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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HERBERT T. JENSEN,)	
)	
Plaintiff,)	Case No. 3:08-cv-00286-TMB
)	
v.)	
)	
CARLOS G. GUTIERREZ, et al.)	
)	MEMORANDUM IN SUPPPORT OF
Defendants.)	MOTION TO DISMISS
)	

I. Introduction and Background

Plaintiff Herbert Jensen has sued State Defendant, Denby Lloyd in his official capacity as the Commissioner of the Alaska Department of Fish and Game (the State). Jensen alleges that the State’s management of Prince William Sound and Copper River salmon fisheries is preempted by the Magnuson-Stevens Act (MSA),¹ and is subject to federal oversight and

¹ 16 U.S.C. 1801-1891c (2007).

administrative procedures.² This action should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because the action is barred by the Eleventh Amendment, the complaint states no viable legal claim, and the Plaintiff lacks standing.

A. Alaska's Fishery Management Regime

The desire for self management of natural resources, and particularly management of Alaska's fishery resources and salmon fisheries, were driving forces behind Alaska Statehood.³ Ownership of the submerged lands of the territorial sea and the fishery resources in those waters passed to the state upon statehood under the Submerged Lands Act of 1953,⁴ and the Alaska Statehood Act.⁵ Alaska's seaward boundaries extend three geographical miles from the coast line.⁶ Title and ownership of natural resources, including fish, of the lands and waters within the boundaries of a state are vested in and assigned to the respective States.⁷ General management authority over fish and wildlife within Alaska passed from the federal government to Alaska in 1959 shortly after Alaska's adoption of a comprehensive fish and game code.⁸

Plaintiff's complaint focuses on the state's longstanding personal use fisheries and, despite the fact that he holds both drift and seine commercial fishing permits,⁹ on a management plan initially adopted in 2005 and effective since 2006, allocating salmon resources between drift and seine commercial fisheries.¹⁰

Personal use fishing is intended as a substitute for subsistence fishing.¹¹ Fish taken through personal use fishing may not be sold or bartered, and may only be consumed as food or

² See Compl. at ¶¶ 1, 17-44.

³ See, e.g., *Pullen v. Ulmer*, 923 P.2d 54, 57 n. 5 (Alaska 1996);

⁴ 43 U.S.C. 1301-56.

⁵ Pub. L. No. 85-508, (1958), 72 Stat. 339.

⁶ 43 U.S.C. § 1301(a)(2); 43 U.S.C. § 1312; *Alaska v. United States*, 545 U.S. 75, 79, 125 S.Ct. 2137, 2144 (2005).

⁷ See 43 U.S.C. § 1301(b); 43 U.S.C. § 1311(a); see also *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995).

⁸ See *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47 n. 2. State management is preempted only where clearly provided by statute or treaty, i.e. the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., The North Pacific Halibut Act of 1982, 16 U.S.C. 773, the Marine Mammal Protection Act, 16 U.S.C. 1361 et. seq., the Endangered Species Act, 16 U.S.C. § 1531 et. seq.

⁹ Compl. at ¶ 3.

¹⁰ See 5 AAC 24.370.

¹¹ See, e.g., 5 AAC 77.001. See also AS 16.05.258; 5 AAC 99.015.

used as bait by the individual who takes the fish or an immediate family member.¹² Personal use fishing regulations have been adopted for numerous areas across the State,¹³ and, in each area where salt waters are included in the area description, the description of the area where personal use fishing is authorized is limited to areas in “waters of Alaska.”¹⁴ “Waters of Alaska” include only internal waters and marine waters extending three miles seaward of the baseline.¹⁵

B. The Federal Fishery Management Regime

Pursuant to the Magnuson-Stevens Act (MSA)¹⁶, under which the United States claims management authority over fisheries within the Exclusive Economic Zone (EEZ)¹⁷ and over anadromous species beyond the EEZ,¹⁸ the Secretary of Commerce has adopted a Fishery Management Plan for the Salmon Fisheries in the EEZ off the Coast of Alaska (FMP);¹⁹ this plan applies to fishing in waters of the EEZ of the coast of Alaska and does not extend into the State territorial sea or internal waters.²⁰

The MSA, with one narrow exception, explicitly provides that it does not preempt state management:

Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.²¹

Federal preemption of state management within state boundaries is allowed only where, after providing notice to the State and opportunity for an adversary adjudicative hearing under the

¹² See AS 16.05.940(25); 5 AAC 77.001(f).

¹³ See Alaska Administrative Code Tit. 5 Chap. 77.

¹⁴ See, e.g., 5 AAC 77.550 (Prince William Sound Area); 5 AAC 77.500 (Cook Inlet Area).
¹⁵ 5 AAC 39.975(13).

¹⁶ 16 U.S.C. 1801-1891c (2007).

¹⁷ The “exclusive economic zone” begins at seaward boundary of each coastal state. See 16 U.S.C. § 1802(11).

¹⁸ 16 U.S.C. § 1811.

¹⁹ See 50 C.F.R. § 679.1(i); Fishery Management Plan for the Salmon Fisheries in the EEZ off the Coast of Alaska (April 1990) (FMP), (public document of which the Court may take judicial notice of) available at <http://www.fakr.noaa.gov/npfmc/fmp/salmon/SalmonFMP.pdf> (last viewed January 28, 2009).

²⁰ See 50 C.F.R. § 679.1(i) (applicable to salmon management area); 50 C.F.R. § 679.2 (defining “salmon management area” as “the waters of the EEZ off the coast of Alaska (see Figure 23 to part 679), including parts of the North Pacific Ocean, Bering Sea, Chukchi Sea, and Beaufort Sea.”) See also FMP at 5.

²¹ 16 U.S.C. 1856(a)(1).

Administrative Procedure Act,²² the Secretary of Commerce makes specific findings that state actions will “substantially and adversely” affect the carrying out of a federal fishery management plan for a fishery “engaged in predominately within the exclusive economic zone and beyond such zone,” and adopts regulations governing a fishery, pursuant to a fishery management plan.²³ Even where the Secretary makes this finding and adopts regulations to govern a fishery within state boundaries, those regulations do not extend to “internal waters” of the state.²⁴

The FMP divides the EEZ off Alaska into an “East” and “West” area,²⁵ and generally prohibits commercial fisheries in the area west of Cape Suckling except for 3 historical commercial net fisheries managed by the State of Alaska in Prince William Sound, Cook Inlet, and the Alaska Peninsula.²⁶ The FMP does not purport to manage these historical net fisheries.²⁷

II. Standard of Review

A complaint may be dismissed as a matter of law if it fails to allege sufficient facts to sustain a claim under a cognizable legal theory.²⁸ “A Rule 12(b)(6) dismissal may be based on either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.”²⁹ While only a short and plain statement showing entitlement to relief is required, a complaint “must, at a minimum, plead ‘enough facts to state a claim for relief that is plausible on its face.’”³⁰

For purposes of a motion to dismiss under F.R.C.P. 12(b)(6), all allegations of the non-moving party are taken as true, and the Court must construe the complaint in the light most

²² 5 U.S.C. § 554. *See also* 50 C.F.R. §§ 600.605 - .630 (Provisions for preemption).

