APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-17081

TERRITORY OF AMERICAN SAMOA,

Plaintiff-Appellee,

v.

NATIONAL MARINE FISHERIES SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; KITTY SIMONDS, EXECUTIVE DIRECTOR OF WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL; MICHAEL D. TOSATTO, REGIONAL ADMINISTRATOR FOR NOAA'S NATIONAL MARINE FISHERIES SERVICE PACIFIC ISLANDS REGIONAL OFFICE; WILBUR ROSS, SECRETARY OF COMMERCE; CHRIS OLIVER**,

Defendants-Appellants.

Argued and Submitted: February 5, 2020
Filed: September 25, 2020

** Chris Oliver, Assistant Administrator for Fisheries, is substituted for Samuel D. Rauch III. See Fed. R. App. P. 43(c)(2).

Appeal from the United States District Court for the District of Hawaii in D.C. No. 1:16-cv-00095-LEK-KJM, Leslie E. Kobayashi, District Judge, Presiding

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MEMORANDUM*

Before: McKEOWN, BADE, and HUNSAKER,*** Circuit Judges.

Appellants seek reversal of the district court's partial grant of summary judgment and vacatur of a final rule regarding large fishing vessels in the waters off the coast of American Samoa. Because the parties are familiar with the administrative record and facts, we do not repeat them here. We have jurisdiction under 28 U.S.C. § 1291 and reverse.

This appeal raises a question of whether the Government of American Samoa ("ASG")—representing an unorganized American territory—can sue federal agencies under the doctrine of parens patriae, on the basis of language of early twentieth-

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*** This case was originally submitted to a panel that included Judge Jerome Farris. After Judge Farris's passing, Judge Hunsaker was drawn to replace him. See Ninth Circuit General Order 3.2.h. Judge Hunsaker has reviewed the briefs, record, and oral argument recording.

century cessions and the status of the waters at issue as high seas. Because parens patriae is a prudential doctrine and not a jurisdictional limitation, we need not reach this issue, and instead proceed to the merits. *See Lexmark Int 'I, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 125-28 & n.4 (2014) (distinguishing between "prudential standing" and Article III jurisdictional limitations).

We review de novo the district court's grant of summary judgment. *Branch Banking & Tr. Co. v. D.M.S.I., LLC,* 871 F.3d 751, 759 (9th Cir. 2019). Our review of the National Marine Fisheries Service's ("NMFS") compliance with the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801—1891d, is dictated by the Administrative Procedure Act, and we will set aside the regulation if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Pae. Coast Fed'n of Fishermen's Ass 'ns* v. *Blank,* 693 F.3d 1084, 1091 (9th Cir. 2012). "This standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Id.* (quotation marks and citation omitted).

Here, NMFS considered the input offered by ASG regarding the rule's impact on fishing communities, the probable effects of increased large vessel longline fishing, and the availability of fish. It is of little import that NMFS did not specifically cite the cessions when detailing the "other applicable laws" it consulted, as NMFS considered the consequences of the rule on alia fishing boats, and rationally determined the effects

were not significant. "[S]ince 2006, fewer than three alia have been operating on a regular basis; and of these, only one was active in 2013 and 2014." Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels, 81 Fed. Reg. 5,619-5,620 (Feb. 3, 2016). The Western Pacific Fishery Management Council and ASG are developing strategies to develop and increase alia fishing, however, and NMFS will annually review the effects of the rule, providing ASG the opportunity for further input and challenge.

When, as here, the agency "has considered the relevant factors and articulated a rational connection between the facts found and the choice made, the decision is not arbitrary or capricious." *Pae. Dawn LLC v. Pritzker,* 831 F.3d 1166, 1173 (9th Cir. 2016) (quotation marks and citations omitted).

REVERSED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil 16-00095 LEK

TERRITORY OF AMERICAN SAMOA,
Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; PENNY PRITZKER, SECRETARY OF COMMERCE; KITTY SIMONDS, EXECUTIVE DIRECTOR OF WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL; EILEEN SOBECK, ASSISTANT ADMINISTRATOR FOR FISHERIES; MICHAEL D. TOSATTO, REGIONAL ADMINISTRATOR FOR NOAA'S NATIONAL MARINE FISHERIES SERVICE PACIFIC ISLANDS REGIONAL OFFICE,
Defendants.

Filed: Mar. 20, 2017

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING

DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

On July 25, 2016, Plaintiff Territory of American Samoa ("Plaintiff") filed its Motion for Summary Judgment ("Motion"). [Dkt. no. 23.] On October 24, 2016, Defendants National Marine Fisheries Service ("NMFS"); United States Department of Commerce ("DOC"); National Oceanic and Atmospheric Administration ("NOAA"); Penny Pritzker, in her official capacity as the Secretary of Commerce; Kitty Simonds, in her official capacity as Executive Director of the Western Pacific Regional Fishery Management Council ("the Council"); Eileen Sobeck, in her official capacity as Assistant Administrator for Fisheries, NMFS; and Michael D. Tosatto, in his official capacity as Regional Administrator, NMFS Pacific Islands Regional Office (all collectively, "Defendants") filed their combined memorandum in opposition to the Motion and Counter-Motion for Summary Judgment ("Counter-Motion"). [Dkt. no. 28.] Plaintiff filed its combined reply in support of the Motion and memorandum in opposition to the Counter-Motion ("Plaintiff's Reply") on December 8, 2016, and Defendants filed their reply in support of the Counter-Motion ("Defendants' Reply") on January 19, 2017. [Dkt. nos. 35, 39.]

These matters came on for hearing on February 13, 2017. After careful consideration of the motions, supporting and opposing memoranda, the arguments of counsel, and the relevant legal authority, Plaintiff's Motion is HEREBY GRANTED IN PART AND DENIED IN PART and Defendants' Counter-Motion

is HEREBY DENIED for the reasons set forth below. Specifically, this Court GRANTS Plaintiff's Motion as to Count I and CONCLUDES that the rule at issue in this case is invalid. In light of the ruling on Count I, this Court DISMISSES Plaintiff's remaining claims as moot.

BACKGROUND

Plaintiff filed its Complaint on March 4, 2016, pursuant to, *inter alia,* the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1855(f). [Complaint at ¶ 7.] Plaintiff seeks an order setting aside NMFS, NCAA, and DOC's Final rule regarding Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area, 81 Fed. Reg. 5619 (Feb. 3, 2016). The rule reduces the size of the Large Vessel Prohibited Area in American Samoa ("LVPA" and "2016 LVPA Rule"). Plaintiff argues that the rule violates the deeds of cession of American Samoa, which constitutes a violation of the MSA. [Complaint at ¶ 6.] Plaintiff alleges that:

> In promulgating this rule, NMFS acted arbitrarily by asserting a rationale to support the new rule that is contrary to the evidence in the record. NMFS also abused its discretion by failing to review, address, or consider the Deeds of Cession as required under the MSA and the Administrative Procedure Act ("APA").

[Id.]

Plaintiff asserts the following claims: violation of the MSA by failing to ensure that the rules promulgated are consistent with the deeds of cession ("Count I"); [id. at 49- 56;] breach of fiduciary duty, in violation of APA, § 706(2) (a) ("Count II"); [id. at 57-61;] failure by NMFS to conduct adequate review of the deeds of cession before promulgating the 2016 LVPA Rule and failure by the Council to provide training on the deeds of cession, both in violation of the MSA, 16 U.S.C. § 1854, and APA § 706(2)(a) ("Count III"); [id. at ¶¶ 62-68;] and arbitrary and capricious action, in violation of APA § 706(2)(a) ("Count IV") [id. at ¶¶ 69-71].

Plaintiff seeks the following relief: 1) an order vacating and setting aside the 2016 LVPA Rule; 2) a declaratory judgment that a) the rule violates the MSA and APA because it is inconsistent with the deeds of cession, b) the rule is a breach of the United States' fiduciary duty to the people of American Samoa, c) NMFS violated the MSA and the APA by failing to review and address the deeds of cession, and d) NMFS acted arbitrarily and capriciously because it relied on a rationale that was contrary to the evidence before it; 3) any appropriate injunctive relief; 4) reasonable attorneys' fees and costs; and 5) any other appropriate relief. [Id. at pgs. 20-21.]

Defendants filed their answer to the Amended Complaint on April 28, 2016. [Dkt. no. 18.]

I. Legal and Historical Background

A. MSA

The Ninth Circuit has stated:

> The Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§ 1801-1884, "was enacted to establish a federal-regional partnership to manage fishery resources." Nat'l Res. Def. Council, Inc, v. Daley, 209 F.3d 747, 749 (D.C. Cir. 2000). Under the MSA, the federal government exercises "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone" ("EEZ"), 16 U.S.C. § 1811(a), which extends from the seaward boundary of each coastal state t[1]] to 200 miles offshore, id. § 1802(11); City of Charleston v. A Fisherman's Best, Inc., 310 F.3d 155, 160 (4th Cir. 2002). The MSA expressly preserves the jurisdiction of the states over fishery management within their boundaries. See 16 U.S.C. § 1856(a)(1).
>
> To manage fishing in the EEZ, the MSA calls for the creation of regional

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[1] "The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States." 16 U.S.C. § 1802(40).

> Fishery Management Councils ("FMCs"), composed of state and federal officials and experts appointed by the Secretary of the National Marine Fisheries Service ("NMFS"). 16 U.S.C. § 1852(b)(1)-(2). With the cooperation of "the States, the fishing industry, consumer and environmental organizations, and other interested persons," id. § 1801(b)(5), the NMFS and FMCs develop and promulgate Fishery Management Plans ("FMPs") to "achieve and maintain, on a continuing basis, the optimum yield from each fishery," id. § 1801(b)(4). In the MSA, "optimum yield" means the amount of fish that "will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems." Id. § 1802(33); see also 50 C.F.R. § 600.310(e)(3).

Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1139-40 (9th Cir. 2015) (footnotes omitted), cert, *denied,* 136 S. Ct. 2448 (2016). The Council is the regional council for Hawai'i, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. 16 U.S.C. § 1852(a)(1)(H). The Council's thirteen voting members include fishery management officials representing those areas, and eight citizens appointed by the Secretary from those areas.

