



1994. He says he called RAM in early April 1995 to inquire about the status of his application, and was told that RAM hadn't received it and that he would not receive any quota shares.

During the course of this appeal, Mr. Sandelin told this Office that his mother, Lydia Sandelin, had mailed his RFA for him. She confirmed this during a telephone call to this Office [January 30, 1996] and again in an affidavit [July 25, 1996]. She stated that:

I sent his IFQ forms in a timely manner that met the deadlines as stated in the National Marine Fisheries Services (sic) requirements. To the best of my knowledge there was absolutely no cause for the arrival of the IFQ forms to be delayed, due to anything on my, or Lonny's, behalf. The IFQ forms were sent via the U.S. Post.

In a second affidavit [December 24, 1997], Mrs. Sandelin provided more details. She stated that Lonny Sandelin received a notice from NMFS in mid-April 1994, which informed him that the agency had not received his RFA. She then located the RFA from December 1993. She stated that Lonny signed the RFA in her presence, at her kitchen table, on a Sunday evening. Mrs. Sandelin said that Lonny gave the RFA to her to mail to NMFS. She mailed it the following day, a Monday, at the drive-through mail box at the post office in Leavenworth, Washington. She remembers that the envelope had the correct NMFS address in Juneau, her return address, and proper first-class postage. She said that "during that same period I did a tremendous amount of paperwork for Lonny with regard to his fishing activities" and on many occasions mailed documents for him, always at the same drive-through mail box in Leavenworth.

Truman Sandelin, Lonny's father, also submitted an affidavit [December 24, 1997] saying that he was present in late April 1994 when Lonny signed the RFA; that he specifically remembers Lonny signing it and handing it to his mother to be mailed, as he did with other documents on many occasions; and that Lydia Sandelin is a responsible and conscientious person and always mailed Lonny's documents promptly. He stated that Lydia was aware of the importance of the RFA and would have made sure it was promptly mailed.

In his own affidavit [December 24, 1997] Lonny Sandelin stated that his mother handled all his paperwork for fishing activities, collected all his mail and "kept me current on my paperwork obligations." He asserted that the RFA he signed in April 1994

had pre-printed information about me and my fishing vessel. I remember questioning whether the vessel listed was the appropriate one to be on the form because I had changed vessels in 1993. We decided the one printed on the form was correct because it was the one used in 1988-1990.

Lonny Sandelin said that he did not think about the RFA or the IFQ program again until April 1995, after his brother mentioned receiving quota shares. He said he then called NMFS to inquire about his

application; that NMFS sent another RFA form to his employer, Delta Marine, and he completed the forms and returned them to NMFS.

## DISCUSSION

NMFS established July 15, 1994, as the application filing deadline for the IFQ program.<sup>3</sup> By its terms, the agency's notice of the application period required that an application form be received at the agency's office in Juneau by that date. Subsequently, RAM initiated a preliminary step in the application process by requiring the filing of an RFA before submitting the application itself. RAM announced that, for the purpose of meeting the filing deadline, it would accept a completed RFA in lieu of an application, as long as the RFA was received by the deadline. Ultimately, RAM decided to accept as timely filed any completed RFA that was postmarked on or before July 15, 1994.<sup>4</sup> We have ruled that the July 15 deadline essentially required that an applicant either deliver an RFA to RAM by that date or otherwise take decisive action by that date to complete the application filing, as by depositing an RFA in the mail.<sup>5</sup>

Lonny Sandelin claims that his RFA was deposited in the U.S. mail before the filing deadline. No one knows what became of that RFA, but there is no evidence that NMFS ever received it. To the contrary, the evidence in the record is that the only RFA for Mr. Sandelin received by NMFS was one submitted in April 1995 — a year after the one he claims was timely sent. This Office has recognized that an RFA that was never received at the RAM office could have been lost by the U.S. Postal Service.<sup>6</sup> That is certainly a possibility in this case. But to make a finding that Mr. Sandelin's first RFA was, in fact, lost in the mail requires stronger evidence than he has provided. Admittedly, when an envelope sent by first-class mail is lost, it can be difficult to prove what happened to it. It is not impossible, however.

In Gene E. Watson,<sup>7</sup> for example, we found by a preponderance of the evidence that the appellant's RFA had been mailed to RAM on May 25, 1994. We based that finding on the totality of the circumstances. We gave great weight to the testimony of the appellant and his bookkeeper. We found

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<sup>3</sup> "Applications must be received during the application period beginning January 17, 1994, and ending at the close of business on July 15, 1994... . Applications for initial allocation of QS received after the close of business on July 15, 1994, will not be considered." 59 Fed. Reg. 701, at 702 (1994).

