

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

and

ALASKA TROLLERS ASSOCIATION AND STATE OF ALASKA,
Defendant-Intervenors/Appellants/ Cross-Appellees.

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

**SOUTHEAST ALASKA NATIVE COALITION MOTION FOR LEAVE TO
FILE AMICI CURIAE BRIEF**

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Central Council of Tlingit & Haida Indian Tribes of Alaska, Angoon Community Association, Chilkat Indian Village, Chilkoot Indian Association, Craig Tribal Association, Hoonah Indian Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kake, Organized Village of Kasaan, Petersburg Indian Association, Sitka Tribe of Alaska, Skagway Traditional Council, Wrangell Cooperative Association, Yakutat Tlingit Tribe, Alaska Native Brotherhood, Alaska Native Sisterhood, Haida Corporation, Huna Totem Corporation, Kake Tribal Corporation, Klawock Heenya, Kootznoowoo Incorporated, Sealaska Corporation, Shaan Seet Incorporated, and Shee Atiká Incorporated (hereinafter “Amici”) respectfully move this Court for leave to file the accompanying Amici Curiae brief in support of the Federal Defendants-Appellants’ First Cross-Appeal Brief.¹ Counsel for Amici endeavored to obtain the consent of all parties to the filing of the brief before filing this motion. All parties consented to the filing of the brief except for Plaintiff-Appellee Wild Fish Conservancy, which reserves its position until such time as it may review this motion and the underlying brief.

¹ CITE

I. Interest of the Amici

The Amici Curiae are sixteen federally recognized Tribes, two Alaska Native advocacy organizations, and eight Alaska Native Corporations (ANC) located in Southeast Alaska. Chinook salmon and the practice of trolling are a central part of the fabric of Southeast Alaska Native communities. The Amici are deeply concerned about the disruptive effects the partial vacatur will have on Southeast Alaska's Tribal trollers and the Tribal communities which depend on them. As such, the Amici are uniquely interested in ensuring the longevity of the Southeast Alaska Chinook salmon (king salmon) troll fishery for economic and cultural reasons, and would be disproportionately impacted by the closure of the fishery.

II. Desirability and Relevance of the Amici Curiae Brief.

The Lingít (Tlingit), Xaadas (Haida), and Ts'msyen (Tsimshian) peoples have stewarded their traditional homelands and waters since time immemorial.²

² Mot. for Leave to File Br. of Amici Curiae Ex. 1, at Peterson Decl. ¶¶ 3, 4; Cook Decl. ¶ 11; Erickson Decl. ¶ 3, ECF 42-3; *See also* Michael Krauss, et al., *Indigenous Peoples and Languages of Alaska*, UNIV. OF ALASKA FAIRBANKS, ALASKA NATIVE LANGUAGE ARCHIVE (2011), <https://www.uaf.edu/anla/collections/map/>.

Documented history of the Lingít and Haida peoples in Southeast Alaska reaches back more than 10,000 years. Steven J. Langdon, *Traditional Knowledge and Harvesting of Salmon by HUNA and HINYAA LINGIT*, Final Report, U.S.

Southeast Alaska Indigenous cultures are grounded in the values of respect for all living creatures and their environment, and of maintaining balance between the two. As President Clinton Cook Sr. of the federally recognized Craig Tribal Association Council stated, “[o]ur ancestors have been the stewards of our lands and waters for generations. We have cared for the ocean and the animals that live in it.”³ Salmon—a foundational food source for Southeast Alaska Indigenous communities—are particularly revered. Trolling for king salmon is a traditional, respectful, and sustainable method of harvesting this culturally significant food.

Traditional and customary harvesting practices, including salmon trolling, have been maintained by Southeast Alaska Indigenous communities over thousands of years. Traditional and customary salmon trolling has evolved into the commercial trolling industry that sustains Southeast Alaska’s communities to this

DEP’T OF FISH & WILDLIFE, FISHERIES INFORMATION SERVICE PROJECT 1 (Series No. FIS 02-104, 2006).

Tsimshian peoples are Indigenous to the Pacific Northwest Coast. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, COMMUNITY PROFILES FOR NORTH PACIFIC FISHERIES – ALASKA: METLAKATLA 4 (Series No. NOAA-TM-AFSC-259, vol. 11, 2005), https://apps-afsc.fisheries.noaa.gov/REFM/Socioeconomics/Projects/communityprofiles/Metlakatla_Profile_2000_2010.pdf.

Metlakatla was settled by Tsimshian people who migrated to Annette Island in the 1800s and was established as a reservation by Congress in 1891. Act of Mar. 3, 1891, Pub. L. No. 51-561, 26 Stat. 1095, 1101.

³ Cook Decl. ¶ 11, ECF 42-3.

day, providing a financial backbone to economies starkly different from their counterparts in the contiguous United States. Modern Tribal trollers follow in the footsteps of their forbearers in advocating for the sustainable harvests of salmon.

For these reasons, the Amici support sound conservation measures aimed at restoring both the Southern Resident Killer Whale (SRKW) and king salmon populations of the Pacific Northwest. But the Amici do not support blunt measures that place the heaviest burdens on the Indigenous people who depend on the king troll industry for both their individual and community wellbeing. Too often have Indigenous communities been asked to bear the brunt of conservation efforts made necessary by overharvesting and ecological degradation that resulted from removing those Indigenous voices from decision making. The threat of a partial vacatur of the Incidental Take Statement (ITS) is yet another example of this inequitable history.

Closing the Southeast Alaska king commercial troll fishery will have disastrous economic and cultural effects on Southeast Alaska Indigenous communities. The Amici urge this Court to carefully consider these disruptive consequences, and to reverse the partial vacatur of the rule that allows the Southeast Alaska commercial troll fishery.

