Ryan P. Steen, AK Bar No. 0912084
Beth S. Ginsberg, Admitted *Pro Hac Vice*
Jason T. Morgan, AK Bar No. 1602010
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900 (phone)
(206) 386-7500 (facsimile)

Connor R. Smith, AK Bar No. 1905046
Stoel Rives LLP
510 L Street, Suite 500
Anchorage, AK 99501
(907) 277-1900 (phone)
(907) 277-1920 (facsimile)
connor.smith@stoel.com

Attorneys for United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund

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 SERVICE, et al., Defendants.	Civil Action No.: 3:21-cv-00255-JMK **REMEDY BRIEF BY PLAINTIFFS UNITED COOK INLET DRIFT ASSOCIATION AND COOK INLET FISHERMEN'S FUND**

I. INTRODUCTION

> Although the courts must never forget that our constitutional system gives the Executive Branch a certain degree of breathing space in its implementation of the law, we cannot countenance maneuvering that merely maintains a facade of good faith compliance with the law while actually achieving a result forbidden by court order. . . . At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.[1]

* * * *

This resonates with particular force here. The National Marine Fisheries Service ("NMFS") has failed to comply with its unambiguous statutory mandate to manage the Cook Inlet salmon fishery as required by the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act" or "MSA") since that statute was enacted in 1976. The Ninth Circuit already admonished NMFS to not "shirk the statutory command" of the Magnuson Act or "wriggle out of" of its clear statutory duties.[2] Yet NMFS did just that by approving and implementing Amendment 14. As this Court explained, "Alternative 4 was crafted as a thinly veiled attempt to ensure an absence of federal management, which conflicts with the Ninth Circuit's holding."[3] Now, *six years* after the Ninth Circuit's decision, the Cook Inlet salmon fishery continues to be poorly managed by the State of

[1] *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

[2] *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.* ("*United Cook*"), 837 F.3d 1055, 1063–64 (9th Cir. 2016).

[3] Dkt. 67, Order on Cross Motions for Summary Judgment ("Order"), at 22.

Alaska "based on parochial concerns,"[4] with no federal management whatsoever and, most importantly, no compliance with the Magnuson Act.

Meanwhile, the commercial fishing industry suffers. For example, in 2020, the State so severely restricted commercial fishing in Cook Inlet that the average commercial driftnet permit holder caught less than 800 sockeye salmon *for the entire season.*[5] While the fleet sat mostly idle, the State wasted more than 500,000 sockeye in the Kenai River and 175,000 sockeye in the Kasilof River by missing its management targets. The result was economically disastrous to the commercial fishing industry. Indeed, the Secretary of Commerce ultimately declared the 2020 Cook Inlet commercial salmon fishing season to be a "disaster" under the Magnuson Act. This was, of course, a disaster of the State's own making. Had the State allowed the commercial fishery to catch the harvestable surplus that it wasted, there would have been no disaster for the Cook Inlet commercial fishery. This kind of waste happens nearly every year.[6]

Under these circumstances, the general remedy of vacatur alone will not ensure prompt and necessary relief. NMFS repeatedly failed to carry out its statutory obligations and has wasted many years in the process. Despite years of litigation, Plaintiffs still have not obtained the remedy to which they are entitled—*i.e.*, *lawful* management of the fishery. The Court has discretion to provide additional relief, particularly when, as here, the agency

[4] *Id*. (quoting *United Cook*, 837 F.3d at 1063).

[5] *See* Declaration of Erik Huebsch, filed herewith, ¶ 30.

[6] *Id*. ¶¶ 20-23.

has a demonstrated pattern of recalcitrance in carrying out its statutory obligations.

Accordingly, as explained more fully below, Plaintiffs request the following additional relief:

(1) A declaratory judgment stating that the Magnuson Act requires NMFS to approve a fishery management plan ("FMP") amendment that (a) governs the entire Cook Inlet salmon "fishery" (as defined by the Magnuson Act); (b) specifies the Magnuson Act's key requirements for the content of an FMP, such as specifying the maximum sustained yield ("MSY"); and (c) does not elevate state interests over federal interests.

