

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,

v.

JENNIFER QUAN, in her official capacity as 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
No. C-20-417 (Hon. Richard A. Jones)

**MOTION OF WASHINGTON DEPARTMENT OF FISH AND
WILDLIFE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN
SUPPORT OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES**

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I. MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Washington Department of Fish and Wildlife (WDFW) respectfully moves this Court for leave to file the accompanying Amicus Curiae brief in support of the Intervenor-Defendants-Appellants/Cross-Appellees pursuant to Federal Rule of Federal Procedure 29(a). Pursuant to Circuit Rule 29-3, counsel for WDFW endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. All parties have consented to WDFW filing an amicus curiae brief except for Plaintiff-Appellee Wild Fish Conservancy, which stated it is unable to determine its position on WDFW's request to file an amicus brief until it reviews the motion.

II. INTEREST OF AMICUS CURIAE

A. Identity of Amicus Curiae

WDFW's enabling statute charges it to "preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters." RCW 77.04.012. Fish and wildlife included in this mandate are Southern Resident killer whales (SRKWs or orca) and salmon species at issue in this case. An important part of accomplishing WDFW's mandate is the co-management of Washington's extensive hatchery system, together with tribal

governments holding treaty-protected, off-reservation fishing rights. *See, e.g.*, Laws of 1891, ch. 129 (establishing and funding a state fish hatchery); RCW 77.95.280 (“harvest of hatchery origin salmon should be encouraged while wild salmon should be afforded additional protection when required.”); *U.S. v. Washington*, 759 F.2d 1353, 1358-59 (9th Cir. 1985) (*en banc*) (holding that hatchery salmon are included within the reserved treaty right to off-reservation fishing, in part because they are mitigation for wild salmon lost to habitat degradation).

The federal Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44, also overlays WDFW’s management whenever ESA-listed species are involved, such as Southern Resident orca and certain Chinook salmon populations. Because orca and salmon travel through federal, Canadian, Washington, and Oregon waters, agreements such as the Pacific Salmon Treaty with Canada, 16 U.S.C. §§ 3631-45, and the Columbia River Compact with the state of Oregon, RCW 77.75.010, also affect WDFW’s management of fish and wildlife in Washington.

B. WDFW’s Interest in this Case

Washington’s coastal and inland waters are home to Southern Resident orca implicated by this case. 2018 brought the deaths of three of the beloved

orca, including the newborn calf of Tahlequah (J35), who swam with her dead calf for over 17 days as the world watched.¹ To address the grave plight of the orca, in March 2018, Washington Governor Jay Inslee issued Executive Order 18-02, directing Washington state agencies to take action.²

Executive Order 18-02 recognized prey availability as one of three primary factors threatening orca. To implement short-term solutions, Governor Inslee ordered WDFW, within 4 months, to “identify the highest priority areas and watersheds for Southern Resident prey in order to focus or adjust, as needed, restoration, protection, incentives, hatcheries, harvest levels, and passage policies and programs.” EO 18-02 at 2. Governor Inslee also established the SRKW Task Force to create and implement a longer-term action plan.

In response to Governor Inslee’s executive order, on September 7, 2018, Washington’s Fish and Wildlife Commission, WDFW’s governing body, provided policy guidance to WDFW representatives on the Governor’s SRKW

¹ See, e.g., Ayana Archie and Jay Croft, CNN, ‘It’s Heartbreaking:’ Killer whale continues carrying dead calf for ‘unprecedented’ length of mourning (Aug. 11, 2018), available at: <https://www.cnn.com/2018/08/10/us/orca-whale-still-carrying-dead-baby-trnd/index.html> (last accessed Oct. 6, 2023).

² Executive Order 18-02 available at: https://www.governor.wa.gov/sites/default/files/exe_order/eo_18-02_1.pdf (last accessed Oct. 6, 2023).

Task Force and the WDFW Director to significantly enhance Chinook salmon availability for orca prey by increasing Chinook releases from hatchery programs by approximately 50 million smolts above 2018 levels.³ This policy became known in Washington as the orca prey initiative.