When the Intervenor State of Alaska sought a stay of the order partially vacating the ITS (and effectively closing the summer and winter commercial Chinook troll fisheries), sixteen Tribes and six Alaska Native Claims Settlement Act Corporations located in Southeast Alaska sought permission from this Court to participate as amici curiae, to ensure the Court would be fully informed about the threats closure of the commercial king troll fishery pose to Tribal communities.⁴ In granting the stay, this Court agreed that there was a “sufficient likelihood” that on appeal, Defendants would establish that the “certain and substantial impacts” of the partial vacatur would “outweigh the speculative environmental threats posed by remanding without vacatur.”⁵

Now at the merits stage, the Amici again seek to fully inform this Court of the disruptive impacts a partial vacatur of the ITS would have on Tribal communities, and to urge the Court not to allow the heaviest burdens of conservation, with no certainty as to the effectiveness of such measures, to fall on Southeast Alaska’s Tribal trollers, their families, and the communities that depend on them.

III. Conclusion

⁴ See Mot. for Leave to File Br. of Amici Curiae, ECF No. 42.

⁵ Order 4, ECF No. 48.

The Amici respectfully request that the Court grant leave to file the accompanying Amici Curiae brief and direct the Clerk to accept the proposed brief for filing.

Respectfully submitted this 6th day of October 2023.

NATIVE AMERICAN RIGHTS FUND

/s/ Matthew N. Newman

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Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, I electronically filed the foregoing SOUTHEAST ALASKA NATIVE COALITION MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF with the Clerk of the Court by using the CM/ECF system.

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

/s/ Matthew N. Newman

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**SOUTHEAST ALASKA NATIVE COALITION AMICI CURIAE BRIEF
IN SUPPORT OF FEDERAL DEFENDANTS-APPELLANTS'
FIRST CROSS-APPEAL BRIEF**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Central Council of Tlingit & Haida Indian Tribes of Alaska, Angoon Community Association, Chilkat Indian Village, Chilkoot Indian Association, Craig Tribal Association, Hoonah Indian Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kake, Organized Village of Kasaan, Petersburg Indian Association, Sitka Tribe of Alaska, Skagway Traditional Council, Wrangell Cooperative Association, and Yakutat Tlingit Tribe are federally recognized Tribal governments with not parent company or stock.

The Alaska Native Brotherhood and Alaska Native Sisterhood are non-profit corporations registered in the State of Alaska with not parent company or stock.

Sealaska Corporation is an Alaska Native Claims Settlement Act (ANCSA) regional corporation. Sealaska Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock. Haida Corporation, Huna Totem Corporation, Kake Tribal Corporation, Klawock Heenya Corporation, Kootznoowoo Incorporated, and Shaan Seet Incorporated are each ANCSA village corporations. These village corporations have no parent corporations and no publicly held corporation owns 10% or more of these village corporations' stock. Shee Atiká Incorporated is an ANCSA urban corporation. Shee Atiká Incorporated

has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION	1
STATEMENT OF THE CASE.....	4
ARGUMENT	6
I. A PARTIAL VACATUR WILL HAVE DISASTROUS ECONOMIC CONSEQUENCES FOR AMICI.	8
II. A PARTIAL VACATUR WILL HAVE DEVASTATING CULTURAL IMPACTS ON THE AMICI.	13
A. The Practice of Trolling is Rooted in Southeast Alaska Indigenous Worldviews of Respect and Reciprocity.....	14
B. Tribal Trollers Are Holders of Priceless Traditional Knowledge of Salmon and Their Habitats.	17
C. Tribal Trollers Fill an Important Cultural Role Within Their Communities.....	21
D. The Partial Vacatur Could Harm Tribal Homelands and Waters, and in Turn Threaten Tribal Existence.....	23
CONCLUSION.....	25
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Allied–Signal, Inc. v. U.S. Nuclear Regul. Comm’n</i> , 988 F.2d 146 (D.C.Cir.1993).....	7
<i>Cal. Cmty. Against Toxics v. U.S. E.P.A.</i> , 688 F.3d 989 (9th Cir. 2012).....	6, 7, 9
<i>Haaland v. Brackeen</i> , 143 S. Ct. 1609 (2023).....	25
<i>United States v. Washington</i> , No. 70-9213, 2013 WL 1334391 (W.D. Wash. 2013).....	5
<i>United States v. Washington</i> , 853 F.3d 946 (9th Cir. 2017).....	5
<i>W. Watersheds Project v. Haaland</i> , 69 F.4th 689 (10th Cir. 2023).....	7
Statutes:	
Act of Mar. 3, 1891, Pub. L. No. 51-561, 26 Stat. 1095.....	2
25 U.S.C. § 1901(3).....	24
Other Authorities:	
ALASKA BOATS & PERMITS, INC, https://www.alaskaboat.com/permits (last visited Sept. 12, 2023).....	11, 12
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INTEREST OF AMICI CURIAE

The Amici Curiae¹ are sixteen federally recognized Tribes,² two Alaska Native advocacy organizations,³ and eight Alaska Native Corporations⁴ (ANC) located in Southeast Alaska (together Amici). Chinook salmon and the practice of trolling are a central part of the fabric of Southeast Alaska Native communities. The Amici are deeply concerned about the disruptive effects the partial vacatur will have on Southeast Alaska's Tribal trollers and the Tribal communities which depend on them. As such, the Amici are uniquely interested in ensuring the longevity of the Southeast Alaska Chinook salmon troll fishery for economic and cultural reasons, and would be disproportionately impacted by the closure of the fishery.

INTRODUCTION

“You have to realize that we treat salmon like we wish to be treated.”

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

² Central Council of Tlingit & Haida Indian Tribes of Alaska, Angoon Community Association, Chilkat Indian Village, Chilkoot Indian Association, Craig Tribal Association, Hoonah Indian Association, Ketchikan Indian Community, Klawock Cooperative Association, Metlakatla Indian Community, Organized Village of Kake, Organized Village of Kasaan, Petersburg Indian Association, Sitka Tribe of Alaska, Skagway Traditional Council, Wrangell Cooperative Association, and Yakutat Tlingit Tribe.

³ Alaska Native Brotherhood and Alaska Native Sisterhood.

⁴ Haida Corporation, Huna Totem Corporation, Kake Tribal Corporation, Klawock Heenya, Kootznoowoo Incorporated, Sealaska Corporation, Shaan Seet Incorporated, and Shee Atiká Incorporated.

