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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT  
ASS'N, ET AL.,

Plaintiffs,

vs.

NATIONAL MARINE FISHERIES  
SERVICE, ET AL.,

Defendants.

Case. No. 3:21-cv-00255-JMK  
3:21-CV-00247-JMK  
CONSOLIDATED

**DECLARATION OF  
JONATHAN M.  
KURLAND**

I, JONATHAN M. KURLAND, declare:

1. I am the Administrator for the Alaska Region of the National Marine Fisheries Service ("NMFS"), National Oceanic and Atmospheric Administration ("NOAA"), within the United States Department of Commerce.

2. As part of my official duties, I assist the Secretary of Commerce, Gina Raimondo ("Secretary"), in carrying out her responsibilities for complying with the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act") as that statute applies to the implementation of fishery management plans ("FMPs") and FMP amendments for fisheries in the exclusive economic zone ("EEZ") off Alaska. I am responsible for coordinating the development and implementation of policies governing the management of salmon fisheries in the EEZ off Alaska under the "Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska" ("Salmon FMP"). As a result, I am familiar with the Salmon FMP, its amendments, and its implementing regulations. I serve on the North Pacific Fishery Management Council ("Council") as NMFS's representative for the Alaska Region.

3. I am familiar with the issues in this litigation and I have read Plaintiffs' Remedy Brief.

4. The following paragraphs explain: (1) NMFS's understanding of the operative management regime for salmon fishing in the Cook Inlet EEZ following this Court's vacatur of the regulations implementing Amendment 14 to the Salmon FMP ("Amendment 14"); (2) NMFS's intended course of action to develop and implement a new Salmon FMP amendment and final rule; (3) the opportunities for collaboration with Plaintiffs and other stakeholders during the development of a new FMP amendment; (4) the conservation and management implications of Plaintiffs' proposed interim management measures; and (5) the availability of interim or emergency rules to change status quo management during the development of a new rule.

#### **Operative Management Regime in the Cook Inlet EEZ**

5. Following the vacatur of Amendment 14, there are currently no operative Federal regulations governing salmon fishing in the Cook Inlet EEZ (i.e., Federal waters). Under the Magnuson-Stevens Act, a State may regulate fishing vessels operating in the EEZ if the vessels are registered under the laws of that State and

there are no Federal fishing regulations for the fishery in which the vessel is operating. 16 U.S.C. § 1856(a)(3)(A). Thus, currently the State of Alaska (“State”) may regulate State-permitted vessels fishing for salmon in the Cook Inlet EEZ. NMFS is not aware of any vessels permitted by a state other than Alaska that fish for salmon in the Cook Inlet EEZ. Until NMFS promulgates new Federal fishing regulations governing salmon fishing in the EEZ, under the Magnuson-Stevens Act the State may continue to regulate these State-permitted vessels participating in commercial and/or recreational fisheries.

6. The State has managed salmon fishing in both the State and Federal waters of Cook Inlet for decades and has consistently prevented overfishing and protected weaker stocks of salmon from excessive fishing pressure while maximizing harvest of stronger stocks. NMFS and the Council’s Scientific and Statistical Committee (SSC) vetted the State management regime in developing Amendment 14 and assessed whether overfishing has occurred over the last 15 years. The SSC also considered whether key stocks (comprising a majority of the value of the fishery) exceeding their escapement goals—i.e., returning to their natal streams in numbers that may

exceed the minimum required for sustainable reproduction—posed any conservation concerns. After this analysis, the SSC found that State harvest targets represented the best scientific information available for the sustainable management of salmon in Cook Inlet and there was no conservation concern associated with key stocks exceeding their escapement goals. It is my opinion that State management during the next fishing season, in which NMFS expects the State to apply these same conservation standards, will ensure the sustainability of the Cook Inlet salmon resource while NMFS develops a new management regime for Federal waters.

