

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
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 MARK DONOVICK,)
 Appellant)
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Appeal No. 02-0008 B
DECISION
December 20, 2006

Mark Donovanick appealed two Initial Administrative Determinations [IADs] that the Restricted Access Management Program [RAM] issued under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ Mr. Donovanick applied for an LLP crab and groundfish license based on the fishing history of the F/V ROUGHNECK, ADFG No. 45495.

IAD No. 02-009 denied Mr. Donovanick's application for an LLP crab license with a Bering Sea and Aleutian Islands Area [BSAI] *C. opilio* and *C. bairdi* endorsement. I have already issued a Decision, which affirmed IAD No. 02-009.²

IAD No. 02-002 addressed Mr. Donovanick's application for an LLP groundfish license. This IAD stated that Mr. Donovanick would receive an LLP groundfish license, for use on a catcher vessel, with a maximum length overall of 59 feet, with Central Gulf and Southeast Outside endorsements. But the IAD denied Mr. Donovanick an Aleutian Islands and a Bering Sea endorsement because, according to the official LLP record, the F/V ROUGHNECK did not make the documented harvests of groundfish in the endorsement qualification period that are required for those endorsements.

Mr. Donovanick can appeal IAD No. 02-002 because it directly and adversely affects his interests.³ The record has sufficient information for me to decide this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and decide Mr. Donovanick's appeal.

SUMMARY

IAD No. 02-0002 is affirmed. Mr. Donovanick does not meet the endorsement qualification period [EQP] requirement for an Aleutian Islands endorsement on his LLP groundfish license. The EQP

¹ The two IADs were combined into one document and dated April 1, 2002. The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions), 50 C.F.R. § 679.4(k)(requirements for licenses) and 50 C.F.R. § 679.43 (appeals). These regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² *Mark Donovanick*, Appeal No. 02-0008A (Sept. 27, 2002). This Decision, and all decisions of this Office, are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/appeals/default.htm>.

³ 50 C.F.R. § 679.43(b)

requirement for an Aleutian Islands endorsement is one documented harvest of groundfish in the Aleutian Islands between January 1, 1992 and June 17, 1995. 50 C.F.R. § 679.4(k)(4)(ii)(A). Mr. Donovanick submitted no evidence of documented harvests of license limitation groundfish in the Aleutian Islands between January 1, 1992 and June 17, 1995.

Mr. Donovanick does not meet the EQP requirement for a Bering Sea endorsement: one documented harvest of groundfish in the Bering Sea between January 1, 1992 and June 17, 1995. 50 C.F.R. § 679.4(k)(4)(ii)(A). To prove he met this requirement, Mr. Donovanick provided copies of eight State of Alaska fish tickets, and eight catcher vessel daily fishing logs, that show the F/V ROUGHNECK as catching Pacific cod in the Bering Sea between January and March 1993. But neither Mr. Donovanick nor the vessel operator nor anyone else submitted these fish tickets or logs to the State or Federal Government.

To receive an LLP license, an applicant must prove documented harvests. To determine whether unsubmitted fish tickets or logs can be evidence of documented harvests for purposes of awarding an LLP license, I relied on two LLP regulations. First, an LLP regulation defines documented harvest as “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.” 50 C.F.R. § 679.2. Second, an LLP regulation states that “evidence of a documented harvest must be demonstrated by a state catch report, a Federal catch report, or other valid documentation.” 50 C.F.R. § 679.4(k)(4)(i).

I conclude that Mr. Donovanick’s unsubmitted fish tickets and catcher vessel daily fishing logs are not evidence of documented harvests because they are not state catch reports, Federal catch reports or other valid documentation of documented harvests. They are not other valid documentation because they were not submitted to the State of Alaska or the Federal Government. The failure of a vessel operator who is not the vessel owner to turn in a fish ticket is not, by itself, an extenuating circumstance that excuses a failure to turn in a fish ticket because it is a common practice for a vessel owner to hire someone else to operate the vessel. I do not address the meaning of “other valid documentation” where the applicant proved extenuating circumstances for failure to turn in a required document, where the applicant turned in an incomplete document or where the applicant turned in one required document but not others.

