No. 12-35976

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF POINT HOPE, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee,

and

NANA REGIONAL CORPORATION, INC. and
TECK ALASKA INCORPORATED,

Intervenor-Defendant-Appellees.

On Appeal from the United States District Court for the District of Alaska
Case No. 3:11-cv-00200-TMB

JOINT ANSWERING BRIEF OF INTERVENOR-DEFENDANT-APPELLEES NANA REGIONAL CORPORATION, INC. AND TECK ALASKA INCORPORATED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, the undersigned counsel for Intervenor-Defendant-Appellees state as follows:

NANA Regional Corporation, Inc. is an Alaska Native corporation formed under the Alaska Native Claims Settlement Act ("ANCSA") and the laws of the State of Alaska. NANA has more than 13,000 Alaska Native shareholders. Pursuant to ANCSA, shares in NANA are not allowed to be sold or traded and there is no publicly traded stock. Accordingly, NANA has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Teck Alaska Incorporated's direct parent corporation is Teck American Incorporated, which owns 100 percent of Teck Alaska Incorporated's stock. Teck American Incorporated is a wholly owned subsidiary of Teck Resources Limited, a publicly traded corporation. Teck Resources Limited has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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I. INTRODUCTION

After years of careful study, in 2006, the Alaska Department of Environmental Conservation ("ADEC") adopted, and the U.S. Environmental Protection Agency ("EPA") approved, a "site-specific" water quality criterion for Main Stem Red Dog Creek, a two-mile stretch of Red Dog Creek in remote Northwest Alaska. This water quality criterion is very narrow in substantive, temporal and geographic application. The standard only applies to "total dissolved solids" ("TDS") in Main Stem Red Dog Creek for approximately one to two weeks each year when Arctic grayling spawn in this stream. Separate water quality standards, not at issue in this litigation, regulate TDS and other discharge parameters in Main Stem Red Dog Creek at all other times of the year and in other downstream water bodies.

Nearly five years after EPA approved this site-specific criteria, Appellants Native Village of Point Hope, Alaska Community Action on Toxics and Northern Alaska Environmental Center (collectively "Point Hope") filed this lawsuit contending that EPA's approval was arbitrary and capricious. However, the district court below held Point Hope's claims meritless and dismissed them after summary judgment briefing and argument.

As addressed below, the district court's dismissal of Point Hope's challenge may be sustained on either of two alternative grounds. First, Point Hope does not

have standing to maintain this lawsuit. Although the TDS site-specific criteria for Main Stem Red Dog Creek during Arctic grayling spawning season has been in place for more than half a decade, Point Hope has identified no member actually injured by EPA's approval of the standard. Because litigants seeking to invoke federal jurisdiction must come forward with facts showing that they have suffered an injury in fact that is concrete and particularized, not hypothetical or conjectural, Point Hope lacks standing. Point Hope has similarly failed to meet the causation or redressability prongs required for standing, and accordingly, their case should be dismissed.

Alternatively, if this Court reaches the merits, Point Hope's admittedly "narrow" challenge to the well-considered scientific and technical judgments of the state and federal agencies responsible for setting water quality standards is, as the district court held, unsustainable. EPA and ADEC analyzed voluminous scientific literature, toxicology testing, decades of field work studying fish in the watershed, and multi-year scientific tests designed to inform the effects of TDS on fish generally, and specifically, the effect of TDS exposure on the Arctic grayling in this watershed. After years of study and analysis, based upon sound scientific judgments that are well-documented in the administrative record, ADEC and EPA reached unanimous agreement to adopt the TDS water quality standard now

challenged. As determined in a well-reasoned opinion below, EPA's decision was not arbitrary or capricious.

II. COUNTER JURISDICTIONAL STATEMENT

The district court below lacked jurisdiction because Point Hope failed to establish standing as required by Article III of the U.S. Constitution.

III. COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellants lack standing to challenge EPA's 2006 decision to approve a site-specific water quality criterion for TDS in Main Stem Red Dog Creek during the two-week Arctic grayling spawning season.

2. Whether EPA's approval of the site-specific criterion for TDS for the Main Stem Red Dog Creek during Arctic grayling spawning season adopted by ADEC was arbitrary and capricious.

IV. STATEMENT OF THE CASE

On April 21, 2006, EPA approved ADEC's 1,500 milligrams per liter ("mg/L") TDS site-specific water quality criterion in the Main Stem Red Dog Creek for Arctic grayling spawning season. ER[1] 56. Five years later Point Hope filed its original complaint in the U.S. District Court for the Western District of Washington. *See* ER 461. NANA Regional Corporation, Inc. ("NANA") and

[1] As cited in this brief, "ER" refers to Point Hope's Excerpt of Record and "SER" refers to the Supplemental Excerpts of Record filed jointly by EPA and the Intervenor-Defendant-Appellees.

Teck Alaska Incorporated ("Teck Alaska") subsequently intervened. *See* ER 463. Upon the suggestion of the district court and the motion of NANA and Teck Alaska, this litigation was transferred to the U.S. District Court for the District of Alaska. *See* ER 465.

Point Hope's amended complaint alleges three claims: (i) that in approving a TDS site-specific criteria of 1,500 mg/L, EPA failed to protect designated uses of Red Dog Creek in violation of Section 303(c)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1313(c)(2)(A); (ii) that EPA's approval was arbitrary and capricious and lacked a "sound scientific rationale" as required by CWA regulations promulgated at 40 C.F.R. § 131.11(a)(1); and (iii) that EPA failed to conduct or to require an anti-degradation analysis prior to approving the TDS site-specific criteria in violation of CWA Section 303(d)(4), 33 U.S.C. § 1313(d)(4)(B). ER 57-60. In early 2012, the parties exchanged motions for summary judgment. *See* ER 472-74. In addition to asserting opposing positions on the merits of Point Hope's claims, NANA and Teck Alaska also contended that Point Hope's claims should be dismissed for lack of standing. The State of Alaska subsequently sought and was granted leave to file an amicus brief on behalf of ADEC in support of EPA's approval of the TDS criterion. *See* ER 473-74.

The district court heard oral argument on the parties' cross-motions. *See* ER 475; SER 1-56. Although the district court was squarely presented with a

challenge to Point Hope's standing, it assumed jurisdiction without deciding standing and granted summary judgment to EPA, NANA and Teck Alaska, dismissing Point Hope's claims on the merits. *See* ER 15 (district court's summary judgment decision stating: "Intervenors further assert that Plaintiffs lack standing. As discussed below, even if Plaintiffs have standing to assert their claims, the Court concludes that EPA's approval of the site-specific criterion was not arbitrary or capricious.").

Point Hope timely appealed from the final judgment entered by the district court. ER 28-29. Based upon the arguments presented in their opening brief, Point Hope has abandoned all claims that EPA's approval of the TDS site-specific criteria violates the CWA or its implementing regulations. *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (issues not raised in appellants' opening brief are waived). Point Hope's sole remaining contention is that the administrative record provides no rational basis for EPA's scientific judgments in approving ADEC's TDS site-specific criteria and, accordingly, EPA has violated the Administrative Procedure Act ("APA").

V. STATEMENT OF FACTS

A. Main Stem Red Dog Creek

Main Stem Red Dog Creek is a two-mile stretch of water located in remote Northwest Alaska, within the DeLong Mountains, formed by the joining of the

Middle and North Forks of Red Dog Creek. Main Stem Red Dog Creek flows into Ikalukrok Creek, which 32 miles later flows into the Wulik River. The Wulik River flows into the Chukchi Sea approximately 40 miles downstream of the confluence of Ikalukrok Creek and the Wulik River. ER 125, 132-34; SER 57.

For a substantial portion of the year, Main Stem Red Dog Creek is frozen. When not frozen, Main Stem Red Dog Creek flows through native mineral bodies, resulting in naturally occurring high acidity and toxic levels of metals. SER 76-78, 131-132. Until the toxicity was reduced as a result of recent mineral development in the area, fish usage of Main Stem Red Dog Creek was limited to migration to the North Fork during spring runoff when brief high flows diluted the natural toxicity of the stream. SER 78, 132-36. At other times of the year, during normal flows, the naturally occurring toxic water in Main Stem Red Dog Creek was fatal to fish. SER 78-81, 89.

