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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAI`I

GREENPEACE FOUNDATION;)	Civil No. _____
CENTER FOR BIOLOGICAL)	
DIVERSITY; AND)	COMPLAINT FOR DECLARATORY AND
TURTLE ISLAND RESTORATION)	INJUNCTIVE RELIEF; SUMMONS
NETWORK,)	
)	
Plaintiffs,)	
)	
v.)	
)	
WILLIAM M. DALEY, SECRETARY OF)	
THE UNITED STATES DEPARTMENT OF)	
COMMERCE; AND PENELOPE D.)	
DALTON, ASSISTANT ADMINISTRATOR)	
OF THE NATIONAL MARINE)	
FISHERIES SERVICE,)	
)	
Defendants.)	
)	
_____)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action challenges defendants' violations of the
National Environmental Policy Act (NEPA), the Endangered Species

Act (ESA), and the Administrative Procedure Act (APA) by failing to properly manage the Crustacean Fishery and the Bottomfish Fishery of the Western Pacific Region to conserve the Hawaiian monk seal (*Monachus schauinslandi*). As a result of defendants' failure to prevent the fisheries from depriving the Hawaiian monk seals of prey, monk seal pups are starving and the species is facing extinction in the near future.

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action by virtue of 28 U.S.C. §§ 1331, 1361, 2201-02, and 5 U.S.C. § 701, et seq. Venue is properly laid in this district under 28 U.S.C. 1391(e).

2. Plaintiff Turtle Island Restoration Network (the "Network") is a nonprofit corporation with its principal place of business in Forest Knolls, California. The Network has approximately 1,000 members throughout the United States and the world, including many that reside in Hawai`i and many more that have visited Hawai`i and plan to do so again. Each of the Network's members shares a commitment to the study, protection, enhancement, conservation, and preservation of the marine environment and the wildlife that lives in it. All spend time in activities devoted to these goals.

3. The Network's membership includes at least two professional photographers that have photographed the Hawaiian monk seal and plan to do so again; one of these is a Hawai'i resident. The Network's president, who was previously a staff member of the International Marine Mammal Project of Earth Island Institute, is a wildlife biologist with a long-term interest in marine mammals in general and the Hawaiian monk seal in particular.

4. Defendants' failure to conserve the Hawaiian monk seal and their other violations of law alleged in this complaint have adversely affected, and are adversely affecting, the Network's ability to study and enjoy the Hawaiian monk seal, and has impaired the ability of the Network and its members to protect, enhance, and conserve the Hawaiian monk seal's endangered population.

5. Plaintiff Greenpeace Foundation is a non-profit Hawai'i corporation with its principal place of business in Kailua, Hawai'i. Greenpeace Foundation is dedicated to the conservation of Hawai'i's marine ecosystems and species, such as the endangered Hawaiian monk seal.

6. Greenpeace Foundation and its members have worked tirelessly on behalf of the Hawaiian monk seal. They have been active in public outreach and education regarding the Hawaiian monk seal for many years, creating public service announcements,

writing articles, and speaking on behalf of the seals at public schools. Sue White, Greenpeace Foundation's president, participated in the tagging and documentation of monk seals at French Frigate Shoals. She also participated in the captive monk seal program as a trainer.

7. Greenpeace Foundation and the actions of its members were the catalyst behind legal action that led to the designation of critical habitat for the Hawaiian monk seal. In 1984, Greenpeace Foundation drafted a resolution in support of monk seal critical habitat, pursuant to which the State of Hawai'i House of Representatives resolved that the Hawai'i legislature and governor request the National Marine Fisheries Service ("NMFS") to designate critical habitat for the monk seal.

8. Greenpeace Foundation was a key participant in the workshop NMFS convened in 1984 on the fate and impact of marine debris, and it persuaded NMFS to include a session in the workshop on management actions to address the problem of monk seals becoming entangled in the debris.

9. After critical habitat for the monk seal was designated, Greenpeace Foundation continued to urge that the boundary be expanded. This eventually led to the expansion of the designated critical habitat from 10 fathoms to 20 fathoms around the Northwestern Hawaiian Islands.

10. Greenpeace Foundation continues to promote monk seal protection, its members continue to study, observe, and enjoy the Hawaiian monk seal, and plan to continue these efforts and activities. Defendants' failure to conserve the Hawaiian monk seal and their other violations of law alleged in this complaint have adversely affected, and are adversely affecting, Greenpeace Foundation's ability to study and enjoy the Hawaiian monk seal, and has impaired its ability and that of its members to protect, enhance, and conserve the Hawaiian monk seal's endangered population. Greenpeace Foundation therefore brings this suit on its own behalf and on behalf of its members.

