

PAUL H. ACHITOFF #5279
ISAAC H. MORIWAKE #7141
EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, Hawai`i 96813-4501
Telephone No.: (808) 599-2436
Fax No.: (808) 521-6841
Email: achitoff@earthjustice.org

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI`I

TURTLE ISLAND RESTORATION) CIVIL NO.
NETWORK; CENTER FOR BIOLOGICAL)
DIVERSITY; AND KAHEA: THE) (OTHER CIVIL ACTION)
HAWAIIAN ENVIRONMENTAL)
ALLIANCE,) COMPLAINT FOR
) DECLARATORY AND
Plaintiffs,) INJUNCTIVE RELIEF;
) SUMMONS
v.)
)
UNITED STATES DEPARTMENT OF)
COMMERCE; NATIONAL MARINE)
FISHERIES SERVICE; GARY LOCKE,)
in his official capacity as)
Secretary of the Department of)
Commerce,)
)
Defendants.)
)
)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action challenges defendants' decision, in their Final Rule implementing the management measures in Amendment 18 to the Fishery Management Plan ("FMP") for the Pelagic Fisheries of the Western Pacific Region ("Final Rule"), to remove all limits on the amount of fishing they allow the Hawai'i-based swordfish longline fishery (the "Fishery"). This expansion of the Fishery will unlawfully increase deaths of critically endangered sea turtles, federally protected seabirds, and endangered whales.

2. Defendants' actions violate numerous environmental laws. By authorizing the Fishery to fish in a manner known to kill migratory birds, including Laysan albatross and black-footed albatross, defendants are violating the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq. ("MBTA"), and the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"). By authorizing the Fishery to fish in a manner known to kill threatened and endangered sea turtles without an adequate Biological Opinion, defendants are violating

the Endangered Species Act, 16 U.S.C. § 1531 et seq. ("ESA"), and the APA. By authorizing the Fishery to fish in a manner known to kill humpback whales, defendants are violating the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. ("MMPA"), the ESA, and the APA. The Court should protect these species from further harm unless and until defendants are in full compliance with the law.

JURISDICTION AND VENUE

3. This Court has jurisdiction of this action by virtue of 28 U.S.C. § 1331 (actions under the laws of the United States), 28 U.S.C. § 2201-02 (power to issue declaratory judgments in cases of actual controversy), 16 U.S.C. 1540(g) (citizen suits to enforce the Endangered Species Act), and 5 U.S.C. § 706 (actions under the APA).

4. Venue is proper in this district under 28 U.S.C. § 1391(e), because one or more plaintiffs reside in this district, and this is a civil action in which officers or employees of the United States or an agency

thereof are acting in their official capacity or under color of legal authority and a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

PARTIES

5. Plaintiff Turtle Island Restoration Network ("TIRN") is a non-profit corporation with its principal place of business in Forest Knolls, California. TIRN is an environmental organization with approximately 10,000 members, many of whom reside in the state of Hawai'i. Each of TIRN's members shares 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 wildlife including seabirds, sea turtles, and marine mammals, as well as professional wildlife photographers, whose livelihood depends in part on the survival of these species and the ability to photograph them in the wild. TIRN's members and staff intend to continue to study, visit, observe, and photograph seabirds, whales, and turtles in the future. TIRN brings this action on behalf of itself and its adversely affected members and staff.

6. Plaintiff Center for Biological Diversity (the "Center") is a non-profit corporation dedicated to preserving, protecting, and restoring biodiversity, native species, ecosystems, and public lands. The Center has over 200,000 members and online activists, 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 marine mammals, seabirds and sea turtles in the waters surrounding Hawai'i. The Center's members and staff intend to continue to research, study, visit, observe, photograph and seek protection for these species in the future. The Center's members and staff derive scientific, recreational, conservation, and aesthetic benefits from the existence of these animals in the wild. The Center brings this action on behalf of itself and its adversely affected members and staff.

7. Plaintiff KAHEA: The Hawaiian Environmental Alliance ("KAHEA") is a tax-exempt, non-profit organization incorporated in Honolulu, Hawai'i. Since the organization was founded in 2000, KAHEA's central

focus has been protecting sensitive ecosystems, fragile and imperiled biodiversity, and Native Hawaiian cultural rights. Plaintiff KAHEA seeks to protect Hawai'i's vulnerable marine ecosystems by ensuring that public officials, such as defendants, apply the law, including preparing adequate environmental analyses.

8. To achieve these goals, KAHEA provides the general public with educational materials and resource information on environmental issues. These materials include, but are not limited to, reprints of news articles, policy reports, legal briefs, press releases, action alerts, and fact sheets. KAHEA has organized public awareness campaigns on O'ahu regarding the effects of various government actions on marine ecosystems and marine life.

