

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
 WILLIAM RENFRO,)
 Appellant)
)
)
)
)
)
)
)

Appeal No. 02-0051
DECISION
March 17, 2004

William Renfro is appealing the Initial Administrative Determination, dated August 30, 2002, issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ Mr. Renfro can appeal this IAD because it directly and adversely affects his interests.²

The IAD acknowledged that Mr. Renfro was the eligible applicant for any LLP licenses resulting from the fishing history of the F/V BRITTANY, ADFG # 13503, and that Mr. Renfro qualified for an LLP crab license endorsed for *C. opilio* and *C. bairdi*, Bristol Bay red king and St. Matthew blue king, with a catcher vessel designation, and maximum length overall (MLOA) of 124 feet. This MLOA was based on a length overall for the F/V BRITTANY of 106 feet.

The IAD denied Mr. Renfro's application for an LLP groundfish license endorsed for Bering Sea, Aleutian Islands and Western Gulf because the F/V BRITTANY did not make the required harvests in the general qualification period or GQP.

By order, I gave Mr. Renfro an opportunity to submit additional evidence or argument in support of his appeal. Mr. Renfro submitted additional argument. The record has sufficient information for me to decide this appeal. I therefore close the record and issue this decision.

SUMMARY

The IAD is affirmed. Although Mr. Renfro has an extensive history fishing crab in the Bering Sea and Aleutian Islands [BSAI], Mr. Renfro did not harvest groundfish in BSAI or the Gulf of Alaska between January 1, 1988 and June 17, 1995, the combined general and endorsement qualifying periods for an LLP groundfish license. The only groundfish harvests claimed by Mr. Renfro during that time period were Pacific cod harvests that he made from the F/V BRITTANY and used as crab bait from the F/V BRITTANY. These are not commercial harvests and therefore do not count toward an LLP license. NMFS adopted the distinction between personal bait harvests, which do not require an LLP license, and commercial bait harvests, which do require an LLP license, in the BSAI Pacific cod gear regulation, 50 C.F.R. § 679.4(k)(9).

¹ The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² 50 C.F.R. § 679.43(b).

Mr. Renfro does not qualify for an LLP groundfish license even though he invested heavily in Pacific cod gear between 1996 and 1999 and made substantial groundfish harvests during that time. These are not the criteria for LLP groundfish licenses in federal regulation and are not the criteria that NMFS used to evaluate other LLP applicants.

Mr. Renfro alleges that he made this investment because an unspecified NMFS employee or employees told Mr. Renfro's father once, or several times, between 1996 and 1999 that Mr. Renfro would receive an LLP license. Such information would have contradicted the LLP regulations, as proposed by NMFS in 1997 and as adopted in 1998. Although there is substantial authority that verbal misinformation by a government agent acting outside the scope of the agent's authority can never prevent the government from applying a valid regulation, I do not rule on that question because Mr. Renfro's allegations are far too conclusory for me to grant him relief under any theory.

Mr. Renfro does not qualify for an LLP groundfish license based on his allegation that certain crab fishermen made token commercial catches of groundfish in the general qualification period because they had special interest group insider information. This allegation, even if true, does not prove that Mr. Renfro made the documented harvests required for an LLP license. If Mr. Renfro is seeking to challenge the LLP regulations, I do not have authority to rule on the validity of the LLP regulations.

ISSUES

1. Does Mr. Renfro qualify for an LLP groundfish license with Aleutian Islands (AI), Bering Sea and Western Gulf endorsements, based on harvests of Pacific cod for use as personal bait?
2. Does Mr. Renfro qualify for an LLP groundfish license based on his substantial investment in Pacific cod gear from 1996 to 1999?
3. Does Mr. Renfro qualify for an LLP groundfish license based on his claim that other fishermen met the GQP requirement for an LLP groundfish license based on special interest group insider information?

ANALYSIS

1. Does Mr. Renfro qualify for an LLP groundfish license with AI, Bering Sea and Western Gulf endorsements, based on harvests of Pacific cod for use as personal bait? No.

To receive an LLP groundfish license, an applicant must have made documented harvests³ of

³ A documented harvest is "a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting." 50 C.F.R. § 679.2. See 50 C.F.R. § 679.4(k)(4)(evidence of documented harvest). When I refer to a harvest, I mean a documented harvest.

license limitation groundfish⁴ in a general qualification period or GQP and an endorsement qualification period or EQP.⁵

The basic GQP requirement for an LLP groundfish license is one groundfish harvest in BSAI or the Gulf of Alaska between January 1, 1988 and June 17, 1992.⁶ Mr. Renfro did not harvest any groundfish in BSAI or the Gulf of Alaska [GOA] between January 1, 1988 and June 27, 1992 from the F/V BRITTANY and therefore does not meet the basic GQP requirement.

