

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

**REPLY IN SUPPORT OF STATE’S  
MOTION FOR STAY PENDING APPEAL**

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Courts remand without vacatur when equity demands. *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022). Equity demands so here. The procedural violation the district court found in the ITS has been remedied since its issuance. This motion does not require the

1 Court to weigh devastation of the livelihoods of thousands of Alaskans, dozens of rural villages,  
2 and a way of life against the benefit of potentially saving even a small number of endangered  
3 whales. Instead, the Court must balance certain and irreparable harm to people, communities,  
4 and culture against speculative, and at best, negligible benefit to an endangered species.

5 Although vacatur is supposed to be an equitable remedy, the Court singled out an  
6 Alaskan fishery to shoulder the entire burden of conservation. This while other fisheries, notably  
7 those occurring along the Pacific Northwest coast, that have disproportionately higher levels of  
8 impact are left untouched and unrestricted.

9 **I. ALASKA IS LIKELY TO SUCCEED ON THE MERITS.**

10 When determining whether an agency action should remain in effect on remand, courts  
11 weigh the seriousness of the agency’s errors against the disruptive consequences of an interim  
12 change. *Regan*, 56 F.4th at 663.

13 On the first factor, errors are not “serious” when an agency, “by complying with  
14 procedural rules...could adopt the same rule on remand.” *Id.* at 663–64. Here, NMFS could  
15 likely “adopt the same [ITS] on remand.” *See id.* at 665.

16 First, there is “no[] detectable” “relationship[] between Chinook salmon abundance and  
17 SRKW demographic rates.” Dkt. 133-2, ¶¶6, 7 (Third Barre Decl.); AR-47286.

18 Second, even assuming that closing the fishery would create some benefit in terms of  
19 marginal increased prey availability—albeit not increased vitality to the SRKW—that increase in  
20 prey availability is exceedingly small (about 0.5% in winter and 1.8% in summer if the *entire*  
21 SEAK fishery is closed, even less if the closure is limited to the troll fishery). Dkt. 133-2, ¶9  
22 (Third Barre Decl.); AR-47440–41, 47505.

23 Third, as this Court recognized, the error with the prey increase program has already been  
24 cured. Dkt. 144 at 31 (“The prey increase program—though previously uncertain and indefinite  
25 in the 2019 SEAK BiOp—has also now been funded and begun providing prey the past three  
26 years.”).

1 WFC points out that some of the prey increase is coming from the State of Washington.  
2 Dkt. 179 at 11–12. This makes sense and does not undermine the equities in Alaska’s favor,  
3 because the prey increase program is meant to offset prey reduction caused by *all* the fisheries  
4 under the Pacific Salmon Treaty, which includes Washington. AR-47506. Washington fisheries  
5 have a much greater impact in reducing prey than the SEAK fishery. AR-47202–04.

6 Importantly, the prey increase program is more than offsetting the slight reduction in prey  
7 availability caused by the SEAK Chinook troll fishery. The BiOp anticipates the program will  
8 generate a 4–5% increase in prey availability for SRKW to offset prey reduction caused by *all*  
9 United States fisheries. AR-47506. The prey increase program is fully funded and currently  
10 underway. Dkt. 133-3, ¶3 (Third Purcell Decl.); Dkt. 133-4, ¶¶7-12 (Second Rumsey Decl.). The  
11 SEAK Chinook troll fishery reduces prey availability for SRKW by less than 0.5% or 1.8%,  
12 depending on the season, Dkt. 133-2 at ¶9 (Third Barre Decl.); AR-47440–41, 47505. This  
13 means that even if “less than half the smolts contemplated” are released as WFC contends, Dkt.  
14 179 at 11, the prey increase program would still be more than offsetting Alaska’s impact.

15 Finally, NMFS lacks authority to impose reduced harvest limits under the ITS. Harvest  
16 limits are set by the terms of the Pacific Salmon Treaty—not by NMFS in a BiOp. Dkt. 43-1,  
17 Att. C (Pacific Salmon Treaty). Changes to Treaty harvest regimes require consensus among the  
18 U.S. Commissioners, one of whom represents Alaska. Pacific Salmon Treaty Act, P.L. 99-5  
19 (1985), §3(a),(h)(1).

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

25 In comparable cases, when so many people’s livelihoods are on the line, the Ninth Circuit  
26 has concluded that vacating an agency decision is unwarranted. *See, e.g., id.* at 664-68 (vacatur  
27 would have disrupted agricultural industry); *Nat’l Fam. Farm Coal. v. EPA*, 966 F.3d 893, 929–  
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1 30 (9th Cir. 2020) (same); *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 993–95 (9th  
2 Cir. 2012) (vacatur would have been “economically disastrous” to a billion-dollar venture  
3 employing 350 workers). So too here.

4 Alaska is likely to succeed on the merits.

5 **II. SHUTTING DOWN SEAK’S CHINOOK TROLL FISHERIES IS A CERTAIN**  
6 **DEATH KNELL TO RURAL SOUTHEAST ALASKA COMMUNITIES.**

7 The economic output of the Chinook summer and winter troll fishery is huge—about \$29  
8 million *each year*. Dkt. 133-1, ¶¶36, 40 (Keaton Decl.).