9. KAHEA brings this action on behalf of itself, its extensive network, including Native Hawaiian cultural practitioners, and on behalf of the people of Hawai'i. The interests of KAHEA's network are being, and will be, adversely affected by defendants' actions

complained of herein. Defendants' failure to comply with applicable laws with respect to its authorization of the Fishery is causing, and will cause, aesthetic and recreational harm to KAHEA and its constituents.

10. Defendant National Marine Fisheries Service ("NMFS") is an agency of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce, and sometimes is referred to as "NOAA Fisheries." NMFS performs two distinct functions relevant to this lawsuit, through two separate offices, and these functions are governed by distinct legal obligations. NMFS's Office of Protected Resources ("NMFS-Protected Resources") is charged with the conservation and management of ocean resources, and is responsible for implementing and enforcing the federal environmental laws as they apply to those resources. NMFS's Office of Sustainable Fisheries ("NMFS-Fisheries") is responsible for managing the United States' commercial fisheries, including the Fishery, and in that capacity must comply

with the environmental laws in the same manner and to the same extent as any other entity.

11. When NMFS-Fisheries proposes to take an action that may affect threatened or endangered marine species, it is known as the "action agency." Section 7(a)(2) of the ESA requires that, as such, it first consult with NMFS-Protected Resources-known in this circumstance as the "consulting agency"-to assess the risks such action may present to the survival and recovery of those species, and insure the proposed action is not likely to jeopardize them.

12. Defendant Department of Commerce is the federal agency with ultimate responsibility for implementing and enforcing compliance with the law, including the provisions for violations of which plaintiffs bring this suit.

13. Defendant Gary Locke is sued in his official capacity as Secretary of the Department of Commerce.

STATUTORY BACKGROUND

The Migratory Bird Treaty Act

14. The MBTA is one of the oldest conservation statutes in existence. Congress passed the MBTA on July 3, 1918 to implement and make enforceable by the courts the International Convention for the Protection of Migratory Birds, 39 Stat. 1702 (1916), between the United States and Great Britain (acting for Canada). These governments were "desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless." Convention, August 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702, 1702.

15. The MBTA and the Convention it implemented were considered "conservation measures of prime importance." H.R. Rep. No. 65-243 at 3 (reprinted letter from Robert Lansing, Secretary of State, to President Wilson). Justice Holmes called the preservation of migratory birds a "national interest of very nearly the first magnitude." Missouri v. Holland, 252 U.S. 416, 435 (1920).

16. The United States subsequently executed treaties with Mexico, Japan, and the former Union of Soviet Socialist Republics, the protections of which are now incorporated into the MBTA. 16 U.S.C. § 703.

17. "The fundamental prohibition in the Migratory Bird Treaty Act is couched in ... expansive" language. Andrus v. Allard, 444 U.S. 51, 59 (1979). Section 2 of the MBTA provides that "it shall be unlawful at any time, by any means or in any manner," to, among many other prohibited actions, "pursue, hunt, take, capture, [or] kill" any migratory bird included in the terms of the treaties. 16 U.S.C. § 703. The term "take" is defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (1997). Both the Laysan and black-footed albatross are included in the list of migratory birds protected by the MBTA.

18. The MBTA imposes strict liability for harming migratory birds.

19. Section 3 of the MBTA authorizes the Secretary of the Interior to "determine when, to what extent, if

at all, and by what means, it is compatible with the terms of the conventions to allow hunting, take, capture, [or] killing . . . of any such bird.” 16 U.S.C. § 704. The U.S. Fish and Wildlife Service (“FWS”) may issue a permit allowing the take of migratory birds, but only if the proposed take is consistent with the treaties, statute and FWS regulations. Defendants have not obtained a permit authorizing any take of migratory birds by the Fishery, nor would such permit be consistent with the MBTA.

The Endangered Species Act

20. “[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). In furtherance of the ESA’s goals to conserve species and the ecosystems on which they depend, Congress mandated in Section 2(c) that “all Federal departments and agencies shall seek to conserve endangered species and threatened species...” Id.

(quoting 16 U.S.C. § 1531(c)) (emphasis in TVA v. Hill). “Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined ‘conserve’ as meaning ‘to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.’” Id. (quoting 16 U.S.C. § 1532(2) (emphasis in TVA v. Hill)). “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184.

