IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION and COOK INLET FISHERMEN'S FUND,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICES; REBECCA BLANK, in her official capacity as the Acting United States Secretary of Commerce; JANE LUBCHENCO, in her official capacity as Administrator, National Oceanic and Atmospheric Administration; and JAMES W. BALSIGER, in his official capacity as NMFS Alaska Region Administrator,

Defendants,

and

STATE OF ALASKA,

Intervenor-Defendant.

Case No. 3:13-cv-00104-TMB

ORDER ON PLAINTIFFS' MOTION TO ENFORCE JUDGMENT (DKT. 151)

I. INTRODUCTION

The matter comes before the Court on Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund's Motion to Enforce Judgment (the "Motion").[1] The National Marine Fisheries Services, Rebecca Blank, Jane Lubchenco, and James Balsiger (collectively, "Defendants") filed an Opposition to the Motion ("Federal Opposition").[2] Intervenor-Defendant

[1] Dkt. 151 (Motion).

[2] Dkt. 157 (Federal Opposition).

State of Alaska ("the State") filed a Memorandum in Opposition to the Motion ("State Opposition").[3] Plaintiffs then filed a Reply in support of the Motion and a Request for Oral Argument, which went unopposed.[4] A hearing on the Motion was held on November 22, 2019.[5] At the hearing, the Court ordered supplemental briefing, which the Parties filed simultaneously on December 16, 2019.[6] The Motion is now ripe for resolution. Based on the record before the Court and for the reasons discussed below, the Motion is **DENIED IN PART AND GRANTED IN PART**.

II. BACKGROUND

In 2013, Plaintiffs filed this action against Defendants challenging the exclusion of the Cook Inlet region from the federal salmon fishery management plan ("FMP") and leaving management of Cook Inlet to the State.[7] The State subsequently moved to intervene as a defendant.[8] After this Court entered summary judgment for Defendants, Plaintiffs appealed.[9] On September 21, 2016, the Ninth Circuit issued its decision, which held that the Magnuson-Stevens Act unambiguously requires a regional fishery council—in this case, the North Pacific Council (the "Council")—to create an FMP for each, entire fishery under its authority that requires

[3] Dkt. 159 (State Opposition).

[4] Dkts. 160 (Reply); 161 (Motion for Oral Argument).

[5] Dkt. 164 (Minute Entry).

[6] Dkts. 165 (Defendants' Supplemental Brief); 166 (Plaintiffs' Supplemental Brief).

[7] Dkt. 1 (Complaint).

[8] Dkt. 12 (Motion to Intervene).

[9] Dkt. 66 (Notice of Appeal).

conservation and management.[10] The Ninth Circuit remanded the case to this Court with instructions that judgment be entered in favor of Plaintiffs.[11]

On remand, the Parties submitted a Joint Motion for Entry of Proposed Judgment, in which the Parties agreed on terms for the Judgment in compliance with the Ninth Circuit decision.[12] The proposed judgment was accepted without revisions and entered on August 3, 2017 ("Judgment').[13] The Judgment requires Defendant NMFS to submit tri-annual status reports to update Plaintiffs and the Court of NMFS's progress toward revising the federal salmon fishery FMP to include management of Cook Inlet.[14] NMFS is also ordered to "work with the [the Council] to ensure that the affected public has appropriate input in the development of any new salmon FMP amendment that addresses Cook Inlet."[15]

On September 4, 2019, Plaintiffs filed the present Motion.[16] Plaintiffs argue that NMFS is not complying with the "letter and spirit" of the Ninth Circuit decision.[17] Specifically, Plaintiffs contend that NMFS is considering revisions to the current FMP that would "improperly narrow

[10] *United Cook Inlet Drift Association v. Nat'l Marine Fisheries Service, et al.*, 837 F.3d 1055, 1065 (9th Cir. 2016).

[11] *Id.*

[12] Dkt. 101 (Joint Motion).

[13] Dkt. 102 (Judgment).

[14] *Id.* at 1.

[15] *Id.*

[16] Dkt. 151.

