

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 02-0044
)	
MAGNE NES,)	DECISION
Appellant)	
_____)	March 5, 2004

STATEMENT OF THE CASE

Magne Nes appeals an Initial Administrative Determination [IAD], dated November 7, 2002, issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹

The IAD denied Mr. Nes's application for an LLP groundfish license with endorsements for the Aleutian Islands [AI], Bering Sea and the Western Gulf. The IAD denied Mr. Nes's application for an LLP crab license with endorsements for BSAI *C. opilio* and *C. bairdi* Tanner crab, AI brown king crab, Bristol Bay red king crab and Pribilof Islands red and blue king crab. Mr. Nes applied for these licenses based on the fishing history of the F/V GOLDEN SABLE, ADFG 40918, formerly the F/V PACIFIC INVADER.

Mr. Nes can appeal the IAD because it directly and adversely affects his interests.² The record has sufficient information for me to decide Mr. Nes's appeal.³ I therefore close the record and issue this decision.

SUMMARY

The IAD is affirmed. Mr. Nes did not harvest groundfish or crab from the F/V GOLDEN SABLE until 1993. Mr. Nes does not qualify for an LLP groundfish license, based on the fishing history of the F/V GOLDEN SABLE. Mr. Nes did not harvest groundfish in the general qualification period or GQP, as required by 50 C.F.R. § 679.4(k)(4)(i). Mr. Nes did not meet the basic GQP requirement for an LLP groundfish license because he did not harvest groundfish between January 1, 1988 and June 27, 1992. Mr. Nes did not meet the extended GQP requirement for vessels that crossed over into groundfish from crab because he did not harvest crab between January 1, 1988 and February 9, 1992.

Mr. Nes does not qualify for an LLP crab license endorsed for *C. opilio* and *C. bairdi*, AI brown

¹ The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.4(k)(4). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² 50 C.F.R. § 679.43(b).

³ 50 C.F.R. § 679.43(g)(2).

king crab or Bristol Bay red king crab, based on the fishing history of the F/V GOLDEN SABLE. Mr. Nes did not harvest crab in the general qualification period or GQP, as required by 50 C.F.R. § 679.4(k)(5)(i). Mr. Nes did not meet the basic GQP requirement because he did not harvest crab between January 1, 1988 and June 27, 1992. Mr. Nes did not meet the extended GQP for vessels that crossed over into crab from groundfish because he did not harvest groundfish between January 1, 1988 and February 9, 1992.

Mr. Nes did qualify under the original LLP regulations for an LLP crab license endorsed for Pribilof red and blue king crab, based on the F/V GOLDEN SABLE. RAM did not require a GQP harvest for that endorsement because the Pribilof red and blue king crab fisheries were closed from 1988 through 1992. But Mr. Nes may not retain an LLP crab license with a Pribilof endorsement because he did not harvest crab in the recent participation period or RPP, as required by 50 C.F.R. § 679.4(k)(5)(iii). The RPP is January 1, 1996 to February 7, 1998. Mr. Nes does not fall within the exceptions to the RPP in 50 C.F.R. § 679.4(k)(5)(iii)(B).

Mr. Nes cannot receive credit for a harvest under the unavoidable circumstance provision in the RPP regulation, 50 C.F.R. § 679.4(k)(5)(v). That provision extends the RPP until January 1, 2000 for an applicant that meets specified requirements. Mr. Nes did not own any vessel, or the fishing history of a vessel, that harvested crab by January 1, 2000. Under the LLP, the vessel owner, not the State permit holder or the captain of the vessel, receives credit for harvests made from a vessel.

ISSUES

1. Does Mr. Nes qualify for an LLP groundfish license with endorsements for the Aleutian Islands, Bering Sea and the Western Gulf, based on the fishing history of the F/V GOLDEN SABLE?
2. Does Mr. Nes qualify for an LLP crab license endorsed for BSAI *C. opilio* and *C. bairdi* Tanner crab, AI brown king crab and Bristol Bay red king crab, based on the fishing history of the F/V GOLDEN SABLE?
3. Does Mr. Nes meet the RPP requirements for an LLP crab license endorsed for Pribilof red and blue king crab?

