

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 03-0024
)
BEN HOGEVOLL,) DECISION
Appellant)
) August 8, 2005
_____)

STATEMENT OF THE CASE

Ben Hogevoll filed a timely appeal of an Initial Administrative Determination¹ (IAD) issued by the Restricted Access Management Program (RAM) under the North Pacific Groundfish and Crab License Limitation Program (LLP).² Mr. Hogevoll can appeal the IAD because it directly and adversely affects his interests.³

RAM determined that Mr. Hogevoll qualifies for an LLP groundfish license endorsed for the Bering Sea (BS) and Western Gulf of Alaska (GOA) groundfish fisheries, based on the fishing history of the F/V CAPE KIWANDA (ADFG No. 61432; USCG No. 618158), a catcher vessel with a length overall (LOA) of 76 feet. The IAD denied Mr. Hogevoll's claim to a Central Gulf of Alaska area endorsement because the NMFS official LLP record shows that the F/V CAPE KIWANDA did not make the required harvests for that endorsement, and because Mr. Hogevoll does not qualify for the Central Gulf area endorsement under the unavoidable circumstances provision, 50 C.F.R. §679.4(k)(8)(iv). Mr. Hogevoll's non-transferable LLP groundfish license (LLG2636) shall remain in effect pending a Final Agency Action on this appeal.⁴

On appeal, Mr. Hogevoll concedes that his vessel did not make the required documented harvests for the Central Gulf area endorsement, but he disputes RAM's determination that he is ineligible for the endorsement under the unavoidable circumstance provision.

Mr. Hogevoll requested a hearing, but the record contains sufficient evidence to make a decision without a hearing under the criteria of the regulations.⁵ This office does not order hearings on

¹IAD No. 03-078 (Sep. 16, 2002).

²The LLP is in 50 C.F.R. §679, primarily 50 C.F.R. §679.4(k). The LLP regulations can be found on the NMFS Alaska Region website <<http://www.fakr.noaa.gov/regs/summary.htm>>.

³50 C.F.R. §679.43(b).

⁴The interim license was reissued to reflect the Appellant's withdrawal of the Aleutian Island and Southeast Outside groundfish claims.

⁵50 C.F.R. § 679.43(g)(3).

factual issues that are not determinative with regard to the relief sought.⁶ Therefore, Mr. Hogevoll's request for a hearing is denied, the record is closed, and I will decide this appeal.

ISSUE

Does Mr. Hogevoll qualify for a Central Gulf of Alaska endorsement on his groundfish license under the unavoidable circumstance regulation, 50 C.F.R. §679.4(k)(8)(iv)?

SUMMARY

Mr. Hogevoll claims that he qualifies for a Central Gulf of Alaska area endorsement on his LLP groundfish license, under an unavoidable circumstance provision in the LLP regulations, due to the grounding of his vessel in 1992.⁷ The Administrative Judge concluded that Mr. Hogevoll satisfied all of the criteria under the unavoidable circumstances provision and qualifies for the Central Gulf of Alaska area endorsement.

ANALYSIS

Does Mr. Hogevoll qualify for a Central Gulf of Alaska area endorsement on his groundfish license under the unavoidable circumstance regulation, 50 C.F.R. §679.4(k)(8)(iv)?

To qualify for an LLP groundfish license with a Central Gulf of Alaska area endorsement, Mr. Hogevoll must first establish that the F/V CAPE KIWANDA was used to make at least one documented harvest of groundfish in the Gulf of Alaska or Bering Sea/Aleutian Islands management areas during the general qualifying period (GQP), January 1, 1988 through June 27, 1992.⁸ The official LLP Record shows that the F/V CAPE KIWANDA has met the requirements of the GQP.⁹

In addition, to qualify for the Central Gulf area endorsement, Mr. Hogevoll must prove that the F/V CAPE KIWANDA made at least one documented harvest of LLP groundfish species in the Central Gulf in any two calendar years between January 1, 1992 and June 17, 1995; *or* four documented harvests of LLP groundfish in the Central Gulf between January 1, 1995 and June 17, 1995.¹⁰ The NMFS official LLP record shows that the F/V CAPE KIWANDA made

⁶50 C.F.R. §679.43(g)(3)(iv).

⁷50 C.F.R. §679.4(k)(8)(iv).

⁸50 C.F.R. §679.4(k)(4)(i)(B)(1).

⁹IAD at 4.

