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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF FISH &
WILDLIFE, *et al.*,

Defendants.

Case No. C21-169-RSL

ORDER GRANTING
MOTION TO DISMISS AND
GRANTING MOTION FOR
LEAVE TO AMEND AND
SUPPLEMENT COMPLAINT

This matter comes before the Court on (1) defendants Washington State Department of Fish and Wildlife and its named Commissioners’ “Motion to Dismiss Pursuant to FRCP 12(b)(1) & (6)” (Dkt. # 16); (2) plaintiff Wild Fish Conservancy’s “Motion for Leave to File First Amended and Supplemental Complaint” (Dkt. # 18), and (3) plaintiff’s “Motion to Supplement the Factual Record” (Dkt. # 34). The Court heard oral arguments on the motion to dismiss and the motion for leave to file an amended complaint on November 2, 2022 (Dkt. # 28). Having heard the arguments and reviewed the submissions of the parties and the remainder of the record, the Court finds as follows:

I. Endangered Species Act Framework

This case arises under the Endangered Species Act (“ESA”). The ESA is a federal statute enacted to provide a program to conserve threatened and endangered species and to protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). The U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) share responsibility for

1 administering the ESA. 50 C.F.R. § 402.01(b).¹ Pursuant to Section 4 of the ESA, the FWS and
2 the NMFS are empowered to designate species as “endangered”² or “threatened.”³ Pursuant to
3 Section 9 of the ESA, it is unlawful to “take”⁴ an endangered species. 16 U.S.C.
4 § 1538(a)(1)(B). The regulations promulgated under the ESA extend this Section 9 protection to
5 certain threatened species. See 50 C.F.R. § 223.203(a); 50 C.F.R. § 17.31(a).

6 The ESA provides mechanisms that exempt certain takings of endangered or threatened
7 species from Section 9 liability. These mechanisms include ESA Section 10 and regulations
8 promulgated under ESA Section 4(d). Under Section 10, the FWS and NMFS may permit
9 (1) acts “for scientific purposes or to enhance the propagation or survival of the affected species
10 . . .” and (2) takings “incidental to, and not the purpose of, the carrying out of an otherwise
11 lawful activity.” 16 U.S.C. § 1539(a)(1). Regulations promulgated under Section 4(d) of the
12 ESA provide take prohibition exemptions for (1) artificial propagation programs for which a
13 state or federal Hatchery and Genetics Management Plan (“HGMP”) meeting delineated criteria
14 has been approved by the NMFS, 50 C.F.R. § 223.203(b)(5), and (2) actions undertaken in
15 compliance with a resource management plan jointly developed by the States of Washington,
16 Oregon and/or Idaho and the tribes meeting delineated criteria, id. § 223.203(b)(6), among
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19 ¹ The NMFS has jurisdiction over marine and anadromous species, and the FWS has jurisdiction
20 over terrestrial and freshwater species. See 50 C.F.R. §§ 17.11, 223.102, 224.101.

21 ² “Endangered species” means “any species which is in danger of extinction throughout all or a
22 significant portion of its range other than a species of the Class Insecta determined by the Secretary to
23 constitute a pest whose protection under the provisions of this chapter would present an overwhelming
24 and overriding risk to man.” 16 U.S.C. § 1532(6).

25 ³ “Threatened species” means “any species which is likely to become an endangered species
26 within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

27 ⁴ “Take” means “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to
28 attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). In turn, “harm” means “an act which
actually kills or injures fish or wildlife. Such an act may include significant habitat modification or
degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral
patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

1 others.⁵ These Section 4(d) regulatory exemptions are known as “Limit 5” and “Limit 6,”
2 respectively.

3 When non-federal actors seek a Limit 5 or Limit 6 exemption, they invoke the FWS or
4 NMFS’s duty to consult under Section 7 of the ESA. Section 7 requires federal agencies to
5 “insure that any action authorized, funded, or carried out by such agency . . . is not likely to
6 jeopardize the continued existence of any endangered species or threatened species or result in
7 the destruction or adverse modification of habitat of such species which is determined by the
8 Secretary, after consultation as appropriate with affected States, to be critical . . .” 16 U.S.C.
9 § 1536(a)(2). Section 7 provides a three-step process:

10 (1) An agency proposing to take an action must inquire of the [FWS
11 or NMFS] whether any threatened or endangered species “may be present”
12 in the area of the proposed action. See 16 U.S.C. § 1536(c)(1).

13 (2) If the answer is affirmative, the agency must prepare a
14 “biological assessment” to determine whether such species “is likely to be
15 affected” by the action. Id. The biological assessment may be part of an
16 environmental impact statement or environmental assessment. Id.

17 (3) If the assessment determines that a threatened or endangered
18 species “is likely to be affected,” the agency must formally consult with the
19 [FWS or NMFS]. Id. § 1536(a)(2). The formal consultation results in a

20 ⁵ The applicable regulation, 50 C.F.R. § 223.203(b), applies to steelhead and Chinook salmon. It
21 does not, however, apply to bull trout. See 50 C.F.R. § 223.203(b) (“The limits to the prohibitions of
22 paragraph (a) of this section relating to threatened West Coast salmon ESUs and steelhead DPSs (of the
23 genus *Oncorhynchus*) listed in § 223.102 are described in the following paragraphs.”) 50 C.F.R. § 17.32
24 provides the general permitting rules applicable to bull trout, and 50 C.F.R. § 17.44(w) provides special
25 rules applicable to bull trout. See 50 C.F.R. § 17.32 (“Upon receipt of a complete application the
26 Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife.”);
27 see also 50 C.F.R. § 17.44(w)(2) (“In the following instances you may take this species in accordance
28 with applicable State, National Park Service, and Native American Tribal fish and wildlife conservation
laws and regulations, as constituted in all respects relevant to protection of bull trout in effect on
November 1, 1999: (i) Educational purposes, scientific purposes, the enhancement of propagation or
survival of the species, zoological exhibition, and other conservation purposes consistent with the Act;
or (ii) Fishing activities authorized under State, National Park Service, or Native American Tribal laws
and regulations.”).

Neither party raises this discrepancy. The Court declines to consider any differentiation under
the regulations, as it is undisputed that appropriate permits and exemptions have been obtained.

1 “biological opinion” issued by the [FWS or NMFS]. See id. § 1536(b). If
2 the biological opinion concludes that the proposed action would jeopardize
3 the species or destroy or adversely modify critical habitat, see id.
4 § 1536(a)(2), then the action may not go forward unless the [FWS or
5 NMFS] can suggest an alternative that avoids such jeopardization,
6 destruction, or adverse modification. Id. § 1536(b)(3)(A). If the opinion
7 concludes that the action will not violate the [ESA], the [FWS or NMFS]
8 may still require measures to minimize its impact. Id. § 1536(b)(4)(ii)-(iii).

9 Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985); see also 50 C.F.R. § 402, subpart B
10 (consultation procedures).

11 Section 11 of the ESA provides a “citizen suit” provision. Pursuant to this provision,
12 “any person may commence a civil suit on his own behalf” “to enjoin any person, including the
13 United States and any other governmental instrumentality or agency . . . who is alleged to be in
14 violation of any provision of [the ESA] or regulation issued under the authority thereof,” among
15 other suit authorizations. 16 U.S.C. § 1540(g)(1)(A). However, no action may be commenced
16 under this provision “prior to sixty days after written notice of the violation has been given to
17 the Secretary, and to any alleged violator of any such provision or regulation,” among other
18 limitations. Id. § 1540(g)(2)(A)(i). The ESA’s citizen suit provision imbues the district courts
19 with the jurisdiction to “enforce any such provision or regulation.” Id. at § 1540(g)(1).

