

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 01-0007
	)	
RICHARD A. NEWBY,	)	DECISION
Appellant	)	
_____	)	March 24, 2005

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on October 24, 2001, that revoked Mr. Newby's crab license (#LLC1966) under the North Pacific Groundfish and Crab License Limitation Program (LLP). The IAD revoked the license because the official LLP record does not show that Mr. Newby's vessel, the F/V RED BARON, made at least one documented harvest of crab in the Bering Sea and Aleutian Islands (BSAI) during the "recent participation period" (RPP), between January 1, 1996, and February 7, 1998.

Mr. Newby filed a Petition for Reconsideration with RAM on December 21, 2001. In response, RAM issued an IAD on Reconsideration (No. 02-001) on February 19, 2002, which affirmed its earlier determination that Mr. Newby's LLP crab license should be revoked. RAM referred the matter to this Office and continued the crab license in effect as a nontransferable license, pending a final agency action in this matter. Mr. Newby filed a Supplemental Appeal with this Office on March 20, 2002.<sup>1</sup>

Mr. Newby's appeal is timely filed. He can appeal the IAD on Reconsideration because it directly and adversely affects his interest. [50 C.F.R. § 679.43(b)] An oral hearing is not necessary in this case because the record on appeal contains sufficient information on which to reach a final decision. [50 C.F.R. § 679.42(m)(4)]

ISSUES

1. Does Mr. Newby qualify for an LLP crab license, based on a documented harvest of crab by the F/V RED BARON during the RPP?

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<sup>1</sup>Mr. Newby's appeal states that it supplements the materials he earlier had submitted to RAM. Appeal at 1. Appeal No. 01-0007 originated as an appeal of RAM's denial of a Crab Vessel Certificate of Eligibility under the Bering Sea and Aleutian Islands Crab Fishing Capacity Reduction Program (§144(d) of the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554 (Dec. 21, 2000)). As a result of the Congress's amendments to the program in July 2001, Crab Vessel Eligibility Certificates were no longer required and Mr. Newby's appeal became moot. *Special Notice: Crab Vessel Certification* (August 2001). On September 27, 2001, Mr. Newby withdrew his appeal without prejudice. LLP crab licenses are still required, however. When Mr. Newby filed the present appeal it was given the same file number as his earlier appeal.

2. Does Mr. Newby qualify for an LLP crab license, based on an “unavoidable circumstance”?

## BACKGROUND

On January 1, 1996, the Vessel Moratorium Program (VMP) took effect.<sup>2</sup> The VMP imposed a temporary moratorium on the entry of new vessels into the commercial king crab and Tanner crab fisheries in the Bering Sea and Aleutian Islands (BSAI).<sup>3</sup> The VMP regulations required a catcher vessel to have a VMP fishing permit on board the vessel while commercially harvesting king and Tanner crab in the BSAI between January 1, 1996, and December 31, 1999.<sup>4</sup> Mr. Newby did not apply for a VMP fishing permit for the F/V RED BARON until February 8, 1999.

On January 1, 2000, the LLP replaced the VMP.<sup>5</sup> RAM issued Mr. Newby an LLP crab license, based on documented harvests of crab made by the F/V RED BARON during (1) the general qualifying period between January 1, 1988, and June 27, 1992; and (2) the endorsement qualifying periods between January 1, 1991, and December 31, 1994.<sup>6</sup>

On October 24, 2001, a new LLP regulation took effect that required the F/V RED BARON to have made at least one additional documented harvest of crab species during the RPP in order for Mr. Newby to retain his LLP crab license.<sup>7</sup>

The North Pacific Fishery Management Council (Council) adopted the RPP requirement to reduce the number of crab licenses that might otherwise be issued under the LLP to persons who had been inactive in the BSAI crab fishery since 1995.<sup>8</sup> The Council reasoned that if permanent licenses were issued to inactive fishermen, they could transfer those licenses to persons who

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<sup>2</sup>Final Rule, 60 Fed. Reg. 40,763 (Aug. 10, 1995). The VMP regulations originally were codified at 50 C.F.R. §§676.1 - 676.6. They were renumbered and placed at 50 C.F.R. §§679.1 - 679.7, as part of a consolidation of the regulations relating to the Exclusive Economic Zone off Alaska, 61 Fed. Reg. 31,228 (June 19, 1996), and eliminated from federal regulation after the LLP took effect. Final Rule, 65 Fed. Reg. 45,316 (July 21, 2000).