The LLP regulations extend the GQP for LLP groundfish licenses until December 31, 1994 for vessels that are less than sixty feet and meet other requirements.⁷ Mr. Renfro did not harvest groundfish between January 1, 1988 and December 31, 1994, and the F/V BRITTANY is 106 feet.

For groundfish licenses, the LLP regulations extend the GQP until June 17, 1995 for vessels that (1) harvested crab between January 1, 1988 and February 9, 1992; *and* (2) harvested or “crossed over” into groundfish between February 10, 1992 and December 11, 1994.⁸ Mr. Renfro does not meet the GQP as a crab crossover vessel because he did not harvest groundfish by December 11, 1994. Mr. Renfro did not harvest groundfish until April 1996.

The endorsement qualification period requirement for an AI endorsement, a Bering Sea endorsement and a Western Gulf area endorsement is one harvest of groundfish in, respectively,

⁴ License limitation groundfish are “target species and the ‘other species’ category, specified annually pursuant to § 679.20(a)(2), except that demersal shelf rockfish east of 140° W. longitude and sablefish managed under the IFQ program are not considered license limitation groundfish.” 50 C.F.R. § 679.2. Groundfish are “target species and the ‘other species’ category, specified annually pursuant to § 679.20(a)(2).” 50 C.F.R. § 679.2. When I refer to groundfish, I generally mean license limitation groundfish.

⁵ 50 C.F.R. § 679.4(k)(4)(i) & (ii).

⁶ 50 C.F.R. § 679.4(k)(4)(i)(A)(one groundfish harvest in BSAI for Bering Sea or Aleutian Islands endorsements); 50 C.F.R. § 679.4(k)(4)(i)(B)(one groundfish harvest in Gulf of Alaska for Western Gulf, Central Gulf or Southeast Outside endorsements).

⁷ 50 C.F.R. § 679.4(k)(4)(i)(A)(2) & (B)(2).

⁸ 50 C.F.R. § 679.4(k)(4)(A)(3) & (B)(3). *See* Final Rule, 63 Fed. Reg. 52,642, 52,643 (1998)(commentary on crossover provision). This way of meeting the GQP requires three harvests: [1] license limitation groundfish in BSAI for a Bering Sea or an Aleutian Island endorsement, and in the GOA for a Western Gulf, Central Gulf or Southeast Outside endorsement, between January 1, 1988 and June 17, 1995; [2] crab between January 1, 1988 and February 9, 1992; [3] groundfish, not license limitation groundfish, in BSAI or GOA with trawl or longline gear except sablefish with fixed gear, between February 10, 1992 and December 11, 1994. Mr. Renfro made the crab harvest but neither of the groundfish harvests.

the AI, the Bering Sea and the Western Gulf areas between January 1, 1992 and June 17, 1995.⁹ Mr. Renfro did not harvest groundfish in Alaska between January 1, 1992 and June 17, 1995.¹⁰ Thus, even if Mr. Renfro met the GQP requirement, he does not meet the EQP requirement for any LLP groundfish endorsement.

Mr. Renfro submitted fish tickets that show groundfish harvests from the F/V BRITTANY in 1996. In a letter with his LLP application, Mr. Renfro explained:

During the 1995 fishing season it became evident that in order to survive in the fishing industry I would have to diversify and enter into fisheries other than crab, therefore I did considerable research about Ground fishing using Non-Trawl gear, and decided to make the investment and enter into Groundfishing in the spring of 1996.

Since the spring of 1996 is after both the GQP and the EQP for all LLP groundfish endorsements, this evidence does not show that Mr. Renfro meets the requirements for an LLP groundfish license.

