

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 02-0039
	)	
HIGH SPIRIT, Inc.,	)	DECISION
Appellant	)	
	)	November 20, 2003
_____	)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that denied Appellant’s applications for a crab license and groundfish license under the North Pacific Groundfish and Crab License Limitation Program (LLP), based on the fishing history of the F/V HIGH SPIRIT. The IAD also denied Appellant’s application for an LLP crab license, based on the combined fishing history of the F/V CLOVERLEAF and the F/V HIGH SPIRIT. The IAD approved the issuance of an LLP crab license to Appellant, based solely on the qualifying fishing history of the F/V CLOVERLEAF.

On appeal, Appellant claims that it qualifies for an LLP crab license, based on the fishing history of the F/V HIGH SPIRIT. Appellant does not claim that it qualifies for an LLP crab license, based on the combined fishing history of the F/V HIGH SPIRIT and the F/V CLOVERLEAF.<sup>1</sup>

Appellant filed a timely appeal of the IAD. Appellant can file an appeal because the IAD directly and adversely affects its interests.<sup>2</sup> An oral hearing is not necessary because the record contains sufficient information on which to reach a final decision.<sup>3</sup>

ISSUE

Does Appellant qualify for an LLP crab license, based on the fishing history of the F/V HIGH SPIRIT?

ANALYSIS

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<sup>1</sup>The LLP regulations do not allow for an applicant to qualify for an LLP crab license, based on the combined fishing history of two vessels; especially when the fishing history of one of the vessels has already qualified the applicant for an LLP license. Therefore, Appellant cannot combine the fishing histories of the F/V CLOVERLEAF and the F/V HIGH SPIRIT to qualify Appellant for an additional LLP crab license. In 63 Fed. Reg. 52646, it states: “... only one license will be issued based on the fishing history of any qualified vessel. For instance, a vessel’s fishing history cannot be divided so that multiple licenses would be issued.”

<sup>2</sup>50 C.F.R § 679.43(b).

<sup>3</sup>50 C.F.R. § 679.42(m)(4).

To qualify for an LLP crab license, an applicant must establish that the applicant's qualifying vessel made at least one "documented harvest"<sup>4</sup> of LLP crab in the Bering Sea and Aleutian Islands (BSAI) during the general qualifying period (GQP) between January 1, 1988, and June 27, 1992;<sup>5</sup> or at least one documented harvest of LLP crab in the BSAI or Gulf of Alaska (GOA) during the GQP between January 1, 1988, and December 31, 1994, and at least one documented harvest of LLP groundfish in the BSAI or GOA (except sablefish with fixed gear) during the GQP between January 1, 1988, and February 9, 1992, and one documented harvest of LLP crab in the BSAI during the GQP between February 10, 1992, and December 11, 1994.<sup>6</sup> The applicant must also establish that the applicant's qualifying vessel made the requisite number of documented harvests of LLP crab in the applicable area in the BSAI during the applicable endorsement qualifying period (EQP) between the years of January 1, 1991, and December 31, 1994.<sup>7</sup>

The official LLP record of the National Marine Fisheries Service (NMFS) shows that the F/V HIGH SPIRIT satisfies the EQP requirement,<sup>8</sup> but not any of the GQP documented harvest requirements, for an LLP crab license.

Appellant claims that the F/V HIGH SPIRIT would have satisfied the GQP documented harvest requirement for an LLP crab license, but for unforeseen and unavoidable construction delays that prevented the vessel from harvesting *C. opilio* and *C. bairdi* crab in the BSAI between October 1991 and April 1992. The evidence on appeal<sup>9</sup> shows that the vessel could not have made any LLP crab harvests during that time because the vessel was not built and made ready for fishing until April 1992.

LLP regulation 50 C.F.R § 679.4(k)(8)(iv) provides for an applicant to qualify for an LLP crab license, based on an "unavoidable circumstance." To qualify for an LLP crab license, based on an unavoidable circumstance, the applicant's qualifying vessel must have made at least one documented harvest of LLP crab between *January 1, 1998, and February 9, 1992.*

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<sup>4</sup>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." [50 C.F.R § 679.2]

<sup>5</sup>50 C.F.R. § 679.4(k)(5)(i)(A).

<sup>6</sup>50 C.F.R. § 679.4(k)(5)(i)(B).

<sup>7</sup>See 50 C.F.R. § 679.4(k)(5)(ii) for the applicable EQP requirements.

<sup>8</sup>The NMFS official LLP record shows that the F/V HIGH SPIRIT made the requisite documented harvests of LLP crab during the EQP for *C. opilio* and *C. bairdi* crab, Bering Sea red king crab, and Pribilof red and blue king crab.

