

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	
)	Appeal No. 00-0011
PAULA J. BROGDON,)	
F/V ISLE ROYAL)	DECISION
ADF&G # 22007,)	
Appellant)	February 26, 2002
_____)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that approved Paula Brogdon's application, under the North Pacific Groundfish and Crab License Limitation Program (LLP), for a groundfish license with endorsements for the Aleutian Islands and the Western Gulf of Alaska areas. The IAD also approved Ms. Brogdon's application for an LLP crab license with an endorsement for Bristol Bay red king crab. These licenses and endorsements were based on the qualifying fishing history of Ms. Brogdon's vessel, the F/V ISLE ROYAL.

The IAD denied Ms. Brogdon's applications for the following endorsements: LLP groundfish for the Bering Sea and Central Gulf of Alaska; and LLP crab for the Aleutian Islands brown king, Aleutian Islands red king, Pribilof Islands red and blue king, and Bering Sea/Aleutian Islands *C opilio* and *C. bairdi* fisheries.

Ms. Brogdon has filed a timely appeal of the IAD. Ms. Brogdon can file an appeal because the IAD directly and adversely affects her interests. [50 C.F.R. § 679.43(b)] Ms. Brogdon requested an oral hearing "if necessary," but a hearing is not necessary in this case because the facts asserted, even if true, do not justify granting relief. [50 C.F.R. §679.43(g)(3)]

ISSUES

1. Does Ms. Brogdon qualify for certain additional LLP groundfish license endorsements and LLP crab license endorsements based on her claim of "unavoidable circumstances"?
2. Does Ms. Brogdon qualify for an LLP groundfish license endorsement for the Central Gulf of Alaska based on certain claimed Pacific cod harvests made aboard the F/V ISLE ROYAL?

SUMMARY

The IAD is affirmed. Ms. Brogdon's claim of unavoidable circumstances fails because the alleged circumstances occurred after June 17, 1995 and, therefore, could not have been the cause of the

vessel's failure to make the documented harvests needed to qualify for the endorsements sought. In addition, Ms. Brogdon presented no evidence that her vessel made at least one documented harvest after any unavoidable circumstances occurred but before June 17, 1995, in any of the endorsements areas, as required by the unavoidable circumstance exception. Therefore, Ms. Brogdon does not qualify for any LLP groundfish or crab license endorsements based on her claim of unavoidable circumstances.

The alleged harvests of Pacific cod, which were used as crab bait on Ms. Brogdon's vessel, did not result from commercial fishing as defined in the Magnuson-Stevens Fishery Conservation and Management Act. The alleged harvests, therefore, did not constitute documented harvests of LLP groundfish and do not qualify Ms. Brogdon for an LLP groundfish license endorsement for the Central Gulf of Alaska or any other area.

ANALYSIS

1. Does Ms. Brogdon qualify for certain additional LLP groundfish license endorsements and LLP crab license endorsements based on her claim of “unavoidable circumstances”?

To qualify for endorsements to LLP groundfish or crab licenses, an applicant must establish that their vessel's fishing history includes the minimum number of documented harvests for each endorsement area and endorsement qualification period specified in 50 C.F.R. §679.4(k)(4)(ii) or (5)(ii). The official LLP record shows that Ms. Brogdon's vessel, the F/V ISLE ROYAL, did not make the requisite documented harvests for any of the endorsements she seeks in this appeal. [IAD, at 4-5, 14]

Ms. Brogdon claims that her vessel made Tanner crab deliveries during “the qualification period.” [Appeal at 1] She does not identify which species of Tanner crab was delivered. She states that the crab was harvested “around Kodiak Island.” [Brogdon letter to RAM, March 26, 2000] This would place the alleged crab harvests in the Central Gulf of Alaska area. That being the case, her claim must fail because only harvests of certain species of Tanner crab in the Bering Sea and Aleutian Islands area would qualify her for an endorsement. Also, Ms. Brogdon has not provided any evidence of documented harvests to support her Tanner crab claim. Therefore, I find that the F/V ISLE ROYAL made no documented harvests of Tanner crab in the Bering Sea and Aleutian Islands area during the endorsement qualifying period for that area. Therefore, Ms. Brogdon's Tanner crab claim does not qualify her for a crab license endorsement for the Bering Sea and Aleutian Islands area. However, Ms. Brogdon does not need a BS/AI endorsement to continue harvesting Tanner crab in the Gulf of Alaska.

Ms. Brogdon also claims in her appeal that her vessel made documented harvests of cod in the Central Gulf of Alaska, which she used as crab bait on the same vessel. [Appeal at 1] She has provided no evidence to document those harvests. The question of whether such harvests, if properly documented, could qualify her for a Central Gulf of Alaska groundfish endorsement is addressed in the discussion of the second issue in this decision.

