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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, and COOK INLET FISHERMAN'S FUND, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, et al., Defendants, STATE OF ALASKA, Intervenor-Defendant.	Case. No. 3:13-cv-00104-TMB **MEMORANDUM IN OPPOSITION TO UCIDA'S MOTION TO ENFORCE JUDGMENT**

INTRODUCTION

The United Cook Inlet Drift Association and Cook Inlet Fisherman's Fund (collectively "UCIDA") ask the court to create important parts of a Fisheries Management Plan ("FMP") with specific features it finds desirable, then order the National Marine Fisheries Service ("NMFS") to implement it. But UCIDA's request fails on procedural grounds, and should be denied.

UCIDA's motion asks this court to issue an order requiring the government to usurp the State's sovereign right to manage salmon in State waters. Contrary to UCIDA's assertion, the Ninth Circuit ordered nothing even remotely justifying the extraordinary relief UCIDA now seeks. This requested relief is far removed from the live controversy in this case, has not been briefed as part of this litigation, and is not ripe for decision. Further, issuing the "declaratory ruling" that UCIDA requests would require this court to first speculate which of three draft plan options the North Pacific Council ("the Council") might adopt, and then speculate whether that option would comport with the requirements of the Magnuson-Stevens Act ("MSA"). The Council is actively working on finalizing the FMP that will regulate fishing in federal waters—the Exclusive Economic Zone ("EEZ")—of Cook Inlet. The Council has not unreasonably delayed the creation of the FMP and judicial intervention is not appropriate nor warranted. The Council should be allowed to complete the FMP unencumbered by the order UCIDA seeks.

The Court should deny UCIDA's motion.

BACKGROUND

I. The North Pacific Fisheries Act of 1954 authorized the three historical commercial salmon net fisheries managed by the State since Statehood.

As the Ninth Circuit explained, the federal waters of the Cook Inlet commercial salmon fishery is one of three historic commercial salmon net fisheries in Alaska that extend into the EEZ, but have been managed by Alaska since statehood. *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv., (UCIDA)* 837 F.3d 1055, 1057-58 (9th Cir. 2016). The origin of these state-managed fisheries dates to the 1950's when the

United States, Canada, and Japan created the International Convention for the High Seas Fisheries of the North Pacific Ocean, which generally banned commercial salmon net fishing in the federal waters adjacent to Alaska, but exempted from the ban the three traditional salmon net fisheries. *Id.*

The convention was implemented by the North Pacific Fisheries Act of 1954. *Id.* Under the 1954 Act, the Federal government issued regulations prohibiting commercial salmon net fishing in the exclusive economic zone adjacent to Alaska except as allowed under state regulations. *Id.* At the time, and continuing until the present, the State authorized and managed three salmon net fisheries partly extending into the exclusive economic zone: in the (1) Cook Inlet Area, (2) Prince William Sound Area (also known as Copper River), and (3) Alaska Peninsula Area (also known as False Pass). 44 Fed. Reg. 33250, 33267 (June 8, 1979). In these three areas, commercial salmon net fishing was allowed and federal regulation was to mirror State regulation. *UCIDA*, 837 F.3d at 1058 (citing 50 C.F.R. § 210.10 (repealed)).

In 1976, Congress passed the Magnuson–Stevens Act, establishing a national program for the conservation of fishery resources, and providing the Secretary of Commerce with fishery management authority in the EEZ (between three and 200 miles from the coastline of the United States); the Secretary's authority under the MSA is in large part delegated to NMFS. *Id.* The MSA also established eight Regional Fishery Management Councils, each charged with preparing an FMP "for each fishery under its authority that requires conservation and management." 16 U.S.C. § 1852(a), (h)(1). The North Pacific Council is responsible for Alaska and the "Pacific Ocean seaward of

Alaska." 16 U.S.C. § 1852(a)(1)(G). After passage of the MSA, the State continued to manage these three fisheries. *UCIDA*, at 1059.

In 1978, the Council adopted an FMP for salmon fisheries near Alaska; the FMP was approved and published by NMFS in 1979. 44 Fed. Reg. 33250; RULEFMP_0001060. The FMP has been amended numerous times; the last major revision prior to 2012 was in 1990. RULEFMP_0001062.

