

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

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

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WILD FISH CONSERVANCY,

*Plaintiff-Appellee/Cross-Appellant,*

v.

JENNIFER QUAN, in her official capacity as Regional Administrator of the  
National Marine Fisheries Service, *et al.*,

*Defendants-Appellants/Cross-Appellees,*

and

STATE OF ALASKA and ALASKA TROLLERS,

*Intervenor-Defendants-Appellants/Cross-Appellees.*

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On Appeal from the United States District Court  
for the Western District of Washington  
Case No. 2:20-CV-00417-RAJ-MLP (Hon. Richard A. Jones)

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**BRIEF OF THE CONSERVATION ANGLER, NATIVE FISH SOCIETY,  
UMPQUA WATERSHEDS, AND SNAKE RIVER WATERKEEPER AS  
*AMICI CURIAE* IN SUPPORT OF APPELLEE/CROSS-APPELLANT  
WILD FISH CONSERVANCY**

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**CORPORATE DISCLOSURE**

Pursuant to Federal Rule of Appellate Procedure 26.1(a), The Conservation Angler, Native Fish Society, Umpqua Watersheds, and Snake River Waterkeeper are nonprofit corporations. The Conservation Angler's parent corporation Wild Salmon Rivers is a nonprofit corporation. No publicly held company owns 10% or more of The Conservation Angler, Wild Salmon Rivers, Native Fish Society, Umpqua Watersheds, or Snake River Waterkeeper.

DATED this 6th day of December 2023.

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### **INTERESTS OF *AMICI CURIAE***

*Amici Curiae* are wild fish and environmental advocacy organizations representing anglers and conservationists who rely on wild Chinook salmon for their recreational and aesthetic interests.<sup>1</sup> To conserve Chinook salmon species, science shows it is critical to protect and recover *wild* Chinook salmon populations. To that end, *Amici* use science, law, and education to secure results that help protect and recover these populations. The prey increase program harms wild Chinook salmon, thereby undermining *Amici*'s efforts.

The Conservation Angler, Native Fish Society, Umpqua Watersheds, and Snake River Waterkeeper (hereinafter, "*Amici*") represent anglers and conservationists throughout the Pacific Northwest who value wild Chinook salmon. The Conservation Angler represents anglers dedicated to saving wild salmon, and it uses science and law to guard wild salmon from hatchery risks. The Conservation Angler's staff and science advisors include renowned experts in the fields of salmon biology and river ecology. Its science director, John McMillan, recently published a peer-reviewed article in an esteemed scientific journal that

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *Amici* 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 *Amici Curiae*) contributed money that was intended to fund preparing or submitting the brief.

synthesizes the findings of 206 peer-reviewed publications on the effects of hatchery salmonids on wild salmonids.<sup>2</sup>

The Native Fish Society is a regional grassroots wild fish advocacy organization, whose network of river-based advocates stretches across 46 rivers in Oregon, Washington, and California. The Native Fish Society's staff includes an expert who holds a Ph.D. in River and Riparian Ecology and a master's degree in Fisheries and Aquatic Sciences. Umpqua Watersheds represents conservationists committed to restoring the Umpqua River ecosystem through education, advocacy, and ecologically sound stewardship. Snake River Waterkeeper represents conservationists committed to protecting the Snake River ecosystem, and it uses science and law to protect wild salmon habitat.

### **SUMMARY OF ARGUMENT**

In passing the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, Congress never intended that harming one imperiled species to provide theoretical benefits to another would be an acceptable ESA recovery action, yet that is exactly what the National Marine Fisheries Service (“NMFS”) asks this Court to sanction. In *TVA v. Hill*, the U.S. Supreme Court held that it was the intent of Congress “to

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<sup>2</sup> John R. McMillan *et al.*, *A global synthesis of peer-reviewed research on the effects of hatchery salmonids on wild salmonids*, 30 Fish. Mgmt. & Ecol. 446 (2023), <https://doi.org/10.1111/fme.12643>.



halt and *reverse* the trend towards species extinction, *whatever the cost.*” 437 US 153, 184 (1978) (emphasis added). This national resolve is directed toward all species at risk of extinction, not just some, and the costs are to be paid by society, not by threatened species. Nevertheless, the federal agency charged with protecting both Chinook salmon and Southern Resident Killer Whales (“SRKW”) is placing the burden of remedying society’s failure to protect ESA-listed whales on the backs of ESA-listed salmon. Specifically, NMFS is proposing to recover SRKW by releasing more hatchery Chinook salmon, even though NMFS knows this action will harm Chinook salmon species and serve as another obstacle to their recovery.

The prey increase program harms threatened Chinook salmon species and conflicts with the goals of the ESA. Agency records and expert reports demonstrate that Chinook salmon hatchery releases were injuring wild Chinook salmon populations even before the prey increase program began. Releasing more hatchery Chinook salmon will increase those impairments. To avoid more harm to wild Chinook salmon, *Amici* respectfully ask the Court to reverse the district court’s decision to leave the prey increase program intact, and request the Court vacate that program. That is the only option that avoids this proverbial “rob Peter to pay Paul” recovery strategy that is contrary to the goals of the ESA.

