

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 02-0052
)
FARWEST LEADER, INC.,) DECISION
Appellant)
) July 21, 2004
_____)

STATEMENT OF THE CASE

Farwest Leader, Inc., (Farwest) appeals an Initial Administrative Determination (IAD) by the Restricted Access Management (RAM) Program under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹ The IAD denied Bering Sea/Aleutian Islands (BSAI) Pacific cod endorsements on Farwest's LLP license.² Farwest can appeal the IAD because it directly and adversely affects Farwest, as required by 50 C.F.R. §679.43(b).

The IAD concluded that Farwest qualified for a BSAI Pacific cod *catcher vessel* hook-and-line gear endorsement on LLP license LLG4005 but not a BSAI Pacific cod *catcher/processor* hook-and-line gear endorsement. The IAD concluded that Farwest did not meet the requirements for a BSAI Pacific cod *pot gear* endorsement for a catcher vessel or catcher processor vessel.

On appeal, Farwest seeks BSAI Pacific cod endorsements for a catcher/processor vessel with hook-and-line and pot gear. Farwest is seeking these endorsements based on the fishing history of the F/V SONYA S, ADFG # 61244. The record provides sufficient information to determine Farwest's appeal.³

ISSUES

1. Does Farwest Leader, Inc., qualify for a BSAI Pacific cod *catcher/processor hook-and-line gear* endorsement on LLP license LLG4005?
2. Does Farwest Leader, Inc., qualify for a BSAI Pacific cod *catcher/processor pot gear* endorsement on LLP license LLG4005?

¹ IAD (Aug. 14, 2002). The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions) and 50 C.F.R. § 679.4(k)(license requirements). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regis/summary.htm>.

² The BSAI Pacific cod gear/species endorsement is at 50 C.F.R. § 679.4(k)(9).

³ 50 C.F.R. 679.43 § (g)(2).

ANALYSIS

1. Does Farwest Leader, Inc., qualify for a BSAI Pacific cod *catcher/processor hook-and-line* gear endorsement on LLP license LLG4005? No.

To qualify for a BSAI Pacific cod *catcher/processor hook-and-line* gear endorsement, Farwest must show that the F/V SONYA S harvested 270 metric tons of Pacific cod in the BSAI directed Pacific cod fishery with hook-and-line gear in any *one* of the years 1996, 1997, 1998, or 1999.⁴ The IAD concluded that Farwest did not meet that requirement.

Farwest appealed, by filing a letter from William Swimlear, the owner and principal of Farwest Leader, Inc.⁵ Farwest never owned the F/V SONYA S but Farwest bought the fishing history of the F/V SONYA S, and the rights to the resulting LLP license, in March 1999.

Farwest asked this Office to review the fishing history of the F/V SONYA S in the official LLP record to determine if it should receive the disputed endorsements. Although the IAD concluded that Farwest did not qualify for any BSAI Pacific cod catcher/processor endorsements, the IAD did not inform Farwest what the official LLP record did show, namely, how many pounds of BSAI Pacific cod the F/V SONYA harvested and in what years.

The official LLP record is the information prepared by NMFS about vessels that participated in the LLP groundfish or crab fisheries during the qualifying periods for LLP licenses and endorsements to those licenses.⁶ A vessel's fishing history of documented harvests in the official LLP record derives from two sources: State of Alaska fish tickets and federal Weekly Production Reports (WPRs).⁷

⁴ 50 C.F.R. § 679.4(k)(9)(ii)(C) & (iii)(G). This requirement has three exceptions, none of which affect this appeal. First, Farwest could use BSAI Pacific cod harvests from another vessel *but only if* the license holder owned the endorsement-qualifying fishing history of the other vessel at the same time it owned the fishing history of the F/V SONYA S. 50 C.F.R. § 679.4(k)(9)(iii)(F)(2). Farwest does not claim it owned the fishing history of another vessel. Second, a license holder can receive a BSAI Pacific cod endorsement if it meets the requirements of the hardship/unavoidable circumstances provision. Farwest does not argue it meets the hardship provision and Farwest did not harvest Pacific cod by April 16, 2000, a requirement of the hardship provision. 50 C.F.R. § 679.4(k)(9)(v)(B)(4). Third, a harvest of BSAI Pacific cod for commercial bait counts toward eligibility amounts even if not in the BSAI Pacific cod directed fishery. 50 C.F.R. § 679.4(k)(9)(iii)(D). I assume that all the F/V SONYA S's Pacific cod harvests were in the directed fishery.