²³ 16 U.S.C. 1856(b).

²⁴ *See* 16 U.S.C. 1856(b). “Internal waters” include “all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured.” *Id.* at (c)(4)(A).

²⁵ *See, e.g.*, 50 C.F.R. Fig. 23 to Part 679 (2008); 50 C.F.R. § 679.2.

²⁶ *See, e.g.*, FMP at 6, App. C; 50 C.F.R. § 679.3(f)(4).

²⁷ *See, e.g.*, FMP at 5 (Plan only allows commercial fishing in East Area except as provided by other Federal law), 19 (two fisheries, commercial troll and sport, managed by plan).

²⁸ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533—534 (9th Cir. 1984).

²⁹ *Johnson v. Riverside Healthcare System*, 534 F.3d 1116, 1121 (9th Cir. 2008) citations omitted.

³⁰ *Id. citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007).

favorable to the non-moving party.³¹ However, on a motion to dismiss for lack of subject matter jurisdiction, no presumption attaches to jurisdictional allegations when they are not intertwined with the merits.³² Also, the Court “is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.”³³

Before invoking the jurisdiction of the federal courts under Article III, Section 1 of the United States Constitution, a court must determine a plaintiff’s standing to pursue a claim. To prove standing, a private plaintiff must establish three things. He must allege facts that show a personal injury-in-fact, that the injury is fairly traceable to the challenged action of the defendant, and the injury is likely to be redressed by a favorable decision.³⁴ Even where an alleged injury is procedural in nature plaintiffs must show that they have “a procedural right that, if exercised, could protect their interests.”³⁵

III. Argument

A. Jensen’s Complaint Against Commissioner Lloyd Must be Dismissed Because it Violates the State of Alaska’s Sovereign Immunity under the Eleventh Amendment

The Eleventh Amendment categorically bars any claim brought by an individual against a state in federal court. The narrow exception to the Eleventh Amendment under *Ex parte Young*,³⁶ does not apply in this case because the State, and not Commissioner Lloyd, is the real party in interest. The State’s special sovereignty interests in management of submerged lands and natural resources, like those addressed by the Supreme Court in *Idaho v. Coeur d’Alene Tribe*,³⁷ also compel the conclusion that the narrow exception to Eleventh Amendment immunity under *Young* should not be extended to the present case.

³¹ *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 248 (9th Cir. 1997); *Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994).

³² *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987).

³³ *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994); *see also Bell Atl. Corp.*, 550 U.S. 544, 127 S.Ct. at 1965.

³⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560—61, 112 S.Ct. 2130 (1992); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 863 (9th Cir. 2003).

³⁵ *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008) citations omitted.

³⁶ 209 U.S. 123, 28 S. Ct 441 (1908).

³⁷ 521 U.S. 261, 117 S.Ct. 2028 (1997).

Congress has not unequivocally abrogated the State's sovereign immunity by the MSA, nor has it authorized private individuals to compel the Secretary to institute procedures to preempt State fisheries management, which, under the reasoning expressed by the U.S. Supreme Court in *Federal Maritime Commission v. South Carolina State Ports Authority*,³⁸ would be just as inconsistent with state immunity as granting of a private right of action in an Article III Court.

1. The Eleventh Amendment Respects the States' Sovereign Status

The Eleventh Amendment of the Constitution of United States provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State.³⁹

The Supreme Court has often acknowledged that the Eleventh Amendment incorporates principles of sovereign immunity as a limitation on judicial authority otherwise conferred to federal courts under to Article III, Sec. 2 of the U.S. Constitution.⁴⁰ The Court has also consistently held that, despite the limited terms of the Eleventh Amendment, a federal court cannot ordinarily entertain a suit brought by a state's own citizen.⁴¹ Finally, the jurisdictional bar provided by the Amendment applies regardless of the nature of the relief sought.⁴²

The Court's historically broad reading of the Eleventh Amendment is rooted in the recognition that forcing a sovereign state to appear against its will in the courts of another

³⁸ 535 U.S. 743, 1222 S.Ct. 1864 (2002).

³⁹ The Eleventh Amendment was adopted following the Supreme Court's unpopular assumption of original jurisdiction in *Chisholm v. Georgia*, 2 U.S. (2Dall.) 419, 1 L.Ed 440 (1793), over a suit brought by a citizen of South Carolina against the State of Georgia.

⁴⁰ See, e.g., *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 291-92, 93 S.Ct. 1614, 1621-22 (1973); *Monaco v. Mississippi*, 292 U. S. 313, 322-323, 54 S.Ct. 745, 747-748 (1934); *Ex Parte State of New York*, 256 U.S. 490, 497, 41 S.Ct. 588, 589 (1921).

⁴¹ E.g., *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974).

⁴² *Fed. Maritime Comm'n.*, 535 U.S. at 769, 122 S.Ct. 1864, citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114 (1996) ("the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."); see also *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984) citing *Missouri v. Fiske*, 290 U.S. 18, 27, 54 S.Ct. 18, 21 (1933) (Eleventh Amendment applies to suits in equity as well as at law).

sovereign is inconsistent with accepted principles of federalism.⁴³ As the Supreme Court stated in *Federal Maritime Commission*:

The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. . . . “The founding generation thought it ‘neither becoming nor convenient that the several States of the Union invested that that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.’⁴⁴

With this principle in mind, the Court has emphasized that a state’s interest in Eleventh Amendment immunity includes not only *whether* it may be sued, but *where* it may be sued.⁴⁵

A state’s immunity from suit by one of its citizens in federal court extends to its principal statewide agencies or departments:

This Court’s decisions thus establish that “an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state” (citations omitted). There may be a question, however, whether a particular suit in fact is a suit against a State. It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.⁴⁶

2. Plaintiff’s Claims Against The State Are Barred By The Eleventh Amendment To The United States Constitution Because They Do Not Fit Within The Exception To Eleventh Amendment Immunity Under *Ex Parte Young*.

a. *Ex Parte Young* Provides Only a Narrow Exception to Eleventh Amendment Immunity

In *Young*, the Court carved out a narrow exception to Eleventh Amendment immunity. The court indulged in the fiction that a suit against a state official was not actually against a state where the official was alleged to have exceeded his lawful authority under state law in acting in

⁴³ See *Employees*, 411 U.S. at 294, 93 S.Ct. at 1614.

