

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 the 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,
Case No. 2:20-cv-00417-RAJ-MLP

**SOUTHEAST ALASKA TRIBAL COALITION
AMICI CURIAE BRIEF IN SUPPORT OF STATE OF ALASKA'S
MOTION FOR STAY PENDING APPEAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Sealaska Corporation is an Alaska Native Claims Settlement Act (ANCSA) Regional Corporation. Sealaska has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock. Huna Totem Corporation, Kake Tribal Corporation, Klawock Heenya Corporation, Kootznoowoo, Incorporated, and Shaan-Seet, Incorporated are each ANCSA Village Corporations. These Village Corporations do not have parent corporations and there is no publicly held corporation that owns 10% or more of the stock of any of the Village Corporations.

INTEREST OF AMICI CURIAE

The Amici Curiae are the Central Council of Tlingit & Haida Indian Tribes of Alaska (“Tlingit & Haida”), fifteen other federally recognized Tribes located in Southeast Alaska,¹ the Sealaska Corporation, the regional Alaska Native Corporation for Southeast Alaska, and five Alaska Native village corporations² (together, “Tribal Amici”).³ The tribal citizens and shareholders of the Tribal Amici are dramatically and disproportionately impacted by the closure of the Southeast Alaska salmon troll fishery and share an interest in ensuring continued access to this culturally important food source and economically critical fishery.

INTRODUCTION

Southeast Alaska is home to the Lingít (Tlingit), Haida, and Tsimshian peoples, who have been stewards of the wild salmon populations of this region since time immemorial. Today, there are nineteen federally and state recognized Southeast Alaska tribes for whom salmon is the foundation of their cultural existence

¹ Angoon Community Association, Chilkat Indian Village, Chilkoot Indian Association, Craig Tribal Association, Hoonah Indian Association, Hydaburg Cooperative Association, Ketchikan Indian Community, Metlakatla Indian Community, Organized Village of Kake, Organized Village of Kasaan, Organized Village of Saxman, Petersburg Indian Association, Skagway Village, Wrangell Cooperative Association, and Yakutat Tlingit Tribe.

² Huna Totem Corporation, Kake Tribal Corporation, Klawock Heenya Corporation, Kootznoowoo, Incorporated, Shaan-Seet, Incorporated.

³ No party’s counsel authored this brief in whole or in part; no party, party’s counsel, or other person contributed money to the brief’s preparation or submission.

and economic welfare.⁴ Approximately 61% of the communities directly supported by the Southeast Alaska salmon troll fishery are recognized communities of the Tlingit & Haida,⁵ and approximately 31% of Southeast Alaska trollers are tribal citizens.⁶ Yet the District Court’s decision shuttering the Southeast Alaska troll fishery *does not once* mention tribes or tribal citizens, let alone the devastating and disproportionate impact the court’s decision will have on indigenous communities.

Instead, the District Court cursorily states that “[s]everal Southeast Alaska communities would also be impacted given their economic reliance on the commercial troll fishery seasons for income, the loss of tax revenue to these communities, and because of existing cost barriers to entry into other salmon fisheries.”⁷ That single sentence is the entire extent of the District Court’s

⁴ See Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2115-16 (Jan. 12, 2023); *List of Federally Recognized Tribes in the Sealaska Region*, ANCSA Reg’l Ass’n., <https://ancsaregional.com/wp-content/uploads/2020/01/The-Sealaska-Region-Tribe-List.pdf>.

⁵ Compare Dkt. No. 21, Ex. 4 ¶ 41, FE-58 (“Harrington Decl.”) (“fisheries support over 23 communities around Southeast Alaska”), and Second Decl. of Douglas Vincent-Lang ¶ 7, Case No. 2:20-cv-00417-RAJ (Oct. 3, 2022), ECF No. 136 (listing troll permits in 23 communities), with Ex. 1, Decl. of Richard *Chalyee Éesh* Peterson ¶ 2 & Ex. A (June 14, 2023) (“Peterson Decl.”) (listing communities of Tlingit & Haida, which include 14 of the troll permit communities).

⁶ Compare Peterson Decl. ¶ 8 (nearly 600 troll permits held by tribal citizens), with Harrington Decl. ¶ 32, FE-54 (annual average of 1,932 permits issued 2011-2020).

