UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY, *Plaintiff-Appellant/Appellee,* v. JENNIFER QUAN, in her official capacity as Regional Administration for the National Marine Fisheries Service, et al. *Defendants-Appellants/Appellees* and STATE OF ALASKA, *Intervenor-Appellant/Appellee* and ALASKA TROLLERS ASSOCIATION, *Intervenor-Appellant/Appellee*.	)	Nos. 23-35322, 23-35323, 23-35324, 23-35354 D.C. No. 2:20-cv-00417-RAJ-MLP

REPLY IN SUPPORT OF STATE'S MOTION TO STAY PENDING APPEAL

I. The district court applied the wrong standard and ignored that the ESA-violation it found had already been remedied.

Determining whether to remand with or without vacatur requires weighing the equities. *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022). While this Court has sometimes referenced a "presumption" of vacatur for APA violations, Dkt. 24-1 at 18–19, when vacatur has the practical effect of injunctive relief, like it does here, it cannot be that vacatur is a presumptive remedy. *See Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156–58 (2010). Nor is

remand without vacatur actually rare. *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 lobster fishery in abeyance when "there are at least open questions concerning the species benefits that would accompany these great costs to the lobstermen").[1]

When determining whether to remand with or without vacatur, this Court considers "how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *California Community Against Toxics*, 688 F.3d at 992 (internal quotations omitted). The Conservancy misstates the law when it asserts that an agency violation is serious when the agency "may reach a different result on remand." Dkt. 24-1 at 20, 23. An error is not serious when the agency "would likely be able to offer better reasoning" or "could adopt the same rule on remand" and an error is serious when "such fundamental flaws in

[1] To name some more remand-without-vacatur cases from this Court and the D.C. Circuit, whose legal framework this Court follows: *Regan*, 56 F.4th at 663–68 (9th Cir. 2022); *Nat'l Family Farm Coalition v. U.S. EPA*, 966 F.3d 893, 929–30 (9th Cir. 2020) *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 993–94 (9th Cir. 2012); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995); *Shafer & Freeman Lakes Envtl. Conservation Corp. v. FERC*, 992 F.3d 1071, 1096 (D.C. Cir. 2021); *Center for Biological Diversity v. EPA*, 861 F.3d 174, 188–89 (D.C. Cir. 2017). Tellingly, in one of the two cases the Conservancy cites for the proposition that remand with vacatur is presumptive, this Court refused to reflexively vacate because there was a "dearth of evidence concerning the impact of vacatur." *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022).

the agency's decision make it unlikely that the same rule would be adopted on remand." *Regan*, 56 F.4th 663–64.

Had the district court correctly applied this standard, it would have concluded that the agency is likely to issue the same ITS. WFC_ER35–38, 46–47. First, NMFS cannot change the Treaty-established harvest limits via a BiOP. Dkt. 15 at 13 & App.10. Second, given actions taken during the past four years, NMFS is likely to issue the same ITS, albeit with "better reasoning." *See Regan*, 56 F.4th at 663. This is because Congress is annually funding the prey increase program and the program is producing prey for SRKW. Dkt. 15 at 12–13. And NMFS has done site specific ESA and NEPA analyses for the hatcheries comprising the prey increase program, which are informing NMFS' programmatic analysis of the program. FE-21–26.

The Conservancy incorrectly asserts that "NMFS will likely include new harvest limits to protect SRKWs" like it has done for "West Coast fisheries." Dkt. 24-1 at 23. The Conservancy's rationale derives from a Treaty provision that applies to Pacific Northwest and most Canadian fisheries, *not* the Alaska fishery. That provision states: "With respect to ISBM [Individual Stock-Based Management] fisheries . . . [the] Parties may implement domestic policies that constrain their respective fishery impacts on depressed Chinook stocks to a greater extent than is required." Dkt. 15, App.77 (2019 Treaty Agreement, Chinook

Chapter, paragraph 5(c)); *see also* WFC_ER452 (BiOp discussing how throughout the negotiations, "it was understood that the United States would further constrain its ISBM fisheries to meet ESA requirements"). Southeast Alaska is an AABM (Aggregate Abundance-Based Management) fishery, not an ISBM fishery, and this difference matters to how harvest limits are set. WFC_ER435, 452. Alaska's harvests numbers are a product of the Pacific Salmon Treaty, and cannot be changed through a BiOp. Dkt. 15 at 13.