<sup>9</sup>Appellant's letter of appeal, October 11, 2002; and the undated letter to "Whom It May Concern" from LaForce, Shipyard, Bayou LaBatre, Alabama.

LLP regulation 50 C.F.R § 679.4(k)(8)(iv) states in relevant part:<sup>10</sup>

(iv) A qualified person who owned a vessel on June 17, 1995, **that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992**, but whose vessel was unable to meet all the criteria ... for a crab species 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 [an unavoidable circumstance] (emphasis supplied) ...

The requirement of a documented harvest between January 1, 1988, and February 9, 1992, is consistent with the plain language and regulatory history<sup>11</sup> of unavoidable circumstances provision, and the intent of the North Pacific Fishery Management Council (Council) to limit access to the LLP crab fisheries, based on *past participation* in the crab fisheries before the adoption of the LLP by June 17, 1995.<sup>12</sup>

Because the F/V HIGH SPIRIT was not built and made ready for fishing until April 1992, the vessel could not have made a documented harvest of LLP crab between January 1, 1988, and February 2, 1992. Therefore, Appellant cannot qualify for an LLP crab license, based on an “unavoidable circumstance,” even if the claimed construction delays prevented to the F/V HIGH SPIRIT from making at least one documented harvest of LLP crab.

Appellant claims that it is financially dependent on the LLP crab fisheries. Appellant writes:<sup>13</sup>

“Fishing has been my only occupation since I graduated from high school in 1972. In 1973, I came to Alaska and my whole fishing career has been here. The culmination of that career is owning the High Spirit and the income it generates, is all I have. If I lose the right to fish all of the crab fisheries I have always fished for, I will be forced into bankruptcy and lost all that I have worked for these past 31 years.”

In addition, Appellant claims that if it is not granted an LLP crab, it will not be able to pay for Appellant’s daughter’s ovarian cancer operation.<sup>14</sup>

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<sup>10</sup>See 50 C.F.R. § 679.4(k)(8)(iv) for all of the requirements of the “unavoidable circumstances” provision.

<sup>11</sup>63 Fed. Reg. 52,646 (October 1, 1998).

<sup>12</sup>63 Fed. Reg. 52,643 (October 1, 1998).

<sup>13</sup>Appellant’s letter of appeal, at 2.

<sup>14</sup>Id.

In several decisions,<sup>15</sup> 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 language of the LLP regulations does not provide for an exception to the documented harvest requirements for an LLP groundfish or crab license, other than the unavoidable circumstances provision. Therefore, as a matter of law, I do not have the authority to grant relief to Appellant in this case, based on financial or personal hardship.

The Council and NMFS forewarned the owners and operators of commercial fishing vessels on September 5, 1990, before the adoption of the LLP,<sup>16</sup> that the entry of new vessels in the BSAI king and Tanner crab commercial fisheries of crab was at risk and that “due consideration” would only be given to those vessels that had commercially fished BSAI crab by February, 9, 1992.<sup>17</sup> Therefore, Appellant’s claim that the LLP regulations were instituted after the F/V HIGH SPIRIT was built is not persuasive.

In light of all of the above, I conclude that Appellant does not qualify for an LLP crab license, based on the fishing history of the F/V HIGH SPIRIT.

#### FINDINGS OF FACT

1. The F/V HIGH SPIRIT was not built and made ready for commercial fishing until April 1992.
2. The F/V HIGH SPIRIT did not make a documented harvest of LLP crab or LLP groundfish between January 1, 1988, and June 27, 1992.

#### CONCLUSIONS OF LAW

1. The “unavoidable circumstances” exception to the documented harvest requirements for an LLP crab license cannot apply in this case because the F/V HIGH SPIRIT did not make at least one documented harvest of LLP crab between January 1, 1988, and February 9, 1992.
2. As an Appeals Officer, I do not have authority to grant relief to an Appellant, based on an extenuating circumstance or financial hardship.
3. Appellant does not qualify for an LLP crab license, based on the fishing history of the F/V HIGH SPIRIT.

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<sup>15</sup>See, e.g., George M. Ramos, Decision on Review, April 25, 1995; Little Ann, Inc., Appeal No. 01-0022, July 10, 2002.

<sup>16</sup>The LLP regulations that pertain to this Decision were adopted on October 1, 1998, and took effect on January 1, 2000. See 63 Fed. Reg. 52,642 - 52,657 (October 1, 1998).

<sup>17</sup>55 Fed. Reg. 36,302 (September 5, 1990); and 60 Fed. Reg. 25,677 (May 12, 1995).

## DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on December 22, 2003, 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, December 1, 2003. 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 of points and authorities in support of the motion.

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Randall J. Moen  
Appeals Officer