dkt. 1, ¶ 183 and Req. for Rel. L and M. Moreover, in reviewing the Elwha Defendants' challenge to constitutional standing, the Court should accept WFC's legal theories on *Ex Parte Young*. *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 441-42 (D.C. Cir. 1998).

1 F.3d 1176, \_\_\_ (9th Cir. 2012) (“actions for prospective non-monetary relief against state or  
 2 tribal officials in their official capacity to enjoin them from violating federal law” are permitted  
 3 under the *Ex Parte Young* doctrine). A suit against an official in his or her official capacity  
 4 under *Ex Parte Young* is not a suit against the individual, but rather is a suit against the official’s  
 5 office. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187 (9th Cir. 2003). It is therefore not  
 6 necessary to allege the personal involvement of defendants when asserting a claim under the *Ex*  
 7 *Parte Young* doctrine; all that is required is that the Complaint name officials whose job duties  
 8 relate to the challenged conduct and who could appropriately respond to an order on injunctive  
 9 relief. *See Hartmann v. Calif. Dep’t of Corrections & Rehabilitation*, No. 1:10-CV-00045-LJO-  
 10 SMS, 2010 U.S. Dist. LEXIS 41522, at \*23 (E.D. Cal. April 28, 2010).<sup>5</sup>

13 The Complaint alleges that the Elwha Defendants are officials of the Tribe with duties  
 14 associated with fisheries, including management of the Tribe’s hatchery. Dkt. 1, ¶¶ 29-32. The  
 15 Complaint alleges that the Tribe’s hatchery is one of the two hatcheries described in the Fish  
 16 Restoration Plan. *Id.* at ¶ 97. The Complaint alleges that the Tribe is implementing programs at  
 17 this hatchery as described in the Fish Restoration Plan for coho, chum and pink salmon, and  
 18 steelhead. *Id.* at ¶¶ 97, 104.

20 These hatchery programs are harming wild native salmonids through a variety of  
 21 mechanisms, including reduced reproductive fitness due to genetic introgression and increased  
 22 competition for resources, including food and rearing space. *Id.* at ¶¶ 110-13. The hatchery fish

25 <sup>5</sup> *See also Gomez v. Martel*, No. Civ. S-09-0265-MCE GGH P. 2009 U.S. Dist. LEXIS 63263, at \*4-6 (E.D. Cal.  
 26 July 23, 2009); and *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012), *abrogating* 500 F.3d 978 (9th Cir. 2007)  
 27 (claims asserting individual liability of officials under 42 U.S.C. § 1983 required pleading facts related to the  
 28 individual’s own actions, but *Ex Parte Young* claims for injunctive and declaratory relief were not subject to this  
 requirement); and *Kotzev v. Ryan*, No. CV 10-0907-PHX-MHM, 2011 U.S. Dist. LEXIS 16638 (D. Ariz. Feb. 18,  
 2011) (dismissing claim against official in his individual capacity for lack allegations pertaining to individual  
 actions, but not dismissing *Ex Parte Young* claims against official in his official capacity).

also prey on wild fish, expose wild fish to diseases, and cause increased predation. *Id.* at ¶ 113. The Tribe's hatchery programs managed by the Elwha Defendants are therefore hindering, and may even prevent, the full recovery of native wild salmonids. *Id.* at ¶ 114. These hatchery programs also cause unlawful "take" of ESA-protected Chinook salmon, steelhead, and bull trout. *Id.* at ¶ 116, 183. These are the injuries WFC complains of, and the traceability prong of the standing analysis is satisfied. *See Maya*, 658 F.3d at 1070 (*citing Allen v. Wright*, 468 U.S. 737, 757 (1984)) ("To survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.'). WFC is not required to carry "so heavy a burden" as to establish that a defendant's actions are the "proximate cause" of its injuries. *Id.*

### 3. The claim against the Elwha Defendants is redressable.

The injuries complained of are redressable by an order from the Court requiring compliance with section 9 of the ESA. *See Covington v. Jefferson County*, 358 F.3d 626, 639 (9th Cir. 2004). WFC's injuries would be redressed by an order requiring the Elwha Defendants to discontinue causing unlawful "take" of ESA-protected species until such time they prepare, and NMFS approves, HGMPs for the hatchery programs. NMFS' approval of the HGMPs would authorize take of Chinook salmon and steelhead. *See* 50 C.F.R. § 223.203(b)(5). Approval of the HGMPs requires that the hatchery programs be implemented in a manner that minimizes genetic and ecological effects on natural populations. 50 C.F.R. § 223.203(b)(5)(i)(E).

