

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) **Appeal No. 01-0027**
)
NEW ERA PARTNERSHIP,) DECISION
Appellant)
)
) October 18, 2005
)
_____)

STATEMENT OF THE CASE

New Era Partnership [New Era] appealed an Initial Administrative Determination [IAD] that the Restricted Access Management Program [RAM] issued on September 4, 2001, under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ New Era can appeal the IAD because it directly and adversely affects its interests.²

New Era applied for an LLP crab license and five area/species endorsements, based on the fishing history of the F/V ALEUTIAN NO. 1 (ADFG 05992, USCG No. 611139), a catcher vessel with a length overall of 126 feet. The IAD determined that New Era qualified for a transferable LLP crab license with four endorsements: Pribilof Islands red and blue king crab, Bristol Bay red king crab, St. Matthew blue king crab, and Bering Sea/Aleutian Islands [BSAI] *C. opilio* and *C. bairdi* (Tanner) crab. The IAD determined that New Era did not qualify for an Aleutian Islands [AI] brown king crab endorsement. On appeal, New Era does not challenge the denial of the AI brown king crab endorsement.³

New Era also applied for an LLP groundfish license based on the fishing history of the F/V ALEUTIAN NO. 1. New Era sought three groundfish area endorsements: Bering Sea, Aleutian Islands, and Western Gulf of Alaska. To receive an LLP license, an applicant must meet the requirements for documented harvests in the general qualification period [GQP] and at least one endorsement qualification period [EQP].⁴ The IAD determined that New Era did not qualify for an LLP groundfish license because its only groundfish harvest during the GQP was not a lawful

¹The 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>>.

²50 C.F.R. § 679.43(b).

³New Era sought to combine LLP crab license LLC3968 with LLC3967, which was based on the fishing history of another vessel, the F/V SEAWIND, and which has an AI brown king crab endorsement. RAM issued an IAD that revoked LLC3967. This office issued a decision that LLC3967 should not be revoked, but that NMFS does not have authority to combine the two licenses. *Ronald Peterson*, Appeal No. 05-0002 (Feb. 17, 1995).

⁴ 50 C.F.R. § 679.4 (i) & (ii).

harvest. The IAD also stated that if the harvest had been lawful, New Era would qualify only for a Bering Sea area endorsement.⁵ Pending a final agency action on New Era's application, RAM issued to New Era a non-transferable LLP groundfish license [LLG4476] and a non-transferable LLP crab license [LLC3968].

On appeal, New Era argues that it qualifies for an LLP groundfish license, but does not argue that it meets the EQP requirements for an Aleutian Islands or a Western Gulf of Alaska endorsement. Therefore, I treat New Era's appeal as disputing only whether it qualifies for an LLP groundfish license with a Bering Sea endorsement.

An oral hearing in this matter was held on March 22, 2005. Ron Peterson, a partner in New Era Partnership, and Christopher Y. Kim, counsel for the Appellant, appeared via telephone from Seattle, Washington. Stuart Rickey, a principal of Rickey and Associates, appeared in person at the OAA offices in Juneau, Alaska. A second oral hearing was held on June 8, 2005. Vicki Vaughan, a management and program analyst in the NMFS Office of Law Enforcement in Juneau, was the sole witness and appeared via telephone. Mr. Peterson and Mr. Kim appeared via telephone from Seattle.

The record contains sufficient information to decide this appeal. Therefore, I close the record and issue this decision.⁶

ISSUE

Does New Era Partnership qualify for an LLP groundfish license with a Bering Sea area endorsement?

SUMMARY

New Era qualifies for an LLP groundfish license with a Bering Sea area endorsement. The F/V ALEUTIAN NO. 1's only groundfish harvest during the general qualification period was made in 1992 without a 1992 Federal Fisheries Permit [FFP]. New Era established by a preponderance of the evidence, however, that it had applied to NMFS for a 1992 FFP in December 1991, while its 1991 FFP was still in effect. Under Section 9(b) of the federal Administrative Procedure Act, 5 U.S.C. §558(c), a timely and sufficient application for a renewal license keeps the applicant's existing license in effect until the agency makes a final determination on the application. Thus, New Era's 1991 FFP was still in effect on January 8, 1992, when the F/V ALEUTIAN NO. 1 landed the groundfish harvest. As a result, the harvest was lawful and constituted a documented harvest under 50 C.F.R. §679.2. Therefore, New Era meets the documented harvest requirement for an LLP groundfish license with a Bering Sea area endorsement.