ISSUES

1. Is Mr. Donovanick eligible for an Aleutian Islands endorsement on his LLP groundfish license?
2. Is Mr. Donovanick eligible for a Bering Sea endorsement on his LLP groundfish license based on fish tickets and catcher vessel daily fishing logs that he did not submit to the State or Federal Government?

ANALYSIS

To receive an LLP groundfish license, an applicant must meet the requirements for documented harvests of license limitation groundfish in a general qualification period [GQP] and an

endorsement qualification period [EQP].⁴ The official LLP record is the information prepared by NMFS as to what vessels made the documented harvests necessary for an LLP license.⁵ If an applicant disagrees with the official LLP record, the applicant has the burden of proving that the official LLP record is incorrect.⁶ NMFS created the official LLP record based on fish tickets submitted to the State of Alaska and weekly production reports submitted to NMFS.⁷

The basic GQP requirement for an Aleutian Islands endorsement and a Bering Sea endorsement is the same: one documented harvest of groundfish in BSAI or the Gulf of Alaska between January 1, 1988 and June 27, 1992.⁸ According to the official LLP record, the F/V ROUGHNECK made numerous documented harvests of groundfish in the Gulf of Alaska between January 1, 1988 and June 17, 1992. Therefore, Mr. Donovan meets the GQP requirement for an Aleutian Islands endorsement and a Bering Sea endorsement. The IAD concluded, however, that Mr. Donovan did not meet the EQP requirement for those endorsements.

1. Is Mr. Donovan eligible for an Aleutian Islands endorsement on his LLP groundfish license? No.

The endorsement qualification period requirement for an Aleutian Islands endorsement is one documented harvest of groundfish in the Aleutian Islands endorsement area between January 1, 1992 and June 17, 1995.⁹ According to the official LLP record, the F/V ROUGHNECK did not make such a harvest. Mr. Donovan did not present any evidence or argument to the contrary. I therefore conclude that Mr. Donovan does not meet the EQP requirement for an Aleutian Islands endorsement on his LLP groundfish license and is not eligible for that endorsement.

⁴ 50 C.F.R. § 679.4(k)(4)(i)&(ii)(A). With one exception not relevant here, all documented harvests of groundfish must be documented harvests of license limitation groundfish. Both terms – groundfish and license limitation groundfish – are defined in 50 C.F.R. § 679.2. When I refer to groundfish, I mean license limitation groundfish.

⁵ 50 C.F.R. § 679.2.

⁶ *Id.*; 50 C.F.R. § 679.4(k)(6)(v).

⁷ Final Rule, 64 Fed. Reg. 42,826, 42,826 (Aug. 6, 1999). NMFS also stated that observer reports were a source of information for the official LLP record. *Id.* Mr. Donovan does not state, and the record does not suggest, that the F/V ROUGHNECK ever had observers on board.

⁸ 50 C.F.R. § 679.4(k)(4)(i)(A)(1); 50 C.F.R. § 679.4(k)(v). Since Mr. Donovan meets this requirement, I do not examine alternate ways to meet the GQP for these endorsements.

⁹ 50 C.F.R. § 679.4(k)(4)(ii)(A).

2. Is Mr. Donovan eligible for a Bering Sea endorsement on his LLP groundfish license based on the fish tickets and vessel logs that he did not submit to the State or Federal Government? No.

The EQP requirement for a Bering Sea endorsement is one documented harvest of groundfish in the Bering Sea between January 1, 1992 and June 17, 1995. According to the official LLP record, the F/V ROUGHNECK did not make such a harvest.

On appeal, Mr. Donovan provided copies of State of Alaska fish tickets and federal catcher vessel daily fishing logs that, on their face, state that the F/V ROUGHNECK harvested groundfish in the Bering Sea between January and March 1993. These harvests were not contained in the official LLP record. The question is whether Mr. Donovan has shown that the official LLP record is incorrect and that these fish tickets and logs supply the evidence for a Bering Sea endorsement.

