

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
) Appeal No. 97-0008
ESTATE OF ZAHARY BASARGIN)
NATALIA BASARGIN,)
PERSONAL REPRESENTATIVE) DECISION
F/V WHITE NIGHT)
ADF&G # 53246)
Appellant) October 25, 1999
_____)

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on March 20, 1996 which denied Zahary Basargin's application for a Vessel Moratorium Qualification and Permit (VMQ&P) under the Vessel Moratorium Program on Groundfish and Crab.¹ The basis of the IAD was that RAM's database did not show that the Appellant's vessel, the F/V WHITE NIGHT, had made any landings of moratorium species between January 1, 1988 and February 9, 1992.

ISSUE

Is the Estate of Zahary Basargin entitled to a Vessel Moratorium Permit based on the landings of the F/V WHITE NIGHT?

BACKGROUND

Zahary Basargin submitted an application for a Vessel Moratorium Qualification and Permit on March

¹ This Decision applies to the Estate's rights under the Vessel Moratorium Program for Groundfish and Crab, which is found at 50 C.F.R. § 679.4(c). The Moratorium Program governs the Estate's ability to harvest moratorium species through December 31, 1999. The Moratorium Program expires on December 31, 1999. See 64 Fed. Reg. 3651-3653 (January 25, 1999). The Moratorium Program should not be confused with the North Pacific License Limitation Program (LLP), which is found at 50 C.F.R. § 679.4(k). The LLP applies to fishing for certain species of groundfish in the Gulf of Alaska and Bering Sea/Aleutian Islands areas and certain species of crab in the Bering Sea/Aleutian Islands area. **The application period for LLP runs from September 13, 1999 to December 17, 1999. For further information on the License Limitation Program, the Estate may contact Restricted Access Management (RAM), NMFS, Box 21668, Juneau, Alaska 99802-1668, 907-586-7474 or 1-800-304-4846 (option 2).**

7, 1996. He claimed he had made landings of moratorium groundfish species with hook gear in period 1 (January 1, 1988 through February 9, 1992) and period 2 (February 10, 1992 through December 11, 1994).

RAM made an Initial Administrative Determination on March 20, 1996 that Mr. Basargin was not entitled to receive a permanent, transferable Moratorium Qualification because it was unable to verify the landings claimed by Mr. Basargin in its official database.² RAM issued Mr. Basargin an interim moratorium permit and a non-transferable moratorium qualification pending final agency action on Mr. Basargin's request.³

The IAD informed Mr. Basargin that if he disagreed with RAM's determination, he could either ask RAM to reconsider its decision or file an appeal with this Office. It informed Mr. Basargin that if he wished to appeal, he needed to submit a full statement in support of his appeal. The IAD also told Mr. Basargin of his right to request a hearing of facts that were in dispute and that if he requested a hearing, he needed to identify the specific facts that were in dispute and the evidence or testimony he would present to resolve those disputes. Finally, the IAD told Mr. Basargin that the interim moratorium permit would expire on May 20, 1996, unless Mr. Basargin either asked for reconsideration or filed an appeal by that date.

On May 20, 1996, RAM received a letter from Natalia Basargin requesting an appeal for the moratorium permit. Natalia Basargin was writing because her husband, Zahary Basargin, had died in a fishing accident in February 1996 and she had been appointed personal representative of his estate.⁴ Mrs. Basargin sent three fish tickets showing landings from the F/V WHITE NIGHT: [1] a fish ticket showing a landing of sablefish and Pacific cod with longline gear on May 6, 1987 at Sand Point,

² RAM's Official Record for the Moratorium Program did not itself contain landings histories. RAM created its Official Record for the Moratorium Program based on information obtained from the North Pacific Fisheries Management Council. The Council staff reviewed landings histories and prepared a list of the vessels it concluded were qualified and what endorsements the applicants should receive. RAM adopted the Council's determinations as part of its Official Record for the Moratorium Program. [Memorandum (e-mail) from Phil Smith, RAM Program Director, to Mary Alice McKeen, September 28, 1999.]

