UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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Litigation Materials for the
October 2023 Meeting of the North Pacific Fishery Management Council:
Wild Fish Conservancy v. Quan

Parties:

Plaintiff: Wild Fish Conservancy.

Federal Defendants: Jennifer Quan, Regional Administrator, National Marine Fisheries Service West Coast Region; Janet Coit, Assistant Administrator for Fisheries of the National Marine Fisheries Service; National Marine Fisheries Service; Department of Commerce; and Secretary of Commerce Gina M. Raimondo.

Defendant-Intervenors: The State of Alaska and Alaska Trollers Association.

Current Case Activity:

As reported at the June 2023 Council meeting, all parties filed notices of appeal to the United States Court of Appeals for the Ninth Circuit (*Wild Fish Conservancy v. Quan*, Nos. 23-35322, 23-35323, 23-35324, 23-35354). We are currently in the middle of briefing on the appeal, pursuant to the following schedule:

- September 29, 2023: First cross-appeal briefs are due (Federal Defendants, State of Alaska, and Alaska Trollers Association).
- October 30, 2023: Second cross-appeal briefs are due (Wild Fish Conservancy).
- November 30, 2023: Third cross-appeal briefs are due.
- The optional cross-appeal reply brief is due within 21 days of service of the last-served third cross-appeal brief.

Following the conclusion of briefing, the Ninth Circuit will schedule the case for oral argument.

Attachments:

- Federal Defendants' first cross-appeal brief
- State of Alaska's first cross-appeal brief
- Alaska Trollers Association's first cross-appeal brief

Nos. 23-35322, 23-35323, 23-35324, 23-35354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY,
Plaintiff/Appellee/Cross-Appellant,
v.

JENNIFER QUAN, in her official capacity as Regional Administrator of the National Marine Fisheries Service; JANET COIT, in her official capacity as the Assistant Administrator for Fisheries of the National Marine Fisheries Service; NATIONAL MARINE FISHERIES SERVICE; GINA M. RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; UNITED STATES DEPARTMENT OF COMMERCE,
Defendants/Appellants/Cross-Appellees,
and

ALASKA TROLLERS ASSOCIATION and STATE OF ALASKA,
Intervenor-Defendants/Appellants/Cross-Appellees.

Appeal from the United States District Court for the Western District of Washington
No. C-20-417 (Hon. Richard A. Jones)

FEDERAL DEFENDANTS-APPELLANTS' FIRST CROSS-APPEAL BRIEF

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INTRODUCTION

The Endangered Species Act ("ESA") protects threatened Chinook salmon and endangered Southern Resident killer whales. The salmon is prey for the whales, meaning that Alaska's management of the Chinook salmon fishery in state and federal waters—the latter of which is subject to federal delegation and oversight—may affect both species. The National Marine Fisheries Service ("NMFS") concluded in a 2019 biological opinion that the federal government's continued delegation of management authority to Alaska (and other related federal actions) complies with the ESA with regard to both species. Along with the opinion, NMFS included an incidental take statement that exempted incidental take of threatened salmon and endangered killer whales associated with the Chinook salmon commercial troll fishery from ESA liability, essentially enabling the fishery to operate consistently with the ESA.

The district court concluded that NMFS's biological opinion was lacking in certain respects, and NMFS is complying with the remand, which it expects to complete by the end of November 2024. This appeal presents the question whether the district court abused its discretion by vacating—as opposed to remanding without vacating—the relevant portion of the incidental take statement that applied to commercial trolling during the winter and summer fishing seasons. But for this Court's order staying the remedy order pending appeal, vacatur would have shuttered Alaska's commercial troll Chinook salmon fishery in the winter and summer seasons for as long as the remand proceeded, with devastating economic impacts and only small benefits to killer whales.

This Court should reverse the decision of the district court to vacate the incidental take statement not only because the court improperly applied a presumption of vacatur, but also because it abused its discretion by overestimating the impact of its chosen remedy on killer whales and underestimating the disastrous economic consequences for Alaska fishing communities.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction over this suit under 28 U.S.C. § 1331 because the claims of plaintiff Wild Fish Conservancy ("the Conservancy") arose under three federal statutes, namely, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*; the ESA, 16 U.S.C. §§ 1531, *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*

(b) The district court's judgment was final because it resolved all the Conservancy's claims. 1 Excerpts of Record ("ER") 2–3. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court issued its remedy decision on May 2, 2023, 1-ER-4–5, and entered judgment on May 4, 2023. 1-ER-2–3. The Defendant/Intervenor State of Alaska noticed its appeal on May 3, 2023, and amended its notice on June 12, 2023. 8-ER-1899–1903. The Defendant/Intervenor Alaska Trollers Association noticed its appeal on May 5, 2023. 8-ER-1910–12. NMFS and the remaining federal defendants[1]

[1] Besides NMFS, the federal defendants are Jennifer Quan, in her official capacity as Regional Administrator of NMFS; Janet Coit, in her official capacity as the Assistant

noticed their appeal on May 23, 2023. 8-ER-1904–09. The Conservancy cross appealed on May 4, 2023. 8-ER-1913–16. The appeals are timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it vacated the portion of the 2019 biological opinion and incidental take statement that exempted from liability under the ESA, 16 U.S.C. §§ 1538(a)(1)(B), 1532(19), 1536(o), the incidental take of Southern Resident killer whales and Chinook salmon resulting from commercial harvests of Chinook salmon during the winter and summer seasons of the troll fishery in Alaska.

STATEMENT OF THE CASE

A. Statutory background

1. The Endangered Species Act

Section 7 of the ESA mandates that federal agencies must ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). To satisfy this substantive mandate, federal agencies must consult NMFS whenever the agency's action "may affect" a listed marine species. 50 C.F.R. § 402.14(a); *see* 16 U.S.C. § 1536(a)(2); *see generally* 50 C.F.R. Pt. 402. Where NMFS itself proposes to take an action that may affect listed species,

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Administrator for Fisheries of NMFS; Gina M. Raimondo, in her official capacity as Secretary of the United States Department of Commerce; and the United States Department of Commerce.

NMFS is both the action and consulting agency. If the action under consultation is likely to adversely affect listed species, the agencies must engage in formal consultation, which culminates in the consulting agency issuing a biological opinion. *See* 50 C.F.R. §§ 402.14(a), 402.14(h). Among other things, a biological opinion includes the consulting agency's opinion on whether the proposed action is "likely to jeopardize the continued existence" of the species. *Id.* § 402.14(h).

ESA Section 9 separately prohibits the "take" of a listed species by any person. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). When a consulting agency determines that the federal action under consideration is not likely to jeopardize a listed species' existence but is reasonably certain to result in "take" of some individual members, the agency issues along with its biological opinion an "incidental take statement" that identifies the extent of anticipated incidental take, reasonable and prudent measures to minimize the extent of take, and terms and conditions to implement the reasonable and prudent measures. *Id.* § 1536(b)(4); *see generally* 50 C.F.R § 402.14(h). Incidental take in compliance with the incidental take statement is exempt from Section 9's prohibition on take. *Id.* § 1536(o).

2. The National Environmental Policy Act

NEPA is a procedural statute that directs federal agencies to evaluate and disclose the environmental effects of, and alternatives to, proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.

§ 4332(2)(C). An agency's analysis of environmental impacts is included in a document referred to as an "environmental impact statement" or "EIS." *See* 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1508.11, 1502.10 (2019).[2] An agency may prepare a shorter document referred to as an "environmental assessment" (or "EA") to determine whether an EIS is necessary. 40 C.F.R. §§ 1501.4(b), 1508.9.

3. The Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act provides NMFS the authority to regulate fisheries in the United States' Exclusive Economic Zone, which extends from the seaward boundary of each coastal state to 200 nautical miles from the coastline and is also referred to as the federal waters. 16 U.S.C. §§ 1802(11), 1811(a), 1854, 1855(d). The Act empowers NMFS to review and implement fishery management plans, which are developed and recommended by Regional Fishery Management Councils. *Id.* § 1854(a). States can regulate fishing in the Exclusive Economic Zone when the fishery management plan delegates management to the State and when the State's regulations are consistent with that plan. *Id.*

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[2] The Council on Environmental Quality ("CEQ") published a new rule in September 2020 revising earlier NEPA regulations, but NMFS's actions at issue here were subject to the earlier version of the regulations. Thus, all citations to CEQ regulations herein refer to the regulations codified at 40 C.F.R. Part 1500 (2019).

In addition, NEPA itself was recently amended by Section 321 of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10, 38–46 (2023), but the amendments are not germane to this dispute.

§ 1856(a)(3)(B). As relevant to this case, Alaska has been delegated authority by NMFS to regulate the commercial troll Chinook salmon fishery in the relevant Exclusive Economic Zone. 5-ER-884.

B. Southern Resident killer whales and Chinook salmon

Killer whales, also known as orcas, are long-lived marine mammals. They are top predators in the food chain and are the world's most widely distributed marine mammal, although they are most abundant in coastal habitats and high latitudes. *See* 70 Fed. Reg. 69,903-01, 69,904 (Nov. 18, 2005). They occur year-round in the waters of southeastern Alaska, British Columbia, and Washington, among other places. *Id.* at 69,905. In the eastern North Pacific region, killer whales have been classified into three different groups—residents, transients, and offshore whales—with different genetics, morphology, ecology, and behavior. *Id.* Resident whales occur in large, stable pods with membership ranging from 10 to 60 whales. *Id.* There are different groups of resident killer whales in the North Pacific—the Southern, Northern, Southern Alaska, Western Alaska, and Western North Pacific residents. *Id.*

At issue in this case is the Southern Resident killer whale. Southern Resident killer whales include three pods of whales. These pods spend a significant amount of time in inland waterways during the spring, summer, and fall, and move into offshore coastal waters in the winter months. 5-ER-966; 6-ER-1357.

Southern Resident killer whales were listed as an endangered "distinct population segment" subject to the ESA's protection in 2005. 16 U.S.C. § 1532(16); 70 Fed. Reg.

at 69,907–09; 5-ER-962–64. Distinct population segments are discrete and significant populations that are separated from other populations of the same taxon. 70 Fed. Reg. at 69,907–08; *see also Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1138 (9th Cir. 2007). Southern Resident killer whales face various threats, including threats to their habitat posed by contaminants, vessel traffic, sound, and limits on the quantity and quality of prey. 70 Fed. Reg. at 69,908–09; 5-ER-968–76. NMFS has developed conservation measures and research programs for Southern Resident killer whales to aid in their recovery. 70 Fed. Reg. at 69,909; *see also* 5-ER-972; 5-ER-975; 6-ER-1194–95. Southern Resident killer whale numbers increased between 1974 and 2011 to a total of 87, and experienced further population growth in 2014 and 2015; however, the population has since decreased to 74. 5-ER-962.

Chinook salmon serve as the primary food source for Southern Resident killer whales, though coho salmon contribute up to 40% of their diet in late summer months. 5-ER-968–69. Hatchery-produced salmon—i.e., salmon raised in a hatchery and then released to the wild—are a significant component of the prey available to the Southern Resident killer whales. 5-ER-968–69; 5-ER-972. While there is evidence that these whales can identify Chinook salmon, there is no evidence that they distinguish between wild and hatchery Chinook, both of which likely have the same caloric content and size when they return to their spawning grounds. *See* 5-ER-972.

NMFS has listed as threatened certain populations (known as "evolutionarily significant units") of Chinook salmon under the ESA, 16 U.S.C. § 1532(16). 5-ER-904–

05. Four of these evolutionarily significant units are relevant here: the Lower Columbia River, Upper Willamette River, Snake River fall-run, and Puget Sound. 4-ER-858; 5-ER-907–12; 5-ER-931–33; 5-ER-938–41; 5-ER-947–52; 5-ER-990. Each evolutionarily significant unit consists of both historical populations of salmon and salmon produced in specified hatchery programs. 5-ER-908–09; 5-ER-931; 5-ER-938–39; 5-ER-048–49. The recovery of these four evolutionarily significant units has been limited by numerous factors, including degraded habitat, hydropower facilities, poor water quality, fishing, and the release of hatchery-produced salmon (which can, at certain times and locations, pose a risk to wild fish from competition or breeding, which reduces genetic diversity and fitness). *See, e.g.,* 5-ER-926–30; 5-ER-935–38; 5-ER-946; 5-ER-957; 5-ER-1106–18; 6-ER-1168–88; 2-ER-276 ¶¶ 7-8; 4-ER-663–67; 2-ER-276–77 ¶¶ 7-8; 2-ER-102–03 ¶ 15; 4-ER-663-67.

Chinook salmon, including the listed salmon at issue in this lawsuit, spawn and rear in freshwater and migrate to the ocean, where they mature. 5-ER-890. They travel substantial distances. The primary populations at issue here spawn in the Pacific Northwest and migrate through Alaskan and Canadian waters. Most mature in 3-5 years and return to their spawning ground in 4-5 years. *Id.*; 5-ER-889; 5-ER-1132; 5-ER-1193; 2-ER-306 ¶ 12.

C. The Pacific Salmon Treaty

Because of migratory patterns, shown below, Chinook salmon that originate in the United States are often caught by fisheries in Canada, and vice versa. 5-ER-880; 5-

ER-890–92. Some Chinook salmon that originate off the coasts of Washington and Oregon migrate to Alaska and are harvested in Alaska's fisheries.

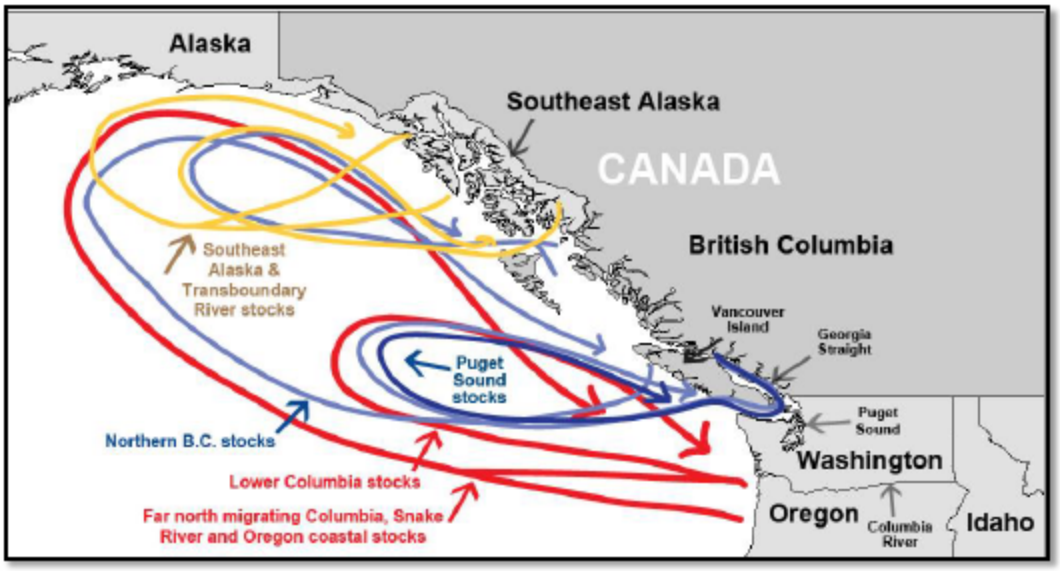

Figure 1. Migratory patterns of major Chinook salmon stock groups.

5-ER-890.

To help manage conflicts that arose from this dynamic, in 1985 the United States and Canada signed the Pacific Salmon Treaty, which established a management framework for Pacific salmon and set upper limits on Chinook salmon harvest. 5-ER-880–81; 4-ER-671–817 (Pacific Salmon Treaty, Jan. 28, 1985, T.I.A.S. No. 11091; Pacific Salmon Treaty Act of 1985, Pub. L. No. 99-5, 99 Stat. 7 (1985)). The United States and Canada most recently agreed upon an updated Chinook fishing regime in 2019 (the "2019 Agreement"), which set annual harvest limits for a ten-year period. 7-ER-1618–1701. The limits for Southeast Alaska fisheries were reduced by 7.5 percent in most years compared to the previous agreement made in 2009, which itself had reduced historic harvest limits. 5-ER-898; 7-ER-1618–1701.

Commercial and recreational fishing for Chinook salmon in federal waters in Southeast Alaska is governed by the fishery management plan for the salmon fisheries in the Exclusive Economic Zone off Alaska, which was developed and recommended by the North Pacific Fishery Management Council and approved by NMFS in 1979. 6-ER-1402; *see* 16 U.S.C. § 1852(a)(1)(G). The fishery management plan was comprehensively amended in 1990, in part to incorporate the limits from the 1985 treaty, and it delegated to Alaska management authority over sport and commercial troll fishing for salmon in federal waters off the coast of Southeast Alaska. 6-ER-1402; *see* 50 C.F.R. § 679.3(f). NMFS subsequently reaffirmed its delegation of such authority in an amendment to the fishery management plan, which is currently in effect for the fisheries that occur in federal waters off Southeast Alaska. *See* 77 Fed. Reg. 75,570 (Dec. 21, 2012). NMFS maintains oversight of Alaska's delegated management of the fisheries in federal waters off Southeast Alaska to ensure management is consistent with the fishery management plan. 7-ER-1462–66. The Alaska Department of Fish & Game sets the annual catch limits each year consistent with the 2019 Agreement. 7-ER-1428–30; 7-ER-1432–34. Between 2011 and 2019, Alaska estimates that, on average, 14% of the commercial Chinook salmon harvest occurred in federal waters. 7-ER-1615 ¶ 22.

D. The 2019 Biological Opinion

In 2019, NMFS issued a biological opinion that considered the combined effects of three federal actions on listed species including Southern Resident killer whales and four evolutionarily significant units of threatened Chinook salmon (Puget Sound

Chinook salmon, Upper Willamette River Chinook salmon, Lower Columbia River Chinook salmon, and Snake River Fall-run Chinook salmon). 5-ER-879–90. The three actions are: (1) the continued delegation of management authority to Alaska over salmon fisheries in federal waters off Southeast Alaska, 5-ER-884–85; (2) federal funding of Alaska's implementation of the Treaty, 5-ER-883–87; and (3) federal funding of a conservation program designed to benefit threatened Chinook salmon and killer whales, 5-ER-887–90; 5-ER-1105–19.

The conservation program had several components, including funding for habitat restoration projects for threatened Puget Sound Chinook salmon. 5-ER-888; 5-ER-1105–19. The component of the conservation program that is relevant here—the prey increase program—involves federal funding for hatchery Chinook production involving release of hatchery-raised salmon into the wild at strategic locations to serve as additional prey for the killer whale. 5-ER-888; 5-ER-1118–19 The prey increase program was projected to result in the release of millions of hatchery-raised young salmon per year to increase the availability of prey for killer whales. 5-ER-888–89. At the time the 2019 biological opinion issued, NMFS's analysis of this conservation program was considered "programmatic," meaning that the agency assessed impacts of the program at the framework (rather than implementation) level. *See* 5-ER-1105–19. NMFS planned to assess future, site-specific projects that actually received funding once the specifics of those projects became known, to determine whether the projects

were adequately covered by an existing biological opinion or would require additional consultation. 5-ER-888–89; 5-ER-1106–18; 6-ER-1167–1204.

The biological opinion concluded that the three actions under consideration were not likely to jeopardize the continued existence of either the threatened Chinook salmon populations or the Southern Resident killer whale. 6-ER-1204.

The biological opinion also included an incidental take statement that exempted take resulting from the Southeast Alaska fisheries. Given that the fisheries' primary effect on the killer whale is through possible reduction in prey availability, NMFS used the annual limit of Chinook salmon catch of the 2019 Agreement as a surrogate for measuring the incidental take of killer whales caused by the fisheries. NMFS exempted those fisheries only from the take associated with a reduction in prey available to the killer whales; no other type of take of killer whales was either anticipated or exempted. 6-ER-1205–06. Consistent with regulations, NMFS did not exempt take of threatened salmon populations associated with the prey increase program because the program was evaluated at a programmatic level. *See* 50 C.F.R. § 402.14(i)(6). NMFS instead explained that it would address any take associated with the prey increase program in site-specific consultations on individual projects. 6-ER-1206.

Under NEPA, NMFS did not analyze the effects of either the incidental take statement or the prey increase program at the programmatic level. NMFS has, however, since completed or identified applicable site-specific ESA consultations and NEPA analyses for the specific hatchery programs that have received federal funding since the

biological opinion issued in 2019. 2-ER-276 ¶ 5; 2-ER-297–99; 2-ER-100–01 ¶¶ 9–11; 2-ER-117–20; 4-ER-664 ¶ 15.

E. Proceedings below

The Conservancy sued NMFS in March 2020 to challenge the biological opinion and incidental take statement, raising several claims under the APA, ESA, and NEPA. Alaska and a representative of the Alaskan commercial fishing industry (the Alaska Trollers Association) intervened as co-defendants. In September 2021, a magistrate judge issued a report and recommendation on the parties' cross-motions for summary judgment. 4-ER-614–55. The magistrate judge found that NMFS's no-jeopardy conclusion in the 2019 biological opinion was arbitrary and capricious—and that NMFS therefore violated its duty under Section 7 of the ESA to ensure that its actions are not likely to jeopardize listed species—because NMFS relied on the effects of mitigation measures that were uncertain to occur. 4-ER-638, 646–47.

Specifically, the magistrate judge found that NMFS erroneously relied on the anticipated offsetting effects of the prey increase program to conclude that the actions addressed in the biological opinion were not likely to jeopardize killer whales; the court perceived the prey increase program to be too vaguely described and uncertain to support a no-jeopardy finding. 4-ER-641–44. The magistrate judge also found that NMFS had improperly "segmented" its analysis by taking the prey mitigation program into account when considering the likely (beneficial) effects of agency action on the killer whales, without simultaneously considering the effects of that program on wild

Chinook salmon. 4-ER-644–46. The magistrate judge also held that NMFS violated NEPA because it should have analyzed the effects of both the issuance of the incidental take statement and the prey increase program. 4-ER-647–51. The district court adopted the report in full in August 2022 over the parties' objections. 4-ER-612–13.

Remedy proceedings followed. In December 2022, the magistrate judge issued a report and recommendation recommending partial vacatur of the incidental take statement contained in the biological opinion to remedy the ESA and NEPA violations that the court had identified at summary judgment. 1-ER-6–45. NMFS, Alaska, and the Alaska Trollers Association presented evidence to the magistrate judge demonstrating both that vacating the incidental take statement would cause devastating harm to the fishery and that the previously uncertain prey increase program had definitively materialized since 2019. *See, e.g.,* 3-ER-505–22; 2-ER-253–321; 2-ER-228–48; 2-ER-182–90; 1-ER-21–27 (discussing affidavits). Nevertheless, the magistrate recommended vacatur of those "portions of the [biological opinion] concerning the incidental take statement that authorizes 'take' of the Southern Resident Killer Whale and the Chinook salmon resulting from commercial harvests of Chinook salmon during the winter and summer seasons (excluding the spring season) of the troll fisheries." 1-ER-7.

