

HIGHLY MIGRATORY SPECIES COMMERCIAL FISHERY PERMIT ELIGIBILITY

In November 2016 the Council received correspondence from National Marine Fisheries Service (NMFS) about NMFS' denial of a request to issue a commercial highly migratory species (HMS) permit to an American Indian born in Canada ([Agenda Item C.6.a, Supplemental NMFS Report, November 2016](#)). In turn, NMFS requested that the Council consider the request for a regulatory amendment to the HMS regulations (50 CFR part 660 subpart K) to address the permit eligibility issue for American Indians who are born in Canada. The Council did not schedule this matter on a future meeting agenda, but requested more information before taking it up.

This report provides background information relative to the request to change permit eligibility conditions.

The HMS commercial permit is described in Federal regulations at 50 CFR 660.707. These regulations state "Only a person eligible to own a documented vessel under the terms of 46 USC 12102(a) may be issued or may hold (by ownership or otherwise) an HMS permit" (50 CFR 660.707(a)(4)). The Fishery Management Plan (FMP) states only that a commercial HMS permit "is to be issued to a vessel owner for each specific vessel used in commercial HMS fishing." The FMP language clearly demonstrates the intent that the permit holder and the vessel owner be the same person. However, the implementing regulations go further than the FMP by limiting permit ownership to those who may own a documented vessel under the statute governing Coast Guard documentation of vessels of the United States.

Section 12102(a) of Title 46 states "a vessel may engage in a trade only if the vessel has been issued a certificate of documentation with an endorsement for that trade under this chapter." (Paragraphs b-d exempt vessels less than 5 net tons, barges engaged in coastwise trade on inland waters, and certain vessels engaged in aquaculture operations.) Section 12103 describes general eligibility requirements for a vessel to be documented including that an individual owner must be a citizen of the United States. (The section also covers associations, trusts, joint ventures, partnerships, and corporations; generally, members or officers of such entities must be United States citizens.) Section 12113 covers fishery endorsements to vessel documentation. A fishery endorsement may be issued for a vessel that satisfies the requirements of section 12103. This section also states "A fishery endorsement is invalid immediately if the vessel for which it is issued is used as a fishing vessel while it is chartered or leased to an individual who is not a citizen of the United States" (Section 12113(b)(2)).

The petitioner in this case, Mr. Tom Hearty, makes an argument based on the unique status of American Indians born in Canada. But Mr. Hearty does not claim that the petitioner is actually a U.S. citizen, or that a vessel owned by an American Indian born in Canada (non U.S. citizen) could be documented under 46 USC 12102 et seq. American Indians born in Canada have the right under the 1795 Jay Treaty between the United States and Great Britain to move freely between the two countries, work in the United States, and receive public assistance like a United States citizen, but they are not automatically "citizens" or treated as citizens for purposes of all laws.

There is no evidence that the Council considered residency status when outlining permit conditions in the FMP. The issue of residency status comes into play by requiring issuance to a vessel owner

and referencing the eligibility requirements at Title 46. Furthermore, the origin of the provision in the HMS FMP implementing regulations that establishes a citizen requirement is murky. The regulatory cross-references invoking the citizenship requirement might have been drafted by NMFS staff with minimal or no input by the Council.¹

Any specific exemption to a citizenship requirement made in the HMS regulations would not trump the eligibility criteria to own a fishing vessel as laid out in Title 46. Alternatively, the Council could decide to eliminate the requirement that only the vessel owner is eligible for the permit. As an example, currently (and under the proposed Federal permit) an individual does not have to be the vessel owner to obtain a California limited entry drift gillnet permit, although the permit must identify the vessel that will be used to fish with the gear. In fact, some current California permit holders are not United States citizens.

Given that the FMP states “Permit requirements could be changed in the future under the framework procedure” described in Chapter 5 of the FMP, the Council could take up this matter as part of the next biennial management process slated to commence in June 2018. Through this process, the FMP allows the regulation to be amended without amending the FMP.

PFMC
03/01/17

¹ Draft proposed regulations were included as Appendix I to the August 2003 FMP Environmental Impact Statement. This was published after the Council had taken final action adopting the FMP. The record does not show that the Council subsequently reviewed (or “deemed”) the draft proposed regulations.