³ Because of the need for vessel owners to show that their vessel had "moratorium qualification," RAM began issuing an actual Certificate of Moratorium Qualification with gear endorsements, in addition to the vessel moratorium permits. RAM issues a transferable Certificate of Moratorium Qualification, if RAM and the applicant have no dispute over whether the vessel is qualified and what gear endorsements the vessel should receive. As in this case, if RAM and the applicant disagree, RAM issues a non-transferable qualification and an interim vessel moratorium permit, giving the applicant what was claimed on the application until the final agency action. *See* 50 C.F.R. § 679.4(c)(10).

⁴ This Decision therefore refers to the Estate as the Appellant.

Alaska; [2] a fish ticket showing a landing of rockfish with longline gear on May 30, 1992 at Homer, Alaska; [3] a fish ticket showing a landing of sablefish, halibut, arrowtooth flounder, shark and Pacific cod with gear type "1" on May 29, 1994 at Homer, Alaska. Mrs. Basargin's letter stated that she was trying to locate her husband's fish tickets or other proof and opined, "maybe this is all I need." She also wrote a letter, dated June 1, 1996, asking for additional time to locate information.

RAM granted Mrs. Basargin an additional 60 days – until September 17, 1996 – to submit additional information and told her that if she failed to respond by that date, the interim permit would expire. On September 17, 1996, RAM received a letter from Mrs. Basargin requesting additional time because she was having a difficult time over her husband's death and needed "more time to get all these things together." RAM responded by granting Mrs. Basargin until December 31, 1996 to submit additional information and once again told her that if she failed to respond by that date, the interim permit would expire.

On December 16, 1996, Mrs. Basargin wrote, "I just can't seem to get to do this, my head is still not straight from the accident and I need more time for getting the papers together. I really need time for this." RAM extended the response time to February 28, 1997. On February 21, 1997, Mrs. Basargin again asked for additional time, merely saying "I still need more time." RAM denied the request and referred the case to this Office for filing as an appeal.

The Estate did not request a hearing and the record before me does not indicate that a hearing is warranted under the criteria in 50 C.F.R. § 679.43(g)(3). The Estate has had ample opportunity to submit additional evidence showing the landings of the F/V WHITE NIGHT. This record does not show that there is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on the basis of mere allegations or denial or general descriptions of positions and contentions. The record contains sufficient information on which to reach final judgment in accord with 50 C.F.R. § 679.43(g)(2) and is hereby closed.

DISCUSSION

The Vessel Moratorium Program on Groundfish and Crab limits fishing for moratorium species of crab in the Bering Sea and Aleutian Islands (BSAI) area and moratorium species of groundfish in the Gulf of Alaska (GOA) and BSAI. Moratorium crab species are Tanner and king crab harvested in BSAI.⁵ Moratorium groundfish species are groundfish, except sablefish caught with fixed gear, harvested in the GOA or BSAI⁶

⁵ 50 C.F.R. § 670.2.

⁶ Moratorium groundfish species means "species of groundfish, except sablefish caught with fixed gear, harvested in the GOA or in the BSAI, the commercial fishing of which is governed by this part." 50 C.F.R. § 679.2. Groundfish means "target species and the 'other species' category, specified annually

The regulations for the Moratorium Program require two steps in deciding an application. First, RAM determines whether a vessel is qualified to participate in the moratorium. A vessel has “moratorium qualification” by its own landings or by transfer of a qualification from another vessel.⁷ The Estate makes no allegation of a transfer, so the only way the F/V WHITE NIGHT could be a qualified vessel is by its own landings. Federal regulation 50 C.F.R. § 679.4(c)(7)(i) specifies that these landings must be of moratorium species and must have occurred between January 1, 1988 and February 9, 1992. This is the qualifying period.

