



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, Washington 98115
October 31, 2016

Mr. Herb Pollard, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, Oregon 97220-1384

Dear Mr. Pollard:

I am writing to request that the Pacific Fishery Management Council (Council) consider the attached request for a regulatory amendment to the Pacific Highly Migratory Species (HMS) regulations to address a permit eligibility issue for American Indians who are born in Canada.

Mr. Tom Hearty requested that the National Marine Fisheries Service (NMFS) issue a Pacific HMS Permit to him on the basis that he is an American Indian born in Canada (he is also a Canadian citizen and Legal Permanent Resident of the United States). As described in the attached letter that we sent to Mr. Hearty, we determined that he is not eligible for an HMS Permit under the existing regulation at 50 CFR § 660.707, which requires that permit holders be citizens of the United States. We therefore denied Mr. Hearty's request for an HMS Permit and subsequently reconsidered and upheld our denial of that request.

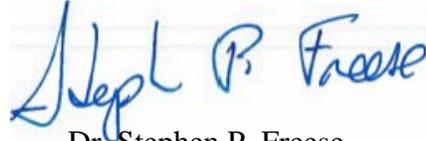
After discussion with, and at the request of, Mr. Hearty's counsel, we are transmitting to you his request that the Council consider proposing a change to the relevant regulations to allow Mr. Hearty and others in his situation to be eligible for a permit, perhaps by creating an exemption for American Indians born in Canada.

We request that the Council give this request consideration as it plans its workload for upcoming meetings. Mr. Hearty's counsel has indicated also that engagement of representatives of the indigenous people's community will be crucial to consideration of this issue. Mr. Hearty's counsel are located in Washington state, so it would be most convenient for them to attend the March 2017 Council meeting for in-person discussions; but they have indicated that they are willing to speak with Council staff at the earliest convenience of staff members.



For your reference, also attached is correspondence from Mr. Hearty's counsel requesting a rehearing and our subsequent affirmation of the denial. If you have any questions on this matter, please contact Melissa Hooper, Acting Chief of the Permits and Monitoring Branch, at 206-526-4357 or melissa.hooper@noaa.gov.

Sincerely,



Dr. Stephen P. Freese
Acting Assistant Regional Administrator
for Sustainable Fisheries

CC: Ms. Heather Fathali, Attorney At Law
Mr. Chuck Tracy, Executive Director, Pacific Fishery Management Council

Attachments:

- HMS Permit denial letter (2014)
- Email from Ms. Fathali to Craig D'Angelo
- Response from NMFS



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213

150413SWR2014SF00135:CMD

JAN 15 2014

Dear Permit Applicant,

Your application for a Pacific Highly Migratory Species (HMS) Vessel Permit has been denied. Vessels with ownership by individuals who are not citizens of the United States may not be issued a Pacific HMS permit.

If the vessel has corporate ownership, the corporation must be incorporated under the laws of the United States or of a State and its chief executive officer, by whatever title must be a citizen; Its chairman of the board of directors must be a citizen and no more of its directors can be noncitizens than a minority of the number necessary to constitute a quorum.

Pacific HMS Permit regulations can be found under Title 50 of the Code of Federal Regulations part 660.707

Your application along with your application fee is enclosed.

If you have any questions, please contact Craig D'Angelo at craig.dangelo@noaa.gov or 562-980-4024.

Regards,


for Bob Turner
Assistant Regional Administrator
West Coast Region

Enclosure(s)

On 10/15/2014 9:17 AM, Heather Fathali wrote:
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
501 West Ocean Boulevard, Suite 4200
Long Beach, CA 90802

Dear Mr. Craig D'Angelo:

RE: Regulatory Amendment to Qualify American Indians Born in Canada to Hold Pacific Highly Migratory Species Vessel Permit

I write on behalf of my client, Mr. Tom Hearty, who was denied a Pacific Highly Migratory Species (HMS) Vessel Permit on June 15, 2014. His denial letter states that vessels with ownership by individuals who are not U.S. citizens may not be issued a Pacific HMS Permit.

