

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 00-0015
	)	
DARJEN, Inc.,	)	DECISION
Appellant	)	
_____	)	December 31, 2002

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that approved the application of Darjen, Inc., for a groundfish license, with an endorsement for Central Gulf groundfish, and the application of Darjen, Inc., for a crab license, with endorsements for Bering Sea/Aleutian Islands (BSAI) *C. opilio* and *C. bairdi* (Tanner) crab, Bristol Bay red king crab, and Pribilof Islands red and blue kind crab, under the North Pacific Groundfish and Crab License Limitation Program (LLP), as the owner of an LLP qualifying vessel, the F/V ALASKA SPIRIT.

The IAD denied Darjen, Inc.'s, application for an LLP groundfish license endorsement for Bering Sea groundfish. The IAD gave Darjen, Inc., until December 4, 2000, to appeal the IAD. RAM issued interim LLP groundfish and crab licenses to Darjen, Inc., pending final agency action of the application.

On November 30, 2000, this Office received a letter from Darjen, Inc., claiming that the F/V ALASKA SPIRIT harvested Pacific cod for crab bait between October, 1993 and December, 2000. We mistakenly assumed the letter did not constitute a timely appeal. As a result, RAM revoked the interim LLP licenses and issued a transferable LLP groundfish license and LLP crab license to Darjen, Inc., but not for Bering Sea groundfish.

On June 20, 2001, we determined that Darjen, Inc.'s, letter of November 30, 2000, constitutes a timely appeal of the IAD.<sup>1</sup> As a consequence, RAM re-instated the interim LLP licenses, pending final agency action. Darjen, Inc., can file an appeal because the IAD directly and adversely affects the interests of Darjen, Inc. [50 C.F.R. § 679.43(b)] An oral hearing is not necessary in this case because the record contains sufficient information on which to reach a final decision. [50 C.F.R. § 679.42(m)(4)]

ISSUE

Does Darjen, Inc., qualify for an LLP groundfish license endorsement for Bering Sea groundfish, based on the harvest of Pacific cod for crab bait aboard the F/V ALASKA SPIRIT?

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<sup>1</sup>See the memorandum to file from Randall Moen, June 21, 2001.

## ANALYSIS

To qualify for an LLP groundfish license endorsement for Bering Sea groundfish, Darjen, Inc., must establish that the F/V ALASKA SPIRIT made at least one “documented harvest” of Bering Sea groundfish during the endorsement qualifying period (EQP), between January 1, 1992, and June 17, 1995.<sup>2</sup>

Evidence of a “documented harvest” is limited to a state fish ticket, Federal catch report, or other “valid documentation.”<sup>3</sup>

The official LLP record does not show that the F/V ALASKA SPIRIT made a documented harvest of Bering Sea groundfish during the EQP.

Darjen, Inc., claims that the vessel harvested Pacific cod<sup>4</sup> for crab bait in the Bering Sea during the EQP, but it did not produce a state fish ticket, Federal catch report, or any other document to show that the F/V ALASKA SPIRIT harvested the fish. Therefore, I find that the vessel did not make a documented harvest of Pacific cod in the Bering Sea during the EQP.

In several decisions,<sup>5</sup> we have ruled that to be considered a "documented harvest" of groundfish under the LLP, the harvest must have been a lawful commercial harvest; and that to be considered a lawful *commercial* harvest, the harvest (of the groundfish) must have been, or intended to be, sold, bartered, or traded to another person.

In Application of Williard S. Ferris,<sup>6</sup> we stated:

A "documented harvest" is defined as a "lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at time of harvesting."<sup>7</sup> Implicit in this definition is the idea that the lawful harvest must be a lawful *commercial* harvest. Otherwise it would make no sense to require that the harvest be recorded in compliance with commercial fishing regulations. ... This view -- that a documented harvest must result from commercial fishing is

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<sup>2</sup>50 C.F.R. § 679.4(k)(4)(ii)(B).