¹⁰50 C.F.R. §679.4(k)(4)(ii)(I) and (J).

documented harvests of LLP groundfish species in the Central Gulf of Alaska in 1993, but failed to make a documented harvest in any other year during the EQP.¹¹

Mr. Hogevoll does not dispute the NMFS official LLP record. He concedes that the F/V CAPE KIWANDA lacks the requisite fishing history to meet the EQP requirements for Central Gulf of Alaska area endorsement. However, Mr. Hogevoll claims that he qualifies for the Central Gulf endorsement under an alternative method – the unavoidable circumstance provision found at 50 C.F.R. §679.4(k)(8)(iv). Mr. Hogevoll claims that the grounding of the F/V CAPE KIWANDA in Oregon in October 1992 prevented it from participating in the Central Gulf groundfish fishery during the fall of 1992. But for that event, he claims, the vessel would have made at least one documented harvest of LLP groundfish in 1992, and would have met the requirements for a Central Gulf area endorsement under 50 C.F.R. §679.4(k)(ii)(I). Therefore, Mr. Hogevoll argues, he qualifies for the endorsement under 50 C.F.R. §679.4(k)(8)(iv).

The unavoidable circumstance regulation is codified at 50 C.F.R. §679.4(k)(8)(iv) and provides:

(iv) A qualified person who owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, 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 because of an unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries) may receive a license if the qualified person is able to demonstrate that:

(A) The owner of the vessel at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for license limitation groundfish or crab species with that vessel during a specific time period in a specific area.

(B) The specific intent to conduct directed fishing for license limitation groundfish or crab species with that vessel was thwarted by a circumstance that was:

(1) Unavoidable.

(2) Unique to the owner of that vessel, or unique to that vessel.

(3) Unforeseen and reasonably unforeseeable to the owner of the vessel.

(C) The circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species actually occurred.

(D) Under the circumstances, the owner of the vessel took all reasonable steps to overcome the circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species.

(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

¹¹IAD at 4.

groundfish or crab species was harvested after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.

Mr. Hogevoll must prove by a *preponderance of the evidence* that he meets each of the above requirements.

It is undisputed that Mr. Hogevoll is a qualified person who owned the F/V CAPE KIWANDA on June 17, 1995. A threshold requirement of 50 C.F.R. §679.4(k)(8)(iv) is that the owner of the vessel must have made a documented harvest of LLP groundfish between January 1, 1988, and February 9, 1992. The NMFS official LLP record shows that the F/V CAPE KIWANDA made documented harvests of LLP groundfish in the Western Gulf of Alaska, Bering Sea, and Central Gulf of Alaska in 1991.¹² Therefore, I find that Mr. Hogevoll meets this threshold requirement.

I will now analyze whether Mr. Hogevoll satisfies all of the remaining criteria under 50 C.F.R. §679.4(k)(8)(iv).

A. At the time of the vessel grounding, did Mr. Hogevoll hold a specific intent to conduct directed fishing for LLP groundfish in the fourth quarter of 1992 in the Central Gulf of Alaska?

Paragraph (A) of the unavoidable circumstance regulation requires Mr. Hogevoll to prove that, at the time of the claimed unavoidable circumstance, he held a specific intent to conduct directed fishing for LLP groundfish during a specific time period in a specific area.¹³ He must have had an intent or plan to participate in the Central Gulf of Alaska fishery at a particular time and “not merely . . . a general desire or dream.”¹⁴

The claimed unavoidable circumstance in this case was the grounding of the F/V CAPE KIWANDA off the coast of Oregon on October 6, 1992.¹⁵ Mr. Hogevoll stated that, at the time of the vessel grounding, the crew had plans to take the F/V CAPE KIWANDA to the Central Gulf (Kodiak) to fish for groundfish in the fourth quarter of 1992, beginning by October 15, 1992.¹⁶ Mr. Hogevoll stated that, on approximately October 1, 1992, he gave two weeks’ advance notice to Jerry Bates, President of Depoe Bay Fish Company, Inc., in Newport, Oregon, of his intent to move the F/V CAPE KIWANDA from Oregon to the Central Gulf of Alaska.¹⁷

¹²F/V CAPE KIWANDA, harvest record, NMFS official record (Jan. 13, 2004).

¹³50 C.F.R. §679.4(k)(8)(iv)(A).

¹⁴*Pequod*, Appeal No. 00-0013 at 12 (April 12, 2002).

¹⁵See discussion of evidence of vessel grounding in section C. of this decision.

¹⁶Ben Hogevoll declaration at 2-3 (Aug. 10, 2003) and Rick Willis letter (Dec. 1, 1999).

¹⁷Ben Hogevoll declaration at 2 (Aug. 10, 2004).