20 **II. Background**

21 Plaintiff is a nonprofit organization dedicated to the preservation and recovery of
22 Washington’s native fish species and the ecosystems upon which those species depend. Dkt. # 1
23 at ¶ 11. Defendants are a Washington State agency that implements fish hatchery programs in
24 the state and its commissioners. Id. at ¶¶ 16-18.

25 Plaintiff brings this action under the citizen suit provision of the ESA. This is not the
26 first time that plaintiff has sued defendants under the citizen suit provision of the ESA. Plaintiff
27 first filed ESA citizen suits in 2002 and 2003 alleging that defendants failed to obtain ESA
28 reviews or approvals for its Puget Sound hatcheries. See Wild Puget Sound, et al v. Koenings,
et al, No. C02-1852-RSL (W.D. Wash.); Threatened Puget, et al v. Koenings, et al, No. C03-

1 687-RSL (W.D. Wash.); see also Dkt. # 18-2 at ¶ A. The parties resolved those suits through a
2 2003 settlement agreement that required defendants to work to secure ESA reviews and
3 approvals and prohibited plaintiff from initiating litigation against defendants for its hatchery
4 programs for ten years. See Wild Puget Sound, No. C02-1852-RSL at Dkt. # 37 (W.D. Wash.
5 May 15, 2003); Threatened Puget, No. C03-687-RSL at Dkt. # 18 (W.D. Wash. May 15, 2003);
6 see also Dkt. # 18-2 at 4-17. Plaintiff sued defendants again in 2014 and 2019, this time in
7 relation to ten additional hatchery programs. See Wild Fish Conservancy v. Anderson et al,
8 C14-465-JLR (W.D. Wash.); Wild Fish Conservancy v. Washington Department of Fish &
9 Wildlife et al, C19-612-JLR (W.D. Wash.); see also Dkt. # 18-2 at ¶¶ B-C. The parties resolved
10 both suits through consent decrees that imposed various restrictions on defendants' hatchery
11 programs. See Wild Fish Conservancy, C14-465-JLR at Dkt. # 22 (W.D. Wash. Apr. 28, 2014);
12 Wild Fish Conservancy v. Washington Department of Fish & Wildlife et al, C19-612-JLR at
13 Dkt. # 7 (W.D. Wash. May 2, 2019); see also Dkt. # 18-2 at 22-33, 35-45.

14 At issue here is defendants' integrated summer steelhead hatchery program on the South
15 Fork of the Skykomish River in Snohomish County, Washington (the "Skykomish Program").
16 Defendants commenced the Skykomish Program prior to the NMFS reviewing and approving
17 the HGMP and prior to the NMFS or FWS providing an authorization for defendants to take
18 ESA-listed species. See Dkt. # 16 at 2. Plaintiff alleges that the Skykomish Program causes
19 take of threatened fish species in violation of Section 9 of the ESA. In particular, plaintiff
20 alleges that the Skykomish Program causes take of the Puget Sound distinct population segment
21 ("DPS") of steelhead, the Puget Sound evolutionary significant unit ("ESU") of Chinook
22 salmon, and the coterminous U.S. bull trout. See Dkt. # 1 at ¶ 57. Such steelhead, Chinook
23 salmon, and bull trout are listed as threatened species under the ESA, see 50 C.F.R. §§ 17.11(h),
24 223.102, and are among the threatened fish protected by the ESA's anti-take provision, see
25 50 C.F.R. §§ 17.31(a), 223.203(a). Plaintiff further alleges that defendants are engaged in a
26 pattern and practice of implementing hatchery programs throughout the State of Washington that
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1 take ESA-listed species without ESA authorizations in violation of Section 9 of the ESA. Dkt.
2 # 1 at ¶¶ 72-74.

3 Defendants submitted an HGMP to the NMFS dated April 12, 2019, pursuant to
4 regulations promulgated under Section 4 of the ESA. Dkt. # 6 at 2. Defendants also submitted a
5 request for the NMFS to issue a permit under Section 10 of the ESA for a trap and haul program
6 at Sunset Falls within the South Fork of the Skykomish River, whose activities included
7 collection of broodstock for the hatchery program. Id. These two applications sought
8 exemptions and/or permits providing exemptions from liability under Section 9 of the ESA for
9 operations of the Skykomish Program. Id.

10 On December 2, 2020, plaintiff mailed a notice of its intent to sue under the ESA to
11 defendants. Dkt. # 1 at 21-28. The notice focused on the Skykomish Program, but framed the
12 implementation of the Skykomish Program in the absence of ESA review or approval as part of
13 a “long and disconcerting pattern of the agency willing to violate the ESA’s prohibition on
14 unauthorized ‘take’ of protected species when it comes to artificial fish propagation,” and noted
15 that defendants “continue[] . . . operating numerous hatcheries without NMFS’s authorization
16 and in violation of the ESA and, for many of the programs [defendants] ha[ve] not even
17 submitted the plan required for NMFS’s review.” Id. at 23-24. The notice alleged that
18 defendants were in violation of Section 9 of the ESA as follows:

19 WDFW is in violation of section 9 of the ESA, 16 U.S.C. § 1538, for
20 implementing and funding the new integrated South Fork Skykomish River
21 summer steelhead program described in the HGMP. As described above,
22 these programs cause take of ESA-listed Puget Sound steelhead, Puget
23 Sound Chinook salmon, and bull trout. This take is not authorized or
24 exempt from liability under section 9 of the ESA . . . The Conservancy
intends to sue WDFW for all take of ESA-listed salmonids resulting from
this new hatchery program.

25 [Hatchery Science Review Group gene flow recommendations]
26 and/or similar requirements, including requirements intended to reduce take
27 of ESA-listed species through ecological interactions, would be imposed on
WDFW’s new integrated South Fork Skykomish River summer steelhead

1 program through any exemption from liability under section 9 of the ESA
2 that may be granted, along with monitoring and evaluation requirements
3 necessary to ensure compliance with such requirements. It is unlikely that
4 WDFW would be able to fully comply with these requirements and the
5 hatchery program will contribute to the continued decline of ESA-listed
6 salmonids. And in any case, WDFW does not have such authorization
7 now, and therefore their 2019 and 2020 take of unmarked and/or wild
8 steelhead from the South Fork of the Skykomish and transfer to Reiter
9 Ponds violated the ESA.

10 Accordingly, the Conservancy provides notice of its intent to sue
11 WDFW to bring its new integrated South Fork Skykomish River summer
12 steelhead program described in the HGMP into compliance with section 9
13 of the ESA. This includes complete compliance with any exemption from
14 ESA liability for take that may be lawfully issued in accordance with the
15 requirements of the ESA, the National Environmental Policy Act, and any
16 other applicable statutes and regulations.

17 Id. at 26-27.

18 After the passage of the statutorily mandated 60-day period, plaintiff filed the instant
19 action on February 10, 2021. See Dkt. # 1.

20 On March 5, 2021, at the request of the parties, the Court stayed proceedings to allow
21 time for NMFS and FWS to issue decisions on whether to provide defendants' requested take
22 exemptions/authorizations for the Skykomish Program. See Dkt. # 7. The Court's order also
23 prohibited defendants from collecting steelhead to supply broodstock for the Skykomish
24 Program and from releasing hatchery fish from the Skykomish Program until such time as both
25 the NMFS and FWS had provided authorizations for the Skykomish Program to take ESA-listed
26 species. See id.

