UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, *et al.*,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 09-0961-RMC

INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendants Linda Behnken, Seafood Producers Cooperative, Annah Taft Perry, Ryan Nichols, Josh Moore, David Gibson, Sherri and Kurt Wohlheuter, Christopher Knight, Halibut Association of North America, North Pacific Seafoods, Inc., Carolyn Heuer, Hoonah Indian Association, the City of Pelican, and the City of Port Alexander, through counsel, hereby move for entry of summary judgment in their favor pursuant to Rule 56 of the Federal Rules of Civil Procedure. As shown in the accompanying memorandum, there are no genuine issues as to any material fact and Intervenor-Defendants are entitled to judgment as a matter of law.

The Final Rule, 74 Fed. Reg. 21194 (A.R. Doc. 5), is lawful and was promulgated in accordance with applicable law.

Dated: July 28, 2009

Respectfully submitted,

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INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. THE BACKGROUND FACTS 1

A. The Subsistence and Commercial Fisheries. 1

B. The Charter Boat Industry. 2

C. The Halibut Resource. 3

III. SUMMARY OF ISSUES 3

IV. THE FAIR AND EQUITABLE QUESTION 5

A. The Halibut Act. 5

B. When Is An Allocation Fair And Equitable? 5

1. What Is A Legitimate Fishery Management Objective? 6

2. Is The Fishery Management Objective At Issue A Legitimate One? 8

a) The Process By Which The GHL Was Developed, 1993-2003 9

b) What Did The Council Say Was The Fishery Management Objective? 11

c) What Was The Record Before The Council Regarding The Plan Objective? 11

d) What Did NMFS Explain Was The Fishery Management Objective? 12

e) Conclusion. 14

C. Is There A Rational Connection Between The Allocation And The Fishery Management Objective? 14

1. What Was In The Council Record About The GHL? 15

2. What Did The Secretary Say About The GHL? 16

Page

3. What Was In The Council Record About The One Halibut Rule Designed To Enforce The GHL?....20

4. What Did The Secretary Say About The One Halibut Rule Designed To Enforce The GHL?....23

5. Why A One Fish Bag Limit? 27

D. What Do Plaintiffs Say In Response? 28

E. Conclusion. 31

V. THE PRESENT PARTICIPATION QUESTION....32

A. Does The Present Participation Standard Apply In This Case? 32

B. Are The GHL And Its Implementing Regulations A Limited Access System? 34

C. If The Present Participation Standard Applies To The GHL, Does It Apply At The Time Of The Allocation Or May A Sector Exceed Its Allocation And Then Demand That Its New "Present Participation" Requires A Reallocation? 34

D. In Assessing Present Participation, Is That Participation Fully Considered When A Sector Is Awarded More Than Its Current Harvest Level? 39

E. Is The 2009 Rule Somehow A New GHL Allocation? 39

F. Conclusion. 42

VI. PLAINTIFFS' CLAIMS ARE BARRED BY LACHES 42

A. The Law. 42

B. The Facts. 44

VII. CONCLUSION 45

TABLE OF AUTHORITIES

Page

Cases

Air Transport Ass'n of Canada v. FAA, 254 F.3d 271 (D.C. Cir. 2001) 33
Alaska Factory Trawler Ass'n. v. Baldridge,
831 F.2d 1456 (9th Cir. 1987) 7, 31, 32
Allen v. Carmen,
578 F. Supp. 951 (D.D.C. 1983) 47
Alliance Against IFQs v. Brown,
84 F.3d 343 (9th Cir. 1996), *cert. denied*, 520 U.S. 1185 (1997).....38, 39, 45
American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998).....33
Bluewater Network v. EPA, 370 F.3d 1 (D.C. Cir. 2004) 33
C&W Fish Company v. Fox,
745 F. Supp. 6 (D.D.C. 1990), *aff'd*, 931 F. 2d 1556 (D.C. Cir. 1991) 7, 8
D&F Alfonso Realty Trust v. Garvey, 216 F.3d 1191 (D.C. Cir. 2000) 33
Fisherman's Finest, Inc. v. Gutierrez, 2008 U.S. Dist. LEXIS 92936
(D.W.D. Wash. Nov. 12, 2008) 32, 33
Independent Bankers Association of America v. Heimann,
627 F.2d 486 (D.C. Cir. 1980) 46, 47
J.H. Miles & Co. v. Brown,
910 F. Supp. 1138 (E.D. Va. 1995).....38
Jost v. Surface Transportation Bd., 194 F.3d 79 (D.C. Cir. 1999).....33
National Coalition for Marine Conservation v. Evans,
231 F.Supp.2d 119 (D.D.C. 2002) 8, 9
National Fisheries Inst., Inc. v. Mosbacher,
732 F. Supp. 210 (D.D.C. 1990) 7, 10, 32
Public Media Center v. FCC, 587 F.2d 1322 (D.C. Cir. 1978).....34
Sea Watch Int'l v. Mosbacher,
762 F. Supp. 370 (D.D.C. 1991) 8, 32, 45
Tripoli Rocketry Ass'n. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives,
437 F.3d 75 (D.C. Cir. 2006).....33
United Boatmen of New Jersey v. Mosbacher,
1992 U.S. Dist. LEXIS 664 (D.N.J. Jan. 23, 1992) 9, 10
Wash. Crab Producers Inc. v. Mosbacher,
924 F.2d 1438 (9th Cir. 1990) 44
Yakutat, Inc. v. Gutierrez,
407 F.3d 1054 (9th Cir. 2005) 44, 45

Statutes

16 U.S.C. § 1802(27) 34
16 U.S.C. § 1851(a)(4).....5
16 U.S.C. § 1853(b)(6).....4, 32, 33, 34, 35, 40, 41, 42

16 U.S.C. § 1854 29
16 U.S.C. § 1854(a) 29
16 U.S.C. § 1854(a)(1)(A) 28
16 U.S.C. § 1854(a)(3) 28
16 U.S.C. § 1854(a)(4) 29
16 U.S.C. § 773 1
16 U.S.C. § 773c(c) 5, 29, 32

Regulations

50 C.F.R. 600.325(c)(3)(i) 6
50 Fed. Reg. 43193 6
55 Fed. Reg. 14833 7
55 Fed. Reg. 18729 8
63 Fed. Reg. 11649 ..... 10, 14
67 Fed. Reg. 3867 ..... 10, 12, 13, 18, 19, 35, 39, 42
68 Fed Reg. 47256 ..... 11, 13, 14, 17, 18, 19, 39, 42
73 Fed. Reg. 30504 14
73 Fed. Reg. 78276 ..... 14, 23, 25
74 Fed. Reg. 21194 ..... 1, 3, 5, 9, 14, 18, 24, 25, 26, 28, 34, 37, 39

Other Authorities

128 Cong. Rec., H.8577 (Daily Ed. May 4, 1982) 33
128 Cong. Rec., S.7470 (Daily Ed. April 22, 1982) 33

I. INTRODUCTION

Pursuant to the Northern Pacific Halibut Act, 16 U.S.C. § 773 ("Halibut Act"), the Secretary of Commerce ("Secretary"), through the National Marine Fisheries Service ("NMFS"), issued a rule limiting each fisherman aboard charter boats in International Pacific Halibut Commission ("IPHC") Management Area 2C to catching one halibut per day. 74 Fed. Reg. 21194 (May 6, 2009)("Rule"), cited as Administrative Record document ("A.R.") 5. The Rule enforces the Area 2C charter industry halibut quota, called the Guideline Harvest Level ("GHL") established in 2003. The GHL was recommended by the North Pacific Fishery Management Council ("Council") created by the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and approved by the Secretary.

II. THE BACKGROUND FACTS

A. The Subsistence and Commercial Fisheries.

The halibut subsistence fishery has existed since humans set foot in Alaska. Subsistence users are men and women of limited economic means. They depend on their halibut subsistence harvest to feed their families. For them, access to the halibut resource is critical.

The commercial halibut fishery is over 100 years old. A.R. 72, A.R. 110, A.R. 212. The character of this fishery is very different from the charter industry generally represented by Plaintiffs. Virtually all Area 2C commercial halibut fishermen operate small boat family businesses. Affidavit of Linda Behnken ("Behnken Aff."), attached as Exhibit 1 to Intervenors' Memorandum of Points and Authorities in Support of Motion to Intervene, ¶ 11. For 2009, pursuant to the fishery management system called the Individual Fishermen's Quota ("IFQ") program, fifty-four percent of commercial fishermen are limited to harvesting less than 3,000 pounds of halibut and 90% to less than 10,000 pounds. *Id.* No person may fish commercially

for halibut in any IPHC management area unless that person holds IFQ program Quota Shares ("QS") for that area. *Id.*, ¶ 4. However, 93% of the Area 2C commercial QS are reserved for vessels less than 60 feet. A.R. 171 at 11. Consistent with this small boat, family operated fishery, 90% of the harvest is delivered to community based processors. *Id.*

The average Area 2C commercial fisherman will likely gross $9,000 from halibut fishing in 2009. For many, halibut is a principal fishery. While most 2C commercial halibut fishermen also harvest salmon or sablefish, family budgets cannot be met without halibut fishing income. Behnken Aff., ¶ 14. Over two-thirds of Area 2C commercial halibut fishermen have purchased the QS that allow them to fish, often pledging their home and boat as collateral. Their ability to repay these loans depends on their halibut harvests. A.R. 171 at 11.

B. The Charter Boat Industry.

The Area 2C charter industry began about 18 years ago. Behnken Aff., ¶ 15. The industry generally represented by Plaintiffs operates fishing lodges charging clients $500-$1,000 per day (not including airfare to and from Alaska). *See* Plaintiffs' websites at www.waterfallresort.com, www.elcapitanlodge.com, www.juneaualaskafishing.com, www.wildstrawberrylodge.com, and www.shelterlodge.com. According to Plaintiffs' affidavits, the annual revenue from the smallest of these lodges amounts to $100,000. Two other lodges had 2008 revenues of $1.6 million and $1.89 million. A fourth Plaintiff stated he spends over $5 million annually on payroll and expenses. Plaintiffs' Motion to File Supplemental Affidavits, Exhibits 1, 2, 3, and 6.

One Plaintiff's lodge operates a corporate fleet of 27 vessels catching 18,400 halibut annually (between 460,000 and 736,000 pounds based on the 25-40 pound average catch weight cited on his website). *Id.*, Exhibit 3; www.waterfallresort.com. Another Plaintiff's lodge has a

fleet of six vessels harvesting 3,720 halibut annually (between 93,000 and 148,800 pounds based on the 25-40 pound average catch weight cited on his website). Plaintiffs' Motion to File Supplemental Affidavits, Exhibit 3; www.elcapitanlodge.com.

