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8  
9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

BZ

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13 PACIFIC DAWN LLC, CHELLISSA LLC,  
14 JAMES AND SANDRA SCHONES, DA YANG  
SEAFOOD INC., and JESSIE'S ILWACO FISH )  
15 COMPANY, )

Case No.

CV 10 4829

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

16 Plaintiffs,

17 v.

18 GARY LOCKE, Secretary of Commerce, in his )  
official capacity as Secretary of the United )  
19 States, NATIONAL OCEANIC AND )  
ATMOSPHERIC ADMINISTRATION, and )  
20 NATIONAL MARINE FISHERIES SERVICE, )

21 Defendants.

22 **INTRODUCTION**

23 1. This case challenges portions of fishery management regulations issued by the  
24 Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration.  
25 ("NOAA"), on October 1, 2010 that established a completely new fishery management program  
26 based on allocation of individual fishing quotas ("IFQs") for the Pacific Coast Groundfish  
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1 Fishery, including the Pacific whiting fishery, to particular harvesting vessels and processing  
2 plants. This new program is also referred to as the Trawl Rationalization Program. The  
3 regulations at issue (the "IFQ Regulations") were promulgated pursuant to the Magnuson-Stevens  
4 Fishery Conservation and Management Act, 16 U.S.C. § 1081, et seq. (Magnuson-Stevens Act).

5 2. Plaintiffs, fishing and processing entities with recent history of participating in the  
6 Pacific whiting fishery, are challenging determinations in the final rule with respect to their initial  
7 IFQ allocations. The IFQ Regulations make fixed allocations awarding a fishery participant a  
8 limited quantity of fish that that participant may then harvest in a fishing season, based on its  
9 relative fishing and/or processing history. A participant must possess the proper permits from the  
10 National Marine Fisheries Service ("NMFS") to harvest the fish and may not obtain any more  
11 Pacific whiting than that allowed under an IFQ Permit and allocation, and annual fishing harvest  
12 limits.

13 3. Plaintiffs submit that NOAA has failed to satisfy the requirement in the Magnuson-  
14 Stevens Act that IFQ allocations must give consideration to recent fishing activity of harvesting  
15 vessels and processing history for processing facilities and otherwise be consistent with the  
16 requirements of the Magnuson-Stevens Act. Instead, the IFQ Regulations favor those with  
17 fishing history in the period 1994 to 2003 and those with processing history from 1998 to 2004,  
18 determinations that, inter alia, arbitrarily do not recognize, or give consideration for, recent  
19 fishing or processing history and the attendant investment commitment to the fishery. As a  
20 result, the IFQ Regulations with respect to the initial allocation of Pacific whiting IFQ violate the  
21 Magnuson-Stevens Act and the Administrative Procedure Act (APA), 5 U.S.C. § 706.

22 4. The IFQ Regulations also do not recognize and credit "B" permit trawl fishing  
23 history in making an initial allocation of IFQ to Pacific Dawn LLC also in violation of the  
24 Magnuson-Stevens Act and the APA.

**JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201-2202 (declaratory judgment); 16 U.S.C. §§ 1855(f), 1861(d) (Magnuson-Stevens Act); and 5 U.S.C. § 701-706 (APA).

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

7. The Pacific Groundfish Fishery that is the subject of this case is prosecuted along the coasts of Oregon, Washington, and California.

**PARTIES**

8. Plaintiff Pacific Dawn LLC (“Pacific Dawn”) is a company based in Seattle, Washington which operates the fishing vessel Pacific Challenger and, in addition, holds the fishing history of the fishing vessel Amber Dawn. Pacific Dawn currently holds permits for fishing for Pacific Groundfish, including whiting, and is otherwise eligible to receive IFQ under the Trawl Rationalization Program. Pacific Dawn has been informed by NMFS that it will receive IFQ initial allocations upon application for a new permit under the Trawl Rationalization Program. However, NMFS has determined, as part of the final rule issued on October 1, 2010, that it will not recognize or give credit to Pacific Dawn in calculating its initial IFQ share for the fishing history of the Amber Dawn on the basis that it was earned under a fishing permit with a “B” endorsement rather than an “A” endorsement. In addition, the final rule does not recognize the recent fishing history held by Pacific Dawn from 2003 to the present in calculating its initial IFQ allocation and otherwise treats Pacific Dawn unfairly and unlawfully under the IFQ Regulations.