In Sections A and B, I examine, whether, as a question of fact, Mr. Donovan submitted the fish tickets to the State of Alaska and the catcher vessel daily logs to NMFS and I conclude he did not. Sections C, D, E & F examine the legal question of whether Mr. Donovan's unsubmitted fish tickets and catcher vessel daily fishing logs constitute evidence of the documented harvest necessary for a Bering Sea endorsement.

A. Mr. Donovan did not submit these fish tickets to the State of Alaska.

On appeal, Mr. Donovan provided xerox copies of eight State of Alaska fish tickets that list harvests of Pacific cod – which is a license limitation groundfish – from the F/V ROUGHNECK in the Bering Sea and are dated between January and March 1993. The tickets list the F/V ROUGHNECK as the vessel from which the cod were caught and Larry McNeese as the State of Alaska permit holder under whose permit the cod were caught. The tickets also show Larry McNeese signing in the space for “fisherman’s signature.”

Mr. Donovan stated that Larry McNeese operated the F/V ROUGHNECK for Mr. Donovan in 1993 and other years.¹⁰ Mr. Donovan stated that Mr. McNeese caught the Pacific cod listed on the fish tickets and sold it to other boats for the other boats to use as crab bait.¹¹ The tickets have a delivery code of “02,” which is “whole fish/bait sold.” And, indeed, five of the eight fish tickets list the names of other boats, which Mr. Donovan states are the boats that bought the cod for bait.

These harvests were not in the official LLP record. These harvests also were not in the fish ticket printouts that Mr. Donovan obtained from the Alaska Department of Fish and Game [ADFG] and the State of Alaska Commercial Fisheries Entry Commission and submitted to

¹⁰Memorandum to File from Mary Alice McKeen (Dec. 6, 2004).

¹¹ *Id.*

RAM.¹²

After I received the eight bait fish tickets, I remanded the appeal to RAM to determine whether these fish tickets were evidence of harvests that should be included in the official LLP record. RAM contacted the State of Alaska, Department of Fish and Game [ADFG]. ADFG searched its records and found no record of these fish tickets.¹³ RAM concluded that it should not add these fish tickets to the official LLP record because they had not been submitted to the State.¹⁴

I gave Mr. Donovanick an opportunity to submit further evidence or argument to RAM's conclusion. Mr. Donovanick provided no evidence that he, Larry McNeese or anyone else submitted these fish tickets to the State of Alaska or even mistakenly submitted them to the Federal Government. Mr. Donovanick made no arguments on this point. Mr. Donovanick stated that he did not know why Mr. McNeese did not submit these fish tickets to the State.¹⁵

I therefore find that neither Mr. Donovanick, Mr. McNeese nor anyone else submitted these fish tickets to the State of Alaska.

B. Mr. Donovanick did not submit these catcher vessel daily fishing logs to NMFS.

On appeal, Mr. Donovanick provided copies of eight catcher vessel daily fishing logs from 1992, and twenty-five catcher vessel daily fishing logs from 1993, for the F/V ROUGHNECK. NMFS required catcher vessels to maintain and submit these logs.¹⁶ I assume, without deciding, that an applicant could receive credit for a documented harvest based on daily catcher vessel logs.

¹² ADFG Printout, September 27, 1999 (fish tickets recorded in the name of Mark Donovanick between 1988 - 1995) [Exhibit 1]; ADFG Printout, September 27, 1999 (continuation of same); Information/General Earnings file from State of Alaska Commercial Fisheries Entry Commission (March 17, 2000)(fish tickets filed by Lary McNeese from 1988 - 1995) [Exhibit 3].

¹³ E-mail correspondence between RAM and the State of Alaska, Department of Fish and Game from September 13, 2002 to October 2, 2002 [Exhibit 9]

¹⁴ RAM Response to Remand (Nov. 5, 2002). RAM noted that neither Mr. Donovanick nor Mr. McNeese had filed a Notice of Intent to Operate. I do not discuss that because I conclude that the fish tickets should not count toward a Bering Sea endorsement because they were not submitted to the State.

