

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0032
)	
KEVIN SUYDAM,)	DECISION
Appellant)	
)	August 23, 2004
_____)	

STATEMENT OF THE CASE

Kevin Suydam filed a timely appeal of an Initial Administrative Determination on Reconsideration (LLPC/IAD No. 02-019), issued on July 31, 2002, by the Restricted Access Management (RAM) Program. Mr. Suydam can appeal the IAD on Reconsideration because it directly and adversely affects his interest, as required by 50 C.F.R. §679.43(b). Mr. Suydam is represented by attorney Bruce Weyhrauch of Juneau, Alaska.

Mr. Suydam holds two non-transferable LLP crab licenses. The first, #LLC4552, is based on the fishing history of his vessel, the F/V LADY ALASKA. The NMFS Official LLP Record shows that the F/V LADY ALASKA made the required documented harvests during the Endorsement Qualifying Periods (EQPs) for the St. Matthew blue king crab and Aleutian Islands red king crab area/species endorsements.¹ The vessel subsequently made a documented harvest of LLP crab species between January 1 and February 7, 1998, during the final five weeks of the Recent Participation Period (RPP).² The NMFS Official LLP Record shows, however, that the vessel did not make any crab harvests during the General Qualifying Period (GQP) and, thus, the F/V LADY ALASKA's fishing history did not qualify for an LLP crab license.³

On January 7, 2000, RAM issued license #LLC4552 to Mr. Suydam as a non-transferable license, with the five area/species endorsements that he applied for, including the St. Matthew blue king and AI red king endorsements.⁴ Then, in the IAD on Reconsideration, RAM denied Mr. Suydam's application for an LLP crab license premised on the fishing history of the F/V LADY ALASKA. The application was denied on the grounds that the vessel lacked a documented harvest of LLP crab species during the GQP. The IAD on Reconsideration stated

¹50 C.F.R. §679.4(k)(5)(ii)(C) and (E).

²50 C.F.R. §679.4(k)(5)(iii)(A). This fact is acknowledged on page 5 of the IAD on Reconsideration, which determined that Mr. Suydam met the requirements of the RPP by virtue of exemption (iv) [50 C.F.R. §679.4(k)(5)(iv)].

³50 C.F.R. §679.4(k)(5)(i). See IAD on Reconsideration at 5, n.3.

⁴The other three were: AI brown king crab, BSAI *C. opilio* and *C. bairdi* (Tanner) crab, and Bristol Bay red king crab.

that license #LLC4552 would remain valid until Final Agency Action is taken on this matter.

On appeal, Mr. Suydam does not dispute or challenge the denial of his application. He acknowledges that license #LLC4552 will expire upon Final Agency Action.⁵ To avoid having the two area/species endorsements from the license expire when the license expires, Mr. Suydam seeks to transfer them to his other LLP crab license, #LLC3894. In the IAD on Reconsideration, RAM denied that request, stating that it had no authority to transfer the endorsements from one license to the other. Mr. Suydam now challenges that determination. He argues (on two grounds that I discuss below) that RAM does have the regulatory authority to transfer the area/species endorsements to his other license.

Mr. Suydam's other license, #LLC3894, is based on the fishing history of the F/V ARCTIC DISCOVERY. Mr. Suydam has never owned that vessel, but he purchased the fishing history of the vessel on February 8, 1996.⁶ The NMFS Official LLP Record shows that the F/V ARCTIC DISCOVERY has a fishing history that meets the documented harvest requirements for the GQP, and the EQPs for three area/species crab endorsements: Aleutian Islands brown king, Bristol Bay red king, and the BSAI *C. opilio* and *C. bairdi* (Tanner) crab fisheries. On January 4, 2000, RAM issued non-transferable license #LLC3894 to Mr. Suydam, with these three endorsements, plus three others for which he had applied.⁷ The IAD on Reconsideration determined that license #LLC3894 qualified only for the first three endorsements, but continued all six pending a Final Agency Action on the matter.