In November 2018, the Governor’s SRKW Task Force, comprised of nearly 50 federal, state, tribal, environmental, and industry representatives, released its year one Final Report and Recommendations. Similar to the Washington Fish and Wildlife Commission’s policy directive, the Task Force recommended “significantly increas[ing] hatchery production and programs to benefit . . . orcas consistent with sustainable fisheries and stock management, available habitat, recovery plans and the [ESA].” Nov. 2018 SRKW Task Force Report at 45-6.⁴ The SRKW Task Force’s final report, issued a year later, carried

³ Sept. 7, 2018 Commission Meeting Minutes, available at: https://wdfw.wa.gov/sites/default/files/about/commission/meetings/2018/09/minutes_sep0718.pdf (last accessed Oct. 6, 2023).

⁴ SRKW Task Force Report and Recommendations (Nov. 16, 2018), available at: https://www.governor.wa.gov/sites/default/files/OrcaTaskForce_reportandrecommendations_11.16.18.pdf (last accessed Oct. 6, 2023).

forward the same recommendation to significantly increase hatchery production.⁵

The Washington legislature supported the SRKW Task Force's recommendation by appropriating millions of dollars to WDFW for the purpose of increasing hatchery production in Washington State. Through the 2018 supplemental capital and operating budgets, the Washington legislature appropriated to WDFW a total of over \$1.6 million to support increased prey for orca. Laws of 2018, ch. 298, § 3054(1)-(3) (capital), ch. 299, § 306(15) (operating).⁶ In the 2019-21 biennial operating budget, the Washington legislature appropriated to WDFW an additional \$3.5 million for each of fiscal years 2020 and 2021 specifically to increase hatchery production with priority "to increase prey abundance for southern resident orcas." Laws of 2019, ch. 415, § 307(11).⁷ Additional funds were appropriated for use by tribes and utilities to

⁵ SRKW Task Force Final Report and Recommendations (Nov. 2019), available at: [20230321-orcataskforce-finalreportandrecommendations-110719.pdf \(wa.gov\)](https://www.wa.gov/20230321-orcataskforce-finalreportandrecommendations-110719.pdf) (last accessed Oct. 6, 2023).

⁶ 2018 supplemental operating and capital budgets available, respectively, at: <http://leap.leg.wa.gov/leap/budget/lbns/2018Omni6032-S.SL.pdf> and <http://leap.leg.wa.gov/leap/budget/lbns/2018Cap6095-S.SL.pdf> (last accessed Oct. 6, 2023).

⁷ 2019-21 biennial operating budget available at: <http://leap.leg.wa.gov/leap/budget/lbns/1921Omni1109-S.SL.pdf> (last accessed Oct. 6, 2023).

operate hatcheries that are “prioritized to increase prey abundance” for orca. *Id.* at § 307(13), (14). The 2022-23 biennial budget again appropriated \$3.5 million annually to WDFW for increased hatchery production to support orca prey. Laws of 2021, ch. 334 § 1307(11).⁸

WDFW and the state of Washington have a significant interest in ensuring the continued survival of orca. While the State has expended significant resources toward increasing the availability of prey for orca in Puget Sound and Washington’s offshore waters, the continuation of NMFS’s prey increase program authorized by the challenged Biological Opinion in this case is essential to meeting Southern Resident orca sustenance requirements. Without these additional federal resources, Washington’s efforts may not be enough to ensure the survival of this culturally and ecologically significant species. Accordingly, WDFW has an interest in providing important information as the Court considers the issues raised on appeal. Fed. R. Civ. P. 29(a)(3)(A).

⁸ 2021-23 biennial operating budget available at: <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5092-S.SL.pdf> (last accessed Oct. 6, 2023).

III. DESIRABILITY AND RELEVANCE

WDFW’s “amicus brief is desirable” and “the matters asserted are relevant to the disposition of the case” because WDFW will explain how the state’s orca prey initiative and the federal prey increase program work in tandem to ensure adequate food availability for Southern Resident orca. Fed. R. Civ. P. 29(a)(3)(B). For example, in support of its Motion for Injunction Pending Appeal (Dkt. 17-1), Plaintiff argued “the District Court relied on erroneous facts in assessing the impact of vacatur[.]” because “NFMS provided data that include releases funded by Washington State under an entirely different program that would be unaffected by any relief entered here.” Dkt. 17-1 at 15. WDFW’s amicus curiae brief will explain how the federal prey increase program is essential to achieving the 4-5% increase in food availability that is necessary to prevent the extinction of Southern Resident orca. 1-ER-0010-11. WDFW will also summarize the significant impacts to Washington’s economy and interstate and international relations of halting the southeast Alaska summer and winter troll fishery.

