UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILD FISH CONSERVANCY, et al.,

Plaintiffs,

v.

NATIONAL PARK SERVICE, et al.,

Defendants.

CASE NO. C12-5109 BHS

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants Robert Elofson, Mike McHenry, Doug Morrill, and Larry Ward's ("Tribal Defendants") motion to dismiss (Dkt. 114). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On November 11, 2012, Plaintiffs Wild Fish Conservancy, Wild Steelhead Coalition, Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler ("Plaintiffs") filed a first supplemental complaint for declaratory

and injunctive relief against Defendants National Park Service; Jonathan B. Jarvis, in his official capacity as the Director of the National Park Service; United States Department of the Interior; Kenneth L. Salazar, in his official capacity as the Secretary of the United States Department of the Interior; United States Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as the Director of the United States Fish and Wildlife Service; United States Department of Commerce; John E. Bryson, in his official capacity as the Secretary of the United States Department of Commerce; NOAA Fisheries Service ("NMFS"); Samuel D. Rauch III, in his official capacity as the Acting Assistant Administrator for Fisheries of NOAA Fisheries Service (collectively "Federal Defendants"); and the Tribal Defendants. Dkt. 66

With regard to the Tribal Defendants, Plaintiffs assert one cause of action against the Tribal Defendants for unauthorized take of protected species in violation of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544. Dkt. 1, ¶¶ 183–187.

On December 20, 2012, the Tribal Defendants filed a motion to dismiss for lack of subject matter jurisdiction. Dkt. 114. On January 7, 2013, the Federal Defendants responded (Dkt. 116) and Plaintiffs responded (Dkt. 117). On January 11, 2013, the Tribal Defendants replied. Dkt. 119. On January 14, 2013, Plaintiffs filed a surreply.[1] Dkt. 122. On February 5, 2013, the Tribal Defendants filed a notice of supplemental authority. Dkt. 123.

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[1] Plaintiffs move to strike the Federal Defendants' response because it supports the motion to dismiss and Plaintiffs will not have an opportunity to respond. Although the Federal Defendants' response does not contain material substantially different from the motion, the Court will not consider the response in determining the motion.

On February 7, 2013 the Court granted Plaintiffs' motion for leave to file an amended complaint. Dkt. 124.

II. FACTUAL BACKGROUND

The Tribe operates multiple hatchery programs pursuant to a Hatchery and Genetic Management Plan ("HGMP") developed through a collaborative process involving the Tribe, the independent, congressionally chartered Hatchery Scientific Review Group ("HSRG"), and various federal and state agencies, including NMFS, FWS, the National Park Service ("NPS"), the United States Geological Survey ("USGS"), and the Washington Department of Fish and Wildlife ("WDFW"). *See* Dkt. 99 at 3–4. The Tribal Defendants contend that "the HGMPs were carefully crafted and exhaustively reviewed to achieve these goals and to minimize potential risks to threatened salmonids." Dkt. 114 at 3.

Originally, Plaintiffs alleged that the Tribal Defendants were operating these hatchery programs without the proper permits and/or approvals from the government. *See* Dkt. 1. Late last year, everything changed because the government issued new approvals. Specifically, on December 10, 2012, NMFS formally approved the Tribe's four HGMPs and the state of Washington's HGMP for its Chinook salmon hatchery program, pursuant to 50 C.F.R. § 223.203(b) ("the 4(d) Rule"). *See* Doc. 111-1 (4(d) Rule Limit 6 Evaluation and Recommended Determination); Doc. 111-2 (Decision Memorandum). The Deputy Regional Administrator's Decision Memorandum provides as follows:

> The five Elwha River salmon and steelhead supportive breeding programs are not new, and all incorporate best management practices and hatchery reforms considered necessary to provide for program operation while minimizing potential risks to ESA-listed species. Given that removal of the Elwha dams has made natural habitat inhospitable for natural origin fish in the lower Elwha River where salmon and steelhead production has been confined for 100 years, and the term of recovery of river and estuary habitat needed to sustain natural production is highly uncertain, the proposed hatchery programs are widely supported in the regions' salmon management and scientific communities to reduce the risk that salmon and steelhead populations remaining in the Elwha River from becoming extirpated.

