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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,

and

STATE OF ALASKA,

Intervenor-Defendant.

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

MOTION TO ENFORCE JUDGMENT

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United Cook Inlet Drift Association et al. v. NMFS et al., 3:13-cv-00104-TMB

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I. INTRODUCTION

Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen’s Fund (collectively “UCIDA” or “Plaintiffs”) seek to enforce the mandate of the Ninth Circuit in *United Cook Inlet Drift Ass’n v. National Marine Fisheries Service*, 837 F.3d 1055, 1064 (9th Cir. 2016) (“*United Cook*”), as well as the stipulated judgment entered by this Court at Dkt. 102. In *United Cook*, the Ninth Circuit held that the National Marine Fisheries Service (“NMFS”) violated the Magnuson Stevens Fishery Conservation and Management Act (“Magnuson Act” or “MSA”) by exempting the Cook Inlet salmon fishery from federal management “because the agency is content with State management.”¹ The Ninth Circuit found that NMFS and the North Pacific Fishery Management Council (the “Council”) are **required** to produce a fishery management plan (“FMP”) for the Cook Inlet salmon fishery pursuant to the Magnuson Act.² Accordingly, this Court remanded the case back to NMFS to produce an FMP for the fishery, as the Ninth Circuit instructed.

This Court retained jurisdiction to oversee compliance during remand.³ As part of that supervision, this Court has the authority to issue orders to enforce compliance with

¹ 837 F.3d at 1057; *see id.* at 1064-65.

² 16 U.S.C. §§ 1801-1891d.

³ Dkt. 102.

the Ninth Circuit's mandate and to set reasonable deadlines for compliance.⁴ Judicial intervention is urgently needed because the remand process has far outstripped the expected timeframe and now has no apparent end in sight. The remand process has stalled because NMFS, the Council, and UCIDA have reached an "impasse" over the scope of NMFS's legal obligations under the Magnuson Act and the Ninth Circuit's decision in this case. In short, NMFS and the Council expressly intend to continue to leave the management of the fishery to the State, whereas UCIDA maintains that the Ninth Circuit's holding forbids this practice. Judicial intervention is needed to break this logjam and bring the remand to an expeditious conclusion.

Judicial intervention is also urgently needed because UCIDA's members cannot afford to wait any longer for the required FMP. In the three seasons under State management (2017, 2018, and 2019) since the Ninth Circuit issued its mandate, the commercial fishery has precipitously declined. The 2018 commercial harvest was *the* worst in more than 40 years, and the 2017 and 2019 seasons were amongst the worst in that same period. Compounding that injury, in each of these three seasons, millions of surplus salmon went unharvested. If these circumstances continue, the Cook Inlet commercial salmon fishery will not survive. A judicial ruling issued years from now finding that NMFS and the Council failed to fulfill the express requirements of the Ninth

⁴ *N.C. Fisheries Ass'n, Inc. v. Evans*, 152 F. Supp. 2d 870, 882 (E.D. Va. 2001) (granting plaintiff's motion to enforce court's prior order to issue "quotas in a reasonable and timely fashion" after Secretary of Commerce failed to meet the imposed deadlines).

Circuit’s decision (should the present unlawful course be allowed to continue) will be cold comfort to a fishery that has expired under State management in the interim.

To fix this urgent problem, UCIDA requests that this Court (a) issue a declaratory ruling to clarify NMFS and the Council’s obligations on remand under the Ninth Circuit’s holding and the Magnuson Act, (b) set express timelines for the Council and NMFS to complete their work on the FMP consistent with those instructions, and (c) appoint a special master to ensure compliance with those orders.

II. BACKGROUND

A. The Magnuson Act Is the National Charter for Fishery Management

The MSA “creates a ‘national program for the conservation and management of the fishery resources of the United States.’”⁵ The MSA calls out anadromous stocks like salmon as an important national resource.⁶ The “declared” purpose of the MSA is to “take immediate action to conserve and manage the fishery resources found off the coasts of the United States, *and* the anadromous species,” like salmon.⁷

⁵ *United Cook*, 837 F.3d at 1057 (quoting 16 U.S.C. § 1801(a)(6)).

