

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 01-0024
)	
LEE ROSE, Inc.,)	DECISION (corrected)
Appellant)	
)	August 3, 2004
_____)	

This corrected Decision supersedes the Decision issued August 2, 2004.

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that denied Appellant's application, under the North Pacific Groundfish and Crab License Limitation Program (LLP), for a groundfish license (with an endorsement for Central Gulf groundfish), and a crab license (with endorsements for Bering Sea and Aleutian Islands Area *C. opilio* and *C. bairdi* crab and Pribilof red and Pribilof blue king crab), based on Appellant's purchase of the fishing history of the F/V VIGILANT. The IAD also denied Appellant's application for an LLP groundfish license and an LLP crab license designated with a length overall (LOA) of 58 feet, based on the F/V VIGILANT.

Appellant filed a timely appeal of the IAD, insofar as it denied its application for an LLP groundfish license and endorsements, and denied the requested LOA. Appellant does not appeal the denial of Appellant's application for an LLP crab license.

Appellant can file an appeal because the IAD directly and adversely affects its interests. [50 C.F.R. § 679.43(b)] The An oral hearing was not held because I determined that an oral hearing will not help resolve the issue presented in this appeal. [50 C.F.R. § 679.43(n)(1)(ii)] The record is closed because the information on the record is sufficient to render a decision. [50 C.F.R. § 679.43(m)(4) and (n)(8)]

ISSUES

1. Does Appellant qualify for an LLP groundfish license, based on Appellant's purchase of the fishing history of the F/V VIGILANT?
2. If so, does Appellant's LLP groundfish license qualify for designation with a maximum length overall (MLOA) of 70 feet?

SUMMARY

The U.S. Coast Guard Abstract of Title for the F/V VIGILANT shows that Admiral Leasing Co., Inc., owned the vessel on June 17, 1995. The vessel has qualifying fishing history for an LLP

groundfish license, endorsed for the Central Gulf groundfish fishery. Admiral Leasing Co., Inc., sold the vessel and its fishing history to the Appellant, based on the express terms of a written contract. The corporation did not transfer the fishing history to anyone else before it transferred the fishing history of the vessel to the Appellant. The Appellant qualifies for an LLP groundfish license, endorsed for the Central Gulf groundfish fishery, based on the Appellant's purchase of the fishing history of the F/V VIGILANT. Appellant submitted three credible documents that collectively show that the LOA of the F/V VIGILANT was 58 feet on June 24, 1992. The Appellant's LLP groundfish license qualifies for designation with an MLOA of 70 feet. The denial of the Appellant's application for an LLP crab species license was not challenged on appeal and, therefore, is affirmed.

ANALYSIS

1. Does Appellant qualify for an LLP groundfish license, with an endorsement for the Central Gulf groundfish fishery, based on Appellant's purchase of the fishing history of the F/V VIGILANT?

To qualify for an LLP groundfish license, based on Appellant's purchase of the fishing history of the F/V VIGILANT, the Appellant must establish that it owns the qualifying fishing history of the vessel and acquired that history through the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred to or retained by Appellant.¹

The NMFS official LLP record shows that: (1) Francis Sur, owned the F/V VIGILANT on June 17, 1995; (2) Francis Sur never applied for an LLP groundfish license; and (3) the F/V VIGILANT has qualifying fishing history for an LLP groundfish license endorsed for the Central Gulf groundfish fishery.²

At the time that RAM issued the IAD, it did not have before it the U.S. Coast Guard Abstract of Title for the F/V VIGILANT. The Abstract of Title, which is better evidence of vessel ownership than the NMFS official LLP record, shows that Admiral Leasing Co., Inc., owned the vessel on June 17, 1995; sold the vessel to Francis Sur on August 31, 1995; re-acquired ownership of the vessel on May 16, 1997; and sold the vessel to Appellant on May 21, 1997.

On July 2, 1997, Admiral Leasing Co., Inc., executed a written contract to transfer the fishing history of the F/V VIGILANT to Appellant.³ The written contract states in relevant part:

¹See "eligible applicant" under 50 C.F.R. § 679.2.

²IAD, at 2.

³See the July 2, 1997, Preferred Mortgage of Vessel.

The parties acknowledge that the North Pacific Fishery Management Council and other agencies or bodies having fisheries jurisdiction over water adjoining Alaska and the Western United States, may take action to allocate fishing privileges by individual quotas, or otherwise limit fishing access and privileges. It is the parties' intent that any and all limited entry rights, quota allocations, or other rights, privileges, and entitlement to the continued operation and use of the vessel in the fisheries, which have inured or may in the future inure to seller by virtue of the seller's ownership or operation of the vessel, are transferred to buyer, are conveyed to the buyer by the seller and shall in the future inure to the benefit of the buyer. Sellers agree to execute any and all documents to effectuate this agreement. This agreement is binding upon all heirs, executors, successors and assigns of the parties.

The language of the written contract requires Admiral Leasing Co., Inc., to transfer to Appellant all of the rights, privileges, and entitlement that are derived from the fishing history of the F/V VIGILANT, by virtue of (1) Admiral Leasing Co., Inc.'s, ownership of the vessel; and (2) any actions taken by the North Pacific Fishery Management Council to limit access to fisheries in the waters off Alaska. I find that the language of this contract clearly and unambiguously provides that the qualifications for a license under the LLP are transferred to the Appellant.

