

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 05-0004  
)  
WILLIAM CHOQUETTE, ) DECISION  
Appellant )  
) May 31, 2005  
)  
\_\_\_\_\_)

STATEMENT OF THE CASE

William Choquette appeals an Initial Administrative Determination [IAD] that the Restricted Access Management Program [RAM] issued on February 11, 2005 under the North Pacific Groundfish and Crab License Limitation Program [LLP].<sup>1</sup>

On December 2, 1999, William Choquette applied for an LLP crab license based on the fishing history of the F/V JACQUELYN R, ADFG No. 54677, USCG No. 612228. With his application, Mr. Choquette submitted a copy of a document entitled “Fishing Rights Bill of Sale.” On its face, this document transferred all of the fishing history of the F/V JACQUELYN R. from the F/V JACQUELYN R. Limited Partnership to William Choquette. [R. 1]<sup>2</sup>

Mark Maring also applied to RAM for an LLP license based on the fishing history of the F/V JACQUELYN R.<sup>3</sup> RAM initially awarded both applicants – William Choquette and Mark Maring – an interim, non-transferable LLP crab license.<sup>4</sup>

On July 26, 2000, RAM issued Mr. Maring transferable LLP crab license LLC3954.<sup>5</sup> RAM informed Mr. Maring: “The evidence you have provided has been determined to be sufficient to amend the NMFS/RAM LLP Official Record.” [ R. 228]

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

<sup>2</sup> [R 1] means page 1 of the record on appeal and is the format I will use for record citations.

<sup>3</sup> I refer to this applicant as Mark Maring but the applicant’s precise name is Mark Maring II, Inc.

<sup>4</sup> RAM issued Mark Marking interim crab license LLC3954 on January 4, 2000 [R. 231]. RAM issued William Choquette interim crab license LLC3711 on December 30, 1999. The record does not have a copy of Mr. Choquette’s interim license but has clear, undisputed references to it. [R. 162-164]

<sup>5</sup> [R. 227] LLC3954 has a catcher/ processor designation, a maximum length overall of 156 feet and three endorsements: Bristol Bay red king crab, Aleutian Islands brown king crab and Bering Sea/Aleutian Islands *C. opilio* and *C. bairdi* [Tanner] crab. NMFS Alaska Region website <<[http://www.fakr.noaa.gov/ram/daily/llp\\_crab.pdf](http://www.fakr.noaa.gov/ram/daily/llp_crab.pdf)>> visited April 20, 2005.

On July 28, 2000, RAM sent Mr. Choquette a Notice of Opportunity to Submit Evidence which stated that Mr. Maring had *applied* for an LLP license based upon the purchase of the fishing rights of the F/V JACQUELYN R. [R. 25] RAM told Mr. Choquette he could submit further evidence that he owned the fishing rights of the F/V JACQUELYN R. [R. 25 - 26] On September 20, 2000, Mr. Choquette requested an extension of time to submit further evidence and requested a copy of Mark Maring's file "so I can understand where he is coming from and what arguments he is making."<sup>6</sup> RAM granted Mr. Choquette an extension of time but did not acknowledge his request for the Maring file.<sup>7</sup>

On November 6, 2000, Mr. Choquette again requested Mr. Maring's file "that I may be reasonably informed and able to address the issues raised by the two applications."<sup>8</sup> Mr. Choquette submitted further evidence on November 9, 2000. [R. 122 - 170] He again requested Mr. Maring's file because Mr. Maring had applied for the same license Mr. Choquette was seeking.<sup>9</sup> RAM did not respond to these requests from Mr. Choquette for Mr. Maring's file.

RAM issued an IAD on February 11, 2005, which denied Mr. Choquette's application. The IAD relied on documents submitted by Mr. Maring.<sup>10</sup> The IAD did not acknowledge that Mr. Choquette had submitted three written requests for those documents.<sup>11</sup>

#### SUMMARY

Mr. Choquette meets the requirements for an LLP license based on the fishing history of the F/V JACQUELYN R. Mr. Choquette is an eligible applicant for this license because he showed that he purchased the fishing history of the F/V JACQUELYN R. on May 15, 1995 from the F/V JACQUELYN R. Limited Partnership, which owned the vessel on that date, by the express terms of a written contract that clearly and unambiguously transferred the fishing history to him.

Based on the record in this appeal, I conclude that the IAD incorrectly concluded that the F/V JACQUELYN R. Limited Partnership did not own the fishing history of the vessel on May 15, 1995. Based on the record in this appeal, I conclude that the IAD incorrectly concluded that Key

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<sup>6</sup> Letter from William Choquette to RAM (Sept. 20, 2000). [R. 67]

<sup>7</sup> Letter from RAM to Willian Choquette (Oct. 4, 2000). [R. 68]

<sup>8</sup> Letter from William Choquette to RAM (Nov. 2, 2000). [R. 70]

<sup>9</sup> Letter from William Choquette to RAM (Nov. 9, 2000). [R. 142]

<sup>10</sup> IAD at 6 - 7. [R. 170 - 171].