⁶ 16 U.S.C. § 1801(a)(1) (“The fish off the coasts of the United States . . . and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources.”); *id.* § 1802(1) (“The term ‘anadromous species’ means species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.”).

⁷ *Id.* § 1801(b)(1) (emphasis added).

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The MSA’s purpose is to put these national fishery resources under “sound management” and “to realize the full potential of the Nation’s fishery resources.”⁸ This includes both conservation measures to prevent overfishing, as well as a “national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry.”⁹

The primary mechanism for providing that sound management is the development of an FMP “which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.”¹⁰ The MSA defines ““fishery”” to mean “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.”¹¹

The MSA prescribes required elements of every FMP.¹² Among other things, an FMP must include “conservation and management measures, applicable to . . . fishing by vessels of the United States, which are. . . consistent with the national standards.”¹³ The FMP must also “assess and specify . . . the maximum sustainable yield and optimum yield from[] the fishery” and “assess and specify . . . the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum

⁸ *Id.* § 1801(a)(5), (7).

⁹ *Id.* § 1801(a)(7).

¹⁰ *Id.* § 1801(b)(4).

¹¹ *Id.* § 1802(13).

¹² *Id.* § 1853(a).

¹³ *Id.* § 1853(a)(1).

yield.”¹⁴ The FMP must also set “annual catch limits” for the fishery that apply to fishing vessels of the United States.¹⁵

The FMP and its conservation measures must meet 10 national standards set forth by the MSA.¹⁶ So, for example, National Standard 1 requires that the FMP “prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”¹⁷ National Standard 3 requires that, “[t]o the extent practicable, an individual stock of fish shall be managed *as a unit throughout its range*, and interrelated stocks of fish shall be managed as a unit or in close coordination.”¹⁸ National Standard 4 requires that any allocation of fishing rights be “fair and equitable” to fishermen and “shall not discriminate between residents of different States.”¹⁹

Although NMFS may “delegate authority over a federal fishery to a state, [it] must do so expressly in an FMP.”²⁰ This may only occur if, at all times, the “State’s laws and regulations are consistent with such fishery management plan.”²¹ And, of course, this may only occur if NMFS has first established an FMP under the *federal* statutory

¹⁴ *Id.* § 1853(a)(3), (a)(4)(A).

¹⁵ *Id.* § 1851(a)(1)-(10).

¹⁶ *Id.* § 1851.

¹⁷ *Id.* § 1851(a)(1).

¹⁸ *Id.* § 1851(a)(3) (emphasis added).

¹⁹ *Id.* § 1851(a)(4).

²⁰ *United Cook*, 837 F.3d at 1063.

²¹ 16 U.S.C. § 1856(a)(3)(B); *see id.* § 1853(b)(5) (allowing NMFS to incorporate state regulations that it has determined to be consistent with federal law into an FMP).

principles set forth above (otherwise there would be no point of comparison to determine the consistency of any state regulations).

B. The Cook Inlet Commercial Salmon Fishery

“Cook Inlet is one of the nation’s most productive salmon fisheries.”²² The Cook Inlet sockeye run in particular has historically been world class, with the potential to produce millions of adult salmon returns annually.

Prior to statehood, the Cook Inlet salmon fishery was managed by the Department of Interior. As a condition of statehood, Alaska was allowed to manage the Cook Inlet salmon fishery provided that “the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad *national interest*.”²³ In 1979, the Council produced an FMP for salmon fisheries in Alaska. For Cook Inlet, the Council admitted that the fishery was “technically” in federal waters, but allowed the State to continue to manage the fishery as a state-water fishery.²⁴ When this practice was challenged by Plaintiffs in 2010, NMFS amended the FMP to remove the Cook Inlet salmon fishery from the scope of the federal plan.²⁵

During the last two decades, the commercial harvest in Cook Inlet has steadily declined. In the 1980s and 1990s, the sockeye harvest alone ranged consistently from 4 -

²² *United Cook*, 837 F.3d at 1057.

²³ Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 341 (1958) (emphasis added).

²⁴ *United Cook*, 837 F.3d at 1058.

²⁵ *Id.* at 1060.