<sup>3</sup>50 C.F.R. § 679.4(k)(4).

<sup>4</sup>Pacific cod is considered "groundfish" under the LLP.

<sup>5</sup>See Application of Williard S. Ferris, Appeal No. 00-0004, January 18, 2002; Paula J. Brogdon, Appeal No. 00-0011, February 26, 2002; and Ronald J. Tennison, Appeal No. 00-0012.

<sup>6</sup>Appeal No. 00-0004, January 18, 2002.

<sup>7</sup>50 C.F.R. § 679.2.

consistent with the LLP's purpose of regulating the commercial fishing of LLP groundfish and crab.<sup>8</sup> Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act defines "commercial fishing" as "fishing in which the fish harvested, either in whole or part, are intended to enter commerce or enter commerce through sale, barter, or trade."<sup>9</sup>

Therefore, even if Darjen, Inc., had produced credible evidence that the F/V ALASKA SPIRIT had harvested Pacific cod for crab bait in the Bering Sea during the EQP, the harvest could not have been legally considered a "documented harvest" of groundfish because the Pacific cod would have been used for crab bait by Darjen, Inc., itself, and not sold, bartered, or traded to another person.

Darjen, Inc., is already lawfully 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).<sup>10</sup> But to endorse Darjen, Inc.'s, LLP groundfish license for the Bering Sea, based on the harvest of Pacific cod for crab bait, would entitle Darjen, Inc., to commercially harvest almost all LLP groundfish in the Bering Sea. The endorsement would be contrary to the primary intent of the LLP, which is to limit, not expand, the commercial fishing of groundfish in the Bering Sea.<sup>11</sup>

In a number of decisions,<sup>12</sup> this Office has ruled that an Appeals Officer is bound by the language of the LLP regulations, and that the authority to change, modify, or declare unconstitutional a duly promulgated regulation lies within the jurisdiction of the Federal court system. Therefore, as an Appeals Officer, I do not have authority to determine whether Kodiak fishermen were given adequate notice of the proposed LLP regulations.<sup>13</sup>

In light of the language and purpose of the LLP regulations, I conclude that Darjen, Inc., does not qualify for an LLP groundfish license endorsement for Bering Sea groundfish, based on the

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<sup>8</sup>50 C.F.R. § 679.1(j).

<sup>9</sup>16 U.S.C. § 1802 (1994).

<sup>10</sup>See 50 C.F.R. § 679.5(a)(1)(iii)(B).

<sup>11</sup>63 Fed. Reg. 52,642 (October 1, 1998).

<sup>12</sup>See, e.g., George M. Ramos, Decision on Review, April 25, 1995, at 4; and Little Ann, Inc., Appeal No. 01-0022, July 10, 2002.

<sup>13</sup>NMFS published the proposed rules of the LLP in the Federal Register on June 16, 1997 (62 Fed. Reg. 32,579) and on August 15, 1997 (62 Fed. Reg. 43,865). Public comment was accepted through August 15, 1997, and through September 29, 1997, respectively.

harvest of Pacific cod for crab bait aboard the F/V ALASKA SPIRIT.

#### FINDINGS OF FACT

1. The harvest of Pacific cod for crab bait aboard the F/V ALASKA SPIRIT was not recorded on a state fish ticket, Federal catch report, or any other credible document with all of the legally required information.
2. The F/V ALASKA SPIRIT did not make a documented harvest of Pacific cod for crab bait in the Bering Sea between January 1, 1992, and June 17, 1995.

#### CONCLUSION OF LAW

Darjen, Inc., does not qualify for an LLP groundfish license endorsement for Bering Sea groundfish, based on the harvest of Pacific cod for crab bait aboard the F/V ALASKA SPIRIT.

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on January 30, 2003, unless by that date the Regional Administrator orders review of the Decision.

Any party, and 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 on January 10, 2003. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact of law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement of points and authorities in support of the motion.

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Randall J. Moen  
Appeals Officer