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IV. CONCLUSION

WDFW respectfully requests the Court grant leave to file the accompanying amicus curiae brief and direct the Clerk to accept the proposed brief for filing.

RESPECTFULLY SUBMITTED this 6th day of October, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that this memorandum contains 1,280 words, in compliance with Cir. R. 27-1(d) and Fed. R. App. P. 27(d)(2)(A), excluding the items exempted by Circuit Rule 27-1(1)(d) and Fed. R. App. P. 27(a)(2)(B) and 32(f). The type size and typeface comply with Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6).

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available at: [20230321-orcataskforce-finalreportandrecommendations-110719.pdf](https://www.wa.gov) (wa.gov) (last accessed Oct. 6, 2023). 2

I. INTEREST OF AMICUS CURIAE

Amicus curiae is the Washington Department of Fish and Wildlife (WDFW),¹ the Washington State agency charged to “preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.” RCW 77.04.012. Washington’s coastal and inland waters are home to Southern Resident killer whales (SRKWs or orca) implicated in this case. Orca’s preferred prey, Chinook salmon, also originate in Washington’s inland waters. WDFW, along with its tribal co-managers, maintain a system of salmon hatcheries in Washington that are crucial to ensuring sufficient availability of this vital food source to support the continued survival of orca.

In 2018, Washington Governor Jay Inslee issued an executive order requiring state agencies to take immediate short-term steps to address threats to orca.² The executive order also established the SRKW Task Force to recommend

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for WDFW certify that (i) no parties’ counsel authored this brief in whole or in part, (ii) no party and no parties’ counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person (other than the amicus curiae) contributed money that was intended to fund preparing or submitting the brief.

² Executive Order 18-02 available at: https://www.governor.wa.gov/sites/default/files/exe_order/eo_18-02_1.pdf (last accessed Oct. 6, 2023).

a longer-term action plan. In response, the Washington Fish and Wildlife Commission directed WDFW to begin increasing hatchery production of Chinook salmon by 50 million fish over 2018 levels to increase the availability of orca prey.³ The SRKW Task Force, comprised of nearly 50 individuals representing federal, state, tribal, environmental, and industry interests, made similar recommendations to significantly increase hatchery production to enhance prey for orca in 2018 and 2019.⁴ Starting in 2018, the Washington legislature significantly increased state funding for state, tribal, and public utility hatchery operations in Washington that resulted in an average increase in production of 10.4 million Chinook between 2019 and 2023, with about a 12.4 million increase in 2023. 2-ER-0107 through 109 (Attachment 1 to Fourth Declaration of Allyson Purcell, National Marine Fisheries Services, West Coast

³ Commission directive available at: https://wdfw.wa.gov/sites/default/files/about/commission/meetings/2018/09/minutes_sep0718.pdf (last accessed Oct. 6, 2023).

⁴ SRKW Task Force Report and Recommendations (Nov. 16, 2018), available at: https://www.governor.wa.gov/sites/default/files/OrcaTaskForce_reportandrecommendations_11.16.18.pdf (last accessed Oct. 6, 2023); SRKW Task Force Final Report and Recommendations (Nov. 2019), available at: [20230321-orcataskforce-finalreportandrecommendations-110719.pdf \(wa.gov\)](https://www.governor.wa.gov/sites/default/files/20230321-orcataskforce-finalreportandrecommendations-110719.pdf) (last accessed Oct. 6, 2023).

Region);⁵ *see also* Laws of 2018, ch. 298, § 3054(1)-(3), ch. 299, § 306(15) (2018 supplemental capital and operating budgets appropriating to WDFW a total of over \$1.6 million to support increased prey for orca);⁶ Laws of 2019, ch. 415, § 307(11) (2019-21 biennial operating budget appropriating to WDFW \$3.5 million for each of fiscal years 2020 and 2021 with priority “to increase prey abundance for southern resident orcas[,]” plus \$1.535 million to tribes for additional hatchery production);⁷ Laws of 2021, ch. 334, § 1307(11)-(14) (2021-23 biennial operating budget appropriating \$3.5 million annually to WDFW for increased orca prey production with additional funding to tribes and public utilities for the same purpose).⁸

⁵ References to the record are to Defendants/Intervenor-Defendants/Cross-Appellees’ Joint Excerpts of Record (Dkt. 58-1-3).

