

Attachment List for State of Alaska's Motion in the Ninth Circuit for a Stay Pending Appeal of the Partial Vacatur of the Incidental Take Statement:

1. State of Alaska's motion for a stay of partial vacatur pending appeal
2. NMFS's response in support of the motion for a stay pending appeal, including attachments
3. Alaska Congressional delegation's response in support of the motion for a stay pending appeal, including attachments
4. Plaintiff WFC's opposition to the motion for a stay pending appeal, not including attachments

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Wild Fish Conservancy,)	
Appellee,	)	No. 23-35322
)	
)	
v.	)	D.C. No. 2:20-cv-00417-RAJ-
	)	MLP
State of Alaska, et al.,)	
Intervenor-Appellant)	MOTION FOR STAY
)	PENDING APPEAL
)	
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MOTION FOR STAY PENDING APPEAL

RELIEF REQUESTED BY JUNE 23

The State of Alaska moves this Court to stay the part of the district court’s June 2 vacatur order that effectively shuts Southeast Alaska Chinook salmon summer and winter troll fisheries. The State requests a stay by June 23 so that the fishermen can gear up for the summer season, which starts on July 1.

The district court erred in vacating the part of 2019 Biological Opinion that shields Alaska and its fishermen from Endangered Species Act liability while the agency rewrites the Biological Opinion. The procedural violations the district court found in the agency opinion were minor and have been addressed since its issuance. And vacatur will, for certain, spawn disaster for Southeast Alaska’s economy and way of life while providing no meaningful benefit to the endangered

Southern Resident killer whales. This is not a case where the district court weighed devastation of the livelihoods of thousands of Alaskans, dozens of remote villages, and a way of life against the benefit of potentially saving even a small number of endangered whales. Instead, the court weighed certain harm to people, communities, and culture against speculative, and at best, minor benefit to an endangered species.

Although vacatur is supposed to be an equitable remedy, the district court for the Western District of Washington singled out an Alaskan fishery to shoulder the entire burden of conservation. This while other fisheries, notably those occurring along the Pacific Northwest coast that have disproportionately higher levels of impact, are left untouched and unrestricted. This is inequitable.

Reversal is warranted.

BACKGROUND

I. Southeast Alaska depends on the Chinook troll fishery.

Troll fishing for Chinook salmon is critical to Southeast Alaska's economy, local government, and culture. It is the "way of life," passed down from one generation to the next. Dkt. 21, ¶1 (Daugherty Decl.); Dkt. 130, ¶¶2, 5, 6, 10 (Jordan Decl.). It supports thousands of Southeast Alaska jobs, which are essential to the survival of coastal communities. Dkt. 133-1, ¶36 (Keaton Decl.); Dkt. 136, ¶2 (Second Vincent-Lang Decl.). Over 1,000 people hold active troll fishing

permits. Dkt. 131-1, ¶32 (Keaton Decl.). This includes 100% of the population of Elfin Cove, 91% of Meyers Chuck, 58% of Pelican, 46% of Point Baker, and 26% of Port Alexander. Dkt. 136, ¶7 (Second Vincent-Lang Decl.). The total annual economic output¹ of the Chinook commercial troll fleet for the winter and summer seasons is approximately \$29 million. Dkt. 133-1, ¶¶36, 40 (Keaton Decl.).² And that figure excludes the additional value from fish processing and the significant taxes that flow to local communities that enable those governments to operate. Dkt. 133-1, ¶36 (Keaton Decl.); Dkt. 136, ¶¶2, 7 (Second Vincent-Lang Decl.).

Many of the Chinook harvested by the Southeast Alaska troll fishery originate in Southeast Alaska, Northern British Columbia, and Central British Columbia, meaning those fish do not overlap with the habitat of the endangered Southern Resident killer whales (SRKW). Dkt. 135, ¶14 (Evenson Decl.); AR-47506.

¹ The total output includes how much trollers are paid for their catch plus the secondary spending that occurs in Southeast Alaska as the fishermen purchase goods and services. Dkt. 133-1, ¶36 (Keaton Decl.).

² The average annual ex-vessel value of the Chinook troll fishery is about \$11.5 million. Dkt. 133-1, ¶34 (Keaton Decl.). That number represents only how much fish is sold, and excludes additional values, such as wages, processing, and tax revenue. *Id.* ¶36.

II. The Salmon Fishery Management Plan governs fishing for Chinook in federal waters.

Congress passed the Magnuson-Stevens Act to prevent overfishing and to conserve and maintain the nation's fisheries to promote employment and food supply. 16 U.S.C. § 1801. Under the Act, the National Marine Fisheries Services (NMFS) approves Fishery Management Plans to regulate fishing. 16 U.S.C. § 1854. Fishing for Chinook in federal waters is governed by the Salmon Fishery Management Plan. AR-502. For decades, NMFS has delegated management authority of commercial troll fishing in federal waters to the State of Alaska. *See e.g.*, AR-502; 77 Fed. Reg. 75,570 (Dec. 21, 2012). The State of Alaska manages as a single unit the Southeast troll fishery in both state and federal waters. AR-515, 540.

III. The Pacific Salmon Treaty establishes how much salmon Canada, Alaska, and the Pacific Northwest states may catch.

Because salmon are highly migratory and cross between Canada and the United States, the two countries signed the Pacific Salmon Treaty in 1985. AR-523. The Treaty's goals are to prevent overfishing and to provide for the optimum production and fair sharing of salmon. AR-523. The parties renegotiate the fishing regimes every ten years to update conservation goals and harvest sharing arrangements. AR-47194–95. In these updates, and in response to concerns for some Chinook stocks, the parties have reduced harvest levels for some fisheries.

AR-47201–02, 4720. The catch limit for the entire Southeast Alaska fishery is set annually based on data from the early winter troll fishery. Dkt. 43-1, 661 (Pacific Salmon Treaty, ch.3, ¶6(b)(ii)).

IV. Availability of Chinook salmon are one of many factors limiting the recovery of Southern Resident Killer Whales.

SRKW are a specific population of killer whales listed as endangered under the Endangered Species Act (ESA). 70 Fed. Reg. 69,903 (Nov. 18, 2005). Their decline has been caused by many factors, including disturbance from vessel sounds and traffic, bioaccumulation of toxic contaminants that depress their immune system and reproductive capability, their removal for public display in aquaria, oil spills, and the quantity and quality of prey. AR-47282–90, 70 Fed. Reg. at 69,908. The preferred diet of SRKW is mature Chinook salmon, though whales do consume other prey. AR-47283–84.

Southeast Alaska fisheries are shouldering the brunt of conservation efforts for the SRKW’s prey. In the 2019 revision to the Treaty, Alaska agreed to reduce its harvests of Chinook in response to SRKW and ESA-listed Chinook conservation concerns. AR-47504. The Southeast Alaska fishery took up to a 7.5% reduction in its allowable Chinook harvest levels, on top of a prior 15% reduction under the 2009 revision of the Treaty. AR-47209, 47212. Other fisheries, notably those along the Washington and Oregon coasts—which have disproportionately higher levels of impact on the SRKW—were largely left untouched and

unrestricted. AR-47350–51; Dkt. 133-2, 114, 142 (NMFS’s BiOp for Pacific Northwest fisheries quantifying impacts of those fisheries on prey abundance for SRKW).

V. NMFS uses hatcheries to reduce chances of species extinction.

Chinook spend about three to five years in the ocean and then, once mature, migrate back to their natal spawning grounds. Four stocks of Chinook relevant to this lawsuit are listed under the ESA, as threatened or endangered. AR-47222–26, 47245–47, 47252–57, 47261–66, 47518–19. The primary causes of declines in these stocks are loss of habitat, hydropower development, poor ocean conditions, overfishing, and hatchery practices. AR-14492, 15761, 15891. NMFS uses hatcheries to preserve vital genetic resources while other factors limiting survival and abundance are addressed. AR-47420. Depending on how a hatchery operates, its effect on salmon can be positive, neutral, or negative. AR-47420–21.

VI. NMFS’s 2019 Biological Opinion includes an incidental take statement for Chinook that might otherwise be prey for SRKW.

The ESA requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of an endangered or threatened species or to destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). If a federal action is “likely to adversely affect” listed species or critical habitat, the agency must issue a biological opinion (BiOp). 50 C.F.R. § 402.14. If the agency determines, while producing the BiOp, that the action is unlikely to jeopardize the

continued existence of the species or result in the destruction or adverse modification of critical habitat, but will result in “take” of a listed species, the agency must issue an incidental take statement (ITS). 16 U.S.C. § 1536(b)(4)(i)-(ii). Any take in compliance with an ITS is shielded from liability under the ESA. 16 U.S.C. § 1536(o)(2).

In 2019, NMFS issued a BiOp considering the combined effects on ESA-listed species from the following federal actions: NMFS’s ongoing delegation of salmon fisheries management to Alaska, federal funding to Alaska to assist meeting obligations under the Treaty, and a conservation program designed to benefit both critical stocks of Puget Sound Chinook salmon and SRKW. AR-47198–204. The conservation program has three components. AR-47202. The first two components are aimed at aiding ESA-listed Chinook by continuing conservation hatchery programs and implementing habitat restoration programs. AR-47202. By increasing Chinook abundance, these programs would incidentally bolster prey availability for SRKW over the long term. *Id.* The third component is a hatchery program designed to increase Chinook availability for SRKW, specifically. AR-47202–03. Importantly, these three mitigation components are intended to offset harms to SRKW and listed Chinook from *all* fisheries under the Pacific Salmon Treaty, not just the Alaska fishery. AR-47202–04, 47506;

Dkt. 133-2, at 24 (West Coast Fisheries BiOp). They contribute to the environmental baseline for other fishery BiOps. *Id.*

NMFS concluded that continued operation of the Southeast Alaska fishery, consistent with the Treaty-established limits and BiOp approved mitigation measures, was not likely to jeopardize the SRKW or the listed stock or adversely modify their critical habitat. AR-47502–08, AR-47485–501. The BiOp thus includes an ITS for SRKW and listed Chinook consistent with the Treaty’s limits. AR-47518–19.

VII. The Wild Fish Conservancy sues NMFS to enjoin Southeast Alaska’s fisheries, and the district court finds ESA and NEPA violations.

The Wild Fish Conservancy sued NMFS to enjoin the Southeast Alaska fishery, arguing that the Southeast Alaska fishery was reducing prey that would otherwise be available to the SRKW, so NMFS should have required reduced harvests beyond those agreed to under the Pacific Salmon Treaty. Dkt. 1, ¶¶10–11 (Compl.). The Conservancy also argued that NMFS erred in relying on mitigation programs that were not yet funded and site-specific and should have analyzed whether the mitigation efforts would negatively affect ESA-listed Chinook stocks. Dkt. 1, ¶¶10–11.

The district court agreed, concluding that NMFS erred in finding no jeopardy to the SRKW, because the mitigation program that would ensure no jeopardy was not yet funded and not yet site-specific. Dkt. 111, at 25–31 (R&R),

Dkt. 122 (order adopting R&R). The court also concluded that NMFS's BiOp was procedurally flawed because it did not explicitly account for how the new prey increase program would affect ESA-listed Chinook. Dkt. 111, at 32–33. Finally, the district court concluded that NMFS failed to conduct sufficient National Environmental Protection Act (NEPA) analysis for the ITS and the prey increase program. Dkt. 111, at 34-38. The district court did not conclude that NMFS should have required reduced harvests beyond those agreed to under the Pacific Salmon Treaty, instead focusing solely on these procedural points.

VIII. The district court chooses to decimate the lifeblood of Southeast Alaska by vacating the agency action instead of simply remanding for correction of procedural errors.

When the district court considered the remedy for the procedural errors it found, the State argued that vacating the ITS would shutter the Southeast Alaska fishery for no discernable conservation gain. Dkt. 134. But the court vacated that portion of the ITS anyway. Dkt. 144 (R&R); Dkt. 165 (adoption of R&R). The court ignored the intervening actions NMFS and Congress has taken to remedy the procedural errors, and concluded that the errors were serious enough to warrant vacatur. Dkt. 144 at 26–28. In assessing the environmental benefit to SRKW from shutting down the fishery, the court ignored the data and analysis in the 2019 BiOp and the subsequent data and declarations provided by NMFS. Dkt. 144, at 29. Instead, the court relied on the Conservancy's disproved assertions, concluding

that closing the Southeast Alaska Chinook fishery would “meaningfully improve[] prey availability to the SRKW, as well as SRKW population stability and growth.” Dkt 144, at 29. The court refused to consider the social and cultural harm closing the fishery would cost Southeast Alaskans and ostensibly considered the “disruptive economic consequences” to the economy of Southeast Alaska. Nov. 1, 2022 Hearing Transcript 48–49, Dkt. 144, at 30. The court did not vacate the prey increase program. Dkt. 144, at 30-33. And it denied the State’s motion to stay vacatur of the ITS pending appeal. Dkt. 193.

STANDARD OF REVIEW

A stay of the district court’s vacatur is merited because Alaska has made a strong showing that it is likely to succeed on the merits, it will be irreparably harmed absent a stay, the stay will not substantially injure the Conservancy but will substantially injure Alaskans, and the public interest lies in granting the stay. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

ARGUMENT

Although the district court found procedural problems with the 2019 BiOp, this Court “leave[s] invalid agency action in place when equity [so] demands.” *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022). Equity demands so here. This is both a reason why Alaska is likely to succeed on the merits of its appeal, and a reason why a stay is justified.

I. Alaska is likely to succeed on the merits.

When determining whether an agency action should remain in effect on remand, courts apply a two-factor balancing test, weighing the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed again later. *Regan*, 56 F.4th at 663. The district court got this analysis wrong. Dkt. 144 (R&R); Dkt. 165 (adoption of R&R).

On the first factor, 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.” *Regan*, 56 F.4th at 663–64.

Here, the remand process has already shown that NMFS not only could, but would likely “adopt the same [ITS] on remand”—that is an ITS covering the same catch limits for the Southeast Alaska Chinook fishery. *See id.* at 665. First, NMFS has “cautioned against overreliance on correlative studies or implicating any particular fishery.” AR-47286. NMFS has repeatedly 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.” Dkt. 133-2, ¶6 (Third Barre Decl.). In other words, shutting down Alaska's Chinook troll fishery does not correlate to saving any or producing any more SRKW.

Second, even assuming that closing the Southeast Alaska Chinook troll fishery will create some benefit in terms of increased prey availability—albeit not increased vitality to the SRKW—that increase in prey availability is exceedingly small (*less than 0.5%* in winter and 1.8% in summer). Dkt. 133-2, ¶9 (Third Barre Decl.); AR-47440–41, 47505. And the increased prey availability would be temporary, lasting only until NMFS issues a new ITS, which is expected to be issued in fall 2024.

Third, the prey increase program is already offsetting the slight reduction in prey availability caused by the Southeast Alaska Chinook fishery. Dkt. 133-3, ¶3 (Third Purcell Decl.); Dkt. 135, ¶¶18–20 (Evenson Decl.). The district court found that NMFS erred in issuing an ITS because the mitigation program was, at the time of the 2019 BiOp, “uncertain and indefinite.” Dkt. 144, at 27. Since that time, the mitigation program has become both certain and definite: it has been funded and is providing increased prey for SRKW. Dkt 133-3, ¶3 (Third Purcell Decl.); Dkt. 133-4, ¶¶7-12 (Second Rumsey Decl.). More Chinook are already in the water. In fact, in another part of its decision, the district court even recognized 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.” Dkt. 144, at 31.³ But when it vacated the ITS, the district court failed to recognize that the error it found with the ITS—that the mitigation plan was not yet funded and not yet site-specific—had already been cured.⁴

Not only is NMFS likely to issue the same decision, but remand is also unlikely to result in reduced harvest limits because NMFS lacks authority to impose them. Harvest limits are set by the terms of the Pacific Salmon Treaty—not by NMFS in a BiOp. Dkt. 43-1, Att. C (Pacific Salmon Treaty). 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 (1985), §3(a),(h)(1).

Additionally, the catch limit for the entire Southeast Alaska fishery is set annually based on data from the early winter troll fishery. Dkt. 43-1, 661 (Pacific Salmon Treaty, ch.3, ¶6(b)(ii)). Closing the winter troll fishery compromises the U.S.’s ability to meet Treaty obligations for setting catch limits.

³ The 2019 BiOp includes a mitigation plan with three parts: the first two are intended to benefit ESA-listed Chinook; the third part is meant to benefit the SRKW. AR-47202–03. Congress continues to fully fund each year the third part of the mitigation plan, Dkt. 162, at 6 (Amici Br. of Alaska Cong. Delegation); Dkt. 133-3, ¶¶ 3, 5 (Third Purcell Decl.), and that hatchery is creating more prey availability for the SRKW. Dkt. 133-2, ¶13 (Third Barre Decl.); Dkt. 133-4, ¶¶7-11 (Second Rumsey Decl.). Congress has also funded the first two mitigation programs, which are meant to benefit ESA-listed Chinook and indirectly benefit SRKW over the long-term. AR-47202; Dkt. 135, ¶8 (Evenson Decl.).

⁴ The other errors the district court found, which are not germane to the relief Alaska seeks (i.e., staying vacatur of the ITS) have also been cured or are being cured. Dkt. 133-3, ¶¶4, 5 9 (Purcell Decl.).

The second factor of the two-factor test for determining whether an agency action should remain in effect on remand is the “the disruptive consequences of an interim change that may itself be changed.” *Regan*, 56 F.4th at 663. That factor strongly favors Alaska because halting the Southeast Alaska Chinook troll fishery for even just a single season will create both immediate and long-lasting harms, as explained further below.

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 664-68 (concluding that although EPA committed serious error by continuing to flout the ESA consultation process, 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) (deciding to remand without vacatur, reasoning that vacating approval of a pesticide could cause serious disruption by disallowing continued use of pesticide); *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 993–95 (9th Cir. 2012) (concluding vacatur was not warranted because closing the power plant would “be economically disastrous” to a billion-dollar venture employing 350 workers and because environmental harms from the power plant were mitigated). So too here.

Alaska is therefore likely to succeed on the merits of its challenge to the district court’s vacatur order.

II. Shutting down Southeast Alaska’s Chinook troll fisheries is a certain death knell to rural Southeast Alaska communities.

Alaska satisfies the other prerequisites for a stay because the district court’s vacatur order will cause unjustified irreparable harm. Dkt. 191 (Daugherty Decl.). The economic output of the Chinook summer and winter troll fishery is huge—about \$29 million each year. Dkt. 133-1, ¶¶36, 40 (Keaton Decl.). The effects of the order will be felt most acutely in the smaller, remote communities, where many people rely on trolling as a primary source of income and, in many cases, the only source. Dkt. 136, ¶4 (Second Vincent-Lang Decl.); Dkt. 132 (Phillips Decl.). For example, 100% of the population of Elfin Cove, 91% of Meyers Chuck, 58% of Pelican, 46% of Point Baker, and 26% of Port Alexander hold trolling permits. Dkt. 136, ¶4 (Second Vincent-Lang Decl.). The effects will also be felt in larger towns like Sitka, where only 7% of the population holds a troll permit, because the fishery still brings in over eight million “ex-vessel” dollars per year—a huge number for a town with only 8,000 residents. *Id.* ¶ 5.

Secondary businesses will also feel the effects of the closure. For instance, fish processing plants, not represented in the \$29 million figure above, also contribute significantly to Alaska’s economy. Dkt. 133-1, ¶36 (Keaton Decl.). Because about a third of the value added from seafood processing jobs is the cost of labor, decreasing the number of fish processed significantly decreases the need for (and wages to) laborers. Dkt. 133-1, ¶36 (Keaton Decl.) These plants could

even be forced to close during the winter, because the troll fishery is their only source of fish at that time. Dkt. 136, ¶6 (Second Vincent-Lang Decl.).

The state and local governments will also lose much-needed tax revenue, which is also not included in the \$29 million figure. Dkt. 133-1, ¶36 (Keaton Decl.). Fish landing taxes pay for schools, utilities, harbor maintenance, and other needed services—for both the State and its municipalities. Dkt. 136, ¶¶2, 7 (Second Decl. Vincent-Lang). Closing the troll fishery will lead to loss of municipal taxes, corporate income taxes, and motor oil tax. *Id.* at ¶7.

Shutting down the summer and winter seasons will reduce trollers' livelihood by between one third and half. *Id.* at ¶3. This might make it financially infeasible to troll fish at all. *Id.* at ¶3. Salmon troll fishermen cannot simply retrofit their boats to participate in another fishery—Alaska's fishing is high specialized and regulated, and investing in new gear and permits costs hundreds of thousands of dollars. *Id.* at ¶8. Families will have to choose between living without work or enough work, or moving to find work, the latter of which will lead to school closures if communities no longer have enough school-age children. *Id.* at ¶4.

In vacating the ITS, the district court not only undervalued the economic devastation to Southeast Alaska, but it completely ignored “the cultural and social harms” of closing the fishery. *See United States v. Washington*, 853 F.3d 946, 961 (9th Cir. 2017) (affirming injunctive relief based on damaged tribal economies,

inability of fishermen to make a living, and the social and cultural harm to communities); Nov. 1, 2022 Hearing Transcript 48–49 (after ATA asserts social harms, court expresses doubt that social harm fit into its analysis). Alaska troll fishing is the “way of life” for southeast communities, passed down from one generation to the next. Dkt. 21, ¶1 (Daugherty Decl.); Dkt. 130, ¶¶2, 5, 6, 10 (Jordan Decl.). It not only allows individuals to pay bills, but it is also critical for communities’ “spiritual and physical wellbeing.” Dkt. 130 ¶¶2, 5, 6, 10 (Jordan Decl.).

Shutting down the Southeast Alaska Chinook troll fishery, even for just one season, means certain economic and cultural devastation.

III. Shutting down Southeast Alaska’s Chinook troll fisheries will 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, negligible. Dkt. 133-2, at ¶7 (Third Barre Decl.). The BiOp’s analysis suggests that the increase in prey would be exceedingly small (*less than* 0.5% in winter and *less than* 1.8% in summer). Dkt. 133-2 at ¶9 (Third Barre Decl.); AR-47440–41, 47505.

The district court erred in ignoring the scientific analysis of the expert agency tasked with studying effects to SRKW, and adopting instead the Conservancy’s analysis. *See San Luis & Delta-Mendota Water Auth. v. Locke*,

776 F.3d 971, 994 (9th Cir. 2014) (instructing courts to be most deferential to agency action that requires a high level of technical expertise). The district court concluded that closing the fishery will create a “meaningful” benefit to the SRKW by assuming that the fishery reduces SRKW prey by about 5%. Dkt. 144, at 29 (citing Dkt. 127-2, ¶¶8, 11 (Third Lacy Decl.)). And the court relied on the Conservancy’s assertion that an increase of prey availability by 5% will linearly benefit the SRKW. Dkt. 144, at 29 (citing Dkt. 127-2, ¶8 (Third Lacy Decl.)). But the Conservancy’s assumptions are wrong for a host of reasons.

First, the Conservancy’s 5% quantification of how the fishery reduces prey for SRKW is unsupportable. The Conservancy claims its number is “an approximate middle value” based on a range of numbers produced by NMFS that model the historical effects of the Southeast Alaska fishery throughout broad SRKW territory. Dkt. 135, ¶15 (Evenson Decl.). But the “approximate middle value” is neither a mean nor median of the range estimates in the 2019 BiOp. *Id.* Moreover, the number does not account for *where* SRKW are located *when* they are feeding. *Id.*; AR-47203, 47439, 47445. The BiOp explains that SRKW generally live in inland waters in the summer and coastal waters in the winter. AR-47280–81, 47441. Had the Conservancy used a more honest number from the data in the 2019 BiOp, they would have represented that the entire Southeast Alaska fishery (not just trollers) reduces prey in inland waters in the summer by only

approximately 1.8%. Dkt. 133-2, ¶9 (3d Barre Decl.); AR-47439–41. And when SRKW move to coastal waters in the winter, the data from the 2019 BiOp shows that the entire Southeast Alaska fishery reduced SRKW prey in winter by about 0.5%. Dkt. 133-2, ¶9 (Third Barre Decl.); AR-47440–41, 47505. Because the partial vacatur applies to only part of the fishery, the reduction in prey expected from closure of the summer and winter trolling season would be even lower. 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 unsupported assertion that it does. Dkt. 144, at 29.

Second, increased prey availability does not linearly correlate to increased benefits to SRKW. Dkt. 133-2, ¶7 (Third Barre Decl.). NMFS has explained that the many factors harming the SRKW act in concert with each other. *Id.* In the BiOp, NMFS “cautioned against correlative studies” between prey availability and SRKW recovery. AR-47286. Since the 2019 BiOp was issued, the Pacific Fishery Management Council formed a workgroup to better evaluate the effects of Council-managed fisheries on SRKW and determined that there is *no* detectable relationship between Chinook abundance and SRKW demographic rates. Dkt. 133-2, ¶7 (Third Barre Decl). 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 SRKW. *Id.*

Third, the assumptions used in the BiOp's model overestimate prey reductions, because the number of predators competing with SRKW has grown since the model's historical data was compiled. Dkt. 135, ¶16 (Evenson Decl.). As mature Chinook swim back towards their spawning grounds, they are consumed by many other predators including salmon sharks, pinnipeds, and Northern Resident killer whales. *Id.* Northern Resident killer whales, whose population is burgeoning, will have an opportunity to intercept Chinook before the SRKW. *Id.* In recent studies, when there has been increased abundance of prey, the Northern Resident killer whales—not the SRKW—have seen improvement. *Id.*⁵

Fourth, the data in the BiOp does not assess the scenario the district court created here—where the Southeast Alaska Chinook troll fishery is closed, and the other fisheries enjoy a windfall. AR-47195. Before Chinook can return to feed SRKW, they are subject to capture by other commercial, recreational, and tribal fisheries off the coasts of Southeast Alaska, British Columbia, and Washington. Dkt. 135, ¶¶7, 16 (Evenson Decl.); Dkt. 34, ¶¶16-20 (Lyons Decl.). Rather than allowing more fish to return to SRKW feeding grounds, the district court decision

⁵ Because this new data—along with others—undermined the Conservancy's request for vacatur, the Conservancy tried to strike the data from the record, which the trial court refused to do. Dkt. 138 at 12-15; Dkt. 144 at 16-24. Nevertheless, the trial court erred in ignoring the State's and NMFS's unrefuted updated data and denying the State's request for an evidentiary hearing to prove that data. Nov. 1, 2022 Hearing Transcript 8-9 (asking for evidentiary hearing); Dkt. 141 (denying request for evidentiary hearing).

gives these fisheries more opportunity to catch more Chinook. Dkt. 135, ¶ 16 (Evenson Decl.); Dkt. 34 (Lyons Decl. ¶ 20). If Alaska does not take its share of Chinook, more will pass through Canadian waters, which can trigger a different, higher in-season fishing limit for Canadian fishermen. AR-47209–10; Dkt. 34, ¶¶17–19 (Lyons Decl.).⁶ The Conservancy’s assumptions simply do not account for how foregone harvest of Chinook by the Southeast Alaska troll fisheries will “likely lead to improved catches in Canadian and Washington fisheries,” rather than improved prey opportunity for the SRKW. Dkt. 135 ¶16 (Evenson Decl.). 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.

Finally, because NMFS will likely issue a similar BiOp on remand, the district court’s partial vacatur will—at best—create a minor, short-term increase of prey availability for SRKW. Even if this Court were to credit the Conservancy’s unsupportable assertion that *continued* closure of the Southeast Alaska troll fishery could create 5% more prey, which would maintain a “long-term population growth rate [of] 0.00%,” the Conservancy does not even try to assert that closing the fishery until NMFS reissues an ITS with the same limits will create a meaningful

⁶ Only a few fisheries, including Southeast Alaska, have set pre-season limits. AR-47206; Dkt. 34, at ¶¶16, 18 (Lyons Decl.). The other fisheries adjust their limits depending on in-season data—that is, higher fish counts can lead to higher limits. AR-47206–11; Dkt. 34, ¶¶19-20 (Lyons Decl.).

long-term benefit to SRKW. Dkt. 127-2, ¶9 (Third Lacy Decl.) Conversely, even a single season closure will devastate Southeast Alaska.

IV. Keeping the Southeast Alaska Chinook troll fishery open is in the public interest.

The public interest supports a stay because the public interest favors saving the communities of Southeast Alaska from certain devastation.

Moreover, Congress has not remained silent on this issue. “Congress funds the prey increase program every year with an understanding that the program will both increase prey abundance and enable certain Alaska and Pacific Northwest fisheries to continue, albeit at a reduced level.” Dkt. 162, at 3 (Amici Congr. Deleg. Br.). In doing so, Congress recommit to the Treaty goals: “to balance the interests of fisheries, protected species, and the rights and obligations of impacted states, countries, and tribes.” *Id.* at 4. The district court undermined Congress’s Treaty goals by vacating the ITS. *Id.* at 7. The district court’s vacatur of the portion of the ITS covering the Southeast Alaska Chinook summer and winter troll fishery is contrary to the public interest.

CONCLUSION

For the above reasons, this Court should stay the district court’s order that partly vacated the ITS.

RESPECTFULLY SUBMITTED May 26, 2023.

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CERTIFICATE OF COMPLIANCE

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s/Laura Wolff

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY,
Plaintiff/ Appellee,

v.

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

and

ALASKA TROLLERS ASSOCIATION, and STATE OF ALASKA,
Defendant-Intervenors/ Appellants

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

**FEDERAL DEFENDANTS' RESPONSE SUPPORTING
THE STATE OF ALASKA'S MOTION FOR A STAY PENDING APPEAL**

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GLOSSARY

AR	Administrative Record
ESA	Endangered Species Act
EEZ	Exclusive Economic Zone
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
PST	Pacific Salmon Treaty
SA	State Appendix Attached to Motion for a Stay in the Ninth Circuit
SEAK	Southeast Alaska
SRKW	Southern Resident killer whales

INTRODUCTION

The Endangered Species Act (“ESA”) protects the threatened Chinook salmon and the endangered Southern Resident killer whale. The salmon is prey for the whale, meaning that Alaska’s management of the Chinook salmon fisheries 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. NMFS then issued an incidental take statement exempting take of threatened salmon and endangered killer whales associated with the Chinook salmon commercial troll fisheries from ESA liability, which enabled the fisheries to operate consistently with the ESA subject to limitations.

The district court concluded that NMFS’s biological opinion was lacking in certain respects. But Alaska’s motion for a stay pending appeal does not require the Court to determine if that conclusion was correct. The motion instead 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. Unless stayed by this Court, that remedy disposition will have the effect of shuttering Alaska’s commercial Chinook salmon winter and summer troll fisheries, with devastating economic impacts and only small and uncertain benefits to killer whales.

This Court should enter a stay pending appeal because Alaska has shown that it is likely to succeed on the merits of its appeal, that it will suffer irreparable harm

absent the stay, and that the balance of the equities and the public interest favor the stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

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 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. *Id.*; 50 C.F.R. § 402.14(a); *see generally* 50 C.F.R. Pt. 402. Where NMFS itself proposes to take an action that may affect listed species, NMFS is both the action and consulting agency. If the action under consultation is “likely to adversely affect” listed species or critical habitat, the agencies must engage in formal consultation, which culminates in the consulting agency issuing a biological opinion. *Id.* § 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.*

ESA Section 9 separately prohibits the “take” (*i.e.*, harassment, harm, hunting, trapping, capturing, killing) of a listed species by any person. 16 U.S.C. §§ 1538(a)(1)(B), 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,” the agency issues along with its biological

opinion an “incidental take statement” that identifies the extent of anticipated 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). Take in compliance with the incidental take statement is exempt from Section 9’s prohibition. *Id.* § 1536(o).

2. The National Environmental Policy Act

The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, establishes a process for federal agencies to consider the environmental impacts of their proposed actions. *Vt. Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 558 (1978). NEPA imposes procedural, not substantive, requirements. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Under NEPA, a federal agency must prepare an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

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 (“EEZ”), which extends from the seaward boundary of each coastal state to 200 nautical miles from the coastline. 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 by Regional Fishery Management Councils. *Id.* § 1854(a). States can regulate fishing in the EEZ when the fishery management plan delegates management

to the State and when the State's regulations follow that plan. *Id.* § 1856(a)(3)(B). As relevant to this case, Alaska has been delegated authority to regulate the Chinook salmon fisheries in the EEZ. SA-608 (AR-47198).

B. Southern Resident killer whales and Chinook salmon

Southern Resident killer whales are a distinct population segment of killer whales found in the coastal and inland waters of the Pacific Northwest, mostly off the coast of British Columbia, Washington, and Oregon. They were listed as an endangered species subject to the ESA's protection in 2005. SA-686-88 (AR-47276-78). These killer whales face various threats, including limits on the quantity and quality of prey, toxic chemicals, oil spills, vessels, and sound. SA-692-700 (AR-47282-90).

Chinook salmon serve as the Southern Resident killer whale's primary source of prey. Chinook salmon spawn and rear in freshwater and migrate to the ocean, where they mature. SA-614 (AR-47204). They travel substantial distances, spawning in the Pacific Northwest and migrating back through Alaskan and Canadian waters. Most mature in 3-5 years and return to their spawning ground in 4-5 years. *Id.*; SA-262 (Dkt. No. 133-2, Third Barre Decl. ¶ 12). NMFS has listed certain populations (known as "evolutionarily significant units") of Chinook salmon under the ESA, 16 U.S.C. § 1532(16). SA-628 (AR-47218). Hatchery-produced salmon—i.e., salmon raised in a hatchery and then released to the wild—provide a "significant component of the salmon prey base returning to watersheds within" the Southern Resident killer whale's range. SA-692-93 (AR-47282-83); SA-696 (AR-47286).

Because of migratory patterns, fish that originate in the United States are often caught by those fishing in Canada, and vice versa. SA-604, 614-16 (AR-47194, AR-47204-06). To help manage conflicts that arose from this dynamic, the United States and Canada signed the Pacific Salmon Treaty in 1985, which established a management framework for Pacific salmon and set upper limits on Chinook salmon harvest. SA-604-05 (AR-47194-95); 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 fishing regime in 2019 (the “2019 Agreement”), which was included in Chapter 3, Annex IV of the Treaty and set annual harvest limits for a ten-year period. 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. SA-622 (AR-47212).

C. The 2019 Biological Opinion

In 2019, NMFS issued a biological opinion that considered the combined effects of three 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). SA-603-14 (AR-47193-204). The three actions are: (1) the delegation of management authority to Alaska over salmon fisheries in federal waters off Alaska’s coast; (2) Federal funding of Alaska’s

implementation of the Treaty; and (3) Federal funding of a conservation program designed to benefit threatened Chinook salmon and killer whales.

One component of the conservation program—the prey increase program—sought to release hatchery-raised salmon into the wild to serve as additional prey for the killer whale. The prey increase program was estimated to result in the release of millions of hatchery-raised young salmon per year to increase the availability of prey for killer whales. SA-612-13 (AR-47202-03). 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 level. NMFS would then assess the future, site-specific projects that actually received funding once the specifics of those projects became known, to determine whether the projects are adequately covered by an existing biological opinion or require additional consultation. SA-612-13 (AR-47202-03).

The biological opinion concluded that the three actions under consideration were not likely to jeopardize the continued existence of either the Chinook salmon or the Southern Resident killer whale. SA-927 (AR-47517).

The biological opinion also included an incidental take statement that exempted take resulting from the Southeast Alaska fisheries up to the levels of annual catch allowed by the 2019 Agreement. 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 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 identified. SA-928-29 (AR-47518-19). Consistent with regulations, NMFS did not exempt take associated with the prey increase program because it was evaluated at a programmatic level. *See* 50 C.F.R. §§ 404.2, 402.14(i)(6). NMFS instead explained that it would address any take associated with the prey increase program in site-specific consultations. SA-929 (AR-47519).

NMFS did not specifically analyze under NEPA the effects of either the incidental take statement included in the biological opinion 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 specific hatchery programs implementing the larger program. SA-411 (Dkt. No. 133-3, Third Purcell Decl. ¶ 5); Federal Exhibit (“FE”) 1-3 (Dkt. No. 183-3, Third Purcell Decl. Attachment 2); FE-20-22, 38-41 (Dkt. No. 183, Fourth Purcell Decl. ¶¶ 9-11 and Attachment 2).

D. Proceedings below

Plaintiff Wild Fish 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, which report the district court adopted in full in August 2022. Dkt. Nos. 111, 122. The court found that NMFS’s finding of no-

jeopardy 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. Dkt. No. 111 at 25, 33-34.

Specifically, the district court found that NMFS erroneously relied on the anticipated effects of the prey increase program to conclude that the actions addressed in the biological opinion as a whole 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. *Id.* at 28-31. The court 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 the Chinook salmon (which the Conservancy believes may be negative). *Id.* at 31-33. The court also held that NMFS should have analyzed under NEPA the effects of both the issuance of the incidental take statement and the prey increase program under NEPA. *Id.* at 34-38.

Remedy proceedings followed. In December 2022, the magistrate judge issued a report and recommendation recommending partial vacatur of the biological opinion to remedy the ESA and NEPA violations that the district court had identified at summary judgment. Dkt. No. 144. On May 2, 2023, the court adopted the report in full. Dkt. No. 165. The parties presented evidence to the court demonstrating both that vacating the incidental take statement would cause devastating harm to the

fisheries and that the previously-uncertain prey increase program had definitively materialized since 2019. *See* Dkt. Nos. 133-36, 149. Nevertheless, the court vacated 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.” Dkt. No. 144 at 2.

Alaska, 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 from commercial fisheries. 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. Dkt. No. 193. Alaska moved for a stay pending appeal in this Court the same day. The Conservancy has since filed its own motion in this Court, which NMFS plans to address in a separate filing.

REASONS FOR GRANTING A STAY

A stay pending appeal requires a showing that Alaska is likely to succeed on the merits of its appeal, will suffer irreparable harm while the appeal is pending if the stay is not granted, and that the balance of the equities and the public interest favor the

stay. *Nken*, 556 U.S. at 434.¹ Because these requirements are met, the Court should grant Alaska’s request for a stay.

I. Alaska is likely to succeed on the merits of its appeal because the decision to vacate was an abuse of the district court’s discretion.

The merits argument presented in Alaska’s motion concerns the district court’s selection of a remedy. A district court’s decision to vacate rather than remand agency action is subject to review for abuse of discretion. *Cachil Debe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1082 (9th Cir. 2010). Although the abuse of discretion standard is “highly deferential to the district court,” reversal is required where the district court makes an error of law or where this Court is “convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.” *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012).

This Court is likely to find that the district court abused its discretion when it vacated the portion of the incidental take statement applicable to the winter and summer seasons of the Chinook commercial troll fisheries in Southeast Alaska.

A. The district court misapplied the relevant standards.

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*

¹ This Court has stated that an injunction may also be appropriate if the movant shows “serious questions” on the merits, but only if it carries its burden on the other factors and if the balance of hardships “tips sharply” in its favor. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). For the reasons discussed below, the State meets either standard.

Service, 907 F.3d 1105, 1121 (9th Cir. 2018), this Court has also held that it is not mechanically “required to set aside every unlawful agency action.” *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). A court’s decision to vacate an agency action remains an equitable remedy, which should be granted only in accordance with traditional equitable considerations. *Nat’l Wildlife Fed’n*, 45 F.3d at 1343; *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”); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (explaining that an injunction “should issue only if the traditional four-factor test is satisfied” and rejecting the “presum[ption] that an injunction is the proper remedy for a NEPA violation except in unusual circumstances”—“[n]o such thumb on the scales is warranted”).²

This Court set forth the standard that it applies when determining whether to vacate agency action in *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). There, the Court explained that the question whether to vacate “depends on how serious the agency’s errors are and the disruptive consequences of an interim change that may itself be changed.” *Id.* at 992 (quotation omitted). Other decisions have explained that, to evaluate the seriousness of an agency’s errors, courts

² The position of the United States is that vacatur is not authorized by Section 706 of the APA. *See United States v. Texas*, No. 22-58 (S. Ct.), Gov’t Op. Br. 40-44; Gov’t Reply Br. 16-20. The federal government acknowledges that this Circuit’s precedent on APA remedies controls at this stage of the proceedings.

may 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 Coal. v. EPA*, 966 F.3d 893, 929 (9th Cir. 2020) (quotation omitted). Courts may also consider the consequences to the environment. *Id.*; *see, e.g., California Communities*, 688 F.3d at 992.

Here, the district court abused its discretion when it erroneously assumed that a court should presumptively vacate an agency’s action when that action violates the APA, rather than evaluate whether vacatur is an appropriate remedy under the traditional factors that govern equitable relief. *See, e.g., Dkt. No. 144* at 14, 24, 30. *California Communities* nowhere stated that the government must overcome a presumption in favor of vacatur. And while various opinions of this Court and the district courts refer to vacatur as the “normal” or “presumptive” APA remedy, vacatur remains an equitable remedy and therefore should be granted only if the relevant equitable considerations favor relief. *See Nat’l Wildlife Fed’n*, 45 F.3d at 1343; *California Communities*, 688 F.3d at 992. This is particularly true when that relief substantially affects entities beyond the defendant federal agency. To the extent that the district court put a thumb on the scale in favor of vacatur, rather than neutrally considering the specific facts before it, that was error.

B. Vacatur is not warranted on this record.

The district court abused its equitable discretion by ignoring or giving unreasonably little weight to certain facts in the judicial record.

