Case No. 20-35029

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED COOK INLET DRIFT ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE; REBECCA BLANK, *et al.*,
Defendants-Appellants,

and

STATE OF ALASKA,
Intervenor-Defendant-Appellant.

Appeal from the United States District Court, District of Alaska,
District Court No. 3:13-cv-00104-TMB

MOTION TO EXPEDITE AND TO TREAT APPEAL AS A COMEBACK CASE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that Appellant United Cook Inlet Drift Association has no parent corporation and no publicly held entity owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that Appellant Cook Inlet Fishermen's Fund has no parent corporation and no publicly held entity owns 10% or more of its stock.

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I. INTRODUCTION

This appeal involves continuing litigation between Plaintiffs-Appellees United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund (collectively, "UCIDA") and Defendants-Appellants National Marine Fisheries Service, *et al.* ("NMFS") over the scope of NMFS's fishery management responsibilities for Cook Inlet salmon fisheries under the Magnuson Stevens Fishery Conservation and Management Act ("Magnuson Act" or "MSA").

In 2016, in an earlier appeal in this case, this Court held that NMFS improperly attempted to "shirk" its duties and "wriggle out of" its statutory obligations under the Magnuson Act by failing to produce a salmon fishery management plan ("FMP") for the Cook Inlet salmon fishery and impermissibly deferring the fishery's management to the State of Alaska (the "State"). *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1063-64 (9th Cir. 2016) ("*United Cook*"). The Ninth Circuit rejected NMFS's efforts to parse the fishery into smaller pieces (explaining that "fishery" is a "defined term" under the MSA), and explained that the purpose of the FMP requirement was to ensure that important national fisheries are "governed by federal rules in the national interest, not managed by a state based on parochial concerns." *Id.*

Now, more than three years after the Ninth Circuit's clear instruction, UCIDA and the rest of the Cook Inlet fishing community are still waiting for their FMP. In the intervening three years, with no FMP and fishery management controlled solely by the State, the Cook Inlet commercial salmon fishing industry

has endured three disastrous fishing seasons, including the worst commercial fishing season in 40 years.

NMFS and its advisory body (the North Pacific Fishery Management Council (the "Council")) contend that it will take *at least* another two years (until fishing season 2022) to complete and put in place an FMP for the Cook Inlet salmon fishery. Even worse, NMFS and the Council on remand are not following the explicit instructions set out by this Court in *United Cook*. The FMP they plan to put in place will improperly parse the "fishery" into smaller sub-parts (and provide an FMP for only one sub-part of the fishery) and expressly allows State parochial interests, rather than federal rules in the national interests, to control the utilization of the fishery. Simply put, NMFS and the Council are continuing to try to "wriggle out of" their duties under the MSA for the Cook Inlet salmon fisheries.

UCIDA's members are facing financial ruin under State management, and they cannot afford to wait two more years for NMFS and the Council to craft an FMP, only to be subjected to an FMP that disregards this Court's instructions and the requirements of the MSA. With no relief in sight, UCIDA moved the district court to enforce this Court's prior ruling, set a deadline for completing the FMP, and provide interim relief to commercial fishermen. NMFS did not dispute that the FMP will parse the fishery into parts (and cover only one part) or that the FMP will elevate State parochial interests over the federal standards. Instead NMFS argued that the district court had to wait until the decision was complete to enforce the Ninth Circuit's decision.

The district court agreed that the FMP must be "compliant with the Ninth Circuit's decision," but declined to clarify what constitutes compliance with this Court's order, and incorrectly determined it was powerless to take any action to ensure that the FMP complies with the decision in *United Cook*. Order on UCIDA's Motion to Enforce Judgment, Case No. 3:13-cv-00104-TMB, District Court ECF No. 168 ("District Court Order") at 11-12. Ultimately, the only relief granted by the district court was to order NMFS to complete the development of the FMP within the extended timeline estimated by NMFS for completion. *Id*. at 12.

UCIDA now appeals the district court's order declining to enforce the substance of this Court's 2016 ruling. UCIDA respectfully requests that the appeal be referred to the original panel (Judges Fisher, Paez, and Hurwitz) for treatment as a comeback case pursuant to General Order 3.6(d). The primary issue on appeal turns on the interpretation of the original panel's opinion, and thus that panel is best positioned to review that key issue. In addition, in light of the irreparable harm to the commercial fishing industry that is currently occurring and will continue to occur under interim State mismanagement, UCIDA also respectfully requests expedited hearing and consideration of this appeal under Ninth Circuit Rule 27-12.[1] UCIDA's members face financial ruin and need relief in this appeal before June of 2020 to avoid another disastrous fishing season.