C. The Halibut Resource.

The Area 2C halibut population has declined 58% over the last decade. Behnken Aff., ¶ 27, *citing* IPHC data at http://www.iphc.washington.edu/halcom/pubs/annmeet/2009 bluebook/bluebook09.pdf, p. 127. The commercial halibut quota has been cut 54%. A.R. 5 at 21207, Response to Comment 46. In contrast, the charter industry harvest increased 107% in the last decade. *Id.* at 21203, Response to Comment 32. Since the GHL was established, the charter industry has exceeded its catch quota in every year: by 22% in 2004, 36% in 2005, 26% in 2006, and 106% in 2008. *Id.* at 21195. The charter fleet overharvest 2004-2008 totaled 3.19 million pounds. Behnken Aff., ¶ 22.

Absent the Rule, the trend of increasing charter industry overharvests would continue. The 2009 GHL is 788,000 pounds. A.R. 5 at 21195. The 2008 charter harvest was 1.914 million pounds. *Id.* If the Rule had been enjoined and the charter industry fished in 2009 as it did in 2008, there is no reason to expect a smaller harvest – meaning the charter industry would have exceeded the GHL by 240%. The Area 2C commercial fleet has not exceeded its quota since the IFQ program was implemented in 1995. A.R. 336 at 182.

III. SUMMARY OF ISSUES[1]

Plaintiffs' argument that there is no explanation for "why" the GHL and its implementing regulations are fair and equitable presents two questions for review.

[1] Intervenor-Defendants have not included a standard of review section not because they agree with and concede to Plaintiff's formulation but because Intervenor-Defendants think nothing further needs to be said given the Court's articulation of the standard of review set forth in the Court's June 25, 2009 Memorandum Opinion in this case.

1. What must the Secretary consider in deciding if an allocation is fair and equitable?

2. Did the Secretary properly consider the relevant issues?

Plaintiffs' argument that the Secretary did not consider the most recent charter industry harvests presents five questions for review.

1. Since the "present participation" standard in 16 U.S.C. § 1853(b)(6) that is incorporated by reference into the Halibut Act applies only to limited access systems, does the Halibut Act's "present participation" standard also only apply to limited access systems?

2. If the "present participation" standard applies only to limited access systems, are the GHL and its implementing regulations a limited access system?

3. If the "present participation" standard applies to the GHL, does it apply at the time the allocation is established or may a sector exceed its allocation and demand that its new "present participation" requires a new allocation?

4. In assessing the "present participation" harvest level of a sector, is that participation adequately considered if the sector is awarded 125% of its existing harvest level?

5. If the regulation establishing the allocation sets forth possible management measures to prevent the allocation from being exceeded, when one of those management measures is implemented, does it represent a new allocation to which the "present participation" standard applies?

An additional question for decision is whether Plaintiffs are barred from bringing this action by laches.

IV. THE FAIR AND EQUITABLE QUESTION

A. The Halibut Act.

The Halibut Act provides that if fishing privileges are allocated among U.S. fishermen, "such allocation shall be fair and equitable to all such fishermen, based upon rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation or other entity acquires an excessive share of the halibut fishing privileges." 16 U.S.C. § 773c(c).[2] The Halibut Act is based on MSA National Standard 4 ("NS 4"), 16 U.S.C. § 1851(a)(4), which contains virtually identical language. Although no regulations or case law interpret the Halibut Act's fair and equitable standard, there are regulations and judicial precedent interpreting the MSA's fair and equitable standard. It is those regulations and precedents to which NMFS and the regulated community look for guidance in applying the Halibut Act. A.R. 5 at 21214, Response to Comment 74.

B. When Is An Allocation Fair And Equitable?

Plaintiffs assert the question is not whether the allocation at issue is "reasonable or legitimate, but whether NMFS has adequately explained *why* it chose" that allocation. Pl. Br. at 2 [emphasis in original].[3] Before addressing the Secretary's explanation, the threshold inquiry is what must be explained. That inquiry begins with NMFS' NS 4 regulations that state an

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[2] In providing a description of the Halibut Act for the Court to rely on, Plaintiffs state the "only" question the Halibut Act requires NMFS to decide in approving an allocation is whether the allocation is fair and equitable. Pl. Br. at 3, 4. Clearly this is incorrect. There are four statutory standards, not one. Either Plaintiffs are misstating the law to the Court or, in presenting their argument in this way, they are conceding the allocation promotes conservation, prevents the concentration of excessive shares, and is based on obligations in federal law.

[3] In their Memorandum in Support of Motion for Preliminary Injunction at 5 and 33-38, Plaintiffs argued the GHL allocation is not fair and equitable because (at 33) NMFS "could not have reasonably found on this record that the one-fish daily limit is 'fair and equitable.'" Implicit in this argument, excised from Plaintiff's latest brief, is the assertion that the record is indeed sufficient to enable the Court to determine if the allocation is fair and equitable.

allocation is fair and equitable if it furthers a legitimate conservation and management objective. 50 C.F.R. 600.325(c)(3)(i). Those regulations also state: "Inherent in an allocation is the advantaging one group to the detriment of another." *Id.*

1. What Is A Legitimate Fishery Management Objective?

Although there are other answers to the question of what constitutes a legitimate fishery management objective, there is consensus that preventing the unrestrained growth of one sector from adversely affecting other sectors is a legitimate fishery management objective.

Amendment 14 to the Gulf of Alaska Groundfish Fishery Management Plan ("FMP") excluded pot fishermen from the fishery. 50 Fed. Reg. 43193 (Oct. 24, 1985). Amendment 14 was justified as a response to the adverse social and economic impacts on hook and line fishermen and coastal communities caused by the rapidly increasing harvesting capacity of pot fishermen that was resulting in a reallocation of the available harvest from the traditional hook and line fishery to the new pot fisheries. *Id.* at 43196, Response to Comment 2. "To allow pot vessels to continue to participate and to expand their efforts in the fishery indefinitely would be unfair to the hook and line fishermen." *Id.* at 43195. A legitimate fishery management objective was redressing the adverse social and economic impacts caused by the rapid growth of a new commercial fishery on the traditional fisheries and regulations eliminating the new fishery were deemed to be fair and equitable to meet this fishery management objective. *Alaska Factory Trawler Ass'n. v. Baldridge,* 831 F.2d 1456, 1460 (9th Cir. 1987).

In *National Fisheries Inst., Inc. v. Mosbacher,* 732 F. Supp. 210 (D.D.C. 1990), the issue was the Atlantic Billfish FMP which effectively closed the Atlantic Ocean and Gulf of Mexico to the commercial billfish fishery. The plaintiffs asserted the allocation of the available harvest to only one user group was unfair and inequitable. The Court said: "Merely because these

provisions have a greater impact upon one type of gear user or group of fishermen does not necessarily mean that they violate National Standard 4." *Id.* at 225.

In *C&W Fish Company v. Fox,* 745 F. Supp. 6 (D.D.C. 1990), *aff'd,* 931 F. 2d 1556 (D.C. Cir. 1991), the plaintiffs challenged a ban on drift gillnets in the Atlantic king mackerel and coastal pelagic fishery. Opponents argued that eliminating one user group from the fishery was not fair and equitable particularly when there was enough fish for all user groups to participate in the fishery without adversely affecting the harvest share of the traditional hook and line fishermen. 55 Fed. Reg. 14833, 14835 (April 19, 1990).

The Secretary's reasons for rejecting the plaintiffs' arguments are instructive. "The intended effects of this rule are: (1) to prevent adverse effects on users of traditional hook-and-line gear, and (2) to prevent adverse effects on other fishery resources taken as a bycatch of drift gillnets." *Id.* at 14833-14834. The Secretary recognized that eliminating drift gillnet fishermen from the fishery would have "significantly adverse effects on drift gillnet operators...." *Id.* at 14835. Nevertheless, the Secretary concluded the new drift gillnet fleet adversely affected the traditional hook and line fishermen and, therefore, "unfairly disadvantages hook-and-line fishermen." *Id.* The Court noted that some plaintiffs depended on the fishery for up to 70% of their income, some had no alternative fisheries in which to participate, and several had their economic survival threatened by the rule. 745 F. Supp. at 7. Nevertheless, the Court found that the ban on the new gear type was fair and equitable. *Id.* at 8.

Other cases follow these precedents. *Sea Watch Int'l v. Mosbacher,* 762 F. Supp. 370, 376-78 (D.D.C. 1991), found an allocation that would drive smaller fishing fleets out of business did not violate NS 4 because inherent in any allocation is the advantaging of one group to the detriment of another. In *National Coalition for Marine Conservation v. Evans,* 231 F.Supp.2d

119 (D.D.C. 2002), plaintiffs challenged area closures prohibiting commercial fishing. Finding the closures were not an allocation, the Court then said even if they were the closures shutting down commercial fishing did not violate the fair and equitable standard. *Id.* at 131.

In *United Boatmen of New Jersey v. Mosbacher,* 1992 U.S. Dist. LEXIS 664 (D.N.J. Jan. 23, 1992), the FMP imposed a daily bluefish bag limit on recreational fishermen. The bag limit implemented a new allocation between the commercial and recreational sectors. The FMP awarded the commercial sector, whose highest recorded catch was 12% of the allowable harvest, 20% of the allowable harvest. The recreational sector, which previously accounted for 90% of the harvest, was cut to 80%. NMFS defended the allocation stating:

> The allocation between the recreational and commercial fisheries will insure that the traditional users and fisheries for bluefish are preserved.

55 Fed. Reg. 18729, 18730 (May 4, 1990).

The plaintiffs argued (1) the regulation "significantly" expanded the commercial fishery at the expense of the recreational sector, and (2) the record contained "sparse" information and justification for the reallocation. 1992 U.S. Dist. LEXIS 664 at *14-15. The Court noted "the Act permits discrimination against either sector to achieve the conservation and management goals" of the FMP. *Id.* at *15. The Court stated that "the advantaging of one group over another (*e.g.,* by increasing its allocation of the catch) does not constitute unfair treatment under the Act." *Id.* at *16-17. A reduction in the recreational quota and a daily bag limit designed to enforce that quota was found to be fair and equitable because requiring everyone to live within their quota was a legitimate conservation and management objective. *Id.* at *15-16.

2. Is The Fishery Management Objective At Issue A Legitimate One?

As established by the cases cited above, a legitimate fishery management objective is the protection of traditional fishery participants from adverse socio-economic impacts caused by

increasing harvests by new fishery participants. Fishery conservation is also a legitimate fishery management objective. *National Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. at 219.

a) The Process By Which The GHL Was Developed, 1993-2003.

