

Summary of Cases for the Spring 2018 Fisheries Committee Meeting

Maritime Law Association

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McPherson V. Fishing Co. of Alaska, I o. 75059-3-I (Wash. Ct. App., May 30, 2017):

Michael McPherson was employed as an assistant engineer on a Defendant's fishing vessel. Prior to his employment McPherson signed as Employment At-Will Contract with the Defendant which stated that McPherson was employed at will for a period of 90 days. Defendant fired McPherson after 18 days.

McPherson filed suit alleging that the Defendant wrongfully fired him asserting that since 46 U.S.C. § 10601 requires fisherman employment agreements to include a "period of effectiveness," Defendant cannot fire him without cause during the 90 day period. Trial court granted Defendant's motion for summary judgment and McPherson appealed.

On appeal the court looked at the history of legislation favoring seamen, fishing agreements, and 46 U.S.C. § 10601. In their review the Appeals Court determined that despite the long history of seamen being wards of the court, a seaman is an at will employee and may be discharged for any or no reason. The Appeals Court further stated with regards to § 10601, that the Statute merely requires fisherman agreements to contain a period of time and is silent with regards to preventing employers from terminating their employees without cause. The Appeals Court found for Defendant and held that fisherman agreements can be at-will employment.

Western Challenger, LLC v. DI V GL Grp, I o. C16-0915-JCC, 2017 WL 3288180 (Dist. Wash, Aug 2, 2017):

Plaintiff purchased the vessel WESTERN CHALLENGER in 2013 with the intentions of using the vessel as a fishing tender. The WESTERN CHALLENGER was originally built as a US Navy minesweeper and was subsequently sold and brought up to Canada where the vessel was converted into a fish tendering vessel. Prior to purchasing the vessel Plaintiffs consulted with the Defendant as to whether there would be issues documenting the vessel with the US Coast Guard so that it may be used as a fishing tender. Once the purchase of the vessel was complete, Plaintiff hired the Defendant to provide a tonnage certificate to the USCG so that a coastwise endorsement could be obtained. Defendant sent a total of three tonnage certificates to the USCG which contained different tonnages, in addition, some certificates omitted remarks indicating the alterations done to the vessel. Because the third and final tonnage certificate provided to the USCG indicated that the vessel was over 200 tons Plaintiff had to obtain special legislation to enable it to receive a coastwise endorsement.

In addition to the requirement of a coastwise endorsement, Plaintiff needed to obtain a fishing endorsement from the National Vessel Documentation Center (NCDC). However, 26 C.F.R. § 67.177 bars a vessel from receiving its fishery endorsement if it has undergone rebuilding and a considerable part of the vessel is modified outside of the US. Following Plaintiffs application for a fishing endorsement, USCG sent Plaintiff a letter requesting all evidence of alterations to the vessel and the location and time where the work was done.

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Because Plaintiff failed to respond to several of these demands, the NVDC denied Plaintiff's application as it could not determine whether the conversion the vessel underwent constituted a foreign build.

Plaintiff initiated suit against Defendant alleging breach of contract and negligent misrepresentation. Defendants filed a motion for partial summary judgment asserting the reason the WESTERN CHALLENGER did not receive a fishery endorsement had nothing to do with their conduct. Defendants motioned for partial summary judgment asserting that Plaintiff failed to mitigate their damages.

After reviewing the evidence in a light favorable to Plaintiff the Court concluded that a trier of fact could find that but for Defendants' assurances that Plaintiff would have no issue documenting the WESTERN CHALLENGER, Plaintiff would not have purchased the vessel. Prior to the sale of the vessel, Defendants assured Plaintiff that it would be possible to document the vessel to be used as a tender in US waters. Based on the evidence presented to the Court, the Defendants knew or should have known that receiving the documentation would have been difficult if not impossible to achieve. As such, the Court denied Defendants' partial motion for summary judgment as to the negligent misrepresentation claim.

Regarding Plaintiff's breach of contract claim, the Court concluded that the claim as it relates to the Defendant, only applies to the coastwise endorsement, which was obtained after special legislation. Because NVDC denied Plaintiff's application for the fishery endorsement due to issues of foreign build the Court concluded that any loss of use damages was not proximately caused by the Defendants.

The Court denied Defendant's motion for partial summary judgment asserting that Plaintiff failed to mitigate their damages. Defendants asserted that Plaintiff could have sold the WESTERN CHALLENGER for a profit and replaced the vessel with a suitable fish tendering vessel. Plaintiff presented evidence that they worked to try and get the vessel to comply with the necessary regulations to allow the WESTERN CHALLENGER to engage in tendering operations. Because both parties submitted contrary evidence, the Court determined that it would be for the jury to decide whether Plaintiff chose the best course of action in mitigating their damages.