[Counter-Motion at 6 n.3 (citing 16 U.S.C. § 1852(a) (1) (H)).]

The FMPs and FMP amendments that the regional councils prepare must be reviewed and approved by NMFS, and must comply with the requirements of 16 U.S.C. § 1853(a) and applicable laws. See 16 U.S.C. § 1854(a)(1)-(3). In addition, regional councils can propose regulations or modifications to regulations that are necessary to implement an FMP or an FMP amendment, and the Secretary can prepare an FMP or an FMP amendment. See §§ 1853(c), 1854(c). Section 1854(c) states, in pertinent part:

> (6) The Secretary may propose regulations in the Federal Register to implement any plan or amendment prepared by the Secretary. In the case of a plan or amendment to which paragraph (4)(A) applies, such regulations shall be submitted to the Council with such plan or amendment. The comment period on proposed regulations shall be 60 days, except that the Secretary may shorten the comment period on minor revisions to existing regulations.
>
> (7) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (6). The Secretary must publish in the Federal Register an explanation of any substantive differences between the proposed and

> final rules. All final regulations must be consistent with the fishery management plan, with the national standards and other provisions of this chapter, and with any other applicable law.

The ten "national standards for fishery conservation and management" are set forth in 16 U.S.C. § 1851(a).

Regulations promulgated pursuant to the MSA are subject to judicial review under certain provisions of the APA. 16 U.S.C. § 1855(f). Section 1855(f)(1)(B) states that "the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of" the APA.

B. Cession

American Samoa is an unincorporated and unorganized United States territory. [Complaint at ¶ 8; Answer at ¶ 8 (admitting those portions of Plaintiff's ¶ 8).] The parties agree that: "At the turn of the 20th Century, the United States Government entered into and executed two separate Deeds of Cession between the United States Government and the leaders of the islands of Tutuila, Aunu'u, Ofu, Olosega, Ta'u and Rose Island." [Complaint at ¶ 16; Answer at ¶ 16.] One is the Tutuila and Aunu'u Deed of Cession, dated April 17, 1900, and the other is the Manu'a Deed of Cession, dated July 14, 1904 (collectively "the Deeds of Cession"). The Deeds of Cession ceded certain lands and surrounding bodies of water to the United States. [Complaint at ¶¶ 17-18; Answer at ¶¶ 17-18 (admitting portions of Plaintiff's ¶¶ 17-18).]

On October 24, 2016, Defendants filed a Motion for Judicial Notice Pursuant to FRE 201(b)(2) ("RJN"). [Dkt. no. 27.] Defendants ask this Court to take judicial notice of the contents of the Convention of 1899[2] and the Deeds of Cession, which they obtained from the American Samoa Bar Association website. [RJN at 1-2.] On December 5, 2016, Plaintiff filed a statement of no opposition to the RJN. [Dkt. no. 32.]

The Cession of Tutuila and Aunu'u states, in pertinent part:

> Now know Ye:
>
> 1. That we, the Chiefs whose names are hereunder subscribed by virtue of our office as the hereditary representatives of the people of said islands, in consideration of the premises herein-before recited and for divers good considerations us hereunto moving, have ceded, transferred, and yielded up unto Commander B. F. Tilley of the U.S.

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[2] In the Convention of 1899, entered into on December 2, 1899 and ratified on February 16, 1900, Germany and Great Britain renounced in favor of the United States their "rights and claims over and in respect to the Island of Tutuila and all other islands of the Samoan group east of Longitude 171 degrees west of Greenwich." [RJN, Attachment at 2.] All three documents that are the subject of the RJN are attached to the RJN as a single Attachment. Because the Attachment is not consecutively paginated, the Court will refer to the page numbers assigned to the Attachment in the district court's electronic case filing system.

"Abarenda." the duly accredited representative of the Government of the United States of America in the islands hereinafter mentioned or described for and on behalf of the said government. All these the islands of Tutuila and Aunu'u and all other islands, rocks, reefs, foreshores and waters lying between the 13th degree and the 15th degree of south latitude and between the 171st degree and 167th degree of west longitude from the meridian of Greenwich, together with all sovereign rights thereunto belonging and possessed by us, to hold the said ceded territory unto the Government of the United States of America; to erect the same into a separate District to be annexed to the said Government, to be known and designated as the District of "Tutuila".

2. The Government of the United States of America shall respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District; but if the said Government shall require any land or any other thing for Government uses, the Government may take the same upon payment of a fair consideration for the land, or other thing, to those who may be deprived of their property on account of the desire of the Government.

[RUN, Attachment at 4.] The Cession of Manu'a Islands states, in pertinent part:

> Now Know Ye: (1) That we, Elesare Tuimanu'a and the Chief whose names are hereunder subscribed, in consideration of the premises hereinbefore recited, have ceded, and, by, These Presents Do Cede, unto the Government of the United States of America, All Those, The Islands of the Manu'a Group, being the whole of eastern portion of the Samoan Islands lying east of Longitude 171 degrees west of Greenwich and known as Tau, Olosega, Ofu, and Rose Islands, and all other, the waters and property and adjacent thereto, together with all sovereign rights thereunto belonging and possessed by us.
>
> To hold the said ceded territory unto the Government of the United States of America, to erect the same into a territory or district of the said Government.
>
> (2) It is intended and claimed by these Presents that there shall be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein, and also that the rights of the Chiefs in each

> village and of all people concerning their property according to their customs shall be recognized.

[Id. at 6.] Plaintiff asserts that: "The property and surrounding waters described in the Deeds of Cession measure more than 28,000 square miles" ("Ceded Area") . [Complaint at ¶ 21 (citing Complaint, Exh. C (map of Ceded Area)).]

In 1929, Congress enacted 48 U.S.C. § 1661, which states, in pertinent part:

> The cessions by certain chiefs of the islands of Tutuila and Manua and certain other islands of the Samoan group lying between the thirteenth and fifteenth degrees of latitude south of the Equator and between the one hundred and sixty-seventh and one hundred and seventy-first degrees of longitude west of Greenwich, herein referred to as the islands of eastern Samoa, are accepted, ratified, and confirmed, as of April 10, 1900, and July 16, 1904, respectively.

§ 1661(a).

C. 2002 LVPA Rule

On January 30, 2002, NMFS, NOAA, and DOC adopted a Final rule regarding Fisheries Off West Coast States and in the Western Pacific; Pelagic Fisheries; Prohibition on Fishing for Pelagic Management Unit Species; Nearshore Area Closures

Around American Samoa by Vessels More Than 50 Feet in Length ("2002 LVPA Rule". 67 Fed. Reg. 4369.[3] It states:

> NMFS issues this final rule to prohibit certain vessels from fishing for Pacific pelagic management unit species (PMUS)[4] within nearshore areas seaward of 3 nautical miles (nm) to approximately 50 nm around the islands of American Samoa. This prohibition applies to vessels that measure more than 50 ft (15.2 m) in length overall and that did not land pelagic management unit species in American Samoa under a Federal longline general permit prior to November 13, 1997. [5] This action is

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[3] The proposed rule was published on July 31, 2001. 66 Fed. Reg. 39475.

[4] "'Western Pacific pelagic management unit species' include different species of tuna, billfish, shark, other pelagic fish, and squid." [Counter-Motion at 10 n.5 (citing 50 C.F.R. § 665.800).]

[5] Defendants state:

> To fish for Western Pacific pelagic management unit species "using longline gear in the EEZ around American Samoa[,]" "[a] vessel of the United States must be registered for use under a valid American Samoa longline limited access permit." 50 C.F.R. § 665.801(c)(1). These limited access permits are issued to the following four vessel size classes: Class A vessels (less than or equal to forty feet long); Class B vessels (over forty feet and up to fifty feet long); Class C

> intended to prevent the potential for gear conflicts and catch competition between large fishing vessels and locally based small fishing vessels [("alias")]. Such conflicts and competition could lead to reduced opportunities for sustained participation by residents of American Samoa in the small-scale pelagic fishery.
>
> . . . .
>
> . . . [S]mall vessel fishermen have raised concerns over the potential for gear conflicts between the small-vessel (less than or equal to 50 ft (15.2 m) in length overall) fishing fleet and large longline fishing vessels greater than 50 ft (15.2 m) length overall, hereafter called "large vessels," targeting PMUS in the American Samoa pelagic fishery, as well as regarding adverse impacts on fishery resources resulting from the increased numbers of large fishing vessels in the fishery. Due to the limited mobility of the smaller vessels, an influx of large domestic vessels fishing in the nearshore waters of the U.S. exclusive economic

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vessels (over fifty feet and up to seventy feet long); and Class D vessels (over seventy feet long). Id. § 665.816(c).

[Counter-Motion at 10 n.6 (alterations Defendants').]

> zone (EEZ) around American Samoa could lead to gear conflicts, catch competition, and reduced opportunities for sustained fishery participation by the locally based small boat operators. Local fishermen and associated fishing communities depend on this fishery not only for food, income, and employment, but also for the preservation of their Samoan culture.

67 Fed. Reg. at 4369.

D. 2016 LVPA Rule

On August 25, 2015, NMFS published the proposed rule and a draft environmental assessment for public comment.[6] 80 Fed. Reg. 51527. "NMFS received comments from over 270 individuals, commercial and recreational fishermen, businesses, Territorial government offices (including the Governor of American Samoa and the American Samoa Department of Marine and Wildlife Resources), Federal agencies, and non-governmental organizations." 2016 LVPA Rule, 81 Fed. Reg. at 5619. Ultimately, the 2016 LVPA Rule

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[6] NMFS's Regulatory Amendment, Exemption for Large (>50 ft) U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Areas, Including an Environmental Assessment and Regulatory Impact Review, dated January 8, 2016 ("2016 LVPA EA") is Administrative Record ("AR") at A185-91.

allows large federally permitted U.S. longline vessels to fish in certain areas of the Large Vessel Prohibited Area (LVPA). NMFS will continue to prohibit fishing in the LVPA by large purse seine vessels. The fishing requirements for the Rose Atoll Marine National Monument remain unchanged. The intent of the rule is to improve the viability of the American Samoa longline fishery and achieve optimum yield from the fishery while preventing overfishing, in accordance with National Standard 1.