B. Red Dog Mine

NANA is an Alaska Native regional corporation established under the Alaska Native Claims Settlement Act. SER 58-65. NANA has more than 12,000 Alaska Native shareholders, the majority of whom live in Northwest Alaska. *Id.* The NANA region is a vast area consisting of 38,000 square miles. *Id.* More than 90 percent of the region's residents are Inupiat, descendants of the people who

have inhabited the NANA region for more than 10,000 years. *Id.* The NANA region maintains a natural resources-dependent culture and economy. *Id.*

The Red Dog Mine property contains one of the largest known zinc deposits in the world and is by the far the most economically important natural resource of the NANA region. *Id.* NANA owns the land and the mineral resources underlying the Red Dog Mine, and leases the load and resources to Teck Alaska, which operates Red Dog Mine pursuant to a long-term operating agreement. *Id.* The Red Dog Mine facilities include a tailings impoundment and a water processing facility. SER 212.

Historically, Red Dog Creek had three forks: the North Fork, Middle Fork and South Fork, which flowed together to form the Main Stem. ER 132. However, the South Fork is now part of the Red Dog Mine tailings impoundment. *Id.* When Red Dog Creek is not frozen, the Red Dog Mine discharges treated wastewater into the Middle Fork of Red Dog Creek, approximately one and one-third miles above the point where the Middle Fork and North Fork join to form Main Stem Red Dog Creek.[2] ER 124. This wastewater discharge is authorized by

[2] The mine disposes of treated wastewater during portions of the year when Red Dog Creek is not frozen in order to maintain the water level in its tailings impoundment at safe levels. Enough treated wastewater must be released each year between the spring thaw in May and freeze up in September or October to ensure that new precipitation runoff can be captured and treated before discharge. ER 124-26.

a National Pollutant Discharge Elimination System ("NPDES") permit issued to Teck Alaska pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.[3] *Id.*

The Red Dog Mine's water treatment facilities and measures to divert water around exposed minerals have greatly improved the water quality in the stream from natural levels. A 2005 report concluded:

> Over the last six years (1998 through 2004) there has been a viable aquatic community in Mainstem Red Dog Creek with the current water quality and mine discharge. Analysis of the water quality data supports the finding that the mine discharge is a net benefit to the creek. The naturally occurring concentrations of metals (especially cadmium and zinc) are diluted, the pH is moderated and the higher hardness of the discharge water moderates the toxicity of the metals.

SER 147. As a consequence, Arctic grayling now inhabit and spawn in some areas of Main Stem Red Dog Creek. SER 86-90, 144-48; ER 139. Arctic grayling spawning begins in late May to mid-June, when water temperatures reach a minimum level, and continues for approximately six to 11 days. SER 145, 150-51, 156; ER 139.

[3] Throughout most of the life of the Red Dog Mine, EPA has been responsible for issuance of NPDES permits in Alaska, including for the Red Dog Mine. However, the State of Alaska has now assumed primacy for the NPDES program in Alaska, and in 2012 ADEC assumed jurisdiction over the Red Dog Mine's NPDES permit.

C. EPA's Approval of the TDS Site-Specific Criteria for Main Stem Red Dog Creek During Arctic Grayling Spawning Season

"Total dissolved solids" or "TDS" is one of the discharge parameters regulated by the Red Dog Mine NPDES permit.[4] ER 124. The limit for TDS in the mine's NPDES permit is determined by reference to the applicable state water quality standard. SER 188. In Alaska, the water quality standards are established by ADEC, subject to final approval by EPA.[5]

The mine's 1998 NPDES permit established TDS limits of 176 mg/L monthly average and 196 mg/L daily maximum; however, the mine's TDS discharges were never able to comply with these limits. ER 124. In 2001, Teck Alaska requested a site-specific standard for TDS in Main Stem Red Dog Creek of 500 mg/L during Arctic grayling spawning season and 1,500 mg/L at all other times. ER 128. In 2003, ADEC adopted this standard and submitted it to EPA for approval. SER 184-201.

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[4] In general, TDS consists of various compounds dissolved in water. ER 212. At the Red Dog Mine, the principal source of TDS is calcium and magnesium sulfates generated by the use of lime (calcium hydroxide) in the water treatment process. ER 213. Although Point Hope suggests that this TDS consists of high concentrations of metals and is the result of "contact with the ore in the main pit and with waste-rock piles," the record shows that the TDS is predominately calcium and sulfates associated with treatment. ER 135.

[5] Subject to certain conditions, the current statewide TDS water quality standard in Alaska, adopted by ADEC in 1999 and approved by EPA in 2002, is 1,000 mg/L. Alaska Admin. Code tit. 18, § 70.020(b)(4).

EPA approved the 1,500 mg/L TDS limit for periods outside Arctic grayling spawning season, but it deferred a decision on the proposed standard during Arctic grayling spawning season. Scientific literature and research, including a recently released study by the Alaska Science and Technology Foundation (the "Stekoll Study"), indicated that fertilization was the life stage most sensitive to TDS exposure, but that the effect of TDS on fertilization success varied widely among different species. ER 103, 210, 218. The recent TDS study did not include Arctic grayling, and EPA was not willing to reach a conclusion concerning the appropriate limit during Arctic grayling spawning season based on tests involving other species. Accordingly, EPA withheld approval of a site-specific criterion for the Arctic grayling spawning season, pending completion of tests to determine the effect of TDS on fertilization success for Arctic grayling. *Id.*

EPA participated in designing an appropriate study (the "Brix & Grosell Study") to address the remaining issues concerning the effects of TDS on Arctic grayling spawning. ER 103, 116, 175, 208-09; SER 209-227. In 2004 to 2005, fisheries scientists conducted grayling and Dolly Varden fertilization tests at the Red Dog Mine site, using fish from area waters. The researchers found that the results from an initial round of four tests in 2004 were highly variable and, accordingly, "did not resolve the uncertainty associated with previous studies." ER 197. After further consultation with EPA and state fisheries scientists, and

adjustments in their methodology to address issues encountered in the 2004 tests, the researchers conducted additional tests in 2005. ER 199. The Brix & Grosell Study concluded that the 2005 tests "provided very consistent data indicating no effects on fertilization success up to the highest TDS concentration tested." *Id.* Based upon the totality of the 2004 and 2005 tests, the Brix & Grosell Study concluded both "that the weight of the evidence now strongly suggests that TDS is having no significant effect on Arctic grayling fertilization success" and that the site-specific limit of 1,500 mg/L "or a value near it" was "appropriate for the protection of" fertilization of salmonids (the family of fish that includes grayling).[6] ER 200-01.

In early 2006, ADEC adopted 1,500 mg/L as a site-specific criterion for TDS at the Main Stem Red Dog Creek during Arctic grayling spawning season. ER 113-19. In April 2006, EPA approved this site-specific criterion. As part of this process, EPA fisheries scientists completed a technical justification, with a detailed evaluation of the 2004 and 2005 Brix & Grosell Study. In EPA's technical review, EPA scientists concluded:

> EPA believes a weight of the evidence approach provides a reasonable basis to interpret the available TDS toxicity data to Arctic grayling.

[6] "Salmonids" are a family of fish that includes trout, salmon, char and grayling. Grayling are in a genus of this family, "thymallus." Arctic grayling are a distinct species, *thymallus arcticus*.

> All of the 2005 data explicitly support a[] [site-specific criteria] of 1,500 mg/L and half of the 2004 data support a TDS [site-specific criteria] in excess of the maximum TDS concentration tested (>921 and >1,381 mg/L). The consistency of the results from the 2005 Arctic grayling all demonstrate[s] no effect on reproduction at TDS concentrations in excess of the maximum TDS concentration tested (2,782 mg/L).

ER 106. EPA approved the site-specific criteria, concluding that "the technical information submitted to EPA in support of this TDS site-specific criteria demonstrates that the 1,500 mg/l TDS site-specific criteria is scientifically defensible [and] the site-specific criteria will protect all designated uses." ER 101.

VI. SUMMARY OF THE ARGUMENT

Although the district court below assumed it had jurisdiction and proceeded to decide Point Hope's claims on the merits, jurisdiction can never be assumed. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998) (federal courts may not decide merits before resolving whether there is Article III jurisdiction). Here, all three Appellants lack standing to pursue their challenge to EPA's approval of the site-specific criteria that governs TDS levels in Main Stem Red Dog Creek during Arctic grayling spawning season.