On appeal, Mr. Suydam asserts that, contrary to RAM's determination, the fishing history of the F/V ARCTIC DISCOVERY includes at least one documented harvest of Aleutian Islands red king crab during the period January 1, 1992, through December 31, 1994.⁸ If true, that would qualify Mr. Suydam for an AI red king crab area/species endorsement on license #LLC3894 without relying on the fishing history of the F/V LADY ALASKA. Mr. Suydam requested a hearing on this "genuine and substantial issue of adjudicative fact," and he asserted that the issue "can be resolved by available and specifically identified reliable evidence." He states that he is ready to substantiate that qualifying history through his testimony and by documentation.⁹ For the reasons discussed later in this decision, I deny Mr. Suydam's request for a hearing on this issue. The administrative record is closed because the information on the record is sufficient to

⁵Appellant's Appeal Brief at 2-3.

⁶Suydam Affidavit, December 1, 2002, at 1; Purchase and Sale Agreement of Fishing Rights, attached to Mr. Suydam's LLP application relating to the F/V ARCTIC DISCOVERY.

⁷The other three were: AI red king crab, St. Matthew blue king crab, and Pribilof red and blue king crab. After the license was issued, Mr. Suydam withdrew his claim to the Pribilof red and blue king area/species endorsements. See Suydam letter to Tracy Buck, May 2, 2000.

⁸*Id.* at 2.

⁹Appellant's Request for a Hearing, December 2, 2002, at 2-3.

render a decision. 50 C.F.R. §679.43(m)(4).

ISSUES

1. Is RAM authorized to transfer area/species endorsements from LLP crab license #LLC4552 to LLP crab license #LLC3894?
2. Does the fishing history of the F/V ARCTIC DISCOVERY qualify LLP crab license #LLC3894 for an Aleutian Islands red king crab area/species endorsement?

ANALYSIS

1. Is RAM authorized to transfer area/species endorsements from LLP crab license #LLC4552 to LLP crab license #LLC3894?

There are two basic reasons why the answer to this question must be “No.” The first reason is that Mr. Suydam does not qualify for LLP crab license #LLC4552 or the endorsements contained on the license. Therefore, although he can use the license to participate in the endorsed fisheries pending Final Agency Action, he cannot do anything else with the license or its endorsements. In particular, he cannot transfer the area/species endorsements to another person or another license because the entire license (including endorsements) is nontransferable and will expire upon Final Agency Action since it does not meet the GQP documented harvest requirement of 50 C.F.R. §679.4(k)(5)(i).¹⁰

The second reason that the area/species endorsements could not be transferred to another license is that, even if #LLC4552 were a valid transferable license, endorsements cannot be stripped or severed from a license and transferred to another license. This is specifically prohibited by 50 C.F.R. §679.4(k)(7)(viii)(A), which reads:

(A) Area endorsements or area/species endorsements specified on a license are not severable from the license and must be transferred together.

This prohibition is bolstered by the language of section 8.1.4.1.1, ¶ 6 of the Fishery Management Plan for the Bering Sea/Aleutian Islands King and Tanner Crabs (Crab FMP), which states, in pertinent part, that an LLP license “will not be combined with other general groundfish or crab licenses the person may own. Species/area endorsements are not separable from the general license they are initially issued under, and shall remain as a single ‘package’” As this office concluded in *Bella K of Seattle, LLC*,¹¹ merging the area/species endorsements from two LLP

¹⁰On the other hand, if #LLC4552 did meet the GQP requirements, it would be a valid transferable license and Mr. Suydam would not need to seek transfer of its area/species endorsements; he could continue to use both of his crab licenses, with all their endorsements, on the F/V LADY ALASKA.

¹¹Appeal No. 02-0006 at 14 (March 25, 2004).

crab licenses is prohibited by 50 C.F.R. §679.4(k)(7)(viii)(A) and section 8.1.4.1.1, ¶ 6 of the Crab FMP.

Nonetheless, Mr. Suydam argues that RAM does have the regulatory authority to transfer the area/species endorsements from license #LLC4552 to license #LLC3894. Mr. Suydam relies on the language of 50 C.F.R. §679.4(k)(5)(iv), as it read at the time he filed his appeal.¹² This regulation was part of a Final Rule that created a Recent Participation Period (RPP) harvest requirement for LLP crab licenses and took effect on October 24, 2001.¹³

The first section of the new rule, 50 C.F.R. §679.4(k)(5)(iii), imposed on LLP crab license holders an additional requirement. To retain their licenses they would now have to show that they had made a documented harvest of any crab species from a qualifying vessel during the period January 1, 1996 through February 7, 1998. A “qualifying vessel,” though not specifically defined in regulation, referred to a vessel that made documented crab harvests during the General Qualification Period and the Endorsement Qualification Period. After the new rule took effect, RAM revoked any LLP crab licenses that were not supported by a documented harvest of crab species from a qualifying vessel during the RPP, unless an exception applied.