Mr. Renfro makes only one argument to show that he harvested groundfish in the LLP qualifying periods. Mr. Renfro states that he caught Pacific cod from the F/V BRITTANY and used it as bait to catch crab from the F/V BRITTANY between 1988 and 1995: “During crab fishing seasons in the Bering Sea I have always had up to 10% of my pot capacity rigged and dedicated to harvest Cod outside the state of Alaska’s three mile limits for baiting crab pots.” This office has decided that cod caught by an applicant, and used by the applicant as crab bait, cannot count as a documented harvest toward an LLP license because it is not a commercial harvest. Unless the cod is sold, bartered or traded to another entity, the harvest is personal use, not commercial.¹¹

Mr. Renfro argues that since he used the Pacific cod as crab bait, and then sold the crab, the Pacific cod should be considered a commercial harvest. The appeals officer rejected that argument in *Paula Brogdon*:

The terms “sale, barter or trade” in the definition of “commercial fishing” in the Magnuson-Stevens Act are not defined, but their plain meaning is that something is exchanged between two or more distinct parties. Ms. Brogdon’s argument that she “sold” the cod to herself or “traded” them is not persuasive. Using one’s own catch for bait on one’s own vessel cannot reasonably be construed as “sale, barter

⁹ 50 C.F.R. § 679.4(k)(4)(ii)(A)(B) & (D).

¹⁰ IAD at 5 - 6 & n. 7.

¹¹ *Willard S. Ferris*, Appeal No. 01-0004 (January 18, 2002); *Paula Brogdon*, Appeal No. 00-0011 (Feb. 26, 2002); *Ronald J. Tennison*, Appeal No. 00-0012 (April 5, 2002), *Darjen, Inc.*, Appeal No. 00-0015 (Dec. 31, 2002). These decisions, and all OAA decisions, are available on the NMFS Alaska Region website, <http://www.fakr.noaa.gov/appeals/default.htm>.

or trade” as envisioned in the Magnuson-Stevens Act. The cod never changed hands, and ownership of the cod was never transferred to another party. Therefore, it cannot be said that the cod were intended to be, or actually were sold, bartered, or traded. As a result, the alleged harvesting and use of the cod were not commercial activities, and the cod did not and were not intended to enter commerce. Consequently, the alleged harvests of cod did not constitute “commercial fishing” within the meaning of the Magnuson-Stevens Act. Therefore, I conclude that the alleged harvests of cod cannot constitute documented harvests of groundfish for purposes of qualifying for an LLP groundfish license or endorsement.¹²

Mr. Renfro argues that, since he had to obtain a State of Alaska cod commercial fishing permit to take the cod, the cod should count as a commercial harvest. He argues the government is trying to have it both ways: on the one hand, requiring a commercial fishing license and, on the other hand, not treating the fishing as commercial fishing. First, it is not the same government entity. The State of Alaska required a commercial license. The Federal Government adopted the LLP and implementing regulations.

Second, the LLP regulations are not trying to have it both ways. As RAM noted, “the LLP limits access to commercial fishing, and eligibility for an LLP license arises from commercial fishing activities.”¹³ A fisherman is *not* required to obtain an LLP license to harvest Pacific cod for the fisherman’s use as crab bait.¹⁴ A fisherman *is* required to obtain an LLP license to harvest Pacific cod and sell it to another entity for bait or any other use because that is commercial fishing. Personal use bait harvests neither count toward, nor require, an LLP license. Commercial bait harvests both count toward, and require, an LLP license.

The North Pacific Fishery Management Council (Council) and NMFS adopted this distinction when NMFS added the BSAI Pacific cod gear endorsement to LLP licenses. Personal use bait harvests are not counted toward a Pacific cod gear endorsement on an LLP license.¹⁵ But a Pacific cod gear endorsement is not required to harvest BSAI Pacific cod for personal bait.¹⁶

Thus, Mr. Renfro may continue – without an LLP license – to do what he had been doing prior to

¹²*Paula Brogdon*, Appeal No. 00-0011 at 5 (Feb. 26, 2002).

¹³ IAD at 5.

¹⁴ The fisherman does not need an LLP license but he must follow other regulations. This Office explained: “Darjen, Inc., is already entitled to harvest Pacific cod and other groundfish for crab bait in the Bering Sea without an endorsement to its LLP groundfish license (as long as the groundfish are taken with crab pot gear during an open season and are used for crab bait aboard the vessel and the bait is not transferred or sold).” *Darjen, Inc.*, Appeal No. 00-0015 at 3 (Dec. 31, 2002), *citing* 50 C.F.R. § 679.5(a)(1)(iii)(B). *Accord Willard Ferris*, Appeal No. 01-0004 at 3 (Jan. 18, 2002) .

¹⁵ 50 C.F.R. § 679.4(k)(9)(iii)(C).

