

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0016
)	
ORLANDO B. BELL,)	DECISION
Appellant)	
_____)	December 13, 2007

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program of the National Marine Fisheries Service (NMFS) issued an Initial Administrative Determination (IAD) on June 19, 2002, that approved Mr. Bell's application under the North Pacific Groundfish and Crab License Limitation Program (LLP) for a groundfish license with an endorsement for the Central Gulf groundfish fishery. The license and endorsement was based on the qualifying fishing history of Mr. Bell's vessel, the catcher vessel, the F/V LINDY (ADF&G No. 20105).

The IAD denied Mr. Bell's request to have his LLP groundfish license endorsed for the Bering Sea, Aleutian Islands, Western Gulf of Alaska, and Southeast Outside District of Alaska groundfish fisheries.

Mr. Bell filed a timely appeal of the IAD. He can file an appeal because the IAD directly and adversely affects his interests.¹ An oral hearing is not necessary in this case because the facts asserted, even if true, do not justify granting relief.²

ISSUE

Does Mr. Bell's LLP groundfish license qualify to be endorsed for the Bering Sea, Aleutian Islands, Western Gulf of Alaska, and Southeast Outside District of Alaska groundfish fisheries, based on the fishing history of the F/V LINDY?

ANALYSIS

To qualify for a Bering Sea groundfish license endorsement, and an Aleutian Islands groundfish license endorsement, Mr. Bell must establish that the F/V LINDY made at least one documented harvest of LLP groundfish in each of those endorsement areas between January 1, 1992, and June 17, 1995.³

¹ 50 C.F.R. § 679.43(b).

² 50 C.F.R. §679.43(g)(3).

³ 50 C.F.R.. § 679.4(k)(4)(ii)(A) and (B).

To qualify for a Western Gulf of Alaska groundfish license endorsement, and a Southeast Outside District of Alaska groundfish license endorsement, Mr. Bell must establish that the F/V LINDY made in each endorsement area at least (1) one documented harvest of LLP groundfish in two separate calendar years during the period January 1, 1992 through June 17, 1995; or (2) four documented harvests of LLP groundfish during the period January 1, 1995 through June 17, 1995.⁴

The LLP regulations define a “documented harvest” of LLP groundfish as a “lawful harvest that was recorded in compliance with the Federal and state commercial fishing regulations in effect at time of harvesting.”⁵ The LLP regulations limit evidence of a documented harvest of groundfish to a Federal catch report, a state fish ticket, or “other valid documentation” (that indicates the amount of groundfish harvested, the vessel name and gear type used to harvest the groundfish, and the date of harvesting, landing, or reporting of the groundfish).⁶

In several decisions,⁷ we have ruled that to be considered a “documented harvest” of LLP groundfish, the harvest must be a lawful *commercial* harvest; and that to be considered a lawful commercial harvest, the groundfish must have been, or have intended to be, sold, bartered, or traded.

In *Willard S. Ferris*,⁸ we said:

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.”⁹ 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.¹⁰ This view is also supported by our statement in another appeals decision that compliance with commercial

⁴ 50 C.F.R. § 679.4(k)(4)(ii)(E) and (F); and 50 C.F.R. § 679.4(k)(4)(ii)(M) and (N).

⁵ 50 C.F.R. § 679.2.

⁶ 50 C.F.R. § 679.4(k)(4).

⁷ See, e.g., *Willard S. Ferris*, Appeal No. 00-0004 (Jan. 18, 2002); *Paula J. Brogdon*, Appeal No. 00-0011 (Feb. 26, 2002); *Ronald J. Tennison*, Appeal No. 00-0012 (Apr. 5, 2002).

⁸ Appeal No. 00-0004 (Jan. 18, 2002).

⁹ 50 C.F.R. § 679.2.

¹⁰ 50 C.F.R. § 679.1(j).

fishing regulations requires that one be lawfully engaged in commercial fishing.¹¹ 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.”¹²

The NMFS official LLP record shows that the F/V LINDY did not make the requisite documented harvests of LLP groundfish between 1992 and June 17, 1995, to qualify Mr. Bell for a Bering Sea, Aleutian Islands, Western Gulf of Alaska, and Southeast Outside District of Alaska groundfish license endorsement.¹³

On appeal, Mr. Bell claims¹⁴ that the vessel’s Federal logbook sheets¹⁵ and Pacific cod harvests for halibut bait qualify him for those endorsements; and that he needs the endorsements to survive economically.

Federal Logbook Sheets

The Federal logbook sheets of the F/V LINDY show that the vessel caught various kinds of groundfish (Pacific cod, thornyhead rockfish, skates, and arrowtooth flounder) which were discarded at sea, while longlining for sablefish in the Southeast Outside District of Alaska area during 1994 or 1995.

Fish that are discarded at sea cannot be considered a commercial harvest of fish, and therefore a “documented harvest” of LLP groundfish, for two reasons. First, to constitute a “harvest” under the LLP, the fish must be caught and retained.¹⁶ Fish that are discarded at sea are not fish that are retained by the fisherman, and therefore cannot be considered a documented harvest.