11. Plaintiff Center for Biological Diversity (the "Center") is a non-profit New Mexico corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands and waters. The Center has over 5,000 members, many of whom reside in Hawai'i or visit Hawai'i regularly. Members of the Center include marine and conservation biologists who have viewed, studied, and enjoyed the Hawaiian monk seal and its habitat, and who intend to visit Hawaiian monk seal habitat later this year to continue these studies and observations. The Center's members derive scientific, recreational, aesthetic, and educational benefits from their studies of the Hawaiian monk seal, and from the

continued existence in the wild of this species. Accordingly, the Center brings this suit on behalf of itself and its members.

12. The Center is actively engaged in numerous conservation issues concerning Hawai`i and its native species, and devote considerable energy to ensuring that the wildlife of the Hawaiian Islands and surrounding areas are protected. For example, the Center recently filed suit against the U.S. Fish and Wildlife Service under the Endangered Species Act on behalf of four species of wildlife endemic to Hawai`i.

13. Defendant William M. Daley is the Secretary of the United States Department of Commerce. Secretary Daley is sued in his official capacity and is responsible for, and has control over, the activities of the Department of Commerce, including the National Marine Fisheries Service ("NMFS"). As Secretary of Commerce, Mr. Daley is ultimately responsible for ensuring that his Department and its officers and employees comply with all applicable law, including the laws for violation of which plaintiffs sue herein. If ordered by the Court, Secretary Daley has the authority and ability to remedy the harm inflicted by defendants' actions.

14. Defendant Penelope D. Dalton is the Assistant Administrator of the National Marine Fisheries Service. Administrator Dalton and is sued in her official capacity and is responsible for, and has control over, the activities of NMFS,

its officers and employees. NMFS is an agency of the United States Department of Commerce which has been entrusted with the conservation and management of ocean resources in the Western Pacific. As Administrator of NMFS, Ms. Dalton is ultimately responsible for ensuring that NMFS complies with the federal laws for violation of which plaintiffs bring this suit. If ordered by the Court, Ms. Dalton has the authority and ability to remedy the harm inflicted by defendants' actions.

FACTS

Status of the Hawaiian Monk Seal

15. The Hawaiian monk seal, listed as endangered under the Endangered Species Act in 1976, is the most endangered marine mammal that lives entirely within U.S. waters and one of the most endangered marine mammals on earth. Monk seals inhabit eight of the Northwestern Hawaiian Islands (NWHI): French Frigate Shoals, Laysan Island, Lisianski Island, Pearl and Hermes Reef, Midway Atoll, Kure Atoll, Necker Island, and Nihoa Island. A relatively small number of monk seals are also found around the main Hawaiian Islands.

16. In 1988, NMFS enlarged the designated critical habitat for the monk seal, which had previously encompassed the nearshore waters around the NWHI to a depth of 10 fathoms, to the 20 fathom depth. At the time it made this decision, NMFS

concluded that this enlargement was necessary to include within the critical habitat adequate foraging area for the animals.

17. The largest monk seal breeding population is located at French Frigate Shoals. By the 1980s, the French Frigate Shoals population comprised at least 50 percent of the total species population. Since 1989, however, the French Frigate Shoals population has plummeted by almost 55 percent, resulting in an annual decline of about 10 percent in the total population of Hawaiian monk seals.

18. The total population of the Hawaiian monk seal is now estimated at 1300-1400. NMFS recently acknowledged that the future of the Hawaiian monk seal is in "grave jeopardy." A 1997 report by NMFS scientists similarly concluded that "[t]he Hawaiian monk seal is clearly at risk of extinction. One major perturbation, such as wide-spread disease, could drive the species to extinction."

19. The decline of the French Frigate Shoals population that has placed the species in such grave danger has resulted from a rapid and dramatic drop in the survival rate of juvenile monk seals to what NMFS has characterized as a "catastrophically low level." In the mid-1980s, 90 percent of seal pups at French Frigate Shoals survived to age 2. By the mid-1990s, the survival rate had dropped to only about 10 percent.

20. The second largest monk seal population is located at Laysan Island. The Laysan colony currently numbers only about one-third of its historical maximum, and Laysan therefore is assumed to be well below its natural carrying capacity. Survival at Laysan also is poor, however, and the size of weaned pups also began to decline in the mid-1980s.