Before examining the fishery management object identified by the Council and NMFS, it is helpful to review the process used to develop the plan objectives and the GHL. Council debate began in 1993 in response to public concern that the charter fleet's rapid growth would impose serious socio-economic impacts on the traditional commercial halibut fishery, dependent local communities, and subsistence fishermen. A.R. 10 at 29, 40-41.[4] As to the commercial sector and dependent coastal communities, the problem derives from how the IPHC sets the commercial quota. The IPHC first determines the total allowable harvest and then subtracts the expected harvest by everyone except the commercial sector. The remainder is the commercial catch limit. A.R. 5 at 21194. Thus, explosive growth in the new charter industry resulted in a direct reallocation of fish from the traditional commercial fishery to the newly emerging charter industry. As to subsistence fishermen, the problem derives from the fact that the charter fleet fishes in-shore areas because its customers are shore based. The geographically concentrated charter harvest competes with subsistence users in these in-shore areas.

The Council determined that managing the charter catch was necessary to prevent the open ended reallocation of fish from the commercial sector to the charter fleet and to ensure that subsistence users had access to the resource. The Council established a Halibut Charter Working Group to identify and examine potential management options. The Working Group, comprised of six charter representatives, three commercial fishery representatives, and one non-charter fish representative, was dominated by the charter industry. A.R. 10 at 30.

[4] Some A.R. documents have pages carrying two numbers, the document's internal pagination and the A.R. pagination in the lower right corner. A.R. cites will be to the A.R. pagination.

In 1995, the Council reviewed the Working Group's findings, received public testimony, and adopted a Problem Statement explaining the issues requiring action. The Problem Statement focused on the biological, social, and economic effects of the rapidly growing charter harvest. In June 1996, the Council narrowed the management options to address the issues in the Problem Statement. *Id.*

In September 1997, the Council adopted a GHL for Area 2C set at 125% of the 1995 charter harvest, 12.35% of the combined Area 2C commercial/charter combined catch. *Id.* In late 1997, NMFS informed the Council the GHL would not be published as a regulation because the Council had not identified what measures could be implemented if the charter fleet ever exceeded 125% of its then current harvest. *Id.* at 31, 63 Fed. Reg. 11649 (March 10, 1998). Nevertheless, NMFS published a Federal Register notice formally announcing the Council's intent to limit the charter harvest to the GHL. *Id.*

Responding to NMFS' action, the Council, in 1998, appointed a nine person GHL Committee to identify management options that could limit the charter harvest to the GHL if the 125% growth limit was exceeded. The GHL Committee was comprised of six charter industry representatives, two subsistence users, and one non-guided recreational fisherman. The subsistence representatives left the Committee after one meeting because they could not afford the travel costs. A.R. 10 at 31. Again, the charter industry dominated the GHL Committee.

In its 1999 meetings, and based on the GHL Committee's recommendations, the Council identified for analysis a suite of management options that could be implemented if the GHL was ever exceeded. *Id.* at 31-32. Those options included a one fish daily bag limit per customer. 67 Fed. Reg. 3867, 3869 (Jan. 28, 2002). The final GHL rule also identified the one halibut bag

limit as a possible management option if the charter catch ever exceeded the GHL. 68 Fed. Reg. 47256, 47259 (Aug. 8, 2003).

At its February 2000 meeting, the Council had before it 25 GHL related options and sub-options. A.R. 10 at 8-10. The Council approved a GHL of 125% of the 1995-1999 average charter harvest with a cap of 13.05% of the combined charter/commercial quota, or 1.4 million pounds. A.R. 8 at 9, A.R. 10 at 10. By using the most current data through 1999, the Council increased the percentage of the overall harvest to be taken by the charter fleet. A.R. 10 at 10.

b) What Did The Council Say Was The Fishery Management Objective?

The Council's 1995 Problem Statement noted several "areas of concern with respect to the recent growth of halibut charter operations...." A.R. 10 at 40. Chief among those concerns was "[p]ressure by charter operations may be contributing to localized depletion.... The recent growth of charter operations may be contributing to ... declining harvests for historic sport and subsistence fishermen.... As there is currently no limit on the annual harvest of halibut by charter operations, an open-ended reallocation from the commercial fishery to the charter industry is occurring.... The economic and social impact on the commercial fleet of this open-ended reallocation may be substantial.... [C]ommunity stability may be affected as traditional sport, subsistence, and commercial fishermen are displaced by charter operators." *Id.*

c) What Was The Record Before The Council Regarding The Plan Objective?

The process used to develop the GHL consumed ten years. The Council devoted over 20 meetings to receiving thousands of pages of testimony and to discussing the best way to manage the halibut fishery. Behnken Aff., ¶ 20. The A.R. contains records of only one of those meetings. In that meeting where the Council approved the GHL, the Council allocated 20 hours to considering halibut management issues (the GHL and an IFQ system for the charter industry),

more than double the time allotted to any other issue. A.R. 7 at 3. This meeting was open to the public. A.R. 1. The Council received 318 written statements totaling 503 pages. A.R. 7, A.R. 6.8-6.326. These numbers do not include the oral testimony.

Among the written statements were many discussing the social and economic problems for the traditional commercial and subsistence fishermen caused by the explosive growth of the charter industry.[5] Typical comments were that people had invested in commercial halibut vessels, QS, etc., often borrowing money, pledging their vessels and homes as collateral, and the ability to repay those loans was jeopardized if the commercial quota was cut to accommodate the new and growing charter industry. *See, e.g.*, A.R. 6.22, 6.37, 6.48, and 6.97.

Other commenters talked about the conservation problems caused by charter fishing, including localized depletion caused by geographically concentrated charter fishing.[6]

d) What Did NMFS Explain Was The Fishery Management Objective?

The Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis ("EA/RIR") for the GHL stated it was "adopted to prevent the erosion of commercial quotas.... The impact on local communities is another prevalent rationale.... The Council has identified [charter operators] as contributing to localized depletion...." A.R. 10 at 40-41.

The preamble to the proposed GHL rule stated the GHL was intended to "effectively limit further growth" of the charter industry to avoid the economic, social, and conservation issues identified in the Problem Statement. 67 Fed. Reg. at 3867-3868. Cognizant of the Council's record, NMFS traces the history of the Council debate, quotes the Council's Problem

[5] A.R. 6.12. 6.15, 6.22, 6.35, 6.37, 6.48, 6.55, 6.97, 6.99, 6.102, 6.104, 6.106, 6.109, 6.110, 6.130, 6.137, 6.143, 6.158, 6.163, 6.172, 6.173, 6.174, 6.177, 6.181, 6.182, 6.188, 6.195, 6.210, 6.218, 6.219, 6.226, 6.227, 6.229, 6.230, 6.231, 6.233, 6.248, 6.249, 6.267, 6.274, 6.281, 6.287, 6.288, 6.302, 6.307, 6.310, 6.322, and 6.325.
[6] A.R. 6.20, 6.33, 6.57, 6.60, 6.102, 6.262, and 6.305.

Statement, and discusses the Council's "intent" as well as the factors that "influenced" elements of the Council's actions. *Id.*

The preamble to the final rule establishing the GHL in 2003 echoes the proposed rule. "The Council recognized the growth in [charter] harvests" was creating the precise "allocative concerns" discussed in the Council's 1995 Problem Statement. 68 Fed. Reg. at 47257. The GHL was established to prevent the social and economic problems caused by the uncontrolled growth of the charter catch. *Id.* NMFS explained the commercial halibut catch limit is the amount of fish left over after other harvests are subtracted from the total allowable harvest. *Id.* "Hence, as the guided recreational fishery expands, its harvests reduce the pounds available to be fished in the commercial halibut fishery and, subsequently, the value of quota shares (QS)...." *Id.* NMFS stated that the "ever increasing harvests in this [charter] fishery may make achievement of Magnuson-Stevens Act National Standards [including NS 4's fair and equitable standard] more difficult." *Id.* Of particular concern was the:

> ability to maintain the stability, economic viability, and diversity of the halibut industry, the quality of the recreational experience, the access of subsistence users, and the socioeconomic well-being of the coastal communities dependent on the halibut resource.

Id. NMFS concluded that "[t]his final rule is the result of ongoing efforts by the Council to address allocation concerns between the commercial IFQ halibut fishery and the guided recreational fishery." *Id.*

As noted in the proposed GHL rule and the preceding sentence, NMFS was cognizant of the record before the Council. NMFS restated the Council's concerns, referenced the Council's policy and Problem Statement, traced the history of Council actions regarding the GHL, and summarized the Council's intent. *Id.* at 47257-47258.

e) Conclusion.

The Council and NMFS had legitimate conservation and management objectives. As in the cases cited in Part IV(B) above, the Council and NMFS sought to limit the rapid growth of the new charter industry to minimize the economic and social impacts on the traditional commercial and subsistence fishermen. NMFS explained the fishery management objective and that the GHL was a balance among different user groups. The GHL was adopted for a legitimate fishery management objective and NMFS explained why that was the case.

C. Is There A Rational Connection Between The Allocation And The Fishery Management Objective?

The Council and the Secretary had a rational basis, fully explained, for their action. Having identified the principal fishery management objective as limiting the adverse social and economic impacts caused by the uncontrolled growth of charter fishing, the Council and NMFS adopted a policy to control the growth of the charter catch. Not surprisingly, and quite logically, that policy was to limit the charter catch.

The GHL "was to place an upper limit" on the charter harvest. 63 Fed. Reg. at 11649. "The GHLs are established as a total maximum poundage" for the charter industry. 68 Fed. Reg. at 47258. "[T]he GHL was to provide a limit on the total amount of harvests in the guided fishery...." *Id.* at 47259. "[I]t is the Council's policy that the charter vessel fishery should not exceed the GHL." 73 Fed. Reg. 30504, 30505 (May 28, 2008). *See also* A.R. 4 at 78277 (Dec. 22, 2008) ("the Council's intent [is] to limit the [charter boat] catch to the GHL.") The Rule preamble states: "The GHL was developed by the Council and approved by NMFS as an allowable level of harvest for the charter vessel fishery...." A.R. 5 at 21202.

1. What Was In The Council Record About The GHL?

Having established a legitimate management objective and a rational way to achieve that objective, the next question is why was the GHL fair and equitable and why was the GHL cap set at 125% of the 1995-1999 average charter catch.

The GHL was the product of ten years of debate and thousands of pages of testimony. In February 2000 when the Council voted to limit the charter harvest to 125% of their average 1995-1999 catch; A.R. 8 at 9, A.R. 9 at 3; the Council had received and considered comments proposing the GHL as (1) a fixed percentage of the total available harvest (A.R. 6.15); (2) a fixed poundage of fish;[7] (3) a fixed number of fish (A.R. 6.23); (4) 125% of the base years;[8] (5) more than 125% of the base years (A.R. 6.93, 6.191, 6.215, and 6.228); (6) 100% of the base years (A.R. 6.44); (7) something less than 125% of the base years (A.R. 6.45); (8) 50% of the total available harvest (A.R. 6.73, 6.84, and 6.185); and (9) a fixed allocation (A.R. 6.82, 6.90, 6.113, 6.115, 6.134, and 6.224).

A significant number of these commenters explained that their proposal was fair and equitable, often using those exact words, or that the allocation of 125% of the charter fleet's current catch was generous. *See, e.g.,* A.R. 6.180, 6.181, and 6.214.