9. Plaintiff Chellissa LLC (“Chellissa”) owns the fishing vessel Chellissa and is based in Florence, Oregon. Chellissa currently holds permits for fishing for Pacific Groundfish, including whiting, and is otherwise eligible to receive IFQ under the Trawl Rationalization Program. The final rule fails to recognize the recent fishing history held by Chellissa from 2003 to the present in calculating its initial IFQ allocation and otherwise treats Chellissa unfairly and

1 unlawfully under the IFQ Regulations.

2 10. Plaintiffs James and Sandra Schones own and operated the fishing vessel Collier  
3 Brothers in the Pacific whiting fishery. James and Sandra Schones currently hold a permit for  
4 fishing for Pacific Groundfish, including whiting, and are otherwise eligible to receive an initial  
5 IFQ allocation under the Trawl Rationalization Program. The final rule fails to recognize the  
6 recent fishing history held by James and Sandra Shones from 2003 to the present in calculating its  
7 initial IFQ allocation and otherwise treats James and Sandra Schones unfairly and unlawfully  
8 under the IFQ Regulations.

9 11. Plaintiff Da Yang Seafood Inc. ("Da Yang") is a fish processing firm based in  
10 Astoria, Oregon. Da Yang started purchasing Pacific whiting after 2004. However, the final rule  
11 denies Da Yang any initial IFQ allocation of Pacific whiting and refuses to recognize the  
12 company's recent history of processing Pacific whiting and otherwise treats Da Yang unfairly and  
13 unlawfully under the IFQ Regulations.

14 12. Plaintiff Jessie's Ilwaco Fish Company ("Ilwaco Fish") is a fish processing firm  
15 based in Ilwaco, Washington that has purchased and processed Pacific whiting since 1976. Its  
16 plant is located in a small fishing community on the Washington Coast and it employs  
17 approximately 100-300 workers in its operations each year. Ilwaco Fish holds the appropriate  
18 permits to receive a share of the initial issuance of whiting quota share to be issued to qualified  
19 shoreside processors, which has been set at 20 percent of the overall quota share available.  
20 However, Ilwaco Fish's processor quota share will not reflect its recent history of processing after  
21 2004 to the present, including 14 million pounds in 2005, 19 million pounds in 2006, and 10  
22 million pounds in 2007. As a consequence, Ilwaco Fish will be forced to forgo market share it  
23 has built up in the Pacific whiting fishery over recent years and its quota share will be much less  
24 than if its recent history were recognized. The final rule denies Ilwaco Fish its rightful initial IFQ  
25 allocation of Pacific whiting, refuses to recognize the company's recent history of processing  
26 Pacific whiting and otherwise treats Ilwaco Fish unfairly and unlawfully under the IFQ

1 Regulations.

2 13. Defendant Gary Locke, the Secretary of the U.S. Department of Commerce, is  
3 responsible under the Magnuson-Stevens Act for approving fishery management plans and  
4 promulgating fishery management regulations, including the Trawl Rationalization Program,  
5 pursuant to the Magnuson-Stevens Act. Secretary Locke is sued in his official capacity.

6 14. Defendant National Oceanic and Atmospheric Administration (NOAA) is a subunit  
7 of the U.S. Department of Commerce with supervisory responsibility for NMFS. The Secretary  
8 of Commerce has delegated certain administrative functions under the Magnuson-Stevens Act to  
9 NOAA, which in turn has sub-delegated certain fishery management functions to NMFS.

10 15. Defendant NMFS is the federal agency that administers the fishery management  
11 plan for the Pacific Coast Groundfish Fishery, of which the Trawl Rationalization Program is  
12 now a part, and is a subunit of NOAA and the U.S. Department of Commerce.

13 16. Secretary Locke, NOAA and NMFS have approved Amendments 20 and 21 to the  
14 Pacific Coast Groundfish Fishery Management Plan (FMP) that comprises in substantial part the  
15 Trawl Rationalization Program and issued final regulations implementing those Amendments in  
16 the Federal Register on October 1, 2010. 75 Fed. Reg. 60868-60999 (Oct. 1, 2010).

