

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 96-0049
)	
HIGH SPIRIT, INC.)	
F/V HIGH SPIRIT)	DECISION
ADF&G # 63219)	
Appellant)	
_____)	November 24, 1999

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on Reconsideration on June 10, 1996, which denied High Spirit, Inc.'s Application for a Vessel Moratorium Qualification and Permit (VMQ&P) under the Vessel Moratorium Program on Groundfish and Crab.¹ The Reconsideration affirmed RAM's earlier IAD of February 29, 1996. The basis for both IADs was that High Spirit, Inc., had not shown that its vessel, the F/V HIGH SPIRIT, had made any landings of moratorium species between January 1, 1988 and February 9, 1992.

ISSUE

Is High Spirit, Inc., entitled to add a gear endorsement, based on the landings of the F/V HIGH SPIRIT, to a moratorium permit it received due to a transfer of a moratorium qualification from the F/V CLOVERLEAF?

BACKGROUND

High Spirit, Inc., [High Spirit], the owner of the F/V HIGH SPIRIT, filed an application for a Vessel Moratorium Qualification and Permit on December 19, 1995. It claimed landings of moratorium crab with pot gear in period 1 (January 1, 1988 through February 9, 1992) and landings of moratorium crab and moratorium groundfish with hook and pot gear in period 2 (February 10, 1992 through December

¹ The Vessel Moratorium Program for Groundfish and Crab, 50 C.F.R. § 679.4(c), expires on December 31, 1999. 64 Fed. Reg. 3651-3653 (1999). The Moratorium Program should not be confused with the North Pacific License Limitation Program (LLP), 50 C.F.R. § 679.4(k). The application period for LLP runs from September 13, 1999 through December 17, 1999. For further information on the License Limitation Program, High Spirit, Inc., may contact Restricted Access Management (RAM), NMFS, Box 21668, Juneau, Alaska 99802-1668, 907-586-7474 or 1-800-304-4846 (option 2).

11, 1994).² At the same time, High Spirit filed an application for the transfer of the moratorium qualification of the F/V CLOVERLEAF to the F/V HIGH SPIRIT.

The application for the transfer was signed by both the president of High Spirit and the president of Cloverleaf '85, Inc. [Cloverleaf], the owner of the F/V CLOVERLEAF. A written agreement was submitted, signed by the presidents of both corporations. It stated that Cloverleaf assigned all of its "right, title and interest in and to crab fishing rights in Alaska" to High Spirit. High Spirit also submitted a fish ticket showing landings of moratorium groundfish species made from its own vessel, the F/V HIGH SPIRIT, on May 25, 1992 in Kodiak.

In its IAD dated February 29, 1996, RAM denied High Spirit's application for a moratorium qualification and permit. RAM stated that it could not verify any landings of moratorium groundfish made from the F/V HIGH SPIRIT between January 1, 1988 and February 9, 1992 with hook gear. The record does not contain a specific decision by RAM on High Spirit's application for a transfer of moratorium qualification from the F/V CLOVERLEAF.

High Spirit asked RAM to reconsider its decision. It submitted a second copy of the May 1992 fish ticket and asked: "Does it not qualify for a crossover?" On reconsideration, RAM affirmed its earlier IAD because the May 1992 fish ticket showed landings outside the period of January 1, 1988 to February 9, 1992. RAM referred the case to this Office for filing as an appeal on June 10, 1996..

Upon receiving the appeal, the Appeals Assistant with this Office informed High Spirit that the owner of the F/V CLOVERLEAF had not filed an application for a moratorium qualification or permit. Cloverleaf, through its agent, Vessel Management, Inc., immediately filed an application for a Moratorium Qualification for the F/V CLOVERLEAF.

RAM approved the transfer of the moratorium qualification of the F/V CLOVERLEAF to the F/V HIGH SPIRIT on June 20, 1996 and issued a transferable Certificate of Moratorium Qualification to the High Spirit.³ Two months later, High Spirit applied for and received a Moratorium Permit. The Moratorium Qualification and Permit issued to High Spirit have the same two endorsements the F/V CLOVERLEAF was entitled to receive: endorsements to harvest moratorium crab species and groundfish species with pot gear.

² Moratorium crab species means "species of king or Tanner crabs harvested in the BSAI." 50 C.F.R. § 679.2. Moratorium groundfish species means "species of groundfish, except sablefish caught with fixed gear, harvested in the GOA or in the BSAI, the commercial fishing of which is governed by this part." *Id.* Groundfish means "target species and the 'other species' category, specified annually pursuant to § 670.20(a)(2)." *Id.*

³ Because of the need for vessel owners to show that their vessel had "moratorium qualification," RAM began issuing an actual Certificate of Moratorium Qualification with gear endorsements, in addition to the vessel moratorium permits.

