

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 03-0008
)
YAKUTAT, INC., LLG 2959) DECISION ON RECONSIDERATION
Appellant)
) June 10, 2010
)
_____)

STATEMENT OF THE CASE

Yakutat, Inc., appealed the Initial Administrative Determination [IAD] that the Restricted Access Management Program [RAM] issued on March 27, 2003, under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹

Mike Burns applied for the LLP license on behalf of Yakutat, Inc.² Mr. Burns is President of Yakutat, Inc.³ The IAD determined that Yakutat, Inc., was entitled to the LLP groundfish license, and the endorsements on that license, that resulted from the fishing history of the F/V BLUE NORTH, USCG 604676, ADFG 41977.⁴ Mr. Burns is also President of Blue North Fisheries, Inc.⁵ Blue North Fisheries, Inc., is affiliated with Yakutat, Inc. Blue North Fisheries operated the F/V BLUE NORTH in 1998, and hired crew for the vessel.⁶ I treat the actions of Blue North Fisheries, Inc., [Blue North Fisheries] as the actions of Yakutat, Inc. [Yakutat].

The IAD determined that, based on the fishing history of the F/V BLUE NORTH, Yakutat qualified for an LLP groundfish license [LLG 2959], for use on a vessel whose length overall does not exceed 174 feet, with the following endorsements: [1] Bering Sea area endorsement, catcher/processor vessel designation, gear designation for non-trawl gear; [2] Aleutian Islands

¹ The 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). These regulations are on the NMFS Alaska region website: <http://www.fakr.noaa.gov/regsummary.htm>

² LLP Application (dated Dec. 10, 1999) (received by RAM, Dec. 15, 1999).

³ LLP Application at 5; State of Washington, Corporations Division website, Registration Data Search: http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601210263 <<visited May 19, 2010>>.

⁴ IAD (Mar. 27, 2003); LLP Qualifications Summary (Sep. 9, 1999) (Official LLP record shows Yakutat, Inc., as owner of record of F/V BLUE NORTH on June 17, 1995). See 50 C.F.R. § 679.2 (definition (1) of eligible applicant for LLP license is owner of a vessel with a qualifying history on June 17, 1995).

⁵ Declaration of Mike Burns at ¶ 2 (Apr. 5, 2010); State of Washington, Corporations Division website, Registration Data Search: http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601174072 <<visited May 19, 2010>>.

⁶ Declaration of Mike Burns at ¶¶ 3 - 6 (Apr. 5, 2010).

area endorsement, catcher/processor vessel, non-trawl gear; [3] for the Bering Sea and Aleutian Islands Management Area [BSAI],⁷ an endorsement to harvest Pacific cod, vessel designation for a catcher vessel, gear designation for pot gear; [4] for BSAI, a Pacific cod endorsement, catcher/processor vessel designation, gear designation for hook-and-line gear.⁸

The IAD determined that Yakutat did not qualify for the following endorsements on LLG 2959: [1] area endorsements for groundfish in the Western Gulf, Central Gulf and Southeast Outside areas; [2] for the BSAI Pacific cod fishery, a vessel designation for a catcher/processor, a gear designation for pot gear. Yakutat does not contest the denial of the area endorsements for Western Gulf, Central Gulf and Southeast Outside. Yakutat appealed the denial of an endorsement to harvest Pacific cod in BSAI with pot gear on a catcher/processor vessel.⁹ Yakutat's application for that endorsement was based on the F/V BLUE NORTH's actual participation in 1997, which is not in dispute, and a claim under the hardship/unavoidable circumstance regulation at 50 C.F.R. §679.4(k)(9)(v)(B) for 1998, which is in dispute. Yakutat can appeal the IAD because it directly and adversely affects its interests.¹⁰

The Office of Administrative Appeals [OAA] issued a Decision on November 26, 2007, which affirmed the IAD.¹¹ Yakutat filed a timely motion for reconsideration.¹² A motion for reconsideration must show that the Decision overlooked or misunderstood a material question of law or fact in the decision.

I granted the motion for reconsideration. I concluded that the Decision incorrectly stated that Yakutat's allegation that the failure of the crew to live up to an agreement to fish Pacific cod from the F/V BLUE NORTH did not, as matter of law, state a claim that could meet the requirements of the hardship/unavoidable circumstance regulation for a Pacific cod endorsement.¹³ I concluded that if Yakutat proved that the crew reneged on an agreement to operate the F/V BLUE NORTH for the pot cod fishery in 1998, at or close to the time the crew had agreed to participate in the fishery, Yakutat could meet the requirements in the hardship/unavoidable circumstance regulation.

⁷ Bering Sea and Aleutian Islands Management Area [BSAI] means the Bering Sea and Aleutian Islands subareas. 50 C.F.R. § 679.2. The Bering Sea and Aleutian Islands subareas are defined by federal Statistical Areas in Figure 1 to 50 C.F.R. § 679.

⁸ IAD at 1 - 2.

⁹ Letter from R. Shawn Griggs, Attorney for Yakutat, Inc., to NMFS, Office of Administrative Appeals [OAA] (May 27, 2003); Letter from R. Shawn Griggs to OAA (July 25, 2003).

¹⁰ 50 C.F.R. § 679.43(b)

¹¹ Decision (Nov. 26, 2007). All prior decisions by OAA are on the NMFS Alaska Region website, Administrative Appeals: <http://www.fakr.noaa.gov/index/appeals/decisionsbynumber.asp>.

¹² Letter from R. Shawn Griggs to OAA (Dec. 6, 2007).

¹³ Order Granting Reconsideration and Granting Yakutat the Opportunity to Submit Additional Evidence and Argument (Mar. 5, 2010).

