

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
JAMIE MARIE, INC.)
F/V JAMIE MARIE) DECISION
ADF&G # 58330)
Appellant)
_____) December 2, 1999

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on June 4, 1996, which denied Jamie Marie, Inc.'s [Jamie Marie] application for a vessel moratorium qualification and permit for the F/V JAMIE MARIE under the Vessel Moratorium Program on Groundfish and Crab.¹ The IAD concluded that Jamie Marie was not entitled to a moratorium qualification or permit for the F/V JAMIE MARIE because it was not a qualifying vessel. Jamie Marie filed a timely appeal. Because the record contains sufficient information on which to reach a final decision and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered.²

ISSUE

Is Jamie Marie entitled to a vessel moratorium qualification and permit for the F/V JAMIE MARIE?

BACKGROUND

On behalf of Jamie Marie, Ron Miller, President of Jamie Marie, applied for a moratorium qualification and permit for the F/V JAMIE MARIE on March 11, 1996. The application claimed that the F/V JAMIE MARIE was an original qualifying vessel and had made landings of moratorium crab and

¹ The Vessel Moratorium Program for Groundfish and Crab, 50 C.F.R. § 679.4(c), which expires on December 31, 1999, should not be confused with the North Pacific License Limitation Program (LLP), 50 C.F.R. § 679.4(k). As of January 1, 2000, a license limitation permit will be necessary to harvest certain species of groundfish in the Gulf of Alaska and Bering Sea and Aleutian Islands (BSAI) areas and Tanner and king crab in BSAI. The application period for LLP is from September 13, 1999 through December 17, 1999. For further information on LLP, Jamie Marie may contact Restricted Access Management (RAM), NMFS, Box 21668, Juneau, Alaska 99802-1668, 907-586-7474 or 1-800-304-4846 (option 2). The NMFS website at "<http://www.fakr.noaa.gov>" also has information on the LLP.

² 50 C.F.R. § 679.43.

moratorium groundfish with hook, trawl and pot gear in the qualifying period or period 1 (January 1, 1988 to February 9, 1992).

With the application, Jamie Marie submitted a letter from its attorney. The letter acknowledged implicitly that the F/V JAMIE MARIE had not made landings in the qualifying period but argued that Jamie Marie should still receive a moratorium qualification and permit. Jamie Marie explained the basis for this request:

During the qualifying years, the JAMIE MARIE landed Halibut and Dungeness Crab in Alaska by hook and line and pot. In 1990, Ron [Miller] sought clarification as to whether his Halibut landings would qualify Jamie Marie, Inc. and/or the JAMIE MARIE for a Groundfish Moratorium Permit. The answer to this question was critical because Ron was planning to refrain from fishing while converting the JAMIE MARIE into a trawler and he did not want to jeopardize the Company's eligibility for a Groundfish Moratorium Permit. Jamie Marie, Inc. was advised that Halibut was considered a Moratorium species and it would not have to land other Groundfish to qualify for a Permit. This was consistent with rules proposed by NMFS and the North Pacific Fishery Management Council. Indeed, as recently as June 3, 1994 (Federal Register/Vol. 59. No. 106. P. 28835), the proposed rules define "Moratorium Species" to include Pacific Halibut.

Furthermore, this conforms with the North Pacific Fishery Management Council Report contained in "True North" in 1992, which defines "Qualifying Vessels" to include all vessels legally landing Groundfish, Halibut, Bering Sea/Aleutian King Crab or Opilio or Bairdi Crab.

Based on the representations that the JAMIE MARIE qualified for a Moratorium Permit, Ron [Miller] did not longline or crab on the Vessel in Alaska during 1991 and 1992 and invested approximately \$909,000.00 in converting the JAMIE MARIE into an operating trawler. Ron's reliance on advice from NMFS that the JAMIE MARIE qualified for a Moratorium Permit was justifiable. Jamie Marie, Inc. should not be denied a Permit because the regulations changed after energy and funds were diverted from Groundfishing to the conversion of the Vessel.

