

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CP SALMON CORPORATION, et al.,

Plaintiffs,

v.

WILBUR ROSS, JR., in his official capacity
as Secretary of the United States Department
of Commerce, et al.,

Defendants.

Case No. 3:16-cv-00031-TMB

ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT
(DKTS. 45 & 49)

I. INTRODUCTION

This case concerns legal challenges to a final rule promulgated by Defendant National Marine Fisheries Service (“NMFS”) on January 5, 2016. Plaintiffs have motioned for summary judgment and Defendants have cross-motioned for summary judgment. Having considered these motions, reviewed the administrative record, and heard oral argument on these issues, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs’ motion for summary judgment and **DENIES** Defendants’ cross-motion for summary judgment.

II. BACKGROUND

Plaintiffs are participants or representatives of the catcher/processor sector of the Bering Sea directed pollock fishery. Defendants are federal agencies and officials responsible for overseeing and regulating the nation’s sustainable fisheries.

A. Statutory background

In 1976, Congress adopted the Magnuson–Stevens Fishery Conservation and Management Act (“MSA”), 16 U.S.C. §§ 1801–1884, to “conserve and manage the fishery

resources found off the coasts of the United States,” among other objectives.¹ The MSA established eight Regional Fishery Management Councils to oversee conservation and management activities, and delegated implementation authority to the Secretary of Commerce.² The Secretary of Commerce, in turn, acts through NMFS and the National Oceanic and Atmospheric Administration (NOAA).³

In 1996, Congress amended the MSA to, in part, provide that the Secretary of Commerce “is authorized and shall collect a fee to recover the actual costs directly related to the management and enforcement of any . . . individual fishing quota program.”⁴ The MSA then defined an “individual fishing quota program” as “a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person.”⁵ The 1996 amendments also imposed a moratorium on the creation of any new individual fishing quota programs through October 1, 2000.⁶ This moratorium was later extended through October

¹ 16 U.S.C. § 1801(b)(1).

² 16 U.S.C. §§ 1852–54; *see also Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 760 (9th Cir. 2009).

³ *Sea Hawk Seafoods, Inc.*, 568 F.3d at 760.

⁴ 16 U.S.C. § 1854(d)(2)(A)(i) (Oct. 11, 1996).

⁵ 16 U.S.C. § 1802(21) (Oct. 11, 1996).

⁶ 16 U.S.C. § 1853(d)(1)(A) (Oct. 11, 1996) (“A Council may not submit and the Secretary may not approve or implement before October 1, 2000, any fishery management plan, plan amendment, or regulation under this Act which creates a new individual fishing quota program.”); *see also Pac. Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1087 (9th Cir. 2012).

1, 2002.⁷

In 1998, Congress enacted the American Fisheries Act (“AFA”).⁸ Subtitle II of the AFA addresses pollock fishing in the Bering Sea and Aleutian Islands Management Area, and establishes an allocation scheme for the total allowable catch of pollock within this area. Under the AFA, 10% of the total allowable catch is allocated to a western Alaska community development quota program established by the MSA. After subtracting this 10% and any allowances for the incidental catch of pollock by vessels harvesting other groundfish species, the remainder is allocated between three different sectors: the inshore sector, the catcher/processor sector, and the mothership sector. Of this remainder, 40% is allocated to the catcher/processor sector, comprising “catcher/processors and catcher vessels harvesting pollock for processing by catcher/processors in the offshore component.”⁹

The AFA lists specific catcher/processors and catcher vessels that are eligible to harvest pollock under this allowance “pursuant to a federal fishing permit.”¹⁰ The AFA also reserves 8.5% of this allowance for harvest only by catcher vessels, and provides that the owners of eligible catcher vessels “may participate in a fishery cooperative” with the owners of the listed catcher/processors.¹¹ The AFA originally directed that the above provisions went into effect on

⁷ Pub. L. No. 106-554, § 144(a) (Dec. 21, 2000).

⁸ Pub. L. No. 105-277, Title II (Oct. 21, 1998).

⁹ Pub. L. No. 105-277, § 206(b)(2) (Oct. 21, 1998) (providing that 50% of the remainder is allocated to the inshore sector and 10% is allocated to the mothership sector).

¹⁰ Pub. L. No. 105-277, §§ 208(b), 208(e) (Oct. 21, 1998).

¹¹ Pub. L. No. 105-277, §210(c) (Oct. 21, 1998).

January 1, 1999,¹² and remained in effect through December 31, 2004.¹³ In 2001, Congress made these provisions of the AFA permanent.¹⁴ In 2002, NMFS adopted regulations implementing these provisions of the AFA.¹⁵

Congress further amended the MSA in 2007. The 2007 amendments did not change the definition of an individual fishing quota, but added a definition of a “limited access privilege,” which is defined as “a Federal permit, issued as part of a limited access system under section 303A to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person,” and “includes an individual fishing quota.”¹⁶ Correspondingly, the 2007 amendments changed the provision authorizing the Secretary of Commerce to collect a cost recovery fee to apply to costs directly related to the management and enforcement of any “limited access privilege program.”¹⁷

¹² Pub. L. No. 105-277, § 206.

¹³ Pub. L. No. 105-277, § 213 (“Sections 206, 208, and 210 shall remain in effect until December 31, 2004, and shall be repealed on such date, except that the North Pacific Council may recommend and the Secretary may approve conservation and management measures as part of a fishery management plan under the Magnuson-Stevens Act to give effect to the measures in such sections thereafter.”).

¹⁴ Pub. L. 107-77, § 211 (“Section 213(a) of title II of division C of Public Law 105–277 is amended by striking the second sentence and inserting in lieu thereof: ‘There are authorized to be appropriated \$6,700,000 per year to carry out the provisions of this Act through fiscal year 2004.’”).

¹⁵ 67 Fed. Reg. 79692 (Dec. 30, 2002) (codified at 50 C.F.R. § 679 et seq.).

¹⁶ 16 U.S.C. § 1802(23A) (Jan. 12, 2007).

¹⁷ 16 U.S.C. § 1854(d)(2)(A)(i) (Jan. 12, 2007).

B. *Factual background*

NMFS publishes harvest specifications every year as tables in the Federal Register, including the total allowable catch of various groundfish. Beginning in 1999, the harvest specifications for pollock in the Bering Sea and Aleutian Islands Management Area have referenced the allocation provisions of the AFA.¹⁸

Following the passage of the AFA, participants in the catcher/processor sector formed two fishery cooperatives, one for catcher vessels and one for catcher/processors. These two cooperatives — which collectively included all but one of the catcher vessels and catcher/processors that comprise the AFA catcher/processor sector — then entered into a joint agreement called the “Cooperative Agreement between Offshore Pollock Catchers’ Cooperative and Pollock Conservation Cooperative.”¹⁹

¹⁸ See, e.g., Table 3, n.1, 64 Fed. Reg. 12108 (Mar. 11, 1999) (“After subtraction for the CDQ reserve and the incidental catch allowance, the pollock TAC is allocated as follows: inshore component—50 percent, catcher/processor component—40 percent, and mothership component—10 percent. Under section 206(a) of the AFA, the CDQ reserve for pollock is 10 percent”). For a list of annual harvest specifications, see <https://alaskafisheries.noaa.gov/harvest-specifications>.

¹⁹ Administrative Record (“A.R.”) 1006032 (“Final Rule”) at 152. The Final Rule was published in the Federal Register at 81 Fed. Reg. 150 (Jan. 5, 2016). This order uses the page numbers from the Federal Register when citing the Final Rule. (“The catcher/processor sector has formed two cooperatives for managing the exclusive harvest allocation mandated for the catcher/processor sector under section 206(b) of the AFA – one cooperative for the catcher/processors and one cooperative for the vessels harvesting pollock for processing by catcher/processors. These two cooperatives are associated through a joint agreement called the ‘Cooperative Agreement between Offshore Pollock Catchers’ Cooperative and Pollock Conservation Cooperative’ to facilitate efficient harvest management and accurate harvest accounting between the participants in the catcher/processor sector.”).

