

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)	Appeal No. 04-0004
)	
THOMAS FALK and)	DECISION
DEBORAH FALK,)	
Appellants)	May 26, 2006
_____)	

STATEMENT OF THE CASE

Thomas Falk appeals an Initial Administrative Determination [IAD 04 -008] issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹

The IAD concluded that Thomas Falk and Deborah Falk, together, are the eligible applicants for an LLP groundfish license (LLG 2794) based on the fishing history of the F/V ARGO (ADFG 32997). This means that RAM would issue one LLP license in the names of Thomas Falk and Deborah Falk.

The IAD concluded that the LLP license will have a vessel designation as a catcher vessel, a maximum length overall [MLOA] designation of 59 feet,² and area endorsements for the Bering Sea, Western Gulf and Central Gulf. The IAD concluded that LLG 2794 will not have area endorsements for the Aleutian Islands and Southeast Outside.

Mr. Falk questioned why the LLP license would not be endorsed for the Aleutian Islands.³ And Mr. Falk and Ms. Falk do not agree whether a Decree of Dissolution, issued by a Washington State court, awarded the right to this LLP license to Thomas Falk alone, or to Thomas Falk and Deborah Falk. Mr. Falk believes that the LLP license should be issued in his name. Ms. Falk believes that the LLP license should be issued in both names.

Mr. Falk can appeal the IAD because it directly and adversely affects his interests.⁴ The record

¹ The LLP is in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions), 50 C.F.R. § 679.4(k) (license requirements), and 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS Alaska region website: <http://www.fakr.noaa.gov/regs/summary.htm>.

² This means the license is for vessels in vessel length category “C,” which are vessels that are less than 60 feet length overall. 50 C.F.R. § 679.4(k)(3)(iii)(C). The F/V ARGO is 58 feet.

³ Letter from Thomas Falk (March 15, 2004).

⁴ 50 C.F.R. § 679.43(b).

has sufficient information for me to decide this appeal.⁵ I therefore close the record and issue this decision.

ISSUES

1. Are Thomas Falk and Deborah Falk the eligible applicants for the LLP license based on the fishing history of the F/V ARGO?
2. Do Thomas Falk and Deborah Falk qualify for an LLP groundfish license with an Aleutian Islands or a Southeast Outside endorsement?

ANALYSIS

1. Are Thomas Falk and Deborah Falk the eligible applicants for the LLP license based on the fishing history of the F/V ARGO? Yes.

To receive an LLP license, an applicant must be an “eligible applicant.” Federal regulation 50 C.F.R. § 679.2 defines eligible applicant as follows:

Eligible applicant means a qualified person^[6] who submitted an application during the application period announced by NMFS ^[7] 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; . . .⁸

⁵ 50 C.F.R. § 679.43(g)(2).

⁶ A qualified person for the LLP means “a person who was eligible on June 17, 1995, to document a fishing vessel under chapter 121, Title 46, USC.” 50 C.F.R. § 679.2.

⁷ Thomas Falk, on behalf of himself, filed a timely application for an LLP license. Deborah Falk, on behalf of herself and Thomas Falk, filed a timely application for an LLP license.

⁸ Federal regulation 50 C.F.R. § 679.2 contains two other definitions of eligible applicants. One applies to the Norton Sound king crab summery fishery, the other to individuals who can demonstrate eligibility pursuant to the Rehabilitation Act of 1973. Neither are at issue in this appeal.

According to the Abstract of Title for the F/V ARGO, Thomas Falk and Deborah Falk became owners of record of this vessel on March 14, 1990.⁹ They recorded a bill of sale, which transferred ownership of the vessel to Thomas C. Falk and Deborah Falk as “joint tenants with right of survivorship.”¹⁰ Thomas and Deborah Falk have not transferred the vessel to anyone since that date.¹¹

Therefore, Thomas Falk and Debora Falk owned the vessel jointly on June 17, 1995. This means that Thomas Falk and Deborah Falk are the eligible applicants for the LLP license based on the fishing history of the F/V ARGO *unless* they transferred the vessel’s LLP-qualifying fishing history according to a written contract that meets the second definition of eligible applicant.

