HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY, *et al.*,	)	No. 3:12-CV-05109-BHS
Plaintiffs,	)	**REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF PLAINTIFFS' COMPLAINT**
v.	)	
NATIONAL PARK SERVICE, *et al.*,	)	
Defendants.	)	**[NOTE ON MOTION CALENDAR: May 4, 2012]**
	)	**ORAL ARGUMENT REQUESTED**

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Environment & Natural Resources Division
c/o U.S. Attorney's Office, 1000 SW Third Avenue
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INTRODUCTION

Federal Defendants have moved for partial dismissal of Plaintiffs' complaint because the 2008 Elwha River Fish Restoration Plan ("Fish Restoration Plan") is not final agency action under the Administrative Procedure Act ("APA") and does not authorize, fund, or carry out any Federal agency action within the meaning of the Endangered Species Act ("ESA"). We explained that the Fish Restoration Plan is a technical memorandum, compiled by Federal and non-Federal biologists and scientists, that provides the scientific framework and guidance for a variety of ecological and fishery activities to restore the Elwha River. It is not binding on any Federal agency and does not authorize any action. The document itself demonstrates that it is not the consummation of Federal agency decision-making, nor does it carry with it any legal consequences. In their opposition brief, Plaintiffs have presented three arguments on the question of whether the Fish Restoration Plan is a Federal agency action requiring NEPA and ESA compliance. As we explain below, these arguments are internally inconsistent, and improperly circumvent the six-year statute of limitations on the National Park Service's 1996 Record of Decision ("ROD"). 28 U.S.C. § 2401(a).

For the reasons discussed below, the Court should grant Federal Defendants' motion, narrow the claims for relief in this case, and the parties can proceed to the merits of the Plaintiffs' remaining claims.[1]

ARGUMENT

[1] Federal Defendants support Elwha Defendants' Motion to Dismiss or In the Alternative for a More Definite Statement, Doc 26. The Elwha Motion identifies deficiencies in the Complaint that are analogous to and consistent with the deficiencies identified by Federal Defendants. Federal Defendants acknowledge that the Lower Elwha Klallam Tribe was uniquely affected by the dams and instrumental in the passage of the Elwha Act, which was the product of unprecedented compromise by numerous stakeholders.

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Plaintiffs first contend it is the alleged "*decision*" to authorize, fund, and implement activities within the Fish Restoration Plan that is the final agency action contested in this case. Plaintiffs' Resp. to Fed. Defs.' Mot. for Partial Dismissal ("Pls.' Resp.") at 14 (emphasis in original). But they do not identify which agency "decision" they are challenging. The crux of Plaintiffs' dispute appears directed at the decision to fund hatcheries on the Elwha River. *See* Pls.' Resp. at 16 ("such as funding the Tribe's hatchery"); Pls.' Compl. ¶ 103 (challenging the disbursement of funds for construction of the Tribe's hatchery). Yet the decision to provide Federal funding for hatcheries to protect Elwha fish stocks during dam removal was executed in 1996 by the Park Service. Fed. Defs.' Mot. Dismiss, Ex. 2, 1996 ROD at 2. Therefore, Plaintiffs are time-barred from challenging that "decision" here. 28 U.SC. § 2401(a).

Perhaps recognizing that identifying the decision to fund these hatcheries would be fatal to their case, Plaintiffs reverse course and argue that the Fish Restoration Plan, itself, is actually final agency action subject to judicial challenge under the APA and ESA. *Id.* at 16. But this contradicts their previous argument that final agency action resulted from unspecified "decisions." *See* Pls.' Resp. at 14 ("It is immaterial whether this document itself is a final agency action."); *see also id.* at 25 ("Federal Defendants argue that the Fish Restoration Plan does not itself authorize, fund, or carry out activities. This is irrelevant."). These contradictions are never explained. Moreover, the 2008 Fish Restoration Plan is not final agency action because although it provides a framework for the activities among the three sovereigns, it does not authorize, fund, or implement any of the actions. It is technical, scientific guidance. Indeed, the NOAA Science Center (the entity that issued this document, but was not named as a defendant here) could withdraw the Fish Restoration Plan tomorrow *and nothing would change*.