<sup>11</sup> After the IAD, Mr. Choquette made a fourth request to RAM for RAM's Maring file. [R. 177-176] RAM treated that request as a Freedom of Information Act request and so informed Mr. Choquette. [R. 178]. NMFS denied Mr. Choquette these documents under FOIA. See pages 14 - 15 *infra*.

Bank owned the fishing history of the vessel on May 12, 1995 and transferred it to Mark Maring on that date.

The IAD relied on documents submitted by Mark Maring to deny William Choquette a license. Mr. Choquette requested those documents but NMFS did not provide those documents to Mr. Choquette. NMFS may not deny Mr. Choquette a license based on documents submitted by another applicant that NMFS will not provide to Mr. Choquette. A decision by the government made on secret undisclosed evidence of a disputed issue violates Mr. Choquette's due process rights to notice of the evidence on which the government is relying and a meaningful opportunity to rebut that evidence. A decision on undisclosed evidence violates the requirement in 50 C.F.R. § 679.43(k) that that decisions of LLP appeals must be based on the record. A decision on undisclosed evidence makes full judicial review impossible.

The usual practice of this Office is to join competing applicants for the same license in one appeal and decide which applicant meets the requirement for the disputed license or quota share. I did not join Mr. Maring in this appeal because NMFS issued Mr. Maring a transferable LLP license based on the fishing history of the F/V JACQUELYN R. on July 28, 2000 and approved transfer of that license to a third party on February 18, 2004.

#### ISSUES

1. Does William Choquette meet the requirements for an LLP crab license based on the fishing history of the F/V JACQUELYN R.?
2. Can NMFS deny Mr. Choquette an LLP license based on documents submitted by a competing applicant that NMFS will not provide to Mr. Choquette?

#### ANALYSIS

##### **1. Does William Choquette meet the requirements for an LLP crab license based on the fishing history of the F/V JACQUELYN R.? Yes.**

To receive an LLP license, an applicant must be an eligible applicant.<sup>12</sup> Eligible applicant is defined in federal regulation 50 C.F.R. § 679.2:

Eligible applicant means a qualified person who submitted an application during the application period announced by NMFS and:

- (1) Who owned a vessel on June 17, 1995, from which the minimum number of harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with

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<sup>12</sup> 50 C.F.R. § 679.4(k)(4)(LLP groundfish license); 50 C.F.R. § 679.4(k)(5)(LLP crab license).

the provisions in paragraph (2) of this definition; or

(2) To whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; . . .<sup>13</sup>

There is no dispute that the fishing history of the F/V JACQUELYN R. meets the requirements for an LLP crab license. Put another way, there is no dispute that the F/V JACQUELYN R. is a vessel “from which the minimum number of harvests were made in the relevant areas during the qualifying periods [for an LLP license] specified in § 679.4(k)(4) and (k)(5).”

Mr. Choquette did not own the F/V JACQUELYN R. on June 17, 1995 and does not claim eligibility under the first definition of eligible applicant. Mr. Choquette claims eligibility under the second definition of eligible applicant. Mr. Choquette states that he is a person “to whom the fishing history . . . [of the F/V JACQUELYN R] has been transferred . . . by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred.”

Mr. Choquette submits a Fishing Rights Bill of Sale, dated May 15, 1995, which transfers to Mr. Choquette, as Buyer,

with respect to the Vessel Jacquelyn R., O.N. 612228 (the “Vessel”) . . . all rights to participate in or benefit from the pollock fishery, crab fishery and any other fishery within the jurisdiction of any local, state or federal agency, including the North Pacific Fishery Management Council (“NPFMC”), the National Marine Fisheries Service (“NMFS”), and the Alaska Department of Fish and Game (“ADF&G”), including without limitation all moratorium rights, community development quotas, Seller’s individual fishing or fishery quotas, individual transferable quotas, quota shares, catch histories, processing histories, and any other Vessel specific rights to engage in or participate in a fishery within the jurisdiction of any local state or federal agency (including NPFMC, NMFS AND ADF&G) whether past present or future, grated [sic] by or available from any local state ore [sic] federal agency or entity (including NPFMC NMFS NOAA AND ADF&G) and all fish tickets, fishing and production information, logs, reports and notices, and all permits and licenses. [R. 1]<sup>14</sup>

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<sup>13</sup> This regulation contains two additional ways a person can be an eligible applicant. One applies to the Norton Sound king crab summery fishery, the other to individuals who can demonstrate eligibility pursuant to the Rehabilitation Act of 1973. Mr. Choquette claims neither.

<sup>14</sup> I refer to the North Pacific Fishery Management Council as the Council.

The Seller is identified as follows:

JACQUELYN R. LIMITED PARTNERSHIP  
By Rydman Management Corporation  
Its Managing Partner

/s/

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By Dennis Rydman, President

Mr. Choquette must prove any disputed fact by a preponderance of the evidence.

**A. Did the express terms of the Fishing Rights Bill of Sale clearly and unambiguously transfer the LLP-qualifying fishing history of the F/V JACQUELYN R. from the F/V JACQUELYN R. Limited Partnership to William Choquette on May 15, 1995? Yes.**

According to the United States Coast Guard Abstract of Title, the F/V JACQUELYN R. Limited Partnership owned the F/V JACQUELYN R. on May 15, 1995. [R. 152].<sup>15</sup> Dennis Rydman, acting on behalf of the F/V JACQUELYN R. Limited Partnership, executed the Fishing Rights Bill of Sale on May 15, 1995.