I concluded that Yakutat had not presented sufficient evidence to establish the facts supporting an unavoidable circumstance claim and that it should have thirty days to present additional evidence and argument in support of its claim.¹⁴ Yakutat submitted additional evidence and argument.¹⁵ I conclude that the record contains sufficient information to decide this appeal and that all procedural requirements have been met.¹⁶ I close the record and issue a decision.

ISSUE

Does Yakutat satisfy the requirements in the BSAI Pacific cod hardship/unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(9)(v)(B), for 1998?

SUMMARY

LLG 2959 is an LLP groundfish license with a catcher/processor endorsement. For 1997, Yakutat, Inc., satisfies the harvest requirement for a BSAI Pacific cod pot gear endorsement on LLG 2959: it harvested over 300,000 pounds of Pacific cod with pot gear in BSAI from the F/V BLUE NORTH. For 1998, Yakutat satisfies the requirements of the hardship/unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(9)(v)(B). Yakutat therefore qualifies for a BSAI Pacific cod pot gear endorsement on LLG 2959.

ANALYSIS

Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, NMFS adopted regulations implementing the North Pacific Groundfish and Crab License Limitation Program [LLP] in the Exclusive Economic Zone off Alaska in 1998.¹⁷ In 2002, pursuant to the Magnuson Act, NMFS adopted regulations requiring a specific endorsement on an LLP license to harvest Pacific cod in the BSAI.¹⁸ The regulation has specific requirements for catcher vessels and catcher/processor vessels and specific requirements for pot gear, jig gear and hook-and-line gear.¹⁹

To qualify for a BSAI Pacific cod pot gear endorsement on an LLP license with a catcher/processor vessel designation, an applicant must demonstrate that the license holder harvested a minimum of 300,000 pounds of Pacific cod in BSAI with pot gear in each of any,

¹⁴ *Id.* at 5 - 8.

¹⁵ Letter from R. Shawn Griggs to OAA (Apr. 5, 2010); Declaration of Alfred Alberts (Mar. 31, 2010); Declaration of Mike Burns (Apr. 5, 2010).

¹⁶ 50 C.F.R. §679.43(k).

¹⁷ Final Rule, 63 Fed. Reg. 52,642 (Oct. 1, 1998).

¹⁸ Final Rule, 67 Fed. Reg. 18,129 (Apr. 15, 2002), *codified primarily at* 50 C.F.R. § 679.4(k)(9). For background, and NMFS's response to comments, on the BSAI Pacific cod endorsement, see Final Rule, 67 Fed. Reg. 18,129, 18,130 - 18,137 (Apr. 15, 2002).

¹⁹ 50 C.F.R. § 679.4(k)(9)(ii).

two years from 1995 through 1998,²⁰ or that the license holder satisfies the hardship/unavoidable circumstance regulation in a year for which the license holder did not meet the 300,000 pound harvest requirement.²¹

Yakutat's LLP groundfish license, LLG 2959, has a catcher/processor vessel designation. LLG 2959 is based on the fishing history and characteristics of the F/V BLUE NORTH. The F/V BLUE NORTH harvested 300,000 pounds (or more) of Pacific cod in the BSAI with pot gear in 1997.²² It therefore meets the harvest requirement for one year in the period 1995 through 1998 through actual harvests of 300,000 pounds. Yakutat did not harvest 300,000 pounds of Pacific cod with pot gear in BSAI in a second year between 1995 and 1998.

For 1998, Yakutat claims that it meets the hardship/unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(9)(v)(B), which provides:

(B) Hardship provision. A license holder may be eligible for a Pacific cod endorsement because of unavoidable circumstances if he or she meets the requirements in paragraphs (k)(9)(v)(B)(1) - (4) of this section. For purposes of this hardship provision, the term license holder includes the person who [sic] landings were used to meet the eligibility requirements for the license holder's groundfish license, if not the same person.

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of this section but that this intent was thwarted by a circumstance that was:

(i) Unavoidable.

(ii) Unique to the license holder, or unique to the vessel that was used at the basis of eligibility for the license holder's groundfish license; and

(iii) Unforeseen and reasonably unforeseeable to the license holder.

(2) The circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) actually occurred;

(3) The license holder took all reasonable steps to overcome the circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph

²⁰ 50 C.F.R. § 679.4(k)(9)(ii)(D).

²¹ 50 C.F.R. § 679.4(k)(9)(v)(B).

²² Landings Records from NMFS, Sustainable Fisheries Division, Attachment 3 to Letter from Captain James Mize, Yakutat, to RAM (Aug. 5, 2002). According to these records, the F/V BLUE NORTH landed 173.743 metric tons of Pacific cod with pot gear in BSAI in 1997: 163.681 in Area 509; 4.75 in Area 517; 5.183 in Area 519. 173.743 metric tons equals 383,038 pounds. (A metric ton is 2,204.62262 pounds.) The precise number of pounds is not relevant to this appeal. What is relevant is that landings in 1997 were at least 300,000 pounds.

(k)(9)(ii) of this section; and

(4) Any amount of Pacific cod was harvested in the BSAI aboard the vessel that was used at the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000.