This is true because the tasks of authorizing, funding, and implementing specific actions are left to the responsible sovereign officials who have the authority to bind their respective agencies. This authority is independent and distinct from the Fish Restoration Plan. *See e.g.* Ex. 4 at Chapter 1 at 1.1 & 1.2 (Park Service Manual for delegation of authority).[2]

And finally, Plaintiffs assert that the Court should compel the Federal agencies to issue a ROD on the Fish Restoration Plan because a "decision" has been "unlawfully withheld." Pls.' Resp. at 21. This argument is a concession that the Fish Restoration Plan is not a decision document, authorized by agency decision-makers, that carries with it legal consequences.[3] Otherwise there would be no reason to request the Court to "compel agency action unlawfully withheld." *Id.* at 21.

In contrast to these internally inconsistent arguments, Federal Defendants and the Lower Elwha Klallam Tribe ("Tribe") have made a straightforward showing: Plaintiffs need to identify which restoration and fishery activities they are challenging because the current complaint does not provide the requisite specificity to invoke this Court's jurisdiction. Plaintiffs, however, chose not to provide this specificity and this failure is not some mere, technical pleading

[2] NMFS is in the process of reviewing the Hatchery Genetic Management Plans ("HGMPs") submitted by the State of Washington and the Tribe for the operation of long-term hatchery programs. NMFS plans to conduct NEPA and ESA analyses on these proposals in accordance with 50 C.F.R. § 223.203 and will once again analyze the effect of Federal funding for these specific hatchery program proposals, many of which are contemplated in the Fish Restoration Plan. NMFS anticipates that the NEPA and ESA consultation will be complete shortly after a 30 day public comment period which will occur this summer. It is likely that upon completion of these final decision documents (which, unlike the Fish Restoration Plan, will be reviewable final agency actions) Federal Defendants would move to dismiss this entire case as moot. Plaintiffs will be free to challenge the merits of these decisions provided they meet the necessary jurisdictional requirements.

[3] This is an entirely new claim for relief that was not pled in Plaintiffs' Complaint. Pls.' Resp. at 21 n.12 (requesting leave to file an amended complaint). Allowing Plaintiffs to amend their complaint at this date would prejudice Federal Defendants, and the Court should deny Plaintiffs' belated request.

deficiency. For example, although Plaintiffs repeatedly contend that all of the named Federal agencies implement "large-scale hatchery programs," the Fish Restoration Plan makes clear that the State of Washington and the Tribe actually implement these programs, not the Federal agencies. Ex. 1, Tech. Memo. at 8 ("The role of the WDFW and Elwha tribal hatcheries throughout the restoration effort is to preserve extant populations during dam removal."); *see also id.* 11-14 (describing WDFW and Tribal hatchery facilities). The only significant Federal nexus to these particular hatchery programs is funding. While it is true that the Park Service funds some of these hatchery programs, it is beyond dispute that the decision to fund hatcheries was made in 1996 and has undergone multiple NEPA and ESA analyses. Ex. 2, 1996 ROD at 2; *see also* Pls.' Compl. ¶¶ 119-125 (recognizing that the Park Service consulted under ESA § 7 on the 1996 decision to fund hatcheries and various restoration and fishery activities detailed in the 1996 Fish Restoration Plan). Without further specificity, the parties and Court are left to guess whether there is jurisdiction.

In sum, Plaintiffs have been given the opportunity to identify which Federal agency action or decision they are challenging and declined to do so. The internal inconsistencies and evasiveness in Plaintiffs' arguments lead to only one conclusion – they are attempting to circumvent the six-year statute of limitations on the Park Service's 1996 decision to fund hatchery programs to protect and restore native Elwha fish species. Based on Plaintiffs' complaint and now their opposition brief, this Court lacks jurisdiction over the contested claims.