[7] A.R. 6.19, 6.42, 6.100, 6.108, 6.109, 6.120, 6.122, 6.128, 6.133, 6.143, 6.158, 6.181, 6.182, 6.194, 6.203, 6.206, 6.212, 6.213; 6.214, 6.219, 6.223, 6.243, 6.244, 6.246, 6.257, 6.262, 6.265, 6.266, 6.270, 6.299, 6.300, 6.308, and 6.309.

[8] A.R. 6.23, 6.25, 6.37, 6.39, 6.61, 6.66, 6.72, 6.75, 6.81, 6.89, 6.91, 6.97, 6.99, 6.104, 6.105, 6.106, 6.108, 6.109, 6.110, 6.112, 6.116, 6.120, 6.121, 6.126, 6.130, 6.137, 6.143, 6.145, 6.157, 6.163, 6.168, 6.172, 6.173, 6.174, 6.175, 6.176, 6.177, 6.178, 6.179, 6.180, 6.181, 6.182, 6.183, 6.184, 6.186, 6.189, 6.190, 6.192, 6.193, 6.194, 6.195, 6.197, 6.201, 6.206, 6.210, 6.211, 6.212, 6.213, 6.214, 6.217, 6.218, 6.225, 6.226, 6.227, 6.229, 6.231, 6.233, 6.234, 6.241, 6.242, 6.243, 6.244, 6.245, 6.246, 6.248, 6.249, 6.250, 6.253, 6.261, 6.263, 6.265, 6.266, 6.267, 6.268, 6.270, 6.271, 6.274, 6.275, 6.278, 6.281, 6.282, 6.284, 6.285, 6.287, 6.288, 6.289, 6.296, 6.299, 6.300, 6.301, 6.305, 6.307, 6.308, 6.309, 6.317, and 6.322.

The Council also received different proposals regarding what years to use as the base years from which to measure the charter harvest. Although in February 2000 the Council decided to use 1995-1999, the Council had received and considered proposals to use 1995-1998 (A.R. 6.15), 1995 (A.R. 6.181, 6.182, 6.269), 1998 (A.R. 6.191, 6.280), 1989-1999 (A.R. 6.276), 1995-1997 (A.R. 6.289), 1998-1999 (A.R. 6.303, 6.311), 2000 (A.R. 6.310), and to not use 1998 (A.R. 6.309, 6.181, 6.182, 6.310).

Commenters noted the Council's final decision would represent a compromise. *See, e.g.*, A.R. 6.23, 6.186. Indeed, the Council debate on the adoption of the GHL reflects the fact that the Council was seeking a compromise to balance the needs of the commercial and charter sectors. A.R. 278 (Council seeking to address concerns of charter and commercial fishermen, it would be "unfair" to impose too great a burden on the charter sector, allocating the charter sector 125% of their 1995-1999 average catch is "the most balanced approach that we can achieve. Its not punitive to the charter sector. It addresses a concern of the commercial sector", GHL preserves the "historical relationship without being punitive" to the "new" charter industry, the GHL is "generous" and "a middle ground"); A.R. 279 (a 125% allocation is generous); A.R. 284 (the Council has sought through its motion to balance the needs of all sectors and to "minimize the impact and disruption to [charter] clients)." There was additional discussion that the 125% allocation to the charter fleet was chosen specifically to buffer any impacts on the charter industry (A.R. 278, A.R. 279, A.R. 280, A.R. 281).

2. What Did The Secretary Say About The GHL?

The issue of whether the Council's decision was fair and equitable was directly and specifically raised in comments to NMFS on the proposed GHL rule. The preamble to the final GHL rule noted the principal reason given by commenters supporting the GHL was that it

established "an equitable allocation between sport and commercial harvests." 68 Fed. Reg. at 47260. These commenters talked about the unfair and inequitable impact on the commercial fishery resulting from a reallocation of fish to the charter sector as the ever increasing charter harvest was deducted from the commercial quota. *Id.* Other commenters spoke of the need to protect the health of the resource by preventing overfishing and of the localized depletion caused by geographically concentrated charter fishing. *Id.* All of these comments addressed issues related to the fishery management objective.

The charter industry opposed the GHL as unfair and inequitable. Charter industry commenters said the charter harvest was a relatively small portion of the overall harvest. NMFS responded that the Council established the GHL as a necessary "upper limit" on the charter harvest in order "to maintain the existing harvest distribution" between the commercial and recreational sectors. *Id.*, Response to Comment 1.

Charter industry commenters argued their fishery provided greater overall economic benefits. NMFS noted the data did not show charter operations provide a greater economic benefit to Alaska and that economic issues were but one factor in determining if the GHL was "fair and equitable." *Id.* at 47260-61, Response to Comment 2.

Charter industry commenters asserted the GHL served no conservation purpose. NMFS noted the concerns about localized depletion caused by concentrated charter industry fishing. *Id.* at 47261, Response to Comment 3.

Charter industry commenters asserted the GHL unfairly contradicted NMFS' commitment to promote recreational fisheries. NMFS noted this commitment did not diminish NMFS' responsibility to address allocation issues and to manage recreational fisheries consistent

with the Halibut Act, including its fair and equitable standard for all fishery participants. *Id.* at 47261, Response to Comment 5.

Charter industry commenters asserted no one had considered the GHL's socio-economic impacts. NMFS referred commenters to the existing socio-economic analyses. *Id.* at 47262, Response to Comment 4, and 47263.

The debate that began 16 years ago regarding whether the GHL is fair and equitable is the same debate Plaintiffs want to have today. The question of whether the GHL is fair and equitable has been asked, explained, and answered. If establishing a cap on one sector's harvest is a rational way to achieve the management objective of limiting the size of that sector's harvest, then selecting a number is not only reasonable, it is a necessity. And selecting a number that is 25% more than that sector's current harvest is not an unreasonable compromise between competing sectors. In fact, it might be asked why it was fair and equitable to give the charter sector more fish than it was harvesting – taking still more fish away from the traditional users.

When the Council and NMFS set a GHL cap above current harvest levels, a compromise was reached. A decision was made that this was the appropriate limit on the ultimate size of the charter harvest. Thus, in the proposed GHL rule, NMFS stated the 125% harvest limit would award the charter fleet 13% of the combined commercial/charter harvest and this limit was the "acceptable annual" charter harvest. 67 Fed. Reg. at 3868. That a policy choice had been made on the appropriate size of the charter harvest is further demonstrated by NMFS' statement that the GHL was an absolute cap regardless of how much the halibut biomass increased. "In the case of increases in stock abundance, the GHL could never exceed its initial" 125% level. *Id.* The preamble to the 2009 Rule recognizes "the GHL does not increase beyond the maximum GHL ... regardless of halibut abundance trends...." A.R. 5 at 21208, Response to Comment 51.

Notwithstanding this history, Plaintiffs assert NMFS has never specifically considered why it is fair to set a 125% cap on the charter harvest. However, in the preamble to the proposed rule, NMFS stated that setting the GHL at 125% of current harvest levels "would allow for limited growth of the guided recreational fishery, but would effectively limit future growth at this level. NMFS invites public comment on this feature of the proposed action." 67 Fed. Reg. at 3868. In short, NMFS considered and then specifically invited public comment on the very issue Plaintiffs claim was never discussed.

And NMFS received comments. Some raised the exact issue Plaintiffs assert was never discussed – that the charter harvest should not be limited to a 125% cap. NMFS' responded "[t]he goal for the GHL is to provide a limit on the total amount" of the charter harvest. "This amount was set higher than existing harvest levels to accommodate some future growth in the recreational sector." 68 Fed. Reg. at 47262. NMFS then explained that the "decision to fix the GHL at a maximum level ... was based on several factors" including the current size of the halibut biomass, current charter harvest levels, and the extensive public comment received on this issue during Council deliberations. *Id.*

The EA/RIR for the GHL, A.R. 10, summarizes the final four alternatives that had been before the Council: setting the GHL as 125% of either the 1995 or the 1998 charter harvests; establishing a fixed amount of fish for the charter industry; managing the GHL as a three year rolling average of the charter catch; or setting the GHL as a percentage of the total available harvest. A.R. 10 at 33. The EA/RIR notes that 125% of the 1995 or 1998 charter harvest would give the charter fleet 12.35% or 16.39% of the total available harvest. *Id.* A three year rolling average would base decisions on the most recent three year rolling average of the charter harvest. The EA/RIR not only traces the history of Council action and the purpose and need for the

action, discussing the intent of the GHL based on "Council discussion, public testimony, and evidence," *id.* at 29-32, but it reviews the Council decision making process as to what the Council "considered" and "decided," *id.* at 32-33. Equally important, the EA/RIR discussed how the GHL was consistent with the Council's Problem Statement and the issues sought to be addressed. *Id.* at 39-41.

Although Plaintiffs claim neither NMFS nor the Council considered "why" the GHL is fair and equitable, there was substantial debate about the proper GHL level. Plaintiffs may think they were entitled to more than 125% of their current harvest, but the judicial precedents say no. And to step back to view the larger picture, the question could be asked why is it fair and equitable to give the charter industry more fish than it was harvesting by taking fish from the small boat family commercial fishery, creating further economic dislocation and loss? The fair and equitable issue has two sides. That Plaintiffs only want to see one side does not mean that decision makers were unaware of and did not see both sides.

3. What Was In The Council Record About The One Halibut Rule Designed To Enforce The GHL?

Once the allocations were decided, the question was how to keep everyone within their quota. As to the charter industry, an enforcement mechanism was not yet necessary because the charter industry was allocated more fish than it was harvesting. When the charter industry's harvest began exceeding the GHL, the Council devoted multiple meetings to discussing harvest control measures ("HCM") to keep the charter industry within its quota. Records of two such meetings (April 2007 and June 2007) are in the A.R.

The memorandum from the Council's Executive Director to Council members preparatory to the April 2007 meeting explained the Council had eight alternative HCM before it, including the one fish bag limit, to enforce the GHL. A.R. 12 at 1. By the June 2007 meeting,

the list had expanded to 13 options, including the one fish bag limit. A.R. 17 at 1. Although the issue of the GHL amount was not on the agenda or before the Council, the testimony the Council heard repeated the debate about the quota limit.

The Council heard testimony that the fishery management objective previously adopted remained valid. Commenters focused on the adverse socio-economic consequences of an increasing charter harvest and GHL exceedances.[9] Witnesses talked about localized depletion,[10] conservation problems,[11] the lack of access to the resource for subsistence users caused by the growing charter fleet (A.R. 12.50, 12.178), and the unfairness of reallocating fish from the commercial fleet to the charter fleet caused by GHL exceedances.[12]

One commenter noted that further reductions in commercial quotas caused by GHL exceedances would "financially cripple us." *See, e.g.,* A.R. 18.89. Others urged the Council to find a solution "that does not take away the investment of established businesses." *See, e.g.,* A.R. 18.99. Others told the Council the "open-ended reallocation" from the commercial to the charter sector "threatens this coastal tradition and coastal economies." *See, e.g.,* A.R. 18.76 at 3.