## ARGUMENT

### **I. Increased Production at the Little White Salmon National Fish Hatchery Exemplifies How the Prey Increase Program Will Harm Wild Chinook Salmon**

#### **A. Prey Increase Program Significantly Increases Hatchery Production**

One of the hatcheries affected by these increases is the Little White Salmon National Fish Hatchery (“LWS Hatchery”), which is a prime example of the dangers that hatchery increases pose to wild Chinook salmon. To ostensibly feed SRKW, NMFS funded the release of over a million hatchery upriver bright fall Chinook salmon (“URB Chinook”) from this hatchery in 2020 and 2021, causing the hatchery to release roughly half a million more hatchery Chinook than it had before receiving this funding. 2-ER-0110-111. Prior to 2020, the hatchery released an eight-year average of 4,296,886 hatchery URB Chinook per year.<sup>3</sup> In 2020 and 2021, the hatchery released 4,773,319 and 4,950,000 hatchery URB Chinook, respectively, which included hatchery URB Chinook for the prey increase program.<sup>4</sup> 2-ER-0111.

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<sup>3</sup> Brook Silver *et al.*, Monitoring and Evaluation Updates for John Day/The Dalles Dam Mitigation Programs at Spring Creek and Little White Salmon National Fish Hatcheries – FY 2022 Annual Report (2023) at 23, [https://www.fws.gov/sites/default/files/documents/2022\\_JDM-Annual-Report\\_Final\\_3-29-2023.pdf](https://www.fws.gov/sites/default/files/documents/2022_JDM-Annual-Report_Final_3-29-2023.pdf).

<sup>4</sup> *Id.*

Increased hatchery production will increase the number of naturally spawning hatchery fish in the White Salmon River, which has already exceeded levels permitted under the ESA. In 2022 and 2023, the U.S. Fish and Wildlife Service (“FWS”) admitted that the number of naturally spawning hatchery URB Chinook in the White Salmon River exceeded ESA take limits set in a 2017 biological opinion that applies to the LWS Hatchery’s URB Chinook program (the “URB BiOp”).<sup>5</sup> NMFS did not identify the URB BiOp as one of the “existing ESA ... analyses that evaluated the effects increased hatchery production” even though it directly applies to one of the hatchery operations involved in the prey increase program. *See* Nat’l Marine Fisheries Serv. Br., at 28 (citing 2-ER-276 ¶ 5; 2-ER-100–01 ¶¶ 9–11; 2-ER-117–20; 4-ER-663 ¶ 15). Nor was the URB BiOp available on NMFS’s online consultation database as of December 4, 2023.<sup>6</sup>

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<sup>5</sup> Brook Silver, *supra* n. 3, at 43 (citing Nat’l Marine Fisheries Serv., Little White Salmon National Fish Hatchery Upriver Bright Fall Chinook Salmon Program. NMFS ESA Section 7 Consultation Biological Opinion and Magnuson-Stevens Act Essential Fish Habitat Consultation WCR-2015-2764 (2017); Brook Silver *et al.*, Monitoring and Evaluation Updates for John Day/The Dalles Dam Mitigation Programs at Spring Creek and Little White Salmon National Fish Hatcheries – FY 2021 Annual Report (2022), at 41, [https://www.fws.gov/sites/default/files/documents/JDTD\\_2021\\_Final\\_0.pdf](https://www.fws.gov/sites/default/files/documents/JDTD_2021_Final_0.pdf).

<sup>6</sup> *See*, Environmental Consultation Organizer, at <https://appscloud.fisheries.noaa.gov/suite/?signin=native>.

According to FWS, the URB BiOp requires it to “manage the abundance” of hatchery URB Chinook that spawn in the White Salmon River so they do not exceed a 3-year moving average of 3,000 adults.<sup>7</sup> But FWS admits that an average of 4,304 hatchery URB Chinook spawned in the White Salmon River in 2019-2021, the most recent period reported.<sup>8</sup> It also admits that an average of 3,609 hatchery URB Chinook spawned in the river in 2018-2020.<sup>9</sup> These numbers do not include “natural” URB Chinook, which annually return in significant numbers to the White Salmon River and, according to FWS, are likely the progeny of stray hatchery URB Chinook.<sup>10</sup>

These spawning numbers will likely rise when the surviving members of the additional half a million hatchery URB Chinook released in 2020 and 2021 return to spawn.<sup>11</sup> These exceedances demonstrate that increasing Chinook hatchery releases will further harm wild Chinook.

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<sup>7</sup> Brook Silver, *supra* n. 3, at 43.

<sup>8</sup> *Id.*

<sup>9</sup> Brook Silver *et al.*, Monitoring and Evaluation Updates for John Day/The Dalles Dam Mitigation Programs at Spring Creek and Little White Salmon National Fish Hatcheries – FY 2021 Annual Report (2022), at 41, [https://www.fws.gov/sites/default/files/documents/JDTD\\_2021\\_Final\\_0.pdf](https://www.fws.gov/sites/default/files/documents/JDTD_2021_Final_0.pdf).