ANALYSIS

The facts of Mr. Nes's fishing history are not in dispute. From 1988 to 1992, the F/V GOLDEN SABLE did not make any documented harvests of license limitation groundfish or crab.⁴ In

⁴ To count toward an LLP license, a harvest must be a *documented harvest*. When I refer to a harvest, I mean a documented harvest. To count toward an LLP license, a harvest must generally be of *license limitation groundfish*. When I refer to groundfish, I mean license limitation groundfish, unless I

1992, Mr. Nes bought the F/V GOLDEN SABLE. In 1993, Mr. Nes took the F/V GOLDEN SABLE and fished Pacific cod in the Bering Sea and *C. bairdi*, Pribilof red king crab and Bristol Bay red king crab. In 1994, Mr. Nes fished Pacific cod in the Western Gulf and opilio crab, Pribilof king crab and AI brown king crab. In 1995, he fished *C. opilio* and Pribilof red and blue king. After 1995, Mr. Nes did not harvest any groundfish or crab from the F/V GOLDEN SABLE. Mr. Nes lost the F/V GOLDEN SABLE in 1997 because the vessel was repossessed through what Mr. Nes claims was an illegal process. Mr. Nes has not owned any vessel, nor the fishing history of any vessel, since he lost the F/V GOLDEN SABLE in 1997.

1. Does Mr. Nes qualify for an LLP groundfish license with endorsements for the Aleutian Islands, Bering Sea and the Western Gulf, based on the fishing history of the F/V GOLDEN SABLE? No.

To receive an LLP groundfish license, an applicant must have harvested groundfish in a general qualification period or GQP *and* an endorsement qualification period or EQP.⁵

The basic GQP for an LLP groundfish license is January 1, 1988 to June 27, 1992.⁶ The F/V GOLDEN SABLE did not harvest any groundfish in BSAI or the Gulf of Alaska between January 1, 1988 and June 27, 1992 and therefore does not meet the basic GQP requirement.

The LLP regulations extend the GQP for LLP groundfish licenses until December 31, 1994 for vessels that are less than sixty feet and meet other requirements.⁷ The F/V GOLDEN SABLE is 100 feet and therefore cannot use this provision.

The LLP regulations extend the GQP for LLP groundfish licenses until June 17, 1995 for an applicant whose vessel “crossed over” into groundfish from crab but the vessel had to have harvested crab between January 1, 1988 and February 9, 1992.⁸ That time period was the

note otherwise. To count toward an LLP license, a harvest must be of *crab species*, which are BSAI king or Tanner crab. When I refer to crab, I mean BSAI king or Tanner crab. For definitions of these terms, see 50 C.F.R. § 679.2.

⁵ 50 C.F.R. § 679.4(k)(4)(i)&(ii).

⁶ 50 C.F.R. § 679.4(k)(4)(A)(1) & (B)(1). For a Bering Sea or Aleutian Islands endorsement, the GQP harvest must be in BSAI. For a Western Gulf, Central Gulf or Southeast Outside endorsement the GQP harvest must be in the Gulf of Alaska or GOA.

⁷ 50 C.F.R. § 679.4(k)(4)(i)(A)(2) & (B)(2).

⁸ 50 C.F.R. § 679.4(k)(4)(i)(A)(3) & (B)(3). This way of meeting the GQP requires three harvests: a license limitation groundfish harvest between January 1, 1988 and June 17, 1995; a groundfish harvest between February 10, 1992 and December 11, 1994 except fixed gear sablefish; and a crab harvest between January 1, 1988 and February 9, 1992. Mr. Nes made the required groundfish harvests but not the crab harvest.

qualifying period for a crab permit in the Vessel Moratorium Program, or VMP, the predecessor program to the LLP.⁹ The F/V GOLDEN SABLE did not harvest crab between January 1, 1992 and February 9, 1992 and therefore does not meet the GQP as a crab crossover vessel.¹⁰

Mr. Nes harvested groundfish – specifically Pacific cod – from the F/V GOLDEN SABLE in the Bering Sea in 1993 and in the Western Gulf in 1994. Mr. Nes therefore meets the endorsement qualification period, or EQP, requirements for Bering Sea and Western Gulf endorsements on an LLP license.¹¹ But since an applicant must meet both the GQP and EQP requirements, Mr. Nes does not qualify for an LLP groundfish endorsement simply because he made the required harvests in the endorsement qualification period.