II. The 1990 salmon FMP prohibited salmon fishing west of Cape Suckling except in the three historically State-managed fisheries.

At the time the 1990 FMP was adopted, the MSA provided that a state could regulate in-state fishing vessels in the exclusive economic zone, subject to the Supremacy Clause's requirement that the state regulations be consistent with federal law. 16 U.S.C. § 1856(a)(3) (1990). The 1990 FMP divided the federal waters off Alaska into East and West Areas. NPFMC_0000975. The West Area is west of Cape Suckling and included the Cook Inlet, Prince William Sound, and Alaska Peninsula Areas.

The 1990 FMP did not establish any management objectives in the West Area because the plan prohibited commercial salmon fishing there except in the three historical salmon net fisheries that were authorized by the North Pacific Fisheries Act:

> In the West Area, the only commercial salmon fishery is the incidental fishery allowed under 50 CFR 210 (*see* Appendix C). Federal regulations implementing the North Pacific Fisheries Act (16 U.S.C. 1021, et seq.), prohibit U.S. fishermen from fishing for or taking salmon with nets in the North Pacific outside Alaskan waters except for three historical fisheries managed by the State; these are the (a) False Pass (South Peninsula), (b) Cook Inlet, and (c) Copper River net fisheries. These fisheries technically extend into the EEZ, but they are conducted and managed by the State of Alaska as nearshore fisheries. Thus, aside from those traditional fisheries, this

> plan prohibits commercial salmon fishing in the EEZ west of the longitude of Cape Suckling.

NPFMC_0000975.

Section 9 of the 1990 FMP provided that the Secretary of Commerce may review State salmon fishing regulations and in-season management relating to the salmon fisheries in the exclusive economic zone off the coast of Alaska for consistency with the FMP, the MSA, and "other applicable Federal law." NPFMC_0001012-14. But such review effectively applied only to State fishing regulations for the East Area, as the FMP did not contain any objectives or other requirements for the West Area.

III. The Sustainable Fisheries Act of 1996 authorizes delegation of fisheries in federal waters to a state.

The Sustainable Fisheries Act of 1996 amended section 306(a) of the MSA to allow FMPs to explicitly delegate management of a fishery in federal waters to a state, after which the state could regulate in-and out-of-state vessels in the fishery. Pub. L. No. 104-297, § 112, 110 Stat. 3596 (1996) (codified at 16 U.S.C. § 1856(a)(3)(B)). For fisheries delegated to state management, the Secretary reviews state fishing regulations and notifies a state when the Secretary determines that state regulations are not consistent with the FMP. *Id.* If the notified state does not correct the inconsistencies identified by the Secretary, the authority of the state to regulate out-of-state vessels in the fishery terminates. *Id.*

IV. Amendment 12 excluded the three historically state-managed salmon net fisheries from the FMP.

Amendment 12 made several changes to the FMP. It identified six new management objectives to guide salmon management under the FMP. RULEFMP_0001063; 77 Fed. Reg. at 75570. It excluded the sport salmon fishery from the West Area. *Id.* And, it excluded the three historically state-managed commercial salmon net fisheries from the West Area. *Id.* In adopting Amendment 12, the Council considered whether to include Cook Inlet within the FMP and delegate management of the fishery to the State through the FMP, and rejected that alternative. RULEFMP_0000696-98; *see also* RULEFMP_0000706 (noting that if Cook Inlet were managed under an FMP it "would result [in] harvests being [unnecessarily] restricted in years when returns were above forecast and harvests too high in years when returns were below forecast").

V. The Ninth Circuit ruled that the FMP must include the historically state-managed Upper Cook Inlet fishery.

UCIDA filed this action in 2013, challenging Amendment 12 and its implementing regulations as contrary to the Magnuson-Stevens Act's requirement that a Council prepare an FMP "for each fishery under its authority that requires conservation and management," 16 U.S.C. § 1852(h)(1). *UCIDA* at 1061. UCIDA also alleged that Amendment 12 was arbitrary and capricious and contrary to the National Environmental Policy Act. *UCIDA* at 1061.

