

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
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ST. GEORGE MARINE, INC.)
Appellant)
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Appeal No. 02-0024
DECISION
February 19, 2004

St. George Marine, Inc., [St. George] appeals an Initial Administrative Determination [IAD] by the Restricted Access Management Program [RAM], dated June 28, 2002, issued under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹

St. George applied for an LLP groundfish and an LLP crab license based on the fishing history of the F/V ST. GEORGE, ADFG 38746. The F/V ST. GEORGE sank on January 4, 1992. St. George obtained a replacement vessel, the F/V JENNIFER A, which began fishing in 1995.

The IAD denied St. George an LLP groundfish license. The IAD acknowledged that St. George should receive an LLP crab license endorsed for Bristol Bay red king and for Bering Sea and Aleutian Islands [BSAI] *opilio/bairdi*. But the IAD denied St. George the four additional endorsements it sought: Pribilof red and blue king, St. Matthew blue king, Aleutian Islands brown king, Aleutian islands red king.

St. George appeals and states it should receive the groundfish license and the additional crab endorsements under the unavoidable circumstances regulation: 50 C.F.R. § 679.4(k)(8)(iv).

St. George also appeals an IAD, dated August 15, 2002, denying it a Pacific cod endorsement on its LLP groundfish license.² St. George argues that it should receive this endorsement under the hardship provision in the Pacific cod regulation: 50 C.F.R. § 679.4(k)(9)(v)(A).

St. George can appeal these IADs because they directly and adversely affect St. George Marine's interests.³ The record has sufficient information for me to decide this appeal. I therefore close the record and issue this decision.⁴

SUMMARY

¹ The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² Letter from St. George Marine (Oct. 9, 2002).

³ 50 C.F.R. § 679.43(b).

⁴ 50 C.F.R. § 679.43(g)(2)

I affirm the IAD. St. George seeks an LLP groundfish license with Aleutian Islands [AI] and Bering Sea endorsements based on the unavoidable circumstance regulation: 50 C.F.R. § 679.4(k)(8)(iv). St. George did not make the documented harvests that are required by this regulation. First, the F/V ST. GEORGE did not harvest any groundfish between January 1, 1988 and February 9, 1992. To receive an LLP groundfish license under the unavoidable circumstances regulation, the applicant must have harvested LLP groundfish – not groundfish or crab – during this time period. Second, St. George did not harvest groundfish in the Aleutian Islands or the Bering Sea from the F/V JENNIFER A, the replacement vessel for the F/V ST. GEORGE, after the F/V ST. GEORGE sank on January 4, 1992 and before June 17, 1995.

Since St. George will not receive an LLP groundfish license, NMFS may not award St. George a Pacific cod gear endorsement on an LLP groundfish license under any theory or regulatory provision. An applicant can only have a Pacific cod gear endorsement on an LLP groundfish license if the applicant has an LLP groundfish license.

RAM determined that St. George should receive an LLP crab license with a Bristol Bay red king crab endorsement under the lost vessel provision in 50 C.F.R. § 679.4(k)(8)(iii), because the F/V ST. GEORGE made all the harvests required for that endorsement *before* it was lost. RAM also determined that St. George should receive a BSAI *opilio/bairdi* endorsement under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), because it met the requirements of that regulation, including a documented harvest of BSAI *opilio/bairdi* from the F/V JENNIFER A after the F/V ST. GEORGE was lost and before June 17, 1995.

But RAM correctly denied St. George additional crab endorsements for Pribilof red and blue king, St. Matthew blue king, Aleutian Islands brown king and Aleutian Islands red king under the unavoidable circumstances regulation because St. George did not harvest those crab species from the F/V JENNIFER A after the F/V ST. GEORGE sank and before June 17, 1995.

ISSUES

1. Did St. George make the documented harvests that are required by the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for an LLP groundfish license with area endorsements for the Bering Sea and the Aleutian Islands?
2. Does NMFS have the authority to award St. George a Pacific cod gear endorsement, based on the hardship provision in the Pacific cod regulation, 50 C.F.R. § 679.4(k)(9)(v)(B)?
3. Did St. George make the documented harvests that are required by subsection (E) of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)(E), for an LLP crab license with endorsements for Pribilof red and blue king, St. Matthew blue king, AI brown king and AI red king?

ANALYSIS

1. Did St. George make the documented harvests that are required by the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)(E), for an LLP groundfish license with area endorsements for the Bering Sea and the Aleutian Islands? No.