Mr. Nes’s appeal puts into stark relief this feature of the LLP regulations. If a vessel did not harvest either groundfish between January 1, 1988 and June 27, 1992 or crab between January 1, 1988 and February 9, 1992, the vessel cannot qualify for an LLP groundfish license with any endorsements because the vessel cannot satisfy the basic general qualification period requirement or the extended GQP for crab crossover vessels.

Mr. Nes states that, before he bought the F/V GOLDEN SABLE in 1992, he contacted a private company that obtained verification of the F/V GOLDEN SABLE’s crab fishing history and told him that the F/V GOLDEN SABLE would qualify for a moratorium permit. Mr. Nes states that he bought the vessel because he believed he would be able to use it to fish crab and groundfish in Alaska.¹² It is true that in 1992, the North Pacific Fishery Management Council was widely circulating a proposal for a Vessel Moratorium Program or VMP and the F/V GOLDEN SABLE would have qualified to fish groundfish and crab under it.¹³ Under the Council’s original moratorium proposal, any harvest of groundfish *or* crab between *January 1, 1980* and February 9, 1992 qualified a vessel to fish groundfish *and* crab.¹⁴ Put another way, a vessel could freely cross over into groundfish based on a crab harvest and vice versa.

⁹ Final Rule, 60 Fed. Reg. 40,763, 40,773 (1995). The VMP was codified primarily at 50 C.F.R. § 679.6, moved to 50 C.F.R. § 679.4, and removed from federal regulation after the LLP went into effect. Final Rule, 65 Fed. Reg. 45,316 (2000).

¹⁰ See Final Rule, 63 Fed. Reg. 52,642, 52,643 (1998)(commentary on crossover provision).

¹¹ 50 C.F.R. § 679.4(k)(4)(ii)(B) (one groundfish harvest in the Bering Sea between January 1, 1992 and June 17, 1995); 50 C.F.R. § 679.4(k)(4)(ii)(D)(one groundfish harvest in the Western Gulf between January 1, 1992 and June 17, 1995, for catcher vessels between 60 and 125 feet).

¹² Letter from Magne Nes (Jan 30, 2004).

¹³ “True North: A Special Report to the Seafood Industry from the North Pacific Fishery Management Council,” September 1992 [Exhibit 1].

¹⁴ True North Report at 5 [Exhibit 1]

NMFS proposed regulations in 1994 which embodied the Council's proposal but those regulations never went into effect.¹⁵ NMFS withdrew them after it determined that the regulations – particularly the crossover provision – violated the Magnuson-Stevens Act and other federal laws.¹⁶ NMFS adopted new moratorium regulations and the F/V GOLDEN SABLE did not qualify for a moratorium permit under the new regulations.¹⁷

Mr. Nes does not allege any facts which come close to making a claim for preventing, or estopping, the government from applying the LLP regulations to his application. A claim of government estoppel requires, among other things, that the government engaged in affirmative misconduct on which the applicant detrimentally relied.¹⁸ Mr. Nes does not allege or provide evidence of affirmative misconduct by the government. The government did not mislead Mr. Nes. He did qualify for a permit under proposed regulations and did not qualify under final ones.

I must judge Mr. Nes's appeal based on the LLP regulations which are final, which are in effect and which NMFS has used to evaluate all other applicants for an LLP license. Since Mr. Nes did not meet the general qualification period requirement in the LLP regulations, I conclude that he does not qualify for an LLP groundfish license with any endorsement.

2. Does Mr. Nes qualify for an LLP crab license endorsed for BSAI *C. opilio* and *C. bairdi* Tanner crab, AI brown king crab and Bristol Bay red king crab, based on the fishing history of the F/V GOLDEN SABLE? No.

To receive an LLP crab license, an applicant must have harvested crab in three periods: a general qualification period, an endorsement qualification period, and a recent participation period.¹⁹

The basic general qualification period for an LLP crab license is January 1, 1988 to June 27, 1992.²⁰ The F/V GOLDEN SABLE did not harvest any crab between January 1, 1988 and June

¹⁵ Proposed Rule (VMP), 59 Fed. Reg. 28,827, 28,829 (1994).