(2) An order requiring NMFS to issue regulations implementing a new, lawful FMP amendment by no later than June 1, 2023 (*i.e.*, prior to next fishing season). If NMFS does not do so, despite best efforts, the order should impose interim relief for the 2023 season to ensure (a) a fair and adequate salmon fishing opportunity in Cook Inlet in 2023 and (b) management of the fishery in compliance with the Magnuson Act.

(3) An order requiring NMFS to collaborate with Plaintiffs and other stakeholders in preparing a new, lawful FMP amendment.

(4) An order requiring NMFS to produce periodic status reports on its progress during the remand, with an opportunity for Plaintiffs to respond to those reports.

(5) The Court's retention of jurisdiction over this case to ensure full and timely compliance with all aspects of the remedy.[7]

II. STANDARDS FOR GRANTING RELIEF

Vacatur and remand is the common remedy for a violation of the Administrative Procedure Act ("APA").[8] Courts also have the discretion to "to retain jurisdiction over a case pending completion of a remand and to order the filing of progress reports."[9] Such discretion is appropriately applied in "cases alleging unreasonable delay of agency action or failure to comply with a statutory deadline, or for cases involving a history of agency noncompliance with court orders or resistance to fulfillment of legal duties."[10] In such circumstances, the district court may "issue detailed remedial orders" to ensure compliance.[11] In addition, the court has discretion to establish a time limit for the agency to take action on remand.[12]

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[7] Plaintiffs also intend to separately seek an award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C § 2412.

[8] *See Burlington Res. Inc. v. FERC*, 513 F.3d 242, 251 (D.C. Cir. 2008).

[9] *Baystate Med. Ctr. v. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C.), *judgment entered*, 587 F. Supp. 2d 44 (D.D.C. 2008); *Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001) ("[F]ederal courts regularly retain jurisdiction until a federal agency has complied with its legal obligations . . . .").

[10] *Baystate*, 587 F. Supp. 2d at 41 (collecting cases).

[11] *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008).

[12] *Zambrana v. Califano*, 651 F.2d 842, 844 (2d Cir. 1981) (courts "may when appropriate set a time limit for action by the [agency], and this is often done"); *see also Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 501 (D.C. Cir. 1988) (ordering "district court to establish, in consultation with the parties, an expedited schedule for further rulemaking proceedings").

District courts also have equitable discretion to provide interim relief pending completion of a remand.[13] "While the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."[14] In particular, courts may order declaratory and injunctive relief designed to preclude a federal agency from acting in contravention of its statutory authority.[15] Courts may also require an agency to modify its current or future practices in order to account for past violations of its statutes or regulations.[16]

The Ninth Circuit recognizes the need for district courts to use a firmer hand in response to agency recalcitrance to carry out required mandates. For example, in *Alaska Center for the Environment v. Browner*, the Ninth Circuit affirmed a district court decision to direct EPA "to take specific steps" where the agency failed "to take any steps to establish" water quality standards that had been "mandated by Congress for more than a

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[13] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 823-24 (9th Cir. 2018) (affirming interim injunction requiring federal agencies to alter operations of federal hydropower projects on an experimental basis during remand).

[14] *Ind. & Mich. Elec. Co. v. Fed. Power Comm'n*, 502 F.2d 336, 346 (D.C. Cir. 1974).

[15] *See Howard v. Pierce*, 738 F.2d 722, 730 (6th Cir. 1984) (court may award declaratory and injunctive relief in order to ensure that agency adopted regulations consistent with the statute).

