

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 04-0003
	)	
KONA KAI, Inc.,	)	DECISION
Appellant	)	
	)	January 7, 2005
_____	)	

STATEMENT OF THE CASE

Kona Kai, Inc. [Kona Kai] appeals an Initial Administrative Determination [IAD] by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].<sup>1</sup>

Thomas Anglin, acting on behalf of Kona Kai, Inc., applied for an LLP groundfish license and an LLP crab license based on the fishing history of the F/V KONA KAI, ADFG No. 51347, USCG No. 669025.<sup>2</sup> It is a catcher vessel with a length overall of 108 feet, which puts it in vessel length category "B." The IAD determined that Kona Kai was the eligible applicant for all LLP licenses based on the fishing history of the F/V KONA KAI.

The IAD determined that, based on the fishing history of the F/V KONA KAI, Kona Kai would receive an LLP crab license with a catcher vessel designation, a maximum length overall of 124 feet, and four area/species endorsements: Bristol Bay red king crab, St. Matthew blue king crab, Bering Sea/Aleutian Islands [BSAI] *C. opilio* and *C. Bairdi* [Tanner] crab, and Pribilof Islands red and blue king crab.

The IAD concluded that, based on the fishing history of the F/V KONA KAI, Kona Kai was not eligible to receive the LLP groundfish license for which it applied, namely an LLP groundfish license with an Aleutian Islands area endorsement and a Bering Sea endorsement.

Kona Kai can appeal the IAD because it directly and adversely affects Kona Kai's interests, as required by 50 C.F.R. § 679.43(b). The record has sufficient information for me to decide this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and decide this appeal. Kona Kai appeals the denial of the Bering Sea endorsement, not the Aleutian Islands endorsement.<sup>3</sup>

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<sup>1</sup> IAD (Jan. 16, 2004). The LLP is in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k) The NMFS Alaska region website, <http://www.fakr.noaa.gov/regs/summary.htm>, has the LLP regulations.

<sup>2</sup> The official LLP record lists Kona Kai, Inc., as the owner of the F/V KONA KAI. For the balance of this decision, I will refer to Kona Kai as the applicant and appellant.

<sup>3</sup> Kona Kai's Appeal Statements (June 11, 2004).

## SUMMARY

The IAD is affirmed. Kona Kai is not eligible to receive an LLP groundfish license with a Bering Sea endorsement based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv). An applicant must meet every requirement of the unavoidable circumstance regulation. The unavoidable circumstance regulation, in section (E), requires that the applicant have harvested groundfish in the desired endorsement area after the unavoidable circumstance and before June 17, 1995. The requirement for a harvest before June 17, 1995 does not have any exceptions. Kona Kai did not harvest groundfish in the Bering Sea before June 17, 1995 and therefore cannot receive credit for a harvest under the unavoidable circumstance regulation.

## ISSUE

Did RAM correctly deny Kona Kai an LLP license with a Bering Sea endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because the F/V KONA KAI did not harvest groundfish in the Bering Sea after the claimed unavoidable circumstance and before June 17, 1995?

## ANALYSIS

To receive an LLP groundfish license with a Bering Sea endorsement, an applicant must have made a documented harvest of license limitation groundfish in a general qualification period [GQP] and an endorsement qualification period [EQP].<sup>4</sup> For a Bering Sea endorsement, the basic GQP requirement is one groundfish harvest in BSAI between January 1, 1988 and June 27, 1992.<sup>5</sup> Kona Kai meets this requirement.<sup>6</sup>

For a Bering Sea endorsement, an applicant must meet the standard requirement for harvests in the endorsement qualification period [EQP] or must meet the requirements in the unavoidable circumstance regulation. The standard EQP requirement for a Bering Sea endorsement is one groundfish harvest in the Bering Sea between January 1, 1992 to June 17, 1995.<sup>7</sup>

Kona Kai admits it does not satisfy that requirement but states it should receive an LLP license

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<sup>4</sup> 50 C.F.R. § 679.4(k)(4)(i). 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. When I refer to groundfish, I mean license limitation groundfish.