⁵ Letter from William Swimlear (Oct. 11, 2002). Farwest is not represented by counsel.

⁶ 50 C.F.R. § 679.2 (definition of official LLP record).

⁷ Supplementary Information, Final Rule, 64 Fed. Reg. 42,826, 42,826 (1999). NMFS also consults State of Alaska processor annual reports and its own observer data. *Id.* A harvest must be a documented harvest to count toward an LLP license or any endorsement on an LLP license. *See* 50

To count toward a BSAI Pacific cod endorsement, a harvest must have occurred in the BSAI Pacific cod directed fishery.⁸ To determine if a harvest occurred in the directed fishery, RAM employed a presumptive 50% rule: it counted a fish ticket or WPR as showing directed fishing only when BSAI Pacific cod comprised 50% or more of the round weight of all the BSAI species on the ticket or WPR.⁹ I do not analyze the 50% rule because *all* of the BSAI Pacific cod from the F/V SONYA S meets the 50% rule. In other words, the rule did not cause RAM to eliminate any Pacific cod from the F/V SONYA S's harvest totals.

A. BSAI Pacific cod harvests with hook-and-line gear from the F/V SONYA S in 1996.

I examined a printout from RAM of fish tickets contained in the official LLP record. It showed that the F/V SONYA S harvested 164,114 pounds of Pacific cod with hook-and-line gear in the BSAI in 1996. This translates into 52.67 metric tons. This harvest was documented in two fish tickets, both dated March 12, 1996.

I examined a printout of Weekly Production Reports from RAM contained in the official LLP record. It showed that the F/V SONYA S harvested 114.56 metric tons of Pacific cod with hook-and-line gear in BSAI in 1996. This harvest was documented in three Weekly Production Reports: for the weeks ending September 7, 14 and 21, 1996.

Within the NMFS Alaska Region, the Division of Sustainable Fisheries (SF) also maintains a database with WPR harvests. SF's data agreed with RAM's data for 1996: 114.56 metric tons of BSAI Pacific cod with hook-and-line gear documented in three WPRs.¹⁰

Therefore, according to these sources, the F/V SONYA S harvested 167.23 metric tons of BSAI Pacific cod with hook-and-line gear in 1996:

52.67 metric tons (fish tickets) + 114.56 metric tons (WPRs) = 167.23 metric tons.
A harvest of 167.23 metric tons in 1996 exceeds the 7.5 metric tons required for a BSAI Pacific cod *catcher vessel* hook-and-line endorsement but falls 102.77 metric tons short of the 270

C.F.R. § 679.4(k)(4); 50 C.F.R. § 679.2 (definition of documented harvest).

⁸ 50 C.F.R. § 679.4(k)(9)(ii)(G), except all documented harvests of Pacific cod *for bait* count toward BSAI Pacific cod endorsements, 50 C.F.R. § 679.4(k)(9)(iii)(D).

⁹ Notice of Changes to LLP, Notice of Preliminary Determination by NMFS, Notice of Opportunity to Challenge Preliminary Determination (June 7, 2002).

¹⁰ SF's data differs from RAM's for 1995. SF shows a harvest of 1008.24 metric tons, or over two million pounds, of BSAI Pacific cod with hook-and-line gear from the F/V SONYA S. RAM's fish ticket and WPR data shows no pounds. This discrepancy does not affect whether Farwest receives a catcher/processor hook-and-line endorsement because 1995 is not a qualifying year for that endorsement. The accuracy of the official LLP record would be enhanced if RAM verified that the fishing history of the F/V SONYA S has the vessel's 1995 WPR data maintained by the Sustainable Fisheries Division.

metric tons required for a BSAI Pacific cod *catcher/processor* hook-and-line endorsement.¹¹

I therefore find that, for 1996, the F/V SONYA S did not harvest 270 metric tons of Pacific cod in the BSAI Pacific cod directed fishery with hook-and-line gear.