Mr. Bates corroborates this claim, and states that Mr. Hogevoll gave him two weeks' notice and expressed his intent to travel to Kodiak, Alaska, and fish groundfish with the F/V CAPE KIWANDA.¹⁸

Mr. Hogevoll also submitted other corroborating statements. His insurance agent, Sue Keese, of Acordia Insurance Co., stated that Mr. Hogevoll intended to fish in Kodiak, Alaska and that he informed her every year prior to renewing his insurance.¹⁹ Greg Hathaway, Plant Manager of Trident Seafoods in Kodiak, Alaska, stated that Mr. Hogevoll was scheduled to fish in the fourth quarter of 1992.²⁰

Although these statements and documents are not contemporaneous, they are consistent and all support Mr. Hogevoll's claims. These statements and documents all tend to prove that Mr. Hogevoll did intend to fish with the F/V CAPE KIWANDA in the Central Gulf of Alaska in the fourth quarter of 1992. These statements and documents also show that Mr. Hogevoll was taking the necessary steps to prepare to fish in the Central Gulf of Alaska in late 1992. Mr. Hogevoll obtained insurance and gave advance notice to the processors in Oregon and Kodiak, Alaska. One would expect him to take such actions if it was really his intention to fish in the Central Gulf at that time. There is no contrary evidence in the record.

The above evidence of Mr. Hogevoll's intent is bolstered by the vessel's prior and subsequent performance in the groundfish fishery in the Central Gulf of Alaska. The F/V CAPE KIWANDA made documented harvest of LLP groundfish in the Central Gulf of Alaska in the fourth quarter of 1991 and 1993.²¹ That shows a pattern of fishing that makes it more likely that Mr. Hogevoll actually intended to fish groundfish in the Central Gulf in the fourth quarter of 1992. It also tends to show that the vessel would have been capable of engaging in such fishing at that time.

Based on all the above evidence, I find it more likely than not that the vessel would have been able to return to the Central Gulf of Alaska in late 1992 to make documented harvests of LLP groundfish, and that, until the time of the grounding, Mr. Hogevoll held the specific intent to do just that.

B. Was the circumstance unavoidable, unique to Mr. Hogevoll, and unforeseen and reasonably unforeseeable by him? Did the circumstance thwart Mr. Hogevoll's specific intent to fish for LLP groundfish in the Central Gulf in the fall of 1992?

¹⁸Jerry Bates letter (Oct. 8, 2003).

¹⁹Sue Keese letter (Oct. 8, 2003).

²⁰Greg Hathaway letter (Nov. 30, 1999).

²¹Harvest record of F/V CAPE KIWANDA, NMFS official LLP record (Jan. 13, 2004).

In *Wizard Fisheries, Inc.*, we concluded that a “*vessel-related* unavoidable circumstance” must be beyond the control of the vessel owner or license holder; it must involve loss, damage, or breakdown of the vessel or its gear or equipment; and it must remove or seriously impair the vessel’s pre-existing capability to meet the landing requirements for the endorsement sought.²² We stated that the North Pacific Fishery Management Council (Council) conceived of an unavoidable circumstance as a sudden and catastrophic event, such as a vessel sinking or grounding, a catastrophic fire, a catastrophic engine failure, or similar disastrous events or acts of God.²³ Furthermore, paragraph (B) of the unavoidable circumstance regulation requires that the circumstance must have been unique to the vessel owner, unforeseen and reasonably unforeseeable by the vessel owner, and must have thwarted the appellant’s specific intent to fish for LLP groundfish as specified in paragraph (A).

The grounding of the F/V CAPE KIWANDA was a sudden and catastrophic event that resulted in considerable damage to the vessel.²⁴ In our decision in *Pequod, Inc.*, which also involved a vessel grounding, we stated: “As long as the damage to the vessel is an accident and is not the result of substance abuse by the boat operator or some other condition that generally impairs the operator’s ability to command a vessel, an accident should generally be considered unavoidable.”²⁵ The record contains no suggestion that the grounding of the F/V KIWANDA was due to negligence on the part of the crew. The record contains no evidence that the F/V CAPE KIWANDA’s grounding was foreseen by Mr. Hogevooll or the crew of the vessel. Therefore, I find that the grounding was unavoidable and unforeseen by Mr. Hogevooll.

In general, the grounding of a properly equipped vessel, operated by an experienced skipper and crew, and engaged in normal fishing operations, is reasonably unforeseeable. As we stated in *Pequod, Inc.*:

[P]roper interpretation of federal fishing regulations requires an appreciation of the risks, rigors and realities of commercial fishing as a way to make a living. In Alaska, boat operators typically work hard long hours under time constraints and often dangerous conditions on the open seas. Some accidents are inevitable. Even a conscientious captain can make a mistake, misjudge his stamina and fall asleep while steering.²⁶

²²Appeal No. 03-0004 at 11-12 (March 3, 2005).

