

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 00-0004
)	
R.J. FIERCE PACKER, LLC,)	DECISION
Appellant)	
_____)	December 18, 2000

STATEMENT OF THE CASE

R.J. Fierce Packer, LLC [Fierce Packer] filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program [RAM] on March 21, 2000. The IAD denied Fierce Packer's application for a groundfish license under the North Pacific Groundfish and Crab License Limitation Program [LLP]. Fierce Packer bases its appeal on the fishing history of the F/V YUKON QUEEN, ADFG # 58510, USCG O.N. 509115. Fierce Packer has shown that the IAD directly and adversely affects its interest, as required by federal regulation 50 C.F.R. § 679.43(b).

The IAD acknowledged that the F/V YUKON QUEEN was a qualifying vessel for the LLP but denied the application because Fierce Packer did not own the F/V YUKON QUEEN on June 17, 1995 and, RAM concluded, was not a person to whom the fishing history of the vessel had been transferred by the express terms of a written contract.

Fierce Packer requested a hearing on its appeal. Although the situation is complex, there is an extensive written record which I have carefully reviewed. My conclusion is that this record establishes, as a matter of law, that Fierce Packer is an owner of the fishing history of the F/V YUKON QUEEN that supports issuance of a license limitation permit. I therefore conclude that Fierce Packer does not meet the requirement in federal regulation 50 C.F.R. § 679.43(g)(3) and deny the request for a hearing at this time.¹

ISSUE

Is Fierce Packer an eligible applicant for an LLP license based on the fishing history of the F/V YUKON QUEEN?

¹ Federal regulation 50 C.F.R. § 679.43(g)(3)(i) provides in part that the appellate officer can order a hearing only if "[t]here is a genuine and substantial issue of adjudicative fact for resolution at a hearing." Since I conclude that the record establishes that Fierce Packer is an eligible applicant for an LLP license, I do not reach whether NMFS is prevented, under a theory of estoppel, from denying Fierce Packer a license and I do not decide whether a hearing would be required to resolve that issue.

REGULATORY BACKGROUND

This appeal requires some background on the License Limitation Program and the program that preceded it: the Moratorium Program. The Vessel Moratorium Program for Groundfish and Crab went into effect on January 1, 1996.² As of that date, a vessel had to have a moratorium permit to fish for moratorium species. Moratorium species were moratorium crab and moratorium groundfish. Moratorium crab were Tanner and king crab caught in the Bering Sea and Aleutian Islands management area [BSAI]. Moratorium groundfish were groundfish, except sablefish caught with fixed gear, harvested in the Gulf of Alaska [GOA] and BSAI.³

For a vessel to receive a moratorium permit, the vessel must have had moratorium qualification. A vessel had moratorium qualification either because it was an original qualifying vessel or because it received a moratorium qualification by transfer from an original qualifying vessel.⁴ An original qualifying vessel is a vessel that made a landing of moratorium crab or groundfish during the qualifying period, which was January 1, 1988 to February 9, 1992.⁵ The fact that a moratorium qualification could be transferred from one vessel to another was a defining characteristic of a moratorium qualification.⁶

A moratorium permit came with any or all of four gear and species endorsements: crab endorsement with pot gear, groundfish with trawl gear, groundfish with pot gear and groundfish with hook gear. The gear endorsements were determined by the qualifying vessel's landings in period 1, which was also January 1, 1988 to February 9, 1992, and period 2, which was February 10, 1992 to December 11, 1994. If a vessel made a landing of any moratorium groundfish in period 1 with any gear, the permit resulting from that vessel's fishing history had the three groundfish endorsements: groundfish with trawl,

² Final rule, 60 Fed. Reg. 40,763, 40,773 (Aug. 10, 1995). The regulations for the Moratorium Program were originally codified at 50 C.F.R. § 676.1 - 679.6. They were renumbered and placed at 50 C.F.R. § 679.1 - 679.7 as part of a consolidation of the regulations relating to the Exclusive Economic Zone off Alaska, 61 Fed. Reg. 31,228 (1996), and eliminated from the Code of Federal Regulations after LLP came into effect. Final rule, 65 Fed. Reg. 45,316 (July 21, 2000).

³ Final rule, 60 Fed. Reg. 40,763, 40,773 (Aug. 10, 1995), formerly 50 C.F.R. § 679.2. Groundfish are those species subject to annual limit setting by NMFS in 50 C.F.R. § 679.20(a)(2). 50 C.F.R. § 679.2. For example, the 2000 harvest specifications for the GOA were published at 65 Fed. Reg. 8298 (Feb. 18, 2000), updated 65 Fed. Reg. 11,909 (March 7, 2000) and are also on the NMFS website: <http://www.fakr.noaa.gov>.

⁴ Final rule, 60 Fed. Reg. at 40,773, formerly 50 C.F.R. § 676.3(c), then 50 C.F.R. § 679.4(c)(7).

⁵ Final rule, 60 Fed. Reg. at 40,773, formerly 50 C.F.R. § 679.2.

⁶ Federal regulations defined moratorium qualification as "a transferable prerequisite for a moratorium permit." Final rule, 60 Fed. Reg. at 40,773, formerly 50 C.F.R. § 679.2.

pot and hook gear. A landing in period 2 in a new fishery (a fishery different from where the vessel made a landing in period 1) enabled some qualifying vessels to cross over into that new fishery and gain an additional gear and species endorsement.⁷

By regulation, the Moratorium Program was to be in effect from January 1, 1996 to December 31, 1998.⁸ The Moratorium Program was a temporary measure to freeze the number of vessels in the moratorium fisheries while NMFS, in conjunction with the North Pacific Fisheries Management Council, developed a more comprehensive plan to regulate these fisheries.⁹ NMFS assumed that, by December 31, 1998, the more comprehensive program would be in effect. But the new program – which was eventually named the North Pacific Groundfish and Crab License Limitation Program or simply License Limitation Program or even more simply LLP – took longer to develop than expected.

Since the LLP was not in place by December 31, 1998, NMFS extended the Moratorium Program through December 31, 1999.¹⁰ This enabled NMFS to complete the LLP regulations and establish an LLP application period of September 13, 1999 through December 17, 1999.¹¹ On December 31, 1999, the Moratorium Program expired and on January 1, 2000, the License Limitation Program came into effect.¹²

The License Limitation Program regulates largely the same fisheries as the Moratorium Program. The

⁷ Final rule, 60 Fed. Reg. at 40,773 - 40,774, formerly 50 C.F.R. § 676.3(e), then 50 C.F.R. § 679.4(c)(5).

⁸ Final rule, 60 Fed. Reg. at 40,773, formerly 50 C.F.R. § 676.3, then 50 C.F.R. § 679.4(c).

⁹ Steven Meyer, Appeal No. 99-0008 at 1 - 2 (Dec. 1, 1999). For the background of the Moratorium Program, see the Proposed Rule for the Moratorium Program, 60 Fed. Reg. 25,677, 25,677 - 25,683 (May 12, 1995) and the Final Rule, 60 Fed. Reg. 40,763, 40,763-40,770 (Aug. 10, 1995).

