

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, *et al.*,

Plaintiffs,

v.

Civil Action No. 09-0961-RMC

GARY LOCKE, in his Official Capacity as
Secretary of the U.S. DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

INTERVENOR-DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO
INTERVENOR-DEFENDANT PETITIONERS' MOTION TO INTERVENE

Plaintiffs' opposition to Intervenor-Defendants' participating in the preliminary injunction phase of this proceeding should be rejected.

Plaintiffs do not object to Intervenor's participation in the merits phase of this proceeding. In fact, "Plaintiffs wish to make it clear that they concede if the one-fish rule is permanently enjoined and there is no replacement mechanism for addressing the allocation of fish between the commercial and charter sectors, the commercial sector may experience legally cognizable harm." Plaintiffs' Opposition to Intervenor-Defendant Petitioners' Motion to Intervene ("Pl. Op.") at 4 (emphasis in original). Plaintiffs' position is that Intervenor does not meet the standards for intervention regarding a preliminary injunction that will allow Plaintiffs to take two fish a day per customer, but Intervenor does meet the standards for intervention regarding a permanent injunction that would allow the same thing.

The charter season lasts from late May to early September. Even on the expedited schedule proposed by Defendants, a ruling on the merits would not be likely until late July. At that point, the charter season is more than 50% over. Although Plaintiffs “wish to make it clear that they concede” Intervenor should participate in a decision on the merits that could invalidate the challenged rule for less than half of the fishing season, Plaintiffs object to that participation in a preliminary injunction proceeding that could invalidate the challenged rule for more than half of the season.

Plaintiffs’ vehemence on the preliminary injunction phase of this case perhaps reflects the fact that, if last year’s proceedings are any guide, the preliminary injunction phase of this case may be the only opportunity Intervenor have to protect their interests.

The problem and harm for Intervenor dependent on the commercial quota is that if a preliminary injunction issues, the commercial halibut quota will be cut. These Intervenor, commercial fishermen, processors, and municipalities, will be harmed by a preliminary injunction. The reasons are found in Plaintiffs’ brief. Plaintiffs admit the International Pacific Halibut Commission (“IPHC”) sets the commercial quota by first establishing the total allowable harvest, then taking the charter, subsistence, and other harvests off the top and what’s left is the commercial harvest. *Id.* at 4. Plaintiffs also admit the IPHC’s “historical practice” is to set the commercial harvest by deducting the actual charter harvest, not the Guideline Harvest Level (“GHL”), from the total allowable harvest. *Id.* at 7, note 3. Thus, if the charter industry gets to fish at a higher level (two fish per day versus one fish per day), their entire enhanced harvest is deducted from the commercial quota.

Last year, fishing under the two fish per day rule that would be allowed by a preliminary injunction, the charter industry took 1.9 million pounds of halibut. The 2009 GHL is 788,000

pounds. 74 Fed. Reg. 21192, 21195 (May 6, 2009). If the one fish per day rule is not enforced, then for whatever period it is not in effect the charter industry will be fishing at the annualized rate of 1.9 million pounds. The larger amount of fish taken will be deducted from the commercial quota. The harm occurs because a preliminary injunction will allow the charter industry to fish at a rate of two fish per day, not one fish. In the preamble to the challenged rule, NMFS acknowledges that “charter harvests in excess of the GHL can have direct and indirect adverse impacts on commercial fishermen and that many commercial longline fishermen have had to borrow money to purchase quota shares. NMFS agrees that allocative and stock impacts can reduce their ability to repay those loans.” *Id.* at 21210.

Plaintiffs’ first rejoinder is that Plaintiffs are sure the IPHC would not reduce the commercial quota until 2010 and, therefore, there must not be any real harm in 2009 to Intervenor who depend on the commercial quota. Such an argument is akin to saying that the harm does not occur when the arsenic is administered, only when it takes effect. However, the proximate cause of death is the administering of the arsenic. The proximate cause of the cut in the commercial quota will be the charter fishing level allowed if a preliminary injunction is granted. Whether the patient survives until 2010 or dies in 2009, the cause of death is the same; the poison was administered in 2009. Moreover, even Plaintiffs admit it is likely the IPHC will take some action in 2009 if the challenged rule is not implemented. Plaintiffs admit the IPHC has stated it is “prepared to take extraordinary action at an intercessional meeting in 2009 to pass IPHC regulations commensurate with the intent to conserve the resource should there be any delay or problem with the implementation for the [regulation at issue in this case].” Pl. Opp. at 7, quoting the January 20, 2009 statement of the IPHC (emphasis added).