Thomas Falk believed that he would receive the LLP license based on the Decree of Dissolution that was entered on July 15, 2000 by a State court in Washington. That he and Deborah Falk, through counsel, approved and was entered on July 25, 2000 by a superior court in the in the State of Washington.¹² Therefore, the question is whether, in the words of 50 C.F.R. § 679.2, the Decree of Dissolution makes Thomas Falk a person “to whom the fishing history [of the F/V ARGO] . . . 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.”

The Decree of Dissolution awarded to Mr. Falk “the fishing moratorium asset.” That is the sole reference to this asset.¹³ The reference to “moratorium” is a reference to the Vessel Moratorium Program (VMP), the predecessor program to the Limited Entry Program.¹⁴ Under the VMP, a vessel owner had to obtain a vessel moratorium permit to participate in the North Pacific crab and groundfish fisheries. The VMP was in effect from January 1, 1996 to December 31, 1999

⁹ United States Coast Guard Abstract of Title (June 18, 2004).

¹⁰ *Id.* The bill of sale was dated February 26, 1990. The difference between the date of the bill of sale and when the parties recorded it – March 14, 1990 – has no significance for this appeal.

¹¹ The Abstract of Title shows the vessel ownership as of June 18, 2004. Neither party has presented any evidence that the F/V ARGO was sold or transferred after that date.

¹² Decree of Dissolution, *In re the Marriage of Deborah Falk and Thomas Conrad Falk*, No. 98-3-00843-3 (Superior Court of Washington, County of Snohomish, July 25, 2000). Through counsel, Thomas Falk and Deborah Falk approved this decree.

¹³ The Decree awards Mr. Falk “IFQ assets (F/V ARGO ED# 00073) Aleutian Is.: 17,230 shares and Bearing [sic] Sea: 2,638 shares.” IFQ means Individual Fishing Quota, another federal fisheries program of restricted access, which governs Pacific halibut and sablefish in the Alaska Exclusive Economic Zone. 50 C.F.R. § 679.40.

¹⁴ Final Rule, 60 Fed. Reg. 40,763 (1995).

and expired when the LLP came into effect on January 1, 2000.¹⁵ Since January 1, 2000, a vessel owner must obtain an LLP license to participate in the North Pacific crab and groundfish fisheries.¹⁶

The Decree of Dissolution is not a written contract that meets the second definition of eligible applicant. The award to Mr. Falk of “the fishing moratorium asset” does not constitute express terms that clearly and unambiguously transfer the F/V ARGO’s LLP qualifying fishing history to Mr. Falk. Although the contract does not have to contain the magic words “LLP,” the contract must have express terms that communicate in a clear and direct way that the vessel owners, Thomas and Deborah Falk, transferred to Thomas Falk the fishing history of the F/V ARGO that is the basis for an LLP license. The Decree does not have any such express terms. It does not transfer to Mr. Falk the LLP license, the right to apply for an LLP license, the LLP asset, the vessel’s qualifying fishing history or the vessel’s fishing history.

Thomas Falk and Deborah Falk do not agree that their Decree of Dissolution transferred the vessel’s LLP-qualifying fishing history to Mr. Falk and are unwilling to reach such an agreement now.¹⁷ Deborah Falk stated that she had historically been involved in the business and that: “During the divorce, we divided the assets equitably and the value of an LLP license was never discussed in mediation. It subsequently come [sic] into existence, based on the previous fishing history of the F/V ARGO of which I was a major participant. A value must be determined prior to my relinquishing any rights.”¹⁸

I therefore conclude that Mr. Falk does not meet the definition of eligible applicant in 50 C.F.R. § 679.2 that awards an LLP license based on ownership of the fishing history of a qualified vessel apart from the vessel itself. I conclude that Thomas Falk and Deborah Falk are the eligible applicants for this LLP license and that the LLP license should be issued in both their names.

