UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
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Litigation Updates for the
April 2025 Meeting of the North Pacific Fishery Management Council

UCIDA v. NMFS

Parties:

Plaintiffs: United Cook Inlet Drift Association (UCIDA); Cook Inlet Fishermen's Fund.

Federal Defendants: National Marine Fisheries Service (NMFS); National Oceanic & Atmospheric Administration (NOAA); Secretary of Commerce, Howard W. Lutnick; and Assistant Administrator for NOAA.

Defendant-Intervenor: State of Alaska.

Case Activity:

On May 29, 2024, Plaintiffs filed a motion in the United States District Court for the District of Alaska challenging Amendment 16 to the Salmon Fishery Management Plan and implementing regulations—issued May 1, 2024—as inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Administrative Procedure Act, and the National Environmental Policy Act. Separately, on July 17, 2024, Plaintiffs filed a complaint challenging the 2024 harvest specifications for the Cook Inlet commercial salmon fishery on many of the same grounds. The Court granted Plaintiffs' motion to consolidate the two cases, and the parties have completed briefing. At oral argument, the Court granted Federal Defendants leave to file a surreply brief that responded to arguments raised by Plaintiffs for the first time in their reply brief.

Status/Next Steps:

Oral argument occurred on March 25, 2025, and the Court has taken the case under advisement. The next step is for the Court to issue a decision.

Attached: Plaintiffs' Opening Brief (Doc. 37, November 6, 2024); Federal Defendants' Response Brief (Doc. 40, December 20, 2024); Plaintiffs' Reply Brief (Doc. 46, January 24, 2025); Defendants' Motion to Strike and Surreply (Doc. 51, February 7, 2025).

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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. and STATE OF ALASKA, Intervenor-Defendant.	**OPENING BRIEF** Civil Action No.: 3:24-cv-00116-SLG LEAD CASE
UNITED COOK INLET DRIFT ASSOCIATION, et al., Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, et al., Defendants.	Case No. 3:24-cv-00154-SLG CONSOLIDATED

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I. INTRODUCTION

This case continues more than 15 years of litigation attempting to compel Defendant National Marine Fisheries Service (NMFS) to comply with its statutory duties under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The MSA was passed in 1976 with a basic mandate to NMFS: produce a "fishery management plan" (FMP) "for each fishery under its authority that requires conservation and management,"[1] and ensure that the fishery is managed to meet the MSA's National Standards.[2]

Despite this clear mandate, NMFS has never produced an FMP for the Cook Inlet salmon fishery that meets the National Standards. For the first 40-plus years after the passage of the MSA, NMFS ignored the Cook Inlet salmon fishery entirely and let the State of Alaska (State) manage the fishery however it saw fit. Unfortunately, the State's management practices—beginning around 2000—took a turn for the worse, and salmon harvest in Cook Inlet began a precipitous and lasting decline that has now persisted for almost 25 years, to the detriment of fishing communities throughout Cook Inlet.

In 2008, to turn the tide on the State's mismanagement, Plaintiffs turned to NMFS, the entity charged by Congress to manage the Nation's salmon fisheries. Plaintiffs filed a petition with NMFS that pointed out the obvious: the Cook Inlet salmon fishery is under NMFS's jurisdiction, and NMFS is required to manage it, just as NMFS does for other

[1] 16 U.S.C. § 1852(h)(1).
[2] *Id.* § 1851.

salmon fisheries in Alaska and along the West Coast. NMFS ignored the petition, resulting in a lawsuit,[3] and then denied the petition, resulting in another lawsuit.[4]

Following settlement of the second lawsuit in 2010, NMFS begrudgingly recognized that it had to do *something* with the Cook Inlet salmon fishery. But instead of doing what Congress instructed and preparing an FMP that would manage the Cook Inlet salmon fishery, NMFS in 2012 issued an FMP amendment (Amendment 12) that codified its practice of deferring all fishery management decisions to the State.

After four years of litigation on Amendment 12, the Ninth Circuit in 2016 reversed in a unanimous and terse decision. The primary question was whether NMFS "can exempt a fishery under its authority that requires conservation and management from an FMP because the agency is content with State management."[5] The Ninth Circuit said no, "[t]he [MSA] unambiguously requires [NMFS] to create an FMP for each fishery under its authority that requires conservation and management."[6] The Ninth Circuit further admonished that NMFS may not "shirk the statutory command that it 'shall' issue an FMP for each fishery within its jurisdiction requiring conservation and management" and cannot "wriggle out of this requirement by creating FMPs only for selected parts of those fisheries,

[3] *United Cook Inlet Drift Association v. Wolfe*, 3:09-cv-00043-RRB.
[4] *United Cook Inlet Drift Association v. Locke*, 3:09-cv-00241-TMB.
[5] *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv. (UCIDA 1)*, 837 F.3d 1055, 1057 (9th Cir. 2016).
[6] *Id.* at 1065.

excluding other areas that required conservation and management."[7] That should have resolved any dispute about the scope of NMFS's obligation.

Unfortunately, old habits die hard. On remand, NMFS found a new way to shirk its duties. In 2022, NMFS issued a new amendment (Amendment 14). This time, NMFS deferred management to the State by closing all fishing in federal waters, resulting in yet another lawsuit.[8] This Court had no trouble rejecting Amendment 14, explaining it was a "thinly veiled attempt" to avoid federal management and skirt the Ninth Circuit's holding in *UCIDA 1*.[9] This Court vacated Amendment 14 and ordered NMFS to prepare "a new FMP amendment that is consistent with this Court's Summary Judgment Order and the previous orders in this litigation and complies with the Magnuson-Stevens Act, the APA, and all other applicable laws by no later than May 1, 2024."[10]

On April 30, 2024, NMFS published the final rule implementing Amendment 16 to the FMP for Cook Inlet, which simply presents a new way for NMFS to shirk the statutory command. This time, NMFS defers management to the State by inconsistently (and unlawfully) parsing the statutory term "fishery" and institutionalizing the States' mismanagement of Cook Inlet for the last two decades as the "optimum yield" for the

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[7] *Id*. at 1064.
[8] *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv. (UCIDA 2)*, Nos. 3:21-cv-00255-JMK & 3:21-CV-00247-JMK, 2022 WL 2222879, at *6 (D. Alaska June 21, 2022). Below, Plaintiffs refer to specific docket entries in Case Nos. 3:21-cv-00255-JMK & 3:21-CV-00247-JMK by the 00247-case number, the docket number, and the date.
[9] *See id.* at *8.
[10] *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 103, at 10 (D. Alaska May 15, 2023).

fishery moving forward. This is déjà vu all over again. The Ninth Circuit in *UCIDA 1* already explained that "fishery" is a "defined term," that NMFS cannot produce "FMPs only for selected parts of those fisheries," and that the entire fishery must be managed to meet "national interest, not managed by a state based on parochial concerns."[11]

Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund (collectively "UCIDA") filed this action because the statute's (and Ninth Circuit's) mandate remains unfulfilled. Amendment 16 and the resulting harvest specifications are unlawful for many of the same reasons that Amendment 14 was unlawful. Most fundamentally, NMFS still has failed to create a lawful FMP amendment for the Cook Inlet salmon fishery as the Ninth Circuit ordered NMFS to do eight years ago.

For the reasons explained below, UCIDA asks this Court to rule that Amendment 16 and its implementing regulations, including the harvest specifications, are arbitrary, capricious, and contrary to the MSA, 16 U.S.C. §§ 1801–1891d, and the APA, 5 U.S.C. §§ 551–59, 701–06. Plaintiffs respectfully request that this Court vacate the decisions approving Amendment 16 and the harvest specifications and order NMFS to comply with the MSA and develop a lawful FMP as the Ninth Circuit instructed.

II. RELEVANT FACTS

The relevant background facts are set out in detail in *UCIDA 1* and *UCIDA 2* and summarized above. Plaintiffs do not repeat those facts here other than to provide context to understand NMFS's current decision.

[11] 837 F.3d at 1064, 1063–64.

A. After the Council failed to recommend an alternative, NMFS created Amendment 16 through the Secretarial amendment process.

In November 2022, this Court in *UCIDA 2* set a May 1, 2024 deadline for completion of remand and ordered periodic status reports by NMFS.[12] In March 2023, the North Pacific Fisheries Management Council (Council) reviewed a draft Environmental Assessment[13] that analyzed four alternatives: 1) no action; 2) federal management in the EEZ with management delegated to the State; 3) federal management in the EEZ without delegation; and 4) federal management with the EEZ closed to commercial fishing.[14] The Council's Advisory Panel (AP) met in April 2023 and voted to recommend alternative 2.[15] The motion's rationale explained that "many AP members recognized that the choice of alternative 2 or 3 was like choosing the lesser of two evils."[16] It explained that alternative 2 "depends on the State's willingness to accept partial delegated management."[17]

At its April 2023 meeting, the Council "was scheduled to take final action to recommend an FMP amendment."[18] "Following the Advisory Panel motion, as was the case during the development of the previous FMP amendment, the State informed NMFS and the Council . . . that it would not accept a delegation of management authority for the Cook Inlet EEZ salmon fishery under the conditions that would be necessary to comply

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[12] *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 77, at 10–11 (D. Alaska Nov. 8, 2022).
[13] COUN00009.
[14] COUN00014–15.
[15] COUN00710.
[16] *Id.*
[17] COUN00711.
[18] *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1 at 1 (D. Alaska Apr. 13, 2023).

with the MSA."[19] "[T]he Council acknowledged [that] delegating management to a State that has indicated it is unwilling to accept delegation is not viable under the MSA."[20] Accordingly, "the Council was left with one viable management alternative[,][21] adopting a federal management regime for the Cook Inlet EEZ."[22] A motion was put forward to adopt this as the preferred alternative, and the motion failed for lack of a second.[23] "With no other viable choice, [NMFS] informed the Council that [it] would immediately work on a Secretarial amendment that would likely resemble Alternative 3."[24]

On May 15, 2023, this Court issued an Amended Remedy Order,[25] explaining that "the actions taken by the Federal Defendants in the eleven months following the Court's Order . . . are nearly identical to those taken to implement the now-vacated Amendment 14."[26] It explained that "[g]iven the history of this litigation and the progress of the remand thus far, the Court concludes that stronger judicial intervention is necessary to ensure that the same processes do not yield the same result."[27] The Court ordered the parties to attend collaboration meetings.[28]

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[19] *Id.* at 2.
[20] *Id.*
[21] Alternative 1 (no action) and Alternative 4 (closure of the EEZ) were not viable because of the Ninth Circuit's and this Court's orders.
[22] *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1 at 2 (D. Alaska Apr. 13, 2023).
[23] COUN00719.
[24] *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1, at 2 (D. Alaska Apr. 13, 2023).
[25] *See UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 103 (D. Alaska May 15, 2023).
[26] *Id.* at 9.
[27] *Id.*
[28] *See id.*

The parties had two collaboration meetings in May 2023 and filed a joint status report regarding the meetings.[29] Plaintiffs explained in the status report that "[a]t this point, UCIDA believes that the parties are still very far apart on what constitutes a legal and effective FMP for the Cook Inlet salmon fishery."[30]

On April 30, NMFS published the final rule implementing Amendment 16.[31] NMFS explained that "amendment 16 will create a new fishery in Cook Inlet, which will occur entirely within Federal waters."[32] Amendment 16 set maximum sustainable yield (MSY) as either (a) the number of surplus fish over the State's escapement goals or (b) the historical harvest that has been allowed by the State. NMFS determined that MSY applies to *all* fishing for stocks in state and federal waters.[33] NMFS then determined that optimum yield (OY) would be a range that includes all historical catches that the State has allowed in *federal waters only*, between 1999 and 2021, and that all other surplus fish are allocated to the State to manage.[34] This was a change from Amendment 14, where NMFS claimed that "the OY for the Cook Inlet salmon fishery is set to 'the level of catch from all salmon fisheries occurring within Cook Inlet (State and Federal Water catch) . . .'"[35]

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[29] *See UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 104 (D. Alaska June 5, 2023).
[30] *Id.* at 7. Plaintiffs also submitted detailed comment letters at every available stage of this process. *See, e.g.*, COUN00762–881; COUN01670; NMFS00662; NMFS00033; SPEC00244.
[31] *See* FR00029.
[32] FR00037.
[33] FR00030 ("MSY is specified for salmon stocks and stock complexes in Cook Inlet"); FR00039.
[34] *See* FR00030.
[35] *UCIDA 2*, 2022 WL 2222879, at *9 (ellipsis in original; citation omitted).

Under Amendment 16, fishing in federal waters opens for two periods a week from approximately June 19 until July 16, then one period a week from July 17 until July 31, and then two periods a week from August 1 until August 15.[36] Fishing in federal waters is closed on August 15 or when the TAC is reached, whichever is earlier.[37] The federal openers fall precisely on the same days and at the same times as state openers.[38] However, commercial fishermen are prohibited from fishing in state and federal waters on the same day.[39] Commercial fishermen fishing in federal waters are required to obtain new federal permits and to "comply with Federal recordkeeping, reporting, and monitoring requirements."[40] Vessels participating in the fishery also must obtain and operate a Vessel Monitoring System (VMS)—costing approximately $3,000 per device—which "transmits real-time GPS location of fishing vessels to NMFS."[41] Vessels are only allowed to deliver their federal waters catch to processors in state waters,[42] and processors purchasing fish are required to obtain federal permits and report all fish purchased daily to NMFS.[43]

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[36] FR00031.
[37] *Id.*
[38] FR00010.
[39] FR00033.
[40] FR00032.
[41] *Id.*; NMFS00682. This is a significant expense for UCIDA's members. *See* 86 Fed. Reg. 60568, 60580 (Nov. 3, 2021) ("Restrictions on fishing in the EEZ in 2020, despite relatively high abundance of salmon returns, resulted in a fishery disaster with the average drift permit holder grossing only about $4,400 for the entire season.").
[42] FR00033.
[43] *Id.*

B. A separate Secretarial rulemaking process resulted in harvest specifications for the 2024 season.

On April 12, 2024, NMFS published proposed harvest specifications "for the salmon fishery of the Cook Inlet exclusive economic zone (EEZ) Area."[44] NMFS explained that the "proposed harvest specifications include catch limits that NMFS could implement . . . assuming the Secretary of Commerce . . . approves amendment 16 to the Salmon FMP."[45] NMFS explained that if Amendment 16 is approved, it would "specify the annual TAC amounts for commercial fishing for each salmon species after accounting for projected recreational fishing removals."[46]

The Council and the AP had already reviewed these proposed TAC amounts at their February 2024 meeting.[47] The AP recommended a TAC of 1,139,235 salmon.[48] NMFS reduced the AP's TAC by 400,805 sockeye and proposed a total of 738,440 to the Council.[49] The motion failed, and NMFS proceeded with a second Secretarial amendment process to establish its proposed TAC.[50]

In public comments on the proposed rule, Plaintiffs explained that a TAC is not an effective management tool for salmon in Cook Inlet.[51] This notwithstanding, on June 18, 2024, NMFS published the final rule establishing its proposed TAC for salmon fishing in

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[44] SPEC00112.
[45] SPEC00113.
[46] *Id.*
[47] *See* COUN01870; COUN02487.
[48] *See* COUN02546.
[49] *See* COUN02600.
[50] SPEC00114.
[51] SPEC00269–76.

federal waters in 2024.[52]

C. Plaintiffs moved to enforce, while also filing protective complaints.

On May 24, 2024, Plaintiffs moved to enforce this Court's orders in *UCIDA 2*.[53] Plaintiffs' motion was denied, and this Court explained that "reviewing the UCIDA Plaintiffs' challenge to Amendment 16 in the separately filed consolidated cases will provide the Court with a more comprehensive view of the factual basis for Amendment 16 and the Final Rule as well as more thorough briefing on the merits by the parties."[54]

Meanwhile, Plaintiffs filed their complaint and petition for review regarding Amendment 16 on May 29, 2024,[55] and their complaint and petition for review regarding the resulting harvest specifications on July 16, 2024.[56] On September 11, 2024, this Court granted Plaintiffs' motion to consolidate the two cases for all purposes.

III. LEGAL STANDARD

"Agency decisions under the Magnuson-Stevens Act . . . are reviewed pursuant to Section 706(2) of the APA[.]"[57] "Judicial review under the APA allows courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[58] "An

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[52] *See* SPEC00001.
[53] *See UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 133 (D. Alaska May 24, 2024).
[54] *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 143, at 8–9 (D. Alaska Sept. 27, 2024).
[55] Case No. 3:24-cv-00116, Dkt 1.
[56] Case No. 3:24-cv-00154, Dkt. 1.
[57] *Flaherty v. Pritzker*, 195 F. Supp. 3d 136, 143 (D.D.C. 2016).
[58] *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (ellipsis in original) (quoting 5 U.S.C. § 706(2)(A)).

agency's decision may 'be found to be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the agency's expertise.'"[59] If the Secretary "'has considered the relevant factors and articulated a rational connection between the facts found and the choice made,'" then the decision is not arbitrary or capricious.[60] But if the "'agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action.'"[61]

IV. ARGUMENT

A. Amendment 16 is Unlawful Because It is Not an FMP for the "Fishery," a Defined Term.

In *UCIDA 1*, the Ninth Circuit said "[t]he [MSA] unambiguously requires [NMFS] to create an FMP for each ***fishery*** under its authority that requires conservation and management."[62] The word "fishery" sets the scope of this obligation. The MSA details the "Required Provisions" of an FMP, which expressly apply to a "fishery," including, among many others, the obligation to provide "conservation and management measures" for "the fishery,"[63] to specify "the maximum sustainable yield and optimum yield from, the

[59] *Id.* (quoting *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1066 (9th Cir. 2005)).
[60] *Id.* (citation omitted).
[61] *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (citation omitted).
[62] 837 F.3d at 1065 (emphasis added).
[63] 16 U.S.C. § 1853(a)(1).

fishery,"[64] to evaluate the impacts to and the "safety of participants in the fishery,"[65] specify criteria for when the "fishery" is overfished,[66] and to set an annual catch limit (ACL) to prevent overfishing "in the fishery."[67]

NMFS runs afoul of these requirements in Amendment 16 by narrowly, inconsistently, and unlawfully construing the term "fishery" to again shirk its duty under the MSA. NMFS concedes for purposes of setting MSY that the "fishery" includes all the salmon stocks born in the streams and rivers of Cook Inlet, and the harvest of those stocks in both state and federal waters.[68] This makes sense. Salmon, which are born in rivers and streams, migrate to the ocean, and then return to their natal rivers and streams to spawn, do not become different stocks of fish as they cross jurisdictional boundaries.

But when it comes to setting actual management measures such as OY, NMFS changes its tune, saying that the "fishery" only consists of the fishing on those stocks of fish that occurs in the EEZ. This, conveniently, allows NMFS to avoid including any conservation or management measures that apply to salmon once they leave the EEZ. NMFS's contorted view of the "fishery" is arbitrary, capricious, contrary to the plain language of the MSA, leads to absurd results, and should be vacated.

1. The scope of an FMP must include "any fishing for such stocks."

NMFS must prepare an FMP "for each fishery under its authority that requires

[64] *Id*. § 1853(a)(3).
[65] *Id*. § 1853(a)(9)(C).
[66] *Id*. § 1853(a)(10).
[67] *Id*. § 1853(a)(15).
[68] *See* FR00039.

conservation and management."[69] "Fishery" is "a defined term,"[70] that means: "(A) 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 (B) any fishing for such stocks."[71] "Fishing" includes all "catching, taking, or harvesting of fish."[72] And a "stock of fish" means "a species, subspecies, geographical grouping, or other category of fish capable of management as a unit."[73] There is some discretion built into identifying the stock or stocks of fish that comprise a fishery under subsection (A).[74] However, once the stock or stocks of fish at issue have been identified based on the required characteristics, there is no discretion in subsection (B). A "fishery" must include "any fishing for such stocks."[75]

The definition of "fishery" is unchanged by the words "under its authority" in the MSA's mandate that NMFS prepare an FMP "for each fishery *under its authority* that requires conservation and management."[76] The statute does not say "for [the portion of] each fishery under its authority." Instead, NMFS must prepare an FMP for "any fishing for such stocks" that comprise a "fishery under its authority" irrespective of whether such fishing occurs under the authority of a foreign nation or one or more states.

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[69] 16 U.S.C. § 1852(h)(1).
[70] *UCIDA 1*, 837 F.3d at 1064.
[71] 16 U.S.C. § 1802(13).
[72] *See id.* § 1802(16).
[73] *Id.* § 1802(42).
[74] *See id.* § 1802(13).
[75] *Id.* § 1802(13)(B).
[76] *Id.* § 1852(h)(1) (emphasis added).

The definition of "fishery" therefore dictates the scope of the FMP that NMFS must prepare because an FMP must cover "any fishing for such stocks." *See UCIDA 1*, 837 F.3d at 1064 ("The government argues that § 1852(h)(1) does not expressly require an FMP to cover an entire fishery, noting that 'the provision says nothing about the geographic scope of plans at all.' But, the statute requires an FMP for a fishery, a defined term."). This makes particular sense in the context of managing anadromous fish, like salmon. As Senator Ted Stevens explained, "species such as salmon, go beyond the existing limits of one jurisdiction into another, and, as a matter of fact, may go beyond into the third area of international jurisdiction. As a practical matter, to the extent possible, we will have uniform and consistent management."[77]

His concerns are recognized directly in the first section of the statute. The MSA explains that "the fish off the coasts of the United States . . . and the anadromous species," like salmon, "which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources."[78] Congress envisioned a "national program for the conservation and management" of these "fishery resources" to ensure conservation and "to realize the full potential of the Nation's fishery resources."[79] That potential is realized through "the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain on a continuing basis, the

[77] 122 Cong. Rec. 119 (1976) (statement of Sen. Stevens); 16 U.S.C. § 1802(1) (defining "anadromous species").
[78] 16 U.S.C. § 1801(a)(1).
[79] *Id.* § 1801(a)(6).

optimum yield from each fishery."[80]

Indeed, determination of the "fishery" is the lynchpin to a proper FMP. The FMP requirement applies to "each fishery."[81] Conservation and management measures must achieve "the optimum yield from each fishery."[82] The "Required Provisions" of an FMP expressly apply to a "fishery," including, among many others, the obligation to provide "conservation and management measures" for "the fishery,"[83] the obligation to specify "the maximum sustainable yield and optimum yield from, the fishery,"[84] to evaluate the impacts to and the "safety of participants in the fishery,"[85] specify criteria for when the "fishery" is overfished,[86] and to set an ACL to prevent overfishing "in the fishery."[87]

2. The scope of Amendment 16 is unlawful because it does not include "any fishing for such stocks."

Applied here, the definition of "fishery" makes it readily apparent that the FMP must govern the "stocks of fish" in Cook Inlet, and "any fishing for those stocks." The "stocks of fish" are not a mystery here. There are five species of salmon that are born in streams and rivers around Cook Inlet, that migrate out to the Pacific Ocean for a number of years, and that pass through the EEZ in Cook Inlet in the summer on their return journey

[80] *Id.* § 1801(b)(4).
[81] *Id.* 1852(h)(1).
[82] *Id.* § 1851(a)(1).
[83] *Id.* § 1853(a)(1).
[84] *Id.* § 1853(a)(3).
[85] *Id.* § 1853(a)(9)(C).
[86] *Id.* § 1853(a)(10).
[87] *Id.* § 1853(a)(15).

to spawn in their natal streams and rivers.[88] NMFS readily acknowledges that there are multiple sectors in both state and federal waters that harvest the same stocks of fish that pass through the EEZ.[89]

In fact, NMFS concedes this straightforward point when it defines MSY at the "stock or stock complex level," explaining that "[b]ecause MSY must be defined in terms of the stocks or stock complexes, *this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet*."[90] This makes sense and is consistent with the statute. Salmon that are born in the Kenai River do not become different "stocks" of fish when their anadromous lifecycle migration takes them from the river, to the ocean, and then back to the river again. The stocks of salmon that are harvested in the EEZ as they return from years in the Pacific Ocean in route to their natal streams are the same stocks of fish that are harvested in state waters.

Despite NMFS's concession, it artificially limited the scope of Amendment 16 to management measures governing the "harvest[] by the commercial and recreation fishing sectors *within the Cook Inlet EEZ Area*."[91] NMFS claims that "[d]efining the fishery as geographically constrained to the Cook Inlet EEZ is consistent with the Magnuson-Stevens Act" and nothing supports "that a Federal FMP must cover fishing that occurs in State

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[88] *See* NMFS02137.
[89] *See* FR00037 ("while accounting for both State and Federal expected harvests."); *id.* ("total harvest of Cook Inlet salmon stocks will continue to occur predominately within State waters").
[90] FR00039 (emphasis added).
[91] FR00036 (emphasis added).

waters if a harvested stock occurs in both State and Federal waters."[92] NMFS is flatly incorrect. Under the plain language of the MSA, the "fishery" consists of "*any* fishing for such stocks."[93]

Nor can NMFS's misinterpretation of the "fishery" be reconciled with the statute. For example, the required provisions of an FMP provide that the FMP shall "assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield, from the fishery …"[94] There is no plausible reading of the statute that allows NMFS to apply the "maximum sustainable yield" to the entire "stock" but restrict "optimum yield" to only that portion of the stock that is harvested in the EEZ. Rather, both MSY and OY must be set for the "fishery," which, by definition, includes "any fishing" for the stock.[95]

NMFS tries to justify its failure to issue an FMP amendment applicable to "any fishing for such stocks" by inventing an excuse that "given the geographical limits placed on NMFS's authority to manage fisheries, it is necessary for the 'fishery' to be geographically constrained to the EEZ."[96] Not so. Aside from the fact that this has no support in the plain language of the statute's "fishery" definition, NMFS's own guidelines make clear "[t]he geographic scope of the fishery, for planning purposes, should cover the

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[92] *Id.*
[93] 16 U.S.C. § 1802(13)(B) (emphasis added).
[94] *Id.* § 1853(a)(3).
[95] *UCIDA 1*, 837 F.3d at 1064.
[96] FR00036.

entire range of the stocks(s) of fish, and not be overly constrained by political boundaries."[97] The FMP "should include conservation and management measures for that part of a management unit *within U.S. waters*,[98] although the Secretary can ordinarily implement them only within the EEZ."[99] And "[w]here state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations."[100]

NMFS claims that "the best scientific information available supports NMFS's determination that the EEZ has unique ecological characteristics due to the mixed stock nature of ***fishing*** in the EEZ, and ***fishing*** for these stocks in the EEZ has distinct technical and economic characteristics that distinguish it from State water fisheries."[101] But subsection (B) of the definition of "fishery" does not permit "any fishing for such stocks" to be divided based on "technical and economic characteristics." The key is that the same stocks are being harvested in both jurisdictions, so the fishing ("any fishing") in both jurisdictions is part of the same "fishery" under the MSA.

NMFS cannot create a new "fishery" that is contrary to Congress's definition nor continue to shirk its duty to prepare an FMP "for each fishery under its authority" by

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[97] 50 C.F.R. § 600.320(b) (emphases added).
[98] The term "U.S. waters" includes state waters. *See* 16 U.S.C. § 1802(45) ("The term 'United States' when used in a geographic context, means all the States thereof.").
[99] 50 C.F.R. § 600.320(d)(2) (emphasis added).
[100] *Id*. § 600.320(e)(3).
[101] FR00036 (emphases added).

manipulating the plain statutory definition to avoid issuing conservation and management measures for both federal and state waters. Amendment 16's definition of "fishery" and the resulting scope of the FMP are arbitrary, capricious, contrary to law, and violate the Ninth Circuit and this Court's orders.

Ultimately, this is just another "thinly veiled attempt" to defer to the State. Congress was clear that salmon stocks are an important national resource, and that these fishery resources must be managed "in accordance with national standards."[102] "The Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."[103] By narrowly constraining the "fishery" to only fishing in federal waters, NMFS fails to include the statutorily required provisions in the FMP that Congress included to ensure that these important stocks of fish are managed in the national interest. Amendment 16 should be vacated.

B. NMFS failed to set Optimum Yield for the "fishery" and instead entirely deferred to the State of Alaska in violation of *UCIDA 1* and *UCIDA 2*.

The MSA requires that "[a]ny [FMP] which is prepared by any Council, or by the Secretary, with respect to any fishery, shall . . . assess and specify the present and probable future condition of, and the maximum sustainable yield and ***optimum yield from, the fishery***, and include a summary of the information utilized in making such specification[.]"[104] The MSA provides further that:

The term "optimum," with respect to the yield from a fishery, means the

[102] 16 U.S.C. § 1801(b)(4).
[103] *UCIDA 1*, 837 F.3d at 1063.
[104] 16 U.S.C. § 1853(a)(3) (emphasis added).

> amount of fish which—(A) will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.[105]

The MSA also provides that an FMP's "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield *from each fishery* for the United States fishing industry."[106] NMFS acknowledges these statutory provisions.[107]

In Amendment 16, NMFS establishes "the OY range for the Cook Inlet EEZ salmon fishery . . . as the range between the average of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021."[108] This definition of OY violates the MSA and the court orders for at least four reasons.

First, the FMP must set and specify the OY from the "fishery," a defined term.[109] Amendment 16 only sets OY for NMFS's artificially defined "Cook Inlet EEZ salmon fishery," which only includes harvest in the EEZ Area.[110] To justify this, NMFS explains that (1) "OY may be established at the stock, stock complex, or fishery level"; that (2) "the

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[105] *Id.* § 1802(33).
[106] 16 U.S.C. § 1851(a)(1) (emphasis added).
[107] *See, e.g.*, NMFS02078.
[108] NMFS02089.
[109] 16 U.S.C. § 1853(a)(3).
[110] NMFS02089; *see also* FR00039; NMFS02235–36.

fishery is properly defined as all harvest of co-occurring salmon stocks in the Cook Inlet EEZ"; and that (3) "[t]hus, OY is better defined for the Cook Inlet EEZ fishery rather than at the stock or stock complex level."[111] But again, the "fishery" cannot be limited to only *some* of the fishing that occurs on a "stock," as NMFS would have it. The "fishery" consists of "any fishing" on a stock. Thus, there is no "EEZ fishery" and OY cannot be "better defined" for that fantasy fishery. NMFS manipulates the definition of "fishery" to wriggle out of its obligation to set OY for *any* harvest on the Cook Inlet salmon stocks, whether such harvest is in state or federal waters.

Second, NMFS's measure of OY is not based on MSY, as the MSA requires. OY must be prescribed "on the basis of the maximum sustainable yield from the fishery."[112] In Amendment 16, "MSY is specified for salmon stocks and stock complexes in Cook Inlet," but for OY, NMFS has arbitrarily cut up these salmon stocks and stock complexes based on a jurisdictional boundary.[113] This violates the MSA.

Third, NMFS chose a measure of OY that ensures full-scale deferral to the State of Alaska, *again*. In Amendment 14, NMFS closed the Cook Inlet EEZ to commercial fishing so that the State could exclusively manage commercial salmon fishing in Cook Inlet's state waters.[114] The Court told NMFS it cannot just close the EEZ, so NMFS did the next closest thing. It created a "Cook Inlet EEZ salmon fishery" that is intentionally designed to

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[111] FR00039.
[112] 16 U.S.C. § 1802(33).
[113] *See supra* Section IV.A.2.
[114] NMFS02112.

maintain the status quo—i.e., facilitate state management. In the final rule, NMFS explains that "[b]ecause EEZ fishing opportunity is expected to be similar to the status quo under this action, salmon harvests in the Cook Inlet EEZ Area and other areas of Cook Inlet are expected to remain at or near existing levels."[115] Because NMFS's OY range includes the average of the three lowest years and the average of the three highest years of total estimated EEZ salmon harvest from 1999 to 2021,[116] NMFS has set an OY range that accounts for *nearly every possible harvest scenario that has occurred in the last two decades under state management*.[117] This is deferral.

The only substantive difference between Amendment 14 and Amendment 16 for OY purposes is that a portion of the fishing under the State's management goals will take place under federal management in the EEZ. NMFS has "[b]ootstrapp[ed] statutorily required management measures, [i.e.,] OY, to the actual number of fish caught in the Cook Inlet, as determined by the State of Alaska."[118] This directly violates this Court's prior order, which cautioned that "[t]he plan for continuous federal management cannot consist of the agency abandoning its responsibilities in favor of deferral to the State."[119]

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[115] FR00057–58.
[116] *See* NMFS02235–36.
[117] In *UCIDA 2*, the Court explained that under state management, "the commercial harvest of salmon from the Cook Inlet has decreased significantly over the past two decades." 2022 WL 2222879 at *3. Yet, inexplicably, NMFS relies entirely on performance *from the past two decades of unlawful management* to define the level of yield that is "optimum" in the Cook Inlet EEZ. *See* NMFS02235–36.
[118] *UCIDA 2*, 2022 WL 2222879 at *11.
[119] *Id.* at *11–12 (emphasis in original).

Fourth, NMFS's OY metric also violates National Standard 1, which requires the FMP amendment to include "[c]onservation and management measures [to] prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."[120] NMFS's OY is set to achieve the status quo—deferral to the State—not the optimum yield from the Cook Inlet salmon fishery as the MSA directs. Amendment 16 does not address the significant potential yield that is going un-harvested according to NMFS's own data.[121] This significant under-harvest persisted into 2024.[122] And Amendment 16's OY metric ensures that these dramatic over-escapements under state management will continue to persist.

In the final rule NMFS explains that

> NMFS has evaluated historical EEZ harvest levels and found that harvest in the EEZ could not be increased to fully harvest surplus Kenai and Kasilof salmon without causing serious impacts to other salmon harvesters and major conservation problems for other stocks. *Whether management in State waters could be modified to increase harvest of these stocks closer to their natal*

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[120] 16 U.S.C. § 1851(a)(1).

[121] *See* SPEC00180 (demonstrating that in every year except one from 1999–2023, Kenai River Late Run Sockeye Salmon exceeded their escapement goal and produced a significant "Potential Yield EEZ," which are wasted fish); SPEC00182 (same for Kasilof River Sockeye Salmon).

[122] https://www.adfg.alaska.gov/sf/FishCounts/index.cfm?ADFG=main.displayResults&COUNTLOCATIONID=41&SpeciesID=420 (demonstrating that the Kasilof River exceeded the lower bound of its escapement goal in 2024 by 908,092 sockeye); https://www.adfg.alaska.gov/sf/FishCounts/index.cfm?ADFG=main.displayResults&COUNTLOCATIONID=40&SpeciesID=420 (demonstrating the Kenai River exceeded the lower bound of its escapement goal in 2024 by 1,176,350 sockeye); *see also Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (explaining that it is appropriate to take judicial notice of information made publicly available by government entities on their websites).

> *streams without increasing pressure on the stocks of lower abundance in the EEZ is outside the scope of this action*, as NMFS has no jurisdiction over State waters[.][123]

But NMFS's own guidelines—which it is required to follow in developing an FMP amendment[124]—command exactly the opposite.[125] NMFS cannot abdicate its responsibility to attempt to achieve OY for the "fishery" because part of harvest is managed by the State.

NMFS has not established OY for the "fishery," and its chosen OY metric is entirely deferential to the State of Alaska. In these ways, Amendment 16 violates the *UCIDA 1*, *UCIDA 2*, and the MSA, which do not permit deferral to the State and which require OY for the "fishery," a defined term.

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[123] FR00040 (emphasis added).

[124] *Oceana, Inc. v. Raimondo*, 530 F. Supp. 3d 16, 20 (D.D.C. 2021), ("These guidelines do 'not have the force and effect of law,' but the various regional councils and NMFS personnel must use them 'to assist in the development of fishery management plans.'" (quoting 16 U.S.C. § 1851(b))) *aff'd*, 35 F.4th 904 (D.C. Cir. 2022); *AP. Bell Fish Co. v. Raimondo*, No. CV 22-1260, 2023 WL 6159985, at *14 (D.D.C. Sept. 21, 2023) (explaining that although the guidelines do not have the force of law, "the APA requires an agency to comply with its own regulations" (quotation marks omitted)), *aff'd in part, rev'd in part and remanded on other grounds*, 94 F.4th 60 (D.C. Cir. 2024).

[125] *See* 50 C.F.R. § 600.320(d)(2) ("FMPs should include conservation and management measures for that part of the management unit within U.S. waters, although the Secretary can ordinarily implement them only within the EEZ."); *id.* § 600.320(e)(3) ("Where state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations."); *id.* § 600.310(f)(4)(iii) ("ACLs for State–Federal Fisheries. For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments should include an ACL for the overall stock that may be further divided.").

C. Amendment 16 also violates National Standards 2, 3, and 10.

1. Amendment 16 is not based on the best available science.

National Standard 2 requires that "[c]onservation and management measures shall be based upon the best scientific information available."[126] Courts have explained that "[a]bsent some indication that superior or contrary data was available and that the agency ignored such information, a challenge to the agency's collection of and reliance on scientific information will fail."[127]

Multiple stock definitions that NMFS used in the final analysis for Amendment 16 were contrary to the recommendations of its own SAFE Team. For example, NMFS defined the Kenai Late Run sockeye salmon stock and the Kasilof sockeye salmon stock in the analysis as limited to those fish harvested in the Cook Inlet EEZ Area.[128] Yet the SAFE Team recommended definitions that tracked these stocks throughout their range.[129] The analysis does not explain why NMFS disregarded the recommendations of its own SAFE Team.[130] Contrary data was available to NMFS, and it ignored it. Accordingly, NMFS violated National Standard 2.

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[126] 16 U.S.C. § 1851(a)(2).
[127] *Massachusetts v. Pritzker*, 10 F. Supp. 3d 208, 217 (D. Mass. 2014) (internal quotation marks and citation omitted).
[128] NMFS02223.
[129] *See* SPEC00145; SPEC00150 ("The NMFS SAFE Team recommends to the SSC that the Federal stock definition for Kasilof River sockeye salmon (KASOCK) would include Cook Inlet EEZ Area harvests, spawning escapements, and associated spawning escapement goals corresponding to the State definition for this stock.").
[130] *See* NMFS02489.

2. NMFS fails to manage stocks as a unit throughout their range, in violation of National Standard 3.

National Standard 3 requires "[t]o the extent practicable, an individual stock of fish [to be] managed as a unit throughout its range, and interrelated stocks of fish [to be] managed as a unit or in close coordination."[131] NMFS explains that it has "designed management measures that allow it to manage stocks of salmon as a unit throughout the portion of their range under NMFS's authority" because it is "not practicable for NMFS to manage salmon stocks into State waters where NMFS has no management jurisdiction."[132] But the National Standard 3 guidelines explain that "FMPs should include conservation and management measures for that part of the management unit within U.S. waters, although the Secretary can ordinarily implement them only within the EEZ."[133] And they clarify that "[w]here state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations."[134]

Here, NMFS artificially limited its conservation and management measures to only the EEZ. NMFS's claims that it has "avoid[ed] relying on the State to achieve any Federal management targets," but those same management targets effectively enshrine all possible

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[131] 16 U.S.C. § 1851(a)(3).
[132] FR00054.
[133] 50 C.F.R. § 600.320(d)(2); *see* FR00054 (citing the National Standard 3 guidelines and describing how they "explain how to structure appropriate management units for stocks and stock complexes").
[134] *Id.*, § 600.320(e)(3).

outcomes under state management into federal law.[135] It is certainly practicable for NMFS to set management measures for the "fishery" as the MSA requires and then, separately, explain what "state action is necessary to implement measures within state waters to achieve FMP objectives."[136] The mere fact that NMFS cannot ordinarily force the State to take action is not an excuse for failing to identify the state action and explaining the consequences of state inaction or contrary action. This information is critically important to facilitate the management of a multi-jurisdictional fishery as the architects of the MSA envisioned.[137] Similarly, the fact that the State is blatantly obstructing MSA management in Cook Inlet[138] and refusing to cooperate[139] with NMFS is *more reason*—not less—why NMFS must articulate the consequences of state inaction or contrary action in its FMP.

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[135] FR00040.
[136] 50 C.F.R. § 600.320(e)(3).
[137] S. Rep. No. 94-416, at 30 (1975) ("[U]nity of management, or at least close cooperation, is vital to prevent jurisdictional differences from adversely affecting conservation practices.").
[138] *See UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1 at 2 (D. Alaska Apr. 13, 2023) ("[T]he State informed NMFS and the Council during the Council meeting that it would not accept a delegation of management authority for the Cook Inlet EEZ salmon fishery *under the conditions that would be necessary to comply with the MSA*." (emphasis added)).
[139] The record contains multiple examples of the State resisting cooperation, seeking to avoid management under the MSA or scrutiny of its actions by the Council or NMFS, and advocating for federal management that aligns with current non-MSA state management. *See* EM02629 ("Me too but not at the expense of overly intrusive Council review of state management as currently envisioned by your agency."); EM04363 (requiring all inquiries for state input and data to be funneled through one point of contact); EM04382 (explaining how to mirror or approximate state management); EM04587 (inquiring whether the Council can set a TAC of zero); EM04878 ("it is our hope federal management will align with state management so that we can cooperate inseason"); EM05319, 5329, 5357 (explaining to NMFS that the State will not provide additional data).

3. Amendment 16 fails to promote safety of human life at sea.

National Standard 10 requires that "[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea."[140] NMFS did not sufficiently consider the negative impacts to the safety of the fleet created by its management measures. Specifically, before Amendment 16, fishermen could fish in federal waters—which are towards the middle of Cook Inlet[141]—and if the weather became dangerous, move to safer waters closer to shore and keep fishing. But now, if fishermen start fishing in federal waters, they are prohibited from moving to state waters to continue fishing if the weather picks up.[142] Fishermen must choose between quitting fishing altogether, and missing out on needed income, or risking their crew and vessels by fishing in dangerous conditions.[143] NMFS's justification for this Hobson's choice is to "ensure accurate catch accounting for Federal managers."[144] Lacking is any analysis of other alternatives that might similarly "ensure accurate catch accounting" but that do not jeopardize the safety of the fleet. The analysis does not meaningfully discuss this major safety concern and whether its costs are outweighed by the benefits of "accurate catch accounting."[145] This issue was identified early in the process by the Council's AP: "The daily registration requirement can undermine safety. A vessel registered to fish in the EEZ

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[140] 16 U.S.C. § 1851(a)(10).
[141] *See* NMFS02111.
[142] *See* Declaration of David Martin (Martin Decl.), filed Nov. 6, 2024, ¶ 11.
[143] *Id.*
[144] FR00033.
[145] *See* NMFS02480–81; NMFS02490–91.

would not be able to move inshore in response to weather conditions. This restriction would force a participant to forgo fishing or face harsh weather in small vessels typically 42 ft or less."[146] Amendment 16 does not promote the safety of human life at sea to the extent practicable.