⁷ R. & R. at 30, Case No. 2:20-cv-00417-RAJ-MLP (Dec. 13, 2022), ECF No. 144.

consideration of the far-reaching and disastrous consequences its decision will have on these small, remote communities. Critically, the court failed to consider the drastic and unparalleled cultural, subsistence, community health, and economic harms its decision would have on the tribes and indigenous communities of the region, whose livelihoods, cultures, and ways of life depend on this fishery.⁸

The Tribal Amici support meaningful conservation efforts that will generate real benefits for the Southern Resident killer whales. But shuttering the Southeast Alaska salmon troll fishery is simply the wrong solution to a complex problem. Vacatur of the Incidental Take Statement (“ITS”) contained in the 2019 Biological Opinion—which effectively shuts down the *entire* fishery—will irreparably harm the Lingít, Haida, and Tsimshian indigenous communities of Southeast Alaska.

ABOUT TLINGIT & HAIDA

Tlingit & Haida is a federally recognized Indian tribe comprised of the indigenous peoples of Southeast Alaska: the Lingít and the Haida. The Lingít history in the region dates back to time immemorial and is documented to extend back over 11,000 years. The traditional Lingít Aaní (Tlingit homelands) stretches from beyond Yakutat in the north to Prince of Wales Island in the south.⁹ The Haida have

⁸ See, e.g., Peterson Decl. ¶¶ 5-9.

⁹ *Id.* ¶ 3; see also *Indigenous Peoples and Languages of Alaska*, Univ. of Alaska Fairbanks, Alaska Native Language Archive, <https://www.uaf.edu/anla/collections/map/> (last visited June 15, 2023) (map

occupied Haida Gwai'i (Haida homelands), including the southern reaches of Southeast Alaska, since time immemorial and their history is documented to extend back at least 12,500 years.¹⁰ Metlakatla was settled by Tsimshian people who migrated to Annette Island in the 1800s and was established as a reservation by Congress in 1891.¹¹ The lands and waters of Southeast Alaska are of historic and cultural importance to these indigenous peoples:

The Haida people and Tlingit people have always lived on these sacred and wondrous lands and waters of Southeast Alaska as the original occupants and guardians. . . .

Our people take great pride in our ability to both cultivate and harvest the resources of the land and sea in a responsible manner. We recognize the value of and retain reverence and respect for all life of the land and sea that we harvest to give us strength and sustenance. . . .

Our history shows that prior to contact this land that is occupied by Tlingit and Haida people remained in balance, maintained that way by our active stewardship, hard work, wise laws, and respect.¹²

Today, the tribal communities in Southeast Alaska include Angoon, Craig, Haines, Hoonah, Hydaburg, Juneau, Kake, Kasaan, Ketchikan, Klawock, Klukwan,

showing traditional territory of Tlingit & Haida).

¹⁰ Peterson Decl. ¶ 3.

¹¹ See Act of March 3, 1891, 26 Stat. 1095, 1101. Metlakatla tribal citizens participate in the Southeast Alaska troll fishery.

¹² *Our History*, Cent. Council of Tlingit & Haida Indian Tribes of Alaska, <http://www.ccthita.org/about/history/index.html> (last visited June 15, 2023).

Metlakatla, Pelican, Petersburg, Saxman, Sitka, Wrangell, and Yakutat.¹³ The smaller communities are predominantly comprised of tribal citizens, many of whom participate in the Southeast Alaska salmon troll fishery deploying traditional practices; the larger communities have significant numbers of tribal citizens who do the same.¹⁴ Troll-caught salmon is a culturally important food source and an economically critical fishery for tribal citizens.¹⁵

ARGUMENT

The Court should grant the State of Alaska’s Motion for Stay Pending Appeal, because the State has “made a strong showing that [it] is likely to succeed on the

¹³ Peterson Decl. ¶ 2 & Ex. A; *see also Chapters*, Cent. Council of Tlingit & Haida Indian Tribes of Alaska, <https://www.ccthita.org/government/delegates/chapters/index.html> (last visited June 15, 2023).

¹⁴ *See* Peterson Decl. Ex. B.