. . . .

SUPPLEMENTARY INFORMATION: The American Samoa large vessel prohibited area (LVPA) extends seaward approximately 30-50 nm around the various islands of American Samoa (see 50 CFR 665.806(b)). Federal regulations restrict vessels 50 ft and longer from fishing for pelagic management unit species within the LVPA. The Council and NMFS established the LVPA in 2002 to prevent the potential for gear conflicts and catch competition between large and small fishing vessels. . . .

Since 2002, the American Samoa pelagic fisheries have changed such that the conditions that led the Council and

NMFS to establish the LVPA are no longer present. The LVPA may be unnecessarily reducing the efficiency of the larger American Samoa longline vessels by displacing the fleet from a part of their historical fishing grounds.

To address the current fishery conditions, the Council recommended that NMFS allow federally permitted U.S. longline vessels 50 ft and longer to fish in portions of the LVPA. Specifically, this action allows large U.S. vessels that hold a Federal American Samoa longline limited entry permit to fish within the LVPA seaward of 12 nm around Swains Island, Tutuila, and the Manua Islands. NMFS will continue to prohibit fishing in the LVPA by large purse seine vessels. The fishing requirements for the Rose Atoll Marine National Monument also remain unchanged.

This action allows fishing in an additional 16,817 nm of Federal waters, allowing large longline vessels to distribute fishing effort over a larger area. This may reduce catch competition among the larger vessels and promote economic efficiency by reducing transit costs. This action is intended to improve the efficiency and economic viability of the American Samoa longline fleet, while

> ensuring that fishing by the longline and small vessel fleets remains sustainable on an ongoing basis. NMFS will continue to prohibit fishing by large longline vessels within the U.S. Exclusive Economic Zone (EEZ) from 3-12 nm around the islands, thus maintaining non-competitive fishing opportunities for the small-vessel longline fleet. . . .

Id. (emphasis in original) (footnote omitted). The 2016 LVPA Rule was effective as of January 29, 2016. Id. Thus, the 2016 LVPA Rule allows permitted Class C and D vessels to fish within the waters that used to be part of the LVPA under the 2002 rule.

In the Complaint, Plaintiff alleges that NMFS's position that the conditions giving rise to the 2002 LVPA Rule no longer exist is mistaken. "Specifically, NMFS determined that the decrease in local alias meant that potential for gear conflict and catch conflict is no longer a concern." [Complaint at ¶ 28.] Plaintiff also alleges that the 2016 LVPA Rule "de-incentivizes inactive or aspiring local alias that want to enter the fishery. This new rule will also lead to overcrowding of the fishery by large vessels." [Id. at ¶ 31.] Further, the rule allegedly fails to address the importance of the fishery to the American Samoan culture. Plaintiff states that the 2016 LVPA Rule did not cite to any of the comments that referred to cultural reasons and the Deeds of Cession as grounds to maintain the 2002 LVPA Rule, including the comments by: the Governor, Dr. Ruth Matagi Tofiga, the director of the American Samoa Department of

Marine and Wildlife Resources and a member of the Council; and descendants of the chiefs who signed the Deeds of Cession. [Id. at ¶¶ 34-36.]

The 2016 LVPA Rule does state:

> Comment 27: Several commenters noted that in the Deed of Cession with the chiefs of the islands of Tutuila, Aunu'u, and Manua Islands, the United States promised to protect the lands, preserve the traditions, customs, language and culture, Samoan way of life, and the waters surrounding the islands, and that all the science and environmental analysis should not supersede the rights of the people of these islands.
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> Response: NMFS' decision to approve the Council's recommendation to modify the LVPA is consistent with its authority under the Magnuson-Stevens Act to manage fishery resources in the U.S. EEZ. This action relieves an area restriction that applied to certain large commercial fishing operators within a portion of the US EEZ (generally 12 to 50 nm from shore), based on NMFS' determination that the restriction no longer serves the conservation and management purposes for which it was developed. Importantly, this action preserves full access to these waters by smaller vessels, including alias, sport fishers, and artisanal fishing vessels,

> throughout the EEZ, as authorized under the existing American Samoa Archipelagic Fishery Ecosystem Plan and implementing regulations. Further, this action does not alter the authority of American Samoa to manage its coastal fisheries to the extent authorized under the Magnuson-Stevens Act, 16 U.S.C. 1856.
>
> NMFS took particular care to ensure that the views of American Samoa stakeholders, including fishermen, fishing communities, and the American Samoa government, were solicited and taken into account throughout the development of this action. Consistent with the Magnuson-Stevens Act, the Council and NMFS provided a number of opportunities for American Samoa's participation during all material phases of the development of this measure, including Council meetings to discuss the amendment, the Coastal Zone Management Act (CZMA) process, and public meetings held in American Samoa (see response to Comment 1).

81 Fed. Reg. at 5623. Plaintiff asserts that the 2016 LVPA Rule does not address "the rights and guarantees provided in the Deeds of Cession" and whether the rule is consistent with them. [Complaint at 38.] Plaintiff argues that, by "allow [ing] large

longliners to fish within ceded areas that were designated as protected properties," the 2016 LVPA Rule violates the Deeds of Cession because the United States government agreed "to safeguard and respect the property rights of the native people of American Samoa according to their customs and practices, which include cultural fishing practices," and Plaintiff alleges those practices "will be greatly inhibited when the LVPA is reduced from 50 to 12 nautical miles." [Id. at ¶ 45.] Because the rule is not consistent with the applicable law, including the Deeds of Cession, Plaintiff argues that it violates the MSA and is an abuse of discretion under the APA. [Id. at ¶¶ 38, 43.] It further argues that the failure to review and address the Deeds of Cession was the result of the Council's failure to train Council members regarding applicable laws, as required by the MSA. Plaintiff asserts that the 2016 LVPA Rule was arbitrary, capricious, and an abuse of discretion because the proposed rule was incomplete and the Council was "uninformed." [Id. at ¶ 39.]

II. Motion

In the Motion, Plaintiff seeks summary judgment as to Counts I, II, and III. [Motion at 2.]

The Council has recognized that "[American] Samoa has a long history of dependence on pelagic fishery resources." [AR at H202.[7]] Plaintiff

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[7] AR at H001-280 is the Council's Measure to limit pelagic longline fishing effort in the Exclusive Economic Zone around American Samoa - Amendment 11 to the Fishery Management Plan for the Pelagic Fisheries of the Western

emphasizes that, during the comment period and at Council meetings prior to the adoption of the 2016 LVPA Rule, "dozens of American Samoans objected to the new rule as a violation of the Deeds, including many highly respected American Samoa officials" - such as those mentioned *supra,* and alia fishermen. [Mem. in Supp. of Motion at 6-7 (citing AR E372, E270, E113, E350-65, E85, G2135-36).] In fact, the Council of Treaty Chiefs of Tutuila, Aunu'uand Manu'a and the American Samoa Council of District Governors submitted a joint resolution, dated June 17, 2014 ("Joint Resolution").[8] [AR at E350-65.] Plaintiff asserts that, despite this, Defendants failed to consider how the rule would affect American Samoa's cultural practices.

Plaintiff argues that the Deeds of Cession are among the applicable laws that a regulation must comply with. Moreover, the deeds are treaties that are binding upon the United States and its agencies, and they have been codified as federal law. Plaintiff urges this Court to conclude that the Deeds of Cession protect American Samoans' cultural fishing rights because the Deeds of Cession protect their rights and

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Pacific Region - dated December 1, 2003 ("Amendment 11"). AR at H188-210 is Appendix I to Amendment 11, titled Fishery Impact Statement.

[8] The Joint Resolution was apparently prepared when the Council was considering reducing the size of the LVPA in 2014.

customs, even if fishing is not expressly mentioned in the deeds.

Plaintiff argues that Defendants failed to consider the cultural practices of American Samoa's local alia fisherman and the effect that the rule would have on American Samoan culture because their fishing rights would be diminished. Plaintiff emphasizes that the reduction of the LVPA from fifty to twelve nautical miles is significant, and there is no indication that the measure would benefit local fisherman or the cultural practices of American Samoans. Plaintiff states that fishing is an "integral part of the American Samoan culture," and Plaintiff argues that the 2016 LVPA Rule will harm the alia fishermen and American Samoan cultural practices "by allowing large vessels equipped with technically advanced boats and fishing gear, as well as increased manpower, to fish in the same waters as the alia fishermen." [Mem. in Supp. of Motion at 13.] Plaintiff therefore argues that the 2016 LVPA Rule is arbitrary and capricious because it is inconsistent with the federal government's duty to protect the customary practices of American Samoa, as the government agreed to do in the Deeds of Cession.

Plaintiff also argues that the 2016 LVPA Rule violates the MSA because it is a FMP and a regulation, and it was adopted without considering applicable federal law. It is arbitrary and capricious because Defendants failed to consider an important aspect of the problem - *i.e.,* the cultural and customary practices protected in the Deeds of Cession.

As to Count II, Plaintiff asserts that the Deeds of Cession establish a trust relationship between the United States and American Samoa, and therefore the United States has a fiduciary duty to American Samoa. Plaintiff argues that the United States breached its fiduciary duty to American Samoa when Defendants adopted the 2016 LVPA Rule.

III. Counter-Motion[9]

Defendants first argue that all of Plaintiff's claims fail because Plaintiff lacks standing. Defendants' primary argument regarding the standing issue is that Plaintiff has not established that it has suffered any injury in fact because the Deeds of Cession do not reserve cultural fishing rights in federal waters because the deeds refer to land and property. See, e.g., Corp, of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 386 (D.C. Cir. 1987).

If this Court concludes that Plaintiff has standing, Defendants argue that the Court should rule in their favor on the merits of each claim. Defendants argue that the United States owns and has sovereign authority over the waters in question under the paramountcy doctrine and the Territorial Submerged Lands Act ("TSLA"), 15 U.S.C. §§ 1704-08. Defendants

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[9] Defendants argue that Defendant Kitty Simmonds is not a proper party in this case. [Counter-Motion at 14 n.7.] This issue is not properly before this Court because Defendants should have raised it in a motion to dismiss rather than in a footnote within their motion seeking summary judgment.

also assert that NMFS complied with the requirements of Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-66, in promulgating the 2016 LVPA Rule.

