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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.	Civil Action No.: 3:21-cv-00255-JMK **REPLY IN SUPPORT OF REMEDY BY PLAINTIFFS UNITED COOK INLET DRIFT ASSOCIATION AND COOK INLET FISHERMEN'S FUND**

I. INTRODUCTION

Defendants are not getting the message. The Ninth Circuit chastised NMFS[1] for trying to "wriggle out of" its Magnuson Act duties, and this Court held that the remand process was "a thinly veiled attempt to ensure an absence of federal management, which conflicts with the Ninth Circuit's holding."[2] NMFS now doubles-down on its defiance, dismissing these admonishments as "perceived 'recalcitrance,'" declaring that it "diligently pursued the last remand in good faith," and claiming that it "fully complied with the previous Judgment."[3] NMFS then asserts that the Court is powerless to provide any additional relief, and the State predictably piles on, arguing that injunctive relief against it would be unconstitutional.

These arguments underscore the need for the Court to step in and instruct NMFS that "enough is enough."[4] The Defendants' intent is clear. They want an open-ended remand with no timeline and no sideboards so they can (again) find new and creative ways to shirk their Magnuson Act obligations. They are unwilling to even *consider* interim measures and object to even the most basic request for a "good faith effort" at interim management that complies with the Magnuson Act. Defendants are content with the *status quo*, unconcerned that the *status quo* violates the Magnuson Act and is causing repeated

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[1] This brief uses the same abbreviations as UCIDA's opening remedy brief.

[2] Dkt. 67, Order at 22.

[3] Dkt. 72 at 5, 19, 23.

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

fishery management disasters and putting commercial fishermen out of business.

Contrary to Defendants' arguments, the Court is not relegated to passively standing by and watching history repeat itself. "Experience . . . shows that the court should, and sometimes must, be more than a passive participant in the remand process."[5] As set forth below, the relief requested by UCIDA is well within the scope of this Court's authority and is essential to avoid further efforts to "wriggle out of" the Magnuson Act.

II. ARGUMENT

A. The Magnuson Act Does Not Limit the Remedies Available to the Court on Remand.

NMFS concedes that the types of relief sought by UCIDA in this case are available in an APA case where the Court finds an agency action to be arbitrary and capricious under 5 U.S.C. § 706(2). NMFS nonetheless argues—apparently for the first time ever—that subsection 1855(f)(1) of the Magnuson Act impliedly limits the remedies available here because the statute provides that "the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title." NMFS reads the word "only" as a complete limit on the Court's remedial authority (in other words, the "only" remedy is to "set aside") rather than interpreting "only" as limiting the *grounds for relief* (§ 706(2)(A), (B), (C), or (D)). Thus, NMFS reasons, the

[5] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* ("*NWF v. NMFS*"), Nos. CV 01-640-RE, CV 05-23-RE, 2005 WL 2488447, at *3 (D. OR. Oct. 7, 2005), *aff'd*, 481 F.3d 1224 (9th Cir. 2007), *opinion amended and superseded*, 524 F.3d 917 (9th Cir. 2008), and *aff'd*, 524 F.3d 917 (9th Cir. 2008).

Court is powerless to set a deadline for remand, provide declaratory relief, require status reports, or impose any other kind of equitable relief. This novel argument—that the Magnuson Act strips a federal court of all of its equitable powers—fails for many reasons.

Initially, this argument is not even plausible given the decades of judicial practice by courts across the country that have *not* limited relief to "only" setting aside the agency decision in Magnuson Act cases.[6] As one court explained in a Magnuson Act case, "[t]hese remedies are within the Court's equitable authority, which includes the power to mandate affirmative relief that serves the interests of justice and the public interest."[7] Indeed, it does not appear that NMFS has ever raised this improbable reading of the statute in any case (and if it has, no court has ever agreed), and NMFS made no such claim when the district court imposed a deadline during the prior remand from the Ninth Circuit's decision.[8]

