

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 02-0006
)
BELLA K OF SEATTLE, LLC,) DECISION
Appellant)
) March 25, 2004
)
_____)

STATEMENT OF THE CASE

The Appellant, Bella K of Seattle, LLC (Bella K), filed a timely appeal of an Initial Administrative Determination on Reconsideration (Reconsideration IAD) issued on February 26, 2002, by the Restricted Access Management (RAM) Program. Bella K can appeal the Reconsideration IAD because it directly and adversely affects Bella K's interest, as required by 50 C.F.R. §679.43(b).

The Reconsideration IAD affirmed RAM's earlier Initial Administrative Determination (IAD) of October 24, 2001. In both documents RAM revoked Bella K's License Limitation Program (LLP) crab license #LLC3661, which had derived from the fishing history of the F/V JAMES A and was endorsed for the Bristol Bay red king crab fishery. RAM revoked the license on the grounds that the F/V JAMES A was not used to make a documented harvest of any BSAI crab during the Recent Participation Period (RPP), which extended from January 1, 1996 through February 7, 1998. The Reconsideration IAD noted that Bella K's other LLP crab license #LLC2020, which was derived from the fishing history of the F/V BELLA K, was still valid and not at risk under the then-new RPP regulations because the F/V BELLA K had been used to make documented harvests of LLP crab during the RPP.

On appeal, Bella K asserts that there is no basis in applicable laws or regulations for revoking its F/V JAMES A-based crab license (#LLC3661). Further, Bella K asserts that the National Marine Fisheries Service (NMFS) should consolidate the LLP crab fishing histories of both vessels in crab license #LLC2020, and should retire license #LLC3661. RAM had stated in the Reconsideration IAD that it did not have regulatory authority to "merge" the two licenses into one, and that to do so would be contrary to the intent of Amendment 10 to the Fishery Management Plan for the Bering Sea/Aleutian Islands King and Tanner Crabs (Crab FMP).

Subsequent to the issuance of the Reconsideration IAD and the filing of this appeal, NMFS revised the regulations that implemented the RPP requirements of Amendment 10.¹ These revised regulations, found at 50 C.F.R. §679.4(k)(5)(iii) and (iv), will be applied in this appeal.

¹Final Rule, 68 Fed. Reg. 46,117 - 46,118 (August 5, 2003).

SUMMARY OF DECISION

The Appeals Officer vacates the Reconsideration IAD, in part, and affirms it, in part. The Appeals Officer concludes that 50 C.F.R §679.4(k)(5)(iii)(A), as revised, requires a person who holds one or more LLP crab licenses to have made only one documented harvest of any amount of LLP crab species during the Recent Participation Period. Such a person is a “recent participant” for purposes of the regulation and is entitled to retain all LLP crab licenses for which the person held the LLP qualifying fishing history at the time the RPP documented harvest was made.

In addition, under 50 C.F.R. §679.4(k)(5)(iv), if the person made a documented harvest of LLP crab species during the period January 1, 1998 through February 7, 1998, the person is entitled to retain any LLP crab licenses for which the person obtained the LLP qualifying fishing history (or contracted to obtain such history) by 8:36 a.m. Pacific Time on October 10, 1998. The Appeals Officer concludes that 50 C.F.R §679.4(k)(5)(iii)(A) and (iv) do not require a person to make a separate documented harvest of LLP crab species from a different vessel for each LLP crab license held. The Appeals Officer concludes that Amendment 10, the revised RPP rule, and the Crab FMP do not give NMFS authority to further restrict the number of LLP crab licenses that a person may retain.

The Appeals Officer finds that Bella K held the LLP qualifying fishing history of the F/V JAMES A while making a documented harvest of an LLP crab species with the F/V BELLA K on February 3, 1998. As a result, the Appeals Officer concludes, Bella K meets the requirements of 50 C.F.R §679.4(k)(5)(iii)(A) and is entitled to retain both LLP crab licenses: #LLC3661, based on the F/V JAMES A’s LLP qualifying fishing history, and #LLC2020, based on the F/V BELLA K’s LLP qualifying fishing history.