As to the GHL itself, the Council heard testimony that (1) the already approved GHL (125% of the 1995-1999 charter harvest) is the correct allocation,[13] (2) the already approved

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[9] A.R. 12.25, 18.2, 18.5, 18.16, 18.74, 18.76, 18.78, 18.79, 18.89, 18.93, 18.99, 18.100.
[10] A.R. 12.45, 12.50, 12.70, 12.73, 12.93, 12.96, 12.103,12.104, 12.105, 12.106, 12.107, 12.108, 12.109, 12.110, 12.111, 12.112, 12.126, 12.161, 12.178, 12.181, 12.194, 18.74.
[11] A.R. 12.53, 12.54, 12.55, 12.56, 12.57, 12.58, 12.66, 18.19, 18.20.
[12] A.R. 12.80, 12.81, 12.94, 12.95, 12.113, 12.121, 12.126, 12.127, 12.128, 12.131, 12.132, 12.133, 12.134, 12.135, 12.136, 12.137, 12.138, 12.145, 12.147, 12.148, 12.151, 12.153, 12.155, 12.156, 12.158, 12.162, 12.164, 12.165, 12.179, 12.184, 18.10, 18.11, 18.14.
[13] A.R. 12.4, 12.25, 12.61, 12.63, 12.65, 12.69, 12.72, 12.75, 12.77, 12.80, 12.81, 12.93, 12.94, 12.95, 12.96, 12.102, 12.106, 12.107, 12.108, 12.109, 12.110, 12.111, 12.112, 12.113, 12.119, 12.124, 12.126, 12.127, 12.128, 12.131, 12.132, 12.133, 12.134, 12.135, 12.136, 12.137, 12.138, 12.139, 12.145, 12.147, 12.148, 12.149, 12.150, 12.159, 12.172, 18.5, 18.7, 18.11, 18.15, 18.19, 18.20, 18.25, 18.26, 18.28, 18.31, 18.32, 18.33, 18.34, 18.35, 18.37, 18.38, 18.41, 18.43, 18.46,

GHL and/or the one fish bag limit are unfair and inequitable, and there needs to be a "fair" allocation,[14] (3) some HCM must be adopted to enforce the GHL,[15] (4) the allocation between the commercial charter sectors should be 86% and 14% (A.R. 12.20), (5) there should be a one fish bag limit,[16] (6) there should be no increase in the GHL (A.R. 12.72), (7) the GHL should be converted into a fixed percentage,[17] (8) the GHL should be converted into a hard allocation,[18] (9) a suite of various HCM should be adopted (A.R. 18.7), and (10) the GHL should not be a fixed quota (A.R. 18.8).

A Plaintiff in the instant case testified he has "watched new charter operators open up shop with no knowledge or consideration of other resource users. With a fully utilized resource, their fish must come from an existing user's fish box. Up until now, it has been the commercial fishing industry that has ponied up the fish." This Plaintiff then advocated a moratorium on new entrants to the charter industry because "[t]he GHL was never intended to stand alone" and now he stands "on the brink of being pushed out of business primarily due to the [Council's] reluctance to act" to limit the number of new charter operators. A.R. 12.176.

The Council heard testimony from the Halibut Charter Coalition of Alaska, a statewide organization of charter operators, stating they were opposed to a one fish bag limit but that they

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18.47, 18.49, 18.50, 18.51, 18.69, 18.70, 18.72, 18.76, 18.77, 18.79, 18.87, 18.90, 18.91, 18.96, 18.97, 18.100, 18.102, 18.112, 18.114, 18.116, 18.117, 18.118, 18.120-123, 18.125-147.

[14] A.R. 12.2, 12.6, 12.16, 12.21-23, 12.27, 12.35, 12.43, 12.68, 12.71, 12.83, 12.91, 12.92, 12.98, 12.120, 12.168, 12.178, 12.138, 18.42, 18.44, 18.45, 18.48, 18.61, 18.62, 18.63, 18.64, 18.66-69, 18.71, 18.80-86, 18.88, 18.101, 18.103-111, 18.113.

[15] A.R. 12.4, 12.26, 12.32, 12.33, 12.34, 12.36, 12.38, 12.39, 12.42, 12.44, 12.49, 12.50, 12.51, 12.53, 12.54, 12.55, 12.56, 12.57, 12.59, 12.60, 12.84, 12.85, 12.86, 12.87, 12.88, 12.90, 12.151, 12.152, 12.153, 12.154, 12.155, 12.156, 12.160, 12.611, 12.612, 12.613, 12.614, 12.615, 12.179, 12.181, 12.189, 12.194, 12.196.

[16] A.R. 12.57, 12.183, 18.16, 18.17.

[17] A.R. 18.8, 18.11, 18.15, 18.19, 18.20, 18.25, 18.26, 18.31, 18.32, 18.33, 18.38, 18.41, 18.46, 18.69.

[18] A.R. 18.12, 18.28, 18.51.

joined others "in recognizing the immediate need for action regarding the implementation of measures that keep charter harvest within the GHL...." A.R. 18.3

To enforce the GHL, the Council voted for a one fish bag limit if the IPHC lowered the total allowable catch such that it also triggered a GHL reduction. A.R. 20 at 1.[19]

4. What Did The Secretary Say About The One Halibut Rule Designed To Enforce The GHL?

The Council sent its recommended HCM to the Secretary. In the preamble to the rule proposing the daily bag limit HCM, NMFS stated that not enforcing the GHL created a conservation concern and resulted in a reallocation from the commercial sector. A.R. 4 at 78277. The final decision memorandum prepared for the 2009 Rule described its purpose as "to minimize the conservation risk to the halibut resource and to reduce the reallocation of halibut away from the commercial sector." A.R. 30 at 1. The EA/RIR noted the Rule was grounded in conservation concerns and in the need to prevent the *de facto* reallocation of fish away from the

[19] If the IPHC did not reduce the allowable catch such that a lower GHL resulted, the Council approved different HCM. *Id.* *See also* A.R. 4 at 78282.

commercial fleet. A.R. 32 at 18.[20] The EA/RIR stated the purpose of the Rule was to "give effect to the Council's intent" to limit the charter harvest to the GHL. *Id.* at 19. The preamble to the final Rule reminded the public that when the charter sector exceeds the GHL (1) the result is a reallocation from commercial fishermen, thwarting the fishery management objective established by the Council and NMFS, and (2) it causes a conservation problem because the overall harvest limits set by the IPHC assume every sector will stay within its quota. A.R. 5 at 21194. *See also id*. at 21199, Response to Comment 8 (Rule has a conservation objective); and at 21210, Response to Comment 64 (charter harvests over the GHL have direct and indirect adverse economic impacts on commercial fishermen).

The issue was not the GHL amount but how to enforce the GHL so as to meet its fishery management objectives. Thus, in the preamble to the proposed one halibut rule, NMFS stated

[20] The IPHC has consistently stated that exceeding the GHL is an important conservation issue. "The achievement of the Commission's conservation mandate is dependent on adherence to catch limits and total yield." A.R. 171, attachment. In 2007, the IPHC wrote the Secretary about the conservation threat from charter boat overfishing stating "overharvesting puts at risk the achievement of IPHC management goals for the halibut stock." *See* Behnken Aff., Appendix C, Letter from Jim Balsiger, Chairman, IPHC, to Secretary of Commerce Carlos Gutierrez, January 23, 2007. In January 2008, the IPHC wrote NMFS stating the IPHC's conservation objectives were "dependent" on enforcing the GHL. A.R. 26. In September 2008, the IPHC wrote the Council stating "[t]he lack of compliance with the GHL 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 [GHL targets] in turn frustrates the ability of the IPHC to meet its management targets." A.R. 21 at 2. The conservation and harvest management problems caused by charter overfishing were 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 GHL 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...." Behnken Aff., Appendix A, Letter from Bruce Leaman, IPHC Executive Director, to Linda Behnken, April 13, 2009. In 2009, the IPHC told NMFS that "[u]ncontrolled harvest by the charter fishery, or harvests in excess of the identified GHL levels ... will result in negative impacts on the Commission's ability to meet its stock management goal and delivery of yield to all user groups." A.R. 203 at 4. Absent the Rule, there is no reason to expect the charter industry will harvest less than the 1.9 million pounds it took in 2008, 2.4 times the 2009 GHL of 788,000 pounds. *Id.* at 3.

the Rule's purpose to limit the charter harvest to the GHL. A.R. 4 at 78277. The purpose was to implement the allocation number, not to change it. This is also reflected in the preamble to the final Rule where NMFS stated:

> The GHL was developed ... as an allowable level of harvest for the charter vessel fishery.... Further, the Council and NMFS have the authority to take subsequent regulatory action to control the harvest of the charter vessel fishery ... to stay within its GHL. Thus, this regulatory within ... is being implemented to meet the policy of the Council when it recommended the GHL.

A.R. 5 at 21202-21203, Response to Comment 28; *see also id.* at 21203, Response to Comment 29 ("the approved GHL policy contemplates ... subsequent regulatory action to control the [charter harvest] ... to stay within its GHL"); *id.* at 21295 (purpose of the daily bag limit is to keep charter harvests to the GHL); and *id.* at 21204, Response to Comment 39 ("This final rule does not change the GHL").[21]

In commenting on the proposed HCM, charter industry opponents tried to reopen the debate about the GHL amount asserting it is neither fair nor equitable, just as they did in 2002. NMFS responded the GHL is intended to keep the charter harvest within limits for the reasons set forth when the GHL was established. A.R. 5 at 21203, Response to Comment 31. *See also id.* at 21202-21203, Response to Comment 28.

Another commenter on the 2009 Rule asserted the GHL is not fair and equitable and NMFS had never determined that the GHL is fair and equitable. Although this issue had already been addressed, NMFS traced the history of the 1995 Council Problem Statement and the purpose of the GHL being to fulfill a management objective that included limiting the growth of one sector that was causing a reallocation from other sectors. NMFS pointed out the GHL was

[21] An October 2008 briefing memorandum from the NMFS Alaska Regional Office to the head of NMFS also described the one halibut rule as needed to "implement" the GHL, not to change the number. A.R. 27 at 1.

based on the historic usage of the resource. *Id.* at 21214-15, Response to Comment 74. In fact, the preamble to the Rule has an entire section titled "Fairness," a section that consumes almost five pages containing the response to 21 comments, eight of which use the specific words "fair," "unfair," "equitable," or "inequitable" while others raise these issues without using those precise words. *Id.* at 21214-21219. These comments replay the past debates.