9 Secondary businesses, like fish processing plants, are not included in the \$29 million  
10 figure and will also feel the effects of the closure. *Id.* ¶36 (decreasing labor needs and wages for  
11 processors); Dkt. 136, ¶6 (Second Vincent-Lang Decl.) (causing processing shutdowns during  
12 winter seasons).

13 The State and local governments will also lose much needed tax revenue—these taxes are  
14 similarly excluded from the \$29 million figure. Dkt. 133-1 ¶36 (Keaton Decl.); Dkt. 136, ¶¶2, 7  
15 (Second Vincent-Lang Decl.).

16 Shutting down the summer and winter trolling seasons will reduce trollers’ livelihoods  
17 between one third and one half. Dkt. 136, ¶3 (Second Vincent-Lang Decl.). Fishermen cannot  
18 simply fish elsewhere or retrofit their boats to participate in another fishery—such an investment  
19 in new gear and permits would cost hundreds of thousands of dollars. *Id.* at ¶8. Families will  
20 have to choose between living without work or enough work, or moving to find work, the latter  
21 of which will lead to school closures if communities no longer have a sufficient number of  
22 school-age children. *Id.* at ¶4.

23 WFC’s speculation that the trollers could “maybe” be granted some federal funding for  
24 what WFC terms a “catastrophic regional fishery disaster” underscores the magnitude of the  
25 economic harm. Dkt. 179 at 14. WFC does not even try to pretend that federal funds would fully  
26 restore the economic harms that will ripple throughout Southeast Alaska if a stay is not granted.

27 *See id.*

1 Closing the fishery will also cause “cultural and social harms.” *See United States v.*  
2 *Washington*, 853 F.3d 946, 961 (9th Cir. 2017) (affirming equitable relief based on damaged  
3 tribal economies, inability of fishermen to make a living, and the social and cultural harm to  
4 communities). Alaska troll fishing is the “way of life” for southeast communities, passed down  
5 from one generation to the next, and is critical for communities’ “spiritual and physical  
6 wellbeing.” Dkt. 21, ¶1 (Daugherty Decl.); Dkt. 130, ¶¶2, 5, 6, 10 (Jordan Decl.).

7 WFC argues that because the Court only partially vacated the ITS, the court’s decision is  
8 not as bad as it could have been. Dkt. 179 at 6. But an atomic bomb is still an atomic bomb,  
9 whether it annihilates one city or two.

10 Shutting down the SEAK Chinook troll fishery, even for just one season, means certain  
11 and irreparable economic and cultural devastation.

12 **III. SHUTTING DOWN SEAK ALASKA’S CHINOOK TROLL FISHERIES WILL**  
13 **PROVIDE NO MEANINGFUL BENEFIT TO THE SRKW.**

14 In contrast to the definite and lasting harm to Southeast Alaska, benefits to SRKW from  
15 closing the SEAK Chinook troll summer and winter fisheries are speculative, and at-best,  
16 negligible. Dkt. 133-2, at ¶7 (Third Barre Decl.). The BiOp’s analysis suggests that the increase  
17 in prey from closing the fishery would be exceedingly small (*less than 0.5%* in winter and *less*  
18 *than 1.8%* in summer). *Id.* ¶9; AR-47440–41, 47505. No one is arguing that the SRKW are not  
19 imperiled. The point is that shutting down the SEAK fishery will provide no meaningful benefit.

20 WFC’s assertion that the SEAK Chinook troll fishery reduces prey availability by 5% is  
21 unsupportable. *See* Dkt. 127-2, ¶¶8, 11 (Third Lacy Decl.). That number does not account for  
22 *where* SRKW are actually located *when* they are feeding. *See id.* The 2019 BiOp explains that  
23 SRKW live in inland waters in the summer and coastal waters in the winter. AR-47280–81,  
24 47441. Had WFC used a more honest number from the BiOp, it would have represented that the  
25 entire SEAK fishery (not just trollers) reduces prey in inland waters in the summer by only  
26 approximately 1.8%. Dkt. 133-2, ¶9 (Third Barre Decl.); AR-47439–41. And when SRKW move  
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1 to coastal waters in the winter, the BiOp shows that the entire SEAK fishery reduces SRKW prey  
2 in winter by about 0.5%. Dkt. 133-2, ¶9 (Third Barre Decl.); AR-47440–41, 47505.

3 Moreover, the increase in prey availability does not correlate with increased benefits to  
4 SRKW. Dkt. 133-2, ¶7 (Third Barre Decl.). In the BiOp, NMFS “cautioned against correlative  
5 studies” between prey availability and SRKW recovery. AR-47286. Since the 2019 BiOp was  
6 issued, the Pacific Fishery Management Council formed a workgroup to better evaluate the  
7 effects of Council-managed fisheries on SRKW and determined that there is *no* detectable  
8 relationship between Chinook abundance and SRKW demographic rates. Dkt. 133-2, ¶7 (Third  
9 Barre Decl).

