Summary of Cases for the Fall 2018
Maritime Law Association
Fisheries Committee Meeting

Prepared by Scott R. Gunst, Jr., Young Lawyers Liaison*

***Massachusetts Lobstermen's Association v. Ross,* 2018 U.S. Dist. LEXIS (D. D.C., Oct. 5, 2018):**

In 2016 President Obama proclaimed that the Canyons and Seamounts of the Northwestern Atlantic Ocean a national monument using the Antiquities Act of 1906. The Act has three distinct parts which authorizes the President to (1) declare objects of historic or scientific interest that are on lands owned or controlled by the Federal Government to be national monuments, (2) empowers the President to reserve parcels of land as part of national monuments, and (3) allows privately held lands to be voluntarily given to the federal government if the land is necessary for the proper care and management of the national monument. Together, courts have interpreted that these provisions give the President substantial though not unlimited discretion to designate lands as national monuments.

The Northwest Canyons and Seamounts Marine National Monument proclamation seeks to protect several underwater canyons, mountains, and ecosystems situated about 130 miles off the New England Coast and encompasses roughly 4,913 square miles. In addition, President Obama directed the Executive Branch to take several steps to conserve the area's resources including directing the Secretaries of Commerce and Interior to develop plans within three years for the proper care and management of the monument as well as prohibit oil and gas exploration and most fishing. Plaintiffs are several commercial-fishing associations who are claiming injury from the restrictions on commercial fishing arguing that the President lacked authority under the Antiquities Act to declare this a monument and the Government filed a Motion to Dismiss.

The District Court held that President did act within the scope of his statutory authority and that the President was allowed to declare these lands a national monument. First, the Court determined that on three separate occasions the Supreme Court has declared that the Antiquities Act does include submerged lands and the water associated with them. Second, the Court determined that past presidents have declared submerged lands as national monuments. In addition, the Court concluded that the Antiquities Act intends to complement existing regulatory authorities and does not conflict with the National Marine Sanctuaries Act, which gives the Executive Branch the authority to designate national marine sanctuaries and to issue regulations protecting those areas. The Court also concluded that the Monument is within the area of the Exclusive Economic Zone and the federal government exercises sufficient control over these lands for the purposes of the Act.

***Oceana v. Ross,* 2018 U.S. Dist. LEXIS 139545, (D. D.C. Aug. 17, 2018):**

This matter arises from a challenge to the 2012 Biological Opinion issued by NMFS that pertains to the Atlantic Sea Scallop Fishery and its impact on the Northwest Atlantic population

* Scott is a partner in the firm, Biggs & Gunst P.C., he may be contacted at SGunst@biggsgunst.com

of the loggerhead sea turtles. In 2014, the Court issued an opinion which remanded the case to NMFS for the purpose of addressing two deficiencies; (1) NMFS was to more clearly explain its reliance on dredge hour surrogate for monitoring loggerhead takes, and (2) requested NMFS to evaluate and explain whether the decision to evaluate loggerhead takes resulting from trawl gear fishing only once every five years opposed to annually is sufficient. *See Oceana, Inc. v. Pritzker,* 75 F. Supp. 3d 469 (D. D.C. 2014).

NMFS revised the Incidental Take Statement ("ITS") for the 2012 BiOp and now contends that it has completed the required tasks on remand by thoroughly explaining its monitoring methods. Oceana, Inc. filed a response arguing that the ITS remains defective and NMFS has failed to demonstrate that its monitoring methods are not arbitrary and capricious. In reviewing whether NMFS properly responded to the Courts earlier concerns, the court notes that an administrative agency that has been ordered to reconsider an earlier decision has an "affirmative duty to respond to the specific issues remanded by the Court."

The Court concluded that NMFS failed to properly explain its reliance on dredge hour surrogate for monitoring takes. Initially NMFS published a revised ITS that illustrated the relationship between dredge hours and the takes as a "strong positive linear relationship." However, when challenged, NMFS disclaimed any reliance on a predictive linear relationship and completely contradicted its revised ITS and failed to provide a sufficient basis to determine whether the dredge hours will serve as an adequate proxy for the takes and therefore provide an appropriate mechanism for determining when the take limit is exceeded. The Court remanded the case back to NMFS to more clearly explain its reliance on dredge hours and instructed the Agency that if it cannot, then it is to determine a more appropriate mechanism for monitoring loggerhead takes resulting from dredge fishing.

