

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
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NUKA ISLAND, INC.,)
Appellant)
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Appeal No. 02-0031
DECISION
January 14, 2005

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on August 16, 2002, that denied 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 NUKA ISLAND in the Bering Sea.

Appellant filed a timely appeal of the IAD. Appellant can file an appeal because the IAD directly and adversely affects its interests. [50 C.F.R § 679.43(b)] Appellant requested an oral hearing, but the request is denied because resolution of the factual issues in the way sought by the Appellant would not be adequate to justify the relief requested. [50 C.F.R. § 679.43(g)(3)(iv)] The record contains sufficient information on which to reach a decision in this appeal. [50 C.F.R. § 679.42(g)(2)] Therefore, I close the record and decide this appeal.

ISSUE

Does Appellant qualify for an LLP groundfish license based on an "unavoidable circumstance"?

ANALYSIS

To qualify for an LLP groundfish license, the Appellant must establish that the F/V NUKA ISLAND made at least one documented harvest of groundfish in the Bering Sea/Aleutian Islands (BSAI) area during the general qualifying period (GQP), which in this case was January 1, 1988 through June 27, 1992;¹ and at least one documented harvest of groundfish in the Bering Sea during the endorsement qualifying period (EQP), between January 1, 1992, and June 17, 1995.²

The IAD states that, according to the official LLP record, the Appellant does not qualify for an LLP groundfish license based on the fishing history of the F/V NUKA ISLAND. The Appellant does not dispute the official LLP record on appeal.³ The Appellant claims that the F/V NUKA

¹50 C.F.R. § 679.4(k)(4)(i)(A)(1).

²50 C.F.R. § 679.4(k)(4)(ii)(B).

³During RAM's consideration of its application, the Appellant produced an affidavit and vessel logbook entries to show that the F/V NUKA ISLAND harvested Pacific cod for crab bait during both the

ISLAND would have made at least one documented harvest of Pacific cod in the Bering Sea *after* the January 1995 *C. opilio* crab fishing season but for a large wave that caused severe damage to the lower house on the starboard side of the vessel and prevented the vessel from fishing again until August 1995.⁴

The LLP regulations provide for an applicant to qualify for an LLP groundfish license based on an “unavoidable circumstance,” if the applicant can satisfy all of the criteria in the unavoidable circumstances provision.⁵

One of the requirements for qualifying under the unavoidable circumstance provision is that the applicant’s vessel must have made at least one documented harvest of LLP groundfish in the appropriate area *after* the unavoidable circumstance occurred but *before* June 17, 1995.⁶ The applicable regulation reads, 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 of the criteria . . . 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.

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 because of an unavoidable circumstance, but who nonetheless were able to re-enter an LLP groundfish fishery after the unavoidable circumstance and make at least one

GQP and the EQP for the Bering Sea groundfish fishery during 1991 and 1995. In the IAD, RAM correctly determined that those harvests cannot be considered documented harvests of groundfish because the fish were kept exclusively for crab bait aboard the vessel and were not sold, bartered, or traded to another person. Thus, they were not commercial harvests of groundfish. *See, e.g., Williard S. Ferris*, Appeal No. 00-0004, January 18, 2002; *Paula J. Brogden*, Appeal No. 00-0011, February 26, 2002; *Ronald J. Tennison*, Appeal No. 00-0012, April 5, 2002; *Darjen, Inc.*, Appeal No. 00-0015, December 31, 2002; and *Stephen L. Lovejoy*, Appeal No. 02-0023, February 26, 2003.

⁴Appeal filing at 1-2 (Sept. 15, 2002).

⁵50 C.F.R. § 679.4(k)(8)(iv).

⁶50 C.F.R. § 679.4(k)(8)(iv)(E).

documented harvest before the adoption of the LLP on June 17, 1995.⁷

The official LLP record shows, and the Appellant acknowledges, that the F/V NUKA ISLAND did not make a documented harvest of Pacific cod or other groundfish after the January 1995 *C. opilio* fishing season and before June 17, 1995. Based on that evidence, I find that the F/V NUKA ISLAND did not make a documented harvest of groundfish after the alleged unavoidable circumstance but before June 17, 1995, as required in paragraph (E) of the unavoidable circumstance provision. This office has consistently held that such a harvest is an absolute requirement to qualify under the unavoidable circumstance provision.⁸ There are no exceptions to this requirement. Therefore, I conclude that the Appellant does not meet the requirements of the unavoidable circumstance provision and does not qualify for an LLP groundfish license based on an unavoidable circumstance.⁹

In reaching this conclusion, I am aware of owner Byron Pierce's statements that the Appellant paid \$500,000 in expenses to recover from the damage to the vessel in 1995, that the Appellant has a "huge financial stake" in the Pacific cod fishery, and that the loss of income from that fishery will be financially devastating.¹⁰ Although I am sympathetic with the Appellant's plight, I have no authority to create an exception to the unavoidable circumstance regulation and grant relief to the Appellant based on its asserted financial dependence on the Pacific cod fishery in the Bering Sea.

FINDINGS OF FACT

1. To qualify under the unavoidable circumstance provision, the Appellant's vessel must have

⁷Council member Dave Benton proposed the unavoidable circumstances provision at the Council meeting on June 15-16, 1995.

⁸*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 (Sept. 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>.

⁹I note that the time period that Appellant had to make the required documented harvest of Bering Sea groundfish after the unavoidable circumstance in this case (January, 1995, through June 17, 1995) falls entirely within the time period for the Bering Sea EQP fishery. Therefore, if the Appellant had made a documented harvest after the unavoidable circumstance in this case, the Appellant would have qualified for a documented harvest under the EQP; and therefore, would not have had to qualify for an LLP groundfish license in this case under the unavoidable circumstance provision.

¹⁰Appeal filing at 2 (Sept. 15, 2002).

made at least one documented harvest of LLP groundfish in the appropriate area *after* the alleged unavoidable circumstance occurred but *before* June 17, 1995.

2. Such a documented harvest is an absolute requirement to qualify under the unavoidable circumstance provision. There are no exceptions to this requirement.

3. An Appeals Officer has no authority to create an exception to the unavoidable circumstance regulation and grant relief to the Appellant based on its asserted financial dependence on the Pacific cod fishery in the Bering Sea.

4. The F/V NUKA ISLAND did not make a documented harvest of groundfish after the alleged unavoidable circumstance in this case but before June 17, 1995.

CONCLUSION OF LAW

The Appellant does not meet the requirements of the unavoidable circumstance provision and does not qualify for an LLP groundfish license based on an unavoidable circumstance.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on February 15, 2005, 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, January 25, 2005. 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