There are numerous factors that can enter into the fairness and equity question. Included can be the achievement of legitimate fishery management objectives, (discussed above and in the preamble to the Rule in A.R. 5 at 21214-21219), the conservation issues associated with making certain that every sector lives within its allocation (discussed in A.R. 5 at 21196-21202), the nature and purpose of the allocation (discussed in A.R. 5 at 21202-21208), the economics of the fishery (discussed in A.R. 5 at 21208-21214), and the viability of alternate management measures (discussed in A.R. 5 at 21219-21222). For 16 years, as reflected in the Council debate and in the rulemaking process, the fair and equitable issue has been fully considered.

It is also worth noting that in evaluating the Council recommendation, the Secretary had the benefit of the public comments on the 2009 Rule. These comments addressed many of the same issues debated over the previous 16 years. Among these comments was one from a charter boat operator stating the one fish daily bag limit would help his industry in the end. A.R. 53. Also included were comments addressing (1) the economic issues associated with GHL exceedances and the consequent reductions in the commercial quota,[22] (2) the adverse conservation impacts for the resource of not enforcing the GHL,[23] (3) the 125% allocation to the

[22] A.R. 44, 49, 64, 66, 71, 80, 82, 83, 84, 87, 88, 95, 106, 110, 113, 121, 129, 133, 139, 144, 145, 148, 152, 171, 177, 190, 195, 214, 215, 218, 220, 222, 225.
[23] A.R. 47, 64, 76-80, 120, 121, 158, 168, 169, 171, 179, 180, 182, 193, 195, 214, 218, 223.

charter industry stating it is fair and equitable,[24] (4) future charter quotas stating they should be cut until the amount of the GHL overages were repaid to the resource (A.R. 50, 88), (5) the general need for the one halibut rule,[25] (6) the unfairness of allowing the charter industry to ignore the GHL, including not participating in resource conservation,[26] (7) the localized depletion caused by geographically concentrated charter fishery,[27] and (8) the one halibut rule as necessary to protect subsistence fishermen.[28] NMFS also received dozens of comments from charter operators detailing their views about the Rule and explaining to NMFS their current situation and participation in the fishery.

5. Why A One Fish Bag Limit?

As early as February 2000, the IPHC told the Council that of the available HCM "only bag limits" and possibly prohibiting crew members from retaining their catch would be effective in constraining the charter harvest. A.R. 6.5 at 2. The minutes of the Council's February 2000 meeting reflect the Council's preliminary view that bag limits "appear to be the most effective" HCM. A.R. 8.2 at 2. The EA/RIR for the GHL concludes that of eleven HCM analyzed "only bag limits and boat limits appear to limit charter harvests." A.R. 10 at 23.

In its April and June 2007 meetings, the Council heard testimony that the one fish bag limit was the most effective way to restrain the charter catch. A.R. 12.13, 12.18. An October 2008 memorandum prepared by NMFS staff for the head of NMFS stated "a one-fish daily bag limit is the only alternative considered by the Council that could reduce the charter vessel halibut

[24] A.R. 49, 64, 65, 72, 81, 100, 103, 106, 108, 113, 121, 135, 139, 148, 152, 154, 158, 171, 179, 190, 195, 202, 214, 218, 223, 237.
[25] A.R. 54, 157, 169, 173, 176, 177, 199, 208, 209, 211, 212, 227, 230, 234.
[26] A.R. 60, 110, 129, 139, 149, 168, 210.
[27] A.R. 88, 158, 171, 182, 189, 195, 222.
[28] A.R. 155, 171, 182, 189, 195.

harvest to near the 2009 GHL level." A.R. 27 at 2. The final EA/RIR for the 2009 Rule stated the same thing. A.R. 32 at 19. So too did the preamble to the Rule. A.R. 5 at 21226.

D. What Do Plaintiffs Say In Response?

Plaintiffs argue the Secretary cannot rely on the Council's reasoning and record when deciding whether to accept the Council's recommendation but must provide an "independent" evaluation. Pl. Br. at 8. As noted above (*infra.* at 12-13, 19-20, 25, 27), the Secretary recognized and cited, effectively adopting, the Council record. Even Plaintiffs admit "[t]here is no dispute ... that the Secretary relied heavily" on the Council record. Pl. Br. at 6. Plaintiffs also admit "there is a vast amount of information in the administrative record from which NMFS could have drawn any number of conclusions...." *Id.* at 3. Plaintiffs just don't like the conclusion that was drawn.

Notwithstanding these admissions, Plaintiffs soldier on asserting the Council's role under the Halibut Act is different than under the MSA and, therefore, the Secretary cannot rely on the Council's rationale and record when considering whether to adopt the Council's recommendation. Plaintiffs argue that under the Halibut Act the Council has only an advisory status whilst under the MSA the Secretary "must adopt" a Council recommendation unless disapproved by the Secretary within 30 days, *citing* 16 U.S.C. § 1854(a)(3). Pl. Br. at 6-7.

In presenting this argument as a principle for the Court to rely on, and in citing 16 U.S.C. 1854(a)(3) as the basis for its argument, Plaintiffs elected to not mention Section 304(a)(1)(A) of the MSA, 16 U.S.C. § 1854(a)(1)(A). That section provides the Secretary must review a Council recommendation to determine if it is consistent with the MSA's ten National Standards, other MSA provisions, and other applicable law. Among those National Standards is NS 4 providing that an allocation be fair and equitable. A Council's recommendation cannot be approved unless

it is consistent with the MSA, including the ten National Standards, and other applicable law. 16 U.S.C. § 1854(a). No court has ever ruled that it is the Council's decision that represents final agency action. Only the Secretary's decision has legal effect. The 30 days cited by Plaintiffs sets the time frame for the decision. The substantive standard for Secretarial review is the same under the MSA and the Halibut Act. Indeed, the language in the Halibut Act, 16 U.S.C. § 773c(c), setting forth the legal standards with which an allocation must comply is identical to that in NS 4 of the MSA, 16 U.S.C. § 1854(a)(4), with the one exception that the former adds the word "halibut" in one place. The "distinction" between the two laws upon which Plaintiffs rely does not exist. Under the Halibut Act, the Secretary can rely on the Council's policies and record, just as the Secretary can under the MSA. Plaintiffs' view of the Council's role is not shared by NMFS or by the courts. As the GHL moved through the Council process, NMFS stated: "Under the Northern Pacific Halibut Act of 1982, the Council is responsible for developing recommendations on the allocation of the halibut resource among U.S. fishermen." A.R. 22 at 2. NMFS later wrote that if the Council's recommendation was approved, "it would result in regulatory action by us later this year or next year." A.R. 23 at 1. Contrary to Plaintiffs' view, this is precisely how the MSA process works. *See* 16 U.S.C. § 1854.[29]

Courts hearing challenges that the Secretary's approval of an FMP violated NS 4's fair and equitable standard have looked to the Council record for explanation of the basis for the allocation, notwithstanding the fact that it is the Secretary who makes the ultimate and legally binding determination that the allocation meets NS 4. In *Alaska Factory Trawlers Ass'n. v. Baldridge*, the Court traced the history of the Council's deliberations, pointed to the pubic

[29] Plaintiffs cite a Federal Register statement by NMFS that NMFS can act under the Halibut Act without a Council recommendation. Pl. Br. at 7. That may or may not be true but here the Secretary is acting on a Council recommendation.

testimony before the Council and noted the Council's minutes showed that the Council had before it "many different viewpoints" from which the Council crafted its compromise. 831 F.2d at 1461-1463. The Court noted "Plaintiffs contend that the Secretary acted in an arbitrary and capricious manner in adopting" the Council recommendation. *Id.* at 1466. The Court found it was "reasonable for the Council" to base its decision on the record before it and "[i]n consequence, the Secretary's decision ... was not arbitrary and capricious." *Id.*

In *National Fisheries Inst., Inc. v. Mosbacher,* plaintiffs asserted the Secretary' approval of the Council's recommended FMP violated the MSA. The Court found "the billfish FMP does not violate National Standard 4." 732 F. Supp. at 226. The Courts' very next words were "The Council carefully considered and ultimately rejected" plaintiffs preferred action. In upholding the Secretary's decision, the Court cited the Council's record.

In *Sea Watch Int'l v. Mosbacher,* plaintiffs asserted the Secretary's approval of an FMP violated NS 4 and the MSA standard for limited access systems requiring consideration of present participation in the fishery. Rejecting both challenges, the Court cited the record developed by the Council and its advisory committees. 762 F. Supp. at 377-380. The Court noted the vigorous debate over various options and said it could not second guess "the balance struck." *Id.* at 379.

A final example is *Fisherman's Finest, Inc. v. Gutierrez*, 2008 U.S. Dist. LEXIS 92936 (D.W.D. Wash. Nov. 12, 2008), where plaintiffs challenged the Secretary's approval of a Council recommended FMP as violating NS 4's fair and equitable standard because, among other things, the data used was "too old and no longer relevant to reallocation...." *Id.* at *15. Throughout its decision, the Court looked at the Council record. The Court concluded "[t]he Council fulfilled its obligations ... by analyzing the impact of the new allocations...." The

Court's very next sentence was "The Court believes that none of the Secretary's actions on this issue were arbitrary and capricious." *Id.* at *20-21.

Plaintiffs rely principally on seven cases to support their view that the Secretary cannot look to the Council record but must supply his own "independent" rationale when approving a Council recommendation. Pl. Br. at 15-30. Interestingly, not one of Plaintiffs' cases involves the MSA or the Councils. Further, none of Plaintiffs' cases are apposite. In *Tripoli Rocketry Ass'n. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives,* 437 F.3d 75 (D.C. Cir. 2006), the problem was the absence of agency standards for judging whether an action complied with the law. The same problem infected the agency's decision in *American Lung Ass'n v. EPA,* 134 F.3d 388 (D.C. Cir. 1998). In *Air Transport Ass'n of Canada v. FAA,* 254 F.3d 271 (D.C. Cir. 2001), the agency failed to provide any record justification for its decision. The same situation arose in *Jost v. Surface Transportation Bd.,* 194 F.3d 79 (D.C. Cir. 1999) and *Bluewater Network v. EPA,* 370 F.3d 1 (D.C. Cir. 2004). In *D&F Alfonso Realty Trust v. Garvey,* 216 F.3d 1191 (D.C. Cir. 2000) and *Public Media Center v. FCC,* 587 F.2d 1322 (D.C. Cir. 1978), the agency had defined legal standards and an explanation for its action. The problem was that the agency did not follow its own standards. These cases, none of which arise under the statutes at issue in the instant case, do not carry Plaintiffs where they want to go.