¹⁶ Disapproval of fishery management plan amendments and withdrawal of proposed rule, 59 Fed. Reg. 43,534, 43,535 (1994).

¹⁷ Proposed Rule, 60 Fed. Reg. 25,677 (1995); Final Rule, 60 Fed. Reg. 40,763, 40,773 (1995); *Anchor Trade & Development, Inc.*, Appeal No. 96-0039 (Nov. 29, 1999)(Mr. Nes's VMP appeal).

¹⁸ *Sherry L. Tuttle & Lori Whitmill*, Appeal No. 96-0010 at 2 (Dec. 3, 1999).

¹⁹ 50 C.F.R. § 679.4(k)(5)(i)(ii)(iii). In implementing the LLP, RAM has not required a GQP harvest for a Pribilof red and blue king endorsement. *See* pages 6 - 7 *infra*. The Council and NMFS added the RPP in 2001. Final Rule, 66 Fed. Reg. 48,8113 (2001), *clarified by* Final Rule, 68 Fed. Reg. 46,117 (2003).

²⁰ 50 C.F.R. § 679.4(k)(5)(i)(A).

27, 1992 and there does not meet the basic GQP requirement for an LLP crab license. The F/V GOLDEN SABLE did not harvest crab until 1993.

The LLP regulations extend the GQP for an LLP crab license until December 31, 1994 for an applicant whose vessel crossed over into crab from groundfish but the vessel had to have harvested groundfish between January 1, 1988 and February 9, 1992,²¹ the qualifying period for a groundfish permit under the Vessel Moratorium Program.²² Since the F/V GOLDEN SABLE did not harvest groundfish between January 1, 1988 and February 9, 1992, Mr. Nes does not satisfy this way of meeting the GQP for a crab license.

I therefore conclude that Mr. Nes does not meet the GQP requirements for an LLP crab license with endorsements for *opilio/bairdi*, AI brown king crab and Bristol Bay red king crab and therefore does not qualify for these endorsements.

I note that Mr. Nes does meet the EQP requirements for these endorsements because he harvested *opilio* and *bairdi*, AI brown king and Bristol Bay red king between January 1, 1993 and December 31, 1994.²³ But since he does not meet the GQP requirement, he cannot receive an LLP crab license with endorsements for *opilio/bairdi*, AI brown king or Bristol Bay red king. Even if he met the GQP and EQP requirements for these endorsements, he would not receive an LLP crab license with these endorsements because he did not harvest crab in the recent participation period or RPP, which I discuss in the next section.

3. Does Mr. Nes meet the RPP requirements for an LLP crab license endorsed for Pribilof red and blue king crab?

The basic GQP for an LLP crab license is January 1, 1988 to June 27, 1992. But the Pribilof red and blue king crab fisheries were closed from 1988 through 1992.²⁴ The IAD states that RAM did not require a GQP harvest as a condition for an LLP crab license endorsed for Pribilof red

²¹ 50 C.F.R. § 679.4(k)(5)(i)(B). It does not have to be a license limitation groundfish harvest. It can be a groundfish harvest, except sablefish caught with fixed gear. This way of meeting the GQP for a crab license also requires a crab harvest between January 1, 1988 and December 31, 1994 and a crab harvest between February 10, 1992 and December 11, 1994. Mr. Nes made the required crab harvests but not the groundfish harvest.

²² See note 9 *supra*.

²³ 50 C.F.R. § 679.4(k)(5)(ii)(B),(D) & (F).

²⁴ Annual Management Report for the Shellfish Fisheries of the Western Region, 1996, Alaska Department of Fish and Game, Regional Information Report No. 4K97-41, at Table 5 - 7 (July 1997).

and blue king crab.²⁵

The EQP requirement for a Pribilof red and blue king endorsement is one harvest of red *or* blue king crab in the Pribilof red and blue king endorsement area between January 1, 1993 and December 31, 1994.²⁶ The Pribilof blue king fishery was closed in 1993 and 1994 but the Pribilof red king fishery was open in September 1993 and 1994.²⁷ Therefore, it was possible for an applicant to meet the EQP requirement through a documented harvest of Pribilof red king. The F/V GOLDEN SABLE did that. It harvested red king crab in the Pribilof endorsement area in September 1993 and September 1994.²⁸ Therefore, under the original LLP regulations, Mr. Nes qualified for an LLP crab license endorsed for Pribilof red and blue king crab.

