

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
BRAD KIMBERLIN,) DECISION
Appellant.)
) May 13, 2004
)
_____)

Brad Kimberlin appeals an Initial Administrative Determination [IAD], dated October 24, 2001, issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ Mr. Kimberlin's groundfish license is LLG license # 3423. It has a Central Gulf area endorsement and was based on the fishing history of the F/V SHANE, ADFG # 33250.

RAM determined that Mr. Kimberlin's LLP groundfish license should have limited transferability. RAM determined that the F/V SHANE had to be permanently affixed to LLG license # 3423 and that LLG license # 3423 may not be used on any other vessel unless the F/V SHANE is lost or destroyed. Mr. Kimberlin can appeal this IAD because it directly and adversely his interests.²

I held a hearing on April 15, 2004 on the question of whether Mr. Kimberlin had separated the F/V SHANE from the fishing history of the F/V SHANE before February 7, 1998 and whether Mr. Kimberlin was currently deploying a vessel in the Central Gulf area of the Gulf of Alaska. The record has sufficient information for me to decide Mr. Kimberlin's appeal. I therefore close the record and issue this decision.³

Mr. Kimberlin had also appealed RAM's determination that his groundfish license should have a non-trawl gear designation.⁴ Mr. Kimberlin has withdrawn his appeal of that determination.⁵

¹ The LLP is located in 50 C.F.R. § 679. Specifically: 50 C.F.R. § 679.1(j) (purpose and scope); 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(a)(6) (definition of harvesting privilege); 50 C.F.R. § 679.4(k)(license requirements); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>.

² 50 C.F.R. § 679.43(b).

³ 50 C.F.R. § 679.43(g)(2).

⁴ NMFS added the non-trawl gear designation after the original LLP regulations. Final Rule, 66 Fed. Reg. 48,813, 48,814 - 48,815, 48, 817 - 48,818 (2001), *adopting* 50 C.F.R. § 679.4(k)(3)(iv).

⁵ Memorandum to File from Mary Alice McKeen (April 9, 2004); Hearing Testimony, Brad Kimberlin (April 15, 2004). All references to testimony will be to this hearing.

SUMMARY OF DECISION

The IAD is affirmed in part and vacated in part. This appeal involves the transfer restriction at 50 C.F.R. § 679.4(k)(7)(ix). I affirm that Mr. Kimberlin's LLP groundfish license [LLG license # 3423] must have a vessel permanently affixed to it because Mr. Kimberlin did not have a Federal Fisheries Permit for the F/V SHANE when the F/V SHANE made the LLP-qualifying harvests for LLG license # 3423.

I vacate the IAD to the extent that it determined that the F/V SHANE is the vessel that must be named on LLG license # 3423. I find that Mr. Kimberlin proved on appeal, by a preponderance of the evidence, that the F/V SHANE and the fishing history of the F/V SHANE were separated prior to February 7, 1998. I find that Mr. Kimberlin's sale of the F/V SHANE to Patrick McKay in November 1996 separated the F/V SHANE from the fishing history of the F/V SHANE. I find that Mr. Kimberlin is not currently deploying a vessel using LLG license # 3423. Before Mr. Kimberlin can use or transfer LLG license # 3423, he must name a vessel on it and that vessel will be permanently affixed to LLG license # 3423.

ISSUE

Must the F/V SHANE be permanently affixed to LLP groundfish license # 3423?

ANALYSIS

RAM issued Mr. Kimberlin a transferable LLP groundfish license – LLG license # 3423 – with a Central Gulf area endorsement, based on the fishing history of the F/V SHANE. RAM issued Mr. Kimberlin's license under the original LLP regulations, which took effect January 1, 2000.⁶

Subsequently, the North Pacific Fishery Management Council recommended a number of amendments to the LLP, which NMFS adopted in September 2001.⁷ In one amendment, NMFS limited the transferability of LLP groundfish licenses that were based on groundfish harvests made while the qualifying vessel did not have a Federal Fisheries Permit.⁸ That amendment is the subject of this appeal. It is federal regulation 50 C.F.R. § 679.4(k)(7)(ix) and it provides in part:

(ix) *Other transfer restrictions.* The transfer of a LLP license that was issued based on the documented harvests from a vessel that did not have an FFP [Federal Fisheries Permit] during the period beginning January 1, 1988, through October 8,

⁶ Final Rule, 63 Fed. Reg. 52,642 (Oct. 1, 1998)(substantive requirements for licenses); Final Rule, 64 Fed. Reg. 42,826 (Aug. 6, 1999)(application and transfer).