The Appeals Officer also concludes that neither the LLP regulations nor Amendment 10 of the Crab FMP authorizes NMFS to consolidate Bella K’s two LLP crab licenses. The Appeals Officer finds that the North Pacific Fishery Management Council (Council) did adopt a motion in 1998 to authorize the consolidation of crab fishing histories from two or more vessels into a single license where the license holder fished crab with only one vessel during the RPP but held one or more additional LLP qualifying fishing histories at that time. Nonetheless, the Council’s motion was not included in the text of Amendment 10, nor was such authorization included in the LLP regulations. Furthermore, an LLP regulation and language in the Crab FMP explicitly prohibit the consolidation of LLP crab species/area endorsements that were initially issued on separate licenses. Thus, the Appeals Officer concludes, NMFS cannot consolidate or merge Bella K’s two LLP crab licenses or the area/species endorsements on those licenses. The Appeals Officer concludes that Bella K’s two LLP crab licenses were properly issued initially as two separate licenses and are required to remain separate licenses, each with their own area/species endorsements.

ISSUES

1. Does Bella K meet the Recent Participation Period (RPP) requirements of 50 C.F.R. §679.4(k)(5)(iii)(A) and should Bella K's LLP crab license #LLC3661 be revoked ?
2. May Bella K's LLP crab license #LLC3661 be merged together with Bella K's other LLP crab license #LLC2020?

ANALYSIS

1. Does Bella K meet the Recent Participation Period (RPP) requirements of 50 C.F.R. §679.4(k)(5)(iii)(A) and should Bella K's LLP crab license #LLC3661 be revoked ?

Federal regulation 50 C.F.R. §679.4(k)(5)(iii)(A) provides:

(iii) Recent participation period (RPP). (A) The RPP is the period from January 1, 1996, through February 7, 1998. To qualify for a crab species license, defined at §679.2, a person must have made at least one documented harvest of any amount of LLP crab species from a vessel during the RPP and must have held a[n] LLP qualifying fishing history at the time of that documented harvest. A[n] LLP qualifying fishing history meets the documented harvest requirements at paragraphs (k)(5)(i) and (k)(5)(ii) of this section.

This regulation took effect on September 4, 2003.² Although by its wording the regulation appears to establish the qualifications for the initial issuance of an LLP crab license, it actually establishes a recent participation requirement for persons to whom one or more LLP crab licenses have already been issued. Thus, the question in this case is not whether Bella K qualifies to receive an LLP crab license. Rather, the question is whether an LLP crab license for which Bella K has already qualified, and which Bella K has held for four years, should now be revoked for failure to meet the new RPP requirements.

The LLP crab license in question, #LLC3661, derived from the LLP qualifying fishing history of the F/V JAMES A. Bella K purchased the fishing history of the F/V JAMES A by written contract in January 1998.³ RAM issued #LLC3661 to Bella K on January 4, 2000, and has renewed the license each year since then. The license has a single area/species endorsement, for the Bristol Bay red king crab fishery. As a result of the Reconsideration IAD in this case, the license has been designated "not transferable," pending a final agency action. Bella K did not purchase, and does not own, the F/V JAMES A.

Bella K does own the F/V BELLA K, and holds the LLP crab license derived from the LLP qualifying fishing history of that vessel, #LLC2020. RAM first issued the license to Bella K on December 27, 1999, and has renewed the license every year since then. #LLC2020 is a

²Final Rule, 68 Fed. Reg. 46,117 (August 5, 2003).

³Appellant's Exhibit A: "Bill of Sale and Assignment of Fishing Rights for James A."

transferable license and has five LLP area/species endorsements: Aleutian Islands brown king crab, Aleutian Islands red king crab, Pribilof Islands red and blue king crab, St. Matthew blue king crab, and Bering Sea/Aleutian Islands *C. opilio* and *C. bairdi*.