27 On April 23, 2021, defendants received a biological opinion ("BiOp") and incidental take
28 statements ("ITS") from the NMFS that included exemptions from liability under Section 9 of
the ESA for the Skykomish Program. Dkt. # 14 at 2; see also NMFS, Endangered Species Act
(ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and
Management Act Essential Fish Habitat (EFH) Consultation (NMFS Consultation Number:

1 WCRO-2019-04075), April 23, 2021 (“NMFS Consultation”) (regarding steelhead and Chinook
2 salmon).⁶

3 On July 2, 2021, NMFS issued a letter of concurrence approving the HGMP for the
4 Skykomish Program and thereby exempted the steelhead and Chinook salmon operations of the
5 Skykomish Program from liability under Section 9 of the ESA so long as the Skykomish
6 Program complied with implementation terms and reporting requirements of the associated
7 BiOp. Dkt. # 14 at 2; see also Dkt. # 22-1 (letter of concurrence).

8 On August 20, 2021, plaintiff served on defendants a supplemental 60-day notice of
9 intent to sue under the ESA. Dkt. # 14 at 3; see also Dkt. # 18-1 at 46-57 (supplemental notice).

10 Regarding the Skykomish Program, the supplemental notice asserted:

11 WDFW began the Skykomish Program, including taking listed broodstock,
12 prior to having ESA authorization and in advance of the proposed program
13 undergoing technical review by the federal regulators charged with
14 upholding the ESA. Only after the Skykomish Program was well
15 underway, and effectively a foregone conclusion, was it reviewed and
16 authorized by NMFS and FWS. This violates the intent of ESA review and
17 approval of proposals which may impact listed species – to prohibit
18 proposed programs which are too impactful, or to iteratively improve
19 proposals via feedback from the services to further minimize negative
20 impacts to listed populations.

21 ⁶ The parties’ joint status report states that defendants received BiOps from both NMFS and
22 FWS including exemptions from liability under ESA Section 9. See Dkt. # 14 at 2. Defendants’
23 declaration of Joseph Coutu indicates that defendants and the Tulalip Tribes received the FWS BiOp and
24 ITS on April 12, 2021. See Dkt. # 22 at ¶ 4. However, defendants did not provide a citation to the FWS
25 report sufficient to allow the Court to review the document. In contrast, defendants’ declaration of
26 James Scott provides a viable citation to the NMFS Consultation, which covers only the steelhead and
27 Chinook salmon at issue. See Dkt. # 17 at 12, 15, 17, 19. The NMFS Consultation indicates that the
28 FWS, as the agency responsible for administering bull trout, would issue a separate ESA Section 7
consultation regarding bull trout. See NMFS Consultation, p. 20. Nonetheless, it is undisputed that
defendants obtained exemptions from liability under ESA Section 9 for the Skykomish Program, and
plaintiff does not suggest that defendants failed to obtain exemptions regarding bull trout. See Dkt. # 16
at 2.

1 Dkt. # 18-1 at 47. The supplemental notice also asserted that “WDFW has and continues to
2 engage in a pattern of operating and implementing hatchery programs without ESA
3 authorizations or approvals, and approvals being issued only following the initiation of
4 litigation.” Id. To this end, the supplemental notice provided notice of ESA Section 9
5 violations for causing take of ESA-listed species prior to obtaining ESA authorization or
6 exemption from Section 9 liability for the following fourteen programs: (1) Whatcom Creek
7 (Fall Chinook), (2) Hupp Springs (Spring Chinook), (3) Kendall Creek North Fork Nooksack
8 (Spring Chinook), (4) Samish (Fall Chinook), (5) Deep River Net Pen (SAFE) (Coho),
9 (6) Lewis River (Coho), (7) Lewis River (Coho (type S)), (8) Lewis River (I-205 wild) (Fall
10 Chum), (9) Lewis River (Speelyai) (Spring Chinook), (10) Chambers Creek (Fall Chinook),
11 (11) George Adams (Fall Chinook), (12) Tumwater Falls (Fall Chinook), (13) Cowlitz (Spring
12 Chinook), and (14) Cowlitz (Lower + Mayfield NP) (Fall Chinook). Id. at 48-52, 55.

13 On September 9, 2021, defendants filed the motion to dismiss presently before the Court.
14 Dkt. # 16.

15 On September 16, 2021, plaintiff filed the motion for leave to file the first amended and
16 supplemental complaint presently before the Court. Dkt. # 18. Plaintiff’s motion included the
17 proposed amended and supplemental complaint. The proposed amended and supplemental
18 complaint increases focus on defendants’ pattern of implementing hatchery programs that harm
19 threatened salmonids prior to obtaining ESA reviews and approvals, includes alleged ESA
20 Section 9 violations for all of the hatcheries named in the supplemental notice except for the
21 Deep River Net Pen program,⁷ and alleges that the Skykomish Program violated Section 9 of the
22 ESA prior to obtaining ESA authorizations and exemptions and “will continue to violate
23 section 9 of the ESA, 16 U.S.C. § 1538, unless WDFW fully complies with NMFS’s and FWS’s
24 BiOp and ITS for the hatchery program and with the provisions of the HGMP and NMFS’s
25 approval of the HGMP.” Dkt. # 18-1 at ¶ 81; see generally Dkt. # 18-1. The proposed amended
26

27 ⁷ The Deep River Net Pen program obtained an exemption from take a few months before
28 plaintiff issued its supplemental notice letter. See Dkt. # 19 at 2 n.2.

1 and supplemental complaint asks the Court to (1) issue a declaratory judgment declaring that
2 defendants are in violation of Section 9 of the ESA and regulations promulgated under
3 Section 4(d) of the ESA for causing take of ESA-listed salmonids through the implementation
4 and funding of defendants' hatchery programs, (2) issue a mandatory injunction requiring
5 defendants to comply with the ESA, (3) enjoin defendants from implementing and funding
6 hatchery programs unless and until compliance with the ESA is obtained, (4) grant certain
7 preliminary, permanent declaratory, and/or injunctive relief as is warranted to ensure
8 defendants' violations of the ESA do not continue to recur, (5) award plaintiff attorney's fees,
9 and (6) grant such additional relief as the Court deems just and proper. *Id.* at 29, ¶¶ A-F.

10 **III. Motion to Dismiss**

11 Defendants move the Court to dismiss plaintiff's claims under Rule 12(b)(1) for lack of
12 subject-matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be
13 granted. The Court finds that plaintiff's claim that defendants were violating Section 9 by
14 operating the Skykomish Program without exemptions is moot, as defendants have now
15 obtained exemptions. The Court finds that plaintiff's remaining claim – that the Skykomish
16 Program is causing unlawful take regardless of its exemptions – fails to state a claim upon which
17 relief can be granted. We address the moot claim first.

18 **A. Claim that Skykomish Program Violated Section 9 by Operating Without** 19 **Exemptions**

20 Rule 12(b)(1) authorizes a motion for dismissal based on a lack of subject-matter
21 jurisdiction. When a court lacks subject-matter jurisdiction, it lacks the power to proceed, and
22 its only remaining function is to dismiss. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83,
23 94 (1998). "A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of
24 the pleadings or by presenting extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328
25 F.3d 1136, 1139 (9th Cir. 2003) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). "In
26 a facial attack, the challenger asserts that the allegations contained in a complaint are
27 insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the

1 challenger disputes the truth of the allegations that, by themselves, would otherwise invoke
2 federal jurisdiction.” Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).
3 Here, defendants bring a factual attack, asserting that the allegations that they are operating the
4 Skykomish Program without an exemption from ESA Section 9 liability are false because they
5 obtained exemptions after plaintiff filed the complaint. Therefore, they argue, the case is moot.

