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Mr. Phil Anderson, Chair
And Members of the Pacific Fishery Management Council
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220-1384

RE: Federal Fishery Permit Citizenship Requirements

Dear Chairman Anderson and Members of the Pacific Fishery Management Council,

I would like to thank the Council for setting aside time on its agenda for this scoping session. I would like to commend the Council staff, NMFS WCR Permits Branch staff, and NOAA General Counsel on their well-prepared and thorough report surveying federal permit eligibility rules.

This is a matter I have been working on for over four years, since March of 2014, when my client, Tom Hearty—a commercial fisherman, vessel owner, and lawful permanent resident of the United States via his status as an American Indian Born in Canada (ABC)—consulted with my office about his ineligibility for a HMS permit.

He was denied a HMS permit because he is not a U.S. citizen. However, he is an American Indian Born in Canada, a special status rooted in the Jay Treaty of 1794. Article 3 of the Jay Treaty sought to resolve tribal tensions that arose from the imposition of what is now the U.S./Canada border line, following the Revolutionary War.

Article 3 of the Jay Treaty did not create a new right for the continent's native population; rather, it recognized the native people's pre-existing right to move freely across their traditional lands.

Article 3 of the Jay Treaty remains in force today; and the rights recognized under it are now codified by statute under Section 289 of the Immigration and Nationality Act [8 U.S.C. 1359]. Section 289 provides:

> *Nothing in this title* [meaning the entire Immigration and Nationality Act] *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.*

As you will recall from prior presentations, qualification for the status is entirely bloodline-based. Tribal enrollment is irrelevant to qualification because there are many tribes/bands in Canada that do not require a 50% bloodline. Thus, simply presenting an Indian Status card does not qualify a person. In order to qualify, an extensive package of evidence is required, including documentation such as tribal records and long-form birth certificates for parents and grandparents.

Those who meet the requisite bloodline are eligible to document themselves as lawful permanent residents (LPRs) with a green card, or to have their bloodline adjudicated by a Customs and Border Protection Officer upon every entry to the United States. In 2016, out of over the 1.1 million green card applications granted, only 166 were granted to those asserting ABC Status—that's roughly 0.0001%!

American Indians Born in Canada are not bound by U.S. immigration laws in the way that other non-citizens are. They enjoy a right of free access to the U.S. unparalleled by anyone but U.S. citizens. Their right of free access extends to any purpose—including permanently residing in the U.S., and working in the U.S. They do not have to obtain passports, visas, green cards, or work authorization cards, and they are not deportable on any ground.

Given the federal and state governments' longstanding and widespread practice of placing ABCs on footing more analogous to U.S. citizens, we approached NMFS to request an amendment that would extend HMS permitting eligibility to ABCs. NMFS in turn transmitted this rulemaking request to PFMC.

After you patiently listened to and considered our presentations and public comment on this issue six times over the past year and a half; we have finally arrived at this scoping session.

The Report before you sets out several options, other than status quo, that you have the power to implement:

- eliminate the citizenship-based eligibility requirement entirely, as a blanket policy or narrowly within HMS;
- expand eligibility to all LPRs, as a blanket policy or narrowly within HMS;
- expand eligibility to ABCs only, as a blanket policy or narrowly within HMS.

Although our original request was to expand permit eligibility to ABCs within the HMS context, we would welcome any of these options; and I will briefly address each option below.

Expanding Eligibility to ABCs

To begin, I would urge the Council to expand permit eligibility to ABCs; bearing the following considerations in mind:

First, rather than expanding permit eligibility to ABCs who have documented with green cards, which is the typical document used to evidence LPR status; I would expand eligibility to those who have been entered to the U.S. as ABCs under § 289.

The reason for this is that ABCs do not have to document themselves with a green card under U.S. law. Many do for the sake of efficiency—they don't want the inconvenience of having their bloodline adjudicated each and every time they cross the border. But U.S. law does not require them to hold a passport or green card. Thus, this distinction shouldn't matter for permitting purposes either, because they already hold the privilege of lawfully residing permanently in the U.S.—it is inherent in their status. Permitting eligibility should hinge on the nature of the privilege accorded to them, not the nature of the document that evidences that privilege.

Additionally, the Report expresses concern that distinguishing eligibility among non-citizens may face a high legal bar to meet constitutional protections. Actually, in these circumstances, it's the opposite. A challenge to the federal government treating ABCs differently than other non-citizens would be subject the lowest equal protection standard of review. In fact, it's a distinction that has been tested before with regard to ABCs, and it was upheld.