Bella K made a documented harvest of LLP crab from the F/V BELLA K on February 3, 1998. I conclude that this meets the first requirement of 50 C.F.R. §679.4(k)(5)(iii)(A) because Bella K thereby “made at least one documented harvest of any amount of LLP crab species from a vessel during the RPP.” Bella K owned the fishing history of the F/V JAMES A on February 3, 1998. I conclude that this meets the second requirement of 50 C.F.R. §679.4(k)(5)(iii)(A) because Bella K “held a[n] LLP qualifying fishing history at the time of that documented harvest.” I read this second requirement as meaning that the LLP qualifying fishing history that was held must be the General Qualification Period (GQP) and Endorsement Qualification Period (EQP) fishing history that gave rise to the LLP crab license in question. Because Bella K meets both RPP requirements of 50 C.F.R. §679.4(k)(5)(iii)(A), I conclude that #LLC3661 should not be revoked.

Applying an earlier version of 50 C.F.R. §679.4(k)(5)(iii)(A), RAM determined that Bella K did not meet the documented harvest requirement because the harvest was made from the F/V BELLA K rather than from the F/V JAMES A, which is the original qualifying vessel for #LLC3661. Under the revised wording of §679.4(k)(5)(iii)(A), it is no longer required that the RPP documented harvest be made from the original qualifying vessel. Now any vessel will suffice.

RAM also stated in the Reconsideration IAD that a single vessel’s RPP fishing history cannot be used to generate more than one LLP license.⁴ The Final Environmental Analysis/Regulatory Impact Review for Amendment 10 states: “Their [the Council’s] intent was that a vessel could only generate one recent participation history under the LLP program.”⁵ The preamble to the Final Rule for the LLP program expressed a similar intent with respect to the LLP qualifying fishing history: “Furthermore, only one license will be issued based on the fishing history of any qualified vessel. For instance, a vessel’s fishing history cannot be divided so that multiple licenses would be issued.”⁶

The RPP regulation, as originally written, literally stated that the requisite RPP documented harvest must have been made from the original qualifying vessel, i.e., the vessel from which the GQP and EQP harvests had been made and which generated the LLP license in question. RAM applied this provision literally and, as in this case, revoked LLP crab licenses that were not supported by an RPP documented harvest from the original qualifying vessel. The trouble with

⁴Reconsideration IAD at 8. “Neither the Council nor the Secretary intended the qualifying harvests from one vessel to give rise to more than one LLP license; . . .”

⁵*Analysis of Proposed License Limitation Package*, July 23, 1999, at 155.

⁶Final Rule, 63 Fed. Reg. 52,646 (October 1, 1998).

reading the former regulation literally and narrowly is that it does not recognize that, under the definition of “eligible applicant,”⁷ a person who owns the LLP qualifying fishing history of a vessel, without owning the vessel itself, is equally qualified for an LLP license as a person who owns both the original qualifying vessel and its LLP qualifying fishing history. Thus, even though the former RPP regulation explicitly said that the RPP documented harvest had to be from “a qualifying vessel,” a fair reading of that regulation would have to accommodate those who had purchased only the fishing history of a qualifying vessel and then made an RPP documented harvest from another vessel.

Notwithstanding how the former regulation ought to have been interpreted, however, under the revised RPP regulation it is clear that the requisite RPP documented harvest is not part of the LLP qualifying fishing history. Section 679.4(k)(5)(iii)(A) defines LLP qualifying fishing history as including only the GQP and EQP fishing history of the original qualifying vessel.⁸ The RPP documented harvest requirement is not specific to any vessel; it is personal to the license holder. As stated in the “Response to Comments” section of the preamble to the Final Rule, NMFS agrees that “persons, rather than vessels, meet the eligibility requirements and receive licenses.”⁹ The revised regulation literally requires that “a *person* must have made at least one documented harvest of any amount of LLP crab species from a vessel during the RPP. . . .” Such a person attains the status of a “recent participant.” The stated purpose of the Secretary of Commerce and NMFS in establishing the RPP requirement was to eliminate the LLP crab licenses of those who were not “recent participants” as of the October 1998 Council meeting, i.e., those who had been inactive in the BSAI crab fishery after 1995.¹⁰

Under §679.4(k)(5)(iii)(A), it is clear that even recent participants are not necessarily meant to keep every LLP crab license they hold. Under the revised version of this paragraph of the regulation, recent participants can retain only those LLP crab licenses for which they held the associated LLP qualifying fishing history at the time they made the requisite RPP documented harvest. In addition, under §679.4(k)(5)(iv), persons who made a documented harvest of LLP crab species between January 1, 1998, and February 7, 1998, were granted an additional eight months – until October 10, 1998 – to obtain the LLP qualifying fishing history associated with any LLP license that they now wish to retain.