In addition to being improbable, NMFS's interpretation is also contrary to Ninth Circuit precedent. The Ninth Circuit has explained:

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[6] *See Nat. Res. Def. Council v. Locke*, No. C 01-0421 JL, 2010 WL 11545702, at *26 (N.D. Cal. Apr. 23, 2010) ("remand with instruction" and one year deadline proper remedy); *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 105, 107-08 (D.D.C. 2007) (imposing deadline); *Fairweather Fish, Inc. v. Pritzker*, No. C14-5685 BHS, 2016 WL 6778781, at *11 (W.D. Wash. Nov. 16, 2016) (directing the agency to properly evaluate the national standards on remand); *Coastal Conservation Ass'n v. Gutierrez*, No. 2:05CV400-FTM-29DNF, 2005 WL 2850325, at *11 (M.D. Fla. Oct. 31, 2005) (entering declaratory judgment).

[7] *Nat. Res. Def. Council*, 2010 WL 11545702, at *25.

[8] *See UCIDA v. NMFS*, Case No. 3:13-cv-00104-TMB (hereafter "*UCIDA 1*"), Dkt. 168 at 11.

> The statute also limits the *grounds for relief*. Under § 1855(f)(1)(B), a court may only set aside regulations if they are: arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A); contrary to constitutional right, power, privilege, or immunity, § 706(2)(B); in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, § 706(2)(C); or without observance of procedure required by law, § 706(2)(D).[9]

Thus, the word "only" in § 1855(f)(1)(B) addresses the "grounds for relief," not the availability of any specific remedy, as NMFS claims. The only limit on "remedy," the Ninth Circuit explains, appears in § 1855(f)(1)(A), which expressly precludes preliminary injunctive relief (not at issue in this case).[10] No other limit on remedy appears, expressly or impliedly, in the Act.

Moreover, NMFS fails to read the statute in context. Section 1861(d) of the Act sets forth the court's "jurisdiction" and provides: a "court may, at any time . . . take such other actions as are in the interest of justice."[11] The Ninth Circuit has instructed that § 1861(d) is "to be read in conjunction with" § 1851(f)(1).[12] As one court explained, the "Court's equitable authority, which includes the power to mandate affirmative relief," is "consonant

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[9] *Turtle Island Restoration Network v. U.S. Dep't of Com.*, 438 F.3d 937, 944 (9th Cir. 2006) (emphasis added).

[10] *Id.* ("[T]he court reviews the contested regulations in accordance with the APA *except* that § 1855(f)(1)(A) precludes preliminary injunctive relief, a remedy ordinarily available under the APA.").

[11] 16 U.S.C. § 1861(d)(4).

[12] *Norbird Fisheries, Inc. v. Nat'l Marine Fisheries Serv.*, 112 F.3d 414, 416 (9th Cir. 1997); *see also Pac. Coast Fed'n of Fishermen's Assocs. v. Blank*, 693 F.3d 1084, 1086 (9th Cir. 2012) (district court "had jurisdiction pursuant to 16 U.S.C. § 1861(d)" in challenge to FMP).

with the MSA's statutory scheme, which empowers . . . reviewing courts to take any action 'in the interests of justice.'"[13]

NMFS nevertheless contends that the Magnuson Act's judicial review provisions are "uniquely narrow" because Section 1855(f) does not expressly authorize a claim under 5 U.S.C. § 706(1) for agency action unlawfully withheld.[14] This is absurd. Section 1855(f) provides the standards for "judicial review" of "regulations" and specifically enumerated "actions." Section 1855(f) has nothing to do with agency inaction that would be otherwise independently reviewable under 5 U.S.C. § 706(1), and thus logically does not mention that provision of the APA. Indeed, NMFS has elsewhere "conceded that APA § 706(1) may provide a basis for relief in cases under the Magnuson-Stevens Act."[15] NMFS's argument is all the more perplexing because Plaintiffs have not asserted a failure to act claim and have instead argued, and this Court has agreed, that NMFS's actions are "arbitrary and capricious."[16] Providing additional equitable relief to ensure that an agency corrects illegal action is well within the scope of the relief available for a violation of § 706(2), and is "clearly permissible" under Ninth Circuit precedent.[17]

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[13] *Nat. Res. Def. Council*, 2010 WL 11545702, at *25 (quoting U.S.C. § 1861(d)).

