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

HERBERT T. JENSEN)

Plaintiff,)

vs.)

CARLOS GUTIERREZ: In His Official)
Capacity as Secretary of Commerce;)

JAMES BALSIGER: In His Official Capacity)
as Assistant Administrator of NOAA Fisheries;)

ERIC OLSON: In His Official Capacity as)
Chair of the North Pacific Fisheries)
Management Council; and,)

DENBY S. LLOYD: In His Official Capacity as)
Commissioner of the Alaska Department of Fish)
and Game.)

Defendants.)

Case No.

**COMPLAINT FOR
DECLARATORY RELIEF**

**(U.S. CONST. ART I, SEC. 8,
CL. 3; 16 U.S.C. § 1801 ET
SEQ.; 5 U.S.C. §553; 42 U.S.C.
§4332(2)(c))**

_____)

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I. NATURE OF THE CASE

1. Plaintiff seeks a declaration that the conservation and management of Pacific salmon in Alaska must comply with the ten national standards and other provisions of the Magnuson-Stevens Fisheries Conservation and Management Act as Reauthorized in 2006. 16 U.S.C. §1801 *et seq.* Plaintiff further seeks a declaration that the promulgation of regulations applicable to the conservation and management of salmon must meet the provisions of the Administrative Procedure Act. 5 U.S.C. §553. Plaintiff seeks a declaration that certain regulations promulgated by the State of Alaska on behalf of the Secretary of Commerce are preempted by applicable federal law. Plaintiff seeks a declaration that regulations promulgated by the State of Alaska on behalf of the Secretary of Commerce are procedurally deficient under 5 U.S.C. §706(2)(A),(B),(C), & (D). Plaintiff requests that the court retain jurisdiction over this case until such time as all applicable orders of the court are met.

II. JURISDICTION AND VENUE

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

III. PLAINTIFF

3. Plaintiff Herbert T. Jensen is a fourth generation Alaskan, whose grandchildren live in Alaska. Mr. Jensen lives in Cordova, Alaska, a commercial fishing community heavily dependent upon the salmon fisheries of the Copper River and Prince William Sound. Mr. Jensen participates in the Copper River and Prince William Sound

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commercial salmon fisheries as a limited entry permit holder in both the salmon drift gillnet and the salmon purse seine fisheries. Mr. Jensen derives the majority of his income salmon purse seine fishing in Prince William Sound. Mr. Jensen relies heavily on the early drift gillnet fishery in the Copper River district, of which a portion occurs in the exclusive economic zone of the United States, for his drift gillnet income.

4. Mr. Jensen is suffering a legal wrong and been adversely affected and aggrieved by actions of the Secretary of Commerce, National Marine Fisheries Service, North Pacific Fisheries Management Council, and the State of Alaska under 5 U.S.C. §702 and therefore asserts standing to bring this action.

5. Mr. Jensen opposed proposed regulations which were promulgated by the State of Alaska on December 8, 2008, on behalf of the Secretary of Commerce and the North Pacific Fisheries Management Council, and also asserts standing to bring this action under the 30 day provision of the Magnuson-Stevens Act, 16 U.S.C. §1855(f).

IV. DEFENDANTS

6. Mr. Carlos Gutierrez is the Secretary Commerce and is vested with the responsibility for implementing and enforcing the Magnuson-Stevens Act under 16 U.S.C. §1855(d). Mr. Gutierrez, as Secretary of Commerce is responsible for reviewing and approving or disapproving regulations concerning anadromous species promulgated by the State of Alaska, National Marine Fisheries Service, and the North Pacific Fisheries Management Council. He is being sued in his official capacity.

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7. Dr. James Balsiger is the Acting Assistant Administrator of Fisheries; he oversees conservation and management of marine fisheries for the National Marine Fisheries Service on behalf of the Secretary of Commerce. He is being sued in his official capacity.