9 million sockeye per year. The 10-year average annual commercial catch from 2008 to 2017 is now down to 2.7 million sockeye.²⁶ All three seasons since the Ninth Circuit issued its decision have been far below that average.²⁷ The commercial sockeye harvest was about 1.8 million in 2017 and 2019, and commercial sockeye harvest in 2018 was only 814,516, the worst harvest in over 40 years.²⁸ The total commercial harvest of all five salmon species in 2018 was approximately 1.3 million salmon, which was 61% less than the recent 10-year average annual harvest of 3.4 million fish.²⁹

This period of historically low salmon harvest has coincided with the State's decision to gradually restrict the commercial fishery year after year to the point where most openings are severely geographically limited to a narrow band, which prevents the fishery from targeting areas where salmon congregate.³⁰ At the same time, the State has continued to increase "escapement" levels to record high (and likely unsustainable) levels.³¹ Even with inflated escapements targets, the restrictions on commercial fishing are so significant that the State still regularly exceeds those escapement goals (e.g. the Kenai in-river sockeye goal has been exceeded nine out of the last 10 years).³² This has resulted in severe financial hardship to the participants in the Cook Inlet salmon fishery,

²⁶ Declaration of Erik Huebsch ("Huebsch Decl.") ¶ 30.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at ¶¶13-16; Declaration of Jeff Fox ("Fox Decl.") ¶¶ 7, 9, 12.

³¹ Huebsch Decl. ¶ 15; Fox Decl. ¶¶ 15-17.

³² Huebsch Decl. ¶ 15; Fox Decl. ¶ 10.

as well as the businesses that rely on the commercial harvest. Twenty years ago, Cook Inlet had 23 major salmon processors; now it is down to four.³³

C. The Ninth Circuit Held That an FMP Is Required for the Cook Inlet Salmon Fishery

Plaintiffs filed their complaint in this action on January 18, 2013, challenging NMFS’s decision to remove the Cook Inlet salmon fishery from the Salmon FMP.³⁴ Plaintiffs alleged that the decision violated NMFS’s statutory obligation to prepare an FMP ““for each fishery under its authority that requires conservation and management.””³⁵ For its part, NMFS argued, *inter alia*, that the Magnuson Act allows NMFS to “cede regulatory authority to a state over federal waters that require conservation and management simply by declining to issue an FMP” and “does not expressly require an FMP to cover an entire fishery.”³⁶ On September 26, 2016, the Ninth Circuit issued an opinion rejecting NMFS’s argument and siding with Plaintiffs.

The Ninth Circuit first disagreed with NMFS’s argument that it could simply “defer” management to the State. The Court stated that there is no “deferral” exception to the Magnuson Act’s mandate that NMFS must prepare an FMP for any fishery requiring conservation and management.³⁷ The Court explained that “the federal government cannot delegate management of the fishery to a State without a plan, because a Council is

³³ Huebsch Decl. ¶ 29.

³⁴ *United Cook*, 837 F.3d at 1061.

³⁵ *Id.* (quoting 16 U.S.C. § 1852(h)(1)).

³⁶ *Id.* at 1062, 1064.

³⁷ *Id.* at 1062.

required to develop FMPs for fisheries within its jurisdiction . . . and then to manage those fisheries ‘through’ those plans.”³⁸ And, the Court was also clear that a purpose of the FMP requirement was to ensure “that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns.”³⁹

Next, the Court disagreed with NMFS’s argument that an FMP need not cover an entire fishery. The Court explained that “fishery is a defined term” and that NMFS’s view, if accepted, would allow it to “fulfill its statutory obligation by issuing an FMP applying to only a single ounce of water in that fishery.”⁴⁰ The Court stated that Congress “did not suggest that [the] Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management.”⁴¹ In short, the Ninth Circuit instructed that (1) NMFS must prepare an FMP consistent with the federal standards set forth in the Magnuson Act that reflect the national interest, and (2) the FMP must address the entire Cook Inlet fishery.

On remand to this Court, the parties agreed to entry of judgment that remanded the case to NMFS, with the Court retaining jurisdiction.⁴² The parties ultimately agreed to allow state management to continue while NMFS and the Council developed a new FMP.

³⁸ *Id.* at 1063.