On appeal from the district court, the Ninth Circuit stated that the language of the MSA "is clear: to delegate authority over a federal fishery to a state, NMFS must do so expressly in an FMP." *Id*. at 1063. The Ninth Circuit's explicit and limited holding was

that "Amendment 12 is therefore contrary to law to the extent it removes Cook Inlet from the FMP." *Id.* at 1065. The case was remanded to this Court with instructions that judgment be entered in favor of UCIDA. *Id.* The Ninth Circuit did not reach any of UCIDA's other challenges to Amendment 12. *Id.* at 1065 n.4.

The Ninth Circuit emphasized that the MSA "allows delegation to a state under an FMP, but does not excuse the obligation to adopt an FMP when a Council opts for state management." *Id*. at 1065.

The Ninth Circuit did not disturb NMFS's determination that the State's management of the Cook Inlet fishery is "consistent with the policies and standards of the Magnuson-Stevens Act," 77 Fed. Reg. at 75570, and "a more effective management system for preventing overfishing of Alaska salmon than a system that places rigid numeric limits on the number of fish that may be caught." *Id.* at 75571. The court simply held that under the MSA it was contrary to law for NMFS to approve an FMP amendment that removed Cook Inlet from the FMP for the purpose of deferring to State management.

Nowhere did the Ninth Circuit hold that federal law requires NMFS to manage salmon in Alaska's sovereign waters.

VI. The Council is actively working on adopting an FMP for Upper Cook Inlet.

Contrary to UCIDA's assertion that the "process has stalled," the Council's triennial status reports show that the Council is actively working on formulating an FMP, engaging the process that is required to pass MSA, APA, and NEPA muster. Dkt. 105, 119, 136, 139, 147, 150. To that end, the Council has adopted a preliminary purpose and

need statement regarding creation of a Salmon FMP in the Cook Inlet EEZ that meets the requirements of section 303(a) of the MSA (16 U.S.C. § 1853) and established the Cook Inlet Salmon Committee. Dkt. 154 (Discussion Paper at 35). The committee has received written proposals from the public to help the Council identify conservation and management measures under section 303(a) of the MSA and has held several meetings to discuss the FMP. *Id* at 21. At the April 2019 meeting the Scientific and Statistics Committee reported on its review of the preliminary status determination criteria for Cook Inlet salmon stocks, which it found to be on track to meet the requirements of the MSA and National Standards 1 and 2. Dkt. 150 at 2.

ARGUMENT

UCIDA's Motion to Enforce Judgment fails on procedural grounds for the four reasons discussed below. The Court need not, and should not, accept UCIDA's invitation to evaluate the merits of the draft proposals under consideration by the Council.

First, the requested order would require the Court to grant relief beyond the scope of the Ninth Circuit's remand and this court's previous judgment. UCIDA is asking the Court to direct the Council to assert jurisdiction over the State's sovereign waters, an extraordinarily contentious issue that has not been litigated in any stage of these proceedings and cannot be appropriately litigated in this procedural posture.

Second, the agency decision is not ripe for adjudication, as it has not yet been adopted. The fact that the court retains jurisdiction does not mean that the Court should tell the Council what should be in the plan nor opine on whether any draft option currently being considered would pass muster under the MSA

Third, an order directing the Council to adopt a plan with specific requirements would circumvent the APA process and disenfranchise numerous other stakeholders with interests in the fishery.

Finally, agency action has not been unlawfully withheld or unreasonably delayed and there is no reason for the court to intervene in this stage of the rulemaking process. The Council is actively working toward implementing an FMP for the federal waters of Cook Inlet, it should be allowed to do its job and formulate the FMP.

I. UCIDA seeks relief that falls well outside the confines of this litigation.

UCIDA cites *California v. U.S. Dep't of Labor* for its proposition that a court order compelling agency action is "particularly appropriate" at this stage. Motion to Enforce Judgment, at 14. However, the court in that case detailed a condition precedent to such judicial intervention when it stated that a "motion to enforce the court's previous judgment may be granted when the prevailing party demonstrates its opponent has not complied with the judgment's terms." *California*, 155 F. Supp. 3d 1089, 1096 (E.D. Cal. 2016) (internal citations omitted). In this matter, UCIDA has not demonstrated that NMFS has failed in any way to follow the Judgment. To the contrary, UCIDA concedes in its own pleading that the Council is currently circulating proposed FMP amendments for Cook Inlet, and dedicates much of its argument to the merits of each proposal.