¹⁰ Proposed rule, 63 Fed. Reg. 63,442 - 53,444 (Nov. 13, 1998); Final rule, 64 Fed. Reg. 3651 - 3653 (Jan. 25, 1999)(extending Moratorium Program through December 31, 1999)

¹¹ Proposed rule, 62 Fed. Reg. 43,866, 43,866 - 43-872, 43,882 - 43,889 (Aug. 15, 1997) (first proposed LLP rules on all aspects of program); Final rule, 63 Fed. Reg. 52,642 (Oct. 1, 1998)(final rules on substantive requirements for license; application and transfer rules reserved); Correcting Amendments to final rule, 63 Fed. Reg. 64,878 (Nov. 24, 1998); Proposed rule, 64 Fed. Reg. 19,113 (April 19, 1999)(application and transfer rules); Final rule, 64 Fed. Reg. 42,826 (Aug. 6, 1999)(application and transfer rules); Notification of application period, 64 Fed. Reg. 49,104 (Sept. 10, 1999).

¹² Final rule, 63 Fed. Reg. 52,642, 52,642 (Oct. 1, 1998)(making January 1, 2000 effective date of LLP permit requirements). For background on the LLP, see the Proposed LLP Rule, 62 Fed. Reg. 43,866, 43,866 - 43,872 (1997) and the Final Rule, 63 Fed. Reg. 52,642, 52,642 - 52,651 (1998).

crab species subject to LLP are the same as moratorium crab: Tanner and king harvested in BSAI.¹³ License limitation groundfish are the same as moratorium groundfish, except that demersal shelf rockfish east of 140° longitude are excluded from the LLP.¹⁴

To receive a license under the LLP, a qualified person must have owned a vessel on June 17, 1995 that made specified landings in a general qualification period and an endorsement qualification period or must own the fishing history that contains those landings.¹⁵ The LLP general qualification period for groundfish licenses is January 1, 1988 to June 27, 1992, which is extended for vessels that meet specific requirements.¹⁶ The endorsement qualification period for groundfish licenses is generally January 1, 1992 to June 17, 1995, again with some exceptions for vessels that meet certain requirements. The groundfish license limitation permit has specific area endorsements. Each area endorsement has specific requirements for landings in that area, that vary according to the length of the boat and the dates of the landings.¹⁷

Under both the Moratorium Program and the License Limitation Program, if RAM determined an applicant met the requirements of the Program, it issued the applicant a document showing the applicant had something transferable. Under the Moratorium Program, it was technically only the moratorium qualification that was transferable. Thus, RAM issued a certificate showing a transferable moratorium qualification and a moratorium permit.¹⁸ Under LLP, it is the license itself that is transferable. A successful applicant therefore receives a transferable license.

If RAM denied a moratorium application, RAM issued a non-transferable certificate of moratorium

¹³ 50 C.F.R. § 679.4(k)(1)(ii)(requiring license limitation permit if vessel engaged in directed fishing for “crab species”); 50 C.F.R. § 679.2 (definition of “crab species”).

¹⁴ 50 C.F.R. § 679.4(k)(1)(i)(requiring license limitation permit if vessel engaged in directed fishing for “license limitation groundfish”); 50 C.F.R. § 679.2 (definition of “license limitation groundfish”).

¹⁵ 50 C.F.R. § 679.2, definition of “eligible applicant” for LLP, subsection (1) and (2). The definition of eligible applicant is quoted in full *infra* at pages 13.

¹⁶ 50 C.F.R. § 679.4(k)(4)(i).

¹⁷ 50 C.F.R. § 679.4(k)(4)(ii). An LLP groundfish license has five possible area endorsements: Aleutian Islands, Bering Sea, Western Gulf, Central Gulf, Southeast Outside.

¹⁸ The regulations provide for moratorium permits. RAM began issuing certificates of moratorium qualification so vessel owners could have a tangible document showing their vessel had “moratorium qualification.” High Spirit, Inc., Appeal No. 96-0049 at 2 n. 3 (Nov. 24, 1999).

qualification and an interim moratorium permit, which expired upon final agency action.¹⁹ If RAM denies an LLP application, RAM issues an interim license, which is not transferable and also expires upon final agency action.²⁰ Under both programs, if the applicant does not file an appeal with the Office of Administrative Appeals [OAA], RAM's action becomes the final agency action. If the applicant files an appeal, OAA's decision becomes the final agency action, unless modified on review by the Regional Administrator for the NMFS Alaska Region.²¹

FACTUAL BACKGROUND

New Yukon Queen L.P. [New Yukon] bought the F/V YUKON QUEEN from Seattle-First National Bank [Sea-First] on December 28, 1994.²² New Yukon applied for a moratorium qualification and permit based on the fishing history of the F/V YUKON QUEEN. RAM issued New Yukon a certificate for a transferable moratorium qualification and a moratorium permit on March 1, 1996.²³

New Yukon experienced financial difficulties. On May 2, 1997, New Yukon's creditors filed a Chapter 7 petition in federal bankruptcy court in Seattle to place New Yukon into involuntary bankruptcy. New Yukon did not contest this involuntary petition and the court appointed Bruce Kriegman as Trustee of New Yukon's Estate on July 11, 1997.²⁴

A word about bankruptcy proceedings and terminology is in order here. The commencement of a bankruptcy case creates an estate. Virtually all the debtor's property interests immediately vest in the

¹⁹ See Final rule, 60 Fed. Reg. at 40,775, formerly 50 C.F.R. § 676.5(e), then 50 C.F.R. § 679.4(c)(10).

²⁰ 50 C.F.R. § 679.4(k)(6)(ix)(non-transferable license generally issued by RAM during appeal period); 50 C.F.R. § 679.43(p)(non-transferable license issued upon acceptance of appeal).

²¹ 50 C.F.R. § 679.43(o)

²² The Abstract of Title for the F/V YUKON QUEEN [Document 61A] shows a Bill of Sale dated December 28, 1994 was filed December 29, 1994. The Vessel Purchase and Sale Agreement between Sea-First and New Yukon was signed on December 13, 1994 [Document 63 B]. The difference between the date of the Sale Agreement and the date of the Bill of Sale – December 13, 1994 versus December 28, 1994 – does not appear material to any issue in this appeal.

²³ Document 70.

