

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 00-0013
)	
PEQUOD, INC.,)	DECISION
Appellant)	
_____)	April 12, 2002

STATEMENT OF THE CASE

Pequod, Inc., [Pequod] filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP]. Pequod can appeal the IAD because it directly and adversely affects Pequod's interests. [50 C.F.R. § 679.43(b)]

According to the LLP Official Record, Pequod is the eligible applicant for LLP licenses resulting from the fishing history of the F/V EARLY DAWN and will receive an LLP groundfish license with a Bering Sea endorsement and an LLP crab license with four endorsements: Aleutian Islands [AI] red king crab, Bristol Bay red king crab, St. Matthew red and blue king crab, and Bering Sea/Aleutian Islands [BSAI] *C. opilio* and *C. bairdi* [Tanner] crab.

The dispute is whether Pequod qualifies for two additional endorsements: an AI endorsement on its groundfish license and an AI brown king crab endorsement on its crab license. Pequod argues it did not make the required harvests for those endorsements because of unavoidable circumstances, as defined by federal regulation 50 C.F.R. § 679.4(k)(8)(iv). The IAD concluded that Pequod did not meet the requirements in 50 C.F.R. § 679.4(k)(8)(iv).

After a status conference on October 19, 2001, I gave Pequod an opportunity to submit evidence and argument on whether the grounding of the F/V EARLY DAWN in March 1994 and subsequent repairs met the requirements of the unavoidable circumstances regulation.

I granted Pequod's request for a hearing on whether it qualified for an AI brown king crab endorsement based on unavoidable circumstances. I denied Pequod's request for a hearing on the AI groundfish endorsement because Pequod did not allege facts which, if proven, would qualify it for that endorsement.¹ Pequod waived thirty days' written notice of the hearing. [50 C.F.R. § 679.43(n)(2)(ii)] I held the hearing, by telephone, on January 3 and 4, 2002.

This decision resolves Pequod's unavoidable circumstances claim. Pequod reserved the argument that one fish ticket with harvests in two statistical areas could count as two documented harvests. This Decision does not address that issue.

¹ Order Granting Oral Hearing, December 26 2001. The requirements for an oral hearing are at 50 C.F.R. § 679.43(g)(3) and 50 C.F.R. § 679.43(n).

ISSUES

1. May an applicant who qualifies for an LLP license seek to qualify for additional endorsements based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)?
2. Does Pequod meet the requirements in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), to receive an AI endorsement on its LLP groundfish license?
3. Does Pequod meet the requirements in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), to receive an AI brown king endorsement on its LLP crab license?

SUMMARY OF DECISION

An applicant, such as Pequod, who qualifies for an LLP license may seek to qualify for additional endorsements based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv).

Pequod does not qualify for an AI endorsement on its LLP groundfish license based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for two reasons. First, Pequod did not harvest any AI groundfish during the period January 1, 1992 to June 17, 1995 and therefore did not harvest any AI groundfish *after* the claimed unavoidable circumstance and *before* June 17, 1995. Second, the circumstances alleged by Pequod – lack of processing facilities on Adak Island for the endorsement qualification period (January 1, 1992 to June 17, 1995) – are not unique to Pequod or the F/V EARLY DAWN.

Pequod qualifies for an AI brown king endorsement on its LLP crab license based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv). Pequod has proven that the circumstances it faced – the grounding of the F/V EARLY DAWN and significant structural repairs that kept the vessel from fishing for four months – were unavoidable, unique and unforeseen by Pequod and, but for these circumstances, Pequod would likely have harvested AI brown king crab during the period March through early July 1994. The F/V EARLY DAWN made three harvests of AI brown king crab *after* the unavoidable circumstances and *before* June 17, 1995.

RECORD AND EXHIBITS

In evaluating Pequod's claim of unavoidable circumstances, I considered all the material in the record, which consists of RAM's file, OAA's file and the testimony at the hearing on January 3 - 4, 2002. The following documents are referred to in this Decision or at the hearing.

- Exhibit 1 IAD, October 26, 2000
- Exhibit 2 Letter from Pequod to RAM, November 16, 1997 [sic 1999]
- Exhibit 3 Letter from Pequod to RAM, November 29, 1999

- Exhibit 4 Invoices from Dungeness Gear Works, 1993 - 1997
- Exhibit 5 Letter from Pequod to NMFS, January 14, 2002
- Exhibit 5-A ADFG Management Report, Table 4-5, on AI golden king crab
- Exhibit 5-B ADFG Printout, F/V EARLY DAWN AI brown king crab landings, 1994 - 1998
- Exhibit 5-C Consent to Transfer Pequod, Inc. Stock from Rick Mezich to Allen Oakley, February 9, 1999
- Exhibit 5-D Pequod, Inc., Voting Stock Register
- Exhibit 6 Affidavit of John May, December 6, 2001
- Exhibit 7 Letter from Pequod's counsel to NMFS, November 19, 2001
- Exhibit 8 Affidavit of Rick Mezich, November 19, 2001
- Exhibit 9 Reconstructed Fishing Schedule for F/V EARLY DAWN, prepared by Rick Mezich, November 2001, with statement by John May
- Exhibit 10 Marco Shipyard Invoice 131479, August 28, 1994
- Exhibit 11 ADFG Vessel Registrations and Commissioner's Permits for the F/V EARLY DAWN 1992 - 1996: list and copies of registrations and permits
- Exhibit 12 Letter from Pequod to OAA, December 21, 2000
- Exhibit 13 North Pacific Fishery Management Council discussion of unavoidable circumstances, June 16 and 17, 1995, portions of transcript
- Exhibit 14 NMFS printout of F/V EARLY DAWN fish tickets for LLP groundfish and crab, 1993 to 1995, attached to Memorandum to File, July 30, 2001
- Exhibit 15 Outline of Rick Mezich's and the F/V EARLY DAWN's fishing history, prepared by Rick Mezich, October 2001 [renumbered from Exhibit 3 at hearing]
- Exhibit 16 1993 - 95 F/V EARLY DAWN landings (sorted by date and fish ticket number, fish fishery registrations), prepared by Pequod's counsel, January 2002 based on Exhibits 11 and 14 [renumbered from Exhibit 2 at hearing]
- Exhibit 17 F/V EARLY DAWN tannery deliveries, prepared by Rick Mezich, January 2002 [renumbered from Exhibit 1 at hearing]
- Exhibit 18 Memorandum to File, March 5, 2002 re phone interview with Rance Morrison
- Exhibit 19 Letter from Pequod's counsel to OAA, March 29, 2002.
- Exhibit 20 Memorandum from Phil Smith to Mary Alice McKeen, Feb. 28, 2001
- Exhibit 21 NMFS printout of F/V EARLY DAWN fish tickets for LLP crab, 1988 to 1992

The following persons testified at the hearing: Rick Mezich, Allen Oakley, Ken Doris, Mary Lee Simmons and Wayne Donaldson. **Rick Mezich** is an owner of Pequod, Inc., and captained the F/V EARLY DAWN during the 1980's. **Allen Oakley** worked as engineer and deckhand on the F/V EARLY DAWN from 1985 to 1991 and has been the primary captain of the vessel since 1991. **Ken Doris** is plant manager for the Westward Seafoods plant in Dutch Harbor. **Mary Lee Simmons** is the bookkeeper and officer manager for Northern Aurora, Inc., the firm that handles Pequod's books and records. **Wayne Donaldson** is the Regional Management Supervisor for the Shellfish and Groundfish Fisheries, Westward Region, Alaska Department of Fish and Game [ADFG]. After the hearing, I conducted a phone interview with **Rance Morrison**, former area biologist for ADFG in Dutch Harbor, now a fisheries biologist with NMFS.

