

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0015
)	
GOLDEN FLEECE, INC.,)	DECISION
Appellant)	
)	October 4, 2006
_____)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that approved Appellant’s application for a groundfish license under the North Pacific Groundfish and Crab License Limitation Program (LLP), based on the fishing history of the F/V GOLDEN FLEECE (ADFG 43260; USCG 609951). The IAD endorsed Appellant’s groundfish license for the Bering Sea and Central Gulf of Alaska groundfish fisheries, but denied endorsements for the Aleutian Islands, Western Gulf of Alaska, and Southeast Alaska Outside area groundfish fisheries, as a result of the vessel’s fishing history.

Appellant timely appealed the denial of the Western Gulf of Alaska groundfish area endorsement. Appellant did not appeal the denial of the other requested endorsements.

Appellant can file an appeal because the IAD directly and adversely affects its interests.¹ An oral hearing is not necessary because the record contains sufficient information on which to reach a final decision.²

ISSUE

Does Appellant qualify for a Western Gulf of Alaska groundfish fishery license endorsement under the unavoidable circumstance provision in the LLP regulations?

ANALYSIS

To qualify for a Western Gulf of Alaska groundfish license fishery endorsement based on the fishing history of the F/V GOLDEN FLEECE, Appellant must establish that the vessel made at least one documented harvest³ of Western Gulf of Alaska groundfish in each of two years between January 1, 1992, and June 17, 1995, or at least four documented harvests of Western

¹ 50 C.F.R § 679.43(b).

² 50 C.F.R § 679.42(m)(4).

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.” 50 C.F.R § 679.2.

Gulf of Alaska groundfish between January 1, 1995, and June 17, 1995.⁴

The NMFS official LLP record shows that the F/V GOLDEN FLEECE made one documented harvest of Western Gulf of Alaska groundfish between January 1, 1992, and June 17, 1995, in February, 1992. Appellant does not dispute the official record, but claims that an "unavoidable circumstance" prevented the F/V GOLDEN FLEECE from making at least one more documented harvest of groundfish between January 1, 1995, and June 17, 1995, to qualify for a Western Gulf of Alaska groundfish license fishery endorsement.

The LLP regulations provide for an applicant to qualify for an LLP groundfish license endorsement, based on an "unavoidable circumstance," as long as the applicant satisfies all of the criteria in the unavoidable circumstance provision of the LLP regulations.⁵ One of these criteria is that the applicant's qualifying vessel must have made at least one documented harvest of LLP groundfish in the appropriate endorsement area *after* the unavoidable circumstance occurred but *before* June 17, 1995. The unavoidable circumstance provision for that one criterion states in relevant part:

(iv) A qualified person who owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish ... between January 1, 1988, and February 9, 1992, but whose vessel was unable to meet all the criteria in paragraph (k)(4) of this section for a groundfish license ... because of an unavoidable circumstance ... may receive a license ... if the qualified person is able to demonstrate that: ...

(E) Any amount of license limitation groundfish ... was harvested on the vessel in the specific area that corresponds to the area endorsement ... for which the qualified person who owned a vessel on June 17, 1995, is applying and that the license limitation groundfish ... was harvested after the vessel was prevented from participating by the unavoidable circumstance, but before June 17, 1995.⁶

The North Pacific Fishery Management Council (Council) adopted the unavoidable circumstance provision to provide relief to those commercial fishermen who were unable to make a documented harvest of LLP groundfish [or LLP crab] because of an unavoidable circumstance, but who were able to re-enter the LLP groundfish [or crab] fishery after the unavoidable circumstance and make at least one documented harvest before the adoption of the LLP on June

⁴ 50 C.F.R § 679.4(k)(4)(ii)(C)(2).

⁵ 50 C.F.R § 679.4(k)(8)(iv).

⁶ 50 C.F.R. § 679.4(k)(8)(iv)(E).

17, 1995.⁷

In its appeal,⁸ the Appellant asserts that it purchased the F/V GOLDEN FLEECE on November 18, 1994, with the intent of using the vessel to begin fishing for Western Gulf groundfish in January 1995. The Appellant did not know that the vessel was unseaworthy until after it took possession of it on “the weekend following Thanksgiving 1994,” which was November 26-27 of that year. After taking possession, the Appellant began discovering significant problems with the vessel that resulted in several months of repairs. The repairs began in mid-December 1994 and lasted until July 23, 1995. The Appellant’s “first opportunity” to use the F/V GOLDEN FLEECE’s to harvest Western Gulf of Alaska groundfish was in August 1995. The vessel made additional Western Gulf of Alaska groundfish harvests in October 1995, March 1996, and February 1997.