⁶ 2018 supplemental operating and capital budgets available, respectively, at: <http://leap.leg.wa.gov/leap/budget/lbns/2018Omni6032-S.SL.pdf> and <http://leap.leg.wa.gov/leap/budget/lbns/2018Cap6095-S.SL.pdf> (last accessed Oct. 6, 2023).

⁷ 2019-21 biennial operating budget available at: <http://leap.leg.wa.gov/leap/budget/lbns/1921Omni1109-S.SL.pdf> (last accessed Oct. 6, 2023).

⁸ 2021-23 biennial operating budget available at: <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5092-S.SL.pdf> (last accessed Oct. 6, 2023).

While Washington State has achieved important increases in hatchery production that are now beginning to benefit orca, the federal orca prey increase program defendant/cross-appellant National Marine Fisheries Services (NMFS) contemplated by the 2019 Biological Opinion challenged in this case is a crucial supplement to the efforts of Washington and its co-managers and partners to sufficiently increase orca prey availability. In this brief, WDFW explains how enjoining the federal program on remand would negatively impact prey availability beyond the year NMFS estimates it will need to complete its reviews. *See* Dkt. 57 at 18-19 (NMFS anticipates completing the required analyses on remand by November 2024).

Washington also has an interest in the Southeast Alaska commercial salmon troll fishery implicated by this case. This brief explains the negative economic impacts to Washington if the fishery is closed pending remand, and the importance to interstate and international relations of maintaining that fishery as contemplated by the Pacific Salmon Treaty between the U.S. and Canada.

II. INTRODUCTION

A major threat to orca survival is the lack of prey—primarily Chinook salmon—and the federal prey increase program seeks to increase hatchery production to supplement this vital food source. The district court’s order on

remedy correctly found that the significant environmental harm that would result from vacating the prey increase program, even for a limited amount of time, would significantly set back federal, state, and tribal efforts to enhance the availability of prey for orca. 1-ER-0036 (Report and Recommendation (District Court Dkt. 144)) (“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 any future operation of the program.”). Plaintiff, Defendant, and Intervenors agree an increase in the availability of prey is crucial for the continued survival of the endangered Southern Resident orca population. *See, e.g.*, 1-ER-0036 (citing Third Giles Decl. at ¶ 18 (Plaintiff’s expert Dr. Deborah Giles, Ph.D. acknowledging “SRKW need an immediate increase in abundance of Chinook available to them to avoid functional extinction, as the current low birth rate, with high early mortality is simply unsustainable.”); 2-ER-0065 at ¶ 27 (Fourth Declaration of Lynn Barre (Corrected), National Marine Fisheries Services, West Coast Region) (NMFS’s Protected Resources Division Branch Chief stating prey increase program is a “critical tool to help address a primary threat to SRKW”).

The errors the district court found NMFS made in establishing the program are not so serious that NMFS cannot make the same decision on

remand. *See Pollinator Stewardship Council v. U.S. Env't Protect. Agency*, 806 F.3d 520, 532 (9th Cir. 2015) (in considering vacatur, a factor is “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.”). And given the significant environmental impact of halting the program, even if for a short time on remand, its decision with regard to the prey increase program should be affirmed. *Id.* (“When deciding whether to vacate rulings by the EPA, we consider whether vacating a faulty rule could result in possible environmental harm, and we have chosen to leave a rule in place when vacating would risk such harm.”); 2-ER-0062 at ¶ 20 (“Disrupting the prey increase program will reduce the amount of food available to SRKWs and negatively impact their foraging behavior, energy balance, health and reproduction, particularly in years of low abundance.”).

Vacatur of the Southeast Alaska commercial winter and summer troll fishery, on the other hand, would result in significant harm to interstate and international relations and economies, including Washington's. Because the district court abused its discretion in vacating that portion of the Biological Opinion, that portion of the order on remedy should be reversed.

III. ARGUMENT

A. Standard of Review

The Ninth Circuit will “leave invalid agency action in place when equity demands that we do so.” *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022) (quoting *Pollinator Stewardship Council*, 806 F.3d at 532) (internal quotations omitted). The Court applies a “two-factor balancing test” to determine whether to leave an agency decision in place on remand: “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*, 56 F.4th at 663 (quoting *Cal. Cmty. Against Toxics v. U. S. Env’t Protect. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (internal quotations omitted).