As to the alleged violations of the MSA, Defendants argue that the Deeds of Cession do not constitute "any other applicable law" that NMFS was required to ensure the proposed rule was consistent with. Further, even assuming that the Deeds of Cession do protect American Samoan cultural fishing rights and that the deeds constituted "any other applicable law" for purposes of the MSA, Defendants argue that NMFS adequately considered and responded to the concerns raised about the rule's impact on American Samoan fishing communities. Defendants assert that the 2016 LVPA Rule was ultimately adopted because the 2002 LVPA Rule was no longer necessary or appropriate under the MSA.

> Comment 3: Several commenters said that the large longline vessels are all vessels of the United States and should have the same right to fish in American Samoa waters as the small alia vessels.
>
> Response: NMFS agrees that all federally permitted American Samoa longline vessels are vessels of the United States. Furthermore, NMFS believes that all fishing sectors should be treated equally, unless there is a legitimate conservation and management need to treat them differently. Here, NMFS is approving an action that exempts large

longline vessels from an area that is currently restricted to them, but open to other fishing vessels, because the conditions that originally led to the restriction for the large longline vessels no longer exists. Specifically, NMFS and the Council established the LVPA in 2002 to separate small longline vessels from large longline and purse seine vessels, and reduce the potential for gear conflict and catch competition between small and large vessels. At that time, the American Samoa longline fishery consisted of about 40 small alia (small fishing catamarans less than 50 ft long) and 25 large conventional mono-hull longline vessels. However, **since 2006, fewer than three alia have been operating on a regular basis; and of these, only one was active in 2013 and 2014.**

As described in the EA, fewer than 50 other small commercial and recreational vessels fish for yellowfin and skipjack tunas and billfishes in nearshore waters and on offshore banks around American Samoa. Therefore, even accounting for the potential for competition with pelagic troll and recreational vessels, the conditions that led to the establishment of the LVPA in 2002 no longer support

> the full extent (30-50 nm) of the original prohibited area for longlining.
>
> . . . .

2016 LVPA Rule, 81 Fed. Reg. at 5260 (emphasis added). As to the factual evidence that was the basis for the 2016 LVPA Rule, Defendants argue that Plaintiff has not shown that NMFS failed to consider contradictory evidence or failed to articulate a rational basis for the rule.

Defendants contend that Count II is barred by the United States' sovereign immunity, and Plaintiff either abandoned or waived Count IV by failing to move for summary judgment.

STANDARD

The parties agree that this Court's review of the 2016 LVPA Rule is pursuant to the Magnuson-Stevens Act. When reviewing a regulation promulgated pursuant to the Magnuson- Stevens Act, a district court "shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (C), or (D) of" the APA. 16 U.S.C. § 1855(f)(1)(B). The APA provides, in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and]
> >
> > (D) without observance of procedure required by law[.]

5 U.S.C. § 706. Thus, the Ninth Circuit has stated:

> In reviewing regulations promulgated under the [Magnuson-Stevens Act], "our only function is to determine whether the Secretary [of Commerce] 'has considered the relevant factors and articulated a rational connection between the Facts found and the choice made.'" Alliance Against IFQs v. Brown, 84 F.3d 343, 345 (9th Cir. 1996) (quoting Wash. Crab Producers, Inc, v. Mosbacher, 924 F.2d 1438, 1440-41 (9th Cir. 1990)). "We

> determine only if the Secretary acted in an arbitrary and capricious manner in promulgating such regulations." Alliance Against IFQs, 84 F.3d at 345. "Under the APA, we will reverse the agency action only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." Lands Council v. Powell, 379 F.3d 738, 743 (9th Cir. 2004), amended by 395 F.3d 1019 (9th Cir. 2005).

Fishermen's Finest, Inc, v. Locke, 593 F.3d 886, 894 (9th Cir. 2010) (some alterations in Fishermen's Finest). "Even when an agency explains its decision with 'less than ideal clarity,'" the Court must uphold the action "if the agency's path may be reasonably discerned." San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 994 (9th Cir. 2014) (citation omitted). This deference is "at its highest where a court is reviewing an agency action that required a high level of technical expertise." Id.

The Ninth Circuit has stated that:

> "Review under the arbitrary and capricious standard is narrow, and we do not substitute our judgment for that of the agency." Ecology Ctr. v. Castaneda, 574 F.3d 652, 656 (9th Cir. 2009) (alterations omitted) (quoting Lands Council v. McNair (Lands Council II), 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *overruled on other grounds by*

> Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)) (internal quotation marks omitted). "Rather, we will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id. (quoting Lands Council II, 537 F.3d at 987) (internal quotation marks omitted).

Cascadia Wildlands v. Bureau of Indian Affairs, 801 F.3d 1105, 1110 (9th Cir. 2015). This showing is a "heavy burden." Managed Pharmacy Care v. Sebelius, 716 F.3d 1235, 1244 (9th Cir. 2013). The arbitrary and capricious standard

> requires the [agency] to articulate [] a rational connection between the facts found and the choice made. [We] review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubberstamp . . . administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute . . . .

Sierra Club v. U.S. E.P.A., 671 F.3d 955, 961 (9th Cir. 2012) (some alterations in Sierra Club) (citations and quotation marks omitted).

DISCUSSION

I. Judicial Notice

As noted *supra,* Defendants ask this Court to take judicial notice of the contents of the Convention of 1899 and the Deeds of Cession, and Plaintiff does not oppose the RJN.

A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). "The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 201(b)(2). The Convention of 1899 and the Deeds of Cession are historical documents that are subject to judicial notice. See, e.g. , United States v. States of Louisiana, et al., 363 U.S. 1, 12-13 (1960) ("Both sides have presented in support of their respective positions a massive array of historical documents, of which we take judicial notice."). Further, the versions of the documents submitted with the RJN were obtained from the American Samoa Bar Association, which is a source whose accuracy cannot reasonably be questioned regarding the authenticity of these documents. This Court therefore GRANTS Defendants' RJN.

II. Standing

At the outset, this Court must address Defendants' argument that Plaintiff lacks standing to pursue the claims in this case. The Ninth Circuit has stated that, in order to prove Article III standing, a plaintiff must establish:

> (1) the existence of an injury-in-fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1224-25 (9th Cir. 2008) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 807 F.3d 1031, 1043 (9th Cir. 2015). As to Plaintiff's claim that it has *parens patriae* standing:

> A claim of *parens patriae* standing is distinct from an allegation of direct injury. See Wyoming v. Oklahoma, 502 U.S. 437, 448-449, 451, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992). Far from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a "quasisovereign interest" "**apart** from the interests of particular private parties." Alfred L. Snapp & Son, Inc. v.

> Puerto Rico ex rel. Barez, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982) (emphasis added). Just as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III. Focusing on [the plaintiff state]'s interests as quasi-sovereign makes the required showing here harder, not easier. The Court, in effect, takes what has always been regarded as a **necessary** condition for *parens patriae* standing — a quasi-sovereign interest — and converts it into a **sufficient** showing for purposes of Article III.

Massachusetts v. E.P.A., 549 U.S. 497, 538 (2007) (emphases in Massachusetts) (some citations omitted). A "quasi-sovereign interest" is a "public or governmental interest[] that concern[s] the state as a whole." Id. at 520 n.17 (citations and quotation marks omitted).

The long-standing cultural significance of fishing in American Samoa is well recognized. During the rule-making process that led to the adoption of the 2002 LVPA Rule, the Council stated:

> American Samoans are among the last full-blooded Polynesians. Their

dependence on fishing undoubtedly goes back as far as the peopled history of the Samoa islands, about 3,500 years ago. Many aspects of the culture have changed in contemporary times but Samoans have retained a traditional social system that continues to strongly influence and depend upon the culture of fishing. . . .

Traditional Samoan values still exert a strong influence on when and why people fish, how they distribute their catch and the meaning of fish within the society. When distributed, fish and other resources move through a complex and culturally embedded exchange system . . . .

. . . .

American Samoa has a long history of harvesting pelagic fish species, especially skipjack and small yellowfin tuna, which has special significance in customary exchanges. Due to a rapidly growing population and overexploitation of some inshore seafood resources, the American Samoa community is becoming even more dependent on pelagic fish for food, employment and income from fisheries and for perpetuation of *fa'a Samoa* (Samoan cultural heritage and way of

> life). Despite increasing commercialization, the small-scale pelagic fishery continues to contributes [sic] strongly to the cultural identity and social cohesion of American Samoa. The role of pelagic fish in meeting cultural obligations is at least as important as the contributions made to nutritional or economic well-being of island residents.

[AR at F072-73 (citations omitted) .[10]] The cultural exchange system for food and other resources supports "extended families and traditional leaders." [AR at H203.] Alia fishermen are also expected to contribute fish for ceremonial purposes. [Id. at H204.] The 2002 LVPA Rule established the LVPA zone "for the sole use of local *alia* (traditional fishing boat) fishermen and thereby [made it] available to the indigenous population of American Samoa to nurture and practice traditional methods of fishing with canoes, alias and other traditional vessels, an art that is fast disappearing." [AR at E271 (page 2 of official comment on the proposed 2016 LVPA Rule by Lolo M. Moliga, Governor of American Samoa).]

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[10] AR at F053-145 is the Council's Prohibition on fishing for pelagic management unit species within closed areas around the islands of American Samoa by vessels more than 50 feet in length - Framework Measure under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region, dated November 1, 2000 and revised December 4, 2001.

This Court FINDS that, in light of the long-standing significance of fishing to the *fa'a Samoa,* Plaintiff has a quasi-sovereign interest in protecting the American Samoan's cultural fishing rights to preserve their culture for the benefit of the American Samoan people as a whole. This is a separate and distinct interest from the interests of individual American Samoans who would arguably have standing to challenge the 2016 LVPA Rule because the rule allegedly impairs their ability to fish for cultural, and other, purposes.