10 Plus, the assumptions used in the BiOp’s model are themselves flawed, and biased high,  
11 because the model is based on historical data that assumes natural mortality is constant, and the  
12 number of predators competing with SRKW has grown since that data was compiled. Dkt. 135,  
13 ¶16 (Evenson Decl.). As mature Chinook swim back towards their spawning grounds, they are  
14 eaten by numerous predators including salmon sharks, pinnipeds, and Northern Resident killer  
15 whales. *Id.* In recent studies, when there has been increased abundance of prey, the Northern  
16 Resident killer whales—not the SRKW—have seen improvement. *Id.*

17 Closure of the fishery will also create a windfall for other fisheries rather than meaningful  
18 prey increase for SRKW. AR-47195. Before Chinook can return to SRKW habitat, they are  
19 subject to capture by other commercial, recreational, and tribal fisheries off the coasts of  
20 Southeast Alaska, Vancouver Island, and Washington. Dkt. 135 ¶¶7, 16 (Evenson Decl.); Dkt.  
21 34, ¶¶16-20 (Lyons Decl.). Rather than allowing more fish to return to SRKW feeding grounds,  
22 this court’s decision gives these fisheries more opportunity to catch more Chinook. Dkt. 135, ¶16  
23 (Evenson Decl.); Dkt. 34 ¶20 (Lyons Decl.). If Alaska does not take its share of Chinook, more  
24 will pass through Canadian waters, which can trigger a different, higher in-season fishing limit  
25 for Canadian fishermen. AR-47209–10; Dkt. 34, ¶¶17–19 (Lyons Decl.). Additionally, the catch  
26 limit for the entire SEAK fishery is set annually based on catch and effort data from the early  
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1 winter troll fishery. Dkt. 43-1, 661 (Pacific Salmon Treaty, ch.3, ¶6(b)(ii)). Closing the winter  
2 troll fishery compromises the U.S.'s ability to meet Treaty obligations for setting catch limits.

3 Finally, because NMFS will likely issue a BiOp covering the same take for the SEAK  
4 fishery, maintaining the district court's partial vacatur will—at-best—create a negligible, short-  
5 term increase of prey availability for SRKW. Even if this Court were to disregard the agency's  
6 analysis and credit WFC's unsupported assertion that the SEAK fishery reduces prey availability  
7 for the SRKW by about 5% during closure, plaintiffs do not even try to assert that closing the  
8 SEAK troll fishery until NMFS reissues an ITS with the same limits will create a meaningful  
9 *long-term* benefit to SRKW. Dkt. 127-2, ¶9 (Third Lacy Decl.) Conversely, even a single season  
10 closure will devastate Southeast Alaska.

11 **IV. KEEPING THE SEAK CHINOOK TROLL FISHERY OPEN IS IN THE PUBLIC**  
12 **INTEREST.**

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

15 Moreover, Congress has not remained silent on this issue. "Congress funds the prey  
16 increase program every year with an understanding that the program will both increase prey  
17 abundance and enable certain Alaska and Pacific Northwest fisheries to continue, albeit at a  
18 reduced level." Dkt. 162 at 3 (Amici Congr. Deleg. Br.). In doing so, Congress reenacts its  
19 commitment to the goals of the Treaty: "to balance the interests of fisheries, protected species,  
20 and the rights and obligations of impacted states, countries, and tribes." *Id.* at 4. Vacating the ITS  
21 and closing Alaska's fishery undermines Congress's Treaty goals and is contrary to the public  
22 interest. *See id.* at 7.

23 **V. CONCLUSION.**

24 For the above reasons, this Court should grant the State's motion to stay the vacatur  
25 pending appeal.

1 Dated: May 26, 2023

2 NOSSAMAN LLP  
3 BRIAN FERRASCI-O'MALLEY

4 By: /s/Brian Ferrasci-O'Malley  
5 Brian Ferrasci-O'Malley, WSBA #46721  
6 719 Second Avenue, Suite 1200  
7 Seattle, WA 98104  
8 Tel: 206.395.7622  
9 [bferrasciomalley@nossaman.com](mailto:bferrasciomalley@nossaman.com)

10 I certify that this memorandum contains 2,100  
11 words, in compliance with the Local Rules.

12 TREG R. TAYLOR  
13 ATTORNEY GENERAL

14 By: /s/Aaron C. Peterson  
15 Aaron C. Peterson, Alaska Bar No. 1011087  
16 Assistant Attorney General  
17 Department of Law  
18 1031 West Fourth Avenue, Ste. 200  
19 Anchorage, AK 99501  
20 Tel: 907.269.5232  
21 [aaron.peterson@alaska.gov](mailto:aaron.peterson@alaska.gov)

22 Attorneys for State of Alaska  
23  
24  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2023, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/ Brian Ferrasci-O'Malley  
Brian Ferrasci-O'Malley

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