An applicant whose vessel did not make the requisite number of documented harvests during the endorsement qualification period may still qualify for LLP endorsements by establishing that the vessel was unable to make those harvests because of an “unavoidable circumstance.” [50 C.F.R. §679.4(k)(8)(iv)] Ms. Brogdon makes the unavoidable circumstance claim with regard to all of the endorsements she is seeking. [Appeal at 1]

One of the requirements for qualifying under the unavoidable circumstance exception is that the vessel must have made at least one documented harvest of LLP groundfish, or appropriate crab species, in the appropriate endorsement area *after* the unavoidable circumstance occurred but *before* June 17, 1995. [50 C.F.R. §679.4(k)(8)(iv)(E)] Because of this requirement, the unavoidable circumstance exception is useless for groundfish endorsements that require only one documented harvest. Therefore, in Ms. Brogdon’s case, the unavoidable circumstance exception does not apply to her application for a Bering Sea area groundfish endorsement.¹

As to the remaining endorsements that Ms. Brogdon seeks, the unavoidable circumstance claim must fail. The primary requirement of the exception is that the vessel must have been unable to meet all the criteria for an endorsement *because* of an unavoidable circumstance. Ms. Brogdon states that when she “began purchasing the F/V ISLE ROYAL” in late 1995 it needed repairs and was not seaworthy. She said that she subsequently discovered there were liens on the vessel, which put a cloud on her title and prevented her from documenting the vessel and obtaining a loan to repair the vessel. She said these were circumstances beyond her control that kept her from “having any fishing record since 1995.” [Appeal at 1; Appellant’s letter to RAM, December 26, 1999]

Apart from the question of whether these circumstances were unavoidable, or whether they meet the requirements of the regulation so as to constitute an “unavoidable circumstance,” it is clear that they occurred *after* June 17, 1995. Ms. Brogdon has not asserted any unavoidable circumstances that occurred during the endorsement qualification period for any of the endorsement areas. Therefore, the circumstances cited by Ms. Brogdon could not have been the cause of the vessel’s failure to make the documented harvests needed to qualify for the endorsements that she seeks. Furthermore, Ms. Brogdon presented no evidence that her vessel made at least one documented harvest after any unavoidable circumstances occurred but before June 17, 1995, in any of the endorsements areas, as required by the unavoidable circumstance exception. Thus, I conclude that Ms. Brogdon does not qualify for any LLP groundfish or crab license endorsements based on her claim of unavoidable circumstances.

¹A Bering Sea area groundfish endorsement requires at least one documented harvest of any amount of LLP groundfish between January 1, 1992 and June 17, 1995. [50 C.F.R. §679.4(k)(4)(ii)(B)]

2. Does Ms. Brogdon qualify for an LLP groundfish license endorsement for the Central Gulf of Alaska based on certain claimed Pacific cod harvests made aboard the F/V ISLE ROYAL?

To qualify for an LLP groundfish license endorsement for the Central Gulf of Alaska area, Ms. Brogdon must prove that the F/V ISLE ROYAL made either (1) one documented harvest of LLP groundfish in two separate calendar years during the period January 1, 1992 through June 17, 1995; or (2) four documented harvests of LLP groundfish during the period January 1, 1995 through June 17, 1995.² [50 C.F.R. §679.4(k)(4)(ii)(I) and (J)]

As this Office stated recently in Application of Willard S. Ferris,³

A “documented harvest” is defined as “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.”⁴ 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. . . . This view – that a documented harvest must result from commercial fishing – is consistent with the LLP’s purpose of regulating the commercial fishing of LLP groundfish and crab.⁵ This view is also supported by our statement in another appeal decision that compliance with commercial fishing regulations requires that one be lawfully engaged in commercial fishing.⁶ 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.”⁷

²These are the endorsement requirements for a category “B” vessel, one with a length overall of 60-124 feet. [50 C.F.R. §679.4(k)(3)(iii)(B)] The F/V ISLE ROYAL has a length overall of 72 feet. [IAD at 2]

³Appeal No. 00-0004, January 18, 2002.

⁴50 C.F.R. § 679.2.

⁵50 C.F.R. § 679.1(j).

⁶Prowler Partnership v. Samuelson, Appeal No. 95-0084, Decision on Reconsideration (Part II), September 29, 1997, at 21-22.

⁷See the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1802-1883 (1994).

