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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Enviros Demand Feds Designate Humpback Critical Habitat

By **Michael Phillis**

Law360 (March 16, 2018, 9:10 PM EDT) -- A coalition of Native-led and environmental organizations filed suit Thursday against the National Marine Fisheries Service, alleging it has not acted quickly enough to designate critical habitat to protect three distinct populations of humpback whales that are endangered or threatened.

The groups bringing suit include the Center for Biological Diversity and the Wishtoyo Foundation, which is a nonprofit that seeks to protect Chumash Native American culture. They allege that after the NMFS listed three populations of humpback whale under the Endangered Species Act, the law required the agency to designate critical habitat for the whale's protection. More than a year after the listings, however, that hasn't happened, according to the suit.

"The final regulation designating critical habitat for the three populations of humpback whales was due no later than Sept. 8, 2017," the complaint said. "To date, the service has neither issued a proposed or final rule to designate critical habitat for the Western North Pacific, Mexico or Central America population of humpback whales, nor made a finding that to do so would be 'not prudent.'"

Not only are their numbers low, but humpback whales can be culturally important, the suit said. The Wishtoyo Foundation, for example, said the humpback whale is "essential to [the Chumash's] connection with their ancestors."

"Since time immemorial, Chumash people have shared our home waters of the Santa Barbara Channel [off California] with humpback whales. They have a deeply respected role in our culture, guiding and protecting our maritime people as we navigate through the channel," Alicia Cordero, a program officer at the Wishtoyo Foundation, said in a statement. "Ensuring proper designation of critical habitat for these populations of endangered humpback whales is a core responsibility for Chumash people."

Designating critical habitat would help the government block activities that require a federal permit and would harm the habitat. Whales get caught in nets and can be harmed by offshore drilling, the suit said. It mentioned a 2015 oil spill in which 21,000 gallons of oil killed some nearby marine life as the kind of threat that needs to be prevented.

The suit said some of the humpback whale populations in question are extremely low in number. The Central America population, for example, has only about 400 whales, the complaint said. By not designating critical habitat, the NMFS "leaves them at increased risk of injury and death in their most important habitat areas."

The suit asks the court to find that the NMFS violated the ESA, and direct it to designate critical habitat for the whale.

In late 2016, the federal government formally **updated** its list of endangered and threatened species, removing the species-level endangered listing for humpback whales and delisting most of the whale's 14 distinct populations.

A representative with NMFS declined to comment.

The plaintiffs are represented by Miyoko Sakashita and Kristen Monsell of the Center for Biological Diversity.

Counsel information for the federal government was not immediately available Friday.

The case is Center for Biological Diversity et al. v. National Marine Fisheries Service et al., case number 3:18-cv-01628, in the U.S. District Court for the Northern District of California.

--Editing by Marygrace Murphy.

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