

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 03-0005
)	
DIAMONDBACK SEAFOODS, Inc.,)	DECISION
Appellant.)	
)	August 24, 2004
_____)	

Diamondback Seafoods, Inc., (Diamondback) appeals the Initial Administrative Determination (IAD), dated March 18, 2003, issued by the Restricted Access Management Program (RAM). RAM issued this IAD under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹ The IAD determined that Diamondback did not qualify for a Bering Sea/Aleutian Islands (BSAI) Pacific cod catcher vessel pot gear endorsement on its LLP groundfish license LLG 1379.

Diamondback’s LLP groundfish license is based on the fishing history of the F/V ANNA MARIE, ADFG 06858. Diamondback argues that it should receive a BSAI Pacific cod pot gear endorsement based on the hardship provision at 50 C.F.R. § 679.4(k)(9)(iv). Although labeled “hardship provision,” I will sometimes refer to it as the unavoidable circumstance provision because the requirements in the hardship provision all relate to proving an unavoidable circumstance.

Diamondback can appeal the IAD because it directly and adversely affects Diamondback’s interests.² The record has sufficient information for me to decide Diamondback’s appeal. I therefore close the record and issue this decision.³

SUMMARY

The IAD is vacated. Diamondback is seeking a BSAI Pacific cod catcher vessel pot gear endorsement on its LLP groundfish license. The requirement for this endorsement, in 50 C.F.R. § 679.4(k)(9)(ii), is that the vessel harvested 100,000 pounds of Pacific cod in the BSAI with pot or jig gear in each of any two years 1995, 1996, 1997, 1998 or 1999. Diamondback’s vessel, the F/V ANNA MARIE, harvested over 100,000 pounds of BSAI Pacific cod with pot gear in 1995;

¹ The LLP is located in 50 C.F.R. § 679. Specifically: 50 C.F.R. § 679.1(j) (purpose and scope); 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(a)(6) (definition of harvesting privilege); 50 C.F.R. § 679.4(k)(requirements for licenses); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). These regulations are on the NMFS Alaska region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² 50 C.F.R. § 679.43(b)

³ 50 C.F.R. § 679.43(g)(2).

none in 1996, 1997, 1998 and 1999; and 200,000 pounds in February and March 2000.

On appeal, Diamondback proved, by a preponderance of evidence, it intended to harvest at least 100,000 pounds of BSAI Pacific cod with pot gear in 1996 but was thwarted by the sinking and total loss of the vessel. On appeal, Diamondback proved the sinking was unavoidable, unique, unforeseen and reasonably unforeseeable and that Diamondback took all reasonable efforts to overcome the unavoidable circumstance. Diamondback met the final requirement of the hardship provision: it harvested BSAI Pacific cod after the unavoidable circumstance and before April 16, 2000. Diamondback does not have to prove the facts required by the unavoidable circumstance provision for 1997, 1998 and 1999. Therefore, Diamondback meets all the requirements of the hardship/unavoidable circumstance provision in the BSAI Pacific cod regulation, 50 C.F.R. § 679.4(k)(9)(v)(B), and qualifies for a BSAI Pacific cod catcher vessel pot gear endorsement on its LLP groundfish license.

ISSUE

Does Diamondback qualify for a BSAI Pacific cod catcher vessel pot gear endorsement on its LLP groundfish license, based on the hardship provision in the BSAI Pacific cod gear regulation, 50 C.F.R. § 679.4(k)(9)(v)(B)?