<sup>5</sup> 50 C.F.R. § 679.4(k)(4)(i)(A)(1). Since Kona Kai satisfies this way, I do not discuss the alternate ways to meet the GQP in 50 C.F.R. § 679.4(k)(4).

<sup>6</sup> The IAD acknowledges this and Kona Kai submitted a fish ticket showing a harvest of 6,000 pounds of Pacific cod in State statistical area 645501, which is in the Bering Sea. Exhibit A.

<sup>7</sup> 50 C.F.R. § 679.4(k)(4)(ii)(B).

with a Bering Sea endorsement under the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), which provides:

**A qualified person** [<sup>8</sup>] 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 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 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]

Kona Kai alleges the following facts in support of its unavoidable circumstance claim, which I take as true for purposes of this decision.<sup>9</sup>

During the 1993 *opilio* season, the F/V KONA KAI grounded and suffered damage to its bow

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<sup>8</sup> A qualified person, for the LLP, means “a person who was eligible on June 17, 1995, to document a fishing vessel under Chapter 121, Title 46, U.S.C. [United States Code.] 50 C.F.R. § 679.2

<sup>9</sup> These facts are based on the evidence submitted by Kona Kai: Affidavit of Thomas Anglin (June 9, 2000); Letter from Larry Bach (June 8, 2000); Statement of Jeanine Crutchfield (May 30, 2000); Statement of Rowland Davis (May 24, 2000); Affidavit of Thomas Anglin, dated June 4, 2004; and other documentary evidence submitted by Kona Kai to RAM and to this Office.

and stem. During 1993 and 1994, Kona Kai performed several rounds of temporary repairs to the vessel but, by 1995, it was clear that permanent, more extensive repairs were needed, if the vessel was to be safe and seaworthy. While the vessel was undergoing repairs, Kona Kai also wanted to add eighteen feet to the midsection of the vessel. Kona Kai arranged with a shipyard in Seattle to repair and lengthen the vessel and received a commitment from the shipyard that the vessel would not be “out of service more than six weeks.”<sup>10</sup> Kona Kai sought this commitment because it intended to fish for Pacific cod in the Bering Sea in May and June 1995. It purchased cod pots. Its vessel had a refrigerated seawater system. It had a market for its cod with Peter Pan Seafoods.

Kona Kai delivered the vessel as it had promised – just after the end of the *opilio* season on March 14, 1995 – but the shipyard took ten weeks, rather than six weeks, to complete the work. This was something Kona Kai reasonably could not and did not foresee. This delay meant that Kona Kai could not participate in the Bering Sea pot cod fishery in May and June 1995.

The vessel fulfilled a salmon tendering contract in the summer of 1995. It participated in the fall crab fisheries. The Bering sea pot cod fishery was closed from October 17 to November 16, 1995. The F/V KONA KAI participated in the Bering Sea pot cod fishery in December 1995 and made a documented harvest of Pacific cod on December 4, 1995. I assume that Kona Kai harvested groundfish in the Bering Sea as soon as it reasonably could after the lifting of the unavoidable circumstance.

The issue in this appeal is the correct interpretation of section (E) of the unavoidable circumstance regulation: 50 C.F.R. § 679.4(k)(8)(iv)(E). Kona Kai interprets section (E) of the unavoidable circumstance regulation so that an applicant meets section (E) if the applicant harvested groundfish in the desired endorsement area as soon as it reasonably could after the lifting of the unavoidable circumstance, even if that date is after June 17, 1995.<sup>11</sup> Kona Kai therefore argues that the documented harvest of groundfish in the Bering Sea on December 4, 1995 meets section (E) of the unavoidable circumstance regulation.