I do not find any language in the RPP regulation, or in the text of Amendment 10, or in the Crab FMP, that gives NMFS the authority to further restrict the number of LLP crab licenses that recent participants can retain. To read into the regulation a requirement that a recent participant

⁷50 C.F.R. §679.2.

⁸“A[n] LLP qualifying fishing history meets the documented harvest requirements at paragraphs (k)(5)(i) and (k)(5)(ii) of this section.”

⁹Final Rule, 68 Fed. Reg. 46,118 (August 5, 2003).

¹⁰Proposed Rule, 68 Fed. Reg. 22,668 (April 29, 2003).

must have made more than one documented harvest of LLP crab species during the RPP, and a further requirement that each LLP crab license must be supported by a separate RPP harvest from a different vessel, would be to impose additional restrictions not contained in the regulation. Adding such restrictions would be a legislative amendment and impermissible rulemaking, rather than a mere interpretation of the existing language.

Section 679.4(k)(5)(iii)(A) on its face requires a person to have made only one documented harvest of any LLP crab species during the RPP to be considered a recent participant. This was obviously intended as a minimal threshold requirement for attaining the status of a recent participant. The regulation does not require LLP crab license holders to have made a separate harvest of each crab species for which they hold endorsements or for each license. Once it is established that the person is a recent participant, the person can retain every LLP crab license associated with the LLP qualifying fishing histories the person held at the time the RPP harvest was made or, under exception (iv), during the extended RPP.

This interpretation of the regulation achieves four goals of Amendment 10 and the RPP requirements: 1) it removes LLP crab licenses from non-recent participants; 2) with limited exceptions, it eliminates LLP crab licenses of recent participants who did not own crab LLP qualifying fishing history during the RPP; 3) it retains the rule that each LLP qualifying crab fishing history will generate only one LLP crab license; and 4) it protects the investment-backed expectations of recent participants who had purchased multiple LLP qualifying fishing histories with the aim of qualifying for multiple area/species endorsements, even though the number of fishing histories they obtained exceeded the number of vessels they owned and/or used during the RPP.

As to this last point, I did not find in the regulatory history of the RPP any intent by the Council or the Secretary of Commerce to require persons to purchase another vessel each time they obtained another LLP qualifying fishing history. On the contrary, it was always understood that persons who held multiple LLP qualifying fishing histories would be allowed to use them on a single vessel. That understanding comports with the fact that some of the BSAI crab fisheries traditionally have had relatively short openings¹¹ and could be fished simultaneously or in succession with other crab fisheries. Under such circumstances, it would be unreasonable to

¹¹For example, from 1985 through 1998, the St. Matthew blue king crab fishery had an average season length of 5.5 days, and was closed from 1999-2002; and from 1993-1998, the Pribilof Islands red and blue king crab fisheries had an average season length of 9.5 days, and was closed from 1988-1992 and from 1999-2002. From 1993-1998, these fisheries opened each year on September 15 and closed between September 21-29. Another example is the Bristol Bay red king crab fishery, which had an average season length of 4.01 days from 1996-2002. The seasons in this fishery from 1990-1996 either immediately preceded or overlapped the longer Bering Sea Tanner crab fishery seasons. Tables 2-2, 2-10, 2-12, and 2-23, *Annual Management Report for the Commercial and Subsistence Shellfish Fisheries of the Aleutian Islands and Bering Sea and the Western Region's Shellfish Observer Program, 2002*. Alaska Department of Fish and Game, Division of Commercial Fisheries, Regional Information Report No. 4K03-52 (September 2003).

expect crab fishermen to use a different vessel in each fishery, merely because the area/species endorsements for those fisheries derived from different vessels' fishing histories.

