The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY, et al., Plaintiffs, vs. NATIONAL PARK SERVICE, et al., Defendants.	No. 3:12-CV-05109-BHS ELWHA DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT NOTE ON MOTION CALENDAR: May 4, 2012 ORAL ARGUMENT REQUESTED

INTRODUCTION

As the Elwha Defendants explained in their opening brief, Plaintiffs' complaint fails to make any factual allegations to support the bare legal conclusion that the Elwha Defendants are in violation of section 9 of the Endangered Species Act "through the preparation, authorization, funding, and/or implementation of the Fish Restoration Plan and the activities described therein." This fundamental deficiency is fatal to Plaintiffs' claim. Because their complaint lacks any factual allegations that the respective Elwha Defendants are engaged in or have control over activities that actually kill or injure ESA-listed fish, Plaintiffs fail to state a claim against the

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Elwha Defendants upon which relief can be granted. Plaintiffs also necessarily fail to establish their constitutional standing as to the Elwha Defendants or to establish that any dispute with them is ripe for judicial review.

Plaintiffs nevertheless seek to defend their complaint by manufacturing allegations that appear nowhere on the face of the complaint. They further seek to mask their failure to allege any facts against the Elwha Defendants by misstating not only the legal standards that control their "take" claim under section 9 of the ESA but also the pleading requirements of the *Ex Parte Young* doctrine. Plaintiffs' obfuscation of the facts and the law does not cure the fundamental deficiency in their complaint, and does not justify maintaining this action as to the Elwha Defendants. Plaintiffs' claim, which seeks to wrest control of the Elwha River fish restoration effort from the three sovereigns charged by Congress to direct that effort, should accordingly be dismissed. In the alternative, Plaintiffs should be required to file a more definite statement.[1]

ARGUMENT

I. Plaintiffs Fail to Make Any Substantive Factual Allegations Against the Elwha Defendants to Establish Their Constitutional Standing or Ripeness

Throughout their response, Plaintiffs repeatedly cite the same paragraphs of the complaint: paragraphs 29–32, 97, 104, 110–114, 116, 183. Paragraphs 29–32 allege that the respective Elwha Defendants are (1) the Director of the River Restoration Project for the Lower Elwha Klallam Tribe, (2) the Hatchery Manager and Fisheries Biologist for the Tribe, and a co-author

[1] The Elwha Defendants concur in and support the Federal Defendants' motion for partial dismissal. Doc. 25. Both the Elwha Defendants' motion and the Federal Defendants' motion address Plaintiffs' failure to plead cognizable legal claims. The Federal Defendants also recognize that the Elwha Act and the removal of the dams represents a high level of sustained collaboration of federal, tribal, and state governments, and public and private interests. The Federal Defendants are also correct that Plaintiffs passed up numerous opportunities over the past fifteen years to voice their concerns. *See* Doc. 25 at 2:23 to 3:13, 16 n.6.

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of the Fish Restoration Plan, (3) the Fisheries Manager for the Tribe, and (4) the Fisheries Habitat Biologist and Manager for the Tribe. Paragraphs 97 and 104 allege that the Lower Elwha Klallam Tribe itself, which is not a party to this action, is implementing activities described in the Fish Restoration Plan, including hatchery programs for salmon and steelhead. Paragraphs 110–114 and 116 broadly allege that hatchery programs adversely affect the recovery of native fish populations and produce impacts that constitute "take." Finally, paragraph 183 alleges in vague and conclusory fashion that the Elwha Defendants are in violation of section 9 of the ESA "through the preparation, authorization, funding, and/or implementation of the Fish Restoration Plan and the activities described therein."

Absent from these paragraphs is any allegation that any of the several Elwha Defendants is engaged in or has control over specific activities that actually kill or injure ESA-listed fish or cause harm to Plaintiffs. Although the complaint purports to challenge the 191-page Fish Restoration Plan in its entirety (including the dozens of hatchery-related, habitat restoration, and monitoring and adaptive management activities described in the Plan), Plaintiffs' response indicates that their claim may be limited to the release of hatchery fish into the Elwha River, *see* Doc. 32 at 5:14–22, 8:17–27, 13:2–3, and to broodstock collection, *see id.* at 14:27–28. The complaint, however, fails to allege that Mr. Elofson, Mr. Ward, Mr. Morrill, and Mr. McHenry, or any of them, are responsible for the release of hatchery fish, for broodstock collection, or for any other activities described in the Fish Restoration Plan. Moreover, while the complaint alleges the Elwha Defendants' job titles, Compl. ¶¶ 29–32, it does not allege their job duties, let alone allege facts to support any inference that those duties include activities that cause "take."