ANALYSIS

For a BSAI Pacific cod catcher vessel pot gear endorsement, the landing requirement is at least 100,000 pounds of Pacific cod caught in the BSAI with pot or jig gear in each of any two years from 1995 to 1999.⁴ According to the official LLP record, the F/V ANNA MARIE harvested approximately 300,000 pounds of Pacific cod in the BSAI with pot gear in 1995 but none in 1996, 1997, 1998 or 1999.⁵

Diamondback does not dispute the fishing history of the F/V ANNA MARIE but seeks credit for a second year of BSAI Pacific cod pot gear fishing under the BSAI Pacific cod hardship provision, which provides:

(A) Hardship provision. A license holder may be eligible for a Pacific cod endorsement because of unavoidable circumstances if he or she meets the requirements in paragraphs (k)(9)(v)(B)(1) - (4) of this section. For purposes of this hardship provision, the term license holder includes the person who [sic]

⁴ 50 C.F.R. § 679.4(k)(9)(ii)(B). The Pacific cod regulation implemented Amendment 67 to the Fishery Management Plan for the BSAI Groundfish Fishery. For background and comments on the Pacific cod regulation, see Final Rule, 72 Fed. Reg. 18,129, 18,129 - 18,138 (April 15, 2002).

⁵ The official LLP record is “the information prepared by the [NMFS Alaska Region] Regional Administrator about vessels that were used to participate in the groundfish or crab fisheries during qualified periods for the groundfish and crab LLP specified at [50 C.F.R.] § 679.4(k).” 50 C.F.R. § 679.2.

landings were used to meet the eligibility requirements for the license holder's groundfish license, if not the same person.

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod **in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of this section** but that this intent was thwarted by a circumstance that was:

- (i) Unavoidable.
- (ii) Unique to the license holder, or unique to the vessel that was used at the basis of eligibility for the license holder's groundfish license; and
- (iii) Unforeseen and reasonably unforeseeable to the license holder.

(2) The circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod **in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii)** actually occurred;

(3) The license holder took all reasonable steps to overcome the circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod **in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) of this section**; and

(4) Any amount of Pacific cod was harvested in the BSAI aboard the vessel that was used at the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000. [emphasis added]

I analyze whether Diamondback meets each requirement of this provision.

1. Did Diamondback hold a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of the BSAI Pacific cod gear regulation? Yes.

The IAD stated that, *based on the record before RAM*, Diamondback had proven “a general intent to increase [its] gear capacity and to harvest Pacific cod with pots during 1996.”⁶ If that is all Diamondback proved, Diamondback did not meet the first requirement because this provision requires the hardship applicant to prove [a] a specific intent, not a general intent, [b] to harvest an amount sufficient to meet the landing requirement for the requested endorsement, not merely to participate in the fishery.

Diamondback submitted additional evidence on appeal. Based on the evidence before RAM and

⁶ IAD at 5.

the additional evidence Diamondback submitted on appeal, I conclude that Diamondback held a specific intent to harvest at least 100,000 pounds of BSAI Pacific cod with pot gear from the F/V ANNA MARIE between October and December 1996.

I base this conclusion on the following facts, which I find that Diamondback proved by a preponderance of evidence: [1] Diamondback purchased the F/V ANNA MARIE in January 1995 and converted the vessel from a trawl cod vessel to a pot cod and pot crab vessel;⁷ [2] Diamondback caught about 300,000 pounds of BSAI Pacific cod with pot gear in 1995 in about 38 days of fishing;⁸ [3] this represented 25% of the vessel's income for 1995;⁹ [3] Diamondback licensed and insured the F/V ANNA MARIE for the BSAI Pacific cod pot gear fishery in 1996: it obtained a Vessel Moratorium Permit with a groundfish pot gear endorsement;¹⁰ it acquired hull insurance and listed pot cod fishing in Alaska in its planned operations between May 1996 and May 1997;¹¹ the skipper of the vessel obtained a State of Alaska license in August 1996 that authorized him to fish BSAI Pacific cod;¹² [4] in September 1996, Diamondback purchased an additional 30 cod pots;¹³ [5] the F/V ANNA MARIE had just finished the St. Matthew blue king fishery in September 1996 and was in Homer, Alaska to pick up cod pots from storage and undergo some repairs, before heading out to King Cove to fish BSAI Pacific cod, along with Bristol Bay red kings, for the rest of the year;¹⁴ [6] the BSAI Pacific cod pot gear fishery was

⁷ Letter from Leonard Herzog to RAM (Aug. 5, 2002)(Exhibit A); Diamondback Financial Statements (showing investment in pot fishing in 1995 and purchase of pots, coiler head and pot launcher)(Exhibit E). All exhibits are to Mr. Herzog's affidavit of May 15, 2003. Leonard Herzog and John Hansen are the principal shareholders of Diamondback Seafoods, Inc., which owns the F/V ANNA MARIE.