When considering whether to vacate an environmental decision on remand, the Ninth Circuit additionally factors whether vacatur “could result in possible environmental harm” and “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.” *Pollinator Stewardship Council*, 806 F.3d at 532.

A district court’s “choice of equitable remedies is reviewed for an abuse of discretion.” *Kenney v. U.S.*, 458 F.3d 1025, 1032 (9th Cir. 2006) (quoting *Labor/Cnty. Strategy Ctr. v. Los Angeles County Metro. Transit Auth.*, 263 F.3d 1041 (9th Cir. 2001) (internal quotations omitted). “The district court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding.” *Id.* (quoting *U.S. v. Washington*, 157 F.3d 630, 642 (9th Cir. 1998) (internal quotations omitted)).

B. The District Court Did Not Abuse Its Discretion in Denying Vacatur of the Prey Increase Program

The district court did not abuse its discretion in finding there will be “significant disruptive consequences” from vacatur of the prey increase program that will “result in gaps in prey abundance that would lead to increased risk to the health of the SRKW and threaten any future operation of the program.” 1-ER-0036-38. In the challenged Biological Opinion, NMFS anticipated that a 20 million increase in Chinook salmon production would “provide a four to five percent increase in prey availability for the SRKW in approximately 4-5 years.” 1-ER-0016. This increase would provide the “around 5 percent” increase in Chinook availability that is necessary “to stop the SRKW decline” 1-ER-0010-11.

For a number of reasons, halting the prey increase program, even if just for a year while on remand, would cause ripple effects that would create a gap in sufficient prey availability for a much longer period of time. *See* Dkt. 57 at 18-19 (anticipating completion of required analyses on remand by November 2024). For example, to the extent federal dollars fund hatchery staff positions, the lack of funding for those positions may require hatchery managers to terminate those positions and re-fill them once federal dollars become available, potentially lengthening the time the federally funded, orca-focused hatchery programs could resume. Adult broodstock are generally collected in the summer and fall, and sufficient funding and staff would need to be in place before collection could occur.

Additionally, whether sufficient broodstock could be collected to re-attain the same increased production levels once program funds are again made available depends upon multiple factors. These include, for example, ocean conditions, the strength of annual returning stocks, and the availability of broodstock in each of the watersheds that support hatchery programs geared toward SRKW. *See, e.g.*, 2-ER-0059 at ¶ 17 (“The overall abundance of Chinook salmon is variable and affected by ocean conditions”). Even if a sufficient number of adult broodstock could be collected at the appropriate locations, it

takes about a year for each hatchery program to rear sub-yearling smolts, and about two years to rear more robust yearling smolts, before those smolts can be released. Once released, it takes at least another year to several years for the Chinook to reach a size typically consumed by SRKW. *See, e.g.*, 2-ER-0059 at ¶ 17 (the Chinook lifecycle requires “3-5 years” before “hatchery fish mature and then become available to the whales as prey in times and areas that overlap and are important to the whales.”). Thus, halting the program on remand, even if the same decision is reached by November 2024, would create a gap extending far beyond a year.

The district court found there is “no guarantee the same rule on remand could reissue[.]” because NMFS could require “additional or alternative mitigation measures to meet its [Endangered Species Act] and [National Environmental Policy Act] obligations in a new [Biological Opinion].” 1-ER-0041. Ninth Circuit precedent, however, does not require a “guarantee” that the same rule issue on remand. Rather, the court considers whether “an agency is *likely* to be able to offer better reasoning and adopt the same rule on remand[.]” *Ctr. for Food Safety*, 56 F.4th at 64 (emphasis added); *see also Pollinator Stewardship Council*, 806 F.3d at 532 (“We have also looked at whether the agency would *likely* be able to offer better reasoning”)