<sup>10</sup> Brook Silver, *supra* n. 3, at 39-40.

<sup>11</sup> The FWS reports explain that the exceedances in 2018-2020 and 2019-2021 triggered a review by FWS, “in cooperation with NMFS,” which led to the conclusion that the exceedances were caused by an anomalously high return of

B. Rising Hatchery Production Increases Harm to Wild Fish

These increased releases will harm a population of wild Lower Columbia River Chinook salmon that was already suffering when the LWS Hatchery released roughly half a million fewer URB Chinook per year, by: (1) destroying wild Chinook salmon eggs through redd superimposition; (2) increasing interbreeding between hatchery and wild Chinook salmon; and (3) decreasing the chances of recovering Lower Columbia River Chinook salmon by lowering the productivity of the White Salmon River's native Chinook population.

Releasing more hatchery URB Chinook will likely lead to more redd superimposition in the White Salmon River, which harms the river's native fall Chinook salmon known as "tules." Redd superimposition occurs when a salmon builds its spawning nest known as a "redd" on top of an existing redd, which can result in significant mortality to salmon eggs.<sup>12</sup> A recent study found "a

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hatchery URB Chinook to the White Salmon River in 2019. Brook Silver, *supra* n. 3, at 44; Brook Silver, *supra* n. 9, at 41. The 2023 report, however, indicates that hatchery URB Chinook exceeded a three-year average of 3,000 fish before 2019. Brook Silver, *supra* n. 3, at 39. Specifically, the report indicates that the three-year abundance average exceeded 3,000 URB Chinook in 2013-2015 (for a 3-yr average of 4,095), 2014-2016 (for a 3-yr average of 3,886), and 2015-2017 (for a 3-yr average of 3,068). *Id.* Therefore, it is not abnormal for the three-year average of hatchery URB Chinook spawning in the White Salmon River to exceed 3,000 fish.

<sup>12</sup> M. Fukishima *et al.*, *Estimation of eggs lost from superimposed pink salmon (Oncorhynchus gorbuscha) redds*. 55 Can. J. of Fish. and Aquat. Sci. 618 (1998).

surprisingly high incidence (71%) of tule redd superimposition by URBs on the ESA-listed tule population” in the White Salmon River.<sup>13</sup> Another 17% of tule redds were disturbed.<sup>14</sup> As a result, fewer tule eggs survived and, thus, fewer tule juveniles will mature and return as adults to perpetuate the population. These impacts occurred when the LWS Hatchery released fewer URB Chinook than it did in 2020 and 2021. Therefore, redd superimposition will likely worsen when the surviving members of the additional URB Chinook released in 2020 and 2021 return to spawn.

Releasing more hatchery URB Chinook will also cause more adverse genetic impacts to wild Chinook salmon. In 2021, FWS found increasing levels of hybridization between hatchery URB Chinook and the river’s tule population.<sup>15</sup> The FWS was investigating hybridization rates because increased hatchery URB

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<sup>13</sup> Justin Baker and David M. Hand, Impacts of redd superimposition on the spawning success of listed tule fall Chinook salmon in the White Salmon River, Washington, U.S. Fish and Wildlife Service (2023), at 1, [https://www.fws.gov/sites/default/files/documents/CRFWCO\\_White%20Salmon%20Redd%20Superimposition\\_Final%20Report%202023%20%286-6-2023%29.pdf](https://www.fws.gov/sites/default/files/documents/CRFWCO_White%20Salmon%20Redd%20Superimposition_Final%20Report%202023%20%286-6-2023%29.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> Christian Smith *et al.*, Hybridization between historically allopatric Chinook salmon populations in the White Salmon River, WA (2021), at 4, [https://www.researchgate.net/publication/349505608\\_Hybridization\\_between\\_historically\\_allopatric\\_Chinook\\_Salmon\\_populations\\_in\\_the\\_White\\_Salmon\\_River\\_WA/link/6033fc4e4585158939c263d2/download](https://www.researchgate.net/publication/349505608_Hybridization_between_historically_allopatric_Chinook_Salmon_populations_in_the_White_Salmon_River_WA/link/6033fc4e4585158939c263d2/download).

Chinook releases “raised the question of whether hybridization rates were increasing.”<sup>16</sup> Those nearby releases were occurring at the LWS Hatchery and the Willard National Fish Hatchery.<sup>17</sup> FWS determined that hybridization rates had indeed increased.<sup>18</sup> Between 2017 and 2019, hybridization rates were 17-32%.<sup>19</sup> During the previously studied period (2006-2008), hybridization rates were 4-15%.<sup>20</sup> Thus, the report indicates that increasing hatchery releases at these hatcheries increases hybridization, which harms the tule population in the White Salmon River. Therefore, hybridization rates will likely rise even more due to the increased release of hatchery Chinook in 2020 and 2021. As a result, increased releases for the prey increase program will harm tule population will be harmed by the.

