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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.,* Defendants.	Case No. 3:21-cv-00255-JMK 3:21-cv-00247-JMK CONSOLIDATED **STATE OF ALASKA'S REMEDY BRIEF**
WES HUMBYRD, *et al.,* Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.,* Defendants.	

> Except as provided in subsection (b), nothing in [the Magnuson-Stevens Fishery Conservation and Management Act] shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.[1]

INTRODUCTION

On June 21, 2022, this Court found that Amendment 14 was unlawful and vacated the Final Rule at 86 Fed. Reg. 60,568. Pursuant to that finding, this Court should remand to the National Marine Fisheries Service ("NMFS") to implement a fishery management plan ("FMP") in the federal waters over which it has authority that complies with the Magnuson-Stevens Act ("MSA") and the Ninth Circuit decision in *United Cook Inlet Drift Association v. National Marine Fisheries Service ("UCIDA I")*.[2]

UCIDA asks the Court for a declaratory judgment directing NMFS to "produce an FMP amendment for Cook Inlet that covers the *entire* Cook Inlet salmon 'fishery' as defined by the Act."[3] UCIDA has argued for years,[4] and now wishes this Court to order, that the FMP Amendment must cover State waters. But the MSA only authorizes federal management over federal waters, i.e., the Exclusive Economic Zone ("EEZ"), not over State waters. This argument has been heard and rejected by the U.S. District Court for the District of Alaska before,[5] and it should be rejected again by this Court.

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[1] 16 U.S.C. § 1856(a)(1).
[2] 837 F.3d 1055 (9th Cir. 2016).
[3] Dkt. 69, Remedy Brief by Plaintiffs UCIDA and CIFF ("UCIDA Brief"), p. 7. (emphasis added)
[4] *See e.g.* 3:13-cv-00104-TMB, Dkt. No. 151, p. 18. (Arguing that NMFS must create an FMP for a "stock *throughout its range* and (2) *enforce* the measures of that FMP in *state waters.*") (emphasis in original).
[5] *Jensen v. Locke*, No. 3:08-CV-00286-TMB, 2009 WL 10674336 (D. Alaska Nov. 9, 2009)

Similarly, the Court should reject UCIDA's request to enjoin Alaska to manage both the federal waters and State waters at hours predetermined by the Court.[6] Such an order is inappropriate both because State waters are not subject to the MSA and because the State cannot be forced to manage a federal fishery in federal waters.

Finally, the Court should not require a new FMP be in place by the summer of 2023. The State largely defers to NMFS's view about what is a reasonable time frame but proposes that two years may be necessary to develop the new FMP, conduct the related reviews (Endangered Species Act, National Environmental Policy Act, etc.), and issue a final rule. As a comparison, the process that led to Amendment 12 began in 2010, and the final rule was not issued until December 2012 and the process that led to Amendment 14 began in 2017, and the final rule was not issued until November 2021.

ARGUMENT

I) The MSA preserves State management authority in State waters and provides only limited authority for the Secretary to preempt State management under circumstances not present here.

The MSA contains an explicit provision preserving State management authorities.[7] The Court need look no further than the express language of 16 U.S.C. § 1856 to see that Congress has directly spoken to the precise question of whether state management is preempted. Congress explicitly and unambiguously stated that except as provided in 16 U.S.C. 1856(b), "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."

[6] UCIDA Brief, pp. 15, 17.
[7] 16 U.S.C. § 1856.

Despite this unequivocal language, UCIDA continues to seek a "declaratory judgment stating that the Magnuson Act requires NMFS to approve a fishery management plan [] amendment that (a) governs the entire Cook Inlet salmon 'fishery' (as defined by the Magnuson Act)."[8] In other words, UCIDA continues to seek, as it has for years, a court order that the federal FMP must cover State waters.

This Court should reject UCIDA's argument and definitively state that, consistent with the plain language of the MSA, the FMP may only cover the federal waters of Cook Inlet.

a) The MSA explicitly left states in charge of managing fisheries in State waters.