Notably, the court in *California* went on to state that "[t]he court may grant the moving party only that relief to which it is entitled under the original judgment. Were this not the rule, motions to enforce would allow an end run around the prevailing party's original burden to establish an injury and entitlement to relief." *Id.*

NMFS argues that the new FMP must preempt State management of salmon in State waters. Mot. Enf. J. at 21-24. At no point in this litigation, before the district court or the Ninth Circuit, has any court held that NMFS must adopt an FMP that manages salmon in Alaska's sovereign waters. By requesting relief outside that which was granted in the original judgment UCIDA is seeking to do exactly that which the court in *California* warned against.

UCIDA originally filed this lawsuit to challenge NMFS's decision to "approve changes to the Salmon FMP to eliminate *federal waters* in Cook Inlet from that FMP." Complaint ¶ 2 (emphasis added). UCIDA argued that removing federal waters from the FMP violated the MSA, NEPA, and the APA. *UCIDA*, at 1061. The Ninth Circuit agreed, holding that Amendment 12 was contrary to the MSA to the extent it removed Cook Inlet from the FMP. *Id.* at 1062. Far from holding that NMFS may implement an FMP that manages salmon in Alaska waters, the Ninth Circuit stated that in order to *delegate authority over the federal fishery to Alaska* "NMFS must do so expressly in an FMP." *UCIDA*, at 1063. (*citing* 16 U.S.C. § 1856(a)(3)(B)). Explaining this in more detail, the court wrote the following:

> If NMFS concludes that state regulations embody sound principles of conservation and management and are consistent with federal law, it can incorporate them into the FMP. Id. § 1853(b)(5). Indeed, Amendment 12 expressly delegates management of the East Area—certain federal waters off Alaska not including Cook Inlet—to Alaska. Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. at 75,570–71; 50 C.F.R. §§ 679.1(i)(2) ("State of Alaska laws and regulations that are consistent with the Salmon FMP and with the regulations in this part apply to vessels of the United States that are commercial and sport fishing for salmon in the East Area of the Salmon Management Area."), 679.3(f).

> Amendment 12 could have expressly delegated management of Cook Inlet to Alaska as well, but it did not.

Id.

The Ninth Circuit concluded by stating that Amendment 12 was contrary to law "to the extent it remove[d] Cook Inlet from the FMP" and repeating that the MSA "allows delegation to a state under an FMP, but does not excuse the obligation to adopt an FMP when a Council opts for state management." *Id*. at 1065.

By arguing that the court should order NMFS to implement an FMP managing salmon in Alaska's waters, UCIDA attempts to take the clear language of the Ninth Circuit order and turn it on its head. Far from ruling that NMFS must implement an FMP managing salmon in Alaska's waters, the Ninth Circuit plainly stated that NMFS may delegate management of a federal fishery to a state so long as it does so in an adopted FMP. UCIDA's attempt to procure a court order on a matter that was never pled and never litigated is exactly the sort of "end run around" its burden to establish an injury and entitlement to relief that the court in *California* warned against. It also raises significant federalism issues and concerns regarding the State's authority to manage its public trust doctrine resources—issues and concerns that have not been briefed and are not ripe for consideration.

II. The Cook Inlet Fishery Management Plan is not ripe to litigate.

Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial

interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (citations omitted). The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Id*. at 808 (*quoting Reno v. Catholic Social Services, Inc*., 509 U.S. 43, 57 (1993)).

Determining whether administrative action is ripe for judicial review requires the court to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Id.* "Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the Administrative Procedure Act until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id*. (*quoting Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990)).

In the matter before this court, potential FMPs are actively moving through the APA process. UCIDA may not favor the possible resulting final rule, thus it asks the court to entangle itself in a disagreement over a *potential* administrative policy. But this sort of entanglement is exactly what that the Supreme Court warned against in *National Park Hospitality Ass'n*. UCIDA cannot point to concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm it, because it does not

yet know what the final regulation will be—which brightly illuminates the fundamental procedural problem with its motion.