At the time Mr. Suydam filed his appeal, section 679.4(k)(5)(iv) read as follows:

(iv) Exception to the complete fishing history earned on one vessel.
A person who can demonstrate that his or her vessel made a documented harvest of crab species during the period from January 1, 1998, through February 7, 1998, and who obtains the fishing history of a vessel that meets the documented harvest requirements of paragraphs (k)(5)(i) and (k)(5)(ii) of this section, or who entered into a contract to obtain the fishing history of a vessel that meets the documented harvest requirements of (k)(5)(i) and (k)(5)(ii) of this section by 8:36 am Pacific standard time on October 10, 1998, is exempted from the requirement of having a complete fishing history earned on one vessel.

This section was created as a limited exception to the requirement that the RPP harvest must have been made from the qualifying vessel. Under this exception, LLP crab license holders who made an RPP harvest from *any* vessel during the final five weeks of the RPP could combine their RPP fishing history from that vessel with the GQP and EQP fishing history of another vessel, if they obtained the fishing history of that vessel by the prescribed date and time.

RAM actually gave Mr. Suydam the benefit of this exception when it determined that the RPP

¹²Since that time, NMFS has amended the regulation and has eliminated the key language that Mr. Suydam relies on. Final Rule, 68 Fed. Reg. 46,117-46,118 (August 5, 2003).

¹³ Final Rule, 66 Fed. Reg. 48,813-48,821 (September 24, 2001).

documented harvest from the F/V LADY ALASKA could be combined with the GQP and EQP qualifications of the F/V ARCTIC DISCOVERY. As a result, RAM determined that Mr. Suydam's crab license #LLC3894 met the requirements of the RPP regulations and would remain valid.

Mr. Suydam argues that RPP exception (iv) authorized RAM to combine the *entire* fishing history of license #LLC4552 with the entire fishing history of license #LLC3894. Thus, according to Mr. Suydam, not only the RPP history but also the EQP history of the F/V LADY ALASKA can be transferred to license #LLC3894. This is a misinterpretation of exception (iv).

RPP exception (iv) must be read in context. It allowed the use of RPP documented harvests from non-qualifying vessels so that an additional small number of LLP crab license holders could meet the RPP requirements. That was the only purpose of the exception.¹⁴ It did not, nor was it intended to, create an exception to the rule that the GQP and EQP fishing histories supporting a license must derive from the same qualifying vessel. In fact, the existence of both the GQP and EQP harvests by the same vessel is what makes that vessel a "qualifying vessel." Without both the GQP and EQP harvests from a single vessel, no LLP crab license can be generated.

In this case, the F/V LADY ALASKA is not a qualifying vessel because it has no GQP fishing history. Although the vessel has the fishing history that would otherwise qualify for two area/species endorsements, RPP exception (iv) cannot keep these area/species endorsements from expiring along with crab license #LLC4552.

As RAM pointed out in the IAD on Reconsideration, "doing so would be contrary to the intent of Amendment 10,^[15] which is to reduce actual and potential effort in the BSAI crab fisheries. Although, after adding endorsements to the original LLP license, only one license would remain (so only one vessel could be used), the additional endorsements on the license could result in an additional vessel being used in each specific endorsement fishery; therefore, approving the combination of EQP harvests from vessels whose harvests during the EQP differ, would also subvert the purpose of Amendment 10."¹⁶

¹⁴ Proposed Rule, 68 Fed. Reg. 22,667-22,670 (April 29, 2003). The preamble to the Proposed Rule for the RPP states that the sole purpose of exception (iv) was to allow persons who participated in a BSAI crab fishery during the period of January 1, 1998, through February 7, 1998, without an LLP qualifying history, to acquire an LLP qualifying fishing history by 8:36 a.m. on October 10, 1998. This exception provided the opportunity for recent participants in the crab fishery, who did not hold an LLP qualifying fishing history when they made the RPP documented harvests, to obtain historical participation in order to qualify for an LLP crab license. *Id.* at 22,668.

¹⁵ Amendment 10 to the Bering Sea/Aleutian Islands crab Fisheries Management Plan was the action by which the North Pacific Fisheries Management Council adopted the RPP requirement.

