



showed that ATP made only one landing in the AI brown king crab endorsement area.<sup>5</sup>

Second, ATP argues that, even if fish ticket C90 009283 is credited as only one documented harvest, ATP should receive credit for a third documented harvest under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv). Third, ATP challenges the legality of the AI brown king crab endorsement regulation.

I held a hearing on January 14, 2003, on the factual question of how RAM constructed the official LLP record and counted fish tickets that showed crab caught from more than one State statistical area.<sup>6</sup> After that hearing, ATP raised its unavoidable circumstances claim. I decline to hold a hearing on this claim because ATP has not alleged facts which, if true, meet the requirements of the unavoidable circumstances regulation.<sup>7</sup> The record has sufficient information for me to decide ATP's appeal.<sup>8</sup> I therefore close the record and issue this decision.

### SUMMARY

The IAD is affirmed. ATP has not proven that the F/V ALASKA TROJAN made three documented harvests of brown king crab between January 1, 1992 and December 31, 1994 in the AI brown king crab endorsement area, as required by 50 C.F.R. § 679.4(k)(5)(ii)(D). ATP argued that RAM improperly counted fish ticket C90 009283 as one documented harvest because the fish ticket showed that ATP caught crab from two State statistical areas within the AI brown king crab endorsement area. The number of State statistical areas on a fish ticket is not a valid criterion for determining documented harvests and awarding LLP crab endorsements.

ATP does not satisfy the requirements of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv). First, ATP was not "unable to participate" in the AI brown king fishery in November 1994 because it had to delay a delivery of crab. Second, ATP was not prevented from conducting directed fishing in the AI brown king crab fishery because it had to delay a delivery.

I do not rule on whether 50 C.F.R. § 679.4(k)(5)(ii) is invalid because it gave crab fishermen until December 31, 1994 to harvest crab in an endorsement qualification period, whereas 50 C.F.R. § 679.4(k)(4)(ii) gave groundfish fishermen until June 17, 1995 to harvest groundfish in the EQP for groundfish licenses. I do not have authority to rule on the legality of regulations.

### ISSUES

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<sup>5</sup> *Argument by RAM*, July 27, 2001.

<sup>6</sup> *Order Setting Hearing*, December 26, 2002.

<sup>7</sup> 50 C.F.R. § 679.43(g)(3)(i) & (iv).

<sup>8</sup> 50 C.F.R. § 679.43(g)(2).

1. Did RAM properly count fish ticket C90 009283 as *one* documented harvest toward an AI brown king crab endorsement on an LLP crab license?
2. Does ATP satisfy the requirements of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)?
3. Do I have authority to rule on ATP's claim that the ending date for the endorsement qualification period for LLP crab licenses in 50 C.F.R. § 679.4(k)(5)(ii) violates the Magnuson-Stevens Act, the Administrative Procedures Act and the United State Constitution?

## ANALYSIS

### Facts as stated by ATP<sup>9</sup>

ATP began fishing for brown and red king crab on November 1, 1994 from its vessel, the F/V ALASKA TROJAN, with the opening of the Adak red king season. David Capri is an owner of ATP and was the captain of the boat. ATP caught brown king crab on November 5 and 7, 1994 in State statistical area 795200, which is in the Aleutian Islands, in an area known as Petrel Banks.

ATP arranged in advance to deliver crab from this trip to Mike Rosenthal, captain of the catcher-processor, the F/V PATRICIA LEE. On November 7, 1994, ATP radioed Mr. Rosenthal but he would not take the crab because poor weather made it difficult to unload the crab and he wanted to process his own crab rather than crab from other boats. ATP went to Kiska Island, picked up gear and fished for crab but without much success. ATP returned to Petrel Banks on November 12, 1994 and caught more brown king crab, this time in State statistical area 805201, which is adjacent to State statistical area 795200.<sup>10</sup>

On November 24, 1994, ATP delivered all its crab to the F/V PATRICIA LEE. The sale on November 24, 1994 resulted in one fish ticket: fish ticket C90 009283.<sup>11</sup> The fish ticket, as prepared by Mr. Capri and Mr. Rosenthal, shows that ATP caught 750 brown king crab.<sup>12</sup> The

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<sup>9</sup> ATP sets out its version of the facts in the *Declaration of David J.G. Capri*, February 19, 2001; the *Declaration of Michael Rosenthal*, August 21, 2001 and the *Supplemental Declaration of David J.G. Capri*, February 14, 2003. I assume, without deciding, that the facts, as stated by ATP, are true because, even if true, I conclude that ATP is not entitled to an AI brown king crab endorsement.

<sup>10</sup> The log of the F/V ALASKA TROJAN's activities, attachment I to Mr. Capri's February 20, 2001 declaration, specifically mentions browns or brown gear on November 5, 16, 19 and 21, 1994.

<sup>11</sup> Fish ticket C90 009283, dated November 24, 1994, is identified in the official LLP record of the fishing history of the F/V ALASKA TROJAN as fish ticket # 551098. Exhibit A at 7.

<sup>12</sup> Exhibit N at 1.

ticket lists State statistical areas 795200 and 805201 as the two areas where ATP caught brown king crab but the ticket list the 750 crab all on the line for Statistical area 795200. The State of Alaska's copy of this fish ticket has statistical area 805201 crossed out.<sup>13</sup> ATP does not know how or why it was crossed out.

When RAM constructed the official LLP record for crab licenses, it used information from State of Alaska fish tickets. The fishing history of the F/V ALASKA TROJAN in the official LLP record therefore shows all the crab on fish ticket C90 009283 as caught in State statistical area 795200.<sup>14</sup>

For purposes of this Decision, I assume, *without deciding*, that the official LLP record should be changed to show that the crab recorded on fish ticket C90 009283 was caught in two State statistical areas. For the balance of the Decision, I refer to fish ticket C90 009283 *as if* this fish ticket and the official LLP record showed that ATP caught 375 crab in State statistical area 795200 and 375 crab in State statistical area 805201, which are the facts asserted by ATP.

### **LLP regulatory background**

The LLP was implemented pursuant to the Magnuson-Stevens Fishery Conservation and Management Act<sup>15</sup> and amendments to the fishery management plans (FMPs) adopted under the Act.<sup>16</sup> The LLP “is the first stage in fulfilling the Council’s commitment to develop a comprehensive and rational management program for the fisheries in and off Alaska.”<sup>17</sup> The Council refers to the North Pacific Fishery Management Council, which is one of the eight regional fishery management councils established by the Act. The Council approved a problem statement in December 1992 that “the domestic harvesting fleet had expanded beyond the size necessary to harvest efficiently the optimum yield (OY) of the fisheries within the EEZ [Exclusive Economic Zone] off Alaska.”<sup>18</sup>

The Council, through its staff, conducted an Environmental Assessment/Regulatory Review of

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<sup>13</sup> Exhibit O.

<sup>14</sup> Fish ticket C90 009283, dated November 24, 1994, is fish ticket # 551098 in Exhibit A at 7.

<sup>15</sup> 16 U.S.C. §§ 1801 - 1883.

<sup>16</sup> The LLP regulations implemented Amendment 39 to the FMP for the Groundfish Fishery for BSAI, Amendment 41 to the FMP for Groundfish Fishery of the Gulf of Alaska and Amendment 5 to the FMP for the Commercial King and Tanner Crab Fisheries in BSAI. Final Rule, 63 Fed. Reg. 52,642, 52,642 (1998). For background to the LLP, see *id.* at 52,642 - 52,643.

<sup>17</sup> *Id.* at 52,642.

<sup>18</sup> *Id.*

possible LLP provisions and how many licenses would result from different provisions.<sup>19</sup> The Council took final action on the LLP and adopted a particular set of recommendations – the Council’s preferred alternative – at its meeting in Dutch Harbor, Alaska on June 17, 1995.<sup>20</sup> Based on the Council’s recommendation, NMFS published proposed LLP regulations for notice and comment.<sup>21</sup> NMFS then prepared final regulations and the Council forwarded them to the Secretary of Commerce for review under the Magnuson-Stevens Act.<sup>22</sup> The Secretary of Commerce, through his designee, the Assistant Administrator for Fisheries, approved the LLP regulations without change or comment.<sup>23</sup> NMFS published the final LLP regulations in October 1998.<sup>24</sup>

At issue is the proper interpretation of one of those regulations, the AI brown king crab endorsement regulation in 50 C.F.R. § 679.5(ii)(D), and the requirement that RAM award that

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<sup>19</sup> Environmental Assessment/Regulatory Impact Review for license Limitation Alternatives for the Groundfish and Crab Fisheries inn GOA/BSAI, September 9, 1997 [hereinafter EA]. ATP received the entire EA in response its Freedom of Information Act [FOIA] request to NMFS. Letter from Michael Stanley to James Balsiger, August 17, 2001, FOIA request [Exhibit C]; Letter from James Balsiger to Michael Stanley, September 18, 2001 with index of documents provided in FOIA response [Exhibit D].

<sup>20</sup> North Pacific Fishery Management Council Newsletter, June 1995 at 1, Exhibit L, also available on the Council’s website at <http://www.fakr.noaa.gov/npfmc/Newsletters/695news.htm>, <visited October 17, 1995>. 9 - 13 of this newsletter have the preferred alternative for the LLP adopted by the Council. I provided a transcript of the Council Deliberations to ATP and made it part of the record on appeal. Transcript (uncertified), North Pacific Fishery Management Council Meeting, June 15 - 17, 1995 (hereinafter Transcript, NPFMC Meeting); Letter to Michael Stanley, Attorney for ATP, August 8, 2001. This Office placed the transcript on the Administrative Appeals section of the NMFS Alaska region website under “Other Documents,” <http://www.fakr.noaa.gov/appeals/default.htm>.

<sup>21</sup> Proposed Rule, 62 Fed. Reg. 43,866, 43,866 - 43,872, 43,882 - 43,889 (August 15, 1997).

<sup>22</sup> 16 U.S.C. § 1853(c); 16 U.S.C. § 1854(b)(1). See Memorandum for Rolland Schmitten, Assistant Administrator for Fisheries, from Steven Pennoyer, Administrator, NMFS Alaska Region, June 4, 1998, Exhibit I.

<sup>23</sup> 16 U.S.C. § 1854 (b)(1)(A). Mr. Schmitten concurred in the final LLP rule. Memorandum for Rolland Schmitten from Steven Pennoyer, July 31, 1998. This was item 18 in NMFS’s response to ATP’s FOIA request. I am adding it to the record as Exhibit V. Mr. Schmitten, in turn, informed the Assistant Secretary for Oceans and Atmosphere, who also concurred. Memorandum for Terry Garcia from Rolland Schmitten, July 31, 1998. This was item 20 in NMFS’s response to ATP’s FOIA request. I am adding it to the appeal record as Exhibit W. The Secretary’s delegations of authority for the Magnuson-Stevens Act and other subjects are online at [[http://nmfsweb.ssp.nmfs.gov/pol\\_pro.htm](http://nmfsweb.ssp.nmfs.gov/pol_pro.htm)] <visited October 15, 2003>, “Delegations of Authority.”

