

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 02-0054  
)  
NORDIC FISHING, INC., ) DECISION  
Appellant )  
)  
February 2, 2005  
)  
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STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on September 12, 2002, that approved the issuance of a crab license (#LLC3960) to the Appellant under the North Pacific Groundfish and Crab License Limitation Program (LLP),<sup>1</sup> based on the qualifying fishing history of the F/V NORTHWIND (ADFG #35733). The IAD approved several endorsements to the LLP crab license,<sup>2</sup> but not the Aleutian Islands red king crab area/species endorsement.<sup>3</sup> The IAD denied the issuance of an additional LLP crab license to the Appellant, endorsed for Aleutian Islands brown king crab, based on the fishing history of the F/V NORDIC PROVIDER (ADFG #00038).<sup>4</sup>

The Appellant filed a timely appeal of the IAD. The Appellant can file an appeal because the IAD directly and adversely affects the Appellant's interests. [50 C.F.R § 679.43(b)] The Appellant did not request an oral hearing, and I did not hold an oral hearing. I have closed the record because it contains sufficient information on which to reach a final decision. [50 C.F.R. § 679.43(g)(2)]

On appeal, the Appellant claims that its LLP crab license (#LLC3960) should be endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the F/V NORTHWIND. The Appellant did not originally claim an Aleutian Islands brown king crab endorsement when it applied for an LLP crab license based on the vessel.

Second, the Appellant claims that it qualifies for a second LLP crab license, endorsed for

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

<sup>2</sup>The crab license is endorsed for Bering Sea/Aleutian Islands *C. opilio* and *C. bairdi* (Tanner) crab, Bristol Bay red king crab, and Pribilof red and blue king crab.

<sup>3</sup>The Appellant actually requested an Adak red king crab license endorsement, which is an Aleutian Islands red king crab license endorsement under the LLP.

<sup>4</sup>The Appellant also requested a Dutch Harbor brown king crab license endorsement, which is an Aleutian Islands brown king crab license endorsement under the LLP.

Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the fishing history of the F/V NORDIC PROVIDER. The Appellant did not originally claim an Aleutian Islands red king crab endorsement when it applied for an LLP crab license based on the vessel.

The Appellant claims that it qualifies for a third LLP crab license, endorsed for Aleutian Islands *C. opilio* crab, based on the fishing history of the F/V NORDIC PRIDE (ADFG #21754). The Appellant claims that it qualifies for a fourth LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the fishing history of the F/V NORDIC MONARCH (ADFG #38549). RAM mentioned the fishing history of these two vessels in the IAD, but did not determine whether those fishing histories qualify the Appellant for any additional LLP crab licenses.

Because I conclude that the Appellant does not qualify for any of the LLP crab licenses or area/species endorsements claimed on appeal, I do not decide whether the claims were timely made.

#### ISSUES

1. Does the Appellant qualify for Aleutian Islands brown king crab and Aleutian Islands red king crab area/species endorsements for LLP crab license (#LLC3960), based on the F/V NORTHWIND under the unavoidable circumstance provision in the LLP regulations?
2. Does the Appellant qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the sinking of the F/V NORDIC PROVIDER in 1986 under the unavoidable circumstance provision in the LLP regulations?
3. Does the Appellant qualify for an LLP crab license, endorsed for Bering Sea and Aleutian Islands *C. opilio* crab and *C. bairdi* crab, based on the sinking of the F/V NORDIC PRIDE in 1985 under the unavoidable circumstance provision in the LLP regulations?
4. Does the Appellant qualify for an LLP crab license (endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab) based on the “forced” sale of the F/V NORDIC MONARCH in 1990 under the unavoidable circumstance provision in the LLP regulations?
5. Can the Appellant qualify for the LLP crab license and endorsement claims made in this appeal, based on lost or destroyed evidence?

#### ANALYSIS

RAM’s official LLP record shows that the Appellant did not make the requisite documented harvests of LLP crab to qualify for any of the LLP crab license endorsements or LLP crab

licenses claimed on appeal.<sup>5</sup> The Appellant did not produce any harvesting records of its own to dispute this. Therefore, I find that the Appellant did not make the requisite documented harvests of LLP crab to qualify for any of the LLP crab license or LLP crab license endorsement claims on appeal.