The record includes comments to the proposed 2016 LVPA Rule addressing the effect that the reduction in the size of the LVPA would have on the American Samoan's fishing practices:

> By allowing large fishing vessels to invade the LVPA, the Council's proposed action threatens to rob the people of these islands of the opportunity to nurture and practice their culture, let alone access the natural resources surrounding their islands. The large long liners, with fishing lines extending many miles present a real risk of entanglement with fishing equipment of alia fishermen. These vessels, with larger catching capacity, could easily deplete the fishing stock; and their presence in these waters will likely discourage local fishermen from practicing traditional fishing methods for fear of being run over by the larger long liners.

[AR at E271-72 (the Governor's Official Comment).]

> [T]he influx of any, let alone 23 longline vessels owned by persons who are not beneficiaries of the [Deeds of Cession], will surely undermine the treatied peoples' property interests in the marine waters and resources within the present LVCA-50 [sic], and create unbalanced competition that will further threaten the collapse of the traditional alia fishing community. . . .

[AR at E353 (page 4 of the Joint Resolution).]

In light of this and other similar evidence, this Court FINDS that Plaintiff has demonstrated an injury-in-fact - the loss of the American Samoan cultural fishing practice - that is fairly traceable to the adoption of the 2016 LVPA Rule. Further, this Court FINDS that: the injury is concrete, particularized, and sufficiently imminent for purposes of Article III standing; and the imminent injury is likely to be redressed by a decision in Plaintiff's favor, because invalidating the 2016 LVPA Rule would reinstate the LVPA established in the 2002 LVPA Rule.

Because this Court has found that Plaintiff has demonstrated both a quasi-sovereign interest and all three elements of Article III standing, this Court CONCLUDES that Plaintiff has *parens patriae* standing to challenge the 2016 LVPA Rule in the instant case. This Court DENIES Defendants' Counter-Motion as to Defendants' request for

summary judgment on the ground that Plaintiff lacks standing.

This Court now turns to the merits of Plaintiff's claims.

III. Count I

Count I alleges that the 2016 LVPA Rule is invalid because NMFS failed to ensure that the rule was consistent with the Deeds of Cession.

A. Paramountcy Doctrine, TSLA, and CZMA

At the outset, this Court acknowledges that Defendants assert that the United States has authority over the waters at issue in this case pursuant to the paramountcy doctrine, the TSLA, and the CZMA. This Court also recognizes that at least some American Samoans have taken the position that American Samoa owns those waters. See, e .q. , AR at E353 (Joint Resolution page 4) (asserting that the Deeds of Cession were "understood by the original treaty signers, among other things, to include the guaranteed right of continued **ownership** and unhindered access of the treaty protected people **to the vast marine waters ceded** for their exclusive benefit" (emphases added)). However, the dispute over the ownership of the waters is not before this Court in this case. This case addresses only the validity of the 2016 LVPA Rule, which reduced the LVPA established in the 2002 LVPA Rule at approximately fifty nautical miles to twelve nautical miles. The issue before this Court in Count I is whether NMFS violated the MSA by failing to ensure that the adoption of the 2016

LVPA Rule was consistent with the Deeds of Cession. This Court therefore concludes that it does not need to address Defendants' arguments regarding the paramountcy doctrine, the TSLA, and the CZMA.

B. MSA - 16 U.S.C. § 1854(c)(7)

As previously stated, the MSA requires that any final regulation promulgated "be consistent with the fishery management plan, with the national standards and other provisions of this chapter, and with any other applicable law." 16 U.S.C. § 1854(c)(7). The MSA does not contain a definition of what is considered "any other applicable law," nor is this Court aware of any case law addressing the issue. The NMFS Operational Guidelines for the Magnuson-Stevens Fishery Conservation and Management Act Fishery Management Process (Sept. 30, 2015), http://www.fisheries.noaa.gov/sfa/laws_policies/operational_ guidelines/index.html ("NMFS Operational Guidelines"), states:

> Section 303(a)(1)(C) of the MSA requires federal fishery management plans to be consistent with other applicable laws. NMFS must also review Council-recommended FMPs, amendments, and regulations to determine whether they are consistent with other applicable law. **These other laws impose additional procedural, substantive, and timing requirements on the decision process.** The particular laws that apply to any given action must be assessed on a case-by-case basis. This section

> provides an overview of the other applicable laws and executive orders that most frequently apply, including but not limited to the:
>
> - Administrative Procedure Act
> - Coastal Zone Management Act
> - Endangered Species Act
> - Executive Orders 12630, 12866, 12898, 13089, 13132, 13158, 13175, 13272
> - Information Quality Act
> - Marine Mammal Protection Act
> - National Environmental Policy Act
> - National Marine Sanctuaries Act
> - Paperwork Reduction Act
> - Regulatory Flexibility Act[.]

NMFS Operational Guidelines, Appendix 2 (Description of the Fishery Management Process) at 9-10 (emphasis added). The Deeds of Cession were accepted, ratified, and confirmed in 48 U.S.C. § 1661. Although they are not among the frequently applied "other applicable law," they are federal law and they constitute "any other applicable law" for purposes of § 1854(c)(7) if they imposed additional procedural or substantive requirements on the rule-making process that culminated in the 2016 LVPA Rule.[11]

Defendants argue that the Deeds of Cession did not impose additional requirements on the rule-

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[11] Plaintiff's challenge to the 2016 LVPA Rule does not present timing issues.

making process at issue in this case because the deeds do not address offshore fishery resources. Defendants assert that the deeds are evidence "Congress' policy of respecting Samoan traditions concerning **land** ownership." Hodel, 830 F.2d at 386 (emphasis added). Although the D.C. Circuit's opinion in Hodel and the underlying district court order, 637 F. Supp. 1398 (D.D.C. 1986), appear to be the only federal cases addressing the Deeds of Cession, these decisions are not binding on this Court. Moreover, Hodel involved a dispute arising from the High Court of American Samoa's decision invalidating a 1953 deed issued when the appellant purchased land in American Samoa. 830 F.2d at 376. Only issues of land ownership were before the D.C. Circuit in that case; the issue of whether the Deeds of Cession preserve more than American Samoan "traditions concerning land ownership" was not before the court. Thus, Hodel does not support Defendants' position that the Deed of Cession only require the United States to preserve American Samoan traditions concerning land ownership.

The Cession of Tutuila and Aunu'u requires the United States to "respect and protect the individual rights of all people dwelling in Tutuila to their **lands and other property** in said District." [RUN, Attachment at 4, H 2 (emphasis added).] The use of the word "lands" and the word "property" indicates that "property" is not limited to land/real property. Further, paragraph 2 goes on to state that, if the United States government "require[s] **any land or any other thing** for Government uses, the Government may take the same upon payment of a

fair consideration for the land, or other thing, to those who may be deprived of their **property** on account of the desire of the Government." [Id. (emphases added).] The use of the word "thing" as distinct from "property" indicates that "property" is not limited to tangible property - such as, for example, a right of access necessary to engage in certain cultural practices.

The Cession of Manu'a Islands expressly recognizes "the rights of the Chiefs in each village and of all people concerning their **property according to their customs."** [Id. at 6 (emphasis added).] The Cession of Manu'a Islands does not include the same references to lands, property, and things, but it is clear from the document as a whole that it is intended to be read together with, and consistently with, the Cession of Tutuila and Aunu'u.[12] This Court therefore concludes that the term "property" in the Cession of Manu'a Islands has the same meaning as the term

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[12] The Cession of Manu'a Islands describes inter *alia,* the 12 Cession of Tutuila and Aunu'uand states:

> And Whereas, Tuimanu'a and his chiefs, being content and satisfied with the justice, fairness, and wisdom of the government as hitherto administered by the several Commandants of the United States Naval Station, Tutuila, and the officials appointed to act with the Commandant, are desirous of placing the Islands of Manu'a hereinafter described under the full and complete sovereignty of the United States of America to enable said Islands, with Tutuila and Aunu'u, to become a part of the territory of said United States[.]
>
> [RUN, Attachment at 6.]

"property" in the Cession of Tutuila and Aunu'u. Further, reading the deeds together, the "individual rights of all people dwelling in Tutuila to their lands and other property" referred to in the Cession of Tutuila and Aunu'u includes customary uses of the people's property referred to in the Cession of Manu'a Islands.

It is true that the Deeds of Cession do not expressly state that "property" includes offshore fishery resources, nor do the deeds identify fishing as one of the protected customary practices. However, those facts are not dispositive. In Parravano v. Babbitt, the Ninth Circuit addressed the following issue:

> Under the Magnuson Act, the Secretary of Commerce may issue emergency regulations to achieve consistency with the national standards set forth in the Act and "any other applicable law." 16 U.S.C. §§ 1853(a)(1)(C), 1854(a)(1)(B). Indian fishing rights that exist under federal law may constitute "any other applicable law." Washington State Charterboat Ass'n v. Baldrige, 702 F.2d 820, 823 (9th Cir. 1983), cert, *denied,* 464 U.S. 1053, 104 S. Ct. 736, 79 L. Ed. 2d 194 (1984) (Northwest Indian treaty fishing rights constitute "other applicable law" under Magnuson Act). Therefore, the question before this court is whether the Hoopa Valley and Yurok Tribes retain federally reserved fishing

> rights that constitute "any other applicable law" within the meaning of the Magnuson Act....

70 F.3d 539, 544 (9th Cir. 1995). The Ninth Circuit ultimately held that the tribes did have fishing rights which constituted "any other applicable law," even though the executive orders establishing the tribes' reservation did not expressly identify fishing rights.

> [T]he 1876 and 1891 executive orders first created and then extended a reservation "for Indian purposes" along the main course of the Klamath River. Donnelly [v. United States] , 228 U.S. [243,] 253, 33 S. Ct. [449,] 451 [(1913)]. We have never encountered difficulty in inferring that the Tribes' traditional salmon fishing was necessarily included as one of those "purposes." See United States v. Wilson, 611 F. Supp. 813, 817-18 (N.D. Cal. 1985), *rev'd on other grounds sub. now.,* United States v. Eberhardt, 789 F.2d. 1354 (9th Cir. 1986). Our interpretation accords with the general understanding that hunting and fishing rights arise by implication when a reservation is set aside for Indian purposes. See Menominee Tribe v. United States, 391 U.S. 404, 406, 88 S. Ct. 1705, 1707, 20 L. Ed. 2d 697 (1968); Pacific Coast [Fed'n of Fishermen's Ass'n, Inc, v. Sec'v of Commerce], 494 F.