<sup>24</sup> The final rule on the substantive LLP provisions was published at 63 Fed. Reg. 52,642 (Oct. 1, 1998). The final rule on LLP application and transfer procedures was published later. Final Rule, 64 Fed. Reg. 42,826 (Aug. 6, 1999).

endorsement if an applicant proves three **documented harvests** of brown king crab in the AI brown king endorsement area between January 1, 1992 to December 31, 1994

I interpret the language of a regulation in light of its purpose and the intent of the Secretary of Commerce.<sup>25</sup> The language of a regulation or statute is unquestionably the most important evidence of the intent of the adopting body – be it a legislature or an administrative agency. Since the Secretary approved the LLP regulations forwarded by the Council without comment or change, I assume that the Secretary’s intent is the same as the Council’s intent and will only refer to the Council’s intent.

**1. Did RAM properly count fish ticket C90 009283 as *one* documented harvest toward an AI brown king crab endorsement on an LLP crab license? Yes.**

The AI brown king crab endorsement regulation, 50 C.F.R. § 679.5(k)(5)(ii)(D), provides:

A crab species license will be assigned [by NMFS] an Aleutian Islands brown king area/species endorsement if **at least three documented harvests of brown king crab** were made by a vessel during the period beginning January 1, 1992, through December 31, 1994 **in the area described in the definition for an Aleutian Islands brown king area/species endorsement at [50 C.F.R.] § 679.2.** [emphasis added]

Section 679.2 defines “documented harvest” as

a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.

The definition of “documented harvest” does *not* define the term “harvest.” It uses the term “harvest” to define the term “documented harvest.” In implementing the LLP, RAM had to use an operational definition of a harvest – of one harvest – so that it could determine whether a document showed that an applicant made one, two, three or four documented harvests.<sup>26</sup> Another way of looking at this is that RAM had to determine what event marked the end of one harvest and the beginning of a second harvest.

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<sup>25</sup> *Tynes Enterprises*, Appeal 00-0014 at 4 (July 11, 2002). See *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Company of Virginia*, 464 U.S. 30, 36 (1983)(“As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve.”)(citation and internal quotations omitted); *United States v. Daas*, 198 F. 3d 1167, 1174 (9<sup>th</sup> Cir. 1999)(“The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute.”)(citation omitted). The principles of statutory construction generally apply to regulations.

<sup>26</sup> Four documented harvests is the highest number of documented harvests that can serve as the basis for any LLP endorsement. See note 52 *infra*.

The operational definition of a harvest that RAM used for assigning LLP crab endorsements was that **one harvest** was all the **crab of one LLP species** caught and retained from **one LLP crab endorsement area** that was landed and recorded on **one fish ticket**. ATP's characterization of RAM's approach as "one fish ticket = one documented harvest" is essentially accurate.<sup>27</sup> Under RAM's approach, the event that marks the end of a harvest is the fisherman landing or offloading one species of LLP crab from one LLP endorsement area and recording it on a fish ticket.<sup>28</sup> RAM argues that it would violate the intent of the North Pacific Fishery Management Council and the Secretary of Commerce to define documented harvest so that one fish ticket, and therefore one landing, could count as more than one documented harvest towards the same LLP endorsement.

ATP argues that RAM erred in counting fish ticket C90 009283 as one documented harvest because it shows that ATP caught crab from two State statistical areas. According to ATP, RAM must count a fish ticket as one documented harvest when it shows crab caught from one State statistical area, as two documented harvests when it shows crab caught from two State statistical areas, as three documented harvests when it shows crab caught from three State statistical areas and as four documented harvests when it shows crab caught from four State statistical areas.<sup>29</sup>

ATP's implicit definition of a harvest for awarding LLP endorsements is **all the crab of one LLP species** caught and retained **from one State statistical area** that was landed and recorded on **one fish ticket**. Under ATP's definition, the event that marks the end of a harvest is a vessel catching and retaining crab from one State statistical area and then moving to another State statistical area and catching and retaining crab from a second State statistical area.

To look at this question graphically, Appendix A is a map showing the AI brown king endorsement area – the large green shaded area – superimposed over the State statistical areas within the AI brown king endorsement area.<sup>30</sup> There are 475 State statistical areas within the AI

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<sup>27</sup> *ATP Post-Hearing Argument* at 6. I say essentially because one fish ticket could *theoretically* equal two documented harvests *if* the fish ticket showed two different LLP crab species caught from two different LLP crab endorsement areas. RAM states that only one fish ticket out of the 50,000 fish tickets in the LLP crab database had two documented harvests. *RAM's Supplement to Response to Amended Order to Produce Evidence* at 2, July 1, 2002.

<sup>28</sup> It is somewhat different for groundfish catcher-processors, which do not have to land or offload their catch to obtain fish tickets and which document their harvest activity by Weekly Production Reports (WPRs). I discuss that at pages 24 - 26 *infra*.

<sup>29</sup> Four documented harvests is the highest number of documented harvests that can serve as the basis for any LLP endorsement. *See* note 52 *infra*.

<sup>30</sup> Map of State Aleutian AI King Crab Registration Area O superimposed upon the State statistical charts for the AI, Exhibit T at 1 (small map); Exhibit T as 2 (large map). The State's King Crab Registration Area for AI, Area O, is the same as the LLP AI brown king crab endorsement area.

brown king crab endorsement area.<sup>31</sup> RAM counts fish ticket C90 009283 as one documented harvest because it only shows that ATP caught brown king crab from the AI brown king endorsement area. ATP states that RAM must count fish ticket C90 009283 as two documented harvests because it shows that ATP caught crab in two of the small boxes representing State statistical areas: State statistical area 795200 and the adjacent State statistical area 805201.

The legal question is whether the number of State statistical areas on a fish ticket is a valid criterion for defining documented harvests and awarding LLP endorsements. **Section A** at pages 8 - 10 explains why the definition of harvest in section 679.2 does not provide RAM a standard for defining documented harvests for awarding LLP endorsements. **Section B** at pages 10 - 14 examines what criterion RAM used to define documented harvests and award LLP endorsements. I find, as a matter of fact, that RAM consistently counted one fish ticket as one, and only one, documented harvest toward one LLP endorsement. **Section C** at pages 14 - 15 examines whether RAM was correct to define a harvest for LLP endorsements by reference to LLP endorsement areas. I conclude RAM was correct. **Section D** at pages 16 - 24 analyzes whether RAM could have used ATP's criterion for documented harvest. I conclude, as a matter of law, that the number of State statistical areas on a fish ticket is an invalid criterion for defining documented harvests and awarding LLP endorsements. **Section E** at pages 24 - 26 analyzes ATP's argument concerning the Weekly Production Reports filed by groundfish catcher-processors. **Section F** at pages 26 - 29 responds to ATP's question why it is being denied an AI brown king endorsement because it did not make three landings of AI brown king crab in the endorsement qualification period.

**A. The definition of "harvest" in section 679.2 does not supply a standard for RAM to determine a harvest for LLP endorsements.**

Section 679.2 defines terms relevant to fishing regulations for the Exclusive Economic Zone (EEZ) off Alaska and is the logical first place to look for a definition of a harvest. Section 679.2 does not define "a harvest" but it defines "harvesting or to harvest" as "the catching and retaining of any fish."

Under this definition, a documented harvest would be *the catching and retaining of one crab recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting*. The event that would determine one harvest is the catching and retaining of one crab. When an applicant caught the next crab, that would be a second harvest. Each crab caught and retained would constitute a separate documented harvest. If RAM were to use this definition, RAM would have to count fish ticket C90 009283 as 750 documented harvests of AI brown king crab.

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Memorandum from Mukhya Khalsa to Mary Alice McKeen, Exhibit T at 3. ATP accurately states: "The CFEC king crab administrative areas correspond to endorsement areas under the LLP." *Response by ATP to RAM's Response to Amended Order to Produce Evidence*, June 5, 2002 at 5.

<sup>31</sup> Memorandum from Mukhya Khalsa to Mary Alice McKeen, May 23, 2003, Exhibit T at 3.



This definition of harvest makes sense in certain contexts. For example, all fishign vessels “that *harvest* halibut or sablefish” must have on board an IFQ permit.”<sup>32</sup> A person may not say that the regulation does not apply to me because “I only caught and retained one halibut.”

But this definition of harvest makes no sense in the context of whether an applicant has proved three documented harvests for an LLP endorsement. Every crab fisherman harvests many crab every time he puts down a line of pots or makes a set or a haul of a landing – whatever unit of effort is used. The standard measure of “catch per unit of effort” [CPUE] in crab fisheries is the number of crab caught from each pot lift. In the 1994 - 1995 crab season, the CPUE was six crab for each pot lift and the average crab landing brought in 6,500 crab.<sup>33</sup>

If each individual crab were a separate documented harvest, every crab fisherman would have hundreds of documented harvests. If RAM adopted this criterion, the requirement for *three* documented harvests would impose no more than the requirement for *one* documented harvest. If the Council intended that each crab on a fish ticket was one landing or harvest, the LLP regulatory history would show the Council and NMFS analyzing whether to require hundreds of landings or harvests, not one versus three.<sup>34</sup>

Thus, the definition of a harvest as “the catching and retaining of any fish” is unreasonable and unsatisfactory in the context of defining documented harvests for LLP endorsements.

## **B. RAM was consistent in the way it credited documented harvests.**

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<sup>32</sup> 50 C.F.R. § 679.4(d)(1). IFQ stands for Individual Fishing Quota, a restricted access program for halibut and fixed gear sablefish.

<sup>33</sup> Annual Management Report for the Shellfish Fisheries of the Westward Region, 2000, Regional Report No. 4K01-45, Alaska Department of Fish and Game (September 2001) at Table 4 - 4, available at ADFG website [<http://www.cf.adfg.state.ak.us/region4/pubs/2002/02-54aleutian.pdf>]. To estimate crabs per landing, I used the following information from Table 4 - 4:

$$\frac{1,924,219 \text{ (number of AI brown king crabs landed – deadloss included)}}{292 \text{ (number of landings)}} = 6589 \text{ crabs per landing}$$

<sup>34</sup> Environmental Assessment [EA], Executive summary at E - 13 [Exhibit G]. When I refer to the LLP regulatory history, I mean the following documents: Transcript, NPFMC Meeting; EA for the LLP; Notice of availability of FMP amendments, 62 Fed. Reg. 32,579 (June 16, 1997); Proposed Rule, 62 Fed. Reg. 43,866 (Aug. 15, 1997); Memorandum for Rolland Schmitten from Steven Pennoyer, June 4, 1998 [Exhibit I] with concurrence by Rolland Schmitten, July 31, 1998 [Exhibit V]; Memorandum for Terry Garcia from Rolland Schmitten, July 31, 1998, with concurrence by Terry Garcia, August 18, 1998 [Exhibit W]; Final Rule, 63 Fed. Reg. 52,642 (Oct. 1, 1998); Correcting Amendments, 63 Fed. Reg. 64,878 (Nov. 24, 1998); Proposed Rule, 64 Fed. Reg. 19,113 (April 19, 1999)(application and transfer provisions); Final Rule, 64 Fed. Reg. 42,826 (Aug. 6, 1999); Notification of Application Period, 64 Fed. Reg. 49,104 (Sept. 10, 1999).