ANALYSIS

The License Limitation Program took effect on January 1, 2000.² A vessel must obtain a license to conduct directed fishing for “license limitation groundfish”³ and “crab species,” which are generally king and Tanner crab harvested in BSAI.⁴ For an LLP groundfish or crab license, the basic requirement is that an applicant must have owned a vessel on June 17, 1995 that made specified groundfish or crab harvests in a general qualification period (GQP) and an endorsement qualification period (EQP) or must own the fishing history that contains those harvests.⁵ Although not part of the original LLP, an applicant for a crab license must now also show a harvest of LLP species in a recent participation period, January 1, 1996 to February 7, 1998.⁶

Generally speaking, an applicant must actually have made the required crab or groundfish harvests. But the LLP is the first federal fishing program in Alaska where an applicant can satisfy some requirements based on groundfish or crab that the applicant would have harvested, but did not, due to unavoidable circumstances. The North Pacific Fishery Management Council [the Council] adopted the concept of unavoidable circumstances for LLP at its June 15 - 17, 1995 meeting.⁷ The Council intended a “narrowly crafted” alternative to the requirement of actual crab or groundfish harvests to receive a license or an endorsement on a license.⁸

² 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). The LLP regulations are on the NMFS website: <http://www.fakr.noaa.gov/regs/summary.htm>

³ License limitation groundfish means “target species and the ‘other species’ category, specified annually pursuant to § 679.20(a)(2), except that demersal shelf rockfish east of 140° W. longitude and sablefish managed under the IFQ program are not considered license limitation groundfish.” 50 C.F.R. § 679.2. The annual specification in 50 C.F.R. § 679.20(a)(2) is the process for setting the Total Allowable Catch [TAC] for groundfish harvested in BSAI and the Gulf of Alaska. When I refer to groundfish in this Decision, I mean license limitation groundfish.

⁴ Crab species means “all crab species covered by the Fishery Management Plan for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands.” 50 C.F.R. § 679.2. That is why the LLP crab license is technically a “crab species license.”

⁵ 50 C.F.R. § 679.2, definition of “eligible applicant” for LLP, subsection (1) and (2); 50 C.F.R. § 679.4(k)(4)(groundfish license requirements); 50 C.F.R. § 679.4(k)(5)(crab license requirements).

⁶ 50 C.F.R. § 679.4(k)(5)(iii)(A). The exceptions to the recent participation requirement are in 50 C.F.R. § 679.4(k)(5)(iii)(B).

⁷ Proposed Rule, 62 Fed. Reg. 43,866, 43,871 (Aug. 15, 1997); Exhibit 13.

⁸ Final Rule, 63 Fed. Reg. 52,642, 52,651 (Oct. 1, 1998).

The unavoidable circumstances regulation resulted and is codified at 50 C.F.R. § 679.4(k)(8)(iv):

A qualified person who owned a vessel on June 17, 1995, that made a documented harvest of license limitation groundfish, or crab species if applicable, between January 1, 1988, and February 9, 1992, but whose vessel was unable to meet all the 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.

Pequod must prove it meets each requirement by a preponderance of the evidence.

1. May an applicant who qualifies for an LLP license seek to qualify for additional endorsements based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

According to the LLP Official Record, Pequod qualifies for an LLP groundfish license with a Bering Sea endorsement and an LLP crab license with four endorsements. Pequod seeks to add an AI endorsement to its groundfish license and an AI brown king endorsement to its crab license. RAM decided Pequod's claim on the merits and presumed, without discussion, that Pequod could seek additional endorsements based on the unavoidable circumstances regulation. Apparently, RAM's practice is to interpret the unavoidable circumstances regulation as available

to an applicant seeking an additional endorsement on an LLP license.⁹

Although the first sentence of the regulation refers to a vessel which is unable to meet all the criteria “for a groundfish license” or “for a crab species license,” and the F/V EARLY DAWN will qualify for a groundfish license and a crab license, I conclude that RAM’s interpretation is correct. The unavoidable circumstances regulation is available to an applicant whose vessel is unable to meet the criteria *for a license with all the endorsements that the applicant is seeking*.

This interpretation is consistent with the treatment of disputed endorsements on appeal. An applicant who is appealing the denial of one endorsement does not get a permanent LLP license with the undisputed endorsements. The applicant only receives a permanent LLP license when NMFS resolves questions about *all* the endorsements sought by the applicant. [50 C.F.R. § 679.4(k)(6)(viii)]

This interpretation also reflects economic reality. Endorsements are not fungible. For example, it could be economically devastating to a fisherman to be excluded from harvesting *opilio* and *bairdi* crab, even if the fisherman had an undisputed St. Matthew red and blue king endorsement. And more to the point, an unavoidable circumstance could have prevented a vessel from participating in one crab fishery at a particular time even if the vessel was able to participate in another crab fishery at another time.

This interpretation is consistent with the unavoidable circumstances regulation itself which requires a documented harvest after the unavoidable circumstance but before June 17, 1995 in the area “that corresponds to the area endorsement or area/species endorsement” for which the applicant claims unavoidable circumstances. [50 C.F.R. § 679.4(k)(8)(iv)] The requirement that the vessel must have participated in a *specific* crab fishery strongly suggests this regulation is available to a vessel which will be excluded from a *specific* crab fishery due to unavoidable circumstances.

Therefore, I conclude that Pequod can argue unavoidable circumstances as a basis for an endorsement on its groundfish or crab license even though the LLP Official Record recognizes Pequod qualifies for other endorsements.

2. Does Pequod meet the requirements in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for an AI endorsement on its groundfish license? No.

To receive an LLP groundfish license with an AI endorsement, an applicant must have one groundfish harvest in BSAI during the general qualification period, which is January 1, 1988 and

⁹ See Paula Brogdon, Appeal No. 00-0011 (Feb. 26, 2002)(RAM denied unavoidable circumstances claim for additional endorsements on the merits); Ronald J. Tennison, Appeal No. 00-0012 (April 5, 2002)(same). Both appeals affirmed RAM’s actions.

June 27, 1992,¹⁰ and one groundfish harvest in the Aleutian Islands during the endorsement qualification period, which is January 1, 1992 to June 17, 1995. [50 C.F.R. § 679.4(k)(4)] The F/V EARLY DAWN met the GQP requirement, but it harvested no groundfish in the Aleutian Islands in the endorsement qualification period, January 1, 1992 and June 17, 1995 and none until 1999 or 2000. [Exhibit 1, Exhibit 2]

Pequod argues that it did not harvest AI groundfish between January 1, 1992 and June 17, 1995 because Adak lacked a processing facility. Pequod argues that “[i]n fishing for p-cod, a catcher boat must deliver at a minimum of every three days in order to prevent degradation of the fish caught. Consequently, fishing in the Aleutian Island area was impossible [for a catcher vessel] because of the run time back to Dutch Harbor.” Pequod argues that in 2000, cod buyers have moved back in: “This now makes it possible for catcher boats to fish for cod out West.” [Exhibit 2]

Since I did not grant Pequod a hearing on its claim to an AI groundfish endorsement, I am viewing the record on this claim in the light most favorable to Pequod. I conclude that Pequod does not qualify for an AI groundfish endorsement on its LLP license for two reasons.

First, the unavoidable circumstances regulation does not excuse the lack of all harvests. It requires that an applicant harvest groundfish in the desired endorsement area *after* the unavoidable circumstances and *before* June 17, 1995. [50 C.F.R. § 679.4(k)(8)(iv)(E)] This requirement makes sure that the applicant fished the specific fishery for which the applicant is claiming unavoidable circumstances *before* the date of final Council action on the LLP, which was June 17, 1995.¹¹ Pequod did not harvest *any* AI groundfish in the *entire* endorsement qualification period for AI groundfish, which is January 1, 1992 to June 17, 1995. Therefore it did not harvest groundfish after the claimed unavoidable circumstances and before June 17, 1995.¹²

Second, the unavoidable circumstances regulation requires that Pequod show a specific intent to harvest AI groundfish that was thwarted by a circumstance “that was unique to [Pequod], or unique to [the F/V EARLY DAWN].” [50 C.F.R. § 679.4(k)(8)(iv)(B)(2)] The lack of processing facilities on Adak Island was not a circumstance that was unique to Pequod or the F/V

¹⁰ The regulation extends this general qualification period for vessels meeting certain criteria, which the F/V EARLY DAWN does not meet. 50 C.F.R. §679.4(k)(4)(i)(A)(2)(3).