Based on a preponderance of the evidence in the administrative record, I find that Bella K held the LLP qualifying fishing history of the F/V JAMES A while making a documented harvest of an LLP crab species with the F/V BELLA K on February 3, 1998. As a result, I conclude that Bella K meets the requirements of 50 C.F.R §679.4(k)(5)(iii)(A) and is entitled to retain both LLP crab licenses #LLC3661 and #LLC2020.

2. May Bella K's LLP crab license #LLC3661 be merged together with Bella K's other LLP crab license #LLC2020?

Bella K states that:

In analyzing the alternatives before it, the Council also addressed the issue of how to treat combinations of LLP-qualifying fishing histories under Amendment 10. In the course of this analysis, the Council considered a hypothetical that mirrors the facts of the Bella K exactly.¹²

Bella K then references a passage from the final Environmental Assessment/Regulatory Impact Review (EA/RIR) for Amendment 10:

If the Council chooses to allow combinations [of fishing histories], then it should also make decisions regarding each of the following potential cases.

* * *

2. The transferring vessel was qualified under the status quo but not under the recent criteria; the buying vessel was qualified under the status quo and under the recent participation criteria. This combination presumably would increase the number of species/area endorsements or combined CV / CP designations for the buying vessel. Analysis of the GCM [groundfish and crab moratorium] data revealed that this combination occurs under many of the alternatives examined. In these cases the Council could advise NMFS as follows:

- a. Create a non-severable package. This will allow the purchaser to keep the rights associated with both vessels. With the creation of non-severable packages, the number of vessels that can fish at any given time would be unaffected in comparison with the number that would qualify if GCM transfer were ignored.
- b. Issue two distinct licenses. This will allow the purchaser to keep the rights

¹²Appellant's Letter to the Chief Appeals Officer, January 23, 2004, at 2.

associated with both vessels. With the issuance of two licenses, the number of vessels that can fish at any given time would increase over what would have occurred if there had been no transfers of fishing histories.¹³

This hypothetical situation does match precisely the facts of this appeal. The transferring vessel, the F/V JAMES A, was qualified under the status quo (pre-RPP requirements) but not under the RPP criteria; the buying vessel, the F/V BELLA K, was qualified under the status quo and under the RPP criteria.

Bella K then asserts that a statement from the EA/RIR provides “explicit and unequivocal” evidence that the Council voted to adopt “option a” during the October 1998 Council meeting. The passage cited reads (in pertinent part): “The Council also voted to issue a single non-severable license when combined fishing histories were used to earn a license (see pp. 82-83).”¹⁴ I do not find this statement, standing alone, to be “explicit and unequivocal” evidence that the Council approved the combining of two or more LLP qualifying fishing histories in one LLP license. My own review of the record, however, does find additional support for the proposition that the Council did vote to authorize such combinations.

First, the minutes of the October 1998 Council meeting state that a motion was approved, without objection, to verify the Council’s intent that if a person had multiple vessels but only one vessel met the recent participation criteria, then only one license would be issued. The minutes further state that this restriction “would still allow the vessel owner to combine previous fishing histories of the vessels for the endorsement purposes on the licensed vessel.”¹⁵

Second, the transcript of the October 9-10, 1998, Council meeting shows that Marcus Hartley of Northern Economics, Inc., a consultant to the Council and a principal contributor to the EA/RIR, presented the issue of stacking of fishing histories and non-severable licenses to the Council. He stated:

[T]here are several instances where there’s one vessel that met the qualifying fishing – or the recent participation period, but he owns, say, two or perhaps three qualifying fishing histories. And how do we deal with those? And when I worked through the numbers, it struck me that perhaps the best way to deal with that is to allow all of these combinations to be stacked and aggregated into a single license and then made non-severable. And, in fact, if you do that, you generally reduce the number of licenses overall that will qualify for the license

¹³*Analysis of Proposed License Limitation Package*, July 23, 1999, at 83.