Under the standard criteria for receiving an LLP groundfish license, an applicant must meet the requirements for documented harvests of license limitation groundfish in a general qualification period [GQP] and an endorsement qualification period [EQP].⁵ For a Bering Sea or AI endorsement on an LLP groundfish license, the basic GQP requirement is one documented harvest of license limitation groundfish in BSAI between January 1, 1988 and June 27, 1992.⁶ The EQP requirement for an Aleutian Islands endorsement is one groundfish harvest in AI between January 1, 1992 to June 17, 1995. The EQP requirement for a Bering Sea endorsement is one groundfish harvest in the Bering Sea between January 1, 1992 to June 17, 1995.⁷

The F/V St. George disappeared without a trace on January 4, 1992. Tragically, the boat and all her crew were lost. The F/V ST. GEORGE had not harvested groundfish in the GQP or EQP. Therefore, based on the F/V ST. GEORGE's actual fishing history – no groundfish harvests from January 1, 1988 to June 17, 1995 – St. George does not qualify for an LLP groundfish license.

St. George seeks an LLP groundfish license with Bering Sea and AI endorsements under the unavoidable circumstances regulation in 50 C.F.R. § 679.4(k)(8)(iv). It 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 [documented harvest] 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 unavoidable circumstance (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation groundfish or

⁵ 50 C.F.R. § 679.4(k)(4). To count toward an LLP license, an applicant must prove “documented harvests” of “license limitation groundfish.” Both terms are defined in 50 C.F.R. § 679.2. When I refer to harvests, I mean documented harvests. Unless otherwise noted, when I refer to groundfish, I mean license limitation groundfish.

⁶ 50 C.F.R. § 679.4(k)(4)(i)(A)(1). There are two alternate ways to meet the GQP in 50 C.F.R. § 679.4(k)(4)(i)(A)(2) and (A)(3). Section (A)(2) applies to applicants that “crossed over” into crab, or harvested crab, by February 10, 1992 but they still had to harvest groundfish by June 17, 1995 and meet other requirements. St. George did not harvest groundfish until 1999. I discuss the “crossover” provision at pages 5 - 6 *infra*. Section (A)(3) applies to vessels less than sixty feet. The F/V ST. GEORGE is 94 feet and the F/V JENNIFER A is 98 feet.

⁷ 50 C.F.R. § 679.4(k)(4)(ii)(A) & (B). That date – June 17, 1995 – was the date of final action on the LLP by the North Pacific Fishery Management Council (Council). Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998); Council Newsletter, June 1995 at 1, available on the Council's website at <http://www.fakr.noaa.gov/npfmc/Newsletters/695news.htm>.

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]

An applicant must meet each requirement of the unavoidable circumstances regulation.⁸ Even if an applicant proves the required facts about the unavoidable circumstance – in subsections A through D – the regulation does not excuse the applicant from all documented harvests. The highlighted portions of the regulation provide that an applicant still must have made two documented harvests: one between January 1, 1988 and February 9, 1992, and one between the unavoidable circumstance and June 17, 1995.

A The F/V ST. GEORGE did not harvest groundfish between January 1, 1988 and February 9, 1992.

⁸ The language of the regulation, on its face, requires an applicant to meet every requirement. The commentary to the final LLP rule supports that interpretation: “*If all these criteria are met to the satisfaction of NMFS, a license may be issued for the relevant fishery and endorsement area. This [unavoidable circumstances] provision is not designed to be a ‘loop hole’ through which an eligible applicant that does not meet the qualification requirements can be issued a license.*” Final Rule, 63 Fed. Reg. 52,642, 52,647 (1998)(emphasis added).

Under the first sentence of the regulation, the applicant under the unavoidable circumstances regulation must have “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.”⁹ The F/V ST GEORGE did not harvest groundfish during this time period but did harvest Bristol Bay red king crab in November 1991. St. George argues that this crab harvest meets this requirement of the unavoidable circumstances regulation because the regulation states groundfish “or” crab. I interpret the language of a regulation in light of the structure of the LLP and the history and purpose of the regulation.

I conclude that, to satisfy this requirement in the unavoidable circumstances regulation, an applicant seeking a groundfish license must have made a groundfish harvest between January 1, 1988 and February 9, 1992, and an applicant seeking a crab license must have made a crab harvest between January 1, 1988 and February 9, 1992.

First, the language supports this conclusion. The unavoidable circumstances regulation does not merely say groundfish or crab. It requires that the applicant made “**a documented harvest of license limitation groundfish, or crab species if applicable**, between January 1, 1988 and February 9, 1992.”¹⁰ The phrase “if applicable” communicates that sometimes an applicant must have harvested groundfish and sometimes crab. Under St. George Marine’s reading, the phrase “if applicable” would mean nothing because a requirement for a crab harvest, as opposed to a groundfish harvest, would never be applicable.

Second, the structure of the LLP program itself – the completely distinct requirements for LLP groundfish and crab licenses – strongly suggests when a crab harvest is “applicable”: when the applicant wants a crab license.¹¹ To receive an LLP groundfish license under the standard criteria, an applicant must have harvested LLP groundfish. To receive an LLP crab license under standard criteria, an applicant must have harvested LLP crab. The assertion that an applicant can receive a *groundfish* license based on a *crab* harvests is somewhat counterintuitive.