6 If the case is moot, the Court lacks subject-matter jurisdiction. Article III of the U.S.
7 Constitution limits the federal courts’ jurisdiction to actual cases or controversies, Am. Rivers v.
8 Nat’l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997), as amended (Sept. 16, 1997),
9 and “prohibits federal courts from taking further action on the merits in moot cases,” Env’t Prot.
10 Info. Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1076 (9th Cir. 2001). Whenever a case loses
11 its character as a present, live controversy, it is moot. Am. Rivers, 126 F.3d at 1123. “[A]n
12 actual controversy must be extant at all stages of review, not merely at the time the complaint is
13 filed.” Ctr. for Biological Diversity v. Marina Point Dev. Co., 566 F.3d 794, 804 (9th Cir. 2009)
14 (citations omitted). “The party asserting mootness bears a ‘heavy’ burden; a case is not moot if
15 any effective relief may be granted.” Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006,
16 1017 (9th Cir. 2012) (citation omitted). Declaring an issue moot “is justified only when it is
17 ‘absolutely clear’ that the litigant no longer has ‘any need of the judicial protection that it
18 sought.’” Id. (citing Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000) (per
19 curiam)).

20 Defendants argue that plaintiff’s claims are moot because defendants have now obtained
21 exemptions from ESA Section 9 liability for operation of the Skykomish Program. While the
22 Ninth Circuit has addressed related questions,⁸ it has not issued a published opinion resolving
23

24 ⁸ For example, the Ninth Circuit has ruled (1) that when one BiOps supersedes another, a
25 challenge to the superseded BiOps is moot, Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1096
26 (9th Cir. 2003) (citing Am. Rivers, 126 F.3d at 1123-24); (2) that claims seeking reconsultation under
27 the ESA are moot upon completion of reconsultation, see, e.g. All. for the Wild Rockies v. Savage, 897
28 F.3d 1025, 1031 (9th Cir. 2018); cf. Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt., 36 F.4th 850,
884-85 (9th Cir. 2022) (holding that, because consultation with the FWS was still ongoing, the court had
jurisdiction over a claim that an agency failed to consult before acting); and (3) that suits seeking to
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1 whether an interceding exemption moots a citizen suit claiming unlawful take under Section 9 of
2 the ESA. The only Ninth Circuit caselaw addressing this question of which this Court is aware
3 is the memorandum disposition issued in Wild Fish Conservancy v. Nat'l Park Serv., 687 F.
4 App'x 554 (9th Cir. 2017), which affirmed the district court's ruling in Wild Fish Conservancy
5 v. Nat'l Park Serv., No. C12-5109 BHS, 2013 WL 549756, at *2 (W.D. Wash. Feb. 12, 2013).
6 The Ninth Circuit's explanation of its reasoning, however, was minimal. The Ninth Circuit
7 ruled as follows:

8 The district court correctly found the Conservancy's initial claim that the
9 Tribe was taking fish without authorization moot in light of NMFS's
10 Limit 6 approval and Incidental Take Statement. See Am. Rivers v. Nat'l
11 Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997) ("If an event
12 occurs that prevents the court from granting effective relief, the claim is
13 moot and must be dismissed."). The district court also correctly found that
14 any claim against the Tribe for taking in violation of NMFS's authorization
15 was barred for lack of notice. 16 U.S.C. § 1540(g)(2)(A)(i); see Sw. Ctr.
16 for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 522
17 (9th Cir. 1998) (holding that citizen-plaintiff must "provide sufficient
18 information of a violation so that the [defendant] could identify and attempt
19 to abate the violation").

20 Wild Fish Conservancy, 687 F. App'x at 558. While the Court is not bound by this unpublished
21 decision or the district court ruling it affirmed, it looks to both as persuasive precedent.

22 In light of the caselaw discussed above, the Court concludes that it can no longer grant
23 meaningful relief on plaintiff's claims grounded in the allegation that the Skykomish Program is

24 reinitiate ESA consultation are moot upon reinitiation of consultation, see, e.g., All. for the Wild
25 Rockies v. U.S. Forest Serv., 907 F.3d 1105, 1121 (9th Cir. 2018); All. for the Wild Rockies v. U.S.
26 Dep't of Agric., 772 F.3d 592, 601 (9th Cir. 2014); but see Forest Guardians v. Johanns, 450 F.3d 455,
27 462 (9th Cir. 2006) (holding that reinitiation claim was not moot where the grazing permit at issue
28 "requires that the Forest Service obtain from FWS annual concurrence that the guidance criteria
 governing the 'not likely to adversely affect' finding have been met," and "the Forest Service's practice
 of not complying with the monitoring requirements is likely to persist despite the recent re-
 consultation").

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1 unlawfully taking ESA-listed species without an exemption from ESA Section 9 liability.⁹ The
2 Court cannot order defendants to seek an exemption because defendants have already obtained
3 an exemption. Cf. Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978)
4 (“Where the activities sought to be enjoined have already occurred, and the appellate courts
5 cannot undo what has already been done, the action is moot.”). Any other relief would serve no
6 purpose because plaintiff’s core objective has been met. Cf. Ctr. for Biological Diversity v.
7 Lohn, 511 F.3d 960, 964 (9th Cir. 2007) (“[D]eclaring the DPS Policy unlawful would serve no
8 purpose in this case because the Service has listed the Southern Resident as an endangered
9 species, the Center’s ultimate objective. That the DPS Policy might adversely affect the
10 Southern Resident’s endangered species status or the Service’s listing determination of certain
11 other killer whale populations at some indeterminate time in the future is too remote and too
12 speculative a consideration to save this case from mootness.”). These claims are accordingly
13 moot.

14 Plaintiff argues that the claims are not moot because: (A) obtaining the exemption is
15 insufficient to moot the case, (B) defendants’ continuing practice and history of violating the
16 ESA means that meaningful relief remains available, (C) this case falls within the voluntary
17 cessation exception to the mootness doctrine because defendants ceased operating the
18 Skykomish Program while obtaining the exemption, and (D) further development of the facts is
19 necessary before the Court can rule on mootness. While plaintiff’s arguments are well reasoned,
20 the Court is ultimately not persuaded. The Court considers each argument in turn.

21
22 ⁹ While the Court recognizes that plaintiff generally couched its request for relief in generic
23 terms, perhaps in an attempt to avoid mootness in the event that defendants obtained an exemption
24 during the pendency of this litigation, plaintiff’s request for relief nonetheless relies on the assertion that
25 the Skykomish Program was operating without the permit. See Dkt. # 1 at 19, ¶ A (Plaintiff requests
26 that the Court “[i]ssue a declaratory judgment declaring that WDFW is in violation of section 9 of the
27 ESA and regulations promulgated under section 4(d) of the ESA for causing ‘take’ of threatened Puget
28 Sound steelhead, threatened Puget Sound Chinook salmon, and threatened bull trout *through the
implementation and funding of the **unreviewed and unpermitted** South Fork Skykomish River summer
steelhead program*”) (emphasis added). The Court discusses below why plaintiff’s claims regarding
post-exemption unlawful take must also be dismissed.