D. The Court should vacate Amendment 16 and its implementing regulations, including the harvest specifications.

> Although the courts must never forget that our constitutional system gives the Executive Branch a certain degree of breathing space in its implementation of the law, we cannot countenance maneuvering that merely maintains a facade of good faith compliance with the law while actually achieving a result forbidden by court order. . . . At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.[147]

This resonates with particular force here. NMFS has again failed to comply with its unambiguous statutory mandate to manage the Cook Inlet salmon fishery as has been required by the MSA since it was enacted in 1976 and despite a Ninth Circuit order and an order from this Court that both affirm and clarify this obligation. At some point, enough is enough.

In light of the errors identified above, Plaintiffs request that the Court immediately issue an order vacating Amendment 16, its implementing regulations, and the harvest specifications, which were issued pursuant to an unlawful FMP amendment. Vacatur is the presumptive remedy for agency actions that are arbitrary, capricious, or contrary to law.[148]

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[146] COUN00711.
[147] *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).
[148] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

Vacatur of the implementing regulations will reinstate the prior existing regulations, which while not ideal, are preferrable to the status quo.[149] Vacatur will thus provide some immediate relief this coming summer to commercial fishermen who are harmed by Amendment 16.[150]

NMFS's pattern of recalcitrance demonstrates that vacatur alone will not ensure prompt and necessary relief. NMFS has repeatedly failed to carry out its statutory obligations and has wasted many years in the process causing irreparable harm to the commercial fishermen and the whole commercial fishing industry. Despite years of litigation, Plaintiffs still have not obtained the remedy to which they are entitled—*lawful* management of the fishery. The Court has discretion to provide additional relief, particularly when, as here, the agency has failed repeatedly to carry out its statutory obligations. In addition to vacatur, Plaintiffs request the following relief:

(1) A declaratory judgment stating that the MSA requires NMFS to approve an FMP amendment that (a) governs the entire Cook Inlet salmon "fishery" as defined by the MSA; (b) specifies the MSA's key requirements for the content of an FMP, such as specifying MSY and OY for the "fishery"; and (c) does not elevate state interests over federal interests.

(2) An order requiring NMFS to issue regulations implementing a new, lawful

[149] *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force.").
[150] *See* Declaration of Erik Huebsch, filed Nov. 6, 2024, ¶¶ 9–11; Martin Decl. ¶¶ 11, 14.

FMP amendment by no later than April 1, 2026.[151] If NMFS does not do so, despite best efforts, the order should impose interim relief for the 2026 season to ensure (a) a fair and adequate salmon fishing opportunity in Cook Inlet in 2026 and (b) management of the fishery in compliance with the MSA.

(3) An order requiring NMFS to collaborate with Plaintiffs and other stakeholders in preparing a new, lawful FMP amendment.

(4) An order requiring NMFS to produce periodic status reports on its progress during the remand, with an opportunity for Plaintiffs to respond to those reports.

(5) The Court's retention of jurisdiction over this case to ensure full and timely compliance with all aspects of the remedy.

Plaintiffs also request that the Court's order include a requirement that the parties meet and confer and propose a briefing schedule or stipulation to this Court to address interim management measures for the 2025 season. To the extent it would assist the Court in determining whether to grant the additional relief detailed above, Plaintiffs welcome the opportunity to provide additional remedy briefing to this Court after the conclusion of the merits briefing.

[151] Plaintiffs would prefer to have lawful regulations in place by April 2025 to govern the 2025 fishing season. But Plaintiffs also recognize that, as a practical matter, NMFS likely will not have time to promulgate new regulations after this Court's order and before the 2025 fishing season.

V. CONCLUSION

For the reasons explained below, UCIDA asks this Court to rule that Amendment 16 and its implementing regulations, including the harvest specifications, are arbitrary, capricious, and contrary to the MSA and the APA. Plaintiffs respectfully request that this Court vacate the decisions approving Amendment 16 and the harvest specifications and order NMFS to comply with the MSA and develop a lawful FMP as the Ninth Circuit instructed.

DATED this 6th day of November 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2024, 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. Participants in this Case No. 3:24-cv-00116-SLG, who are registered CM/ECF users, will be served by the CM/ECF system.

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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., Federal Defendants and STATE OF ALASKA, Defendant-Intervenor	Case Nos. 3:24-cv-116-SLG (lead); 3:24-cv-154-SLG CONSOLIDATED **FEDERAL DEFENDANTS' RESPONSE BRIEF**

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EA	Environmental Assessment
EEZ	Exclusive Economic Zone
FMP	Fishery Management Plan
Magnuson Act	Magnuson-Stevens Fishery Conservation and Management Act
NMFS	National Marine Fisheries Service
SAFE	Stock Assessment and Fisheries Evaluation
Salmon FMP	Fishery Management Plan for Salmon Fisheries off the Coast of Alaska
SSC	Scientific and Statistical Committee
UCIDA	United Cook Inlet Drift Association
VMS	Vessel Monitoring System

This case involves a challenge to regulations promulgated by the National Marine Fisheries Service ("NMFS") implementing Amendment 16 to the Fishery Management Plan ("FMP") for Salmon Fisheries off the Coast of Alaska ("Salmon FMP"). The United Cook Inlet Drift Association ("UCIDA") and Cook Inlet Fishermen's Fund (collectively "Plaintiffs") filed two complaints. The first case, *UCIDA v. NMFS*, Case number 3-24-cv-116-SLG, challenged Amendment 16's implementing regulations, 89 Fed. Reg. 34,718 (April 30, 2024). The second case, *UCIDA v. NMFS*, Case number 3-24-cv-154-SLG, challenged regulations setting harvest specifications for the 2024 fishery. Both cases challenge NMFS's Final Rules under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act" or "the Act"), 16 U.S.C. § 1801 *et seq*. and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706.

Consistent with the Court's Orders consolidating these two cases, Federal Defendants are filing a combined response brief. *UCIDA v. NMFS*, Case number 3-24-cv-154-SLG, ECF No. 1. In accordance with Local Rule 16.3(c), Federal Defendants are filing only a response brief, but seek summary judgment on all of Plaintiffs' claims.

INTRODUCTION

For decades, NMFS has tried to work with Plaintiffs and the State of Alaska to facilitate a fishing regime for salmon in Cook Inlet that maximizes

catch for the fleet, while minimizing the administrative burden on fishermen. Compromise has been impossible, however, because of two fundamental disagreements between NMFS and Plaintiffs. The first is whether the Magnuson Act requires NMFS to manage salmon fishing in State waters. NMFS has, for decades, maintained that it does not have this authority. Although Plaintiffs seem to abandon this position in their briefing, Plaintiffs' longstanding insistence that NMFS must preempt State management has animated this dispute and undermined any attempt at resolution or compromise.

The second is Plaintiffs' belief that Alaska has mismanaged the salmon fisheries in Cook Inlet, both causing populations to decrease and severely "under harvesting" salmon. In their view, the drift gill net fleet should be catching significantly more salmon than the State has allowed. But there has never been any support for this theory. NMFS and its science advisors have examined this issue many times over the years and concluded that harvest levels authorized by Alaska generally tracked what could be allowed under the Magnuson Act. There has never been credible scientific support for the idea that the drift gill net fleet could meaningfully increase its harvest without harming the more vulnerable stocks in Cook Inlet.

The lack of agreement on these two fundamental issues resulted in litigation, but the litigation did not resolve these key points. And although

NMFS prevailed in several suits,[1] Plaintiffs ultimately prevailed on two narrow issues: first, the Ninth Circuit found that NMFS could not exclude a fishery in federal waters from an FMP, even if Alaska was adequately managing the fishery. Second, this court found that NMFS could not close federal waters to commercial salmon fishing, which it viewed as an implicit deferral to the State.

Plaintiffs try to weave a tale of federal malfeasance, but the record shows a different story. In an effort to avoid additional regulatory burdens, NMFS has been trying to fashion a solution that would not result in two parallel fisheries—one in federal waters and one in state waters. But with Amendment 16, Plaintiffs have finally gotten what they claimed to want: full federal management of salmon fishing in the portion of Cook Inlet under NMFS's jurisdiction. Unsurprisingly, Plaintiffs remain dissatisfied because Amendment 16 does not change management in State waters and does not result in significant catch increases for the drift gillnet fleet. But neither of those outcomes were possible remedies from the previous litigation. And this

[1] *See, e.g.*, *See Jensen v. Locke*, 08-cv-00286-TMB (D. Alaska), ECF No. 75 (Granting Motion to Dismiss); *UCIDA v. Locke*, 09-cv-00043-RRB (D. Alaska), ECF No. 28 (Order Denying Plaintiffs' Motion for Summary Judgment); *UCIDA v. Locke*, 09-cv-00241-TMB (D. Alaska), ECF No. 45 (Consent Decree); *UCIDA v. NMFS*, 13-cv-00104-TMB (D. Alaska), ECF No. 64 (Denying Plaintiffs' Motion for Summary Judgment).

newest lawsuit, while seemingly aimed at continuing the cycle of litigation, also would not change these outcomes.

Plaintiffs have secured the result their litigation sought—a federally managed fishery in the federal waters of Cook Inlet. This fishery functions well and fairly. The litigation treadmill should stop and NMFS should be permitted to move forward with implementing this newly established fishery.

BACKGROUND

I. The Magnuson Act

The Magnuson Act establishes a national program for conservation and management of fishery resources.[2] 16 U.S.C. §§ 1801(a)(6), 1811(a). Congress passed the Act to "conserve and manage the fishery resources found off the coasts of the United States. . ." and "promote domestic commercial and recreational fishing under sound conservation and management principles. . . ." *Id.* § 1801(b)(1), (3).

In the Magnuson Act, Congress established federal management authority over all fishery resources within an "exclusive economic zone" ("EEZ") often called "Federal waters." This zone extends from the seaward boundary of each State—which is generally three nautical miles from a State's coastline—to 200 nautical miles from the coastline. *Id.* §§ 1802(11),

[2] NMFS implements the Magnuson Act under authority delegated from the Secretary of Commerce.

1811(a). With a limited exception, nothing in the Act "shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." *Id.* § 1856(a)(1); *cf. id.* § 1856(b)(1) (providing that, in some cases and following prescribed procedures, NMFS may preempt state jurisdiction and authority and regulate a fishing area within the boundaries of a State).

The Magnuson Act created eight Regional Fishery Management Councils to advise the Secretary regarding fishery management. *Id.* § 1852(a)-(b). Council members include federal and state fishery management officials and other fishery experts nominated by state governors and appointed by the Secretary. *Id.* § 1852(b). Each Council must establish and maintain a committee of experts, called the Scientific and Statistical Committee ("SSC"), to help collect and reviewing scientific information and to provide ongoing scientific advice for fishery management decisions. *Id.* § 1852(g)(1).

Among other duties, each "Council shall . . . for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary" an FMP and necessary plan amendments. *Id.* § 1852(h)(1). If, after a reasonable time, a Council fails to develop a necessary amendment to an FMP, NMFS may prepare the amendment and implementing regulations. *Id.* § 1854(c)(1). Amendments carried out under this provision are called "Secretarial amendments." When NMFS prepares a Secretarial

Amendment, it must conduct public hearings, submit the Amendment to the Council for consideration and comment, and provide for a 60-day public comment period. *Id*. §§ 1854(c)(2)(A) & 1854(c)(4)(A)-(B).

All FMPs and their implementing regulations must be consistent with ten National Standards. *Id.* § 1851(a). National Standard 1 requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." *Id.* § 1851(a)(1). National Standard 2 requires that measures be based on the "best scientific information available." *Id.* § 1851(a)(2). Advisory guidelines for the National Standards are set forth at 50 C.F.R. § 600.305 *et seq*.

The Magnuson Act sets forth required provisions for FMPs, including that FMPs must contain measures "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. § 1853(a)(1)(A). To prevent overfishing, FMPs must establish mechanisms for annual catch limits ("ACLs") and accountability measures. *Id*. § 1853(a)(15). *See also* 50 C.F.R. § 600.310(e)(2)(i)(B)-(C) (defining overfishing).

The Magnuson Act also establishes "optimum yield" as a long-term management target that represents the average amount of fish harvested in

a fishery that will provide the greatest overall benefits for the Nation. 16 U.S.C. § 1802(33). Optimum yield is "prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor." *Id.* In mixed-stock fisheries (like this one), optimum yield is often specified for the fishery as a whole, while other reference points (like maximum sustainable yield) are specified for individual stocks. 50 C.F.R. 600.310(e)(3)(iv)(C). Importantly, when determining the greatest benefit to the Nation, optimum yield is reduced from maximum sustainable yield to account for ecological factors to identify the harvest levels that will continue to support multiple active fishery sectors without resulting in overfishing for any one stock. *Id.* §§ 600.310(e)(3)(iii)(A); 600.310(b)(2)(ii) ("[t]he most important limitation on the specification of OY is that the choice of OY and the conservation and management measures proposed to achieve it must prevent overfishing").

The Magnuson Act provides for judicial review of final regulations promulgated by NMFS under the Act. 16 U.S.C. § 1855(f)(1). The scope of review and allowable relief that courts may order in such cases is circumscribed. *Id.*

II. Factual Background

A. Salmon Fisheries and Federal Management in Alaska.

There is a lengthy history underlying management of the salmon fisheries of Cook Inlet. Alaska has had authority over fisheries in State waters since statehood. *See Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). Beginning in 1954, federal waters were subject to the North Pacific Fisheries Act of 1954 ("North Pacific Act"). Pub. L. No. 83-579, 68 Stat. 698. Beginning in 1970, the regulations promulgated under the North Pacific Act defined the "exclusive waters adjacent to Alaska" as "those in which salmon net fishing is permitted under State of Alaska regulations" and declared that federal regulation of net fishing in those exclusive waters outside of State waters would be the same as those promulgated by Alaska. 35 Fed. Reg. 7070 (May 5, 1970); 50 C.F.R. § 210.1 (1971).

In 1976, Congress enacted the Fishery Conservation and Management Act (the precursor to the Magnuson Act). Pursuant to that Act, the Council developed, and in 1979 NMFS approved, the FMP for the Salmon Fisheries in the EEZ off Alaska (hereinafter, "Salmon FMP") that covered much of the EEZ seaward of Alaska. *See* FR00002. From the start, the Salmon FMP's management area has included only Federal waters.

In 1992, Congress repealed the North Pacific Act and passed the North Pacific Anadromous Stocks Act of 1992 ("1992 Act") to implement the

Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean. Pub. L. No. 102–567, §§ 801–14, 106 Stat. 4270, 4309 (Oct. 29, 1992) (codified at 16 U.S.C. §§ 5001–5012). The 1992 Convention only covered waters of the North Pacific Ocean and its adjacent seas beyond the EEZ, and thus the 1992 Act did not authorize promulgation of federal regulations governing the EEZ. *Id.* § 5002(6). As a result, NMFS repealed those regulations. 60 Fed. Reg. 39,272 (August 2, 1995). The Salmon FMP was not revised to reflect this change in law, and thus Alaska continued to manage three historical net fisheries as it had done since Alaska statehood in 1959. FR00002.

B. Cook Inlet Salmon Fisheries

The salmon fisheries of Alaska target five species of Pacific salmon (Chinook, pink, sockeye, chum, and coho). NMFS01983. Along with being differentiated by species, each species is also made up of several "stocks," which are generally delineated by the areas that the salmon spawn or the time of year that they spawn (e.g., "Kenai River sockeye salmon" or "Kenai River late run Chinook salmon"). NMFS02269. Typically, salmon are managed to "escapement goals," which are the number of salmon from a particular stock that "escape" harvest and return to a river to spawn. FR00006.

After salmon leave the river of their birth, they spend years at sea where they can be found in assemblages of diverse species and stocks from across the Pacific, including Alaska, Asia, and the West coast of the United States. FR00009; NMFS02231-32. When it is time for salmon to spawn, they return to their place of birth. Stocks originating from Cook Inlet will enter Cook Inlet, but remain in diverse assemblages of Cook Inlet stocks. *Id*. As they get closer to shore, the stocks begin to disaggregate and disperse towards individual rivers until finally beginning the journey upstream. *Id*. For purposes of salmon fisheries management, this means that the closer to the river a fishery operates, the better that fishery can target a particular stock. *Id*. The fishery in the Cook Inlet EEZ Area—more than three miles from shore—is a "mixed stock" fishery, meaning that participants catch an assemblage of Cook Inlet stocks and cannot effectively target any one particular stock. *Id*.

C. Amendment 12 to the Salmon FMP

The Council and NMFS undertook a major revision of the Salmon FMP in 2011. As part of the deliberations for what would become Amendment 12, the Council recognized that there was ambiguity with respect to management authority for three historic net fisheries in the EEZ because of the withdrawal of the North Pacific Act regulations. NMFS02141. In reexamining this issue, the Council recommended (and NMFS agreed) that

the Cook Inlet area should be excluded from the Salmon FMP's definition of West Area—which is managed by closure—allowing Alaska to continue managing salmon stocks in the Cook Inlet EEZ. *Id*. NMFS determined that the fishery did not require federal conservation and management because it had been successfully managed by Alaska since statehood. 77 Fed. Reg. 75,570, 75,574 (Dec. 21, 2012). Accordingly, NMFS promulgated a final rule redefining the West Area to exclude "the Cook Inlet Area." *Id*. This exclusion had the effect of "deferring" management of the federal salmon fishery to Alaska in this area of Federal waters. *See id*. at 75,583.

Plaintiffs challenged the 2012 Final Rule. In district court, NMFS prevailed. *UCIDA v. NMFS*, No. 3:13-cv-00104-TMB, 2014 WL 10988279, at *17 (D. Alaska Sept. 5, 2014). Plaintiffs appealed the judgment, and the Ninth Circuit reversed. 837 F.3d 1055 (9th Cir. 2016). In its opinion, the Ninth Circuit held that a Council—as approved by NMFS—was required to issue an FMP for each fishery under its authority requiring conservation and management, irrespective of whether Alaska was adequately managing it. *Id*. at 1063. The Court reasoned that because "[n]o one disputes that the exempted area of Cook Inlet is a salmon fishery" and "the government concedes that the Cook Inlet fishery requires conservation and management," it must be included in an FMP. *Id*. at 1064 & 1061. The case was remanded to the district court.

D. Amendment 14 to the Salmon FMP

On remand, NMFS worked with the Council to amend the FMP and promulgate a new final rule that would comply with the decision of the Ninth Circuit. For years, the Council developed an alternative that would delegate management authority to Alaska and preserve the historic extent of the fishery under one manager. 86 Fed. Reg. 60,568, 60,568-69 (Nov. 3, 2021). But at the end of the remand period, Alaska announced that it would not accept a delegation of management authority. *Id*. Without an agreement from the State to accept the delegation of management authority, the Council recommended that NMFS close the EEZ to commercial salmon fishing. *Id*. at 60,569.

Information in the analysis prepared for Amendment 14 demonstrated that Federal management would be unlikely to appreciably change salmon conservation metrics and thresholds established in Cook Inlet, but would increase costs, complexity, and management uncertainty without corresponding benefits. FR00003. In other words, NMFS's judgment (as informed by the SSC) was that harvest levels that had historically occurred and were likely to occur under State management resembled harvest levels that would be authorized under the Magnuson Act. *Id*.

Following the Council's recommendation, NMFS published a final rule implementing Amendment 14. *Id*. The Final Rule extended the preexisting

West Area closure to include the Cook Inlet EEZ Area, finding that closure was a precautionary management approach, consistent with management throughout the West Area, avoided elevated costs and uncertainty, and drift gillnet fishing could continue entirely within State waters. *Id*.

Plaintiffs challenged Amendment 14 and its implementing regulations.[3] *UCIDA v. NMFS*, No. 3:21-CV-00247-JMK, 2022 WL 2222879, at *1 (D. Alaska June 21, 2022). On June 21, 2022, Judge Kindred issued an order granting Plaintiffs' motion for summary judgment. Judge Kindred held that NMFS's closure of the EEZ to salmon fishing constituted a "deferral" of management to Alaska and held that NMFS could not rely on the State to achieve optimum yield. *Id*. at 8. Judge Kindred also found that Amendment 14 violated National Standards 2, 4, and 8. *Id*. at 12-16. In addition, Judge Kindred held that the recreational fishery must be included in the FMP Amendment and that its exclusion rendered the entire Amendment arbitrary and capricious, even though NMFS has never found that the recreational fishery requires conservation and management. *Id*. at 7-8.

[3] A second set of plaintiffs also challenged Amendment 14 on Constitutional grounds. *UCIDA*, 2022 WL 2222879, at *1. The district court granted summary judgment to NMFS on those claims. *Id.*

E. Development of Amendment 16

On remand, NMFS began working with the Council to establish a federal management regime in the Cook Inlet EEZ Area. NMFS02152. Although NMFS and the Council once again tried to develop an alternative that would delegate management to Alaska, that alternative was ultimately not viable because the State refused to accept delegation. FR00003. NMFS therefore focused on developing an alternative for exclusive federal management of the Cook Inlet EEZ Area. *Id*. This alternative would create a completely new Federal management regime. NMFS02219; FR00004. The Council, at the urging of Alaska, refused to take action on the new FMP Amendment. FR00001. Accordingly, NMFS moved forward with developing a Secretarial FMP Amendment and rulemaking to implement that Amendment. *Id*.

To accomplish this task, NMFS had to establish all elements required for federal management. While NMFS's definitions of fishery, optimum yield, and maximum sustainable yield are discussed in detail below, infra II & III, Amendment 16 also included other Magnuson Act requirements:

1. Status Determination Criteria and Annual Catch Limits. Status determination criteria establish when a stock is overfished or when overfishing is occurring. 50 C.F.R. § 600.310(b); FR00007. ACLs are statutorily required limits on fishing. FR00007-8; 16 U.S.C. §

302(h)(6). ACLs are the benchmark that drive annual fishing in federally managed fisheries.

2. Harvest Specifications and Annual Processes. Establishing the management infrastructure, including a process for setting annual fishing rules, development of the Stock Assessment and Fisheries Evaluation ("SAFE") document, the SSC review process, the public input process, the Council process for recommending catch limits, and the rulemaking schedule. FR00008-9.
3. Federal Commercial Fishing Season and Fishing Periods. Establishing a process and criteria for determining, based on salmon abundance, how long the fishery can be open, and under what circumstances it must be closed to avoid overfishing. FR00009-11.
4. Inseason Management. Creating a system to monitor the fishery during the season, determine whether any provision needs to change, and the mechanics of implementing those decisions, including the early closure of the fishery if necessary to avoid exceeding an annual catch limit. FR00011-12.
5. Requirements for Catcher Vessels. Establishing who can obtain a permit, creating a requirement for participants to log data to allow NMFS to collect the information necessary to effectively manage the fishery, and creating a Vessel Monitoring System ("VMS")

requirement. FR00012. VMS is a common component of commercial fisheries off Alaska and allows NMFS to gather critical data necessary to enforce the rules of the fishery. FR00013.

6. Gear Restrictions. Setting rules for the size of drift gill net gear and how it can be deployed.
7. Recreational Salmon Fishery Management Measures. Providing for regulation of recreational fishing in the Cook Inlet EEZ Area. FR00014.

This is not an exhaustive list of Amendment 16's provisions, but demonstrates the many components required to establish a new fishery management regime for federal waters. Amendment 16 was implemented through notice and comment rulemaking, resulting in a final rule and codified regulations implementing the Amendment's framework provisions. 50 C.F.R. § 679; FR00068-78.

F. 2024 Harvest Specifications

NMFS also published a rule, following notice and comment, that implemented Amendment 16 for 2024. This rule set the fishing limits for each stock and other annual requirements for the 2024 fishing season. SPEC00001.

STANDARD OF REVIEW

The Magnuson Act authorizes judicial review of regulations implementing an FMP in accordance with Sections 706(2)(A)-(D) of the APA. 16 U.S.C. § 1855(f)(1). Under the APA, a court may set aside agency regulations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is a "highly deferential" standard of review, and a reviewing court's "only task is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Midwater Trawlers Coop. v. Dep't of Com.*, 282 F.3d 710, 716 (9th Cir. 2002) (citation omitted).

In resolving questions of statutory interpretation, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). To resolve the meaning of disputed statutory language, a court must adopt the interpretation that the court, "after applying all relevant interpretive tools, concludes is best." *Id.* at 2266.

ARGUMENT

The Magnuson Act expressly grants NMFS authority to manage fisheries between three and 200 miles offshore. The Act includes a flexible definition of "fishery" and "stock of fish" that focus on whether the fish and

fishing in question can be managed as a unit. Plaintiffs attempt to demonstrate that Congress mandated a usurpation of traditional state authority through the definition of "fishery." Their position is, of course, untenable. Perhaps in recognition of this, Plaintiffs have shifted their position over the years. In the past, Plaintiffs—both before the courts and the agency—have argued that NMFS had the authority (and the mandatory obligation) to regulate salmon fishing within the borders of a state. *See UCIDA v. NMFS*, No. 3:21-CV-00247-JMK, 2023 WL 3467496, at *2 n.23) (D. Alaska May 15, 2023) (declining Plaintiffs' request to issue "an order regarding NMFS's authority to manage state waters."). More recently, Plaintiffs have argued instead that it is irrelevant whether NMFS has management authority over state waters. *UCIDA v. NMFS*, 3:21-cv-00255-SLG, ECF No. 137 at 11. They now assert that NMFS had to issue an FMP that contains conservation and management measures that cover the entire geographic range of a stock, whether or not NMFS can actually implement regulations putting those measures in place. This new gloss on their old position fares no better—the Magnuson Act does not require busy work, and NMFS does not have to issue advice to Alaska on how it should carry out its sovereign obligations to manage fisheries in State waters. Instead, Magnuson Act requires that NMFS consider the management activities of other

jurisdictions when implementing fishery management measures in areas under NMFS's jurisdiction. Amendment 16 does this and should be upheld.

I. NMFS Correctly Limited its Management to Federal Waters.

A. The Magnuson Act's Plain Language Grants NMFS Jurisdiction to Manage Fisheries Only in Federal Waters (3-200 miles offshore).

The plain language of the Act limits NMFS's jurisdiction to management of fishing between three and 200 miles offshore. First, section 101(a) establishes the Nation's "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, *within the [EEZ]*." 16 U.S.C. § 1811(a) (emphasis added). The Act defines the EEZ as the zone established by Presidential Proclamation 5030 (March 10, 1983), in which President Reagan claimed a 200-mile zone within which the United States would assert sovereign rights over natural resources. *Id*. § 1802(11). The Act clarifies that "the inner boundary of [the EEZ] is a line coterminous with the seaward boundary of each of the coastal States." *Id*. Alaska's seaward boundary is three nautical miles from its coast. 43 U.S.C. § 1301(b). The jurisdiction of the councils is cabined accordingly. The Magnuson Act sets forth that each council must prepare an FMP for "each fishery *under its authority* that requires conservation and management." 16 U.S.C. § 1852(h)(1) (emphasis added). The North Pacific

Council has "authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean *seaward* of Alaska." *Id*. § 1852(a)(1)(G) (emphasis added).

Most importantly, the Act explicitly recognizes and reserves State jurisdiction over fishery resources. As set forth in Section 306(a)(1), "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." *Id.* § 1856(a)(1). Congress legislated against a background that assumed "'states have broad trustee and police powers over wild animals within their jurisdictions' to the extent that state management is 'not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.'" *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 80 F.4th 943, 947 (9th Cir. 2023) (quoting *Kleppe*, 426 U.S. at 545). Taken together, the meaning of Section 306(a)(1) is clear—the Magnuson Act does not abrogate traditional state authority.[4]

This provision contains one exception, which allows (but does not require) NMFS to preempt a state's authority under very specific circumstances, including an opportunity for a hearing under 5 U.S.C. § 554. 16 U.S.C. § 1856(b). At the hearing, NMFS must demonstrate that "the fishing in a fishery, which is covered by a [FMP], is engaged in predominately

[4] This court has already considered and rejected the notion that the Magnuson Act's assertion of authority over anadromous stocks "beyond" the EEZ, 16 U.S.C. § 1811(b)(1), applies to State waters. *Jensen v. Locke*, No. 3:08-cv-00286-TMB, 2009 WL 10674466, at *4 (D. Alaska Nov. 5, 2009).

within the [EEZ] and beyond such zone" and that the State's action or inaction will substantially and adversely affect the implementation of the FMP. *Id*. Notably, this limited preemption authority does not apply to a State's "internal waters," e.g., streams, rivers, and lakes. *Id*. § 1856(b)(1). Congress placed explicit and narrow limits on NMFS's ability to preempt state management of state fisheries.

B. The Case Law Uniformly Agrees that the Magnuson Act delegated Management Authority to NMFS for Federal Waters Only.

The Ninth Circuit and the district courts have regularly recognized the jurisdictional limitations of the Magnuson Act, which "delegated to the Secretary of Commerce the authority to set harvest levels in ocean fisheries located between three and two hundred nautical miles offshore." *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1058 (9th Cir. 2005); *Washington v. Daley*, 173 F.3d 1158, 1161–62 (9th Cir. 1999); *Midwater Trawlers Coop. v. Dep't of Com.*, 393 F.3d 994, 998 n.6 (9th Cir. 2004); *Pac. Coast Fed'n of Fishermen's Ass'n v. Sec'y of Com.*, 494 F. Supp. 626, 632 (N.D. Cal. 1980) (holding that the jurisdiction of the Pacific Fishery Management Council and NMFS did not extend to inland fisheries used by Indians).

Indeed, the Ninth Circuit's decision in *UCIDA v. NMFS*—relied on heavily by Plaintiffs—clearly articulates this principle and the jurisdictional

divide between state and federal waters is fundamental to that court's analysis. The *UCIDA* court recognized that "States retained jurisdiction over the first three miles from the coast,… and the federal government had jurisdiction over the next 197 miles." 837 F.3d at 1058 (citations omitted). It explained that "The North Pacific Council has jurisdiction over the *federal waters* of Cook Inlet." *Id*. at 1060 (emphasis added). Looking to Congressional history, the *UCIDA* court recognized that Congress was aware of the issues with stocks that would cross between state and federal waters. *Id*. Accordingly, Congress passed a provision "directing Councils, if possible, to incorporate state management measures in FMPs." *Id*. at 1058. The *UCIDA* court was concerned about NMFS's treatment of the "federal fishery," but never suggested that its holding applied to state waters. *Id*. at 1063.

C. The Congressional History Supports NMFS's Position.

Plaintiffs cite the same congressional history as the *UCIDA* court for the proposition that Senator Ted Stevens supported their view that FMPs must cover state water salmon fisheries. Plts.' Opening Br., ECF No. 37 ("Br.") at 14. This cherry-picked quote is out of context. Read in full, the congressional history demonstrates just the opposite. The conversation concerned a "technical amendment" from Senator Stevens that was

"intended, with regard to anadromous species, to preserve the State jurisdiction as it now exists." 122 Cong. Rec. 117 (1976).[5]

The record contains an exchange between Senators Stevens, Magnuson, and Gravel regarding the wisdom of switching between state and federal jurisdiction at the three-mile line. Senator Gravel was of the opinion that "[y]ou cannot draw a political line in the water and hope that these fish are going to obey it . . . ." *Id*. at 119. Senator Stevens was of the opinion that conflicts would be minimal because the Councils were composed of people selected by the governors of the coastal states and "are urged to work out a management scheme for the 197 miles which, to the greatest extent possible, is consistent with what the State is actually doing within the 3-mile limit, without the consent of the Federal Government." *Id*. at 120. However, at all times, the Senators understood that the Act as drafted did create a management line at three miles offshore and that the states had management shoreward of that line and the federal government had management authority seaward of that line. In short, this jurisdictional divide was not an afterthought, accidental, or unconsidered. It is a fundamental bedrock principle underlying the entire statute.

[5] For the convenience of the Court, the relevant excerpts from the Congressional Record are included as exhibit 1 to this brief.

II. The Definition of "Fishery" Does Not Overturn the Well-Settled Management Differentiation.

In the face of this clear and unambiguous language, judicial interpretation, and intent, Plaintiffs assert that Congress inserted a loophole. In Plaintiffs' view, Congress did not do so explicitly, but instead through the definition of "fishery." Br. at 11. Plaintiffs believe that via this definition, Congress implicitly granted NMFS authority to wrest management authority from a State within its boundaries. But "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). And Congress would not have delegated a decision of "such economic and political significance to an agency in so cryptic a fashion." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

A. NMFS Appropriately Defined the Fishery.

Congress defined "fishery" as "(A) 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 (B) any fishing for such stocks." 16 U.S.C. § 1802(13) (emphasis added). A "stock of fish" is "a species, subspecies, geographical grouping, or other category of fish *capable of management as a*

unit." *Id*. § 1802(42) (emphasis added). Both definitions are extremely flexible and grant NMFS discretion to define a fishery based on particular circumstances. *Or. Trollers Ass'n v. Gutierrez*, No. CIV. 05-6165-TC, 2005 WL 2211084, at *9 (D. Or. Sept. 8, 2005), *aff'd*, 452 F.3d 1104 (9th Cir. 2006) (explaining that "the agency has a great deal of discretion in determining what an appropriate 'stock' is"); *See Loper Bright*, 144 S. Ct. at 2263 (explaining that "[a] statute's meaning may well be that the agency is authorized to exercise a degree of discretion" such as where a statute directs an agency "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" (citation omitted)).

But there is no evidence that the definition of "fishery" was meant to be a grant of authority that would allow NMFS to regulate fishing in state waters (or foreign waters). This is evident because both definitions make clear that these are *management units*, not simply a biological designation, and must be defined based on the ability to treat them as a unit for management purposes. NMFS must determine what stocks can be treated as a unit for management purposes as a factual matter and that determination is properly informed by NMFS's authority to manage the fishery.

Here, NMFS defined the "fishery" as all salmon fishing in the Cook Inlet EEZ Area. FR00029. NMFS "determined that salmon stocks in the Cook

Inlet EEZ Area can be treated as a unit for purposes of conservation and management because they all fall within the geographical management area under NMFS's jurisdiction, the best scientific information available supports NMFS's determination that the EEZ has unique ecological characteristics due to the mixed stock nature of fishing in the EEZ, and fishing for these stocks in the EEZ has distinct technical and economic characteristics that distinguish it from State water fisheries." FR00036.

Plaintiffs do not meaningfully dispute any of these conclusions. Instead, their argument is that because the stocks in the Cook Inlet EEZ fishery are biologically related to the stocks in the State-managed fishery, NMFS was required to define "fishery" to include the full range of each stock's biological unit. *See* Br. at 13. But the definitions of "fishery" and "stock of fish" do not turn on whether the fish are a biological unit. Both terms ask NMFS to determine whether they are an appropriate management unit. And viewed in this light, NMFS's determination is reasonable and should be upheld.

Plaintiffs quote NMFS's rule, which explains that maximum sustainable yield does not subdivide between state and federal waters, as theoretical support for their argument. *Id.* at 16. Maximum sustainable yield is not defined in the statute. But, unlike "fishery" or "stock of fish," maximum sustainable yield is a biological reference point and is equal to the maximum

possible sustainable removals of a stock or stock complex throughout its range, without reference to management jurisdictions. FR00006; 50 C.F.R. § 600.310(e)(i)(A). There is nothing in the statute that suggests the definition of maximum sustainable yield mandates any particular definition of "fishery" or is otherwise intended to drive the definition of the management unit. Rather, maximum sustainable yield is important to determining how many fish can be caught in fisheries under NMFS's jurisdiction in light of the biological condition of a stock throughout its range.

Indeed, Plaintiffs' reading would make the term "capable of management as a unit" a nullity. *Of course*, fishery managers should consider the full extent of the biological unit when setting harvest levels for the fishery they manage, including harvest levels in other jurisdictions. *See* FR00039 (explaining that "[b]ecause MSY is not a management target, it does not depend on any management actions. Rather, it describes the capacity of a stock to be harvested sustainably, regardless of who manages fishing or how harvest is authorized."). To do otherwise would ignore the biological unit. Yet, under Plaintiffs' reading of the statute, if NMFS considers the entire range of the stock when calculating maximum sustainable yield and other biological reference points, it must define "fishery" and "stock of fish" as the biological range of the stock, regardless of whether it is "capable of management as a unit." 16 U.S.C. § 1802(42). That

is not a faithful application of the Magnuson Act. In interpreting statutes, courts should observe the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation and quotes omitted).

Plaintiffs cite *UCIDA v. NMFS* as precedent supporting their position and continually repeat that court's recognition that "fishery" is a "defined term." Br. at 4, 11, 13, 14, 20, & 24. Yet, they omit the very next sentence of the opinion, which clarified that "[n]o one disputes that the *exempted area* of Cook Inlet is a salmon fishery." 837 F.3d at 1064 (emphasis added). The "exempted area" was the EEZ portion of Cook Inlet. Plainly, the *UCIDA* court recognized the term "fishery" could be limited, in accordance with management authority, to the Cook Inlet EEZ Area. Except for *UCIDA v. NMFS* (which really supports NMFS's position), Plaintiffs do not cite a *single case* in support of their illogical argument. Br. at 11-19. This is a striking omission, given that this language has been part of the Act for 45 years. In fact, as explained below, Plaintiffs understandably avoid the caselaw, as it cuts strongly against them.

B. NMFS is Not Required to Set Forth Management Measures for Fisheries it Does Not and Cannot Manage.

In tacit recognition of the Magnuson Act's clear limitations, Plaintiffs attempt to soften their argument by suggesting that this case is not really about the limits of NMFS's management authority (it is), but instead is about the scope of the FMP which, in their view, must include conservation and management measures covering all fishing "irrespective of whether such fishing occurs under the authority of a foreign nation or one or more states."[6] Br. at 13.

This argument fares no better. Shortly after passage of the Magnuson Act, West coast salmon fishermen challenged FMPs developed by the Pacific Fishery Management Council. *Wash. Trollers Ass'n v. Kreps*, 466 F. Supp. 309 (W.D. Wash., 1979). In that case, the plaintiffs' "principal complaint is that the Plan contains no description of inland fisheries." *Id.* at 313. In response, NMFS pointed to the definition of fishery and its instruction that fishery be limited to "stocks of fish, and any fishing for such stocks, 'which can be treated as a unit for purposes of conservation and management.'" *Id.* (quoting 16 U.S.C. § 1802(13)). The court agreed with NMFS, holding

[6] This would be a change in Plaintiffs' litigating position. Plaintiffs have previously argued that the Magnuson Act required NMFS to manage salmon throughout their range. *UCIDA v. NMFS*, 807 F. App'x 690, 691 (9th Cir. 2020) (rejecting UCIDA's appeal where the fishery issue was fully briefed); *Jensen v. Locke*, No. 3:08-CV-00286-TMB, 2009 WL 10674336, at *5-6 (D. Alaska Nov. 9, 2009).

"Inasmuch as the Secretary's management authority does not extend to inland fisheries (ss 1811, 1856), it was not unreasonable for her to approve a description limited to the ocean salmon fishery under her jurisdiction." *Id.* Two years later, in a similar lawsuit, another court agreed with this assessment and held that "the Secretary does not have jurisdiction over the inland fisheries, and that 'it was not unreasonable for her to approve a description (of the fishery) limited to the ocean salmon fishery under her jurisdiction.'" *Pac. Coast Fed'n of Fishermen's Ass'n*, 494 F.Supp. at 633 (quoting *Wash. Trollers Ass'n*, 466 F. Supp. at 313) (alteration in original); *Parravano v. Babbitt*, 861 F. Supp. 914, 925 (N.D. Cal. 1994), *aff'd*, 70 F.3d 539 (9th Cir. 1995) ("The Magnuson Act, and its National Standards, 16 U.S.C., § 1801 et seq., apply to regulation of ocean harvesting in the Exclusive Economic Zone—the area from 3–200 miles seaward—and not to in-river fisheries.").

These courts had good reason to reach this conclusion. Plaintiffs' interpretation would lead to an absurd result: NMFS would be required to include detailed descriptions of a fishery managed by another sovereign and potentially draft extensive plans that set season dates, bag limits, allocations between user groups, and gear restrictions for areas outside its management authority that it cannot implement. It would also potentially lead to endless bouts of litigation over the contents of these advisory measures or efforts to

enforce them against the State. Nothing in the statute mandates this conflict and the Court should not read in such a requirement. In addition, this highlights a fatal flaw of Plaintiffs' argument—even if they were to win this argument *nothing would change* on the ground. Alaska would not change its management practices to heed the advice of NMFS's FMP (the history of this case makes that clear), and NMFS would have no authority to force Alaska to make changes. The FMP would be nothing more than an advisory document.

In short, there is no support for Plaintiffs' hyper-technical, myopic reading of the definition of "fishery." It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (citation omitted). Looking to the statutory scheme as a whole, NMFS's definition of fishery fits the goals of the statute, avoids absurd results, and is supported by the administrative record. It should be upheld.

III. NMFS Reasonably Defined Optimum Yield.

"Optimum yield is not a year-by-year number, but a long-term average amount of desired yield from a stock. As such, it is distinct from metrics like annual catch limit or annual catch target which are set on an annual basis." *Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029, 1046 (N.D. Cal. 2013) (cleaned up); 50 C.F.R. § 600.310(e)(3)(ii). Optimum yield does not dictate ACLs and it

does not act as either a floor or a ceiling on harvest. If stocks are more abundant than the levels anticipated when setting optimum yield, nothing would prevent NMFS from setting higher catch levels. Conversely, if the stocks are less abundant than anticipated, the Magnuson Act's requirement to prevent overfishing and the process for specifying ACLs would dictate lower catch levels. Accordingly, optimum yield is not used to set harvest levels in any particular year, but is used as a long-term metric for evaluating the success of a management framework. *See id*; 16 U.S.C. § 1852(h)(5). It is distinct from the obligation to "develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its [SSC]," *id*. § 1852(h)(6).

In prescribing optimum yield for the fishery on the basis of maximum sustainable yield, NMFS used the best scientific information available to identify the range of harvest levels in the EEZ that will provide the greatest net benefit to the Nation by ensuring *all stocks* harvested in the EEZ can meet their escapement goals and the greatest number and diversity of stakeholders and fishery sectors will retain access to the resource. FR00042. As NMFS explained:

> Because it is not possible to harvest one stock at a time in this mixed stock fishery, because there are weak stocks intermingled with stocks that regularly exceed their escapement goal, and because harvest of all Cook Inlet stocks also occurs in State marine and fresh waters, OY must be reduced from MSY to

> account for these various ecological, economic, and social factors. For this reason, OY would be defined at the fishery level to account for mixed stock harvest and variabilities in run strength.

FR00007.