Specifically, the magistrate judge believed that "circumstances in which a remand without vacatur is appropriate are 'rare' or 'limited' " because "the APA requires a 'presumption of vacatur' if an agency acts unlawfully and this presumption must be overcome by the party seeking remand without vacatur.' " 1-ER-18–19; 1-ER-29. The

magistrate further found that NMFS's ESA and NEPA errors were "sufficiently serious violations" that "undermine[d] central congressional objectives of the ESA and NEPA." 1-ER-31–33. The magistrate judge also focused on "potential environmental disruption, as opposed to economic disruption" that would result from its remedy decision, and believed that it should "tip the scale in favor of protecting listed species in considering vacatur." 1-ER-33–34 (internal quotations and citations omitted). The judge concluded that the economic losses that would result from vacatur of the incidental take statement "do not overcome the seriousness of NMFS's violations given the presumption of vacatur, the harm posed to the [killer whales] by leaving the incidental take statement in place and the Court's mandate to protect the endangered species." 1-ER-35.

The judge found, by contrast, that significant disruptive environmental consequences would result from vacatur or injunction of the prey increase program, and that therefore remand without vacatur of the portion of the biological opinion covering the prey increase program was appropriate. 1-ER-35–38. On May 2, 2023, the district court adopted the report in full over the parties' objections. 1-ER-4–5.

Alaska, the Alaska Trollers Association, the Conservancy, and NMFS each appealed. Alaska moved for a stay of the remedy order insofar as it vacated the portion of the incidental take statement exempting take by the commercial troll fishery. The Conservancy moved for an injunction pending appeal of the remedy order to the extent that the order did not vacate the portion of the biological opinion relating to the prey

increase program. On May 26, 2023, the district court denied the motions of Alaska and the Conservancy. 2-ER-66–70. Alaska moved for a stay pending appeal in this Court, which the Alaska Trollers Association and NMFS both supported. The Conservancy likewise moved this Court to enjoin implementation of the biological opinion as it pertained to the prey increase program.

This Court stayed the district court's judgment to the extent that it vacated the portions of the biological opinion and incidental take statement relating to the commercial harvests of Chinook salmon during the winter and summer seasons of the troll fishery. 2-ER-47–51. This Court found that "the moving parties have established a sufficient likelihood of demonstrating on appeal that the certain and substantial impacts of the district court's vacatur on the Alaskan salmon fishing industry outweigh the speculative environmental threats posed by remanding without vacatur." 2-ER-50. This Court denied the Conservancy's motion to enjoin implementation of the prey increase program, "particularly in light of the district court's finding that" halting the program "would ultimately put the whales at further risk of extinction." 2-ER-51.

SUMMARY OF ARGUMENT

The district court abused its discretion when it vacated the portions of the biological opinion and incidental take statement that exempted from liability under the ESA, 16 U.S.C. §§ 1538(a)(1)(B), 1532(19), 1536(o), the incidental take of Southern Resident killer whales and Chinook salmon resulting from commercial harvests of Chinook salmon during the winter and summer seasons of the troll fishery in Alaska.

Under this Court's precedent, vacatur of an agency action in response to a statutory violation is an equitable remedy that requires a court to consider the seriousness of the agency's errors and vacatur's disruptive consequences. A court should evaluate these factors neutrally. The district court here, however, erroneously presumed that vacatur is the appropriate remedy for the ESA and NEPA violations it identified. This presumption impermissibly placed a thumb on the scale of vacatur.

The court further erred by finding the errors made by NMFS to be serious enough to warrant vacatur when the record before the court showed the opposite. An error is sufficiently serious to warrant vacatur when the agency would not likely be able to reach the same result on remand via additional or different reasoning. Here, the district court found no fundamental flaws in the agency's analysis that would preclude it from adopting the same decision on remand with additional information. The court instead held that NMFS had not adequately considered the potential impacts of its decision on Southern Resident killer whales and ESA-listed salmon under the ESA and NEPA, and that there was inadequate information to establish that the prey increase program was certain enough to occur to qualify as mitigation. Since the district court's 2019 merits ruling, however, the prey increase program has been implemented and funded each year, as evidence submitted to the district court showed. NMFS has also analyzed the environmental impacts of each hatchery program that it funds (or ensured that existing environmental analysis is sufficient). This all shows that NMFS will be able to offer additional explanation and adopt the same decision on remand.

Finally, the district court abused its discretion when it weighed the disruption caused by vacatur against the incremental benefits. The disruptive consequences of vacatur would be extraordinary. The record before the district court demonstrated that vacatur would cause losses of $29 million each year in an industry that helps ensure the livelihoods of thousands of people. Vacatur would further disrupt the complex regulatory framework for managing fisheries, the balance struck by the United States and Canada in the Pacific Salmon Treaty, and the balance struck by Congress between Chinook salmon fisheries and killer whale preservation, in turn frustrating conservation efforts by pitting fishing communities against killer whale conservation.

On the other hand, any benefits to killer whales from vacating the incidental take statement would be small and short-lived. Fishing in *all* Southeast Alaska salmon fisheries during the remand period would reduce prey availability for killer whales by an average of only 0.5% in the coastal waters where whales are generally present during the winter and by an average of only 1.8% in inland waters where whales are generally present during the summer. The reductions in prey expected to result from only the winter and summer seasons of the commercial Chinook salmon troll fishery (which are only some of the salmon fisheries in Southeast Alaska) would necessarily be lower and would not, in NMFS's expert opinion, jeopardize the Southern Resident killer whale, particularly in light of the fact that the fish previously released as a result of the prey increase program are becoming available to supplement the prey for killer whales. NMFS expects to comply with the district court's remand order by the end of

November 2024. Taken together with the additional fish returning from prey increase funding, fishing during this period will not jeopardize the Southern Resident killer whale.

Meanwhile, the district court's order vacating the portion of the incidental take statement relating to the Chinook salmon troll fishery would irreparably devastate Southeast Alaskan communities. The district court abused its discretion by improperly discounting the effects of vacatur and overestimating any potential benefits to killer whales, and its order vacating the incidental take statement should be reversed.

STANDARD OF REVIEW

A district court's remedy decision is subject to review for abuse of discretion. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1082 (9th Cir. 2010); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 654 (9th Cir. 2011). "District courts abuse their discretion when they rely on an erroneous legal standard or clearly erroneous finding of fact." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1271 (9th Cir. 2020) (citation omitted). A remedy that is "overbroad" is an "abuse of discretion." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)).

ARGUMENT

I. The district court's decision to vacate was an abuse of discretion.

The district court abused its discretion when it vacated the portion of the biological opinion and incidental take statement applicable to the winter and summer seasons of the Chinook commercial troll fishery in Southeast Alaska.

A. The district court misapplied the relevant standards.

Instead of requiring the Conservancy to affirmatively demonstrate that vacatur of the incidental take statement was the appropriate remedy, the district court erroneously presumed that the incidental take statement should be vacated unless NMFS showed that vacatur was not warranted. *See, e.g.,* 1-ER-14, 29, 35. A court's decision to vacate an agency action is an equitable remedy.[3] *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *In re Clean Water Act Rulemaking*, 60 F.4th 583, 593–94 (9th Cir. 2023) (describing vacatur as an exercise of equitable authority); *United States v. Texas*, 143 S. Ct. 1964, 1985 (2023) (Gorsuch, J., concurring) (describing vacatur as

[3] To the extent the courts have held that vacatur is the presumed remedy because Section 706 of the APA provides that "reviewing court[s] shall" "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706, it is the position of the United States that vacatur is not authorized by Section 706. *See United States* v. *Texas*, No. 22-58 (S. Ct.), Gov't Op. Br. 40–44; Gov't Reply Br. 16–20. Because it is not authorized by the statute, it cannot be considered a presumptive remedy for an APA violation. The federal government acknowledges, however, that this Circuit's precedent on APA remedies controls at this stage of the proceedings. *But see Texas*, 143 S. Ct. at 1980–85 (Gorsuch, J., concurring) (discussing whether vacatur is authorized by Section 706 of the APA and stating that the Supreme Court "would greatly benefit from the considered view of our lower court colleagues.").

an "expansive equitable power"); *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (explaining that Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with "traditions of equity practice"). Thus, vacatur should not be granted as a matter of course but only in accordance with the traditional balancing of equitable considerations. If anything, "faithful application of [equitable] principles suggests that an extraordinary remedy like vacatur would demand truly extraordinary circumstances to justify it." *Texas*, 143 S. Ct. at 1985.

While vacatur has sometimes been described by this Court as the presumptive remedy for an APA violation, *see, e.g.*, *Alliance for the Wild Rockies v. United States Forest Service*, 907 F.3d 1105, 1121 (9th Cir. 2018); *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022), this presumption "invert[s] the proper mode of analysis," *Monsanto*, 561 U.S. at 157. Equitable remedies do not "issue[] as of course," but only where legal remedies are inadequate and "the intervention of a court of equity" is required to ensure against "irreparable injury." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). A party seeking equitable relief from a court must show entitlement to such relief. *Monsanto*, 561 U.S. at 156–57.

The Supreme Court's decision in *Monsanto*, which addressed the circumstances in which a court may issue an injunction, is instructive here. 561 U.S. at 156–57. The district court in *Monsanto* ordered that the appropriate remedy for the government's NEPA violation was, among other things, to enjoin the government from deregulating planting of genetically engineered alfalfa pending completion of the mandated

environmental impact statement and to enter a nationwide injunction prohibiting almost all future planting of genetically engineered alfalfa. *Id.* at 156. The petitioners argued that the lower courts had erroneously assumed that an "injunction is generally the appropriate remedy for a NEPA violation" that "may be withheld" only "in unusual circumstances." *Id.* at 157. The Supreme Court agreed, explaining that the "presum[ption] that an injunction is the proper remedy for a NEPA violation except in unusual circumstances" erroneously "invert[s] the proper mode of analysis." *Id.* A court should not "ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test" governing injunctions. *Id.* at 158 (emphasis in original). In other words, there should be no "thumb on the scales" in favor of equitable relief; the court should instead carefully consider each equitable factor to determine whether the party seeking relief has demonstrated entitlement. *Id.* at 156–57; *see also City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–38 (1933) ("an injunction is not a remedy which issues as of course").

Despite language suggesting vacatur should be presumed, this Circuit has also held that courts are not mechanically "required to set aside every unlawful agency action." *Nat'l Wildlife Fed'n*, 45 F.3d at 1343; *see also United States v. Afshari*, 426 F.3d 1150, 1156 (9th Cir. 2005) (explaining that it is "well established" that the APA does

not compel vacatur upon the finding of a legal violation or procedural flaw).[4] Rather, this Court should look to the two factors described in *Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) to determine whether vacatur is appropriate. *See California Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). A court must first consider the seriousness of the agency's errors and, second, the disruptive consequences that would result from vacatur. *Id.* Courts may also consider the consequences to the environment, *National Family Farm Coalition v. U.S. EPA*, 966 F.3d 893, 929 (9th Cir. 2020), as well as the economic "disrupt[ion] to the [affected]

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[4] Indeed, remand to agencies without vacatur is common. *See, e.g., Pac. Bell v. Pac. W. Telecomm. Inc.*, 325 F.3d 1114, 1123 (9th Cir. 2003) (allowing agency actions to remain in place pending completion of remand, even where the actions were found to be arbitrary and capricious); *WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855, 883 (D. Mont. 2021) (stating in a biological opinion and incidental take statement challenge that the "underlying agency action may be 'left in place while the agency reconsiders or replaces the action'") (citing *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010)); *Inst. for Fisheries Res. v. U.S. Food & Drug Admin.*, 499 F. Supp. 3d 657, 669 (N.D. Cal. 2020) (declining to vacate where the agency had not fully analyzed potential impacts but had taken precautionary steps, vacatur would result in wasteful loss of property and animal life, and the agency could cure defects on remand); *Nat'l Wildlife Fed. v. NMFS*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011) (holding that "equity can authorize the district court to keep an invalid [action] in place during any remand if it provides protection for listed species within the meaning of the ESA"); *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) (remanding without vacatur where vacatur would "disrupt settled transactions"); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1041–43 (D. Ariz. 2009) (finding biological opinion arbitrary and remanding for reconsideration); *Nat'l Wildlife Fed'n v. NMFS*, 254 F. Supp. 2d 1196, 1215 (D. Or. 2003) (remanding biological opinion without vacatur, to give NMFS an opportunity to consult on identified defects); *Columbia Snake River Irrigators Ass'n v. Evans*, No. CV 03–1341–RE, 2004 WL 1240594, at *1 (D. Or. June 3, 2004) (expressly stating that the court "did not order the [biological opinion in *Nat'l Wildlife Fed'n v. NMFS*, 254 F. Supp. 2d 1196] vacated, but remanded it").

industries," *American Water Works Ass'n*, 40 F.3d at 1273. *See also California Communities*, 688 F.3d at 993–94 (considering environmental and economic consequences). That is, there is an equitable balancing of factors rather than application of a presumption.

Although the district court here acknowledged that it was required to balance the foregoing factors, the court nevertheless committed the same error identified in *Monsanto* by erroneously presuming that vacatur was the correct remedy, 1-ER-14, 29, 35, when, in fact, "[n]o such thumb on the scales is warranted," 561 U.S. at 157. The court instead should have neutrally considered whether the relevant equitable considerations favor vacatur, in light of the record compiled by the parties. This is particularly true when that relief substantially affects entities beyond the defendant federal agency, as is the situation here. *See Texas*, 143 S. Ct. at 1985–86 (Gorsuch, concurring) (cautioning that "a district court should 'think twice—and perhaps twice again—before granting'" sweeping relief in the form of vacatur) (citation omitted).

In sum, to the extent that the district court weighted the scale in favor of vacatur, rather than placing the burden of showing entitlement to vacatur on the Conservancy and neutrally considering the specific facts before it, that was error.

B. The court erred in concluding the agency's errors were serious.

As discussed above, the district court's proper role under this Court's precedent was to weigh the factors set out in *Allied Signal*, the first of which is the seriousness of the agency's "deficiencies (and thus the extent of doubt whether the agency chose

correctly)." *Allied-Signal*, 988 F.2d at 150–51. To evaluate the seriousness of an agency's errors, courts consider "whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Nat'l Fam. Farm Coalition*, 966 F.3d at 929 (quotations and citation omitted); *see Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (also relevant to the analysis is "whether by complying with procedural rules, [the agency] could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand."); *see also Allied-Signal*, 988 F.2d at 150–51. The district court abused its equitable discretion here: first, by automatically assuming that NMFS's errors were serious enough to warrant vacatur simply because killer whales are endangered and, second, by ignoring or giving unreasonably little weight to important facts in the judicial record. The record compels a finding that it is likely that NMFS will be able to issue the same incidental take statement on remand after additional explanation and therefore NMFS's errors were not serious. This factor did not favor vacatur, and the district court erred in concluding otherwise.

The court acknowledged that it was at least possible that NMFS would be able to reach the same result on remand. 1-ER-41. It nevertheless held that the legal errors it identified were serious because (1) the ESA requires the agency to ensure against the jeopardy of listed species, (2) the agency did not comply with the ESA or NEPA (and

therefore undermined statutory objectives), and (3) killer whales remain at a high risk of extinction. 1-ER-32–33. But not every legal error requires an agency's decision to be vacated; that is true even when the decision involves a listed species. When considering the seriousness of the errors, the district court should have considered only whether NMFS may adopt the same decision after conducting additional analysis. *See, e.g., Nat'l Fam. Farm Coal. v. U.S. EPA*, 966 F.3d 893, 929 (9th Cir. 2020) (holding that an error under the Federal Insecticide, Fungicide, and Rodenticide Act—failing to consider harm to monarch butterflies caused by killing milkweed—was not serious where the agency was likely to be able to adopt the same outcome on remand).

The record compels a conclusion that NMFS is, in fact, likely to be able to adopt the same decision on remand. One of the district court's central reasons for finding an ESA violation was the perception that NMFS relied on the anticipated benefits of the prey increase program despite uncertainties about future funding and details of implementation. 1-ER-31 (citing 4-ER-640–47). NMFS had examined the prey increase program in the biological opinion at a framework level that enabled it to perform a broad-scale analysis of the program's benefits and impacts. *See, e.g.,* 5-ER-889; 6-ER-1304; 6-ER-1318–25. NMFS also committed to conducting additional, more detailed analysis under the ESA and NEPA as necessary and noted that it could always reinitiate consultation if there was inadequate funding and a corresponding need to develop additional mitigation for killer whales. *See, e.g.,* 5-ER-1106, 1114, 1119.

This level of detail and commitment to conduct additional studies did not satisfy the district court as to the merits. Significantly, however, the district court did not find that there was a fundamental flaw in the agency's ultimate determination that the Chinook salmon troll fishery in Alaska would not jeopardize listed species. The court concluded that the agency had not done *enough* analysis of the program's impacts under the ESA and NEPA or provided enough information to show that the mitigation program was certain enough to occur to satisfy the requirements of the ESA. *See* 1-ER-31–32; 4-ER-637–51. These kinds of errors are procedural in that they involve how much analysis NMFS completed (or when it was completed), as opposed to suggesting an incurable defect with NMFS's substantive conclusions on jeopardy. *See Nat'l Fam. Farm Coalition*, 966 F.3d at 929; *see also* 2-ER-275–76 ¶¶ 3–5 (discussing additional analysis). When an agency commits only technical or procedural errors, it generally is the case that the agency will "likely be able to offer better reasoning" and "adopt the same [decision] on remand." *Nat'l Fam. Farm Coalition*, 966 F.3d at 929 (quotations and citation omitted); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005).

The record eliminates any doubt that that is the case here. The court concluded that the details of the prey increase program were insufficiently concrete for the agency to rely on that program's benefits to offset any harm to the whale from harvesting salmon when the agency issued the biological opinion in 2019. However, the judicial record before the district court at the remedy phase in 2022 showed that in fact the prey

increase program has been funded (between $5.6 and 7.3 million annually) and implemented each year since 2020. *See* 1-ER-36; 2-ER-255–57 ¶¶ 7–9; 2-ER-305–07, 310–11 ¶¶ 11, 13, 22 ("[W]e anticipate increases in prey abundance are near to or being realized as we reach the 3–5 year maturation time frame following each year of implementation."); 2-ER-275–76 ¶¶ 3–5; 2-ER-284–85. Including fish from projects funded by Washington State, the combined federal and state releases are "on track to provide the benefits to [killer whales] that were anticipated in the [biological opinion]." 2-ER-275–76 ¶¶ 3–5; 2-ER-281–86; 5-ER-889 (anticipating funding from nonfederal sources); 4-ER-663 ¶ 13.

Even the district court noted that the "prey increase program—though previously uncertain and indefinite in the 2019 [biological opinion]—has also now been funded and begun providing prey the past three years." 1-ER-36. The subsequent implementation of the prey increase program as anticipated has effectively cured (or at a minimum, greatly reduced the significance of) any error on NMFS's part in relying on the then-tentative program to reach its no jeopardy determinations in the 2019 biological opinion.

Moreover, for every hatchery program receiving federal funding under the prey increase program, NMFS has subsequently completed site-specific ESA and NEPA analyses or identified existing ESA and NEPA analyses that evaluated the effects of increased hatchery production, including impacts to listed salmon. 2-ER-276 ¶ 5; 2-ER-100–01 ¶¶ 9–11; 2-ER-117–20; 4-ER-663 ¶ 15. Contrary to the district court's bare

conclusion that the agency's errors were serious, 1-ER-41, this analysis suggests that NMFS will be able to offer better reasoning on remand in support of its decision in the 2019 biological opinion to adopt the prey increase program at a framework level. The continued implementation of that program under the existing framework will in turn ensure that the agency can continue relying on that program's benefits to the whale's prey base when it considers the effect of continued salmon harvest in the future.

Yet, ignoring the new factual developments, the district court's discussion of the seriousness of the agency's errors parroted its earlier conclusion that the agency relied on "uncertain and indefinite mitigation measures." 1-ER-31. This was clearly erroneous, in light of the evidence that the prey increase program is in fact being implemented. Moreover, to the extent that the stakes of an agency's error under the ESA or NEPA may be high if a listed species is in greater peril, the district court additionally erred here by (as discussed further below, pp. 35–39) failing to consider whether the specific legal errors it found would exacerbate the killer whale's condition during the remand, given that the remand period was expected to be short and the prey increase program has been funded and operational for the past three years.

C. The limited benefits and devastating consequences of vacatur weigh heavily in favor of remand without vacatur.

For the foregoing reasons, the district court erred in determining that the agency committed "serious" errors for purposes of determining a remedy. But in any event, even where an agency's errors are "significant," this Court has held that equitable

considerations may lead to remand without vacatur. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995). The district court abused its discretion in weighing the equities, just as it did in weighing the seriousness of the agency's error. Therefore, regardless of whether this Court finds that NMFS's errors were serious, it should reverse on the ground that the district court independently abused its discretion when it heavily discounted the disruptive consequences of vacatur while overstating the benefits to killer whales from vacatur. 1-ER-33–35.

At the outset, the district court erroneously believed that it was required to focus primarily on potential environmental, versus economic, impacts when weighing the equities. *See* 1-ER-33–34. Circuit precedent makes plain, however, that it is appropriate to consider economic impacts. *See California Communities*, 688 F.3d at 993–94. The district court also appears to have misunderstood the sweeping consequence of its decision, which would effectively close the winter and summer seasons of the commercial Chinook salmon troll fishery in Southeast Alaska. Although the district court correctly held that vacatur of the incidental take statement "in and of itself does not result in a prohibition on fishing," 1-ER-35 n.17, 2-ER-68–69, vacatur had the practical effect of operating as an injunction on the fisheries. Without exemption from ESA Section 9's prohibition on take in the incidental take statement, the State cannot open the fishery without risking severe civil and criminal penalties. *See* 2-ER-250; 2-ER-252; 4-ER-657.

The record before the district court demonstrated that vacatur would cause losses of $29 million each year in an industry that helps ensure the livelihoods of thousands of people. *See* 3-ER-516–22 ¶¶ 31–41; *see also* 2-ER-91–94 ¶¶ 34–40. Chinook salmon are the highest value per pound of the five salmon species harvested in Southeast Alaska, making them the most lucrative. 3-ER-514 ¶ 26. There are over one thousand active permit holders who participate in the troll fisheries annually, and many are small-scale participants who rely heavily on income from the troll fisheries. 2-ER-517 ¶ 32; *see also* 2-ER-90, 94 ¶¶ 32, 41. The troll fisheries support over 23 communities in Southeast Alaska, most of which are small, rural, and isolated, some of which are Alaska Native communities, and some of which depend heavily on the commercial troll fishery. 2-ER-517 ¶ 32; *see also* 2-ER-94 ¶ 41. If the incidental take statement is vacated, businesses may close, and jobs will be lost. 2-ER-230–32 ¶¶ 4–7.