<sup>3</sup>Final Rule, 60 Fed. Reg. 40,763 (Aug. 10, 1995).

<sup>4</sup>50 C.F.R. § 676.3(a) provided in relevant part: “[A]ny vessel used to catch and retain moratorium crab species or to conduct directed fishing for any moratorium groundfish species must have a valid moratorium permit issued for that vessel under this part on aboard the vessel at all times it is engaged in fishing activities.”

<sup>5</sup>Final Rule, 65 Fed. Reg. 45,316 (July 21, 2000).

<sup>6</sup>50 C.F.R. § 679.4(k)(5).

<sup>7</sup>Final Rule, 66 Fed. Reg. 48,813 - 48,822 (Sept. 24, 2001).

<sup>8</sup>Proposed Rule, 66 Fed. Reg. 17,397, 17,397-17,398 (March 30, 2001).

would become active in the fishery.<sup>9</sup> This result would be contrary to the purpose of the LLP because it would likely increase fishing efforts above the current levels in the crab fisheries.<sup>10</sup> The Council estimated that the RPP requirement would reduce the number of eligible vessels for harvesting BSAI crab by 25 percent.<sup>11</sup>

After the RPP requirement took effect, RAM revoked Mr. Newby's LLP crab license because the LLP crab harvests made by the F/V RED BARON during the RPP in 1997 were made without a vessel moratorium permit. Therefore, RAM determined that the harvests could not be considered "lawful" and did not constitute "documented harvests" for purposes of qualifying Mr. Newby for an LLP crab license.

## ANALYSIS

### **1. Does Mr. Newby qualify for an LLP crab license, based on a documented harvest of crab by the F/V RED BARON during the RPP?**

To retain his LLP crab license, Mr. Newby must establish that he was a "recent participant," *i.e.*, that he made at least one documented harvest of crab in the BSAI during the RPP between January 1, 1996, and February 7, 1998.<sup>12</sup> If he can establish that he was a recent participant, then he can retain any LLP crab license for which he held the LLP qualifying fishing history at the time he made the RPP documented harvest.<sup>13</sup>

The LLP regulations define a "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" (emphasis supplied).<sup>14</sup> The LLP regulations do not explain or define the term "lawful harvest." However, to say that an act is "lawful" commonly implies that the act is

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<sup>9</sup>*Id.*

<sup>10</sup>66 Fed. Reg. 48,814 (Sept. 24, 2001).

<sup>11</sup>Council's October 1998 Newsletter. Available at: <http://www.fakr.noaa.gov/npfmc/newsletters/1098news.htm>

<sup>12</sup>50 C.F.R. § 679.4(k)(5)(iii)(A).

<sup>13</sup>*Bella K of Seattle, L.L.C.*, Appeal No. 02-0006 at 14 (March 25, 2004). A recent participant can also retain a crab license if he or she made the documented harvest during the period January 1, 1998 through February 7, 1998, and obtained or contracted for the LLP qualifying fishing history for that license by 8:36 a.m. Pacific Time on October 10, 1998, as provided in the so-called "exception (iv)." 50 C.F.R. §679.4(k)(5)(iii)(B)(iv).

