

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
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ARCTIC EAGLE, LLC,)
Appellant)
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Appeal No. 02-0028
DECISION
August 27, 2004

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on August 15, 2002, that determined that Appellant's groundfish license under the License Limitation Program (LLP), #LLG3890, does not qualify for a hook-and-line or pot gear endorsement for the Pacific cod fishery in the Bering Sea and Aleutian Islands (BSAI), based on the fishing history of its catcher vessel, the F/V ARCTIC EAGLE.

Appellant filed a timely appeal of the IAD. Appellant can file an appeal because the IAD directly and adversely affects its interests. [50 C.F.R § 679.43(b)] Appellant requests an oral hearing, but an oral hearing is not necessary in this case because the record contains sufficient information on which to reach a final decision. [50 C.F.R. § 679.42(m)(4)]

Appellant does not appeal the denial of the BSAI Pacific cod hook-and-line endorsement. Appellant claims only that its LLP groundfish license qualifies for a BSAI Pacific cod catcher vessel pot gear endorsement.

ISSUE

Does Appellant's LLP groundfish license qualify for a BSAI Pacific cod catcher vessel pot gear endorsement, based on the fishing history of the F/V ARCTIC EAGLE, or an "unavoidable circumstance"?

ANALYSIS

The LLP groundfish regulations require an LLP groundfish license to be specifically endorsed for Pacific cod with pot gear to commercially harvest Pacific cod aboard a catcher vessel with that gear in the BSAI.¹

To qualify for a BSAI Pacific cod catcher vessel pot gear endorsement, an applicant must establish that its LLP qualifying vessel harvested at least 100,000 pounds of Pacific cod in the

¹50 C.F.R. § 679.4(k)(9)(i).

BSAI with pot gear in each of any two of the years between 1995 and 1999.²

The official LLP record shows that the F/V ARCTIC EAGLE did not make enough harvests of Pacific cod in the BSAI to qualify Appellant's groundfish license for a Pacific cod catcher vessel pot gear endorsement. Appellant produced fish tickets for Pacific cod harvests, but the fish tickets show that the F/V ARCTIC EAGLE harvested over 100,000 pounds of BSAI Pacific cod with pot gear during only one year (1999) of the required two years for the endorsement between 1995 and 1999. I find that the F/V ARCTIC EAGLE did not harvest at least 100,000 pounds of Pacific cod in the BSAI with pot gear in each of any two of the years between 1995 and 1999.

Appellant can still qualify for a Pacific cod catcher vessel pot gear endorsement if it can establish that the F/V ARCTIC EAGLE would have met the eligibility requirements for the gear endorsement, but for an "unavoidable circumstance." To qualify for a Pacific cod catcher vessel pot gear endorsement based on an "unavoidable circumstance," Appellant must establish that:

(1) it had a specific intent at the time of the unavoidable circumstance to use the F/V ARCTIC EAGLE to make the sufficient amount of harvests required for a Pacific cod pot gear endorsement, but that the intent was thwarted by a circumstance that was unavoidable, unique to Appellant or the vessel, unforeseen, and reasonably unforeseeable to Appellant;

(2) the circumstance that prevented the F/V ARCTIC EAGLE from meeting the eligibility requirements for a Pacific cod pot gear endorsement actually occurred;

(3) Appellant took all reasonable steps to overcome the circumstance that prevented the F/V ARCTIC EAGLE from meeting the eligibility requirements for a Pacific cod pot gear endorsement; and

(4) the F/V ARCTIC EAGLE harvested any amount of Pacific cod with pot gear in the BSAI after the unavoidable circumstance, but before April 16, 2000.³

In its letter of appeal, Appellant claims that winter opilio crab seasons, spring vessel maintenance schedules, and summer tendering contracts, prevented the F/V ARCTIC EAGLE from making enough Pacific cod harvests to qualify Appellant's groundfish license for a Pacific cod catcher vessel pot gear endorsement.

The letter reads in relevant part:

Our vessel, the F/V Arctic Eagle, has participated in the Bering Sea/Aleutian Islands P. Cod fishery using both hook & line and pots since the vessel was first

²50 C.F.R. § 679.4(k)(9)(ii)(B).

³50 C.F.R. § 679.4(k)(9)(v)(B). For the regulatory history of the unavoidable circumstances provision, *see* 67 Fed. Reg. 18,137 (April 15, 2002).

commissioned in 1991. ...

The Arctic Eagle would participate in the directed P Cod pot fishery each year after the winter Opilio crab fishery which usually began on or about January 15th. Directly after the Opilio crab fishery our vessel would switch over its gear to target P cod in the Bering Sea. Each year from 1991 until 2002 we would make a couple of deliveries as our time would allow There was no minimum requirement of poundage until the NPFMC adopted a resolution in 2000 ... Our intent was to show consistent intent and participation. ...

