

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 04-0005
)	
SELDOVIA FISHERIES, INC.,)	DECISION
Appellant)	
)	September 7, 2004
_____)	

Seldovia Fisheries, Inc., [Seldovia] filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹

Seldovia applied for an LLP groundfish license based on the fishing history of the F/V BLUE PACIFIC, ADFG # 62905. Seldovia applied for a license with a catcher/processor vessel designation for vessel length category A, which means the length overall of the vessel was 125 feet or greater on June 17, 1995.² Seldovia applied for a license with five area endorsements: Bering Sea, Aleutian Islands, Western Gulf, Central Gulf (which includes the West Yakutat District) and Southeast Outside.

The IAD stated that Seldovia was the eligible applicant for an LLP license based on the fishing history of the F/V BLUE PACIFIC, with a catcher/processor vessel designation, and a maximum length overall [MLOA] of 180 feet. The IAD determined that Seldovia qualified for area endorsements for the Bering Sea and for the Aleutian Islands. The IAD determined that Seldovia did not qualify for an LLP license with Western Gulf, Central Gulf or Southeast Outside area endorsements because the F/V BLUE PACIFIC had not made the documented harvests required for those endorsements.

Seldovia can appeal the IAD because it directly and adversely affects its interests, as required by 50 C.F.R. § 679.43(b). The record has sufficient information for me to decide this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and decide this appeal.

SUMMARY

Seldovia Fisheries, Inc., does not qualify for an LLP groundfish license with area endorsements for Western Gulf, Central Gulf or Southeast Outside. According to the official LLP record, the F/V BLUE PACIFIC did not make the documented harvests of license limitation groundfish in

¹ IAD (Feb. 5, 2004). The LLP is in 50 C.F.R. § 679: 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)(requirements for licenses); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). The NMFS Alaska region website, <http://www.fakr.noaa.gov/regs/summary.htm>, has the LLP regulations.

² 50 C.F.R. § 679.4(k)(3)(iii). If the vessel was under reconstruction on June 17, 1995 – which the F/V BLUE PACIFIC was not – the relevant date is the date that reconstruction was completed.

the endorsement qualification period [EQP] that are required by 50 C.F.R. § 679.4(k)(4)(ii) for these endorsements. On appeal, Seldovia did not submit any evidence or argument that the official LLP record is incorrect and therefore did not carry its burden to prove that the official LLP record should be changed.

ISSUE

Does Seldovia Fisheries, Inc., qualify for an LLP groundfish license with area endorsements for Central Gulf, Western Gulf or Southeast Outside?

ANALYSIS

To qualify for an LLP groundfish license with area endorsements for Central Gulf, Western Gulf or Southeast Outside, Seldovia must have made documented harvests³ of license limitation groundfish⁴ in a general qualification period [GQP] and an endorsement qualification period [EQP].⁵ The basic GQP requirement is one harvest of groundfish in the Bering Sea/Aleutian Islands [BSAI] or the Gulf of Alaska [GOA] between January 1, 1988 and June 27, 1992.⁶ The IAD determined that, based on the official LLP record, Seldovia met the GQP requirement.

The endorsement qualification period requirement for a Western Gulf endorsement is one harvest of groundfish in the Western Gulf in each of any two calendar years from January 1, 1992, through June 17, 1995.⁷ The EQP requirement for a Central Gulf endorsement is one harvest of groundfish in the Central Gulf (including the West Yakutat District) in each of any two calendar years from January 1, 1992, through June 17, 1995.⁸ The EQP requirement for a Southeast Outside endorsement is one harvest of groundfish in the Southeast Outside District in

³ To count toward an LLP license, a harvest must be a documented harvest. A documented harvest is “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.” 50 C.F.R. § 679.2. When I refer to a harvest, I mean a documented harvest

⁴ License limitation groundfish are “target species and the ‘other species’ category, specified annually pursuant to § 679.20(a), except that demersal shelf rockfish east of 140° W. Longitude and sablefish managed under the IFQ program are not considered license limitation groundfish.” 50 C.F.R. § 679.2. When I refer to groundfish, I mean license limitation groundfish.