I wish to make clear that I am only deciding whether this Decree of Dissolution meets the requirements for an eligible applicant in federal regulation 50 C.F.R. § 679.2. I am not applying the standard for interpreting a decree of dissolution under Washington law and I am not deciding the proper interpretation of this decree under Washington law.

¹⁵ Final Rule, 65 Fed. Reg. 45,316, 45,316 (2000) (commentary). The VMP rule was eliminated as obsolete from federal regulation. *Id.* at 45,317 - 45,318.

¹⁶ 50 C.F.R. 679.4(k)(1).

¹⁷ *Cf. Oscar Wilson*, Appeal 00-0011 (Feb. 27, 2003)(owner as of June 17, 1995 signed a written statement that the sale to the applicant included the vessel’s fishing history and that the owner retained no rights to the vessel or its fishing history).

¹⁸ Letter from Deborah Falk to Mary Alice McKeen (Sept. 15, 2004)

2. Do Thomas Falk and Deborah Falk qualify for an LLP groundfish license with an Aleutian Islands or a Southeast Outside endorsement? No.

The Falks meet the general qualification period or GQP requirement for an LLP license with an Aleutian Islands endorsement and a Southeast Outside endorsement. The F/V ARGO harvested license limitation groundfish between January 1, 1988 to June 27, 1992.¹⁹

But, according to the official LLP record, the Falks do not meet the endorsement qualification period, or EQP, requirement for an Aleutian Islands or a Southeast Outside endorsement: one harvest of license limitation groundfish in the Aleutian Islands between January 1, 1992 and June 17, 1995 for an Aleutian Islands endorsement, and one harvest of license limitation groundfish in Southeast Outside area between January 1, 1992 and June 17, 1995 for a Southeast Outside endorsement.²⁰

The official LLP record is presumed to be correct. The applicant who claims the official LLP record is incorrect has the burden of proving that his or her claims, rather than the official LLP record, are correct.²¹

Mr. Falk submitted a copy of an IFQ Annual Fishing Permit that grants F/V ARGO, Inc., the them the right to harvest 155 pounds of halibut in 1997 in area 4B, which is in the Aleutian Islands.²² IFQ stands for the Individual Fishing Quota Program for halibut and fixed gear sablefish.²³ The IFQ program went into effect in 1995.²⁴ Under the IFQ program, vessel owners, or in some cases vessel lessees, received the right to harvest a percentage of the total allowable catch [TAC] of halibut, based on the amount of halibut they landed in specific years in specific areas.²⁵ This right was the person's quota share. NMFS annually translates a person's quota share into a particular number of pounds that the quota share holder can catch and record on his or her IFQ permit.²⁶ Once issued, a person's quota share is transferable.

¹⁹ 50 C.F.R. § 679.4(k)(4)(i)(B)(1). Because the Falks meet the GQP requirement under paragraph (B)(1), I do not discuss the other ways a vessel could meet the GQP requirement.

²⁰ 50 C.F.R. § 679.4(k)(4)(A) & (E).

²¹ 50 C.F.R. § 679.2 (definition of official LLP record); 50 C.F.R. § 679.4(k)(6)(v).

²² Figure 15 to 50 C.F.R. § 679. I assume that Thomas and Deborah Falk are the same as F/V ARGO Inc.

²³ 50 C.F.R. § 679.4(d)(IFQ permits); 50 C.F.R. § 679.40 (sablefish and halibut quota share).

²⁴ Final Rule, 60 Fed. Reg. 12,152, 12,152 (1995)(supplementary information).

²⁵ 50 C.F.R. § 679.40(a).

²⁶ 50 C.F.R. § 679.40(b); 50 C.F.R. § 679.40(c).