As explained by the Ninth Circuit, Congress created the MSA in 1976.[9] The MSA "extended federal jurisdiction to 200 miles from the coastline, [] and regulated foreign fishing in that area."[10] The court went on to clarify that "[s]tates retained jurisdiction over the first three miles from the coast, *id*. § 306(a) (codified as amended at 16 U.S.C. § 1856), and the federal government had jurisdiction over the next 197 miles, originally called the fishery conservation zone ("FCZ") and later named the exclusive economic zone."[11]

The MSA defines the "exclusive economic zone" as "the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this

[8] UCIDA Brief, p. 3.
[9] *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv*., 837 F.3d 1055, 1058 (9th Cir. 2016).
[10] *Id*. (internal citations omitted).
[11] *Id*. (some internal citations omitted).

chapter, *the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States*."[12]

MSA Section 306 is titled "State Jurisdiction." Section 306(a) reads in relevant part as follows: "[e]xcept as provided in subsection (b), nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.[13]

UCIDA would have this Court ignore the plain language of the MSA and order NMFS to usurp State management of fisheries in State waters on the flimsy theory that, unbeknownst to the Congress that passed the MSA, the definition of "fishery" requires it.[14] But NMFS does not have the authority to manage fisheries in State waters unless preemption is specifically provided for by Congress, or when the Secretary follows the preemption procedures in Section 306(b) of the MSA.[15] Neither required hook is present in this case.

Under certain circumstances and pursuant to certain procedures, the Secretary of Commerce may notify the State of "his intention to regulate the applicable fishery within

[12] 16 U.S.C. § 1802(11) (emphasis added).
[13] 16 U.S.C. § 1856
[14] UCIDA Brief, p. 7, note 22.
[15] It is worth noting that Congress granting NMFS the authority to preempt State management in limited situations was not without controversy. *See, e.g.,* H.R. Rep. 94-445, 1976 U.S.C.C.A.N. 593 at 660-61 (Dissenting Views on H.R. 200 objecting to grant of authority to Secretary to determine that state action or inaction is substantially and adversely affecting federal management activities and apply federal regulations within state waters) reprinted in A Legislative History of the Fishery Conservation and Management Act of 1976, Committee Print 94th Congress 2d Session, October 1976 at 1156.

the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan."[16] And when that happens the State has rights, such as the right "to petition the Secretary for reinstatement of its authority over such fishery" and the right to a hearing on the issue.[17]

The plain language of the MSA make two things clear: first, none of the circumstances under which the Secretary may assert management authority over State waters are present here (and UCIDA does not argue that such circumstances are present); and second, the Secretary has not attempted to notify the State that she intends to assert jurisdiction over the State's sovereign waters. As such, no authority exists for this Court to order that the forthcoming FMP amendment cover State waters.

b) The MSA authorizes NMFS to manage fisheries within the EEZ, not State waters.

UCIDA apparently continues to misinterpret the language of the MSA regarding management of anadromous species "throughout its range."[18] UCIDA appears to be arguing, as it has in the past, that managing a species "throughout its range" requires NMFS to usurp State management of anadromous species that may be caught in both EEZ and State waters. But this interpretation ignores both the plain text and the legislative history of the law.

The MSA establishes the United States sovereign right to exert management

[16] 16 U.S.C. § 1856(b).
[17] *Id*.
[18] UCIDA Brief, p. 7.

authority over all fishery resources "within the exclusive economic zone."[19]

The United States may also exercise exclusive fishery management authority over all "anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation."[20] That is, NMFS may manage from three miles[21] to beyond 200 miles, so long as the species is not the waters of a foreign nation.

"Beyond the exclusive economic zone" has never been interpreted to mean "in State waters." State waters are not referred to as "waters beyond the EEZ" in the MSA, they are referred to as "State waters."[22]

[19] 16 U.S.C. § 1811(a).
[20] 16 U.S.C. § 1811(b)(1).
[21] Or the "boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States."
[22] *See e.g.* 16 U.S.C. 1855, 1855 note ("Within 60 days after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, the Secretary of Commerce shall determine whether fishing in *State waters*…) (emphasis added); 16 U.S.C. 1857(1)(R) ("It is unlawful for a person to use any fishing vessel to engage in fishing in Federal or *State waters*, or on the high seas or in the waters of another country, after the Secretary has made a payment to the owner of that fishing vessel under section 312(b)(2).") (emphasis added); 16 U.S.C. 1861a(b)(2)(A) ("through the Secretary of the department in which the Coast Guard is operating, subjected to title restrictions (including loss of the vessel's fisheries endorsement) that permanently prohibit and effectively prevent its use in fishing in federal or *state waters*, or fishing on the high seas or in the waters of a foreign nation.") (emphasis added).

