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MEMORANDUM

TO: Stephanie Queen, City Manager
City of Soldotna

Soldotna City Council



FROM: Brooks W. Chandler
City Attorney

DATE: January 18, 2022

SUBJECT: Filing of Amicus Brief in United Cook Inlet Drift Association v. National Marine Fisheries Service

This memorandum summarizes a recent lawsuit filed by the United Cook Inlet Drift Association (UCIDA) and the Cook Inlet Fishermen’s Fund (CIFF) against the National Marine Fisheries Service¹ (NMFS) and the National Oceanic and Atmospheric Administration (NOAA) and individual officers thereof that is currently pending in the United States District

¹ NMFS is a named defendant. The specific regulatory action being challenged is the approval by the United States Secretary of Commerce of an amendment to a federal fisheries management plan that was recommended for approval by the North Pacific Fishery Management Council (“Council”). That approval was finalized by issuing federal regulations. This memorandum refers to NMFS throughout rather than the Secretary of Commerce or the United States.

Court for the District of Alaska. The claims and the historical background of the case are discussed.

Also discussed is the potential for the City of Soldotna to participate in this case by filing a legal brief (called an amicus brief) with the District Court. The current deadline for filing is February 17.

CASE BACKGROUND²

Parties-

UCIDA is an Alaska cooperative corporation with approximately 200 members³ all of whom are required to hold limited entry salmon drift permits to fish in a specific management area in Cook Inlet generally referred to as Upper Cook Inlet. UCIDA has historically taken an advocacy role before regulatory agencies who make decisions on allocation of the Cook Inlet salmon resource⁴.

CIFF is a non profit corporation with 446 members including commercial fisherman (both UCIDA eligible members and otherwise) processors and others. CIFF was incorporated in 1976. It's mission is to advocate for Cook Inlet commercial fishermen⁵.

NMFS is part of NOAA and is charged with managing commercial fisheries in federal waters within what is called the "Exclusive Economic Zone" (EEZ) of the United States. Since 1982 this has extended between 3 miles and 200 miles from shore. Portions of Cook Inlet are within the EEZ but also within State of Alaska territorial waters which extend

²The majority of this information is taken from allegations in the 52 page Complaint. Our office has not verified the accuracy of the allegations.

³The most recent biennial report for UCIDA was filed in 2020 and stated there were 198 members all of whom pay an annual fee of \$200. Most cooperative fish marketing groups are supported by members contributing a percentage of the value of their catch to the group.

⁴Complaint para. 15.

⁵Complaint para. 17.

3 miles from shore⁶. Since statehood primary management of Alaska salmon fisheries has been done by the State of Alaska⁷. This occurred both through “custom and practice” (Cook Inlet) and by specific delegations of authority in an approved federal management plan (Southeast Alaska).

Case History

This current dispute originated in 2010. UCIDA was not satisfied with the way Alaska had been managing the salmon fishery in Cook Inlet. In general, UCIDA thought the State was letting too many salmon go by either to be harvested by sport fishers, dipnetters or not at all and that State mismanagement had led to a declining number of returning salmon.

UCIDA asked for the federal government, through NMFS to “take over” management by adopting a federal fisheries management plan meeting federal management standards as opposed to the past practice of state management in accordance with state standards as implemented by the State of Alaska Board of Fish and Game⁸. NMFS responded by adopting an amendment to an existing federal management plan in 2012 which officially exempted the Cook Inlet salmon fisheries from the federal plan in effect deferring management to the State of Alaska. The stated basis for removing these districts from the federal management plan was that NMFS was content with state management.

UCIDA sued asking a judge to require NMFS to develop a federal management

⁶This “coterminous” inner boundary of the EEZ is recognized in the federal statute authorizing NMFS’ fishery management role (Magnuson-Stevens Fishery Conservation and Management Act).

⁷Those familiar with the history of statehood will recall that gaining local control over management of the salmon resource was one of the prime motivating factors of the statehood movement. The Seattle based processors were significant opponents to statehood.

⁸The State manages salmon by setting escapement goals adjusting fishing time for commercial fishing and bag limits for sport fishing based on whether the State thinks a set escapement goal is being met. The conclusion as to whether escapement goals are being met is primarily based on fish counting via sonar and “test fisheries” during the season. NMFS manages commercial fisheries by setting quotas deciding in advance of a season how many fish may be harvested commercially without regard to how many fish have “escaped”.

plan that specifically included Cook Inlet. Like the current case, the 2012 lawsuit began in United States District Court. UCIDA lost in the District Court but won on appeal to the 9th Circuit.

The court told NMFS that if it wanted to delegate management authority for Cook Inlet to the State of Alaska it had to accomplish that goal through an express delegation in a fisheries management plan that included Cook Inlet rather than by excepting out Cook Inlet from a federal fisheries management plan. The Court ordered NMFS to include Cook Inlet in a federal fisheries management plan.

But the maxim “be careful what you wish for” now applies. When NMFS was forced to adopt a federal plan that included Cook Inlet the plan that was adopted closed the “federal waters” in Cook Inlet to commercial fishing instead of delegating management of the fishery to the State of Alaska⁹. The plan also “deferred” managing sport fishing to the State. The result of this decision is to limit the area for commercial salmon fishing to “state waters” i.e within 3 miles of shore.

