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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

UNITED COOK INLET DRIFT	)	Case No.
ASSOCIATION, INCORPORATED;	)	
	)	
Plaintiff,	)	
vs.	)	<b>COMPLAINT FOR</b>
	)	<b>DECLARATORY AND</b>
OTTO WOLF: In His Official Capacity as	)	<b>INJUNCTIVE RELIEF</b>
Acting Secretary of Commerce;	)	
	)	<b>(U.S. CONST. ART. VI, CL. 2;</b>
	)	<b>U.S. CONST. ART I, SEC. 8,</b>
Defendant.	)	<b>CL. 3; U.S. CONST. AMEND.</b>
_____	)	<b>V; 16 U.S.C. § 1801 <i>ET SEQ.</i>; 5</b>
	)	<b>U.S.C. §553; 28 U.S.C. §2201(a);</b>
	)	<b>28 U.S.C. §2202; 42 U.S.C.</b>
	)	<b>§4332(2)(c))</b>

**I. NATURE OF THE CASE**

1. Plaintiff United Cook Inlet Drift Association, Inc. (UCIDA) brings this action against the Secretary of Commerce for failure to respond to a petition for emergency rulemaking under the Administrative Procedure Act, filed by UCIDA in June

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of 2008. Failure to respond to UCIDA's petition resulted in past and ongoing harm in violation of the Due Process clause and Equal Protection guarantees of the Fifth Amendment, and in violation of the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens). 16 U.S.C. §1801 *et seq.*

## II. JURISDICTION AND VENUE

2. This court has jurisdiction over this action under 16 U.S.C. §1855(f); 5 U.S.C. §702; 28 U.S.C. §2201(a); 28 U.S.C. § 1331. Venue is proper under 28 U.S.C. § 1391(e).

## III. PLAINTIFF

3. UCIDA is a cooperative corporation, registered and in good standing in the State of Alaska, that represents commercial fishermen who utilize drift gillnets in the Exclusive Economic Zone (EEZ) of Cook Inlet, Alaska to harvest salmon. UCIDA actively participates in efforts at the state and national level to promote the interests of its members. Members of UCIDA consist of resident and non-resident commercial fishermen who rely predominately upon the harvests of sockeye salmon to earn their livelihood. Most of the sockeye salmon harvested by UCIDA members are returning to the major spawning rivers in Cook Inlet; in particular the Kenai, Kasilof, Crescent, and Susitna Rivers.

4. In addition to participating in the commercial fishery, some UCIDA members participate in recreational fishing, including UCIDA members from other states. Although UCIDA does not generally advocate for the recreational interests of its

members and it is not UCIDA's primary purpose, some of UCIDA's members are precluded from participating in resident-only fisheries and are therefore harmed by ongoing state regulations that prohibit non-resident participation in recreational fisheries.

5. In February of 2008, UCIDA represented its members at the state level, opposing promulgation of proposed state salmon regulations that would substantially and adversely affect their fishery in the EEZ. Immediately after the State of Alaska promulgated these regulations, which would have a substantial and adverse affect on the ability of UCIDA members to remain economically viable, UCIDA filed a petition for emergency rulemaking (Petition) with the Secretary of Commerce pursuant to 5 U.S.C. §553(e), urging the Secretary to initiate emergency preemption proceedings against the State of Alaska under 16 U.S.C. §1855(c)(1) prior to the 2008 salmon season.

6. The Secretary failed to respond to the UCIDA petition. UCIDA brings this action on behalf of its members – those commercial salmon fishermen operating drift gillnets in the EEZ and state waters – to assert their right to petition for rulemaking under the APA and Magnuson-Stevens. UCIDA has standing under both the APA and Magnuson-Stevens to bring this action. The Secretary unlawfully failed to respond to UCIDA's Petition, causing irreparable injury to UCIDA's members. Because the injury caused by the challenged state regulations is ongoing, and the Secretary's ongoing failure to respond to the Petition denies UCIDA due process under the APA and the U.S. Constitution, there is an ongoing controversy over which this court can grant a remedy.

#### IV. DEFENDANT

7. Defendant Otto Wolf is the Acting Secretary of Commerce, who has management authority over anadromous species throughout their range under Magnuson-Stevens. He is vested with responsibility for implementing and enforcing Magnuson-Stevens under 16 U.S.C. § 1855(d). He is being sued in his official capacity

#### V. BACKGROUND

8. Congress exercised federal jurisdiction over all anadromous fish species, including Pacific salmon throughout their range, in the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens Act), as reauthorized in 2006. 16 U.S.C. §1811(b)(1). Congress clearly articulated ten national standards applicable to conservation and management of anadromous species. The ten national standards are:

- (1) 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.
- (2) Conservation and management measures shall be based upon the best scientific information available.
- (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.
- (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(8) Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

(9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

(10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea

16 U.S.C. §1851(a).

9. Congress then delegated to the Secretary of Commerce (Secretary) and eight Regional Fishery Management Councils, authority to implement the Magnuson-Stevens Act. The Secretary has authority and the responsibility to “promulgate such regulations,...as may be necessary to discharge such responsibility or to carry out any other provision of [Magnuson-Stevens].” 16 U.S.C. §1855(d). The Secretary delegated his authority to the National Marine Fisheries Service (NMFS) to enact appropriate

regulations to implement and enforce the anadromous species provisions of Magnuson-Stevens.