Finally, the increased hatchery URB Chinook releases in 2020 and 2021 will impair the recovery of Lower Columbia River Chinook salmon. The White Salmon River’s fall Chinook salmon population is classified as a “contributing” population, indicating that some restoration of the population must occur to recover Lower

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<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Columbia River Chinook salmon.<sup>21</sup> That is unlikely to occur because of the population's productivity levels. The species' recovery plan explains that the population's baseline productivity and abundance is "very low."<sup>22</sup> Hybridization and redd superimposition lowers the population's productivity.<sup>23</sup> Releasing more URB Chinook will lower the population's productivity even more, thereby further impairing the recovery of Lower Columbia River Chinook salmon.

## **II. Hatcheries are Preventing Recovery of Wild Chinook Salmon**

### **A. Chinook Salmon Remain Threatened**

The four Chinook salmon species at issue have been on the federal threatened and endangered species list for roughly a quarter century, and the prey increase program makes their chances of recovery more remote. Pursuant to Section 4(c)(2) of the ESA, 16 U.S.C. § 1533(c)(2), NMFS must review the listing classifications for these species at least once every five years and determine whether they should be changed. In 2022, NMFS determined that Lower Columbia River Chinook salmon and Snake River fall Chinook salmon still warrant the

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<sup>21</sup> Nat'l Marine Fisheries Serv., ESA recovery plan for Lower Columbia River Coho salmon, Lower Columbia River Chinook salmon, Columbia River Chum salmon, and Lower Columbia River Steelhead (2013) at 3-5 - 3-6, <https://repository.library.noaa.gov/view/noaa/16002>.

<sup>22</sup> *Id.* at 7-17.

<sup>23</sup> Justin Baker & David M. Hand, *supra* n. 13, at 1.



threatened status they have carried for the last 23 and 30 years, respectively.<sup>24</sup>

NMFS has not issued 5-year classification determinations for Puget Sound Chinook salmon or Upper Willamette Chinook salmon since 2016.<sup>25</sup> However, NMFS's recent biological viability assessment for listed salmon and steelhead species (the "2022 Assessment") indicates that the threatened status they have carried for 23 years will not change.<sup>26</sup> According to the assessment, both species remain at "moderate" risk of extinction.<sup>27</sup> The viability of Upper Willamette

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<sup>24</sup> Nat'l Marine Fisheries Serv., 2022 5-Year Review: Summary and Evaluation of Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, Lower Columbia River Coho Salmon, and Lower Columbia River Steelhead (2022), at 4, 99, <https://repository.library.noaa.gov/view/noaa/48670>; Nat'l Marine Fisheries Serv., 2022 5-Year Review: Summary & Evaluation of Snake River Fall-Run Chinook Salmon (2022) at 4, 63, <https://repository.library.noaa.gov/view/noaa/45370>.

<sup>25</sup> Nat'l Marine Fisheries Serv., 2016 5-Year Review: Summary & Evaluation of Puget Sound Chinook Salmon, Hood Canal Summer-run Chum Salmon, and Puget Sound Steelhead (2017), <https://repository.library.noaa.gov/view/noaa/17015>; Nat'l Marine Fisheries Serv., 2016 5-Year Review: Summary & Evaluation of Upper Willamette River Steelhead and Upper Willamette River Chinook (2016), <https://repository.library.noaa.gov/view/noaa/17028>.

<sup>26</sup> M.J. Ford, Biological Viability Assessment Update for Pacific Salmon and Steelhead Listed Under the Endangered Species Act: Pacific Northwest. U.S. Dep't of Commerce, NOAA Technical Memorandum NMFS-NWFSC-171 (2022), at 181, 206, <https://repository.library.noaa.gov/view/noaa/34363>; Endangered and Threatened Species; Threatened Status of Three Chinook Salmon Evolutionarily Significant Units (ESUs) in Washington and Oregon, and Endangered Status for One Chinook Salmon ESU in Washington, 64 Fed. Reg. 14,308 (Mar. 24, 1999).

<sup>27</sup> M.J. Ford, *supra* n. 26, at 181, 206.

Chinook is likely declining,<sup>28</sup> and NMFS considered downgrading their status to “endangered.” *NW Env’tl Def. Ctr. et al. v. U.S. Army Corps of Engineers et al.*, 558 F.Supp.3d 1056, 1060 (D. Or. 2021).

These species remain threatened because they are not meeting recovery goals. The 2022 Assessment explains that “[a]ll Puget Sound Chinook salmon populations continue to remain well below ... planning ranges for recovery escapement goals.”<sup>29</sup> Many Lower Columbia River Chinook salmon populations remain at “high risk, with low natural-origin abundance levels.”<sup>30</sup> Snake River fall Chinook salmon are not recovered because not a single population in the ESU is “highly viable.”<sup>31</sup> The demographic risk for most Upper Willamette Chinook salmon populations remains “high” or “very high,” and hatchery Chinook salmon comprise more than half of the natural spawning populations in all but two rivers.<sup>32</sup>

The 2022 Assessment indicates that hatchery programs are limiting the recovery of the species. For Lower Columbia River Chinook salmon, NMFS found that the “estimated proportion of hatchery-origin spawners was well in excess of

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<sup>28</sup> *Id.* at 181.