¹⁵ Memorandum to File from Mary Alice McKeen (Dec. 6, 2004).

¹⁶ "The operator of each catcher-processor and catcher vessel harvesting groundfish from any reporting area in the Bering Sea and Aleutian Islands management area must maintain onboard a Daily Fishing Logbook of the effort and catch information of the vessel as described in paragraph (b)(2)(ii) 9f this section." 50 C.F.R. § 675.5(b)(2)(i) (August 1992). "The operator of a catcher vessel or catcher/processor vessel must submit a copy of the Daily Fishing Logbook on a quarterly basis to the Alaska Fisheries Science Center." 50 C.F.R. § 679.5(b)(2)(v) (August 1992). The current provision is at 50 C.F.R. § 679.5(a)(2) & (c) and Table 9 to Part 679.

1992 logs

The NMFS archives had copies of the 1992 logs,¹⁷ from which I find that Mr. Donovanick or the vessel operator submitted those logs to the Federal Government. Of the eight logs from 1992, seven listed sablefish caught with fixed gear, which is not a license limitation groundfish,¹⁸ and one log did not list the species. But all eight logs show fish caught *in the Central Gulf, not the Bering Sea*. Therefore, these logs do not support a Bering Sea endorsement.

1993 logs

Of the twenty-five logs from 1993, eight show Pacific cod caught in the Bering Sea. But the NMFS archives did not have these logs, or any other logs, from the F/V ROUGHNECK for 1993 or 1994.¹⁹ And Mr. Donovanick did not introduce any argument or evidence that he or anyone on his behalf had submitted these logs to the Federal Government. I therefore find that neither Mr. Donovanick nor anyone on his behalf submitted these logs to the Federal Government.

Therefore, the legal question is whether Mr. Donovanick may receive a Bering Sea endorsement on his LLP license based on fish tickets that were not submitted to the State of Alaska and on catcher vessel daily fishing logs that were not submitted to the Federal Government.

C. The regulations involved in this question.

The definition of “harvesting” or “to harvest” is “the catching and retaining of any fish.”²⁰ While the fish tickets and the logs could prove that Mr. Donovanick harvested – as in caught and retained – Pacific cod in the Bering Sea in the EQP, the question is whether these fish tickets prove that Mr. Donovanick made a “documented harvest” because, to receive a Bering Sea or any endorsement on an LLP crab or groundfish license, the applicant must prove documented harvests.²¹

Two regulations come into play. The first is the definition of a documented harvest in federal regulation 50 C.F.R. § 679.2. It defines documented harvest as “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.” The second is the regulation that prescribes what is acceptable “evidence of a documented harvest.” That regulation, 50 C.F.R. § 679.4(k)(4)(i), provides:

¹⁷ Memorandum (e-mail) from Jerry Berger to Mary Alice McKeen (Sept. 24, 2004 [Exhibit 10]).

¹⁸ 50 C.F.R. § 679.2 (definition of license limitation groundfish).

¹⁹ Memorandum (e-mail) from Jerry Berger to Mary Alice McKeen (Sept. 24, 2004 [Exhibit 10]).

²⁰ 50 C.F.R. § 679.2.

²¹ 50 C.F.R. § 679.4(k)(4)(i) & (ii); 50 C.F.R. § 679.4(k)(5)(i) & (ii).

Qualifications for a groundfish license. A groundfish license will be issued to an eligible applicant that meets the criteria in paragraphs (i)(4)(i) and (i)(4)(ii) of this section. For purposes of the license limitation program, **evidence of a documented harvest must be demonstrated by [1] a state catch report, [2] Federal catch report, or [3] other valid documentation that indicates the amount of license limitation groundfish harvested, the vessel and gear type used to harvest the license limitation groundfish, and the date of harvesting, landing, or reporting.** State catch reports are Alaska, California, Oregon, or Washington fish tickets. Federal catch reports are Weekly Production Reports required under § 679.5. [numbers in brackets added]

D. Are Mr. Donovick’s unsubmitted vessel logs Federal catch reports?

The regulation specifically states: “Federal catch reports are Weekly Production Reports required under § 679.5.”²² I conclude therefore that catcher vessel daily fishing logs, whether submitted or not, are not Federal catch reports.