Although the TDS site-specific criteria for Main Stem Red Dog Creek has been in place for seven years, Appellants have failed to come forward with any evidence showing actual harm to even a single member of their respective organizations. The best they have mustered are expressions of "concerns"

regarding possible future environmental consequences and novel self-serving claims that the Appellant advocacy groups have spent money advocating against and challenging EPA's decision to approve the TDS rule. Even as repackaged in their opening brief in this appeal, Appellants' allegations are legally insufficient to meet their burden to demonstrate any of the three standing requirements established in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Moreover, as determined by the court below, Point Hope has not met its heavy burden under the APA to demonstrate that EPA's carefully crafted and well-documented scientific judgments are arbitrary, capricious or otherwise contrary to law. EPA's determination that the 1,500 mg/L standard was fully protective of all stages of Arctic grayling development including fertilization was based on its scientific judgment, and the judgment of the State of Alaska experts, and this kind of determination is entitled to deference by this Court. *See Lands Council v. McNair (Lands Council I)*, 537 F.3d 981, 988 (9th Cir. 2008) (en banc) (emphasizing that to "act as a panel of scientists that instructs the [agency] how to validate its hypotheses . . . , chooses among scientific studies . . . and orders the agency to explain every possible scientific uncertainty. . . . is not a proper role for a federal appellate court"). Although Point Hope claims that there is significant "uncertainty" regarding latent effects from exposure during fertilization, there is no

evidence to support such a claim at levels at or below 1,500 mg/L for Arctic grayling. Instead, it is clear (as the district court held) that Point Hope's so-called uncertainty is nothing but a disagreement with the EPA's conclusions from existing studies. It is well-settled that such disagreement is no basis for overturning EPA's judgment, and this decision of the district court should therefore be affirmed.

VII. ARGUMENT

A. All Three Appellants Lack Standing to Challenge EPA's Approval of ADEC's TDS Site-Specific Criteria for Main Stem Red Dog Creek During Arctic Grayling Spawning Season

As an initial matter, the district court's dismissal of Point Hope's claims should be sustained because Appellants lack standing. The context of this litigation is, by definition, exceptionally narrow – a *site-specific* water quality criterion for one parameter (TDS), established for one fish species (Arctic grayling), during one brief life cycle phase (the six- to 10-day spawning period that occurs once a year), in one very remote and geographically limited area (a two-mile stretch of creek in Northwest Alaska). To establish standing to challenge this site-specific water quality criteria, Appellants were required to come forward with evidence showing that they or their members are injured by this narrow rule. As discussed below, Appellants fundamentally failed meet this burden and could not even identify a single member who has ever even been to the specific site at issue,

or uses or enjoys resources at that site. Instead, Appellants strain to manufacture standing based on unsupported conjecture and inapposite case law.

For Appellant Native Village of Point Hope, Appellants rely on conjecture and word games, asking this Court to presume that some generically defined "fish" that are caught in the Wulik River 70 miles away from Main Stem Red Dog Creek (by someone else) *could* be Arctic grayling, *could* have come from Main Stem Red Dog Creek (rather than one of the other Wulik River tributaries) and *could* have spawned in the two-mile stretch of Main Stem Red Dog Creek during the two weeks for which the TDS site-specific standard applies. For Appellants Alaska Community Action on Toxics ("ACAT") and Northern Alaska Environmental Center ("NAEC"), Appellants attempt to fit a square peg in a round hole by claiming they suffered a cognizable injury in fact when they spent money on their own self-identified mission priorities. Both of these arguments fail to demonstrate that Appellants have suffered an injury in fact caused by EPA's approval of the TDS site-specific criteria or redressed by a favorable decision in this case.

1. Appellants have the burden of proof in establishing standing

Every plaintiff must establish standing before proceeding to the merits of its case. *Steel Co.*, 523 U.S. at 94-95. Standing to assert a claim presents a question of law reviewed *de novo*. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152 (9th Cir. 2000). Although the district court below assumed jurisdiction and dismissed Point Hope's

claims on the merits, this Court may affirm the district court on any ground supported by the record. *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1190 (9th Cir. 1998).[7]

To satisfy the constitutional standing requirements of Article III, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly 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." *Laidlaw*, 528 U.S. at 180-81; *Steel Co.*, 523 U.S. at 103-04 ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." (footnote omitted)). The plaintiff has the burden of proof to show that each of the *Laidlaw* factors is met by a "substantial probability." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). This evidentiary obligation is more than just an "ingenious academic exercise in the conceivable" and cannot be satisfied by vague allegations that "some (unidentified) members have planned to visit some (unidentified) small parcels affected by" the agency action "and will suffer (unidentified) concrete

[7] *See* Dkt. 10-2 at 24 n.14 (Point Hope's acknowledgement that standing must be addressed *de novo* on appeal).

harm as a result." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-99 (2009) (internal quotation marks and citation omitted).

2. The Native Village of Point Hope has not established standing

An organization has standing if it can show that one of "its members would otherwise have standing to sue in [its] own right." *Laidlaw*, 528 U.S. at 181. Appellant Native Village of Point Hope premises its standing on the declarations of two of its members – Franklin Sage and Jack Schaefer. *See* ER 31-36. However, the Sage and Schaefer declarations do not establish standing for these individuals in their own right, and the Native Village of Point Hope therefore lacks standing to pursue this case on their behalf.

a. Mr. Sage and Mr. Schaefer have not been injured

The injury-in-fact prong of the *Laidlaw* factors is the "hard floor of Article III jurisdiction." *Summers*, 555 U.S. at 497. Individual plaintiffs in CWA cases satisfy the injury-in-fact requirement by demonstrating both: (i) that they use the resource at issue (here, Arctic grayling that spawn in the Main Stem Red Dog Creek); and (ii) that their use has been curtailed or diminished due to the challenged action (here, EPA's approval of the TDS site-specific criteria). *See Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001). Importantly, the focus of the inquiry is "concrete and particularized and . . . actual or imminent" harm to the

plaintiffs, not "conjectural or hypothetical " harm to the environment in the abstract. *Laidlaw*, 528 U.S. at 180.

The declarations of Mr. Sage and Mr. Schaefer simply fail to state that they use or enjoy Arctic grayling that spawn in Main Stem Red Dog Creek. Mr. Sage and Mr. Schaefer live in Point Hope, a distant village in another watershed from Red Dog Creek and the Wulik River.[8] They do not testify to using or relying on Main Stem Red Dog Creek for any purpose, or that they have ever even been to Main Stem Red Dog Creek. Nor do they testify that they eat or have otherwise used or enjoyed Arctic grayling that spawn in the Main Stem Red Dog Creek. The absence of any testimony as to the use of the resource at issue in this litigation is fatal to their standing.

Without any direct testimony as to the actual use or enjoyment of Main Stem Red Dog Creek or the Arctic grayling that spawn there, Appellants rely on vague and generic statements about unspecified "fish" that are caught in the Wulik River, many miles from Main Stem Red Dog Creek. Dkt. 10-1 at 26-27. Instead of testifying to use of Arctic grayling that spawn in Main Stem Red Dog Creek, Mr. Sage generically states that he trades traditional foods from Point Hope with

[8] Point Hope is located on the Chukchi Sea coast, approximately 75 miles northwest of the mouth of the Wulik River, in a separate watershed from Red Dog Creek and its tributaries. *See* SER 57.

unspecified family members for "fish from the Wulik River and its tributaries." ER 31-32. With even less clarity, Mr. Schaefer offers only inadmissible hearsay testimony that unidentified "tribal members" have unidentified "family" living elsewhere that fish for Arctic grayling and other "fish," that Dolly Varden (a different fish species that is subject to a different unchallenged water quality standard for TDS) is a delicacy in Point Hope and that unidentified "residents" of Point Hope barter and exchange with people from the village of Kivalina "for Dolly Varden and other 'fish' obtained from the Wulik River." ER 34.

