

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 05-0003
)	
HAL LEWIS,)	DECISION
Appellant)	
)	December 17, 2007
_____)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on February 11, 2005, that denied Mr. Lewis' application under the North Pacific Groundfish and Crab license limitation program (LLP) for an LLP groundfish license with a Bering Sea area groundfish endorsement based on the fishing history of the F/V MAKUSHIN (ADF&G No. 00144).

Mr. Lewis filed a timely appeal of the IAD. He can file an appeal because the IAD directly and adversely affects his interests. [50 C.F.R § 679.43(b)] Mr. Lewis does not request an oral hearing, nor is an oral hearing is authorized in this case because the appeal does not meet the requirements of 50 C.F.R. §679.43(g)(3)(i),(ii), (iii), and (iv).¹ The record contains sufficient information to decide this appeal, and therefore the record is now closed. 50 C.F.R. §679.43(g)(2).

ISSUE

Is Hal Lewis an eligible applicant for an LLP groundfish license based on the fishing history of the F/V MAKUSHIN?

¹(g) The appellate officer will review the applicant's appeal and request for hearing, and has discretion to proceed as follows: * * *

(3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following: (i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law. (ii) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions. (iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate. (iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.

SUMMARY OF DECISION

The IAD is VACATED. Mr. Lewis satisfies the second definition of “eligible applicant” in 50 C.F.R. § 679.2, which requires ownership of an LLP qualifying fishing history based on the express terms of a written contract. Mr. Dennis Robinson owned the F/V MAKUSHIN on June 17, 1995, and transferred the vessel’s fishing history to Mr. Lewis based on the express terms of a written contract. Therefore, Hal Lewis is an eligible applicant for an LLP groundfish license based on the fishing history of the F/V MAKUSHIN.

ANALYSIS

The LLP regulations require an LLP license to be issued only to an eligible applicant.² The term “eligible applicant” is defined in federal regulation 50 C.F.R. § 679.2. The regulation provides:

Eligible applicant means a qualified person who submitted an application during the application period announced by NMFS and:

(1) Who owned a vessel on June 17, 1995, from which the minimum number of harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or

(2) To whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained . . .³

Mr. Lewis claims on appeal that he is an eligible applicant for an LLP groundfish license based on ownership of the LLP qualifying fishing history of the F/V MAKUSHIN that was transferred to him by Mr. Dennis Robinson.

Mr. Lewis can establish his claim in this case if he can demonstrate that Mr. Robinson owned the F/V MAKUSHIN on June 17, 1995, and transferred the qualifying fishing history of the vessel to Mr. Lewis based on the express terms of a written contract.

Mr. Robinson’s Ownership of the F/V MAKUSHIN on June 17, 1995

² 50 C.F.R. § 679.4(k)(4); and 50 C.F.R. § 679.4(k)(5).

³ Federal regulation, 50 C.F.R. § 679.2, contains two additional ways a person can be an eligible applicant. One applies to the Norton Sound king crab summer fishery, the other to individuals who demonstrate eligibility pursuant to the Rehabilitation Act of 1973. Mr. Lewis claims neither.

The abstract of title for the F/V MAKUSHIN shows that Dennis Robinson has been the only registered owner of the vessel and that he owned the vessel on June 17, 1995.⁴ Therefore, I shall presume that Mr. Robinson owned the F/V MAKUSHIN on that date.

RAM denied Mr. Lewis' application for an LLP groundfish license on grounds that the City of Unalaska, Alaska, owned the F/V MAKUSHIN on June 17, 1995, and that he does not have a written contract that clearly and unambiguously shows the city transferred the vessel's fishing history to him.⁵

RAM determined that the City of Unalaska owned the F/V MAKUSHIN on June 17, 1995 (and its fishing history) based on a letter from the city⁶ which shows the city "impounded" the F/V MAKUSHIN on March 20, 1995, and sold the vessel at public auction to Mr. Troy LaRue on August 25, 1995.⁷ The city impounded and sold the vessel on evidence that Mr. Robinson had for more than a year "made no effort to maintain the vessel or make good his financial obligations [to the city]."⁸

The city's regulations authorize the city to impound a vessel to "abate derelicts and nuisances;" sell the vessel after 90 days if the impoundment charges and moorage fees remain unpaid; hold the net proceeds of the vessel's sale in trust; and pay the net proceeds to the vessel's owner (if

⁴ Department of Transportation, U.S. Coast Guard, General Index or Abstract of Title, F/V MAKUSHIN, June 27, 2000.