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Plaintiffs seek to overcome their failure to allege any facts against the Elwha Defendants by misstating the substance of the complaint. Plaintiffs assert, for example, that "the Elwha Defendants have operated and continue to operate the hatchery and release hatchery fish into the Elwha River," citing paragraph 183. Doc. 32 at 5:26–28. But paragraph 183 says no such thing—nor do any other paragraphs of the complaint allege that the Elwha Defendants operate the hatchery or release hatchery fish. Nevertheless, Plaintiffs repeatedly mischaracterize the complaint as alleging that the Elwha Defendants are engaged in the ongoing implementation of the hatchery programs described in the Fish Restoration Plan. *See, e.g.*, *id.* at 11:28 to 12:1, 12:12–13, 14:8–9, 15:15–18. These statements should be disregarded.

Because Plaintiffs fail to make any "factual allegations of injury" that have any "causal connection" to the respective Elwha Defendants' conduct, Plaintiffs lack constitutional standing as against the Elwha Defendants and their claim should be dismissed for lack of subject matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also* Doc. 26 at 15:7 to 16:9. Similarly, while Plaintiffs' complaint reflects their philosophical opposition to hatchery programs and the role of such programs in restoring native fish populations, it fails to allege sufficient facts to establish that there is any dispute with the Elwha Defendants that is ripe for judicial review. *See* Doc. 26 at 16:11 to 18:3.

II. Plaintiffs Fail to State a Claim Against the Elwha Defendants Under Section 9 of the ESA Upon which Relief Can Be Granted

Plaintiffs also seek to overcome their failure to allege any facts against the Elwha Defendants by misstating the legal standards that control their "take" claim. Plaintiffs repeatedly equate the mere existence and operation of the Tribe's fish hatchery with a violation of section 9.

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See, e.g., Doc. 32 at 9:1–5, 11:17–19, 15:4–7. But the ESA does not prohibit fish hatcheries, it prohibits "take," and no court has ever held that hatcheries *per se* cause "take" of listed fish. To the contrary, Congress and the Ninth Circuit have recognized that hatchery supplementation may play an appropriate role in the conservation and recovery of threatened species under the ESA, and NMFS has accordingly listed hatchery-spawned Elwha River Chinook salmon and steelhead as threatened alongside their naturally-spawned counterparts. *See* Doc. 26 at 11:1–17.

To establish "take" by showing "harm," Plaintiffs must allege and prove that each of the Elwha Defendants is engaged in an activity that "actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102 (defining "harm"). Moreover, "[t]he balance of [Ninth Circuit] authority suggests that a population level effect is necessary for harm resulting from habitat modification to be considered a take." *Coal. for a Sustainable Delta v. McCamman*, 725 F. Supp. 2d 1162, 1170 (E.D. Cal. 2010).

Plaintiffs purport to recite the definition of "harm," but omit the critical requirement that habitat modification *actually kill or injure* fish. *See* Doc. 32 at 15:1–3. Plaintiffs also erroneously suggest that hatchery programs cause "take" by "impeding" or "hindering" the recovery of wild fish populations. *Id.* at 8:21–22, 11:1–2. This Court has rejected that standard. *See Seattle Audubon Soc'y v. Sutherland*, No. 06-CV-1608, 2007 WL 2220256, at *8 (W.D. Wash. Aug. 1, 2007) (Pechman, J.) ("The Court will not entertain the possibility of a preliminary injunction based on an 'impairment of recovery' theory. When interpreting the federal regulatory definition of 'harm,' the Supreme Court made clear that 'actual death or injury of a protected animal is

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necessary' to prove harm by habitat modification. . . . Given the Supreme Court's holding in [*Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 691 n.2 (1995)], evidence that recovery of a species is impaired, without a showing of likely death or injury, is insufficient to prove ESA take.").