### B. The Claim Against the Elwha Defendants is Ripe for Judicial Review.

WFC's claim against the Elwha Defendants for unlawful take of ESA-protected fish is ripe for review. The Elwha Defendants have implemented and will continue to implement the

1 hatchery programs described in the Fish Restoration Plan. These programs have caused and will  
 2 continue to cause unlawful take of ESA-protected species. This claim is therefore ripe.

3 “The basic rationale of the ripeness doctrine is to prevent courts, through avoidance of  
 4 premature adjudication, from entangling themselves in abstract disagreements.” *Scott v.*  
 5 *Pasadena Unified School District*, 306 F.3d 646, 662 (9th Cir. 2002). “An action is unripe when  
 6 the issues are not sufficiently concrete for judicial resolution.” *W. Oil & Gas Ass’n v. Sonoma*  
 7 *County*, 905 F.2d 1287, 1290 (9th Cir. 1990) (internal quotations omitted). A violation of  
 8 section 9 of the ESA is actionable once illegal take is imminent. *See Defenders of Wildlife v.*  
 9 *Bernal*, 204 F.3d 920, 925 (9th Cir. 1999).

10 WFC alleges that the Elwha Defendants are implementing the hatchery programs  
 11 described in the Fish Restoration Plan for coho, chum and pink salmon, and steelhead. Dkt. 1, ¶¶  
 12 97, 104.<sup>6</sup> These activities are causing the injuries addressed in the Complaint. *See id.* at ¶ 114.  
 13 These activities are causing unlawful “take” of ESA-listed species. *Id.* at ¶ 116. WFC’s claim  
 14 against the Elwha Defendants for violating section 9 of the ESA therefore is ripe for review  
 15 because it does not rely on “future events that are too uncertain and speculative.” *See Chandler*,  
 16 598 F.3d at 1123.

17 The Elwha Defendants rely upon cases and arguments that are inapposite to this situation.  
 18 In *Ohio Forestry Ass’n v. Sierra Club*, the plaintiffs challenged the legality of the Forest  
 19 Services’ Federal Land and Resource Management Plan, under which the Forest Service could  
 20 not actually permit the timber harvesting activities discussed in the plan before engaging in  
 21 additional procedures. 523 U.S. 726, 728, 730 (1998). In *Ohio Forestry*, the Court noted “the  
 22

---

23 <sup>6</sup> Additionally, thousands of non-native Chambers Creek hatchery steelhead would have been released from the  
 24 Tribe’s hatchery into the Elwha River this Spring without the interim stipulated order entered by the Court. *See* Dkt.  
 25 19.

considerable legal distance between the adoption of the Plan and the moment when a tree is cut.”  
*Id.* at 730. Here, in contrast, the moment has come when the hatchery programs are being implemented and hatchery fish have been, and will continue to be, released into the Elwha River. WFC’s claim against the Elwha Defendants challenges their actual ongoing implementation of the hatchery programs, and the unlawful “take” occurring as a result of such activities. This claim is therefore ripe. *See Palila v. Hawaii Dep’t of Land & Natural Res.*, 639 F.2d 495, 497 (9th Cir. 1981) (ESA claim is proven by showing “that the alleged activity had some prohibited impact on an endangered species”); *Friends of Merrymeeting Bay v. Topsham Hydro Partners L.P.*, No. 2:11-CV-37-GZS, 2011 U.S. Dist. LEXIS 76583, at \*13 (D. Me. July 14, 2011) (“Whether a statutory violation is taking place now is not dependent on facts that have not yet been sufficiently developed.”).

Contrary to the Elwha Defendants’ argument, a delay in review of this claim will result in significant hardship to WFC. These hatchery programs are not subject to HGMPs that have been approved by NMFS to ensure that harm to wild fish is being appropriately minimized. In addition to causing unlawful “take” of ESA-listed fish, these activities are also harming the recovery of wild fish in the Elwha River. The court in *Friends of Merrymeeting Bay* rejected a dam operator’s similar argument that delaying review would not cause hardship:

The basis of this action is alleged damage to the declining Atlantic salmon population, and it is the hardship to that endangered species that is the proper focus of this portion of the ripeness inquiry. The evidence on this point is uniform; the plaintiffs allege that further delay could cause extinction of the species as a result of the alleged taking.