¹¹ Final Rule, 63 Fed. Reg. 52,642, 52,651 (Oct. 1, 1998).

¹² This requirement – a harvest by June 17, 1995 – means that the unavoidable circumstances regulation is not available to any applicant seeking a groundfish endorsement that requires only one harvest in the endorsement qualification period, such as the AI groundfish endorsement, because the endorsement qualification period for all groundfish endorsements ends on June 17, 1995. If the applicant had one harvest by June 17, 1995, the applicant would not need to claim unavoidable circumstances.

EARLY DAWN. Every vessel that wanted to sell AI groundfish faced the lack of processing facilities on Adak Island.

Pequod argues that this problem did not affect all vessels in the Aleutian Islands because it did not affect catcher/processor vessels. [Exhibit 12 at 3 - 4] It is true that the lack of onshore processing facilities did not affect all vessels in the Aleutian Islands because catcher/processor vessels can process their catch on board the vessel. But just because this condition did not affect **100%** of the vessels in the Aleutian Islands does not mean the condition is unique to the F/V EARLY DAWN. This problem affected an entire large class of vessels: all catcher vessels. This is an untenable and unreasonable definition of the word “unique.”

I therefore conclude that Pequod does not meet two requirements in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for an AI groundfish endorsement. Since an applicant must meet each and every criterion in the unavoidable circumstances regulation, I do not need to decide whether Pequod meets the other requirements in the regulation.

2. Does Pequod meet the requirements in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), to receive an AI brown king endorsement on its LLP crab license? Yes.

To receive an AI brown king crab endorsement, a vessel must meet three requirements:

- [1] one harvest of any LLP crab species between January 1, 1988 and June 17, 1992, the general qualification period;¹³
- [2] three harvests of AI brown king crab between January 1, 1992 and December 31, 1994, the endorsement qualification period for an AI brown king endorsement;
- [3] one harvest of any LLP crab species in the recent participation period, January 1, 1996 to February 9, 1998. [50 C.F.R. § 679.4(k)(5)]

With respect to each:

- [1] the F/V EARLY DAWN met the GQP requirement: it had 98 documented harvests of LLP crab in the general qualification period, January 1, 1988 to June 17, 1992.¹⁴
- [2] the F/V EARLY DAWN did not have three AI brown king harvests in the endorsement qualification period. It made two AI brown king harvests in the EQP: on November 24, 1994 and December 10, 1994.
- [3] RAM issued Pequod a certificate of eligibility that it met the recent participation requirement. [Exhibit 20]. The record does not contain all the documented crab harvests

¹³ The regulations extend the general qualification period for crab licenses for vessels that meet certain criteria, which the F/V EARLY DAWN does not meet. 50 C.F.R. § 679.4(k)(5)(i)(B).

¹⁴ Exhibit 21. These harvests included an AI brown king harvest in 1988.

made by the F/V EARLY DAWN between January 1, 1966 and February 9, 1998 but it does show five documented harvests of AI brown king crab in 1996. [Exhibit 5-B]

Pequod seeks credit for a third AI brown king harvest in the endorsement qualification period based on unavoidable circumstances, as defined in 50 C.F.R. § 679.4(k)(8)(iv).

Pequod argued to RAM that, during the endorsement qualification period, the F/V EARLY DAWN “was working with the State of Alaska in developing the deep water crab fisheries for tanneri, angulatus and couesi.” Pequod argues that the F/V EARLY DAWN received experimental permits for these species from the State of Alaska “and in return we gave to the ADF&G [Alaska Department of Fish and Game] all pertinent information on these crab species.”[Exhibit 3]

The IAD correctly rejected this argument. Although Pequod did fish deepwater crab on experimental permits and did give information to the State of Alaska, Pequod made a business decision to try to develop the experimental species into a commercially viable operation. Pequod sold the crab (tanneri, angulatus and couesi) it caught on the experimental permits issued by the State. Pequod did not show that its participation in the deepwater crab fisheries was the result of circumstances that were unavoidable, unique or unforeseen. [50 C.F.R. § 679.4(k)(8)(iv)(b)] This claim therefore does not meet the requirements of the unavoidable circumstances regulation.

At a status conference on Pequod’s appeal, Pequod submitted documentation that the F/V EARLY DAWN grounded in March 1994 and had to undergo major structural repairs which kept it from fishing from March until early July 1994. [Exhibit 10]. I gave Pequod the opportunity to provide evidence and argument on whether this met the requirements of the unavoidable circumstances regulation. After reviewing Pequod’s evidence and argument [Exhibits 7 - 10], I concluded that an oral hearing was necessary to evaluate this claim. I wanted the give-and-take of an oral hearing and I wanted to assess the credibility of witnesses.

Based on a careful review of the evidence in the record and the testimony at the hearing, I conclude that Pequod has shown that it meets each requirement in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for an AI brown king endorsement on its LLP crab license. I conclude that Pequod has shown, by a preponderance of the evidence, that it intended to harvest AI brown king crab during the time period March 4, 1994 to July 5, 1994 and that, but for the grounding and repairs of the F/V EARLY DAWN, it would have done so. I therefore conclude that Pequod should receive credit for a third AI brown king crab harvest during the endorsement qualification period and, with that, an AI brown king crab endorsement on its crab license.

The unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), is technical and can be parsed in different ways. I analyze it as having seven requirements, which I will examine in turn.

[1] Is Pequod a qualified person that owned a vessel on June 17, 1995 that made a harvest of LLP crab between January 1, 1988 and February 9, 1992? [50 C.F.R. § 679.4(k)(8)(iv)] Yes.

Pequod is a qualified person that owned a vessel, namely the F/V EARLY DAWN, on June 17, 1995 that made one harvest of any LLP crab species between January 1, 1988 and February 9, 1992. [Exhibit 1] The F/V EARLY DAWN actually made eighty-eight documented harvests of LLP crab during this time period. [Exhibit 21].

The Council chose this period – January 1, 1988 to February 9, 1992 – because that was the qualifying period under the Vessel Moratorium Program, the predecessor program to LLP.¹⁵ For a crab license, the Council intended to limit the availability of unavoidable circumstances to vessels that got into the crab fishery in the Moratorium qualifying period. [Exhibit 13 at 3]. The Council did not want relative newcomers to the LLP/Moratorium crab fisheries – king and Tanner crab in the BSAI – to get relief under the unavoidable circumstances provision.

Another way of looking at this requirement is that the Council excluded from unavoidable circumstances relief any vessel entering the LLP fisheries *after* February 9, 1992. With eighty-eight harvests of LLP crab between January 1, 1988 to February 9, 1992, the F/V EARLY DAWN was well-established in the LLP crab fisheries by February 9, 1992.

[2] Was the F/V EARLY DAWN unable to harvest AI brown king crab in the endorsement qualification period, January 1, 1992 to December 31, 1994, or for some portion of that period, because of the claimed circumstances? [50 C.F.R. § 679.4(k)(8)(iv)] Yes.

The regulation next requires that an applicant prove that the “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^[16] 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**).”¹⁷ I analyze below whether the circumstance was “unavoidable” but, as a threshold matter, Pequod must prove that the F/V EARLY DAWN was unable to harvest AI

¹⁵ Final Rule, 60 Fed. Reg. 40,763, 40,773 (Aug. 10, 1995). This is *different* from the general qualification period for crab licenses: January 1, 1988 to *June 17, 1992*. 50 C.F.R. § 679.4(k)(5)(i)(A).