ESA § 7(a)(2)

21. Section 7(a)(2), 16 U.S.C. § 1536(a)(2), is a critical component of the ESA’s statutory and regulatory scheme to conserve endangered and threatened species. Section 7(a)(2) requires, among other things, that every federal agency must determine whether its actions “may affect” any endangered or threatened species. If so, and unless it is determined that the

"action agency's" proposed actions are unlikely to adversely affect the species, the action agency must formally consult defendant NMFS-Protected Resources (in the case of marine species) as part of its duty to "insure that [its] action is ... not likely to jeopardize the continued existence" of that species. 16 U.S.C. § 1536(a) (1), (2); 50 C.F.R. § 402.14. "Jeopardize the continued existence of" is defined as engaging in an action that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

22. An action agency's duties under the ESA to conserve endangered species and to avoid jeopardy are not limited to making such efforts as will not interfere with what it deems its "primary mission," such as promoting commercial fisheries. The "pointed omission of the type of qualifying language previously included in endangered species legislation reveals a

conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." TVA v. Hill, 437 U.S. at 185. "[T]he agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear." Id. at 184 (quoting 119 Cong. Rec. 42913 (1973)) (emphasis in TVA v. Hill).

23. Section 7(a)(2) of the ESA and its implementing regulations require that, once an agency enters formal consultation with NMFS-Protected Resources, the latter must prepare a Biological Opinion. 50 C.F.R. § 402.14. The Biological Opinion must include, among other things, a "detailed discussion of the effects of the action on listed species" and NMFS-Protected Resources' "opinion on whether the action is likely to jeopardize the continued existence of the species..." 50 C.F.R. § 402.14(h)(2), (3).

24. In formulating the Biological Opinion, NMFS-Protected Resources must use the "best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8).

25. An action agency—in this case, NMFS-Fisheries—does not satisfy its independent *substantive* duty under ESA § 7(a)(2) to insure against jeopardy merely by carrying out its *procedural* duty under that section to consult with the consulting agency, NMFS-Protected Resources. The action agency's reliance on the consulting agency's Biological Opinion must not be arbitrary, capricious, an abuse of discretion, or contrary to law.

ESA § 9(a)

26. The ESA, in Section 9, generally prohibits any person, including both private persons and federal agencies, from "taking" any endangered or threatened species, such as, in this case, humpback whales, leatherback sea turtles, or loggerhead sea turtles. 16 U.S.C. § 1538(a)(1). The term "take" is defined by the ESA to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

27. If, following consultation with the action agency, NMFS-Protected Resources concludes that a proposed action will not jeopardize any listed species, it may authorize the take of listed species incidental to the proposed action. In such case, NMFS-Protected Resources must provide in the Biological Opinion an Incidental Take Statement that specifies, among other things, the amount or extent of take that will incidentally occur as a result of the action, and "those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact." 50 C.F.R. § 402.14(i)(1)(i), (ii); see also 16 U.S.C. § 1536(b)(4).

28. The regulations require that "if during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded the Federal agency must reinitiate consultation immediately." Id. § 402.14(i)(4).

The Marine Mammal Protection Act

29. 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).

30. The primary mechanism by which the MMPA protects marine mammals is through the implementation of a moratorium on the take of marine mammals. 16 U.S.C. § 1371(a). "Take" is defined broadly by the MMPA to mean "to harass, hunt, capture, or kill, or

attempt to harass, hunt, capture or kill any marine mammal." 16 U.S.C. § 1362(13).

31. The MMPA includes exceptions to the moratorium on take, including a regime to regulate and authorize limited incidental take of threatened or endangered marine mammals that occurs as a result of commercial fishing operations. NMFS may allow incidental take in commercial fisheries only after determining that:

(I) the incidental mortality and serious injury resulting from fishery operations will have a negligible impact on such species or stock;

(II) a recovery plan has been developed or is being developed for such species or stock pursuant to the ESA, and

(III) a monitoring program is established and a take reduction plan has been or is being developed for such species or stock pursuant to 16 U.S.C. § 1387.

16 U.S.C. § 1371(a)(5)(E).

32. Pursuant to 16 U.S.C. § 1387, NMFS must develop a take reduction plan if the rate of commercial fisheries' take of a stock of a marine mammal has not been reduced to "insignificant levels approaching a

zero mortality and serious injury rate" by 2001. 16
U.S.C. §§ 1387(b)(1), (4). The "zero mortality rate
goal" is "10 percent of the Potential Biological
Removal level for a stock of marine mammals." 50
C.F.R. § 229.2 (defining "insignificance threshold").
"Potential Biological Removal level" ("PBR") is the
number of human-related mortalities a stock may
withstand without impairing its ability to reach or
maintain its optimum sustainable population.

33. NMFS must establish a take reduction team "[a]t
the earliest possible time (not later than 30 days)
after the Secretary issues a final stock assessment ...
for a strategic stock." Id. § 1387(f)(6)(A). Congress
provided strict deadlines for the team to develop a
draft plan that NMFS must amend as necessary to comply
with the MMPA, approve, and implement. Id. §
1387(f)(7), (8).

