NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION

In Re Application of	)	
	)	
ATLANTICO, Inc.	)	**Appeal No. 09-0054**
	)	
Applicant.	)	
	)	

ORDER AFFIRMING DECISION

The Regional Administrator, pursuant to 50 C.F.R. § 679.43(o)(1), hereby affirms the Recommended Decision of the hearing officer in this matter, issued on December 24, 2009. As specified in 50 C.F.R. § 679.43(o)(2), my action in affirming the hearing officer's decision takes effect immediately and constitutes the final agency action in the subject appeal.

Date: 12/30/09

Robert D. Mecum
Acting Administrator
Alaska Regional Office

Distribution:

I certify that on this 30th day of December, 2009, this order was distributed by facsimile and/or electronic transmission to the following:

Randall Moen, Administrative Judge, Office of Administrative Appeals, AKR
Jessica Gharrett, Program Administrator, Restricted Access Management Division, AKR
Ellen Sebastian, Records Office, AKR
Michael A. D. Stanley, Attorney for Atlantico, Inc.

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 09-0054
	)	
ATLANTICO, INC.,	)	DECISION (Corrected)[1]
Appellant	)	
	)	December 29, 2009

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program of the National Marine Fisheries Service (NMFS) issued an Initial Administrative Determination (IAD) on August 13, 2009, that denied the issuance of individual fishing quota (IFQ) to Atlantico, Inc., for the 2009/2010 fishing year in the Bering Sea/Aleutian Islands (BSAI) crab fisheries managed under the BSAI Crab Rationalization Program (CRP).[2]

RAM denied the issuance because it determined that Atlantico, Inc., (hereinafter referred to as "Atlantico") did not timely submit an application for an IFQ crab permit by the required deadline of August 1, 2009. According to RAM, it did not receive the application until August 18, 2009.

Atlantico, through counsel, filed a timely appeal of the IAD with the Office of Administrative Appeals, NMFS, Alaska Region.[3] Atlantico can file an appeal because the IAD directly and adversely affects Atlantico's interests.[4]

In its appeal, Atlantico requested an oral hearing. To determine whether the appeal could be best resolved by a written hearing, OAA ordered Atlantico to submit sworn statements and any

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[1] This corrected Decision contains two technical corrections which do not affect the outcome of the original Decision. The first technical correction is on page 8, line 3, of the section "Disposition and Order," in which the words "January 25, 2009" in the original Decision are deleted and replaced with "January 25, 2010." The second technical correction is on page 8, line 6, of the section "Dispostion and Order," in which the words "January 4, 2009" are deleted and replaced with "January 4, 2010."

[2] Final Rule, 70 Fed. Reg. 10,174 (Mar. 2, 2005). This rule, and subsequent amendments, are primarily at 50 C.F.R. Part 680, available online at the NMFS Alaska Region website: http://alaskafisheries.noaa.gov/regs/summary.htm.

[3] Appeal of Initial Administrative Determination from Michael A.D. Stanley to Office of Administrative Appeals, September 1, 2009.

[4] 50 C.F.R. § 679.43(b).

documentary evidence in support of its appeal.[5]

In response to the order, Atlantico submitted a sworn affidavit from William E. Jacobson, 50% owner and managing partner of Atlantico; Kristin Deane, manager of Advanced Harvesters Cooperative, and Erling E. (Jake) Jacobsen, manager of the Intercooperative Exchange (ICE); and a bank statement from Wells Fargo for the purchase of a facsimile machine from Wal-Mart on July 15, 2009.[6]

On September 15, 2009, OAA, at Atlantico's request, remanded this appeal to RAM, in consultation with Office of General Counsel, NMFS, Alaska Region, to consider the following question:

> If the facts as presented by Appellant Atlantico, Inc., are accepted as true, can Atlantico's annual application for individual fishing quota for the 2009/2010 crab fishing year be deemed constructively filed by the August 1 deadline specified in 50 C.F.R. § 680.4(f)(1)?[7]

On October 9, 2009, RAM determined that based on these alleged facts, Atlantico's annual application for IFQ for the 2009/2010 crab fishing year could not be deemed "constructively filed" by the August 1 deadline, and it therefore affirmed the IAD.[8]

On October 16, 2009, Atlantico responded to RAM's affirmation of the IAD, and requested OAA to grant interim relief to allow Atlantico to harvest its IFQ while this appeal is still pending.[9] OAA informed Atlantico that it does not have authority to order an interim permit unless the regulation specifies that an applicant receives an interim license or permit pending appeal.[10] The regulations which govern the BSAI crab rationalization program do not provide for an interim permit to be granted pending the outcome of appeal. Therefore, I cannot order an interim IFQ

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[5] Order For Further Statements and Evidence, Mary Alice McKeen, Administrative Judge, September 1, 2009).