C. NMFS' January 5, 2016 final rule

On January 7, 2015, NMFS published a proposed rule in the Federal Register (“Proposed Rule”).²⁰ Citing the MSA’s provision on cost recovery fees as statutory authority, the Proposed Rule sought to implement cost recovery fees for a number of programs, including the AFA program allocating pollock in the Bering Sea and Aleutian Islands Management Area. The Proposed Rule explained that, under the MSA, these programs are “individual fishing quota programs” because “(1) NMFS issues permits as part of a limited access system established under each of these programs; (2) these permits allow the harvest of a quantity of specific fisheries representing a portion of the TAC of the fisheries managed under each of these programs; and (3) these permits are received or held for exclusive use by specific persons as defined for each of these programs.”²¹

With respect to the catcher/processor sector, the Proposed Rule explained that participants in the sector formed a “joint agreement called the ‘Cooperative Agreement between Offshore Pollock Catchers’ Cooperative and Pollock Conservation Cooperative’ (AFA Offshore Joint Cooperative).” The Proposed Rule explained that the joint cooperative “receives an exclusive harvest privilege of up to 99.5 percent of the TAC allocated to the catcher/ processor sector.”²² The Proposed Rule defined the “person” receiving the exclusive harvest privilege as

²⁰ A.R. 1005825. The Proposed Rule was published in the Federal Register at 80 Fed. Reg. 936 (Jan. 7, 2015). This order uses the page numbers from the Federal Register when citing the Proposed Rule.

²¹ *Id.* at 937.

²² *Id.* at 949. The Proposed Rule explains that “all but one” participant who harvests pollock in the catcher/processor sector is a member of the joint cooperative, and that AFA § 208(e)(21) “limits the amount of harvest by the one participant in the catcher/processor sector who is not a member of the AFA Offshore Joint Cooperative to 0.5 percent of the TAC assigned to the catcher/processor sector, thereby providing an exclusive harvest privilege to all the AFA Offshore Joint Cooperative members. The participant who is not a member of the AFA Offshore

the “AFA Offshore Joint Cooperative,” and defined the annual “permit” authorizing this privilege as “Table 3 of the BSAI final groundfish harvest specifications published in the Federal Register.”²³

Following publication of the Proposed Rule, the 30-day public comment period ran through February 6, 2015. NMFS received three letters containing 24 substantive comments.²⁴ NMFS published a final rule in the Federal Register on January 5, 2016 (“Final Rule”).²⁵ The Final Rule largely followed the Proposed Rule, and provided that NMFS would determine the annual cost recovery fee for each program, including the AFA pollock allocation program.

The Final Rule also included responses to each of the substantive comments. In response to a comment about whether the AFA pollock allocations constituted a “permit” under the MSA, the Final Rule reiterated that the “harvest specifications with the directed fishing allowance is a permit that authorizes the AFA sectors to harvest a portion of the pollock TAC each year.”²⁶ Another comment contended that the joint cooperative agreement between the two cooperatives within the catcher/processor sector was not a “person” under the MSA. The Final Rule noted that the Proposed Rule “was not sufficiently specific” in defining the “person” that receives the individual fishing quota for the catcher/processor sector, and clarified that “NMFS considers the AFA catcher/processor sector an entity and therefore a person under the Magnuson-Stevens

Joint Cooperative would not be subject to a cost recovery fee for its harvest of pollock under this proposed rule.” *Id.* at 940.

²³ *Id.* at 943.

²⁴ A.R. 1006032 at 155 (Final Rule).

²⁵ *Id.* at 150.

²⁶ *Id.* at 156 (response to cmt. 5).

Act.”²⁷ The Final Rule then explained that the members of the catcher/processor sector had already formed an entity to represent the sector for the purpose of receiving and managing a salmon allocation and designated an entity representative. The Final Rule concluded that this same entity representative would be responsible for submitting the cost recovery fee payment for the catcher/processor sector with respect to the pollock allocation.²⁸

The Final Rule went into effect on February 4, 2016.²⁹ NMFS published the cost recovery fee percentages for the programs discussed in the Final Rule, including the AFA pollock allocation to the catcher/processor sector, in the Federal Register on November 28, 2016.³⁰

D. Parties’ cross-motions for summary judgment

On February 1, 2016, Plaintiffs filed a complaint against Defendants challenging several aspects of the Final Rule.³¹ Plaintiff CP Salmon Corporation is a Washington nonprofit entity, and is the designated entity for the catcher/processor sector described in the Final Rule.³² Plaintiff Stephanie Madsen is the entity representative for CP Salmon Corporation responsible

²⁷ *Id.* at 157 (response to cmt. 6).

²⁸ *Id.* (“members of the AFA catcher/processor sector also formed one entity to represent the AFA catcher/processor sector for the purposes of receiving and managing their transferable Chinook salmon PSC allocation under the regulations at § 679.21(f)(8)(i)(C) NMFS has modified this final rule to clarify that the entity representative under § 679.21(f)(8) will be the designated representative responsible for submitting the cost recovery fee payment for the AFA catcher/processor sector.”).

²⁹ *Id.* at 150.

³⁰ 81 Fed. Reg. 85522 (Nov. 28, 2016).

³¹ Dkt. 1.

³² *Id.* at 2–3.

for submitting the cost recovery fee under the Final Rule.³³ Plaintiff Northern Jaeger LLC is a Delaware limited liability company that owns a catcher/processor vessel listed in the AFA, and is owned by a member of CP Salmon Corporation.³⁴ Plaintiff Glacier Fish Company LLC is a Washington limited liability company that owns a catcher/processor vessel listed in the AFA, and is a member of CP Salmon Corporation.³⁵ Defendants are Wilbur Ross, Jr., in his capacity as Secretary of Commerce, NOAA, and NMFS.³⁶

On May 23, 2017, Plaintiffs filed a motion for summary judgment.³⁷ Plaintiffs seek an order setting aside the Final Rule and associated regulations to the extent they apply to the catcher/processor sector of the Bering Sea directed pollock fishery, requiring NMFS to refund cost recovery fees collected from participants in this sector, and enjoining further recovery of cost recovery fees from these participants.³⁸ Plaintiffs challenge the Final Rule on a number of bases under the Administrative Procedure Act (“APA”).³⁹ Plaintiffs contend that there is an “unexplained inconsistency” between NMFS’ original opinion beginning in 1998 that the AFA did not create a new individual fishing quota in the catcher/processor sector, and NMFS’ contrary opinion, which it expressed for the first time in 2013 and reiterated in the Final Rule.⁴⁰

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1. The Complaint named Penny Pritzker in her capacity as Secretary of Commerce. Wilbur Ross, Jr. was substituted for Penny Pritzker pursuant to Fed. R. Civ. P. 25(d)(1).

³⁷ Dkt. 45.

³⁸ *Id.* at 17–19.

³⁹ 5 U.S.C. § 706(2); Dkt. 45 at 16.

⁴⁰ Dkt. 45 at 21–22.

Plaintiffs also argue that Defendant NMFS should be judicially estopped from arguing that the catcher/processor sector has a “Federal permit” based on NMFS’ previous position in *Lovgren v. Locke*, 701 F.3d 5 (1st Cir. 2015).⁴¹ Relatedly, Plaintiffs contend that there is no rational basis on which to distinguish the catcher/processor sector pollock allocation from a similar sector allocations in other fisheries, which are not considered permits and are not subject to cost recovery.⁴²

Plaintiffs also contend that the Final Rule contradicts the clear language of the MSA, and challenge the Final Rule’s interpretation of the terms “person,” “federal permit,” “under a limited access system,” and “exclusive use” under the MSA.⁴³ Additionally, Plaintiffs argue that the Final Rule’s identification of Stephanie Madsen on behalf of CP Salmon Corporation as the payor of the cost recovery fee is not a logical outgrowth of the Proposed Rule, which identified the payor as a “designated representative” of the joint agreement between the two cooperatives.⁴⁴ Finally, Plaintiffs submit that even if NMFS has cost recovery authority, the provisions describing recoverable costs and determining amounts of fees conflict with NMFS’ longstanding interpretation of the MSA’s provision on cost recovery fees.⁴⁵

On July 28, 2017, Defendants filed a combined response in opposition and cross-motion for summary judgment.⁴⁶ Citing to the APA’s definition of a “license” and the NMFS

⁴¹ *Id.* at 19–21.

⁴² *Id.* at 21–22.

⁴³ *Id.* at 24–32.

⁴⁴ *Id.* at 22–23.

⁴⁵ *Id.* at 32–33.