E. Are Mr. Donovick’s unsubmitted fish tickets State catch reports?

The regulation states: “State catch reports are Alaska, California, Oregon, or Washington fish tickets.”²³ I conclude the term “fish tickets” means State of Alaska fish tickets (or fish tickets from California, Oregon or Washington) that were submitted to the State at or near the time of the harvest. I reach this conclusion for three reasons.

First, State catch reports are evidence of a documented harvest. A documented harvest is a lawful harvest “that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting.”²⁴ State commercial fishing regulations require – and have since at least 1972 – that every buyer of fish and every fisherman who sells his own catch record every landing on a fish ticket and submit the fish ticket to the State within seven days after landing the fish.²⁵

The State requires this information is so that it can know what fish are being taken from the sea and can manage and conserve the resource. If the fisherman does not submit the fish ticket to the State, the State has no record of those fish being caught and the fish ticket does not serve its

²² 50 C.F.R. § 679.4(k)(4)(i)

²³ 50 C.F.R. § 679.4(k)(4)(i).

²⁴ 50 C.F.R. § 679.2.

²⁵ 5 Alaska Administrative Code [AAC] 39.130(c). A regulation substantially the same has been in effect since at least 1972. Alaska Administrative Register 72, July 1972 (5 AAC 39.130).

essential function. If the fisherman does not submit the fish ticket to the State, it is the same as the fisherman merely making a private list for his own business purposes. It may benefit the fisherman in that he can keep track of what fish he sold and to whom he sold them. But, until a fish ticket is submitted to the State, it remains only a private list and is not a State catch report.

Second, a fish ticket that was not submitted to the State at or near the time of the landing was not a State catch report in the IFQ program. IFQ stands for Individual Fishing Quota program for Pacific halibut and sablefish. The IFQ program was the first federal program of restricted access for fisheries in federal waters off Alaska.²⁶ The IFQ regulation had the same language as the LLP regulation concerning fish tickets: “State catch reports are Alaska, Washington, Oregon, or California fish tickets.”²⁷ In the IFQ program, a fish ticket that was *not* submitted to the State was *not* a State catch report and did *not* result in the applicant receiving Quota Share. The Regional Administrator [RA] for the NMFS Alaska Region explicitly stated this, when he affirmed *Leonard Leach*, an IFQ decision by this Office:

The fish tickets and, for at sea processors, Weekly Production Reports contemplated in the [IFQ] regulation [on evidence of legal landings] . . . are fish tickets and WPRs *which were filed contemporaneously with the landing*.²⁸
[emphasis added]

Third, the LLP rule has a new, catchall, third category for evidence of a documented harvest: other valid documentation. This is the place to consider documents that do not squarely fit within the category of state or Federal catch reports.

I therefore conclude that Mr. Donovan's unsubmitted fish tickets are not State catch reports within the meaning of 50 C.F.R. § 679.4(k)(4)(i). I now turn to whether they are other valid documentation.

F. Are Mr. Donovan's unsubmitted fish tickets and unsubmitted catcher vessel daily fishing logs other valid documentation of documented harvests?

To repeat the relevant language of 50 C.F.R. § 679.4(k)(4)(i):

²⁶ Final Rule, 58 Fed. Reg. 59,375 (Nov. 9, 1993). It is codified at 50 C.F.R. §679.2 (definitions); 50 C.F.R. §679.4(a), (d) (IFQ permits); 50 C.F.R. §679.40 (allocation and calculation of Quota Share/IFQ); 50 C.F.R. §679.41 (transfer of Quota Share/IFQ).

²⁷ 50 C.F.R. § 679.40(a)(3)(v)(B). Unlike the LLP rule, the IFQ rule did not have the “other valid documentation” language, a difference I discuss in the next section.

²⁸ *Leonard Leach*, Appeal No. 95-0015 (Decision on Review)(Aug. 31, 1998) *affirming Leonard Leach*, Appeal No. 95-0015 (May 6, 1998) (initial decision), (August 3, 1998) (reconsideration decision). The RA has explicitly commented only on six decisions by this Office. The RA decisions are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/appeals/radecisionsbynumber.html>.