1 **1. Exemption**

2 Plaintiff argues that obtaining an exemption cannot moot the case because an ESA
3 exemption is merely an affirmative defense. See Dkt. # 20 at 16-18, 20-21. Under Rule 4(d),
4 NMFS’ approval of a plan provides an “affirmative defense” against allegations of unlawful
5 take that “must be raised, pleaded, and proven by the proponent.” 50 C.F.R. § 223.203(c).¹⁰
6 Plaintiff contends that because its complaint alleged that the Skykomish program was causing
7 unlawful take (not only that it was operating without an exemption), the issuance of an
8 exemption means only that defendants now have an affirmative defense available. See Dkt. # 20
9 at 17. Plaintiff further argues that as a result, the case cannot be moot as defendants have made
10 no effort to prove compliance with the exemptions or establish that they “have completely or
11 irrevocably eradicated the effects of the alleged violation.” Dkt. # 20 at 18 (quoting Chang v.
12 United States, 327 F.3d 911, 918 (9th Cir. 2003)).

13 The case on which Plaintiffs rely for the proposition that defendants bear the burden of
14 proving compliance with exemptions, United States v. Charette, is inapposite. 893 F.3d 1169,
15 1174 (9th Cir. 2018). That case held that a private party being prosecuted for “take” of an
16 endangered species in violation of the ESA bears the burden of proving he or she had a valid
17 take permit as an affirmative defense *in a criminal action*. Id.; see also Nw. Env’t Def. Ctr. v.
18 U.S. Army Corps of Eng’rs, 479 F.Supp.3d 1003, 1021 n.8 (D. Or. 2020). Furthermore, review
19 of the relevant statutory text reveals the affirmative defense arises only after an exemption has
20 been issued:

21 In connection with any action alleging a violation of section 1538 of this
22 title, any person claiming the benefit of any exemption or permit under this
23 chapter shall have the burden of proving that the exemption or permit is

24
25
26 ¹⁰ As plaintiff notes, a BiOp and ITS issued under section 7 can similarly function as a permit
27 authorizing take, and also provides an “affirmative defense against a claim alleging take in violation of
28 the ESA.” See Dkt. # 20 at 11 (citing 16 U.S.C. §§ 1536(o)(2), 1539(g); H.R. Rep. No. 94-823, at 6
(1976)).

1 applicable, has been granted, and *was valid and in force at the time of the*
2 *alleged violation.*

3 16 U.S.C. § 1539(g) (emphasis added). A common sense reading of the statute compels the
4 conclusion that now that exemptions have been issued for the Skykomish Program, defendants
5 will have an affirmative defense to allegations of unlawful take. Specifically, they will have an
6 “absolute defense” to liability under Section 9 as long as they can demonstrate complete
7 compliance with the terms of the exemption. See 50 C.F.R. § 223.203(c). However, where the
8 allegation against defendant is specifically that it is causing take by operating without
9 authorization, the affirmative defense cannot be available as the very allegation at issue is that
10 no permit or exemption “has been granted.” 16 U.S.C. § 1539(g).

11 Plaintiff’s attempt to invoke the affirmative defense to stave off mootness construes the
12 issue too broadly. The Court does not find plaintiff’s overarching claim that defendant is
13 violating Section 9 moot. It simply finds plaintiff’s claim that defendants were taking fish
14 without authorization is moot, as defendants have now obtained the relevant exemptions.

15 Plaintiff argues against this conclusion, citing Native Fish Soc’y v. Nat’l Marine
16 Fisheries Serv., No. C12-431-HA, 2013 WL 12120102 (D. Or. May 16, 2013), and Strahan v.
17 Roughead, 910 F.Supp.2d 358, 377-78 (D. Mass. 2012). However, neither opinion is binding on
18 this Court, and both cases dealt with whether plaintiff’s overall Section 9 claims were mooted by
19 the issuance of exemptions in contrast to the more specific question we address here. Native
20 Fish Soc’y, 2013 WL 12120102, at *9; Strahan, 910 F.Supp.2d at 374.

21 Indeed, the court in Native Fish Soc’y explicitly acknowledged that it had “no trouble in
22 conceiving of a situation in which the issuance of an ITS would moot a plaintiff’s claims or
23 allegations [of section 9 violations].” 2013 WL 12120102, at *9 n.6. Other district courts in
24 this circuit have similarly concluded that “case law confirms that issuance of [an agency
25 exemption] moots ESA Section 9 claims.” Oregon Wild v. Connor, No. C9-185-AA, 2012 WL
26 3756327, at *2 (D. Or. Aug. 27, 2012) (collecting cases); see also All. for Wild Rockies v.
27 Burman, 499 F.Supp.3d 786, 794 (D. Mont. 2020) (concluding that where “incidental take of

1 bull trout has been authorized by the ITS . . . [plaintiff] has achieved its relief sought and the
2 Section 9 claim is moot.”); Wild Equity Inst. v. City and Cnty. of S.F., No. C11-958-SI, 2012
3 WL 6082665, *3 (N.D. Cal. Dec. 6, 2012) (finding that “[t]he ITS now authorizes take of the
4 Frog and the Snake . . . [i]f the City fails to abide by the terms of the ITS, then plaintiffs will
5 have a new cause of action, but until then the City is shielded from liability.”); Wild Fish
6 Conservancy, 2013 WL 549756, at *2.

7 **2. Relief Available**

8 Plaintiff next argues that defendants’ continuing practice and history of violating the ESA
9 means that meaningful relief remains available. “A case becomes moot only when it is
10 impossible for a court to grant any effectual relief whatever to the prevailing party.” Knox v.
11 Serv. Emps. Int’l Union, Loc. 1000, 567 U.S. 298, 307 (2012) (citing City of Erie v. Pap’s A.M.,
12 529 U.S. 277, 287 (2000)) (internal punctuation omitted). With regards to the Skykomish
13 Program, the Court disagrees that relief remains available. As discussed above, the Skykomish
14 Program has already obtained its exemptions, and the Court is therefore unable to grant
15 meaningful injunctive relief.

16 Declaratory relief is also inappropriate. Plaintiff argues that declaratory judgment would
17 provide effective relief because it would guide defendants’ future implementation and operation
18 of many hatchery programs that do not have ESA approvals and would ensure that defendants
19 do not continue their unlawful practices. See Dkt. # 20 at 22. The cases that plaintiff relies
20 upon, Johanns and Tidwell, are distinguishable. In Johanns, the specific grazing permit at issue
21 required the Forest Service to obtain annual concurrence from the FWS. The Ninth Circuit
22 reasoned that declaratory relief was appropriate because “a declaratory judgment that the Forest
23 Service’s actions relating to Water Canyon violated the ESA would provide effective relief by
24 governing the Forest Service’s actions *for the remainder of the allotment’s permit term* and by
25 prohibiting it from continuing to violate the law.” Johanns, 450 F.3d at 462-63 (emphasis
26 added). A declaratory judgment regarding a specific permit is much narrower in scope than a
27 declaratory judgment regarding defendants’ entire hatchery program. Tidwell, as a decision of

1 the U.S. District Court for the District of Oregon, is not binding on this Court. Nonetheless, it is
2 likewise distinguishable on the ground of scope. There, the plaintiffs' claims went to the NMFS
3 and Forest Service's management of grazing permits in the Malheur National Forest. Oregon
4 Nat. Desert Ass'n v. Tidwell, 716 F. Supp. 2d 982, 989 (D. Or. 2010). The court found that the
5 defendants had not carried their heavy burden of establishing that the court could provide no
6 effective relief for the violations alleged because the grazing activities continued to be managed
7 under the same BiOp "and declaratory judgment that the Forest Service violated the ESA by
8 failing to timely reinitiate formal consultation could provide effective relief." Id. at 994-95.
9 Unlike the plaintiffs in Johanns and Tidwell, plaintiff does not assert it requires declaratory
10 relief regarding the specific program at issue – the Skykomish Program – but rather indicates
11 that declaratory relief could guide defendants' other hatchery programs. See Dkt. # 20 at 22-23.
12 This argument does not save plaintiff's initial claims from mootness.

