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

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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), SalmonState respectfully moves this Court for leave to file the accompanying Amicus Curiae brief in support of the Appellant-Intervenor State of Alaska's Opening Brief,¹ Federal Defendant-Appellants' First Cross-Appeal Brief,² and Intervenor-Appellant Alaska Trollers Association's First Cross-Appeal Brief.³ Counsel for SalmonState endeavored to obtain the consent of all parties to the filing of the Amicus Curiae brief prior to filing of this motion. All parties consented to the filing of the brief except for Plaintiff-Appellee, Wild Fish Conservancy, who reserves its position on the brief and its opportunity to respond to this motion. 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.

I. SalmonState's Interest.

SalmonState is an Alaska based and Alaska focused project of New Venture

¹ See First Brief on Cross-Appeal for review, No. 23-35324 (September 29, 2023), ECF No. 57

² See First Brief on Cross-Appeal for review, No. 23-35324 (September 29, 2023), ECF No. 55

³ See First Brief on Cross-Appeal for review, No. 23-35324 (September 29, 2023), ECF No. 58

Fund supporting innovative and effective public interest projects. SalmonState works within Alaska to guarantee Alaska remains a salmon state by protecting and preserving habitat and promoting fish first policies for this irreplaceable resource. SalmonState works alongside other Alaska organizations, commercial fishers, sport and recreational fishing guides and enthusiasts, salmon dependent businesses, and Alaska Native groups to maintain sustainable commercial, sport, and subsistence fisheries.

Alaska is a salmon state. The coastal communities of Southeast Alaska are deeply connected to salmon, through community activities and engagement centered around salmon, generations of fishing, services and industry supporting commercial, sport, and subsistence fishing, and continued adaptation of conservation practices to protect the fish and their habitat. The salmon fishermen and the coastal communities in which they reside are part of the salmon ecosystem, important for the vitality and endurance of the fish. SalmonState works within and among these communities to advocate for sustainable fishing practices, healthy and adaptive salmon populations, and protections of important salmon habitat.

II. Relevance of Amicus Curiae Brief.

This amicus brief presents discussion of public interest relevant and desirable to this Court in this case. Fed. R. App. P. 29(a)(3). The impacts of the District Court's decision will have a profound impact on the salmon-dependent coastal

communities of Southeast Alaska. Not only will the direct-target Chinook salmon fishermen lose income, but community identity and supporting industries will also suffer. SalmonState holds a perspective as a public interest organization advocating for salmon and salmon habitat protection as well as sustainable fisheries practices. SalmonState requests the submission of this brief to offer this Court a clear picture of Alaska's coastal communities, their connection to salmon, their dedication and interest in maintaining healthy Chinook salmon populations, and the irreparable harm that closure of the Southeast Chinook salmon troll harvest would inflict on those communities.

III. Conclusion.

SalmonState respectfully moves this Court for leave to file the accompanying Amicus Curiae brief in support of the Appellant-Intervenor State of Alaska's Opening Brief, Federal Defendant-Appellants' First Cross-Appeal Brief, and Intervenor-Appellant Alaska Trollers Association's First Cross-Appeal Brief.

DATED this 5th day of October, 2023, at Homer, Alaska.

SALMONSTATE

By: /s/ Loretta Brown
Loretta Brown
Alaska Bar No. 1507061

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 27(d)(1)(E) and 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.

SALMONSTATE

DATED: October 5, 2023

By: s/ Loretta Brown
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 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.

SALMONSTATE

DATED: October 5, 2023

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

**IN THE UNITED STATES COURT OF APPEALS
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WILD FISH CONSERVANCY,
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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

**SALMONSTATE AMICUS CURIAE BRIEF IN SUPPORT OF STATE
OF ALASKA'S OPENING BRIEF, FEDERAL DEFENDANT-
APPELLANTS' FIRST CROSS-APPEAL BRIEF, AND ALASKA
TROLLERS ASSOCIATION'S FIRST CROSS-APPEAL BRIEF**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), SalmonState is an Alaska initiative of New Venture Fund. New Venture Fund has no parent company, no subsidiary or subordinate company, and no affiliate company. No publicly held company owns 10% or more of New Venture Fund stock, or any lesser portion of New Venture Fund stock.

STATEMENT OF INTEREST OF AMICUS CURIAE

SalmonState is an Alaska based and Alaska focused project of New Venture Fund supporting innovative and effective public interest projects. SalmonState works within Alaska to guarantee Alaska remains a salmon state by protecting and preserving habitat and promoting fish first policies for this irreplaceable resource. SalmonState works alongside other Alaska organizations, commercial fishers, sport and recreational fishing guides and enthusiasts, salmon dependent businesses, and Alaska Native groups to maintain sustainable commercial, sport, and subsistence fisheries.

SalmonState supports and advocates for the sustainable harvest of salmon in Alaska water that connects Alaska residents, Indigenous communities, and visitors to Alaska and its ecosystem. The five Pacific salmon species in Alaska's ocean, coastal, and inland waterways are integral to Alaska's coastal community identity. Southeast Alaska communities are deeply connected to salmon and are part of the salmon ecosystem, important for the vitality and endurance of the fish. SalmonState works within and among these communities to advocate for sustainable fishing practices, healthy and adaptive salmon populations, and protections of important salmon habitat.