⁴⁶ Dkt. 49.

regulations' definition of a "permit," Defendants argue that the notice of harvest specifications published in the Federal Register is a "permit" under the MSA, and that NMFS' positions in other cases and with respect to other fisheries are consistent with this position.⁴⁷ Defendants also maintain that NMFS' interpretation of the terms "exclusive use," "person," and "under a limited access system" in the Final Rule are consistent with the MSA.⁴⁸ With respect to whether the catcher/processor sector allocation is an individual fishing quota, Defendants submit that Congress, by adopting the AFA, created an exception to the MSA's moratorium on new individual fishing quota programs, and that this position is again consistent with NMFS' prior positions.⁴⁹ Defendants maintain that the Final Rule's clarification of the entity representative was a logical outgrowth of the public notice and comments received on the Proposed Rule.⁵⁰ Finally, Defendants contend that the provisions describing recoverable costs and the amount of fees are reasonable and consistent with the MSA.⁵¹

Defendants ask the Court to deny Plaintiffs' motion for summary judgment, and grant summary judgment for Defendants finding that NMFS properly concluded that the catcher/processor sector's pollock allocation met the definition of an individual fishing quota, and that NMFS is therefore legally obligated to implement cost recovery fees under the MSA.⁵² Defendants also ask, in event the Court finds for Plaintiffs, that the Court remand the Final Rule

⁴⁷ *Id.* at 20–29.

⁴⁸ *Id.* at 30–35.

⁴⁹ *Id.* at 36–41.

⁵⁰ *Id.* at 41–44.

⁵¹ *Id.* at 44–45.

⁵² *Id.* at 45.

in order to allow NMFS to proceed consistent with the Court's opinion, and that the Court allow Defendants to submit additional briefing on remedy.⁵³

Plaintiffs filed a reply in support of their motion for summary judgment on August 25, 2017.⁵⁴ Plaintiffs maintain their initial arguments, and argue that Defendants advanced a “new interpretation” of the term “permit” — based on the APA and NMFS regulations — in their response in opposition/cross-motion for summary judgment.⁵⁵ Plaintiffs argue this “broad” interpretation was not included in the Proposed Rule or Final Rule and therefore is not entitled to deference, and that this interpretation conflicts with NMFS' position in *Lovgren v. Locke* and is an improper and incorrect interpretation of the MSA.⁵⁶

The Court heard oral argument on the parties' cross-motions for summary judgment on January 22, 2018.⁵⁷ These motions are now ripe for resolution.

III. STANDARD OF REVIEW

In a review of administrative action, “the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”⁵⁸ In this context, “summary judgment is an appropriate mechanism

⁵³ *Id.* at 46.

⁵⁴ Dkt. 50.

⁵⁵ *Id.* at 15–16.

⁵⁶ *Id.* at 17–20.

⁵⁷ Dkt. 57.

⁵⁸ *City & Cty. of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985)).

for deciding the legal question of whether the agency could reasonably have found the facts as it did.”⁵⁹

The MSA provides that regulations promulgated by the Secretary of Commerce under the MSA are subject to judicial review under APA sections 706(2)(A)–(D).⁶⁰ APA section 706(2)(A) requires a reviewing court to set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶¹ Under the APA’s arbitrary and capricious standard, the Court “must determine whether the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made.”⁶² 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,”⁶³ and the “party challenging an agency’s action as arbitrary and capricious bears the burden of proof.”⁶⁴ APA

⁵⁹ *Id.*; see also *S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1256 (E.D. Cal. 2010) (“Under [APA ‘arbitrary and capricious’] review, the court does not employ the usual summary judgment standard for determining whether a genuine issue of material fact exists. This is because the court is not generally called upon to resolve facts in reviewing agency action.”) (internal citations omitted).

⁶⁰ 16 U.S.C. § 1855(f). The MSA limits judicial review to petitions for review filed within 30 days after the date on which the regulations are promulgated or the action is published in the federal register. *Id.* at § 1855(f)(1). As described above, the Final Rule in this case was published in the Federal Register on January 5, 2016, and Plaintiffs filed their complaint on February 1, 2016.

⁶¹ 5 U.S.C. § 706(2)(A).

⁶² *Pac. Coast Fed’n of Fishermen’s Assocs. v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012) (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 88 (1983)) (internal citations omitted).

⁶³ *Id.* (quoting *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir.2007)).

⁶⁴ *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009) (quoting *City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002)).

sections 706(2)(B)–(D) further require a reviewing court to set aside agency action if it is “contrary to constitutional right, power, privilege, or immunity,”⁶⁵ “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,”⁶⁶ or “without observance of procedure required by law.”⁶⁷

Additionally, the Court reviews NMFS’ interpretation of the MSA under the two-step framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁶⁸ The Court first considers “whether Congress has directly spoken to the precise question at issue,” and if so, “must give effect to the unambiguously expressed intent of Congress.”⁶⁹ If the statute is “silent or ambiguous” on the precise issue, the Court asks whether Congress delegated authority to the agency “to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.”⁷⁰ When the agency interprets the statute through an exercise of that authority, the Court must “accept the agency’s construction of the statute” so long as “the implementing agency’s construction is reasonable.”⁷¹

⁶⁵ 5 U.S.C. § 706(2)(B).

⁶⁶ 5 U.S.C. § 706(2)(C).

⁶⁷ 5 U.S.C. § 706(2)(D).

⁶⁸ 467 U.S. 837, 842–43 (1984); *see also* *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1120 (9th Cir. 2016).

⁶⁹ *Chevron*, 467 U.S. at 842–43; *Glacier Fish*, 832 F.3d at 1120.

⁷⁰ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Glacier Fish*, 832 F.3d at 1120.

⁷¹ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Glacier Fish*, 832 F.3d at 1120.

IV. ANALYSIS

A. *Change in agency position*

“One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”⁷² Where an agency has failed to articulate an explanation for its action “clear enough that its path may reasonably be discerned,” such action is arbitrary and capricious.⁷³ An “[u]nexplained inconsistency” between agency actions is “a reason for holding an interpretation to be an arbitrary and capricious change.”⁷⁴ An agency “may not depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”⁷⁵ An agency policy change complies with the APA “if the agency (1) displays awareness that it is changing position, (2) shows that the new policy is permissible under the statute, (3) believes the new policy is better, and (4) provides good reasons for the new policy, which, if the new policy rests upon factual findings that contradict those which underlay its prior policy, must include a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁷⁶

⁷² *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

⁷³ *Id.* (internal citations omitted).

⁷⁴ *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Nat'l Cable*, 545 U.S. at 981).

⁷⁵ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also California Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n*, 879 F.3d 966, 977 (9th Cir. 2018) (“FERC had a longstanding policy that incentives should only be awarded to induce future behavior. FERC departed from this policy without acknowledgment or explanation. This departure was arbitrary and capricious.”).

⁷⁶ *Organized Vill. of Kake*, 795 F.3d at 966 (quoting *FCC v. Fox*, 556 U.S. at 515–16) (internal citations omitted).

Plaintiffs contend that there is an unexplained inconsistency between NMFS' original position as to whether the AFA's allocation to the catcher/processor sector is an IFQ program and NMFS' position in the Final Rule.⁷⁷ Plaintiffs cite to a February 2002 environmental impact statement published by NMFS concerning proposed amendments to fishery management plans in light of the AFA.⁷⁸ The environmental impact statement addressed a comment about leasing arrangements between the catcher vessels and catcher/processors under the AFA, and in response noted that "[i]n a legal opinion on this issue, the NOAA Office of General Counsel concluded that allowing catcher vessels to lease their 8.5% quota to catcher/processors is consistent with the intent of the statute and does not create a new IFQ program."⁷⁹ Plaintiffs also cite a December

⁷⁷ Dkt. 45 at 20–21.

⁷⁸ *Id.* at 14–15.

⁷⁹ Dkt. 24 at 9–10. In full, the comment and response in the 2002 environmental impact statement read:

Comment 7: There should be an alternative that considers the environmental effects of allowing or not allowing leasing under section 210(c) of the AFA, as discussed in the attached comment letter which also argues that allowing such leasing effectively creates a new IFQ program which is illegal under the Magnuson-Stevens Act.

Response: Subsection 210(c) of the AFA addresses the issue of whether catcher vessels authorized to deliver to catcher/processors may join into a cooperative with the catcher/processors themselves. In a legal opinion on this issue, the NOAA Office of General Counsel concluded that allowing catcher vessels to lease their 8.5% quota to catcher/processors is consistent with the intent of the statute and does not create a new IFQ program. To prohibit leasing arrangements within cooperatives would undermine the intent of the AFA to provide for the decapitalization and rationalization of the BSAI pollock fishery. Leasing arrangements (whereby one vessel fishes pollock quota on behalf of another vessel within the same cooperative) are present and actively used in all of the AFA cooperatives formed to date in all three sectors of the BSAI pollock fishery. The only way to completely eliminate leasing within the context of a limited access program would be to issue each individual vessel a non-transferrable individual fishing quota that could be fished only by the vessel itself. Such a program would amount to a non-transferrable IFQ program and not a fishery cooperative program.