[1] Undersigned counsel for UCIDA contacted counsel for NMFS and State by email on January 20, 2020 regarding this motion. Counsel for NMFS represented that NMFS reserves taking a position on the motion until after the motion is filed, and

II. BACKGROUND

A. The Statutory Fishery Management Framework Is Clear.

Congress enacted the Magnuson Act to ensure the "sound management" and "full potential of the Nation's fishery resources." 16 U.S.C. § 1801(a)(5), (6). The primary mechanism for providing that sound management is through the development of FMPs, intended to "achieve and maintain, on a continuing basis, the optimum yield from each fishery." *Id*. § 1801(b)(4).

The MSA prescribes required elements of every FMP. Among other components, an FMP must: (1) include "conservation and management measures, applicable to . . . fishing by vessels of the United States, which are . . . consistent with the national standards"; (2) "assess and specify . . . the maximum sustainable yield and optimum yield from[] the fishery"; (3) "assess and specify . . . the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield"; and (4) set "annual catch limits" for the fishery that apply to fishing vessels of the United States. *Id.* § 1853(a)(1), (3), (4)(A), (15).

Each FMP and its conservation measures must meet 10 national standards set forth by the MSA. *Id*. § 1851. Among these national standards are the requirements that the FMP "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry," *id*. § 1851(a)(1), and that, "[t]o the extent practicable, an individual stock of fish

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that NMFS intends to file a response. Counsel for the State also reserved taking a position, but indicated it would likely oppose to any motion to expedite.

shall be managed *as a unit throughout its range*, and interrelated stocks of fish shall be managed as a unit or in close coordination." *Id.* § 1851(a)(3) (emphasis added). In addition, allocation of fishing rights must be "fair and equitable" to fishermen and "shall not discriminate between residents of different States." *Id.* § 1851(a)(4).

To ensure these federal standards are met, NMFS may "delegate authority over a federal fishery to a state," but only by "do[ing] so expressly in an FMP." *United Cook*, 837 F.3d at 1063. This delegation by FMP may occur only if, at all times, the "State's laws and regulations are consistent with such fishery management plan." 16 U.S.C. § 1856(a)(3)(B). And, of course, this may occur only after NMFS has first established an FMP under the *federal* statutory principles set forth above.

B. The Cook Inlet Commercial Salmon Fishery Is Being Managed out of Existence.

Cook Inlet, along Alaska's southern coast, is one of the nation's most productive salmon fisheries. *United Cook*, 837 F.3d at 1057. Once known for its world-class sockeye run, over the past four decades the Cook Inlet salmon fishery has steadily—and more recently, precipitously—declined. In the 1980s and 1990s, the *sockeye* salmon harvest alone consistently ranged from four to nine million sockeye per year. Declaration of Erik Huebsch in Support of UCIDA's Motion to Enforce Judgment, District Court ECF No. 153 ("Huebsch Decl.") ¶ 30. By 2018, the total commercial harvest of *all five* salmon species hovered around just 1.3 million salmon—61% less than the recent (already reduced) 10-year average annual harvest of 3.4 million fish. *Id.*

As a condition of its statehood in 1959, Alaska was allowed to manage the Cook Inlet salmon fishery so long as "the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad *national interest*." Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 341 (1958) (emphasis added). In 1979, the Council produced a federal FMP for salmon fisheries in Alaska. For Cook Inlet, however, the Council admitted that though the fishery "technically" occurred in federal waters, the State could continue to manage the fishery as a State-water fishery. *United Cook*, 837 F.3d at 1058. When UCIDA challenged this practice in 2010, NMFS simply amended the Alaskan salmon FMP to remove the Cook Inlet salmon commercial fishery from the scope of the federal plan altogether. *Id*. at 1060.

Since that time, Cook Inlet salmon harvests have continued to plummet under State management. The State's decision to gradually restrict the commercial fishery year after year to a point at which most openings are severely geographically limited to a narrow band has prevented fishery participants from targeting areas where salmon congregate. Huebsch Decl. ¶¶ 13-16; Declaration of Jeff Fox in Support of UCIDA's Motion to Enforce Judgment, District Court ECF No. 152 ("Fox Decl.") ¶¶ 7, 9, 12. At the same time, the State has continued to increase "escapement" levels to record high (and likely unsustainable) levels. Huebsch Decl. ¶ 15; Fox Decl. ¶¶ 15-17. This mismanagement has resulted in severe financial hardship to the participants in the Cook Inlet salmon fishery and the many businesses that rely on the commercial harvest. Huebsch Decl. ¶ 29.