**NMFS’s Proposed Plan to Develop a New Salmon FMP Amendment**

7. From before the inception of the Salmon FMP in 1979 until the advent of Amendment 14, and then again after Amendment 14 was vacated, the State has managed salmon fishing in both State and Federal waters of Cook Inlet. For most of this time, the State had explicit authority to manage across the State-Federal boundary outside the context of an FMP under the North Pacific Fisheries Act of 1954. After the expiration of this statutory authority, NMFS and the Council have amended the Salmon FMP twice to comply with the Magnuson-Stevens Act while maintaining stability in the fishery,

preserving the conservation successes of State management, and ensuring that salmon fishing continues to be managed according to the best scientific information available. First, NMFS implemented Amendment 12 to the Salmon FMP, which excluded the Federal waters of Cook Inlet from the Salmon FMP's management area and thereby deferred management to the State, reasoning that Federal conservation and management was not necessary in light of the State's historical and continued management success. However, the Ninth Circuit disagreed with NMFS's final rule.

8. On remand, NMFS worked with stakeholders on a committee organized by the Council and through the Council process to identify alternative management options following the Ninth Circuit decision. Three options emerged: (1) explicitly delegating management authority to the State, which would have been closest to status quo management but would have required the State and fishery participants to comply with additional Federal procedural requirements for the EEZ portion of the salmon fishery; (2) creating a new management regime for the Cook Inlet EEZ, with Federal waters managed exclusively by NMFS and the State retaining management authority only for State waters; or (3) closing the EEZ to commercial

salmon fishing, as is the case throughout the rest of the EEZ, and moving all harvest into State waters, where the vast majority of salmon fishing in Cook Inlet already occurs. Because the State determined it did not want to accept delegated management authority, NMFS was left with two unpopular options, but determined closing the EEZ to commercial salmon fishing would be most likely to achieve the optimum yield from Cook Inlet salmon stocks and place the least administrative and financial burden on both participants and fishery managers. After this Court determined that closing the EEZ through Amendment 14 was inconsistent with the Magnuson-Stevens Act, NMFS began the process of amending the Salmon FMP again consistent with this Court's decision. In accordance with this Court's order, the planned FMP amendment will address the management of both commercial and recreational salmon fishing in the EEZ. As is required for any FMP, the planned amendment will specify maximum sustainable yield (MSY), optimum yield, and describe the manner in which catch limits and overfishing levels would be established on an annual basis. The precise contours of the new management regime would be best developed through the Council process with its expert advisory bodies, allowing all impacted

stakeholders opportunities to provide input and ensuring any newly developed management targets—including harvest limits—undergo necessary review by the SSC. NMFS has already informed the Council that it has begun work on this new FMP amendment, and is working on making updates to the analysis previously considered by the Council to better highlight the current suite of possible management alternatives. NMFS would like to ensure the Council, agency scientists, the SSC, Plaintiffs, and other stakeholders—particularly recreational fishermen who did not participate in the deliberations over Amendment 14, which focused on commercial fishing—have ample time to discuss and develop management alternatives. In NMFS’s view, providing such opportunities for full stakeholder involvement in the development of a new FMP amendment and management regime is necessary and appropriate under the Magnuson-Stevens Act.

9. In order to accommodate all of these interests and to ensure timely completion, NMFS plans to adhere to the following schedule, which reflects the steps and processes that NMFS believes are necessary for full compliance with the Magnuson-Stevens Act and other applicable laws:



- October 2022: Discuss the needed FMP amendment with the Council and proffer a motion that would task Council staff with updating the analysis from Amendment 14 to highlight the current scope of management under consideration and identify possible management alternatives.
- December 2022: Council considers an Initial Review analysis. This step of the Council process is necessary to receive input from the Advisory Panel (stakeholder representatives) and the public regarding the implications, adequacy, and completeness of the impact analysis and management alternatives.
- April 2023: Council takes final action to select a policy recommendation. This is likely the meeting at which the SSC will provide peer review of the management framework that would be used to establish annual catch limits and overfishing levels, ensuring the Council relies on the best scientific information available.
- October 2023: NMFS receives the Council recommendations and solicits public comment on the

proposed FMP amendment and proposed rule. Under the Magnuson-Stevens Act, a notice of the proposed FMP amendment must be published within five days after it is transmitted by the Council to NMFS, and NMFS must provide a 60-day public comment period. 16 U.S.C. § 1854(a). The proposed rule will have a 30-day public comment period, which will fall within the comment period for the proposed FMP amendment. After the close of public comments on the FMP amendment, the Secretary will have 30 days to approve, disapprove, or partially approve the proposed amendment in light of public comments. Thus, within 90 days after publishing the proposed FMP amendment for public comment, the Secretary will be able to make a final decision on approval of the FMP amendment.