In addition to asking RAM to state a legal position, I directed RAM to state how, in practice, it counted a fish ticket that showed crab caught in more than one State statistical area.<sup>35</sup> RAM stated that it counted one fish ticket as one documented harvest toward one LLP crab endorsement, irrespective of the number of State statistical areas on the fish ticket.

RAM stated that the only time it counted one fish ticket as two documented harvests is if the fish ticket showed the applicant caught crab of two different LLP species from two different LLP endorsement areas.<sup>36</sup> For example, if a fish ticket showed brown king crab from the AI brown king endorsement area *and* St. Matthew blue king crab from the St. Matthew area, RAM would count that fish ticket as two documented harvests. RAM stated that it examined each of the 50,000 fish tickets in the crab database seven times – one for each LLP area/species crab endorsement – and found only one fish ticket with two documented harvests.<sup>37</sup>

In response, ATP argued that the record was still unclear and requested a hearing “at which a representative of RAM would describe the development of the Official LLP record in detail and then respond to questions from the hearing officer and counsel for ATP.”<sup>38</sup> To clarify the record, I held a hearing on how RAM constructed the official LLP record and counted fish tickets that showed fish caught in more than one State statistical area.<sup>39</sup> ATP submitted questions in advance of the hearing and also questioned the three senior RAM staff who testified at the hearing: Philip Smith, RAM Program Administrator; Jessica Gharrett, RAM Data Operations Manager; and Mukhya Khalsa, a RAM computer specialist familiar with RAM’s construction of the official LLP record and treatment of fish tickets.<sup>40</sup>

RAM’s testimony was internally consistent and consistent with its written position and did describe in more detail how RAM created the official LLP record and counted documented harvests. Mr. Smith explained that RAM created the official LLP crab record based solely on fish tickets required by the State of Alaska: “Even though they’re [BSAI crab] federal waters

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<sup>35</sup> *Order to Produce Evidence*, May 7, 2002; *Amended Order to Produce Evidence*, May 10, 2002; *Order Permitting Supplement to RAM Response to Amended Order to Produce Evidence*, June 26, 2002.

<sup>36</sup> *RAM’s Response to Amended Order to Produce Evidence*, May 22, 2002; *RAM Supplement to Response to Amended Order to Produce Evidence*, July 1, 2002.

<sup>37</sup> *RAM’s Supplement to Response to Amended Order to Produce Evidence* at 2, July 1, 2002.

<sup>38</sup> *Response by ATP to Supplement to Response to Amended Order to Produce Evidence*, July 26, 2002, at 4.

<sup>39</sup> *Order Setting Hearing*, December 26, 2002.

<sup>40</sup> *ATP’s Questions for RAM*, January 9, 2003. The hearing occurred on January 14, 2003. All references to “Hearing Transcript” are to this transcript for this hearing, which is in the appeal record.

crab, the federal government has basically delegated fisheries management or crab management to the State. And so they use State fish tickets as the sole way of recording harvests.”<sup>41</sup> RAM created a large database with the State fish ticket data, which formed the basis of the official LLP record.

The record on appeal contains the fishing history of the F/V ALASKA TROJAN as contained in the official LLP record.<sup>42</sup> The fishing history of the F/V ALASKA TROJAN does break down the crab caught on each fish ticket by State statistical area.<sup>43</sup> That is because the State statistical areas are the only information on a State fish ticket that shows where the fisherman caught the crab.<sup>44</sup> RAM translated the State language on the fish ticket – the State statistical areas – to the federal language it needed for the LLP – the LLP king crab endorsement area in which the State statistical area was located. RAM *added* the LLP endorsement area to the vessel’s fishing history in the official LLP record. RAM did that to the fishing history of the F/V ALASKA TROJAN in the official LLP record.<sup>45</sup>

RAM used that information to determine what LLP endorsements, according to the official LLP record, the vessel had earned. The testimony at the hearing was unequivocal. In determining what endorsements the vessel earned, Ms. Khalsa testified that RAM examined each line on a fish ticket to determine if that line showed any crab caught that met the requirements for any LLP crab endorsement.<sup>46</sup> Mr. Smith, Ms. Gharett and Ms. Khalsa testified that if a fish ticket showed that the applicant caught crab that met the requirement for one LLP crab endorsement, RAM credited that fish ticket as one, but not more than one, documented harvest toward that LLP crab endorsement.<sup>47</sup> At the hearing, RAM produced a brief internal memo from Ms. Gharett: “For fish tickets, each valid fish ticket of delivered catch will be counted as evidence of one documented harvest.”<sup>48</sup>

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<sup>41</sup> *Testimony of Philip Smith*, Hearing Transcript at 15.

<sup>42</sup> Exhibit A, the fishing history of the F/V ALASKA TROJAN from the official LLP record. Exhibit A-1 is a memorandum from Ms. Khalsa explaining what the columns in Exhibit A represent.

<sup>43</sup> Exhibit A, column 10.

<sup>44</sup> Exhibit N [six fish tickets submitted by ATP].

<sup>45</sup> Exhibit A, column 11. Exhibit A-1 states this column is “the LLP endorsement area that the statistical area is a member of.”

<sup>46</sup> *Testimony of Mukhya Khalsa*, Hearing Transcript at 27 - 31.

<sup>47</sup> *Testimony of Philip Smith*, Hearing Transcript at 16 - 17; *Testimony of Mukhya Khalsa*, Hearing Transcript at 31 - 33; *Testimony of Jessica Gharrett*, Hearing Transcript at 35 - 38, 44 - 48.

<sup>48</sup> Memorandum from Jessica Gharrett, RAM Data Operations Manager, dated June 7, 1999, to Tracy buck, Allen Butner, Tom Fletcher. [Exhibit P] Ms. Gharrett testified that the memo translated

RAM prepared a Qualification Summary for each vessel and sent it to the vessel's owner.<sup>49</sup> The Qualification Summary listed the endorsements that RAM concluded, based on the official LLP record, the vessel had earned. The record on appeal contains the Qualification Summary for the F/V ALASKA TROJAN. It states

This summary is derived from information in the "Official LLP record," a database assembled to assist with the LLP application process. The information is presumed to be a correct summary of qualifications under the program, as of the date set out above [September 9, 1999]. It is only a summary, and may be amended as more information (from whatever source) becomes available. [Exhibit B]

The Qualification Summary for the F/V ALASKA TROJAN lists five LLP crab endorsements that the vessel had earned: Aleutian Islands red king crab, BSAI *opilio/bairdi*, Bristol Bay red king, Pribilof red and blue king, St. Matthews blue king. [Exhibit B]

ATP requested, under the Freedom of Information Act, all documents in the NMFS Alaska Region's possession related to the term "documented harvest."<sup>50</sup> ATP did not submit any documents that show that RAM counted documented harvests for LLP endorsements differently from what RAM says it did.

ATP interprets the following testimony of Mr. Smith as acknowledging that each separate entry by State statistical area in the official LLP record constitutes a separate harvest:

Mr. Smith: I mean, that's the crux of the matter, of course, and, you know, clearly, yes, it [the fish ticket file] does document that fish came out of different statistical areas, but for purposes of implementing the LLP program, it does not represent different documented harvests. . . .

Mr. Stanley [Attorney for ATP]: Let me understand. Your answer is it documented a harvest, but it's not a quote/unquote documented harvest?

Mr. Smith: For purposes of the definition contained in [50 C.F.R. §] 679.2, that's correct.

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RAM's policy into a "business rule." Hearing Transcript at 45 - 50. A business rule is a customer-specific rule that programmers use to handle data in the way that the customer or client desires. *Testimony of Mukhya Khalsa*, Hearing Transcript at 32 - 34.

<sup>49</sup> *Testimony of Philip Smith*, Hearing Transcript at 17 - 18.

<sup>50</sup> Exhibit C. The index of documents in NMFS's response is Exhibit D. NMFS's response was 1280 pages. I granted ATP's request for an extension of time to respond to RAM's Argument until it received NMFS's FOIA response. *Order Granting Extension of Time*, September 19, 2001.

[Hearing Transcript at 77 - 78].<sup>51</sup>

I do not interpret Mr. Smith's testimony the way ATP does. As I have noted, the definition of "to harvest" in section 679.2 is "the catching and retaining of any fish." In context, Mr. Smith was simply admitting the obvious – that ATP caught and retained crab from different places in the AI brown king crab endorsement area at different times during its November 1 - 24, 1994 trip. But Mr. Smith made clear he was not stating that RAM should have counted, or did count, each line on a fish ticket as a harvest *for purposes of determining documented harvests for LLP endorsements*.

Ms. Gharrett, RAM Data Operations Manager, made the same point:

The way I read that is that Mr. Stanley wants confirmation that we acknowledge hatch or extraction or removal of crabs from the ocean in two different State statistical areas. And assuming that the information on the ticket that Mr. Capri submitted is accurate, in fact that he did catch crabs in two State statistical areas, then, yes, we acknowledge that. If, in fact, that was what – what happened.

And, as Mr. Smith stated, for purposes of eligibility for that in particular Brown King Crab endorsement, however, that fish ticket will only count as one documented harvest towards eligibility for that endorsement, regardless of the number of statistical areas from which Brown King Crab were harvested, as documented on that one ticket. [Hearing Transcript at 79 - 80]

Even if Mr. Smith were, in essence, questioning other parts of his own testimony and his own written statements of RAM's policy and practice – which it is clear to me he was not – Mr. Smith's testimony is not evidence that RAM in fact counted one fish ticket as more than one documented harvest toward the same LLP endorsement. The record is clear that RAM did not do this.

I therefore find that, for all applicants, RAM counted one fish ticket as one documented harvest toward one LLP endorsement, even if the fish ticket showed fish caught from more than one State statistical area. I base this finding on ATP's characterization of RAM's policy as "one fish ticket = one documented harvest," RAM's written statements submitted in this appeal, RAM's consistent testimony at the hearing, Ms. Gharrett's internal memo to RAM staff, RAM's treatment of the fishing history of the F/V ALASKA TROJAN, the Qualification Summary for the F/V ALASKA TROJAN and ATP's failure to submit any documents or evidence that RAM counted one fish ticket as more than one documented harvest toward the same LLP endorsement.

Although I find that RAM treated all fish tickets this way, I note that this issue directly affects

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<sup>51</sup> ATP Post-Hearing Argument at 4 - 5, February 14, 2003.

LLP endorsements that require or may require more than one documented harvest. For crab licenses, it is the AI brown king crab endorsement, at issue here, and the BSAI *opilio/bairdi* crab endorsement, which also requires three documented harvests between January 1, 1992 and December 31, 1994. For groundfish licenses, it is the endorsements which RAM issues if an applicant proves four documented harvests.<sup>52</sup>

**C. RAM was correct to define a harvest for LLP endorsements by reference to LLP endorsement areas.**

RAM defined a harvest for determining LLP endorsements as all the crab of one LLP species **from one LLP crab endorsement area** landed and recorded on one fish ticket. RAM's focus on the LLP crab endorsement area as the critical area was correct.