RAM’s interpretation of section (E) is that it does not grant NMFS authority to examine why an applicant did not harvest groundfish in the desired endorsement area before June 17, 1995 and to extend the time for a harvest beyond June 17, 1995 based on a determination as to why the applicant did not make a harvest by June 17, 1995. RAM interprets section (E) as a mandatory requirement which has no exceptions.

I conclude that RAM’s interpretation of section (E) is correct. I conclude that Kona Kai cannot receive an endorsement based on the unavoidable circumstance regulation because it does not

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<sup>10</sup> Affidavit of Thomas Anglin at 5 (June 4, 2004).

<sup>11</sup> Kona Kai makes many of the same arguments as Hansen Enterprises, Inc., Appeal No. 02-0025. Kona Kai and Hansen are represented by the same counsel. I issued a decision in *Hansen* on December 14, 2004, that affirmed the IAD and that uses much of the same language as this decision. This Office has stayed the effect of *Hansen*, pending a motion for reconsideration by that appellant.

meet section (E). I therefore need not decide, and do not decide, whether Kona Kai meets sections (A) through (D) because, even if it did, it would not receive the LLP license it seeks. To analyze whether RAM's or Kona Kai's interpretation is correct, I examine the language of the regulation in light of the purpose and history of the regulation. I also examine how the agency has interpreted the regulation. The text of the regulation is unquestionably the most important evidence of the meaning of a regulation or statute.

The unavoidable circumstance regulation was adopted as part of the LLP by the Secretary of Commerce under the Magnuson-Stevens Fishery and Conservation Management Act.<sup>12</sup> The Secretary did not change the LLP regulation as transmitted to him by the North Pacific Fishery Management Council [Council] and NMFS.<sup>13</sup> I will therefore treat the Council and NMFS intent as the Secretary's intent.

#### **A. Language of unavoidable circumstance regulation.**

The language of the unavoidable circumstance regulation, standing alone, strongly supports RAM's interpretation. The first sentence of the regulation states that the applicant "may receive a license *if* the qualified person is able to demonstrate" and then lists the requirements in sections (A) through (E).

Section (E), on its face, requires a groundfish harvest "in the specific area that corresponds to the area endorsement . . . for which the qualified person . . . is applying" and requires that the harvest be "after the vessel was prevented from participating by the unavoidable circumstance but *before* June 17, 1995." Kona Kai did not harvest groundfish in the Bering Sea until December 4, 1995, which is after June 17, 1995. A harvest *after* June 17, 1995 does not satisfy the requirement for a harvest *before* June 17, 1995. Before does not mean after.

#### **B. Purpose and history of unavoidable circumstance regulation.**

The purpose and regulatory history support a mandatory interpretation of section (E). In adopting the LLP regulation, NMFS explained how the unavoidable circumstance regulation would work: "If *all* these criteria [in the unavoidable circumstance regulation] are met to the satisfaction of NMFS, a license may be issued for the relevant fishery and endorsement area."<sup>14</sup>

During the notice-and-comment period on the proposed LLP rule, the only comment NMFS received on the unavoidable circumstance regulation was that a 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

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<sup>12</sup> 16 U.S.C. §§ 1801 - 1883.

<sup>13</sup> Final Rule, 53 Fed. Reg. 52,642, 52-642 - 52,643 (1998).

<sup>14</sup> Supplementary Information, Final Rule, 53 Fed. Reg. 52,642, 52,647 (1998)(emphasis added).

not have a documented harvest before June 17, 1995.<sup>15</sup> NMFS labeled that as Comment 17 and 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.<sup>[16]</sup> **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.**<sup>17</sup>

This is compelling evidence that the Council and NMFS made a deliberate policy choice to impose an across-the-board requirement for the unavoidable circumstance applicant to make a harvest in the desired endorsement area by June 17, 1995. The Council and NMFS intended that any harvests after June 17, 1995 could not qualify an applicant to receive an LLP license.

