

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

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| In re Application of |) | Appeal No. 06-0011 |
| |) | |
| ESTATE OF MICHAEL L. TOLVA, |) | DECISION |
| Appellant |) | |
| |) | June 20, 2007 |
| _____ |) | |

STATEMENT OF THE CASE

Mrs. Mimi J. Tolva, the widow of Michael L. Tolva and the representative of his estate, filed a timely appeal of an Initial Administrative Determination (IAD) issued on May 1, 2006, by the Restricted Access Management (RAM) program in the Alaska Region of the National Marine Fisheries Service (NMFS). The IAD denied the Estate's application for catcher vessel crew Quota Share (QS) in the Bristol Bay red king crab, Bering Sea Snow crab, Bering Sea Tanner crab, and Pribilof Island red and blue king crab fisheries under the Bering Sea/Aleutian Islands (BSAI) Crab Rationalization Program (CRP), based on Mr. Tolva's fishing history. RAM determined that Mr. Tolva did not meet the recent participation requirement of the CRP regulations, and did not qualify for an exemption from recent participation, and, therefore, his estate does not qualify for QS under this program.

The Estate may bring an appeal because its interest in obtaining crab QS is directly and adversely affected by the IAD, as required by regulation.¹ The Appellant did not request an oral hearing, and a hearing was not ordered because there are no material factual issues in dispute in this case.² The Appellant is represented in this case by Attorney Duncan R. McIntosh of the Seattle law firm Mundt MacGregor LLP.

ISSUE

Does the Appellant qualify for catcher vessel crew QS in the Bristol Bay red king crab, Bering Sea Snow crab, Bering Sea Tanner crab, and Pribilof Island red and blue king crab fisheries?

¹50 C.F.R. § 679.43(b).

²50 C.F.R. § 679.43(g)(3) provides, in part, that the Appellate Officer may "[o]rder that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:

(i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law."

ANALYSIS

According to the IAD, Mr. Tolva did not qualify for catcher vessel crew QS in the Bristol Bay red king crab, Bering Sea Snow crab, Bering Sea Tanner crab, and Pribilof Island red and blue king crab fisheries because he did not satisfy the recent participation requirement specified in the CRP regulations, or the exemption from that requirement.³ It is undisputed that Mr. Tolva did not meet the recent participation requirement because he did not make the required crab landings in two of the last three crab seasons prior to June 10, 2002.⁴ That was because, unfortunately, Mr. Tolva died of cancer on June 3, 2000.⁵

Mrs. Tolva does dispute, however, RAM's determination that her husband did not qualify for the exemption. Under 50 C.F.R. § 680.40(b)(3)(iii)(C)(2), the recent participation requirement does not apply if "the individual who is otherwise eligible to receive an initial issuance of QS died while working as part of a harvesting crew in any U.S. commercial fishery." Mrs. Tolva argues that her husband died while working as part of a harvesting crew in the Alaska halibut fishery because he was actively involved with the harvesting crew of the F/V WILD CAT in preparing the vessel for halibut fishing at the time of his death.⁶ She argues that "[p]reparing the vessel is part and parcel of the work of a harvesting crew."⁷

It is not clear in the record exactly what work Mr. Tolva was doing shortly before he died. The appeal filing states that the crew of the F/V WILD CAT "were getting ready to fish, preparing the vessel and negotiating sales contracts."⁸ It states that Mr. Tolva had entered into a contract with Coal Point Processors for the sale of halibut that he anticipated the vessel would be delivering soon.⁹ Three of the four affidavits in the record, from Mr. Tolva's friends and co-workers, said that he was "actively preparing the vessel" at Homer, Alaska, in May 2000 "for immediate departure for participation in the halibut longline fishery."¹⁰ An affidavit from Mr. Tolva's father stated that the vessel would have been ready for departure in "perhaps two to four

³ 50 C.F.R. § 680.40(b)(3)(iii)(C).

⁴ Column D of Table 7 to Part 680.