21. Monk seal pups at French Frigate Shoals are not surviving primarily because they are starving, due to lack of available prey. Monk seal prey includes lobster, octopus (which is caught as "bycatch" by the Crustacean Fishery), and fish that are targeted by the Bottomfish Fishery.

22. As a result of the starvation and death of female monk seal pups, fewer females are entering the breeding population. Fewer seals therefore will be born, and the species' decline is likely to decline further.

The Crustacean Fishery in the Northwest Hawaiian Islands

23. The Crustacean Fishery in the NWHI primarily harvests two species: the Hawaiian spiny lobster (*Panulirus marginatus*), and the slipper lobster (*Scyllarides squammosus*). Octopus, bottomfish, and Kona crab are incidentally caught. During the 1980s, thousands of pounds of octopus were sometimes caught on a single trip.

24. Over the past several years there have been 5-10 vessels active in the Crustacean Fishery. Each vessel can set over 1,000 lobster traps each night in depths of 10-35 fathoms around the NWHI. The Crustacean Fishery fishes in about 70 percent of the area designated as critical habitat for the Hawaiian monk seal.

25. NMFS' failure to properly manage the Crustacean Fishery in the NWHI has proven disastrous to the fishery, to lobster stocks, and to the monk seal. Until the mid-1970's, only a few thousand pounds of lobster were caught annually by the fishery. Thereafter, the catch began to increase. In 1983, a Fishery Management Plan (FMP) for the Crustacean Fishery was implemented pursuant to what is now known as the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, et seq. The FMP placed no restrictions on the number of spiny lobsters that could be harvested as long as the lobsters were at least minimum size, and no restrictions at all on harvest of slipper lobster.

26. The spiny lobster population's Maximum Sustainable Yield (MSY) for the entire NWHI was estimated in the 1983 FMP to be from 200,000 to 435,000 lobsters per year, with MSY at French Frigate Shoals estimated to be no more than 2,650 lobsters per year. Slipper lobster MSY was estimated at 600,000 per year.

27. Throughout the 1980s, the fishery systematically harvested NWHI lobsters far in excess of the stocks' Maximum Sustainable Yields. In 1985 and again in 1986, for example, about 1,200,000 slipper lobsters were harvested, or about twice the MSY. About 900,000 legal spiny lobsters were harvested in each of those years, or two to over four times the MSY. Hundreds of thousands of sublegal (juvenile or undersized) and berried (gravid, or pregnant) lobsters also were caught each year, many of which did not survive despite being released. This pattern continued throughout the 1980s.

28. NMFS frequently changed its estimates of MSY for the fishery, but it soon became obvious that the estimates had little basis and that harvests at such rates were not sustainable. It became more and more difficult to harvest lobster throughout the NWHI, as measured by Catch Per Unit Effort (CPUE) (i.e., the number of lobsters per trap haul). Lobster CPUE for the NWHI declined steadily throughout the 1980s. In 1983, CPUE for legal spiny and slipper lobster was 2.71. By 1988, CPUE had been reduced to 1.26. By 1991, it was only 0.56.

29. By 1990, most of the NWHI lobster harvest had become concentrated in two areas -- Necker Island and Gardner Pinnacles -- that are on either side of French Frigate Shoals, and at Maro Reef, near Laysan Island, where the monk seal colony

is also declining. Monk seals from the French Frigate Shoals population travel to Necker Island and/or Gardner Pinnacles to forage, and monk seals from the Laysan Island colony travel to Maro Reef. In 1990, NMFS estimated that the spiny lobster spawning stock biomasses at Necker Island and Maro Reef had been reduced to only 27 percent and 17 percent, respectively, of their pre-exploitation levels.

30. Lobster CPUE continued to drop in the 1991 season and, on May 8, 1991, NMFS closed the fishery for the remainder of the year to protect what was left of the depleted fishery from further destruction. In 1991, FMP Amendment 7 implemented a limited entry system and an annual, NWHI-wide harvest quota. The fishery reopened in 1992, and another 424,000 lobsters were harvested, at a CPUE of only 0.60.

31. At the beginning of the 1994 season, NMFS announced a quota of 200,000 lobsters for the Crustacean Fishery. After the season was underway, NMFS concluded that its quota had been far too high, that a properly protective quota was only 20,900, and that the season should therefore immediately be aborted. The fishery had already harvested 131,000 lobsters, however. The fishery remained closed in 1995 (although 38,000 lobsters were harvested anyway under an experimental permit). The fishery harvested 187,000 lobsters in 1996, 310,000 in 1997, and 225,000 in 1998.