The Conservancy's *ipse dixit* assertion that "the prey increase program … will likely be altered or even terminated" during the remand process is also belied by the record. Dkt. 24-1 at 20. "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." Dkt. 22-2 at 9; Dkt. 15, App.417–19. Plus, NMFS has *already* undergone ESA and NEPA analyses regarding site-specific hatchery programs within the prey increase program, and has not terminated the program. FE-21–26.

Even if NMFS seriously erred in 2019 when it issued a BiOp in reliance on a not-yet-funded and not-yet-site-specific prey increase program—which the State does not concede—the prey increase program is now funded and site specific. In fact, it is currently more than mitigating the impact of the Southeast Alaska Chinook troll fishery on SRKW. While it is true that initial one-time investments

in infrastructure upgrades meant that fewer smolts were released in the first couple years of the program, the number of smolts released annually is ramping up and meeting NMFS's expectations. WFC_ER109 (more than 19 million smolts released last year).

The Conservancy points out that some of the prey increase is funded by the State of Washington. Dkt. 24-1 at 22. This makes sense and does not undermine the equities in Alaska's favor, because the program is meant to offset prey reduction caused by *all* Treaty fisheries, including Washington. WFC_ER747.

In any event, even if the program produced only half the smolts anticipated in the 2019 BiOp and increased prey by 2–2.5% (rather than 4–5%), that would still greatly exceed the prey reduction caused by the *entire* Southeast Alaska fishery (approximately 0.5% during winter in coastal waters and 1.8% during summer in inland waters). WFC_ER680–82, 746; WFC_SER41.

The Conservancy's discussion of alleged deficiencies with the $61.8 million Puget Sound salmon mitigation program has little relevance to the Southeast Alaska fishery, which takes very few ESA-listed stocks. Dkt. 24-1 at 22; WFC_ER686, WFC_SER12. That program is meant to mitigate for Canadian and Pacific Northwest fisheries' large impact on Puget Sound Chinook and habitat degradation in the Pacific Northwest. WFC_SER11–13, WFC_ER42–43, 585, 660, 668.

II. Shutting down Southeast Alaska's Chinook troll fishery will cause catastrophic and irreparable harm.

The Conservancy downplays the harm to Southeast Alaska by arguing that not *all* fisheries are closed, and that the district court only *partly* vacated the ITS. Dkt. 24-1 at 28. But an atomic bomb is still an atomic bomb, whether it annihilates one city or two.

Moreover, this is about more than economic harm. This Court must also consider the social and cultural implications of how vacatur will harm families who have fished for generations; some of whom, since time immemorial. Dkt. 15, App.216–17; Dkt. 22-3 at 103–04 (nearly 600 tribal members hold commercial and hand troll permits in Southeast Alaska). As the president of the Central Council of Tlingit and Haida Indian Tribes declared, "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." Dkt. 22-3 at 104. Everything costs money: food, clothes, even fuel and gear to go subsistence fishing.

As shown in the numerous resolutions from tribes, small communities, and business associations, closing the summer and winter troll fishery—the second largest fleet in Alaska with over a thousand active permit holders—will create *severe* hardship. *See, e.g.*, Dkt. 22-3 at 57, 84 (Sitka), 58 (Gillnetters), 60 (Port

Alexander), 64, 74 (Klawock), 68 (Yakutat), 69 (Petersburg), 73 (Armstrong-Keta), 76 (Hoonah), 77 (Craig), 79 (Ketchikan), 81 (Pelican), 83 (Wrangell), 85–86 (Organized Village of Kake), 87 (Juneau), 90 (Sitka Tribal Council), 92–93 & 103–04 (Tlingit and Haida Indian Tribes), 95–96 (Port Townsend Marine Trades Association), 101 (Yakutat Tlingit Tribe).