1998 email from the NOAA General Counsel, which interprets the AFA to provide that “if all of the AFA-eligible offshore catcher vessels form a co-op with the catchers/processors, then their share of the 8.5% set aside could be harvested by the co-op through whatever private arrangements are agreed to among the participants.” Plaintiffs contrast this reference to private arrangements with “any kind of government permit that could be construed as an IFQ.”⁸⁰

Defendants argue that NMFS’ prior position is consistent with the position expressed in the Final Rule. Defendants note that the MSA’s temporary moratorium on IFQ programs did not limit Congress’ ability to create new IFQs through the enactment of the AFA.⁸¹ Looking at the 2002 environmental impact statement, Defendants emphasize that Plaintiffs focus on a single sentence from an 800-page document, and contend that Plaintiffs misread this sentence.

According to Defendants, this sentence “states that the catcher sector could lease their annual quota to another sector (the AFA catcher/processor sector) without creating a *new* IFQ program.”⁸² Defendants also note that on another page of the same environmental impact study, NMFS specifically stated that the inshore co-op program authorized by the AFA meets the MSA definition of an IFQ.⁸³ According to Defendants, “[b]ecause NMFS has long held that the AFA

Regarding the issue of environmental effects of leasing. These effects are analyzed within the overall context of the preferred alternative which assumes that leasing arrangements will exist within all three sectors of the BSAI pollock fishery. The EIS concludes that 25% or more of the BSAI pollock fleet is likely to retire as a result of the preferred alternative due to the ability of vessels in all sectors of the fishery to lease pollock quota within cooperatives.

⁸⁰ Dkt. 45 at 15.

⁸¹ Dkt. 49 at 36.

⁸² *Id.* at 40 (emphasis in original).

⁸³ *Id.* Plaintiffs, in their reply, note that there are significant differences between the inshore and catcher/processor sector programs in the AFA.

Program indeed meets the Magnuson-Stevens Act's definition of an IFQ, at least since 2002, there is no need to examine if the agency provided sufficient explanation because there is no change in the agency's position."⁸⁴

As NMFS did not display awareness that that it was changing position in the Final Rule, and now contends that it has maintained a consistent position over time, the threshold question is whether NMFS did indeed change its stance in promulgating the Final Rule. Plaintiffs, as the party challenging NMFS' action, bear the burden of proof.⁸⁵ At the outset, the Court notes that the 1998 email and the excerpt from the 2002 environmental impact statement are significantly shorter and less comprehensive policy articulations than those courts typically consider in assessing a change in policy. In *F.C.C. v. Fox*, for instance, the Supreme Court considered an FCC enforcement policy that deviated from "prior Commission and staff action."⁸⁶ Likewise, in *California Public Utilities Commission v. F.E.R.C.*, the Ninth Circuit considered two FERC orders that departed from a "longstanding policy" that was "evinced in a series of FERC decisions and statements."⁸⁷

In the present case, both parties' arguments largely turn on a single sentence contained in a 2002 environmental impact study. The Court notes that Defendants' explanation is not entirely cohesive with Defendants' argument concerning the formation of the catcher/processor sector in their cross-motion for summary judgment, although it does not necessarily conflict with

⁸⁴ *Id.* at 41.

⁸⁵ *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009).

⁸⁶ 556 U.S. 502, 517 (2009).

⁸⁷ 879 F.3d 966, 977 (9th Cir. 2018).

the position articulated in the Final Rule.⁸⁸ The Court also notes that while Defendants contend NMFS has viewed the AFA catcher/processor sector program as an IFQ since 2002, Defendants do not explain why NMFS waited until 2015 to institute a cost recovery fee, particularly since NMFS acknowledges that the MSA “requires” NMFS to collect this fee for IFQ programs.⁸⁹ However, this lack of clarity also reflects the limited information available about NMFS’ prior position.⁹⁰ Plaintiffs, on the basis of the documents in the administrative record, fall short of demonstrating that NMFS has departed from a prior position such that NMFS’ position in the Final Rule constituted an arbitrary and capricious change.

⁸⁸ Defendants contend that the NOAA General Counsel’s opinion that “allowing catcher vessels to lease their 8.5% quota to catcher/processors is consistent with the intent of the statute and does not create a new IFQ program” refers to the possibility of creating *another* IFQ program, on top of the IFQ program already created for the catcher/processor sector by the AFA. However, Defendants also state that the catcher/processor sector — which is the “person” in the purported IFQ program — was only created when the two cooperatives entered into a joint agreement. *See* Dkt. 49 at 32. Although the Court notes the potential inconsistency in Defendants’ arguments as argued in their cross-motion for summary judgment, the Court “may look only to the administrative record to determine whether the agency has articulated a rational basis for its decision.” *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). While the Proposed Rule contained similar language about the joint agreement, the Final Rule did not tie the creation of the creation of the catcher/processor sector to the joint cooperative agreement, but simply defined the relevant “person” as “the catcher/processor sector that is able to harvest pollock from the sector’s directed fishing allowance defined in section 206(b)(2) of the AFA.” A.R. 1006032 at 157 (Final Rule); *see also Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir. 2017) (concluding that the Forest Service’s decision to issue a draft environmental impact study and then withdraw the document was not an agency change in policy, “as a draft EIS is not an agency decision at all”).

⁸⁹ A.R. 1006032 at 157–58 (Final Rule).

⁹⁰ The administrative record also does not reveal any reliance on an understanding of NMFS’ prior policy. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (“A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department’s prior policy—the explanation fell short of the agency’s duty to explain why it deemed it necessary to overrule its previous position.”).

B. Judicial estoppel

Judicial estoppel is “is an equitable doctrine invoked by a court at its discretion,” and is “intended to prevent improper use of judicial machinery.”⁹¹ Although non-exhaustive, “several factors typically inform the decision whether to apply the doctrine in a particular case.”⁹² “First, a party’s later position must be ‘clearly inconsistent’ with its earlier position.”⁹³ “Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.”⁹⁴ “A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”⁹⁵

Plaintiffs contend that NMFS should be estopped “from asserting to this Court that the [catcher/processor] sector receives a Federal permit amounting to an IFQ.”⁹⁶ Plaintiffs’ argument centers on the First Circuit’s decision in *Lovgren v. Locke*.⁹⁷ In *Lovgren*, the plaintiffs brought several challenges to NMFS regulations implementing an amendment to the Northeast

⁹¹ *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal citations omitted); *see also Ah Quin v. Cty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Dkt. 45 at 22.

⁹⁷ 701 F.3d 5 (1st Cir. 2012).

Multispecies Fishery Management Plan.⁹⁸ Within the Northeast Multispecies Fishery, vessel owners were required to apply for permits. The challenged regulations established new annual catch limits for each of the Fishery's stocks, and assigned each permit holder a "potential sector contribution," which represented a share of the new annual catch limits.⁹⁹ Under the regulations, a permit holder could choose to join a voluntary, self-selecting group or "sector," at which point the permit holder's potential sector contribution would be combined with those of other members to determine the sector's "annual catch entitlement" ("ACE"), representing "the maximum amount of each fish stock that a sector's members could collectively catch."¹⁰⁰ Sectors could also lease ACE from other sectors, and thereby increase their entitlement for a particular stock. Permit holders who chose not to join a sector could fish in the "common pool," which was governed by a different regime.¹⁰¹ The *Lovgren* plaintiffs argued that the sector allocation program created by the NMFS regulations was both an IFQ and a limited access privilege program, but did not comply with the MSA's requirements for new limited access privilege programs.¹⁰² The *Lovgren* defendants, including NMFS, argued that the amendment did not create a new limited access privilege program.¹⁰³

⁹⁸ The amendment, known as Amendment 16, or A16, was first adopted by the New England Fishery Management Council and submitted to NMFS for review and approval. NMFS then engaged in notice and comment rulemaking and ultimately largely approved the amendment and issued three related sets of regulations. *Id.* at 18.

⁹⁹ *Id.* at 18–19.