The district court did not make factual findings concerning the extent of the potential economic impact, instead noting the parties' different estimates and acknowledging that vacatur would "result in disruptive economic consequences for the Chinook salmon troll fishery and the economy of Southeast Alaska," but nevertheless concluding that the economic impacts did not "overcome the seriousness of NMFS's violations given the presumption of vacatur, the harm posed to the [killer whale], and the Court's mandate to protect the endangered species." 1-ER-35. The Conservancy estimated an economic impact of the troll fishery around $9.5 million for the winter and summer seasons. *See* 1-ER-35 (citing 4-ER-603–04). This estimate, however, did

not account for economic impact beyond income. The data shows that the economic output of the commercial troll fishery in the winter and summer, inclusive of the wages, processing, and income from goods and services supporting fishing operations as well as ex-vessel value (that is, the dollar value of commercial landings), would be approximately $29 million every year. 2-ER-521 ¶ 40. The Conservancy also asserted that only 2.6% of the Southeast Alaska seafood industry would be impacted, but any number can be made to appear small by expanding the universe it is compared to. These economic impacts will affect thousands of individuals and devastate the many fishing communities that are dependent on the troll fleet. 2-ER-514, 517 ¶¶ 26, 32; 3-ER-516–22 ¶¶ 31–41; *see also* 2-ER-91–94 ¶¶ 34–40.

In short, individuals, businesses, and communities in Southeast Alaska will be irreparably harmed by vacatur of the incidental take statement. *See* 2-ER-517 ¶ 32; 2-ER-230–32 ¶¶ 4–7. This Court implicitly recognized as much when it held in granting the stay that "the moving parties have established a sufficient likelihood of demonstrating on appeal that the certain and substantial impacts of the district court's vacatur on the Alaskan salmon fishing industry outweigh the speculative environmental threats posed by remanding without vacatur." 2-ER-50. Vacatur is inappropriate when it would cause "economically disastrous" impacts—as it will here. *California Communities*, 688 F.3d at 993–94 (rejecting vacatur because it would halt construction of a "much needed power plant" that employed 350 workers); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) ("[t]he threat of being driven out of

business is sufficient to establish irreparable harm."); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980) (acknowledging that the potential closure of a business constitutes irreparable harm); *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994); *see also* 2-ER-140; 9th Cir. Dkt. No. 22-3 (pages 48–100 of attachments to 9th Cir. Alaska Congressional Delegation Amicus Brief). The severity of the economic impact here weighs heavily against vacatur, and the district court failed to give these grave harms sufficient weight, particularly considering the limited benefit that would accrue to killer whales from the closure of the fishery (discussed in detail below, pp. 35–39) and the likelihood that NMFS will be able to adopt the same approach on remand.

In addition to causing tangible economic harm to communities, vacatur will also disrupt the complex regulatory framework for managing fisheries, the balance struck by the United States and Canada in the Pacific Salmon Treaty, and the balance struck by Congress between Chinook salmon fisheries and killer whale preservation, all of which the district court failed to adequately account for. *See Weinberger*, 456 U.S. at 312 (courts "should pay particular regard for the public consequences" of equitable relief). The fishery limits set forth by the 2019 Agreement were "the result of a complex bilateral negotiation wherein the Parties sought to find an acceptable and effective distribution of harvest opportunities and fishery constraints that, when combined with domestic fishery management constraints, would be consistent with the fundamental conservation and sharing objectives of the Treaty." 5-ER-1053–54; 5-ER-879–83

(explaining history of treaty negotiation process and noting that, absent an agreement with Canada, NMFS was limited in its ability to consult on potential environmental impacts of salmon); 5-ER-887–88 ("Because of the complicated relationships between fisheries in Alaska, Canada, and the southern U.S. that are subject to the Agreement and the need to find a balanced solution, it was necessary to see that all fisheries were reduced."). The incidental take statement—and fishing that occurs pursuant to the take exemption included therein—is part of this comprehensive management scheme that is designed to achieve the objectives of the 1985 treaty and 2019 Agreement, including sharing limited fishery resources and conserving listed species. *See, e.g.,* 5-ER-81–83 (explaining history of NMFS's ESA consultation in relation to the treaty).

Congress has decided to fund the prey increase program against this regulatory backdrop, and with the understanding that commercial Chinook salmon fisheries coastwide will continue to operate under the rubric of the 2019 Agreement, taking into account the ESA status of killer whales and certain salmon populations. *See* 2-ER-255–57 ¶¶ 7–9) (discussing appropriations); *see, e.g.*, Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020); 4-ER-819–20 (Explanatory Statement Regarding the House Amendment to the Senate Amendment to H.R. 133, Consolidated Appropriations Act, 2021 at H7928). Although the district court believed that vacatur would achieve its "mandate to protect the endangered species," 1-ER-35, by vacating the incidental take statement, its decision instead circumvents the balance struck by

Congress. *See United States v. Oakland Cannabis Buyers' Co-operative*, 532 U.S. 483, 497 (2001) (courts should not deprive "Congress' 'order of priorities,' as expressed in the statute" of effect) (citation omitted); *cf. United States v. State of Wash.*, 459 F. Supp. 1020, 1106 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) (the public interest is served "by permitting the United States Government to honor its treaty obligations").

In addition to inappropriately discounting the severe social, political, and economic consequences that would result from vacatur, the district court further abused its discretion by overestimating the benefits. To obtain equitable relief in an ESA case, a plaintiff must generally demonstrate "a definitive threat of future harm" to the species absent that remedy. *Nat'l Wildlife Federation v. NMFS*, 886 F.3d 803, 819 (9th Cir. 2015) (citation omitted); *cf. Pac. Coast Federation of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1210 n.12 (E.D. Cal. 2008) (the issuance of an injunction based on harm to individuals of a species is appropriate only where "the loss of those individuals would be significant for the species as a whole"). No definitive threat of harm to killer whales exists here.

NMFS presented evidence supporting its expert conclusion that operation of the fishery pending remand will not jeopardize the Southern Resident killer whale. 2-ER-304–05 ¶ 10. As an initial matter, not all fish that go unharvested in the subject Alaska fisheries will become available as prey due to "natural mortality and harvest in other fisheries," such as Canadian fisheries. 3-ER-516–17 ¶¶ 30, 31; 2-ER-89–90 ¶ 31. NMFS estimated that fishing in *all* Southeast Alaska salmon fisheries—of which the fishery at

issue here is only a part—would reduce prey availability for killer whales by an average of only 0.5% in the coastal waters where whales are generally present during the winter and an average of only 1.8% in inland waters where whales are generally present during the summer. 2-ER-304 ¶ 9; 2-ER-57 ¶ 11; 2-ER-126 ¶ 11; *see* 5-ER-1126–27; 6-ER-1192. These reductions, "particularly in the most important locations and seasons for the whales, are small and . . . will not jeopardize their survival or recovery." 2-ER-302 ¶ 5. The reductions in prey expected to result from only the winter and summer seasons of the commercial Chinook salmon troll fishery would necessarily be lower. It is also worth noting that most of the salmon caught in Southeast Alaska fisheries are not from salmon stocks (that is, certain groups of salmon) that are currently considered of greatest importance to Southern Resident killer whales. 6-ER-1194–95 ("With the exception of the Columbia River brights that have relatively large run sizes, the whales' priority stocks are not a high proportion of the [Southeast Alaska] fisheries catch"); *compare* 5-ER-1129 (showing that, with the exception of Columbia Upriver bright stocks, the other stocks making the largest contributions to the Southeast Alaska catch list are not high on the Southern Resident killer whale priority list) *with* 6-ER-1193 (showing the highest-priority stocks for Southern Resident killer whales—Puget Sound and lower Columbia River fall stocks—account for only 2–3% of the total catch in the [Southeast Alaska] fisheries); 5-ER-970–71; 5-ER-1130–31.

NMFS and state, local, and tribal partners are also taking efforts to minimize impacts to killer whales and promote recovery, such as imposing mandatory and

voluntary vessel measures that reduce interference with killer whale foraging, cleaning up or reducing inputs of harmful contaminants, conservation hatchery programs (designed to restore wild fish populations), and habitat restoration projects. *See, e.g.,* 2-ER-310–11 ¶ 22; 6-ER-1193–95 ("starting in 2018, additional protective measures in U.S. and Canadian waters are being implemented to reduce impacts from fisheries and vessels in key foraging areas").

Relying on a declaration submitted by the Conservancy (which had projected that operation of the Southeast Alaska Chinook salmon fishery would reduce prey by 6%), the district court determined that "closing the troll fisheries in the manner requested would increase prey available to" killer whales, though it declined to make any factual findings over "how much prey" would ultimately reach the whale. 1-ER-34 (*citing* 4-ER-608–10 ¶¶ 8, 10, 11). But NMFS's experts reviewed the declaration and concluded that it was significantly flawed. 2-ER-302–04 ¶¶ 6–9. First, the declaration did not include most recent population updates (that is, the births of two calves in early 2022), and relied on "outdated correlations of coastwide Chinook abundance and survival or fecundity of [Southern Resident killer whales]." 2-ER-302–03 ¶ 6. The workgroup set up to advise the Pacific Fishery Management Council on the effects of salmon fisheries on Southern Resident killer whales found that these correlations "have weakened or are not detectable," and an expert panel "cautioned against overreliance on correlative studies or implicating any particular fishery in evaluating the status of [Southern Resident killer whales]." 2-ER-303 ¶ 7; 5-ER-972. In addition to this quantitative issue,

the Conservancy's declaration "overstate[s] the benefits that would likely be realized by the whales." 2-ER-303–04 ¶ 8. As noted in the declaration submitted by one of NMFS's experts with remedy briefing:

> Both the Chinook salmon prey and [Southern Resident killer whale] predators are highly mobile. Thus, not all of the Chinook salmon caught in [Southeast Alaska] troll fisheries would migrate south into [killer whale] habitat and those that would migrate south would not all survive or be intercepted by the whales.

Id.; *see also* 2-ER-513–16 ¶¶ 23, 29–30 (only a portion of the Chinook salmon harvested in the winter and summer seasons would return to Southern Resident killer whale habitat); 3-ER-516–17 ¶ 31. The Conservancy's calculation was further flawed because it failed to account for seasonal and spatial variability of Southern Resident killer whales. 2-ER-304 ¶ 9. The expert evidence submitted by NMFS showed that the Conservancy's declarant failed to account for all relevant factors in estimating the benefit of closing the fishery.

Instead of properly deferring to the agency's expertise, *Friends of Animals v. United States Fish & Wildlife Serv.*, 28 F.4th 19, 29 (9th Cir. 2022); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014), the district court declared in cursory fashion that despite the admitted "uncertainty as to how much prey would ultimately reach" killer whales, "closure of the fisheries meaningfully improves prey available to the [whale]." 1-ER-34, 39. But the small reductions in prey availability resulting from operating the fishery mean that any potential benefits of closing the fishery are just as small. This is all the more true because the prey increase program has

been in operation from 2020 to the present and has resulted in "a certain and definite increase in prey," 1-ER-36, available to whales during the remand period. *See also* 2-ER-304–05 ¶¶ 9–10; 2-ER-54–55, 59 ¶¶ 7, 15; 2-ER-123–24, 128 ¶¶ 7, 15; 2-ER-94 ¶ 41; 2-ER-99 ¶¶ 6-8; 2-ER-99–16.

This is particularly relevant given the short duration of the remand. NMFS plans to complete its new analyses pursuant to the district court's merits decision no later than November 2024. 2-ER-145–46 ¶ 5; *see also* 88 Fed. Reg. 54,301, 54,302 (Aug. 10, 2023) (notice of intent announcing NMFS's decision to prepare an environmental impact statement). Any limited impacts to killer whales that might result from the operation of the commercial Chinook salmon troll fishery during the remand period will accordingly be minimal.

Finally, vacatur has the potential to frustrate broader efforts to promote the recovery of ESA-listed species. NMFS works with its regional partners, including the States of Washington, Oregon, Alaska, and Tribes with treaty fishing rights, to manage fisheries and mitigate the effects of the fisheries and to establish a suite of restoration and recovery actions that benefit species such as endangered killer whales and threatened Chinook salmon. NMFS, with its regional partners, has worked very hard to promote actions that will recover killer whales. *See* 2-ER-310–11; 2-ER-332–36; *see also* 6-ER-1195 ("starting in 2018, additional protective measures in U.S. and Canadian waters are being implemented to reduce impacts from fisheries and vessels in key foraging areas"). One of these programs is the prey increase program, which balances

the prey needs of killer whales with the coastwide fisheries that target salmon allowed under the treaty. *See* 5-ER-887–89 (explaining that the United States decided to fund the prey increase program and other mitigation measures to "mitigate the effects of harvest and other limiting factors that contributed to the reduced status of Puget Sound Chinook salmon and [Southern Resident killer whales]," in addition to reducing harvest levels). Vacatur frustrates those efforts by pitting fishing communities against killer whale conservation. *See* 2-ER-64–65 ¶¶ 25, 27; 2-ER-133–34 ¶¶ 25, 27.

In sum, the district court lacked a sufficient basis for vacatur and abused its discretion when it erroneously discounted the many disruptive consequences of vacatur and improperly elevated the limited benefits provided to killer whales during the remand period.

CONCLUSION

For all these reasons, the district court's order should be reversed insofar as it vacated the 2019 biological opinion and incidental take statement.

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September 29, 2023
DJ# 90-8-6-08342

STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any cases that are considered related within the meaning of Circuit Rule 28-2.

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September 29, 2023
DJ# 90-8-6-08342

CERTIFICATE OF COMPLIANCE FOR BRIEFS

I hereby certify that this brief contains 10,379 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

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September 29, 2023
DJ# 90-8-6-08342

Nos. 23-35322, 23-35323, 23-35324, 23-35354

United States Court of Appeals for the Ninth Circuit

JENNIFER QUAN, in her official capacity as Regional Administrator of the National Marine Fisheries Service; JANET COIT, in her official capacity as the Assistant Administrator for Fisheries of the National Marine Fisheries Service; NATIONAL MARINE FISHERIES SERVICE; GINA M. RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; UNITED STATES DEPARTMENT OF COMMERCE,

Appellants-Defendants,

THE STATE OF ALASKA,

Appellant-Intervenor,

THE ALASKA TROLLERS ASSOCIATION,

Appellant-Intervenor,

v.

WILD FISH CONSERVANCY, a Washington non-profit corporation,

Cross-Appellant-Plaintiff,

Appeal from U.S. District Court, Western District of Washington, Seattle
Honorable Richard A. Jones
No. C-20-417-RAJ

OPENING BRIEF OF APPELLANT-INTERVENOR STATE OF ALASKA

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JURISIDICTIONAL STATEMENT

The Wild Fish Conservancy sued the National Marine Fisheries Service, alleging violations of the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act. 8-ER-1845–74. The State of Alaska and the Alaska Trollers Association intervened. 4-ER-821–22; 8-ER-1803–04. The district court had jurisdiction to review the Conservancy's claims. 5 U.S.C. §§ 701–706; 16 U.S.C. § 1540(g); 28 U.S.C. § 1331. It entered a final judgment. 1-ER-2–3 All four parties timely appealed. 8-ER-1899–1921. This Court has jurisdiction to review the district court's decision. 28 U.S.C. § 1291.

INTRODUCTION

This case is about the proper remedy when a court finds flaws in an agency's environmental analysis. Here, the district court's choice of remedy would effectively halt a critical Alaskan fishery—irreparably harming Southeast Alaskan communities—without providing a corresponding benefit to endangered species, only to have the agency reissue the same decision the following year.

In 2019, the National Marine Fisheries Service issued a Biological Opinion about Southeast Alaska fisheries. The opinion addressed the continued delegation of management of the Southeast Alaska salmon fishery to the State of Alaska, federal funding to the State to manage the fishery under the terms of the Pacific Salmon Treaty, and conservation programs for endangered Southern Resident

killer whales and some threatened Chinook salmon. The conservation programs are designed to offset impacts from numerous fisheries in Alaska and the Pacific Northwest. One of the conservation measures, the "prey increase program," produces additional hatchery fish to release into the wild to boost the amount of prey available for the endangered whales. In its Biological Opinion, the agency concluded that Alaska's fishery would not jeopardize the endangered whales and salmon, and issued an Incidental Take Statement for any incidental "take" of those species, for purposes of the Endangered Species Act.

In 2020, the Wild Fish Conservancy sued the agency to enjoin the Southeast Alaska fishery and the prey increase program. The district court found flaws in the agency's Biological Opinion and concluded that the agency should also have performed further environmental analysis under the National Environmental Policy Act. The court ordered briefing on the remedy. That is the focus of this appeal.

In remanding to the agency for further analysis, the district court partly vacated the Incidental Take Statement, which effectively enjoined the Southeast Alaska Chinook salmon troll fishery. It did so even though closing that fishery would have certainly spawned disaster for Southeast Alaska's economy and way of life while providing no meaningful benefit to the endangered whales. And it did so even though, by 2023 (when the district court entered its remedy order), the flaws

the district court found with the Biological Opinion had already been substantially remedied.

This Court stayed the district court's vacatur order because a flawed Incidental Take Statement need not be vacated upon remand and instead "may be left in place when equity demands." 2-ER-47–51. This Court found that the defendants and intervenors had shown "a sufficient likelihood" that "the certain and substantial impacts of the district court's vacatur on the Alaska salmon fishing industry outweigh the speculative environmental threats posed by remanding without vacatur." 2-ER-50. This Court was right. For the same reasons it granted the stay, this Court should now reverse the district court's vacatur order.

This is not a typical environmental law case. Environmental conservation organizations; local, tribal, and federal governments; and Congressional leaders have banded together to keep the Southeast Alaska fishery open. *See* Congressional Delegation and Tribal Coalition amici briefs and attachments thereto, ECF Nos. 22 & 42. SalmonState, an organization whose goal is ensuring access to sustainable wild salmon, said it best: the Conservancy's litigation is "misguided [and] irresponsible," an "abuse of the Endangered Species Act," and "in all probability won't save a single endangered killer whale, but will ruin the livelihoods of thousands of Alaska's most committed, long-term conservationists

and wild salmon allies."[1] *See also* Appx. to Cong'l Del. Amici Br. at 95–96, ECF No. 22-3 (May 23, 2023 Letter from four conservation groups—SalmonState, Southeast Alaska Conservation Council, Sitka Conservation Society, and Alaska Rainforest Defenders—denouncing the Conservancy's suit).

ISSUES PRESENTED FOR REVIEW

1. *Equities:* Given the certain devastation that vacatur would have caused Southeast Alaska and the speculative environmental benefit of vacatur to the whales, did equity demand remand to the agency without vacatur?
2. *Seriousness of errors:* Given that the prey increase program was no longer uncertain and unspecific and that the agency completed Endangered Species Act and National Environmental Policy Act analyses for each hatchery within the program, were the agency's errors serious enough to require vacatur?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Southeast Alaska depends on the Chinook troll fishery.

Troll fishing for Chinook salmon is critical to Southeast Alaska's economy, local governments, and culture. Trollers fish by hook and line, handling each

[1] SalmonState condemns Wild Fish Conservancy's fatally flawed approach to environmentalism and judge's decision on Alaska's troll fishery, SalmonState.org (last visited September 25, 2023), https://salmonstate.org/press-releases/salmonstate-condemns-wild-fish-conservancys-fatally-flawed-approach-to-environmentalism-and-judges-decision-on-alaskas-troll-fishery.

individual fish with care. 8-ER-1807. Trollers are advocates for sustainable wild salmon and ally with conservation groups to protect and restore wild salmon. Appx. to Cong'l Del. Amici Br. at 95–96, ECF No. 22-3 (May 23, 2023 Letter from four conservation groups in support of trollers). This is because trollers' livelihoods depend on healthy salmon runs. 3-ER-544–45.

The Chinook troll fishery is crucial to the broader Southeast Alaska troll fishery. Depending on the year, Chinook amounts to between one third and one half of the troll fleet's "ex vessel" earnings (i.e., how much trollers are paid for their catch). 2-ER-229. While trollers fish for Coho and chum salmon in addition to Chinook salmon, troll-caught Chinook fetch by far the highest value per pound. 3-ER-514; *see also* Exh. to Tribal Amici Br., ECF No. 42-3 at 19 (Dybdahl Decl. ¶7). Chinook also grow much larger than Coho or chum. 3-ER-514; *see also* Exh. to Tribal Amici Br., ECF No. 42-3 at 19 (Dybdahl Decl. ¶7). This means that catching one Chinook could equal the value of catching five Coho. And this matters because, as discussed above, trollers catch one fish at a time. 8-ER-1807. For many trollers, not being able to fish for Chinook means it is not economically viable to troll fish at all. 2-ER-229; *see also* Exh. to Tribal Amici Br., ECF No. 42-3, at 13, 19, 27 (Douville, Dybdahl, and Marks Decls.). While this appeal concerns the district court's order effectively closing the summer and winter Chinook troll

seasons, the order implicated the viability of the entire Southeast Alaska troll fishery as well.

The total annual economic output of the Chinook commercial troll fleet for the winter and summer seasons is approximately $29 million. 3-ER-519–21. This includes how much trollers are paid for their catch (i.e., the "ex vessel" value) plus wages and the secondary spending that circulates in Southeast Alaska as the fishermen purchase goods and services, which keeps the local communities afloat. 3-ER-517–19. The average annual "ex-vessel" value of the Chinook troll fishery for the summer and winter seasons is about $10.4 million. 3-ER-518, 521.

The troll fishery supports jobs for over one thousand people. 3-ER-519–20; 2-ER-228–29; Appx. to Cong'l Del. Amici Br., Dkt. 22-3 at 52 (2023 Alaska Legislature Resolution). As for direct employment, over 1,000 people hold active troll fishing permits in Southeast Alaska. 3-ER-517. Additionally, many trollers employ deckhands. 3-ER-519; *see also* Exh. to Tribal Amici Br., ECF No. 42-3, at 34 (Peterson Decl.).

Fish processing plants—which contribute significantly to Alaska's economy—also rely on the troll fishery. 3-ER-519. Even more so during the winter, when the troll fishery provides the only source of fish. 2-ER-231.