⁸ Official LLP record. The precise amount was 304,123 pounds.

⁹ Diamondback Financial Statements (Exhibit E).

¹⁰ Federal Vessel Moratorium Permit # 1362 for the F/V ANNA MARIE with endorsements for Crab/Pot Gear; Groundfish/Trawl Gear; Groundfish/Pot Gear; Groundfish/Hook Gear (Exhibit O).

¹¹ Rollins/Hudig Hall letter of insurance coverage (May 10, 1996)(Exhibit P at 1); Marine Insurance Application (Exhibit P at 8).

¹² Affidavit of Steve Reinhart (May 13, 2003). The State of Alaska Commercial Fisheries Entry Commission website confirms that Steve Reinhart obtained a license for fishery M 91B on August 15, 1996. <<<http://www.cfec.state.ak.us/pmtlist/yr1996/HLDFNAME/pbNO138.htm>>> visited June 21, 2004. A license for fishery M 91B is for miscellaneous pot gear, Area B, which is Statewide.

¹³ Affidavit of Leonard Herzog (May 15, 2003); Affidavit of Steve Reinhart (May 13, 2003); Quotes from Dungeness Gear Works for pots (Exhibit R & S); Invoice from Peter Pan Seafoods for delivery of pots on October 4, 1996 (Ex. T)

¹⁴ Affidavit of Leonard Herzog (May 15, 2003); Affidavit of Steve Reinhart (May 13, 2003).

open from September through December 1996;¹⁵ [7] it made economic sense for Diamondback to participate heavily in the BSAI Pacific cod pot fishery, given its investment in converting the F/V ANNA MARIE to a pot cod vessel and the vessel's record of BSAI Pacific cod fishing in 1995;¹⁶ [8] when Diamondback reentered the BSAI Pacific cod pot gear fishery in 2000, it harvested 200,000 pounds in January and February, two months of fishing.¹⁷

2. Was Diamondback's intent thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable? Yes.

The F/V ANNA MARIE sank in the Homer harbor in the early morning hours of October 1, 1996.¹⁸ The sinking was the result of seawater entering the vessel through the bilge system, caused by the vessel engineer's failure to completely shut the bilge valves following maintenance work done on the vessel. The damage to the vessel was significant, serious and structural. The vessel was eventually declared a constructive total loss by the insurance company, which approved repairs totaling \$485,882.

Repairs to the vessel included the following: the main engine was rebuilt, both generators were replaced, most motors and starters were replaced, the engine room bulkhead and refrigeration system were dismantled and rebuilt. Three electricians worked on the vessel continuously in Homer from October until the middle of December. The engines and gear had to be transported to Anchorage for rebuilding. All of the work, except replacement of the refrigerated seawater system (RSW), was completed by early January 1997. The RSW, which was necessary for Diamondback's Pacific cod operations, was not completed and reinstalled until April 1997.

a. Was this circumstance unavoidable? Yes.

The repairs to the vessel, and the vessel being completely out of commission from October 1996 through December 1996, was unavoidable. After the accident occurred, Diamondback had no choice but to *not* go fishing. But what of the accident itself? In *Pequod, Inc.*, we looked at that

¹⁵ NMFS Alaska Region website, <<<http://www.fakr.noaa.gov/1996/dapst96.txt>>> visited August 13, 2004. The 1996 status of fisheries section shows the BSAI Pacific cod pot gear fishery was open throughout 1996.

¹⁶ Affidavit of John Hansen (May 13, 2003).

¹⁷ IAD at 6.

