

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of )  
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SANKO FISHERIES, LLC, )  
Appellant )  
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Appeal No. 02-0036  
DECISION  
May 20, 2004

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that denied Appellant's application for a groundfish license under the North Pacific Groundfish and Crab License Limitation Program (LLP), based on the fishing history of the F/V ALASKAN ENTERPRISE in the Bering Sea. RAM also issued a subsequent IAD that determined that Appellant's LLP groundfish license could not be endorsed to harvest Pacific cod with hook-and line or pot gear in the Bering Sea/Aleutian Islands (BSAI) area, if Appellant qualified for an LLP groundfish license.

Appellant filed a timely appeal of the IAD that denied Appellant's application for an LLP groundfish license. Appellant can file an appeal because the IAD directly and adversely affects Appellant's interests. 50 C.F.R. § 679.43(b).

Appellant did not appeal the subsequent IAD that denied the endorsement of Appellant's LLP groundfish license for the harvest of Pacific cod with hook-and-line or pot gear in the BSAI. Appellant did not request an oral hearing and an oral hearing is not necessary because the record contains sufficient information on which to reach a final decision. 50 C.F.R. § 679.42(m)(4).

ISSUE

Does Appellant qualify for an LLP groundfish license, based on Pacific cod harvests for crab bait made by the F/V ALASKAN ENTERPRISE?

ANALYSIS

To qualify for an LLP groundfish license, Appellant must establish that the F/V ALASKAN ENTERPRISE<sup>1</sup> made at least one documented harvest of groundfish in the BSAI area during the general qualifying period (GQP) between January 1, 1988, and June 27, 1992;<sup>2</sup> and at least one documented harvest of groundfish in the Bering Sea during the endorsement qualifying period (EQP) between January 1, 1992, and June 17, 1995.<sup>3</sup>

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<sup>1</sup>The current name of the vessel is the F/V CANYON ENTERPRISE.

<sup>2</sup>50 C.F.R. § 679.4(k)(4)(i)(A)(1).

<sup>3</sup>50 C.F.R. § 679.4(k)(4)(ii)(B).

In several decisions,<sup>4</sup> we have ruled that to be considered a documented harvest of groundfish under the LLP, the harvest of the fish must have been a lawful *commercial* harvest (as a result of a commercial fishing of groundfish); and that the harvest of Pacific cod for crab bait cannot be considered a commercial harvest of groundfish unless the Pacific cod was intended to be, or was actually, sold, bartered, or traded.

In Application of Williard S. Ferris, we stated:<sup>5</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 time of harvesting.”<sup>6</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>7</sup> This view is also supported by our statement in another appeals decision<sup>8</sup> that compliance with commercial fishing regulations requires that one be lawfully engaged in commercial fishing. 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>

The official LLP record of the National Marine Fisheries Service (NMFS) does not show that the F/V ALASKAN ENTERPRISE made a documented harvest of groundfish in the Bering Sea during the EQP for the fishery (between January 1, 1992, and June 17, 1995).

Appellant claims that the F/V ALASKAN ENTERPRISE harvested Pacific cod with pot gear in the Bering Sea during 1995, which was used exclusively aboard the vessel as bait for the

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<sup>4</sup>See, e.g., Williard S. Ferris, Appeal No. 00-0004, January 18, 2002; Paula J. Brogdon, Appeal No. 00-0011, February 26, 2002; Ronald J. Tennison, Appeal No. 00-0012, April 5, 2002; Darjen, Inc., Appeal No. 00-0015, December 31, 2002; and Stephen L. Lovejoy, Appeal No. 02-0023, February 26, 2003.

<sup>5</sup>Appeal No. 00-0004, January 18, 2002.

<sup>6</sup>50 C.F.R § 679.2.

<sup>7</sup>50 C.F.R. § 679.1(j).

<sup>8</sup>Prowler Partnership v. Samuelson, Appeal No. 95-0084, Decision on Reconsideration (Part II), September 29, 1997, at 21-22.