The State of Alaska and local governments rely on trollers for much-needed tax revenue. This includes corporate income taxes and motor oil tax for the State,

and municipal taxes for local governments. 2-ER-231. It also includes fish landing taxes. 2-ER-231. Half of those landing taxes goes to the State's general fund and the other half goes to the respective municipality or unorganized boroughs where the landing occurs, which, in turn, pays for schools, utilities, harbor maintenance, and other needed services. 2-ER-231.

Troll fishing supports small Southeast Alaska communities where the fishery is *the* economy, as well as larger communities where the fishery is a significant contributor to the economy. For small towns like Pelican, about a third of its population participates directly in the troll fishery. 3-ER-524. The fishery further supports the local economy because trollers pay moorage, buy ice, refuel, and visit the local café. 3-ER-524. Community members work at the local processing plant, which operates to process the trollers' catch. 3-ER-524–25. And raw fish taxes account for ten percent of the town's entire annual local revenue, which pays for education, water, wastewater, electricity, snowplowing, trash, and boardwalk repairs. 3-ER-524.

Troll fishing is also critical to larger towns like Sitka. Although only seven percent of the households there are associated with troll permits, the troll fishery nonetheless brings in over eight million "ex-vessel" dollars per year, a huge number for a town with only 8,000 residents. 2-ER-230–32. This "ex vessel" value does not account for the additional benefit created by secondary spending as

fishermen purchase goods and services throughout the local community. 3-ER-519–20. And it does not account for the fish landing taxes, which support community infrastructure and basic services. 3-ER-519; 2-ER-230–31.

Troll fishing is a "way of life," passed down from one generation to the next. 8-ER-1812–13; 3-ER-543–47. It not only allows individuals to pay bills, but it is also critical for communities' "spiritual and physical wellbeing." 3-ER-547.

This cultural importance is especially significant for many Alaska Natives, including Tlingit and Haida people who have lived in Southeast Alaska since time immemorial, and Tsimshian people who migrated to the Annette Islands in the 1800s. Tribal Amici Br. and Exh., ECF Nos. 42-2, 42-3. These native people participate in the Southeast Alaska troll fishery and use each season to pass down intergenerational knowledge. Exh. to Tribal Amici Br., ECF No. 42-3, at 33 (Peterson Decl.). About 600 troll permits are held by members of federally recognized tribes. Exh. to Tribal Amici Br., ECF No. 42-3, at 34 (Peterson Decl.). Because troll fishing is one of the few industries that offers well-paying jobs in remote Southeast Alaska, it enables tribal members to continue living on their traditional lands and practicing their traditional way of life. Exh. to Tribal Amici Br., ECF No. 42-3, at 43 (Ware Decl.) Everything costs money: food, clothes, even fuel and gear to go subsistence fishing.

If this Court had not stayed the district court's vacatur order, the Chinook troll fishery in Southeast Alaska would have been effectively shut down in 2023. *See* 2-ER-49–51. Shutting down that fishery, even for just one season, would have meant economic, social, and cultural devastation.

B. Southern Resident killer whales are listed under the Endangered Species Act, as are some stocks of Chinook salmon.

Southern Resident killer whales (SRKW) are a specific population of killer whales listed as endangered under the Endangered Species Act (ESA). Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903 (Nov. 18, 2005). Their population is at a historic low, down from a peak of 97 in 1996 and slightly greater than their nadir of 67 in 1974, when their census began. 5-AR-962–63; 4-ER-607. Their decline was initially precipitated by their removal for public display in aquaria in the 1970's. 70 Fed. Reg. at 69,908. Their continued decline has been attributed to multiple factors including prey availability, toxins in their environment and food, and vessel noise and vessel traffic that disturbs use of echolocation to forage and communicate. *Id.*; 5-ER-968–76. The whales are typically found throughout the waters off Washington, Oregon, and Vancouver Island. 5-ER-968–76. And they typically live in inland waters in the summer and coastal waters in the winter. 5-ER-966–67, 1127. The preferred diet of these whales is mature Chinook salmon, though they do consume other species of salmon and other species of fish as

mature Chinook salmon are not present in sufficient numbers year round. 5-ER-969–70.

Chinook salmon hatch in freshwater and then migrate to the ocean where they mature for three to five years before returning to their birth waters to spawn and die. 5-ER-890. Some Chinook that originate in the Pacific Northwest migrate far north into the Gulf of Alaska and take advantage of the nutrient rich waters to feed and grow before returning to spawn in their natal streams. 5-ER-890; 2-ER-240. Not all mature salmon return to their spawning grounds (and to SRKW territory). 2-ER-242–43; 8-ER-1775–76

Before mature Chinook that spend time in the Gulf of Alaska can become prey for the SRKW, they have to migrate through a gauntlet of other predators and fisheries, and most don't make it. 2-ER-242–43; 8-ER-1779–80. Some are consumed by salmon sharks, pinnipeds, and other resident populations of killer whales. 2-ER-242–43; 8-ER-1779–80. Some are captured by commercial and recreational fisheries off the coasts of Southeast Alaska, British Columbia, and Washington. 2-ER-237, 243; 8-ER-1779–80, 1794–95.

Four threatened stocks of Chinook[2] are relevant to the Alaska fishery because the fishery incidentally takes a small number of these fish. 4-ER-858; 6-

[2] These are the Lower Columbia River Chinook, the Snake River Fall-run Chinook, the Upper Willamette River Chinook, and the Puget Sound Chinook. 4-ER-858.

ER-1205–06. The Alaska fishery is a mixed-stock fishery, meaning it harvests various stocks of Chinook—some originate from various areas within Alaska, some from Northern and Central British Columbia, some from Southern British Columbia, and some from the Pacific Northwest. 2-ER-241–42. These four listed stocks originate in the Pacific Northwest. 4-ER-858. The primary causes of decline for these listed Chinook stocks are loss of habitat, hydropower development, poor ocean conditions, overfishing, and poor hatchery practices. 5-ER-929, 935–36, 946, 957. Depending on how a hatchery operates, its effect on salmon can be positive, neutral, or negative. 5-ER-1106–07. NMFS uses hatcheries to preserve vital genetic resources for severely threatened stocks while other factors limiting survival and abundance are addressed. 5-ER-1106. Hatchery-produced salmon provide a "significant component of the salmon prey base returning to the watersheds within the range of SRKW." 5-ER-972. Hatchery-produced salmon also provide a significant component of the Southeast Alaska fishery's harvest. 2-ER-246.

II. STATUTORY FRAMEWORK

A. The Magnuson-Stevens Act

In 1976, in response to foreign competition for fish in the United States' exclusive economic zone,[3] Congress passed the Magnuson-Stevens Act. 16 U.S.C. § 1801, *et seq*. The Act establishes a national program for the management of federal fisheries to prevent overfishing; to promote optimal yields of the nation's fisheries; and to sustain the economic, employment, and food supply benefits derived from the nation's fisheries. 16 U.S.C. § 1801. Under the Act, the National Marine Fisheries Service (NMFS) implements Fishery Management Plans to regulate fishing between three and 200 miles from the coast. 16 U.S.C. §§ 1853, 1854. States maintain authority to regulate fishing in their territorial waters, which extend three miles from the coast.[4] 16 U.S.C. § 1856.

The Act placed the salmon fishery between three and 200 miles off the coast of Alaska under federal management. 2-ER-1402, 1407, 1415. Nevertheless, the early versions of federal Fishery Management Plan adopted most of the State of

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[3] Under international law, coastal nations have jurisdiction over resources in their exclusive economic zone (EEZ), which extends 200 nautical miles from a nation's coastline.

[4] While the country's EEZ extends 200 miles off the coastline, states have "title to and ownership of" and the "right and power to manage" the natural resources located within three miles from their coastlines. 43 U.S.C. §§ 1311, 1312. The Magnuson-Stevens Act does not diminish a state's jurisdiction over resources in its waters. 16 U.S.C. § 1856.

Alaska's harvest restrictions and management measures. 6-ER-1408. And since 1990, NMFS's Fishery Management Plan has delegated management authority of commercial troll fishing in federal waters in Southeast Alaska to the State. 6-ER-1402, 1409. The agency reaffirmed that delegation in 2012. Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. 75,570 (Dec. 21, 2012); 6-ER-1403.

The State has been managing its fisheries since statehood. 6-ER-1415; Alaska Statehood Act, Pub. L. 85-805, § 6(e), 72 Stat. 339, 340–41 (1958). It does so according to the "sustained yield" principle mandated by its constitution. Alaska Const. art VIII, § 4. The State manages "wild salmon stocks . . . at levels of resource productivity that assure sustained yields." 5 Alaska Admin. Code 39.222(c). The State manages the Southeast Alaska troll fishery in federal waters (which are subject to the Magnuson-Stevens Act) and state waters (which are not) as a single unit. 6-ER-1415; 7-ER-1441. Troll fishing for Chinook in winter (October through April) and spring (May through June) occurs exclusively in state waters, while the summer season (July through September) extends to federal waters as well. 7-ER-1441–42.

The judicial review provisions of the Magnuson-Stevens Act are narrow to ensure that Fishery Management Plans and amendments to them—such as the agency's delegation of management to Alaska—"are effectuated without

interruption and that challenges are resolved swiftly." *See Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 948 (9th Cir. 2006).

B. The Pacific Salmon Treaty

Because salmon are highly migratory and salmon originating in Canada are intercepted in the United States and vice versa, the two countries signed the Pacific Salmon Treaty in 1985. 6-ER-1423. The Treaty is based on shared responsibility for conservation and rational management and provides a bilateral forum for cooperation and coordination of research, management, and enhancement. 6-ER-1423. The Treaty's goals are to prevent overfishing, provide for optimum production, and afford equitable benefit to each party from the production of salmon originating in its waters. 6-ER-1417, 1423. The parties renegotiate the fishing regimes every ten years to update conservation goals and harvest sharing arrangements. 5-ER-880–81.

Harvest limits and harvest exploitation rates are set by complex Treaty negotiations. 7-ER-1618–8-ER-1765. In addition to bilateral international agreement, changes to Treaty harvest regimes also require intranational agreement (i.e., consensus among the U.S. Commissioners, one of whom represents Alaska). Pacific Salmon Treaty Act, Pub. L. 99-5, §3(a),(g), 99 Stat. 7 (1985). Most Treaty fisheries are managed as Individual Stock-Based Management fisheries based on

exploitation rate impacts on specific constituent stocks, and have flexibility to increase or decrease their harvest depending on in-season abundance levels of those particular stocks. 8-ER-1794–95; 5-ER-895. The other three fisheries, including the Southeast Alaska fishery, are Aggregate Abundance-Based Management fisheries, and are managed to catch limits set before the season opens and only have flexibility to decrease their harvest depending on in-season abundance levels, but cannot exceed their catch limit. 8-ER-1794; 5-ER-891–92. According to Treaty negotiations, the catch limit for the entire Southeast Alaska fishery (not just the trollers) is set annually based on data from the early winter troll fishery. 7-ER-1676; 5-ER-892.

In the most recent Treaty negotiation, and in response to concerns for some Chinook stocks and SRKW, the parties reduced harvest limits for Aggregate Abundance-Based Management fisheries. 5-ER-887–88; 6-ER-1191. Alaska agreed to reduce its harvests of Chinook by up to 7.5%, and Canada agreed to reduce its harvest by 12.5%. 5-ER-895; 6-ER-1191. Other fisheries, notably those along the coasts of Southern British Columbia, Washington and Oregon—which operate in the waters SRKW inhabit—were largely left untouched by the Treaty. *See* 5-ER-1036–37; 3-ER-414, 442. The harvest limit reductions are the product of complex, multi-issue, multi-party political negotiation rather than a reflection of any fishery's proportional impact on the endangered whales.

C. The Endangered Species Act

The Endangered Species Act (ESA) requires federal agencies to ensure that any action they fund, authorize, or carry out is "not likely to jeopardize the continued existence of any endangered species or threatened species" or destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). If an agency action is "likely to adversely affect" any listed marine or anadromous species or their designated critical habitat, NMFS must issue a Biological Opinion (BiOp). 50 C.F.R. § 402.14. A BiOp analyzes whether the proposed action is likely not just to affect a species, but whether it is likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. *Id.* If the agency determines that the proposed action will not have these jeopardizing effects, and that any incidental "taking" of the listed species will not jeopardize the species or destroy its critical habitat, the agency issues an Incidental Take Statement (ITS). 16 U.S.C. § 1536(b)(4). The statutory term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The regulatory definition of "harm" includes degrading habitat to such a degree that it "actually kills or injures" wildlife "by significantly impairing essential behavioral patterns, including, breeding, spawning, [. . . or] feeding." 50 C.F.R. § 222.102. Any take that complies with an ITS is shielded from liability under the ESA. 16 U.S.C. §

1536(o)(2). If a person knowingly "takes" a listed species without an ITS in place, the person is subject to criminal and civil penalties, and may be liable for litigation costs in citizen suits. 16 U.S.C. §§ 1540(a), 1540(b), 1540(g)(4).

D. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) is a procedural statute that requires federal agencies to evaluate the environmental consequences of proposed major federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(C). NEPA serves the dual purpose of informing agencies of the environmental effects of proposed federal actions and making relevant information available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Whether an agency prepares no NEPA analysis, a brief Environmental Assessment, or a more robust Environmental Impact Statement depends on whether it is taking a major federal action, whether the action is categorically exempt from NEPA, whether the significance of its impacts are unknown, and whether or not the action is found to have a significant environmental impact. *See* 40 C.F.R., Part 1501. The agency determines which category of NEPA assessment it conducts. *See id.*

E. The Administrative Procedure Act

The Administrative Procedure Act (APA) affords judicial review to persons aggrieved by certain federal actions. 5 U.S.C. § 702. Because neither the ESA nor

NEPA supply a separate standard of review, the APA provides the legal framework for reviewing claims under those Acts, meaning courts analyze ESA and NEPA claims by considering whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

III. PROCEEDINGS BELOW

A. NMFS's 2019 Biological Opinion shielded the Southeast Alaska salmon fishery from ESA liability.

In 2019, NMFS issued a Biological Opinion (2019 BiOp) considering the combined effects on ESA-listed species from the following federal actions: (1) the agency's ongoing delegation of salmon fisheries management in Southeast Alaska to the State, (2) federal funding to the State to manage the fisheries and meet the obligations under the Pacific Salmon Treaty, and (3) a conservation program for habitat improvement and hatchery production to benefit both critical stocks of Puget Sound Chinook salmon and SRKW. 5-ER-884–90.

Although the conservation program is described in the 2019 BiOp, which otherwise focuses on the Southeast Alaska fishery, the program is intended to offset impacts to the endangered whales and ESA-listed Puget Sound Chinook from *all* fisheries under the Pacific Salmon Treaty, not just the Alaska fishery. 5-ER-888–90; 6-ER-1193; 3-ER-324–25.

The conservation program has three components. 5-ER-888. The first two components aim to aid ESA-listed Puget Sound Chinook by continuing hatchery programs to conserve genetics for at-risk stocks and implementing habitat restoration programs. 5-ER-888. Puget Sound Chinook are one of the four stocks of Chinook relevant to Alaska's fishery because, as stated above, Alaska incidentally takes some of those fish. 5-ER-1014–21; 6-ER-1281–94. But in terms of quantity, the Alaska fishery takes very few Puget Sound salmon because these stocks have local migratory pattern and only occasionally stray as far as Alaska. 5-ER-890, 1014–21; 2-ER-243–44. These two components are mainly meant to mitigate for Canadian and Pacific Northwest fisheries' large impact on Puget Sound Chinook and habitat degradation in the Pacific Northwest. 2-ER-243–44; 5-ER-888–90, 1031, 1105. By increasing Puget Sound Chinook abundance, these two components of the conservation program would incidentally bolster prey availability for the endangered whales over the long term. 5-ER-888.

The third component of the conservation program is a hatchery initiative designed to increase Chinook availability specifically for SRKW. 5-ER-888–89. The 2019 BiOp explains how reduced prey availability "may cause [SRKW] to spend more time foraging than when prey is plentiful and increase the risk of poor body condition and nutritional stress." 6-ER-1194. The prey increase program

intends to increase prey availability to the endangered whales by 4 to 5 percent at a cost of $5.6 million annually. 5-ER-889; 6-ER-1194.

The 2019 BiOp analyzed whether, given these mitigation measures, the Southeast Alaska fishery was likely to jeopardize the endangered whales. The BiOp found that the entire fishery (i.e., sport, commercial seine and gillnet, subsistence, and troll) has historically reduced SRKW prey availability in inland waters from July through September by 0.1% to 2.5%, and in coastal waters from October through April by only 0.2 to 1.1%. 5-ER-1126–27; 6-ER-1192, 1194. The BiOp also reported historical data for the converse times and places: coastal waters in the summer and inland waters in the winter. 5-ER-1126–27. If time of year is taken out of the analysis, the BiOp calculates that the Southeast Alaska fishery reduces SRKW prey availability in coastal waters by an average of 5% and in inland waters by an average of 1%. 5-ER-1125. But the time and place breakdown of the fishery's impact on prey availability is relevant because the endangered whales typically live in inland waters in the summer and coastal waters in the winter. 5-ER-966–867; 6-ER-1191–92.

NMFS concluded that continued operation of the Southeast Alaska fishery, consistent with the Treaty-established limits and 2019 BiOp approved mitigation measures, was not likely to jeopardize the SRKW or the four relevant listed Chinook stock or adversely modify their critical habitat. 6-ER-1172–95. The BiOp

thus included an ITS for any incidental take of SRKW and the four ESA-listed Chinook consistent with the Treaty's limits. 6-ER-1205–06.

B. In 2020, the Wild Fish Conservancy sued NMFS.

In 2020, the Wild Fish Conservancy sued NMFS, alleging NEPA, ESA, and APA violations. 8-ER-1845–74. The State of Alaska and the Alaska Trollers Association intervened. 4-ER-821–22; 8-ER-1803–04.

The parties cross-moved for summary judgment, and the trial court found in the Conservancy's favor. 4-ER-612–53.

First, the court concluded that the agency violated the ESA because its determination that the endangered whales would not be jeopardized relied on a mitigation program (the prey increase program) that was not yet fully funded and not yet site-specific. 4-ER-612–13, 638–47. Agencies may rely on mitigation measures in making no jeopardy determinations, but the mitigation must "describe, in detail, the action agency's plan" and be "reasonably certain to occur." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020).

Second, the court concluded that the 2019 BiOp was flawed because it did not consider how the new prey increase program would affect threatened Chinook stocks. 4-ER-612–13, 644–47. The court did not find any flaw in the BiOp's consideration of how the Southeast Alaska fishery itself impacts those stocks. *See generally* 4-ER-612–53. Rather, the flaw the district court found was the agency's

failure to analyze how the prey increase program might impact those stocks. 4-ER-612–13, 645–46.

Third, the court found that the agency's ITS should have triggered NEPA review. 4-ER-612–13, 647–50.

Finally, the court concluded that the prey increase program should have triggered NEPA review. 4-ER-612–13, 650–51.

C. In 2023, the district court vacated part of the 2019 BiOp, effectively enjoining the Southeast Alaska troll fishery.

The parties then briefed the appropriate remedy for these ESA and NEPA violations. 8-ER-1933. Because the Magnuson-Stevens Act barred directly enjoining NMFS from delegating fishery management to the State—one of the actions analyzed in the BiOp—the Conservancy instead sought to vacate the BiOp's ITS, which indirectly enjoined Alaska's fishery. 7-ER-1587, 1604; 4-ER-823; 8-ER-1933.

Vacating the ITS effectively enjoined Alaska's fishery because the ITS shields Alaska and trollers from ESA liability. 16 U.S.C. § 1536(o)(2). The ESA makes people civilly and criminally liable for knowingly "taking" a listed species without an ITS in place and subjects defendants to litigation costs. 16 U.S.C. § 1540. The ITS is critical for Alaska's fishery because it covers incidental take of the four relevant ESA-listed salmon—not just SRKW—and Alaska's trollers do incidentally take some ESA-listed salmon, albeit in limited numbers. 6-ER-1205.

Given the exceedingly expensive litigation costs, civil fines, and criminal penalties for each take, fishing is effectively enjoined if there is no ITS in place for ESA-listed salmon. 16 U.S.C. § 1540(a) (civil penalties), § 1540(b) (criminal violations), § 1540(g)(4) (fee shifting costs for citizen suits).[5]

In addition to asking the district court to vacate the ITS, the Conservancy also sought to enjoin the prey increase program, arguing that increased hatchery production would harm wild ESA-listed salmon. 1-ER-30.

The district court granted the Conservancy's request to vacate the ITS as applied to the summer and winter Chinook troll fishery. 1-ER-5, 44–45. The court asserted that there was a "presumption" that vacatur was the proper remedy, that courts deviate from vacatur in "rare" circumstances, and that the defendants did not overcome the presumption. 1-ER-4, 19, 29, 35.

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[5] Vacating the ITS for SRKW does not have quite the same injunctive effect. This is because it is questionable whether the Southeast Alaska fishery's minimal impact on prey availability is significant enough to constitute a "take" of SRKW under the ESA. *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1419–20 (9th Cir. 1990) (finding no "take" where evidence of any one year's water diversion did not actually cause the listed fish's spawning problems, especially given that other water users were also diverting water). NMFS appears to have included an ITS for the whales in the 2019 BiOp in an excess of caution to account for years of low salmon abundance and because NMFS lacked "data needed to establish quantitative relationship between prey availability" and "effects to SRKW." 6-ER-1206. The 2023–2024 fishing season is *not* projected to be a year of low Chinook abundance. 2-ER-60–61. Nevertheless, the litigation risks could still make fishing without an ITS for SRKW untenable.

The district court denied the Conservancy's request to enjoin the prey increase program. 1-ER-4, 35–38.

The State filed in the district court a motion to stay vacatur of the ITS pending appeal, which the Alaska Trollers Association joined, and which the federal defendants supported. 8-ER-1936. The Conservancy cross-moved for an injunction pending appeal of the prey increase program. 8-ER-1936. The district court denied both motions. 8-ER-1937.

The parties then asked this Court for the same relief. State's Motion to Stay, ECF No. 15; Conservancy's Cross-Motion for Injunction, ECF No. 19; ATA's Joinder to Motion to Stay, ECF No. 20; Fed'l Response Supporting Motion to Stay, ECF No. 21. The Alaska Congressional Delegation filed an amici brief supporting the State's requested stay, which included letters and resolutions from dozens of remote Southeast Alaska communities, tribes, and tribal organizations, discussing how important the Chinook troll fishery was to their communities and how disastrous its closure would be. Cong'l Amici Br., ECF No. 22. A coalition of Alaska tribes and tribal organizations also submitted an amici brief outlining the devastating and disproportionate impact the closure would have on indigenous communities of Southeast Alaska. Tribal Amici Br., ECF No. 42.