⁹ 50 C.F.R. § 679.4(k)(8)(iv)(emphasis added).

¹⁰ 50 C.F.R. § 679.4(k)(8)(iv)(emphasis added). This situation is quite different from *Wards Cove Packing Co. v. NMFS*, 307 F. 3d 1214 (9th Cir. 2002), where the IFQ regulation merely stated, without qualification, that a vessel had to have landed “halibut or sablefish.” Further, the court in *Wards Cove* reached a conclusion as to the purpose and structure of the regulation and interpreted the regulation in accord with that conclusion: “[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. The purpose and structure of this regulation would be gravely undermined by St. George’s interpretation. *See* pages 5 - 7 *infra*.

¹¹ The LLP groundfish and crab licenses have different general qualification periods, different endorsement qualification periods and different documented harvest requirements. 50 C.F.R. § 679.4(k)(iv) & (v).

In fact, the LLP regulations spell out quite specifically the only instance when an applicant can use a crab harvest to meet a requirement for an LLP groundfish license. It is the “crossover” provision, which allows an applicant that harvested crab between January 1, 1988 and February 9, 1992, and crossed over into groundfish by December 11, 1994, to satisfy an alternative GQP provision for a groundfish license.¹² The crossover provision has been controversial in the history of the LLP and the Vessel Moratorium Program, which was the predecessor program to the LLP.¹³ The wide-open crossover provision was one reason the Secretary of Commerce rejected the first set of moratorium regulations.¹⁴ This history supports the conclusion that [1] it is unusual when the Council and NMFS intend that a crab harvest can support a groundfish license and [2] when the Council and NMFS intend this unusual result, they will do so explicitly.

Third, the purpose of the requirement for a documented harvest between January 1, 1988 and February 9, 1992 supports the conclusion that a groundfish applicant must prove a groundfish (not a crab) harvest during this time period. It is a striking time period. It is not the general qualification period: that is January 1, 1988 to June 17, 1992. Where did it come from? The time period January 1, 1988 to February 9, 1992 is the general qualifying period under the Vessel Moratorium Program.¹⁵ The Council wished to grant LLP groundfish and crab licenses under the unavoidable circumstances provision only to vessels that qualified under the Vessel Moratorium Program or VMP.

But did the Council mean that, to receive an LLP *groundfish* license under the unavoidable circumstances provision, a vessel must have qualified for a *groundfish* moratorium permit, or could it be either a groundfish or crab permit? I conclude the Council intended that a LLP

¹² 50 C.F.R. § 679.4(k)(4)(i)(A)(3) & (B)(3)(the groundfish harvest must be of groundfish – not license limitation groundfish – with trawl or longline gear but not sablefish with fixed gear). The LLP regulations also specify the only situation where an applicant can use a groundfish harvest to partially satisfy the requirements for an LLP crab license. It is the “crossover” provision for meeting the GQP for a crab license. 50 C.F.R. § 679.4(k)(5)(i)(B).

¹³ Final Rule (VMP), 60 Fed. Reg. 40,763, 40,773 (1995). The Moratorium rule was initially codified primarily at 50 C.F.R. § 679.6, moved to 50 C.F.R. § 679.4, and then eliminated from the Code of Federal Regulations after the LLP went into effect. Final Rule, 65 Fed. Reg. 45,316 (2000).

¹⁴ Disapproval of fishery management plan amendments and withdrawal of proposed rule, 59 Fed. Reg. 43,534, 43,535 (1994). For the history of the crossover provisions, see Proposed Rule (VMP), 59 Fed. Reg. 28,827, 28,829 (1994); Disapproval, 59 Fed. Reg. 43,534, 43,535 (1994); Proposed Rule (VMP), 60 Fed. Reg. 25,677, 25,678, 25,680 - 25,681 (1995); Final Rule (VMP), 60 Fed. Reg. 40,763, 40,765 - 40,766 (1995); Proposed Rule (LLP), 62 Fed. Reg. 43,866, 43,867 (1997); Final Rule (LLP), 63 Fed. Reg. 52,642, 52,643 (1998).

¹⁵ Final Rule (VMP), 60 Fed. Reg. 40,763, 40,773 (1995). See *Pequod, Inc.*, Appeal No. 00-0013 at 10 (April 12, 2002).

groundfish applicant must have harvested groundfish in the Moratorium qualifying period.