I. PLAINTIFFS MISSTATE THE PROPER STANDARD OF REVIEW.

Relying almost exclusively on an unpublished case from the Western District of Pennsylvania, Plaintiffs advance the novel argument that because they have made an allegation

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that there is final agency action somehow related to the Elwha River, it is now Federal Defendants' burden to disprove this legal conclusion by filing a declaration or affidavit with the Court contesting this vague generalization. Plaintiffs have it exactly backwards. The burden of establishing subject matter jurisdiction in response to a Rule 12(b)(1) motion belongs to Plaintiffs. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996); *Friends of Roeding Park v. City of Fresno*, _ F. Supp. 2d _, 2012 WL 293602 (E.D. Cal. 2012); *Pac. Coast Fed'n of Fishermen's Ass'ns/Inst. for Fisheries Res. v. Gutierrez*, 2007 WL 1752289 (E.D.Cal. 2007) ("Plaintiffs bear the burden of proving the existence of subject matter jurisdiction which here includes 'identifying specific federal conduct and explaining how it is final agency action within the meaning of 5 U.S.C. § 551(13).'" (citation omitted).

In addition, according to Plaintiffs, filing a declaration would create a factual dispute, which in turn warrants denying Federal Defendants' motion, ordering discovery, and proceeding to trial or an evidentiary hearing. Pls.' Resp. at 28-29. This circular logic does not exist in the Ninth Circuit and inverts the well-established rule that it is Plaintiffs' burden to demonstrate that this Court has jurisdiction.[4] *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (plaintiff may not rely on a "bare legal conclusion" to establish jurisdiction); *Colo. Farm Bureau*

[4] Plaintiffs seem to confuse the difference between a facial and factual motion to dismiss under Rule 12(b)(1). As noted in our opening motion, to the extent we rely on allegations from the Plaintiffs' complaint, Federal Defendants accept these allegations as true only at this stage of the proceedings. Fed. Defs.' Mot. Dismiss. at 9 n.4. Further, we have only relied on publicly available documents almost all of which are referenced in Plaintiffs' complaint. There is no factual dispute as to whether the Fish Restoration Plan is final agency action because this is a legal inquiry appropriate for disposition under Rule 12. *See Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 592 (9th Cir. 2008) (dismissing for lack of final agency action on a Rule 12(c) motion). Review of the document, as well as the other publicly available documents referenced in the complaint, establishes that neither prong of the finality requirement has been met. Merely alleging a contrary legal conclusion, labeling it as a factual assertion, and then maintaining there is a factual dispute to avoid dismissal, conflates the proper inquiry and runs counter to the well-established principle it is Plaintiffs' burden to establish jurisdiction.

Fed'n v. U.S. Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000) ("Whether federal conduct constitutes final agency action within the meaning of the APA is a legal question."); *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981) (noting that in determining justiciability and standing, court does not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations").

Plaintiffs' assertions that their allegations of final agency action remain "undisputed" and "uncontroverted," *see* Pls.' Resp. at 14-15, are belied by Federal Defendants' motion to dismiss and supporting exhibits. For example, on its face, Exhibit 1 (the 2008 Fish Restoration Plan) demonstrates that the plan itself is not final agency action. Exhibit 2 (the 1996 ROD) and Exhibit 3 (Appendix 2: Fish Restoration Plan) likewise facially demonstrate that the decisions to use hatcheries and outplant fish were made long ago. Plaintiffs' exceedingly vague allegations of "authorization," "implementation," and "funding" do not change the reality that the challenged Federal actions occurred in 1996 and are time-barred from challenge. Federal Defendants properly disputed the allegations in the complaint, and Plaintiffs have failed to carry their burden of establishing subject matter jurisdiction by identifying discrete, final agency action. *See Thompson v. McCombe*, 99 F.3d at 353.