[6] Applicant's Submission Of Statements and Evidence, Michael A.D. Stanley, Attorney for Atlantico, Inc., September 11, 2009.

[7] Order For Remand, Mary Alice McKeen, Administrative Judge, September 15, 2009.

[8] Determination On Reconsideration, Jessica Gharrett, Program Administrator, Restricted Access Management, October 9, 2009.

[9] Motion For Interim Relief, and Response to Determination of Reconsideration, Michael A.D. Stanley, Attorney for Atlantico, Inc., October 16, 2009.

[10] *See, e.g.,* 50 C.F.R. § 679.4(k)(6)(ix)(An interim license can be issued pending final agency action in the License Limitation Program).

crab permit for Atlantico in this appeal.

On December 8, 2009, Administrative Judge Randall Moen conducted a telephonic hearing to determine whether Atlantico's application was timely filed. William E. Jacobson and Karen Deane testified as witnesses, independently from one another. Neither of them heard each other's testimony. Atlantico's attorney, Michael A.D. Stanley, was present for their testimony. Both Mr. Jacobson and Ms. Deane testified that they had read, signed, and agreed with the statements in their sworn affidavits

The record contains sufficient information to decide this appeal, and therefore the record is now closed.[11]

ISSUE

Whether NMFS should accept Atlantico, Inc.'s application as having been timely filed.

ANALYSIS

Under 50 C.F.R. § 680.4(f)(1), holders of crab quota share (QS) must apply annually for an IFQ crab permit for the upcoming fishing year. The regulation provides:

> (1) A complete application must be received by NMFS no later than August 1 of the crab fishing year for which a person is applying to receive IFQ or IPQ. If a complete application is not received by NMFS by this date, that person will applicant will not receive IFQ or IPQ for that crab fishing year.

The record in this appeal shows that Atlantico's application for the annual crab permit was received by RAM on August 18, 2009, seventeen days after the deadline. In its appeal, Atlantico claims that it reasonably concluded that it faxed its application on July 14, 2009, and that therefore its application should be treated as timely filed. Atlantico's application should be accepted as timely filed.

1. The theory of "decisive action" affords a basis to accept Atlantico's late application.

The IFQ Program for Pacific halibut and sablefish had an application deadline that was comparable in wording to the annual deadline for an IFQ crab permit.[12] That deadline was published in a notice in the Federal Register:

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[11] 50 C.F.R. §679.43(g)(2).

[12] Final Rule, 58 Fed. Reg. 59,375 (Nov. 9, 1993). This rule, and subsequent amendments, are primarily at 50 C.F.R. Part 679, available online at the NMFS Alaska Region website: http://alaskafisheries.noaa.gov/regs/summary.htm.

> Applications must be received during the period beginning January 17, 1994; and ending at close of business on July 15, 1994. . . . Applications for initial allocation of QS received after close of business on July 15, 1994, will not be considered.[13]

In several decisions,[14] this Office has ruled that an application for Pacific halibut and sablefish QS under the IFQ program can be treated as if timely filed, even if not received by the application filing deadline, if the applicant took "decisive action" to complete the filing of the application before the application filing deadline.

In these decisions, the applicant took "decisive action" to complete the filing of an application before the July 15, 1994, application deadline when the applicant gave his application to the captain of a fishing tender in the Bering Sea on June 30, 1994, for delivery to NMFS via U.S. mail;[15] when the applicant gave his application to his bookkeeper/secretary, who signed and placed it in the office's outgoing mail on May 25, 1994;[16] when the applicant prepared the application in the presence of a permit broker and deposited the application in a U.S. post office mail box on June 3, 1994;[17] when the applicant put his application in his office outgoing mail box on June 30, 1994 for delivery to NMFS via U.S. mail;[18] and when the applicant, who was on a fishing vessel off the Aleutian Islands, gave his application to a fishing tender on July 12 or 13 for delivery to NMFS via U.S. mail.[19]

The Regional Administrator affirmed these decisions in spite of the wording in the IFQ notification of the application period that a complete application "must be received" by July 15, 1994, and that applications received after the close of business on that day "will not be

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[13] Notification of Application Period, 59 Fed. Reg. 701, 702 (Jan. 6, 1994). 50 C.F.R. § 679.40(a)(6)(ii) reads: "An application period of no less than 180 days will be specified by notification in the **Federal Register** and other information sources that the Regional Administrator deems appropriate."