²⁴ Trustee's Interim Report and Account and Application for Interim Compensation and Reimbursement at 1, In re: New Yukon Queen Limited Partnership, Debtor, Bankruptcy No. 97-06086 (United States Bankruptcy Court for the Western District of Washington at Seattle, March 31, 1999)(hereinafter Trustee's Interim Report)[Document 64, Exhibit D].

estate.²⁵ Chapter 7 proceedings are liquidation proceedings. In a Chapter 7 case, the trustee collects all non-exempt property of the debtor, converts the property to cash and distributes the cash to the creditors.²⁶

Contract between Bankruptcy Trustee and Fierce Packer

The Bankruptcy Trustee for New Yukon's Estate filed a report with the Bankruptcy Court that described how he set about fulfilling his duties. The Trustee reported that he had conducted a preliminary investigation and "determined that the primary property of the Estate was a 165 foot fishing vessel known as the Yukon Queen ("YQ"), a fishing moratorium permit with related fishing rights, and possible transfer avoidance claims."²⁷ He states that he originally sought to sell the boat with the permit but, when he could not do that, he sold the boat without the fishing rights.²⁸ The vessel's abstract of title shows that on February 9, 1998, the Bankruptcy Trustee sold the vessel "free and clear of all liens and interests" to Mireya Chiriboga.²⁹

The Trustee then told the court how he negotiated the sale of the permit with related fishing rights:

I consulted an experienced maritime broker, Roger Lohrer with Dock Street Brokers, about the value of the fishing permit and the marketability thereof. The value of permits were [sic] subject to question because of potential material changes in the fishing industry and the federal system for regulating fishing activity. The lower levels of fishing stock and uncertainty about governmental restrictions on harvesting thereof (particularly with larger vessels), narrowed the market for the Estate's permit. Notwithstanding the foregoing, however, Mr. Lohrer indicated to me that he felt the permit could still be sold for a substantial sum.

Upon my authorization, my attorney obtained an order approving my employment of Mr. Lohrer. Mr. Lohrer advertised the availability of the permit and consulted with me and my counsel periodically about the status of his marketing activities. Initially, there

²⁵ See Bankruptcy Service L. Ed., § 4.1, Creation of Estate, § 4.2, Scope of Estate.

²⁶ D. Epstein, Bankruptcy and other Debtor-Creditor Laws in a Nutshell 134 (5th ed. 1995).

²⁷ Trustee's Interim Report, *supra* note 24, at 2. The "transfer avoidance claims" have nothing to do with the transfer of the moratorium permit but concern whether the debtor transferred assets before the bankruptcy to the unfair detriment of creditors.

²⁸ Id.

²⁹ Document 61 A.

was limited interest in the permit and the highest offer received was about \$50,000. Subsequently, however, Mr. Lohrer located a buyer who offered to pay \$150,000. I worked closely with Mr. Lohrer to work out the terms of the sale. **The buyer was not familiar with bankruptcy and expressed apprehension about completing a sale with a bankruptcy estate.**

We were successful in addressing the buyer's doubts and the buyer entered into an agreement to purchase the permit. Another party interested in the permit emerged and I negotiated a sale to the buyer at an increase [sic] price of \$200,000. My counsel prepared the appropriate pleadings requesting Court approval. The Court approved the sale in October, 1998. [emphasis added]³⁰

The agreement that the Trustee described to the court is entitled "Earnest Money Agreement for Purchase and Sale of Vessel Moratorium Qualification/Future Rights."³¹ Mr. Kriegman, acting as trustee for New Yukon's Estate, and Ronald K. Peterson, managing partner for Fierce Packer, signed it on September 14, 1998. It provided for the sale of the rights arising from the F/V YUKON QUEEN's fishing history:

I, R.J. Fierce Packer LLC (hereinafter referred to as "Buyer") offer to purchase, and I, Bruce Kriegman, Trustee (hereinafter referred to as "Seller") offer to sell the Vessel Moratorium Qualification ("VMQ") identified below together with **any and all Fishing Rights (and the right to apply therefore) arising from the fishing, harvesting, catch history or landings of the Vessel identified below [the F/V YUKON QUEEN]**, regardless whether such Fishing Rights are awarded or awardable to the Seller or Buyer as vessel owner or to the Vessel. **As used herein, the term "Fishing Rights" means any and all fishing rights of any kind whatsoever established, now or in the future, pursuant to any state, federal, or other governmental or administrative restricted access management programs for the commercial crab and/or groundfish (excluding sablefish and halibut) fisheries in the waters of the North Pacific off Alaska, including without limitation, the Gulf of Alaska, Bering Sea and Aleutian Island waters. "Fishing Rights" includes, but are not limited to: moratorium, license limitation or limited entry permits or licenses; IVQ's, or ITQ's; trip or season limits; any combination of the above.**[emphasis added]

The following provisions in Fierce Packer and the Trustee's contract address the Bankruptcy Trustee's authority to sell the vessel's fishing rights and Fierce Packer's concerns about dealing with a bankruptcy estate.

³⁰ Trustee's Interim Report, *supra* note 24, at 2 - 3.

³¹ Document 53, Exhibit 1.

Seller [the Bankruptcy Trustee] warrants and represents that Seller has complete authority to enter into the terms of this agreement and execute the agreement and complete the transaction in it's [sic] entirety. [Paragraph 5 c, Representations]

Seller warrants that Seller shall cooperate fully with the Buyer regarding the application for and procurement of any Fishing Rights transferred pursuant to the agreement [paragraph 5 e, Representations]

If future "fishing rights" (as defined in the first paragraph of this agreement) are being sold as part of this agreement, then Seller warrants and represents that Seller was the owner of record of the vessel defined in paragraph one of this agreement on June 17th, 1995 and that Seller has not transferred any rights or privileges, at anytime, in any manner which may affect the fishing history of the vessel or license qualification for LLP or "fishing rights" which are part of this agreement. [paragraph 5 f, Representations]

Buyer and Seller agree that should Seller not provide the Buyer satisfactory documentation by the date of closing to support the issuance of groundfish catcher-processor license for the Bering Sea/Aleutian Islands under the proposed License Limitation Program as proposed at 62 FR 43866 *et. seq.* then this Agreement shall be null and void and Buyer shall be entitled to the immediate return of Buyer's earnest money. The determination of satisfactory documentation shall be at the sole discretion of Buyer. [Addendum A]

There are no warranties regarding the property or its condition. All sales are "as is, where is" and without any warranties express or implied, with the exception that the sale will be free and clear of all liens and encumbrances. [Addendum B, paragraph 2]

Fierce Packer obtained a letter from James Rigby, Attorney for the Bankruptcy Trustee of the Estate of New Yukon, which stated: "This bankruptcy estate owned and sold the F/V YUKON QUEEN, without the associated fishing rights."³²

Bankruptcy Court Order

After Fierce Packer signed the earnest money agreement with the Bankruptcy Trustee but before the parties completed the sale, the Bankruptcy Trustee, through the Trustee's attorney, sought specific court approval of the sale. Judge Thomas T. Glover, United States Bankruptcy Judge, signed an Order for Sale of Assets of the Estate Free and Clear of Liens and Encumbrances on October 2, 1998. It

³² Letter To Whom It May Concern from James Rigby, dated October 8, 1998 [Document 13, Exhibit 5]

stated:

THIS MATTER having come regularly before the below signed judge of the above entitled court upon the trustee's motion to see assets of the estate, it appearing that all interested parties have received notice and no objection to the motion having been filed, or said objection having been incorporated into the terms of this order, now, therefore, it is hereby

ORDERED that the trustee, Bruce P. Kriegman, is authorized to sell the property of the estate according to those terms set forth below:

Purchaser:	R.J. Fierce Packer LLC
Purchaser's address:	3901 Leary Way N.W. Seattle, WA 98107
Sales price:	\$150,000 \$ 200,000 [³³]
Costs of sale (commission, etc)	Four percent (4%) of the gross payable to Dock Street Brokers, Inc.
Terms of sale:	Cash upon closing
Property to be sold:	Vessel Moratorium Qualification, together with any and all fishing rights relating to the vessel F/V YUKON QUEEN
Encumbrances and approximate payoff amounts:	None.