⁵IAD at 6, n. 6.

⁶50 C.F.R. § 679.43(k).

ANALYSIS

To qualify for an LLP groundfish license with a Bering Sea area endorsement, New Era must prove by a preponderance of the evidence that the F/V ALEUTIAN NO. 1 made at least one documented harvest of license limitation groundfish in the BSAI or Gulf of Alaska management areas during the GQP, between January 1, 1988, and June 27, 1992.⁷ New Era must also prove that its vessel made at least one documented harvest of license limitation groundfish in the Bering Sea subarea during the EQP, between January 1, 1992, and June 17, 1995.⁸ In this instance, the GQP and EQP overlap during the period January 1, 1992, through June 27, 1992. Thus, a single documented harvest made during that six-month time period could satisfy both the GQP and EQP requirements.

According to the IAD, the NMFS official LLP record shows that the F/V ALEUTIAN NO. 1 made only one reported harvest of groundfish during the GQP. This was a harvest of Pacific cod in the Bering Sea subarea, which was recorded on a fish ticket dated January 8, 1992.⁹ If this harvest was a *documented harvest*, it would satisfy both the GQP and EQP requirements, and New Era would qualify for a transferable LLP groundfish license with a Bering Sea area endorsement.¹⁰

A documented harvest is defined at 50 C.F.R. §679.2 as “a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of the harvesting.” It is undisputed that New Era’s January 8, 1992, Pacific cod harvest was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of the harvesting. RAM determined, however, that the harvest was not lawful because NMFS has no record that a Federal Fishing Permit for 1992 had been issued for the F/V ALEUTIAN NO. 1.

As the IAD stated, former federal regulation 50 C.F.R. §675.4(a) and (b), which was in effect in January 1992, provided, in relevant part:

(a) General. No vessel of the United States may fish for groundfish in the Bering

⁷50 C.F.R. § 679.4(k)(4)(i)(A)(1). *License limitation groundfish* and *groundfish* are both defined in 50 C.F.R. §679.2. The differences between the two are slight and not relevant to this appeal. I use the terms interchangeably.

⁸50 C.F.R. §679.4(k)(4)(ii)(B).

⁹IAD at 6.

¹⁰The F/V ALEUTIAN NO. 1 also had two documented harvests of Pacific cod in the Bering Sea subarea on February 27, 1995, and March 2, 1995, either of which would satisfy the EQP documented harvest requirement for the Bering Sea area endorsement. *Fishing History of F/V ALEUTIAN NO. 1* NMFS issued a 1995 Federal Fisheries Permit to New Era for the vessel on February 21, 1995. E-mail correspondence from Jessica Gharrett, RAM Data Manager, and Tracy Buck, RAM Permit Operations Manager, to Mary Alice McKeen (Feb. 14, 2005).

Sea and Aleutian Islands management area without first obtaining a permit issued under this Part. Such permits shall be issued without charge.

(b) Application. The vessel permit required under paragraph (a) of this section may be obtained by submitting to the Regional Director a written application. . .¹¹

The IAD determined that, because the F/V ALEUTIAN NO. 1 was not properly licensed when it made the Pacific cod harvest on January 8, 1992, the harvest was unlawful and did not meet the definition of a documented harvest. Therefore, the IAD determined, New Era did not meet the GQP requirement for an LLP groundfish license and the license application must be denied.

On appeal, New Era does not argue that any groundfish harvest in federal waters made without a Federal Fisheries Permit is a lawful harvest.¹² New Era argues that it should get credit for the January 8, 1992, harvest for two reasons specific to New Era. First, New Era states that it applied for an FFP on December 13, 1991, and went fishing in reliance on a date-stamped copy of its FFP application because it hadn't received the FFP by January 8, 1992. Second, NMFS gave New Era credit for the January 8, 1992, groundfish harvest when it issued New Era a vessel moratorium qualification and permit under the Vessel Moratorium Program, a predecessor program to the LLP, and therefore should be estopped from denying the validity of that harvest.¹³ I do not decide this second issue because this appeal is satisfactorily resolved by my decision on the first issue.

The central question in this appeal is whether New Era's January 8, 1992, Pacific cod harvest was lawful. That, in turn, will depend on whether the F/V ALEUTIAN NO. 1 was properly licensed when it made the Pacific cod harvest on January 8, 1992.