The Arctic Eagle, because of summer work commitments and spring-summer haul out maintenance schedules, would stay P cod pot fishing as long as we thought we could without crunching ourselves up against our summer tendering commitments. ...

The Arctic Eagle has maintained membership in the largest crab-fishery group representing boats from Alaska, Oregon, Washington ... the Alaska Crab Coalition. Arne Thompson, founder and executive director, encourages those member vessels interested in maintaining eligibility in the BS/AI P cod fishery to make one or two deliveries to stay recent. That has been the consistent message throughout the years by Mr. Thompson. We heeded those words and make what we thought were deliveries enough to show intent even though many times we pushed ourselves up against other commitments with the vessel. ...

[We] the ACC lobbied hard against the special interest groups who succeeded in getting the 100,000 lb minimum in place, thus excluding many as ourselves who fished each year to ensure a place.

The Opilio seasons sometimes would run into April or May allowing us very little time to direct fish for P cod. The one year when ADF&G postponed the Opilio season (2000) until April 15 because of ice covering the crab grounds, the F/V Arctic Eagle fished P cod with pots from around January 25 to April 1. We harvested well more than the 100,000 lb. minimum nearly 5 times that much only because we had the time to do so.

With the shrinking crab seasons and increased lay up time P cod is factored very heavily into our production and bottom line and now we can't [fish for P cod]. That's not right. We knew we would be doing more P cod fishery and would require that income to remain a viable entity. We need to be able to fish as we have shown intent from day one in 1991.

Now we are being penalized because we had tending work in the summer with our vessel. We fished each of the qualifying years. ...

Even if the claims made in Appellant's letter are true, none of those claims can be construed as

an “unavoidable circumstance” because Appellant must have known beforehand that the alleged circumstances could prevent the F/V ARCTIC EAGLE from harvesting at least 100,000 pounds of BSAI Pacific cod with pot gear. Appellant knew (or reasonably should have known) each year before it fished that the amount of Pacific cod that the F/V ARCTIC EAGLE could harvest would be limited by lengthy opilio crab seasons, vessel maintenance schedules, and summer tendering commitments. Appellant could have avoided those circumstances to fish additional Pacific cod, but it chose instead (apparently for economic reasons) to fish for crab, and to use the F/V ARCTIC EAGLE for summer tendering. I find that the circumstances alleged by Appellant were reasonably foreseeable to, and avoidable by, Appellant.

Appellant claims that it would have harvested additional Pacific cod if it had known beforehand of the threshold levels established by the North Pacific Fishery Management Council and the National Marine Fisheries Service for the Pacific cod catcher vessel pot gear endorsement. In doing so, Appellant acknowledges that it was not beyond its control to harvest more Pacific cod during the eligibility period for a BSAI Pacific cod catcher vessel pot gear endorsement. Based on the evidence before me, none of the circumstances alleged by Appellant can be considered an “unavoidable circumstance.”

Appellant claims that it has consistently fished for Pacific cod since 1991. Even if that is true, it has not demonstrated that it harvested at least 100,000 pounds of BSAI Pacific cod with pot gear in at least two years between 1995 and 1999. Nor has Appellant established that it was prevented from meeting the eligibility criteria for a BSAI Pacific cod catcher vessel pot gear endorsement by an “unavoidable circumstance.” I conclude that Appellant does not qualify for a BSAI Pacific cod catcher vessel pot gear endorsement, based on the fishing history of the F/V ARCTIC EAGLE or an “unavoidable circumstance.”

FINDINGS OF FACT

1. The F/V ARCTIC EAGLE did not harvest at least 100,000 pounds of Pacific cod in the BSAI with pot gear in each of any two of the years between 1995 and 1999.
2. Even if lengthy opilio crab seasons, vessel maintenance schedules, and summer work commitments prevented the F/V ARCTIC EAGLE from harvesting enough Pacific cod harvests to qualify Appellant for a Pacific cod catcher vessel pot gear endorsement, those circumstances were reasonably foreseeable to, and avoidable by, Appellant.

CONCLUSION OF LAW

Appellant’s LLP groundfish license does not qualify for a BSAI Pacific cod catcher vessel pot gear endorsement, based on the fishing history of the F/V ARCTIC EAGLE or an “unavoidable circumstance.”

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on

September 27, 2004, unless by that date the Regional Administrator orders review of the Decision. Any party, and 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 on September 7, 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.

Randall J. Moen
Appeals Officer