The Conservancy suggests that the harm will not be irreparable, because, it asserts, there is a possibility that the loss of income will "ultimately . . . be recovered." Dkt. 24-1 at 29–30. The Conservancy below suggested that "maybe" the trollers could be granted some federal funding for what the Conservancy termed a "catastrophic regional fishery disaster." Dist. Ct. Dkt. 179 at 14. This just underscores the magnitude of the economic harm. And the Conservancy does not pretend that federal funds, if granted at some future point, would fully restore the economic, social, and cultural harms that will ripple throughout Southeast Alaska if a stay is not granted.

III. Shutting down Southeast Alaska's Chinook troll fisheries will provide *no meaningful benefit* to the SRKW.

No one disputes that the SRKW are imperiled. But the district court clearly erred in finding that partial vacatur would meaningfully improve prey availability to SRKW and SRKW population stability and growth. WFC_ER39. Because the entire Southeast Alaska fishery reduces prey availability for SRKW by only 0.5%

in the winter in coastal waters and 1.8% in the summer in inland waters, and because the troll fishery reduces SRKW prey by even less, Dr. Lacy's assumptions about the potential meaningfulness of a 3–12 % increase in prey availability for SRKW is unhelpful to the Court's analysis. Dkt. 24-1 at 26 (citing WFC_SER76–78). Dr. Lacy's oversimplified model does not accurately reflect the troll fisheries' effect on prey available to SRKW, as further explained in the State's motion for stay. Dkt. 15 at 17–22. The Conservancy's reliance on another hired declarant, who testified about how great Dr. Lacy is, does not fix the flaws in his model. Dkt. 24-1 at 25 (citing WFC_ER243). Nor are Dr. Lacy's inflated numbers fixed by the Conservancy's impugning and moving to strike testimony from NMFS, the State, and the Trollers. Dkt. 24-1 at 26; Dist. Ct. Dkt. 138 at 12–16, Dist. Ct. Dkt. 188. It simply reveals the Conservancy's strategy of obfuscating the facts and trying to confuse the district court and this Court. The district court clearly erred in relying on the Conservancy's assumptions without taking a critical look at the Conservancy's flawed analysis.

The State is not, as the Conservancy suggests, asking this Court to blindly defer to post-decision declarations. Dkt. 24-1 at 26. Rather, the State asks the Court to defer to the highly technical data within the BiOp and use the declarations to understand that data. Dkt. 15 at 17–18. The declarations explain that the number Dr. Lacy chose from the BiOp to quantify Alaska's effect on prey availability for

SRKW was neither the mean nor the median within a range of historical data. *E.g.*, WFC_SER10. Additionally, if Dr. Lacy looked more critically at the BiOp's data, he would have focused on data showing prey numbers when the whales and prey are actually expected to be in the same location at the same time, not data showing higher numbers of prey reduction in places where whales typically aren't present. WFC_SER10–11, 41–42. Had he considered the proper data, Dr. Lacy would have chosen a much lower number representing the fishery's effect on reducing prey. Moreover, the Court should not ignore further research and analysis of the correlation between prey availability and the vitality of SRKW since 2019 simply because it was undertaken after the 2019 BiOp and undermines the Conservancy's case. WFC_SER8–9. This is especially so here, when the Court's decision—if not stayed—will cause irreparable harm to Southeast Alaska communities.

The Conservancy again misleads the Court by saying that Alaska takes 110,000 Chinook "from populations used by SRKW as prey" and that number of salmon would be "significant to SRKWs." Dkt. 24-1 at 27. First, the data shows that only about 76,000 Chinook taken by the Southeast Alaska troll fishery annually (not just summer and winter) are "high priority" for SRKW. WFC_SER9–10. High priority stocks are those that have been shown through studies to consistently comprise SRKW's diet because those stock and whales are

present in the same place and at the same time.[2] WFC_SER9. Of the high priority Chinook that are caught in summer and winter, no one—not even Dr. Lacy (the Conservancy's expert)—thinks that the SRKW will have an opportunity to catch all the Chinook foregone by Alaska's trollers. The Conservancy's assertion that 110,000 fish caught in Alaska are significant to SRKW is just another example of the Conservancy's using misleading numbers to try to confuse this Court.