¹⁸ The evidence for the facts in the next two paragraphs is as follows: Work Order to NC Machinery to inspect damage to boat (Oct. 2 1996)(Exhibit I); Marine Damage Report by Patrick McNary, Marine Surveyors (Oct. 10, 1996)(Exhibit J); Claim Adjustment on F/V ANNA MARIE (Exhibit K); Letters from Marine Surveyors to Risk Services, Inc., listing charges for repairs, covering work performed between October 10, 1996 through December 31, 1996)(Exhibit L); Coastal Refrigeration Bid (Dec. 30-, 1996)(Exhibit N); Affidavit of Leonard Herzog (May 15, 2003).

question. In *Pequod*, the vessel's captain fell asleep, the vessel grounded and it had to undergo repairs for four months.¹⁹ Even though, in one sense of the word, the accident in *Pequod* was avoidable – the boat captain did not have to fell asleep – we found it was unavoidable within the meaning of the unavoidable circumstance regulation at issue in that appeal.²⁰ We recognized in *Pequod* that “some accidents are inevitable” and concluded:

Even a conscientious captain can make a mistake, misjudge his stamina and fall asleep while steering.

The unavoidable circumstances regulation should not be interpreted to exclude from consideration an experienced and able captain who makes a mistake and is honest about it. The regulation should not be interpreted to require perfection from hardworking citizens trying to earn a livelihood. As long as the damage to the vessel is an accident and is not the result of substance abuse by the boat operator or some other condition that generally impairs the operator's ability to command a vessel, an accident should generally be considered unavoidable.²¹

The same conclusion applies to the mistake by the F/V ANNA MARIE's engineer in leaving the valve open. It was an accident and not intentional damage. It did not result from substance abuse by the engineer. As soon as the engineer discovered his mistake, he immediately went to a nearby vessel and contacted the Homer Harbormaster, who responded with portable pumps.²² It did not result from the owner's hiring an inexperienced captain or crew or the owner's inattention to maintenance of the vessel. The captain, Steve Reinhart, had twenty years experience running similar vessels and an unlimited 1600 ton license.²³ The vessel was well-maintained. It had been hauled out in April 1996 for repairs and routine maintenance and professionally surveyed in May 1996 with no recommendations made by the surveyor.²⁴ I conclude the sinking and repairs to the F/V ANNA MARIE were unavoidable within the meaning of the unavoidable circumstance regulation.

¹⁹ Appeal No. 00-0013 (April 12, 2002).

²⁰ 50 C.F.R. § 679.4(k)(8)(iv). This regulation specified what an unavoidable circumstance applicant had to prove to obtain an original LLP license. Although Diamondback already has an LLP license and is seeking a BSAI Pacific cod endorsement on an original LLP license, the hardship provision for a BSAI Pacific cod endorsement is very similar to the unavoidable circumstance provision for an original LLP license.

²¹ Appeal No. 00-0013 at 21-22 (April 12, 2002).

²² Marine Damage Report at 2 (Oct. 10, 1996) (Exhibit J).

²³ Affidavit of Steve Reinhart (May 13, 2003).

²⁴ Affidavit of Leonard Herzog (May 15, 2003); Marine Survey Report (June 26, 1996) (Ex. J).

b. Was this circumstance unique to Diamondback or unique to the F/V ANNA MARIE? Yes.

The sinking and repairs to the F/V ANNA MARIE were unique to Diamondback and to the F/V ANNA MARIE. It was a condition that affected this vessel only, not the whole fleet or a segment of the fleet.

c. Was this circumstance unforeseen and reasonably unforeseeable? Yes.

Diamondback did not know this accident was going to happen and therefore it was unforeseen. The accident was reasonably unforeseeable. It did not result from something Diamondback did that it should not have done. Nor did it result from something Diamondback did *not* do that it should have done. Diamondback hired an experienced captain and crew. It maintained the vessel in a satisfactory condition. The vessel was about to engage in the type of fishing for which the vessel was equipped, licensed and insured.

d. Did this circumstance thwart Diamondback from meeting the landing requirements for a catcher vessel pot gear endorsement? Yes.