For purposes of the license limitation program, ***evidence of a documented harvest*** must be demonstrated by a state catch report, a Federal catch report, ***or other valid documentation*** that indicates the amount of license limitation groundfish harvested, the vessel and gear type used to harvest the license limitation groundfish, and the date of harvesting, landing, or reporting. State catch reports are Alaska, California, Oregon, or Washington fish tickets. Federal catch reports are Weekly Production Reports required under § 679.5. [emphasis added]

Mr. Donovanick's unsubmitted fish tickets and unsubmitted vessel logs have the four pieces of information required for other valid documentation: amount, vessel, gear and date.²⁹ But, here, too, the question is whether unsubmitted fish tickets and vessel logs are valid documentation of the harvests listed on these documents.

I start by examining the purpose of the other valid documentation provision. The regulatory history of the provision – from both the IFQ and the LLP program – is helpful. The IFQ regulation on evidence of legal landings is very similar to 50 C.F.R. § 679.4(k)(4)(i) *except* the IFQ regulation does not have the “other valid documentation” language. The IFQ regulation states:

(B). Documentation. Evidence of legal landings shall be limited to documentation of state or Federal catch reports that indicate the amount of halibut or sablefish harvested, the IPHC regulatory area or groundfish reporting area in which it was caught, the vessel and gear type used to catch it, and the date of harvesting, landing, or reporting. State catch reports are Alaska, Washington, Oregon, or California fish tickets. Federal catch reports are WPRs required under § 679.5.³⁰

The proposed LLP rule did not address at all the evidence an applicant could use to prove a documented harvest.³¹ In the final LLP rule, the Council and NMFS added the language addressing the evidence an applicant could use to prove a documented harvest and a similar provision on evidence that could prove processing activity.³² NMFS explained the new evidence provisions as follows:

²⁹ I do not address whether several documents together could supply the required information..

³⁰ 50 C.F.R. § 670.40(a)(3)(v)(B). The commentary to the IFQ rule states: “Other types of documents that report landings of fish will *not* be considered evidence of legal landings for purposes of initial allocation of [quota share].” Final Rule, 58 Fed. Reg. 59,375, 39,382 (1993)(emphasis added).

³¹ Proposed Rule, 62 Fed. Reg. 43,866, 43,886 (1997) *proposed* 50 C.F.R. § 679.4(i)(4).

³² 50 C.F.R. § 679.4(k)(3)(ii)(3) (“For purposes of paragraphs (k)(3)(ii)(A)(1) and (k)(3)(ii)(3), evidence of processing must be demonstrated by Weekly Production Reports or other valid documentation demonstrating that processing occurred on the vessel during the relevant period.”)

In § 679.4(i)(3)(ii)³³, paragraph (i)(3) is added to describe the forms of evidence that can be used to verify the processing activity of a vessel for purposes of establishing eligibility for a catcher/processor designation. In § 679.4(i)(4), text is added to describe the forms of evidence that can be used to verify a documented harvest for purposes of establishing eligibility for a groundfish license.

To summarize, the IFQ regulation only had two categories of acceptable evidence: [1] state catch reports and [2] Federal catch reports. In the LLP, the Council and NMFS quite deliberately added a third category of acceptable evidence: other valid documentation. I therefore conclude that the purpose of the “other valid documentation” provision was to expand or liberalize the evidence for proving documented harvests. If the phrase “other valid documentation” is to have any meaning, it must, in some instances, allow an applicant to prove a documented harvest with documents other than a state catch report, which means a state fish ticket, or a Federal catch report, which means a weekly production report.

Although it is important to give the term “other valid documentation” meaning, I conclude that this appeal does not present an instance of other valid documentation for three reasons.