10. The North Pacific Fishery Management Council (Council) retains jurisdiction over anadromous species in the EEZ from 3-200 miles off the coast of Alaska. The Council delegated management authority to the State of Alaska in the EEZ through the 1990 Fishery Management Plan for Salmon in the EEZ off the Coast of Alaska (FMP). The FMP for salmon closes the EEZ west of Cape Suckling to salmon fishing, with the exception of three historic net fisheries. The Cook Inlet commercial salmon drift gillnet fishery occurs in the EEZ west of Cape Suckling and is one of the three historic net fisheries preserved in the FMP.

11. The State of Alaska manages anadromous species in state waters under the Statehood Act, which provided that management of fish and game resources would transfer to the state once "adequate provision for the administration, management, and conservation of said resources in the broad national interest" were in place. Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, July 7, 1958.

12. The Statehood Act incorporates the Submerged Lands Act of 1953 by reference. The Submerged Lands Act, while transferring title to the submerged lands under the navigable waters of the United States to the states, retained federal jurisdiction over those waters and resources for the purposes of navigation and commerce. Alaska Statehood Act, §6(c); 42 U.S.C. §772 *et seq.*

13. Congressional authority to enact Magnuson-Stevens and the Submerged Lands Act is rooted in the Commerce Clause of the United States Constitution, which provides that Congress shall regulate commerce among the several states and with foreign nations. U.S. Const. Art. I, § 8.

14. The State of Alaska promulgated regulations that permit Alaska residents to harvest salmon to the exclusion of commercial fisherman and non-resident recreational fishermen in the drainages of Cook Inlet. UCIDA alleges that resident-only harvests of salmon are violative of Magnuson-Stevens, and they substantially and adversely affect the Cook Inlet EEZ fishery, thereby causing ongoing harm to UCIDA's members.

15. UCIDA alleged violations of federal law under Magnuson-Stevens including discrimination based on residency, failure to manage for optimum sustained yield, and harm to essential fish habitat, and sent a letter to the North Pacific Fishery Management Council urging the Council to provide comments to the Secretary of Commerce as provided for in the Council's procedures and the FMP.

16. The Council, through its executive director, responded that the Council had no obligation to provide comments to the Secretary, and that there are no federal laws that apply to salmon management in state waters.

17. UCIDA then filed a PETITION FOR EMERGENCY RULES RELATED TO SALMON MANAGEMENT IN COOK INLET, ALASKA pursuant to the APA and Magnuson-Stevens with the Defendant on June 16, 2008, alleging a violation of Magnuson-Stevens and urging Defendant to take emergency action.

18. Specifically, UCIDA challenged the resident-only fisheries, mandatory closures, arbitrary season opening and closing dates, escapement goals that do not meet optimum sustained yield, and failure of the state to utilize the best available science when promulgating regulations. UCIDA requested that the Secretary take steps to protect the commercial fishing community and the essential fish habitat upon which UCIDA's members and salmon rely.

19. The Secretary failed to respond to the Petition.

20. On July 24, 2008, the Cook Inlet fishery targeting Kenai River sockeye salmon was closed for the season in an attempt to achieve the minimum escapement goal. The resident-only personal use fishery continued unabated until the normal regulatory season closure at 11:00 p.m. on July 31. The minimum sockeye salmon escapement goal for the Kenai River was not met.

21. On November 20, 2008 a letter was sent to the Secretary inquiring into the status of the Petition. As of March 3, 2009, there has been no response to the Petition or the letter of inquiry related to the Petition.

22. The same regulations are in place for the 2009 and 2010 seasons which led to the 2008 closure of the EEZ fishery in favor of resident-only fisheries. UCIDA's members have been harmed and continue to be harmed by the state regulations pertaining to salmon management in Cook Inlet and the EEZ.

23. UCIDA sought a remedy through the petition process available under the APA in an effort to redress the ongoing harm suffered by its members. The Secretary, by

failing to respond to the Petition, denies UCIDA's members due process under the provisions of the APA, Magnuson-Stevens, and the United States Constitution.