In concluding that the agency's errors were serious enough to require vacatur, the district court abused its discretion by failing to account for developments that arose since the issuance of its decision finding that the agency had violated the ESA and NEPA. One of the district court's central reasons for finding an ESA violation was the perception that NMFS relied on the anticipated effects of the prey increase program despite uncertainties about future funding and details of implementation. Dkt. No. 144 at 26 (citing Dkt. No. 111 at 27-34). But regardless of whether the details of that program were sufficiently concrete for the agency to rely on them when it issued the biological opinion in 2019, the record before the district court at the remedy phase showed that in fact the prey increase program has been funded and implemented each year since 2020. Dkt. No. 144 at 31; SA-417-19 (Dkt. No. 133-4, Second Rumsey Decl. ¶¶ 7-9); SA-261-67 (Dkt. No. 133-2, Third Barre Decl. ¶¶ 11, 13, 22). The implementation of the prey increase program as anticipated has effectively cured (or at a minimum, reduced the significance of) any error on the part of NMFS in relying on the program to reach its no jeopardy determinations in the 2019 biological opinion. 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." Dkt. No. 144 at 26.

The district court also abused its discretion by concluding that the legal errors it identified were serious enough to warrant vacatur, rather than remand without vacatur, simply because the ESA requires the agency to ensure against the jeopardy of

listed species, the agency did not comply with the ESA or NEPA, and killer whales remain at a high risk of extinction. *Id.* at 27-28. While it is certainly possible 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 failed to consider whether the specific errors it found here would exacerbate the killer whale's condition during the remand, given that the prey increase program has been funded and operational for the past three years. As explained above, the identified legal deficiency no longer fits the remedy. Moreover, for every hatchery program receiving funding under the prey increase program, NMFS has since 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. SA-411 (Dkt. No. 133-3, Third Purcell Decl. ¶ 5); Federal Exhibit ("FE") 1-3 (Dkt. No. 183-3, Third Purcell Decl. Attachment 2); FE-20-22, 38-41 (Dkt. No. 183, Fourth Purcell Decl. ¶¶ 9-11 and Attachment 2). Contrary to the court's conclusion, Dkt. No. 144 at 36, this analysis suggests that NMFS will be able to offer better reasoning on remand in support of its decision in the 2019 biological opinion and adopt the same decision in response to the district court's remand.

Beyond the district court's analysis of whether the errors it identified were sufficiently serious, the court independently abused its discretion in both too heavily discounting the disruptive consequences of vacatur and overstating the benefits to whales from vacatur. Dkt. No. 144 at 30.

By explaining that “vacatur of the incidental take statement does not result in a prohibition on fishing in and of itself in federal or state waters,” Dkt. No. 193 at 3-4, the district court appears to have misunderstood the sweeping consequence of its decision, which effectively closes the winter and summer commercial Chinook salmon troll fisheries in Southeast Alaska. Without exemption from Section 9 take in the incidental take statement, the State cannot open the fisheries without risking severe civil and criminal penalties. *See* Dkt. No. 134 at 7; Dkt. No. 94 at 24. Thus, as the record before the district court demonstrated, the vacatur will lead to the loss of \$29 million each year in an industry that helps ensure the livelihoods of thousands of people. *See* SA-249-54 (Dkt. No. 133-1, Keaton Decl. ¶¶ 31-40); FE-55-58 (Dkt. No. 184, Harrington Decl. ¶¶ 34-40). There are over one thousand active permit holders who participate in the troll fisheries annually, and many participants are small-scale participants who rely heavily on income from the troll fisheries. FE-54, 58 (Dkt. No. 184, Harrington Decl. ¶¶ 32, 41). The troll fisheries support over 23 communities in Southeast Alaska, most of which are small and isolated, some of which are Alaska Native communities, and some of which depend heavily on the commercial troll fisheries. *Id.* ¶ 41. Businesses may close and jobs will be lost. SA-438-39 (Dkt. No. 136, Second Vincent-Lang Decl. ¶¶ 4-7); *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.”).

The district court further abused its discretion when evaluating the benefits of vacatur. NMFS presented evidence supporting its expert conclusion that operation of

the fisheries pending appeal will not jeopardize the Southern Resident killer whale. SA-260-61 (Dkt. No. 133-2 (Third Barre Decl.) ¶ 10); *Nat'l Wildlife Federation v. NMFS*, 886 F.3d 803, 819 (9th Cir. 2015) (while “[s]howing an extinction-level threat to listed species is not required,” plaintiffs nonetheless must demonstrate “a definitive threat of future harm” to the species) (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) (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.”). NMFS estimated that fishing in *all* Southeast Alaska fisheries—of which the fisheries at issue here are only a part—would reduce prey availability for killer whales by an average of 0.5% in the coastal waters where whales are generally present during the winter and an average of 1.8% in inland waters where whales are generally present during the summer. SA-260 (Dkt. No. 133-2, Third Barre Decl. ¶ 9); FE-09 (Dkt. No. 182, Fourth Barre Decl. ¶ 11); *see* SA-850-51 (AR-47440-41); SA-915 (AR-47505). The reductions in prey expected to result from only the winter and summer commercial Chinook salmon troll fisheries would necessarily be lower. Additionally, 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. FE-53-54 (Dkt. No. 184, Harrington Decl. ¶ 31). NMFS and state, local, and tribal partners are also taking efforts to minimize impacts to killer whales and promote recovery, such as the imposition of mandatory and voluntary vessel measures that reduce interference with killer whale foraging, cleaning up or reducing inputs of

harmful contaminants, conservation hatchery programs, and habitat restoration projects. SA-266-67 (Dkt. No. 133-2, Third Barre Decl. ¶ 22); SA-918 (AR-47508) (“starting in 2018, additional protective measures” “are being implemented to reduce impacts from fisheries and vessels in key foraging areas”).

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],” Dkt. No. 144 at 29, 34. But the small reductions in prey availability resulting from operation of the fisheries mean that the (uncertain) benefits of closing the fisheries 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,” Dkt. No. 144 at 31, available to killer whales over the next two years. *See* SA-260-61 (Dkt. No. 133-2, Third Barre Decl. ¶ 9-10); FE-58 (Dkt. No. 184, Harrington Decl. ¶ 41); FE-6-7, 11 (Dkt. No. 182, Fourth Barre Decl. ¶¶ 7, 15); FE-20, 28-29 (Dkt. No. 183, Fourth Purcell Decl. ¶¶ 6-8 and Attachment 1). NMFS also plans to complete its new analyses pursuant to the district court’s merits decision no later than November 2024, Dkt. No. 150 ¶ 5, which means that any impacts resulting from the operation of the commercial Chinook salmon troll fisheries during the remand period and pending

appeal would be short lived. The Conservancy is free to challenge any new analysis completed by NMFS.

In contrast, the record is unequivocal that, during that same time frame, individuals and businesses in Southeast Alaska will be irreparably harmed by vacatur of the incidental take statement. *See California Communities*, 688 F.3d at 993-94 (finding vacatur inappropriate where vacatur would halt construction of a “much needed power plant” that employed 350 workers, resulting in “economically disastrous” impacts); SA-438-39 (Dkt. No. 136, Second Vincent-Lang Decl. ¶¶ 4-7); *Am. Passage Media Corp.*, 750 F.2d at 1474; *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). The severity of the economic impact weighs heavily against vacatur and the district court failed to give those grave harms sufficient weight, particularly considering the limited benefit that would accrue to killer whales resulting from the closure and the likelihood that NMFS will be able to adopt the same approach on remand.

II. Alaska has shown a likelihood of irreparable harm while this appeal is pending, and the balance of equities and the public interest favor a stay.

Alaska must also show that it will be irreparably harmed absent a stay, that a stay pending appeal would serve the public interest, and that the balance of equities is in its favor. *Cf. Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (discussing standard for preliminary injunction).

For the same reasons that the district court abused its discretion in elevating impacts to killer whales and concluding that vacatur would not be too disruptive, Alaska can show that a stay is in the public interest and that irreparable harm will result in its absence. There is no evidence that economic disruptions to those engaged in fishing in Southeast Alaska may be repaired, and the impacts to killer whale prey abundance will be minimal. *See supra* pp. 15-18.

A stay is also in the public interest because, without it, the complex regulatory framework for managing fisheries and broader efforts to promote the recovery of ESA-listed species will be frustrated. Within that framework, 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. Vacating the incidental take statement would interfere with this regulatory framework and would not engender public support for killer whale recovery efforts. NMFS, with its regional partners, has worked very hard to promote actions that will recover killer whales, one of which is the prey increase program that balances the coastwide fisheries that target salmon allowed under the Treaty and the prey needs of killer whales. The remedy frustrates those efforts by creating tension between killer whale conservation efforts and fishing communities. Pitting an endangered species against unnecessary economic dislocation harms NMFS, and more importantly, the endangered Southern Resident killer whales. *See* FE-16-17 (Dkt. No. 182, Fourth Barre Decl. ¶¶ 25, 27).

Congress has made decisions to fund the prey increase program against the backdrop of the ESA and the endangered status of Southern Resident killer whales, and with the understanding that commercial Chinook salmon fisheries coastwide will continue to operate under the rubric of the 2019 Agreement. *See* SA-417-19 (Dkt. No. 133-4, Second Rumsey Decl. ¶¶ 7-9); *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). Indeed, that was the very reason Congress funded, and continues to fund, the prey increase program. “Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.” *United States v. Oakland Cannabis Buyers’ Co-operative*, 532 U.S. 483, 497 (2001).

CONCLUSION

For all these reasons, Alaska’s motion for a stay pending appeal should be granted.

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DJ# 90-8-6-08342

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion response contains 5,198 words, excluding the items exempted by Cir. R. 27-1(1)(d). The type size and typeface comply with Fed. R. App. P. 27(d)(1)(E).

s/ Thekla Hansen-Young
THEKLA HANSEN-YOUNG

Counsel for Federal Defendants-
Appellants

LIST OF FEDERAL EXHIBITS

Exhibit No.	Document Name	Page No.
1	Docket No. 133-3, Attachment 2, Third Declaration of Allyson Purcell, National Marine Fisheries Service, West Coast Region (October 3, 2022).	FE-01
2	Docket No. 182, Fourth Declaration of Lynne Barre, National Marine Fisheries Service, West Coast Region (May 22, 2023)	FE-04
3	Docket No. 183, Fourth Declaration of Allyson Purcell, National Marine Fisheries Service, West Coast Region (May 22, 2023)	FE-18
4	Docket No. 184, Declaration of Gretchen Harrington (May 22, 2023)	FE-42

Third Purcell Declaration

Attachment 2

Attachment 2, Third Purcell Declaration.

PST Funded SRKW hatchery production for FY2020 - FY2022 and NMFS' corresponding ESA and NEPA evaluations.

Program	Species	Operator	ESA Coverage	NEPA Coverage
Columbia River Basin				
Little White Salmon NFH Carson NFH	Spring Chinook	USFWS	Biological Opinion: USFWS Artificial Propagation Programs in the Lower Columbia and Middle Columbia River (Attachment 2a)	Environmental Impact Statement: Mitchell Act. Available at: https://www.fisheries.noaa.gov/resource/document/final-environmental-imp-act-statement-inform-columbia-river-basin-hatchery
Spring Creek NFH	Fall Chinook (tule)			
Little White Salmon NFH	Fall Chinook (brights)			
Dworshak NFH	Spring Chinook	Nez Perce/USFWS	Biological Opinion: Five Clearwater River Basin Spring/Summer Chinook Salmon and Coho Salmon Hatchery Programs (Attachment 2b)	
Wells	Summer Chinook	Douglas PUD	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2c)	
East Bank		Yakima Nation	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs. (Attachment 2c)	
Marion Drain				
Umatilla	Fall Chinook (URB)	Confederated Tribes of the Umatilla Indian Reservation/ODFW	Biological Opinion: Umatilla River Spring Chinook Salmon, Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2d)	
Bonneville	Fall Chinook (tule)	ODFW	Biological Opinion: Mitchell Act Final Environmental Impact Statement preferred alternative and administration of Mitchell Act hatchery funding (Attachment 2e)	
SAFE	Spring Chinook	ODFW	Biological Opinion: Select Area Fisheries Enhancement (SAFE) Spring Chinook	

			Salmon and Coho Salmon Programs (Attachment 2f)	
Puget Sound Region				
Issaquah	Fall Chinook	WDFW	<p>Biological Opinion: Five Hatchery Programs for Salmon in the Lake Washington Drainage (Attachment 2g)</p> <p>Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)</p>	<p>Environmental Assessment: Lake Washington Basin Hatcheries Available at: https://media.fisheries.noaa.gov/2022-07/FINAL_Lake_Washington_EA_FONSI_BAT-2.15.2022_07262022.pdf</p>
Soos Creek-Palmer Pond	Fall Chinook	WDFW	<p>Biological Opinion: Ten Hatchery Programs for Salmon and Steelhead in the Duwamish/Green River Basin (Attachment 2h)</p> <p>Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)</p>	<p>Environmental Impact Statement: Duwamish-Green Hatcheries Available at: https://www.fisheries.noaa.gov/resource/document/final-environmental-impact-statement-eis-duwamish-green-hatcheries</p>
Tulalip Bernie Gobin	Summer Chinook	Tulalip Tribe	<p>Biological Opinion: Seven Hatchery and Genetic Management Plans for Snohomish River basin Salmon (Attachment 2i)</p> <p>Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)</p>	<p>Supplemental Environmental Assessment: Snohomish Hatcheries Available at: https://media.fisheries.noaa.gov/2022-09/SnohomishHatcheries_SupplEA_FONSI_20210506.pdf</p>
University of Washington	Fall Chinook	Muckleshoot Indian Tribe	<p>Biological Opinion: Five Hatchery Programs for Salmon in the Lake Washington Drainage (Attachment 2g)</p> <p>Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)</p>	<p>Environmental Assessment: Lake Washington Basin Hatcheries Available at: https://media.fisheries.noaa.gov/2022-07/FINAL_Lake_Washington_EA_FONSI_BAT-2.15.2022_07262022.pdf</p>

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

_____)
)
WILD FISH CONSERVANCY,)
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Plaintiff,)
)
v.)
)
JENNIFER QUAN, <i>et al.</i> ,)
)
Defendants,)
)
and)
)
ALASKA TROLLERS ASSOCIATION,)
)
Defendant-Intervenor)
)
and)
)
STATE OF ALASKA,)
)
Defendant-Intervenor.)
_____)

Case No. 2:20-cv-417-RAJ-MLP

FOURTH DECLARATION OF
Lynne Barre,
National Marine Fisheries Service,
West Coast Region

I, Lynne Barre, declare and state as follows:

Introduction

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1. I am currently a Branch Chief in the Protected Resources Division of the National Marine Fisheries Service (NMFS), West Coast Region (WCR) and my duties have included leading the recovery program for Southern Resident killer whales (SRKW) since 2002.
2. My responsibilities in my current and previous positions with NMFS have included implementation of the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA). Since 2002 I have worked on the endangered listing of the SRKW, designated SRKW critical habitat, finalized a SRKW Recovery Plan and implemented actions to conserve and recover SRKW. Since SRKWs were listed under the ESA in 2005, I've worked on ESA section 7 consultations for a variety of projects, including fisheries actions, analyzing effects on SRKW and their designated critical habitat. In 2018-2019 I served as a member of the Washington State Orca Task Force, participating in Task Force meetings and threat-based workgroup meetings on prey, vessels/noise and contaminants.
3. In my current role as a Branch Chief, I oversee a team of employees working on implementation of a variety of MMPA and ESA programs, including completing section 7 ESA consultations for SRKW and other listed species, close collaboration with NMFS science centers and other research partners, and

1 coordinating with internal and external salmon recovery and management
2 programs.

- 3 4. In preparation for this declaration I reviewed plaintiff's Motion for Injunction
4 Pending Appeal and the State of Alaska's Motion for a Partial Stay Pending
5 Appeal. For previous declarations, I reviewed the declarations submitted with
6 Plaintiffs' filings, including the declarations of Dr. Robert Lacy and Dr. Deborah
7 Giles. I am familiar with the scientific literature regarding SRKW.
8

9 **The Effect of Plaintiff's Remedies on Southern Resident Killer Whales.**
10

- 11 5. I was asked to provide my opinion on the effect of vacating portions of the 2019
12 Opinion on Southeast Alaska (SEAK) salmon fisheries (2019 Opinion) and
13 shutting down NMFS's prey increase program for SRKW.
14
- 15 6. My previous declarations have addressed these topics in detail and summaries of
16 key points are included here. The motions do not alter my conclusions and
17 opinions in my first three declarations regarding the impacts on SRKWs of
18 closing SEAK fisheries and shutting down the prey increase program. Nor is there
19 any new scientific information or data that alters my previous conclusions.
20
- 21 7. As previously stated in the 2019 Opinion and based on our analysis, the prey
22 reductions from the SEAK troll fisheries, particularly in the most important
23 locations and seasons for the whales, are small and, considered in concert with the
24 prey increase program, will not jeopardize their survival or recovery. Closing the
25 SEAK fishery will provide only a small benefit to SRKWs. In contrast, shutting
26 down the prey increase program will have a significant negative effect on
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1 SRKWs. The prey increase program, designed to support the prey base for
2 SRKWs and as implemented beginning in 2020, provides a meaningful increase
3 in prey abundance and benefits SRKWs. Closing the SEAK troll fisheries and
4 shutting down the prey increase program will likely result in a net reduction in
5 prey available to the whales.
6

7 8. As described in my First Declaration, the relationship between SRKW and their
8 prey is complex, and our understanding of that relationship has been evolving and
9 is subject to considerable scientific uncertainty. Plaintiff's expert, Dr. Robert
10 Lacy, reported effects from the SEAK fisheries on SRKW using his Population
11 Viability Analysis (PVA) model; the primary assumption in this model is based
12 on outdated correlations between Chinook abundance and SRKW fecundity and
13 survival. Based on my review of recent scientific review and guidance, and my
14 understanding of the complexity and uncertainty surrounding the SRKW/prey
15 relationship, I find the plaintiff's estimate of the reduction in prey available due to
16 SEAK fisheries is based on an outdated relationship quantifying specific changes
17 in SRKW reproduction or survival metrics from specific Chinook salmon
18 abundances and therefore presents an inaccurate assessment of the effects on
19 SRKWs.
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22 9. The Pacific Fishery Management Council (PFMC), an entity involved with
23 management of ocean fisheries, formed an Ad Hoc Workgroup, which included a
24 scientist with SRKW PVA modeling expertise, to evaluate the effects of Council-
25 managed fisheries on SRKW. The Workgroup made efforts to quantify the
26 relationships described above. In their 2020 report to the Council the Workgroup
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1 described their analysis, results, and characterized the uncertainty for both
2 abundance and demographic rates (PFMC 2020, Attachment B to Second
3 Declaration of Allyson Purcell). They found the previous relationships between
4 Chinook salmon abundance and SRKW demographic rates, which Dr. Lacy relies
5 on in his model, have weakened or are not detectable, and therefore we do not
6 rely on them in our analysis. That is, the relationship that Dr. Lacy relies on to
7 support his opinions is no longer the best available science. Prior to the Ad Hoc
8 Workgroup, an expert panel (Hilborn et al. 2012) also cautioned against
9 overreliance on correlative studies or implicating any particular fishery in
10 evaluating the status of SRKWs. The small SRKW population size limits the
11 ability to detect a relationship to input into a PVA, the relationships are likely not
12 constant over time, and we acknowledge that multiple factors, not just prey
13 abundance, may be impacting the vital rates of the whales.

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16 10. Aside from the problematic quantitative relationship between Chinook salmon
17 abundance and SRKW population parameters used in the Lacy model, Plaintiff's
18 estimate of a 4.8% increase in prey from closing the winter and summer troll
19 fisheries and the general benefits to the SRKW population is oversimplified and
20 overstates the benefits that would likely be realized by the whales. This is
21 particularly true if the fishery is closed for just one year when Chinook abundance
22 is not particularly low. Both the Chinook salmon prey and SRKW predators are
23 highly mobile. Thus, not all of the Chinook salmon caught in SEAK troll fisheries
24 would migrate south into SRKW habitat and those that would migrate south
25 would not all survive or be intercepted by the whales.
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- 1 11. The analysis of SEAK fisheries effects on SRKW and conclusions in our 2019
2 Opinion considered overall average prey reductions, however, we gave weight to
3 a more detailed seasonal and spatial analysis for three time periods in both coastal
4 and inland habitat areas. When taking SRKW seasonal movements into
5 consideration and times and locations when Chinook salmon are expected to
6 become potential prey for SRKW (i.e., coastal areas during Oct-Apr, inland areas
7 during July-Sep), we estimated that prey reductions from all SEAK salmon
8 fisheries that are part of the action, not just summer and winter troll fisheries,
9 would be much lower: an average of 0.5% in the coast during winter (up to 1.1%),
10 and an average of 1.8% in the inland during summer (up to 2.5%) [see 2019
11 Opinion pp. 248-249, 313]. Prey reductions from the summer and winter Chinook
12 commercial troll fisheries, which are the subject of the court's vacatur, would be
13 even lower than the estimates for all of the SEAK salmon fisheries.
14
- 15 12. NMFS concluded in the 2019 Opinion that SEAK salmon fisheries would cause
16 adverse effects to the whales by removing prey from their habitat, but not cause
17 injury or mortality that would jeopardize the SRKW population. The conclusions
18 were based on our assessment of prey reductions for all SEAK salmon fisheries,
19 focused on the times and areas most important to the whales, and relied on
20 multiple lines of evidence about the SRKWs' diet, their energy needs, Chinook
21 salmon abundance, how the fisheries will reduce available prey, and how the
22 whales might change their behavior. In addition to the magnitude of prey
23 reductions, we considered the context of Chinook salmon abundance levels,
24 including natural variability in ocean conditions, and also other actions that are
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1 being taken to improve the whales' ability to survive and recovery. We also relied
2 on the conservation funding program described in the 2019 Opinion.

3 13. The conservation funding program includes funding for hatchery production to
4 benefit SRKW by increasing Chinook abundance (prey increase program),
5 conservation hatchery programs, and habitat restoration projects to support
6 vulnerable populations of Puget Sound Chinook salmon with the added benefit of
7 increasing SRKW prey abundance. Hatchery produced Chinook salmon support
8 the prey base for the whales since the whales do not distinguish between hatchery
9 produced or wild fish. As described in the 2019 Opinion, hatchery fish often
10 contribute to the salmon stocks consumed by the whales (Hanson et al. 2010). The
11 design of the prey increase program for SRKW focuses on achieving a
12 "meaningful increase" in prey abundance with broad distribution to supplement
13 prey where it is most important to whales (i.e. coastal areas during Oct-Apr,
14 inland areas during July-Sep) as those times and areas were identified as most
15 limiting for prey availability.
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19 14. In the 2019 Opinion we acknowledged the initial delay in increased prey until 3-5
20 years following the first years of implementation, while hatchery fish mature and
21 then become available to the whales as prey in times and areas that overlap with
22 and are important to the whales. We also recognized that not every Chinook
23 salmon produced would go directly to SRKWs, as there are other factors and
24 predators driving salmon mortality, and in the 2019 Opinion we acknowledged
25 that our ability to fully understand the efficacy and predict performance of the
26 program was limited. We are not able to assign increases in prey availability
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1 resulting from the hatchery funding as direct offsets for any particular fishery
2 managed under the Pacific Salmon Treaty agreement (SEAK, U.S. West Coast or
3 Puget Sound) because of the variability in annual reductions of available prey
4 from those fisheries. However, even with these limitations, based on the best
5 available science, we concluded that the prey increase program would provide a
6 meaningful increase in prey abundance and benefit SRKWs. Since the 2019
7 Opinion my confidence in the benefits of the prey increase program for SRKW
8 has only grown.
9

10 15. There has been significant progress on funding and implementation of the prey
11 increase program for the benefit of SRKWs. The prey increase program
12 considered in the 2019 Opinion is being implemented (see Fourth Purcell
13 Declaration) and we anticipate increases in prey abundance starting in 2023, as
14 we reach the 3-5 year maturation time frame following the first year of
15 implementation.
16

17 16. We will continue monitoring the number of smolts produced by the hatchery
18 programs funded by the prey increase program and other partners, as well as the
19 increases in estimated levels of adult Chinook salmon prey available to the
20 whales, to evaluate the efficacy of the program in achieving a meaningful increase
21 in prey abundance.
22

23 17. The overall abundance of Chinook salmon is variable and affected by ocean
24 conditions and the realized percent increase in prey abundance will be dependent
25 on estimates of the overall abundance of Chinook salmon each year. That is, as
26 natural abundance decreases, the effect of the prey increase program increases,
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1 and vice versa. The funded hatchery production may be most important in a year
2 in which overall Chinook abundance is low, and in such a low abundance year,
3 the percent increase resulting from the funded production may be higher.

4 Although the funded production would still make a contribution in a high
5 Chinook salmon abundance year, the percent increase would be lower if overall
6 Chinook salmon abundance is very high in any year.

8 18. In the 2019 Opinion, and also in our recent biological opinion on West Coast
9 salmon fisheries (NMFS 2021, Attachment 1), which analyzes the effects of
10 removing adult Chinook salmon prey that might otherwise be available to the
11 SRKW, as well as in the Risk Assessment completed by the Council Ad Hoc
12 Workgroup (PFMC 2020, Second Purcell Decl. Att. B), we identify that
13 reductions in prey are expected to have the greatest impacts on the whales in low
14 Chinook salmon abundance years. When prey are scarce, the SRKWs likely spend
15 more time foraging compared to periods of high prey abundance. Increased
16 energy expenditure and prey limitation can result in nutritional stress, which has
17 been linked to reduced body condition, and lower birth and survival rates. The
18 increase in abundance anticipated from the prey increase program will contribute
19 to overall Chinook abundance, and reduce the potential for SRKWs to experience
20 low abundance conditions in general.

24 19. Based on pre-season estimates of Chinook salmon abundance we are not
25 anticipating a low abundance year for the 2023-2024 fishing season. In our recent
26 analysis of impacts from Puget Sound salmon fisheries on SRKW (NMFS 2023,
27 Attachment 2), we projected the pre-season abundance estimate for Chinook
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1 salmon ages 3-5 in the Salish Sea was 706,713, which is slightly higher but
2 similar to the post-season average annual abundance estimate of approximately
3 675,393 fish for the retrospective time period of 2009-2018. We also reviewed the
4 pre-season estimate for the North of Falcon area¹ to evaluate whether Chinook
5 salmon abundance was below the threshold that would trigger additional
6 management measures to reduce fishery impacts on SRKW under Amendment 21
7 to the Pacific Fishery Management Council's Salmon Fishery Management Plan.
8 The projected North of Falcon abundance was 889,900, which is above the
9 threshold of 623,000 indicating low abundance and higher risk for SRKW (see
10 Table 5 in Salmon Technical Team Report 1: Preliminary Analysis of Tentative
11 2023 Ocean Salmon Fishery Management Measures, Attachment 3). NMFS is
12 particularly concerned with reductions in Chinook prey in years when pre-fishery
13 Chinook abundance is low relative to historical abundances; this concern drives
14 the approach taken in the PFMC's Amendment 21, and has been important in our
15 analysis of the effects of the Puget Sound fisheries on SRKW. Because projected
16 Chinook salmon abundance for Puget Sound and the North of Falcon areas is
17 expected to be close to average in 2023, we are less concerned about the impacts
18 of Chinook prey reductions resulting from the 2023 SEAK fisheries than we
19 would be if abundances were lower than average.
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27 ¹ The North of Falcon area refers to the ocean area between the U.S./Canada border and Cape Falcon, Oregon. The
28 mix of salmon stocks present in the ocean differs significantly between the areas north and south of Cape Falcon.
The Council's Workgroup concluded that Chinook abundance in the North of Falcon area is of particular importance
to SRKW.

1 20. Disrupting the prey increase program will reduce the amount of food available to
2 SRKWs and negatively impact their foraging behavior, energy balance, health and
3 reproduction, particularly in years of low abundance. If the prey increase program
4 for SRKWs is enjoined or disrupted, the hatchery production actions that have
5 been funded and implemented in 2020, 2021, and 2022, would still be expected to
6 increase prey at some level through 2027 as those fish mature; however,
7 additional hatchery production specifically targeted to benefit the SRKW could be
8 compromised in later years. Any disruption in funding would result in a gap in
9 additional prey abundance. In the absence of the intended prey increase, there
10 would be lower overall abundance of Chinook salmon and there could be an
11 elevated risk of Chinook salmon abundance falling to the low abundance levels
12 associated with increased risk to the health of the SRKWs.
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15 21. Plaintiff's declarants have asserted that prey abundance has the largest impact on
16 the population growth rate of SRKWs and that increases in prey abundance are
17 needed for SRKWs to recover, and yet disrupting the prey increase program
18 would result in reduced future abundance of prey for SRKWs. The goal of the
19 prey increase program is to help support increased prey available to SRKWs and
20 support their recovery. It is difficult to precisely estimate the increased risk to the
21 health of SRKWs from disrupting the prey increase program, but it could manifest
22 in the whales foraging for longer periods, traveling to alternate locations, or
23 abandoning foraging efforts. Changes to foraging behavior could result in
24 SRKWs not consuming sufficient prey to meet their energetic needs, which could
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1 affect the health of individual whales, reproduction and the status and growth of
2 the population, as cited in the Plaintiff's declarations and our 2019 Opinion.

3 22. As described in the Fourth Purcell Declaration, ESA consultations have been
4 completed to evaluate the potential impacts on threatened and endangered salmon.
5 Therefore, in addition to supporting recovery of SRKWs, we have concluded that
6 the hatchery production will not jeopardize survival or recovery of listed salmon.
7

8 23. In addition to the reductions in fisheries under the PST and the prey increase
9 program, we continue to work on a comprehensive recovery program that
10 addresses all of the primary threats to SRKW, including vessel disturbance and
11 contaminants, and not only prey. We also acknowledge that all of the threats are
12 potential limiting factors, not just prey availability, and that they are
13 interconnected, as vessels and sound can impact the whales' ability to forage,
14 access, and consume the prey that are available in their habitat. NMFS Recovery
15 Plan and other documents such as the Washington State Orca Task Force (Task
16 Force) 2018 and 2019 reports and recommendations, and the Canadian Recovery
17 Plan for SRKW, also acknowledge the importance of and interactions between
18 multiple threats.
19
20

21 24. Conservation and recovery of SRKW and their Chinook salmon prey is complex
22 and challenging because there are multiple interacting threats over large
23 geographic and transboundary landscapes and we have endangered predators
24 relying on prey, some of which are also threatened or endangered. Both SRKW
25 and Chinook salmon face impacts from many human activities, variable
26 oceanographic conditions, and environmental change in their vast habitats.
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28

1 Recovery programs for both species include a variety of tools and actions that can
2 have short-term or long-term benefits. Significant actions have been taken that are
3 effective in the short term and make the existing abundance of prey more
4 available and accessible to SRKW, including reductions in fisheries to protect
5 salmon and SRKW, and mandatory and voluntary vessel measures that reduce
6 interference with SRKW foraging. Other actions like cleaning up or reducing
7 inputs of harmful contaminants or recovering runs of salmon have a longer-term
8 outlook for realizing benefits to SRKWs.
9

10 25. As part of the action considered in the 2019 Opinion, the conservation programs
11 to aid Puget Sound Chinook salmon include continuing conservation hatchery
12 programs and implementing habitat restoration projects. It will likely take many
13 years before ecosystem services of the habitat are restored and they support
14 increased Chinook salmon productivity. The prey increase program for SRKW,
15 however, has already been implemented for multiple years and is increasing the
16 prey available to SRKW now. With four years of funding and implementation
17 resulting in additional prey for the whales starting in 2023, effects evaluated for
18 threatened and endangered salmon, and protections for salmon in place, it fills an
19 important gap until other longer-term actions for salmon and SRKW are
20 successful. NMFS and our Federal, State and Tribal partners recognize the
21 importance of working on actions with both short-term and long-term benefits to
22 the SRKW, including the prey increase program, to help stop the decline of the
23 endangered SRKW population and support their recovery.
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1 26. A study published in 2023 (Kardos et al. 2023, Attachment 4) provided new
2 insight into the role of genetic inbreeding in limiting the SRKW population
3 through increased mortality and reduced reproductive capacity for females with
4 shorter life spans. While the results of this study provide a new context for
5 considering actions to address the threats, including actions to increase prey
6 available to the whales, it does not change our conclusions about the importance
7 of prey to the whales, impacts of SEAK fisheries, or benefits from the prey
8 increase program.
9

10 27. Disrupting the prey increase program would result in fewer Chinook salmon
11 available to SRKW, and increase the risk for harm to SRKW through behavioral
12 and physiological impacts. Disruptions could affect the long-term support and
13 commitment needed to fund this program and provide benefits to SRKW over the
14 next decade and could negatively impact the critical partnerships and momentum
15 for recovery and conservation of SRKW and salmon. The prey increase program
16 is a critical tool to help address a primary threat to SRKW and without it there
17 will be a negative impact on the recovery program for SRKW.
18
19

20
21 I declare under penalty of perjury that the foregoing is true and correct.
22

23 Executed on May 22, 2023, in Seattle, WA.
24

25 **BARRE.LYNNE.M.** Digitally signed by
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Lynne Barre
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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

_____)
)
WILD FISH CONSERVANCY,)
)
Plaintiff,)
)
v.)
)
JENNIFER QUAN, <i>et al.</i> ,)
)
Defendants,)
)
and)
)
ALASKA TROLLERS ASSOCIATION,)
)
Defendant-Intervenor.)
)
and)
)
STATE OF ALASKA)
)
Defendant-Intervenor.)
)
_____)

Case No. 2:20-cv-417-RAJ-MLP

FOURTH DECLARATION OF
Allyson Purcell, National Marine
Fisheries Service, West Coast
Region

I, Allyson Purcell, declare and state as follows:

Introduction

1
2 1. I am currently the Division Manager for the National Marine Fisheries Service's
3 (NMFS's) West Coast Region's Sustainable Fisheries Division. I previously prepared three
4 declarations that were submitted in this matter; my first declaration was submitted on May 11,
5 2020 (First Purcell declaration) and my second declaration was submitted on May 25, 2021
6 (Second Purcell declaration); my third declaration was submitted on October 3, 2022 (Third
7 Purcell declaration).
8

9 2. Prior to taking my current position within NMFS in 2022, and beginning in 2017, I was
10 the Branch Chief for the Anadromous Production and Inland Fisheries Branch of the West Coast
11 Region's Sustainable Fisheries Division. In that position I oversaw a team of biologists, who
12 work with hatchery operators across Oregon, Washington, and Idaho to ensure their hatchery
13 programs do not jeopardize the survival and recovery of species listed under the Endangered
14 Species Act (ESA). In addition, the Anadromous Production and Inland Fisheries Branch
15 administers the Mitchell Act grant program, which provides approximately \$16 million in annual
16 funding for hatchery programs in the Columbia River Basin.
17
18

19 3. I have worked for NMFS since 2002. Since 2002, my primary duties have included
20 evaluating salmon and steelhead hatchery programs under the ESA and National Environmental
21 Policy Act (NEPA).
22

23 4. I hold a Master of Science in Fisheries and Allied Aquaculture from Auburn University
24 and a Bachelor of Science in Biology from Vanderbilt University.

25 5. In this fourth declaration, I provide an update on the Pacific Salmon Treaty's prey
26 increase program for Southern Resident killer whales (SRKWs), and respond to specific
27 allegations by the Wild Fish Conservancy in their motion for an injunction pending appeal.
28

Status of the Prey Increase Program

6. In previous declarations, I described how the prey increase program for SRKWs was implemented in fiscal year 2020, 2021 and 2022 (Second and Third Purcell Declarations). Attachment 1 to my third declaration included tables showing amounts spent and fish released from programs receiving funding. Attachment 1 to this declaration updates those tables; it includes updated juvenile Chinook release numbers with fiscal year 2020 through 2022 funding and includes information on what was funded in fiscal year 2022.¹ In summary, over \$5.4 million of funds were distributed (after overhead removed) by NMFS in fiscal year 2022 for the prey increase program. More than 17 million juvenile Chinook were released in 2022 as a result of federal and Washington State legislature funding for additional hatchery Chinook production to increase prey for SRKW.

7. For fiscal year 2023, NMFS has not yet distributed funds, but we anticipate distributing more than \$5.6 million in 2023.

8. Chinook salmon mature and become available as prey to SRKW at age three to five. Fourth Declaration of Lynne Barre, ¶¶ 14-15. Over 11 million additional juvenile Chinook salmon were released in 2020 to increase prey for SRKW using a combination of federal and state funding. Many of these fish are now adults and contributing to the SRKW prey base. More than 13 million additional juvenile Chinook salmon were released in 2021 and many of these fish will soon be adults and contributing to the SRKW prey base.

NMFS' Evaluation of the Prey Increase Program

¹ Some numbers in Attachment 1 to this declaration differ from the numbers in the tables in Attachment 1 to my third declaration; these changes are due to updated reporting from hatchery managers, either reporting actual releases in place of estimated releases, or correcting prior errors.

1 9. As described in my previous declaration (Second Purcell Declaration) and Attachment 1
2 to my third declaration (Third Purcell Declaration), NMFS uses a series of criteria when
3 determining which hatchery production to fund as part of the prey increase program for SRKWs.
4 In addition to considering where hatchery production will have the most value to SRKWs,
5 NMFS considers the potential adverse effects of increased production on ESA-listed species.
6 One of the criteria we use in deciding which programs to fund is that increased production
7 cannot jeopardize the survival and recovery of any ESA-listed species. Another criterion is that
8 all increased production must be reviewed under the ESA and NEPA, as applicable, before
9 NMFS funding can be used. NMFS plans to continue to use these criteria to make funding
10 determinations in 2023 and 2024.
11
12

13 10. Attachment 2 summarizes the ESA and NEPA analyses that NMFS has completed on
14 the effects of the increased production proposals that have been awarded federal funds to date.
15 In some cases, the effects of the increased production proposals were fully evaluated in
16 previously completed ESA and NEPA documents. However, in other cases, the increased
17 production proposals required new ESA and NEPA analyses. Each year, NMFS reviews the
18 proposals and determines which ones need additional ESA and/or NEPA review. As Attachment
19 2 demonstrates, before these funds can be utilized, NMFS ensures the funded production is
20 covered by site-specific ESA and NEPA reviews.
21
22

23 11. Our site-specific ESA and NEPA analyses are the best way to evaluate risks associated
24 with the prey increase programs because it is difficult to understand biological risks without
25 knowing the project-level details. That is, to fully evaluate effects, we need to know where the
26 fish will be released, the origin of the broodstock (e.g., local or non-local), how many natural-
27
28

1 origin fish will be included in the broodstock, how will the fish be acclimated and released, how
2 the returning adults will be managed (e.g., will they be removed at a weir), and what the role of
3 the affected population(s) is in recovery of the species. Our site-specific ESA analyses ensure
4 that none of the increased hatchery production jeopardizes survival and recovery of listed salmon
5 or adversely modify designated critical habitat.

7 12. Wild Fish Conservancy argues that NMFS is relying on “outdated” site-specific
8 biological opinions and NEPA analyses for programs awarded funds under the prey increase
9 program. This is not the case. In some instances, NMFS is relying on biological opinions and
10 NEPA documents that pre-date the funding program, but the fact that these documents pre-date
11 the funding does not render them “outdated.” This is because in many cases the hatchery
12 operators ask NMFS to evaluate the effects of higher levels of production than what is typically
13 produced in a hatchery program to give them the flexibility to increase production if additional
14 funding becomes available. NMFS tracks production levels and other parameters on which
15 hatchery managers are required to report under the incidental take statements associated with the
16 relevant biological opinions. NMFS also tracks new scientific information on the effects of
17 hatchery production, as new research is conducted and papers are published. If we become
18 aware of new factual or scientific information that might trigger reinitiation of any of the
19 biological opinions on which we rely, or which might require new or supplemental NEPA
20 analysis, we reinitiate consultation and conduct new analyses. We are not aware of any such
21 new information with regard to the hatchery programs that have received funds through the prey
22 increase program, other than those programs for which we did new consultations and NEPA
23 analyses specifically to address the prey increase funding.

1 13. NOAA has substantial experience with hatchery programs and has developed and
2 published a series of guidance documents for designing and evaluating hatchery programs
3 following best available science (Hard et al. 1992; Jones 2006; McElhany et al. 2000; NMFS
4 2004; NMFS 2005; NMFS 2008).

5
6 14. Over the past decade, we have completed biological opinions and NEPA documents
7 (Environmental Assessments or Environmental Impact Statements) on close to 200 hatchery
8 programs using best available science. Our biological opinions include a detailed assessment of
9 genetic risks, competition and predation, facility effects, and disease risks to ESA-listed species.
10 Our NEPA documents evaluate the effects of a full range of alternatives on the human
11 environment, including an assessment of cumulative effects.
12

13
14 15. The major genetic risks that NOAA evaluates in our review of hatchery programs
15 include loss of genetic diversity (both within and among populations) and the loss of fitness due
16 to selection for traits favorable in the hatchery but deleterious in the wild. The Hatchery
17 Scientific Review Group (HSRG) has developed recommendations for reducing genetic risks by
18 managing the proportion of hatchery-origin fish spawning naturally (pHOS) and the proportion
19 of natural-origin fish incorporated into the broodstock (pNOB). A population's Proportionate
20 Natural Influence (PNI) is determined based on pHOS and pNOB values. The HSRG's
21 recommendations for PNI and pHOS vary depending on whether a hatchery program is
22 segregated or integrated.² Their recommendations also vary based on the biological significance
23 of the population for ESA recovery (i.e., primary, contributing, or stabilizing) and the affected
24
25

26
27 ² An integrated hatchery program includes natural-origin adults in the broodstock. Generally, an integrated program
28 intends for the natural environment to drive the adaptation of a composite population of fish that spawns both in a
hatchery and in the natural environment. A segregated hatchery program intends to isolate hatchery-origin fish from
natural-origin fish, creating an isolated hatchery-origin population and an isolated natural-origin population.

