NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 04-0002
	)	
JAMIE MARIE, INC.	)	ORDER DENYING MOTION FOR
Appellant.	)	RECONSIDERATION AND
	)	ESTABLISHING A NEW EFFECTIVE
	)	DATE FOR THE DECISION
	)	
_____	)	May 25, 2006

Jamie Marie, Inc., [Jamie Marie] filed a timely appeal of an Initial Administrative Determination [IAD] that the Restricted Access Management Program [RAM] issued on January 9, 2004. The IAD denied Jamie Marie's application for an LLP groundfish license. The IAD determined that Jamie Marie did not meet the requirement for harvests in a general qualifying period [GQP], as required by 50 C.F.R. § 679.4(k)(4)(i). Jamie Marie acknowledged that it did not meet the GQP requirements but argued that NMFS should be legally prevented, or "estopped," from denying it an LLP license.

I issued a Decision on April 13, 2006 that affirmed the IAD. In the Decision, I explained that government estoppel is an extraordinary remedy that is reserved only for situations of serious injustice because, by accepting a claim of estoppel, NMFS would be prevented from judging Jamie Marie's application according to published regulations and according to the same rules by which it judged all other LLP applicants.[1]

I concluded that Jamie Marie did not meet five requirements, each of which an applicant must meet to prevail on a claim of government estoppel. First, Jamie Marie was not ignorant of the true facts.[2] Second, Jamie Marie's reliance on the statements by a NMFS employee was unreasonable.[3] Third, if a NMFS employee assured Jamie Marie it would receive a license before NMFS adopted the requirements for a license, the employee was acting outside the scope of the employee's authority.[4] Fourth, NMFS did not commit affirmative misconduct.[5] Fifth, estoppel was not necessary to avoid a serious injustice.[6]

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[1] Decision at 5.

[2] Decision at 8 - 10.

[3] Decision at 10 - 12.

[4] Decision at 12 - 14.

[5] Decision at 14 - 17.

[6] Decision at 18 - 19.

Jamie Marie filed a timely motion for reconsideration of the Decision on April 24, 2006. I issued an order staying the effective date of the Decision on April 25, 2006. The standard for reconsidering the Decision is that Jamie Marie must show that the administrative judge misunderstood or overlooked a material question of law or fact.[7] A material question of law or fact is one which would change the outcome of the decision or is necessary for an accurate statement of a critical point in the appeal.

Jamie Marie agrees with the Decision's statement of the requirements for estoppel: "The criteria for estoppel have been accurately described in the Decision."[8] Jamie Marie argues that the Decision overlooked that Jamie Marie meets the requirements for estoppel. For reasons I explain below, I conclude that the Decision did not overlook or misunderstand any argument or evidence that shows that Jamie Marie meets the requirements for estoppel. I therefore deny the motion and establish June 25, 2006 as the new effective date of the Decision.

Involvement of Phil Chitwood

Jamie Marie's main point is that "the involvement of Phil Chitwood distinguishes this case from others."[9] The Decision noted Mr. Chitwood's unique and extensive experience with Alaska fishery issues:

> From 1977 to 1984, he was Chief of the Fisheries Management Division for the NMFS Alaska Region. From 1984 to 1988, he was responsible for the fishing operations of Marine Resources International in the Pacific Ocean and the Bering Sea. In 1988, Mr. Chitwood became the Director of Government Affairs for Arctic Alaska Fisheries, which operated thirty-five vessels in Alaskan waters, one-third of which fished for groundfish. Ron Miller's father, Francis Miller, was President of Arctic Alaska Fisheries. Francis Miller asked Phil Chitwood to contact NMFS on Ron Miller's behalf.[10]

But the unique status of Mr. Chitwood does not help Jamie Marie's claim of estoppel. If anything, as former head of the Fisheries Management Division in the NMFS Alaksa Region, Mr. Chitwood was uniquely informed of the process under the Magnuson-Stevens Act whereby NMFS adopts regulations to limit access to a fishery. The Decision noted:

> And Mr. Chitwood would know the basic legal fact that the Secretary of

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[7] Memorandum from Edward Hein, Chief Appeals Officer, OAA (April 26, 1999), available on the NMFS Alaska Region website, http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.

[8] Motion for Reconsideration at 2.

[9] Motion for Reconsideration at 1.

[10] Decision at 6, *citing* Affidavit of Phil Chitwood ¶¶ 5 - 9 (Jan. 28, 2004).