[16] *See Nw. Env't Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) (agencies' unlawful authorization of overfishing of salmon could be remedied by injunctive relief in the form of "higher escapement provisions and lower quotas").

decade."[17] The Ninth Circuit explained that Congress cannot always "foresee the precise nature of agency dereliction of duties that Congress prescribes," and that "[w]hen such dereliction occurs, it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy."[18]

III. ARGUMENT

A. Declaratory Relief Is Necessary and Appropriate to Ensure Compliance with the Magnuson Act.

Declaratory relief in this case is necessary to avoid another wasted remand.[19] NMFS has twice attempted to shirk its statutory duties to the detriment of the Cook Inlet salmon fishery and the fishermen and communities who rely on it for their livelihoods. NMFS has done so by finding (unlawful) ways to support its persistent belief that the State should manage the fishery without oversight. Most recently, NMFS "abandon[ed] its responsibilities in favor of deferral to the State," "open[ing] the door for state management that is inconsistent with, and free from, oversight by the federal agencies ultimately tasked with conservation and management of the fishery."[20] NMFS did so despite crystal clear

[17] 20 F.3d 981, 986 (9th Cir. 1994).

[18] *Id.* at 987.

[19] *See Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("[A] request for declaratory relief may be considered independently of whether other forms of relief are appropriate."); *Swanson Grp. Mfg. LLC v. Bernhardt*, 417 F. Supp. 3d 22, 30 (D.D.C. 2019) ("[T]he Court may declare the agency's failure to act as unlawful and compel the agency to act." (citation omitted)).

[20] Dkt. 67 at 30 of 54.

instructions from the Ninth Circuit to the contrary.[21] Declaratory relief is needed to ensure that NMFS's stubborn, incorrect beliefs do not again carry forward into the next remand.

Accordingly, Plaintiffs request a declaratory judgment stating the following instructions:

1) NMFS must produce an FMP amendment for Cook Inlet that covers the entire Cook Inlet salmon "fishery" as defined by the Act.[22]

2) The FMP amendment must specify the MSY, optimum yield ("OY"), accountability measures, and any other applicable metrics for the fishery, as required and defined by the Act.[23]

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[21] *See, e.g.*, *United Cook*, 837 F.3d at 1063.

[22] 16 U.S.C. § 1852(h)(1) (requiring—"shall" prepare—an FMP "for each fishery under its authority that requires conservation and management"); 16 U.S.C. § 1802(13) (defining "fishery" as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management" and "any fishing for such stocks"); *United Cook*, 837 F.3d at 1065 ("The Magnuson-Stevens Act unambiguously requires a Council to create an FMP for each fishery under its authority that requires conservation and management."); 16 U.S.C. § 1851(a)(3) ("To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range . . .").

[23] 16 U.S.C. § 1853(a)(3) (FMP required to "assess and specify . . . the maximum sustained yield and optimum yield from[] the fishery"); *id.* § 1853(a)(15) (FMP required to "establish a mechanism for specifying annual catch limits in the plan" and "including measures to ensure accountability"); *see also* Dkt. 67 at 17-18 ("the Ninth Circuit determined that Cook Inlet is a fishery within NMFS's jurisdiction requiring conservation and management pursuant to the Act"); *see id.* at 23 (discussing the Act's requirements for an FMP regarding annual catch limits and optimum yield); *id.* at 29 ("The Magnuson-Stevens Act surely does not intend for the State of Alaska to be the sole arbiter of conservation and management without any federal stewardship.").

3) The FMP may not elevate the interests of the State of Alaska over the federal interests in the fishery or create a management plan that is subservient to State interests.[24]

This limited declaratory relief will ensure that NMFS produces an FMP amendment that complies with what "[t]he Magnuson-Stevens Act unambiguously requires," while at the same time leaving the ultimate substance of the FMP amendment up to the agency.[25] It leaves little room for NMFS to again "wriggle out" of its statutory duties.

B. The Court Should Impose a Deadline for Completion of the Remand.

"Ninth Circuit precedent expressly permits imposition of deadlines on the remand process."[26] "For example, [the Ninth Circuit has] found that a court has discretionary authority to impose deadlines on remand proceedings and that requiring regular status reports during remand is 'clearly permissible.'"[27] A deadline is plainly needed on remand in this case since it has been *six years* since the *United Cook* decision and *no progress* has

[24] *United Cook*, 837 F.3d at 1063 ("[F]ederal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."); *see also* Dkt. 67 at 30 ("The plan for continuous federal management cannot consist of the agency abandoning its responsibilities in favor of deferral to the State.").

[25] *United Cook*, 837 F.3d at 1065.