¹⁶ 50 C.F.R. § 679.4(k)(9)(iv)(C).

1996: catching Pacific cod and using it as crab bait. But Mr. Renfro cannot use those harvests to branch out into commercial fishing. I therefore conclude that Mr. Renfro does not qualify for an LLP license with AI, Bering Sea or Western Gulf endorsements.

2. Does Mr. Renfro qualify for an LLP license based on his substantial investment in Pacific cod gear from 1996 to 1999?

Mr. Renfro produced substantial evidence that he invested heavily to outfit the F/V BRITTANY with Pacific cod gear from 1996 to 1999. Mr. Renfro has shown numerous harvests of Pacific cod and other groundfish with that gear between 1996 to 1999. *If* Mr. Renfro qualified for an LLP license, he would receive a BSAI Pacific cod gear endorsement on that license. NMFS added the BSAI Pacific cod gear endorsement after the original LLP and based it on harvests in the years 1995 to 1999.¹⁷ But, to receive a Pacific cod endorsement on an LLP license, Mr. Renfro must first have an LLP license, and that requires documented harvests of groundfish between January 1, 1988 and June 17, 1995.

Mr. Renfro states that he invested in the Pacific cod gear relying on a commitment by NMFS to grant him an LLP groundfish license:

I was unable to obtain any additional correspondence or notes from my files, as my father, who was my book keeper and business manager, passed away in 2002. All of my files, which were in his possession, were moved three times by his executor and some of the documents may have been discarded.

It is my contention that my father had communication with Marine Fisheries regarding the entry regulations and the grandfather provisions. We would never had made the decision to continue to invest significant sums in Cod fishing specific gear without a commitment that our license application would be approved under the grandfather provisions.

The grandfather provisions should apply equally to pot fishery as well as fixed gear fishery. Why is it that a trawler who invests in \$100,000 of gear is grandfathered and a crab boat which invests the same \$100,000 in the same gear to adapt to the specific Cod fishery is not? It is my belief that my father was assured that the cross over provisions would apply to both and I relied on that assurance to continue to purchase gear in order to fish Pacific cod. A denial of my permit will preclude me from making a living from the commercial Cod fishery.¹⁸

¹⁷ Final Rule, 67 Fed. Reg. 18,129 (April 15, 2002) *adopting* 50 C.F.R. § 679.4(k)(9). RAM determined that Mr. Renfro met the requirements for a BSAI Pacific cod endorsement for pot gear for a catcher vessel on his *interim, non-transferable* LLP groundfish license. Notice, June 7, 2002. This means that RAM determined that Mr. Renfro harvested 100,000 pounds of Pacific cod in the BSAI with pot or jig gear in each of any of two years from 1995 to 1999. 50 C.F.R. § 679.4(k)(9)(ii)(B).

¹⁸ Letter from William Renfro to OAA at 1 - 2 (Oct. 3, 2003).

I analyze Mr. Renfro's arguments under three topics: grandfather provisions, crossover provisions, and misinformation or misadvice.

A. Grandfather provisions.

I am not sure what Mr. Renfro means by "grandfather provisions." That is not a term found in the LLP regulations or used much in the LLP regulatory history. Generally, grandfather provisions refer to features in a law that permit a person to continue to do what the person had been doing before the law passed. Since the LLP regulations grant licenses to fish groundfish in the future based on whether the applicant fished groundfish in the past, they are basically a type of grandfather provision. Mr. Renfro did not fish groundfish between January 1, 1988 and June 17, 1995 and therefore is not "grandfathered" in to continue to fish groundfish in the LLP.

Mr. Renfro ties grandfather provisions to investment of \$100,000 in gear. Neither LLP groundfish licenses nor crab licenses are based on investment in gear. Both groundfish and crab licenses are based on past participation through proof of documented harvests in a general qualification period and an endorsement qualification period.¹⁹

The only LLP regulation that grants something based on investment in gear is one that allows a person to change a gear designation on an LLP groundfish license if the person invested \$100,000 in gear or vessel conversion by February 7, 1998 and made a documented harvest with that gear by December 31, 1998.²⁰ This provision is equally available to the person who spent \$100,000 on nontrawl gear, which is pot or longline gear, and the person who spent \$100,000 on trawl gear.²¹ But this provision is only available to a person that has an LLP groundfish license.