³⁹ *Id.*

⁴⁰ *Id.* at 1064.

⁴¹ *Id.*

⁴² Dkt. 102.

This agreement was driven, in part, by NMFS's express threat that it would close the fishery entirely in federal waters if state management did not continue during remand.⁴³

NMFS estimated that it would take the Council "approximately two years to develop and take final action on a new amendment to the Salmon FMP that addresses the Cook Inlet Area."⁴⁴

D. Actions on Remand Have Reached an Impasse

Nearly three years have passed since the Ninth Circuit issued its ruling, and NMFS and the Council have made little progress toward the development of an FMP. There is now no prospect of moving the remand to a timely resolution that adheres to the Ninth Circuit's instructions.⁴⁵

The problem is that NMFS and the Council are considering three proposals on remand, and *none* of those three proposals comply with the Ninth Circuit's holding or the MSA. These three proposals are summarized as follows and are addressed in more detail in Section IV.A *infra*.

Alternative One is to produce no FMP.⁴⁶ This is obviously not permissible under the Ninth Circuit's holding that an FMP is required.

⁴³ See Declaration of James Balsiger (Dkt. 88) ¶¶ 18, 20.

⁴⁴ *Id.* at ¶ 21.

⁴⁵ Huebsch Decl. ¶¶ 26-27.

⁴⁶ Declaration of Jason Morgan ("Morgan Decl."), Ex. A at 35 (Discussion Paper by Council and NMFS).

Alternative Two would require NMFS to develop an FMP that defers to the State for the determination of essential federal requirements for the FMP, such as setting optimum yield (“OY”) for the Cook Inlet salmon fishery, setting annual catch limits, and making allocation decisions. For example, whereas the MSA requires the Council to set OY at the level that “will provide the greatest overall benefit to the Nation,”⁴⁷ under Alternative Two, the Council proposes to set OY at the level that reflects “the biological, economic, and social factors considered by” Alaska Board of Fish (the “Board”) and the Alaska Department of Fish and Game (“ADF&G”).⁴⁸ This contradicts the Ninth Circuit’s instruction that NMFS and the Council must develop an FMP according to “federal rules in the national interest[.]” so that the fishery is “not managed by a state based on parochial concerns.”⁴⁹

Alternative Three would require NMFS to carve out and establish a separate federal fishery within the EEZ, and then create an FMP that would address only the federal part of the fishery. This federal fishery would occur if, and only if, the state allows it; if the state decides to “allocate” the entire harvestable surplus in state waters, Alternative Three closes the separate federal fishery.⁵⁰ This subservient approach plainly

⁴⁷ 16 U.S.C. § 1802(33)(A).

⁴⁸ Morgan Decl., Ex. A at 35, 68.

⁴⁹ *United Cook*, 837 F.3d at 1063.

⁵⁰ Morgan Decl., Ex. A at 34, 58.

elevates parochial concerns over national interests, and does not comply with the letter or spirit of the MSA or Ninth Circuit’s instructions.

The Council created a stakeholder group (the “Salmon Committee”) composed of commercial fishing interests and tasked the Salmon Committee with developing recommendations for the Salmon FMP to implement one of the three alternatives outlined above.⁵¹ But many of the members of the Salmon Committee (including UCIDA members) expressed a fundamental disagreement over the scope of the FMP, as limited by the three alternatives.⁵²

Specifically, UCIDA believes that, under the Ninth Circuit’s order, the Council and NMFS are required to manage Cook Inlet salmon stocks as a unit throughout their range, subject to the requirements of the Magnuson Act and its national standards, not the parochial interest of the State.⁵³ The Council and NMFS disagree, stating that “[t]hese concepts are not supported by the Council,” and instructed the Salmon Committee to focus on the federal portion of the fishery and accept one of the three alternatives above.⁵⁴ One Council member directed UCIDA members to stop “debating those kinds of issues,” and “to play within the boundaries of the ballfield that is the Magnuson-

⁵¹ Huebsch Decl. ¶ 25.

⁵² *Id.* ¶ 26.; *see also* Morgan Decl., Ex. B at 5-6 (transcript of Council proceedings).

⁵³ Huebsch Decl. ¶ 26.