13 3. Voluntary Cessation

14 Third, plaintiff argues that this case falls within the voluntary cessation exception to the
15 mootness doctrine because defendants ceased operating the Skykomish Program while obtaining
16 the exemption. "It is well settled that 'a defendant's voluntary cessation of a challenged practice
17 does not deprive a federal court of its power to determine the legality of the practice.'" Friends
18 of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting City
19 of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). Plaintiff's argument fails
20 because while it is true that defendants voluntarily ceased operating the Skykomish Program
21 pending receipt of exemptions, see Dkt. # 7 (order granting parties' stipulated motion to cease
22 Skykomish Program operations pending obtaining ESA exemptions), the exemptions have now
23 been obtained. "The ESA allows a citizen suit for the purpose of obtaining injunctive relief
24 only." Marina Point Dev. Co., 566 F.3d at 804 (citing 16 U.S.C. § 1540(g)(1)(A)). "Of course,
25 that is forward looking, and is intended to prevent a defendant from taking an endangered or
26 threatened species." Id. (citing 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31). Given that
27 defendants have now obtained exemptions for the Skykomish Program, it is irrelevant that

1 defendants voluntarily ceased operations prior to obtaining these exemptions. It would be
 2 impossible for defendants to revert to operating the Skykomish Program *prior* to obtaining
 3 exemptions, and the Court is constrained to granting forward-looking relief.¹¹

4 Plaintiff also argues that defendant “has not demonstrated that its wrongful behavior is
 5 not reasonably likely to recur at [other hatchery programs].” Dkt. # 20 at 24. However, this
 6 argument impermissibly broadens the voluntary cessation exception. Here, the “challenged
 7 practice” that defendants voluntarily halted was the *operation of the Skykomish program* without
 8 exemptions. Defendants’ alleged conduct at other hatcheries is not relevant to the voluntary
 9 cessation inquiry. Any claim that defendants are operating other hatcheries without ESA
 10 exemptions “would constitute an entirely new violation subject to judicial review.” Burman,
 11 499 F.Supp.3d at 794.

12 **4. Evidentiary Hearing and Discovery**

13 Finally, plaintiff argues that further development of the facts is necessary before the
 14 Court can rule on mootness. “[D]iscovery should ordinarily be granted where pertinent facts
 15 bearing on the question of jurisdiction are controverted or where a more satisfactory showing of
 16 the facts is necessary.” Laub v. U.S. Dep’t of Interior, 342 F.3d 1080, 1093 (9th Cir. 2003)
 17 (quoting Butcher’s Union Loc. No. 498, United Food & Com. Workers v. SDC Inv., Inc., 788
 18 F.2d 535, 540 (9th Cir. 1986)). Plaintiff premises this argument on the idea that the Court must
 19 determine whether the Skykomish Program complies with its exemptions from Section 9
 20 liability prior to concluding plaintiff’s claims are moot. However, the only facts relevant to the
 21

22 ¹¹ Plaintiff’s citation to Rosemere Neighborhood Ass’n v. EPA, 581 F.3d 1169 (9th Cir. 2009),
 23 does not change the result. In Rosemere, the challenged conduct was the agency’s failure to process
 24 plaintiff’s complaint within the regulatory deadlines. 581 F.3d at 1171-73. The agency had voluntarily
 25 ceased the challenged behavior (refusing to process the complaint) by eventually processing plaintiff’s
 26 complaint after plaintiff had commenced legal action against the agency. Id. The court held that this
 27 conduct did not moot the case because it was likely that the plaintiff would file another complaint with
 28 the agency, and again be subject to the agency’s refusal to meet regulatory deadlines. Id. at 73-76.
 Here, as discussed above, the “voluntarily ceased” behavior is operating the Skykomish program prior to
 obtaining ESA exemptions, a behavior that cannot be repeated now that ESA exemptions have been
 obtained.

1 Court's mootness inquiry – which, as discussed above, is focused exclusively on plaintiff's
2 claim that the Skykomish Program was operating without exemptions – are whether exemptions
3 have now been obtained. Because the parties do not dispute that exemptions have been
4 obtained, see Dkt. 20 at 13, the Court declines to defer ruling on mootness.

5 **B. Claims That the Skykomish Program Is Causing Ongoing Unlawful Take**

6 Defendants also move to dismiss claims that the Skykomish Program is causing ongoing
7 unlawful take under Rule 12(b)(1) and Rule 12(b)(6).

8 **1. Lack of Jurisdiction**

9 Defendants argue that allegations of take beyond the bounds of the exemptions is not
10 concretely alleged in plaintiff's notice letter to defendants, and thus must be dismissed under
11 Rule 12(b)(1). See Dkt. # 1 at 21-28. The citizen suit provision of the ESA, under which
12 plaintiff brings the current action, is a supplementary enforcement mechanism. See Gwaltney of
13 Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60-62 (1987) (finding that “the
14 citizen suit is meant to supplement rather than to supplant governmental action”). One of the
15 limits imposed on these enforcement actions is a jurisdictional sixty-day notice period. 16
16 U.S.C. § 1540(g)(2)(A)(i); Sw. Ctr. for Biological Diversity, 143 F.3d at 520 (citing Save the
17 Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988)). The core purpose of the notice
18 requirement is to provide defendants with “an opportunity to review their actions and take
19 corrective measures if warranted,” and offer “an opportunity for settlement or other resolution of
20 a dispute without litigation.” Id. The notice must, “at a minimum provide sufficient
21 information so that the [notified parties] could identify and attempt to abate the
22 violation.” Animal Legal Def. Fund v. Olympic Game Farm, Inc., 951 F.Supp.3d 956, 967
23 (W.D. Wash. 2022) (quoting Sw. Ctr. For Biological Diversity, 143 F.3d at 522) (internal
24 punctuation omitted). “A reviewing court may examine both the notice itself and the behavior
25 of its recipients to determine whether they understood or reasonably should have understood the
26 alleged violations.” Klamath-Siskiyou Wildlands Ctr. v. MacWhorter, 797 F.3d 645, 651 (9th
27 Cir. 2015). “[A] notice need not provide the exact details of the legal arguments that the

1 plaintiffs intend to eventually make.” Conservation Cong. v. Finley, 774 F.3d 611, 618 (9th Cir.
2 2014) (citing Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1072-73 (9th Cir. 1996)). The
3 question is “whether the notice provided information that allowed the defendant to identify and
4 address the alleged violations, considering the defendant’s superior access to information about
5 its own activities.” Klamath-Siskiyou, 797 F.3d at 651.

6 Here, the notice letter was issued before the exemptions were in place. Thus, it would
7 have been impossible for plaintiff to specifically allege that defendants were exceeding the take
8 authorizations in the exemptions. Defendants argue that as a result, notice was insufficient, and
9 the Court does not have jurisdiction over the claims. However, the Ninth Circuit does not
10 require hyper technical specificity when reviewing citizen suit notices. Here, plaintiff’s notice
11 letter stated that there are “clear recommendations regarding the maximum acceptable level of
12 gene flow from integrated hatchery programs to wild conspecific populations and regarding the
13 introgression of natural origin fish into the broodstock along with hatchery-origin fish” and that
14 “it is unlikely that WDFW would be able to fully comply with these requirements.” Dkt. # 28-1
15 at 27. Furthermore, the notice letter specified that plaintiff “provides notice of its intent to sue
16 WDFW to bring its . . . Skykomish [Program] . . . into compliance with section 9 of the ESA.
17 This includes complete compliance with any exemption from ESA liability for take that may be
18 lawfully issued” Id. Thus, notice was sufficient to alert defendants that plaintiff would sue
19 due to a belief that the Skykomish Program was causing unlawful take, regardless of the
20 exemptions obtained.