INTRODUCTION

Alaska communities and people are closely tied to salmon. The State of Alaska's coastal waters and inland rivers and lakes support the five Pacific salmon species. All five salmon species are harvested throughout the state in commercial, sport, and subsistence fisheries. The people of Alaska's connection to salmon unite its Indigenous communities, Alaskan residents, and visitors. This connection is illustrated by the deep interest the people of Alaska have in maintaining and promoting healthy salmon populations through sustainable fishing practices. In the face of climate change and rapidly changing ocean conditions, salmon harvesters throughout Alaska are working to protect this beautiful and important natural resource. In Southeast Alaska, the State of Alaska Department of Fish and Game ("ADFG") and National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS") work in close coordination to implement management measures to support healthy Chinook salmon runs and aid in the recovery and restoration of Pacific Northwest origin stocks intercepted in the Southeast Alaska waters.

ARGUMENT

This Court should reverse the decision of the District Court to vacate the incidental take statement as requested by the federal Defendant-Appellants, the State of Alaska, and Alaska Troller's Association because in an abuse of

discretion, the District Court did not account for the significant consequences of said vacatur to Southeast Alaska coastal communities or the uncertainty that shuttering Southeast Alaska Chinook salmon fishing will materially improve prey availability for the Southern Resident Orca whales. This Amicus Curiae brief discusses that the reversal the District Court's vacatur would serve the public interest.

I. Shuttering in the direct Chinook salmon commercial fishery in Southeast Alaska will irreparably harm the fishermen and coastal communities while providing minimal positive impact to the recovery and restoration of the endangered Southern Resident Orca whale population.

Absent this Court reversing the District Court's vacatur, the State of Alaska, the Southeast Alaska Chinook salmon fishers, Indigenous communities and individuals, support industries and businesses, and coastal communities throughout Southeast Alaska will suffer irreparable harm. The Chinook salmon troll fishery is a lifeline for rural residents across this region where hundreds of small-boat fishermen take great pride in the high-quality food product they provide to consumers across America. Loss of access to this fishery would compromise the well-being of Southeast Alaskan communities, particularly that of its most rural residents.

In Southeast Alaska, commercial fishing is generational and whole communities depend heavily upon healthy returning salmon runs. Chinook salmon have been a

high value target for commercial and recreational fisheries for over a century,⁴ and central to Indigenous people's survival and cultural and traditional way of life for thousands of years.⁵ In modern times, the subsistence, sport, and commercial fisheries remain predominant economic drivers for the region and the state. These fisheries provide a strong sense of identity in coastal communities, with most residents directly and indirectly tied through ownership of fishing permits, and boats, work as year-round and seasonal crew members, and by owning and operating support industries including but not limited to boat yards, mechanical and parts shops, seafood processors, grocers, fuel providers, restaurants, lodging, and guide services.

As the Appellants State of Alaska, Alaska Trollers Association, and National Marine Fisheries Service argue, the closure of the Southeast Alaska Chinook salmon troll fishery, resulting from the District Court's decision to vacate the NMFS Incidental Take Statement, will have a harsh impact on Southeast coastal communities,⁶ with little to no change in the advancement of the recovery and

⁴ See Skannes, et. al., *History of the Winter Salmon Troll Fishery in Southeast Alaska/Yakutat*, Fishery Management Report No. 14-38, Alaska Department of Fish and Game, October 2014, <https://www.adfg.alaska.gov/FedAidPDFs/FMR14-38.pdf>

⁵ See Southeast Alaska Tribal Coalition Amici Curiae Brief in Support of the State of Alaska's Motion for Stay Pending Appeal, No. 23-35322, 23-35323, 23-35323, 23-35324, 23-35354 (June 16, 2023), ECF No. 40-1

⁶*Id* at 6-8.

restitution of the endangered Southern Resident Orca population.⁷ Shuttering the Chinook salmon fishery will irreparably harm Southeast Alaska communities. Furthermore, the Southern Resident orcas will glean little benefit from a closure of the Southeast Chinook salmon troll fishery and have a low probability of encountering those Chinook salmon that would otherwise have been harvested by the Southeast Alaska fishermen.⁸ It lies squarely within the public interest and balancing of equity for this Court to reserves the District Court's vacatur, allowing the Chinook salmon troll fishery to continue.

II. Southeast Alaska Chinook salmon troll fishery, including its Indigenous participants, have a vested interest in the health and sustainability of Chinook salmon population.

The Southeast Alaska Chinook salmon troll fishery has undertaken reduced catch limits and additional conservation measures to aid in the restoration and recovery of the Chinook salmon, while the seventy-two (72) individual Southern Resident Orca whales face not only reduced prey abundance but a myriad of environmental stressors in their spring, summer, and fall range waters of Washington State and coastal Canada. The underlying significant contributions to Chinook salmon declines mirror those of their Southern Resident Orca whale

⁷ See State of Alaska Motion for Stay Pending Appeal, No. 23-35322, (May 26, 2023), ECF No. 15-1 at 15-18.