8. Mr. Eric Olson is the Chairman of the North Pacific Fisheries Management Council. The North Pacific Fisheries Management Council is specifically delegated authority for salmon management in the exclusive economic zone of the United States under the Magnuson-Stevens Act. Mr. Olson is being sued in his official capacity.

9. Denby S. Lloyd is the Commissioner of the Alaska Department of Fish and Game. He is responsible for managing anadromous salmon species in Alaska in accordance with applicable laws. He is also delegated authority to manage salmon in the exclusive economic zone of the United States on behalf of the Secretary of Commerce, through the North Pacific Fisheries Management Council, thereby acting as an agent of the United States. He is being sued in his official capacity.

V. BACKGROUND

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

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

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

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

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

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

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

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

16 U.S.C. §1851(a).

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

12. The North Pacific Fishery Management Council (Council) retains jurisdiction over anadromous species in the exclusive economic zone (EEZ) from 3-200 miles off the coast of Alaska. The Council delegated management authority to the State of Alaska in the EEZ through the 1990 Fishery Management Plan for Salmon in the EEZ off the Coast of Alaska (FMP). The FMP for salmon does not include three historic net fisheries which still occur in the EEZ west of Cape Suckling in the Gulf of Alaska. The Copper River commercial salmon drift gillnet fishery occurs in the EEZ west of Cape Suckling and is one of the fisheries not included in the FMP.

13. The State of Alaska manages anadromous species in state waters under the Statehood Act, which provided that management of fish and game resources would

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transfer to the state once “adequate provision for the administration, management, and conservation of said resources in the broad national interest” were in place. Alaska Statehood Act, Public Law 85-508, 72 Stat. 339, July 7, 1958.

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

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

16. The State of Alaska failed to adhere to the ten national standards of the Magnuson-Stevens Act regarding salmon management in the EEZ and state waters. The Secretary, NMFS, and the Council abandoned their oversight duties, and failed to disapprove regulations promulgated by the State of Alaska that are violative of the Magnuson-Stevens Act. These failures have harmed, and continue to harm, Plaintiff in a manner that threatens the economic viability of his commercial fishing enterprise and salmon resources in Alaska. Plaintiff seeks a declaration that the State of Alaska must follow the Magnuson-Stevens Act to conserve and manage salmon resources in the state,

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and to find preempted, those regulations violative of the Magnuson-Stevens Act. Plaintiff further seeks a declaration that regulations promulgated on behalf of the Secretary of Commerce must meet the procedural requirements of the Administrative Procedure Act as mandated under the Magnuson-Stevens Act.

First Claim
Alaska Salmon Regulations are Facially Discriminatory
And Violative of National Standard 4

17. Paragraphs 1 through 16 are realleged and incorporated by reference herein.

18. The State of Alaska impermissibly discriminates against non-residents and burdens interstate commerce through regulations establishing personal use salmon harvests to Alaska residents. The resident-only personal use harvests substantially and adversely affect commercial salmon fishing in both state waters and the EEZ. The Magnuson-Stevens Act prohibits discrimination between residents of different states. 16 U.S.C. §1851(a)(4). However, the State of Alaska prosecutes salmon fisheries which are open only to Alaska residents. 5 A.A.C. §77.540. Personal use harvests of sockeye salmon on the Copper River alone exceed 100,000 salmon annually. The 2006 Copper River personal use harvest was 103,859 sockeye salmon, or 593,035 lbs, which would

have been worth \$1.115 million to the commercial drift gillnet fleet, or \$2,257.00 per active permit holder.¹

19. Plaintiff fishes commercially for Copper River sockeye salmon in both the EEZ and state waters. The personal use harvest of salmon by Alaska residents results in actual economic harm to Plaintiff by reducing the number of salmon available in the commercial harvest. The resident-only personal use fishery is facially discriminatory and violative of Magnuson-Stevens national standard number four. Personal use salmon harvests also violate national standard number 8, which mandates that conservation and management measures shall take into account the importance of fishery resources to the communities dependent upon them, to promote the sustained participation of those communities in commercial fisheries, and to minimize adverse economic consequences on those communities.