[26] *Intertribal Sinkyone Wilderness Council v. Nat'l Marine Fisheries Serv.*, No. 1:12-CV-00420 NJV, 2013 WL 8374150, at *2 (N.D. Cal. Nov. 26, 2013).

[27] *Id.* (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 937 (9th Cir. 2008)).

been made. The fishery continues to suffer mismanagement in the absence of a valid FMP.[28]

1. The Court Should Require a New FMP Amendment and Final Rule to Be Completed by June 1, 2023.

Two viable options exist for NMFS to complete a new FMP amendment and final rule by June 2023. The first option is for the Council to develop a new FMP amendment and for NMFS to approve the amendment and issue implementing regulations.[29] The history in this case demonstrates that this is possible by June 1, 2023. Although the Council process leading up to Amendment 14 stretched from April 2017 until December 2020, the alternative that was ultimately adopted as Amendment 14 was *first* introduced at the October 12, 2020 Council meeting and voted on at the December 2020 meeting.[30] After the December 2020 Council meeting, it only took NMFS until June 4, 2021 to write the FMP amendment and promulgate a proposed rule implementing the chosen alternative.[31] NMFS ultimately issued its Final Rule on November 2, 2021, one year and 21 days after the alternative was first introduced to the Council and 11 months after the Council adopted the alternative.[32]

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[28] *See infra* at Section III.B.2.c.ii (discussing prejudice that has occurred and will continue without the Court's intervention on remand).

[29] *See* 16 U.S.C. §§ 1852, 1853, 1854(a) and (b).

[30] *See* Dkt. 67 at 11-12.

[31] *Id.* at 12.

[32] *Id.*

NMFS's last-minute alacrity occurred because of the court-ordered deadline requiring that "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."[33] Although NMFS failed to produce a *compliant* FMP, NMFS's actions in response to the Court's order demonstrates that a court-ordered deadline is an effective tool to prompt NMFS to timely act.[34]

To the extent NMFS believes it cannot issue a new final rule by June 1, 2023, pursuant to the Council-initiated process, then there is another viable, and more efficient, option. Specifically, Section 304(c) of the Magnuson Act allows "[t]he Secretary [to] prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this chapter, and any other applicable law."[35] These are known as "Secretarial Amendments." For example, Section 304(c)(1)(C) allows for a Secretarial Amendment if "the Secretary is given authority to prepare such plan or amendment under this section."[36] This Court may,

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[33] *See United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, No. 3:13-cv-00104-TMB, 2020 WL 1061794, at *5 (D. Alaska Jan. 6, 2020) (emphasis omitted), *aff'd*, 807 F. App'x 690 (9th Cir. 2020).

[34] *See Nat. Res. Def. Council v. Evans*, 290 F. Supp. 2d 1051, 1053 (N.D. Cal. 2003) ("A former NMFS official testified that the agency frequently shifts staff, resources and priorities to meet court-ordered deadlines.").

[35] 16 U.S.C. § 1854(c).

[36] 16 U.S.C. § 1854(c)(1)(C); *see also* 16 U.S.C. § 1855(d) (authorizing the Secretary to promulgate regulations to "carry out any fishery management plan or amendment approved or prepared by him").

and should, give the Secretary authority to prepare an MSA-compliant FMP amendment pursuant to Section 304(c)(1)(C).[37] NMFS could certainly prepare a new FMP amendment and issue a final rule by the June 1, 2023, if it believes it could not do so using the Council process. In addition, or in the alternative, NMFS could develop a Secretarial Amendment under Section 304(c)(1)(A) if the "Council fails to develop and submit [an FMP amendment] to the Secretary, after a reasonable period of time."[38] The Council has already twice failed to produce a lawful FMP amendment, and NMFS could therefore proceed to prepare a Secretarial Amendment under Section 304(c)(1)(A). The Court's order should make clear NMFS's ability to proceed with a Secretarial Amendment under either Section 304(c)(1)(A) or Section 304(c)(1)(C) if such action is needed in order to meet the June 2023 deadline.