> Commerce is the ultimate legal authority for approving a limited access system for a fishery under the Magnuson-Stevens Act and that, until the Secretary approves Fishery Management Plan amendments and implementing regulations, there is nothing in place that is legal, final and in effect. It is like baseball. It does not matter whether a runner is one foot or thirty feet from home plate. Until the runner crosses home plate, there is no score.[11]

First requirement for estoppel: the applicant must have been ignorant of the true facts.

On the first requirement – that the person asserting estoppel must be ignorant of the true facts – Jamie Marie states:

> The relevant facts are not what Jamie Marie, Inc., knew in 1991 and 1992 with respect to the potential limited access fishery, but what it was lead [sic] to believe with respect to the qualification of halibut as a groundfish. Jamie Marie, Inc., did not know the true fact that halibut would not be considered a groundfish for the limited access groundfish fishery.[12]

The relevant facts *are* what Jamie Marie knew in 1991 and 1992 because that is when Jamie Marie states that it did not go fishing because of what the NMFS employee told Phil Chitwood. The Decision concluded that Jamie Marie did know the true facts in 1992: Jamie Marie knew it did not need a limited access license to fish for groundfish and Jamie Marie knew that NMFS had not adopted requirements for a limited access license that Jamie Marie might need in the future.[13] The Decision noted: " It was precisely *because* the government had not adopted regulations which established the requirements for a groundfish license that Jamie Marie could not consult written, published federal regulations and instead sought information through Mr. Chitwood."[14]

A "fact" has to be something that has happened. ***In 1992, no one knew "the true fact that halibut would not be considered a groundfish for the limited access groundfish fishery" because that had not happened yet***. No one knew that halibut would not be considered a groundfish until the Secretary disapproved the proposed moratorium regulation in 1994 and NMFS withdrew the proposed rule.[15]

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[11] Decision at 9.

[12] Motion for Reconsideration at 2.

[13] Decision at 8.

[14] Decision at 9 (emphasis in original).

[15] Decision at 16 - 17.

Second requirement for estoppel: the applicant's reliance was reasonable.

Jamie Marie states that Mr. Chitwood "reasonably expected the information he received in response to a direct question to NMFS would be accurate."[16] The Decision addressed this. An applicant cannot expect "accurate" information about what the requirements for a government license will be, *before* the government has even proposed the requirements for the license in a rule, much less adopted the requirements.[17] This is similar to Jamie Marie's claim that it was misled at to the "true facts." Just as in 1992, there were no "true facts" as to what would be required for a limited access license in the future, so too, in 1992, before the government adopted requirements for a limited access license, Jamie Marie could not reasonably expect "accurate" information about what those requirements will be. The Decision notes: "Although Mr. Miller wanted certainty, an applicant is not entitled to certainty about what federal regulations will require for a limited access fishing license, *before the regulations are adopted.*"[18]

Third requirement for estoppel: NMFS employee acted within the scope of his authority.

The Decision concluded that if a NMFS employee assured Jamie Marie it would receive a license before NMFS adopted the requirements for a license, the employee was acting outside the scope of the employee's authority. Jamie Marie argues that the Decision overlooked that

> [t]he employee was acting in his capacity as an agent for NMFS disseminating information it knew was to be relied upon in making a fish harvesting decision. To infer that a government employee is working outside of his/her official capacity by giving information during business hours while working from his office denigrates the credibility of any agent of any government facility.[19]

I agree that a NMFS employee has authority to disseminate information about current requirements for fishing in Alaska and proposed requirements. But the Decision found that a NMFS employee does not have authority to promise someone they would receive a license before NMFS adopted the requirements for a license:

> No NMFS official, no matter what their rank, has authority to adopt private, individual requirements for an LLP license. Put another way, no NMFS official has authority to adopt requirements for an LLP license *before* the Secretary adopts regulations that the agency will apply to all applicants for the license. And

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[16] Motion for Reconsideration at 2.

[17] Decision at 10 - 11.

[18] Decision at 10 (emphasis in original).

[19] Motion for Reconsideration at 3.

a member of the public is properly charged with knowledge of that fact.[20]

Fourth requirement for estoppel: NMFS committed affirmative misconduct.

The Decision concluded that NMFS did not commit affirmative misconduct. Jamie Marie asserts that a government official's statements rise to affirmative misconduct "when the maker knows that the recipient of information is relying on the statements to make a decision which may have a significant affect on their livelihood."[21] This statement implies that [1] there is a single standard for affirmative misconduct and [2] the standard is when the government employee knows that the recipient of the information would rely on the government employee's statements to make a decision which may have a significant affect on their livelihood.