RAM issued an IAD on June 4, 1996, which denied the application, because the F/V JAMIE MARIE had not made landings of moratorium crab or moratorium groundfish during the qualifying period (January 1, 1988 to February 9, 1992). Jamie Marie filed a timely appeal with this Office and argued that RAM should be estopped, or prevented, from applying the regulations that define an original

qualifying vessel to its application.³

DISCUSSION

Federal regulations require that, for a vessel to receive a moratorium permit, the vessel must have moratorium qualification.⁴ A vessel has moratorium qualification either because it is an original qualifying vessel or because it has received a moratorium qualification by transfer from an original qualifying vessel.⁵ An original qualifying vessel is a vessel that made landings of moratorium species during the qualifying period, which is January 1, 1988 to February 9, 1992.⁶ The regulations define moratorium species as moratorium crab or moratorium groundfish species.⁷ Moratorium crab is defined as Tanner and king crab harvested in the Bering Sea and Aleutian Islands area (BSAI). Moratorium groundfish is defined as species of groundfish, except sablefish caught with fixed gear, harvested in the Gulf of Alaska or in BSAI.⁸ Halibut is not specified as a moratorium species.

Jamie Marie does not dispute that the F/V JAMIE MARIE made no landings of moratorium species within the qualifying period, as that term is defined in the regulations for the Moratorium Program. Neither does Jamie Marie allege that the F/V JAMIE MARIE received a moratorium qualification by transfer from another vessel. Jamie Marie argues nonetheless that it should receive a moratorium qualification and permit for the F/V JAMIE MARIE as an original qualifying vessel because the F/V JAMIE MARIE made landings of halibut and Dungeness crab during the qualifying period and Jamie Marie relied on proposed regulations and what Mr. Miller was allegedly told about proposed regulations in discussions with (unspecified) NMFS personnel.

Jamie Marie is correct that the North Pacific Fisheries Management Council proposed regulations for a moratorium on entry into groundfish, crab and halibut fisheries which defined halibut as a moratorium

³ After Jamie Marie filed its appeal, RAM mistakenly sent Jamie Marie a notice that its interim permit had expired because RAM was unaware that an appeal had been filed. Jamie Marie brought that fact to RAM's attention. RAM promptly sent Jamie Marie a letter acknowledging its mistake and acknowledging that the interim permit and non-transferable certificate of moratorium qualification were still valid.

⁴ 50 C.F.R. § 679.4(c)(6)(requirements of application for permit); 50 C.F.R. § 679.2 (definition of "moratorium qualification" as "a transferable prerequisite for a moratorium permit").

⁵ 50 C.F.R. § 679.4(c)(7).

⁶ 50 C.F.R. § 679.2.

⁷ 50 C.F.R. § 679.2.

⁸ 50 C.F.R. § 679.2

species and granted moratorium rights to any vessel that made a halibut landing during the qualifying period.⁹ The Council proposed that the qualifying period would be January 1, 1980 to February 9, 1992.¹⁰ Jamie Marie is also correct that those regulations embodied the concepts in the Council's 1992 Report, "True North: A Special Report to the Seafood Industry From The North Pacific Fishery Management Council."

The proposed regulations required amendments to the Fishery Management Plan for the moratorium fisheries. The Secretary of Commerce has the statutory obligation to review any proposed amendments to the fishery management plans that are formulated under the Magnuson-Stevens Fishery Conservation and Management Act¹¹ and the regulations which implement any plan amendments. The Secretary of Commerce disapproved the proposed regulations as violating the Magnuson Act and other federal laws. NMFS therefore withdrew the proposed regulations.¹²

The regulations had to be substantially rewritten to meet the objections of the Secretary of Commerce.¹³ The new regulations limited the definition of moratorium species to moratorium crab and moratorium groundfish. Halibut was specifically excluded.¹⁴ The qualifying period was also shortened by eight years, so it was 1988 to 1992 rather than 1980 to 1992.¹⁵ Those regulations were approved and took effect on September 11, 1995.¹⁶ Clearly, the government has the authority, and indeed the obligation, to respond to public comment and official review, when it is developing a complex regulatory scheme such as the Moratorium Program. This process may, of course, involve rewriting proposed regulations.

Although the question of whether, and under what circumstances, the government can be estopped is a

⁹ Proposed Rule, 59 Fed. Reg. 28,827 - 28,838 (June 3, 1994). The regulations did not propose defining Dungeness crab as a moratorium species. *Id.* at 28,828.

¹⁰ 59 Fed. Reg. at 28,828.