> Supp. [626,] 632 [(N.D. Cal. 1980)]. Thus, we reject
>
> Parravano's novel theory that ambiguity in the phrase "for Indian purposes" should be resolved against the Tribes.

Id. at 545-46. The cited portion of Menominee Tribe stated:

> Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree with the Court of Claims that the language "to be held as Indian lands are held" includes the right to fish and to hunt. The record shows that the lands covered by the Wolf River Treaty of 1854 were selected precisely because they had an abundance of game. See Menominee Tribe of Indians v. United States, 95 Ct. Cl. 232, 240—241 (1941). The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.

391 U.S. at 406 (footnotes omitted).

Defendants are correct when they emphasize that American Samoa is a territory, not a Native American tribe, but Plaintiff does not rely on Parravano because Plaintiff is asserting that the federal courts should treat American Samoa - or United States territories in general - in the same manner that they treat Native

American tribes. Plaintiff merely relies on Parravano for the proposition that cultural practices can be protected by inference. Like the executive orders that established the reservation in Parravano and the treaty granting the reservation in Menominee Tribe, neither of which expressly referred to the specific traditional practice at issue in the case, the Deeds of Cession preserved the American Samoans' right to use their "property" to continue their customary practices, but the deeds do not specifically identify those customary practices. The American Samoans are an island people and, as previously stated, their history of fishing practices goes back thousands of years, *i.e.* their fishing customs were well- established at the time of cession. Pursuant to Parravano, this Court CONCLUDES that the American Samoans' right to use their "property" to continue their customary fishing practices is reserved by implication in the Deeds of Cession.

Because the Deeds of Cession require the United States to respect the American Samoans' customary fishing practices, this Court CONCLUDES that the deeds imposed additional procedural or substantive requirements on the rule-making process that culminated in the 2016 LVPA Rule. Therefore, the Deeds of Cession constitute "any other applicable law," which the 2016 LVPA Rule must be consistent with pursuant to § 1854(c) (7).

Defendants argue that NMFS did consider the American Samoans' interest in cultural fishing practices prior to adopting the 2016 LVPA Rule. Defendants emphasize that NMFS considered the

impact on American Samoan fishing, and both the 2016 LVPA Rule and the 2016 LVPA EA state that NMFS will "annually review[ ] the effects of the 2016 LVPA Rule on catch rates, small vessel participation, and sustainable fisheries development initiatives." [Counter-Motion at 28 (citing AR at Al, 125-35).] However, the consideration of American Samoan cultural fishing practices in general is not enough. This Court has concluded that the Deeds of Cession require the United States to preserve American Samoan cultural fishing practices and that the deeds constitute "any other applicable law" for purposes of the MSA. Thus, the 2016 LVPA Rule should not have been adopted without a determination that the proposed rule was consistent with, *inter alia,* the Deeds of Cession.

Based upon Defendants' positions in this case, it is clear that NMFS did not consider whether the proposed rule that eventually became the 2016 LVPA Rule was consistent with the Deeds of Cession. Because NMFS failed to consider whether the proposed rule was consistent with the Deeds of Cession, it "entirely failed to consider an important aspect of the problem," and therefore the adoption of the 2016 LVPA Rule was arbitrary and capricious.[13]

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[13] This Court does not need to address Defendants' argument that the changed circumstances between 2002 and 2016 warranted the reduction in the size of the LVPA. Even accepting Defendants' characterization of the evidence before the NMFS, it was still required to consider that evidence in light of the United States' obligation under the Deeds of

See Cascadia Wetlands, 801 F.3d at 1110. This Court CONCLUDES that the 2016 LVPA Rule is invalid and GRANTS the Motion as to Plaintiff's request for summary judgment on Count I. In light of this Court's ruling, this Court DENIES the Counter-Motion as to Defendants' request for summary judgment on Count I.

IV. Remaining Claims

Because this Court has ruled in Plaintiff's favor as to Count I and concluded that the 2016 LVPA Rule is invalid, this Court does not need to reach the merits of Counts II, III, and IV, all of which are essentially alternate theories of why the 2016 LVPA Rule is invalid. This Court therefore DISMISSES Counts II, III, and IV as MOOT, and DENIES the remaining portions of Plaintiff's Motion and Defendants' Counter-Motion.[14]

CONCLUSION

On the basis of the foregoing, Plaintiff's Motion for Summary Judgment, filed July 25, 2016, is HEREBY GRANTED IN PART AND DENIED IN PART. Specifically, the Court GRANTS Plaintiff's Motion as to Count I, insofar as this Court ORDERS that the Final rule regarding Pacific Island Pelagic Fisheries;

Cession to protect American Samoan cultural fishing practices.

[14] Because this Court has dismissed Count IV as moot, this Court does not need to address Defendants' argument that Plaintiff abandoned or waived Count IV by failing to move for summary judgment on that claim.

Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area, 81 Fed. Reg. 5619 (Feb. 3, 2016), be VACATED AND SET ASIDE.

Further, the remaining claims, Counts II, III, and IV, are HEREBY DISMISSED AS MOOT. Plaintiff's Motion is therefore DENIED AS MOOT as to Plaintiff's request for summary judgment on Counts II, III, and IV. Defendants' Counter-Motion for Summary Judgment is HEREBY DENIED in its entirety.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, March 20, 2017.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil 16-00095 LEK-KJM

TERRITORY OF AMERICAN SAMOA,
Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; PENNY PRITZKER, SECRETARY OF COMMERCE; KITTY SIMONDS, EXECUTIVE DIRECTOR OF WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL; EILEEN SOBECK, ASSISTANT ADMINISTRATOR FOR FISHERIES; MICHAEL D. TOSATTO, REGIONAL ADMINISTRATOR FOR NOAA'S NATIONAL MARINE FISHERIES SERVICE PACIFIC ISLANDS REGIONAL OFFICE,
Defendants.

Filed: Aug. 10, 2017

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION AND TO AMEND THE COURT'S JUDGMENT (DKT. NO. 48)

PURSUANT TO LOCAL RULE 60.1 AND FEDERAL RULE OF CIVIL PROCEDURE 59(E)

On May 9, 2017, Defendants National Marine Fisheries Service ("NMFS"); United States Department of Commerce ("DOC"); National Oceanic and Atmospheric Administration ("NOAA"); Wilbur Ross, in Ins official capacity as the Secretary of Commerce; Kitty Simonds, in her official capacity as Executive Director of the Western Pacific Regional Fishery Management Council ("the Council"); Samuel D. Rauch, in Iris official capacity as Acting Assistant Administrator for Fisheries. NMFS; and Michael D. Tosatto, in his official capacity as Regional Administrator, NMFS Pacific Islands Regional Office (all collectively, "Defendants") filed their "Motion for Reconsideration and to Amend the Court's Judgment (Dkt. No. 48) Pursuant to Local Rule 60.1 and Federal Rule of Civil Procedure 59(e)" ("Motion for Reconsideration"). [Dkt. no. 49.] Plaintiff Territory of American Samoa ("Plaintiff") filed its memorandum in opposition on May 25, 2017, and Defendants filed their reply on June 8, 2017. [Dkt. nos. 56, 57.]

The Court has considered the Motion for Reconsideration as a non-hearing matter pursuant to Rule LR7.2(e) of the Local Rules of Practice of the United States District Court for the District of Hawai'i ("Local Rules"). On July 31, 2017, this Court issued an entering order informing the parties that the Motion for Reconsideration was denied ("7/31/17 EO Ruling"). [Dkt. no. 59.] The instant order supersedes the 7/31/17 EO Ruling, and Defendants' Motion for

Reconsideration is hereby denied for the reasons set forth below.

BACKGROUND

On March 20, 2017, this Court issued its Order Granting in Part and Denying in Part Plaintiffs Motion for Summary Judgment and Denying Defendants' Counter-Motion for Summary Judgment ("3/20/17 Order").[1] [Dkt. no. 45.[2]] This Court concluded that the NMFS, NOAA, and DOC "Final rule regarding Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area." ("LVPA" and "2016 LVPA Rule") issued on February 3, 2016,[3] was invalid because NMFS failed to consider whether the proposed rule was consistent with the Deeds of Cession.[4] 3/20/17 Order, 2017 WL 1073348,

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[1] Plaintiff filed its Motion for Summary Judgment on July 25, 2016 ("Plaintiff's Motion"), and Defendants filed a Counter-Motion for Summary Judgment on October 24, 2016 ("Counter-Motion," and collectively "Motions for Summary Judgment"). [Dkt. nos. 23, 28.] The hearing on the Motions for Summary Judgment was held on February 13, 2017. [Minutes, filed 2/13/17 (dkt. no. 40).]

[2] The 3/20/17 Order is also available at 2017 WL 1073348.

[3] The 2016 LVPA Rule is available at 81 Fed. Reg. 5619.

[4] The "Deeds of Cession" refer to the Tutuila and Aunu'u Deed of Cession, dated April 17, 1900, and the Manu'a Deed of Cession, dated July 14, 1904. See 3/20/17 Order, 2017 WL 1073348, at *3.

at *17. Plaintiffs request for summary judgment on Count I—which alleged that the 2016 LVPA Rule violated the Magnuson-Stevens Fishery Conservation and Management Act ("MSA")—was granted and the 2016 LVPA Rule was vacated. Plaintiffs' request for summary judgment as to Counts II, III, and IV was denied as moot, and Defendants' Counter-Motion was denied in its entirety. Id.

Final judgment was entered on April 11, 2017. [Dkt. no. 48.] The Motion for Reconsideration followed.

DISCUSSION

I. Applicable Standards

Defendants bring the Motion for Reconsideration pursuant to Local Rule 60.1 and Fed. R. Civ. P. 59(e). Local Rule 60.1 states:

> Motions for reconsideration of interlocutory orders may be brought only upon the following grounds:
>
> > (a) Discovery of new material facts not previously available;
> >
> > (b) Intervening change in law;
> >
> > (c) Manifest error of law or fact.
>
> Motions asserted under Subsection (c) of this rule must be filed and served not more than fourteen (14) days after the court's written order is filed. . . .