⁸ *Id.*

predators, including rising ocean water temperature, high vessel traffic, water quality and pollutant discharge, and multiple habitat degradations.⁹

The Southeast Alaska troll fishery is a sustainable and clean fishery. Troll fishing for Chinook salmon is akin to a hook-and-line gear operation in the open ocean that targets individual adult salmon with minimal bycatch and habitat disturbance.¹⁰ Most of the approximately 1,400 Southeast troll participants¹¹ are independent, family owned and local community-based operations, outfitted with gear specific for troll fishing. Delegated the management of the Chinook salmon troll fishery from NMFS under the Magnuson-Stevens Fishery Conservation and Management Act,¹² the ADFG has an established a limited entry program, limiting the number of actively fishing troll boats in operation, thereby limiting the number of Chinook salmon harvested.¹³

⁹ Governor's Salmon Recovery Office, *2022 State of Salmon in Watersheds*, Washington State Recreation and Conservation Office.

¹⁰ Alaska Trollers Association, *Trolling: Alaska's quintessential low impact small boat fishery*, January 2023.

¹¹ McDowell Group, *Economic Impact of the Pacific Salmon Treaty on the Alaska Troll Fleet*, Prepared for Northern Southeast Regional Aquaculture Association, December 5, 2019, at 15.

¹² First Brief on Cross-Appeal for review, No. 23-35324 (September 29, 2023), ECF No. 55, at 6.

¹³ 16 U.S.C. § 1856(a)(3)(B); 50 C.F.R. § 679.3(f); *Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska*, North Pacific Fishery Management Council, National Marine Fisheries Service, Alaska Region, and State of Alaska Department of Fish and Game, October 2018, at 36.

The Pacific Salmon Treaty of 1985, an agreement between the United States and Canada, dictates the distribution of harvest levels for shared salmon stocks such as Chinook salmon.¹⁴ Under the Pacific Salmon Treaty, Chinook salmon harvest levels for all of the Southeast Chinook salmon fisheries are set annually based on salmon abundance, and include salmon subject to the Treaty and Alaska hatchery fish.¹⁵ Upon adoption of the Pacific Salmon Treaty in 1985, the Chinook salmon harvest levels for Southeast Alaska fishermen was reduced, with the catch limit set for all gear groups in Southeast Alaska to 263,000 Chinook salmon¹⁶ compared to the average 322,912 harvested by all gear groups in the years 1975-1984.¹⁷ The harvest limit was further reduced by 15% in 2009, and in 2019 under the 2019-2028 Pacific Salmon Treaty Agreement, the Southeast Alaska troll fishery catch limit was reduced again by 7.5%, with a limit of 101,280 Chinook salmon.¹⁸ These harvest level reductions for the Alaska Southeast troll fishery

¹⁴ *Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon*, Pacific Salmon Treaty of 1985, Pub. L. No. 99-5, 99 Stat. 7 (1985)

¹⁵ *Id.*, Chapter 3, at 8.

¹⁶ Gaudet, et. al., *Southeast Alaska Chinook Salmon Harvests, Harvest Limits, and Annual Deviations from Pacific Salmon Treaty Allocations, 1985 through 2002*, Special Publication No. 04-15, Alaska Department of Fish and Game, November 2004, at 63.

¹⁷ *Id.* at page 12.

¹⁸ Hagerman, et. al., *2019 Summer Troll Fishery Management Plan*, Regional Information Report No. 1J19-08, Alaska Department of Fish and Game, June 2019, at 6.

were implemented in acknowledgement of and in an effort to aid in the recovery and restoration of the Chinook salmon populations. By engaging in the Pacific Salmon Treaty and continually reducing harvest catch limits for the Southeast Alaska Chinook salmon troll fishery, the State of Alaska and the fishermen have demonstrated a willingness to engage with the States of Washington, Oregon, the federal government, Canada, and the Province of British Columbia to shoulder some of the burden and cost of recovery of these Chinook salmon populations. As such, it is disingenuous of the Wild Fish Conservancy to weaponize the Endangered Species Act¹⁹ in a manner that scapegoats and shuts a sustainable fishery and harms coastal communities that have willingly engaged in these conservation measures while ignoring the underlying significant contributions to the Southern Resident Orca decline. As stated by Appellant parties State of Alaska, Alaska Trollers Association, and NMFS to this Court and the District Court, the vacatur of the NMFS Incidental Take Statement disregards the conservation management programs and practices for the conservation and restoration of Chinook salmon populations in place by the federal and state governments, and Indigenous fishers, and ignores the uncertainty of any improvement in the prey availability and recovery of the Southern Resident Orca whales from such vacatur.

¹⁹ 16 U.S.C. §§ 1531-1544

CONCLUSION

The Amicus Curiae, SalmonState, respectfully requests that this Court reverse the District Court's vacatur of the NMFS Incidental Take Statement and allow the Southeast Chinook salmon troll fishery to continue.

Respectfully submitted this 5th day of October, 2023 at Homer, Alaska.

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