First, Mr. Donovan does not argue, and the record does not suggest, any extenuating circumstances for Mr. McNeese’s failure to submit the 1993 fish tickets and vessel logs. Mr. McNeese submitted fish tickets and logs in 1993 which documented fishing from the F/V ROUGHNECK in the Central Gulf and Southeast and NMFS awarded Mr. Donovan an LLP groundfish license with Central Gulf and Southeast endorsements based on this fishing. But Mr. McNeese did not submit fish tickets or logs for the F/V ROUGHNECK’s Pacific cod fishing in the Bering Sea in 1993. Mr. Donovan stated that he did not know why Mr. McNeese did not do that. A vessel owner is usually bound by the actions of his or her agents, including the persons hired by the owner to operate the vessel. It is common in the fishing industry for a vessel owner, all the time or some of the time, to hire someone else to run the boat. I conclude that a vessel operator’s failure to turn in documentation of a harvest behalf of the vessel owner, by itself, cannot be an extenuating circumstance for failure to submit documentation.

Second, NMFS had not excused submission of fish tickets or logs for the Pacific cod harvested by the F/V ROUGHNECK in the Bering Sea in 1993. The 1993 harvests by the F/V ROUGHNECK were of Pacific cod *that Mr. McNeese sold to other vessels for bait*. I was aware that, in 1992, NMFS had informed fisherman who caught groundfish in crab pot gear *to use as crab bait for their own vessels* that they did not have to comply with Federal groundfish reporting and recordkeeping requirements.³⁴ I contacted NMFS staff in Dutch Harbor who stated

³³ All LLP regulations were renumbered from § 679.4(i) to § 679.4(k) and all references to section 679.4(i) were changed to section 679.4(k). Correcting Amendments, 63 Fed. Reg. 64,878 (1998).

³⁴ NMFS News release 92-107 (Sept. 4, 1992) attachment to Statement of Rance Morrison (Dec. 2, 2004) (Exhibit 14). The fishermen had to be participating in an open season for crab.

that this policy did *not* extend to fisherman who caught bait and sold it to other vessels.³⁵

I provided Mr. Donovanick with a copy of this information and gave him an opportunity to submit evidence and argument in response to it.³⁶ Mr. Donovanick submitted no further evidence or argument. I therefore conclude there were no extenuating circumstances for Mr. Donovanick's or Mr. McNeese's failure to turn in the fish tickets or the catcher vessel logs to the government agency responsible for collecting that data.

Third, as I have noted, the requirement to record a harvest with the State or Federal Government is vital to conserving and managing the fishery. These harvests were not recorded in any way with any government entity. Although the purpose of the other valid documentation language is to expand the documents that can prove a documented harvest, that purpose is not without limits. It must be placed in context. An applicant is still submitting other valid documentation of a documented harvest, which is a harvest that was "recorded in compliance with Federal and state commercial fishing regulations in effect at the time of harvesting."³⁷

An unsubmitted fish ticket or vessel log is a purely private document. It is no different from a business ledger or a list of sales. To say that a vessel owner "recorded" the harvest with himself is an unreasonable reading of the word "recorded." The government requires the vessel owner to record the harvests *with the government* so that the government knows about the fishing: how many fish are being taken, where, when, with what gear and other information. These documents – fish tickets and logs – do not fulfill their essential function if they are not submitted to the government at or near the time of harvesting but kept by the owner and produced, years later, when the owner seeks a license based on those harvests. It would do violence to the definition of documented harvest – which requires that the harvest was "recorded in compliance with Federal and state commercial fishing regulations" – to accept a purely private document as evidence of a documented harvest, particularly when the vessel owner did not record the harvest in any form with any government entity and has proven no extenuating circumstances for the failure to record.

I therefore conclude that Mr. Donovanick's unsubmitted fish tickets and catcher vessel logs are not other valid documentation within the meaning of 50 C.F.R. § 679.4(k)(4)(i) and that Mr. Donovanick is not eligible for a Bering Sea endorsement on his LLP groundfish license based on the fish tickets and vessel logs that he did not submit to the State or NMFS.

