

HONORABLE BENJAMIN H. SETTLE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY, <i>et al.</i> ,)	No. 3:12-CV-05109-BHS
)	
Plaintiffs,)	PLAINTIFFS’ SURREPLY TO REPLY
v.)	IN SUPPORT OF FEDERAL
)	DEFENDANTS’ MOTION FOR
NATIONAL PARK SERVICE, <i>et al.</i> ,)	PARTIAL DISMISSAL
)	
Defendants,)	
)	

Pursuant to Local Rule CR 7(g), Plaintiffs Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Flyfishers Steelhead Committee, and Wild Salmon Rivers d/b/a Conservation Angler (collectively, “WFC”) hereby request the Court strike, in whole or in part, the Reply in Support of Federal Defendants’ Motion for Partial Dismissal of Plaintiffs’ Complaint, Dkt. 34 (May 4, 2012) (“Reply”).

I. INTRODUCTION.

The Reply submitted by Federal Defendants does not comply with the Court’s rules prescribing page limitations for briefs, and should therefore be stricken in whole or in part.

1 Further, the Reply contains a new argument asserted under Rule 12(b)(6) that WFC has failed to
2 state a claim upon which relief can be granted. This improperly raised issue should be stricken.

3 **II. ARGUMENT.**

4 The Federal Defendants' Reply should be stricken for failing to comply with the Court's
5 rules setting page limitations on briefs. Reply briefs submitted in support of motions to dismiss
6 are limited to twelve pages. W.D. WASH. LOCAL RULE CR 7(e)(3). Federal Defendants' Reply,
7 at fourteen pages, exceeds this limit. Dkt. 34.

9 The subject matter of this lawsuit, including the factual background, is somewhat
10 complex. Accordingly, both Federal Defendants and WFC sought five additional pages for their
11 primary briefs addressing the issues raised in Federal Defendants' motion for partial dismissal.
12 See Dkt. 21; and Dkt. 29. WFC expended significant efforts preparing a response brief that fully
13 addressed Federal Defendants' arguments without exceeding the twenty-nine pages permitted by
14 the Court.¹ Federal Defendants, on the other hand, simply disregarded the Court's rules in
15 submitting the over-length Reply. The Court should strike this non-compliant brief.

18 Further, the Reply raised a new argument, asserted under a different rule, that was not
19 addressed in Federal Defendants' motion. To the extent the Court does not strike the entire
20 Reply, this argument should be stricken.

22 Federal Defendants argued in their motion that certain parties should be dismissed from
23 the lawsuit because they cannot be sued under the Endangered Species Act ("ESA") citizen suit
24 provision in their role as administrators of the ESA. Dkt. 25, 35:5-36:7. Federal Defendants
25 asserted this argument under Rule 12(b)(1), arguing a lack of subject matter jurisdiction because
26

27
28 ¹ Federal Defendants' motion, on the other hand, did not comply with this limitation, as it included argument on two
unnumbered pages in addition to the twenty-nine numbered pages of argument. Dkt. 25, 1:19-2:27.

1 the ESA citizen suit provision does not provide the necessary waiver of sovereign immunity. *See*
 2 *id.* at 35:22, 36:1-3. WFC responded by pointing out that Federal Defendants are misconstruing
 3 the claims—the ESA citizen suit claims are alleged against the Federal Defendants in their role
 4 as *regulated parties* violating the substantive provisions of the ESA, and not in their role as
 5 administrators of the ESA. Dkt. 31, 26:17-20, 27:1-18.

7 In their Reply, Federal Defendants argue for the first time that these claims should be
 8 dismissed under Rule 12(b)(6) for failure to state a claim for which relief can be granted. Dkt.
 9 34, 14:3-20, 15:1-11, 15:21-22.² Federal Defendants argue that the Complaint does not include
 10 sufficient factual assertions that these parties are violating the ESA as “action agencies.”³ *Id.* at
 11 14:18-20, 15:1. This is an entirely new argument.

13 “It is well established in this circuit that courts will not consider new arguments raised for
 14 the first time in a reply brief.” *Bach v. Forever Living Products U.S., Inc.*, 473 F.Supp.2d 1110,
 15 1122 n.6 (W.D. Wash. 2007); *and see Gadda v. State Bar of Cal.*, 511 F.3d 933, 937 n.2 (9th Cir.
 16 2007). Accordingly, the Court should strike this argument improperly raised for the first time in
 17 the Reply.

19 **III. CONCLUSION.**

20 For the foregoing reasons, WFC respectfully requests the Court strike, in whole or in
 21 part, Federal Defendants’ Reply.

23 RESPECTFULLY SUBMITTED this 9th day of May, 2012.

25 _____
 26 ² Federal Defendants suggest that their motion included arguments made under Rule 12(b)(6) because the rule was
 27 cited as an alternative ground for dismissal. Dkt. 34, 15:21-22. The only mention of Rule 12(b)(6) in the Federal
 28 Defendants’ motion is found in a footnote on an unnumbered page. Dkt. 25, 2:24-25. Regardless, Federal
 29 Defendants did not argue in their motion that WFC failed to assert allegations necessary to state a claim for which
 relief can be granted. Rather, this is an entirely new argument.

³ The Complaint does allege that Federal Defendants have taken actions that subject them to the substantive
 requirements of the ESA as “action agencies.” *See, e.g.*, Dkt. 1, ¶¶ 102-03.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the attorneys of record.

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