Id. at 3. In addition, NMFS prepared a Biological Opinion ("BiOp") and issued an Incidental Take Statement ("ITS"). *See* Dkt. 11–3.

The agencies' approvals accordingly exempt the hatchery programs from the "take" prohibition with respect to potential effects on threatened Puget Sound steelhead, Puget Sound Chinook salmon, and bull trout. In approving the Tribe's HGMPs and joint resource management plan ("RMP") with the State, NMFS expressly provided that its approval exempts the programs from the "take" prohibition:

> NMFS has reviewed the five plans provided by the [Lower Elwha Klallam Tribe ("LEKT")] and WDFW pursuant to limit 6 of the 4(d) Rule, and evaluated them together against the requirements of the 4(d) Rule. Based on this evaluation, NMFS' determination is that activities implemented as described in the five plans would not appreciably reduce the likelihood of survival and recovery of ESA-listed Puget Sound Chinook salmon or steelhead, and that the plans address all of the criteria specified in Limit 5 of the 4(d) Rule. If the Regional Administrator concurs with this recommended determination, take prohibitions would not apply to activities implemented in accordance with the five co-manager HGMPs composing the hatchery RMP for salmon and steelhead populations in the Elwha River watershed.

Doc. 111-1 at 66; *see also* Doc. 111-2 at 7 (Regional Administrator, concurring). The ITS's issued by NMFS and FWS also recognize the exemption from potential "take" liability that they provide. *See* Doc. 111-3 at 185; Doc. 100-1 at 43; Doc. 100-3 at 41.

The parties dispute the legality of the hatcheries' current operations. In the amended complaint, Plaintiffs allege that the Tribal Defendants are not operating their hatcheries in accordance with the government's approval that was issued on December 10, 2012. Dkt. 115–1, ¶¶ 23, 26. Plaintiffs, however, have failed to allege that they provided the Tribe written notice of specific violations. Mr. Morrill declares that the Tribal Defendants are operating the hatchery program in conformity and compliance with the government issued approvals. Dkt. 120, Declaration of Doug Morrill, ¶ 2.

III. DISCUSSION

As a threshold matter, this appears to be an issue that could have been resolved via stipulation because every position Plaintiffs present in opposition has been squarely rejected. To summarize, the case law makes sense: once the government issues an approval to take endangered species, the fight lies with the government and not the entity that received such approval. There is, however, an exception to this general rule when the entity is operating outside the scope of the permit. But, if such a circumstance exists, the complaining party must give notice to the entity and an opportunity to cure the alleged illegal operations before filing suit. Although Plaintiffs allege that the Tribal Defendants are operating outside of their permits, Plaintiffs have failed to give the Tribal Defendants notice of specific acts that can be cured. Therefore, the Tribal Defendants

shall be dismissed and the matter can proceed with Plaintiffs' challenges to the government decisions and actions.[2]

Article III of the United States Constitution limits the federal courts' jurisdiction to actual cases or controversies, *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997), and "prohibits federal courts from taking further action on the merits in moot cases," *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1076 (9th Cir. 2001). Whenever a case loses its character as a present, live controversy, it is moot. *Am. Rivers*, 126 F.3d at 1123. "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 804 (9th Cir. 2008) (citations omitted).

The Tribal Defendants argue that Plaintiffs' claim against them has become moot. "The party asserting mootness bears a 'heavy' burden; a case is not moot if any effective relief may be granted." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1017 (9th Cir. 2012) (citation omitted). Declaring an issue moot "is justified only when it is 'absolutely clear' that the litigant no longer has 'any need of the judicial protection that it sought.'" *Id*. (citing *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam)).

[2] This summary serves two puposes: (1) to summarize the following discussion and (2) to highlight the reccurring theme that both the Court's and the parties' resources are being unnecessarily consumed with matters that could be resolved more efficiently.