These vague and generic statements are no substitute for evidence of actual injury. It is *conceivable* that the "fish" caught at the Wulik River as described in the declaration include Arctic grayling. It is *conceivable* that the "fish" traded for by Mr. Sage's and Mr. Schaefer's unidentified family members include Arctic grayling from the Wulik River. It is *conceivable* one of those Arctic grayling caught in the Wulik River (and ultimately traded for) was one of the few Arctic grayling from Main Stem Red Dog Creek (rather than one of the many that spawned in Wulik River or its other tributaries). However, the Supreme Court's standing analysis requires more than an "ingenious . . . exercise in the *conceivable*." *Summers*, 555 U.S. at 499 (emphasis added; internal quotation marks and citation omitted). Instead, a party must "'set forth' by affidavit or other evidence 'specific facts'" demonstrating standing. *Lujan v. Defenders of Wildlife*,

504 U.S. 555, 561 (1992) (citation omitted). Mr. Schaefer and Mr. Sage set forth no specific facts showing that they use or enjoy Arctic grayling from Main Stem Red Dog Creek and therefore lack standing in this case.

Point Hope attempts to obscure these fatal factual deficiencies in its brief with footnotes that endeavor to reinvent the Sage and Schaefer declarations. Dkt. 10-1 at 26-27 nn.16-17. Point Hope strains to bridge the gap between the use of "fish," "especially Dolly Varden," by unspecified others (testified to in the Schaefer and Sage declarations), and the use of Arctic grayling that spawn in Main Stem Red Dog Creek by Mr. Sage and Mr. Schaefer (what Point Hope must prove), by arguing that the term "fish" as used in these declarations must be interpreted to include Arctic grayling spawning in the Main Stem Red Dog Creek. *Id*.

Point Hope's belated efforts to spin the declarations are no substitute for evidence. If Mr. Sage or Mr. Schaefer actually traded for or otherwise used Arctic grayling from the Main Stem Red Dog Creek they should have so stated in their declarations.[9] Point Hope did not submit such testimony (presumably because they could not) and therefore fail to demonstrate standing.

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[9] At the summary judgment stage of litigation, a plaintiff may no longer rest on mere allegations, but must set forth by affidavit or other *admissible* evidence specific facts demonstrating standing. *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008). Point Hope's standing burden on summary

(continued . . .)

In any event, a review of the paragraphs cited by Point Hope further demonstrates the weakness of its arguments. According to Point Hope, Mr. Sage's intent in using the word "fish" may be inferred from his first use of the term in paragraph 4 of his declaration. Dkt. 10-1 at 26 n.16.[10] There, Mr. Sage states that he has family members living in Kivalina who fish for "Dolly Varden (what we refer to as trout), Arctic grayling and other fish in the Wulik River and its tributaries." ER 31 at ¶ 4. That sentence does not purport to define the term "fish"

(. . . continued)
judgment cannot be met through inadmissible hearsay evidence. Fed. R. Civ. P. 56(c)(4) (requiring that declarations "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated"); *Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."); *see Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988) ("It is well settled that only admissible evidence may be considered . . . in ruling on a motion for summary judgment."). Testimony offered through the declarations of Sage and Schaefer regarding the actions and concerns of unidentified others is inadmissible hearsay for which there is no applicable evidentiary exception. Fed. R. Evid. 801, 802; *see* ER 34-36 at ¶¶ 6-14 (hearsay testimony of Mr. Schaefer); ER 31-32 at ¶¶ 4-6 (hearsay testimony of Mr. Sage). As was the case below, NANA and Teck Alaska object to Point Hope's reliance upon inadmissible testimony in an attempt to establish its standing.

[10] Appellants' reliance upon *American Federation of Government Employees Local 1 v. Stone*, 502 F.3d 1027, 1032 (9th Cir. 2007), for the proposition that all reasonable inferences regarding standing should be drawn in plaintiffs' favor on a motion to dismiss is misplaced. As emphasized by the Supreme Court in *Lujan*, the requirements for standing are different and far more rigorous at the litigation stage of this case (*i.e.*, summary judgment). 504 U.S. at 561.

and does not support Point Hope's inference that all subsequent uses of the word "fish" "should be understood to include these specific species." Dkt. 10-1 at 26 n.16. Even if so, there is no grounds to infer that his use of the word "fish" is supposed to include "Main Stem Red Dog Creek" (a tributary that he never mentions). ER 31-32. Accordingly, Mr. Sage's generic statements fail to provide the "specific facts" sufficient to demonstrate standing. *See* SER 44 (lines 2-4) (district court's comment that counsel's argument conflates a specific reference to grayling in paragraph 4 to define the meaning of "fish" elsewhere in the declaration).

Point Hope's efforts to reinterpret Mr. Schaefer's declaration fare no better. According to Point Hope, the Court should look to paragraph 6 of Mr. Schaefer's declaration to interpret the meaning of "fish." Dkt. 10-1 at 27 n.17. However, paragraph 6 is entirely inadmissible hearsay testimony that unnamed "tribal members" who have family in Kivalina travel to Kivalina to fish for "Arctic grayling, Dolly Varden, white fish and salmon." ER 34 at ¶ 6. Even if this statement were admissible, which it is not, the sentence plainly does not purport to define the meaning of "fish" as otherwise used in the declaration. *See also* ER 35

at ¶ 10 (Schaefer testimony emphasizing hearsay concerns about "fish – especially Dolly Varden").[11]

These issues aside, even if Mr. Sage and Mr. Schaefer somehow use "fish" that include Arctic grayling that spawn in the Main Stem Red Dog Creek, Point Hope must also demonstrate a connection between their use of the resource and a concrete and particularized injury, such as impairment or curtailment in use or enjoyment of the resource. *See, e.g., Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000) (use of resource impaired sufficient for standing because "although [plaintiff] likes to fish, he refrains from fishing in the creek because of concerns about pollution"). However, Point Hope has failed to allege, let alone to establish, this essential factual link. Neither Mr. Sage nor Mr. Schaefer ever alleges that his use of Arctic grayling is "diminished," "impaired" or otherwise "curtailed." To the contrary, Mr. Sage testified that he continues to "regularly" trade for "fish" notwithstanding the passage of many years since implementation of the TDS site-specific criterion. ER 31 at ¶ 4. For his part, Mr. Schaefer only testifies to the hearsay interests of unidentified others who he says continue to catch and eat the fish from the Wulik River. ER 35.

[11] *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 234-35 (1990) (affidavit to establish standing insufficient because it did not explicitly name the individuals allegedly harmed by the challenged action).

In yet another attempt to bridge the fatal gap between their declarations and demonstration of an the injury in fact, Point Hope references testimony that the skin and the outer layer of fat from "fish" are removed because "someone at the Red Dog Mine told the people eating the fish to do this." ER 35 at ¶ 11; *see* ER 32 at ¶ 5. The flaws with this argument are many. *First*, as Point Hope's counsel admitted on the record during summary judgment oral argument, neither Mr. Sage nor Mr. Schaefer testifies to personally engaging in this behavior. SER 46 (lines 4-47, line 5). Instead, their declarations offer inadmissible hearsay and double hearsay testimony regarding the alleged behavior of unidentified others and the alleged statements of an unidentified person to unidentified others. *Second*, neither Mr. Sage nor Mr. Schaefer testifies that anyone's interest in eating or trading for fish is diminished or harmed by this "common practice." *Third*, even if removal of skin and fat from "fish" is assumed to include Arctic grayling, even if hearsay testimony of this activity by unspecified others may be relied upon and even if removal of the skin and fat is presumed to harm Point Hope – none of which is permissible – then the declarations still fail to link removal of fish skin and fat to adoption of the TDS site-specific criteria. To the contrary, the declarations attribute this practice to generic concerns regarding pollution from the Red Dog Mine (which began operations 16 years before the TDS site-specific criteria was

implemented), and to an alleged instruction by an unidentified worker at Red Dog Mine to unidentified people at an unidentified time. ER 32 at ¶ 5; ER 35 at ¶ 11.