[14] Dkt. 72 at 7.

[15] *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016).

[16] Order at 42.

[17] *NWF v. NMFS*, 524 F.3d 917, 937 (9th Cir. 2008) (affirming remand order requiring status reports and collaboration based on violation of § 706(2)); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 825 (9th Cir. 2018) (affirming injunctive relief pending completion of remand based on violation of § 706(2)).

Lastly, NMFS tries to distinguish the discretion exercised by the district court in *NWF v. NMFS*, on the grounds that the case involved the Endangered Species Act ("ESA"), and the ESA contains a citizen suit provision that expressly authorizes injunctive relief. [18] This is a red herring. The *NWF* case involved claims under the APA, not the ESA's citizen suit provision, and the court reviewed the case under the arbitrary and capricious standard of "5 U.S.C. § 706(2)(a)."[19] The relief granted in that case issued pursuant to APA, not the ESA citizen suit provision. The same panoply of equitable remedies is therefore available here.[20]

B. Declaratory Relief Is Necessary and Appropriate.

The history of this case demonstrates the need for declaratory relief. The judgment entered in the district court following the decision in *United Cook* did not contain any substantive instructions. UCIDA's members reasonably believed that NMFS would follow the Ninth Circuit's clear instructions in *United Cook* during remand. That belief proved wrong. When it became clear that NMFS was not following *United Cook*, UCIDA sought judicial enforcement. NMFS argued that it was only required to comply with the judgment (which did not expressly require NMFS to do anything) and that it could not be compelled

[18] *NWF v. NMFS*, 524 F.3d 917, 927 (9th Cir. 2008) (affirming *NWF v. NMFS*, No. CV 01-640-RE, 2005 WL 2488447 (D. Or. Oct. 7, 2005)).

[19] *Id.*

[20] NMFS also ignores precedent explaining that "a request for declaratory relief may be considered independently of whether other forms of relief are appropriate." *Powell v. McCormack*, 395 U.S. 486, 517-518 (1969).

to comply with the Ninth Circuit's decision. The result, as the Court now knows well, was a wasted remand and an agency decision that "conflicts with the Ninth Circuit's holding in *UCIDA 1*."[21]

NMFS argues that it should again be left to its own devices on remand. NMFS makes the hollow offer that UCIDA is free to file a new lawsuit if NMFS disregards the Court's summary judgment order. This is insanity. The Court is not required to allow another wasted remand.[22] There is nothing equitable about Plaintiffs endlessly filing and winning lawsuits, spending hundreds of thousands of dollars in doing so (and recouping that money from the government), only to never obtain any actual relief. Apparently, NMFS is content with wasting taxpayer money and federal resources in that fashion (while continuing to violate the law), but that does not mean this Court must play NMFS's farcical game.

UCIDA asks for narrow declaratory relief, and the only actual dispute raised by Defendants as to the substance of that request appears to be the instruction that the FMP must cover "the entire Cook Inlet salmon 'fishery' as defined by the Act."[23] But this objection is baseless. The Court's summary judgment order explains:

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[21] Order at 22.

[22] *NWF v. NMFS*, 2005 WL 2488447, at *1 ("The entire remand time was lost and wasted. This remand, therefore, requires a somewhat detailed order and monitored progress.").

[23] Dkt. 69 at 7. NMFS concedes that the other two requests "track statutory provisions or the Court's summary judgment order." NMFS Br. At 14.