– James Osborne, Chookaneidí clan of Hoonah⁵

The Lingít (Tlingit), Xaadas (Haida), and Ts’msyen (Tsimshian) peoples have stewarded their traditional homelands and waters since time immemorial.⁶ Southeast Alaska Indigenous cultures are grounded in the values of respect for all living creatures and their environment, and of maintaining balance between the two. As President Clinton Cook Sr. of the federally recognized Craig Tribal Association Council stated, “[o]ur ancestors have been the stewards of our lands

⁵ Steve J. Langdon, *Tlingit Engagement with Salmon: The Philosophy and Practice of Relational Sustainability*, in THE ROUTLEDGE HANDBOOK OF INDIGENOUS ENVIRONMENTAL KNOWLEDGE 169, 171 (Thomas F. Thornton & Shonil A. Bhagwat eds., 2020).

⁶ Mot. for Leave to File Br. of Amici Curiae Ex. 1, at Peterson Decl. ¶¶ 3, 4; Cook Decl. ¶ 11; Erickson Decl. ¶ 3, ECF 42-3; *See also* Michael Krauss, et al., *Indigenous Peoples and Languages of Alaska*, UNIV. OF ALASKA FAIRBANKS, ALASKA NATIVE LANGUAGE ARCHIVE (2011), <https://www.uaf.edu/anla/collections/map/>.

Documented history of the Lingít and Haida peoples in Southeast Alaska reaches back more than 10,000 years. Steven J. Langdon, *Traditional Knowledge and Harvesting of Salmon by HUNA and HINYAA LINGIT, Final Report*, U.S. DEP’T OF FISH & WILDLIFE, FISHERIES INFORMATION SERVICE PROJECT 1 (Series No. FIS 02-104, 2006).

Tsimshian peoples are Indigenous to the Pacific Northwest Coast. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, COMMUNITY PROFILES FOR NORTH PACIFIC FISHERIES – ALASKA: METLAKATLA 4 (Series No. NOAA-TM-AFSC-259, vol. 11, 2005), https://apps-afsc.fisheries.noaa.gov/REFM/Socioeconomics/Projects/communityprofiles/Metlakatla_Profile_2000_2010.pdf.

Metlakatla was settled by Tsimshian people who migrated to Annette Island in the 1800s and was established as a reservation by Congress in 1891. Act of Mar. 3, 1891, Pub. L. No. 51-561, 26 Stat. 1095, 1101.

and waters for generations. We have cared for the ocean and the animals that live in it.”⁷ Salmon—a foundational food source for Southeast Alaska Indigenous communities—are particularly revered. Trolling for Chinook salmon is a traditional, respectful, and sustainable method of harvesting this culturally significant food.

Traditional and customary harvesting practices, including salmon trolling, have been maintained by Southeast Alaska Indigenous communities over thousands of years. Traditional and customary salmon trolling has evolved into the commercial trolling industry that sustains Southeast Alaska’s communities to this day, providing a financial backbone to economies starkly different from their counterparts in the contiguous United States. Modern Tribal trollers follow in the footsteps of their forbearers in advocating for the sustainable harvests of salmon.

For these reasons, the Amici support sound conservation measures aimed at restoring both the Southern Resident Killer Whale (SRKW) and Chinook salmon populations of the Pacific Northwest. But the Amici do not support blunt measures that place the heaviest burdens on the Indigenous people who depend on the Chinook troll industry for both their individual and community wellbeing. Too often have Indigenous communities been asked to bear the brunt of conservation

⁷ Cook Decl. ¶ 11, ECF 42-3.

efforts made necessary by overharvesting and ecological degradation that resulted from removing those Indigenous voices from decision making. The threat of a partial vacatur of the Incidental Take Statement (ITS) is yet another example of this inequitable history.

Closing the Southeast Alaska Chinook commercial troll fishery will have disastrous economic and cultural effects on Southeast Alaska Indigenous communities. The Amici urge this Court to carefully consider these disruptive consequences, and to reverse the partial vacatur of the rule that allows the Southeast Alaska commercial troll fishery.

STATEMENT OF THE CASE

Under the auspices of seeking to protect the SRKW and certain populations of Chinook, Plaintiff Wild Fish Conservancy sued officials of the National Marine Fisheries Service (NMFS) and the U.S. Department of Commerce in 2020, arguing, *inter alia*, that NMFS violated the Endangered Species Act and the National Environmental Policy Act in issuing the 2019 Southeast Alaska Biological Opinion (2019 BiOp), which allows some harvest of Chinook, including salmon that might otherwise be a food source for the SRKW.⁸ The District Court agreed.⁹

⁸ 18-ER-1871-73.

⁹ 4-ER-612-13.

At the remedy stage, Wild Fish Conservancy requested that the court remand to the agency and vacate the portions of the ITS from the 2019 BiOp that authorize the harvest of Chinook in the summer and winter seasons of the Southeast Alaska commercial troll fishery, and the portions of the 2019 BiOp that approve a program designed to increase Chinook populations.¹⁰ The District Court agreed in part, vacating the rule allowing harvests of Chinook in the summer and winter commercial troll seasons in Southeast Alaska.¹¹ In doing so, the Court grossly underestimated the disruptive effects the partial vacatur would have on Southeast Alaska communities, and failed entirely to consider the unique and overwhelming effects on the Amici.¹²

When the Intervenor State of Alaska sought a stay of the order partially vacating the ITS (and effectively closing the summer and winter commercial Chinook troll fisheries), sixteen Tribes and six Alaska Native Claims Settlement Act Corporations located in Southeast Alaska sought permission from this Court to participate as amici curiae, to ensure the Court would be fully informed about the

¹⁰ 1-ER-7.

¹¹ 1-ER-4–5.

¹² *Cf. United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017) (Recognizing, in another context, that “reduction in tribal [salmon] harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to the economic harm” (quoting *United States v. Washington*, No. 70-9213, 2013 WL 1334391, at *15 (W.D. Wash. 2013))).

threats closure of the commercial Chinook troll fishery pose to Tribal communities.¹³ In granting the stay, this Court agreed that there was a “sufficient likelihood” that on appeal, Defendants would establish that the “certain and substantial impacts” of the partial vacatur would “outweigh the speculative environmental threats posed by remanding without vacatur.”¹⁴

Now at the merits stage, the Amici again seek to fully inform this Court of the disruptive impacts a partial vacatur of the ITS would have on Tribal communities, and to urge the Court not to allow the heaviest burdens of conservation, with no certainty as to the effectiveness of such measures, to fall on Southeast Alaska’s Tribal trollers, their families, and the communities that depend on them.