### C. NMFS practice.

RAM has consistently applied the mandatory interpretation to section (E) and this Office has affirmed that interpretation.<sup>18</sup> In fact, this Office has ruled on this issue more than any other

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<sup>15</sup> *Id.* at 52,651.

<sup>16</sup> 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.

<sup>17</sup> Supplementary Information, Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998)(emphasis added).

<sup>18</sup> *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 7 - 11 (Dec. 28, 2004); *Arctic Baruna LLC*, Appeal No. 02-0024 at 4 (Dec. 22, 2004); *Hansen Enterprises, Inc.*, Appeal No. 02-0025 (Dec. 14, 2004); *Erla-N, LLC*, Appeal No. 01-0026 (Sept. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sept. 10, 2004); *Notorious Partnership*, Appeal No. 03-0015 (Aug. 9, 2004); *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004); *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004); *Mark Donovick*, Appeal No. 02-0008 at 8 - 9 (Sept. 27, 2002); *Little Ann, Inc.*, Appeal No. 01-0022 at 3 at (July 10, 2002); *Ronald Tennison*, Appeal 00-0012 at 2, 6 (April 15, 2002); *Pequod, Inc.*, Appeal No. 00-0013 at 7, 24 (April 12, 2002); *Paula Brogdon*, Appeal No. 00-0011 at 3 (Feb. 26, 2002). These decisions are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/appeals/default.htm>.

single issue in LLP appeals. This Office has concluded, in each appeal, that even if an LLP applicant met, or could meet, the other requirements in the unavoidable circumstance regulation, the applicant could receive an endorsement *only* if the applicant harvested the particular crab or groundfish species after the unavoidable circumstance and before June 17, 1995.

#### **D. Kona Kai's arguments.**

Kona Kai argues that the word “may” in the first sentence of the unavoidable circumstance regulation suggests that the requirements that follow the “may” are not mandatory. The use of the word “may” refers to the fact that the applicant “may receive” an endorsement only *if* the applicant proves all the facts required in sections (A) through (E). It does not suggest that the applicant may receive the endorsement if the applicant does not prove one of the facts required in sections (A) through (E).

Kona Kai argues that the lack of semi-colons between the sections and the lack of the word “and” between the sections is evidence that the sections are not mandatory requirements. Semi-colons and “ands” are not the only way to communicate mandatory requirements. The lead in language to the provision – that the applicant may receive the license “if the qualified person is able to demonstrate that” – followed by a list is an effective way of communicating that the applicant must meet each requirement.<sup>19</sup>

Kona Kai argues that the purpose of the unavoidable circumstance provision is to help vessel owners whose vessels were lost, damaged or otherwise out of the fishery. That is true but the remedy adopted by the Council and NMFS for those vessel owners is not open ended. The remedy has within it a requirement for a harvest before June 17, 1995.

Kona Kai argues that the purpose of section (E) is to prevent reward of speculative ventures, namely a vessel owner who made a harvest after the Council acted only for the purpose of obtaining an LLP license. Kona Kai argues that it intended to harvest Pacific cod in the Bering Sea quite apart from the impending License Limitation Program.

A purpose of section (E) was to prevent granting licenses based on speculative fishing. In proposing the unavoidable circumstance provision, Council Member Dave Benton stated: “[T]his motion does not reward speculative ventures.”<sup>20</sup> Council Member Mace stated that he hoped the motion “shuts the door in continued speculation.”<sup>21</sup>

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<sup>19</sup> 1A SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 21:14 at 191 (Norman Singer, ed., 6<sup>th</sup> ed. 2002 rev.).

<sup>20</sup> Transcript (uncertified), North Pacific Fishery Management Council Meeting, June 15 - 17, 1995 at 70, available on the Administrative Appeals section of the NMFS Alaska region website under “Other Documents,” <http://www.fakr.noaa.gov/appeals/default.htm>.