¹⁵ *Id.* ¶ 5; *see also* Courtney Carothers et al., *Indigenous Peoples and Salmon Stewardship: A Critical Relationship*, 26 *Ecology & Soc’y* 1, 5 (2021), <https://repository.library.noaa.gov/view/noaa/31612> (“Salmon were/are the most important resource for the Tlingit.”); David Arnold, *Work and Culture in Southeastern Alaska: Tlingits and the Salmon Fisheries*, in *Native Pathways: American Indian Culture and Economic Development in the Twentieth Century* 158-59, 164, 177 (Brian Hosmer & Colleen O’Neill eds., 2004) (“Tlingits continue to participate in the commercial fisheries Tlingit identity is still inextricably linked to salmon fishing.”); Amanda Walch et al., *A Scoping Review of Traditional Food Security in Alaska*, 77 *Int’l J. Circumpolar Health* 1, 1 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5757232/#CIT0011> (discussing role that “traditional, culturally appropriate foods play in the health and well-being of Indigenous peoples”).

merits,” the State and third parties “will be irreparably injured absent a stay,” “issuance of the stay will [not] substantially injure the other parties interested in the proceeding,” and “the public interest lies” in granting a stay.¹⁶

The District Court’s decision to vacate the ITS will shut down the Southeast Alaska salmon troll fishery for the summer and winter seasons. The District Court greatly discounted the severe economic impacts of its decision and failed to consider the devastating cultural and economic impact this closure will have on indigenous communities. In fact, the District Court *did not once* mention tribes or Southeast Alaska’s indigenous peoples at all.

Whether agency action should be vacated on remand “depends on how serious the agency’s errors are and the disruptive consequences of an interim change that may itself be changed.”¹⁷ Thus, “when equity demands,” the agency action “can be left in place while the agency follows the necessary procedures to correct its action.”¹⁸ The Court should balance the agency’s “errors against the consequences of [vacatur as] a remedy.”¹⁹ Here, equity demands the ITS be left in place.

The harm from vacatur of the ITS is not speculative or abstract. It is concrete,

¹⁶ *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quotations omitted).

¹⁷ *Cal. Cmty. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (quotation omitted).

¹⁸ *Id.* (quotation omitted).

¹⁹ *Id.* at 993.

imminent, and dire. Southeast Alaska’s indigenous communities face irreparable injury if the stay is not granted. An entire industry—one that the residents of the region’s small, remote, and largely indigenous communities critically depend on—faces extinction.²⁰ As described by Tlingit & Haida President Richard *Chalyee Éesh* Peterson:

Our villages are in isolated locations on the coast of the Pacific and the shores of the Southeast Alaska archipelago. Few villages have road access; fishing and harvesting from the ocean and beaches is a major food source.

Troll-caught salmon is a culturally important food source and an economically critical fishery for our tribal citizens. For untold numbers of generations, our people have ventured out to troll for salmon, including Chinook salmon (king salmon). . . . Historically this was done by hook-and-line in cedar canoes. Today we use small fishing boats, but the techniques and knowledge used are based on our traditional practices. . . .

Troll fishing keeps our culture and traditions alive and gives young people an opportunity to make a living and support their families. . . . Closing of the troll fishery for even one season can cause irreparable breaks in this intergenerational knowledge. Our young people will lose out on critical learning opportunities or may move out of region entirely if the troll fishery is no longer a viable source of income to support their families.²¹

Tribal fishermen “play a crucial economic role in their communities.”²²

²⁰ See *Am. Passage Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (“The threat of being driven out of business is sufficient to establish irreparable harm.”).

²¹ Peterson Decl. ¶¶ 4-7.

²² *Id.* ¶ 8.

Nearly 600 trolling permits are held by tribal citizens, and these “permit holders provide food, employment, and income for many people beyond themselves in [tribal] communities.”²³ Trolling is one of the few industries that offers well-paying jobs in remote Southeast Alaska, jobs which enable tribal citizens “to continue to live on [their] traditional homelands . . . and to practice [their] traditional way[s] of life.”²⁴ The stories of tribal citizens who are impacted by this closure are countless. Tribal Amici urge the Court to consider the personal statements from tribal leaders and tribal citizens regarding the catastrophic impact this closure will have, not only on their livelihoods but on their cultural heritage and their entire way of life.²⁵

²³ *Id.*

²⁴ Ex. 1, Decl. of William Ware ¶ 3; *see generally* 16 U.S.C. § 3111(1) (“the continuation of the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional, and cultural existence”).