Point Hope's declarations also state that it or unidentified others have various "concerns." Mr. Sage is concerned that unspecified "pollution" from the Red Dog Mine will impact unspecified "fish" in the Wulik River, and he is concerned that the TDS site-specific criteria will not protect "fish." ER 32 at ¶¶ 6-7. Mr. Schaefer is concerned about the Red Dog Mine generally, about quality and quantity of "fish," especially Dolly Varden, in the Wulik River system, and about health and subsistence. ER 35-36 at ¶¶ 9-14. These expressions of concern, no matter how sincere, are insufficient to establish standing. Such concerns are mere statements of interest in a problem or issue, not a concrete or particularized, actual or imminent, injury in fact. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (organization's genuine and longstanding concerns about the effects of development in the Mineral King Valley insufficient; an interest in the problem is not enough to establish injury in fact).[12]

[12] Because Native Village of Point Hope lacks any injury in fact, it is equally clear that it has no injury within the zone of interests of the CWA, and Appellants' arguments on that point are therefore irrelevant. *See* Dkt. 10-1 at 33-34.

b. Native Village of Point Hope has not established causation or redressability

Point Hope's declarations also fail to establish the *Laidlaw* causation and redressability factors. Although the Sage and Schaefer declarations rotely state they are concerned about the TDS site-specific criteria, it is apparent that their concerns are caused by longstanding perceptions of discharges from the Red Dog Mine that predate EPA's adoption of the TDS site-specific criteria. *See, e.g.*, ER 35 at ¶ 9 (hearsay testimony that Point Hope "has been concerned about the Red Dog Mine and [EPA's] oversight of the Mine since it began and from its earliest construction"). Moreover, the focus of their concerns is on Dolly Varden, a species of fish subject to a different water quality criterion (with the same 1,500 mg/L limit) that has not been challenged. ER 35 at ¶ 10 (hearsay testimony of "members' concerns about the quantity and quality of fish – especially Dolly Varden – in the Wulik River system"). These concerns are not caused by EPA's approval of the TDS site-specific criteria, nor could these concerns ever be redressed were Point Hope to prevail in this lawsuit.[13]

[13] Appellants contend that both Mr. Sage and Mr. Schaefer have testified that the TDS site-specific criteria lowers the water quality in Red Dog Creek, causing impacts to fish survival that reduce subsistence resources. Dkt. 10-1 at 28. They further contend that a favorable result in this litigation would redress the adverse impacts to subsistence resources. *Id.* However, this argument significantly misstates the record. The TDS site-specific criteria has been in effect for seven years, yet neither Mr. Sage nor Mr. Schaefer testifies that there has been any actual

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3. ACAT and NAEC lack standing

In contrast to Appellant Native Village of Point Hope, Appellants ACAT and NAEC do not contend that any individual member of their organizations has suffered an injury in fact from EPA's approval of the TDS site-specific criterion. Instead, ACAT and NAEC assert that they have organizational standing because, in giving attention to the TDS site-specific criterion, these advocacy groups have diverted resources from other programs. However, ACAT's and NAEC's self-serving statements that they have diverted resources in volitionally educating their members and the public about TDS water quality issues and in participating in the administrative process prior to EPA's approval do not meet the requirements of the "diversion of resources" test as established by the Ninth Circuit and other courts.

a. An organization asserting standing on its own behalf must meet the same test for standing as an individual

The starting point for determining organizational standing is the Supreme Court's decision in *Morton*, 405 U.S. 727. In *Morton*, the Sierra Club challenged

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water quality impact, any reduction in "fish" survival or any reduction in the availability of subsistence resources. Instead of providing the required "factual showing of perceptible harm," Point Hope's declarations voice generalized concerns unsupported by admissible evidence. *Summers*, 555 U.S. at 499 (internal quotation marks and citation omitted). Moreover, Point Hope does not even bother to address the fact that Red Dog Mine has actually improved water quality conditions for Arctic grayling in Main Stem Red Dog Creek, which in its natural state had metal concentrations lethal to that species.

the Forest Service's decision to approve a Disney resort on federal land. The Supreme Court recognized that development of the proposed Mineral King resort in a national forest could potentially cause recreational and aesthetic injury; however, the Sierra Club did not base its standing on such injuries to any of its members. *Id*. at 734-35. Instead, the Sierra Club relied on the organization's "longstanding concern with and expertise in such [forest preservation] matters." *Id*. at 736. The Court rejected Sierra Club's contention, explaining that "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id*. at 739. Moreover, the Court explained that allowing standing based on such an injury would effectively render the injury-in-fact requirement meaningless, and "there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived." *Id*. Accordingly, the Sierra Club lacked standing to file suit on its own behalf.

Here, ACAT and NAEC lack standing for the same reasons as did Sierra Club. The standing declarations of ACAT and NAEC testify to no injuries to their members. ER 37-44. Instead, like the Sierra Club in *Morton*, ACAT and NAEC claim an "organizational interest in ensuring that federal and state laws are

followed to protect clean water." ER 43 at ¶ 10; ER 39 at ¶ 12. However sincere ACAT's and NAEC's interest may be, as long ago established in *Morton*, a "mere 'interest in a problem'" is legally insufficient to establish standing. 405 U.S. at 739. If ACAT and NAEC could establish standing based only on their interest in an activity, then, just as the Supreme Court concluded in *Morton*, the injury-in-fact requirement would have no limitations. *Id.*

Notably, Appellants neither contended below nor argue here that ACAT and NAEC are able to establish standing based upon an injury in fact to one of their members. Accordingly, Appellants have conceded that they have no standing unless ACAT and NAEC are exempt from organizational standing jurisprudence premised upon *Morton*.

b. ACAT and NAEC have not met the *Havens* diversion-of-resources test

Unable to meet the organizational standing requirements established in *Morton*, Appellants rely instead on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and its progeny – a line of Fair Housing Act ("FHA") civil rights cases that recognize standing for organizations who expose discriminatory housing practices. However, even if the *Havens* "frustration of its mission" and "diversion of resources" standing test is applied here, Appellants have not met it.

Havens arose in the context of a class action lawsuit against an apartment complex owner in Richmond, Virginia, alleging discriminatory practices in

violation of the FHA. Plaintiffs were a non-profit organization whose mission was to promote equal opportunity housing, and who fulfilled that mission by providing counseling services. The defendant in that case effectively frustrated those counseling efforts by engaging in discriminatory housing practices. To combat that injury to its core purpose, the plaintiff nonprofit had to go *outside* its programs and hire two people as "testers" in order to investigate and expose discriminatory "racial steering" practices prohibited by the FHA. Focusing expressly on standing under the FHA, the Supreme Court found the nonprofit's allegation that the defendant's discriminatory housing practices frustrated the organization's ability to "provide counseling and referral services for low- and moderate-income homeseekers" sufficient because it represented a "concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – [that was] . . . far more than simply a setback to the organization's abstract social interests[.]" *Id.* at 379.

Point Hope parrots language from *Havens*, alleging that the TDS site-specific criteria at issue in this litigation "frustrates [ACAT's and NAEC's] missions and program goals" and as a result, Appellants have devoted resources (i) "to educate staff and the public about the impacts of TDS on fish species"; (ii) "to review subsequent permit applications . . . based on the TDS site-specific

criterion"; and (iii) to "submit comments [during the ADEC and EPA administrative process] advocating for stricter limits." Dkt. 10-1 at 30-31.

Point Hope's reliance on *Havens* and its progeny is misplaced for numerous reasons. At the outset, the ACAT and NAEC are materially distinguishable from the plaintiff nonprofit in *Havens* who was forced to divert resources away from its core mission. Here, by contrast, the only injuries identified by ACAT and NAEC *are expenditures on their program goals*. ACAT explains that its "mission is to ensure justice by advocating for environmental and community health and working to protect Alaskan's and Alaska Native's right to clean air, water, and a toxic free environment." ER 42. Thus, its expenditures related to "educating the public about the legal shortcomings of the site specific criterion" are not a diversion from its mission; those expenditures are a part of its core purpose. ER 43. So too, NAEC explains that its mission is to "promote conservation and sustainable resource stewardship in Interior Arctic Alaska through education and advocacy." ER 38. Accordingly, NAEC's expenditures "educating the public about the legal shortcomings of EPA's" rule are squarely within NAEC's mission as well. ER 40.