21 **2. Failure to State a Claim**

22 Additionally, defendants argue that plaintiff’s allegations that defendants are causing
23 unlawful take – despite their exemptions – must be dismissed for failure to state a claim upon
24 which relief can be granted. Dkt. # 21 at 8, 11; Dkt. # 16 at 3, 5. A claim is appropriately
25 dismissed pursuant to Rule 12(b)(6) if the claim “fail[s] to state a claim upon which relief can be
26 granted.” Whitaker v. Tesla Motors, Inc., 985 F.3d 1173, 1175 (9th Cir. 2021) (quoting Fed. R.
27 Civ. P. 12(b)(6)). The question for the Court is whether the facts alleged in the complaint

1 sufficiently state a “plausible” ground for relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
2 (2007). To survive dismissal, plaintiff must make a “short and plain statement of the claim”
3 from which the Court can draw the reasonable inference that the defendants are liable and that
4 the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2); United States v. Corinthian Colls., 655
5 F.3d 984, 991 (9th Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)); see also
6 Twombly, 550 U.S. at 570. Plaintiff must plead sufficient facts “to raise a right to relief above a
7 speculative level,” . . . “a formulaic recitation of the elements of a cause of action will not do.”
8 Whitaker, 985 F.3d at 1176 (quoting Twombly, 550 U.S. at 555). In the context of this motion,
9 the Court must “accept factual allegations in the complaint as true and construe the pleadings in
10 the light most favorable to the nonmoving party.” Manzarek v. St. Paul Fire & Marine Ins. Co.,
11 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted). The Court’s review is generally limited
12 to the contents of the complaint. Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996).

13 Here, plaintiff’s claims of ongoing unlawful take are speculative. The complaint states,
14 “Even if NMFS and/or FWS approve WDFW’s HGMP or issue take statements or permits for
15 the new hatchery program, WDFW *will likely* remain in violation of section 9 of the ESA
16 because the South Fork Skykomish River summer steelhead program cannot satisfy the
17 requirements imposed by NMFS and/or FWS,” Dkt. # 1 at ¶ 68 (emphasis added), and goes on
18 to state that “*it is unlikely that WDFW would be able* to fully comply with [future exemption-
19 imposed] requirements, and the hatchery program will contribute to the continued decline of
20 ESA-listed salmonids,” id. at ¶ 71 (emphasis added). To survive a motion to dismiss, plaintiff
21 must “raise a right to relief above a speculative level.” Whitaker, 985 F.3d at 1176 (quoting
22 Twombly, 550 U.S. at 555). Here, plaintiff has not met this standard. The complaint does not
23 allege facts that would entitle plaintiff to relief; it merely theorizes that such facts would likely
24 materialize. Thus, the Court grants defendants’ motion to dismiss for failure to state a claim as
25 to defendant’s allegations of post-exemption take.

26 Plaintiff filed a motion to expand the factual record, seeking to introduce facts that would
27 establish defendants are violating the Skykomish Program’s exemptions. See Dkt. # 34.

1 However, a motion to dismiss under Rule 12(b)(6) generally must rely solely on the contents of
2 the pleadings. See Fed. R. Civ. P. 12(d). There are two exceptions to this rule: the
3 incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201.
4 Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018). Judicial notice
5 under Rule 201 permits a court to notice an adjudicative fact if it is “not subject to reasonable
6 dispute.” Fed. R. Evid. 201(b). A fact is “not subject to reasonable dispute” if it is “generally
7 known,” or “can be accurately and readily determined from sources whose accuracy cannot
8 reasonably be questioned.” Fed. R. Evid. 201(b)(1)-(2). Incorporation by reference allows a
9 court to consider documents “incorporated into the complaint by reference.” J. K. J. v. City of
10 San Diego, 42 F.4th 990, 997 (9th Cir. 2021) (quoting Tellabs, Inc. v. Makor Issues & Rts., Ltd.,
11 551 U.S. 308, 322 (2007)). Neither exception applies here. The relevant report was not relied
12 upon (as it did not exist) when plaintiff filed its complaint. And, as plaintiff acknowledges, the
13 facts it seeks to introduce in the motion to supplement demonstrate that there is “significant
14 factual dispute.” Dkt. # 34 at 7. Accordingly, the Court denies plaintiff’s motion to supplement
15 the record.¹²

16 In conclusion, to the extent that plaintiff’s claims regarding the Skykomish Program go to
17 pre-exemption unlawful take, they are moot. To the extent they go to post-exemption unlawful
18 take, they fail to state a claim upon which relief can be granted. When amendment would be
19 futile dismissal may be ordered with prejudice. See Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir.
20 1996). Plaintiff’s claims are therefore dismissed with prejudice with regard to the pre-
21 exemption claims and without prejudice with regard to the post-exemption claims. Accordingly,
22 plaintiff is free to incorporate its recent, more specific allegations against the Skykomish
23 Program into its Amended Complaint.

24
25 ¹² Plaintiff also filed a surreply moving the Court to strike materials filed with defendants’
26 response regarding defendants’ purported compliance with the ITS and approved HGMP. See Dkt. # 25.
27 Because the Court concludes that such compliance is irrelevant to the motion to dismiss currently before
28 the Court, it declines to consider such materials, and therefore need not rule on plaintiff’s motion to
strike.

ORDER GRANTING MOTION TO DISMISS AND
GRANTING MOTION FOR LEAVE TO AMEND
AND SUPPLEMENT COMPLAINT - 22

1 IV. Motion to Amend and Supplement Complaint

2 Plaintiff moves the Court for leave to file a first amended and supplemental complaint
3 adding claims regarding a number of other hatchery programs.

4 Plaintiff seeks to amend the complaint to include alleged violations of ESA Section 9 that
5 occurred before the initial complaint was filed. Plaintiff does not assert, nor could it, that it is
6 entitled to amend its pleadings as a matter of course. See Fed. R. Civ. P. 15(a)(1). Once the
7 time has passed for amending pleadings as a matter of course, Rule 15(a)(2) provides that the
8 Court “should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). Leave to
9 amend, however, “is not to be granted automatically.” In re W. States Wholesale Nat. Gas
10 Antitrust Litig., 715 F.3d 716, 738 (9th Cir. 2013), aff’d sub nom. Oneok, Inc. v. Learjet, Inc.,
11 575 U.S. 373 (2015) (quoting Jackson v. Bank of Haw., 902 F.2d 1385, 1387 (9th Cir. 1990)).
12 The Court considers the following five factors to assess whether to grant leave to amend:
13 “(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment;
14 and (5) whether plaintiff has previously amended his complaint.” Id. (quoting Allen v. City of
15 Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)).

16 Amendment here is proper. There is no sign of bad faith. Despite the passage of time,
17 this case is still in its infancy due to a stay entered on March 5, 2021, see Dkt. # 7, thus
18 minimizing prejudice to defendants. Amendment does not appear to be futile because
19 amendment remedies the primary problem impacting the original complaint: mootness. Finally,
20 this is plaintiff’s first request to amend the complaint, which favors permitting amendment here.
21 Defendants primarily argue that plaintiff should not be granted leave to amend because (1) the
22 new claims are not related to the Skykomish Program, and (2) plaintiff’s knowledge of the
23 thirteen additional hatchery programs included in the proposed amended and supplemental
24 complaint is not new. See Dkt. # 19 at 4-6. Defendants, however, fail to tie these objections to
25 any of the factors that the Court considers when determining whether to grant leave to amend or
26 to cite any law in support of these positions. See id. To the extent that defendants argue that
27 plaintiff’s original notice letter did not include the new claims, see id. at 4-5, the Court notes that

1 plaintiff issued a supplemental notice letter on August 20, 2021. See Dkt. # 18-1 at 46-57. The
2 Court therefore grants plaintiff leave to amend the complaint.