²³*Id.* at 12, citing *Alaska Trojan Partnership*, Appeal No. 01-0001 at 32-33 (Oct. 20, 2003). *See also*, Transcript of NPFMC meeting at 69-71, 151-152 (June 16-17, 1995).

²⁴See discussion of vessel damage in section D. of this decision.

²⁵*Pequod, Inc.*, Appeal No. 00-0013 at 22 (April 12, 2002).

²⁶*Id.* at 21.

The grounding of the F/V CAPE KIWANDA was clearly an accident. The vessel was properly equipped, engaged in normal operations, and the skipper and crew were experienced. I find that the grounding was reasonably unforeseeable to the vessel owner.

As previously discussed, the F/V CAPE KIWANDA had the capability before the grounding to fish groundfish in the Central Gulf. The grounding removed that capability for a period of approximately three months.²⁷ The evidence in the record indicates that the grounding and subsequent repairs were unique to the F/V CAPE KIWANDA and Mr. Hogevoll, and did not affect any other vessel or license. Therefore, I find that the grounding was unique to the F/V CAPE KIWANDA and that it removed the vessel's pre-existing capability to meet the landing requirements for the Central Gulf endorsement.

The evidence in the record shows that Mr. Hogevoll would have gone to the Central Gulf of Alaska in the fall of 1992 to fish LLP groundfish if the F/V CAPE KIWANDA had not grounded, and I have found that he had that specific intent. The F/V CAPE KIWANDA needed only one more documented harvest of LLP groundfish in the Central Gulf to qualify for the Central Gulf area endorsement. However, they were unable to complete this task because, as a result of the grounding, the vessel was in Oregon undergoing major repairs from early October 1992 until late January of 1993.²⁸ It is reasonable to find that the F/V CAPE KIWANDA could have made the required documented harvest during the three months it took to complete the vessel repairs. The evidence in the record is that Mr. Hogevoll's failure to make the requisite LLP groundfish harvest to qualify for the Central Gulf area endorsement was directly attributable to the grounding and subsequent repairs, and that those events were the sole cause of that failure. Therefore, I find that the vessel grounding thwarted Mr. Hogevoll's specific intent to fish for LLP groundfish in the Central Gulf of Alaska in the fall of 1992.

C. Did the vessel grounding actually occur?

Mr. Hogevoll and Rick Willis, captain of the F/V KIWANDA in 1991, submitted statements that the vessel grounded off of Cape Foulweather on October 6, 1992.²⁹ Mr. Hogevoll also submitted a *Newport (Ore.) News-Times* article, which states that the F/V KIWANDA grounded on October 6, 1992, off the coast of Oregon and that two U.S. Coast Guard stations responded to the distress call as the vessel was taking on water.³⁰ Mr. Hogevoll provided a communications report from the Yaquina Bay Coast Guard Station that states that the F/V CAPE KIWANDA was damaged on October 6, 1992, that the crew experienced steering difficulty, and the U.S. Coast

²⁷See discussion at section D. of this decision.

²⁸John T. Curry, Marine Surveyor invoices for repair dating from Oct. 28, 1992 until January 20, 1993 (Feb. 8, 1993).

²⁹Ben Hogevoll declaration (Aug. 10, 2004); Rick Willis declaration (Dec. 1, 1999).

³⁰*Newport News-Times* at A5 (Oct. 14, 1992).

Guard aided them in pumping water from the engine room.³¹ This evidence is sufficient to establish that the vessel grounding actually occurred, as required by paragraph (C) of the unavoidable circumstance regulation, and I so find.

D. Did Mr. Hogevoll take all reasonable steps to overcome the vessel's grounding?

After the grounding occurred on October 6, 1992, the F/V CAPE KIWANDA was immediately scheduled for repairs. The vessel was almost a total loss, and repairs took until January of 1993 to be completed.³² The total cost of repairs was \$223,966.91.³³ The NMFS official LLP record shows that the F/V CAPE KIWANDA made its first post-grounding documented harvest in the Bering Sea on February 4, 1993. That was about two weeks after vessel repairs were finished. I find that Mr. Hogevoll acted with diligence and took all reasonable steps to recover from the grounding as quickly as possible. Therefore, I find that Mr. Hogevoll meets the requirements of paragraph (D) of the unavoidable circumstance provision.