DISCUSSION

The issue which remains is whether High Spirit, after obtaining a moratorium qualification by transfer from the F/V CLOVERLEAF, can engraft on to the permit resulting from that qualification a gear endorsement based on the fishing history of the F/V HIGH SPIRIT. If High Spirit could do this, it could add to its moratorium permit an endorsement to harvest groundfish with hook gear, based on the May 1992 landing from the F/V HIGH SPIRIT of moratorium groundfish with hook gear in the Gulf of Alaska.⁴ If High Spirit cannot do this, it is limited to the gear endorsements that the F/V CLOVERLEAF was entitled to receive. I conclude that High Spirit is limited to the gear endorsements that the F/V CLOVERLEAF was entitled to receive.

The Moratorium Program was enacted to prevent the entry of additional vessels into the moratorium fisheries, while the North Pacific Fisheries Management Council developed a comprehensive, permanent plan for management of the moratorium fisheries.⁵ To receive any rights under the moratorium program, a vessel had to have moratorium qualification. A vessel had moratorium qualification either because it was an “original qualifying vessel” or because it received a transfer of a moratorium qualification from an original qualifying vessel.⁶ An original qualifying vessel is “a vessel that made a legal landing during the moratorium qualifying period.”⁷ The moratorium qualifying period was January 1, 1988 to February 9, 1992.⁸ Simply put, for a boat to qualify to participate in the moratorium, it has to have landed moratorium crab or groundfish during the qualifying period or obtain a qualification from a vessel that did.

If a vessel qualifies to participate in the moratorium, the vessel owner is entitled to a permit which authorizes the harvest of moratorium species with specific gear types. Four gear endorsements are possible: moratorium crab with pot gear, moratorium groundfish with trawl gear, moratorium groundfish with pot gear and moratorium groundfish with hook gear.⁹ If a vessel is an original qualifying vessel, it receives a moratorium qualification and permit with all the gear endorsements generated by the vessel’s own landing history. By the same token, if a vessel has moratorium qualification because it received a transfer of a moratorium qualification from an original qualifying vessel, the transferee vessel is entitled to a permit with all the gear endorsements generated by the original vessel’s landing history.

⁴ 50 C.F.R. § 679.4(c)(5)(iv).

⁵ Notice of Proposed Rule, 60 F.R. 25,677, 25,677 (1995).

⁶ 50 C.F.R. § 679.4(c)(7).

⁷ 50 C.F.R. § 679.2.

⁸ *Id.*

⁹ 50 C.F.R. § 679.4(c)(5).

Webster's Third New International Dictionary defines transfer as "the conveyance of right, title, or interest in either real or personal property from one person to another by sale, gift, or other process." Transferable is defined as "capable of being made over from one party to another so as to vest in the transfer all the transferor's legal rights, title or interest in the property being transferred." The F/V CLOVERLEAF cannot transfer more than it had. A transfer cannot somehow result in an increase in what is being transferred. It would undermine the purpose of the Moratorium Program if, every time a moratorium qualification is transferred, the amount of fishing effort permitted in the moratorium fisheries could increase.

Since the F/V CLOVERLEAF is an original qualifying vessel, the question is what did the F/V CLOVERLEAF have available for transfer. To receive an endorsement to harvest groundfish with hook gear, the endorsement sought by High Spirit, an applicant must show:

[1] a legal landing of any moratorium groundfish with any authorized gear in period 1, which is January 1, 1988 to February 9, 1992.

OR

[2] a legal landing of moratorium crab in period 1 (January 1, 1988 to February 9, 1992) and a legal landing of moratorium groundfish with hook gear in period 2 (February 10, 1992 to December 11, 1994).¹⁰

The Official Record for the Moratorium Program indicates that F/V CLOVERLEAF did not have the landings necessary for an endorsement for groundfish with hook gear. It only harvested moratorium crab between January 1, 1988 and February 9, 1992.¹¹ Since the F/V HIGH SPIRIT has moratorium qualification only by transfer from the F/V CLOVERLEAF, the F/V HIGH SPIRIT is not entitled to an endorsement to harvest groundfish with hook gear because the F/V CLOVERLEAF was not entitled to that endorsement.

High Spirit asked whether the F/V HIGH SPIRIT qualifies for a "crossover" into the groundfish/hook gear fishery. Although the term "crossover" appears nowhere in the regulations, the term and the concept of "crossover" were the subject of considerable debate in the development of the Moratorium Program.¹² What the North Pacific Fisheries Management Council meant by crossover was permitting

¹⁰ 50 C.F.R. § 679.4(c)(5).

¹¹ If a vessel is entitled to a moratorium permit with an endorsement to harvest crab and groundfish with pot gear, that means that the vessel had landings of moratorium crab in period 1, January 1, 1988 to February 9, 1992. 50 C.F.R. § 679.4(c)(5)(i)(iii).