Like the LLP, the VMP had separate qualifications and separate permits for groundfish and crab. Like the LLP, the VMP awarded crab permits based on crab landings and groundfish permits based on groundfish landings. Like the LLP, the only exception was the crossover provisions.¹⁶ In moving the unavoidable circumstances provision for the LLP, Council Member Dave Benton stated:

The first point I'd like to take up is the issue of lost vessels or vessels which left **the fishery** due to factors beyond the control of the owner, but which were conforming with the rules. I would make the following motion: I'd move that vessels which qualified under the moratorium, and were lost, damaged, or otherwise out of **the fishery** due to factors beyond the control of the owner, and which were replaced **or otherwise reentered the fisheries in accordance with the moratorium rules** and made a landing in **a fishery** any time between the time the vessel left **the fishery** and the date of final Council action on the license program will be qualified for a general license and area endorsement **for that fishery**.¹⁷ [emphasis added]

This statement suggests a congruity between the fishery in which the applicant participated during the Moratorium, the fishery that the applicant left, and the fishery that the applicant reentered by June 17, 1995. The requirement, codified in subsection (E) of the unavoidable circumstances regulation, that the vessel *reenter* the fishery by June 17, 1995 implies that the vessel had already *entered* the fishery in the first place. If a vessel never caught groundfish in the Moratorium qualifying period, the vessel could not in any sense *reenter* the groundfish fishery by June 17, 1995.

I therefore conclude that the purpose of the unavoidable circumstances provision is to protect persons [1] who entered the groundfish or crab fishery, depending on which license they want, by February 9, 1992, the end of the Moratorium qualifying period, [2] were prevented from making the documented harvests necessary for an LLP license; and [3] reentered the groundfish or crab fishery, depending on which license and endorsement they want, by the date of final Council action, which was June 17, 1995.

Neither the F/V ST. GEORGE nor the F/V JENNIFER A entered the groundfish fishery by February 9, 1992. St. George states that it did not harvest groundfish until December 1999 because it took several years to settle the litigation over the loss of its vessel, then to find a replacement vessel, then to widen the replacement vessel so it could harvest minimally harvest groundfish in 1999, and then to install a refrigerated seawater system in 2001 so that it could

¹⁶ Final Rule (VMP), 60 Fed. Reg. 40,763, 40,765 - 40,766, 40,773 - 40,774 (1995).

¹⁷ Transcript (uncertified), North Pacific Fishery Management Council Meeting, June 15 - 17, 1995 at pages 69 - 70, available on the Administrative Appeals section of the NMFS Alaska region website under "Other Documents," <http://www.fakr.noa.gov/appeals/default.htm>.

have a productive Pacific cod season in 2002.¹⁸ St. George supports each of these assertions with credible evidence and, for purposes of this decision, I accept St. George's assertions as true.

But the fact remains that St. George did not participate in the groundfish fishery until December 13, 1999. The Council reserved the unavoidable circumstances provision in the LLP for vessels that participated in the Moratorium Program. It would contravene the Council's and the Secretary's intent to grant an LLP groundfish license to a vessel that did not harvest groundfish until almost eight years after the end of the Moratorium qualifying period, no matter what the reasons for the vessel's lack of participation.

Since St. George did not make a groundfish harvest between January 1, 1988 to February 9, 1992, I conclude that it cannot receive an LLP groundfish license under the unavoidable circumstances provision.

B. The F/V JENNIFER A did not harvest groundfish in the Bering Sea or Aleutian Islands after the F/V ST. GEORGE sank on January 4, 1992 and before June 17, 1995.

Subsection (E) of the unavoidable circumstances regulation requires an additional documented harvest. For each endorsement sought by the applicant, the applicant must have harvested "any amount of license limitation groundfish or crab species . . . in the specific area that corresponds to the area endorsement or area/species endorsement . . . after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995."

St. George's replacement vessel, the F/V JENNIFER A, did not harvest groundfish in the Aleutian Islands or the Bering Sea (or anywhere else) between January 4, 1992 and June 17, 1995. The F/V JENNIFER A did not harvest groundfish until December 1999, when it harvested 298 pounds of Pacific cod in the Bering Sea. I do not know exactly when St. George harvested groundfish in the Aleutian Islands, but it was after 1999.¹⁹

St. George states that it intended to deliver Pacific cod with the F/V ST. GEORGE, before it sank, and would have delivered Pacific cod in 1992 and subsequent years, had the F/V ST. GEORGE not sank. St. George argues that it spent considerable funds widening the F/V JENNIFER A and installing a refrigerated seawater system to make the vessel a productive cod vessel and would suffer economically if it could not continue to harvest Pacific cod.

Subsection (E) is clear and unambiguous. In *addition* to proving certain facts about the unavoidable circumstance – listed in subsections (A) through (D) – an applicant under the

¹⁸ Letter from St. George Marine to OAA (Oct. 9, 2002); Letter from St. George Marine to OAA (Dec. 12, 2003).