Critically, Appellants ignore numerous cases from this Court and others confirming this commonsense interpretation of *Havens*. In *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010), the Ninth Circuit explained that standing based on "a diversion of its

resources and a frustration of its mission" has a number of important limitations. (Internal quotation marks and citation omitted.) This Court explained that the *Havens* standard does not allow a plaintiff to "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Id*. Rather, the plaintiff "must instead show that it would have suffered some other injury *if it had not diverted resources to counteracting the problem*." *Id*. (emphasis added). In other words, the organization had to be placed in the untenable situation where it "could not avoid suffering one injury or the other" – either injury from the defendant's actions or injury counteracting the defendant's actions. *Id*. Thus, under *Lake Forest*, the organization must show that it would have suffered an injury if it had not diverted those resources.[14]

[14] Unable and unwilling to address the limitations placed by the Ninth Circuit on application of the *Havens* test in *Lake Forest*, Appellants cite instead to *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012). In *Fair Housing Council*, plaintiffs argued that the anti-discrimination provisions of the FHA prohibited an internet service that helps roommates find each other from requesting information about sex and sexual orientation, and then sorting, steering and matching users based on these characteristics. In a terse three-sentence analysis of standing prior to moving on to dismissal of plaintiffs' claims on the merits, the court found organizational standing premised on the *Havens* test. As another FHA case for which there is only a summary analysis of standing, *Fair Housing Council* is unenlightening except for its unreserved endorsement and application of the limits on the *Havens* test previously established in *Lake Forest*. *See id.* at 1219 ("An organization 'cannot manufacture [an] injury by incurring litigation costs or simply choosing to

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Other courts agree that standing under *Havens* cannot be based on harms that are "self-inflicted" or based on a decision "that its money would be better spent" on certain objectives, *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994), that are based on an "organization's budgetary choices," *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 101 (D.D.C. 2000), or that are presumed by merely stating that the organization's purposes will be "frustrated," *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433-34 (D.C. Cir. 1995). As one court explained:

> The pivotal inquiry is therefore not whether the organization has diverted resources from one priority to another, but whether its activities have been directly impeded by defendant's activities, thus necessitating the diversion of resources.

Long Term Care Pharmacy Alliance v. UnitedHealth Grp., Inc., 498 F. Supp. 2d 187, 192 (D.D.C. 2007). Plainly stated, a diversion of resources based on "an abstract conflict between defendant's activities and plaintiffs' advocacy goals" is not sufficient. *Id.*

The D.C. Circuit's decision in *National Ass'n of Home Builders v. EPA*, 667 F.3d 6 (D.C. Cir. 2011), is also instructive. In *Home Builders*, the plaintiffs asserted standing as an organization to challenge a CWA jurisdictional

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spend money fixing a problem that otherwise would not affect the organization at all.'" (brackets in original) (quoting *Lake Forest*, 624 F.3d at 1088)).

determination. The plaintiff claimed it had "spent considerable staff time and monetary resources in the quest to clarify CWA jurisdiction, such as submitting comments to the EPA and to the Corps, testifying before the United States Senate and participating in numerous court cases, including this one." *Id*. at 12 (internal quotation marks and citation omitted). The D.C. Circuit rejected this basis for standing, explaining that (1) litigation expenses "do not qualify as an injury in fact"; (2) the plaintiffs failed to show that the expenses incurred went "beyond those normally expended"; and (3) the plaintiffs failed to show the alleged violation "perceptively impaired a non-abstract interest." *Id*. (internal quotation marks and citation omitted).[15]

Applying these precedents, ACAT and NAEC have not demonstrated the requisite injury in fact. Appellants' identified injuries – spending resources educating the public, advocating for a more stringent TDS standard and participating in permitting decisions – are simply "self-inflicted" injuries, "budgetary choices" as to how to target their advocacy efforts or outright litigation-related expenses. *Fair Emp't Council*, 28 F.3d at 1276-77; *Am. Farm*

[15] Other courts have similarly declined to find standing based on the *Havens* line of cases in an environmental context. *Consejo de Desarrollo Economico de Mexicali v. United States*, 417 F. Supp. 2d 1176, 1186-87 (D. Nev. 2006) (rejecting *Havens* argument in case under Endangered Species Act); *Am. Farm Bureau*, 121 F. Supp. 2d at 100-01 (rejecting *Havens* argument in case under Federal Insecticide Fungicide and Rodenticide Act).

Bureau, 121 F. Supp. 2d at 100-01. NAEC and ACAT have not alleged that they would have "suffered *some other injury* if it had not diverted resources to counteracting the problem" as required by the Ninth Circuit. *Lake Forest*, 624 F.3d at 1088 (emphasis added). Nor have they satisfied the "pivotal" inquiry of showing that their "activities have been directly impeded by defendant's activities, thus necessitating the diversion of resources," *Long Term Care*, 498 F. Supp. 2d at 192, or that the expenses incurred were for "operational costs beyond those normally expended to carry out its advocacy mission," *Home Builders*, 667 F.3d at 12 (internal quotation marks and citation omitted). Simply put, NAEC and ACAT have done nothing more than allege that they spent resources on "an abstract conflict between defendant's activities and plaintiffs' advocacy goals," and as such, they lack an injury in fact. *Long Term Care*, 498 F. Supp. 2d at 192.

In addition to failing to demonstrate injury in fact, Appellants have not demonstrated how EPA's approval caused their diversion of resources, or their injury would be redressed by a favorable court decision. Funds expended and other resources devoted to the administrative process *prior* to EPA's decision in 2006, such as hiring an expert or participating in the ADEC and EPA processes, could never have been "caused" by EPA's later approval. Such an argument renders causation meaningless as a temporal matter. Nor may NAEC and ACAT rely on litigation expenses incurred in challenging EPA's decision in federal court.

ER 40 at ¶ 14. That leaves only educational expenses. However, the ACAT and NAEC declarations do not allege that EPA's actions forced them to expend these resources or otherwise "caused" them to do so; instead they passively explain that such resources were diverted as "a result of the EPA's decision" with which they disagree. *Id.*; ER 43 at ¶ 12. The Ninth Circuit requires more than a passive "as a result" causal connection. ACAT and NAEC must demonstrate that they "could not avoid suffering one injury or the other." *Lake Forest*, 624 F.3d at 1088. ACAT and NAEC have not provided such evidence and, accordingly, have not demonstrated that EPA's action "caused" their voluntary advocacy decision to allocate resources to education.

In sum, as the Supreme Court held in *Morton*, allowing standing based on the concerns and interests of an organization alone would effectively render the injury-in-fact requirement for Article III standing meaningless. 405 U.S. at 739. Accordingly, the genuine subjective concerns of ACAT and NAEC for water quality advocacy and education, in the absence of an injury in fact, cannot confer standing. If ACAT and NAEC have standing because preserving water quality is a core organizational value and because they voluntarily elected to devote resources in pursuit of that core value, then the doctrine of standing places no limits on the ability of an organization to file lawsuits on any subject allegedly germane to its abstract interests.

B. EPA's Approval of Alaska's Site-Specific Water Quality Standard for Main Stem Red Dog Creek Was Not Arbitrary or Capricious

1. This Court's precedents require deference to EPA's decision and the highest deference to EPA's analysis of scientific data

Agency decisions challenged on the basis of the sufficiency of the supporting administrative record must be upheld unless they are arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Lands Council I*, 537 F.3d at 987. Review under the arbitrary and capricious standard is narrow and highly deferential. *Lands Council v. McNair (Lands Council II)*, 629 F.3d 1070, 1074 (9th Cir. 2010); *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). The agency's action is presumed valid. *Lands Council II*, 629 F.3d at 1074; *Nw. Ecosystem*, 475 F.3d at 1140. The Court does not substitute its judgment for that of the agency. *Lands Council II*, 629 F.3d at 1074. A court may reverse a decision as arbitrary and capricious only if the agency relied upon factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem or offered an explanation that either runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Lands Council I*, 537 F.3d at 987.

Courts apply their highest level of deference when they review scientific and technical analyses within the agency's area of expertise. *Native Ecosystems*

Council v. Weldon, 697 F.3d 1043, 1053 (9th Cir. 2012) ("[W]e are required to apply the highest level of deference in our review of the Forest Service's scientific judgments . . . ."). Within this realm, agencies are entitled to "great deference." *Native Vill. of Point Hope v. Salazar*, 680 F.3d 1123, 1133, 1134 (9th Cir. 2012). "Courts may not impose themselves 'as a panel of scientists that instructs [the agency] . . . , chooses among scientific studies . . . , and orders the agency to explain every possible scientific uncertainty.'" *Native Ecosystems*, 697 F.3d at 1051 (brackets and ellipses in original) (quoting *Lands Council I*, 537 F.3d at 988). Courts do not make "'fine-grained judgments'" of agency scientific analyses. *Lands Council I*, 537 F.3d at 993-94 (citation omitted). The agency is entitled to decide between conflicting scientific evidence, and a reviewing court does not ask if it would give more or less weight to the competing evidence. *Native Ecosystems*, 697 F.3d at 1051; *Lands Council I*, 537 F.3d at 1000; *Trout Unlimited v. Lohn*, 559 F.3d 946, 958-59 (9th Cir. 2009) (deferring to agency evaluation of fisheries science).