¹⁴*Id.*, at 155.

¹⁵North Pacific Fishery Management Council, *Minutes*, October 1998, at 11.

program, not by a big number, but say up to ten or 12 in some cases.¹⁶

The transcript further shows that the Council members then discussed several particulars regarding the RPP proposal, including what has become known as exemption or exception four [50 C.F.R. §679.4(k)(5)(iv)], but that the stacking of fishing histories issue was included in the motion the Council eventually approved. Here are some selected excerpts from the Council's discussion:

MS. BEHNKEN: . . . If someone had multiple histories and one met that recent qualifying period with one vessel, that that [sic] would result in one permit. And I mean that's what you're asking us to make –

MR. HARTLEY: That was my recommendation.

MS. BEHNKEN: – a call on it.

MR. HARTLEY: It wasn't specifically addressed by the AP, and therefore not specifically included in the AP's motion. And we indicated to them that in the absence of guidance we would implement it that way. But given the history of confusion on this particular issue, maybe we ought to have addressed specifically.

MS. BEHNKEN: Well, Mr. Chairman?

THE CHAIRMAN: Yes.

MS. BEHNKEN: If it helps in clarifying this, I would so move that that be Council direction to Staff that if a – I guess it would be a person has multiple vessels but only one meets the recent qualifying criteria, that only one vessel then receives a license. So, it results in one license.

MR. HARTLEY: And does that then imply that it allows the previous fishing histories to be added together and combined for the endorsement purposes in that case? And that was where we were talking about it perhaps. That would fit with the same process, exactly.

MS. BEHNKEN: Right.¹⁷

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MR. AUSTIN: I'll second Ms. Behnken's motion.

¹⁶Exhibit 1: Transcript of NPFMC meeting, October 10, 1998, at 38-39 (Northwest Transcribers).

¹⁷*Id.* at 40-41.

MS. BEHNKEN: Thank you.¹⁸

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MR. BENTON: So, could the maker of the motion or Staff explain to us very quite clearly because I'm a little confused still. And I'm worried about the issue that Dr. Pereyra identified. Explain quite clearly how this would work and what would be implemented by the motion.¹⁹

* * *

MS. BEHNKEN: I'm going to punt that to Staff.²⁰

* * *

DR. PAUTZKE: The motion here was stacking histories from –

THE CHAIRMAN: Okay. Let's take care of this motion.²¹

* * *

MR. BENTON: Marcus, the motion is particular to the exemption at this juncture as I understand it.

MR. HARTLEY: No.

MR. BENTON: No. That's my question.

MR. HARTLEY: It includes both issues. It includes the exemption and the overall program.

MR. O'LEARY: Stacking, too.

MR. HARTLEY: Okay.²²

¹⁸*Id.* at 41.

¹⁹*Id.*

²⁰*Id.* at 42.

²¹*Id.* at 44.

²²*Id.* at 51.

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THE CHAIRMAN: Any further discussion? Is there any objection to the motion? Hearing none, it passes.²³

Having thoroughly reviewed the EA/RIR, the Council minutes, and the Council transcript, I am persuaded by a preponderance of the evidence that the Council did, in fact, approve a motion to allow the aggregation or stacking of LLP qualifying fishing histories from multiple vessels into one LLP crab license, and I so find.

I conclude, however, that the Council's vote to approve this motion was insufficient to give NMFS the authority to combine LLP licenses that have already been properly issued, or to combine LLP qualifying fishing histories from multiple vessels into one LLP crab license. I reach this conclusion for four reasons. First, language authorizing NMFS to combine fishing histories in this way was not included in the Final Rule of September 24, 2001, or in the Final Rule of August 5, 2003. The regulation pertaining to the RPP is silent with regard to this issue. Second, for whatever reason, the language or substance of the Council's motion was not included in Amendment 10 to the Crab FMP.

