NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 02-0034
	)	
MELANIE, INC.,	)	DECISION
Appellant	)	
	)	May 27, 2005
	)	

The Restricted Access Management (RAM) program issued two Initial Administrative Determinations (IADs) on August 27, 2002, that approved Appellant's applications under the North Pacific Groundfish and Crab license limitation program (LLP) for an LLP groundfish license and an LLP crab license. IAD No. 02-116 denied Appellant's request for a Bering Sea area endorsement to the groundfish license. IAD No. 02-027 denied Appellant's request for a St. Matthew blue king area/species endorsement to the crab license. Both claims were based on the qualifying fishing history of the F/V MELANIE.

Appellant filed a timely appeal of the IADs. Appellant can file an appeal because the IADs directly and adversely affects its interests. [50 C.F.R § 679.43(b)] I did not order an oral hearing because there are no disputed factual questions that would be determinative in this case, and because a hearing may not be ordered on issues of policy or law. [50 C.F.R § 679.43(g)(3)] I have closed the record because it contains sufficient information on which to reach a final decision. [50 C.F.R. § 679.42(m)(4)]

ISSUES

1. Does Appellant's LLP groundfish license qualify for a Bering Sea area endorsement based on Pacific cod harvests for crab bait made by the F/V MELANIE in 1994?

2. Does Appellant's LLP crab license qualify for a St. Matthew blue king crab area/species endorsement based on an unavoidable circumstance under the unavoidable circumstance provision in the LLP regulations?

ANALYSIS

1. Does Appellant's LLP groundfish license qualify for a Bering Sea area endorsement based on Pacific cod harvests for crab bait made by the F/V MELANIE in 1994?

To qualify for a Bering Sea area endorsement on its groundfish license, Appellant must establish that the F/V MELANIE made at least one documented harvest of Bering Sea groundfish during the endorsement qualifying period (EQP) for the fishery, between January 1, 1992, and June 17, 1995.[1]

[1] 50 C.F.R. § 679.4(k)(4)(ii)(B).

In several decisions, this Office has ruled that to be considered a "documented harvest" of groundfish under the LLP, the harvest of the fish must have been a lawful *commercial* harvest (as result of a commercial fishing of groundfish); and that the harvest of Pacific cod for crab bait cannot be considered a commercial harvest of groundfish unless the Pacific cod was intended to be, or was actually, sold, bartered or traded.[2]

In Application of Williard S. Ferris, we stated:

> A "documented harvest" is defined as a "lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at time of harvesting." Implicit in this definition is the idea that the lawful harvest must be a lawful *commercial* harvest. Otherwise it would make no sense to require that the harvest be recorded in compliance with commercial fishing regulations. ...
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> This view – that a documented harvest must result from commercial fishing – is consistent with the LLP's purpose of regulating commercial fishing of LLP groundfish and crab. Section 3 of the Magnuson-Stevens Fishery Conservation and Management Act defines "commercial fishing" as "fishing in which the fish harvested, either in whole or part, are intended to enter commerce or enter commerce through sale, barter, or trade [internal citations omitted].[3]

The NMFS official LLP record does not show that the F/V MELANIE made at least one documented harvest of Bering Sea groundfish during the EQP for the fishery. Appellant disputes this, based on Pacific cod harvests made by the vessel in 1994 that were used exclusively aboard the vessel as bait for the commercial fishing of *C. opilio* crab.

Even if the F/V MELANIE made the Pacific cod harvests as claimed, the Pacific cod harvests still cannot be considered documented harvests of LLP groundfish because the fish were not, nor were they intended to be, sold, bartered or traded, but kept exclusively aboard the F/V MELANIE as bait for the commercial fishing of crab.

Appellant does not claim, nor does the evidence on appeal, show that the F/V MELANIE harvested any other groundfish in the Bering Sea during the EQP for the fishery. I find that the F/V MELANIE did not make at least one documented harvest of Bering Sea groundfish during the EQP for the fishery.

Appellant argues that the literal definition of a "documented harvest" does not specifically require a lawful *commercial* harvest of groundfish, for purposes of qualifying an applicant for an LLP groundfish license endorsement.

