Summary of Cases for the Spring 2020 Fisheries Committee Meeting

Maritime Law Association

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***Center for Biological Diversity v. Ross,* 2020 U.S. Dist. LEXIS 62550 (D. D.C., April 9, 2020):**

In 2014, National Marine Fisheries Service produced a biological opinion finding that, despite the finding potential to harm the North Atlantic Right Whale in unsustainable numbers, the American lobster fishery would not jeopardize their continued existence. In so finding, however, the Service failed to include an "incidental take statement" as required under the Act. The Court conclude that the agency's reasons for the omission are unavailing and held the 2014 Biological Opinion to be illegal under the Endangered Species Act (ESA).

The ESA requires that each federal agency must insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered species. If agency action may affect a listed species then the agency must engage and consult with an expert agency to determine whether the action will violate the ESA's prohibition on jeopardizing the continued existence of an endangered species. If the taking of an endangered species is authorized pursuant to the ESA then the an incidental taking statement must be produced whenever an incidental take is reasonable to occur and that ITS must confirm that any take complies with both the ESA and the MMPA.

Despite determining that the lobster fishery had the potential to take North Atlantic Right Whales within the meaning of the ESA, the 2014 BiOp issued concluded that it did not included an incidental take authorization because an ITS cannot be lawfully issued under the ESA unless the incidental take authorization exists for that marine mammal under the Marine Mammal Protection Act (MMPA) and an incidental take of the ESA-listed whales by the lobster fishery has not been authorized under the MMPA. The Court concluded that the 2014 BiOp violates the ESA because NMFS was required to produce a ITS and it did not.

***Massachusetts Lobstermen's Association v. Ross,* 945 F.3d 535 (Ct. App. D.C., Dec. 27, 2019):**

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

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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

The Court of Appeals upheld the lower court's ruling that the President was allowed to declare these lands a national monument pursuant to the National Monument Act and the Antiquities Act. 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 agreed 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.

In a new argument, Plaintiff's claim that the Monument is not the "smallest area compatible" with management. The Court dismissed these claims after looking at previous case law which held that the ecosystems of the surrounding area is also included not just specific areas. In this case the Monument protects not only "the canyons and seamounts themselves," but also "the natural resources and ecosystems in and around them."

***In re Complaint of B&C Seafood, LLC,* 2019 U.S. Dist. Lexis 95693 (D. N.J. 2019)**:

In 2017 there was a collision between the vessels, F/V TOOTS II and M/V OLEANDER. Following the collision, the Toots II was towed to a shipyard in New Jersey where initial surveys indicated that the repairs would total $188,330. However further surveys discovered more damage which indicated that the fair and reasonable cost for repairs would be $450,259.00 which made the vessel a constructive total loss. The owner of the Toots sought to limit their liability pursuant to the Limitation of Liability Act. Claimants sought to include the value of the Toots fishing permits which had a value at the time of the incident of $1,370,000.00 and therefore the fair market value for the Toots II should be $1,495,000.00. The vessel's owner argues that the value is $60,967.85.

The District Court looked to the language of the Limitation of Liability Act as well as previous case holdings and concluded that fishing permits are not an appurtenance for the purpose of the Limitation of Liability Act. In looking at past decisions, the Court concluded that there is a distinction between those appurtenances physically onboard the vessel and those which are not at the time of loss. The court concluded that while copies of the fishing permits are onboard the vessel, the permits themselves are intangible and not on board the vessel and therefore not appurtenances.

The District Court also briefly distinguished this matter to those decisions related to maritime liens as not being applicable because they serve separate purposes. Maritime liens were created to promote commerce while the Limitation of Liability Act was created with the intention to limit a vessel owners' liability and prevent exposure to unlimited liability.

***Oceana, Inc. v. Ross,* 2020 U.S. Dist. LEXIS 16390 (D. N.D. Cal. Jan. 31, 2020):**

In April 2019, NMFS published a proposed rule titled "Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Multi-Year Harvest Specifications for the Central Subpopulation of Northern Anchovy" in the Federal Register and requested public comment. On May 31, 2019 the final rule was published which sets catch limits and other reference points for the Pacific sardine, Pacific mackerel, jack mackerel, northern and central subpopulations of the northern anchovy, market squid, and krill. Plaintiff filed suit alleging that the Rule is not based on the best available science, fails to prevent overfishing, fails to achieve optimum yield, and that Defendants failed to articulate a rational basis for their decisions in violation of the Magnuson Act and the APA.

Plaintiffs filed a motion to compel the completion of the administrative record by adding two categories of materials: (1) scientific research and presentations that NMFS scientists and others developed and presented to NMFS officials; and (2) NMFS scientists' communications, analyses, and draft assessments of the science that NMFS considered during the formulation of the Rule.