The express terms of the Fishing Rights Bill of Sale unambiguously transfer from the F/V JACQUELYN R. Limited Partnership to Mr. Choquette *all* rights to the fishing history of the F/V JACQUELYN R. The contract transfers to Mr. Choquette “*all* rights to participate in or benefit” from the crab fishery including “without limitation *all* moratorium rights . . . catch histories . . . and any other Vessel specific rights to engage in or participate in a fishery within the jurisdiction of *any* local state or federal agency (including NPFMC NMFS AND ADF&G) whether past present or future.” The LLP is a program that grants the licensee the benefit of participating in the crab fishery. It is based on the catch history of a specific vessel. It is within the jurisdiction of the Council and NMFS.

To meet the written contract definition of eligible applicant, the contract does *not* have to use the magic words “LLP” and, indeed, as of May 1995, it was not clear what kind of restricted access program the Council and NMFS were going to adopt for the North Pacific crab and groundfish fisheries.<sup>16</sup> But the contract *does* have to transfer an LLP-qualifying fishing history to the applicant. Since this contract, by its terms, transfers all of the benefit from the F/V JACQUELYN R.’s fishing history, it necessarily includes the vessel’s LLP-qualifying fishing

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<sup>15</sup> The Abstract of Title shows that the F/V JACQUELYN R. Limited Partnership acquired title to the vessel on March 3, 1987 [R. 152]

<sup>16</sup> It was not until April 1994 that the Council received an LLP proposal and not until June 17, 1995 that the Council adopted the LLP as its preferred alternative. Final Rule, 63 Fed. Reg. 52,642, 52,642 (Oct. 1, 1998).

history. The language of this contract is equivalent to other documents that NMFS has recognized as transferring an owner's rights under the LLP and the Vessel Moratorium Program, the predecessor to the LLP.<sup>17</sup>

I note that the contract was executed by Dennis Rydman. The IAD does not dispute that [1] Dennis Rydman had authority to enter into contracts on behalf of Rydman Management Corporation, [2] Rydman Management Corporation was the general partner for the F/V JACQUELYN R. Limited Partnership and [3] Rydman Management Corporation had authority to enter into contracts on behalf of the F/V JACQUELYN R. Limited Partnership including the power to "exchange, sell, or mortgage the F/V JACQUELYN R. and any other partnership asset or property."<sup>18</sup>

The IAD implicitly relied on Mr. Rydman's authority to bind the F/V JACQUELYN R. Limited Partnership because the IAD concluded that Key Bank owned the fishing history of the F/V JACQUELYN R. on May 12, 1995. Key Bank's authority derives exclusively from mortgages and loan documents executed by Mr. Rydman on behalf of the F/V JACQUELYN R. Limited Partnership.

I therefore conclude that the Fishing Rights Bill of Sale is a written contract that, by its express terms, clearly and unambiguously transferred the LLP-qualifying fishing history of the F/V JACQUELYN R from the F/V JACQUELYN R. Limited Partnership to Mr. Choquette on May 15, 1995. The IAD, however, concluded that Key Bank owned and sold the fishing history of the F/V JACQUELYN R. to Mr. Maring on May 12, 1995 and that Mr. Rydman did not own, and therefore could not sell, the fishing history to Mr. Choquette on May 15, 1995. I examine the arguments in the IAD.

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<sup>17</sup> See, e.g., *Oscar Wilson, Sr.*, Appeal No. 00-0011 at 4 (Feb. 27, 2003) (applicant received LLP license based in part on affidavit that sale included "any fishing rights, and or fishing history, which attached to the vessel before or after the sale"); *Yukon Queen Fisheries, LLP*, Appeal No. 96-0009 at 2 (Sept. 17, 1998)(applicant received moratorium permit because contract transferred to applicant "all right, title and interest in and to all individual fishing quota rights and individual transferable quota rights, limited entry rights, and similar fishing quota rights, licenses, intangibles or privileges, however characterized, or any form whatsoever, whenever issued, under federal, state or local law, for harvesting and processing" and all of the seller's "rights, title and interest in and to and benefit of all catch histories, landings records, fish tickets or other fishing records and histories of the Vessel.")

<sup>18</sup> Limited Partnership Agreement and Certificate for F/V JACQUELYN R. Limited Partnership, (March 3, 1987) at ¶ 10(c) [R. 60]. Mr. Choquette submitted credible documentary evidence that support each of these propositions. *Id.* [R. 63 - 51]; Amendment to Certificate (May 28, 1987) [R. 51]; Articles of Incorporation of Rydman Management Corporation (March 3, 1987) [R. 49 - R. 46]; Minutes of Special Meeting of Sole Director of Rydman Management Corporation (June 4, 1993). [R. 43]

**B. Based on the record in this appeal, did Key Bank own the fishing history of the F/V JACQUELYN R. on May 12, 1995? No.**

The IAD states:

Information provided to RAM by the other claimant to the fishing history, and the LLP crab license derived from that history, Mark Maring (dba Mark Maring II, Inc.) included:

1. A letter from Mr. Maring's attorney, Robert A. Green, which stated in pertinent part: "The Purchase and Sale Agreement was entered into between Mark Maring and Key Bank on or before May 12, 1995. The JACQUELYN R had been under the Bank's custody for some time prior to the Agreement. Obviously, Key Bank would not agree to sell the JACQUELYN R unless it had possession of the Vessel. Mr. Maring purchased the JACQUELYN R in good faith."
2. A copy of the Memorandum of Agreement between Key Bank and Mark Maring for the purchase of the F/V JACQUELYN R, including all fishing rights associated with the vessel, dated May 12, 1995.