C. This Court Previously Held That an FMP Is Required for the *Entire* Cook Inlet Salmon Fishery.

In 2013, UCIDA filed suit in district court, claiming that NMFS's decision to remove the Cook Inlet commercial salmon fishery from the FMP violated NMFS's statutory obligation to prepare an FMP "'for each fishery under its authority that requires conservation and management.'" *United Cook*, 837 F.3d at 1061 (quoting 16 U.S.C. § 1852(h)(1)). 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." *Id*. at 1062, 1064.

On September 26, 2016, a Ninth Circuit panel comprising Circuit Judges Fisher, Paez, and Hurwitz issued an opinion rejecting both of NMFS's arguments, and siding with UCIDA. The Court first rejected NMFS's position that it could simply "defer" management to the State, holding "the federal government cannot delegate management of the fishery to a State without a plan, because a Council is required to develop FMPs for fisheries within its jurisdiction . . . and then to manage those fisheries 'through' those plans." *Id.* at 1063. In so stating, the Court made clear that the Council cannot "shirk [its] statutory command," as a key 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." *Id.*

Next, the Court rejected NMFS's argument that an FMP need not cover the entire fishery. The Court explained 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." *Id.* at 1064. In short, the Ninth Circuit held that (1) NMFS must prepare an FMP consistent with the federal standards set forth in the Magnuson Act that reflect the national interest—and not parochial State concerns—and (2) the FMP must address the *entire* Cook Inlet fishery.

On remand to the district court, the parties agreed to entry of judgment that remanded the case to NMFS, with the court retaining jurisdiction while NMFS and the Council developed a new FMP. *See* District Court Order at 3.

D. NMFS and the Council Are Disregarding Clear Instruction in *United Cook*.

Over three years have passed since the Ninth Circuit issued its 2016 ruling, and NMFS and the Council have made little progress toward developing an FMP. Even more problematic than the delay, NMFS and the Council are dead-set on pursuing a plan that will not comply with the Court's instruction in *United Cook*. NMFS and the Council are considering only three options on remand, and none of these options comply with *United Cook* or the MSA.

Under one option, no FMP would be produced. Declaration of Jason Morgan in Support of UCIDA's Motion to Enforce Judgment, District Court ECF No. 154 ("Morgan Decl."), Ex. A, ECF No. 154-1, at 35 (Discussion Paper by Council and NMFS). This approach patently violates this Court's holding that an FMP is required under the MSA.

The second option does not cover the entire fishery, again directly contrary to this Court's holding that NMFS may not evade its statutory obligations by

creating an FMP "for selected parts" of the fishery while ignoring other parts that require conservation and management. *United Cook*, 837 F.3d at 1064. Moreover, this option defers to the State to determine the essential components of the FMP, like setting optimum yield and annual catch limits for the Cook Inlet salmon fishery, and making allocation decisions, all of which are essential requirements under the MSA (not State law). Thus, despite the MSA's requirement that the Council must set optimum yield at the level that "will provide the greatest overall benefit *to the Nation*," the Council proposes a level that reflects "the biological, economic, and social factors considered by" the Alaska Board of Fish and Department of Fish and Game. Morgan Decl., Ex A at 35, 68. This "fox in the hen house" option directly contradicts the Ninth Circuit's mandate that NMFS and the Council must develop an FMP according to "federal rules in the national interest[]" so the fishery is "not managed by a state based on parochial concerns." *United Cook*, 837 F.3d at 1063.

The third proposal also does not cover the entire fishery, again directly contrary to this Court's holding that NMFS may not evade its statutory obligations by creating an FMP "for selected parts" of the fishery while ignoring other parts that require conservation and management. *Id.* at 1064. Equally problematic, this option creates a subservient federal fishery that would occur only if and when the State allows it to do so; that is, under this option, the State could simply "allocate" the entire harvestable surplus in State waters, resulting in closure of the separate federal fishery. Morgan Decl., Ex. A, at 34, 58. This subservient approach, too,

elevates parochial concerns over national interests, and violates both the MSA and this Court's prior instructions.

NMFS and the Council are thus disregarding the decision in *United Cook* and coming up with clever ways to accomplish the same status quo that existed when this Court issued its 2016 ruling. Without an instruction from this Court, the FMP remand process will be nothing more than a five-year procedural sham.

