

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 01-0025
)
ZOLOTOI PARTNERSHIP,) DECISION
Appellant)
)
April 9, 2004
_____)

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that denied Appellant's application under the North Pacific Groundfish and Crab License Limitation Program (LLP) for (1) an LLP groundfish license endorsed for the Bering Sea and Aleutian Islands (BSAI) groundfish fisheries; (2) an LLP groundfish license endorsed with a catcher/processor designation; and (3) an LLP crab license endorsed for Aleutian Islands brown king crab and Bristol Bay red king crab. Appellant applied for the LLP groundfish license, the catcher/processor designation, and the crab endorsements based on the fishing history of the F/V ZOLOTOI.

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

ISSUES

1. Does Appellant qualify for an LLP groundfish license, based on a "documented harvest" of LLP groundfish?
2. Does Appellant qualify for an LLP groundfish license, or LLP crab license endorsements for Aleutian Islands brown king crab and Bristol Bay red king crab, based on an "unavoidable circumstance?"

ANALYSIS

1. Does Appellant qualify for an LLP groundfish license, based on a "documented harvest" of LLP groundfish?

The F/V ZOLOTOI made at least one documented harvest of LLP groundfish in the BSAI during the general qualifying period for an LLP groundfish license, which is between January 1, 1988,

and June 27, 1992, with limited exceptions.¹ Therefore, to qualify for an LLP groundfish license, Appellant must establish that the F/V ZOLOTOI made at least one documented harvest of LLP groundfish in the Bering Sea or Aleutian Islands during the endorsement qualifying period (EQP) between January 1, 1992, and June 17, 1995.²

The official LLP record of the National Marine Fisheries Service (NMFS) does not show that the F/V ZOLOTOI made at least one documented harvest of LLP groundfish in the Bering Sea or Aleutian Islands during the EQP for those areas.

Appellant claims that the F/V ZOLOTOI made LLP groundfish harvests in the Bering Sea or Aleutian Islands during that time period, and that the harvested fish, were “kept ashore in cold storage for future use as bait by ... [the] vessel in other fisheries.”³

In several decisions,⁴ this Office has ruled that to be considered a “documented harvest” of groundfish under the LLP, the harvest must have been a lawful commercial harvest; and that to be considered a lawful *commercial* harvest, the harvest (of the groundfish) must have been, or intended to be, sold, bartered, or traded to another person.

In Williard S. Ferris,⁵ we stated:

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.”⁶ 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. This view is also supported by our statement in another appeal decision 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”

¹IAD at 7.

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

³April 5, 2000, letter to RAM from Gordon Blue, Appellant’s managing partner.

⁴See e.g., Williard S. Ferris, Appeal No. 00-0004, January 18, 2002; Paula J. Brogdon, Appeal No. 00-0011, February 26, 2002; and Ronald J. Tennison, Appeal No. 00-0012.

⁵Appeal No. 00-0004, January 18, 2002, at 2.

⁶50 C.F.R. § 679.2.

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.”

Therefore, even if Appellant has credible evidence that the F/V ZOLOTOI harvested groundfish in the Bering Sea or the Aleutians during the EQP for the fisheries, the harvests cannot be legally considered a “documented harvest” of groundfish in this case because the groundfish harvests were not, nor were they intended to be, sold, bartered, or traded to another person; they were used exclusively aboard the vessel for bait. Using one’s own catch for bait on one’s own vessel cannot be reasonably construed as a sale, barter, trade, as envisioned by the Magnuson-Stevens Act.⁷ The groundfish of the F/V ZOLOTOI never changed hands, and ownership of the fish was never transferred to another party. Therefore, it cannot be said that the groundfish were intended to be, or actually were, sold, bartered, or traded; or that the groundfish were the result of a lawful commercial harvest. Consequently, the alleged groundfish harvests made the F/V ZOLOTOI during the EQP in this case cannot be considered documented harvests of groundfish, for purposes of qualifying Appellant for an LLP groundfish license.

I conclude that Appellant does not qualify for an LLP groundfish license, based on a “documented harvest” of LLP groundfish.

2. Does Appellant qualify for an LLP groundfish license, or LLP crab license area/species endorsements for Aleutian Islands brown king crab and Bristol Bay red king crab, based on an “unavoidable circumstance”?

Appellant claims that an “unavoidable circumstance” (caused by the Federal court’s delay in the confirmation of the U.S. Marshal’s sale of the F/V ZOLOTOI to Appellant)⁸ prevented the F/V ZOLOTOI from making enough documented harvests during the last eight months of year 1992 to qualify Appellant for (1) an LLP groundfish license, based on harvests of groundfish in the Bering Sea or Aleutian Islands; and (2) LLP crab license area/species endorsements for Aleutian Islands brown king crab and Bristol Bay red king crab.⁹

The LLP regulations provide for an applicant to qualify for an LLP groundfish license or LLP crab license endorsements, based on an “unavoidable circumstance,” as long as the applicant can satisfy all of the criteria in the unavoidable circumstances provision of LLP regulation 50 C.F.R. § 679.4(k)(8)(iv).