This Court stayed the district court's vacatur order, recognizing that a flawed agency action "need not be vacated upon remand and instead may be left in place

when equity demands." 2-ER-50. It concluded that "the moving parties have established a sufficient likelihood of demonstrating on appeal that the certain and substantial impacts of the district court's vacatur on the Alaska salmon fishing industry outweigh the speculative environmental threats posed by remanding without vacatur." 2-ER-50. This Court denied the Conservancy's motion to enjoin the prey increase program pending appeal. 2-ER-50–51.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in effectively enjoining the Southeast Alaska Chinook troll fishery by vacating the fishery's Incidental Take Statement.

First, the district court erred in putting a thumb on the scale of vacatur. When vacatur has the effect of an injunction, there can be no presumption of vacatur. Rather, the equities control.

Second, the district court erred in balancing the equities. Equity demanded remand without vacatur. The certain and substantial impacts of the district court's vacatur on the Alaska salmon fishing industry outweighed the speculative environmental threats posed by remanding without vacatur. The district court erred in undervaluing the cascading harms to Southeast Alaska from closing the fishery during remand. And the district court erred in finding that closing the fishery on remand would meaningfully benefit the endangered whales. The district court further erred in choosing a remedy that undermines international negotiations and

that conflicts with the purpose of the prey increase program. Congress funds the prey increase program to ensure *both* that the endangered whales get more prey and that the Alaska fishery (as well as other fisheries in the Pacific Northwest) can continue to operate.

Third, the district court erred because the agency is likely to issue the same ITS on remand, meaning that vacatur will be too short-lived to justify its destabilizing effects. By 2023, when the district court entered its vacatur order, the flaws the court had found in the 2019 BiOp had been substantially remedied. The court erred in ignoring this, and instead focusing on the errors in 2019. And despite the Conservancy's desire that NMFS, on remand, contravene international negotiations and lower Alaska's harvest levels in a BiOp, NMFS has neither the authority nor reason to do so. NMFS is likely to issue the same ITS on remand. Vacating the ITS in the meantime would have devastated Southeast Alaska while providing no meaningful benefit to the endangered whales.

STANDARD OF REVIEW

This Court reviews a district court's decision to remand without vacatur for abuse of discretion. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010). A district court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous findings of fact. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564, n.2 (2014). Even when there

is no error of law or fact, a district court also abuses its discretion when this Court is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Est. of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016).

ARGUMENT

I. Courts consider two factors when deciding whether to vacate an unlawful agency action and put no thumb on the scale of vacatur.

This Court instructs that a two-factor test applies when determining whether an agency action should remain in effect on remand. *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022) (discussing Ninth Circuit's adoption of D.C. Circuit's test in *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The test weighs the "seriousness of the agency's errors against the 'disruptive consequences of an interim change that may itself be changed.'" *Regan*, 56 F.4th at 663 (quoting *Allied-Signal*). One factor in this analysis—the "disruptive consequences" factor—gets at the equities. *Id.* at 668. Even when errors are substantive, the equities may nonetheless warrant remand without vacatur. *Cal. Cmtys. Against Toxics v. E.P.A.*, 688 F.3d 989, 993–94 (9th Cir. 2012). The other factor gets at whether the agency will likely institute the same rule on remand. *Regan*, 56 F.4th at 663–67. Both factors weighed in favor of remand without vacatur here, and the district court erred in concluding otherwise.

The district court also erred in constraining its decision because of a "presumption" of vacatur. 1-ER-4, 35. Although this Court has, on occasion, referred to vacatur as a "presumptive" remedy for APA violations, in practice, this Court refuses to reflexively apply any such presumption. *350 Montana v. Haaland*, 50 F.4th 1254, 1259, 1273 (9th Cir. 2022) (refusing to automatically vacate decision because there was "dearth of evidence concerning the impact of vacatur").[6] "A federal court is not required to set aside every unlawful agency action, and the decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity." *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) (internal quotation marks omitted); *see also Regan*, 56 F.4th at 663. The district court erred by feeling compelled by a "presumption" of vacatur. 1-ER-4, 35.

Moreover, when vacatur has the practical effect of an injunction, like it does here, a court cannot rightly put a thumb on the scale favoring such relief. *See Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156–58 (2010) (no presumption of injunctive relief for NEPA violation). This is not a case where the district court was deciding whether to vacate a new agency rule with novel

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[6] In fact, whether § 706's "hold unlawful and set aside" language even means "vacate" is subject to current debate. *See United States v. Texas*, 143 S. Ct. 1964, 1981–85 (2023) (Gorsuch, J., concurring) (opining that the APA's phrase "set aside" is not tantamount to "vacate" and that ordinary remedies apply under the APA instead).

prospective effect—the district court was deciding whether to effectively enjoin local fishermen who have been troll fishing their entire lives. The district court erred in applying a presumption favoring such drastic injunctive relief. 1-ER-4, 35.

II. The equities warranted remand without vacatur.

This Court "leave[s] invalid agency action in place when equity [so] demands." *Regan*, 56 F.4th at 663 (internal quotation marks omitted). Equity so demanded here. Shutting down Southeast Alaska's Chinook troll fishery would do little for endangered whales while causing catastrophic and irreparable harm to Southeast Alaska. The district court erred in undervaluing the cascading harms to Southeast Alaska from closing the fishery. 1-ER-4, 35. It erred in finding that shutting down Alaska's fishery would provide meaningful benefit to the SRKW. 1-ER-4, 34. And it erred in concluding that any benefit to the whale—no matter how small or speculative—outweighed the concrete, severe, and devastating harm to Southeast Alaska communities. 1-ER-4, 34–35.

A. Shutting down Southeast Alaska's Chinook troll fishery is a certain death knell to rural Southeast Alaska communities.

The record before the district court established that halting the Southeast Alaska Chinook troll fishery for even just a single season would create both immediate and long-lasting economic, social, and cultural harms. The district court erred in discounting this largely undisputed evidence.

The economic output of the Chinook summer and winter troll fishery is huge—about $29 million each year. 3-ER-519–21. The effects of shuttering it would be felt most acutely in smaller, remote communities, where the troll fishery is the primary industry and where secondary businesses have sprung up to support that fishery. 2-ER-230; 3-ER-523–25. The effects would also be felt in larger towns like Sitka, where just the "ex vessel" value of the fishery brings in millions of dollars. 2-ER-230.

Enjoining the troll fishery hurts more than just the fishermen because money generated from the fishery circulates throughout local communities through secondary spending. 3-ER-519–20. When trollers do not fish, the impacts cascade throughout the supply chain: they do not stop at stores to buy ice; purchase fuel at the dock; buy gear from local merchants; or sell their fish to local businesses who then smoke and sell it. 3-ER-519–21; *see also* Exh. to Tribal Amici Br., ECF No. 42-3, at 5 (Cook Sr. Decl.). The loss of the troll fishery would mean the loss of these secondary transactions.

It would also harm other secondary businesses such as fish processing plants. 3-ER-519. Because about a third of the value added in seafood processing is the cost of labor, decreasing the quantity of fish processed significantly decreases the need for (and wages to) laborers. 3-ER-519. If the winter fishery is closed,

processing plants could be forced to close too because the troll fishery is their only source of fish at that time. 2-ER-231.

Enjoining the fishery would harm the state and local governments by decreasing much-needed revenue from municipal taxes, corporate income taxes, motor oil taxes, and fish landing taxes. 3-ER-519; 2-ER-229, 231.

Shutting down the summer and winter seasons would reduce trollers' livelihoods by more than a third of the troll fleet's earnings. 2-ER-229. This might make it financially infeasible to troll fish at all. 2-ER-229; *see also* Exh. to Tribal Amici Br., ECF No. 42-3, at 19, 27 (Dybdahl & Marks Decls.). This is significant for more than 1,000 people who hold active troll fishing permits, and for the people who work for them. 3-ER-517, 519; *see also* Exh. to Tribal Amici Br., ECF No. 42-3, at 34 (Peterson Decl.).

Trollers cannot simply retrofit their boats for another fishery—Alaska's fishing is highly specialized and regulated, and investing in new gear and permits costs hundreds of thousands of dollars. 2-ER-232.

Nor can trollers just find other jobs. 2-ER-230. Troll fishing "is one of the few industries that offers well-paying jobs in remote Southeast Alaska." Tribal Amici Br., ECF No. 42-2, at 13. Shutting down the Chinook troll fishery would force families to choose between living without enough work or moving to find work. 2-ER-230. If families move, this could deprive remote communities of

enough school-age children to support their schools, leading to local school closures. 2-ER-230. And for tribal members, moving would mean leaving their traditional lands and their traditional way of life. Tribal Amici Br., ECF No. 42-2, at 13.

Vacatur would severely and irreparably harm the "way of life" for Southeast Alaska communities. 8-ER-1812–13; 3-ER-543–47; 2-ER-228–29. In vacating the ITS, the district court completely ignored the cultural and social harms of closing the fishery. *See* 1-ER-4–45. At oral argument, the magistrate judge doubted that those uncontested harms fit into its analysis. 2-ER-198–99. And neither the magistrate nor the district court mentioned the cultural and social harms in its orders. *See* 1-ER-4–45. Yet those impacts are relevant to the equities, so the court erred as a matter of law in ignoring them. *See United States v. Washington*, 853 F.3d 946, 961, 977 (9th Cir. 2017) (affirming that equitable considerations include "cultural and social harm" to communities "in addition to the economic harm"). The Alaska Trollers Association discussed these harms at length. *See, e.g.*, 2-ER-198–99 (oral argument citing to numerous declarations about such harms). And tribes and tribal organizations that would be significantly affected by vacatur of the ITS but that were not joined in this lawsuit, expounded on those cultural harms before this Court. Tribal Amici Br., ECF No. 42-2.

Even setting aside the social and cultural harms, the district court erred in concluding that the economic harms by themselves did not sufficiently weigh against vacatur. In comparable cases, when so many people's livelihoods are on the line, this Court has concluded that vacating an agency decision is unwarranted. *See, e.g.*, *Regan*, 56 F.4th at 668 (concluding that vacatur was unwarranted due, in part, to the disruption to the agricultural industry vacatur would cause); *Nat'l Family Farm Coalition v. EPA*, 966 F.3d 893, 929–30 (9th Cir. 2020) (remanding without vacatur because vacating approval of a pesticide that had been registered for five years could cause serious disruption to farmers); *Cal. Cmtys. Against Toxics*, 688 F.3d at 993–95 (concluding that vacatur was not warranted because, among other reasons, closing the power plant would "be economically disastrous" to a billion-dollar venture employing 350 workers). Likewise here, shutting down the Southeast Alaska Chinook troll fishery—even for just one season—would mean certain economic devastation. These undisputed facts weigh heavily against vacatur and the district court erred in undervaluing them.

B. Shutting down Southeast Alaska's Chinook troll fishery would provide no meaningful benefit to the SRKW.

In contrast to the definite and lasting harm to Southeast Alaska, the benefits to SRKW from closing the fishery while NMFS reissues an ITS are speculative and, at best, minor. 2-ER-303–04. The district court did not make a finding regarding how much prey would ultimately reach the endangered whales if the

fishery were closed. *See generally* 2-ER-4–45. Instead, it acknowledged the "uncertainty as to how much prey would ultimately reach the SRKW." 1-ER, 4, 34. It erred in finding that "under any scenario" "closure of the fisheries [would] meaningfully improve[] prey availability to the SRKW, as well as SRKW population stability and growth." 1-ER-4, 34. Because the record does not support the finding that shuttering Alaska's fishery would provide meaningful improvement to the endangered whales, the court's finding is clear error.

The BiOp's analysis estimates that the increase in SRKW prey would be exceedingly small (less than 0.5% average in winter and less than 1.8% in summer in places where the whales typically are present during those times). 2-ER-304; 5-ER-1126–27; 6-ER-1192. And no one, not even the Conservancy's expert, opined that an increase of less than 2% prey availability while the BiOp is reissued would be "meaningful." *See* 4-ER-609–10 (Third Lacy Decl.)

The district court's finding of "meaningful" benefit to the SRKW rests on numerous flaws:

First, the district court appeared to credit the Conservancy's faulty graphic analysis. 1-ER-4, 34 (Report & Recommendation citing ¶11 of Lacy's Third Declaration to support finding that closing the fishery would be "meaningful"). The Conservancy's graph modeled what would happen *assuming* the entire Southeast Alaska fishery reduced prey availability for SRKW by 3%, 6%, 9%, or

12%, and chose 6% as "an approximate middle value" of a historical range of data from the 2019 BiOp. 4-ER-608–10. One problem with this graph is the *assumed* input numbers. Bad input assumptions lead to meaningless predictions. And the Conservancy's graph used unsupportable input numbers. Six percent is neither the mean nor the median of the range of historical estimates of prey reduction caused by the Alaska fishery. 2-ER-242; 5-ER-1126–27 (2019 BiOp's table of estimated historical impact).

The Conservancy's range is skewed too. By assuming that the Alaska fishery reduces prey availability by 3 to 12%, the Conservancy appeared to use data only from *coastal waters* during *the summer*. *Compare* 4-ER-610 (Lacy Third Decl.), *with* 5-ER-1126–27 (2019 BiOp's table of estimated historical impact). The historical impact of the entirety of Alaska's fishery on SRKW prey availability for all other times and locations is much less, always below 3.5%. 2-ER-242; 5-ER-1126–27. In fact, the Conservancy's expert even acknowledged the lower levels of impact on prey availability during non-summer seasons in coastal waters and during all seasons in inland waters. 8-ER-1835 (First Lacy Decl.). To that point, during the winter, when prey is less available and when increases or reductions of prey therefore matter most, Alaska reduces prey availability by a mere percentage of a single percent. 5-ER-970, 1032, 1126–27; 3-ER-340, 357. But in graphing Alaska's impact, the Conservancy ignored those numbers showing the fishery's

historical low impact because those numbers didn't fit its narrative, and instead used only the highest numbers it could find. 4-ER-610 (Third Lacy Decl.).

The Conservancy (and the district court) also failed to account for the whales' migration patterns. *See generally* 4-ER-605–11; 1-ER-4–45. As the BiOp explains, the whales generally live in inland waters in the summer and coastal waters in the winter. 5-ER-966–67; 6-ER-1191–92. Had the Conservancy picked numbers fairly representing the time and place where prey and whales intersect, it would have represented that the entire Southeast Alaska fishery (not just trollers) reduces prey in inland waters in the summer by approximately 1.8% (with a range of 1.1 to 2.5%). 2-ER-304; 5-ER-1126–27; 6-ER-1192. And when SRKW move to coastal waters in the winter, the data from the 2019 BiOp show that the entire Southeast Alaska fishery reduces SRKW prey availability by only about 0.5% (with a range of 0.2 to 1.1%). 2-ER-304; 5-ER-1126–27; 6-ER-1192. Because the vacatur order would have enjoined only part of the fishery (the commercial trollers in winter and summer), the reduction in increased prey availability expected would be even less.

Simply put, the historical data from the 2019 BiOp does not suggest that the Southeast Alaska Chinook troll fishery reduces prey availability for SRKW by 5%, and the district court erred in relying on the Conservancy's graph representing that it does. 1-ER-4, 34.

Second, the district court erred in assuming that increased prey availability linearly correlates to increased benefits to SRKW—i.e., that more prey availability equals more population stability. 1-ER-4, 34. As the agency has explained, the many factors harming the whales act in concert with each other. 2-ER-309. In the BiOP, NMFS advised against "implicating any particular fishery." 5-ER-972. Since the BiOp was issued, the Pacific Fishery Management Council formed a workgroup to better evaluate the effects of Council-managed fisheries on the endangered whales and determined that there is *no* detectable relationship between Chinook abundance and SRKW demographic rates. 2-ER-303. The sample size of the SRKW is too small, the relationships are not constant over time, and critically, "multiple factors, not just prey abundance," may be impacting the whales. 2-ER-303. In other words, more prey availability does not mean population stability and growth. The district court erred in simplistically assuming that it does. 1-ER-4, 34.

Third, the district court failed to consider that increased prey availability could just feed other predators rather than help the endangered whales. Using a historical-data based model to predict how closing the fishery would increase prey for SRKW overestimates the potential benefit to the endangered whales because the number of competing predators has grown since the model's data were compiled. 2-ER-242–43. As mature Chinook swim back towards their spawning grounds, they are consumed by many other predators including salmon sharks,

pinnipeds, Alaska Resident killer whales, and Northern Resident killer whales. 2-ER-242–43. In particular, the population of Northern Resident killer whales is burgeoning and they have a high degree of dietary overlap with SRKW. 2-ER-242–43; *see also* 8-ER-1775–76. In recent studies, when prey abundance has increased, the Northern Resident killer whales—not the SRKW—have seen improvement. 2-ER-243. The district court did not address this evidence. *See generally* 1-ER-4–45.

Fourth, the district court ignored the likelihood that an increase of Chinook abundance from closing the Alaska fishery might be offset by other fisheries increasing their own harvest in response. *See generally* 1-ER-4–45. Before Chinook can reach the SRKW, they are subject to capture by other commercial, recreational, and subsistence fisheries off the coasts of Southeast Alaska, British Columbia, and Washington. 2-ER-242–43; 8-ER-1794–95. Rather than allowing more fish to return to SRKW feeding grounds, the district court decision gives these other fisheries more opportunity to catch more Chinook. 2-ER-243; 8-ER-1795.[7] The Conservancy's assumptions and the district court's findings simply do not consider that foregone Alaska harvest will "likely lead to improved catches in

[7] Only a few fisheries, including Southeast Alaska, have limits set before the season opens. 5-ER-892; 8-ER-1794–95. The other fisheries adjust their harvests depending on in-season data—that is, higher fish counts can lead to higher harvests. 8-ER-1795; *see also* 5-ER-895–97.

Canadian and Washington fisheries," rather than more prey availability for the SRKW. 2-ER-243. The district court did not restrict any other fisheries, instead placing the entire burden of conservation on Alaska's summer and winter Chinook troll fisheries and leaving other fisheries free to cancel out the potential minor benefit to the SRKW.

Fifth, the district court did not assess the meaningfulness of providing what is only—at best—a short-term increase of prey availability effective only until the agency reissues a new BiOp. *See generally* 1-ER-4–45. As discussed below, NMFS will likely issue the same ITS on remand. *See infra* Argument Section III. Even if it were not error to credit the Conservancy's unsupportable assertion that *continued* closure of the Southeast Alaska troll fishery could create 5% more prey for SRKW and would maintain a "long-term [] population growth rate [of] 0.00%," no one, not even the Conservancy, asserts that closing the fishery just until NMFS reissues an ITS with the same harvest numbers will create a meaningful long-term benefit to the endangered whales. 4-ER-609 (Third Lacy Decl.) Conversely, even a single season closure will devastate Southeast Alaska. This situation epitomizes how vacatur would lead to "disruptive consequences" (devastation to Southeast Alaska) under an "interim change" (vacatur of the ITS) that would then "itself be changed" (reissuance of the ITS). *Regan*, 56 F.4th at 663.

For all these reasons, the district court clearly erred in finding that its vacatur order would *meaningfully* improve prey availability to SRKW as well as SRKW population stability and growth. 1-ER-4, 34. The data show that the entire Southeast Alaska fishery reduces prey availability for the endangered whales by an average of 0.5% in the winter in coastal waters and 1.8% in the summer in inland waters (in places when and whales are typically present) and that the trollers' impact as a part of that fishery is even less. 2-ER-304; 5-ER-1126–27; 6-ER-1192. The district court erred in relying on the Conservancy's flawed analysis instead of taking a critical look at the data.

C. Shutting down Southeast Alaska's Chinook troll fishery is not in the nation's interest.

Congress funds the prey increase program every year with an understanding that the program will both increase prey abundance for the SRKW and enable the Southeast Alaska fishery to operate under the terms of the 2019 Treaty negotiations. 2-ER-137. Congress has thus already weighed the equities and has spoken. The district court abused its discretion in imposing a remedy that overrides Congress's choice.

The district court also abused its discretion in imposing a remedy that undermines the United States' Treaty negotiations with Canada. This is not a typical ESA case because it involves Congress's complementary objectives under the Pacific Salmon Treaty. Enjoining the Alaska fishery would frustrate the

Treaty's principle of fairly sharing salmon with Canada. Canadian Individual Stock-Based Management fisheries have broad latitude under the Treaty to increase their take of Chinook in response to increased abundance resulting from Alaska's foregone harvest. 8-ER-1795; 7-ER-1675. Vacating the ITS might therefore do little to decrease overall harvest (because Canada can take more) while also undermining the harvest sharing arrangement that the United States negotiated in 2019. And vacatur would continue to impact Alaska's fishery even once a new BiOp is in place because Alaska's Treaty harvest limits are—per the 2019 negotiations—set based on fishing data from the previous winter season. 7-ER-1676; 5-ER-892. If the winter fishery is closed, Alaska does not have the data required to set its Treaty harvest limits for the following year. 7-ER-1676; 5-ER-892. Instead, Alaska would be subjected to lower harvest levels for all of its Treaty fisheries the following year, further compromising Congressional intent that the United States receive its fair share of salmon. 2-ER-1676.

Given the undisputed harms to Southeast Alaska, the absence of meaningful benefit to the SRKW, and Congress's intent to keep the fishery open and fairly share salmon with Canada, the equities demand remand without vacatur. *Regan*, 56 F.4th at 663. The equities are determinative here, so this Court need not get to the second prong of test. *See id.* at 663-69 (remanding without vacatur despite the court's categorizing the errors as "serious" and despite the court's "serious concern

that EPA continues to flout the ESA"); *Cal. Cmtys. Against Toxics*, 688 F.3d at 993–95 (remanding without vacatur based on equities despite "substantive" errors). But if this Court does consider the "seriousness" of NMFS's violations, that prong also weighs in favor of remand without vacatur.

III. The agency will likely issue the same ITS on remand, which also favors remand without vacatur.

The other part of the two-factor test considers the seriousness of the agency's errors, meaning whether the agency is likely to issue the same decision on remand. *Regan*, 56 F.4th at 663–64. An error is not serious when "the agency would likely be able to offer better reasoning" or when "by complying with procedural rules, it could adopt the same rule on remand." *Id.* Conversely, an error is serious when "such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Id.* To determine whether an agency would adopt the same rule, courts consider, among other things, whether the agency has substantially complied with the law. *Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 929 (9th Cir. 2020).

Here, the district court found no *direct* flaws in NMFS's analysis regarding how the Alaska fishery itself affects SRKW and ESA-listed salmon. *See generally* 1-ER-4–45. Rather, the district court found *indirect* flaws in the analysis—it saw problems with the agency's approval of the prey increase program, which is meant

to mitigate against the impact of multiple Treaty fisheries, including Alaska's. 1-ER-4, 32–33.