Plaintiffs next say that if the IPHC does indeed decide to do something in 2009, the IPHC will probably act against the charter industry, not the commercial sector. However, a preliminary injunction allowing the charter industry to fish at a rate exceeding its quota leaves the IPHC with no alternative but to cut the commercial quota in order to bring the overall harvest rate into balance with what the IPHC believes to be an acceptable overall harvest. Plaintiffs fail to explain how it will be possible for the IPHC to take action, actions that are implemented by the U.S. government under the Halibut Act if this Court rules that the charter industry halibut quota is not enforceable because it violates the Halibut Act.

Plaintiffs next seek to dismiss the possibility that NMFS could change the individual commercial allocations in 2009 to compensate for the effect of a preliminary injunction because of the administrative difficulties in changing allocations to individual commercial fishermen that have already been made. This is pure speculation on Plaintiffs' part. In fact, in 2008, after the initial individual quota share allocations had been made in the black cod fishery, NMFS reissued black cod quotas – after the season began and even after some quota share holders had already harvested their entire quota. Contrary to what Plaintiffs speculate, there is precedent for NMFS doing exactly what Plaintiffs claim cannot be done.

In addition to the issue of commercial quota reductions caused by a preliminary injunction, all Intervenors are harmed if the resource biomass declines. This year, like last year, when the IPHC set the overall harvest rate, it assumed the GHM would be implemented based on U.S. government assurances that the charter industry would be regulated under a one fish rule. If the charter industry is allowed to operate under a two fish per day rule, the allowable safe harvest set by the IPHC will be exceeded. The result is that the resource is harmed and the overall amount of fish available for future harvest declines. Plaintiffs see absolutely no problem here

“because any overage this year can be adjusted for next year, as has always been the practice of the IPHC.” *Id.* at 7, note 3. The problem for Intervenors is, as Plaintiffs admit, the “adjustment” made by the IPHC will be to reduce the commercial quota to account for “any overage” by the charter industry. The charter harvest is taken off the top.

Plaintiffs then assert that if the charter industry exceeds its quota, it really does not create any conservation problems. That may be Plaintiffs’ position but the fishery managers disagree. The IPHC has consistently stated: “The achievement of the Commission conservation mandate is dependent on adherence to catch limits and total yield.” *See* Affidavit of Linda Behnken (“Behnken Aff.”), attached as Exhibit 1 to Intervenor’s Memorandum of Points and Authorities in Support of Motion to Intervene, Appendix B, Letter from Bruce Leaman, Executive Director, IPHC, to Stephanie Madsen, Chair, Council, Dec. 1, 2006.¹ The biological threat from charter overfishing was restated emphatically by the IPHC in 2009. “The Commission certainly views the recent harvests and current stock status in Area 2C as a conservation concern.... The assertion ... that overages of the GHJ by the charter sector do not represent a conservation concern ... is incorrect. Lack of adherence to limits imposed on any sector can result in the Commission exceeding its management targets for a given area.... Uncontrolled harvest by the charter fishery, or harvests in excess of the identified GHJ levels ... will result in negative

¹ In 2007, the IPHC also wrote the Secretary of Commerce about the conservation threat caused by charter boat overfishing stating that “overharvesting puts at risk the achievement of IPHC management goals for the halibut stock.” *See* Ex. 1, Behnken Aff., Appendix C, Letter from Jim Balsiger, Chairman, IPHC, to Secretary of Commerce Carlos Gutierrez, January 23, 2007. In 2008, the IPHC wrote the Council stating “[t]he lack of compliance with the GHJ targets will exacerbate the present conservation problem in Area 2C. Estimates of exploitable biomass for Area 2C have decreased markedly in recent years and the lack of adherence by the charter fishery to the [GHJ targets] in turn frustrates the ability of the IPHC to meet its management targets.” *See* Ex. 1, Behnken Aff., Appendix B, Letter from Bruce Leaman, IPHC Executive Director, to Council, Sept. 19, 2008.

impacts on the Commission's ability to meet its stock management goal and delivery of yield to all user groups." *See* Ex. 1, Behnken Aff., Appendix A, Letter from Bruce Leaman, IPHC Executive Director, to Linda Behnken, April 13, 2009.²