<sup>14</sup>50 C.F.R. § 679.2

authorized, or not forbidden, by law.<sup>15</sup>

The VMP regulations that were in effect during the RPP explicitly made it *unlawful* for a vessel to commercially harvest king crab and Tanner crab in the BSAI without a VMP fishing permit.<sup>16</sup> Mr. Newby concedes that the F/V RED BARON did not have a VMP fishing permit when the vessel made several crab harvests in the BSAI during 1997.<sup>17</sup> Therefore, I conclude that the F/V RED BARON did not make a lawful harvest of crab species during the RPP. The record contains no evidence that Mr. Newby made any other crab harvests during the RPP from any other vessel. Therefore, I conclude that Mr. Newby did not meet the requirements of 50 C.F.R. §679.4(k)(5)(iii)(A) and does not qualify for an LLP crab license, based on a documented harvest of crab species during the RPP.

## **2. Does Mr. Newby qualify for an LLP crab license, based on an “unavoidable circumstance”?**

Although the Mr. Newby did not make a documented harvest of crab during the RPP, Mr. Newby argues that he qualifies for an LLP crab license because an “unavoidable circumstance” prevented his vessel from conducting “directed fishing”<sup>18</sup> of crab species during the RPP.<sup>19</sup>

To qualify for an LLP crab license, based on an unavoidable circumstance, Mr. Newby must establish that:

- (1) at the time of the unavoidable circumstance, he had a specific intent to conduct directed fishing of king or Tanner crab in a specific area and during a specific time period;
- (2) his specific intent to conduct directed fishing of king or Tanner crab was thwarted by a circumstance that was unavoidable, unique to him or his vessel, and unforeseen and reasonably unforeseeable by him;
- (3) the circumstance that prevented him from conducting directed fishing of king or Tanner crab actually occurred;

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<sup>15</sup>BLACK’S LAW DICTIONARY 612 (6<sup>th</sup> ed. 1991).

<sup>16</sup>Federal regulation 50 C.F.R. § 676.6(e) stated: “[I]t is unlawful for any person to: . . . (e) Catch and retain moratorium crab species or conduct directed fishing for any moratorium groundfish species with a vessel that has not been issued a valid moratorium permit; . . . .”

<sup>17</sup>Petition for Reconsideration at 2 (Dec. 21, 2001).

<sup>18</sup>Under 50 C.F.R. § 679.2, “directed fishing” of LLP crab is defined as the “catching and retaining of any license limitation crab species.”

<sup>19</sup>50 C.F.R. § 679.4(k)(5)(v).

(4) he took all reasonable steps to overcome the circumstances that prevented him from conducting directed fishing of king or Tanner crab; and

(5) his vessel made at least one documented harvest of king or Tanner crab in the BSAI *after* the unavoidable circumstance but *before* January 1, 2000.<sup>20</sup>

In addition, as this Office stated recently in *Wizard Fisheries, Inc.*,<sup>21</sup>

. . . to be “unavoidable,” the circumstance must be beyond the control of the vessel owner or license holder. . . . Lightning, storms, or other severe and unanticipated weather conditions would be examples of circumstances that are beyond a person’s control and, therefore, unavoidable. Likewise, a heart attack, stroke, or sudden debilitating illness or injury to the owner, skipper, or crew members could be considered unavoidable. So, too, would many, if not all, accidents be deemed beyond a person’s control and unavoidable. [citations omitted]

Mr. Newby claims that he did not know that the F/V RED BARON was required to have a VMP fishing permit when the vessel harvested Tanner crab in the BSAI in 1997, and he first learned of the permit requirement as a result of an enforcement action against him in February 1999.<sup>22</sup> Mr. Newby argues that his ignorance constitutes an “unavoidable circumstance,” for purposes of qualifying him for an LLP crab license.

It is a well-known maxim that ignorance of the law is no excuse. As we have previously stated, “Fishing is a highly regulated industry. It is a fisherman's responsibility to keep informed of applicable regulations.”<sup>23</sup> Mr. Newby had a duty to keep abreast of the Federal regulations that governed the operation of the F/V RED BARON while the vessel was harvesting crab in the Bering Sea during the VMP.

