

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	
	)	Appeal No. 00-0012
RONALD J. TENNISON,	)	
F/V DESTINY,	)	DECISION
ADF&G # 35639	)	
Appellant	)	April 5, 2002
_____	)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that approved Ronald Tennison’s application for a crab license under the North Pacific Groundfish and Crab License Limitation Program (LLP), as the owner of the LLP qualifying vessel F/V DESTINY. The IAD approved crab license area/species endorsements for the Bering Sea/Aleutian Islands (BSAI) *C. opilio* and *C. bairdi* crab fisheries and the Bristol Bay red king crab fishery.

The IAD denied Mr. Tennison’s application for LLP crab license endorsements for the Aleutian Islands brown king, Aleutian Islands red king, and Pribilof red and blue king crab fisheries. The IAD also denied Mr. Tennison’s application for an LLP groundfish license, with endorsements for the Bering Sea, Aleutian Islands, Western Gulf of Alaska, and Central Gulf of Alaska areas.

Mr. Tennison filed a timely appeal of the IAD. Mr. Tennison can file an appeal because the IAD directly and adversely affects his interests. [50 C.F.R. § 679.43(b)] Mr. Tennison did not request a hearing, and I have determined that an oral hearing in this case is unnecessary because the facts asserted, even if true, do not justify granting relief. [50 C.F.R. §679.43(g)(3)] I have closed the record because it contains sufficient information on which to render a decision. [50 C.F.R. §679.42(m)(4)]

Mr. Tennison stated that he wants this Office to “reconsider the IAD denying me an endorsement for Pribilof crab and BSAI cod” [Appeal at 7]; however, because I view this statement as being somewhat ambiguous, I am treating this as an appeal of everything denied in the IAD.

ISSUES

1. Does Mr. Tennison qualify for an LLP groundfish license based on certain claimed Pacific cod harvests made aboard the F/V DESTINY?
2. Does Mr. Tennison qualify for an LLP groundfish license, or certain LLP crab license area/species endorsements, based on his claim of “unavoidable circumstances”?

## SUMMARY

The IAD is affirmed. The alleged harvests of Pacific cod, which were used as crab bait on Mr. Tennison's vessel, did not result from commercial fishing as defined in the Magnuson-Stevens Fishery Conservation and Management Act. The alleged harvests, therefore, did not constitute documented harvests of LLP groundfish, and do not qualify Mr. Tennison for an LLP groundfish license or endorsement.

Mr. Tennison's claim of unavoidable circumstances fails as to groundfish because his vessel did not make a documented harvest of LLP groundfish during the period January 1, 1988 to February 9, 1992, as required by 50 C.F.R. §679.4(k)(8)(iv). To qualify for an LLP groundfish license under the unavoidable circumstances exception, his vessel must have made such a harvest, regardless of whether his claimed unavoidable circumstances were, in fact, unavoidable, unique to Mr. Tennison, unforeseen and reasonably unforeseeable, and prevented him from conducting directed fishing for LLP groundfish. Therefore, Mr. Tennison does not qualify for an LLP groundfish license based on his claim of unavoidable circumstances.

Mr. Tennison's claim of unavoidable circumstances fails as to all three crab species license endorsements that he seeks because his vessel did not make a documented harvest of any Aleutian Islands brown king, Aleutian Islands red king, or Pribilof red or blue king crab after the asserted unavoidable circumstances ended but before June 17, 1995, as required by 50 C.F.R. §679.4(k)(8)(iv). The vessel never made any documented harvests of Aleutian Islands brown king or Aleutian Islands red king crab, and made no documented harvests of Pribilof red or blue king crab until September 1995. Therefore, Mr. Tennison does not qualify for any of the three LLP crab license endorsements he seeks based on his claim of unavoidable circumstances.

## ANALYSIS

### **1. Does Mr. Tennison qualify for an LLP groundfish license based on certain claimed Pacific cod harvests made aboard the F/V DESTINY?**

To qualify for an LLP groundfish license with the endorsements he seeks, Mr. Tennison must meet the requirements of both the general qualification period (GQP) and the appropriate endorsement qualification periods (EQP) [50 C.F.R. §679.4(k)(4)(i) and (ii)]. There are three alternative ways to meet the GQP requirements. The first is that he must show that the F/V DESTINY made a documented harvest of LLP groundfish in the Gulf of Alaska (GOA) or in the Bering Sea/Aleutian Islands (BSAI) area during the general qualification period, January 1, 1988 through June 27, 1992. A second alternative has three parts: he must show that the vessel made (a) a documented harvest of crab species in either of those areas between January 1, 1988 and February 9, 1992; and (b) a documented harvest of LLP groundfish in the same area between January 1, 1988 and June 17, 1995; and (c) a documented harvest of any groundfish species (other than sablefish with fixed gear) in the GOA or the BSAI using trawl or longline gear between February 10, 1992 and December 11, 1994. A third alternative for meeting the GQP

requirements involves harvesting LLP groundfish using pot or jig gear from a vessel under 60 feet LOA. This alternative does not apply to Mr. Tennison because his vessel is 100 feet LOA.

