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The lawsuit brought by the Wild Fish Conservancy is a challenge to the Biological Opinion (BiOp), the document that provides Endangered Species Act coverage to all of Southeast Alaska's salmon fisheries. The judge issued an order granting the Plaintiff Wild Fish Conservancy's motion for summary judgment. Key Points from the Judge's order on summary judgment included: (1) NMFS's actions require certain mitigation; (2) NMFS failed to create a binding mitigation measure that described "in detail the action agency's plan to offset the environmental damage caused by the project" for the prey increase program; (3) NMFS's failure to make a jeopardy determination on the prey increase program for ESA-listed Chinook salmon violated its obligations under the ESA; and (4) NMFS violated NEPA requirements in issuing the Incidental Take Statement.

The lawsuit is currently in the "remedy" phase. The Plaintiff has argued for vacatur of the incidental take statement that provides ESA coverage for the winter and summer troll fisheries while NMFS fixes its flawed BiOp and for the permanent termination of the prey increase program for Southern Resident Killer Whales required in the Biological Opinion. The Defendants (the Department of Justice, the Department of Commerce and NOAA) and the Defendant Intervenors (Alaska Trollers Association and the State of Alaska) argued against vacatur, allowing ESA coverage to continue, while NMFS works on revising the BiOp.

On Tuesday, U.S. Magistrate Judge Michelle Peterson issued a report and recommendation (R&R) and proposed order. The magistrate recommends (1) the Biological Opinion be remanded to NMFS to remedy ESA and NEPA violations, (2) vacating the portions of the BiOp that authorize "take" of Southern Resident Killer Whales and Chinook salmon resulting from commercial harvests of Chinook during the winter and summer troll fisheries, and (3) leaving the Southern Resident Killer Whale hatchery prey production program in place.

The next step is an opportunity for all parties to file objections and respond to the other parties filed objections. After the objection process, what happens next is in the hands of the Article III Judge. This litigation is still active and the State of Alaska will continue to defend its fisheries vigorously.