<sup>29</sup> *Id.* at 206.

<sup>30</sup> *Id.* at 129.

<sup>31</sup> *Id.* at 61.

<sup>32</sup> *Id.* at 180.

the limits set in the recovery plan for many of the primary populations.”<sup>33</sup> Except for one population of Willamette River Chinook salmon, “the proportions of natural-origin spawners ... are well below those identified in the recovery goals.”<sup>34</sup> Snake River fall Chinook salmon had such a “high proportion of within-population hatchery spawners (70%) in all major spawning areas,” that the species does not meet the requirements of two different recovery plan strategies.<sup>35</sup> Increasing hatchery releases put recovery goals for these species further out of reach.

B. Hatchery Releases are Preventing the Recovery of Chinook Salmon in the Columbia Basin

In 2015, independent scientific experts released a report indicating that high abundances of hatchery salmon in the Columbia River Basin are contributing to density-dependent impacts that prevent the recovery of wild salmon populations.<sup>36</sup> Density dependence is the relationship between population density and population growth rate.<sup>37</sup> Generally, when population density is high, growth rate is low due

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<sup>33</sup> *Id.* at 127.

<sup>34</sup> *Id.* at 179.

<sup>35</sup> *Id.* at 60.

<sup>36</sup> Ind. Scientific Adv. Bd, *Density Dependence and its Implications for Fish Management and Restoration Programs in the Columbia River Basin* (2015), [https://www.nwcouncil.org/media/filer\\_public/ca/f8/caf855b9-696e-4b39-aa9e963451a0a986/isab2015-1\\_0.pdf](https://www.nwcouncil.org/media/filer_public/ca/f8/caf855b9-696e-4b39-aa9e963451a0a986/isab2015-1_0.pdf).

<sup>37</sup> *Id.* at 4.

to competition for limited resources.<sup>38</sup> When hatchery salmon spawn with wild salmon as a result of supplementation programs or straying away from hatcheries, they “increase overall density and thus reduce the productivity of the natural population demographically through density dependence in the short term.”<sup>39</sup>

The Independent Scientific Advisory Board (“ISAB”), which advises the Northwest Power and Conservation Council on Columbia Basin salmon, reported that salmon densities in most of the ESA-listed populations that it examined are so high that they are “strong enough to constrain their recovery.”<sup>40</sup> According to ISAB, juvenile salmon densities in the Columbia Basin may be at the highest levels ever.<sup>41</sup> At the same time, one third of historical habitat is no longer accessible due to dams, while habitat in many accessible areas is degraded.<sup>42</sup> Not surprisingly, the fish “may now be exceeding the carrying capacity of some areas of the Columbia Basin and its estuary.”<sup>43</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Memorandum from Ind. Scientific Adv. Bd. to Ind. Scientific Adv. Bd. Oversight Panel (Jul. 19, 2016) at 26, [https://www.nwcouncil.org/sites/default/files/isab2015-1adensitydependenceaddendum\\_response\\_to\\_critfc\\_19july2016.pdf](https://www.nwcouncil.org/sites/default/files/isab2015-1adensitydependenceaddendum_response_to_critfc_19july2016.pdf).

<sup>40</sup> Ind. Scientific Adv. Bd., *supra* n. 36, at 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Hatchery releases are preventing the recovery of Chinook salmon species in the Columbia Basin. ISAB reported that “[a]ll but one Chinook salmon ESU includes 30% or more hatchery-origin fish on the spawning grounds” and that Snake River fall Chinook salmon have approximately 80% hatchery-origin spawners.<sup>44</sup> Meanwhile, available habitat has significantly declined. For example, half of all spring and summer Chinook salmon habitat is gone in the Columbia Basin and mainstem fall Chinook salmon spawning habitat has decreased by 83%.<sup>45</sup> Not surprisingly, high abundance of hatchery Chinook salmon in the remaining fractions of their historical habitat is contributing to density-dependent mortality of wild Chinook salmon. Indeed, ISAB found that most interior Columbia River Basin Chinook salmon populations are not sustainable because of the high number of spawners in available habitat, which is largely driven by hatchery releases.<sup>46</sup> Based on ISAB’s findings, releasing more hatchery Chinook salmon would further restrict the recovery of Lower Columbia River Chinook salmon and Snake River fall Chinook salmon.

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<sup>44</sup> *Id.* at 111 (emphasis added).

<sup>45</sup> *Id.* at 48.

<sup>46</sup> *Id.* at 8.