UCIDA sued again in November. The State has intervened in support of NMFS. According to UCIDA the closure decision was made because the State of Alaska representatives declared the State of Alaska was not willing to accept a delegation of management authority from the United States. The State’s position is that federal oversight of State management is an unacceptable infringement of Alaska’s “right” to manage the Cook Inlet salmon resource.

Current Claims

There are both procedural and substantive claims in this case plus an administrative appeal. UCIDA claims the closure violates federal standards and statutes applicable to federal management plans as well as the prior 9th Circuit decision. UCIDA also claims an Environmental Assessment (“EA”) prepared by NMFS which concluded closing

⁹Presumably such a delegation would have changed the management approach from an escapement based system to a “catch limits” based system using federal standards.

the fisheries would have “no significant impact” was inadequate¹⁰. UCIDA claims NMFS should have disclosed the State’s objection to being delegated management authority (and perhaps other “key information”) further in advance of the Council decision recommending closure of the fisheries and should have presented the proposed closure to a “scientific and statistical committee”¹¹ prior to taking action.

Case Status

The court granted UCIDA’s request to fast track the case. Opening briefs must be submitted by February 7. The current schedule will result in a court decision in advance of the 2022 commercial fishing season. If the City is going to submit a brief supportive of UCIDA the latest that brief can be submitted is February 17.

ANALYSIS

What is an Amicus Brief.

Amicus is Latin for “friend”. It is filed by someone who is not a party to the case. The brief takes a position typically siding with someone who is a party and suggesting how the court should rule.

Why File an Amicus Brief.

A. Economic Impact. The outcome of the case may have an immediate impact on Soldotna. Closing an area to commercial fishing could mean there will be less salmon caught by commercial fishers. Presumably Cook Inlet drift permit holders will still be allowed by the State to fish within 3 miles from shore but this will likely require

¹⁰The National Environmental Policy Act (“NEPA”) requires federal agencies to evaluate the environmental impact of many of their actions. This is a two step process. First an EA is prepared analyzing environmental impacts. Based on the EA an agency either prepares a much more detailed Environmental Impact Statement (“EIS”) or issues a written Finding of No Significant Impact (“FONSI”). NMFS issued a FONSI prior to closing the fisheries.

¹¹This committee is referenced in the Magnuson-Stevens Act.

management decisions on balancing set net fishing and drift fishing. So negative economics to Soldotna from the closure seems a likely outcome. We are not fisheries biologists so cannot determine how a commercial closure of the EEZ will impact how many salmon are harvested by UCIDA members.

B. Setting Precedent. If Soldotna feels federal catch limit management standards rather than escapement based state management standards should be applied to Cook Inlet salmon this case will set precedent as to whether that will be the management scheme for the immediate future. This case may have impacts beyond the precise geographical area of the EEZ. Should UCIDA prevail it is theoretically possible the State would need to alter current management of Kenai River salmon in other areas of Cook Inlet outside the EEZ either legally (under theories similar to those advanced by UCIDA in this case) or practically (because a bifurcated management system inside and outside the EEZ would not be workable). There is also a procedural precedent to “how” fisheries management decisions are made. If UCIDA prevails a more detailed and presumably improved administrative process could impact the outcome of future NMFS decisions that affect Soldotna residents. Finally, whether an EA has properly led to a FONSI is an issue that could be relevant to federally managed projects with which Soldotna is involved in the future.

C. Political Position. Taking an official legal position reflecting the judgment of the elected representatives of the City of Soldotna as to whether federal or state management of commercial salmon fishing is in the best interest of Soldotna residents theoretically could influence future state policy on fishery management. It also could influence future policy decisions of the North Pacific Fishery Management Council.

D. General Support. The City may wish to express support for UCIDA in particular or for the commercial fishing industry in general. There are aspects of this industry that go beyond economics. It is part of the culture and history of this area. Ensuring opportunities to make a living commercial fishing survive and thrive is something Council may choose to support in this very concrete way.

Why Not File an Amicus Brief.

A. Cost. This is a significant expense. My initial estimate was \$20,000 (estimated 80 hours of attorney time). That is based on this being a case that has gone on for many years with thousands of pages of material in the record. Certainly our office will work

to hold costs below this estimate if authorized to file a brief. For example, if the brief that is filed is narrowly targeted to no more than one of the multiple issues in the case it can be done with less attorney time.

B. Neutrality. If this is viewed as an allocation dispute between commercial fishers and sport fishers the City may wish to remain neutral.

C. Public Purpose. If the City Council believes this case is only about the private economic interests of UCIDA members it may not make sense to use public funds to support a private economic interest.

D. Impact/Need. The City Council may feel that since the City of Homer and the City of Kenai have already decided to file their own briefs that the potential impact of the City filing a brief will be reduced and therefore not worth the expense.

Our office has started to more closely look at the case in order to be prepared to file a brief to meet what is a tight deadline. We will be able to meet the deadline if Council authorizes a brief to be filed.