To satisfy the unavoidable circumstance regulation, an applicant must show it meets each requirement of the regulation by a preponderance of the evidence in the record. The purpose of the unavoidable circumstance provision is to grant relief to a license holder who shows that it likely would have harvested the amount of Pacific cod required under the standard criteria for the endorsement, but for an unavoidable circumstance.²³

The unavoidable circumstance alleged by Yakutat is that it had an agreement with a crew to fish the pot cod fishery in June and July 1998 from the F/V BLUE NORTH and the crew reneged on its agreement at the beginning of June. I conclude, based on a preponderance of evidence in the record, that Yakutat has shown that it satisfies the requirements of the unavoidable circumstance regulation in 50 C.F.R. § 679.4(k)(9)(v)(B) for 1998. There are different ways to analyze the regulation but I divide it into seven requirements:

[1] Did the license holder at the time of the unavoidable circumstance hold a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in the table at paragraph (k)(9)(ii) of this section? Yes. [50 C.F.R. § 679.4(k)(9)(v)(B)(1)]

The license holder is Yakutat. The time of the claimed unavoidable circumstance is June 1998, which is when Yakutat states that key members of the crew informed Yakutat that the crew did not intend to participate in the pot cod fishery in BSAI from the F/V BLUE NORTH.

A specific intent is more than a general desire or interest in a fishery. To prove a specific intent, the applicant must have taken concrete steps to participate in the fishery. Generally, the license holder must be ready to participate in the fishery, when the unavoidable circumstance intervenes to thwart the license holder's intent. To be ready to participate in a fishery, the license holder usually will have a vessel equipped to participate, and a crew ready to participate, in the fishery.²⁴

²³ Final Rule, 67 Fed. Reg. 18,129, 18,131 (2002). The applicant must also prove it took all reasonable steps to overcome the circumstance. 50 C.F.R. § 679.4(k)(9)(v)(B)(3).

²⁴ See *Pequod, Inc.*, Appeal No. 00-0013 at 13 (Apr. 12, 2002) ("To evaluate Pequod's claim that it intended to harvested [sic] AI [Aleutian Islands] brown king crab between March 4, 1994 and July 5, 1994, I will examine the extent to which the F/V EARLY DAWN was prepared and equipped to conduct AI brown king crab fishing in March 1994; whether Pequod offered credible testimony of its intent during this time period; and what Pequod did when the F/V EARLY DAWN was able to resume fishing."). Available on the NMFS Alaska Region website, Administrative Appeals: <http://www.fakr.noaa.gov/index/appeals/decisionsbynumber.asp>.

The table at paragraph(k)(9)(ii) specifies the harvest level for a BSAI Pacific cod pot gear endorsement on an LLP groundfish license with a catcher/processor vessel designation. The harvest level for that endorsement in the qualification table is a minimum of 300,000 pounds of Pacific cod harvested in BSAI with pot gear.²⁵

Putting these provisions together, Yakutat must show, by a preponderance of evidence, that it held a specific intent in June 1998 to harvest 300,000 pounds (or more) of cod with pot gear in BSAI in 1998 from the F/V BLUE NORTH. I analyze whether Yakutat has shown that it had equipped a vessel for the pot cod fishery, that it had arranged for a crew to participate in that fishery, and that it had a specific intent to harvest 300,000 pounds of Pacific cod with pot gear in BSAI in 1998.

Was the F/V BLUE NORTH equipped to harvest over 300,000 pounds of Pacific cod with pot gear in June 1998? The F/V BLUE NORTH was built in 1945 as a Navy oiler. Yakutat first modified the vessel so it could participate in the hook-and-line sector of the BSAI Pacific cod fishery.²⁶ The vessel participated heavily in that fishery from at least 1995 to 2000.²⁷ In December 1996, Yakutat invested in excess of \$200,000 so the vessel could participate in the BSAI pot cod fishery.²⁸ Yakutat planned to participate in the pot cod fishery from the F/V BLUE NORTH in the summer months when “weather conditions are milder and the vessel is less likely to encounter rough seas.”²⁹ Yakutat did not intend to participate in the pot cod fishery with the F/V BLUE NORTH in the fall and winter months because the vessel was less stable with a full complement of pot gear, due to the height of the gear deck, and had a tendency to roll when loaded with pot gear.³⁰

Yakutat participated in the BSAI pot cod fishery with the F/V BLUE NORTH in June and July 1997, harvesting over 300,000 pounds of Pacific cod.³¹ The record contains no evidence that the vessel had undergone any changes between 1997 and 1998 which would have made it physically unable to harvest Pacific cod in 1998. The F/V BLUE NORTH participated in the hook-and-line Pacific cod fishery in BSAI in early 1998. Yakutat stored the vessel’s pot gear in Dutch Harbor so the vessel could “exchange its hook and line gear for pots in Dutch Harbor, and immediately

²⁵ 50 C.F.R. § 679.4(k)(9)(ii)(D).

²⁶ Letter from R. Shawn Griggs to OAA, at 1 - 2 (July 25, 2003); Letter from Captain James Mize, Yakutat, to RAM at 2 (Aug. 5, 2002).

²⁷ Landings Records of Pacific cod and other groundfish species, Attachment 3 to Letter from Captain James Mize, Yakutat, to RAM (Aug. 5, 2002).

²⁸ Letter from Captain James Mize, Yakutat, Inc., to RAM at 2 (Aug. 5, 2002)

²⁹ Declaration of Mike Burns at ¶ 5 (Apr. 5, 2010).

³⁰ Letter from Captain James Mize, Yakutat, to RAM at 2 -3 (Aug. 5, 2002); Declaration of Mike Burns at ¶ 5 (Apr. 5, 2010); Letter from R. Shawn Griggs to OAA, at 2 (July 25, 2003).

³¹ Letter from Captain James Mize, Yakutat, to RAM at 2 - 3 & Landings Records, Attachment 3 (Aug. 5, 2002); Email from Patty Britza, Fisheries Information Specialist, NMFS, to Mary Alice McKeen (June 4, 2010) (FV Blue North weekly production reports listed by date).

turn-around and participate in the Pacific cod pot fishery in late spring/early summer.”³² Telex messages between the Yakutat “Office” and the “Boat” in May and June 1998 indicate that the F/V BLUE NORTH was physically capable of pot cod fishing in June and July 1998, if it had a qualified crew.³³ And, with the same vessel, Yakutat harvested over 300,000 pounds of Pacific cod with pot gear in May and June 1999.³⁴ I find that the F/V BLUE NORTH was equipped to participate in the BSAI pot cod fishery in June 1998.