The State could not find a single instance of a court determining that NMFS may usurp State management of fisheries in State waters, without engaging in the MSA required preemption process laid out in Section 306(b), simply because the target fish traverses federal waters at one point in its life cycle. UCIDA does not, and cannot, point to a single shred of support for its theory that anytime fish traverse federal waters to enter a State waters fishery that NMFS may usurp State management. Conversely, courts have regularly found, consistent with the plain language of the MSA, that States retain jurisdiction from the coast to the three mile seaward boundary.[23] As those cases show, the distinction between state and federal waters is important. As such, the Court should explicitly order that the FMP amendment cover the EEZ waters, not State waters. In doing so, this Court would align with every other court that has addressed the issue.

UCIDA also makes much of the MSA definition of "fishery."[24] Fishery, for the purposes of the MSA, is defined as "one or more stocks of fish which can be treated as a

[23] *See e.g. Davrod Corp. v. Coates*, 971 F.2d 778, 786 (1st Cir. 1992) ("the [MSA] as originally framed confirmed state jurisdiction over fisheries within a State's internal waters and, for coastal states, out to the three-mile limit."); *Conservation Council for Hawaii v. Nat'l Marine Fisheries Serv.*, 154 F. Supp. 3d 1006, 1014 (D. Haw. 2015) (Under the MSA, the federal government exercises fishery management authority over all fish "within the exclusive economic zone… which extends from the seaward boundary of each coastal state to 200 miles offshore"); *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 160 (4th Cir.2002) (The [MSA] expressly preserves the jurisdiction of the states over fishery management within their boundaries"); *Chinatown Neighborhood Ass'n v. Harris*, 33 F. Supp. 3d 1085, 1102–03 (N.D. Cal. 2014), *aff'd*, 794 F.3d 1136 (9th Cir. 2015) ("States generally have authority over fishing within the boundaries of the state, which for most states extends three miles seaward from the coastline."); *Massachusetts by Div. of Marine Fisheries v. Daley*, 170 F.3d 23, 25 (1st Cir. 1999) ("the [MSA] does not govern fishing in state waters….").

[24] *See e.g.* UCIDA Brief, p. 7.

unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics."[25] That makes perfect sense in the context of the MSA, a unit of similar fish travelling through the EEZ should be managed as a unit throughout its range. That is, a unit of fish travelling through waters over which the MSA grants NMFS fisheries management authority should be managed holistically, with its entire life cycle in mind. But misinterpreting that rather obvious principle to mean that NMFS has authority over any anadromous fish in State waters goes directly against the text of the MSA and all jurisprudence interpreting it.

This Court should unambiguously reject UCIDA's assertion that the "throughout its range" language or "fishery" definition gives NMFS the authority to craft an FMP amendment that covers both State and federal waters, i.e., "the entire Cook Inlet Salmon 'fishery'." The MSA authorizes NMFS to establish an FMP that covers the EEZ, and that is what this Court should order.

II) UCIDA's argument has been rejected by the U.S. District Court for the District of Alaska in a previous case.

The U.S. District Court for the District of Alaska has previously rejected a nearly identical argument to the one now advanced by UCIDA. In 2009 a commercial fisherman sued the then Secretary of Commerce, Gary Locke, and then Commissioner of the Alaska Department of Fish and Game, Denby Lloyd, arguing that Alaska's resident-only subsistence fishery, Alaska's subsistence use priority, and their combined impact on

[25] 16 U.S.C. § 1802(13).

commercial fisheries violate four of the MSA national standards.[26] The plaintiff in that case argued that Congress, in enacting the MSA, "implicitly preempted state management of salmon in Alaska."[27] The plaintiff claimed, just as UCIDA does here, that "Congress intended the Magnuson-Stevens Act to apply to salmon management in both state waters and the exclusive economic zone."[28] Like here, the plaintiff's argument was "premised on his interpretation of the statutory phrase 'throughout the migratory range of each such species beyond the exclusive economic zone' to permit the extension of the Magnuson-Stevens Act to state territorial and internal waters where anadromous species are located."[29]

The court applied "traditional tools of statutory construction to determine Congressional intent as to the meaning of the Statutory phrase"[30] and rejected the

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[26] *Jensen v. Locke*, No. 3:08-CV-00286-TMB, 2009 WL 10674336, at *1.
[27] *Id*.
[28] *Id*. UCIDA uses the phrase "convers the entire Cook Inlet salmon 'fishery'" to assert this claim.
[29] *Id*.
[30] *Id*. at 8. The court explained the following:

> According to accepted canons of statutory interpretation, the Court must "presume that words used more than once in the same statute have the same meaning." The term "beyond" is used in several provisions of the Magnuson-Stevens Act to indicate areas that are outward or seaward, as opposed to areas that are inward or shoreward. For example, Section 1802 defines the term "high seas" to include "all waters beyond the territorial sea of the United States and beyond any foreign nation's territorial sea." Congress did not intend to define "high seas" to include the territorial or inward waters of a state but rather defined the term to include waters seaward of the territorial sea. Similarly, in Section 1860 Congress expressly created a distinction between territorial and internal waters, which are shoreward of the exclusive economic zone, and those "beyond the exclusive economic zone." Rather than equating these zones of water, Congress used the disjunctive term or in referring to

plaintiff's argument. The court concluded that "in enacting the Magnuson-Stevens Act Congress intended the states to retain exclusive authority to regulate fishing within territorial and inland waters, absent satisfaction of the statutory preemption procedures set out in Section 1856(b)."[31] The district court further explained that the MSA "provides for federal preemption of state regulation of territorial or internal waters only in limited circumstances where, after 'notice and an opportunity for a hearing,' the Secretary of Commerce finds that state action will 'substantially and adversely affect' the carrying out of a fishery management plan for a fishery 'engaged in predominately within the exclusive economic zone and beyond such zone.'"[32]

Beyond the plain language of the MSA, the district court reviewed the legislative history and found that it too supported the conclusion that States retain jurisdiction over their waters. The court explained that the Senate version of the Act specified "it was not to be construed to diminish jurisdiction of any State over any natural resource beneath and in the *waters within its boundaries*."[33] Similarly, the court found the House version

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> vessels "shoreward of the outer boundary of the exclusive economic zone of the United States or beyond the exclusive economic zone of any nation." When interpreting a single legislative text, terms must be given a consistent meaning. Congress appears to have intended the terms "beyond" and "beyond the exclusive economic zone" to only include waters seaward of the exclusive economic zone and to exclude territorial or internal waters.
> *Id*. (internal footnotes omitted).

[31] *Id*. at 10.
[32] *Id*. at 9. citing 16 U.S.C. § 1856(b)(1).
[33] *Id*. citing Senate Commerce Comm. Print, February 19, 1976, Conf. Policy Issues Summ. H.R. 2000 (S. 961) at 3, reprinted in A Legislative History of the Fishery Conservation and Mgmt. Act of 1976, Comm. Print 94th Cong. 2d Sess., October 1976 at 100 (emphasis in original).

provided that the Act did not "diminish" state regulatory authority in "internal waters."[34]

The court explained:

> The House Report noted that "Under United States law, the biological resources within the territorial sea of the United States (i.e., out to 3 miles) are the management responsibility of the adjacent several States of the Union. Whatever regulation of both fishermen and fish harvest, that occurs in this area is as deemed necessary and appropriate by each concerned State." The House version of the Act stated that jurisdiction "may [only] be diminished with respect to any anadromous species ... if the Secretary of Commerce finds that a fishery management plan under this legislation applies to such species and that such State has taken any action, or omitted to take any action, the result of which will substantially and adversely affect the carrying out of the management plan."[35]

Accordingly, the court held, "contemporaneous legislative history of the Magnuson-Stevens Act suggests that Congress did not intend to preempt state authority to regulate territorial and internal waters."[36]

This Court should come to the same conclusion as the previous district court presented with this issue and unambiguously hold that NMFS does not have authority to manage salmon in Alaska's waters absent a new act of Congress or through the preemption procedures codified in the MSA.

III) The State has been managing the EEZ fishery consistent with the MSA national standards and the Court should not enjoin the State to manage to goals set by UCIDA.

a) Optimum yield is part of national standard 1, not the lone goal of management.