The evidence provided by William Choquette indicates that the F/V JACQUELYN R was sold at auction by the Changwon District Court of Korea on May 30, 1995. Documentation discussed herein as provided by counsel of Mark Maring indicates that possession and control of the F/V JACQUELYN R was held by this entity for some time prior to the auction. Although the specific date upon which this entity took possession of the vessel is unclear it is apparent that Dennis Rydman did not have control of the vessel on the date he entered into the Fishing Rights Bill of Sale with William Choquette on May 15, 1995 and that another party, Key Bank of Washington, had sufficient legal authority to enter into the Memorandum of Agreement with Mark Maring on May 12, 1995 for the purchase of the F/V JACQUELYN R and all accompanying fishing rights. The fishing history of a vessel is presumed to reside with the owner of that vessel on June 17, 1995. On June 19, 1995, Key Bank of Washington was rendered the successful bidder and purchaser of the F/V JACQUELYN R. Accordingly, that entity had control of the vessel's physical form and fishing history as of that date. [R. 170 - 171].

The question is whether, on the record before me, Key Bank owned the fishing history of the F/V JACQUELYN R. on May 12, 1995. If it did not own the fishing history on May 12, 1995, it could not sell it to Mr. Maring on that date. RAM did not provide Mr. Choquette with the documents which formed the basis for its denial of his application. I analyze that issue below and

conclude that RAM cannot deny Mr. Choquette a license based on these documents because it did not provide Mr. Choquette an opportunity to rebut them.<sup>19</sup>

But here I analyze the arguments and evidence, as described in the IAD. The IAD relied on three things: [1] an agreement between Key Bank and Mark Maring; [2] Key Bank's physical control of the vessel on May 12 1995; [3] the presumption in the LLP regulation that the owner of the vessel as of June 17, 1995 owns the fishing history of the vessel.

### **1. Agreement between Key Bank and Mark Maring**

The IAD concluded that Key Bank and Mark Maring entered into a purchase and sale agreement of the F/V JACQUELYN R. on May 12, 1995 that included the fishing rights of the vessel. The problem with that conclusion is that the record has no evidence that, before May 12, 1995, Key Bank had anything but a preferred ship mortgage.

Dennis Rydman, on behalf of the F/V JACQUELYN R Limited Partnership, executed a preferred ship mortgage in favor of Key Bank to secure a debt of three million dollars on October 10, 1991.<sup>20</sup> The "Granting Clause" states the F/V JACQUELYN R. Limited Partnership

has granted, conveyed, mortgaged, pledged, confirmed, assigned, transferred, and set over, and by these presents does grant, convey, mortgage, pledge, confirm, assign, transfer create a security interest in, and set over, unto mortgagee and its successors and assigned, *the whole of the vessel described as follows:*

That certain vessel JACQUELYN R., Official No. 612288, documented under the laws of the United States, and having her home port at Seattle, Washington, together with all her engines, propellers, machinery, bowspirts, masts, ramps, rigging, boats, anchors, cables, chains, capstans, outfit, tackle, tools, pumps and pumping equipment, apparel, furniture, fittings, fishing gear except pots, nets, fish processing equipment, and other equipment, spares, spare parts, and all other appurtenances appertaining and belonging thereto, whether on board or on shore, and also any and all additions, improvements, replacements, and after acquired property hereafter made in or to said vessel or said appurtenances, whether on board the vessel or not (said vessel, together with all the forgoing, being herein called the "Vessel"); . . . [emphasis added] [R. 110 - 109]

The mortgage repeatedly refers to the borrower's obligations with respect to "the vessel" and the

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<sup>19</sup> See pages 12 - 15 *infra*.

<sup>20</sup> [R. 111 - 89] For reasons that are unclear to me, these parties also executed a preferred ship mortgage on that same date for two million dollars. [R. 88 - 72]. The result is the same whichever document controls because both encumber the vessel only.



mortgagee's rights with respect to "the vessel."<sup>21</sup> The definition clause of the mortgage states "Vessel' shall have the meaning stated in the granting clause of this Mortgage."<sup>22</sup> The mortgage nowhere mentions the vessel's fishing rights or fishing history. It is apparent that the mortgage goes to great pains to specify all of the physical elements that comprise "the vessel" but does not include the intangible fishing history of the vessel.