⁵ 50 C.F.R. § 679.4(k)(4)(i)&(ii).

⁶ 50 C.F.R. § 679.4(k)(4)(i)(A)(1) & (B)(1); 50 C.F.R. § 679.4(k)(4)(iv); 50 C.F.R. § 679.4(k)(4)(v). There are other ways to meet the GQP for vessels that harvested crab (“crossover vessels”) or used jig gear. 50 C.F.R. § 679.4(k)(4)(A)(2)&(3); 50 C.F.R. § 679.4(k)(4)(B)(2)&(3). These are not relevant to this appeal, since Seldovia meets the basic GQP requirement.

⁷ 50 C.F.R. § 679.4(k)(4)(ii)(C).

⁸ 50 C.F.R. § 679.4(k)(4)(ii)(H).

each of any two calendar years from January 1, 1992, through June 17, 1995.⁹

The IAD determined that, according to the official LLP record, Seldovia did not meet the EQP requirement for a Western Gulf, Central Gulf or a Southeast Outside endorsement: the F/V BLUE PACIFIC did not make one harvest of groundfish in each of two calendar years from January 1, 1992, through June 17, 1995 in the Western Gulf, Central Gulf or Southeast Outside areas.

The official LLP record is the information prepared by NMFS about vessels that participated in the LLP qualifying periods.¹⁰ NMFS created a record of vessel documented harvests based on federal Weekly Production Reports and State of Alaska fish tickets.¹¹ The official LLP record is presumed to be correct. The applicant who claims the official LLP record is incorrect has the burden of proving that the applicant, rather than the official LLP record, is correct.¹²

After Seldovia submitted its LLP application to RAM, RAM provided Seldovia with a Notice of Opportunity to Submit Evidence.¹³ RAM identified three differences between Seldovia's application and the official LLP record. First, the official LLP record listed Pacific Eastern Fisheries, Inc., not Seldovia Fisheries, Inc., as the owner of the vessel. Second, the official LLP record showed the F/V BLUE PACIFIC's length overall [LOA] was 168 feet, not 176 feet. Third, the official LLP record did not show that the F/V BLUE PACIFIC made the harvests required for a Western Gulf, Central Gulf or Southeast Outside area endorsements.

Seldovia responded to RAM.¹⁴ On the question of ownership, Seldovia submitted a written contract with Pacific Eastern Fisheries, Inc., signed by the bankruptcy trustee appointed by the court to act for Pacific Eastern Fisheries, Inc. The contract, by its express terms, clearly and unambiguously transferred both the F/V BLUE PACIFIC, and the LLP fishing history of the F/V BLUE PACIFIC, to Seldovia.¹⁵ On the LOA of the vessel, Seldovia submitted a letter from a naval architect/marine engineering firm that did extensive work on the vessel that the vessel's

⁹ 50 C.F.R. § 679.4(k)(4)(ii)(M).

¹⁰ 50 C.F.R. § 679.2.

¹¹ Final Rule, 64 Fed. Reg. 42,826, 42,826 (1999)(supplementary information). NMFS also used data from observers aboard the vessels. *Id.*

¹² 50 C.F.R. § 679.2 (definition of official LLP record); 50 C.F.R. § 679.4(k)(6)(v).

¹³ Notice of Opportunity to Submit Evidence (Jan. 19, 2000).

¹⁴ Letter from Michael F. Burns to RAM (March 8, 2000).

¹⁵ Purchase and Sale Agreement (Jan. 7, 1997). Seldovia also submitted a court order approving the sale. Order Implementing Sale of the F/V LIBERTY BAY [now F/V BLUE PACIFIC] Free and Clear of Liens Under 11 U.S.C. § 363(f) and Authorizing the Trustee to Obtain Credit under 11 U.S.C. § 364(d), No. 96-15046 (United States Bankruptcy Court, Western District of Washington, Jan. 17, 1997).