¹⁶ Although this language refers to the vessel being unable to meet “all the criteria” in 50 C.F.R. § 679.4(k)(4) and (k)(5), and on its face that could include the requirements for a harvest in the general qualification period in 50 C.F.R. § 679.4(k)(4) and (k)(5), the unavoidable circumstances regulation itself requires that a vessel have a harvest between January 1, 1988 and February 9, 1992. 50 C.F.R. § 679.4(k)(8)(iv)(E). If the vessel had such a harvest, it would have a harvest in the general qualification period. Thus, it appears that the unavoidable circumstances regulation only provides an alternate way of satisfying the harvest requirements in the endorsement qualification period.

¹⁷ 50 C.F.R. § 679.4(k)(8)(iv)(emphasis added). I quote the entire regulation at page 5 *supra*.

brown king crab during the endorsement qualification period, or for some portion of it, because of the circumstances it is claiming were unavoidable, unique, unforeseen and reasonably unforeseeable.

I find that Pequod has met this requirement. I find that the F/V EARLY DAWN was unable to participate in the AI brown king fishery from approximately March 4, 1994 until July 5, 1994 because of physical damage to the F/V EARLY DAWN. I base this finding on the testimony of Allen Oakley, the testimony of Rick Mezich, the fourteen page repair bill from Marco Shipyard and the documented fishing history of the F/V EARLY DAWN.¹⁸ Allen Oakley has been the primary captain for the F/V EARLY DAWN from 1991 to the present and became part owner of Pequod, Inc., in approximately 1998 [Exhibit 5]. Rick Mezich is an owner of Pequod, Inc., and was captain of the F/V EARLY DAWN during the 1980's.

In January and February 1994, the F/V EARLY DAWN fished the Bering Sea opilio fishery, the traditional opening fishery for the Alaska crab fleet. The opilio fishery closed on March 1, 1994.¹⁹ A few days after the opilio fishery closed – on or about March 4, 1994 – Allen Oakley took the F/V EARLY DAWN to gather gear he had stored off St. George Island. Mr. Oakley fell asleep while steering and the boat slammed into a rockpile off the shore of the island. The boat bounced and slammed into another rockpile/reef. Mr. Oakley and the crew pumped out the tank to lighten the boat. This enabled them to maneuver the boat off the rocks and away from the shore. Mr. Oakley checked the boat to determine if it could safely get back to port. He did not see damage above the water line and the hull did not appear compromised. Mr. Oakley gathered the gear and got the boat back to port, where he called Mr. Mezich. Mr. Mezich arranged to have the boat examined for damage and then told Mr. Oakley to bring the vessel to Seattle for repairs.

The F/V EARLY DAWN went to Marco Shipyard in Seattle and was put in dry dock on March 23, 1994. The damage was significant and structural. The shipyard replaced twenty-three feet of keel (on a 108-foot boat), replaced the bow stem, repaired nine cracked bulwark stanchions, realigned the vessel's shafting and conducted other systemic evaluations and repair. The repairs took over three months and cost approximately \$125,000.²⁰ The vessel left the shipyard and was back on the Alaska fishing grounds by July 5, 1994. [Exhibit 11 at 1, 27]

I therefore conclude that the grounding and subsequent repairs of the F/V EARLY DAWN made

¹⁸ Testimony of Allen Oakley, Tape 2, Side B, Log 122-201 (Jan. 3, 2002); Testimony of Rick Mezich, Tape 2, Side B, Log 212 - 271 (Jan. 3, 2002); Exhibit 10; Exhibit 11; Exhibit 15. Pequod stated that the date of the accident was March 3 or March 4, 1994 [Exhibit 19]. I have used March 4, 1994 as the date of the grounding.

¹⁹ Annual Management Report for the Shellfish Fisheries of the Westward Region, 2000, Regional Report No. 4K01-45, Alaska Department of Fish and Game (September 2001) at Table 5 - 26 (hereinafter ADFG Management Report).

²⁰ The exact amount, after negotiation, was \$123,669.56. [Exhibit 10]

it unable to participate in any fishery – including the AI brown king crab fishery – from March 4 to July 5, 1994. This leads to the next question, namely whether Pequod has shown it intended to fish for AI brown king crab during the time the F/V EARLY DAWN was out of commission.

[3] Did Pequod intend to conduct directed fishing for AI brown king crab in the period March 4, 1994 to July 5, 1994? [50 C.F.R. § 679.4(k)(8)(iv)(A)] Yes.

The specific language of this section is that an applicant must demonstrate that “**at the time of the unavoidable circumstance [it] held a specific intent to conduct directed fishing for license limitation groundfish or crab species with the vessel during a specific time period in a specific area.**” 50 C.F.R. § 679.4(k)(8)(iv)(A). “[A]t the time of the unavoidable circumstance” in this case means during the time period March 4, 1994 to July 5, 1994. To hold “**a specific intent**” means that Pequod did not merely have a general desire or dream but had an intent or plan to participate in a particular fishery at a particular time.

The regulations define “**directed fishing**” as follows:

(1) With respect to groundfish recordkeeping and reporting, any fishing activity that results in the retention of an amount of a species or species group on board a vessel that is greater than the maximum retainable bycatch amount for that species or species group as calculated under [50 C.F.R.] § 679.20.

(2) With respect to license limitation groundfish species, directed fishing as defined in paragraph (1) of this definition, or, **with respect to license limitation crab species, the catching and retaining of any license limitation crab species.**²¹

Directed fishing for LLP crab therefore does *not* mean catching more than a bycatch amount of crab. It means catching and retaining any amount of an LLP crab species. Directed fishing of LLP crab therefore means the same as harvest of LLP crab because “harvesting” or “to harvest” also means “the catching and retaining of any fish.”²²

The directed fishing has to be “**for license limitation groundfish or crab species.**” I interpret this to require fishing for the particular species which is the subject of the disputed endorsement. The directed fishing has to be “**during a specific time period in a specific area.**” Since this regulation permits the applicant to, in essence, add a harvest to its fishing history during the endorsement qualification period, the “**specific time period**” has to be within the endorsement qualification period and has to be the time of the unavoidable circumstances. The “**specific area**” must be the endorsement area for the endorsement the applicant is seeking.

²¹ 50 C.F.R. § 679.2 [emphasis added].

²² 50 C.F.R. § 679.2.

Putting this all together means that Pequod must prove that it intended to harvest brown king crab in the AI brown king endorsement area between March 4, 1994 and July 5, 1994. For convenience, I will refer to this as an intent to harvest AI brown king crab.

By its nature, the unavoidable circumstances regulation requires an applicant to prove something which is somewhat speculative, namely that the applicant intended to do something *that it did not do* and that it would have done something *that it did not do*. Pequod had two documented harvests of AI brown king crab in the endorsement qualification period, on November 24, 1994 and December 10, 1994. Pequod's particular claim is that it intended to *begin* AI brown king fishing earlier than it did. It is claiming that unavoidable circumstances caused it to miss its *first* AI brown king harvest in the endorsement qualification period, rather than its second or third.

To evaluate Pequod's claim that it intended to harvested AI brown king crab between March 4, 1994 and July 5, 1994, I will examine the extent to which the F/V EARLY DAWN was prepared and equipped to conduct AI brown king crab fishing in March 1994; whether Pequod offered credible testimony of its intent during this time period; and what Pequod did when the F/V EARLY DAWN was able to resume fishing.

[a] Pequod specifically equipped the F/V EARLY DAWN to harvest deepwater crab species and AI brown king crab.

Paradoxically, Pequod's intent to fish AI brown king crab does begin with its intent to fish deepwater crab: *tanneri*, *angulatus* and *couesi*.²³ *Tanneri* and *angulatus* are Tanner crabs, with *tanneri* often found at depths of 400 to 500 fathoms (2400 to 3000 feet). *Couesi* is a scarlet king crab, often found at depths of about 200 fathoms (1200 feet).²⁴ AI brown king crab are typically fished closer to the surface – between 100 and 200 fathoms (600 to 1200 feet) – and are not considered a deepwater crab, although one reason the species is so healthy is that distribution of legal males extends to depths greater than typically fished.²⁵

In 1992, Mr. Mezich and Mr. Oakley testified before the Alaska Board of Fish and Game to obtain experimental permits for deepwater crab.²⁶ The deepwater species were considered “experimental” or “exploratory” because not much was known about their biology or life

²³ *Tanneri*, *angulatus* and *couesi*, as well as Pribilof brown king crab, are LLP crab species, 50 C.F.R. § 679.2, but the LLP does not have a specific endorsement for those species.