34. Humpback whales are deemed a "strategic stock"
under the MMPA because they are listed as endangered.
16 U.S.C. § 1362(19)(C). Defendants have failed to

develop a take reduction plan despite acknowledging since at least 1998 that the Central North Pacific humpback stock is losing at least 10 percent of its PBR to commercial fisheries. Defendants' failure to initiate a take reduction plan, among other things, precludes NMFS from issuing a permit authorizing any take by the Fishery.

FACTUAL BACKGROUND

The Swordfish Longline Fishery

35. In longline fishing, a monofilament mainline is set horizontally at a preferred depth in the water column, suspended by floats spaced at regular intervals. Mainlines may be up to 60 nautical miles long. Branchlines are clipped to the mainline at regular intervals, and each branchline carries a single baited hook. After the mainline is completely deployed, the gear is allowed to "soak" for several hours before being retrieved, or "hauled." In longlining, a "set" is a discrete unbroken section of mainline, floats and branchlines.

36. Vessels in the Hawaiïi-based longline fishery target primarily tuna or swordfish, and use different techniques for each. Longline fishing for swordfish is known as "shallow-set" fishing; the bait is set at depths of 30-90 meters. A typical set for swordfish uses about 700-1,000 hooks. Shallow-set longline gear is set at night, with luminescent light sticks attached to the branchlines.

37. The tuna or "deep-set" fishery sets 1,200-1,900 baited hooks at depths of 150-400 meters. Tuna lines are typically set in the morning and hauled in the afternoon.

38. Although there is spatial overlap between the areas fished by the shallow-set and deep-set components of the Hawaiïi-based longline fishery, most swordfish longlining occurs north, and most tuna longlining occurs south, of the Hawaiian Islands.

39. The Court in Leatherback Sea Turtle v. National Marine Fisheries Service, Civ. No. 99-00152 DAE, 1999 WL 33594329 (D. Haw. October 18, 1999), determined that

NMFS had violated the National Environmental Policy Act by failing to prepare an Environmental Impact Statement ("EIS") assessing the impacts of the Hawai'i longline fishery's activities. The Court enjoined most swordfish longlining pending issuance of an EIS.

40. In March 30, 2001, NMFS-Protected Resources issued an EIS and a Biological Opinion pursuant to Section 7(a)(2) of the ESA, in which NMFS-Protected Resources concluded that the longline fishery, as NMFS-Fisheries previously had authorized it, was jeopardizing the continued survival of several species of sea turtles. To reduce this impact, NMFS prohibited all Hawai'i-based swordfish longlining, and also prohibited tuna longlining during certain times and in certain places. NMFS issued regulations implementing those prohibitions on June 12, 2002.

41. The federal district court for the District of Columbia subsequently vacated the regulations banning swordfish longlining on procedural grounds. On April 2, 2004, NMFS-Fisheries promulgated a rule that, among

other actions, reopened the Fishery subject to restrictions intended to limit mortality of protected species. In particular, NMFS-Fisheries limited the Fishery to 2,120 sets per year, and required that it use modified fishing gear (e.g., a "circle hook" rather than a "J hook," and mackerel bait instead of squid bait). NMFS-Fisheries also imposed a "hard cap" on turtle bycatch, requiring that if the Fishery caught 16 leatherbacks or 17 loggerheads in a given fishing season, the Fishery would have to close for the remainder of the calendar year.

42. In 2006, the Fishery caught at least 17 loggerheads after only a few months of fishing, and the Fishery closed until the following year. During the 2007 season, the Fishery approached the limit, catching at least 15 loggerhead sea turtles.

Migratory Seabirds

43. When longlines are being set or hauled, and the baited hooks are near the water's surface, birds dive at the bait, become hooked, and drown. As a result,

mortality in longline fisheries has become the most critical global threat to albatross species. Nineteen of the world's 21 albatross species are now globally threatened with extinction, due principally to incidental catch in longline fisheries.

44. The Fishery catches and drowns migratory seabirds. Most of the birds caught in the Fishery are black-footed albatross (*Phoebastria nigripes*) and Laysan albatross (*Phoebastria immutabilis*). The short-tailed albatross (*Phoebastria albatrus*), numbering only about 2,300 breeding pairs globally and listed as endangered under the Endangered Species Act, also has been spotted in areas where the Fishery operates.

45. The death of one black-footed albatross, for example, has an exponential impact on the breeding success of the entire species. The birds mate for life, and return to the same nest site each year to reunite with their mates. If one mate fails to return to the nest, the remaining mate likely will miss three

breeding cycles before it finds a new life-partner and mates.

46. The International Union for Conservation of Nature and Natural Resources' ("IUCN's") Red List is one conservation tool upon which scientists rely, and is the world's most comprehensive inventory of the global conservation status of plant and animal species. How a species is listed on the IUCN Red List depends on the severity of its situation relative to several factors, including: (1) the rate of population decline of the species over three generations, (2) fragmentation or fluctuations in the geographic range of the species, and (3) probability of extinction based on the quantitative analysis of the species over a 10-20 year period.