*Friends of Merrymeeting Bay*, 2011 U.S. Dist. LEXIS 76583, at \*14-15. The Court should similarly reject the Elwha Defendants’ argument that their ongoing implementation of hatchery programs causing unlawful “take” of ESA-listed salmonids is not ripe. Indeed, allowing “further

1 factual development” before judicial review, as the Elwha Defendants suggest, would result in  
 2 further irreparable harm to these species.

3 **C. Relief may be Granted for the Claim Stated Against the Elwha Defendants.**

4 The Court should deny the Elwha Defendants’ motion to dismiss for failure to state a  
 5 claim. The facts alleged in the Complaint, and the reasonable inferences drawn therefrom,  
 6 plausibly suggest that WFC is entitled to relief for its claim alleged against the Elwha  
 7 Defendants. *See Wilson*, 668 F.3d at 1140. The allegations demonstrate that the Elwha  
 8 Defendants are liable, in their official capacities, for implementing hatchery programs that are  
 9 causing “take” of ESA-protected species in violation of section 9 of the ESA.  
 10

11 As discussed *supra*, WFC alleges its claim against the Elwha Defendants in their official  
 12 capacities under the *Ex Parte Young* doctrine. It is therefore not necessary to allege personal  
 13 involvement of these individuals; all that is required is that the Complaint name officials whose  
 14 job duties relate to the hatchery operations and who could appropriately respond to an order on  
 15 injunctive relief. *See supra*, Sec. V.A.2 (and authorities cited therein). The Elwha Defendants  
 16 are officials of the Tribe charged with managing hatchery programs. *See* Dkt. 1, ¶¶ 29-32. The  
 17 Tribe is implementing the hatchery programs described in the Fish Restoration Plan for coho,  
 18 chum and pink salmon, and steelhead. *Id.* at ¶¶ 97, 104.  
 19

20 These hatchery programs harm ESA-listed fish through a variety of mechanisms. *See id.*  
 21 at ¶ 110. The hatchery fish breed with wild fish, resulting in offspring with reduced ability to  
 22 survive and reproduce in the wild. *Id.* at ¶ 111-12. The hatchery programs cause increased  
 23 competition for essential resources, including food and rearing space. *See id.* at ¶ 113. Hatchery  
 24 fish also prey on wild fish, expose wild fish to diseases, and cause increased predation. *Id.* The  
 25 broodstock collection activities also harm wild fish. *Id.* at ¶ 116. These hatchery programs are  
 26

1 therefore causing “take” of ESA-listed Chinook salmon, steelhead, and bull trout, which is  
 2 defined to include harm caused by significantly disrupting essential behavioral patterns, such as  
 3 breeding or feeding. 16 U.S.C. § 1532(19); 50 C.F.R. 17.3; 50 C.F.R. § 222.102.

4 Section 9 of the ESA prohibits take of protected species unless otherwise authorized. 16  
 5 U.S.C. § 1538(a)(1). NMFS has not approved HGMPs for the Elwha Defendants’ hatchery  
 6 programs, and the “take” being caused by these programs therefore violates the ESA. WFC’s  
 7 claim against the Elwha Defendants requests relief for these statutory violations. *See* Dkt. 1, ¶  
 8 183.

9  
 10 Establishing a violation of the take prohibition does not require the type of “proximate  
 11 causation” showing the Elwha Defendants suggest. *See Loggerhead Turtle v. County Council of*  
 12 *Volusia County*, 148 F.3d 1231, 1251 (11th Cir. 1998); *and see* 16 U.S.C. § 1538(g) (it is  
 13 unlawful to cause a “take” to be committed, or to solicit another to commit a “take”).  
 14 Regardless, as discussed above, the Complaint alleges sufficient facts to establish that Elwha  
 15 Defendants’ ongoing implementation of the hatchery programs described in the Fish Restoration  
 16 Plan are the direct and proximate cause of unlawful takes of ESA-listed salmonids.