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Id.*

¹⁰² *Id.* at 20. Plaintiffs also raised additional challenges to the regulations based on both the MSA and the National Environmental Policy Act. *Id.*

¹⁰³ *Id.*

Of particular relevance, the *Lovgren* defendants argued that a “sector” did not receive a “Federal permit” within the meaning of the MSA, as an ACE allocation is not a Federal permit “as that term is understood in fishery management.”¹⁰⁴ The *Lovgren* plaintiffs acknowledged that the Northeast Multispecies Fishery had long had a regulated permitting system, and that the ACE allocation would not be a Federal permit under the Fishery’s existing regulations on permits. However, they contended that the appropriate construction of the term “Federal permit” as used in the MSA would be “the layperson’s meaning of the word ‘permit,’” and that the ACE allocation thus qualified as a Federal Permit because it was “a form of permission.”¹⁰⁵ The First Circuit agreed with defendants that the term “Federal permit,” had “an understood meaning in fisheries management,” and concluded that defendants’ construction of the term was a permissible construction of the MSA. The First Circuit explained that the term permit refers to “a document, issued by the Secretary or an authorized federal agency, that authorizes its holder to participate in a federal fishery,” and noted that “the MSA continues to distinguish ‘Federal permits’ from other forms of permission relating to fishing.”¹⁰⁶

In the present case, Plaintiffs contend that NMFS’s position on the meaning of the term “Federal permit” is clearly inconsistent with NMFS’ position in *Lovgren*, as NMFS now argues that the pollock sector directed fishing allowance is “documentation granting permission to fish” and is therefore a “Federal permit.”¹⁰⁷ Plaintiffs note that NMFS successfully persuaded the First Circuit of its contradictory opinion in *Lovgren*, and argue that NMFS is now engaging in a

¹⁰⁴ *Id.* at 24.

¹⁰⁵ *Id.* at 25.

¹⁰⁶ *Id.* at 24–25.

¹⁰⁷ Dkt. 45 at 23–24.

deliberate change of position and should be judicially estopped. In response, Defendants argue that their present position is not inconsistent as the sector program at issue in *Lovgren* is significantly different from the directed fishing allocation for the AFA catcher/processor sector.¹⁰⁸ Defendants note that Northeast Multispecies Fishery and the Greater Atlantic Region of NMFS did not have a specific regulation defining the term “permit,” and that by contrast, the Alaska region of NMFS has a regulation defining a permit as “documentation granting permission to fish.”¹⁰⁹ Additionally, Defendants note that unlike the temporary and fluid sectors in *Lovgren*, the AFA catcher/processor sector is statutorily defined in the AFA. Defendants also contend that NMFS is neither deriving an unfair advantage nor imposing an unfair detriment on Plaintiffs.¹¹⁰

While NMFS’s argument concerning the meaning of the term “Federal permit” in *Lovgren* differs from NMFS’ position in the present case, NMFS’ present argument is based on an application of an NMFS regulation that did not apply to the region at issue in *Lovgren*. A determination based on an Alaska regional regulation will not risk inconsistency with the First Circuit’s conclusions regarding a regional fishery program based in New England.¹¹¹ Moreover, Plaintiffs do not appear to have relied on NMFS’ position in *Lovgren*, and NMFS does not

¹⁰⁸ Dkt. 49 at 24–28.

¹⁰⁹ *Id.* at 25 (citing 50 C.F.R. § 679.2).

¹¹⁰ *Id.* at 29.

¹¹¹ *See, e.g., United States v. Washington*, 88 F. Supp. 3d 1203, 1213 (W.D. Wash. 2015) (“While Respondents point to the Makah’s expressions of support for their customary ocean fishing grounds in *Mosbacher* and Subproceeding 92–1, the Court does not find any obvious inconsistency with the Makah’s positions in this subproceeding.... the Makah’s statements that substantial evidence supported the Secretary’s determination pertained to the rights of tribes fishing in Subarea 2A–1, not the Quinault and Quileute specifically”).

appear to gain any particular advantage by raising a distinct argument in the present case.

Accordingly, judicial estoppel does not preclude Defendants from arguing that that directed fishing allocation for the catcher/processor sector is a Federal permit. Defendants' interpretive arguments and Plaintiffs' related contentions are substantively addressed in subsection D below.

C. Rational basis for distinguishing the Bering Sea pollock catcher/processor sector

In addition to judicial estoppel, Plaintiffs contend that the Final Rule is arbitrary and capricious agency action as there is “no rational basis on which to conclude the [catcher/processor] sector [directed fishing allocation] is a Federal Permit when NMFS previously determined that Amendment 16 sector ACE in the Northeast multispecies groundfish fishery and the allocation to the [catcher/processor] sector of the whiting fishery off the West Coast are not Federal permits.”¹¹² Plaintiffs explain that the directed fishing allocation for the Bering Sea pollock catcher/processor sector, the annual catch entitlement for sectors in the Northeast, and the allocation to the Pacific whiting catcher/processor sector are all “published in the Federal Register.”¹¹³ Plaintiffs note that both the Northeast sector annual catch entitlement and whiting catcher/processor sector allocation were raised in a comment to the Proposed Rule, and that the Final Rule only addressed the Pacific whiting fishery and distinguished the pollock catcher/processor sector on the basis that it receives mandated allocations and has specifically named eligible participants — both of which Plaintiffs contend also apply to the Pacific whiting catcher/processor sector.

Defendants maintain that the Bering Sea pollock catcher/processor sector is distinct from both the Northeast sector annual catch entitlement and the Pacific whiting catcher/processor

¹¹² Dkt. 45 at 24.

¹¹³ *Id.*

sector because the former is managed under the AFA. Defendants maintain that these regional regulations differ from those of the Pacific whiting fishery, and therefore distinguish the present program.¹¹⁴

Under the APA’s arbitrary and capricious standard, the Court must “examine the agency’s decision to ensure that it has articulated a rational relationship between its factual findings and its decision.”¹¹⁵ “A decision is 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.”¹¹⁶

In the Final Rule, NMFS explained its rationale for concluding that the Bering Sea catcher/processor sector receives a “Federal permit” and is therefore subject to cost recovery under the MSA. Although NMFS’ response to the public comment concerning other fishery programs was sparse and did not specifically discuss permits, NMFS responded to another comment specifically addressing the meaning of a permit by citing the regional regulation defining a permit as “documentation granting permission to fish.”¹¹⁷ The present regulation and NMFS’ conclusions largely concern legal interpretation, rather than specific factual findings.¹¹⁸

¹¹⁴ Dkt. 29 at 27.

¹¹⁵ *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1132 (9th Cir. 2010).

¹¹⁶ *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)) (internal citations omitted).

¹¹⁷ A.R. 1006032 at 156 (Final Rule).

¹¹⁸ *Cf. Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010) (“Here, we hold that NMFS has not offered a satisfactory explanation for its action. First, the agency has not adequately explained its finding that sea lions are having a ‘significant negative impact’ on the decline or recovery of listed salmonid populations given earlier factual findings by NMFS that fisheries that cause similar or greater mortality among these populations are not having

Although NMFS' positions with respect to similar programs may be relevant to a change in position or judicial estoppel, as discussed above, and to the Court's evaluation of NMFS' interpretation of the MSA, as discussed below, there is no freestanding procedural obligation for NMFS to distinguish its application of a statutory and regulatory framework to a particular program from its application in other contexts.¹¹⁹

D. NMFS' Interpretation of the MSA

The Court generally reviews NMFS' interpretation of the MSA under the *Chevron* two-step framework.¹²⁰ At step one, the Court considers whether "the intent of Congress is clear."¹²¹ When "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress."¹²² If the statute is "silent or ambiguous" on the precise issue, the Court considers whether Congress delegated authority to the agency "to speak with the force of law when it addresses ambiguity in the statute or fills a

significant negative impacts. Second, the agency has not adequately explained why a California sea lion predation rate of 1 percent would have a significant negative impact on the decline or recovery of these salmonid populations. These procedural errors require us to direct the district court to vacate NMFS's decision"); *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1120 (9th Cir. 2006) ("There is no evidence in the record that the Council's 1986 and 1988 studies are outdated or flawed. Bereft of any contrary science, plaintiffs' bare allegation that the agency's distinction conflicts with the 'best scientific evidence available' fails.").

¹¹⁹ Plaintiffs did not argue that NMFS' response somehow constituted a failure to respond. See *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("An agency need only respond to 'significant comments,' those which, 'if adopted, would require a change in the agency's proposed rule.'").

¹²⁰ See, e.g., *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1120 (9th Cir. 2016); *Pac. Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012); *Oregon Trollers Ass'n*, 452 F.3d at 1116.

¹²¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Glacier Fish*, 832 F.3d at 1120.