¹² See Notice of Proposed Rule, 59 Fed. Reg. 28,827- 28,838 (June 3, 1994); Disapproval and Withdrawal of Proposed Rule, 59 Fed. Reg. 43,534-43,535 (Aug. 24, 1994); Notice of Proposed Rule, 60

a vessel, which was a qualified vessel, to participate or cross over to additional moratorium fisheries based on landings after the qualifying period. The Council originally proposed quite broad crossover privileges and then scaled them back.¹³ The crossover privileges that the Council eventually adopted are in 50 C.F.R. § 679.4(c)(5), which specifies “gear endorsement criteria.”¹⁴

This regulation coins the terms “period 1” and “period 2.” It permits some vessels with qualifying landings in period 1, which is January 1, 1988 to February 9, 1992, which is the same time period as the qualifying period, to cross over and participate in additional moratorium fisheries based upon landings in period 2, which is February 10, 1992 to December 11, 1994. The crossover or gear endorsement regulation simply gave additional, limited rights to original qualifying vessels that met specified conditions.¹⁵ The F/V HIGH SPIRIT thus does not really want to cross over into the groundfish/hook gear fishery, as that concept is embodied in the regulations, because it did not participate in any moratorium fishery in the qualifying period or period 1.

As noted, the conditions for crossing over into the groundfish/hook gear fishery are that the vessel either participated in a groundfish fishery with trawl or pot gear in period 1 (January 1, 1988 to February 9, 1992) or that it participated in a moratorium crab fishery in period 1 and the groundfish/hook gear

Fed. Reg. 25,677 - 25,687 (May 12, 1995); Final Rule, 60 Fed. Reg. 40,763 - 40,775 (Aug. 10, 1995). The subject of “crossover” is discussed at the following pages: 59 Fed. Reg. at 28,829; 59 Fed. Reg. at 43,535; 60 Fed. Reg. at 25,677-25,681; 60 Fed. Reg. at 40,765-40,766.

¹³ 60 Fed. Reg. at 25,678.

¹⁴ The gear endorsement regulation was originally at 50 C.F.R. § 679.6.3(e) and is now at 50 C.F.R. § 679.4(c)(5). The change in placement occurred as part of the consolidation of NMFS regulations in 1996. 61 Fed. Reg. 31228, 31237 (1996). The differences between former 50 C.F.R. § 676.3(e) and current 50 C.F.R. § 679.4(c)(5) are strictly stylistic.

¹⁵ The preamble or background section to the final regulations states:

[T]he [North Pacific Fisheries Management] Council decided at its meeting in December 1994 to propose limiting crossovers. Under the revised proposal, which this final rule adopts, a vessel that made a legal landing from January 1, 1988, through February 9, 1992, in either a groundfish or crab fishery, but not both, can cross over as a new vessel in the fishery in which it did not make a legal landing in the qualifying period provided:

1. It uses in the new fishery only the same fishing gear type that it used to qualify for the moratorium in the other fishery; or
2. It made a legal landing in the crossover fishery during the period February 10, 1992, through December 11, 1994, and it uses only the same fishing gear type that it used during that period.

60 Fed. Reg. at 40,765 (emphasis added) .

fishery in period 2 (February 10, 1992 to December 11, 1994).¹⁶ Although the F/V HIGH SPIRIT made a groundfish landing with hook gear in period 2, it did not land moratorium crab in period 1. Although the F/V CLOVERLEAF made a moratorium crab landing in period 1, it did not land moratorium groundfish with any gear in period 2.

The regulations do not permit an applicant to combine vessel histories. Each vessel stands or falls on its own landings history or the landings history of the vessel from which it receives a moratorium qualification by transfer. Since neither the F/V HIGH SPIRIT nor the F/V CLOVERLEAF meet the requirements for an endorsement to harvest groundfish with hook gear, the regulations do not allow issuance of a permit with that endorsement.

High Spirit is entitled to receive all the F/V CLOVERLEAF had to offer. With the full transfer of the F/V CLOVERLEAF's moratorium qualification to the F/V HIGH SPIRIT, that has occurred. I conclude that High Spirit is not entitled to add an groundfish/hook gear endorsement to a vessel moratorium permit it received due to the transfer of a moratorium qualification from the F/V CLOVERLEAF.

FINDING OF FACT

No legal landings of moratorium species between January 1, 1988 and February 9, 1992 were made from the F/V HIGH SPIRIT.

CONCLUSION OF LAW

High Spirit is not entitled to add a gear endorsement, based on landings of the F/V HIGH SPIRIT, to a vessel moratorium permit it received due to the transfer of a moratorium qualification from the F/V CLOVERLEAF.

DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is AFFIRMED. This Decision takes effect December 24, 1999, unless by that date the Regional Administrator orders review of the Decision.

Any party, including 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, December 4, 1999. 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

¹⁶ 50 C.F.R. § 679.4(c)(5)

statement or points and authorities in support of the motion.

Mary Alice McKeen
Appeals Officer