The Court accepted NMFS explanation regarding the use of the five-year timetable as loggerhead interactions with trawls are rare. NMFS further explained that a very simple model requires at least twenty to thirty bycatch events and it is uncommon to have that many observed loggerhead interactions within a single year, therefore the data must be pooled across multiple years to have sufficient information to build a proper model.

***Gulf Fisherman Association v. National Marine Fisheries Service,* 2018 U.S. Dist. LEXIS 163685 (D. La. Sept. 25, 2018):**

Plaintiffs seek to challenge administrative action by NMFS, whereby the agency adopted a regulatory scheme for offshore aquaculture in the federal waters of the Gulf of Mexico's EEZ. Plaintiffs argue that the regulations are invalid as they fall outside NMFS authority to regulate aquaculture fisheries under the MSA. NMFS contends that the term "harvesting" within the MSA gives them the authority to regulate aquaculture, interpreting "harvesting" to mean the "act or process of gathering a crop," a crop of fish.

After reviewing the language of the MSA, the Court determined that the Act does not authorize the regulation of aquaculture. The Court concluded that Congress did not contemplate the term harvesting to include the farming of fish and when read in conjunction with other terms within the MSA, specifically, "catching" and "taking," clearly refers to the catching of wild fish

and describe traditional fishing activities, not the farming of fish. Therefore, the term "harvesting" should be read similarly to traditional fishing of wild fish.

The Court also comments that the MSA does not mention aquaculture or the management of fish as "crops." Instead the term "aquaculture" is used in only three discrete and immaterial provisions of the MSA. Therefore, the Court concluded that Congress did not intend for the MSA to grant MNFS the authority to regulate aquaculture.

***NRDC, Inc. v. Ross,* 2018 Ct. Intl. Trade Lexis 103 (U.S. Ct. Int'l. Trade Aug. 14, 2018):**

This matter involves the Vaquita, the world's smallest porpoise which there are currently 15 left in the wild. It is undisputed that the cause of the species decline is inadvertent tangling and drowning in gillnets. In a previous decision issued on July 26, 2018, the Court granted a preliminary injunction requiring the Government to ban the importation of all fish and fish products which use gillnets within the Vaquita's known habitat under the Marine Mammal Protection Act ("MMPA"). *See NRDC, Inc. v. Ross,* 2018 Ct. Intl. Trade LEXIS 103 (U.S. Ct. Int'l. Trade, July 26, 2018). The Government is now seeking to limit the scope of the preliminary injunction and questions whether the injunction is effective immediately.

The Court found that (1) the ban on the importation of commercial fish mandated by the MMPA is not limited to legal fisheries but also illegal fisheries; (2) the Government is to ordered to ban the importation from Mexico of all shrimp, curvina, sierra, and chano fish caught with gillnets inside the vaquita's range; (3) while other laws may also restrict the import of some of the fish covered by the ban, it does not bar the Court from preliminary enjoining the Government to ban importation under the MMPA; (4) the MMPA is effective immediately.

In its opinion, Court found that the Lacey Act and the MSA do not render the MMPA inoperative. The Government argued that preliminary injunction cannot include imports of shrimp and chano caught in gillnets contrary to Mexican law because the Lacey Act and the MSA statutorily ban fish harvested in violation of foreign law and impose steeper penalties than the MMPA. The Court concluded that both the Lacey Act, the MSA, and the MMPA serve complementary, non-duplicative functions as part of a wider framework of wildlife protection legislation. Therefore, neither the Lacey Act nor the MSA provide an exclusive source of federal authority for regulating fish imports and does not excuse the Government from its MMPA obligations or prevent the issuance of a preliminary injunction requiring the Government to ban imports mandated by the MMPA.