#### 17 LEGAL AND FACTUAL BACKGROUND

18 17. The Magnuson-Stevens Act created a national fishery management system for fish  
19 resources and fishing activity located in a 200-nautical mile Exclusive Economic Zone along the  
20 U.S. coast, including California, Oregon and Washington.

21 18. Pursuant to that national fishery management system, the responsible federal  
22 agencies, NOAA and NMFS, acting upon recommendations of the Pacific Fishery Management  
23 Council created to provide for "bottom-up" fishery management plans for various groups of  
24 marine fisheries, long ago adopted the Pacific Coast Groundfish FMP. Approximately 90 species  
25 of groundfish, including whiting, are managed pursuant to the FMP through a number of  
26 measures, including annual harvest limits, trip and landing limits, no-fishing areas, seasonal  
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1 closures, and gear restrictions. New entrants into the fisheries are limited and the size of the trawl  
2 fleet has declined by nearly 50 percent over the last decade. The Pacific Coast Groundfish  
3 Fishery is one of the most strictly regulated fisheries in the world, and overall is considered one  
4 of the healthiest by recent peer-reviewed scientific analysis.

5 19. Upon approval of the FMP by NOAA and NMFS, acting for the Secretary of  
6 Commerce, regulations were promulgated to implement the FMP, which is amended and updated  
7 on a regular basis as environmental and economic conditions change. Further, the FMP is  
8 updated and amended at least bi-annually but sometimes every quarter-year or monthly when  
9 appropriate. The goal is to conserve the various fisheries subject to the FMP to ensure the long-  
10 term conservation of fish stocks while taking into account the impacts of the FMP on fishing  
11 communities, individuals and companies that depend on the fisheries.

12 20. On October 1, 2010, NOAA published a final rule implementing Amendments 20  
13 and 21 to the FMP. Amendment 20 establishes a Trawl Rationalization Program that consists of  
14 an IFQ program for the shorebased trawl fleet and cooperative programs, for the at-sea  
15 mothership and catcher/processors trawl fleets. The Trawl Rationalization Program is intended to  
16 increase net economic benefits, create individual economic stability, provide full utilization of the  
17 trawl sector allocation, consider environmental impacts, and achieve individual accountability of  
18 catch and bycatch. Amendment 21 establishes fixed allocations of quotas for limited entry trawl  
19 participants.

20 21. The final rule contains standards and procedures for issuance of IFQ permits and  
21 initial allocations of IFQ (based on a catch history possessed by current permit holders), among  
22 other provisions. The allocation formulas contained in Amendment 20 and implemented by the  
23 final rule are based on vessel landings for the trawl vessel sector or processor receipt history for  
24 the shoreside sector. For plaintiffs, each is expected to receive an initial allocation of IFQ that  
25 will cause them to reduce their operations, leading to a reduction in the market share each has  
26 recently developed.

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22. The final rule allocates 80 percent of the Pacific whiting IFQ to current vessel permit holders and 20 percent of the shoreside harvest allocation to shoreside processors.

23. With respect to vessel permits, the final rule states the following (75 Fed. Reg. at 60959): “Whiting QS [quota share] based on each limited entry trawl permit’s history will be allocated based on the permit’s relative history from 1994 to 2003.” History after 2003 was not considered important or relevant, and was rejected as a basis for allocation.

24. With respect to shoreside processors, the final rule states the following: (75 Fed. Reg. at 60960): “For each eligible shoreside processor, whiting QS [quota share] will be allocated based on the eligible shoreside processor’s relative history from 1998 through 2004.” History after 2004 was not considered important or relevant, and was rejected as a basis for allocation.

25. All fishery management plans and regulations implementing such plans must comply with the requirements of Magnuson-Stevens Act in order to be binding and effective. Any such regulations that are not so consistent are unenforceable.

26. The Administrative Procedure Act, 5 U.S.C. § 706(2), authorizes a federal court to hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

27. The Pacific whiting fishery is one of the most important commercial fisheries, and the largest, off the Pacific Coast and is found in Oregon, Washington, and California. Recent harvest levels have been within the annual conservation guidelines set by NOAA and NMFS and the stock is not considered overfished. In fact, the independent Marine Stewardship Council in 2009 certified the Pacific whiting fishery as sustainable and well-managed.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION**

**(Violation of Magnuson-Stevens Act in failing to properly consider and credit fishing history after 2003 for Pacific whiting trawl vessels)**

28. Plaintiffs incorporate by reference all preceding paragraphs.

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1 29. The Magnuson-Stevens Act contains a number of requirements for adopting FMPs  
2 and implementing regulations to carry out FMPs, including, inter alia, the requirement of  
3 considering both recent harvests and historic harvests, basing determinations on the best available  
4 information, considering the impacts on local fishing communities, and making allocations fair  
5 and equitable to all fishermen, among other required considerations.