<sup>21</sup> *Id.*

But the method the Council and NMFS chose to prevent reward of speculative ventures was a clear and unambiguous requirement for a harvest *before* June 17, 1995, the date of final Council action on the LLP. The Council and NMFS did *not* adopt the method urged by Kona Kai: individualized fact-finding as to why an applicant did not participate in the fishery before June 17, 1995; a determination of how soon after June 17, 1995 the applicant did participate in the fishery; and an award of the endorsement if NMFS determines that the applicant did not participate in the fishery after June 17, 1995 as a speculative venture and did participate in the fishery as soon as it could reasonably could, after the lifting of the unavoidable circumstance. There simply is no language in the regulation itself nor evidence in the regulatory history that the Council and NMFS chose the method urged by Kona Kai.

Kona Kai argues that its situation is different from the facts in prior OAA decisions because Kona Kai's unavoidable circumstance – the delay by the shipyard – occurred in April 1995 which meant that Kona Kai could not harvest groundfish in the Bering Sea by June 17, 1995. This argument is without merit. Prior OAA decisions were *not* based on any specific facts about the applicant's situation, including whether the unavoidable circumstance started or ended before, near or after June 17, 1995. Each decision was based on the simple fact that the applicant did not make a harvest before June 17, 1995.<sup>22</sup>

Further, many applicants claimed that they experienced an unavoidable circumstance that started before June 17, 1995 and that they experienced continuing effects of the unavoidable circumstance that prevented them from making a documented harvest before June 17, 1995. In *St. George Marine Inc.*, the applicant's vessel disappeared in January 1992, the applicant was unable to obtain a replacement vessel until January 1995 and the Pribilof crab fishery was not open until September 1995.<sup>23</sup> In *Bowlden, Inc.*, the applicant's vessel suffered significant damage in February 1995 and was not back in the water until after July 1995.<sup>24</sup> It did not matter if these applicants had good reasons for not making a documented harvest by June 17, 1995 because section (E) of the unavoidable circumstance regulation “does not make an exception for any reason.”<sup>25</sup>

Kona Kai is correct that the requirement in section (E) does disadvantage applicants who suffered an unavoidable circumstance close to June 17, 1995. It *is* less likely that these applicants would have gotten back into the fishery by June 17, 1995. But that disadvantage is inherent in the approach the Council and NMFS took. A requirement for a harvest by a certain date will exclude certain vessels who have good reasons for not having made a harvest by that date. But based on the language and regulatory history of section (E), I conclude that the

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<sup>22</sup> See note 18 *supra*.

<sup>23</sup> *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004).

<sup>24</sup> *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004).

<sup>25</sup> *Notorious Partnership*, Appeal No. 03-0015 at 5 (Aug. 9, 2004).



Council and NMFS chose the advantages of a requirement for a harvest by a certain date over the advantages of a case-by-case determination of why a vessel did not make such a harvest.

Kona Kai argues that the unavoidable circumstance regulation does call for a case-by-case determination. It does in sections (A) through (D) but not in section (E). I concluded in *Bowlden, Inc.*:

It is true that section (D) does refer to the owner taking “all reasonable steps to overcome the circumstance that prevented the owner from conducting directed fishing for license limitation groundfish or crab species.” But section (D) requires that the owner prove that the owner took all reasonable steps but, despite the owner’s best efforts, was still *unable* to fish. Section (E) serves a completely different purpose. It establishes a deadline by which the owner had to fish. I cannot interpret these two sections together as alternate requirements.<sup>26</sup>

Kona Kai argues that whether an applicant made a harvest by June 17, 1995 should be a “factor” in determining whether an applicant meets the unavoidable circumstance regulation. Kona Kai is correct that this Office did develop a list of factors to determine if the applicant had proved an oral lease for the IFQ program.<sup>27</sup>