- April 2024: NMFS publishes a final rule.
- May 2024: Final rule effective.
- May 2024-June 2024: Participants will have at least 30 days after the rule's effective date to apply for any new permits required to participate in the Federal fishery and

install any required monitoring or reporting equipment.

If NMFS is allowed to adhere to this schedule, it will issue a final rule no later than May 2024.

10. Plaintiffs suggest NMFS could implement a new management regime through a Secretarial amendment more quickly than through the Council process. However, a Secretarial amendment would require many of the same processes listed above and all the supporting analysis would have to be completed without the benefit of Council staff assistance. Moreover, the required peer review of management measures would need to be accomplished without the Council's SSC. A Secretarial amendment would also lose out on the benefits of input from the Council's Advisory Panel, whose input has previously been favorably cited by Plaintiffs, and public testimony through the Council process. Whether the Council recommends an FMP amendment or the Secretary acts without Council input, NMFS must ensure that the agency has a reasonable range of alternatives to choose from, those alternatives are fully analyzed, and the public has ample opportunities to comment. In preparing a Secretarial amendment, the Secretary must conduct public hearings in the geographical areas concerned to allow interested persons to be heard

and submit a proposed amendment to the Council for comment. 16 U.S.C. § 1854(c)(2)(A), (c)(3). In addition, the Secretary would need to allow a 60-day public comment period on the proposed amendment. The time it would take to identify a range of alternatives, prepare an analysis, and schedule and conduct an adequate number of public meetings—without the assistance of Council staff and outside the context of regularly-organized Council meetings—would be approximately equivalent to the time it will take the Council to consider a new FMP amendment and propose action under the schedule above. In addition, all catch limits are constrained by the fishing level recommendations of the SSC for Council-managed fisheries, or a separate peer review process for Secretarial FMPs. To establish a new management regime for Cook Inlet without the benefit of the SSC, the Secretary would need to develop and establish a new peer review process to provide the scientific information needed to manage the fishery. 50 C.F.R. § 600.310(b)(2)(v)(C). The peer review process must be established according to very specific criteria to ensure the reliability of the scientific advice it produces, and a description of the process would need to be published in the Federal Register. 50 C.F.R. § 600.315(b). This would all take time, possibly

more time than submitting proposed harvest limits and management measures to the already-established SSC through the Council process. In my opinion, a Secretarial amendment and final rule would be less efficient and provide less opportunities for stakeholder input than amending the FMP through the Council process, which is specifically designed for development of fishery management measures through an open and inclusive system of stakeholder involvement.

### **Collaboration with Plaintiffs and Other Stakeholders**

11. As with the development of any Council FMP amendment and associated implementing regulations, NMFS intends to give Plaintiffs and all other impacted stakeholders ample opportunities to participate in the process and provide comments. This includes stakeholders from the recreational sector that would not have been regulated under any of the previously considered management alternatives, as the development of Amendment 14 focused on the commercial sector throughout the Council process. Plaintiffs will have opportunities to testify and submit written comments at each of the Council meetings listed above in NMFS's proposed schedule. Plaintiffs will also be invited to comment on the proposed FMP amendment and proposed rule.