¹²² *Chevron*, 467 U.S. at 842–43; *Glacier Fish*, 832 F.3d at 1120.

space in the enacted law.”¹²³ When the agency interprets the statute through an exercise of that authority, the Court must “accept the agency’s construction of the statute” so long as “the implementing agency’s construction is reasonable . . . even if the agency’s reading differs from what the court believes is the best statutory interpretation.”¹²⁴ An interpretation is reasonable so long as it “reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress’ expressed intent.”¹²⁵

Plaintiffs raise a number of arguments concerning NMFS’ interpretation of the MSA. The MSA defines a “limited access privilege” to include an “individual fishing quota,” and defines an individual fishing quota as “a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person.”¹²⁶ Plaintiffs contest NMFS’ interpretation of the terms “Federal permit,” “person,” “under a limited access system,” and “exclusive use,” as well as NMFS’ broader conclusion that the AFA created an IFQ, and the appropriate level of deference.¹²⁷

¹²³ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Glacier Fish*, 832 F.3d at 1120.

¹²⁴ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Glacier Fish*, 832 F.3d at 1120.

¹²⁵ *Rust v. Sullivan*, 500 U.S. 173, 184 (1991); *Glacier Fish*, 832 F.3d at 1120.

¹²⁶ 16 U.S.C. § 1802(23).

¹²⁷ Dkt. 45 at 27–32; Dkt. 50 at 10–23.

a. Federal Permit

As described above, the parties dispute whether the harvest specifications published annually in the Federal Register constitute a “Federal permit.” In the Final Rule, NMFS explained its rationale for concluding that the catcher/processor sector receives a Federal permit:

Section 3 of the Magnuson Stevens Act defines an individual fishing quota as “a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person.” According to § 679.2, a permit means documentation granting permission to fish. The harvest specifications, with the AFA directed fishing allowance entitling the catcher/processor sector to harvest a quantity of fish for its exclusive use, is the individual fishing quota and documentation granting permission to fish.

In their cross-motion for summary judgment and at oral argument, Defendants maintain and expand on this explanation. Defendants quote the full definition of a “permit” at 50 C.F.R. § 679.2, part of the NMFS regulations implementing the AFA programs, which provides that “[p]ermit means documentation granting permission to fish and includes ‘license’ as a type of permit.”¹²⁸ Noting that the NMFS regulations do not specifically define the term “license,” Defendants then look to the APA, which defines a “license” to include “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”¹²⁹ Defendants thus contend that the annual harvest specifications are a Federal permit as they “authorize fishing” and therefore fall within NMFS’ “broad definition of the term ‘permit.’”¹³⁰

¹²⁸ Dkt. 49 at 20.

¹²⁹ *Id.*

¹³⁰ *Id.*

Defendants expressly tie this broad definition to the regulatory definition at 50 C.F.R. § 679.2. Defendants explain that the Alaska Region of NMFS promulgated this definition through notice and comment rulemaking, and distinguish the definition used in *Lovgren* on the basis that there was no comparable regulatory definition in the Northeast Region. At oral argument, Defendants acknowledged that the harvest specifications do not meet the definition of a “Federal permit” articulated in *Lovgren*. However, because the Alaska Region of NMFS has specifically defined the term “permit” to include a license, and as NMFS’ interpretation of their own regulations are due particular deference, Defendants contend that the harvest specifications constitute a permit for the Bering Sea pollock catcher/processor sector.¹³¹

Plaintiffs object to Defendants’ interpretation on several grounds. First, Plaintiffs argue that Defendants’ broad interpretation of the term “permit” is not entitled to deference as NMFS did not include this interpretation in either the Proposed or Final Rules. Plaintiffs note that NMFS only quoted the first part of the definition at § 679.2 — leaving out the reference to a “license” — in the Final Rule, and made no mention of the APA’s definition of a license.¹³² Plaintiffs also argue that Defendants’ interpretation of the term “Federal permit” in the MSA by reference to the definition of “permit” at § 679.2 is unreasonable, as nothing in the MSA or AFA indicates that Congress intended a “Federal permit” to mean a “permit” as defined by NMFS.¹³³ Moreover, Plaintiffs note that the regulatory definition at § 679.2 was only promulgated in 2008, and therefore “cannot serve as a basis on which to defend the CP sector’s status as an IFQ

¹³¹ *Id.* at 22, 25.

¹³² Dkt. 50 at 16–17.

¹³³ *Id.* at 17–18.

program in effect before that date.”¹³⁴ Finally, Plaintiffs argue that even if the regulatory definition is relevant, NMFS’ interpretation is contrary to the plain language of the regulation and evidence of NMFS’ intent at the time it adopted the regulation.¹³⁵

Turning to *Chevron* step one, the MSA itself does not define “Federal permit” or “permit,” and the Court has not found any provision in the MSA that specifically addresses the format of a Federal permit.¹³⁶ Similarly, in both *Lovgren* and *Glacier Fish*, the First and Ninth Circuits concluded that the MSA had not directly spoken to whether the disputed permits at issue in those cases constituted Federal permits within the meaning of the statute.¹³⁷ The Court concludes that Congress has not directly spoken to the precise question at issue.

With respect to whether Congress delegated authority to NMFS to “speak with the force of law” in interpreting this term, the MSA specifically directs the Secretary of Commerce to collect a fee to recover costs related to the management and enforcement of limited access privilege programs. To do so, the Secretary, acting through NOAA and NMFS, must determine which programs are limited access privilege programs, which in turn requires consideration of the term “Federal permit.” Although the MSA does not specifically direct NMFS to engage in

¹³⁴ *Id.* at 18–19.

¹³⁵ *Id.* at 20.

¹³⁶ At oral argument, Plaintiffs acknowledged that no provision in the MSA or the AFA foreclosed NMFS’ interpretation. Tr. at 5, 9.

¹³⁷ *See Lovgren v. Locke*, 701 F.3d 5, 22 (1st Cir. 2012) (“we agree with defendants that the statutory text does not compel the conclusion that A16’s sector program meets the statutory definition of a LAPP or an IFQ”); *Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1121 (9th Cir. 2016) (“we have not found, and the parties have not identified, any provisions in the Magnuson–Stevens Act that specifically address whether a limited access privilege could include a permit issued to a coop along the lines set forth in NMFS’s regulations. We therefore conclude that Congress has not directly spoken to this issue.”).

formal rulemaking on this point, the statutory language implicitly requires NMFS to determine its applicability.¹³⁸ Accordingly, the Court will defer to NMFS' construction as long as it is reasonable.¹³⁹

However, as Plaintiffs note, Defendants significantly expanded their interpretive argument in their briefing before this Court. NMFS referenced the definition of "permit" at 50 C.F.R. § 679.2 in the Final Rule, but did not discuss the meaning of a "license" within this definition, or refer to the definition of "license" under the APA. In reviewing agency action, the Court "may not accept . . . counsel's *post hoc* rationalizations," as "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."¹⁴⁰ While the Court will defer to NMFS' interpretation as described in the Final Rule, Defendants' additional arguments are not entitled to the same deference.

Moreover, even applying *Chevron* deference, NMFS' conclusion that the harvest specifications constitute a "Federal permit" is not a "reasonable interpretation" of the MSA.¹⁴¹ Under *Chevron*, the Court must determine whether the agency action was "based on a

¹³⁸ Cf. *Glacier Fish*, 832 F.3d at 1120 ("Here, Congress directed NMFS to promulgate a fishery management plan and implementing regulations that have the force of law through notice-and-comment rulemaking. See 16 U.S.C. § 1854. Accordingly, we must defer to NMFS's construction").

¹³⁹ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Glacier Fish*, 832 F.3d at 1120.

¹⁴⁰ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, (1983); see also *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008); *Kunaknana v. U.S. Army Corps of Engineers*, 23 F. Supp. 3d 1063, 1093 (D. Alaska 2014).

¹⁴¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); see also *Nat. Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 880 (9th Cir. 2005) ("even under the *Chevron* standard of review, the 2002 quota was based on an impermissible construction of the Act.").

permissible construction of the statute,”¹⁴² or in other words, “reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent.”¹⁴³

Defendants assert, without explanation, that the term “Federal permit” in the MSA should be interpreted by reference to the definition of “permit” in the NMFS regulations concerning the AFA. At the outset, the Court notes that this argument suffers from a timing discrepancy. The meaning of a statutory term is ordinarily understood as of the time of the statute’s enactment.¹⁴⁴ Congress amended the MSA to include the cost recovery provision and a definition of an IFQ, which included the term “Federal permit,” in 1996. NMFS only adopted the regulatory definition of a “permit” codified at 50 C.F.R. § 679.2 in 2008. Defendants themselves argue that NMFS “has long held that the AFA Program indeed meets the Magnuson-Stevens Act’s definition of an IFQ, at least since 2002,” but do not explain how the harvest specifications could have constituted a “Federal permit” between 2002 and 2008, when there was no regional regulatory definition in place.¹⁴⁵ To the contrary, Defendants conceded at oral argument that the harvest specifications would not fall under the definition of a “Federal permit” in *Lovgren*,¹⁴⁶ which

¹⁴² *Id.* at 843.