II. THE FISH RESTORATION PLAN IS NOT AN AGENCY ACTION REQUIRING NEPA AND ESA REVIEW.

A. The Fish Restoration Plan is Not the Consummation of Agency Decision-making.

Plaintiffs argue that the Fish Restoration Plan marks the consummation of Park Service, NMFS, FWS, and Interior and Commerce defendants' decision-making process. In support, Plaintiffs primarily rely on the Park Service's website, which provides nothing more than a

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citation to the Fish Restoration Plan informing the public of its availability. Pls.' Resp. at 16. Plaintiffs neglect to explain how this one-line citation on a website demonstrates that this is the "last word" on an extraordinary range of fishery and restoration activities. In contrast, in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 592 (9th Cir. 2008), the court found there was the consummation of Corps' decision-making because "the approved jurisdictional determination states on its face that it 'is valid for a period of five (5) years' and that the Corps' position would change only if 'new information supporting a revision is provided.'" Similarly, in *Oregon Natural Desert Association v. U.S. Forest Service*, 465 F.3d 977, 985 (9th Cir. 2006), the court found consummation of agency decision-making because the "Forest Service arrived at a definitive position to allow grazing in the Malheur National Forest and put that decision into effect by issuing grazing permits." *Id.* at 985. No such circumstances exist here.

Unlike a defined jurisdictional statement or issuance of a signed grazing permit, there is no affirmative statement obligating any Federal agency anywhere in the Fish Restoration Plan. By its own terms, the plan does not purport to bind any entity and makes clear that it is only scientific guidance that can be followed or ignored. Ex.1, Tech. Memo. at 1 (identifying "research, methodologies, and strategies" and describing "methods proposed" for restoration). As this Court has found, Science Center technical memoranda, like the one here, are not binding on an agency. *Salmon Spawning & Recovery Alliance v. Lohn*, No. 06-cv-1462 RSL, 2008 WL 782851, at *6-7 (W.D. Wash. Mar. 20, 2008), *aff'd* 342 Fed. Appx. 336 (9th Cir. 2009). In fact, the State and Tribe are seeking approval by NMFS of their HGMPs, which will likely result in changes or modifications for the implementation of these hatchery programs. Elwha Mot.

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Dismiss at 9 ("Each of these hatchery programs will be the subject of a NOAA-approved Hatchery and Genetic Management Plan ("HGMP"), which will identify and define the precise scope of the activities associated with the implementation of the program, including measures calculated to protect ESA-listed fish . . . .").

The Fish Restoration Plan is precisely the type of "tentative recommendation" discussed in *Bennett*, 520 U.S. at 178. To be sure, there will be more deliberate and binding decision-making by the agencies in the future – for example, this finality is expected to occur in NMFS's forthcoming NEPA and ESA decisions on the State and Tribe's HGMPs – but this process can only be triggered by submission of the HGMPs to NMFS. When completed, Plaintiffs will be free to attempt a challenge, but in the interim a bare allegation that there has been consummation of decision-making is insufficient.

B. <u>The Fish Restoration Plan Does Not Carry Any Legal Consequences.</u>

Plaintiffs contend that the Fish Restoration Plan has legal consequences because it was prepared "under the Elwha Act." Pls.' Resp. 17-18. They further allege the Plan will have legal consequences from "physical impacts on the environment" and therefore must be final agency action. *Id.* 18-19. Neither contention is persuasive.

The Elwha Act directed the Secretary of the Interior to "prepare a report on the acquisition of the Projects and his plans for the full restoration of the Elwha River ecosystem and the native anadromous fisheries *and submit such report on or before January 31, 1994 . . . .*" Pub. L. 102-495 § 3(c) (emphasis added). The parameters and content of this report were detailed in § 3(c)(1) through (c)(5). *Id.* The Elwha Act further provides that

> Effective sixty days after submission of the report referred to in section 3(c) and following the conveyance in section 3(e), the Secretary is authorized and directed,

> subject to the appropriation of funds therefor, to take such actions as are necessary to implement – (1) the definite plan *referred to in section 3(c)(2)* for the removal of the dams and full restoration of the Elwha River ecosystem and native anadromous fisheries . . . .