### C. Restricting Wild Chinook Recovery Constrains Chinook Fishing

Low wild Chinook salmon returns prevent recreational fishers from fishing. When too few wild Chinook salmon return, fishery managers often close Chinook salmon fishing. For example, in 2021, fishery managers closed Chinook salmon fishing on the lower Columbia River to protect ESA-listed fall Chinook salmon, thereby preventing anglers from fishing for more abundant upriver fall Chinook salmon.<sup>47</sup> Last summer, managers closed nearly all fishing on the Snohomish River and its tributaries to protect wild Puget Sound Chinook salmon.<sup>48</sup> As explained, hatchery releases constrain wild Chinook salmon recovery. Therefore, releasing hatchery Chinook salmon for fishing paradoxically contributes to fishing closures, thereby harming anglers.

### III. **Reversing the District Court’s Decision on the Prey Increase Program Is Consistent with Ninth Circuit Precedent**

The Ninth Circuit weighs “possible environmental harm” when deciding whether to vacate rules. *Pollinator Stewardship Council v. U.S. Env’t Prot.*

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<sup>47</sup> Micah Rice, *Columbia River Salmon Fishing to Close Below Bonneville Dam*, *The Columbian* (Sept. 2, 2021), <https://www.columbian.com/news/2021/sep/02/columbia-river-salmon-fishing-to-close-below-bonneville-dam/>

<sup>48</sup> Isabella Breda, *Summer Chinook fishing on premier WA rivers called off as salmon struggle*, *Seattle Times* (Jun. 21, 2023), <https://www.seattletimes.com/seattle-news/environment/summer-chinook-fishing-on-premier-wa-rivers-called-off-as-salmon-struggle/>

*Agency*, 806 F.3d 520, 532 (9th Cir. 2015). For example, in *Cal Cmty's Against Toxics v. U.S. Env't Prot. Agency*, this Court remanded a Clean Air Act rule without vacating it because doing so could lead to air pollution, undermining the goals of the statute. 688 F.3d 989, 994 (9th Cir. 2012). Additionally, the air pollution had been found to be insignificant with mitigation. *Id.* In *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-1406 (9th Cir. 1995), this Court refused to vacate an ESA-listing decision for a snail species when doing so would risk potential extinction of the species. Finally, in *Pollinator Stewardship Council*, this Court vacated the registration of an insecticide chemical because leaving it in place “risk[ed] more potential harm than vacating it.” 806 F.3d at 532.

Remanding without vacating the prey increase program will harm ESA-listed Chinook salmon. As demonstrated, hatchery releases were harming threatened Chinook salmon species even before the prey increase program started. The pre-program release levels of URB Chinook at the LWS Hatchery exceeded take limits set in the URB BiOp. Pre-program releases across the Columbia Basin were contributing to density dependence impacts that constrain the recovery of ESA-listed Chinook salmon populations. Releasing more hatchery Chinook salmon will only increase the risk that these harms will continue and likely, worsen. Therefore, the Court should reverse the district court's order denying vacatur of the prey increase program.

Remanding without vacating the prey increase program would undermine the ESA. Congress enacted the ESA “to halt *and reverse* the trend toward species extinction, whatever the cost.” *Tenn Valley Auth.*, 437 US at 184 (emphasis added). As this Court recognizes, “[t]he goal of the ESA is not just to ensure survival, but to ensure that the species recovers to the point it can be delisted.” *Alaska v. Lubchenco*, 723 F.3d 1043, 1048 (9th Cir. 2013) (citing *Gifford Pinchot Task Force*, 378 F.3d 1059, 1070 (9th Cir. 2004) *rev’d on other grounds*). The four Chinook salmon species at issue have been stuck in threatened status for roughly a quarter century, in part, due to the impact of hatchery production. Releasing more hatchery Chinook salmon will drive these wild fish further away from recovery, the exact opposite trend that Congress intended. Therefore, the Court should reverse the district court’s order denying vacatur of the prey increase program.

### **CONCLUSION**

Based on the foregoing and arguments in the briefs of Plaintiff-Appellee/Cross-Appellant, *Amici* respectfully ask the Court to reverse the district court’s decision not to vacate the prey increase program.



RESPECTFULLY SUBMITTED this 6th day of December, 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 December 6, 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.

By s/ Robert Kirschner Jr.

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

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

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

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

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WILD FISH CONSERVANCY,

*Plaintiff-Appellee/Cross-Appellant,*

v.

JENNIFER QUAN, in her official capacity as Regional Administrator of the  
National Marine Fisheries Service, *et al.*,

*Defendants-Appellants/Cross-Appellees,*

and

STATE OF ALASKA and ALASKA TROLLERS,

*Intervenor-Defendants-Appellants/Cross-Appellees.*

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On Appeal from the United States District Court  
for the Western District of Washington  
Case No. 2:20-CV-00417-RAJ-MLP (Hon. Richard A. Jones)

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**MOTION FOR LEAVE FOR THE CONSERVATION ANGLER, NATIVE  
FISH SOCIETY, UMPQUA WATERSHEDS AND SNAKE RIVER  
WATERKEEPER TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF  
APPELLEE/CROSS-APPELLANT WILD FISH CONSERVANCY**

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The Conservation Angler, Native Fish Society, Umpqua Watersheds, and Snake River Waterkeeper (hereinafter, the “Salmon Conservation Groups” or “*Amici*”) respectfully move this Court for leave to file the accompanying amici curiae brief in support of Plaintiff-Appellee/Cross-Appellant Wild Fish Conservancy. Pursuant to Circuit Rule 29-3, counsel for *Amici* contacted counsel of record for all parties to seek their consent for the filing of the brief. Plaintiff-Appellee/Cross-Appellant consents to the filing of this motion. Defendants-Appellants/Cross-Appellees and Intervenors-Defendants-Appellants/Cross-Appellees take no position.