The Appellant claims that these assertions constitute an “unavoidable circumstance” within the meaning of the unavoidable circumstance provision in the LLP regulations. The Appellant does not explain which of the assertions constitute an “unavoidable circumstance.” Overall, the Appellant appears to be claiming that the circumstance of having an unseaworthy vessel in need of major unexpected vessel repairs constitutes an unavoidable circumstance that prevented the Appellant from fishing for Western Gulf of Alaska groundfish until August 1995.

The NMFS official LLP record shows that the F/V GOLDEN FLEECE did not make a documented harvest of Western Gulf of Alaska groundfish between January 1, 1995, and June 17, 1995. The Appellant makes no claim to the contrary. I find therefore that the F/V GOLDEN FLEECE did not make a documented harvest of Western Gulf of Alaska groundfish after the Appellant’s alleged unavoidable circumstance in this case but before June 17, 1995.

The Appellant makes four arguments for not requiring the Appellant in this case to make a documented harvest before June 17, 1995, to qualify for a Western Gulf of Alaska groundfish license under the unavoidable circumstance provision.

First, the Appellant argues that NMFS has “broad authority” to exempt an applicant from the June 17, 1995, cut-off date.

The Appellant does not cite where this “broad authority” comes from. As an Administrative Judge, I am bound by the language of the LLP regulations and NMFS’ reasonable interpretation of those regulations.⁹ The language of the LLP regulations does not provide for an exception to the requirement of a documented harvest after an unavoidable circumstance, but before June 17,

⁷ See the discussion of the unavoidable circumstance provision in the transcript of the Council’s meeting of June 15-16, 1995, for the final action on the LLP.

⁸ Appellant’s Full Statement In Support of Appeal, October 2, 2002; and William Bisbee affidavit (Dec. 27, 2000).

⁹ See, e.g., *George M. Ramos*, Decision on Reconsideration (April 25, 1995).

1995. RAM interprets the regulations to require an *actual* documented harvest of LLP groundfish *after* an unavoidable circumstance, but *before* June 17, 1995, to qualify an applicant for an LLP groundfish license, based on an unavoidable circumstance. RAM's practice is reasonable given the plain language, and regulatory history, of the requirement.

This Office has not in any decision exempted an applicant from a regulatory deadline or cut-off date.¹⁰ In certain cases, we have authority to grant discretionary relief to an Appellant, but only as "a matter of fairness," and only if the relief would be "consistent with and not undermine the purpose of the particular rule in question."¹¹ It is clear from the regulatory history that the Council adopted the June 17, 1995, cut-off date to insure that an applicant does not obtain relief, based on an unavoidable circumstance, without proof of a documented harvest before the adoption of the LLP. To exempt Appellant in this case from the June 17, 1995, cut-off date, would be inconsistent with the plain language, and undermine the purpose, of the requirement for a documented harvest before June 17, 1995. Therefore, as a matter of law, I do not have authority to exempt Appellant from June 17, 1995, cut-off date.

Second, the Appellant argues that the documented harvest requirement after an unavoidable circumstance but before June 17, 1995, is not a "mandatory factor" in the unavoidable circumstance provision.

In several decisions, this Office has consistently held that the requirement of a documented harvest after an unavoidable circumstance but before June 17, 1995, is an absolute requirement to qualify under the unavoidable circumstance provision.¹²

Both this Office and RAM interpret the requirement of a documented harvest after an unavoidable circumstance but before June 17, 1995, as a requirement that must be met to qualify an applicant for an LLP groundfish license endorsement.

The plain language in 50 C.F.R § 679.4(k)(8)(iv)(E) of the unavoidable circumstance provision requires the Appellant to demonstrate that the F/V GOLDEN FLEECE made at least one

¹⁰ *George M. Ramos*, Appeal No. 94-0008 (March 21, 1995).

¹¹ *Michael B. White*, Appeal No. 94-0009, (Jan. 17, 1995).