²⁴ Testimony of Wayne Donaldson, Tape 3, Side A, Log 210-240 (Jan. 4, 2002); Testimony of Rick Mezich, Tape 1, Side A, Log 460 - 470 (Jan. 4, 2002); Testimony of Allen Oakley, Tape 1, Side B, Log 600 (Jan 3, 2002); ADFG Management Report at 103 - 111.

²⁵ ADFG Management Report, *supra* note 19, at 102.

²⁶ Testimony of Rick Mezich, Tape 1, Side B, 370 - 395 (Jan. 3, 2002).

history.²⁷ In 1993, the F/V EARLY DAWN received its first permit for tanneri, angulatus and couesi crab. [Exhibit 11] The F/V EARLY DAWN was the only vessel targeting tanneri in 1993.²⁸

To harvest deepwater crab, Pequod designed special gear and modified the F/V EARLY DAWN. Mr. Mezich and Mr. Oakley worked with Dungeness Gear Works in Seattle and designed an inverted dome pot, which weighed about 150 to 180 pounds. Single crab pots were rectangular and weighed about 800 pounds. The lighter weight pot was necessary for longlining the deepwater species because the lines had to go deep and support many pots at once. The record contains bills and receipts from Dungeness Gear Works in 1993 for gear alone in excess of \$135,000. [Exhibit 4] The boat itself had to be outfitted with a new deepwater power block, a stern ramp, a larger hydraulic pump and improved electronics. [Exhibit 3].²⁹

Pequod designed this gear to fish deepwater crab species *and* brown king crab. In its initial application to RAM, Pequod referred to “the large investment we made in vessel conversion and pots and gear for the brown king and deep water crab.” [Exhibit 3 at 2]. At the hearing, Rick Mezich testified:

In latter part of 1992 and 1993, we invested hundreds of thousands of dollars for line that is used in the longline fishery and also built pots for the longline fishery. And the lines and the pots that we built are multispecies type of equipment. They can be used for grooved tanneri, they can be used for scarlet king crab, they can be used for golden brown crab. In fact to this day we are still using that gear for the brown, for the golden crab in the Aleutians.³⁰

Allen Oakley, captain of the F/V EARLY DAWN from 1991 to the present, testified:

What I’d like to address is when we built this gear, these domed pots for longlining, we installed panels, escape mechanisms to comply with regulations and to allow the removal of prerecruits and small crab. When we built this gear, it was built with panels for the smaller tanneri species and for the brown crab. That was, and, in that way when we went out West [the Aleutians], we could target those fisheries and those species legally to allow the . . . with the proper escape

²⁷ Testimony of Wayne Donaldson, Tape 3, Side A, 210 - 230 (Jan. 4, 2002). The permit itself, rather than across-the-board State regulations, specifies season dates, areas of operation, size limits, observer coverage or logbooks requirements. 5 AAC 35.082 (Commissioner’s permits for tanneri and angulatus); 5 AAC 34.082 (Commissioner’s permit for couesi king crab).

²⁸ Testimony of Allen Oakley, Tape 1, Side B, Log 474 (Jan. 3, 2002).

²⁹ Testimony of Rick Mezich, Tape 4, Side B, Log 1 - 60 (Jan. 4, 2002).

³⁰ Tape 1, Side A, Log 360 - 365 (Jan. 3, 2002). Brown king and golden king are the same crab.

mesh. And I think that is really important because that is why we built the gear. We built the gear with panels and escape mesh in them so it wasn't specifically built just for the tanneri fisheries. It had the bigger escape mesh to allow the prerecruits and the female brown crab to escape. And I think that is very relevant and important because, you couldn't There were regulations for escape mechanism and escape mesh and we anticipated and built the gear accordingly.³¹

Based on the documentary evidence and testimony, I find that Pequod made a significant investment in gear and vessel modifications in 1992 and 1993 so that the F/V EARLY DAWN could longline deepwater crab *and* brown king crab. But until Pequod actually used the new gear, it did not know if the gear would work. In 1993, Pequod tested the gear on the small brown king fishery in the Bering Sea, which is centered in the Pribilof Islands.³² The new gear worked. The F/V EARLY DAWN made eight documented harvests of tanneri, and six were documented harvests of tanneri *and* brown king crab. [Exhibit 14] Thus, I find that in March 1994 the F/V EARLY DAWN was equipped to harvest AI brown king crab.

[b] Pequod provided credible testimony that it intended to harvest AI brown king crab in the spring of 1994.

After learning that its new gear worked on deepwater crab *and* brown kings in the Pribilofs, Pequod states that in 1994 it intended to try its new gear on a broader canvas: the Aleutian Islands. Allen Oakley testified at several points in the hearing:

What we recognized early on was that the gear was going to fish both species, that it would fish both species, because we caught brown crab in the Bering Sea in '93 with this gear type and so we knew that if we went out West [the Aleutians], which there was more resource and we'd have more of an opportunity to target the brown crab, the scarlet crab and the tanneri, odds for economic opportunity. . . .

Once we early on in 1993, we determined okay, that this gear would fish, would hold king crab, that was our direction, our intent, because we knew that was where the real opportunity was going to be. . . .

The brown king was a king crab. King crab are a premium price wise and it only made sense that we were going to, you know it was my intention, to go out and, if I could harvest crab for 75 cents a pound versus 2.50 to three dollars a pound, I certainly wanted to get a shot at the brown crab and catch enough of those, to get

³¹ Tape 3, Side B, Log 427 - 443 (Jan. 4, 2002).

³² ADFG Management Report, *supra* note 19, at 164 - 166. Over the past twenty years, a small brown king fishery has been prosecuted sporadically around St. Matthew Island as well. *Id* at 166 - 167, Table 5-17.

out there, between the three species [tanneri, scarlet and brown king] to make it economically viable. That was, it was the only thing that made sense.³³

Mr. Oakley's testimony is supported by State regulations, which provide that deepwater crab may be longlined *only* where State regulations permit longlining of pots for brown king crab.³⁴ These regulations clearly contemplate a multispecies crabbing operation for brown king and deepwater crab, which is how Mr. Oakley testified he intended to deploy the F/V EARLY DAWN in the spring of 1994.

Mr. Oakley's testimony is consistent with data on the Aleutian Islands brown king crab fishery. It is an abundant resource. It is unique among BSAI king crab fisheries "in that it has never failed to open due to low stock abundance."³⁵ In the 1992/1993 season, the AI brown king crab fishery totaled 6.29 million pounds, valued at approximately \$13 million; in 1993/1994, 5.55 million pounds, valued at \$13 million; in 1994/1995, 8.1 million pounds, valued at \$21 million.³⁶ Brown king crab *are* a premium crab. The price of brown king crab is consistently higher than any of the deepwater crabs.³⁷

The Aleutian Islands brown king crab is the only major brown king fishery in Alaska. It dwarfs the Bering Sea brown king fishery in the Pribilofs, which is where Pequod fished in 1993 and which had a *total* value of between approximately \$200,000 - \$300,000.³⁸ It is quite credible that a vessel owner who invested hundreds of thousands of dollars in gear and equipment for longlining deepwater crab and brown king crab intended to try that gear in the Aleutian Islands.

I note that Pequod had not registered the F/V EARLY DAWN for the AI brown king crab fishery in March 1994, when the vessel ran aground while picking up its gear. This does not show that Pequod lacked the intent to fish AI brown king crab *after* it picked up the gear. Vessels were usually registered for a particular crab fishery at the same time an ADFG representative inspected the vessel's tank. Tank inspections occurred just before the vessel was going out for a particular

³³ Testimony of Allen Oakley at Tape 2, Side A, Log 515 - 559 (Jan. 3, 2002).