The main flaw the district court found was that the prey increase program was (in 2019) not yet certain and not yet site-specific, so NMFS should not have relied on it in issuing an ITS. 1-ER-4, 30–39. But since 2019, the program has become certain and site-specific. Congress annually funds the prey increase program., 4-ER-660, 663; 2-ER-ER-255–57, 275; *see also* 2-ER-99.[8] The agency has made site-specific determinations in choosing hatcheries to produce additional prey for SRKW. 2-ER-275–77. And the number of smolts (young Chinook) released annually is meeting the agency's expectations. 2-ER-275, 285 (more than 11 million smolts released in 2020, nearly 14 million released in 2021, and more than 19 million released in 2022). Even if the program produced only half the smolts anticipated in the 2019 BiOp and increased prey by 2 to 2.5% (rather than 4 to 5%), that would still greatly exceed the prey reduction caused by the *entire* Southeast Alaska fishery (approximately 0.5% during winter in coastal waters and 1.8% during summer in inland waters). 2-ER-304; *see also* 2-ER-245–46.

The main flaw the district court identified—that the prey increase program was not yet site-specific and not yet certain in 2019—could not justify vacating the

[8] It has also fully funded the other conservation programs for Puget Sound salmon. 2-ER-255–57.

ITS in 2023, because by 2023, the program *was* site-specific and certain and had been fully funded every year. 4-ER-660–61, 663; 2-ER-255–57, 275; *see also* 2-ER-99. Yet the district court concluded in 2023 that this flaw was serious enough to warrant vacatur. 1-ER-4, 32–33. This was legal error. Indeed, the district court all but acknowledged that the main flaw supporting its vacatur no longer existed by finding elsewhere in its order that the prey increase program "though previously uncertain and indefinite in the 2019 SEAK BiOp—has also now been funded and begun providing prey the past three years." 1-ER-4, 36.

As for the other flaws the district court found, they have since been substantially corrected too. The district court found that the ESA and NEPA required the agency to assess how the prey increase program would affect ESA-listed salmon. 1-ER-4, 33. Since then, the agency has done this. The risks to wild fish from hatcheries is best analyzed at site-specific levels that consider where the hatchery fish are released. 2-ER-277. In 2019, NMFS had not definitively chosen which hatcheries it would use to produce more prey for the SRKW. 4-ER-661. But the agency has since chosen hatcheries for its prey increase program. 4-ER-662–63; 2-ER-275–77. And NMFS has undergone ESA and NEPA analyses regarding each site-specific hatchery within the prey increase program, including how those programs affect ESA-listed salmon, and it has not terminated the program. 4-ER-661–62 (discussing how agency picks hatchery programs that will not jeopardize

ESA-listed species); 2-ER-275–76 (discussing agency's conducting ESA and NEPA review for using hatcheries to produce more fish). NMFS is using these analyses, which consider cumulative impacts, as it prepares its programmatic NEPA analysis and new BiOp, expected to be issued in the fall of 2024. 2-ER-145–46, 276–77. The agency has thus substantially complied with both the procedural and substantive aspects of the ESA and NEPA.

This case is thus similar to *National Family Farm Coalition v. U.S. Environmental Protection Agency*, in which the EPA failed to fully consider the risks of a pesticide to monarch butterflies. 966 F.3d 893, 916–17 (9th Cir. 2020). There, the EPA considered how a pesticide would affect milkweed *near* farmers' fields, but it did not consider how the pesticide would affect milkweed *in* those fields. *Id.* This Court found the error not "serious" in light of the EPA's full compliance with the ESA and substantial compliance with another applicable environmental statute. *Id.* The agency's error here is similarly not serious enough to warrant vacatur.

Or consider *Center for Food Safety v. Regan*, in which the EPA repeatedly "flout[ed]" the ESA's consultation requirement and violated another environmental statute's notice-and-comment provisions when it registered a pesticide. 56 F.4th at 656–64. This Court called the EPA's violation of the ESA "serious." *Id.* at 664. Despite that appellation, this Court concluded that vacatur was unwarranted

because the "seriousness" prong of the analysis gets at whether the agency could "likely adopt the same . . . decision on remand." *Id.* at 663. And this Court concluded it could. *Id.* at 663–64. This Court relied on the fact that the EPA did not register the pesticide "in total disregard of its potential harm." *Id.* at 664. So too here. One criterion NMFS uses in deciding which hatcheries to fund for the prey increase program is that increased production cannot jeopardize the survival and recovery of ESA-listed salmonids. 2-ER-275–77. And NMFS reviews increased production under the ESA and NEPA, as applicable. 2-ER-275–76. The agency is thus not executing the prey increase program "in total disregard of its potential harm" to ESA-listed salmon. *See Regan*, 56 F.4th at 664. And because the problems the district court found with the ITS relate to the prey increase program, NMFS will likely issue the same ITS on remand.

The district court committed legal error when it ignored the agency's environmental analyses of each hatchery used in the prey increase program and cursorily concluded that the agency had not demonstrated substantial compliance with NEPA and the ESA. 1-ER-4, 33. Considering Congress's actions over the past four years and the agency's analyses of site-specific hatchery programs being used to increase prey for SRKW, NMFS is likely to issue the same ITS on remand, albeit with "better reasoning." *See Regan*, 56 F.4th at 663.

The Conservancy speculates that NMFS might change its decision by further reducing harvest limits below those in the Pacific Salmon Treaty, but NMFS lacks authority to change the Treaty-established harvest limits via a BiOP. Harvest limits are set by the terms of the Pacific Salmon Treaty—not by NMFS in a BiOp. 7-ER-1618–8-ER-1765. Changes to Treaty harvest regimes require consensus among the U.S. Commissioners, one of whom represents Alaska. Pacific Salmon Treaty Act, P.L. 99-5, §3(a),(g), 99 Stat. 7 (1985).

Nor would there be reason for the agency to reduce harvest limits even if such authority existed. Alaska's effect on prey availability for the endangered whales is minor. The BiOp shows that the *entire* Southeast Alaska fishery (not just trollers) reduces prey availability for SRKW by an average of 0.5% in coastal waters in winter and by 1.8% in inland waters in summer. 2-ER-304; 5-ER-1126–27; 6-ER-1192. The 2019 BiOp also discussed that "the impact of reduced Chinook salmon harvest on future availability of Chinook salmon to Southern Residents is not clear and cautioned against overreliance on correlative studies or implicating any particular fishery." 5-ER-972. Since then, NMFS has reiterated that the Conservancy's asserted "relationship quantifying specific changes in reproduction or survival metrics from specific Chinook salmon abundances [is] outdated and not based on the best available science." 2-ER-302. Plus, Alaska already took a reduction of up to 7.5% to its Treaty harvest limits to support

SRKW and ESA-listed Chinook stocks. 5-ER-895; 6-ER-1191. And the prey increase program is already more than mitigating Alaska's minor impact on prey availability. 2-ER-245–46.

Because the prey increase program is now certain and site-specific and NMFS has substantially complied with the ESA and NEPA, the flaws the district court found are not serious enough to justify vacatur. The district court erred in vacating the ITS only to have the agency reissue it in the fall of 2024 with irreparable harm to Southeast Alaska (and no real benefit to the endangered whales) in the meantime.

CONCLUSION

Alaska requests this Court reverse the district court's order partially vacating the ITS.

Dated: September 29, 2023.

TREG TAYLOR
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STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any cases that are considered related within the meaning of Circuit Rule 28-2.

September 29, 2023 */s/ Laura Wolff*
Laura Wolff

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 10,927 words, excluding the items exempted by FRAP 32(f), and thus complies with the word limit of Cir. R. 32-1. The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

September 29, 2023 */s/ Laura Wolff*
Laura Wolff

Nos. 23-35322, 23-35323, 23-35324, 23-35354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY,

Plaintiff-Appellee/Cross-Appellant,

vs.

JENNIFER QUAN, in her official capacity as the Regional Administrator for the National Marine Fisheries Service, et al.,

Defendants-Appellants/Cross-Appellees,

and

STATE OF ALASKA and ALASKA TROLLERS ASSOCIATION,

Intervenor-Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court for the
Western District of Washington,
Case No. 2:20-cv-00417-RAJ-MLP

ALASKA TROLLERS ASSOCIATION'S FIRST CROSS-APPEAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), the undersigned counsel for Intervenor-Defendant-Appellant/Cross-Appellee Alaska Trollers Association, states that the Alaska Trollers Association, an Alaskan nonprofit trade association, has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

Dated this 29th day of September, 2023.

Respectfully submitted,

s/ Douglas J. Steding
Douglas J. Steding, WSBA #37020

Attorney for Intervenor-Defendant-Appellant/Cross-Appellee Alaska Trollers Association

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GLOSSARY OF ACRONYMS

ATA	Alaska Trollers Association
BiOp	Biological Opinion
ESA	Endangered Species Act
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
PST	Pacific Salmon Treaty
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whale
WFC	Wild Fish Conservancy

I. INTRODUCTION

This appeal asks whether the district court abused its discretion in crafting an equitable remedy that: (1) will cause devastating cultural and economic harm to communities in Southeast Alaska; (2) avoids only speculative environmental harm to Southern Resident Killer Whales ("SRKWs") from harvesting Chinook salmon in Southeast Alaska; and (3) leaves in place the prey increase program intended to more than fully mitigate any harm to SRKWs associated with the harvest of salmon in Southeast Alaska. The district court committed legal and fact-finding errors in weighing the equities to determine whether to vacate the flawed agency decision. The order must be reversed and remanded with instructions to remand the agency's decision without vacatur.

Chinook salmon—some of which are listed as "threatened" or "endangered" under the Endangered Species Act ("ESA")—are preferred prey for the endangered SRKW. This case has singled out one fishery that harvests Chinook, the Southeast Alaska troll fishery ("SEAK troll fishery"), to address the plight of the SRKW. The SEAK troll fishery is one of many fisheries ranging from California up through Canada and Alaska that harvest Chinook salmon and are governed by the complex, interrelated, and comprehensive framework for salmon fisheries provided by the Pacific Salmon Treaty (the "PST" or "Treaty") between the United States and Canada.

In April 2019, Defendants-Appellants/Cross-Appellees National Marine Fisheries Services, et al. ("NMFS") issued their Southeast Alaska Biological Opinion ("2019 SEAK BiOp"), which consulted on multiple federal actions. The 2019 SEAK BiOp determined that those actions would not jeopardize the continued existence of listed species and provided an Incidental Take Statement (the "ITS") that granted Southeast Alaska fisheries "take" protection under the ESA regarding Chinook salmon and SRKWs, among other listed species. The federal actions at issue involved funding initiatives to implement the Treaty. Specifically, NMFS consulted on a "prey increase program" designed to provide a meaningful increase in Chinook prey to SRKWs and mitigate against limiting factors of the SRKW population, including Chinook harvests. That program was a key component of NMFS's jeopardy analysis and its issuance of the ITS. The ITS provided by the 2019 SEAK BiOp is crucial to the SEAK troll fishery—without it, the fishery cannot operate due to the risk of liability under the ESA.

In March 2020, almost a year after its issuance, Plaintiff-Appellee/Cross-Appellant Wild Fish Conservancy ("WFC") challenged the 2019 SEAK BiOp. The Alaska Trollers Association ("ATA") intervened in the litigation to provide a voice to the trollers and to protect their way of life. WFC alleged that NMFS's federal actions pursuant to its analysis under the 2019 SEAK BiOp violated multiple federal laws, including its obligation under the ESA to ensure that the actions did

not jeopardize the continued existence of SRKWs and Chinook salmon. The district court ruled in WFC's favor on the merits.

When determining the appropriate remedy, WFC requested that the district court vacate the prey increase program and the portions of the ITS that provided take protection to the two primary seasons of the SEAK troll fishery. WFC effectively advocated for the closure of a single fishery—the SEAK troll fishery—in the name of benefiting the SRKW despite the multi-national, multi-state, and multi-fishery management regime governing Chinook salmon harvests. In arguing for that relief, WFC overestimated the link between the SEAK troll fishery and the SRKW and disingenuously underestimated the impacts to the communities of Southeast Alaska that would result from closing their commercial troll fishery.

WFC's request for vacatur required the district court to undertake an equitable balancing test in crafting the appropriate remedy. The district court elected to vacate the ITS, as WFC requested, but not the prey increase program. That decision was an abuse of discretion because the court made legal and fact-finding errors. Central to these errors was the district court's favoring of SRKWs without regard for the actual threat of harm to the SRKW from the actions and the district court's failure to account for the significance of the disruptive consequences of vacatur.

Here, equity demands remand of NMFS's decision without vacatur. On the one hand, the record reflects that allowing the SEAK troll fishery to operate will do little, if anything, to harm the SRKW population—particularly in light of the available mitigation from the prey increase program that the district court rightly refused to enjoin. On the other hand, the record before this Court is replete with examples of how closing the SEAK troll fishery would have many significant disruptive consequences in the form of cultural harm, economic harm, and undermining the management of fisheries under the Treaty.

Trolling is a generational way of life that is rooted in great respect for the fish and the sustenance the fish provide. Closing the SEAK troll fishery will cause trollers to suffer harm to their cultural identity. Sixteen federally and state-recognized tribes in Alaska have also come forward to explain the cultural importance of trolling to their respective communities in a joint proposed *amici* filing. The economic consequences of closing the fishery will be debilitating. Individual trollers will be unable to maintain their livelihood. Communities that depend on taxes and economic activity that result from the fishery will struggle to maintain crucial public services. The indirect impacts of closing the troll fishery will further extend throughout Southeast Alaska to industries that depend on the fishery and communities large and small. Finally, as the Alaska Congressional

Delegation has explained, the district court's ruling risks undermining the careful management regime of salmon fisheries under the PST.

The ATA respectfully requests that the Court reverse the district court's order with instructions to remand NMFS's decision without vacatur.

II. JURISDICTIONAL STATEMENT

WFC brought claims against NMFS in the United States District Court for the Western District of Washington, pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540(g), alleging violations of Section 7 of the ESA, 16 U.S.C. § 1536; the Administrative Procedure Act, 5 U.S.C. §§ 701–706; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370m-12. 8-ER-1849, 1852, 1871–72.[1] Accordingly, the district court had federal question subject matter jurisdiction over the dispute under 28 U.S.C. § 1331. Venue was proper in the Western District pursuant to 28 U.S.C. § 1391(e) because WFC alleged that the violations, events, and omissions giving rise to its claims occurred within the Western District.

On May 5, 2023, the ATA filed its notice of appeal of the Western District's May 4, 2023 order granting, in part, WFC's Motion for Final Order on Relief and for a Temporary Restraining Order and/or a Preliminary Injunction

[1] For all references to the excerpts of record, the ATA refers to the Joint Excerpts of Record filed with NMFS's opening brief, ECF No. 58.

Pending Entry of a Final Order on Relief. 1-ER-0002 (Judgment in a Civil Case); 8-ER-1910 (ATA Notice of Appeal). That order was a final judgment, set out in a separate document as required by Federal Rule of Civil Procedure 58. Because the ATA initiated its appeal within thirty days of the district court's order, the appeal was timely under Federal Rule of Appellate Procedure 4(a)(1). The Ninth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because it is an appeal of a final decision from the United States District Court for the Western District of Washington.

III. STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in vacating the ITS for the SEAK troll fishery when the agency is likely to reach the same decision on remand and when vacatur would cause undisputed cultural and economic harm to the communities of Southeast Alaska, while providing, at best, a speculative benefit to SRKWs for which mitigation is provided.
2. Whether the district court erred in striking portions of Paul Olson's declaration referencing the economics at issue in this case under Federal Rule of Evidence ("FRE") 702 when Mr. Olson has specialized knowledge from his experience quantifying the value of Southeast Alaska's fisheries and visitor economics to Alaska's coastal communities.

3. Whether the district court erred in striking Tad Fujioka's declaration under FRE 702 when Mr. Fujioka has specialized knowledge from his experience as a chairman and member of the Sitka Fish and Game Advisory Committee and providing advice to the Alaska Board of Fisheries on harvest, management, and allocation of Alaska's fishery resources.

IV. STATEMENT OF THE CASE

This case involves the intersection of international, federal, and state management of salmon fisheries in the United States and Canada under the Treaty with management of listed species under the ESA—namely Chinook salmon and the SRKW. *See* 5-ER-0879–81. The issues at hand are complicated by the fact that Chinook salmon are preferred prey for SRKWs. 5-ER-0969. There are various "stocks" of Chinook salmon listed under the ESA—some are listed as "threatened" and others as "endangered." 4-ER-0858–59. The SRKW prefers some Chinook stocks over others as prey. *See* 5-ER-1129–31.

A. The Treaty.

The United States and Canada first ratified the Treaty in 1985 to "provide[] a framework for the management of salmon fisheries" in the United States and Canada due to the migratory nature of salmon. 5-ER-0880, 0890. The Treaty "established fishing regimes that set upper limits on intercepting fisheries,

defined as fisheries in one country that harvest salmon originating in another country, and sometimes include provisions that apply to the management of… non-intercepting fisheries as well." 5-ER-0880. These regimes are designed to be implemented by each country and serve the salmon conservation, production, and harvest allocation goals set forth in the Treaty. *Id.* Those regimes apply to fisheries in Canada, Alaska, and the "southern U.S.," meaning California, Oregon, and Washington. 5-ER-0881, 0883.

The Treaty was renegotiated and renewed in 1999, 2009, and, most recently, in 2019.[2] 5-ER-0880–81. Under the fishing regimes, the United States, through NMFS and the North Pacific Fishery Management Council, delegates management of the Southeast Alaska fisheries in the United States' exclusive economic zone to the State of Alaska. 5-ER-0882. There are currently two such fisheries—the salmon troll fishery and the sport salmon fishery. 5-ER-0884. As a result, the SEAK troll fishery that is the subject of the district court's order represents one fishery within this management regime that governs many fisheries from multiple states and nations.

[2] The renewed agreement was agreed upon by the parties in 2018 but took effect in 2019 and is referenced as the "2019 Agreement" or "2019 PST Agreement." 5-ER-0881.

B. The SEAK Troll Fishery.

The ATA intervened in this litigation to defend the SEAK trollers. The ATA is a Juneau-based nonprofit commercial trade organization that represents approximately 450 members that participate in and derive their livelihoods from the troll fishery. 2-ER-0072. Trolling is a unique form of commercial fishing that represents a generational way of life for much of Southeast Alaska. *See* 3-ER-0543–48; 2-ER-0072. Trollers harvest one salmon at a time and, thus, have great respect for the salmon that offer their bodies to sustain the trollers with healthy food. 3-ER-0545. Due to this reliance and respect, trollers consider themselves conservationists for salmon such as the Chinook. 3-ER-0544–45; 8-ER-1785. For decades under the Treaty, the SEAK trollers have sacrificed much as their allowable catch has been significantly decreased. *See* 5-ER-0898 (SEAK fisheries were reduced by 7.5 percent and fifteen percent in the 2019 and 2009 negotiations of the Treaty, respectively). Third-generation troller Eric Jordan has provided an eloquent description on what it means to be a troller in these trying times. 3-ER-0543–48.

The SEAK troll fishery consists of three seasons each year: winter (October through April), spring (May through June), and summer (July through September). 5-ER-1004. Closing the winter and summer seasons would effectively close the entire fishery because the short spring season cannot support

the entire fishery. 2-ER-0073. Even one year of losing the fishery would cause most trollers to stop fishing as they would not be able to afford to transition to another fishery and would have difficulty meeting their significant fixed costs. 2-ER-0073–74.

The SEAK troll fishery also has broad importance throughout the communities in Southeast Alaska. Nearly 72,500 people live in the thirty-three communities of Southeast Alaska. 2-ER-0073. Communities such as Edna Bay, Elfin Cove, Meyers Chuck, Point Baker, Port Protection, Port Alexander, and Pelican are historical fishing villages that remain almost exclusively reliant on commercial fishing. *Id.* Given the high percentage of residents who possess commercial troll permits (2-ER-0231–32 (Table 2)), the troll fishery is the most important fishery to those communities. 2-ER-0073. Without the troll fishery, those historical fishing villages would lose significant income that helps pay for crucial city services such as education, water/wastewater, electricity, snowplowing, trash, boardwalk/harbor repairs, and public health and safety. 3-ER-0524. Ultimately, losing the fishery for one year will result in an economic loss between over $72 million and $85 million across Southeast Alaska. 3-ER-0520.

The impacts from the SEAK fisheries, including the troll fishery, on prey availability for the SRKW are limited. Prey availability was not the origin of the SRKW population concerns—"the current small size of the SRKW population

was not caused by lack of salmon," but the reduced population size is "due in large part to the legacy of an unsustainable live-capture fishery for display in aquariums." 6-ER-1312. Currently, the SRKW population is threatened by prey availability, vessel noise and disturbance, and persistent chemical contamination or pollution. 5-ER-0962; 6-ER-1308. The impacts from the SEAK fisheries, including the SEAK troll fishery, are limited by both the timing of the troll fishery's harvest and the stocks of Chinook salmon that compose those harvests. Specifically, "[w]ith the exception of the Columbia River brights, that have a relatively large run size, the largest stocks contributing to the SEAK fisheries catch are currently not considered at the top of the priority prey list for SRKWs." 5-ER-1131. Those other stocks "ranked high on the priority list… make up a smaller proportion of the fishery catch (approximately 2 to 3 percent of the total catch for the SEAK fisheries) and catch a relatively lower proportion of the total run size of those stocks." 6-ER-1193.

Furthermore, even if the highest hypothetical impact to prey availability resulted from the SEAK fisheries' harvests, those impacts "would likely occur rarely" and would occur in the coastal range "during a time period when the whales are more often observed in inland waters," spreading the impacts "across a large area where the whales would not have access to all of the Chinook salmon or be expected to experience localized prey depletion." 6-ER-1194.

Ultimately, an independent science panel assessing the impacts of fisheries on prey availability for SRKWs "cautioned against overreliance on correlative studies or implicating any particular fishery." 5-ER-0972.

C. 2019 SEAK BiOp.

In 2019, NMFS took action to continue implementation of the Treaty and analyze the effects of the SEAK fisheries on listed species under the ESA. *See* 5-ER-0881. Specifically, NMFS conducted consultation pursuant to the ESA on three federal actions related to the 2019 version of the Treaty and the management of SEAK fisheries to ensure that those actions did not jeopardize the continued existence of listed species. 5-ER-0883–90; 16 U.S.C. § 1536(2) (imposing obligation to ensure that an action "is not likely to jeopardize the continued existence of any endangered species or threatened species"). Here, the two relevant listed species are the SRKW and the Chinook salmon. 5-ER-0882. NMFS's consultation regarding these three federal actions was memorialized in NMFS's 2019 SEAK BiOp on April 5, 2019.[3] *See* 4-ER-0858.