47. In 2003 the black-footed albatross was uplisted to "Endangered," with a "very high risk of extinction in the wild," because its population was anticipated to decline by at least 60% over the next three generations.

48. On or about September 28, 2004, plaintiffs TIRN and the Center submitted a petition to the United States Fish and Wildlife Service ("FWS") to list the black-footed albatross as "threatened" under the Endangered Species Act. On October 9, 2007, FWS published in the Federal Register its finding that "[t]he petition presents reliable information to indicate that the lack of adequate regulatory mechanisms to minimize incidental mortality in commercial fisheries and the ingestion of environmental contaminants may threaten the black-footed albatross," and that "the petition presents substantial scientific or commercial information indicating that listing the black-footed albatross as threatened or endangered may be warranted..." 72 Fed. Reg. 57278, 57283 (October 9, 2007).

49. NMFS-Fisheries adopted a regulation requiring that longline vessels utilize mitigation methods designed to reduce seabird bycatch. The regulation requires in relevant part that Fishery vessels must

employ one of two methods for mitigating seabird bycatch: "side-setting," or, alternatively, discharging fish parts (offal) on the opposite side of the vessel while setting or hauling longline gear, using thawed bait that has been dyed blue, and setting and hauling the lines at night. 50 C.F.R. § 665.35.

50. Side-setting is a means by which longline gear is deployed from the side of the vessel rather than from the conventional position at the stern. When set from the side, the baited hooks travel along the side of the vessel hull where seabirds, such as albatrosses, are unable or unwilling to pursue them. Ideally, by the time the hook passes the stern, the hook has sunk below the surface beyond the reach of seabirds.

51. Research has shown that seabird bycatch varies with the mitigation method employed, geographic location, time of day when lines are set, and other variables. According to NMFS, "sea trials indicate that side-setting is the most effective of any single seabird mitigation method in reducing albatross

mortality in the Hawaii longline fishery. Side-setting produced the lowest seabird interaction rates when compared to underwater setting chutes and blue-dyed bait in both [tuna] and [swordfish] fisheries." NMFS, Annual Report on Seabird Interactions and Mitigation Efforts in the Hawaii Longline Fishery for 2007 (2008).

52. According to the Final Supplemental Environmental Impact Statement prepared for Amendment 18 to the Fishery Management Plan ("EIS") prepared by the Western Pacific Regional Fishery Management Council ("WESPAC") dated March 10, 2009, "[s]ide-setting has been proven to nearly eliminate seabird interactions with longline vessels." EIS at 250.

53. Despite this, defendant NMFS has failed to require that the Fishery employ side-setting, and has acknowledged that in 2007 (the period covered in NMFS's most recent annual report on seabird interactions and mitigation efforts), not a single vessel in the Fishery actually utilized side-setting. The Fishery continues

to hook and drown seabirds, including black-footed and Laysan albatross.

Sea Turtles

54. Sea turtles are among the most ancient creatures living on earth. They were common 130 million years, during the age of dinosaurs in the Cretaceous period. Six of the world's seven species of sea turtles are now in danger of extinction due to a number of causes, with incidental bycatch in commercial fisheries being among the most significant.

55. Leatherback sea turtles (*Dermochelys coriacea*) are caught in the Hawai'i longline fishery and are unique among sea turtles in lacking a hard shell. They are the largest of all sea turtles, and the most massive of all living reptiles: they may grow to a length of 7 feet and weigh up to 2,000 pounds. Living in the open ocean and feeding primarily on jellyfish, leatherbacks can swim at speeds in excess of 20 miles per hour and dive deeper than 3,000 feet.

56. Leatherback populations in the Pacific include Eastern Pacific populations nesting in Mexico and Costa Rica, and Western Pacific populations nesting primarily in Papua New Guinea, Papua, Indonesia, and the Solomon Islands. According to defendant NMFS, “past and present fisheries interactions have been, and continue to be, the greatest human impact on leatherback turtles” within the Western Central Pacific area affected by the Fishery. NMFS, Biological Opinion on Amendment 18 to Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region (2008) (“BiOp”) at 43.

57. “Catastrophic declines” have been observed in both Eastern and Western Pacific leatherback populations. NMFS, Leatherback Sea Turtle (*Dermochelys coriacea*) 5-Year Review: Summary and Evaluation (2007) (“Leatherback Status Review”) at 26. The “major nesting rookery at Rantau Bang in Terengganu, Malaysia has collapsed from over 10,000 nests in 1956 to 20 or fewer nests in recent years.” Id. at 14. “At Playa

Grande, Costa Rica, considered the most important nesting beach in the Eastern Pacific, the number of nesting females dropped steadily from 1,367 in 1988-1989 (July-June) to 506 in 1994-1995 to 117 in 1998-1999." Id. at 12. In Pacific Mexico, "[t]ens of thousands of nests were likely laid on the beaches in the 1980s, but during the 2003-2004 season a total of 120 nests was recorded on the four primary index beaches combined." Id. at 13.