To aid its remand efforts, the Council created a stakeholder group consisting of commercial fishing interests tasked with developing recommendations for the salmon FMP to implement one of the three alternatives outlined above. Huebsch Decl. ¶ 25. Understandably, many group members (including UCIDA members) have expressed fundamental disagreement over the scope of the FMP, as limited to the three aforementioned alternatives. *Id*. ¶ 26; *see also* Morgan Decl., Ex. B, ECF No. 154-2, at 5-6 (transcript of Council proceedings).

Principally, UCIDA maintains that this Court's prior order requires the Council and NMFS 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. Huebsch Decl. ¶ 26. The Council and NMFS disagree, stating that "[t]hese concepts are not supported by the Council," and directing the stakeholder group to focus on only the federal portion of the fishery and to accept one of the three alternatives above. Morgan Decl., Ex. C, ECF No. 154-3, at 4 (Meeting Summary, April 1, 2019).

Thus, there has emerged a clear and distinct impasse between UCIDA, on one hand, and NMFS and the Council, on the other hand, regarding the

requirements of the Magnuson Act and this Court's interpretation thereof. UCIDA maintains, consistent with this Court's opinion, that the MSA does not allow NMFS to produce (1) no FMP, (2) a shell FMP that applies to only part of the fishery and that allows the State to "fill in the blanks" for statutorily mandated federal FMP requirements, or (3) an FMP that applies only a part of the fishery and creates a subservient federal fishery that fishes only if and when the State allows it to. Because NMFS and the Council are pursuing only these three alternatives, the end result will inevitably violate the Ninth Circuit's order.

E. The District Court Denies UCIDA's Request for Relief.

With no prospect of timely or compliant resolution on remand, UCIDA moved the district court to enforce both the overarching Ninth Circuit mandate and the stipulated district court judgment implementing that mandate, to set a deadline by which the Council and NMFS must act on the FMP, and, if a compliant FMP could not be implemented by that date, to grant interim relief for the 2020 season. UCIDA's Motion to Enforce Judgment, District Court ECF No. 151. The district court in part granted and in part denied that motion. The district court agreed that "the length of time that has passed since this case was remanded is understandably frustrating," and directed "Defendants to resolve the process expeditiously." District Court Order at 12. To do so, the court ordered that NMFS must "prepare and adopt a salmon FMP compliant with the Ninth Circuit's decision **on or before December 31, 2020**" and then take final action on the FMP one year later (on or before December 31, 2021). *Id*. at 10 (emphasis in original). Commercial salmon

fishing in Cook Inlet occurs in the summer (June through August), and accordingly, there will be no FMP in place until fishing season 2022.

However, the district court declined to enforce the substance of the prior judgments, apparently believing that it was powerless to enforce the instructions of this Court until NMFS reaches a final decision. Thus, while the court ordered the production of "a salmon FMP compliant with the Ninth Circuit's decision," it refused to grant UCIDA's request for any instruction on what is meant by "compliant" with *United Cook*. The Court also refused to grant UCIDA any interim relief for fishing season 2020.

This leaves UCIDA in an impossible position. Under the district court's decision, UCIDA must watch for two *more* years (five years total) while NMFS and the Council continue to slowly build an FMP on a faulty legal foundation that does not comply with *United Cook* or the MSA. And while NMFS and the Council continue to "shirk" their duties, commercial fishermen face financial ruin under State management. UCIDA seeks expedited hearing on its appeal and assignment to the prior panel to bring prompt resolution to this appeal, so that the remand can get back on track before the commercial fishery collapses entirely. Ultimately, UCIDA simply asks for a process that achieves the result ordered by this Court almost four years ago, which itself was the product of an enormous expenditure of time and resources by UCIDA.

III. GROUNDS FOR EXPEDITED CONSIDERATION

Ninth Circuit Rule 27-12 governs requests for expedited consideration. That Rule provides for expedited hearing when "good cause" is shown. "Good cause"

exists when, "in the absence of expedited treatment, irreparable harm may occur." *Id*. This appeal presents good cause for expedited review because irreparable harm is occurring and, absent expedited treatment, will continue to occur.