Despite UCIDA's allegations, the State's management of Cook Inlet salmon is in

[34] *Id*.
[35] *Id*. quoting H. Rep. No. 94-445 at 29.
[36] *Id*.

accordance with the MSA national standards. Optimum yield is contained within one of ten national standards,[37] and the relief UCIDA seeks is largely focused on this half-section of national standard 1. But it is notable that optimum yield is the *second* goal of national standard 1, the first listed goal is to "prevent overfishing."[38] It is also important to point out that NMFS has previously found that the State's escapement goal management system is consistent with national standard 1 because the State's system is more effective than an FMP for preventing overfishing of salmon stocks.[39]

A court ordered change to the State's escapement goals and weak stock management could very likely result in management that violates national standard 1's goal of "preventing overfishing" while also forcing Alaska to violate its Constitutional mandate to manage fish in accordance with sustained yield principles.[40]

UCIDA presents the fishing times codified at 5 AAC 21.320 as "regular fishing periods" that 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."[41] This request is particularly perplexing, as the Cook Inlet drift fishery was open to commercial drift fishing *nearly every day of July* of 2022.[42] That is, the drifters were able

[37] 16 U.S.C. § 1851(a). National standard 1 reads in its entirety: "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."
[38] *Id*.
[39] 77 Fed. Reg. at 75582.
[40] Alaska Const. art. VIII, § 4.
[41] UCIDA Brief, p. 12.
[42] *See* UCI Preliminary Inseason Estimates for UCI Harvest - Daily, available at https://www.adfg.alaska.gov/index.cfm?adfg=commercialbyareauci.salmon_harvest_current, last visited

to fish much more often than the eight "regular fishing periods" in July that UCIDA requests this Court to order open in the future. Regardless, 5 AAC 21.320 is only operative when the Department is not *conserving* other weak stocks, such as Kenai River king salmon.[43] In UCIDA's estimation, this Court should order Alaska to manage its sovereign State waters and the EEZ according to one-half of one of the ten national standards and ignore the rest. This is a ridiculous request and the Court should reject it.

b) Cook Inlet is a crowded and complex fishery and Alaska's sustained yield management maximizes fisheries while protecting weak stocks.

Cook Inlet waters include fisheries where "all five species of salmon enter Cook Inlet, with considerable overlap in timing and migration routes"[44] and are harvested by subsistence (both state subsistence and federally qualified users), commercial, sport, and personal use fishers. To manage crowded and complex fisheries, the State uses real time catch and escapement data, providing opportunity consistent with the national standard 1 directive to prevent overfishing (or, in the State vernacular, to ensure sustainability of the resources). The injunction sought by UCIDA would quite literally put this Court in the untenable position of managing the fisheries, and without the necessary data to manage them consistent with either the MSA national standards or the Alaska Constitution.[45]

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[43] *See e.g.* 5 AAC 21.359(e)(3), 5 AAC 21.363(e).

[44] *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 note 61 (Alaska 2015)

[45] Courts, both state and federal, have long recognized the perils of courts managing fisheries by injunction, and have repeatedly warned courts against doing so. Judge Holland addressed this issue in *John v. Alaska*, A85–698, Unpublished Order at 5 (D.Alaska Jan. 19, 1990) ("Firstly, the Board must bring considerable expertise to the

UCIDA mischaracterizes the State's escapement-based management as an illegal departure from managing for maximum sustained yield because it utilizes "inriver run goals" in some areas.[46] UCIDA's criticism is misplaced. The inriver run goal is simply a recognition that some harvest will occur "in river" upstream of the point where escapement is estimated.[47] UCIDA is apparently complaining that any noncommercial fishing is allowed to occur on Cook Inlet salmon stocks. But the MSA recognizes recreational fishing as an important activity to be *promoted*,[48] not prevented as UCIDA suggests. Regardless, it is important to reiterate that Alaska is not required to manage for the MSA national standards in State Waters,[49] as the standards do not apply to state

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complex fish management questions that come before it. This court does not have that expertise. While the court is quite comfortable ... in its role as the reviewer of agency rule-making ..., the court should not—for lack of expertise—make the fine scientific wildlife management decisions that are called for by state and federal law. In short, the fish and game management ought to be done by the fish and game managers."); *see also Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015); ("issuing such an injunction would potentially put Alaska's court system in the untenable position of managing one of Alaska's most crowded and contentious fisheries, despite our long-standing policy of not second-guessing the Department's management decisions based on its specialized knowledge and expertise."); *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries,* 803 P.2d 391, 397 (Alaska 1990) ("We have no authority to substitute our own judgment for the Board of Fisheries' particularly since highly specialized agency expertise is involved.")

[46] UCIDA Brief, p. 14.

[47] *See* 5 AAC 39.222(f)(19) "inriver run goal" means a specific management objective for salmon stocks that are subject to harvest upstream of the point where escapement is estimated; the inriver run goal will be set in regulation by the board and is comprised of the [sustainable escapement goal], [biological escapement goal], or [optimal escapement goal], plus specific allocations to inriver fisheries.