Plaintiffs further misapprehend their legal burden by arguing that they are not required to allege and prove that the Elwha Defendants' actions proximately cause "take." *See* Doc. 32 at 15:10–12. The Supreme Court, the Ninth Circuit, and the lower federal courts have in fact made clear that plaintiffs must show proximate causation under the ESA. *See* Doc. 26 at 18:18 to 19:2; *see also Coal. for a Sustainable Delta*, 725 F. Supp. 2d at 1170–71 (noting *Sweet Home's* requirements of proximate causation and foreseeability); *Aransas Project v. Shaw*, __ F. Supp. 2d __, No. 2:10-cv-00075, 2011 WL 6033036, at *19 (S.D. Tex. Dec. 5, 2011) (denying motion for summary judgment because there were "genuine issues of fact as to Defendants' actions being the proximate cause of a 'take' of Whooping Cranes").[2]

Plaintiffs' general allegations regarding the adverse impacts of hatchery fish on wild fish, Compl. ¶¶ 110–114, 116, and the Tribe's implementation of hatchery programs, *id.* ¶¶ 97, 104, fall far short of establishing the necessary elements of a section 9 "take" claim. And Plaintiffs' bare assertion that the Elwha Defendants have violated the ESA, *id.* ¶ 183, is a legal conclusion that is not entitled to the assumption of truth on a motion to dismiss. *See* Doc. 26 at 18:13–17. The complaint thus does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" that the Elwha Defendants are engaged in or have control

[2] Plaintiffs' reliance on *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998), is misplaced. In that case, the Eleventh Circuit found that a showing of proximate cause was not required to establish constitutional standing, but it made no such finding with respect to section 9 "take" liability. *See id.* at 1250–51 & n.23.

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over activities that proximately cause the actual death or injury of ESA-listed fish, let alone that have a population level effect on those fish, and therefore is subject to dismissal for failure to state a claim upon which relief can be granted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiffs cannot sustain a "take" claim simply because they object to the collective judgment of the United States, the Tribe, and the state of Washington that hatchery programs are necessary to prevent the extirpation of native Elwha River fish species from heavy sedimentation released during and after dam removal, and to facilitate the long-term recovery of those populations. *See* Doc. 26 at 10:4–20 & n.5. Plaintiffs assert several claims under section 7 of the ESA against the Federal Defendants because they contend that these hatchery programs "may affect" ESA-listed fish, 50 C.F.R. § 402.14(a), and further contend that the Federal Defendants failed to comply with procedures to insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species," 16 U.S.C. § 1536(a)(2). *See* Compl. ¶¶ 153–175. These section 7 standards and procedures do not, however, apply to the Elwha Defendants, and Plaintiffs cannot use an improperly alleged section 9 "take" claim as a vehicle to wrest control of the Elwha River restoration effort and the Tribe's fish hatchery from the sovereigns Congress mandated to direct that effort.[3]

[3] Plaintiffs intend to ask the Court to impose "limits and conditions upon specific types of fish stocks, quantities of fish releases, dates and timing for releases, the scope of artificial propagation programs, monitoring requirements, and other details." Doc. 32 at 17:24–27. In other words, Plaintiffs will ask the Court to assume supervision over the scope and implementation of the hatchery programs crafted by "an interagency group of experts" (in Plaintiffs' words, Doc. 31 at 18:12–19) to protect and to restore native Elwha River fish populations. The ESA, however, does not transform the federal courts into fish masters or expert natural resources agencies. *See, e.g.*, *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1214 (E.D. Cal. 2008) (stating, in section 7 context, "A federal court lacks the expertise and/or background in fish biology, hydrology, hydraulic engineering, water project operations, and related scientific and technical disciplines that are essential to determining how the water projects should be operated on a real time, day-to-day basis. The scientific, engineering, and operational constraints under which the Projects are managed on a day-to-day basis are of mind-boggling complexity and sensitivity, requiring the highest level of skill, competence, and experience.").

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III. The *Ex Parte Young* Doctrine Does Not Excuse Plaintiffs' Failure to Allege Sufficient Facts Either to Establish Constitutional Standing or to State a Claim Upon which Relief Can Be Granted

Plaintiffs effectively concede their failure to make sufficient factual allegations against the Elwha Defendants by arguing that the *Ex Parte Young* doctrine, which Plaintiffs purport to invoke to circumvent the sovereign immunity of the Lower Elwha Klallam Tribe, reduces their burden to establish constitutional standing and to state a claim upon which relief can be granted. Doc. 32 at 9:21 to 10:12, 14:12–17 (stating that "[i]t is . . . not necessary to allege the personal involvement of defendants when asserting a claim under the *Ex Parte Young* doctrine"). That is, Plaintiffs contend that the *Ex Parte Young* doctrine excuses their failure to allege that the respective Elwha Defendants are actually engaged in or have control over activities that proximately cause the death or injury of ESA-listed fish. Plaintiffs are incorrect.[4]