Aqua King Fishery, LLC v. Conservation Commission of Provincetown, I o. 16-P-1366 (Mass. App. Ct. June 16, 2017):

Aqua King appeals the decision of the Superior Court denying its motion for judgment on the pleadings finding that it failed to obtain a permit from the Conservation Commission of Provincetown for the use of hydraulic dredge fishing gear in its commercial sea clam fishing operation on areas of the ocean floor near Provincetown's shore. On appeal Aqua King argues that the activity is controlled by the Division of Marine Fisheries and is exempt from municipal and state regulations. In addition, Aqua King appeals the judgment obtained by the Commission on its counterclaims based on violations of the Wetlands Protection Act.

On appeal the Commission argues that it was required to comply with Provincetown's by-laws because it reasonably related to the Commission's statutory responsibility of protecting

wetland resource areas and prohibited hydraulic dredging from occurring within the waters of Provincetown without a proper filing before the Conservation Commission.

In finding for Aqua King, the Court looked at the language of G.L. c 130, § 52 which authorizes towns to "control, regulate or prohibit the taking of eels and any or all kinds of shellfish and sea worms." However, the Section explicitly excludes sea clams and ocean quahogs from the category of shellfish that towns are authorized to regulate. The Court further held that the Commission did not obtain approval from the director of the Division of Marine Fisheries to regulate the exempted shellfish species and therefore had no authority to require Aqua King to obtain a permit.

Regarding the Commission's claims under the Wetlands Protection Act, the Court found for the Commission concluding that Aqua King's dredging technique causes a temporary deepening of the ocean floor within nearshore waters. Therefore there is a reasonable basis for the Commission's decision.

***United States v. Rafael*, 282 F. Supp. 3d 407 (Dist. Mass. 2017):**

Defendant Carlos Rafael plead guilty to twenty-three counts of false labeling and identification in violation of the Lacey Act. The Government now seeks forfeiture of 13 of his vessels and fishery permits, whose total value is approximately \$27,000,000, after taking into consideration the liens and attachments on the vessels and permits. After looking at the language of 16 U.S.C. § 3374, which holds that all vessels used to aid in the importing, exporting, transporting, selling, receiving, acquiring or purchasing of fish is subject to forfeiture if such vessel was used in a criminal violation of the Lacey Act and supporting case law, the Court concluded that the forfeiture of the vessels is mandatory.

Defendant contends that despite the statutory mandate, the forfeiture the government seeks runs afoul of the US Constitution, specifically the Eighth Amendment. In determining whether the government's action is unconstitutional, the Court looked at whether the Rafael falls into the class of person that the statute was principally directed, other penalties authorized by the legislature, and the harm that he has caused. In concluding that the fines imposed by the government are not grossly disproportionate the Court found that Rafael was a class of person that the Lacey Act is principally directed at. Specifically, the Court concluded that the Act's purpose is to protect those species of fish and wildlife whose continued existence is presently threatened. In addition, the Court looked at the harm that Rafael's actions had caused to the New England fishery, and concluded that it was substantial. Furthermore, the Court concluded he used his corrupt practices to control the fishery and harm those businesses who rely on the fishery.

The Court concluded that the forfeiture of assets valued up to approximately ten times the maximum fine set by the guidelines is within the limit of constitutional proportionality given the circumstances of the case and ordered Rafael to forfeit four vessels and 34 fishing permits for an appraised value of \$2,258,850.00.

Following the Court's decision, the government moved for reconsideration, which was denied, but the Court clarified that the order for forfeiture of the four vessel includes all the permits pertaining to the vessels.

***Oceana, Inc. v. Pritzker*, Case I o. 1-CV-06784-LHK, 2017 U.S. Dist. LEXIS 129985 (Dist. I o. Ca. August 15, 2017):**

Plaintiff, Oceana, Inc. brought the following action challenging the October 26, 2016 publication of the Catch Rule which set annual catch limits for various species of fish including the northern anchovy. Plaintiff contends that there are three sets of documents and data which should have been a part of the administrative record but was excluded. The Court discussed that review under the APA is restricted to the administrative record which consists of all documents and materials directly or indirectly considered by the agency decision makers and includes evidence contrary to the agency's position. In rebutting the completeness of the administrative record, the "plaintiff must show clear evidence that the record is not complete by identifying reasonable non-speculative grounds for the belief that the documents were considered by the agency and not included in the record."

In reviewing the administrative record, the Court concluded that the magistrate judge found correctly that the Finfish Report and the 2015 Trawl Survey were "directly or indirectly considered by the agency in formulating the Catch Rule and not included in the record, therefore the presumption of completeness was rebutted and found for the Plaintiff.