⁷ Final Rule, 66 Fed. Reg. 48,813 (Sept. 24, 2001).

⁸ Final Rule, 66 Fed. Reg. 48,813, 48,814, 48,822 (Sept. 24, 2001).

1998, must be accompanied by the vessel from which the documented harvests were made or its replacement vessel, or if the LLP license and vessel were separated by transfer prior to February 7, 1998, then by the vessel that is currently being deployed by the license holder.

A. RAM correctly decided that LLG license # 3423 should have a transfer restriction.

Mr. Kimberlin received his LLG license # 3423 based on groundfish harvests he made from the F/V SHANE in the Central Gulf between February 29, 1992 and March 28, 1992.⁹ RAM determined that Mr. Kimberlin did not have a Federal Fisheries Permit when he made the LLP qualifying harvests.¹⁰ Mr. Kimberlin does not contest this. Therefore, Mr. Kimberlin's LLG license #3423 must have a vessel permanently affixed to it. The question is which vessel.

B. The F/V SHANE and the fishing history were separated by transfer prior to February 7, 1998.

The regulation states that the vessel must be the [1] the vessel that made the qualifying documented harvests, [2] the replacement vessel for that vessel or [3] "if the LLP license and vessel were separated by transfer prior to February 7, 1998, then by the vessel that is currently being deployed by the license holder."¹¹ Although the regulation refers to the "the LLP license" and the vessel being separated prior to February 7, 1998, there were no LLP licenses prior to January 1, 2000. I interpret the regulation to mean that the LLP qualifying fishing history of the vessel and the vessel were separated prior to February 7, 1998.¹²

Therefore, the question is whether the F/V SHANE was separated from the fishing history of the F/V SHANE prior to February 7, 1998. I find that Brad Kimberlin proved, by a preponderance of the evidence, that he separated the F/V SHANE from the fishing history of the F/V SHANE when he sold the F/V SHANE, but not the fishing history of the F/V SHANE, to Patrick McKay

⁹ The requirements for an LLP groundfish license with a Central Gulf endorsement are at 50 C.F.R. § 679.4(k)(i)(B) (general qualification period) and (k)(ii)(A) (endorsement qualification period). Mr. Kimberlin made eleven documented groundfish harvests from the F/V SHANE between February 29, 1992 and March 28, 1992.

¹⁰ Mr. Kimberlin did not argue that he had a Federal Fisheries Permit at any time between January 1, 1988 and October 1, 1998.

¹¹ 50 C.F.R. § 679.4(k)(7)(ix).

¹² There were moratorium permits and qualifications under the Vessel Moratorium Program (VMP) between January 1, 1996 and December 31, 1999 but neither Mr. Kimberlin nor any other applicant received, or applied for, a moratorium permit based on the fishing history of the F/V SHANE.

in August 1996.¹³ I base this finding on the following evidence:

[1] Mr. Kimberlin and Mr. McKay signed an escrow agreement with National Bank of Alaska which states that the items being sold were “30' Roberts #592140 boat with engien [sic] & misc goods.” The agreement does not state that Mr. Kimberlin is selling the fishing history of the boat nor impose any requirements on Mr. Kimberlin to cooperate in transferring any future licenses or permits to Mr. McKay.

[2] Mr. Kimberlin and Mr. McKay both testified credibly that, when Mr. Kimberlin sold the vessel to Mr. McKay, they did not add any amount for the sale of the fishing history and rights to future fishing permits or licenses based on the vessel’s fishing history.

[3] Mr. Kimberlin was operating the F/V SHANE when it made the qualifying harvests in the Central Gulf between February 29, 1992 and March 28, 1992. Mr. Kimberlin testified that it was hard work and he would not have intended to transfer the results of his hard work to Mr. McKay.

[4] Mr. McKay testified credibly that he had no interest in commercial fishing and did not purchase the F/V SHANE to commercially fish. He testified that he purchased the vessel for sport fishing.