ARGUMENT

The Amici oppose a vacatur of the ITS that would disproportionately impact Southeast Alaska Indigenous peoples who have sustained a respectful reciprocal relationship with salmon since time immemorial.

Vacatur is an equitable remedy, and therefore should be granted only if equitable considerations favor relief.¹⁵ A flawed agency action need not be

¹³ See Mot. for Leave to File Br. of Amici Curiae, ECF No. 42.

¹⁴ Order 4, ECF No. 48.

¹⁵ *Cal. Cmty. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012).

vacated.¹⁶ When deciding if an agency action should be vacated, courts consider “the disruptive consequences of an interim change that may itself be changed.”¹⁷ The analysis encompasses a broad range of possible disruptive consequences; this Court has declined to grant vacatur, for example, where a vacatur would be “economically disastrous” to a large business venture, would delay fulfillment of a pressing public need, and would thwart the aim of the underlying law.¹⁸ Other courts have declined to vacate agency actions where vacatur would disrupt seasonal industries in a way that would have long-term impact.¹⁹

Vacatur is inappropriate here because it would put the heaviest burdens of uncertain conservation measures on the Amici. The Amici are deeply invested in the long-term survival of Chinook salmon, indeed all salmon, and therefore support sound conservation measures. But a vacatur of the ITS that would essentially shutter the Southeast Alaska Chinook troll fishery—a fishery that is both sustainable and grounded in traditional practices—will have devastating economic

¹⁶ *Id.*

¹⁷ *Id.* (adopting the test from *Allied–Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150-51 (D.C.Cir.1993)).

¹⁸ *Cal. Cmty. Against Toxics*, at 993-94.

¹⁹ *W. Watersheds Project v. Haaland*, 69 F.4th 689, 722-23 (10th Cir. 2023) (declining to vacate a BiOp where vacating a cattle grazing regulation would have disrupted seasonal grazing rotations in a way that would have impacted future seasons, affecting permit holders and local communities).

effects on the exact people and communities that have proven adept at caring for these species for thousands of years. Moreover, the cascading effects of a vacatur would threaten community health and culture, and potentially cause long-term harm to Tribes and their homelands.

I. A PARTIAL VACATUR WILL HAVE DISASTROUS ECONOMIC CONSEQUENCES FOR AMICI.

It is undeniable that salmon and other sea life continue to suffer devastating population declines, and that the management decisions required by the current environmental crises are only going to get more difficult.²⁰ But the burdens of measures aimed at conservation should not fall primarily on Indigenous people and communities. The economic harms perpetrated by the partial vacatur would be ruinous to Tribal trollers and Southeast Alaska Tribal communities.

Closing the commercial Chinook salmon troll fishery for the summer and winter seasons would have devastating economic impacts on Southeast Alaska's Indigenous communities. Nearly 600 commercial Chinook troll permits are held by

²⁰ See, e.g., Grant T. Hagerman et al., *Northern Southeast Alaska Chinook Salmon Stock Status and Action Plan, 2022*, ALASKA DEP'T OF FISH & GAME 1-2, 8 (Regional Information Report No. 1J22-17, June 2022), <https://web.archive.org/web/20230925232116/https://www.adfg.alaska.gov/FedAidPDFs/RIR.1J.2022.17.pdf>, (describing “the stocks of management concern” designations for Chinook salmon stocks from the Chilkat, King Salmon, and Taku Rivers in Southeast Alaska).

Tribal citizens.²¹ Tribal trollers are the economic lynchpins of their families and communities. For many Tribal trollers, up to seventy percent of their annual income is generated by Chinook troll fishing.²² For example, while only approximately twenty of the Craig Tribal Association’s five hundred Tribal citizens are permit holders, many other Tribal citizens (including half of the Craig Tribal Association Tribal Council) live in households directly supported by a permit holder.²³ Further, permit holders—even those who live outside local Tribal communities—provide employment to other community members in roles such as crew, bookkeepers, sales representatives, and people to clean, process, and smoke fish.²⁴ Tribal troller James Dybdahl states that he usually employs four to five people during trolling season and that a closure would mean not only a loss of income for him, but for his crewmembers, his bookkeeper, and his sales staff.²⁵

²¹ Peterson Decl. ¶ 8, ECF 42-3. Compare *Cal. Cmty. Against Toxics*, 688 F.3d at 993-994 (denying a vacatur that would have been economically disastrous to a business venture with 350 employees).

²² Cook Decl. ¶ 5, ECF 42-3.

²³ Cook Decl. ¶¶ 3, 4, ECF 42-3. *See also* Yates Decl. ¶ 2, ECF 42-3 (“My father, George Yates, is one of the oldest of his seventeen siblings. He learned to fish at an early age to support his family. He would give most of his earnings at the end of fishing season to his mother, my grandmother, to supplement the family income. My aunts and uncles have told me that they would have gone hungry as kids if my dad hadn’t fished to support them.”).

²⁴ Peterson Decl. ¶ 8, ECF 42-3; Dybdahl Decl. ¶ 9, ECF 42-3.

²⁵ Dybdahl Decl. ¶ 9, ECF 42-3.

Likewise, Tribal troller Fredrick Phillips has five employees year-round and a few more during trolling season on their fish tender boat, which buys fresh caught fish directly from smaller trollers.²⁶ All of these people and their families are supported either directly or indirectly by the commercial trolling industry and a closure would mean a dramatic decline in their annual income. Trollers also generate local economic activity all over Southeast Alaska by paying for fuel, ice, gas, groceries, licenses, and fishing gear from local stores.²⁷ Some municipalities tax these purchases to fund critical public services.²⁸ Without the Chinook troll fishery, and the complex web of local economic exchanges it enables, Southeast Alaska Indigenous communities will suffer.