¹⁹ The record suggests it was 2002, which St. George states was its first productive Pacific cod season. Letter from St. George to OAA (Oct. 9, 2002).

unavoidable circumstances regulation must prove a documented harvest, of the species and area desired, between the unavoidable circumstance and before June 17, 1995. I do not have the authority to extend that deadline until December 13, 1999 for the Bering Sea endorsement, and until after that for the Aleutian Islands endorsement, based on an applicant's investment in the vessel or the hardship to the applicant from being denied an LLP license.²⁰

Since St. George did not harvest groundfish in the Aleutian Islands or the Bering Sea between January 4, 1992 and June 17, 1995, I conclude that it can not receive an LLP license with those endorsements under the unavoidable circumstances regulation.

2. Does RAM have the authority to award St. George a Pacific cod endorsement, based on the hardship provision in the Pacific cod regulation, 50 C.F.R. § 679.4(k)(9)(v)(A)? No.

As originally adopted, an LLP groundfish license had area endorsements – Aleutian Islands, Bering Sea, Western Gul, Central Gulf and Southeast Outside – but no gear or species endorsements. In 2002, the Council and NMFS added a BSAI Pacific cod endorsement for pot and hook and line gear.²¹ The Council and NMFS added this endorsement “to address the concern that fisherman who have made significant long-term investments and have long catch histories in the hook-and-line or pot gear BSAI Pacific cod fisheries needed protection from fisherman who have no or limited history in those fisheries.”²²

The F/V JENNIFER A, a catcher vessel, does not meet the standard harvest requirements for a Pacific cod endorsement. For a catcher vessel to receive a pot gear endorsement for BSAI Pacific cod, the vessel must have harvested 100,000 pounds of BSAI Pacific cod with pot or gear in each of any two years from 1995 to 1999.²³ The F/V JENNIFER A did not harvest any Pacific cod in 1995, 1996, 1997 or 1998. It first harvested Pacific cod in 1999 with a harvest of 298 pounds.

St. George seeks a Pacific cod endorsement under the hardship provision of the Pacific cod regulation.²⁴ To receive a Pacific cod endorsement on an LLP groundfish license, the applicant

²⁰ The Pacific cod gear regulation has a “hardship provision.” It does not help St. George. First, it applies to receiving a Pacific cod gear regulation, not the underlying LLP license. Second, although labeled “hardship provision,” it does not grant the Pacific cod gear endorsement based on economic hardship but upon proof of unavoidable circumstances. See 50 C.F.R. § 679.4(k)(9)(B).

²¹ Final Rule, 67 Fed. Reg. 18,129 (2002), *adopting* 50 C.F.R. § 679.4(k)(9).

²² Final Rule, 67 Fed. Reg. 18,129, 18,130 (2002). The Council and NMFS adopted this endorsement in Amendment 67 to the Fishery Management Plan for the BSAI Groundfish fishery.

²³ 50 C.F.R. § 679.4(k)(9)(ii)(B).

²⁴ 50 C.F.R. § 679.4(k)(9)(v)(B).

must have an LLP groundfish license. Since I have concluded that St. George does not qualify for an LLP groundfish license, NMFS cannot award St. George a Pacific cod endorsement on an LLP groundfish license under any theory or regulatory provision.

3. Did St. George make the documented harvests that are required by subsection (E) of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for an LLP crab license with endorsements for Pribilof red and blue king, St. Matthew blue king, Aleutian Islands brown king and Aleutian Islands red king? No.

Under the standard criteria for receiving an LLP crab license, an applicant must harvest LLP crab²⁵ in a general qualification period [GQP], an endorsement qualification period [EQP] and a recent participation period [RPP].²⁶ The basic GQP requirement is the same for all LLP crab endorsements: one harvest of any type of LLP crab between January 1, 1988 and June 17, 1992.²⁷ St. George meets the GQP requirement because it harvested Bristol Bay red king crab from the F/V ST. GEORGE in November 1991. St. George meets the RPP requirement. It made numerous documented harvests of BSAI crab between January 1, 1996 and February 9, 1998.

The IAD concluded that St. George should receive an LLP crab license with a Bristol Bay red king crab endorsement. The EQP requirement for a Bristol Bay red king crab endorsement is one harvest of red king crab in the Bristol Bay king crab endorsement area between January 1, 1991 and December 31, 1994.²⁸ St. George meets this requirement because the F/V St. George harvested Bristol Bay red king crab in November 1991. Since the F/V St. George met the requirements for this endorsement before it was lost, St. George receives the endorsement based on the fishing history of its lost vessel.²⁹

The IAD also concluded that St. George should receive an LLP crab license with a BSAI *opilio/bairdi* endorsement.³⁰ The EQP requirement for a BSAI *opilio/bairdi* endorsement is

²⁵ By LLP crab, I mean the crab governed by the LLP, which are BSAI Tanner and king crab. 50 C.F.R. § 679.2. The LLP regulations use the term “crab species.”