17  
 18 The Elwha Defendants’ reliance on *Gregory Village Partners, L.P. v. Chevron U.S.A.,*  
 19 *Inc.*, 805 F.Supp. 2d 888, 898 (N.D. Cal. 2011) is misplaced. There, the plaintiffs failed to allege  
 20 that a defendant was an owner/operator of a parcel of land during the relevant time period to  
 21 establish that a violation of CERCLA occurred. *Id.* Here, WFC’s Complaint alleges that the  
 22 Elwha Defendants are presently officials charged with duties related to the Tribe’s fisheries,  
 23 including management of the hatchery, and that statutory violations are ongoing.

24  
 25 The Ninth Circuit has described what the Federal Rules of Civil Procedure require:  
 26  
 27  
 28



[The complaint must include sufficient allegations] to give the notice of the claim such that the opposing party may defend himself or herself effectively. The theory of the federal rules is that once notice-giving pleadings have been served, the parties are to conduct discovery in order to learn more about the underlying facts.

*Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011). This requires only a short and plain statement of the claim showing the pleader is entitled to relief, and not detailed factual allegations. *Iqbal*, 556 U.S. at 677-78. The Complaint provides adequate notice of WFC's claim that the Elwha Defendants' hatchery programs are causing unlawful "take" of ESA-protected species.<sup>7</sup>

**D. A More Definite Statement is Not Appropriate.**

Rule 12(e) provides that a defendant may move for a more definite statement if a complaint "is so vague or ambiguous that the [defendant] cannot reasonably prepare a response." FED. R. CIV. P. 12(e). Motions for a more definite statement are disfavored and rarely granted because of the minimal pleading requirements of the Federal Rules of Civil Procedure. *Sony Corp. v. LG Elecs. U.S.A., Inc.*, 768 F.Supp. 2d 1058, 1064 (C.D. Cal. 2011). Parties are expected to use discovery, not the pleadings, to learn the specifics of the claims being asserted. *Id.* A motion for a more definite statement is proper only when the complaint is so indefinite that the defendant cannot ascertain the nature of the claim asserted. *C.D. v. Sonora Sch. Dist.*, 691 F.Supp. 2d 1170, 1191 (E.D. Cal. 2010). As discussed herein, the allegations in the Complaint satisfy the notice pleading requirements, and a more definite statement is therefore not required.

---

<sup>7</sup> That the Complaint provided adequate notice of this claim is demonstrated by the fact that, while the Elwha Defendants have been implementing the hatchery programs unlawfully for some time, they are now finally seeking approval of HGMPs to authorize their conduct. See Dkt. 26, 9:13-10:3.



1 As described *supra*, the Complaint includes sufficient allegations to apprise the Elwha  
2 Defendants of the claim asserted against them—that their implementation of the hatchery  
3 programs for coho, chum and pink salmon, and steelhead as described in the Fish Restoration  
4 Plan is causing “take” of ESA-listed Chinook salmon, steelhead, and bull trout through a variety  
5 of mechanisms in violation of section 9 of the ESA. Further allegations are not necessary to  
6 satisfy the notice pleading standard.  
7

8 The cases cited by Elwha Defendants do not support their argument that a motion for a  
9 more definite statement is appropriate in this case. In *Sierra Club, Hawaii Chapter v. City &*  
10 *County of Honolulu*, 415 F. Supp. 2d 1119, 1128 (D. Haw. 2005), the court ordered the plaintiffs  
11 to provide a more definite statement because the plaintiffs did not oppose the defendants’  
12 request. Similarly inapposite is *Clark v. McDonald’s Corp.*, 213 F.R.D. 198, 234 (D.N.J. 2003),  
13 where the plaintiffs’ complaint did not identify which of the approximately 3,000 McDonalds  
14 restaurants throughout the country were alleged to be in violation of a statute, resulting in a lack  
15 of key allegations that were necessary to prove their case. Far from that “shotgun” pleading,  
16 WFC has specifically identified where the violations are occurring, the activities causing the  
17 violations, and the mechanisms by which the unlawful “takes” occur. These allegations provide  
18 sufficient specificity to satisfy the pleading standards for an ESA claim.  
19  
20