LOA was 180.1 feet.¹⁶

But on the fishing history of the vessel, Seldovia did not submit any evidence. Seldovia stated that the F/V BLUE PACIFIC made landings under previous names – the F/V AQUATIC EXPLORER and the F/V LIBERTY BAY - and that it needed some time to track down the previous captains who participated in the Gulf of Alaska fisheries.¹⁷

When RAM made its initial administrative determination on February 5, 2004, it changed the official LLP record to reflect Seldovia Fisheries, Inc., as the owner of the F/V BLUE PACIFIC. RAM changed the official LLP record to reflect the length overall of the vessel as 180 feet. But RAM did not receive any evidence that the official LLP record of the fishing history of the F/V BLUE PACIFIC was incorrect and therefore denied Seldovia the Western Gulf, Central Gulf and Southeast Outside area endorsements.

I note that Seldovia asserted to RAM that “only one landing is needed from 1/1/92 to 6/17/95.”¹⁸ I believe Seldovia is referring to a mistake in the original LLP regulations. For a Western Gulf endorsement only, the LLP rule mistakenly omitted the phrase “in each of two calendar years” and so the text of the rule simply required one documented harvest between January 1, 1992 and June 17, 1995.¹⁹

This does not help Seldovia. First, according to the official LLP record, the F/V BLUE PACIFIC did not make one documented harvest in the Western Gulf between January 1, 1992 and June 17, 1995 and Seldovia submitted no evidence that it did. According to the official LLP record, the F/V BLUE PACIFIC did not harvest groundfish in the Western Gulf until April 24, 1999. Second, Seldovia made no argument based on the former regulation. Third, NMFS corrected the regulation in May 2000 and added the phrase “in each of two calendar years.”²⁰ RAM evaluated Seldovia’s application according to the requirement for a Western Gulf endorsement in federal regulation since May 2000 and in effect when RAM issued the IAD.²¹

¹⁶ Letter from Jonathan G. Parrott, P.E., Jensen Maritime Consultants, Inc., to Mike Burns, Blue North Fisheries (Feb. 4, 2000).

¹⁷ Letter from Michael F. Burns to RAM (March 8, 2000).

¹⁸ *Id.*

¹⁹ Final Rule, 63 Fed. Reg. 52,642, 52,655 (Oct. 1, 1998) *adopting* 50 C.F.R. § 679.4(i)(4)(ii)(C)(1). NMFS corrected all the references from section 679.4(i)(to 679.4(k). Correcting Amendments, 63 Fed. Reg. 64,878 (Nov. 24,1998).

²⁰ Correcting Amendments, 93 Fed. Reg. 30,549 (May 12, 2000). This notice in the Federal Register stated that the correcting amendments had an effective date of January 1, 1999.

²¹ This was also the requirement for a Western Gulf endorsement for category A vessels adopted by the North Pacific Fishery Management Council and contained in the proposed LLP rule. *Id.*

When Seldovia filed its appeal, it did not submit any evidence that the official LLP record was incorrect.²² Seldovia stated that it had just gotten access to 53 boxes of materials relating to the F/V BLUE PACIFIC and bankruptcy proceedings involving Pacific Eastern Fisheries, Inc. Seldovia stated that it had just started to review the boxes and expected “the process will take approximately 60 - 90 days to review and then assemble the data for submission to the agency.” Seldovia requested an extension until July 5, 2004 – which was ninety days – to provide supplemental materials in support of this appeal.

This Office granted Seldovia an extension of sixty days – until June 8, 2004 – to submit pleadings and evidence in support of its appeal.²³ Seldovia did not submit any legal argument or evidence by June 8, 2004 or anything since that date. Seldovia has not made contact with this Office since that date.