[17] *Id.* at 19–24.

the scope of inquiry for conservation and management measures in the FMP" and impermissibly defer to State management.[18] Plaintiffs request three forms of relief from this Court, as follows:

1. An order declaring that NMFS and the Council "may not create an FMP that is subservient to or defers to state management goals" but rather the FMP must "provide management goals, objectives, and measures throughout the entire range of the Cook Inlet salmon stocks, including state waters, as required by the Magnuson Act;"[19]

2. An order setting hard deadlines on NMFS and the Council to complete the FMP by the beginning of the 2020 salmon fishing season, or else to negotiate an interim measure to ensure an orderly execution of the 2020 salmon fishing season;[20] and

3. An order appointing a special master to oversee the compliance process on remand, including, if necessary, the negotiations affecting the 2020 salmon fishing season.[21]

In summary, Plaintiffs contend that the development of an FMP on remand has reached an impasse and that judicial intervention is needed to ensure compliance.[22]

On October 2, 2019, Defendants filed the Federal Opposition to the Motion.[23] Defendants assert that they are complying with the Judgment and that Plaintiffs have failed to identify any instance of noncompliance.[24] Instead, Defendants argue, Plaintiffs' Motion seeks to change the terms of the Judgment to "dictate the contents of the new FMP amendment."[25] As such, the Motion should be viewed as a motion to alter or amend the Judgment and should be denied pursuant to

[18] *Id.* at 22–23.

[19] *Id.* at 25.

[20] *Id.* at 25–27.

[21] *Id.* at 27

[22] *Id.* at 28–29.

[23] Dkt. 157.

[24] *Id.* at 6–7, 13.

[25] *Id.* at 9.

Federal Rule 60(b).[26] Defendants further argue that the Court lacks jurisdiction to grant Plaintiffs their requested relief because the Court may only review final agency actions and the Council—which is not a party to this action—is still in the process of drafting the new FMP.[27] Finally, Defendants argue that Plaintiffs have not established that they are entitled to injunctive relief or the appointment of a special master.[28] Defendants conclude that the Motion should be denied.

On the same day, the State filed the State Opposition, which argues that the Motion should be denied on procedural grounds because the issue is not ripe for decision.[29] The State alleges that the Council is "actively working on formulating an FMP, engaging the process that is required to pass [the Magnuson-Stevens Act], [the Administrative Procedure Act], and [National Environmental Policy Act] muster."[30] At this point, the State argues, Plaintiffs seek relief beyond the scope of the Ninth Circuit decision and the Judgment on remand.[31] Furthermore, the State contends that the issue is not ripe to litigate because Plaintiffs are challenging a potential outcome of the deliberative process and not a finalized FMP.[32] In addition, the State explains that the Council's rulemaking process complies with applicable federal rules and procedures, the time it has taken to follow these procedures is not unreasonable delay, and Plaintiffs cannot circumvent

[26] *Id.* at 15–19.

[27] *Id.* at 14–16.

[28] *Id.* 16–20.

[29] Dkt. 159 at 1–2.

[30] *Id.* at 7–8.

[31] *Id.* at 9–11.

[32] *Id.* at 11–14.

the process with judicial intervention.[33] Therefore, the State concludes, that the Motion should be denied.

Plaintiffs filed their Reply on October 14, 2019.[34] In the Reply, Plaintiffs reallege that NMFS is not in compliance with either the Judgment or the Ninth Circuit decision.[35] Plaintiffs also assert that this Court has the authority to supervise the remand because it expressly retained jurisdiction to supervise compliance with the terms of the Judgment and because federal courts have inherent jurisdiction to "manage its proceedings, vindicate its authority, and effectuate its decrees."[36] Plaintiffs argue that, contrary to Defendants' position, Rule 60(b) does not apply to this case and that the issues are ripe for decision because the requisite "final action" occurred when Defendants issued the underlying FMP.[37] Therefore, Plaintiffs reiterate their requests for relief and argue that the Motion should be granted.[38]

On November 22, 2019, the Court heard oral argument on the Motion.[39] At the hearing, Plaintiffs conceded that Defendants have not violated any express terms of the Judgment but are violating the "spirit" of the Ninth Circuit's order on remand. In response, Defendants claim that they are following the appropriate procedures and that in doing so, the process is taking a

[33] *Id.* at 14–18.

[34] Dkt. 160.

[35] *Id.* at 6–7.

[36] *Id.* at 8–9 (quoting *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016)).

[37] *Id.* at 10–13.