¹¹ *Prowler Partnership v. Samuelson*, Appeal No. 95-0084, Decision on Reconsideration (Part II) at 21-22 (Sep. 29, 1997).

¹² Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1802-1883 (1994).

¹³ The NMFS official LLP record shows that the vessel made harvests of yelloweye, roughey, thornyhead, and shortraker rockfish in Southeast, Alaska in 1992 or 1995, but the harvests, by law, are not considered *LLP* groundfish harvests. *See, e.g.*, definition of “License Limitation Groundfish” at 50 C.F.R. § 679.2, and the Final GOA harvest specifications published in the Federal Register at 65 Fed. Reg. 8298 (February 18, 2000).

¹⁴ Mr. Bell’s letter of appeal (Aug. 14, 2002).

¹⁵ *See* the vessel’s Catcher Vessel Daily Fishing Log for March and April, 1995, and the vessel’s Daily Cumulative Production Log for May, 1994.

¹⁶ Definition of *harvest* at 50 C.F.R. § 679.2.

Second, a documented harvest must be the result of commercial fishing. If fish are discarded at sea, they do not enter commerce, and therefore cannot constitute a documented harvest. Therefore, the discarded groundfish in the Federal logbook sheets of the F/V LINDY cannot be considered documented harvests of LLP groundfish.

One of the vessel's Federal logbook sheets indicates that the F/V LINDY may have harvested redbanded rockfish in Southeast Alaska waters on March 20, 1995.¹⁷ Even if the harvest could be considered a documented harvest of LLP groundfish, the harvest would still not qualify Mr. Bell for a Southeast Outside District of Alaska endorsement. That is because he has no proof that the F/V LINDY made any other documented harvests of LLP groundfish in Southeast Alaska waters between 1992 and June 17, 1995.¹⁸

Pacific Cod for Halibut Bait

Mr. Bell's letter to RAM and four affidavits from two of the vessel's crew members state that the F/V LINDY harvested Pacific cod for halibut bait in Southeast, Alaska during 1992, and in the Aleutian Islands during 1995. Even if that is true, fish that are brought aboard a vessel and used exclusively for bait on the same vessel are not fish that were harvested, or intended to be, sold, bartered, or traded. Therefore, the Pacific cod that was brought aboard the F/V LINDY for halibut bait cannot be considered a commercial harvest of fish and, therefore, cannot be considered a documented harvest of LLP groundfish.

Neither the Federal Logbook Sheets, nor the Pacific cod harvests for halibut bait by the F/V LINDY, show that the vessel made the requisite documented harvests for the groundfish license endorsements sought by Mr. Bell. Because of this, I find that the F/V LINDY did not make the requisite documented harvests of LLP groundfish for the groundfish license endorsements sought by Mr. Bell on appeal.

Mr. Bell's Economic Survival

The North Pacific Fishery Management Council (Council) adopted the LLP groundfish regulations in part to provide stability to the Federal groundfish fisheries off Alaska.¹⁹ To accomplish this purpose, the LLP regulations limit the number, size, and specific operation of vessels that may be deployed in the groundfish fisheries in the Federal waters off Alaska.²⁰ As

¹⁷ See the Catcher Vessel Daily Fishing Log for the F/V LINDY, March 20, 1995, which provides that the vessel's discards of 500 pounds of redbanded rockfish were "kept not discarded."

¹⁸ Mr. Bell produced State of Alaska fish ticket G92-002790, but it is for the harvest of groundfish (shortraker rougheye rockfish) in the Central Gulf endorsement area on May 25, 1992.

¹⁹ Preamble to the LLP regulations at 63 Fed. Reg. 52,642 - 52,652 (Oct. 1, 1998).

²⁰ Preamble to the LLP regulations at 63 Fed. Reg. 52,642 - 52,652 (Oct. 1, 1998).

an Administrative Judge, I am bound by the language of those regulations, even if the regulations may cause undue financial hardship.

Based on all of the above, I must conclude that Mr. Bell's LLP groundfish license does not qualify to be endorsed for the Bering Sea, Aleutian Islands, Western Gulf of Alaska, and Southeast Outside District of Alaska groundfish fisheries based on the fishing history of the F/V LINDY.

FINDINGS OF FACT

1. Neither the Federal Logbook Sheets, nor the Pacific cod harvests for halibut bait by the F/V LINDY, show that the vessel made the requisite documented harvests for the groundfish license endorsements sought by Mr. Bell.
2. The F/V LINDY did not make the requisite documented harvests of LLP groundfish for the groundfish license endorsements sought by Mr. Bell on appeal.

CONCLUSION OF LAW

Mr. Bell's LLP groundfish license does not qualify to be endorsed for the Bering Sea, Aleutian Islands, Western Gulf of Alaska, and Southeast Outside District of Alaska groundfish fisheries based on the fishing history of the F/V LINDY.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on January 14, 2008, 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, December 26, 2007.²¹ 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.

²¹ If the last day of the time period for filing a Motion for Reconsideration falls on a Saturday, Sunday, or Federal holiday, the time period will extend to the close of business on the next business day. December 24, 2007, is a holiday for most Federal government offices, including NMFS.

Randall J. Moen
Administrative Judge