3 Plaintiff also seeks to supplement the complaint to include alleged violations of Section 9
4 of the ESA that occurred after the initial complaint was filed. Under Rule 15(d), “the court may
5 on just terms, permit a party to serve a supplemental pleading setting out any transaction,
6 occurrence, or event that happened after the date of the pleading to be supplemented. The court
7 may permit supplementation even though the original pleading is defective in stating a claim or
8 defense.” Fed. R. Civ. P. 15(d). “Rule 15(d) permits the filing of a supplemental pleading
9 which introduces a cause of action not alleged in the original complaint and not in existence
10 when the original complaint was filed.” Cabrera v. City of Huntington Park, 159 F.3d 374, 382
11 (9th Cir. 1998) (quoting United States v. Reiten, 313 F.2d 673, 674 (9th Cir. 1963)). Leave to
12 permit supplemental pleading is “favored.” Planned Parenthood of S. Ariz. v. Neely, 130 F.3d
13 400, 402 (9th Cir. 1997) (quoting Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988)). Motions
14 to amend pursuant to Rule 15(d) should be granted “unless undue prejudice to the opposing
15 party will result.” LaSalvia v. United Dairymen of Ariz., 804 F.2d 1113, 1119 (9th Cir. 1986)
16 (quoting Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973)).

17 Defendants argue that the Court should not grant leave to supplement because (1) leave to
18 permit supplemental pleading “cannot be used to introduce a ‘separate, distinct and new cause of
19 action,’” Dkt. # 19 at 7 (quoting Planned Parenthood of S. Ariz., 130 F.3d at 402),
20 (2) supplementation can only be used to add claims that arise from facts which come into
21 existence after the filing of the current complaint, id. (citing Eid v. Alaska Airlines, Inc., 621
22 F.3d 858, 874 (9th Cir. 2010)), (3) the Court lacks jurisdiction because at the time plaintiff filed
23 its motion to amend and supplement the complaint, 60 days had not yet passed from its issuance
24 of the supplemental notice letter, id. at 7-8, (4) the nature of the relief that plaintiff may seek for
25 the new claims is different from any relief that it may try to seek for the Skykomish Program, id.
26 at 8-11, (5) the interests of parties unrelated to the Skykomish Program will need to be
27 considered, id. at 11-12, and (6) supplementation will complicate attorney’s fee issues, id. at 12.

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1 The Court takes these as arguments that defendants would suffer undue prejudice from
2 supplementation of the complaint and considers each in turn.

3 First, while defendants argue that leave to permit supplemental pleading “cannot be used
4 to introduce a ‘separate, distinct and new cause of action,’” Dkt. # 19 at 7 (quoting Planned
5 Parenthood of S. Ariz., 130 F.3d at 402), this is an incomplete recitation of the law. In Cabrera,
6 the Ninth Circuit expanded on this rule, stating, “supplemental pleading cannot be used to
7 introduce a ‘separate, distinct and new cause of action’ *where the original action between the*
8 *parties has reached a final resolution and the district court does not retain jurisdiction.”*
9 Cabrera, 159 F.3d at 382 n.11 (quoting Planned Parenthood of S. Ariz., 130 F.3d at 402)
10 (emphasis added). This rule does not bar supplementation here because the Court
11 simultaneously considers defendants’ motion to dismiss and plaintiff’s motion to amend and
12 supplement the complaint, which were both noted for the same day, and thus has yet to enter a
13 final judgment. Cf. Planned Parenthood of S. Ariz., 130 F.3d at 402 (holding that district court
14 lacked jurisdiction to grant plaintiffs’ request to supplement their complaint where it had entered
15 final judgment four years prior). Even taking defendants’ statement of the law as correct, this
16 argument still fails. In Keith, the Ninth Circuit explained that “[w]hile some relationship must
17 exist between the newly alleged matters and the subject of the original action, they need not all
18 arise out of the same transaction.” Keith v. Volpe, 858 F.2d 467, 474 (9th Cir. 1988). The new
19 claims need not address the Skykomish Program; it is sufficient that they are also ESA Section 9
20 claims regarding defendants’ hatchery programs.

21 Second, the Court agrees that supplementation can only be used to add claims post-dating
22 the complaint. See Fed. R. Civ. P. 15(d). To the extent that plaintiff’s new claims do not meet
23 this requirement, it is via plaintiff’s tandem request for leave to *amend* that they are approved.

24 Third, defendants are correct that 60 days from the issuance of the supplemental notice
25 letter had not yet expired at the time that plaintiff filed its motion to amend and supplement the
26 complaint. Dkt. # 19 at 7-8. The 60-day notice period is jurisdictional. See Sw. Ctr. for
27 Biological Diversity, 143 F.3d at 520. Nonetheless, the 60-day notice period has now long-

1 since expired, and it is measured against the date that the amended and supplemental complaint
2 is actually filed rather than the date that plaintiff requested leave from the Court. See U.S. Dep't
3 of Agric., 772 F.3d at 601-04. This argument therefore fails.

4 Addressing defendants' fourth and fifth arguments, defendants seem to argue that the
5 Court should not grant leave to supplement because this will be a complicated case. See Dkt.
6 # 8-12. The Court, however, is well-equipped to handle complicated matters. It is unclear how
7 requiring plaintiff to file this as a new suit would uncomplicate the claims. Further, as
8 defendants recognize, additional parties may join or intervene in existing litigation. See Dkt.
9 # 19 at 12. Defendants are welcome to utilize proper procedure to seek to join any other parties
10 that they deem appropriate.

11 Finally, defendants argue that the Court should deny supplementation because it might
12 complicate an eventual award of plaintiff's attorney's fees. See id. at 12. This falls short of
13 undue prejudice. The Court is confident that plaintiff's counsel will maintain appropriate billing
14 records throughout the course of litigation.

15 In summary, plaintiff may file its first amended and supplemental complaint, striking the
16 claims dismissed by this Order.

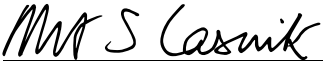
17 **V. Conclusion**

18 For all of the foregoing reasons, IT IS HEREBY ORDERED that:

- 19 1. Defendants' Motion to Dismiss Pursuant to FRCP 12(b)(1) & (6) (Dkt. # 16) is
20 GRANTED. Plaintiff's pre-ESA-exemption claims relating to the Skykomish Program
21 are dismissed with prejudice as moot. Plaintiff's post-ESA-exemption claims relating to
22 the Skykomish Program are dismissed without prejudice.
- 23 2. Plaintiff's Motion for Leave to File First Amended and Supplemental Complaint (Dkt.
24 # 18) is GRANTED. Plaintiff may file its first amended and supplemental complaint,
25 striking the claims dismissed by this Order and any other moot claims.
- 26 3. Plaintiff's Motion to Supplement the Factual Record (Dkt. # 34) is DENIED.
- 27 4. The Clerk of Court is directed to return this action to the Court's active caseload.

28 ORDER GRANTING MOTION TO DISMISS AND
GRANTING MOTION FOR LEAVE TO AMEND
AND SUPPLEMENT COMPLAINT - 26

DATED this 7th day of February, 2023.


Robert S. Lasnik
United States District Judge

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