The lease cases do not support Kona Kai’s argument for several reasons. First, the IFQ regulation had an undefined term that had to be defined, namely a lease. The unavoidable circumstance regulation does not have an undefined ambiguous term. The phrase “before June 17, 1995” does not need definition and is not, on its face, ambiguous. Second, generally speaking, it is hard to conceptualize how a harvest by a certain date could be a “factor.” A harvest by a certain date is something an applicant did or did not do. Third, in this specific context, the Council or NMFS gave no indication that they intended a harvest by June 17, 1995 to be one factor in the unavoidable circumstance determination. There is every indication that the Council and NMFS intended it to be a mandatory requirement for such a determination. To repeat NMFS’s response to Comment 19:

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.<sup>28</sup>

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<sup>26</sup> *Bowlden, Inc.*, Appeal No. 02-0037 at 11 (July 7, 2004).

<sup>27</sup> See, e.g., *Bruce A. Lewis*, Appeal No. 97-0016 at 2 - 3 (March 27, 2000). IFQ stands for Individual Fishing Quota program for Pacific halibut and sablefish. The IFQ regulation awarding quota share to vessel lessees was 50 C.F.R. § 679.40(a)(2)(i)(B) & (a)(3)(iii).

<sup>28</sup> Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

Kona Kai argues that the June 17, 1995 deadline should be “equitably tolled.” The doctrine of equitable tolling permits an agency to toll or suspend an application deadline, if the applicant was unable to file a timely application for reasons beyond the applicant’s control. It is reserved for truly catastrophic situations.<sup>29</sup> The doctrine of equitable tolling has no relevance to this appeal. It permits an agency to toll or suspend an *application deadline*. It lets an agency judge an application on the merits rather than deny it as late.

The requirement for a harvest by June 17, 1995 is different. It is not an application deadline but a substantive requirement for an LLP license, just like the requirement for a harvest within a general qualification period and an endorsement qualification period. NMFS does not toll or suspend the requirements for GQP or EQP harvests by a certain date. Once the merits of an application are before NMFS, NMFS must judge the application according to the substantive requirements in federal regulation for evaluating that application.

Kona Kai argues that the requirement for a harvest by June 17, 1995 makes the unavoidable circumstance provision unusable for any groundfish endorsement that only requires one harvest in the endorsement qualification period because the EQP ends on June 17, 1995: if the applicant had such a harvest, it would not need the unavoidable circumstance provision. I have stated that in previous decisions,<sup>30</sup> but I realize now that is inaccurate. The unavoidable circumstance provision is usable by applicants seeking a one-harvest groundfish endorsement if the applicant met the harvest-by-June 17th-requirement with a replacement vessel for a vessel that was lost, damaged or otherwise unable to participate in the fishery.<sup>31</sup> Kona Kai does not claim a harvest with a replacement vessel.

And the limited usefulness of this provision to applicants seeking a Bering Sea groundfish endorsement, or any other groundfish endorsement that requires only one harvest in the EQP, is precisely *because* those endorsements require only one harvest in the EQP. Put another way, the unavoidable circumstance provision is of limited usefulness to applicants who made *no* groundfish harvests for approximately three and a half years: January 1, 1992 to June 17, 1995.<sup>32</sup>

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<sup>29</sup> *John T. Coyne*, Appeal No. 94-0012 (Jan. 31, 1996); Decision on Reconsideration, *John T. Coyne*, Appeal No. 94-0012 (May 24, 1996)(applicant in isolated drug treatment program); *Estate of Kinberg*, Appeal No. 95-0035 (Aug. 1, 1997)(death of applicant’s husband followed by severe depression); *Christopher O. Moore*, Appeal No. 95-0044 (Sept. 5, 1997)(murder of applicant’s mother followed by extensive publicity and lengthy criminal trial of applicant’s stepfather).

<sup>30</sup> *Bowlden, Inc.*, Appeal No. 02-0037 at 10 (July 7, 2004); *Hansen Enterprises, Inc.*, Appeal No. 02-0025 at 10-11(Dec. 14, 2004).