NMFS therefore defined optimum yield as the "as the harvest levels that are expected to capture as much yield in excess of escapement goals as possible in the EEZ without any individual stock routinely not achieving these escapement goals and risking overfishing, thereby maintaining a harvestable surplus for all other salmon users." FR00042. The best scientific information available of what this level should be was the historic catch between 1999 and 2021, which captured a variety of different conditions, resulted in numerous viable fisheries, and prevented stocks from becoming overfished. *Id*. In the future, as NMFS collects its own data regarding what level of fishing will "capture as much yield in excess of escapement goals as possible in the EEZ without any individual stock routinely not achieving these escapement goals and risking overfishing," it may revise these estimates. *Id.*

Plaintiffs' objections to this definition misunderstand the purpose and function of optimum yield. Their primary argument is, confusingly, that the definition of optimum yield does not achieve optimum yield. Br. at 23. In support of this theory, Plaintiffs allege that Amendment 16 does not address what it calls "under-harvest." *Id*. As explained above, the definition of

optimum yield does not affect harvest levels on a year-to-year basis. *Oceana*, 940 F. Supp. 2d at 1046. Instead, harvest is constrained by the Act's requirement to avoid overfishing. *See* 16 U.S.C. § 1851(a)(1). As such, it is unclear why Plaintiffs believe that changing the definition of optimum yield would have any impact on this so-called "under harvest."

There is also no evidence of "under harvest" in the Cook Inlet EEZ Area. The record demonstrates that the Cook Inlet EEZ Area cannot support any significant increases in harvest without a serious chance of overfishing weak stocks. FR00043; NMFS02605-25. This would remain true regardless of the definition of optimum yield. As explained above, supra at 10, the fishery in the Cook Inlet EEZ Area is not selective. Instead, it catches mixed assemblages of Cook Inlet stocks. NMFS02231-32. Accordingly, as NMFS explained "[p]roviding for greater harvest of the more abundant stocks in the EEZ would create a significant risk of not meeting escapement goals for less abundant stocks and reducing or eliminating the harvestable surplus of these stocks available to all other salmon users." FR00040. Specifically, NMFS "evaluated historical EEZ harvest levels and found that harvest in the EEZ could not be increased to fully harvest surplus Kenai and Kasilof salmon without causing serious impacts to other salmon harvesters and major conservation problems for other stocks." *Id*. In fact, under State management, some stocks did not meet their escapement goals, demonstrating that

increased fishing pressure would not be sustainable. NMFS02268. This is NMFS's independent judgment, confirmed by the Council's SSC, not deferral to Alaska as Plaintiffs assert. FR00040; COUN01828.

Plaintiffs' other objections fare no better. Plaintiffs complain that NMFS did not define optimum yield for what it considers the "fishery," i.e., state waters.[7] Br. at 21. But this is just a restatement of its earlier argument, which is responded to supra at 23-31. Plaintiffs next maintain that NMFS did not prescribe optimum yield on the basis of maximum sustainable yield. *Id*. To be sure, NMFS defined maximum sustainable yield on a stock-by-stock basis, while optimum yield is set at the fishery level. But, while maximum sustainable yield must be defined at the stock level, 50 C.F.R. § 600.310(e)(1)(i)-(ii), optimum yield can be set at either the stock or fishery level. *Id*. § 600.310(e)(3). And in this case NMFS defined optimum yield at the fishery level by choosing the harvest levels that are expected to capture as much yield in excess of escapement goals as possible in the EEZ, reduced by the ecological factor of ensuring that individual stocks would achieve their

[7] At Plaintiffs' urging, Judge Kindred held that NMFS's definition of optimum yield in Amendment 14 (which included fish caught in federal and state waters) was unlawful because "hinging federal management targets on the changing landscape of state decisions is an improper delegation of management authority to the State." *UCIDA v. NMFS*, 2022 WL 2222879, at *10. To comply with this order, NMFS specifically developed a framework that "does not rely on the State to achieve any of the FMP's management objectives." FR00059.

escapement goals and not risk overfishing. NMFS looked at the best scientific information to determine what constituted maximum sustainable yield for the fishery as a whole. FR00007; FR00041. For a mixed stock fishery like the Cook Inlet EEZ salmon fishery, a management target for the fishery as a whole is a better indicator of management success than considering stocks individually.

Finally, Plaintiffs argue that using State-gathered data as the basis for NMFS's calculation of optimum yield is a "deferral." Br. at 21-22. Once again, there is no support for this argument. NMFS determined historic catch data is the best scientific information available regarding the appropriate optimum yield. FR00007. Although Alaska was the day-to-day manager of the fishery during this time, that does not mean the data collected is inherently suspect or that relying on such data inappropriately defers to the State. In fact, there is no other data available regarding a range of harvests that are likely to be sustainable and provide the greatest net benefit to the Nation into the future. *Id*. As explained above, NMFS has independently evaluated these historic EEZ harvest levels and determined the range of harvests between the average of the three highest and three lowest years represent the highest possible harvest levels across a variety of fishery conditions without overfishing weak stocks (and therefore will provide the greatest net benefits to the nation).

IV. Plaintiffs Lack Standing.

To the extent Plaintiffs concede that NMFS lacks management authority in State waters, Plaintiffs lack standing. A plaintiff lacks standing if "the relief sought will not redress the inquiries alleged." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). There must be a causal link between the injury asserted and the relief claimed. *Id.*; *Shulman v. Kaplan*, 58 F.4th 404, 409 (9th Cir. 2023). Plaintiffs put forth two alleged harms: (1) State mismanagement of salmon in Cook inlet, and (2) harm from the bifurcation of the historic fishing area into two fisheries. ECF No. 37-1 at ¶7-9 ("Huebsch Decl. ") ECF No. 37-2 at ¶5 & ¶11 ("Martin Decl."). But if NMFS cannot manage in State waters or otherwise require Alaska to follow the Magnuson Act, neither of these harms can be remedied by this lawsuit.

Plaintiffs' standing declarations make plain that their primary concerns are with "the State's management of salmon fisheries in Cook Inlet" and the State's supposed failure to manage their fisheries consistent with the Magnuson Act. Huebsch Decl. ¶ 7; Martin Decl. ¶ 5. But this lawsuit is against NMFS and would not change or effect State management.[8] Mr. Martin states if Plaintiffs receive a favorable decision from this Court "the harm to my ability to fish this coming summer will be minimized." Martin

[8] Again, there is no evidence that Alaska's management is inconsistent with what would be authorized under the Magnuson Act. FR00006.

Decl. ¶ 14. But it is not clear how this could be. If NMFS issues advisory conservation and management measures, nothing would change regarding salmon fishing in Cook Inlet.

In their brief, Plaintiffs seem to concede that NMFS does not have management jurisdiction over State waters and could not compel Alaska to change its management practices or follow the Magnuson Act.[9] As such, the declarations do not provide a basis for standing to challenge the lack of explanatory conservation and management measures because a favorable decision would not redress their alleged injuries. Plaintiffs' position on this point is muddled, but either they are arguing that NMFS can and must manage salmon in State waters (in which case they are wrong) or that NMFS must issue an advisory FMP (in which case they lack standing).

V. NMFS Complied with the National Standards.

A. NMFS Complied with National Standard 2.

National Standard 2 sets forth that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Plaintiffs identify no scientific information not considered

[9] In its reply in support of its motion to enforce the judgment related to Amendment 14, Plaintiffs called NMFS's explanation of its jurisdictional limits "a strawman," argued that they were "not asking NMFS to exceed its jurisdictional authority," and conceded that NMFS "may not be able to enforce" management measures in state waters. *UCIDA v. NMFS*, 3:21-cv-00255-SLG, ECF No. 137, at 11.

or scientific information that was incorrect. Instead, Plaintiffs assert that NMFS's "SAFE Team"[10] recommended a different stock definition for Kenai Late Run sockeye and Kasilof sockeye salmon than the definition adopted by NMFS when it approved Amendment 16. Br. at 25. But the definition that Plaintiffs quote states that the Federal stock definitions for both stocks "include Cook Inlet EEZ Area harvests" and do not include State water harvest. SPEC00145; SPEC00150. This aligns with Amendment 16's approach. Plaintiffs offer no explanation for how these definitions are inconsistent, and this argument accordingly fails.

B. NMFS Complied with National Standard 3.

National Standard 3 states that 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. 16 U.S.C. § 301(a)(3). The Cook Inlet stocks cannot be managed as a unit throughout their range because NMFS does not have management authority over the full extent of their range and Alaska has declined to accept a delegated program. Under Amendment 16, NMFS coordinates with the State

[10] The "SAFE Team" is just a group of NMFS employees—in many cases the same ones that drafted the analytical document and environmental assessment ("EA") supporting Amendment 16—with specific expertise. *Compare* SPEC00117 *with* NMFS02493. It is not distinct from "NMFS," as Plaintiffs imply.

before, during, and after each fishing season. FR00015. Plaintiffs make no argument that NMFS has failed to provide for this close coordination. Accordingly, Amendment 16 is consistent with National Standard 3 because it ensures "close coordination" and accounting for State harvest when setting federal harvest limits. *Id*.

Plaintiffs make no argument that NMFS has failed to provide for this close coordination. Instead, they repeat the same argument that NMFS was required to manage salmon throughout their range, including in State waters. Br. at 26. But they again err by reading sentences in isolation and failing to give meaning to the full provisions. Clearly, using the phrase "to the extent practicable" and by providing for "close coordination," Congress was aware that NMFS would be managing cross-jurisdictional stocks. As the Senate Committee explained when considering National Standard 3, "[t]he committee recognizes the need to have close cooperation between the Federal and State government because of the separation of jurisdiction inherent in this Act." S. Rep. No. 94-416, at 31-32 (1975). Plaintiffs would read this phrase out of the statute and create a rule in which NMFS must manage a stock "throughout its range" in all instances.

Plaintiffs rely on the National Standard Guidelines, but once again read a phrase in isolation and take it out of context. The Guidelines state that "FMPs should include conservation and management measures for that

part of the *management unit* within U.S. waters, although the Secretary can ordinarily implement them only within the EEZ." 50 C.F.R. § 600.320(d)(2) (emphasis added). "Management unit" is defined as "a fishery or that portion of a fishery identified in an FMP as relevant to the FMP's management objectives," *id*. § 600.320(d), which in this case is the Cook Inlet EEZ Area. FR00029. In the National Standard Guidelines, NMFS has not, as Plaintiffs suggest, required itself to issue unenforceable management measures for other sovereigns. Instead, the National Standard 3 Guidelines simply state that FMPs should contain recommendations to states when state action is needed to achieve FMP objectives. 50 C.F.R. § 600.320(e)(3). Read in context, Plaintiffs plainly misrepresent the import of that provision.

C. Amendment 16 complies with National Standard 10.

National Standard 10 provides that "[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea." 16 U.S.C. § 1851(a)(10). NMFS considered safety at sea in its EA. NMFS02417-19; NMFS02480-81. In particular, NMFS explained that VMS provides a valuable tool for search and rescue efforts, allowing rescuers to find and respond to distress calls with greater accuracy and speed. NMFS02481.

Plaintiffs focus their critique on Amendment 16's prohibition on participating in both the federal and state fisheries on the same day. Br. at

28. NMFS explained that if vessels were allowed to fish in both fisheries on the same day, those vessels' catch would contain a mix of salmon caught in the two fisheries with no way to accurately apportion the catch between the two fisheries. FR00048. NMFS explained that without this prohibition, it "could not accurately monitor EEZ harvests and ensure the fishery complies with all Magnuson-Stevens Act requirements." *Id*.

First, Plaintiffs waived this argument. "[A]bsent exceptional circumstances, failure to raise arguments before an agency, such as in comments during a public-comment process, usually waives a litigant's rights to make those arguments in court." *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 487–88 (9th Cir. 2023). While commenters on the proposed rule did comment on this prohibition, no commenter suggested that it presented a safety issue. FR00048. Plaintiffs do not even suggest that this comment was made during rulemaking or in any comment letter. Instead, they cite to one of their standing declarations. Br. at 28 n.142. Plaintiffs' reliance on these declarations for non-standing related arguments is inappropriate in this APA action, where this Court's review is "limited to the administrative record on which the agency based the challenged decision." *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). Plaintiffs' lone citation to the record fares no better. Br. at 29 n.146. The quoted language comes from a report recommending adoption of delegated management to Alaska,

not independent management of the EEZ and could not have reasonably put the agency on notice. COUN00711.

In any event, the complaint is also wrong. NMFS explained that Amendment 16 "closes fishing in the Cook Inlet EEZ Area prior to the advent of deteriorating late summer and fall weather conditions." FR00057. In addition, "the safety benefits resulting from VMS will more than offset any marginal, indirect adverse effects on safety that this action may have." *Id.* NMFS had a legitimate purpose in establishing the prohibition, which is necessary for accurately counting catch, and it also included important safety measures. NMFS's conclusion that Amendment 16 met the requirements of National Standard 10 was not arbitrary and capricious.

VI. Vacatur is Not an Appropriate Remedy.

Plaintiffs request a laundry list of affirmative, injunctive relief, none of which is warranted or justified. But their remedy request fails at an even more basic level. They have made no argument at all as to why they would be entitled to vacatur of Amendment 16. "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted)). As described

above, supra at 14-16, Amendment 16 implemented a detailed management scheme for the Cook Inlet EEZ Area. Plaintiffs are not entitled to vacatur of the entire rule when they have only challenged specific, severable aspects of the rule. *See Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987, 995 (D. Alaska 2021) (tailoring vacatur to avoid disruptive consequences and address a specific harm).

There is no argument, for example, that NMFS's permit and logbook requirements or harvest specifications process, FR00070, are unlawful. Instead, Plaintiffs' arguments have focused on the definitions of "fishery" and "optimum yield." But a decision favorable to Plaintiffs on these grounds—and a change to these definitions—would not implicate the nuts and bolts of the fishery management structure NMFS has developed and put in place.

Thus, the seriousness of the errors would be relatively minor and capable of correction during a standard remand without vacatur. In contrast, vacating Amendment 16, which governed the 2024 fishing season, would be wildly disruptive. Participants would have procured federal licenses and VMS systems that would suddenly not be needed. NMFS's nascent management infrastructure would be struck down (without any argument that it is unlawful) and need to be reconstructed. In short, Plaintiffs have made no argument at all that vacatur is beneficial or needed to address any harm.

Plaintiffs have, for years, argued that NMFS must manage salmon fishing in the EEZ. Now that federal management is in place, they seek a return to State management. Such an outcome is inconsistent with the Ninth Circuit's decision in *UCIDA v. NMFS* and remand without vacatur would be the appropriate remedy.

CONCLUSION

The Court should enter judgment in favor of Federal Defendants.

Dated: December 20, 2024

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This brief contains 9,979 words.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel of record using the CM/ECF system on December 20, 2024.

/s/ *Maggie Baker Smith*

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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., Federal Defendants and STATE OF ALASKA, Defendant-Intervenor	Case Nos. 3:24-cv-116-SLG (lead); 3:24-cv-154-SLG CONSOLIDATED **DECLARATION OF MAGGIE BAKER SMITH**

1. I am a trial attorney in the Wildlife and Marine Resources Section of the Environment and Natural Resources Division of the United States Department of Justice. I am counsel for the Federal Defendants in the above-captioned case.
2. Attached as Exhibit 1 is a true and correct copy of the 122 Congressional Record, 94th Congress, 1st Session for January 19, 1976. I obtained this record from the Department of Justice Library.
3. Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 18, 2024, in Seattle, Washington.

Maggie Baker Smith

Maggie Baker Smith

Exhibit 1

the international equivalent of a domestic coup de'état: when a nation or group of nations is powerful enough to create an international crisis—as the United States did when it made the dollar inconvertible in 1971, and as did the oil nations at the end of 1973—or else when a threat to peace becomes more serious, as is happening with the rise in the number of plutonium reactors and with development of new methods of uranium enrichment.

In the past, the chief techniques for maintaining world stability in the strategic and diplomatic realm were the balance of power among the strong and the decisive superiority of the strong over the weak. In the world economy, the technique was the enlightened hegemony of one nation, serving as the guardian of a global system that ran to its advantage: Britain before World War I, the United States after 1945. But today there are too many local balances for the great powers, singly or jointly, to be able to control them all, as was shown in Southeast Asia. Even when there exists a balance of military might, as there is in Europe, it can be upset *from within, for instance by domestic upheavals* such as those now affecting Mediterranean Europe. The Soviet Union can try to influence such events, but even its grip over foreign Communist parties is weakening.

If the traditional techniques do not work in what can we put our hopes? Obviously the world is not ready for supranational management. Americans often fail to grasp the intensity of the new nations' desire for independence, a desire heightened by their awareness of interdependence. These nations see talk of supranational solutions as a sly device of the rich and the mighty. Nor does the "free market" offer a solution to world economic problems. To many new nations, eager for purely national answers to their troubles, the free market is the problem, not the solution. Even for nations attracted to an open world economy, the free market is unacceptable because it often works against them.

Thus there is no substitute for global bargaining—issue by issue, deal by deal—for a colossal expansion of diplomacy, resembling the constant maneuvering and coalition-building of domestic politics. But three gloomy warnings are necessary.

THE NEW MOBILITY

First there is a major difference between internal bargains and international ones. Domestic controls last because they are backed by the power of the state: groups wheel and deal under the law and the threat of sanctions. How long, if interests change (as they always do), can international compacts last? If in domestic societies the battles against inequality and injustice have often been partly won it is because of the power of the ballot and of the mobility of industrial workers and capital. Mobility on the scale now considered normal has never existed in global society.

Second, global bargaining will lead to a jointly managed and moderate world order only if coherent solutions are found to the global issues. But there is a double risk of incoherence. At the national level (especially in the big countries) foreign policy making becomes the plaything of too many bureaus and interests, it covers too many issues to be easily centralized in one department or even in the head of one leader; and therefore the gap between domestic demands and external necessities deepens. At the international level there are too many games, chessboards, overlapping coalitions and contradictory grievances, power is too unevenly split between participants and between issues for instant coherence. There is no invisible hand guiding the parties toward wisdom.

Finally the world may well end up being manageable only if the degree of interdependence is reduced. Neither nations nor individuals can be totally enmeshed with one another without breakdowns—physical or mental. This means that one objective in world economic affairs ought to provide as many nations or regions as possible with a modicum of self-sufficiency, especially in agriculture and in basic industries. It also means that ways will have to be found to keep violence localized. Nobody now seems to know how to cope with international terrorism. Even partial success would require drastic changes in behavior, in economic structure, in social policy, among advanced as well as developing countries.

There are therefore no reasons for easy optimism. A prerequisite to any kind of success is an awareness of the new conditions of international affairs, of the fact that world order tomorrow will require almost the opposite of world politics in the past. It will require a willingness to limit national freedom of action, to remove opportunities for blackmail, to accept greater institutionalization. This raises the issue of the citizens' and of the leaders' education. In what country are they really prepared for such realities and *such imperatives, where are they willing* to stop listening to familiar clichés, fixed ideologies, self-boosting delusions or self-righteous harangues?

CONCLUSION OF MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I know there is no further morning business.

The PRESIDING OFFICER. Morning business is concluded.

MAGNUSON FISHERIES MANAGEMENT AND CONSERVATION ACT OF 1976

The PRESIDING OFFICER. There being no further morning business, under the previous order, the Senate will now proceed to the consideration of the unfinished business, S. 961, which the clerk will state by title.

The assistant legislative clerk read as follows:

A bill (S. 961) to extend, pending international agreement, the fisheries management responsibility and authority of the United States over the fish in certain ocean areas in order to conserve and protect such fish from depletion, and for other purposes.

The Senate resumed the consideration of the bill.

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONSIDERATION OF CERTAIN MEASURES ON THE CALENDAR

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of calendar orders numbered 553 and 565, both of which have been cleared on both sides of the aisle.

The PRESIDENT OFFICER. Without objection, it is so ordered.

SUPPLEMENTAL EXPENDITURES BY THE COMMITTEE ON THE JUDICIARY

The resolution (S. Res. 330) authorizing supplemental expenditures by the Committee on the Judiciary for inquiries and investigations, was considered and agreed to, as follows:

Resolved, That S. Res. 72, Ninety-fourth Congress, agreed to July 26 (legislative day, July 21), 1975, is amended as follows:

(1) In section 2, strike out "$4,057,700" and insert "$4,069,700".

(2) In section 11, strike out "$283,300" and insert "$295,300".

STATUE OF LINCOLN TO ISRAEL

The joint resolution (H.J. Res. 406) for the presentation by the United States to Israel of a statue of Abraham Lincoln to be donated by Leon and Ruth Gildesgame, of Mount Kisco, N.Y., was considered, ordered to a third reading, read the third time, and passed.

The preamble was agreed to.

QUORUM CALL

Mr. ROBERT C. BYRD. Mr. President, I renew the suggestion of the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, is is so ordered.

NOMINATION OF MR. GEORGE BUSH TO BE DIRECTOR OF THE CIA

Mr. ROBERT C. BYRD. Mr. President, by the direction of the distinguished majority leader, I wish to state for the RECORD that as of now at least the nomination of Mr. George Bush to be Director of the CIA will be considered on Monday next.

ORDER OF BUSINESS

Mr. MAGNUSON. Mr. President, what is the pending order of business?

The PRESIDING OFFICER. S. 961.

MAGNUSON FISHERIES MANAGEMENT AND CONSERVATION ACT OF 1976

The Senate continued with the consideration of the bill (S. 961) to extend, pending international agreement, the fisheries management responsibility and authority of the United States over the fish in certain ocean areas in order to conserve and protect such fish from depletion, and for other purposes.

Mr. MAGNUSON. Mr. President, once again, today, the Senate is considering legislation for the conservation of U.S. coastal fisheries. S. 961, the bill before us now, is a marked improvement over the bill approved by this body in 1974 by a vote of 68 to 27.

The bill has the following major features:

It establishes a 200-nautical mile fishery conservation zone off the coasts of the United States, on an interim basis;

It asserts U.S. management jurisdiction over anadromous species of fish spawned in U.S. waters throughout their range, on an interim basis;

The jurisdiction features of the bill terminate when and if a law of the sea treaty enters into force;

It reserves available catch for U.S. fishermen and authorizes foreign fishing for any surplus;

It sets a firm ceiling on all fishing effort at sound conservation levels;

It encourages international agreements to solve mutual fishery management problems between nations;

It creates a national fishery management program for all fish resources subject to U.S. jurisdiction; and

It provides the enforcement, surveillance and penalty authority necessary to implement the act.

This bill gives us a dual opportunity. First, it allows the United States to manage the foreign fishing effort it has not been able to control through international agreements. Second, S. 961 creates a national management program, centered at the regional level, for rational management and conservation. With this bill, we have the best chance ever to reverse the trend of decline now prevalent in most of our fisheries. This bill will also assure our coastal fishermen a better economic future.

In the last several months, since S. 961 was favorably reported by the Commerce Committee, a battle of facts has been waged by those who oppose the bill and by those of us who have worked on this legislation for over 2 years now. But upon close examination, I believe my colleagues will see the subterfuge of the opposition. By taking statistics out of context, by withholding information, by painting an overly optimistic picture, the Department of State and others have sought to show that our fisheries are not in trouble. But they know that our fish stocks are in serious trouble and need protection from further overfishing. And the Department of State knows that they failed to do the job of negotiating meaningful treaties for fishery conservation in the past. That is one of the reasons why we are here with this bill today.

It is a fact that the Alaska pollack, the Pacific ocean perch, the Pacific hake, the haddock, the yellowtail flounder, and others are depleted due to foreign fishing. It is also a fact that existing treaties will not end overfishing or allow these stocks to rebuild so that they may provide a maximum sustainable yield. It is also a fact that the U.S. catch in many important coastal areas is declining or is below the catch of just 10 years ago.

We cannot now control foreign fishing—not through international agreement, not in any effective way. Our own fishermen rightly object to being tightly regulated while foreign vessels do what they wish. S. 961 will change this. The United States will have the superior bargaining position and will no longer "cave-in" to treaties which institutionalize excessive foreign fishing.

The significant accomplishment which is now in S. 961 is title II, the national fishery management program. Provisions under this title will, for the first time, create a national management program far the conservation of our fishery resources. Last year during debate over the predecessor bill to S. 961, several Senators criticized the bill because it did not contain the kinds of conservation measures which would be needed to manage fishery resources which would come under our jurisdiction.

Consequently, this year the Commerce Committee worked hard in obtaining the title II provisions. New ground had to be plowed. To assist our efforts, I called together a fishery management workshop and invited representatives of the fishing industry, State fishery experts, and others interested in fishery management. Out of that workshop came the provisions which are now in title II of S. 961.

The bill creates semi-independent regional fishery management councils to draw up management plans and to recommend regulation for the management of fisheries within their regions. Recommended management regulations are sent to the Secretary of Commerce for his evaluation. If these measures are consistent with specific management standards contained within the act, then the Secretary must promulgate them. If, however, the Secretary determines that they are not so consistent, or that they create a violation of existing law, then he returns them to the councils for further work. If the councils fail to make the necessary changes, the Secretary of Commerce then would go forward with the regulations. However, we feel that use of the veto by Secretary of Commerce would be rare and that for the most part, primary management decisions would be lodged in the regional councils.

The councils themselves would be made up of representatives of the various States in the regions designated. We have developed a mechanism whereby the Governor of each State would recommend those to be placed on the councils. The President would appoint them with the consent of the Senate. This, we believe, will thus create a high-level panel of qualified individuals who will make management decisions based on the best information possible and on the standards set forth in the act.

As is evident, we have attempted to balance the national perspective with that of the individual States. We firmly believe that this institutional arrangement is the best hope we can have of obtaining fishery management decisions which in fact protect the fish and which, at the same time, have the support of the fishermen who are regulated. These provisions are greatly needed to straighten out our often confusing present management program. I believe these provisions are imperative for the conservation of our many declining fishery resources.

Mr. STEVENS. Mr. President, today the Senate will consider S. 961, the Magnuson Fisheries Management and Conservation Act of 1976. This legislation is of critical importance to the Nation's fishing industry. Domestic stocks of commercial fish will be destroyed through the poor conservation practices of foreign high seas fishing fleets unless they are afforded the protection which a 200-mile contiguous fisheries zone offers.

Mr. President, we consider this legislation at a time of critical importance to the development of international ocean law. Within the next few months the United Nations Conference on the Law of the Sea will again meet in an attempt to reach an international consensus on ocean law which will shape the future of ocean development. I must report, however, that the prospects of resolving the disputes between the nation state parties participating in that conference are not good. The delegates must resolve some 115 areas of disagreement.

The most contentious of these issues arise from attempts to establish an international regime to control the development of deep seabed ocean mining. Many of us who have studied the progress of the United Nations Conference on the Law of the Sea over the last decade believe that it will take many years for the disputed aspects of the future laws governing deep seabed mining operations to be resolved. I do not mean to be critical of the Conference when I state that. Work of such complexity and importance should be resolved slowly and carefully. There is too much at stake to do otherwise.

The United Nations Conference on the Law of the Sea is, however, also responsible for creating a set of international laws regarding conservation of the living resources of the ocean. It is in regard to the living resources of the oceans that expediency is required. I need not, for example, fully reiterate to my colleagues here in the Senate the depleted state of the coastal and anadromous species of fish found off of this country. These stocks, which represent a great renewable resource of protein, are on the verge of being irreparably destroyed. The activities of superefficient foreign high seas fishing fleets have in fact reduced the biomass of fish in the North Atlantic by 50 percent. Some 14 species of commercial fish found in both the Atlantic and/or Pacific are listed as depleted. Mr. President, it is obvious immediate action is needed to save this valuable resource.

We can now see the quagmire which entraps the United Nations Conference on the Law of the Sea. The Conference must act immediately to save the living resources of the oceans. Yet, the conference cannot act on the issue of deep seabed mining without many years of further intense negotiations. Should the Conference resolve itself prematurely in order to protect the living resources of the oceans, it might well commit errors in the resolution of deep seabed mining issues that would plague the future of that industry for decades.

Since a treaty concerning the living resources of the ocean cannot be separated from a treaty governing the mining of deep seabed resources, the Conference delegates will be put in the unfortunate position of having to sacrifice

one resource for the other. S. 961, the Magnuson Fisheries Management and Conservation Act provides a reasonable alternative to this paradox.

The issues regarding the living resources of the oceans have, by and large, been resolved. We have embodied in S. 961 a fisheries regime identical to what most students of the United Nations Law of the Sea Conference believe will ultimately be in the final form of the Law of the Sea Treaty concerning living resources. By enacting S. 961 into law we will have alleviated the necessity for the Law of the Sea Conference to prematurely sacrifice U.S. interests in the deep seabed mining area in order to conserve the ocean's living resources. With the knowledge that the living resources of the high seas are adequately protected the delegates to the United Nations Conference on the Law of the Sea can take the needed time to effectively resolve the complex issues regarding deep seabed mining.

Mr. President, I would urge each of my colleagues to support S. 961, the Magnuson Fisheries Management and Conservation Act. This legislation is a vitally needed conservation measure. It not only controls foreign fishing activities but will place the living resources of the oceans under comprehensive management for the first time. S. 961 is needed not only for the protection of living resources but for the protection of U.S. interests in deep seabed mining, for without this legislation the delegates to the United Nations Conference on the Law of the Sea will feel pressured, out of deference to conserve the ocean's living resources, into prematurely concluding that conference.

Mr. President, S. 961 presents us with a solution whereby we can protect the living resources at the earliest possible date yet allow the Conference sufficient time to adequately resolve the problems of a deep seabed mining regime.

Mr. MAGNUSON. Mr. President, this legislation was pending when we recessed on December 19, and it is now before us. It is still on the calendar as the pending order of business.

Due to the fact that a number of Senators are not here yet, which is amply evidenced by the late quorum call and the live quorum, we thought on this particular bill, in which there are many Senators who have an interest one way or another, we do have several technical amendments which I have looked at, the distinguished Senator from Alaska (Mr. STEVENS) has looked at, and we thought today we might be able, in order to save time, to dispose of these so-called technical amendments.

The Senator from Alaska is at the desk and we have both looked them over. I do not think there will be any objection to them. They are merely perfecting amendments to the bill and we thought we would get rid of them today so that we could proceed tomorrow with one or two so-called major amendments to the bill and see how far we progress tomorrow on the bill.

After the technical amendments, the Senator from Washington will suggest that the leadership recess the Senate until tomorrow, which I believe they plan to do, if we can get rid of these technical amendments. We have looked over the amendments of the Senator from Alaska and have made some minor modifications. They do not affect the main thrust of the bill one iota but make it much more readable and perfect its provisions.

I will yield to the senior Senator from Alaska to present his amendments.

Mr. GRAVEL. Will the Senator yield for a question prior to that?

Mr. MAGNUSON. Yes.

Mr. GRAVEL. If the amendments to the bill are to perfect it, as the Senator states, the Parliamentarian tells me that these sections may not be amendable again. As I recall the practice, it has been that after the bill has been discussed and amended, at the end the staff prepares a whole bevy of cleanup amendments, so to speak, or technical amendments, and those are just passed with no objections at all. The difficulty now is, with technical amendments the bill could be peppered so there would be no way in a legislative fashion to amend the bill substantively after it has been corrected technically.

Mr. MAGNUSON. The Senator is correct. It is true that normally we go through introductory remarks on a bill and then we take up perfecting amendments. That happens on every bill that is somewhat complicated and of a major nature.

I surely would ask unanimous consent that if we pass these technical amendments today, in no way, in parliamentary terms, will passage prejudice anyone's right to amend the section that they amend today.

The PRESIDING OFFICER (Mr. CURTIS). Is there objection?

Mr. GRAVEL. Reserving the right to object——

The PRESIDING OFFICER. The Senator from Alaska.

Mr. GRAVEL. Will the Senator repeat his statement?

Mr. MAGNUSON. We would proceed with these technical amendments but they would not prejudice the right of the Senator from Alaska, or any other Senator, to amend the sections of the bill that the technical amendments might refer to today.

Mr. GRAVEL. Reserving the right to object, and addressing the question to the Parliamentarian, as I understand it this would place no impediment at all to any amendments of any kind at any point in time.

The PRESIDING OFFICER. If all of the amendments considered today are considered as original text for the purpose of amendment, that would be correct.

Mr. GRAVEL. Is that correct?

Mr. MAGNUSON. Yes.

Mr. GRAVEL. With that modification to the unanimous consent——.

The PRESIDING OFFICER Does the Senator from Washington include in his unanimous-consent request that these amendments be considered as original text?

Mr. MAGNUSON. Yes.

The PRESIDING OFFICER. Is there objection? The Chair hears none and it is so ordered.

The clerk will report the first committee amendment.

Mr. STEVENS. Mr. President, I ask unanimous consent, in view of the fact that those are the Armed Services Committee amendments, that the committee amendments be held over until tomorrow and that we be permitted to proceed with these technical amendments from the Commerce Committee at this time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STEVENS. Mr. President, so there is no confusion about this, I ask that during the pendency of this bill, Mike Spaan, and Steve Perles of my staff and Gerald Kovach from the Commerce Committee staff, be granted the privilege of the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STEVENS. Mr. President, we have a series of technical amendments.

First I would like to call up——

Mr. GRAVEL. Will the Senator yield for an inquiry?

Mr. STEVENS. I yield.

Mr. GRAVEL. Will the Senator yield that we have copies of them and I can follow along?

Mr. STEVENS. I will state to the Senator that they are on his desk, but in two instances we do have a revision. I would be happy to see that the staff gives the revision to the Senator.

AMENDMENT NO. 1158, AS MODIFIED

Mr. STEVENS. Mr. President, I call up amendment No. 1158 and ask unanimous consent to amend it so that it reads as I am sending the modification to the desk.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Alaska proposes an amendment No. 1158, as modified.

The amendment, as modified, is as follows:

On page 38, line 9, after the word "authority", but before the period, insert the words "in the manner provided for in title II of this Act".

On page 38, line 19, after the word "States", but before the colon, insert the words "in the manner provided for in title II of this Act".

Mr. STEVENS. Mr. President, the purpose of this amendment is to make certain that the jurisdiction of the United States over anadromous species is consistent with title 2 of the bill. Its purpose is technical in that if the Senator will look at page 65, section 205 of this bill he will see it provides that—

Nothing in this act shall be construed to extend the jurisdiction of any State over any natural resources beneath or in the waters beyond its seaward boundaries or to diminish the jurisdiction of any State over any natural resources beneath and in the waters within its boundaries.

The intent of this amendment is to make certain with respect to anadromous species, and with particular refer-

ence to our salmon off the coast of Alaska, the intent of the bill applies to an anadromous species as set forth in section 205. I have revised this amendment in accordance with the suggestions of our chairman and the committee staff. I am happy to answer any questions about it.

The existing language on page 38, line 23, does have a possibility of being interpreted contrary to the purpose I have just stated. That is why it is a technical amendment to insure that the intent of the committee is carried out.

Do my colleagues have any questions concerning this technical amendment?

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Mr. GRAVEL. The amendment given to me was an amendment to page 38, line 9.

Mr. STEVENS. That is the suggestion that it be inserted there. It is substitute for the original amendment which applied to page 38, line 23. The amendment I have submitted is a substitute for the printed version of amendment 1158.

Mr. GRAVEL. It says in the manner provided for in title II of this act. What is title II?

Mr. STEVENS. I just read the provisions of section 205 on page 65 setting forth the provisions of title II which apply to this issue. What it says, in effect, is that nothing in this act is to enlarge or diminish the jurisdiction of the States within the 3-mile limit. This amendment is technical to make sure that same principle applies to anadromous species so that the State's jurisdiction over salmon within its 3-mile limit is preserved as it is today and is not to be affected by this bill. That was our intent.

Mr. GRAVEL. What is the status up to the 12 miles?

Mr. STEVENS. The contiguous fisheries zone is currently under the jurisdiction of the Federal Government, but there are no comprehensive fisheries management regulations that apply in that area now. They will be promulgated by the Fisheries Management Councils out to 200 miles. The areas between the 3-mile State limit and the 200-mile limit would be within the jurisdiction of the Management Council.

Mr. GRAVEL. In the State of Alaska, the salmon fishing mostly takes place within the 12-mile area. That is presently within State jurisdiction.

Mr. STEVENS. No.

Mr. GRAVEL. The regulation of the salmon fishery of Alaska is primarily handled by the State at the present time, is it not?

Mr. STEVENS. And we have another amendment to try to insure that that continuity is preserved. But that is not correct. The State's jurisdiction ends at 3 miles. I might say that that issue is in litigation right now in terms of assertion of jurisdiction beyond 3 miles. I certainly would not want to create any new law, but the State does challenge that position in terms of some species.

Mr. GRAVEL. Then in a de facto fashion the State of Alaska is presently exercising its authority over the fisheries within 12 miles, is it not?

Mr. STEVENSON. I will say to my colleague that as to Alaskans, the State of Alaska does exercise that jurisdiction. It is contested beyond 3 miles as to non-Alaskans. Since most of the fishing that we have in our State is in fact directed at salmon and since most of the target stream areas of that fishery are in fact within the 3 miles, the State already has control over the majority of salmon fishing activities within the State. Some salmon long-line trawlers, however, are outside the 3 miles.

Mr. GRAVEL. Would not this matter come into conflict between the Federal and the State authorities, and should not that be resolved in this legislative process here?

Mr. STEVENS. We are not trying to resolve that. We are trying to reassure the States that nothing in this act is intended to take away from the State any jurisdiction it has now. That is what section 205 says. It says nothing is going to enlarge or diminish the jurisdiction of any State over its natural resources beneath and in the waters within its boundaries.

Mr. GRAVEL. Why, if the committee felt that there was efficacy in leaving the 3-mile area in this case, where we take most of our Alaskan fish, why did the committee feel that that area should be delineated to have it under State jurisdiction, and then the 12-mile area not be under State jurisdiction? Why did not the committee go ahead and correct that, establish uniformity, and get the whole issue out of the courts?

Mr. STEVENS. This bill will settle that because the jurisdiction beyond the 3 miles, if this bill passes, is in fact conferred on the Fisheries Management Councils, which in the State of Alaska would consist of nine members, five of whom would be Alaskans. Alaska is the only State so affected by this bill, because we are the only State which has just one council.

So this would resolve the problem the Senator is addressing. We are trying to make sure, in this technical amendment, that no one can look at the provisions of title I and say that, this changes existing State jurisdiction with regard to anadromous species. This amendment is intended, with regard to anadromous species, to preserve the State jurisdiction as it now exists.

Mr. GRAVEL. I think we will have trouble here as we pass in the night, but if this legislation is going to confirm the authority of the Federal Government in the 12-mile area, and leave in the hands of the State—I pose that as a question: Does it leave in the hands of the States that 3-mile area? Is that strictly a fact?

Mr. STEVENS. That is correct. It does not change anything with respect to State jurisdiction within the 3-mile zone; it creates a new management entity within the 197-mile area, which is in fact oriented toward local government and not the Federal Government in the first instance, because Fisheries Management Council members are nominated by the Governor. That is, they are suggested by the Governor, nominated by the President, and confirmed by the Senate; but they represent a regional concept rather than a State or Federal concept.

Mr. GRAVEL. I appreciate that, but my query goes to this: Why do we, in setting up the management concept, draw an arbitrary line between 3 and 12 miles, and say this belongs to the State, and they shall manage it, and the rest belongs to the Federal Government and they shall manage it through these regional councils. How can you have efficient management if you have a dichotomous situation, where basically, with salmon, my colleague knows as well as I you should be able to regulate them for thousands of miles? But what the Senator is now telling me is that we are going to have a Federal program which deals with the 12 miles and a State program which deals with the 3 miles.

Mr. STEVENS. No, I have not mentioned 12 miles. My colleague has talked about 12 miles. We are dealing with 197 miles. The 12-mile line is obliterated.

Mr. GRAVEL. Fine, whatever happens. But you are still drawing a line between the 3 miles, and saying that is State waters, and in our case that is where we catch most of our salmon. How can the Federal Government claim it will have an impact on our salmon fisheries when most of them are now within the State boundaries?

Mr. STEVENS. Let me state that the Submerged Lands Act drew the line at 3 miles. That is the old tidelands fight, and we are not changing that. What we are saying is that with regard to anadromous species, the State's jurisdiction is now preserved.

If my colleague will bear with me, we are going to propose other amendments, which will assure there is no conflict of management regulations throughout the territory of anadromous fish. It is my hope that we will go as far as Congress can possibly go to assure that with a State such as Alaska, where one State is involved with the resource, that the management councils will use State law to the maximum extent possible, but in any event if there is a conflict it will be worked out by the regional council and not by the Federal Government. That is what I hope we can agree upon. Alaskans represent a majority of the members on the North Pacific Fisheries Management Council. The same thing would be true with regard to the other councils; the majority of them will be local representatives of the States within the region. Fisheries management disputes will not be settled here in Washington; they will be settled in the regional council if there is a dispute between the States affected by the 197-mile fisheries zone.

Mr. GRAVEL. But are we not setting it up for a dispute, if, as the Senator says, the States will have total power over the waters and whatever is in the waters, fish or what have you?

Mr. STEVENS. That is the law today, and we have no intent to change the 3-mile limit.

Mr. GRAVEL. But I just wonder about the consistency of the committee. If they are going to leave a 3-mile area or region around our country, and say that is

State jurisdiction, and from thence forward to the 200 miles it will be Federal jurisdiction, do we not set up a mishmash of inconsistencies that will really foster disagreement, conflict, and litigation?

Because if we get various economic groups within a State, they will be prone, of they cannot get the ascendent position of influence, to move to another area to try to protect themselves, and then they will be set for quarrels over their various legal positions. It is like saying we are going to create legislation for cities and States, but inside a State we are going to create another State. That is essentially the way I see this, though I have faith that the committee is going to come forward with other amendments.

Mr. STEVENS. If the Senator is going to change section 205, we suggest he offer an amendment. The amendment now before us is technical and states that whatever applies to title II applies to the fishery boundaries enunciated in title I.

This is a technical amendment to assure that the bill is internally consistent. I suggest the Senator direct his attention toward section 205, which preserves the existing circumstances. This assures that the present situation regarding State jurisdiction will continue to exist regarding anadromous species and migratory species. All we are saying in this amendment is that this bill is not intended to amend the Submerged Lands Act regarding the jurisdiction conferred on the States—any State—by that act. We are preserving that 3-mile jurisdiction.

If the Senator will be patient with us, he will see that the management council concept will provide the coordination between the State and the Federal interests that the Senator has just indicated are in conflict. That conflict can be eliminated through the regional councils.

Mr. GRAVEL. The Senator mentioned the Submerged Lands Act. That just deals with oil and minerals, does it not?

Mr. STEVENS. No, no.

Mr. GRAVEL. Well, what?