[38] *Id.* at 15.

[39] Dkt. 164.

reasonable amount of time. Defendants estimate that they will have an FMP amendment prepared for final action by December 2020.[40]

The Court expressed concern that the development of an FMP for Cook Inlet should not take longer than necessary. Therefore, the Court ordered supplemental briefing with respect to the timing issue. Plaintiffs' Supplemental Brief provides examples of FMPs that Plaintiffs claim took less than two years to finalize.[41] Plaintiffs allege that Defendants are "dragging their feet in the process" of developing an FMP to the detriment of Plaintiffs' salmon fishery.[42] On the other hand, Defendants' Supplemental Briefing offers counterexamples of FMPs that took up to eight years to finalize.[43] Therefore, Defendants maintain that the length of time that has lapsed has been reasonable and judicial intervention is not needed.[44]

III. LEGAL STANDARD

Federal courts have the inherent power to enforce their own judgments.[45] A motion to enforce a court's previous judgment may be granted if the moving party demonstrates that its opponent has not complied with the terms of the judgment.[46] "The court may grant the moving

[40] *See* Dkt. 158 at 11 (Dr. Balsiger's Declaration).

[41] Dkt. 166 at 3–5.

[42] *Id.* at 2, 5–9 (contending Defendants could have been more proactive in certain instances).

[43] Dkt. 165 at 13–15.

[44] *Id.* at 16.

[45] *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Cal. Dep't of Social Serv. v. Leavitt*, 523 F.3d 1025, 1033 (9th Cir. 2008); *State of Cal. v. U.S. Dep't of Labor*, 155 F. Supp. 3d 1089, 1095 (E.D. Cal. 2016).

[46] *State of Cal.*, 155 F. Supp. 3d at 1096 (citing *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004)).

party only that relief to which it is entitled under the original judgment. "[47] "Were this not the rule, motion to enforce would allow an end run around the prevailing part's original burden to establish an injury and entitlement to relief."[48]

A party may also move for relief from a final judgment, order, or proceeding under Federal Rule of Civil Procedure 60(b). The moving party must show that they are entitled to relief under at least one of six circumstances.[49] A motion under Rule 60(b) must be filed within "a reasonable time" and no more than one year from entry of judgment for three of the six listed circumstances.[50]

IV. ANALYSIS

In this case, Plaintiffs are explicitly not moving for relief from judgment under Rule 60(b).[51] Plaintiffs' Motion purports to seek enforcement of the Court's Judgment but it also seeks relief outside the terms of the Judgment, such as ordering interim measures and the appointment of a special master.[52] Plaintiffs are not entitled to the requested relief for two reasons: (1) they

[47] *Id.*

[48] *Id.*

[49] Fed. R. Civ. P. 60(b) (permitting relief from a final judgment for "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.").

[50] Fed. R. Civ. P. 60(c).

[51] *See* Dkt. 160 at 11 ("Rule 60(b) therefore does not apply."). As such, the Court does not find it necessary to engage in a Rule 60(b) analysis to address Plaintiffs' Motion.

[52] *See* Dkt. 151 at 23–27.

have failed to show noncompliance with the terms of the Judgment and (2) the Court does not have authority to grant the relief sought.

A. Compliance with the Judgment

After the Ninth Circuit remanded the case to this Court, the Parties submitted a Joint Motion for Entry of Proposed Judgment.[53] The Court accepted the proposed judgment terms verbatim.[54] In summary, the Judgment requires NMFS and the Council to develop a new salmon FMP that addresses Cook Inlet and file tri-annual status reports regarding their progress.[55] Once the Council adopts an amendment, NMFS must "take final agency action and/or promulgate a final rule" within one year.[56] Plaintiffs may negotiate the deadline for final agency action or the promulgation of the final rule and also Plaintiffs reserve certain rights to seek court-ordered deadlines.[57] Plaintiffs agree that exercising the right for a court-ordered deadline "will not be considered enforcement of this judgment."[58]

Plaintiffs have failed to show that Defendants are not complying with the terms of the Judgment. Rather, Plaintiffs' Motion focuses on the Council's "approach to the FMP," including the content of three proposed amendments that are currently under consideration by the Council.[59] The Judgment provides that NMFS and the Council must develop a salmon FMP in accordance

[53] Dkt. 101 (Joint Motion).