¹¹ 16 U.S.C. §§ 1801 - 1863.

¹² Disapproval of Amendments and Withdrawal of Proposed Rule, 59 Fed. Reg. 43,534 - 43,535 (Aug. 24, 1994).

¹³ Notice of Proposed Rule, 60 Fed. Reg. 25,677 - 25,687 (May 12, 1995); Final Rule, 60 Fed. Reg. 40,763 - 40,765 (Aug. 10, 1995).

¹⁴ 60 Fed. Reg. at 25,678; 60 Fed. Reg. at 40,764 - 40,766.

¹⁵ *Id.*

¹⁶ 60 Fed. Reg. at 40,763.

complex question, any courts that have permitted estoppel have required a showing of affirmative misconduct by the government.¹⁷ Jamie Marie points to no authority that permits estoppel based on a claim that the litigant was misadvised by a government official about what the regulations of a program were going to be.¹⁸

Mr. Miller is not specific as to whom he spoke to and when. But taking the facts Mr. Miller alleges in the light most favorable to him, Mr. Miller knew that a moratorium program was being developed and that it was not yet in place. Therefore, he knew he was only hearing what was being proposed and what a NMFS employee hoped or thought would become the permanent features of the Moratorium Program. The proposed regulations are self-evidently that: proposed. The Report, True North, is clearly only the Council's vision of what it wanted a Moratorium Program to be. In fact, the front page of the True North report states: "The proposed moratorium still needs to be approved by the Secretary of Commerce. If she approves, it will be implemented sometime in early 1993."

I do note that the financial effect on Jamie Marie from the changes in the regulations between the original, proposed rule and the final rule has been substantially mitigated by the fact that Jamie Marie has received an interim permit to participate in the moratorium fisheries. The permit has been valid since March 28, 1996, when it was issued, and will continue in effect until December 31, 1999, when the Moratorium Program ends.

Based on the clear requirements of these regulations, I conclude that the F/V JAMIE MARIE is not a qualifying vessel. Neither has the F/V JAMIE MARIE received a moratorium qualification by transfer from another vessel. Therefore, I conclude that Jamie Marie is not entitled to a vessel moratorium qualification and permit for the F/V JAMIE MARIE.

FINDINGS OF FACT

1. The F/V JAMIE MARIE did not make landings of any moratorium species between January 1, 1988 and February 9, 1992.
2. The F/V JAMIE MARIE did not receive a moratorium qualification by transfer from another vessel.

¹⁷ See Jean F. Rydstrom, Annotation, *Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies*, 27 A.L.R. 2d 702 (1976)

¹⁸ See Prowler Partnership v. Gainhart Samuelson, Appeal No. 95-0084 at 10 (Nov. 8, 1995)("[T]he statements [by RAM] must have been made in 1987 or 1988 in order to have had any effect on the Appellant's decisions regarding the NMFS contracts. The agency cannot be bound by statements that were allegedly made before the IFQ program and the IFQ regulations were adopted.")

3. The regulations for the Moratorium Program came into effect on September 11, 1995.
4. Whatever communication Ron Miller had with a government agency concerning the Moratorium Program was before the regulations for the Moratorium Program went into effect.
5. The government documents Mr. Miller read or discussed concerned proposals for a Moratorium Program and proposals for regulations for a Moratorium Program.

CONCLUSIONS OF LAW

1. To receive a moratorium permit, a vessel must either be an original qualifying vessel or obtain a transfer of a moratorium qualification from another vessel.
2. An original qualifying vessel is a vessel that had at least one landing of a moratorium species between January 1, 1988 and February 9, 1992.
3. The F/V JAMIE MARIE is not an original qualifying vessel.
4. The F/V JAMIE MARIE does not have moratorium qualification by a transfer of a moratorium qualification from another vessel.
5. NMFS is not estopped from evaluating the application of Jamie Marie under the regulations of the Moratorium Program that define an original qualifying vessel.
6. Jamie Marie is not entitled to a moratorium qualification or permit for the F/V JAMIE MARIE.

DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is AFFIRMED. This Decision takes effect January 3, 2000, unless by that date the Regional Administrator orders review of the Decision. Any party, including 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 13, 1999. 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 Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Mary Alice McKeen
Appeals Officer