Mr. Hearty is a Canadian citizen and a Legal Permanent Resident (LPR) of the United States; however, his LPR status is unique because it is derived from his special American Indian born in Canada (ABC) status. An ABC is treated by the United States as essentially equivalent to a U.S. citizen with regard to all immigration rights and benefits. As such, I seek a regulatory amendment giving ABCs the qualification to hold an HMS permit. Alternatively, I seek an informal amendment through a policy memorandum.

To provide a context, ABC status is rooted in the Jay Treaty, which was negotiated by the United States and Great Britain in 1794 in part to mitigate the bisection of tribal lands by the newly established U.S./Canada border; it provided that American Indians could travel freely across the international boundary. The Jay Treaty is still treated as in force by the U.S. Department of State, and its relevant rights and benefits are today codified at § 289 of the Immigration and Nationality Act (INA).

Section 289 of the INA grants Canadians with a 50% or greater American Indian bloodline (defined by the statute as “American Indians born in Canada”) privileges unparalleled by all but United States citizens, virtually unrestricted by U.S. immigration laws— as described by the U.S. Embassy in Canada (Ottawa), they may enter and remain in the U.S. for purposes including “employment, study, retirement, investing, and/or immigration”; ABCs are not deportable on any ground, and are not required to obtain immigrant visas.

The unique status held by ABCs, and Mr. Hearty’s status as such, is significant because the regulations for Pacific HMS Vessel Permits include the general eligibility requirement that a vessel owner be a citizen of the United States; set forth at 50 CFR 660.707, 46 USC § 12103(b), and replicated at Page 2 of the Pacific HMS Vessel Permit Application.

Title 46 defines the term “citizen of the United States” by simply adopting the definition of a U.S. national set forth by the Immigration and Nationality Act (INA). *46 USC § 104*. The INA defines a national of the United States as either (A) a citizen of the United States, or (B) a person

who, though not a citizen of the United States, owes permanent allegiance to the United States. *INA § 101(a)(22)*. However, it must be noted that the INA is a pervasively cross-referenced statute, and its sections cannot be read in isolation. This is especially important with regard to § 289, governing ABCs, which states that

“*Nothing in this title* [all of Title 8, including the definition of a U.S. national] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.”

This extraordinary provision essentially exempts ABCs from the substantive immigration laws otherwise set forth by the INA. As such, it is inappropriate to gauge ABCs against the INA definition for citizenship adopted by Title 46; rather, they should be treated as equivalent to U.S. citizens for permitting purposes, which would be more consistent with the underlying policies behind the citizenship requirement for vessel permitting.

Vessel documentation laws requiring U.S. citizenship date back to the very first Congress. The modern Merchant Marine Act was passed in 1920, with Congress making its intent clear in the Preamble—to foster an American Merchant Marine “that would be readily available to the nation in times of emergency and one that would channel the benefits of carrying domestic trade to U.S. citizens.” *See 41 Stat. 988 (1920) (preamble)*. These objectives continue to be echoed in the most current iteration of the Merchant Marine Act. *46 U.S.C. § 50101*.

These concerns remain fully addressed by permitting vessels owned by ABCs to hold Pacific HMS permits. ABCs are free to live in the United States, to work in the United States, and to serve in the United States military. ABCs are on equal footing with U.S. citizens for the purposes of most federal public benefit programs, including the Supplemental Nutrition Assistance Program (SNAP; commonly known as Food Stamps), Social Security Insurance, and Medicaid.

The same is true for state benefits; in Washington State for example, for the purposes of determining an individual’s citizenship status for public assistance, “U.S. citizens” are defined to include American Indians Born in Canada. *WAC 388-424-0001*.

The Federal Regulations which govern Highly Migratory Species are found at *50 CFR § 660 subpart K—Highly Migratory Fisheries*. Pacific HMS Vessel permitting regulations are specifically set forth at *50 CFR § 660.707—Permits*, which is the section through which the U.S. citizenship requirement is derived. However, it is significant to note that directly preceding the section on permitting is *50 CFR § 660.706—Pacific Coast Treaty Indian Rights*, which provides an exemption from the HMS regulations for certain treaty Indians to harvest HMS in their usual and accustomed fishing areas in U.S. waters.