Ms. Brogdon claims that the F/V ISLE ROYAL harvested cod “[d]uring this season,” which I will presume, for the sake of this discussion, means during one or both of the LLP groundfish endorsement periods for the Central Gulf of Alaska area. Ms. Brogdon states that the cod were sold “to myself for use as bait” and that “[w]e do ‘sell’ the codfish we catch to ourselves.” [Appeal at 1, 3]⁸ She also states that she paid for the cod bait with the lost opportunity cost of removing crab pots from the crab fishery and using them to harvest cod. [Appeal at 2, 3] Furthermore, Ms. Brogdon argues, “[i]t could also be said that we could TRADE these groundfish for the crab we could have caught.” [Appeal at 4]

The terms “sale, barter or trade” in the definition of “commercial fishing” in the Magnuson-Stevens Act are not defined, but their plain meaning is that something is exchanged between two or more distinct parties. Ms. Brogdon’s argument that she “sold” the cod to herself or “traded” them is not persuasive. Using one’s own catch for bait on one’s own vessel cannot reasonably be construed as “sale, barter or trade” as envisioned in the Magnuson-Stevens Act. The cod never changed hands, and ownership of the cod was never transferred to another party. Therefore, it cannot be said that the cod were intended to be, or actually were sold, bartered, or traded. As a result, the alleged harvesting and use of the cod were not commercial activities, and the cod did not and were not intended to enter commerce. Consequently, the alleged harvests of cod did not constitute “commercial fishing” within the meaning of the Magnuson-Stevens Act. Therefore, I conclude that the alleged harvests of cod cannot constitute documented harvests of groundfish for purposes of qualifying for an LLP groundfish license or endorsement. I conclude that Ms. Brogdon does not qualify for an LLP groundfish license endorsement for the Central Gulf of Alaska based on the claimed Pacific cod harvests made aboard the F/V ISLE ROYAL.

FINDINGS OF FACT

1. The F/V ISLE ROYAL made no documented harvests of Tanner crab in the Bering Sea and Aleutian Islands area during the endorsement qualifying period for that area.
2. The F/V ISLE ROYAL did not make at least one documented harvest of LLP groundfish in the Bering Sea area groundfish endorsement area *after* the unavoidable circumstance occurred but *before* June 17, 1995.
3. The unavoidable circumstances cited by Ms. Brogdon occurred after June 17, 1995, and were not the cause of the vessel’s failure to make the documented harvests needed to qualify for the endorsements that she seeks.

⁸Ms. Brogdon does not state what interest, if any, she had in the F/V ISLE ROYAL at the time the cod was allegedly harvested. Because Ms. Brogdon states that she “sold” the cod to herself, and that she began purchasing the vessel only in late 1995, I presume that she is asserting that she was the skipper or a crew member aboard the vessel during some or all of the Central Gulf of Alaska groundfish endorsement qualifying period, January 1, 1992 through June 17, 1995.

4. The F/V ISLE ROYAL did not make a documented harvest after unavoidable circumstances occurred but before June 17, 1995, in any of the endorsements areas.
5. The cod allegedly harvested from the F/V ISLE ROYAL were not intended to be, and were not actually, sold, bartered, or traded.
6. The alleged harvesting and use of the cod aboard the F/V ISLE ROYAL were not commercial activities.

CONCLUSIONS OF LAW

1. Ms. Brogdon's Tanner crab claim does not qualify her for a crab license endorsement for the Bering Sea and Aleutian Islands area.
2. The unavoidable circumstance exception does not apply to Ms. Brogdon's application for a Bering Sea area groundfish endorsement.
3. Ms. Brogdon does not qualify for any LLP groundfish or crab license endorsements based on her claim of unavoidable circumstances.
4. The terms "sale, barter or trade" in the definition of "commercial fishing" in the Magnuson-Stevens Act require that something be exchanged between two or more distinct parties.
5. Using one's own catch for bait on one's own vessel cannot reasonably be construed as "sale, barter or trade" as envisioned in the Magnuson-Stevens Act.
6. The alleged harvests of cod aboard the F/V ISLE ROYAL did not constitute "commercial fishing" within the meaning of the Magnuson-Stevens Act.
7. The alleged harvests of cod aboard the F/V ISLE ROYAL do not constitute documented harvests of groundfish for purposes of qualifying for an LLP groundfish license or endorsement.
8. Ms. Brogdon does not qualify for an LLP groundfish license endorsement for the Central Gulf of Alaska based on the claimed Pacific cod harvests made aboard the F/V ISLE ROYAL.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect March 28, 2002, 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, March 8, 2002. 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 a memorandum of points and authorities, in support of the motion.

Edward H. Hein
Chief Appeals Officer