Third, in order to merge the endorsement on license #LLC3661 with the endorsements on license #LLC2020, RAM would have to ignore or violate another LLP regulation that prohibits the severing of area/species endorsements from a license.²⁴

Fourth, the Crab FMP contains provisions that specifically prohibit the combining of LLP licenses and the separating of area/species endorsements from the licenses they are initially issued under. This language was not changed by the Council, even though they amended this paragraph in other ways as part of Amendment 10. Section 8.1.4.1.1, ¶ 6, provides:

6. Separability of General Licenses and Endorsements. General licenses may be issued for the Bering Sea/Aleutian Islands groundfish, Gulf of Alaska groundfish, and Bering Sea/Aleutian Islands crab fisheries. Those general licenses initially issued to a person based on a particular vessel's catch history are not separable and shall remain as a single "package", except that a BSAI general crab license may be separated solely for the purposes of a crab license buyback program if such is approved by the Council and Secretary. General licenses transferred after initial allocation shall remain separate "packages" in the form they were initially issued, and will not be combined with other general groundfish or crab licenses the person may own. Species/area endorsements are not separable from the general license they are initially issued under, and shall remain as a single

²³*Id.* at 52.

²⁴50 C.F.R. §679.4(k)(5)(viii)(A): "Area endorsements or area/species endorsements specified on a license are not severable from the license and must be transferred together."

“package,” which includes the assigned catcher vessel/catcher processor and length designations.

The key language from §8.1.4.1.1, ¶6 of the Crab FMP is the passage that states that an LLP license “will not be combined with other general groundfish or crab licenses the person may own. Species/area endorsements are not separable from the general license they are initially issued under, and shall remain as a single ‘package’” I read this language as prohibiting NMFS from combining LLP crab or groundfish licenses, and prohibiting NMFS from separating crab area/species endorsements from the license under which they are initially issued, as long as the initial issuance was proper.

In this case, Bella K does argue that their LLP crab licenses were not properly issued initially. Bella K asserts that only one license, #LLC2020, should have been initially issued to them, and that this license should have included all the area/species endorsements supported by the LLP qualifying fishing histories of both the F/V BELLA K and the F/V JAMES A.²⁵ Bella K asserts that the Council’s approval of the stacking of fishing histories on one license gives NMFS the authority to do so.

Thus, we emphasize that under the Council’s approach, it is only LLP-qualifying fishing histories, and not crab LLP licenses, that are merged. Given this distinction, the OAA’s concerns regarding a lack of explicit authority for the “merging” of two crab LLP licenses should be alleviated, since only one license should have been issued in the first place.²⁶

I disagree. First of all, the Council’s vote to approve a motion authorizing the combination of fishing histories cannot supply authority to NMFS when neither the LLP regulations nor the Crab FMP itself gives NMFS that authority. NMFS regulations and the FMP, as approved by the Secretary of Commerce, are the governing authorities. In this instance, reading into the regulations or the Crab FMP substantive provisions that reflect the Council’s motion would require making legislative choices that are better suited to rulemaking than adjudication. What effect, for example, would the merger of crab fishing histories have on a license holder’s ability to transfer any associated LLP groundfish licenses, which under current regulation cannot be transferred separately from the LLP crab licenses that were derived from the same vessel’s fishing history.²⁷ While requiring RAM to merge the LLP qualifying fishing histories of two vessels might provide an attractive and convenient resolution of this and a number of other RPP-related appeals, I do not have the necessary legal authority and, therefore, decline to do so.

²⁵Appellant’s Letter to the Chief Appeals Officer, January 23, 2004, at 6.

²⁶*Id.*

²⁷50 C.F.R. §679.4(k)(5)(viii)(B): “A groundfish license and a crab species license issued based on the legal landings of the same vessel and initially issued to the same qualified person are not severable and must be transferred together.”

Second, it does not appear from the record that RAM's initial issuance of licenses #LLC3661 or #LLC2020 was in any way improper. Bella K does not dispute that RAM properly determined the crab area/species endorsements that were justified by the LLP qualifying fishing histories of the F/V JAMES A and the F/V BELLA K, and that are contained in these two licenses. At the time of initial issuance, RAM had no reason to combine the fishing histories of these vessels in one license, since under the regulations in effect at the time, each vessel's fishing history qualified for the issuance of a separate LLP crab license. Finally, Bella K has held these two licenses for four years without complaining that they had been improperly issued. The time for appealing the initial issuance of these licenses has long passed.