⁵ Certificate of Death of Michael L. Tolva (June 14, 2000). [Exhibit A]

⁶Tolva Appeal at 2 (Oct. 13, 2006).

⁷ *Id.*

⁸ *Id.* at 4.

⁹ *Id.* at 5.

¹⁰ Declaration of Ian Pitzman (Apr. 20, 2006); Declaration of Timothy Carr (May 10, 2006); Declaration of Raymond Bellamy (May 2, 2006).

days”.¹¹ Mr. Ian Pitzman declared that “[a]s I understand it, Mike’s intention was to take the vessel out in around a week or two; just as soon as the vessel was ready.”¹²

We will assume for the sake of this analysis that, in the days just before and up until he died, Mr. Tolva was in Homer helping to prepare the vessel for a halibut fishing trip.¹³ The question is whether he was “working as part of a harvesting crew” at the time he died, for purposes of qualifying for the exemption from the recent participation requirement under 50 C.F.R. § 680.40(b)(3)(iii)(C)(2).

The term “harvesting crew” and the phrase “working as part of a harvesting crew” are not explicitly defined in the crab rationalization program regulations. The only place in NMFS regulations where the term and phrase are defined is within the definition of “IFQ crew member,” a term unique to the IFQ program for Pacific halibut and sablefish.¹⁴

IFQ crew member means any individual who has at least 150 days experience working as part of the harvesting crew in any U.S. commercial fishery, or any individual who receives an initial allocation of QS. **For purposes of this definition,** “harvesting” means work that is directly related to the catching and retaining of fish. Work in support of harvesting, but not directly involved with harvesting, is not considered harvesting crew work. For example, searching for fish, work on a fishing vessel only as an engineer or cook, or work preparing a vessel for a fishing trip would not be considered work of a harvesting crew. [emphasis supplied]¹⁵

In the IAD, RAM stated that the phrase “working as part of the harvesting crew in any U.S. commercial fishery” has the identical meaning in both the halibut and sablefish IFQ program and the crab rationalization program.¹⁶

Although we acknowledge that the “IFQ Crewmember” standard was designed for a different IFQ program, we are not free to simply ignore this regulatory definition of the identically worded phrase, particularly as it directly addresses the nature of the work that comprises activities that qualify one to be considered “as

¹¹Declaration of Clarence Tolva (May 5, 2006).

¹² Declaration of Ian Pitzman (Apr. 20, 2006).

¹³ The death certificate shows that Mr. Tolva died at Providence Alaska Medical Center in Anchorage, Alaska. [Exhibit A]

¹⁴ 50 C.F.R. §§ 679.40 - 679.45.

¹⁵ 50 C.F.R. § 679.2.

¹⁶ IAD at 3 - 4.

part of the harvesting crew in any U.S. fishery.”¹⁷

RAM determined that Mr. Tolva was not working as part of a harvesting crew because the definition of IFQ crew member specifically stated that “‘harvesting’ means work that is directly related to the catching and retaining of fish” and that “work preparing a vessel for a fishing trip would not be considered work of a harvesting crew.”¹⁸ The meanings given in the IFQ crew member definition for “harvesting” and “work of a harvesting crew” are expressly limited to the definition of IFQ crew member. Therefore, we conclude that those definitions, while they may be instructive, are not controlling for purposes of the CRP and, in particular, 50 C.F.R. § 680.40(b)(3)(iii)(C)(2).

Although some of a vessel’s crew members might not be part of the harvesting crew, all who are members of the harvesting crew are necessarily members of the vessel’s crew. The CRP regulations define the word “crew” to mean “[a]ny individual, other than the fisheries observers, working on a vessel that is engaged in fishing.”¹⁹ Thus, to be working as part of a harvesting crew, a person must be working on a vessel that is engaged in fishing.