B. Crossover provisions.

I am familiar with the term "crossover provisions" in the LLP regulatory history. It refers to provisions that allow vessels that harvested groundfish to cross over into the crab fishery. It also refers to provisions that allow vessels that have harvested groundfish to cross over into the crab fishery.²²

NMFS proposed LLP regulations in August 1997 with a limited crossover provision.²³ NMFS

¹⁹ 50 C.F.R. § 679.4(k)(4)&(5). For crab licenses, the Council and NMFS added a requirement for a crab harvest in a recent participation period or RPP. Final Rule, 66 Fed. Reg. 48,813 (2001), *adopting* 50 C.F.R. § 679.4(k)(5)(iii), *clarified by* Final Rule, 68 Fed. Reg. 46,117 (2003).

²⁰ 50 C.F.R. § 679.4(k)(3)(iv)(E)(2) & (F)(2).

²¹ *Id.*; 50 C.F.R. § 679.2 (definition of nontrawl gear under authorized fishing gear).

²² For background on the crossover provisions in the VMP and LLP, see Final Rule, 63 Fed. Reg. 52,642, 52,643 (1998); *Magne Nes*, Appeal No. 02-0024 at 4 - 5 (March 5, 2004).

²³ Proposed Rule, 62 Fed. Reg. 43,866, 43,867, 43,886 (Aug. 15, 1997).

adopted the LLP regulations – with no change in the crossover provision – in October 1998. Under the LLP regulations, the only crossover provision for crab vessels to receive an LLP groundfish licenses is the one already noted: a limited extension of the general qualification period for a crab vessel who “crossed over,” or harvested, groundfish by December 11, 1994.²⁴ The F/V BRITTANY did not harvest groundfish by December 11, 1994 and therefore does not qualify for a groundfish license under the crossover provisions in the LLP.

C. Misinformation or misadvice.

Mr. Renfro claims that his father was misadvised by NMFS, that Mr. Renfro invested in Pacific cod gear based on that misadvice and that Mr. Renfro should therefore receive an LLP license. Mr. Renfro in essence asks NMFS to waive the requirements of the LLP regulations and grant him an LLP groundfish license even though he did not make the documented harvests required for the license. Put another way, Mr. Renfro asks that NMFS be prevented, or estopped, from judging his LLP license by the same criteria it used to judge other LLP applicants.

Mr. Renfro does not allege that he relied on any concrete action by the government that indicated he would receive an LLP license.²⁵ He does not allege that he received any written documents that assured him he would receive an LLP license.²⁶ He does not allege that he relied on a consistent agency policy that vessels with a fishing history like the F/V BRITTANY qualified for an LLP license.²⁷ Mr. Renfro alleges verbal misadvice or misinformation from an individual NMFS employee or employees.

Mr. Renfro states that a NMFS employee or employees made a commitment to his father that the F/V BRITTANY qualified for an LLP groundfish license. Such a commitment would have been unreasonable and startling as a general matter because a government employee, acting as a regulator, is not in the business of making “commitments” to grant someone a license or a benefit. Such a commitment would have been unreasonable and startling in this specific context

²⁴ Final Rule, 63 Fed. Reg. 52,642, 52,643, 52,655 (Oct. 1, 1998), *adopting* 50 C.F.R. § 679.4(i)(4)(A)(3) & (B)(3), *changed to* 50 C.F.R. § 679.4(k)(4)(A)(3) & (B)(3) by Correcting Amendments, 63 Fed. Reg. 64,878 (Nov. 24, 1998).

²⁵ *See, e.g., R.J. Fierce Packer, LLC*, Appeal No. 00-0004 (Dec. 18, 2000)(third party purchaser relied on contract with federal bankruptcy trustee and NMFS’s issuance of a transferable moratorium qualification); *Watkins v. United States Army*, 875 F.2d 699 (9th cir. 1989), *cert. denied* 498 U.S. 957 (1990)(serviceman relied on repeated reenlistment by the army); *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973)(landowners relied on government’s approval of written contracts and government’s assistance in dividing partnership lands); *Gestuvo v. District Director of US Immigration and Naturalization Service*, 337 F. Supp. 1093 (C.D. Calif. 1971)(alien relied on INS’s approval of petition for preference classification).

²⁶ Government representatives signed written documents in the cases cited at note 28 *supra*.