Nevertheless, the Appellant can still qualify for an LLP crab license or area/species endorsement based on an “unavoidable circumstance,” as long as the Appellant can satisfy all of the criteria in the unavoidable circumstance provision of the LLP regulations.<sup>6</sup>

The North Pacific Fishery Management Council (Council) adopted the unavoidable circumstance provision to provide relief to those commercial fishermen who were unable to make a documented harvest of LLP groundfish or LLP crab because of an unavoidable circumstance, but who were able to re-enter the LLP groundfish or LLP crab fishery after the unavoidable circumstance and make at least one documented harvest before the adoption of the LLP by June 17, 1995.<sup>7</sup>

One of the requirements in the unavoidable circumstance provision is that the applicant must have owned a qualifying vessel on June 17, 1995, that made a documented harvest of LLP crab between January 1, 1988, and February 9, 1992, and another documented harvest of LLP crab in the appropriate endorsement area *after* the unavoidable circumstance but *before* June 17, 1995. The applicable regulation reads, in relevant part:<sup>8</sup>

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

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<sup>5</sup>See 50 C.F.R. § 679.4(k)(5)(ii)(D) and (E), for the requisite documented harvests of crab to qualify for LLP crab license endorsements for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the F/V NORTHWIND. See 50 C.F.R. § 679.4(k)(5)(i), 50 C.F.R. § 679.4(k)(5)(ii)(E), and 50 C.F.R. § 679.4(k)(5)(iii), for the requisite number of documented harvests of crab to qualify for an LLP crab license, endorsed for Aleutian Islands red king crab, based on the F/V PROVIDER. See 50 C.F.R. § 679.4(k)(5)(i), 50 C.F.R. § 679.4(k)(5)(ii)(B), and 50 C.F.R. § 679.4(k)(5)(iii), for the requisite number of documented harvests of crab to qualify for an LLP crab license, endorsed for Bering Sea and Aleutian Islands *C. opilio* crab and *C. bairdi* crab, based on the F/V NORDIC PRIDE. See 50 C.F.R. § 679.4(k)(5)(i), 50 C.F.R. § 679.4(k)(5)(ii)(D) and (E), and 50 C.F.R. § 679.4(k)(5)(iii), for the requisite number of documented harvests of crab to qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the F/V NORDIC MONARCH.

<sup>6</sup>50 C.F.R. § 679.4(k)(8)(iv).

<sup>7</sup>Council member David Benton proposed the unavoidable circumstance provision at the Council’s meeting of June 15-17, 1995, that discussed the final action on the LLP.

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

in ... paragraph (k)(5) of this section for a crab license ... because of an unavoidable circumstance ... may receive a license ... if the qualified person is able to demonstrate that: ...

(E) Any amount of license limitation ... 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 ... crab species was harvested after the vessel was prevented from participating by the unavoidable circumstance but before June 17, 1995.

**1. Is the Appellant's LLP crab license (#LLC3960) entitled to endorsements for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the F/V NORTHWIND under the unavoidable circumstance provision in the LLP regulations?**

The Appellant claims that poor fishing in prior years, and that medical treatments for cancer, constitute unavoidable circumstances that prevented the skipper of the F/V NORTHWIND from hiring a crew to make enough documented harvests of crab during 1992 and 1993 to qualify for LLP crab license endorsements for Aleutian Islands brown king crab and Aleutian Islands red king crab.

Even if each of those alleged circumstances could be construed as an unavoidable circumstance, the Appellant still must establish that the F/V NORTHWIND made at least one documented harvest of Aleutian Islands brown king crab and Aleutian Islands red king crab after the alleged unavoidable circumstance but before June 17, 1995, to qualify the Appellant's LLP crab license (#LLC3960) for those endorsements under the unavoidable circumstance provision in the LLP regulations.<sup>9</sup>

Neither the NMFS official LLP record, nor the evidence on appeal, show that the F/V NORTHWIND made at least one documented harvest of Aleutian Islands brown king crab or Aleutian Islands red king crab after the alleged unavoidable circumstance but before June 17, 1995. Therefore, I find that the F/V NORTHWIND did not make at least one documented harvest of Aleutian Islands brown king crab or Aleutian Islands red king crab after the alleged unavoidable circumstance in this case but before June 17, 1995.