More to the point, in this case it would be hard to find that ignorance of the law was a matter beyond Mr. Newby’s control. Mr. Newby had ample opportunity to find out that the F/V RED BARON needed a VMP fishing permit to harvest crab in the BSAI in 1997. NMFS published

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<sup>20</sup>*Id.*

<sup>21</sup>Appeal No. 03-0004 at 11-12 (March 3, 2005).

<sup>22</sup>Petition for Reconsideration at 2 (Dec. 21, 2001).

<sup>23</sup>*T. Samuelson and T. Vasileff*, Appeal No. 94-0011 at 5 (Sept. 18, 1995).

the VMP regulations in the Federal Register.<sup>24</sup> RAM believes it mailed a summary of the regulations and an application for a VMP fishing permit to his home address in late 1995.<sup>25</sup> The VMP had been in effect for more than a year before the F/V RED BARON commercially harvested crab in the Bering Sea. With reasonable inquiry, Mr. Newby could have discovered that the VMP regulations required the vessel to have a VMP fishing permit for the harvesting of BSAI king or Tanner in 1997.

I find that Mr. Newby's ignorance of the vessel moratorium permit requirement was not a circumstance beyond his control. Therefore, I conclude that his ignorance does not constitute an unavoidable circumstance within the meaning of 50 C.F.R §679.4(k)(5)(v). Mr. Newby does not claim, nor did he produce evidence of, any other unavoidable circumstance that may have prevented the F/V RED BARON from making a documented crab harvest during the RPP. As a result, I conclude that Mr. Newby does not qualify for an LLP crab license, based on an "unavoidable circumstance" during the RPP.

Mr. Newby argues that granting him an LLP crab license for the F/V RED BARON would not increase the amount of crab fishing activity in the BSAI beyond the level of participation when the LLP was established. Even if that were true, it would not authorize me to grant relief to Mr. Newby in contravention of the LLP regulations.

#### FINDINGS OF FACT

1. The VMP regulations during the RPP explicitly made it *unlawful* for a vessel to commercially harvest king and Tanner crab in the BSAI without a VMP fishing permit.
2. The only king or Tanner that the F/V RED BARON harvested during the RPP was *C. opilio* crab in the BSAI in 1997.
3. The F/V RED BARON did not have a VMP fishing permit when it harvested *C. opilio* crab during the RPP in 1997.
4. Mr. Newby's ignorance of the vessel moratorium permit requirement was not a circumstance beyond his control.

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<sup>24</sup>Proposed Rule, 60 Fed. Reg. 25,677 (May 12, 1995); Final Rule, 60 Fed. Reg. 40,763 (Aug. 10, 1995).

<sup>25</sup>RAM has no formal record of having mailed the application to Mr. Newby, but says it was RAM's practice to mail the materials to any person who appeared eligible, and there was no information in the record suggesting that the materials were not sent. RAM's IAD re: Mr. Newby's application for a Vessel Moratorium Qualification and Vessel Moratorium Permit for the F/V RED BARON (continued) (continued) at 2, n. 1 (Feb. 16, 1999) (in OAA file of Richard A. Newby, Appeal No. 99-0001). Mr. Newby asserts that he never received notice from RAM that a federal moratorium permit was required. Petition for Reconsideration at 2 (Dec. 21, 2001).

## CONCLUSIONS OF LAW

1. The F/V RED BARON did not make a lawful harvest of king or Tanner crab in the BSAI during the RPP.
2. Mr. Newby does not qualify for an LLP crab license, based on a documented harvest of crab from the F/V RED BARON during the RPP.
3. Mr. Newby's ignorance of the vessel moratorium permit requirement does not constitute an unavoidable circumstance within the meaning of 50 C.F.R §679.4(k)(5)(v).
4. Mr. Newby does not qualify for an LLP crab license, based on an "unavoidable circumstance" during the RPP.

## DISPOSITION

The IAD on Reconsideration that is the subject of this Appeal is AFFIRMED. This Decision takes effect April 25, 2005, unless by that date the Regional Administrator orders review of the Decision.

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, April 4, 2005, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement in support of the motion.

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Randall J. Moen  
Appeals Officer