Mr. Rydman executed an amendment to the mortgage on June 2, 1993 that increased the secured amount to approximately \$3.1 million dollars. [R. 122 - 118] The amendment refers to the original agreement "which encumbers the vessel JACQUELYN R." [R. 121] The amendment continues all of the provisions of the original mortgage. [R. 120] The amendment therefore did not add the fishing history of the F/V JACQUELYN as security for the mortgage. Therefore, Key Bank's mortgage is not a written contract that, by its express terms, clearly and unambiguously transferred to Key Bank the fishing history of the F/V JACQUELYN R.

This construction of Key Bank's mortgage is consistent with judicial construction of preferred ship mortgages. Courts do not permit holders of preferred ship mortgages to seize any property not specifically listed as the subject of the mortgage: "Nothing in the nature of the ship mortgage, nor in the terms of its statutory implementation, suggests that its lien should extend to what the mortgagor did not own and had no right to acquire."<sup>23</sup>

In *United States v. F/V GOLDEN DAWN*, the court did not permit the holder of a preferred ship mortgage to seize the vessel's depth sounding equipment, concluding that such equipment was not part of the vessels' "engines, machinery, masts, bowsprits, boats, anchors, cables, chains, rigging, tackler, apparel and furniture and all other appurtenances therefore pertaining and belonging."<sup>24</sup> In *C.I.T. Corporation v. Oil Screw Peggy*, the court held that the holder of a preferred ship mortgage did not have a security interest in leased radar equipment on the vessel.<sup>25</sup>

In *In re Levy-Mellon Marine*, the court held that the holder of a preferred ship mortgage did not have a security interest in the accounts receivable generated by the mortgaged vessels.<sup>26</sup> The court stated:

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<sup>21</sup> Preferred Ship Mortgage (Oct. 10, 1991) *passim* [R. 111 - 89].

<sup>22</sup> *Id.* at § 1.11 [R. 108]

<sup>23</sup> *United States v. F/V GOLDEN DAWN*, 222 F. Supp. 186, 188 (E.D. New York 1963), *quoted with approval in C.I.T. Corporation v. Oil Screw Peggy*, 424 F.2d 767, 768 (5th Cir. 1970)(per curiam).

<sup>24</sup> 222 F. Supp. 186, 187 (E.D. New York 1963).

<sup>25</sup> 424 F. 2d 767 (5th Cir. 1970) (per curiam).

<sup>26</sup> 61 B.R. 331 (Bankr. W.D. La 1986).

Of course, of primary significance in this case is the fact that the mortgage in question does not specifically purport to grant a security interest in freights, charter hire or accounts receivable.<sup>27</sup>

Noting that “[a]ccuracy and specificity in what is subject to the mortgage is essential,”<sup>28</sup> the court concluded: “[A] pledge of freights will not be implied, but must be specifically included in the mortgage.”<sup>29</sup> Similarly, I will not imply a pledge of a vessel’s future fishing history in a preferred ship mortgage. I conclude that the preferred ship mortgage did not give Key Bank any interest in the fishing history of the F/V JACQUELYN R.

## **2. Key Bank’s physical control of the vessel on May 12, 1995**

The IAD states that Dennis Rydman did not have physical control of the vessel on May 15, 1995 and that Key Bank did have physical control of the vessel. Accepting as true that Key Bank had physical control of the vessel on or before May 12, 1995,<sup>30</sup> the only rights Key Bank had on May 12, 1995 were those conferred by the preferred ship mortgage. That mortgage gave Key Bank a security interest in the vessel. It gave Key Bank the right to have the vessel seized and sold at a judicial sale. I have concluded that the mortgage did not give Key Bank any interest in the fishing history of the F/V JACQUELYN R.

## **3. Presumption of ownership of the fishing history of the vessel**

The IAD’s conclusion rests on two premises. The first premise is that the fishing history of a vessel is presumed to reside with the owner of the vessel on June 17, 1995. The second premise is that, since Key Bank was rendered the successful bidder on June 9, 1995 through a court order from the Changwon District Court in Korea, Key Bank owned the vessel on June 17, 1995. I will assume for the sake of argument that the second premise is sound, namely that Key Bank’s status as confirmed successful bidder is equivalent to Key Bank owning the vessel as of June 17, 1995.<sup>31</sup>

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<sup>27</sup> *Id.* at 332.

<sup>28</sup> *Id.* at 334.

<sup>29</sup> *Id.* at 335.

<sup>30</sup> I do not make or imply a finding on this point because the vessel was seized in Korea and sold according to a Korean court order. The Korean court order states that auction proceedings did not occur until May 30, 1995, Key Bank was not the successful bidder until June 2, 1995 and Key Bank did not pay in full the price of the vessel until June 23, 1995. [R. 125 - 127] *See* note 31 *infra*. It is possible the vessel was in the physical control of the Korean authorities on May 12, 1995.