FURTHER, IT IS HEREBY ORDERED that said sale will be free and clear of all liens and interests, said liens and interests to attach to the proceeds of the sale as though those proceeds were the property, said liens and interests to be satisfied from those proceeds. Notwithstanding the foregoing, the trustee may pay in full the above named secured creditors, in the order of their liens.

FURTHER, IT IS HEREBY ORDERED that the purchaser is a good faith purchaser for value.³⁴

The Yukon moratorium appeal

³³ The change to \$200,000 was initialled by someone but the writing is unclear.

³⁴ Document 13, Exhibit 4 [emphasis added].

Fierce Packer contracted with the Bankruptcy Trustee for New Yukon because New Yukon was in bankruptcy. New Yukon had bought the F/V YUKON QUEEN from Sea-First. The reason why Sea-First, a bank, owned a boat was that it had foreclosed on loans to Yukon Queen Fisheries, L.P. [Yukon], the prior owner of the F/V YUKON QUEEN. These loans were secured by preferred ship mortgages on the F/V YUKON QUEEN.³⁵ Yukon, the prior owner of the F/V YUKON QUEEN, also applied for a moratorium qualification and permit based on the fishing history of the F/V YUKON QUEEN. RAM denied the application on February 29, 1996 because Yukon did not own the vessel at the time of Yukon's application.³⁶

Yukon appealed RAM's decision to the Office of Administrative Appeals [OAA]. While Yukon's appeal was pending, Yukon's attorney contacted OAA. Yukon knew that New Yukon had a transferable moratorium qualification for the F/V YUKON QUEEN. Yukon was concerned that, if Yukon won its appeal and New Yukon had transferred the moratorium qualification, Yukon might not get relief.

Chief Appeals Officer Edward Hein responded to that concern by a letter to Yukon's attorney in March 1997:

I asked Phil Smith of the RAM Division what his policy would be concerning the issuance of a moratorium qualification to Yukon Queen Fisheries, Ltd. if they won their appeal and if, in the meantime, New Yukon Queen were to transfer their qualification to a third party. Mr. Smith stated that, in that event RAM would issue another qualification certificate for the same vessel to Yukon Queen Fisheries, Ltd. Therefore, I conclude that relief would be available to your client if the appeal is successful, regardless of whether New Yukon Queen, Inc., transfers its certificate. Therefore, I have not asked RAM Division to suspend transferability of the certificate.³⁷

OAA did not treat New Yukon and Yukon's claims as competing. It did not join New Yukon in Yukon's appeal.

After that, OAA learned from Yukon's attorney that New Yukon was in bankruptcy. OAA decided

³⁵ Document 13, Exhibits 1, 2 and 3.

³⁶ In re Application of Yukon Queen Fisheries, LP, Appeal No. 96-0009 at 1 (Sept. 17, 1998). Under the Moratorium Program, the owner of the vessel at the time of application was presumed to own the vessel's fishing history, although another applicant could show that they had retained the fishing history or purchased it separately. E.g., Vern Jamison, Appeal No. 96-0031 at 2-3 (Dec. 1, 1999).

³⁷ Letter from Chief Appeals Officer Edward H. Hein to R. Bruce Johnson, March 30, 1997. [Document 53, Exhibit 4]

not to notify the bankruptcy court of any cloud on New Yukon's moratorium qualification for two reasons.³⁸ First, OAA did not want to run afoul of the automatic stay in the Bankruptcy Code, which could have interfered with the transferability of the moratorium qualification. OAA wanted to be able to grant prompt relief to Yukon, if Yukon won its appeal. Second, as Chief Appeals Officer Hein stated in his letter to Yukon's attorney, OAA believed that RAM would issue a second moratorium qualification based on the fishing history of the F/V YUKON QUEEN, if Yukon won its appeal. Therefore, OAA did nothing to suspend, or interfere with, the transferability of New Yukon's moratorium qualification.

On September 17, 1998, OAA decided that Yukon had retained the fishing history of the F/V YUKON QUEEN and was therefore entitled to a transferable moratorium certificate and moratorium permit.³⁹ The Acting Regional Administrator issued the following decision upon review of OAA's decision in the Yukon moratorium appeal:

Pursuant to the provisions of 50 C.F.R. § 679.4(c) and § 679.43(o), I hereby AFFIRM the Decision issued by the Office of Administrative Appeals (OAA) in this matter on September 1 forth therein, effective as of October 21, 1998.

The Decision of the OAA correctly states that the Office of Restricted Access Management, National Marine Fisheries Service, previously issued essentially the same Vessel Moratorium Qualification (VMQ) and Permit (VMP) successfully sought by the Appellant in this matter to New Yukon Queen Limited Partnership which is not a party to these proceedings. The Decision of the OAA did not, however, go on to state whether Appellant's success would result in commencement of revocation proceedings against the VMQ and VMP previously issued to New Yukon Queen Limited Partnership. This is a question of considerable importance that deserves to be answered. Taking into account all the circumstances described in the Decision of the OAA, I have determined that NMFS will not commence revocation proceedings against the VMQ and VMP previously issued to New Yukon Queen Limited Partnership, notwithstanding Appellant's successful appeal in this matter.⁴⁰

Transfer of New Yukon's Moratorium Qualification to Fierce Packer

³⁸ Memo from Chief Appeals Officer Edward H. Hein to Fierce Packer File, December 13, 2000. [Document 69]

³⁹ In re Application of Yukon Queen Fisheries, LLP, Appeal No. 96-0009 (Sept. 17, 1998).

⁴⁰ Decision on Review Affirmed, In re Application of Yukon Queen Fisheries, LLP, Appeal No. 96-0009 (Oct. 21, 1998) by Acting Regional Administrator James Balsiger. Dr. Balsiger is now Regional Administrator.