21 WFC should not be required to specify the scope of injunctive relief it will seek for the  
22 Elwha Defendants’ violations of the ESA. WFC’s request for permanent injunctive relief may  
23 include limits and conditions upon specific types of fish stocks, quantities of fish releases, dates  
24 and timing for releases, the scope of artificial propagation programs, monitoring requirements,  
25 and other details based upon a thorough scientific analysis. WFC should be allowed to obtain  
26 relevant data before preparing its request for permanent injunctive relief, including information  
27  
28

1 concerning the Elwha Defendants' hatchery operations and the results of any monitoring that has  
2 been conducted. The Elwha Defendants essentially ask the Court to order WFC to prepare its  
3 expert witness opinions at the pleading stage. This is not an appropriate request for a more  
4 definite statement, but rather is information that should be developed through the disclosure and  
5 discovery requirements.  
6

7         The Elwha Defendants' sweeping claim, based upon two outlying cases, that plaintiffs in  
8 ESA cases must provide specific details about the scope of injunctive relief at the pleading stage  
9 is misguided and inapplicable to this situation. In *Hawaiian Crow v. ('Alala) v. Lujan*, 906 F.  
10 Supp. 549, 553 (D. Haw. 1991), the court required the plaintiffs to amend their complaint  
11 concerning a single, narrow issue about whether their request for injunctive relief applied to all  
12 of the defendants' land or just the essential habitat portion. Such an either-or decision about the  
13 scope of the injunctive relief is simply not possible in a complex situation such as this where  
14 WFC does not yet have access to all of the relevant data about the activities at the Elwha  
15 Defendants' hatchery. The court in *Natural Res. Defense Council v. Kempthorne*, 539 F. Supp.  
16 2d 1155, 1191 (E.D. Cal. 2008), ordered the plaintiffs to specify whether they sought relief  
17 concerning water contracts with absent parties because if so, those parties would need to be  
18 joined to the action. A more definite statement may be necessary to determine whether all of the  
19 necessary parties are joined in an action, but it should not be required here where WFC has not  
20 conducted discovery to facilitate its evaluation of the scope of permanent injunctive relief it will  
21 seek.  
22  
23  
24  
25  
26  
27  
28

**E. To the Extent the Court Finds More Factual Allegations Appropriate, WFC Requests Leave to Amend its Complaint.**

The Federal Rules provide that a “court should freely give leave” to amend a pleading “when justice so requires.” FED. R. CIV. P. 15(a)(2). The Ninth Circuit has clarified that “this policy is to be applied with extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (internal citation omitted). A request for leave to amend a complaint “generally shall be denied only upon showing of bad faith, undue delay, futility, or undue prejudice to the opposing party.” *Chudacoff v. Univ. Med. Ctr.*, 649 F.3d 1143, 1152 (9th Cir. 2011) (internal citations omitted).

As discussed above, WFC has pleaded sufficient factual allegations to meet the federal pleading standards and to place the Elwha Defendants on notice of the claim alleged against them. However, to the extent the Court finds that more factual allegations would be appropriate in this case, WFC respectfully requests that the Court provide leave to file an amended complaint that addresses any factual inadequacies found by the Court.

**VI. CONCLUSION.**

For the foregoing reasons, WFC respectfully requests the Court deny Elwha Defendants’ Motion to Dismiss.

1 RESPECTFULLY SUBMITTED this 30th day of April, 2012.

2 By: s/ Brian A. Knutsen

3 Brian A. Knutsen, WSBA # 38806

4 Richard A. Smith, WSBA # 21788

5 Claire E. Tonry, WSBA # 44497

6 Smith & Lowney, PLLC

7 2317 East John St., Seattle, WA 98112

8 Tel: (206) 860-2883; Fax: (206) 860-4187

9 E-mail: briank@igc.org; rasmithwa@igc.org

10 clairet@igc.org

11 *Attorneys for Plaintiffs Wild Fish Conservancy,*  
12 *Wild Steelhead Coalition, Federation of Flyfishers*  
13 *Steelhead Committee, and Wild Salmon Rivers d/b/a*  
14 *Conservation Angler*  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 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.

s/ Brian A. Knutsen  
Brian A. Knutsen, WSBA # 38806  
Attorney for Plaintiffs  
Smith & Lowney, PLLC  
2317 E. John Street, Seattle, WA 98112  
Tel: (206) 860-2883; Fax: (206) 860-4187  
Email: briank@igc.org