I conclude that the Appellant's LLP crab license (#LLC3960) is not entitled to endorsements for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the F/V NORTHWIND under the unavoidable circumstance provision in the LLP regulations.

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<sup>9</sup>*Id.*

**2. Does the Appellant qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the sinking of the F/V NORDIC PROVIDER in 1986 under the unavoidable circumstance provision in the LLP regulations?**

The Appellant claims that the sinking of the F/V NORDIC PROVIDER in 1986 constitutes an unavoidable circumstance that prevented the Appellant from making enough documented harvests of crab to qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab.

Even if the sinking of the vessel could be construed as an unavoidable circumstance, the Appellant still must establish that the F/V NORDIC PROVIDER made at least one documented harvest of LLP crab between January 1, 1988, and February 9, 1992, to qualify for an LLP crab license based on the fishing history of that vessel under the unavoidable circumstance provision in the LLP regulations.<sup>10</sup>

In this case, the F/V NORDIC PROVIDER did not make a documented harvest of LLP crab during that time period because the vessel sank in 1986. Therefore, I conclude that the Appellant does not qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the sinking of the F/V NORDIC PROVIDER in 1986 under the unavoidable circumstance provision in the LLP regulations.

**3. Does the Appellant qualify for an LLP crab license, endorsed for Bering Sea and Aleutian Islands *C. opilio* and *C. bairdi* crab, based on the sinking of the F/V NORDIC PRIDE in 1985 under the unavoidable circumstance provision in the LLP regulations?**

The Appellant claims that the sinking of the F/V NORDIC PRIDE in 1985 constitutes an unavoidable circumstance that prevented the Appellant from making enough documented harvests of crab to qualify for an LLP crab license, endorsed for Bering Sea and Aleutian Islands *C. opilio* and *C. bairdi* crab.

Even if the sinking of the vessel in 1985 can be construed as an “unavoidable circumstance,” the Appellant still must establish that the F/V NORDIC PRIDE made at least one documented harvest of LLP crab between January 1, 1988, and February 9, 1992, to qualify for an LLP crab license based on the fishing history of that vessel under the unavoidable circumstance provision in the LLP regulations.<sup>11</sup>

In this case, the F/V NORDIC PRIDE did not make a documented harvest of LLP crab during

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<sup>10</sup>50 C.F.R. § 679.4(k)(8)(iv).

<sup>11</sup>50 C.F.R. § 679.4(k)(8)(iv)(E).

that time period because the vessel sank in 1985. Therefore, I conclude that the Appellant does not qualify for an LLP crab license, endorsed for Bering Sea and Aleutian Islands *C. opilio* and *C. bairdi* crab, based on the sinking of the F/V NORDIC PRIDE in 1985 under the unavoidable circumstance provision in the LLP regulations.

**4. Does the Appellant qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the “forced” sale of the F/V NORDIC MONARCH in 1990 under the unavoidable circumstance provision in the LLP regulations?**

The Appellant claims that a divorce, which forced the Appellant to sell the F/V NORDIC MONARCH in 1990, constitutes an unavoidable circumstance that prevented the vessel from making enough documented harvests of crab to qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab.

Even if the “forced” sale of the F/V NORDIC MONARCH in 1990 could be construed as an unavoidable circumstance, the Appellant must still establish that it owned the vessel on June 17, 1995, to qualify for an LLP crab license, based on the fishing history of that vessel under the unavoidable circumstance provision in the LLP regulations.<sup>12</sup>

In this case, the Appellant did not own the F/V NORDIC MONARCH on June 17, 1995, because it sold the vessel in 1990. Nor is there evidence that the Appellant retained the rights to the fishing history and license qualification of the vessel when the vessel was sold. If a vessel is sold on or before June 17, 1995, it is presumed that the vessel’s fishing history and license qualification were transferred with the vessel.<sup>13</sup>