While the highest level of scrutiny—strict scrutiny—applies to equal protection challenges to a *state's* classification of aliens;[1] the lowest level of scrutiny—rational basis review—applies to equal protection challenges to the *Federal Government*'s classification of aliens.[2]

The reason for this is that the Fourteenth Amendment's limits on state powers are substantially different from the Fifth Amendment's limits on the federal power over immigration.[3] This is because "it is the business of the political branches of the Federal Government, rather than that of ... the States ... to regulate the conditions of entry and residence of aliens."[4]

In the landmark 1976 Supreme Court case *Mathews v. Diaz*, a group of LPRs sued to challenge the constitutionality of a Social Security Act provision that discriminated among lawful permanent residents—only allowing benefits to those who had resided in the U.S. for a certain amount of time.

The issue was whether discrimination by the Federal Government among a group of non-citizens, allowing benefits to some but not to others, is constitutionally permissible. The Court said yes, it is, as long as there is a rational basis for making that distinction. Under rational basis scrutiny, a classification should be upheld "if there is a rational relationship between the disparity of the treatment and some legitimate government purpose."[5] In fact, "a classification must be upheld against equal protection challenge if there is ANY reasonably conceivable state of facts that could provide a rational basis for the classification."[6]

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[1] *See Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).
[2] *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).
[3] *See Rodriguez ex rel. Rodriguez v. United States,* 169 F.3d 1342, 1347 (11th Cir. 1999) (citing *Mathews v. Diaz*, 426 U.S. 67 (1976)).
[4] *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342, 1347 (11th Cir. 1999) (citing *Mathews v. Diaz,* 426 U.S. 84-85 (1976)).
[5] *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1350, 1347 (11th Cir. 1999) (citing *Heller v. Doe*, 509 U.S. 312, 319-320 (1993)).
[6] *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1350, 1347 (11th Cir. 1999) (citing *Heller v. Doe*, 509 U.S. 312, 319-320 (1993)).

Moreover, the burden is on those challenging the classification "to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."[7] The Supreme Court upheld the distinction made by the Federal Government.

Fast forward to 1996, and sweeping welfare reform precluded most non-citizens from receiving the federally-funded means-tested public benefits of Social Security Insurance and food stamps. Fourteen special categories of non-citizens were exempt from this preclusion, and just as in *Mathews*, a group of non-citizens sued in federal court to challenge the constitutionality of the new law. This case was significant, because one of the fourteen special categories was American Indians Born in Canada.

The 11th Circuit, applying *Mathews*, determined the appropriate standard was rational basis review because the suit raised a challenge to the Federal Government's distinction among non-citizens. As part of its analysis it reviewed each of the fourteen categories to determine whether there was a rational basis for *that* category to be provided with these public benefits, and found a rational basis behind them all. When it came to the category of American Indians Born in Canada, it noted that Congress' decision to provide benefits to such a group had a rational basis in "the Federal Government's unique and continuing relationship with and responsibility to the Indian people," and pointed to the Congressional interest in preserving aboriginal rights of American Indians to move freely across territories originally occupied by them.[8]

It is further notable that Congress defines "federal public benefit" to include "any grant, contract, loan, professional license, or **commercial license provided by an agency of the United States** or by appropriated funds of the United States."[9] It follows that a federal fishing permit is a type of commercial license provided by an agency of the United States, for which ABCs should not be ineligible.

Expanding Eligibility to Include Lawful Permanent Residents or Eliminating the Citizenship-Based Eligibility Requirement Entirely

The Report does a great job of surveying the federal permit eligibility requirements of the West Coast Region, the federal eligibility requirements of the other NOAA Fisheries Regions, and also of the West Coast state permits. This survey is telling.

Under the West Coast Region, four of the five federal permits effectively limit eligibility to U.S. citizenship. But with regard to the other Fisheries Regions, most do not impose a U.S. citizenship or residency requirement in their regulations. Therefore, eliminating the citizenship requirement entirely, or at least expanding it to LPRs, would be consistent with the other Fisheries Regions.

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[7] *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1350, 1347 (11th Cir. 1999) (citing *Heller v. Doe*, 509 U.S. 312, 320-321 (1993)).

[8] *Rodriguez v. United States*, 169 F.3d 1342, 1352 (11th Cir. 1999) (citing 25 U.S.C. § 450 a(b); and citing Akins v. Saxbe, 380 F. Supp. 1210, 1219-1220 (D.Me. 1974)).

[9] 8 USC 1611(c)(1)(a).

I will not recap the Report's findings on every point, but I note that if my client were to apply for a federal permit to fish in the Caribbean, Gulf of Mexico, South Atlantic, Mid-Atlantic, or New England, he would receive one. He would also be eligible for all but two of the federal permits for fisheries in the Western Pacific. Similarly, U.S. citizenship is not required to obtain a commercial fishing permit in any of the three West Coast states.[10]

With regard to the West Coast Region, I again note that four of the five permits either indirectly or directly disqualify a vessel owner who is not a U.S. citizen (the exception being the recently established Limited Entry Drift Gillnet Permit).