Mr. STEVENS. That is a jurisdictional act. It states that the seaward boundaries of the States are 3 miles.

Mr. GRAVEL. So that is the intent of this legislation when the Senator has it designed and engineered as he feels is proper. My question now is, will the Federal Government or will these regions have definitive control over the area of water?

Mr. STEVENS. There is no control over water. This is controlled for conservation purposes over the water column, the fisheries, and other living resources under the sea.

Mr. GRAVEL. That is what I mean. Will the regions control the water column and the living resources in that water column within 3 miles?

Mr. STEVENS. No.

Mr. MAGNUSON. No.

Mr. GRAVEL. No. So the Senator is leaving a situation, and, although he may consider this a technical amendment, it only brings to the fore a pitfall in the bill which I think is quite serious. That is, for what do we think that we are legislating? We think we are legislating from the coastline of this country up to 200 miles, but in point of fact we are not. We are going to have one jurisdiction for 197 miles, which is a Federal jurisdiction, but we are going to have a State jurisdiction within 3 miles. The fish obviously swim through both jurisdictions.

As a lay person, that seems to me to create an area that is going to be fraught with difficulty, and we should anticipate this and do something about it.

What has the committee chartered to solve this problem in this legislation?

Mr. MAGNUSON. The committee has a target to do exactly what the Senator from Alaska suggested. We are suggesting that the 3-mile limit which is subject to the——

Mr. STEVENS. Submerged Land Act.

Mr. MAGNUSON. Yes, the Land Act, remain as it is.

Between 3 and 12 miles there has been some dispute. There is a dispute in my State about it. But we say that the States should be exactly as they are in regard to the 3-mile limit. The bill then takes away any doubt as to State and Federal jurisdiction beyond the 3-mile limit and sets up these councils and boards which will take care of disputes. It removes all of these things the Senator is talking about if he believes in the concept of 200-mile limit. If he does not believe in that, he can bring up all kinds of things. He can bring up technical amendments: What about the 12 miles and 15 miles or the 3 miles? We do not change that. If he does not believe in the 200-mile limit and the conservation, then I suppose he could talk about it. But this removes any doubt about situations beyond 3 miles.

In the case of Alaska, I should think that under the bill the 197 miles, as far as Alaska is concerned, would be almost in complete control of the Alaskans themselves, working with the Federal Government under the formulas and procedures in the bill.

So there is no argument about the 12-mile limit. That is out. We are dealing now with what do we do with the 197 miles.

If we passed the 200-mile limit bill, these are the procedures that have been set up, but we are trying to protect the right of the States under the laws that now exist and as to what jurisdiction they legitimately claim in the 3-mile limit.

It will clear up a lot of problems on the coasts of Oregon and Washington as far as we are concerned, because now there is some confusion concerning who has control of the 9 miles and who steps in. There is confusion as to who calls upon enforcement even of the 12 miles? This removes all doubt as to that.

But the Senator has to believe in the concept that we are going to control 197 miles of our own coastal zones. If he does not believe in that, then he can have amendments as to who is going to handle it up to 15 miles or who is going to handle it within 3 miles. Are the State claims right or are they wrong? We wish to protect the right of the States to do what they think is right under the law which now exists and within the 3 miles. That is all this does.

Mr. STEVENS. That is a fishery conservation zone. I am sure my colleague is not suggesting we federalize our 3-mile area.

Mr. GRAVEL. No. In fact, what I am suggesting is that maybe we are federalizing the 197 miles and throwing the State a sop of 3 miles. What I am suggesting and what I wish to pursue is this. Let me just state I am for the concept of 200 miles. I wish to see us have it in Alaska. I wish to see it under the management of the State government, because I think they have done a better job than the Federal Government has ever thought of doing in that area, and I shall have legislation to try to bring that about.

If the Senator is talking about the States having the mineral rights of the 3-mile limit, fine, but if he is telling me that we have a conservation piece of legislation and that the State is going to make decisions on conservation within 3 miles and the Federal Government is going to make decisions on conservation between 3 miles and up to 200 miles, meaning 197 miles, and the fish, particularly anadromous fish, pass through both areas, then I am saying that what we have set up is a diabolical situation of conflict between the State and the Federal Government, and we cannot pass it over by saying: "Well, we are going to have regional councils. We are going to have representation from the State, particularly Alaska or the State of Washington or California."

What I am saying is that we will have economic interests within those States that may be quarreling. If we cannot succeed in one legal area to have them work their will they will move into another area, and then we shall have a conflict. We shall have a conflict between the forces that will have control of the governmental processes involving 3 miles and those that have control of governmental processes controlling the 197 miles. Then they will be in conflict. We will find ourselves in litigation, and we will have one heck of a mess on our hands.

Mr. STEVENS. Mr. President, will the Senator yield?

Mr. GRAVEL. Let me clarify this one more time. I wish to make it clear that I am for a 200-mile limit. I think it is in the best interest of conservation. If this bill is truly a conservation bill, then is there not any concern with what takes place within the 3 miles with respect to fish? How can we conserve salmon if when the fish swims through the 3-mile area they are caught and there is no escaping? How could this legislation claim that it is a conservation piece of legislation if it cannot address itself to solving a category such as that problem?

Mr. STEVENS. I wish my colleague would read section 206, Interstate Cooperation of Uniform Laws, and the goal of encouraging cooperative action.

Mr. GRAVEL. I shall be happy to read it. I will read it right now.

Mr. STEVENS. Let me continue my thought. The Senator mentions the ex-

isting problem. If the Senator will look at section 205 he will find that it does not state what the seaward boundary is. If he wishes to make an amendment to put in seaward boundary of States 200 miles off the shore, he may do so. The Senator knows it will not pass and so do I.

S. 961 mentions the seaward boundary. It leaves unchanged the definition of what is in fact the seaward boundaries of the State. As a practical matter, we are trying to help solve that problem, and have a provision in this bill which establishes a review panel so that fishermen will not have to go to court in order to resolve jurisdictional disputes as they have had to do in the past. This is not a concept of litigation. It is trying to solve the jurisdictional problem the Senator mentioned. For species, such as salmon, go beyond the existing limits of one jurisdiction into another, and, as a matter of fact, may go beyond into the third area of international jurisdiction. As a practical matter, to the extent possible, we will have uniform and consistent management.

As I said we have another amendment coming which deals with the problem of trying to utilize the State laws to the maximum extent possible regarding any species that originates in State waters and then goes outside of those waters. As the Senator knows it still is a technical amendment. As a matter of fact, I think the bill would be so interpreted without this technical amendment.

But the question was raised at the hearings and meetings we had in Alaska, and they wished a clarification to make certain that the language on page 38 was not a U.S. position of usurping the existing jurisdiction of the State of Alaska with regard to salmon. There is no such intent. This amendment is offered to reassure the people who raised that question that there is no difference between title I and title II with regard to the jurisdiction of a State within the 3-mile limit.

I think the committee has been very direct and open about our intent not to disurb the coastal State jurisdiction within the 3-mile limit but to encourage the creation of regional councils which will, to the greatest extent possible, extend State management concepts out to 200 miles.

With regard to other States, my colleagues should take a look at New England, for example, where jurisdictional boundaries converge as they reach the edge of the 200-mile zone. It is a nice question as to whose State law would apply in that region. Further those fish not only go outside the 3-mile limit into the 197 miles, but also, they go into the jurisdiction of States on either side. That problem occurs not only on the east coast but is the existing situation in Oregon, Washington, and California for some species. We are trying to establish the principle of a single management concept for those species, and this is the best way to accomplish that end. S. 961 creates a council of those three States that would attempt to take the best of the respective State laws and apply them, with the hope that there will be intrastate cooperation, to the 197 miles outside of State jurisdiction. This will provide uniform laws regarding the management of those species within the 3 miles.

I still think we are on the right track. This is a technical amendment. The Senator's objection is to section 205, not to this amendment. I presume that is the case.

We do not want a different concept applying to the salmon than applies to the halibut. This reassures the salmon people that we intend to follow section 205 with regard to anadromous species. That is all it does.

Mr. MAGNUSON. Mr. President, will the Senator yield?

Mr. STEVENS. I yield.

Mr. MAGNUSON. I say to the Senator from Alaska that we have been at this a long time. Over the past 6 years, we have probably had numerous workshops on this, calling in people from all segments of the fishing community. In this area, new ground had to be plowed, because domestic jurisdictional problems have plagued us in the waters between 3 and 12 miles. This is what has been recommended. All the fishery experts were unanimous that we had to plow this new ground with respect to the waters beyond 3 miles in a new 200-mile zone and work out with the States and all the people involved the rules which have to be promulgated by the Secretary. We cannot leave it as it is.

I believe that what the senior Senator from Alaska says is that we are trying to remove some of the problems that will exist if we do not have this bill, if nothing is done, or if no international agreement is made. We now have difficulties within the 12 miles, and they will remain if we leave it as it is.

We think the States have handled the 3 miles fairly well, and under existing law they are supposed to do so. The situation with respect to Alaska is a little more unusual than with most States in the Union, because there is not the problem of overlapping State lines.

But I know of no matter that these management councils must decide, that will be without dispute by somebody. I have dealt with fishermen all my life; and if you can get a unanimous-consent agreement in a fishery hall, whether it be management or union or both, I will put in with you. They are independent people, and they have their own ideas. But they all thought that new ground should be plowed, particularly if we are going to pass a 200-mile-limit bill, and I think this is the sensible and practical way to do it. That is all this is about.

Mr. GRAVEL. I certainly have no objection to plowing new ground, and I think that is what should be done. But I would rather focus on what actually is being done. It can be called plowing new ground, but if it sets up a whole host of potential areas of conflict, we have not addressed ourselves to the conservation problem with respect to fisheries.

Mr. MAGNUSON. It will reduce conflict to a minimum. That is what we think.

Mr. GRAVEL. I understand that the committee would have that kind of possessive view toward its work.

However, my colleague commended to my reading section 206. I read section 206, and I see nothing that solves the conflict. It is a short section:

> The Secretary shall encourage cooperative action by the States and Councils for the management and conservation of coastal and anadromous species of fish and Continental Shelf fishery resources, and shall encourage, insofar as practicable, the enactment of improved and uniform State laws relating to the management and conservation of such fish.

I am not an authority on the English language, but I know what the word "encourage" means. What the word "encourage" means is that the Secretary does not have the power to effect. All he can do is ask or plead.

Mr. STEVENS. That is absolutely right. I am glad the Senator pointed that out.

Mr. GRAVEL. When the situation is in conflict, that is not a very strong tool to resolve the conflict.

What I am saying is that we are leaving in the hands of the Federal Government the conservation management of anadromous and other fish which are within 200 miles, which go beyond 3 miles, but are within 200 miles. So one area is going to be Federal domain and another area is going to be State domain, and they are both going to be doing "conservation." How can you have proper conservation if you have economic interests, as we all agree, that may differ as to what rewards they want to effect? How can you have a situation where you say this is conservation?

We could pass this measure, and a State—certainly, it would not be my State—could turn around and violate all those conservation practices, and the Federal Government could do nothing but twiddle its fingers. Where is the sense of that?

You cannot draw a political line in the water and hope that these fish are going to obey it or hope that people who make their livelihood there will have a unanimity of attitude at all times as to what conservation should be.

If it means my making a lot of money this year as opposed to your making a lot of money this year, I am more for my conservation approach than for your conservation approach, because my conservation approach is going to have the merit and the virtue of making me a lot of money as I conserve.

The Senator can speak of technical amendments all he wishes, but this is probably the only place we are going to address ourselves very pointedly to this issue.

Mr. STEVENS. We will focus in on that issue in just a minute.

Mr. GRAVEL. I do not know how more pointedly we can get to it. The Senator has made the admission that the State can manage its conservation within 3 miles.

Mr. STEVENS. With regard to that issue I suggest that the Senator take a look at my amendment No. 1302, which talks about fish off a single State. He will see that we are going to come directly to that issue.

Mr. GRAVEL. Unfortunately, I am not

privy to have read all the amendments the Senator has in his portfolio.

Mr. STEVENS. It is at the desk.

Mr. GRAVEL. All I know is what we have before us. What we have before us is the Senator's "technical" amendment, which will foster conflict for time immemorial. That is what we have before us—this little, old technical amendment that is going to create a quarrel between the Federal Government and the State government on fisheries as long as we are alive.

Perhaps the committee felt that they were addressing themselves to conservation, but I say to the committee, most respectfully, that perhaps they have not done the proper job on it. Perhaps they should look to the problem of controlling the waters for conservation purposes—not for oil or minerals, but for conservation purposes—right up to the shoreline.

In States such as mine, we would not mind that, so long as we had the implementive power to regulate the fisheries from their line to 200 miles, even with the approval of the Federal Government, because we have a good track record and we have a great deal of experience in Alaska.

My proposal—and I will have an amendment to this effect—is that the State of Alaska, using it as an example, would develop a plan such as we have for air, for environmental purposes. The State develops a clean air plan. It submits the plan to the Federal Government, and the Federal Government either approves or disapproves. If it approves, then the State implements the plan. If the State does nothing, then obviously the Federal Government has to come in and do the work. But we will do our work in Alaska.

I am suggesting that I do not want to see a situation that will guarantee future conflict. I want to see a uniformity of conservation practices within the 3 miles and outside the 3 miles, up to 200 miles; but I want to see them on a uniform basis, because I know they will work.

I want to see a situation in which my State has the option to submit a plan to the Federal Government. If that plan is approved, that plan then will be carried out by the State government. If the State government does not do a good job in carrying it out, then the Federal Government—as is done with respect to clean air—can step in and see that they carry it out, even if they have to carry it out themselves. That is not too much to ask.

I do not think I have confused the issue. I have tried to state it as clearly as I can. I think that the merit of my proposal is that there is not an arbitrary line at 3 miles, so that within 200 miles there is a 3-mile jurisdiction and a 197-mile jurisdiction for fish that swim both ways.

Mr. STEVENS. Mr. President, will the Senator yield for a question?

Mr. GRAVEL. I am happy to yield.

Mr. STEVENS. Perhaps the Senator will recall the fishtrap argument, where the Federal Government believed that fishtraps were the most efficient and the best way to harvest fish. Let us assume that we come back to that point and we follow the Senator's procedure and the State presents a plan that says we are not going to allow fishtraps. The Federal Government says, "No, we are not going to approve that and we know more than you know about conservation, so we are telling you, from the shoreline out, we are going to allow fishtraps wherever they can be used."

The Senator is not really suggesting that, is he? Is he really suggesting that? Is he suggesting that to me?

Mr. GRAVEL. Let me suggest that my colleague is right. The way this thing is run and with his technical amendment, that is exactly what could happen.

Mr. STEVENS. Negative. Absolutely no way. We do not have to bring anything to Washington under the Submerged Lands Act. That is what the amendment says, we do not have to bring anything to Washington concerning anadromous fish within 3 miles. We have set up a management council which is composed of people from the area—not from Washington. They are selected by the Governors of the States involved. They are urged to work out a management scheme for the 197 miles which, to the greatest extent possible, is consistent with what the State is actually doing within the 3-mile limit, without the consent of the Federal Government.

My colleague is suggesting that we are going to have to come, hats in our hands, to deal with what goes on within the 3-mile limit. Believe me, there is a lot more than anadromous species within the 3-mile limit.

Mr. GRAVEL. Nobody is going to have to come hat in hand, because what we are going to do is give the State 3 miles and they can do what they please, and give the Federal Government 197 miles and they can do what they please. That is the point I am making: that is a ridiculous situation to be in, to have two political entities that share power over water when we have fish that intermingle within those political entities. It does not make any sense.

Then when we pass that off as conservation, I do not understand it. I just do not understand.

The Senator brought up the fishtraps. I will give an example. Suppose there is a national movement that says we are going to harvest fish in the most efficient manner possible. We do not care about employment, we do not care about jobs, we do not care what effect they will have. We are talking about the gross national product, and the easiest and fastest ways to harvest fish is with fishtraps. So if we technically had that program in Alaska, outside of 3 miles around Alaska, one could have fishtraps. Inside the 3 miles around Alaska, we would feel differently. So inside the 3-mile limit, we would be against fishtraps, but it would not do us any good because the fish would not come back to within 3 miles, because they would have all been caught in traps.

Mr. STEVENS. What entities would promulgate the regulations within the 197 miles off our State? It would be the North Pacific Fisheries Management Council composed primarily of Alaskans. The Senator keeps talking about the Federal Government. This is a regionalization of the 197-mile fisheries zone.

Mr. GRAVEL. Who would appoint those Alaskans to the council?

Mr. MAGNUSON. The Governor.

Mr. STEVENS. He would select them, and if they were otherwise cleared, the President would submit their names to the Senate for confirmation.

Mr. GRAVEL. Does the Governor recommend or does the Governor appoint? Suppose the President does not like John Jones, whose name has been sent up by the Governor. Can he nominate Bill Brown?

Mr. STEVENS. No.

Mr. GRAVEL. So he has to go back to the Governor?

Mr. STEVENS. Right.

Mr. GRAVEL. So the President cannot appoint anybody, unless he is given the names by the Governor, to this council.

Mr. STEVENS. Right.

Mr. GRAVEL. Suppose the Governor, in the last 4 months of his term submits the names to the President and we get a new government administration. How does the present State government administration reconcile itself, if there is a radical change in policy, to the Federal administration, which has people of prior allegiance?

Mr. STEVENS. I did not know we are taking into account political considerations with regard to the conservation of fish.

Mr. GRAVEL. I think it is recognized, with mature government officials, that occasionally, some appointments are made on the basis of political party affiliation.

Mr. STEVENS. I do not know that that is so. Elmer Rasmuson, who has done such a great job in Alaska on the fisheries commission was suggested by a Democrat, resuggested by a Republican, then again by a Democrat, now again by a Republican. We have not had political considerations affect this type of appointment, and I do not think the fisheries community would stand for it. We are talking about people who will promulgate regulations for a region. Up in Maine, we could have two or three States within the region. If political considerations enter into this process, I think there would be a real revolt. This is not something that is personal. These people are to represent the State and more particularly the fishing interests of the State with regard to conservation principles.

Mr. GRAVEL. Let me state that these people will be representing economic interests. I have found economic interests to be partisan to the degree that there are people served by economic interests. So if we have three people that will make money in this economic area as opposed to that economic area, they are partisan to the areas that they are concerned with.

The Senator might say that it is pretty farfetched that we would see this radical change in policy. Let me state that in Alaska we had overwhelming agreement for a proposal for limited entry. Now, scarcely 3 years later, it is receiving over-

whelming reaction the other way, for change.

When we are dealing with conservation, we are not dealing with a positive science. We are dealing with an applied situation. All I am saying is that the facts have not been altered by the scenarios that we may want to develop with respect to the appointment process.

What the Senator is saying is that up to 3 miles, the State has responsibility for the conservation of fish. Beyond the 3 miles, it is within the Federal domain. Now, that is a conflict that should not have to exist.

If the Senator tells me, well, never mind, we do not have to worry, there is no conflict there if the Governor appoints——

Mr. MAGNUSON. Why should that be a conflict?

Mr. GRAVEL. It is a conflict. It is a conflict of law. A blind man could recognize that.

Mr. MAGNUSON. There is nothing but conflict if we do not do it.

Mr. GRAVEL. There is a State jurisdiction and a Federal jurisdiction. Why not have joint jurisdiction?

Mr. MAGNUSON. Why does the Senator not submit an amendment, then?

Mr. GRAVEL. I will submit an amendment that will give joint jurisdiction from the shoreline out.

Mr. MAGNUSON. Who is going to have it? The State?

Mr. GRAVEL. The State will have the primary responsibility, and will submit a plan to the Federal Government. Would that meet the approval of the chairman?

Mr. STEVENS. It would not meet my approval. I do not want to have to submit something to the Federal Government regarding the 3-mile limit.

Mr. GRAVEL. I am asking the chairman, would he be prepared to accept that approach? I am willing to accept it. We would have uniformity of jurisdiction. I am not splitting hairs on this. I know we can consider a technical amendment. All can see that there is a dichotomous situation right now.

Mr. STEVENS. Who would do it for Maine, New Hampshire, and Rhode Island?

Mr. MAGNUSON. This is not just a bill for Alaska. This is a bill for all the other States.

Mr. GRAVEL. I recognize that. The final authority would be the Secretary, under my proposal. He would be the one that would entertain the plans.

Mr. MAGNUSON. The Senator has it more confused than ever.

Mr. GRAVEL. No, it is very clear. All it states is that if you are a fishery State and want to submit a plan for conservation, go ahead and submit that plan to the Secretary and if he approves it, the plan sticks and then the State implements it.

Obviously, the Secretary is not going to approve a plan for the State of Maine which might be in conflict with the State of New Hampshire. The Secretary would say, "Hey, the State of Maine," and they have the regions set up. They have formed their little region. But Alaska is so big, we do not need a region. We are a region. We have been acting like a region. We have been acting like a region up to the 12 miles where we have legal authority, and I hope we can correct this legislation so we can continue to do it up to 200 miles.

So I ask my colleagues, recognizing that they perceive as well as I do the very dangerous situation that exists in having a dichotomous legal authority, over 3 miles and 197 miles, that we lump those two areas together for the sake of conservation. That is the only thing that makes sense—lump those two things together and, then, accept this amendment that I have sent to the desk. It will be printed and the staffs will have a chance to assess it on the morrow and we can take it up at that time.

Mr. STEVENS. Does my colleague want his amendment to be in title I or title II?

Mr. GRAVEL. I would rather have—my amendment goes to title II. It overlaps into title I.

Mr. STEVENS. This little amendment simply states that whatever happens in title II applies to title I. That is all this says. No one argues with it. It is technical. It provides very simply that title I and title II are consistent with regard to jurisdiction.

If the Senator wants to amend title II, he can offer an amendment. This is a very technical amendment.

Mr. President, I move the adoption of my amendment.

The PRESIDING OFFICER. The question is on agreeing to Mr. STEVENS' amendment.

The amendment, as modified, was agreed to.

Mr. STEVENS. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. MAGNUSON. I move to lay that motion on the table.

The motion was agreed to.

Mr. MAGNUSON. Mr. President, the Senator from Maine (Mr. MUSKIE), has a very abiding interest in this matter, and I would suggest, if it is agreeable with my colleagues, that since he has another engagement we allow him to present his matter at thist ime.

Mr. MUSKIE. I thank my good friend from Washington. I do appreciate this courtesy, and I also express my appreciation to the Senator from Alaska for his courtesy.

Mr. MAGNUSON. Before the Senator speaks, we have all been away for awhile, but the Senator is familiar with the foreign fishing fleet digging up every lobster they can find off the coast of Maine in the last 2 weeks, is he not?

Mr. MUSKIE. I am very familiar with that.

Mr. MAGNUSON. The Senator has been up there.

Mr. MUSKIE. I have been there, and examined that kind of a problem in 40-below-zero weather is especially painful, may I say.

Mr. STEVENS. May I ask, is my colleague on a fishing expedition today? I understand he was going to go on a fishing expedition tonight. [Laughter.]

Mr. MUSKIE. I do my fishing on Wednesday night. I thank my good friend from Alaska.

Mr. President, we began a discussion of this legislation as the pending business before Congress adjourned in the first session, and I thought the issues were pretty well laid out at that time and that it is most appropriate we should take this afternoon to resurface these issues for the purpose of finally resolving this legislation.

As the Senate returns again to consideration of the Magnuson Fisheries Management and Conservation Act, we have before us at long last an opportunity to provide our fishermen the minimum support which a citizen would expect from his Government—the opportunity to pursue his livelihood free from the devastating intrusion of fleets from beyond our shores which he is powerless to challenge except through his elected government.

For years, our fishermen have been asked to wait, to be patient, to allow time for international agreements to stop the plunder of our fisheries resources. The result has been 22 international agreements, none of them enforced or enforceable, and a Law of the Sea Conference which holds little promise of even agreement, let alone implementation in the near future

We now hear new promises from the administration of agreements to limit fishing activities by foreign fleets. But those agreements which have been reached offer no clear hope of reducing foreign fishing to levels which will permit the restoration of fish stocks. The quotas agreed to are higher than the U.S. negotiators were seeking and it is not clear that the ICNAF quotas provide real protection to the most threatened stocks in the ICNAF area.

There is little comfort for New England fishermen in quotas which permit foreign vessels to take "only" 70 percent of the fish within 200 miles of our shore.

It would be extremely optimistic to conclude that under existing agreements fish stocks in the Northwest Atlantic can be returned to the level which will produce the maximum sustainable yield, even assuming that the quotas will be observed. And this is most unlikely unless and until the United States assumes jurisdiction over the resource.

The interest of these foreign fleets in observing quotas is minimal as compared to their interest in exploiting the resource as rapidly and as completely as possible.

Each year the fleet of foreign fishing vessels off our shores increases. The Commerce Committee reported that in June of 1975 a total of 204 foreign fishing vessels were sighted off New England, an increase of 21 vessels over May 1975 and 45 over June 1974. Of the total, 160 vessels were from the Soviet Union. My own conversations with Maine fishermen confirm that the foreign presence is increasing and that their activities are becoming increasingly intense. Maine fishermen continue to report gear and traps destroyed by intruding trawlers without any protective measures being available to the fishermen or, may I say, to their government.

In the face of this growing presence and with news of new shortages in Soviet

grain production, we are asked by the opponents of this legislation to place our faith and trust for the preservation of our fisheries in voluntary compliance by nations whose past behavior, present needs and patterns of investments all indicate that they are bent on continuing to exploit these limited resources.

I do not believe this body will have to deliberate long to determine that such faith would be misplaced.

When we opened debate on this bill before Christmas, I drew my colleagues' attention to an article from the Boothbay Register of December 4, 1975. The simple logic in that article is compelling and irrefutable. To summarize it again, it points out that ICNAF quotas can only be enforced by the home country of a violating vessel. The most flagrant violators of ICNAF are the Polish and the Russians. Both countries require the maximum immediate catch. Both countries are increasing their investment in fishing fleets off our shores. In both countries the fishing vessels are government owned. In neither of those countries is it likely that a captain who violates ICNAF regulations will be punished by the government which employs him.

The final irony in the experience of some New England fishermen is that they must bear the burden of the violations by others as reduced quotas necessitated by foreign activities force curtailment of domestic fishing. Our own fishermen can look neither to government subsidies to help meet the competition nor to a benign enforcer who will look aside if these quotas are violated.

The 200-mile-limit bill would repair that situation by recognizing that the United States has the most direct interest in conserving the fisheries resources off our shores and permits us on that basis to move toward utilization of the species in a manner consistent with the best interest of our fleet and preservation of the resource.

Under this bill we would have the jurisdictional basis now lacking to make clear and timely management decisions about our fish resources. We could gather the appropriate data to make broad, long-term decisions on management problems and, more importantly, we would have the authority to monitor and enforce fishing practices consistent with those decisions.

The opponents of this legislation, Mr. President, argue that unilateral action threatens our progress in international negotiations on fisheries and jeopardizes the entire Law of the Sea Conference, but this view ignores the specific language in the bill which honors existing agreements and calls for further negotiations to achieve consistency with our proposed extended fisheries jurisdiction. That position also assumes—that position of opposition, Mr. President—incorrectly, that U.S. action would produce a reaction from other coastal nations contrary to the manner in which these nations have reacted in the past and inconsistent with their perception of their own best interests as they have stated them at the Law of the Sea Conference. Opponents argue that the same nations which agreed to 200-mile limit provisions in the single negotiating text of the Law of the Sea Conference would, in response to our unilateral assertion of similar jurisdiction, abandon all previously negotiated fisheries treaties, abandon international negotiations, and set off individually to stake disproportionate claims of sovereignty over commercial and military traffic off their shores.

Mr. President, that is ridiculous. There is no reason to expect such a response and there could be no justification for such a response should any nation take that course. S. 961 is unrelated to commercial or military transit and in no way could another coastal nation justify expanded control over such traffic based on our actions in this bill in this area.

In adopting the 200-mile fisheries management zone, Mr. President, we are not claiming a 200-mile territorial limit. There is no international threat of that kind implied by the bill. And we would not exclude other nations from our fish management zone.

But we would require other nations to abide by the rules we set up to protect our fish stocks.

We hear optimistic predictions for the upcoming Law of the Sea Conference from those opponents who argue that we should wait—delay action on this measure until another round has adjourned. I, too, am hopeful, Mr. President, that the international negotiations will succeed and without delay, but I cannot reasonably predict—and neither can those most directly involved with the talks—that we will reach agreement this year.

And while we wait, the situation for our fisheries resources and for our fishermen worsens by the day. It is cruel and and irresponsible for our Government to ask American fishermen to wait any longer. We have agreed to a compromise in the legislation before us which will allow conclusion of the March meeting of the Law of the Sea Conference before the 200-mile limit bill goes into effect.

I take it that means, however long it takes that March meeting to conclude its business. So that there is a real prospect to conclude agreement at the Law of the Sea Conference, whether that takes 5, 10, or 20 weeks. This bill gives them the opportunity to achieve that agreement. But if they do not, then I think we can assume, as we correctly assumed in 1975 and as we correctly assumed in 1974, that agreement is not likely in this calendar year.

If we wait another 3 years on the promise of no more than a year's delay, as we did 2 years ago, then in 1978 we will still be debating this legislation on the floor, waiting for the optimistic prediction about the Law of the Sea Conference to come true.

Mr. President, I have been a delegate to the Law of the Sea Conference—I attended the first in Caracas, Venezuela, in 1974 with my good friend from Alaska (Mr. STEVENS), and we concluded from that exposure to the conference that they would not finish that year, and we were right. We concluded from that exposure to that conference that they would not finish in 1975, and we were right.

I happen to believe that one of the strongest impulses for agreement that we could create is the enactment of this bill which says to the delegates from the Law of the Sea Conference, "As soon as you have reached agreement, the legislation the American Congress has enacted will yield to your agreement."

I think that is the strongest impulse for constructive action that we could conceivably generate.

So Mr. President, we should not delay action on this bill. Passage of the bill would be the best sign we can give the world community that we are serious about protecting a major food source for the world. And if we do not give this sign we must expect failure again at the conference and perhaps the loss of our last opportunity to save many of the species of fish which are now threatened with extinction.

May I add this thought, Mr. President, that if we should fail to take this action we will have given a signal to those foreign fishing fleets which are now exploiting our fishery resources, and who now do so in utter disregard of the rights of our fishermen and the gear which they have placed in our territorial waters, the signal that we do not care to protect through the U.S. Congress. I, for one, will not participate in the giving of any such signal.

Mr. President, it is our responsibility to act on behalf of our citizens to protect this great resource. The foreign nations which fish off our shores have shown no indication that they will assume the responsibility if we do not.

May I add, Mr. President, that they could, knowing of the great concern in the Congress in behalf of our citizens, voluntarily restrict the activities of their fishing fleets in our waters to conform—to conform—to the conservation objectives which we are seeking to establish. They do not. And why not? Because they are going to exploit these resources as long as they can—as long as they can—and if they can persuade us to suspend action until the Law of the Sea Conference finally concludes an agreement on that wide range of issues far beyond the 200-mile limit which stands in the way of agreement, then what they will have done is create a field day for themselves for as many years as it takes to resolve the Law of the Sea Conference into a comprehensive agreement.

Mr. President, S. 961, a bill to create a 200-mile fishery conservation zone off the coasts of the United States, will shortly be before the Senate for a vote.

Support for this legislation continues to grow throughout the Nation. But the bill is urgently needed to turn around the depressed economic situation in many of our coastal communities. This bill will provide a very real opportunity for many of our fishermen to continue their livelihood in these troublesome financial times. Instead of going on unemployment or even welfare, fishermen will be able to continue their livelihood without Federal assistance.

In October of this year, the AFL-CIO Maritime Trades Department adopted a resolution supporting legislation creating a 200-mile fishery conservation zone. It

should be noted that the Senate bill does exclude tuna from its coverage.

I believe the position of labor on S. 961 is of considerable interest to my colleagues. I ask unanimous consent that the letter signed by Mr. O. William Moody of the AFL–CIO and the attached resolution be printed at this point in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

MARITIME TRADES DEPARTMENT,
Washington, D.C., November 19, 1975.

HON. WARREN G. MAGNUSON,
Chairman, Senate Commerce Committee, Russell Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: At its recent convention, the AFL–CIO Maritime Trades Department adopted a resolution on national fisheries policy issues. Included in this resolution was a policy statement by the Maritime Trades Department on the proposed 200-mile fisheries jurisdiction legislation now pending before the Senate, which will affect many members of MTD affiliated unions. I am forwarding a copy of this resolution to you so that you may be aware of the MTD's position.

The MTD's resolution strongly supports the 200-mile limit concept for the United States. However, the MTD is concerned that any such legislation passed by the Senate should exclude U.S. distant waters fishermen who catch highly migratory species off the coasts of other nations. This will enable U.S. distant waters fishermen to continue to operate under the protection of the Fishermen's Protective Act.

Sincerely,

O. WILLIAM MOODY, Jr.

RESOLUTION ADOPTED BY THE AFL–CIO MARITIME TRADES DEPARTMENT AT ITS CONVENTION IN SAN FRANCISCO, CALIF., OCTOBER 1975

RESOLUTION NO. 12—NATIONAL FISHERIES POLICY

The United States fishing industry continues to be plagued by fleets of foreign vessels overfishing American coastal fisheries. Some fish species have been seriously depleted, and American fishermen have suffered heavy losses and the damage of gear due to this growing foreign incursion.

While the United States government controls the fish take of U.S. fishermen, the foreign fleets remain unregulated as to catch, vessels, and gear. Employing larger vessels and massive nets, foreign fishermen have drastically reduced both Atlantic and Pacific Coast stocks.

The subsidized fishing fleets of foreign countries, particularly the Soviet Union, have diminished the best fish from many regions, including the Outer Banks off New England. Off the Pacific Coast, tuna stocks are threatened by foreign fishermen who violate international fish conservation conventions in fishing for already depleted tuna stocks.

Foreign incursions into U.S. coastal waters plus other problems facing the fishing industry have reduced the U.S. catch and increased U.S. dependence upon imported fish. Today, the United States imports more than 60 percent of all its fish, contributing a billion dollar drain to the balance of payments.

The United States, which was once the world's second leading fishing nation, is now sixth, behind Peru, the People's Republic of China, Japan, Norway, and the Soviet Union. The number of American fishing vessels has declined. The remaining fleet is largely obsolete: 60 percent of the vessesl are over 16 years old, and 27 percent are over 26 years old.

Coming at a time when the United States fishing fleet should be growing rapidly, these developments are particularly disconcerting. Inflation and the resulting high cost of food have made fish more attractive than ever as a meat substitute. Last year, fish consumption in the U.S. rose 7.1 percent—faster than in any other country. The market is there, but the U.S. fishing industry has been unable to capitalize upon it.

Lack of United States government support for the U.S. fishing fleet has been one of the primary obstacles to the fishing industry overcoming the excessive foreign competition for U.S. coastal stocks.

Rather than take unilateral action to preserve U.S. fish stocks, the United States has been committed to waiting for the United Nations Law of the Sea Conference to work out a new international fisheries policy. Thus far, there have been no definitive results from that conference due to the overwhelming variety of conflicting national interests and problems.

The United States Department of State refuses to impose sanctions against those nations which harass, fire upon, seize, and fine U.S. tuna vessels fishing in international waters. The State Department ignores foreign violations of international fishing conventions and treaties signed by the U.S. and other nations to conserve tuna.

Considering these multiple problems and the continuing refusal of the federal government to seek any solution, it is imperative that Congress now mandate the new loan and assistance programs and the fishery controls essential to restoring the U.S. fishing fleet to competitive capacity.

It is imperative that the United States act to preserve the U.S. fisheries and the U.S. fishing fleet before both are demolished by foreign fishing fleets.

Therefore, be it

Resolved: That the AFL–CIO Maritime Trades Department urges the prompt passage of H.R. 200, a bill establishing a 200-mile fishing conservation zone around the United States that would protect U.S. coastal fisheries and leave U.S. distant water fishermen free to fish off other nations' coasts for tuna and other migratory species; and be it further

Resolved: By the AFL–CIO Maritime Trades Department that a program should be established to provide assistance to U.S. fishing operators enabling them to modernize and upgrade their fleets and to obtain insurance and other protection on a commercially viable basis.

Mr. MUSKIE. I hope, Mr. President, that my colleagues will join me and my good friend from Washington (Mr. MAGNUSON), whose name is on this bill and who has led the fight for it for so many years, and my good friend from Alaska (Mr. STEVENS), with whom I have been happy to be associated in fighting this battle in supporting this legislation, in moving it quickly through the final stages of the legislative process.

May I express my appreciation to my good friends for yielding to me at this time.

Mr. STEVENS. Will the Senator yield?

Mr. MUSKIE. Yes.

Mr. STEVENS. Mr. President, I thank the Senator for his continued assistance in this matter. I enjoyed very much being able to accompany him to the Caracas meeting, and to the meetings that we had with the ambassadors from Russia, from Japan, and the others who were involved.

The staff has just called my attention to an article from the Journal of Commerce for Tuesday, January 6, entitled "U.S. Mackerel Stocks Seen Lower This Year." It quotes Charles Philbrook, the enforcement officer of the National Marine Service's Northeast Fisheries Center in Massachusetts.

I did not have any prior knowledge of this, but I just wanted to show how correct the Senator is in his assessment of these foreign fishing operations and what they are doing.

This report indicates one of the major reasons that mackerel stocks are down compared to prior years. But the interesting thing is Mr. Philbrook "estimated the Soviet fleet had overfished its 1975 mackerel quota by about 70,000 metric tons, based on reports from fishery service observers posted on U.S. Coast Guard vessels and on aircraft."

The fishery service has no enforcement powers over foreign vessels fishing beyond the U.S. 12-mile fishing limit, so it must report quota violations to the State Department and to ICNAF. "We took documentation of the Soviet quota violations before the ICNAF meeting in Scotland last winter," said Mr. Philbrook. "The Russians were embarrassed and said their overfishing was due to a computer error. They admitted they may have overcaught their mackerel by as much as 100,000 tons."

We had documentation that they overfished 70,000 and they admitted 100,000.

The Soviet quota for mackerel in 1975 was 101,000 metric tons.

In other words, they have admitted 100 percent overfishing in 1 year alone. One or 2 more years like that, and if those Soviet computers get screwed up again, we will really be in trouble.

That is why I say to my friend from Maine I think he has made a very good point. I do not know of anyone who has been more stalwart in his support for our objectives of fisheries conservation in the meetings that we have attended on the international scene. On behalf of all of our fishermen from Alaska I thank the Senator for his support of this bill and for his call for its quick passage. Because of things like that, 1 or 2 more years like that and the mackerel off the eastern coast will go the way of the herring off the State of California. I am sure my friend knows that story well. It was overfishing and lack of good management concepts that destroyed that fishing area. I would hate to see the other fisheries of the country go in the same direction. I am sure my colleague from Washington joins me in thanking the Senator for his support.

Mr. MUSKIE. I thank the Senator.

I remind the Senator of a conversation we had with one of the Russian delegates at the conference in Caracas. He had taken vigorous exception to our support of this 200-mile legislation. I suggested to him, "You can take the step to avoid our taking unilateral action of this kind by simply voluntarily restricting your activities in our waters."

His answer to that was a very strong negative. He said, "We have ICNAF. That is policing the thing."

He, of course, understood, as we do now, according to the figures the Senator has just given, that ICNAF is not

being effectively enforced. So, of course, he is happy to lean on ICNAF as an excuse to do what they wanted to do and they have done exactly what they wanted to do all this time.

One thing that is particularly offensive is that these fleets come over to our shores and their draggers get right down to rock bottom. Then they go full speed ahead, whatever speed they need, and they just rip the bottom apart, fishing gear, lobster traps, whatever.

Sure, we have some legislation which says the U.S. Government will help the fishermen prosecute a claim. How in Heaven's name is a fisherman going to make a claim when these fleets come and operate in the dead of night? They have come and gone before anybody knows the damage which has been done. The fisherman arrives out there to tend his gear or his traps and they are gone. How will he identify the offender to place a claim?

Then he comes down here to talk to the Government agents about recovering in some way: "We are helpless. Give us the facts."

"I have no facts."

Last year the Senator will remember that Congress enacted legislation requiring the government to reimburse the fisherman until the Government, which is in a better position to prosecute a claim, does so and recovers. If the Government is unsuccessful, the fisherman still gets his money. The President of the United States vetoed that. He said the U.S. Government has no basis to prosecute such a claim.

If the great U.S. Government does not have a basis for prosecuting the claim to a successful conclusion, how do these little fishermen, who have to mortgage everything in the world they own in order to buy their boat and net, prosecute a claim of this kind?

Then they ask us to establish the 200-mile limit to give that kind of protection and the President of the United States says to them, "Wait until we conclude an international agreement."

I cannot blame them when they get the idea, the sneaking suspicion, that their Government does not really care about what happens.

So, Mr. President, I say to my good friends we are going to pass this 200-mile-limit legislation. I believe that is the best signal we can give to the world that although we are interested in their welfare, we are also interested in the welfare of our people; that we intend to exercise the authority and the responsibility of our Government to do so until they will join us in an effective, enforceable way to protect these stocks, to protect our fishermen, as well as to advance the cause of international law and order.

I do not think pursuing the latter objective means that we just sit on our hand and ignore the injury which is being done to American citizens while their Government stands helplessly by. I thank my good friend for yielding.

Mr. STEVENS. Mr. President, I ask unanimous consent that the article from which I quoted be printed in the RECORD at this point.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Journal of Commerce, Jan. 6, 1976]

SOVIET TRAWLERS MONITORED—U.S. MACKEREL STOCKS SEEN LOWER THIS YEAR

(By Peter T. Leach)

The Soviet fishing fleet is gathering off Montauk Point, in the mackerel fishery southwest of Nantucket Island, the National Marine Fisheries Service said Monday.

About 30 to 40 large stern-trawlers have arrived in the area in the last few days and more are coming every day, said Charles Philbrook, an enforcement officer at the National Marine Fisheries Service's Northeast Fisheries Center in Gloucester, Mass.

In addition, there are about 25 Polish trawlers, 20 from East Germany and 10 from Bulgaria, bringing to 100 to 125 the number of East European trawlers fishing in a zone from 15 to 40 miles off the United States East Coast from Nantucket to Northern New Jersey, Mr. Philbrook said.

In the three winter months from January through March, when the U.S. coastal mackerel fishery is at its teeming peak, there may be as many as 300 foreign vessels fishing off the East Coast, but the catch may be down this year because of overfishing last year, which appears to have sharply reduced the mackerel stocks.