¹² *Nuka Island, Inc.*, Appeal No. 02-0031 (Jan. 14, 2005); *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 7 - 11 (Dec. 28, 2004); *Arctic Baruna LLC*, Appeal No. 02-0024 at 4 (Dec. 22, 2004); *Hansen Enterprises, Inc.*, Appeal No. 02-0025 (Dec. 14, 2004); *Erla-N, LLC*, Appeal No. 01-0026 (Sep. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sept. 10, 2004); *Notorious Partnership*, Appeal No. 03-0015 (Aug. 9, 2004); *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004); *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004); *Mark Donovan*, Appeal No. 02-0008 at 8 - 9 (Sept. 27, 2002); *Little Ann, Inc.*, Appeal No. 01-0022 at 3 at (July 10, 2002); *Ronald Tennison*, Appeal 00-0012 at 2, 6 (April 15, 2002); *Pequod, Inc.*, Appeal No. 00-0013 at 7, 24 (April 12, 2002); *Paula Brogdon*, Appeal No. 00-0011 at 3 (Feb. 26, 2002). These decisions are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/appeals/default.htm>.

documented harvest of LLP groundfish after the unavoidable circumstance but before June 17, 1995.

The regulatory history in the preamble of the LLP regulations refers to all five paragraphs in the unavoidable circumstance provision as the “criteria ... [that must be] ... met to the satisfaction of NMFS” to qualify an applicant for an LLP groundfish license (or groundfish license endorsement).¹³

RAM’s interpretation 50 C.F.R § 679.4(k)(8)(iv)(E) in this case is consistent with the plain language and regulatory history of the unavoidable circumstance provision. Therefore, the documented harvest requirement after an unavoidable circumstance but before June 17, 1995, is a “mandatory factor” that must be met to qualify Appellant for an LLP groundfish license endorsement, based on an unavoidable circumstance.

Third, the Appellant argues that the documented harvest requirement after an unavoidable circumstance but before June 17, 1995, unfairly and arbitrarily discriminates against Appellant and other similarly situated applicants, and violates Federal statutes.

The Appellant in this case has not shown that NMFS has ever exempted an applicant from the requirement of a documented harvest after an unavoidable circumstance but before June 17, 1995, based on a claim for an LLP groundfish license endorsement under the unavoidable circumstance provision.

As previously stated, I am bound by the language of the LLP regulations, and I do not have authority to change, modify, or rule unconstitutional the unavoidable circumstance provision.¹⁴ Appellant’s argument that the documented harvest requirement after an avoidable circumstance but before June 17, 1995, unfairly and arbitrarily discriminates against Appellant and other similarly situated applicants, or violates a Federal statute, is not a sufficient basis for granting Appellant relief in this case.

Finally, the Appellant argues that the “Doctrine of Equitable Tolling” requires NMFS to toll the June 17, 1995, deadline in this case for making at least one documented harvest after an unavoidable circumstance.

This Office has applied the Doctrine of Equitable Tolling only in appeals that relate to the untimely filing of an application.¹⁵ The Doctrine of Equitable Tolling requires NMFS to toll or suspend an application deadline if the applicant can establish that (1) the applicant did not timely file an application because of extraordinary circumstances beyond the applicant’s control; (2) the

¹³ Final Rule, 63 Fed. Reg. 52,646-52,647 (October 1, 1998).

¹⁴ See e.g., *Little Ann, Inc.*, Appeal No. 01-0022 (July 10, 2002).

¹⁵ See, e.g., *John T. Coyne*, Appeal No. 94-0012 (May 24, 0012); *Application of John B. Lee III*, Appeal No. 00-0003 (Dec. 5, 2002).

applicant diligently submitted an application after the end of the extraordinary circumstances that prevented the filing within the application period; and (3) the processing of the application will not harm the implementation of the applicable program. In this case, Appellant's LLP application was untimely filed. Therefore, the Doctrine of Equitable Tolling cannot be used to exempt Appellant from the June 17, 1995, cut-off date.

None of Appellant's arguments for exempting Appellant from the requirement of a documented harvest after an unavoidable circumstance but before June 17, 1995, are persuasive. I conclude that Appellant does not qualify for a Western Gulf of Alaska groundfish fishery license endorsement under the unavoidable circumstance provision in the LLP regulations.

Because my conclusion above is dispositive of this case, I do not decide whether the circumstances asserted by the Appellant constitute an "unavoidable circumstance" within the meaning of the unavoidable circumstance provision in the LLP regulations.

FINDING OF FACT

The F/V GOLDEN FLEECE did not make a documented harvest of Western Gulf of Alaska groundfish after the alleged unavoidable circumstances in this case but before June 17, 1995.

CONCLUSION OF LAW

Appellant does not qualify for a Western Gulf of Alaska groundfish fishery license endorsement under the unavoidable circumstance provision in the LLP regulations.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect November 6, 2006, unless by that date the Regional Administrator takes further action under 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 the tenth day after this Decision, October 16, 2006. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that the Administrative Judge overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.

Randall J. Moen
Administrative Judge