³⁴ 5 AAC 34.082 (couesi permits); 5 AAC 35.082 (tanneri and angulatus permits).

³⁵ ADFG Annual Management Report, *supra* note 19, at 97.

³⁶ ADFG Annual Management Report, *supra* note 19, at Table 4-4, Table 4-5

³⁷ ADFG Annual Management Report, *supra* note 19, at Table 4-5, Table 4-8, Table 4-11.

³⁸ In 1992, one boat participated in the Pribilof brown king fishery, making the total value of the fishery confidential. In 1993, the Pribilof brown king fishery saw five boats catch a total of 67,000 pounds valued at \$163,000. In 1994, three boats, 89,000 pounds valued at \$336,252. ADFG Annual Management Report, *supra* note 19, at Table 5-15 & Table 5-16.

fishery because ADFG certified that the tank or live holds of the vessel were empty.³⁹ The F/V EARLY DAWN simply never got to that point of a tank inspection and vessel registration for the AI brown king crab fishery because it went to Seattle for repairs instead. But, after the repairs to the F/V EARLY DAWN, Pequod registered the vessel for the AI brown king fishery in the fall of 1994, the spring of 1995 and the fall of 1995.

[c] The AI brown king harvests by the F/V EARLY DAWN in the fall of 1994 and in 1995 support Pequod’s claim.

In 1994 and 1995, Pequod registered the F/V EARLY DAWN for brown king in the Aleutians, and made documented harvests of brown king in the Aleutians, on the following dates, with the approximate poundage of live crab noted:⁴⁰

1994	10.29	Registration: brown king
	11.24	Harvests: red king [600 pounds] and brown king [15,000 pounds]
	12.10	Harvest: brown king [13,000 pounds]
1995	3.18	Registration: brown king
	3.18	Registration: tanneri, angulatus, couesi
	5.8	Registration: brown king
	5.8	Registration: tanneri, angulatus, couesi
	5.25	Harvests: brown king [750 pounds] and couesi [1900 pounds]
	6.22	Harvest: brown king [108 pounds] and tanneri [28,000 pounds]
	6.30	Harvest: brown king [230 pounds], tanneri [2500 pounds], couesi [130 pounds]
	8.31	Registration brown king
9.12	Harvest: brown king [7000 pounds], tanneri [3000 pounds], angulatus	

³⁹ Testimony of Rick Mezich and Allen Oakley, Tape 1, Side A, Log 107 - 208 (Jan. 3, 2002). The F/V EARLY DAWN’s vessel registrations and permits typically show tank inspections on the same day or the day after the vessel registration was signed. [Exhibit 11] *See* 5 AAC 34.020 (“In a king crab registration area, district, or section where tank inspections are required, a vessel registration is not valid until the vessel has had a tank inspection. . . . Successful completion of the inspection validates the vessel’s registration for a registration area.”); 5 AAC 34.030 (“[W]ithin 24 hours before a season opening or at any time during the open season before taking or processing king crab, a king crab vessel registered for a registration area must have its holds or live tanks inspected by a local representative of the department at inspection points specified in this chapter.”).

⁴⁰ Exhibits 11, 14, 16. The F/V EARLY DAWN registered for and harvested other crab species in other areas in 1994 and 1995. This is only the vessel’s AI brown king registrations and harvests. The F/V EARLY DAWN was not actually registered for the Aleutian Islands but for the Adak Registration Area (Area R) or the Dutch Harbor registration area (Area O). In 1996, the Alaska Board of Fisheries combined the Dutch Harbor and Adak Registration Areas into the AI king crab registration area (Area O). ADFG Management Report, *supra* note 19, at 93.

- [6500 pounds], couesi [225 pounds].
10.1 **Registration:** brown king
10.10 **Harvests:** brown king [400 pounds], tanneri [1400], angulatus [16,000].

These harvests – made after the F/V EARLY DAWN resumed fishing – corroborate Pequod’s testimony that in 1994, it intended to branch out into the Aleutian Islands earlier in 1994 than it did. After its boat was repaired, Pequod registered the F/V EARLY DAWN for the AI brown king once in 1994 and four times in 1995. Pequod made two AI brown king harvests in 1994, one of 15,000 pounds, another of 13,000 pounds. Its harvests in 1995 were smaller but included one of 7000 pounds. After its start in this fishery in 1994 and 1995, Pequod has stayed, with substantial AI brown king harvests in 1996, 1998, up until the present.⁴¹ Pequod’s conduct subsequent to the spring of 1994 – that it in fact got into and stayed in the AI brown king fishery – is consistent with its testimony that it intended to get into that fishery in the spring of 1994.

The pattern of 1995 harvests also corroborate Pequod’s testimony that, in the spring of 1994, it intended to use its gear to catch deepwater crab *and* brown king crab in the Aleutians because that is what Pequod did: brown king and couesi on May 25, 1995; brown king and tanneri on June 22, 1995; brown king, tanneri and couesi on June 30, 1995; brown king, tanneri, angulatus and couesi on September 12, 1995; brown king, tanneri and angulatus on October 10, 1995. From March 4, 1995 to July 5, 1995, *which corresponds to the time period that the F/V EARLY DAWN missed fishing in 1994*, the F/V EARLY DAWN registered twice for AI brown king crab and made three documented harvests of AI brown king crab and couesi or tanneri.

Allen Oakley testified that “the catch history you saw in 95 would have occurred in 94.” The grounding “set me back a year.”⁴² Mr. Oakley testified that in 1995, the F/V EARLY DAWN was longlining for brown king *and* deepwater crab.

Question [from Pequod’s attorney]: Is it fair to say your target fishery in April, May of 1995 was the brown king crab fishery?

Answer: In 1995, we actually were, I was setting gear throughout the depths. I was looking for all the species. I had some gear shallow, looking for brown crab, targeting the brown crab, some gear deeper targeting tanneri. I had some gear in between for the scarlet [couesi] since they inhabit the depths in between and you

⁴¹ In 1996 the F/V EARLY DAWN made documented harvests of AI brown king in the following approximate amounts: 1200 pounds, 7000 pounds, 51,000 pounds, 18,000 pounds and 26,000 pounds. [Exhibit 5 - B]. In 1997, Pequod tried tuna fishing in the South Pacific. [Testimony of Rick Mezich, Tape 3, Side A, Log 552, Jan. 4, 2002]. In 1998, the F/V EARLY DAWN returned to Alaska, harvesting 50,000, 135,000 and 62,000 pounds of AI brown king crab. [Exhibit 5 - B]. It has continued with substantial harvests of AI brown king crab since 1998. [Exhibit 3]

⁴² Testimony of Allen Oakley, Tape 2, Side A, Log 568 - 571 (Jan. 4, 2002).

get some scarlet and some brown crab.⁴³

Overall, I found Mr. Oakley's testimony credible. His testimony was internally consistent. He took care in answering, gave details and did not appear to overstate facts simply to make the strongest case possible. For example, as just noted, when questioned by Pequod's attorney as to whether his target fishery in April and May of 1995 was the brown king, he answered that he was targeting a number of species. When he was unsure of something, he indicated that. For example, he stated that he was unsure of when he became a part owner of the F/V EARLY DAWN and, after the hearing, Pequod stated it was 1998 rather than 1994.⁴⁴ Mr. Oakley did not equivocate when testifying to something that could possibly cast him in a negative light. He forthrightly testified that he fell asleep while steering the F/V EARLY DAWN when it hit the rocks at St. George Island.⁴⁵ When Mr. Oakley's testimony was capable of being confirmed, it was. For example, the 2000 ADFG Management Report confirmed Mr. Oakley's testimony that the F/V EARLY DAWN was the only vessel fishing tanneri in 1993.⁴⁶ The former area biologist for the Alaska Department of Fish and Game, stationed in Dutch Harbor from 1991 to 2001, who had official dealings with Mr. Oakley, found Mr. Oakley to be "ruthlessly honest."⁴⁷

I did not find credible Pequod's evidence that the F/V EARLY DAWN would have primarily fished AI brown king, rather than tanneri, in the spring of 1994.⁴⁸ I did not find that claim credible because after the F/V EARLY DAWN was repaired, it continued in 1994 and 1995 to harvest large amounts of tanneri, much more tanneri than brown king. It is clear to me that Pequod made an economic decision to fish tanneri heavily throughout 1993, 1994 and 1995.⁴⁹

⁴³ Testimony of Allen Oakley, Tape 2, Side A, Log 531 - 540 (Jan. 3, 2002).