The majority of high priority fish that are not captured by commercial trollers will not make the 1,000-mile journey to where SRKW are present. They will be intercepted by burgeoning populations of predators and fisheries on their southbound migration. WFC_SER10–11. And because ISBM fisheries are not managed to a catch limit, those fisheries have broad latitude under the Treaty to increase their take of Chinook in response to any abundance created when Southeast Alaska trollers are effectively enjoined from catching fish. Dkt. 15, App.10 (Lyons Decl.), App.77 (Chinook Chapter, paragraph 5(a)). To be clear, the State does not assert that *none* of the Chinook otherwise harvested by trollers will reach SRKW feedings grounds. The State is simply presenting the Court with a

[2] Conversely, low priority Chinook are from stocks that have not been found in SRKW diet, because although SRKW might want to eat them if they were in a fish tank together, the fish generally aren't present in the same place and time as the whales.

more honest, realistic picture of the fishery's actual effect on SRKW's prey, which the Conservancy has failed to do.

And this does not account for how the prey increase program has already been offsetting the fishery's minor effect.

IV. The public interest strongly reinforces the need to stay the district court's order.

The Conservancy is wrong in arguing that a speculative and, at best, minor benefit to an endangered species trumps certain economic devastation at the remedy stage. While the Congressional purpose of protecting endangered species is no doubt important, this case is unlike *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 171 (1978), where everyone agreed that the operation of a dam would either eradicate an endangered species or destroy its critical habitat, and not operating the dam would not harm the species. In this case, the fishery's effect on the whale is minor, those effects have already been mitigated, and the benefits to the whales from closing the fishery are speculative.

Moreover, this is not a typical ESA case because it involves Congress's complementary objectives under the Treaty. Pacific Salmon Treaty Act, P.L. 99-5 (1985). If a stay is not granted, the Treaty principle of fairly sharing salmon with Canada will be frustrated. Dkt. 15, App.26. First, a closure affects how the United States and Canada share the resources while the ITS is vacated. Canadian ISBM

fisheries have broad latitude under the Treaty to increase their take of Chinook in response to increased abundance resulting from Alaska's foregone harvest. Dkt. 15, App.77 (Chinook Chapter, paragraph 5(a)). Second, even once NMFS issues a new ITS, the vacatur order will impede fairly sharing the resource. This is because Alaska's harvest limits are set based on fishing data from the previous winter season. Dkt. 15, App.78 (Chinook Chapter, paragraph 6(b)(ii)). If the winter fishery is closed, Alaska will not have the data required to set harvest limits under the terms of the Treaty for the following year. *Id*. Instead, Alaska will be subjected to lower-than-negotiated harvests levels for all of its Treaty fisheries the following year, compromising Congressional intent that the United States receive its fair share of salmon. Dkt. 15, App.78 (Chinook Chapter, paragraph 6(b)(iii)).

In this case, environmental conservation organizations; local, tribal, and federal governments; and Congressional leaders have banded together to argue that a stay is in the public interest. Dkt. 22. SalmonState, an organization whose goal is ensuring access to sustainable wild salmon, said it best: the Conservancy's litigation is "misguided [and] irresponsible," an "abuse of the Endangered Species Act," and "in all probability won't save a single endangered killer whale, but will ruin the livelihood of thousands of Alaska's most committed, long-term

conservationists and wild salmon allies."[3] *See also* Dkt. 22-3 at 99–100 (letter from four conservation groups—SalmonState, Southeast Alaska Conservation Council, Sitka Conservation Society, Alaska Rainforest Defenders—denouncing Conservancy's suit).

Staying the district court's vacatur order is merited.

RESPECTFULLY SUBMITTED June 12, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 12, 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 brief contains 2,798 words. I certify that this complies with Rule 27's word limit and Rule 32.
s/ Laura Wolff

[3] SalmonState On Ongoing Lawsuit Targeting Southeast Alaska Salmon Trollers, https://aksportingjournal.com/salmonstate-on-ongoing-lawsuit-targeting-southeast-alaska-salmon-trollers/ (May 2, 2023).