**AMICI HAVE INTEREST IN CASE AS WILD FISH ADVOCATES**

The Salmon Conservation Groups represent anglers and conservationists throughout Washington, Oregon, Idaho, and California, who value wild Chinook salmon. *Amici* work to protect wild Chinook salmon on behalf of their members and the species.

The Conservation Angler is a science-based conservation organization, whose staff and scientific advisors include highly respected experts in the fields of salmon biology and river ecology. The Conservation Angler’s science director, John McMillan, recently published a peer-reviewed article in an esteemed international aquatic biology journal that synthesizes the findings of 206 peer-reviewed publications on the effects of hatchery fish on wild salmonids. The



Conservation Angler spends significant time and resources educating policymakers on the impacts of hatchery programs on wild salmonids. When necessary, it also pursues litigation to guard wild salmon and steelhead from hatchery programs and policies that put them at risk. For example, it is a co-plaintiff with Plaintiff-Appellee/Cross-Appellant Wild Fish Conservancy in a Washington state case challenging Washington's orca prey initiative, which supplements the federal prey increase program at issue in this litigation. *Wild Fish Conservancy et al. v. Wash. Dep't of Fish & Wildlife*, King County Superior Court No. 21-2-13546-0.

Native Fish Society is a grassroots wild fish advocacy organization based in the Pacific Northwest. It pursues legal and policy outcomes that help protect and recover wild salmon and steelhead. For example, it successfully sued NMFS to protect Lower Columbia River Chinook salmon from hatchery threats stemming from the Sandy River Hatchery. *Native Fish Soc. v. Nat'l Marine Fisheries Serv.*, 992 F.Supp.2d 1095 (2014). It also engaged in litigation that forced the U.S. Army Corps of Engineers to alter hydropower operations to protect Upper Willamette River Chinook salmon. *Nw Env't'l Def. Ctr. v. U.S. Army Corps. of Engineers*, 558 F.Supp.3d 1056 (D. Or. 2021). It also invests significant time and resources educating policymakers on the impacts of hatchery operations on wild salmonids.

Umpqua Watersheds is a local nonprofit organization that focuses its efforts on protecting and restoring the Umpqua River watershed. On August 4, 2022,

Umpqua Watersheds, Native Fish Society, and the Center for Biological Diversity submitted a petition to list two species of Chinook salmon under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*: (1) Oregon Coast Chinook salmon; and (2) Southern Oregon and Northern California Coastal Chinook salmon.<sup>1</sup>

Umpqua Watersheds is interested in the outcome of this case because Oregon Coast Chinook salmon are harvested in the Southeast Alaska salmon troll fishery. 5-ER-1130.

Snake River Waterkeeper is an Idaho based nonprofit organization that works to protect water quality and fish habitat throughout the Snake River Basin. It monitors water quality and, when necessary, brings litigation to ensure water quality and salmon habitat is protected. For example, Snake River Waterkeeper and its allies successfully sued the U.S. Environmental Protection Agency to issue a total maximum daily load under the Clean Water Act for temperature pollution in the Columbia and Snake Rivers. *Columbia Riverkeeper et al. v. Wheeler*, 944 F.3d 1204, 1212-1213 (9th Cir. 2019).

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<sup>1</sup> See, Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List Oregon Coast and Southern Oregon and Northern California Coastal Chinook Salmon as Threatened or Endangered Under the Endangered Species Act, 88 Fed. Reg. 1548 (Jan. 11, 2023).

All the Salmon Conservation Groups have a strong interest in ensuring that the prey increase program is vacated because of the risks it poses to wild salmon. The best scientific data available demonstrates that, except in limited circumstances, hatcheries have adverse impacts on wild salmonids.<sup>2</sup> Reports from the National Marine Fisheries Service (“NMFS”) and independent scientists who advise the Northwest Power and Conservation Council indicate that hatchery programs are impairing the recovery of the four Chinook salmon species at issue in this litigation.<sup>3</sup>

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<sup>2</sup> See, John R. McMillan et al., “A global synthesis of peer-reviewed research on the effects of hatchery salmonids on wild salmonids,” 30 *Fish. Mgmt. & Ecol.*, at 446, (2023) <https://doi.org/10.1111/fme.12643> (explaining that out of 206 peer-reviewed publications, 83% found hatchery salmonids have adverse effects on wild salmonids, with only 3% reporting beneficial effects); See also, Hitoshi Araki & Corrine Schmid, *Is hatchery stocking a help or harm? Evidence, limitations and future directions in ecological and genetic surveys*, 308 *Aquaculture S2-S11* (2010) (explaining that out of 266 peer-reviewed papers, nearly three-quarters of those studies found negative effects on wild fish, including reduced genetic variation and fitness, and none finding a positive effect).

