

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 03-0015  
)  
NOTORIOUS PARTNERSHIP, ) DECISION  
Appellant )  
) August 9, 2004  
\_\_\_\_\_ )

STATEMENT OF THE CASE

Notorious Partnership (NP) 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>

The IAD denied NP an Aleutian Islands endorsement on its groundfish license [LLG3612] and a St. Matthew blue king crab endorsement on its crab license [LLC3613]. NP sought these endorsements based on the unavoidable circumstances regulation: 50 C.F.R. § 679.4(k)(8)(iv). The IAD denied these endorsements because NP did not harvest those species after a claimed unavoidable circumstance and before June 17, 1995, as required by section (E) of the unavoidable circumstances regulation. NP can appeal the IAD because the IAD directly and adversely affects NP's interests, as required by 50 C.F.R. § 679.43(b).

On appeal, Notorious Partnership argues that it was impossible for it to harvest St. Matthew blue king crab by June 17, 1995 and, therefore, the provision requiring a harvest by June 17, 1995 should not be enforceable against NP. On appeal, Notorious Partnership makes no argument challenging RAM's denial of a Bering Sea endorsement on its LLP groundfish license.<sup>2</sup>

SUMMARY

The IAD is affirmed. Notorious Partnership appeals the denial of a St. Matthew blue king crab endorsement on its LLP crab license. NP claimed this endorsement based on the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv). NP argued that it was impossible for it to meet section (E) of that regulation, which requires a harvest of the particular crab species for which NP is seeking an endorsement after the claimed unavoidable circumstance and before June 17, 1995.

An applicant may only receive credit for a harvest under the unavoidable circumstance

---

<sup>1</sup> IAD, May 15, 2003. 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> Letter from Captain Gretar Gudmundson (July 3, 2003).

regulation if it meets *all* the requirements of the regulation, including section (E). NP's claim that it was impossible for it to meet section (E) is another way of stating that NP wants NMFS to examine the reasons why NP did not harvest St. Matthew blue king crab before June 17, 1995 and make some kind of determination about those reasons.

The North Pacific Fishery Management Council (Council) and NMFS made a policy choice to impose an across-the-board requirement that the unavoidable circumstance applicant must have harvested the particular crab species for which the applicant is seeking an endorsement after the unavoidable circumstance and before June 17, 1995. Nothing in the LLP regulations authorizes RAM or the appeals officer to [1] examine why an applicant did not meet that requirement and [2] extend the deadline based on any kind of determination about why the applicant did not meet that requirement.

### ISSUE

May Notorious Partnership receive a St. Matthew blue king crab endorsement on its LLP license under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv)?

### ANALYSIS

The official LLP record shows no documented harvests of St. Matthew blue king crab from the F/V NOTORIOUS between January 1, 1992 and December 31, 1994.<sup>3</sup> Therefore, Notorious Partnership does not meet the standard endorsement qualification period (EQP) requirement for a St. Matthew blue king crab endorsement on its LLP license.<sup>4</sup>

Notorious Partnership admits this but states it should receive a St. Matthew blue king crab endorsement based on the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), which provides:

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

---

<sup>3</sup> IAD at 5.

<sup>4</sup> 50 C.F.R. § 679.4(k)(5)(ii)(C).

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]**

It is not clear what unavoidable circumstance NP is claiming. NP states that it purchased the F/V NOTORIOUS, formerly the F/V IRONHEAD, in 1994. NP submitted documentation of extensive work it had done on the vessel from August 1994 to December 1994.<sup>5</sup> The mere purchase of a vessel by a new owner is not an unavoidable circumstance. It is a decision by one person or entity, usually for economic reasons, to buy a vessel from another person or entity. Vessels change hands all the time. It is a fact of life in the commercial fishing industry, but it is not unavoidable.

The fact that the F/V NOTORIOUS was out of the fishery from August 1994 to December 1994 could constitute an unavoidable circumstance. It depends on the reason why the vessel was out of the fishery. An economic decision by a new owner to equip the vessel for a new fishery is not an unavoidable circumstance. A decision by an owner to repair significant structural damage to a vessel is ordinarily an unavoidable circumstance.<sup>6</sup>

---

<sup>5</sup> Letter from Captain Gretar Gudmundsson to RAM with receipts from Marine Fluid Power, August 19, 1994 to December 23, 1994, totalling \$127,361.57 (March 7, 2000).

<sup>6</sup> See *Pequod, Inc.*, Appeal No. 00-0013 at 10 - 12 (April 12, 2002). In proposing the unavoidable circumstances provision, Council Member Dave Benton stated: "What I was envisioning was a vessel that had catastrophic damage; a fire that gutted the vessel, something in that order. Not what you would consider routine damage that Robin [Samuelson] encounters when he leaves the dock." Council Member Clem Tillion stated a similar understanding: "So it has to be absolutely catastrophic to be warranted under this or else we're being too lenient." Transcript (uncertified), Council Meeting, June 15 - 17, 1995 at 70 - 71. The transcript is of the Council's deliberation before it took final action on the

If Notorious Partnership met section (E), I would ask it to explain what unavoidable circumstance it was claiming and to submit further evidence on whether it met the other requirements of the unavoidable circumstance regulation. But NP must meet *all* the requirements of the unavoidable circumstance regulation, including section (E). That interpretation adopts the natural reading of language and structure of the regulation, which lists several requirements and states that the applicant “may receive a license *if* the qualified person is able to demonstrate” that the applicant meets them.<sup>7</sup>

That interpretation comports with NMFS’s explanation of the unavoidable circumstance regulation in the Federal Register: “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>8</sup> RAM has consistently applied that interpretation to other applicants, and this Office has affirmed.<sup>9</sup> Even if an applicant met, or could meet, the other requirements in the unavoidable circumstance regulation, an applicant will receive an endorsement under the unavoidable circumstance regulation only if the applicant harvested the particular crab or groundfish species after the unavoidable circumstance and before June 17, 1995.<sup>10</sup>

NP argues that it would have been impossible for it to harvest St. Matthew blue king by June 17, 1995 because it bought the boat in May 1994; the boat was being overhauled from August to December 1994; after the work was finished, the next opening for St. Matthew blue king was in September 1995; and NP fished in that opening.

It is true that, in each year from 1992 through 1995, the St. Matthew Islands blue king crab

---

LLP. The transcript is available on the Administrative Appeals section of the NMFS Alaska region website under “Other Documents,” <http://www.fakr.noaa.gov/appeals/default.htm>.

<sup>7</sup> 50 C.F.R. § 679.4(k)(8)(iv)(emphasis added).

<sup>8</sup> Supplementary Information, Final Rule, 53 Fed. Reg. 52,642, 52,647 (1998)(emphasis added).

<sup>9</sup> *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, and all decisions of the Office of Administrative Appeals, are available on the NMFS Alaska Region website at <http://www.fakr.noaa.gov/appeals/default.htm>.

<sup>10</sup> LLP crab licenses have area/species endorsements. Therefore, for a crab license, the harvest before June 17, 1995 must be of a particular crab species in a particular endorsement area. LLP groundfish licenses originally had area endorsements only. Therefore, for a groundfish license, the harvest by June 17, 1995 simply had to be any species of license limitation groundfish (a term defined in 50 C.F.R. § 679.2) but it had to be in a specific area: Aleutian Islands, Bering Sea, Western Gulf, Eastern Gulf or Southeast Outside.

fishery was only open for a week or less and only in September.<sup>11</sup> But NP's claim that it was "impossible" for it to harvest St. Matthew blue king crab before June 17, 1995 is another way of stating that NP wants NMFS to [1] examine *why* it did not harvest St. Matthew blue king crab before June 17, 1995 and [2] grant NP an endorsement if NMFS determines that NP's reasons were sufficient to justify NP's failure to harvest St. Matthew blue king crab by June 17, 1995.

The defect in this argument is that section (E) of the unavoidable circumstance regulation simply and plainly requires a harvest *before June 17, 1995*.<sup>12</sup> It does not make an exception for any reason. It does not make an exception for applicants who purchased the vessel near the end of the endorsement qualification period. It does not make an exception for fisheries which are only open in September.