[54] *Compare* Dkt. 101-1 (Proposed Judgment) *with* Dkt. 102.

[55] Dkt. 102 at 1.

[56] *Id.* at 2.

[57] *Id.*

[58] *Id.*

[59] Dkt. 151 at 19–24.

with "[the Council's] Statement of Organization, Practices, and Procedures, including sections 2.3.4 Council Committees, 3.7 Public Hearings, and 3.11 Principles for Stakeholder Involvement."[60] Although the Judgment allows for negotiation, it does not provide specific, enforceable procedures or deadlines NMFS or the Council must follow. Notably, the Judgment expressly does not bind NMFS or the Council "with regard to the contents of the new FMP amendment, which include, but are not limited to, a description of the fishery and conservation and management measures."[61] Therefore, Plaintiffs' two chief complaints—the timeliness of the process and the content of the proposed amendments—are not terms of the Judgment and Plaintiffs have not alleged any other instances of noncompliance.

The length of time that has passed since this case was remanded is understandably frustrating. This Court issued its Judgment in August 2017 and, to date, Defendants have not finalized an FMP amendment. Consequently, Plaintiffs have continued to operate under the State's management and without a valid FMP for nearly two and a half years. Plaintiffs argue that judicial intervention is needed because the case on remand has been pending "with no end in sight."[62] Despite allegations of delay, Plaintiffs do not allege or provide evidence of bad faith stalling this process. On the contrary, Defendants assert that they have been following the appropriate procedures and have made substantial progress.[63] Defendants estimate that the Council could adopt an FMP amendment by December 2020.[64] The Court is persuaded that the Council "is engaged in

[60] Dkt. 102 at 1.

[61] *Id.*

[62] Dkt. 151 at 28.

[63] Dkt. 157 at 10.

[64] *Id.*

the good faith development of a new Amendment" but nonetheless directs Defendants to resolve the process expeditiously.[65] Because the Judgment allows for court-imposed deadlines and such action is not considered enforcement of the Judgment, the Court **HEREBY ORDERS** Defendants adhere to their estimated timeline and adopt a final FMP amendment by **December 31, 2020**.[66] The Court will not entertain additional time without a showing of good cause.

B. Authority to Grant Relief

As for Plaintiffs' other requests, Court does not have the authority to grant such interim relief. Here, the Council is still "actively working on formulating an FMP" and following the requisite procedures.[67] The Council has not yet adopted an amendment to the FMP and so Plaintiffs can only speculate what the potential defects may be in a final FMP. Federal courts have the authority to review an agency's regulations or actions[68] but neither a final rule nor action has taken place here. Any intervening order by this Court would be inappropriate at this time.[69] Plaintiffs may seek review of the final FMP if they still question whether the amended terms comply with the Ninth Circuit's directive on remand.

Similarly, although Plaintiffs argue that the FMP should be established prior to the start of the 2020 fishing season, they also propose interim measures for the 2020 fishing season and until

[65] *See* Dkt. 165 at 15.

[66] *See* Dkt. 102 at 2.

[67] Dkt. 159 at 7–8.

[68] 16 U.S.C. § 1855(f)(1).

[69] *See Golden v. Zwickler*, 394 U.S. 103, 108 (holding that federal courts do not render advisory opinions and adjudication requires concrete legal issues, not abstractions).

an FMP is in place.[70] Plaintiffs, as Council committee members, do not explain why they are not able to negotiate with the Council directly to implement such measures. Interim measures were not considered by the Ninth Circuit decision or the Court's Judgment so this Court does not have the authority to compel such actions.

Finally, the Court finds that appointment of a special master is not appropriate at this time.

V. CONCLUSION

For the foregoing reasons, the Motion at docket 151 is **DENIED IN PART**. The Motion is **GRANTED IN PART** to the extent Plaintiffs seek court-imposed deadlines. Pursuant to the Judgment, Defendants are **HEREBY ORDERED** to prepare and adopt a salmon FMP compliant with the Ninth Circuit's decision **on or before December 31, 2020** and final agency action and/or promulgation of a final rule shall occur within one year thereafter.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 6th day of January, 2020.

/s/ *Timothy M. Burgess*
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

[70] Dkt. 151 at 26–27.