A 20 PERCENT REDUCTION

"Some of the vessels we have already boarded say the mackerel fishing is down this year," Mr. Philbrook said, adding, "we are going to have to monitor the Soviets even more closely this year, since they agreed to a 20 per cent reduction in their 1976 mackerel quota."

The catch quotas on individual species of fish in the rich North Atlantic fisheries are set each year by the nations of the International Conference on North Atlantic Fisheries, which is universally known as ICNAF.

The National Marine Fisheries Service is responsible for monitoring the fishing fleets in U.S. coastal waters to make sure the ICNAF nations are abiding by the catch quotas.

Mr. Philbrook estimated that the Soviet fleet had overfished its 1975 mackerel quota by about 70,000 metric tons, based on reports from Fisheries Service observers posted on U.S. Coast Guard vessels and aircraft.

The Fisheries Service has no enforcement powers over foreign vessels fishing beyond the U.S. 12-mile fishing limit, so it must report quota violations to the State Department and to ICNAF.

"We took documentation of Soviet quota violations before the ICNAF meeting in Scotland last year," said Mr. Philbrook.

"The Russians were embarrassed and said their overfishing was due to a computer error. They admitted that they may have overcaught their mackerel quota by as much as 100,000 tons," he said.

The Soviet quota on mackerel for 1975 was 101,000 metric tons. Partly because they were caught with evidence of their own violations, the Soviets agreed to a mackerel quota of 80,000 tons for 1976.

PRESSURE FOR EXTENSION

The difficulty of enforcing catch quotas in the North Atlantic fisheries is one of the reasons that pressures is building within the U.S. to extend the fisheries limit to 200 miles.

The House of Representatives has already passed a bill extending the fishing limit from 12 to 200 miles, and the Senate will begin deliberations on its version of the bill when it reconvenes following the Christmas recess.

The National Marine Fisheries Service, which already has enforcement officers aboard some 80 per cent of the U.S. Coast Guard vessels and aircraft, would be responsible for enforcing the 200-mile fishing zone.

Although the 200-mile zone sounds huge and impossible to police, the best fishing grounds are within certain well-defined areas and the Fisheries Service is familiar with the patterns followed by foreign trawlers in these areas.

Because over-fishing by the highly mechanized fleets of foreign trawlers has reduced the stocks of many species of fish in the North Atlantic fisheries, ICNAF has been reducing the fishing quotas from year to year and has closed some areas altogether to fishing at certain seasons.

The last meeting of ICNAF in Montreal in September decided to reduce the total quotas on all species of fish to be caught in 1976 by 34 per cent.

Despite the ICNAF quotas, the total number of fish of all species in the North Atlantic fisheries has declined sharply in recent years, and some species have fallen below what is called the maximum sustainable yield, i.e. the level at which they can replenish their numbers through reproduction at the end of each year's fishing catch.

"It's not a matter of biological extinction, but of economic survival," said William Gordon, the regional director of the Northeast Fisheries Center of the National Marine Fisheries Service.

"My own feeling is that the sooner it (the 200-mile limit) is administered, the better," Mr. Gordon said.

The intensification of foreign fishing within the U.S. 200-mile coastal zone has occurred since 1961, when the Soviet Union's fleet of mechanized trawlers and refrigeration ships first appears off the East Coast.

Before 1961, the only people fishing the North American coastal waters were fishermen from the U.S. and Canada. In subsequent years, the Russian ships were joined by trawler fleets from other East European countries, from Western Europe and from Japan.

DECLINE IN BIOMASS

Until 1968 there appeared to be little change in the overall size of the fish stocks, but since then, the decline in the total biomass, or weight, of all fish and of individual species has been obvious.

Stocks of yellowtail flounder, haddock, herring and of the category known as other flounders have all declined below maximum sustainable yield.

In the fisheries from George's Bank, off Cape Cod, to Cape Hatteras the total biomass of the 10 most frequently netted species of fish was estimated at 14.2 billion pounds in the 1963–1965 period, according to Mr. Gordon of the Fisheries Service.

By the 1972–1974 period, the total biomass of these 10 species had declined to an estimated 8.8 billion pounds, a drop of some 38 per cent.

In 1966, the total landings of all species of fish by all nations in the George's Bank to Cape Hateras fisheries was about one million metric tons, which was three times the average annual U.S. catch in the 1950s.

Between 1966 and 1974, the total landings of all species averaged about one million metric tons a year, while the U.S. share of the total catch declined to 20 per cent.

The decline in the total stocks of all fish was so marked by 1973 that the nations of ICNAF held a special meeting in October of that year to establish catch quotas, which were set at a total of 924,000 metric tons by all nations during 1974.

Subsequent meetings of ICNAF set an annual quota for all nations of 850,000 tons for 1975. For 1976, the total quota has been reduced 34 per cent to 650,000 metric tons.

Mr. Gordon expressed his hope that the latest catch quotas will result in a revival of the stocks of the most depleted species.

If the current catch quotas are observed, he said, it will take five years for the total biomass of all species to build up again and it will take seven years for the stocks of the most badly depleted species to revive.

Mr. GRAVEL. I would like to speak to some of the points of my distinguished colleague from Maine, for whom I have great affection and respect, as everybody knows.

In this particular area I believe we have a slight disagreement. I think the disagreement hinges not so much on the deep emotional commitment he has to solve the problem or his understanding of the problem. I believe we all recognize that great harm has been done to our fisheries in the past.

I think where we differ is how to try to solve the problem for the future. If my colleague believes that passing this bill will be a prod to the international conference, all I can say is I disagree radically and so do most of the leaders of the delegations at the conference itself.

Mr. MUSKIE. Will the Senator yield?

Mr. GRAVEL. Yes.

Mr. MUSKIE. Mr. President, I ask unanimous consent that Jim Case, of my staff, be granted the privilege of the floor during the consideration of the pending legislation.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MUSKIE. I understand the position of the Senator. I must say that over the years of my public life I have been in the forefront of those who have tried to press for international agreements to establish an international regime of law, not only with respect to the oceans but with respect to other matters that set nations against nations. I have been to the SALT talks. I have been to just about every international conference that had any chance of resolving points of friction between nations in the context of the international regime of law and order.

But here we have a unique problem which we find stalemated all these years. I have heard these arguments year after year. I would not have passed the judgment I have passed and described here in the Chamber had I not been to the conference. But I have received the flavor of it. There are a lot of things that stand between the conference and the agreement on the 200-mile limit. The 200-mile limit is not one of them. As I understand, there is strong support on the 200-mile limit, but it may be blocked from final international agreement because there are other problems that look pretty intractable in many ways. I just do not see why the 200-mile limit should be held hostage to these other more intractable problems, which could hold up the Law of the Sea Conference for some time.

Frankly, there was one other impression I had of the conference which I thought was very reassuring. I thought for the most part there was a very positive attitude on the part of all 149 nations toward the importance of writing a new law of the seas. They were involved in a learning process at that time, but they were not reluctant in any way to assert their national interest.

A lot of them there at that conference had already established a 200-mile limit, not just as a coastal fisheries zone but a territorial limit of 200 miles. But they did not find that fact to inhibit their participation in a conference that could establish a different set of rules, nor did I find other nations inhibited in talking to the nations that had already acted because they had already acted. Every nation pursues its self-interest as best it can.

For some reason we in the United States seem to feel we are the only Nation that can never unilaterally pursue its own interest, but that we can only do so in the context of achieving agreement with all other nations. The frustration I experienced with this problem finally persuaded me to move in the other direction, but I understand the rationale. We just reach a different conclusion.

Mr. GRAVEL. I think our conclusions are the same, but our methods to get to the conclusion are different. The method I would employ would be to put more pressure on the international body. I do not think this legislation would act as a pressuring device.

Mr. MUSKIE. Let me tell the Senator one reason why I think it acts as a pressuring device. The Third World countries of the conference, especially those that are land-locked, are particularly interested in the minerals of the deep sea. They think they have a right to share them. They view that as—what is it they call it? Not the global heritage——

Mr. GRAVEL. The heritage of mankind.

Mr. MUSKIE. The heritage of mankind. They are much more interested in that than in this problem. But if they see the United States moving unilaterally out of frustration to deal with this problem, they might well feel we would move unilaterally in that area also. They understand that the problem cannot be resolved without our participation, and they also understand that we have the technology and the capital to move unilaterally to exploit the mineral resources of the deep sea. So if they see us moving unilaterally with respect to this problem, they could well conclude that "the United States might move unilaterally in order to deal with that other issue in which we are interested, and we had better move rapidly to conclude this Law of the Sea Conference."

Everyone pursues whatever motivation seems to have the highest priority with him. But I cannot see enacting this legislation unilaterally as persuading those nations to abandon the only chance they have to get a share of the heritage of mankind.

Mr. GRAVEL. Let me just say that if it is OK for the fishermen to take 200 miles, what is wrong with giving it to the third world? If we can do it unilaterally, why should not the mining interests move unilaterally to begin mining the deep sea?

Mr. MUSKIE. For very real reasons.

Mr. GRAVEL. Why?

Mr. MUSKIE. Those are not being exploited and devoured and disappearing, and the fisheries are being exploited and devoured and disappearing, and being subjected to growing assault from other countries.

Right now, there is a moratorium, worldwide, on the minerals of the deep sea. There is none here. If the Senator can get us a similar moratorium with respect to the fisheries off our coasts, I will join him.

Mr. GRAVEL. There is no moratorium on deep sea mining.

Mr. MUSKIE. There is a tacit moratorium.

Mr. GRAVEL. They are only withholding moving in because of the actions of our executive with respect to certain pressuring moves. There is also pressure in this body to get legislation to move. So I make my one small point in respect to the Senator's argument: If it is good for fisheries, why is it not good for mining? If it is good for fisheries, why not do it for mining?

Mr. MUSKIE. Because the Senator mixes up the motivation. If that is an example of the strength the Senator is arguing, he knows I am not persuaded at all. I am persuaded even more that we are not.

Mr. GRAVEL. I was merely trying to address myself to one of the minor points the Senator raised.

Another point I would like to make is in regard to the charge the Senator makes that our fisheries are being decimated right now. That is not the case.

Mr. MUSKIE. If the Senator would come to Maine and persuade my fishermen that that is not the case, then it would be much easier for me to join with the Senator in his position.

Mr. GRAVEL. I have talked with some of the New England fishermen.

Mr. MUSKIE. Mine? Would the Senator identify them?

Mr. GRAVEL. I would be happy to go to Maine, as the Senator from Maine knows, and state my position on fisheries, and let him attack me, and I hope that would help him.

Mr. MUSKIE. I would rather attack the problem.

Mr. GRAVEL. Right; that is what I would like to attack also: The problem right here and now as to what its impact would be on the international community.

I wish someone in the media would interview the various heads of delegations and report back to the American people as to what they think about it—not what you or I think or the Senator from Washington thinks would be the impact of the conference, but what the people at the conference think would be the result of the conference.

Mr. MUSKIE. I can tell you what they will find out.

Mr. GRAVEL. I wish the Senator would accord me the same courtesy I have accorded. If we act unilaterally in this matter, what is to stop any nation from acting unilaterally in a matter it perceives in its interest?

Mr. MUSKIE. Is the Senator asking me the question?

Mr. GRAVEL. Let me finish. Be it in the area of fisheries, passage, mining.

transportation, pollution, or what have you. If we determine this to be in our interest and move unilaterally, what is to stop any other nation from doing the same, and if that happens, as every other nation moves unilaterally, what is the point of having an international conference to move in a concerted fashion?

Mr. MUSKIE. Let me answer the first question first. If they ask that question of those delegates, they will get a 100 percent uniform answer.

Mr. GRAVEL. They will not get a 100 percent answer.

Mr. MUSKIE. I am willing to conclude that they will. You talk with the delegates, and their posture is that, of course, they are going to. But when you talk to some of them privately, off the record, I think you will get a more valid assessment.

The Senator asks me what is to stop any nation from acting unilaterally. Absolutely nothing, whether or not this legislation is enacted; and some of them have acted unilaterally, without this legislation having been enacted.

We are involved in the SALT conference. Has that suspended any activity on our part in establishing our defense posture, building up our armed forces, continuing with the development of nuclear weapons? We went ahead with the ABM treaty even while the SALT negotiations were going on, and they ultimately resulted in outlawing the ABM. But we proceeded. I mean the fact that a conference is called and is being held does not suspend the action of nations acting in their own behalf. Nations are going to be motivated in their reaction to what we do here, not by any sense of outlawry by which we effect it, but by their perceived self-interest.

What I said in my prepared speech is that I do not believe that the perception of their self-interest which led 149 nations to go to the Law of the Sea Conference with respect to this issue, notwithstanding the fact that several other countries had already acted unilaterally to establish 200-mile territorial limits, indicates they all understand, while nations are now acting unilaterally and may continue to act unilaterally until the agreement to the new law of the seas is established, it still makes sense to write a new law of the seas.

We cannot expect people to suspend all their activities or nations to suspend all their activities on the basis of a hope that something in the nature of some form of specific agreement will ultimately make a unilateral action void, without meaning, and ineffective.

We continue to do business as our national interest requires until there is an international agreement which establishes a new set of rules. I think those delegates at the Law of the Seas Conference are sophisticated enough politicians to understand that.

I have talked to a lot of them about their internal politics. They understand that until one reaches agreement one does not give away anything.

We have not had an agreement yet. I am saying we are not going to give away anything that we do not have to give away.

With respect to the deep sea minerals, of course, there is not an agreement on a moratorium, but everyone has held back because they know they can. Those minerals are not going to disappear while the conference goes on. But I say to the Senator that our fisheries can. It is that prospect that motivates us to move. If we can declare a moratorium, as I suggested to the Russian delegates at Caracas, as suggested to the Japanese delegates, and as I suggested to others, and if we could voluntarily create a moratorium at some level so that we can suspend the threat of exploitation and decimation of our resources, I would be happy to join in such a moratorium and vote to suspend action on 200-mile-limit litigation until we get an international agreement, but I am not going to assume that there is going to be an international 200-mile limit at the end of this calendar year. I think that is a very unrealistic assumption.

The Senator cannot promise me that there will be an agreement at the end of this calendar year. The State Department cannot. The President cannot. The record is that there probably will not. So that means still another year because, once we enter a calendar year with such negotiations, the tendency is to use it all. So I am just not content to wait, and I do not think we are going to jeopardize the Law of the Sea Conference. I am not going to be able to convince the Senator from Alaska on that point.

I regret to say I shall have to leave the Chamber for reasons the Senator understands.

But before I do it, even though I disagree with him so strongly, I compliment him on the vigor and thoroughness with which he has pursued his point of view. It has been an example of the way a Senator ought to approach an issue when he thinks deeply about it. So in my disagreements with the Senator I do not in any way challenge the ability with which he is pursuing his case.

Mr. GRAVEL. I thank our colleague for that, and I do understand the reasons for his absence. I regret that this whole country is going to be denied his wisdom as we pursue it. But we understand his duty and I think the Nation shall perceive it this evening.

Mr. MAGNUSON addressed the Chair.

Mr. President, do I still have the floor?

Mr. MAGNUSON. I wish the Senator from Maine would wait for only a half minute.

I listened to his able presentation, and I have listened to the Senator from Alaska I do not know how long, but a long time. But if I can have the attention of the Senator from Alaska—those are a lot of papers he has there—the argument that was made that the Senator from Maine so adequately answered takes me back a long time. It takes me back 11 years ago in Geneva. I was there 11 years ago. Exactly the same argument was made against the 12- and 9-mile limit that he is making. That was 11 years ago. Now that is waiting a long time. The military was there arguing against a 12-mile limit. Oh, everything was going to happen, everyone in the world was going to have a navigation revolution. We do not have that.

The Senator knows these nations are going to make their agreements according to their own interests. We are not fishing off everyone else's shores.

I wish to say again, that which I have said before. Here, for example, is a half page ad from the Japanese Government which is intimating their views. I shall say to the Senator from Alaska that they will never sign a law of the sea agreement that will restrict them in any way. This was an ad by the Japanese Fisheries Association printed in American papers all over the country during the recess.

They do not practice conservation. Fifty or 60 years ago, the greatest fishing grounds in the world were off the islands of Japan and because they did not do what we are trying to do, they have to go someplace else. This is the real problem.

If we went fishing off the coast of Japan today, if we went fishing off their coasts, I am sure the Senator from Alaska will agree with me—if he will listen a minute—if we went fishing off the Japanese coast, if we started early enough in the morning, the Japanese Diet would meet in the afternoon and throw us out. That is also true with all the countries that are fishing off our coast. We do not fish off everyone's coast. But we are only saying we are protecting our own pasture. That is all.

This was the same argument—and it is like a broken record—that I listened to 11 long years ago. Everyone is going to do something and act unwisely.

As the Senator from Maine says, that is ridiculous.

Mr. MUSKIE. I thank the Senator from Washington.

Mr. GRAVEL. I thank our colleague.

I only wish to correct the record on several points, and I know our colleague from Maine will have occasion to review the record. If he wishes to challenge it, he can do it either in written statement or back here in the Chamber at a later time.

First off, when we talk about the moratorium with respect to deep sea mining, it is not hard to have a moratorium. We are the only nation that can mine in the deep sea. The Japanese are close to doing it, and there is talk that maybe the West Germans can do it. So when we talk about the whole world holding back from mining the deep sea, the whole world does not have the ability to mine the deep sea. There is only one country that does, and that is this country.

I say if we can act unilaterally to increase our fisheries we can act unilaterally in other economic areas. I might add that when I see this chart here I am persuaded to question whether or not this is a conservation act or whether it is an act to increase the American catch. If that is the case, then it is not a conservation act. It is an act to only have more fish caught by Americans. That is a good goal, but——

Mr. MAGNUSON. We are not increasing the Americans' catch necessarily. It is only to keep what fish we have there.

Mr. GRAVEL. I wish to make it clear.

Mr. MAGNUSON. Mr. President, will the Senator yield?

Mr. GRAVEL. If we can do this I will be happy to yield in one moment. Let me make a point.

Mr. MAGNUSON. Will the Senator yield a half minute?

Mr. GRAVEL. I am happy to yield a half minute.

Mr. MAGNUSON. There is no amendment pending and the pending business is the bill, is that right?

Mr. GRAVEL. Yes.

Mr. MAGNUSON. I ask the Senator, is he speaking on the bill or can we proceed with these amendments?

Mr. GRAVEL. I am speaking on the bill as Senator MUSKIE spoke on the bill.

Mr. MAGNUSON. All right. He has plenty of time. I wish to point out——

Mr. GRAVEL. I wish to finish. The point was made by me that if we act unilaterally in one economic area, such as fisheries, why can we not act unilaterally in another economic area, such as mining? Of course, we can. If we can act to improve the economic interests of our fisheries community, which I would like to do, since my State would be the major beneficiary of that, then what is to stop a group from coming into the Senate—and legislation has already been introduced which is already before the committee—to say, "Well, if this is good for the fisherman, why can we not do the same thing for the mining community?" Of course, there is no argument one can make against it—not at all, because if we did it for the fishing interests we should be able to do it for the mining interests.

It is mistaken to use the argument that the Third World countries will absolutely take a position of abeyance or doing nothing, or this will be pressure on the international conference because they desire the rights from deep sea mining. I might suggest that the Third World is more interested in the 200 miles than is the industrialized world.

In fact, the 200-mile concept came from the Third World, and the United States of America had to be dragged, kicking and screaming, to the conference table to agree to the 200 miles. Many of us from fishery States advocated 200 miles long ago, but the Federal Government of the United States of America opposed this.

So now if we turn around and act unilaterally and give the ability to the Third World nations to act with legitimacy and unilaterally, what motivation is there for them to come to the bargaining table, to the international conference, with any degree of sincerity? Obviously, none at all. That, of course, would destroy the conference; because when we move unilaterally, we set in motion the legality of any nation in the world moving similarly unilaterally on its economic interests as it perceives them.

From that point forward, it is "Katy, bar the door" to the 200-mile international conference; everybody is doing his own number, and you have anarchy on the seas. The only way you can protect the fisheries is not through a system of law, not a bilateral treaty, and not even through a system of sending out destroyers side by side with every vessel, because the American public will not pay the tab for doing that. That is essentially what takes place in this measure.

We are told that we are taking 200 miles. Every fisherman in this country knows that this kind of legalism, without the backup of the money to police it, is not worth the powder to blow it. It is just a political stroke job on the fishing industry. They will buy it for a year, but, believe me, they will not buy it for much longer than that; because they will recognize that their 200 miles is nothing but a paper 200 miles. The only way you can have a real 200 miles is through enforcement, and the cost of enforcement probably costs more than the economic value of the fisheries in question. That is the tragedy of it. So there is only one way really to solve the problem, and that is with agreement.

My colleague says that the fisheries of the Northeast coast, the Atlantic coast, are depleted. Some are depleted. Some have received very short shrift and very poor conservation practices at the hands of foreigners. But to hold that position today, one has to be totally oblivious to the accomplishments of the agreement of last fall, in which the catch was negotiated down to 650,000 tons. The American portion of that was negotiated up from 17 percent to 35 percent and the foreign catch down to 65 percent.

The Department of Commerce, through the Marine Science Bureau, tells us that the fish on the east coast, on a biomass basis, can be renewed under the present agreement in 5 to 8 years. If these technocrats are correct—and these are the same people who speak to the Senator from Maine and the Senator from Washington, as they speak to me—and if we take their information and data at face value, the political statement made in this body that the fish stocks are being raped today is not true. It just is not true. It may have been true 3 years ago, but we are not arguing this issue as of 3 years ago. We are arguing it as of today. The situation today is that these stocks, under existing negotiations, can be renewed on a 5- to 8-year basis, regardless of this legislation or regardless of the Law of the Sea. That is the situation today. It certainly is not a situation that cries out for panic action.

With respect to policing, it should be understood that our negotiators are in Rome now, negotiating at an international meeting, to be able to have observers on all the vessels within the ICNAF region, so that we will not be able to have mistakes, intentional or unintentional, that we will not be party to them, because we will have an observer within ICNAF regions on every vessel.

The cost of putting on these observers, the cost of enforcing the law and the treaty, at this time, is infinitesimal compared to the potential cost of having to arm our warships and sending them out to sea to protect our fishermen. I think that is when the fishermen will recognize that the secret to success in the 200 miles is not in unilateral action but is in collective world action, on a bilateral, multilateral world treaty basis, backed up with proper tools to monitor it, proper tools to enforce it. The tool to enforce it in this case would be observers on each vessel, whether it is a bilateral agreement, a multilateral agreement in ICNAF, or the law of the sea.

When we move unilaterally to a 200-mile basis, we set in motion acrimony and the inability to secure the proper type of protection and the proper type of monitoring of foreign activities. They will fish our stocks anyway, unless we do it in a proper way.

Another statement was made by the Senator from Maine to the effect that if we took a survey at the U.N. presently, all the nations would say that the conference would fail if we were to pass this measure. That is not the case at all. Quite a number of nations at the U.N. would like to see us move unilaterally.

An individual from Iceland came up to me and asked very anxiously when this measure would pass. The people in Iceland cannot wait for this measure to pass, so that they can ask us for military aid to protect Iceland from the British. If they do not get the military aid from us——

Mr. STEVENS. Mr. President, will the Senator yield?

Mr. GRAVEL. I should like to finish. I have been very accommodating to my senior colleague, but I should like to finish this point

What will happen is that we will have moved unilaterally, and the actions of Iceland, which were lost in the international court, which were declared illegal in the international court, would now be made legal, at least as they perceive it, by our actions. They would ask us for military aid to protect them from the British. That is an interesting consideration, because we consider the British our good friends, and we would not be prone to give Iceland military aid. That would mean that Iceland would have to get aid from another major military power. Who would that be? Obviously, Iceland, which is one of the bulwarks of our defense system, would have to appeal to the Soviet Union. This is a situation tailor-made to do what is being done in the Middle East; and it will move into the whole ocean area. So we perhaps would have a situation in which we would see Russian military vessels moving into Iceland to act as a barrier against British military action, trying to protect the economic interests as they see them. That is just one of the potential scenarios that can be developed.

Let me again correct the Senator from Maine, who stated that many, many countries have gone to 200 miles. That is not so. Only about 10 percent of the world's nations have gone to the 200 miles unilaterally. That is not recognized at all by the major powers of the world.

It certainly makes a difference when Brazil or Bangladesh goes 200 miles and when the United States, the most powerful nation on earth, goes 200 miles. It makes a big difference, because Brazil and Bangladesh cannot enforce what they have done and we can. So as soon as we set that in motion, Canada will have to go 200 miles, as will Britain, the Soviet Union, and Japan. Everybody will go 200 miles, and everybody will go 200 miles for interests as they see them.

It is similar to what was done by the Mexicans. Six days after the bill passed the House of Representatives, the Mexican Government, the executive of the Mexican Government, declared a 200-mile zone. To the uninitiated, this may sound just like what the House did. There is a big difference, because all the House did was to pass a 200-mile fisheries conservation zone. What Mexico did, and requested its Parliament to put in motion—and is now being ratified by all the equivalent states in Mexico—is a constitutional amendment that gives them patrimonial seas. That means that they not only take control of conservation for fisheries; they take control of all maritime activity above the water, in the water column, and below the water. That is considerably different from what we have done.

But you say, how can they do that? How can they not do that? If we legally can take 200 miles for the economic interests of our fisheries, what stops them from taking the 200 miles as they perceive their interests?

The patrimonial sea is nothing new for them. This is something that has many, many decades of legitimacy in their thought, as they perceive their interests with respect to the seas.

Let me underscore the point that I made earlier in disagreement with my respected colleague from the State of Maine. That is his view that this will help the international conference. In my view, this will actually thwart the international conference. I rest my case on the very simple, logical fact that if we can do something, so can any other country in the world. So when we legalize this action of taking, then any other country can similarly go take something that they view as in their interest.

When they do this, there is no reason to sit down and negotiate, because we *have taken it, they have taken it. The* impetus behind the conference evaporates; so we would see the conference peter to an end.

We will compound this great tragedy because, when we are done dealing with the fisheries, the mining interests will come to this Congress and say, "Gentlemen, you have satisfied the economic interests of the fisheries; now we want you to pass legislation satisfying our economic interest." I do not know of anybody who can stand up here with a straight face and say, "No, we cannot do it for you because you are different, but we can do it for the fishing community."

Let me make abundantly clear, so that there is no confusion, my view is that this legislation will hurt the fishing community, not help. There is only one way that we can acquire a 200-mile agreement that will be meaningful to the fishermen of my State and of the Nation. That is to have 200 miles which is enforceable—enforceable not by a Congress that will not appropriate the money to enforce, which is evident in this legislation, but enforceable because the mechanisms available will be so simple and so abundant. I am talking in this regard about what I spoke of earlier. That is to have observers.

Under the Law of the Sea, it would be as easy as pie to have observers on every single vessel that comes within our jurisdiction, because that would be the general intent of the Law of the Sea. But when we move unilaterally, there is no way to get that kind of agreement and, therefore, that kind of policing, and therefore, that kind of 200-mile agreement. The 200 miles we get under this legislation is a specious, cosmetic piece of legislation that will lead us to economic disaster in our fisheries. It is just that simple.

I address myself to one minor point, a minor point which I hope the Members of the body will come to realize is a major point. That is that my colleague from Maine said we could pass this legislation and this would act as pressure and, when the law of the sea comes into being, we can correct it. Or that this legislation would not take effect until the Law of the Sea Conference has a chance to act in the spring of this year. If that is the case, if the effective date of this legislation is placed forward to next year, why is it that we have to pass this legislation now? Why is it that we cannot wait? It is now the 19th of January. Why is it that we cannot wait until the 7th of May to measure the progress of this international conference? This legislation is going to have an effective date a year hence and we cannot wait what?—2½ or 4 months?—to find out if this international agreement will come into being when so much is at stake. I do not understand the need for panic, which is the position that is being taken by the committee in this regard. I think it is most significant that the International Conference on the Law of the Sea has been meeting through unofficial bodies, whether the Evanson group or bilateral meetings as people from our State Department travel the world, trying to *secure agreement. We have made* progress, significant progress, in certain areas, and there is no reason to expect that we cannot make progress in the one area that is in contention. That is in the deep-sea mining area. The rest of the conference is in general agreement. Why we cannot expect that that kind of progress could be made this year is beyond me.

I think I have responded to the best of my ability to the general points made by the Senator from Maine, and I yield the floor at this time.

Mr. STEVENS. Mr. President, I wonder if it would be possible to secure agreement on these other technical amendments with regard to some time so we can complete what our understanding is with the leadership about today. We have agreed to take just the technical amendments today, going to the committee amendments and the other nontechnical amendments tomorrow.

Would my colleague have any objection to that procedure?

Mr. GRAVEL. Well, no, on the face of it, but in reality, I have not found the leadership terribly accommodating to my position. If they are truly technical amendments, I would have no objection to them. But if the Senator's interpretation, which I now suspect——

Mr. STEVENS. Do not suspect my interpretation.

Mr. GRAVEL. From our colloquy, if the Senator's interpretation of what is technical is what I have already seen demonstrated, I might not have the same interpretation as to "technical". I do not want to prejudice my position, saying I do not think that is technical. If the Senator's amendment is technical, let us have that test.

Mr. STEVENS. Let me test it, then, Mr. President, if I may, and send to the desk a substitute for my amendment 1159.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk proceeded to read the amendment.

Mr. STEVENS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Page 57, after line 14, insert the following new paragraph:

"(2) The Secretary shall have no authority to promulgate management regulations establishing a limited access system under subsection (b) (1) of this section unless such regulations have been approved by a majority of the membership of the Council involved."

Page 57, line 15, strike "(2)" and insert "(3)".

Page 57, line 19, strike "(3)" and insert "(4)".

Mr. STEVENS. Mr. President, this amendment was much sought after by Alaska fishermen. It has been discussed with members of our committee from other States. I originally had put in an amendment which would remove from the Secretary the authority to promulgate regulations establishing a Federal limited entry program. It was pointed out to me that some management councils in some areas of the country do, in fact, want a limited entry concept and that this original amendment would have taken away from the Secretary the right to promulgate regulations in the areas where it might be desired by the majority of the councils involved. So the new substitute for amendment 1159 provides that the Secretary has no authority to promulgate this limited access system under this section unless the regulations have been first approved by a majority of the council involved.

In other words, we feel that gear limitation proposals must originate with the regional management council and shall not originate with the Federal Government. That was the concept that was the intent of the committee. I believe that was our original intent.

Again, my colleague may not believe this is a technical amendment, but this is for the purpose of clarifying our intent with regard to the limited entry concept, which, as he has already remarked, is a very hot issue now in our State, and I think in other areas of the west coast.

I am hopeful that this amendment will be accepted. It is, again, an amendment to make certain that any concept of limited access or limited entry will originate with the councils involved and the

Secretary would only promulgate management regulations involving that concept if it were first approved by a majority of the regional council involved.

Mr. GRAVEL. If my colleague will state it again, in other words, the Secretary would not have the power to initiate. It would have to come from the council, is that the point?

Mr. STEVENS. Yes. The limited access system concept, which we call them, would have to originate or be approved by a majority of the council involved.

Mr. GRAVEL. Just for my own edification, on decisions between the Secretary and council, which is more binding? Is the council an autonomous group that can go out and make decisions or do they make decisions and then recommend to the Secretary?

Mr. STEVENS. They recommend regulations. They become Federal regulations by virtue of the approval by the Secretary and promulgation by him so they will then be enforceable by the Federal Government rather than by the State governments because there is, in all instances but one, more than one State government involved. We wish these regulations to be enforced within the constitutional sense against both U.S. citizens and noncitizens within the jurisdictional area for conservation purposes.

But it is a proposal—the Secretary must promulgate the regulations for them to be final.

Mr. GRAVEL. What I am trying to drive at is can the council—suppose there is a disagreement between the council and the secretary. Whose views would prevail?

Mr. STEVENS. Well, that would depend on the circumstance and, as a practical matter, the Secretary would not have to promulgate them if he disagreed with them, but there would be a potential for a review by the Fisheries Management Review Board where these matters would go for review if there was a dispute.

So, in the normal sense, the council would make the proposals. The Secretary would review them to see if they are consistent with the criteria that are set forth in the bill, and if they are, he then promulgates them. If he says they are not, then the matter can be taken to the Fisheries Review Board.

Mr. GRAVEL. Who appoints the members of the Fisheries Review Board?

Mr. STEVENS. They are appointed in a similar manner to the councils themselves, and if my colleague will look at page 60 they are appointed by the President.

Mr. GRAVEL. What page number?

Mr. STEVENS. Page 60. Five members appointed by the President, with the advice of this body.

Mr. GRAVEL. So five members are appointed by the President.

Mr. STEVENS. It has been pointed out to me that normally the Secretary would return the proposed regulation to the council with his disagreement. In other words, the process for review, ultimately is the appeal to the Review Board.

Mr. GRAVEL. Normally, as I read this, the President would appoint these people obviously on the recommendation of the Secretary, would he not? Yes. It says appointed by the President—the domain is within the Secretary, and obviously it would be the Secretary in a de facto fashion who would be appointing the members of the Review Council. So the council——

Mr. STEVENS. No; I must correct my colleague. If he will look at page 60 again he will see that they are to be appointed by the President from a list of qualified individuals submitted to the President by the National Governors' Conference, and that the list must contain not less than three individuals for each vacancy. The Secretary does not select the judges, if that is the point.

Mr. GRAVEL. Yes; that was my point and, I think, it is properly corrected here by what the Senator has done.

Mr. STEVENS. I hope the Senator will accept this as being a technical amendment because that is what it is. We have no intention to have the Secretary impose a system which, in some areas of the country, is anathema, and in other areas of the country is a solution. Each region should decide what it wants to have as far as a system for conservation is concerned.

(At this point Mr. BROCK assumed the chair.)

Mr. GRAVEL. I have no objection to the amendment. I was just trying to proceed, by using this, in developing my knowledge as to the relationship that would exist between the council and the Secretary, and that is primarily what I was concerned with.

I have no objection to this amendment.

Mr. STEVENS. I move the adoption of the amendment.

The PRESIDING OFFICER. The question is on agreeing to Mr. STEVENS' amendment.

The amendment was agreed to.

Mr. GRAVEL. Mr. President, if I could address a question to my colleague on the same point, if he could clear up for me the relationship between the secretary and the council in the event there is a disagreement on policy. Now, in this particular case we have just passed this technical amendment which said the secretary cannot act with respect to limited access without the acquiescence of the council. That is what I understand we have just done. What does that mean for the balance of the activities that exist between the secretary and the council? Can the secretary disregard all other actions of the council or should we pass a technical amendment here that would require any decision made by the secretary to first receive the approval of the council?

Mr. STEVENS. Again I must answer my colleague by saying it depends upon the circumstance of who has the proper authority. As the Senator knows, in the fishing industry there are decisions which have to be made at times which are temporary in nature and which deal with a particular problem. So the answer is this: Normally, if the secretary does not agree he must send it back. But in an emergency there is an opportunity for the secretary to promulgate ad hoc, temporary short-term type regulations. We did not want the concept of limited entry to sneak in here under the guise of an emergency power, and that is why this amendment was offered.

AMENDMENT NO. 1186

May I, Mr. President, call up another amendment, amendment No. 1186.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Alaska (Mr. STEVENS) proposes amendment No. 1186.

Mr. STEVENS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered. Amendment No. 1186 is as follows:

On page 54, line 11, after "shall" insert: "initiate action on the formulation of such management plans and recommended regulations not later than sixty days after the first day on which all initial members of the Council have been appointed and taken office, and shall".

Mr. STEVENS. Mr. President, there was some question raised as to the timeliness of moving after the councils have been appointed.

The purpose of this amendment is to say that within 60 days after they are appointed and take office they have to initiate the action required under the act. Administratively, of course, we have a procedure to comply with, et cetera, but our intent is that they would not be appointed and just sit there; they have got to have some urgency toward initiating their plans. But again I want to point out this does not say they have to be completed by any particular time. It says they have got to get to work within 60 days after they are appointed. They would have to find an office; hire staff and do a lot of other things, but we want to put some sense of urgency into establishing the Management Council's framework, and this is what this amendment is for. I hope that it will also be taken as a technical concept. It means they have got 60 days to organize their house, and then they have got to start initiating——

Mr. GRAVEL. I have no objection to the amendment.

Mr. STEVENS. I move the adoption of that amendment also.

The PRESIDING OFFICER. The question is on agreeing to Mr. STEVENS' amendment (No. 1186).

The amendment was agreed to.

AMENDMENT NO. 1188

Mr. STEVENS. Mr. President, I would like to call up amendment 1188.

The PRESIDING OFFICER. The clerk will state the amendment by title.

The legislative clerk read as follows:

The Senator from Alaska (Mr. STEVENS) proposes amendment No. 1188.

Mr. STEVENS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

Amendment No. 1188 is as follows:

On page 51 between lines 6 and 7, insert the following:

(4) (a) the Governor of each State entitled to membership on a Council wishing to submit to the President, pursuant to this sub-

section, a list of names setting forth the individuals qualified to be appointed as members of such Council as representatives of each such State shall submit such a list to the President not later than 45 days after the date of enactment of this Act or March 15, 1976, whichever occurs last.

(b) Presidential appointments pursuant to this subsection shall be sent to the Senate for confirmation no later than 90 days after the date of enactment of this Act or April 1, 1976, whichever occurs last.

Mr. STEVENS. I want to explain this concept again. We have situation where we cannot compel the Governors of the States to submit nominations to the President, but we can ask them if they want to submit the names to the President that they do so within a specified timeframe. So what this says is that within 45 days after enactment of this act or March 15, 1976, whichever occurs last—in other words, it is 45 days, and I think we could strike that reference to March 15, 1976—the Governors must submit their names, and the President would have 90 days after the enactment of this act to submit the names to the Senate.

Again, we want to get the council into operation. We have another amendment which I think will become controversial. It is not being brought up at this time, and would make the act effective now but enforceable later so that the councils will get to work and the management scheme will be implemented and the regulatory process followed. The date on which those regulations will be enforced against anyone would be delayed in order to give the March session of Law of the Sea Conference as the Senator from Maine indicated, to make progress. Perhaps the matter would be reviewed on another basis later on, but at least the management framework is needed whether the Law of the Sea Conference agrees upon a 200 miles or it is unilaterally enacted.

We must have a fisherman's management regions, in any event, if it is to be constitutionally enforceable against anyone, be they noncitizens or citizens, it must be on the basis of due process. So due process must be complied with.

Again, unless there is some objection, I would like——

Mr. GRAVEL. I have no objection.

Mr. STEVENS. Mr. President, I would like to modify that amendment to strike the words "or March 15, 1976, whichever occurs last from lines 7 and 8, and to strike the words "or April 1, 1976, whichever occurs last".

This was submitted last year. Those are now no longer relevant.

The PRESIDING OFFICER. If the Senator will submit the modification to the desk, without objection, the modification will be agreed to.

Mr. STEVENS. And as modified, I move the adoption of the amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment, as modified.

The amendment, as modified, was agreed to as follows:

On page 51 between lines 6 and 7, insert the following:

(4)(a) the Governor of each State entitled to membership on a Council wishing to submit to the President, pursuant to this subsection, a list of names setting forth the individuals qualified to be appointed as members of such Council as representatives of each such State shall submit such a list to the President not later than 45 days after the date of enactment of this Act.

(b) Presidential appointments pursuant to this subsection shall be sent to the Senate for confirmation no later than 90 days after the date of enactment of this Act.

Mr. STEVENS. Mr. President, we have no more noncontroversial amendments.

I understand that the Senator from South Carolina wishes the floor.

We do have other amendments that we will bring up.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. THURMOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. THURMOND. Mr. President, rarely have I seen the Senate so unified in attempting to accomplish a certain goal, but at the same time, so sharply divided on how to get the job done than in the case of S. 961, the fisheries bill.

Each Member is strong in his view that our coastal fish must be conserved and the American fishermen who bring this vital food to our tables must be protected.

The problem revolves around the best means to accomplish this task. The proponents of S. 961 favor unilateral action by establishing a 200-mile fishery conservation zone, while the opponents feel direct negotiations with other fishing nations is the wiser course.

My study of this problem has placed me on the side opposing a bill such as S. 961 for a number of reasons.

NEGOTIATIONS SUCCESSFUL

Briefly it is my belief U.S. fishing rights are being and can be further advanced through bilateral and multilateral negotiations. Further, it appears passage of this bill would create serious national security problems for the United States. Finally, this legislation would end a long standing U.S. policy of not recognizing unilateral claims of oceans' jurisdiction.

Mr. President, I would like to summarize briefly the points under these three headings which argue against passage of S. 961.

First, our national security interests and how they would be affected by S. 961.

ICELAND SITUATION

A classic example of what could happen is illustrated by the "cod war" underway between Iceland and Great Britain. In October Iceland imposed a 200-mile fishing zone about 10 days after House passage of a bill similar to S. 961.

Since that time these two countries, both our NATO allies, have been in a state of tension and potential conflict. On November 27 Icelander youths stoned the British Embassy in Reykjavik following a rally of 5,000 protesting British naval intervention. The British Navy sent their boats into the 200-mile zone to protect British fishermen working these waters.

On December 11 an Icelandic gunboat that had been rammed, opened fire on British vessels and as a result the British vessels were damaged and an Icelandic crewman injured.

This incident and the entire fishing problem has also led the leaders of Iceland to state that the patrolling by British warships in Iceland's waters was a powerful argument against NATO in Iceland today.

Mr. President, as the Iceland incident illustrates, unilateral action in establishing fishing zones can trigger national security problems not only for the nation setting up the zone, but for other nations as well.

Mr. President, I would like to refer to an article in the Los Angeles Times of the 13th of January 1976, headed "Iceland Threatens To Leave NATO—Break in Diplomatic Ties With Britain Virtually Certain in Fishing Dispute."

BRUSSELS.—Iceland threatened to leave the North Atlantic Treaty Organization Monday if Britain does not withdraw its warships from disputed fishing zones off its coast.

Iceland claims a 200-mile fishing limit off its coasts. Britain does not recognize the claim.

Iceland served notice that it was virtually certain to break diplomatic relations with Britain in protest against the activities of Royal Navy warships in its disputed fishing zone.

"There are now all signs that Iceland will break diplomatic relations with Britain because of the British frigates' rammings of Icelandic patrol vessels last week," Johannesson said.

In Brussels, after a special meeting of NATO ambassadors, Icelandic Envoy Tomas Tomasson told reporters, "If the Royal Navy does not leave, this will lead to a consideration of our participation in this alliance."

The NATO alliance urged Britain and Iceland to use restraint and said it was sending Secretary General Joseph Luns to Iceland to meet government leaders.