Troll permit holders cannot easily pivot to other fisheries or industries. Troll fishing has relatively low entry costs,²⁹ and entering other fisheries requires buying or leasing new permits and gear, with no guarantee of recovering the initial outlay.³⁰ As Tribal troller Michael Douville stated, “if you have been a fisherman

²⁶ Phillips Decl. ¶ 2, 3, ECF 42-3.

²⁷ Cook Decl. ¶ 7, ECF 42-3; Dybdahl Decl. ¶ 9, ECF 42-3.

²⁸ *See* Cook Decl. ¶ 9, ECF 42-3.

²⁹ Raymond Douville Decl. ¶ 4, ECF 42-3.

³⁰ Dybdahl Decl. ¶ 7, ECF 42-3.

your entire life, you are not qualified for other jobs, and you do not have access to other jobs.”³¹ In some communities, there are no other industries to pivot to.³²

Further, a partial vacatur would likely cost troll permit holders any equity they hold in their businesses; after the District Court’s decision, prices for troll equipment and permits plummeted. James Dybdahl stated that before this litigation, he estimated that his power trolling permit was valued “close to \$40,000” on the open market but since this litigation troll permits “are sitting on the market at less than \$25,000 with no takers.”³³ Similarly, Tribal troller Raymond Douville stated that before this litigation the estimated value of a hand troll permit was “between \$20,000 and \$30,000” on the open market.³⁴ Indeed, two online brokers for Alaska troll permits are listing power troll permits from \$24,000 to \$34,000 and hand troll permits from \$8,500 to \$10,500.³⁵ If a troller wanted to exit the trolling industry now, they would be forced to take a significant loss on the sale of their permits.

³¹ Michael Douville Decl. ¶ 3, ECF 42-3.

³² Ware Decl. ¶ 4, ECF 42-3.

³³ Dybdahl Decl. ¶ 8, ECF 42-3.

³⁴ Raymond Douville Decl. ¶ 4, ECF 42-3.

³⁵ ALASKA BOATS & PERMITS, INC, <https://www.alaskaboat.com/permits> (last visited Sept. 12, 2023); ALASKAN QUOTA & PERMITS, LLC, <https://www.alaskabroker.com/listings/permits.html#STATEWIDE> (last visited Sept. 12, 2023).

The financial losses from closure of the summer and winter Chinook troll fisheries would likely result in outmigration from Southeast Alaska Tribal communities.³⁶ Chinook trolling is one of the better-paying jobs in the area,³⁷ and is more accessible to young people than other fisheries because of the comparatively low cost of entry.³⁸ In contrast, Southeast Alaska salmon purse seine permits are currently selling for between \$150,000 to \$255,000 and Southeast drift gillnet permits are currently selling for between \$55,000 and \$76,000.³⁹ The permit costs alone for other salmon permits are prohibitive barriers to entry for many people and this does not include the costs of the boats, equipment, and crew needed to operate a seine or gillnet fishing boat. Economic pressures have already forced many people to leave Tribal communities to seek work.⁴⁰ Without trolling, there would be devastatingly fewer employment opportunities within Tribal

³⁶ See Cook Decl. ¶ 6, ECF 42-3 (“Some individuals have told me that based on the closure this summer alone, they fear they may need to move away in order to earn enough income. I fear that if the closure lasts longer, many more might have to leave.”).

³⁷ Ware Decl. ¶ 3, ECF 42-3.

³⁸ Raymond Douville Decl. ¶ 4, ECF 42-3.

³⁹ ALASKA BOATS & PERMITS, INC, *supra* note 34; ALASKAN QUOTA & PERMITS, LLC, *supra* note 34.

⁴⁰ Raymond Douville Decl. ¶ 5, ECF 42-3.

homelands.⁴¹ Because Southeast Alaska Tribal communities are small, the loss of even a few jobs could impact a family's ability to remain in the community. This has ripple effects in the community. One less family can mean the closure of a community's school if the student body drops below ten students.⁴² Fewer jobs means less money being spent at local businesses.

Southeast Alaska salmon trollers are economic linchpins throughout the region. The wealth they generate directly supports not only their own families, but their employees, local businesses, and Tribal and municipal governments. The disastrous domino effect of allowing a partial vacatur will cause lasting, if not irreparable, harm to Tribal trollers and the people and communities that rely on them. As Tribal troller Michael Douville put it, "The economies of our communities depend entirely on these fisheries."⁴³

II. A PARTIAL VACATUR WILL HAVE DEVASTATING CULTURAL IMPACTS ON THE AMICI.

⁴¹ Peterson Decl. ¶ 7, ECF 42-3. Compare Ware Decl. ¶ 3, ECF 42-3 ("Trolling has allowed my family and I to continue to live in our traditional homelands, rather than move to a larger, more urban community . . .").

⁴² Hannah Colton, *Proposed increase to minimum enrollment threatens funding for dozens of small schools*, ALASKA PUBLIC MEDIA (Oct. 26, 2015), <https://alaskapublic.org/2015/10/26/proposed-increase-to-minimum-enrollment-threatens-funding-for-dozens-of-small-schools/#:~:text=Since%201998%2C%2010%20students%20has,to%20qualify%20for%20state%20funding>.

⁴³ Douville Decl. ¶ 3, ECF 42-3.

In addition to the disastrous economic consequences a partial vacatur would have on the Amici, there would also be negative cultural impacts. Modern day trolling as a fishing method has its roots in Southeast Alaska Indigenous practices and worldviews. Tribal trollers play an important role within their communities, both as carriers of traditional ecological knowledge and also as providers for the larger community.

A. The Practice of Trolling is Rooted in Southeast Alaska Indigenous Worldviews of Respect and Reciprocity.

The closure of the Southeast Alaska Chinook troll fishery would perpetrate cultural harm on the Amici by forcing them to halt a practice that is and has been integral to their communities' cultural, spiritual, and physical wellbeing. The act of salmon trolling itself is deeply rooted in Southeast Alaska Indigenous worldviews and is an expression of those values. The Lingít *ayut wune* (law), for example, prescribes appropriate behavior among humans and between humans and wildlife, and is based on respect and balance.⁴⁴ Rather than viewing salmon as “resources” to be “managed,” this worldview respects salmon as beings who permit humans to use their bodies for sustenance.⁴⁵ Flowing from this acknowledgement of the

⁴⁴ Langdon, *Traditional Knowledge and Harvesting of Salmon*, *supra* note 5, at 88, 90; Langdon, *Tlingit Engagement with Salmon*, *supra* note 4, at 172.