2. The Court Should Include a Contingency Plan in Its Remedy Order.

The unfortunate history of this case is the best evidence of why it is necessary for this Court to include a contingency plan in its remedy order to address unexcused delays. The trajectory of the prior remand was circular, bringing Plaintiffs back to the same position they were in when the Ninth Circuit ruled in their favor six years ago. *Lawful*

[37] *See Evans*, 290 F. Supp. 2d at 1057 ("The Secretary is hereby given authority to prepare or cause to be prepared and approve or adopt rebuilding plans for the species listed in this order pursuant to 16 U.S.C. § 1854(c)(1)(C) of the [MSA]."); *id*. at 1053 ("The Court could order elimination of the 'scoping' hearings, in fact, elimination of the Council entirely would greatly speed the proceedings."); *id*. at 1056 ("Congress understood that the Councils could be a source of delay[.]").

[38] 16 U.S.C. § 1854(c)(1)(A).

progress is now more crucial than ever.[39] Plaintiffs therefore request that this Court include two substantive interim protections in its remedy order that would take effect if NMFS fails to issue a new, lawful FMP amendment and final rule by June 1, 2023.[40]

These requested protections are described in the two following subsections. The third subsection below addresses the legal bases supporting these interim protections.

a. Part One—regular fishing days for the 2023 fishing season.

The State of Alaska's regulation—Alaska Admin. Code tit. 5, § 21.320—regarding regular fishing periods provides for open fishing periods Mondays and Thursdays from 7:00 AM until 7:00 PM. The Court should require that the fishery will be open on these days, at a minimum, in the 2023 season for commercial fishing on an inlet-wide basis. Plaintiffs need this certainty prior to the 2023 fishing season so that they can make the investment needed to prepare for the fishing season.[41]

b. Part Two—MSA-compliant management of the fishery.

If the FMP cannot be completed by June of 2023, the Court should require the fishery to be managed by NMFS and the State in a good faith effort to meet the requirements of the Magnuson Act during fishing season 2023. Full compliance with the

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[39] *See infra* at Section III.B.2.c.ii.

[40] *See Seattle Audubon Soc. v. Moseley*, 798 F. Supp. 1494, 1497 (W.D. Wash. 1992) ("[A] district court has the authority to 'order the relief it considers necessary to secure prompt compliance' with the law. Federal courts have often found it necessary to order administrative agencies to take particular steps, and to do so by specified times." (internal citations omitted)).

[41] Declaration of Erik Huebsch ¶¶ 8-10, 26, 28, 31-34.

MSA, of course, can only be achieved through a proper FMP that meets the national standards. Nonetheless, there are a few straightforward interim requirements that could be imposed to push the fishery in the direction of compliance, while at the same time alleviating some of the ongoing harm to commercial fishing interests if a compliant FMP cannot be achieved in 2023.

The Magnuson Act requires that fisheries be managed for "optimum yield," which must be set on the basis of MSY.[42] The State historically managed salmon in a manner intended to achieve MSY by setting "escapement goals" that sought to achieve MSY within a range of plus or minus 10 percent.[43] Setting escapement goals to achieve MSY is a generally accepted fishery management practice, and involves managing the fishery to allow sufficient spawners to escape and reproduce.[44]

But over the last two decades, two clear problems have arisen with the State's management. *First*, it stopped setting escapement goals to achieve MSY.[45] For Kenai sockeye, for example, the State created a "sustainable escapement goal" of 750,000 to 1.3 million sockeye, and then abandoned its own "sustainable" escapement goal in favor of an

[42] 16 U.S.C. §§ 1802(33) 1851(a)(1); 50 C.F.R. § 600.310(e)(1)(i)(A) ("MSY is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics (e.g., gear selectivity), and the distribution of catch among fleets.").

[43] Huebsch Decl. ¶¶ 7, 17-19.

[44] *Id*. ¶ 7.

[45] *Id*. ¶¶ 13-16.