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[2]*See, e.g., Williard S. Ferris,* Appeal No. 00-0004 (Jan.18, 2002); *Paula J. Brogdon,* Appeal No. 00-0011 (Feb. 26, 2002); *Ronald J. Tennison,* Appeal No. 00-0012 (April 5, 2002); *Darjen, Inc.,* Appeal No. 00-0015 (Dec. 31, 2002); and *Stephen L. Lovejoy,* Appeal No. 02-0023 (Feb. 26, 2003).

[3]Appeal No. 00-0004 at 1-2 (Jan.18, 2002).

Even though the plain language of the definition of a "documented harvest" does not specify the kind of "lawful harvest" that must be recorded to qualify an applicant for an LLP groundfish license endorsement, NMFS, as a governmental agency, has an inherent authority to reasonably interpret its own regulations. Because the primary purpose of the LLP is to regulate the commercial fishing of groundfish (or crab), the term "lawful harvest" can be reasonably interpreted within the definition of a "documented harvest" as a lawful *commercial* harvest. Thus, Appellant's argument that a "documented harvest" does not have to be a lawful *commercial* harvest is not persuasive.

Appellant argues that the harvest of Pacific cod for crab bait constitutes commercial fishing of groundfish because the cod is "bartered" or "traded" when it is used as bait for crab.

Using one's own catch for bait on one's own vessel cannot be reasonably construed as "barter or trade" as envisioned in the Magnuson-Stevens Act.[4] While the terms "sale, barter, or trade" are not defined in the definition of "commercial fishing" in the Magnuson-Stevens Act, their plain meaning is that something is exchanged between two or more distinct parties. The cod in this case never changed hands, and ownership of the cod was never transferred to another party. Therefore, it cannot be said that the cod was intended to be, or actually was, bartered, or traded when it was used exclusively aboard the F/V MELANIE as bait for the commercial fishing of crab. Appellant's argument that the harvest of Pacific cod for crab bait constitutes "commercial fishing" of groundfish is not persuasive.

Appellant also argues that it is currently "financially dependent" on the fishing of Pacific cod in the Bering Sea.

In a number of decisions,[5] this Office has ruled that an Appeals Officer is bound by the language of the LLP regulations, and that the authority to change, modify, or declare unconstitutional a duly promulgated regulation lies within the jurisdiction of the Federal court system. The LLP regulations do not provide for an exception to the requirement of a documented harvest for an LLP groundfish license endorsement. Therefore, I do not have authority to grant relief to Appellant in this case based on its financial dependence in the Bering Sea Pacific cod fishery.

Based on the evidence before me, I conclude that Appellant's LLP groundfish license does not qualify for a Bering Sea groundfish fishery license endorsement based on Pacific cod harvests for crab bait made by the F/V MELANIE in 1994.

2. Does Appellant's LLP crab license qualify for a St. Matthew blue king crab area/species endorsement based on an unavoidable circumstance under the unavoidable circumstance provision in the LLP regulations?

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[4]Magnuson-Stevens Fishery Management and Conservation Act, 16 U.S.C. §1851 *et seq.* *See Paula J. Brogden,* Appeal No. 00-0011 at 5 (Feb. 26, 2002).

[5]*See, e.g., George M. Ramos,* Appeal No. 95-0008, Decision on Review at 4 (April 25, 1995); and *Little Ann, Inc.,* Appeal No. 01-0022 (July 10, 2002).

To qualify for a St. Matthew blue king area/species endorsement on its LLP crab license, the Appellant must establish that the F/V MELANIE made at least one "documented harvest" of St. Matthew blue king crab during the endorsement qualifying period (EQP) for the fishery, between January 1, 1992, and December 31, 1994. The applicable regulation provides in relevant part:

> A crab license species license will be assigned a St. Matthew blue king area/species endorsement if at least one documented harvest of blue king crab was made by a vessel during the period beginning January 1, 1992, through December 31, 1994, in the area described in the definition for a St. Matthew blue king area/species endorsement at § 679.2.[6]

The NMFS official LLP record shows that the F/V MELANIE did not make a documented harvest of St. Matthew blue king crab during the EQP for the fishery (between January 1, 1992, and December 31, 1994). Appellant does not dispute this, but claims that an "unavoidable circumstance" (caused by a mechanical failure to the F/V MELANIE) prevented the vessel from making at least one documented harvest of St. Matthew blue king crab during the September 1994 fishing season.

The LLP regulations provide for an applicant to qualify for an LLP crab area/species endorsement, based on an unavoidable circumstance, as long as the applicant can satisfy all of the criteria in the unavoidable circumstance provision of LLP regulation, 50 C.F.R. §679.4(k)(8)(iv).