⁴⁵ Langdon, *Traditional Knowledge and Harvesting of Salmon*, *supra* note 5, at 88, 103; Langdon, *Tlingit Engagement with Salmon*, *supra* note 4, at 171-72.

willing self-sacrifice, salmon must be treated with respect when captured, and overharvest and waste of any kind is prohibited.⁴⁶

Similar traditional laws, *yah 'guudang*, govern Haida communities.⁴⁷ The core of the Haida worldview is the belief in the personhood of all living animals and the understanding that sustaining human lives, and sustaining the lives of species that humans rely upon in order to survive, requires maintaining positive and respectful relationships with those creatures.⁴⁸ Violations of the laws of respect

⁴⁶ Langdon, *Traditional Knowledge and Harvesting of Salmon*, *supra* note 5, at 98-100 (quoting Lilly White,

My mom said, “Long ago, we not only ate the salmon. They were used for many things. Nothing was wasted.” All the uses they found for it. The bones and back bones of the large salmon the women used them for combs. The salmon tails were also tied together. When the salmon tails dried, they were like plastic. Those were used as brooms . . . they swept dirt with it. Even the slime. They made it for masks . . . paste.)

(quoting Sam Hanlon, “One of the things our Tlingit people practiced We took only what we needed and no more.”).

⁴⁷ COUNCIL OF THE HAIDA NATION, HAIDA GWAII YAH’GUUDANG [RESPECT FOR THIS PLACE], HAIDA LAND USE VISION, https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/haida_land_use_vision.pdf.

⁴⁸ See Steven J. Langdon & Robert Sanderson, *Customary and Traditional Knowledge of Sockeye Salmon Systems of the K’iis Xaadas (Hydaburg Haida)*, Final Report for FRMP 07-651, at 22-25 (U.S. Fish & Wildlife Service, Office of Subsistence Management, Fisheries Resource Monitoring Program 2009).

to salmon, for example, can result in sanctions and reprisals, such as the salmon refusing to return the following year.⁴⁹

These central principles of respect and balance continue today through the practice of trolling.⁵⁰ Troll-caught Chinooks are some of the highest value fish on the market today because trolling itself preserves the quality of the fish. For example, Tribal troller Fredrick Philips stated, “Troll caught Chinooks are high quality fish. This is because trollers catch Chinook salmon on a line, not in a net, so the meat of a troll caught fish is pristine.”⁵¹ In handling their individual catches, Tribal trollers know their ethical responsibility to treat each fish with respect, recognizing their sacrifice to feed humans. As Tribal troller Paul Marks stated, “I handle each individual fish with care and respect.”⁵² Another Tribal troller, Julie Yates stated that it was on her father’s trolling boat that she learned “a deep respect for the ocean” and “how to properly care for each fish we caught.”⁵³ Mrs. Yates

⁴⁹ Langdon, *Traditional Knowledge and Harvesting of Salmon*, *supra* note 5, at 99 (quoting Clara Peratrovich, “Because if you mistreat the salmon, or anything . . . but especially the salmon people, [they] rebel, they take their people back out and they never return. If you mistreat that salmon, you’re never going to have a full return the following year.”).

⁵⁰ *Id.* at 88, 118.

⁵¹ Phillips Decl. ¶ 3, ECF 42-3.

⁵² Marks Decl. ¶ 7, ECF 42-3.

⁵³ Yates Decl. ¶ 3, ECF 42-3.

further elaborated that “each fish must be treated with great care and respect. This is the ethos of troll fishermen.”⁵⁴

B. Tribal Trollers Are Holders of Priceless Traditional Knowledge of Salmon and Their Habitats.

It is not just the salmon caught by commercial Tribal trollers that upholds Southeast Alaska Indigenous culture, but the act of fishing itself. European records of Southeast Alaska Native peoples trolling for Chinooks go back to at least the 1700s,⁵⁵ and Indigenous knowledge confirms that Southeast Alaska Native peoples have troll-caught Chinooks since before western contact:

This is all we [Native people] have ever done—building fish traps and trolling with bone hooks from canoes and harvesting the salmon when they return each year. Most Native people have been fishermen from before anyone can remember. The traditions go back to before commercialization, before state management, and before the federal government even existed.⁵⁶

As such, Tribal trollers have generations of knowledge of salmon behavior, salmon populations, and pressures on those populations.⁵⁷ Long-established harvest and conservation measures in Southeast Alaska are grounded in this

⁵⁴ *Id.*

⁵⁵ Langdon, *Customary and Traditional Knowledge of Sockeye Salmon Systems*, *supra* note 48, at 13.

⁵⁶ Michael Douville Decl. ¶ 3, ECF 42-3.

⁵⁷ See Langdon, *Customary and Traditional Knowledge of Sockeye Salmon Systems*, *supra* note 48, at 46-48, 56-62; Langdon, *Tlingit Engagement with Salmon*, *supra* note 4, at 178.

traditional ecological knowledge, and in the cultural values of balance and respect.⁵⁸ For example, the rights to fish certain salmon streams were traditionally owned by certain clans or lineages, and with the right to fish came the responsibility to care for the stream.⁵⁹ Traditional maintenance practices included monitoring the presence of other species that impact salmon life cycles and making adjustments to maintain balance.⁶⁰ Today's Tribal trollers are a living embodiment of these traditional maintenance practices. As Tribal troller Michael Douville stated:

You did not fish where you did not have permission—families and clans had their own salmon streams. All the salmon streams and all the outside islands had fish traps that were owned by families, and those rock formations are still here to this day. They are a constant reminder that the sustainable harvest of these salmon is in line with our traditional and customary practices and is an expression of our sovereignty.⁶¹

⁵⁸ Langdon, *Tlingit Engagement with Salmon*, *supra* note 4, at 174.