²⁶ 50 C.F.R. § 679.4(k)(5)(i)(ii)(iii). The Council and NMFS added the RPP requirement for crab licenses after the original LLP regulations. Final Rule, 66 Fed. Reg. 48,813 (2001), *clarified by* Final Rule, 68 Fed. Reg. 46,117 (2003).

²⁷ 50 C.F.R. § 679.4(k)(5)(i).

²⁸ 50 C.F.R. § 679.4(k)(5)(ii)(F).

²⁹ 50 C.F.R. § 679.4(k)(8)(iii).

³⁰ IAD at 9 & 11.

three harvests of BSAI *opilio/bairdi* between January 1, 1992 and December 31, 1994.³¹ The F/V ST. GEORGE did not make any of those harvests. But the IAD concluded that St. George should receive the *opilio/bairdi* endorsement because it met the requirements in the unavoidable circumstances regulation for that endorsement.³²

[1] St. George owned a vessel that made a documented harvest of crab in the Moratorium qualifying period: January 1, 1988 and February 9, 1992. It harvested Bristol Bay red king crab from the F/V ST. GEORGE in November 1991.

[2] The F/V ST. GEORGE was lost and therefore unable to participate in this fishery in the endorsement qualification period.

[3] St. George intended to participate in the *opilio* fishery in 1995. St. George had outfitted its vessel for crab and pot cod in 1991. It had fished Bristol Bay red king in November 1991. The F/V ST. GEORGE was en route to the fishing grounds for the *opilio* opening in January 1992, when it sank. St. George had an agreement to deliver *opilio, bairdi*, king crab and Pacific cod to Icicle Seafoods in the 1991-1992 seasons and beyond.³³

[4] St. George's intent to participate was thwarted by the sinking of the vessel.

[5] The loss of the vessel was unavoidable, unique and unforeseen and unforeseeable. St. George submitted documents that the vessel had annual safety examinations in 1990 and 1991 and that the vessel's safety equipment that was recovered – the Epirb and a life raft that inflates automatically – performed superbly.³⁴

[6] The unavoidable circumstance actually occurred: the vessel was lost.

[7] The F/V JENNIFER A made a documented harvest of *opilio* in 1995 after the F/V ST. GEORGE sank on January 4, 1992 and before June 17, 1995.³⁵ It made four documented

³¹ 50 C.F.R. § 679.4(k)(5)(ii)(B).

³² 50 C.F.R. § 679.4(k)(8)(iv). I quote the regulation in full at pages 3 - 4 *supra*.

³³ Letter from Rob Rogers, General Manager Floating Operations, Icicle Seafoods, to NMFS (received March 15, 2000). [Exhibit 1] St. George is still delivering to Icicle Seafoods.

³⁴ Port State Information eXchange, U.S. Coast Guard, October 23, 1999 [Exhibit 2]; Clippings from trade journals [Exhibit 3]. Epirb stands for emergency positioning indicator radio beacon.

³⁵ Since the F/V ST. GEORGE sank, St. George can use harvests from a replacement vessel to meet this requirement. *Mark Donovick*, Appeal No. 02-0008 at 7 (Sept. 27, 2002). All OAA decisions are on the NMFS Alaska Region website, <http://www.fakr.noa.gov/appeals/default.htm>

harvests of *opilio* crab in the Bering Sea, totaling over 120,000 pounds, in January and February 1995.

But the IAD concluded that St. George Marine should not receive an LLP crab license with endorsements for Pribilof red and blue king, St. Matthew blue king endorsement, AI brown king and AI red king. The EQP requirements for those endorsements are as follows:³⁶

[1] Pribilof red and blue king crab endorsement: one harvest of red *or* blue king crab in the Pribilof red and blue king endorsement area between January 1, 1993 and December 1994;³⁷

[2] St. Matthew blue king crab endorsement: one harvest of blue king crab in the St. Matthew blue king crab endorsement area between January 1, 1992 and December 31, 1994;

[3] AI brown king crab endorsement: three harvests of brown king crab in the Aleutian Islands brown king and red king crab endorsement area between January 1, 1992 and December 31, 1994;

[4] AI red king crab endorsement: one harvest of red king crab in the Aleutian Islands red king and brown king crab endorsement area between January 1, 1992 and December 31, 1994.

St. George did not make any of these harvests with the F/V ST. GEORGE or the F/V JENNIFER. Therefore, St. George can receive these endorsements only if it meets the requirements of the unavoidable circumstances regulation.

