

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

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| In re Application of |) | Appeal No. 02-0021 |
| |) | |
| HJELLE ENTERPRISES, Inc., |) | DECISION |
| Appellant |) | |
| _____ |) | July 23, 2004 |

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that revoked Appellant's crab license under the North Pacific Groundfish and Crab License Limitation Program (LLP). The IAD revoked the license because the official LLP record of the National Marine Fisheries Service (NMFS) does not show that Appellant's original LLP qualifying vessel, the F/V PACIFIC STAR, made at least one documented harvest of crab in the Bering Sea and Aleutian Islands (BSAI) during the "recent participation period" (RPP), which is between January 1, 1996, and February 7, 1998.

Appellant requested RAM to reconsider the IAD based on the loss at sea in 1997 of Mr. Sam Hjelle, the skipper and owner of the F/V PACIFIC STAR. RAM denied the request on the ground that the vessel did not make at least one documented harvest of LLP crab after the alleged "unavoidable circumstance," but before January 1, 2000. After it denied the request for reconsideration, RAM forwarded the IAD and the request for reconsideration to this Office for consideration as a timely filed appeal.

Appellant's appeal is timely filed. Appellant can file an appeal because the IAD directly and adversely affects its interests. [50 C.F.R. § 679.43(b)] A hearing was not held and the record is closed because the information on the record is sufficient to render a decision. [50 C.F.R. § 679.43(m)(4)]

ISSUE

Does Appellant qualify for an LLP crab license, based on an "unavoidable circumstance" that prevented the F/V PACIFIC STAR from making a documented harvest of LLP crab species in the BSAI during the RPP?

ANALYSIS

The LLP regulations provide for an applicant to qualify for an LLP crab license, based on ownership of an original LLP qualifying vessel that made at least one documented harvest of

LLP crab in the BSAI during the RPP (between January 1, 1996, and February 7, 1998).¹

The North Pacific Fishery Management Council proposed the RPP requirement (in October 1998) to reduce the amount of crab fishing activity in the BSAI, which was expected to increase upon implementation of the LLP (on January 1, 2000).² The Council's intent was to reduce the number of crab licenses that might otherwise be issued to persons who had been inactive in the crab fishery since 1995. If permanent licenses were issued to inactive fishermen, the fishermen could transfer those licenses to persons who would become active in the fishery. This result would be contrary to the purpose of the LLP because it would likely increase fishing efforts above the then-current levels in the crab fisheries.³

Both Appellant and RAM agree that the F/V PACIFIC STAR did not make a documented harvest of LLP crab during the RPP. Nevertheless, the LLP regulations provide that Appellant can still qualify for an LLP crab license by establishing that an "unavoidable circumstance" prevented the vessel from making a documented harvest of LLP crab in the BSAI during the RPP.⁴

One of the criteria for qualifying under the unavoidable circumstances provision is that the applicant's vessel must have made at least one documented harvest of LLP crab in the applicable area/species endorsement area *after* an unavoidable circumstance prevented the applicant from participating in the fishery but *before* January 1, 2000.⁵

Appellant claims that Mr. Hjelle's tragic death at sea in 1997 constitutes an "unavoidable circumstance" that prevented the F/V PACIFIC STAR from making at least one documented harvest of LLP crab in the BSAI during the RPP.⁶ Appellant produced evidence showing that just prior to Mr. Hjelle's death, Appellant spent over \$3.8 million to purchase and ready the F/V PACIFIC STAR to harvest LLP crab in the BSAI.⁷ I do not doubt Mr. Hjelle's death kept the

¹50 C.F.R. § 679.4(k)(5)(i), (ii), and (iii). The RPP requirement is based on Federal law pursuant to the Consolidation Appropriations Act of 2001, Pub. L. No. 106-554 § 144 (December 21, 2000). *See* 66 Fed. Reg. 48,821 (September 24, 2001) for the regulatory history of the RPP requirement.

²*See* the Council's October 1998 newsletter.

³Final Rule, 66 Fed. Reg. 48,814 (September 24, 2001)

⁴50 C.F.R. § 679.4(k)(5)(v).

⁵50 C.F.R. § 679.4(k)(5)(v)(E).

⁶Appellant's (Teresa Hjelle) letter to Phil Smith, NMFS, December 20, 2001.

⁷Appellant's (Teresa Hjelle) letter to Phil Smith, NMFS, December 20, 2001, and attachment to the letter entitled, "Expenses Incurred in 1997 With Intent to Participate in the 1997 Brown Crab Fishery."

Appellant from making an RPP harvest, nor do I doubt that the Appellant intended to fish crab in the BSAI before the end of the RPP. Nevertheless, as tragic as Mr. Hjelle's death was, neither the NMFS official LLP record, nor the evidence produced by Appellant, show that the vessel made a documented harvest of LLP crab in the BSAI after Mr. Hjelle's death in 1997 but before the implementation of the LLP on January 1, 2000.

To grant Appellant an LLP crab license in this case, based solely on Mr. Hjelle's tragic death, would violate the express language, and intended purpose, of the unavoidable circumstances provision. I find that the F/V PACIFIC STAR did not reenter the LLP crab fishery and make a documented harvest of LLP in the BSAI after Mr. Hjelle's death but before January 1, 2000. Therefore, I conclude that the Appellant does not qualify for an LLP crab license, based on an "unavoidable circumstance."

As an Appeals Officer, I do not have authority to change or rule invalid a federal regulation that was duly implemented in accordance with the federal Administrative Procedure Act.⁸ The RPP regulations were duly implemented.⁹ Therefore, I do not have authority to grant relief to the Appellant, based on financial hardship, or even on the loss of a loved one who was the skipper of the F/V PACIFIC STAR and the central figure in the Appellant's business.

FINDINGS OF FACT

1. The F/V PACIFIC STAR did not make a documented harvest of LLP crab species during the RPP.
2. The F/V PACIFIC STAR did not reenter the LLP crab fishery and make a documented harvest of LLP in the BSAI after Mr. Hjelle's death but before January 1, 2000.

CONCLUSION OF LAW

Appellant does not qualify for an LLP crab license, based on an "unavoidable circumstance" that prevented the F/V PACIFIC STAR from making a documented harvest of crab during the RPP.

DISPOSITION

The IAD that is the subject of this Appeal is AFFIRMED. This Decision takes effect on August 23, 2004, 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

⁸5 U.S.C. §§ 551 - 706. *See, e.g., George M. Ramos*, Decision on Review, Appeal No. 94-0008, April 21, 1995, at 4; and *Little Ann, Inc.*, Appeal No. 01-0022, July 10, 2002.

⁹Final Rule, 66 Fed. Reg. 48,813-48,822 (Sept. 24, 2001); Final Rule, 68 Fed. Reg. 46,117-46,118 (Aug. 5, 2003).

this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, August 2, 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 in support of the motion.

Randall J. Moen
Appeals Officer