One of the criteria for qualifying under the unavoidable circumstances provision is that the

⁷See Paula J. Brogdon, Appeal No. 00-0011, February 26, 2002, at 5.

⁸Appellant’s appeal, dated November 28, 2001, at 8-13.

⁹See 50 C.F.R. § 679.4(k)(5)(ii)(D) and (F), for the requisite number of documented harvests of crab to qualify for LLP crab license endorsements for Aleutian Islands brown king crab and Bristol Bay red king crab.

applicant's qualifying vessel must have made at least one documented harvest of LLP groundfish or, if applicable, at least one documented harvest of LLP crab, in the appropriate endorsement area *after* the unavoidable circumstance occurred but *before* June 17, 1995. The applicable regulation¹⁰ reads in relevant part:

(iv) A qualified person who owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, or crab species, if applicable, between January 1, 1988, and February 9, 1992, but whose vessel was unable to meet all the criteria in paragraph (k)(4) of this section for a groundfish license or paragraph (k)(5) of this section for a crab license ... because of an unavoidable circumstance ... may receive a license ... if the qualified person is able to demonstrate that: ...

(E) Any amount of license limitation groundfish or appropriate crab species was harvested on the vessel in the specific area that corresponds to the area endorsement or area/species endorsement for which the qualified person who owned a vessel on June 17, 1995, is applying and that the license limitation groundfish or crab species was harvested after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.

In several decisions,¹¹ this Office has ruled that the requirement of a documented harvest after an unavoidable circumstance, but before June 17, 1995, must be satisfied to qualify an applicant under the unavoidable circumstances provision.

The North Pacific Fishery Management Council adopted the unavoidable circumstances provision to provide relief to those commercial fishermen who were unable to make a documented harvest of LLP groundfish or LLP crab because of an unavoidable circumstance, but who were able to re-enter the LLP groundfish or LLP crab fishery after the unavoidable circumstance and make at least one documented harvest before the adoption of the LLP by June 17, 1995.¹²

Neither the NMFS official LLP record, nor the evidence on appeal, show that the F/V ZOLOTOI made at least one documented harvest of LLP groundfish or LLP crab after the alleged unavoidable circumstance, but before June 17, 1995. Appellant does not dispute the NMFS

¹⁰50 C.F.R. § 679.4(k)(8)(iv)(E).

¹¹See e.g., Paula J. Brogdon, Appeal No. 00-0011, February 26, 2002; Ronald J. Tennison, Appeal No. 00-0012, April 5, 2002; Little Ann, Inc., Appeal No. 01-0022, July 10, 2002.

¹²Council member David Benton proposed the unavoidable circumstances provision at the Council's meeting of June 15-16, 1995, that discussed the final action on the LLP.

official LLP record. Therefore, I find that the F/V ZOLOTOI did not make at least one documented harvest of LLP groundfish or LLP crab after the alleged unavoidable circumstance in this case, but before June 17, 1995.

I conclude that Appellant does not qualify for an LLP groundfish license, or for an LLP crab license area/species endorsement for Aleutian Islands brown king crab and Bristol Bay red king crab, based on an “unavoidable circumstance.”

Because Appellant does not qualify for an LLP groundfish license, I do not need to decide whether the LLP groundfish license would qualify to be endorsed with a catcher/processor designation.

FINDINGS OF FACT

1. The Appellant has credible evidence that the F/V ZOLOTOI harvested LLP groundfish in the Bering Sea or the Aleutians during the EQP for the fisheries (between January 1, 1992, and June 17, 1995); however, the harvests cannot be legally considered “documented harvests” of groundfish in this case because the groundfish harvests were not, nor were they intended to be, sold, bartered, or traded to another person, but were used exclusively aboard the vessel for bait.
2. The F/V ZOLOTOI did not make at least one documented harvest of LLP groundfish or LLP crab after the alleged unavoidable circumstance in this case, but before June 17, 1995.

CONCLUSIONS OF LAW

1. Appellant does not qualify for an LLP groundfish license, based on a “documented harvest” of LLP groundfish.
2. Appellant does not qualify for an LLP groundfish license, or for LLP crab license area/species endorsements for Aleutian Islands brown king crab and Bristol Bay red king crab, based on an “unavoidable circumstance.”

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on May 10, 2004, 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, April 19, 2004. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact of law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement, or points and authorities, in support of the motion.

Randall J. Moen
Appeals Officer