⁴⁴ Testimony of Allen Oakley, Tape 3, Side A, Log 360 - 365 (Jan. 4, 2002); Exhibit 5.

⁴⁵ Testimony of Allen Oakley, Tape 2, Side B, Log 122-201 (Jan. 3, 2002).

⁴⁶ ADFG Annual Management Report, *supra* note 19, at 107.

⁴⁷ Memorandum to File from Mary Alice McKeen, March 5, 2002 (phone interview with Rance Morrison)[Exhibit 18]. Mr. Morrison worked for ADFG in Dutch Harbor from 1991 to 1993 as head of the observer program and from 1993 to 2001 as area biologist. Mr. Morrison now works for NMFS in Dutch Harbor as a fisheries biologist. Pequod agreed to waive its right to a hearing at which Mr. Morrison testified and to treat this memorandum as constituting Mr. Morrison's testimony.

⁴⁸ Affidavit of Rick Mezich, Nov. 19, 2001 at ¶9 [Exhibit 8]; Affidavit of John May, Dec. 6, 2001 [Exhibit 6]. Pequod offered a reconstructed fishing schedule for 1994 for the F/V EARLY DAWN, which stated that Pequod planned to harvest 80,000 pounds of AI brown king crab between March 15 and June 10 and 225,000 pounds of tanneri between June 15 and August 31.

⁴⁹ In the summer of 1994 [July 1 -September 30], the F/V EARLY DAWN made tanneri harvests of approximately 130,000 pounds in the Bering Sea and no tanneri harvests after that. In the spring of 1995 [March 1 - June 30], it landed 110,000 pounds of tanneri in the Aleutians. In the summer of 1995

But Pequod does not have to show that it would have exclusively or even primarily fished AI brown king crab between March and early July 1994. Pequod has to show it intended to harvest AI brown king crab – in any amount – during that time period.⁵⁰ I conclude Pequod has shown that it intended to harvest AI brown king crab during the period March 4, 1994 and July 5, 1994 and would have made done so, but for the fact that the F/V EARLY DAWN was unable to fish during that four-month period.

I base this conclusion on the direct testimony of Pequod’s intent, in particular the testimony of Allen Oakley, the vessel’s captain in 1994 and 1995, and the facts as I have found them. Pequod invested heavily in specific gear and substantial modifications of the F/V EARLY DAWN so it could harvest deepwater crab and brown king crab. Pequod was operating under State regulations which permitted longlining for deepwater crab only where they permitted longlining for brown king crab. It made economic sense that Pequod intended to use its new gear and newly equipped vessel in Aleutian Islands brown king fishery. And after the F/V EARLY DAWN was seaworthy, Pequod did that. The F/V EARLY DAWN made two substantial harvests of AI brown king crab in the fall of 1994, five harvests of AI brown king and one or more deepwater crab species in 1995, and has continued in the AI brown king crab fishery to this day.

[4] Were Pequod’s circumstances unavoidable, unique and unforeseen or reasonably unforeseeable? [50 C.F.R. § 679.4(k)(8)(iv)(B)(1)(2)(3)] Yes.

[a] Were Pequod’s circumstances unavoidable? [50 C.F.R. § 679.4(k)(8)(iv)(B)(1)]

Once the F/V EARLY DAWN hit the rocks and sustained damages, the repairs to the boat were unavoidable. It would have been irresponsible for Pequod *not* to make them. But what of the fact that the F/V EARLY DAWN grounded because the operator of the boat fell asleep? On the one hand, it could be argued that was avoidable: he did not have to fall asleep. On the other hand, fishing is a business in which boat operators work long hours under difficult conditions.

I find that the grounding and the repairs of the F/V EARLY DAWN were unavoidable within the meaning of 50 C.F.R. § 679.4(k)(8)(iv) for four reasons. **First**, the problem was physical damage to the vessel. The unavoidable circumstances regulation specifically lists physical damage to a vessel as an example of an unavoidable circumstance.⁵¹ During the Council discussion of the

[July 1 - September 30], it harvested 85,000 pounds of tanneri in BSAI. [Exhibit 14, Exhibit 16]

⁵⁰ As noted, the regulations define “harvesting” as “catching and retaining any fish.” 50 C.F.R. § 679.2. This means that applicants who made actual harvests of LLP crab received crab endorsements based on harvests of *any* amount of crab. This decision applies the same standard to an applicant seeking a crab endorsement based on unavoidable circumstances.

⁵¹ 50 C.F.R. § 679.4(k)(8)(iv) states that the regulation is available to a vessel which is unable to meet the harvest requirements for a groundfish or crab endorsement “because of an unavoidable circumstance (i.e., **the vessel was lost, damaged** or otherwise unable to participation in the license

unavoidable circumstance regulation, physical damage to a vessel was a recurrent example Council members gave of an unavoidable circumstance. [Exhibit 13]

Second, the damage to the vessel was catastrophic. Council Member Clem Tillion stated, the damage had to be “absolutely catastrophic to be warranted under this or else we’re being way too lenient.”[Exhibit 13 at 3] Council Member Dave Benton said, not the “routine damage that Robin encounters when he leaves the dock,” but “ the disablement of the ship . . . [that] made it totally inoperable in the fishery for quite some period of time.” [Exhibit 13 at 3] Measured by the nature of the repairs (structural), the cost of the repairs (\$125,000) and the effect on the vessel (four months out of fishing), the damage to the F/V EARLY DAWN was catastrophic. Given the extent of the damage to the F/V EARLY DAWN, it was unavoidable that the vessel was out of the fishery for four months.

Third, Pequod, Inc., the owner of the F/V EARLY DAWN, acted responsibly before and after the grounding. Pequod had hired an able and experienced captain who had not grounded a vessel before this incident (and has not since). Mr. Oakley got his captains license in 1983. As noted, he worked as engineer and deckhand on the F/V EARLY DAWN from 1985 to 1991 and became captain in 1991.⁵² He had helped Pequod design the gear and obtain the permits needed for the F/V EARLY DAWN to fish deepwater crab and brown king crab.

After the accident, Mr. Oakley saw to the immediate safety of the crew and the integrity of the vessel. He checked the boat for damages which made the vessel immediately unseaworthy, brought the boat safely to port and promptly reported the accident to Mr. Mezich, an owner of the vessel. Due to the damage to the boat, Mr. Mezich instructed Mr. Oakley to bring the boat to Seattle for repairs, even though it meant the vessel had to lose time from fishing.⁵³ The record contains no suggestion that this accident was due to substance abuse or any problem which impaired Mr. Oakley’s ability to command a vessel.

Fourth, proper interpretation of federal fishing regulations requires an appreciation of the risks, rigors and realities of commercial fishing as a way to make a living. In Alaska, boat operators typically work hard long hours under time constraints and often dangerous conditions on the open seas. Some accidents are inevitable. 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

limitation groundfish or crab fisheries).”(emphasis added)

⁵² Testimony of Allen Oakley, Tape 2, Side B, Log 144 - 145 (Jan. 3, 2002), Tape 3, Side A, Log 390-397 (Jan. 4, 2002) The captain’s license was to operate vessels less than 100 tons.

⁵³ Testimony of Allen Oakley, Tape 2, Side B, Log 122-201 (Jan. 3, 2002). Testimony of Rick Mezich, Tape 2, Side B, Log 212 - 271 (Jan. 3, 2002).

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.

[b] Were Pequod's circumstances unique? [50 C.F.R. § 679.4(k)(8)(iv)(B)(2)] Yes.