1 population's recovery phase (i.e., preservation, recolonization, local adaptation and full
2 restoration) (HSRG 2018).

3
4 16. Although NOAA has not formally adopted the HSRG's gene flow recommendations, we
5 believe they are important and we use them along with other best available science in our review
6 of hatchery programs. For a particular program, we may, based on specifics of the program,
7 consider a pHOS or PNI level to be a lower risk than the HSRG would but, generally, if a
8 program meets HSRG standards, NOAA will typically consider the risk levels to be acceptable.³
9
10 Optimal pHOS will depend upon multiple factors, such as the importance of the population to
11 ESA recovery and the fitness differences between hatchery-origin and natural-origin fish.
12 NMFS considers these factors in its site-specific ESA evaluations. In addition, we consider the
13 cumulative impacts of all other hatchery programs that may be contributing to pHOS for a
14 particular population.

15
16 17. NOAA has worked tirelessly with hatchery operators to ensure that none of the
17 increased production programs jeopardize the survival or recovery of ESA-listed species.
18
19 Furthermore, we have been working with the hatchery operators to implement tools that
20 allow us to increase prey for SRKW while simultaneously reducing genetic risks to ESA-
21 listed salmon. For example, during development of our biological opinion on ten hatchery
22 programs in the Green/Duwamish River Basins, we worked with the hatchery operators to
23 implement some key changes in the fall Chinook hatchery program that we expect will
24

25
26 ³ There are a few exceptions. Based on recent guidance from the HSRG (HSRG 2018), the HSRG does not
27 recommend PNI and pHOS standards during the "preservation" or "rebuilding" recovery phases. NOAA believes
28 that unless hatchery programs are specifically designed to aid in the recovery of a population, pHOS and/or PNI
should be managed during the preservation and rebuilding phases. Another exception where NOAA appears to be
more conservative than the HSRG is with steelhead hatchery programs that use highly domesticated broodstocks.
NOAA has imposed more stringent guidelines than recommended by the HSRG (NMFS 2016).

1 substantially increase PNI while producing an additional 2 million smolts to augment prey
2 for endangered SRKW.

3
4 ***Impact of Interrupting Funding for the Prey Increase Program***

5 18. It is hard to predict what would happen if funds for the prey increase program are
6 interrupted. Without continued funding, hatchery operators would likely not spawn
7 additional adult fish this fall to provide increased prey to SRKW. In addition, there are
8 currently juvenile fish in the hatchery facilities that have been produced using FY 2022
9 funds. Without continued funding, hatchery operators may not be able to rear these fish until
10 the time when they would normally be released. If the funds were interrupted, one potential
11 result is that the hatchery operators would use other sources of funds to rear the juvenile fish
12 in the hatcheries until they are ready for release. Another scenario would be that the hatchery
13 operators release the fish early, in which case they would have lower chance of survival,
14 reducing their potential contribution to SRKW diet. Another important biological concern is
15 that if the fish are released early, they would probably not be externally marked (e.g., adipose
16 fin clip) or tagged. Marking and/or tagging of hatchery-origin salmon allow us to monitor
17 and manage genetic risks. As an example, in some tributaries, weirs are used to block the
18 passage of fish so that hatchery-origin fish can be removed to control pHOS. If the hatchery
19 fish are not marked, they will likely be indistinguishable from the wild fish and would be
20 passed above the weir to spawn naturally, which would increase pHOS and could potentially
21 increase genetic risk in those tributaries.
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1 **Conclusion**

2 19. It is my opinion that NOAA is implementing the prey increase program in a thoughtful
3 and careful manner. All increased production proposals are being reviewed in site-specific ESA
4 and NEPA evaluations before federal prey increase funding is used. As a result, NOAA is able
5 to ensure that the funding for the prey increase program is not resulting in irreparable harm to
6 ESA-listed salmon, while providing benefits to endangered SRKW. Interrupting funding for the
7 prey increase program is likely to decrease available prey to SRKW. Interrupting funding for the
8 prey increase program may also increase risks to ESA-listed Chinook salmon species if it results
9 in hatchery-origin fish being prematurely released from the hatcheries without being marked or
10 tagged.
11

12
13 20. I declare under penalty of perjury that the foregoing is true and correct. Executed on
14 May 22, 2023, in Portland, OR.
15

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Attachment 1

Table 1. Washington State Funding for SRKW Prey in the 2019-2021 biennium

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2019 Release	2020 Release	2021 Release
Kendall	Puget Sound	Sp. CK	WDFW	500,000	Kendall	Kendall	704,170	449,199	381,725
Whatcom Cr.	Puget Sound	F. CK	WDFW	500,000	Samish	Whatcom Cr.	200,000	670,000	491,747
Hupp Springs	Puget Sound	Sp. CK	WDFW	500,000	Minter	Hupp	259,873	388,909	543,034
Samish	Puget Sound	F. CK	WDFW	1,000,000	Samish	Samish	1,089,148	1,217,867	0
Wallace River	Puget Sound	Sum. CK	WDFW	400,000	Wallace River	Wallace River	-	260,745	0
Wallace River	Puget Sound	Sum. CK	WDFW	100,000	Wallace River	Wallace River	-	34,938	44,158
Soos/Palmer	Puget Sound	F. CK	WDFW	2,000,000	Green River	Palmer	282,638	1,210,986 ^a	-
Marblemount	Puget Sound	Sp. CK	WDFW	400,000	Marblemount	Marblemount	-	203,095	574,408
Sol Duc	WA Coast	Sum. CK	WDFW	500,000	Sol Duc	Sol Duc	500,143	582,479	480,291
Sol Duc	WA Coast	Sum. CK	WDFW	0	Sol Duc	Sol Duc	-	-	67,787
Humtulpils *	WA Coast	F. CK	WDFW	500,000	Humtulpils	Humtulpils	-	-	-
Minter	Puget Sound	F. CK	WDFW	400,000	Minter	Minter	763,333	321,497	332,672
Naselle	WA Coast	F. CK	WDFW	2,500,000	Naselle	Naselle	-	-	1,472,258
Forks Creek	WA Coast	F. CK	WDFW	50,000	Forks Creek	Forks Creek	567,560	2,278,497	257,338
Wells Hatchery	Columbia River	Sum. CK	DPUD	500,000	Wells	Wells Hatchery	0	541,299	482,734
Quinault Lake	WA Coast	F. CK	Quinault Indian Nation	500,000	Quinault	Quinault Lake	-	-	500,000
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	150,000	Sol Duc	Bear Springs	-	-	147,913
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	75,000	Sol Duc	Bear Springs	-	70,000	70,758
Wilkeson Creek	Puget Sound	F. CK	Puyallup Tribe of Indians	1,075,200	Voights	Wilkeson Creek	-	728,587	246,849
White River	Puget Sound	Sp. CK	Muckleshoot Indian Tribes	200,000	White River	White River	-	-	167,557
Squaxin/South Sound Net Pens	Puget Sound	F. CK	Squaxin Island Tribe	500,000	Deschutes / Green River	Squaxin/South Sound Net Pens	-	-	-
Lummi Bay Hatchery	Puget Sound	Sp. CK	Lummi Nation	500,000	Kendall	Lummi Bay	-	50,000	222,168
Skookum Creek	Puget Sound	Early CK	Lummi Nation	1,000,000	Skookum Creek	Skookum Cr.	-	870,000	794,626

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2019 Release	2020 Release	2021 Release
Klickitat Hatchery	Columbia River	F. CK	Yakama Nation	1,000,000	Klickitat/Little White	Klickitat River	-	1,000,000	-
Lewis River	Columbia River	Sp. CK	WDFW	-	Lewis River	Lewis River	944,425		389,959
TOTAL							5,311,290	10,878,098	7,278,023

^a Partially funded by PST with FY19 funds
 SP CK = spring Chinook; F. CK = fall Chinook; WDFW = Washington Department of Fish and Wildlife

Table 2. Washington State Funding for SRKW Prey in the 2021-2023 biennium

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2022 Release	Estimated 2023 Release
Kendall	Puget Sound	Sp. CK	WDFW	500,000	Kendall	Kendall	635,697	500,000
Whatcom Cr.	Puget Sound	F. CK	WDFW	500,000	Samish	Whatcom Cr.	543,181	500,000
Hupp Springs	Puget Sound	Sp. CK	WDFW	500,000	Minter	Hupp	515,642	476,000
Samish	Puget Sound	F. CK	WDFW	1,000,000	Samish	Samish	906,459	1,200,000
Wallace River	Puget Sound	Sum. CK	WDFW	400,000	Wallace River	Wallace River	1,049,421	1,200,000
Wallace River	Puget Sound	Sum. CK	WDFW	100,000	Wallace River	Wallace River	0	79,315
Marblemount	Puget Sound	Sp. CK	WDFW	500,000	Marblemount	Marblemount	128,022	500,000
Marblemount	Puget Sound	Sp. CK	WDFW	500,000	Marblemount	Marblemount	0	100,000
Sol Duc	WA Coast	Sum. CK	WDFW	500,000	Sol Duc	Sol Duc	558,969	436,000
Sol Duc	WA Coast	Sum. CK	WDFW	0	Sol Duc	Sol Duc	28,588	64,982
Minter	Puget Sound	F. CK	WDFW	400,000	Minter	Minter	291,083	400,000
Naselle	WA Coast	F. CK	WDFW	2,500,000	Naselle	Naselle	2,577,982	1,800,000
Forks Creek	WA Coast	F. CK	WDFW	50,000	Forks Creek	Forks Creek	108,072	90,000
Wells Hatchery	Columbia River	Sum. CK	DPUD	500,000	Wells	Wells Hatchery	520,239	514,000
Quinault Lake	WA Coast	F. CK	Quinault Indian Nation	500,000	Quinault	Quinault Lake	446,651	500,000
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	75,000	Sol Duc	Bear Springs	115,179	120,000
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	75,000	Sol Duc	Bear Springs	72,651	23,000
Wilkeson Creek	Puget Sound	F. CK	Puyallup Tribe of Indians	1,075,200	Voights	Wilkeson Creek	611,685	1,400,000
White River	Puget Sound	Sp. CK	Muckleshoot Indian Tribes	200,000	White River	White River	238,335	273,385
Squaxin/South Sound Net Pens	Puget Sound	F. CK	Squaxin Island Tribe	500,000	Deschutes / Green River	Squaxin/South Sound Net Pens	0	0
Lummi Bay Hatchery	Puget Sound	Sp. CK	Lummi Nation	500,000	Kendall	Lummi Bay	499,193	504,080
Skookum Creek	Puget Sound	Early CK	Lummi Nation	1,000,000	Skookum Creek	Skookum Cr.	0	800,000
Klickitat Hatchery	Columbia River	F. CK	Yakama Nation	1,000,000	Klickitat/Little White	Klickitat River	574,715	641,914
Lewis River	Columbia River	Sp. CK	WDFW	-	Lewis River	Lewis River	268,950	290,000
TOTAL							11,090,714	12,412,676

Table 3. Programs that received FY20 PST funding for the Hatchery Production Initiative for SRKW

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2020 Release	2021 Release ^b	2022 Release ^b	Operating Cost	Infrastructure Cost	Total Cost
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum CK	Tulalip Tribe	1,000,000	Wallace	Tulalip Bay	-	-	958,415	\$555,914	\$783,414	\$1,339,328
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum CK	RCO overhead	-	N/A	-	-	-	-	-	-	\$55,180
Soos Creek Hatchery	Puget Sound	F. CK	WDFW	2,000,000	Green River	Green River	-	2,003,244 ^c	-	\$245,559	-	\$245,559
Soos Creek Hatchery	Puget Sound	F. CK	RCO overhead	-	N/A	-	-	-	-	-	-	\$10,117
Partial funding for NWIFC marking trailer	Puget Sound	All	NWIFC	-	N/A	-	-	-	-	-	\$500,000	\$500,000
Partial funding for NWIFC marking trailer	Puget Sound	All	RCO overhead	-	N/A	-	-	-	-	-	-	\$20,600
Marion Drain Hatchery	Columbia River	Sum. CK	Yakama Nation	500,000	Entiat/Wells/Chelan	Yakima River	-	279,594	-	\$43,000	-	\$43,000
Select-Area Fishery Enhancement (SAFE)	Columbia River	Sp. CK	ODFW	1,320,000 ^a	Willamette River	Youngs Bay or Tongue Point	-	-	-	\$600,000	-	\$600,000
SAFE	Columbia River	Sp. CK	ODFW	1,500,000	Willamette River	Youngs Bay or Tongue Point	-	-	-	\$251,477 ^b	-	\$251,477
Umatilla Hatchery	Columbia River	F. CK (URB)	ODFW	120,000	Little White	Umatilla River	-	-	-	\$30,000	-	\$30,000
Parkdale Hatchery	Columbia River	Sp. CK	CTWSR	Not enough BS; Funds need to be reallocated	Hood River	N/A	-	-	-	\$31,230	-	\$31,230
Round Butte Hatchery	Columbia River	Sp. CK	ODFW	Not enough BS; Funds reallocated to Bonneville tules	Deschutes River	N/A	-	167,000	-	\$0	-	\$0
Bonneville Hatchery	Columbia River	F. CK (tules)	ODFW	200,000	Bonneville Pool	Columbia River	-	344,122	-	\$25,000	-	\$25,000

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2020 Release	2021 Release ^a	2022 Release ^a	Operating Cost	Infrastructure Cost	Total Cost
Wells Hatchery	Columbia River	Sum. CK	DPUD	500,000	Wells	Columbia River	-	482,734	-	\$170,000	-	\$170,000
Little White/Willard National Fish Hatchery (NFH)	Columbia River	F. CK (URB)	USFWS	630,000	Little White	Little White River	479,694	-	-	\$200,000	-	\$200,000
Little White/Willard NFH	Columbia River	F. CK (URB)	USFWS	650,000	Little White	Little White River	-	649,356	-	\$165,000	\$140,000	\$305,000
Little White/Willard NFH	Columbia River	Sp. CK	USFWS	400,000	Spring Chinook	Columbia River	-	-	380,578	\$160,000	-	\$160,000
Spring Creek NFH	Columbia River	F. CK (tules)	USFWS	2,000,000	Columbia River Gorge tules	Columbia River	-	688,509	-	\$360,000	\$515,000	\$875,000
TOTAL							479,694	5,959,869	1,338,993	\$2,585,703	\$1,938,414	\$4,861,491

^a Tag codes will be available after the fish are tagged. ^b Additional funding will be needed in FY21 to complete rearing and release of these fish. ^c Partially funded by WDFW
 RCO = WA's Recreation and Conservation Office; CTWSR = Confederated Tribes of the Warm Springs Reservation of Oregon; DPUD = Douglas Public Utility District; USFWS = United States Fish and Wildlife Service; ODFW = Oregon Fish and Wildlife Service; NWIFC = Northwest Indian Fisheries Commission; BS = broodstock; URB = Upriver Bright fall Chinook salmon; NFH = National Fish Hatchery; SP CK = spring Chinook; F. CK = fall Chinook

Table 4. Programs that received FY21 PST funding for the Hatchery Production Initiative for SRKW

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2021 Release	2022 Release	2023 Release	Operating Cost	Infrastructure Cost	Total Cost
Issaquah Hatchery	Puget Sound	F. CK	WDFW	1,000,000	Issaquah/ Soos Creek	Issaquah Creek	-	707,026	-	\$135,000	-	\$135,000
Issaquah Hatchery	Puget Sound	F. CK	RCO overhead	-	NA	-	-	-	-	-	-	\$5,562
Soos Creek Hatchery	Puget Sound	F. CK	WDFW	2,000,000	Green River	Green River	-	2,077,000	-	\$428,000	-	\$428,000
Soos Creek Hatchery	Puget Sound	F. CK	RCO overhead	-	N/A	-	-	-	-	-	-	\$17,634
Marking trailer	Puget Sound	All	WDFW	-	N/A	-	-	-	-	-	\$1,500,000	\$1,500,000
Marking trailer	Puget Sound	All	RCO overhead	-	N/A	-	-	-	-	-	-	\$61,800
Clark Creek Hatchery upgrades	Puget Sound	N/A	Puyallup Tribe	These upgrades will create additional capacity to raise fish	N/A	-	-	-	-	-	\$1,200,000	\$1,200,000
Clark Creek Hatchery upgrades	Puget Sound	N/A	RCO overhead	-	N/A	-	-	-	-	-	-	\$49,440
University of Washington Hatchery	Puget Sound	F. CK	Muckleshoot Indian Nation	180,000	N/A	-	-	-	-	-	\$325,000	\$325,000
University of Washington Hatchery	Puget Sound	F. CK	RCO overhead	-	N/A	-	-	-	-	-	-	\$13,390
Marblemount Hatchery	Puget Sound	N/A	WDFW	These upgrades will create additional capacity to raise fish	N/A	-	-	-	-	-	\$346,587.02	\$346,587.02
Marblemount Hatchery	Puget Sound	N/A	RCO overhead	-	N/A	-	-	-	-	-	-	\$14,892.82
Enhanced monitoring plan for ecological effects	Puget Sound	All	WDFW	-	N/A	-	-	-	-	\$5,000	-	\$5,000
Enhanced monitoring plan for	Puget Sound	All	PSMFC overhead	-	N/A	-	-	-	-	\$457	-	\$457

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2021 Release	2022 Release	2023 Release	Operating Cost	Infrastructure Cost	Total Cost
ecological effects												
East Bank and Marion Drain Hatcheries	Columbia River	Sum. CK	Yakama Nation	500,000	Entiat/Wells/Chelan	Yakima River	-	19,755	-	\$137,707	-	\$137,707
Kliekitat Hatchery	Columbia River	F. CK	Yakama Nation	These upgrades will create additional capacity to raise an additional 1,000,000 F. CK (URB)	N/A	-	-	-	-	-	\$55,000	\$55,000
Select-Area Fishery Enhancement (SAFE)	Columbia River	Sp. CK	ODFW	1,500,000	Willamette River	Yongs Bay or Tongue Point	-	1,507,467	-	\$851,476	-	\$851,476
Umatilla Hatchery	Columbia River	F. CK (URB)	ODFW	120,000	Little White	Umatilla River	-	127,931	-	\$30,000	-	\$30,000
Bonneville Hatchery	Columbia River	F. CK (tules)	ODFW	250,000	Bonneville Pool	Columbia River	-	250,000	-	\$56,430 ^b	-	\$56,430
Umatilla and Bonneville Hatchery	Columbia River	F. CK (URB)	ODFW	100,000	Little White	Umatilla River	167,010	-	-	\$35,778	-	\$35,778
Wells Hatchery	Columbia River	Sum. CK	DPUD/WDFW	500,000	Wells	Columbia River	-	550,000	-	\$175,000	-	\$175,000
Dworshak NFH	Columbia River	Sp. CK	Nez Perce Tribe	500,000	Clearwater River	Clearwater River	-	544,979	-	\$81,000	\$75,000	\$156,000
Little White NFH	Columbia River	Sp. CK	USFWS	650,000	Little White	Little White River	-	-	497,692	\$200,915	\$98,050	\$289,965
Spring Creek NFH	Columbia River	F. CK (tules)	USFWS	2,000,000	Columbia River Gorge tules	Columbia River	-	66,294	-	\$317,989	\$88,200	\$406,189
Carson NFH	Columbia River	Sp. CK	USFWS	100,000	Carson	Wind River	-	-	74,123	\$65,459	\$96,600	\$162,059
TOTAL							167,010	5,300,452	571,815	\$2,519,754	\$3,784,437.02	\$6,467,367

Table 5. Programs that received FY22 PST funding for the Hatchery Production Initiative for SRKW

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2022 Release	Anticipated 2023 Release	Anticipated 2024 Release	Operating Costs	Capital Costs	Total Cost
Issaquah Hatchery	Puget Sound	F. CK	WDFW	1,000,000	Issaquah Hatchery	Issaquah Creek	-	1,000,000	-	\$135,000	-	\$135,000
Automatic marking trailer	Puget Sound	N/A	WDFW	N/A	NA	NA	-	-	-	-	\$1,500,000	\$1,500,000
Soos Creek-Palmer Pond Hatchery Chinook	Puget Sound	F. CK	WDFW	2,000,000	Green River	Green River	-	2,000,000	-	\$428,000	-	\$428,000
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum. CK	Tulalip Tribe	2,000,000	Wallace	Tulalip Bay	-	1,600,000	-	\$555,914	-	\$555,914
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum. CK	RCO overhead	-	NA	NA	-	-	-	-	-	\$22,904
University of Washington Hatchery	Puget Sound	F. CK	Muckleshoot Indian Tribe	180,000	NA	NA	-	-	-	\$75,071	\$315,261	\$390,332
University of Washington Hatchery	Puget Sound	F. CK	RCO overhead	-	NA	NA	-	-	-	-	-	\$16,082
Spring Creek NFH	Columbia River	F. CK (tule)	USFWS	2,000,000	Columbia River Gorge tules	Columbia River	-	0	-	\$346,235	\$156,993	\$503,228
Little White Salmon NFH	Columbia River	Sp. CK	USFWS	650,000	Little White Salmon River	Little White Salmon River	-	-	650,000	\$214,477	-	\$214,477
Carson NFH	Columbia River	Sp. CK	USFWS	100,000	Carson	Wind River	-	-	100,000	\$89,281	\$63,000	\$152,281
Wells Hatchery	Columbia River	Sum. CK	WDFW/DPU	500,000	Wells	Columbia River	-	514,000	-	\$175,000	-	\$175,000
East Bank and Marion Drain Hatcheries	Columbia River	Sum. CK	Yakama Nation	500,000	Entiat/Chelan/Wells	Yakima River	-	109,876	-	\$148,212	-	\$148,212
Dworshak NFH	Columbia River	Sp. CK	Nez Perce Tribe	500,000	Clearwater Spring Chinook/Dworshak NFH	Dworshak NFH	-	493,858	-	\$140,775	-	\$140,775
SAFE	Columbia River	Sp. CK	ODFW	1,500,000	Willamette Tribes	SAFE	-	1,430,813	-	\$876,956	-	\$876,956
Bonneville Hatchery	Columbia River	F. CK (tule)	ODFW	250,000	Bonneville	Tanner Creek	-	250,000	-	\$150,854	-	\$150,854

Table 6. Summary of 2020, 2021, 2022, and actual and anticipated 2023 hatchery-origin Chinook salmon releases

Funding Source	Release Years			
	2020	2021	2022	2023 (Actual and Anticipated)
PST FY20	479,694	5,959,869	1,338,993	-
PST FY21	-	167,000	5,300,452	571,815
PST FY22			-	7,398,547
Washington State Legislature ('19-'21)	10,850,280	7,278,023	-	-
Washington State Legislature ('21-'23)	-	-	11,090,714	12,412,676
TOTAL	11,357,792	13,404,892	17,730,159	20,383,038

Attachment 2

Attachment 2, Fourth Purcell Declaration.**Pacific Salmon Treaty Prey Increase Program Funded SRKW hatchery production for FY2020 - FY2022 and NMFS' corresponding ESA and NEPA evaluations.**

Program	Species	Operator	ESA Coverage	NEPA Coverage
Columbia River Basin				
Little White Salmon NFH Carson NFH	Spring Chinook	USFWS	Biological Opinion: USFWS Artificial Propagation Programs in the Lower Columbia and Middle Columbia River (Attachment 2a)	Environmental Impact Statement: Mitchell Act. Available at: https://www.fisheries.noaa.gov/resource/document/final-environmental-impact-statement-inform-columbia-river-basin-hatchery
Spring Creek NFH	Fall Chinook (tule)			
Little White Salmon NFH	Fall Chinook (brights)			
Dworshak NFH	Spring Chinook	Nez Perce/USFWS	Biological Opinion: Five Clearwater River Basin Spring/Summer Chinook Salmon and Coho Salmon Hatchery Programs (Attachment 2b)	
Wells	Summer Chinook	Douglas PUD	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2c)	
East Bank		Yakima Nation	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs. (Attachment 2c)	
Marion Drain				
Umatilla	Fall Chinook (URB)	Confederated Tribes of the Umatilla Indian Reservation/ODFW	Biological Opinion: Umatilla River Spring Chinook Salmon, Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2d)	
Bonneville	Fall Chinook (tule)	ODFW	Biological Opinion: Mitchell Act Final Environmental Impact Statement preferred alternative and administration of Mitchell Act hatchery funding (Attachment 2e)	
SAFE	Spring Chinook	ODFW	Biological Opinion: Select Area Fisheries Enhancement (SAFE) Spring Chinook Salmon and Coho Salmon Programs (Attachment 2f)	

Dworshak NFH	Spring Chinook	Nez Perce/USFWS	Biological Opinion: Five Clearwater River Basin Spring/Summer Chinook Salmon and Coho Salmon Hatchery Programs (Attachment 2b)	Environmental Assessment: Snake River Basin Hatcheries
Wells	Summer Chinook	Douglas PUD	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2c)	Supplemental Environmental Assessment: Wells Summer Chinook Salmon Program
Puget Sound Region				
Issaquah	Fall Chinook	WDFW	Biological Opinion: Five Hatchery Programs for Salmon in the Lake Washington Drainage (Attachment 2g) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Environmental Assessment: Lake Washington Basin Hatcheries Available at: https://media.fisheries.naa.gov/2022-07/FINAL_Lake_Washington_EA_FONSI_BAT_2.15.2022_07262022.pdf
Soos Creek-Palmer Pond	Fall Chinook	WDFW	Biological Opinion: Ten Hatchery Programs for Salmon and Steelhead in the Duwamish/Green River Basin (Attachment 2h) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Environmental Impact Statement: Duwamish-Green Hatcheries Available at: https://www.fisheries.naa.gov/resource/document/final-environmental-impact-statement-eis-duwamish-green-hatcheries
Tulalip Bernie Gobin	Summer Chinook	Tulalip Tribe	Biological Opinion: Seven Hatchery and Genetic Management Plans for Snohomish River basin Salmon (Attachment 2i) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Supplemental Environmental Assessment: Snohomish Hatcheries Available at: https://media.fisheries.naa.gov/2022-09/SnohomishHatcheries_SupplEA_FONSI_2021_0506.pdf
University of Washington	Fall Chinook	Muckleshoot Indian Tribe	Biological Opinion: Five Hatchery Programs for Salmon in the Lake Washington Drainage (Attachment 2g) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Environmental Assessment: Lake Washington Basin Hatcheries Available at: https://media.fisheries.naa.gov/2022-07/FINAL_Lake_Washington_EA_FONSI_BAT

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1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON
3 AT SEATTLE

4	_____)	
5)	
6	WILD FISH CONSERVANCY,)	Case No. 2:20-cv-417-RAJ-MLP
7)	
8	Plaintiff,)	DECLARATION OF
9	)	GRETCHEN HARRINGTON
10	v.)	
11	JENNIFER QUAN, <i>et al.</i> ,)	
12)	
13	Defendants,)	
14)	
15	and)	
16)	
17	ALASKA TROLLERS ASSOCIATION,)	
18)	
19	Defendant-Intervenor,)	
20)	
21	and)	
22)	
23	STATE OF ALASKA,)	
24)	
25	Defendant-Intervenor.)	
26)	
27	_____)	
28)	

20 I, Gretchen Harrington, declare:

21
22 1. I am the Assistant Regional Administrator of the Sustainable Fisheries Division,
23 National Marine Fisheries Service (“NMFS”) Alaska Region, which is an operating unit
24 within the National Oceanic and Atmospheric Administration (“NOAA”), a component of the
25 United States Department of Commerce (“DOC”). I have occupied this position since
26 December 5, 2022. My duties generally include managing the Sustainable Fisheries Division,
27
28

1 providing technical and policy advice, and assisting in the preparation and review of
2 regulatory documents. Prior to my current position, I served as the Assistant Regional
3 Administrator for the Habitat Conservation Division, the National Environmental Policy Act
4 Coordinator for Alaska Region, and the Fishery Management Plan Coordinator, including the
5 Salmon Fishery Management Plan, for the Sustainable Fisheries Division. I have worked for
6 NMFS Alaska Region since 1998, primarily in the Sustainable Fisheries Division, where I
7 worked on developing and implementing the regulatory programs covering federal fisheries in
8 Alaska.
9

10
11 2. As part of my official duties, I assist the Alaska Region in carrying out duties
12 delegated by the Secretary of Commerce, Gina M. Raimondo (“Secretary”). This includes
13 carrying out the Secretary’s responsibilities for complying with the Magnuson-Stevens
14 Fishery Conservation and Management Act (“Magnuson-Stevens Act”), as that statute applies
15 to the implementation of fishery management plans (“FMPs”) and FMP amendments for
16 fisheries in the exclusive economic zone (“EEZ”) off Alaska. I assist with coordinating the
17 development and implementation of policies governing the management of Federal fisheries
18 off Alaska, including the salmon fisheries off Alaska under the “Fishery Management Plan for
19 the Salmon Fisheries in the EEZ Off Alaska” (“Salmon FMP”). I also serve on the North
20 Pacific Fishery Management Council (“Council”) as the voting alternate for NMFS Alaska
21 Region. I am familiar with the Salmon FMP, its amendments, and its implementing
22 regulations.
23
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28

1 3. I am familiar with the issues in this litigation, and I have read nearly all of the parties'
2 briefing on their motions for summary judgment and their motions for a post-judgment stay
3 and injunction.

4
5 4. In the following paragraphs, I affirm and update the statements that my predecessor,
6 Josh Keaton, had provided, including: (1) a brief history of the Salmon FMP; (2) an
7 explanation of the Salmon FMP's delegation of management of fishing in federal waters (the
8 EEZ off Southeast Alaska) to the State of Alaska; (3) an overview of the Southeast Alaska
9 Chinook salmon commercial troll fishery; and (4) an overview of the economic value of the
10 Southeast Alaska Chinook salmon commercial troll fishery.
11

12 **Brief History of the Salmon FMP**

13
14 5. The State of Alaska has managed Southeast Alaska salmon fisheries inside and outside
15 of state waters since statehood in 1959.
16

17 6. In 1976, Congress passed the Magnuson-Stevens Act, which established federal
18 fishery management authority over the exclusive economic zone, 16 U.S.C. § 1811, which in
19 Alaska generally includes waters from 3 to 200 nautical miles offshore. The State of Alaska
20 manages fisheries that occur in waters up to 3 nautical miles offshore.
21

22 7. The Secretary of Commerce approved and implemented the original Salmon FMP in
23 1979. The 1979 Salmon FMP established the Council's and NMFS's authority over the
24 commercial and sport salmon fisheries occurring in the EEZ, or federal waters, off Alaska and
25 divided the EEZ into two areas – an East Area and a West Area – at the longitude of Cape
26
27
28

1 Suckling. 50 C.F.R. § 679.2 (defining the East Area as the area of the EEZ in the Gulf of
2 Alaska east of the longitude of Cape Suckling (143° 53.6' W)).

3
4 8. In the East Area, the 1979 Salmon FMP authorized commercial fishing for salmon
5 with hand troll or power troll gear and prohibited commercial fishing for salmon with any
6 other gear type. The FMP also authorized sport fishing for salmon in the East Area. The
7 1979 Salmon FMP's primary function was to limit entry in the commercial troll fishery; the
8 Council intended the rest of the Salmon FMP management measures for the sport fishery and
9 the commercial troll fishery in the East Area to be complementary with State of Alaska
10 regulations for the salmon fisheries in adjacent state waters. The 1979 Salmon FMP adopted
11 the State of Alaska's harvest restrictions and management measures.
12

13
14 9. In 1990, the Council comprehensively revised the Salmon FMP with Amendment 3.
15 In recommending and approving Amendment 3, the Council and NMFS reaffirmed that
16 existing and future salmon fisheries occurring in the EEZ require varying degrees of Federal
17 management and oversight. Under Amendment 3, the 1990 Salmon FMP continued to
18 authorize sport fishing and commercial hand troll and power troll gear fishing in the East Area
19 and to limit entry in the commercial troll fishery. However, in order to address the
20 inefficiencies and management delays inherent with the federal system duplicating the State
21 of Alaska's harvest restrictions and management measures for state waters, Amendment 3
22 delegated management authority to the State of Alaska to regulate the sport and commercial
23 troll fisheries in the East Area.
24

25
26 10. Pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1856(a)(3)(B), NMFS may
27 delegate management of a fishery in the EEZ to a state. In making this delegation, the
28

1 Salmon FMP was amended to include a chapter governing Council and NMFS oversight of
2 the State's exercise of delegated authority.

3
4 11. In 2012, NMFS approved Amendment 12 to the Salmon FMP. With regard to the
5 East Area, Amendment 12 updated the Salmon FMP to include several provisions that
6 addressed new requirements arising from revisions to the Magnuson-Stevens Act; these
7 provisions included annual catch limits and accountability measures. Amendment 12 also
8 reaffirmed the existing delegation of management authority for the sport and commercial troll
9 salmon fisheries in the East Area to the State of Alaska, as well as the prohibition on net
10 fishing in the East Area.¹

13 **Delegation of Management Authority in the East Area to the State of Alaska**

14
15 12. The Salmon FMP sets forth the Council's management policy and objectives for the
16 salmon fisheries in the EEZ off Alaska (Chapter 3 of the Salmon FMP). The Salmon FMP
17 establishes the management areas and the salmon fisheries to be managed by the FMP
18 (Chapter 2 of the Salmon FMP). The Salmon FMP also specifies the commercial gear types
19 authorized (Chapter 5), the status determination criteria applicable to salmon fisheries in the
20 East Area (Section 6.1), and identifies and describes essential fish habitat and habitat areas of
21 particular concern for the salmon stocks managed by the FMP (Chapter 7). However, the
22

23
24 ¹ Since Amendment 12, the Council and NMFS have amended the FMP three times. The 2018 FMP amendment
25 (Amendment 13 to the Salmon FMP) updated the description and identification of essential fish habitat for salmon
26 species, *see* 83 Fed. Reg. 31,340 (July 5, 2018). The 2021 FMP amendment (Amendment 15 to the Salmon FMP)
27 updated the FMP to clearly and accurately explain bycatch reporting consistent with requirements to establish
28 standardized bycatch reporting methodology in FMPs, *see* 86 Fed. Reg. 51,833 (Sept. 17, 2021). Another 2021
FMP amendment (Amendment 14 to the Salmon FMP) addressed management of salmon fishing in Cook Inlet, in
the West Area, *see* 86 Fed. Reg. 60,568 (Nov. 3, 2021). There is ongoing litigation over management in the West
Area, but that does not implicate the provisions of the FMP that apply to the East Area. The 2018 and 2021 FMP
amendments do not alter the Council's and NMFS's delegation of management of the commercial troll and sport
fisheries in the East Area to the State of Alaska.

1 Salmon FMP delegates all other management and regulation of the commercial troll and sport
2 salmon fisheries in the East Area to the State of Alaska pursuant to 16 U.S.C. § 1856(a)(3)(B)
3 of the Magnuson-Stevens Act.

4
5 13. Chapter 4 of the Salmon FMP describes the roles of the various agencies in
6 implementing the FMP. Section 4.3.2 describes the role of the Alaska Department of Fish
7 and Game (“ADF&G”). Under the Salmon FMP, the Council and NMFS delegated
8 regulation of the commercial troll and sport salmon fisheries in the East Area to the State of
9 Alaska. In general, these fisheries are controlled by State of Alaska regulations prescribing
10 limits on harvests, fishing periods and areas, types and amounts of fishing gear, commercial
11 fishing effort, minimum length for Chinook salmon, and reporting requirements. State
12 regulations apply to all fishing vessels participating in these fisheries regardless of whether
13 the vessel is registered under the laws of the State of Alaska.

14
15
16 14. ADF&G manages the fisheries during the fishing season (e.g., inseason) and issues
17 emergency regulations to achieve conservation objectives and to implement allocation
18 policies established by the Alaska Board of Fisheries. ADF&G also monitors the fisheries,
19 collects data on the stocks and the performance of the fisheries, and provides annual reports
20 on stocks and fisheries for each of the State of Alaska’s management areas.

21
22
23 15. Although the Salmon FMP delegates to the State of Alaska much of the day-to-day
24 management of the sport and commercial troll salmon fisheries occurring in the East Area,
25 State of Alaska management measures applicable to the sport and commercial troll salmon
26 fisheries in the East Area must be consistent with the Salmon FMP, the Magnuson-Stevens
27 Act, and other applicable federal law. Chapter 9 of the Salmon FMP states that the Council
28

1 and NMFS stay apprised of state management measures and ensure that the delegation of
2 fishery management authority to the State is carried out in a manner consistent with the
3 Salmon FMP, the Magnuson-Stevens Act, and other applicable federal law.

4 5 **The Southeast Alaska Chinook Salmon Commercial Troll Fishery**

6
7 16. The following paragraphs are based on my review of publicly-available reports and
8 information provided by ADF&G and the Pacific Salmon Commission's Chinook Technical
9 Committee, and my review of a publicly-available report published by the McDowell Group
10 on the Economic Impact of the Pacific Salmon Treaty on the Alaska Troll Fleet.

11
12 17. Under management provisions of the Pacific Salmon Treaty, ADF&G announces
13 annual all-gear catch limits for treaty Chinook salmon. The all-gear catch limit for Southeast
14 Alaska is based on a forecast of the aggregate abundance of Pacific Coast Chinook salmon
15 stocks subject to management under the Pacific Salmon Treaty.