The language of the AI brown king endorsement regulation strongly supports RAM's interpretation. To receive an AI brown king crab endorsement, an applicant must have made at least three documented harvests "in the area described in the definition for an Aleutian Islands brown king area/species endorsement at [50 C.F.R.] § 679.2."<sup>53</sup> Section 679.2 specifically and precisely defines the AI brown king endorsement area.<sup>54</sup> The relevant area for an AI brown king endorsement is the *entire* AI brown king endorsement area. Section 679.2 does not define the relevant area as any of the 475 State statistical areas within the AI brown king endorsement area.

The purpose of the regulation also supports RAM's interpretation. The AI brown king crab endorsement regulation prescribes requirements for the right to fish in the *entire* AI brown king endorsement area, not merely State statistical area 795200 or 805201. It makes sense that there is symmetry between the area in which an applicant has to prove a past documented harvest and the area in which the applicant will receive the right to make future crab harvests.

The regulatory history supports RAM's interpretation. The Council and NMFS identified LLP endorsement areas as the relevant areas for awarding LLP endorsements. In commentary to the

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<sup>52</sup> An applicant receives these groundfish endorsements upon proving *four* documented harvests of groundfish in the relevant area between January 1, 1995 and June 17, 1995: [1] catcher/processor, Western Gulf, category B which is vessels 60 up to 125 feet; [2] any vessel, Central Gulf, category B; [3] any vessel, Southeast Outside, category B. 50 C.F.R. § 679.4(k)(4)(ii)(F), (J) & (N) (four harvests are an alternate basis to two harvests, one in each year, from January 1, 1992 to June 17, 1995).

<sup>53</sup> 50 C.F.R. § 679.4(k)(5)(ii)(D), quoted at page 6 *supra*.

<sup>54</sup> In the definition of "area/species endorsement," section 679.2 defines the Aleutian Islands brown king endorsement area as "waters with an eastern boundary the longitude of Scotch Cap Light (164° 44' long.), a western boundary of the U.S.-Russian Convention Line of 1867, and a northern boundary of a line from the latitude of Cape Sarichef (54° 36' N. lat.) westward to 171° W. long., then north to 55° 30' N. lat., then west to the U.S.-Russian Convention line of 1867."

final LLP rule, NMFS explained:

The Council recommended different requirements so that incidental catches would not qualify a person for a license (e.g., incidentally caught Tanner crab with red or blue king crab), but, in fisheries where a single harvest may have indicated that a person intended to remain in a fishery (e.g., the Pribilof red and blue king crab fishery that was closed from 1988 through 1992), minimal participation would be recognized.<sup>[55]</sup> The following requirements were recommended by the Council and approved by NMFS: (1) For a red and blue king crab license, at least one documented harvest of the appropriate crab species made from a vessel **in the appropriate fishery during the EQP**; and (2) for a brown king and Tanner crab license, at least three documented harvests of the appropriate crab species made from a vessel **in the appropriate fishery during the EQP**.

**The appropriate fishery is the area, as defined in the regulations, that corresponds to the area/species endorsement for which the eligible applicant is seeking qualification.** [emphasis added]<sup>56</sup>

The LLP regulations specify seven crab fisheries and seven area/species endorsements for LLP crab licenses. RAM checked each fish ticket seven times to determine if an applicant met the requirements for any of the LLP crab endorsements through the crab recorded on that fish ticket. RAM did this so it could count one fish ticket as two documented harvests, if the fisherman caught two LLP crab species from two LLP crab endorsement areas.

This criterion for when to count one fish ticket as two documented harvests is valid. RAM properly concluded that the Council intended that an applicant receive credit for any crab it caught and retained from different LLP crab endorsement areas. This criterion made sure that RAM did not shortchange any applicant by overlooking fishing activity that should count toward an LLP crab endorsement, *according to a criterion approved by the Council*.

**D. The number of State statistical areas on a fish ticket is not a valid standard for defining a documented harvest and awarding LLP endorsements.**

ATP argues that RAM must count fish ticket C90 009283 as two documented harvests because it shows that ATP caught crab from two State statistical areas. The number of State statistical areas on a fish ticket corresponds to a fact: how many State statistical areas the vessel crossed into, caught crab in and recorded on one fish ticket. **This fact does not obviously correspond to any necessary difference in investment or effort by the vessel owner.** If, after running to Kiska, ATP had come back to the *same* State statistical area (area 795200) rather than the one next to it (805201), ATP would have likely used the same gas, fuel, bait, time and money.

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<sup>55</sup> ATP quoted this section in its *Post-Hearing Argument* at 11.

<sup>56</sup> Final Rule, 63 Fed. Reg. 52,642, 52,645 (1998)(commentary).

ATP must show that its criterion for documented harvests – the number of State statistical areas on a fish ticket – is consistent with the Council’s intent in adopting the LLP regulations. For the following six reasons, I conclude that ATP’s criterion is not a valid standard for defining a documented harvest and awarding LLP endorsements.

**First, ATP’s criterion for documented harvest is not authorized by the express language of any LLP regulation.** The definition of documented harvest is “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.”<sup>57</sup> ATP argues that the “plain meaning” of the definition of documented harvest is that RAM must determine documented harvests according to the number of State statistical areas on a fish ticket.<sup>58</sup> If, by plain meaning, ATP means that the language by itself compels a certain interpretation, ATP’s argument fails. The language of the regulation does not suggest ATP’s interpretation, much less compel it.

The definition of documented harvest does not contain the term “State statistical areas.” It does not tell RAM that a documented harvest is “a lawful harvest that was recorded *in a State statistical area* in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.” It does not tell RAM to count documented harvests for LLP endorsements according to the number of State statistical areas on a fish ticket. It is hard to imagine how a regulation could have a “plain meaning” with respect to an issue and not contain any words that expressly address that issue.

The other regulations that directly bear on this issue also do *not* refer to State statistical areas. The definition of “to harvest” does not state “the catching and retaining of any fish *from a State statistical area*.” The AI brown king endorsement regulation does not tell NMFS to assign endorsements based on three documented harvests “*from three State statistical areas*.” In fact, no LLP regulation mentions the term or concept of State statistical areas *at all*. No LLP regulation states that harvests by State statistical areas is the *standard* for determining documented harvest and assigning LLP endorsements. No LLP regulation states that harvest by State statistical areas is relevant *in any way* to assigning LLP licenses.

ATP notes that the definition of documented harvest requires that the harvest be “a lawful harvest” and asserts that all the crab recorded on fish ticket C90 009283 was lawfully harvested. I accept that premise, but the fact that ATP acted lawfully when harvesting all the crab on fish ticket C90 009283 does not imply that RAM must count the crab caught from two State statistical areas reported on one fish ticket as two documented harvests toward an AI brown king endorsement.

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<sup>57</sup> 50 C.F.R. § 679.2.

<sup>58</sup> *ATP Post-Hearing Argument* at 7 - 11.



*Wards Cove Packing Co. v. NMFS*, cited by ATP, does not suggest a different conclusion.<sup>59</sup> Unlike the regulation before me, the regulation in *Wards Cove* did directly address the issue in dispute. It stated that a qualified person was an applicant who “owned a vessel that made legal landings of halibut or sablefish harvested with fixed gear.”<sup>60</sup> The court rejected NMFS’s argument that an applicant who only fished halibut in the qualifying years could not receive rights to fish sablefish because the regulation said halibut *or* sablefish. Here, ATP cites no regulation that even arguably directly addresses whether NMFS must define documented harvests according to the number of State statistical areas on a State fish ticket.

Further, *Wards Cove*, like many decisions that invoke the plain meaning rule, did not only look at the language of the regulation. The court reached a conclusion as to the purpose of the regulation and interpreted the regulation in accord with that purpose.<sup>61</sup> ATP has not shown that the purpose of the documented harvest definition, or any other LLP regulation, is to award LLP endorsements based on the number of State statistical areas from which a fisherman caught crab.

**Second, ATP’s criterion for documented harvest is not implicit in the language of any LLP regulation.** ATP suggests that the definition of documented harvest *implicitly* contains ATP’s proposed standard because one element of the definition is that the harvest was recorded “in compliance with” federal and State commercial fishing regulations in effect at the time of harvesting and a State regulation required that a fisherman record State statistical areas.<sup>62</sup> It is true that a State regulation requires – and has at least since 1972 – that a fisherman record on a

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<sup>59</sup> *Wards Cove Packing Co. v. NMFS*, 307 F.3d 1214 (9<sup>th</sup> Cir. 2002)

<sup>60</sup> *Id.* at 1216, quoting 50 C.F.R. § 679.40(a)(2)(A) (current version).

<sup>61</sup> “[W]e find it clear that the regulations recognize that from year-to-year a fixed gear commercial operator might have switched between the two species of fish in response to market conditions, but would still be entitled to catch both species, with the amount of allowable catch based on actual landings of that species.” *Id.* at 1220. See *United States v. Daas*, 198 F. 3d 1167, 1174 (9<sup>th</sup> Cir. 1999)(“To determine the plain meaning of a particular statutory provision, and thus congressional intent, the court looks to the entire statutory scheme.”)(citation omitted); *United States v. Flores-Garcia*, 198 F. 3d 1119, 1121 (9<sup>th</sup> Cir. 2000)(“We ascertain the statute’s plain meaning by examining the statute’s language, its internal structure as well as its object and policy.”)(citation omitted); *Children’s Hospital and Health Center v. Belshe*, 188 F. 3d 1090, 1096 (9<sup>th</sup> Cir. 1999)(“To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy.”)( citation omitted). Since I believe [1] it is always important to examine the purpose of a regulation and [2] that is often found in the regulatory history, I question whether there is any meaningful difference between determining the “meaning” of a regulation and the “plain meaning” of a regulation.

<sup>62</sup> *ATP Response to Argument by RAM* at 12 - 13 (October 22, 2001).

fish ticket “the nearest headland or bay or statistical catch area in which fish were taken.”<sup>63</sup>

But the fact that the State requires a piece of information on a fish ticket does not mean that NMFS must or should accept that information as showing a separate harvest. In addition to State statistical areas, State regulations require fishermen to report the number of crab caught, the number of pounds, the number of pots pulled and the price paid for the crab.<sup>64</sup> But nothing turns on those facts in determining documented harvests and awarding LLP endorsements.

The requirement that a harvest was recorded “in compliance with” federal and State regulations is a *general* requirement. It suggests only that the Council wished NMFS to credit fishing activity that is supported by proper documentation. The requirement for compliance with federal and State regulations does not single out compliance with *any specific State regulation* as having any particular importance in granting LLP endorsements. If the Council intended that NMFS assign LLP endorsements based on a particular fact – the number of State statistical areas on a fish ticket – and compliance with a particular State regulation, the Council or NMFS would have said so in an LLP regulation. How else could the public or NMFS or the courts know that this particular fact was important in determining whether an applicant should receive an AI brown king crab endorsement? Without express language, RAM had no authority to read into the LLP regulations a directive to award endorsements based on the number of State statistical areas on a fish ticket.