The regulatory history of the LLP regulations provides that if a vessel was sold after June 17, 1995, it is presumed that the seller retained the ownership of the vessel's fishing history in the absence of a written contract that states otherwise.⁴ The record on appeal does not show that Admiral Leasing Co., Inc., transferred the fishing history of the F/V VIGILANT to Francis Sur by written agreement when it sold the vessel to Francis Sur on August 31, 1995. Based on that fact, and the fact that Francis Sur never applied for an LLP license, I find that Admiral Leasing Co., Inc., retained ownership of the fishing history of the F/V VIGILANT when it sold the vessel to Francis Sur on August 31, 1995. The record on appeal does not show that Admiral Leasing Co., Inc., transferred the fishing history of the F/V VIGILANT by written agreement to anyone other than Appellant.

Based on a preponderance of the evidence in the record, I find that Admiral Leasing Co., Inc., transferred all of the fishing history of the F/V VIGILANT (that would now qualify as LLP fishing history) to Appellant on July 2, 1997. I conclude that the Appellant meets the definition of an eligible applicant for an LLP groundfish license, as provided in paragraph (2) of that definition in 50 C.F.R. § 679.2. I conclude that the Appellant qualifies for an LLP groundfish license, with an endorsement for Central Gulf groundfish fishery, based on the fishing history of the F/V VIGILANT.

⁴63 Fed. Reg. 52,646 (October 1, 1998).

2. Does Appellant's LLP groundfish license qualify for designation with an MLOA of 70 feet?

The LLP regulations provide that an LLP license may only be used on a vessel that has an LOA less than or equal to the MLOA specified on the license.⁵ The general rule is that the MLOA to be designated on an LLP license is the LOA of the LLP qualifying vessel (1) on June 24, 1992, times 120%, or 125 feet, whichever is less, if the vessel's LOA was 125 feet on that date; or (2) upon date of completion if the vessel was under reconstruction on June 24, 1992. However, if the LOA of the vessel on June 24, 1992, was under 60 feet, then the MLOA cannot exceed 59 feet.⁶

Evidence of a vessel's LOA may consist of a past marine survey, an original builder's certificate, admeasurement documents submitted to the U.S. Coast Guard National Documentation Center, a certificate of registration that states the vessel's length, or other credible evidence.⁷

On appeal, the Appellant produced a marine survey that was completed for the F/V VIGILANT on October 23, 1999; a certificate of documentation for the vessel issued by the U.S. Coast Guard on May 28, 1997; and a copy of a list of vessels documented with the U.S. Coast Guard in 1989. All of the documents show the registered length of the F/V VIGILANT was 50.2 feet as of those dates. The marine survey also shows an LOA of 58 feet. There is no evidence in the record that the LOA of the vessel had ever been changed. By a preponderance of the evidence in the record, I find that the LOA of the F/V VIGILANT was 58 feet on June 24, 1992. Therefore, I conclude that the Appellant's LLP groundfish license #LLG3779 qualifies for designation with an MLOA of 59 feet.

FINDINGS OF FACT

1. Admiral Leasing Co., Inc., owned the F/V VIGILANT on June 17, 1995, and sold the vessel to Francis Sur on August 31, 1995.
2. Admiral Leasing Co., Inc., did not transfer ownership of the fishing history of the F/V VIGILANT to Francis Sur by written agreement when it sold the vessel to Francis Sur on August 31, 1995.
3. Admiral Leasing Co., Inc., transferred the fishing history of the F/V VIGILANT to Appellant on July 2, 1997, based on the express terms of a written contract.
4. Admiral Leasing Co., Inc., did not transfer the fishing history of the F/V VIGILANT to

⁵See definition of "LOA" and "MLOA" at 50 C.F.R. § 679.2.

⁶See definition of "MLOA" at 50 C.F.R. § 679.2.

⁷63 FR 52644-645 (October 1, 1998).

anyone other than Appellant.

5. The F/V VIGILANT has qualifying LLP fishing history for an LLP groundfish license with an endorsement for the Central Gulf groundfish fishery.
6. The LOA of the F/V VIGILANT was 58 feet on June 24, 1992.

CONCLUSIONS OF LAW

1. The Abstract of Title of the F/V VIGILANT is better evidence of vessel ownership than the NMFS official LLP record for the vessel.
2. The express terms of Admiral Leasing Co.'s written contract with the Appellant, dated July 2, 1997, clearly and unambiguously provides that the qualifications for a license under the LLP, based on the fishing history of the F/V VIGILANT, are transferred to the Appellant.
3. The Appellant meets the definition of an eligible applicant for an LLP groundfish license, as provided in paragraph (2) of that definition in 50 C.F.R. § 679.2.
4. The Appellant qualifies for an LLP groundfish license, with an endorsement for the Central Gulf groundfish fishery, based on the fishing history of the F/V VIGILANT.
5. The Appellant's LLP groundfish license #LLG3779 qualifies for designation with a MLOA of 59 feet.

DISPOSITION AND ORDER

The portions of the IAD that denied Appellant's application for an LLP groundfish license with an endorsement for Central Gulf groundfish fishery, and Appellant's request for a license designation of an LOA of 58 feet for the F/V VIGILANT, are VACATED. The portion of the IAD that denied the Appellant's application for an LLP crab species license is AFFIRMED. RAM is ORDERED (1) to amend the NMFS official LLP record to show that the Appellant is the owner of the LLP qualifying fishing history of the F/V VIGILANT, and that the LOA of the vessel was 58 feet on June 24, 1992; and (2) to issue a transferrable LLP groundfish license #LLG3779 to the Appellant, endorsed for the Central Gulf of Alaska groundfish fishery and designated with an MLOA of 59 feet. This Decision takes effect September 2, 2004, unless by that date the Regional Administrator orders review of the Decision.

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, August 13, 2004. 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 in support of the motion.

Randall J. Moen
Appeals Officer