Id. § 4(a)(1) (emphasis added). The definite plan "referred to in section 3(c)(2)" is the 1994 Elwha Report. *See id.* § 3(c)(2) ("The report shall include feasibility studies for each alternative considered and a definite plan for removal."). In 1994, the Secretary submitted the Elwha Report to Congress. *See* Fed. Defs.' Exhibit 7 (excerpts of "1994 Elwha Report"). Following submission, the Secretary began implementing the Report.

Plaintiffs contend that the Elwha Act requires the Secretary to implement the 2008 Fish Restoration Plan and therefore it must have legal consequences. This is not a reasonable reading of the statute. The Elwha Act required the Secretary to implement the Elwha Report 60 days after submittal to Congress. Although there was an appendix attached to the Report that contained a fish restoration plan, the Act does not speak to a 2008 Fish Restoration Plan. The Secretary discharged his duty under the Elwha Act when he began implementing the Report in 1994. Plaintiffs cite no authority for the proposition that there is a continuing Secretarial duty under the Elwha Act, and the plain language of the statute certainly does not support such a reading.

To illustrate, a motion to compel compliance with the 2008 Fish Restoration Plan under the Elwha Act could not occur because the Act does not specify this mandate. *See Southern Utah Wilderness Alliance v. Norton*, 542 U.S. 55, 59-65 (2004). Moreover, even if Plaintiffs' reading of the Act were correct, any challenge to the utilization and funding of hatcheries would be time-barred. The 1994 Elwha Report clearly stated that: "Hatchery support will be required to develop and maintain broodstock for outplanting. For this purpose, the two existing fish

production facilities in the lower river (those of the Washington Department of Fisheries and the Lower Elwha S'Klallam Tribe) would be modified to produce juvenile fish for outplanting." Ex. 7, *id.* at p. 101. Under Plaintiffs reading, this decision was made by the Secretary in 1994 and to the extent Plaintiffs disagree with this decision under the Elwha Act, they are 17 years too late in bringing their challenge.

Finally, Plaintiffs attempt to assign legal consequence to the Plan because the State, Tribe, or Federal government may, in the future, decide to implement the strategies therein, physically impacting the environment. However, as discussed previously, the Plan itself does not authorize, fund, or implement any action, and therefore has neither legal nor physical effects. As explained in *Fairbanks North Star*, "agency action that left the world just as it found it . . . cannot be fairly described as implementing, interpreting, or prescribing law or policy." 543 F.3d at 594 (internal citations omitted).[5]

C. The Fish Restoration Plan is Not an Affirmative Agency Action Requiring Consultation Under the ESA.

[5] Plaintiffs also rely on *Tuggle* and *Stout* for the categorical proposition that species management plans are final agency actions. ECF No. 31 at 19:3-18. These cases are inapposite because the agency actions challenged in those cases determined legal rights or imposed binding obligations. At issue in *Tuggle* was a standard operating procedure (SOP) for Mexican wolf management, promulgated under authority from a Memorandum of Understanding (MOU)—signed by federal defendants. *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1109-10 (D. Ariz. 2009). The procedure was a final agency action because it resembled an annual operating instruction for grazing—an instrument that "instructs the permit holder as to how federal law and regulatory standards apply," and "result[s] in the imposition of enforceable rights and obligations on the permittee." *Id.* at 1112. The court concluded the operating procedure established "direct and immediate" protocols for conducting wolf control actions. *Id.* at 1114. Similarly, in *Stout*, the court determined a Wild Horse Plan issued by the Forest Service was final agency action because it "had a direct and immediate effect on the agency's day-to-day operations, and required immediate compliance with its terms." *Stout v. U.S. Forest Serv.*, 2011 U.S. Dist. LEXIS 23570, *22 (D. Or. 2011). In contrast to *Tuggle* and *Stout*, the 2008 Plan determines no rights, imposes no obligations, and demands no compliance. It is a technical memorandum that identifies scientific research, methodologies, and strategies for preservation and restoration of fish stocks.