To meet the endorsement qualification period requirements, Mr. Tennison must show that his vessel made the requisite number of documented harvests of LLP groundfish for a category “B” vessel (60 feet to 124 feet LOA) in the relevant endorsement areas during the specified time period. For most of the groundfish endorsements Mr. Tennison seeks, the EQP is January 1, 1992 through June 17, 1995.

The agency’s LLP Official Record shows that the F/V DESTINY made only one documented harvest of LLP groundfish during the years 1988 through 1995. That was a 1993 harvest using longline gear in the Central Gulf of Alaska. Therefore, according to LLP Official Record, Mr. Tennison’s vessel does not have a fishing history that meets the first alternative requirement for the general qualification period. It does appear, however, that the vessel’s fishing history meets the second, three-part alternative. The LLP Official Record shows that the F/V DESTINY had a documented harvest of a crab species in the Gulf of Alaska in 1988. The 1993 longline harvest in the Central Gulf of Alaska meets the other two requirements of this alternative. Therefore, Mr. Tennison meets the GQP requirements for an LLP groundfish license.

The EQP requirements, however, are another story. Because Mr. Tennison’s only documented harvest of LLP groundfish was in the Central Gulf, he cannot meet the EQP requirements for any of the other area endorsements. There are two ways for a category B vessel, such as the F/V DESTINY, to get a Central Gulf area endorsement. One way is to have made one documented harvest of LLP groundfish in the Central Gulf in each of two calendar years between January 1, 1992 and June 17, 1995 [50 C.F.R. §679.4(k)(4)(ii)(I)]. Mr. Tennison’s 1993 Central Gulf groundfish harvest supplies one of these two required harvests, but according to the LLP Official Record, he still lacks a second documented harvest in 1992, 1994, or in the period January 1 - June 17, 1995. The second way for a category B vessel to meet the EQP requirements for the Central Gulf is to have made four documented harvests of LLP groundfish during the 6½-month period January 1 - June 17, 1995, but the LLP Official Record shows that the F/V DESTINY made no documented harvests of LLP groundfish during that period.

Mr. Tennison does not claim to have made any other documented harvests of LLP groundfish, and he did not submit any fish tickets or other evidence of documented harvests. Thus, neither the LLP Official Record nor the administrative record in this appeal contain any evidence of documented harvests that would qualify Mr. Tennison for an LLP groundfish license.

Mr. Tennison does claim, however, that the F/V DESTINY made an unspecified number of *undocumented* harvests of Pacific cod (an LLP groundfish) in the BSAI area during the opilio crab seasons between 1992 - 1994. He argues that these *were* documented harvests because the North Pacific Fishery Management Council, in estimating the amount of Pacific cod that was harvested annually, assumed that 10 pounds of bait cod are used for each crab pot pulled in the BSAI. He also argues that the State of Alaska documented his Pacific cod harvests “when they

gave all the opilio fishermen a ‘blanket fish ticket’ by deducting an amount off the quota that they contributed to our targeting of cod for bait.” [Appellant’s letter to RAM, December 2, 1999] Mr. Tennison further argues that NMFS documented all Pacific cod harvests used for crab bait by exempting them from reporting requirements [Appeal at 6].

Under the LLP, evidence of a documented harvest must be demonstrated by a state or federal catch report, or other valid documentation that indicates “the amount of license limitation groundfish harvested, the groundfish reporting area in which the license limitation groundfish was harvested, the vessel and gear type used to harvest the license limitation groundfish, and the date of harvesting, landing, or reporting.”<sup>1</sup> None of the so-called “documentation” that Mr. Tennison argues was done by the Council, the State of Alaska, or NMFS constitutes the required type of evidence. The “documentation” does not provide the specific information required concerning amount, reporting area, vessel, gear type, and dates of harvesting. In fact, the “documentation” does not establish anything about the F/V DESTINY, including whether it ever harvested Pacific cod.

Mr. Tennison argues that because his claimed Pacific cod harvests were exempt from NMFS reporting requirements they were “caught in accordance and in compliance with all state and federal requirements.” [Appeal at 5] As this Office stated in Application of Willard S. Ferris,<sup>2</sup>

A “documented harvest” is defined as “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.”<sup>3</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 consistent with the LLP’s purpose of regulating the commercial fishing of LLP groundfish and crab.<sup>4</sup> This view is also supported by our statement in another appeal decision that compliance with commercial fishing regulations requires that one be lawfully engaged in commercial fishing.<sup>5</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

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<sup>1</sup>50 C.F.R. §679.4(k)(4).

<sup>2</sup>Appeal No. 00-0004, January 18, 2002.

<sup>3</sup>50 C.F.R. § 679.2.

<sup>4</sup>50 C.F.R. § 679.1(j).