Neither NMFS nor New Era has any record or other evidence that a 1992 FFP was ever issued to New Era. New Era requested and received an extension of time for Mr. Peterson to search his records for a 1992 FFP or a copy of an application for a 1992 FFP. Mr. Peterson testified that he and his bookkeeper, Floyd Unger, searched through more than 200 boxes of New Era's records, but were unable to find a 1992 FFP or a copy of an application for a 1992 FFP.¹⁴

¹¹This regulation was recodified in 1996 and was renumbered as 50 C.F.R. §679.4(b)(1). 61 Fed. Reg. 31,228, 31,236 (June 19, 1996). It reads: "No vessel of the United States may be used to fish for groundfish in the GOA or BSAI unless the owner first obtains a Federal fisheries permit for the vessel, issued under this part. A Federal fisheries permit is issued without charge." In 1995, the name of the permit was changed from "Federal fishing permit" to "Federal fisheries permit." 60 Fed. Reg. 40,763, 40,772 (Aug. 10, 1995).

¹²The fish ticket submitted by New Era shows the harvest occurred in State statistical area 655430, which is in Federal waters.

¹³Appeal brief at 5-6.

¹⁴Oral hearing, Mar. 22, 2005, tape side A, counter 535-538.

This Office asked NMFS to search its own FFP records. NMFS disposes of its paper files relating to FFPs after six years.¹⁵ Before disposing of the files, however, NMFS enters FFP information from the files into a database. NMFS's computer records show that it issued the following FFP's to New Era for the F/V ALEUTIAN NO. 1: 1989 FFP (issued Sep. 20, 1989); 1990 FFP (issued Dec. 18, 1989); 1991 FFP (issued Dec. 10, 1990); 1995 FFP (issued Feb. 21, 1995); 1996 FFP (issue date unknown); and a three-year FFP for 1997 - 1999 (issued Jan. 6, 1997).¹⁶ These records do not show that NMFS issued an FFP to New Era in December 1991 or any time in 1992, 1993, or 1994. I reviewed these records with Mr. Peterson during the March 22 hearing, and he does not dispute what they show. Therefore, I find by a preponderance of the evidence that NMFS did not issue a 1992 Federal Fisheries Permit to New Era for the F/V ALEUTIAN NO. 1.

The question remains, however, whether New Era applied for a 1992 FFP. This is a critical question because, under certain circumstances, the filing of an application can legally authorize a vessel to fish pending the issuance of the permit. The applicable law is Section 9(b) of the federal Administrative Procedure Act, 5 U.S.C. §558(c). That statute provides, in relevant part:

When a licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

In explaining the rationale for this provision, *The Attorney General's Manual on the APA*, at 91-92, states:

This sentence states the best existing law and practice. [Citation omitted.] It is only fair where a licensee has filed his application for a renewal or a new license in ample time prior to the expiration of his license, and where the application itself is sufficient, that his license should not expire until his application shall have been determined by the agency. In such a case the licensee has done everything that is within his power to do and he should not suffer if the agency has failed, for one reason or another, to consider his application prior to the lapse of this license. Agencies, of course, may make reasonable rules requiring sufficient advance application.¹⁷

¹⁵E-mail correspondence from Jessica Gharrett, Tracy Buck and Vicki Vaughn (Feb. 28, 2005 and March 1, 2005) with Alaska Region File Plan at page 8 (Exhibit 2).

¹⁶E-mail correspondence from Jessica Gharrett, RAM Data Manager, and Tracy Buck, RAM Permit Operations Manager to Mary Alice McKeen (Feb. 14, 2005)(Exhibit 1). From 1979 to 1995, the permits were annual permits. Beginning in 1997, the permits were issued on a three year cycle, so a permit was valid from 1997 through 1999. NMFS issued New Era an FFP in 1996 and 1997. *Id.*

¹⁷Reprinted in FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK at 157-158 (2nd ed. 1992).

The APA defines *license* to include “the whole or a part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”¹⁸ A Federal Fishing Permit meets this definition of a license. The record in this case shows that New Era held a valid 1991 FFP, which had been issued on December 10, 1990, and by its own terms was in effect until December 31, 1991.¹⁹ Therefore, an application by New Era for a 1992 FFP would have been an application for a renewal license. If New Era submitted a completed application for a 1992 FFP while its 1991 FFP was still in effect, i.e., on or before December 31, 1991, then the application would have been both timely and sufficient under the APA. Such an application would have automatically kept New Era’s 1991 FFP in effect until the agency made a determination on the issuance of a 1992 FFP.