A word about the telexes. The telexes were thirteen messages delivered through the Inmarsat-C system in May and June 1998. Eight messages were “Office →to Boat,” which were messages from the Yakutat/Blue North Fisheries Office to the F/V BLUE NORTH. Five messages are “Boat → Office,” which were messages from the F/V BLUE NORTH to the Yakutat/Blue North Fisheries Office.³⁵ I have numbered the telexes 1 through 13.

Did Yakutat have an agreement with a crew to participate in the BSAI pot cod fishery in June 1998? Because of its size, the F/V BLUE NORTH has special staffing requirements imposed by the Coast Guard.³⁶ The vessel is required to operate under the command of a licensed master, mate, and chief engineer at all times. Mike Burns, President of Yakutat, stated that, when he signed on a crew for the F/V BLUE NORTH for the hook-and-line groundfish fishery at the beginning of 1998, many of the crew also agreed to work on the vessel during the pot cod fishery as well.³⁷ Mike Burns stated that the crew members that began working in early 1998, and agreed to continue into the pot cod fishery, included the vessel’s key crew members: Alfred Alberts, the licensed master, Rodney Devine, the licensed mate, and Rudy Perez, the licensed chief engineer.³⁸

The evidence in the record tending to show that Yakutat did not have an agreement with the crew to harvest pot cod in June and July 1998 is the language in some of the telexes from the Office to

³² Declaration of Mike Burns at ¶ 6 (Apr. 5, 2010).

³³ Telexes, Attachment 1 to Letter from Captain James Mize, Yakutat, to RAM (Aug. 5, 2002). The telexes were also attached to Yakutat’s appeal. Exhibit B to Letter from R. Shawn Griggs to OAA (July 25, 2003). The set of telexes submitted by Captain Mize has some lines cut off of at the bottom of Telexes 4, 6, 8 and 11. The set attached to Mr. Griggs’s letter is more complete. I will refer to that set.

³⁴ Landings Records, Attachment 3 to Letter from Captain James Mize, Yakutat, to RAM (Aug. 5, 2002). According to these records, the F/V BLUE NORTH landed a total of 160.733 metric tons of Pacific cod with pot gear in BSAI in 1999: 3.808 in Area 519; 69.698 in Area 542; 87.227 in Area 543. This converts to 354,356 pounds. Email from Patty Britza, Fisheries Information Specialist, NMFS, to Mary Alice McKeen (June 4, 2010) (F/V BLUE NORTH weekly production reports listed by date).

³⁵ Exhibit B to Letter from R. Shawn Griggs to OAA (July 25, 2003).

³⁶ Declaration of Mike Burns at ¶ 4 (Apr. 5, 2010). The vessel is 174 feet length overall. Letter from Jonathan G. Parrott, P.E., Jensen Maritime Consultants, Inc., to Mike Burns (Feb. 4, 2000).

³⁷ Declaration of Mike Burns at ¶ 6 (Apr. 5, 2010).

³⁸ *Id.* at ¶¶ 6 & 10.

the Boat.³⁹ Alfred Alberts, the licensed master, states these telexes are consistent with his experience that “Mike [Burns] will approach the officers and crew using indirect language similar to that in the telexes to confirm their earlier commitments to remain on the boat for another fishery.”⁴⁰ Mike Burns stated: “My messages inquiring about the crew’s continued commitment to the pot cod season were obtusely worded so as not to offend or upset the crew. I use this approach frequently to maintain good relations between our corporate office and the vessel crew.”⁴¹

I find that the preponderance of evidence in the record confirms Mike Burns’s sworn statement that he had lined up a pot cod crew for the F/V BLUE NORTH for June and July 1998: the sworn statement of Alfred Alberts, the F/V BLUE NORTH’s licensed master, that, at the beginning of 1998, he told Mike Burns that he would skipper the F/V BLUE NORTH for the summer pot cod fishery;⁴² a telex from early June, 1998, that the Yakutat was arranging food for a pot crew of twelve to fourteen people and two thirty-day trips;⁴³ a telex that Pat Burns, co-owner of Blue North, was going to fly up to Dutch Harbor to launch the pot cod trip and bring parts for the vessel;⁴⁴ Yakutat’s substantial investment, in 1996, to equip the F/V BLUE NORTH for the pot cod fishery, which gave Yakutat an incentive to obtain crew for the pot cod fishery in 1997 and 1998; Yakutat’s successful recruitment of crew for the F/V BLUE NORTH’s participation in the pot cod fishery in the summer of 1997, and harvest of over 300,000 pounds in that fishery,⁴⁵ which bolsters Yakutat’s claim that it intended to do the same thing in 1998; the F/V BLUE NORTH was physically equipped to participate in the summer pot cod fishery in 1998 and was present at the time and place to do that, namely BSAI in June 1998.

³⁹ Telex # 1, Office →to Boat (“LOOKING TOWARD THE FUTURE - POT FISHING AFTER TURBO. WHAT IS THE INTEREST LEVEL OF SHIPS’ OFFICERS? NEED TO START PLANNING.”) (undated but internal reference to person flying up on 4/25/98); Telex # 3, Office →to Boat (ALSO, COULD YOU START FEELING THE CREW OUT FOR POT COD CANDIDATES. LET ME KNOW WHAT IT LOOKS LIKE.) (undated but reference to closure on May 14, 1998)

⁴⁰ Declaration of Alfred Alberts at ¶ 9 (Mar. 31, 2010).