⁴⁴ *Fed. Maritime Comm’n*, 535 U.S. at 760, 122 S.Ct. at 1874. (citations omitted).

⁴⁵ *Pennhurst*; 465 U.S. at 100, 104 S.Ct. at 907.

⁴⁶ *Pennhurst*, 465 U.S. 89, 100, 104 S.Ct. 900, 908) (citations omitted). See also, *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771, 774 (9th Cir. 1995) (“The United States Supreme Court has extended the reach of the Eleventh Amendment to bar federal courts from presiding over any suit in which a state or ‘arm of the state’ is a defendant. *State Highway Comm’n v. Utah Constr. Co.*, 278 U.S. 194, 199, 498 S.Ct. 104, 106, 73 L.Ed.262 (1929).”); *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 380 (9th Cir. 1993) (affirming the district court holding that the Alaska Railroad is “an arm of the state.”).

the state's behalf by attempting to enforce an unconstitutional state statute.⁴⁷ The Court reasoned that because the state official's action was unconstitutional, he was "stripped" of his official authority and the plaintiff could obtain prospective injunctive relief in federal court barring the official from further unconstitutional activity.⁴⁸ While the fiction of *Young* has never been overruled, the Supreme Court has never given it an expansive interpretation.⁴⁹ Indeed, the doctrine remains potentially applicable only in suits against officials in their individual capacities requesting solely prospective injunctive relief to vindicate established federal rights.⁵⁰ By contrast, suits against officials for prospective relief from violations of state law are barred by the Eleventh Amendment, and the exception announced in *Young* does not apply.⁵¹

Even in a suit brought solely against a public official, the Eleventh Amendment bars the suit when "the state is the real, substantial party in interest."⁵² Thus, "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."⁵³ A suit is against a state if "the judgment sought would expend itself on the public domain or treasury."⁵⁴ Thus, even in suits naming only a public official, the suits are deemed to be against the state if the relief sought would operate in effect against the state.⁵⁵

In *Idaho v. Coeur d'Alene Tribe of Idaho*,⁵⁶ the Supreme Court expanded upon this concept: "When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation *whenever state policies*

⁴⁷ 209 U.S. at 160, 28 S. Ct. at 454.

⁴⁸ *Id.*

⁴⁹ See *Pennhurst*, 465 U.S. at 102, 104 S.Ct. at 909.

⁵⁰ See *Schuer v. Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687 (1987); *Pennhurst*, 465 U.S. at 103, 104 S.Ct. at 910.

⁵¹ *Pennhurst*, 465 U.S. at 103, 104 S.Ct. at 910.

⁵² *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945); *Pennhurst*, 465 U.S. at 101, 104 S.Ct. at 908.

⁵³ *Pennhurst*, 465 U.S. at 101, 104 S.Ct. at 908 (emphasis added) citing *Hawaii v. Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1053 (1963).

⁵⁴ *Pennhurst*, 465 U.S. at 101, n. 11, 104 S.Ct. at 908 citing *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006 (1963).

⁵⁵ *Edelman*, 415 U.S. at 668-69, 94 S.Ct. at 1353. *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990) citing *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425. See also *Papasan v. Allain*, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 2942 (1986).

⁵⁶ 521 U.S. 261, 117 S.Ct. 2028 (1997).

or procedures are at stake.”⁵⁷ In that case, the issue was whether the federal court had jurisdiction to hear an action against Idaho officials brought by an Indian tribe requesting injunctive and declaratory relief barring Idaho from exercising regulatory authority over a lake that was claimed by the plaintiff Indian tribe. The Court cautioned that the *Young* exception must not be reflexively applied:

To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle reaffirmed just last term in *Seminole Tribe*, that the Eleventh Amendment immunity represents a real limitation on a federal court’s federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.⁵⁸

The Court said that although naming of a state official and requesting prospective injunctive relief to vindicate federal rights may ordinarily be sufficient to fit within *Young*, a court must, still examine the effect of a suit and its impact on special sovereignty interests “in order to decide whether the *Ex parte Young* fiction is applicable.”⁵⁹ The court’s principal opinion also identifies two features of prior decisions after *Young* justifying the exception to immunity where: 1) the plaintiff does not have an alternative state court forum to have the case heard, and 2) principles of federalism support a concern that federal law be interpreted by federal courts.⁶⁰ The principal opinion concludes, however, that federal interests in having federal law interpreted by federal courts are of questionable value in *Young* cases, given the equal dignity of state courts to interpret federal law subject to review by the Supreme Court.⁶¹

In *Coeur d’Alene Tribe*, the Court observed that to allow the suit to go forward would require a “determination that the lands in question are not even within the regulatory jurisdiction of the state.”⁶² The court stated:

⁵⁷ 521 U.S. at 269, 117 S.Ct. at 2034.

⁵⁸ 521 U.S. at 270, 117 S.Ct. at 2034.

⁵⁹ 521 U.S. at 281, 117 S.Ct. at 2040.

⁶⁰ See 521 U.S. at 270-274, 117 S.Ct. at 2035-2036.

⁶¹ 521 U.S. at 275-276; 117 S.Ct. at 2037.

⁶² *Id.*

The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands⁶³

The Court noted that the relief sought in *Coeur d'Alene Tribe* would deprive the State of Idaho of its sovereign control over submerged lands, which are infused with the public trust of the State and control over which is an essential attribute of sovereignty:

Not only would the relief block all attempts by these officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect. As we stressed in *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-198, 107 S.Ct. 2318, 2320-2322, 96 L.Ed.2d 162 (1987), lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty." *Id.*, at 195, 107 S.Ct., at 2320. The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Lessee of Waddell*, 16 Pet. 367, 410, 10 L.Ed. 997 (1842). . . .⁶⁴

The Court concluded that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon its Treasury,"⁶⁵ and that under these circumstances the *Young* exception was not applicable and that:

The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity to suit and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.⁶⁶

The dignity of the State of Alaska and the exercise of its sovereign powers over the state waters and land at issue in this case compel no lesser treatment.

⁶³ 521 U.S. at 282, 117 S.Ct. at 2040.

⁶⁴ 521 U.S. at 283, 117 S.Ct. at 2041.

⁶⁵ 521 U.S. at 287, 117 S.Ct. at 2043.

⁶⁶ *Id.*

b. Plaintiff Has Not Requested Prospective Injunctive Relief Against A State Officer Named In His Individual Capacity.