Mr. President, those are just some excerpts from that article in the Los Angeles Times. I believe it fully illustrates the dangers in a bill of this type, because after this bill providing for a 200-mile limit passed the House, this action was taken by Iceland. We can see the effect of legislation of this kind pending in the Congress of the United States.

MEXICAN INCIDENT

Another example may be found in Mexican waters. Following House passage of a fisheries bill, Mexico asked its legislature to establish a 200-mile fishing economic zone that would even restrict ships of a particular design in that zone.

Thus, it appears the tension created by unilateral action can make enemies out of friends and many lead to problems unrelated to fishing disputes.

Of greatest importance in the national security area is that unilateral action on fishing can encourage expanded territorial claims. This could lead to the following problems:

Restrictions on mobility in, on, and over the oceans by our Navy, Air Force, and merchant marine fleet;

The necessity to get permission to overfly territorial waters;

Prohibition of submarines operating in territorial waters, thus sharply reducing our area of operations;

Restrictions on surface ships in territorial waters if the affected coastal nation considers such ships a threat to its safety.

The trend on territorial claims is clear. In 1945 only three countries claimed territorial rights of 7 to 12 miles. In 1950 this number jumped to 20 and it is now 58. Further, about 23 countries claim territorial rights beyond 12 miles.

In 1966, when the United States increased its fishing zone to 12 miles, 51 nations extended their territorial claims and 50 claimed fishing zones.

In 1958, only two nations claimed 200-mile fishing zones, but now nine nations have made 200-mile territorial claims, none of which we recognize. These include seven nations in South America and two in Africa.

Finally, on this point, the Senate should know that the Chairman of the Joint Chiefs and the Chiefs of the Navy and Air Force have testified in opposition to S. 961 because of the restrictions on military operations and the cost of enforcement.

INTERNATIONAL LAW

Mr. President, another important aspect of this bill is that it violates the freedom of fishing agreements, one of four basic ocean freedoms agreed to by the United States at the 1958 Geneva Convention.

Three points on the international law problems need to be made:

Passage will effectively abrogate numerous existing fishing agreements.

S. 961 is contrary to longstanding U.S. policy and practice of not recognizing unilateral claims of oceans' jurisdiction.

Based on present international law, the United States is not recognizing on the west coast the 200-mile claims of Mexico, Ecuador, and other countries relative to our tuna fishing operations.

FISHING CLAIMS

The final point which needs to be addressed is the main thrust of the bill which attempts to solve problems for our fishermen on both coasts.

Opponents of S. 961 feel the United States is making good progress through bilateral and multilateral negotiations, while supporters of the bill see the need for unilateral action.

PROGRESS THROUGH NEGOTIATION

Let us examine this issue in more detail. First, country to country negotiations since 1972 have not only reduced the total catch within 200 miles of our shores for conservation reasons, but have sharply cut the catch by foreign vessels and increased the U.S. catch.

ATLANTIC PROGRESS

This is illustrated by the following quotas negotiated by the International Commission for Northwest Atlantic Fisheries:

In 1972 the total catch was 1.1 million tons, 83 percent foreign and 17 percent United States.

In 1974 the total catch was reduced to 923,000 tons, 79 percent foreign, 21 percent United States.

In 1975 the total catch was reduced to 850,000 tons, with the foreign catch at 75 percent and the U.S. catch at 25 percent.

In 1976, quotas approved by the ICNAF nations provide for a total take of 650,000 tons, 65 percent foreign and 35 percent United States.

Mr. President, the State Department advises the present U.S. quota is about all our northwest Atlantic fishermen can handle and the reduced foreign catch will allow needed conservation measures to take hold.

WEST COAST SITUATION

Now, on the west coast the United States has negotiated a good agreement with the Japanese, and passage of this bill would be a setback for the salmon industry which opposes S. 961. Presently the Japanese are taking only 3 percent of U.S. salmon. Further, other negotiations are about complete and when announced should demonstrate the effectiveness of solving these problems through bilateral and multilateral negotiations.

In summary, on the fishing aspects of the bill, these points need to be made:

Since last year, fishing quotas for the Soviets, Poles, Japanese, and other foreigners have been reduced 23 percent.

BILATERAL AGREEMENT BETWEEN POLAND AND U.S.

On December 16 the United States announced the successful negotiation with Poland of an excellent fishing agreement which sets quotas with Poland in U.S. Pacific waters effective January 1, 1976.

The key points of this agreement include:

First. United States is allowed to set allowable catch for any species.

Second. U.S. fishermen can take as much of that allowable catch as their boats can handle.

Third. The remaining allowable catch is then allocated to fishermen of other nations.

Fourth. Poland agreed to a 39-percent reduction in the quotas for hake, the chief catch of the Polish boats.

Fifth. Poland also agreed to reduce their vessel days in the U.S. Pacific waters by the same 39 percent which gives real strength to the agreement, since the absence of their boats greatly reduces any violation of the quotas.

Sixth. Poland agreed to stay out of some areas entirely.

Seventh. Poland agreed to fish in some areas only certain times.

Eighth. This accomplishment, of course, was not known when the Commerce Committee wrote S. 961.

This outstanding agreement with Poland demonstrates the success our Government is having in bilateral and multilateral negotiations. Certainly the threat of S. 961 had a great deal to do with this outstanding agreement, but enactment of S. 961 would abrogate this agreement.

Further, solution of the hake fishing problems in the U.S. Pacific waters will be hopefully solved in negotiations with the Russians in February.

Mr. President, I ask unanimous consent that the press release issued by the Department of State entitled "United States and Poland Sign New Fisheries Agreement" be printed in the RECORD at this point.

There being no objection, the press release was ordered to be printed in the RECORD, as follows:

UNITED STATES AND POLAND SIGN NEW FISHERIES AGREEMENT

The United States and Poland signed today in Washington a new fisheries agreement concerning Polish fishing off the Pacific Coast of the United States.

The new agreement is the first bilateral transient agreement in employment of the new United States fisheries initiative. The United States fisheries initiative was announced by Secretary of State Henry A. Kissinger in a speech to the American Bar Association Convention in Montreal, Canada, last August. The Secretary described proposals in Congress to establish a 200-mile fishing zone by unilateral action as "extremely dangerous" and incompatible with efforts to solve fisheries problems in the Third United Nations Conference on the Law of the Sea.

"To conserve the fish and protect our fishing industry while the treaty is being negotiated," Secretary Kissinger said, "the United States will negotiate interim arrangements with other nations to conserve the fish stocks to ensure effective enforcement, and to protect the livelihood of our coastal fishermen."

"These arrangements will be a transition to the eventual 200-mile zone," he said.

The first step in the new initiative was successfully completed at the meeting of the International Commission for the Northwest Atlantic Fisheries in October. Among other things, member countries (other than the United States) that fish off the United States Atlantic Coast agreed to reduce their catch in 1976 by 34 per cent over 1975. In succeeding negotiations, the United States will continue to pursue the objectives and principles of the fisheries initiative.

The agreement with Poland includes, for the first time, principles that will govern future fishing off the Pacific Coast of the United States by Polish fishermen. These principles are based on the consensus emerging from the United Nations Conference on the Law of the Sea concerning legal and jurisdictional changes in the regime of fisheries management within 200 miles of coastal countries.

The new principles are designed to adjust future Polish fishing to the new regime. Poland agrees that the United States will determine the total allowable catch for species off the Pacific Coast on the basis of the best available scientific evidence. Within this total, which will be set to ensure the effective conservation of the stocks, American fishermen will have a preference to that part of the total they are able to harvest. Any surplus within the total will be allocated among foreign fishermen.

In the elaboration of these principle, substantial new restrictions and controls affecting Polish fishing operations in the North Pacific, designed to protect resources off the United States coast and the special interests of U.S. fishermen, were agreed to by Poland.

Under terms of the former agreement, Poland harvested 42,500 metric tons of hake off the U.S. Pacific Coast in 1975. Under the new agreement, Poland's hake quota has been reduced in 1976 by 39 per cent to 26,000 metric tons. Poland also agreed to reduce its fishing effort by a similar percentage in terms of numbers of days that its fishing and processing vessels will engage in the hake fishery. Under this arrangement, Poland will move its fleet seaward off the U.S. coast when it has reached its hake quota or the agreed number of vessel-days, whichever occurs first. This measure will serve to protect certain important coastal species, such as rockfish, which are taken incidentally by foreign countries while fishing for hake.

Even with the new restrictions and controls in the Polish fishery, the total harvest of Pacific hake is, however, in excess of maximum sustainable yield level since, in addition to Poland, several other foreign countries are engaged in the hake fishery. Therefore, the United States will seek to reduce

the catches made by other nations in future negotiations to protect the hake stock.

Poland also agreed to reduce the total number of vessels it plans to license for operation off the U.S. Pacific Coast in 1976* from 15 to 12, and to reduce the number of fishing and processing vessels that will be permitted in various areas and times off the U.S. coast from 11 to 8.

A provision in the former agreement prohibiting fisheries by Poland on Pacific salmon, halibut, rockfish, blackcod, flounders and soles, Pacific mackerel, shrimp and continental shelf resources, was expanded to include Pacific herring as well in 1976.

New area and time restrictions have also been incorporated in the new agreement. For example, Poland agreed to refrain from fishing year-round from 38°30′ North Latitude off the coast of northern California south to the US-Mexico border to help protect rockfish and juvenile hake stocks. In the Gulf of Alaska, Poland agreed to refrain from fishing in certain areas and times, similar to provisions in the U.S. agreements with Japan and the Soviet Union, to protect halibut and other groundfish stocks and to reduce fishing gear conflicts. In addition, Poland agreed to refrain from fishing for a nine-month period in a large area between 147°W and 157°W Longitude in the vicinity of Kodiak Island, Alaska.

Other restrictions and measures contained in the former agreement, including a voluntary inspection scheme, conciliation of gear loss and vessel damage claims, and the opportunity to place U.S. observers aboard Polish vessels to collect scientific data, are continued in the 1976 agreement.

The new agreement was signed on behalf of the United States by Miss Rozanne Ridgway, Deputy Assistant Secretary for Oceans and Fisheries Affairs, Department of State, who headed the U.S. Delegation. The Polish Charge d'Affaires, a.i., Minister Jozef Wiejacz, signed for the Polish People's Republic. The agreement will be effective for one year, starting January 1, 1976.

Mr. THURMOND. Mr. President, since 1972, total quotas allowed foreign fishermen have been cut by 50 percent. U.S. unilateral action, such as S. 961, would wipe out these valuable gains. Gulf coast shrimp fishermen, as well as the tuna fleet, could be seriously injured by similar claims.

Mr. President, in closing I recognize this has been a long statement, but this is an important issue.

Although I am sympathetic to those Members who are most affected by these fishing problems, it is nevertheless my view their own interests would be best served by allowing country-to-country negotiations to continue at least for another year. It is my feeling the fishing interests will be best served by such an approach and additionally, such a solution would relieve us of many national security problems.

Late last week seven of my colleagues joined me in a "Dear Colleague" letter which is now on the desks of the membership. It is my hope each Senator will study this letter carefully and take note of the editorials from the New York Times, Wall Street Journal, and Washington Post which oppose S. 961. In conclusion, I ask unanimous consent that this letter and its attachments be printed in the RECORD at the conclusion of my remarks.

*Original press release incorrectly read 1977 instead of 1976.

The PRESIDING OFFICER (Mr. BROCK). Without objection, it is so ordered.

(See exhibit 1.)

Mr. THURMOND. Mr. President, the Chief of Naval Operations, Adm. James L. Holloway III, made a strong statement before the Armed Services Committee on this measure. I wish to quote an excerpt from his statement. He said:

Our economy depends on free movement of raw materials and manufactured goods by sea. This movement is protected in part by the 1958 Convention on the High Seas which recognized the following general principles of international law: (1) freedom of navigation (2) freedom of fishing (3) freedom to lay submarine cables and pipelines and (4) freedom to fly over the high seas. The legislation before you would unilaterally abrogate freedom of fishing out to 200 miles which is one of the constituent elements of the overall freedom of the high seas. Such action would be a beginning to "creeping jurisdiction" which leads to full territorial claims.

The response of other nations is not likely to be limited to comparable legislation. For instance a few days after House approval of a similar unilateral bill, Mexico also announced a unilateral claim, but its claim went far beyond those made in S. 961. We face the unhappy prospect that other nations, stimulated by U.S. action, will claim the right to abrogate unilaterally other identified freedoms, including the freedoms of navigation and overflight leading finally, to full sovereignty. We are faced with choosing to contest such claims; trying to make costly bilateral agreements on rights of movement, or acquiescing in being potentially excluded from almost 40% of the world's oceans area.

In the testimony last year of the Chairman of the Joint Chiefs of Staff, General Brown, he strongly opposed unilateral legislation and delineated in detail why such "creeping jurisdiction" leading to greatly expanded territorial seas must be stopped through the achievement of an equitable, timely and comprehensive Law of the Sea Treaty.

The effect of a 200-mile territorial sea extending off the coasts of many nations in the world would be detrimental to military mobility. It would result in the prohibition of overflight by military aircraft and submerged operation of submarines except at the sufferance of a coastal state in almost forty percent of what is internationally recognized as high seas. The entire Mediterranean, the operating area of the Sixth Fleet, would be territorial seas of the littoral states and could be closed completely to the United States. Similarly, large portions of the operating area of the Seventh Fleet would become territorial sea. An unconstrained extension to even 12 miles would close the straits of Bab El Mandeb, Dover, Gibraltar, Hormuz and Lombok. Virtually every passage now narrow enough to be called a strait would be closed by the extension of territorial waters to 200 miles.

In the past we have asserted that no nation may unilaterally abrogate high seas freedoms—that only through multilateral negotiation can the necessary adjustments in coastal state resource jurisdiction be properly accommodated with the community and common interests of mankind as a whole. Our departure from this practice would encourage other nations to do the same.

Mr. President, I ask unanimous consent that the entire statement of Admiral Holloway be printed in the RECORD at this point in my remarks.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

PREPARED STATEMENT OF ADM. JAMES L. HOLLOWAY, III

Mr. Chairman and Members of the Committee: I appreciate the opportunity to appear on behalf of the Chairman, JCS before this Committee to present the military assessment of the impact of U.S. unilateral claims to jurisdiction over the high seas. The Magnuson Fisheries Management and Conservation Act (S. 961) is such a claim, and I consider that passage of this legislation at this time would be detrimental to our security interests, since it would delay and perhaps destroy chances for achieving a rule in the oceans through the medium of a widely accepted, equitable Law of the Sea Treaty.

Our fundamental security interest in the rule of law in the oceans is reduction of sources of conflict. To do this we must look ahead, and develop a regime in the seas which will reduce the potential for conflict by reducing uncertainty of law and reducing the possibilities of confrontation over competing claims. The United States has consistently supported the development of a reasonable Law of the Sea Treaty as the best means of achieving such a regime. Our studies by the JCS in recent years have pointed to the potential for ever increasing confrontations, chaos, challenges, and conflict in the oceans, unless a new, comprehensive, Law of the Sea Treaty is concluded. The oceans are a last frontier. They have been subject to ever increasing unilateral claims to national jurisdiction since World War II.

The position of the United States has been and should continue to be one of opposing such unilateral claims. By our nonrecognition the number of these unilateral claims has remained small. Only nine nations thus far claim full territorial seas of 200 miles while four others claim lesser jurisdiction over the same distance. Those closest to the daily negotiations on the Law of the Sea indicate that this number will multiply rapidly if our country reverses itself and moves unilaterally to increase its jurisdiction over the high seas.

Our economy depends on free movement of raw materials and manufactured goods by sea. This movement is protected in part by the 1958 Convention on the High Seas which recognized the following general principles of international law: (1) freedom of navigation (2) freedom of fishing (3) freedom to lary submarine cables and pipelines and (4) freedom to fly over the high seas. The legislation before you would unilaterally abrogate freedom of fishing out to 200 miles which is one of the constituent elements of the overall freedom of the high seas. Such action would be a beginning to "creeping jurisdiction" which leads to full territorial claims.

The response of other nations is not likely to be limited to comparable legislation. For instance a few days after House approval of a similar unilateral bill, Mexico also announced a unilateral claim, but its claim went far beyond those made in S. 961. We face the unhappy prospect that other nations, stimulated by U.S. action, will claim the right to abrogate unilaterally other identified freedoms, including the freedoms of navigation and overflight leading finally, to full sovereignty. We are faced with choosing to contest such claims; trying to make closely bilateral agreements on rights of movement, or acquiescing in being potentially excluded from almost 40% of the world's oceans area.

In the testimony last year of the Chairman of the Joint Chiefs of Staff, General Brown, he strongly opposed unilateral legislation and delineated in detail why such "creeping jurisdiction" leading to greatly expanded territorial seas must be stopped through the achievement of an equitable, timely and comprehensive Law of the Sea Treaty.

The effect of a 200-mile territorial sea extending off the coasts of many nations in the world would be detrimental to military mo-

bility. It would result in the prohibition of overflight by military aircraft and submerged operation of submarines except at the sufferance of a coastal state in almost forty percent of what is internationally recognized as high seas. The entire Mediterranean, the operating area of the Sixth Fleet, would be territorial seas of the littoral states and could be closed completely to the United States. Similarly, large portions of the operating area of the Seventh Fleet would become territorial sea. An unconstrained extension to even 12 miles would close the straits of Bab El Mandeb, Dover, Gibraltar, Hormuz, and Lombok. Virtually every passage now narrow enough to be called a strait would be closed by the extension of territorial waters to 200 miles.

In the past we have asserted that no nation may unilaterally abrogate high seas freedoms—that only through multilateral negotiation can the necessary adjustments in coastal state resource jurisdiction be properly accommodated with the community and common interests of mankind as a whole. Our departure from this practice would encourage other nations to do the same.

Our experience in attempting to obtain overflight clearances in Europe during the most recent Arab-Israeli conflict leads us to believe that bilateral negotiations cannot be depended upon to ensure the military mobility necessary to achieve U.S. foreign policy objectives.

General Brown spoke last year to the needs of the U.S. Air Force for keeping rights of overflight, rights not enjoyed over sovereign areas. He also spoke to the impact on our nuclear submarine forces of increasing territoriality and the loss of high seas areas for submerged operations. This committee knows of the importance of global mobility in an era of decreasing overseas presence, and what competing unilateralism means in terms of loss of movement. Whatever hurts our chances for a comprehensive, timely Law of the Sea Treaty directly hurts our military security.

Mr. Chairman, a Law of the Sea Treaty which gives us a settled regime in the oceans greatly reduces sources of conflict among nations. Such conflict has been caused by competing unilateral claims to various jurisdictions—claims which eventually extend to full sovereignty. If the U.S. unilaterally declares a 200 mile fishing zone, as proposed in S. 961, after our years of constant opposition which has helped to keep such claims by others at a minimum, we will at the very least, slow up the positive momentum now existing in the Law of the Sea negotiations, and quite probably destroy our chance for an agreement that supports our present and future security needs in the oceans. It is for this reason that the military services recommend against the proposed unilateral legislation.

General Jones has endorsed the substance of my remarks and we will respond to any questions you may have regarding security implications of the proposed legislation. Rear Admiral Morris, the JCS Representative for the four services at the Law of the Sea Conference, can reply to specific questions regarding that undertaking.

Thank you.

Mr. THURMOND. Mr. President, General Jones, the Chief of Staff of the Air Force, testified before the Committee on Armed Services on November 19, 1975, and I wish to state here a portion of his statement.

General JONES. I associated myself with the remarks in the statement of Admiral Holloway. Many have asked, when they heard that I was coming to testify on the Law of the Seas and the Emergency Marine Fisheries Protection Act, what the Air Force was doing in this business. And of course, the point is the one that Admiral Holloway made, which is that what happens on the sea impacts the air overhead, and our need to fly unimpeded over international waters.

In the last few days, I have spent a great deal of time studying the previous testimony, and whatever else I could find. As an American I am very sympathetic to the problem of our fishing industry, of the depletion of our stocks and other problems of the sea, ecology, such as hopefully we can resolve this problem, and solve it in a way that does not increase the probability of some sort of confrontation.

The concern, of course, is the one expressed of creeping jurisdiction, and the implications of the United States being the leader in taking an action. We cannot say with 100 percent assurance if this bill is passed, that other nations will start moving in this direction, but the history has shown that this is the trend. And our concern, of course, is with our unarmed transports.

Really the problem in the air is in some ways more severe than on the surface, because on the surface we do have 2,000 years of precedent on the right of innocent passage. That is not everything, but at least it is the right of innocent passage into, and through the territorial waters of foreign countries. But military aircraft do not have the right of innocent passage over the territorial seas of another country. So we are very, very concerned about the possible extension of territorial limits.

We realize that this act does not extend our territorial limits, and it is limited only to fishing. But if we take this action and say it is to our advantage to deviate from the 1958 agreement, then other nations may believe they also have a right to. We end up with this creeping jurisdiction and an increased probability of conflict. There is also an increased probability of our long-range transports not being able to resupply our own forces or other forces without being escorted, without having to go on different routes, and in certain cases being denied overflight. So it is of deep concern to us, Mr. Chairman, on the overflight rights.

Mr. President, I ask unanimous consent that the full statement of General Jones be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT BY GENERAL JONES

General JONES. I associate myself with the remarks in the statement of Admiral Holloway. Many have asked, when they heard that I was coming to testify on the Law of the Seas and the Emergency Marine Fisheries Protection Act, what the Air Force was doing in this business. And of course, the point is the one that Admiral Holloway made, which is that what happens on the sea impacts the air overhead, and our need to fly unimpeded over international waters.

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Mr. THURMOND. Mr. President, I have a statement here issued by Gen. George S. Brown, U.S. Air Force, Chairman of the Joint Chiefs of Staff, and he was accompanied by Rear Adm. Max K. Morris, U.S. Navy, Joint Chiefs' representative to the Law of the Sea Conference.

I shall not take time to read his entire statement, but I will read into the RECORD a few excerpts.

This is on page 2 of his statement:

The proposed legislation would unilaterally abrogate freedom of fishing, one of the constituent elements of the overall freedom of the high seas. The response of other nations to this legislation is not likely to be limited to comparable restrictions on fishing. If the United States, by unilateral act, abrogates one identified freedom, we face the unhappy prospect that other nations may claim the right unilaterally to abrogate other identified freedoms, including the essential freedoms of navigation and overflight.

In response, many nations will surely claim 200-mile exclusive fishing zones. Some will claim 200-mile pollution control zones. Some will claim the right throughout such areas to promulgate and endorse restrictive regulations of various sorts against vessels bearing vital energy supplies to our shores. Some will attempt to prohibit nuclear-powered vessels, or vessels and aircraft carrying strategic weapons from venturing within 200 miles of their coast. Some will even claim a 200-mile zone of sovereignty, thereby completely barring our aircraft and submergerd submarines from their claimed zone. This is the history of the growth of such claims. Prior to our claim of a 12-nautical mile fishing limit, there were only 25 claims to a territorial sea of 12 nautical miles or more. There are now over 80 such claims.

The effect of a 200-mile territorial sea extending off the coasts of many nations in the world would be devastating to military mobility.

Mr. President, another excerpt from General Brown's statement:

If the United States now abandons its opposition to unilateral claims in the ocean, we will inevitably be faced with an increasing number of competing, retaliatory, or unrelated claims impacting adversely on national security interests.

If, as we expect, enactment of this legislation were to result in extended delay in the law of the sea negotiations, we will have reverted to the uncertain and dangerous procedure of shaping a new legal order for the world's oceans by the process of claim and counterclaim, action and reaction, which eventually would coalesce into customary international law. This is a dangerous way to regulate any relations among states. But when the claims begin to affect the mobility of our strategic and general-purpose forces,

the risk involved in the process of challenge is much higher. To set the nation on this path toward resolution of oceans policy issues is, in my view, both dangerous and unwise.

Mr. President, those excerpts, as I said, were from the statement of General Brown before the Committee on Armed Services.

Mr. President, I ask unanimous consent that his entire statement be printed in the RECORD at this point in my remarks.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF GEN. GEORGE S. BROWN, U.S. AIR FORCE, CHAIRMAN, JOINT CHIEFS OF STAFF, ACCOMPANIED BY REAR ADM. MAX K. MORRIS, U.S. NAVY, JOINT CHIEFS REPRESENTATIVE TO THE LAW OF THE SEA CONFERENCE

General BROWN. Mr. Chairman and Senator Thurmond, I appreciate the opportunity to appear before this committee to present our assessment of the impact that passage of the Emergency Marine Fisheries Protection Act of 1974 would have on the security of the United States.

First, I assure the committee that the Department of Defense is well aware of the difficulties being experienced by our coastal fishermen. A solution to these problems must be found. Any such solution, however, must be compatible with our national security interests. I am convinced that passage of this legislation at this time would be counter to the security interests of the United States.

The major U.S. military interest in the seas is maximum mobility for our operations free of interference by others. The United States—like virtually all of the major powers that have preceded it in history—has fundamental high seas interests integrally related to its major power responsibilities and its security.

The mobility of our strategic and general purpose forces becomes a more important factor in our security as the presence of our forces—both strategic and general purpose—on foreign territory is reduced. Worldwide commitments and long lines of communications place additional emphasis on mobility requirements. Furthermore, the ability of our deterrent forces to carry out their mission cannot be dependent on the sufferance of other nations who may perceive their interests as different from ours.

In regard to our strategic forces, they must be numerous enough, efficient enough, and deployed in such a way that a potential aggressor will always know that the sure result of any type of nuclear attack against the United States is unacceptable damage from our retaliation. Furthermore, these forces are essential to the maintenance of a stable political environment within which the threat of aggression or coercion against the United States or its allies is minimized.

Thus, the survivability of our strategic forces is essential to the protection of our vital interests. As an indispensable element of our strategic forces, the United States seaborne nuclear deterrent is dependent not only upon freedom of mobility in the oceans and through certain international straits but upon secrecy. In the territorial sea, submarines are required to navigate on the surface. In the absence of free passage through straits, an extension of the territorial sea from 3 to 12 miles would force us, as to many straits used for international navigation, including Gibraltar, to attempt to strike the best possible bilateral bargain for consent to transit submerged. The cost of this consent may be expected to increase with the magnitude of the known U.S. interest involved.

Our general purpose forces now play a larger role in deterring attacks than at any time since the nuclear era began. Like our strategic seaborne forces, our general purpose naval and air forces depend upon the maximum mobility for their operations, free of interference by others. This mobility will be particularly important to our ability to deter or respond to localized aggression during a period of decreasing overseas presence. Our mobility currently depends upon freedom to navigate on and under the high seas and through certain international straits and freedom to fly over the high seas and certain international straits. Authority for coastal States to regulate these activities degrades our mobility and threatens the peace.

Our antisubmarine warfare operations involve surface and air units that cannot conduct such operations in foreign territorial seas without consent. As such operations can be easily observed, our ability to track Soviet submarines that entered foreign territorial seas submerged—legally or illegally—would be diminished as the territorial sea is extended farther seaward.

With this background, it is now appropriate to assess the impact of the pending legislation on these interests.

The Convention on the High Seas of 1958 specifically lists four high seas freedoms which are recognized by the general principles of international law. They are: (1) freedom of navigation, (2) freedom of fishing, (3) freedom to lay submarine cables and pipelines, and (4) freedom to fly over the high seas. The United States and 52 other nations are parties to this Convention.

The proposed legislation would unilaterally abrogate freedom of fishing, one of the constituent elements of the overall freedom of the high seas. The response of other nations to this legislation is not likely to be limited to comparable restrictions on fishing. If the United States, by unilateral act, abrogates one identified freedom, we face the unhappy prospect that other nations may claim the right unilaterally to abrogate other identified freedoms, including the essential freedoms of navigation and overflight.

In response, many nations will surely claim 200-mile exclusive fishing zones. Some will claim 200-mile pollution control zones. Some will claim the right throughout such areas to promulgate and endorse restrictive regulations of various sorts against vessels bearing vital energy supplies to our shores. Some will attempt to prohibit nuclear-powered vessels, or vessels and aircraft carrying strategic weapons from venturing within 200 miles of their coast. Some will even claim a 200-mile zone of sovereignty, thereby completely barring our aircraft and submerged submarines from their claimed zone. This is the history of the growth of such claims. Prior to our claim of a 12-nautical mile fishing limit, there were only 25 claims to a territorial sea of 12 nautical miles or more. There are now over 80 such claims.

The effect of a 200-mile territorial sea extending off the coasts of many nations in the world would be devastating to military mobility. It would result in the prohibition of overflight by aircraft and submerged operation of submarines except at the sufferance of a coastal state in almost 40 percent of what is now internationally recognized as high seas. The entire Mediterranean would be territorial seas of the littoral states and could be closed completely to the United States. Virtually the entire operating area of both the 7th and 6th Fleets would become territorial sea. An unconstrained extension to even 12 miles would close the Straits of Bab El Mandeb, Dover, Gibraltar, Hormuz, and Lombok. Virtually every passage now narrow enough to be called a strait would be closed by 200 miles.

How will we respond to such claims, Mr. Chairman? We have consistently maintained that no nation may unilaterally abrogate high seas freedoms—that only through multilateral negotiation can the necessary adjustments in coastal state jurisdiction be properly accommodated with the common interest of mankind as a whole. What will be our response after we, too, have succumbed to the temptation of the quick unilateral solution presented in this bill?

Our experience with overflight clearances in Europe during the most recent Mideast conflict leads us to conclude that bilateral negotiations cannot be depended upon to insure that military mobility necessary to achieve U.S. foreign policy objectives. What this bill invites, then, is a situation wherein the United States must either acquiesce in serious erosion of its rights to use the world's oceans, or must be prepared to forcefully assert or purchase those rights.

Let me turn now to the events to be anticipated off our own coasts. It is highly unlikely that the major maritime powers who fish off our coast, especially Japan and the Soviet Union, would acknowledge the validity of a sweeping claim. To do so would totally undercut their own position both on fisheries in general and in the law of the sea negotiations in particular. We must, therefore, assume that such vessels would not seek our permission to fish within 200 miles of our coasts and that they would continue to do so. Enforcement of the act would involve boarding, inspection, arrest, and seizure. I cannot predict with certainty how they would react to such enforcement measures by the United States.

I can, however, clearly point to the history of the last year in which the United Kingdom responded to a claim of a 50-mile fishery zone on the part of Iceland by providing warship escort for the British fishing vessels.

Our claim would be even more contentious than that which Iceland has made for two reasons. First, our claim would be more expansive—200 miles rather than 50 miles—and, second, since that time the International Court of Justice has found Iceland's actions in making such a claim to be in contravention of the rights of others. Should other nations choose to follow the pattern set by the United Kingdom of providing warship escort for fishing vessels, we would be faced with a direct military confrontation which could easily spread. I am, of course, not suggesting that we would not be able to meet and defeat such a threat. I do suggest that the risk of confrontation is unwarranted.

I would now like to turn to the effects which enactment of this bill would be likely to have on our ability to achieve a law of the sea treaty. From the very beginning of the law of the sea negotiations, the United States has been the strongest advocate of the principle that international conflicts concerning uses of the ocean can only be effectively resolved through international agreement. We have invariably protested unilateral claims by other states, whether to extended territorial seas or extended jurisdiction of one type or another, such as fishing jurisdiction. Our protest notes normally stress our view that unilateral claims to extended jurisdiction during the course of negotiations can only inhibit the negotiations and decrease the likelihood of reaching agreement.

A dramatic reversal of the position from which we have been negotiating, practically on the eve of what is apparently the most crucial negotiating session, would seem to be capable of no other effect than utterly destroying our credibility, along with rendering slim or even nonexistent our ability to obtain an overall package settlement of the existing disputes concerning ocean uses.

Mr. Chairman, I believe that the best way of preserving our essential mobility is through a comprehensive law of the sea treaty which will, in settling existing and

potential conflicts, reaffirm, by treaty our vital rights of navigation, overflight, and unimpeded passage of international straits. The alternative would be their preservation through their continued exercise despite the denial by others of our right to do so, and the use of force, in defense of such rights, when confronted by the force of others.

In summary, Mr. Chairman, it is my earnest assessment that the interests of the United States in establishing an equitable and stable regime for the oceans which will protect all of our interests—resources as well as national security—are best served by not precipitating unilateral acts such as those which would result upon the passage of S. 1988, but rather by seeking and achieving international agreement in the law of the sea treaty.

In my judgment, enactment of the proposed legislation would seriously erode the prospect for a broadly based multilateral treaty putting to rest the wide range of increasingly contentious ocean issues. Enactment of the proposed legislation would be a dramatic and highly visible reversal of past U.S. policy. For the United States to adopt unilateralism as a viable approach to oceans policy problems at this juncture would seriously undercut the credibility of U.S. negotiators not only on the fisheries issue, but also on our basic commitment to international agreement. This unilateral action could result in an erosion of the world's perception of our other essential objectives such as unimpeded transit through and over straits, which we have identified as both cornerstones of our policy and essential elements of an acceptable solution.

If the United States now abandons its opposition to unilateral claims in the ocean, we will inevitably be faced with an increasing number of competing, retaliatory, or unrelated claims impacting adversely on national security interests.

If, as we expect, enactment of this legislation were to result in extended delay in the law of the sea negotiations, we will have reverted to the uncertain and dangerous procedure of shaping a new legal order for the world's oceans by the process of claim and counterclaim, action and reaction, which eventually would coalesce into customary international law. This is a dangerous way to regulate any relations among states. But when the claims begin to affect the mobility of our strategic and general purpose forces, the risk involved in the process of challenge is much higher. To set the nation on this path toward resolution of oceans policy issues is, in my view, both dangerous and unwise.

Thank you, Mr. Chairman.

The CHAIRMAN. We have with us also Mr. John Norton Moore, Chairman of the National Security Council Interagency Task Force on the Law of the Sea, Department of State.

Mr. THURMOND. Mr. President, I have a statement of John N. Moore, the Chairman of the National Security Council Interagency Task Force on the Law of the Sea and Deputy Special Representative of the President for the Law of the Sea Conference. He testified before the Committee on Armed Services on November 19, and I wish to quote an excerpt from his statement.

In considering the impact of a unilateral U.S. claim, it must be borne in mind that great maritime powers are traditionally the most reluctant to support unilateral extensions of jurisdiction over the high seas. Thus much of the rest of the World would regard any U.S. claim as a minimum, not a maximum, indication of permissible unilateral assertions of jurisdiction. Moreover, there would be a great temptation in other countries to strike while the iron is hot and blame the consequent confusion regarding navigation and other freedoms—detrimental to U.S. interests—on the domestic political pressure in their own countries created by the U.S. precedent and the domestic political need to go beyond the U.S. claim. We should keep in mind in this connection that the U.S. is the number one user of the world's oceans.

In the law of the sea negotiations, a number of nations directly oppose our interests in protecting navigation. Some argue for restrictions and political controls in straits while others want to close territorial seas to certain types of vessels. Some of these nations may well be willing to use U.S. action on fisheries to justify their own future actions restricting navigation and scientific research. A unilateral extension of fisheries jurisdiction by the U.S. will clearly undercut our political ability to prevent those actions.

Mr. President, I ask unanimous consent that the entire statement of Mr. John Norton Moore be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

PREPARED STATEMENT OF THE HONORABLE JOHN NORTON MOORE

Mr. Chairman, Members of the Committee, I appreciate the opportunity to appear before the Committee to testify in opposition to S. 961, a bill which would extend U.S. fisheries jurisdiction to 200 miles onto the high seas. That bill—if passed and enacted into law—would breach solemn treaty obligations of the United States, would severely harm United States oceans and foreign relations interests, and would mark a step backward in mankind's efforts to achieve a stable order for the world's oceans.

All can agree with the purpose of this bill; to protect fish stocks off our coasts until such time as a fully effective Law of the Sea Treaty is in force. In the past, certain stocks have been seriously damaged by overfishing. Despite past overfishing, however, recent fishery agreements have dramatically turned the tide in protection of stocks off our coasts. At the present time, approximately only ten to fifteen, if that, of the more than 100 species off our coast of interest to commercial sportsfishermen are expected to be below maximum sustainable yield and declining as a result of foreign fishing. Moreover, S. 961 or other bills which would unilaterally extend U.S. fisheries jurisdiction from the present 12-mile limit to 200 miles, are neither the most effective way to deal with our remaining fisheries problems nor compatible with the diverse interests of the United States as the number one user of the world's oceans.

The Third United Nations Conference on the Law of the Sea—dealing with issues of fundamental importance in all areas of oceans use—has held only eighteen weeks of substantive work. Despite such few weeks in formal session, there is broad agreement on a 200-mile economic zone as part of a comprehensive Law of the Sea Treaty. The Single Negotiating Text produced at the last session of the Conference makes clear that this zone could provide the kind of jurisdiction needed to ensure full management and conservation of coastal fish stocks while protecting our vital navigational interests. The text also provides for increased jurisdiction for the protection of our important salmon stocks. Although the Law of the Sea negotiations are difficult and time-consuming, they are on track and we have good expectations of concluding a treaty which would protect our important security interests in the oceans. There is simply no question that a comprehensive Law of the Sea Treaty will also provide full protection for coastal fish stocks.

We are aware that the Law of the Sea negotiations are difficult and that we cannot predict with certainty when a treaty will be concluded. As such, we have not relied solely on the prospect of a new Law of the Sea Treaty to bring overfishing off our coasts under control. Actions recently taken to protect coastal stocks include:

An intensification of efforts to strengthen protection from bilateral and limited multilateral fishery agreements with nations fishing off our coasts;

New enforcement measures which went into effect December 5, 1974, to strengthen protection for our continental shelf fishery resources.

That these measures are succeeding is illustrated by the successful outcome of the Special Meeting of the International Commission for the Northwest Atlantic Fisheries only seven weeks ago. The meeting, to which President Ford sent a personal message, was among the most successful in the history of the Commission and resulted in a 23 percent reduction in overall catch quotas over 1975 in the area from Maine to North Carolina. According to our fisheries scientists, operation at this level should provide for overall recovery of the stocks in the area rather than further decline. Agreement was also reached on closing a large area on Georges Bank to vessels using gear capable of catching the depleted yellowtail flounder, haddock, and other bottomfish. Similarly, bilateral negotiations with the Japanese have resulted in a reduction of their harvest of king crabs to less than 300,000 today. By contrast, the U.S. catch of king crab has increased from 123,000 to nearly nine million today. This year's agreement alone reduced Japanese king crab quota by nearly 60 percent from 700,000 crabs to 300,000. To cite another recent example, this year the Japanese agreed to reduce their catch of pollack in the Northern Pacific by nearly 30 percent from 1.5 million tons to 1.1 million tons. We will be negotiating with the Japanese to reduce allocations to the Maximum Sustainable Yield (MSY).

To further increase the protection for fish stocks off our coasts, Secretary Kissinger has recently announced a new initiative to negotiate the functional equivalent of a 200-mile fishing zone off the U.S. coast phased over the next one to three years. Our plan will be to accomplish through negotiations, not unilateral action, establishment of a fully effective conservation regime and preferential harvesting rights for United States fishermen within 200 miles off our coasts.

The principal—and only justifiable—rationale for S. 961 is as an emergency measure to protect fish stocks off our coast until a Law of the Sea Treaty can be concluded. Our new information, in the light of recent fishery agreements, indicates that efforts to meet the problem through negotiations have been successful. In view of this new information, the most important of which has been available only within the last few weeks, any rationale for S. 961 seems removed.

I would like to briefly survey the state of the stocks off the U.S. coast area by area to indicate which stocks are below maximum sustainable yield and declining in light of new agreements now in force. Many of these agreements were not in force when this Committee last addressed the problem.

THE NORTHWEST ATLANTIC FROM MAINE TO CAPE HATTERAS, N.C.

As a result of the recent historic ICNAF agreement, principal stocks in this area are expected to rebuild. The most pressing problems in the area, the condition of haddock and yellowtail flounder, are being addressed through new quota agreements severely restricting catch, and time and area closures that are expected to allow the stocks to regenerate. We were successful in closing most of the important Georges Bank area, a closure sufficiently large to provide satisfactory protection for these stocks and other bottomfish. Although certain stocks such as

haddock remain depleted as a result of past overfishing, nothing in S. 961 can remedy past damage.

CAPE HATTERAS, N.C., TO THE FLORIDA KEYS

In this area, problems to stocks are minimal. At this time there are no stocks within this area which are below maximum sustainable yield and declining as a result of foreign fishing. The only depleted species within the region, menhaden, is found within the present U.S. exclusive fisheries jurisdiction of the 12-mile contiguous zone and has been depleted by U.S. fishing.

THE GULF OF MEXICO

There are no stocks within this area below maximum sustainable yield and declining as a result of foreign fishing. In contrast, our Gulf fishermen fish for shrimp and red snapper within 200 miles of other nations.

CALIFORNIA

Only one stock, Pacific hake, off the California coast is below maximum sustainable yield and declining as a result of foreign fishing. We do not now have a commercial fishery for Pacific hake. In contrast, California is the principal home port for the efficient U.S. tuna fleet which fishes within 200 miles of other nations and which lands about $138 million in tuna annually. Moreover, U.S. fishing is responsible for the depletion of several stocks off California, including the Pacific sardine.

THE NORTHEAST PACIFIC: OREGON AND WASHINGTON

Several stocks in this area continue to be fished beyond maximum sustainable yield, most importantly Pacific hake and rockfishes. Nevertheless, recent bilaterals with Japan and the Soviet Union have made major progress in controlling the overfishing. For example, the Japanese agreed this year to a 20% reduction in total bottomfish, 75% in rockfishes, and 63% in bottomfish in certain specific conservation zones. The Soviet agreement closes coastal areas off southern Washington, Oregon and Northern California to all Soviet trawling between November 1 and April 25 to protect bottomfish. The Soviets have also agreed to a 60% reduction in their incidental catch or rockfishes. Our estimates indicate that the two stocks of primary concern, Pacific hake and rockfishes, will require only a further 25 and 14 percent reduction respectively. In the light of recent progress this seems reasonably attainable in the near future and we will make every effort to that end.

THE GULF OF ALASKA AND THE BERING SEA

Several stocks in these areas continue to be fished beyond maximum sustainable yield, including pollack, rockfishes, sablefish and halibut. Nevertheless, recent bilaterals with the Soviet Union and Japan have made major progress in protecting these stocks.

For example, in the Gulf this year, the Soviets agreed to reduce their catch of pollack by 29%. Rockfish and sablefish, however, will require an additional 26 and 29 percent reduction, respectively, to reach maximum sustainable yield.

In the Bering Sea, Japan and the Soviet Union this year agreed to a reduction in their pollack fishing of approximately 27%. We estimate that an additional 24% reduction will be required to bring the harvest within the maximum sustainable yield. We believe reductions of this magnitude are feasible in the light of recent progress.