E. Conclusion.

Courts have repeatedly rejected challenges under NS 4's fair and equitable standard even when the allocation threatened the survival of one group of fishermen. Balancing the needs of a new and rapidly growing industry sector with the needs of existing fishery participants is a legitimate fishery management objective justifying an allocation under the fair and equitable standard. When considering the fairness of the GHL, it is noteworthy that the charter allocation

was set at 125% of their existing harvest levels. This was done at the expense of other user groups but it fully accounted for the present participation of the charter industry. Once a quota allocation is established, it is also a legitimate fishery conservation objective to establish a management program designed to keep each sector within its quota. If one sector consistently exceeds its allocation, the original fishery management objective is defeated. NMFS in 2002 and 2003, and again in 2009, fully explained the rationale for the GHL and how it satisfied the Halibut Act. The reality is that Plaintiffs simply want to continue fishing at whatever level their capacity allows at the expense of everyone else. The GHL was established for a legitimate fishery conservation and management objective, consistent with judicial precedents.

V. THE PRESENT PARTICIPATION QUESTION

A. Does The Present Participation Standard Apply In This Case?

The "present participation" standard in the Halibut Act derives from the incorporation by reference of section 303(b)(6) of the MSA, 16 U.S.C. § 1853(b)(6). *See* Halibut Act, 16 U.S.C. § 773c(c). Section 303(b)(6) sets legal standards for when fishery managers establish a limited access system. Within the MSA, this section only applies to limited access programs, not to each and every regulation. The same is true under the Halibut Act. Although not written artfully, a contextual reading of the Halibut Act, 16 U.S.C. § 773c(c), coupled with the legislative history, reveals that the reference to 16 U.S.C. § 1853(b)(6) is a reference applicable only to limited entry regulations.

The first sentence of 16 U.S.C. § 773c(c) authorizes the Council to develop regulations under the Halibut Act. It identifies limited access regulations as one of the many types of regulations the Council may develop. It is the second sentence of 16 U.S.C. § 773c(c) that creates the possible confusion. That sentence states:

> Such regulations ... shall not discriminate between residents of different States, and shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of [the MSA].

Plaintiffs read "such regulations" to mean that each and every Halibut Act regulation, no matter the subject matter, must be measured by standards that the MSA makes applicable only to limited access systems. Given that Congress was importing MSA standards into the Halibut Act, it is not likely Congress intended the MSA's limited access standards to apply to every Halibut Act regulation when that is clearly not the case in the MSA.

The legislative history of the Halibut Act shows that the incorporation by reference of the MSA's limited access regulations applies only if a limited access system is established under the Halibut Act. In the Senate floor debate on S. 2244 that became the Halibut Act, Senator Gorton, a member of the Committee with jurisdiction over the bill, first described the range of regulations the Council could develop. The Senator then stated:

> In addition, S. 2244 provides authority to the Council and to the Secretary of Commerce to establish a system of limited access, provided that such a system comports with all of the requirements of the [MSA].

128 Cong. Rec., S.7470 (Daily Ed. April 22, 1982). When the House of Representatives debated S. 2244, Congressman Breaux, Chairman of the Subcommittee with jurisdiction, explained the Council could develop a variety of regulations and then stated:

> To allow for the possibility that limited entry may be imposed on U.S. vessels in the halibut fishery, the act allows such privileges to be allocated between various U.S. fishermen, but requires that any such allocation be consistent with the standards specified in the [MSA] ...."

128 Cong. Rec., H.8577 (Daily Ed. May 4, 1982). If the Council established a limited access program under the Halibut Act, Congress was importing the MSA standards by which to measure any such regulation. Congress was not expanding the MSA provision to apply it to each and every Halibut Act regulation.

B. Are The GHL And Its Implementing Regulations A Limited Access System?

Neither the GHL nor the Rule establishes a limited access system. A limited access system is a permit system limiting the number of fishermen allowed to participate in the fishery to specified permit holders. *See* 16 U.S.C. § 1802(27)). The hallmark of a limited access system is the requirement that one must have a specific permit to participate in the fishery. A general fishing permit is not sufficient. The GHL does not limit access to the charter fishery by requiring that charter vessels have a specific halibut fishing permit. Anyone can buy or rent a boat and enter the fishery. The GHL is not a limited access system.

That neither the GHL nor the Rule establishes a limited access program is demonstrated by the fact that in March 2007 the Council approved a limited access rule for the charter industry. A.R. 5 at 21220, Comment 106 and Response; A.R. 32 at 45. The GHL is not a limited access system and the reference in the Halibut Act to 16 U.S.C. § 1853(b)(6) applies to circumstances not present here.

C. If The Present Participation Standard Applies To The GHL, Does It Apply At The Time Of The Allocation Or May A Sector Exceed Its Allocation And Then Demand That Its New "Present Participation" Requires A Reallocation?

Assuming the 16 U.S.C. § 1853(b)(6) limited access standard applies to the GHL, Plaintiffs argue NMFS must revise the 2003 GHL allocation because charter harvests are now larger. The central problem with this argument is that the courts have rejected it.

Common sense, as well as fishery management principles, tell you that an "allocation" has two parts: the number and the enforcement mechanism to keep a sector within its number. The number, here the GHL, was established in 2003. Since charter fishermen were awarded 125% of their existing catch, there was no need to implement an enforcement system, called harvest control measures. Only after the GHL was exceeded did HCM become necessary. HCM

do not change the number. HCM simply make certain the number is not exceeded. The judicial precedents are that the present participation standard applies when the number is set, not when the HCM are put into place. That those events are separated in time because of the generous allocation provided the charter industry does not change the legal principle.[30]

In *J.H. Miles & Co. v. Brown,* 910 F. Supp. 1138, 1160 (E.D. Va. 1995), the Court found that the setting of annual fishing quotas to implement a limited access system established five years before did not require a new section 1853(b)(6) analysis to account for the "present participation" that existed five years later. The plaintiffs complained that new data, five years after the allocation, showed greater present participation and that the original allocation must be reconsidered based on this new present participation. The Court rejected the argument.

> Plaintiffs read the statute too narrowly. The statute provides that when the Secretary *establishes* a system "limiting access," he must take into account the aforementioned factors. Such a system was established ... five years ago.

910 F. Supp. at 1160 (emphasis in original). The section 1856(b)(6) factors apply when the allocation was established, not thereafter.

In *Alliance Against IFQs v. Brown,* 84 F.3d 343 (9th Cir. 1996), *cert. denied,* 520 U.S. 1185 (1997), the Secretary excluded from consideration the most recent period of "present participation." The Court found this made sense in order to avoid rewarding people who increased their harvests just to argue for greater "present participation." Significantly, the Court also discussed the issue of whether present participation is considered at the time the limited

[30] As NMFS stated in the proposed rule establishing the GHL, "The GHL would establish an estimated amount of halibut harvests that may be taken annually.... The system of harvest reduction measures would provide for a number of management measures to take effect ... in the event that harvests exceed the GHL." 67 Fed. Reg. at 3867. In that preamble, NMFS "specifically requests" public comment on the potential HCM, including a one fish bag limit. *Id.* at 3869. Similarly, in the final GHL rule, NMFS noted "if the GHL were exceeded, subsequent harvest restrictions could be implemented...." 68 Fed. Reg. at 47258.

access system is established or whether the "present participation" standard is a moving target requiring future changes to the original allocation.

> Under the regulations, eligibility for quota shares depends on fishing during the years 1988, 1989, and 1990. Whatever years are used necessarily recede into the distant past. Even in 2005, assuming the regulatory scheme lasts that long, the quota shares will be based on fishing prior to 1991. Future generations of fishermen will continue to be governed by these pre-1991 allocations.

Id., at 347-348. Present participation is considered when allocation is first established.

When the Council adopted the charter harvest cap in February 2000, the Council used 1995-1999 as the years from which to measure the charter harvest. A.R. 8 at 9; A.R. 10 at 10. Previously, the Council was debating whether to use as the base years 1995, 1998, or somewhere within 1995-1998. A.R. 10 at 33. That the Council in February 2000 adjusted the base years to include the year that had ended but two months before settles the issue of whether the Council was using the most current data was used.

To accept Plaintiffs' argument that people who ignore and overfish their quota are entitled to a new allocation because of their now increased harvest is to improperly encourage people to disregard the regulatory scheme and the fishery management objectives so that they can argue their current "present participation" requires a revision of the original allocation. As one commenter on the 2009 Rule said: "The charter industry should not be rewarded" for ignoring the GHL and opposing its enforcement. A.R. 158.

Moreover, Plaintiffs' legal position leads to dysfunctional fisheries management. Plaintiffs' argue the 2003 GHL and the 2009 regulations enforcing it are flawed because they fail to recognize the charter fleet is now capable of harvesting more fish. The argument is "Because we can harvest more, we should get more" and the 2003 GHL should be ignored. But this is a never ending argument that would prevent the achievement of legitimate fishery management

objectives. If Plaintiffs' legal theory is adopted, every time the charter industry increases its capacity to catch fish, its "present participation" must be recognized, the commercial allocation reduced, and more fish given to the charter industry. This effectively defeats the fishery management objective properly adopted by the Council and the Secretary.

Conveniently, Plaintiffs ignore the flip side of their argument. Plaintiffs' legal argument would apply with equal force to the commercial sector and to the consideration of that sector's "present participation." The commercial fleet also has the capacity to harvest more than its quota. In the last four years, the commercial quota has been cut by 54%. A.R. 5 at 21207, Response to Comment 46. The capacity exists to catch more fish. Using Plaintiffs' logic, the commercial fleet should employ the "present participation" argument and receive more fish because it has the present capacity to catch more fish.

But say Plaintiffs, the issue is not capacity but actual harvests and the charter industry is actually catching 1.9 million pounds of halibut annually. The problem with this rhetoric is that the only reason the charter industry is catching this amount of fish is that they have ignored their allocation. In contrast, Area 2C commercial fishermen have not exceeded their quota since the IFQ program was established in 1995. A.R. 336 at 182. If the legal principle advocated by Plaintiffs is adopted, it applies to all sectors. If Plaintiffs' legal principle becomes governing law, the commercial sector should follow the charter industry's example, ignore its quota, fish to its capacity, and argue that its "present participation" means it must get a larger quota.

Regardless of whether you measure "present participation" by harvest capacity or by actual harvest, a policy decision for another day, the problem with Plaintiffs' position is that it undermines the achievement of legitimate and properly established fishery management objectives. It allows people to defeat those objectives by ignoring them. Fishery management

based on the principle that the more you catch the more you get can have only one outcome – a bankrupt resource. Rather than admit the dysfunctional result of such a "present participation" argument, Plaintiffs try to argue the GHL was never intended to be an allocation.

Plaintiffs cannot rewrite history to pretend the GHL was some mythical number with no meaning. As noted in Part IV(C), *infra.* at 14, the GHL was to place an upper limit on the charter harvest. But Plaintiffs and their industry brethren ignored the GHL. They increased fishing capacity and pretended the GHL did not exist, exceeding it by 22% in 2004, 36% in 2005, 26% in 2006, 34% in 2007, and 106% in 2008. Having violated the GHL, they now ask to be rewarded by (1) having their new present participation "considered," (2) being awarded a larger quota, and (3) reducing the commercial quota to accommodate the charter industry harvest. This is precisely the result the GHL was intended to prevent.