To fit within the *Ex parte Young* exception, a complaint must name a state official, in his individual capacity, and request prospective, injunctive relief.⁶⁷ Although Plaintiff has requested prospective, declaratory and injunctive relief, he has named Denby Lloyd, as a party defendant in his official capacity, not in his individual capacity.⁶⁸ Although this defect in pleading may be easily resolved with leave of the court and proper amendment, such a remedy would be to “adhere to an empty formalism,” as the Supreme Court has put it, and ignore the clear nature of this case.⁶⁹ The State is the real party at interest in this case, and analyzing the interests at stake compels the conclusion that this matter is not within the exception to Eleventh Amendment immunity provided by *Young*.

c. The State Is the Real Party In Interest In This Case

In *Coeur d’Alene Tribe*, five members of the Court agreed that the essential test of whether a case fits within *Ex parte Young* requires the Court to “examine the effect of the...suit and its impact on the special sovereignty interests” of the state that are implicated.⁷⁰ The interests of Alaska’s sovereignty implicated by this case are remarkably similar to the interests of Idaho that the Court found in *Coeur d’Alene Tribe* to bar that lawsuit.

As in *Coeur d’Alene Tribe*, plaintiff seeks to “bar the State’s principal officers from exercising their governmental powers over disputed land and waters.”⁷¹ The lawsuit, if successful, “would diminish...the State’s control over a vast reach of lands and waters” long deemed by the State to be within its proper jurisdiction.⁷² As in *Coeur d’Alene*, “[t]o pass this off as a judgment causing little or no offence to [Alaska’s] sovereign authority and its standing in the Union would be to ignore the reality” of the case.⁷³ If successful, this case would impact state sovereignty far more than in *Coeur d’Alene* because it would apply to waters throughout the

⁶⁷ *Coeur d’Alene Tribe*, 521 U.S. at 269, 117 S.Ct. at 2034; *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908).

⁶⁸ Compl. at 1.

⁶⁹ *See Coeur d’Alene Tribe*, 521 U.S. at 270, 117 S.Ct. at 2034.

⁷⁰ *Coeur d’Alene Tribe*, 521 U.S. at 281, 117 S.Ct. at 2040.

⁷¹ 521 U.S. at 282, 117 S.Ct. at 2040.

⁷² *Id.*

⁷³ *Id.*

State and essentially strip the State of the management authority over its abundant salmon resource, depriving it of a sovereignty interest that served as a driving force for statehood.⁷⁴

The fisheries challenged here, with the exception of only three small extensions into the EEZ, occur entirely within the boundaries of the State of Alaska in water overlaying land belonging to the State.⁷⁵ Under both federal and state law, the state holds the fish within the State of Alaska in trust for its people.⁷⁶ Title and ownership of fish found in the waters within the boundaries of a state are vested in and assigned to the respective States.⁷⁷ Congress explicitly recognized the sovereign interests of the states in managing their fish resources and to prefer their own residents in taking such resources in the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005, which states:

It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and nonresidents of such State with respect to the availability of licenses or permits for taking of particular species of fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with issuance of licenses or permits for hunting or fishing.⁷⁸

The Alaska Constitution requires the management of these resources for the maximum benefit and use for all Alaskans;⁷⁹ it directs the legislature to provide for the management of the State's

⁷⁴ See, e.g., *Pullen v. Ulmer*, 923 P.2d 54, 57 n. 7 (Alaska 1996). While Plaintiff's commercial fisheries occur entirely within the Prince William Sound Area, see Compl. at ¶ 3; 5 AAC 24.100; 5 AAC 24.200, his complaint regarding State personal use fisheries is not limited to fisheries connected to the waters of Prince William Sound. See, e.g., Compl. at ¶ 22 (asking for declaration that Upper Cook Inlet Personal Use regulations at 5 AAC 77.540 and related regulations are preempted by federal law).

⁷⁵ Pursuant of the Submerged Land Act, 43 U.S.C. §§ 1301-1315, and the Statehood Act, Pub. L. No. 85-508, (1958), 72 Stat. 339, the State received title to submerged lands within three miles of the shore of Alaska, to the land underlying historic bays and other inland waters with entrances of less than 24 miles in diameter, including Prince William Sound.

⁷⁶ *Hughes v. Oklahoma*, 441 U.S. 332, 334, 99 S.Ct. 1727, 1735 (1979) (Acknowledging that although state "ownership" of wildlife is not sufficient to prevent modern commerce clause analysis of discriminatory state law, states have an important sovereignty interest in managing their wildlife).

⁷⁷ See 43 U.S.C. § 1301(b); 43 U.S.C. § 1311(a); see also *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995).

⁷⁸ Pub. L. 109-13 (HR 1268, Section 6036), 119 Stat. 231 (2005).

⁷⁹ Alaska Const., Art. VIII, §§ 1-2.

lands, waters and fish and game,⁸⁰ which must be “utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”⁸¹ The state constitution prohibits exclusive rights of fishery, with a narrow exception for limited entry into fisheries.⁸² The legislature has, in turn, authorized the Department of Fish and Game and the Board of Fisheries to regulate fisheries,⁸³ delegating authority to allocate fishery resources among various user groups, including personal use, sport, and commercial fisheries to the Board.⁸⁴ Accordingly, the Board and the Department exercise the State’s sovereign authority over fish in Alaska waters, providing for numerous salmon fisheries scattered throughout the waters of the State.⁸⁵

As in *Coeur d’Alene Tribe*, the relief requested here would bar state jurisdiction over its lands and waters and “divest the state of its sovereign control” over fisheries, an essential attribute of sovereignty.⁸⁶ The State of Alaska, exercising its sovereign authority -- not an individual officer acting without the authority of state law -- is the real party in interest.

Plaintiff’s complaint’s objective is to strip the state of authorities granted to it under the Submerged Lands Act of 1953 and the Alaska Statehood Act and return those authorities to the federal government or require the State to act as a mere appendage of the federal government.⁸⁷ There can be no doubt therefore, that the relief requested in this action, just as it was in *Coeur d’Alene Tribe*, would affect a State’s sovereign interest in its land, waters and other natural resources “in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.”⁸⁸ No matter how plaintiff crafts the exterior appearances of this lawsuit, it is against the State of Alaska, and is therefore barred by the Eleventh Amendment.

⁸⁰ Alaska Const., Art. VIII, sec 2.

⁸¹ Alaska Const. Art. VIII, § 4.

⁸² Alaska Const., Art. VIII, sec 15; *see also Vanek v. State*, 193 P.3d 283, 290 (2008) (limited entry must “impinge as little as possible” on common use clause).