[48] *See* 16 U.S.C. § 1801(3) "It is therefore declared to be the purposes of the Congress in this chapter to… promote domestic commercial and recreational fishing under sound conservation and management principles…"

[49] *See supra* note 26. *See also Cook Inlet Fisherman's Fund v. Dep't of Fish & Game*, 514 P.3d 1250, 1257-60. (Alaska 2022).

management measures in State waters absent secretarial preemption under 16 U.S.C. § 1856(b).[50]

It is also notable that UCIDA focuses solely on the escapement numbers in the Kenai and Kasilof rivers,[51] but there are hundreds of spawning tributaries that make up the Upper Cook Inlet mixed stock fishery and they too must be managed for sustained yield.[52] The Kenai sockeye goal has been achieved in seven of the past eleven years, while Larson and Packers Creek have consistently been on the low end the escapement goal during that same time frame.[53] One significant factor in years where the Kasilof River exceed the escapement goal, such as 2022, are restrictions placed on the commercial, sport, and personal use fisheries to *conserve* the struggling Kenai River king salmon that were forecasted to barely meet minimum escapement.[54] Unfortunately, even with the preventative measures and conservative weak stock management approach, Kenai River king salmon fell 1,048 short of the escapement goal.[55]

UCIDA exemplifies its misunderstanding of fisheries management when it argues

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[50] *See Massachusetts by Div. of Marine Fisheries*, at 25 ("the Magnuson-Stevens Act does not govern fishing in state waters….")
[51] UCIDA Brief, p. 13-14.
[52] *See e.g.* ADF&G Anadromous Waters Catalogue, available at: https://www.adfg.alaska.gov/FedAidPDFs/SP22-03.pdf, last visited September 27, 2022.
[53] ADF&G Upper Cook Inlet commercial fisheries annual management report, 2021, pp. 120-22 & Appx A21, available at: https://www.adfg.alaska.gov/FedAidPDFs/FMR22-16.pdf, last visited September 27, 2022.
[54] Emergency Order No. 2-KS-1-09-22, available at: https://www.adfg.alaska.gov/Static-sf/EONR/PDFs/2022/R2/EO%202-KS-1-09-22.pdf; last visited September 27, 2022.
[55] ADF&G Final Late Run Kenai River Chinook Inseason Summary, available at: https://www.adfg.alaska.gov/sf/FishCounts/index.cfm?ADFG=main.kenaiChinook#/inseasonSummary; last visited September 27, 2022.

that ensuring escapement lands within the management range "is uncomplicated as the State can (and should) simply manage the fishery to meet the escapement goals the State has already established."[56] When weak stocks must be conserved, and those stocks traverse the same waters as abundant stocks, they must be managed to prevent overfishing and ensure sustained yield. Of course, if Alaska is rendered unable to continue managing for sustained yield in Cook Inlet, and stocks currently experiencing low productivity are not adequately conserved, the ultimate result could be more dramatic restrictions *on all fisheries* than those that have been implemented to this point.

Given all of this, the Court should reject UCIDA's invitation to enjoin the State to manage any waters, State or federal, in any particular way.

IV) The Court should allow NMFS an adequate amount of time to craft an FMP that will withstand scrutiny.

UCIDA asks this Court to order a new FMP Amendment and Final Rule be completed by June 1, 2023. This is not a realistic timeline for any fishery that will include take in the EEZ. Creating an FMP for a federal fishery in the EEZ is a major federal action triggering NEPA.[57] NEPA, declares a broad national commitment to protecting and promoting environmental quality and establishes important "action-forcing

[56] UCIDA Brief, p. 15.

[57] *See e.g. Greenpeace v. Nat'l Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1257 (W.D. Wash. 1999) ("The Fishery Management Plans (FMPs), such as those for the fisheries in this case, undisputedly constitute major federal actions requiring an EIS"); *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1121 (D. Haw. 2000) (finding that "management of the Fishery pursuant to the FMP qualifies as a major federal action"); *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 101 (D.D.C. 2011), 831 F. Supp. 2d at 101 ("The approval of FMPs and amendments to FMPs are considered major Federal actions within the meaning of NEPA.").

procedures" to meet this goal.[58] NEPA "does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions."[59] It is simply not realistic that an agency could create an FMP amendment and take the required hard look at the environmental consequences of the plan within a handful of months.