Subsection (E) of the unavoidable circumstances regulation requires that, *for each endorsement sought*, the applicant made a documented harvest “in the specific area that corresponds to the area endorsement or area/species endorsement for which the qualified person . . . is applying.”³⁸ Between January 4, 1992 and June 17, 1995, St. George harvested only *opilio*. Therefore, St. George does not qualify for those endorsements under the unavoidable circumstances regulation.

St. George argues that it is certain that it would have participated in all those crab fisheries if the F/V ST. GEORGE had not been lost. I assume that St. George could prove that. But the

³⁶ 50 C.F.R. § 679.4(k)(5)(A), (C), (D), (E), (F).

³⁷ A documented harvest of Pribilof blue king crab between January 1, 1993 - December 31, 1994 was not possible because that fishery was closed, although the Pribilof red king fishery was open in 1993 and 1994. See note 42 *infra*.

³⁸ 50 C.F.R. § 679.4(k)(8)(iv).

unavoidable circumstances regulation requires the applicant make a harvest after the unavoidable circumstance – in this case the loss of the vessel on January 4, 1992 – and before June 17, 1995. If the vessel is lost, the applicant may make the harvest with a replacement vessel.

St. George submits substantial and credible evidence that it acted expeditiously in having its replacement vessel, the F/V JENNIFER A, fish *opilio* by January 1995 – because of the time it took to investigate the disappearance of the F/V ST. GEORGE, settle the legal proceedings, receive a cash settlement from its insurance company, find and purchase a replacement vessel, obtain financing for substantial repairs to the vessel and complete the repairs.³⁹ St. George argues that it could not have fished Pribilof red or blue king crab by *June* 1995 because the Pribilof crab fishery was not open until *September* 1995. (The Pribilof king crab fishery is a short September fishery.⁴⁰) St. George argues that it fished Pribilof red and blue king in September 1995, as soon as the F/V JENNIFER A was able. For the other endorsements, St. George cannot make that argument because it did not harvest St. Matthew blue king, Aleutian Islands brown king or Aleutian Islands red king in 1995, 1996, 1997, 1998 or 1999.⁴¹ But St. George can credibly claim that it harvested Pribilof red and blue king crab as soon as the F/V JENNIFER was able.

The unavoidable circumstance regulation does not give me the authority to examine *why* an applicant did not harvest Pribilof red or blue king crab, or any particular crab species, between the unavoidable circumstance and June 17, 1995. It does not give me the authority to extend the June 17, 1995 deadline based on how long it took a vessel owner to obtain a replacement vessel after the original vessel disappeared. Nor does it authorize me to extend the June 17, 1995 deadline where a particular crab fishery was not open for all or part of 1995 and the applicant made a documented harvest in the first opening in that crab fishery in 1995.⁴²

³⁹ Letter from St. George Marine to OAA with attachments (Dec. 12, 2003).

⁴⁰ See note 42 *infra*.

⁴¹ The F/V JENNIFER A harvested brown king crab on December 2, 1995 but from Bristol Bay, not the Aleutian Islands. Exhibit 4 (fish ticket C92 004119 submitted by St. George). The fish ticket shows the crab caught in State statistical area 675600, which is not in the AI brown king endorsement area, as defined in 50 C.F.R. § 679.2 under area/species endorsements.

⁴² The Alaska Department of Fish and Game provided this information on crab openings:

- The Pribilof Islands blue king crab fishery was closed in 1991, 1992, 1993, 1994 and open September 15 - 22, 1995. [1996 Report, Table 5-7 at 152]
- The Pribilof Islands red king crab fishery was closed in 1991, 1992, open September 15 - 21, 1993, September 15 - 21 1994 and September 15 - 22, 1995. [1996 Report, Table 5-7 at 152]
- The St. Matthew Islands blue king crab fishery was open every September from 1991 to 1995 for three to seven days. [1996 Report, Table 5-15 at 161]
- The AI red king crab fishery was formerly divided into the Dutch Harbor and Adak fisheries. The Dutch Harbor red king fishery was closed from 1983 through 1996. [1996 Report, Table 3-3]

When NMFS proposed the LLP in the Federal Register, the only comment on the unavoidable circumstances regulation was that the requirement for a harvest by June 17, 1995 was “unfair to a person who could have used the provision except that he or she did not have a documented harvest before prior to June 17, 1995.” NMFS responded:

Response: Based on the approved recommendation of the Council, NMFS narrowly crafted the unavoidable circumstances provision to grant eligibility only when the minimum requirements for eligibility under the EQP [endorsement qualification period] 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. However, the unavoidable circumstances provision was never intended to extend the EQP.⁴³ Unless a person can demonstrate his or her intent to remain an active participant in the groundfish fisheries through a documented harvest made from a vessel, or its replacement, and submitted after that vessel was lost, damaged, or unable to participate but before June 17, 1995, that person cannot use the unavoidable-circumstances provision. A harvest before June 17, 1995, indicated a participant’s good faith effort to remain in the groundfish fisheries. This requirement is not unfair because any participation after June 17, 1995, the date of final Council action, is not considered a qualifying harvest under the LLP.⁴⁴