One of the criteria for qualifying under the unavoidable circumstance provision is that the applicant's vessel must have made at least one documented harvest of LLP crab in the appropriate species endorsement area *after* the unavoidable circumstance occurred but *before* June 17, 1995. The applicable regulation provides in relevant part:

> (iv) A qualified person ... whose vessel was unable to meet all of the criteria ... for a crab species license because of an unavoidable circumstance ... may receive a license if the qualified person is able to demonstrate that:
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> > (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 groundfish or crab species was harvested after the vessel was prevented from participating by the unavoidable circumstance, but before June 17, 1995.[7]

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[6] 50 C.F.R. § 679.4(k)(5)(ii)(C).

[7] 50 C.F.R. § 679.4(k)(8)(iv)(E).

In several decisions, this Office has consistently held that the requirement of a documented harvest after an unavoidable circumstance, but before June 17, 1995, is an absolute requirement to qualify under the unavoidable circumstance provision.[8]

Neither the NMFS official LLP record, nor the evidence on appeal, show that the F/V MELANIE made a documented harvest of St. Matthew blue king crab after the alleged unavoidable circumstance in September 1994, but before June 17, 1995. I find that the F/V MELANIE did not make a documented harvest of St. Matthew blue king crab after the alleged unavoidable circumstance in September 1994, but before June 17, 1995.

Appellant argues that it can still qualify for a St. Matthew blue king crab area/species endorsement, based on a documented harvest of another kind of LLP crab species made by the F/V MELANIE after the alleged unavoidable circumstance in September 1994, but before June 17, 1995. The plain language and history of the documented harvest requirement after an unavoidable circumstance clearly provide for the harvest to be made in the "specific area" that "corresponds to the ... area/species endorsement for which the ... [applicant] is applying ... ."[9] Therefore, Appellant cannot qualify for a St. Matthew blue king crab area/species endorsement, based on a documented harvest of a different kind of crab species.

Appellant argues that the F/V MELANIE would have made a documented harvest of St. Matthew blue king crab after the alleged unavoidable circumstance in September 1994, but before June 17, 1995, but for the closure of the fishery until September 1995.[10] Even if that is true, the language of the unavoidable circumstance provision does not provide for an exception to the requirement of a documented harvest after an unavoidable circumstance.

The Council could have adopted language that would have granted relief to applicants who would have made a documented harvest of St. Matthew blue king crab but for the closure of the September 1994 fishery, but it did not do so. The requirement of an actual harvest of St.

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[8]*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 (Sep. 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.

[9]63 Fed. Reg. 52,645 (Oct. 1, 1998).

[10]Appellant acknowledges in Appellant's appeal, at 4, that it could have harvested St. Matthew blue king crab when the fishery was open for at least a half day after the alleged unavoidable circumstance in September, 1994, but that it fished another LLP crab species for economic reasons.

Matthew blue king crab after an alleged unavoidable circumstance is consistent with the Council's intent to provide relief to those commercial fishermen who were unable to make the requisite documented harvests of LLP groundfish because of an unavoidable circumstance, but who were able to re-enter an LLP groundfish fishery after the unavoidable circumstance and make at least one documented harvest *before* the adoption of the LLP on June 17, 1995.[11] Appellant's argument that the F/V MELANIE would have made a documented harvest of St. Matthew blue king crab after the alleged unavoidable circumstance, but for the closure of the fishery, is not persuasive.

Appellant argues that it is commercially dependent on the St. Matthew blue king crab fishery. Even if that is true, the LLP regulations do not provide for an LLP crab license to be endorsed for that fishery solely on the basis of commercial or financial hardship. Therefore, as an Appeals Officer, I do not have the authority to grant relief to Appellant based on Appellant's commercial dependence on the St. Matthew blue king crab fishery.

Appellant further argues that the documented harvest requirement of St. Matthew blue king crab after an unavoidable circumstance but before June 17, 1995, arbitrarily discriminates against Appellant in this case (and other similarly situated applicants) because the St. Matthew blue king crab fishery was closed after the alleged unavoidable circumstance (in September 1994) and did not re-open until the following year in September, 1995.

