San Francisco Herring Assn. v. U.S. Dept. of Interior—Enforcement of Ban on Commercial Herring Fishing in the Golden Gate National Recreational Area Constituted Final Agency Action

In 2013, the San Francisco Herring Association sued the Department of the Interior, challenging a National Park Service determination to enforce a ban on commercial herring fishing within the Golden Gate National Recreational Area. The district court granted summary judgment to the Department on the merits. *San Francisco Herring Assn. v. U.S. Dept. of Interior*, 2014 WL 12489595 (N.D. Cal. Apr. 29, 2014). On appeal, the Ninth Circuit held that the enforcement decision did not constitute a final agency action subject to review under the Administrative Procedure Act and vacated the judgment, with instructions to dismiss the action without prejudice. 683 Fed. Appx. 579 (9th Cir. 2017). Although the district court allowed the Association on remand to request leave to file a second amended complaint, it concluded that the new allegations still did not establish final agency action and accordingly denied the motion on futility grounds. 2018 WL 905847 (Feb. 15, 2018). The court of appeals reversed in part on appeal. *San Francisco Herring Assn. v. U.S. Dept. of Interior*, No. 18-15443, 2019 WL 7342999 (9th Cir. Dec. 31, 2019).

The panel principally addressed the question whether final agency action existed; i.e., whether the action "'mark[ed] the consummation of the agency's decisionmaking process' and was action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *See Bennett v. Spear*, 520 U.S. 154 (1997). In that regard, the proposed amended complaint alleged several threats of criminal prosecution in January 2013 and 2014 that had appeared in the first amended complaint but also contained "'additional details about how the NPS specifically patrolled the waters to prevent [Association] members from harvesting herring.'" In disagreeing with the district court that the proposed complaint's allegations fell short of showing final agency action, the panel reasoned:

> While it can sometimes be difficult to discern if the agency's decisional process is truly final, this is not such a case. The agency here repeatedly declared its authority over the waters of the GGNRA in formal notices, refused to change its position when pressed, and then enforced its fishing ban against individual fishermen, potentially subjecting them to serious penalties. It raises questions of basic fairness for the Park Service to assert its jurisdiction over the fishermen and bring them to the precipice of punishment through in-water enforcement orders, only to later claim there is nothing conclusive here for the fishermen to even challenge. The APA's judicial review provisions prevent precisely this "heads I win, tails you lose" approach.

It thus rejected the federal defendants' position that the Association was required to request a rulemaking procedure to establish the necessary "'consummation of the agency's decision-making process,'" observing that "[w]e have no license to limit the scope of final agency actions to 'rules[,]' while "the Park Service—having undertaken enforcement activities confirming its decision-making process was not only consummated, but operationalized—has no license to force the fishermen into an unnecessary rulemaking process either." The panel further held the second prong of final agency action satisfied by the Park Service's "confronting fishermen in the waters of the GGNRA and ordering them to stop fishing there[]" and placing "the fishermen ... 'in legal jeopardy if [they] fail[ed] to comply with the [o]rders.'" It commented later that "[i]t is hard to fault the fishermen for obeying a law enforcement order instead of flouting it. And perhaps unsurprisingly, precedent on the 'final agency action' question did not require Association

members to call the Park Service's bluff and engage in what the government regards as unlawful behavior."

The panel affirmed the district court's denial of leave to include a count for a declaratory judgment in the second amended complaint. "The Association," it explained, "does not explain how its new count could add anything to the final agency action issue (and it does not)." The district court therefore did not abuse its discretion in declining to allow the court "[g]iven the substantial delay involved, the duplicative nature of the relief requested in the new count, and the Association's previous amendment of its complaint."

Ninth Circuit Decision Link: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/31/18-15443.pdf