This across-the-board rule was intentional. During the notice-and-comment period on the proposed LLP regulation, NMFS received a comment that the requirement for a harvest by June 17, 1995 was "unfair to a person who could have used the [unavoidable circumstance] provision except that he or she did not have a documented harvest before prior [sic] to June 17, 1995."<sup>13</sup> NMFS 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>14</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

---

<sup>11</sup> From 1992 to 1995, the St. Matthew blue king crab fishery was open on the following dates: September 4 - 7, 1992; September 15 - 21, 1993; September 15 - 22, 1994; September 15 - 20, 1995. Tables 2-12, *Annual Management Report for the Commercial and Subsistence Shellfish Fisheries of the Aleutian Islands and Bering Sea and the Western Region's Shellfish Observer Program, 2002*. Alaska Department of Fish and Game, Division of Commercial Fisheries, Regional Information Report No. 4K03-52 (September 2003). It followed a similar pattern until 1999, when the fishery was closed. *Id.*

<sup>12</sup> 50 C.F.R. § 679.4(k)(8)(iv)(E).

<sup>13</sup> Supplementary Information, Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

<sup>14</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.

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>15</sup>

The appellant in our decision in *St. George Marine, Inc.*, made a claim similar to NP's.<sup>16</sup> The applicant's vessel sank and the applicant had a replacement vessel in the water by January 1995. The Pribilof red and blue king crab fishery was only open in 1995 for a few days in September and the appellant participated in that opening. *St. George Marine, Inc.*, upheld RAM's denial of a Pribilof red and blue king endorsement:

The unavoidable circumstance regulation does not give me the authority to examine *why* an applicant did not harvest Pribilof red or blue king crab, or any particular crab species, between the unavoidable circumstance and June 17, 1995. It does not give me the authority to extend the June 17, 1995 deadline based on how long it took a vessel owner to obtain a replacement vessel after the original vessel disappeared. Nor does it authorize me to extend the June 17, 1995 deadline where a particular crab fishery was not open for all or part of 1995 and the applicant made a documented harvest in the first opening in that crab fishery in 1995.<sup>17</sup>

The North Pacific Fishery Management Council and NMFS made a policy choice to impose an across-the-board deadline for a harvest before June 17, 1995 as part of the unavoidable circumstance regulation. The Council and NMFS adopted a requirement that "does not take into account the applicant's individual circumstances and the opening dates of different crab fisheries."<sup>18</sup> Whatever the pros and cons of this approach, it is in a duly promulgated regulation<sup>19</sup> and NMFS must follow it.

Since the F/V NOTORIOUS did not harvest St. Matthew blue king crab before June 17, 1995, I conclude that Notorious Partnership may not receive a St. Matthew blue king crab endorsement under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).<sup>20</sup>

---

<sup>15</sup> Supplementary Information, Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

<sup>16</sup> Appeal No. 02-0024 (Feb. 19, 2004).

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> 50 C.F.R. § 679.4(k)(8)(iv) *adopted by* Final Rule, 63 Fed. Reg. 52,642, 52,657 (1998).

<sup>20</sup> RAM also denied NP's application for a Bering Sea endorsement on its LLP groundfish license. Although NP did not appeal the Bering Sea endorsement, RAM's denial of the Bering Sea groundfish endorsement is correct because NP did not harvest license limitation groundfish in the Bering Sea before June 17, 1995.

## FINDING OF FACT

Notorious Partnership did not make a documented harvest of St. Matthew blue king crab before June 17, 1995.

## CONCLUSIONS OF LAW

1. Notorious Partnership did not meet the requirement in section (E) of the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).
2. Notorious Partnership may not receive a St. Matthew blue king crab endorsement on its LLP license under the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(8)(iv).

## DISPOSITION

The IAD is AFFIRMED. This Decision takes effect September 8, 2004, unless by that date the Regional Administrator orders review of the Decision.

The Appellant or RAM may submit a motion for reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, August 19, 2004. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the appeals officer and must be accompanied by a written statement in support of the motion.

---

Mary Alice McKeen  
Appeals Officer