**Third, section 679.2 does not define State statistical areas.** Section 679.2 painstakingly, even obsessively, defines any geographical area that is relevant to federal fishing programs in the EEZ off Alaska. Section 679.2 defines at least 39 geographical areas.<sup>65</sup> Section 679.2 actually does

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<sup>63</sup> The current regulation requires that each buyer shall record each landing on an ADF&G fish ticket, which must show “the nearest headland or bay or statistical catch area in which the fish were taken.” 5 AAC 39.130(c)(7). A regulation substantially the same has been in effect since at least 1972. Alaska Administrative Register 42, July 1972 (5 AAC 39.130).

<sup>64</sup> 5 AAC 39.130(c)(8)(B)(fish ticket must record “the number and pounds of king, Dungeness, and Tanner crab); 5 AAC 39.130(c)(10)(fish ticket must record “other information the department may require). The fish tickets record the number of pots pulled or the number of drags, the price paid per pound and the total amount paid for the crab recorded on that line. See Exhibit N (six ticket tickets).

<sup>65</sup> 50 C.F.R. § 679.2 defines Area endorsement, Area/species endorsement, Bering Sea and Aleutian Islands Area, Bering Sea and Aleutian Islands Management Area [BSAI], Bering Sea Subarea of the BSAI, Bogoslof District, Bycatch Limitation Zone 1, Bycatch Limitation Zone 2, Catcher Vessel Operational Area [CVOA], Central Aleutian District, Central Gulf of Alaska [GOA] Regulatory Area, Chinook Salmon Savings Area of the BSAI, Chum Salmon Savings Area of the BSAI CVOA, *C. Opilio* Bycatch Limitation Zone, Eastern Aleutian District, Eastern Gulf of Alaska Eastern Regulatory Area, Federal waters, Gulf of Alaska, Harvest limit area for Atka mackerel directed fishing, Herring Savings Area, High Seas Salmon Management Area, IFQ regulatory area, Management area, Nearshore Bristol Bay Trawl Closure Area of the BSAI, North Pacific fishery, Red King Crab Savings Area, Red King Crab Savings Subarea, Regulatory area, Reporting area, Scallop Registration Area H, Sitka Pinnacles Marine

define “statistical areas,” but these are *federal statistical areas*.<sup>66</sup> Federal statistical areas are also called reporting areas.<sup>67</sup> BSAI is divided into 18 federal statistical/reporting areas.<sup>68</sup> The Gulf of Alaska is divided into eight federal statistical/reporting areas.<sup>69</sup> These areas are completely different from, and much larger than, State statistical areas. If the Council and NMFS intended to key award of LLP endorsements to State statistical areas, it is inconceivable to me that the LLP regulations would not define State statistical areas and distinguish them from federal statistical areas.

**Fourth, the LLP regulatory history does not show that the Council or NMFS considered ATP’s definition of documented harvest.** The Council, in deliberating on the LLP, did not mention State statistical areas once. The Council deliberations do not show any discussion of whether it is fair to award an AI brown king endorsement to a fisherman who made one landing of crab caught from two or three State statistical areas and deny the endorsement to a fisherman who made one landing of crab caught from one State statistical area.<sup>70</sup> ATP points to no document in the LLP regulatory history or its FOIA materials showing that the Council or NMFS considered, much less approved, defining a documented harvest according to the number of State statistical areas on a fish ticket.

The Council, through the EA and other staff analysis, analyzed how many licenses could result from different LLP provisions or “configurations.” In all of the configurations, the Council only analyzed different *landing* requirements.<sup>71</sup> The Council did not analyze how many LLP licenses

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Reserve, Southeast Outside District of the GOA, Statistical; area, Steller Sea Lion Protection Areas, Superexclusive registration area, Trawl test areas, U.S.-Russian Boundary, Walrus Protection Areas, West Yakutat District, Western Aleutian District, Western GOA Regulatory Area.

<sup>66</sup> Section 679.2 defines “statistical areas” as “the part of any reporting area defined in Figures 1 and 3 to this part, contained in the EEZ [exclusive economic zone].” All the figures which are part of section 679 are on the NMFS Alaska Region website at <http://www.fakr.noaa.gov/rr/figures.htm>.

<sup>67</sup> Reporting area is also defined in 50 C.F.R. § 679.2 by reference to Figures 1 and 3. In figures 1 and 3, federal statistical areas are the same as federal reporting areas.

<sup>68</sup> Figure 1a to Part 679.

<sup>69</sup> Figure 3a to Part 679.

<sup>70</sup> Transcript, NPFMC Meeting, *supra* note 20.

<sup>71</sup> The Executive Summary of the LLP in the EA on page E - 7 states: “Six main components, each having from four to eight options, significantly influence the ultimate composition of the license program. The six components are nature of licenses, license recipients, license designations, qualifying period, *landings requirements* for general license qualification and *landings requirements* for endorsement qualification.” [Exhibit G at 10][emphasis added]. The Crab Table Appendix to the EA describes the options or different LLP configurations. It only analyzes different *landings*

would result from ATP's definition of documented harvest, where one landing can be counted as one, two, three or four documented harvests, even though it had that data readily available in the official LLP record.<sup>72</sup>

**Fifth, ATP's standard would lead to "undue participation," as defined by the Council.** In taking final action on the LLP, the Council approved granting an LLP brown king endorsement to a vessel that "made at least three landings in the Brown King crab fishery during the Endorsement Qualification Period (EQP) of 1/1/92 to 12/31/94."<sup>73</sup> Council Member Benton explained:

Use of three landings for these are reflective of the difference in those fisheries, brown king crab fisheries in particular, have a fairly discrete group of participants. They have by and large stuck with that fishery; **having a landing requirement of less than three would result in undue participation in these fisheries.**<sup>74</sup>

ATP's standard for harvest would award an AI brown king endorsement on less than three landings. ATP would receive it, based on two landings. Since the Council did not consider ATP's standard for documented harvests, I do not know how many other additional licenses would result in this fishery and the other fisheries – the *opilio/bairdi* and certain groundfish endorsements – where NMFS awards endorsements based on more than one documented harvest.<sup>75</sup> But the increase in participation from ATP's definition could be substantial. In ATP's fishing history, "multiple harvests, by separate stat areas, are indicated for most [of its] deliveries."<sup>76</sup> Since ATP only started fishing for AI brown king in November 1994, the record only has the two 1994 fish tickets for AI brown king crab which RAM counts as two documented harvests and ATP counts as three.

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*requirements.* [Exhibit U]

<sup>72</sup> The only reference I found in the LLP regulatory history to State statistical areas was in Appendix IV to the EA, "Methods of Construction and Assumptions in the Groundfish and Crab License Limitation Databases," Exhibit H. The Council approved translating the "one degree longitude by one-half degree latitude blocks" on fish tickets – which are the State statistical areas – into relevant LLP areas. Exhibit H at 1, 3. This is exactly what RAM did.

<sup>73</sup> Council Newsletter, June 1995 at 10, Exhibit L, available on the Council's website at <http://www.fakr.noaa.gov/npfmc/Newsletters/695news.htm>. The Council and NMFS initially proposed a Dutch Harbor brown king and an Adak brown king endorsement. Proposed LLP rule, 62 Fed. Reg. 43,866, 43,888 (1997). The final LLP rule combined them into one AI brown king endorsement, a change NMFS clearly identified and explained. Final Rule, 63 Fed. Reg. 52,642, 52,648 (1998).

<sup>74</sup> Transcript, NPFMC Meeting, at 94 (emphasis added).

<sup>75</sup> See note 52 *supra*.

<sup>76</sup> ATP Response to Argument by RAM at 4, October 22, 2001.

For 1995, ATP had six fish tickets showing AI brown king deliveries. Four of the six fish tickets show crab caught in more than one State statistical area. One ticket shows crab caught in four State statistical areas. One ticket shows crab caught in five State statistical areas. Under ATP’s definition, RAM would count these six fish tickets as **sixteen** documented harvests. Under RAM’s definition, RAM would count these six fish tickets as **six** documented harvests.<sup>77</sup>

ATP argues that its standard for documented harvests would not unduly increase LLP licenses.<sup>78</sup> ATP identifies configuration 31422 in the Environmental Assessment as closest to the AI brown king crab recommendation of the Council and notes the EA estimated that 67 licenses with AI brown king crab endorsements would be issued under that configuration. ATP then turns to the NMFS website and notes that NMFS has issued only 38 licenses with AI brown king endorsements: 26 permanent and 12 interim.<sup>79</sup> From these facts, ATP concludes that its definition of documented harvest would not undermine the goal of the LLP to reduce capacity and effort in the LLP groundfish and crab fisheries.

ATP’s reasoning is flawed. First, the Council’s concept of “undue participation” was not only based on the number of licenses that could result from the three-landings criterion. It had a fairness element in it. The Council limited participation to “a fairly discrete group of participants” that “have by and large stuck with the fishery” and shown a certain level of

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<sup>77</sup> Exhibit A, the fishing history of the F/V ALASKA TROJAN from the official LLP record, shows the following with respect to brown king crab caught by the vessel in the Aleutian Islands in 1995. In Exhibit A, column 14 is the delivery code. Code 1 is whole fish/food. Code 79 is deadloss. Deadloss is not counted toward documented harvests. Exhibit A-1 has the labels for the columns in Exhibit A.

Fish ticket # [column 3]	Date [columns 2, 6, 7]	# of State statistical areas on fish ticket [column 10]	# of documented harvests per ATP’s definition	# of documented harvests per RAM’s definition
550091	4/17/95	4	4	1
550076	5/5/95	2	2	1
550105	5/20/95	1	1	1
550054	6/3/95	1	1	1
550266	11/27/95	5	5	1
550261	12/18/95	3	3	1
			<b>TOTAL 16</b>	<b>TOTAL 6</b>

<sup>78</sup> ATP Post-Hearing Argument at 12 - 16.

<sup>79</sup> ATP Post-Hearing Argument at 15 - 16.

participation in the fishery: three landings by December 31, 1994. Second, the EA analyzed in configuration 31422, and every other configuration, how many licenses would result from different *landing* requirements.<sup>80</sup> The EA does not give us any information how many additional licenses would result in the AI brown king crab fishery if RAM used ATP's definition of documented harvest, where one landing can count as one, two, three or four documented harvests. Third, ATP's definition would also increase participation, to an unknown extent, in other fisheries where NMFS awards endorsements based on more than one documented harvest: the BSAI *opilio/bairdi* crab fishery and certain groundfish fisheries.<sup>81</sup>

It is possible that, given how big the LLP endorsement areas are, how small the State statistical areas are, and how much money it takes to outfit a vessel and prosecute a fishery, many vessels, like the F/V ALASKA TROJAN, cross into different State statistical areas, catch crab or groundfish in more than one State statistical area and land the fish at the same time on one fish ticket. *If* the Council had analyzed the issue, it would have analyzed how much additional participation would result if NMFS awarded endorsements based on the number of State statistical areas on a fish ticket rather than on the number of landings. The Council would then have made a policy judgment whether that was a fair criterion to adopt and whether the additional effort from awarding licenses on that basis furthered the fishery management plans for the BSAI groundfish fishery, the GOA groundfish fishery and the BSAI crab fishery. Neither this Office nor RAM is authorized or equipped to make that type of judgment.

