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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

HUI MĀLAMA I KOHOLĀ; CENTER)	Civil No.
FOR BIOLOGICAL DIVERSITY; and)	
TURTLE ISLAND RESTORATION)	COMPLAINT FOR DECLARATORY
NETWORK;)	JUDGMENT AND INJUNCTIVE
	RELIEF; SUMMONS
Plaintiffs,)	
)
v.)	
)
NATIONAL MARINE FISHERIES)	
SERVICE; UNITED STATES)	
DEPARTMENT OF COMMERCE; and)	
DONALD L. EVANS, SECRETARY)	
OF THE DEPARTMENT OF)	
COMMERCE;)	
)
Defendants.)	
_____)	

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

1. By this action, Plaintiffs Hui Mālama i Koholā (“the Hui”), Center for Biological Diversity (“the Center”), and Turtle Island Restoration Network (“TIRN”) seek declaratory judgment and injunctive relief challenging the continued failure of Defendants National Marine Fisheries Service (“NMFS”), United States Department of Commerce, and Secretary of Commerce Donald L. Evans to classify the Hawai‘i Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, and Oceanic Sharks Longline/Setline Fishery (“Hawai‘i longline fishery”) as a Category I commercial fishery, as required by Section 118 of the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1387. Since 2000, stock assessment reports (“SARs”) for the false killer whale, a marine mammal found in Hawaiian waters, have documented that the Hawai‘i longline fishery has caused and is continuing to cause excessive mortality or serious injury to this cetacean. Data contained in these SARs trigger a mandatory Category I designation for the Hawai‘i longline fishery, which, in turn, requires NMFS to develop and implement a take reduction plan to reduce fishery-related harm to the false killer whale and other marine mammal species, including the Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale. NMFS disregarded the SARs for the false killer whale and arbitrarily classified the Hawai‘i longline fishery as Category III in its 2001, 2002 and 2003 Lists of Fisheries, thereby allowing NMFS to avoid its statutory duty to develop and implement take reduction plans for this

fishery. Because the MMPA does not require take reduction plans for marine mammal stocks in Category III fisheries, NMFS's arbitrary classification of the Hawai'i longline fishery is permitting ongoing irreparable harm to the false killer whale and other marine mammal species.

2. Plaintiffs seek declaratory judgment that NMFS's decision to classify the Hawai'i longline fishery as Category III is arbitrary and capricious in violation of the MMPA and the Administrative Procedure Act ("APA"). Plaintiffs also request appropriate injunctive relief to ensure that NMFS complies fully with the MMPA and the APA and to avoid irreparable harm to plaintiffs, the false killer whale and other marine mammal species until compliance occurs.

3. This action arises under and alleges violations of the MMPA, 16 U.S.C. §§ 1361-1407, and the APA, 5 U.S.C. §§ 701-706.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 706 (actions under the APA); 28 U.S.C. § 1331 (actions under the laws of the United States); 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her duty); and 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy).

5. Venue is properly vested in the Court pursuant to 28 U.S.C. § 1391(e), as a substantial part of the events or omissions giving rise to the claims occurred within this judicial district.

PARTIES

6. Plaintiff Hui Mālama i Koholā is a Hawai‘i unincorporated association whose members consist of fishermen, Hawaiian cultural practitioners, and others from across the State of Hawai‘i who share a common goal: the protection of koholā (whales) and other marine life. The Hui seeks to promote sound management of ocean resources, with an emphasis on utilizing the precautionary approach to ensure that, seven generations from now, there will be healthy populations of koholā and other marine species for Hawai‘i’s keiki (children) to observe and to mālama (care for). The members of the Hui regularly use the coastal and pelagic waters off the coast of Hawai‘i for subsistence, commercial, recreational, and aesthetic activities, including sailing, swimming, and fishing. In addition, the Hui’s Hawaiian cultural practitioners have a spiritual relationship with the many species of koholā, as well as other marine mammal species, native to Hawai‘i. The Hui’s members have studied, visited, observed or attempted to observe and sought protection for many marine mammal species, including the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale. The Hui’s members intend to continue to study, visit, observe, and

seek protection for these marine mammals in the future. The Hui's members derive cultural, recreational, conservation, and aesthetic benefits from the existence of the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale in the wild. The Hui brings this action on behalf of itself and its adversely affected members.