16
17 18. The Southeast Alaska Chinook salmon all-gear catch limit is allocated among sport
18 and commercial fisheries under management plans specified by the Alaska Board of Fisheries.
19 Under the current plans, the commercial purse seine, commercial drift gillnet, and commercial
20 set gillnet are first allocated their limit, as follows: commercial purse seine, 4.3 percent of the
21 all-gear catch limit; commercial drift gillnet, 2.9 percent of the all-gear catch limit; and
22 commercial set gillnet, 1,000 Chinook salmon. After subtraction of the net gear limits, the
23 remainder of the all-gear catch limit is allocated as follows: commercial troll, 80 percent;
24 sport, 20 percent.
25
26
27
28

1 19. Over the previous five years (2018 to 2022), I estimate that the three net gear fisheries
2 were allocated on average 7.78 percent of the annual all-gear Chinook catch limit, the sport
3 fishery was allocated on average 18.44 percent of the annual all-gear Chinook catch limit, and
4 the troll fishery was allocated on average 73.78 percent of the annual all-gear Chinook catch
5 limit. The annual allocation to the troll fishery is therefore a significant portion of the overall
6 treaty Chinook limit for the State of Alaska, with the sport fishery receiving the second
7 highest portion of the overall treaty Chinook limit for the State of Alaska.
8

9
10 20. The spring fishery occurs in May and June and mostly targets Alaska hatchery-
11 produced Chinook salmon. Non-Alaska hatchery fish are counted towards Alaska's annual
12 catch limit of Chinook salmon under the Pacific Salmon Treaty. In 2021, the trollers
13 harvested 12,952 treaty Chinook in the spring season. I estimate the commercial troll spring
14 fishery harvested an average of 10,833 treaty Chinook salmon, and 13,865 total Chinook
15 salmon, per year from 2017 through 2021, based on the Pacific Salmon Commission, Joint
16 Chinook Technical Committee's Annual Reports of Catch and Escapement.
17

18
19 21. The winter season is currently October 11 to March 15. The State-established
20 guideline harvest level (GHL) for the winter fishery is 45,000 non-Alaska hatchery-produced
21 Chinook salmon (meaning, treaty Chinook subject to the Pacific Salmon Treaty). Any treaty
22 Chinook salmon not harvested during the winter fishery are available for harvest in the spring
23 and summer commercial troll fisheries. Based on ADF&G's Regional Information Report
24 No. 1J21-14, the troll fleet has not harvested the entire GHL since 2016. In the 2020/2021
25 winter fishery, a total of 268 permits were fished, and the five-year average number of permits
26 fished per year was 353 permits. The trollers harvested 14,013 treaty Chinook salmon in the
27
28

1 winter season in 2021. I estimate the commercial troll winter fishery harvested an average of
2 18,745 treaty Chinook salmon per year from 2017 through 2021 (of the total annual average
3 of 19,811 Chinook salmon per year, an average of 8.8 percent were of Alaska hatchery
4 origin), based on the Pacific Salmon Commission, Joint Chinook Technical Committee's
5 Annual Reports of Catch and Escapement.
6

7 22. The summer season is July 1 through September 30. Most of the Chinook salmon
8 harvested in the summer fishery are non-Alaska hatchery origin (meaning, treaty Chinook
9 subject to the Pacific Salmon Treaty). The summer fishery targets the number of treaty
10 Chinook salmon remaining on the annual troll allocation after the winter and spring troll
11 treaty Chinook harvests are subtracted. The State of Alaska manages the summer troll fishery
12 to achieve the remaining catch limit of treaty fish available for the troll fleet, with an
13 additional harvest of Chinook salmon produced in Alaska hatcheries. The trollers harvested
14 128,626 treaty Chinook salmon in the summer season in 2021. I estimate the commercial troll
15 summer fishery harvested an average of 100,200 treaty Chinook salmon per year from 2017
16 through 2021 (of the total annual average of 102,254 Chinook salmon per year, an average of
17 3 percent were of Alaska hatchery origin), based on the Pacific Salmon Commission, Joint
18 Chinook Technical Committee's Annual Reports of Catch and Escapement.
19
20
21

22 23. For the winter and summer seasons, I estimate the commercial troll fleet harvested an
23 average of 118,945 treaty Chinook salmon per year from 2017 through 2021. For all three
24 seasons, I estimate the commercial troll fleet harvested an average of 129,802 treaty Chinook
25 salmon per year from 2017 through 2021 (and 135,930 total Chinook salmon per year).
26 During this same time period, all Southeast Alaska salmon fisheries (net, troll, and sport)
27
28

1 harvested an average of 170,627 treaty Chinook salmon (and 204,362 total Chinook salmon
2 per year). Troll harvest therefore constituted on average 76 percent of the harvest of the
3 Southeast Alaska all-gear catch limit for treaty Chinook salmon, and on average 67 percent of
4 the harvest of all Chinook salmon in Southeast Alaska.
5

6 24. The estimated most recent five-year average catch of 129,802 treaty Chinook salmon
7 and 135,930 total Chinook salmon in the troll fishery appears to be a marked decline
8 considering the 2011-2020 average of 201,718 Chinook salmon per year, and the 1962-2020
9 average of 243,435 Chinook salmon per year, as reported by ADF&G (Fishery Management
10 Report No. 22-05). While catch increased in 2020 and 2021, troll harvests were quite low in
11 2017 through 2019, with the lowest troll catch since 1962 reported in 2018.
12
13

14 25. The commercial troll fleet uses two fishing methods: hand trolling and power trolling.
15

16 26. Chinook salmon are the highest value per pound of the five salmon species harvested
17 in Southeast Alaska, and Chinook salmon caught in the troll fishery have the highest value per
18 pound for all gear types harvesting Chinook salmon. For example, in 2021, the average ex
19 vessel price per pound for troll-caught Chinook salmon was \$7.50 per pound, while the net
20 fisheries per pound price ranged from \$4.00 to \$5.60 per pound. By comparison, the second
21 highest value species are coho salmon: in 2021, price per pound of coho salmon caught in the
22 troll fishery was \$2.97 per pound, while the net fisheries per pound price ranged from \$0.75 to
23 \$1.73 per pound.
24
25

26 27. The Southeast Alaska troll fishery operates in both federal and State of Alaska waters,
27 although the majority of the catch and effort occurs in state waters. The commercial troll
28

1 fishery operates in both federal and state waters in only the summer season. The spring and
2 winter commercial troll fisheries and all net fisheries (the commercial purse seine, drift
3 gillnet, and set gillnet) occur in state waters.
4

5 28. The State of Alaska relies on information reported on state Fish Tickets to estimate the
6 proportion of fish harvested in state waters and federal waters. Over the 2011-2019 period,
7 we have estimated that, on average, 14 percent (28,915 fish) of the total troll fishery Chinook
8 salmon harvest occurred in federal waters each year. Both the amount and the proportion of
9 Chinook salmon harvested in federal waters has varied over this time period (2011-2019).
10 The proportion of Chinook salmon harvested in federal waters each year can vary depending
11 on oceanographic conditions, weather, or other factors, and commercial fishing vessels
12 targeting Chinook salmon independently decide where to fish, depending on each vessel's
13 operating decisions. Overall the proportion of Chinook salmon harvested in federal waters
14 each year generally represents a small proportion (14 percent average) of total Chinook
15 salmon harvested by the commercial troll fishery. *See* Merrill Decl. ¶¶ 22-23 (Doc. 43-2).
16
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18

19 29. Most of the Chinook salmon harvested in Southeast Alaska are of non-Alaska origin,
20 caught consistent with the terms of the Pacific Salmon Treaty. The non-Alaska component of
21 the harvest is made up of both hatchery and wild stocks emanating from British Columbia and
22 the Pacific Northwest. For example, for the winter troll fishery, ADF&G estimates the
23 coastwide hatchery contribution of fish caught in the winter troll fishery, which includes
24 hatchery fish from Alaska, British Columbia, Idaho, Oregon, and Washington. For the 2020-
25 2021 fishery, the coastwide hatchery contribution was 42 percent of catch, with Alaska
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27
28

1 hatchery fish comprising 11 percent. For the 2021-2022 fishery, the coastwide hatchery
2 contribution was 35 percent of catch, with Alaska hatchery fish comprising 7 percent.

3
4 30. If the troll fishery did not operate, only a portion of the fish allocated to the State of
5 Alaska under the Pacific Salmon Treaty would return to rivers and hatchery facilities in
6 British Columbia and the Pacific Northwest due to natural mortality and harvest in other
7 fisheries (for example, Canadian and southern U.S. fisheries). In addition, Chinook salmon
8 return to spawn at various ages (from ages two to seven), and not all of the fish caught in the
9 fishery would return in the same year to spawn. The fishery catches fish of all ages.
10

11 **Economic Value of the Southeast Alaska Chinook Salmon Commercial Troll Fishery**

12
13 31. If the incidental take statement (ITS) were vacated as to the Chinook salmon troll
14 fishery, the Southeast Alaska troll fleet would no longer have incidental take coverage under
15 the Endangered Species Act (ESA) for the take of listed species. Vacatur of the ITS could
16 have significant disruptive consequences for the prosecution of the Chinook salmon troll
17 fishery, as trollers would be forced to decide between fishing without ESA incidental take
18 coverage and risking liability under the ESA or halting fishing activities to avoid liability
19 under the ESA and therefore foregoing economic revenue. If the trollers did not operate in
20 the winter and summer seasons, however, it is not certain that the reduction in harvest in
21 Southeast Alaska would mean that all their unharvested treaty fish would be available to
22 Southern Resident killer whales in their habitat. Recent average catches in the troll winter
23 and summer seasons have totaled 118,945 treaty Chinook salmon from 2017 through 2021
24 (see ¶ 23). Not all of those treaty fish (meaning non-Alaska wild and hatchery fish that are
25 returning to rivers and hatchery facilities in British Columbia and the Pacific Northwest)
26
27
28

1 would return to Southern Resident killer whale habitat due to natural mortality and harvest in
2 other fisheries. To estimate economic impacts to the Chinook troll fleet if that fleet was
3 unable to fish for Chinook salmon, I looked at the number of troll permits issued and the ex-
4 vessel value of the Chinook troll fleet, information that is publicly available on ADF&G's
5 website. I also looked at a report on the total economic impact from the entire troll fleet. I
6 referenced these outside reports because they are the best information available to NMFS.
7

8
9 32. ADF&G reports the number of permits that are issued and fished each year. In 2021,
10 the hand troll fleet had 902 issued permits, with 202 permit holders reporting salmon
11 landings. ADF&G reports an annual average (2011-2020) of 971 issued permits and 295
12 fished permits for hand troll. In 2021, the power troll fleet had 957 issued permits, with 629
13 permit holders reporting salmon landings. ADF&G reports an annual average (2011-2020) of
14 961 issued permits and 715 fished permits for power troll. Based on these reports, on average
15 from 2011 to 2020, there were over 1,000 annual active permittee holders (combined for
16 power and hand troll permittees). While all troll permit holders might not target Chinook
17 salmon, trollers harvest 76 percent of Southeast Alaska's total Pacific Salmon Treaty Chinook
18 harvest, on average (and 67 percent of all Chinook salmon harvest in Southeast Alaska, on
19 average) (see ¶ 23). Based on my professional understanding of the commercial fisheries in
20 Southeast Alaska, there are several Southeast Alaska communities that are dependent on the
21 Chinook troll fishery (to process fish, and/or provide services like fuel) and therefore could be
22 disproportionately affected if the Chinook troll fleet did not operate.
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25
26 33. ADF&G reports the ex-vessel value of the commercial salmon fisheries. Ex-vessel
27 value measures the dollar value of commercial landings and is usually calculated by
28

1 considering the price per pound at the first purchase multiplied by the total pounds landed.
2 Based on ADF&G's annual overviews of the Southeast Alaska salmon fisheries, ADF&G
3 calculates ex-vessel value by multiplying the number of salmon caught by the average weight
4 by the average price per pound.
5

6 34. Based on the ADF&G Fishery Management Report No. 22-05, in 2021, the ex-vessel
7 value of the entire troll fishery (including all species of salmon) was \$32,218,063, with the
8 ex-vessel value of the troll fishery for Chinook salmon totaling \$13,560,260. Based on
9 ADF&G's annual overviews of the fishing seasons from 2017 through 2021 (Fishery
10 Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate the five-year
11 annual average of the ex-vessel value of the entire troll fishery is \$28,128,983.20, with a five-
12 year annual average of the ex-vessel value of the Chinook troll fishery of \$11,462,827.60. I
13 also estimate that the ex-vessel value of the Chinook troll fishery is on average 41.56 percent
14 of the total ex-vessel value of the entire troll fishery.
15
16

17 35. Based on the ADF&G Fishery Management Report No. 22-05, in 2021, the ex-vessel
18 value of all Southeast Alaska salmon fisheries (all gear types, all salmon species) was
19 \$142,949,849, and I estimate that the Chinook troll fishery constituted 9.49 percent of that
20 total ex-vessel value. Based on the ADF&G's annual overviews of the fishery seasons from
21 2017 through 2021 (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-
22 01), I estimate that the ex-vessel value of the Chinook troll fishery is on average 10.91 percent
23 of the total ex-vessel value of all Southeast Alaska salmon fisheries (2017-2021), but can be
24 as high as 20.81 percent of total ex-vessel value of all Southeast Alaska salmon fisheries, as
25 was the case in 2020.
26
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28

1 36. Ex-vessel value is one measurement of the value of a fishery, but it does not account
2 for additional value created by, for example, wages, processing, and tax revenue. A report
3 prepared the McDowell Group on the Economic Impact of the Pacific Salmon Treaty on the
4 Alaska Troll Fleet examined the following impacts of the troll fleet: direct (skipper and crew
5 income), indirect (jobs and wages generated by the purchase of goods and services in support
6 of troll fishing operations), and induced (jobs and wages generated when skippers and crew
7 spend their fishing income in support of their households) impacts. The McDowell Group
8 report was based on five-year averages from 2014 to 2018, and included the following
9 information on the economic output of the fleet:
10

- 11 • Ex-vessel earnings averaged \$32.9 million.
- 12 • An average of 729 permits were fished, and approximately 1,400 fishermen earn
13 income directly from the fishery, including skippers (permit holders) and crew.
- 14 • Total direct, indirect, and induced employment is estimated at 735 jobs.
- 15 • Direct labor income (the amount skippers and crew take home) is estimated at
16 \$20.4 million.
- 17 • Total direct, indirect, and induced labor income is estimated at \$28.5 million.
- 18 • Total annual output is estimated at \$44.1 million. Output is a measure of total
19 spending related to the commercial troll fleet. It includes the total amount trollers
20 are paid for their catch plus all the secondary spending in Southeast Alaska that
21 occurs as fishermen purchase goods and services. It does not include effects of
22 processing troll-caught fish.
- 23 • Processors add value to the troll catch, generating total average annual first
24 wholesale value of the troll harvest totaling about \$70 million (based on statewide
25 relationship between ex-vessel and first wholesale values for species harvested by
26 trollers).
- 27 • Though it is difficult to attribute specific seafood processing jobs to the troll catch
28 (as employees process fish from other commercial fisheries at the same time),
approximately one-third of the added value is the cost of labor, or about \$12
million annually.
- Including fishing, processing, and all related multiplier effects, the entire troll fleet
(all species of salmon) has a total annual economic impact of approximately \$85
million, as measured in terms of total output.

- 1 • Chinook accounted for about 44 percent of the power troll fleet's total ex-vessel
2 value over the 2014 to 2018 period. All other factors held equal, Chinook account
3 for approximately \$37 million in annual economic output in Southeast Alaska.
- 4 • Total ex-vessel value of the hand troll harvest averaged \$1.6 million, with an
5 average of 285 permits fished. The hand troll fleet's total regional economic
6 impact, as measured in terms of total output, is approximately \$3.3 million
7 annually.

8 37. Looking at the most recent five years of data (2017 to 2021) from ADF&G's Fishery
9 Management Reports (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-
10 01), I estimate that the average annual ex-vessel value of the entire troll fleet declined to
11 \$28,128,983.20, a \$4,771,016.80 (or 14.50 percent) reduction from the annual ex-vessel value
12 in the McDowell Group report of \$32,900,000. I assume a 14.50 percent reduction in the ex-
13 vessel value would correspond to similar reductions in economic impacts used to estimate the
14 total annual economic output of the troll fleet, and therefore reduce the estimate by the
15 McDowell Group of \$85,000,000 by 14.50 percent. This results in an estimate of the total
16 annual economic impacts of the entire troll fleet of \$72,675,000. These reductions in value
17 seem consistent with the decline in catch numbers of Chinook salmon (see ¶ 24) and the
18 reductions in catch agreed to under the 2019 Pacific Salmon Treaty Agreement, which in most
19 years imposes a 7.5 percent reduction in Chinook salmon harvest levels in Southeast Alaska.

20 38. Over the most recent time period (2017 to 2021), the ex-vessel value of Chinook
21 caught by the troll fleet constituted a slightly smaller percentage of the ex-vessel value of all
22 salmon species caught by the troll fleet (41.56 percent compared to 44 percent used by the
23 McDowell Group). I used this updated percentage to estimate the annual economic output of
24 the Chinook salmon commercial troll fishery (for all three seasons) at \$30,203,730.
25
26
27
28

1 39. Finally, I account for the ex-vessel value of the spring fishery. Based on the annual
2 overviews published by ADF&G of the fishery seasons from 2017 through 2021 (Fishery
3 Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate that the average
4 annual ex-vessel value (2017 to 2021) of the spring Chinook salmon commercial troll fleet is
5 \$1,054,893.66.
6

7 40. Based on the McDowell Group report and my review of the most recent ADF&G data
8 on the ex-vessel value of the troll fleet (including, specifically the Chinook troll fleet), I
9 therefore estimate the total annual economic output of the Chinook salmon commercial troll
10 fleet, for the winter and summer seasons specifically, to be approximately \$29 million
11 (\$29,148,836.34).
12

13 41. While troll fishing vessels are small, their economic impacts are far reaching,
14 especially in Southeast Alaska, where nearly every community includes individuals who earn
15 their living by trolling for salmon. The salmon troll fisheries support over 23 communities
16 around Southeast Alaska. Further, a number of the communities where troll fishermen work
17 and live are Alaska Native communities. Notably, the Southeast Alaska commercial salmon
18 troll fisheries have an 85 percent Alaska residency rate, the highest level of local ownership of
19 any major Alaska fishery, with about one in every 50 people in Southeast Alaska working on
20 a trolling boat. The small, rural, isolated Southeast Alaska communities that are dependent on
21 the Chinook salmon troll fishery (to homeport, to process fish, and/or to provide services like
22 fuel), including Alaska Native communities, would be disproportionately affected if the
23 Chinook troll fleet did not operate during the summer and winter seasons. A loss of troll
24 fishing income would be devastating to these small coastal communities.
25
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1 42. In sum, if the ITS for the Chinook salmon commercial troll fishery in the winter and
2 summer seasons were to remain vacated, there will likely be significant consequences to the
3 Chinook troll fleet and fishing communities in Southeast Alaska if the troll fleet was unable to
4 fish for Chinook salmon in the absence of ESA take coverage. In addition to the disruptive
5 and hard to quantify impacts described above, I find:

- 6
7 • Based on my review of reports from ADF&G, the ex-vessel value of the Chinook
8 salmon commercial troll fishery totaled \$13,560,260 in 2021, with an estimated five-
9 year annual average of \$11,462,827.60. Excluding the estimated five-year annual
10 average ex-vessel value of the spring season, I estimate the annual average ex-vessel
11 of the Chinook salmon commercial troll fishery in the winter and summer seasons to
12 be \$10,407,933.94.
- 13
14 • Based on my review of reports from ADF&G and a report from the McDowell Group,
15 and accounting for recent declines in ex-vessel value and the estimated ex-vessel value
16 of the spring fishery, I estimate the total annual economic output of the Chinook
17 salmon commercial troll fishery in the winter and summer seasons to be
18 approximately \$29 million.
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1 Pursuant to 28 U.S.C. § 1746, I swear under penalty of perjury that the foregoing is
2 true and correct.

3
4 HARRINGTON.GRETCHEN.N.ANNE.1365893833
5 N.ANNE.1365893833 Digitally signed by
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Date: 2023.05.22 13:12:11 -08'00'

6 GRETCHEN HARRINGTON
7 Assistant Regional Administrator,
8 Sustainable Fisheries Division, Alaska Region
9 National Marine Fisheries Service

10 May 22, 2023
11 DATE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

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

v.

JENNIFER QUAN, Regional Administrator; CHRIS OLIVER, Assistant
Administrator for Fisheries; NATIONAL MARINE FISHERIES SERVICE; GINA
RAIMONDO, Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE,
Defendants-Appellants/Cross-Appellees,

and

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

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

**MOTION OF THE ALASKA CONGRESSIONAL DELEGATION FOR
LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF
INTERVENOR-DEFENDANTS-APPELLANTS'
MOTION FOR STAY PENDING APPEAL**

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

U.S. Senators Dan Sullivan and Lisa Murkowski and U.S. Congresswoman Mary Sattler Peltola (hereinafter, “the Alaska Congressional Delegation”) respectfully move this Court for leave to file the accompanying Amici Curiae brief in support of the Intervenor-Defendants-Appellants’ motion for stay pending appeal. Counsel for the Alaska Congressional Delegation contacted counsel of record for all parties to seek their consent for the filing of the brief. All parties have consented to the filing of this motion except for Plaintiff-Appellee Wild Fish Conservancy, who opposes the motion.

I. The Alaska Congressional Delegation’s Interest

Amici Curiae are Members of Congress—two U.S. Senators and the sole Member of the U.S. House of Representatives—elected from the State of Alaska and who were Amici Curiae in the litigation before the district court. The Alaska Congressional Delegation has a unique interest in this litigation, particularly with regard to their interest in the faithful administration of the Pacific Salmon Treaty (the “Treaty”), and the impact of the district court’s order on the troll fishery participants and fishing communities of Southeast Alaska (“SEAK”).

The Alaska Congressional Delegation shares a bipartisan interest in ensuring that the nation’s treaty obligations are met. The Treaty underlying this litigation is the product of decades of international collaboration between the United States and

Canada to manage the complexities of Pacific salmon fisheries in a sustainable, responsible manner, which includes mitigating the impacts of Treaty-protected rights on endangered species. R. & R. at 8 (Dec. 13, 2022), ECF 144, App. 31 (“R&R”) (describing U.S. interests and objectives); Decl. of Frederick Turner at 610, (May 11, 2020), ECF 43-1, App. 11 (treaty principles).¹ Congress has allocated millions of dollars to meet our nation’s obligations under the Treaty, including providing the funding necessary to implement mitigation and conservation programs. Second Decl. of Scott Rumsey at 4 (Oct. 3, 2022), ECF 133-4, App. 28. While the United States’ Treaty obligations will remain unchanged regardless of the outcome of this litigation, the district court’s order affirming the Magistrate Judge’s R&R threatens vital components of the Treaty’s negotiated approach to the management of Pacific regional fisheries.

Further, as representatives of the people of Alaska, the Alaska Congressional Delegation has an interest in ensuring that the shared environmental resources of the Pacific Ocean are protected and promoted in a fair and responsible manner that does not needlessly disrupt long-established regional fisheries.

The Alaska Congressional Delegation members serve in positions of legislative oversight of issues directly involved in this case. Senator Dan Sullivan

¹ “App.” refers to pages in the Appendix attached hereto.

has represented Alaskans in the U.S. Senate since 2015. He serves on the U.S. Senate Committee on Commerce, Science, and Transportation, which oversees issues including fisheries, marine transportation, highways, interstate commerce, and transportation, and which has jurisdiction over the Pacific Salmon Treaty Act. He is the Ranking Member of the Subcommittee on Oceans, Fisheries, Climate Change and Manufacturing. Prior to his tenure as U.S. Senator, Senator Sullivan served as the Commissioner of the Alaska Department of Natural Resources and the Attorney General of the State of Alaska, where he was regularly involved with issues related to Alaska's fisheries.

Senator Lisa Murkowski has served the people of Alaska in the U.S. Senate since 2002. She serves on the U.S. Senate Committee on Appropriations, and on its Subcommittee for Commerce, Justice, Science, and Related Agencies, which has appropriations jurisdiction over the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service, the agency with primary responsibility for implementation of the Treaty. She is also the Ranking Member of the Subcommittee on Interior, Environment, and Related Agencies, which has appropriations jurisdiction over the U.S. Fish and Wildlife Service and Bureau of Indian Affairs. Funding for Treaty implementation, including mitigation, comes through these subcommittees. Senator Murkowski is also the Vice Chair of the U.S. Senate Committee on Indian Affairs.

Congresswoman Mary Sattler Peltola was elected to Congress in August 2022 to serve out the late Congressman Don Young's term. She was re-elected in November 2022. She currently serves on the U.S. House Committee on Natural Resources, which is responsible for legislation governing issues related to fisheries—including the Pacific Salmon Treaty Act—and wildlife, public lands, oceans, and Native Americans. Before her election to the U.S. House of Representatives, Congresswoman Peltola served for 10 years in the Alaska State Legislature. She grew up commercially fishing alongside her father, and she previously served as the Executive Director of the Kuskokwim River Inter-Tribal Fish Commission, where she helped mobilize 118 Tribes and rural Alaskans to advocate for the protection of salmon runs in Alaska.

As explained more fully in the proffered Amici Curiae brief, this case has broad-reaching implications for not only the nation's treaty obligations, but also the State of Alaska, its fisheries, and its people. The Alaska Congressional Delegation is comprised of the three representatives that the people of Alaska have elected to represent them in Congress, and they offer a unique perspective and legislative expertise on the implications of this case for the people of Alaska.

II. Desirability and Relevance of Amici Curiae Brief

An Amici Curiae brief presenting the Alaska Congressional Delegation's perspective is desirable and relevant to the disposition of this case and motion. Fed. R. App. P. 29(a)(3).

As described above, the Alaska Congressional Delegation has a unique perspective that will help this Court decide the legal questions at issue in this case, including the need for a partial stay pending appeal. Its members share a bipartisan interest in ensuring that the nation's treaty obligations are met and that the shared environmental resources of the Pacific Ocean are protected and promoted in a fair and responsible manner that does not needlessly disrupt regional fisheries, which are an integral part of Alaska's ecosystems, culture, and economy. The Alaska Congressional Delegation proffers its brief to explain Congress' faithful administration of the Treaty's carefully balanced policy agreements, and to stress the irreparable harm this Court's decision will have on those interests if the 2019 SEAK Biological Opinion's incidental take statement authorizing take of the Southern Resident Killer Whale and Chinook salmon is vacated.

III. Conclusion

For the reasons set forth above, the Alaska Congressional Delegation respectfully requests that the Court grant the motion for leave to file.

Respectfully submitted,

/s/ Tyson C. Kade

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Dated: June 2, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), and Circuit Rule 27-1, I hereby certify that the foregoing Motion for Leave to File Amici Curiae Brief has been prepared in a proportionally spaces typeface (using Microsoft Word 365, in 14-point Times New Roman font), contains 1,036 words total.

Respectfully submitted,

/s/ Tyson C. Kade

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 15. Certificate of Service for Electronic Filing

9th Cir. Case Number(s) 23-35322, 23-35323, 23-35324, 23-35354

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants (*list each name and mailing/email address*):

Description of Document(s) (*required for all documents*):

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Signature s/ Tyson C. Kade **Date** June 2, 2023
(*use "s/[typed name]" to sign electronically-filed documents*)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

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

v.

JENNIFER QUAN, Regional Administrator; CHRIS OLIVER, Assistant
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Defendants-Appellants/Cross-Appellees,

and

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

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

**ALASKA CONGRESSIONAL DELEGATION
AMICI CURIAE BRIEF IN SUPPORT OF INTERVENOR-DEFENDANTS-
APPELLANTS' MOTION FOR STAY PENDING APPEAL**

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INTEREST OF AMICI CURIAE¹

The Amici Curiae are Alaska's members of the U.S. Congress. The Amici share a bipartisan interest in ensuring that the nation meets its treaty obligations and protects and promotes the Pacific Ocean's shared environmental resources in a fair and responsible manner that does not needlessly disrupt long-established regional fisheries. Amici submit this brief to emphasize their interests in the faithful administration of the carefully balanced policy agreements in the Pacific Salmon Treaty ("Treaty") and to stress the immediate and irreparable harm the district court's decision will have on those public interests if not stayed pending appeal.

INTRODUCTION

If not stayed, the immediate result of the district court's order will be to needlessly decimate the upcoming summer and winter seasons of the Southeast Alaska ("SEAK") Chinook salmon troll fishery, thereby frustrating the purpose and intent of the Treaty and causing economic devastation to Alaska's SEAK troll fishery participants and fishing communities. Intervenor-Defendants-Appellants and Defendants-Appellants are likely to succeed on the merits of their claims, and the other factors weigh heavily in favor of a stay.

¹ No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person made a monetary contribution to the brief's preparation or submission.

RELEVANT FACTUAL BACKGROUND²

The Treaty represents decades of international collaboration between the United States and Canada to manage the complexities of Pacific salmon fisheries sustainably, responsibly, and in a manner that mitigates the impacts of those Treaty-protected rights on endangered species. R. & R. at 8, No. 2:20-cv-00417-RAJ (W.D. Wash. Dec. 13, 2022), ECF 144, App. 31 (“R&R”) (describing U.S. interests and objectives); Decl. of Frederick Turner at 610, No. 2:20-cv-00417-RAJ (W.D. Wash. May 11, 2020), ECF 43-1, App. 11 (treaty principles).³ At the request of the U.S. Pacific Salmon Commissioners,⁴ Second Decl. of Scott Rumsey at 4, No. 2:20-cv-00417-RAJ (W.D. Wash. Oct. 3, 2022), ECF 133-4, App. 28, Congress has allocated tens of millions of dollars to meet the United States’ obligations under the Treaty,

² The Alaska Congressional Delegation agrees with the background contained in the motion of Intervenor-Defendant-Appellant State of Alaska (No. 23-35322, ECF 15), which Intervenor-Defendant-Appellant Alaska Trollers Association has joined (No. 23-35323, ECF 19), and the statement of the case in the response by Federal Defendants-Appellants (No. 23-35354, ECF 7), and repeats them here only as necessary to support arguments in this brief.

³ “App.” refers to pages in the Appendix attached hereto.

⁴ The Pacific Salmon Commission is the body formed by the governments of Canada and the United States to implement the Treaty. The Pacific Salmon Commission is a 16-person body with four commissioners and four alternates from each country representing the interests of commercial and recreational fisheries as well as federal, state, and tribal governments. Decl. of Scott Rumsey at 3, No. 2:20-cv-00417-RAJ (W.D. Wash. May 11, 2020), ECF 43-4, App. 13.

including providing more than \$18 million annually to implement mitigation and conservation programs. *Id.* at 4-5, App. 28-29.

In part, the district court's order affirming the Magistrate Judge's R&R vacates the 2019 Biological Opinion's ("BiOp") incidental take statement ("ITS") for the SEAK salmon troll fishery. The ITS is vital to the success of the Treaty's negotiated approach to management. It allows the SEAK fishery, whose annual permit holders are mostly small family-owned businesses in Southeast Alaska, Decl. of Paul Olson at 4-5, No. 2:20-cv-00417-RAJ (W.D. Wash. May 11, 2020), ECF 39, App. 2-3, to continue operating under the Treaty's Chinook salmon harvest limits while incidentally taking a small number of protected species. Without the ITS, the troll fishery cannot operate for 10 months of the year. Alaska Trollers Resp. at 11, No. 2:20-cv-00417-RAJ (W.D. Wash. Oct. 3, 2022), ECF 128, App. 19; Decl. of Paul Olson ¶ 44, No. 2:20-cv-00417-RAJ (W.D. Wash. Oct. 3, 2022), ECF 131, App. 21. The economic and social impact of this closure will be severe in many of our remote communities, where a significant fraction of our residents rely on trolling as a primary source of income. *E.g.*, Phillips Decl. ¶¶ 4-7, No. 2:20-cv-00417-RAJ (W.D. Wash. Oct. 3, 2022), ECF 132, App. 23-24.

ARGUMENT

A. Standard of Review

When deciding a motion to stay, this Court considers

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Lair v. Bullock, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). When the government is a party, the third and fourth factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1091 (9th Cir. 2014) (citation omitted). Because stays are directed at the judicial proceeding and not an individual actor, they “are typically less coercive and less disruptive than are injunctions.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (citation omitted); see also *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 656 (9th Cir. 2021).

B. The Likelihood of Success on the Merits Weighs in Favor of a Partial Stay.

When it adopted the R&R vacating the ITS for the SEAK Chinook salmon troll fishery, the district court relied on a misapplication of the vacatur standards and failed to consider the Treaty’s role in managing the complex interplay of competing interests and fishery management challenges at issue.

When determining whether to vacate an invalid agency action, a court must 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 v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022) (quoting *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (remanding without vacatur due to unnecessary waste of already invested public resources and harm to agricultural industry))).

The “seriousness” of an agency’s error is determined by considering “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.” *Ctr. for Food Safety*, 56 F.4th at 663-64 (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)). Generally, when deciding whether to vacate agency action, “courts of equity should pay particular regard for the public consequences.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted); *see also California Communities Against Toxics*, 688 F.3d at 994 (vacatur unwarranted due to public need for completion of power plant, “economically disastrous” impact of stopping

construction on plant, and fact that harms of proceeding were insignificant with mitigation).

The 2019 BiOp’s prey increase program, which the district court appropriately left in place, is a salmon hatchery production program that aims to provide a four-to-five percent increase in prey available for the Southern Resident Killer Whale (“SRKW”), and which the R&R recognized is working. R&R at 31, App. 38.⁵ That increase helps accomplish the Treaty’s objectives by offsetting any minimal detrimental impact Alaska fisheries might otherwise have on the number of fish available for the SRKW. Congress funds the prey increase program every year with an understanding that it will both increase prey abundance and enable certain Alaska fisheries to continue operating. *Id.* at 12, App. 32.

The evidence before the district court was that, given this successful mitigation already in place, the “prey reductions from the SEAK troll fisheries, particularly in the most important locations and seasons for the whales, are small and . . . will not jeopardize their survival or recovery.” Third Decl. of Lynne Barre ¶ 5, No. 2:20-cv-00417-RAJ (W.D. Wash. Oct. 3, 2022), ECF 133-2, App. 26.

⁵ Wild Fish Conservancy seeks to stay implementation of the prey increase program pending appeal, but disrupting the program now, after careful and deliberate balancing of conservation and allocation interests through the extensive Treaty process, would reverse much of the recognized progress and endanger the wildlife Congress intended to conserve through the Treaty’s mitigation and conservation programs. As the R&R concluded, vacating the program would put the SRKW at increased risk. R&R at 34, App. 39.

Because the ITS would cause only negligible harm, there was no need to vacate it, irrespective of any alleged flaws. Doing so was inconsistent with the applicable legal standards described above and undermines the Treaty's objectives.

C. Vacating the ITS Will Cause Irreparable Harm to SEAK Troll Fishery Participants and Fishing Communities and Undermine Treaty Objectives.

The economic and cultural devastation the SEAK fishery participants and fishing communities will experience if the ITS is vacated is well-documented in the motion of the State of Alaska and in the record. Vacatur would result in an estimated \$29 million annual loss in an industry that employs hundreds of people and would detrimentally impact an entire way of life that has existed for generations. R&R at 30, App. 37; Defs.' Objs. to R. & R. at 8, No. 2:20-cv-00417-RAJ (W.D. Wash. Jan. 10, 2023), ECF 149, App. 47; Alaska Objs. to R. & R. at 9, No. 2:20-cv-00417-RAJ (W.D. Wash. Jan. 10, 2023), ECF 148, App. 45; Alaska Trollers Ass'n Objs. to R. & R. at 3, 11-12, No. 2:20-cv-00417-RAJ (W.D. Wash. Jan. 10, 2023), ECF 147, App. 41-43.⁶ This harm easily outweighs the ITS's negligible impact, which has *already been mitigated*. Furthermore, because fisheries along the coasts of Oregon,

⁶ The Alaska Legislature recently found that, when accounting for multiplier effects of the fishing, seafood processing, and fisheries-related industries, commercial trolling in SEAK has a total annual economic impact of approximately \$85 million in total output. H.R.J. Res. 5, 33rd Leg., 1st Sess. (Alaska 2023), App. 48-50.

Washington, and Canada will continue harvesting salmon that provide prey for SRKWs, vacatur of the ITS provides no meaningful biological benefit.

As described above, the prey increase program, which Congress has funded and which the R&R concluded is working, helps accomplish the Treaty's objectives by mitigating against the already reduced fishing privileges of the SEAK Chinook salmon troll fishery. *See, e.g.,* Rumsey Decl. at 13, App. 17 (Fiscal Year 2020 Spend Plan for treaty implementation). Yet, when considering the potential environmental harms that might arise from leaving the ITS in place, the R&R failed to balance or even mention the mitigating benefits of the prey increase program. *See* R&R at 26-30, App. 33-37. Vacating the ITS does nothing to prevent harm and, instead, needlessly imposes it on SEAK's troll fishery participants and fishing communities. *See, e.g.,* *Ctr. for Biological Diversity v. Raimondo*, No. 18-cv-112-JEB, 2022 WL 17039193, at *2 (D.D.C. Nov. 17, 2022) (holding vacatur of BiOp for federal lobster fishery in abeyance when "there are at least open questions concerning the species benefits that would accompany these great costs to the lobstermen.").

D. The Balance of Equities and Public Interest Weigh in Favor of a Partial Stay.

For reasons already stated, a partial stay would allow the SEAK salmon fishing season to proceed without injury to Wild Fish Conservancy, as any harm from the ITS is already mitigated. The public's interest in Congress meeting the Treaty's objectives also weighs in favor of a stay. *See, e.g.,* *United States v.*

Washington, 459 F. Supp. 1020, 1106 (W.D. Wash. 1978) (recognizing public interest served by permitting the United States to honor its treaty obligations); *see also Weinberger v. Romero-Barcelo*, 456 U.S. at 312 (when granting injunctive relief, “courts of equity should pay particular regard for the public consequences.”). Indeed, since the district court issued its decision, more than 30 Alaska and Washington communities, Tribes, conservation organizations, and governments have passed resolutions or issued other statements opposing closure of the SEAK troll fishery. These documents respond directly to the magistrate’s R&R and the district court’s order and demonstrate the significant public interest at stake.⁷

The Treaty works to balance the interests of fisheries, protected species, and the rights and obligations of impacted states, countries, and Tribes. *See Turner Decl.* at 200-01, App. 7-8. When setting SEAK Chinook salmon harvest limits, it aims 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.” *Id.* at 200, App. 7. The ITS program is part of that comprehensive management scheme intended to achieve the Treaty’s objectives. Vacating the ITS undermines those objectives and the public interests they protect.

⁷ For this Court’s convenience, these statements and resolutions are attached in the appendix to this brief. *See App.* 51-100.

CONCLUSION

Based on the foregoing and arguments in the motion of Intervenor-Defendants-Appellants, this Court should stay the district court's order vacating the ITS for the SEAK salmon troll fishery. Vacating the ITS would cause irreparable harm to SEAK troll fishery participants and fishing communities, frustrate the Treaty's objectives, and run counter to the public interest.

Respectfully submitted,

/s/ Tyson C. Kade

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Dated: June 2, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a), 32(a), and 32(g), and Circuit Rule 32-1, I hereby certify that the foregoing Alaska Congressional Delegation Amici Curiae Brief in Support of Intervenor-Defendants-Appellants' Motion for Stay Pending Appeal has been prepared in a proportionally spaces typeface (using Microsoft Word 365, in 14-point Times New Roman font), contains 2,178 words total, excluding items exempted by Federal Rule of Appellate Procedure 32(f).

Respectfully submitted,

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Dated: June 2, 2023

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

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

v.

JENNIFER QUAN, Regional Administrator; CHRIS OLIVER, Assistant
Administrator for Fisheries; NATIONAL MARINE FISHERIES SERVICE; GINA
RAIMONDO, Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE,
Defendants-Appellants/Cross-Appellees,

and

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

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

**ALASKA CONGRESSIONAL DELEGATION
APPENDIX**

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Dated: June 2, 2023

The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, a Washington
non-profit corporation,

No. 2:20-cv-0417-MLP

Plaintiff,

**DECLARATION OF PAUL OLSON IN
SUPPORT OF DEFENDANT-
INTERVENOR ALASKA TROLLERS
ASSOCIATION'S BRIEF IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

v.

NOTING DATE: May 18, 2020

BARRY THOM, in his official capacity as
Regional Administrator of the National Marine
Fisheries Service; CHRIS OLIVER, in his
official capacity as the Assistant Administrator
for Fisheries of the National Marine Fisheries
Service; NATIONAL MARINE FISHERIES
SERVICE; WILBUR ROSS, JR., in his official
capacity as Secretary of the United States
Department of Commerce; and UNITED
STATES DEPARTMENT OF COMMERCE,

Defendants.

and

ALASKA TROLLERS ASSOCIATION,

Intervenor-Defendant.

I, PAUL OLSON, hereby declare as follows:

1. I submit this declaration in support of the Alaska Trollers Association's Motion to Intervene in this case. I have personal knowledge of the matters stated herein and, if called as a witness, could and would competently testify thereto.

2. I am a member of the Alaska Trollers Association. I recently moved to

DECLARATION OF PAUL OLSON IN SUPPORT OF DEFNDANT-
INTERVENOR ALASKA TROLLERS ASSOCIATION'S BRIEF IN
OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION (2:20-cv-0417-MLP)

LANDYE BENNETT BLUMSTEIN LLP
1300 SW 5th Avenue, Suite 3600
Portland, OR 97201
Tel: (503) 224-4100

43W6451

1 summer troll seasons. I have attached as Exhibit "A" to my Declaration a fuller description of
2 the way in which the seasons are structured.

3 13. One of my primary work emphases involves the valuation of ecosystem services
4 in southeast Alaska and doing research and writing related to how those services influence the
5 local, regional and national economy. In particular, I review and collect socio-economic data on
6 an annual basis, and over the past two years have worked with the Alaska Sustainable Fisheries
7 Trust to publish an annual report – “Sea Bank” – that quantifies the value of southeast Alaska’s
8 fisheries and visitor economies to coastal communities.

9 14. The Alaska troll salmon fishery is the second largest fleet in the state of Alaska,
10 second only to Bristol Bay. There are over 1,000 individual permit holders active each year.
11 These are almost all family-owned businesses. Women increasingly captain the boats, and
12 female crew members are commonplace and growing in number. We typically generate roughly
13 \$30 million in ex-vessel income, meaning, the price paid directly to the fishermen. We support
14 thousands of employees in southeast Alaska. Troll fish generate value throughout the Pacific
15 Northwest economy, first through local processors in southeast Alaska and eventually as a
16 premier fish at “white tablecloth” restaurants. Nearly every business in southeast Alaska
17 communities benefits from the troll fishery.

18 15. Over 80 percent of the active permit holders reside in southeast Alaska
19 communities. Many of the remaining permit holders are Washington residents like myself who
20 spend up to six months operating in southeast Alaska and consider southeast Alaska
21 communities to be our second homes.

22 16. The data that I review each year shows that the Wild Fish Conservancy’s lawsuit
23 will be devastating to southeast Alaska’s communities. The largest private sector economy in
24 southeast Alaska over the past decade has been the tourism industry, which supports dozens of
25 retail businesses in all major communities. When I am not fishing I work with eco-tour
26 companies who have interests in the conservation of southeast Alaska’s salmon, scenery, and

1 wildlife. I attend visitor industry teleconferences held by the Juneau Economic Development
2 Council, Forest Service meetings for visitor products providers, and draft letters for eco-tour
3 companies advocating for protection of the natural environment. Through this work I have
4 personal knowledge that many visitor products providers will not operate in 2020 because of the
5 global COVID-19 pandemic, and those who do hope to operate anticipate losing at least half of
6 their normal operating season.

7 17. Southeast Alaska's top private sector economy is the visitor products industry.
8 Published economic studies show that this industry provides a \$1 billion economic impact when
9 including indirect and multiplier economic impacts. In 2017, over 1.5 million people visited
10 southeast Alaska – two-thirds of all visitors to the state. These visitors spent \$700 million in
11 southeast Alaska, supporting 11,924 jobs and \$445 million in labor income.

12 18. Commercial fishing is the second largest private sector economy in southeast
13 Alaska. According to reports published by the National Marine Fisheries Service regarding U.S.
14 fisheries, in 2017, southeast Alaska supported six of the top 100 seafood producing ports in the
15 United States: Sitka, Ketchikan, Petersburg, Juneau, Wrangell, and Yakutat. These six ports
16 alone produced 260 million pounds of seafood, generating nearly \$218 in landed values. Salmon
17 is the most important seafood product by far, with 2017 landings of 247 million pounds worth
18 \$169 million.

19 19. The troll fishery has an even greater significance to the viability of southeast
20 Alaska coastal community economies because of the high level of resident participation.
21 Economic studies show that the “multiplier” economic effects associated with jobs and wages
22 generated by the troll fishery increases due to year-round purchases of goods and services in
23 support of fishing operations and local, resident households. Economists estimate the total
24 annual economic output of the troll fishery in southeast Alaska at \$85 million. Chinook salmon
25 accounts for roughly 44 percent, or \$37 million of this annual economic output. A copy of the
26 most recent study of the economic impact of the Alaska Troll salmon fishery that focuses on the

HONORABLE MICHELLE L. PETERSON

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WILD FISH CONSERVANCY,

Plaintiff,

v.