32. Because the lobster vessels lay hundreds of traps and can harvest tens of thousands of lobsters, and because lobster fishing is generally restricted to the narrow banks of the atolls, the lobster harvest is spatially and temporally concentrated and the population subject to rapid depletion. For example, the 1997 harvest of 186,000 lobsters was taken in only about three weeks by five boats fishing near one bank, Necker Island.

33. Beginning in 1998, rather than set a single, NWHI-wide lobster harvest quota, each year NMFS has set an individual harvest quota for each of the three primary fishing areas (Gardner Pinnacles, Necker Island, and Maro Reef), and a fourth quota for all remaining banks in the NWHI, including French Frigate Shoals. This approach redistributes fishing effort to such areas as French Frigate Shoals, where fishing might otherwise not occur. In 1998, almost 40 percent of all lobster fishing effort in the NWHI was concentrated at Necker Island, where monk seals from French Frigate Shoals are known to forage. Spiny lobster CPUE throughout the NWHI was only 0.48.

The Bottomfish Fishery in the Northwest Hawaiian Islands

34. The Bottomfish Fishery for the Western Pacific Region fishes in the NWHI, as well as around the main Hawaiian Islands. Currently, 17 permits have been issued for bottomfish

vessels. The fishery targets snappers, groupers, and jacks. `Öpakapaka (pink snapper), onaga (longtail snapper), häpu`upu`u (seabass), and butaguchi (thick-lipped trevally) are the species most commonly caught in the NWHI. Boats in this fishery use 3 to 6 lines, each with 6 to 15 baited hooks, at depths of 60 to 125 fathoms.

35. The distribution of bottomfish in the NWHI is closely linked to suitable habitat. The fish are concentrated along the drop-off zones centered around the 100-fathom isobath which surrounds the islands and banks.

36. Bottomfish landings began increasing in the mid-1970s. The Fishery Management Plan (FMP) NMFS implemented in 1986 noted that "[s]everal indicators already seem to point to the potential for overfishing in the Hawaiian bottomfish fishery," and that "Hawaii's fishermen have clearly voiced their fear [that] smaller-sized fish and lower catch per unit effort indicate that the fishery is reaching a danger point."

37. The 1986 FMP estimated the maximum sustainable yield (MSY) for the NWHI at about 500,000 pounds, and pointed to the fact that the fishery had exceeded this level in 1984 and 1985 as a cause for concern. Nevertheless, from 1984 to 1986, total landings of NWHI bottomfish increased by 43 percent to about 715,000 pounds. Although the catch of the most prized fish, `öpakapaka, had declined sharply, the catch of onaga rose

fourteenfold in this period, and catches of butaguchi and häpu`upu`u each doubled.

38. In the mid-1980s, the fishery began seriously to deplete bottomfish stocks in the waters around French Frigate Shoals and nearby Brooks Banks and Necker Island, to which Hawaiian monk seals from the French Frigate Shoals colony travel. In 1984, about 85 percent of all bottomfish caught in the NWHI was harvested from this area. As the fish began to disappear from this area, which is relatively close to the main Hawaiian Islands, the fishery moved further "up the chain" to the more distant islands to find more bottomfish.

39. In 1985, 38 percent of the catch came from French Frigate Shoals, Necker Island, and Brooks Banks. By 1986, the fishery was able to harvest only about 10 percent of its total catch in this area; most of the catch came from the more distant islands and banks in the NWHI chain. Thus, FMP Amendment 2 noted "significant declines in CPUE have occurred for the major bottomfish species in the southern reaches of the NWHI and perhaps even farther northwest," and "there is good reason to be concerned about the condition of bottomfish stocks in the NWHI."

40. CPUE for bottomfish in the area of Necker Island, near French Frigate Shoals and where monk seals from French Frigate Shoals forage, is only half what it was when CPUE for that area was first recorded.

41. The Bottomfish Fishery interacts with Hawaiian monk seals, which remove fish directly from lines. To avoid having monk seals take commercially valuable fish, crewmen sometimes try to distract the seals with fish that are not marketable, such as kähala. Kähala is known to accumulate ciguatera toxin, which has been known to kill monk seals.