Defendants apparently invoke Local Rule 60.1(a) because they have submitted a new declaration by Defendant Tosatto, with exhibits, three of which are reports of fishery data from 2016. [Motion for Reconsideration, Decl. of Michael D. Tosatto, Exhs. C-E.[5]] The report that is Exhibit C was issued on April 28, 2017, and the reports that are Exhibits D and E are revisions of preliminary estimates provided on March 8, 2017. While these particular reports were not available to Defendants while this Court was considering the Motions for Summary Judgment, the information contained in them was available to Defendants, at least in some form. Thus, the evidence presented with the Motion for Reconsideration does not constitute "new material facts not previously available," and the motion cannot be considered pursuant to Local Rule 60.1(a).

The Motion for Reconsideration alleges that this Court made manifest errors of law or fact. Because a motion brought pursuant to Local Rule

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[5] Exhibit A is a letter dated May 3, 2017 to the Governor of American Samoa from the Tautai O Samoa Longline & Fishing Association ("the Association"), stating the Association's position on a proposal to amend the LVPA to twenty five miles from shore. While this Court respects the Association's position, it declines to consider the letter because the letter is not relevant to the legal issues presented in the Motion for Reconsideration. Exhibit B is a NMFS and NOAA Final rule, 70 Fed. Reg. 29646 (May 24, 2005), which is legal authority that was available to the parties and this Court while the Motions for Summary Judgment were pending.

60.1(c) must be filed within fourteen days after the filing and service of the court's order, Defendants' request for reconsideration pursuant to Local Rule 60.1(c) is untimely. This Court's order was filed on March 20, 2017, but Defendants did not file the Motion for Reconsideration until May 9, 2017.

To the extent the Motion for Reconsideration relies on Local Rule 60.1, it is denied. Only Defendants' arguments based on Rule 59(e) will be considered.[6] Because Rule 59(e) states, "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Defendants' Motion for Reconsideration is timely, to the extent it is based upon Rule 59(e).

> Rule 59(e) offers "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Carroll v, Nakatani, 342 F.3d 934, 945 (9th Cir. 2003) (internal quotation marks and citation omitted). In the Ninth Circuit, a successful motion for reconsideration must accomplish two goals. First, "a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision." Na Marno O 'Aha 'Ino v, Galiher, 60 F. Supp.

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[6] This is largely a distinction without a difference because the standards for reconsideration under Rule 59(e) and reconsideration under Local Rule 60.1 are the same.

2d 1058, 1059 (D. Haw. 1999). Second, it "must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Id.

Courts have established three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. Allstate Ins. Co. v. Herron, 634 F.3d 1101. 1111 (9th Cir. 2011); Mustafa v. Clark County Sch, Dist., 157F.3d 1169,1178-79 (9th Cir. 1998). The District of Hawaii has implemented these standards in Local Rule 60.1.

Mere disagreement with a previous order is an insufficient basis for reconsideration. See Leong v, Hilton Hotels Corp., 689 F. Supp. 1572. 1573 (D. Haw. 1988) (Kay. J.). In addition, a Rule 59(e) motion for reconsideration may not present evidence or raise legal arguments that could have been presented at the time of the challenged decision. See Kona Enters., Inc, v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). "Whether or not to grant reconsideration is committed to the sound discretion of the court." Navajo Nation v. Confederated Tribes and

Bands of the Yakama Indian Nation, 331 F.3d 1041. 1046 (9th Cir. 2003).

United States ex rel. Atlas Copco Compressors LLC v. RWT LLC, Civ. No. 16-00215 ACK-KJM. 2017 WL 2986586, at *1-2 (D. Hawai`i July 13, 2017), *appeal filed*, No. 17-80147 (9th Cir. July 25. 2017).

II. Defendants' Arguments

Defendants choose to limit their request for reconsideration to the issues of standing and remedy. [Mem. in Supp. of Motion for Reconsideration at 1.] Defendants first argue that this Court committed clear error when it concluded that "Plaintiff has *parens patriae* standing to challenge the 2016 LVPA Rule in the instant case." See 3/20/17 Order, 2017 WL 1073348, at *13. Defendants argue that: neither a state nor a territory can have *parens patriae* standing to sue the United States government; and, even if it were possible for Plaintiff to have *parens patriae* standing, clear error was committed in concluding that Plaintiff satisfied the required elements for *parens patriae* standing.

If Defendants' standing argument is unsuccessful. Defendants argue that reconsideration is still warranted because vacatur of the 2016 LVPA Rule is an inappropriate remedy. Defendants urge remand without vacatur of the rule and permission to complete the rule making process on remand within fifteen months.

At the outset, the Court is disappointed that Defendants are raising arguments for the first time in the Motion for Reconsideration. Plaintiff asserted

parens patriae standing in response to the Counter-Motion's argument that Plaintiff lacked standing, and Plaintiff consistently requested vacating the 2016 LVPA Rule in its filings related to the Motions for Summary Judgment. [Mem. in Supp. of Combined Reply in Supp. of Pltf.'s Motion & Opp. to Counter-Motion ("Combined Reply & Opp."), filed 12/8/16 (dkt. no. 35), at 2-7 (arguing that Plaintiff satisfies the requirements of both *parens patriae* standing and Article III standing); Mem. in Supp. of Pltf.'s Motion at 20 ("the Court should nullify the 2016 LVPA Rule"); Mem. in Supp. of Pltf.'s Combined Reply & Opp. at 15 (asking this Court to "enjoin Defendants from implementing the 2016 LVPA until all applicable laws and the requirements of the [Administrative Procedures Act ("APA")] are fulfilled").]

Defendants had the opportunity to address the *parens patriae* argument, but chose not to do so. See Defs.' Reply in Supp. of Counter-Motion ("Defendants' Reply"), filed 1/19/17 (dkt. no. 39), at 4 ("a response to Plaintiffs contention that it has *parens patriae* standing would be futile"). Defendants disingenuously state that "[t]he parties did not brief remedy, nor did the Court invite briefing on remedy." [Mem. in Supp. of Motion for Reconsideration at 11.] To the contrary, Plaintiff clearly sought vacatur. If Defendants believed that vacatur would be inappropriate, they had every opportunity to present that argument in their Counter-Motion and in Defendants' Reply. No invitation is needed to address arguments clearly presented in the submitted briefs.

It is well-settled that a court will not grant reconsideration based on evidence and legal arguments that could have been presented in connection with the underlying motion. See, e.g., Kona Enters., 229 F.3d at 890. Thus, outright denial is permissible since Defendants could have (but did not) raised both the *parens patriae* argument and remand without vacatur argument in the underlying Motions for Summary Judgment. However, for the sake of completeness, the merits of Defendants' arguments will be addressed.

A. Parens Patriae

Defendants' position is based on Alfred L, Snapp & Sons, Inc, v. Puerto Rico ("Snapp"), 458 U.S. 592 (1982). There, the United States Supreme Court held that the Commonwealth of Puerto Rico had *parens patriae* standing to sue the defendants for alleged violations of federal law. Although the defendants in Snapp were private defendants, the Supreme Court noted:

> A State does not have standing as *parens patriae* to bring an action against the Federal Government. Massachusetts v, Mellon, 262 U.S. 447, 485-486, 43 S. Ct. 597, 600-601, 67 L. Ed. 1078 (1923) ("While the State, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v, Illinois, 180 U.S. 208, 241, 21 S. Ct. 331, 343, 45 L. Ed. 497 [(1901)]), it is no part of its duty or power to enforce their rights in respect of their relations with

> the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae") . . . .*

Id. at 610 n. 16. Clearly, a state—or a United States territory— cannot assert *parens patriae* in a case like Snapp. The instant case, however, is not like Snapp.

In Snapp, the Commonwealth of Puerto Rico "sought declaratory relief with respect to the past practices of petitioners and injunctive relief requiring petitioners to conform to the relevant federal statutes and regulations in the future." Id. at 598-99. In contrast, Plaintiff seeks judicial review, pursuant to the APA and the MSA, of an agency rule. This Court agrees with Plaintiff that this type of *parens patriae* action is possible, as recognized in Massachusetts v. EPA, 549 U.S. 497 (2007). In Massachusetts v. EPA, "a group of 19 private organizations filed a rulemaking petition asking [the Environmental Protection Agency ("EPA")] to regulate greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act." Id. at 510 (footnote, citation, and internal quotation marks omitted). The EPA issued an order denying the rulemaking petition, and the petitioners, "joined by intervenor States and local governments, sought review of EPA's order in the United States Court of Appeals for the District of Columbia Circuit." Id. at 511, 514. Noting that only one of the petitioners on appeal needed to establish standing to permit review, the Supreme Court focused on Massachusetts's interests, and ultimately held that the petitioners on

appeal had standing. Id. at 519, 526. The Supreme Court noted:

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. See Alfred L, Snapp & Son, Inc, v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982) ("One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers").
>
> These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the "emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be

> anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a) (1). Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607 (b) (1). Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.

Id. at 519-20 (alteration in Massachusetts v. EPA) (footnote omitted). The Supreme Court specifically rejected the dissent's argument that Snapp precluded *parens patriae* cases and noted that "Massachusetts does not here dispute that the Clean Air Act applies to its citizens; it rather seeks to assert its rights under the Act." Id. at 520 n.17.

Similarly, here, while Plaintiff arguably could prevent large vessels from American Samoa from fishing in the LVPA, it has no power to prevent foreign vessels from doing so. Under the MSA, the LVPA is within the federal government's "exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone ('EEZ'), which extends from the seaward 7 boundary of each coastal state to 200 miles offshore."[7] 3/20/17 Order, 2017 WL 1073348, at

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[7] American Samoa is considered a "state" for purposes of the MSA. 16 U.S.C. § 1802(40).

*2 (footnote, internal quotation marks, and some citations omitted) (quoting Chinatown Neighborhood Ass'n v, Harris, 794 F.3d 1136, 1139 (9th Cir. 2015)). The MSA requires NMFS to protect the resources in the LVPA by adopting rules and regulations that are "consistent with the fishery management plan, with the national standards and other provisions of this chapter, and with any other applicable law." See 16 U.S.C. § 1854(c)(7). The Deeds of Cession constitute "any other applicable law," with which NMFS rules and regulations must be consistent. 3/20/17 Order, 2017 WL 1073348, at *16. Plaintiff is not seeking to apply the MSA to its people; it seeks to assert its rights under the MSA by using the APA's established procedure to challenge arbitrary and capricious agency action. As articulated in Massachusetts v. EPA, Plaintiff may assert *parens patriae* standing to challenge the 2016 LVPA Rule.