20. Defendants failed to account for the importance of the Copper River sockeye salmon fishery to the commercial fishing community which depends upon them. Defendants failed to minimize the adverse economic effects of the resident-only personal use fishery, thereby threatening the sustained participation of that community. Plaintiff is a member of the commercial fishing community dependent upon the Copper River sockeye salmon harvests, and is further harmed by Defendants' failure to disapprove the State of Alaska personal use fishery regulations.

¹ Information extracted from Botz, J. *et al*, *Fishery Management Report No. 08-30, 2006 Prince William Sound Area Finfish Management Report* available online at <http://www.sf.adfg.state.ak.us/FedAidPDFs/fmr08-30.pdf> last visited 11/18/2008.

21. The Secretary, NMFS and the Council breached their duty to provide regulatory oversight of the State of Alaska under the Magnuson-Stevens Act, by failing to disapprove of the resident-only personal use regulations which violate national standards four and eight, thereby causing harm to Plaintiff's economic enterprise and jeopardizing the sustained participation of the commercial fishing community dependent upon the Copper River sockeye salmon.

22. The court should declare the Alaska resident-only personal use salmon regulations violative of the Magnuson-Stevens Act and find 5 A.A.C. §77.540 and related regulations preempted by federal law, and accordingly set them aside.

Second Claim

Alaska Regulations Do Not Meet Optimum Sustained Yield in Violation of National Standard 1

23. Paragraphs 1 through 22 are realleged and incorporated by reference herein.

24. Escapement goals set by the State of Alaska do not meet optimum sustained yield. Failure to manage for optimum sustained yield results in lost yield to the salmon fisheries, thereby causing harm to Plaintiff and others in the commercial salmon fishing community. Failure to manage for optimum sustained yield is not in the National interest and is contrary to Congressional intent.

25. Magnuson-Stevens national standard number one provides that conservation and management measures shall achieve, on a continuing basis, optimum

yield from each fishery. 16 U.S.C. §1851(a)(1). In the salmon fishery, optimum yield means “that amount of any species of salmon that will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities...” 50 C.F.R. §679.2.

26. The State of Alaska through Statewide Salmon Escapement Goals, 5 A.A.C. § 39.223, manages for biological escapement goals, sustainable escapement goals, and sustained escapement thresholds for salmon. The State of Alaska manages on the sustained yield principle, rather than that of optimum sustained yield mandated by the Magnuson-Stevens Act.

27. Sustained yield management directly conflicts with the Magnuson-Stevens Act, and this court should order the State of Alaska to manage salmon based optimum sustained yield and to set escapement goals accordingly. Alternatively, the court should order the Secretary, or his federal delegate, to set optimum escapement goals and order the State of Alaska to manage for the optimum escapement goals set by the proper federal authority.

Third Claim
Alaska Regulations Allocate Salmon Solely on Economics and Violate National Standard 5

28. Paragraphs 1 through 27 are realleged and incorporated by reference herein.

29. The State of Alaska allocates salmon resources between competing commercial fisheries based solely on economics. This economic allocation harms Plaintiff's commercial fishing interest by reducing time and area available for Plaintiff to utilize seine gear, thereby threatening the economic viability of Plaintiff's major capital investment in his seine vessel and gear. Allocation based solely on economics is violative of the Magnuson-Stevens Act. 16 U.S.C. §1851(a)(5).

30. Magnuson-Stevens national standard five states that conservation and management measures shall "consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." 16 U.S.C. §1851(a)(5). The State of Alaska allocates salmon resources in Prince William Sound between seine and drift gillnet fisheries based on economics. Alaska regulations affecting time and area for seine and drift gillnet salmon fisheries is determined by calculations which "shall be based on the ex-vessel value of the harvest of enhanced salmon stocks by the drift gillnet and purse seine fisheries." 5 A.A.C. §24.370(b).