The first action was NMFS's continued delegation of management authority over the SEAK troll fishery and sport salmon fishery to the State of

[3] One noteworthy aspect of this case, although not uncommon, is that NMFS was both the "action agency" and the "consulting agency," meaning that the agency consulted with itself to satisfy the requirements of the ESA. *See* 4-ER-0858–61 (listing NMFS as both an action agency and a consulting agency).

Alaska. 5-ER-0884. The second action was for a federal funding initiative to implement the 2019 Treaty. 5-ER-0884–87. The third action was funding of a conservation program designed for the benefit of critical Puget Sound stocks of Chinook salmon and SRKWs. 5-ER-0887–90. The conservation program funding consisted of three components: (1) continuation of conservation hatchery programs targeted at the weakest Puget Sound Chinook populations; (2) funding to address limiting habitat conditions for the same weakest Puget Sound Chinook populations; and (3) a "mitigation funding initiative" that "was specifically designed to increase the production of hatchery Chinook salmon to provide an immediate and meaningful increase in prey availability for SRKWs." 5-ER-0888, 1105. While the first two components of that third action will increase Chinook salmon abundance and prey availability for SRKWs, the third component, otherwise known as the "prey increase program," is most relevant to this appeal. *See* 5-ER-1118. The 2019 SEAK BiOp concludes that the prey increase program will increase SRKW prey by four to five percent "in the times and areas most important to SRKWs," helping offset impacts in SRKW prey reduction from SEAK fisheries, other baseline fisheries, and other limiting factors for the SRKW population. 5-ER-0888–90, 1133; 6-ER-1193 (explaining that targeted funding initiative was intended to mitigate impacts from SEAK fisheries, Canadian fisheries, and "SUS," or southern U.S. fisheries).

NMFS relied, in part, on the mitigation of impacts to SRKWs provided by the prey increase program to conclude that the three proposed federal actions would not jeopardize the continued existence of listed Chinook, the SRKW, and other ESA-listed species. 4-ER-0858–61; 6-ER-1195.

To ensure that those actions were conducted consistent with the 2019 SEAK BiOp analysis and the ESA, the 2019 SEAK BiOp included an ITS that applied to all of the SEAK salmon fisheries that are regulated under the PST by the State of Alaska. 6-ER-1204–14. An ITS effectively exempts an action or actions from the ESA's general prohibition against "take"[4] of a listed species by allowing such take to occur provided the action is performed in compliance with the terms and conditions of the ITS. *See* 16 U.S.C. § 1538(a)(B) (prohibiting take of any listed species); 16 U.S.C. § 1539(a)(1)(B) (granting authority for permitted take incidental to otherwise lawful activity); 6-ER-1204 (explaining need to comply with provided ITS). As relevant here, the ITS associated with the 2019 SEAK BiOp provided coverage for incidental take of SRKWs and Chinook salmon resulting from the SEAK fisheries' harvests. 6-ER-1204–06. In short, the ITS allows the SEAK troll fishery to operate without threat of liability under the ESA.

[4] Under the ESA, "'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

D. WFC's Complaint.

On March 18, 2020, WFC filed its complaint in the United States District Court for the Western District of Washington. *See generally* 8-ER-1845. WFC alleged three claims: (1) that NMFS failed to ensure no jeopardy to SRKWs and Chinook salmon under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2); (2) that NMFS's 2019 SEAK BiOp was arbitrary and capricious, and not in accordance with law under the Administrative Procedure Act; and (3) that NMFS failed to conduct required analyses under NEPA. 8-ER-1871–72. The case was referred to a United States Magistrate Judge, the Honorable Michelle L. Peterson, on April 17, 2020. 8-ER-1820. The ATA's motion to intervene to defend its interests related to the SEAK troll fishery was granted on April 23, 2020. 8-ER-1803.

WFC first sought a preliminary injunction to stay the take authorization in the 2019 SEAK BiOp, stay federal delegation of authority for the SEAK fisheries to the State of Alaska, and prevent the 2020 summer fisheries from commencing. 7-ER-1587. The district court denied WFC's motion because it was not timely filed under the Magnuson-Stevens Act. *See* 7-ER-1604; 4-ER-0823. The State of Alaska (the "State") then successfully intervened in the matter on March 30, 2021. 4-ER-0821.

E. The District Court's Ruling on the Merits.

The proceedings below were conducted in two stages, pertaining to the merits and the remedy, respectively. After the parties filed their respective motions for summary judgment or cross-motions for summary judgment, the district court adopted verbatim Magistrate Judge Peterson's report and recommendation and ruled in favor of WFC on the merits.[5] 4-ER-0612–15. The district court's decision to grant WFC's motion for summary judgment consisted of four holdings relevant to this appeal.

First, the court held that the 2019 SEAK BiOp was arbitrary, capricious, and not in accordance with law. 4-ER-0638–46. The district court found that NMFS procedurally violated the ESA when it relied on uncertain mitigation from the prey increase program to support its no jeopardy finding with respect to SRKWs and that NMFS failed to make a jeopardy determination on the prey increase program's impacts on listed Chinook salmon. *Id.* Second, as a consequence of NMFS's flawed procedural ESA violations, the district court held that NMFS violated its substantive duties to ensure no jeopardy to the SRKW and Chinook salmon resulting from the proposed actions. 4-ER-0646–47. Third, the district court held that NMFS violated NEPA by failing to conduct

[5] As a result, all references to the district court's findings or holdings will refer to the magistrate judge's report and recommendation.

sufficient environmental analysis in issuing the ITS. 4-ER-0647. Lastly, the district court held that NMFS violated NEPA by failing to conduct an environmental analysis for the prey increase program. 4-ER-0650–51.

F. The District Court's Ruling on the Remedy.

After that ruling on the merits, WFC moved for a final order on relief.[6] 1-ER-0006. During the briefing on the remedy, WFC also moved to strike multiple declarations offered by NMFS, the ATA, and the State in support of their remedy briefing. 1-ER-0020. The report and recommendation granted WFC's motion to strike with respect to the ATA's declarants and granted WFC's motion for a final order on relief in part. 1-ER-0027–28, 0044–45. Once again, the district court adopted the report and recommendation verbatim. 1-ER-0004.

Regarding WFC's motion to strike, the court refused to consider any opinion on economics from ATA member Paul Olson and refused to consider ATA member Tad Fujioka's opinions altogether. 1-ER-0027–28. The court held that "Mr. Olson's overall background and work history do not support a minimal foundation to provide an expert opinion regarding the economics at issue in this case" under FRE 702. *Id.* (internal quotation marks omitted). Similarly, the court

[6] WFC also moved for a temporary restraining order and/or a preliminary injunction pending entry of the final order from the magistrate judge. 1-ER-0007. That request was denied because, as the report and recommendation explained, such relief could only be granted by the district court. *Id.*

held that Mr. Fujioka failed to identify sufficient background or "specialized experience in data analysis that would qualify him to provide an expert opinion on impacts to the fisheries from closure or to rebut [the] population viability analysis" presented by WFC's expert Dr. Robert Lacy. 1-ER-0028.

Regarding the remedy, the district court granted a portion of the remedy proposed by WFC, remanded the 2019 SEAK BiOp, and vacated the "portions of the 2019 SEAK BiOp concerning the incidental take statement that authorizes 'take' of the Southern Resident Killer Whale and Chinook salmon resulting from commercial harvests of Chinook salmon during the winter and summer seasons (excluding the spring season) of the troll fisheries." 1-ER-0005. The court denied WFC's request that the "portions of the 2019 SEAK BiOp that adopt, and consult under Section 7 of the ESA on NMFS's prey increase program be vacated and/or enjoined."[7] *Id.*

The district court held that the presumptive remedy for NMFS's ESA violations was to vacate the 2019 SEAK BiOp and the ITS for the SEAK fisheries. 1-ER-0029. However, the court noted that WFC requested a "partial vacatur"—seeking to vacate the ITS to the extent that it allows the SEAK troll fishery to harvest in the winter and summer and vacate the prey increase

[7] Given its refusal to vacate the prey increase program, the district court also denied WFC's request to permanently enjoin implementation of the program. 1-ER-0042–44.

program. *Id.* The district court evaluated whether to vacate the ITS and the prey increase program, individually, with a three-pronged analysis: (1) "weigh[ing] the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed"; (2) whether "vacating or leaving the decision in place would risk environmental harm"; and (3) whether the agency could reach the same decision on remand with better reasoning. 1-ER-0030 (internal quotation marks omitted).

In the first prong of its analysis, the court first determined that errors that NMFS committed under the ESA and NEPA were serious. 1-ER-0031–33. When weighing those errors against the disruptive consequences, the court explained that it was required to "tip the scale in favor of protecting listed species in considering vacatur" because the ESA "singled out the prevention of species extinction." 1-ER-0034 (internal quotation marks and brackets omitted). Under that reasoning, the court held that it "largely should focus on potential environmental disruption, as opposed to economic disruption." 1-ER-0033 (internal quotation marks omitted). The court nevertheless explained that it would "consider" economic consequences because it was commonplace to do so in the Ninth Circuit. 1-ER-0034.

With respect to the ITS, although the district court recited some of the estimates offered by the parties of economic impacts from vacating, the court

concluded that those economic disruptions did not "overcome the seriousness of NMFS's violations given the presumption of vacatur, the harm posed to the SRKW by leaving the ITS in place and the Court's mandate to protect the endangered species." 1-ER-0035.

The court reached the opposite conclusion pertaining to the prey increase program—finding that vacating the program would result in "pronounced environmental and economic disruption." *Id.* The court contrasted its ruling on the merits that NMFS's no jeopardy analysis was flawed because the prey increase program was unspecified and uncertain, holding that "[t]he prey increase program—though previously uncertain and indefinite in the 2019 SEAK BiOp—has also now been funded and begun providing prey the past three years." *Compare* 4-ER-0646–47 *with* 1-ER-0036. In reaching that conclusion, the court acknowledged that "[t]he prey increase program is on track to provide the benefits to SRKWs that were anticipated in the 2019 SEAK BiOp on the effects of domestic actions associated with implementing the 2019 PST." 1-ER-0036 (internal brackets and quotation marks omitted). As a result, the court reasoned that "the disruptive consequences of vacatur of the prey increase program would ultimately put the SRKW at further risk of extinction." 1-ER-0038.

In the second prong of its analysis—whether vacating or leaving in place the ITS and the prey increase program would cause environmental harm—the district court again reached differing conclusions. Regarding the ITS, the court held that "[t]he risk of environmental harm to the SRKW from leaving the ITS in place, and by otherwise not allowing for an increased amount of prey to benefit the SRKW, therefore counsels in favor of vacatur of the ITS." 1-ER-0039. In contrast, the court found that "vacatur of the prey increase program would assuredly result in environmental harm to the SRKW by eliminating a targeted source of prey." *Id.* Although WFC also alleged harms to wild Chinook populations from the prey increase program, the court explained that the record reflected that such hypothetical harms from hatcheries "can be mitigated to limit any potential negative impacts." 1-ER-0040. Thus, according to the court, any potential harm to wild Chinook did not outweigh "certain environmental harm to the SRKW by eliminating a targeted source of prey." *Id.*

Finally, the court found that the third prong of its analysis "appear[ed] to favor vacatur of the ITS and the prey increase program because there is no guarantee the same rule on remand could reissue." 1-ER-0041. The court noted that the third prong may support remand without vacatur with respect to the prey increase program, explaining that "NMFS now appears poised on remand to remedy deficiencies in the 2019 SEAK BiOp with more specific and definite

consideration of the mitigation measures now that they have been funded and in place, and the impacts of the program on [listed Chinook] can be better quantified and qualified." *Id*. The court made no finding regarding how the recognized certainty of the mitigation provided by the prey increase program would impact the ITS decision on remand. *See id.*

As a part of the objection process to the magistrate judge's report and recommendation, the Alaska Congressional Delegation filed an *amicus* brief in support of Defendants and Defendant-Intervenors. *See generally* 2-ER-0135; 8-ER-1935 (district court ECF No. 161).

G. Appeal and Stay Pending Appeal.

In response to the court's remedy ruling, the court entered its final judgment. *See* 1-ER-0002. The State, WFC, ATA, and NMFS all appealed the judgment to this Court. *See* 8-ER-1899–21. The State then moved the district court to stay the portion of its order vacating the ITS. *See* 8-ER-1936 (district court ECF No. 172). The ATA joined in that motion. *Id.* (district court ECF No. 173). WFC also moved for post-judgment relief from the district court—moving for an injunction of the prey increase program while pending appeal. *Id.* (district court ECF No. 177). The district court denied both motions. 2-ER-0066.

The State and WFC then each filed similar motions to their respective motions before the district court, each requesting the same relief from this Court.

ECF No. 15; ECF No. 19. [8] The ATA again joined in the State's motion. ECF No. 20. The Alaska Congressional Delegation moved to file an *amicus* brief in support of the State's motion to stay. ECF No. 27-1. Sixteen federally and state-recognized Tribes located in Alaska also moved to file an *amicus* brief in support of the State's motion. ECF No. 42-1. The Tribal *Amici* acknowledged that they moved to file their support more than seven days after the motion but asserted that there was "good cause" for the Court to consider their filings. *Id.* at 6.

In one ruling, the Court granted the State's motion (the "Stay"), denied WFC's motion, and granted the Alaska Congressional Delegation's motion. ECF No. 48 at 3-5. The Court remained silent on the Tribal *Amici*'s motion. *See generally id.* The Court granted the Stay because "the moving parties have established a sufficient likelihood of demonstrating on appeal that the certain and substantial impacts of the district court's vacatur on the Alaskan salmon fishing industry outweigh the speculative environmental threats posed by remanding without vacatur." *Id.* at 4. In rejecting WFC's motion, the Court held that WFC did not "demonstrate[] that the district court likely abused its discretion in declining to vacate the prey increase program, particularly in light of the district court's finding that the disruptive consequences of vacatur would ultimately put

[8] All references to the Ninth Circuit's docket refer to Court of Appeals Docket No. 23-35322 as the primary case of the consolidated appeal.

the whales at further risk of extinction and outweigh the seriousness of the agency's errors." *Id.* at 5.

The matter now comes before the Court on the merits of the district court's vacatur decision.

V. SUMMARY OF ARGUMENT

On its own, a violation of law does not demand vacatur. Remand without vacatur is appropriate when equity demands that outcome. When undertaking the equitable analysis of whether to vacate a flawed agency decision or rule, a district court must balance or weigh the seriousness of an agency's errors and the disruptive consequences of vacating the agency's decision.

The seriousness of the error is informed by whether the agency could reach the same decision on remand, with better reasoning or additional support. Additionally, the seriousness of the errors must be weighed against the disruptive consequences of vacating the decision.

The ATA is not appealing the district court's opinion on the merits that NMFS committed serious errors when it violated NEPA and the ESA with its 2019 SEAK BiOp. However, given the district court's ruling that crucial faults with the 2019 SEAK BiOp—namely the certainty associated with the prey increase program—have been alleviated, there is a serious possibility that NMFS will be able to substantiate its decision and the ITS on remand. Such errors pale

in comparison to the certain cultural and economic devastation that will befall communities across Southeast Alaska if the ITS is vacated and the SEAK troll fishery is closed.

The district court abused its discretion in crafting an equitable remedy that vacated the ITS. The district court committed legal error by tipping its equitable analysis in favor of the SRKW without regard for the only speculative harm to the species that would result from no vacatur. The district court also committed a fact-finding error by failing to appreciate the magnitude of the disruptive consequences that will result from vacating the ITS. The ATA respectfully submits that the district court's ruling must be reversed.

The ATA appeals two additional decisions by the district court. The district court abused its discretion in striking the declarations of ATA members Paul Olson and Tad Fujioka. Had the court properly applied the relaxed FRE 702 standard for expert testimony, it would have recognized the specialized knowledge that qualified both individuals to opine on the economics and fisheries management issues presented by this dispute. Had the court considered the information presented by both individuals, the court would have been better informed for its equitable decision to craft the remedy.

VI. STANDARD OF REVIEW

This Court reviews the first issue on appeal—the district court's vacatur of the ITS—for an abuse of discretion. *W. Watersheds Project v. McCullough*, No. 23-15259, 2023 WL 4557742, at *3 (9th Cir. July 17, 2023); *see also Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010) (the Ninth Circuit "review[s] for an abuse of discretion the district court's equitable orders"). "The district court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding." *Kenney v. United States*, 458 F.3d 1025, 1032 (9th Cir. 2006) (quoting *United States v. Washington*, 157 F.3d 630, 642 (9th Cir. 1998)). "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Morales v. Hickman*, 438 F.3d 926, 930 (9th Cir. 2006) (internal quotation marks omitted).

The remaining two issues on appeal concern the district court's refusal to consider testimony from two ATA members as expert evidence under FRE 702. The ATA preserved this argument for appeal by arguing at oral argument that WFC's motion to strike should be denied and objecting to the district court's ruling to the contrary during the objection process following Magistrate Peterson's report and recommendation on the remedy. *See* 2-ER-0148–50, 0157–58. This Court "review[s] the district court's ruling on the admissibility of expert testimony for an

abuse of discretion." *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1231 (9th Cir. 2017). However, this Court "review[s] *de novo* the construction or interpretation of the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule." *Id.* (internal quotation marks and ellipses omitted).

VII. ARGUMENT

A. Equity Demands Remand Without Vacatur Here Given the Agency's Errors, the Speculative Benefits of Vacatur, and the Economic or Other Disruptive Consequences of Vacating the ITS.

The district court abused its discretion in vacating the portions of the 2019 SEAK and ITS that authorize "take" of SRKWs and Chinook salmon from SEAK troll fishery harvests of Chinook salmon during the winter and summer seasons of the fishery. The district court's decision failed to properly weigh the economic and other disruptive consequences and against the agency's errors and the speculative environmental impacts. The ATA respectfully requests that the Court reverse the district court's ruling on this first issue on appeal.

1. Vacatur Is Not a Mandated Remedy for Agency Error.

"A flawed [agency] rule need not be vacated." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Instead, "when equity demands, the

regulation can be left in place while the agency follows to the necessary procedures to correct its action." *Id.* (internal quotation marks omitted).[9]

The core of the analysis when determining whether to vacate a flawed agency rule, order, or decision is the two-pronged "*Allied-Signal* test." That test, set forth by the D.C. Circuit Court of Appeals, provides that the "decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted). That test has been consistently applied in the Ninth Circuit. *See e.g.*, *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022); *Nat'l Res. Def. Council v. EPA*, 38 F.4th 34, 51-52 (9th Cir. 2022); *Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144-45 (9th Cir. 2020); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015); *Cal. Cmtys. Against Toxics*, 688 F.3d at 992.

In the first prong of the *Allied-Signal* test, the Ninth Circuit "look[s] to whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or

[9] The ATA joins NMFS's argument that no presumption of vacatur should be applied. ECF No. 57 at 20-24. Regardless of any presumption, the ATA asserts that vacatur is not appropriate under the vacatur standard.

whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Ctr. for Food Safety*, 56 F.4th at 663-64; *see also Nat'l Res. Def. Council*, 38 F.4th at 51-52; *Nat'l Family Farm Coal.*, 960 F.3d at 1144-45; *Pollinator Stewardship Council*, 806 F.3d at 532. For instance, in *Allied-Signal*, the court declined to vacate the agency order because there was "at least a serious possibility that the [agency would] be able to substantiate its decision on remand." 988 F.2d at 151.

Under the second prong of the *Allied-Signal* test, courts "consider whether vacating a faulty rule could result in possible environmental harm… and the disruptive impact of vacatur." *Ctr. for Food Safety*, 56 F.4th at 668 (internal quotation marks omitted). As this Court recognized with the Stay, that test counsels against vacatur when the results would be "economically disastrous." ECF No. 48 at 4 (quoting *Cal. Cmtys. Against Toxics*, 688 F.3d at 992).

The Ninth Circuit considers the *Allied-Signal* test to be a "two-factor balancing test" that requires a court to "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Ctr. for Food Safety*, 56 F.4th at 663.

2. A Proper Application of the *Allied-Signal* Test Demonstrates that Equity Demands Remand Without Vacatur.

In this matter, equity demands remand without vacatur of the ITS. First, due to the likelihood that NMFS will be able to substantiate the ITS for the winter and

summer seasons of the SEAK troll fishery on remand, NMFS's errors are not so serious that they demand vacatur of the ITS. Second, the certain economic devastation and other consequences that will result from vacating the ITS outweigh the agency's errors and any speculative environmental benefit from vacatur or any speculative environmental threat from remanding without vacatur.

a. NMFS's Likelihood to Substantiate the ITS on Remand Demonstrates that Its Errors Are Not So Serious as to Demand Vacatur.

In its decision on the merits, the district court found two primary errors pertaining to the ITS. The court held that NMFS violated NEPA in issuing the ITS because the ITS "constituted a major federal action" that required NMFS to complete an environmental assessment or environmental impact statement under NEPA before issuing the ITS. 4-ER-0650. The court also held that NMFS violated its substantive obligation to ensure against jeopardy to the SRKW under the ESA. 4-ER-0646.

Relevant to WFC's NEPA claims, this Court has recently emphasized that NEPA is a "purely procedural statute" and held that although a failure to conduct NEPA analysis may typically require vacatur, remand without vacatur is appropriate when there will be "significant disruptive consequences of vacatur." *Solar Energy Indus. Ass'n v. FERC*, --- F.4th ----, No. 20-72788, 2023 WL 5691711, at *28 (9th Cir. Sept. 5, 2023) (recognizing disruptive consequences of

forcing states to undo investments complying with flawed rule and readopt new rules). As demonstrated below, NMFS's NEPA violations in this matter fall into the category of violations where remand without vacatur is appropriate despite serious errors because vacating the ITS will result in severe disruptive consequences to the communities of Southeast Alaska.

Regarding WFC's ESA claims, the court held that "the central point at issue" was that "the prey increase program [was] NMFS's essential long-term mitigation solution to NMFS's proposed actions," including the continued authorization of Alaska's management of the Southeast Alaska fisheries. 4-ER-0641. In the merits stage of this matter, the court found that the prey increase program was not sufficiently specific or reasonably certain to occur to qualify as mitigation. 4-ER-0641–44. Thus, the court held that NMFS's reliance on the prey increase program as justification for its no jeopardy determination and issuance of the ITS was arbitrary and capricious. 4-ER-0646.