**First Claim**

**Defendant Failed to Respond to UCIDA's Petition for Emergency Rulemaking**

24. Paragraphs 1 through 23 are realleged and incorporated by reference herein.

25. UCIDA's members have a statutory interest under the APA and Magnuson-Stevens related to petitions for rulemaking which are filed with the Defendant.

26. UCIDA'S members also have a substantive interest in the commercial fishery in the EEZ of Cook Inlet as recognized by Congress in Magnuson-Stevens, including adherence to the ten national standards and protection of essential fish habitat.

27. Defendant unlawfully withheld agency action regarding UCIDA's Petition, resulting in actual harm to UCIDA's members when their fishery was closed in favor of resident-only fisheries and the minimum escapement goal for sockeye salmon was not achieved in the Kenai River. Defendant's inaction failed to provide procedural protections to ensure that the ten national standards are met and that essential fish habitat is protected. UCIDA members suffer ongoing harm because the same regulations which closed the Cook Inlet fishery in 2008 and failed to adhere to the ten national standards and fail to protect essential fish habitat are in place for the 2009 and 2010 seasons.

28. UCIDA's members have a statutory and substantive interest in the Cook Inlet EEZ salmon fishery that could have been protected if Defendant acted lawfully and

considered the Petition. Defendant's failure to act resulted in actual harm to UCIDA members during the 2008 season, and because the same state regulations remain in place, UCIDA members will suffer harm in the 2009 and 2010 seasons that is concrete and particularized – restrictions on their fishery in favor of resident-only fisheries, lost yield, and essential fish habitat degradation.

29. UCIDA respectfully requests this court to declare resident-only fisheries preempted under the Commerce Clause and Magnuson-Stevens as a matter of law. Further, UCIDA requests an order of remand to the Defendant to thoughtfully consider all elements of UCIDA'S Petition and to initiate preemption proceedings against the State of Alaska to redress the ongoing harm suffered by UCIDA members.

**Second Claim**  
**Defendant Violated UCIDA's Members Due Process Rights Under the 5<sup>th</sup> Amendment**

30. Paragraphs 1 through 29 are realleged and incorporated by reference herein.

31. Defendant's failure to respond to UCIDA's Petition deprived UCIDA's membership due process of law under the Fifth Amendment to the United States Constitution regarding their statutory liberty to commercial fish granted under Magnuson-Stevens and the APA.

**Third Claim**  
**Defendant Violated UCIDA's Members Equal Protection**

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32. Paragraphs 1 through 31 are realleged and incorporated by reference herein.

33. Defendant's failure to respond to UCIDA's Petition deprived UCIDA's membership equal protection under the United States Constitution, the APA, and Magnuson-Stevens.

### PRAYER FOR RELIEF

Therefore, Plaintiff respectfully requests that the Court:

1. Declare Defendant's failure to respond to UCIDA's Petition a violation of the APA, Magnuson-Stevens, and the 5<sup>th</sup> Amendment for unreasonably withholding agency action.

2. Declare Defendant's actions a deprivation of the due process and equal protection rights of UCIDA's members.

3. Declare that the state authorized resident-only salmon fisheries in Cook Inlet, Alaska are unconstitutional and therefore preempted by federal law.

4. Order the Defendant to initiate preemption proceedings against the State of Alaska under Magnuson-Stevens for actions that substantially and adversely affect the commercial salmon fishery in the EEZ of Cook Inlet.

5. Order the Secretary to review the Cook Inlet Salmon regulations and show cause that they meet the ten national standards of Magnuson-Stevens, with particular

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attention to season opening and closing dates, mandatory closures, whether the Kenai River sockeye salmon escapement goals achieve optimum sustained yield, and whether adequate measures are in place to protect essential fish habitat.

6. Order the Secretary to provide comments to the State of Alaska and to establish a consultation process for protection and rehabilitation of essential fish habitat in the Cook Inlet basin.

7. Order the Secretary to provide procedural guidance to the North Pacific Fishery Management Council regarding requests for comments to the Secretary related to fishery management by members of the public and other interested parties.

8. Retain jurisdiction over this matter until such time as the Secretary of Commerce demonstrates to the court that salmon regulations in Cook Inlet comply with the ten national standards and other provisions of the Magnuson-Stevens Act.

9. Award Plaintiff the costs of this action, including reasonable attorney's fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

10. Grant Plaintiff such other and further relief as the Court deems just and proper.

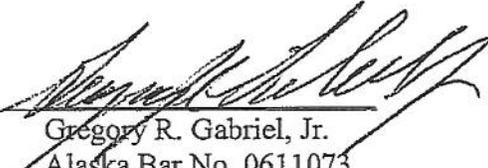
DATED: This 4<sup>th</sup> day of March, 2009.

Respectfully submitted,  
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