Plaintiffs contend that the APA does not apply to ESA citizen suit cases. These arguments run counter to the Supreme Court's decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), which evaluated whether the Environmental Protection Agency ("EPA") had complied with the ESA § 7(a)(2), and unambiguously imported the APA, including the finality requirement, 5 U.S.C. § 704, into their ESA evaluation. *See id.* at 659 ("The federal courts ordinarily are empowered to review only an agency's final action, *see* 5 U.S.C. § 704"); *see also id*. at 657 (applying the APA's "arbitrary and capricious" standard of review to EPA permitting decision); *id*. at 658 (suggesting the appropriate APA remedy would have been to remand to the agency); *id.* (recognizing the APA's harmless error under 5 U.S.C. § 706). Plaintiffs' bald assertion that Federal Defendants have disregarded "controlling precedent," with no real substantive response to the Supreme Court's decision is not compelling.[6]

Regardless of whether the APA finality requirement applies in an ESA citizen suit case, Plaintiffs have still failed to demonstrate that the Fish Restoration Plan "authorizes, funds, or carries out" an *affirmative* agency action triggering the consultation requirements under ESA §

[6] Plaintiffs also contend that the Ninth Circuit's decision in *Western Watersheds v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011) and *Karuk Tribe of California v. U.S. Forest Service*, 640 F.3d 979, 992 (9th Cir. 2011) support its position. With respect to *Kraayenbrink*, that opinion is internally inconsistent. *Compare Kraayenbrink*, 632 F.3d at 496 (noting that Section 706 of the APA governs review of the ESA claim), *with id.* at 497 (declining to apply the APA). As to *Karuk Tribe*, Plaintiffs neglect to note that in taking the case *en banc*, the Ninth Circuit directed that the panel decision is not to be cited as precedent to any court of the Ninth Circuit. 658 F.3d 953 (9th Cir. 2011). In any event, Plaintiffs omit that in the panel decision, the Ninth Circuit also issued the following statement which is supportive of our position here: "Where the agency is not the authority that empowers or enables the activity, because a preexisting law or contract grants the right to engage in the activity subject only to regulation, the agency's decision not to regulate (be it based on a discretionary decision not to regulate or a legal bar to regulation) is not an agency action for ESA purposes." 632 F.3d at 992.

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7(a)(2), 16 U.S.C. 1536(a)(2). Plaintiffs' primary response is that Federal Defendants "have not presented any evidence to refute the allegations that they are, *in fact*, authorizing, funding, and implementing hatchery operations . . . ." Pls.' Resp. at 25. This is not the standard – it is Plaintiffs' burden. More importantly, this ignores the reality that nothing in the 2008 Plan establishes this legal assertion and Federal Defendants provided the Court with the 1996 ROD that acknowledges the Park Service funds some aspects of these hatchery programs. This 1996 ROD is the affirmative final agency action, but a challenge to it is time-barred. Besides funding, Plaintiffs fail to identify any other Federal affirmative action.

Plaintiffs' reliance on *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988) and *Pacific Rivers Council*, 30 F.3d 1050, 1053 (9th Cir. 1994) is misplaced. In *Connor* there was no dispute that the NEPA Finding of No Significant Impact ("FONSI") and lease-sale for mining were issued by the Forest Service and were agency action within the meaning the ESA. The dispute was over whether the biological opinion was broad enough in scope to cover all the temporal phases of the lease-sale. *Connor*, 848 F.2d at 1452-53. *Pacific Rivers* similarly involved a dispute over whether the Forest Service's Land Resource Management Plans ("LRMPs") had an on-going effect triggering the obligation to consult. 30 F.3d at 1053. The Forest Service conceded that the LRMPs were agency action within the meaning of the ESA when they were adopted, but maintained that it did not have to consult because there was no on-going effect to species once adopted. *Id.* Here, the dispute is not over whether there is an on-going effect or whether the existing consultation was sufficiently broad; the dispute is much more basic – the Fish Restoration Plan does not authorize, fund, or carry out any Federal agency action because it is nothing more than a technical memorandum providing scientific guidance.