<sup>5</sup>Prowler Partnership v. Samuelson, Appeal No. 95-0084, Decision on Reconsideration (Part II), September 29, 1997, at 21-22.

trade.”<sup>6</sup>

Mr. Tennison asserts that he fished for cod to “sell” to himself for use as bait [Appeal at 4]. He also states that he “paid” for the cod with the lost opportunity cost of removing crab pots from the crab fishery and using them to harvest the cod [Appeal at 4]. I have previously considered and rejected these arguments in the Appeal of Paula J. Brogdon.<sup>7</sup> In that decision, I stated:

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 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.

The Brogdon decision is dispositive on the question of the alleged Pacific cod harvests in this case. I conclude here, as I did in that case, that the alleged harvests of Pacific cod cannot constitute documented harvests of groundfish for purposes of qualifying for an LLP groundfish license or endorsement. Therefore, I conclude that Mr. Tennison does not qualify for a groundfish license on the basis of his claimed Pacific cod harvests from the F/V DESTINY.

## **2. Does Mr. Tennison qualify for an LLP groundfish license, or certain LLP crab license area/species endorsements, based on his claim of “unavoidable circumstances”?**

The regulations provide that an applicant whose vessel was unable to meet all the criteria for an LLP groundfish license or LLP crab species license “because of an unavoidable circumstance” may still receive a license if the applicant meets certain requirements.<sup>8</sup> One of the requirements, pertaining to an applicant for an LLP groundfish license, is that the vessel must have made a documented harvest of license limitation groundfish between January 1, 1988 and February 9, 1992. The evidence in the record of this appeal shows that Mr. Tennison’s vessel, the F/V DESTINY, did not make any documented harvests of license limitation groundfish during that

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<sup>6</sup>Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§1802-1883 (1994). Section 3 is found at 16 U.S.C. §1802.

<sup>7</sup>Appeal No. 00-0011, February 26, 2002.

<sup>8</sup>50 C.F.R. §679.4(k)(4)(8)(iv).

period. Therefore, regardless of whether Mr. Tennison meets the other requirements of the regulation, he cannot qualify for an LLP groundfish license on the basis of an “unavoidable circumstance” claim.

To qualify for the LLP crab license area/species endorsements that he seeks, Mr. Tennison must show, among other things, that his vessel harvested the appropriate crab species in those specific endorsement areas after the claimed unavoidable circumstances ended but before June 17, 1995.<sup>9</sup> The evidence in the record of this appeal shows that the F/V DESTINY did not harvest any Aleutian Islands brown king crab, Aleutian Islands red king crab, or Pribilof red or blue king crab at any time between 1988 and June 17, 1995. The record shows that the earliest the F/V DESTINY harvested any of these crab species in these endorsement areas was September 1995, when the vessel harvested Pribilof red and blue king crab for the first time. Therefore, regardless of whether Mr. Tennison meets the other requirements of the regulation, he cannot qualify for any of these LLP crab license area/species endorsements on the basis of an “unavoidable circumstance” claim.

#### FINDINGS OF FACT

I find by a preponderance of the evidence in the record that:

1. The F/V DESTINY made only one documented harvest of LLP groundfish during the years 1988 through 1995. That was a 1993 harvest using longline gear in the Central Gulf of Alaska.
2. The F/V DESTINY had a documented harvest of a crab species in the Gulf of Alaska in 1988.
3. Mr. Tennison lacks a second documented harvest of LLP groundfish in the Central Gulf in 1992, 1994, or in the period January 1 - June 17, 1995.
4. The F/V DESTINY did not make any documented harvests of license limitation groundfish during the period January 1, 1988 through February 9, 1992.
5. The F/V DESTINY did not harvest any Aleutian Islands brown king crab, Aleutian Islands red king crab, or Pribilof red or blue king crab at any time between 1988 and June 17, 1995.

#### CONCLUSIONS OF LAW

1. Neither the LLP Official Record nor the administrative record in this appeal contain any evidence of documented harvests that would qualify Mr. Tennison for an LLP groundfish license.

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<sup>9</sup>50 C.F.R. §679.4(k)(8)(iv)(E). Although the first paragraph of the regulation states that a qualified person may receive a “license,” we agree with RAM’s apparent interpretation that the unavoidable circumstance regulation also authorizes the issuance of endorsements to the license.

2. Mr. Tennison's alleged harvests of Pacific cod cannot constitute documented harvests of groundfish for purposes of qualifying for an LLP groundfish license or endorsement.
3. Mr. Tennison does not qualify for a groundfish license on the basis of his claimed Pacific cod harvests from the F/V DESTINY.
4. Mr. Tennison does not qualify for an LLP groundfish license on the basis of an "unavoidable circumstance" claim.
5. Mr. Tennison does not qualify for any of these LLP crab license area/species endorsements he seeks on the basis of an "unavoidable circumstance" claim.

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect May 6, 2002, 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, April 15, 2002. 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.

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Edward H. Hein  
Chief Appeals Officer