BARRY THOM, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION,

Defendant-Intervenor.

Case No. 2:20-cv-417-RAJ-MLP

DECLARATION OF
FREDERICK H. TURNER

Declaration of Frederick H. Turner
Case No. 2:20-CV-417-RAJ-MLP

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Exhibit A

Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens

Consultation on the Delegation of Management Authority for Specified Salmon Fisheries to the State of Alaska

NMFS Consultation Number: WCR-2018-10660

Action Agencies: The National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA)

Affected Species and NMFS’ Determinations:

ESA-Listed Species*	Status	Is Action Likely to Adversely Affect Species?	Is Action Likely To Jeopardize the Species?	Is Action Likely to Adversely Affect Critical Habitat?	Is Action Likely To Destroy or Adversely Modify Critical Habitat?
Lower Columbia River Chinook Salmon (<i>Oncorhynchus tshawytscha</i>)	Threatened	Yes	No	No	No
Snake River Fall-run Chinook Salmon (<i>O. tshawytscha</i>)	Threatened	Yes	No	No	No
Upper Willamette River Chinook Salmon (<i>O. tshawytscha</i>)	Threatened	Yes	No	No	No
Puget Sound Chinook Salmon (<i>O. tshawytscha</i>)	Threatened	Yes	No	Yes	No
Upper Columbia River spring-run Chinook Salmon (<i>O. tshawytscha</i>)	Endangered	No	No	No	No
Snake River spring/summer-run Chinook Salmon (<i>O. tshawytscha</i>)	Threatened	No	No	No	No
California Coastal Chinook Salmon (<i>O. tshawytscha</i>)	Threatened	No	No	No	No
Central Valley spring-run Chinook Salmon (<i>O. tshawytscha</i>)	Threatened	No	No	No	No

effects of fisheries under the new agreement. As discussed above, the fisheries off the U.S. West Coast and inland waters are managed to meet more restrictive domestic objectives for ESA listed salmon, and thus will not likely change as a result of the 2019 Agreement.

2.5.1.1 Retrospective Analysis

The effect of the 2019 Agreement on ERs and natural escapement for ESA-listed Chinook salmon was considered using a retrospective analysis. The analysis was conducted using the FRAM. The FRAM is the tool used primarily for assessing Chinook salmon fisheries by the PFMC off the west coast and in Puget Sound and is described in more detail below.

The retrospective analysis used for analyzing the effects of the proposed action relies on a review of past circumstances to develop an understanding of the likely influence of the 2019 Agreement on the fisheries, and the resulting effects on ERs and escapements of ESA-listed species and other stocks of concern. Actual outcomes over the next ten years will depend on year-specific circumstances related to individual stock abundance, the combined abundances of stocks in particular fisheries, and how fisheries actually are managed in response to these circumstances.

The retrospective analysis uses years from the recent past (1999 through 2014) because they provide a known set of prior circumstances regarding stock abundance and actual fishery affects. The retrospective analysis considers how outcomes would have changed under alternative management scenarios. The scenarios are explained in more detail below, but generally represent 1) what actually occurred based on post season estimates of stock abundance and fishery catches; 2) what we can reasonably expect to occur under the 2019 Agreement given an informed assessment of how fisheries are likely to be managed in the future, i.e., with domestic constraints in addition to those prescribed in the 2019 Agreement ; 3) the previous scenario but with SEAK fisheries set to levels of the 2009 agreement, to isolate the effects of the proposed action; and 4) how the fishery provisions in the 2019 Agreement would perform if there was an unexpected and broad scale decline of 40 percent in the abundance of Chinook salmon. The 40 percent abundance decline scenario is unlikely to occur during the term of the 2019 Agreement but is included to cover the situation of a prolonged and broad scale down turn in productivity and abundance that could occur as a consequence of long term cycles in ocean conditions or global climate change.

Before describing the scenarios used in the retrospective analysis in more detail, it is important to highlight one point. Although the bilateral Agreement sets limits on the fisheries, domestic conservation considerations often result in fisheries that are reduced further than require by the Agreement. The 2019 Agreement sets limits on harvest in both AABM and ISBM fisheries, but it is important to understand the context within which the limits were established. The fishery limits in the 2019 Agreement are 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. The fisheries subject to the Agreement are governed by these constraints. The bilateral fishing regimes are reflective of many considerations, including the historical relationship among fisheries, the variable and evolving nature of the resource base in both countries, and a balancing among

fisheries to allocate fishing opportunities and fishery constraints between and among mixed stock and more-terminal fisheries in the two countries. The fishery and stock-specific annual limits in the agreed regimes were negotiated with the clear understanding that, as previously described above, more restrictive fishery and stock-specific measures often would be required and applied in each country as necessary to meet domestic objectives, such as those required to meet ESA obligations for listed Chinook salmon species. This understanding is specifically acknowledged in paragraph 5(c) of the Chinook chapter of the 2019 Agreement which says:

either or both parties may implement domestic policies that constrain their respective fishery impacts on depressed Chinook stocks to a greater extent than is required by this Paragraph;

Past experience has borne out this relationship between the international limits established in the PST agreements and domestic constraints: fisheries in Canada and the southern U.S. in particular often have been more constrained by ESA and/or other Canadian or U.S. domestic management considerations than was necessary to comply with the applicable bilateral Agreement. As an example, from 1999 to 2002 Canadian AABM fisheries were reduced greatly relative to what was allowed under the 1999 Agreement because of domestic concerns particularly for their WCVI Chinook stock. More recently, Canada has managed the NCBC AABM fishery at levels well below that required by the 2009 Agreement. Southern U.S. fisheries in Puget Sound and along the coast were also often constrained beyond the applicable ISBM requirements because of ESA and other management considerations and conservation constraints. Generally fisheries in SEAK have been managed to stay within PST catch limits. However, in 2018 SEAK fisheries were voluntarily and deliberately managed to a harvest limit that was 10 percent below the allowable harvest limit that was determined by the 2018 SEAK preseason AI from the PSC Chinook Model in order address concerns for Chinook salmon stocks in SEAK, Northern BC and the Transboundary Rivers. This difference between what was required in past bilateral agreements and the tighter constraints that have been applied for domestic reasons is used to inform the modeling in some of the scenarios described below and analyzed herein in the retrospective analysis.

For this analysis, the following four scenarios were run in FRAM using a retrospective analysis of the 1999-2014 fishing years:

Scenario 1: FRAM Validation

- *FRAM runs using actual post-season fishery catches and best available estimates of annual stock abundances.*

The FRAM Validation scenario approximates what actually occurred from 1999 to 2014 based on post season information. These runs are also used in other forums to evaluate the model and the management system and their relative success in meeting fishery and stock specific management objectives. These were described in Section 2.4, Environmental Baseline, as the exploitation between 1999 and 2014 and from this point forward are referred to as Scenario 1. See for example Figure 25 and Table 33.

Exhibit C

PACIFIC SALMON COMMISSION

Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon



Prepared by the
Pacific Salmon Commission
January 2020



Article IV: Conduct of Fisheries

In order to facilitate the implementation of Articles III, VI and VII:

1. Each Party shall submit an annual report on its fishing activities in the previous year to the other Party and to the Commission. The Commission shall forward the reports to the appropriate Panels.
2. The Panels shall consider the reports submitted pursuant to paragraph 1 and shall provide their views to the Commission. The Commission shall review the reports of the Panels and shall provide its views to the Parties.
3. Each year the State of origin shall submit preliminary information for the ensuing year to the other Party and to the Commission, including:
 - (a) the estimated size of the run;
 - (b) the interrelationship between stocks;
 - (c) the spawning escapement required;
 - (d) the estimated total allowable catch;
 - (e) its intentions concerning management of fisheries in its own waters; and
 - (f) its domestic allocation objectives whenever appropriate.

The Commission shall forward this information to the appropriate Panels.

4. The Panels shall examine the information submitted pursuant to paragraph 3 and report their views to the Commission with respect to fishery regimes for the following year.
5. The Commission shall review the reports of the Panels and shall recommend fishery regimes to the Parties.
6. On adoption by both Parties, the fishery regimes referred to in paragraph 5 shall be attached to this Treaty as Annex IV.
7. Each Party shall establish and enforce regulations to implement the fishery regimes adopted by the Parties. Each Party, in a manner to be determined by the Commission, shall notify the Commission and other Party of these regulations and shall promptly communicate to the Commission and to the other Party any in-season modification.

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HONORABLE MICHELLE L. PETERSON

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

_____)
)
WILD FISH CONSERVANCY,)
)
Plaintiff,)
)
v.)
)
BARRY THOM, <i>et al.</i> ,)
)
Defendants,)
)
and)
)
ALASKA TROLLERS ASSOCIATION,)
)
Defendant-Intervenor.)
_____)

Case No. 2:20-cv-417-RAJ-MLP
DECLARATION OF Scott Rumsey
National Marine Fisheries Service,
West Coast Region

I, Scott Rumsey, declare and state as follows:

1 post-doctoral research at Oregon State University before joining the National Oceanic
2 and Atmospheric Administration (NOAA) in 2001.

3 3. Since 2018 I have served as the shadow to the federal Alternate Commissioner on
4 the Pacific Salmon Commission (Ms. Staci MacCorkle, U.S. Department of State). In
5 this role I have become familiar with the management under the Pacific Salmon Treaty,
6 negotiation of the 2019 Pacific Salmon Treaty Agreement, the overall funding the U.S.
7 Pacific Salmon Commissioners agreed to pursue in connection with the Pacific Salmon
8 Treaty Agreement, as well as the specific actions included in that initiative for the
9 conservation of Puget Sound Chinook salmon and Southern Resident killer whales
10 (SRKW). The Pacific Salmon Commission is the body formed by the governments of
11 Canada and the United States to implement the Pacific Salmon Treaty. The Pacific
12 Salmon Commission is a sixteen-person body with four Commissioners and four
13 alternates from each Country, representing the interests of commercial and recreational
14 fisheries as well as federal, state and tribal governments.

15 4. In my capacity as WCR Deputy Regional Administrator, I am responsible for the
16 budget planning and obligation of the Congressionally appropriated funds to implement
17 the Pacific Salmon Treaty Agreement. Through my experience managing the Pacific
18 Coastal Salmon Recovery Fund, I am intimately familiar with the underlying science,
19 planning, and implementation for habitat restoration actions and hatchery production to
20 recover Endangered Species Act listed salmon, steelhead, and SRKW.

21 5. In preparation for this declaration, I have reviewed the 2019 Biological Opinion on the
22 Consultation on the Delegation of Management Authority for Specified Salmon Fisheries
23 to the State of Alaska (2019 Opinion). I also reviewed the Consolidated Appropriations
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1 Act, 2020, Public Law 116-93 (January 2020) as well as the U.S. Section to the Pacific
2 Salmon Treaty FY2020 Funding Agreements (Spend Plan) (Attachment A) and a
3 briefing document on the Spend Plan prepared for Congress (Attachment B).

4 Additionally, I reviewed plaintiff's motion for a preliminary injunction and the
5 declarations filed in support of the motion by Dr. Deborah Giles and Dr. Robert Lacy.

6
7 6. The purpose of this declaration is to address the issues raised by the above
8 declarants concerning the funding of conservation and mitigation measures as
9 contemplated in the 2019 Opinion.

10 7. The 2019 Opinion analyzed a proposed action with three components relating to
11 domestic implementation of the 2019-2028 Pacific Salmon Treaty Agreement. The first
12 component of the proposed action was the delegation of management authority over the
13 salmon troll fishery and the sport salmon fishery in the Southeast Alaska Exclusive
14 Economic Zone (EEZ) to the State of Alaska. The second component of the proposed
15 action was related to Federal funding that NMFS distributes to the State of Alaska to
16 monitor and manage salmon fisheries and implement the Pacific Salmon Treaty.

17
18 8. The third component of the proposed action was funding of a conservation
19 program for Puget Sound Chinook salmon and SRKW. The third component of the
20 proposed action included three elements of this funding initiative. The first element
21 supports continuation of conservation hatchery programs for the Nooksack, Dungeness
22 and Stillaguamish Chinook salmon populations and develop a new program for the Mid-
23 Hood Canal population. In the 2019 Opinion, these programs were estimated to require
24 \$3.06 million in funding annually and are intended target the weakest populations of
25 Puget Sound Chinook salmon that are considered essential for recovery. The second
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1 element improves habitat conditions for these four populations through projects that
2 would cost \$31.2 million and be implemented within the first three years of the 2019
3 Pacific Salmon Treaty Agreement. These two elements, conservation hatchery and
4 habitat programs, are anticipated to improve abundance and productivity for the four
5 critical Puget Sound Chinook populations, as well as increase prey availability for
6 SRKW.
7

8 9. The third funding element was specifically designed to increase the production of
9 hatchery Chinook salmon to provide a meaningful increase in prey availability for SRKW
10 (Hatchery Production Initiative for SRKW). The 2019 Opinion included a preliminary
11 design of the Hatchery Production Initiative for SRKW to use for purposes of the analysis
12 and as a benchmark for evaluating the program. A key objective of the preliminary
13 design was to increase adult prey availability by 4-5% in areas and at times that are most
14 important to SRKW. The program was anticipated to cost \$5.6 million per year which
15 would result in an additional 20 million Chinook salmon smolts produced from hatchery
16 programs.
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19 10. Since implementation of the 2019 Opinion, the non-federal U.S. Pacific Salmon
20 Commissioners (representing native American tribes, and the states of Washington,
21 Oregon, and Alaska) have sought funding from Congress to implement the 2019 Pacific
22 Salmon Treaty Agreement. In federal Fiscal Year (FY) 2020, Congress appropriated
23 these funds to NMFS and other federal agencies to support implementation of the Pacific
24 Salmon Treaty Agreement. The FY2020 funding NMFS received was consistent with the
25 description of the funding initiative in the 2019 Opinion.
26
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Attachment B

- Grants for Chinook Salmon Assessment Letter of Agreement (LOA): \$1.6 million to support Chinook LOA Grants to the states and Pacific Salmon Commission in support of abundance-based management approach for Chinook salmon fisheries in Southeast Alaska

(3) New funding to support implementation of the 2019-2028 Pacific Salmon Treaty Agreement – \$3.0 million

- \$1.5 million in new funding would support new data collection and fishery monitoring, stock assessment and analyses to successfully implement the new 2019-2028 agreement
- \$1.5 million in new hatchery production in Southeast Alaska to mitigate for harvest reductions in Southeast Alaska fisheries agreed to as part of the new 2019-2028 agreement.

HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, *et al.*,

Defendants.

And

ALASKA TROLLERS ASSOCIATION,
and STATE OF ALASKA,

Defendant-Intervenors.

Case No. 2:20-cv-00417-RAJ-MLP

DEFENDANT-INTERVENOR ALASKA
TROLLERS ASSOCIATION'S RESPONSE TO
PLAINTIFF WILD FISH CONSERVANCY'S
MOTION FOR RELIEF

Noting Date: October 14, 2022

ORAL ARGUMENT REQUESTED

Army Corps of Engineers, 466 F. Supp. 3d 1217, 1219 (W.D. Wash. 2020), *aff'd*, 843 Fed. Appx. 77 (9th Cir. 2021). This case—where WFC’s alleged environmental benefit may actually pose environmental harm and the economic consequences are severe—is a prime instance where remand without vacatur is appropriate.

Courts deviate from the ordinary remedy of vacatur when “equity demands.” *Coal. to Protect Puget Sound Habitat*, 843 Fed. Appx. 77, 80 (9th Cir. 2021) (internal quotation marks omitted). In determining whether vacatur is appropriate, a court considers “at least three factors.” *Nat. Res. Def. Council v. U.S. Env’tl. Prot. Agency*, 38 F.4th at 51 (emphasis added). First, a court weighs “the seriousness of the agency’s errors against the disruptive consequences of an interim change that may itself be changed.” *Id.* (internal quotation marks omitted). Second, a court considers “the extent to which either vacating or leaving the decision in place would risk environmental harm.” *Id.* at 51-52 (internal quotation marks omitted). Third, courts “examine whether the agency would likely be able to offer better reasoning and 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.” *Id.* at 52 (internal quotation marks and alterations omitted).

WFC views the standard for remand without vacatur too narrowly. WFC argues that courts focus on “environmental disruption, as opposed to economic disruption” when determining whether vacatur is appropriate. Dkt. No. 127 at 20 (quoting *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 460 F. Supp. 3d 1030, 1038 (D. Mont. 2020)). As highlighted above, the *Nat. Res. Def. Council v. U.S. Env’tl. Prot. Agency* test is not limited to the above three factors or environmental concerns. 48 F.4th at 51 (courts consider “at least three factors”). When weighing whether vacatur is appropriate, it is commonplace for courts to consider the economic impacts of vacatur. *See e.g., California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 993-94 (9th Cir. 2012); *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1028 (N.D. Cal. 2021); *Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987, 993 (D. Alaska 2021); *Se.*

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HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, *et al.*,

Defendants.

And

ALASKA TROLLERS ASSOCIATION,
and STATE OF ALASKA,

Defendant-Intervenors.

Case No. 2:20-cv-00417-RAJ-MLP

DECLARATION OF PAUL OLSON IN
SUPPORT OF DEFENDANT-INTERVENOR
ALASKA TROLLERS ASSOCIATION’S
RESPONSE TO PLAINTIFF WILD FISH
CONSERVANCY’S MOTION FOR A FINAL
ORDER ON RELIEF

Noting Date: October 14, 2022

ORAL ARGUMENT REQUESTED

I, Paul Olson, declare as follows:

1. I submit this declaration in support of the Alaska Trollers Association’s Response to Plaintiff Wild Fish Conservancy’s (“WFC”) Motion for a Final Order on Relief. I have personal knowledge of the matters stated herein and, if called as a witness, could and would competently testify thereto.

2. I live in Chelan County in Washington State during the winter. My address is: 22901 Morgan Street, Leavenworth, WA 98826. I am a member of the Alaska Trollers Association. I previously lived in Southeast Alaska in the municipalities of Sitka and Wrangell

DECLARATION OF PAUL OLSON IN SUPPORT OF
DEFENDANT-INTERVENOR ALASKA TROLLERS
ASSOCIATION’S RESPONSE TO PLAINTIFF WILD FISH
CONSERVANCY’S MOTION FOR A FINAL ORDER ON
RELIEF -- 1

NORTHWEST RESOURCE LAW PLLC
71 Columbia Street, Suite 325
Seattle, WA 98104
206.971.1564

1 brokers advertising boat/permit packages that vary from \$80,000 to \$165,000. These values
2 depend on access to the Chinook salmon fishery and would be much lower if that access is
3 diminished.

4 43. Commercial fishers and processors also provide substantial direct economic
5 benefits to local communities through landing taxes and fisheries business taxes. Fishery
6 business tax revenues from processors go into Alaska’s general fund, and the legislature then
7 appropriates up to fifty percent of the revenue back into the community where the processing
8 occurred. Also, half of the landing tax is returned revenue to municipalities based on landings
9 there.

10 44. In sum, the economic harms to Southeast Alaska fishers and communities vastly
11 exceed the impacts estimated by WFC’s declarants. The closure of the summer and winter troll
12 Chinook fisheries will immediately reduce the troll fleet by an unknown but significant amount
13 and reduce the incomes of and economic outputs from the remaining fleet depending on
14 fluctuations in remaining target species, coho and chum, neither of which consistently supports
15 the fishery. Because of this impact, WFC’s request for injunctive relief is not “limited” to the
16 winter and summer Chinook fishery. The high proportion of a troller’s annual earnings from the
17 Chinook fishery—typically over forty percent—support fishing vessel maintenance, fuel,
18 moorage, gear purchases and numerous other expenses. Many trollers will cease fishing
19 immediately, and those remaining will be unable to withstand downward fluctuations in harvests
20 of other species. This will cause the region to lose its second largest and most widely distributed
21 fishery with the highest levels of resident participation, meaning the loss of millions of dollars in
22 non-fishing jobs, tax revenues, and other benefits.

23 ///

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DECLARATION OF PAUL OLSON IN SUPPORT OF
DEFENDANT-INTERVENOR ALASKA TROLLERS
ASSOCIATION’S RESPONSE TO PLAINTIFF WILD FISH
CONSERVANCY’S MOTION FOR A FINAL ORDER ON
RELIEF -- 14

NORTHWEST RESOURCE LAW PLLC
71 Columbia Street, Suite 325
Seattle, WA 98104
206.971.1564

HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, *et al.*,

Defendants.

And

ALASKA TROLLERS ASSOCIATION,
and STATE OF ALASKA,

Defendant-Intervenors.

Case No. 2:20-cv-00417-RAJ-MLP

DECLARATION OF PATRICIA PHILLIPS IN
SUPPORT OF DEFENDANT-INTERVENOR
ALASKA TROLLERS ASSOCIATION’S
RESPONSE TO PLAINTIFF WILD FISH
CONSERVANCY’S MOTION FOR A FINAL
ORDER ON RELIEF

Noting Date: October 14, 2022

ORAL ARGUMENT REQUESTED

I, Patricia Phillips, declare as follows:

1. I submit this declaration in support of the Alaska Trollers Association’s Response to Plaintiff Wild Fish Conservancy’s (“WFC”) Motion for a Final Order on Relief. I have personal knowledge of the matters stated herein and, if called as a witness, could and would competently testify thereto.

2. I am the mayor of Pelican, Alaska. The Pelican City Council is comprised of six members; five city council members hold hand-troll or power-troll salmon permits. The population of Pelican ranges from 75 annual residents to over 200 residents during the summer.

3. I am distressed by the relief that WFC is seeking in this case. WFC claims it has “narrowly limited” its requested relief by only requesting to close the winter and summer portions of the southeast Alaska troll fishery. In WFC’s estimation that would result in *only* a \$9.5 million impact that is allegedly less than 2.6 percent of the southeast Alaska seafood industry. In addition to being inaccurate, WFC significantly and adversely undersells the economic impacts of its proposed relief.

4. The City of Pelican depends heavily on the southeast Alaska troll fishery. The winter season extends from October to April and the summer season extends from July to September. The effects of closing those seasons would be anything but “narrow,” and the impacts cannot be explained away as percentages. If WFC receives what it seeks, those of us who live in Pelican year-round will struggle to maintain our way of life with no influx of economic activity from the winter and summer fishing seasons.

5. The City relies on the troll fishery for significant portions of its annual revenue. For the fish caught in those seasons, the City receives 50 percent of the raw fish tax collected by the State of Alaska for fish that are landed and processed at the local seafood plant. In the 2021 fiscal year, the City received \$22,500 from the raw fish tax for the summer season alone. Raw fish taxes represent approximately 10 percent of our annual local revenue. That revenue constitutes a significant portion of the City’s general fund and funds crucial city services including education, water/wastewater, electricity, snowplowing, trash, boardwalk/harbor repairs, and public health and safety.

6. The seasons also benefit our City by bringing an increased presence of fishing vessels into our port. These vessels pay moorage, buy ice, refuel, and visit our local café. Our port employs 10 people in various positions related to those activities. We sell approximately 700 tons of ice each year. Without the troll fishery, our port would struggle to remain viable.

7. Approximately 30% of the Pelican population participates in the troll fishery. Those fishers are already struggling as the charter lodge industry continues to grow. The local

1 seafood processor hires up to 40 individuals to process primarily salmon. The remedy sought by
2 WFC may be the final death knell on their way of life.

3 8. Although these numbers may sound small relative to a large city like the one
4 where WFC is located, these types of impacts would be felt across rural fishing communities in
5 southeast Alaska. The socioeconomic impacts of WFC's requested remedy would adversely
6 impact the way of life in these rural communities that is linked to harvesting Chinook salmon for
7 food security, and in a way that impacts a livelihood that actively participates in protection of
8 fisheries resources, with conservation at the core of its management principles.

9 9. I respectfully request that the Court consider the adverse impacts WFC's request
10 to close our fishery would have on our community, and craft a remedy that preserves our
11 community and is not the death knell for our way of life.

12
13 Sworn to under penalty of perjury of the laws of the United States of America, at Pelican,
14 Hoonah-Angoon County, Alaska, this 23 day of September, 2022.

15
16 *Patricia Phillips*
17 Patricia Phillips

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DECLARATION OF PATRICIA PHILLIPS IN SUPPORT OF
DEFENDANT-INTERVENOR ALASKA TROLLERS
ASSOCIATION'S RESPONSE TO PLAINTIFF WILD FISH
CONSERVANCY'S MOTION FOR A FINAL ORDER ON
RELIEF -- 3

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THE HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

)	
)	
WILD FISH CONSERVANCY,	)	Case No. 2:20-cv-417-RAJ-MLP
)	
Plaintiff,	)	THIRD DECLARATION OF
	)	Lynne Barre,
	)	National Marine Fisheries Service,
v.	)	West Coast Region
)	
SCOTT RUMSEY, <i>et al.</i> ,)	
)	
Defendants,)	
)	
and)	
)	
ALASKA TROLLERS ASSOCIATION,)	
)	
Defendant-Intervenor)	
)	
and)	
)	
STATE OF ALASKA,)	
)	
Defendant-Intervenor.)	
)	
)	

1 previous Lacy Declarations. There is no substantial new information provided in
2 the plaintiff's motion or the recent declarations by Dr. Giles and Dr. Lacy that
3 alter my conclusions and opinions in my first two declarations regarding the
4 impacts on SRWKs of closing SEAK fisheries and enjoining the prey increase
5 program.

6
7 5. As previously stated in the 2019 Opinion and based on our analysis, the prey
8 reductions from the SEAK troll fisheries, particularly in the most important
9 locations and seasons for the whales, are small and, considered in concert with the
10 prey increase program, will not jeopardize their survival or recovery. Closing the
11 SEAK fishery will provide only a small benefit to SRKW. Enjoining the prey
12 increase program will have a significant negative effect on SRKW. The prey
13 increase program, designed to support the prey base for SRKW and as
14 implemented over the last three years, provides a meaningful increase in prey
15 abundance and benefits SRKW. Closing the SEAK troll fisheries and enjoining
16 the prey increase program will likely result in a net reduction in prey available to
17 the whales.
18

19
20 6. As described in my First Declaration, based on scientific review and guidance,
21 uncertainties, and the complexity surrounding the relationship between SRKW
22 and their prey, I find Dr. Lacy's modeled relationship quantifying specific
23 changes in reproduction or survival metrics from specific Chinook salmon
24 abundances to be outdated and not based on the best available science. Although
25 mentioned in Dr. Giles' Declaration, Dr. Lacy did not include the most recent
26 population updates, including two new calves born in early 2022. The primary
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HONORABLE MICHELLE L. PETERSON

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

_____)	
)	
WILD FISH CONSERVANCY,	)	Case No. 2:20-cv-417-RAJ-MLP
)	
Plaintiff,	)	SECOND DECLARATION OF
	)	Scott Rumsey,
v.)	National Marine Fisheries Service,
)	West Coast Region
SCOTT RUMSEY, <i>et al.</i> ,)	
)	
Defendants,)	
)	
and)	
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ALASKA TROLLERS ASSOCIATION,)	
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Defendant-Intervenor)	
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and)	
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STATE OF ALASKA,)	
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Defendant-Intervenor.)	
_____)	

I, Scott Rumsey, declare and state as follows:

The 2019 Opinion included a preliminary design of the SRKW prey increase program to use for purposes of the analysis and as a benchmark for evaluating the program. A key objective of the preliminary design was to increase adult prey availability by 4-5% in areas and at times that are most important to SRKW. The program was anticipated to cost \$5.6 million per year.

Funding Since 2019 Pacific Salmon Treaty Agreement

8. Since the 2019 Opinion was signed, the non-federal U.S. Pacific Salmon Commissioners (representing native American tribes, and the states of Washington, Oregon, and Alaska) have sought funding from Congress to implement the 2019 Pacific Salmon Treaty Agreement, including funds for the conservation program that is the third element of the proposed action in the Opinion. For all three fiscal years (FY) since the 2019 Opinion was signed (i.e., FY 2020, FY 2021, and FY2022), Congress has appropriated funds for NOAA's implementation of the Pacific Salmon Treaty. As directed by Congress, NOAA, in consultation with the U.S. Section of the PSC, has developed annual Spend Plans regarding the expenditure of those funds, consistent with the 2019 Opinion. As described in my first declaration, for FY 2020, the Spend Plan allocated a total of \$19.1 million for the conservation activities as follows: \$3.1 million for conservation hatcheries, \$5.6 million through NMFS for the SRKW prey increase program, and \$10.4 million for Puget Sound habitat restoration and protection. First Rumsey Declaration, Att B.

9. For FY 2021, the Spend Plan allocated a total of \$18.8 million for conservation activities as follows: \$2.9 million for conservation hatcheries, \$5.5 million through NMFS and \$1.8 million through U.S. Fish and Wildlife Service ("FWS") for SRKW prey

production (totaling \$7.3 million), and \$10.4 million for Puget Sound habitat restoration and protection.

10. For FY 2022 the Spend Plan allocated a total of \$18.1 million for conservation activities as follows: \$3.2 million for conservation hatcheries, \$4.5 million through NMFS and \$1.8 million through FWS for the SRKW prey increase program (totaling \$6.3 million), and \$10.4 million for Puget Sound habitat restoration and protection.

These Spend Plans guide NMFS' distribution of the funds.

11. NMFS has, through carefully evaluated grants, successfully used these funds as anticipated in the 2019 Opinion and the referenced Spend Plans to contribute to the restoration of Chinook habitat in Puget Sound, implementation and development of conservation hatchery programs to protect and recover four highly vulnerable populations of Puget Sound Chinook, and to strategically increase production of hatchery Chinook to increase prey availability for SRKW. Of particular relevance to Plaintiff's remedy request, NMFS has successfully implemented the prey increase program by awarding funds through FY 2022 while ensuring that increased production does not jeopardize listed fish or adversely modify their critical habitat, and to ensure that production is targeted to maximize the benefits to SRKW. See Third Purcell Declaration.

12. FY 2023 presidential budget and Senate and House reports, if ultimately adopted, would provide funds for Pacific salmon management activities at a similar level to FY 2022. Thus it is likely that the prey increase program would continue in FY 2023 at a similar level to FY 2022 if it is not enjoined or disrupted.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, *et al.*,¹

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

Case No. C20-417-RAJ-MLP

REPORT AND RECOMMENDATION

I. INTRODUCTION

This matter is before the Court on Plaintiff Wild Fish Conservancy’s (“WFC”) Motion for “Final Order on Relief and for a Temporary Restraining Order and/or a Preliminary Injunction Pending Entry of a Final Order on Relief” (“Plaintiff’s Motion”). (Pl.’s Mot. (dkt.

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Scott Rumsey, the current Acting Regional Administrator for NMFS, was substituted for Barry Thom as a Defendant in this action. (*See* dkt. # 126 at 1 n.1.)

estimates for Chinook salmon populations in areas of the Puget Sound, the Lower Columbia River, and the Washington Coast are “well in excess of levels recommended by the HSRG.”⁵ (First Luikart Decl. at ¶¶ 51-53; *see also* Third Luikart Decl. at ¶¶ 6-7.)

iii. Pacific Salmon Treaty and Salmon Fishery Management Plan

Chinook salmon regularly migrate between the United States and Canadian waters, and therefore, fish originating in one country are often caught or “intercepted” by those fishing in the other country. (R. & R. at 9 (citing AR at 523, 47194-95).) To resolve this issue, the United States and Canada ratified the Pacific Salmon Treaty (“PST”) in 1985, establishing a framework for the management of Pacific salmon fisheries in those waters that fall within the PST’s geographical scope. (*Id.*) The countries entered into the most recent agreement in 2019, which set the current upper harvest limits of Chinook salmon. AR at 47194-95. A “key objective” of the United States in negotiating the 2019 PST was to achieve harvest reductions “to help address ongoing conservation concerns for Puget Sound Chinook salmon and coincidentally provide benefits for SRKWs.” AR at 47201-02.

NMFS has delegated its authority over Southeast Alaska salmon fisheries in federal waters to the State of Alaska. (R. & R. at 10 (citing 50 C.F.R. § 679.3(f); AR at 502).) Under the Magnuson-Stevens Act, the North Pacific Fishery Management Council (“NPFMC”) maintains “authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska.” (*Id.* (citing 16 U.S.C. § 1852(a)(1)(G); AR at 502).) NPFMC first developed a fishery management plan (“FMP”) for salmon fisheries in Alaska in 1979 (“Salmon FMP”) and has since issued several amended plans. (*Id.* (citing Fisheries of the Exclusive Economic Zone Off

⁵ Per Dr. Luikart, mean pHOS estimates for Chinook salmon populations in rivers in Puget Sound, the Lower Columbia River, and the Washington Coast range from a 12 percent mean pHOS for at least one river studied between 2010 and 2020 in the Washington Coast up to a 97 percent mean pHOS in another river studied in the Lower Columbia from 2010 to 2016. (Third Luikart Decl. at ¶¶ 6-7 (citing Table 1).)

Ex. 1.) Government Defendants represent that the prey increase program is “increasing the prey available to SRKW now,” that the “increase in abundance anticipated from the prey increase program will contribute to the overall Chinook abundance, and reduce the potential for [SRKWs] to experience low abundance conditions in general,” and that the prey increase program remains “on track to provide the benefits to SRKWs that were anticipated in the [2019 SEAK BiOp].” (See Third Barre Decl. at ¶¶ 15, 22; Third Purcell Decl. at ¶¶ 3, 9-10.)

III. DISCUSSION

WFC argues that its request for partial vacatur is the most reasonable interim solution because it focuses on the most harmful aspects of NMFS’s unlawful actions and will only affect fisheries that have the most impact on the SRKW and threatened Chinook salmon. (Pl.’s Mot. at 10-11, 21-22.) Specifically, WFC argues its sought partial vacatur is warranted because vacatur is the presumptive remedy, NMFS’s ESA and NEPA violations are serious, and risks to the SRKW and Chinook salmon greatly outweigh any disruptive consequences arising from vacatur. (*Id.* at 22-30.) WFC additionally argues the Court should enjoin NMFS’s implementation of the prey increase program until NMFS remediates its BiOp because the prey increase program will irreparably harm wild salmonids and suppress salmon recovery efforts, which poses long-term threats to SRKW. (*Id.* at 30-33.)

Government Defendants counter that the Court should remand the 2019 SEAK BiOp to NMFS without vacatur to allow NMFS to undertake additional analysis under the ESA and NEPA and that no form of injunctive relief is appropriate. (NMFS’s Resp. at 1, 10-24.) The ATA concurs and argues that WFC’s sought vacatur is not warranted as it would provide “a small hypothetical benefit to the SRKW population, but a guaranteed economic disaster” for the Southeast Alaska troll fishery communities and that WFC’s sought injunction of the prey

Defendants counter that remand without vacatur is the more appropriate solution as WFC misrepresents the “narrow” scope of its sought relief as the Southeast Alaska troll fishery is allocated an average of 73.78 percent of the overall limit for Treaty Chinook salmon in Alaska, and because it underestimates economic impacts on the troll fishery and Southeast Alaska communities. (NMFS’s Resp. at 10-11 (citing Keaton Decl. at ¶¶ 18-19, 36, 40); ATA’s Resp. at 3-4, 7-12; State of AK’s Resp. at 3-7 (citing Evenson Decl. at ¶¶ 12-15, 21, Second Vincent-Lang Decl. at ¶¶ 2, 4).) Defendants further argue that vacatur of the prey increase program would immediately cut off funding aimed at replenishing the SRKW food supply, which remains a critical tool to SRKW recovery. (NMFS’s Resp. at 11 (citing Third Barre Decl. at ¶ 23); ATA’s Resp. at 10, 12; State of AK’s Resp. at 11-13.)

The Court will consider the relevant factors in turn:

1. Seriousness of Agency Error and Disruptive Consequences

First, violations that undermine important congressional objectives of the underlying statute are found to be serious. *See, e.g., W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020) (“[T]he seriousness of . . . deficiencies . . . should be measured by the effect the error has in contravening the purposes of the statutes in question”) (citation and internal quotations omitted); *see also Wild Fish Conservancy v. Nat’l Park Serv.*, 2014 WL 3767404, at *3 (W.D. Wash. July 31, 2014) (finding failure to consider viable alternative of reduced hatchery releases a serious NEPA violation). On this aspect, the Court previously determined that NMFS erred due to its reliance on uncertain and indefinite mitigation measures to find no jeopardy to the SRKW, and its failure to address the prey increase program in its jeopardy analysis for the threatened Chinook salmon ESUs. (*See R. & R.* at 27-34.) NMFS

additionally failed to provide the proper NEPA procedures for the issuance of the ITS in the 2019 SEAK BiOp and in adopting the prey increase program. (*See id.* at 34-38.)

Government Defendants argue that the issues identified by the Court are not serious enough errors to warrant vacatur. (NMFS's Resp. at 12-14.) Government Defendants note that courts have chosen to remand without vacatur in similar instances where "not minor" error has been found, and that the seriousness of the errors here with regard to the prey increase program are diluted because every program funded has been subject to subsequent ESA and NEPA compliance.¹⁵ (NMFS's Resp. at 12-13 (citing *Nat'l Fam. Farm Coal. v. U.S. Env't'l Protec. Agency*, 966 F.3d 893, 929 (9th Cir. 2020); *WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855, 884 (D. Mont. 2021).)

Here, the SRKW have been listed as endangered under the ESA since 2005, and remain at a high risk of extinction. *See* 50 C.F.R. § 224.101(h); AR at 15988-89, 47276 ("[T]he [SRKW] population has declined to historically low levels."). The Puget Sound, the Lower Columbia River, the Upper Willamette River, and the Snake River fall-run Chinook salmon ESUs are all also each listed as threatened under the ESA. *See* 50 C.F.R. § 223.102(e). Section 7(a)(2) of the ESA requires federal agencies to ensure their actions do not jeopardize the continued existence of endangered species, and its consultation requirements are purposed to prevent violations of that mandate. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). NMFS's errors in relying on uncertain and indefinite mitigation measures to find no jeopardy to

¹⁵ Government Defendants additionally argue that the NEPA violations do not rise to the level of serious error because it was procedural, rather than substantive, error and that remand itself will allow NMFS to remedy the violations by releasing new NEPA analyses and determinations. (NMFS's Resp. at 13-14.) However, courts consider NEPA violations, other than "mere technical or procedural formalities," serious. *See Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1244-45. Furthermore, this contention ignores that the Court has also found substantive violations of the ESA occurred with regard to both NMFS's no jeopardy finding for the SRKW and failure to address the prey increase program in its jeopardy analysis for the Chinook salmon ESUs. (R. & R. at 33-34.)

the endangered SRKW, failure to address the prey increase program in its jeopardy analysis for the threatened Chinook salmon ESUs, and failure to conduct necessary NEPA analyses are therefore sufficiently serious violations as they clearly undermine central congressional objectives of the ESA and NEPA. *See Zinke*, 441 F. Supp. 3d at 1083, 1086-87; *Nat. Res. Defense Council v. E.P.A.*, 489 F.3d 1364, 1374 (D.C. Cir. 2007) (“The agency’s errors could not be more serious insofar as it acted unlawfully, which is more than sufficient reason to vacate the rules.”).

Moreover, Government Defendants’ cited authority is distinguishable. In *Nat’l Fam. Farm Coal*, the Ninth Circuit found remand without vacatur was appropriate because the “EPA’s error—failing to consider harm to monarch butterflies caused by killing target milkweed” was not serious “in light of EPA’s full compliance with the ESA and substantial compliance with FIFRA [the “Federal Insecticide, Fungicide, and Rodenticide Act”].” 966 F.3d at 929. And in *WildEarth Guardians*, the district court remanded without vacatur in that case because with “limited exception, the record reflected that Federal Defendants met their statutory obligations” in planning for and implementing a revised forest management plan.¹⁶ 545 F. Supp. 3d at 863, 884. No similar full or substantial compliance with the ESA or NEPA on the noted violations has been demonstrated by Defendants in this case.

As for “disruptive consequences,” the “court largely should focus on potential environmental disruption, as opposed to economic disruption.” *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 460 F. Supp. 3d 1030, 1038 (D. Mont. 2020); *see also In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1028 (N.D. Cal. 2021) (“[O]ur court of appeals has

¹⁶ In addition, the district court in *WildEarth Guardians* noted the seriousness of the ESA violations in that case did not favor vacatur due to the environmental harm that would result from vacatur of the revised forest management plan, as a previous and less protective forest management plan would assume its place, and because the errors were limited in scope. 545 F. Supp. 3d at 884.

focused more on environmental consequences when considering whether to vacate EPA rules”). “The ESA . . . did not seek to strike a balance between competing interests but rather singled out the prevention of species [extinction] . . . as an overriding federal policy objective.” *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 891 (9th Cir. 2022) (citation and internal quotations omitted). Courts thus “tip” the scale in favor of protecting listed species in considering vacatur. *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1242 (citing *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987); see also *N. Plains Res. Council*, 460 F. Supp. 3d at 1037-38. Nevertheless, when weighing the appropriateness of vacatur, it also remains common for courts to consider the economic consequences of vacatur. See e.g., *Cal. Cmities. Against Toxics*, 688 F.3d at 993-94; *Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987, 993 (D. Alaska 2021) (“While Plaintiffs contend that the primary consequences to be considered when assessing the disruptive impact of vacatur are environmental harms, the Ninth Circuit has explicitly considered the economic consequences of vacatur”).

