

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	
)	Appeal No. 01-0022
LITTLE ANN, INC.)	
F/V LITTLE ANN)	DECISION
ADF&G # 41572,)	
Appellant)	July 10, 2002
_____)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that denied Appellant's application to harvest Bristol Bay red king crab, Norton Sound red and blue king crab, and Bering Sea/Aleutian Islands (BSAI) *C. opilio* and *C. bairdi* (Tanner) under the North Pacific Groundfish and Crab License Limitation Program (LLP), based on "special or unavoidable circumstances" regarding the F/V LITTLE ANN.

Appellant has filed a timely appeal of the IAD. Appellant is entitled to file an appeal because the IAD directly and adversely affects its interests. [50 C.F.R. § 679.43(b)]

Appellant has 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)]

ISSUE

Does Appellant qualify for any LLP crab license endorsements, based on "special or unavoidable circumstances"?

SUMMARY

The IAD is affirmed. Appellant's claim of "special or unavoidable circumstances" fails because the F/V LITTLE ANN (or its replacement vessel) did not make at least one documented harvest in any of the LLP endorsement areas, after any unavoidable circumstance but before June 17, 1995, as required by the unavoidable circumstance exception. Therefore, Appellant does not qualify for any LLP crab license endorsements based on a claim of special or unavoidable circumstances.

ANALYSIS

To qualify for endorsements to an LLP crab license, an applicant must establish that the applicant's vessel's fishing history includes the minimum number of documented harvests for each endorsement area and endorsement qualification period (EQP) specified in 50 C.F.R. §679.4(k)(5)(ii).

An applicant whose vessel did not make the requisite number of documented harvests during the (EQP) 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)]

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)] The harvest requirement after an unavoidable circumstance is consistent with the intent of the North Pacific Fisheries Management Council to provide relief to those commercial fishermen who were able to re-enter an LLP fishery after an unavoidable circumstance and make at least one documented harvest before the adoption of the LLP on June 17, 1995.¹

Therefore, even if it could be established that an “unavoidable circumstance” prevented an applicant’s vessel from making the requisite number of documented harvests, the applicant would not be entitled to an LLP endorsement unless the vessel (or its replacement vessel) made at least one documented harvest after the unavoidable circumstance but before June 17, 1995.

The following facts are not disputed: (1) Appellant lost its commercial fishing vessel, the F/V LITTLE ANN, at sea on May 1, 1990;² and (2) neither the official LLP record, nor the evidence produced by Appellant, show that the F/V LITTLE ANN (or any other vessel owned by the Appellant) made a documented harvest of LLP crab after the sinking of the vessel on May 1, 1990, and before June 17, 1995.³ Therefore, I find that the F/V LITTLE ANN (and any other vessel owned by the Appellant) did not make the minimum number of documented harvests in any of the LLP endorsement areas or during any of the LLP endorsement qualification periods for the crab endorsements that Appellant seeks on appeal.

Appellant claims that the requirement of a documented harvest after an unavoidable circumstance is “arbitrary and capricious,” and therefore, unenforceable; and that Appellant qualifies for the requested endorsements in this case because it has satisfied all other requirements under the “unavoidable circumstance” exception.

¹See the minutes of the Council meeting on June 15, 1995.

²See the “Statement of Total Loss Per M/V F/V LITTLE ANN” that was submitted with the Appellant’s LLP application.

³A BSAI area C. *opilio* and C. *bairdi* crab endorsement requires at least three documented harvests of any amount of BSAI area C. *opilio* and C. *bairdi* crab between January 1, 1992, and December 31, 1994; a Bristol Bay red king crab endorsement requires at least one documented harvest of any amount of Bristol Bay red king crab between January 1, 1991 and December 31, 1994; and a Norton Sound red and blue king crab endorsement requires at least one harvest of any amount of Norton Sound red or blue king crab between January 1, 1993, and December 31, 1994. [50 C.F.R. §679.4(k)(5)(ii)]

In a number of decisions,⁴ we have ruled that the Office of Administrative Appeals does not have the authority to change, modify, or declare unconstitutional, a duly promulgated federal regulation, and the authority to do so lies within the jurisdiction of the federal court system. Therefore, I will not determine whether the existing LLP regulation is “arbitrary and capricious,” and therefore, unenforceable.

Appellant asserts that it could not re-enter the LLP crab fisheries after the loss of the F/V LITTLE ANN because of financial difficulties and because of fishery closures. Even if that is true,⁵ Appellant presented no evidence that its replacement 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, I conclude that Appellant does not qualify for any of the LLP crab endorsements that it seeks on appeal, based on special or unavoidable circumstances. Thus, it is unnecessary to hold a hearing to determine if the Appellant has satisfied all of the other criteria for the “unavoidable circumstance” exception.

FINDINGS OF FACT

1. The F/V LITTLE ANN (and any other vessel owned by the Appellant) did not make the minimum number of documented harvests in any of the LLP endorsement areas or during any of the LLP endorsement qualification periods for the crab endorsements that Appellant seeks on appeal.
2. The F/V LITTLE ANN (and any other vessel owned by the Appellant) did not make at least one documented harvest in any of the LLP endorsement areas that Appellant seeks on appeal, after any unavoidable circumstance, but before June 17, 1995.

CONCLUSIONS OF LAW

1. The Office of Administrative Appeals does not have the authority to determine whether any portion of the unavoidable circumstance exception is “arbitrary and capricious,” and therefore, unenforceable.

⁴See, e.g., Jeff Kerbel, Appeal No. 95-0009, March 14, 1997; and George M. Ramos, Decision on Review, April 25, 1995, at p.4, where it states: “it is wholly in appropriate for an administrative appeals officer to pass judgment on either the validity or the wisdom of duly promulgated regulations and policies.”

⁵State of Alaska Department of Fish and Game (ADF&G) records show that (1) the Bristol Bay red king crab fishery was closed during the EQP for the fishery, through June 17, 1995; (2) the BSAI Tanner crab fishery was closed between January 1, 1995, and June 17, 1995; and (3) the BSAI C. opilio crab and Norton Sound red king crab fisheries were closed for certain time periods between January 1, 1995, and June 17, 1995. See the E-mail from Mary Furuness (NMFS) to Randall Moen, July 1, 2002; and the website for ADF&G at <http://www.cf.adfg.state.ak.us/region4/shellfsh/crabs/1953-00.htm>

2. Appellant does not qualify for any of the LLP crab endorsements that it seeks on appeal, based on special or unavoidable circumstances.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect August 9, 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, July 22, 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.

Randall J. Moen
Appeals Officer