²⁷ *Cf. Alaska Professional Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999)(FAA notice of new policy invalid under the Administrative Procedures Act because notice changed a consistent, verbal policy of thirty years standing; new policy had to be adopted through rulemaking).

because the F/V BRITTANY did not qualify for an LLP groundfish license under the LLP as approved by the Council in June 1995,²⁸ as proposed by NMFS in regulations in August 1997,²⁹ and as adopted by NMFS in final regulations in October 1998.³⁰ Under each of those proposals or rules, the F/V BRITTANY did not qualify for an LLP license because it did not harvest groundfish until 1996.

The F/V BRITTANY did qualify for a moratorium groundfish permit under the Vessel Moratorium Program – the predecessor program to the LLP³¹ – under regulations that NMFS proposed and withdrew in 1994 and under regulations that NMFS adopted in 1995.³² But, as noted, the F/V BRITTANY never qualified for an LLP groundfish license under the LLP as approved by the Council, proposed by NMFS or finally adopted by NMFS.

There is substantial legal authority that verbal misinformation from a government agent cannot prevent, or estop, the government from applying a valid regulation if the agent is acting outside the scope of his or her authority.³³ I do not rule on that question, however, because Mr. Renfro's allegations and evidence are far too conclusory for me to grant relief under any theory.

First, I cannot grant relief based on “mere allegations or denials or general descriptions of positions and contentions.”³⁴ I conclude that Mr. Renfro's claim is based on a mere allegation.

Mr. Renfro's only evidence of misinformation is his own allegation that his father said he was

²⁸ North Pacific Fishery Management Council Newsletter, June 1995, available on the Council's website <http://www.fakr.noaa.gov/npfmc/newsletters/695news.htm>, <visited March 16, 2004>. Pages 9 - 13 of this newsletter have the preferred alternative for the LLP adopted by the Council.

²⁹ Proposed Rule, 62 Fed. Reg. 43,866, 43,867 (Aug. 15, 1997).

³⁰ Final Rule, 63 Fed. Reg. 52,642, 52,643 (Oct. 1, 1998).

³¹ Final Rule, 60 Fed. Reg. 40,763 (1995). The Moratorium Program was eliminated from federal regulation after the LLP went into effect. Final Rule, 65 Fed. Reg. 45,316 (2000).

³² Proposed Rule, 59 Fed. Reg. 28,827, 28,829 (1994). NMFS withdrew it in August 1994 because the Secretary of Commerce determined that the moratorium regulation – particularly the liberal crossover provision – violated the Magnuson Stevens Act and other federal laws. Disapproval of fishery management plan amendments and withdrawal of proposed rule, 59 Fed. Reg. 43,534,43,535 (1994). The Council and NMFS redrafted the moratorium regulation with a more limited crossover provision. Under this regulation, the F/V BRITTANY qualified for a moratorium groundfish permit with a pot gear endorsement, based solely on crab harvests. Final Rule, 60 Fed. Reg. 40,763, 40,773 (1995), *adopting* 50 C.F.R. § 676.3(d)(3)(ii).

³³ *See, e.g., Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 66 (1984).

³⁴ *See* 50 C.F.R. § 679.43(g)(3)(ii). This is the standard for holding a hearing to determine facts. If Mr. Renfro has not produced enough evidence to create a factual dispute and hold a hearing, he has not produced enough evidence for me to resolve the factual dispute in his favor and grant him relief.

told by someone at NMFS that Mr. Renfro would receive a permit. Mr. Renfro has not alleged: whether it was one employee or more than one; the names of any employees; whether it was one conversation or more than one; the dates or other specifics of any conversations; what led Mr. Renfro's father to contact NMFS; what Mr. Renfro's father said; how he described his son's situation; and what the NMFS employee said that led Mr. Renfro's father to believe that the F/V BRITTANY qualified for an LLP groundfish license. Even applicants who *unsuccessfully* seek to avoid a regulation typically allege and prove that a specific government employee made a specific untrue statement,³⁵ but Mr. Renfro has failed to do that.

Second, I cannot grant relief "if the evidence described is insufficient to justify the factual determination sought."³⁶ I conclude that Mr. Renfro's evidence is insufficient to justify the factual determination he seeks, namely, that a NMFS employee made a commitment to Mr. Renfro's father that the F/V BRITTANY – a vessel that did not harvest groundfish between 1988 and 1995 – would receive an LLP groundfish license.

I reach this conclusion for four reasons: the claimed misstatement by the NMFS employee is so unreasonable and startling; the allegation is not supported by any details or context about the claimed misstatement; the allegation is not supported by any evidence other than Mr. Renfro's assertion; and the allegation reveals a fundamental confusion about the regulation permitting a trawl gear designation based on proof of \$100,000 of investment in gear.

