

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	
	)	Appeal No. 01-0004
WILLARD S. FERRIS,	)	
F/V SEABROOKE,	)	DECISION
ADF&G # 36800,	)	
Appellant	)	January 18, 2002
_____	)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on May 20, 2001, that approved Mr. Ferris's application for groundfish and crab licenses under the North Pacific Groundfish and Crab License Limitation Program (LLP), based on the fishing history of his LLP qualifying vessel, the F/V SEABROOKE. RAM denied Mr. Ferris's request for endorsements to his groundfish license for the Bering Sea and the Aleutian Islands groundfish fisheries, but issued interim LLP groundfish and crab licenses with all the endorsements he requested, pending final agency action on his application.

Mr. Ferris has timely appealed the two groundfish endorsements denied to him in the IAD. His interests are directly and adversely affected by the IAD and, therefore, he has standing to bring an appeal. [50 C.F.R. § 679.43(b)] An oral hearing is not necessary in this case because the record contains sufficient information on which to reach a final decision. [50 C.F.R. § 679.43(k)]

ISSUE

Do harvests of Pacific cod allegedly made aboard the F/V SEABROOKE, and used by Mr. Ferris for crab bait, qualify Mr. Ferris for LLP groundfish license endorsements for the Bering Sea and Aleutian Islands groundfish fisheries?

ANALYSIS

To qualify for LLP groundfish license endorsements for both the Bering Sea and Aleutian Islands groundfish fisheries, the licensed vessel must have made at least one "documented harvest" of LLP groundfish in each of those fisheries during the period January 1, 1992 through June 17, 1995.<sup>1</sup> A "documented harvest" is defined as "a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting."<sup>2</sup> Implicit in this definition is the idea that the lawful harvest must be a lawful *commercial* harvest.

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<sup>1</sup>See 50 C.F.R. § 679.4(k)(4)(ii)(A) and (B).

<sup>2</sup>50 C.F.R. § 679.2.

Otherwise it would make no sense to require that the harvest be recorded in compliance with commercial fishing regulations.

This view – that a documented harvest must result from commercial fishing – is consistent with the LLP’s purpose of regulating the commercial fishing of LLP groundfish and crab.<sup>3</sup> This view is also supported by our statement in another appeal decision that compliance with commercial fishing regulations requires that one be lawfully engaged in commercial fishing.<sup>4</sup> Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act defines “commercial fishing” as “fishing in which the fish harvested, either in whole or part, are intended to enter commerce or enter commerce through sale, barter, or trade.”<sup>5</sup>

Mr. Ferris claims that the F/V SEABROOKE harvested Pacific cod between January 1992 and September 1995 in both the Bering Sea and Aleutian Islands groundfish fisheries, and that the cod was used exclusively as bait in the course of the vessel’s commercial crab fishing. He does not claim that the vessel did any other groundfish fishing in the Bering Sea or Aleutian Islands groundfish fisheries during the endorsement qualification period, nor does the LLP official record show that he did any such fishing.

Even if Mr. Ferris’s claims of harvesting of Pacific cod are true, such harvests cannot be construed as the commercial fishing of groundfish because the cod were not harvested with the intent to enter commerce, nor did they enter commerce, through sale, barter, or trade. Although the Pacific cod were allegedly used as bait in the commercial fishing of crab, the cod themselves were not the object of any commercial fishing. Thus, the F/V SEABROOKE was not engaged in the commercial fishing of LLP groundfish when it harvested the cod for use as bait. Therefore, I conclude that the alleged harvests of Pacific cod cannot constitute documented harvests of groundfish for purposes of qualifying for LLP groundfish licenses or endorsements.

Mr. Ferris argues that it is discriminatory for NMFS to let halibut fishermen obtain an LLP groundfish license (or endorsement) based on a single Pacific cod caught as “bycatch,” but not to allow crab fishermen to obtain an LLP license (or endorsement) based on a targeted harvest of Pacific cod. Admittedly, at first glance this may seem unfair. The issue, however, is not whether the Pacific cod were harvested as a targeted species or as bycatch; the question is whether the Pacific cod were harvested commercially. If the Pacific cod were intended to enter commerce, or actually entered commerce, “through sale, barter or trade,” and they were lawfully harvested and

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<sup>3</sup>50 C.F.R. § 679.1(j).

<sup>4</sup>Prowler Partnership v. Samuelson, Appeal No. 95-0084, Decision on Reconsideration (Part II), September 29, 1997, at 21-22.

<sup>5</sup>See the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1802 (1994).

properly documented, they can be credited as documented harvests for purposes of LLP groundfish license or endorsement qualification. Refusing to credit the noncommercial harvest of Pacific cod for LLP groundfish license or endorsement qualification is not unfairly discriminatory.

Mr. Ferris argues that he is being wrongly penalized for not having “official” records of Pacific cod harvests for crab bait because the harvests were exempt from commercial fishing reporting requirements. The fact is, Mr. Ferris is not being penalized. He can continue to harvest Pacific cod for use as crab bait without the LLP endorsements he seeks and without having to report the harvests, so long as he takes the Pacific cod in crab pots while participating in an open season for crab and he does not sell the Pacific cod or transfer it to another vessel.<sup>6</sup> Mr. Ferris simply will not be allowed to use those noncommercial harvests of Pacific cod to establish a groundfish fishing history in, and gain entry into, the Bering Sea and Aleutian Islands groundfish fisheries under the LLP.

#### FINDING OF FACT

Mr. Ferris’s alleged harvests of Pacific cod in the Bering Sea and Aleutian Islands groundfish fisheries aboard the F/V SEABROOKE were not made with the intent to enter commerce, and did not enter commerce, through sale, barter, or trade.

#### CONCLUSIONS OF LAW

1. To be considered a documented harvest under the LLP program, a harvest must be a lawful commercial fishing harvest.
2. The F/V SEABROOKE was not engaged in the commercial fishing of LLP groundfish when it allegedly harvested Pacific cod for use as crab bait on the same vessel.
3. The alleged harvests of Pacific cod by the F/V SEABROOKE in the Bering Sea and Aleutian Islands groundfish fisheries do not constitute documented harvests of LLP groundfish for the purpose of qualifying for LLP groundfish licenses or endorsements.
4. The harvests of Pacific cod allegedly made aboard the F/V SEABROOKE, and used by Mr. Ferris for crab bait, do not qualify Mr. Ferris for LLP groundfish license endorsements for the Bering Sea and Aleutian Islands groundfish fisheries.

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect February

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<sup>6</sup>50 C.F.R. § 679.5(a)(1)(iv)

19, 2002, unless by that date the Regional Administrator orders review of the Decision.

Any party, and RAM, may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, January 28, 2002. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact of law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement of points and authorities in support of the motion.

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Randall J. Moen  
Appeals Officer