B. BSAI Pacific cod harvests with hook-and-line gear from the F/V SONYA S in 1997 to 1999.

For 1997, 1998 and 1999, neither the RAM data nor the SF data show any documented harvests of groundfish from the F/V SONYA S. I therefore find that the F/V SONYA S did not harvest 270 metric tons of Pacific cod in the BSAI Pacific cod directed fishery with hook-and-line gear in 1997, 1998 or 1999.

Since the F/V SONYA S did not harvest 270 metric tons of BSAI Pacific cod in 1996, 1997, 1998 or 1999, I conclude that Farwest does not qualify for a BSAI Pacific cod catcher/processor hook-and-line gear endorsement on LLP license LLG4005.

2. Does Farwest Leader, Inc., qualify for a BSAI Pacific cod *catcher/processor pot gear* endorsement on LLP license LLG4005? No.

For a BSAI Pacific cod catcher/processor pot gear endorsement, Farwest must show that the F/V SONYA S harvested 300,000 pounds of Pacific cod with pot gear in the directed fishery in each of any *two* of the years 1995, 1996, 1997, or 1998.¹² For a catcher vessel pot gear endorsement, the F/V SONYA S must have harvested 100,000 pounds of BSAI Pacific cod with pot or jig gear in the directed fishery in each of any *two* of the years 1995, 1996, 1997, 1998, or 1999.¹³

The fishing history of the F/V SONYA S – as documented in RAM’s fish ticket database, RAM’s WPR database and Sustainable Fisheries’s WPR database – shows that the vessel did not harvest *any* Pacific cod with pot or jig gear in the BSAI from 1995 to 1999. Farwest has not introduced any evidence or argument to the contrary.

I therefore find that the F/V SONYA S did not harvest 300,000 pounds of Pacific cod in the

¹¹ To convert these amounts to pounds:

Needed for BSAI P cod catcher/processor hook-and-line endorsement -	270 mt or 595,248 lbs
BSAI P cod hook-and-line harvest by F/V SONYA S in 1996	- 167.23 mt or 368,679 lbs
Difference between amount needed and amount harvested	- 102.77 mt or 226,569 lbs

The 7.5 metric tons required for a BSAI catcher vessel hook-and-line gear endorsement is 16,535 pounds.

¹² 50 C.F.R. § 679.4(k)(9)(ii)(D).

¹³ 50 C.F.R. § 679.4(k)(9)(ii)(B).

BSAI in any two of the years 1995 to 1998 with pot gear and conclude that Farwest does not qualify for a BSAI Pacific cod catcher/processor pot gear endorsement on LLP license LLG4005. I further conclude that Farwest does not qualify for a catcher vessel pot gear endorsement because the F/V SONYA S did not harvest 100,000 pounds of BSAI Pacific cod with pot or jig gear in any two years from 1995 to 1999.

I wish to address a question raised by Farwest. Farwest states that, when it bought the fishing history of the F/V SONYA S in March 1999, it intended to use the resulting LLP license on a catcher/processor vessel with hook-and-line and pot gear in BSAI. Farwest questions why it cannot now do that.

When NMFS first issued LLP licenses in 2000, Farwest's license had a catcher/processor vessel designation with four area endorsements: Aleutian Islands, Bering Sea, Central Gulf and Western Gulf. This license meant that Farwest could catch-and-process any species of groundfish, including Pacific cod, with any legal gear in the Aleutian Islands, Bering Sea, Central Gulf and Western Gulf with a vessel whose maximum length overall is 124 feet.¹⁴ The LLP groundfish license, as originally issued, had no species or gear endorsements.¹⁵

In 2002, the North Pacific Fishery Management Council (Council) and NMFS added the BSAI Pacific cod gear/species endorsements to the LLP groundfish license.¹⁶ Effective January 1, 2003, an LLP license holder could not conduct directed fishing for Pacific cod in the BSAI with hook-and-line or pot gear without a specific endorsement.¹⁷ The Council and NMFS made the vessel's catch history of BSAI Pacific cod from 1995 to 1999 the test for the new BSAI Pacific cod endorsements. Except for the hardship provision, the intent of the license holder or vessel owner is not relevant.¹⁸

¹⁴ LLG4005, issued to Farwest Leader, Inc., March 28, 2000 The LLP license is necessary to harvest license limitation groundfish, 50 C.F.R. § 679.4(k)(4)(k)(1), a term defined in 50 C.F.R. § 679.2. When I refer to groundfish, I mean license limitation groundfish.