⁸³ *See* AS 16.05; e.g., AS 16.04.221, AS 16.05.241, AS 16.05.251 (Board); AS 16.05.010; AS 16.05.020; AS 16.05.050; AS 16.05.060; AS 16.05.241 (Commissioner).

⁸⁴ AS 16.05.251(e); 5 AAC 39.205.

⁸⁵ *See* Alaska Administrative Code Tit. 5 Chap. 77; e.g., 5 AAC 77.550 (Prince William Sound Area); 5 AAC 77.500 (Cook Inlet Area).

⁸⁶ *See* 521 U.S. at 283, 117 S.Ct. at 2041.

⁸⁷ E.g. Compl. at ¶¶ 13 – 16; Compl. at pages 17-18.

⁸⁸ *Coeur d’Alene Tribe*, 521 U.S. at 287, 117 S.Ct. at 2043. *See also Pullen v. Ulmer*, 923 P.2d 54, 59-61 (Alaska 1996) (treating fish as “assets” of the State which may not be appropriated by initiative).

B. Plaintiff's Claims Fail to State a Viable Legal Claim (Claims 1-5)

1. Section 306 of the Magnuson-Stevens Act Precludes Claims On Salmon Fisheries Occurring Within the Boundaries of the State.

Plaintiff erroneously claims that, under a section of the MSA that asserts federal jurisdiction over fish in the EEZ and anadromous species “beyond” the EEZ,⁸⁹ initial responsibility for management of anadromous species within State waters rests in the Secretary, not the State of Alaska. This assertion lacks any merit for salmon fisheries occurring entirely within State boundaries in the western portion of the Salmon Management Area where Plaintiff’s fisheries are conducted.

Section 306 of the MSA⁹⁰ specifically provides that nothing in Chapter 38 of Title 16⁹¹ shall be construed as diminishing the jurisdiction or authority of any State within its boundaries except where the Secretary, after notice to the State and opportunity for an adjudicative hearing, makes specific findings that state actions will “substantially and adversely” affect the carrying out of a federal fishery management plan for a fishery “engaged in predominately within the exclusive economic zone and beyond such zone,” and adopts regulations governing a fishery, pursuant to a fishery management plan.⁹²

The relevant language of the MSA relating to waters within State boundaries provides:

(a) In general

(1) Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

(2) For the purposes of this chapter, except as provided in subsection (b) of this section, the jurisdiction and authority of a State shall extend--

(A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party; . . .⁹³

⁸⁹ 16 U.S.C. § 1811.

⁹⁰ 16 U.S.C. § 1856 (2007).

⁹¹ The MSA is set out in Chapter 38 of Title 16. *See* 16 U.S.C. §§ 1801 – 1891c (2007).

⁹² 16 U.S.C. § 1856(b). *See also* 50 C.F.R. §§ 600.605 - .630 (Preemption Provisions).

⁹³ 16 U.S.C. § 1856(a) (2007).

The relevant language of the MSA relating to exceptions where the Secretary may claim jurisdiction to waters within a State provides:

(b) Exception

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, 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.⁹⁴

Even where the Secretary makes this finding and adopts regulations to govern a fishery within state boundaries, those regulations do not extend to “internal waters” of the state.⁹⁵ Because the clear and express terms of the MSA preserve State jurisdiction within State Boundaries, because statutory preemption procedures have not been utilized, and because Plaintiff does not even allege that the statutory requirements for preemption are met, Plaintiff fails to state a claim for which relief can be granted regarding fisheries within the boundaries of the State of Alaska.

2. Section 306(a)(3) of the Magnuson-Stevens Act Precludes Plaintiff’s Claims for Relief With Respect to the Historical Net Fisheries That Extend into the EEZ of the Coast of Alaska in the West Portion of the Salmon Management Area.

Section 306(a)(3) of the MSA⁹⁶ explicitly provides that a State may regulate fishing of a vessel outside the boundaries of the State in three circumstances-- two of which are potentially relevant here. First a State may regulate vessels registered under the laws of the State where there is no Fishery Management Plan or applicable Fishery regulations or where the State’s laws are consistent with the fishery management plan or regulations. Second, a State may regulate

⁹⁴ 16 U.S.C. § 1856(b) (2007).

⁹⁵ 16 U.S.C. § 1856(b) (2007). “Internal waters” include “all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured.” *Id.* at (c)(4)(B). As explained below, the personal use fishery challenged in this case occurs at a location more than 100 miles inland from the coast and far into internal waters.

⁹⁶ 16 U.S.C. § 1856(a)(3) (2007).

where a FMP delegates management to the State and the States laws and regulations are consistent with the FMP. The relevant sections provide:

(3) A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances:

(A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.

(B) The fishery management plan for the fishery in which the fishing vessel is operating delegates management of the fishery to a State and the State's laws and regulations are consistent with such fishery management plan. If at any time the Secretary determines that a State law or regulation applicable to a fishing vessel under this circumstance is not consistent with the fishery management plan, the Secretary shall promptly notify the State and the appropriate Council of such determination and provide an opportunity for the State to correct any inconsistencies identified in the notification. If, after notice and opportunity for corrective action, the State does not correct the inconsistencies identified by the Secretary, the authority granted to the State under this subparagraph shall not apply until the Secretary and the appropriate Council find that the State has corrected the inconsistencies. For a fishery for which there was a fishery management plan in place on August 1, 1996 that did not delegate management of the fishery to a State as of that date, the authority provided by this subparagraph applies only if the Council approves the delegation of management of the fishery to the State by a three-quarters majority vote of the voting members of the Council.⁹⁷

It is unclear which of these provisions could be applicable; while there is an FMP for Salmon fisheries off the Coast of Alaska,⁹⁸ that document specifically prohibits commercial fishing in the West Area of the EEZ off the Coast of Alaska (an area encompassing Prince William Sound) except as provided by other federal law,⁹⁹ and goes on in App. C to state that net fishing for salmon is permitted in three historical fishing areas “in which salmon net fishing is permitted under State of Alaska Regulations.”¹⁰⁰ Those areas include a small area of the EEZ off the coast

⁹⁷ 16 U.S.C. § 1856(a)(3).

⁹⁸ See 50 C.F.R. § 679.1(i); Fishery Management Plan for the Salmon Fisheries in the EEZ off the Coast of Alaska (April 1990) (FMP), (public document of which a court may take judicial notice) available at <http://www.fakr.noaa.gov/npfmc/fmp/salmon/SalmonFMP.pdf>.

⁹⁹ FMP at 5, App. C.

¹⁰⁰ FMP at App. C-1.

of Prince William Sound.¹⁰¹ The FMP states that it only manages two fisheries in the EEZ, the commercial troll fishery and the sport fishery.¹⁰² So it appears that either there is no FMP for the commercial fishery off Prince William Sound or that there is an FMP that delegates management to the State of Alaska. Regardless of which provision applies, Plaintiff's claims fail.