> The Magnuson-Stevens Act specifically requires that an FMP be developed "for each *fishery* under its authority that requires *conservation and management*." A "fishery" is defined in the Act as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics" and "any fishing for such stocks."[24]

The Ninth Circuit "ruled that an FMP must be adopted for the entire fishery,"[25] and explained that, "[t]he Magnuson-Stevens Act unambiguously requires a Council to create an FMP for each fishery under its authority that requires conservation and management," and that "the statute requires an FMP for a fishery, a defined term."[26] NMFS clearly agrees, as the FMP expressly states: "[t]he Cook Inlet salmon fishery includes the stocks of salmon harvested by all sectors within State and federal waters of Cook Inlet."[27] NMFS's own 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."[28] There is no legitimate dispute that the FMP must cover "the entire Cook Inlet salmon 'fishery' as defined by the Act."[29]

Defendants ignore this language and attack strawmen, claiming that UCIDA is

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[24] Order at 17 (internal footnotes omitted).

[25] Order at 19.

[26] *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1064-65 (9th Cir. 2016).

[27] AKR_1917.

[28] 50 C.F.R. § 600.320(b).

[29] Dkt. 69 at 7.

arguing for preemption of state management.[30] The State, for its part, shadow boxes with a different case, interpreting different statutory provisions, and claims UCIDA wants to "usurp" state management.[31] The issues of how and when the Magnuson Act preempts state management are important ones, to be sure, but they are not part of this case, and are not part of the declaratory relief requested by UCIDA. UCIDA instead seeks precisely what the Ninth Circuit said is required: "the statute requires an FMP for a fishery, a defined term."[32]

Oddly, the State seeks its own declaratory relief (despite not asserting or winning on any claims), and requests an order "that the FMP amendment cover the EEZ waters, not State waters."[33] NMFS does not, and cannot, join this argument, as NMFS's FMP states that the "Cook Inlet salmon fishery includes the stocks of salmon harvested in State and federal waters,"[34] and sets optimum yield ("OY") for the *entire* salmon fishery including state waters, although it inappropriately set that OY at "the level of catch from all salmon

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[30] NMFS Br. at 13. This court has already noted that this strawman does not reflect UCIDA's argument. Order at 18, n.87.

[31] The *Jensen v. Locke* case involved arguments that NMFS has exclusive management authority over salmon (and that the state therefore had no authority). No. 3:08-CV-00286-TMB, 2009 WL 10674336, at *7 (D. Alaska Nov. 9, 2009). This is not UCIDA's argument. On the contrary, the "Act contemplates State and Federal cooperation." Order at 25. Such cooperation does not "usurp" state authority.

[32] *United Cook*, 837 F.3d at 1064.

[33] Dkt. 73 at 8.

[34] AKR_0001917.

fisheries occurring within Cook Inlet (State and Federal water catch)."[35] The State's position is contrary the FMP,[36] the express terms of the statute,[37] NMFS's regulations,[38] and the Ninth Circuit's instruction that "the statute requires an FMP for a fishery, a defined term."

The State's request, while procedurally and substantively baseless, confirms the need for the relief requested by UCIDA. The State has an outsized influence on the Council process (as evidenced during the prior remand), and it is already staking out another legally baseless remand position that "fishery" does not mean what the statute says. The State has done nothing to assure the Court or anyone else that it will not again improperly influence the remand process, and it can fairly be expected that the State will do so. Declaratory relief is therefore essential to avoid another wasted remand.

C. UCIDA's Requested Deadline Is Reasonable, and Its Request for Interim Relief Is Narrowly Tailored and Appropriate.

NMFS argues that it cannot complete a remand before May 2024, but this is difficult to understand. NMFS (supposedly) has been working on developing an FMP for the Cook Inlet salmon fishery for more than a *decade*. It should not have to start from scratch. Other

[35] Order at 23.

[36] AKR_1917.

[37] 16 U.S.C. § 1851(a)(3).