¹⁵ Final Rule, 63 Fed. Reg. 52,642, 52,654 - 52,656 (1998). NMFS added a trawl/non-trawl gear designation to the LLP groundfish license in 2001. Final Rule, 66 Fed. Reg. 48, 813 (2001). Farwest qualified for a non-trawl gear designation but has not received a license with that designation because it has not named a vessel on its LLP license, another change in the LLP since the original regulations. *Id* at 48,815.

¹⁶ Final Rule, 67 Fed. Reg. 18,129 (2002).

¹⁷ 50 C.F.R. § 679.4(k)(9)(i).

¹⁸ 50 C.F.R. § 679.4(k)(9)(v)(B)(license holder, or vessel owner at the time of the unavoidable circumstance, must have had specific intent to harvest BSAI Pacific cod in the eligibility amounts; this intent was thwarted by an unavoidable circumstance that was unique and unforeseen and reasonably unforeseeable; but, in addition, vessel must have harvested BSAI Pacific cod by April 15, 2000).

Therefore, despite Farwest's original intention, and despite the fact that LLG4005 will still have a catcher/processor vessel designation, Farwest cannot participate as a catcher-processor in the BSAI Pacific cod directed fishery with hook-and-line or pot gear because Farwest does not have the specific BSAI Pacific cod endorsements which are now necessary to do that.

Farwest will still have an LLP license with a catcher/processor vessel designation, a non-trawl gear designation and area endorsements for Bering Sea, Aleutian Islands, Western Gulf and Central Gulf. Farwest can still participate as a catcher/processor with non-trawl gear for any species of groundfish, including Pacific cod, in the Central Gulf and Western Gulf. Farwest can participate as a catcher/processor with non-trawl gear for any species of groundfish, other than Pacific cod, in BSAI.

For BSAI Pacific cod, Farwest's license will have a BSAI Pacific cod catcher vessel hook-and-line endorsement. Farwest may conduct directed fishing for Pacific cod in the BSAI with hook-and-line gear. But with LLP license LLG4005, Farwest may not conduct directed fishing for Pacific cod in the BSAI with pot gear and may not process Pacific cod in the BSAI caught with hook-and-line or pot gear.

FINDINGS OF FACT

1. The F/V SONYA S did not harvest 270 metric tons of Pacific cod with hook-and-line gear in the BSAI Pacific cod directed fishery in any one of the years 1996 to 1999.
2. The F/V SONYA S did not harvest 300,000 pounds of Pacific cod with pot gear in the BSAI Pacific cod directed fishery in any two of the years 1995 to 1998.
3. The F/V SONYA S did not harvest 100,000 pounds of Pacific cod with pot or jig gear in the BSAI Pacific cod directed fishery in any two of the years 1995 to 1999.

CONCLUSIONS OF LAW

1. Farwest Leader, Inc., does not qualify for a BSAI Pacific cod catcher/processor hook-and-line gear endorsement on LLP license LLG4005.
2. Farwest Leader, Inc., does not qualify for a BSAI Pacific cod catcher/processor pot gear endorsement on LLP license LLG4005.
3. Farwest Leader, Inc., does not qualify for a BSAI Pacific cod catcher vessel pot gear endorsement on LLP license LLG4005.

DISPOSITION AND ORDER

The IAD that is the subject of this Decision is **AFFIRMED**. This Decision takes effect on August 20, 2004, unless by that date the Regional Administrator orders review of this Decision.

Farwest Leader, Inc., 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, August 2, 2004. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that the appeals officer overlooked or misunderstood and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Appeals Officer