<sup>31</sup> *MGF Fisheries, Inc.*, Appeal No. 02-0047 at 31 (Dec. 28, 2004). See *Mark Donovanick*, Appeal No. 02-0008A (Sept. 27, 2002).

<sup>32</sup> *Bowlden, Inc.*, Appeal No. 02-0037 at 10 (July 7, 2004). *Bowlden* mistakenly said it was a two and a half year period.

This is not such an unreasonable result that I can ignore the clear language of the unavoidable circumstance provision, reinforced by the clear history and purpose of the provision.

Kona Kai suggests that a mandatory interpretation of section (E) of the unavoidable circumstance regulation violates the national standard in the Magnuson-Stevens Act that requires that a fishery management plan be “fair and equitable” to fishermen.<sup>33</sup> If Kona Kai is arguing that section (E) violates the Magnuson-Stevens Act, I do not have authority to rule on that question. The Secretary of Commerce reviews proposed regulations to determine whether they are consistent with the Magnuson-Stevens Act.<sup>34</sup> By publishing the LLP regulations, the Secretary determined that they were consistent with the Act.<sup>35</sup> The Magnuson-Stevens Act provides for judicial review of regulations but the petition for review must be filed within 30 days after the date the regulation is published in the Federal Register.<sup>36</sup>

I do have the authority to interpret and apply the regulations that govern Kona Kai’s application. I have reviewed RAM’s interpretation of the unavoidable circumstance regulation. I have concluded that RAM’s interpretation is correct and implements the intent of the Council and NMFS and, therefore, the Secretary of Commerce.

All of Kona Kai’s arguments are insufficient to overcome the clear language of section (E), reinforced by the regulatory purpose and history of the provision. The Council and NMFS adopted a requirement that “does not take into account the applicant’s individual circumstances,”<sup>37</sup> and therefore does not allow me to take into account the applicant’s individual circumstances as to why it did not harvest groundfish in the desired endorsement area by June 17, 1995. Since Kona Kai did not harvest groundfish in the Bering Sea before June 17, 1995, I conclude that RAM correctly denied Kona Kai an LLP license with a Bering Sea endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).

Since Kona Kai will not receive an LLP groundfish license, I do not analyze whether it could receive a BSAI Pacific cod endorsement on an LLP license.<sup>38</sup> An applicant can receive a BSAI Pacific cod endorsement on an LLP license only if the applicant first receives an LLP license.

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<sup>33</sup> 16 U.S.C. § 1851(a)(4)(A).

<sup>34</sup> Magnuson-Stevens Act, § 304(b)(1), 16 U.S.C. § 1854 (b)(1).

<sup>35</sup> Magnuson-Stevens Act, § 304(b)(1)(A), 16 U.S.C. § 1854 (b)(1)(A).

<sup>36</sup> Magnuson-Stevens Act, § 305, 16 U.S.C. § 1855(f).

<sup>37</sup> *St. George Marine, Inc.*, Appeal No. 02-0024 at 15 (Feb. 19, 2004).

<sup>38</sup> Kona Kai sought the Pacific cod endorsement under the hardship/unavoidable circumstance provision of the BSAI Pacific cod gear endorsement regulation. 50 C.F.R. § 679.4(k)(9)(v)(B).

## FINDING OF FACT

Kona Kai, Inc., did not make a documented harvest of groundfish in the Bering Sea before June 17, 1995.

## CONCLUSION OF LAW

RAM correctly denied Kona Kai, Inc., an LLP license with a Bering Sea endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv), because the F/V KONA KAI did not harvest groundfish in the Bering Sea after the claimed unavoidable circumstance and before June 17, 1995.

## DISPOSITION

The IAD is AFFIRMED. This Decision takes effect February 7, 2005, unless by that date the Regional Administrator orders review of the Decision.

Kona Kai, 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, January 17, 2005. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the appeals officer and must be accompanied by a written statement in support of the motion.

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Mary Alice McKeen  
Appeals Officer