⁴¹ Declaration of Mike Burns at ¶ 9 (Apr. 5, 2010).

⁴² Declaration of Alfred Alberts at ¶ 6 (Mar. 31, 2010) (“At the beginning of 1998, I told Mike Burns, president of Blue North Fisheries, that I would skipper the F/V BLUE NORTH for the spring groundfish longline fishery, the summer pot cod fishery, and fall longline fishery. Given my long history with the company, this agreement was never put in writing, and I would have considered it unusual to have done so.”)

⁴³ Telex # 7, “Office →Boat,” Exhibit B to Letter from R. Shawn Griggs to OAA (July 25, 2003). This telex does not have a date but is between one dated June 3 (1998) and one dated June 8 (1998).

⁴⁴ Telex # 11, “Office →Boat,” (June 10, 2008) (“Pat was holding parts order to take with him when he went up to launch pot trip.”), Exhibit B to Letter from R. Shawn Griggs to OAA (July 25, 2003); Declaration of Mike Burns at ¶13 (Apr. 5, 2010).

⁴⁵ Landings Records, Attachment 3 to Letter from Captain James Mize, Yakutat, to RAM (Aug. 5, 2002).

Further, the evidence in the record shows that, as soon as Yakutat realized that the crew was backing out, it sought replacement crew. Mike Burns cold-called known candidates within the company employment database and contacted other fishing companies that shared personnel.⁴⁶ Yakutat placed an ad in the Seattle Times time in early June,⁴⁷ and used a specialized maritime recruiting service, Marine Employment Services, to solicit replacement crew.⁴⁸ Yakutat also ran an ad in July.⁴⁹ These actions corroborate Yakutat's allegation that, until early June 1998, it believed it had a crew ready to participate in the summer pot cod fishery and that it intended to deploy the F/V BLUE NORTH in that fishery. I find that Yakutat had arranged for a crew to participate in the summer pot cod fishery with the F/V BLUE NORTH in 1998.

Did Yakutat specifically intend to go pot cod fishing in June 1998? I have found that it was prepared to participate in the BSAI summer pot cod fishery. Yakutat had specifically equipped the F/V BLUE NORTH for this fishery, had participated in the fishery the year before, had made arrangements with a crew, and had the vessel where it needed to be to prosecute this fishery. I find that, in June 1998, Yakutat had a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to land 300,000 pounds, or more, of cod with pot gear in 1998.

[2] Did the circumstance occur and did it thwart the license holder's intent to participate in the fishery? Yes. [50 C.F.R. § 679.4(k)(9)(v)(B)(1) & (2)]

The regulation requires that the license holder shows that the circumstance occurred,⁵⁰ and that the circumstance thwarted the license holder's intent to participate in the fishery.⁵¹ In the context of this appeal, Yakutat must show that the crew reneged on its agreement to participate in the fishery and that this thwarted Yakutat's intent to participate in the fishery.

Did the crew renege on its agreement to participate in the pot cod fishery? I find that a number of crew members, including key members of the crew, reneged on their agreement to work on the F/V BLUE NORTH for the pot cod fishery in June and July 1998. I base that finding on the following evidence. Alfred Alberts, captain of the F/V BLUE NORTH, stated: "Around June 3, 2008, I informed Blue North Fisheries that I no longer wanted to work on board the F/V Blue North for the pot cod season. I communicated this to Mike Burns via Inmarsat-C. Mike [Burns] attempted to talk me out of my decision, but after so many months at sea, I felt we could not

⁴⁶ Letter from Captain James Mize, Yakutat, Inc., to RAM at 4 (Aug. 5, 2002).

⁴⁷ Declaration of Mike Burns at ¶ 14 (Apr. 5, 2010); Statement of Account from Seattle Times, (billing period 5/29/98 - 06/04/98), Attachment 2 to Letter from Captain James Mize, Yakutat, to RAM (Aug. 5, 2002).

⁴⁸ Declaration of Mike Burns at ¶ 14 (Apr. 5, 2010); Letter from Captain James Mize, Yakutat, to RAM (Aug. 5, 2002).

⁴⁹ Declaration of Mike Burns at ¶ 14 (Apr. 5, 2010).

⁵⁰ 50 C.F.R. § 679.4(k)(9)(v)(B)(2).

⁵¹ 50 C.F.R. § 679.4(k)(9)(v)(B)(1).

continue on and fish the pot cod season.”⁵² Mike Burns stated: “In early June of 1998, a number of the crew that I had arranged to operate the BLUE NORTH in the spring pot cod fishery contacted me and told me that they no longer intended to participate in that fishery and that I would have to find alternate crew for that voyage. These crew members included Alfred Alberts, the captain, Rudy Perez, chief engineer, and Rodney Devine, mate. Although I tried to talk each of them out of their decision to back out of the pot cod fishery, I was ultimately unsuccessful.”⁵³ A telex from the Boat to the Office states that the “crew is tired” and “it’s been a long season.”⁵⁴

Did this circumstance – the lack of a crew – thwart Yakutat’s intent to participate in the pot cod fishery? Yes. The evidence is clear that, in June 1998, as soon as Yakutat learned that it did not have a crew to operate the F/V BLUE NORTH in the pot cod fishery, Yakutat had the vessel brought back to Seattle.⁵⁵

[3] Was Yakutat’s intent to harvest in excess of 300,000 pounds of Pacific cod in 1998 thwarted by a circumstance that was *unavoidable*? Yes. [50 C.F.R. § 679.4(k)(9)(v)(B)(1)(i)]

Was the circumstance – the lack of a qualified crew – “unavoidable” by Yakutat, within the meaning of the unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(9)(v)(B)(1)(i)? Webster defines “unavoidable” as “incapable of being shunned or prevented.”⁵⁶ The requirement that the circumstance be unavoidable insures that the license holder was hit by a circumstance beyond the control of the license holder.⁵⁷ Thus, if a license holder did not have a vessel that was able to participate in the pot cod fishery, it would not be facing a circumstance that was unavoidable.⁵⁸ The license holder could have avoided that circumstance by having a vessel equipped to participate in the fishery. Or if Yakutat simply did not try to line up a crew until June 1998, its circumstance would have been avoidable. It simply had to start looking earlier. Here, at the beginning of 1998, Yakutat arranged for a crew to continue fishing on the F/V BLUE NORTH through the pot cod fishery.