I find that Diamondback has proven, by a preponderance of evidence, that the unavoidable circumstance thwarted, or prevented, Diamondback from harvesting 100,000 pounds of BSAI Pacific cod with pot gear. Put another way, I find that Diamondback has proven, by a preponderance of evidence, that it likely would have caught that amount *but for* the unavoidable circumstance.

I base this finding on the evidence that supports my finding that Diamondback specifically intended to participate in the BSAI Pacific cod pot gear fishery and well-positioned to do so.²⁵ In addition, I base this finding on the following evidence that is specific to the amount of BSAI Pacific cod that the F/V ANNA MARIE would likely have harvested: the vessel harvested 300,000 pounds of BSAI Pacific cod with pot gear in thirty-eight days of fishing in 1995; the captain's estimate that the vessel could harvest 100,000 pounds in eight days is supported by the rate of harvest of the vessel in 1995;²⁶ the vessel would have had thirty more cod pots in 1996; when Diamondback resumed BSAI Pacific cod pot fishing in 2000, the vessel harvested 200,000 pounds in that fishery in January and February 2000.

3. Did the circumstance that prevented Diamondback from conducting directed fishing for

²⁵ See pages 4 - 5 *supra*.

²⁶ Affidavit of Steve Reinhart (May 13, 2003). According to the official LLP record, the vessel harvested 124,000 pounds of BSAI Pacific cod with pot gear between May 22 - 29, 1995 and 95,000 pounds between June 1 - 6, 1995.

BSAI Pacific cod in a manner sufficient to meet the landing requirements for a catcher vessel pot gear endorsement actually occur? Yes.

The vessel actually sank, or was swamped, in the harbor and could not fish at all from October to December 1996. The vessel sank just before it would have fished for BSAI Pacific cod with pot gear.

4. Did Diamondback take all reasonable steps to overcome the circumstance that prevented it from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirement for a catcher vessel pot gear endorsement? Yes.

After the accident on October 1, 1996, Diamondback immediately had the vessel surveyed for damage and immediately had repair work commence on the vessel. The repair work proceeded expeditiously but kept the vessel out of commission through December 1996.²⁷

5. Did Diamondback harvest any amount of BSAI Pacific cod after the unavoidable circumstance but before April 16, 2000? Yes.

Diamondback harvested approximately 200,000 pounds of BSAI Pacific cod with pot gear in January and February 2000.

6. Does Diamondback have to prove the facts in paragraphs 1 - 5 for 1997, 1998 and 1999? No.

The IAD states that Diamondback gave “no explanation as to why the vessel was not used in the Pacific cod pot fishery during 1997, 1998, or 1999.”²⁸ The IAD does not flesh out what Diamondback would have to prove for those years but implies that Diamondback would have to prove the facts in paragraphs 1 - 5 for 1997, 1998 *and* 1999, namely: that it specifically intended to harvest 100,000 pounds of BSAI Pacific cod with pot gear in each of those years, that its intent was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable in each of those years; that it took all reasonable steps to overcome the circumstance in each of those years; that the circumstance actually occurred in each of those years; and that it harvested BSAI Pacific cod after the unavoidable circumstance but before April 15, 2000.

I conclude that Diamondback does not have to prove the facts in paragraphs 1 - 5 for each year from 1996 to 1999. I conclude that Diamondback has to prove the facts in paragraphs 1 - 5 for one year from 1996 to 1999 and that, if I made Diamondback prove those facts for every year from 1996 to 1999, I would be adding requirements to the hardship provision. I base this

²⁷ The evidence for this conclusion is the sources in note 18 *supra*.

²⁸ IAD at 5.

conclusion on the language of the unavoidable circumstance provision construed in light of its purpose.