⁵ IAD, at 3-5. At about the same time that Mr. Lewis applied for an LLP license, another applicant (Zenith Fishing Co., Inc.) claimed that it owned the qualifying fishing history of the F/V MAKUSHIN based on fishing rights acquired from Cathryn Bray and Troy LaRue. RAM denied Zenith Fish Co., Inc.'s application on grounds that the City of Unalaska owned the vessel on June 17, 1995, and that the evidence did not show that Cathryn Bray and Troy LaRue had acquired the fishing history of the F/V MAKUSHIN from the city. [See IAD issued by RAM to Zenith Fish Co., Inc., at 9 (Feb. 14, 2005)]

⁶ Undated chronology of events for the F/V MAKUSHIN and Mr. Dennis Robinson, International Port of Dutch Harbor, City of Unalaska.

⁷ The record does not contain a bill of sale of the F/V MAKUSHIN to Mr. LaRue, but it is evident that the city sold the vessel to him at public auction on August 25, 1995. See, e.g., "Sealed Bid Opening," F/V MASKUSHIN, International Port of Dutch Harbor, City of Unalaska, August 25, 1995; letter of Troy LaRue to Debbie Ramos, October 15, 1998, in which Mr. LaRue states that he purchased the F/V MAKUSHIN from the City of Unalaska, at a public auction on August 25, 1995; and letter of Jim Severns, Port Director, City of Unalaska, to Troy LaRue, September, 20, 1996, and notice of public auction for the sale of the F/V MAKUSHIN by the City of Unalaska, September 26, 1996, which acknowledge Mr. LaRue as the owner of the vessel.

⁸ Undated chronology of events for the F/V MAKUSHIN and Mr. Dennis Robinson, International Port of Dutch Harbor, City of Unalaska.

the proceeds are claimed within five years). The language of the regulations provides:⁹

§18.20.010 IMPOUNDMENT. (Unalaska, Alaska, Code of Ordinances)

(A) The Harbormaster may take immediate possession and/or impound and remove any vessel within its jurisdiction:

(1) To abate derelicts and nuisances; ...

§ 18.20.020 EXPENSES.

(A) Expenses incurred by the Harbormaster in the removal, towing, impounding, custodianship, moorage and/or storage of any vessel under § 18.20.010 shall be paid by such vessel and its operator. ...

(C) The Harbormaster may decline to release possession of any vessel until all charges are paid in certified funds. ...

§ 18.20.050 SALE OF IMPOUNDED VESSELS.

(A) In the event a vessel remains impounded for 90 days and impound charges and expenses remain unpaid, the Harbor Master (of the City of Unalaska, Alaska) may sell the vessel at public auction to the highest and best bidder ...

(B) Not less than 20 days prior to sale, the city shall publish a notice of sale once in a newspaper of general circulation in the city. The notice shall describe ... the intention of the city to sell the vessel at public auction on a day and at a time certain for cash to the highest and best bidder.

(C) The person whose bid is accepted shall immediately pay the Harbormaster the full purchase price ...

(D) After the full purchase price plus any costs are paid by the successful bidder to the Harbormaster, the city shall make and deliver its bill of sale without warranty of title, for the vessel to the successful bidder.

(E) The proceeds of such sale shall be first applied to the costs of sale, then to impoundment expenses, then to delinquency charges

⁹ Unalaska, Alaska, Code of Ordinances, §§ 18.20.010 - 18.20.070.

accrued, then to moorage and service fees accrued. Any balance remaining shall be held in trust by the city for the owner of the vessel to claim. If the balance is not claimed within five years, the balance shall be deposited into the Port Enterprise Fund.

A reasonable reading of the city's regulations shows that the City of Unalaska (1) did not acquire ownership, but only legal custody or possession, of the F/V MAKUSHIN when it impounded the vessel on March 20, 1995; (2) was not authorized to sell the vessel until after 90 days of impounding (which in this case would have been June 18, 1995; and (3) sold the F/V MAKUSHIN to Troy LaRue on behalf of the vessel's owner, Dennis Robinson, at public auction on August 25, 1995.

Based on the preponderance of evidence, I find that Dennis Robinson owned the F/V MAKUSHIN on June 17, 1995.

Mr. Robinson's Retention of the Fishing History of F/V MAKUSHIN

The preamble to the LLP regulations provides that if a vessel is sold after June 17, 1995, and the disposition of the vessel's fishing history is not mentioned in the contract, it will be presumed that the vessel's fishing history and LLP license qualification remained with the seller.¹⁰ The language of the City of Unalaska's regulations,¹¹ and the public bid award¹² for sale of the F/V MAKUSHIN to Troy LaRue, did not provide for Mr. LaRue to acquire the fishing rights of the vessel when the city sold the vessel to him (at public auction) on August 25, 1995. Based on the preponderance of evidence, I find that Dennis Robinson retained ownership of the LLP qualifying fishing history of the F/V MAKUSHIN when the City of Unalaska sold the vessel to Troy LaRue on August 25, 1995.