[14] *Michael B. White*, Appeal No. 94-0009 (Jan. 17, 1995); *Keith T. Sugiura*, Appeal No. 94-0005 (Apr. 20, 1995); *Gene E. Watson*, Appeal No. 95-0007 (July 10, 1995); *Estate of Zahary Kuzmin*, Appeal No. 95-0097 (Jan. 30, 1996); *Gerald I. Brager*, Appeal No. 95-0027 (Jan. 31, 1996).

[15] *Michael B. White*, Appeal No. 94-0009 (Jan. 17, 1995).

[16] *Gene E. Watson*, Appeal No. 95-0007 (July 10, 1995).

[17] *Estate of Zahary Kuzmin*, Appeal No. 95-0097 (Jan. 30, 1996).

[18] *Gerald I. Brager* Appeal No. 95-0027 (Jan. 31, 1996).

[19] *Keith T. Sugiura*, Appeal No. 94-0005 (Apr. 20, 1995).

considered."[20]

The rationale of decisive action can and should be applied to a situation where, as here, an applicant for an annual IFQ crab permit reasonably concluded that the application had been mailed or faxed. The evidence in this appeal does not consist of vague assertions but detailed affidavits and consistent sworn testimony at a hearing. The requirement for decisive action means that applicants who file late due to neglect or inadvertence will not receive relief. This Office has rejected several appeals by late applicants for an IFQ crab permit but the facts in those appeals did *not* constitute taking decisive action.[21] A ruling in Atlantico's favor in this appeal will not undermine the BSAI crab IFQ program because RAM sets aside pounds for all applicants who appeal.[22] RAM's construction of the deadline guarantees that those pounds will not be fished.

I conclude that as a matter of law, an application for an annual IFQ crab permit can be treated as timely filed if the applicant took "decisive action" to complete the filing of the application before the application filing deadline.

2. The testimony of Mr. Jacobson and Ms. Deane.

Mr. Jacobson and Ms. Deane testified that they believed they had faxed Atlantico's application to NMFS on July 14, 2009, before the application deadline.

Both testified that:

• Ms. Deane faxed the Atlantico's application to NMFS from her office on July 14, 2009, and Mr. Jacobson witnessed it;

• they stood by the fax machine as the application was being faxed, there were no signs the application had not been faxed; and they believed the fax had successfully been transmitted;

• they have been filing separate applications for Atlantico the past several years and have never had a problem doing it;

• they were aware of the August 1 deadline when they faxed Atlantico's application to NMFS;

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[20] Notification of Application Period, 59 Fed. Reg. 701, 702 (Jan. 6, 1994).

[21] *David E. Thompson*, Appeal No. 06-0012 (Nov. 20, 2006); *Sitkin Island, Inc., and Northern Orion, Inc.*, Appeal No. 06-0017 (Jan. 31, 2007); *Gary D. Cobban, Jr.*, Appeal No. 06-0014 (Apr. 30, 2007); *Walter Christensen*, Appeal No. 06-0016 (May 2, 2007).

[22] Email from Jessica Gharrett, NMFS, to Mary Alice McKeen, OAA, December 22, 2009.

• they were surprised when they learned the application had not been received by the August 1 deadline, and Ms. Deane immediately contacted her office to have the application resent to NMFS.

Mr. Jacobson testified that:

• he filled out and signed the application in Ms. Deane's office on July 14, 2009;

• he signed the application on the same day he signed the applications for his other two companies (Northern Seiners, Inc., and Ruff & Ready, Inc);

• Ms. Deane had called him the day before (July 13) to come to her office to send the applications to NMFS;

• when he went to Ms. Deane's office he told her he was uncertain whether Atlantico would continue membership with Advanced Harvesters Cooperative, but she told him he should still have Atlantico's application faxed from her office to meet the deadline;

• he agreed and watched Ms. Deane fax the application to NMFS.

In describing what he saw, Mr. Jacobson testified that:

> We talked for awhile, then she walked over to the fax machine. I'm in that office now; it's probably a 12 x 16 foot office. The fax machine is next to the desk to the window. She put, I believe, four or five pages in there and dialed the number. The pages all came through and she felt she had sent the fax and that it had gone through; and I felt the same way.