The language of the unavoidable circumstance provision is that the licenseholder must have held a specific intent “to conduct directed fishing for BSAI Pacific cod *in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii)*” that was thwarted by a circumstance that was unavoidable, unique, unforeseen and unforeseeable; that the circumstance that prevented the license holder from “conducting directed fishing for BSAI Pacific cod *in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii)* actually occurred;” and that the license holder took all reasonable steps to overcome the circumstance that prevented it “from conducting directed fishing for BSAI Pacific cod *in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii)* of this section.”

What is a “manner sufficient to meet the landing requirements in paragraph (k)(9)(ii)?” The manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) is that the vessel must have harvested [1] BSAI Pacific cod [2] of a certain amount [3] with particular gear [4] in certain years.²⁹ With respect to time, the manner by which a license holder meets the landing requirements is year by year. A license holder qualifies for this endorsement if it harvested 100,000 pounds of BSAI Pacific cod with pot gear in 1995, which Diamondback did, and then 100,000 pounds in of BSAI Pacific cod with pot gear in 1996, 1997, 1998 *or* 1999. If I required Diamondack to prove that it would have harvested 100,000 pounds in 1996, 1997, 1998 *and* 1999, I would be requiring Diamondback to prove that it would have harvested BSAI Pacific cod in a manner sufficient to *exceed*, not *meet*, the landing requirement for a BSAI Pacific cod catcher vessel pot gear endorsement.

The very requirement that the license holder must have held “a specific intent” to harvest the requisite amount of BSAI Pacific cod is more compatible with a year-by-year analysis. That is because specific intent is, well, specific: it requires the license holder to submit proof of specific actions and efforts that show the license holder really was going to go out at a specific time and place with a specific vessel to fish a specific species. It is hard to imagine a vessel owner having “a specific intent” to harvest BSAI Pacific cod for a four-year period – from 1996 to 1999. If I required Diamondback to prove four different specific intents and four different unavoidable circumstances – one for each year – this would be multiplying the requirement of the hardship provision which requires the license holder to prove one specific intent, one unavoidable circumstance that actually occurred and one set of reasonable steps to overcome the unavoidable circumstance.

The approach suggested by the IAD would frustrate the purposes of the hardship provision by requiring Diamondback to prove far more than the applicant who received an LLP license based on actual harvests. I view the purpose of the hardship provision as granting relief to the license holder who likely would have made the additional required harvests but for the unavoidable

²⁹ 50 C.F.R. § 679.4(k)(9)(ii).

circumstance.³⁰ Since Diamondback has proven, by a preponderance of the evidence, that it would have harvested that level of BSAI Pacific cod with pot gear in 1996, 1997, 1998 *or* 1999 *but for* the unavoidable circumstance, it qualifies for the endorsement.

I acknowledge the evidence in the record that Diamondback voluntarily decided to sit out the BSAI Pacific cod pot fishery in 1997, 1998 and 1999 and participate in other fisheries.³¹ It appears that Diamondback made an economic decision to forego BSAI Pacific cod fishing. Economic reasons are the classic case of a circumstance that is *not* unique to the vessel or the vessel owner because every vessel owner must contend with the market and the price of the product it seeks to sell. But a vessel owner who sits out three years for economic reasons still receives the BSAI Pacific cod pot gear endorsement if it harvested the required amounts of BSAI Pacific cod in the other two years.

Therefore I conclude that a hardship applicant can sit out three years in the BSAI Pacific cod pot gear fishery but still receive the endorsement if the applicant proves, by a preponderance of evidence, what Diamondback has proved, namely: [1] it fished one of those years, namely 1995, to the eligibility amount; [2] it specifically intended to fish one of the other years, namely 1996, to the eligibility amount but was thwarted by a circumstance that was unavoidable, unique, unforeseen and reasonably unforeseeable; the unavoidable circumstance actually occurred; it made all reasonable efforts to overcome the circumstance and it participated in the fishery in any amount after the unavoidable circumstance and before April 16, 2000.

Two additional reasons support this conclusion. First, the interpretation that the applicant who proves an unavoidable circumstance in 1996 must also prove an unavoidable circumstance in 1997, 1998 and 1999 is in tension with the last section of the hardship provision – 50 C.F.R. § 679.4(k)(9)(v)(B)(4) – that gives the license holder until *April 16, 2000* to participate in the BSAI Pacific cod fishery after the unavoidable circumstance.