7. Plaintiff Center for Biological Diversity is a non-profit corporation dedicated to preserving, protecting, and restoring biodiversity, native species, ecosystems, and public lands. The Center has over 7,000 members, many of whom reside in the State of Hawai'i, and maintains offices throughout the western United States. The Center's members and staff regularly use the coastal and pelagic waters off the coast of Hawai'i for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center's members and staff have researched, studied, visited, observed or attempted to observe, photographed or attempted to photograph, and sought protection for many marine mammal species, including the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale in the waters off the coast of Hawai'i. The Center's members and staff intend to continue to research, study, visit, observe, photograph and seek protection for these marine mammals in the future. The Center's members and staff derive scientific, recreational, conservation, and aesthetic benefits from the existence of the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale in

the wild. The Center brings this action on behalf of itself and its adversely affected members and staff.

8. Plaintiff Turtle Island Restoration Network is a non-profit corporation with its principal place of business in Forest Knolls, California. TIRN is an environmental organization with approximately 4,000 members, many of whom reside in the State of Hawai‘i. Each of TIRN’s members share a commitment to the study, protection, enhancement, conservation, and preservation of the marine environment and the wildlife that lives within it. All of TIRN’s members spend time in activities devoted to these goals. TIRN’s members and staff regularly use the coastal and pelagic waters off the coast of Hawai‘i for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities, including wildlife-viewing activities such as swimming, snorkeling, kayaking, scuba diving, and whale watching. TIRN’s members and staff include marine biologists who are engaged in the study, protection, enhancement, conservation, and preservation of false killer whales, Hawaiian monk seals, humpback whales, sperm whales, blue whales and fin whales, as well as professional wildlife photographers, whose livelihood depends in part on the survival of these marine mammals and the ability to photograph them in the wild. TIRN’s members and staff intend to continue to study, visit, observe, and photograph the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin

whale in the future. TIRN brings this action on behalf of itself and its adversely affected members and staff.

9. Plaintiffs' scientific, cultural, recreational, conservation, and aesthetic interests in the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale are harmed by NMFS's failure adequately to protect these marine mammals from commercial fisheries. Specifically, NMFS's continued failure to classify the Hawai'i longline fishery as Category I in its List of Fisheries and subsequent failure to develop and implement take reduction plans for the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale have resulted in the continued mortality of, and serious injury to, these marine mammals. The death and injury of the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale impairs plaintiffs' scientific, cultural, recreational, conservation, and aesthetic interests in these species. This harm to the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale – and to plaintiffs' interests in them – would not have occurred had NMFS complied with the MMPA's legal mandates. Only if NMFS complies with the MMPA's procedural and substantive requirements, and consequently takes the necessary steps to reduce to insignificant levels the mortality and serious injury of the false killer whale, Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale, will the harm to plaintiffs' interest be redressed. Therefore, plaintiffs' members

and staff have been, are being, and unless the relief requested herein is granted, will continue to be adversely affected and injured by NMFS's failure to comply with the MMPA.

10. Defendant National Marine Fisheries Service is an agency of the National Oceanic and Atmospheric Administration of the United States Department of Commerce. NMFS is sometimes referred to as "NOAA Fisheries." NMFS is charged with the management of fisheries in United States' waters including the Hawai'i longline fishery and is entrusted with the conservation and management of ocean resources in the Pacific. NMFS is responsible for ensuring compliance with the federal laws for whose violation plaintiffs bring this suit.

11. Defendant Department of Commerce is the federal agency with ultimate responsibility to implement and enforce compliance with the federal laws for whose violation plaintiffs bring this suit.

12. Defendant Donald L. Evans is sued in his official capacity as Secretary of the Department of Commerce.

LEGAL AND FACTUAL BACKGROUND

NMFS's Mandatory Duties Under the MMPA.

13. Congress enacted the Marine Mammal Protection Act in 1972 in response to widespread concern that large numbers of marine mammals were being killed through interactions with commercial fisheries. Congress found that "certain

species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). The policy behind the MMPA is that "such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population." 16 U.S.C. § 1361(2).

14. Congress added sections 117 and 118 to the MMPA on April 30, 1994, to address interactions between commercial fisheries and marine mammals. Section 117 requires NMFS to prepare marine mammal stock assessments for marine mammals within a fishery based upon "the best scientific information available." 16 U.S.C. § 1386(a). Section 118 addresses the taking of marine mammals incidental to commercial fishing operations and requires NMFS to classify each commercial fishery according to its rate of fishery-related injury to marine mammals. 16 U.S.C. § 1387.