It is well established that "'[t]he threat of being driven out of business is sufficient to establish irreparable harm.'" *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 994 (N.D. Cal. 2013) (brackets in original) (quoting *Am. Passage Media Corp. v. Cass Commc'ns, Inc*., 750 F.2d 1470, 1474 (9th Cir. 1985)), *aff'd sub nom. Drakes Bay Oyster Co. v. Jewell*, 729 F.3d 967 (9th Cir. 2013), *and aff'd,* 747 F.3d 1073 (9th Cir. 2014); *see also Foremost Int'l Tours, Inc. v. Qantas Airways Ltd*., 379 F. Supp. 88, 97 (D. Haw. 1974) (finding irreparable harm where plaintiff-tour company "established that the existence of its business life as a competitor in the freewheeling tour market is threatened"), *aff'd*, 525 F.2d 281 (9th Cir. 1975); *Semmes Motors, Inc. v. Ford Motor Co*., 429 F.2d 1197, 1205 (2d Cir. 1970) (finding irreparable harm based on threats to plaintiff's "right to continue a business in which [he] had engaged for twenty years and into which his son had recently entered" and to "not to live on the income from a damages award"). Indeed, in *Drakes Bay* this Court affirmed a finding of irreparable harm after agency actions severely limited an oyster harvesting company's commercial operations such that it would not have been able to realize a viable harvest "down the line," which "would prevent them from effectively resuming operations, destroying their business." *Drakes Bay*, 921 F. Supp. 2d at 995.

Like the *Drakes Bay* oyster fishery, the Cook Inlet commercial salmon fishery currently teeters on the brink of collapse. Its participants are actively being

driven out of business and are unlikely to survive any further delay without a legally compliant FMP. Huebsch Decl. ¶¶ 29, 32–33. In the three seasons the State has managed the fishery since the Ninth Circuit's mandate, UCIDA's members have suffered serious financial harms due to (1) restrictions by the State on fishing in certain areas within Cook Inlet; and (2) reduced salmon run sizes precipitated by the State's management measures that violate the Magnuson Act. Numerous processors already are facing bankruptcy, and commercial fishers face near-certain insolvency. *Id.* ¶ 32.

The new 10-year average from 2008 to 2017 for the once-famed Cook Inlet sockeye catch, formerly yielding up to nine million sockeye, is now down to just 2.7 million. Huebsch Decl. ¶ 30. And the three most recent seasons yielded harvests far below that average. *Id.* The commercial sockeye harvest in 2018 was just 814,516, the lowest in over 40 years. *Id.* The 2020 season, in all likelihood, will be significantly worse still, as the industry will face even more time and area closures under State management without an FMP. *Id.* ¶ 33.

More concerning, absent expedited review of this appeal, UCIDA faces at least two more fishing seasons under the State's mismanagement without an FMP. Even if NMFS and the Council comply with the district court's December 2020 deadline to develop and adopt a compliant FMP, that FMP will not be finalized for another year (December 2021), per the district court's deadline order. Accordingly, even if NMFS and the Council do meet the district court's deadline, the resulting FMP will not take effect until fishing season 2022. *See* NMFS's Supplemental Brief Opposing Motion to Enforce, District Court ECF No. 165

("Defs.-Appellants' Supp. Br.") at 14 (describing need for Secretarial review and likely timeline).

UCIDA's members cannot continue to absorb these financial losses, year after year. Presently, many commercial fisherman are not even making back their expenses. Huebsch Decl. ¶ 30. UCIDA's members are losing their boats and their livelihoods. As one report recently explained, whereas most of the State has seen strong commercial fishing seasons, Cook Inlet in 2019 experienced "another poor season" causing "the value of driftnet permits [to] plummet." Laine Welch, *Regional fishing successes cause spike in sale prices for Alaska salmon permit*, ANCHORAGE DAILY NEWS (Nov. 26, 2019), https://www.adn.com/business-economy/2019/11/26/regional-fishing-successes-cause-spike-in-sale-prices-for-alaska-salmon-permits/. Repeated poor seasons are having a disastrous toll: "You have folks in Cook Inlet that have hung on for years and they're trying to get out [of Cook Inlet] and go to Area M or Bristol Bay where they can hopefully make a living." *Id*.

Expedited consideration of this appeal is necessary to get this remand back on track and stem the irreparable harm befalling the commercial fishing industry in Cook Inlet. The district court recognized the inevitable harm that would ensue from even one more fishing season without an operative FMP, and suggesting that UCIDA should simply "negotiate with the Council directly to implement [interim] measures" for the 2020 fishing season. District Court Order at 11. But NMFS, not the Council, has authority to implement interim measures, and NMFS has represented that it is unwilling to do so. In fact, the only interim measure NMFS

will consider is *closing the entire fishery during remand*. Declaration of Dr. James W. Balsiger in Opposition to UCIDA's Motion for Entry of Final Judgment, District Court ECF No. 88 ¶¶ 18, 20. Thus, there is currently no way for UCIDA to avoid or mitigate the inescapable, irreparable harm that will ensue from a mismanaged 2020 Cook Inlet salmon fishing season.