Jamie Marie does not cite any authority for the assertion that this is the standard for determining affirmative misconduct or even the critical fact. The only case cited by Jamie Marie where the court estopped the government was *Watkins v. United States Army,* which discussed the affirmative misconduct requirement:

> There is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances. Affirmative misconduct does require an affirmative misrepresentation or affirmative concealment of a material fact by the government, although it does not require that the government intend to mislead a party. Finally, it is well settled that the government is not bound by the unauthorized acts of its agents.
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> Here, the Army affirmatively misrepresented in its official records throughout Watkins' fourteen-year military career that he was qualified for reenlistment. . . . Thus, the Army affirmatively acted in violation of its own regulations when it repeatedly represented that Watkins was eligible to reenlist, as well as when it reenlisted him time after time. . . .
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> In the present case, the Army's conduct went far beyond a mere failure to inform or assist. As the district court noted, the Army did not stand aside while Watkins reenlisted or accepted a promotion; it plainly acted affirmatively in admitting, reclassifying, reenlisting, retaining and promoting Watkins. Furthermore, this case does not merely involve misinformation provided by government agents. Rather, it involves ongoing active misrepresentations by Army officials acting well within their scope of authority. "Without Army approval [Watkins] would not have been able to enter, remain or progress in the Army. The defendants point out that reenlistment is exclusively the Secretary's function, [sic] Here he exercised his authority three times.... To satisfy the element of affirmative

[20] Decision at 13.

[21] Motion for Reconsideration at 3.

misconduct the court need look no further." [footnotes omitted][22]

On the element of affirmative misconduct, Jamie Marie's situation might be comparable to *Watkins* if NMFS had awarded Jamie Marie a permanent LLP license for fourteen years, renewed it several times, approved additional endorsements and then tried to revoke the license.

Instead, viewing the facts in the light most favorable to Jamie Marie, a NMFS employee gave Jamie Marie misinformation about future requirements for a limited access license, when Jamie Marie knew that NMFS had not adopted the final, legal requirements for such a license. The claimed misadvice was given in two telephone calls – one in early 1991 and the other in the spring of 1992,[23] was not contained in any written documents, was not confirmed by any official action and was not about current, actual legal requirements.

The Decision cited several instances where the courts did not find affirmative misconduct by the government even though the government employee knew, or should have known, that the recipient of the information would rely on information the government employee was providing.[24] In *Schweiker v. Hansen*, a social security field representative gave incorrect advice to an inquiry about whether a person was eligible for benefits. The Supreme Court concluded the government's errors fell "far short of conduct which would raise a serious question whether petitioner is estopped from insisting upon compliance with the valid regulation."[25] In *United States v. Marine Shale Processors,* the Louisiana Department of Environmental Qualify [LDEQ] told a facility in a written letter that the facility complied with federal requirements, when the facility did not, and the circumstances "suggest[ed] that LDEQ intended for MSP [the business] to rely on the letter."[26]

In *Purcell v. United States*, a person who had taken over running a business asserted that an IRS agent "'encouraged' him to keep the business going, and behaved in a manner that led nim to believe that the IRS would not seek to hold him personally responsible for the Hatcher period taxes [the taxes owed by the business before he took over the business]."[27] The court did not estop the government from enforcing the statute that held the taxpayer personally liable for taxes the business owed before the taxpayer took the business over. The Decision quoted the formulation in *Purcell* for affirmative misconduct: "Affirmative misconduct involves ongoing

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[22] 875 F.2d 699, 707 (9th Cir. 1989), *cert. denied* 498 U.S. 957 (1990).

[23] Ron Miller states Mr. Chitwood contacted NMFS in early 1991 and the spring of 1992. Affidavit of Ron Miller ¶ 5 (March 30, 2000).

[24] Decision at 14 n.56.

[25] *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (per curiam) (internal quotation and citation omitted) *cited in* Decision at 14 n. 56.

[26] 81 F. 3d 1329, 1351 (5th Cir. 1996) *cited in* Decision at 14 n. 56.