⁵⁴ Morgan Decl., Ex. C at 4 (Meeting Summary, April 1, 2019).

Stevens Act.”⁵⁵ UCIDA brought this issue to the Court’s attention when it first arose almost two years ago,⁵⁶ and has endeavored through written comments and testimony to affect change through the administrative process.⁵⁷ NMFS has only become more entrenched with its narrow reading of the MSA and the Ninth Circuit’s opinion, issuing a legal “memorandum” to the Council on the scope of the FMP.⁵⁸

There is a clear and distinct “impasse” between UCIDA, on one hand, and NMFS and the Council, on the other hand, regarding the “boundaries of the ballfield.”⁵⁹ And NMFS and the Council are dead wrong. The “boundaries of the ballfield”—as established by the Ninth Circuit and the Magnuson Act—plainly do not allow NMFS to produce (1) no FMP, (2) a shell FMP that allows the State to “fill in the blanks” for certain statutorily mandated federal FMP requirements, or (3) an FMP that provides manage guidance only the portion of the fishery that occurs in the EEZ. Yet NMFS and the Council are indisputably pursuing *only* these three alternatives, and accordingly, the end result will *inevitably* violate the Ninth Circuit’s order, unless this Court intervenes now.

⁵⁵ *Id.*, Ex. B at 17.

⁵⁶ *See* Dkt 112 (letter to Judge Burgess).

⁵⁷ *See* Morgan Decl., Ex. D at 10, 28 (comment letters).

⁵⁸ *Id.* Ex. D at 1 (NMFS memorandum).

⁵⁹ Huebsch Decl. ¶ 27.

III. AUTHORITY TO GRANT RELIEF

A federal court has jurisdiction to “manage its proceedings, vindicate its authority, and effectuate its decrees.”⁶⁰ This general rule also extends to mandates issued to a federal agency,⁶¹ and the agencies must comply with both the “letter and spirit” of the Court’s order.⁶² Thus, “an administrative agency is bound on remand to apply the legal principles laid down by the reviewing court.”⁶³ “Should an agency neglect the orders of a federal court, an order enforcing the original mandate is in fact ‘particularly appropriate.’”⁶⁴

IV. ARGUMENT

A. NMFS and the Council Are Not Complying with the Ninth Circuit’s Holding

The remand process has stalled because NMFS and the Council are not following the Ninth Circuit’s instructions or the requirements of the MSA. There are two basic problems with the Council’s approach to the FMP. *First*, it improperly defers essential decision-making to the State of Alaska. *Second*, it improperly narrows the scope of the Council’s obligations to federal waters rather than providing management goals and

⁶⁰ *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994)).

⁶¹ *California v. U.S. Dep’t of Labor*, 155 F. Supp. 3d 1089, 1095-96 (E.D. Cal. 2016) (citing *Flaherty v. Pritzker*, 17 F. Supp. 3d 52, 55 (D.D.C. 2014)).

⁶² *Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1214 (C.D. Cal. 2005), [Cite].

⁶³ *Id.* at 1213 (citing *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989)).

⁶⁴ *California*, 155 F. Supp. 3d at 1096 (citation omitted); *see also N.C. Fisheries*, 152 F. Supp. 2d at 882.

objectives for the entire fishery. Without instruction from this Court, the remand will ultimately produce an FMP that does not comply with the requirements of the MSA.

Starting with improper deferral, the Ninth Circuit made clear that NMFS could not defer its statutory obligations to the State. NMFS is required to produce a plan to manage the Cook Inlet salmon fishery subject to *national standards*, not state parochial concerns, and NMFS cannot “shirk” those duties by deferring to the State.⁶⁵ The MSA allows NMFS and the Council to delegate implementation of an FMP to a state under the auspices of a compliant FMP, but requires the Council and NMFS—not the State—to establish the conservation and management measures for that FMP, specify the OY and maximum sustained yield for the fishery, establish the annual catch limits for that fishery, ensure that the allocation decision is fair and equitable, and otherwise provide instruction as to how to manage the fishery consistent with national standards.⁶⁶

However, Alternative Two simply defers these essential decisions to the State. As to the core obligation to set OY and maximum sustained yield for the fishery (*see* National Standard 1 and 16 U.S.C. § 1853(a)(1)), under Alternative Two, NMFS and the Council would let the Board determine OY to “reflect[] the biological, economic, and social factors considered by the [Alaska] Board [of Fish] and ADF&G.”⁶⁷ Similarly,

⁶⁵ *United Cook*, 837 F.3d at 1063.