Regarding localized depletion and its impact on Intervenor who are subsistence fishermen and Native peoples, Plaintiffs do not dispute that localized depletion causes the harms stated by Intervenor. Instead, Plaintiffs assert there is no localized depletion. Note what Plaintiffs do not say. They do not challenge the data cited in Intervenor's affidavits that the Alaska Department of Fish and Game has found that charter catch rates are down by 50% or more in the principal charter fishing areas. *See* Ex. 1, Behnken Aff., ¶ 42. Taking longer to catch the same amount of fish means the fish are less plentiful, *i.e.*, there is localized depletion. Plaintiffs' only response is that NMFS states it does not "have scientific information" regarding localized depletion. Pl. Op. at 3. The fact that NMFS has not done a scientific study does not

² Plaintiffs also claim that there is no conservation issue because "realized IPHC target harvest rates have exceeded the target harvest rates since about 2000..." Pl. Op. at 4, note 3, quoting the Environmental Assessment. The realized harvest rate is the actual harvest rate. The target rate is what is sought for conservation purposes. The reason the realized rate has been exceeded is twofold. First, approximately three years ago and based on new data analyses, the IPHC determined the halibut biomass was smaller than previously thought. This led the IPHC to back calculate the appropriate target harvest rates. When compared to the newly calculated target rates, the realized rate was too high. It was not, as Plaintiffs imply, a lack of concern for the resource. Second, the unregulated growth of charter industry was the main reason the realized rates were high. The GHIL was intended to correct that issue but the charter industry has exceeded its GHIL in every year, last year by 106%. In the last four years, the commercial harvest has been cut 54% for conservation reasons while the charter harvest has been at record highs. 74 Fed. Reg. at 21207. NMFS acknowledges that part of the commercial quota decline "is attributable to the guided charter fishery overages." 74 Fed. Reg. at 21212. Indeed, between 1999 and 2005 the charter harvest increased 107%. *Id.* at 21203. If there is a problem with the IPHC harvest realization rates, it is a problem caused by the charter industry. Plaintiffs also fail to note that as a result of IPHC management policies, large amounts of otherwise harvestable fish have been left unharvested in the past, allowing for a large increase in halibut biomass. *Id.* at 21212.

mean the problem does not exist and that Alaska's data is not valid.³ It should also be noted that in other documents NMFS acknowledges the existence of localized depletion in areas where the charter industry concentrates. Approximately 40% of the annual charter harvest comes from waters around Sitka, Alaska. Behnken Aff., ¶ 42. Due in large part to the effects of this concentrated fishing, a Local Area Management Plan was adopted by NMFS "to address localized depletion of halibut in the Sitka Sound area..." Environmental Assessment/Regulatory Impact Review for a Regulatory Amendment to Amend Proposed Halibut Subsistence Fishery Regulations in Convention Waters, Nov. 8, 2001, p. 5, available at http://alaskafisheries.noaa.gov/npfmc/current_issues/halibut_issues/SubsistenceII.pdf.

Finally, Plaintiffs contend the Court decided the issue last year and should not think about it again. But the Court must think about it again because the factual circumstances are different and the resulting arguments are different. This is a new case, a new rulemaking, and a new administrative record. The timeliness issue regarding intervention present last year does not exist this year. The data before the Court last year showed the charter industry had exceeded its GHY by 34% in 2007, a number believed to be significant. A year later in 2008, the overage is up to 106%. 74 Fed. Reg. at 21195. That is a difference of orders of magnitude and the allocation problem it creates is also orders of magnitude greater. In 2008, the IPHC had not

³ Plaintiffs also miss the point when they assume that the numerical amount of halibut taken by the charter fleet does not affect the numerical amount of halibut that can be taken by subsistence fishermen and Alaska's Native peoples for subsistence and cultural purposes. *Id.* at 3, note 1. Being allowed to take any number of halibut is irrelevant if the halibut are not there because they have been fished out by the charter industry – fished out because charter boats will be able to take a higher number of fish if a preliminary injunction is granted. And those fish are taken first in inshore areas where subsistence fishermen and Native peoples must fish. While large and powerful charter boats can go elsewhere after their concentrated fishing depletes an area, subsistence fishermen, as the name implies, do not own large and powerful vessels that allow them to go elsewhere to find fish.

made the declarative statement it has now made that if the GHJ is not enforced, the IPHC will take “extraordinary action” in 2009 to address the problem. The facts are different this year.

For all of the reasons discussed above, Plaintiffs’ opposition is without merit.

Dated: June 2, 2009

Respectfully submitted,

/s/ George J. Mannina, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2009, copies of the foregoing *Reply to Opposition to Motion to Intervene* were served via email and first class mail, postage prepaid, upon the following counsel of record:

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