[27] 1 F. 3d 932, 939 - 940 (9th Cir. 1993) *quoted in* Decision at 14 n. 56.

active misrepresentations or a pervasive pattern of false promises as opposed to an isolated act of providing misinformation."[28]

Jamie Marie states that NMFS committed affirmative misconduct because "[t]he message to Mr. Chitwood was clear and unequivocal."[29] The Decision addressed this in several ways. First, the Decision concluded that the message to Mr. Chitwood was *not* clear and unequivocal *about facts or current regulations or requirements.*[30] Second, the Decision noted that oral misinformation is particularly unlikely to constitute affirmative misconduct.[31] The Decision noted that Jamie Marie provided no authority where the government was estopped because on *verbal advice* about a *future regulation.*[32] Third, the Decision concluded that affirmative misconduct must be beyond "mere negligence, carelessness, mistake, inaction, acquiescence, or failure to follow an internal agency guideline."[33] Even assuming NMFS provided Jamie Marie information that was clearly incorrect, Jamie Marie's assertion do not amount to NMFS engaging in "ongoing active misrepresentations or a pervasive pattern of false promises."[34]

Fifth requirement: estoppel is necessary to avoid serious injustice.

The Decision concluded estoppel is not necessary to avoid serious injustice. Jamie Marie states that, but for the representations of NMFS, it would have landed groundfish in 1992 and qualified for a groundfish license.[35] This goes to prove that Jamie Marie relied in fact on NMFS's statement. The Decision assumed that Jamie Marie relied on NMFS's statements and did not go groundfish fishing in the spring of 1992 because of them.[36] The requirement of serious injustice is separate from the requirement of reliance-in-fact by the applicant. The serious injustice requirement is related to whether Jamie Marie's reliance was reasonable and means that the

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[28] 1 F. 3d 932, 940 (9th Cir. 1993)(citations omitted) *cited in* Decision n. 56.

[29] Motion for Reconsideration at 3.

[30] Decision at 8 - 10.

[31] Decision at 14.

[32] Decision at 12.

[33] Decision at 14.

[34] *Purcell v. United States,* 1 F. 3d 932, 940 (9th Cir. 1993)(citations omitted) *cited in* Decision at 14 n. 56.

[35] Jamie Marie states that it spent $900,000 converting its vessel to a trawl vessel in 1992. The Decision noted that Jamie Marie has been able to use its vessel in the trawl groundfish fishery since 1993 because federal regulations granted Jamie Marie the right to receive an interim moratorium permit and then an interim LLP license. "This lessens, but does not eliminate, the adverse economic effect on Jamie Marie from judging its application according to final published regulations." Decision at 19.

[36] Decision at 7.

government may be estopped only when, considering all the applicant's circumstances, estoppel is necessary to avoid a serious injustice. The Decision did not overlook this point but concluded

> Many, if not all, unsuccessful LLP applicants would have made the harvests necessary for an LLP license if only they had known in advance what was necessary. . . .
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> Before it adopts a system of limited access, the government does not have an obligation to inform vessel owners what the requirements will be so that they can meet those requirements. In fact, that would cause a rush of speculative entrants into the fishery – persons participating because they know access will be limited and want to get in under the wire. The Council's Notice in 1990 states: "This action is necessary to alert the public of the Council's fishery management intentions and possible constraints on future access to public fishery resources. The intended effect of this announcement is to *discourage* new entry into the identified fisheries while the Council continues discussions on whether and how access to these fisheries should be controlled."
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> My conclusion concerning reasonable reliance applies here. If I granted Jamie Marie's claim of estoppel, I would be saying that Jamie Marie was entitled to certainty when it sought information from a government official about future legal requirements. I cannot say that. When a fishery goes from open access to restricted access, a member of the public is not entitled to know, and cannot expect to know, with certainty, what the new rules will be, before the government adopts them.
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> A member of the public can seek information, make its best guess as to what those rules will be and act accordingly. Based on its assessment of what the future rules will be, a vessel owner can choose to participate in certain fisheries and not others. A vessel owner can make certain investments and not others. But if, after the final rules are adopted, the vessel owner wishes it had participated in different fisheries, the vessel owner is not entitled to an exception to the final rules under the theory of government estoppel. It does not cause serious injustice to judge that applicant according to the rules that the government actually adopted and applied to all other applicants for the same license.[37]

DISPOSITION

Jamie Marie, Inc.'s motion for reconsideration is DENIED. The Decision in this Appeal, dated April 13, 2006, will take effect June 25, 2006, unless, by that date, the Regional Administrator orders review of the Decision.

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[37] Decision at 18 (footnote omitted).

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Mary Alice McKeen
Administrative Judge