Second, this Office has not interpreted the unavoidable circumstance regulation for an LLP license to require that the applicant prove specific intent and unavoidable circumstances for the *entire* eligibility period. The applicant must show that the unavoidable circumstance lasted a *sufficient* period of time to prevent the applicant from *meeting* the actual harvest level required for the endorsement.³² Diamondback has proven that the sinking of its vessel, and the resulting three

³⁰ The commentary to the BSAI Pacific cod final rule states that the license holder must show that “[*b*]ut for the unavoidable circumstances, he or she could have made sufficient landings to meet the requirements for a particular Pacific cod endorsement from the vessel that was the basis for eligibility for his or her LLP groundfish license.” Final Rule, 67 Fed. Reg. 18,129, 18,131 (2000) (emphasis added).

³¹ Affidavit of John Hansen (May 13, 2003).

³² See, e.g., *Pequod, Inc.*, Appeal No. 00-0013 (unavoidable circumstance lasted four months out of three-year eligibility period). As I have noted, *Pequod* involved a claim for an endorsement to an original LLP crab license and the unavoidable circumstance regulation at 50 C.F.R. § 679.4(k)(8)(iv).

months of repairs, likely prevented it from harvesting at least 100,000 pounds of BSAI Pacific cod with pot gear in 1996.

Therefore, I conclude that Diamondback has proven that it satisfies all the requirements of the hardship provision in the BSAI Pacific cod gear regulation, 50 C.F.R. § 679.4(k)(9)(v)(B), and qualifies for a BSAI Pacific cod catcher vessel pot gear endorsement on its LLP license.

FINDINGS OF FACT

1. Diamondback specifically intended to conduct directed fishing for BSAI Pacific cod in a manner sufficient to harvest 100,000 pounds of BSAI Pacific cod with pot gear between October and December 1996.
2. Diamondback's intent was thwarted by the sinking of the F/V ANNA MARIE on October 1, 1996 and the repairs to the vessel from October 1996 through the end of December 1996.
3. The sinking of the F/V ANNA MARIE was an accident and not the result of negligence or inattention to the vessel or its fishing operations by Diamondback.
4. The repairs to the vessel were significant, structural and necessary.
5. The sinking of the vessel and repairs to the vessel was not foreseen by Diamondback.
6. The sinking of the vessel was not the result of actions that Diamondback either did or should not have done.
7. Diamondback took all reasonable steps to promptly and expeditiously repair the F/V ANNA MARIE.
8. Diamondback harvested 200,000 pounds of BSAI Pacific cod in January and February 2000.

CONCLUSIONS OF LAW

1. Diamondback held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in 50 C.F.R. § 679.4(k)(9)(ii)(B) for a BSAI Pacific cod catcher vessel pot gear designation.
2. Diamondback's circumstance was unavoidable.
3. Diamondback's circumstance that was unique to the vessel and the vessel owner.
4. Diamondback did not foresee this circumstance.
5. Diamondback's circumstance was not reasonably foreseeable by Diamondback.

6. The circumstance thwarted or prevented Diamondback from meeting the landing requirements for a BSAI Pacific cod catcher vessel pot gear endorsement.
7. The circumstance actually occurred.
8. Diamondback took all reasonable steps to overcome the circumstance.
9. Diamondback harvested BSAI Pacific cod with pot gear from the F/V ANNA MARIE after the unavoidable circumstance and before April 16, 2000.
10. Diamondback qualifies for a BSAI Pacific cod catcher vessel pot gear endorsement on its LLP groundfish license, based on the hardship provision in the BSAI Pacific cod gear regulation, 50 C.F.R. § 679.4(k)(9)(v)(B).

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. This Decision takes effect September 23, 2004, unless by that date the Regional Administrator orders review of the Decision.

Diamondback Seafoods, 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, September 3, 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