(emphasis added). Here, it is likely that increased hatchery production will still be necessary on remand to provide benefits to orca, even if NMFS identifies additional mitigation actions. The parties acknowledge that food availability is crucial to orca survival. *See, e.g.*, 1-ER-0036 (citing Third Giles Decl. at ¶ 18) (“SRKW need an immediate increase in abundance of Chinook available to them to avoid functional extinction. . .”); 2-ER-0065 at ¶ 27 (prey increase program “critical tool to help address a primary threat to SRKW”). Increased hatchery production provides an increase in Chinook availability in the times and locations that orca need them within three to five years of initiation. 2-ER-0058 at ¶ 13. The district court faulted the prey increase program as a mitigation measure for the Southeast Alaska fishery in part because it found the program was not reasonably certain to occur. In the ensuing years, however, it has occurred, and the benefits are starting to be realized today. 2-ER-0065 at ¶ 25 (“The prey increase program for SRKW . . . has already been implemented for multiple years and is increasing the prey available to SRKW now.”).

Without NMFS’s program allocating federal funds to contribute to increased Chinook hatchery production, it will be difficult, if not impossible, to meet the 20 million, or “around 5 percent,” increase in Chinook necessary to support orca’s dietary needs. *See* 1-ER-0010 through 11; 1-ER-0040

(“significant interruption of the prey increase program would result in a certain environmental harm to the SRKW by eliminating a targeted source of prey.”). In 2023, the federal program will contribute an estimated 7.4 million Chinook smolts, adding to the estimated 12.4 million in increased production funded by the Washington legislature. 2-ER-0116. Without this increase, it will be more difficult for orca to find food. This could change their foraging behavior, which “could result in SRKWs not consuming sufficient prey to meet their energetic needs” and thereby affecting “the health of individual whales, reproduction and the status and growth of the population.” 2-ER-0063 at ¶ 21.

To prevent these adverse behavioral and physiological impacts, federal funds through the prey increase program are essential to achieve the increased hatchery production of Chinook salmon needed to support orca in the short-term. Washington’s SRKW Task Force sunset in 2019, and halting the federal prey increase program will set Washington’s plan for orca conservation back by many years with no other prey increase plan to take its place. The district court’s decision not to vacate this program on remand was not an abuse of discretion and should be upheld.

C. The District Court Abused its Discretion in Enjoining the Southeast Alaska Troll Fishery

The district court erred in vacating the challenged Biological Opinion’s Incidental Take Statement (ITS) for the Southeast Alaska Chinook summer and winter salmon troll fishery, and WDFW agrees with this Court’s Order staying part of that decision. Dkt. 48, Order at 4. As this Court correctly recognized in staying the district court’s decision, “[a] flawed agency rule does not need to be vacated upon remand and instead may be left in place when equity demands.” Dkt. 48 at 4 (*citing Cal. Cmty. Against Toxics*, 688 F.3d at 992). The district court’s decision to vacate the ITS, if upheld, would have adverse consequences on Washington, from both an economic standpoint, as well as from a management standpoint under the Pacific Salmon Treaty (Treaty). The district court’s decision to vacate the ITS should, in equity, be reversed.

The Treaty was signed between the United States and Canada in 1985 and provides a framework for the two countries to cooperate in the management of Pacific salmon. Pacific Salmon Treaty 2019-2028, A shared commitment to a better future for salmon at 1.⁹ The Treaty “is critical to meeting the provisions of the federal Endangered Species Act (ESA), addressing tribal fishing rights,

⁹Available: <https://www.orca.wa.gov/wp-content/uploads/PacificSalmonTreatyFY23.pdf> (last accessed Oct. 6, 2023).

and maintaining sustainable U.S. fisheries that provide 26,700 full time equivalent jobs and \$3.4 billion in economic value annually.” *Id.* at 1. About every ten years, the parties revisit the Treaty to account for current conditions and any new challenges that arise. *Id.* Under the Treaty, WDFW and Treaty Tribes are responsible for the majority of the U.S. fishery and stock assessments in Washington. *Id.* at 5. In addition, WDFW participates on a number of panels and committees to assist the Pacific Salmon Commission in implementation of the Chinook, chum, coho, and Fraser sockeye chapters. *Id.* at 5.

NMFS estimates that closure of the *entire* Southeast Alaska fishery—just a portion of which represents the summer and winter commercial troll fishery—would result in an average 1.1 percent increase in the number of Chinook salmon in coastal waters where whales are present in the winter, and an average 1.8 percent increase in inland waters where the whales are present in the summer. 2-ER-304 at ¶ 9. Closure of just the Southeast Alaska winter and summer troll fishery, in turn, would result in an even smaller increase in the Chinook salmon return to Washington waters.