If there is no FMP applicable to the net fisheries off Prince William Sound, then pursuant to 16 U.S.C. 1856(a)(3)(A)(i), the State of Alaska has authority to manage the fisheries under the express terms of the MSA and there is no basis for Plaintiff's requested relief of federal oversight of the State's Fishery unless the Secretary first adopts an FMP applicable to the commercial fisheries in the area.

If there is an FMP applicable to the net fisheries off Prince William Sound, that FMP delegates management authority to the State. Further, if the Secretary determines that a state law or regulation applicable to the fishery is inconsistent with the FMP, the Secretary is required to "notify the State and the appropriate Council [North Pacific Fishery Management Council] of such determination and provide an opportunity for the State to correct any inconsistencies identified in the notification."¹⁰³ The State would lose authority only if, after receiving notice from the Secretary, it fails to correct the inconsistencies identified; at that point, under the terms of the FMP, because commercial net fishing is allowed in the EEZ only pursuant to regulations of the State of Alaska,¹⁰⁴ no fishing would be allowed in the EEZ. Plaintiff does not identify specific violations of the FMP and ask the Secretary to provide the State with an opportunity to correct them. Likewise, he does not ask for closure of the EEZ to commercial fishing.

Therefore, regardless of whether or not there is an FMP managing commercial net fisheries in the EEZ off the coast of Prince William Sound, the State of Alaska has management authority in the fishery under the terms of 16 U.S.C. 1856(a)(3), and the relief requested by the Plaintiff is inconsistent with the statute. Plaintiff's claims for relief relating to the portions of the EEZ where historical net fisheries extend into the EEZ off the Coast of Alaska in the West portion of the Salmon Management Area fail to state a claim for which relief can be granted.

¹⁰¹ See FMP at App. C-3.

¹⁰² FMP at 19.

¹⁰³ 16 U.S.C. § 1856(a)(3)(B) (2007).

¹⁰⁴ FMP at 5, 19, App. C.

C. Plaintiff Lacks Standing

The plaintiff claims that his interests have been somehow infringed or damaged by the regulations adopted by the Alaska Board of Fisheries and administered by the State of Alaska that discriminate against non-residents in personal use fisheries and that allocate salmon resources between commercial gillnet and seine fisheries. Plaintiff, who according to his complaint is an Alaska resident, a resident of Cordova, and a dual permit holder holding permits in both the seine and gillnet commercial fisheries,¹⁰⁵ does not identify clearly what protected right is being damaged, or how he is being directly harmed by the defendants' actions.

Under the "injury-in-fact" prong of the test required for standing, the alleged injury must be "an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical. . . ." ¹⁰⁶ A plaintiff must show that the alleged injury is "peculiar to himself or to a distinct group of which he is a part, rather than one shared in substantially equal measure by all or a large class of citizens. . . ." ¹⁰⁷ Lastly, the "... plaintiff must also assert his own legal interests rather than those of third parties." ¹⁰⁸

1. Plaintiff has not shown standing for a challenge to State personal use fisheries occurring within the waters of Alaska (Claim 1).

As a resident of Alaska,¹⁰⁹ the plaintiff is free to participate in State personal use fisheries and cannot show "injury in fact" as a result of discrimination against nonresidents. Because he can participate in the personal use fisheries, Plaintiff cannot show that personal use fisheries in the state waters constitute a direct "invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical." ¹¹⁰ Plaintiff attempts to bootstrap into standing by implying that, in the absence of a personal use fishery the

¹⁰⁵ Compl. at ¶ 3.

¹⁰⁶ *Lujan*, 504 U.S. at 560--561. An alleged injury must be "...distinct and palpable and not abstract or conjectural or hypothetical..." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, (1984).

¹⁰⁷ *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 1608, (1979).

¹⁰⁸ *Id.*

¹⁰⁹ Compl. at ¶3.

¹¹⁰ *Lujan*, 504 U.S. at 560--561. An alleged injury must be "...distinct and palpable and not abstract or conjectural or hypothetical..." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, (1984).

salmon taken in the personal use fishery would be available to, and taken by, commercial fishermen such as himself.¹¹¹ Plaintiff does not and cannot allege facts to support this premise.

Plaintiff's bootstrap injury premise has multiple flaws. First, the MSA recognizes the value of recreational fisheries and does not require fish currently harvested under personal use regulations to be made available to commercial fisheries in general, or to Plaintiff's commercial fisheries in particular, if the personal use fishery were eliminated.¹¹² Second, Plaintiff has only a limited due process property interest in the harvest of salmon within the State of Alaska, not an interest that would allow harvest free of regulation by the Board of Fisheries.¹¹³ Third, Plaintiff's commercial fisheries occur in salt water,¹¹⁴ and most personal use fishing occurs far upriver in fresh waters not open to commercial fishing; fish not harvested in the personal use fishery would be available to sport and subsistence fishermen, not commercial fishermen.¹¹⁵ Fourth, resident needs for salmon would not change as a result of elimination of the personal use fishery, and thus the Alaska Board of Fisheries would likely substantially increase the sport fish allocation under its allocation criteria,¹¹⁶ and increase the amounts necessary for subsistence under AS 16.05.258 to accommodate fishers who would shift from personal use to subsistence fisheries. The Board would likely actually be forced to decrease the downstream commercial allocations if it chooses to maintain resident sport fish harvests by liberalizing sport fish methods and means for nonresidents as well as residents in order to maintain harvest opportunity for residents.

¹¹¹ Compl. at ¶18.

¹¹² See 16 U.S.C. 1802(33) (defining "optimum" yield from a fishery as the yield that "will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities," and providing that maximum sustained yield may be "reduced by any relevant social, economic, or ecological factor.") (emphasis added).

¹¹³ See e.g., Alaska Const. Art. VIII, §§ 3, 15, 17; AS 16.43.950; *Vanek v. State*, 193 P.3d 283, 293-294 (2008).

¹¹⁴ See, e.g., 5 AAC 24.200.

¹¹⁵ See, e.g., 5 AAC 77.591(a), (f) (Copper River personal use salmon fishery limited to Chitina subdistrict); see also Compl. at ¶ 3 (focused on Copper River personal use sockeye harvests).

¹¹⁶ See AS 16.05.251(e); 5 AAC 39.205.

Under the standards in *Lujan*,¹¹⁷ plaintiff lacks standing to challenge Alaska's personal use fisheries because he has not shown an injury traceable to the fisheries and has not shown that the injury is likely to be redressed by a favorable decision. His first claim must be dismissed.