Even if it could be presumed that the Appellant had retained the rights to the fishing history and license qualification of the F/V NORDIC MONARCH when the vessel was sold, there is no evidence that the Appellant made a documented harvest of Aleutian Islands red king crab or Aleutian Islands brown king crab with another *non-qualifying* vessel after the “forced sale” of the F/V NORDIC MONARCH but before June 17, 1995. The NMFS official LLP record shows that the Appellant made documented harvests of Aleutian Island red king crab with the F/V NORTHWIND in November 1990 and in December 1991, after the forced sale. But the Appellant has already been issued an LLP crab license based on the qualifying fishing history of the F/V NORTHWIND. Therefore, even if the Appellant had retained the fishing history and license qualification of the F/V NORDIC MONARCH, the Appellant still could not combine that fishing history with the fishing history of another of its vessels to qualify for an LLP crab license under the unavoidable circumstance provision in this case.<sup>14</sup>

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<sup>12</sup>*Id.*

<sup>13</sup>the *See* the regulatory history of the LLP regulations at 63 Fed. Reg. 52,646 (Oct. 1, 1998).

<sup>14</sup>*See Arctic Baruna, L.L.C.*, Appeal No. 02-0043, (Dec. 22, 2004), at 4 and 5.

I conclude that the Appellant does not qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the “forced” sale of the F/V NORDIC MONARCH in 1990 under the unavoidable circumstance provision in the LLP regulations.

**5. Can the Appellant qualify for the LLP crab license and endorsement claims made in this appeal, based on lost or destroyed evidence?**

The Appellant claims that its accountant passed away two years ago, and that the accountant’s files have been lost or destroyed. The implication is that those files would have produced sufficient documentation to support the claims made by the Appellant on appeal.

As an Appeals Officer, I must rely on the evidence in the administrative record to decide the outcome of a case. The duty of an appellant is to produce sufficient evidence to support any claims made on appeal. Even if the Appellant’s accountant’s files were lost or destroyed, the Appellant has not established that those files would have provided sufficient evidence to support the claims made in this case on appeal. I conclude that the Appellant cannot qualify for the LLP crab licenses and endorsements claimed in this appeal, based on lost or destroyed evidence.

**FINDINGS OF FACT**

1. The Appellant did not make the requisite number of documented harvests of LLP crab to qualify for any of the LLP crab license or LLP crab license endorsement claims on appeal.
2. The F/V NORTHWIND did not make at least one documented harvest of Aleutian Islands brown king crab or Aleutian Islands red king crab after the alleged unavoidable circumstance in this case, but before June 17, 1995.
3. The F/V NORDIC PROVIDER did not make a documented harvest of LLP crab between January 1, 1988, and February 9, 1992, because the vessel sank in 1986.
4. The F/V NORDIC PROVIDER did not make a documented harvest of LLP crab between January 1, 1988, and February 9, 1992, because the vessel sank in 1985.
5. The Appellant did not own the F/V NORDIC MONARCH on June 17, 1995, because it sold the vessel in 1990.
6. Even if the Appellant’s accountant’s files were lost or destroyed, the Appellant has not shown that those files would have provided sufficient evidence to support the claims made in this case on appeal.

**CONCLUSIONS OF LAW**

1. The Appellant can qualify for an LLP crab license or an LLP crab license endorsement in this

case, based on an “unavoidable circumstance,” as long as the Appellant can satisfy all of the criteria in the unavoidable circumstance provision of the LLP regulations.

2. The Appellant’s LLP crab license (#LLC3960) is not entitled to endorsements for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the F/V NORTHWIND under the unavoidable circumstance provision of the LLP regulations.

3. The Appellant does not qualify for LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the sinking of the F/V NORDIC PROVIDER in 1986 under the unavoidable circumstance provision of the LLP regulations.

4. The Appellant does not qualify for an LLP crab license, endorsed for Bering Sea and Aleutian Islands *C. opilio* crab and *C. opilio* crab, based on the sinking of the F/V NORDIC PRIDE in 1985 under the unavoidable circumstance provision in the LLP regulations.

5. The Appellant does not qualify for an LLP crab license, endorsed for Aleutian Islands brown king crab and Aleutian Islands red king crab, based on the “forced” sale of the F/V NORDIC MONARCH in 1990 under the unavoidable circumstance provision in the LLP regulations.

6. The Appellant cannot qualify for the LLP crab licenses and endorsements claimed in this appeal, based on lost or destroyed evidence.

#### DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on March 4, 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 February 14, 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.

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Randall J. Moen  
Appeals Officer