¹⁴³ *Rust v. Sullivan*, 500 U.S. 173, 184 (1991).

¹⁴⁴ *See, e.g., Carciari v. Salazar*, 555 U.S. 379, 388 (2009) (“We begin with the ordinary meaning of the word ‘now,’ as understood when the IRA was enacted.”).

¹⁴⁵ Dkt. 49 at 41.

¹⁴⁶ Dkt. 57 (Oral Argument held on Jan. 22, 2018).

Defendants distinguish from this case precisely because “the Northeast Fishery and the Greater Atlantic Region of NMFS did not have a specific regulation defining the term ‘permit.’”¹⁴⁷

More fundamentally, Defendants’ contention that the term “Federal permit” may have different meanings in different regions is at odds with the text and purpose of the MSA. In addition to defining the terms “limited access privilege program” and “individual fishing quota,” the MSA regulates the development of these programs by regional fishery councils.¹⁴⁸ Nothing in the MSA suggests that NMFS should be able to alter the definition of a “Federal permit” and thereby broaden or narrow the category of programs that qualify as “limited access privilege programs” — and are subject to the related provisions of the MSA — in different regions. While different regions could conceivably issue different types or formats of permits, such permits, in order to qualify a program as an individual fishing quota and/or a limited access privilege program, must all be “Federal permits” within the meaning of the MSA.¹⁴⁹ It strains the bounds of reasonability to conclude that the same agency could significantly expand the definition of a statutory term for one region while applying a far narrower definition elsewhere without ultimately draining the statutory term of any meaning.

NMFS’ interpretation is also inconsistent with the use of the term “permit” in the MSA and in NMFS regulations, including the NMFS Alaska region regulations implementing the

¹⁴⁷ Dkt. 49 at 25.

¹⁴⁸ See 16 U.S.C. § 1853a(a) (“After January 12, 2007, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.”).

¹⁴⁹ Indeed, in *Lovgren*, the First Circuit cited different types of permits used in fisheries in a number of regions to conclude that a permit “is a document, issued by the Secretary or an authorized federal agency, that authorizes its holder to participate in a federal fishery.” *Lovgren v. Locke*, 701 F.3d 5, 24–25 (1st Cir. 2012).

AFA. As described in *Lovgren*, the term “Federal permit” has “an understood meaning in fisheries management,” and has been used consistently in the MSA and in NMFS regulations covering different regions.¹⁵⁰ The Alaska region regulations cited by Defendants include a provision on permits,¹⁵¹ which describes a number of available permits — including a specific “IFQ permit” — that comport with the general understanding of a “permit” as “a document, issued by the Secretary or an authorized federal agency, that authorizes its holder to participate in a federal fishery.”¹⁵²

Finally, even looking to the definition of a “permit” in § 679.2, as advanced by Defendants, the definition itself does not suggest that a “permit” under these regulations is intended to encompass harvest specifications. This section defines a permit as “documentation granting permission to fish,” including a “license.” In *Lovgren*, NMFS quoted Black’s Law Dictionary’s definition of a “permit” as “a certificate evidencing permission; a license,” and concluded that a Federal permit did not encompass “any sort of permission” but rather, in the context of the MSA, referred to a permit issued under that system.¹⁵³ NMFS’ invocation of the term “license” does not significantly alter this analysis. Moreover, these same regulations, in addition to including a provision on permits that does not include harvest specifications, also include a provision implementing the AFA program which references the harvest specifications and makes no mention of an IFQ, limited access privilege, or a permit.¹⁵⁴

¹⁵⁰ *Id.* at 24–26.

¹⁵¹ 50 C.F.R. § 679.4.

¹⁵² *Lovgren*, 701 F.3d at 25.

¹⁵³ *Id.*, Brief for the Federal Defendant-Appellees, 2012 WL 1075783 at 37.

¹⁵⁴ 50 C.F.R. § 679.20.

The Court thus concludes that NMFS' interpretation of "Federal permit" in the Final Rule is not a permissible construction of the MSA.

b. Person

The parties also dispute whether the catcher/processor sector may be a "person" who receives an individual fishing quota under the MSA. As with the term "Federal permit," NMFS directly addressed this issue in the Final Rule in response to a comment. With respect to "person," however, NMFS acknowledged that "the proposed rule was not sufficiently specific in explaining who the person is that receives the individual fishing quota."¹⁵⁵ In the Proposed Rule, NMFS identified the relevant "person" as the "AFA Offshore Joint Cooperative,"¹⁵⁶ which NMFS described as a "joint agreement... to facilitate efficient harvest management and accurate harvest accounting between the participants in the catcher/processor sector."¹⁵⁷ In the Final Rule, NMFS did not link the "person" to the joint cooperative agreement, but rather identified the relevant person as "the catcher/processor sector that is eligible to harvest pollock from that sector's directed fishing allowance defined in section 206(b)(2) of the AFA."¹⁵⁸ NMFS explained:

Regulations at § 679.2 define a person as "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other non-individual entity (whether or not organized, or existing under the laws of any state), and any Federal, state, local, or foreign government or any entity of any

¹⁵⁵ A.R. 1006032 at 157 (Final Rule).

¹⁵⁶ A.R. 1005825 at 943, Table 2 (Proposed Rule).

¹⁵⁷ *Id.* at 940. The Proposed Rule did not specifically discuss the two cooperatives who formed this agreement, but noted that the joint agreement, in full, is "called the 'Cooperative Agreement between Offshore Pollock Catchers' Cooperative and Pollock Conservation Cooperative' (AFA Offshore Joint Cooperative)." *Id.*

¹⁵⁸ A.R. 1006032 at 157 (Final Rule).

such aforementioned governments.” A similar definition of a “person” is in section 3 of the Magnuson-Stevens Act.

As explained in response to Comment 5, the directed fishing allowance is an individual fishing quota. NMFS allocates the directed fishing allowance to the AFA catcher/processor sector. NMFS considers the AFA catcher/ processor sector an entity and therefore a person under the Magnuson-Stevens Act.¹⁵⁹

Plaintiffs acknowledge that the MSA defines “person” to include an “entity,” but contend that NMFS’ interpretation is foreclosed by the text of the AFA.¹⁶⁰ Plaintiffs point to the AFA’s harvest cap provision, which prohibits any “particular individual, corporation, or other entity” from harvesting “a total of more than 17.5 percent of the pollock available to be harvested in the directed pollock fishery.”¹⁶¹ As Congress allocated the catcher/processor sector an amount greater than the 17.5% harvest cap, Plaintiffs argue, Congress could not have considered the catcher/processor sector to be an “entity” subject to that cap, and there is no evidence that Congress intended the word “entity” to have different meanings in the MSA and the AFA.¹⁶² Plaintiffs also argue that the catcher/processor sector is “simply a description of the vessels” authorized under the AFA to harvest the 40% catcher/processor sector allocation, and therefore is not an entity capable of receiving a permit.¹⁶³

¹⁵⁹ *Id.*

¹⁶⁰ Dkt. 45 at 28; Dkt. 57 (Oral Argument held on Jan. 22, 2018).

¹⁶¹ Pub. L. No. 105-277, § 206(b)(2) (Oct. 21, 1998), § 210(e)(1); *see also* § 205(4) (“the term ‘directed pollock fishery’ means the fishery for the directed fishing allowances allocated under paragraphs (1), (2), and (3) of section 206(b)”).

¹⁶² Dkt. 45 at 28; Dkt. 50 at 13.

¹⁶³ Dkt. 50 at 12.