Rather than re-analyze the regulations pertaining to each permit when they are already well-summarized in the Report, I would simply like to highlight the fact it is not clear that disqualification of LPRs across the four fisheries was the intent of the Council. Overall, to the extent intent has been expressed, the Council has indicated a desire to limit foreign control; but not to exclude LPRs, a group expressly eligible under the MSA to hold a limited access privilege. Thus, expanding eligibility to LPRs still protects the concern of foreign control.

The development of the Quota Share permits is likely the best evidence of Council's intent regarding foreign ownership as applied to LPRs. When formulating the Quota Share plan, Council carefully considered and developed a clear statement of intent on the matter: "*No person can acquire quota shares or quota pounds other than (1) a United States citizen, (2) a permanent resident alien, or (3) a corporation, partnership, or other entity . . . that is eligible to own and control a U.S. fishing vessel with a fishery endorsement pursuant to 46 USC 12113.*"

The Council expressly recorded its rationale behind the Quota Share restriction that included eligibility for LPRs: "*In developing language to implement its intent, the Council checked the MSA provisions on who should be restricted from holding a limited access privilege (QS/QP) and the NMFS limited entry program website forms indicating who is eligible to own a limited entry permit in the current permit system. On the basis of this latter information, the Council included legal resident aliens in its specification of those eligible to hold QS/QP.*" Among the reasons given for specific eligibility that included favoring LPRs, was to limit foreign ownership to realize net national economic benefits.

With regard to HMS, the fishery this request was originally tied to, the Report points out HMS' functionally different nature from the other four permits. As the Report states, "*the general HMS permit is functionally different than the permits described above, because it does not confer a privilege through license limitation or, in the case of the QS permit, to own an asset. Instead, it was created as a mechanism to keep track of vessels participating in the HMS fishery and by extension obligate participants to comply with other regulatory requirements. This difference further weakens the rationale for limited eligibility to U.S. citizens since no privilege is being conferred.*"

[10] The Report provides citations for California and Oregon, the rules for Washington can be found at Washington Administrative Code, Chapter 220-351, *Commercial Fisheries–Permits/Licensing.*

The Council's intent regarding the purpose of the HMS permit was plainly expressed in the HMS FMP/FEIS: "*The permit is to be issued to a vessel owner for each specific vessel used in commercial HMS fishing,*" to allow for "*tracking and controlling, by permits, commercial HMS fishing activities and the effects of regulations on those activities.*" Although there is nothing in the HMS FMP to suggest that Council intended to limit eligibility to U.S. citizens, the regulation includes the language that "*only a person eligible to own a documented vessel under the terms of 46 USC 12102(a) may be issued . . . a general HMS permit.*"

Why this cross-reference requiring U.S. citizenship was included is unclear, as it is out of step with the nature of this general permit and with the Council intent to simply track participation in the fishery. As the Report suggests, it is likely that when the regulations were drafted, this passage was simply borrowed from the CPS regulation; for which there is no clear rationale in the record for why this eligibility requirement was implemented.

If the Council wants to limit the action it takes to just HMS, rather than establishing a broader eligibility rule, the functionally different nature of HMS permits would be a rational reason to do so.

Moving Forward

The Council has a buffet of options before it. I would urge the Council to begin the process of taking action on one of these options, and not to leave things at status quo.

The MSA and federal law does not preclude NMFS from issuing fishing or vessel permits to non-citizens; and most of the other Fisheries Regions carry no citizenship or residency requirements. But, if limiting foreign ownership to realize net national economic benefits is to be our north star, then looking to MSA provisions on who should be restricted from holding a limited access privilege is entirely logical—and the MSA does not restrict LPRs from eligibility.

Expanding eligibility for the West Coast permits to both U.S. citizens and LPRs seems like a happy medium that would allow for internal consistency within the region, be more consistent with the other regions, and address the concern of foreign control. Meanwhile, an even narrower expansion to only ABCs should easily prevail against any equal protection challenge under rational basis review.

Alternatively, if the Council wishes to focus narrowly on HMS and only change the regulation of that fishery; then its functionally different nature as a general permit created for tracking purposes gives the Council ample reason to expand eligibility to ABCs and/or LPRs, or to simply do away with the citizenship requirement in that category.

I thank you for your attention today, and over the past year and half. I hope you will take this opportunity to reach a fair and equitable result, and I would be happy to answer questions or provide additional information as needed.

Sincerely,

Heather Fathali
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