"in-river run goal" that ranges between 1 million and 1.6 million (depending on run size).[46] *Second*, the State has consistently failed to manage the fishery so that escapement actually falls with its (hugely) inflated escapement goal ranges.[47] Escapement for the Kenai sockeye fishery alone in 2021 was 2.4 million—meaning more than 1.2 million sockeye over the high end of the "sustainable" goal range were lost to harvest.[48] This year, the Kasilof sockeye fishery had an escapement of 971,604, when the State's own "biological escapement goal" is only 140,000 – 320,000 spawners.[49]

This lost harvest opportunity is not accidental. The State intentionally manages Cook Inlet stocks to *exceed* the "sustainable" or "biological" escapement goals that are established by the State itself.[50] The State bypasses its own escapement goals by setting "in-river run" goals for Cook Inlet stocks that far exceed the escapement goals. In other words, the State intentionally manages the Cook Inlet stocks to *not* meet MSY and to greatly exceed the State's own "sustainable" or "biological" escapement goals.

This directly contradicts the Magnuson Act.[51] Accordingly, if a new final rule is not issued by June 1, 2023, this Court's remedy order should require that the Cook Inlet salmon

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[46] *Id.* ¶ 21.
[47] *Id.*
[48] *Id.*
[49] *Id.* ¶¶ 22-23.
[50] *Id.* ¶¶ 21-24, 27.
[51] 16 U.S.C. §§ 1802, 1853(a)(3); § 1851(a) (requiring fisheries to be managed in accordance with national standards for conservation and management); 50 C.F.R. §§ 600.305 – .355 (same).

fishery must be managed in a good faith effort to meet MSY. While it may be NMFS's obligation to determine the exact parameters of optimum yield and MSY in the first instance on remand, as an interim measure, the Court can require the State to manage the fishery, at the very least, to ensure that it meets its own "sustainable" escapement goal for Kenai River and "biological" escapement goal for the Kasilof River. These are the two most important commercial fishing runs in Cook Inlet, and requiring compliance with these two goals as an interim measure would significantly reduce lost harvest in 2023. This is uncomplicated as the State can (and should) simply manage the fishery to meet the escapement goals the State has already established.

c. The interim measures described above can be accomplished in two ways.

There are two ways that the above-requested interim measures can be supported and implemented. First, the Court may order NMFS to issue an interim rule under the Magnuson Act establishing the two measures before June 1, 2023, if NMFS does not believe it can issue a final rule by that date. Second, the Court may enjoin the State of Alaska, as an intervenor-defendant as of right, to comply with the above two measures in its management of the fishery.[52]

[52] The State of Alaska is managing the fishery until a new FMP amendment and final rule is issued. *See* Entry of Judgment, *United Cook*, No. 3:13-cv-00104-TMB, ECF 102 (Aug. 3, 2017), ¶ 1.

(i) NMFS may issue emergency or interim measures under the Magnuson Act.

Section 305(c) of the Magnuson Act provides:

> If the Secretary finds that an emergency exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency or overfishing, without regard to whether a fishery management plan exists for such fishery.[53]

Case law establishes that NMFS may promulgate emergency and interim rules to comply with court orders.[54] Thus, to the extent NMFS is unable to meet a court-ordered deadline of June 1, 2023 for the completion of a new FMP amendment and final rule, it has authority to issue emergency or interim measures to govern the fishery. The Court should require NMFS to timely assess, during the remand, whether it will meet the June 1, 2023 deadline and, if NMFS determines in good faith that it will not do so, then the remedy order should instruct that NMFS must timely issue an emergency or interim rule applicable for the 2023 fishing season to effectuate Part One and Part Two above.[55] To the extent such an order is

[53] 16 U.S.C. § 1855(c).

[54] *Hawaii Longline Ass'n. v. Nat'l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 8 (D.D.C.), *on reconsideration in part*, 288 F. Supp. 2d 7 (D.D.C. 2003) ("NMFS promulgated an emergency interim rule to comply with the CMC court's injunctive orders."); *see also* 65 Fed. Reg. 51,992 (Aug. 25, 2000); *Nat. Res. Def. Council v. Gutierrez*, No. C 01-0421JL, 2007 WL 1518359, at *5 (N.D. Cal. May 22, 2007) (requiring NMFS to establish an interim rule by a specific deadline).