2. Plaintiff has no standing to challenge the State Prince William Sound Management and Salmon Enhancement Allocation Plan(Claim 3).

As member of both of the principal gear groups in the state commercial salmon fishery in Prince William Sound,¹¹⁸ which together receive ninety-six percent of the commercial enhanced salmon allocation,¹¹⁹ plaintiff has not shown that the allocation plan constitutes a direct "invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical. . . ." ¹²⁰ Plaintiff does not allege an inability to fish in the drift gillnet fishery during years where the allocation plan results in conditions unfavorable to the seine fishery. Plaintiff also does not even allege that any portion of his own fishing occurs in the EEZ, noting only that a portion of the drift gillnet fishery extends into the EEZ.¹²¹

Even assuming an injury could be shown from the gillnet fishery's displacement of the seine fishery in some years as Plaintiff seems to assert,¹²² he has not shown that the injury is fairly traceable to his allegations of error.¹²³ Nothing in the MSA requires any particular allocation plan to be adopted. The MSA recognizes economic and social factors and provides for allocation of fishery resources among fishermen.¹²⁴ The MSA's national standards for fishery conservation and management, 18 U.S.C. § 1851, are broad and open-ended in scope, like the allocation criteria and general authorities of the Alaska Board of Fisheries,¹²⁵ they mandate no particular regulation or allocation. Plaintiff does not allege any facts to support his bald

¹¹⁷ 504 U.S. at 560-61.

¹¹⁸ Compl. at 3.

¹¹⁹ See 5 AAC 24.370. This fishery does extend slightly into the EEZ, see 5 AAC 24.301.

¹²⁰ *Lujan*, 504 U.S. at 560--561. An alleged injury must be "...distinct and palpable and not abstract or conjectural or hypothetical..." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, (1984).

¹²¹ See Compl. at 3, 12,

¹²² See Compl. at ¶¶ 29-31; 5 AAC 24.370(h).

¹²³ See Compl. at ¶¶ 16, 24-44.

¹²⁴ See 16 U.S.C. 1802(33) (defining "optimum" yield from a fishery); 16 U.S.C. 1851(a)(4).

¹²⁵ E.g. AS 16.05.251(e) (allocation criteria), AS 16.05.251 (general authorities for conservation and development of fisheries).

assertion, inconsistent with both the express language of 5 AAC 24.370,¹²⁶ the State of Alaska's legal standards for allocation,¹²⁷ and the Board's express findings,¹²⁸ that "the State of Alaska allocates salmon resources between competing fisheries based solely on economics."¹²⁹ He alleges no facts to show the challenged regulations do not comply with legal standards in state law. Further, Plaintiff ignores the fact that commercial net fishing in the EEZ off the coast of Prince William Sound¹³⁰ is generally prohibited under the FMP, and only allowed pursuant to regulations of the State of Alaska,¹³¹ and therefore, as discussed more fully in Section B above, if the regulations of the State of Alaska are preempted, the result is not Secretarial promulgation of new fishing regulations, but complete closure of the EEZ to commercial fishing. Plaintiff does not allege that the State of Alaska would be likely to pursue regulations to reopen the EEZ to commercial fishing subject to federal procedures or that the federal regulatory process provides sufficient flexibility to allow effective in-season management of salmon fisheries. Invalidation of the State's regulations would result in closure of a portion of Plaintiff's fishery, not an application of different procedures by the Secretary or the State, and redressibility cannot be shown.¹³² Plaintiff lacks standing to challenge the State's management and allocation plan because he has not shown an injury traceable to the plan and likewise has not shown that the injury could be redressed by a favorable decision. His third claim must be dismissed.

¹²⁶ See 5 AAC 24.370. (Purpose is to "provide fair and reasonable allocation of the harvest of enhanced salmon . . . reduce conflicts between these user groups . . . maintain the long-term historic balance between competing commercial users," while "acknowledging developments in the fisheries.").

¹²⁷ AS 16.05.251(e); 5 AAC 39.205.

¹²⁸ Alaska Board of Fisheries Findings on Prince William Sound Management and Salmon Enhancement Allocation Plan, No. 2006-248-FB (May 3, 2006); Alaska Board of Fisheries Findings Regarding the Prince William Sound Management and Salmon Enhancement Allocation Plan (5 AAC 24.370) No. 97-167-FB (January 29, 1997). (public documents which the Court may take judicial notice of) available (last viewed January 26, 2009) at: <http://www.boards.adfg.state.ak.us/fishinfo/regs/pfindx.php>).

¹²⁹ Compl. at ¶ 29.

¹³⁰ This is in the "West Area" under the FMP. See FMP at 2.

¹³¹ FMP at 5, App C-1.

¹³² See *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir. 2008) ("the redressibility requirement is not toothless in procedural injury cases").

3. Plaintiff has not shown standing for general challenges to the State's alleged failure to comply with National Standards of MSA. (Claims 1-5)

Plaintiff also has not shown standing for his general claims regarding allegations of the State's failure to comply with the National Standards of the MSA. As shown in Section B above, absent a showing under the MSA's grounds for federal preemption of state management, a circumstance Plaintiff does not even allege, any potential for relief is limited to the waters of the EEZ-- nothing in the MSA preempts State management within state boundaries absent such circumstances. Further, Plaintiff has not identified any concrete injury to his interests within either State waters or the EEZ. To the extent that Plaintiff alleges procedural injury, because he does not allege that the statutory grounds for federal preemption of state waters management are met, any potential relief is limited to waters of the EEZ, and he has not shown that invalidating state regulations and the closure of the EEZ under the FMP¹³³ could benefit his fisheries.

Plaintiff's second claim focuses on MSA National Standard 1 which provides that fisheries conservation and management measures shall "prevent overfishing, while achieving, on a continuing basis, the optimum yield from each fishery. Plaintiff has not alleged facts to show that this alleged failure constitutes a "concrete and particularized" injury."¹³⁴ His only assertion of injury for this claim is a bald statement, unsupported by facts or allegations showing harm to his particular fisheries, that such failure "results in lost yield to the salmon fisheries, thereby causing harm to Plaintiff and others in the commercial salmon fishery."¹³⁵ He alleges no facts to show that the MSA's "optimum yield" definition would likely result in either production of additional fish or more fish being available for his fisheries. Because the MSA's optimum yield definition is open-ended, includes consideration of food production and recreation opportunities, and allows departure from maximum sustained yield based on "relevant social, economic, or ecological factors,"¹³⁶ and because these concepts are compatible with the broad state standards

¹³³ See Section B above.

¹³⁴ *Lujan*, 504 U.S. at 560--561. An alleged injury must be "...distinct and palpable and not abstract or conjectural or hypothetical..." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, (1984).