Moreover, if this appeal is considered in the traditional course, the parties will likely receive a final decision from this Court around the time NMFS and the Council are required to have developed the FMP. At that point (presuming the Court agrees the Council and NMFS are not complying with *United Cook*), NMFS and the Council would then have to start from scratch to develop a compliant FMP, again restarting and delaying the timeline. *See* Defs.-Appellants' Supp. Br. at 9-10 ("NMFS is starting from scratch because the Ninth Circuit required the formation of an FMP for the Cook Inlet EEZ fishery.").

UCIDA's members will be out of business before that happens. If the current trend in salmon yield decline continues for even one more season, let alone three, under the status quo of State mismanagement, there may no longer be a Cook Inlet commercial salmon fishery for which to advocate. *See* Huebsch Decl. ¶¶ 30-33. If the severe harm already inflicted on UCIDA's members and the rest of the Cook Inlet commercial fishing industry from the State's mismanagement without a compliant FMP is not already irreparable, it surely will become so after another season or seasons of decline under State mismanagement.

Thus, there is good cause and urgent need for expedited review here. UCIDA needs relief from this Court on the appeal by May 1, 2020, so that there is

time to put in place interim measures for fishing season 2020 (which begins in June). And UCIDA urgently needs instructions from this Court now, so that the FMP produced by NMFS is compliant with the Ninth Circuit's decision, else the remand will have been a wasted exercise. Accordingly, pursuant to Circuit Rule 27-12, UCIDA requests that the Court set the following briefing schedule:

1. UCIDA's Opening Brief due February 20, 2020;
2. NMFS and State of Alaska's Response Brief due March 23, 2020; and
3. UCIDA' Reply Brief due April 7, 2020.

UCIDA respectfully request that the Court set argument in this matter as soon as practicable thereafter so as to allow for a decision on the merits of the appeal by May 1, 2020.

IV. GROUNDS FOR TREATMENT OF APPEAL AS A "COMEBACK CASE"

Ninth Circuit General Order 1.12 provides that a comeback case "means subsequent appeals or petitions from a district court case or agency proceeding involving substantially the same parties and issues from which there previously had been a calendared appeal or petition." Pursuant to General Order 3.6(d), the original panel may decide to accept review of a new appeal "that predominately involves the interpretation and application of the prior panel decision."

The present appeal meets all criteria for treatment as a comeback case, and the case should be submitted to the original panel to consider whether it will accept the present appeal. This appeal involves the exact "same parties" from 2016: UCIDA, NMFS, and the State.

The present appeal also involves the same "issues" litigated in the prior appeal. In fact, the specific question posed in this appeal turns on the correct interpretation of this Court's prior holding. This Court previously explained, "The [Magnuson Act] unambiguously requires a Council to create an FMP for each fishery under its authority that requires conservation and management. The Act allows delegation to a state under an FMP, but does not excuse the obligation to adopt an FMP when a Council opts for state management." *United Cook*, 837 F.3d at 1065. NMFS expressly cannot "wriggle out of this requirement," including through evasive workarounds like "creating FMPs only for selected parts of those fisheries." *Id*. at 1064.

Clear as the 2016 panel's opinion may seem, NMFS and the Council continue to misunderstand its directive, again attempting to "wriggle out" of their duties under the MSA. The district court offered no interpretive guidance, ordering only that NMFS and the Council develop and adopt an FMP "compliant with the Ninth Circuit's decision." District Court Order at 10. That order means nothing because NMFS has stated—incorrectly—that it believes the current FMP process is compliant. Now, the parties stand at an impasse as to how to construe the operative mandate, all while the Cook Inlet salmon fishery withers away.

In sum, because this case involves the same parties, the same standards, and the same issues, and because interpretation and application of the prior appeal will be dispositive of the merits of this appeal, treatment as a comeback case is warranted.

V. CONCLUSION

For the foregoing reasons, UCIDA respectfully requests that this appeal be (1) expedited and (2) submitted to the original panel for consideration as a comeback case.

DATED: January 22, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the January 22, 2020, I electronically filed the foregoing **Motion to Expedite and to Treat Appeal as a Comeback Case** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case that are registered CM/ECF users will be served by the appellate CM/ECF system.

I certify that I served the foregoing document on this date by mail to the following unregistered case participants:

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