[55] *See Nat'l Wildlife Fed'n*, 524 F.3d at 936 (district court has authority to issue order requiring NMFS to provide a "failure report" to the district court if it believed the agencies would be unable to meet the court's deadline for agency action).

characterized as injunctive relief, Plaintiffs are entitled to such relief for the reasons set forth below.

(ii) The Court may enjoin both NMFS and the State of Alaska to manage the fishery consistent with Part One and Part Two above.

Injunctive relief is necessary and proper here because Plaintiffs have prevailed on the merits but will be irreparably harmed if NMFS and the State of Alaska[56] do not manage the fishery in compliance with the Magnuson Act and in the event a new, lawful final rule is not issued before the next fishing season.[57] "[A] district court has broad discretion to fashion injunctive relief."[58] To obtain this type of injunctive relief, a plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent

[56] As a full-party intervenor, the State is subject to injunctive relief. *See Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 483 (9th Cir. 2022) (holding that where an intervenor-defendant brought itself into the litigation under Fed. R. Civ. P. 24(a), "[i]t would defy logic to now hold that the injunction as applied to [intervenor-defendant] is overly broad"); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) ("Intervenors under Fed. R. Civ. P. 24(a)(2) . . . enter the suit with the status of original parties and are fully bound by all future court orders.").

[57] *See N.C. Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 667 (E.D. Va. 1998) (granting injunctive relief against NMFS when the Secretary had abdicated his responsibilities under the Magnuson Act and failed to comply with the court's prior order).

[58] *Melendres v. Maricopa Cnty.*, 897 F.3d 1217, 1221 (9th Cir. 2018).

injunction."[59]

Plaintiffs have plainly suffered irreparable injury (for well over six years) and will continue to suffer such injury until the fishery is managed in compliance with the Magnuson Act. This injury is described in detail in the Declaration of Erik Huebsch.[60] Unless NMFS produces a lawful final rule before the next fishing season, injunctive relief is the only remedy that will prevent Plaintiffs' harm from continuing through 2023. There is no monetary remedy available to Plaintiffs for the Defendants' destruction of their members' livelihoods; the waste of numerous salmon that go unharvested each year and that will predictably go unharvested in 2023 without further relief; the reduction in the value of Plaintiffs' members' vessels, gear, and limited entry permits; and the years of Plaintiffs' members' lives spent attempting to obtain from Defendants what the law requires.[61]

Additionally, the balance of hardships weighs strongly in favor of Plaintiffs. Defendants have disregarded clear instructions given by the Ninth Circuit. The State of Alaska finagled that result in pursuit of its desire to supplant the federal interest in this fishery with the State's parochial interest, and NMFS facilitated and ultimately effectuated that unlawful outcome. There is *no hardship* to either NMFS or the State of Alaska in being

[59] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010) (citation omitted).

[60] Huebsch Decl. ¶¶ 20-24, 29-35.

[61] *Id*.

required to do what the Magnuson Act plainly requires. In contrast, Plaintiffs' members have weathered extreme hardship throughout this saga and will continue to do so until the fishery is lawfully managed.[62]

Finally, injunctive relief will serve the public interest. Here, the public interest is established by the Magnuson Act, which "makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."[63] Requiring NMFS and the State of Alaska to manage the fishery consistent with the Magnuson Act (if a final rule is not timely issued) during the 2023 fishing season is therefore squarely in the public interest. The extensive record in this case also supports that conclusion as do the briefs of the *amicus curiae* filed in support of Plaintiffs.[64]

The Court should therefore issue an injunction that requires both NMFS and the State of Alaska to comply with Part One and Part Two above for the 2023 fishing season (should a final rule not be timely issued). The injunction should require (i) NMFS to effectuate Part One and Part Two through issuance of an interim rule and (ii) the State to comply with Part One and Part Two regardless of whether or not NMFS timely issues an interim rule.

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[62] *See id*. ¶ 35.

[63] *United Cook*, 837 F.3d at 1063-64.

[64] *See* Dkts. 48-51 (orders granting filing of amicus briefs).