The cases upon which Defendants' argument rely were either issued prior to Massachusetts v. EPA or are distinguishable. One case cited. Sierra Forest Legacy v. Sherman, 646 F.3d 1161 (9th Cir. 2011), was decided after Massachusetts v. EPA and thus needs to be addressed. In Sierra Forest, the Ninth Circuit concluded that "California, like all states, 'does not have standing as *parens patriae* to bring an action against the Federal Government'" Id. at 1178 (quoting Alfred L, Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 610 n.16, 102 S. Ct. 3260. 73 L. Ed. 2d 995 (1982)). The Ninth Circuit, however, also recognized that: "States are also not 'normal litigants for the purposes of invoking federal jurisdiction'"; and the "'well-founded desire to preserve [a state's] sovereign

territory' 'support[s] federal jurisdiction,' which may be further reinforced by ownership of 'a great deal of the territory alleged to be affected' by a challenged federal action." Id. (alterations in Sierra Forest) (some citations and internal quotation marks omitted) (quoting Massachusetts v. EPA, 549 U.S. at 518, 519). Of significance to the matter at hand, it held that "the State of California ha[d] concrete and particularized interests protected by the application of" the National Environmental Policy Act ("NEPA") to the United States Forest Service's 2004 Sierra Nevada Forest Plan Amendment ("2004 Framework"), and "California ha[d] standing to assert a facial NEPA claim against the 2004 Framework." Id. at 1178-79. Thus, Sierra Forest supports Plaintiffs *parens patriae* standing to challenge agency action in this case, namely, the 2016 LVPA Rule.

Defendants' argument that Snapp and similar cases preclude Plaintiff from asserting *parens patriae* standing in this case is rejected. As to Defendants' contention that, even if Plaintiff can assert *parens patriae* standing, it does not meet the *parens patriae* requirements in this case, their arguments merely disagree with this Court's analysis in the 3/20/17 Order, and such disagreement does not constitute sufficient grounds for reconsideration. See Barnes v. Sea Hawaii Rafting. LLC, 16 F. Supp. 3d 1171, 1183 (D. Hawai'i 2014) ("Mere disagreement with a

previous order is an insufficient basis for reconsideration." (citation omitted)).[8]

To the extent that Defendants' Motion for Reconsideration challenges this Court's ruling on the standing issue, the motion is denied.

B. Remedy

Defendants argue that, even if the standing argument is rejected, "the remedy of vacatur is unjust and the Court should exercise its discretion to leave the 2016 LVPA Rule in place during remand." [Mem. in Supp. of Motion for Reconsideration at 21.] Defendants acknowledge that, under the APA, "where an agency rule is found to be arbitrary and capricious or otherwise not in accordance with law. the proper course, except in rare circumstances. is to remand to the agency[.']" [Id. (quoting INS v. Orlando Ventura, 537 U.S. 12, 16 (2002)).] Defendants argue that this is one of the rare circumstances where remand without vacatur is warranted because the seriousness of the error in the 2016 LVPA Rule is outweighed by the "'disruptive consequences' of vacatur." [Id. at 22 (quoting Cal. Cmtys. Against Toxics v. EPA, 688 F.3d

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[8] Even if this Court concluded that it was not possible for Plaintiff to have parens patriae standing to challenge the 2016 LVPA Rule, this Court would still find that Plaintiff "has concrete and particularized interests protected by the application of [the MSA] to the [2016 LVPA Rule]." See Sierra Forest, 646 F.3d at 1178. For the reasons stated in the 3/20/17 Order, 2017 WL 1073348, at *13, this Court would conclude that Plaintiff has standing to raise a direct challenge the 2016 LVPA Rule.

989, 992 (9th Cir. 2012)).] Further, Defendants represent that "NMFS can correct its error through a rulemaking process that should take no longer than fifteen months." [Id. at 21] In California Communities, the Ninth Circuit stated:

> A flawed rule need not be vacated. See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995); W. Oil & Gas Ass'n v, EPA, 633 F.2d 803, 813 (9th Cir. 1980). Indeed, "when equity demands, the regulation can be left in place while the agency follows the necessary procedures" to connect its action. Idaho Farm Bureau, 58 F.3d at 1405. Even though the agency's error was significant in Idaho Farm Bureau, we didn't vacate the agency's rule because that could have wiped out a species of snail. Id. at 1405-06. Similarly, in Western Oil and Gas, we didn't order vacatur because doing so would have thwarted "the operation of the Clean Air Act in the State of California during the time the deliberative process [was] reenacted." 633 F.2d at 813.
>
> Whether agency action should be vacated depends on how serious the agency's errors are "and the disruptive consequences of an interim change that may itself be changed." Allied-Signal, Inc, v. U.S. Nuclear Regulatory Comm'n,

> 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted).

688 F.3d at 992 (alteration in Cal. Cmtys.).

The general rule is that the APA **"requires** federal courts to set aside federal agency action that is 'not in accordance with law.' 5 U.S.C. § 706(2)(A)." Fed. Commc'ns Comm'n v. NextWave Pers. Commc'ns Inc., 537 U.S. 293, 300 (2003) (emphasis added). As Defendants recognize, the exception of remand without vacatur is applied only in rare circumstances.

The instant case does not present the type of rare circumstances where the exception is warranted. Defendants' failure to follow the law in drafting the 2016 LVPA Rule was a significant error. Does equity demand that this regulation be left in place while Defendants correct their action? It does not. In Idaho Farm Bureau, the rule was not vacated because to do so would have caused a species of snail to be wiped out. 58 F.3d at 1405-06. Here, Defendants have not shown significant harm would result from the vacatur of the 2016 LVPA Rule. While Defendants argue that disruption will ensue and benefits that have accrued because of the 2016 LVPA Rule would be lost if vacated, these fall short of "rare circumstances" warranting remand without vacatur. An improved circumstances argument or generalized disruption claim could be made for almost every invalid agency rule and thus can hardly meet the requirement of rarity.

To the extent that Defendants' Motion for Reconsideration challenges the order that the 2016

LVPA Rule is vacated, the motion is denied. Defendants have failed to establish either clear error in the 3/20/17 Order or that reconsideration is necessary to prevent manifest injustice.

CONCLUSION

On the basis of the foregoing, Defendants' "Motion for Reconsideration and to Amend the Court's Judgment (Dkt. No. 48) Pursuant to Local Rule 60.1 and Federal Rule of Civil Procedure 59(e)," filed May 9, 2017, is HEREBY DENIED.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, August 10, 2017.

/s/ Leslie E. Kobayashi

Leslie E. Kobayashi

United States District Judge

Appendix D

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

16 U.S.C. § 1853(a)

(a) Required provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall--

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are--

(A) necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this chapter, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential

revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify--

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational,[1] charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this chapter, and the estimated processing capacity of, and the

actual processing capacity utilized by, United States fish processors,[2]

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 1855(b)(1)(A) of this title, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 1854(a) of this title (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social

impacts, of the conservation and management measures on, and possible mitigation measures for--

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

(C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority--

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under

catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;[3]

(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

16 U.S.C. § 1854(a)

(a) Review of plans

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall--

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall--

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 1853(a)(6) of this title.

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify--

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection.

(5) For purposes of this subsection and subsection (b), the term "immediately" means on or before the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, plan amendment, or proposed regulation that the Council characterizes as final.

16 U.S.C. § 1854(c)

(c) Preparation and review of Secretarial plans

(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this chapter, and any other applicable law, if--

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management;

(B) the Secretary disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment; or

(C) the Secretary is given authority to prepare such plan or amendment under this section.

(2) In preparing any plan or amendment under this subsection, the Secretary shall--

(A) conduct public hearings, at appropriate times and locations in the geographical areas concerned, so as to allow interested persons an opportunity to be heard in the preparation and amendment of the plan and any regulations implementing the plan; and

(B) consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(3) Notwithstanding paragraph (1) for a fishery under the authority of a Council, the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system, including any limited access privilege program, unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

(4) Whenever the Secretary prepares a fishery management plan or plan amendment under this section, the Secretary shall immediately--

(A) for a plan or amendment for a fishery under the authority of a Council, submit such plan or amendment to the appropriate Council for consideration and comment; and

(B) publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(5) Whenever a plan or amendment is submitted under paragraph (4)(A), the appropriate Council must submit its comments and recommendations, if any, regarding the plan or amendment to the Secretary before the close of the 60-day period referred to in paragraph (4)(B). After the close of such 60-day period, the Secretary, after taking into account any such comments and recommendations, as well as any views, information, or comments submitted under paragraph (4)(B), may adopt such plan or amendment.

(6) The Secretary may propose regulations in the Federal Register to implement any plan or amendment prepared by the Secretary. In the case of a plan or amendment to which paragraph (4)(A) applies, such regulations shall be submitted to the Council with such plan or amendment. The comment period on proposed regulations shall be 60 days, except that the Secretary may shorten the comment period on minor revisions to existing regulations.

(7) The Secretary shall promulgate final regulations within 30 days after the end of the comment period under paragraph (6). The Secretary must publish in the Federal Register an explanation of any substantive differences between the proposed and final rules. All final regulations must be consistent with the fishery management plan, with the national standards and other provisions of this chapter, and with any other applicable law.

16 U.S.C. § 1855(f)

(f) Judicial review

(1) Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that--

(A) section 705 of such Title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such Title.

(2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

(3)(A) Notwithstanding any other provision of law, the Secretary shall file a response to any petition filed in accordance with paragraph (1), not later than 45 days after the date the Secretary is served with that petition, except that the appropriate court may extend the period for filing such a response upon a showing by the Secretary of good cause for that extension.

(B) A response of the Secretary under this paragraph shall include a copy of the administrative

record for the regulations that are the subject of the petition.

(4) Upon a motion by the person who files a petition under this subsection, the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.