The Court presently is unable to review an agency record to determine if the FMP comports with the requirements of the MSA, for the obvious reason that the record is not yet complete and the FMP is not finalized. This presents a problem for UCIDA's request, because on the occasion that the reviewing court "cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Even if there were an agency record and a finalized FMP, the relief UCIDA seeks would still be extraordinary. Only in "rare circumstances," such as agency intransigence in complying with a congressional mandate, should the court remand with specific instructions to an agency on discretionary matters within the agency's expertise. *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 770 (9th Cir. 2007). But no "rare circumstances" are present in this case. The Ninth Circuit concluded that Amendment 12 was "contrary to law to the extent it removes Cook Inlet from the FMP," so the court remanded the matter and retained jurisdiction but left it to the Council to prepare the new FMP. Dkt. 102. There is nothing rare about these circumstances. Indeed, this is a standard challenge to agency action, and nothing about it warrants a court order directing the content of an agency rule.

As a matter of practicality, UCIDA's motion "to enforce judgment" is actually a challenge to a not yet adopted FMP. Of course, UCIDA cannot style it that way, as no

cause of action exists until the agency action is final. *See e.g. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61–62 (2004) (To maintain a cause of action under the APA, a plaintiff must challenge "agency action" that is "final."). It is clearly premature to challenge the FMP, so UCIDA is instead attempting to cut off the rulemaking process by petitioning the court to write the plan. The court should not take the invitation.

Cook Inlet is a complex multi-stock, multi-use fishery where competing goals and interests must be managed. Dkt. 154 (Discussion Paper, at 96). Courts should generally avoid creating fisheries policy, as doing so is simply not within the expertise of the judiciary. Judge Holland explained:

> [T]he Board must bring considerable expertise to the complex fish management questions that come before it. This court does not have that expertise. While the court is quite comfortable . . . in its role as the reviewer of agency rule-making . . ., the court should not—for lack of expertise—make the fine scientific wildlife management decisions that are called for by state and federal law. In short, the fish and game management ought to be done by the fish and game managers.

John v. Alaska, A85–698, Unpublished Order at 5 (D. Alaska Jan. 19, 1990).

The not-yet promulgated FMP is not ripe for judicial review and no rare circumstances are present in this matter that warrant the court's intervention. The Council is working on the FMP, and UCIDA may challenge it when it is finalized and adopted. Until that time the Court should allow the Council to complete its work.

III. The Fishery Management Plan is subject to the requirements of the Administrative Procedures Act.

The MSA provides for judicial review of "[r]egulations promulgated by the Secretary" in accordance with the APA. 16 U.S.C. § 1855(f). The Secretary of

Commerce, acting through NMFS, is responsible for evaluating proposed regulations submitted by the Regional Councils for consistency with any other applicable law, and must publish approved proposed regulations in the Federal Register for a public comment period of 15 to 60 days before promulgating final regulations. 16 U.S.C. § 1854(b). Draft FMPs and amendments to FMPs are proposed regulations subject to this notice and comment provision. 16 U.S.C. § 1853(c). In addition, actions taken by NMFS constituting "rulemaking" under the APA are also subject to that statute's notice and comment provision, unless they qualify for one of its exceptions. *See* 5 U.S.C. § 551(5); 5 U.S.C. § 553.

UCIDA requests a court order declaring that the FMP must manage salmon in state waters and not defer to the state—despite the fact that the federal government does not have jurisdiction over state waters and the MSA allows for delegation to the State. In addition to being outside the scope of this litigation and not ripe for a decision, such a "declaratory ruling" would displace the agency's technical expertise and circumvent APA notice and comment requirements.

As the rulemaking process to this point shows, the commercial drift fishing fleet that UCIDA represents is not the only party with an interest in the continuing vitality of salmon runs in Cook Inlet. For example, the Discussion Paper regarding revisions to the FMP details the Council receiving input from the Cook Inlet Aquaculture Association, the Matanuska-Susitna Borough Fish and Wildlife Commission, the Community of Nikolaevsk, and the Kenai River Sportfishing Association. Dkt. 154 (Discussion Paper, at 22). These groups are somewhat representative of the broad range of interested parties

that use Cook Inlet salmon. Subsistence users, communities that rely on salmon for guided sport revenue and personal use, and other commercial fishing interests all have significant interests in the FMP that ultimately governs fishing in the Cook Inlet EEZ. The entirety of the FMP should be subject to the open process adopted by the Council in accordance with the APA.