If and only if the vessel has moratorium qualification, RAM proceeds to the second step: which species the vessel can harvest and what gear the vessel can use in that harvest. Four different gear endorsements are possible. A vessel can receive the right to harvest moratorium crab with pot gear, moratorium groundfish with pot gear, moratorium groundfish with hook gear or moratorium groundfish with trawl gear.

Federal regulation 50 C.F.R. § 679.4(c)(5) contains the gear endorsement criteria. A landing of moratorium crab in period 1 (January 1, 1988 to February 9, 1992) gives the applicant a crab endorsement. A landing a moratorium groundfish with hook, pot or trawl gear in period 1 gives the applicant endorsements to harvest moratorium groundfish with hook, pot and trawl gear. It is true that, in some circumstances, an applicant can gain an additional gear endorsement from a landing in period 2 (February 10, 1992 to December 11, 1994), but that is only if the applicant first had a landing in period 1 (January 1, 1988 to February 9, 1992).⁸

The fish tickets submitted by the Estate show landings before and after, but not during, the critical time period of January 1, 1988 to February 9, 1992. The landing of Pacific cod at Sand Point occurred in May 1987. The landing of rockfish at Homer occurred in May 1992. The landing of flounder, shark

pursuant to § 670.20(a)(2).” *Id.* Pursuant to 50 C.F.R. § 670.20(a)(2), NMFS, after consultation with the North Pacific Fisheries Management Council, sets annual total allowable catch (TAC) and reserves for certain species of fish. The TAC figures are published annually in the Federal Register. Arrowtooth flounder, shark and Pacific cod are groundfish under this process. Salmon and halibut are not. *See, e.g.*, 55 Fed. Reg. 3223 - 3229 (Jan. 31, 1990) (1990 fishing year); 56 Fed. Reg. 6290 - 6296 (Feb. 15, 1991)(1991 fishing year); 57 Fed. Reg. 2844 - 2851 (Jan. 24, 1992)(1992 fishing year).

⁷ 50 C.F.R. § 679.4(c)(7)

⁸ For example, under 50 C.F.R. § 679.4(c)(5), an applicant who had a landing of moratorium groundfish in period 1 only would receive a permit with gear endorsements to harvest groundfish with trawl, pot and hook gear. If, in addition, the applicant had a landing of moratorium crab in period 2, a crab endorsement would be added to the permit.

and Pacific cod at Homer occurred in May 1994.⁹ The Estate's landings in May 1992 and May 1994 are outside the qualifying period and outside period 1. These landings in period 2, by themselves, cannot be the basis of an award of a moratorium permit.

Neither RAM's Official Record nor the evidence submitted by the Estate shows that the F/V WHITE NIGHT made any landings of moratorium crab or groundfish species between January 1, 1988 and February 9, 1992. Therefore I conclude that the F/V WHITE NIGHT is not a qualified vessel and that the Estate is not entitled to a vessel moratorium permit.

FINDING OF FACT

No legal landings of moratorium species between January 1, 1988 and February 9, 1992 were made from the Estate's vessel, the F/V WHITE NIGHT.

CONCLUSIONS OF LAW

The Estate of Zahary Basargin is not entitled to a Vessel Moratorium Permit based on the landings of the F/V WHITE NIGHT.

DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is AFFIRMED. This Decision takes effect November 24, 1999, unless by that date the Regional Administrator orders review of the Decision.

Any party, including 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, November 4, 1999. 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 points and authorities in support of the motion.

⁹ The fish ticket provided by the Estate for the 1994 landing of flounder, shark and Pacific cod in Homer has a gear code "1." The Alaska Department of Fish and Game Code list, printed in 1996, lists "1" as purse seine. This appears to have been the gear code for purse seine since 1982. [Memorandum to File re Call to ADF&G Biologist David Petree, September 30, 1999] Therefore, in addition to being the wrong time period, this fish ticket might not assist the Estate because it might be the wrong gear type. This issue need not be resolved because any 1994 landings are outside the qualifying period (January 1, 1988 through February 9, 1992).

Mary Alice McKeen
Appeals Officer