The fact that a person had a quota share certificate in 1997 means either that NMFS issued that person quota share as an initial issue or NMFS issued that person quota share as a transferee from someone else. The Falks received quota share initially, which means that NMFS examined their halibut fishing history and determined that they met the requirements for quota share.²⁷

The fact that the Falks harvested *halibut* at any time in any place does not support their claim to an LLP license. To qualify for an LLP license, an applicant must have harvested *license limitation groundfish* in specified places at specified times.²⁸ Halibut is not a license limitation groundfish.

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.²⁹

The annual specification process in 50 C.F.R. § 679.20(a)(2) is the process whereby NMFS, in consultation with the North Pacific Fishery Management Council, sets the Total Allowable Catch [TAC] for groundfish in the Gulf of Alaska and the Bering Sea/Aleutian Islands area.³⁰ This occurs under the Magnuson-Stevens Fishery Conservation and Management Act.³¹ NMFS does not set the TAC for halibut under the Magnuson-Stevens Act.³² Since halibut is not “specified annually pursuant to § 679.20(a),” it is not a license limitation groundfish and NMFS may not count any halibut caught by the Falks toward an LLP license.

The TAC for halibut is based on recommendations by the International Pacific Halibut Commission [IPHC] under the Convention Between the United States and Canada for the

²⁷ The Falks received quota share as initial issues for area 4B under the name of F/V ARGO, Inc. NMFS Alaska Region website <<http://www.fakr.noaa.gov/ram/initissu.csv>>.

²⁸ 50 C.F.R. § 679.4(k)(4)(i)&(ii).

²⁹ 50 C.F.R. § 679.2.

³⁰ See, e.g., Final 2004 Harvest Specifications for Gulf of Alaska Groundfish, 69 Fed. Reg. 9261 (2004), available on NMFS Alaska Region website <<http://www.fakr.noww.gov/frules/fr9261.pdf>>.

³¹ 16 U.S.C. §§ 1801 - 1883.

³² Table 2A to 50 C.F.R. § 679 lists the FMP groundfish species and halibut is not listed.

Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea.³³ NMFS *did* count halibut caught by the Falks toward their quota share, according to the regulations of the IFQ program.³⁴

I conclude that the F/V ARGO did not harvest any license limitation groundfish in the Aleutian Islands or Southeast Outside in the endorsement qualification period. I therefore conclude that Thomas Falk and Deborah Falk do not qualify for an LLP groundfish license with an Aleutian Islands or a Southeast Outside endorsement.

FINDINGS OF FACT

1. Thomas Falk and Deborah Falk owned the F/V ARGO jointly on June 17, 1995.
2. Thomas Falk and Deborah Falk did not enter into a written contract that, by express terms, clearly and unambiguously transferred the LLP-qualifying fishing history of the F/V ARGO to Thomas Falk.
3. The total allowable catch [TAC] for halibut is not determined by NMFS in the annual specification process pursuant to 50 C.F.R. § 679.20(a)(2).
4. The F/V ARGO did not harvest license limitation groundfish in the Aleutian Islands or in the Southeast Outside area in the endorsement qualification period: January 1, 1992 to June 17, 1995.

CONCLUSIONS OF LAW

1. Thomas Falk and Deborah Falk are the eligible applicants for the LLP license based on the fishing history of the F/V ARGO.
2. Halibut is not a license limitation groundfish.
3. Thomas and Deborah Falk do not qualify for an LLP license with an Aleutian Islands endorsement or a Southeast Outside area endorsement.

DISPOSITION

The IAD is AFFIRMED. This Decision takes effect June 26, 2006, unless by that date the Regional Administrator takes action under 50 C.F.R. § 679.43(o).

³³ Final Rule, 69 Fed. Reg. 9231, 9231 (2004). The IPHC regulations at 50 C.F.R. §§ 300.60 - 300.66 have been approved by the Secretary of State of the United States under section 4 of the Northern Pacific Halibut Act, 16 U.S.C. § 773 - 773k. *Id.*

³⁴ 50 C.F.R. § 679.40(a) (initial allocation of quota share).

Thomas Falk or Deborah Falk 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, June 5, 2006. 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.

Mary Alice McKeen
Administrative Judge