2. EPA's scientific and technical judgments are well-explained in and supported by the administrative record

Applying the above principles of deference that govern this Court's review of agency scientific determinations, there is no basis for this Court to substitute its judgment for EPA's well-supported and explained decision. To the contrary, the record demonstrates a comprehensive multi-year process to reach a well-reasoned

decision resolving all legitimate uncertainties. This process included evaluation of information from many sources concerning the Arctic grayling population in Red Dog Creek and the effect of TDS on all life stages of this population. Based on this review, the collective judgment of the fisheries scientist at EPA and the state agencies was that the entire record supported the 1500 mg/L site-specific criteria.

In 2001, Teck Alaska submitted a request to ADEC to adopt a site-specific criteria to govern TDS in Main Stem Red Dog Creek. To evaluate this request, ADEC gathered studies concerning the effects of TDS on aquatic organisms, and it reviewed the extensive studies of the biota in Red Dog Creek before and after commencement of mining. In its evaluation of the proposed 2003 site-specific criteria, EPA also gathered and independently analyzed scientific data regarding the effects of TDS on aquatic organisms. This information included laboratory toxicity studies, an exhaustive review of relevant scientific literature and field surveys in the affected watershed. *See generally* ER 215-18; *see also* SER 67-126, 163-208.

The numerous field studies conducted by the Alaska Department of Fish and Game ("ADF&G") in Red Dog Creek confirmed that exposure to TDS generated by the mine's water treatment processes had not adversely affected Arctic grayling populations. Quite the opposite, these field studies showed that since the mine began operations (and began water treatment processes that increased TDS levels

in Main Stem Red Dog Creek), Arctic grayling had *expanded* their use of Main Stem Red Dog Creek. *See generally* SER 86-89; *see also* SER 254-255; ER 255. Moreover, while the toxicity studies concluded that the effects of TDS depend upon variables that include the ionic composition of the TDS, the particular species exposed to TDS, and the life history stage when exposure occurred (ER 228; SER 272), scientific studies also demonstrated that for salmonids (the family of fish that includes grayling), the fertilization stage is the life stage that is most sensitive to exposure to TDS. ER 103.[16]

Based on this wealth of scientific evidence, in 2003 EPA approved the 1,500 mg/L TDS limit for Main Stem Red Dog Creek, except for the period when Arctic grayling spawn in this stream. ER 210-19. EPA specifically concluded that a 1,500 mg/L TDS standard was protective of all life stages of Arctic grayling outside Arctic grayling spawning. ER 218. No party appealed from this determination.

Out of an abundance of caution, EPA deferred approval of the proposed site-specific criteria during Arctic grayling spawning season based on the Stekoll

[16] The data included studies indicating that the most sensitive stage for exposure of fish to TDS is the period from fertilization to egg hardening, and that after egg hardening, fish do not appear to be affected by elevated concentrations of TDS up to 2,000 mg/L. ER 216, 228; SER 167, 195-96, 251; ER 358-59. The egg-hardening phase is a two-minute period after fertilization. SER 167, 195.

Study, which indicated that TDS had an impact on spawning success in some salmonid species, and no effect on spawning success in other salmonid species. ER 218, 210, 208. The Stekoll Study did not include Arctic grayling, and EPA concluded it was not possible to extrapolate from that study whether TDS exposure affects Arctic grayling fertilization (and if so, at what concentration of TDS). ER 210, 218. EPA therefore ordered Teck Alaska to conduct research to assess the effect of TDS on Arctic grayling spawning. ER 208-09, 210, 218.[17]

Accordingly, EPA worked with ADEC, the Alaska Department of Natural Resources ("ADNR"), ADF&G and Teck Alaska to design an appropriate study to address the effects of TDS on Arctic grayling fertilization.[18] Based on directions from the fisheries scientists at these agencies, Brix & Grosell conducted a two-year study of TDS impacts on fertilization using Arctic grayling and Dolly Varden from

[17] EPA also ordered further study concerning the effect of TDS on fertilization for another species, Dolly Varden. However, as the district court concluded, Dolly Varden are irrelevant to this case. ER 16 n.58. The TDS site-specific criterion at issue applies only during a six- to 11-day period in late May or early June when Arctic grayling spawn in Main Stem Red Dog Creek. Dolly Varden do not spawn in Main Stem Red Dog Creek; they spawn in other streams, in the fall. SER 94-95; *see also* ER 125, 139, 217; SER 245-255. Dolly Varden are not even present in Main Stem Red Dog Creek during the short time when the challenged site-specific criteria is in effect. ER 118.

[18] *See* ER 103 ("EPA had substantial input into development of the testing protocols along with ADEC; [OHMP;] and the Alaska Department of Fish & Game."); *see also* ER 116, 175; SER 280, 209-227.

area waters. ER 177. Their study concluded that "the weight of evidence now strongly suggests that TDS is having *no significant effect* on Arctic grayling fertilization success," and that a site-specific limit of 1,500 mg/L or a value near it would be appropriate for protection of spawning by Arctic grayling in Main Stem Red Dog Creek. ER 200-01 (emphasis added).[19]

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[19] In an apparent reprise of an argument that it has abandoned, Point Hope continues to mischaracterize the Brix & Grosell Study, claiming it showed that "at a TDS concentration of 1,357 mg/L, twenty percent of Arctic grayling eggs would not successfully fertilize." Dkt. 10-1 at 11. This statement is false. In their final report, Brix & Grosell used eight field tests to analyze the effect of TDS on Arctic grayling fertilization. ER 193. *In six of these eight tests, TDS had no observable effect on Arctic grayling fertilization, up to the maximum level of TDS exposure in that particular test.* ER 192-93. Specifically, there was no observable effect on Arctic grayling fertilization at 921 mg/L in test 1, 1,381 mg/L in test 2 and 2,781 mg/L in tests 8, 9, 10 and 11. (This level is described as "no observable effect concentration" in the table at ER 193.) These six tests did not identify the TDS exposure level where there was a 20 percent effect on fertilization (the "EC 20" value), because in these six tests there was no effect on fertilization, even at the maximum TDS exposure level achieved in that test. The reported results for these six tests reflect this fact, as they report the EC 20 values as ">921," ">1381" and ">2781." ER 10, 193.

To compute a number for regulatory purposes, Brix & Grosell calculated the geometric mean of the EC 20 values for all eight tests. For purposes of this calculation, they disregarded the fact that for six of the eight tests, it never observed a 20 percent effect on Arctic grayling fertilization. For these six tests, it used the maximum level tested as a proxy for the level where there was a 20 percent effect. With this caveat, the geometric mean of the EC 20 values for all eight Arctic grayling tests was 1,357 mg/L. *See* ER 200. This geometric mean value does not support Point Hope's statement that at a concentration of 1,357 mg/L, 20 percent of Arctic grayling eggs would not successfully fertilize. As demonstrated in the administrative record, Point Hope's mischaracterization is not a statement or a conclusion reached by Brix & Grosell, EPA or ADEC.

After thorough review, public comments and a public hearing, in January 2006, ADEC adopted 1,500 mg/L as the site-specific criterion for TDS for Main Stem Red Dog Creek during Arctic grayling spawning season. ER 108-20.[20] ADEC found that the evidence reasonably demonstrated that the site-specific criteria would fully protect designated uses of Main Stem Red Dog Creek. ER 113, 117. In making this decision, ADEC again analyzed a wide range of information, including laboratory studies, literature reviews conducted on the effects of TDS on Arctic grayling and extensive reports on monitoring of aquatic life at the mine site. ER 113, 118-19.[21] This material included field studies conducted by ADF&G from 1999 to 2004 indicating that Arctic grayling and invertebrates in Red Dog Creek were not being affected by higher TDS levels in Red Dog Creek.[22]

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[20] ADEC made specific findings in support of its adoption of this site-specific criteria. ER 113, 117-18. Although Alaska law authorizes appeals from ADEC decisions (first to the agency, and then to the Superior Court), neither the Appellants nor any other party appealed from ADEC's decision adopting this site-specific criteria. Instead, five years later, Appellants sued EPA to challenge its approval of ADEC's decision.