***Oceana, Inc. v. National Marine Fisheries Service*, Case I o. 15-35940, 2017 WL 3722843 (9th Cir. August 29, 2017):**

Plaintiffs Oceana, Inc. and Greenpeace, Inc. appealed the district court's grant of summary judgment to the National Marine Fisheries Service which challenged NMFS's 2014 biological opinion and final environmental impact statement assessing the effect of proposed fishing regulations on a distinct population of Steller sea lions.

In upholding the district court's granting of summary judgment, the Court of Appeals found that NMFS properly assessed whether allowing fishing under specific conditions is likely to jeopardize the sea lion's existence. In support of their findings the Court found that NMFS looked at numerous scientific reports and considered these when making their conclusion. In addition, NMFS did not err by failing to identify the tipping point beyond which a species could recover as NMFS concluded that there would be no significant effect on the population or habitat and therefore the court of appeals found that they were not required to calculate the tipping point of the species. The Court of Appeals further held that what constitutes best scientific data available belongs to the agency's special expertise and found that the best scientific data available does not mean the best scientific data possible.

***Oceana, Inc. v. Ross*, Case I o. 17-cv-829 (CRC), 2017 WL 999909 (Dist. Dist. Columbia Feb. 21, 2018)**

Oceana, Inc. brought suit under the Administrative Procedure Act challenging NMFS's plan for the Dusky Shark. In addition, Oceana filed a motion to compel NMFS to complete or supplement the administrative record with four categories of documents: (1) studies and other documents cited in the environmental impact statement (EIS), (2) catch data, (3) documents

withheld by NMFS under the deliberative process privilege, and (4) certain other extra-record studies and data.

Under the APA there are two situations in which a Plaintiff may seek to add evidence or documents to the administrative record; (1) extra-judicial evidence that was not initially before the agency but plaintiff believes should be in the record, and (2) evidence that should have been properly a part of the administrative record but was excluded by the agency. The Court looked at the history of the plan and determined that the first set of documents, "studies and other documents cited in the EIS," belonged in the administrative record as it was apparent that NMFS clearly considered and relied on the documents and their contents rather than merely mentioning the documents existence. However, the Court determined that the documents cited in the body of the EIS are there for further reference and were simply mentioned and do not appear to have been used, discussed, or consulted by decision makers.

In denying Oceana's motion regarding the remaining three categories of documents, the Court found that these items did not belong in the administrative record. Regarding the catch, data the Court determined that just because the data existed does not mean that NMFS used or considered the raw data or used an aggregated version of data. Regarding reviews, comments, emails, and drafts the court determined that these materials fell within deliberative process privilege. The Court further determined that comments on drafts concerning issues such as how to frame and interpret data fall within the scope of deliberative privilege. Regarding the extra record documents, the Court found that Oceana failed to meet their burden to show that the agency either deliberately or negligently ignored the possibly adverse documents or that the documents are background information needed to determine that the agency has considered all relevant factors.

Pacific Choice Seafood Company v. Ross, Case I o. 15-cv-05572-HSG

At issue in this matter are amendments to the Pacific Coast Ground Fish Management Plan, which established new limited access privilege program and created a Individual Fishing Quota system giving participants in the fishery a specific portion of the quota share. In passing the new IFQ program there was a 2.7% aggregate limit on the total quota share ("QS") of all non-whiting species fished in the pacific fishery that a person may own or control. If a participant owned more than 2.7% they were to divest their excess shares by a set date. Plaintiff, Pacific Choice received a letter from NMFS informing the them that it owned excess QS of the aggregate limit and would need to divest the excess QS or NMFS would revoke the excess QS. Plaintiff did divest their share by the deadline.

Plaintiff challenged the IFQ program contending that NMFS acted *ultra vices* in defming the scope of ownership and control over the QS and set an arbitrary and capricious aggregate limit on QS. In finding that NMFS acted within its statutory authority when defining ownership and control for the purposes of the IFQ Program, the Court looked at the history of the IFQ program and found that QS is a regulatory privilege that simply grants permission to engage in activities permitted by the IFQ Program. Congress did not confer any right of compensation to the holder if the program is revoked, limited or modified.

Plaintiff also challenged that the aggregate limit of 2.7% is arbitrary and capricious as NMFS did not engage in "reasoned decision making." In finding for the defendant, the court looked at the language of the MS which required NMFS to ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program. In reviewing the record the Court determined that NMFS identified the management objectives, and provided a reasoned explanation for setting the aggregate limit

Oceana, Inc. v. Ross, I o. 1:15-cv-01220-ESH, 2017 U.S. Dist. Lexis 135845 (Dist. Dist. Of Columbia August 24, 2017):

Congress directed NMFS and the regional counsels to establish methodologies for collecting and reporting data on bycatch. In response the Northeast region adopted the Standardized Bycatch Reporting Methodology in 2015. Plaintiff Oceana, Inc. brought suit claiming that the methodology violates the Magnuson-Stevens Act (MSA), the National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA). Both parties filed motion for summary judgment.

