

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 03-0019  
)  
HENRY KROLL, ) DECISION  
Appellant )  
) June 10, 2004  
\_\_\_\_\_)

STATEMENT OF THE CASE

The Appellant, Henry Kroll, filed a timely appeal of an Initial Administrative Determination (IAD) issued on July 18, 2003, by the Restricted Access Management (RAM) Program. The IAD denied the Appellant's application for a Subsistence Halibut Registration Certificate (SHARC). Mr. Kroll can appeal the IAD because it directly and adversely affects his interest, as required by 50 C.F.R. § 679.43(b). Mr. Kroll did not request a hearing, and a hearing was not held because the record contains sufficient information and evidence to render a decision without a hearing.

ISSUE

Whether Henry Kroll is eligible for a Subsistence Halibut Registration Certificate as a resident of a rural community under 50 C.F.R. § 300.65(f)(1).

ANALYSIS

NMFS regulations governing the subsistence harvesting of Pacific halibut in waters in and off Alaska took effect on May 15, 2003.<sup>1</sup> Under these regulations, no person may engage in subsistence fishing for halibut unless the person qualifies for such fishing pursuant to 50 C.F.R. § 300.65(f) and holds a Subsistence Halibut Registration Certificate issued by NMFS under 50 C.F.R. § 300.65(h). A person may qualify for subsistence halibut fishing either as a resident of a rural community that is listed in the regulations or as a member of an Alaska Native tribe listed in the regulations.

Mr. Kroll applied for a SHARC on the basis of claimed residency in a rural community, and does not claim membership in an Alaska Native tribe. In his SHARC application, Mr. Kroll identified his "community of residence" as "the remote north shore of Tuxedni Bay." In a letter submitted to RAM on July 17, 2003, Mr. Kroll stated: "There are no roads, phone lines or electric lines, mail service, sewer, water or any other public services in this remote area. The only way to get to this area is by boat or plane." He attached a map showing the location of his residence.

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<sup>1</sup>Pacific Halibut Fisheries; Subsistence Fishing, 68 Fed. Reg. 18,145-18,166 (April 15, 2003) (to be codified at 50 C.F.R. pt. 300, 600 and 679).

RAM does not dispute Mr. Kroll's claim that he resides on the north shore of Tuxedni Bay. In the IAD, RAM determined that Mr. Kroll did not claim to be a resident of a community that is listed in 50 C.F.R. § 300.65(f)(1). RAM further noted correctly that under the subsistence halibut regulations the waters of Tuxedni Bay are within the Anchorage-Matsu-Kenai non-subsistence marine waters area in Commission regulatory area 3A.<sup>2</sup> These waters are closed to subsistence halibut fishing, even for persons who do hold a Subsistence Halibut Registration Certificate.

On appeal, Mr. Kroll submitted, among numerous other documents, a letter dated October 15, 2003, from Ms. Mary McBurney, the subsistence program manager for the Lake Clark National Park. The letter states that, because Mr. Kroll maintains his permanent primary residence within the boundaries of Lake Clark National Park, he is qualified to engage in subsistence activities within the park. The letter also states that Tuxedni Bay is designated as a rural area by the Federal Subsistence Board under 36 C.F.R. § 242.3(21) and that, therefore, Mr. Kroll is considered a rural resident for the purposes of the Federal subsistence program.

Although a portion of Tuxedni Bay lies within the boundaries of Lake Clark National Park,<sup>3</sup> NMFS regulations prohibit subsistence halibut fishing in all of Tuxedni Bay. While Mr. Kroll may be authorized under Federal Subsistence Board regulations and National Park Service regulations to engage in subsistence fishing within the boundaries of the park, under NMFS regulations, no one is authorized to engage in subsistence halibut fishing in Tuxedni Bay.

Whether there is a conflict between the jurisdictions and regulations of NMFS and of the Federal Subsistence Board or the National Park Service is a question I need not resolve here. For the purposes of this appeal, it is sufficient to find that Tuxedni Bay is not a rural community listed under 50 C.F.R. § 300.65(f)(1) and to conclude, therefore, that Mr. Kroll is ineligible for a SHARC from NMFS.

I note, however, that a letter to Mr. Kroll from Mr. Chris Oliver, Executive Director of the North Pacific Fishery Management Council, dated April 23, 2004, states that the Alaska Board of Fisheries will accept for consideration a petition by Mr. Kroll to add Tuxedni Bay to the list of rural communities eligible for subsistence halibut fishing. If such a proposal were approved by the Board and adopted by the Council, it appears that Mr. Kroll would then be able to qualify for a SHARC from NMFS. Mr. Oliver's letter states that such a proposal could be submitted to the Board until the end of October 2004, and that he should contact Ms. Diana Cote, the Executive Director of the Board at 465-6095 for further information. Although the issuance of a SHARC would not authorize Mr. Kroll to engage in subsistence halibut fishing in the waters of Tuxedni Bay, it would allow him to subsistence halibut fish in other parts of regulatory area 3A that are

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<sup>2</sup>50 C.F.R. § 300.65(g)(iii) (2004).

<sup>3</sup>Exhibit A: Map of Lake Clark National Park, *available at* <http://data2.itc.nps.gov/parks/lac1/ppMaps/LACLmap1%2Epdf>

open to subsistence halibut fishing.

#### FINDING OF FACT

Tuxedni Bay is not a rural community listed under 50 C.F.R. § 300.65(f)(1).

#### CONCLUSION OF LAW

Henry Kroll is ineligible for a Subsistence Halibut Registration Certificate as a resident of a rural community under 50 C.F.R. § 300.65(f)(1).

#### DISPOSITION

The IAD that is the subject of this Decision is **AFFIRMED**. This Decision takes effect July 12, 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, June 21, 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, or points and authorities, in support of the motion.

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Edward H. Hein  
Chief Appeals Officer