Incidental catch of halibut—in the course of a directed fishery for other species—has been a serious problem for Alaskan fishermen but recent measures to control incidental catch should reduce this problem.

We do not have a commercial fishery for pollack or Pacific hake, although at some time in the future one might be developed. In contrast, Alaska fishermen now harvest over $100 million in salmon yearly. These stocks depend for protection on the International North Pacific Fisheries Commission (INPFC) agreement with Japan and bilateral agreements with other nations. In the absence of agreement, these stocks would be vulnerable to capture beyond 200 miles since approximately 80% of the stocks migrate beyond 200 miles at some point during their life cycle.

In addition, as has been previously indicated, recent bilateral agreements have provided Alaskan fishermen with a great increase in protection and preference with respect to crabs. Salmon, crabs and shrimp (in Alaska found within the 12-mile U.S. exclusive fishery jurisdiction) are by far the greatest commercial harvest to Alaksa fishermen. Both crab and shrimp in Alaska are now under exclusive U.S. fisheries jurisdiction and salmon is largely protected pursuant to the INPFC agreement with Japan and other bilaterals.

Mr. Chairman, although I have previously indicated in testimony before this Committee reasons why passage of legislation such as S. 961 would severely damage the national interest, I would like to briefly indicate again for the record some of the serious objections to passage of such legislation. These include:

Such a unilateral extension would violate the pledged word of the United States as embodied in our solemn treaty obligations, including the important 1958 Geneva Convention on the High Seas;

Passage would seriously undermine our ability to prevent unilateral claims by others which could seriously harm U.S. defense and energy needs. The recent Mexican announcement of a 200-mile economic zone, possibly including jurisdiction over vessel operations and standards, is an illustration that these concerns are real and immediate;

Passage would seriously injure important U.S. tuna and shrimp interests which fish within 200 miles of other nations. The value of tuna landings caught in international waters off foreign shores by U.S. fishermen alone exceeds $138 million per year;

Passage would undermine U.S. leadership in the Law of the Sea negotiations and seriously damage the effort to obtain a stable order for the oceans;

Passage would undermine the establishment of international measures for the conservation and full utilization of oceans protein supplies; and

Confrontation with nations fishing off our coasts rather than a continuation of our successful fishery negotiations could delay rather than advance solution of remaining fishery problems.

None of these objections can be cured by a delayed effectilve date.

We must not as a nation fail to provide the leadership necessary to protect our national oceans interests and to guide all nations to a stable order for the oceans. Our fisheries interests, our security interests, and our strong interest in a stable oceans regime all require that we not enact S. 961. I urge that this Committee and the Senate firmly reject this bill and in doing so reaffirm United States leadership in oceans policy and the integrity of our pledged word.

SUPPLEMENTAL STATEMENT BY JOHN NORTON MOORE, CHAIRMAN, THE NSC INTERAGENCY TASK FORCE ON THE LAW OF THE SEA AND DEPUTY SPECIAL REPRESENTATIVE OF THE PRESIDENT FOR THE LAW OF THE SEA CONFERENCE

Enactment of legislation establishing United States' fishing jurisdiction to 200 miles will have a severe adverse impact on other United States' uses of the oceans off the coasts of other countries which will go far beyond fishery matters. Although by its terms S. 961 is limited to jurisdiction over fisheries, other countries could well use our action as a precedent to extend their own jurisdiction over other uses of the oceans which are vital to the United States.

The history of the law of the sea is replete with trends and individual actions in which nations have built their own extended claims of jurisdiction on the foundation of different claims advanced by others. The 20th Century unilateral claims to a 12-mile territorial sea began with a Russian claim of a 12-mile fishing zone, which was later "reinterpreted" as a territorial sea by the Soviet Government. The effect of extending the territorial sea to 12 miles in straits would severely damage the navigational and security interests in the absence of adequate agreement on unimpeded passage of straits.

In the 1940's the doctrine of jurisdiction over the resources of the continental shelf was developed with a clear limitation that the jurisdiction did not extend to the superjacent water column. However, in the early 1950's, Chile, Ecuador and Peru, with a very narrow continental shelf off their coasts, claimed sovereignty over the waters to 200 miles, clearly encouraged by the United States Truman Proclamation of 1945 regarding the continental shelf. They argued that if the U.S. could unilaterally extend its jurisdiction for one purpose that suits its interests, others could extend jurisdiction for other purposes that suit their interests. This process of South American 200-mile claims, originally for fisheries purposes, culminated in a Brazilian 200-mile territorial sea claim.

Article 2 of the 1958 Convention on the High Seas guarantees not only the freedom of fishing but also the freedoms of navigation, overflight, and the freedom to lay and maintain submarine cables and pipelines, as well as other freedoms recognized by general principles of international law. If the United States openly violates a specified freedom of the high seas, other nations would feel free to violate other freedoms including the freedom of navigation.

More recently, the President of Mexico has sent a draft law to his parliament to establish a 200-mile economic zone off the coast of Mexico. While his basic rationale for the draft law is to ensure Mexican jurisdiction over resources off its coast, the law also asserts Mexican control over scientific research and does not exclude jurisdiction to set standards for ship construction and operation within the 200-mile zone.

While it is not clear whether the pending U.S. legislation encouraged the Mexican action, they have closely monitored U.S. actions. In any case, Mexico did expand its proposed law to cover navigation-related matters although the basic purpose is to cover fisheries.

[In considering the impact of a unilateral U.S. claim, it must be borne in mind that great maritime powers are traditionally the most reluctant to support unilateral extensions of jurisdiction over the high seas. Thus much of the rest of the World would regard any U.S. claim as a minimum, not a maximum, indication of permissible unilateral assertions of jurisdiction. Moreover, there would be a great temptation in other countries to strike while the iron is hot and blame the consequent confusion regarding navigation and other freedoms—detrimental to U.S. interests—on the domestic political pressure in their own countries created by the U.S. precedent and the domestic political need to go beyond the U.S. claim. We should keep in mind in this connection that the U.S. is the number one user of the world's oceans.]

In the law of the sea negotiations, a number of nations directly oppose our interests in protecting navigation. Some argue for restrictions and political controls in straits while others want to close territorial seas to certain types of vessels. Some of these nations may well be willing to use U.S. action on fisheries to justify their own future actions restricting navigation and scientific research. A unilateral extension of fisheries jurisdiction by the U.S. will clearly undercut our political ability to prevent those actions.

Mr. MOORE. Recent progress in protection of fish stocks off our coasts demonstrates, I believe, that there is no emergency justifying

passage of S. 961. Although the Law of the Sea Treaty is expected to provide full protection of the coastal stocks off our coast. We have been intensively negotiating bilateral and multilateral fishery agreements for the protection of those stocks, and there are now more than 22 of these fishery agreements in place.

Mr. THURMOND. Mr. President, this is a matter of great national import. This is a matter that concerns, as these gentlemen have testified, the Chairman of the Joint Chiefs of Staff of the Armed Services, the Chief of Naval Operations, the Chief of Staff of the Air Force, and the ambassador appointed by the President to the Law of the Sea Conference. There is no question in my mind that all these gentlemen have set out in their statements very vital points which I think the Senate should consider in passing upon this bill.

As I stated earlier, we all have the same goal. It is a matter of how we reach that goal. Are we going to pass a bill providing for unilateral action, or are we going to give an opportunity here for this progress to continue? I realize that it is taking longer than it should, but when you have to deal with many nations in the world, it takes a great deal of time.

As I have pointed out, we just obtained this agreement with Poland, we are getting agreements with other nations, and within a reasonable time it is hoped that we will have an agreement of the sea that will protect the fisheries of this Nation without the necessity of passing a bill providing for unilateral action to that extent.

It is not just passing this fisheries bill, but we are setting a precedent here, as was brought out in some of these statements, in which other fields may be gone into. Fields of pollution may be gone into, fields of stopping ships with nuclear weapons may be gone into, and other forms of navigation may be gone into.

Furthermore, these experts of ours—I presume they are experts; they are the best we have—the chairman of the Joint Chiefs of Staff and the Chief of Staff of the Air Force—are very concerned about overflights, because we have to pass over other nations in delivering equipment and supplies to our forces in various parts of the world, and it is essential that we be able to maintain the overflights. So we feel that, with respect to navigation and overflights, from the standpoint of national interest, it would be better for this bill not to pass.

Again I assure those espousing this bill that I can understand their concern and their desire to attain relief; but I believe relief is going to come. It may come faster than they think, and it may come in a way that will do more good in the end, rather than have the treaties already entered into abrogated. Should these treaties be abrogated, it would place us in confusion, so that we perhaps will have to start all over again, and this would disrupt our relations with many countries.

EXHIBIT 1

U.S. SENATE,
Washington, D.C., January 19, 1976.

DEAR COLLEAGUE: We are writing reference S. 961, the 200-mile limit fisheries bill, as it is our view this legislation is not only unthe coasts of the U.S., and approval by the necessary, but would do irreparable harm in several respects.

Essentially there are three issues involved: fishing interests, national security interests, and international law.

FISHING INTERESTS

1. The purpose of S. 961, to protect coastal fisheries, has largely been accomplished through bilateral and multilateral negotiations:

Since last year, fishing quotas for the Soviets, Poles, Japanese and other foreigners have been reduced 23 percent;

Since 1972, total quotas allowed foreign fishermen have been cut by 50%;

U.S. unilateral action, such as S. 961, would wipe out these valuable gains;

Gulf Coast shrimp fishermen, as well as the tuna fleet, could be seriously injured by such extensive claims. Just recently 10 U.S. shrimp boats were seized by Mexico and charged with violation of Mexico's current 12-mile territorial limit;

U.S. unilateral action would upset salmon agreements in the West Coast waters presently negotiated with Japan.

NATIONAL SECURITY INTERESTS

Past experience indicates that broad unilateral claims, such as encompassed in this bill, will cause other nations to also act unilaterally on issues important to them which may well go beyond strictly fishing interests and impact unfavorably on our national security.

Iceland has recently claimed a 200-mile fishing zone and a "cod war" has now developed between the British Navy and Iceland's Coast Guard;

Six days after House passage of a 200-mile fisheries bill, Mexico called for a 200-mile economic zone which goes beyond mere fishing rights;

Mobility in, on and over the oceans is a fundamental need for our Navy, Air Force and Merchant Fleet;

Overflight above territorial waters can be accomplished only with permission of the coastal states if territorial claims are made;

In territorial waters submarines cannot travel submerged, thus sharply restricting the ocean areas in which our missile subs could operate;

In territorial waters, even surface ships can be restricted if the coastal state considers them to be a "threat." Nine nations have in recent years made 200-mile territorial claims;

The Chairman of the Joint Chiefs of Staff, and the Chiefs of the Navy and Air Force are opposed to this legislation, because of the restrictions on military operations, anticipated enforcement problems and the resulting costs.

INTERNATIONAL LAW

S. 961 violates Freedom of Fishing Agreements, one of four basic ocean Freedom expressions in the 1958 Geneva Convention, of which the United States is a signator.

Passage will effectively abrogate numerous existing fishing agreements;

S. 961 is contrary to long-standing U.S. policy and practice of not recognizing unilateral claims of oceans' jurisdiction;

Based on present international law, the U.S. is not recognizing on the West Coast the 200-mile claims of Mexico, Ecuador, and other countries relative to our tuna fishing operations.

It is our view that if this bill passes, the United States, a country committed to a rule of law and the number one user of the world's oceans would be forced to abandon our past stand against recognition of unilateral claims.

We recommend that you carefully consider these fishing, national security and international law issues which passage of S. 961 would involve. It is our conclusion that approval of the Fisheries Bill at this time would not be in the best interests of the United States.

Attached are copies of editorials from the New York Times, the Wall Street Journal, and the Washington Post in opposition to S. 961.

Sincerely,

JOHN TOWER,
DEWEY BARTLETT,
DICK CLARK,
GALE MCGEE,
HUGH SCOTT,
ROBERT GRIFFIN,
STROM THURMOND,
BARRY GOLDWATER,
U.S. Senators.

[From the New York Times, Dec. 8, 1975]

FISH AND THE SEAS

The Senate is soon to act on a bill that would arbitrarily extend United States fisheries jurisdiction to 200 miles.

This newspaper supported a companion bill last summer, which has already been adopted by the House, because we then believed that such unilateral action offered the last hope of saving rapidly dwindling fish stocks off the coasts of the United States, particularly in the Northwest Atlantic. A recent breakthrough in multilateral efforts to curb overfishing by large foreign fleets off New England and the Middle Atlantic states radically changed that situation.

Prodded no doubt by the threat of Congressional action, seventeen nations, meeting in September at a special session of the International Commission for Northwest Atlantic Fisheries, (ICNAF) in the Montreal, approved new quotas that will drastically decrease foreign fishing while allowing some increase in the catch of American fishermen. The three largest foreign fishing operations—those of the U.S.S.R., Poland and East Germany—have been cut by mutual consent to about 50 percent of 1974 levels. Most of the productive Georges Bank area has been closed to trawlers capable of catching seriously depleted groundfish. As a result, United States fisheries experts estimate that stocks can rebuild to maximum sustainable yield levels within seven years.

Admittedly, important questions regarding enforcement remains to be ironed out at another ICNAF meeting that is scheduled to be held in Rome next month. And more needs to be done to reduce quotas of endangered species in the Northwest Pacific, where significant but still inadequate progress has been achieved through bilateral and multilateral negotiations during the past year. Nevertheless, the recent thrust has clearly been toward greater cooperation for conservation by those nations which have been the most serious offenders—the Soviet bloc countries and Japan.

Against the risk that this encouraging multilateral trend cannot be sustained must be weighed the larger threat to broader United States interests that could now arise from any unilateral American fisheries action. An arbitrary extension of a 200-mile fisheries jurisdiction would endanger the critical Law of the Sea Conference that is due to reconvene in New York next March; this will try to complete a comprehensive agreement covering not only fisheries but also such vital United States interests as free passage of vessels and aircraft through and over offshore waters and straits, deep sea mining and scientific research. With so much at stake, and with so much already achieved toward attaining the goal of fisheries conservation through multilateral action, we believe it would not at this time be in the national interest for Congress unilaterally to extend American fisheries jurisdiction.

[From the Wall Street Journal, Dec. 8, 1975]

THE 200 MILE LIMIT

The Senate Armed Services Committee recently approved a bill that will prohibit fishing by foreign fleets within 200 miles of

the coasts of the U.S., and approval by the full Senate is expected shortly. One measure of its popularity can be seen in the 2-to-1 margin by which the House passed a similar bill last month.

There is the usual mixture of political expediency and economic advantage behind the congressional enthusiasm; some arguments are on a par with those warnings a few years ago that foreign "sweat shops" were destroying the American textile industry. And there is an element of national muscle flexing in inferences that we should pass the bill and leave it to the Coast Guard, or Navy if need be, to deal with any foreign fleets foolish enough to transgress.

Congressmen who favor the bill generally seem convinced that it is necessary for protecting the U.S. fishing industry and for preventing the depletion of dwindling fish stocks. Nevertheless, there are better ways to accomplish these desirable ends.

The State Department, which is lobbying against the extension, is concerned by the fact that 15 nations already have claimed a 200-mile limit. For the U.S. to do so, it feels, would invite a stampede of other nations to follow suit. And it could lead some to claim not just fishing rights but sovereignty far out into the oceans. Mexico, for example, claimed territorial jurisdiction up to 200 miles shortly after the House passed its 200-mile bill in October.

Adm. James Holloway, Chief of Naval Operations, testified that the proposed bill might result in U.S. warships and possibly merchant ships being denied access to the Mediterranean and other important waterways.

Congress is unimpressed with assurances that the Law of the Sea Conference is almost certain soon to include a 200-mile economic zone treaty with the kinds of protection it wants. And proponents of the bills are probably right that such a treaty is more a hope than a certainty. But the most reasonable and effective safeguards, in our view, can be assured through bilateral agreements between interested nations. The State Department ignored the problem of fish depletion for much too long, but current bilateral agreements with Russia, Japan and other nations seeem adequate to protect principal fish stocks. If not, they should be renegotiated so that they do provide adequate protection.

Legal scholars are agreed that such unilateral action being planned by Congress would violate international law. And since international law has taken such a drubbing in recent years, we don't wonder that Congress does not feel any overriding urge to genuflect before it. Yet it is important for the U.S. to avoid being a party to any such violations, in part as an example to those who do mock it, but more importantly in order to keep faith with America's own values and aspirations.

[From the Washington Post, Nov. 4, 1975]

THE FISHING BILL

Some high-class testimony by Sen. Mike Gravel (D-Alaska) has provided a certain hope that a bill to unilaterally extend American fisheries jurisdiction out to 200 miles, passed in the House by a vote of 208–101, may yet be slowed in the Senate. From the viewpoint of the American interest in promoting international agreement on issues of the sea, this has always been an unfortunate bill, one that could not fail to spur similar unilateral steps by other coastal nations and to undermine the ongoing United Nations Law of the Sea Conference. But it has also been understood both by supporters and opponents that the measure would not be fought out primarily on terms of international law and the larger diplomatic interest. Rather, the bill was recognized as one embodying a deep, desperate and legitimate concern by American fishermen to prevent the continued ransacking of American coastal fisheries by the high-technology distant-water fleets of other nations, particularly Russia and Japan. Against this sort of immediate economic interest—measured in declining catches and revenues, and in rising unemployment in the industry—more abstract considerations have not stood a chance.

Precisely here lies the importance of Sen. Gravel's testimony. Using new figures that sobered even the most ardent advocates of the 200-mile bill, he argued that foreign overfishing is being reduced, and can likely be further reduced, by the enforcement of international agreements already in place and by the prompt negotiation of further agreements. The negotiations approach has the further keen advantage of not undercutting the substantial American interests in tuna and other coastal species caught within 200 miles of other nations. Past experience has given American fishermen good reason to be leery of promises of protection by diplomatic negotiation. But recent and current experience is much more solid. The threat of unilateral enactment of a 200-mile fisheries zone did in fact mobilize a previously laggard State Department and gave it the club it needed for successful fisheries negotiations with other countries. American fishermen need now to understand the degree of success they have actually attained. They cannot afford to overplay their hand.

Last year the Senate, knowing that the House would not take up the bill, voted 68 to 27 for a 200-mile zone. But the Gravel testimony, casting doubt as it does on the economic need and value to fishermen of such a zone, could if properly exploited reduce that margin and put the vote into a realm where the key factor would be whether President Ford exercised a veto. Twice Mr. Ford has said that he favors a 200-mile limit, but one achieved by negotiation. On the eve of an election year, he will be under heavy political pressure to cast a veto, despite the country's broad foreign-policy interest in avoiding the diplomatic damage of a unilaterally enacted zone. Sen. Gravel, who has a large fishing constituency of his own has shown him the way.

Mr. MAGNUSON. Mr. President, the hour is a little late, but I want the RECORD to show just one or two points. It will take only a moment.

In the first place, I say to the Senator from South Carolina that nowhere in the bill, nowhere in the hearings, nowhere in all the years we have been talking about this with the military and everyone else, does the proposed legislation affect any treaty in existence. We in this country never have advocated a treaty, with one minor exception, and we did that specifically. So that argument, is seems to me, falls flat on its face, because we are not talking about treaties in existence.

I did not hear all of the speech of the Senator from South Carolina. I left the Chamber and enjoyed the cigar he gave me today, and I congratulated him. However, the argument that was just made was one I listened to 11, 12, and 15 years ago. The military do not want anything. They opposed the 12-mile limit. As I recall, in Geneva they must have had five admirals lobbying against the 12-mile limit, that it might affect navigation.

With respect to the provisions of the bill, navigation is totally unrelated to the military interests in the ocean, but its provisions expressly disclaim any congressional intent to affect navigation rights.

Even when Mexico put into effect the 200-mile limit, they protected all navigation rights and what all countries have done with the 12-mile limit.

The bill does not create any territorial sea. It has no intention to do so and cannot be interpreted that way, and any restrictions on commercial navigation by any other countries would have to come in an agreement with these countries all working it out, not because there is some bill about fishing. Fishing has nothing at all to do with this.

I enjoy the optimism of the Senator from South Carolina about this; but if he had been at many of these Law of the Sea conferences as long as I have, he would not have that kind of optimism. However, if that miracle should come through in March—and we all are going toward the same goal, as he says—then the bill says it is inoperative. So I cannot see that this has anything to do with that. It never was intended for navigation, for air rights, or any of these things.

Does the Senator think somebody is going to stop our flying over their country because we do not allow them to fish off our shores? In most of the places he is talking about, they do not fish off our shores, anyway.

I say to the Senator from South Carolina that we did make an agreement with Poland as to hake in the North Pacific. We gave them a quota—32,000 tons. We certainly were very generous. Does the Senator know why? There are no hake left. The Russians have fished them all out. They are gone. So we made a great concession there, after they were all gone. The Poles are not going to have much hake, and we have none.

First of all, the agreement which was referred to by the Senator from South Carolina does not set any fishery jurisdiction on coastal nations. It never did. It has to do with other phases of navigation.

Again, the bill does not affect any treaty in existence, and it is not intended to do so. The Senator from Alaska and I would be the first to object if there were any indication that it did.

Mr. STEVENS. Mr. President, I move to reconsider the vote on the three amendments that were previously adopted on a voice vote and ask unanimous consent that they be reconsidered en bloc.

The PRESIDING OFFICER (Mr. GRAVEL). Is there objection? Without objection, it is so ordered.

Mr. MAGNUSON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. STEVENS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS RELATING TO S. 961

Mr. DURKIN. Mr. President, I rise today to express my enthusiastic support

of S. 961, the Magnuson Fisheries Management and Conservation Act, which would establish vital new conservation measures urgently needed to save the New England fishing industry.

Foremost among the provisions of the proposed act is the creation of a 200-mile fishery conservation zone over which the United States will exercise exclusive fishery management jurisdiction. While foreign fishermen would not be barred from the zone, they will be required to abide by the rules we establish to assure that fishing off our coasts will continue into the next century.

The measure is long overdue. Large foreign fishing fleets have robbed our coastal fishery resources. Our domestic industry has been decimated. At least 14 species of fish have been endangered. Countless jobs have been lost, and the price of fish has skyrocketed.

This act would begin to reverse that trend.

There are those who would urge that passage of this act be delayed until the conclusion of the United Nations Law of the Sea Conference. Unfortunately, an acceptable agreement has eluded such conferences for more than a decade now while foreign vessels continued to vacuum and package fish within sight of our coastal States.

If we act now, we will show the world we mean to put a stop to past encroachments, and, by our action, perhaps trigger an agreement at the United Nations conference.

If we fail to act, more jobs will be lost, entire species may soon become extinct and fish prices will continue to rise.

This legislation will not ring bells in Peoria or Topeka, Mr. President. But in Portland, Portsmouth, and Narragansett Bay, passage of this act will let our fisherman know that the United States still has the will to protect our own vital economic interests.

Mr. METCALF. I rise in support of S. 961, the Fisheries Management and Conservation Act.

I do so although Montana has neither seacoast nor a fishing industry.

During the past few days, I have been visited by well-intentioned, but misguided people who have alleged that enactment of this legislation would wreck the United Nations Law of the Sea Conference.

On the basis of my personal knowledge of this Law of the Sea Conference, at this time there is no indication that from it will emerge a treaty with which the United States can live, and which this body will ratify.

I came into the law of the sea business in 1969, when Chairman JACKSON appointed me to head a special Subcommittee on the Outer Continental Shelf.

Since then, we have held four hearings on the status of negotiations at the United Nations Law of the Sea Conference. The first was held on September 10, 1973 and published under the title "Status Report on Law of the Sea Conference." The second was held on September 17, 1974, and published as part 2 of the Status Report. The third, on June 4, 1975, was part 3. And we have just gone to press with part 4, the hearings held on October 29.

So far, the United Nations has been able to agree only on where to meet next. Now it is New York in late March.

From the deliberations at Geneva this past spring also came the "Informal Single Negotiating Test," which is a part of our hearing record of June 4. From the point of view of the United States, the kindest words I have heard about part 1 of the text is that it is an "unmitigated disaster." Part 1 deals with the regime and machinery for the seabed beyond national jurisdiction.

Part of our hearing record of October 29 is an article from the October 26 issue of the New York Times, by Mr. C. L. Sulzberger, headlined "The Path to Easy Failure."

One of the points he made is on how we stand in the world. As he put it:

> An informal estimate by American diplomats reckons that in the present U.N. Assembly about 35 members are our friends, about 35 are neutral although rather hostile, and about 70 are sworn adversaries.

With a majority of the votes against us, I do not see how we can emerge from these negotiations with a treaty with which we can live. If we do so, I note that S. 961 will cease to exist. If and when the international community can agree to protect basic fishery resources, it can take over.

ORDER INDEFINITELY POSTPONING S. 2815

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that Calendar No. 557, S. 2815, be indefinitely postponed.

The PRESIDING OFFICER. Without objection, it is so ordered.

JOINT SESSION OF THE TWO HOUSES TO HEAR AN ADDRESS BY THE PRESIDENT OF THE UNITED STATES

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Vice President of the United States, the President pro tempore, or the Acting President pro tempore, be authorized to appoint a committee of Senators on the part of the Senate to join with a like committee on the part of the House of Representatives to escort the President of the United States into the House Chamber.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER VITIATING ORDER FOR RECOGNITION OF SENATOR SYMINGTON ON TOMORROW AND FOR THE RECOGNITION OF SENATOR SYMINGTON ON WEDNESDAY

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the recognition of Mr. SYMINGTON on tomorrow be vitiated, and that he be transferred to Wednesday immediately following the recognition of the two leaders or their designees under the standing order.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR A PERIOD FOR THE TRANSACTION OF ROUTINE MORNING BUSINESS AND RESUMPTION OF CONSIDERATION OF UNFINISHED BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that on tomorrow, after Mr. JAVITS has been recognized under the order previously entered, there be a period for the transaction of routine morning business of not to exceed 30 minutes, with statements limited therein to 5 minutes each, and that the Senate, at the close of routine morning business on tomorrow, resume consideration of the unfinished business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERT C. BYRD. That is S. 961.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. ROBERT C. BYRD. Mr. President, the Senate shortly will recess until the hour of 8:20 p.m. tonight. Following the President's state of the Union message before a joint session of Congress, the Senate will stand in adjournment until the hour of 12 o'clock meridian tomorrow.

After the two leaders or their designees have been recognized under the standing order on tomorrow, Mr. JAVITS will be recognized for not to exceed 15 minutes, after which there will be a period for the transaction of routine morning business of not to exceed 30 minutes, with statements limited therein to 5 minutes each; at the conclusion of which the Senate will resume consideration of the unfinished business, S. 961, a bill to extend, pending international agreement, the fisheries management responsibility and authority of the United States over the fish in certain ocean areas in order to conserve and protect such fish from depletion, and for other purposes. Rollcall votes may occur on that bill, on amendments thereto, and motions in relation thereto, on conference reports and/or other matters.

RECESS UNTIL 8:20 P.M.

Mr. ROBERT C. BYRD. If there be no further business to come before the Senate, I move, in accordance with the order previously entered, that the Senate stand in recess until the hour of 8:20 p.m. today.

The motion was agreed to, and at 5:15 p.m., the Senate recessed until 8:20 p.m.; whereupon, the Senate reassembled when called to order by the Vice President.

SENATE CONCURRENT RESOLUTION 85—SUBMISSION OF A CONCURRENT RESOLUTION AUTHORIZING THE PRINTING OF A REPORT

(Referred to the Committee on Rules and Administration.)

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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. and STATE OF ALASKA, Intervenor-Defendant.	**REPLY BRIEF** Civil Action No.: 3:24-cv-00116-SLG LEAD CASE
UNITED COOK INLET DRIFT ASSOCIATION, et al., Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, et al., Defendants.	Case No. 3:24-cv-00154-SLG CONSOLIDATED

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I. INTRODUCTION

The statutory obligation is clear. NMFS must produce an FMP for "each *fishery* under its authority," and that FMP has "required provisions" including, *inter alia*, a duty to "assess and specify … the maximum sustainable yield ["MSY"] and optimum yield ["OY"] from, the *fishery,*" and to establish an "annual catch limit ["ACL"]" to prevent overfishing "in the *fishery*."[1] NMFS concedes that the "fishery" for purposes of setting MSY includes all Cook Inlet salmon stocks in both state and federal waters. But capriciously and contrary to statute, NMFS claims that "fishery" means only harvest in federal waters for OY, ACLs, and the scope of its FMP. NMFS fails to cogently explain how the word "fishery" as used in the directive to set MSY, OY, and ACLs means two different things.

Instead, NMFS's arguments erect and attack a strawman, *i.e.*, that Plaintiffs' "believe that via this ['fishery'] definition, Congress implicitly granted NMFS authority to wrest management authority from a State within its boundaries."[2] From this false premise, NMFS goes to great lengths to prove that states have jurisdiction to manage fishing in state waters on stocks in the fishery. UCIDA agrees. In fact, since at least March 2017, UCIDA has argued:

> To be clear, this does not mean that [NMFS] is required to take over the State's job or preempt state fishery management. Rather, it means that [NMFS], *through the FMP, has to set the standards for this fishery based on the requirements of the MSA and its 10 national standards*. Whether the State

[1] 16 U.S.C. §§ 1852(h)(1), 1853(a)(3), (14), (15) (emphases added).

[2] Dkt. 40 at 33.

> is ultimately willing to voluntarily meet those standards is a separate question, as is the potential need for preemption if the State does not meet those standards.[3]

The MSA plainly requires a NMFS-approved FMP to set standards applicable to stocks and fishing that occurs in *both* federal and state waters. UCIDA filed this case because NMFS continues its refusal to produce an FMP that satisfies those MSA requirements.

NMFS dismisses the MSA standards as "busy work."[4] To the contrary, those standards establish the metrics for determining the health of the stocks of fish covered by the FMP, how much fishing pressure (from *all* sources) those stocks can sustain, whether those stocks are overfished, and how to rebuild overfished stocks.[5] Done properly, an FMP establishes these metrics for the management of each stock of fish as a unit. The FMP's standards are implemented by NMFS for fishing on the stock that occurs in federal waters and by a state for fishing that occurs in state waters. But without FMP standards that apply to anadromous fish stocks' migratory ranges, there can be no management of those stocks as a unit. This is precisely why, as detailed below, the FMP for West Coast salmon stocks (in contrast to the FMP at issue here) establishes all required MSA standards for each of those stocks *as a whole* even though the fishing for those stocks is subject to federal management in federal waters and state management in state waters.

Ultimately, NMFS's jurisdictional rhetoric is a smokescreen. The fact that Alaska

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[3] NMFS02559.

[4] *See* Dkt. 40 at 27.

[5] *See* Dkt. 37 at 20 (UCIDA opening brief describing requirements for FMP).

has jurisdiction to manage state water harvest of Cook Inlet salmon stocks has no bearing on NMFS's statutory obligation to produce an FMP containing *all* required standards for those stocks. NMFS first shirked that duty by refusing to issue *any* FMP for Cook Inlet salmon stocks. The Ninth Circuit ruled that unlawful.[6] NMFS next shirked that duty by closing fishing in the EEZ altogether. This Court found that unlawful.[7] Now, for the third time, NMFS has shirked that duty by contorting the "fishery" definition in a manner that is contrary to the MSA, NMFS's own record in this case, and its practice in other fisheries (such as the West Coast salmon FMP). Amendment 16 is unlawful, and the Court should vacate NMFS's decision.

II. ARGUMENT

A. NMFS's failure to create an FMP for the "fishery" violates the MSA.

NMFS admits that, in Amendment 16, it "defined the 'fishery' as *all salmon fishing* in the Cook Inlet EEZ Area."[8] NMFS defends this position with two arguments. First, NMFS contends it was jurisdictionally prohibited from defining the "fishery" to include areas in state waters. Second, because of its perceived jurisdictional limits, NMFS claims the salmon "stocks" at issue must be limited to the EEZ. Neither argument has merit.

1. Defendants' jurisdictional arguments are contrary to the MSA.

The MSA requires an FMP to address "any fishing" for the stocks covered by the

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[6] *UCIDA 1*, 837 F.3d 1055, 1057 (9th Cir. 2016).

[7] *UCIDA 2*, No. 3:21-CV-00247-JMK, 2022 WL 2222879, at *6 (D. Alaska June 21, 2022).

[8] Dkt. 40 at 34 (emphases added); *see also* FR00039 ("the fishery is properly defined as all harvest of co-occurring salmon stocks in the Cook Inlet EEZ").

FMP.[9] Nothing about this obligation requires NMFS to exceed its jurisdictional authority and manage fishing in state waters. Even though Congress expected that NMFS and the states would collaborate under FMPs that addressed federal and state waters,[10] states have primary authority under the MSA to manage fishing occurring within their territorial waters.[11] This is the rule, but Congress also created an exception in section 306(b):

> **(b) Exception — (1)** If the Secretary finds, after notice and an opportunity for a hearing . . ., that--
>
> > **(A)** the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the exclusive economic zone and beyond such zone; and
> >
> > **(B)** any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;
>
> the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.[12]

This provision shows that Congress anticipated that some fishing in "a fishery, which is covered by [an FMP]" may occur outside federal waters and provided a process for

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[9] *See* 16 U.S.C. § 1852(h)(1) (FMP requirement), § 1802(13)(B) ("fishery" definition).

[10] *See* H.R. Rep. No. 94-445 at 73 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 641 ("The Committee is most hopeful that appropriate action will be taken by the States to cooperate with the Secretary so that Federal assertion of jurisdiction in such instances will not be necessary.").

[11] 16 U.S.C. § 1856(a)(1) ("Except as provided in subsection (b), nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.").

[12] 16 U.S.C. § 1856(b).

addressing state actions that "substantially and adversely affect the carrying out of such [FMP]."

Indeed, numerous cases confirm the non-controversial fact that a state has authority to manage fishing in its territorial waters under normal circumstances, even in a manner contrary to an FMP—to a point.[13] The possibility that a state may act contrary to an FMP is one reason it is critical for an FMP to describe the "[m]anagement activities and habitat programs of adjacent states and their effects on the FMP's objectives and management measures" and, "[w]here state action is necessary to implement measures within state waters to achieve FMP objectives," "identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations."[14]

The manner in which an FMP must address state and federal waters for anadromous fish stocks is best illustrated by the Pacific Fishery Management Council's Salmon FMP ("West Coast FMP").[15] In that FMP, NMFS defined the "fishery" to include anadromous

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[13] *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 176 (D.D.C. 2014) ("It also bears noting that states manage their own waters, and do not always conform to federal rules . . . . State regulations thus may affect the federal management scheme."); *Fishing Rts. All., Inc. v. Pritzker*, 247 F. Supp. 3d 1268, 1273–74 (M.D. Fla. 2017) ("[T]he federal season length reduction has been counteracted by non-conforming state regulations."); *Coastal Conservation Ass'n v. U.S. Dep't of Com.*, 846 F.3d 99, 104 (5th Cir. 2017) ("While the Gulf Council has shortened the fishing season in federal waters, the Gulf states have responded by loosening restrictions in state waters.").

[14] 50 C.F.R. § 600.320(e)(3).

[15] Even NMFS points to this as an example of an FMP that "covers salmon stocks caught in the EEZ off the coasts of Washington, Oregon, and California." FR00037. The West Coast FMP is available on the Pacific Fishery Management Council's website: Salmon

stocks throughout their range.[16] The scope of that FMP covers "the coastwide aggregate of natural and hatchery salmon species that is contacted by salmon fisheries in the [EEZ] off the coasts of Washington, Oregon, and California."[17] NMFS in the West Coast FMP set OY for the whole "fishery," which it defined as:

> The optimum yield to be achieved for species covered by this plan is the total salmon catch and mortality (expressed in numbers of fish) resulting from fisheries within the EEZ adjacent to the States of Washington, Oregon, and California, *and in the waters of those states (including internal waters), and Idaho*, that, to the greatest practical extent within pertinent legal constraints, fulfill the plan's conservation and harvest objectives.[18]

Moreover, the West Coast FMP establishes status determination criteria, conservation objectives, and other conservation and management measures for the stocks *throughout their range*, by appropriately accounting for "any fishing for such stocks."[19] In sharp

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fishery management plan and amendments, Fishery Management Plan (2024), https://www.pcouncil.org/fishery-management-plan-and-amendments-3/, or directly at this link: Pacific Coast Salmon Fishery Management Plan (Feb. 2024), https://www.pcouncil.org/documents/2022/12/pacific-coast-salmon-fmp.pdf/; *see also Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (explaining that it is appropriate to take judicial notice of information made publicly available by government entities on their websites).

[16] *See* West Coast FMP at Table 1-1, pp. 7–13 ("Stocks and Complexes in the Fishery").

[17] *Id.* at 5.

[18] *See id.* § 2.2, p. 13 (emphasis added).

[19] *See id.* at pp. 15–20 (status determination criteria that take into account all fishing on the stocks); Table 3-1, pp. 21–27 (conservation objectives for the "stocks in the fishery"); *id.* at pp. 28–41 (harvest controls for any fishing on such stocks).

contrast, Amendment 16 cabins these definitions, criteria, and measures to EEZ harvest only.[20]

Additionally, the West Coast FMP establishes harvest measures without distinction for EEZ and state territorial waters.[21] It explains that "[t]he Council assumes these ocean harvest controls also apply to territorial seas or any other areas in state waters specifically designated in the annual regulations."[22] The West Coast FMP contemplates in-season adjustments to quotas for "[a]ny catch that take place in fisheries within territorial waters that are inconsistent with federal regulations in the EEZ."[23] It also explains that "[c]losures will be coordinated with the states so that the effective time will be the same for EEZ and state waters."[24] In short, in the West Coast FMP, NMFS appropriately defined the "fishery," established conservation and management measures for the "fishery," and recognized that adjacent states maintain default authority over their territorial waters (subject to section 306(b)).

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[20] *See* NMFS02089 (stocks defined as only EEZ harvest of each stock); NMFS02091 (status determination criteria for stocks as defined); NMFS02088–89 (OY for just EEZ harvest); FR00045 ("OFL and ABC are specified for each stock or stock complex," defined at NMFS02089 as only EEZ harvest).

[21] *See* West Coast FMP at pp. 62–63.

[22] *See id.*

[23] *See id.* at p. 66; *see also* 50 C.F.R. § 660.408(j) ("Quotas (by species, including fish caught 0–3 nm seaward of Washington, Oregon, and California).").

[24] West Coast FMP at p. 79.

The case law cited by NMFS does not support its position. For example, in *Oregon Trollers Ass'n v. Gutierrez*,[25] the Ninth Circuit explained that "'the 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.'"[26] "By defining the Klamath Management Zone to reach from Humbug Mountain, Oregon, to Horse Mountain, California, the [West Coast FMP] takes into account the migration pattern of the Klamath chinook from the Klamath River to the ocean, and their growth to maturity off the coasts of Oregon and California."[27] It further explained that "[s]almon fisheries throughout this range, off the coasts of both states, are managed in the same manner to ensure that 35,000 natural spawning Klamath chinook escape."[28]

Additionally, NMFS claims that "[t]he Ninth Circuit and the district courts have regularly recognized the jurisdictional limits of the [MSA]."[29] But the cases cited by NMFS just confirm the non-controversial default federal-state division of jurisdictional authority established by the MSA.[30] For instance, NMFS quotes the Ninth Circuit's background statement of law, in *Parravano v. Babbit*, that the MSA "delegated to the Secretary of

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[25] Dkt. 40 at 34 (citing *Oregon Trollers*, No. CIV. 05-6165-TC, 2005 WL 2211084, at *9 (D. Or. Sept. 8, 2005), *aff'd*, 452 F.3d 1104 (9th Cir. 2006)).

[26] 452 F.3d at 1121 (brackets omitted) (quoting 50 C.F.R. § 600.320(b)).

[27] *Id.*

[28] *Id.*

[29] Dkt. 40 at 30.

[30] *See id.* (collecting cases); *see also* Dkt. 41 at 20, n.50 (collecting similar cases).

Commerce the authority to set harvest levels in ocean fisheries located between three and two hundred nautical miles offshore."[31] The court was generally describing the MSA, not analyzing the scope of an FMP or a "fishery."[32] Even so, this case is also about the Klamath chinook stock. *Oregon Trollers* and the West Coast FMP[33] consider that stock throughout its range. The very same background section of *Parravano* explained that the MSA charged Councils with recommending "*salmon 'escapement' levels*"[34] (which occur in state waters) and are plainly conservation and management measures for the "fishery."[35]

NMFS also cites two 40-year-old district court cases—*Washington Trollers Ass'n* from 1979 (which NMFS fails to mention was overruled by the Ninth Circuit in 1981)[36] and *Pacific Coast Federation of Fishermen's Ass'n* from 1980 (which quoted and relied on *Washington Trollers* before it was overruled).[37] Those cases are not good law, but even if they were, they are not applicable here. They are about whether NMFS included an adequate "description of the fishery" under 16 U.S.C. § 1853(a)(2) in one of its very first FMPs for West Coast salmon (which went into effect on an emergency basis) after the

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[31] 70 F.3d 539, 542 (9th Cir. 1995).

[32] *See id.*

[33] *See* West Coast FMP at 7 (including Klamath chinook stocks in FMP), 21 (setting conservation objectives for all fishing of Klamath chinook).

[34] *Parravano*, 70 F.3d at 542–43 (emphasis added).

[35] *See id.* at 543 n.2 ("'Escapement' literally refers to the number of salmon that are allowed to 'escape' harvest and to spawn.").

[36] *See Wash. Trollers Ass'n v. Kreps*, 645 F.2d 684 (9th Cir. 1981).

[37] *See* Dkt. 40 at 30; *id.* at 38–39.

passage of the MSA.[38] These courts held that NMFS's description was not unreasonable under § 1853(a)(2) merely because it did not include a description of the "inland"[39] fisheries.[40] A more relevant authority is the West Coast FMP, which *does* include stocks throughout their range and fishing occurring in inland waters of the states (and even landlocked Idaho) when setting OY for the entire "fishery" as required by the statute.[41]

Finally, NMFS points to the *UCIDA 1* court's statement that "[n]o one disputes that the exempted area of Cook Inlet is a salmon fishery" as support for cabining the Cook Inlet salmon fishery to the EEZ.[42] But *UCIDA 1* addressed whether NMFS could entirely exempt the EEZ from its FMP,[43] and the court simply acknowledged that no party disputes the existence of a salmon fishery in the Cook Inlet EEZ. The Ninth Circuit did not apply the MSA's definition of "fishery" to the stocks of fish in Cook Inlet, nor could it on the record before it because NMFS had not produced *any* FMP.