C. The Court Should Require NMFS to Collaborate with Plaintiffs in the Development of the FMP.

The Court has discretion to order collaboration with Plaintiffs on remand when, as here, NMFS has been recalcitrant.[65] The prior remand order did not require NMFS to collaborate with Plaintiffs, and the result was a farce. The Council created a Salmon Stakeholder Committee ("the Committee"), but refused to accept Plaintiffs' recommendations for who should be on the Committee and ultimately refused to consider the Committee's work.[66] The public process, too, was entirely irrelevant. As NMFS's Regional Director admitted, there was "a failure to communicate" with the public, and the "council action did not reflect the request of the 230 public commenting letters or the oral comment from 30 people who testified at the meeting."[67] This led to the "state [having] an overriding interest in which an alternative was selected[, which] was crafted as a thinly veiled attempt to ensure an absence of federal management."[68] Under these circumstances, NMFS should be required to collaborate with Plaintiffs on remand.

D. The Court Should Retain Jurisdiction to Ensure Compliance.

"Generally, a remand order is an interlocutory order that does not divest a court of

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[65] *See Nat'l Wildlife Fed'n*, 524 F.3d at 937 ("[C]ollaboration requirement is justified both as a reasonable means to ensure that NMFS complies with ESA's mandate . . . and as a reasonable procedural restriction given the history of the litigation.").

[66] *See* Dkt. 38 at 21-22 of 50.

[67] AR_0013023.

[68] Dkt. 67 at 22.

jurisdiction over a case."[69] "[T]he court retains jurisdiction after remand to oversee the agency's actions in compliance with the court's directive."[70] It has been six years since the Ninth Circuit instructed NMFS to prepare a lawful FMP amendment for the Cook Inlet salmon fishery.[71] But Plaintiffs are situated no differently than they were at that time. "There is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough.'"[72]

The Court should therefore retain jurisdiction over this case to ensure that NMFS complies with *all aspects* of the remedy order (as requested above), including the preparation of an FMP amendment and final rule that comply with the requested declaratory relief. Additionally, the Court should require NMFS to file monthly status reports with the Court, explaining the progress that has been made.[73] Plaintiffs should be allowed an opportunity to respond, as needed, to those status reports to avoid NMFS

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[69] *Avery v. Sec'y of Health & Hum. Servs.*, 762 F.2d 158, 163 (1st Cir. 1985); *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990) ("in general, remand orders are not considered final").

[70] *Nat. Res. Def. Council v. Evans*, 243 F. Supp. 2d 1046, 1047 (N.D. Cal. 2003); *see also Nat'l Wildlife Fed'n*, 886 F.3d at 815 (affirming district court's decision to retain jurisdiction to ensure compliance).

[71] *United Cook*, 837 F.3d at 1064-65.

[72] *Ctr. for Biological Diversity v. Ross*, No. CV 18-112 (JEB), 2020 WL 4816458 (D.D.C. Aug. 19, 2020) (quoting *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d at 627).

[73] *Nat. Res. Def. Council v. Evans*, No. C 01-0421 JL, 2004 WL 2271595, at *5 (N.D. Cal. Mar. 29, 2004) (court may maintain jurisdiction to ensure its orders are complied with).

repeating prior errors.[74]

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court to enter a remedial order consistent with the relief described above, and as outlined in Plaintiffs' proposed order filed herewith.

DATED this 6th day of September, 2022.

/s/ Jason T. Morgan
Jason T. Morgan, AK Bar No. 1602010
Ryan P. Steen, AK Bar No. 0912084
Beth S. Ginsberg, Admitted *Pro Hac Vice*
Connor R. Smith, AK Bar No. 1905046

Attorneys for United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund

Certification: Pursuant to Local Civil Rule 7.4(a)(1), this brief contains 5,699 words.

[74] *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 1000 (9th Cir. 2000) (court's "authority to 'enforce' an existing requirement is more than the authority to declare that the requirement exists and repeat that it must be followed.").

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court, District of Alaska by using the CM/ECF system, which will send notice of such filing to counsel of record.

/s/ Jason T. Morgan
Jason T. Morgan, AK Bar No. 1602010