I conclude that Mr. Renfro's allegation that he purchased Pacific cod gear because of misinformation from NMFS does not qualify him for an LLP permit.

3. Does Mr. Renfro qualify for an LLP groundfish license based on his claim that other fishermen met the GQP requirements for an LLP groundfish license based on special interest group insider information? No.

Mr. Renfro states:

I wish to place in this appeal my belief that there exists information regarding the Alaska Crab Coalition activities in the early 1990's that provided advance notice to its members regarding the selection of dates for qualification for limited entry. Most of the Alaskan fisherman were out to sea the majority of the time and unable to attend meetings regarding the upcoming limited entry requirements. It is my contention that this special interest group had information that it provided only to its members.

³⁵ See, e.g., *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 66 (1984)(Traveler's insurance Medicare manager incorrectly told health care provider that it could include wages paid from a CETA grant in its request for Medicare reimbursement); *Schweiker v. Hansen*, 450 U.S. 785 (1981)(field representative of Social Security Administration incorrectly told woman she was not eligible for mother's insurance benefits).

³⁶ 50 C.F.R. § 679.43(g)(3)(iii)(standard for granting a hearing).

It's [sic] members made "token" Cod catches which were not commercially reasonable and in fact were made with significant financial losses to each boat, but nonetheless, would eventually qualify them for the GQP which would be determined several years later. Why should these "token" catches of between 5,000 and 10,000 pounds be considered "commercial" catches and the 30,000 to 40,000 pounds of Cod I harvested and used for bait be considered "sport"? This evidence of insider information prejudiced the non-members who may have been equally qualified for the limited entry fishery but for their lack of notice. While I understand that the Office of Administrative Appeals may not be able to fully address this issue, I want to preserve my argument if it becomes necessary to seek a Federal Court determination.³⁷

Mr. Renfro does not qualify for an LLP license based on this allegation for four reasons. First, Mr. Renfro did not harvest groundfish in either the GQP or the EQP. Second, to the extent that Mr. Renfro repeats here his bait argument, I have decided that NMFS properly denied LLP licenses based on harvests of Pacific cod for personal crab bait. Third, assuming that Mr. Renfro's allegation is true, I cannot award Mr. Renfro an LLP license based on these facts because he does not meet the requirements in the LLP regulations for a license and he has not described any legal theory that would enable me to grant him relief. Fourth, I have the duty to apply the LLP regulations in the appeals that I decide. I presume the validity of duly promulgated regulations. If Mr. Renfro is seeking to challenge the validity of an LLP regulation, I do not have the authority to rule on such a challenge.³⁸

FINDINGS OF FACT

1. Mr. Renfro did not harvest groundfish from the F/V BRITTANY between January 1, 1988 and June 17, 1995, the combined general and endorsement qualifying periods for an LLP groundfish license.
2. Mr. Renfro used the Pacific cod he caught from the F/V BRITTANY between January 1, 1988 and June 17, 1995 as personal crab bait.

CONCLUSIONS OF LAW

1. Mr. Renfro does not qualify for an LLP groundfish license with AI, Bering Sea and Western Gulf endorsements, based on Pacific cod he harvested and used as bait.
2. Mr. Renfro does not qualify for an LLP groundfish license based on his investment in Pacific cod gear between 1996 and 1999.
3. Mr. Renfro's claim of misinformation is too conclusory to grant him relief under any theory.

³⁷ Letter from Mr. Renfro to OAA at 3 - 4 (Oct. 3, 2003)

³⁸ *George Ramos*, Appeal 94-0008, Regional Director's Decision on Review at 4 (April 21, 1995).

4. Mr. Renfro's claim of misinformation is based on a mere allegation and description of his belief.
5. Mr. Renfro's evidence is insufficient to justify the factual determination he seeks, namely, that a NMFS employee made a commitment to Mr. Renfro's father that Mr. Renfro would receive an LLP groundfish license.
6. Mr. Renfro does not qualify for an LLP groundfish license based on his claim that other fishermen met the GQP requirements for an LLP groundfish license because they benefitted from special interest group insider information.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect April 16, 2004, unless by that date the Regional Administrator orders review of the Decision.

Any party 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, March 29, 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 or points and authorities in support of the motion.

Mary Alice McKeen
Appeals Officer