<sup>4</sup>Policy announced July 26, 1994, by Philip J. Smith, Chief, RAM Division.

<sup>5</sup>*See, Michael B. White*, Appeal No. 94-0009, January 17, 1995, *aff'd* January 20, 1995.

<sup>6</sup>*See, e.g., Gene E. Watson*, Appeal No. 95-0007, July 10, 1995; and Gerald I. Brager, Appeal No. 95-0027, January 31, 1997.

<sup>7</sup>Gene E. Watson, *supra*, at 3-4.

that their testimony was sincere and credible. The appellant provided a photocopy of the original RFA showing it had been signed by the bookkeeper on May 25, 1994. The bookkeeper testified that she placed the RFA in the office's outgoing mail basket after signing it, and that her regular business routine was to take outgoing mail to the post office every day. We said the versions of the facts given by the appellant and his bookkeeper were internally consistent, were consistent with the RAM record of telephone conversations and receipt of documents, and were consistent with what one would expect to find if the facts were as the appellant claimed. We particularly noted that it was understandable that the appellant would have inquired about the status of his application when he had not heard anything from RAM by late September 1994.

In contrast, the evidence in Mr. Sandelin's case is weaker than in Watson and Gerald I. Brager,<sup>8</sup> and in some respects casts doubt upon Mr. Sandelin's claims. First, neither Mr. Sandelin, nor his parents, provided any documents to substantiate their claim that the first RFA was mailed in April 1994. Unlike the Watson and Brager cases, the Sandelin's did not keep a photocopy of the completed RFA showing a signature date consistent with the claim, nor were there any business records or notes that might have supported the claim. And the Sandelins' recollection of when the RFA was mailed was not as specific as in Watson or Brager.

Second, Mr. Sandelin said he specifically remembered vessel information pre-printed on the RFA he signed in April 1994. This conflicts with RAM's practice, which was to leave the vessel information portion of the RFA forms blank when they were sent to potential applicants.

Third, I am troubled by the fact that Mr. Sandelin would have waited a full year after sending in the first RFA before inquiring with RAM about what happened. This is particularly so in light of the second notice RAM sent to Mr. Sandelin telling him they had still not received his RFA as of June 15, 1994. If, in fact, the RFA had been mailed to RAM in late April 1994, then RAM's second notice should have aroused sufficient alarm to cause Mr. Sandelin or his mother to contact RAM before the July 15, 1994 deadline to ensure that the RFA was received before the deadline. The Appellant's lack of due diligence in this regard is inconsistent with Truman Sandelin's statement that his wife is responsible and conscientious, was aware of the importance of the RFA, and would have made sure it was promptly mailed. Without denying that Mrs. Sandelin may be a very responsible and conscientious person, the failure to respond to the June 1994 notice suggests that neither Lonny Sandelin nor his mother were as attentive to his quota share application as the affidavits indicate, and casts doubt on his claim that the first RFA was mailed in April 1994.

I find the evidence in the record insufficient to prove, by the preponderance of the evidence standard, that Mr. Sandelin's RFA was mailed to RAM on or before the July 15, 1994 application filing deadline.

Under certain circumstances, an RFA postmarked or mailed after the filing deadline may be accepted

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<sup>8</sup>See, note 6, *supra*.

as timely filed, as a matter of law, under the doctrine of equitable tolling. Under this widely recognized doctrine, an administrative agency may toll the running of a federal application period while an applicant is suffering from a disability or incompetency resulting from extraordinary circumstances beyond the applicant's control that prevented filing by the deadline. *See, e.g., John T. Coyne*, Appeal No. 94-0012, (Decision on Reconsideration), May 24, 1996. Because there is no evidence in the record that Mr. Sandelin suffered from such a disability or incompetency, I conclude that the doctrine of equitable tolling does not apply in this case. Therefore, I conclude that Mr. Sandelin's application for quota share was not timely filed and his application was properly denied by RAM.

#### FINDING OF FACT

The evidence in the record is insufficient to prove, by the preponderance of the evidence standard, that Mr. Sandelin's RFA was mailed to RAM on or before the July 15, 1994 application filing deadline.

#### CONCLUSIONS OF LAW

1. The doctrine of equitable tolling does not apply in this case.
2. Mr. Sandelin's application for quota share (RFA) was not timely filed, and his application was properly denied by RAM.

#### DISPOSITION

The IAD, dated April 12, 1995, which denied Mr. Sandelin's application for quota share, is **AFFIRMED**. This Decision takes effect on February 25, 1999, unless by that date the Regional Administrator orders review of the Decision.

Any party, including 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 February 5, 1999, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or Points and Authorities in support of the motion.

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Edward H. Hein  
Chief Appeals Officer