On October 26, 1998, the permit broker submitted an application to RAM, signed by the Bankruptcy Trustee, to transfer New Yukon's moratorium qualification to Fierce Packer. In support of the transfer application, the permit broker submitted Fierce Packer's contract with the Bankruptcy Trustee, Judge Glover's order and the Acting Regional Administrator's decision I have just quoted. On November 5, 1998, RAM approved the transfer of New Yukon's moratorium qualification to Fierce Packer. RAM issued Fierce Packer a moratorium permit and a certificate for a transferable moratorium qualification usable on the F/V AKUTAN.⁴¹

Fierce Packer's application for a license limitation permit

When the License Limitation Program came into effect, Fierce Packer applied for a groundfish license limitation permit based on the fishing history of the F/V YUKON QUEEN. At one point, Fierce Packer's attorney also appeared to be making a separate claim based on the fishing history of the F/V AKUTAN. The IAD concluded that Fierce Packer does not have any claim for a license limitation permit based on the fishing history of the F/V AKUTAN. Fierce Packer has not appealed that determination.⁴²

The IAD also concluded that Fierce Packer is not eligible to apply for a groundfish license based on the fishing history of the F/V YUKON QUEEN. The IAD states:

Although the YUKON QUEEN is a vessel which, according to the Official LLP Record, has sufficient harvests to develop a qualifying fishing history, and although the documents submitted by your attorney provide some evidence that (at least some of) the YUKON QUEEN's fishing rights were purchased by R.J. Fierce Packer LLC, taken as a whole there is insufficient evidence in this record to support R.J. Fierce Packer's claim to own the vessel's entire fishing history (or, in particular, that portion of the fishing history that gives rise to a license under the LLP). [footnotes omitted]⁴³

⁴¹ Document 67.

⁴² Fierce Packer's application and subsequent letters from counsel referred to a crab license and other fishing rights and permits. The IAD concluded: [1] neither the P/V AKUTAN nor the F/V YUKON QUEEN had landings necessary for a crab license and therefore Fierce Packer did not have any right to an interim or final crab license; [2] Fierce Packer's request for an LLP permit "and all other fishing rights and permits that R.J. Fierce Packer purchased associated with the Yukon Queen and the Akutan," standing by itself, is too vague and unsubstantiated to impose upon RAM an affirmative obligation to respond to anything besides Fierce Packer's application for an LLP groundfish permit. Fierce Packer did not appeal these determinations.

⁴³ IAD at 6 - 7.

RAM concluded that Fierce Packer was not an “eligible applicant” as defined by federal regulation 50 C.F.R. § 679.2. Fierce Packer appeals that determination.

DISCUSSION

An LLP groundfish license will be issued to an “eligible applicant” who made specified landings in specified areas.⁴⁴ Federal regulation 50 C.F.R. § 679.2 defines “eligible applicant:”

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 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), unless the fishing history of that vessel was transferred in conformance with 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; or

(3) Who was an individual who held a State of Alaska permit for the Norton Sound king crab summer fishery in 1993 and 1994, and who made at least one harvest of red or blue king crab in the relevant area during the period specified in § 679.4(k)(5)(ii)(G), or a corporation that owned or leased a vessel on June 17, 1995, that made at least one harvest of red or blue king crab in the relevant area during the period in § 679.4(k)(ii)(G), and that was operated by an individual who was an employee or a temporary contractor; or

(4) Who is an individual that can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(c).

Fierce Packer is not claiming to meet the requirements of subsection (3) or (4). Fierce Packer did not own the F/V YUKON QUEEN on June 17, 1995 and so it cannot apply under subsection (1). It is worth noting that, even though Fierce Packer did not own the F/V YUKON QUEEN on June 17, 1995, Fierce Packer purchased the fishing history of the F/V YUKON QUEEN from the Bankruptcy

⁴⁴ 50 C.F.R. § 679.4(k)(4).

Trustee for the Estate of New Yukon. The Bankruptcy Trustee was standing in the shoes of New Yukon, which did own the vessel on June 17, 1995.

Fierce Packer claims eligibility to apply under subsection (2), namely that it is a qualified person “[t]o 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.”

Clearly, Fierce Packer’s contract with the Bankruptcy Trustee for New Yukon transferred to Fierce Packer all the fishing history of the F/V YUKON QUEEN after December 28, 1994 because that is when New Yukon purchased the vessel. But the fishing history of a vessel after December 28, 1994, standing by itself, cannot support issuance of any LLP license. The question then is whether Fierce Packer’s contract with the Bankruptcy Trustee transferred to Fierce Packer the vessel’s pre-December 28, 1994 fishing history. Based on the unique circumstances in this record, I conclude, as a matter of law, that Fierce Packer is entitled to be treated as an owner of the entire fishing history of the F/V YUKON QUEEN up until February 9, 1998, when the Bankruptcy Trustee sold the F/V YUKON QUEEN.

1. Fierce Packer is not bound by OAA’s decision in the Yukon moratorium appeal.

The IAD notes that the evidence that particularly supports Fierce Packer’s claim is the bankruptcy court’s order authorizing the bankruptcy trustee to sell to Fierce Packer the “Vessel Moratorium Qualification, together with any and all fishing rights relating [to] the vessel F/V YUKON QUEEN.”⁴⁵ The IAD then cites the evidence contrary to Fierce Packer’s claim: OAA’s findings in the Yukon moratorium appeal that Yukon’s settlement agreement with Sea-First meant that Yukon retained the fishing history and the moratorium qualification of the F/V YUKON QUEEN.⁴⁶ In fact, the IAD suggests that RAM did not really make an independent assessment of Fierce Packer’s claim because RAM thought the OAA decision in the Yukon moratorium appeal was determinative.

Fierce Packer cannot be bound by OAA’s decision in the Yukon moratorium appeal. Neither Fierce Packer nor New Yukon nor the Bankruptcy Trustee of New Yukon’s Estate had notice or opportunity to be heard before, or even after, the OAA decision in the Yukon appeal. Notice and opportunity to

⁴⁵ IAD at 7, note 5, *quoting* Order of Sale of Assets of the Estate Free and Clear of Liens and Encumbrances, October 2, 1998 by Judge Thomas Glover.

⁴⁶ IAD at 7.

be heard is an essential requirement of due process of law.⁴⁷ Fierce Packer cannot be bound by the decision of any tribunal, if Fierce Packer, or its predecessor in interest, did not have notice and meaningful opportunity to be heard before that tribunal.

Further, the IAD does not mention or examine this agency's actions involving Fierce Packer after OAA's decision of the Yukon moratorium appeal: the Acting Regional Administrator's Decision reviewing OAA's decision of the Yukon moratorium appeal, RAM's transfer of New Yukon's moratorium qualification to Fierce Packer and RAM's issuance to Fierce Packer of a moratorium permit.

2. This record establishes, as a matter of law, that Fierce Packer is an owner of the entire fishing history of the F/V YUKON QUEEN.