Although the Tribal Defendants have acquired approval for their activities from the government, Plaintiffs argue that their claim is not moot. First, Plaintiffs claim that there will be future violations:

> Chambers Creek steelhead released by the Elwha Defendants will continue to return to the Elwha River for the next two to three years. Dkt. 70, ¶¶ 50, 52. These highly-domesticated fish will continue to harm ESA-listed steelhead. Id. at ¶¶ 52-53. The Court therefore retains jurisdiction to enter injunctive relief to counteract the continuing effects of these unlawful releases. See Gordon, 849 F.2d at 1245. Such relief may include ordering Elwha Defendants to maintain hatchery gates open during Chambers Creek steelhead returns and to staff the hatchery holding ponds in an effort to intercept as many of these fish as possible. See Dkt. 70, ¶ 52.

Dkt. 117 at 12. The Tribal Defendants counter that it

> has already committed to "keep open the hatchery outfall gates during the period of Chambers Creek returns and . . . harvest all Chambers Creek fish that return to the hatchery." Doc. 103 ¶38. Under the native steelhead HGMP, weirs and traps will be operated at the hatchery "to collect and cull the last remaining returns of marked, early-returning Chambers Creek lineage adult steelhead." Doc. 114 at 22:5-7. NMFS's ITS is also clear that "[t]he Action Agencies must ensure that [the Tribe] continue[s] to remove . . . any Chambers Creek steelhead encountered at weirs and traps or at the hatchery." Doc. 111-3 at 193 ¶3d. Because the relief proposed by Plaintiffs is already required, it would not be meaningful for this Court to enter such an order. And although Plaintiffs also argue that the Court "has jurisdiction to prevent future unlawful releases" of Chambers Creek fish, Doc. 117 at 13:2-3, the Tribe has permanently terminated the program, and there is nothing for the Court to enjoin.

Dkt. 119 at 7. The Court finds that the Tribal Defendants have met their burden to show that future illegal "take" will not occur.

Second, Plaintiffs allege that the Tribal Defendants are not operating in conformance with the newly issued approvals. The ESA, however, requires Plaintiffs to provide "notice of the violation." 16 U.S.C. § 1540(g)(2)(A)(1). "The key language in

the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance.'" *Waterkeepers Northern California v. AG Industrial Mfg., Inc.*, 375 F.3d 913 (9th Cir. 2004) (quoting *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002)). It is undisputed that Plaintiffs have failed to provide any notice of any alleged violation. Even in their brief, Plaintiffs only allege that "available information indicates that the Defendants do not have adequate funding to conduct even one year of the most basic monitoring and adaptive management activities required for their hatchery programs." Dkt. 117 at 24.[3] On the other hand, the Tribal Defendants have submitted evidence that the hatchery programs are operated in compliance with the government's approvals. Therefore, the Court finds Plaintiffs' argument meritless.

Finally, Plaintiffs request that the Court hold an evidentiary hearing or allow them leave to conduct discovery. Neither of these actions is appropriate. With regard to an evidentiary hearing, Plaintiffs must offer more specific allegations than the general "Defendants' hatchery activities causing take are ongoing." Dkt. 117 at 24. In order to enter a finding of fact, Plaintiffs would have to provide evidence or sufficient information to identify an alleged violation. They have failed to do this. With regard to discovery, Plaintiffs have failed to show a need for Court-ordered discovery because Plaintiffs have failed to give the Tribal Defendants notice in the form of sufficient information of a specific illegal act that can be corrected. Once this occurs and Tribal Defendants fail to

[3] Even if lack of "adequate funding" was a violation of the ESA, it's unclear whether the Court has the power to order the Tribal Defendants to obtain "adequate funding."

correct any such act, then a new action may be filed. Therefore, the Court denies Plaintiffs' requests.

IV. ORDER

Therefore, it is hereby **ORDERED** that the Tribal Defendants' motion to dismiss (Dkt. 114) is **GRANTED** for lack of subject matter jurisdiction. The Clerk shall terminate these Defendants.

Dated this 12th day of February, 2013.

BENJAMIN H. SETTLE
United States District Judge