⁵⁹ Langdon, *Customary and Traditional Knowledge of Sockeye Salmon Systems*, *supra* note 48, at 122. Salmon stream ownership was among the most important types of property ownership, and “those claims had to be ceremonially confirmed and continued through presence and use of the resource.” *Id.* at 13. *See also* Langdon, *Traditional Knowledge and Harvesting of Salmon*, *supra* note 5, at 95-97 (describing some of the duties of clan leaders or their designees as trustees with respect to salmon utilization); Michael Douville Decl. ¶ 3, ECF 42-3.

⁶⁰ Langdon, *Tlingit Engagement with Salmon*, *supra* note 4, at 174-76, 180-82 (describing how traditional measures to maintain balance such as allowing a family of mergansers to feed on salmon eggs, harvesting excess Dolly Varden char which feed on infant salmon, transferring salmon gametes to other streams to rebuild populations, or removing beaver dams to allow access to salmon spawning grounds.)

⁶¹ Michael Douville Decl. ¶ 3, ECF 42-3.

Traditional salmon fishing practices, likewise, incorporate the principles of balance and sustainability.⁶² Trolling for Chinooks is a traditional and sustainable harvesting method.⁶³ As President Clinton Cook Sr. stated, “salmon and trolling have always been part of our culture”⁶⁴ Trolling is a technique that involves trailing a line with a baited hook, traditionally made of bone, behind a canoe or other small boat.⁶⁵ Modern-day commercial troll fishing is the direct descendant of customary and traditional Tribal troll fishing. While most people now use modern fishing boats rather than cedar canoes, hooks are typically made from materials

⁶² Langdon, *Customary and Traditional Knowledge of Sockeye Salmon Systems*, *supra* note 48, at 34-41 (Tidal pulse fishing utilizes a half-circle stone trap at the mouth of the salmon stream, which does not block salmon from moving into a stream on the incoming tide, but captures salmon during the first half of the outgoing tide. One researcher noted “its genius lies in insuring that salmon have the opportunity to move into the stream and on to their spawning grounds on each high tide.” Various other weirs and traps were constructed so as to ensure that enough salmon could pass upstream to spawn.).

⁶³ *Id.* at 33; Cook Decl. ¶ 11, ECF 42-3; Peterson Decl. ¶¶ 5, 6, ECF 42-3.

⁶⁴ Cook Decl. ¶ 12, ECF 42-3.

⁶⁵ Langdon, *Customary and Traditional Knowledge of Sockeye Salmon Systems*, *supra* note 48, at 33-34; Steve J. Langdon, *Adaptation and Innovation in Tlingit and Haida Salmon Fisheries*, SMITHSONIAN FOLKLIFE FESTIVAL 10 (1984), <https://festival.si.edu/articles/1984/adaptation-and-innovation-in-tingit-and-haida-salmon-fisheries>; Michael Douville Decl. ¶ 3, ECF 42-3.

other than bone, and lines are sometimes drawn back to the boat by hydraulic crank rather than by hand, the general knowledge and techniques are the same.⁶⁶

Knowledge of how, where, and when to sustainably troll for Chinooks was handed down from parents and grandparents through the ages, and today's Tribal troll fishers prioritize teaching future generations.⁶⁷ Jim Dybdahl of Hoonah, Alaska learned how to troll on his family's fourteen-foot skiff and passed that knowledge onto his children.⁶⁸ Paul Marks II fishes with his father and brother and brings his young daughter on their boat so she can learn as well.⁶⁹ Likewise, Tribal troller Raymond Douville grew up fishing with his father Michael Douville. He credits his success as a troll fisherman to his childhood on his father's boat: "I have been successful as a fisherman because of what I learned from my dad on his troll boat."⁷⁰

⁶⁶ Langdon, *Traditional Knowledge and Harvesting of Salmon*, *supra* note 5, at 48; Peterson Decl. ¶ 5, ECF 42-3; Raymond Douville Decl. ¶ 4, ECF 42-3 (discussing costs for power troller permits and hand troller permits).

⁶⁷ Cook Decl. ¶ 10, ECF 42-3; Yates Decl. ¶ 4, ECF 42-3; Peterson Decl. ¶¶ 5,7, ECF 42-3; Dybdahl Decl. ¶¶ 2,3, ECF 42-3; Erickson Decl. ¶2, ECF 42-3; Phillips Decl. ¶ 1, ECF 42-3.

⁶⁸ Dybdahl Decl. ¶¶ 2, 3, ECF 42-3.

⁶⁹ Marks Decl. ¶¶ 3, 11, ECF 42-3.

⁷⁰ Raymond Douville ¶ 5, ECF 42-3.

These Tribal fishers are just some of many who are keeping alive traditional knowledge about where and when to troll for Chinooks.⁷¹ If the partial vacatur is upheld, the closure of the Southeast Alaska Chinook troll fishery will cause a break in the passing on of this knowledge. For example, President Richard Peterson of Central Council of the Tlingit & Haida Indian Tribes of Alaska stated, “Closing of the troll fishery for even one season can cause irreparable breaks in this intergenerational knowledge.”⁷² Fishing is part of Native identity in the region and losing access to these practices will result in a break from that identity and history.⁷³ If fishing is closed for the long term, the loss of knowledge becomes permanent.⁷⁴ Closing the commercial Chinook troll fishery for even one season could disrupt traditional ways of living that have persisted since time immemorial. These are cultural harms that cannot be remedied by, for example, federal fisheries disaster relief funding. Money is not a replacement for millennia-long cultural traditions.

C. Tribal Trollers Fill an Important Cultural Role Within Their Communities.

⁷¹ See Yates Decl. ¶¶ 3, 4, ECF 42-3.

⁷² Peterson Decl. ¶ 7, ECF 42-3.

⁷³ Phillips Decl. ¶ 5, ECF 42-3.

⁷⁴ See Raymond Douville Decl. ¶ 5, ECF 42-3.

