

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

WILD FISH CONSERVANCY,)	
<i>Plaintiff-Appellant/Appellee,</i>)	Nos. 23-35322, 23-35323, 23-
)	35324, 23-35354
v.)	
)	D.C. No. 2:20-cv-00417-RAJ-
JENNIFER QUAN, in her official)	MLP
capacity as Regional Administration for)	
the National Marine Fisheries Service, et)	ALASKA’S JOINDER
al.)	SUPPORTING OPPOSITIONS
<i>Defendants-Appellants/Appellees</i>)	TO PLAINTIFF’S MOTION
)	FOR INJUNCTION PENDING
)	APPEAL
and)	
STATE OF ALASKA,)	
<i>Intervenor-Appellant/Appellee</i>)	
)	
and)	
ALASKA TROLLERS ASSOCIATION,)	
<i>Intervenor-Appellant/Appellee.</i>)	

**ALASKA’S JOINDER SUPPORTING OPPOSITIONS TO PLAINTIFF’S
MOTION FOR INJUNCTION PENDING APPEAL**

The State of Alaska joins the federal defendants’ (NMFS) and Alaska Trollers Association’s responses opposing the Wild Fish Conservancy’s motion for an injunction pending appeal. The State adopts and incorporates by reference the arguments presented by NMFS and the Alaska Trollers Association.

The State further adds two points.

First, throughout the litigation below, and now also on appeal, the Conservancy has fostered a distorted narrative. When the Alaska Trollers

Association, State of Alaska, and National Marine Fisheries Service presented evidence undermining the Conservancy's narrative, the Conservancy did not substantively respond to that evidence. Instead, it moved to strike numerous declarations. Dist. Ct. Dkt. 138 at 12–16, Dist. Ct. Dkt. 188.

Trying to pervert the narrative once again, the Conservancy now attaches, as an “appendix,” a new declaration to its motion for an injunction pending appeal. Dkt. 17-2. The Conservancy's new declaration responds to old material: three declarations from Dr. Luikart that were filed between May 2021 and September 2022, Ms. Purcell's Third Declaration that was filed October 2022, and pHOS data from undated sources and from a 2017 BiOp. Dkt. 17-2, at 4–13. The Conservancy has not moved this Court to accept this new material that was never presented to the district court. Nor has it explained why acceptance would be appropriate.

Save unusual circumstances, this Court does not allow parties to submit new evidence on appeal. *Lowry v. Barnhart*, 329 F.3d 1019, 1024-26 (9th Cir. 2003) (imposing monetary sanctions against party who unilaterally supplemented the record because the party simply included the new material with its appellate filing without even pointing out that the material was never submitted to the district court). The Court should strike this appendix from the record. Or the Court should

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allow NMFS, should NMFS so choose, to file responsive evidence to address the Conservancy's newly added declaration.

Second, in response to the Conservancy's argument that there is no need for the prey increase program because the Southeast Alaska troll fishery is closed, Dkt. 19-1 at 24, it's helpful to understand the very different impacts to SRKW of closing the Alaska fishery and the prey increase program. NMFS's modeling in the BiOp shows that the entire Southeast Alaska fishery (not just the trollers), decreases prey availability to SRKW by approximately 0.5% during winter in coastal waters and 1.8% during summer in inland waters. Dkt. 15-2, App. 849–51, 915 (BiOp data modeling prey reduction caused by Alaska fishery), App. 260 (NMFS declaration explaining that data). Because the trollers represent only a portion of the fishery (albeit a significant portion), their contribution to the decrease in prey availability is even less. And NMFS's model is biased high, for the reasons discussed in the State's motion for stay pending appeal. Dkt. 15-1 at 18–22. In comparison, the prey increase program is intended to increase prey availability by 4–5%. Dkt. 15-2, App. 612–14, 916.

RESPECTFULLY SUBMITTED June 9, 2023.

STATE OF ALASKA
TREG TAYLOR
ATTORNEY GENERAL

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By: s/ Laura Wolff
Laura Wolff
Assistant Attorney General
1031 West Fourth Avenue, Ste. 200
Anchorage, AK 99501
(907) 269-6612 phone
(907) 276-3697 fax

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 9, 2023.

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

CERTIFICATE OF COMPLIANCE

This pleading contains 492 words. I certify that this complies with Rule 27's word limit and Rule 32.

s/ Laura Wolff

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