An EIS or an EA must be completed. UCIDA knows this because they complained that the NEPA process was lacking for Amendment 14.[60] But, ignoring their previous complaints, UCIDA now wishes this Court to disregard NEPA and order a fishery be opened, without any of the required NEPA procedures, by June 1, 2023.[61]

To support its argument that a new FMP can be in place by the summer of 2023, UCIDA incorrectly asserts that Amendment 14 was first introduced at the October 12, 2020 Council meeting.[62] While "Alternative Four" was first introduced in October of 2020, it was substantively contained within, and analyzed under, "Alternative Three" which was considered by the Council from the beginning of the Council process.[63] Federal management and closure of the EEZ was studied for several

[58] *Robertson v. Methow Valley Citizens Council*, 490 U S. 332, 348 (1989).
[59] *Tri-Valley CAREs v. U.S. Dept. of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) (internal citations omitted); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004).
[60] *See* UCIDA's Opening Brief, Dkt. 38, p. 40 "NMFS violated NEPA by failing to provide "a convincing statement of reasons" as to why its unprecedented closure will not have significant impacts."
[61] UCIDA Brief, p. 9.
[62] *Id*.
[63] *See e.g.* AKR0000047.

years prior to promulgation of the final rule.[64]

Beyond NEPA, NMFS must analyze the impact of a new federal drift fishery in the EEZ on endangered species in Cook Inlet.[65] Section 7 of the ESA requires any agency planning an action that "may affect" listed species to consult with NMFS or the USFWS.[66] Cook Inlet is home to species listed as endangered under the ESA, such as the beluga whale DPS listed on October 22, 2008,[67] and NMFS has identified more than one third of Cook Inlet as critical habitat.[68]

Amendment 14 was not expected to "result in a change to the incidental take level of marine mammals, including beluga whales."[69] The impact of a new fishery that UCIDA seeks to be open at predetermined times for "commercial fishing on an inlet-wide basis,"[70] regardless of run abundance, has not been analyzed. And it seems apparent that mandating a federal fishery without the required consultation is an invitation for future litigation.

V) The Court should not order the State to conduct a function of the United States in the EEZ.

The State has previously agreed to continue managing Cook Inlet consistent with its regulatory management plans, until an FMP is in place. But the State should not be, indeed cannot be, ordered to manage federal waters pursuant to any particular dictate

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[64] AKR0013822
[65] AKR0000192.
[66] 50 C.F.R. § 402.14(a).
[67] *Id*.
[68] AKR0000193.
[69] AKR0000359.
[70] UCIDA Brief, p. 12.

beyond those management plans.

To the extent that UCIDA is asking the Court to order Alaska to manage fisheries in the EEZ, the State fundamentally opposes being *required* to do the United States' job and there is no legal authority to support such a proposition. NMFS may not order the State to manage a federal fishery in federal waters, as such a directive would violate the Tenth Amendment's anticommandeering doctrine.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[71] The anticommandeering doctrine "is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States.[72] Both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty."[73] Accordingly, "even where Congress has the authority ... to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[74]

The Court put the point succinctly in *Printz v. United States*: "The Federal Government" may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[75] This necessarily

[71] U.S. Const. amend. X.
[72] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476, (2018).
[73] *Id*. (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).
[74] *New York*, 505 U.S. 144, 166 (1992) (citations omitted).
[75] 561 U.S. 898, 935 (1997)

includes "administering or enforcing" federal fisheries management plans.

Here, UCIDA wishes the State to be forced to manage a federal fishery in federal waters. But pursuant to the anticommandeering doctrine, the United States cannot *force* the State to manage the EEZ fishery, as that is plainly categorized as "administering a federal regulatory program," and in federal waters. It then flows logically that this Court may not force the State to "administer a federal regulatory program" in the EEZ.

While the State can accept delegated management under a new FMP amendment, it cannot be forced to manage the federal waters of Cook Inlet.

CONCLUSION

For all of the above reasons, the Court should deny UCIDA's request for declaratory and injunctive relief in its entirety. Rather, the Court should clearly and unambiguously affirm that NMFS is to create an FMP amendment that encompasses the federal waters of Cook Inlet, in accordance with plain language of the MSA.

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CERTIFICATE OF SERVICE

I certify that the foregoing **STATE OF ALASKA'S REMEDY BRIEF** was served electronically on all parties using the CM/ECF system.

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