When it came time for the court to craft the appropriate equitable remedy to address the ESA and NEPA violations, its view of the prey increase program had changed. By that point, the court explained that the prey increase program "has been fully funded for the past three years." 1-ER-0016. As a result, although the court previously considered the prey increase program to be "uncertain and indefinite," the program has been providing prey and "is on track to provide the

benefits to SRKWs that were anticipated in the 2019 SEAK BiOp." 1-ER-0036 (internal quotation marks and brackets omitted).

The district court's finding that the prey increase program was no longer speculative undercuts the court's reasoning for vacating the ITS. The primary reason that the district court found the no jeopardy determination and ITS violated the ESA during the merits stage was NMFS's reliance on the speculative mitigation from the prey increase program. The court held at the time of the remedy phase of the litigation that those concerns had been alleviated. In fact, one reason the district court declined to vacate the program was that the district court recognized that the now certain program could be justified on remand. However, the court made no observation on how the certainty of the mitigation would impact the no jeopardy and ITS analysis. It stands to reason that, if the mitigation was on track to provide the intended benefits, the certain mitigation would further bolster the ITS on remand. As such, "there is at least a serious possibility that [NMFS] will be able to substantiate its decision on remand." *Allied-Signal, Inc.*, 988 F.2d at 151. That possibility suggests that the errors are not so serious to outweigh the severe disruptive consequences that will result from vacatur.

b. The Disruptive Consequences of Vacating the ITS Far Outweigh NMFS's Errors or Any Speculative Environmental Benefit of an Interim Vacatur.

This Court, in granting the Stay, has already recognized a likelihood "that the certain and substantial impacts of the district court's vacatur on the Alaskan salmon fishing industry outweigh the speculative environmental threats posed by remanding without vacatur." ECF. No. 48 at 4. Although WFC has repeatedly downplayed its requested relief as merely "partial vacatur" (*see* 1-ER-0030) with limited impacts on the communities of Southeast Alaska, the record is replete with evidence of the true magnitude of impacts to the culture and economies of Southeast Alaska.

i. Vacating the ITS Threatens a Way of Life Central to Communities in Southeast Alaska.

The impacts of vacatur are not just about numbers—although the numbers explaining the detrimental impacts to the economies of many communities are significant. Trolling is personal. 3-ER-0544. Trolling is a way of life. 3-ER-0545. Trolling is the harvest of one Chinook salmon at a time with great respect for the fish that sustain the trollers of Southeast Alaska. *Id*. Third-generation troller Eric Jordan explained in detail the physical, spiritual, and cultural importance of Chinook salmon and trolling to him and many other families in Southeast Alaska. 3-ER-0543–48. Mr. Jordan artfully describes the suffering that SEAK trollers will endure—effectively bringing an end to a generational way of life—if vacatur is

granted. 3-ER-0544–48. The ATA respectfully implores the Court to review Mr. Jordan's declaration to obtain a complete understanding of the impacts of the district court's order.

ii. Vacating the ITS Will Result in Devastating Economic Impacts to Communities in Southeast Alaska.

The detrimental economic impacts of the district court's decisions are also staggering. Closing the troll fishery for the winter and summer seasons would close the fishery for nine of the twelve months of the year. 2-ER-0073. Because three months of a spring season cannot sustain the entire troll fishery, and there are cost and regulatory barriers for trollers to enter other fisheries, the district court's vacatur of one year's worth of the fishery would effectively cause most trollers to cease fishing altogether. 2-ER-0073–74. Thus, vacatur threatens the livelihood of those trollers.

The resulting harm will be felt in individual Southeast Alaskan communities. Entire communities across Southeast Alaska are disproportionately dependent on the direct and indirect economic activity resulting from the SEAK troll fishery. There are at least six other "historical fishing villages that rely almost exclusively on commercial fishing." 2-ER-0073.

For instance, according to Mayor Patricia Phillips of Pelican, Alaska, closing the troll fishery would place Pelican's year-round residents at risk of maintaining

their livelihood. 3-ER-0524. In addition to the thirty percent of the city's population that participates in the troll fishery for their own livelihood, the raw fish tax is an important source of funding for crucial city services such as education, water/wastewater, electricity, snowplowing, trash, boardwalk/harbor repairs, and public health and safety. *Id.* The troll fishery is also crucial to local businesses in Pelican—the port and local café are highly dependent on the business that the trollers bring in each year. *Id.* Without the troll fishery, the local port would struggle to remain viable, and the entire City of Pelican would be forced to endure dire circumstances. 3-ER-0524–25.

The impacts are not unique to small communities—the economic output of the two seasons of the Chinook troll fishery at issue amounts to $29 million per year. 3-ER-0521. In addition to the direct loss of that output, dependent industries, namely fish processing plants, will also suffer from the closed fishery. 3-ER-0519. Taking the "multiplier effect" of all direct and indirect impacts into account demonstrates that the total economic impact of closing the fishery ranges between over $72 million and $85 million. 3-ER-0520.

iii. Other Parties Have Offered Additional Perspective on the Disruptive Consequences of the District Court's Order.

The ATA notes that multiple *amici curiae* filings in the district court and before this Court have brought forth additional disruptive consequences that

further demonstrate the necessity to remand without vacatur. The Alaska Congressional Delegation explained that vacating the ITS and closing the SEAK troll fishery would frustrate the balance and objectives of the Treaty. *See generally* ECF No. 27-1; 2-ER-0135. Similarly, sixteen federally and state-recognized Tribes located in Southeast Alaska submitted an *amicus* brief, collectively, highlighting "the devastating and disproportionate impact that closure of the troll fishery will have on indigenous communities in Southeast Alaska." ECF No. 42-1 at 3. The ATA respectfully requests that the Court consider these materials as further evidence of the extreme magnitude of the disruptive consequences at issue.

iv. Closing the Troll Fishery Will Not Measurably Benefit the SRKW.

As a threshold issue, courts assess the impacts of creating an interim change that may itself be changed. *See, e.g.*, *Ctr. for Food Safety*, 56 F.4th at 663. Here, closing the troll fishery would be an interim change. There is no indication that the troll fishery would be closed indefinitely—in fact, NMFS has represented that it will complete updated NEPA and ESA analyses by November 2024. 2-ER-0145–46. As demonstrated above, closing the fishery for even just one year will have dramatic cultural and economic impacts to the trollers. *See* 2-ER-0073–74. In stark contrast, there is no indication that an interim closure will benefit SRKWs. WFC's own expert concludes that closing the troll fishery would only help stabilize the SRKW population at a 0.00 percent growth rate over the "long-term." 4-ER-0608–

09. That analysis suggests that the "long-term" is 100 years. 4-ER-0607. Thus, while the negative consequences will be severe, there is no indication that closing the SEAK troll fishery for one year would benefit the SRKW.

The link between the SEAK troll fishery and the health of the SRKW is tenuous, and remanding without vacatur would only impose the threat of speculative environmental harm. The district court overestimated the relationship between fishing in Southeast Alaska and the SRKW population, accepting without analysis WFC's contention that closing the fishery in Southeast Alaska would result in a meaningful increase in prey for SRKWs. *See* 1-ER-0038–39.

Critically, the majority of harvests in the SEAK troll fishery are not of those Chinook salmon stocks most preferred by the SRKW. As identified in the 2019 SEAK BiOp, the Chinook salmon most preferred by the SRKW amount to only two to three percent of the total catch for not just the winter and summer seasons of the SEAK troll fishery but all SEAK fisheries. 5-ER-1131. The origins of the fish caught in the SEAK fisheries are very well studied and understood, and the 2019 SEAK BiOp relied on that understanding when it concluded that, absent catch of stocks with relatively large run sizes, "the largest stocks contributing to the SEAK fisheries catch are currently not considered at the top of the priority prey list for SRKWs." *Id.* The 2019 SEAK BiOp notes that the greatest hypothetical reductions in prey to the SRKW from the SEAK fisheries "would likely occur rarely," would

be spread across a large area to limit "localized prey depletion," or would not align with the migratory pattern of the whales. 6-ER-1194.

These limited speculative impacts would be mitigated by the prey increase program. The tenuous relationship between the SEAK troll fishery and priority prey for the SRKW, coupled with the mitigation from the prey increase program, provided the justification for NMFS's no jeopardy conclusion in issuing the ITS. 6-ER-1195. Importantly, the mitigation from the prey increase program is not a one-to-one ratio with the harvests of the SEAK troll fishery because only a small amount of priority stocks for SRKWs are harvested in Southeast Alaska. The 2019 SEAK BiOp acknowledged that the target of the prey increase program was to mitigate effects much broader than those tied to the SEAK troll fishery. 5-ER-0888 (identifying that the targeted funding initiative was needed to mitigate the "effects of harvest and other limiting factors that contributed to the reduced status of Puget Sound Chinook salmon and SRKWs"). Thus, the mitigation from the 2019 SEAK BiOp was much more encompassing than just mitigating impacts from the SEAK troll fishery; it was intended to compensate for impacts from fisheries in Canada, states south of Alaska, and other limiting factors on the SRKW population. *Id.* In fact, the 2019 SEAK BiOp concluded that the proposed federal actions were intended to "improv[e] conditions for listed Chinook salmon and Southern Resident killer whales compared to recent years." 6-ER-1195.

As the district court held at the remedy stage, this mitigation is now "certain" and a "definite increase in prey is available to the SRKW from the prey increase program." 1-ER-0036. In other words, the "prey increase program is on track to provide the benefits to SRKWs that were anticipated in the 2019 SEAK BiOp." *Id.* (internal quotation marks and brackets omitted). If the prey increase program is maintained, there is little risk to SRKWs in allowing the SEAK troll fishery to operate. As a result, the equities demand remand without vacatur with respect to these specific circumstances.

3. The District Court Abused Its Discretion in Concluding that the ITS Must Be Vacated While the Prey Increase Program Is Maintained.

The district court abused its discretion because its equitable decision to vacate was based on fact-finding and legal errors. The court's decision demonstrated a "clearly erroneous factual finding" as the court failed to properly account for the magnitude of the cultural, spiritual, and economic impacts of vacatur. *Kenney*, 458 F.3d at 1032. The court's reference to the impacts was cursory, restating the estimates of economic impacts and summarily concluding that although it did not take "such economic consequences lightly, they [did] not overcome the seriousness of NMFS's violations." 1-ER-0035.

The court seemingly reached this conclusion because it also committed legal error by distorting the *Allied-Signal* test. Specifically, the court reasoned that it was

required to "'tip' the scale in favor of protecting listed species in considering vacatur." 1-ER-0034 (quoting *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015)). The *Klamath-Siskiyou Wildlands Ctr.* decision relied on this Court's holding in *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987), which, in turn, relied on the United States Supreme Court opinion in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 186 (1978). Both the *Sierra Club* and *Tennessee Valley Auth.* decisions concerned the standard for an injunction rather than the vacatur standard. *See Tennessee Valley Auth.*, 437 U.S. at 172; *Sierra Club*, 816 F.2d at 1378. In the injunction context, those decisions highlighted Congress's intent of relying on "institutionalized caution" in favor of endangered species, particularly because "projects that jeopardize[] the continued existence of endangered species threaten[] incalculable harm." *Sierra Club*, 816 F.2d at 1383; *see also Tennessee Valley Auth.*, 437 U.S. at 186-94.

It is essential to note that the *Sierra Club* and *Tennessee Valley Auth.* decisions involved threats of drastic harm to the species from the challenged actions. In *Sierra Club*, unlike here, the agency had failed to secure the promised mitigation for its actions that were planned to occur in wetlands that were "essential to the survival" of two listed birds, thereby threatening jeopardy to the continued existence of the species. 816 F.2d at 1378-79, 1386-88. In *Tennessee*

Valley Auth., the issue presented was whether to enjoin the completion of a dam when completing the dam would eradicate an entire endangered species. 437 U.S. at 173-74. As those two decisions demonstrate, caution in favor of the species is informed by the threats facing the species from the proposed actions at issue.

When considering vacatur, courts are obligated to conduct a "balancing test" and "weigh" the disruptive consequences against the agency's errors. *Ctr. For Food Safety*, 56 F.4th at 663. To the extent that caution in favor of listed species is appropriate in the vacatur analysis, it cannot supplant that obligation or tip the analysis so far as to effectively require vacatur, particularly when the threats to the species from the challenged actions are speculative.

In this matter, the district court abused its discretion in vacating the ITS after tipping its analysis in favor for the species without adequately balancing the equities of the speculative threat of harm to the species against the extreme and lasting disruptive consequences of vacatur. As demonstrated by the available evidence and the above analysis, there is a likelihood that vacatur will be short-lived and NMFS will substantiate the ITS on remand. Allowing the ITS to remain in place does not present a viable threat of jeopardizing the continued existence of the SRKW. The SEAK troll fishery's impacts to the SRKW are limited due to the stocks of Chinook salmon harvested by the fishery and the timing of any potential prey reduction. *See* 5-ER-1131. And, any such impacts will be compensated by the

mitigation provided for in the 2019 SEAK BiOp via the prey increase program—mitigation that was intended to compensate for much more than the impacts of the troll fishery and that the district court determined to be certain and providing the intended benefits. *See* 5-ER-0888 (broad intended benefits of mitigation); 1-ER-0036 (finding that the mitigation is providing the intended benefits). Any environmental harm to the SRKW from remand without vacatur is merely speculation. That speculation is dramatically outweighed by the certain cultural and economic harm that will befall the communities of Southeast Alaska and sound the "final death knell on their way of life." 3-ER-0525.

The district court exercised its discretion "to an end not justified by the evidence." *Morales*, 438 F.3d at 930. Any caution or tipping in favor of the SRKW is not sufficient to overcome the dramatic and certain spiritual, cultural, and economic harms that will result from vacatur, and "equity demands" remand without vacatur. *Cal. Cmtys. Against Toxics*, 688 F.3d at 992.

B. The District Court Abused Its Discretion in Striking Portions or the Entirety of Two Declarations Submitted by the ATA in Its Briefing on the Remedy.

In addition to reaching the wrong conclusion on vacatur, the district court abused its discretion in refusing to consider expert testimony offered by the ATA to inform the court's vacatur analysis. The district court held that neither Mr. Olson

nor Mr. Fujioka were sufficiently qualified to offer their opinions. In doing so, the district court applied the FRE 702 standard too strictly.

"The admission of expert testimony is governed by Federal Rule of Evidence 702." *FTC. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014). Under FRE 702, a court "must ensure that all admitted expert testimony is both relevant and reliable." *Wendell*, 858 F.3d at 1232. An expert witness must also be qualified with "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." FRE 702(a). When considering admissibility of testimony in a bench trial, courts "are mindful that there is less danger that a court will be unduly impressed by the expert's testimony or opinion" than a jury. *BurnLounge Inc.*, 753 F.3d at 888 (internal quotation marks omitted). An expert need not be "formally qualified as [an] expert" because "in considering the admissibility of testimony based on some 'other specialized knowledge,' [FRE] 702 generally is construed liberally." *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). The FRE 702 standard is "flexible" and the rule "should be applied with a liberal thrust favoring admission." *Wendell*, 858 F.3d at 1232 (internal quotation marks omitted).

Although FRE 702 favors admission of evidence, it still provides the fact finder with the discretion to determine the appropriate weight to afford the evidence. *See City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir.

2014) ("[W]hen an expert meets the threshold established by Rule 702, the expert may testify and the fact finder decides how much weight to give that testimony."); *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010), *as amended* (Apr. 27, 2010) ("Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion."); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) ("Disputes as to the strength of an expert's credentials, faults in his use of a particular methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." (Internal quotation marks and brackets omitted.)).

1. Paul Olson Has Sufficient Specialized Knowledge to Opine on the Economic Consequences of Closing the SEAK Troll Fishery.

Under the flexible FRE 702 standard, Paul Olson possesses sufficient specialized knowledge to opine on the economics at issue in this matter. The district court acknowledged that Mr. Olson is an ATA member, a commercial salmon troller, and an attorney. 1-ER-0027. The court questioned Mr. Olson's characterization that he has "extensive familiarity with natural resource economics, including economic impact analyses." *Id.* (quoting 3-ER-0530). The court appeared to have discounted any specialized knowledge that Mr. Olson could have, noting that "for most of his 27 years of commercial trolling, between 40 to 70 percent of his income [has been] dependent on fishing." 1-ER-0027. As

Mr. Olson demonstrated, he has specialized knowledge on the economics of this matter and is not merely just a fisherman.

Mr. Olson explained that a primary aspect of his work in the last four years has "involve[d] the valuation of ecosystem services in Southeast Alaska and doing research and writing related to how those services influence the local, regional, and national economy." 3-ER-0530. Specifically, during that time, Mr. Olson has "review[ed] and collect[ed] socio-economic data related to Southeast Alaska's resources and fisheries on an annual basis" to help the Alaska Sustainable Fisheries Trust publish an annual report called "Sea Bank." *Id.* This report "quantifies the value of Southeast Alaska's fisheries and visitor economies to coastal communities." *Id.*

The declaration at issue is Mr. Olson's third declaration that was filed before the district court. In his first declaration, Mr. Olson highlighted the same economic experience related to the Sea Bank reports. 8-ER-1808. In that first declaration, Mr. Olson introduced a recent economic impact study on the impacts of reductions in harvest of Chinook salmon under the 2019 PST. 8-ER-1809–10. Mr. Olson also opined on multiple economic issues, including average ex-vessel income, the relative size of the commercial fishing sector in the Southeast Alaskan economy, and the multiplier effect of jobs and wages generated by the troll fishery in his first declaration. 8-ER-1808–10. Mr. Olson presented similar

opinions in his second declaration. 8-ER-1769–71. WFC did not move to strike either of those prior declarations and the district court considered Mr. Olson's prior economic opinions.

In his third declaration, Mr. Olson relied on his specialized knowledge of the economic issues in Southeast Alaska to highlight the inaccuracies that resulted from WFC's expert applying a "proxy model"—designed for California, Oregon, and Washington fisheries—to Southeast Alaska. 3-ER-0531, 0533. Mr. Olson highlighted inconsistencies between the analysis of WFC's expert and the economic study that Mr. Olson presented with his first declaration. 3-ER-0532–33. Mr. Olson also observed that WFC's expert had underestimated the ex-vessel value of the SEAK fisheries. 3-ER-0531. Mr. Olson presented additional economic analyses specific to the communities of Southeast Alaska that contradicted the findings of WFC's expert. 3-ER-0532, 0534–35. Mr. Olson's opinions—based on specialized knowledge regarding the economies of communities in Southeast Alaska—were particularly valuable to the district court because WFC's expert demonstrated "no experience relative to Alaska fisheries or economies." 3-ER-0535. While WFC failed to appreciate the true impacts to Southeast Alaska, Mr. Olson relied on his specialized knowledge to explain that closing the summer and winter seasons of the troll fishery would

cause many trollers to cease fishing immediately and risk the second-largest fishery in the region. 3-ER-0541.

The district court's decision to strike Mr. Olson's third declaration is not consistent with the relaxed FRE 702 standard, particularly given that the opinions were not presented to a jury. FRE 702 "contemplates a broad conception of expert qualifications." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004) (internal quotation marks and emphasis omitted). The fact that Mr. Olson has primarily earned his income from fishing does not preclude him from being qualified, as the district court suggested. 1-ER-0027. The court's conclusion that Mr. Olson failed to provide a minimal foundation to support his qualifications is particularly troubling considering that the court previously considered Mr. Olson's economic opinions in his first two declarations. Arguably, the court—at least implicitly—had already acknowledged that he had satisfied the threshold established by FRE 702 by allowing him to submit economic opinions prior to the declaration that the court struck. The court, as the fact finder, should have determined what weight to afford Mr. Olson's related opinions in his third declaration rather than strike the declaration.

2. Tad Fujioka Has Sufficient Specialized Knowledge to Opine on the Failure of WFC's Experts to Appreciate the Dynamics of Management of Fisheries Under the PST.

The district court similarly applied the FRE 702 standard too narrowly regarding the declaration of ATA member Tad Fujioka. The court concluded that Mr. Fujioka did not identify any "specialized experience in data analysis that would qualify him to provide an expert opinion on impacts to the fisheries from closure or to rebut [the] population viability analysis" of WFC's expert. 1-ER-0028.

Mr. Fujioka demonstrated sufficient specialized knowledge on fisheries management, the PST, and fisheries impacts to support his declaration explaining how the analysis by WFC's expert was oversimplified and inconsistent with the PST. He explained that he was on the Board of the ATA between 2013 and 2021, including a stint as its vice president. 3-ER-0561. Mr. Fujioka also serves on the Board of Directors of the Seafood Producers Cooperative, having become chairman in 2021. *Id.* Both positions have provided Mr. Fujioka with specialized knowledge of the impacts of reduction in harvest levels for fisheries. 3-ER-0561–62. Perhaps most prominently, Mr. Fujioka also participates in the management of Alaska's fisheries as a member and past chairman of the Sitka Fish and Game Advisory Committee. 3-ER-0563. Mr. Fujioka's involvement with that committee involves "provid[ing] advice to the

Alaska Board of Fisheries on harvest, management, and allocation of Alaska's fishery resources." *Id.* Mr. Fujioka's responsibilities with that committee require him "to regularly review sales and marketing data, Alaska Department of Fish and Game management reports and research, and other materials related to the value, ecology, and harvest of Chinook salmon." *Id.* As evidenced by Mr. Fujioka's declaration, this experience has provided him with specialized knowledge in the practical application of the PST. *See, e.g.*, 3-ER-0562–70.

Mr. Fujioka did not rely on this specialized knowledge to submit his own population viability analysis. He merely used his knowledge and experience to demonstrate that the theoretical analysis conducted by WFC's expert was inconsistent with observed harvests and practical application of the PST. *See* 3-ER-0567–71. As discussed with respect to Mr. Olson, the court was free to weigh the competing opinions as it saw fit as the fact finder, but excluding the testimony was improper under the relaxed standard of FRE 702.

VIII. CONCLUSION

The SEAK troll fishery is at an unfortunate tipping point. A ruling on this dispute in favor of maintaining the ITS is critical. The district court's ruling and WFC's policy preferences will not completely change the course of the PST. NMFS will provide future incidental take statements for SEAK fisheries to harvest Chinook salmon. A proper recognition of the equities presented will help

dissuade a future cycle of biological opinions, incidental take statements, challenges to those statements, threats to the way of life of the trollers, and the need to obtain emergency relief. The ATA respectfully requests that the Court reverse the district court's decision with instruction to remand the 2019 SEAK BiOp without vacating the ITS or prey increase program while NMFS corrects its errors.

RESPECTFULLY SUBMITTED this 29th day of September, 2023.

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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 using the Appellate CM/ECF. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 29th day of September, 2023.

s/ Eliza Hinkes
Eliza Hinkes
Paralegal

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