15. Section 117 requires NMFS to "prepare a draft [SAR] for each marine mammal stock which occurs in waters under the jurisdiction of the United States." 16 U.S.C. § 1386(a). Each SAR must include, among other things, a minimum population estimate, an estimate of "the annual human-caused mortality and serious injury of the stock," descriptions of commercial fisheries that interact with the stock, including "the estimated level of incidental mortality and serious injury

of the stock by each such fishery on an annual basis,” and an estimate of the potential biological removal (“PBR”) level for the stock. Id. The MMPA defines the term “potential biological removal level” as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” 16 U.S.C. § 1362(20).

16. The MMPA requires NMFS to finalize a SAR no later than 90 days after either the close of the public comment period on the draft SAR or following an agency proceeding on the draft, when requested. 16 U.S.C. § 1386(b)(3).

17. Section 117(d) mandates that NMFS “establish three independent regional scientific review groups representing Alaska, the Pacific Coast (including Hawaii), and the Atlantic Coast (including the Gulf of Mexico).” 16 U.S.C. § 1386(d)(1). These groups consist of individuals with expertise in, among other things, marine mammal biology and ecology, population dynamics and modeling, and commercial fishing technology and practices. Id.

18. NMFS prepares its SARs “in consultation with the appropriate regional scientific review group established under [section 117(d)].” 16 U.S.C. § 1386(a).

19. Section 118(b) requires commercial fisheries to “reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994.” 16

U.S.C. § 1387(b)(1). To help accomplish this goal, the MMPA requires NMFS to publish each year in the Federal Register a list of commercial fisheries that categorizes each fishery according to the rate of fishery-related injury to marine mammals. 16 U.S.C. § 1387(c)(1). The three categories identify fisheries that have:

- (i) frequent incidental mortality and serious injury of marine mammals [(“Category I” fisheries)];
- (ii) occasional incidental mortality and serious injury of marine mammals [(“Category II” fisheries)]; or
- (iii) a remote likelihood of or no known incidental mortality or serious injury of marine mammals [(“Category III” fisheries)].

16 U.S.C. § 1387(c)(1)(A).

20. The MMPA’s implementing regulations define a Category I fishery as one that has “frequent incidental mortality and serious injury of marine mammals.”

50 C.F.R. § 229.2. Such a fishery “is one that is by itself responsible for the annual removal of 50 percent or more of any stock’s [PBR] level.” Id.

21. A Category II fishery “occasionally causes mortality or serious injury of marine mammals,” which is defined as a commercial fishery “that, collectively with other fisheries, is responsible for the annual removal of more than 10 percent of any marine mammal stock’s [PBR] level and that is by itself responsible for the annual removal of between 1 and 50 percent, exclusive, of any stock’s [PBR] level.” Id.

22. A Category III commercial fishery “has a remote likelihood of causing incidental mortality and serious injury of marine mammals.” Id. Such a fishery is “one that collectively with other fisheries is responsible for the annual removal of:”

(1) Ten percent or less of any marine mammal stock’s [PBR] level, or

(2) More than 10 percent of any marine mammal stock’s [PBR] level, yet that fishery by itself is responsible for the annual removal of 1 percent or less of that stock’s [PBR] level.

Id.

23. Section 118(f)(1) requires NMFS to develop and implement a take reduction plan for each strategic stock that interacts with a Category I or II commercial fishery. 16 U.S.C. § 1387(f)(1). The term “strategic stock” is defined as a marine mammal stock:

- (A) for which the level of direct human-caused mortality exceeds the [PBR] level;
- (B) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973 . . . within the foreseeable future; or
- (C) which is listed as a threatened species or endangered species under the Endangered Species Act of 1973 . . . , or is designated as depleted under [the MMPA].

16 U.S.C. § 1362(19).

24. “The immediate goal of a take reduction plan [is] to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the [PBR] level established for that stock.” 16 U.S.C. § 1387(f)(2). Within 5 years of implementing the take reduction plan, the goal is to reduce “the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1387(f)(2).

25. Section 118(f)(4) describes the required contents of take reduction plans. 16 U.S.C. § 1387(f)(4). These include, among other things, a review of the information found in the final stock assessments, regulatory measures to reduce mortality, and dates for achieving the plan’s objectives.