First, with regard to disruptive consequences from vacatur of the ITS, there does not appear to be any environmental disruption stemming from disallowing Chinook salmon harvest permitted by the ITS. Instead, closing the troll fisheries in the manner requested would increase prey available to SRKW. (See Third Lacy Decl. at ¶¶ 8, 10.) Though there is uncertainty as to how much prey would ultimately reach the SRKW, the record before the Court suggests that closure of the fisheries meaningfully improves prey available to the SRKW, as well as SRKW population stability and growth, under any scenario. (*Id.* at ¶ 11.)

Nonetheless, vacatur of the ITS will result in disruptive economic consequences for the Chinook salmon troll fishery and the economy of Southeast Alaska.¹⁷ WFC estimates an economic impact of around \$9.5 million loss in generated annual income in the winter and summer seasons, which WFC estimates would impact about 2.6 percent of the Southeast Alaska seafood industry. (See First Radtke Decl. at ¶ 31.) Defendants estimate that the annual economic output of the Chinook salmon commercial troll fleet for the winter and summer seasons fishery to be approximately \$29 million. (Keaton Decl. at ¶¶ 40-41.) Several Southeast Alaska communities would also be impacted given their economic reliance on the commercial troll fishery seasons for income, the loss of tax revenue to these communities, and because of existing cost barriers to entry into other salmon fisheries. (See Keaton Decl. at ¶¶ 31, 41; Phillips Decl. at ¶¶ 1-9; Second Vincent-Lang Decl. at ¶¶ 4-5, 7.) Though the Court does not take such economic consequences lightly, in this case, they do 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. See *Nat'l Fam. Farm Coal.*, 960 F.3d at 1144-45 (vacating pesticide registrations due to EPA's FIFRA violations despite economic impact on farmers who would be required to purchase alternative seeds and pesticides); see also *Coal. to Prot. Puget Sound*, 466 F. Supp. 3d at 1225-26.

Next—as to disruptive consequences from vacatur of the prey increase program—there appears to be pronounced environmental and economic disruption. The primary limiting factor for SRKW is prey abundance and availability, and a substantial portion of the SRKW's diet consists of Chinook salmon. See AR at 47276, 47278, 47282-83, 47286-87, 47434. It is clear

¹⁷ As noted by Government Defendants, vacatur of the ITS in and of itself does not result in a prohibition on fishing, but instead, there is no exemption under Section 9 of the ESA in the event “take” occurs. (NMFS's Resp. at 19-20 (citing 16 U.S.C. § 1536(o)(2); Keaton Decl. at ¶ 31).)

from the record, including WFC’s own experts, that the SRKW require a rapid increase in the abundance of Chinook salmon. (*See* Third Giles Decl. at ¶ 18 (“SRKW need an immediate increase in the abundance of Chinook available to them to avoid functional extinction, as the current low birth rate, with high early mortality is simply unsustainable”); Third Lacy Decl. at ¶¶ 5-6.) Hatchery produced Chinook salmon benefit the SRKW as they support such needed prey availability and contribute to the salmon stocks consumed by the SRKW. (*See* AR at 47286, 47447; Third Barre Decl. at ¶ 11 (“[T]he whales do not distinguish between hatchery produced or wild fish.”) As such, a certain and definite increase in prey is available to the SRKW from the prey increase program.

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.¹⁸ (*See* Third Purcell Decl. at ¶ 3 (“[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].”); *id.* at ¶¶ 3, 5, Exs. 1-2; Third Barre Decl. at ¶ 13 (“[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.”); Second Rumsey Decl. at ¶¶ 7-11.) Over \$5.4 million of funds were distributed by NMFS in the 2022 fiscal year for the prey increase program, with more than 19 million juvenile Chinook salmon released. (*See* Third Purcell Decl. at ¶ 3.)

A disruption to the prey increase program, or its funding, thus appears primed to result in gaps in prey abundance that would lead to increased risk to the health of the SRKW and threaten

¹⁸ For all three fiscal years since the 2019 SEAK BiOp, Congress has appropriated funds for implementation of the prey increase program. (*See* Second Rumsey Decl. at ¶¶ 8-10.)

helping to restore the SRKW population. (*See* AR at 47276, 47278, 47282-83, 47286-87, 47434; *see also* Third Giles Decl. at ¶ 18; Third Lacy Decl. at ¶¶ 5-6.) Chinook salmon caught in the Southeast Alaska troll fishery are from stocks consumed by the SRKW (*see* Evenson Decl. at ¶ 14, Ex. A), and no party here suggests that there would not be at least some benefit to the SRKW from additional prey availability. The 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.

On the contrary, vacatur of the prey increase program would assuredly result in environmental harm to the SRKW by eliminating a targeted source of prey. As considered above, the prey increase program was specifically designed to support the SRKW and has been implemented since the 2019 SEAK BiOp issued to increase SRKW prey abundance. (*See* Third Barre Decl. at ¶ 5 (“The prey increase program . . . provides a meaningful increase in prey abundance and benefits SRKWs.”).) Without the increased prey provided by the prey increase program, there would be risk of environmental harm to the SRKW’s recovery. (*See* Third Barre Decl. at ¶¶ 16 (“In the absence of the intended prey increase, there would be lower overall abundance of Chinook salmon and there could be an elevated risk of Chinook salmon abundance falling to the low abundance levels associated with increased risk to the health of the SRKWs.”), 23 (“Enjoining or disrupting the prey increase program would result in fewer Chinook salmon available to SRKW, and increase the risk for harm to SRKW through behavioral and physiological impacts.”).)

Still, the environmental harm factor is difficult to fully quantify. There is an inherent conflict in this case from the Chinook salmon, a threatened species, serving as priority prey for the endangered SRKW. (*See* Third Barre Decl. at ¶ 22 (“Conservation and recovery of SRKW

HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, *et al.*,

Defendants.

And

ALASKA TROLLERS ASSOCIATION,
and STATE OF ALASKA,

Defendant-Intervenors.

Case No. 2:20-cv-00417-RAJ-MLP

DEFENDANT-INTERVENOR ALASKA
TROLLERS ASSOCIATION’S OBJECTIONS
TO REPORT AND RECOMMENDATION

Noting Date: January 27, 2023

I. INTRODUCTION

The trollers of Southeast Alaska, represented in this matter by the Alaska Trollers Association (“ATA”), are great stewards of the environment. They catch salmon one at a time, cherishing the benefits that the wild fish have provided to their families and communities for generations. The Wild Fish Conservancy (“WFC”)—a Seattle-based organization determined to eliminate hatcheries and the sustainable harvest of salmon, with no ties to the communities of Southeast Alaska—has exploited flaws in environmental analyses performed by the federal government in a quest to decimate that generational way of life of thousands of Alaskans. To

During the merits portion of this case, the Court agreed with WFC’s arguments that NMFS violated the Endangered Species Act (“ESA”) and the National Environmental Policy Act (“NEPA”).¹ Namely, the Court found that NMFS failed to sufficiently explain its prey increase program to demonstrate that benefits from the program would occur with necessary certainty to inform whether the Southeast Alaska fisheries would jeopardize the SRKW population.

Now, at the remedy stage, the Report and Recommendation concludes that in the years following the issuance of the 2019 BiOp, the prey increase program has been implemented with such certainty that the program must continue. With that understanding, the Report and Recommendation illogically concludes that the appropriate remedy for NMFS’s errors is to uphold the prey increase program yet revoke incidental take protection under the ESA afforded to the Southeast Alaska fisheries through the 2019 BiOp.

The Report and Recommendation is not fully informed on the impacts of its proposed decision because it erroneously refused to consider multiple declarations submitted by the ATA. Contrary to the Report and Recommendation’s conclusions, if the prey increase program is maintained, allowing Southeast Alaska fisheries to continue to harvest with incidental take protection will have mitigated impacts that will be far outweighed by the effective closure of the troll fisheries and the resulting catastrophic economic impacts to the communities of Southeast Alaska. Missing the spring and summer seasons will preclude many trollers from maintaining their way of life.

The extraordinary nature of this remedy cannot be overstated. Fisheries along the coasts of Oregon, Washington, and Canada continue to harvest salmon that provide prey for SRKWs. Yet, the Report and Recommendation proposes reaching up to Alaska and removing the least consequential aspect of the 2019 BiOp to the SRKWs—the authorization for Southeast Alaska

¹ The Court adopted Magistrate Peterson’s September 27, 2021 Report and Recommendation on the merits, Dkt. No. 111, in its entirety. Order Adopting Report and Recommendation, Dkt. No. 122. Accordingly, the ATA refers to Dkt. No. 111 for the Court’s holding on the merits.

remedy will close the troll fishery for 10 months of the year, effectively closing the entire fishery because trolling may no longer be economically viable if limited to two months each year. Dkt. No. 128 at 11; Dkt. No. 131 at ¶ 44.

The Report and Recommendation concludes that the economic consequences here “do not overcome the seriousness of NMFS’s violations” or “the harm posed to the SRKW by leaving the ITS in place.” Dkt. No. 144 at 30. Given that the error identified by the Court—the reliance on uncertain mitigation—has become a nonissue with the Report and Recommendation’s recognition of the certainty of the prey increase program, the Report and Recommendation’s conclusion of the balance between economic consequences and environmental harm is wrong. Under the factors that are considered when determining whether to remand without vacatur, the proposed remedy has resolved the environmental harm that could result from the ITS and, as a result, the agency is likely to reach the same conclusion on remand. Accordingly, the drastic economic consequences demonstrate that remand without vacatur of the ITS is demanded by equity.³ See Dkt. No. 128 at 8-9 (discussing relevant factors, including economic harm); *Coal. to Protect Puget Sound Habitat v. United States Army Corps of Engineers*, 843 Fed. Appx. 77, 80 (9th Cir. 2021) (courts deviate from ordinary remedy of vacatur when “equity demands” (internal quotation marks omitted)).

The economic impacts cannot be overstated. Vacating the ITS will have catastrophic economic impacts that far outweigh any impacts to the SRKW that will be mitigated by the prey increase program. The economic impacts of this remedy cannot be reduced to mere numbers that may seem insignificant to an area like Seattle. They will be damning to an entire way of life in Alaska that has existed for generations. To fully understand the generational impacts of this

³ The ATA recognizes that the Court also held that NMFS violated NEPA in issuing the ITS. Dkt. No. 111 at 34-35. As explained, with the prey increase program in place, the 2019 BiOp demonstrates that no jeopardy to the continued existence or recovery of SRKWs will occur. That also suggests that the ITS will be issued on remand after NEPA analysis. Thus, NMFS’s NEPA violations alone do not demand vacatur when the environmental harms are mitigated and the economic harm—as explained in this section—is drastic.

decision, the ATA implores the Court to review the declaration of Eric Jordan in its entirety. Dkt. No. 130. As Mr. Jordan articulated, this remedy does nothing more than cause more suffering; it lacks the particularity that will serve the listed species and the trollers of Southeast Alaska. *See id.* at ¶¶ 8-12.

The impacts will be felt beyond the level of individual families and traditions. As explained by City of Pelican Mayor Patricia Phillips, her entire city will struggle mightily without the influx of economic activity that the troller fishing seasons bring to her community. Dkt. No. 132 at ¶ 4. The State of Alaska also demonstrated that the impacts will be “far-reaching” and impact the “social and economic fabric of coastal communities in Southeast Alaska.” Dkt. No. 134 at 7.

Respectfully, although the Report and Recommendation claims that it “does not take such economic consequences lightly,” Dkt. No. 144 at 30, the proposed remedy does exactly that. The suggested remedy will mitigate any impacts to the SRKW from the trollers in Southeast Alaska, yet the Report and Recommendation still *chooses* to devastate an entire region of Alaska and a way of life that has persisted for generations. There is nothing equitable about this *choice* that mitigates impacts to the SRKWs, gives the Federal Defendants a pass for its faulty analysis, and punishes the ATA and communities of Southeast Alaska.

VI. CONCLUSION

The Report and Recommendation proposes that the Court use its discretion to adopt the “equitable” remedy described therein. However, the proposed remedy punishes the trollers of Southeast Alaska for the mistakes made by NMFS. Any impacts of allowing the ITS to continue to authorize the trollers to fish will be mitigated by the prey increase program. The economic consequences of the proposed remedy, however, will be dire to Southeast Alaska. Given the Report and Recommendation’s reasoning regarding the prey increase program, the Court should also elect to decline to vacate the ITS and continue to allow the trollers in Southeast Alaska to fish.

Honorable Richard A. Jones
Honorable Michelle L. Peterson

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, in his official capacity as
Acting Regional Administrator for the National
Marine Fisheries Service, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

CASE NO: 2:20-cv-00417-RAJ-MLP

**STATE OF ALASKA'S OBJECTIONS TO
THE COURT'S REPORT AND
RECOMMENDATION**

1 leaving the BiOp and ITS in place while on remand.

2 The R&R appropriately recognized that the economic consequences of vacatur should be
3 considered:

4 Nevertheless, when weighing the appropriateness of vacatur, it also remains common
5 for courts to consider the economic consequences of vacatur. *See e.g., Cal. Cmities.*
6 *Against Toxics*, 688 F.3d at 993-94; *Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d
7 987, 993 (D. Alaska 2021) (“While Plaintiffs contend that the primary consequences
8 to be considered when assessing the disruptive impact of vacatur are environmental
9 harms, the Ninth Circuit has explicitly considered the economic consequences of
10 vacatur . . .”).

11 R&R at 29.

12 In addition, during oral argument on Plaintiff’s remedy motion, the Magistrate Judge agreed with
13 the State that the relief Plaintiff requests is not “a narrow, moderate, or reasonable request,” but
14 rather, is “radical.” Transcript of Motion Hearing at 54. But the R&R goes on to substantially
15 downplay the actual foreseeable disruptive economic consequences for the economy of
16 Southeast Alaska and the communities that rely upon the economic activity generated by the
17 fishery. The R&R details Plaintiff’s estimated “economic impact of around \$9.5 million loss in
18 generated annual income in the winter and summer seasons” and the federal defendant’s
19 “estimate that the annual economic output of the Chinook salmon commercial troll fleet for the
20 winter and summer seasons fishery to be approximately \$29 million.” *Id.* at 30. These dollar
21 amounts might be insignificant in the Lower 48, but in Southeast Alaska they are substantial.
22 The R&R makes the rather sterile observation that “[s]everal Southeast Alaska communities
23 would also be impacted given their economic reliance on the commercial troll fishery seasons for
24 income, the loss of tax revenue to these communities, and because of existing cost barriers to
25 entry into other salmon fisheries.” *Id.* This is a polite way of saying that several communities that
26 are wholly reliant upon the impacted fisheries would see their entire tax base wiped out.

27 This definite impact of the vacatur recommended in the R&R should be given much more
28 weight. The Court should reject the finding in the R&R that the certain economic catastrophe to
Southeast Alaska communities does “not overcome the seriousness of NMFS’s violations.” *Id.*

HONORABLE RICHARD A. JONES

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WILD FISH CONSERVANCY,)	
Plaintiff,	)	Case No. 2:20-cv-417-RAJ-MLP
v.	)	DEFENDANTS' OBJECTIONS TO REPORT AND RECOMMENDATION
SCOTT RUMSEY, <i>et al.</i>,	)	NOTE ON MOTION CALENDAR: JANUARY 27, 2023
Defendants,)	
and)	
ALASKA TROLLERS ASSOCIATION,)	
Defendant-Intervenor,)	
and)	
STATE OF ALASKA,)	
Defendant-Intervenor.)	

1 least some benefit to the SRKW from additional prey availability.” *Id.* at 34. But the scope of
2 that benefit is small in those times and those areas where prey is most valuable to SRKW, and
3 the benefit assumed by Plaintiff is an “oversimplification and overestimation.” Dkt. # 133-2
4 (Third Barre Decl.) ¶ 9. Viewed from the perspective of the expected prey reduction from
5 SEAK fisheries, NMFS estimated that all the SEAK fisheries would reduce SRKW prey
6 availability by an average of 0.5% in the coastal waters during the winter and an average of
7 1.8% in inland waters during the summer. *Id.*; see AR 47440-41, 47505. The reductions in prey
8 expected from the commercial troll fishery for Chinook salmon during the winter and summer
9 fisheries, which Plaintiff focuses on its remedy request, would be even lower, and thus the
10 benefit would be relatively small. This is especially true in light of the operation of the prey
11 increase program from 2020 to 2022, which represents “a certain and definite increase in prey . .
12 . available to the SRKW.” Dkt. # 144 at 31. That program is expected to provide additional prey
13 for SRKW over the next two years while NMFS completes new analyses responsive to the
14 Court’s merits decision. Thus, the Court can meet the mandate to protect species by allowing
15 fishing and the prey increase program to continue.

16 On the other side of the scale is a substantial economic impact that cannot be
17 overlooked. Vacating the ITS for the winter and summer commercial troll fisheries could lead
18 to the loss of \$29 million each year in an industry that employs hundreds of people. *See* Keaton
19 Decl. ¶¶ 31-40. This economic impact includes ex-vessel prices, which represents the value of
20 the commercial landings of fish, as well as other economic factors, such as skipper and crew
21 income and the secondary spending of that income. *Id.* Where the economic impact is severe,
22 courts have found that vacatur is not warranted. For example, in *California Communities*
23 *Against Toxics v. U.S. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (per curiam), the Ninth
24 Circuit determined that although the agency’s rule was invalid, remand without vacatur was
25 warranted in part because of the economic impacts of stopping a “billion-dollar venture
26 employing 350 workers.” Harking back to *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d
27 1392 (9th Cir. 1995), the court stated: “While we have only ordered remand without vacatur in
28 limited circumstances, if saving a snail warrants judicial restraint, *see Idaho Farm Bureau*, 58

STATE OF ALASKA

THE LEGISLATURE

2023

Source
CSHJR 5(FSH)

**Legislative
Resolve No.**
3



Urging the United States Secretary of Commerce, the National Marine Fisheries Service, the Alaska Department of Fish and Game, and other federal and state agencies to defend the state's fisheries, including the Southeast Alaska troll fishery.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS commercial fishing is a mainstay of the state's economy and the largest private sector employer in the state; and

WHEREAS, in Southeast Alaska alone, the seafood industry directly employed 11,300 workers and provided \$653,000,000 in total economic output in 2019; and

WHEREAS the troll fleet is one of the largest fleets in the state and the largest fleet in Southeast Alaska, and, in 2019, approximately 1,450 fishers earned income directly from the fishery; and

WHEREAS state residents comprise 85 percent of the state's commercial troll permit holders, making it the highest level of local ownership of any major fishery in the state; and

WHEREAS commercial salmon trolling contributes to the economy of Southeast Alaska year-round, with winter, spring, and summer troll seasons sustaining employment in fishing, seafood processing, and fisheries-related industries; and

WHEREAS, when accounting for multiplier effects of the fishing, seafood processing, and fisheries-related industries, commercial trolling is one of the three most valuable commercial fisheries in Southeast Alaska and has a total annual economic impact of approximately \$85,000,000, as measured in terms of total output; and

WHEREAS, as compared to the costs of entry to other state fisheries, the affordability of the troll fishery provides an entry level opportunity for new commercial fishers, and, as a result, there are troll fishery permit holders in nearly all 33 communities in Southeast Alaska, all of which will suffer if the Southeast Alaska chinook troll fishery is closed; and

WHEREAS the Wild Fish Conservancy filed a lawsuit against the United States Secretary of Commerce and the National Marine Fisheries Service alleging that the Southeast Alaska chinook troll fishery authorized by the National Marine Fisheries Service is contributing to the extinction of an endangered population of southern resident killer whales; and

WHEREAS only two to three percent of the total Alaska catch is from the Puget Sound chinook salmon and lower Columbia River fall stocks, which constitute the most important stocks for southern resident killer whales, and the Alaska fishery catch is only a small portion of those stocks' runs; and

WHEREAS numerous studies have identified habitat loss and industrial activities in Puget Sound as factors negatively affecting southern resident killer whales; and

WHEREAS, while the population of southern resident killer whales has struggled, most of the northern and Alaska resident killer whale populations have at least doubled over the last 40 years; and

WHEREAS the Wild Fish Conservancy lawsuit has the potential to result in the closure of the Southeast Alaska troll fishery, despite the improbability of the closure resulting in meaningful benefits to southern resident killer whales; and

WHEREAS, if successful, the Wild Fish Conservancy lawsuit could affect other state fisheries by rescinding the state's delegated authority to manage and implement salmon fisheries in state water and in the exclusive economic zone off the shores of the state, requiring changes in the allocation of salmon under the Pacific Salmon Treaty and implementing new restrictions and closures in the state's fisheries;

BE IT RESOLVED that the Alaska State Legislature urges the National Marine

Fisheries Service to find a way to hold the Southeast Alaska troll fishery harmless and prioritize preparation of the necessary documents and processes to support the continuation of the Southeast Alaska winter and summer troll fisheries while the National Marine Fisheries Service prepares a new biological opinion; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the National Marine Fisheries Service and the Alaska Department of Fish and Game to commit the necessary resources to effectively defend the state's fisheries in present and future lawsuits, including the Wild Fish Conservancy lawsuit; and be it

FURTHER RESOLVED that the Alaska State Legislature urges the state to work with the Alaska Congressional delegation to keep the Southeast Alaska troll fishery open should the court adopt the magistrate judge's recommendation that the troll fishery be closed.

COPIES of this resolution shall be sent to the Honorable Joseph R. Biden, President of the United States; the Honorable Kamala D. Harris, Vice President of the United States and President of the U.S. Senate; the Honorable Gina Raimondo, United States Secretary of Commerce; the Honorable Richard W. Spinrad, Ph.D., United States Under Secretary of Commerce for Oceans and Atmosphere and National Oceanic and Atmospheric Administration Administrator; Janet Coit, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration; the Honorable Doug Vincent-Lang, Commissioner, Alaska Department of Fish and Game; and the Honorable Lisa Murkowski and the Honorable Dan Sullivan, U.S. Senators, and the Honorable Mary Peltola, U.S. Representative, members of the Alaska delegation in Congress.



SSRAA

Southern Southeast Regional Aquaculture Association, Inc.

14 Borch Street, Ketchikan, Alaska 99901

P: 907.225.9605 F: 907.225.1348

SSRAA Resolution on the Wild Fish Conservancy Lawsuit

Whereas the Southern Southeast Regional Aquaculture Association's mission is to enhance and rehabilitate salmon production in southern Southeast Alaska to the optimum social and economic benefit of salmon users; and

Whereas commercial fishing is a mainstay of Alaska's economy and the largest private sector employer in the state; and

Whereas the troll fleet is the second largest fleet in Alaska; and

Whereas 44% of the fishing income to trollers is derived from their Chinook catch; and

Whereas commercial salmon trolling is a year-round contributor to Southeast Alaska economy and sustains year-round employment in the fishing, processing, and support sector industries; and

Whereas including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$85 million for the whole of Southeast annually, as measured in terms of total output; and

Whereas the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and,

Whereas the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries; and

Whereas the Wild Fish Conservancy lawsuit has the potential to impact other Southeast Fisheries through effects on the Pacific Salmon Treaty, a new Biological opinion and the Section 7 take permit.

Whereas the communities of Southeast will suffer severe economic hardship if the Southeast troll fishery is closed.

Therefore, be it resolved that the Southern Southeast Regional Aquaculture Association urges in the strongest possible terms that:

NMFS prioritize preparation of the necessary documents and processes to support prosecution of the Southeast winter and summer troll fisheries; and,

NMFS and ADFG commit the necessary resources to effectively defend Alaska's fisheries and the Southeast troll fishery in particular; and

All necessary and available state, federal and private resources be made available to support lawsuit defendants and intervenors through all possible appeals; and

The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.


Susan Doherty

General Manager SSRAA

Approved: January 7, 2023



UNITED FISHERMEN OF ALASKA

Mailing Address: P.O. Box 20229, Juneau AK 99802-0229

Phone: (907) 586-2820

E-mail: ufa@ufa-fish.org **Website:** www.ufa-fish.org

UFA Resolution on the Wild Fish Conservancy Lawsuit

Whereas the United Fishermen of Alaska’s mission is to promote and protect the common interest of Alaska’s commercial fishing industry, as a vital component of Alaska’s social and economic well-being; and

Whereas commercial fishing is a mainstay of Alaska’s economy and the largest private sector employer in the state; and

Whereas the troll fleet is the second largest fleet in Alaska; and

Whereas 44% of the fishing income to trollers is derived from their Chinook harvest; and

Whereas commercial salmon trolling is a year-round contributor to Southeast Alaska economy and sustains year-round employment in the fishing, processing, and support sector industries; and

Whereas including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$85 million for the Southeast economy annually, as measured in terms of total output; and

Whereas the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Southeast winter and summer troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and,

Whereas the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries; and

Whereas the Wild Fish Conservancy lawsuit has the potential to impact other Southeast Fisheries thru effects on the Pacific Salmon Treaty, a new Biological opinion and the Section 7 take permit; and

Whereas the communities of Southeast will suffer severe economic hardship if the Southeast troll fishery is closed.

Therefore, be it resolved that the United Fishermen of Alaska urges in the strongest possible terms that:

NMFS prioritize preparation of the necessary documents and processes to support prosecution of the Southeast winter and summer troll fisheries; and,

NMFS and ADFG commit the necessary resources to effectively defend Alaska’s fisheries and the Southeast troll fishery in particular; and

All necessary and available state, federal and private resources be made available to support lawsuit defendants and intervenors through all possible appeals; and

The State of Alaska work with Alaska’s Congressional delegation to protect Alaska’s fisheries from present and future misdirected or malicious lawsuits.

Matt Alward
President, United Fishermen of Alaska

Approved: January 12, 2023

**A RESOLUTION OF THE CITY AND BOROUGH OF SITKA SUPPORTING THE
SOUTHEAST ALASKA TROLL FISHERY**

WHEREAS, commercial fishing is a mainstay of Sitka's economy and the largest private sector employer in the state; and

WHEREAS, the Southeast Alaska troll fleet is the second largest fleet in Alaska and the largest fleet in Southeast Alaska; and

WHEREAS, approximately 30% of the troll fleet is based in Sitka; and

WHEREAS, 60% of the winter chinook troll fishery catch and approximately 40% of the total Southeast troll catch is landed in Sitka; and

WHEREAS, commercial salmon trolling is a year-round contributor to Sitka's economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact in Sitka of approximately \$34 million annually, as measured in terms of total output; and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service (NMFS) threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and

WHEREAS, the community of Sitka will suffer severe economic hardship if the Southeast troll fishery is closed.


NOW, THEREFORE, BE IT RESOLVED that the Assembly of the City and Borough of Sitka urges in the strongest possible terms that:

1. NMFS prioritize preparation of the necessary documents and processes to support prosecution of the Southeast winter and summer troll fisheries; and
2. NMFS and Alaska Department of Fish and Game commit the necessary resources to effectively defend Alaska's fisheries and the Southeast troll fishery in particular all the way to the highest court in the land; and
3. All necessary and available state, federal or private resources be made available to support lawsuit defendants and intervenors; and
4. The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

PASSED, APPROVED, AND ADOPTED by the Assembly of the City and Borough of Sitka, Alaska on this 24th day of January, 2023.


Kevin Mosher, Deputy Mayor

ATTEST:



Sara Peterson, MMC
Municipal Clerk

1st and final reading: 1/24/2023

Sponsors: Christianson / Ystad



Box 2196, Petersburg AK 99833 * (253) 279-0707 * usag.alaska@gmail.com * akgillnet.org

USAG'S MAIN PURPOSE IS TO PROTECT, SERVE AND ENHANCE SOUTHEAST ALASKA'S COMMERCIAL GILLNET FISHERY

January 24, 2023

Senator Dan Sullivan

302 Hart Senate Office Building

Washington, DC 20510

Dear Senator Sullivan,

United southeast Gillnetters are writing today to voice our support of the SEAK troll fleet in their efforts to counter the Wild Fish Conservancy lawsuit, which could result in the closure of the SEAK commercial troll fishery. The success of this lawsuit would set a precedence that could open the door to a plethora of lawsuits that could affect numerous Alaska fisheries. The extra-territorial aspects, and the fact that it would take precedent over the Pacific Salmon Commission Treaty is alarming.

The loss of the troll fishery would be a devastating blow to the economy of the region. Most of these troll dollars stay in state, as approximately 85% are Alaska residents and there are trollers in nearly every SE community. In 2022, commercial troll had an ex-vessel value of approximately \$35M and an average of \$85M in total SE economic output over the last several years. The region, and the state, will struggle mightily should this lawsuit move forward. The people here know it. Communities are considering donating public money to finance the defense fund. They realize the draconian impact this represents.

The State of Alaska has committed to fighting this lawsuit. At this time, it is unclear to us if ^{JUNE 2023}

NMFS intends to.

It's our ask today that you encourage NMFS to continue to:

- a) Appeal any decision that does not protect Alaska's sustainable troll fishery,
- b) Commit all necessary resources to timely National Marine Fisheries Service 2019 Biological Opinion (BiOp) revisions,
- c) Provide interim Endangered Species Act coverage to the Southeast Alaska troll fishery, if needed, while the BiOp is revised.

Please take the necessary steps to advise the NMFS it is of the utmost importance to do whatever is necessary to implement a temporary Incidental Take Statement that allows the troll fishery to remain open, while this lawsuit courses through the legal system. Our understanding is that this will allow them to fish until NMFS can produce a revised Biological Opinion.

United Southeast Alaska Gillnetters represents the interest of 474 SEAK permit holders, and is committed to preserving the economics of our fishery, the region, and the fishing industry in general. Our organization is community based throughout the region, with chapters in Ketchikan, Wrangell, Petersburg, Sitka, Juneau, and Haines. Thank you for your consideration of our request.

Sincerely,



Max Worhatch, Executive Director, USAG

Cc: Senator Lisa Murkowski
Representative Mary Peltola
Doug Vincent-Lang
Alaska Trollers Association

CITY OF PORT ALEXANDER

PO BOX 8068
PORT ALEXANDER, ALASKA 99836
907-568-2211
cityofportalexander@yahoo.com

RESOLUTION 23-02

A Resolution to support the Southeast Alaska Troll Fisheries

Whereas Southeast Alaska salmon trolling has historically been one of the main sources of Port Alexander's economic existence;

Whereas the community of Port Alexander will suffer severe economic hardship if the Southeast Alaska troll fishery is closed;

Whereas the Wild Fish Conservancy (WFC), a Seattle-based organization, has singled out the Southeast Alaska troll fishery in a lawsuit against National Marine Fisheries Service (NMFS) threatening to close the Southeast Alaska troll fishery despite that closure providing no meaningful benefit to the Southern Resident Killer Whales (SRKW);

Whereas the WFC lawsuit challenges NMFS's Biological Opinion regarding Southeast Alaska troll fishery and the impact of Washington's Chinook and Southern Resident Killer Whales (SRKW);

Whereas the Magistrate for the US Western Washington District Court recommendations in this lawsuit contradicts NMFS conclusion that the Incidental Take Permit (ITP) that allows Southeast Alaska's troll fishery to harvest Chinook year-round would not appreciably reduce the likelihood of both survival and recovery of the SRKW or destroy or adversely modify their designated critical habitat;

Whereas science tells us that cutting harvest is not going to be enough to restore Washington local Chinook populations and will do nothing to help SRKW;

Whereas SRKW are threatened by urbanization, toxic water pollutants and noise disturbance in their critical habitat and

Whereas fish managers recognize that continued disturbance and degradation

of habitat, not fisheries, are the primary problem limiting the viability of the Puget Sound Chinook; and, therefore be it

Resolved: That the City of Port Alexander urges the Magistrate take a hard look at the facts that Alaska Trollers Association has provided;

In the strongest possible terms consider the devastating economic impacts shutting down the Southeast Alaska troll fishery would have on many small Southeast Alaska communities; and, therefore be it further

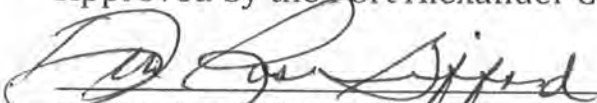
Resolved: That the City of Port Alexander urges the NMFS to prioritize preparations of the necessary documents and processes to support the continuation of the Southeast Alaska troll fishery;

That NMFS and Alaska Department of Fish and Game commit the necessary resources to effectively defend Alaska's fisheries and the Southeast Alaska troll fishery in particular;

That the State of Alaska and Federal resources be made available to support lawsuit defendants and intervenors through all possible appeals and

The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

Approved by the Port Alexander City Council on January 25, 2023


Debra Rose Gifford, Mayor


Shanna Smith, City Clerk

The Honorable Rick Larsen
Wall Street Building
2930 Wetmore Avenue, Suite 9F
Everett, WA 98201

January 30, 2023

Dear Representative Larsen,

We are writing on behalf of the Working Waterfront Coalition of Whatcom County (the Coalition) in reference to the Wild Fish Conservancy's misguided lawsuit against NMFS and Alaska's small boat hook-and-line troll fishery. This lawsuit could have a devastating effect on Southeast Alaska's fishing fleet, processors, support sector, and the health of these economies. The Coalition urges you to encourage and support NOAA Fisheries (NMFS) as it may:

1. Appeal any decision that does not protect Alaska's sustainable troll fishery,
2. Commit all necessary resources to timely BiOp revisions,
3. Provide interim ESA coverage to the SE troll fishery, if needed, while the BiOp is revised.

The Coalition, a 501c6 non-profit, promotes the vitality and economic benefits of our working waterfronts for the people of Whatcom County, Washington State. With over 130 member companies, organizations, fishing vessels, and individuals from the local maritime economy, we are working hard to accomplish this mission. See: www.whatcomworkingwaterfront.org. Coalition members include:

- a number of trollers homeported in Bellingham and fishing in the SE Alaska fishery
- processors including [Seafood Producers Cooperative](#) and [Icy Strait Seafoods](#) who process much of this troll-caught salmon.
- tender vessels that transport the catch from fishing grounds to processing plants
- a myriad of marine service companies that supply, build, repair, and service these hook-and-line boats.

The **economic impact** of the troll fleet to Southeast Alaska is undisputed. The troll fleet has an annual economic impact on Southeast Alaska of approximately \$85 million, as measured in total output. Trolling is a pillar in Southeast Alaska's economy, is vital to the region's economy, and to the vitality of these small rural communities.

Additionally, the troll fleet has advocated continuously for **salmon habitat protection** and **sustainable fisheries management**. This lawsuit actually detracts from the real threats the orcas face: industrial toxins, water pollution, vessel traffic, and noise disturbance. Granted these threats require many years of concentrated and dedicated mitigation efforts before realizing a clear Return-on-Investment (ROI). In contrast, the misguided Wild Fish Conservancy lawsuit employs sensational public attention and further detracts from the real hard work of addressing the major issues.

Additionally, the recreational fisheries in BC and Washington State that catch king salmon in the area also play a significant role in the health of these king salmon runs. Focusing solely on the commercial

Continued -

troll fleet is not helpful to solving the issue. The Southeast Alaska troll fishery, which operates hundreds of miles away from the orca's habitat, is a very small factor in the orca's plight.

To reiterate: Closing Alaska's troll fishery would be disastrous for both Alaskan and Washington fishing families, as well as countless extended local businesses – yet provides no meaningful benefit to the Southern Resident orcas.

We ask that you support a NMFS appeal of any decision that does not protect Alaska's sustainable troll fishery, commit all necessary resources to timely Biological Opinion revisions, and support the provision of interim ESA coverage to the Southeast Alaska troll fishery, if needed, while NMFS's Biological Opinion is revised, to ensure that the 2023 salmon season operates uninterrupted and with its historical opening date.

Please feel free to contact us with any questions or concerns. We thank you for your concerted attention to remaining attuned to this issue and its implications for both Washington and Alaska.

Sincerely,

A handwritten signature in black ink that reads "Pete Granger". The signature is written in a cursive, slightly slanted style.

Pete Granger
Government Relations Committee Chair
Board of Directors
Working Waterfront Coalition of Whatcom County
360-223-3995

RESOLUTION 23-18**A Resolution of the Klawock Cooperative Association opposing The Wild Fish Conservancy Lawsuit to close 2023 winter/summer commercial troll fishery in Southeast Alaska**

WHEREAS, the Klawock Cooperative Association is a federally recognized Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) and May 1, 1936 (49 Stat. 1250); and

WHEREAS, the Klawock Cooperative Association (hereinafter "KCA" is governed by a Council of elected representatives comprised of a Tribal President and 650 members who act in accordance with the powers granted to it by its Constitution and By-Laws (Ratified on October 04, 1938); and

WHEREAS, the Klawock Cooperative Association opposes the Wild Fish Conservancy's lawsuit that challenges the National Marine Fisheries Service (NMFS) *Biological Opinion* regarding Southeast Alaska's fisheries and the impact of the fisheries on the state of Washington's Chinook and Southern Resident Killer whales (SRKW), and

WHEREAS, the commercial fishing industry is a mainstay of Alaska's economy and the largest private sector employer in the state of Alaska; and

WHEREAS, the troll fleet is the second largest fleet in Alaska with Chinook harvest being 44% of their fishing income, and

WHEREAS, commercial salmon trolling is a year-round contributor to Southeast Alaska economy and sustains year-round employment in the fishing, processing, and support sector industries, and

WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$ 85 million for the Southeast Alaska economy annually, as measured in terms of total output, and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Southeast winter and summer troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales, and

WHEREAS, the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries, and

The Klawock Cooperative Association, ("the Tribe"), is a duly constituted Indian Tribe organized pursuant to the authority of Section 16 of the Act of Congress of June 18, 1934 (48 Stat. 984), amended May 1 1936 (49 Stat. 1250) The Klawock Cooperative Association Tribal Council is a duly elected governing body of the Tribe, authorized to act by and on the behalf of its members.

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast Fisheries through effects on the Pacific Salmon Treaty, a new Biological opinion and the Section 7 take permit, and

WHEREAS, the communities of Southeast Alaska will suffer severe economic hardship if the Southeast troll fishery is closed.

WHEREAS, Klawock Cooperative Association urges that:

- National Marine Fisheries Service prioritize preparation of the necessary documents and processes to support prosecution of the Southeast Alaska winter and summer troll fisheries, and
- National Marine Fisheries Service and Alaska Department of Fish & Game commit the necessary resources to effectively defend Alaska’s fisheries and the Southeast Alaska troll fishery, and
- All necessary and available state, federal, and private resources be made available to support lawsuit defendants and intervenors through all possible appeals, and
- The State of Alaska work with Alaska’s Congressional delegation to protect Alaska’s fisheries from present and future misguided lawsuits, and

NOW THEREFORE BE IT RESOLVED, that the **Klawock Cooperative Association** opposes the Wild Fish Conservancy lawsuit to close the 2023 winter and summer troll fishery in Southeast Alaska.

CERTIFICATION

The forgoing Resolution 23-18 was duly adopted at a Regular council meeting held this 31st day of January 2023, by the Klawock Cooperative Association by a quorum vote

8 Yes

0 No

1 Abstain

Patricia Cottle

Patricia Cottle, President Date

Patricia Rowan 2/3/23

Patricia Rowan, Secretary Date

The Klawock Cooperative Association ("the Tribe") is a duly constituted Indian Tribe organized pursuant to the authority of Section 16 of the Act of Congress of June 18, 1934 (48 Stat. 984), amended May, 1 1936 (49 Stat. 1250) The Klawock Cooperative Association Tribal Council is a duly elected governing body of the Tribe, authorized to act by and on the behalf of its members.

Become a Member Today!
<https://www.seiners.net/membership/>

**Southeast Alaska Seiners
Association
PO Box 6238
Ketchikan, AK 99901**



January 31, 2023

Senator Lisa Murkowski
522 Hart Senate Office Building
Washington, DC 20510

Senator Dan Sullivan
302 Hart Senate Office Building
Washington, DC 20510

Representative Mary Peltola
153 Cannon HOB
Washington, DC 20515

Dear Senator Murkowski, Senator Sullivan, and Representative Peltola,

The Southeast Alaska Seiners Association (SEAS) is writing to voice our support of the Southeast Alaska troll fleet in their efforts to counter the lawsuit brought by the Wild Fish Conservancy (a conservation organization based in Washington State) against the National Marine Fisheries Service (NMFS).

This lawsuit specifically attacks Alaska's management of its Chinook salmon fisheries under the Pacific Salmon Treaty and could result in the closure of the winter and summer Southeast Alaska commercial troll fishery.

The lawsuit argues that Alaska fisheries threaten the survival of several ESA-listed Chinook salmon stocks in Washington and Oregon, and thus, the endangered Southern Resident Killer Whales that depend on Chinook salmon for food. Judge Jones supported their claims. This

lawsuit does not attack similar fisheries that occur off the coasts of Washington and Oregon despite similar impacts.

Wild Fish Conservancy's statements also make no mention of challenges currently faced by Chinook salmon and Southern Resident Killer Whales on the West Coast. These challenges range from warming and acidification of ocean waters, chemical pollution, acoustic and physical disturbance from vessels and other noise sources, and dams blocking salmon's return to natal streams to spawn.

SEAS is asking our Washington D.C. delegation and State officials to strongly advise NMFS to quickly implement a Temporary Incidental Take Statement that allows the Alaska troll fishery to remain open while this lawsuit progresses through the legal system. This will allow trollers to fish until NMFS can produce a revised Biological Opinion.

SEAS believes in the continued harvest of salmon which has been responsibly and sustainably managed by the Alaska Department of Fish and Game (ADFG) since 1959.

