

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 01-0026
)	
ERLA-N, LLC,)	DECISION
Appellant)	
)	September 16, 2004
_____)	

STATEMENT OF THE CASE

The Appellant, Erla-N, LLC, applied for a crab license under the North Pacific Groundfish and Crab License Limitation Program (LLP), based on the fishing history of the F/V ERLA-N, and sought five area/species endorsements on the license for the following fisheries: Pribilof Islands red and blue king crab, Bristol Bay red king crab, St. Matthew blue king crab, Bering Sea and Aleutian Islands *C. opilio* and *C. bairdi* (Tanner) crab, and Aleutian Islands brown king crab.

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD No. 01-066) that approved the Appellant's application for the license and four of the area/species endorsements, but denied the Aleutian Islands brown king crab area/species endorsement. RAM issued LLP crab license #LLC3857 to the Appellant, with all five endorsements as a non-transferrable license pending a final agency action by NMFS.

The Appellant filed a timely appeal of the IAD. The Appellant can appeal the IAD because the IAD directly and adversely affects Appellant's interests.¹ The Appellant requested an oral hearing, but I deny the request because even if the facts asserted by the Appellant were established at a hearing, they would not be adequate to justify granting relief in this case.² I have closed the record because the record contains sufficient information on which to reach a final decision.³

ISSUE

Does Appellant's LLP crab license qualify for an Aleutian Islands brown king crab area/species endorsement under the unavoidable circumstances provision of the LLP regulations?

¹50 C.F.R. § 679.43(b).

²50 C.F.R. § 679.43(g)(3)(iv).

³50 C.F.R. § 679.43(m)(4).

ANALYSIS

To qualify for an Aleutian Islands brown king crab area/species endorsement to its LLP crab license, the Appellant must establish that the F/V ERLA-N made at least three documented harvests of brown king crab in the Aleutian Islands between January 1, 1992, and December 31, 1994.⁴ The LLP regulations define a “documented harvest” as a “lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at time of harvesting.”⁵

The Appellant claims that the F/V ERLA-N began fishing Aleutian Islands brown crab in the early 1980s and has “continued to fish that species in a consistent manner until the present.”⁶ The Appellant states that it fished brown crab “every other year throughout the decade of the 1980s” and “intended to continue to fish crab through the 1990s. Specifically, Mr. Nordheim [and owner of Erla-N, LLC] intended that the Vessel fish Brown Crab in 1993.”⁷

The NMFS official LLP record does not show that the F/V ERLA-N harvested *any* Aleutian Islands brown king crab between January 1, 1992, and December 31, 1994, the endorsement qualification period (EQP) for that fishery. The Appellant acknowledges that the vessel’s fishing history is insufficient to satisfy the EQP for AI brown king crab. Rather, the Appellant claims that a series of unavoidable circumstances (which consisted of unforeseen vessel repairs) prevented the F/V ERLA-N from harvesting Aleutian Islands brown king crab during the EQP. Appellant also claims that it invested more than \$400,000 in brown king crab fishing gear between 1986 and 1995; and that Appellant depends on Aleutian Islands brown king crab to remain ‘financially viable.’”

The LLP regulations provide for an applicant to qualify for an LLP crab license area/species endorsement, based on an “unavoidable circumstance,” as long as the applicant can satisfy all of the criteria in the unavoidable circumstances provision of LLP regulation 50 C.F.R § 679.4(k)(8)(iv). One of the criteria for qualifying under the unavoidable circumstances provision is that the applicant's qualifying vessel must have made at least one documented harvest of LLP crab in the appropriate endorsement area *after* the unavoidable circumstance occurred but *before* June 17, 1995.⁸

⁴50 C.F.R § 679.4(k)(5)(ii)(D).

⁵50 C.F.R § 679.2.

⁶Appeal at 2.

⁷*Id.* at 3.

⁸50 C.F.R. § 679.4(k)(8)(iv)(E).

In several decisions,⁹ this Office has ruled that the requirement of making a documented harvest after an unavoidable circumstance occurred but before June 17, 1995, must be satisfied to qualify an applicant under the unavoidable circumstances provision.

RAM interprets the unavoidable circumstances provision to require an *actual* documented harvest of LLP groundfish after an unavoidable circumstance but before June 17, 1995, to qualify an applicant for an LLP groundfish license, based on an unavoidable circumstance. RAM's interpretation is reasonable, given that it is consistent with the plain language and regulatory history of the unavoidable circumstances provision.

Neither the NMFS official LLP record, nor the evidence on appeal, show that the F/V ERLA-N made any harvests of Aleutian Islands brown king crab after the alleged unavoidable circumstances but before June 17, 1995. Appellant does not dispute the NMFS official LLP record. Therefore, I find by a preponderance of the evidence in the record that the F/V ERLA-N did not make at least one documented harvest of Alaska Islands brown king crab after the alleged unavoidable circumstances in this case, but before June 17, 1995. Thus, I conclude that the Appellant's LLP crab license #LLC3857 does not qualify for an Aleutian Islands brown king crab area/species endorsement under the unavoidable circumstances provision of the LLP regulations.

The language of the LLP regulations does not provide for an exception to the requirement of a documented harvest after an unavoidable circumstance but before June 17, 1995. Therefore, I do not have the authority to exempt Appellant from the documented harvest requirement despite Appellant's significant financial investments, historical participation, and financial dependence, in the brown king crab fishery.

FINDING OF FACT

The F/V ERLA-N did not make at least one documented harvest of Aleutian Islands brown king crab after the alleged unavoidable circumstances in this case but before June 17, 1995.

CONCLUSION OF LAW

The Appellant's LLP crab license #LLC3857 does not qualify for an Aleutian Islands brown king crab area/species endorsement under the unavoidable circumstances provision of the LLP regulations.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on October

⁹See, e.g., Paula J. Brogdon, Appeal No. 00-0011, February 26, 2002; Ronald J. Tennison, Appeal No. 00-0012, April 5, 2002; Little Ann, Inc., Appeal No. 01-0022, July 10, 2002.

18, 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, September 27, 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.

Randall J. Moen
Appeals Officer