In sum, the MSA requires an FMP for stocks occurring in both state and federal waters to set standards and metrics for "any fishing for such stocks." That is precisely what

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[38] *See Wash. Trollers Ass'n v. Kreps*, 466 F. Supp. 309, 313 (W.D. Wash. 1979); *Pac. Coast Fed'n of Fishermen's Ass'n v. Sec'y of Com.*, 494 F. Supp. 626, 627 (N.D. Cal. 1980).

[39] NMFS is never permitted to preempt state management of inland or internal waters. *See* 16 U.S.C. § 1856(b)(1) ("other than its internal waters").

[40] *See supra* note 38.

[41] *See supra* note 18 and accompanying text.

[42] *See* Dkt. 40 at 37 (citing 837 F.3d at 1064).

[43] *See UCIDA 1*, 837 F.3d at 1057.

NMFS did for the salmon stocks covered by the West Coast FMP. NMFS's jurisdictional arguments are inapt and should be rejected.

2. NMFS's cramped application of the "stock of fish" definition is arbitrary and contrary to the MSA.

NMFS must "identify in [its] FMPs the stocks that require conservation and management."[44] The Cook Inlet salmon stocks "are anadromous, beginning their lives in Alaskan freshwater, migrating to the ocean, and returning to freshwater to spawn."[45] Years ago, NMFS determined that these stocks require conservation and management, and that remains true today.[46] And yet NMFS has stubbornly refused to produce an FMP that actually sets conservation and management measures for these stocks. After first "shirk[ing]" that duty by not developing an FMP at all[47] and then trying (unsuccessfully) to close the EEZ portion of the fishery,[48] NMFS now attempts to avoid its obligation by—for the first time ever—defining the Cook Inlet salmon stocks to be only those fish "harvested in the Cook Inlet EEZ Area."[49] NMFS justifies this new approach, saying that

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[44] 50 C.F.R. § 600.310(d)(1); *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54–55 (D.D.C. 2012) ("Defendants' responsibilities therefore include ensuring compliance with Section 1852(h)'s requirement that the Council prepare an FMP or amendment for any stock of fish that 'requires conservation and management.'" (citation omitted)).

[45] *UCIDA 1*, 837 F.3d at 1057.

[46] *Id.* at 1062 ("The government concedes that Cook Inlet is a fishery under its authority that requires conservation and management."); *see* FR00008.

[47] *UCIDA 1*, 837 F.3d at 1063.

[48] *UCIDA 2*, 2022 WL 2222879, at *8.

[49] NMFS02089; Dkt. 40 at 34–35.

Cook Inlet salmon in the EEZ are merely "biologically related to the stocks in the State-managed fishery."[50] But there are no "biologically related" EEZ fish and state fish. Cook Inlet salmon passing through the EEZ are the *same fish* that migrate into state waters.

Indeed, prior to the Final Rule, there was never a debate about what constitutes the stocks of salmon in Cook Inlet that require conservation and management. For example, "the 2021 Salmon FMP [] states that '[t]he Cook Inlet salmon fishery includes the stocks of salmon harvested by all sectors within State and federal waters of Cook Inlet.'"[51] As recently as the Proposed Rule, NMFS acknowledged that "the jurisdictional issues in Cook Inlet are challenging because salmon are harvested in both State and Federal waters *but originate from the same stocks* that spawn entirely in State freshwaters."[52] It was only in the Final Rule where NMFS, for the first time, declared the existence of new Cook Inlet

[50] Dkt. 40 at 35.

[51] *UCIDA 2*, 2022 WL 2222879, at *8 (citation omitted).

[52] FR00004 (emphasis added). The Proposed Rule consistently refers to Cook Inlet salmon stocks as occurring in both federal and state waters. *See* FR00005 ("Participants were universally concerned about the health of Cook Inlet salmon stocks."); FR00007 ("harvest of all Cook Inlet stocks also occurs in State marine and fresh waters"); FR00009 (describing how stocks mix together and move up Cook Inlet and "into State waters to reach their spawning streams"); FR000010 (discussing fishing "for all Cook Inlet sockeye salmon and coho stocks"); FR000015 ("Given the significant degree of interaction among salmon fisheries in Cook Inlet, management of salmon stocks as a unit or in close coordination throughout all Cook Inlet salmon fisheries is particularly important.").

salmon "stocks" consisting only of the fish harvested in the EEZ.[53] This change is unlawful many times over.

First, NMFS changed its position on this critical issue without any acknowledgment or analysis. Such a change only "complies with the APA if the agency (1) displays 'awareness that it is changing position,' (2) shows that 'the new policy is permissible under the statute,' (3) 'believes' the new policy is better, and (4) provides 'good reasons' for the new policy, which, if the 'new policy rests upon factual findings that contradict those which underlay its prior policy,' must include 'a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.'"[54] NMFS satisfied none of these requirements.

Second, NMFS's new definition is not supported by the record. For example, the Final Environmental Assessment ("FEA") analyzed the full Cook Inlet salmon stocks, not just salmon harvested in the EEZ.[55] The FEA explains that a closure in the Cook Inlet EEZ

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[53] *Compare* SPEC01222 (paragraph under "*New draft FMP language for the Cook Inlet EEZ*") *with* NMFS02223 (bullets under "*New draft FMP language for Cook Inlet EEZ*"); *see* FR00036; *see also* NMFS02089–90.

[54] *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)).

[55] NMFS02114 ("The EA provides the best available information on the status of the salmon stocks in Cook Inlet"); *id*. ("Assessment is done at the stock or stock complex level and takes into consideration total catch of salmon from all fisheries."); NMFS02229 ("Because salmon are exploited in multiple fisheries, and because multiple salmon stocks may be exploited within the Federal waters of Cook Inlet, it is necessary to determine fishery specific contribution to the total exploitation rate to determine the actions necessary to end and prevent future overfishing."); NMFS02286 ("However, even with conservative management, because harvests in the EEZ (and State waters) occur before spawning

salmon fishery may occur for a given fishing year if "[o]pening the Cook Inlet EEZ salmon fishery would likely result in overfishing for one or more stocks."[56] But it is logically impossible to determine whether a stock is overfished if that stock is defined as only harvested fish (in which case 100% of the stock is harvested every year if EEZ fishing occurs).[57] Even more absurdly, a closure of the Cook Inlet EEZ salmon fishery in a given year would mean that *no fish were harvested in the EEZ*, which, in turn, would mean that the stock (defined as *harvested* fish) would never have existed for that year.

Moreover, nowhere in the entire FEA section titled "Alaska Salmon Stocks" is there any mention of stocks limited to just the fish harvested in the EEZ.[58] That section concludes by stating that "compensatory fishery effort would be expected in State waters during years when EEZ harvests were reduced, *such that any reductions in the harvest of Cook Inlet salmon stocks and subsequent changes in escapement are not expected to be significant*. Therefore, the impacts of [Amendment 16] *on salmon stocks* are not likely to be significant."[59] But this explanation makes no sense if the "stock" is defined as only fish harvested in the EEZ, in which case EEZ-harvested fish never become part of the state water stocks. By definition, harvested EEZ fish cannot reduce the harvest in separately

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escapements are fully assessed, it is still possible that these harvests could result in the spawning escapement goals not being achieved for some stocks during some years[.]").

[56] NMFS02230.

[57] *See, e.g.*, 50 C.F.R. § 600.310(j) (requiring NMFS to address overfishing and rebuilding for stocks).

[58] *See* NMFS02261–63; NMFS02285–88.

[59] NMFS02288 (emphases added); *see also* NMFS02488.

designated state water stocks. The FEA only makes sense if Cook Inlet salmon stocks consist of fish throughout their migratory range (as the FEA intended).

The FMP also analyzes Cook Inlet salmon stocks as a whole. It explains that "NMFS and the Council will work with the State to coordinate management of State and Federal salmon fisheries harvesting *the same stocks* to the extent practicable to avoid overfishing and minimize disruption to all Cook Inlet salmon harvesters."[60] The FMP further explains that "[f]or salmon stocks harvested in the Cook Inlet EEZ Area, MSY is defined at the stock or stock complex level."[61] NMFS states that "this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet."[62] This directly contradicts NMFS's position that salmon harvested in the EEZ are a separate "stock." The FMP also states that "[t]he stock assessment section of the SAFE contains available information for each salmon stock."[63] And each salmon stock in the SAFE is defined as the stock throughout its range, rather than the portion harvested in the EEZ.[64] There are even statements in the Final Rule that contradict NMFS's new definition.[65] In sum, nothing in the record supports NMFS's last-minute change to the Cook Inlet "stock" definition.

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[60] NMFS02087 (emphasis added).

[61] NMFS02088.

[62] *Id*.

[63] NMFS02090.

[64] SPEC00124–25.

[65] *See, e.g.*, FR00037 ("total harvest of Cook Inlet salmon stocks will continue to occur predominately within State waters"); FR00039 (for "salmon stocks harvested in the Cook Inlet EEZ Area, MSY is defined at the stock or stock complex level"); FR00046 ("Over

Third, NMFS's new definition cannot be reconciled with the MSA or NMFS's own guidelines. Under the MSA, a "fishery" consists of both (1) "one or more stocks of fish" and (2) "any fishing for such stocks."[66] But if NMFS can define a "stock" solely based on the fishing for that stock (*i.e.*, all Cook Inlet salmon harvested in the EEZ), then "any fishing for such stocks" has no meaning or purpose.[67] Moreover, if NMFS defines a stock as only the *harvested fish* in an area, then the MSA's definition of "migratory range" also has no meaning because, for that stock, there is no "maximum area at a given time of the year within which fish of [the] anadromous species or stock . . . can be expected to be found."[68] By NMFS's definition, such fish are only part of the "stock" at the time they are harvested (*i.e.*, netted and pulled out of the water) and therefore have *no* migratory range. To compound the absurdity, those fish that swim through the EEZ but are *not* harvested never become part of the EEZ "stock." The MSA's National Standard 3 is similarly devoid of meaning under NMFS's definition because if NMFS can carve an anadromous stock

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time, NMFS will work to expand the scientific information available to manage Cook Inlet salmon stocks."); FR00049 ("NMFS agrees that it is prudent for conservation of Cook Inlet salmon stocks to reduce the number of commercial fishery openings in the Cook Inlet EEZ Area."); FR00061–62 ("NMFS will manage salmon fishing in the Cook Inlet EEZ Area using the best available science to achieve OY and prevent overfishing on all Cook Inlet salmon stocks").

[66] 16 U.S.C. § 1802(13).

[67] *See* Dkt. 40 at 36 ("In interpreting statutes, courts should observe the 'cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

[68] 16 U.S.C. § 1802(29).

into separate parts based on when and where they are harvested, then those fish cannot be "managed as a unit."[69]

Nor do NMFS's own guidelines provide any support for NMFS's "geographical grouping" rationale.[70] Those guidelines explain that "[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries."[71] In other words, a *jurisdictional* grouping cannot substitute for a *geographic* grouping because those terms mean distinctly different things.[72] In any event, NMFS's "stock" definition is not even really geographic because it is not solely dependent on whether a given fish occupies the EEZ but rather on whether it is *harvested* in the EEZ. In sum, NMFS's last-minute change to the definitions of the Cook Inlet salmon stocks is arbitrary and capricious, contrary to the record, and contrary to the MSA.

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[69] 16 U.S.C. § 1851(a)(3) ("[A]n individual stock of fish shall be managed as a unit throughout its range."); *see also* FR00015 (explaining the importance of managing *Cook Inlet salmon stocks* as a unit throughout their range).

[70] *See* Dkt. 40 at 35; *see also* NMFS02062 (map of the EEZ area).

[71] 50 C.F.R. § 600.320(b).

[72] *See Oregon Trollers*, 452 F.3d at 1120–21 (discussing the vital importance of preventing "jurisdictional differences" from adversely affecting conservation practices when "fish live in the waters of more than one jurisdiction" and explaining that geographic scope of FMP should include stocks throughout their range).

B. NMFS failed to set OY for the "fishery," opting instead to defer to the State.

NMFS acknowledges that OY must be set at the "fishery level," but Amendment 16 did not do so.[73] NMFS defined MSY at the "stock or stock complex" level without subdividing "between State and EEZ waters in Cook Inlet."[74] Then, NMFS claimed "OY is defined at the fishery level," but it only defined it *for the harvest on the stocks in the EEZ*.[75] A "fishery" *is broader* not *narrower* than a "stock or stock complex." This is plain from the definition of a "fishery,"[76] from NMFS's guidelines,[77] and from the West Coast FMP.[78] NMFS failed to set OY for the "fishery" in violation of 16 U.S.C. § 1853(a)(3).[79]

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[73] *See* Dkt. 40 at 41–42; FR00030 ("Amendment 16 defines the OY range for the Cook Inlet EEZ salmon fishery in the Salmon FMP as the range between the averages of the three lowest years . . . and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021.").

[74] NMFS02088.

[75] NMFS02088–89.

[76] *See* 16 U.S.C. § 1802(13)(A) ("one or more stocks of fish which can be treated as a unit").

[77] *See* 50 C.F.R. § 600.305(c) (explaining how to group stocks together into a fishery); *id.* § 600.310(d)–(e)(3) (discussing the stocks of stock complexes that comprise a fishery and how OY may be set at the "stock, stock complex, or fishery level"); *id.* § 600.320(b) (explaining that the geographic scope of a fishery should cover the entire range of "stock(s) of fish").

[78] *See* West Coast FMP § 2.1, p. 13 (defining OY at the fishery level).

[79] Even NMFS previously agreed that "[MSY], [OY], acceptable biological catch, status determination criteria . . ., and annual catch limits . . . [must be set] without regard to Federal and State boundaries." NMFS02551–52 And that "[o]nce established, these reference points will guide the Council and NMFS in their management (either direct or delegated) of the commercial salmon fishery occurring within the Cook Inlet EEZ Area." NMFS02553.

Similarly, by setting OY only for harvest in the EEZ, NMFS's OY metric was not prescribed "on the basis of the maximum sustainable yield from the fishery" as required.[80] Since MSY was set at the stock or stock complex level,[81] NMFS could either define the yield that was optimum for each stock, or for each stock complex, or for the entire fishery.[82] Because NMFS chose to set OY for the "fishery," it needed to define the "long-term average amount of desired yield from" all the stocks in the fishery as a whole.[83] It is only once this overarching metric is set on the basis of MSY[84] that NMFS can establish the acceptable biological catch and ACLs for the fishery.[85] NMFS's guidelines plainly explain how to set ACLs for state-federal fisheries,[86] directing that NMFS should set an ACL "for the overall stock that may be further subdivided" for example, "into a Federal-ACL and

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[80] *See* 16 U.S.C. § 1802(33). NMFS does not meaningfully respond to this point. *See* Dkt. 40 at 44–45.

[81] NMFS02088.

[82] 50 C.F.R. § 600.310(e)(3) ("OY may be established at the stock, stock complex, or fishery level."); *id.* § 600.310(e)(3)(ii) ("OY is a long-term average amount of desired yield from a stock, stock complex, or fishery.").

[83] *See* West Coast FMP § 2.2, p. 13 (example of defining OY at the fishery level).

[84] *See* 50 C.F.R. § 600.310(e)(1) (illustrating how MSY is a building block of OY).

[85] *See id.* § 600.310(f).

[86] *See id*. § 600.310(f)(4)(iii).

state-ACL."[87] Here, NMFS set OY just for federal harvest[88] and an ACL only for federal waters.[89] NMFS thus violates its own guidelines.

By setting OY in this way (focused exclusively on EEZ harvest), NMFS abdicated any role in ensuring that "optimum yield from each fishery for the United States fishing industry" is achieved as required by National Standard 1.[90] Without an overall management target for the "fishery," like that found in the West Coast FMP,[91] NMFS's focus is limited to EEZ harvest. In this way, NMFS conveniently defined all harvest (or waste) that occurs on the same stocks in state waters as outside of what it must account for in meeting National Standard 1. NMFS readily admits this in the Final Rule, explaining that "[t]o avoid relying on the State to achieve any Federal management targets under amendment 16, NMFS has established OY for the Cook Inlet EEZ fishery and developed a harvest specifications process that will achieve that OY on a continuing basis while preventing overfishing of any of the salmon stocks of varying abundance that co-occur in the EEZ."[92] NMFS has no visibility into (or responsibility for) whether National Standard 1 is met for the "fishery"

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[87] *Id.*

[88] NMFS02089.

[89] FR00059 ("implementing a federally-managed fishery in the EEZ that includes all Magnuson-Stevens Act requirements—including ACLs").

[90] 16 U.S.C. § 1851(a)(1); *see also* NMFS00673–75 (UCIDA comments on OY metric).

[91] *See* West Coast FMP § 2.2, p. 13.

[92] FR00040.

as a whole because it avoided setting that target.[93] As explained in UCIDA's opening brief, this is improper deferral to the state, again.[94]

C. Amendment 16 violates the National Standards.

1. The best available science does not support NMFS's stock definitions.

Plaintiffs explained that in Amendment 16 NMFS disregarded the recommendation of its SAFE Team when defining the stocks by focusing on just the portion of the stocks harvested in the EEZ, even though the SAFE Team recommended defining the stocks to correspond to the state's definitions.[95] NMFS disagrees that there is a conflict, claiming that the SAFE Team's stock definitions "do not include State water harvest."[96] But the SAFE Team report explains "[t]he definitions of salmon stocks considered in this SAFE *align with*, or are aggregations of, the stock definitions used by the State. . . . Assumptions of the analyses within this SAFE include: *that Federal stock definitions align with the State's definitions for Kenai River Late Run sockeye, Kasilof River sockeye, and Kenai River Late Run Large Chinook salmon*" and so on.[97] NMFS cannot seriously contend that

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[93] NMFS asserts that UCIDA's complaint is about State-gathered data. *See* Dkt. 40 at 45. Not so. UCIDA's complaint is regarding the metrics NMFS set, and did not set, using that data.

[94] Dkt. 37 at 26–27. NMFS's other arguments regarding underharvest, *see* Dkt. 40 at 43, are not supported by the record—*see* Dkt. 37 at 28, n.121; FR00040; SPEC00184; SPEC00192; FR00054—and are irrelevant to how to properly set OY.

[95] Dkt. 37 at 30.

[96] Dkt. 40 at 47–48.

[97] SPEC00125 (emphases added).

the state stock definitions focus exclusively on EEZ harvest and omit any state harvest.[98]

2. Amendment 16 violates National Standard 3 by *preventing* stocks of salmon in Cook Inlet from being managed in the same manner throughout their geographical ranges.

The Ninth Circuit has explained that "'[t]he purpose of [National Standard 3] is to induce a comprehensive approach to fishery management' that is not jeopardized when fish live in the waters of more than one jurisdiction."[99] "To further this goal, '[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.'"[100] It explained that "[w]hen a stock of fish is managed in the same manner throughout its geographical range, National Standard No. 3 is satisfied."[101] In applying this standard to multi-jurisdictional fishing on the Klamath chinook stock, the Ninth Circuit determined that "[s]almon fisheries throughout this range, off the coasts of both states, are managed in the same manner to ensure that 35,000 natural spawning Klamath chinook escape."[102] The court concluded these measures were consistent with National Standard 3.

The comparison to Amendment 16 is stark. The geographical scope of Amendment 16 is intentionally limited to "all salmon fishing in the Cook Inlet EEZ

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[98] *See* NMFS02223; NMFS02089–90.

[99] *Oregon Trollers*, 452 F.3d at 1120 (quoting 50 C.F.R. § 600.320(b)).

[100] *Id.* at 1121.

[101] *Id.*

[102] *Id.*

Area."[103] And rather than view stocks throughout their range, Amendment 16 focuses just on harvest in the EEZ.[104] NMFS trumpets that it has "avoid[ed] relying on the State to achieve any Federal management targets under amendment 16,"[105] but by stubbornly focusing on just the EEZ, NMFS has deprived the "fishery" of a "'national or regional perspective'"[106] and effectively ensured that the stocks of salmon in Cook Inlet will not be managed as a unit throughout their range.[107] This violates National Standard 3.

3. Amendment 16 does not promote safety of human life at sea.

Plaintiffs did not waive the argument that Amendment 16 wrongfully prohibits fishing in federal and state waters on the same day as this issue was raised repeatedly in UCIDA's comment letters.[108] There are multiple problems that flow from this prohibition, including dangers to fishermen that the Council's own AP identified.[109] There is no waiver when, as here, the asserted claims address the agency's obligation to comply with a

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[103] Dkt. 40 at 34.

[104] *See* Dkt. 40 at 48; NMFS02223; NMFS02089–90.

[105] FR00040.

[106] *See Oregon Trollers*, 452 F.3d at 1121 (citation omitted).

[107] *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 749 (D.C. Cir. 2000) (The MSA "was enacted to establish a federal-regional partnership to manage fishery resources.").

[108] *See* NMFS00682–83; NMFS01627–29; *see also Glacier Fish Co. v. Pritzker*, 832 F.3d 1113, 1120 n.6 (9th Cir. 2016) (explaining that courts "generally do not invoke the waiver rule so long as an issue was raised 'with sufficient clarity,'" "'considered sua sponte by the agency,'" or "'raised by someone other than the petitioning party'" (citations omitted)).

[109] COUN00711.

statutory mandate.[110] National Standard 10 requires NMFS to do more than point generally to VMS and claim that it will offset a danger NMFS failed to meaningfully consider.[111] Conservation and management measures should *affirmatively promote the safety of human life at sea*. Any purported marginal improvement to "search and rescue efforts" from VMS is severely counteracted by management measures that will result in *more situations* where fishermen must be rescued.

D. Plaintiffs have standing to challenge Amendment 16.

After 15 years of constant litigation, NMFS half-heartedly argues that Plaintiffs lack standing to bring this case because (in NMFS's cynical view) a lawfully compliant FMP would be "advisory" only, and the state could choose to disregard the FMP.[112] This argument is baseless. A lawfully compliant FMP for the entire fishery is not so toothless, and the state can only disregard an FMP at the peril of preemption.[113] Moreover, Plaintiffs' declarations identified numerous harms caused by Amendment 16 that will be remedied or lessened if the amendment is vacated and if NMFS is ordered to comply with the MSA and

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[110] *See, e.g.*, *Fairweather Fish, Inc. v. Pritzker*, 155 F. Supp. 3d 1136, 1141-42 (W.D. Wash. 2016) (waiver inapplicable to claims that NMFS failed to comply with the National Standards).

[111] *See* Dkt. 40 at 50–52.

[112] Dkt. 40 at 46–47.

[113] 16 U.S.C. § 1856(b). Plaintiffs have never conceded that NMFS "does not have management jurisdiction over State waters." Dkt. 40 at 47. NMFS has exclusive jurisdiction in the EEZ and concurrent jurisdiction in adjoining state waters subject to the preemption provisions of the MSA.

produce an FMP for the "fishery."[114] These harms include that Amendment 16's fragmented management regime will cause long-term harms to the sustainability of the fishery.[115] They also include harms flowing from NMFS's continued deferral to the state in violation of the MSA and prior court orders, and from the fact that NMFS "has cemented the last two decades of state management into federal law"[116] even though "the commercial harvest of salmon from the Cook Inlet has decreased significantly over the past two decades" under state management.[117] These harms would be lessened by the vacatur of Amendment 16 and replacement with a lawful FMP for the "fishery,"[118] which would "'induce a comprehensive approach to fishery management'" in Cook Inlet.[119] Nothing more is required for standing.

E. Amendment 16 must be vacated and replaced with a lawful FMP.

Vacatur is the required, default remedy under the APA.[120] "The Ninth Circuit has explained that a court should 'order remand without vacatur only in limited circumstances,'

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[114] *See* Dkt. 37-1 at 4–7; Dkt. 37-2 at 6–10; *see also Matsumoto v. Labrador*, 122 F.4th 787, 797 (9th Cir. 2024) (articulating the test for standing).

[115] Dkt. 37-1 at 5 ("Amendment 16 enforces an unnatural jurisdictional line as a fishing boundary."); Dkt. 37-2 at 8 ("CIFF filed the above-captioned lawsuit to prevent the immediate and long-term harm that will occur if Amendment 16 is allowed to remain in place").

[116] *See* Dkt. 37-2 at 8.

[117] *UCIDA 2*, 2022 WL 2222879 at *3.

[118] *See* Dkt. 37-1 at 5–7; Dkt. 37-2 at 9.

[119] *Oregon Trollers*, 452 F.3d at 1120 (quoting 50 C.F.R. § 600.320(b)).

[120] *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 443 F. Supp. 3d 995, 1022 (D. Alaska 2020).

and 'leave an invalid rule in place only when equity demands.'"[121] NMFS makes no showing that "equity demands" leaving the rule in place during remand. Instead, its primary argument is that vacatur would be wildly disruptive to *participants* in commercial salmon fishing in the Cook Inlet EEZ.[122] *Plaintiffs represent these participants*, who submitted comment letters and declarations detailing how NMFS's management measures have made fishing in Cook Inlet as difficult and economically unviable as possible.[123] NMFS's other justification—that vacatur would be disruptive to NMFS because its "nascent management infrastructure would be struck down . . . and need to be reconstructed"—is similarly unavailing.[124] Courts have concluded that equity requires remand without vacatur when vacatur would lead to air pollution[125] or risk potential extinction of a species.[126] Equity does not support departing from the default rule to "hold unlawful and set aside" agency action based on any perceived inconvenience to NMFS of being required to prepare a lawful FMP amendment.

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[121] *Id.* (quoting *Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015)).

[122] Dkt. 40 at 53.

[123] NMFS01677–78; NMFS00681–85; Dkt. 37-1 at 4–6; Dkt. 37-2 at 6–9.

[124] Dkt. 40 at 53.

[125] *Cal. Cmtys. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012).

[126] *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

"[T]he determination of the 'fishery' is the lynchpin to a proper FMP."[127] NMFS's entire FMP amendment is based on a legally erroneous definition of "fishery."[128] Similarly, NMFS failed to set any conservation and management targets for the "fishery." Vacatur is especially appropriate here where the very core of NMFS's FMP is erroneous. NMFS suggests that "the nuts and bolts of the fishery management structure" can be left in place, but this makes no sense. The entire purpose of the "nuts and bolts" is to achieve overarching goals that remain unset. Vacatur is the appropriate remedy.

Lastly, NMFS does not meaningfully address the relief beyond vacatur that UCIDA requests. As explained in its opening brief, that relief is particularly necessary here.

III. CONCLUSION

Plaintiffs respectfully request an order granting the relief requested in Section IV.D of their opening brief. Amendment 16 must be vacated and replaced with a lawful FMP.

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[127] Dkt. 37 at 20; *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 457 (5th Cir. 2020), as revised (Aug. 4, 2020) ("The concept of a 'fishery' is central to the Act[.]").

[128] *Oregon v. Ashcroft*, 368 F.3d 1118, 1129 (9th Cir. 2004) ("We 'must, of course, set aside [agency] decisions which rest on an erroneous legal foundation.'") (quoting *NLRB v. Brown*, 380 U.S. 278, 291–92 (1965)), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006)).

DATED this 24th day of January 2025.

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This brief contains 7,377 words.

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2025, 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. Participants in this Case No. 3:24-cv-00116-SLG, who are registered CM/ECF users, will be served by the CM/ECF system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, *et al.* *Plaintiffs,* v. NATIONAL MARINE FISHERIES SERVICE, *et al.* *Defendants*, STATE OF ALASKA *Intervenor-Defendant.*	Case Nos. 3:24-cv-116-SLG (lead); 3:24-cv-154-SLG **FEDERAL RESPONDENTS' MOTION TO STRIKE OR IN THE ALTERNATIVE FOR LEAVE TO FILE A SURREPLY**

Federal Respondents move under Federal Rule of Civil Procedure 12(f) to strike the new arguments and facts advanced by Plaintiffs in their reply brief. Plaintiffs Reply Brief, ECF No. 46 ("Pls.' Reply Br."). For the reasons discussed below, the Court should strike pages 2-3, 5-11,

and 18-20 or, in the alternative, allow Federal Respondents leave to file a surreply.

ARGUMENT

In its reply brief, for the first time, Plaintiffs cite to new evidence—the Pacific Fishery Management Council's Pacific Coast Salmon Fishery Management Plan ("Pacific Coast Salmon FMP"). This was improper for three independent reasons, each of which is sufficient to grant this motion.

I. Plaintiffs Cannot Introduce New Evidence in Their Reply Brief.

"As a general rule, a movant may not raise new facts or arguments in his reply brief." *Bodo v. Angasan*, No. 3:23-CV-00035-SLG, 2023 WL 5350679, at *2 (D. Alaska Aug. 21, 2023) (quotation omitted). "It cannot seriously be disputed that a movant is obligated to file with a motion the evidentiary materials necessary to justify the relief it seeks." *Mercado v. Sandoval, Inc.*, No. 2:08-CV-02648-GEB-EF, 2009 WL 2031715, at *1 (E.D. Cal. July 9, 2009) (quotation omitted). And, "[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond." *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (quotation omitted); *Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1188 (9th Cir. 2024).

Despite this clear instruction, Plaintiffs have introduced new evidence in their reply brief. They rely on a fishery management plan that is not part of the administrative record and was not cited in their opening brief. This is not a passing reference. Plaintiffs cite this plan over a dozen times as an "authority" that dictates how the National Marine Fishery Service ("NMFS") should have structured the fishery in this case. *See, e.g.*, Pls.' Reply at 10; *see also id*. at 2-3, 5-11, 18-20. The Pacific Salmon FMP is not an "authority," in the sense of a case or regulation. Instead, it is offered by Plaintiffs as evidence of the supposed "correct" way to draft a fishery management plan. It was improper for Plaintiffs to introduce it in their reply and Court should strike the pages that rely on this evidence. Depriving Federal Defendants of a meaningful opportunity to respond is prejudicial and does not assist the Court. Plaintiffs seriously and

materially misrepresent the contents of the Pacific Coast Salmon FMP and misrepresent its applicability to the Cook Inlet Area, which is operating under very different factual and legal circumstances.

II. Plaintiffs' New Evidence is Inadmissible.

Not only is Plaintiffs' new evidence improper, they also have provided no reason as to why this evidence should be considered in this record-review case. In keeping with their overall approach to this litigation, Plaintiffs do not say why they believe this new evidence is admissible, but instead make vague gestures towards two possibilities, neither of which has merit. First, they assert that "[e]ven NMFS points to this as an example of an FMP that 'covers salmon stocks caught in the EEZ off the coasts of Washington, Oregon, and California.'" Pls.' Reply at 5 n.15. To the extent that this is an argument that the Pacific Coast Salmon FMP should have been included in the administrative record because it was briefly mentioned in the Final Rule, Plaintiffs missed their opportunity to raise this argument. This district's local rules provide that supplementation of the administrative record must be done by a motion filed not more than 21 days after the agency record is filed. L.Civ.R. 16.3(b)(2). Plaintiffs would have been required to overcome the presumption of regularity afforded the agency and would have been required to provide some sort of explanation as to why the document was improperly excluded from the record. *See California v. U.S. Dep't of Homeland Sec.*, 612 F. Supp. 3d 875, 882 (N.D. Cal. 2020). Plaintiffs have not even tried to meet the relevant standards.

Second, Plaintiffs provide a "see also" citation to *Daniels-Hall v. National Education Association*, 629 F.3d 992, 998 (9th Cir. 2010), for the proposition that courts can take judicial notice of information on government websites. Once again, if Plaintiffs had wanted the Court to take judicial notice, it was required to file a "separate motion." L.Civ.R. 7.3(d). In that motion, Plaintiffs would have had the burden to demonstrate why this document met the requirements for judicial notice outlined in Federal Rule of Evidence 201 and why it should be relied on in this record review case. Plaintiffs have again not even tried to meet the relevant standards. Parties cannot simply cite to new evidence without providing grounds for its admission and the pages

should be struck for this reason as well.

III. Plaintiffs Administratively Waived Their Opportunity to Present this Evidence.

Plaintiffs' attempts to deprive Federal Defendants of a reasonable opportunity to explain the contents of the Pacific Coast Salmon FMP are exacerbated by yet another fatal error: Plaintiffs failed to raise this issue in any of the administrative processes or rulemakings and arguments related to this document, therefore waived their right to raise them now. *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 487–88 (9th Cir. 2023). If, as Plaintiffs argue, the Pacific Coast Salmon FMP was the model that Amendment 16 should have followed, they had an obligation to raise this argument with the agency. Plaintiffs filed at least five comment letters totaling thousands of pages and dozens of exhibits. NMFS00033-185; NMFS00662-1918; COUN00762-881; COUN01617-1739; SPEC000266-1732. Yet nowhere in these voluminous comments do Plaintiffs mention the Pacific Coast Salmon FMP. This failure deprived the agency of a reasonable opportunity to consider Plaintiffs' evidence and explain their rationale for why this model may or may not work in the Cook Inlet EEZ Area. This is yet another reason that Plaintiffs' new evidence should be stricken from their reply brief.

IV. In the Alternative, NMFS should be Granted Leave to File a Surreply.

If, despite all these failings, the Court declines to strike Plaintiffs' new evidence, Federal Defendants respectfully request leave to file a surreply, a proposed copy of which is attached as Exhibit 1. While Federal Defendants appreciate that the Court has scheduled oral argument in this matter, they submit that oral argument would not be a sufficient opportunity to respond to this type of evidence. Plaintiffs rely on and quote extensively from the Pacific Coast Salmon FMP. Pls.' Reply at 2-3, 5-11, 18-20. Each one of these statements misrepresents the Pacific Coast Salmon FMP and its applicability to the facts of this fishery. A written surreply is the best way to explain these issues.

Dated: February 7, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2025, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, *et al.* *Plaintiffs,* v. NATIONAL MARINE FISHERIES SERVICE, *et al.* *Defendants*, STATE OF ALASKA *Intervenor-Defendant.*	Case Nos. 3:24-cv-116-SLG (lead); 3:24-cv-154-SLG **FEDERAL RESPONDENTS' PROPOSED SURREPLY BRIEF**

In its reply brief, Plaintiffs, for the first time, introduce into evidence the Pacific Coast Salmon Fishery Management Plan ("Pacific Coast Salmon FMP"). Plaintiffs' Reply Brief, ECF No. 46 at 2 ("Pls.' Reply Br."). This surreply brief explains the Pacific Coast Salmon FMP and

its relevance (or lack of relevance) to the Amendment 16 to the Alaska Salmon FMP.

ARGUMENT

Plaintiffs seriously misrepresent the contents of the Pacific Coast Salmon FMP and its usefulness as a model for establishing a federal fishery in the Cook Inlet Exclusive Economic Zone ("EEZ") Area under Amendment 16 to the Alaska Salmon FMP. On its face, the Pacific Coast Salmon FMP is clear that it only manages "salmon fisheries in the [EEZ] (three to 200 miles offshore) off Washington, Oregon, and California[.]" Pacific Coast Salmon FMP (Feb. 2024) at 9, https://www.pcouncil.org/documents/2022/12/pacific-coast-salmon-fmp.pdf (last visited Feb. 6, 2024) (hereafter "PCSFMP"). It "covers the coastwide aggregate of natural and hatchery salmon species that is contacted by salmon fisheries in the [EEZ] off the coasts[1] of Washington, Oregon, and California." *Id*. at 13.

There are important differences between how the two plans function. First, for the Pacific Coast Salmon FMP, most of the stocks in the fishery are managed under the Pacific Salmon Treaty, the Endangered Species Act ("ESA"), or are classified as "hatchery stocks." *Id.* at 37. Accordingly, of the 50 stocks or stock complexes "in the fishery," (*see id*. at 15-20) only three (Klamath River fall Chinook, Sacramento River Fall Chinook, and Willapa Bay natural coho) are subject to the Magnuson Act's requirement to establish annual catch limits. *Id*. at 40. Unlike the Magnuson Act, both the ESA and the Pacific Salmon Treaty set standards that must be met by both the state and the federal government.[2] The comparison that Plaintiffs try to make between the Pacific Coast Salmon FMP and Amendment 16 is simply not apt because the legal backdrop is so different.

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[1] The boundaries of the States extend three miles offshore, and "off the coast" means the area seaward of that State boundary.

[2] The Pacific Salmon Treaty establishes fishing regimes that must be implemented by the parties. PCSFMP at 36-37; NMFS01989 (explaining the Pacific Salmon Treaty). Should a state take an action that might prevent the United States from meeting its treaty obligations, the Pacific Salmon Treaty Act of 1985 provides for federal preemption that (unlike the Magnuson Act) would apply to inland waters and does not require a 5 U.S.C. § 554 hearing. *Compare* 16 U.S.C. § 3635 *with id.* § 1856(b).

Second, the National Marine Fisheries Service ("NMFS") has a long and successful practice of managing federal and state waters fisheries collaboratively with Washington, Oregon, and California, with agreement from the States to take conforming measures. This type of cooperation has not been offered by the State of Alaska. *See, e.g.*, EM05319; NMFS02664.

Plaintiffs point to a table in the Pacific Coast Salmon FMP that lists stocks and complexes "in the fishery" as evidence that the definition of "fishery" in the Pacific Coast Salmon FMP defined "'fishery' to include anadromous stocks throughout their range." Pls.' Reply Br. at 5-6. But the table is just a list of stocks, not a definition of "fishery." PCSFMP at 15-20. In actuality, the Pacific Coast Salmon FMP acknowledges that these stocks are caught in many different fisheries. For example, when discussing overfishing, the Pacific Coast Salmon FMP explains:

> Because salmon are exploited in multiple fisheries, it is necessary to determine fishery specific contribution to the total exploitation rate to determine the actions necessary to end and prevent future overfishing. As the Council has no jurisdiction over river fisheries and ocean fisheries north of the U.S./Canada border, it also may be necessary for other responsible entities to take action to end ongoing and prevent future overfishing.

Id. at 24. Thus, the Council is focused on actions "to ensure Council area fisheries are not contributing to overfishing". *Id*. This is also consistent with the FMP's acknowledgement that many of the stocks in the fishery are caught in Canadian and Alaskan fisheries, but the Pacific Coast Salmon FMP contains no description of those fisheries or conservation and management measures for those fisheries. *See id*. at 15-20 (listing stocks, many of which make "[s]ignificant contributions to Alaska and Canada ocean fisheries"). This is further evidence that, as Federal Defendants explained in their response brief, the Magnuson Act's definition of "fishery" is very flexible and provides the agency with significant discretion to use a definition that meets the needs of a specific factual scenario. ECF No. 40 at 34.

Plaintiffs next argue that Amendment 16 should have used a definition of optimum yield that is similar to the definition used in the Pacific Coast Salmon FMP. Pls.' Reply Br. at 6. That definition sets optimum yield as the total harvest in state and federal waters. PCSFMP at 21. Plaintiffs argue that this definition accounts for "any fishing" for the stocks in the fishery. Pls.' Reply Br. at 6. But this is not true. As explained above, many of the stocks in the fishery are also caught in Alaska and Canada and this definition of optimum yield does not include that fishing. Thus, although the Pacific Coast Salmon FMP defines optimum yield differently than Amendment 16, it most definitely does draw a jurisdictional boundary and does not include catch throughout the stocks' range. Further, this definition of optimum yield almost exactly mirrors the definition of optimum yield proposed by NMFS in Amendment 14 to the Alaska Salmon FMP, which this court found arbitrary and capricious to the extent it relied on the State of Alaska to achieve optimum yield.[3]

Finally, it is not true that the Pacific Coast Salmon FMP "establishes harvest measures without distinction for EEZ and state territorial waters." Pls.' Reply Br. at 7. Plaintiffs have already conceded that NMFS lacks authority to "establish" management measures in state waters. *Id.* at 1. It is true that the Council "assumes" that consistent

[3] When setting optimum yield for Amendment 14, NMFS used a nearly identical definition of optimum yield: "optimum yield for the Cook Inlet salmon fishery is the level of catch from all salmon fisheries occurring within the Cook Inlet (State and Federal water catch)." *UCIDA v. NMFS*, No. 3:21-CV-00247-JMK, 2022 WL 2222879, at *10 (D. Alaska June 21, 2022). At Plaintiffs' urging the court determined this definition was unlawful because "hinging federal management targets on the changing landscape of state decisions is an improper delegation of management authority to the State." *Id*. Accordingly, NMFS crafted a definition of optimum yield for Amendment 16 that was independent of state management decisions. It seems likely that if NMFS had adopted a definition of optimum yield that was identical to the one in the Pacific Coast Salmon FMP, Plaintiffs would now be arguing that it violated the judgment in the Amendment 14 litigation.

conservation and management measures will be enacted in state waters, but that is a function of the longstanding cooperation and coordination between NMFS and the west coast states. It says nothing about the definition of "fishery" or the legal requirements for the contents of an FMP. Instead, it is consistent with Senator Steven's vision that Councils would adopt rules that are "consistent with what the State is actually doing within the 3-mile limit." ECF No. 40 at 32.

It is certainly possible and consistent with the Magnuson Act for an FMP to acknowledge substantial integration between state waters fisheries and federal fisheries targeting the same stocks. However, such integration requires the consent of both sovereigns, which is not present here. NMFS established the Cook Inlet EEZ Area fisheries in the context of limited willingness from the State of Alaska to facilitate and coordinate with the federal fishery and it therefore necessarily operates differently than the Pacific Coast Salmon FMP. For these reasons, it was reasonable for Amendment 16 to be different from the Pacific Coast Salmon FMP and the Court should reject Plaintiffs' arguments that NMFS should have followed that model in this case.

Dated: February 7, 2025

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, *et al.* *Plaintiffs,* v. NATIONAL MARINE FISHERIES SERVICE, *et al.* *Defendants*, STATE OF ALASKA *Intervenor-Defendant.*	Case Nos. 3:24-cv-116-SLG (lead); 3:24-cv-154-SLG

[PROPOSED] ORDER GRANTING FEDERAL DEFENDANTS' MOTION TO STRIKE

For good cause shown, Federal Defendants' motion to strike pages 2-3, 5-11, and 18-20 from Plaintiffs' reply brief (ECF No. 46) is GRANTED.

DATED this ____ day of _____ 2025 in Anchorage, Alaska.

_____
Honorable Sharon L. Gleason
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, *et al.* *Plaintiffs,* v. NATIONAL MARINE FISHERIES SERVICE, *et al.* *Defendants*, STATE OF ALASKA *Intervenor-Defendant.*	Case Nos. 3:24-cv-116-SLG (lead); 3:24-cv-154-SLG

[PROPOSED] ORDER GRANTING FEDERAL DEFENDANTS' MOTION TO FILE A SURREPLY

For good cause shown, Federal Defendants' motion to file a surreply to Plaintiffs' reply brief (ECF No. 46) is GRANTED.

DATED this ____ day of _____ 2025 in Anchorage, Alaska.

_____
Honorable Sharon L. Gleason
United States District Judge