⁶⁶ *See, e.g.*, 50 C.F.R. § 600.310(f)(4)(iii); *supra* Section II.A; *United Cook*, 837 F.3d at 1062-64.

⁶⁷ Morgan Decl., Ex. A at 68.

Alternative Two defers the determination about a fair and equitable allocation of the fishery (National Standard 4) to the State by establishing fishing seasons to meet the State’s “economic and social objectives.”⁶⁸ As to the mandatory obligation to set “annual catch limits” (*see* 16 U.S.C. § 1853(a)(15)), Alternative Two would require NMFS and the Council to use “escapement goals and management plan objectives established by the state,” which in turn are based on the State’s assessment (not NMFS’s assessment) of policy objectives, OY, and allocation decisions.⁶⁹ Accordingly, under Alternative Two, the fishery will be governed by state “parochial concerns,” which is directly contrary to the Ninth Circuit’s holding and to the Magnuson Act.⁷⁰

As to the scope of the FMP, the Magnuson Act requires NMFS to establish conservation and management measures for a “fishery” that are “applicable to foreign fishing and fishing by vessels of the United States.”⁷¹ The “United States” means “all the States thereof.”⁷² The term “fishery,” as the Ninth Circuit explained, is “a defined term”⁷³ that means “one or more stocks of fish which can be treated as a unit for purposes of conservation and management.”⁷⁴ National Standard 3 expressly states that NMFS has an obligation to manage each fishery (including the salmon stocks in Cook Inlet) “as a

⁶⁸ *Id.* at 42.

⁶⁹ *Id.* at 43.

⁷⁰ *United Cook*, 837 F.3d at 1063.

⁷¹ 16 U.S.C. § 1853(a)(1).

⁷² *Id.* § 1802(45).

⁷³ *United Cook*, 837 F.3d at 1064.

⁷⁴ 16 U.S.C. § 1802(13).

unit throughout its range.”⁷⁵ And, NMFS’s interpretive regulations confirm that “[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stock(s) of fish, and not be overly constrained by political boundaries.”⁷⁶ As one court explained, “[w]hen a stock of fish is managed in the same manner throughout its geographical range, National Standard No. 3 is satisfied.”⁷⁷

Consistent with these legal requirements, the Ninth Circuit instructed:

When Congress directed each Council to create an FMP “for each fishery under its authority that requires conservation and management,” *id.* § 1852(h)(1), it did not suggest that a Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management.^[78]

In so instructing, the Ninth Circuit disapproved the piecemeal management of a fishery in which some parts of the fishery would be managed under the national standards and other parts would not.

However, this is precisely what NMFS and the Council are attempting to do. Alternative Three would carve out a federal-only portion of the fishery, manage the fishery only while the salmon are in federal waters, and give the state *carte blanche* with respect to those same fish in state waters, *including authority to allocate the entire harvestable surplus to state interests*. Both Alternatives Two and Three improperly

⁷⁵ *Id.* § 1851(a)(3).

⁷⁶ 50 C.F.R. § 600.320(b).

⁷⁷ *Or. Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1121 (9th Cir. 2006).

⁷⁸ *United Cook*, 837 F.3d at 1064.

narrow the scope of inquiry for conservation and management measures in the FMP. NMFS and the Council are clear that the FMP will only provide conservation and management measures (if at all) for fishing in the EEZ.⁷⁹ NMFS and the Council further contend that fishing in federal waters must be subservient to the State's fishery management decisions, and that "the EEZ portion of the fishery would only occur if there was a harvestable surplus after accounting for removals in State waters."⁸⁰

NMFS and the Council's position is that they cannot control, restrict, or even influence the state management in state waters.⁸¹ But that is precisely what National Standard 3 requires: management of a stock "as a unit . . . throughout its range."⁸² The plan sets the standard for the entire fishery, and NMFS can delegate management of implementation of that plan to the state (under appropriate conditions). NMFS's position overlooks its obligations to both (1) develop an FMP that provides management goals, objectives, and measures for a stock *throughout its range* and (2) *enforce* the measures of that FMP *in state waters*.⁸³ It may well be that NMFS needs the State's cooperation in

⁷⁹ Morgan Decl., Ex. A at 40 (Alternative 2); *id.* at 55 (Alternative 3).