Plaintiffs' argument that because they have ignored the GHL and increased their harvests they deserve a larger allocation under the guise of "present participation" also overlooks the fact that the Council and NMFS have already addressed this very issue. As noted in Part IV(C)(2), *infra.* at 18-19, when the GHL was established, a conscious policy choice was made to set a limit on the future growth of the charter industry. The proper level of charter industry participation in the halibut harvest was debated, discussed in the proposed GHL rule (where NMFS specifically asked for public comment on this precise issue), and in the final GHL rule where NMFS responded to the comments received. The Council and NMFS affirmatively and with due deliberation considered the harvest level to which the charter industry should grow. That the charter industry has ignored the policy and overharvested its quota does not mean the Council and NMFS have ignored the "present participation" issue.

D. In Assessing Present Participation, Is That Participation Fully Considered When A Sector Is Awarded More Than Its Current Harvest Level?

Plaintiffs cannot credibly say that when the GHL was adopted the Council and NMFS did not consider present participation. Present participation was fully considered and accounted for because the GHL was set at 125% of the then existing charter harvest. Every present participant was protected. In fact, their harvest levels could grow by 25% above current levels before reaching the GHL.

E. Is The 2009 Rule Somehow A New GHL Allocation?

As discussed above, the 2009 Rule selects one HCM to enforce the existing allocation, a tool specifically identified when the GHL was established. When the GHL was proposed and finalized, NMFS identified the one halibut per day rule as a means to enforce the GHL. 67 Fed. Reg. at 3869; 68 Fed. Reg. at 47259. The 2009 Rule simply enforces the GHL harvest limitation, it does not establish a new one.

Nevertheless, NMFS did consider the issue of present participation when promulgating the 2009 Rule. In the preamble to the Rule, NMFS details the precise present participation of the charter industry giving the most recent harvest levels, their percent of the total harvest, and the trend in the charter harvest. A.R. 5 at 21203, Response to Comment 32. NMFS continues this analysis discussing the 2008 share of the total allowable catch taken by the charter industry and the commercial sector. *Id.* at 21217, Response to Comment 87.

In the preamble, NMFS responds directly to a comment that the GHL and this Rule are not fair and equitable because they are using dated information that is between 9 and 15 years old, a comment that is identical to the argument in Plaintiffs' Brief at 39. NMFS responds it has consistently used the best available and most current data, referencing several documents. A.R. 5 at 21204 , Response to Comment 34. Among the documents referenced is the State of Alaska

final data for 2007 (the most recent year for which final data are available) showing the current charter catch overall and the catch by port, as well as the number of active charter vessels (709), the average number of trips per vessel, and the average number of anglers per trip. Also among the referenced documents is the final EA/RIR for the Rule which presents a detailed analysis of the charter fleet including its character and capacity. A.R. 32 at 29-40. The same document considers the economic impact of the Rule on the charter industry. *Id.* at 47-54.

Specifically, the EA/RIR details the most recent data on subsistence, commercial, charter, non-charter sport, and research catches. *Id.* at 27, 37. NMFS recognizes the different way the charter fleet now operates, one segment serving cruise ships and day customers and another operating out of lodges serving multi-day customers. *Id.* at 29. NMFS reviews the number of halibut harvested by charter clients subdivided by region. *Id.* at 30. The current number of charter boats, customers, and charter boat trips are set forth. *Id.* at 31-32. The catch efficiency of charter operations measured by the catch per unit of effort is explained. *Id.* at 39-40. The expenditures by charter clients, including the direct and indirect economic effects, are reviewed. *Id.* at 32-33. The regional and local economic impacts of the charter fleet are analyzed. *Id.* at 38-39, 59-60. A summary of the survey of charter operators regarding their operations is included. *Id.* at 34-36. The possible economic impacts of the one halibut rule on the charter fleet are discussed with NMFS dividing the analysis between day boats and lodge boats to reflect the current structure of the charter industry. *Id.* at 47-54. NMFS does a comparative summary of the costs and benefits of the Rule using the available data. *Id.* at 63-65.

Any claim that NMFS did not consider current data, the current status of charter fleet, and its current participation in the fishery is belied by the record. In an MSA case involving challenges under NS 4 and 16 U.S.C. § 1853(b)(6), the Court found "As long as the Secretary

considered the fishermen's interests, and 'considered the relevant factors and articulated a rational connection between the facts found and the choice made,' the Secretary's decision will not be found to lack a rational basis." *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1067 (9th Cir. 2005), *quoting Wash. Crab Producers Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1990).

In that regard, it may also be helpful to see how the courts have interpreted the MSA standard that NMFS "take into account" the 16 U.S.C. § 1853(b)(6) factors when establishing a limited access system. That inquiry begins with the fact that present participation is only one of seven factors to be taken into account under 16 U.S.C. § 1853(b)(6). *Yakutat, Inc. v. Gutierrez*, 407 F.3d at 1070. Congress allowed the Secretary some discretion, not only by leaving "present participation" undefined (*i.e.*, capacity versus present harvest, the years to be considered, etc.), but also by listing it as only one of many factors to be taken into account. *Alliance Against IFQS v. Brown*, 84 F.3d at 347.

In *Yakutat*, the Court found that when the limited access system was based on an analysis of some, but not all, of the seven 16 U.S.C. § 1853(b)(6) factors, the requirement that such factors be taken into account was still satisfied. *Yakutat, Inc. v. Gutierrez*, 407 F.3d at 1068. In *Yakutat*, the Secretary opted to limit the present participation analysis, ignoring the most recent data. The Court found this acceptable, stating the Secretary could balance and pursue the approach expected to produce the best results: "The Secretary placed a higher premium on historical participation and significant dependence, instead of focusing solely on present participation." *Id.* at 1073. That analysis bears a striking resemblance to the instance case.

In another case where the Secretary chose to exclude several years from the present participation analysis, the Court found:

> The very language of Section 1853(b)(6) indicates that its enumerated factors must be balanced against each other and against "any other relevant

> considerations." As long as the Council and the Secretary took these factors into account, the Court may not second-guess the accuracy of the balance struck. The choice of cut-off dates and weighting formulas thus was not arbitrary and capricious or an abuse of discretion.…

Sea Watch Int'l v. Mosbacher, 762 F. Supp. at 379.

F. Conclusion.

Plaintiffs' "present participation" argument fails because (1) present participation has been fully considered in every rulemaking, (2) Plaintiffs' argument leads to illogical and dysfunctional results, (3) Plaintiffs' arguments have already been rejected by the courts, and (4) section 1853(b)(6) is not truly applicable here.

VI. PLAINTIFFS' CLAIMS ARE BARRED BY LACHES

Plaintiffs' real target in this action is not the HCM established in the Rule but the GHL allocation set in 2003. Whatever HCM might have been selected to enforce the GHL is irrelevant. Plaintiffs' oppose the GHL limit and they want it rendered a nullity.

The charter industry and these Plaintiffs participated in 2002-2003 rulemaking establishing the GHL, advancing the same arguments presented today. The GHL rule cited the one halibut bag limit as among the management tools to be used to enforce the GHL. 67 Fed. Reg. at 3869; 68 Fed. Reg. at 47259. Neither the Plaintiffs nor anyone else in the charter industry challenged that rulemaking. They cannot do so now.

A. The Law.

In *Independent Bankers Association of America v. Heimann,* 627 F.2d 486 (D.C. Cir. 1980) (*per curiam*), a trade association of federal and state chartered banks challenged a ruling by the Comptroller of the Currency 12 years after its promulgation. The District Court granted the plaintiff's motion for summary judgment. The United States Court of Appeals for the District of Columbia Circuit reversed stating:

> The venerable maxim vigilantibus non dormientibus aequitas subvenit (equity aids the vigilant, not those who slumber on their rights) requires that a suit in equity, though otherwise meritorious, be dismissed if two requirements are met: (1) unreasonable delay in bringing the claim for relief and (2) prejudice caused by that delay.

Id. at 488. The Court found that while some delay might have been understandable, a 12-year delay was unreasonable given that the trade association, like the Plaintiffs here, was a sophisticated party knowledgeable about the impact of government rulings. *Id.* The Court then found that invalidating the ruling after the delay would unfairly prejudice third parties who had made substantial financial commitments based on the Comptroller's ruling. *Id*. The Court held that laches barred the plaintiff's claim. *Id*.

In a factually distinguishable case, *Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983), the Court held that the defense of laches was not available even though the regulation at issue had been instituted almost seven years earlier. Citing Circuit precedent, the Court noted that in order "[t]o support a defense of laches, the defendant must offer evidence that the plaintiff unreasonably delayed in challenging defendant's action and that the defendant has been prejudiced by the delay." *Id*. at 962-63, *citing Independent Bankers Ass'n. of America v. Heimann*, 627 F.2d at 488. Regarding unreasonable delay, the Court found, unlike the instant case, that the plaintiffs did not know or have reason to know of the defendant's challenged conduct until shortly before the filing of the action, and thus there was no unreasonable delay. *Id*. at 963. Continuing its analysis, but assuming for the sake of argument that the plaintiffs had unreasonably delayed, the Court found the defendant failed to demonstrate that it had "changed his position in a manner that would not have occurred but for plaintiff's delay." *Id.* at 964.

B. The Facts.

The record of Plaintiffs' actions has been discussed above. Each of the Plaintiffs was in business when the GHL was established. Several participated in the Council process and in the NMFS rulemaking. Plaintiffs clearly knew of the GHL and its intended purpose when it was proposed in 2002 after ten years of debate before the Council.

What remains is the issue of whether Intervenors have been prejudiced by Plaintiffs' delay. The answer is yes. Intervenors Behnken, Moore, Wohlheuter, and Knight, like many commercial fishermen, changed positions to their detriment in reliance on the existence of the GHL as a limit on charter industry harvests. They would not have done so if they had known the GHL would not be enforced. They purchased QS, often borrowing money and pledging their homes and/or boats as collateral, in reliance on the GHL. Behnken Aff., ¶ 10; Affidavits of Josh Moore, ¶ 3, Sherri and Kurt Wohlheuter, ¶ 3, and Christopher Knight, ¶ 9, each attached to Intervenors' Memorandum Of Points And Authorities In Support Of Motion To Intervene as Exhibits 1, 5, 7, and 8. Now, because of reductions in their QS caused in part by charter industry overfishing, they find themselves in severe economic distress. They would not have purchased QS but for the GHL. They have changed position based on the GHL and will be significantly prejudiced if Plaintiffs prevail in overturning the Rule, thereby increasing the charter industry harvest and reducing the commercial harvest.

Plaintiffs' action is barred by laches.

VII. CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully request that their Motion for Summary Judgment be granted and Plaintiffs' Motion for Summary Judgment be denied.

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Respectfully submitted,

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