The Council and NMFS made a deliberate policy choice to adopt an across-the-board requirement for a documented harvest by June 17, 1995 that does not take into account the applicant’s individual circumstances and the opening dates of different crab fisheries. Whatever the pros and cons of this requirement, RAM is bound by the requirement and so am I. The F/V JENNIFER A did not harvest Pribilof red or blue king crab, St. Matthew blue king crab, AI

at 82] The Adak red king was open November 1 - November 28, 1994 and November 1, 1995 - February 15, 1996. [1995 Report, Table 5-7 at 123]

■ The AI brown king crab fishery was also formerly the Dutch Harbor and Adak fisheries. The Dutch Harbor brown king fishery was open September 1, 1994 - October 28, 1994 and September 1, 1995 - October 29, 1995. The Adak brown king fishery was open November 1, 1994 - August 15, 1995 and November 1, 1995 - August 15, 1996. [1996 Report, Table 3-2 at 181 & Table 4-2 at 106]

■ The Bristol Bay red king crab fishery was open November 1 - 8, 1991, November 1 - 8, 1992, November 1 - 10, 1993, and closed in 1994 and 1995 [1995 Report, Table 6 - 13 at 168].

The 1995 report is the Annual Management Report for the Shellfish Fisheries of the Westward Region, Regional Information Report No. 4K97-16, Alaska Department of Fish and Game (March 1997). The 1996 report is the Annual Management Report for the Shellfish Fisheries of the Westward Region, Regional Information Report No. 4K97-41 (July 1997).

⁴³ The ending date for the EQP for all crab endorsements is December 31, 1994. 50 C.F.R. § 679.4(k)(5)(ii). Therefore, the unavoidable circumstances provision actually *does* give crab applicants longer than the crab EQP to make this harvest because it gives them until June 17, 1995.

⁴⁴ Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

brown king crab, AI red king crab or Bristol Bay red king crab after the F/V St. George sank but before June 17, 1995. Therefore, I conclude that NMFS may not issue St. George an LLP crab license with those endorsements under the unavoidable circumstances provision.

FINDINGS OF FACT

1. The F/V ST. GEORGE disappeared on January 4, 1992.
2. The F/V ST. GEORGE did not make a documented harvest of harvest license limitation groundfish between January 1, 1988 and February 9, 1992.
3. The F/V JENNIFER A, the replacement vessel for the F/V ST. GEORGE, did not make a documented harvest of license limitation groundfish between January 4, 1992 and June 17, 1995.
4. The F/V JENNIFER A harvested license limitation groundfish on December 13, 1999.
5. The F/V ST. GEORGE harvested Bristol Bay red king crab in November 1991.
6. The F/V JENNIFER A made four documented harvests of BSAI *opilio* crab between January 4, 1992 and June 17, 1995.
7. The F/V JENNIFER A did not make a documented harvest of Pribilof red or blue king, St. Matthew blue king, AI brown king or AI red king between January 4, 1992 and June 17, 1995.

CONCLUSIONS OF LAW

1. St. George did not make the documented harvest required by the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for an LLP groundfish license with area endorsements for the Bering Sea and the Aleutian Islands.
2. To receive an endorsement on an LLP groundfish license under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), an applicant must have made a documented harvest of license limitation groundfish, not crab, in the Moratorium qualifying period: January 1, 1988 and February 9, 1992.
3. To receive an endorsement on an LLP groundfish license under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), an applicant must have made a documented harvest of license limitation groundfish in the area of the endorsement – here the Bering Sea and the Aleutian Islands – between the date of the unavoidable circumstances and June 17, 1995.
4. RAM does not have the authority to award St. George a Pacific cod endorsement on an LLP groundfish license, based on the hardship provision in the Pacific cod regulation, 50 C.F.R. § 679.4(k)(9)(v)(A), because St. George has not met the requirements for an LLP groundfish

license.

5. St. George did not make the documented harvests that are required by subsection (E) of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for an LLP crab license with endorsements for Pribilof red and blue king, St. Matthew blue king, AI brown king and AI red king.

6. To receive an endorsement for an LLP crab license under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), an applicant must have made a documented harvest of crab of the desired species in the desired endorsement area – here red or blue king in the Pribilof area, blue king in the St. Matthew blue king area, brown king in the AI brown king area, red king in the AI red king area – between the date of the unavoidable circumstance and June 17, 1995.

DISPOSITION

The IAD is AFFIRMED. This Decision takes effect March 22, 2004, unless by that date the Regional Administrator orders review of the Decision.

The Appellant or RAM may submit a motion for reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, March 1, 2004. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Appeals Officer