31. Regulations promulgated by the State of Alaska under 5 A.A.C. §24.370 which allocate salmon resources between seine and drift gillnet fisheries are based solely upon economics in violation of the Magnuson-Stevens Act. This economic allocation harms Plaintiff's economic investment in the seine fishery. Plaintiff respectfully requests that the court specifically find the economic allocations under 5 A.A.C. §24.370 violative of national standard five and set aside the regulation as preempted by federal law.

Fourth Claim
Alaska Regulations Are Promulgated in Violation of the Administrative Procedure Act and the Magnuson-Stevens Act

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

33. Regulations promulgated by the State of Alaska have substantially and adversely affected commercial fisheries in both state waters and the EEZ. The regulations promulgated by the State of Alaska, under authority of the Secretary, are promulgated in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 553, for lack of notice and comment, as well as, lack of a record for judicial review.

34. The Administrative Procedure Act requires agencies provide notice and comment prior to rulemaking. Timely notice must be published in the Federal Register of proposed rules and final rules, to provide all interested parties the opportunity to comment on the proposed rule on the record, and to provide notice of final rules for the purposes of compliance and enforcement. 5 U.S.C. §553. The Secretary must promulgate rules necessary to carry out his duties under the Magnuson-Stevens Act, including conservation and management of anadromous species throughout their range, in accordance with §553 of the APA. 16 U.S.C. § 1855(d).

35. Judicial review of regulations promulgated under the Magnuson-Stevens Act may be reviewed only if “ a petition for such review is filed within 30 days after the

date on which the regulations were promulgated or the action is published in the Federal Register...” 16 U.S.C. §627(f)(1).

36. The reviewing court “shall only set aside any such regulation or action on a ground specified in section 706(2)(A),(B),(C), or (D) of [Title 5].” 16 U.S.C.

§627(f)(B). Regulations adopted by the Secretary under the Magnuson-Stevens Act may only be set aside if they are:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right;
- (D) without observance of procedure required by law

5 U.S.C. §706(2)(A),(B),(C),(D).

37. If the Secretary fails to disapprove of regulations promulgated by the State of Alaska, they are considered approved by the Secretary. *Ramsey v. Kantor*, 96 F.3d 434, 445 (9th Cir. 1996). Ultimately, federal control and responsibility is vested in the Secretary of Commerce for salmon regulations promulgated by the State of Alaska. 16 U.S.C. §627(d). The Secretary of Commerce must “review the harvest plans prepared by the State of Alaska in accordance with his obligations under the Magnuson Act.” 96 F.3d at 445. If the Secretary fails to disapprove regulations promulgated by the State, they become law. *Id.*

38. Commercial salmon fishing regulations are promulgated by the State of Alaska through an ad hoc committee process, with no official record for judicial review.

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The regulations promulgated by the State of Alaska are not published in the Federal Register. This failure harms Plaintiff because actions taken by the State of Alaska evade judicial review for failure to publish in the Federal Register, as well as, failure on the part of the State of Alaska to provide an official record of the committee process to determine whether the regulations should be set aside under 5 U.S.C. §706(2)(A)(B)(C) or (D). This denies Plaintiff his due process rights regarding rulemaking approved by the Secretary that affects Plaintiff's commercial fishing operation.

39. The court should find the regulations promulgated by the State of Alaska on behalf of the Secretary of Commerce procedurally deficient under both the APA and the Magnuson-Stevens Act, and accordingly set them aside under 5 U.S.C. §706(2)(D).

Fifth claim
Alaska Salmon Regulations Violate National Standards 2 and 8

40. Paragraphs 1 through 39 are realleged and incorporated by reference herein.

41. The Magnuson-Stevens Act mandates, under national standard number two, that the conservation and management of anadromous species "shall be based upon the best scientific information available." 16 U.S.C. §1851(a)(2). This necessarily incorporates national standard number eight, which requires the Secretary to consider the economic impacts to the commercial fishing communities of the regulations promulgated, and to minimize the adverse economic impacts, if any, on those communities. 16 U.S.C. §1851(a)(8).