<sup>31</sup> Order, Changwon District Court in Korean, certified by Court Clerk (July 15, 1995). [R. 125] Mr. Choquette submitted the order in Korean, a translation of the order and an affidavit of the accuracy of the translation. [R. 125 - 127]. The Order recites these dates:

The first premise does not defeat Mr. Choquette's claim. The regulation states the owner of a vessel on June 17, 1995 is the eligible applicant for the LLP license based on that vessel's fishing history "unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition."<sup>32</sup> Paragraph (2) is the provision I have analyzed, namely that an eligible applicant is someone to whom the fishing history has been transferred by the express terms of a written contract. Therefore, assuming that Key Bank owned the vessel on June 17, 1995, it did not own the fishing history *because the fishing history of the vessel had already been transferred in conformance with the paragraph (2) of the definition of eligible applicant.*

I note that the commentary to the final LLP rule describes a different presumption. The commentary states if a vessel is sold *on or before* June 17, 1995, the fishing history of the vessel is *presumed* to go with the vessel and go to the buyer. If the vessel is sold *after* June 17, 1995, the fishing history of the vessel is *presumed* to stay with the seller and not go to the buyer.<sup>33</sup> This presumption is used "to determine the qualification for a license in the absence of a written contract provision addressing the vessel's fishing history."<sup>34</sup> If a written contract clearly addresses the vessel's fishing history, the written contract governs. Here a written contract specifically provides for sale of the fishing history. Therefore I find that the presumption is rebutted. The written contract governs and it transferred the fishing history from the F/V JACQUELYN R. Limited Partnership to William Choquette.

Therefore, *on the record before me*, I conclude that Key Bank did not own, and therefore could not sell, the fishing history of the F/V JACQUELYN R. on May 12, 1995. Unless the F/V JACQUELYN R. Limited Partnership entered into another agreement with Key Bank – besides the preferred ship mortgage and the amendment to the ship mortgage – all Key Bank had authority to seize, and sell, was the vessel. Since Key Bank did not own the fishing history of the vessel on May 12, 1995, the F/V JACQUELYN R. Limited Partnership still owned the vessel's fishing history, could transfer it to Mr. Choquette on May 15, 1995, and did transfer it to him.

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Auction proceedings for the F/V JACQUELYN R. on May 30, 1995;  
Court rendered order determining Key Bank to be a successful bidder on June 2, 1995;  
Court order became final and conclusive on June 9, 1995;  
Creditor paid in full the price of the vessel on June 23, 1995. [R. 125]

The Order concludes: "[T]he title to the Vessel (including the appurtenance, equipment) has been transferred to the creditor *as of June 23, 1995* free and clear of all mortgages, maritime liens and other encumbrances in accordance with Korean Law." (emphasis added) [R. 125] The Abstract of Title for the F/V JACQUELYN R. notes that 100% of vessel transferred to Key Bank by a court order dated June 23, 1995. [R. 155]. The Abstract records a bill of sale from Key Bank to Mark Maring dated July 25, 1995 and recorded October 16, 1995. [R. 155]

<sup>32</sup> 50 C.F.R. § 679.2. The regulation is quoted in full at page 3 - 4 *supra*.

<sup>33</sup> Final Rule, 63 Fed. Reg. 52,642, 52,645 - 52,646 (Oct. 1, 1998).

<sup>34</sup> *Id.* at 52,646.

I therefore conclude that, based on the record in this appeal, William Choquette purchased the fishing rights of the F/V JACQUELYN R. from the F/V JACQUELYN R. Limited Partnership, the owner of the vessel on May 12, 1995, through a written contract that clearly and unambiguously transferred the vessel's fishing history to him. I therefore conclude that William Choquette meets the requirements for an LLP license based on the fishing history of the F/V JACQUELYN R.

But the IAD denied Mr. Choquette this license based on information not in the record of Mr. Choquette's appeal, namely, documents provided by Mr. Maring that NMFS would not release to Mr. Choquette. I now examine whether NMFS can do that.

**2. Can NMFS deny Mr. Choquette an LLP license based on documents submitted by another applicant that NMFS will not provide to Mr. Choquette? No.**

**A. Legal principles**

RAM, acting for NMFS, cannot rely on Mr. Maring's documents to deny Mr. Choquette an LLP license because RAM would not provide those documents to Mr. Choquette. And I cannot examine and consider those documents, and deny Mr. Choquette a license based on them, unless the agency consents to my giving them to Mr. Choquette. The reason is a bedrock principle of American law. The government cannot deprive a person of a property interest without giving the person an opportunity to examine the disputed evidence on which the government based its decision.

First, a decision made on undisclosed, or secret, evidence denies the applicant due process of law. A leading treatise on administrative law states the universally accepted principle:

Due process requires notice of the adverse contentions *and access to the evidence in order to assure an adequate opportunity to participate*. The proceeding may be found defective if the agency withholds an important piece of information. The use of undisclosed information violates due process absent extraordinary circumstances.<sup>35</sup>

The Regional Administrator for the NMFS Alaska Region affirmed this principle in *Jesse T. Agee*:

At a minimum, procedural due process requires a pre-deprivation procedure that involves notice of the evidence that forms the basis of the government's proposed action, and an opportunity for the individual observer to respond in a meaningful

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<sup>35</sup> C. Koch, 2 ADMINISTRATIVE LAW AND PRACTICE § 5.32 at 123 - 124 (2d ed. 1997)(emphasis added) (footnotes omitted).

way to that evidence.<sup>36</sup>

The IAD quotes Mr. Green's letter and simply asserts that the Agreement between Key Bank and Mr. Maring included all the fishing rights. [R. 170] This does not give Mr. Choquette access to that evidence and does not enable him to respond in a meaningful way to those documents.<sup>37</sup>

Second, a decision made on secret, undisclosed evidence violates federal regulation 50 C.F.R. § 679.43(k). That regulation governs LLP appeals and it states: "The decision [by an appellate officer] must be based solely on the record of the proceedings." Therefore, if I examined this evidence, I would have to include it in the record and would have to disclose it to Mr. Choquette. This is the general rule for administrative records: "The record should be made available to the parties."<sup>38</sup> This Office has always made the record on appeal available to appellants to the extent permitted by law. Therefore, I have not examined the Maring evidence because the agency will not make it available to Mr. Choquette.