**Sixth, the purpose of the new term, “documented harvest,” was to clarify, not change, the standard for granting LLP endorsements.** In the final LLP regulations, the Council and NMFS changed the term “legal landing” to “documented harvest.” NMFS explained the change this way:

A definition for the term “documented harvest” is added to the final rule. The term “documented harvest” replaces “legal landing” throughout the final rule. The new term more accurately describes the activity necessary for eligibility. Included in the proposed definition of legal landing was the activity of off-loading. Off-loading is not necessary for eligibility. Further, the area endorsement(s) a person is issued should reflect the area in which fishing occurred, not the area in which the fish were delivered.<sup>82</sup>

The important point here is what the commentary does *not* state. It does not mention State statistical areas. It does not state that the Council adopted this new term because it wished RAM to award LLP endorsements based on the number of State statistical areas from which the vessel caught crab, not the number of legal landings which the vessel made. Given the absence of *any* reference to State statistical areas in *any* LLP regulation, *including* the new definition of

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<sup>80</sup> Exhibit U.

<sup>81</sup> See note 52 *supra*.

<sup>82</sup> Final rule, 63 Fed. Reg. 52,642, 52,648 (October 1, 1998)(supplementary information)

documented harvest, RAM could not reasonably read this commentary that it should give any significance to State statistical areas in determining LLP endorsements.

Similarly, when NMFS forwarded the final LLP regulations to the Assistant Administrator for Fisheries for review under the Magnuson-Stevens Act, NMFS did not state that the regulations changed the standard for eligibility from the Council's original recommendations and from the proposed LLP rule. NMFS explained the changes this way:

No major changes were made in the final rule due to comments received on the proposed rule. Of the few changes that were made to the final rule, most were editorial changes designed to make the regulations more understandable to the public. In addition to the editorial changes, the term "documented harvest" was added to the final rule. **This term more accurately describes the behavior necessary for eligibility and replaces "legal landing."** Also, two provisions were added to describe the forms of evidence that could be used to verify processing activity and documented harvests.<sup>83</sup> (emphasis added)

If the term "documented harvest" does not change the standard for eligibility, what does it clarify and more accurately describe? One, it clarifies that offloading is not necessary for eligibility. An entire class of vessels – catcher-processors – do not offload their catch. Catcher-processors process their own catch. Catcher-processors can get fish tickets and document their harvest without offloading or landing. Two, the new term makes clear that what is important is where and when the fishing occurred, not where and when the landing occurred.

I read the sentence in the commentary that "Offloading is not necessary for eligibility" as meaning "Offloading *or landing* is *not always* necessary for eligibility." It is not necessary for catcher-processors. ATP reads this sentence as meaning "Offloading *or landing* is *never* necessary for eligibility." ATP reads into this sentence an intent by the Council to forbid NMFS from using landings as a criterion for documented harvests – a criterion the Council analyzed and approved when it took final action on the LLP in June 1995. If the Council intended to adopt a whole new standard for LLP endorsements, it would not have done this with one sentence in the commentary to the final regulations. The Council and NMFS would have adopted a regulation which expressly adopted a new standard and would have explained the basis for the new standard in the commentary.

Another way of saying the same thing is that when the Council took final action on the LLP in June 1995, it recommended that an applicant receive an AI brown king endorsement if the applicant made three "somethings" in the endorsement qualification period. It called those somethings three "landings." If the Council or NMFS, by the new term "documented harvest," intended to award this endorsement based on three different "somethings," the Council and NMFS would have explained that change to the public, when it published the final rule, and to

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<sup>83</sup> Memorandum for Rolland Schmitt, Assistant Administrator for Fisheries, from Steven Pennoyer, Administrator, Alaska Region, June 4, 1998, Exhibit I.

the Secretary's designee, when it asked him to approve the rule under the Magnuson-Stevens Act.

**E. ATP notes that a groundfish catcher-processor receives credit for every *week* of harvesting activity it reports on a Weekly Production Report.**

ATP notes several times that RAM credits a groundfish catcher-processor with one documented harvest for every week of harvesting/processing activity it reports on a Weekly Production Report or WPR.<sup>84</sup> ATP implies that it is unfair that it caught crab in two weeks during its November 1994 fishing trip and received credit for one documented harvest whereas a groundfish catcher-processor would receive credit for two documented harvests if it were on the water for two weeks and submitted two Weekly Production Reports. This argument implies a definition of harvest for LLP endorsements, namely, all the crab caught and retained in one week. The key event marking the end of a harvest would be the catching and retaining of crab and then the passage of time. This is not a valid standard that I can require RAM to adopt in evaluating ATP's, and every other vessel's, fish tickets.

It is true that federal regulations require that groundfish catcher-processors file Weekly Production Reports (WPR) and RAM counts each WPR as a documented harvest.<sup>85</sup> But ATP is not a groundfish catcher-processor, did not have to file WPRs and did not file WPRs. Therefore, RAM cannot count ATP's harvests, or the harvests of any other crab catcher vessel, through WPRs.

RAM is treating ATP the same as all other applicants who recorded their harvests on fish tickets and who applied for an LLP crab license for a catcher vessel. RAM is counting this fish ticket the same as it counted the other 50,000 fish tickets that comprise the crab LLP database. To treat ATP's fish ticket differently from all other fish tickets would be unfair to other applicants.

The question then becomes whether RAM should re-count all 50,000 crab fish tickets in the LLP crab database. If ATP's goal is to treat catcher vessels and catcher-processor vessels the same, ATP's criterion – the number of State statistical areas on each fish ticket – does not achieve that goal. It is underinclusive and overinclusive. A vessel could fish in many State statistical areas within one week and it could fish in the same State statistical area over several weeks. I have no reason to conclude that the number of State statistical areas on a crab fish ticket corresponds to the number of weeks in which the vessel caught crab. So ATP must be proposing that RAM recount all the crab fish tickets simply by the number of weeks in which a vessel caught crab.

I find no support in any LLP regulation or the LLP regulatory history for that approach. The AI brown king endorsement regulation does not tell RAM to count documented harvests by weeks

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<sup>84</sup> *ATP's Post-Hearing Argument* at 7, 10.

<sup>85</sup> 50 C.F.R. § 679.5(i); Exhibit P; *Testimony of Mukhya Khalsa, Philip Smith, Jessica Gharrett*, Hearing Transcript at 49 - 54.



of activity by a catcher vessel. RAM does not have that information readily available because a crab fisherman did not have to report on any State or federal form the number of weeks during which he caught crab. Neither the Council deliberations nor the EA nor the commentary to the proposed or final LLP regulations suggest that the number of weeks of harvest activity by a crab catcher vessel is the standard for defining documented harvests by crab catcher vessels.

The opposite is the case. The Council approved using WPRs in the LLP groundfish database.<sup>86</sup> It approved using fish ticket landings in the groundfish database for vessels that had fish tickets.<sup>87</sup> It approved using only fish ticket data to construct the crab LLP database.<sup>88</sup> In voting on the AI brown king endorsement, the Council was made aware of the different ways groundfish catcher processors and crab catcher vessels record their activity:

Council Member Hegge: I was just curious. We have a different way of looking at a landing in groundfish and I was wondering what you're calling a landing here. Do you do weekly reports and would it be the same way or it is an offload, or how do you determine that?

Council Staff Member Brannan: I believe for catcher processors it's a weekly landing and for a catcher vessels it's when they offload. And, there's a separate fish ticket filled out for bairdi or opilio, so they're kept separate. [Transcript, NPFMC Meeting, at 95]

Crab catcher vessels do offload or land their catch. That is a sensible way to look at their activity. A catcher-processor does not necessarily offload and may be operating more or less continuously. A time-based standard make sense for them.

I conclude that RAM correctly counted ATP's fish ticket as one documented harvest even though it covered activity that spanned more than one week.

**F. ATP argues that it is unfair that RAM denied it an AI crab endorsement because it did not make three *landings* of AI brown king crab.**

ATP argues:

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<sup>86</sup> *Appendix IV to EA, "Methods of Construction and Assumptions in the Groundfish and Crab License Limitation Data Bases,"* Exhibit H, at 1. "A data base was designed specifically for the license alternatives developed by the Council, and approved at their January meeting. . . . Data from the Weekly Processor Reports (WPR), Domestic Observer Reports and Joint Venture Observer Reports were easily transferred to FMP [Fishing Management Plan] sub-areas." Exhibit H at 1.

<sup>87</sup> Exhibit H at 1.

<sup>88</sup> Exhibit H at 3. The fish ticket data came from the State of Alaska's Commercial Fisheries Entry Commission Condensed General Earnings (CGE) files. *Id.*

Mr. Smith admits that if the F/V ALASKA TROJAN had made another delivery sometime prior to November 24, 1994, RAM would conclude that three documented harvests had been made from the vessel and “we wouldn’t be here.” [Hearing Transcript at 85] Why should this extra delivery make a difference in whether ATP receives an Aleutian Islands brown king crab endorsement? The vessel’s harvesting activity – fishing in two statistical areas – would have been the same in either instance. Why should ATP’s eligibility to continue in this fishery, which is so important to its economic future (see Exh. A at 7-230) depend on whether the crab it caught were reported on one fish ticket or two? NMFS expressly stated, when it promulgated the final rule and explained inclusion of the term “documented harvest,” that “Off-loading is not necessary for eligibility.” [citation omitted] If that is so, then why is a third landing the determining factor in whether a vessel is found to have made three “documented harvests?”

Although not apparent at first glance, this argument is not based on the fact that an applicant caught crab in different State statistical areas and landed them at the same time. The same argument would apply if a vessel caught crab in one State statistical area, tried to deliver, went back to the very same State statistical area, caught more crab and delivered all the crab on the same fish ticket. Likewise, a vessel owner could make two sets a few days apart in the same State statistical area, or on the same day, and ask the same question, “Why is a third landing the determining factor in whether [my] vessel is found to have made three ‘documented harvests?’”

It is a fair question: why should eligibility for an AI brown king crab endorsement depend on the number of landings? **First, the number of landings is the criterion approved and recommended by the North Pacific Fishery Management Council.** And I have concluded that the term “landing” means the same as “documented harvest.” Therefore, by counting one landing as two, three or four documented harvests, ATP doublecounts one documented harvest two, three or four times.

**Second, ATP is being treated like all other applicants for an AI brown king endorsement.** I have determined that RAM did not count one fish ticket as more than one documented harvest toward any single LLP endorsement. Therefore, no other applicant received an AI brown king endorsement with fewer than three landings.

**Third, if offloading can never be necessary for eligibility for LLP endorsements, all the Council analysis and almost all of the LLP licenses awarded to date violate that principle.** ATP’s argument proves too much. The Council analyzed eligibility for LLP licenses primarily through analysis of fish tickets, which a fisherman receives only upon offloading or landing. NMFS determined eligibility for LLP crab licenses based exclusively on fish tickets. Likewise, NMFS determined eligibility for most LLP groundfish applicants based on fish tickets – except applicants who proved their documented harvest through Weekly Production Reports.<sup>74</sup> If

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<sup>74</sup> RAM staff testified that, when RAM was setting up the LLP, it had a business rule for the possible use of observer data in awarding *groundfish* endorsements. *Testimony of Philip Smith and Jessica Gharrett*, Hearing Transcript at 50 - 54. But Ms. Gharrett testified that, to her knowledge, “no

offloading can never be necessary for eligibility, almost all the Council analysis and almost all of the LLP licenses awarded by NMFS to date violate that principle.