In addition to their well-known nutritional value, Chinook salmon have a tremendous cultural import to all Southeast Alaska Indigenous peoples.⁷⁵ Traditional fishing practices, including trolling, are all aligned with the instruction to take only what is needed, and to prevent overharvest. The concept of taking only what is needed, however, has never been a prohibition against taking enough to share or trade to support your family and community.⁷⁶ On the contrary, the concept of taking only what is needed has always encompassed use beyond a particular family or even extended family.⁷⁷

Tribal trollers play a significant role within their communities ensuring that those who cannot fish or cannot afford to fish still have access to Chinook salmon for their own physical and cultural nourishment. Local fishermen are able to provide a key cultural and nutritional resource to Native elders and Tribal citizens who otherwise would not be able to fish for themselves.⁷⁸ In addition to providing fish to the larger Native community, Tribal trollers also supply fish for important community events. Tribal troller Paul Marks stated that he often will troll to

⁷⁵ See Cook Decl. ¶ 12, ECF 42-3; Peterson Decl. ¶¶ 4, 7, ECF 42-3; Phillips Decl. ¶ 5, ECF 42-3.

⁷⁶ Langdon, *Tlingit Engagement with Salmon*, *supra* note 4, at 179.

⁷⁷ Langdon, *Customary and Traditional Knowledge of Sockeye Salmon Systems*, *supra* note 48, at 26.

⁷⁸ Dybdahl Decl. ¶¶ 4, 5, ECF 42-3.

harvest Chinook salmon for potlatches.⁷⁹ Potlatches are important cultural events in which a whole community will often participate.⁸⁰ Tribal trollers are the bridge that connects many Southeast Alaska Indigenous peoples to cultural foods like Chinook salmon that they might not otherwise have access to. Tribal trollers allow Tribal citizens to remain connected to local places and waters even if they are unable to fish for themselves.⁸¹ A partial vacatur would not only cut off Tribal trollers from accessing this important fishery, but whole Tribal communities will be denied access to this highly nutritious and sustainable food.

D. The Partial Vacatur Could Harm Tribal Homelands and Waters, and in Turn Threaten Tribal Existence.

Finally, if the economic and cultural effects of a partial vacatur drive people out of Tribal communities, the disruptive effects will have broad reach. When people are forced to leave their traditional homelands and waters, it is not just traditional ecological knowledge about Chinook salmon that is in jeopardy, but *all* place-based traditional knowledge. The loss of such invaluable knowledge reaches beyond Tribes and Tribal citizens to all people who could benefit from traditional

⁷⁹ Marks Decl. ¶ 8, ECF 42-3.

⁸⁰ *Id.*; Sara Florence Davidson & Robert Davidson, POTLATCH AS PEDAGOGY: LEARNING THROUGH CEREMONY 4 (2018) (“Traditionally the potlatch was the legal foundation of our social structure and ensured the transmission of our cultural knowledge.”).

⁸¹ Dybdahl Decl. ¶ 4, ECF 42-3; Peterson Decl. ¶ 6, ECF 42-3.

ecological knowledge.⁸² Native people in Southeast Alaska have been steadfast environmental advocates; while their perspectives may be complemented by western science and policy initiatives generated outside the region; it cannot be replaced.

Importantly, the disruptive effects of a closure could touch the very core of Tribal existence. Tribes are made up of their people: people who have relational ties to the lands, waters, and wildlife of the region that preexist the founding of this country.⁸³ When the connections between the people, their traditional lands and waters, and the animals stewarded by the people are severed, Tribal Nations are harmed.⁸⁴ Disrupting the transmission of culture and driving Native people from their homelands are well-tested tools for forcing assimilation and undermining

⁸² *See, e.g.*, Mem. from Council on Env't Quality to Heads of Fed. Dep'ts & Agencies, Guidance for Federal Departments and Agencies on Indigenous Knowledge, EXEC. OFF. OF THE PRES. (Nov. 30, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>; National Strategy for the Arctic Region, WHITEHOUSE.GOV (Oct. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/National-Strategy-for-the-Arctic-Region.pdf>.

⁸³ *See, e.g.*, 25 U.S.C. § 1901(3) (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”).

⁸⁴ *See* Decl. of Michael Douville ¶ 3, ECF 42-3 (“[T]he sustainable harvest of these salmon is in line with our traditional and customary practices and is an expression of our sovereignty. Telling us we cannot fish is another attack on our Indigenous rights and way of life.”).

Tribal sovereignty.⁸⁵ These actions can be overt and violent, as in the past. Or they can be administrative and *seemingly* benign, but no less devastating to Tribal communities. As Tribal President Clinton Cook Sr. noted, “As people leave the community, I expect that our Tribal citizenship would also decrease.”⁸⁶ If the next generation of Tribal citizens is driven out of the region, it is not hyperbole to suggest that the Tribes’ very futures are threatened.

CONCLUSION

Responsible stewardship of waters and fisheries resources is vital to the Tlingit, Haida, and Tsimshian way of life and is an expression of their Tribal sovereignty. Troll fishermen continue traditional practices by harvesting Chinook salmon sustainably and responsibly. Allowing the partial vacatur to stand will have a devastating impact on the Amici. The Amici, as the original stewards of the land in Southeast Alaska, support reasonable conservation efforts to protect Chinook salmon and by extension the SRKW. However, such efforts should not come at the expense of the cultural and economic wellbeing of the Amici and Southeast Alaska Tribal communities. For the foregoing reasons, the Amici respectfully request that

⁸⁵ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1642 (2023) (Gorsuch, J Concurring) (summarizing past federal programs and actions, which while seemingly benign, led to “destroying tribal identity and assimilating Indians into broader society.”).

⁸⁶ Cook Decl. ¶ 6, ECF 42-3.

this Court reverse the partial vacatur of the ITS that would close the Southeast Alaska commercial Chinook troll fishery.

Respectfully submitted this 6th day of October 2023.

NATIVE AMERICAN RIGHTS FUND

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 5,894 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). I hereby certify that the word count complies with Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 32-1.

/s/ Matthew N. Newman

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, I electronically filed the foregoing SOUTHEAST ALASKA NATIVE COALITION AMICI CURIAE BRIEF IN SUPPORT OF FEDERAL DEFENDANTS-APPELLANTS' FIRST CROSS-APPEAL BRIEF with the Clerk of the Court by using the CM/ECF system.

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