[38] 50 C.F.R. § 600.320(b).

courts have found agency time schedules unpersuasive under similar circumstances.[39]

NMFS's request for delay might be more understandable and acceptable if it were willing to provide *any* measure of relief to embattled fishermen for the 2023 season. It offers none. Instead, it argues for the status quo and throws stones at UCIDA's effort to craft reasonable interim relief. This is unfortunate. The status quo is illegal deferral by NMFS as it continues to "shirk" its duties under the Magnuson Act. The status quo is repeated fishery disasters under state management. The status quo is millions of surplus salmon going unharvested while commercial fishing vessels sit idle.

UCIDA has demonstrated that it is entitled to equitable injunctive relief if NMFS cannot produce an FMP before next season. UCIDA has prevailed on the merits. It has shown a likelihood of irreparable injury through uncontested evidence of a repeated pattern of fishery overescapement and economic disasters, and it demonstrated that such harms are likely to continue next summer, causing further harm.[40] And UCIDA has shown that both the balance of the equities and public interest favor injunctive relief.

NMFS makes a misstep, arguing that because UCIDA seeks to "change the status quo" it has a higher burden of showing irreparable injury.[41] But this higher standard applies

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[39] *See, e.g.*, *NWF v. NMFS*, No. CV 01-640-RE, 2005 WL 2488447, at *1 (D. Or. Oct. 7, 2005) ("[T]he Action Agencies urged that no time limit be set, and that if a limit was set, it should be no less than two years. At this stage of the proceedings, I do not believe a remand period of more than one year is appropriate considering past actions on remand.")

[40] Huebsch Decl. ¶¶ 28, 34-35.

[41] NMFS Br. at 20.

only to a "preliminary injunction" where there are concerns about changing the status quo, not an injunction after the merits have been reached.[42] The status quo is illegal deferral of clear statutory obligations, resulting in repeated lost harvest and economic ruin. There is no legal or equitable concern about preserving such a status quo.

The State argues that it gave UCIDA plenty of fishing opportunity last summer, and in fact, more opportunity than UCIDA is asking for now. That is not true. The State did allow many "openings" last summer, but as UCIDA already explained (and the State does not dispute), those openings did not occur at times and locations where the fish were *actually present*.[43] UCIDA is asking for a *minimum* of two days (two twelve-hour periods) a week on an *inlet-wide* basis so its members can catch the available surplus. This was the historical practice of the State, and the State provides no evidence that this historical practice ever resulted in overfishing on any stocks.

Ultimately, the difficult question for the Court is not *whether* injunctive relief is warranted, but what that relief should be. Plaintiffs are cognizant that the Court does not want to be placed in a position of trying to run the fishery. By statute, that is NMFS's job. But NMFS illegally punted that job to the State. Now NMFS asserts that it will not do its job next summer either, and the State protests that it would be unconstitutional to force it

[42] *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 n.13 (9th Cir. 2019).

[43] Huebsch Decl. ¶¶ 26-28.

to comply with federal law when managing fisheries in federal waters.[44] What are Plaintiffs to do but seek judicial remedy when the state and federal governments refuse to comply with federal law?

The narrow request put forward by UCIDA is intended to ameliorate some of the ongoing harm until a proper FMP is put in place. None of the Defendants' objections are significant. UCIDA is not asking for a greater "allocation" of fish or to take fish away from other users—it is asking for a reasonable opportunity to harvest the surplus that is otherwise wasted every single year due to chronic overescapement.[45] The State argues this relief will impair weak stocks, but they rely only on the argument of counsel, not testimony from one of the State's fishery managers.[46] NMFS claims that UCIDA's proposal requires openings "regardless of salmon run strength," but UCIDA suggested no such draconian restriction,

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[44] The State argues that injunctive relief would violate the anticommandeering provision of the U.S. Constitution. But that provision limits Congressional authority. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The State cites no case applying that provision to the judiciary. The Court has broad equitable authority to right established wrongs, and the State submitted to the authority of the Court by intervening in this case. The State orchestrated an illegal delegation of the fishery to "ensure an absence of federal management" in direct contravention of an existing Ninth Circuit decision. Order at 22. There is no "affront to state sovereignty" (*Murphy*, 138 S. Ct. at 1476) in ordering the State to provide interim relief to mitigate the harm caused by its decision to disregard federal law and the Ninth Circuit's instruction.