[21] ADEC's record included its decision document from the 2003 TDS site-specific criterion decision (SER 163-208), and materials that ADEC reviewed in 2003. ER 113, 118-19.

[22] ER 117 ("Field studies to monitor the effect of the effluent from Red Dog Mine have been conducted since the Mine opened. . . .The report for the 2004 field season . . . states 'Arctic grayling use (adults and fry) of Mainstem Red Dog Creek

(continued . . .)

Following ADEC's decision, ADEC submitted its decision to EPA for approval. ER 108. In April 2006, EPA reviewed and approved Alaska's site-specific criterion for TDS during the Arctic grayling spawning season. ER 100-07. The collective judgment of the scientists at EPA and state resource agencies was that the record, viewed as a whole, supported this site-specific criterion.

This kind of careful analysis and scientific judgment is precisely the kind of agency determination entitled to the highest level of deference. *See Native Ecosystems*, 697 F.3d at 1051 (agency is entitled to decide between conflicting scientific evidence; reviewing court does not determine if it would give more or less weight to competing evidence); *Lands Council I*, 537 F.3d at 1000 (same); *Trout Unlimited*, 559 F.3d at 958-59 (same). Indeed, this is precisely what the district court below concluded, finding that:

> EPA articulated a rational connection between the evidence and its decision. The Court cannot conclude that EPA's explanation ran "counter to the evidence before the agency" or was "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

ER at 17. Nothing more is required to affirm the district court's dismissal below.

(. . . continued)
currently is much higher than that described in baseline studies.' . . . *This report provides field evidence that indicates that the Arctic grayling and invertebrates in Red Dog Creek are not being affected by the higher total dissolved solids levels.*" (emphasis added)); *see also* SER 144-48; ER 139.

3. Point Hope's efforts to create scientific uncertainty lack merit

Appellants abandon the majority of their arguments on appeal, devoting scarcely six pages to the merits. Point Hope's only remaining argument on appeal is that the Brix & Grosell Study was insufficient, and that EPA "lacked critical information about the long-term and delayed impacts to Arctic grayling eggs that are fertilized in water with a TDS concentration of 1,500 mg/l." Dkt. 10-1 at 27. Therefore, argues Point Hope, EPA overlooked an important issue in making its decision. This argument fails for a host of reasons.

As an initial matter, Point Hope's argument studiously ignores the entire body of evidence considered by the agencies. As the district court observed:

> EPA's review of the studies, literature, and surveys – including Stekoll, et al. – led it to become concerned about the impact of TDS on "fertilization success." EPA was otherwise satisfied that 1,500 mg/L would be protective of Arctic grayling. Accordingly, fertilization success is exactly what the Brix and Grosell study focused on. Indeed, although Stekoll et al. referred to possible studies of long term impacts, they emphasized the need for "short term bioassays at critical stages, such as fertilization or hatch." Stekoll et al. also cautioned against extrapolating based on the results from their chronic assays. Accordingly, contrary to Plaintiffs' counsel's contention . . . EPA did not ignore "an important aspect of the problem."

ER 13-14 (internal citations omitted). Thus EPA (and the state) carefully considered all potential impacts to Arctic grayling and concluded that there would be no significant impacts at the 1,500 mg/L level.

Moreover, Point Hope's contention that additional testing was necessary is unsupported by any scientific opinion in the record. After completion of the 2004 and 2005 Brix & Grosell Study, the professional biologists at EPA and the responsible state environmental and wildlife agencies concluded that no additional tests were necessary, and that the overall data fully supported the site-specific criteria during Arctic grayling spawning season. ER 103 (EPA), ER 113 (ADEQ), SER 280 (ADNR). The Stekoll Study did not compel a different conclusion. While Point Hope might draw different conclusions from those studies, the district court correctly explained that

> it is readily apparent that Plaintiffs' disagreement with EPA's decision is merely a difference in view. In the context of APA review, EPA's decision among conflicting points of view is entitled to deference.

ER 17. Thus, Point Hope's contention that EPA ignored an important aspect of the problem, or otherwise acted arbitrarily and capriciously, does not withstand analysis.

As the sole support for its argument, Point Hope seizes upon bits of data in the Stekoll Study and extrapolates the data to reach conclusions that were not shared by the professional fisheries biologists who analyzed the data and supported the site-specific criteria. Point Hope's litigation-driven views of the Stekoll study do not override the contemporaneous scientific judgments made by the state and federal agencies. In fact, in many of the tests reported in the Stekoll Study,

exposure of salmon eggs to TDS did not affect short-term or long-term mortality rates, even at TDS levels far in excess of 1,500 mg/L. ER 275-78, 282. Moreover, as the district court observed, when negative effects on salmon were observed, these effects occurred at TDS levels far in excess of the TDS levels at issue here. ER 16 n.57; ER 345-46, 353 (negative effects at 2,500 mg/L); *see also* SER 74.

Lastly, Point Hope's argument that there is some critical uncertainty regarding the impact of the 1,500 mg/L standard simply makes no sense when placed in context. Main Stem Red Dog Creek in its natural state was deadly to Arctic grayling, and Arctic grayling could not (and did not) spawn there before Red Dog Mine began treating the effluent discharge to remove naturally occurring heavy metals. Field studies conducted since Red Dog Mine began treating the discharge have demonstrated that Arctic grayling for the first time can now spawn in Main Stem Red Dog Creek, and have shown no effects – latent or otherwise – from increased TDS discharges. SER 86-89, 144-48, 254-55; ER 255. There is simply no uncertainty here as to the impact of TDS on Arctic grayling in Main Stem Red Dog Creek.

The proposition that EPA ignored an important aspect of the problem in this context is unfounded. EPA scientists carefully reviewed the Stekoll Study and the other scientific data concerning the Arctic grayling population in Red Dog Creek. They made a scientific assessment that further research was needed on one specific

issue: the effect of TDS on "fertilization success."[23] EPA directed completion of a scientific study to address this specific issue. EPA and state fisheries scientists closely supervised the study's design and execution, ensuring that it addressed the remaining issue that concerned them. After Brix & Grosell completed their study, fisheries scientists at the state and federal environmental agencies concluded that the study provided the necessary data and that the record as a whole, including the data generated by this study, supported a TDS site-specific criteria of 1,500 mg/L during Arctic grayling spawning season in Main Stem Red Dog Creek. EPA followed their recommendation. ER 100-07. As the district court concluded, EPA was not further required to chase down "every possible scientific uncertainty" in light of this record, especially when the so-called uncertainty is really just a "difference in view" as to the meaning of scientific studies. ER 17.

In short, Point Hope's abbreviated arguments fail to demonstrate any grounds for overturning EPA's reasoned approval of the site-specific criteria.

[23] ER 218, 103 (EPA scientific assessment that "[e]xisting literature and research showed the fertilization stage is the most sensitive life stage to exposure to TDS in the composition similar to that present in the Red Dog Mine effluent"); *see* ER 16 at n.58 (district court's rejection of Point Hope's characterization of the Stekoll Study based upon the administrative record).

VIII. CONCLUSION

Point Hope, ACAT and NAEC do not have standing to challenge EPA's decision. Even if they had standing, there is no basis for reversing EPA's approval of the water quality standard adopted by Alaska to govern Main Stem Red Dog Creek during the short period when Arctic grayling spawn in this stream. This Court's precedents require deference to EPA's decision. The district court's judgment should be affirmed.

DATED: May 28, 2013.

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STATEMENT OF RELATED CASES

Counsel for NANA Regional Corporation and Teck Alaska, Inc. are unaware of any case that is related to this appeal within the meaning of Ninth Circuit Rule 28-2.6.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,134 words, excluding the parts of the brief exempted from Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: May 28, 2013.

/s/ Jeffrey W. Leppo
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 28, 2013.

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