New Era claims that it did file a timely application for a 1992 FFP. As stated earlier, NMFS has no record showing that New Era made such an application, and New Era was unable to produce a copy of the application. On appeal, however, New Era has presented relevant documentary and testimonial evidence that it filed an application for a 1992 FFP on or about December 13, 1991, while its 1991 FFP was still in effect.

The most important evidence in this regard comes from Stuart Rickey, a fisheries consultant and a principal of Rickey & Associates, in Douglas, Alaska. Mr. Rickey testified that he began working as a fisheries consultant with his father in 1980, and has operated the business himself since 1987.²⁰ He testified that Ron Peterson or New Era has been his client for more than 20 years.²¹ Mr. Peterson testified that New Era uses Stuart Rickey exclusively to obtain all necessary fishing permits and licenses.²² Mr. Rickey stated in an affidavit that he applied for a Federal Fisheries Permit for the F/V ALEUTIAN NO. 1 on behalf of New Era, on or about December 13, 1991.²³

At the March 22 hearing, Mr. Rickey produced regularly kept business records, portions of his original telephone logs from 1991, which I personally examined. One phone log entry, dated December 6, 1991, reads “Ron Peterson - ques. on Fed. Fish. Per.” and, in red ink, “OK”.²⁴ Mr. Rickey testified that this shows that “on 12/6/91, Ron Peterson called me with questions

¹⁸5 U.S.C. §551(8).

¹⁹E-mail correspondence from Jessica Gharrett, RAM Data Manager, and Tracy Buck, RAM Permit Operations Manager, to Administrative Judge Mary Alice McKeen (Feb. 14, 2005)(Exhibit 1).

²⁰Oral hearing, Mar. 22, 2005, tape side A, counter 080-083.

²¹Oral hearing, Mar. 22, 2005, tape side A, counter 085-088.

²²Oral hearing, Mar. 22, 2005, tape side A, counter 547-559.

²³Declaration of Stuart Rickey at 1 (undated)(Exhibit C).

²⁴Exhibit B at 3.

regarding a Federal Fisheries Permit.” He stated that the “OK” next to Mr. Peterson’s name “indicates to me that I answered his question.”²⁵

Another log entry, dated December 12, 1991, shows, among other notations, the names of New Era’s two partners, Ron Peterson and Jostein Karlsen; a phone number, (206) 783-5633; the words “Get Fed. Fish. Per.”, “1992 M91B”, “Aleutian No. 1”, “Send to Ron’s home”, and “bill Floyd”, and, in red ink, “Sent 12-13” and a check mark.²⁶ Mr. Rickey testified that this entry on the phone log was “a phone call from Ron Peterson that I took regarding getting a Federal Fisheries Permit for 1992, and also obtaining for Jostein Karlsen an M91B, which is designated as, M is miscellaneous, 91 is for pot gear for a vessel over 60 feet, B designates statewide.”²⁷ He also stated that “This tells me I sent him [Peterson] something, and I believe it was a date-stamped copy of the Federal Fisheries Permit application – date-stamped by the [NMFS] Enforcement Division.”²⁸ He said that “bill Floyd” means he was supposed to send the invoice to Floyd Unger.²⁹ He said the red “Sent 12-13” indicates he sent a copy of the application to Mr. Peterson on that date, and the check mark shows that he sent an invoice.³⁰

Mr. Rickey acknowledged there was nothing in the phone log entry about a date-stamped copy of an application or about the Enforcement Division.³¹ When I asked Mr. Rickey how he happened to recall the date that he submitted an FFP application to NMFS so many years earlier, he stated that he referred to his telephone log.³² In his affidavit, Mr. Rickey stated that he submitted the application for a 1992 FFP to the NMFS Enforcement Division, and gave the application to Vicki Vaughan.³³

During the March 22 hearing, I asked the following questions, among others, and Mr. Rickey gave the answers indicated:

Q: How do you happen to recall that you gave the application to Vicki Vaughan

²⁵Oral hearing, Mar. 22, 2005, tape side A, counter 206-213.

²⁶Exhibit B at 5.

²⁷Oral hearing, Mar. 22, 2005, tape side A, counter 262-272.

²⁸Oral hearing, Mar. 22, 2005, tape side A, counter 273-290.

²⁹*Id.*

³⁰Oral hearing, Mar. 22, 2005, tape side A, counter 186-194.

³¹Oral hearing, Mar. 22, 2005, tape side A, counter 273-290.