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42. The ad hoc committee process utilized by the State of Alaska fails to utilize the best available science when promulgating commercial salmon fishing regulations. Economic impacts to the commercial fishing community are not considered. There are no mitigation measures implemented to reduce the adverse economic impacts of regulations which adversely affect commercial salmon fishing communities. The outcome of the ad hoc committee process is based upon "the best available politics" rather than the best available science as required by the Magnuson-Stevens Act. *Midwater Trawlers Co-op. v. Dep't of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002).

43. Failure to utilize the best available science results in regulations based upon political compromise, and therefore harms Plaintiff because fishing time and area is reduced for Plaintiff based upon politics rather than conservation. Limited Entry into fisheries incidentally limits political power of those participants. The Magnuson-Stevens Act foresaw potential adverse affects to the politically limited commercial fishing communities, and mandates use of the best available science in the promulgation of regulations affecting those communities. Additionally, Congress ordered measures to minimize those regulations harmful to the economic interests of those commercial fishing communities. Plaintiff is further harmed by the failure of the Secretary to minimize economic harm to protect Plaintiff's commercial fishing community from adverse regulations promulgated by the State of Alaska related to anadromous species.

44. Plaintiff requests the court order the Secretary to review regulations promulgated by the State of Alaska for compliance with national standard number two

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and eight; and to further order the Secretary to preempt noncompliant state regulations and to promulgate emergency regulations that conserve and manage anadromous species in state waters, and the EEZ, that are based upon the best available science, and mitigate adverse economic impacts to the Plaintiff's commercial fishing community.

PRAYER FOR RELIEF

Therefore, Plaintiff respectfully requests that the Court:

1. Declare that management of anadromous species in Alaska must meet the Magnuson-Stevens Act and the ten national standards incorporated therein.
2. Order the Secretary of Commerce to show cause why he has failed to fulfill his duties to conserve and manage anadromous species throughout their range, including Alaska state waters.
3. Order the North Pacific Fishery Management Council to review State of Alaska salmon regulations which affect salmon fisheries in the EEZ, and to amend the Fishery Management Plan for salmon to include the historic net fisheries in the EEZ west of Cape Suckling.
4. Enter an order setting aside Alaska personal use salmon fishing regulations as facially discriminatory, and preempted by federal law.
5. Order the Secretary of Commerce to set optimum escapement goals for salmon spawning in Alaska and to manage the salmon fisheries to meet those goals.

6. Enter an order setting aside 5 A.A.C. §24.370 as preempted under federal law.

7. Declare salmon fishery regulations promulgated by the State of Alaska on behalf of the Secretary of Commerce violative of the Administrative Procedure Act, the Magnuson-Stevens Act, and otherwise not in accordance with law.

8. Order the Secretary of Commerce to follow the procedures set forth in 5 U.S.C. §553 as mandated under 16 U.S.C. § 1855(d) when approving or disapproving regulations promulgated by the State of Alaska on his behalf.

9. Order Defendants to show cause how regulations enacted by the State of Alaska and approved by the Secretary, and the Council, are based upon the best available science and minimize adverse economic effects to the commercial salmon fishing community.

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

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

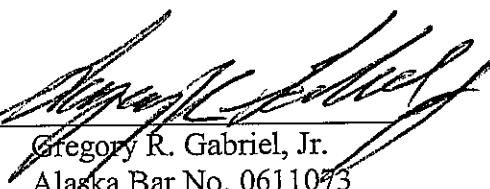
12. Grant Plaintiff such other and further relief as the Court deems just and proper.

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DATED: This 22nd day of December, 2008.

Respectfully submitted,
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