Under the *Ex Parte Young* doctrine, sovereign immunity does not bar suits for prospective injunctive relief against state or tribal officials alleged to be acting in violation of federal law. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). The Supreme Court made clear in *Ex Parte Young*, 209 U.S. 123, 156 (1908), however, that such officials must be "clothed with some duty in regard to the enforcement" of the laws challenged. The Court explained:

> In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it

[4] The Elwha Defendants do not concede that Plaintiffs may employ the *Ex Parte Young* doctrine to assert a claim against the Elwha Defendants under section 9 of the ESA. That question is not currently before the Court. The only question before the Court is, assuming for the sake of argument that the *Ex Parte Young* vehicle is available under these circumstances, whether the doctrine reduces Plaintiffs' burden to allege facts sufficient to establish constitutional standing or to state a claim upon which relief can be granted. The answer to that question is clearly no.

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> is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

Id. at 157. Accordingly, "the named officials must have 'the requisite enforcement connection to' the challenged law for the *Ex Parte Young* exception to apply." *Vaughn*, 509 F.3d at 1092 (quoting *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002)); *see also Hill v. Wash. State Dep't of Corr.*, 628 F. Supp. 2d 1250, 1259 (W.D. Wash. 2009) (Settle, J.). This enforcement connection, moreover, must be "fairly direct." *See Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992).

In *Vaughn*, the Ninth Circuit held that the tribal tax official was subject to suit under *Ex Parte Young* where he was "allegedly responsible for administering and collecting the challenged tax, and has already transmitted tax registration forms to [plaintiff]." 509 F.3d at 1092–93. In contrast, the tribal Chairman was not subject to suit because "[plaintiff] has not alleged that [he] is in any way responsible for enforcing the tax." *See id*. at 1093; *see also Nat'l Audubon Soc'y, Inc.*, 307 F.3d at 846–47 (affirming the dismissal of the Governor of California and the California Resources Secretary because they did not have the "direct authority and practical ability to enforce the challenged statute," and thus lacked the requisite "enforcement connection" under *Ex Parte Young*). Judge Leighton made the same distinction in *Nisqually Indian Tribe v. Gregoire*, No. 08-cv-05069, 2008 WL 1999830, at *6–7 (W.D. Wash. May 8, 2008), between Squaxin Island Tribal officials allegedly authorized to enter and implement the challenged cigarette tax compact addendum and those officials not alleged to have such authority.[5]

[5] The unpublished district court opinions cited by Plaintiffs, which address prisoner claims under 42 U.S.C. § 1983, *see* Doc. 32 at 10:10–12 & n.5, are not to the contrary. For example, in *Hartmann v. Cal. Dep't of Corr. & Rehab.*, No. 1:10-CV-00045-LJO-SMS, 2010 WL 1729757, at *9 (E.D. Cal. April 28, 2010), the court held that "[b]ecause . . . Warden Lattimore has the authority to make Civil Service appointments at [the correctional facility] as well as to

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Here, Plaintiffs allege no facts as to the Elwha Defendants except their job titles and that one of them co-authored the Fish Restoration Plan. *See supra* at 2–3. Plaintiffs fail to allege that they are responsible for implementing or authorizing any of the activities in the Fish Restoration Plan that they purport to challenge. Thus, even if Plaintiffs could assert a claim against the Elwha Defendants under *Ex Parte Young*, *see supra* n.4, Plaintiffs fail to establish the "enforcement connection" necessary to support such a claim. The Ninth Circuit considered a similar dearth of factual allegations in *Yakima Indian Nation v. Locke*, 176 F.3d 467, 469 (9th Cir. 1999) ("The complaint contains no allegations that the governor is charged with operating the state lottery[.]"). Noting that the "enforcement connection" is an "important qualification" to the *Ex Parte Young* doctrine, the Court held the doctrine did not apply "[b]ecause the governor lacks the requisite connection to the activity sought to be enjoined, [and thus] he serves 'merely . . . as a representative of the state,' and the [Plaintiff] is 'thereby attempting to make the state a party.'" *See id.* at 469–70 (quoting *Ex Parte Young*, 209 U.S. at 157); *see also Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002) (where plaintiff makes no factual allegations against tribal officials he "may [not] circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe").