42. Monk seals with bottomfish hooks in their mouths and jaws have been observed, and intentional harming of monk seals by bottomfish fishers has been reported anonymously. In 1985, NMFS' draft Biological Opinion for the Bottomfish Fishery conceded that interactions with monk seals are relatively common at French Frigate Shoals, and that "[t]his behavior of the seals is expectedly upsetting to the fishermen and predictably leads to reprisals." This language was deleted from the final version of the Biological Opinion. A NMFS employee commented internally: "[C]lubbing monk seals with boards and shooting monk seals is a rather significant impact on an endangered species. . . . Do we have to pretend it's not happening?"

43. NMFS has acknowledged that it is likely that such interactions are occurring but not being reported, and that self-reporting by fishermen is not reliable. However, NMFS does not require that bottomfishing vessels carry observers, relying instead on the fishermen to report to NMFS that they have harmed monk seals.

Defendants' Violations of Section 7 of the Endangered Species Act -- The Crustacean Fishery

44. Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, is a critical component of the ESA's statutory and regulatory scheme to conserve endangered and threatened species. Section 7(a)(1) imposes on defendants the affirmative duty to use all methods necessary to conserve Hawaiian monk seals to the point that they no longer need the protections of the ESA. 16 U.S.C. § 1536(a)(1). Section 7(a)(2) requires, among other things, that defendants insure that their actions are "not likely to jeopardize the continued existence" of the Hawaiian monk seal, or "result in the adverse modification or destruction" of the Hawaiian monk seal's critical habitat. 16 U.S.C. § 1536(a)(2).

45. The ESA requires that federal agencies formally consult with NMFS to ensure that their actions will not violate § 7(a)(2)'s prohibitions on jeopardizing the Hawaiian monk seal or adversely modifying its critical habitat. (In this instance, NMFS is effectively required to consult with itself.) Promptly after concluding such consultation, NMFS must prepare a Biological Opinion. 16 U.S.C. § 1536(b)(3)(A). The Biological Opinion must include, among other things, a "detailed discussion of the effects of the action on listed species or critical

habitat" and NMFS' "opinion on whether the action is likely to jeopardize the continued existence of [the] species or result in the destruction or adverse modification of critical habitat" 50 C.F.R. § 402.14(h)(2),(3).

46. After completion of consultation under ESA § 7, consultation must be reinitiated if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. 50 C.F.R. § 402.16(b). Consultation also must be reinitiated if the action is modified in a manner that causes an effect to a listed species or its habitat that was not previously considered in a biological opinion. 50 C.F.R. § 402.16(c).

47. NMFS issued a Biological Opinion in connection with the preparation of the Crustacean FMP in 1981. NMFS expressed concern that the fishery "has the potential of reducing the lobster populations to levels at which lobsters are no longer available to monk seals." It noted that the FMP "proposes to protect the monk seal from the reduction in availability of lobster by maintaining lobster populations at MSY levels." As described above, far from maintaining lobster populations at MSY, the practically unregulated fishery caused the lobster populations to collapse within a few years. NMFS concluded in the Biological Opinion that "[t]here is insufficient information available for the [Western Pacific

Regional Fishery Management Council] to be able to insure that the proposed activity will not jeopardize the continued existence of the monk seal"

48. NMFS was "unable to reach a conclusion regarding the likelihood of jeopardy as the result of implementing the proposed FMP." Although the ESA required NMFS to give the benefit of the doubt to the endangered species, NMFS nonetheless recommended implementation of the FMP, contingent upon the collection of information on the role of lobster in the diet of the Hawaiian monk seal, among other requirements. The 1983 Recovery Plan for the Hawaiian Monk Seal also expressed "concern" about the possible impact of the Crustacean Fishery on the monk seal and called for studies to quantify monk seal take of commercially important fish and invertebrates. NMFS did little to obtain such information, however.

49. In 1996, NMFS issued another Biological Opinion. It acknowledged that the decline of the monk seal population may be due to the Crustacean Fishery's removal of prey and that "the importance of lobsters and other crustaceans in the monk seal diet has still not been elucidated. Consequently there is some concern regarding the availability of lobster at French Frigate Shoals where overall productivity has been low for a number of years." NMFS concluded, however, that the Crustacean Fishery is

not likely to jeopardize the continued existence of the Hawaiian monk seal.

50. Although the fishery harvests lobster in about 70 percent of Hawaiian monk seal critical habitat, and removes prey from the critical habitat of an endangered species known to be starving, the 1996 Biological Opinion concluded that the fishery "is not likely to destroy or adversely modify any designated critical habitat."