Even though Fierce Packer is not bound by OAA's decision in the Yukon moratorium appeal, this Office could now give Fierce Packer notice and opportunity to be heard on whether in fact Yukon had retained the rights to the fishing history of the F/V YUKON QUEEN in its settlement agreement with Sea-First.⁴⁸ If this Office, after giving Fierce Packer notice and opportunity to be heard, concluded that Yukon retained rights to the fishing history of the F/V YUKON QUEEN, it would usually follow that New Yukon could not own the same fishing history. If New Yukon did not own the fishing history that Yukon retained, the argument would be that the Bankruptcy Trustee for New Yukon could not have sold to Fierce Packer what New Yukon did not own. This approach would treat Yukon's claim as competitive with Fierce Packer's claim.

I conclude that I should not re-examine in this appeal whether Yukon retained fishing rights to the F/V YUKON. I conclude that this record establishes, as a matter of law, that Fierce Packer is entitled to be treated as an owner of the entire fishing history of the F/V YUKON QUEEN, assuming that Yukon also owns all or part of the same fishing history. Since Fierce Packer owns a fishing history that supports issuance of a license limitation permit, Fierce Packer is an eligible applicant within 50 C.F.R. § 679.2. Four reasons support this conclusion.

A. The conclusion that Fierce Packer owns the entire fishing history of the F/V YUKON QUEEN is most consistent with Fierce Packer's contract with the bankruptcy trustee.

⁴⁷ Mullane v. Hanover Central Bank & Trust Co., 339 U.S. 306, 314 (1950). Cf. 50 C.F.R. § 679.43(f)(requiring an applicant on appeal to submit a "statement of the reasons the initial administrative determination has a direct and adverse effect on the applicant.")

⁴⁸ If I took that course of action, I would have to decide whether to give Yukon notice and opportunity to participate in Fierce Packer's appeal.

The contract is for the sale of “any an all” fishing rights arising from the entire fishing history of the F/V YUKON QUEEN. The contract nowhere divides up the fishing history of the F/V YUKON QUEEN into that which supports a moratorium permit and that which supports a license limitation permit. To the contrary, the contract defines fishing rights as broadly as possible:

I, R J Fierce Packer LLC (hereinafter referred to as “Buyer”) offer to purchase, and I, Bruce Kriegman, Trustee, (hereinafter referred to “Seller”) offer to sell the Vessel Moratorium Qualification (“VMQ”) identified below together with any and all Fishing Rights (and the right to apply therefore) arising from the fishing, harvesting, catch history of landings of the Vessel identified below, regardless whether such Fishing Rights are awarded or awardable to the Seller or Buyer as vessel owner or to the Vessel. As used herein, the term “Fishing Rights” means any and all fishing rights of any kind whatsoever established, now or in the future, pursuant to any states, federal, or other governmental or administrative restricted access management programs for the commercial crab and/or groundfish (excluding sablefish and halibut) fisheries in the waters of the North Pacific off Alaska, including without limitation, the Gulf of Alaska, Bering Sea and Aleutian Island waters. “Fishing Rights” includes, but are not limited to: moratorium, license limitation or limited entry permits or licenses; Federal Fisheries permits or licenses; specific gear or species endorsements under a restricted access management program; IQ’s, IFQ’s, IVQ’s, or ITQ’s; trip or season limits; any combination of the above.⁴⁹

The trustee warranted that he had “complete authority” to enter into a sale of the F/V YUKON QUEEN’s fishing rights and to “complete the transaction in it’s [sic] entirety.” The trustee agreed to cooperate fully regarding the application for any fishing rights transferred by the contract.⁵⁰

The contract specifies “license limitation” permits or licenses in the definition of fishing rights. The contract contains the Trustee’s warranty that he was the owner of the boat on June 17, 1995, a key date in LLP, but a date of no significance in the Moratorium Program. The contract specifies that if the Trustee did not provide Fierce Packer with satisfactory documentation by the date of closing that Fierce Packer would get a license under the License Limitation Program, the Agreement was null and void.

The parties clearly knew the Moratorium Program was ending and was being replaced by the License Limitation Program. I assume that the parties knew, by the time they consummated the contract in

⁴⁹ Document 53, exhibit 1 [emphasis and underlining added]

⁵⁰ Id.

November 1998, that the Moratorium Program was being extended until December 31, 1999. It is not credible to find that Fierce Packer paid \$200,000 in November 1998 for only some of the fishing history of the F/V YUKON QUEEN – for the fishing history that would give it the right to participate in the fishery for one more year.

Mr. Peterson stated in an affidavit, filed with his appeal: “When R.J. Fierce Packer LLC purchased the fishing rights, we believed we were buying the complete fishing history associated with the Vessel.”⁵¹ The terms of the contract, the basic facts of the contract and the background of the contract unequivocally support that claim. This contract cannot be reasonably interpreted as transferring only the fishing history of the F/V YUKON QUEEN that supports a moratorium permit.

B. The conclusion that Fierce Packer owns the entire fishing history of the F/V YUKON QUEEN is most consistent with the Bankruptcy Court’s order.

After Fierce Packer signed the contract with the Bankruptcy Trustee but before the parties completed the sale, the Bankruptcy Trustee obtained specific court approval of the sale from the bankruptcy court. A bankruptcy court is a unit of the federal district court.⁵² Judge Glover’s order clearly does not divide up the fishing rights of the F/V YUKON QUEEN. It does not state that Fierce Packer is authorized to buy the fishing rights that support a moratorium permit but not the fishing rights that support a license limitation permit. This order authorizes the Bankruptcy Trustee to sell to Fierce Packer “any and all fishing rights relating to the vessel F/V YUKON QUEEN.” This order states there are no encumbrances on this property and that Fierce Packer is buying these fishing rights “free and clear of all liens and interests.”

C. The conclusion that Fierce Packer can apply for a license limitation permit is most consistent with this agency’s past actions.

1. Transfer of New Yukon’s moratorium qualification to Fierce Packer

When the permit broker submitted the application to transfer New Yukon’s moratorium qualification to Fierce Packer, he submitted Fierce Packer’s contract with the Bankruptcy Trustee for the sale of the moratorium qualification “together with any and all Fishing Rights” of the F/V YUKON QUEEN and Judge Glover’s court order authorizing the sale of the moratorium qualification “together with any and all fishing rights relating to the vessel F/V YUKON QUEEN.” NMFS, acting through RAM, approved the transfer of New Yukon’s moratorium qualification to Fierce Packer and issued Fierce Packer its

⁵¹ Declaration of Ronald K. Peterson, May 22, 2000.

⁵² The Bankruptcy Code provides: “In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the [federal] district court to be known as the bankruptcy court for that district.” 11 U.S.C. § 151. The Bankruptcy Court’s order is quoted in full at pages 8 - 9 *supra*.

own certificate of moratorium qualification and a moratorium permit.