In response, Defendants reiterate that the MSA defines “person” to include any “entity,” and note that the NMFS regulations implementing the AFA contain a similar definition of “person” that expressly includes any “non-individual entity.” The NMFS regulations further define a “non-individual entity” as “a person who is not an individual or ‘natural’ person; it includes corporations, partnerships, estates, trusts, joint ventures, joint tenancy, and any other type of ‘person’ other than a natural person.”¹⁶⁴ In their briefing before this Court, Defendants change the description of the relevant sector from the description in the Final Rule, which did not specifically define the catcher/processor sector by way of the two cooperatives. Defendants now posit that the “AFA catcher/processor sector was created when two cooperatives entered into a joint agreement,” and that through this agreement, “these two cooperatives, comprise a non-individual entity, i.e. the AFA catcher/processor sector, because the sector acts as a single entity and receives its exclusive harvest privilege as one entity.”¹⁶⁵ With respect to the 17.5% harvest cap, Defendants argue that Plaintiffs are confusing the term “person,” which includes a “non-individual entity,” with the separate term “AFA entity” in NMFS’ regulations implementing the AFA.¹⁶⁶ Defendants argue that the AFA’s harvest cap applies to specifically to AFA entities, not to any non-individual entity.¹⁶⁷

Under *Chevron*, the Court’s analysis begins with the plain language of the MSA. Unlike the term “Federal permit,” the MSA specifically defines “person”: “The term ‘person’ means any

¹⁶⁴ Dkt. 49 at 32 (quoting 50 C.F.R. § 679.2).

¹⁶⁵ *Id.* at 32–33.

¹⁶⁶ 50 C.F.R. § 679.2 (“AFA entity means a group of affiliated individuals, corporations, or other business concerns that harvest or process pollock in the BS directed pollock fishery”).

¹⁶⁷ Dkt. 49 at 32–33.

individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.”¹⁶⁸ The MSA does not define “entity,” and NMFS based its interpretation in the Final Rule on its conclusion that the catcher/processor sector is an entity, and therefore a person. However, both the common sense meaning of the term “entity” and its use in the context of the MSA’s definition “person” foreclose this interpretation.

When a statute does not expressly define a term, courts consider “the common sense meaning of the statute’s words,” including review of dictionaries.¹⁶⁹ Black’s Law Dictionary defines an “entity” as a “real being; existence . . . an organization or being that possesses separate existence for tax purposes,” and gives as examples “corporations, partnerships, estates and trusts.”¹⁷⁰ Courts also read terms in context, and may consider “the structure of the relevant provisions.”¹⁷¹ The structure of the MSA’s definition of “person,” which includes “any

¹⁶⁸ 16 U.S.C. § 1802(36).

¹⁶⁹ *Arizona Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1249 (9th Cir. 2007); *The Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir. 2003), *amended on reh’g en banc in part sub nom. Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 360 F.3d 1374 (9th Cir. 2004).

¹⁷⁰ Black’s Law Dictionary 477 (5th ed. 1979). In considering the common sense meaning of a term, the Court looks to dictionaries that were current when the legislation was drafted. *Arizona Health Care*, 508 F.3d at 1249. Congress included the above definition of “person” in the MSA when it was first passed in 1976, although Congress only added a definition of an “individual fishing quota,” which includes reference to a “person,” in 1996. The 1999 version of Black’s Law Dictionary similarly defines an “entity” as an “organization (such as a business or a governmental unit) that has a legal identity apart from its members.” Black’s Law Dictionary 553 (7th ed. 1999).

¹⁷¹ *The Wilderness Soc’y*, 353 F.3d at 1062.

corporation, partnership, association, or other entity,” indicates that corporations, partnerships, and associations are examples of the types of entities that constitute persons under the MSA.

Although the MSA’s definition of a “person” is broad, it does not encompass a list. As described in the Final Rule, the “person” identified by NMFS is “the catcher/processor sector . . . defined in section 206(b)(2) of the AFA.” Section 206(b)(2), in turn, refers to “catcher/processors and catcher vessels harvesting pollock for processing by catcher/processors in the offshore component.” Sections 208(b) and 208(e) then list the individual catcher vessels and catcher/processors, respectively, that are eligible to harvest pollock under section 206(b)(2).¹⁷² Although these provisions list a number of individual vessels, and may indeed describe the AFA’s “catcher/processor sector,” none of these provisions describe an organization or a being that possesses a separate existence outside of its constituent members. Moreover, the MSA’s definition of an “individual fishing quota” describes a harvest privilege that may be “that may be received or held for exclusive use by a person.”¹⁷³ A list of vessels, in contrast to an organization or another “real being,” is not capable of receiving or holding such a privilege.¹⁷⁴

¹⁷² Sections 208(b) and 208(e) list eligible vessels by name and include provisions concerning unlisted vessels that may also be eligible to harvest pollock if they meet certain historical criteria. *See* Pub. L. No. 105-277, §§ 208(b)(8) and 208(e)(21).

¹⁷³ 16 U.S.C. § 1802(23). Moreover, while a sector allocation could potentially be a different type of quota program, the MSA distinguishes between an “individual quota program” and a “sector allocation.” *See* 16 U.S.C. §§ 1853a(h) (“Nothing in this chapter . . . shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocation”) and 1853a(i) (“The requirements of this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation”).

¹⁷⁴ *Cf. Glacier Fish Co. LLC v. Pritzker*, 832 F.3d 1113, 1120 (9th Cir. 2016) (concluding that a “coop,” which was “a group of participants that acts both as a group and individually,” could hold a “Federal permit” under the MSA).

The language and format of the MSA's definition of "person" preclude NMFS' interpretation of this term.¹⁷⁵

Defendants' revised description of the relevant "person" in their briefing before this Court is similarly unavailing. In their cross-motion for summary judgment, Defendants contend that by entering into a joint agreement, the two cooperatives in the catcher/processor sector now comprise an entity.¹⁷⁶ However, an "agreement," like a list, simply does not fall within the common sense meaning of the term entity. While an individual cooperative may receive a permit, as discussed in *Glacier Fish*, an "agreement" between two cooperatives is not itself an organization or a being capable of receiving a privilege.¹⁷⁷

NMFS' interpretation of "person" in the Final Rule is not a permissible construction of the MSA.

c. Under a limited access system and exclusive use

Plaintiffs also argue that the AFA program is not an individual fishing quota because the purported Federal permit to the catcher/processor sector is not issued "under a limited access system," and the purported person does not have "exclusive use" to harvest a quantity of fish. As

¹⁷⁵ With respect to Plaintiffs' argument concerning the AFA's harvest cap, the Court notes that the AFA does not appear to have intended for the harvest cap to apply to the entire sectors receiving directed fishing allowances under section 206(b). However, the AFA's use of the term "entity" is not necessarily coextensive with the use of the term "entity" in the MSA, and NMFS has adopted a specific definition for an "AFA entity" who is subject to the harvest cap. *See* 50 C.F.R. §§ 679.2; 679.7(k)(6) ("It is unlawful for an AFA entity . . . to harvest, through a fishery cooperative or otherwise, an amount of BS pollock that exceeds the 17.5 percent excessive share limit"). As the Court concludes that NMFS' interpretation conflicts with the plain language of the MSA, the Court need not resolve whether the language of the AFA would similarly foreclose NMFS' construction.

¹⁷⁶ Dkt. 49 at 33.

¹⁷⁷ *Cf. Glacier Fish*, 832 F.3d at 1120.

the Court has concluded that both the “Federal permit” and the “person” described in the Final Rule reflect impermissible constructions of the MSA, the Court does not reach these issues.

E. Designation of CP Salmon Corporation as payor and recoverable costs

In addition to the procedural and interpretive challenges discussed above, Plaintiffs raise specific arguments about the designation of CP Salmon Corporation as the payor and the calculation of recoverable costs in the Final Rule. As the Court concludes that the Final Rule impermissibly interprets and thereby violates the MSA, the Court likewise does not reach these arguments.

F. Remedy

In their cross-motion for summary judgment, Defendants request the opportunity to submit additional briefing on remedy in the event the Court rules in favor of Plaintiffs.¹⁷⁸ While the Court notes that an impermissible construction of a statute, in contrast to other agency action, may not typically be cured on remand, the Court grants Defendants’ request to provide further briefing on remedy.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the Final Rule violates the Magnuson–Stevens Fishery Conservation and Management Act in its construction of the terms “Federal permit” and “person.”

IT IS HEREBY ORDERED:

1. Plaintiffs’ Motion for Summary Judgment is **GRANTED IN PART** with respect to these arguments and **DENIED IN PART**.
2. Defendants’ Cross-Motion for Summary Judgment is **DENIED**.

¹⁷⁸ Dkt. 49 at 46.

3. Within 21 days of this order, Defendants shall file supplemental briefing on the remedy, limited to 10 pages. Plaintiffs may file any response within 14 days of Defendants' supplemental briefing, also limited to 10 pages.

Dated at Anchorage, Alaska, this 30th day of March, 2018.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE