

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
ARCTIC BARUNA, L.L.C.,)
Appellant)
)
)
December 22, 2004
)
_____)

STATEMENT OF THE CASE

Arctic Baruna, L.L.C., filed this timely appeal challenging the revocation of crab license #LLC5206 by the Restricted Access Management (RAM) Program of the National Marine Fisheries Service (NMFS), Alaska Region. The Appellant's predecessor, All Alaskan Seafoods, Inc. (AAS),¹ applied for the license in November 1999 under the North Pacific Groundfish and Crab License Limitation Program (LLP).² AAS based its claim to this license on the crab fishing history of the F/V PACIFIC APOLLO (ADFG 33015; USCG 513151).

RAM issued an interim nontransferable license to AAS on January 9, 2001. RAM revoked the license nine months later in an Initial Administrative Determination, dated October 24, 2001, on the grounds that the vessel had not harvested any LLP crab³ in the Bering Sea/Aleutian Islands fishery during the newly established Recent Participation Period (RPP).⁴ Arctic Baruna petitioned RAM for reconsideration on December 21, 2001. RAM issued an Initial Administrative Determination on Reconsideration, dated August 14, 2002, that affirmed the IAD and revoked the interim license on two grounds: (1) the vessel had not made the requisite documented crab harvests in the appropriate Endorsement Qualification Periods (EQP)⁵ to qualify for a license, nor did the vessel meet the requirements of the "unavoidable circumstance"

¹AAS was incorporated in 1975. AAS owned the F/V PACIFIC APOLLO when it sank on October 24, 1990, and transferred the fishing history of the vessel to Arctic Baruna I, Inc., on May 21, 1997. Arctic Baruna I, Inc., sold the fishing history to Arctic Baruna, L.L.C., on December 22, 1998. AAS was dissolved in 2000. *See* Lloyd Cannon Affidavit (Dec. 20, 2001) at 1-2 and Attachments.

²The 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 Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>

³LLP crab are species harvested in the BSAI crab fishery. *See* 50 C.F.R. §679.2 (definition of "crab species").

⁴The RPP is the period January 1, 1996, through February 7, 1998. 50 C.F.R. §679.4(k)(5)(iii).

⁵50 C.F.R. §679.4(k)(5)(ii).

provision;⁶ and (2) as stated in the IAD, the vessel did not make the requisite LLP crab harvest during the RPP.

Arctic Baruna appealed the IAD on Reconsideration on October 14, 2002. Arctic Baruna can appeal because the IAD on Reconsideration directly and adversely affects the Appellant's interests, as required by 50 C.F.R. §679.43(b). The Appellant did not request an oral hearing, and none was held. The record has sufficient information to decide this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and decide this appeal.

ISSUE

Should Arctic Baruna, L.L.C.'s interim nontransferable LLP crab license #LLC5206 become a permanent transferable license, or should it be revoked?

ANALYSIS

To qualify for an LLP crab license, an applicant must own the LLP qualifying fishing history⁷ of a vessel, as specified in regulation,⁸ and must meet the requirements of the RPP provision.⁹ An LLP qualifying fishing history of a vessel consists of a specified number of documented harvests of LLP crab species during a General Qualification Period (GQP)¹⁰ and during one or more Endorsement Qualification Periods.¹¹

It is undisputed that the fishing history of the F/V PACIFIC APOLLO includes the requisite documented LLP crab harvest to meet the GQP requirement. The Appellant concedes that the vessel did not make any documented harvests of LLP crab during the EQPs for the two area/species endorsements it seeks: the BSAI *C. opilio* and *C. bairdi* (Tanner) crab and the

⁶50 C.F.R. §679.4(k)(8)(iv).

⁷"An LLP qualifying fishing history meets the documented harvest requirements of 50 C.F.R. §679.4(k)(5)(i) and (ii)." See 50 C.F.R. §679.4(k)(5)(iii)(A).

⁸See 50 C.F.R. §679.2 (definition of "eligible applicant" for purposes of the LLP program). Under paragraphs (1) or (2) of the definition, the critical element is that one must own a vessel's LLP qualifying fishing history at the time the license is issued. Under paragraph (1), the owner of the vessel on June 17, 1995, is presumed to own the vessel's fishing history, but that presumption can be rebutted if it is shown that the fishing history has been transferred as provided in paragraph (2). Paragraphs (3), (4), and (5) of the definition do not apply to this Appellant.

⁹50 C.F.R. §679.4(k)(5)(iii). See also *Bella K of Seattle, Inc.*, Appeal No. 02-0006 (March 25, 2004).

¹⁰50 C.F.R. §679.4(k)(5)(i).

¹¹50 C.F.R. §679.4(k)(5)(ii).

Bristol Bay red king crab.¹² The Appellant asserts, however, that it qualifies for these endorsements without meeting the EQP requirements because it meets the requirements of the unavoidable circumstance provision.¹³ That provision reads:

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.

In the IAD on Reconsideration, RAM determined, in particular, that the applicant did not demonstrate that the F/V PACIFIC APOLLO, or a replacement vessel, had made the

¹²The EQP requirement for a BSAI area/species endorsement is three documented harvests of Tanner crab during the three-year period January 1, 1992, through December 31, 1994. 50 C.F.R. §679.4(k)(5)(ii)(B). The EQP requirement for the Bristol Bay red king area/species endorsement is one documented harvest of red king crab during the four-year period January 1, 1991, through December 31, 1994. 50 C.F.R. §679.4(k)(5)(ii)(F).

¹³50 C.F.R. §679.4(k)(8)(iv). This unavoidable circumstance provision should not be confused with the unavoidable circumstance provision for RPP, found at 50 C.F.R. §679.4(k)(5)(v).

documented harvests required by paragraph (E) after the F/V PACIFIC APOLLO sank but before June 17, 1995.¹⁴ Paragraph (E) establishes a mandatory harvest requirement; if an applicant cannot meet that requirement, then its unavoidable circumstance claim fails.¹⁵

It is undisputed that Arctic Baruna, L.L.C., owns LLP crab licenses based on the fishing history of three other vessels: license #LLC2087 derives from the qualifying fishing history of the F/V SEA PRODUCER; license #LLC2088 derives from the qualifying fishing history of the F/V OCEAN TEMPEST; and license #LLC2120 derives from the qualifying fishing history of the F/V SHELKOF.¹⁶ All three of these vessels made the requisite documented harvests to qualify for the BSAI *C. opilio* and *C. bairdi* (Tanner) crab and the Bristol Bay red king crab area/species endorsements.¹⁷

As stated earlier,¹⁸ the EQPs for these area/species endorsements cover the periods from January 1, 1991 or 1992, and run through December 31, 1994. Therefore, all three of these vessels made the documented harvests required for those endorsements after the F/V PACIFIC APOLLO sank (October 24, 1990) but before June 17, 1995.¹⁹ Thus, any one of these three vessels would seem to meet the requirements of paragraph (E) of the unavoidable circumstance regulation, except that none of them can be considered a replacement vessel for the F/V PACIFIC APOLLO. That is because the EQP fishing histories of these vessels are not available to be combined with the GQP fishing history of the F/V PACIFIC APOLLO to create a complete LLP qualifying fishing history, since each vessel's EQP fishing history has already been used to qualify for its own LLP crab license. Neither the GQP nor the EQP fishing history of a vessel can be reused to create

¹⁴IAD on Reconsideration at 12.

¹⁵*Hansen Enterprises, Inc.*, Appeal No. 02-0025 (Dec. 14, 2004); *Erla-N, LLC*, Appeal No. 01-0026 (Sept. 16, 2004); *Pacific Rim Fisheries, Inc.*, Appeal No. 01-0009 (Sept. 10, 2004); *Notorious Partnership*, Appeal No. 03-0015 (Aug. 9, 2004); *Bowlden, Inc.*, Appeal No. 02-0037 (July 7, 2004); *St. George Marine, Inc.*, Appeal No. 02-0024 at 13 - 15 (Feb. 19, 2004); *Mark Donovanick*, 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). Our Decisions are published at: <http://www.fakr.noaa.gov/appeals/default.htm>.

¹⁶Lloyd Cannon Affidavit (Dec. 20, 2001) at 3-4 and Attach. 5-6. *See, also, Arctic Baruna, L.L.C.*, Appeal No. 02-0042 (Aug. 31, 2004).

¹⁷All three vessels also qualified for the St. Matthew blue king crab area/species endorsement, but the Appellant is not seeking that endorsement for license #LLC5206.

¹⁸*See note 12 supra.*

¹⁹I will assume for the sake of this analysis that there was common ownership of all three vessels, as well as of the F/V PACIFIC APOLLO, during this time period.

more than one LLP license.²⁰

The administrative record in this case contains no evidence that the Appellant owns the fishing history of any other vessels that made the requisite documented harvests of LLP crab to satisfy the requirements of paragraph (E) of the unavoidable circumstance provision. Thus, the Appellant's unavoidable circumstance claim fails. Therefore, I conclude that F/V PACIFIC APOLLO's fishing history remains incomplete and does not constitute an LLP qualifying fishing history. Consequently, the Appellant does not qualify for a transferable LLP crab license based on the fishing history of the F/V PACIFIC APOLLO, and license #LLC5206 should be revoked.

Because I have decided that the F/V PACIFIC APOLLO does not have an LLP qualifying fishing history, and that license #LLC5206 should be revoked, I need not decide whether the Appellant meets the requirements of the RPP. It is clear, however, that the Appellant would not meet the RPP requirements. Under *Bella K of Seattle, Inc.*, a recent participant can retain every LLP crab license associated with the LLP qualifying fishing histories the person held at the time of the RPP harvest.²¹ The Appellant is a recent participant by virtue of the RPP harvests made by the F/V ARCTIC BARUNA I and the F/V ARCTIC BARUNA II.²² But since there is no LLP qualifying fishing history for the F/V PACIFIC APOLLO, the Appellant cannot meet the requirements of the RPP provision.

FINDINGS OF FACT

1. The fishing history of the F/V PACIFIC APOLLO includes the requisite documented LLP crab harvest to meet the GQP requirement.
2. The F/V PACIFIC APOLLO did not make any documented harvests of LLP crab during the EQPs for the two area/species endorsements it seeks: the BSAI *C. opilio* and *C. bairdi* (Tanner) crab and the Bristol Bay red king crab.
3. Arctic Baruna, L.L.C., owns LLP crab licenses based on the fishing history of three other vessels: the F/V SEA PRODUCER (#LLC2087); the F/V OCEAN TEMPEST (#LLC2088); and

²⁰The preamble to the Final Rule for the LLP stated: “[O]nly one license will be issued based on the fishing history of any qualified vessel. For instance, a vessel’s fishing history cannot be divided so that multiple licenses would be issued.” Final Rule, 63 Fed. Reg. 52,646 (Oct. 1, 1998). The evidence in the record does not show whether any of these three vessels made a harvest between January 1 and June 17, 1995, the period after the EQPs until the deadline in paragraph (E) of the unavoidable circumstance provision. Such post-EQP fishing history could not be combined with the GQP history of the F/V PACIFIC APOLLO to satisfy the unavoidable circumstance requirement because that would entail dividing a vessel’s fishing history to create multiple crab licenses.

²¹Appeal No. 02-0006 at 13 (March 25, 2004).

²²See *Arctic Baruna, L.L.C.*, Appeal No. 02-0042 at 3 (Aug. 31, 2004).

the F/V SHELIKOF (#LLC2120).

4. All three of these vessels made the requisite documented harvests to qualify for the BSAI *C. opilio* and *C. bairdi* (Tanner) crab and the Bristol Bay red king crab area/species endorsements.
5. None of these vessels can be considered a replacement vessel for the F/V PACIFIC APOLLO because each vessel's EQP fishing history has already been used to qualify for its own LLP crab license.
6. The Appellant does not own the fishing history of any vessels that made the requisite documented harvests of LLP crab to satisfy the requirements of paragraph (E) of the unavoidable circumstance provision.

CONCLUSIONS OF LAW

1. To qualify for an LLP crab license, an applicant must own the LLP qualifying fishing history of a vessel, as specified in regulation, and must meet the requirements of the RPP provisions.
2. An LLP qualifying fishing history of a vessel consists of a specified number of documented harvests of LLP crab species during a General Qualification Period (GQP) and during one or more Endorsement Qualification Periods.
3. Federal regulation 50 C.F.R. §679.4(k)(8)(iv)(E) establishes a mandatory harvest requirement; if an applicant cannot meet that requirement, then its unavoidable circumstance claim fails.
4. Neither the GQP nor the EQP fishing history of a vessel can be reused to create more than one LLP license.
5. F/V PACIFIC APOLLO's fishing history remains incomplete and does not constitute an LLP qualifying fishing history.
6. The Appellant does not qualify for a transferable LLP crab license based on the fishing history of the F/V PACIFIC APOLLO, and license #LLC5206 should be revoked.

DISPOSITION

The IAD that is subject of this Appeal is **AFFIRMED** on the grounds stated in this Decision. This Decision takes effect January 21, 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 the tenth day after this Decision, January 3, 2005. A Motion for Reconsideration must be in writing, must specify one or more material

matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement in support of the motion.

Edward H. Hein
Chief Appeals Officer