Motions to complete the Administrative Record may be granted where the agency fails to submit the 'whole record. The whole record encompasses all the evidence that was before the decision-making body including "document contrary to the agency's position and all documents and materials directly or indirectly considered by agency decision-makers. An agency's certification of the administrative record is entitled to a strong presumption of regularity, a certification that does not make clear that the record includes all documents and materials directly or indirectly considered by the agency in making its decision "suggests noncompliance with the standard according to which an administrative record should be compiled. In this case the certification submitted by the agency failed to identify any criteria issued by NMFS staff in their search for an assembly of documents for the administrative record.

A plaintiff may also overcome the presumption of completeness by: (1) identifying the allegedly omitted materials with sufficient specificity; and (2) identifying reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not

included in the record. In this case the Plaintiff specifically identified ten documents it believed were omitted by Defendant's in their preparation of the administrative record. In reviewing these documents the Court applied the rule that if scraps of paper were used by agency scientists to develop recommendations for NMFS, those papers must be included in the record. Therefore those documents used but not included must now be included in the administrative record.

***Ctr. for Biological Diversity v. Ross,* 2019 U.S. Dist. LEXIS 220065 (D. N.D. Cal. Dec. 20, 2019):**

Longline fishing is banned within 200 miles off the West Coast under federal regulations and state law to ensure the protection of sea turtles. In 2015, the Pacific Fishery Management Council recommended that NMFS authorize two EFPs to two vessels for a period of two years to allow exploratory longline fishing to gauge impacts, determine whether this type of fishing is economically viable, assess the type and extent of interactions with protected species, and test mitigation measures appropriate to minimize adverse environmental impacts.

At the same time NMFS was considering allowing longline fishing in the EEZ, it was also considering sea turtle conservation efforts. On December 21, 2017, NMFS issued an opinion titled "Biological and Conference Opinion on the Proposed Implementation of a Program for the Issuance of Permits for Research and Enhancement Activities on Threatened and Endangered Sea Turtles Pursuant to the Endangered Species Act" ("2017 BiOp"). The 2017 BiOp estimated that the Pacific leatherback population has declined from an estimated 81,000 individuals to less than 3,000 total adult and subadult turtles and estimated that the counts of leatherbacks at nesting beaches indicate a decline "at a rate of almost six percent per year since 1984. NMFS attributes this steep decline, in part, to fisheries bycatch, which it identifies as one of three "primary threats." Despite this finding, NMFS issued a final environmental assessment finding no significant impact and such, no EIS for the EFP was required.

In the 2018 BiOp, the Fisheries Service found that fishing under the permit would result in the hooking or entanglement of two female Pacific leatherback sea turtles, one of which would result in the death of the animal; and the hooking or entanglement of two loggerhead sea turtles, one of which would result in the death of the animal. Thus, the Fisheries Service's EFPs reverse protections in place for leatherback sea turtles despite continuing population declines and the agency's admission that the extinction of Pacific leatherbacks "is almost certain in the immediate future."

Plaintiffs challenge the Fisheries Service's issuance of an exempted fishing permit (EFP) that would allow two vessels to engage in commercial longline fishing in the West Coast Exclusive Economic Zone (EEZ) for a period of two years. Plaintiffs contend that the agency's issuance threatens the survival and recovery of Pacific leatherback sea turtles and other endangered species.

First Plaintiffs argue that NMFS issuance of the longline permits disregarded the best available science and binding case law. Plaintiffs contend that the Government failed to use the best available science when it ignored the 2017 BiOp, which showed that the number of nesting Pacific leatherbacks and the number of leatherbacks off California have declined beyond the

numbers in the 2018 BiOp, and by ignoring bycatch data. The defendants concede that they did not address the 2017 BiOp and therefore the court found that they failed to consider the best available science.

Plaintiff argue that NMFS's failure to consider reasonable alternatives to mitigate the longline permit's environmental impacts, failure to take a hard look at the cumulative impacts, and failure to prepare an environmental impact statement violated NEPA. NEPA requires federal agencies to file an environmental impact statement ("EIS") before undertaking "major Federal actions significantly affecting the quality of the human environment." If the agency finds, based on a less formal and less rigorous "environmental assessment," that the proposed action will not significantly affect the environment, the agency can issue a Finding of No Significant Impact ("FONSI") in lieu of the EIS. An agency decision that a particular project does not require an EIS will be upheld unless that decision is unreasonable. Here the court concluded that Defendants do not explain how they reconciled the prior opinion that "every turtle counts" to the survival of the species with the EA's current opinion that one turtle is expendable. In fact, the Government seems to think that the "likely" death of one endangered animal is not significant, in part, because, once there is a bycatch mortality, the longline "fishing effort must halt." This departure occurred within less than two years, and, at the very least, requires the preparation of an EIS, because it raises a "substantial question" as to whether the action would cause a significant impact to the environment.

For the reasons set forth above, the Fisheries Service's issuance of the EFP violated the ESA and NEPA. As a result, it also violates the MSA, because the MSA requires that the action be consistent with federal law, including the ESA.