Ms. Deane testified that:

• she is the registered contact for Advanced Harvesters Cooperative with a duty to submit the cooperative's members applications to NMFS;

• the application dated on July 14, 2009, is the application she thought she faxed to NMFS on July 14, 2009, and is the application she resent to NMFS on August 18, 2009;

• she does not know why the application was not received on July 14, 2009, but believes it was due to faulty phone service or a defective fax machine;

• she is "absolutely certain" she put Atlantico's application to NMFS through her fax machine on July 14, 2009;

• on July 15, 2009, the day after she thought she had faxed the application to NMFS, she had also

attempted to fax another annual IFQ crab permit application to a cannery out in Bristol Bay but found out the application had not been received;

• to correct the problem, she purchased a new fax machine that same day (July 15, 2009).[23]

In describing what she did to fax Atlantico's application, Ms. Deane testified as follows:

> I wrote the cover sheet (for the application), turned around and put it in the fax machine and pushed the button (and watched) it go. I, generally speaking, watch my fax machine (when I send documents) ... to make sure every single page goes through. Some times I stand there with my hand on it just to make sure it is a completed fax. Indeed, in this case I stood right there. Bill and I were probably talking about other things, but I am positive, *absolutely positive*, that the fax connected in the sending, *without a doubt in my mind.*

It is reasonable to believe Atlantico's application was faxed but not received on July 14, 2009. Mr. Jacobson and Ms. Deane were credible witnesses. Their testimony was consistent with their own and each other's testimony, and with the statements in their sworn affidavits. RAM has said (in its own review of this case) that it has no reason to doubt the statements in their affidavits.[24]

Based on the preponderance of evidence, I find that Atlantico attempted to fax a complete annual application for an IFQ crab permit to NMFS on July 14, 2009, and reasonably concluded that the application had been faxed, but unbeknownst to Atlantico, the application was not received before the required August 1 deadline.

4. Atlantico took "decisive action" to complete the filing of an application for an IFQ crab permit by the August 1 deadline.

Atlantico "faxed" its application two weeks before the filing deadline. The application appeared to be successfully transmitted. Both Mr. Jacobson and Ms. Deane had reason to believe that they did not have anything further to do with regard to the faxing of Atlantico's application. NMFS's policy was to accept applications by fax. Mr. Jacobson and Ms. Deane had successfully faxed applications for Atlantico in the past without any problems.

Based on all of these facts, I conclude Atlantico took "decisive action" to complete the filing of

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[23] *See* bank statement from Wells Fargo for purchase of a facsimile machine from Wal-Mart on July 15, 2009.

[24] Determination On Reconsideration at 12, Jessica Gharrett, Program Administrator, RAM, October 9, 2009: "While RAM does not dispute the statements in the affidavits, these statements alone are not sufficient for RAM to conclude that Atlantico's application was constructively filed with NMFS on July 14, 2009."

an annual application for an IFQ crab permit before the required August 1 deadline. Therefore, Atlantico's application should as a matter of law be treated as having been timely filed. Because Atlantico's application was timely filed, Atlantico is entitled to an IFQ crab permit for the 2009/2010 fishing year based on the QS it holds under the Crab Rationalization Program.

FINDINGS OF FACT

This appeal centers around Atlantico's faxing of its application on July 14, 2009. Having considered the Appellant's sworn affidavits and the documents it has produced, and having heard the sworn testimony on behalf Atlantico, I find that the Appellant has established that:

1. Atlantico attempted to fax a complete annual application for an IFQ crab permit to NMFS on July 14, 2009, but unbeknownst to Atlantico, the application was not received before the August 1 application filing deadline.

2. Atlantico reasonably concluded it had faxed its application to NMFS.

3. Atlantico's action was taken with the intent and reasonable expectation that the application promptly would be received by NMFS by the August 1 deadline.

4. The application was placed in Ms. Deane's fax machine and sent but not received by NMFS.

CONCLUSIONS OF LAW

1. Atlantico took "decisive action" to complete the filing of an annual application for an IFQ crab permit before the required August 1 deadline.

2. Atlantico's application should be treated as having been timely filed.

3. Atlantico is entitled to an IFQ crab permit for the 2009/2010 fishing year based on the QS it holds under the Crab Rationalization Program.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is ordered to process the Appellant's application as if it had been filed in a timely fashion. This Decision takes effect January 25, 2010, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

Either party may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on January 4, 2010, the tenth day after 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 Administrative Judge, and must be accompanied by a written statement in support of the motion.

There is still sufficient time for RAM to process Atlantico's application for an IFQ crab permit for the 2009/2010 fishing year. Therefore, I recommend that the Regional Administrator expedite review of this decision and, if the Regional Administrator does not wish to modify it, give it an immediate effective date.

Randall J. Moen
Administrative Judge