That small benefit from enjoining the Southeast Alaska fishery must be considered in the context of the long, litigious, and complex negotiation of the Pacific Salmon Treaty, and the impacts the closure of the fishery would have on

U.S. fisheries management. Chapter 3 of the Treaty limits the allowable catch in the Southeast Alaska fishery based on the projected abundance of Chinook salmon. Those limits were established most recently in 2019 through a long series of negotiations, first between Washington State and Washington's Treaty tribes, then between the west coast states and the state of Alaska, and finally between the U.S. and Canada. *See* Dkt. 21 at 12 (Federal Defendants' Response Supporting the State of Alaska's Motion for a Stay Pending Appeal). The final agreement included a package of fishery reductions in Southeast Alaska, Canada, and the southern U.S., over \$31 million in federal investments in habitat restoration, more than \$3 million annually for hatchery programs to maintain at-risk Chinook salmon stocks, and more than \$5.6 million annually to increase prey for Southern Resident killer whales.¹⁰

Washington's Governor praised the agreement in a news release at the time: "This step comes at a crucial time as we continue to see declines in Chinook salmon populations around Puget Sound. As we work with our international partners to send more fish into our waters, it becomes even more crucial that state leaders do what's necessary to protect and restore habitat and

¹⁰ *See, e.g.*, <https://www.orca.wa.gov/wp-content/uploads/PacificSalmonTreatyFY23.pdf> (last accessed Oct. 6, 2023).

address the dire needs of these fish.”¹¹ He also stated: “This agreement corresponds with the efforts I asked state agencies to take earlier this year to benefit southern resident killer whales and salmon. Additional federal funding is essential in order to make the key conservation work possible to recover salmon, and in turn, our orcas.”¹²

This litigation has already resulted in friction within the U.S. section of the Pacific Salmon Commission,¹³ and closure of the Southeast Alaska fishery would have significant domestic implications on Washington. *See, e.g.*, Dkt 15-1 at 2 (State of Alaska argues it was singled out to shoulder the entire burden of conservation under the District Court’s decision, and that burden was not shared by fisheries occurring along the Pacific Northwest coast). Many coastal communities in Southeast Alaska rely heavily on income generated from the fishing industry. *See, e.g.*, Dkt. 42-2 at 7-8 (Southeast Alaska Tribal Coalition

¹¹ Available at: <https://medium.com/wagovernor/agreement-to-boost-salmon-returning-to-pacific-northwest-waters-f78642ce7a66> (last accessed Oct. 6, 2023).

¹² *Id.*

¹³ The Pacific Salmon Commission is the body formed by the Governments of Canada and the United States to implement the Pacific Salmon Treaty. *See* <https://www.psc.org/about-us/> (last accessed Oct. 6, 2023).

Amici Curiae Brief in Support of State of Alaska’s Motion for Stay Pending Appeal). In Washington, many residents have commercial permits to engage in the Southeast Alaska troll fishery. In 2022, there were 142 Washington residents with such permits, and in 2023 there were 136.¹⁴

Vacating the parts of the ITS that exempt Southeast Alaska fishing from the “take” provisions of the Endangered Species Act is outweighed by the harms from a shutdown. Under the Pacific Salmon Treaty, the states fish collectively as the United States, and it upsets the Treaty as a whole to shut down one part. Indeed, as the State of Alaska has already succinctly noted, “[c]losing the troll fishery would compromise the U.S.’s ability to meet Treaty obligations for settling catch limits.” Dkt. 15-1 at 13 (Motion for Stay Pending Appeal). Accordingly, WDFW urges the Court to reverse the District Court and deny vacatur of the ITS.

IV. CONCLUSION

Like in *Ctr. for Food Safety*, vacatur of the Biological Opinion “may end up harming the environment more and disrupting the [fishing] industry.” *Ctr. for*

¹⁴ Available at: [CFEC Public Search Database \(state.ak.us\)](https://cfecpublicsearchdatabase.state.ak.us) (last accessed Oct. 6, 2023)

Food Safety, 56 F.4th at 652 (denying vacatur on remand). As such, WDFW respectfully requests the Biological Opinion remain in effect on remand.

RESPECTFULLY SUBMITTED this 6th day of October, 2023.

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