<sup>9</sup>16 U.S.C. § 1802 (1994).

commercial fishing of crab, and which was recorded in the vessel's fishing logs.<sup>10</sup>

Even if that is true, the harvest of the Pacific cod cannot be considered a “documented harvest” of groundfish because the cod was not, nor was it intended to be, sold, bartered, or traded. Using one's own catch for bait on one's own vessel cannot be reasonably construed as a sale, barter, or trade, as envisioned by the Magnuson-Stevens Act.<sup>11</sup> The groundfish of the F/V ALASKAN ENTERPRISE never changed hands, and ownership of the fish was never transferred to another party. Therefore, it cannot be said that the groundfish was intended to be, or actually was sold, bartered, or traded; and that the groundfish was the result of lawful commercial fishing of groundfish. I conclude that the F/V ALASKAN ENTERPRISE did not make a documented harvest of Pacific cod during the EQP for the Bering Sea groundfish fishery.

1. Appellant argues that a literal reading of the definition of “documented harvest” does not require a lawful *commercial* harvest of groundfish, for purposes of qualifying an applicant for an LLP groundfish license.

We have already addressed Appellant's argument in the above noted decisions.<sup>12</sup> NMFS, as a governmental agency, has an inherent authority to reasonably interpret its own regulations. The plain language of the definition of a “documented harvest” does not specify the kind of “lawful harvest” that must be recorded to qualify an applicant for an LLP groundfish license. The regulations that govern the LLP pertain only to the commercial fishing of groundfish and crab. Therefore, the term “lawful harvest” within the definition of a “documented harvest” can be reasonably interpreted as a lawful *commercial* harvest. Therefore, Appellant's argument that a documented harvest does not have to be a lawful *commercial* harvest is not persuasive.

2. Appellant argues that the harvest of Pacific cod for crab bait constitutes a “commercial” harvest because the fish was used as bait for the commercial harvest of crab.

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>13</sup> The Pacific cod that was allegedly harvested by the F/V ALASKAN ENTERPRISE was not, nor was it intended to be, sold, bartered, or traded; but it was kept exclusively for crab bait aboard the vessel. Therefore, the harvest of the Pacific cod for crab bait cannot be considered a “commercial” harvest for purposes of qualifying Appellant for an LLP groundfish license.

Appellant can continue to harvest Pacific cod for use as crab bait without an LLP groundfish

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<sup>10</sup>John Bogg's affidavit, December 9, 1999.

<sup>11</sup>Paula J. Brogdon, Appeal No. 00-0011, February 26, 2002, at 5.

<sup>12</sup>See note 4.

<sup>13</sup>16 U.S.C. § 1802 (1994).

license and without having to report the harvests, so long as it takes the Pacific cod in crab pots while participating in an open season for crab and it does not sell the Pacific cod or transfer it to another vessel.<sup>14</sup> Appellant simply will not be allowed to use those noncommercial harvests of Pacific cod to establish a groundfish history in, and gain entry to, the BSAI groundfish fisheries under the LLP.

In a number of decisions,<sup>15</sup> this Office has ruled that an Appeals Officer is bound by the language of the LLP regulations. The LLP regulations do not provide for a financial hardship exception to the documented harvest requirements for an LLP groundfish license. Therefore, I do not have the authority to grant Appellant an LLP groundfish license on the basis of financial hardship.

I conclude that Appellant does not qualify for an LLP groundfish license, based on Pacific cod harvests made by the F/V ALASKAN ENTERPRISE, and used as crab bait aboard the vessel.

#### FINDING OF FACT

The alleged Pacific cod that was harvested by the F/V ALASKAN ENTERPRISE in 1995 during the EQP for the Bering Sea fishery, was not, nor was it intended to be, sold bartered or traded; but it was kept exclusively aboard the vessel as bait for the commercial fishing of crab.

#### CONCLUSIONS OF LAW

1. The F/V ALASKAN ENTERPRISE did not make a documented harvest of Pacific cod during the EQP for the Bering Sea groundfish fishery.
2. Appellant does not qualify for an LLP groundfish license, based on Pacific cod harvests made by the F/V ALASKAN ENTERPRISE, and used as crab bait aboard the vessel.

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on June 21, 2004, unless by that date the Regional Administrator orders review of the Decision.

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 on June 1, 2004. 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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<sup>14</sup>50 C.F.R. § 679.5(a)(1)(iii)(B)(1).

<sup>15</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.

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Randall J. Moen  
Appeals Officer