58. The largest known nesting site for the Western Pacific population, accounting for about 38 percent of the population, is at Jamursba-Medi, in Papua, Indonesia. Nesting numbers at Jamursba-Medi have dropped from over 13,000 nests recorded in 1984 to 1,865-3,601 recorded between 2001 and 2004, which equates to four nesting seasons. Leatherback Status Review at 13. WESPAC's EIS describes the status of the second largest Western Pacific leatherback population, in Papua New Guinea, as "critical." EIS at 86, 88.

59. The leatherback sea turtle has been listed since 1970 under the Endangered Species Act as "endangered" throughout its entire range. The IUCN's Red List 2000 classifies the leatherback as "Critically Endangered" at a global level, facing an "extremely high risk of extinction in the wild," because there has been an "observed, estimated, inferred or suspected reduction of at least 80% over the last three generations." In fact, the IUCN concluded the leatherback's global population may have been reduced by 78 percent in less than a single generation.

60. The Fishery also catches and kills loggerhead sea turtles (*Caretta caretta*). According to defendant NMFS, "[t]he most significant manmade factor affecting the survival and recovery of the loggerhead is incidental capture in commercial and artisinal fisheries." NMFS, Loggerhead Sea Turtle (*Caretta caretta*) 5-Year Review: Summary and Evaluation (2007) at 36.

61. According to defendant NMFS, all of the loggerheads the Fishery incidentally catches come from the North Pacific population that nests in Japan, and that population has declined by 50-90 percent over the past fifty years. BiOp at 20-21.

62. Loggerhead sea turtles are currently listed under the Endangered Species Act as "threatened." In July 2007, plaintiffs TIRN and the Center submitted to NMFS a petition to uplist the North Pacific loggerhead to "endangered." In November 2007, defendant NMFS found that this change in the loggerhead's status may be warranted. 72 Fed. Reg. 64585, 64587 (November 16, 2007). In August 2009, defendant NMFS issued a Loggerhead Sea Turtle 2009 Status Review, in which NMFS found that the North Pacific population of loggerheads qualifies as a distinct population segment ("DPS") as defined in the Endangered Species Act, and that the population faces a "high likelihood of quasi-extinction." Id. at vi; see also id. at 161 (population "at risk of extinction.")

63. The Fishery also takes threatened olive ridley, threatened green, and endangered hawksbill sea turtles.

Humpback Whales

64. Thousands of humpback whales (*Megaptera novaeangliae*) migrate to Hawai'i's waters each year to breed, calve, and nurse their young between November and April. Migrating from summer feeding grounds off the coasts of British Columbia and Southeast Alaska, humpback whales that winter in Hawai'i comprise about half of the North Pacific population. BiOp at 17. This population was internationally protected in 1965 after whaling efforts reduced its numbers to only 1,000, and it was subsequently listed as endangered in the United States in 1973. FSEIS at 125.

65. Central North Pacific humpbacks face a number of threats, with fishing gear entanglements and ship strikes considered the most significant. BiOp at 40. Fishing gear entanglement is of particular concern, accounting for about two-thirds of the humpback whale mortalities estimated to occur annually from these two

activities. Id. Whales migrating to and from their Hawai'i breeding grounds pass through the area where the Fishery operates, and because humpback whales are shallow divers, generally diving to less than 60 meters, they are exposed to shallow-set gear. Id. at 40, 17.

66. Entanglements with fishing gear expose humpbacks to increased risk of starvation, infection, physical trauma, ship strikes and, in some cases, drowning. BiOp at 18. Reports of humpback whales entangled with fishing gear in Hawai'i's waters appear to be on the rise. Id. at 17. For example, there were 23 reports of entangled humpback whales from 2001-2006, and 16 of these reports are from 2005 and 2006. Id.

67. According to the R.P. Angliss and B.M. Allen, Alaska Marine Mammal Stock Assessments, 2008, NOAA Technical Memorandum NMFS-AFSC-193 (2009) ("SAR"), the minimum annual mortality and serious injury from commercial fishery-related incidents for the Central North Pacific humpback stock is "not less than 10% of

the calculated PBR...and, therefore, can not be considered to be insignificant and approaching a zero mortality and serious injury rate.” Id. at 176 (emphasis added). The SAR notes these mortality estimates “should be considered a minimum,” and that it is likely that mortality and serious injury actually are occurring at higher rates. Id.