⁵² Declaration of Alfred Alberts at ¶ 10 (Mar. 31, 2010).

⁵³ Declaration of Mike Burns at ¶ 10 (Apr. 5, 2010).

⁵⁴ Telex # 8, Exhibit B to Letter from R. Shawn Griggs to OAA (July 25, 2003).

⁵⁵ Declaration of Mike Burns at ¶ 11 (Apr. 5, 2010); Declaration of Alfred Alberts at ¶ 12 (Mar. 31, 2010).

⁵⁶ Webster’s Third New International Dictionary (1986).

⁵⁷ Final Rule, 67 Fed. Reg. 18,129, 18,137 (Apr. 15, 2002) (“The Council also recommended a hardship provision that was designed to assist applicants to achieve eligibility if they were prevented from meeting all the eligibility requirements by circumstances beyond their control.”)

⁵⁸ An unavoidable circumstance cannot be a vessel’s physical characteristics that prevent the vessel from being able to participate in the fishery. Neither would a vessel’s physical characteristics be unforeseen or reasonably unforeseeable. *Wizard Fisheries, Inc.*, Decision, Appeal No. 03-0004 at 7 - 16 (Mar. 3, 2005); *Wizard Fisheries, Inc.*, Decision on Reconsideration, Appeal No.03-0004 at 10 - 11 (Apr. 27, 2005). Available at <http://www.fakr.noaa.gov/index/appeals/decisionsbynumber.asp>.

Further, the circumstance of a crew reneging on its agreement to fish would be “avoidable” by the license holder if the license holder, or its agent, did something which caused the crew to back out of its agreement. As one court noted, when evaluating whether the crew’s actions were attributable to the vessel owner, “[o]vertopping all considerations, however, it must be recalled that the hindering event was not of the owner’s making or neglect.”⁵⁹ For example, if the vessel owner was not providing a safe vessel, or did not pay the crew for trips during the first part of the season, the crew would have reason to renege on its agreement to fish later trips in the season. In those examples, the crew’s actions would be avoidable by the vessel owner – by the owner providing a safe ship or living up to financial agreements with the crew.

The record contains no evidence that Yakutat/Blue North Fisheries took action which would make the crew’s decision attributable to the license holder. The telexes between the Office and the Boat mention no dispute over safety or money.⁶⁰ If there were such a dispute, I would expect to find reference to it there. I find that Yakutat/Blue North Fisheries had not done anything that caused the crew to renege on its agreement to fish BSAI Pacific cod in June and July 1998.

The prior Decision found that the circumstance was not unavoidable because the intent of the crew was, as a matter of law, attributable to the vessel owner and license holder.⁶¹ Yakutat, on reconsideration, argued against this proposition, stating that the intent of an employee is not always attributable to the employer and the intent of an agent is not always attributable to the principal.⁶² Yakutat is correct that, as a matter of law and as a matter of fact, the intent of the license holder can be different from the intent of crew members and therefore the actions of the crew are not automatically attributable to the license holder.

The prior Decision stated that the unavoidable circumstance had to physically disable the vessel.⁶³ While catastrophic damage to the vessel is a classic example of an unavoidable circumstance, the regulation, by its terms, does not require physical damage to the vessel.⁶⁴ The regulation requires that the circumstance have certain characteristics – the circumstance must be unavoidable, unique, unforeseen and unforeseeable – and that the circumstance thwarted the license holder’s specific intent to participate in the fishery. A crew’s decision to renege on an agreement to participate in the fishery can have those characteristics and can have the effect of thwarting a license holder’s specific intent to participate in the fishery.

The prior Decision states that the unavoidable circumstance regulation for the BSAI Pacific cod endorsement, which was adopted in 2002, should be interpreted the same as the two earlier

⁵⁹ *M/V MARILENA P*, 433 F. 2d 164, 168 (4th Cir. 1969) (crew refused to load vessel bound for Vietnam).

⁶⁰ Exhibit B to Letter from R. Shawn Griggs to OAA (July 25, 2003).

⁶¹ Decision at 6 - 7 (Nov. 26, 2007).

⁶² Letter from R. Shawn Griggs to OAA at 2 - 4 (Dec. 6, 2007).

⁶³ Decision at 3 - 6 (Nov. 26, 2007).

⁶⁴ 50 C.F.R. § 679.4(k)(9)(v)(B).

unavoidable circumstance provisions.⁶⁵ The two earlier unavoidable circumstance provisions were in the original LLP regulation, adopted in 1998,⁶⁶ and in the regulation for a recent participation requirement for an LLP crab license, adopted in 2001.⁶⁷ Clearly the BSAI Pacific cod provision is patterned after the two, earlier unavoidable circumstance provisions: the language is unmistakably similar.⁶⁸ But the three provisions are not identical. I do not resolve whether the three unavoidable circumstance provisions must be interpreted the same in every respect because I do not interpret the earlier provisions as excluding the type of unavoidable circumstance claim Yakutat is making here.