In finding for the Defendant and dismissing Plaintiffs case the Court looked at the language of the MSA which requires FMT's to establish a standardized reporting methodology to assess the amount and type of bycatch occurring in a fishery and include conservation and management measures that will minimize bycatch and bycatch mortality. The Court also looked at prior attempts to establish a standardized reporting methodology. In 2008 the D.C. District Court held that NMFS failed to establish a standardized methodology because it reserved to itself complete discretion to trigger an exemption from the methodology that it had described and the 2008 District Court found that there was no meaningful constraint on how NMFS would allocate observers once the exemption was triggered. Following this remand, SBRM, NMFS, and the councils revised the methodology to address these concerns which were approved in 2015.

The MSA requires the establishment of the SBRMs but does not discuss how much funding is required to be devoted to them. Because the MSA is silent on funding, the Court cannot determine whether NMFS allocated a reasonable amount of funding to the SBRM. The Court can only determine whether NMFS has created an impermissibly vague funding trigger for departing from the standardized methodology. The Court found that NMFS established a standardized methodology in the 2015 SBRM despite allowing adaptation to available funding through the prioritizing process as the prioritization process is party of the standardized methodology, is not a departure from it and that NMFS adequately defined the funding trigger for the prioritization process and there is an identifiable standard for the process.

The Court also found that NMFS did not violate the Endangered Species Act as NMFS provided a reasoned explanation in the environmental assessment about why the environmental effects of the SBRM were not reasonably foreseeable.

Alfa International Seafood v. Ross, Case I o. 1:17-cv-00031 (APM), 2017 WL 3726984 (Dist. Dist. of Columbia, August 28, 2017)

To address the issue of illegal, unreported, and unregulated ("IUU") fishing and "seafood fraud" the Seafood Import Monitoring Program ("SIMP") was promulgated by the Department of Commerce through NMFS. The regulation requires U.S. based importers to collect information

about each stage of the supply chain for certain types of seafood imported into the U.S., identify the seafood species entering the U.S. and obtain a permit from the Department to continue importing seafood into the U.S. In challenging the SIMP Plaintiffs claim that the Department acted without proper authority under relevant statutes and the Constitution by issuing an overly expansive and highly burdensome regulatory regime and relying on insufficient evidence.

The Court first held that the ratification of the Rule by the Under Secretary of Commerce for NOAA, Kathryn Sullivan and Assistant Administrator of Fisheries Eileen Sobeck did not violate the Appointments Clause. The Court found the text of the MSA does not specifically grant the Department the authority to issue regulations pertaining to seafood fraud specifically. However, when considering the legislative history of the MSA, Congress intended that the MSA authorize the department to regulate seafood fraud. The Court found that Congress had expanded the Secretary's regulatory powers under the MSA. This expansion of regulatory powers with the understanding that the Secretary was focused on seafood fraud lead the Court to conclude that Congress intended for the Secretary to exercise rulemaking authority to prevent seafood fraud.

The Court also found that the Lacey Act is not the exclusive source of authority for promulgating regulations to combat seafood fraud. While the Lacey act prohibits mislabeling and provides the authority to regulate the contents of seafood labels, the MSA grants the Department broad authority to issue regulations designed to regulate all aspects of the IUU.

The Court further found that the Department did not violate the APA as the Department did established a sufficient link between the Rule and Combating IUU fishing and seafood fraud. The administrative record clearly demonstrated the important role that a traceability system can play in addressing the problems of IUU fishing and seafood fraud and the Rule is not arbitrary and capricious. The Court determined that the Department properly assessed the Rule's compliance costs. In reviewing the record, the Department made supply-side costs estimates by examining relevant data and articulated a satisfactory explanation for its actions including a rational connection between the facts found and the choices the Department made.

Finally, the Court found that the Department satisfied the Requirements of the Regulatory Flexibility Act, which requires agencies issuing regulations likely to have a significant impact on small entities to prepare both an initial regulatory flexibility analysis and a final regulatory flexibility analysis whose purpose is to estimate the financial impact of the new regulations on small businesses and to ensure the agency makes all reasonable efforts to minimize the impact. In looking at the Department's actions, the Court determined that the Department made a "good faith" effort to consider significant alternatives under the RFA, which is all that is required under the Act.