Fierce Packer never owned the F/V YUKON QUEEN and never claimed to own it. The only way that NMFS issued Fierce Packer a moratorium permit was that it determined that the Bankruptcy Trustee for New Yukon transferred to Fierce Packer the fishing history of the F/V YUKON QUEEN that supported issuance of a moratorium permit.⁵³ The fishing history of the F/V YUKON QUEEN supports both a moratorium permit and an LLP license. Although the record does not contain the landings history of the F/V YUKON QUEEN before 1995, every landing that supports an award of a moratorium permit helps toward an award of an LLP permit.⁵⁴ That is because the landing periods in the Moratorium Program are from January 1, 1988 to December 11, 1994 and the LLP qualification periods are from January 1, 1988 to June 17, 1995.⁵⁵ If Fierce Packer's contract with the Bankruptcy Trustee transferred the fishing history of the F/V YUKON QUEEN to Fierce Packer when Fierce Packer applied for a moratorium permit, the most consistent result is that the same contract should transfer that fishing history to Fierce Packer when Fierce Packer applies for an LLP license.

The record indicates that RAM relied on Judge Glover's order in transferring New Yukon's moratorium qualification to Fierce Packer.⁵⁶ As noted, the scope of Judge Glover's order is to unequivocally authorize the transfer to Fierce Packer of the fishing rights resulting from the entire fishing history of the F/V YUKON QUEEN, not merely the fishing history that supports a moratorium permit.

NMFS placed no limitations or restrictions on the transfer to Fierce Packer. The record contains no evidence that NMFS treated Fierce Packer's moratorium qualification and permit as anything other

⁵³ NMFS could not approve transfer of a moratorium qualification unless Fierce Packer met all legal requirements for a transfer, including that "[t]he moratorium permit associated with the moratorium qualification is not revoked or suspended." Final rule, 60 Fed. Reg. at 40,774, formerly 50 C.F.R. § 676.4(a), then 50 C.F.R. § 679.4(c)(9)(i).

⁵⁴ Except a landing of demersal shelf rockfish east of 140° longitude because that was a moratorium groundfish but is not a license limitation groundfish. *See supra* note 14 and text accompanying.

⁵⁵ The LLP has requirements for landings in different time periods (the general qualification period and the endorsement qualification period) and sometimes more than one landing in a particular time period. Clearly a vessel's fishing history can meet the requirement of the Moratorium Program but not LLP. Thus, even though every landing that supported issuance of a moratorium permit (or a gear endorsement on a permit) would count toward an LLP license, the moratorium landings might not be enough for an LLP license.

⁵⁶ Memorandum [e-mail] from Jessica Gharrett to Mary Alice McKeen, November 28, 2000 [Document 66] The IAD also noted that the Bankruptcy Court's order offered particular support to Fierce Packer's application. IAD at 7 n.5.

than a fully valid qualification with the requisite supporting fishing history attached.

2. Other actions by NMFS

In addition to NMFS's approving the transfer of New Yukon's moratorium qualification to Fierce Packer, the conclusion that Fierce Packer can apply for a license limitation permit, notwithstanding any claim by Yukon to the fishing history of the F/V YUKON QUEEN, is most consistent with these other actions by NMFS:

- NMFS awarded New Yukon a certificate for a transferable moratorium qualification and a moratorium permit in 1996 based on the fishing history of the F/V YUKON QUEEN.
- When Yukon sought a moratorium qualification and permit based on the fishing history of the F/V YUKON QUEEN, NMFS stated that it was willing to issue a second moratorium qualification and permit based on the fishing history of the F/V YUKON QUEEN and did not suspend the transferability of New Yukon's moratorium qualification.⁵⁷
- When NMFS learned that New Yukon had filed bankruptcy, NMFS decided that it would not notify the bankruptcy court of any cloud on New Yukon's moratorium qualification arising from Yukon's moratorium appeal.⁵⁸
- When the Acting Regional Administrator affirmed OAA's decision of the Yukon moratorium appeal, he decided that New Yukon would retain its transferable moratorium qualification and its moratorium permit even though this permit was based on the fishing history of the F/V YUKON QUEEN and Yukon was receiving a moratorium permit and qualification based on the fishing history of the F/V YUKON QUEEN.⁵⁹

Each of these actions either established initially or maintained that New Yukon had “a transferable prerequisite for a moratorium permit.”⁶⁰

⁵⁷ Letter from Chief Appeals Officer Edward Hein to R. Bruce Johnson, March 30, 1997 [Document 53], quoted in text accompanying note 37 *supra*.

⁵⁸ Memorandum from Chief Appeals Officer Edward Hein to Fierce Packer file, December 13, 2000 [Document 69], quoted in text accompanying note 38 *supra*.

⁵⁹ The Acting Regional Administrator's Decision is quoted in the text accompanying note 40 *supra*.

⁶⁰ This is the definition of a “moratorium qualification” in federal regulation, quoted at note 6 *supra*, with underlining added.

3. Acting Regional Administrator's Decision in the Yukon moratorium appeal

The clearest indication in this record that NMFS should not deny Fierce Packer an LLP license because of a potential competing claim from Yukon to the fishing history of the F/V YUKON QUEEN is the last action noted above, namely the Acting Regional Administrator's Decision in the Yukon moratorium appeal. The Acting Regional Administrator specifically concluded that, "taking into account all the circumstances" in that appeal, New Yukon should keep its moratorium permit even though Yukon was receiving a moratorium permit based on the fishing history of the same vessel.

The circumstances facing Fierce Packer in this appeal are different from the circumstances facing New Yukon in Yukon's moratorium appeal in two ways. First, as a result of the Acting RA's Decision, New Yukon kept a moratorium permit, which was for a program that was ending in a little over a year. By contrast, LLP is in place indefinitely and any license awarded to Fierce Packer has no definite expiration date. This points toward denying Fierce Packer's appeal.

Second, as a result of the Acting RA's decision in the Yukon moratorium appeal, New Yukon kept its moratorium qualification. New Yukon did not separately purchase the fishing history of the F/V YUKON QUEEN so it could participate in federal programs limiting fishing in the North Pacific. If New Yukon were prosecuting this appeal, instead of Fierce Packer, it is possible that we could find New Yukon was on notice of Yukon's competing claim and Yukon's settlement agreement with Sea-First. At the very least, we would probably decide which party – as between Yukon and New Yukon – owned the fishing history to support an LLP license.

Fierce Packer's circumstances, however, are more compelling. Fierce Packer is an innocent third party purchaser for value who paid a substantial sum of money for the fishing history of the F/V YUKON QUEEN, specifically because it wished to participate in the Moratorium Program, the License Limitation Program and future federal programs of restricted access in these fisheries. Ron Peterson, Managing Partner of Fierce Packer, stated that he did not know of any competing claims to the fishing history of the F/V YUKON QUEEN and he did not know of Yukon's settlement agreement with Sea-First to retain fishing rights of the F/V YUKON QUEEN when he purchased those rights from the Bankruptcy Trustee.⁶¹ I find that assertion credible. It is compatible with the contemporaneous evidence in the record, in particular the contract he signed, the terms of the federal court order and this agency's actions maintaining the complete transferability of New Yukon's moratorium qualification.