68. Defendant NMFS estimated that the Rule likely will result in the Fishery killing an additional humpback whale every one to two years, in addition to the mortality and serious injuries already occurring due to fishing gear entanglements. BiOp at 52.

69. NMFS since at least 1998 has been issuing annual SARs finding the fisheries’ take rate for the Central North Pacific stock exceeds the level requiring preparation of a take reduction plan, but has never taken the actions required by the statute. The 30-day period following finalization of the 2008 SAR passed on May 29, 2009, and NMFS again failed to set the mandated process in motion by convening a take reduction team.

NMFS's failure to initiate development of a take reduction plan, and its failure affirmatively to determine the fisheries' impacts to the stock are negligible, precludes NMFS from authorizing incidental take of humpbacks in this fishery under the MMPA.

70. The ESA and the MMPA each strictly prohibit such incidental take unless NMFS authorizes it in accordance with the provisions of those statutes. However, NMFS has not authorized either the incidental take already occurring prior to the Rule, nor the additional incidental take NMFS acknowledges will occur as a result of defendants having eliminated all restrictions on fishing effort. According to the BiOp, "[b]ecause MMPA 101(a)(5)(e) authorization has not been completed, incidental take of humpback whales **is not authorized** for the proposed action at this time." BiOp at 78 (emphasis added).

The Rule

71. On December 10, 2009, NMFS published a final rule implementing Amendment 18 to the Fishery

Management Plan which governs the Fishery's operation (the "Rule"). The Rule becomes effective as of January 11, 2010.

72. According to defendant NMFS, prior to NMFS's removal of all limits on swordfish longline effort in the Fishery, North Pacific loggerheads faced an over 83 percent likelihood of be coming quasi-extinct within the next three loggerhead generations. BiOp at 56. The Rule nearly triples the number of loggerhead sea turtles the Fishery is authorized to catch.

73. According to defendant NMFS, "[b]aseline conditions for [the Western Pacific leatherback] population are already poor, and appear to be getting worse..." BiOp at 75. The Rules nevertheless eliminates any restrictions on swordfish fishing effort, maximizing the likelihood that leatherback turtles will be entangled and drowned during the fishing season, since the Fishery will be open until the maximum number of leatherbacks is caught—unless the maximum number of loggerheads is caught first.

74. The Migratory Bird Treaty Act strictly prohibits defendants from authorizing the Fishery to fish in a manner anticipated to result in mortality of migratory seabirds. Defendants, already aware that the Fishery unlawfully kills migratory seabirds, by the Rule have now authorized the Fishery to deploy an unlimited number of longline sets, and thereby cause albatross mortality without any limit. Moreover, defendants have authorized the Fishery to cause more seabird mortality than would occur if defendants required the Fishery to use side-setting, the mitigation method defendants have determined is most effective.

FIRST CLAIM FOR RELIEF

(VIOLATION OF MIGRATORY BIRD TREATY ACT AND
ADMINISTRATIVE PROCEDURE ACT)

75. Plaintiffs reallege and incorporate by this reference paragraphs 1- 74 of this Complaint.

76. By issuing the Rule authorizing the Fishery to fish in a manner that will result in unauthorized take of migratory birds, defendants violated and continue to

violate the Migratory Bird Treaty Act, 16 U.S.C. § 703
et seq., and Administrative Procedure Act, 5 U.S.C. §
701 et seq.

SECOND CLAIM FOR RELIEF

(VIOLATION OF ENDANGERED SPECIES ACT SECTION 7 AND
ADMINISTRATIVE PROCEDURE ACT)

77. Plaintiffs reallege and incorporate by this reference paragraphs 1- 74 of this Complaint.

78. The Biological Opinion defendant NMFS prepared to assess the Regulations' impacts upon threatened and endangered species (the "BiOp") is arbitrary, capricious, contrary to law, and invalid, for reasons including but not limited to those alleged hereinafter.

79. The BiOp is arbitrary, capricious, and contrary to law in failing to contain an Incidental Take Statement authorizing any level of take of humpback whales, despite predicting that humpback whales will be killed in the Fishery, in violation of 16 U.S.C. § 1536(b) (4) and 50 C.F.R. § 402.14(i).

80. The BiOp is arbitrary, capricious, and contrary to law in failing to minimize take, in violation of 16 U.S.C. § 1536(b) (4) and 50 C.F.R. § 402.14(i).

81. The BiOp is arbitrary, capricious, and contrary to law in that it is not based upon the best scientific

and commercial data available. NMFS entirely ignored relevant factors and failed to analyze and develop projections based on information that was available, in violation of 16 U.S.C. § 1536(a)(2).

82. The BiOp is arbitrary, capricious, and contrary to law in that it fails to address the impacts of the proposed take on species recovery, rather than merely on survival, in violation of 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.02 (definition of "jeopardize the continued existence of").