[5] Mr. McKay has made no commercial harvests with the F/V SHANE.¹⁴

[6] Mr. McKay did not apply for a moratorium permit or an LLP license and therefore has never asserted to NMFS that he owned the fishing history of the F/V SHANE.

Based on that finding, I conclude that, within the meaning of 50 C.F.R. § 679.4(k)(7)(ix), the LLP license of the F/V SHANE and the F/V SHANE were separated by transfer in August 1996, which was prior to February 7, 1998.

C. Mr. Kimberlin is not currently deploying a vessel in the Central Gulf groundfish fishery.

Since I have concluded that the LLP qualifying history and the vessel were separated by transfer prior to February 7, 1998, the vessel that must be named on the license is the “vessel that is currently being deployed by the license holder.”¹⁵ Mr. Kimberlin has not made any documented harvests of groundfish in the Central Gulf from any vessel, including the F/V SHANE, since

¹³ Subsequent to August 1996, Mr. McKay defaulted on the contract. Mr. Kimberlin repossessed the F/V SHANE and resold it, again without the fishing history, to Jim Higgins. Mr. Higgins, like Mr. McKay, has not used the F/V SHANE for commercial fishing. Official LLP record of fishing history of F/V SHANE; Hearing Testimony of Jim Higgins.

¹⁴ Official LLP record of fishing history of F/V SHANE.

¹⁵ 50 C.F.R. § 679.4(k)(7)(ix).

March 29, 1992.¹⁶ I conclude that Mr. Kimberlin is not currently deploying any vessel.¹⁷

If Mr. Kimberlin wishes to use or transfer LLG license # 3423, he must name a vessel on LLG license # 3423 and the name of that vessel will be permanently affixed to the license. Until Mr. Kimberlin names a vessel on LLG license # 3423, the license may not be used or transferred.

FINDINGS OF FACT

1. When Brad Kimberlin made the qualifying harvests of groundfish from the F/V SHANE in 1992, he did not have a Federal Fisheries Permit for the vessel.
2. When Brad Kimberlin sold the F/V SHANE to Patrick McKay in August 1996, he sold the F/V SHANE to Patrick McKay but he did not sell the fishing history of the F/V SHANE to him.
3. Mr. Kimberlin has not made any documented harvests in the Central Gulf from the F/V SHANE or any other vessel since March 28, 1992.

CONCLUSIONS OF LAW

1. LLG license # 3423 must have a vessel permanently affixed to it.
2. The F/V SHANE and the LLP qualifying fishing history of the F/V SHANE were separated by transfer prior to February 7, 1998.
3. The F/V SHANE does not have to be permanently affixed to LLG license # 3423.
4. Mr. Kimberlin is not currently deploying a vessel in the groundfish fishery in the Central Gulf of Alaska.

DISPOSITION

The IAD that is the subject of this appeal is VACATED in part and AFFIRMED in part. It is vacated in that Mr. Kimberlin does not have to name the F/V SHANE on LLG license # 3423. It

¹⁶ Official LLP record; Hearing Testimony of Brad Kimberlin. The LLP credits harvests to the vessel owner, not the skipper or the State of Alaska permit holder. 50 C.F.R. § 679.2; *Magne Nes*, Appeal No. 02-0044 at 9 - 10 (March 5, 2004).

¹⁷ I note that Mr. Kimberlin has named the F/V SHANE on LLG license # 3423, which is now an interim, non-transferable license. This does not show that Mr. Kimberlin is currently deploying the F/V SHANE because [1] he has not used the vessel since March 29, 1992 and [2] I credit his testimony that he kept the F/V SHANE in his name and on the interim license because the buyer of the F/V SHANE agreed to that and because it would have helped Mr. Kimberlin if he had lost the appeal and, therefore, could only have transferred LLG license #3423 if he transferred the F/V SHANE along with the license.

is affirmed in that, before Mr. Kimberlin can use or transfer LLG license # 3423, he must name a vessel on LLG license # 3423 and that vessel will become permanently affixed to LLG license # 3423. This Decision takes effect June 13, 2004, unless by that date the Regional Administrator orders review of the Decision.

Any party 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, May 24, 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 or points and authorities in support of the motion.

Mary Alice McKeen
Appeals Officer