The original LLP provision refers to a person “whose vessel was unable to meet all the criteria [for an LLP 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*).”⁶⁹ Although the BSAI Pacific cod unavoidable circumstance provision does not have the italicized language, I do not interpret the phrase “or otherwise unable to participate in the license limitation groundfish or crab fisheries” as requiring the same type of physical damage that would result in a vessel being lost or damaged. The failure of a license holder to have a qualified crew could be a circumstance that makes the vessel “otherwise unable to participate” in a fishery. Yakutat correctly notes: “[U]nder principles of maritime law, the failure to have adequate, properly licensed, and trained crew on board renders a vessel unseaworthy. The refusal of the crew to engage in a Pacific cod fishery was no less debilitating to the operation of the Vessel than the breakdown of a significant piece of equipment would have been.”⁷⁰

I find that the crew’s decision in 1998 to not fish in the Pacific pot cod fishery in BSAI was unavoidable by Yakutat and was unavoidable within the meaning of the unavoidable circumstance regulation.

[4] Was Yakutat’s intent to harvest in excess of 300,000 pounds of Pacific cod in 1998 thwarted by a circumstance that was *unique to the license holder or unique to the vessel* that was used as the basis of eligibility for the license? Yes. [50 C.F.R. § 679.4(k)(9)(v)(B)(1)(ii)]

⁶⁵ Decision at 4 - 5 (Nov. 26, 2007).

⁶⁶ Final Rule, 63 Fed. Reg. 52,642, 52,657 (1998), *codified at* 50 C.F.R. § 679.4(k)(8)(iv).

⁶⁷ Final Rule, 66 Fed. Reg. 48,813, 48,821- 48,822 (2001), *codified at* 50 C.F.R. § 679.4(k)(5)(v).

⁶⁸ Compare 50 C.F.R. § 679.4(k)(9)(v)(B) (BSAI Pacific cod provision) with 50 C.F.R. § 679.4(k)(8)(iv) (original LLP provision) and 50 C.F.R. § 679.4(k)(5)(v) (crab recency provision).

⁶⁹ 50 C.F.R. § 679.4(k)(8)(iv) (emphasis added). Accord 50 C.F.R. § 679.4(k)(5)(v) (“A qualified person . . . whose vessel was unable to meet [the crab recent participation requirement] . . . because of unavoidable circumstances (*i.e., the vessel was lost[,] damaged, or otherwise unable to participate in the license limitation crab fisheries*).

⁷⁰ Letter from R. Shawn Griggs to OAA at 5 (Dec. 6, 2007).

The need to find a qualified crew was definitely *not* unique to Yakutat. What was unique to Yakutat was the need to find a crew, including three key licensed officers, at or near when the crew had agreed to fish, because the crew reneged on its prior agreement.

[5] Was Yakutat’s intent to harvest in excess of 300,000 pounds of Pacific cod in 1998 thwarted by a circumstance that was unforeseen and reasonably unforeseeable to Yakutat? Yes. [50 C.F.R. § 679.4(k)(9)(v)(B)(1)(iii)]

Did Yakutat foresee that crew members would change their minds about participating in the summer pot cod fishery? Mike Burns states that he did not foresee this occurring and learned of the crew member’s decision not to continue into the pot cod fishery in early June 1998.⁷¹ Alfred Alberts, the vessel’s captain, states that he told Mr. Burns of his decision in early June 1998.⁷² Yakutat took actions to recruit substitute crew in June 1998, as soon as it learned of the decision by the crew.⁷³ I find that Yakutat did not foresee this circumstance.

Was this circumstance reasonably unforeseeable? The record contains no evidence that the crew members informed Mr. Burns of their decision before early June 1998. Yakutat was relying on crew members to carry through on their commitment, to repeat what they had done the year before (and what they did the next year) and to continue fishing on board the vessel that they were already on. I find that the circumstance of the crew backing out of their agreement to fish the 1998 pot cod fishery was not reasonably foreseeable.

[6] Did Yakutat take all reasonable steps to overcome the unavoidable circumstance? Yes. [50 C.F.R. § 679.4(k)(9)(v)(B)(3)]

I have previously described Yakutat’s efforts to find a replacement crew.⁷⁴ Mike Burns cold-called known candidates within the company employment database and contacted other fishing companies that share personnel. Yakutat placed an ad in the Seattle Times time in early June, and used a specialized maritime recruiting service, Marine Employment Services, to solicit replacement crew. It also ran an ad in July. These efforts were unsuccessful.

Yakutat did not fish for pot cod in the fall or winter of 1998 with the F/V BLUE NORTH. I conclude that is not a step which Yakutat should be required to have taken, as a reasonable step within the meaning of 50 C.F.R. § 679.4(k)(9)(v)(B)(3). I find that the vessel was not equipped to participate in the pot cod fishery in the fall and winter months. I base this on the statements of Mike Burns and Captain James Mize, Yakutat’s representative before RAM, that the vessel was less stable with a full complement of pot gear, due to the height of the gear deck, and had a

⁷¹ Declaration of Mike Burns at ¶ 10, ¶ 11 (Apr. 5, 2010).

⁷² Declaration of Alfred Alberts at ¶ 10 (Mar. 31, 2010).

⁷³ See text accompanying notes 46 - 49 *supra*.