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Plaintiffs' failure to identify one affirmative agency action within the meaning of the ESA cannot be casually cast aside as "immaterial" or "irrelevant." *See* Pls.' Resp. at 14, 25.[7]

III. THE DEPARTMENT OF COMMERCE AND INTERIOR DEFENDANTS MUST BE DISMISSED.

The parties agree that ESA citizen suits cannot be brought against the Department of Commerce and Interior Defendants for maladministration of the ESA. Pls.' Resp. at 27 ("the ESA citizen suit provision provides for claims against regulated agencies for violating the substantive requirements of the statute, but not claims against FWS and NMFS for errors in their administration of ESA."); *see also Bennett v. Spear*, 520 U.S. at 173. However, Plaintiffs contend that they are challenging the Interior and Commerce defendants in their roles as "action agencies" because they "have violated the substantive requirements of the ESA in approving, funding, and implementing the activities described in the Fish Restoration Plan." Pls.' Resp. 27. The problem with Plaintiffs' argument is that their complaint is devoid of any specific allegation that would support this assertion. Indeed, the paragraphs Plaintiffs identify (¶¶ 156, 164, 174, 178, 180) are nothing more than bare legal conclusions that "Federal Defendants" have allegedly violated the ESA. *Id.* Plaintiffs' complaint does not provide the requisite factual assertions and fails to specifically allege that the Commerce and Interior defendants are violating the

[7] Plaintiffs also maintain that their bare allegation, that helicopter flights have been authorized within the Wilderness area, is sufficient to survive Federal Defendants' motion. An allegation must be formed after a reasonable inquiry and have some evidentiary support, and here there is no factual basis to support the notion that helicopter flights for the purpose of hatchery out-planting are occurring or will occur in the near future. This Court must presume the Park Service "will follow the law." *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010). And the Park Service has explained that it must follow its regulations and policies before authorizing these flights. Fed. Defs.' Mot. Dismiss at 28-29. Plaintiffs must present something more than a simple allegation, without any factual support, to overcome the presumption that the Park Service will follow the law. *Id.* In the absence of this showing, Plaintiffs have failed to establish that their Wilderness Act claim is ripe for review.

substantive provision of the ESA as "action agencies." In light of the Supreme Court's express distinction in *Bennett,* that Commerce and Interior defendants are not subject to maladministration suits, Plaintiffs' complaint is deficient.[8] *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Swan View Coal. v. U.S. Forest Serv.*, 09-CV-127-DWM (April 26, 2010, D. Mt.), slip opinion at 8-13 (complaint alleging that an amended record of decision (environmental analysis), without detailing which specific agency action violated the ESA, was insufficient under *Iqbal* and *Twombly*). These defendants should be dismissed.

CONCLUSION

For the reasons set forth below the Court should dismiss claims for relief: 1, 3, 4, 7, 10, and 11 against all named Federal Defendants. We also request dismissal of claims for relief: 4, 5, 7, and 8, against the following Department of Commerce and Interior defendants: United States Department of the Interior; Kenneth Salazar; United States Fish and Wildlife Service; Daniel M. Ashe; United States Department of Commerce; John E. Bryson; NOAA Fisheries; Samuel D. Rauch III.[9]

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[8] To the extent necessary, Federal Defendants move under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *See* Fed. Defs.' Mot. Dismiss at 2 n.1.

[9] Plaintiffs' final contention that an evidentiary hearing or discovery would be proper in this case, brought pursuant to the APA and ESA, is completely at odds with well-established Supreme Court and Ninth Circuit case law. In this case, "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006); *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984) ("Because the ESA contains no internal standard of review, section 706 of the [APA], 5 U.S.C. § 706, governs review of the Secretary's actions."); *see also Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004) (same). If additional explanation beyond the administrative record is necessary, the proper course is not to

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

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hold a *de novo* evidentiary hearing, but to provide the agency an opportunity to submit further explanation. *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980) (quoting *Camp*).

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