83. The BiOp is arbitrary, capricious, and contrary to law in that NMFS-Protected Resources' jeopardy analysis compares the effects of the Rule on listed species relative to the risk posed by baseline conditions, instead of determining whether the action, in combination with the environmental baseline and cumulative effects, will jeopardize the species, in violation of 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.02 (definition of "jeopardize the continued existence of").

THIRD CLAIM FOR RELIEF

(VIOLATION OF ENDANGERED SPECIES ACT SECTION 7 AND ADMINISTRATIVE PROCEDURE ACT)

84. Plaintiffs reallege and incorporate by this reference paragraphs 1- 74 of this Complaint.

85. Section 7(a)(2) of the ESA requires NMFS-Fisheries, as the action agency implementing the Rule, to insure that its actions are not likely to jeopardize the continued existence of any threatened or endangered species.

86. NMFS-Fisheries' reliance on NMFS-Protected Resources' inadequate Biological Opinion was arbitrary, capricious, an abuse of discretion and/or contrary to law, and violates the former's duty under 16 U.S.C. § 1536(a)(2) to insure against jeopardy.

FOURTH CLAIM FOR RELIEF

(VIOLATION OF ENDANGERED SPECIES ACT SECTION 9)

87. Plaintiffs reallege and incorporate by this reference paragraphs 1- 74 of this Complaint.

88. The Rule authorizes fishing in a manner that presents an imminent and reasonably certain threat of harm to endangered humpback whales. This violates the prohibition on unauthorized take contained in 16 U.S.C. § 1538(a).

FIFTH CLAIM FOR RELIEF

(VIOLATION OF ENDANGERED SPECIES ACT SECTION 9)

89. Plaintiffs reallege and incorporate by this reference paragraphs 1- 74 of this Complaint.

90. The Rule authorizes fishing that presents an imminent and reasonably certain threat of harm to endangered leatherback and hawksbill sea turtles and threatened loggerhead, olive ridley, and green sea turtles. The BiOp upon which the Incidental Take Statement purporting to authorize take of these species is based is inadequate and invalid, and defendants'

take of the species therefore is unauthorized and violates 16 U.S.C. § 1538(a).

SIXTH CLAIM FOR RELIEF

(VIOLATION OF MARINE MAMMAL PROTECTION ACT AND ADMINISTRATIVE PROCEDURE ACT)

91. Plaintiffs reallege and incorporate by this reference paragraphs 1- 74 of this Complaint.

92. Defendant NMFS failed to initiate a take reduction plan, notwithstanding that since at least 1998 it has determined that the Central North Pacific humpback stock is losing at least 10 percent of its PBR to commercial fisheries, and NMFS has failed to affirmatively determine that the fisheries' impacts to the stock are negligible. Accordingly, NMFS is precluded from authorizing, and has not authorized, the incidental take of endangered humpback whales in the Fishery.

93. By issuing the Rule authorizing the Fishery to fish in a manner that will result in unauthorized take of endangered humpback whales, defendants violated and

continue to violate the prohibition on marine mammal take imposed by 16 U.S.C. § 1371.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that defendants have violated and are violating the Migratory Bird Treaty Act and the Administrative Procedure Act by issuing the Rule authorizing the Pelagic Fisheries of the Western Pacific Region to fish in a manner that will take migratory birds;

2. Enter a declaratory judgment that defendants have violated and are violating Section 7 of the Endangered Species Act and Administrative Procedure Act by issuing an inadequate Biological Opinion purporting to analyze the Rule's impacts on threatened and endangered species;

3. Enter a declaratory judgment that defendants have violated and are violating Section 7 of the

Endangered Species Act by failing to insure against jeopardizing threatened and endangered species;

4. Enter a declaratory judgment that defendants have violated and are violating Section 9 of the Endangered Species Act by issuing the Rule authorizing the Fishery to fish in a manner that likely will take threatened and endangered sea turtles without legal authorization;

5. Enter a declaratory judgment that defendants have violated and are violating Section 9 of the Endangered Species Act by issuing the Rule authorizing the Fishery to fish in a manner that likely will take endangered marine mammals without legal authorization;

6. Enter a declaratory judgment that defendants have violated and are violating the Marine Mammal Protection Act and Administrative Procedure Act by issuing the Rule authorizing the Fishery to fish in a manner that likely will take endangered marine mammals without legal authorization;

7. Issue appropriate injunctive relief;

8. Award plaintiffs the costs of this litigation,
including a reasonable attorney's fee; and

9. Provide such other relief as may be just and proper.

DATED: Honolulu, Hawai'i, December 16, 2009.

Respectfully submitted,

PAUL H. ACHITOFF
ISAAC H. MORIWAKE
Earthjustice
223 S. King Street, Suite 400
Honolulu, HI 96813
Attorney for Plaintiffs