³²Oral hearing, Mar. 22, 2005, tape side A, counter 130-132.

³³Declaration of Stuart Rickey at 1 (undated)(Exhibit C).

specifically?

A: Because I recall, when she told me they would not be able to produce the permit for two to three weeks because of computer problems, I recall telling her that the moratorium deadline is going to come and go prior to them being able to produce the permit, and that this could cause difficulty for these boat owners.

Q: Was she (Vaughan) the person you usually dealt with at NMFS Enforcement when you applied for permits?

A: Mainly Vicki. There was also a lady there named Alica, who I would deal with sometimes.

Q: But you recall in this instance that you dealt with Vicki Vaughan? A: Yes.

Q: Had you previously applied for FFPs with her for your clients? A: Yes.³⁴

* * * * *

Q: Had this [a delay in issuing a permit because of a computer problem] ever happened before, in your experience?

A: Yes. Not specifically related to the computer problem, but there had been delays in getting permits.

Q: In your recollection, how long does it usually take to get a Federal Fisheries Permit from the time you apply?

A: Then, I would say a day or two. I would drop off an application, and they would either call me up or I would call and check with them to see when I could pick it up.

Q: So you would generally pick it up from them, when it was issued?

A: Yes, I would. Always.

Q: And then you would mail that to the client?

A: Normally it would be sent to the vessel.

Q: Based on your experience, would there be any reason for NMFS to deny

³⁴Oral hearing, Mar. 22, 2005, tape side A, counter 312-324.

issuance of an FFP if the application was complete and was properly submitted?

A: No.

Q: Other than this instance, has NMFS ever failed to process a Federal Fisheries Permit application that you submitted for any of your clients, do you recall?

A: Only when they couldn't process it.

Q: Like what, for example?

A: Like the person who would do that particular function wasn't there, that type of reason.

Q: And has NMFS ever denied issuance of a Federal Fisheries Permit to any of your clients when you submitted the application, do you recall?

A: I don't believe so.³⁵

* * * * *

Q: Mr. Rickey, was it your usual practice to get a stamped receipt or other proof that you had submitted an application to NMFS?

A: At that time, no.

Q: But you stated in your declaration that you did that in this case?

A: Yes, because the question came up, applied in a timely manner, they were not able to produce the permit, but if they wanted to go fishing they had to have something. Because if they were boarded by the Enforcement officers, they had to show them something. And I remember discussing it with people in Enforcement and for the interim time, before they could produce the permit, I would send them a date-stamped copy of the application, and if they were boarded and that was brought into question, they were to call the Enforcement office in Juneau.

Q: So you had a discussion about this with people at Enforcement?

A: Yes.

³⁵Oral hearing, Mar. 22, 2005, tape side A, counter 332-370.

Q: At that time, at the time you brought this application in?

A: Basically it was, well what can I do? And that was what we arrived at.

Q: Do you remember who you talked to about that?

A: Well, I believe I mentioned it to Vicki, probably. And she would ask, I think his name was Dan, I believe he was a supervisor there.

Q: I take it you were satisfied with their answer, that a stamped copy of the application would be sufficient in lieu of, until they actually got the permit.

A: Right, because my concern was they would go fishing and if they were boarded by Enforcement, they could have their fishing operations stopped, they'd be cited, and I felt that we had done the application in a timely manner. The fact that their computer was down should not prevent these people from participating in the fishery.

Q: And they agreed with you?

A: Yes.

Q: Is that an arrangement that you had ever done before, do you recollect?

A: I can't remember if it was before or after, but I know this situation came up probably two other times. That was the only thing I could do for my client, and it was acceptable to the NOAA Enforcement people at the time to have the agent call them and say, "This guy only has an application, he doesn't have the permit."

Q: Do you recall, or do you know, whether any of your clients, where this happened, where you had to send them a stamped copy of the application rather than the permit itself, that they ever actually had to rely on that with Enforcement?

A: Not that I'm aware of. Like I say, I think it only happened two or three times.

Q: And was this, do you recall, in this instance, was this something, sort of a solution, that you suggested to NMFS, or that they suggested to you, do you recall?

A: I think it may have been my suggestion.

Q: And when you say a stamped copy, what does that mean?

A: They would date-stamp, a typical date stamp I believe, and it had “NOAA Enforcement” as part of the stamp.

Q: Showing that it had been received?

A: And the date it was received, yes.

Q: And then, is it your testimony that you mailed this stamped copy of the application to Mr. Peterson?