The F/V EARLY DAWN's accident and repairs were unique to the F/V EARLY DAWN. Unlike the price of crab or the lack of processing facilities for groundfish, the damage to the F/V EARLY DAWN was unique to the F/V EARLY DAWN and did not affect the entire crab fleet or a large segment of it.

[c] Were Pequod's circumstances unforeseen and reasonably unforeseeable? [50 C.F.R. § 679.4(k)(8)(iv)(B)(3)] Yes.

The grounding of the F/V EARLY DAWN was unforeseen to Pequod. The owners did not have advance knowledge that the accident would occur. This specific accident was also reasonably unforeseeable, since it did not result from Pequod hiring an unsuitable captain, using a vessel that was not equipped for the task it was performing or any other action that Pequod took which Pequod should not have taken.

[5] Did the circumstances that prevented Pequod from conducting directed fishing for AI brown king crab actually occur? [50 C.F.R. § 679.4(k)(8)(iv)(C)] Yes.

The F/V EARLY DAWN was grounded, underwent repairs in Seattle and was prevented from fishing from early March through early July 1994.

[6] Under the circumstances, did Pequod take all reasonable steps to overcome the circumstance that prevented the owner from conducting directed fishing for AI brown king crab? [50 C.F.R. § 679.4(k)(8)(iv)(D)] Yes.

The accident occurred on or about March 1, 1994. Pequod immediately had the vessel inspected, took the vessel to Seattle for repairs, had extensive repair work done and got the vessel back on the fishing grounds by July 5, 1994. The F/V EARLY DAWN was fishing close to two months before Pequod even received a final bill for the repairs on August 28, 1994. [Exhibit 10].

[7] Did Pequod harvest brown king crab from the F/V EARLY DAWN in the Aleutian Islands after the F/V EARLY DAWN was prevented from participating by unavoidable circumstance but before June 17, 1995? [50 C.F.R. § 679.4(k)(8)(iv)(E)] Yes.

This provision requires that an applicant show a harvest "in the specific area that corresponds to the area endorsement or area/species endorsement" for which the applicant is claiming unavoidable circumstances after the unavoidable circumstances and before June 17, 1995. This

contrasts with the initial requirement in the unavoidable circumstances regulation of a harvest of *any* LLP crab species between January 1, 1988 and February 9, 1992, the moratorium qualifying period. This date – June 17, 1995 – is the date of final Council action on the LLP. This requirement insures that a vessel cannot get credit for any speculative harvests – harvests made *because* the Council had adopted the LLP.⁵⁴

Pequod met this requirement. It made three documented harvests after the unavoidable circumstances (which lasted from March 4, 1994 to July 5, 1994) and before June 17, 1995. It harvested AI brown king crab on November 24, 1994, December 10, 1994 and May 25, 1995.

Conclusion

The Council limited the availability of unavoidable circumstances to a narrow class of vessels. The vessel had to have harvested LLP crab between January 1, 1988 and February 9, 1992, the qualifying period under the Moratorium Program. After that, the vessel or its owner had to be struck by unavoidable circumstances that kept the vessel out of the fishery for a significant period of time. The Council deliberations and the regulation itself both treat physical damage to a vessel as the paradigm example of unavoidable circumstances. After the physical damage or other unavoidable circumstances, the vessel had to get back into the LLP crab fisheries by June 17, 1995 but this harvest had to be of the specific type of crab and in the specific area for which the applicant is claiming unavoidable circumstances.

I conclude that, as to its application for an AI brown king crab endorsement on its crab license, Pequod has proven that the F/V EARLY DAWN meets the requirements of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), and falls within the narrow class of vessels intended to receive relief by this regulation.

FINDINGS OF FACT

1. The F/V EARLY DAWN made no documented harvests of AI groundfish between January 1, 1992 and June 17, 1995.
2. In 1992 - 1993, Pequod equipped the F/V EARLY DAWN to harvest deepwater crab and brown king crab.
3. Pequod had a specific intent to conduct directed fishing for AI brown king crab with the F/V EARLY DAWN during the period March 4, 1994 to July 5, 1994.
4. The F/V EARLY DAWN suffered significant physical damage on or about March 4, 1994 in an accidental grounding off St. George Island.

⁵⁴ Council Member Dave Benton stated: “I think it’s important, Mr. Chairman, to note that this motion does not reward speculative ventures.” [Exhibit 13 at 2]

5. The F/V EARLY DAWN was not damaged due to substance abuse by the operator of the vessel or any other problem which impaired the operator's ability to command a vessel.
6. The grounding and repairs of the F/V EARLY DAWN prevented the vessel from fishing from March 4, 1994 until July 5, 1994.
7. Pequod would likely have harvested AI brown king crab during the period March 4, 1994 through July 5, 1994 but for the grounding and repairs to the F/V EARLY DAWN during that time period.

CONCLUSIONS OF LAW

1. Pequod did not meet the requirement in 50 C.F.R. § 679.4(k)(8)(iv)(E) because it did not harvest any AI groundfish between January 1, 1992 and June 17, 1995.
2. A lack of processing facilities on Adak Island during the AI endorsement qualification period, January 1, 1992 to June 17, 1995, is not a circumstance that was unique to Pequod or the F/V EARLY DAWN within the meaning of 50 C.F.R. § 679.4(k)(8)(iv)(b)(2).
3. Pequod does not meet the requirements in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), for a Aleutian Islands endorsement on its LLP groundfish license.
4. Directed fishing for LLP crab species means harvesting any amount of crab species.
5. A business decision to harvest deepwater crab species during the endorsement qualification period for an AI brown king crab endorsement, January 1, 1992 to December 31, 1994, is not an unavoidable circumstance within 50 C.F.R. § 679.4(k)(8)(iv).
6. Pequod had a specific intent to harvest AI brown king crab between March 4, 1994 and July 5, 1994, a period within the endorsement qualification period for an AI brown king endorsement, thereby meeting the requirement in 50 C.F.R. § 679.4(k)(8)(iv)(A).
7. The grounding and repairs of the F/V EARLY DAWN are circumstances that are unavoidable within the meaning of 50 C.F.R. § 679.4(k)(8)(iv)(A)(1).
8. The grounding and repairs of the F/V EARLY DAWN are circumstances that are unique to Pequod and to the F/V EARLY DAWN within the meaning of 50 C.F.R. § 679.4(k)(8)(iv)(A)(2).
9. The grounding and subsequent repairs of the F/V EARLY DAWN are circumstances that were unforeseen, and reasonably unforeseeable, by Pequod within the meaning of 50 C.F.R. § 679.4(k)(8)(iv)(A)(3).

10. The circumstances that prevented Pequod from conducting directed fishing for AI brown king crab – the grounding of the F/V EARLY DAWN and subsequent repairs – actually occurred, thereby meeting the requirement in 50 C.F.R. § 679.4(k)(8)(iv)(C).
11. Pequod took all reasonable steps to overcome the circumstances that prevented it from harvesting AI brown king crab by promptly arranging for significant structural repairs of the vessel, thereby meeting the requirement in 50 C.F.R. § 679.4(k)(8)(iv)(D).
12. Pequod made three harvests of AI brown king crab from the F/V EARLY DAWN after the grounding and repairs of the vessel but before June 17, 1995, thereby meeting the requirement in 50 C.F.R. § 679.4(k)(8)(iv)(E).
13. Pequod meets the requirements in the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), to receive an AI brown king endorsement on its LLP crab license.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is AFFIRMED in part and VACATED in part. This Decision takes effect May 13, 2002. The IAD is AFFIRMED as to its denial to Pequod of an AI groundfish endorsement on Pequod's LLP groundfish license. The IAD is VACATED as to its denial to Pequod of an AI brown king endorsement on Pequod's LLP crab species license. RAM is ordered to include an AI brown king endorsement on Pequod's LLP crab species license.

The appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, April 22, 2002. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Mary Alice McKeen
Appeals Officer