26. To develop take reduction plans, NMFS is charged with establishing, no later than 30 days after the issuance of a final SAR for a strategic stock, take reduction teams comprised of scientists, fishermen and other interested and qualified parties. 16 U.S.C. § 1387(f)(6). The take reduction teams are then charged with developing draft take reduction plans which NMFS must amend as necessary to comply with the MMPA, approve, and implement. 16 U.S.C. § 1387(f)(7), (8).

27. The MMPA does not require the development or implementation of take reduction plans for marine mammal stocks within a Category III fishery.

NMFS Arbitrarily Classifies the Hawai'i Longline Fishery as Category III in its List of Fisheries

28. The false killer whale (*Pseudorca crassidens*) is a marine mammal found worldwide, primarily in tropical and warm-temperate waters. Recent studies indicate that Hawai'i's population of false killer whales may comprise a distinct genetic population. The miles of lines used by the Hawai'i-based longline fleet hook and entangle false killer whales, which can result in serious injury or death through drowning.

29. In December 2000, NMFS issued the first SAR that provided a minimum population estimate for the Hawaiian stock of false killer whales. The 2000 SAR estimated a minimum population size of 83 false killer whales. Using this population estimate, NMFS calculated a PBR level of 0.8 false killer whales per year.

30. The 2000 SAR reported that, on average, the Hawai'i longline fishery seriously injures or kills 9 false killer whales per year. It concluded that:

Because the rate of serious injury to false killer whales within the U.S. EEZ in the Hawaiian longline fishery (9 animals per year) exceeds the PBR (0.8), this stock is considered a strategic stock under the 1994 amendments to the MMPA. The total fishery mortality and serious injury cannot be considered to be insignificant and approaching zero, because it exceeds the PBR.

31. The PBR level of 0.8 established in the 2000 SAR means that, by definition, NMFS is under a mandatory duty to classify the Hawai'i longline fishery as a Category I fishery if, on average, fishery-related interactions mortally

or seriously injure 0.4 or more false killer whales (fifty (50) percent of the stock's PBR level) per year.

32. A Category III classification for the Hawai'i longline fishery would be appropriate only if, on average, fishery-related interactions from all fisheries collectively caused serious injury or mortality to 0.08 or fewer false killer whales from the Hawai'i stock (ten (10) percent of the stock's PBR level) per year or if the Hawai'i longline fishery alone annually caused serious injury or mortality to 0.008 or fewer false killer whales from the Hawai'i stock (one (1) percent of the stock's PBR level).

33. The rate of mortality or serious injury to false killer whales reported in the 2000 SAR was 1,125 percent of the stock's PBR level, or over twenty-two (22) times greater than take levels which, pursuant to MMPA regulations, mandated a Category I classification for the Hawai'i longline fishery.

34. In November 2000, the scientific review group that NMFS established for the Pacific region recommended to NMFS that it recategorize the Hawai'i longline fishery from Category III to Category I due to the level of mortality of false killer whales.

35. On August 15, 2001, NMFS published its final 2001 List of Fisheries, allegedly based on the final SARs for 2000. In that document, NMFS acknowledged that its "SARs provide the best available information on both the level of serious injury and mortality of marine mammals that occurs incidental to

commercial fisheries and the Potential Biological Removal (PBR) levels for marine mammal stocks.” NMFS then ignored the data presented in the 2000 SAR for Hawai‘i’s population of false killer whales regarding these factors, classifying the Hawai‘i longline fishery as Category III.

36. In 2001, NMFS revised the SAR for the Hawaiian stock of false killer whales. The 2001 SAR, finalized on December 31, 2001, reaffirmed the 2000 SAR’s minimum population estimate of 83 false killer whales, its PBR level of 0.8, and its estimate that, on average, the Hawai‘i longline fishery seriously injures or kills 9 false killer whales per year. Accordingly, the 2001 SAR reached the identical conclusions as the 2000 SAR: since the rate of serious injury to false killer whales in the fishery far exceeds the PBR level, (1) this stock is considered a “strategic stock” under the MMPA, and (2) “[t]he total fishery mortality and serious injury cannot be considered to be insignificant and approaching zero.”

37. On January 17, 2002, NMFS published in the Federal Register a notice that the 2001 List of Fisheries would remain in effect, unchanged, as the 2002 List of Fisheries. In so doing, NMFS continued to ignore the data in its SARs clearly establishing that serious injury and mortality to the Hawaiian stock of false killer whales mandated classifying the Hawai‘i longline fishery as Category I, instead of Category III.