Given the Federal Regulations’ explicit recognition of Indian treaty fishing rights at § 660.706, a regulatory amendment (or informal amendment through a policy memorandum) giving ABCs the qualification to hold an HMS permit would not only complement the Indian treaty recognition and other exemptions already in place; but it would be consistent with the federal government’s

longstanding treatment of ABCs as essentially equal to U.S. citizens, and would continue to satisfy the policies underlying the U.S. citizenship requirement for vessel permitting.

Attached to this letter I enclose the most recent edition of an article I have co-authored about American Indians Born in Canada; which details the history of the Jay Treaty, the rights and benefits held by American Indians Born in Canada, and the cross-border issues faced by American Indians Born in Canada today.

Please do not hesitate to contact me if you have any questions. I look forward to working with you to facilitate the implementation of this important amendment.

Sincerely,

Heather Fathali
Attorney at Law

Heather Fathali
Attorney at Law
[360.671.5945](tel:360.671.5945) business
[360.676.5459](tel:360.676.5459) fax

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Creating Transparent Borders

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, Washington 98115

September 14, 2016

Heather Fathali
Attorney At Law
Cascadia Cross-Border Law
1305 11th Street, Suite 301
Bellingham, WA 98225

Dear Ms. Fathali:

This letter is in response to your request for reconsideration of our denial of issuance of a Pacific Highly Migratory Species Vessel Permit (HMS Permit) to your client, Tom Hearty. Mr. Hearty is a Canadian citizen, a Legal Permanent Resident (LPR) of the United States, and an American Indian born in Canada. We previously denied the request on the grounds that, subject to the applicable regulations, vessels owned by individuals who are not United States citizens may not be issued a permit. You requested a “regulatory amendment” making American Indians born in Canada eligible for HMS permits or in the alternative, an informal amendment through a policy memorandum. You offered in support of your request a law review article by Greg Boos et. al., *Canadian Indians, Inuit, Métis, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States*, 4 SEATTLE J. ENVTL. L. 343 (2014).

As reflected in the HMS Permit application, applicable regulation requires that in order for an individual to be an eligible vessel owner he or she must be “a citizen of the United States.”¹ This requirement is set forth in 50 CFR § 660.707 which states that only “a person eligible to own a documented vessel under the terms of 46 U.S.C. 12102(a) may be issued ... an HMS permit.”² 46 U.S.C. § 12103, formerly cited as 46 U.S.C. § 12102, lays out the eligibility requirements for documented vessels including that any eligible individual owner of a documented vessel must be “a citizen of the United States.”³ Title 46 of the U.S. Code defines the term “citizen of the United States” as someone “who is a national of the United States as defined in section 101(a) (22) of the Immigration and Nationality Act.”⁴ INA § 101(a)(22) defines the term “national of the United States” to mean either “a citizen of the United States” or “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”⁵

¹ National Oceanic and Atmospheric Administration National Marine Fisheries Service, Pacific Highly Migratory Species Vessel Permit Application, available at

http://www.westcoast.fisheries.noaa.gov/fisheries/migratory_species/pacific_hms_permits.html

² 50 C.R.F. § 660.707 (a) (4).

³ 46 U.S.C. § 12103 (b) (1).

⁴ 46 U.S.C. § 104.

⁵ 8 U.S.C. § 1101 (a) (22).



It is undisputed that Mr. Hearty is not a U.S. citizen; it is our assumption also that Mr. Hearty was not born to non-citizen nationals of the United States. Mr. Hearty has not sought to show that he is a U.S. national through his owing permanent allegiance to the United States. Our review of your request, in light of the eligibility criteria for holding an HMS permit under applicable regulations, leads us to conclude that Mr. Hearty is not eligible for an HMS permit. This is the National Marine Fisheries Service's second review of this request, and per the regulations at 50 CFR §660.707(b), it constitutes final agency action.

As Mr. Hearty cannot meet the prerequisites for issuance of an HMS Permit for his vessel, we understand your communication to be a request that NMFS change applicable regulations to create an exemption for American Indians born in Canada. For such a change to regulations, it is necessary to engage the Pacific Fishery Management Council. Thus, NMFS will transmit your letter as a rulemaking request to that body.

Please contact Melissa Hooper, at 206-526-4357 or melissa.hooper@noaa.gov, if we may be of any further service in this matter.

Sincerely,



Barry A. Thom
Regional Administrator

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
7600 Sand Point Way NE
Seattle, WA 98115

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