**Fourth, if the Council intended to eliminate landing as an element in determining harvests, it would have supplied a new standard.** If the Council meant that offloading can *never* be necessary for eligibility, it would have said what *was* necessary for eligibility. RAM uses a landings-based standard keyed to LLP endorsement areas to define documented harvests for LLP crab licenses. ATP has not provided a superior standard that I have the authority to order RAM to use. I simply see no principled way I can grant ATP relief. By principled, I mean based on a standard that I can state coherently, that is derived from the LLP regulations and that NMFS could apply to other applicants.

The standard for a harvest in the federal regulations defines harvest animal by animal – “the catching and retaining of any fish” – so that each crab is one harvest. This does not supply a valid standard for defining harvest in the context of LLP endorsements

The only standard offered by ATP – the number of State statistical areas on a fish ticket – does not supply a valid standard. After an exhaustive consideration of the evidence, I cannot conclude that any policy maker – the Council, NMFS, the Secretary of Commerce – considered this as a criterion, much less authorized me to order that LLP endorsements be awarded on that basis. I would be making up the standard out of whole cloth.

The problem with all of ATP’s other arguments is that they do not offer a defensible, coherent standard for defining harvests for the purpose of awarding LLP endorsements. The federal regulations also define a “set” for crab pots. It is “when the pots in a string are hauled more than once in the same position.”<sup>75</sup> This definition of harvest dissects the fishing activity itself. Is ATP urging that standard for one harvest? There is no support in the language or regulatory history for that definition. There is no Council analysis or deliberation of that as a possible criteria for LLP licenses. Every crab fisherman that puts down one string of pots almost certainly puts down a second string.<sup>76</sup> This definition of harvest would eviscerate the distinction between one and three documented harvests and lead to far more AI brown king crab endorsements than intended by the Council.

Is ATP saying that it is not every set but every set where the vessel moves to a different place? How much would the vessel have to move? One mile? Two miles? On the same day? On different days? Here, too, the regulatory history does not show any analysis or consideration of

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license or endorsement was based on observer data. It was a data source of third resort, if you will, and was never required to be used.” Hearing Transcript at 53.

<sup>75</sup> 50 C.F.R. § 679.2.

<sup>76</sup> In 1994 - 1995 season, each pot yielded on the average six crabs and each landing/fish ticket showed an average of approximately 6,500 crab caught. *See* note 33 *supra*.

this as a criterion for LLP endorsements.

If not the fishing activity itself, is ATP saying the standard should be the passage of time – the number of weeks in which a catcher vessel catches crab? I have analyzed that and concluded that is not a standard I am empowered to adopt and order RAM to use.

If not the fishing activity, what about the financial investment of the applicant? ATP states that it invested significant sums of money in 1994 in converting its vessel for the AI brown crab fishery.<sup>77</sup> An applicant's investment of money to participate in a fishery is not a factor in defining a documented harvest anywhere in the LLP regulations. ATP states that it has participated heavily in the AI brown king crab fishery *since* entering it in November 1994 and has become financially dependent on it.<sup>78</sup> An applicant's participation in the AI brown king crab fishery after December 1994 and an applicant's financial dependence on this fishery are not factors that the regulations articulate or authorize NMFS to use in awarding this endorsement.

ATP states that it would have had two landings if circumstances had been different. That argument provides no standard *for determining whether an applicant made one or two documented harvests*. I can only consider this claim under the unavoidable circumstances regulation, where the regulations give me a *standard* and *authority* to examine an applicant's individual circumstances and what would have happened if circumstances had been different.

It would be possible to develop a standard for documented harvests other than a landings-based standard but it would have to be developed through rule making rather than adjudication. It would be the product of the legislative-style regulatory process under the Magnuson-Stevens Act: Council staff work on an Environmental Assessment; Council deliberation; NMFS input through drafting regulations; Secretary of Commerce review and approval. I cannot adopt a new standard for documented harvests and neither can RAM.

**2. Assuming that the facts as stated by ATP are true, does ATP satisfy the requirements of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)? No.**

I analyze the language of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), construed in light of the purpose of the regulation. The regulation provides:

A qualified person who owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, or crab species if applicable, 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 or paragraph (k)(5) of this section for a crab species license **because of an**

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<sup>77</sup> ATP Post-Hearing Argument at 12.

<sup>78</sup> ATP Post-Hearing Argument at 16; Statement by ATP Counsel, Testimony by Philip Smith, Hearing Transcript at 89 - 94.

**unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries)** may receive a license if the qualified person is able to demonstrate that:

(A) The owner of the vessel at the time of the unavoidable circumstance held a specific intent **to conduct directed fishing** for license limitation groundfish or crab species with that vessel during a specific time period in a specific area.

(B) The specific intent **to conduct directed fishing** for license limitation groundfish or crab species with that vessel was thwarted by a circumstance that was:

(1) Unavoidable.

(2) Unique to the owner of that vessel, or unique to that vessel.

(3) Unforeseen and reasonably unforeseeable to the owner of the vessel.

(C) The circumstance that prevented the owner **from conducting directed fishing** for license limitation groundfish or crab species actually occurred.

(D) Under the circumstances, the owner of the vessel took all reasonable steps to overcome the circumstance that prevented the owner **from conducting directed fishing** for license limitation groundfish or crab species.

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

To receive credit for a harvest under the unavoidable circumstances regulation, an applicant must meet each requirement of the regulation. I conclude that ATP does not meet two requirements in the unavoidable circumstances regulation. ATP's vessel was not "lost, damaged or otherwise unable to participate" in the AI brown king crab fishery during the EQP. ATP was not unable to conduct directed fishing in the AI brown king crab fishery during the EQP.

**A. Was the F/V ALASKA TROJAN "lost, damaged or otherwise unable to participate" in the AI brown king crab fishery in the endorsement qualification period within the meaning of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)? No.**

A vessel owner can only claim eligibility under this regulation if its vessel was unable to meet the criteria for an LLP license "because of an unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries)."<sup>79</sup> As a threshold matter, ATP "must prove that the [F/V ALASKA TROJAN] was unable to harvest brown king crab during the endorsement qualification period, or for some

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<sup>79</sup> 50 C.F.R. § 679.4(k)(8)(iv).

portion of it, because of the circumstances it is claiming were unavoidable, unique, unforeseen and reasonably unforeseeable.”<sup>80</sup>

ATP has not asserted that its vessel was lost or damaged during any part of the endorsement qualification period. Therefore, the only way ATP could meet this requirement was if its vessel was “otherwise unable to participate” in the AI brown crab fishery during the endorsement qualification period.

ATP does not argue explicitly that it was “otherwise unable to participate” in the AI brown king crab fishery. The argument suggested by the facts ATP presented is that ATP was unable to participate in the brown king crab fishery because it caught brown king crab but had to wait to deliver it. The issue is whether a delay in the delivery of crab means an applicant was “otherwise unable to participate” in the fishery. This is an untenable interpretation of that requirement for four reasons.

**First**, ATP’s interpretation does violence to the language of the regulation. Webster’s Third New International Dictionary defines “participate” as “to take part in something (as an enterprise or activity) usually in common with others.”<sup>81</sup> ATP was participating in the brown crab fishery throughout the period November 1 to November 24, 1994. According to David Capri’s log, the F/V ALASKA TROJAN was “working” or “fishing” for crab all but six days between November 1 - 24, 1994.<sup>82</sup> And even on those six days, it was steaming out to the fishing grounds, running to Kiska or unloading its catch. The log specifically notes “browns” or “brown crab gear” on November 5, 7, 16 and 21.<sup>83</sup>

When, exactly, under ATP’s interpretation, was ATP “unable to participate” in the AI brown king crab fishery? Was it from November 7 to November 24, 1994, because it radioed the F/V PATRICIA LEE on November 7 and had to wait until November 24, 1994 to deliver the crab it caught? But ATP was on the fishing grounds throughout that time period. It had the brown king crab it caught. It was catching, or actively trying to catch, more crab. It did eventually sell and deliver all the crab it caught. Under ATP’s definition, a vessel could be considered “unable to participate” in the fishery, even though it was on the water, catching crab some of the time, trying to catch it the rest – to all intents and purposes participating in the fishery.

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<sup>80</sup> *In re Application of Pequod, Inc.*, Appeal No. 00-0013, April 12, 2002 at 10. Pequod met that requirement because its vessel was unable to, and did not participate in, the AI brown king fishery from approximately March 4, 1994 until July 5, 1994 because of significant physical damage.

<sup>81</sup> Webster’s Third New International Dictionary (1986).

<sup>82</sup> November 2, 3, 4, 5, 6, 7, 8, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23. *Affidavit of David Capri*, February 19, 2001, Attachment I (log of activities of F/V ALASKA TROJAN, from October 22, 1994 to January 1, 1995). The entry for November 11 is equivocal.

<sup>83</sup> *Id.*

**Second**, ATP’s interpretation of the regulation would mean that any time a boat was delayed from delivering crab for even a short period of time – for a day or two – it could claim it was “unable to participate” in the fishery and meet this requirement in the unavoidable circumstances regulation. The endorsement qualification period for AI brown king crab covered three years. During a three-year period, it is likely that virtually every vessel participating in any fishery has to wait to deliver product for some period of time due to weather, crew problems, mechanical problems on the catcher vessel or the processor vessel, scheduling delays because several vessels want to deliver at the same time or, as here, because a processor wants to process its own catch first. Under ATP’s interpretation, this exception – which was meant to be a narrow exception to the standard criteria of actual harvests – would swallow the rule.<sup>84</sup>

**Third**, ATP’s definition does not fit with the other parts of this requirement. The requirement that the vessel be “otherwise unable to participate” in the crab fishery is part of the short list, namely that the vessel was unable to meet the criteria for an LLP license because “of an unavoidable circumstance, **(i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or crab fisheries).**” Being “otherwise unable to participate” means that the vessel is unable to participate in the fishery in a way similar to a vessel that is lost or damaged is unable to participate in the fishery. A vessel that is lost or damaged cannot catch fish. It typically cannot even try to catch fish and has to leave the fishery for a significant period of time.

My interpretation of the phrase “or otherwise unable to participate” conforms to the principle of statutory interpretation that “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>85</sup> This principle “rests on practical insights about everyday language usage. When people list a number of particulars and add a general reference like ‘and so forth’ they mean to include by use of the general reference not everything else but only others of like kind.”<sup>86</sup>

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<sup>84</sup> The commentary to the final LLP rule states that NMFS “narrowly crafted the unavoidable circumstances provision to grant eligibility only when the minimum requirements for eligibility under the EQP would have been met except that circumstances beyond the control of the owner of the vessel at that time prevented that vessel from meeting those requirements.” Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

<sup>85</sup> 2A SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47:17 at 272 (Norman Singer, ed., 6<sup>th</sup> ed. 2000 rev.)(footnotes omitted). The Latin name for this principle is “ejusdem generis” or things of the same kind.