⁷⁴ *Id.*

tendency to roll when loaded with pot gear.⁷⁵ Mike Burns states the vessel was equipped to participate in the summer months, when the weather is calmer and rough seas are less likely.⁷⁶ These statements are confirmed by the vessel's participation in the pot cod fishery in 1997 and 1999, only in May, June and July.⁷⁷

**[7] Did Yakutat harvest any amount of BSAI Pacific cod aboard the F/V BLUE NORTH after the F/V BLUE NORTH vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000?
Yes. [50 C.F.R. § 679.4(k)(9)(v)(B)(4)]**

This provision simply requires that the license holder have harvested any amount of Pacific cod in the BSAI – one pound would suffice – after the unavoidable circumstance lifted and before April 16, 2000. The IAD stated that Yakutat met this requirement.⁷⁸ As noted previously, according to records submitted by Yakutat, the F/V BLUE NORTH harvested 354,356 pounds of Pacific cod with pot gear in the BSAI in 1999.⁷⁹

FINDINGS OF FACT

I find by a preponderance of the evidence that:

1. Yakutat landed over 300,000 pounds of Pacific cod in BSAI with pot gear from the F/V BLUE NORTH in 1997.
2. In June 1998, Yakutat had equipped the F/V BLUE NORTH to participate in the BSAI pot cod fishery in June and July 1998.
3. As of the beginning of June 1998, Yakutat had arranged with a crew to harvest Pacific cod in the BSAI pot cod fishery from the F/V BLUE NORTH in June and July 1998.
4. In June 1998, Yakutat had a specific intent to harvest over 300,000 pounds in the BSAI pot cod fishery in 1998.
5. At the beginning of June 1998, the crew, including key members of the crew, reneged on its agreement to fish pot cod from the F/V BLUE NORTH in June and July 1998.

⁷⁵ Letter from Captain James Mize, Yakutat, to RAM at 2 -3 (Aug. 5, 2002); Declaration of Mike Burns at ¶ 5 (Apr. 5, 2010); Letter from R. Shawn Griggs to OAA, at 2 (July 25, 2003).

⁷⁶ Declaration of Mike Burns at ¶ 5 (Apr. 5, 2010).

⁷⁷ Email from Patty Britza, Fisheries Information Specialist, NMFS, to Mary Alice McKeen (June 4, 2010). The F/V BLUE NORTH weekly production reports show the vessel landed BSAI Pacific cod with pot gear in June/July 1997 and in May/June 1999).

⁷⁸ IAD at 11.

⁷⁹ See note 34 *supra*.

6. As soon as Yakutat learned of the crew's decision to not fish pot cod from the F/V BLUE NORTH in June and July 1998, it sought replacement crew.
7. Yakutat's specific intent was thwarted by the crew's decision to not fish pot cod from the F/V BLUE NORTH in June and July 1998.
8. Yakutat did not take any action which caused the crew members to renege on their agreement to fish pot cod from the F/V BLUE NORTH.
9. The circumstance faced by Yakutat was unavoidable by Yakutat.
10. The circumstance faced by Yakutat was unique to Yakutat.
11. The circumstance faced by Yakutat was unforeseen by Yakutat.
12. The F/V BLUE NORTH was not equipped to participate in the BSAI pot cod fishery in the fall and winter.
13. Yakutat harvested BSAI Pacific cod after June 1998 and before April 16, 2000.

CONCLUSIONS OF LAW

1. Yakutat's LLP groundfish license, LLG 2959, is based on the fishing history and characteristics of the F/V BLUE NORTH.
2. Yakutat meets the harvest requirement in 50 C.F.R. § 679.4(k)(9)(ii)(D) for 1997 for a BSAI Pacific cod pot gear endorsement on LLG 2959 through its actual harvest in 1997 of over 300,000 pounds of Pacific cod with pot gear in BSAI.
3. Yakutat, Inc., satisfies the requirements in the hardship/unavoidable circumstance regulation, 50 C.F.R. § 679.4(k)(9)(v)(B), for 1998.
4. The crew's decision in June 1998 to not harvest Pacific cod from the F/V BLUE NORTH in June and July 1998 is a circumstance that was, within the meaning of 50 C.F.R. § 679.4(k)(9)(v)(B)(1), unavoidable, unique, unforeseen and reasonably unforeseeable.
5. At the time of the unavoidable circumstance, Yakutat held a specific intent to harvest 300,000 pounds (or more) of BSAI Pacific cod with pot gear in 1998 from the F/V BLUE NORTH, within the meaning of 50 C.F.R. § 679.4(k)(9)(v)(B)(1).
6. Yakutat's specific intent to harvest 300,000 pounds (or more) of BSAI Pacific cod with pot gear in 1998 was thwarted by the circumstance of the crew's decision to not harvest Pacific cod, within the meaning of 50 C.F.R. § 679.4(k)(9)(v)(B)(1).

7. The circumstance occurred, within the meaning of 50 C.F.R. § 679.4(k)(9)(v)(B)(2), namely the crew in June 1998 decided not to harvest Pacific cod with pot gear from the F/V BLUE NORTH in June and July 1998.

8. Yakutat took all reasonable steps to overcome the crew's decision to not harvest BSAI Pacific cod with pot gear in 1998, within the meaning of 50 C.F.R. § 679.4(k)(9)(v)(B)(3).

9. Yakutat was not required, as a reasonable step within the meaning of 50 C.F.R. § 679.4(k)(9)(v)(B)(3), to participate in the BSAI pot cod fishery in the fall or winter of 1998.

10. Yakutat satisfies the requirements in 50 C.F.R. § 679.4(k)(9) to receive a BSAI Pacific cod pot gear endorsement on LLG 2959.

DISPOSITION

The IAD that is the subject of this appeal is VACATED in part and AFFIRMED in part. This Decision takes effect July 12, 2010, unless by that date the Regional Administrator orders review of the Decision. The IAD is VACATED as to its denial to Yakutat, Inc., of an endorsement to harvest Pacific cod in the BSAI with pot gear on LLG 2959. The IAD is AFFIRMED in all other respects.

The appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, June 21, 2010. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.



Mary Alice McKeen
Chief Administrative Judge (acting)