Third, and finally, a decision made on undisclosed evidence makes meaningful judicial review impossible. An appeals officer must explain the basis for his or her decision. It is a universally accepted principle of American law that administrative adjudicators "must state findings and reasons that support their decision."<sup>39</sup>

If Mr. Maring's evidence persuaded me that he owned the fishing history of the F/V JACQUELYN R., I would have to explain in my decision why I found Mr. Maring's evidence more persuasive than Mr. Choquette's evidence. If Mr. Choquette appealed this decision to a federal court, the agency could not maintain that I could examine Mr. Maring's evidence but the court could not. Thus, the court would have to review the evidence I relied upon. And the agency could not maintain that RAM could consider Mr. Maring's evidence, I could consider Mr. Maring's evidence and the court could consider Mr. Maring's evidence, but Mr. Choquette, the person actually affected by the evidence, could not see it. Therefore, I conclude that NMFS cannot deny Mr. Choquette an LLP license based on information submitted by another applicant that NMFS will not provide to Mr. Choquette.

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<sup>36</sup> *Jesse T. Agee*, Appeal No. 95-0012, Decision on Review at 2 (Oct. 7, 2003), *affirming* OAA Decision (Sept. 26, 2003). All decisions by the Office of Administrative Appeals, and the Regional Administrator's Decisions, are in the Administrative Appeals section of the NMFS Alaska Region website. <<<http://www.fakr.noaa.gov/appeals/default.htm>>>

<sup>37</sup> *Cf. Arnette v. Kennedy*, 416 U.S. 134, 137 (1974) (discharge of federal employee did not violate due process, but employee could inspect material on which the discharge was based and government provided employee a copy of the material).

<sup>38</sup> C. Koch, 2 ADMINISTRATIVE LAW AND PRACTICE § 5.63 at 219 (2d ed. 1997).

<sup>39</sup> C. Koch, 2 Administrative Law and Practice § 5.64 at 224 (2d ed. 1997)(footnote omitted).

## B. Freedom of Information Act response

On February 22, 2005 – after the IAD – Mr. Choquette submitted a fourth request to RAM for the Maring documents. [R. 177 - 178] RAM treated it as a Freedom of Information Act (FOIA) request and referred it to the FOIA Officer.<sup>40</sup> NMFS declined to release the Maring documents on which RAM based its decision, citing exemption 4 to the FOIA.<sup>41</sup> Exemption 4 prevents release of “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”<sup>42</sup> For two reasons, I conclude that NMFS’s response to the FOIA request does not mean that NMFS may deny Mr. Choquette this license without showing him the Maring documents.

First, the Due Process Clause of the Federal Constitution and the federal regulation governing LLP appeals are independent sources of Mr. Choquette’s right to see the information which provides the basis for NMFS denying him a license. FOIA governs release to the general public. The right of a denied applicant to see a document is not necessarily coextensive with the right of a member of the general public to see a document. For example, if a document is disseminated under FOIA, the agency may not place any restrictions on who else can see the document.<sup>43</sup> In an appeal, an appeals officer could, if the facts warranted, impose such a restriction.

Second, Mr. Maring could have had no reasonable expectation that NMFS would refuse to disclose his information *to a competing applicant for the same LLP license*. If applicant A wants NMFS to award him an LLP license, and deny the license to applicant B, applicant A cannot reasonably expect that NMFS will award him the license, and deny it to applicant B, without

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<sup>40</sup> Memorandum from RAM to William Choquette (Feb. 23, 2005). [R. 178]

<sup>41</sup> Letter from James Balsiger, NMFS Alaska Regional Administrator, to William Choquette (March 18, 2005) [R. 236]; Letter from William Hogarth, Assistant Administrator for Fisheries, to William Choquette (May 9, 2005) [R. 253 - 251] NMFS released some documents to Mr. Choquette – primarily documents related to Mr. Maring’s transfer of LLP crab license LLC 3954 – but did not release the documents which led RAM to deny Mr. Choquette’s application. [R. 180 - 235; R. 251] NMFS also withheld some documents based on Exemption 5 in FOIA, which protects inter-agency or intra-agency memorandums or letters. 5 U.S.C. § 552(b)(5)(2000). [R. 236] I do not believe that RAM relied on the Exemption 5 documents to deny Mr. Choquette a license.

<sup>42</sup> 5 U.S.C. § 552(b)(4)(2000). A decision on whether documents are protected from release under Exemption 4 requires the government to initially decide whether the information was submitted voluntarily or was compelled. The Department of Justice handbook on FOIA thoroughly analyzes this issue. Office of Information and Privacy, United States Department of Justice, FREEDOM OF INFORMATION ACT GUIDE AND PRIVACY ACT OVERVIEW 279 - 304 (May 2004).