¹⁶ IAD on Reconsideration, Appeal No. 02-019 (July 31, 2002).

The language of 50 C.F.R. §§679.4(k)(5)(iii) and (iv) has been amended since the filing of this appeal. The revised regulations no longer contain the language that created an exemption from the requirement of having a complete fishing history earned on one vessel, which is the language Mr. Suydam relied upon in his brief. The revised regulations also do not require any RPP documented harvests to have been made on a qualifying vessel. The revised RPP regulations have been interpreted and applied in several decisions issued by this office.¹⁷ I conclude that there is no language in the former or current exception (iv) that authorizes, or even mentions, transferring area/species endorsements from one license to another. Thus, whether I apply the regulation that was in effect at the time the IAD on Reconsideration was issued and at the time this appeal was filed, or the regulation that is now in effect, the result is the same: no transfer.

Mr. Suydam also argues that RAM has the authority to combine the EQP fishing histories of the F/V ARCTIC DISCOVERY and the F/V LADY ALASKA (effectively transferring the area/species endorsements of license #LLC4552 to license #LLC3894) under an alternative theory. Mr. Suydam asserts that his purchase of the fishing history of the F/V ARCTIC DISCOVERY in 1996 removed that vessel from the crab fishery and allowed him to bring another vessel, the F/V LADY ALASKA, into the fishery. Mr. Suydam asserts that the F/V LADY ALASKA was able to make the EQP documented harvests – and subsequently qualify for the two endorsements that he wants to transfer – only because the vessel was the beneficiary of the F/V ARCTIC DISCOVERY’s GQP fishing history. Thus, he argues, the fishing histories of the two vessels have already been combined, “in that sense.”¹⁸ Therefore, he seems to suggest, RAM can’t refuse to combine the EQP fishing histories and area/species endorsements now.

Mr. Suydam’s argument is confused and illogical. First of all, he appears to be thinking that because the F/V LADY ALASKA fished with the vessel moratorium qualification (VMQ) of the F/V ARCTIC DISCOVERY during the Vessel Moratorium Program,¹⁹ therefore RAM must have already merged or combined the fishing histories of the two vessels. This is inaccurate. As we have stated in prior decisions, the regulations of the Vessel Moratorium Program did not authorize NMFS to combine fishing histories of different vessels in awarding moratorium permits.²⁰ “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.”²¹ Therefore, the F/V

¹⁷*Bella K of Seattle, LLC*, Appeal No. 02-0006 (March 25, 2004); *Sitkin Island, Inc.*, Appeal No. 02-0018 (April 16, 2004); *Northern Orion, Inc.*, Appeal No. 02-0019 (April 16, 2004); and *Deep Sea Fisheries, Inc.*, Appeal No. 02-0029 (April 26, 2004).

¹⁸Appellant’s Appeal Brief at 6.

¹⁹The Vessel Moratorium Program on Groundfish and Crab was in effect from 1996 - 1999. See Final Rule, 60 Fed. Reg. 40,763-40,775 (Aug. 10, 1995).

²⁰*Tynes Enterprises, Inc., et al.*, Appeal No. 00-0014 at 11-12 (July 11, 2002).

²¹*High Spirits, Inc.*, Appeal No. 96-0049 at 6 (November 24, 1999).
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LADY ALASKA's participation in the moratorium was based solely on the fishing history and VMQ of the F/V ARCTIC DISCOVERY, not on a combination or merger of the two vessels' fishing histories.

Second, Mr. Suydam asserts that his purchase of the fishing history of the F/V ARCTIC DISCOVERY in 1996 enabled the F/V LADY ALASKA to participate in the St. Matthew blue king and Aleutian Islands red king crab fisheries during the EQP, and thereby subsequently earn the LLP area/species endorsements for those fisheries. The EQP for both of these endorsements was January 1, 1992 through December 31, 1994.²² I fail to see how purchasing the fishing history of the F/V ARCTIC DISCOVERY more than a year *after* the EQP ended could have enabled the F/V LADY ALASKA to make the required documented harvests *during* the EQP to qualify for the area/species endorsements. Thus, I find that Mr. Suydam's argument on this point is without merit.