A: Yes, to the best of my knowledge.

Q: And, in these instances, would you have kept a copy for yourself?

A: No, not then. I did not have a copier, I was not as fastidious as I am now.

Q: Okay. And, in this case, do you recall following up with NMFS on Mr. Peterson’s behalf or New Era’s behalf to make sure that the FFP was issued?

A: No. I do not believe I followed up.

Q: Do you recall whether Mr. Peterson or Mr. Karlsen or any of the partnership people asked you to do that?

A: No, I don’t believe they did.

Q: So, as far as you were concerned, once you submitted the application, and you got a stamped receipt, a stamped copy back showing it had been received, and you sent that down to Mr. Peterson, that basically, as far as the FFP was concerned, your job was done and they were okay?

A: Yes. It was my assumption that they had satisfied the deadline requirement and that this was the best scenario that could be done at the time.

Q: Okay. And what about the permit itself? Would you have normally taken it upon yourself to inquire about, well, where’s this permit, or would they normally call you when it was ready to pick up, or how does that work?

A: I think I would normally call them because I was probably anxious for them, normally, you know. But in this particular instance, I assumed that when they issued the permit they would send it to the office or whatever address they had for the company. And the company would then forward it on to the vessel.

Q: As opposed to sending it through you?

A: Yes.

Q: But that was the usual way it was done, or normally they would send it to you?

A: Usually, I would call them and go over and pick them up.

Q: So why would it be different in this case, do you think?

A: Because of the situation. The boat had a date-stamped copy, Enforcement had a date-stamped copy. My job was done, basically. It would seem like there would be no urgency in getting them the permit to where I wouldn't have to go over and get it, put it on an airplane because they had a date-stamped copy, which had been pretty much hashed out as, you know, they were trying.³⁶

In analyzing the evidence in this case, I start from the proposition that there are only two likely scenarios that would explain why NMFS did not issue a 1992 FFP to the F/V ALEUTIAN NO. 1: either Stuart Rickey never submitted an application, or he did submit an application, but NMFS failed to process it. I believe these are the only likely explanations because an FFP is a very easy permit to obtain; there are no special qualifications and no fees required. I would expect NMFS to have issued a permit if New Era had filed a timely and complete application, and if NMFS had processed the application. Since the standard of proof on factual questions in administrative appeals is a preponderance of the evidence, the question becomes: Is it more likely than not that Stuart Rickey filed a 1992 FFP application for the F/V ALEUTIAN NO. 1 on or about December 13, 1991?

Mr. Rickey is the only one alleged to have submitted an FFP application on behalf of New Era. Given that Mr. Rickey has been in the business of filing fishing permit applications since 1980, one can reasonably expect that in 1991 he would have known how to properly complete permit applications. If he did submit an application in this instance, I believe it more likely than not that it would have been a properly completed application. At the least, if the application had been incomplete or improperly filled out, I would have expected NMFS to notify Mr. Rickey or New Era and give them an opportunity to correct the application. Mr. Rickey did not indicate that there was any problem with the application he claims he submitted. Therefore, I find that if he did submit an application in this case, then the application was properly completed.

The main piece of documentary evidence in the record on the issue of whether Mr. Rickey filed an FFP application with NMFS is his telephone log. The log contains detailed hand-written notes. The photocopied pages in the file match the original log that Mr. Rickey presented at the March 22 hearing. These are orderly business records and they possess the indicia of reliability. Each phone call is dated and entered in chronological order. The entries are clear, legible, and

³⁶Oral hearing, Mar. 22, 2005, tape side A, counter 413-491.

evenly spaced. They do not appear to me to have been altered. Thus, they are credible evidence.

The log pages submitted show a total of four calls from the New Era partners in December 1991. The entries for December 6 and 12 both contain explicit references to a Federal Fisheries Permit. The December 12 entry indicates that Mr. Rickey was instructed to get a Federal Fisheries Permit for the F/V ALEUTIAN NO. 1 and send it to Ron Peterson's home. It also shows that he completed the task and sent an invoice on December 13, 1991. These log entries are highly relevant and I give them substantial weight. They are contemporaneous evidence that Mr. Peterson was attempting, through Mr. Rickey, to obtain a 1992 FFP.