<sup>86</sup> *Id.*, § 47:18 at 289 (footnote omitted). This principle is similar to another principle of statutory construction, “noscitur a sociis,” or associated words, which means “ ‘it is known from its associates’ and in practical application means that a word may be defined by an accompanying word, and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense: *Id.*, § 47.16 at 265 - 266 (footnotes omitted).

**Fourth**, ATP’s interpretation goes against the purpose of the unavoidable circumstances regulation. This regulation was the result of deliberations by the North Pacific Fishery Management Council. The Council’s deliberations make clear that the Council intended the unavoidable circumstances provision to apply only in extreme and severe situations which keep a boat out of the fishery – situations comparable to the loss of a vessel or catastrophic, disabling damage to a vessel.

Council Member Dave Benton, who proposed the unavoidable circumstances regulation, stated “there are instances where vessels have been lost or they were damaged or some other factor came around **that caused the vessel to leave the fishery** that was beyond the control of the owner.”<sup>87</sup> In response to a question from Council Member Robin Samuelson as to whether the vessel had to be unseaworthy, Mr. Benton replied: “What I was envisioning was a vessel that had catastrophic damage; a fire that gutted the vessel, something in that order. **Not what you would consider routine damage** that Robin encounters when he leaves the dock.”<sup>88</sup> Council Member Clem Tillion stated his understanding: “**So it has to be absolutely catastrophic to be warranted under this or else we’re being too lenient.**”<sup>89</sup>

Council Member Benton brought a motion to tighten the exception the next day because he was concerned that “the way we worded this . . . it may be a little bit too open-ended in terms of the language and could result in some administrative confusion.”<sup>90</sup> A discussion followed. Acting Regional Administrator for NMFS Don Collinsworth explained that he appreciated “the discussion to get the flavor of the Council’s intent on this issue” and would instruct NMFS staff to draft regulations that reflected the Council’s intent – that “**the Council is talking about something severe rather than minor.**” Council Member Benton stated: “With that understanding, **that what we mean here is something extraordinary and severe**, I would withdraw my motion. I’m perfectly comfortable with the discussion; if that’s the understanding on the record. I’m happy.”<sup>91</sup>

ATP’s interpretation of the phrase “unable to participate” goes against the entire tenor of the Council deliberations on the regulation. It would permit applicants whose vessels have not suffered anything extraordinary and severe – vessels that have not missed even a day of fishing –

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<sup>87</sup> Transcript, NPFMC Meeting, at 70.

<sup>88</sup> *Id.* at 70 - 71.

<sup>89</sup> *Id.* at 71.

<sup>90</sup> *Id.* at 151 - 152.

<sup>91</sup> *Id.* at 151-152.



to claim unavoidable circumstances because they had to delay a delivery of crab or groundfish.<sup>92</sup>

I conclude that the phrase “otherwise unable to participate” means that the vessel was prevented from fishing or trying to catch fish in a way comparable to a vessel that was lost or suffered significant damage. I conclude that ATP has not shown that the F/V ALASKA TROJAN was unable to participate in the AI brown crab fishery in the endorsement qualification period, or some portion of it, and therefore cannot get credit for a third harvest under the unavoidable circumstances regulation.

**B. Was ATP unable to conduct directed fishing in the AI brown king crab fishery within the meaning of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)? No.**

The unavoidable circumstances regulation, by its terms, requires that an owner have a specific intent “to conduct directed fishing for license limitation groundfish or crab species with that vessel during a specific time period in a specific area;”<sup>93</sup> that “the specific intent to conduct directed fishing” was thwarted by a circumstance that was unavoidable, unique and unforeseen;<sup>94</sup> that “the circumstance that prevented the owner from conducting directed fishing” actually occurred;<sup>95</sup> and that the owner took all reasonable steps to overcome the circumstance “that prevented the owner from conducting directed fishing.”<sup>96</sup> The phrase “conduct directed fishing” or “conducting directed fishing” appears four times in the regulation.

Section 679.2 defines “directed fishing” with respect to license limitation crab species as “the catching and retaining of any license limitation crab species.”<sup>97</sup> ATP acknowledges that it conducted directing fishing AI brown king crab. It caught and retained crab on November 5, 7, 19 and 21, 1994.<sup>98</sup> ATP bases its unavoidable circumstances argument on the premise that it could substitute the phrase “making a landing” for “conducting directed fishing.” ATP declined

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<sup>92</sup> I do not foreclose the possibility that a vessel may be unable to participate in the fishery because of severe problems suffered by *the owner*, such as severe, unexpected illness. *See* 50 C.F.R. § 679.4(k)(8)(iv)(B)(2)(specific intent to conduct directed fishing was thwarted by a circumstance that was “unique to the owner of the vessel, or unique to that vessel.”)

<sup>93</sup> 50 C.F.R. § 679.4(k)(8)(iv)(A).

<sup>94</sup> 50 C.F.R. § 679.4(k)(8)(iv)(B).

<sup>95</sup> 50 C.F.R. § 679.4(k)(8)(iv)(C).

<sup>96</sup> 50 C.F.R. § 679.4(k)(8)(iv)(D).

<sup>97</sup> 50 C.F.R. § 679.2.

<sup>98</sup> *ATP’s Amendment to Application*, February 14, 2003.

to submit legal argument on this premise.<sup>99</sup>

ATP relied solely on a statement by RAM Program Director Philip Smith at the January 14, 2003 hearing that he would not automatically foreclose an argument for unavoidable circumstances by an applicant whose vessel caught and retained fish but who was prevented by an unavoidable circumstance, such as a boat sinking, from selling the fish and obtaining a fish ticket.<sup>100</sup>

I do not resolve whether an applicant could prove unavoidable circumstances in the situation described by Mr. Smith because the unavoidable circumstances claimed by ATP did *not* prevent ATP from catching crab, did *not* prevent ATP from delivering the crab it caught and did *not* prevent ATP from documenting that sale on a fish ticket. ATP argues that unavoidable circumstances *delayed* a landing and prevented it from selling the crab in two batches instead of one. ATP's argument would have to be that selling the crab *as soon as the fisherman wishes to sell it* or selling crab *without delay* is part of the definition of "conducting directed fishing" for purposes of the unavoidable circumstances regulation.

This argument suffers from the same problems as ATP's argument that a delay in delivering crab means that ATP was "unable to participate" in the AI brown crab fishery. The concept of selling crab *at the time of one's choice* is not suggested by the term "directed fishing." It is not part of the specific definition of the term in the federal regulations. ATP's interpretation would mean that a fisherman who delayed selling crab for any reasons other than the fisherman's own preference could claim that unavoidable circumstances prevented it from "conducting directed fishing," even though the vessel never missed a day on the fishing grounds.

ATP's definition of "conducting directed fishing" contravenes the regulatory history of the unavoidable circumstances provision. The regulation was meant to assist vessels that had to leave the fishery because of a severe and extraordinary condition. It would unreasonably expand the regulation to apply it to vessels that never had to stop fishing but simply had to land their catch in one large batch rather than two smaller ones.

Therefore, I conclude that ATP has not shown that it was unable to conduct directed fishing in the AI brown king crab fishery within the meaning of the unavoidable circumstances regulation.

**4. Do I have the authority to rule on ATP's claim that the ending date for the endorsement qualification period for LLP crab licenses in 50 C.F.R. § 679.4(k)(5)(ii) violates the Magnuson-Stevens Act, the Administrative Procedures Act and the United States Constitution? No.**

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<sup>99</sup> *Reconsideration of Order Granting Hearing*, April 11, 2003; *Letter from Michael A.D. Stanley to Mary Alice McKeen*, April 17, 2003.

<sup>100</sup> *ATP's Amendment to Application*, February 14, 2003; *Testimony by Philip Smith*, Hearing Transcript at 82.

ATP objects to the difference in ending dates for the endorsement qualification periods for crab licenses versus groundfish licenses: December 31, 1994 versus June 17, 1995.<sup>101</sup> ATP argues that the LLP regulations unfairly give groundfish applicants approximately five and a half months longer than crab applicants to make the required harvests for an LLP license.

ATP argues that the ending date for the crab EQP [1] violates National Standard 4 of the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(4), because it is not “fair and equitable;” [2] is inconsistent with the purpose of the endorsement qualification period and section 303(b)(6) of the Magnuson-Stevens Act, 16 U.S.C. § 1853(b)(6), because it does not take into account ATP’s recent participation in the fishery; [3] violates the Administrative Procedures Act, 5 U.S.C. §551, because it is arbitrary and capricious; [4] denies ATP equal protection under the fourteenth amendment to the United States Constitution.

I have the duty to *interpret* the regulations and *apply* them to appeals before me. I must presume the validity of duly promulgated regulations. I do not have the authority to rule on ATP’s challenges to the substantive provisions of a regulation.<sup>102</sup>

#### FINDINGS OF FACT

1. RAM’s operational definition of a harvest for awarding LLP endorsements was all the crab of one LLP species, caught and retained from one LLP crab endorsement area, recorded on one fish ticket.
2. RAM consistently counted one fish ticket as one documented harvest, unless the fish ticket showed that the applicant caught more than one crab or groundfish species that could go toward more than one LLP endorsement.
4. ATP did not miss any time on the fishing grounds from November 1 through November 24, 1994.
5. ATP recorded all the brown king crab it caught between November 1 and November 24, 1994 on fish ticket C90 009283
6. ATP received credit for all the brown king crab it caught between November 1 and November 24, 1994 as one documented harvest toward an AI brown king crab endorsement on an LLP crab license.

#### CONCLUSIONS OF LAW

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<sup>101</sup> *Appeal of IAD* at 1 - 3, February 20, 2001.

<sup>102</sup> *George Ramos*, Appeal 94-0008, March 21, 1995, Regional Director’s Decision on Review at 4, April 21, 1995.

1. RAM's definition of harvest for purposes of determining LLP endorsements was proper.
2. RAM properly counted fish ticket C90 009283 as one documented harvest.
3. RAM is not required to count fish ticket C90 009283 as two documented harvests, assuming it showed the same species of crab caught in two State statistical areas.
4. The number of State statistical areas on a fish ticket is an invalid criterion for defining documented harvests and awarding LLP endorsements
5. RAM is not required to count fish ticket C90 009283 as two documented harvests because it records crab that ATP caught in two weeks.
6. The F/V ALASKA TROJAN was not "lost, damaged or otherwise unable to participate" in the AI brown crab fishery, within the meaning of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), between November 1 and November 24, 1994.
7. ATP was not unable to conduct directed fishing in the AI brown king crab fishery, within the meaning of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), between November 1 and November 24, 1994.
8. I do not have authority to rule on ATP's claim that the ending date for the endorsement qualification period for LLP crab licenses in 50 C.F.R. § 679.4(k)(5)(ii) violates the Magnuson Act, the Administrative Procedures Act and the United States Constitution.

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect November 19, 2003, 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 at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, October 30, 2003. A Motion for Reconsideration must be in writing, must allege one or more specific, 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. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

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Mary Alice McKeen  
Appeals Officer