I conclude that RAM does not have the authority to transfer the area/species endorsements from LLP crab license #LLC4552 to LLP crab license #LLC3894, and that to do so would violate 50 C.F.R. §679.4(k)(7)(viii)(A) and section 8.1.4.1.1, ¶ 6 of the Crab FMP.

2. Does the fishing history of the F/V ARCTIC DISCOVERY qualify LLP crab license #LLC3894 for an Aleutian Islands red king crab area/species endorsement?

Mr. Suydam states that RAM failed to recognize that the fishing history of the F/V ARCTIC DISCOVERY qualifies for an Aleutian Islands red king area/species endorsement. Under 50 C.F.R §679.4(k)(5)(ii)(E), a crab license will be assigned an Aleutian Islands red king area/species endorsement if at least one documented harvest of AI red king crab was made by a vessel during the period beginning January 1, 1992, through December 31, 1994 (EQP).

The NMFS official LLP record for the F/V ARCTIC DISCOVERY contains data showing the vessel's documented harvests from 1988 through 1999. The official LLP record does not show that the F/V ARCTIC DISCOVERY made any documented harvests of Aleutian Islands red king crab during the EQP. Mr. Suydam has not produced any evidence to show that the F/V ARCTIC DISCOVERY made a documented harvest of Aleutian Islands red king during the EQP. He asked this Office to review the vessel's fishing history, and he requested an oral hearing so that he could testify that the fishing history of the F/V ARCTIC DISCOVERY qualified for a AI red king area/species endorsement.

I deny the request for an oral hearing because Mr. Suydam did not specifically identify any available reliable evidence, as required under 50 C.F.R. §679.43(g)(ii). Mr. Suydam's sworn testimony alone would be insufficient to show that the F/V ARCTIC DISCOVERY made the requisite documented harvest to qualify for the AI red king area/species endorsement, particularly since he never owned the vessel and does not claim that he fished the vessel during

²²50 C.F.R. §679.4(k)(5)(ii)(C) and (E).

the EQP. Therefore, I deny the request for oral hearing on the additional grounds that the evidence described in his request for hearing, even if established at the hearing, would not be adequate to justify resolution of this factual issue in the way that he seeks, as required by 50 C.F.R. §679.43(g)(iii).

Based on a preponderance of the evidence in the record, I find that the fishing history of the F/V ARCTIC DISCOVERY does not include at least one documented harvest of AI red king crab during the period beginning January 1, 1992 through December 31, 1994. Therefore, I conclude that Mr. Suydam does not qualify for an Aleutian Island Red King area/species endorsement on LLP crab license #LLC3894, based on the fishing history of the F/V ARCTIC DISCOVERY.

FINDINGS OF FACT

1. The F/V LADY ALASKA did not make any crab harvests during the General Qualifying Period (GQP).
2. The fishing history of the F/V ARCTIC DISCOVERY does not include at least one documented harvest of AI red king crab during the period beginning January 1, 1992 through December 31, 1994.

CONCLUSIONS OF LAW

1. Mr. Suydam does not qualify for LLP crab license #LLC4552 or the endorsements contained on the license.
2. Mr. Suydam cannot transfer the area/species endorsements of license #LLC4552 to another person or another license because the entire license (including endorsements) is nontransferable and, ultimately, void since it does not meet the requirements of 50 C.F.R. §679.4(k)(5)(i) [the GQP documented harvest requirement].
3. There is no language in the former or current RPP exception (iv) [50 C.F.R. §679.4(k)(5)(iv)] that authorizes, or even mentions, transferring area/species endorsements from one license to another.
4. RPP exception (iv) did not, nor was it intended to, create an exception to the rule that the GQP and EQP fishing histories supporting a license must derive from the same qualifying vessel.
5. RAM does not have the authority to transfer the area/species endorsements from LLP crab license #LLC4552 to LLP crab license #LLC3894. To do so would violate 50 C.F.R. §679.4(k)(7)(viii)(A) and section 8.1.4.1.1, ¶ 6 of the Crab FMP.
6. Mr. Suydam does not qualify for an Aleutian Island Red King area/species endorsement on LLP crab license #LLC3894, based on the fishing history of the F/V ARCTIC DISCOVERY.

DISPOSITION

The IAD on Reconsideration that is the subject of this Appeal is AFFIRMED. This Decision takes effect September 22, 2004, unless by that date the Regional Administrator orders review of this 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 2, 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 in support of the motion.

Edward H. Hein
Chief Appeals Officer