When Seldovia requested the extension, it stated:

We disagree with the agency’s determination that the fishing history of the F/V BLUE PACIFIC does not qualify it for a groundfish license endorsed for the Western Gulf of Alaska, Central Gulf of Alaska, or Southeast Outside areas. As the agency is well aware, a great deal of evidence documenting the historical activities of the BLUE PACIFIC (and similarly situated vessels) is held by persons or state agencies over whom we are powerless to compel disclosure. Despite the obvious due process concerns presented, we believe we have found the evidence required to establish eligibility for the disputed areas without having to tackle the due process issues today.²⁴

Seldovia’s comment does not further its claim to these endorsements. First, Seldovia did not make or explain a due process argument – then or since. Second, with this decision, I am providing Seldovia a copy of the WPR printout from the official LLP record for the F/V BLUE PACIFIC. I can provide this information to Seldovia because it either was the owner of the vessel at the time the WPR was filed or obtained the rights to the fishing history from the prior owner of the vessel.²⁵ Third, I cannot provide Seldovia a fish ticket printout of the F/V BLUE

²² Letter from Michael Shanahan, Vice President Administration/General Counsel, Blue North Fisheries (April 2, 2004). Blue North Fisheries is the management company for Seldovia Fisheries, Inc.

²³ Order Granting Extension to Supplement Appeal With Pleadings and Evidence (May 26, 2004)

²⁴ Letter from Michael Shanahan, Vice President Administration/General Counsel, Blue North Fisheries (April 2, 2004).

²⁵ Seldovia obtained all rights to the vessel’s fishing history from the prior owner through the contract and court order cited in note 15 *supra*. If Seldovia has reason to believe I overlooked something in the WPR printout, it can request reconsideration of the decision.

PACIFIC's documented harvests in the official LLP record because Seldovia is not the State of Alaska permit holder that made the harvests nor has Seldovia given me a release from the State of Alaska permit holder(s).²⁶ Finally, by this argument, or anything Seldovia has submitted, Seldovia has not given me any reason to believe that the official LLP record for the F/V BLUE PACIFIC is incomplete and that Seldovia is being denied anything it is entitled to receive.

Seldovia first stated on March 8, 2000 that it needed time to locate evidence of documented harvests by the F/V BLUE PACIFIC that were not in the official LLP record. In the four and a half years since then, Seldovia has not submitted any evidence that the official LLP record is incorrect and that the F/V BLUE PACIFIC made the harvests required for a Western Gulf, Central Gulf or Southeast Outside endorsement, namely one harvest of groundfish in the Western Gulf, Central Gulf or Southeast Outside district in each of two calendar years between January 1, 1992 and June 17, 1995.

I therefore conclude that Seldovia has not shown that the official LLP record is incorrect. I conclude that Seldovia does not qualify for an LLP license with a Western Gulf, Central Gulf or Southeast Outside endorsement.

FINDINGS OF FACT

1. The F/V BLUE PACIFIC did not make two documented harvests of license limitation groundfish in the Western Gulf between January 1, 1992 and June 17, 1995.
2. The F/V BLUE PACIFIC did not make two documented harvests of license limitation groundfish in the Central Gulf between January 1, 1992 and June 17, 1995.
3. The F/V BLUE PACIFIC did not make two documented harvests of license limitation groundfish in the Southeast Outside Area District between January 1, 1992 and June 17, 1995.

CONCLUSIONS OF LAW

1. Seldovia Fisheries, Inc., has not shown that the official LLP record is incorrect regarding the fishing history of the F/V BLUE PACIFIC.
2. Seldovia Fisheries, Inc., does not qualify for an LLP groundfish license with area endorsements for Central Gulf, Western Gulf or Southeast Outside.

DISPOSITION

²⁶ Reciprocal Data Access Agreement between NOAA, Alaska Department of Fish and Game and Alaska Commercial Fisheries Entry Commission (Sept. 23, 1999). *See* Alaska Statutes 16.05.815.

The IAD is AFFIRMED. This Decision takes effect October 7, 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, September 17, 2004. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that I have overlooked or misunderstood and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Appeals Officer