As an Appeals Officer, I do not have authority to challenge the validity of a duly promulgated regulation, even if it could be shown that the documented harvest requirement after an unavoidable circumstance arbitrarily discriminates against Appellant in this case. We have also held in another decision that this argument is not an adequate ground for granting relief.[12] Therefore, Appellant's argument is not persuasive.

Appellant argues that the language of the documented harvest requirement after an unavoidable circumstance can be interpreted as a "non-mandatory" factor.

The language of the LLP regulations lists five criteria under the unavoidable circumstances provision. One of the criteria provides for an applicant to demonstrate that it made a documented harvest after an unavoidable circumstance. The express language of the unavoidable circumstances provision does not make any of the five criteria discretionary. The history of the LLP regulations clearly provides that the Council and NMFS intended that all five criteria be "met to the satisfaction of NMFS" to qualify an applicant for an LLP license, based on an unavoidable circumstance.[13] Therefore, Appellant's argument that the harvest requirement after an unavoidable circumstance can be interpreted as a "non-mandatory" factor is not

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[11] *See* the minutes of the Council's meetings on June 15 and 16 of 1995.

[12] *Kona Kai, Inc.,* Appeal No. 04-003 (Jan. 7, 2005).

[13] 63 Fed. Reg. 52,647 (Oct. 1, 1998).

persuasive.[14]

Appellant argues that the doctrine of equitable tolling requires that the June 17, 1995, deadline for the documented harvest requirement after an unavoidable circumstance be tolled in this case.

The doctrine of equitable tolling has been applied by this Office in appeals that relate to the untimely filing of an application under the Individual Fishing Quota Program[15] and the LLP.[16] Under the doctrine of equitable tolling, NMFS may toll, or suspend, an application deadline if the applicant can establish that (1) the applicant did not timely file an application because of an extraordinary circumstance beyond the applicant's control; (2) the applicant diligently submitted an application after the end of the extraordinary circumstance that prevented the filing within the application period; and (3) the processing of the application will not harm the implementation of the program. Appellant's LLP application was timely filed by the LLP application deadline. Therefore, the doctrine of equitable tolling does not apply in this case.[17]

Based on the evidence before me, I conclude that Appellant's LLP groundfish license does not qualify for a St. Matthew blue king crab area/species endorsement under the unavoidable circumstance provision in the LLP regulations.

FINDINGS OF FACT

1. The alleged Pacific cod harvests made by the F/V MELANIE in 1994 were not, nor were they intended to be, sold, bartered or traded, but were used exclusively aboard the vessel as bait for the commercial fishing of crab.

2. The F/V MELANIE did not harvest any other groundfish in the Bering Sea during the EQP for the fishery.

3. The F/V MELANIE did not make at least one documented harvest of Bering Sea groundfish during the EQP for the fishery.

4. The F/V MELANIE did not make a documented harvest of St. Matthew blue king crab after the alleged unavoidable circumstance in September 1994, but before June 17, 1995.

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[14]*See, e.g, Kona Kai, Inc.,* Appeal No. 04-003 (Jan. 7, 2005).

[15]*See, e.g., John T. Coyne,* Appeal No. 94-0012 (May 24, 1996); *Estate of Marvin C. Kinberg,* Appeal No. 95-0035 (Aug. 1, 1997); *Christopher O. Moore,* Appeal No. 95-0044 (Sep. 5, 1997); *Estate of Nghia Nguyen,* Appeal No. 98-0004 (Sep. 27, 2001).

[16]*Application of John B. Lee III,* Appeal No. 00-0003 (Dec. 5, 2002); and *Chris R. Opheim, Sr.,* Appeal No. 00-0006 (Dec. 27, 2002).

[17]For additional discussion, *see, e,g, Kona Kai, Inc.,* Appeal No. 04-003 at 10 (Jan. 7, 2005).

CONCLUSIONS OF LAW

1. Appellant does not qualify for a Bering Sea area endorsement on its LLP groundfish license based on Pacific cod harvests for crab bait made by the F/V MELANIE in 1994.

2. Appellant does not qualify for a St. Matthew blue king crab area/species endorsement on its LLP crab license under the unavoidable circumstance provision in the LLP regulations.

DISPOSITION

The IADs that are the subjects of this appeal are AFFIRMED. This Decision takes effect on June 27, 2005, unless by that date the Regional Administrator orders review of the Decision. Any party, and 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 on June 6, 2005. 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.

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Randall J. Moen
Appeals Officer