Plaintiffs' inability to identify specific activities of the Elwha Defendants that the Court should enjoin to redress the alleged "take," Doc. 32 at 11:14–18, underscores the lack of a "causal connection between their responsibilities and any injury that the plaintiffs might suffer,

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direct [the facility's] managers and supervisors, she is the proper party to respond to any declaratory or injunctive order entered by this Court with regard to the institution at which Plaintiffs are confined." The court dismissed numerous other *Ex Parte Young* defendants. *See id.* Plaintiffs' reliance on *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012), is similarly unavailing because it does not involve the *Ex Parte Young* doctrine, but rather discusses the heightened pleading required in cases involving qualified immunity where the claim lies under 42 U.S.C. § 1983.

such that relief against the defendants would provide redress" for purposes of constitutional standing, and such that the threshold requirements of *Ex Parte Young* would be met. *See Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004). The doctrine accordingly does not excuse Plaintiffs' failure to allege sufficient facts against the Elwha Defendants to establish standing and to state a claim upon which relief can be granted.[6]

IV. A More Definite Statement is Appropriate Because the Elwha Defendants Should Not Be Required to Guess as to What Activities Plaintiffs Allege to Cause Take and May Seek to Enjoin

If the Court does not dismiss Plaintiffs' claim on this motion, Plaintiffs should be ordered to file a more definite statement because the complaint fails to allege facts sufficient to put the respective Elwha Defendants on meaningful notice as to which of their activities allegedly cause "take," and fails to specify the scope of injunctive relief sought. *See* Doc. 26 at 20:5 to 22:21. In response, Plaintiffs argue that the complaint, which purports to challenge "the preparation, authorization, funding, and/or implementation of the Fish Restoration Plan and the activities described therein," satisfies the requirements of notice pleading. The thrust of Plaintiffs' argument is that they may indiscriminately challenge the dozens of hatchery-related, habitat restoration, and monitoring and adaptive management activities described in the Plan for ten different fish species, and then at some future date, following discovery, identify the particular activities that cause "take" and that they will seek to enjoin.

[6] In fact, the doctrine requires Plaintiffs to be precise in their allegations regarding each defendant's connection to specific activities alleged to cause "take," to establish that this is not an impermissible action against the Lower Elwha Klallam Tribe. Nevertheless, in making their *Ex Parte Young* arguments, Plaintiffs point to paragraphs 97 and 104 of the complaint, which allege that the Tribe is implementing the hatchery programs described in the Fish Restoration Plan. Doc. 32 at 10:17–19, 14:18–20. These paragraphs, however, make no allegations against the Elwha Defendants. Plaintiffs' attempt to conflate the Tribe and the Elwha Defendants and to treat them as interchangeable is plainly impermissible under *Ex Parte Young*.

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Plaintiffs should be required to allege reasonably specific facts as to the activities each Elwha Defendant is engaged in or has control over that actually kill or injure ESA-listed fish, as required by section 9.[7] "Even under the liberal norms of notice pleading, . . . a pleader may not require a defendant to guess at what the contours of the claims against it may be when they take shape at some uncertain future time." *U.S. ex rel. Kneepkins v. Gambro Healthcare*, 115 F. Supp. 2d 35, 41 (D. Mass. 2000). Contrary to Plaintiffs' suggestion, the decisions cited by the Elwha Defendants, Doc. 26 at 21:21 to 22:11, are not "outlying cases." Doc. 32 at 18:7. They are merely examples of the federal courts' exercising their sound discretion to require a more definite statement where plaintiffs have failed to sufficiently allege the scope of the actions that they challenge and the injunctive relief that they intend to seek.

It is appropriate for the Court to exercise that discretion here. Plaintiffs should not be permitted to hide the ball at the outset of this action, while the Tribe devotes a substantial portion of its limited human and financial resources to the restoration of native Elwha River fish populations (including hatchery programs for Chinook, coho, chum, and pink salmon, and winter steelhead), and then to later seek the destruction of the very fish that the Tribe has spent years rearing to support the restoration effort.

CONCLUSION

The Elwha Defendants respectfully request that the Court dismiss Plaintiffs' claim for lack of standing and lack of ripeness, and for failure to state a claim upon which relief can be granted. In the alternative, Plaintiffs should be ordered to file a more definite statement.

[7] To satisfy the jurisdictional prerequisites of the ESA, Plaintiffs may be required to provide 60-days' notice to the Elwha Defendants of the specific activities that they seek to challenge so that the Elwha Defendants have the opportunity to abate any alleged section 9 violation. *See Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520–22 (9th Cir. 1998); *see also* Doc. 25 at 25:12–14.

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DATED this 4th day of May, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2012, I electronically filed the Elwha Defendants' Reply in Support of Motion to Dismiss, or, in the Alternative, Motion for a More Definite Statement with the Clerk of the Court, using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

DATED this 4th day of May, 2012.

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