Sincerely,

Phil Doherty – Executive Director SEAS

Cc: Alaska Governor Mike Dunleavy

ADF&G Commissioner Doug Vincent-Lang

ADF&G Extended Jurisdiction Manager Dani Evenson

Alaska Trollers Association Amy Daugherty, Executive Director

**CITY AND BOROUGH OF YAKUTAT, ALASKA
RESOLUTION 23-392**

**A RESOLUTION OF THE CITY AND BOROUGH OF YAKUTAT, ALASKA ASSEMBLY
SUPPORTING THE ALASKA TROLL FISHERY**

WHEREAS, Commercial fishing is a mainstay of the Yakutat economy and the largest private sector employer in the state, and

WHEREAS, Yakutat \$15.9 Million in commercial fish landing ind 2021 made it the 68th highest ranking port in the United States, and

WHEREAS, Yakutat residents hold 74 hand and power troll permits, and

WHEREAS, Commercial salmon trolling is a year-round contributor to the Yakutat's economy and sustains year-round employment in the fishing and support sector industries, and

WHEREAS, 44% of the fishing income to trollers is derived from their Chinook catch, and

WHEREAS, Approximately 15% of Alaska's winter troll Chinook catch occurs in or near Yakutat, and

WHEREAS, Including fishing, processing and all related multiplier effects, the troll fleet has a total economic impact in Yakutat of approximately \$1.3 million annually, and

WHEREAS, The Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries, and

WHEREAS, The community of Yakutat will suffer severe hardship if the Alaska Troll Fishery is closed, now

THEREFORE BE IT RESOLVED, That the Assembly of the City and Borough of Yakutat urges in the strongest possible terms that:

- 1) The National Marine Fisheries Service (NMFS) prioritize preparation of the necessary documents to support preservation of the winter and summer troll fisheries, and
- 2) NMFS and the Alaska Department of Fish and Game commit the necessary resources to effectively defend Alaska's fisheries and particularly the troll fishery, and
- 3) All Necessary and available state, federal, and private resources be made available to support lawsuit defenders and intervenors, and
- 4) The State of Alaska works with the Alaska Congressional Delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

**PASSED AND APPROVED BY THE CITY AND BOROUGH OF YAKUTAT THIS 2nd DAY
OF February, 2023.**

ATTEST:


TINA RYMAN, CLERK




CINDY BREMNER, MAYOR

**PETERSBURG BOROUGH
RESOLUTION #2023-02**

**A RESOLUTION SUPPORTING THE SOUTHEAST ALASKA TROLL FISHERY AND
URGING THE NATIONAL MARINE FISHERIES SERVICE AND THE ALASKA
DEPARTMENT OF FISH & GAME TO COMMIT THE NECESSARY RESOURCES TO
DEFEND ALASKA'S FISHERIES**

WHEREAS, commercial fishing is a mainstay of Petersburg's economy and the largest private sector employer in the State of Alaska; and

WHEREAS, the Southeast Alaska troll fleet is the second largest fleet in Alaska with 44% of fishing income to trollers being derived from their Chinook catch; and

WHEREAS, approximately 22% of the Southeast Alaska troll fleet permits are homeported in Petersburg; and

WHEREAS, 133 unique troll permits reported Petersburg as port of landing in the 2021 troll fish ticket records; and

WHEREAS, 14% of the total 2021 winter chinook troll fishery catch was landed in Petersburg; and

WHEREAS, commercial salmon trolling is a year-round contributor to Petersburg's economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact in Petersburg of approximately \$4.25 million annually, as measured in terms of total output; and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service (NMFS) threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast fisheries; and

WHEREAS, the community of Petersburg will suffer severe economic hardship if the Southeast troll fishery is closed.

THEREFORE BE IT RESOLVED that the Assembly for the Petersburg Borough strongly urges that:

1. NMFS prioritize preparation of the necessary documents and processes to support prosecution of the Southeast winter and summer troll fisheries; and
2. NMFS and Alaska Department of Fish & Game commit the necessary resources to effectively defend Alaska's fisheries and the Southeast troll fishery in particular; and
3. All necessary and available state, federal or private resources be made available to support lawsuit defendants and intervenors; and

4. The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

PASSED AND APPROVED by the Petersburg Borough Assembly on February 6, 2023..



Mark Jensen, Mayor

ATTEST:



Debra K. Thompson, Borough Clerk



“Resolution on the Wild Fish Conservancy Lawsuit”

WHEREAS commercial fishing is a mainstay of Alaska’s economy and the largest private sector employer in the state; and

WHEREAS the troll fleet is the second largest fleet in Alaska with 44% of the fishing income to trollers being derived from their Chinook catch; and

WHEREAS commercial salmon trolling is a year-round contributor to Southeast Alaska economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$85 million for the whole of Southeast annually, as measured in terms of total output; and

WHEREAS the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and,

WHEREAS the Wild Fish Conservancy lawsuit has the potential to impact other Southeast Fisheries; and

WHEREAS the communities of Southeast will suffer severe economic hardship if the Southeast troll fishery is closed.

WHEREAS Southeast Conference recognizes the importance of subsistence use of the Chinook fisheries for all Alaskans; and

WHEREAS the cultural, traditional and ongoing importance of marine uses of the indigenous people of Alaska; and

Therefore, be it resolved that Southeast Conference urges in the strongest possible terms that:

NMFS prioritize preparation of the necessary documents and processes to support defense of the Southeast winter and summer troll fisheries; and,

NMFS and ADFG commit the necessary resources to effectively defend Alaska’s fisheries and the Southeast troll fishery in particular; and

All necessary and available state, federal and private resources be made available to support lawsuit defendants and intervenors through all possible appeals; and

Therefore, be it further resolved, that:

Southeast Conference encourages the State of Alaska to work with Alaska’s Congressional delegation to protect Alaska’s fisheries from present and future misdirected or malicious lawsuits.

Adopted by the Southeast Conference on

Witness by:



Lacey Simpson
President

Attest:



Robert Venables
Executive Director



Armstrong-Keta, Inc.
PO Box 1075, Sitka, AK, 99835
Phone: (907)586-3443
Email: aki@ak.net

AKI Resolution on the Wild Fish Conservancy Lawsuit

Whereas Armstrong-Keta, Inc.'s mission is to enhance and support the commercial and sport fishing fleets, the rural communities, and the fishing-related businesses of southeast Alaska with research into salmon enhancement and the production of additional salmon; and

Whereas commercial fishing is a mainstay of Alaska's economy and the largest private sector employer in the state; and

Whereas the troll fleet is the second largest fleet in Alaska; and

Whereas 44% of the fishing income to trollers is derived from their Chinook catch; and

Whereas commercial salmon trolling is a year-round contributor to Southeast Alaska economy and sustains year-round employment in the fishing, processing, and support sector industries; and

Whereas including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$85 million for the whole of Southeast annually, as measured in terms of total output; and

Whereas the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and

Whereas the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries; and

Whereas the Wild Fish Conservancy lawsuit has the potential to impact other Southeast Fisheries thru effects on the Pacific Salmon Treaty, a new Biological opinion and the Section 7 take permit; and

Whereas the communities of Southeast will suffer severe economic hardship if the Southeast troll fishery is closed.

Therefore, be it resolved Armstrong-Keta, Inc. urges in the strongest possible terms that:

NMFS prioritize preparation of the necessary documents and processes to support prosecution of the Southeast winter and summer troll fisheries; and

NMFS and ADFG commit the necessary resources to effectively defend Alaska's fisheries and the Southeast troll fishery in particular; and

All necessary and available state, federal and private resources be made available to support lawsuit defendants and intervenors through all possible appeals; and

The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

Bryanna Torgeson
General Manager AKI

Approved: February 8, 2023

Killer Whale Lawsuit Against SE Trollers

Whereas commercial fishing is a mainstay of Alaska's economy and the largest private sector employer in the state; and

Whereas the troll fleet is the second largest commercial fleet in Alaska; and

Whereas between 2000-2018, the troll fleet landed on average 3.02 million pounds of Chinook salmon each year at an average value of \$11.7 million; and

Whereas between 2000-2018, Chinook accounted for 44% of the troll fleet's annual ex-vessel earnings on average and in 2015 made up 58% of the fleet's income; and

Whereas approximately 1,450 fishermen/women earn income directly from the troll fishery, including skippers (permit holders) and crew, with total direct, indirect and induced labor income estimated at \$28.5 million; and

Whereas, in 2018, the residents of the Prince of Wales Island-Hyder Census Area (Craig, Klawock, Thorne Bay, Coffman Cove, Hydaburg, Metlakatla, Kake and other communities) landed 17% of the Alaska resident troll Chinook harvest and 15% of the total troll Chinook harvest value; and

Whereas in 2021, Craig ranked 30th in the nation for commercial seafood landings (21 million pounds) and 52nd in value (\$22.7 million), out of 137 of the nation's top fishing ports; and

Whereas commercial salmon trolling is a year-round contributor to the Southeast Alaska economy and sustains year-round employment in the fishing processing and support sector industries; and

Whereas including fishing, processing and all retailer multiplier effects, the troll fleet has a total economic impact of approximately \$85 million for the whole of Southeast annually, as measured in terms of total output; and

Whereas the lawsuit files by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Alaska winter and summer troll fisheries despite those closures providing no meaningful benefits to Southern Resident Killer Whales; and

Whereas the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries; and

Whereas the communities of Southeast will suffer severe economic hardship if the troll fishery is closed; then

Therefore, be it resolved that the ADFG Klawock Advisory Committee urge in the strongest possible terms that:

NMFS and ADFG commit the necessary resources to effectively defend Alaska's fisheries and the troll fishery in particular; and

All necessary and available state, federal or private resources be made available to support lawsuit defendants and intervenors; and

The State of Alaska work with Alaska's Department of Law and the Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

ADFG Klawock Advisory Committee



City of Hoonah | P.O. Box 360 | 300 Front Street | Hoonah, AK 99829
Phone: (907) 945-3663 Fax: (907) 945-3445

RESOLUTION No. 23-02-02

A RESOLUTION SUPPORTING THE SOUTHEAST ALASKA TROLL FISHERY AND URGING THE NATIONAL MARINE FISHERIES SERVICE AND THE ALASKA DEPARTMENT OF FISH & GAME TO COMMIT THE NECESSARY RESOURCES TO DEFEND ALASKA’S FISHERIES

WHEREAS, commercial fishing is a mainstay of Hoonah’s economy and the largest private sector employer in the State of Alaska; and

WHEREAS, the Southeast Alaska troll fleet is the second largest fleet in Alaska with 44% of fishing income to trollers being derived from their Chinook catch; and

WHEREAS, commercial salmon trolling is a year-round contributor to Hoonah’s economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service (NMFS) threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast fisheries; and

WHEREAS, the community of Hoonah will suffer severe economic hardship if the Southeast troll fishery is closed.


THEREFORE BE IT RESOLVED that the City Council for the City of Hoonah strongly urges that:

1. NMFS prioritize preparation of the necessary documents and processes to support prosecution of the Southeast winter and summer troll fisheries; and
2. NMFS and Alaska Department of Fish & Game commit the necessary resources to effectively defend Alaska’s fisheries and the Southeast troll fishery in particular; and
3. All necessary and available state, federal or private resources be made available to support lawsuit defendants and intervenors; and


Mayor Gerald Byers



SIGNED AND ATTESTED TO THIS 14TH DAY OF FEBRUARY 2023.


City Clerk Jennifer Bidiman

ATTEST

**CITY OF CRAIG
RESOLUTION 23-03**

A RESOLUTION ADVOCATING ON THE WILD FISH CONSERVANCY LAWSUIT

WHEREAS, commercial fishing is a mainstay of Alaska's economy and the largest private sector employer in the state; and,

WHEREAS, commercial fishing has significant historical and economic significance in Craig; and,

WHEREAS, the troll fleet is the second largest commercial fleet in Alaska; and,

WHEREAS, between 2000 – 2018, the troll fleet land on average 3.02 million pounds of Chinook salmon each year at an average value of \$11.7 million; and,

WHEREAS, approximately 1,450 fishermen earn income from the troll fishery, including skippers, (permit holders) and crew with a total direct, indirect, and labor income estimated at \$28.5 million; and,

WHEREAS, in 2018, the residents of the Prince of Wales-Hyder Census Area (Craig, Klawock, Thorne Bay, Coffman Cove, Hydaburg, Metlakatla, Kake, and other communities) landed 17% of the Alaska resident troll Chinook harvest and 15% of the total troll Chinook harvest value; and,

WHEREAS, in 2021 Craig ranked 30th in the nation for commercial seafood landings (21 million pounds) and 52nd in value (\$22.7 million), out of 137 of the nation's top fishing ports; and,

WHEREAS, commercial salmon trolling is a year-round contributor to Southeast Alaska and Craig's economy and sustains year-round employment in the fishing, processing, and support sector industries; and,

WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$85 million for the whole of Southeast annually, as measured in terms of total output; and,

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close Alaska's winter and summer troll fisheries despite those closure providing no meaningful benefits to Southern Resident Killer Whales; and,

WHEREAS, the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries; and,

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast Fisheries; and,

City of Craig
Resolution 23-03
Page 2

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to have catastrophic impacts to the economy and quality of life in Craig; and,

NOW, THEREFORE, BE IT RESOLVED that the City of Craig, Alaska urges in the strongest possible terms that:

1. NMFS prioritize preparation of the necessary documents and processes to support Alaska's troll fisheries.
2. NMFS and the Alaska Department of Fish and Game commit the necessary resources to effectively defend Alaska's fisheries and the troll fishery in particular.
3. All necessary available state, federal and private resources be made available to support lawsuit defendants and intervenors through all possible appeals.

BE IT FURTHER RESOLVED the City of Craig, Alaska encourages the State of Alaska to work with Alaska's Department of Law and Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits

This resolution shall become effective immediately upon its adoption.

PASSED AND APPROVED by a duly constituted quorum of the city council this 15th day of February 2023.



 MAYOR TIM O'CONNOR



 KECIA WEATHERWAX, CITY CLERK



CITY OF KETCHIKAN, ALASKA**RESOLUTION NO. 23-2874****A RESOLUTION OF THE COUNCIL OF THE CITY OF KETCHIKAN, ALASKA OPPOSING THE WILD FISH CONSERVANCY LAWSUIT AND PROTECTING THE SOUTHEAST ALASKA CHINOOK SALMON TROLL FISHERY FROM CLOSURE; AND ESTABLISHING AN EFFECTIVE DATE**

WHEREAS, the Ketchikan City Council and community of Ketchikan recognize that commercial fishing has long provided an economic backbone for Alaska and is the largest private sector employer in the state providing year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, including fishing, processing, and all related multiplier effects, the salmon troll fleet has a total economic impact of approximately \$85 million for the Southeast region annually, as measured in terms of total output; and

WHEREAS, the troll fishing fleet is the second largest fleet in Alaska with 44% of the fishing income to trollers derived from Chinook salmon catches; and

WHEREAS, recognize the importance of the hatchery systems throughout Southeast Alaska including the Southern Southeast Regional Aquaculture Association (SSRAA) in their efforts to enhance and rehabilitate salmon production in the region; and

WHEREAS, a pending lawsuit filed by the Wild Fish Conservancy in the Federal District Court in Washington state (Docket No. C20-417-RAJ, WAWD) challenges the National Marine Fisheries Service fishery management plan and seeks the closure of the Southeast troll fishery in a claimed effort to provide measurable ecological relief to the endangered Southern Resident Killer Whales located off the Washington and Oregon coasts; and

WHEREAS, the Wild Fish Conservancy has pledged to work to eliminate mixed stock fisheries and to eliminate hatcheries throughout Southeast Alaska, and the pending litigation has the potential to impact other Southeast fisheries through impacts on the Pacific Salmon Treaty, and the Section 7 troll take permit; and

WHEREAS, the communities of Southeast will suffer severe economic hardship and threatens subsistence use of Chinook fisheries if the pending litigation results in the wholesale closure of the Southeast troll fishery.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Ketchikan, Alaska as follows:

Section 1: The City of Ketchikan urges the National Marine Fisheries Service (NMFS) to commit all necessary resources to defend its troll fishery management efforts in Alaska and to strenuously oppose any effort toward a wholesale closure of the Southeast Alaska winter and summer troll fisheries.

Section 2: The City of Ketchikan supports the (NMFS) and Alaska Department of Fish and Game (ADF&G) commitment to provide necessary resources to defend Southeast Alaska's hatchery system and troll fisheries.

Section 3: The City of Ketchikan urges all state and local governmental bodies to work with Alaska's congressional delegation to protect fisheries from lawsuits that threaten the region's economic, cultural, and social livelihood.

Section 4: This resolution shall become effective immediately upon adoption.

PASSED AND APPROVED by a duly constituted quorum of the City Council for the City of Ketchikan on this 16th day of February, 2023.



Dave Kiffer, Mayor

ATTEST:



Kim Stanker, City Clerk



City of Pelican

BOX 737 - PELICAN, ALASKA 99832 - PHONE: 735-2202/2203 - FAX: 735-2258 - EMAIL: cityhall@pelicancity.org - WEBSITE: www.pelican.net

EQUAL OPPORTUNITY EMPLOYER

CITY OF PELICAN

RESOLUTION NO. 2023-3

A RESOLUTION OF THE CITY OF PELICAN SUPPORTING THE SOUTHEAST ALASKA TROLL FISHERY AND ASKING FOR IMMEDIATE ACTION AGAINST THE WILD FISH CONSERVANCY LAWSUIT

WHEREAS, commercial fishing is a mainstay of Pelican's economy and the largest private sector employer in the state; and

WHEREAS, the Southeast Alaska troll fleet is the second largest fleet in Alaska and the largest fleet in Southeast Alaska; and

WHEREAS, 44% of the fishing income to trollers is derived from Chinook catch; and

WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$85 million for the whole of Southeast annually, as measured in terms of total output; and,

WHEREAS, commercial salmon trolling is a year-round contributor to Pelican's economy; and

WHEREAS, Shared Fisheries Business Tax contributions to the City of Pelican have been steadily increasing to over \$36,000 for the last fiscal year; and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service (NMFS) threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast fisheries through effects on the Pacific Salmon Treaty, a new Biological opinion and the Section 7 take permit; and

WHEREAS, the community of Pelican will suffer severe significant adverse economic hardship if the Southeast troll fishery is closed.

NOW, THEREFORE, BE IT RESOLVED that the City of Pelican urges in the strongest possible terms that:

1. NMFS prioritize preparation of the necessary documents and processes to support prosecution of the Southeast winter and summer troll fisheries; and
2. NMFS and Alaska Department of Fish and Game commit the necessary resources to effectively defend Alaska's fisheries and the Southeast troll fishery in particular all the way to the highest court in the land; and
3. All necessary and available state, federal or private resources be made available to support lawsuit defendants and intervenors; and
4. The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

PASSED, APPROVED AND ADOPTED THIS 16th DAY OF FEBRUARY 2023.

Patricia Phillips

Lattieca Stewart

Signed:
Patricia Phillips, Mayor

Attest:
Lattieca Stewart, City Clerk

CITY AND BOROUGH OF WRANGELL, ALASKA

RESOLUTION No. 02-23-1756

A RESOLUTION OF THE ASSEMBLY OF THE CITY AND BOROUGH OF WRANGELL, ALASKA, SUPPORTING THE ALASKA TROLLERS ASSOCIATION AGAINST A LAWSUIT TO STOP THE CHINOOK SALMON FISHERY IN SOUTHEAST ALASKA

WHEREAS, Commercial fishing is a mainstay of Wrangell's economy and the largest private sector employer in the state; and

WHEREAS, the troll fleet is the second largest fleet in Alaska; and

WHEREAS, Commercial salmon trolling is a year-round contributor to Wrangell's economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of \$85 million for the whole of Southeast annually, as measured in terms of total output; and

WHEREAS the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and

WHEREAS the community of Wrangell will suffer severe economic hardship if the Southeast troll fishery is closed; and

NOW WHEREAS BE IT RESOLVED THAT THE WRANGELL BOROUGH ASSEMBLY URGES IN THE STRONGEST POSSIBLE TERMS THAT:

Section 1. NMFS prioritize preparation of the necessary documents and process to support prosecution of the Southern Southeast winter and summer troll fisheries; and

Section 2. NMFS and ADFG commit the necessary resources to effectively defend Alaska's fisheries and the Southeast troll fishery in particular; and

Section 3. All necessary and available state, federal, or private resources be made available to support lawsuit defendants and interveners; and

Section 4. The State of Alaska work with Alaska's Congressional Delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

PASSED AND APPROVED BY THE ASSEMBLY OF THE CITY & BOROUGH OF WRANGELL, ALASKA THIS 17th DAY OF FEBRUARY 2023.

CITY & BOROUGH OF WRANGELL

Patricia Gilbert
Patricia Gilbert, Borough Mayor

ATTEST: *Kim Lane*
Kim Lane, MMC, Borough Clerk



Sitka Fish & Game Advisory Committee

Heather Bauscher, Chair

224 Observatory Street, Sitka, AK 99835

WHEREAS, the Sitka Fish & Game Advisory Committee (Sitka AC) is a group of 17 Sitkans representing a diversity of users of local natural resources including Power Trollers, Hand Trollers, Charter fishermen, Resident Sportfishermen, Fish Processors, Conservationists, Longliners, Seiners, Hunters, Guides, and Trappers, and

WHEREAS the Sitka AC is directed by 5 AAC 96.050 to provide a local forum for fish and wildlife conservation and use, and to cooperate and consult with interested persons and organizations, including government agencies, and

WHEREAS commercial fishing is a mainstay of Sitka's economy and the largest private sector employer in the state; and

WHEREAS, the Alaska troll fishery's 1,500 permit holders includes more Alaskans than any other fishery

WHEREAS, approximately 30% of the troll fleet is based in Sitka; and

WHEREAS, 60% of the winter chinook troll fishery catch and approximately 40% of the total Southeast troll catch is landed in Sitka; and

WHEREAS, commercial salmon trolling is a year-round contributor to Sitka's economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total annual economic impact of approximately \$34 million in Sitka, and more than \$80M statewide as measured in terms of total output; and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service (NMFS) threatens to close the Southeast troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales; and

WHEREAS, the community of Sitka will suffer severe economic hardship if the Southeast troll fishery is closed.

NOW, THEREFORE, BE IT RESOLVED that the Sitka AC urges in the strongest possible terms that:

1. NMFS prioritize preparation of the necessary documents and processes to support prosecution of the winter and summer Alaska troll fisheries; and
2. NMFS and Alaska Department of Fish and Game commit the necessary resources to effectively defend Alaska's fisheries and the troll fishery in particular all the way to the highest court in the land; and
3. All necessary and available state, federal or private resources be made available to support lawsuit defendants and intervenors; and
4. The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future misdirected or malicious lawsuits.

Heather Bauscher, Chair

Sitka Fish & Game Advisory Committee



Organized Village of Kake

P.O. Box 316

Kake, Alaska 99830-0316

Telephone 907-785-6471

Fax 907-785-4902/www.kake-nsn.gov



(Federally Recognized Tribal Government serving the Kake, Alaska area)

Resolution No. 2023- 04 - Organized Village of Kake opposing The Wild Fish Conservancy Lawsuit to close 2023 winter/summer commercial troll fishery in Southeast Alaska

- WHEREAS, the Organized Village of Kake(hereinafter OVK) is a federally recognized Indian Tribe under federal law and is empowered under its Constitution and By-Laws to execute agreements and contracts with the United States to benefit its members; and,
- WHEREAS, OVK is organized pursuant to the authority of the Federal Indian Reorganization Acts(hereinafter IRA) of 1934 and 1936 with IRA Council as the duly-elected Governing body formed under its Constitution and By-Laws; and,
- WHEREAS, the OVK opposes the Wild Fish Conservancy’s lawsuit that challenges the National Marine Fisheries Service (NMFS) Biological Opinion regarding Southeast Alaska’s fisheries and the impact of the fisheries on the state of Washington’s Chinook and Southern Resident Killer whales (SRKW), and
- WHEREAS, the commercial fishing industry is a mainstay of Alaska’s economy and the largest private sector employer in the state of Alaska; and
- WHEREAS, the troll fleet is the second largest fleet in Alaska with Chinook harvest being 44% of their fishing income, and
- WHEREAS, commercial salmon trolling is a year-round contributor to Southeast Alaska economy and sustains year-round employment in the fishing, processing, and support sector. industries, and
- WHEREAS, including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact of approximately \$ 85 million for the Southeast Alaska economy annually, as measured in terms of total output, and
- WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the National Marine Fisheries Service threatens to close the Southeast winter and summer troll fishery despite that closure providing no meaningful benefits to Southern Resident Killer Whales, and
- WHEREAS, the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries, and
- WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast Fisheries through effects on the Pacific Salmon Treaty, a new biological opinion and the Section 7 take permit, and

Organized Village of Kake
Resolution No. 2023-04:
Opposition to WFC Lawuit re: king salmon
Page 2

WHEREAS, the communities of Southeast Alaska will suffer severe economic hardship if the Southeast troll fishery is closed.

WHEREAS, OVK urges that:

- National Marine Fisheries Service prioritize preparation of the necessary documents and processes to support prosecution of the Southeast Alaska winter and summer troll fisheries, and
- National Marine Fisheries Service and Alaska Department of Fish & Game commit the necessary resources to effectively defend Alaska’s fisheries and the Southeast Alaska troll fishery, and
- All necessary and available state, federal, and private resources be made available to support lawsuit defendants and intervenors through all possible appeals, and
- The State of Alaska work with Alaska’s Congressional delegation to protect Alaska’s fisheries from present and future misguided lawsuits, and

BE IT FURTHER RESOLVED, that OVK opposes the Wild Fish Conservancy lawsuit to close the 2023 winter and summer troll fishery in Southeast Alaska.

CERTIFICATION

This resolution was duly adopted as an IRA Council Meeting this 23rd day of February 2023, by quorum of 7 (includes president as non-voting chairperson except in case of tie vote) with 6 yes votes, 0 no votes, and 0 abstaining.

Joe Jackson
Joe Jackson, President

Robin Ross
Attested by

Presented by: Triem
Presented: 02/27/2023
Drafted by: R. Palmer III

RESOLUTION OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 3023(b)

A Resolution of the City and Borough of Juneau Opposing the Wild Fish Conservancy Lawsuit and Protecting the Southeast Alaska Troll Fishery from Closure.

WHEREAS, commercial fishing is a mainstay of Alaska's economy, the largest private sector employer in the state, and sustains year-round employment in the fishing, processing, and support sector industries in Southeast Alaska; and

WHEREAS, the troll fleet is the second largest fleet in Alaska, and trollers derive an estimated 44% of their income from the Chinook catch; and

WHEREAS, commercial salmon trolling is a year-round contributor to the Southeast Alaska economy and sustains year-round employment; and

WHEREAS, there are approximately 581 fishing and seafood processing jobs in Juneau that represent approximately \$27.4 million in wages, which includes commercial salmon trollers and processors that depend on Chinook salmon; and

WHEREAS, the troll fleet, including fishing, processing, and all related multiplier effects, has a total annual economic impact of approximately \$85 million across Southeast Alaska; and

WHEREAS, a lawsuit, *Wild Fish Conservancy v. Rumsey et al.*, in the Western District of Washington State Federal Court (No. C20-417-RAJ-MLP) challenges the National Marine Fisheries Service fishery management plan and seeks the closure of the Southeast troll fishery—except from May 1 through June 30—in an effort to provide more Chinook salmon to the endangered Southern Resident killer whales located in the Pacific Northwest; and

WHEREAS, many communities of Southeast will suffer severe economic hardship if the pending litigation results in the closure of the Southeast troll fishery.

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

Section 1. The City and Borough of Juneau urges the National Marine Fisheries Service (NMFS) to prioritize preparation of the necessary documents and processes to support continuation of the Southeast winter and summer troll fisheries.

Section 2. The City and Borough of Juneau supports the NMFS and the Alaska Department of Fish and Game's commitment to defend Southeast Alaska's hatchery system and troll fishery.

Section 3. The City and Borough of Juneau urges all state and local governmental bodies to work with Alaska's congressional delegation to protect Southeast Alaska's economic, cultural, and social livelihood related to Chinook salmon while also protecting the Southern Resident killer whale population.

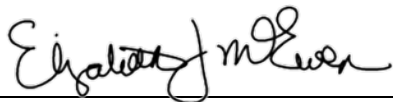
Section 4. This resolution shall be effective immediately after its adoption.

Adopted this 27th day of February 2023.



Beth A. Weldon, Mayor

Attest:



Elizabeth J. McEwen, Municipal Clerk



NORTHERN SOUTHEAST REGIONAL AQUACULTURE ASSOCIATION, INC.
1308 Sawmill Creek Road
Sitka, Alaska 99835
Office: (907) 747-6850 fax:(907) 747-1470

NSRAA Resolution 3-1-23(B)

A Resolution of the Northern Southeast Regional Aquaculture Association (NSRAA) supporting the Southeast Alaska Troll Fisheries.

WHEREAS fishing is a mainstay of Southeast Alaska’s economy and the largest private sector employer in the state of Alaska; and

WHEREAS The mission of NSRAA is in part ...”to assist in the restoration and rehabilitation of Alaska’s salmon stocksto all common property users, without adversely affecting wild salmon stocks. NSRAA is committed to...sustainable harvest management, ... high quality fish habitat, and ...the highest scientific standards in carrying out its mission.”; and

WHEREAS salmon trolling is a long-term sustainable SE Alaska fishery, an essential contributor to the SE Alaska economy, sustains year- round employment in the fishing, processing, and support sector industries like NSRAA; and

WHEREAS The lawsuit filed by the Wild Fish Conservancy (WFC) against the National Marine Fisheries Service (NMFS) to close the SE Alaska troll fishery for no meaningful benefit to Southern Resident Orcas will adversely affect NSRAA; and

WHEREAS The agenda of the WFC to restrict salmon hatchery programs in Idaho, Washington, and Oregon could threaten SE Alaska’s well managed salmon hatchery programs like NSRAA’S; and

WHEREAS The WFC lawsuit could set a precedent for more similarly misguided lawsuits affecting multiple SE Alaska salmon fisheries.

Now, Therefore Be It Resolved that NSRAA requests the State of Alaska, NMFS, and Alaska’s Congressional delegation commit to defend SE Alaska’s salmon fisheries from this and future lawsuits.

A handwritten signature in black ink that reads 'Deborah Lyons'.

Secretary/Treasurer
NSRAA Board



Tribal Council Resolution 2023-035

Encouraging State and Federal Action to Protect Commercial Troll Access to Chinook Salmon in Alaska in Waters

WHEREAS, Sitka Tribe of Alaska is the federally recognized tribal government for more than 4,534 enrolled tribal citizens in Sitka, Alaska, organized under the Indian Reorganization Act of 1934 as amended; and

WHEREAS, Sitka Tribe of Alaska is responsible for the health, safety, welfare, and cultural preservation of its tribal citizens and their use of the Sitka Tribe traditional territory; and

WHEREAS, Sitka Tribe of Alaska’s traditional territory reflects the lands and waters historically and presently the stewardship responsibility of the Sheet’ka Kwáan and as such are composed of the western side of Baranof Island, the greater reaches of Peril Strait, southwestern portions of Chichagof Island and the myriad of islands as well as the waters between these locations; and

WHEREAS, Article VII Section 9(1)(h) of the Constitution of Sitka Tribe of Alaska specifically directs the Sitka Tribal Council “to protect and preserve the Tribal property, wildlife, and natural resources within those areas under the jurisdiction of the Tribe”; and

WHEREAS, The cost of living in remote rural Southeast Alaska has increased significantly in recent years; and

WHEREAS, The lawsuit filed by the Wild Fish Conservancy has the potential to significantly impact a number of Tribal households that rely on commercial trolling for a living; and

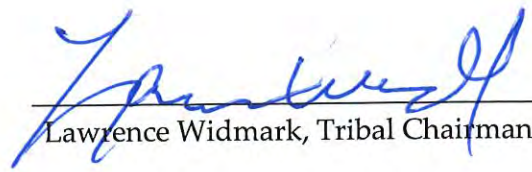
WHEREAS, The relief sought by the Wild Fish Conservancy would have an inconsequential affect on the Southern Distinct orca population, but it would have a profound negative impact the Southeast Alaska troll fleet and the economy of Sitka, and

WHEREAS, A court ruling in favor of the Wild Fish Conservancy would set a dangerous precedent that threatens the chinook sport fishery in Alaska and the ability of substance harvesters to feed their family’s needs, and

NOW THEREFORE BE IT RESOLVED, that the Tribal Council of Sitka Tribe of Alaska hereby encourages the state and federal governments take immediate action to protect Alaska’s commercial and sport access to chinook salmon in Alaskan waters.

C.CERTIFICATION

The foregoing resolution was adopted at a duly convened meeting of the Tribal Council of Sitka Tribe of Alaska, held on March 15, 2023, and at which a quorum was present by a vote of 8 IN FAVOR, 0 AGAINST, 0 ABSTAIN, and 0 ABSENT.



Lawrence Widmark, Tribal Chairman

Attest:



Louise Brady, Tribal Secretary

Executive Council of the Central Council
TLINGIT & HAIDA INDIAN TRIBES OF ALASKA

Resolution EC 23-14

Title: Opposition to the Wild Fish Conservancy Lawsuit to Close the 2023 Winter and Summer Commercial Troll Fishery in Southeast Alaska

WHEREAS, the Central Council of Tlingit & Haida Indian Tribes of Alaska (Tlingit & Haida) is a federally recognized tribe with more than 35,000 citizens; and

WHEREAS, under Article X of the Tlingit & Haida Constitution, the Executive Council is the governing body of Tlingit & Haida when the Tribal Assembly is not in session; and

WHEREAS, the Tribal Assembly is not in session; and

WHEREAS, Tlingit & Haida opposes the Wild Fish Conservancy's lawsuit that challenges the Nation Marine Fisheries Service (NMFS) Biological Opinion regarding Southeast Alaska's fisheries and the impact of the fisheries on the state of Washington's Chinook and Southern Resident Killer Whales; and

WHEREAS, the commercial fishing industry is a mainstay of Alaska's economy and the largest private sector employer in the state of Alaska; and

WHEREAS, the troll fleet is the second largest fleet in Alaska with Chinook harvest being 44% of their fishing income; and

WHEREAS, the commercial salmon trolling is a year-round contributor to Southeast Alaska's economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, including fishing, processing, and all related multiplied effects, the troll fleet has a total economic impact of approximately \$85 million for the Southeast Alaska economy; and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the NMFS threatens to close the Southeast winter and summer troll fishery despite the fact that the closure would provide no meaningful benefits to the state of Washington's Southern Resident Killer Whales; and

WHEREAS, the Wild Fish Conservancy has pledged to eliminate mixed stock fisheries and eliminate hatcheries; and

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast fisheries through effects on the Pacific Salmon Treaty, a new biological opinion and the Section 7 take permit; and

WHEREAS, the communities of Southeast Alaska will suffer severe economic hardship if the Southeast Alaska troll fishery is closed; and

NOW THEREFORE BE IT RESOLVED, that the Executive Council of the Central Council of Tlingit & Haida Indian Tribes of Alaska hereby opposes the Wild Fish Conservancy lawsuit to close the 2023 winter and summer troll fishery in Southeast Alaska;

BE IT FURTHER RESOLVED, that Tlingit & Haida further requests:

- National Marine Fisheries Service prioritize preparation of necessary documents and processes to support the protection of the Southeast Alaska winter and summer troll fisheries; and
- National Marine Fisheries Services and Alaska Department of Fish & Game commit the necessary resources to effectively defend Alaska’s fisheries and the Southeast Alaska troll fishery; and
- All necessary and available state, federal, and private resources be made available to support lawsuit defendants and intervenors through all possible appeals; and
- The State of Alaska work with Alaska’s Congressional delegation to protect Alaska’s fisheries from present and future misguided lawsuits.

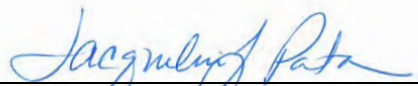
ADOPTED this 20th day of March 2023, by the Executive Council of the Central Council of Tlingit & Haida Indian Tribes of Alaska, by a vote of 5 yeas, 0 nays, 0 abstentions and 1 absence.

CERTIFY



President Richard J. Peterson

ATTEST



Tribal Secretary Jacqueline L. Pata



Letter of support for SE Alaska Chinook Fishery, May 11, 2023

While Alaska may be more than 1,000 miles away, Washington State is closely connected to our 49th State in many ways, especially in the fishing industry where this relationship runs deep and ripples throughout our economy, communities, & culture.

The Port Townsend Marine Trades Association of Jefferson County, Washington State, represents hundreds of small local businesses that are directly connected with Alaska's troll fleet. PTMTA promotes the vitality and economic benefits of Jefferson County's working waterfront which represents 20% of the total jobs in Jefferson County, including many trollers who homeport in Port Townsend and fish in Alaska's troll fishery each summer. Hundreds of fishing boats come from all over the Pacific Northwest including Alaska, to haul out annually at the Port of Port Townsend's boat yard to access the marine trades businesses that supply, build, repair and service Alaska's troll fishery.

We are seeing the complexities and the nuances of this relationship play out in a lawsuit that the Seattle-based Wild Fish Conservancy has brought against the National Marine Fisheries Service (NMFS) with the goal to shut down Southeast Alaska's small-boat, hook-and-line chinook troll fishery in the misguided name of saving the Southern Resident killer whales (SRKW).

Blaming Alaska's troll fishery for the SRKW's decline might sound like an easy solution, but the reality is not that simple — nor does it follow the well-documented science pointing to the habitat loss and degradation, toxic water pollution and dams here in Washington State & the rest of the Pacific Northwest regions that are harming our local salmon populations — and with them the SRKW. Washington State has played a direct role in decimating the orca population, for example, when it allowed 80 orcas in 1970 to be captured in Penn Cove to sell to marine aquariums, with 5 killed during that process and the remaining (except one) died within 5 years of captivity.

Washington State has just released its [2022 State of Salmon in Watersheds](#) report which provides a sobering snapshot of the status of Washington's salmon populations and the pressures feeding their declines. The report reinforces the major impact that habitat loss (much of it driven by Washington's booming population) is having on Washington's salmon.

Shutting down Alaska's troll fishery will not bring us any closer to addressing the deeper, complex issues that are driving the decline of our local orca and salmon populations. Instead, it will have devastating impacts on hundreds of fishing families and businesses that rely on Alaska's troll fishery for their income and jeopardize the economic stability of Washington and Alaska's coastal communities.

The troll fishery has operated for more than 100 years, which is testament to its sustainable fishery management and Alaska's commitment to the Pacific Salmon Treaty which sets strict annual harvest limits that are carefully managed by Alaska Department of Fish and Game.

The troll fishery provides an entry level opportunity due to its affordability when compared to other fisheries in Alaska. Approximately 1,450 fishermen earn income directly from the fishery, including skippers (permit holders) and crew.

Many Southeast Alaska troll fishery permit holders live in Washington State and migrate to Alaska each summer to make their income. In addition, there are many seafood processors, distributors and transportation companies based in Washington that rely on Southeast Alaska's troll fishery as a key source of revenue — not to mention the restaurants, retail stores and fish markets that are committed to sourcing only troll-caught salmon because of its trusted reputation for sustainability and premium quality. Combined, Southeast's troll fishery generates \$148 million annually in economic outputs for all of these different business sectors in the Northwest and beyond (SeaBank 2022).

The Southeast troll fishery is consistently in the top 3 most valuable fisheries in Southeast with a 5-year average ex-vessel value of \$30M. Including fishing, processing, and all related multiplier effects, the troll fleet has a total economic impact in Southeast Alaska of approximately \$85 million annually; 44% of that \$85 million is derived from Chinook harvest.

Maintaining access to this fishery is critical for the well-being and continued diversification in Alaska & Washington state's economy. The troll fishery is a lifeline for rural livelihoods of hundreds of small-boat fishermen who take great pride in the high-quality product they provide to consumers across America. It is critical to many of our Washington State Ports & to the hundreds of local maritime trades businesses that support this fishery.

As multigenerational fishing families and businesses that rely on clean and intact waterways, healthy ecosystems and sustainable fisheries, our future is tied to the health of the orcas, wild salmon, and all of our marine environment. It's time to stop passing the blame around and instead realize that we're all in the same boat and start pulling in the same direction. We need collaborative partnerships that promote what's best for the salmon, including doubling-down on restoring critical salmon habitat and addressing the root problems that have gotten us to this point.

PTMTA feels this recent court judgment is arbitrary and capricious at best. It is most heartbreaking & unfair that one judge's ruling could have such a large impact on our communities and so little impact upon our whales. Alaska and Washington's fishing families & businesses will always be a strong voice for wild salmon, our marine environment, and our maritime heritage. We support our troll and long line fishing industry and all of the businesses they sustain.

Sincerely,
Pete Langley, Board President,
Port Townsend Marine Trades Association

The mission of PTMTA is to serve as a unified voice for the marine trades, promoting economic development stability in the community and resolving issues that threaten the livelihood of the marine trades in Jefferson County.