51. NMFS' underlying analysis for the 1996 Biological Opinion of the effects of the Crustacean Fishery on the continued existence of the Hawaiian monk seal and its critical habitat was inadequate, its conclusions were arbitrary and capricious, and it failed to give the benefit of the doubt to the species as required by the ESA. Moreover, to the extent that NMFS relied on the definition of "destruction or adverse modification" in 50 C.F.R. § 402.02 to justify its conclusion that the operation of the Crustacean Fishery under the FMP does not adversely modify critical habitat, the regulation's equation of adverse modification with jeopardy is contrary to the ESA and is invalid.

52. Since the 1996 Biological Opinion was issued, new information has revealed effects of the Crustacean Fishery that are likely to adversely affect the Hawaiian monk seal and its

critical habitat in a manner and to an extent not previously considered.

53. For example, recent scientific evidence indicates that lobster constitutes an important part of the monk seal diet, that lobster may be the most nutritionally beneficial monk seal prey, that octopus is an important component of the monk seal diet, and that octopus is more prevalent in the diet of monk seals at French Frigate Shoals than in the diet of members of other colonies. It is also now known that members of the French Frigate Shoals colony forage at Gardner Pinnacles and Necker Island, where lobster fishing is most concentrated, and that monk seals at French Frigate Shoals generally dive deeper and travel greater distances to forage than do monk seals from the more stable colony at Pearl and Hermes Reef. NMFS has not considered any of this evidence in considering whether the Crustacean Fishery may be jeopardizing the continued existence of the monk seal or adversely modifying its critical habitat.

54. In 1999, NMFS conducted an "informal section 7 consultation" concerning the impacts of the Crustacean Fishery generally and Amendment 9 to the FMP in particular. The opinion noted that NMFS lacks a sound scientific basis for setting area-specific lobster population estimates or harvest guidelines, but nevertheless concluded arbitrarily that the area-specific harvest guidelines are not likely to adversely affect the monk

seal, and that the data available is inadequate to demonstrate that the fishery jeopardizes the Hawaiian monk seal.

55. Neither the 1996 Biological Opinion nor the 1999 "informal consultation" considered the recent evidence described in the preceding paragraph, the impact of the fishery on monk seal critical habitat, nor the cumulative effects of the Bottomfish and Crustacean Fisheries, nor did either give to the critically endangered species the benefit of the considerable doubts about the fisheries' safety. Defendants are required to reinitiate formal consultation under ESA § 7 regarding the effects of the Crustacean Fishery on the Hawaiian monk seal. 50 C.F.R. § 402.16(b). Crustacean fishing in the NWHI must be enjoined at least until such consultation has been completed.

Defendants' Violations of Section 7 of the Endangered species Act

-- The Bottomfish Fishery

56. NMFS issued a Biological Opinion in 1986 in connection with the Bottomfish FMP. In concluding that the fishery would not likely jeopardize the existence of the monk seal, NMFS discussed the effects of the Bottomfish Fishery on the monk seal in less than a single page, and did not consider the possibility that the fishery may compete with the monk seal for prey.

57. NMFS issued another Biological Opinion in 1991 in connection with FMP Amendment 4, which allowed NMFS to place observers on fishing vessels in the NWHI. The 1991 Biological Opinion also concluded that the amendment would not likely jeopardize the existence of the monk seal.

58. Since the 1986 and 1991 Bottomfish Fishery Biological Opinions were issued, new information has revealed effects of the fishery that are likely to adversely affect the Hawaiian monk seal in a manner and to an extent not previously considered, requiring reinitiation of consultation.

59. For example, the drastic decline in the survival rate of French Frigate Shoals pups and the decline of that population as a result of the seal pups' inability to find sufficient prey occurred only after issuance of the Bottomfish Fishery Biological Opinions.

60. Also since these Biological Opinions were issued, studies confirmed that the Bottomfish Fishery may be competing for food with the monk seals. As NMFS acknowledged in its 1999 Program Review: "Recent studies have also identified a different potential interaction between the commercial bottomfish fisheries in the NWHI and the monk seal. . . . [M]onk seals commonly dive to depths of 10-200m and forage on commercially valuable fish. It is possible that bottomfish (snapper,

grouper, and jacks) are more important in the monk seal's diet than originally thought"

61. Also following the issuance of the Bottomfish Fishery Biological Opinions, the Crustacean Fishery collapsed, thereby reducing the availability of that element of the monk seal's diet. NMFS has not considered any of this information, or the cumulative effects of the Bottomfish and Crustacean Fisheries, in an ESA § 7 consultation. Nor has it considered the impact of the practice in the Bottomfish Fishery of feeding monk seals discarded fish, such as kähala, to prevent them from taking commercially valuable fish from the lines, although kähala is known to accumulate ciguatera toxin and the 1983 Recovery Plan for the Monk Seal points out the threat to monk seals posed by ciguatera. Defendants are required to reinitiate formal consultation under ESA § 7 regarding the effects of the Bottomfish Fishery on the Hawaiian monk seal. 50 C.F.R. § 402.16(b). Bottomfish fishing in the NWHI must be enjoined at least until such consultation has been completed.