⁸⁰ *Id.* at 34.

⁸¹ *Id.*

⁸² 16 U.S.C. § 1851(a)(3).

⁸³ For example, regulations for setting "annual catch limits" ("ACLs") through FMPs under the MSA, while "recogniz[ing] that Federal management is limited to the portion of the fishery under Federal authority," state that "[f]or stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments *should include an ACL for the overall stock* that may be further divided. For example, the overall ACL could be divided into a Federal-ACL and state-ACL." 50 C.F.R. § 600.310(f)(4)(iii) (emphasis added).

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State waters to carry out an FMP (just as it may need cooperation from foreign nations in international waters), and the MSA provides NMFS with authority to encourage state cooperation and, in certain circumstances, supersede state authority when cooperation is not forthcoming.⁸⁴ But the fact that NMFS may need cooperation to *enforce* an FMP does not excuse NMFS or the Council from producing an FMP that contains the required measures to manage the stock “throughout its range.” Without those measures, there is nothing for which NMFS can seek the State’s cooperation.

NMFS is heading down the opposite path. By disclaiming any ability to provide management objectives or measures beyond the borders of the EEZ, NMFS has made clear that any result (whether Alternative One, Two, or Three) will result in the State developing the standards for, and managing, the portions of the fishery that occur in State waters and federal management of the fishery in federal waters only, with the federal fishery occurring if, and only if, the State allows fishing in federal waters.⁸⁵ This would result in a situation that is virtually no different than when this litigation began and is fundamentally unworkable.⁸⁶ NMFS’s plan for the remand is contrary to both the letter and spirit of the Ninth Circuit’s ruling, and accordingly, UCIDA asks the Court to issue a declaratory ruling to get this remand back on track.

⁸⁴ 16 U.S.C. § 1856(b)(1).

⁸⁵ *See supra* Section II.D.

⁸⁶ Fox Decl. ¶ 14.

B. Interim Relief Is Necessary to Ensure Compliance with the Prior Holding in This Case and to Prevent Further Impairment to the Fishery and Commercial Fishing Interests

In light of the above failures, an order “enforcing the original mandate is in fact ‘particularly appropriate.’”⁸⁷ Specifically, UCIDA asks the Court to issue an order declaring that (1) 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; and (2) NMFS and the Council may not create an FMP that is subservient to or defers to state management goals and objectives for the Cook Inlet salmon fishery, but instead must ensure the entire fishery is managed to meet the MSA’s national standards.

In addition to declaratory relief, UCIDA requests that the Court set a hard deadline on NMFS and the Council to complete the FMP. “Ninth Circuit precedent expressly permits imposition of deadlines on the remand process.”⁸⁸ A deadline here is urgently needed because Plaintiffs’ members are suffering significant financial injury under the State’s continued management of the fishery without the necessary guidance of an

⁸⁷ *California*, 155 F. Supp. 3d at 1096 (citation omitted).

⁸⁸ *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); *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 937 (9th Cir. 2008) (it is “clearly permissible” to “impose a deadline for the remand proceedings”). Under both Federal Rule of Civil Procedure 65 and the All Writs Act, this Court also has the derivative authority to enforce its orders on the Council, even though it is not a party. *See Fed. R. Civ. P.* 65(d)(2); All Writs Act, 28 U.S.C. § 1651(a).