38. NMFS issued its most recent final SAR for Hawai‘i’s population of false killer whales on October 31, 2002. The 2002 SAR reaffirmed the estimates

in the 2000 and 2001 final SARs regarding the minimum population size of false killer whales in Hawaiian waters (83 whales), as well as the calculation of a PBR level of 0.8 false killer whales per year.

39. Based on additional observer data, the 2002 SAR concluded that, on average, the Hawai‘i longline fishery seriously injures or kills 7.0 false killer whales per year. This rate of mortality or serious injury is 875 percent of the stock’s PBR level, or over seventeen (17) times greater than take levels which, pursuant to MMPA regulations, require a Category I classification.

40. Because the estimated annual mortality and serious injury to the false killer whale far exceeded the stock’s PBR, NMFS’s 2002 SAR – like the final SARs for 2000 and 2001 – identified Hawai‘i’s population of false killer whales as a strategic stock and concluded that “[t]he total fishery mortality and serious injury cannot be considered to be insignificant and approaching zero.”

41. Once again ignoring its own SARs – which NMFS reaffirmed “provide the best available information on both the level of serious injury and mortality of marine mammals that occurs incidental to commercial fisheries and the [PBR] levels” – and the recommendation of the experts on its Pacific Scientific Review Group, NMFS classified the Hawai‘i longline fishery as Category III in the final List of Fisheries for 2003, which was published on July 15, 2003.

42. Because the MMPA contains no legal mandate to develop or implement take reduction plans for marine mammal stocks within a Category III

fishery, NMFS's continued refusal to classify the Hawai'i longline fishery as a Category I fishery has allowed the fishery to continue annually to take nearly ten times more false killer whales than the number NMFS has determined "may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population." 16 U.S.C. § 1362(20).

43. NMFS's continued failure to accurately classify the Hawai'i longline fishery as Category I and develop and implement a take reduction plan for the false killer whale has resulted in the continued needless death and injury of false killer whales.

44. NMFS's 2000, 2001 and 2002 SARs identify the Hawaiian monk seal, humpback whale, sperm whale, blue whale and fin whale as strategic stocks potentially affected by interactions with the Hawai'i longline fishery. By failing to classify the Hawai'i longline fishery as Category I, NMFS has deprived these imperiled marine mammal species of the vital protection that take reduction plans would afford.

CLAIM FOR RELIEF

45. Plaintiffs reallege and incorporate by reference each and every allegation set forth in paragraphs 1-44 of this Complaint.

46. NMFS's failure to reclassify the Hawai'i longline fishery as Category I in its 2003 List of Fisheries was arbitrary, capricious, and contrary to law, in violation of the MMPA, 16 U.S.C. §§ 1361-1407, and the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that defendants have violated and are continuing to violate the Marine Mammal Protection Act and the Administrative Procedure Act by failing to reclassify the Hawai'i longline fishery as Category I.
2. Enter appropriate injunctive relief to ensure that defendants comply with the MMPA and the APA and to avoid irreparable harm to plaintiffs, false killer whales, Hawaiian monk seals, humpback whales, sperm whales, blue whales and fin whales until such compliance occurs;
3. Award plaintiffs the cost of this litigation, including reasonable attorneys' fees; and
4. Provide such other relief as may be just and proper.

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DATED: Honolulu, Hawai‘i, November 19, 2003.

Respectfully submitted,

EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, HI 96813

By: _____
David L. Henkin
Attorney for Plaintiffs Hui Mālama i
Koholā, Center for Biological Diversity, and
Turtle Island Restoration Network

IN THE UNITED STATES DISTRICT COURT
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NATIONAL MARINE FISHERIES)
SERVICE; UNITED STATES)
DEPARTMENT OF COMMERCE; and)
DONALD L. EVANS, SECRETARY)
OF THE DEPARTMENT OF)
COMMERCE;)
)
)
Defendants.)
_____)

SUMMONS IN A CIVIL ACTION

TO: THE ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon plaintiffs' attorneys, Earthjustice , 223 South King Street, Suite 400, Honolulu, Hawai'i 96813, an answer to the complaint which is herewith served upon you, within twenty (20) days (or sixty (60) days if the defendant is the United States) after service of this summons upon you,

exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

DATED: Honolulu, Hawai'i, _____.

CLERK OF THE ABOVE-ENTITLED COURT