12. During the previous remand, members of the plaintiff's organization constituted a majority on the Cook Inlet Salmon Committee ("Committee"), which was established by the Council to provide input on the development of Amendment 14. While the Committee provided some feedback that was incorporated into elements of the analysis, a significant amount of time was spent attempting to reconcile differences in legal opinions between Committee members and NMFS. Primarily, Plaintiffs insisted NMFS has the authority to manage salmon throughout their range, including into State waters, and proposed management alternatives that would have set harvest limits in both State and Federal waters under the FMP. As NMFS explained, under the Magnuson-Stevens Act, NMFS has the authority to manage only those portions of the fishery in Federal waters because the Cook Inlet salmon fishery occurs predominately in State waters. Ultimately, the Committee's final recommendation was reviewed by the Council but not adopted for analysis because it included federal management measures applicable to State waters (i.e., outside of Council jurisdiction). These disagreements will likely continue to persist, which will add time to any remand.

13. Plaintiffs do not represent the perspectives of all stakeholders in the Cook Inlet drift gillnet fleet, let alone all stakeholders in the Cook Inlet commercial salmon fishery sector. During the previous remand, UCIDA did not treat the dissenting viewpoints of other stakeholders with respect, particularly during the Committee process. NMFS is committed to hearing all perspectives and ideas from stakeholders, both inside and outside Plaintiffs' organization and fishery sector.

Interim Management Measures Proposed by Plaintiffs

14. Plaintiffs propose two interim management measures that they advocate should apply to the 2023 fishery. Plaintiffs first suggest that NMFS and the State must open the entirety of Cook Inlet for at least two 12-hour fishing days each week, regardless of salmon run strength or any other indicators of the salmon stocks in Cook Inlet. Without the authority to close the fishery under this proposed management scheme if warranted, NMFS could find itself in violation of the Magnuson-Stevens Act's mandate to prevent overfishing. The drift gillnet fleet can substantially interact with stocks that have been subject to overfishing in the recent past, including certain coho and sockeye salmon stocks. NMFS often refers to stocks like these that are

more vulnerable to overfishing as weak stocks. While overfishing has been rare, many of the individual salmon stocks in these stock complexes have not met escapement goals in multiple years. Under status quo conditions, when the State recognizes that an escapement goal may not be met, they take action to reduce harvest. Mandating harvest periods without regard to salmon abundance may result in overfishing of weak stocks, and/or failures to meet escapement goals, as well as limit harvest opportunities in other Cook Inlet salmon fishery sectors. Adjusting fishery open times and areas to avoid weak stocks is a critical and regularly-used management tool. If overall salmon removals are increased in Cook Inlet, NMFS would also have to carefully evaluate the potential impacts to endangered Cook Inlet beluga whales, which depend on many of the same stocks harvested by the fishery for prey.

15. Plaintiffs frame their second interim management proposal as mandating the 2023 fishery is managed according to the standards of the Magnuson-Stevens Act. However, in explaining their interpretation of the Magnuson-Stevens Act, Plaintiffs misstate NMFS's management targets under the Act and fail to acknowledge NMFS's primary obligation to prevent overfishing. Plaintiffs also



appear to ask for increased harvest opportunities without any stock assessment or peer review process to support the establishment of harvest limits that differ from the status quo, which would be inconsistent with the Magnuson-Stevens Act. Under National Standard 1 of the Magnuson-Stevens Act, NMFS must ensure that management measures will prevent overfishing while achieving optimum yield. Though Plaintiffs are correct that optimum yield is established “on the basis” of MSY—i.e., optimum yield is derived from MSY—it is not equivalent to MSY. Instead, optimum yield is “reduced” from MSY “by any relevant economic, social, or ecological factor.” 50 C.F.R. § 600.310(e)(3)(i)(A). Even if optimum yield and MSY were equivalent, NMFS does not manage to ensure that optimum yield or MSY is achieved for every stock of fish in every fishing season because these are not annual harvest limits. Rather, optimum yield and MSY are long-term averages that serve as reference points in establishing other fishery management measures. In any federally-managed fishery, optimum yield may be defined so as to protect the weakest stocks in the fishery after a thorough peer review process by the Council’s SSC. In the National Standard 1 Guidelines, MSY is defined as “the largest long-term average catch or

yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics (e.g., gear selectivity), and the distribution of catch among fleets.” Anecdotal evidence that a particular stock is being harvested at levels below its maximum potential harvest rate does not mean the fishery as a whole is not achieving optimum yield for all stocks in light of economic, social, or ecological factors. Furthermore, while a post season evaluation of the data clearly indicates how fishery harvests compare to MSY in a given year, during the fishing season it is frequently highly uncertain how many fish may still be returning. In light of this often significant uncertainty, it is very appropriate for managers to be conservative. An order to manage the fishery such that one stock of salmon in Cook Inlet meets MSY on an annual basis would almost certainly result in exceeding MSY for co-occurring stocks—that is, would result in overfishing for those stocks—which would be inconsistent with NMFS’s management obligations under the Magnuson-Stevens Act.

**Use of Emergency Rules Prior to Implementation of a New Management Regime**

16. Though Plaintiffs suggest NMFS could implement their

proposed interim management measures in 2023 through an emergency or interim action, this is not an appropriate situation for NMFS to use its emergency or interim rulemaking authority. Section 305(c) of the Magnuson-Stevens Act clearly limits this authority to situations in which there is overfishing or some other conservation and management emergency. Under NMFS policy guidance, an emergency is a situation that (1) results from recent, unforeseen events or recently discovered circumstances, (2) presents serious conservation or management problems in the fishery, and (3) can be addressed through emergency regulations for which the immediate benefit outweighs the significant public interest in notice and comment rulemaking. 62 Fed. Reg. 44421, 44422 (Aug. 21, 1997). NMFS's emergency and interim rulemaking authority under section 305(c) is intended to prevent significant harm to fishery resources or participants resulting from unforeseen circumstances, as when NMFS must take immediate action to close a fishery to prevent overfishing. Contrary to Plaintiffs' suggestions, NMFS does not use its emergency or interim rulemaking authority to resolve allocative disputes or concerns of under-harvest on the part of one stakeholder group.

17. There is currently no evidence of overfishing nor any other

type of emergency in the Cook Inlet salmon fishery that would warrant emergency or interim action. Plaintiffs are asking NMFS to take emergency or interim action to increase their number of fishing days and total harvest of salmon in 2023, regardless of resulting impacts on weaker stocks or other stakeholders and without any stock assessment or analysis to support their request. Increasing the harvest of sockeye salmon, for example, without gathering the necessary scientific data or establishing peer reviewed harvest limits that account for all stocks of salmon in this mixed stock fishery could decrease the harvest of other sectors and increase the risk of overfishing on weaker stocks of salmon caught as bycatch. Emergency action should be used only to reduce the risk of overfishing, not to exacerbate that risk. Plaintiffs' proposed interim management measures would create an unnecessary risk of overfishing and deprive the public of the opportunity to comment on an issue with implications for many stakeholders beyond the sector in which Plaintiffs participate.

18. Plaintiffs built their businesses under State management and have operated under status quo management conditions as long as this fishery has been open. In the absence of Federal regulations,

the State has statutory authority to continue managing State-permitted vessels when fishing for salmon in the Cook Inlet EEZ. NMFS plans to promulgate a final rule according to the schedule described above. Because there is no immediate concern of overfishing and because emergency action to increase harvest for Plaintiffs could have allocative implications for other users and create conservation concerns for weaker stocks of salmon, an emergency or interim rule to alter the status quo management regime until a new final rule is implemented would be inappropriate.

19. In light of the information above, it is my opinion that amending the FMP on an expedited basis through the Council process and implementing a final rule before the 2024 fishing season—while maintaining status quo fishery conditions in the interim—is the best course of action. May 2024 is the soonest NMFS could implement a new final rule while: (1) avoiding any conservation risks to the salmon resources; (2) ensuring that any new management regime is based on the best available scientific information; and (3) providing ample opportunities for stakeholders and the public to give input before changing fishery conditions.

Pursuant to 28 U.S.C. § 1746, I swear under penalty of perjury that  
the foregoing

is true and correct.



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JONATHAN M. KURLAND  
Administrator, NMFS Alaska Region