The court should allow the FMP to be developed by the Council and proceed through the APA process. Taking UCIDA's invitation to order certain terms be written into the FMP would functionally render the notice and comment period a formality and serve to disenfranchise a large swath of Cook Inlet fisheries resource users.

IV. Agency Action has not been unreasonably delayed.

One of UCIDA's fundamental complaints is that the Council is taking too long to develop an FMP for Cook Inlet. It makes two references to "nearly three years" having passed since the Ninth Circuit remand, despite it having been only just over two years since this court signed the Entry of Judgment remanding the matter to NMFS. Dkt. 102 (Motion to Enforce Judgment, at 10, 23). Further, NMFS estimated that it would need "approximately two years to develop and take final action on a new amendment to the Salmon FMP that addresses the Cook Inlet Area." Dkt. 88, ¶ 21.

While the situation here stems from a violation of the MSA, it is analogous to a court reviewing agency action under the APA, as it involves creation of a new regulation that must comply with the APA. Under the APA, the court may compel "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The court looks to the following "TRAC factors" in assessing whether such judicial intervention is necessary:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;"
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by the delay; and
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 n. 7 (9th Cir.1997) (*quoting Telecommunications Research & Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984).

In this case, there is no colorable argument that NMFS and the Council are unreasonably delaying the process of promulgating an FMP for this very complex fishery. Just over two years have passed since the Entry of Judgment remanded the case to NMFS. During those two years the Alaska Region Administrator has sent six letters to the court describing the progress that the Council is making toward crafting the FMP amendment to address Cook Inlet. Dkt. 105, 119, 136, 139, 147, 150. The letters describe receiving public input and establishing the Cook Inlet Salmon Committee, which was created to (i) "develop options for fishery management measures for specific Council-identified management needs," (ii) "provide perspectives on potential social and economic impacts of proposed fishery management measures," (iii) provide

recommendations to the Council on analytical documents prepared by Council and NMFS staff, and (iv) to provide recommendations on certain FMP requirements at section 303(a) of the MSA. Dkt. 136. The letters also detail federal and state authorities working together to prepare the analysis needed for the Council's consideration and development of status determination criteria for the Cook Inlet salmon stocks and necessary to understand the environmental impacts of alternative status determination criteria. Dkt. 147, 150. The letters show that the agency is working in good faith toward finalizing a rule, not unreasonably delaying the process as UCIDA suggests.

The other TRAC factors do not save UCIDA's request. No human health or welfare is at stake in the present matter and UCIDA cannot convincingly argue that it is being prejudiced by the perceived delay in implementation of the new FMP, as it cannot know whether it would benefit financially under the new federal plan versus the current state management under which commercial fishermen are experiencing historic success.[1]

In short, the TRAC factors do not weigh in favor of judicial intervention into this stage of the rulemaking process.

CONCLUSION

UCIDA's request fails on procedural grounds, and does not justify examining the merits of the Council's proposed FMPs. UCIDA's requested relief falls beyond the scope

[1] The Alaska salmon fishery in 2019, under complete state management, was one of the most successful commercial fishing seasons in Alaska's history with a statewide catch of over 203,000,000 salmon. *See e.g. ADF&G 2019 Preliminary Alaska Commercial Salmon Harvest - Blue Sheet* https://www.adfg.alaska.gov/index.cfm?adfg=commercialbyfisherysalmon.bluesheet (last visited October 2, 2019).

of this litigation, as it raises federalism and state sovereignty issues that have not been litigated in any stage of these proceedings. UCIDA seeks court intervention on a rule that is not yet finalized, and is not yet ripe to litigate. Any such order would essentially circumvent the APA process and lock numerous other stakeholders with interests in the fishery out of the process. Agency action has not been unlawfully withheld or unreasonably delayed and there is no reason for the court to intervene in this stage of the rulemaking process.

The Motion to Enforce Judgment should be denied.

DATED October 2, 2019.

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CERTIFICATE OF SERVICE

I certify that on October 2, 2019 the foregoing was served electronically on all parties via the CM/ECF system.

/s/ Aaron C. Peterson
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