




U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
OFFICE OF GENERAL COUNSEL
Pacific Islands Section
Daniel K. Inouye Regional Center
1845 Wasp Blvd., Bldg. 176
Honolulu, Hawaii 96818
(808) 725-5205 • Fax: (808) 725-5216

DATE: June 9, 2017

MEMORANDUM

TO: Edwin Ebisui, Chair
Western Pacific Fishery Management Council

FROM: Frederick W. Tucher 
Chief, Pacific Islands Section, NOAA Office of General Counsel

SUBJECT: NOAA OFFICE OF GENERAL COUNSEL, PACIFIC ISLANDS SECTION
REPORT TO THE 170th COUNCIL MEETING

The Pacific Islands Section's Report to the 170th Meeting of the Western Pacific Fishery Management Council is as follows:

Litigation Matters

Territory of American Samoa v. NMFS, et al., 16-cv-95 (D. Haw.) As previously reported, on March 20, 2017, U.S. District Judge Leslie Kobayashi vacated and set aside a 2016 final rule amending the American Samoa Large Vessel Prohibited Area (LVPA), holding that NOAA's action violated the "other applicable law" provision of the Magnuson-Stevens Act by failing to consider its obligation to protect cultural fishing rights under the Deeds of Cession. NOAA had approved the Final Rule for the purpose of removing regulatory barriers that were preventing the American Samoa longline fishery from operating more efficiently following years of declining catch rates and increasing costs. The Final Rule at issue reduced the prohibited area for eligible longline vessels from 50 to 12 nautical miles from shore, while providing for annual Council review of the action's impacts on other fishery sectors. In ruling for the Territory of American Samoa on its primary claim, Judge Kobayashi held that the Deeds of Cession did not need to expressly state that "property" includes offshore fishery resources, and that cultural fishing practices under the Deeds are protected by inference. On May 9, 2017, the United States filed a motion seeking reconsideration of the Court's decision on both standing and remedy. NOAA first argued that the Court erred when it found that American Samoa had standing as



parens patriae to bring an action against the Federal Government; and further, that the Court's decision improperly relied upon speculative comments to show that cultural fishing rights would actually be harmed under the Final Rule. NOAA also argued that the Court erred when it vacated and set aside the Final Rule without first considering the equities involved, including record evidence that the Final Rule was developed to assist a struggling longline fishery, as well as evidence that the Rule would not adversely impact any other American Samoa fishery sector, including alias. NOAA has requested remand of the Rule without vacatur for a period of fifteen months in order to correct the deficiencies identified in the Court's decision. Plaintiff has opposed reconsideration, arguing that the Court's decision properly determined that American Samoa had standing to assert its quasi-sovereign interest to protect cultural practices, and further that NOAA's data failed to show that vacatur of the LVPA Rule would have highly disruptive consequences on longliners. We anticipate a decision on the motion for reconsideration by July 2017.

Turtle Island Restoration Network, Center for Biological Diversity v. NMFS and USFWS, 13-17123 (9th Cir.). As previously reported, Plaintiffs appealed a District Court's August 23, 2013 decision affirming all of NOAA's determinations under the Endangered Species Act, National Environmental Policy Act, and Migratory Bird Treaty Act (MBTA), to authorize the continued operation of the Hawaii-based shallow-set longline fishery. On January 29, 2014, Plaintiffs filed their opening brief with the Ninth Circuit Court of Appeals, arguing in relevant part, that the USFWS was arbitrary and capricious in issuing the MBTA permit because it failed to consider alternatives to reduce impacts on migratory birds, and also that NMFS' biological opinion ignored its own studies and experts in authorizing the fishery to increase impacts on endangered sea turtles. On March 31, 2014, NMFS and USFWS filed an answering briefing, arguing in relevant part that USFWS' issuance of the MBTA special purpose permit was reasonable and based on a proper application of its regulations, and that NMFS' biological opinion considered the best available scientific information in rationally concluding that the fishery would not jeopardize leatherbacks and North Pacific loggerhead sea turtles. Also on March 31, 2014, intervenor-defendant Hawaii Longline Association filed its answering brief, contending that the agencies' decision-making was reasonable and complied with all relevant statutes. A Ninth Circuit panel heard oral arguments on June 14, 2016. On April 14, 2017, the Ninth Circuit panel issued an order directing that the parties file simultaneous supplemental briefs addressing whether the FWS's issuance of the special purpose permit is consistent with past practice, focusing on the Solicitor's opinion of January 10, 2017 (currently suspended), which discusses past instances of special purpose permits under 50 C.F.R. § 21.27. On May 22, 2017, the parties filed the supplemental briefs, the US arguing that the USFWS' issuance of the special-purpose permit to cover incidental take of migratory birds by the fishery was consistent with its past practice and should be accorded deference. A decision is pending.