FMP.⁸⁹ In the three seasons that the state has managed the fishery since the Ninth Circuit's mandate, Plaintiffs' members have suffered serious financial harms due to (1) restrictions by the state on fishing in the EEZ (and elsewhere in the Cook Inlet); and (2) reduced salmon run sizes precipitated by the State's management measures that do not comply with the Magnuson Act.⁹⁰ These injuries will continue unless and until NMFS approves an FMP that requires management of the fishery consistent with the Magnuson Act. Plaintiffs' members cannot afford further delays or wait indefinitely for NMFS to issue an FMP only to have to challenge the FMP for failure to comply with the Ninth Circuit's instructions in 2016.⁹¹

Accordingly, UCIDA asks for an order compelling the Council to complete production of the FMP within six months and NMFS to issue final regulations implementing the FMP prior to the start of the 2020 fishing season (late June 2020). This deadline places no substantial burden on NMFS or the Council. By statute, NMFS should have had its plan completed decades ago.⁹² Any burden on NMFS in completing this long overdue task is outweighed by hardships the fishing community has suffered, and will continue to suffer, without management of the Cook Inlet salmon fishery in a

⁸⁹ Huebsch Decl. ¶¶ 29-33.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *United Cook*, 837 F.3d at 1059.

manner consistent with the MSA’s national standards under an FMP.⁹³ In the alternative, if NMFS cannot complete the FMP process by the beginning of the 2020 salmon fishing season, UCIDA requests that the Court order the parties (including intervenor State of Alaska) to negotiate an orderly execution of the 2020 fishing season as an interim measure that will ensure an orderly fishery and reasonable fishing opportunities for Plaintiffs’ members until an FMP is put in place.

Furthermore, UCIDA requests that the Court appoint a special master to oversee compliance with the remand and, if necessary, to oversee negotiation of an orderly fishery for 2020 if no FMP is completed. Federal Rule of Civil Procedure 53(a)(1)(C) permits a court to appoint a master to “address . . . posttrial matters that cannot be effectively and timely addressed by an available . . . judge of the district.” Once appointed, a master may “regulate . . . proceedings,” and “take all appropriate measures to perform the assigned duties fairly and efficiently,” including the authority to issue a “report” or “order” if so directed by the court.⁹⁴ This inherent authority, too, is codified in the All Writs Act.⁹⁵ With respect to post-remand administrative proceedings, a master,

⁹³ Huebsch Decl. ¶¶ 29-33.

⁹⁴ Fed. R. Civ. P. 53(c)-(e).

⁹⁵ *See Nat’l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 544 (9th Cir. 1987) (“The appointment of a master to monitor compliance with the preliminary injunction . . . validly applies the All Writs Act.”).

in such context often termed a “special master,” may be appointed “to oversee [agency] compliance with continuing court orders” and “implement the decree.”⁹⁶

The Court’s prior order sought to ensure compliance with periodic status updates.⁹⁷ Those status updates have proven insufficient to keep the remand on track, and the current Council process is presently going nowhere. Members of the Council have indicated that they are willing to drag out the process until Plaintiffs “stop debating those kinds of issues” and simply acquiesce to the Council’s (erroneous) position on the scope and function of the FMP.⁹⁸ Accordingly, a special master is appropriate to “observe” NMFS and the Council, and “report to the court any policies or practices [he or she] believes may violate the letter or spirit of any term of the” order.⁹⁹

V. CONCLUSION

For the foregoing reasons, UCIDA’s motion should be granted. The current remand is now nearly three years in the making with no end in sight. In the interim, the commercial fishing industry has suffered through disastrous fishing seasons under

⁹⁶ *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982); *see, e.g., Hook v. Ariz. Dep’t of Corr.*, 107 F.3d 1397, 1403 (9th Cir.) (special master to oversee compliance with court-ordered prison reforms “after court monitoring alone had been demonstrated to be inadequate”), *as amended on reh’g and reh’g en banc* (Apr. 22, 1997); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1307-11 (E.D. Pa. 1977) (special master to monitor compliance with injunction ordering state hospital reforms).

⁹⁷ Dkt. 102 ¶ 2.

⁹⁸ Morgan Decl., Ex. B at 17.

⁹⁹ *Mullen*, 828 F.2d at 539, 545.

continued state management. Judicial intervention is urgently needed to get the remand on track and moving toward a fully compliant FMP.

I certify that this motion contains 5,686 words, and is in compliance with LCR 7.4(a).

Respectfully submitted, September 4, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2019 I filed a copy of the foregoing document, *Motion to Enforce Judgment*, was served electronically on the below parties.

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