RAM concluded, however, that Mr. Nes could not retain an LLP license with this endorsement because he does not meet the recent participation, or RPP, requirement. The basic RPP requirement is one harvest of any species of LLP crab between January 1, 1996 and February 7, 1998.²⁹ The F/V GOLDEN SABLE did not harvest crab between January 1, 1996 and February 7, 1998. Mr. Nes does not argue that it did.

The RPP regulation has three exceptions: [1] for a Norton Sound red and blue king endorsement; [2] for vessels less than sixty feet; and [3] for vessels that were lost or destroyed after the vessel made a harvest in the RPP.³⁰ None apply to Mr. Nes. He is not seeking a Norton sound endorsement. His vessel is not less than sixty feet. The F/V GOLDEN SABLE was not physically lost or destroyed and it did not make a harvest in the RPP.

The RPP regulation has an unavoidable circumstances provision.³¹ It *extends* the RPP until

²⁵ IAD at 5. Since those fisheries were not open during the GQP, if RAM had applied the GQP requirement to this endorsement, it would have been impossible for an applicant who fished only Pribilof red or blue king crab to receive an LLP license with that endorsement.

²⁶ 50 C.F.R. § 679.4(k)(5)(A).

²⁷ Annual Management Report, *supra* note 24, at Table 5 - 7. The Pribilof red king fishery was open for six days in September 1993 and September 1994.

²⁸ In September 1995, the Pribilof red *and* blue king crab fishery were open. *Id.* The F/V GOLDEN SABLE harvested both species.

²⁹ 50 C.F.R. § 679.4(k)(5)(iii).

³⁰ 50 C.F.R. § 679.4(k)(5)(iii)(B).

³¹ The unavoidable circumstances provision, 50 C.F.R. § 679.4(k)(5)(iii)(v), states:

(v) A qualified person who owned a vessel on June 17, 1995, that met the requirements in paragraphs (k)(5)(i) and (ii) of this section, but whose vessel was unable to meet the requirements

January 1, 2000 for an applicant who proves that he was prevented from making a harvest within the standard RPP by unavoidable circumstances and who meets other conditions.

Mr. Nes states that he could not harvest crab from the F/V GOLDEN SABLE after 1995 because he had to take the vessel to South America in 1997 to avoid foreclosure. He states that he relied on promises by an investor that the investor would obtain the licenses necessary for Mr. Nes to fish in South America. Mr. Nes states that the investor did not obtain the licenses, left him stranded in South America and illegally repossessed the vessel.³² Mr. Nes has not owned any vessel, or the fishing history of any vessel, since he lost the F/V GOLDEN SABLE.

Assuming that Mr. Nes could prove that the repossession of the F/V GOLDEN SABLE was an unavoidable circumstance within the meaning of the regulation³³ and assuming that Mr. Nes still owns the fishing history of the F/V GOLDEN SABLE,³⁴ he did not make a crab harvest by January 1, 2000 and therefore cannot use the unavoidable circumstances provision.

Mr. Nes obtained State of Alaska crab permits and caught Bristol Bay red king crab in

of paragraph (k)(5)(iii) of this section because of unavoidable circumstances (i.e., the vessel was lost, damaged, or otherwise unable to participate in the license limitation 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 fishing for license limitation 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 crab species was thwarted by a circumstance that was:

(1) Unavoidable;

(2) Unique to **the owner of that vessel**, or unique to that vessel; and

(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 crab species actually occurred;

(D) Under the circumstances, **the owner of the vessel** took all reasonable steps to overcome the circumstances that prevented the owner from conducting directed fishing for license limitation crab species; and

(E) **Any amount of license limitation crab species was harvested on the vessel after the vessel was prevented from participating but before January 1, 2000.** [emphasis added]

³² Statement of Magne Nes (submitted Oct. 16, 1992).