If NMFS denied Fierce Packer the right to apply for a license limitation permit, the effect on Fierce Packer would be drastic and unfair. I conclude that overall the circumstances facing Fierce Packer in this appeal are more compelling than the circumstances facing New Yukon in Yukon's moratorium

⁶¹ Declaration of Ronald K. Peterson, March 28, 2000; Declaration of Ronald K. Peterson, May 22, 2000.

appeal. The Acting Regional Administrator concluded that New Yukon's circumstances warranted two moratorium permits based on the fishing history of one vessel. The conclusion that Fierce Packer's circumstances warrant continuation of that situation, namely two licenses from the same fishing history, is most consistent with the Acting Regional Administrator's Decision in the Yukon moratorium appeal.

D. The conclusion that Fierce Packer can apply for a license limitation permit protects an innocent third party purchaser for value.

The record is clear that [1] Fierce Packer intended to purchase all the future fishing rights that resulted from the fishing history of the F/V YUKON QUEEN, not merely the right to fish for one more year, [2] Fierce Packer reasonably concluded that it had purchased any and all future fishing rights relating to the F/V YUKON QUEEN, [3] Fierce Packer paid a considerable sum of money for its purchase, [4] Fierce Packer purchased this asset from a federal bankruptcy trustee and [5] a federal judge specifically authorized the sale. That same federal judge specifically found that Fierce Packer was a "good faith purchaser for value."

This agency has been sensitive to the circumstances of innocent third parties who purchase transferable federal fishing rights in other programs when NMFS has not limited the transferability of those rights. In In re Application of Darius Baltz, an appeal over the award of Quota Share [QS] under the Individual Fishing Quota program for halibut and sablefish, this Office stated: "[A]s a matter of policy, [RAM] does not revoke such QS in the hands of an innocent third party," even though it resulted in applicants receiving IFQ credit for identical fishing history.⁶²

In Baltz, the agency in essence made a mistake and did not suspend transferability of the QS. NMFS did not penalize the innocent third party who reasonably and in good faith relied on the transferability of the QS and purchased the quota share. I have no basis for concluding that NMFS does not wish to consider the circumstances of an innocent third party who reasonably and in good faith relied on the fact that NMFS did not limit transferability of a moratorium qualification and approved transfer of those rights.

A decision that Fierce Packer is not eligible to apply for a license limitation permit would drastically penalize a businessperson, who acted in good faith and relied on the representations of a federal bankruptcy trustee, terms of a federal court order and actions by this agency. An interpretation of this record that Fierce Packer is an eligible applicant for an LLP license is better because it avoids this harsh result.

3. This decision is strictly limited to the facts of this case.

I have decided that Fierce Packer is an eligible applicant for a license limitation permit based on the

⁶² In re Application of Darius Baltz, Appeal No. 95-0028 at 1 (Jan. 30, 1996)

fishing history of the F/V YUKON QUEEN, assuming that another applicant can receive an LLP license based on all or some of the same fishing history. This decision is strictly limited to the facts of this case. First, Fierce Packer signed a contract with a federally-appointed bankruptcy trustee for the Estate of New Yukon for the purchase of any and all fishing rights arising from the fishing history of the F/V YUKON QUEEN. Second, a federal court issued a decision that Fierce Packer was entitled to purchase those fishing rights from the bankruptcy trustee with no encumbrances, that the sale would be free of all liens and interests and that Fierce Packer was a good faith purchaser for value. Third, Fierce Packer was not on notice that a competing claim existed to the fishing history of the F/V YUKON QUEEN. Fourth, the record contained affirmative indications that NMFS had decided that it would permit two permits or licenses based on the fishing history of the same vessel, most notably the Acting Regional Administrator's decision in the Yukon moratorium appeal. Fifth, Fierce Packer was an innocent third party who paid a substantial sum of money for purchase of all the fishing history and the fishing rights relating to the F/V YUKON QUEEN. Each of these facts is important to my decision.

FINDINGS OF FACT

1. NMFS issued New Yukon a certificate for a transferable moratorium qualification and a moratorium permit in 1996 based on the fishing history of the F/V YUKON QUEEN.
2. NMFS did not ever suspend, or interfere with, the transferability of New Yukon's moratorium qualification.
3. NMFS decided that it would not notify the bankruptcy trustee or the bankruptcy court of any cloud on New Yukon's moratorium qualification.
4. NMFS did not join New Yukon in Yukon's moratorium appeal.
5. New Yukon was filed into involuntary bankruptcy in May 1997.
6. The federal bankruptcy court appointed a Bankruptcy Trustee for the Estate of New Yukon in July 1997.
7. On February 9, 1998, the Bankruptcy Trustee sold the F/V YUKON QUEEN to Mireya Chiriboga.
8. The Bankruptcy Trustee for the Estate of New Yukon and Fierce Packer agreed in September 1998 to sell to Fierce Packer all the fishing rights arising from the fishing history of the F/V YUKON QUEEN.
9. A federal bankruptcy court approved the Bankruptcy Trustee's sale to Fierce Packer of all the fishing rights relating to the F/V YUKON QUEEN for \$200,000 in October 1998.

10. NMFS, acting through RAM, approved the transfer of New Yukon's moratorium qualification to Fierce Packer and issued Fierce Packer a moratorium permit in November 1998.
11. When NMFS approved the transfer of New Yukon's moratorium qualification to Fierce Packer, Fierce Packer did not own the F/V YUKON QUEEN.
12. Fierce Packer and the Bankruptcy Trustee reasonably believed that Fierce Packer had purchased the fishing history of the F/V YUKON QUEEN that would support an award of a license limitation permit.
13. Fierce Packer paid \$200,000 for the purchase of the entire fishing history of the F/V YUKON QUEEN, up until February 9, 1998, when the Bankruptcy Trustee sold the vessel.

CONCLUSIONS OF LAW

1. Fierce Packer is entitled to be treated as an owner of the entire fishing history of the F/V YUKON QUEEN, up until February 9, 1998, when the Bankruptcy Trustee sold the F/V YUKON QUEEN.
2. Fierce Packer is an innocent third party purchaser for value of the fishing history of the F/V YUKON QUEEN from Bankruptcy Trustee Bruce Kriegman up until February 9, 1998, when the Bankruptcy Trustee sold the F/V YUKON QUEEN.
3. Fierce Packer is an eligible applicant for an LLP license based on the fishing history of the F/V YUKON QUEEN up until February 9, 1998, when the Bankruptcy Trustee sold the F/V YUKON QUEEN.

DISPOSITION AND ORDER

The IAD denying the Appellant's application is VACATED. The Restricted Access Management Program is ORDERED to process Fierce Packer's application for a license limitation permit and award to Fierce Packer whatever licenses and endorsements to those licenses result from the entire fishing history of the F/V YUKON QUEEN up until February 9, 1998. This Decision takes effect on January 17, 2001, unless by that date the Regional Administrator orders review of the Decision.

The appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, December 28, 2000. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the

motion or the issuance of a Decision on Reconsideration.

Mary Alice McKeen
Appeals Officer