²⁵ *See* Decl. of Clinton Cook Sr. ¶ 13 (“The District Court’s order has frightened our Tribe and our people. We are frustrated and angry that this decision was made without considering the impact on our Tribal communities and without consulting us.”); Decl. of Michael Douville ¶ 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.”); Decl. of Raymond Douville ¶ 4 (“Trolling allows younger tribal fishermen who are just entering the industry, like I did at 21, to support their families and remain in their Southeast Alaska communities.”); Decl. of James Dybdahl ¶ 6 (“Not being able to fish for Chinook will be devastating to my business. About 60-70% of my income comes from the Chinook troll fishery. The July 1 season opener alone accounts for tens of thousands of dollars in gross sales.”); Decl. of James Erickson ¶ 3 (“We are fundamentally connected to a way of life on the water, and we have been since before western contact and the monetary system we have today. The food of the ocean, such as Chinook, nourishes us both physically and

In addition to failing to consider cultural harms to the indigenous peoples of Southeast Alaska,²⁶ the District Court greatly underweighted the economic impact of its decision. This Court has found vacatur of an agency decision to be an inappropriate remedy when it would cause severe economic consequences, which will irrefutably happen here.²⁷

culturally.”); Decl. of Paul Marks II ¶ 7 (“Fishing is not only my livelihood but my connection to my family and my culture. I’m happiest when I’m on the water, and I handle each individual fish with care and respect.”); Peterson Decl.; Decl. of Frederick Phillips ¶ 5 (“Tribal elders especially depend on the trollers to have access to healthy, traditional foods, like Chinook, year-round.”); Decl. of William Ware; Decl. of Julie Yates ¶ 7 (“If the closure is allowed to happen, we will not only lose a large portion of our income, but we will also be deprived of an important part of our Haida culture as well.”). These declarations are included as Ex. 1 to this brief.

²⁶ Cf. *United States v. Washington*, 20 F. Supp. 3d 986, 1021 (W.D. Wash. 2013) (“The depletion of salmon stocks and the resulting diminished harvests have harmed the Tribes and the individual members economically, culturally, and personally.”), *aff’d*, 853 F.3d 946, 966 (9th Cir. 2017) (“consequent reduction in tribal 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” (quotation omitted)).

²⁷ See, e.g., *Cal. Cmty. Against Toxics*, 688 F.3d at 993-94 (concluding vacatur would be “severe” where it would delay construction of “a much needed power plant” and affect the employment of 350 workers); *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 652, 668 (9th Cir. 2022) (declining to vacate pesticide registration—even where EPA admitted it did not comply with ESA—where vacatur would cause “a disruption to the agricultural industry”); *City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586, at *3 (9th Cir. July 8, 2021) (concluding FAA violated NEPA, NHPA, and section 4(f) by failing to complete proper environmental review, but remanding without vacatur because vacating agency action “would be severely disruptive in terms of cost, safety, and potential environmental consequences”); *Nat’l Fam. Farm Coal. v. U.S. E.P.A.*, 966 F.3d 893, 929-30 (9th Cir. 2020) (noting “evidence of potentially serious disruption if a pesticide that has been registered for

The Southeast Alaska salmon troll fishery “is a resilient, responsible, and sustainable fishery” that not only supports tribal citizens economically but keeps the cultures and traditions of the indigenous peoples of Southeast Alaska alive. Closing the fishery will inflict irreversible harm on tribal citizens who “rely on this fishery for [their] livelihoods and [their] cultural wellbeing.”²⁸

CONCLUSION

The Tribal Amici respectfully request that the Court grant the State of Alaska’s Motion for Stay Pending Appeal.

over five years can no longer be used”); *Cook Inletkeeper v. U.S. E.P.A.*, 400 F. App’x 239, 240-41 (9th Cir. 2010) (declining to vacate permit that authorized water pollution by natural gas and oil extraction facilities in Cook Inlet, even where EPA conceded the “antidegradation finding was flawed,” “to avoid the disruptive consequences that would flow from vacating the permit”). This approach is consistent with other Circuits. *See, e.g., Gulf Restoration Network v. Haaland*, 47 F.4th 795, 805 (D.C. Cir. 2022) (declining to vacate offshore oil and gas leases where doing so “would be highly disruptive for the lessees”); *Shafer & Freeman Lakes Env’t Conservation Corp. v. FERC*, 992 F.3d 1071, 1096 (D.C. Cir. 2021) (remanding without vacating ITS because utility operating dam would lose legal protection from ESA liability); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1325, 1331-32 (D.C. Cir. 2021) (declining to vacate orders authorizing natural gas export terminals and pipelines); *W. Watersheds Project v. Haaland*, Nos. 22-8031 & 22-8043, 2023 WL 3637804, at *21-22 (10th Cir. May 25, 2023) (declining to vacate decision authorizing livestock grazing in violation of National Forest Management Act because it would disrupt seasonal patterns of grazing and adversely impact ranchers and local communities).

²⁸ Peterson Decl. ¶¶ 6, 9.

Respectfully submitted this 16th day of June 2023 at Anchorage, Alaska.

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In accordance with Fed. R. App. P. 29(a)(4), this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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