[45] The State argues that those fish can be caught by "in river" fishermen. But as UCIDA explained (and the State does not dispute) "in river" fishing has no capacity to harvest the millions of fish that go wasted every year. Huebsch Decl. ¶¶ 21-23, 28.

[46] *United States v. Sanchez*, 659 F.3d 1252, 1258 (9th Cir. 2011) (arguments by a lawyer are not evidence); *Conservation L. Found. v. Ross*, 374 F. Supp. 3d 77, 91 (D.D.C. 2019) ("The Government's view advanced in its brief, however, is only a litigation position.").

and is amenable to clarifying its requested relief to allow for emergency adjustment in response to an unexpectedly low run strength. NMFS claims that interim regulation could require ESA consultation on the beluga, but that is not credible given NMFS's position in Amendment 14 that "it is unlikely that salmon abundance is limiting beluga whale recovery in Cook Inlet."[47] These concerns have no merit.

Ultimately, the obligation to manage these stocks in a manner consistent with the Magnuson Act in 2023 and beyond rests squarely on NMFS's shoulders. Yet NMFS presents nothing but roadblocks to interim relief. If the Court has any concerns with the propriety of the narrow interim relief requested by UCIDA, then the Court should put the onus on NMFS to get the FMP done by fishing season 2023, and if NMFS absolutely cannot do so (as they claim), then the Court should require NMFS to confer with the State and Plaintiffs and come back to the Court next spring with a legitimate proposal to provide interim relief for the 2023 season.

D. Collaboration During Remand and Continuing Jurisdiction with Status Reports Is Essential to Developing a Viable FMP.

NMFS claims its remand was not a farce, but the record shows otherwise. During the prior remand, the State clearly "had an overriding interest in which alternative was selected" and the "record clearly establishes that Alternative 4 was crafted as a thinly veiled attempt to ensure an absence of federal management."[48] NMFS has already conceded that

[47] 86 Fed. Reg. 60,568, 60,582 (Nov. 3, 2021).

[48] Order at 22.

the public comment process was a "failure."[49] This is not a model to be repeated.

NMFS complains that these measures will "influence the final rule" and that UCIDA will "run to the Court at every perceived slight." These are the precise arguments rejected by the court in *NWF v. NMFS*, where the district court imposed a collaboration requirement, required status reports, and retained jurisdiction to ensure compliance.[50] There, as here, NMFS argued that it would be "improper" to issue such an order because it would "inject the court into the deliberative process."[51] The court disagreed. It "recognized" that NMFS "alone is charged with responsibility of drafting a valid biological opinion," but that "they have not succeeded," and the "many failures in the past have taught us that the preparation or revision of NOAA's biological opinion on remand must not be a secret process with a disastrous surprise ending" and that the "parties must confer and collaborate if we are to reach the goal of a valid biological opinion."[52]

These concerns resonate here. NMFS has now twice failed to produce a valid FMP for Cook Inlet, and the prior remand resulted in a surprise ending with a last-minute announcement by the State that it was unwilling to accept a delegated program. Simply put, "the history of NOAA's failures to comply with the [MSA], constitutes 'substantial

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[49] AR_0013023 (discussing the "failure to communicate" in public process).

[50] No. CV 01-640-RE, 2005 WL 2488447, at *3 (D. Or. Oct. 7, 2005).

[51] *Id*.

[52] *Id*.

justification' for a process that is somewhat detailed and monitored by the court."[53]

III. CONCLUSION

UCIDA respectfully requests that the Court order the relief set forth in UCIDA's proposed order.

DATED this 13th day of October, 2022.

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Certification: Pursuant to the Court's order at Docket 75, this brief contains 4,124 words.

[53] *Id*. at 4.

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court, District of Alaska by using the CM/ECF system, which will send notice of such filing to counsel of record.

/s/ Jason T. Morgan
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