Although the phone log entries do not in themselves prove that Mr. Rickey actually filed an FFP application with NMFS in December 1991, they certainly suggest that he did. The log entry for December 12, 1991, indicates persuasively that Mr. Rickey was instructed to obtain an FFP and a state miscellaneous pot gear ("M91B") permit for the F/V ALEUTIAN NO. 1. I view the accompanying notation "Sent 12-13" and the check mark in red ink as strong evidence that Mr. Rickey completed the task he was given, or at least that he did as much as he was able to do. Sending an invoice suggests that Mr. Rickey's job was done and, in fact, he testified that he considered his job done at that point.³⁷ The phone log entry is corroborated by state permitting records from the Alaska Commercial Fisheries Entry Commission (CFEC), which show that Mr. Rickey obtained an M91B permit for Jostein Karlsen and the F/V ALEUTIAN NO. 1 on December 13, 1991.³⁸

Since we have already established that NMFS never issued a 1992 FFP for the F/V ALEUTIAN NO. 1, then I must assume that, if Mr. Rickey sent to Mr. Peterson something relating to an FFP, it must have been something other than the permit itself. While it is possible that Mr. Rickey sent only the state fishing permit he was asked to obtain, I think it more likely that he also sent something regarding an FFP because he considered his job done and sent an invoice. It is plausible that Mr. Rickey might have sent a date-stamped copy of the FFP application in lieu of the permit itself. That would have proven to Mr. Peterson that Mr. Rickey had done what he could to obtain an FFP, and it likely would have satisfied Mr. Peterson and Mr. Karlsen that they had some legal authority to go fishing until the 1992 FFP arrived.

The main evidence that Mr. Rickey obtained a date-stamped copy of New Era's 1992 FFP application from NMFS Enforcement is Mr. Rickey's own affidavit and testimony. At the March 22 hearing, his answers to my questions were responsive, direct, and non-evasive. In general, I found him to be a credible witness. Mr. Rickey's recollection of events from 1991 was appropriately detailed, yet he did not overstate what he knew or remembered. For example, he accurately recalled that Vicki Vaughan worked at the NMFS Enforcement Office in December 1991, and that a woman named "Alica" [Eliza] also was working there at that time, issuing

³⁷Oral hearing, Mar. 22, 2005, tape side A, counter 482-491.

³⁸Commercial Fishing Permit Application, CFEC (Exhibit 3, page 2).

permits. Those facts were verified by Ms. Vaughan at the June 8 hearing.³⁹

Mr. Rickey stated that he believes he gave New Era's FFP application to Ms. Vaughan; that she told him there would be a delay of two to three weeks in issuing the permit because of computer problems; and that he proposed, and NMFS Enforcement agreed to, giving him a date-stamped copy of the application that New Era could fish with until the FFP was issued. Ms. Vaughan testified that she has no recollection of these events.⁴⁰ She acknowledged, however, that NMFS Enforcement has had, or probably has had, computer problems that at times delayed the issuance of permits.⁴¹ Ms. Vaughan testified that NMFS Enforcement normally did not date-stamp permit applications as a way of giving people a receipt, and she could not recall whether she had ever done so.⁴² She said that NMFS Enforcement does have a date stamp like the one described by Mr. Rickey.⁴³ Ms. Vaughan testified that, although she could not specifically recall her office giving Mr. Rickey a date-stamped copy of an FFP application for the F/V ALEUTIAN NO. 1, she thought it reasonably could have happened.⁴⁴ Thus, I find that Ms. Vaughan's testimony does not contradict Mr. Rickey's testimony and, in fact, supports it to some extent.

Mr. Rickey explained why he requested a date-stamped copy of the application from NMFS. He stated that New Era was anxious to get a permit in time to fish cod in January, and that he was concerned that his client not be kept from fishing by administrative delays, and that they not be subject to a potential enforcement action for fishing without a permit. I find Mr. Rickey's explanation both reasonable and plausible because it makes sense and seems likely that someone in his shoes would have such concerns for his clients, and would do what he could under the circumstances to help his clients get authorization to fish.

Other evidence in the record tends to support Mr. Rickey's claim that he received a date-stamped application from NMFS and sent it to New Era. Mr. Peterson testified that he received the date-stamped copy of the application and a cod permit from Mr. Rickey by express delivery a day or two after calling Mr. Rickey and asking him to obtain the FFP and the M91B permit.⁴⁵ He testified that he gave the whole packet, including the date-stamped application, to his partner,

³⁹Oral hearing, June 8, 2005, tape side A, counter 064; 134.

⁴⁰Oral hearing, June 8, 2005, tape side A, counter 154.