Defendants' Violations of the National Environmental Policy Act
-- The Crustacean Fishery

62. Defendants' authorizations of the Bottomfish and Crustacean Fisheries through Fishery Management Plans constitute major federal actions significantly affecting the quality of the

human environment within the meaning of the National Environmental Policy Act (NEPA), requiring the preparation of one or more comprehensive and adequate Environmental Impact Statements (EIS). 42 U.S.C. § 4332.

63. The only EIS prepared for the Crustacean Fishery accompanied the original lobster FMP in 1983. At the time the EIS was prepared, the Crustacean Fishery had not yet been overfished and had not yet collapsed, the French Frigate Shoals monk seal colony had not yet begun its precipitous decline due to starvation, and studies revealing the important role lobster plays in the monk seal diet and the overlap between the monk seal's foraging range and the Crustacean Fishery had not yet been performed. The EIS therefore did not assess the impacts of the fishery on monk seals in light of any of these critical factors.

64. The Crustacean FMP was subsequently amended ten times. NMFS approved Environmental Assessments (EAs) for various amendments to the FMP. These EAs generally assessed only the impact of the individual amendments, which often were viewed as reducing risks to endangered species and therefore as having no adverse impacts. None of the EAs assessed the impacts of the fishery as a whole in light of the critical information discussed above.

65. An EIS must be supplemented when substantial changes have been made to an action that are relevant to environmental concerns. 40 C.F.R. § 1502.9(c)(1)(i). Such changes include the amendments to the FMP, which, individually and cumulatively, have substantially changed the Crustacean Fishery.

66. An EIS must contain an assessment of cumulative impacts, including the impacts of an action when added to other past, present, and reasonably foreseeable future actions. For example, the EIS for the Crustacean Fishery must include an assessment of the impact of the fishery when added to the impact of the Bottomfish Fishery, and vice versa. No such assessment has ever been done.

67. An agency is required to supplement an EIS whenever there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). NMFS therefore is required to supplement its EIS for the Crustacean Fishery to assess, among other things, the changes that have occurred in the fishery since the EIS was prepared, the fishery's environmental impacts in light of all of the significant information that has become available during the past 17 years concerning lobster stocks, the monk seal's status, diet, and foraging ecology, and the cumulative impacts of other

fisheries. The EIS must also include a thorough discussion of alternatives that would protect the Hawaiian monk seal, including the alternative of a ban on lobster fishing in the NWHI.

68. Crustacean fishing in the NWHI must be enjoined at least until defendants have completed the EIS and have complied fully with all of their obligations under NEPA.

Defendants' Violations of the National Environmental Policy Act
-- The Bottomfish Fishery

69. Defendants have never prepared an EIS for the Bottomfish FMP or for any amendment to the FMP. The Bottomfish FMP and some of its amendments were accompanied instead by EAs and Findings of No Significant Impact. Since it is now known that Hawaiian monk seals are starving due to lack of available prey, that monk seals forage on commercially valuable fish in the same areas and at the same depths fished by the Bottomfish Fishery, that there are cumulative impacts on monk seals from the Crustacean Fishery, and that critically endangered monk seals directly interact with the Bottomfish Fishery in ways that may be detrimental to the monk seals, it is now apparent that the Bottomfish Fishery is a major federal action significantly affecting the quality of the human environment, and that an EIS must be prepared.

70. Bottomfish fishing in the NWHI must be enjoined at least until defendants have completed the EIS and have complied fully with all of their obligations under NEPA.

FIRST CLAIM FOR RELIEF
(Endangered Species Act Section 7(a)(1)
and Administrative Procedure Act)

71. Plaintiffs reallege and incorporate by this reference paragraphs 1-70 of this complaint.

72. Defendants have failed to develop programs for the conservation of the Hawaiian monk seal, and have otherwise failed to use all methods and procedures which are necessary to bring the species to the point at which it is no longer endangered, in violation of 16 U.S.C. § 1536(a)(1) and the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.