³³ Mr. Nes would have to prove the required facts in Sections (A) through (D) of the unavoidable circumstances provision and would have to meet the objection that his difficulties were the result of economic pressures and economic choices and therefore were not unavoidable, unique or unforeseen.

³⁴ 50 C.F.R. § 679.4(k)(5)(iii)(A). Pacific Wave International, Inc., and Francis Miller claimed any LLP licenses issued to Mr. Nes. Letter from Bruce Hull (Oct. 7, 1999); Letter from William DeVoe (Dec. 17, 1999). I do not rule on these claims because Mr. Nes is not receiving any LLP licenses.

November 1998 and *C. bairdi* in January and February 1999 from the F/V SUNSET BAY. Mr. Nes did not own the F/V SUNSET BAY or the fishing history of the F/V SUNSET BAY. Under the LLP, the owner of the vessel, or the owner of the vessel's fishing history, receives credit for the documented harvests made from a vessel, not the captain nor the State of Alaska permit holder who recorded the crab harvest. The LLP regulations define the owner of the vessel, or the owner of the vessel's fishing history, as the person who is the eligible applicant for an LLP license.³⁵ The LLP regulatory history clearly shows that was the policy choice made by the Council and NMFS in adopting the LLP.³⁶ And the unavoidable circumstance provision in the RPP specifically imposes its requirements upon the owner of the vessel.³⁷

Mr. Nes asks why is it that permit holders sometimes have rights and sometimes do not. Mr. Nes relates an incident where a crew member absconded with money from a sale of crab and Mr. Nes

contacted Alaska Department of Fish and Game and police and was told that [the crew member] owned the whole load of crab as he was the permitholder . . . not the vessel that fished the crab or the vessel owner. To this day I am still at a loss, that when a permitholder is the owner of the product now then can a vessel get rights to quotas. The vessel is just a *vehicle* to transport the catch from the ocean to the offloading station and without a captain the vessel itself cannot fish the product.³⁸

It is sometimes confusing because fisheries in Alaska are managed by the State and Federal governments and different species are managed under different regulatory schemes. It is also true sometimes permit holders receive fishing privileges and sometimes they do not. For example, it was permit holders – specifically gear license holders – who largely received rights

³⁵ 50 C.F.R. § 679.2 (first and second definition of eligible applicant). The only exception is permit holders in the Norton Sound king crab summer fishery in 1993 and 1994 and the LLP regulation specifically spells out that exception. *Id.* (third definition of eligible applicant)

³⁶ NMFS explained in the commentary to the final LLP regulations: “As defined by these regulations, an eligible applicant is (1) the owner, on June 17, 1995, of a qualified vessel or (2) the person to whom the qualified vessel's fishing history was transferred or retained by written contract” Final Rule, 63 Fed. Reg. 52,642, 52,645 (1998). In moving that the Council recommend granting LLP licenses to vessel owners, Council Member Dave Benton stated: “Throughout the discussions, both groundfish and crab, the Council has heard again extensive testimony regarding the need to award licenses to current owners and I think this is consistent with public testimony and with the Council's discussions on this matter of numerous Council meetings.” Transcript (unofficial) of Council meeting at 87 (June 15 - 17, 1995), available at the Administrative Appeals section of the NMFS Alaska region website under “Other Documents,” <http://www.fakr.noaa.gov/appeals/default.htm>.

³⁷ 50 C.F.R. § 679.4(k)(5)(iii)(v) (A), (B), (C), (D). I quote the regulation at note 31 *supra*.

³⁸ Letter from Mr. Nes to OAA (Jan. 30, 2004)(emphasis in original).

to salmon under the State of Alaska's original salmon limited entry program adopted in 1973.³⁹

The regulations for each fishing program determine who receives fishing privileges under each program. The LLP regulations grant rights to vessel owners and those who stand in the shoes of vessel owners through purchase of a qualifying fishing history. Since Mr. Nes did not own the F/V SUNSET BAY or the fishing history of the F/V SUNSET BAY, he cannot receive credit under the unavoidable circumstances provision for any harvests made from the F/V SUNSET BAY.