6 30. By failing to consider and credit recent fishing history for trawl vessels after 2003  
7 in the Pacific whiting fishery, the final rule creating the Trawl Rationalization Program violated  
8 the Magnuson-Stevens Act.

9 **SECOND CAUSE OF ACTION**  
10 **(Violation of Magnuson-Stevens Acts for failing to properly consider and credit recent**  
11 **processing history after 2004 for whiting shoreside processors)**

11 31. Plaintiffs incorporate by reference all preceding paragraphs.

12 32. The Magnuson-Stevens Act contains a number of requirements for adopting FMPs  
13 and implementing regulations to carry out FMPs, including, inter alia, the requirement of  
14 considering both recent harvests and historic harvests, basing determinations on the best available  
15 information, considering the impacts on local fishing communities, and making allocations fair  
16 and equitable to all fishermen among other required considerations.

17 33. By failing to consider and credit recent fish receipts for shoreside processors in the  
18 Pacific whiting fishery after 2004, the final rule creating the Trawl Rationalization Program  
19 violated the Magnuson-Stevens Act.

20 **THIRD CAUSE OF ACTION**  
21 **(Violation of Magnuson-Stevens Acts for refusing to properly consider and credit fishing**  
22 **history associated with "B" permits)**

23 34. Plaintiffs incorporate by reference all preceding paragraphs.

24 35. The Magnuson-Stevens Act contains a number of requirements for adopting FMPs  
25 and implementing regulations to carry out FMPs, including, inter alia, the requirement of  
26 considering both recent harvests and historic harvests, basing determinations on the best available  
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1 information, considering impacts on local communities, and making allocations fair and equitable  
2 to all fishermen among other required considerations.

3 36. By failing to consider and credit fishing history for "B" trawl permits in the Pacific  
4 whiting, the final rule creating the Trawl Rationalization Program violated the Magnuson-Stevens  
5 Act.

6 **FOURTH CAUSE OF ACTION**  
7 **(Violation of the APA)**

8 37. Plaintiffs incorporate by reference all preceding paragraphs.

9 38. The final rule with respect to the treatment of prior history for trawl vessels and  
10 shoreside processors and for treatment of fishing history for "B" permits violates the Magnuson  
11 Stevens Act and is arbitrary and capricious, an abuse of discretion, and otherwise not in  
12 accordance with law.

13 39. The final rule therefore violates the APA.

14 **PRAYER FOR RELIEF**

15 Wherefore, Plaintiffs request that the Court:

16 1. Enter a declaratory judgment that Defendants, in the Final Rule, violated the  
17 Magnuson-Stevens Act and the APA for unlawfully failing to consider and credit Pacific whiting  
18 trawl fishing history after 2003 in making initial allocations of IFQ and to fairly and lawfully  
19 consider the history and circumstances of each Plaintiff;

20 2. Enter a declaratory judgment that Defendants, in the Final Rule, violated the  
21 Magnuson-Stevens Act and the APA for unlawfully failing to consider and credit Pacific whiting  
22 processing history after 2004 in making initial allocations of IFQ and to otherwise treat Plaintiffs  
23 fairly and lawfully;

24 3. Enter a declaratory judgment that Defendants, in the Final Rule, violated the  
25 Magnuson-Stevens Act and the APA for unlawfully failing to consider and credit limited trawl  
26 permit "B" history in making initial allocations of IFQ and to otherwise treat Plaintiffs fairly and  
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lawfully;

4. Remand the Final Rule for proceedings and action consistent with the Magnuson-  
Steven Act and the APA;

5. Award plaintiffs their fees, expenses and costs pursuant to the Equal Access to  
Justice Act, 28 U.S.C. § 2412;

6. Provide such other relief as is just and proper.

DATED: October 25, 2010

Respectfully submitted,

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