Mr. Lewis' Ownership of the LLP Qualifying Fishing History of the F/V MAKUSHIN based on the Express Terms of a Written Contract

On appeal, Mr. Lewis produced a signed April 8, 2002, letter from Dennis Robinson, which states: "I, Dennis Robinson, transfer my fishing history from the FV Makushin to Hal Lewis, LLG3083 Groundfish license number."¹³ Mr. Lewis also produced a signed and notarized May 8, 2006, letter from Dennis Robinson, which states:

¹⁰ Final Rule, 63 Fed. Reg. 52,646 (Oct. 1, 1998).

¹¹ Unalaska, Alaska, Code of Ordinances, §§ 18.20.010 - 18.20.070.

¹² Sealed Bid Opening," F/V MAKUSHIN, International Port of Dutch Harbor, City of Unalaska, (Aug. 25, 1995).

¹³ Dennis Robinson's letter to NMFS (April 8, 2002).

I Dennis Robinson transferred my fishing history from the F/V Makushin to Hal Lewis.

There was no purchase price. Mr. Lewis fished with me on the F/V Makushin a few trips, we have been friends for over 20 years.

We do not have a copy of the original letter we sent your office. I would like this letter to be the contract for transferring my fishing history from the F/V Makushin [sic] to Hal Lewis on this date May 8, 2006.

Accompanying Mr. Robinson's notarized letter is a signed statement from Mr. Lewis, which reads:

"It would be nice to have this permit granted. I am a 29 year resident of unalaska, Dutch Harbor, [sic] and would like to see local boats fish in front of our town."

Mr. Robinson's letters clearly and unambiguously provide for the fishing history of the F/V MAKUSHIN to be transferred to Mr. Lewis. By implication, the transfer of his fishing history includes the LLP qualifying fishing history of the vessel.¹⁴

The North Pacific Fishery Management Council has recommended that NMFS recognize written contracts to the extent practicable.¹⁵ The letters of Mr. Robinson and statement of Mr. Lewis collectively show that Mr. Robinson transferred the fishing history of the F/V MAKUSHIN to Mr. Lewis; Mr. Robinson does not want to be paid for the vessel's fishing history; and Mr. Robinson and Mr. Lewis want their arrangement to be considered a written contract for purposes of qualifying Mr. Lewis for an LLP license. Even though the transfer of the fishing history of the F/V MAKUSHIN occurred after the close of the LLP application period, the language in the LLP regulations does not limit the time period for the transfer of a vessel's fishing history.

Based on the evidence before me, I conclude that Dennis Robinson transferred the LLP qualifying fishing history of the F/V MAKUSHIN to Mr. Lewis based on the express terms of a written contract. I conclude that Hal Lewis is an eligible applicant for an LLP groundfish license based on the fishing history of the F/V MAKUSHIN.

FINDINGS OF FACT

1. Dennis Robinson owned the F/V MAKUSHIN on June 17, 1995.
2. Dennis Robinson retained ownership of the LLP qualifying fishing history of the F/V

¹⁴ See, e.g., *Oscar Wilson, Sr.*, Appeal No. 01-0011 (Feb. 27, 2003).

¹⁵ 62 Fed. Reg. 43,870 (Aug. 15, 1997); and 63 Fed. Reg. 52,645 (Oct. 1, 1998).

MAKUSHIN when the City of Unalaska sold the vessel on his behalf to Troy LaRue on August 25, 1995.

3. The letters of Mr. Robinson and statement of Mr. Lewis collectively show that Mr. Robinson transferred the fishing history of the F/V MAKUSHIN to Mr. Lewis; Mr. Robinson does not want to be paid for the vessel's fishing history; and Mr. Robinson and Mr. Lewis want their arrangement to be considered a written contract for purposes of qualifying Mr. Lewis for an LLP license.

4. Even though the transfer of the fishing history of the F/V MAKUSHIN occurred after the close of the LLP application period, the language in the LLP regulations does not limit the time period for the transfer of a vessel's fishing history.

CONCLUSIONS OF LAW

1. Dennis Robinson transferred the LLP qualifying fishing history of the F/V MAKUSHIN to Hal Lewis based on the express terms of a written contract.

2. Hal Lewis is an eligible applicant for an LLP groundfish license based on the fishing history of the F/V MAKUSHIN.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is ORDERED to approve the application of Mr. Lewis for an LLP groundfish license, and to issue him an LLP groundfish license with a Bering Sea area groundfish endorsement based on the fishing history of the F/V MAKUSHIN. This Decision takes effect on January 16, 2008, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. §679.43(o).

The Appellant or 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, December 27, 2007. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Administrative Judge, and must be accompanied by a written statement in support of the motion.

Randall J. Moen
Administrative Judge