<sup>43</sup> *Id.* at 90 (May 2004).

showing applicant B the information applicant A submitted to support his application.<sup>44</sup> The practice of this Office is to join in the same appeal competing applicants for the same license or quota.<sup>45</sup> How else could an agency decide between two competing applicants, except to hear evidence from both applicants before rendering its decision?

### **C. Joinder of Mr. Maring**

Therefore, normally I would join Mr. Maring as a necessary party to Mr. Choquette's appeal and fully hear the evidence of these two competing claimants for this LLP license. The competing applicants would fully hear each other's evidence. And the result would be one LLP license based on the fishing history of the F/V JACQUELYN R. – awarded to either Mr. Maring or Mr. Choquette.

I am not joining Mr. Maring in this appeal, however, because NMFS issued Mr. Maring a transferable LLP license on July 26, 2000 and approved a transfer of that license – to Alaska Trojan Partnership – on February 18, 2004.<sup>46</sup> Mr. Maring no longer owns a transferable or non-transferable license based on the fishing history of the F/V JACQUELYN R.

I emphasize that I have not examined the evidence Mr. Maring submitted to RAM. Mr. Maring's evidence convinced RAM that he met the requirements for an LLP crab license based on the fishing history of the F/V JACQUELYN R. I have analyzed the arguments in the IAD issued to Mr. Choquette and the description of the Maring evidence in the IAD, but I have not examined the Maring evidence itself. I therefore do not make or imply any decision on whether Mark Maring met the requirements for an LLP crab license based on the fishing history of the F/V JACQUELYN R. because I have not examined the evidence Mr. Maring submitted, I have not given him an opportunity to submit evidence and argument, and I have not given him an opportunity to rebut Mr. Choquette's evidence and arguments.

I am perfectly willing to issue a Decision on Reconsideration in this appeal which evaluates the Maring evidence. If RAM or the Regional Administrator wish me to evaluate the Maring evidence, I would stay this decision. I would notify Mr. Maring. I would put Mr. Maring's information in the record of Mr. Choquette's appeal, provide it to Mr. Choquette, and give Mr. Choquette an opportunity to rebut it.<sup>47</sup>

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<sup>44</sup> The IAD quoted four sentences from one of the withheld documents – a letter from Mr. Maring's attorney, Robert Green – and therefore released part of that document. [R. 170]

<sup>45</sup> See, e.g., *In re Applications of Jay R. Thomassen, Appellant, and Mechanics Service, Inc., Respondent*, Appeal No. 95-0122 (July 29, 1998)(IFQ appeal).

<sup>46</sup> [R. 181] On December 24, 2003, RAM had approved Mr. Maring's application to designate the F/V ALASKA TROJAN on LLP crab license LLC3954. [R. 213]

<sup>47</sup> I would decide, at that point, if an oral hearing were warranted based on 50 C.F.R. § 679.43(g).

But, in this Decision, I am deciding what is before me on the record before me. Based on the record before me, I conclude that William Choquette meets the requirements for a transferable LLP crab license based on the fishing history of the F/V JACQUELYN R.

#### FINDINGS OF FACT

I therefore find by a preponderance of evidence the following facts.

1. The F/V JACQUELYN R. Limited Partnership owed the F/V JACQUELYN R. on May 15, 1995.
2. Dennis Rydman was the managing partner of the F/V JACQUELYN R. Limited Partnership on May 15, 1995 and had the legal authority to agree to contracts on behalf of the F/V JACQUELYN R. Limited Partnership.
3. Dennis Rydman signed a contract on May 15, 1995, entitled "Fishing Rights Bill of Sale," with William Choquette.
4. The Fishing Rights Bill of Sale, by its express terms, clearly and unambiguously provides that all rights to the fishing history of the F/V JACQUELYN R. are transferred to Mr. Choquette.
5. The record in this appeal does not show that the F/V JACQUELYN R. Limited Partnership transferred to Key Bank or any other entity the fishing history of the F/V JACQUELYN R. before May 15, 1995.
6. The record in this appeal does not show that the F/V JACQUELYN R. Limited Partnership pledged the fishing history of the F/V JACQUELYN R. as security for a mortgage with Key Bank.

#### CONCLUSIONS OF LAW

1. William Choquette meets the requirements for an LLP license based on the fishing history of the F/V JACQUELYN R.
2. William Choquette is a person to whom an LLP-qualifying fishing history was transferred by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred.
3. An appeals officer may not decide an appeal based upon evidence which is not in the record of the appeal.
4. An appeals officer may not decide an appeal based upon disputed evidence that the agency does not make available to the appellant.
5. NMFS may not deny Mr. Choquette an LLP license based on information submitted by



another applicant because NMFS will not provide that information to Mr. Choquette.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is ORDERED to issue a transferable LLP crab license to William Choquette. This Decision takes effect June 30, 2005, unless the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

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, June 10, 2005. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement in support of the motion.

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Mary Alice McKeen  
Appeals Officer