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Pacific Choice Seafood Co. v. Ross—Ninth Circuit affirms NMFS's order under the Magnuson-Stevens Act requiring participant in Pacific non-whiting groundfish fishery to divest excess quota share

The National Marine Fisheries Service implements the Magnuson-Stevens Fishery Conservation and Management Act in the Pacific Ocean. In 2010, the Service issued a final rule (75 Fed. Reg. 78,344 (Dec. 15, 2010)) that set catch quotas for a fishery permit holder with respect to 90 species of groundfish, excluding Pacific whiting, off the Pacific Coast of California, Oregon and Washington. The quota is 2.7 percent of the aggregate catch limit. The Service interpreted the relevant provision of the Magnuson-Stevens Act, 16 U.S.C. § 1853a(c)(5)(D)(i), "as authorizing it to prohibit permit holders from 'own[ing] or control[ling]' quota share above the maximum." The regulations further defined "control" to include "the 'ability through any means whatsoever to control or have a controlling influence' over an entity holding quota share." Pacific Choice Seafood Co. operates a processing facility and "indirectly controls several vessels that participate in the fishery" whose take quotas totaled 3.8 percent of the aggregate take limit. After the Service issued a final rule ordering divestiture of the excess 1.1 percent, Pacific Seafood sought judicial review under the Administrative Procedure Act. The district court granted summary judgment to the federal defendants. *Pacific Choice Seafood Co. v. Ross*, 309 F. Supp. 3d 787 (N.D. Cal. 2018). The Ninth Circuit affirmed. *Pacific Choice Seafood Co. v. Ross*, No. 19-15455, 2020 WL 5742046 (9th Cir. Sept. 25, 2020).

After finding that Pacific Seafood had filed a timely challenge to the divestiture rule, the panel addressed in order the two principal challenges to the quota requirement: (1) "the Service misinterpreted the term 'excessive share' in section 1853a(c)(5)(D) by sidelining considerations of market power in favor of per-vessel profitability," and (2) "the Service acted arbitrarily and capriciously by failing to consider all relevant factors and relying on insufficient analysis in choosing the 2.7 percent limit." The panel construed the first challenge as based on the argument "that it would be improper for the Service to determine that a particular limit would prevent any market participant from exercising market power but then to set a lower limit that reflects other considerations." Central to resolving this issue was § 1853a(c)(5)(D) that requires the Service to

> ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by—
> (i) establishing a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use; and
> (ii) establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges.

Deeming the statute "ambiguous as to what factors the Service must consider in setting a maximum share," the panel applied *Chevron* deference factors and found that in § 1853a(c)(5)(B) "Congress

directed the Service to consider a wide range of factors in establishing limited access privilege programs, including 'the basic cultural and social framework of the fishery' and 'the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries.'" Give these objectives,

> it was reasonable for the Service to conclude that other factors can dictate a lower maximum share than might be required by a singular focus on preventing excessive market power—or, in other words, that the Service may attempt to do something more than act simply as a fishery-specific version of the Federal Trade Commission or the Justice Department's Antitrust Division.

The panel next concluded the 2.7 percent quota was not arbitrary, capricious or an abuse of discretion. In that regard, it rejected Pacific Seafood's contention that the Service's analysis had "ignor[ed] market power altogether" and had "failed to articulate 'the methods by which, and the purposes for which' it set the maximum share at 2.7 percent rather than at some other percentage." It instead found the record "show[ed] that the Service did consider market power" through the detailed analyses of the Groundfish Allocation Committee and the Groundfish Management Team that formed the basis for maximum share limit adopted by the Groundfish Advisory Subpanel and, ultimately, by the Service. Thus,

> [v]iewed as a whole, the record contains extensive justification for the 2.7 percent limit. As the Management Team concluded, that limit accommodates a variety of the [Pacific Fishery Management] Council's objectives for setting a maximum share, including "cap[ping] the initial allocation of quota share at a level that is consistent with" historical quota distributions on the 2003 control date, and allowing more consolidation in the fishery than a lower limit—such as 2.3 percent—would accomplish. The Service's environmental impact statement fully explains how the agency arrived at the 2.7 percent limit from the Quota Committee's initial recommendation of 1.5 to 5 percent.

The panel, finally, rejected Pacific Seafood's contention that the Service's regulations improperly introduced the word "control" into the agency interpretation of "'hold, acquire, or use' [in § 1853a(c)(5)(D)] to include 'control'" and then "proceeded to define 'control' to include, among other things, 'the ability through any means whatsoever to control or have a controlling influence over the entity to which [quota share] is registered.'" 50 C.F.R. § 660.140(d)(4)(iii)(H). Applying *Chevron* again, the panel saw "nothing in the statute that unambiguously forecloses the Service's approach. Instead, the Service's rule represents a reasonable implementation of Congress's directive that quota allocations be 'fair and equitable' and be 'carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.'" Nor did the panel find the rule, while broad, insufficient "to inform regulated entities about what types of conduct the Service will prohibit: ownership or control that evades the Service's maximum share limits." But, more to the immediate point, "we see no ambiguity about whether Pacific Choice 'own[ed] or control[led]' the related entities at issue here. Pacific Choice's brief discloses that each of the six entities that held quota share are wholly owned either by Frank Dulcich or by a corporation that Dulcich owns. Under any plausible definition of 'control,' Dulcich controls the Pacific Choice entities."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/25/18-15455.pdf