³⁵ Statement of Rance Morrison (Dec. 2, 2004) (Exhibit 14). In Unalaska (Dutch Harbor), Mr. Morrison worked as the State of Alaska's Shellfish Observer Program Coordinator from 1991 to 1992; the State's BSAI area management biologist from 1992 to 2001; and the NMFS fisheries biologist from 2001 to the present. *Id.*

³⁶ *Order Adding Documents to Record* (Dec. 3, 2004).

³⁷ 50 C.F.R. § 679.2.

In this decision, I do not decide comprehensively what could constitute “other valid documentation,” based either on the type of document or the circumstances under which a document was prepared, submitted or not submitted. That is best done on a case-by-case basis, by examining the arguments and evidence from each appellant.

This is not a situation where an applicant submitted a fish ticket, or reasonably thought he had submitted a fish ticket, but the ticket was actually not submitted due to government error or processor negligence. This is not a situation where the applicant submitted a fish ticket but it was missing a piece of information.³⁸ This is not a situation where an applicant submitted one piece of documentation but not others. This is a situation where the vessel operator, without any extenuating circumstances, did not record the harvests with the State or NMFS.

FINDINGS OF FACT

1. Mr. Donovanick did not make a documented harvest of license limitation groundfish in the Aleutian Islands from the F/V ROUGHNECK between January 1, 1992 and June 17, 1995.
2. Neither Mark Donovanick nor Larry McNeese nor anyone else submitted Mr. Donovanick’s Pacific cod bait fish tickets dated between January and March 1993 to the State of Alaska.
3. Neither Mark Donovanick nor Larry McNeese nor anyone else submitted the F/V ROUGHNECK’s catcher vessel daily fishing logs dated between January and March 1993 to NMFS.
4. NMFS did not have any policy excusing vessel operators who sold Pacific cod for bait from complying with Federal groundfish recordkeeping and recording requirements.

CONCLUSIONS OF LAW

1. Mr. Donovanick does not meet the endorsement qualification period requirement for an LLP groundfish license with an Aleutian Islands endorsement in 50 C.F.R. § 679.4(k)(4)(ii)(A).
2. Mr. Donovanick is not eligible for an Aleutian Islands endorsement on his LLP groundfish license.
3. Mr. Donovanick’s fishing logs are not Federal catch reports within the meaning of 50 C.F.R. § 679.4(k)(4)(I) because they are not Weekly Production Reports.
4. Mr. Donovanick’s unsubmitted fish tickets are not State catch reports within the meaning of

³⁸ *Charles Adamonis*, Appeal No. 95-0133 (April 5, 1996). This Office allowed the applicant to add the gear type to an otherwise complete halibut fish ticket that had been recorded with the State of Alaska. This could be viewed as a case of substantial compliance by the applicant with the requirement to report the landing.

50 C.F.R. § 679.4(k)(4)(I).

5. The failure of a vessel operator to submit documentation of a harvest on behalf of a vessel owner is not, by itself, an extenuating circumstance that excuses the failure to submit documentation.
6. Mr. Donovanick faced no extenuating circumstances that justify the failure to submit the fish tickets and the catcher vessel daily fishing logs at or near the time of harvesting.
7. An applicant has not presented other valid documentation of a documented harvest when the applicant provides fish tickets and catcher vessel daily logs on appeal but did not submit those documents to the State or NMFS at or near the time of harvesting and proves no extenuating circumstances for the failure to submit the documents.
8. Mr. Donovanick's unsubmitted fish tickets and catcher vessel daily fishing logs are not "other valid documentation" of the Pacific cod harvests listed on the tickets within the meaning of 50 C.F.R. § 679.4(k)(4)(i).
9. Mr. Donovanick is not eligible for a Bering Sea endorsement on his LLP groundfish license based on the fish tickets and vessel logs he provided on appeal but had not submitted to the State or NMFS.

DISPOSITION

IAD 02-002 is AFFIRMED. Mr. Donovanick does not meet the requirements for a Aleutian Islands or Bering Sea endorsement on his LLP license. This Decision takes effect January 19, 2007, unless by that date the Regional Administrator orders review of the Decision.

Mr. Donovanick 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, January 2, 2007. 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 Administrative Judge, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Administrative Judge