I conclude that RAM properly initially issued LLP crab licenses #LLC3661 or #LLC2020. I also conclude that RAM lacks the authority to merge these two licenses or to issue a single license that combines the LLP qualifying fishing histories of the F/V BELLA K and the F/V JAMES A.

FINDINGS OF FACT

1. Bella K held the LLP qualifying fishing history of the F/V JAMES A while making a documented harvest of an LLP crab species with the F/V BELLA K on February 3, 1998.
2. The Council approved a motion to allow the aggregation or stacking of LLP qualifying fishing histories from multiple vessels into one LLP crab license.
3. Language authorizing NMFS to combine fishing histories as intended by the Council was not included in the Final Rule of September 24, 2001, or in the Final Rule of August 5, 2003.
4. The language or substance of the Council's motion was not included in Amendment 10 to the Crab FMP.

CONCLUSIONS OF LAW

1. 50 C.F.R. §679.4(k)(5)(iii)(A) on its face requires a person to have made only one documented harvest of any LLP crab species during the RPP to be considered a recent participant.
2. 50 C.F.R. §679.4(k)(5)(iii)(A) does not require LLP crab license holders to have made a separate harvest of each crab species for which they hold endorsements or for each license.
3. Once it is established that a person is a recent participant, the person can retain every LLP crab license associated with the LLP qualifying fishing histories the person held at the time the RPP harvest was made or, under exception (iv), during the extended RPP.
4. Bella K's documented harvest of LLP crab from the F/V BELLA K on February 3, 1998, meets the first requirement of 50 C.F.R. §679.4(k)(5)(iii)(A), that the license holder "made at least one documented harvest of any amount of LLP crab species from a vessel during the RPP."

5. Bella K's ownership of the fishing history of the F/V JAMES A on February 3, 1998, meets the second requirement of 50 C.F.R. §679.4(k)(5)(iii)(A), that the license holder "held a[n] LLP qualifying fishing history at the time of that documented harvest."
6. Because Bella K meets both RPP requirements of 50 C.F.R. §679.4(k)(5)(iii)(A), LLP crab license #LLC3661 should not be revoked. Bella K is entitled to retain both LLP crab licenses #LLC3661 and #LLC2020.
7. The Council's vote to approve a motion authorizing the combination of fishing histories cannot supply authority to NMFS when neither the LLP regulations nor the Crab FMP itself gives NMFS that authority.
8. Merging the endorsement on license #LLC3661 with the endorsements on license #LLC2020 would violate 50 C.F.R. §679.4(k)(5)(viii)(A), which prohibits the severing of area/species endorsements from a license.
9. Section 8.1.4.1.1, ¶6, of the Crab FMP prohibits NMFS from combining LLP crab or groundfish licenses, or separating crab area/species endorsements from the license under which they are initially issued, as long as the initial issuance was proper.
10. RAM's initial issuance of LLP crab licenses #LLC3661 or #LLC2020 was proper.
11. RAM lacks the authority to merge Bella K's two LLP crab licenses or to issue a single license that combines the LLP qualifying fishing histories of the F/V BELLA K and the F/V JAMES A.

DISPOSITION AND ORDER

The Reconsideration IAD that is the subject of this Decision is VACATED insofar as it revoked Bella K's LLP crab license #LLC3661, and is AFFIRMED insofar as it denied Bella K's request to merge LLP licenses #LLC3661 and #LLC2020, or to reissue a single license containing the area/species endorsements from both licenses. RAM is ORDERED to reissue #LLC3661 and #LLC2020 to Bella K as transferrable licenses. This Decision takes effect April 26, 2004, unless by that date the Regional Administrator orders review of this 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, April 5, 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.

Edward H. Hein
Chief Appeals Officer