<sup>3</sup> See, e.g., M.J. Ford, Biological Viability Assessment Update for Pacific Salmon and Steelhead Listed Under the Endangered Species Act: Pacific Northwest. U.S. Dep’t of Commerce, NOAA Technical Memorandum NMFS-NWFSC-171 (2022), at 60, 127, 179, <https://repository.library.noaa.gov/view/noaa/34363>; Ind. Scientific Adv. Bd, *Density Dependence and its Implications for Fish Management and Restoration Programs in the Columbia River Basin* (2015), at 1, [https://www.nwcouncil.org/media/filer\\_public/ca/f8/caf855b9-696e-4b39-aa9e963451a0a986/isab2015-1\\_0.pdf](https://www.nwcouncil.org/media/filer_public/ca/f8/caf855b9-696e-4b39-aa9e963451a0a986/isab2015-1_0.pdf).

The prey increase program is thus contrary to the goals of the ESA.

Congress enacted the ESA “to halt and *reverse* the trend toward species extinction, whatever the cost.” *Tenn Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added). Thus, “[t]he goal of the ESA is not just to ensure survival, but to ensure that the species recovers to the point it can be delisted.” *Alaska v. Lubchenco*, 723 F.3d 1043, 1048 (9th Cir. 2013) (citing *Gifford Pinchot Task Force*, 378 F.3d 1059, 1070 (9th Cir. 2004) *rev’d on other grounds*).

Indeed, state and federal governments have spent billions of taxpayer dollars to try to bring about salmon recovery.<sup>4</sup> Despite this massive investment, however, the four ESA-listed Chinook salmon species at issue in this case are not meeting recovery goals, in part because the impact of hatchery production on wild Chinook salmon populations.

In addition, the prey increase program specifically undercuts *Amici’s* work to protect wild Chinook salmon. For example, Snake River Waterkeeper’s successful litigation to improve the water quality of the Columbia and Snake Rivers should increase wild Chinook salmon productivity. But the benefits of this

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<sup>4</sup> See e.g., William K. Jaeger and Mark D. Scheuerell, *Return(s) on investment: Restoration spending in the Columbia River Basin and increased abundance of salmon and steelhead*, PLoS One 18(7): e0289246 (2023), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0289246>

work are limited by the prey increase program, because the production of more hatchery fish will reduce the productivity of wild salmon, as the hatchery fish and their progeny compete for food and space.

Increasing hatchery releases also undermine *Amici*'s successful policy efforts to protect wild Chinook salmon and their habitat. For example, The Conservation Angler successfully pressed the Oregon Fish and Wildlife Commission to establish no-angling zones in cold water refuges in the Columbia River.<sup>5</sup> The purpose of these zones is to protect migrating adult Chinook salmon and steelhead migrating upstream on the Columbia River, where warming summer water temperatures are threatening ESA-listed stocks. Releasing more hatchery Chinook salmon will increase competition between hatchery and wild Chinook salmon for space in these limited areas.

### **AMICI BRING UNIQUE PERSPECTIVE AND EXPERTISE**

An *amici curiae* brief presenting the Salmon Conservation Groups' perspective is desirable and relevant to the disposition of this case because the Salmon Conservation Groups offer a unique perspective and scientific and legal

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<sup>5</sup> The Conservation Angler, New Oregon Rules Protect Migrating Columbia Wild Steelhead and Salmon Within Cold Water Refugia (Mar. 8, 2023), <https://www.theconservationangler.org/blog/coldwaterrefugia>.

expertise on the implications of this case for threatened Chinook salmon. Fed. R. App. P. 29(a)(3).

As described above, the Salmon Conservation Groups are directly involved in efforts to protect and recover Chinook salmon. *Amici* are knowledgeable about the threats that hatcheries pose to wild salmon and wild salmon recovery. For example, *Amici* will present evidence that releases of hatchery Chinook salmon under the prey increase program will cause exceedances of ESA take limits established in a biological opinion that applies to one of hatcheries that received funding to release more hatchery Chinook salmon for the purported purpose of feeding southern resident killer whales (“SRKW”). *Amici* will also offer evidence that higher hatchery production as a result of the prey increase program will provide yet another obstacle to the recovery of Chinook salmon species.

### **CONCLUSION**

For the reasons set forth above, the Salmon Conservation Groups respectfully request that the Court grant their motion for leave to file the attached *amici curiae* brief.

RESPECTFULLY SUBMITTED this 6th day of December, 2023.

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By: s/ Robert Kirschner Jr.

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By s/ Robert Kirschner Jr.