Email: ptmarinetrades@gmail.com, Website: www.ptmta.org



RESOLUTION 23-56

A RESOLUTION OF THE ALEUTIANS EAST BOROUGH ASSEMBLY SUPPORTING SOUTHEAST ALASKA SALMON TROLL FISHERMEN

WHEREAS, the Southeast Alaska Chinook salmon troll fishery is a sustainable fishery that has operated for over one hundred years, much like salmon fisheries of the Aleutians East; and

WHEREAS, Southeast Alaska fishermen and communities are dependent on the troll fishery; and

WHEREAS, on May 2nd, U.S. District Judge Richard Jones remanded the 2019 Southeast Alaska Biological Opinion back to NMFS to remedy ESA and NEPA violations, and vacated portions of the Biological Opinion that authorized the Southeast Alaska Chinook salmon troll fishery; and

WHEREAS, U.S. District Judge Jones ruling attempts to reallocate Chinook salmon from Southeast Alaska salmon trollers to the endangered Southern Resident killer whales, by closing the summer and winter Southeast Alaska Chinook salmon troll fishery; and

WHEREAS, the Southern Resident killer whales spend winters along the West Coast of California, Oregon and Washington and summers in their critical habitat of Puget Sound, the Strait of Juan de Fuca and the San Juan Islands, and generally not in waters off Alaska; and

WHEREAS, threats to the endangered Southern Resident killer whales include vessel traffic noise, disturbances and pollution in their habitat as well as reduced prey availability; and

WHEREAS, the State of Alaska, Governor Mike Dunleavy and the Alaska Congressional Delegation of Senators Dan Sullivan, Lisa Murkowski and Representative Mary Peltola have condemned Judge Jones ruling to close the Southeast Alaska Chinook salmon troll fishery; and

WHEREAS, the Southeast Alaska Chinook salmon troll fishery is integral to Southeast Alaska communities' culture and economies; and

WHEREAS, the Southeast Alaska Chinook salmon troll fishery is not an existential threat to Southern Resident killer whales and closing the Southeast Alaska Chinook salmon troll fishery will not significantly improve conditions for Southern Resident killer whale survival.

NOW THEREFORE BE IT RESOLVED, the Aleutians East Borough Assembly supports Southeast Alaska troll fishermen efforts to continue the historic sustainable Chinook salmon fishery that supports Southeast communities and provides Alaska Chinook salmon to markets; and

BE IT FURTHER RESOLVED, the Aleutians East Borough Assembly supports an appeal to the Ninth District Court of Appeals that would stay U.S District Judge Jones ruling and would allow Southeast Alaska Chinook salmon troll fisheries to commence July 1, and

BE IT FURTHER RESOLVED, the Aleutians East Borough Assembly urges NMFS to expedite issuance of an updated Southeast Alaska Biological Opinion that would include Chinook salmon commercial harvest by the Southeast Alaska troll fleet.

Approved and Adopted this 18th day of May 2023.



Alvin D. Osterback, Mayor



Beverly Rosete, Clerk

Janet Coit, Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
1315 East West Highway
Silver Spring, MD 20910

Jon Kurland, Regional Administrator
NOAA Fisheries Alaska Region
PO Box 21668
Juneau, AK 99802

May 23, 2023

Dear Assistant Administrator Coit and Regional Administrator Kurland:

As conservation organizations that are deeply committed to and invested in the future health of our marine and freshwater ecosystems, we stand in support of Southeast Alaska's salmon troll fishery. We urge our state and federal officials as well as elected decision-makers, to protect this fishery and the families and businesses that depend on it from the Wild Fish Conservancy's [misguided lawsuit against the National Marine Fisheries Service](#).

The Wild Fish Conservancy's lawsuit aims to portray Southeast Alaska's troll fishery as a threat to the health and survival of Washington's Southern Resident Killer Whales and endangered Chinook populations. However, it is well-established that chronic habitat problems in Washington and nearby Southern British Columbia are the root cause for the continued decline of the SRKW's primary food source: Chinook salmon.

The State of Washington's latest [State of Salmon in Watersheds 2022 Report](#) reinforces this point, drawing attention to the rapid loss of salmon habitat as well as the impacts of climate change. The report also calls attention to the fact that we're not keeping pace with the habitat restoration work needed to restore Washington's salmon; only \$1.6 billion of a needed \$4.7 billion has been received. Meanwhile, Southeast Alaska's trollers have given up a substantial percentage of their Chinook harvest since the Pacific Salmon Treaty was adopted in 1985, but as the data clearly shows that's not been enough to restore these salmon runs. Putting Alaska fishing families on the beach will solve nothing; in fact, it will only add to the problem.

For decades, Southeast Alaska's trollers have been advocating for wild salmon and their habitat in both Southeast Alaska (e.g., the Tongass National Forest, Transboundary Mines) and the Pacific Northwest (e.g., the Snake River in the Columbia Basin). Time and again Southeast's trollers have shown up to testify on behalf of protecting wild salmon, have signed onto letters to decision-makers, and have even contributed financially to organizations in Alaska and the Northwest working to protect and restore wild salmon. That's in large part because trollers understand that their own survival hinges on healthy wild salmon runs; sustainability is part of their bottom line.

Despite being a small-boat fishery, Southeast Alaska's troll fleet creates tremendous benefit, opportunity, and stability for Alaskans, especially those in Southeast's rural and isolated communities. Approximately 1,450 fishermen earn income directly from the fishery, including skippers (permit holders) and crew. Approximately 85% of troll permit holders reside in Southeast Alaska and the troll fishery provides more jobs for Alaskan residents than any other fishery and is especially important to those who live in smaller, remote communities since it allows for year-round fishing opportunities. Southeast's troll fishery also supports families and businesses based in the Northwest, including more than 100 troll permit holders, seafood processors, distribution and transportation companies.

While we the undersigned support the goals of the Endangered Species Act, we are deeply concerned that the Wild Fish Conservancy's attack on Alaskan fishing families diverts attention from the core challenges facing salmon and divides groups that should be working together for the future of wild salmon all along the Pacific Coast of North America. It also directly threatens the future of Southeast Alaska where hundreds of small-boat fishermen take great pride in the high-quality food product they provide to consumers across America. We urge you to stand with Southeast Alaska's trollers so that they can continue to generate income for our rural communities, contribute to our local food security, and advocate for the health of the orcas and salmon.

Sincerely,

Tim Bristol, Executive Director
SalmonState
www.salmonstate.org

Meredith Trainor, Executive Director
Southeast Alaska Conservation Council
www.seacc.org

Andrew Thoms, Executive Director
Sitka Conservation Society
www.sitkawild.org

Larry Edwards, Secretary
Alaska Rainforest Defenders
www.alaskarainforest.org

Cc: Alaska U.S. Senator Lisa Murkowski
Alaska U.S. Senator Dan Sullivan
Alaska U.S. Representative Mary Peltola
Washington U.S. Senator Maria Cantwell
Washington U.S. Senator Patty Murray
Washington Governor Jay Inslee
Alaska Governor Mike Dunleavy

Yakutat Tlingit Tribe

606 Forest Hwy. 10 * P.O. Box 418 * Yakutat, Alaska 99689
Phone (907) 784-3238 * Fax (907) 784-3595 * www.ytttribe.org



RESOLUTION 2023-14

OPPOSING THE WILD FISH CONSERVANCY LAWSUIT AGAINST NMFS WHICH THREATENS THE ECONOMIC SECURITY OF THE YAKUTAT TRIBAL PEOPLE

WHEREAS, the Yakutat Tlingit Tribe (YTT) is a federally recognized Tribe under federal law; and

WHEREAS, the governing body of the Yakutat Tlingit Tribe is the Yakutat Tlingit Tribal Council (the “Tribal Council”); and

WHEREAS, it is the Mission of the YTT to “preserve, maintain and protect the unique culture, land and resources of Yakutat Tlingit people; to maximize our social, health & well-being while creating economic development benefits to all tribal members.”; and

WHEREAS, the commercial fishing industry is a mainstay of Alaska’s economy and the largest private sector employer in the state of Alaska; and

WHEREAS, the troll fleet is the second largest fleet in Alaska with Chinook harvest being 44% of their fishing income; and

WHEREAS, the commercial salmon trolling is a year-round contributor to Southeast Alaska’s economy and sustains year-round employment in the fishing, processing, and support sector industries; and

WHEREAS, including fishing, processing, and all related multiplied effects, the troll fleet has a total economic impact of approximately \$85 million for the Southeast Alaskan economy; and

WHEREAS, the lawsuit filed by the Wild Fish Conservancy against the NOAA National Marine Fisheries Service (NMFS) threatens to close the Southeast winter and summer troll fishery; and

WHEREAS, the Wild Fish Conservancy lawsuit has the potential to impact other Southeast fisheries through effects on the Pacific Salmon Treaty, a new biological opinion and the Section 7 take permit; and

WHEREAS, the communities of Southeast Alaska, including Yakutat, will suffer severe economic hardship if the Southeast Alaska troll fishery is closed; and

WHEREAS, the Yakutat Tlingit Tribe acknowledges the importance and cultural significance of the endangered Southern Resident Orcas to the Coast Salish and Coastal Tribal communities in Washington State and British Columbia; and

To preserve, maintain and protect the unique culture, land & resources of Yakutat Tlingit people;
to maximize our social, health & well-being while creating economic development benefits to all tribal members.



NOW, THEREFORE BE IT RESOLVED, that the Yakutat Tlingit Tribe hereby opposes the Wild Fish Conservancy lawsuit to close the 2023 winter and summer troll fishery in Southeast Alaska.

BE IT FURTHER RESOLVED, that YTT requests that:


- National Marine Fisheries Service prioritize preparation of necessary documents and processes to support the Southeast Alaska winter and summer troll fisheries opening on time and being fully prosecuted; and
- National Marine Fisheries Services and Alaska Department of Fish & Game commit the necessary resources to effectively defend Alaska's fisheries and the Southeast Alaska troll fishery; and
- All necessary and available state, federal, and private resources be made available to support lawsuit defendants and intervenors through all possible appeals; and
- The State of Alaska work with Alaska's Congressional delegation to protect Alaska's fisheries from present and future lawsuits.

CERTIFICATION

Adopted at a duly convened meeting the Yakutat Tlingit Tribe, at which a quorum of members was present, by a vote of 5 for, 0 against, and 0 abstained, this 24th day of May 2023.



John Buller, Tribal President



Victoria Demmert, Tribal Secretary

**DECLARATION OF RICHARD CHALYEE ÉESH PETERSON IN SUPPORT OF
AMICI CURIAE BRIEF OF THE ALASKA CONGRESSIONAL DELEGATION IN
SUPPORT OF INTERVENOR-DEFENDANT STATE OF ALASKA'S
MOTION FOR STAY PENDING APPEAL**

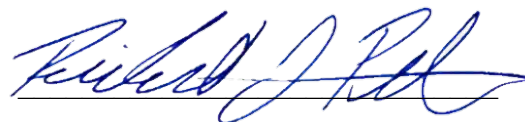
I, Richard Chalyee Éesh Peterson, declare as follows:

1. I submit this declaration in support of the *Amici Curiae* brief of the Alaska Congressional Delegation in support of Defendant-Intervenor State of Alaska's motion for a stay pending appeal. I have personal knowledge of the matters discussed herein.
2. I am the President of the Central Council of Tlingit & Haida Indian Tribes of Alaska ("Tlingit & Haida"), a federally and state recognized tribe representing over 35,000 tribal citizens. Tlingit & Haida's ancestral lands and waters encompass Southeast Alaska and extend into the Yukon and British Columbia in Canada.
3. Tlingit and Haida peoples have called Southeast Alaska home since time immemorial. Salmon has been a cultural mainstay for our people as long as we have existed. Our tribal citizens have fished the waters of Southeast for thousands of years and our tribal citizens continue to do so today as permitted troll fisherman. The tradition of "trolling" pre-dates western contact when Tlingit and Haida peoples used a hook-and-line (bone hooks) from their canoes when fishing for Chinook salmon. In some cases, four generations of one family have supported their household and the Southeast economy through a hook-and-line fishery, as did their ancestors before them. Responsible stewardship of our waters is vital to the Tlingit and Haida way of life and is an expression of our sovereignty. Troll fishermen continue our traditional practices by harvesting Chinook salmon sustainably and responsibly.
4. In addition to their cultural role, these fishermen play a crucial economic role in their communities. There are nearly 600 tribal citizens who hold commercial power and hand

troll permits throughout Southeast Alaska communities. These permit holders provide employment and income for many people beyond themselves. According to the Alaska Trollers Association, roughly one in forty people in Southeast Alaska work on a troll boat. This impact extends even further when the industries that support trollers, such as fish processors, are accounted for. The seasonality of the troll fishery means that missing even one opener can cause a troller and their crew to lose a sizeable portion of their annual income. The negative impacts of missing an opener can extend far past the fishing season, it can mean families might not have the money, food, and resources they need to support themselves for the rest of the year.

5. Given the significant cultural and economic importance of the Chinook salmon fishery to our tribal citizens, Tlingit & Haida is in full support of Congress's efforts to fund and maintain both conservation efforts and a sustainable Chinook salmon fishery. The goals of Congress are the same as Tlingit & Haida: to have a healthy and productive fishery for generations to come.
6. If a stay is not granted, the closure of the summer and winter Chinook salmon troll fishery will have a devastating cultural and economic impact on our tribal citizens and their communities which rely on this fishery for their livelihood and their cultural well-being.

Sworn to under penalty of perjury of the laws of the United States of America, at Juneau, Alaska, this 2nd day of June 2023.



Richard Peterson

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

**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

**PLAINTIFF-APPELLEE/CROSS-APPELLANT'S RESPONSE TO
INTERVENOR-DEFENDANT-APPELLANT STATE OF ALASKA'S
MOTION FOR STAY PENDING APPEAL**

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Attorneys for Plaintiff-Appellee/Cross-Appellant Wild Fish Conservancy

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GLOSSARY OF ACRONYMS

BiOp	Biological Opinion
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
PST	Pacific Salmon Treaty
PVA	Population Viability Analysis
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whale

Plaintiff-Appellee/Cross Appellant Wild Fish Conservancy (“Conservancy”) hereby responds to the State of Alaska’s Motion for Stay Pending Appeal (“Motion to Stay”) and respectfully requests the Court deny the relief requested therein.

I. INTRODUCTION.

The National Marine Fisheries Service (“NMFS”) violated the Endangered Species Act (“ESA”) by issuing an incidental take statement (“ITS”) authorizing excessive salmon harvests in Southeast Alaska that threaten the continued survival of Southern Resident Killer Whales (“SRKW”) and Chinook salmon in reliance on undefined and uncertain mitigation; mitigation that is nowhere near meeting its objectives four years later. NMFS also violated the National Environmental Policy Act (“NEPA”) by issuing the ITS without first considering alternatives, like reduced harvests, or providing any required evaluations. The presumptive remedy for such serious deficiencies is vacatur of the entire ITS. The District Court, however, carefully crafted a remedy that protects imperiled species but allows most fisheries covered by the illegal ITS to continue. That was not an abuse of discretion. *See Coal. to Prot. Puget Sound Habitat v. U.S. Army Corps Eng’rs*, 843 F. App’x 77, 80 (9th Cir. 2021). The Motion to Stay should therefore be denied because Alaska has not made a strong showing that it will succeed on appeal.

The Motion to Stay should also be denied because a stay would substantially injure the Conservancy’s interests; specifically, it would harm ESA-listed SRKWs

and Chinook salmon and even threaten extinction of SRKWs. Finally, the Motion to Stay must be denied because it is not in the public interest: “Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.” *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996).

II. REGULATORY FRAMEWORK.

“The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, **whatever the cost.**” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added). To this end, section 9 of the ESA makes it unlawful to “take” listed species. *See* 16 U.S.C. § 1538(a)(1)(B).

Section 7 of the ESA imposes substantive and procedural requirements on federal agencies. Substantively, agencies must “insure” their actions “[are] not likely to jeopardize the continued existence of . . . [listed] species.” 16 U.S.C. § 1536(a)(2); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1414–15 (9th Cir. 1990). The procedural requirements are intended to facilitate compliance with that substantive mandate. *See Thomas v. Peterson*, 753 F.2d 754, 763–65 (9th Cir. 1985), *abrogated on other grounds, Cottonwood Env’t Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091–92 (9th Cir. 2015). Specifically, agencies planning an action that “may affect” listed species (“action agency”) must consult with NMFS. 50 C.F.R. § 402.14(a).

Consultation results in the consulting agency’s issuance of a biological opinion (“BiOp”) determining whether the action is likely to jeopardize listed species. *Id.* § 402.14(h)(1). If jeopardy is not likely, the BiOp will include an ITS defining the amount of take anticipated. *Aluminum Co. of Am. v. Adm’r, Bonneville Power Admin.*, 175 F.3d 1156, 1158–59 (9th Cir. 1999); 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(i)(1)(i). Take that complies with an ITS is exempt from liability. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

“NEPA ‘is our basic national charter for protection of the environment.’ . . . The statute provides environmental protection not by mandating ‘particular results,’ but by prescribing the process that an agency must follow to evaluate and approve an action that will have environmental consequences.” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020) (citations omitted).

NEPA requires environmental impact statements (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C)(i). The EIS “serves NEPA’s ‘action-forcing’ purpose in two important respects. . . . It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v.*

Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (citation omitted). An environmental assessment (“EA”) is prepared to determine whether an action will have significant environmental impacts if the action is neither one that normally requires an EIS nor one that is excluded from NEPA review. *Hale v. Norton*, 476 F.3d 694, 700 (9th Cir. 2007); 40 C.F.R. § 1501.4.¹

Agencies must consider alternatives in either an EA or EIS. *See* 42 U.S.C. § 4332(2)(C)(iii), (2)(E); *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228–29 (9th Cir. 1988); *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012). “Informed and meaningful consideration of alternatives . . . is . . . an integral part of the statutory scheme.” *Hodel*, 852 F.2d at 1228. In an EA or EIS, agencies must assess cumulative impacts; i.e., “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 608 F.3d 592, 602–03 (9th Cir. 2010) (citation omitted). Public participation is also required for both an EA and EIS. *See* 40 C.F.R. §§ 1501.4(b), 1503.1(a)(4).

¹ The 1978 NEPA regulations, as amended, were in effect when NMFS made the relevant decisions here. *See* 85 Fed. Reg. 43,304, 43,305–06 (July 16, 2020). All citations to the NEPA regulations herein are to that version.

III. STATEMENT OF FACTS.

A. Endangered SRKWs and Threatened Chinook Salmon.

The SRKW “has declined to historically low levels” and is considered one of the most at-risk species. WFC_ER378–79, 516. Insufficient prey—namely, Chinook salmon—is the primary cause of the decline, contributing to premature mortality and reduced fertility. WFC_SER193, 209–10; *see also* WFC_ER516, 522, 526–27, 675. Dr. Deborah Giles studies SRKWs and explains that current conditions are “unprecedented,” with more than a fifth of the population likely vulnerable and emaciated. WFC_SER83–84, 238–40. “[A]n immediate increase in the abundance of Chinook [salmon] . . . [is needed] to avoid functional extinction.” WFC_SER85.

The Puget Sound, Lower Columbia River, Upper Willamette River, and Snake River fall-run Chinook salmon evolutionarily significant units (“ESU”) are threatened species under the ESA. 50 C.F.R. § 223.102(e). Primary causes of their decline include harvests and hatcheries. WFC_ER349, 372, 374, 376. Many populations within these ESUs are at a high extinction risk and below escapement goals; i.e., not enough adult fish are returning to spawn. *See, e.g.*, WFC_ER480–81, 488, 506.

B. Southeast Alaska Salmon Fisheries and NMFS’s SEAK BiOp.

Salmon are harvested in Southeast Alaska in commercial, recreational, and

subsistence fisheries. *See* WFC_ER 137–145, 347, 712, 716. Species harvested are Chinook, sockeye, coho, pink, and chum salmon. *See* WFC_ER 137–145, 347. The fisheries use hand and power troll gear, purse seines, and drift and set gillnets. WFC_ER145. Troll fisheries harvest mostly coho and Chinook salmon; the purse seine and drift gillnet fisheries harvest mostly pink and chum salmon; and the set gillnet fisheries harvest mostly sockeye and coho salmon. *See* WFC_ER139. While most Chinook salmon harvested are taken in the troll fisheries, some are also harvested in purse seine and gillnet fisheries. *See id.*

NMFS consulted under section 7 of the ESA on the 10-year fishing regimes set by the 2019 Pacific Salmon Treaty, which culminated in NMFS’s issuance of a BiOp in 2019 (“SEAK BiOp”). *See* WFC_ER435, 437. NMFS determined that the fisheries take SRKWs by reducing prey availability. WFC_ER674–90, 760. Specifically, the SEAK BiOp found that Southeast Alaska harvests will reduce SRKW prey in coastal waters from 0.2% to 12.9%, and from 0.1% to 2.5% for inland waters. WFC_ER680–81.

The fisheries also take, via harvest, threatened Puget Sound, Lower Columbia River, Upper Willamette River, and Snake River fall-run Chinook salmon. *See, e.g.*, WFC_ER614–60, 759–60. Finally, the fisheries take threatened Mexico humpback whales and endangered Western Steller sea lions through entanglements and hooking injuries. WFC_ER690–722, 760–65.

While the 2019 Treaty reduced harvests levels from the prior agreement, it was determined that more was needed to protect SRKWs and Puget Sound Chinook salmon. *See* WFC_ER441–42. NMFS could have imposed harvest limits to protect these species. *See, e.g.*, WFC_ER452, 609, 677. Instead, NMFS announced a federal “funding initiative” that seeks to offset harvest impacts. WFC_ER441–43. The initiative comprises three elements, including the “prey increase program” through which NMFS seeks to fund increased Chinook salmon hatchery production in Puget Sound and the Columbia River and on the Washington Coast in an effort to increase SRKW prey. WFC_ER442–43. The other components focus on recovering Chinook salmon populations in four specific Puget Sound rivers by funding habitat restoration and conservation hatchery programs. WFC_ER442.

NMFS concluded that the fisheries, with the mitigation, are not likely to jeopardize listed species. WFC_ER725–58. The SEAK BiOp included an ITS authorizing Southeast Alaska salmon fisheries to “take” ESA-listed Chinook salmon, SRKWs, Mexico humpback whales, and Western Steller sea lions. WFCW_ER758–68.

IV. SUMMARY OF RELEVANT PROCEEDINGS.

The Magistrate Judge issued a Report and Recommendation on September 27, 2021 granting the Conservancy success on the merits and denying cross-

motions by NMFS, the Trollers, and Alaska. WFC_ER54. The District Court Judge adopted that Report and Recommendation on August 8, 2022. WFC_ER51–52.

The District Court held that the SEAK BiOp violated the ESA because the mitigation relied upon to approve the fisheries lacked specific and binding plans and was not subject to NMFS’s control or otherwise certain to occur. WFC_ER77–83. The SEAK BiOp further violated the ESA because NMFS failed to evaluate whether the prey increase program is likely to jeopardize threatened salmon; NMFS thereby impermissibly segmented consultation by assuming the program’s supposed benefits to SRKWs while failing to consult on the harm to salmon. WFC_ER83–85. The District Court declined to address two additional SEAK BiOp deficiencies raised by the Conservancy—including that NMFS failed to draw a rational connection between the facts and its conclusion that the fisheries will not jeopardize SRKWs—suggesting that the errors already found were dispositive. WFC_ER77. The District Court held that NMFS violated the substantive duty under ESA section 7 to ensure its actions do not jeopardize SRKWs and Chinook salmon. WFC_ER84–86.

The District Court found that NMFS violated NEPA by issuing the ITS authorizing the fisheries without preparing either an EIS or an EA. WFC_ER86–89. NMFS also violated NEPA by failing to prepare an EIS or an EA before adopting the prey increase program. WFC_ER89–90.

The Magistrate Judge issued a Report and Recommendation on remedies on December 13, 2022, which the District Court Judge adopted on May 2, 2023. WFC_ER9–50. The District Court granted the Conservancy’s request to remand the SEAK BiOp to NMFS to remedy its violations. WFC_ER49–50. The District Court granted the Conservancy’s request for partial vacatur of the ITS, vacating the ITS to the extent it authorized commercial harvests of Chinook salmon in the summer and winter seasons of the troll fishery. WFC_ER50. The Conservancy’s request for interim relief against the prey increase program was denied. *Id.*

V. STANDARD OF REVIEW.

“The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion.” *Lado v. Wolf*, 952 F.3d 999, 1006 (9th Cir. 2020) (citations omitted). The Court considers four factors in evaluating these stays: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *See id.* at 1006–07 (citation omitted).

VI. ARGUMENT.

A. Alaska Has Not Made a Strong Showing of Success on the Merits.

“An applicant for a stay pending appeal must make ‘a **strong showing** that

he is likely to succeed on the merits.” *Lado*, 952 F.3d at 1010 (emphasis added) (citation omitted). Alaska falls far short of this standard.

Alaska’s Motion to Stay focuses on vacatur of the ITS. Such equitable remedies are reviewed for an abuse of discretion. *See United States v. Alisal Water Corp.*, 431 F.3d 643, 654 (9th Cir. 2005); *Coal. to Protect Puget Sound*, 843 F. App’x at 80. This “review is limited and deferential.” *United States v. California*, 921 F.3d 865, 877 (9th Cir. 2019) (citation omitted). A district court abuses its discretion if the decision is based on an incorrect legal standard or on clearly erroneous factual findings. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008). “Under this standard, ‘as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.’” *Id.* at 987 (citation omitted). Alaska cannot make a strong showing that the District Court abused its discretion in fashioning partial vacatur.

1. The District Court applied the correct standard for vacatur.

The District Court thoroughly and accurately described and applied vacatur standards. *See WFC_ER23–25*, 35–47.

The Administrative Procedure Act instructs that courts “shall . . . set aside” unlawful agency actions. 5 U.S.C. § 706(2). As such, “vacatur is the presumptive remedy”; courts may remand without vacatur only in “limited” or “rare”

circumstances. See *350 Mont. v. Haaland*, 29 F.4th 1158, 1177 (9th Cir. 2022); *Humane Soc’y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018).

The party opposing vacatur bears the burden of “overcom[ing] the presumption of vacatur.” *All. for the Wild Rockies*, 907 F.3d at 1121–22. For such requests, courts weigh the seriousness of the errors against the disruptive consequences that might result from the interim change from vacatur. *Cal. Cmty. Against Toxics v. U.S. Env’t Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012). Further, “[t]he ESA . . . ‘did not seek to strike a balance between competing interests’ but rather ‘singled out the prevention of species [extinction] . . . as an overriding federal policy objective.’” *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 891 (9th Cir. 2022) (citation omitted). Courts thus tip the scale in favor of protecting listed species in considering vacatur. *E.g.*, *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic & Atmospheric Adm’n*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015); *see also N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 460 F. Supp. 3d 1030, 1037–38 (D. Mont. 2020); *Aquall. v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 883 (E.D. Cal. 2018).

2. The Court correctly found NMFS’s violations to be serious.

The District Court correctly found the violations “sufficiently serious . . . as they clearly undermine central congressional objectives.” WFC_ER36–38.

Courts tend to find violations serious that undermine congressional objectives of the underlying statute. *See, e.g., W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020). Violations are also serious where the agency may reach a different result on remand. *See, e.g., Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532–33 (9th Cir. 2015) (finding violations serious where agency may reach a different conclusion after obtaining adequate studies). “Technical” errors may be less serious because it is more likely the agency will reach the same conclusion on remand. *Nat'l Family Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 929 (9th Cir. 2020).

NMFS violated the ESA by issuing the ITS for fisheries that threaten imperiled SRKWs and Chinook salmon in reliance on undeveloped and uncertain mitigation. WFC_ER79–83. Moreover, one mitigation component—the prey increase program—was adopted in violation of the ESA and NEPA and will likely be altered or even terminated when reviewed under those statutes. *See* WFC_ER83–85, 89–90. These deficiencies undermine the ITS because, at best, it is uncertain whether impacts will be sufficiently mitigated to avoid jeopardizing SRKW and Chinook salmon. This is an exceedingly serious violation because it contravenes the ESA mandate for agencies to **insure** their actions are not likely to jeopardize listed species. *See* 16 U.S.C. § 1536(a)(2); *Hill*, 437 U.S. at 173 (explaining that the ESA duty to “insure” “admits of no exception”); *W.*

Watersheds Project v. Kraayenbrink, 632 F.3d 472, 495 (9th Cir. 2011) (describing section 7’s mandate as the “heart of the ESA”).

Alaska argues that NMFS is now implementing the prey increase program, suggesting that NMFS’s impermissible reliance on this mitigation is no longer a serious violation. Motion to Stay 12–13. The Court should reject this contention. The District Court found that “NMFS failed to . . . describe[] ‘in detail the . . . action agency’s plan to offset the environmental damage,’” to include “specific deadlines for implementing the proposed mitigation,” and to specify “requirements by which to confirm that the mitigation is being implemented in the manner and on a schedule needed to avoid extinction of the SRKW.” WFC_ER80–82 (citation omitted). These deficiencies persist, as NMFS has yet to develop a plan that details how mitigation will be implemented in manner that avoids extinction of SRKWs. The District Court’s remedy order did not state otherwise—it simply found that the prey increase program has released fish that will provide some prey, not that NMFS is implementing adequate mitigation to ensure the fisheries do not jeopardize SRKWs as required under ESA section 7. *See* WFC_ER41.

Further, NMFS is nowhere near meeting objectives for the prey increase program. The SEAK BiOp contemplated releasing 20 million hatchery smolts annually. WFC_ER443, 747. NMFS’s records show the program released 597,242 smolts in 2020, approximately 6.3 million smolts in 2021, and approximately 8

million smolts in 2022. WFC_ER120 (“PST”—Pacific Salmon Treaty—refers to releases under the prey increase program). The program is releasing **less than half** the smolts contemplated. To mask this deficiency, NMFS submitted data that include past smolt releases funded by Washington State under an entirely different program. *See* WFC_ER99, 120. Washington’s releases do not compensate for NMFS’s shortcomings; notably, NMFS has insisted throughout these proceedings that the prey increase program is needed as mitigation despite Washington’s separate efforts. *See* WFC_ER278; WFC_SER48–49. Moreover, Washington’s past smolt releases occurred under annual budgets passed by the state legislature—there is no legal obligation or binding plan for them to continue and no basis to assume they will. *See* WFC_ER107, 278. Accordingly, Washington’s efforts cannot be relied upon as mitigation to offset harm from the salmon fisheries. *See Bernhardt*, 982 F.3d at 743.

Beyond shortcomings with the prey increase program, NMFS is failing to implement mitigation needed for salmon. *See* WFC_ER82–83 (District Court held that NMFS impermissibly relied on undefined mitigation needed for Puget Sound Chinook salmon). For example, the mitigation was to include development of a new conservation hatchery program in Hood Canal, but there is no indication this occurred. *See* WFC_ER442, 661.

In addition to ESA violations, NMFS violated NEPA by issuing the ITS

without **any** required processes—NMFS did not evaluate cumulative impacts of the fisheries and other actions (e.g., other fisheries), NMFS did not consider alternatives (e.g., reduced harvests), and NMFS did not allow for public input. *See* WFC_ER86–89. These are each serious violations warranting vacatur. *See, e.g., Klamath-Siskiyou*, 109 F. Supp. 3d at 1245 (“A failure to analyze cumulative impacts will rarely—if ever—be so minor an error as to satisfy th[e] first . . . factor.” (citation omitted)); *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 468 F. Supp. 3d 1148, 1151–54 (D. Alaska 2020) (finding violations serious because the “EIS’s lack of site-specificity and inadequate comparison of alternatives precluded . . . the requisite hard look at the Project’s potential impacts and deprived the public of the opportunity to comment on those impacts, thus undermining ‘the two fundamental objectives’ of NEPA” (citation omitted)). Alaska did not even address these NEPA violations.

NMFS’s errors are serious because, at a minimum, NMFS “may” reach different decisions on remand. *See Pollinator Stewardship*, 806 F.3d at 532–33. It is unclear whether the fisheries can be approved under ESA standards and, at minimum, NMFS will likely include new harvest limits to protect SRKWs that are triggered during low salmon abundance periods, as the agency did in the recent West Coast fisheries BiOp. *See* WFC_SER69–71. Alaska erroneously claims that NMFS cannot impose such restrictions. Motion to Stay 13. The Treaty was

“negotiated with the clear understanding that . . . more restrictive . . . measures often would be required and applied . . . to meet domestic objectives, such as those required to meet ESA obligations.” WFC_ER609 (citing the 2019 Treaty, Chinook Chapter, paragraph 5(c)).

In sum, the errors underpinning NMFS’s ITS are serious and ongoing.

3. **The District Court did not abuse its discretion in finding that disruptive consequences do not outweigh the seriousness of the violations.**

The District Court found there would be some economic consequences to the commercial fishing industry and some communities in Southeast Alaska, which the District Court explained it “does not take . . . lightly.” WFC_ER40. The District Court concluded that such economic impacts do not outweigh the seriousness of the violations, particularly given the environmental consequences of leaving the illegal ITS in place. WFC_ER39–40, 43–44, 47. That was not an abuse of discretion.

While economic impacts may be considered in assessing the consequences of vacatur, the primary focus in a case like this are environmental impacts. *See N. Plains*, 460 F. Supp. 3d at 1038. The rare cases where remand without vacatur is warranted typically involve circumstances where vacatur poses environmental harm. *See Cal. Cmty.*, 688 F.3d at 993–94 (withholding vacatur where it would risk increased air pollution, “the very danger the Clean Air Act aims to prevent”);

Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (withholding vacatur that would risk a species' extinction); *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 668–69 (9th Cir. 2022) (remanding without vacatur where such relief would have resulted in use of more harmful pesticides). Indeed, this Court recently found that, where “[t]he agency’s errors . . . are significant and vacatur will not cause an environmental harm . . . [,] the presumption of vacatur is not overcome.” *See Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. 22-15259, 2023 U.S. App. LEXIS 11031, at *10 (9th Cir. May 5, 2023).

The District Court correctly found that vacatur of the illegal ITS would not result in any environmental harm. WFC_ER39. The District Court further found:

Though there is uncertainty as to how much prey would ultimately reach the SRKW, the record before the Court suggests that closure of the fisheries meaningfully improves prey available to SRKW, as well as SRKW population stability and growth, under any scenario.

Id. Alaska disagrees with that finding but fails to meet its burden to show it was clearly erroneous. *See Mot. to Stay* 11–12; *McNair*, 537 F.3d at 986.

Dr. Robert Lacy is the conservation scientist who developed the Vortex population viability analysis (“PVA”) relied upon by NMFS’s SEAK BiOp and Canada to assess the status of SRKWs. WFC_SER 190–91, 194–98; *see also* WFC_ER518, 522, 744. He “is among the world’s most experienced, respected, and sought-after modelers for conducting [PVA]” WFC_ER243. Dr. Lacy explained that prey abundance is the primary factor affecting SRKW population

status and that a 5% increase in prey is needed to merely stop the SRKW's decline. WFC_SER75–76, 193. Dr. Lacy conducted modeling to show the impact to SRKW from the partial vacatur. *See* WFC_SER76–77. He explained that the SEAK BiOp suggests the fishery reduces prey by about 6 percent, but there is “considerable uncertainty around this number.” *Id.* Dr. Lacy's model therefore showed impacts from closing the fishery under different assumptions; i.e., if the fishery reduces prey by 3%, 6%, 9%, and 12%. WFC_SER77–78. Each projection showed a meaningful improvement to SRKW viability; however, if the fishery reduces prey by 3%, its closure alone would not stop the species' decline. *See id.*

Alaska incorrectly suggests that the District Court erred in considering Dr. Lacy's opinions instead of simply accepting NMFS's self-serving declarations submitted on remedies. *See* Mot. to Stay 17–18; *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185–86 (9th Cir. 2011) (“Deference to agency experts [on remedy issues] is particularly inappropriate when their conclusions rest on a foundation tainted by procedural error.”). NMFS has PVA experts on staff but, tellingly, chose not to have them opine on Dr. Lacy's work. Instead, NMFS attacked Dr. Lacy through Lynn Barre, a Branch Chief that did not identify any qualifications to opine on such matters. *See* Mot. to Stay 17–20; WFC_SER37–49, 111–20, 173–88. Ms. Barre's criticisms show a lack of understanding in PVA modeling. *See, e.g.*, WFC_SER40–41 (Ms. Barre criticized Dr. Lacy's model because “not all of the

Chinook salmon caught in SEAK troll fisheries would migrate south . . . or be intercepted by the whales”), 129 (Dr. Lacy explained that “no one claims that all the fish escaping the fishery would be consumed by the whales, and it is illogical to assert that such an assumption is necessary in order to estimate the impacts on [SRKWs] of a change in overall [prey] abundance.”); *see also* WFC_SER128–34. The District Court did not err in considering Dr. Lacy’s opinions.

Alaska’s own data show that **83%** of the Chinook salmon harvested in its troll fishery are from stocks used by SRKW as prey and that most are “high priority” prey. WFC_SER22–23. Those data show that the troll fishery harvests around 110,000 Chinook salmon from populations used by SRKWs as prey. *Id.* That is significant to SRKWs. By comparison, NMFS’s prey increase program hopes to release 20 million smolts, which would produce around 150,000 adult Chinook salmon. *See, e.g.*, WFC_SER277 (identifying smolt-to-adult return ratios in the range of 0.5% to 1.0%). NMFS found that would have a “meaningful” impact, affecting prey availability by four to five percent. WFC_ER442–43. The District Court’s finding that partial vacatur would meaningfully improve prey under any scenario was not clearly erroneous.

The economic consequences are significantly alleviated by the District Court’s partial vacatur. The presumptive remedy is “[f]ull vacatur” of the illegal ITS, which authorizes all Southeast Alaska salmon fisheries. *See Coal. to Protect*

Puget Sound, 843 F. App'x at 80; WFC_ER759. The District Court vacated the ITS only for commercial harvests of Chinook salmon in two seasons of the troll fishery, affecting a small portion of fisheries covered by the ITS. *See* WFC_ER50.

The harvest value for all commercial salmon fisheries in Southeast Alaska in 2020 was \$55.2 million. WFC_ER140. The harvest value of Chinook salmon caught in the troll fishery was \$11.5 million—around 21 percent of the total harvest value. *See id.* **Seventy-nine percent** of the commercial harvest value covered by the unlawful ITS is unaffected by the partial vacatur; i.e., all commercial gillnet and seine fisheries and all troll harvests of coho and other non-Chinook species. The vacatur also does not affect significant sport and subsistence fisheries covered by the ITS. *See* WFC_ER132–33. Thus, the partial vacatur impacts a small fraction of harvests illegally authorized by NMFS's faulty ITS.

The District Court's equitable remedy was not an abuse of discretion, "given a consideration of the relevant factors and the presumption of vacatur."

WFC_ER47. Alaska has not made a "strong showing" that an abuse of discretion occurred. *See Lado*, 952 F.3d at 1010. The Motion to Stay should be denied.

B. A Stay Would Substantially Injure the Conservancy.

The Motion to Stay should also be denied because it would injure the Conservancy and because Alaska has not shown it would be irreparably injured absent a stay. *See Lado*, 952 F.3d at 1006–07.

Most Chinook salmon harvested in the troll fishery are considered “high priority” prey for SRKWs. WFC_SER22–23. As discussed, NMFS has yet to develop plans needed to mitigate the harvests and the prey increase program has released less than half the hatchery smolts targeted. Meanwhile, the current condition of the SRKW is “unprecedented,” with more than a fifth of the population likely vulnerable and emaciated, and “an immediate increase in the abundance of Chinook [salmon] . . . [is needed] to avoid functional extinction.” WFC_SER83–85. The District Court’s partial vacatur provides needed rapid relief by “meaningfully improv[ing] prey available to SRKW.” WFC_ER39. The Motion to Stay should be denied because it would substantially injure the Conservancy’s interests in preserving SRKWs and Chinook salmon.

The Motion should also be denied because Alaska did not establish it would be irreparably injured absent a stay. *See Lado*, 952 F.3d at 1007. “[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.” *Sampson v. Murray*, 415 U.S. 61, 90 (1974). “The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Id.* (citation omitted).

The District Court significantly reduced economic impacts by issuing partial

vacatur that does not affect most harvests covered by the unlawful ITS. Further, federal relief funding can be made available for fishery disasters, including those resulting from “judicial action.” *See* 16 U.S.C. § 1861a. The availability of such mitigation funding undermines Alaska’s assertion of “irreparable harm.” *See Sampson*, 415 U.S. at 90.

C. The Equites and Public Interests Disfavor a Stay.

The Motion to Stay should be denied because it is not in the public interest.

In enacting the ESA, “Congress viewed the value of endangered species as ‘incalculable’” and therefore sought to “halt and reverse the trend toward species extinction, whatever the cost.” *Hill*, 437 U.S. at 184, 187. “Congress intended endangered species to be afforded the highest of priorities” through a policy of “institutionalized caution.” *Id.* at 174, 194. “Accordingly, courts ‘may not use equity’s scales to strike a different balance,’” as “‘the balance of hardships always tips sharply in favor of endangered and threatened species.’” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (citation omitted). The Court should reject Alaska’s request to prioritize economic considerations over imperiled species.

Instead, the equities favor relief that ensures the continued survival of SRKWs and Chinook salmon while NMFS evaluates the fisheries under the ESA and NEPA. This is especially true here where economic impacts were greatly

tempered through partial vacatur. The Motion to Stay should be denied because it is not in the public interest.

VII. CONCLUSION.

The Conservancy respectfully requests the Court deny the Motion to Stay.

Respectfully submitted this 5th day of June 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response to a motion complies with the requirements of Federal Rules of Appellate Procedures 27(d)(1) and 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced font.

I further certify that this response to a motion complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,196 words, according to the count of Microsoft Word.

DATED this 5th day of June 2023.

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