SECOND CLAIM FOR RELIEF

(Endangered Species Act Section 7(a)(2)
and Administrative Procedure Act -- Crustacean Fishery)

73. Plaintiffs reallege and incorporate by this reference paragraphs 1-72 of this complaint.

74. The 1996 Biological Opinion for the Fishery Management Plan, as amended, for the Crustacean Fisheries of the Western Pacific Region, and the 1999 "informal" section 7 consultation regarding establishment of permanent lobster fishing areas are arbitrary, capricious, and unlawful, in violation of 16 U.S.C. § 1536(a)(2) and the Administrative Procedure Act, 5 U.S.C. § 701 et seq., for at least the following reasons:

a. They do not adequately discuss or address the impacts, including cumulative impacts, of continued fishery

activities on populations of endangered Hawaiian monk seals and their critical habitat;

b. They do not include the best scientific evidence available; and

(c) Their conclusions that the fishery's continued operations are not jeopardizing and will not jeopardize the continued existence of the species nor adversely modify critical habitat do not give the benefit of any doubts to the endangered species nor follow rationally from the best scientific evidence available.

75. Defendants also are required by 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.16, and the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., to reinitiate formal consultation regarding the Crustacean Fishery because new information has revealed effects of the action that may affect the Hawaiian monk seal and its critical habitat in a manner and to an extent not previously considered.

THIRD CLAIM FOR RELIEF

(Endangered Species Act Section 7(a)(2)
and Administrative Procedure Act -- Bottomfish Fishery)

76. Plaintiffs reallege and incorporate by this reference paragraphs 1-75 of this complaint.

77. Defendants are required to reinitiate formal consultation under section 7 of the Endangered Species Act

regarding the Bottomfish Fishery of the Western Pacific Region because new information has revealed effects of the action that may affect the Hawaiian monk seal and its critical habitat in a manner and to an extent not previously considered. Defendants' failure to do so violates 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.16, and the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

FOURTH CLAIM FOR RELIEF

(National Environmental Policy Act
and Administrative Procedure Act -- Crustacean Fishery)

78. Plaintiffs reallege and incorporate by this reference paragraphs 1-77 of this complaint.

79. Defendants' continuing authorization of the Crustacean Fisheries of the Western Pacific Region in the absence of an adequate EIS, and their failure to supplement existing NEPA documents to address the substantial changes that have taken place in the fishery and incorporate new circumstances and information relevant to environmental concerns violates NEPA, 42 U.S.C. § 4332, 40 C.F.R. § 1502.9, and the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

FIFTH CLAIM FOR RELIEF

(National Environmental Policy Act
and Administrative Procedure Act -- Bottomfish Fishery)

80. Plaintiffs reallege and incorporate by this reference paragraphs 1-79 of this complaint.

81. Defendants' continuing authorization of the Bottomfish Fishery of the Western Pacific Region in the absence of an adequate EIS, and their failure to supplement existing NEPA documents to address the substantial changes that have taken place in the fishery and incorporate new circumstances and information relevant to environmental concerns violates NEPA, 42

U.S.C. § 4332, 40 C.F.R. § 1502.9, and the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that:

(a) Defendants have violated and are violating the Endangered Species Act and the Administrative Procedure Act by failing to develop programs for the conservation of the Hawaiian monk seal, and otherwise failing to use all methods and procedures which are necessary to bring the species to the point at which it is no longer endangered;

(b) Defendants have violated and are violating the Endangered Species Act and the Administrative Procedure Act by authorizing the Crustacean and Bottomfish Fisheries in the absence of adequate Biological Opinions, and by failing to reinitiate consultation as required by law;

(c) Defendants have violated and are violating the National Environmental Policy Act and the Administrative Procedure Act by failing to prepare one or more comprehensive and adequate Environmental Impact Statements concerning the impacts of the Crustacean and Bottomfish Fisheries on, among

other aspects of the environment, the endangered Hawaiian monk seal;

2. Enter appropriate preliminary and permanent injunctive relief to ensure that defendants comply with NEPA, the ESA, and the APA and to avoid irreparable harm to plaintiffs and the ecosystem until such compliance occurs, including but not limited to enjoining all commercial crustacean and bottomfish fishing in and around the Northwest Hawaiian Islands at least for the duration of defendants' noncompliance;

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

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

DATED: Honolulu, Hawai'i, January 26, 2000.

Respectfully submitted,

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