

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0040
)	
RAYMOND BELLAMY,)	DECISION
Appellant)	
)	June 14, 2005
_____)	

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on August 28, 2002, that denied Raymond Bellamy's application for a groundfish license, with two endorsements, under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹ Mr. Bellamy claimed area endorsements for the Bering Sea and the Central Gulf of Alaska fisheries, based on the fishing history of his vessel, the F/V FARRAR SEA (ADFG 61954, USCG 973143), a catcher vessel with a length overall of 100 feet.

The IAD granted Mr. Bellamy's application for an LLP crab license with three area/species endorsements: Bristol Bay red king crab, Pribilof Islands red and blue king crab, and Bering Sea/Aleutian Islands *C. opilio* and *C. bairdi* (Tanner) crab. The crab license claim was based on the fishing history of the same vessel. RAM issued a nontransferable LLP groundfish license (LLG 4595) and a nontransferable LLP crab license (LLC3338) to Mr. Bellamy, pending a final agency action on his application.

Mr. Bellamy filed a timely appeal of the portion of the IAD that denied his groundfish license claim. He can file an appeal because the IAD directly and adversely affects his interests.² I ordered an oral hearing to help me determine whether Mr. Bellamy qualifies for a groundfish license with a Central Gulf of Alaska area endorsement under an unavoidable circumstance provision in the LLP regulations. The hearing did not address Mr. Bellamy's claim to a Bering Sea area endorsement because I have concluded, as a matter of law, that Mr. Bellamy cannot qualify for that endorsement. This office does not order hearings on factual issues that are not determinative with regard to the relief sought.³

The hearing was held on May 27, 2005. Testifying at the hearing via telephone from Homer, Alaska, were: Mr. Bellamy, the owner of the F/V FARRAR SEA; Ian Pitzman, a replacement skipper for the vessel; Mimi Tolva, the widow of former skipper Mike Tolva; and Chris Branch,

¹The LLP is in 50 C.F.R. §679, primarily 50 C.F.R. §679.4(k). The LLP regulations can be found on the NMFS Alaska Region website <<http://www.fakr.noaa.gov/regs/summary.htm>>.

²50 C.F.R §679.43(b).

³50 C.F.R. §679.43(g)(3)(iv).

a crew member of the F/V FARRAR SEA. Attorney C. Michael Hough of Homer represented the Appellant.

ISSUES

1. Does Mr. Bellamy qualify for an LLP groundfish license with a Bering Sea area endorsement under the unavoidable circumstance provision, based on Mr. Tolva's illness from cancer?
2. Does Mr. Bellamy qualify for an LLP groundfish license with a Central Gulf of Alaska area endorsement under the unavoidable circumstance provision, based on Mr. Tolva's illness from cancer?

SUMMARY

Mr. Bellamy claims that he qualifies for an LLP groundfish license, with a Bering Sea area endorsement and a Central Gulf of Alaska area endorsement, under an unavoidable circumstance provision in the LLP regulations.⁴ These claims are based on the illness from cancer in 1995 of Mike Tolva, the operator of the F/V FARRAR SEA.⁵

Mr. Bellamy does not qualify for a Bering Sea area endorsement because he did not satisfy one of the requirements of the unavoidable circumstance provision. Specifically, the F/V FARRAR SEA did not make a documented harvest of groundfish in the Bering Sea after Mr. Tolva temporarily recovered from his illness on April 1, 1995, but before June 17, 1995.

Mr. Bellamy qualifies for the Central Gulf of Alaska area endorsement because he satisfied all of the criteria under the unavoidable circumstance provision with regard to that endorsement.

The IAD is affirmed as to the Bering Sea area endorsement, but vacated as to the Central Gulf of Alaska area endorsement.

ANALYSIS

To qualify for an LLP groundfish license with a Bering Sea area endorsement or a Central Gulf of Alaska area endorsement, Mr. Bellamy must first establish that his qualifying vessel made at least one documented harvest of groundfish in the Bering Sea/Aleutian Islands (BSAI) or Gulf of Alaska management area during the general qualification period (GQP), January 1, 1988, through June 27, 1992.⁶ The NMFS official LLP record shows that the F/V FARRAR SEA

⁴50 C.F.R. §679.4(k)(8)(iv).

⁵Mr. Tolva died from cancer on June 3, 2000. Testimony of Mimi Tolva, tape 1, side B.

⁶50 C.F.R. §679.4(k)(4)(i)(A)(1) and (B)(1). See also §679.4(k)(4)(iv) and (v).

made a documented harvest of Pacific cod in the Bering Sea on November 23, 1991.⁷ RAM determined that the F/V FARRAR SEA met the GQP requirement.⁸

To qualify for a Bering Sea area endorsement, Mr. Bellamy must also show that his vessel made at least one documented harvest of groundfish in the Bering Sea subarea during the endorsement qualification period (EQP) for the fishery, January 1, 1992, through June 17, 1995.⁹ The NMFS official LLP record shows that the F/V FARRAR SEA did not make any documented harvests of groundfish in the Bering Sea subarea during the EQP.¹⁰ Mr. Bellamy does not dispute the NMFS official LLP record.

To qualify for a Central Gulf of Alaska endorsement, Mr. Bellamy must show that his vessel made either two documented harvests of groundfish in the Central Gulf, one per year during any two years between January 1, 1992, and June 17, 1995;¹¹ or four documented harvests of groundfish in the Central Gulf between January 1, 1995, and June 17, 1995.¹² The NMFS official LLP record shows that the F/V FARRAR SEA made a total of three documented harvests of groundfish in the Central Gulf of Alaska during the EQP. All three were in 1995: Pacific cod on March 16 and March 21, and yelloweye rockfish (red snapper) on June 11. Again, Mr. Bellamy does not dispute the NMFS official LLP record.

Rather, Mr. Bellamy argues that he qualifies for the Bering Sea and Central Gulf of Alaska area endorsements under 50 C.F.R. §679.4(k)(8)(iv), one of the three unavoidable circumstance provisions in the LLP regulations. The threshold requirement of 50 C.F.R. §679.4(k)(8)(iv) is that the owner of the vessel must have made a documented harvest of groundfish between January 1, 1988, and February 9, 1992. Mr. Bellamy meets this requirement because the F/V FARRAR SEA made a documented harvest of Pacific cod in the Bering Sea on November 23, 1991. Then the Appellant must show that the vessel was unable to meet all the criteria in 50 C.F.R. §679.4(k)(4) because of an unavoidable circumstance.

Mr. Bellamy claims that the F/V FARRAR SEA would have made the requisite documented harvests for both area endorsements but for the illness from cancer of the vessel's operator, Mike Tolva, between 1993 and April 1, 1995.¹³ During the hearing, Mr. Bellamy and Mrs. Tolva

⁷Memorandum to file by Chief Appeals Officer Edward H. Hein (June 10, 2005).

⁸IAD at 5.

⁹50 C.F.R. §679.4(k)(4)(ii)(B).

¹⁰IAD at 6.

¹¹50 C.F.R. §679.4(k)(4)(ii)(I).

¹²50 C.F.R. §679.4(k)(4)(ii)(J).

¹³Mr. Bellamy's affidavit (Dec. 3, 1999); Mike Tolva's affidavit (Feb. 18, 2000); and C. Michael Hough's letter to RAM (Oct. 14, 2002).

characterized the business relationship between Mr. Bellamy and Mr. Tolva as a lease relationship. They testified that Mr. Tolva, as the lessee of the F/V FARRAR SEA, was in charge of the day-to-day operations of the vessel, and that Mr. Bellamy was not responsible for the day-to-day operations. [Tape 1, side B] Mr. Tolva, in an affidavit, also stated that he leased the vessel from Mr. Bellamy for most of the period 1993 through early 1998.¹⁴

I found both Mr. Bellamy and Mrs. Tolva to be sincere and credible witnesses. I have no reason to doubt their testimony. Based on a preponderance of evidence in the record, I find that Mr. Tolva was responsible for the day-to-day operations of the F/V FARRAR SEA in 1995, the critical year for purposes of Mr. Bellamy's unavoidable circumstance claim. Where someone other than the owner of the vessel is responsible for the day-to-day operations of the vessel, including the decisions regarding when, where, and whether to fish, I conclude it is reasonable to impute that person's intent and actions to the vessel's owner, for purposes of an unavoidable circumstance claim. Depending on the facts of each case, an Appeals Officer should be able to consider the intent and actions of the vessel owner, the person in charge of the fishing operations, or both. Therefore, I conclude that Mr. Tolva's intent and actions can be imputed to Mr. Bellamy to determine whether Mr. Bellamy can qualify for a Bering Sea and a Central Gulf of Alaska groundfish license endorsement under the unavoidable circumstance provision in the LLP regulations.

Thus, under the unavoidable circumstance provision, Mr. Bellamy must establish that:

- (1) Mr. Tolva had a specific intent at the time of his illness to make the requisite documented harvests of LLP groundfish during a specific time period in the Bering Sea and the Central Gulf of Alaska;
- (2) Mr. Tolva's specific intent to harvest the LLP groundfish was thwarted by a circumstance that was unavoidable, unique, and unforeseen and reasonably unforeseeable to him;
- (3) the circumstance that prevented the F/V FARRAR SEA from harvesting the LLP groundfish actually occurred;
- (4) Mr. Tolva took all reasonable steps to overcome the circumstance that prevented him from harvesting the LLP groundfish; and
- (5) Mr. Tolva used the F/V FARRAR SEA to make at least one documented harvest of LLP groundfish in the Bering Sea and the Central Gulf of Alaska after his alleged unavoidable circumstance but before June 17, 1995.¹⁵

¹⁴Mr. Tolva said he was unable to fish in 1994 due to illness from cancer. He was diagnosed with cancer in April 1994. Mike Tolva affidavit at 1-2 (Feb. 18, 2000).

¹⁵50 C.F.R. §679.4(k)(8)(iv)(A) - (E).

1. Does Mr. Bellamy qualify for an LLP groundfish license with a Bering Sea area endorsement under the unavoidable circumstance provision, based on Mr. Tolva's illness from cancer?

Mr. Bellamy claims that Mr. Tolva's illness from cancer prevented the F/V FARRAR SEA from making the requisite documented harvests to qualify for a Bering Sea area endorsement. Under the unavoidable circumstance provision, Mr. Bellamy must establish that the vessel made at least one documented harvest of LLP groundfish in the Bering Sea after Mr. Tolva temporarily recovered from his illness from cancer on April 1, 1995, but before June 17, 1995.¹⁶

The NMFS official LLP record shows, and Mr. Bellamy does not dispute, that the F/V FARRAR SEA did not make at least one documented harvest of LLP Bering Sea groundfish between April 1, 1995, and June 17, 1995. I therefore find that the F/V FARRAR SEA did not make a documented harvest of Bering Sea groundfish after the unavoidable circumstance but before June 17, 1995. I conclude, therefore, that Mr. Bellamy does not meet the requirements of 50 C.F.R. §679.4(k)(8)(iv)(E). As this office has stated in several decisions, the requirement of a documented harvest after an unavoidable circumstance but before June 17, 1995, is an absolute requirement to qualify under the unavoidable circumstance provision.¹⁷ Therefore, I conclude that Mr. Bellamy does not qualify for an LLP groundfish license with a Bering Sea endorsement under the unavoidable circumstance provision, based on Mr. Tolva's illness from cancer.

2. Does Mr. Bellamy qualify for an LLP groundfish license with a Central Gulf of Alaska area endorsement under the unavoidable circumstance provision, based on Mr. Tolva's illness from cancer?

Because the F/V FARRAR SEA made three documented harvests of groundfish in the Central Gulf of Alaska between January 1, 1995, and June 17, 1995, Mr. Bellamy can qualify for an LLP groundfish license with a Central Gulf area endorsement if he proves that the vessel would have made a fourth documented harvest during that time period but for an unavoidable circumstance.¹⁸

Mr. Bellamy claims that the F/V FARRAR SEA would have made another documented harvest

¹⁶50 C.F.R. §679.4(k)(8)(iv)(E).

¹⁷*Nuka Island, Inc.*, Appeal No. 02-0031 (Jan. 14, 2005); *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 (Sep. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sep. 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 Donovan*, Appeal No. 02-0008 at 8 - 9 (Sep. 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>>.

¹⁸50 C.F.R. §679.4(k)(4)(ii)(J) and §679.4(k)(8)(iv).

of Pacific cod with pot gear in the Central Gulf during the first half of March 1995 but for Mr. Tolva's illness from cancer.¹⁹ Mr. Hough stated in his response to my Request for Evidence:

Mike Tolva was fishing the Farrar Sea in the Bering Sea in January of 1995. During the season, Mike had to fly out due to complications caused by his cancer. Ian Pitzman had to take over as skipper.

Mike directed the crew to bring the crab pots back with the vessel, as opposed to storing the pots in Dutch Harbor, so that the pots could be converted to fish cod in the Central Gulf. The crew was not happy at having to do so because they had made money fishing crab, they were exhausted and looking forward to time off.

When the Farrar Sea did return to Homer, Mike made efforts to act as skipper again by directing the pot conversion, but he failed to get the conversions accomplished due to cancer complications and Ian again was put in a position of having to act as skipper doing what he had never had to do before; direct the conversion of about 80 crab pots into cod pots. Ian finally did get the pots converted, something Mike could have accomplished in a much briefer period of time. Once Ian got fishing, the Farrar Sea did make two large deliveries.

Based on discussions with Ian Pitzman and a crew member who fished with Mike and Ian in 1995, the intent to fish was certainly expressed prior to January of 1995.

Ian is the best person to explain where Mike would have fished for cod. At a minimum, he would have fished the same areas Ian fished, off the west end of Kodiak and off Gore Point. Mike would have fished the end of January through June 17, 1995. . . .

Chris Branch is a crew member who is knowledgeable about the plans to fish cod, the delays in converting the crab pots and fishing the subject fishery with Ian.²⁰

In a 1999 affidavit, Mr. Tolva wrote:

I tried to fully fish the subject fisheries in 1995 by training a relief skipper, but by the time we got everything together and I felt he was competent enough to skipper the vessel we only got two trips in the Gulf. We did catch and sell fish until they closed the fishery. . . .

I was able to stay close to medical treatment in Central Gulf, while I could not

¹⁹Request for Evidence to Mr. Bellamy (May 26, 2004); and C. Michael Hough response to the Request for Evidence (June 14, 2004).

²⁰Hough response to the Request for Evidence (June 14, 2004).

safely do so in BSAI at that time.²¹

In Wizard Fisheries, Inc., we said that a heart attack, stroke, or sudden debilitating illness or injury to the owner, skipper, or crew members can be considered an unavoidable circumstance.²² Therefore, Mr. Tolva's illness from cancer is an allowable basis for Mr. Bellamy's unavoidable circumstance claim. To qualify for an LLP groundfish license with a Central Gulf of Alaska area endorsement, Mr. Bellamy must satisfy all of the requirements under the unavoidable circumstance provision.

1. Did Mr. Tolva have a specific intent at the time of the unavoidable circumstance to use the F/V FARRAR SEA to make at least one documented harvest of Pacific cod in the Central Gulf of Alaska during a specific time period?

Mimi Tolva, Ian Pitzman, and Chris Branch testified that Mr. Tolva was ill from cancer when he left the F/V FARRAR SEA in the Bering Sea at St. Paul, Alaska, on January 22, 1995. They said that he remained ill until after the vessel's replacement skipper, Mr. Pitzman, made the vessel's two documented harvests of Pacific cod in the Central Gulf on March 16 and 21, 1995. Their testimony was detailed, moving, and credible.

Mr. Pitzman and Mr. Branch testified that they knew Mr. Tolva wanted to use the F/V FARRAR SEA to harvest Pacific cod in the Central Gulf of Alaska with pot gear when Mr. Tolva ordered the vessel to return to Homer, Alaska, with its crab pots on February 17, 1995, the day the vessel had made its last delivery of opilio crab and the day the winter Bering Sea opilio crab fishery closed. [Tape 1, sides A and B] Mr. Pitzman said he understood that when the vessel returned to Homer, "We were cod fishing, no doubt about it." He knew it because "Mike had told us to bring the gear home." [Tape 1, side B] Both recalled being quite upset about having to stack and haul 116 crab pots back to Homer. They said they had made plenty of money fishing for crab, and neither knew how to convert crab pots to cod pots for cod fishing. [Tape 1, sides A and B]

Mr. Pitzman and Mr. Branch did not know specifically when Mr. Tolva had planned to fish cod, but Mr. Pitzman understood that Mr. Tolva had wanted to do it "as soon as possible" after the vessel returned to Homer. [Tape 1, side B] Mr. Pitzman testified that "Mike was the kind of guy . . . who wanted make as much money as possible within the time frame that he had to fish." [Tape 1, side B]

It would make sense that Mr. Tolva would have wanted the F/V FARRAR SEA to leave as soon as possible for the Central Gulf Pacific cod fishing grounds. He had ordered the vessel to return to Homer with the vessel's crab fishing pots immediately after the opilio crab season ended. Based on closures in previous years, Mr. Tolva would have been able to anticipate that there

²¹Mike Tolva's affidavit (Feb. 18, 2000).

²²Appeal No. 03-0004 at 12, nn. 45-46 (March 3, 2005).

would be approximately one month left to fish for cod after the vessel's return to Homer.²³ It is believable that Mr. Tolva would have wanted to make as many fishing trips as possible before the cod season ended.

Mr. Pitzman and Mr. Branch testified that it took five to six days to get to Homer by February 23, 1995, due to bad weather (an ice storm). They estimated that it normally takes one to two days to convert 100 crab pots to cod pots, and one to two days to buy groceries and bait. [Tape 1, sides A and B] A receipt in the record shows that Mr. Tolva purchased cod triggers for the crab pots of the F/V FARRAR SEA on February 28, 1995.²⁴ Mr. Pitzman testified that Mr. Tolva did not relinquish control of the vessel until a few days before the vessel's first fishing trip for Pacific cod in the Central Gulf, which began on or about March 14, 1995. [Tape 1, side B]

Mr. Pitzman testified that a normal fishing trip for cod in the Central Gulf takes two to three days, but that the vessel could have made as many as six fishing trips in six days if the crew wanted to do so and if fishing conditions were good. [Tape 1, side B] Based on this testimony, it would appear that the F/V FARRAR SEA easily could have made a documented harvest of Pacific cod with pot gear in the Central Gulf between the vessel's originally planned departure date (on or about March 1, 1995), and the date the vessel actually departed, March 14, 1995.

I find Mr. Pitzman's estimates plausible, given that both of the other documented harvests of Pacific cod in this case were made within a two-to-three-day fishing trip. Based on a preponderance of the evidence before me, I find that when the Bering Sea opilio crab fishery closed on February 17, 1995, Mr. Tolva held the specific intent to begin using the F/V FARRAR SEA to harvest Pacific cod in the Central Gulf of Alaska approximately one week after the vessel's arrival in Homer, which would have been on or about March 1, 1995, and to make at least one documented harvest of Pacific cod in the Central Gulf of Alaska during a specific time period, i.e., between March 1 and March 14, 1995.

2. Was Mr. Tolva's specific intent to harvest Pacific cod in the Central Gulf of Alaska thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable to him?

Mr. Tolva's illness from cancer was obviously beyond his control, unavoidable, and unique to him, but was it unforeseen and reasonably unforeseeable to him? Mimi Tolva testified that her husband was diagnosed with cancer in April 1994, and started chemotherapy in June or July 1994. "At first, he would do okay, but the chemotherapy was wearing him down; then he would bounce back and wanted to keep fishing." [Tape 1, side B] She testified that he attempted to fish the winter opilio crab season, but had to leave the F/V FARRAR SEA on January 22, 1995,

²³NMFS groundfish fisheries closure records show that the Pacific cod fishery in the Central Gulf of Alaska had previously closed on April 4, 1992, March 24, 1993, and March 16, 1994, and remained closed through at least June 17 in each of those years. See NMFS Alaska Region website <<http://www.fakr.noaa.gov/sustainablefisheries/closure.html>>.

²⁴Invoice from Kachemak Gear Shed to Farrar Sea Fish, Inc. (Feb. 28, 1995).

because of a relapse of his cancer-related illness. Mrs. Tolva stated that, after the F/V FARRAR SEA arrived in Homer from the Bering Sea on February 23, 1995, “Mike was weak, [and] feeling up and down . . . and by March of 1995, it was taking him longer and longer to recover from the chemo.” [Tape 1, side B]

Mimi recalled that “Mike wanted to go cod fishing” after the vessel returned to Homer; he thought it was going to be important for the future.” Mrs. Tolva also recalled that Mr. Tolva had had a chemotherapy treatment on or about February 23, 1995, and that he was “very sick” for the next two to three weeks. [Tape 1, side B] She further recalled that her husband had a “certain amount of frustration” and was “not feeling good” at that time: “He wanted them to be out making money cod fishing, but it wasn’t happening.” She concluded: “When the vessel returned to Homer, Mike had every intention of fishing cod that year [1995]; he didn’t get someone to take his place because he kept thinking he was going to bounce back.” [Tape 1, side B]

Ian Pitzman testified that it was an “uncertain time” when the F/V FARRAR SEA returned to Homer on February 23, 1995. “We really didn’t know what was next.” He had been a “crab captain [for the vessel], but he didn’t know who would be the cod captain.” He also did not know “exactly when they’d be going or if he’d be going” cod fishing, but he knew that “Mike always expected to come back, even when he was sick.” [Tape 1, side B]

Chris Branch testified that he had “no idea of what was going on either way” after the vessel returned to Homer on February 23, 1995. He stated, “Mike was “always acting like he was going to come back; he didn’t want to relinquish command of the boat . . . that was his life.” [Tape 1, side B]

In sum, all of the witnesses testified that Mr. Tolva had, throughout his illness, periods of apparent recovery followed by very rapid incapacitating relapses, and that at the time Mr. Tolva left the vessel in January 1995, he and his crew had no way of knowing the extent or certainty of his condition. Due to the nature of Mr. Tolva’s illness, it is evident that the timing and duration of his periods of recovery and relapse were unforeseen and reasonably unforeseeable by him.

The final question under this part of the analysis of Mr. Bellamy’s unavoidable circumstance claim is whether the claimed circumstance actually thwarted Mr. Tolva’s specific intent to make an additional harvest of Pacific cod in early March 1995.

Mr. Pitzman testified that he can convert 150 crab pots to cod pots in one day, but that it took him an “unnecessarily long period of time” to convert the crab pots of the F/V FARRAR SEA to cod pots when Mr. Tolva was in relapse because “he had never done it before,” “the crew was reluctant to do it,” and because “they kept waiting for Mike to show up and take over.” [Tape 1, side A] He testified that “if Mike had been in charge, he would have been ramrodding us from the start; it would have taken a lot faster to do it;” [Tape 1, side B] and “the vessel would have made at least a couple of more trips for cod.” [Tape 1, side A] Mr. Pitzman testified that “what the crew missed most was “Mike’s leadership and enthusiasm for cod fishing;” and that “he really wanted to get the boat out there, but he couldn’t get us to do it, given the time frame that

he wanted to do it” because he was ill. [Tape 1, side B] Mr. Pitzman testified that “Mike liked to be in charge; he wanted to be on the boat, to run the boat; but he couldn’t [because] he was pretty sick at that time.” [Tape 1, side B]

Mr. Pitzman testified that he took over the crab pot conversions, “when it became obvious that Mike could no longer function;” and that he did so “just a couple of days before they left on the vessel’s first fishing trip.” [Tape 1, side A] He estimated that it took approximately ten days to convert 80 crab pots to cod pots. [Tape 1, side B] Chris Branch estimated that it took them approximately two weeks to convert nearly 100 crab pots to cod pots; and that the F/V FARRAR SEA departed for the Pacific cod fishing grounds two days after the pots were converted. [Tape 1, side B] According to Mr. Branch, “all they really would have had to do (after the pots were converted) was get groceries and bait; and that once the pots were on the boat, they would have left immediately.” [Tape 1, side B] According to Mr. Pitzman, “if Mike had not been ill, he would have kept us up 48 hours straight; we would have converted every pot; [and] we would have got a lot of fishing done.” [Tape 1, side A]

Based on a preponderance of the evidence, I find that Mr. Tolva’s illness caused several days of delay in the departure of the F/V FARRAR SEA for the Pacific cod fishing grounds in the Central Gulf of Alaska, and that, but for those delays, the vessel could have left sooner and made at least one more fishing trip between March 1 and March 14, 1995. I conclude that Mr. Tolva’s specific intent to harvest Pacific cod in the Central Gulf of Alaska during the specific time period between March 1 and March 14, 1995, was thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable to him.

3. Did the circumstance that prevented the F/V FARRAR SEA from making an additional harvest of Pacific cod in the Central Gulf of Alaska in March 1995 actually occur?

Based on a preponderance of evidence in the record, I find that Mr. Tolva was in a period of relapse and ill from cancer between January 22, 1995, and April 1, 1995. I have already concluded that this unavoidable circumstance prevented the F/V FARRAR SEA from making an additional harvest of Pacific cod in the Central Gulf of Alaska. Therefore, I find that the circumstance that prevented the F/V FARRAR SEA from making an additional harvest of Pacific cod in the Central Gulf of Alaska in March 1995 actually occurred.

4. Did Mr. Tolva take all reasonable steps to overcome the circumstance that prevented the F/V FARRAR SEA from making an additional harvest of Pacific cod in the Central Gulf of Alaska?

Mimi Tolva testified that when her husband “finally realized he could not run the boat, he had Ian [Pitzman] do it” and that it was “a last-minute decision.” [Tape 1, side B] She testified her husband could have hired someone else much sooner, but “he thought he’d be able to do it.” [Tape 1, side B] Mr. Pitzman testified that during this period of time, “Mike was really not ready to give the boat to someone else; he probably just wanted someone to fill in for him for a couple of days.” [Tape 1, side B]

Mr. Bellamy testified that he did not know the extent of Mr. Tolva’s illness at the time, and that

he had “no authority over the day-to-day operations of the vessel.” [Tape 1, side B] Mr. Bellamy recalled asking Mr. Tolva at that time if he wanted him to take over the operations of the vessel, but that he had said no, and that doing the job made him feel better. [Tape 1, side B] Mimi Tolva testified that she was unaware at that time of the impact that her husband’s illness had on the daily operations of the vessel. [Tape 1, side B]

Mr. Tolva waited to hire Mr. Pitzman to take over the F/V FARRAR SEA until after he realized that he could no longer continue with the operations of the vessel. Mr. Pitzman was working as a crew member of the vessel after it had returned from the Bering Sea to Homer, Alaska, when Mr. Tolva was ill, and was undoubtedly the best available person to skipper the vessel. While he did not have experience in Pacific cod fishing in the Central Gulf, he had previously captained the vessel, making several deliveries of opilio crab at St. Paul Island during 1995. In hindsight, Mr. Tolva’s illness cost the vessel valuable time and additional fishing trips. Nevertheless, the delays caused by his illness are understandable given the uncertain nature of the illness. I find that Mr. Tolva took all reasonable steps to overcome the circumstance that prevented the F/V FARRAR SEA from making an additional harvest of Pacific cod in the Central Gulf of Alaska in March 1995.

5. Did Mr. Tolva use the F/V FARRAR SEA to make at least one documented harvest of LLP groundfish in the Central Gulf of Alaska after the unavoidable circumstance but before June 17, 1995?

The official LLP record shows that *Mr. Tolva* used the F/V FARRAR SEA to make a documented harvest of yelloweye rockfish in the Central Gulf on June 11, 1995. That was after Mr. Tolva went through a period of relapse and temporarily recovered from his illness on April 1, 1995. Using this date as the end of the unavoidable circumstance, I find that Mr. Tolva made the harvest of yelloweye rockfish after the unavoidable circumstance but before June 17, 1995.

I conclude that Mr. Bellamy has satisfied all of the criteria under the unavoidable circumstance provision in the LLP regulations. As a result, I conclude that he qualifies for an LLP groundfish license with a Central Gulf of Alaska area endorsement under the unavoidable circumstance provision, based on Mr. Tolva’s illness from cancer.

FINDINGS OF FACT

I find by a preponderance of the evidence in the record the following facts:

1. Mr. Tolva was responsible for the day-to-day operations of the F/V FARRAR SEA in 1995.
2. The F/V FARRAR SEA did not make a documented harvest of Bering Sea groundfish after the unavoidable circumstance but before June 17, 1995.
3. Mr. Tolva’s illness from cancer is an allowable basis for Mr. Bellamy’s unavoidable circumstance claim.

4. When the Bering Sea opilio crab fishery closed on February 17, 1995, Mr. Tolva held the specific intent to begin using the F/V FARRAR SEA to harvest Pacific cod in the Central Gulf of Alaska approximately one week after the vessel's arrival in Homer, which would have been on or about March 1, 1995, and to make at least one documented harvest of Pacific cod in the Central Gulf of Alaska during a specific time period, i.e., between March 1 and March 14, 1995.
5. Mr. Tolva's illness from cancer was beyond his control, unavoidable, and unique to him.
6. The timing and duration of Mr. Tolva's periods of recovery and relapse were unforeseen and reasonably unforeseeable by him.
7. Mr. Tolva's illness caused several days of delay in the departure of the F/V FARRAR SEA for the Pacific cod fishing grounds in the Central Gulf of Alaska. But for those delays, the vessel could have left sooner and made at least one more fishing trip between March 1 and March 14, 1995.
8. Mr. Tolva was in a period of relapse and ill from cancer between January 22, 1995, and April 1, 1995.
9. The circumstance that prevented the F/V FARRAR SEA from making an additional harvest of Pacific cod in the Central Gulf of Alaska in March 1995 actually occurred.
10. Mr. Tolva took all reasonable steps to overcome the circumstance that prevented the F/V FARRAR SEA from making an additional harvest of Pacific cod in the Central Gulf of Alaska in March 1995.
11. Mr. Tolva made the harvest of yelloweye rockfish after the unavoidable circumstance but before June 17, 1995.

CONCLUSIONS OF LAW

1. Where someone other than the owner of the vessel is responsible for the day-to-day operations of the vessel, including the decisions regarding when, where, and whether to fish, it is reasonable to impute that person's intent and actions to the vessel's owner, for purposes of an unavoidable circumstance claim. Depending on the facts of each case, an Appeals Officer should be able to consider the intent and actions of the vessel owner, the person in charge of the fishing operations, or both.
2. Mr. Tolva's intent and actions can be imputed to Mr. Bellamy to determine whether Mr. Bellamy can qualify for a Bering Sea and a Central Gulf of Alaska groundfish license endorsement under the unavoidable circumstance provision in the LLP regulations.
3. Mr. Bellamy does not meet the requirements of 50 C.F.R. §679.4(k)(8)(iv)(E).
4. Mr. Bellamy does not qualify for an LLP groundfish license with a Bering Sea endorsement

under the unavoidable circumstance provision, based on Mr. Tolva's illness from cancer.

5. Mr. Tolva's specific intent to harvest Pacific cod in the Central Gulf of Alaska during the specific time period between March 1 and March 14, 1995, was thwarted by a circumstance that was unavoidable, unique, unforeseen, and reasonably unforeseeable to him.

6. Mr. Bellamy has satisfied all of the criteria under the unavoidable circumstance provision in the LLP regulations.

7. Mr. Bellamy qualifies for an LLP groundfish license with a Central Gulf of Alaska area endorsement under the unavoidable circumstance provision, based on Mr. Tolva's illness from cancer.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is **AFFIRMED** with respect to Mr. Bellamy's claim for a Bering Sea LLP groundfish license endorsement, but **VACATED** with respect to his claim for a Central Gulf of Alaska LLP groundfish license endorsement. RAM is ordered to issue a transferable LLP groundfish license with a Central Gulf of Alaska area endorsement to Raymond Bellamy. This Decision takes effect on July 14, 2005, 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 June 24, 2005, the tenth day after this Decision. 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.

Randall J. Moen
Appeals Officer