Therefore, I conclude that Mr. Nes cannot retain an LLP crab license with a Pribilof red and blue king endorsement because he did not harvest crab during the recent participation period, does not fit within an exception to the RPP requirement and cannot satisfy the unavoidable circumstances provision in the RPP regulation.

Conclusion

Mr. Nes points to a long and distinguished history of fishing in Alaska, spanning the years 1959 to 1999. But it is not continuous. Mr. Nes did not fish groundfish or crab in Alaska in 1988 to 1992, 1996 and 1997. In 1998 to 1999, he participated in the crab fishery as a permit holder, not a vessel owner. The LLP requires documented harvests in specific times and specific places and grants credit for those harvests to a vessel owner or someone standing in the shoes of the vessel owner. Unfortunately, Mr. Nes does not meet those requirements and therefore does not qualify for an LLP groundfish or crab license.

FINDINGS OF FACT

1. The F/V GOLDEN SABLE did not make a documented harvest of LLP groundfish in BSAI or GOA between January 1, 1988 and June 27, 1992, the general qualifying period for LLP groundfish licenses in 50 C.F.R. § 679.4(k)(4)(i).
2. The F/V GOLDEN SABLE is not less than sixty feet.
3. The F/V GOLDEN SABLE did not make a documented harvest of crab between January 1, 1988 and February 9, 1992, a requirement to meet the extended general qualifying period for "crossover" vessels for LLP groundfish licenses in 50 C.F.R. § 679.4(k)(4)(A)(3) and (B)(3).
4. The F/V GOLDEN SABLE did not make a documented harvest of crab between January 1, 1988 and June 27, 1992, the general qualifying period for LLP crab licenses in 50 C.F.R. § 679.4(k)(5)(i).
5. The F/V GOLDEN SABLE did not make a documented harvest of LLP groundfish between

³⁹ Alaska Statutes 16.43.260(a). *See* CFEC v. Apokedak, 680 P.2d 486 (Alaska 1984).

January 1, 1988 and February 9, 1992, a requirement to meet the extended general qualifying period for “crossover” vessels for LLP crab licenses in 50 C.F.R. § 679.4(k)(i)(B).

6. The F/V GOLDEN SABLE did not make a documented harvest of crab between January 1, 1996 and February 7, 1998, the recent participation period in 50 C.F.R. § 679.4(k)(iii).

7. Mr. Nes is not seeking an LLP license endorsed for Norton blue and red king crab.

8. The F/V GOLDEN SABLE was not lost or destroyed.

9. Mr. Nes harvested crab from the F/V SUNSET BAY in November 1998, January 1999 and February 1999 using State of Alaska crab permits issued in his name.

10. Mr. Nes did not own the F/V SUNSET BAY, or the fishing history of the F/V SUNSET BAY, at the time of those crab harvests or any other time.

CONCLUSIONS OF LAW

1. Mr. Nes does not qualify for an LLP groundfish license endorsed for the Aleutian Islands, Bering Sea and the Western Gulf, based on the fishing history of the F/V GOLDEN SABLE.

2. Mr. Nes does not qualify for an LLP crab license endorsed for *opilio/bairdi*, AI brown king crab and Bristol Bay red king crab, based on the fishing history of the F/V GOLDEN SABLE.

3. Mr. Nes may not retain an LLP crab license endorsed for Pribilof red and blue king crab because he does not satisfy the requirements of the RPP regulation, 50 C.F.R. § 679.4(k)(5)(iii).

4. Mr. Nes does not satisfy the requirement in section (E) of the unavoidable circumstances provision in the RPP regulation, 50 C.F.R. § 679.4(k)(5)(iii)(v), because he did own a vessel, or the fishing history of a vessel, from which crab was harvested after an unavoidable circumstance and before January 1, 2000.

5. Under the LLP, the owner of the vessel, or the owner of the vessel’s fishing history, receives credit for documented harvests made from a vessel, not the State of Alaska permit holder, with the exception of a permit holder for the Norton Sound king crab summer fishery in 1993 and 1994 as specified in the definition of eligible applicant in 50 C.F.R. § 679.2.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect April 5, 2004, unless by that date the Regional Administrator orders review of the Decision.

Any party 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, March 15,

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 or points and authorities in support of the motion.

Mary Alice McKeen
Appeals Officer