E. Did the F/V CAPE KIWANDA make a documented harvest of LLP groundfish after the grounding but before June 17, 1995?

Paragraph (E) of the unavoidable circumstance regulation specifies that the vessel must have made a documented harvest in the appropriate endorsement area after an unavoidable circumstance but before June 17, 1995. As this office has stated in other decisions, that is an *absolute* requirement to qualify under the unavoidable circumstances provision.³⁴ The NMFS official LLP record shows that the F/V CAPE KIWANDA made a documented harvest of LLP groundfish (Pacific cod) in the Central Gulf of Alaska on March 15, 1993. Thus, I find that the vessel made a documented harvest in the appropriate endorsement area after the unavoidable circumstance but before June 17, 1995.

³¹U.S. Coast Guard Communications Report, Marine Safety Office (Oct. 1992).

³²Letter of John T. Curry, Marine Surveyor (Oct. 9, 1993).

³³Letter from John T. Curry to Patrick McReynolds, Yaquina Insurance Co. (Feb. 8, 1993).

³⁴*Rex W. Duncan*, Appeal No. 04-0041 (June 29, 2005); *Raymond Bellamy*, Appeal No. 04-0040 (June 14, 2005); *Kona Kai, Inc.*, Appeal No. 04-0003 (Jan. 7, 2005); *Nuka Island, Inc.*, Appeal No. 02-0031 (Jan. 14, 2005); *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 7 - 11 (Dec. 28, 2004); *Arctic Baruna LLC*, Appeal No. 02-0024 at 4 (Dec. 22, 2004); *Hansen Enterprises, Inc.*, Appeal No. 02-0025 (Dec. 14, 2004); *Erla-N, LLC*, Appeal No. 01-0026 (Sep. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sep. 10, 2004); *Notorious Partnership*, Appeal No. 03-0015 (Aug. 9, 2004); *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004); *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004); *Mark Donovick*, Appeal No. 02-0008 at 8 - 9 (Sept. 27, 2002); *Little Ann, Inc.*, Appeal No. 01-0022 at 3 at (July 10, 2002); *Ronald Tennison*, Appeal 00-0012 at 2, 6 (April 15, 2002); *Pequod, Inc.*, Appeal No. 00-0013 at 7, 24 (April 12, 2002); *Paula Brogdon*, Appeal No. 00-0011 at 3 (Feb. 26, 2002). These decisions are on the NMFS Alaska Region website: <<http://www.fakr.noaa.gov/appeals/default.htm>>.

Based on all the above findings, I conclude that Mr. Hogevoll meets all the requirements of the unavoidable circumstance regulation, 50 C.F.R. §679.4(k)(8)(iv), and thereby qualifies for a Central Gulf of Alaska area endorsement on his LLP groundfish license (LLG2636), and that the license should be made transferable.

FINDINGS OF FACT

I make the following findings of fact based on a preponderance of the evidence in the record:

1. Mr. Hogevoll is a qualified person who owned the F/V CAPE KIWANDA on June 17, 1995.
2. Mr. Hogevoll made a documented harvest of LLP groundfish with the F/V CAPE KIWANDA between January 1, 1988, and February 9, 1992.
3. At the time of the claimed unavoidable circumstance, Mr. Hogevoll held a specific intent to conduct directed fishing for LLP groundfish in the fourth quarter of 1992 in the Central Gulf of Alaska.
4. The grounding of the F/V CAPE KIWANDA on October 6, 1992, was a circumstance that was unavoidable, unique to Mr. Hogevoll, and unforeseen and reasonably unforeseeable by him. The grounding thwarted Mr. Hogevoll's specific intent to fish for LLP groundfish in the Central Gulf in the fall of 1992.
5. The grounding of the F/V CAPE KIWANDA on October 6, 1992, actually occurred.
6. Mr. Hogevoll took all reasonable steps to overcome the grounding of the F/V CAPE KIWANDA.
7. The F/V CAPE KIWANDA made a documented harvest of LLP groundfish after the grounding but before June 17, 1995.

CONCLUSIONS OF LAW

1. Mr. Hogevoll meets all the requirements of the unavoidable circumstance regulation, 50 C.F.R. §679.4(k)(8)(iv).
2. Mr. Hogevoll qualifies for a Central Gulf of Alaska area endorsement on his LLP groundfish license.

DISPOSITION AND ORDER

The denial of a Central Gulf of Alaska area endorsement to the Appellant in the IAD that is the subject of this appeal is VACATED. I order RAM to add a Central Gulf of Alaska area endorsement to Mr. Hogevoll's LLP groundfish license (LLG2636) and to make the license

transferable. This Decision takes effect on September 7, 2005, 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 August 18, 2005, the tenth day after this Decision. 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 Administrative Judge, and must be accompanied by a written statement in support of the motion.

Clancy I. DeSmet
Administrative Judge

Edward H. Hein
Chief Administrative Judge