⁴¹Oral hearing, June 8, 2005, tape side A, counter 160.

⁴²Oral hearing, June 8, 2005, tape side A, counter 189-219.

⁴³*Id.*

⁴⁴Oral hearing, June 8, 2005, tape side A, counter 239-267.

⁴⁵Oral hearing, Mar. 22, 2005, tape side A, counter 547-559; tape side B, counter 238-241.

Jostein Karlsen, who took it with him on the vessel by January 3 or 4, 1992.⁴⁶ Mr. Peterson stated that Mr. Karlsen had a problem when the F/V ALEUTIAN NO. 1 made the Pacific cod delivery at Trident Seafoods in Akutan, on January 8, 1992. He said that someone at the plant asked to see their FFP. He said that he believes that Mr. Karlsen presented the date-stamped application and, as a result, Trident was willing to write the fish ticket.⁴⁷

While Mr. Peterson's recollection on some points was not as clear as Mr. Rickey's, I found Mr. Peterson to be a credible witness. He stated that the F/V ALEUTIAN NO. 1 made only one landing of Pacific cod in 1992 because he was only trying to qualify for the moratorium. He also testified that he had difficulty convincing his crew to leave earlier than usual, before New Year's, to make only one Pacific cod landing. Mr. Peterson said the crew objected because "there was no money in it" for them, and they normally didn't go fishing until the end of the first week of January, for the *opilio* crab fishery.⁴⁸

I give more weight, however, to New Era's history of always obtaining an FFP before the F/V ALEUTIAN NO. 1 fished for groundfish. The only exception was 1992. The vessel's fishing and permit history show that New Era was aware of the FFP requirement and consistently complied with the regulations. This history of compliance makes it more likely that New Era would have applied for a 1992 FFP in December 1991. Combined with Mr. Rickey's telephone logs, affidavit, and testimony, the State of Alaska permit records, and the testimony of Ms. Vaughan and Mr. Peterson, the evidence in the record is adequate to support a finding, by a preponderance of the evidence, that New Era filed a completed 1992 FFP application with the NMFS Enforcement Office on or about December 13, 1991, and I so find.

Consequently, I conclude that New Era made timely and sufficient application for a renewal license in accordance with NMFS rules, as provided in Section 9(b) of the federal Administrative Procedure Act, 5 U.S.C. §558(c). Therefore, I also conclude that the 1991 FFP for the F/V ALEUTIAN NO. 1 did not expire on December 31, 1991, and was still in effect on January 8, 1992. I conclude that New Era's Pacific cod delivery on that date, recorded on a fish ticket, was a lawful harvest, and therefore constitutes a *documented harvest* as defined at 50 C.F.R. §679.2. Finally, I conclude that New Era qualifies for an LLP groundfish license with a Bering Sea area endorsement based on the fishing history of the F/V ALEUTIAN NO. 1.

FINDINGS OF FACT

1. NMFS did not issue a 1992 Federal Fisheries Permit for the F/V ALEUTIAN NO. 1.

⁴⁶*Id.*

⁴⁷Oral hearing, Mar. 22, 2005, tape side A, counter 579-586; tape side B, counter 206-233.

⁴⁸Oral hearing, Mar. 22, 2005, tape side B, counter 099-144.

2. New Era Partnership did submit to NMFS a timely and sufficient application for a 1992 Federal Fisheries Permit for the F/V ALEUTIAN NO. 1 on or about December 13, 1991.

CONCLUSIONS OF LAW

1. New Era made timely and sufficient application for a renewal license in accordance with NMFS rules, as provided in Section 9(b) of the federal Administrative Procedure Act, 5 U.S.C. §558(c).
2. The 1991 FFP for the F/V ALEUTIAN NO. 1 did not expire on December 31, 1991, and was still in effect on January 8, 1992.
3. New Era's Pacific cod delivery on January 8, 1992, recorded on a fish ticket, was a lawful harvest, and therefore constitutes a *documented harvest* as defined at 50 C.F.R. §679.2.
4. New Era qualifies for an LLP groundfish license with a Bering Sea area endorsement based on the fishing history of the F/V ALEUTIAN NO. 1.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is ORDERED to issue to New Era Partnership a transferable LLP groundfish license with a Bering Sea area endorsement in accordance with the findings and conclusions of this Decision. This Decision takes effect November 17, 2005, unless the Regional Administrator takes further action in this appeal 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, October 28, 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.

Edward H. Hein
Chief Administrative Judge