The Magnuson-Stevens Fishery and Conservation Management Act (MSA),²⁰ whose definitions apply to the CRP, defines “fishing” as follows:

- (15) The term “fishing” means --
 - (A) the catching, taking, or harvesting of fish;
 - (B) the attempted catching, taking, or harvesting of fish;
 - (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or
 - (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).
- Such term does not include any scientific research activity which is conducted by a scientific research vessel.²¹

Preparing a vessel for a fishing trip, as we assume Mr. Tolva was doing when he died, does not fit any of the meanings in the MSA definition of “fishing.” Preparing a vessel for a fishing trip does not meet paragraphs (A), (B), or (C) because it is not the actual or attempted catching,

¹⁷ IAD at 4.

¹⁸ *Id.*

¹⁹ 50 C.F.R. § 680.2, paragraph (1) of the definition of “crew”. Paragraph (2) pertains to the Economic Data Report and is not relevant here.

²⁰ 16 U.S.C. §§ 1801- 1884.

²¹ 16 U.S.C. § 1802 (15).

taking, or harvesting of fish, nor is it an activity that, in itself, can reasonably be expected to result in the catching, taking, or harvesting of fish, even though preparing the vessel is one of the many steps that must be taken prior to engaging in fishing. Under paragraph (D), which specifically includes support or preparation, Mr. Tolva's activities preparing the vessel for a fishing trip do not constitute "fishing" because they were not "operations at sea." Additionally, allowing on-shore or dockside preparations of a vessel to qualify as "fishing" under paragraph (C) would undermine or negate the restriction of paragraph (D), which limits preparations to "operations at sea."

The inescapable conclusion is that when a vessel is being prepared on shore or in port for a fishing trip, such a vessel is not then engaged in fishing, as defined in the MSA. Consequently, work done to prepare a vessel for a fishing trip is not work on a vessel that is engaged in fishing, and an individual doing such work does not meet the definition of "crew" under the CRP.

Since, for purposes of determining eligibility for the recent participation exemption, Mr. Tolva's work was not crew work, neither can it be considered work of a harvesting crew. Therefore, we conclude that Mr. Tolva did not die "while working as part of a harvesting crew" and that he does not meet the eligibility requirements for the recent participation exemption under 50 C.F.R. § 680.40(b)(3)(iii)(C)(2). We conclude, therefore, that the Appellant does not qualify for catcher vessel crew QS in the Bristol Bay red king crab, Bering Sea Snow crab, Bering Sea Tanner crab, and Pribilof Island red and blue king crab fisheries.

CONCLUSIONS OF LAW

1. The definitions of "harvesting" and "work of a harvesting crew" within the definition of "IFQ crew member" at 50 C.F.R. § 679.2 are expressly limited to "IFQ crew member," a term unique to the Pacific halibut and sablefish IFQ program, and are not controlling for purposes of the crab rationalization program and, in particular, 50 C.F.R. § 680.40(b)(3)(iii)(C)(2).
2. To be working as part of a harvesting crew, a person must be working on a vessel that is engaged in fishing.
3. Mr. Tolva's activities preparing the vessel for a fishing trip do not constitute "fishing" under the Magnuson-Stevens Act because they were not "operations at sea."
4. Work done to prepare a vessel for a fishing trip is not work on a vessel that is engaged in fishing, and an individual doing such work does not meet the definition of "crew" under the CRP.
5. Mr. Tolva's work was not crew work and, therefore, it cannot be considered work of a harvesting crew.
6. Mr. Tolva did not die "while working as part of a harvesting crew" and, therefore, he does not meet the eligibility requirements for the recent participation exemption under 50 C.F.R.

§ 680.40(b)(3)(iii)(C)(2).

7. The Appellant does not qualify for catcher vessel crew QS in the Bristol Bay red king crab, Bering Sea Snow crab, Bering Sea Tanner crab and Pribilof Island red and blue king crab fisheries.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on July 20, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

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 July 2, 2007, the tenth day after this Decision. 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 Administrative Judges, and must be accompanied by a written statement in support of the motion.

Randall J. Moen
Administrative Judge

Edward H. Hein
Chief Administrative Judge