¹³⁵ Compl. at ¶ 10.

¹³⁶ 16 U.S.C. § 1802(33).

for sustained yield management,¹³⁷ application of the MSA definition would not result in any difference in escapement goals or in any changes in salmon production, even if it were made applicable to State waters. Plaintiff cites nothing in the MSA mandating that any increased salmon production be made available to his fisheries or that he has any legally protected interest in such additional fish. Plaintiff cannot show that any injury from the State's alleged failure to manage for "optimum yield" would be likely to be redressed by a favorable decision.

Plaintiff's fourth claim focuses on allegations that he is harmed by an alleged failure to adopt state salmon management regulations under the federal Administrative Procedure Act (APA).¹³⁸ This claim is meritless because, as shown above in Section B.2, the Secretary has deferred salmon management in the EEZ to the State, and state regulations do not change or amend the FMP or federal fishery regulations.¹³⁹ Even more importantly, Plaintiff can show no harm from failure to promulgate regulations using the federal APA. State regulations must be promulgated pursuant to the State APA,¹⁴⁰ through notice and comment rulemaking,¹⁴¹ in a process substantially similar to that required under the federal APA, and are subject to challenge in State Court for failure to comply with procedural or substantive requirements.¹⁴² Plaintiff does not allege that the State failed to follow its required administrative procedures or that he has been denied actual notice and opportunity to comment on or challenge fishery regulations pursuant to State law. He makes the unsubstantiated allegation that the Board of Fisheries use of an "ad hoc" committee process--which develops recommendations for review by the full Board--allows Board actions to evade judicial review.¹⁴³ But Plaintiff does not make the necessary factual allegations to support this claim. He does not allege that the Board's committee process, which supplements the Board's formal procedures,¹⁴⁴ replaces the normal notice and comment

¹³⁷ See, e.g., 5 AAC 39.222 (Policy for the management of sustainable salmon fisheries); 5 AAC 39.223 (Policy for statewide salmon escapement goals).

¹³⁸ 5 U.S.C. §§ 551 et. seq.

¹³⁹ See Section B.2 above (the three historical net fisheries extending into the EEZ are not part the FMP); FMP at 5, 19, App. C.

¹⁴⁰ Alaska Statute Tit. 44 Ch. 62.

¹⁴¹ E.g. AS 44.62.180-44.62.290.

¹⁴² E.g. AS 44.62.300.

¹⁴³ Compl. at ¶ 38

¹⁴⁴ See, e.g., Alaska Board of Fisheries, Policy for Formation and Role of Committees at Board Meetings, No. 2000-199-FB (Findings of the Alaska Board of Fisheries are public

rulemaking procedures required by State law. Under State law, to accommodate judicial review, the Board develops an adequate record showing that it has taken a hard look at the issues and engaged in reasoned decision making¹⁴⁵. The Board process produces an extensive record that is used for purposes of judicial review.¹⁴⁶ The Board also often makes findings explaining its actions.¹⁴⁷ Plaintiff also does not allege that the unrecorded committee meetings of the Alaska Board of Fisheries are any different than the unrecorded committee meetings of the North Pacific Fishery Management Council, that are used to supplement the regulatory processes of the Council and the Secretary under the MSA. Because he does not allege that his procedural rights would be significantly greater under the federal APA, or that he has been denied due process under State regulations, Plaintiff has not shown any concrete injury from the State administrative process. Further, because the APA governs the actions of federal agencies, not state agencies, and because Plaintiff does not allege that the statutory requirements for Secretarial preemption of State regulation under the MSA are met,¹⁴⁸ it is unlikely that his injury could be redressed by a favorable decision. Even if the Secretary used notice and comment under the federal APA to effectuate state regulations in the EEZ, that would not change the State administrative process.

Plaintiff's fifth claim alleges violations of MSA national standards 2 and 8 by the State and requests that the Court order the Secretary to review and preempt noncompliant state regulations. Plaintiff alleges only that the State's "ad hoc committee process," fails to address these standards by not using the best available science and by not considering economic impacts on commercial fishing minimizing adverse economic impacts on those communities.¹⁴⁹ Plaintiff fails to allege the Board of Fisheries failed to consider these factors in its full regulatory process that explicitly requires consideration of both the history of the fishery, and "the importance of each fishery to the economy of the region and the local area in which the fishery is located,"¹⁵⁰

documents which the Court may take judicial notice of; they are available (last viewed January 26, 2009) at: <http://www.boards.adfg.state.ak.us/fishinfo/regs/pfindx.php>).

¹⁴⁵ See, e.g., *Tongass Sport Fishing Association v. State*, 866 P.2d 1314, 1319 (Alaska 1994).

¹⁴⁶ See, e.g., *Stepovak-Shumagin Set Net Association v. State*, 886 P.2d 632 (1994).

¹⁴⁷ See, e.g., Alaska Board of Fisheries Findings No. 2006-248-FB (May 3, 2006) and No. 97-167-FB (January 29, 1997) (Findings supporting the Prince William Sound Allocation Plan).

¹⁴⁸ 16 U.S.C. § 1856; see also Section B. above.

¹⁴⁹ Compl. at ¶¶41-43.

¹⁵⁰ AS 16.05.251(e)(1), (6).

and which requires the Board to take a “hard look” at the problems presented to it.¹⁵¹ He fails to allege that these considerations, substantially the same as those in National Standards 1 and 8, do not achieve the purposes of those standards. He also fails to identify any particular regulation that is alleged to violate these standards. In the absence of a concrete example of injury from a particular regulation, his allegations of harm are hypothetical and speculative. Plaintiff also fails to allege that grounds for Secretarial preemption of State regulation under the MSA are met,¹⁵² and it is not likely that Plaintiff’s alleged injury could be redressed by a favorable decision.

V. Conclusion

There are three independent reasons for dismissal of Plaintiff’s claims. First, Plaintiff’s claims seek to directly divest the State of Alaska of its sovereign rights and responsibilities and are barred by State sovereign immunity under the Eleventh Amendment. Second, the express language of the MSA preserves State authority over salmon management. Third, Plaintiff has not alleged sufficient facts to show injury, causation, or redressibility, and thus lacks standing to raise his claims. Plaintiff’s complaint must be dismissed.

RESPECTFULLY SUBMITTED this 2nd day of February, 2009.

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¹⁵¹ See, e.g., *Tongass Sportfishing*, 866 P.2d at 1319.

¹⁵² See 16 U.S.C. § 1856(b).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 3, 2009, a copy of the foregoing Memorandum in Support of Motion to Dismiss was served electronically on

Gregory R. Gabriel, Jr.

and by regular U.S. mail on

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